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THE SURF IS UP, BUT WHO OWNS THE BEACH?—WHO SHOULD REGULATE COMMERCE ON THE INTERNET?

CHARLES R. TOPPING*

I. INTRODUCTION

On October 21, 1998, President Clinton signed into law the Internet Tax Freedom Act as part of the Fiscal Year 1999 Omnibus Appropriations Bill. The act imposes a three-year moratorium on all taxation of Internet access fees charged by Internet service providers ("ISPs") and on "multiple" or "discriminatory" taxes on electronic commerce. The act creates a 19-member Advisory Commission on Electronic Commerce which will strive to develop a national framework within eighteen months to collect and distribute state tax receipts in a fairly nondiscriminatory way. This commission must include the secretaries of the Treasury and Commerce Departments, the U.S. trade representative, eight leaders from industry and consumer groups, and eight from state and local governments. The act also includes a grandfather provision for existing state and local taxes on Internet access under certain conditions.

The process that led to the act's passage began on June 23, 1998, when the U.S. House of Representatives unanimously passed its version of the Internet Tax Freedom Act.¹ That act cited among its goals the establishment of a "national policy" against state and local interference with interstate commerce on the Internet and the exercise of congressional jurisdiction over interstate commerce by "establishing a moratorium on the imposition of exactions that would interfere with the free flow of com-


merce via the Internet.” The act also included a declaration that the Internet should be free of foreign tariffs, trade barriers, and other restrictions.5

On October 8, 1998, the Senate followed suit and passed, almost unanimously, a separate but similar piece of legislation, also entitled the Internet Tax Freedom Act.4 Like its House counterpart, this legislation would also place a moratorium of three years on any new Internet and electronic commerce taxes. It was this version with some slight modifications that made its way into the Omnibus Appropriations Bill signed by President Clinton. The version of the act, as reported and amended by the Senate Committee on Finance as of October 1, contained several legislative findings. These findings may illuminate the regulatory mindset on Capitol Hill concerning the Internet:

(1) As a massive global network spanning not only State but international borders, the Internet and the related provision of online services and Internet access service are inherently a matter of interstate and foreign commerce within the jurisdiction of the United States Congress under Article I, section 8, clause 3 of the United States Constitution.

(2) Even within the United States, the Internet does not respect State lines and operates independently of State boundaries. Addresses on the Internet are designed to be geographically indifferent. Internet transmissions are insensitive to physical distance and can have multiple geographical addresses.

(3) ... [I]t is ... infeasible to separate domestic intrastate Internet transmissions from interstate and foreign Internet transmissions.

(4) Consumers, businesses, and others engaging in interstate and foreign commerce through online services and Internet access service could become subject to more than 30,000 separate taxing jurisdictions in the United States alone.

(5) Inconsistent and inadministerable taxes imposed on online services and Internet access service by State and local governments threaten to

(A) subject consumers, businesses, and other users engaged in interstate and foreign commerce to multiple, confusing, and burdensome taxation,

2. Id.
3. See id. § 6.
(B) restrict the growth and continued technological maturation of the Internet itself, and
(C) call into question the continued viability of this dynamic medium.

(6) Because the tax laws and regulations of so many jurisdictions were established long before the advent of the Internet, online services, and Internet access service, their application to this new medium and services in unintended and unpredictable ways could prove to be an unacceptable burden on the interstate and foreign commerce of the Nation.

(7) The electronic marketplace of services, products, and ideas available through the Internet can be especially beneficial to senior citizens, the physically challenged, citizens in rural areas, and small businesses. It also offers a variety of uses and benefits for educational institutions and charitable organizations.

(8) A consistent and coherent national policy regarding taxation of online services, Internet access service, and communications and transactions using the Internet, and the concomitant uniformity, simplicity, and fairness that is needed to avoid burdening this evolving form of interstate and foreign commerce, can best be achieved by the United States exercising its authority under Article I, section 8, clause 3 of the United States Constitution.\(^5\)

It is clear both from these findings as well as from the language of the Act that the 105th Congress placed a premium on the unfettered growth and development of the Internet as an instrumentality or conduit of interstate commerce. The Congress believed that state and local taxation could create an "unacceptable burden" on interstate commerce conducted via the Internet. It passed the Internet Tax Freedom Act to prevent the imposition of that burden. Senator Wyden, one of the sponsors of the Senate version of the act, aptly summarized these sentiments when he expressed his concern that if local and state regulators were to create "a crazy quilt of State and local taxes where each jurisdiction goes off and does its own thing, it is going to be very difficult for those entrepreneurs, senior citizens, handi-

capped and disabled people to go out and hire the accountants and lawyers that would be necessary . . . ." He continued:

If somebody from Florida, for example, orders Harry and David's fruit in Medford, [Oregon,] using America Online in Virginia, pays for it with a bank card in California, and ships it to their cousin in New York, we are talking about a completely different kind of commerce than we have seen in the past.

Concerns about uniformity and promotion of Internet-based commerce, however, are not the only concerns. They seem to clash with concerns about state and local interests in raising revenue and overall fairness in tax policy. The National League of Cities, holding its annual convention in Kansas City during the first week of December, spoke against provisions in the Internet Tax Freedom Act, decrying the legislation for its potential to deprive local governments of a vital source of revenue. Senator Graham of Florida voiced these same concerns when he said that "the price that society is going to pay is imbalance in the commercial marketplace and a degradation of our police, fire and educational services." Senator Enzi suggested that the act would discriminate against local businesses whose Internet-based competitors would not have to pay sales and use taxes. He argued, "Are we going to be in the business of picking the tax winners and the tax losers? I am talking about the towns where the people of America live. We know who the losers will be. It will be the small retailer in your town, the one that you rely on to run down and pick up the emergency item.

These opposing concerns implicate the tension between federal interests and state and local interests. This tension, often characteristic of congressional preemption under the Commerce Clause, has now reached the Internet. The Internet Tax Freedom Act is not the only attempt by Congress to regulate the Internet. Congress also passed the Children's Online Privacy Protection Act of 1998, which was amended to the Internet Tax

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7. Id.
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Freedom Act and which mandates that the Federal Trade Commission write rules and enforcement strategies requiring researchers to obtain parental permission before collecting personal information over the Internet from minors, including their name, address, e-mail address, and phone number. Congress also passed the Digital Millennium Copyright Act,\(^\text{12}\) which implements treaties on intellectual property protection that the Clinton Administration negotiated, and which protects America's intellectual property in the online environment. Additionally, Congress enacted the Government Paperwork Elimination Act,\(^\text{13}\) which encourages the government to move towards electronic filing and the acceptance of electronic signatures. Finally, Congress passed the Next Generation Internet Research Act of 1998,\(^\text{14}\) which authorizes an initiative to connect universities at speeds that are 1,000 times faster than today's Internet and conduct long-term research on Internet technologies.

This flurry of recent legislation affecting the Internet should come as no surprise. Since the early nineties, the Internet has captured the fancy of legal scholars, practitioners, and legislators alike.\(^\text{15}\) The panoply of recent literature about the Internet underscores its perceived importance.\(^\text{16}\) Litigation that involves


\(^{15}\) Articles about the legal challenges of a widely used Internet have been appearing in law journals since 1993.

\(^{16}\) Discussion about the legal, ethical, and public policy ramifications of the Internet has reached an all-time high. The vast number of recent articles addressing law and the Internet in some manner no doubt illustrates the perceived importance and perhaps also the complexity that this new technological conundrum presents. In 1997 alone, there were at least 73 articles published in various law journals attempting to make legal sense of this new medium. Twenty of them dealt with issues involving jurisdiction and the Internet. Eight dealt with obscenity and the Internet. Seven dealt with copyright protection and the Internet. Six dealt with issues involving government regulation of Internet-based activities. Five dealt with privacy and the Internet. Four concerned themselves with trademark protection on the Internet. Four dealt with issues involving taxation of Internet-based activities. Four dealt with issues of free speech and the Internet. Yet four more of them dealt with issues involving currency regulation and the Internet. Three addressed the proper legal regime that should govern the Internet. Three were concerned with intellectual property and the Internet generally. Three addressed defamation and libel on the Internet. Two dealt with telecommunications and the Internet.
Internet-related issues has become more commonplace. Regulators at both the federal and state level have introduced more legislative initiatives concerning the Internet than ever before. Far from leveling off, this flurry of activity seems to be intensifying.

A brief glimpse at some of the substantive legal issues raised by the Internet illustrates the pervasiveness of this new technological medium. The Internet has rekindled as vigorously the fervor of free speech activists as it has the resolve of those who rally against pornography. It has given rise to a flurry of intellectual activities and discussions.

17. In 1997, for example, at least seven state cases and 45 federal cases dealt in some way with liability for Internet-based activity.


lectual property litigation surrounding the use of domain names and cyber-squatting. A widespread number of employers now


grapple with issues like e-mail privacy in the workplace.\textsuperscript{21} Internet activities have also precipitated numerous defamation suits.\textsuperscript{22} Attorneys who advertise on the Internet could face liability in other jurisdictions.\textsuperscript{23} The Internet has also proven to be


23. For example, Texas and Florida have concluded that law firm Web pages (apparently including those of out-of-state firms) are subject to the rules of professional conduct applicable to attorney advertising. See American Libraries Ass’n v. Pataki, 969 F. Supp. 160, 167 (S.D.N.Y. 1997); see also Texans
elusive ground for fraud, where e-mail addresses can be hijacked and messages can be intercepted or copied. Anonymity can be generated by Internet users quite readily, given that a user's computer address may be altered and a user's name may be changed or masked.\textsuperscript{24} Untraceable hackers have the ability to cripple entire servers by sending an overwhelming barrage of "spam."\textsuperscript{25} Even if the liabilities are clear-cut, and the defendants are known, discerning who has proper jurisdiction over acts committed on the Internet often poses further obstacles.\textsuperscript{26} Corporate

Against Censorship v. State Bar of Texas, 888 F. Supp. 1328 (E.D. Tex. 1995) (discussing applicability of Texas lawyers' advertising regulations to the Internet). Minnesota has aggressively pursued out-of-state advertisers and service providers who reach Minnesotans via the Internet.


executives transacting business on the Internet have grown increasingly wary of being ensnared by some obscure law that the courts of a remote state seek to enforce in cyberspace,\textsuperscript{27} even though the law was written long before the Internet ever existed.\textsuperscript{28} Despite the newly-formed Advisory Commission on Electronic Commerce, regulators at the federal, state, and local levels will no doubt continue to debate the merits of different types of taxation schemes, and lobby the Commission to embrace their positions.\textsuperscript{29}

The flurry of recent activity to come to terms with the Internet is inextricably tied to the question of what the Internet actually is. Because the Internet is so diverse, it functions like no other single means of communication already in existence. Applying existing legal and regulatory paradigms to the Internet seems to be unavailing. Is the Internet more like television, print media, telephone, or a highway? While surfing the Internet, "one rapidly encounters actors that resemble publishers, phone companies, postal services, libraries, bookstores, flea markets, retailers, soapbox preachers, and voyeurs." H. Joseph Hameline and William Miles, in a piece appearing in the Boston Bar Journal, describe why sometimes applying existing legal and regulatory paradigms to the Internet can be like trying to fit a square peg into a round hole:

Unlike a postal service, online there is often no identifiable sender and rarely does the creator of the information direct it to a particular recipient. As distinguished from the traditional publisher, the Internet publisher does not maintain editorial control over the content of messages and cannot control their distribution. Regarding the broadcast medium, receiving images and messages over the Internet requires active selection and decision making not part of the passive viewing of television or radio. . . . Commercial endeavors in this "sprawling mall offering goods and services" range from passive advertising to interactive communication and sales.

Moreover, as the Senate findings in the Internet Tax Freedom Act suggest, the Internet defies our traditional methods of delineating boundaries. When traversing cyberspace, we receive little or no warning as to when we have left our state, our nation, or our continent. Indeed, the Internet is truly a transnational communications medium with no discernible borders. As Sean Selin writes, "[s]ince international boundaries do not appear as signposts on the information superhighway, activities on the Internet can take place in distant jurisdictions, sometimes without the knowledge of the actor." The new relationships that the Internet creates among and between individuals "strain legal
principles and categories that currently direct judicial power over individual action, either civilly or criminally.35 This has led several commentators to argue that cyberspace requires a regime of rules quite distinct from those that currently regulate physical, geographically defined territories.36 Others have observed that the current structure of the Internet increases the pressure on courts and regulators to impose liability on intermediaries such as Web servers and Internet-access providers. Henry Perritt illustrates the rationale behind this approach when he writes:

Whose substantive legal rules apply to a defamatory message that is written by someone in Mexico, read by
someone in Israel by means of an Internet server located in the United States, injuring the reputation of a Norwegian?

Whose courts have jurisdiction to adjudicate claims of injury or violation of national standards? Must a Norwegian go to Mexico or the United States to find a legal institution with power over one of the two potential sources of compensation? If not, if jurisdiction exists in Norway, the most convenient forum for the victim, how is a favorable decision by a Norwegian tribunal ordering that the Mexican originator or the American intermediary pay damages to be enforced?

Suppose the message is criminal instead of defamatory, involving child pornography or indecency, or representing some sort of financial fraud or forgery or terroristic threat. Where can the wrongdoer be tried, only where he is physically found? If the answer is yes, how should extradition or extra-legal means of physically moving the alleged wrongdoer to the place of trial be utilized? Whose substantive criminal law should apply? An inability to answer these questions satisfactorily increases the pressure to hold intermediaries liable, because unsatisfactory answers to the jurisdictional questions make legal recovery from content originators less likely. The Internet tradition of allowing anonymity makes the position of intermediaries even worse. If the victim cannot identify the originator because she is anonymous, immunizing an intermediary leaves a faultless victim bearing the loss.\(^\text{37}\)

Yet others argue that no changes are needed, that existing legal and regulatory paradigms are sufficient for application to Internet-based activities.\(^\text{38}\) Recently, in exercising jurisdiction, courts have attempted to draw a distinction between "passive"

\(^{37}\) Perritt, Jurisdiction in Cyberspace: The Role of Intermediaries, supra note 26.

Web sites and more interactive sites. The factors a court should use to distinguish between the two are less clear.

What is clear, however, is that legal scholars, practitioners, and legislators wield quite a number of different—and often conflicting—solutions to the perplexities of the Internet. We are befuddled not only by the inherent conceptual difficulties that the Internet poses, but also by the plethora of solutions proposed. Which solution—or group of solutions—is the right solution? This tough question cannot be ignored. Despite its challenges, the Internet is here to stay. Its full potential has yet to be realized. Its effect on our economy, our culture, and our society continues to expand.

The numbers speak for themselves. The Internet has experienced extraordinary growth. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number grew to approximately 90,000. By 1993, over one million computers were linked. By the beginning of 1995, the Internet linked 75 countries, with another 77 connected by e-mail. By late 1996, the total number of Internet host computers worldwide was esti-

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39. See Getting Jurisdiction in Cyberspace Is No Snap (or Click), Nat'l L.J., Dec. 29, 1997, at B12. The story reads, in pertinent part:

Three federal circuit courts have now addressed whether and when a Web site confers jurisdiction in a state foreign to the Web master. The Second U.S. Circuit Court of Appeals found a purely passive Web site insufficient for personal jurisdiction to be asserted over a Missouri defendant under New York's long-arm statute. Bensusan Restaurant Corp. v. King, [106 F.3d 25 (2nd Cir. 1997)]. Confronted with a slightly more interactive Web site, where a visitor to the home page who wanted to learn more was allowed to leave a name and contact information, the Ninth Circuit declined to exercise jurisdiction over the Florida defendant when no other contacts with the state, Arizona, were found, and there was no evidence that anyone from Arizona had left a name or even accessed the site. Cybersell Inc. v. Cybersell Inc., [130 F.3d 414 (9th Cir. 1997)].

... Those seeking [to have a court exercise] jurisdiction based on online activity should turn to CompuServe Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), in which the court found that the Texas-based defendant had targeted and solicited business in the plaintiff's state.

40. For a listing of factors to which courts have looked in determining jurisdiction over Web site owners, see Otho B. Ross, Recent Case Finds Web Site Confers Jurisdiction: A Minnesota Court Holds That a Gambling Web Site Subjects Its Owner to Personal Jurisdiction, Nat'l L.J., Feb. 3, 1997, at C11. For an analysis of recent cases addressing personal jurisdiction for Internet-based activities, see Dale M. Cendali & Rebecca L. Weinstein, Personal Jurisdiction and the Internet, 520 PLI/Pat. 975 (1998).


42. See id.

43. See Gigante, supra note 26, at 523.
mated to be 9.4 million, with 60% of those located within the United States. Estimates placed the total number of Internet users worldwide at forty million people. These numbers are increasing exponentially, causing estimates of future growth to be revised upward. As of February 1997, the Internet consisted of thirteen million host computers in 90 countries linked by more than 50,000 connected computer networks.

Commercial activity on the Internet has also witnessed explosive growth. Internet advertising revenues exceeded $1 billion in 1997, up from $267 million in 1996. Within a single year, Amazon.com, an online bookstore, increased its sales nearly ten times, selling 6.5 million books in 1997. Also in a year’s time, Internet airline ticket sales nearly tripled and are expected to grow sixfold, to $5 billion a year, by the year 2000.

Earlier in 1998, the United States Department of Commerce issued a report titled *The Emerging Digital Economy*, which contains a number of interesting statistics on the growth of electronic commerce. The high-tech industry employs 7.4 million people, earning an average of $46,000 annually, compared to $28,000 in the private sector overall, and suffers from a shortage of skilled workers. Traffic on the Internet is doubling every 100 days, making it the fastest growing technology in human history. By the end of 1997, ten million people had purchased something online with a credit card, double the 1996 rate.

We can expect the Internet’s extraordinary growth to continue. The total number of Internet users is expected to grow to 200 million by next year. According to a recent report by Forrester Research, business-to-business electronic commerce will

44. *See* ACLU v. Reno, 929 F. Supp. at 831. The court went on to state, “This count does not include the personal computers people use to access the Internet using modems.” *Id.*
45. *See id.*
47. *See* Kalow, supra note 26, at 2243.
49. This information comes from remarks made by President Clinton at the recent Technology ‘98 Conference in San Francisco, as reported in Electronic Commerce Update, CYBERSPACE LAW., May-June 1998, at 25.
50. For a summary of these statistics, see *In the News*, CYBERSPACE LAW., July-Aug., 1998, at 30.
52. Forrester Research is a company that helps its clients determine the effects of technology on their businesses, as well as on individual consumers and society at large. Customers purchase annual memberships to any of twelve
represent $66 billion in U.S.-related Internet revenues by the year 2000. The overall Internet economy is expected to approach $200 billion in the year 2000, and to surpass $300 billion by 2002. "The march toward an increasingly open electronic marketplace has already reached the point of no return," says Walid Mougayar, president of Toronto-based CYBER-Management, Inc. "Every day," he says, "the electronic commerce market gets bigger and bigger, and every day a new Internet-related business begins to threaten an existing traditional business." From all of this we can conclude that the Internet will continue to demand increasing attention.

II. OVERVIEW

As legislators at both the national and local levels attempt to create regulatory schemes for Internet commerce, and as both state and federal courts adjudicate an increasing number of Internet-based disputes, the importance of better understanding the implications of regulating the Internet as interstate commerce becomes paramount. Clearly, the Internet is evolving and developing at a much more rapid pace than any other mechanism of commerce. Most scholars, legislators, and practitioners would agree that the Internet has not reached its final form. Regulators must be careful not to arrest this evolution. Yet, a proper regulatory scheme poses the opportunity to make the Internet more stable, to increase confidence in its ability to accommodate commercial transactions, and to reduce uncertainty about liability for Internet-based activities. Such a scheme

research services that focus on three main areas—corporate information technology, new media, and senior management—and consider such issues as investment and financing decisions, hiring needs, and organizational structure. Customers include large enterprises and technology vendors. For further information, consult Hoover's company capsule online (visited February 10, 1998) <http://www.hoovers.com/capsules/52441.html>. Forrester Research maintains a homepage at <http://www.forrester.com>.


54. See id.

55. See U.S. DEPARTMENT OF COMMERCE, THE EMERGING DIGITAL ECONOMY. For a summary of these and other statistics contained in the report, see In the News, supra note 50.


57. Id.
would likely accelerate, rather than arrest, the growth of electronic commerce and Internet-based technology. The path toward such a scheme will necessarily require us to answer questions about how much regulation is appropriate, who should regulate, and how.

This Note will attempt to contribute to the discussion about these questions. Part Three of this Note will examine the Internet itself in greater depth, providing a brief description of the Internet's origins, its technology, and how it operates. Part Four explores issues associated with regulating the Internet as interstate commerce in light of a 1997 ruling by a federal district court in New York. It evaluates each facet of the ruling with an eye toward the Commerce Clause's impact, if any, on Internet regulation by states. Finally, Part Five of this Note will present some conclusions about whether the district court's ruling should be followed and whether Congress should act through legislation to better define the lines of demarcation between legitimate state interests in regulating the Internet and those areas which should be regulated exclusively at the federal level.

III. THE INTERNET

In *ACLU v. Reno*, a three-judge panel from the United States District Court for the Southern District of New York held that certain provisions of the Communications Decency Act of 1996—which sought to regulate content transmitted over the Internet—violated the First Amendment. In its published opinion, the court made numerous factual findings about the nature of the Internet. Much of my ensuing discussion about the Internet in this part of the Note relies heavily on the court's find-

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58. 929 F. Supp. 824 (S.D.N.Y. 1996). In *ACLU v. Reno*, the plaintiffs filed suit challenging the constitutionality of provisions of the Communications Decency Act ("CDA") which sought to protect minors from harmful material on the Internet. A second suit was filed by additional plaintiffs, and the cases were consolidated. Eventually the case reached the U.S. Supreme Court, which held that: (1) provisions of the CDA prohibiting transmission of obscene or indecent communications by means of a telecommunications device to persons under age eighteen, or sending patently offensive communications through the use of an interactive computer service to persons under age eighteen, were content-based blanket restrictions on speech, and thus, could not withstand a First Amendment challenge as time, place, or manner restrictions; (2) the challenged provisions were facially overbroad in violation of the First Amendment; and (3) the constitutionality of the provision prohibiting transmission of obscene or indecent communications by means of a telecommunications device to persons under age eighteen would be saved from facial overbreadth challenge by severing term "or indecent" from the statute pursuant to its severability clause. Reno v. ACLU, 521 U.S. 844 (1997).
ings for two reasons. First, the findings reflect an accurate appraisal of the history and capabilities of Internet technology. Second, because this appraisal has been recognized by a federal court, other federal courts will likely rely on it in rendering their own decisions about Internet-based activities.

The United States government created the forerunner of what we now call the Internet in the late sixties. An experimental project of the Advanced Research Project Agency ("ARPA"), this network "linked computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research." It was called ARPANET. Its purpose was to "create a decentralized system of computers that would be better able to withstand a nuclear attack by preserving some of the data because it was stored at different locations." The network facilitated a process whereby individual messages could reach their destinations through any number of different routes between computers. In the event of a catastrophe or the destruction of some of the computers, vital scientific and military information could still reach its destination by being re-routed by those computers still in operation. As the ARPANET continued to develop, other similar networks developed to link "universities, research facilities, businesses, and individuals around the world." Eventually, as computer use grew throughout the world, each of these networks were themselves linked together, in turn creating a "larger international web of computers:" the modern-day Internet.

60. See 929 F. Supp. at 831.
61. Selin, supra note 34, at 367.
62. "Thus, a message sent from a computer in Washington, D.C., to a computer in Palo Alto, California, might first be sent to a computer in Philadelphia, and then be forwarded to a computer in Pittsburgh, and then to Chicago, Denver, and Salt Lake City, before finally reaching Palo Alto." 929 F. Supp. at 831.
63. See 929 F. Supp. at 831, 832; Selin, supra note 34, at 367; Knoll, supra note 59, at 276. "If the message could not travel along [the normal] path (because of military attack, simple technical malfunction, or other reason), the message would automatically (without human intervention or even knowledge) be re-routed . . . " 929 F. Supp. at 832.
64. It subsequently ceased to exist. See 929 F. Supp. at 832.
65. Id.
66. Selin, supra note 34, at 368. Selin further writes, "Scientists in Germany could operate a telescope in Australia, and academics in Japan could
The Internet is not a single entity (at least in the traditional sense). As the court in *ACLU v. Reno* pointed out,

No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the internet.67

No one can simply "turn off" the Internet.68 Moreover, it would be extremely difficult at best to suppress or divert an individual message. Messages between computers on the Internet can be subdivided into smaller "packets" sent independently to the destination, where the receiving computer can reassemble them.69 Although all packets of a given message often follow the same path to their destination, "if computers along the route cooperate on research problems with the United States through this computer web." *Id.*

67. 929 F. Supp. at 832 (finding 11).
68. *See* Selin, *supra* note 34, at 368-69. He writes, "Short of eliminating most of the computers or telephone lines in the world, the Internet cannot be shut down." *Id.* at 369. Further, he writes,

The closest thing to a nerve center for the Internet is Internic, which is the sole company that issues domain names. . . . Even if Internic were somehow disabled, communications can still occur because each web site has its own numerical address which allows access separate from its domain name.

*Id.* at 369 n.22.
69. *See id.* at 369 n.22; *see also* 929 F. Supp. at 832 (finding 9). Selin provides a more detailed description:

In a typical transaction, a local computer server divides a form of data, be it an E-mail message or video signal, into multiple portions or "packets," each packet having a standard size and an address on it. The computer then sends these packets through its connection with the Internet. From there, a computer reads the addresses and sends the packets in the general direction of the destination, using the best available path at the moment. Individual parts of the message may end up taking different routes. The same reading and sending happens at the next intersection, and so on, until the packets reach their destination. When the packets reach their destination, a computer waits to receive all of them and then reassembles the data. There is usually no way to predict which international borders will be crossed during transmission. Furthermore, once information is
become overloaded, then packets can be re-routed to less loaded computers.  

Individual users can access the Internet in several ways. Students, faculty, and researchers at educational institutions (primarily universities) throughout the country can access the Internet through those institutions. Many employers link their office computer networks to the Internet, thereby providing their employees direct Internet access. Many local libraries also offer their patrons the use of computers that are linked to the Internet. Numerous individuals utilize Internet service providers ("ISPs"), or commercial entities offering customers Internet access through their own computer networks (linked to the Internet) in exchange for a monthly or hourly fee. Additionally, an increasing number of "storefront computer coffee shops" provide hot coffee along with Internet access in exchange for a small hourly fee. Finally, individuals can access the Internet by using some of the thousands of local dial-in computer services, often called "bulletin board systems" or "BBSs."

Upon gaining Internet access, an individual has a variety of different methods of communication and information exchange at his or her disposal. The most common methods are one-to-one messaging (such as e-mail), one-to-many messaging (such
postal service, simple e-mail generally is not secure "and can be accessed or viewed on intermediate computers between the sender and the recipient (unless the message is encrypted)." Id.

79. See id. (finding 24). Listservs allow communications about particular subjects of interest to a group of people. The court provides an illustration of how these listservs work:

[People can subscribe to a "listserv" mailing list on a particular topic of interest to them. The subscriber can submit messages automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers. There are thousands of such mailing list services on the Internet, collectively with hundreds of thousands of subscribers. Users of "open" listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be "closed," i.e., only allowing for one's acceptance into the listserv by a human moderator.

Id.

80. See id. at 834-35 (finding 25). These are similar in function to listservs, but function differently in the manner in which communications are transmitted. Unlike listservs, users need not subscribe to the discussion mailing lists in advance, but rather can access the database at any time. While a small number of USENET newsgroups are "moderated," most are open access. When an individual user with access to a USENET server posts (e.g., sends or uploads) a message to an "open access" newsgroup, the message is then automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, which then propagate the message to the servers adjacent to those servers, and so on. Using the court's language,

The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages . . . are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.

Id. at 835. There are currently newsgroups on more than fifteen thousand different subjects. See id. (finding 26).

81. See id. (finding 27). Features like "talk" allow one-to-one communications "and 'Internet Relay Chat' (or "IRC") allows two or more to type messages to each other that almost immediately appear on the others' computer screens." The court states, "IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone. With IRC, however, at any one time there are thousands of different party lines available,
(such as "telnet"),\textsuperscript{82} and remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").\textsuperscript{83} "Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (such as pictures), and moving video images."\textsuperscript{84}

The World Wide Web has become one of the most popular resources on the Internet. The World Wide Web is a series of documents stored in a variety of formats\textsuperscript{85} by different computers all over the Internet.\textsuperscript{86} Each such document has an address (which functions in a manner similar to that of a telephone number).\textsuperscript{87} Most Web documents contain links, which, upon being selected by the user, pull up another document, irrespective of where in the world it is actually stored.\textsuperscript{88} Many organizations now have "home pages" on the Web. Home pages serve as "hubs" full of links that refer users to other documents with more

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\textsuperscript{82.} See id. (finding 29). "[U]sing telnet, a researcher at a university, for example, would be able to use the computing power of a supercomputer located at a different university. A student can use telnet to connect to a remote library to access the library's online card catalog program." Id.

\textsuperscript{83.} See id. at 835-36 (findings 30 through 33). There are three primary methods to locate and retrieve information on the Internet. File transfer protocol or "ftp," refers to a simple method by which a user can obtain a list of computer files available on a remote computer, and transfer one or more of those to his or her own computer. See id. (finding 31). The second method "uses a program and format named 'gopher' to guide an individual’s search through the resources available on a remote computer." Id. (finding 32). The third method, and perhaps the most well known, is the "World Wide Web." The Web utilizes a formatting language called hypertext markup language (HTML). "[P]rograms that browse the Web can display HTML documents containing text, images, sound, animation, and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one can 'click' using a computer mouse on the description of the resource and be immediately connected to the resource itself." Id. (finding 33).

\textsuperscript{84.} Id. at 834 (finding 22).

\textsuperscript{85.} Formats include, but are not limited to, text, still images, sounds, and video.

\textsuperscript{86.} See ACLU v. Reno, 929 F. Supp. at 836 (finding 36).

\textsuperscript{87.} See id.

\textsuperscript{88.} See id. The court further states, "Links for example are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but [are] also [used] as cross-references, footnotes, and new forms of information structure." Id. "These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique." Id. (finding 39).
specific information regarding certain aspects of the organization.\textsuperscript{89} The Web is, in essence, a giant "platform through which people and organizations can communicate through shared information."\textsuperscript{90}

When a user makes information available, that information is said to be "published" on the Web.\textsuperscript{91} As long as the information published has been formatted according to Web standards, other users will be able to view it.\textsuperscript{92} These standards are sophisticated and flexible enough to allow a variety of organizations to publish Web documents, including banks, corporations, newspapers, and magazines (which now publish online versions of their material), government agencies, and even some courts.\textsuperscript{93} Yet publishing on the Web is still simple enough to allow individuals and smaller community organizations to publish their own personal home pages. Because the standards are uniform and utilize a common language, they allow computers that would otherwise be incompatible with each other to communicate on the Web.\textsuperscript{94} Individual Web sites can be open to the general public or closed, such that only those with advance authorization may access them.\textsuperscript{95}

To search the Web, a variety of "search engines" have developed which allow users of the Web to search particular information in all of the public sites that are part of the Web.\textsuperscript{96} Most such searches are performed by requesting that the search engines locate all of the public sites which contain one or a group of specified key words pertinent to the topic on which information is sought. Because of the way the Web is organized and configured, no single organization can control any membership in the Web, "nor is there any single centralized point from

\textsuperscript{89} See id. (finding 37).
\textsuperscript{90} Id. at 837 (finding 40).
\textsuperscript{91} See id. The court further states:
\begin{quote}
Publishing on the Web simply requires that the ‘publisher’ has a computer connected to the Internet and that the computer is running [Web] server software. The computer can be as small as a personal computer costing less than $1500 . . . or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.
\end{quote}
Id.
\textsuperscript{92} See id. (finding 42).
\textsuperscript{93} See id.
\textsuperscript{94} See id. at 838 (finding 45).
\textsuperscript{95} See id. (finding 43).
\textsuperscript{96} See id. (finding 44).
which individual Web sites or services can be blocked from the Web."

IV. THE INTERNET AS COMMERCE

Numerous states have attempted to regulate the Internet. Most attempts have dealt with content and indecency. The U.S. Supreme Court's recent opinion in Reno v. ACLU suggests that many challenges to such state laws will concentrate on First Amendment issues. While much of the initial state regulation sought to restrict indecent or obscene content on the Internet, state legislatures have become increasingly concerned with regulating and "harnessing" Internet-based commercial transactions. These state attempts at regulation vary widely, and have focused on areas such as taxation, consumer protection,

97. Id. at 838 (finding 46).
98. Maryland legislators recently attempted "to extend a law concerning telephone misuse to encompass 'obscene, lewd, lascivious, filthy or indecent' electronic mail and online communications . . . . Similar legislation was introduced in New York and was passed in Connecticut in 1995." Wendy R. Leibowitz, Maryland is Trying to Ban Lewd E-Mail, Nat' L J., Feb. 24, 1997, at B1.
100. See Hameline & Miles, supra note 30, at 21.
101. See id.
102. See id. Some states have created study groups to deal with the issues involved with applying existing tax codes to Internet-based commerce. For example, the California Legislature created the California Internet Review Commission to examine the feasibility of applying sales taxes to the Internet. See David Hipschman, Get Ready, They're Trying to Tax Commerce on the Internet, Ledger, Mar. 17, 1996, at D11. Resulting in part from the Commission's findings, California currently has a three-year moratorium on the imposition of new, so-called discriminatory Internet taxes. Governor Wilson signed this bill into law last August. The bill closely parallels the Internet Tax Freedom Act that the 105th Congress passed in October. For good discussions of issues associated with state taxation of Internet-based commerce, see Ashraf, supra note 29; Grierson, supra note 29.
103. Hameline and Miles cite the recent action taken by the California Legislature to amend § 17538 of its Business and Professions Code to include the requirement "that a vendor conducting business over the Internet or any other electronic means of communication make certain disclosures to a buyer." Hameline & Miles, supra note 30, at 22 (citing A.B. 3220 (approved in September 1996)). A violation of this provision is a misdemeanor. See id. For other examples, see Minnesota's Electronic Authentication Act, enacted on May 19, 1997. A number of states have provided for certification authorities ("CAs"), which are organizations that serve to verify and authenticate individuals' or companies' digital signatures after requiring that the individual or company provide the certification authority with reliable evidence of identity. Twenty-seven states have already enacted digital signature legislation of some kind. Nine other states have either introduced digital signature
advertising,\textsuperscript{104} anti-gambling provisions,\textsuperscript{105} anonymity,\textsuperscript{106} and trademark protection measures.\textsuperscript{107} While some states have been quite ambitious in their attempts to regulate Internet commerce, others have refrained, citing a fear of overburdening a technological medium still in the midst of evolution.\textsuperscript{108} Nevertheless, legislation or are still in the process of drafting it. For current summaries and status updates on digital signature legislation at the state level, see the McBride, Baker & Coles Summary of Electronic Commerce and Digital Signature Legislation Web pages, available at \texttt{<http://www.mbc.com/ds_sum.html>}. For more information about CAs and digital signatures, see Maureen S. Dorney, \textit{Digital Signature Legislation}, 491 PLI/Pat. 141 (1997). See also Georgia's law prohibiting Internet users from falsely identifying themselves online, \textit{infra} note 106.

104. For example, both Texas and Florida have decided that law firm Web pages (even those of out-of-state firms) "are subject to the rules of professional conduct applicable to attorney advertising." \textit{American Libraries Ass'n v. Pataki}, 969 F. Supp. 160, 168 (S.D.N.Y. 1997).


106. As noted in \textit{American Libraries Ass'n v. Pataki}, "the Georgia legislature has enacted a recent law prohibiting Internet users from 'falsely identifying' themselves online." 969 F. Supp. at 168 (citing \textit{Ga. Code Ann.} § 16-9-93.1 (1981)).

107. In 1996, for example, the California Legislature considered a bill that would have prohibited a person from using a company's trademark as an e-mail address without its permission. Hameline & Miles, \textit{supra} note 30, at 23 (citing Ilana DeBare, \textit{State Trademark Bill Ignites Net Turmoil}, SACRAMENTO BEE, March 2, 1996, at F1).

108. By way of illustration, consider the following. "Minnesota has aggressively pursued out-of-state advertisers and service providers who reach Minnesotans via the Internet; Illinois has also been assertive in using existing laws to reach out-of-state actors whose connection to Illinois occurs only by virtue of an Internet communication . . . Florida has taken the opposite route, declining to venture into online law enforcement until various legal issues . . . have been determined." \textit{American Libraries Ass'n}, 969 F. Supp. at 168.
there seems to be no shortage of new legislative proposals. The regulatory environment among the states is thus rapidly changing, somewhat unpredictable, and enshrouded in great debate.

As the debate over how to regulate the Internet rages on, however, both federal and state courts, faced with the necessity of resolving the Internet-based disputes before them, must find readily workable solutions, even amidst the absence of statutory guidance on a particular issue. Thus, judicial resolution will continue to draw new lines in previously uncharted territory. In some instances, judicial resolution can forestall or preempt certain types of legislative action, better defining (for better or for worse) the future course of any legal or regulatory paradigm for the Internet.

This is precisely what happened on June 20, 1997, when a federal district court judge in the Southern District of New York temporarily restrained the enforcement of New York’s Internet Decency Law. The controversy began when various organizations that use the Internet to communicate brought an action challenging the constitutionality of a New York statute criminalizing any use of a computer to disseminate obscene material to minors. The plaintiffs challenged the New York statute on First Amendment and dormant Commerce Clause grounds. Judge Preska held that the statute violated the dormant Commerce Clause. Her opinion in this case, *American Libraries Ass’n v. Pataki*, represents the first attempt at judicial resolution of numerous commerce-related issues on which Congress, to date, has been silent. If Judge Preska’s resolution is followed by other federal courts, this case will substantially affect the future course of any legal or regulatory paradigm for the Internet.

What does this opinion portend for the Internet? Should it be upheld? Should it be followed by other federal courts? And if so, what kind of options does this give Congress? Judge Preska’s opinion provides an ideal context for a broader discussion that concerns the Commerce Clause’s impact on Internet regulation by states. This section of the Note analyzes the *American Libraries*
Ass'n opinion, discusses the opinion's validity, and whether courts should follow it.

A. The Dormant Commerce Clause

We begin with the Commerce Clause. The Commerce Clause of the United States Constitution states that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."113 One commentator has succinctly observed that the Commerce Clause has three basic purposes: (1) creating and maintaining a "federal free trade unit," (2) fostering "material success," and (3) promoting "the peace and safety of the Union."114 The U.S. Supreme Court has held that the clause not only empowers Congress to regulate interstate commerce, but also thwarts the states' power to enact laws that interfere with interstate commerce.115 This latter function pertains to its "dormant" aspect.116 The Court has repeatedly declared that the main precept behind its dormant Commerce Clause jurisprudence is the prevention of "economic protectionism."117 In General Motors Corp. v. Tracy,118 the Court stated that "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'impedes' free private

113. U.S. CONST. art. I § 8, cl. 3.
118. 519 U.S. 278 (1997).
trade in the national marketplace.” Thus, a state regulation found to be discriminatory or unduly burdensome to interstate commerce will be invalidated, even though it might concern an area that Congress has chosen not to regulate. The Supreme Court has used dormant Commerce Clause jurisprudence to invalidate a large number of state regulations affecting interstate commerce.120

B. American Libraries Association v. Pataki: A Good Opinion?

In American Libraries Ass’n v. Pataki, Judge Preska begins her dormant Commerce Clause analysis with a brief discussion of three ways that courts have used the clause to invalidate state legislation. First, the clause prohibits discrimination aimed directly at interstate commerce.121 Second, the clause bars state regulations that, although facially nondiscriminatory, unduly burden interstate commerce.122 Third, courts have “long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.”123

In applying the dormant Commerce Clause to the challenged New York Act, Judge Preska first inquires whether the Act “concerns” interstate commerce such that it would trigger dormant Commerce Clause scrutiny.124 She begins by looking at the plain language of the Act. “By its terms,” she concludes, “the Act applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction.”125 Next, she examines the Act’s legislative history, which she finds to evince the New York legislators’ understanding and intent that the Act would apply to communications between New Yorkers and parties outside the

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119. Id. at 287 (alteration in original, citations omitted) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980)).
120. For example, the Court has used the clause to invalidate train length restrictions (see Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945)), truck length prohibitions (see Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)), and various provisions regulating produce (see Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)).
122. See 969 F. Supp. at 169 (citing Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662 (1981)).
123. Id. at 169 (citing Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886)).
124. Id. at 169-73.
125. Id. at 169-70.
Finally, she concludes that the interstate nature of the Internet itself provides perhaps the "strongest support" for applying dormant Commerce Clause scrutiny.127

Having concluded that dormant Commerce Clause scrutiny applies, Judge Preska next inquires whether the communicative activity over the Internet, which the challenged provisions of the Act proscribes, is "commerce" within the meaning of the Commerce Clause. Noting that the definitions of commerce used by the U.S. Supreme Court have been very broad, Judge Preska answers this inquiry affirmatively,128 even though the parties to the case stipulated that the Internet is not exclusively or even primarily a means of commercial communication.129 Noting that the Supreme Court has held that the dormant Commerce Clause is applicable to activities undertaken without a profit motive,130 Judge Preska holds that the stipulation "cannot insulate the statute at issue from Commerce Clause scrutiny."131 She also notes that the Internet serves more than just communicative functions. Analogizing the Internet to railroads, trucks, and highways, she writes, "[t]he Internet is more than a means of communication; it also serves as a conduit for transporting digitized goods, including software, data, music, graphics, and videos which can be downloaded from the provider's site to the Internet user's computer."132 She concludes that "the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regula-

126. See id. at 170.

127. Id. at 170-72. Judge Preska considers many of the same aspects of the Internet set forth above, such as its insensitivity to geographic distinctions, the inability of a state to shut out Internet users from another state, the inability of an individual user to discover the physical location of a recipient to whom that person might address an Internet communication, and the packet switching and caching features of Internet data exchange. See id.

128. See id. at 173.

129. See id. at 172.

130. In support of this contention, Judge Preska cites Edwards v. California, 314 U.S. 160 (1941), a case in which the U.S. Supreme Court examined the constitutionality of a California statute prohibiting the transport of indigent people into the state. The Court invalidated the statute as violative of the dormant Commerce Clause, reasoning that "the transportation of persons is 'commerce' and that the California law at issue raised an unconstitutional barrier to that commerce." 314 U.S. at 172-73. "In making its threshold determination, the Court emphasized that [i]t is immaterial whether or not the transportation is commercial in character." 314 U.S. at 172 n.1.

131. 969 F. Supp. at 172.

132. Id. at 173
tion of the Internet impels traditional Commerce Clause considerations.”

1. The Three Modes of Analysis Under the Dormant Commerce Clause

Since the Act does trigger dormant Commerce Clause scrutiny, Judge Preska proceeds to scrutinize the Act under three independent modes of analysis, each mode corresponding to one of the three ways that courts have used the dormant Commerce Clause to invalidate state legislation. We now turn to her analysis under these modes.

a. Prohibition of Discrimination Aimed Directly at Interstate Commerce

Judge Preska finds that “New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.” To reach this finding, she first considers the implications of Edgar v. MITE, a case in which the Supreme Court held that a regulation having the “practical effect” of regulating transactions which take place across state lines, exceeds the “inherent limits of the State’s power,” irrespective of the legislators’ intentions. Hameline and Miles believe that Judge Preska’s use of this opinion indicates that she “viewed this law as not merely discriminating against out-of-state interests, but as a deliberate attempt to regulate the activities of residents of other states.”

Noting that the “extraterritoriality” analysis used in Edgar found support from only a plurality of the Court, Judge Preska cites Healy v. The Beer Institute as a majority opinion expressly adopting this same type of analysis. In that case, the Court examined the constitutionality of a Connecticut statute requiring out-of-state beer shippers to affirm that their prices were no higher than the prices charged in the bordering states at the time of the affirmation. The Healy Court derived three guiding principles from its prior caselaw. “First, the Commerce

133. Id.
134. See supra notes 121-23 and accompanying text.
140. American Libraries Ass’n, 969 F. Supp. at 175.
141. See id.
Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state. 142 Second, a statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of that state's authority, and is invalid even if the legislature did not intend the statute's extraterritorial reach. 143 Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute, but more importantly, by hypothesizing the statute's impact if many other states adopted similar legislation. 144 Under this analysis, the Court invalidated the Connecticut statute as "per se" violative of the dormant Commerce Clause. 145

Judge Preska's use of the Edgar/Healy analysis provides substantial support for her premise that any attempt to deliberately regulate trade in other states is per se violative of the dormant Commerce Clause. Her conclusion, however, that the New York Act reflected an attempt to deliberately regulate Internet activity in other states, depends on another premise crucial to the outcome. To reach her conclusion, she must prove that the Internet's very nature makes it impossible to restrict the effects of the New York Act to conduct occurring within New York. Without citing specific evidence or support, Judge Preska states that "[a]n Internet user may not intend that a message be accessible to New Yorkers, but lacks the ability to prevent New Yorkers from visiting a particular Web site or viewing a particular newsgroup posting or receiving a particular mail exploder." 146

As discussed above, however, individual Web sites can be closed to the general public, such that only those with advance authorization may access them. 147 By maintaining a closed Web site, an Internet site owner does have the ability to prevent New Yorkers or, for that matter, any other particular group of users, from accessing the site without advance authorization. Similarly, any listserv can also be closed such that advance authorization in the form of an encryption code or password would be required

142.  Healy, 491 U.S. at 336.
143.  See id.
144.  See id.
145.  See American Libraries Ass'n, 969 F. Supp. at 177 ("This encroachment upon the authority which the Constitution specifically confers upon the federal government and upon the sovereignty of New York's sister states is per se violative of the Commerce Clause.").
146.  969 F. Supp. at 177.
147.  See supra text accompanying note 95.
to access it.\textsuperscript{148} Currently a small number of USENET newsgroups are “moderated,” or closed.\textsuperscript{149} Finally, e-mail communications can be encrypted, such that recipients for whom the messages were never intended are not able to decode them.\textsuperscript{150} This suggests that an Internet user does not “lack” the ability to prevent New Yorkers from receiving the material that user disseminates.

This would seem to undermine Judge Preska’s premise that “the nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York.”\textsuperscript{151} Certainly, the nature of the Internet makes this task more difficult, but hardly impossible. Advance authorization to access a Web site or newsgroup, or to receive certain types of e-mail messages, represents a way that owners of Web sites, newsgroups, and listservs could protect themselves from violating the provisions of the New York Act. While this is not currently the norm on the Internet, and it would certainly lessen the ease of access non-minors have to indecent or obscene material, the process would be quite simple in operation and would resemble that of a magazine subscription solicitation.

Under a system of advance authorization, a user maintaining a Web site that contains obscene or indecent material would utilize a homepage devoid of such material, but with a non-offensive verbal description of what the Web site contains. This description would obviously need to be crafted in a manner that does not violate any state or federal law. The additional pages within the Web site would be open only to those who obtained advance authorization in the form of an encryption code or a password. And to obtain this advance authorization, the prospective subscriber to this Web site would need to fill out a subscription agreement providing information like the user’s home mailing address, telephone number, full name, and age. The user’s signature would certify that the information provided, including age and location, is true and accurate. The user would then enclose payment, in the form of a check or a credit card number, along with the subscription form, in an envelope. The user would then mail it (not electronically, but via regular mail) to the mailing address of the Web site owner. Upon receiving the signed subscription form, the Web site owner would issue a password to the subscriber, and send it to the subscriber via regular

\begin{thebibliography}{9}
\bibitem{148} See \textit{supra} note 79.
\bibitem{149} See \textit{supra} note 80.
\bibitem{150} See \textit{supra} note 78.
\bibitem{151} \textit{American Libraries Ass'n}, 969 F. Supp. at 177.
\end{thebibliography}
mail. The Web site owner might also bill the subscriber for access time (e.g., a set rate per minute).

This process avoids dissemination of indecent or obscene material to minors, the primary goal of the New York Act. By using an independent means of communication like regular mail, it avoids the problems associated with verification of location and identity on the Internet. Moreover, it avails the transaction of the federal anti-mail fraud provisions. Since the agreement would be in writing, and signed by the user, it avoids evidentiary problems associated with authentication of electronic documents. A smart owner of a Web site, newsgroup, or listserv would certainly be wise to take measures like deactivating old passwords and issuing new ones at regular time intervals. This would ensure that the owner maintains close tabs on the subscribers’ locations, lest they relocate into a jurisdiction with different rules. Any subscriber who moves to another state would notify the owner of his or her change in address. Otherwise, the subscriber would never receive the new password or encryption code necessary for future access.

There are strong arguments against this sort of a system, however. It would place a burden on owners of Web sites, newsgroups, and listservs who, regardless of their location, choose to operate in those states with legislative provisions similar to the New York Act at issue here. This burden would increase transaction costs by forcing these owners to (1) stay current on regulatory developments concerning the Internet in all states where subscriptions might be sought, (2) maintain detailed records of all the subscribers involved, (3) maintain different access packages for different subscribers depending on their specific juris-

152. See supra note 24 and accompanying text.
154. The owner might be wise to take additional precautions like obtaining indemnification from the subscriber for any liability arising from the subscriber’s Internet activities and including in the subscription agreement a provision in which the subscriber agrees not to use the service in certain proscribed states (such as those with more stringent restrictions on content, or those from which the owner is unwilling to accept subscribers).
diction, (4) bill customers and keep accurate records of their accounts, and (5) hire, train, and manage personnel to do all this, depending on the size and scope of the operation. The increased transaction costs would no doubt shut out many current owners unable to afford them. Probably the highest cost would be that of keeping current on all the regulatory developments and maintaining a separate program for each state from which the owner accepts subscribers.

Moreover, this sort of a system violates the inherent nature of the Internet. As the Internet has evolved, it has given rise to a commercial culture quite comfortable with high-speed transactions between parties who have never met outside of cyberspace. A system that relies on the postal service for security goes against the grain of a technological medium that offers convenience and speed as its primary perks. This sort of system might repel those who have become accustomed to the Internet's expanding propensity to provide instant gratification for a wide variety of consumer desires.

Additionally, the subscription agreements, no matter how well crafted, might not be enough to insulate a site owner or Internet disseminator from liability, should one of the subscribers decide to access material in a state that prohibits such material while traveling through that state on a plane or in a train. This would provide an incentive for site owners and Internet disseminators to use one subscription agreement tailored to the restrictions imposed by all the states. Under such a scenario, however, the site owners and Internet disseminators would be hard-pressed to continuously update their subscription agreements to conform with the rapidly changing landscape of state regulation. Worse yet, the state whose restrictions were the most comprehensive would be dictating the terms of Internet access to subscribers in all the other states. This is the precise sort of result that the dormant Commerce Clause would seem to preclude.

Much of the material that would fall within the auspices of the New York Act, however, is currently provided by owners who charge fees to users seeking to access their sites. Usually, this entails obtaining a credit card number which the user enters onto an electronic form furnished at the home page. Under the

155. Most of the Internet sites which disseminate obscene or indecent material have home pages which require users to submit age verification agreements, which include the user's home address and telephone number, and also to submit the user's credit card number before granting access to the links to the site's other Web pages which contain the obscene or indecent material.
scenario discussed above, if the transaction costs for the owners go up, we can expect that the owners will pass these additional costs along to the subscribers. And as the subscription expenses for subscribers increase, we can expect that some subscribers will determine that the expenses outweigh the benefits. Others might be unwilling to disclose their identity. These subscribers will cancel their subscriptions. The corresponding decrease in the number of subscribers may have the effect of shutting some additional site owners and Internet disseminators out of the market. Those who remain will compete for subscribers, which will create price competition. Thus, while subscription fees for subscribers may increase, the increase in price will be tempered by competition between site owners and Internet disseminators.

The New York Act is simply incapable of resolving other problems. This type of scheme would have no force against foreign owners disseminating indecent or obscene material over the World Wide Web. It would have no force against anonymous owners or against hackers who create temporary Web sites for the purpose of disseminating indecent or obscene materials. Many who fall in the latter group would be difficult, if not impossible, to trace. Moreover, because these types of owners do not necessarily attempt to make a profit by posting indecent or obscene images on the Web, they would have no incentive to use the subscription system. And many of these types of owners, because their budgets and their operations are so small, are poorly informed about different state regulatory developments.

These problems, however, are not the same sorts of problems faced by owners seeking to abide by the Act. Unlike those problems, these problems exist independently of any legislative scheme in force. These problems are inherent to the Internet, and would still exist irrespective of the New York Act's enforcement. They would exist whether the Internet was regulated at the state level or at the federal level. Thus, these problems are not related to the legislation.

Opponents of a system of advance authorization will no doubt point to the risk that valid passwords could be passed along to minors who could then log on to Web sites disseminating illicit material without any knowledge by the site owners and Internet disseminators that a minor had accessed them. This is a valid objection. Site owners could certainly reduce this risk by billing their subscribers for the time they spend on the site. No subscriber would want to be billed for Internet time used by someone else. Thus, a subscriber would have little incentive to relinquish his or her password, and in the event of discovering unauthorized use, would have every incentive to immediately
contact the site owner and request that a new password be issued. Nevertheless, aside from reliance on a subscriber’s good faith, there would be no assurance that the passwords would not be abused. A purported subscriber could certainly sell the use of his or her password to a minor without any knowledge on the part of the site owner. Under such circumstances, the site owner/disseminator could defend itself from liability by asserting that it was the subscriber, not the owner, who disseminated the indecent or obscene material to the minor. Nevertheless, the slim likelihood of being discovered would gravitate heavily in favor of a subscriber undertaking such deception, especially for subscribers willing to take the risk in exchange for some extra cash. A system that allows this to happen might strike us as inadequate.

Relying on a system of advance authorization is not as outrageous as it might seem, however. This is exactly how Lexis-Nexis and Westlaw operate. In many respects, this system’s operation is analogous to the way many credit card companies operate. Many interactive cable television services and satellite television services issue access codes to parents which could quite easily end up in their children’s hands. There always exists the possibility that a minor will obtain a fake driver’s license and successfully purchase alcoholic beverages at a liquor store. Perhaps even more probable is that the minor will find someone else old enough to buy the liquor for the minor in exchange for a favor or some extra cash. There always exists the possibility that pornographic magazines will be inadvertently sold to a minor or that the video store clerk will rent a movie with indecent content to a minor. In some cases, perhaps the sale or dissemination will be purposeful.

That this type of behavior occurs, and often without anyone else’s knowledge, does not lead us to excoriate the laws that regulate these areas. We do not emasculate these provisions because,

156. Lexis-Nexis and Westlaw are legal databases which contain, among other things, the text of many federal and state court opinions, federal and state statutes, secondary sources such as law journal articles, and recent news from the legal profession as well as general news. Both Lexis-Nexis and Westlaw issue passwords which their subscribers must enter as a pre-requisite to network access. The passwords are not issued over the Internet, but through alternative means: directly from a representative, for example, or through regular mail. Without a valid password, access to Westlaw or Lexis-Nexis simply is not possible.

157. For example, this is one feature widely advertised by DirectTV, which allows subscribers to this satellite television service to use their Digital Satellite Systems (or DSS units) to place a “parent lock” on material that parents feel is unsuitable for their children. Once the lock is activated, the material can be accessed only through the use of an authorization code.
for the most part, this type of behavior is the exception, not the norm. Fear of being caught, being imprisoned, losing one’s liquor license, having one’s business closed, and fear of other sanctions thwarts those individuals who would otherwise have no compunction about violating regulations such as the New York Act. We accept that no piece of legislation is perfect, and that there will always be a tiny fraction of the populace who succeed in subverting the law. In the case of the Internet, the fact that newer technology is involved does not mean that the situations mentioned above are no longer analogous.

We can conclude from the foregoing analysis that deliberate attempts at Internet regulation are not coterminous with deliberate attempts at regulating the affairs of other states. Because the nature of the Internet makes it possible for owners/disseminators to use subscription agreements to restrict the effects of the New York Act to conduct occurring within New York, it would seem that the Act, while deliberately imposed on the Internet, is not a deliberate projection of New York law into other states whose citizens use the Net. This supports the conclusion that the New York Act need not be construed as being incapable of restriction to conduct occurring within New York. At a minimum, this sheds questionable light on Judge Preska’s conclusion under the first mode of analysis. The New York Act need not necessarily be construed as direct discrimination against interstate commerce. Thus, it need not be regarded as “per se violative of the Commerce Clause.”

It is also true, however, that if states other than New York enacted incongruent legislation concerning the same matters as concerns the New York Act, it would create a patchwork of inconsistent state obligations. These inconsistent obligations would make it much more difficult for owners of Web sites, USENET groups, and listservs to conduct business in all the states. Indeed, such an environment might even create incentives for owners to completely abandon any effort to obtain subscribers in certain states. This hypothetical situation is precisely what is demanded by the third prong of the Healy analysis, i.e., considering the practical effect of the statute by hypothesizing the statute’s impact if many other states adopted similar legislation. But under such a scenario, none of the individual state laws would be per se violative of the Commerce Clause. Rather, they would impose an undue burden on interstate commerce such that any benefits of these individual state provisions would not outweigh the overall

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burden they would impose on the Internet. The second mode of analysis employs precisely this type of balancing test, and it is to this mode that Judge Preska next turns.

b. Prohibition of Undue Burdens on Interstate Commerce

Under the second mode of analysis, Judge Preska is concerned with indirect regulation of interstate commerce. The U.S. Supreme Court set forth the balancing test applicable to indirect regulations of interstate commerce in *Pike v. Bruce Church, Inc.* This test employs a two-fold inquiry. First, the legitimacy of the state’s interest is examined. Second, the burden that the state’s statute imposes on interstate commerce is weighed in light of the local benefit it confers on the citizens of that state.

Judge Preska utilizes this test to evaluate the New York Act. She first concludes that the protection of children is a legitimate state interest. Turning to the second aspect of the test, she finds that the unique nature of the Internet and the jurisdictional constraints on enforcement would likely impair the Act from achieving its intended effect of keeping obscene materials from minors in New York, while the Act’s burden on interstate commerce outweighs the local benefit. In discussing the jurisdictional problems, she notes that “[n]early half of Internet communications originate outside the United States.” She also notes

159. *See id.* at 177. As Judge Preska observes, the distinction between direct versus indirect regulations of interstate commerce is unclear:

The distinction between direct regulations of interstate commerce, which are subject to a per se rule of invalidation, and indirect regulations subject to the less stringent balancing test has never been sharply defined. In either situation, however, the “critical consideration is the overall effect of the statute on both local and interstate activity.”


161. *See American Libraries Ass’n*, 969 F. Supp. at 177. Judge Preska cites several cases in support of this contention. *See New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)); *see also Sable v. Federal Communications Comm’n*, 492 U.S. 115, 126 (1989) (“[T]here is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”).

that any attempt by New York to prosecute an out-of-state individual whose only contact with New York occurs via the Internet "is beset with practical difficulties, even if New York is able to exercise criminal jurisdiction over such parties."163 "The prospect of New York bounty hunters dragging pedophiles from the other 49 states into New York," she remarks, "is not consistent with traditional concepts of comity."164 Thus, any local benefit of the Act is limited to those cases which New York is realistically able to prosecute.165

Judge Preska finds that the local benefits of the Act are further limited insofar as many of the Act's objectives can already be accomplished through "vigorous enforcement of the existing laws criminalizing obscenity and child pornography."166 "The local benefit to be derived from the challenged section of the statute," she concludes, "is therefore confined to that narrow class of cases that does not fit within the parameters of any other law."167

The same practical problems associated with prosecuting out-of-state individuals under the New York Act, however, would no doubt present themselves when existing laws criminalizing child pornography and obscenity are applied to Internet-based activity. Therefore, the benefits of vigorously enforcing existing laws to Internet-based activity might also be minimal, and such laws as applied to the Internet might be susceptible to the same dormant Commerce Clause challenge as the Act at issue in this case. Judge Preska does not address this possibility.

"Balanced against the limited local benefits resulting from the Act," Judge Preska finds, "is an extreme burden on interstate commerce."168 For one thing, the range of communications potentially affected by the Act is quite large, and could include famous works of authorship such as Huckleberry Finn by Mark Twain or The Color Purple by Alice Walker.169 Famous nude works by artists such as Botticelli, Manet, Matisse, Cezanne, and others could also be included.170 The Act could, therefore, have a "chilling effect" on speech and expression on the Internet. This appears to be more a problem with the language of the Act rather than a problem related to the nature of the Internet.
Judge Preska also notes that the costs associated with Internet users’ attempts to comply with the terms of the Act are excessive.\(^{171}\) In support of this assertion she cites *ACLU v. Reno*,\(^{172}\) which held that the costs of compliance with the Communications Decency Act, along with the impending threat of serious criminal sanctions for failure to comply, could drive some Internet users off the Internet.\(^{173}\) The discussion under the first mode of analysis above shows why some owners of Web sites, USENET groups, or listservs might find the costs too excessive and leave certain markets all together. Those who remain in the market would be forced to adopt some kind of system of subscription or registration, so as to ensure that no potentially indecent or obscene material falls into the wrong hands. This group would include a large number of site owners who disseminate predominantly decent material, but who would be concerned about potential liability under the Act. In response, some individual Internet users might conclude that the costs of subscribing are not worth the benefit derived. This decision could force out yet more site owners who would otherwise enjoy a significant audience in the Act’s absence. It would seem, therefore, that “the severe burden on interstate commerce resulting from the New York statute is not justifiable in light of the attenuated local benefits arising from it.”\(^{174}\) Even if one were to conclude that the Act’s local benefits are more numerous than Judge Preska allows, the higher transaction costs that the Act imposes on the Internet cannot be disputed. The Act clearly externalizes these costs to Internet users outside of New York. Thus, Judge Preska’s conclusion under this mode of analysis is warranted.

### c. Prohibition of State Regulation of Activities That Demand Cohesive National Treatment

Turning to the third mode of dormant Commerce Clause analysis, Judge Preska finds support for the proposition that “if the mode of commerce is such that it demands consistent, national treatment, regulation is permitted only by Congress.”\(^{175}\) She purports to find support for this proposition primarily in three older cases. The first, *Wabash, St. Louis & Pacific Railway Co. v. Illinois*,\(^ {176}\) dealt with an attempt by Illinois to establish interstate railway rates. The U.S. Supreme Court struck the Illinois

\(^{171}\) *See id.*


\(^{173}\) *See American Libraries Ass’n*, 969 F. Supp. at 180.

\(^{174}\) *Id.* at 181.

\(^{175}\) *See Hameline & Miles, supra* note 30, at 21.

\(^{176}\) 118 U.S. 557 (1886).
statute at issue, stating, "this species of regulation is one which
must be, if established at all, of a general and national character,
and cannot be safely and wisely remitted to local rules and
regulations . . . ." 177

The second case, *Southern Pacific Co. v. Arizona* ex rel. *Sulli-
van*, 178 dealt with the constitutionality of an Arizona statute
which sought to limit the length of trains within the state to four-
teen passenger and seventy freight cars. In that case, the lower
court found that ninety-three percent of the freight traffic and
ninety-five percent of the passenger traffic in Arizona were inter-
state. 179 The court also found that "travel by trains of more than
fourteen passenger cars and more than seventy freight cars over
the main lines of the United States was standard practice, and
that the Arizona law had the effect of forcing railroads to
decouple their trains in Texas or New Mexico and reform the
train at full length in California." 180 The U.S. Supreme Court
concluded that because the Arizona train limit law controlled the
length of trains beyond Arizona's borders, it imposed a serious
burden on interstate commerce. 181 Judge Preska observes that in
this case the Court was relying on a "long-established rule barring
the states from regulating 'those phases of the national com-
merce which, because of the need of national uniformity,
demand that their regulation, if any, be prescribed by a single
authority."

an Illinois statute that required the use of contour mudguards on
trucks in Illinois. The U.S. Supreme Court noted that straight or
conventional mudguards were permitted in most states and actu-
ally required in Arkansas. 184 "The Court struck the Illinois law as
imposing an undue burden on interstate commerce, in part
because Illinois was insisting upon 'a design out of line with the
requirements of almost all the other states.' " 185 Although the
Court acknowledged in this case that coordinated legislation was
needed, it remains unclear whether this case belongs in the same

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178. 325 U.S. 761 (1945).
180. *Id.* (quoting *Southern Pac.*, 325 U.S. at 774).
181. *See id.*
182. *Id.* (quoting *Southern Pac.*, 325 U.S. at 767 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824))).
185. *Id.* (citing *Bibb*, 359 U.S. at 528-29).
class as *Wabash* and *Southern Pacific*. In *Bibb* the Court stopped short of declaring interstate commerce via the highway system something that should be exclusively regulated on a national level. To that extent, it does not bolster Judge Preska’s analysis under the third mode as strongly as the other two cases.

Judge Preska analogizes these three cases to the Internet, finding that the Internet, like the rail and highway traffic at issue in these cases, “requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.” 186 “Regulation on a local level, by contrast,” she states, “will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities.” 187 She observes that states other than New York have enacted laws designed to protect minors from indecent communications over the Internet, but that the other states have adopted different methods to accomplish their aims. 188 She further observes that the New York Act relies heavily on community standards in determining precisely what sort of Internet-based communications are harmful to minors. 189 Differing community standards exist not only among different states, but also among different communities within the same state. 190 This results in a great deal of uncertainty and unpredictability over what kind of material a community will find objectionable, and which communities are likely to object.

“In this sense,” she asserts, “the Internet user is in a worse position than the truck driver or train engineer who can steer around Illinois or Arizona, or change the mudguard or train configuration at the state line; the Internet user has no ability to bypass any particular state.” 191 Judge Preska moves from this assertion to the conclusion that an Internet user (and by user she means a site owner or Internet disseminator) must therefore

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186. Id.
187. Id.
188. See id. “Georgia has made it a crime to communicate anonymously over the Internet, while Oklahoma, like New York, has prohibited the online transmission of material deemed harmful to minors.” Id. (citing GA. CODE. ANN. § 16-19-93.1 (1996); OKLA. STAT. tit. 21, § 1040.76 (1996)).
189. See id.
either comply with the state with the most stringent standard, or forego the message all together. This conclusion is certainly reasonable. Additionally, unlike a truck driver or train operator, a person who disseminates material over the Internet has no idea which routes that material will travel to reach its final destination.\textsuperscript{192} While an Internet site owner or disseminator can restrict subscriber access to the material he or she disseminates, and therefore, can bypass access by resident subscribers in certain states, the site owner/disseminator cannot restrict or control the states through which the disseminated material travels.

But this distinction could be meaningless. Judge Preska asserts that because site owners/disseminators would have no idea what states through which the disseminated material traveled, regulation should occur at the federal level. But because the Internet is truly a global medium, neither will site owners/disseminators know what country through which their disseminated material traveled. Under such logic, therefore, even federal regulation of the Internet should yield to global regulation. Neither federal nor state regulation would be meaningful because neither could regulate persons able to control the localities through which the information they disseminate might travel.

But this distinction could also be meaningless in yet another respect. Just as site owners/disseminators could not control the locations through which their disseminated material traveled, neither could state, federal, or even international regulators prove that the disseminated material actually traveled through certain locations. Thus, regulation of the manner in which disseminated information travels through a particular jurisdiction is ineffective because of its inability to be enforced. There simply is no situation on the Internet analogous to regulating truck lengths, or mudguard use, or train lengths. The only way a state could regulate the manner in which Internet-disseminated material traveled through it would be to regulate the host computers within that state. Because such computers are instrumentalities of commerce via the Internet, however, the state would need to overcome the \textit{Pike} balancing test, an unlikely scenario.

A more meaningful theory of regulation would be regulation of the disseminated material at its destination. Moreover, under a system of advance authorization, an Internet site owner/disseminator does have the capability to bypass certain states by

\textsuperscript{192} This point is also made by Kenneth D. Basinger in \textit{Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy}, 32 GA. L. REV. 889, 903-14 (1998).
simply not accepting subscriptions from those states. This would not necessarily prove fatal to a finding that the Internet is a mode of commerce which demands consistent, national treatment. Rather, since Internet site owners/disseminators can bypass certain states by controlling their subscription lists, the situation is more analogous to the railroad company in Arizona or the truck driver in Illinois than Judge Preska allows.

She concludes that the Internet represents one of those areas of commerce which should receive consistent treatment, and thus, that it is "susceptible to regulation only on a national level." She states:

Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations. Without the limitations imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of the Internet altogether.

Further development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance. Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace. The need for uniformity in this unique sphere of commerce requires that New York's law be stricken as a violation of the Commerce Clause.

If courts adopt the final rationale offered by Judge Preska in her third mode of analysis under the dormant Commerce Clause, or the "need for uniformity" approach, the Internet may enjoy freedom from virtually all state regulations. As Hameline and Miles observe, this reasoning, if followed, could preempt most state regulation of the Internet and place the task of regulation "squarely" on the federal government. State consumer protection laws, tax codes, blue-sky laws, anti-gambling

194. Id. at 181, 183.
195. Hameline and Miles make this same observation. See supra note 30, at 21.
196. Id. at 22.
197. See supra note 103.
198. See supra note 102.
199. Hameline and Miles observe that many states are already drafting exemptions from their regulations for generic offering notices posted on the Internet. See supra note 30, at 23.
provisions, superscript 200 and trademark protection measures superscript 201 applied to the Internet could soon be challenged on dormant Commerce Clause grounds. Due to the far-reaching ramifications this decision portends, it becomes necessary to evaluate its validity and the extent to which it should be followed, if at all.

2. Criticism of American Libraries Association v. Pataki

As her conclusion quoted above explicitly observes, Judge Preska assumes that the growth and further development of the Internet is an important public policy objective. Absent this assumption, her case for reserving the Internet for virtually exclusive federal regulation becomes much weaker. The primary purpose of assuring more predictability and uniformity of Internet regulation is to encourage more commerce to take place there. Thus, the public policy goal is an expanded Internet on which more commercial transactions occur. The way of attaining this goal is by ensuring uniformity and predictability of Internet regulation. However, is this the proper role of the judiciary?

Numerous critics think not. U.S. Supreme Court Justice Antonin Scalia, for example, asserts that “negative’ Commerce Clause jurisprudence” puts the Court in a legislative role, whereby decisions made under its guise amount to prospective decisionmaking, and “prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.” superscript 202 Critics like Justice Scalia point to the role of the judiciary envisioned by the Constitution’s Framers, in which the courts were to remain free from “majoritarian”

200. Consider, for example, the law against Internet gambling recently enacted by the state of Louisiana, which provides a maximum $500 fine or six months in prison for an individual who participates in Internet gambling, and a maximum $20,000 fine or five years in prison for anyone who designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a homepage, Web site, or any other product accessing the Internet, World Wide Web, or any part thereof offering to any client for the primary purpose of conducting as a business of any game, contest, lottery, or contrivance. See LA. STAT. ANN. § 90.3.E (West Supp. 1998). Already, more than 600 Internet sites exist on the subject of gambling. See Salbu, supra note 190, at 443.

201. See supra note 107.

political pressure. The judiciary, therefore, is not the proper body to make policy decisions. "Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, . . . and 'ill suited to the judicial function.' Because the dormant Commerce Clause must address the "inevitably shifting variables of a national economy," its critics urge that the judiciary abandon the doctrine completely. In addition to arguments based on separation of powers, critics of the dormant Commerce Clause doctrine also cite a lack of textual support for the doctrine in the Constitution, a lack of support in the discernible intent of the Framers, and an encroachment against federalism.

It is doubtful that, in light of the extensive body of dormant Commerce Clause jurisprudence developed over nearly two centuries, the Court would now invalidate the doctrine. Moreover, the judiciary employs balancing tests similar to that used by Judge Preska in numerous other contexts, and these types of tests, susceptible as they are to being riddled with policy concerns, have consistently been upheld. Nonetheless, American Libraries Ass'n is certainly vulnerable to the criticism that the court has overstepped its bounds and, by enjoining the enforcement of the New York Act, has made policy. Such an argument represents ripe ground to attack the decision on appeal or to

203. Id. at 1244 (citing Martin H. Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. Rev. 1, 16 (1987)).

204. See id.

205. Id. (citing Bendix Autolite Corp., 486 U.S. at 897 (Scalia, J., concurring) (quoting CTS Corp. v. Dynamic Corp. of Am., 481 U.S. 69, 95 (Scalia, J., concurring))).

206. Id. (citing Smith, 496 U.S. at 203 (Scalia, J., concurring)).

207. For critiques of the dormant Commerce Clause doctrine, see Petragnani, supra, note 116; Friedman, supra note 116; Redish & Nugent, supra note 116. Critics have also asserted that the Privileges and Immunities Clause in Article IV will accomplish alone what the courts have attempted to accomplish through their use of dormant Commerce Clause jurisprudence. See Redish & Nugent, supra note 116, at 605-12. See also Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. Rev. 1387, 1410 (1987).

208. Consider, for example, the Lemon test, used widely in Supreme Court Establishment Clause jurisprudence. See Lemon v. Kurtzman, 403 U.S. 602 (1971). The test, though weakened, has been upheld. As another example of a balancing test, consider the test adopted in substantive due process jurisprudence with respect to abortion, balancing the woman's right to privacy in making a decision about whether to terminate her pregnancy against the State's right to protect the potential life she carries as long as the State does not impose an "undue burden" on the woman's privacy rights. See Planned Parenthood v. Casey, 510 U.S. 1309 (1994).
attack a future attempt to invalidate state regulation of the Internet under the auspices of the dormant Commerce Clause.

Dormant Commerce Clause critics certainly might construe congressional silence as a willingness by federal legislators to allow the states to regulate the Internet. However, congressional silence could also be construed in another sense. If the premise that the Internet-based activity comprises interstate commerce remains undisputed, then Congress has authority to act in this area, though it might opt not to act. By not acting, Congress has not placed any obstacles, at least at the federal level, in front of the unfettered growth of the Internet. In this sense, the congressional decision not to act could be the best evidence of a national public policy to leave the Internet alone and let it grow. Since inconsistent state regulations unduly interfere with that “unwritten” policy, they present obstacles to the Internet’s continued growth and development. Seen in this light, Judge Preska’s opinion adopts the only alternative: virtually exclusive federal jurisdiction over the Internet.

This argument, while seemingly tenuous, is no different from the argument advocated by critics of the dormant Commerce Clause. Both advocates and opponents of dormant Commerce Clause jurisprudence advance their own meanings of congressional silence. Opponents view congressional silence as deference to state legislation. Proponents of the dormant Commerce Clause, by contrast, view congressional silence not as deference to state legislation, but simply as the lack of a congressional will to act. The absence of a will to act does not mean that courts are prevented from finding a given transaction or series of transactions to be interstate commerce.209 Similarly, the fact that Congress has acted does not suddenly transform intrastate commerce into interstate commerce. Courts have invalidated congressional overreaching into the sovereign affairs of states just as readily as they have invalidated state overreaching detrimental to interstate commerce.210 But Congress can reverse

209. Proponents of dormant Commerce Clause jurisprudence advance numerous other arguments in support of the doctrine. The “implicit” structural argument maintains that while no explicit textual authorization may exist for the dormant Commerce Clause concept, the principle is implicit within the constitutional structure, and therefore valid. See Regan, supra note 116. Other arguments advance a concept of “constitutional common law.” See Henry Monaghan, The Supreme Court 1974 Term—Foreward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). For a good summary of these positions, see Redish & Nugent, supra, note 116.

210. See, e.g., Boerne v. Flores, 521 U.S. 507, 534 (1997) (holding that the Religious Freedom Restoration Act exceeds Congress’ power because it would amount to a “considerable congressional intrusion into the States’ traditional
the effects of judicial invalidation of state overreaching by legislatively carving out certain areas for state regulation, even though an existing federal legislative scheme might otherwise preempt state action in that particular area.\textsuperscript{211}

It lies beyond the scope of this Note to evaluate and/or justify the merits of dormant Commerce Clause jurisprudence. Rather, the foregoing is offered to illustrate the divisions among legal scholars and jurists about the legitimacy of this theory. Although dormant Commerce Clause jurisprudence has arguably been employed by the courts since *Gibbons v. Ogden*,\textsuperscript{212} the theory remains murky and widely disputed. These divisions raise the possibility, however unlikely, that Judge Preska's opinion could be reversed, modified, or vacated on appeal by a court hostile to the doctrine. Even if the validity of the doctrine remains intact on appeal in this case or in future cases employing the doctrine to invalidate state regulation of Internet-based activities, *American Libraries Ass'n* and its future progeny raise other problems.

As shown above, Judge Preska's analysis fails to necessarily prove that the New York Act is "per se" violative of the commerce clause. Moreover, her analysis under the third mode—that the Internet is a mode of commerce that demands consistent national treatment—could be vulnerable because of her misstatements about an Internet owner's capability to avoid certain states. As previously shown, a system of registration and advance notification would allow Internet users to restrict subscriptions to residents from certain states. This weakens her premise that the Internet, by its nature, is susceptible to regulation almost exclu-

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\textsuperscript{212} 22 U.S. (9 Wheat.) 1 (1824).
sively at the federal level. This weakness could lead a court to invalidate Judge Preska's conclusion in her first and third modes of analysis. This would leave intact only the second mode, the "undue burdens" approach, which envisions concurrent regulation of the Internet both by states and by Congress.213

C. The State Interests in Regulating the Internet

This possibility leads us to inquire about how such concurrent regulation would work. Is concurrent regulation of the Internet even possible? We begin with an assessment of what the legitimate regulatory interests of states are, and move from there into those areas less likely to find insulation from dormant Commerce Clause scrutiny.

Analysis under the dormant Commerce Clause applies only to those state regulations found to be discriminatory. According to Michael E. Smith,214 a regulation is discriminatory if "it imposes greater economic burdens on those outside the state to the economic advantage of those within."215 Smith notes the two main issues a court must reconcile when applying this definition to a state regulation and also notes who must bear the burden of showing that the regulation is discriminatory:

The proposed definition of discrimination gives rise to two main issues: what kinds of economic burdens are sufficient to constitute a disfavored discrimination, and what is a sufficiently unequal distribution of burdens and advantages. On the two issues, as on all others that concern whether the regulation is discriminatory, the party challenging the regulation, not the state, has the burden of proof.216

The first issue addresses the kinds of economic burdens sufficient to constitute a disfavored discrimination. Regulations that obstruct the flow of goods originating from outside the regu-

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213. In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the U.S. Supreme Court enunciated the principle that the federal jurisdiction under the Commerce Clause comes in two parts. For matters such as pilotage in local waters that fall within interstate commerce but that are also of significant local concern, the federal and state jurisdictions are concurrent. See 53 U.S. (12 How.) at 319-20. For those matters for which there should be a uniform rule, the power of Congress is exclusive. See id. at 319.

214. Professor of Law, Boalt Hall School of Law, Univ. of Calif., Berkeley.


216. Id.
lating state are generally found to be sufficient in this regard.\textsuperscript{217} Similarly, regulations that artificially inflate the price of goods originating outside the regulating state are generally also sufficient.\textsuperscript{218} As with restrictions on the flow of incoming goods, regulations that restrict the flow of outgoing goods are generally also found to be a burden sufficient enough to comprise a disfavored discrimination.\textsuperscript{219} However, in some cases, the Court has upheld regulations that increase the prices that out-of-state buyers pay for goods made in-state.\textsuperscript{220}

Turning to the second issue, at what point are a regulation's burdens and advantages sufficiently unequal? According to Smith, it is not possible to specify how uneven the distribution of burdens and advantages must be to count as a discrimination.\textsuperscript{221} Smith does make a few generalizations, however. While the Commerce Clause has traditionally been concerned with the shifting of economic benefits and burdens, some U.S. Supreme Court decisions "suggest that the shifting of noneconomic burdens to people elsewhere may also constitute discrimination."\textsuperscript{222} Noneconomic burdens include things like shifting health and safety hazards to other states.\textsuperscript{223} Examples might include regulations that divert the transportation of hazardous cargo to other states, or regulations that inhibit the incoming flow of toxic waste for disposal from sources outside the state.

Potential discrimination might also consist of granting undue benefits, such as state money or resources, to local people. Since 1976, however, the Supreme Court has held that these benefits are entirely outside the Commerce Clause altogether. In so doing, the Court has distinguished state regulation of the private market, which is subject to the Commerce Clause, from state participation in the market, which is not.\textsuperscript{224} The latter has come to

\begin{itemize}
\item \textsuperscript{217} See id.
\item \textsuperscript{218} See id.
\item \textsuperscript{219} See id.
\item \textsuperscript{220} See id. at 1214 (citing H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939)).
\item \textsuperscript{221} See id. at 1219.
\item \textsuperscript{222} Id. at 1220 (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)).
\item \textsuperscript{223} Smith notes that the use of the Commerce Clause in this area may go beyond the Framers' intent, as they were concerned primarily with state actions involving the imposition of economic burdens. Moreover, the Court associates state independence mainly with noneconomic interests such as health and safety rather than regulation. See id. at 1222.
\item \textsuperscript{224} See id. (citing Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-09 (1976)).
\end{itemize}
be known as the “market-participant exception” to the dormant Commerce Clause.225

In employing this exception, the Court has held that no violation of the Commerce Clause occurs when states prefer residents over nonresidents in hiring workers, selling goods, or purchasing services for government use.226 The market participant exception relies on a distinction between impermissible regulation and permissible participation.227 Commentators have criticized this distinction because of its vagueness and also because of the little guidance it gives lower courts.228 Indeed, the Court has not articulated criteria which lower courts could use to distinguish regulation from participation.229 Other commentators have defended the market-participant doctrine.230 These commentators offer four principal justifications for the doctrine: (1) it is “fair and consistent with broadly shared conceptions of property to let state governments favor state residents when selecting the recipients of the state’s own largess;”231 (2) the values of federalism weigh heavily against interference with state autonomy in this area,232 (3) “marketplace preferences for local concerns in general pose less of a danger to Commerce Clause values than do those discriminatory regulations and taxes that engendered recognition of the dormant Commerce Clause principle;”233 and (4) considerations emanating from the constitutional text and its history suggest that states should have more latitude when dealing in the market than when regulating the efforts of others at free trade.234 The disagreements among legal scholars about the market-participant exception’s

225. For good discussions of the market participant exceptions to the dormant Commerce Clause, see generally Barton B. Clark, Comment, Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause, 60 U. CHI. L. REV. 615 (1993); Dan T. Coenen, State User Fees and the Dormant Commerce Clause, 50 VAND. L. REV. 795 (1997); Dan T. Coenen, supra note 114.


227. See Clark, supra note 225, at 620.

228. See id.

229. See id.

230. See, e.g., Coenen, supra note 114, at 398 (“The Court's market-participant decisions reflect a sound, if complex, accommodation of competing constitutional values.”).

231. Id. at 420

232. See id.

233. Id.

234. See id.
efficacy as a workable legal doctrine illustrate perhaps its shortcomings and shed a questionable light on its future.

Applying the foregoing discussion to state regulation of the Internet, other state regulations similar to the New York Act could potentially be construed as discriminatory on the grounds that they obstruct the flow of goods originating from outside the regulating state. This requires that "goods" be defined as images, information, documents, music, videos, pictures, or other media transmitted or downloaded via the Internet. Given the broad definition of commerce that modern courts currently apply, an expansive definition of "goods" that includes media transmitted over the Internet does not seem inconsistent with current dormant Commerce Clause jurisprudence. The New York Act does indeed obstruct the flow of these types of goods originating from outside New York because it requires that disseminators of material which could potentially come within its terms take further measures to comply with the Act.

It could be more difficult for state regulations similar to the New York Act to be construed as discriminatory on the grounds that they artificially inflate the price of goods originating outside the regulating state. Compliance with the New York Act would artificially inflate the costs of Internet site owners outside the state who disseminate material coming within its terms. But the cost of compliance for those outside the state of New York would be equal to that of those inside the state. The Act artificially inflates the price of goods, but does so in a manner that does not discriminate between New York residents and non-residents. Site owners inside New York that disseminate material coming within the Act's terms will absorb the same increase in costs as those outside the state.

State regulations that strive to tax in-state subscriptions only to out-of-state Internet dissemination services would be construed as discriminatory because they would impose a cost on out-of-state Internet disseminators that those in-state would not have. Such regulations would obstruct the flow of goods by artificially increasing the costs of subscriptions to Internet disseminators outside the state. The increased costs that the tax would impose could cause several consumers within the state, who would otherwise subscribe, to opt against subscribing. This would lower the overall number of subscribers the out-of-state disseminator could otherwise obtain in the absence of the tax. The lower number of subscribers, in turn, represents an indirect way that an out-of-state disseminator of material on the Internet would have his or her own costs artificially inflated by a state tax regulation.
A state regulation that strives to tax in-state Internet disseminators could be construed as discriminatory on the grounds that such a measure would restrict the flow of outgoing goods. It would do this by artificially increasing the cost of disseminating material to all subscribers, both in-state and out-of-state. These increased costs would be passed along to subscribers through an inflated subscription price, thereby making the disseminators less competitive with other out-of-state disseminators who do not need to pay such taxes in their states. The result would be fewer subscribers to services provided by in-state Internet disseminators, both inside and outside the state. This, in turn, would cause a decrease in the amount of goods the taxed in-state Internet entities disseminate in general.

As a market participant, a state could get away with more. A state government may decide to select and pay a private contractor to disseminate (or post on the Web) all of its various government documents. As a market participant, a state government could confer this benefit entirely on one Internet disseminator within the state. Similarly, a state could become an ISP itself, competing in the market with other service providers, charging user fees to those who use the state's Internet services. As an ISP, it could charge lower user fees to state residents than to out-of-state residents, just as could a private ISP. A state government may also become a consumer of various Internet services, opting to utilize one or several in-state ISPs over others.

If a state regulation is found to be discriminatory, the state has the burden of justifying it. This burden consists of three separate showings that states must make. According to Michael Smith:

First, the state must prove that it has a legitimate interest to be served by the regulation. Second, it must show that the regulation serves this interest to a substantial extent. Third, it must prove that it has no available alternatives to the regulation that are less discriminatory. Uncertainty on the record on these points, particularly the latter two, is resolved against the state. The state is excused from its burden of proof only if Congress has consented to the discrimination, which rarely occurs.

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235. The state, under such a scenario, would need to employ the same measures as a private ISP to identify those who use the state's service (e.g., a subscription system) so that the user fees the state charges are not paid by users who do not use its services. Otherwise, the state would expose itself to antitrust claims.

236. Smith, supra note 215, at 1231 (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). See generally Dean Milk Co. v. City of Madison, 340 U.S. 349,
Since a state must sufficiently make each of these showings, this burden is a very heavy one. Recent U.S. Supreme Court jurisprudence suggests that the Court is in no way reluctant to invalidate a state regulation for its failure to meet any one of the three conditions mentioned above. State attempts to justify regulations have been rejected by the Court on the ground that either the asserted state interests were illegitimate, that they were not substantially served by regulation, that less discriminatory alternative means were available, or some combination thereof.\(^2\)

In cases involving discriminatory state regulations, the Supreme Court has found a variety of noneconomic state interests to be legitimate. Most frequently cited are traditional police power concerns, health, and safety.\(^2\)³ In application, these have interests that have ranged from highway and employee safety to healthful milk, air, and water.\(^2\)³⁷ Over the years the Court has recognized the legitimacy of other noneconomic interests as well. These include racial equality, household privacy, and the protection of natural resources.\(^2\)³⁹ The Court has recognized even some economic interests as being legitimate. "States may protect consumers from conventionally disfavored economic disadvantages such as fraud and overreaching, confusion, and incompetent or inadequately insured sellers."\(^2\)⁴¹ States may also

\[\text{Note: Citations are for illustrative purposes and are not in the original document.}\]

\(^2\)\(^3\)⁴ (1951) (discussing the showings that states must make); Hunt v. Washington Apple Advert. Comm'n, 432 U.S. 333, 353 (1977) (discussing the same issue).

\(^2\)³⁷. See Smith, supra note 215, at 1232.

\(^2\)³⁸. Smith notes that occasionally the Court has suggested that health and safety are weightier than other legitimate state interests and thus might more readily justify a discriminatory regulation. See id. at 1234.


\(^2\)⁴¹. Id. (citing Edgar v. MITE Corp., 457 U.S. 624, 644 (1982); Washington Apple Advert. Comm'n, 432 U.S. at 353; Robertson v. California, 328 U.S. 440, 457 (1946); California v. Thompson, 313 U.S. 109, 114-15 (1941)).
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protect consumers from high prices\(^{242}\) as well as excessive government costs.\(^{243}\)

In analyzing whether a regulation serves the asserted state interest to a substantial enough extent, "[u]nless the legislature is peculiarly inept, state regulations ought to satisfy this test fairly readily."\(^{244}\) In analyzing whether there exist less discriminatory alternatives to a state regulation, the Court has begun to insist that there be a "close fit" between the geographical scope of the regulation and the need that allegedly justifies it.\(^{245}\) In other words, the regulation may be neither unduly underinclusive in burdening local residents nor unduly overinclusive in relation to people elsewhere. If the former, the regulation may not serve the state's asserted interest to a substantial enough extent, and the state presumably has the less discriminatory alternative of expanding the scope of the regulation. If the latter, the state can presumably narrow the regulation's scope without also sacrificing the asserted interest.\(^{246}\)

Applying the above discussion to state regulation of the Internet, what type of state interests regarding Internet-based activities would a federal court likely regard as legitimate? It would seem that regulations banning Internet-based fraud, though discriminatory, would come within the police power exception to the dormant Commerce Clause. The Court would likely give states some latitude and flexibility in this area, since such state measures are designed to protect consumers. Similarly, regulations banning anonymity would seem to be well within this purview. State regulations imposing criminal liability for transmitting computer viruses into the state could be justified as measures designed to promote health and safety—the health and safety not only of the Internet, but of all the computer systems linked to the Internet.

There are other state interests which a federal court would likely regard as invalid. Recently enacted legislation in some states banning wine sales over the Internet would seem to implicate concerns about discrimination against out-of-state com-


\(^{244}\) Id. at 1236.

\(^{245}\) Id. at 1238.

\(^{246}\) See id.
Additionally, while a state has an interest in protecting its residents from high prices, an attempt by a state to regulate prices on the Internet might fail to prove the least discriminatory way of protecting consumers from high prices, especially given the difficulties associated with defining the applicable market involved, the applicable competitors of the ISPs or disseminators affected, and the applicable market price. The very nature of the Internet makes discovering the answers to these questions virtually impossible.

Similarly, although the state could likely justify a measure banning Internet anonymity, it might have more difficulty justifying a particular encryption or registration scheme because of the consequences such a scheme would have to ISPs and disseminators outside the state. Such a specific scheme would likely be stricken because it would fail to prove the least discriminatory way of protecting against fraud, especially in light of a less discriminatory alternative—a simple ban on anonymous transmission. Any scheme more specific would too readily resemble measures requiring specific types of mudflaps on trucks, specific train lengths, or specific identification criteria for apple crates.

State regulation of Internet-based gambling presents a less clear-cut case. Although states have traditionally regulated the gambling that has occurred within their borders, the global and trans-jurisdictional nature of the Internet makes state regulation of Internet gambling more tenuous. Such regulation would undoubtedly be discriminatory. However, a state's ability to resist a dormant Commerce Clause challenge would depend on that

247. The states of Florida, Georgia, Kentucky, Tennessee, and North Carolina have enacted laws making it a felony to ship alcoholic beverages to residents of their states. Concerns about underage drinking and lost tax revenues seem to be the driving force behind these enactments. Vinters claim that the real reason for the enactments is to protect the oligopoly of liquor distributors in those states. See Electronic Commerce Update, supra note 48. It is unclear whether these provisions would withstand a dormant Commerce Clause challenge.


251. For an evaluation of Louisiana's recently enacted provision against Internet gambling (LA. REV. STAT. ANN. § 14:90.3.E (West Supp. 1998)) with respect to the dormant Commerce Clause, see Bassinger, supra note 192, at 915-22.

252. Traditionally, such state regulations have been justified under the guise of states' police power, "likely motivated by an interest in protecting the state-run gambling monopolies." Hameline & Miles, supra note 30, at 22.
state's ability to effectively assert a vital state interest in the regulation. The burdens associated with gambling include addiction, diminished job performance, crime, decreased spending on other forms of entertainment, and the regressive nature of gambling. This would suggest that a state could justify a discriminatory regulation affecting Internet gambling on the grounds that, although it might obstruct the flow of goods, it promotes the health and safety of state residents. While such noneconomic interests would likely be upheld, a state would encounter great difficulty asserting that any measure which restricts or heavily regulates Internet gambling is the least discriminatory alternative, especially in light of the fact that several states, such as Nevada, permit widespread gambling.

Clearly, concurrent regulation of the Internet by both federal and state authorities may be perhaps the most equitable means of fairly balancing state and federal interests. It would not come without a price, however. Legal uncertainty and unpredictability would still continue. While the dormant Commerce Clause will forestall some state regulatory measures, other carefully crafted measures in a limited number of areas will escape invalidation and survive to shape the future of the Internet. In other areas, the more murky ones, the dormant Commerce Clause will invite further litigation to better define lines of demarcation between legitimate state interests in regulating the Internet and those areas which, because of their strong linkage with interstate commerce, are susceptible only to federal regulation.

V. CONCLUSION

We can arrive at several conclusions concerning the impact the dormant Commerce Clause might have on state regulation of the Internet. First, dormant Commerce Clause jurisprudence has its share of critics. Although unlikely, the doctrine could be completely scrapped or at least modified by the U.S. Supreme Court. This would clear the way for states to aggressively regulate the Internet in those areas where Congress has not. It would also mean less predictability from state to state of liability for individuals engaging in commerce over the Internet. Second, although rare in practice, Congress could carve out specific areas for state regulation of the Internet. For example, Congress could allow states to impose registration requirements on ISPs. Third, states

253. See Montpas, supra note 105, at 170-71.

254. For a more detailed discussion of the localized interests states might have in regulating Internet gambling, see Salbu, supra note 190, at 443-48.
could have a direct role in shaping the future of the Internet by becoming market participants rather than regulators. For example, a state could become an ISP in competition with other ISPs. Fourth, states could use noneconomic interests such as their police powers, health, safety, and consumer protection from fraud and overreaching to have a direct impact on the development of the Internet. Fifth, while the lines of demarcation seem clear when it comes to state prevention of fraud, anonymity, or prohibition of computer viruses, there exist several other cases, such as state regulation of Internet gambling, which are less clear-cut. These more murky cases will demand resolution either through the courts or through congressional preemption.

I conclude that the result in American Libraries Ass'n v. Pataki should be followed. Despite the strong arguments, set forth above, militating heavily against Judge Preska's first mode analysis, the "per se" approach, and third mode analysis, the "need for uniformity" approach, her second mode analysis, the "undue burdens" approach, seems unassailable. The New York Act does, indeed, impose burdens on the residents of other states which far exceed the limited benefits New York residents could derive from the Act. Even if only this second mode of analysis were to survive an attack on appeal, it introduces dormant Commerce Clause considerations to state regulation of the Internet. These considerations cannot be ignored. The Internet, by its nature, is a conduit of interstate commerce. Construing the Internet as a conduit of interstate commerce will not put all issues to rest, but it will certainly narrow the issues.

By forestalling some state regulatory measures, the dormant Commerce Clause will take the Internet's development down a new path. But this path has its own share of problems. How broad will the market-participant exception be when applied to state regulation of the Internet? How far can a state go in mandating a system of registration in the name of preventing fraud? Without congressional action, these questions will be resolved judicially through expensive and protracted litigation. Such litigation would only impede the more rapid growth and development of the Internet. Thus, if the growth and further development of the Internet as a commercial mechanism remains an important public policy goal, then Congress should act to make Internet liability more predictable and more stable.

American Libraries Ass'n has paved the way for Congress to act. The measures such as the Internet Tax Freedom Act recently enacted by the 105th Congress represent important first steps, but they are baby steps. The Internet Tax Freedom Act itself merely imposes a moratorium on federal, state, or local tax-
ation of Internet access so that regulators can study the Internet and the potential effects that various proposed federal or state taxation schemes might have on electronic commerce. The states presumably retain the power to tax areas other than Internet access, and to regulate other Internet-based activities under their police powers. Because lines of demarcation between permissible and impermissible state and local regulation of these activities have yet to be drawn, the Internet continues to remain an uncertain environment for commercial transactions. This is why additional congressional preemption would be helpful. Clearly, it would hardly settle the debate about how to regulate the Internet, but it would make that debate more manageable by making it a national debate. It would focus the attention and energy of the many commercial interests that the Internet serves. This step alone would confer a great deal more stability and predictability upon Internet commerce than would the current regime, with its fifty-one separate jurisdictions applying disparate and inconsistent regulatory paradigms to the Internet.

I have not made a case in this paper for the specific type of legal and regulatory paradigm Congress should enact. Such questions do not lend themselves to easy answers, nor should they. Indeed, Congress must be careful not to arrest the rapid development of this new technological medium. Additionally, the formulation of a comprehensive regulatory paradigm for a technological medium in the midst of evolution will be a formidable task to complete, even in eighteen months. On the other hand, the absence of national uniformity in this area might be precisely what impedes a pace of development perhaps even more robust—and also more logical and consistent—than what we have seen. By exercising its jurisdiction over this instrumentality of interstate commerce, Congress would confer more than stability. It would also confer legitimacy. This legitimacy would encourage many more commercial interests to take their wide variety of endeavors to the Internet with confidence. I believe, therefore, that proper congressional regulation of Internet commerce is not necessarily coterminous with the reduction or demise of that commerce. To the contrary, carefully crafted and prudently calculated legislation might permit Internet-based commerce to blossom even more than it already has.

Additionally, as American Libraries Ass'n shows us, the federal courts are willing to act where Congress has not. Furthermore, given the trends I have highlighted in this note, federal litigation over Internet-based activities is likely to increase, not decline. Thus, Congress must decide whether these issues should play out
in a judicial arena or in a legislative one. I believe that Congress, rather than the courts, is a more appropriate forum for defining lines of demarcation between legitimate state interests in regulating the Internet and those areas which should—and do—reside within the purview of federal regulatory power. Unlike a court, Congress is a deliberative body, able to carefully consider many interests that could never find adequate representation in a pending suit. Moreover, Congress has the ability—through legislation—to craft remedies that a court could never fashion. Finally, and perhaps most importantly, Congress can revise, reform, and even repeal ineffective legislation. Judicial decisions, by contrast, are much more difficult to overturn. The court in American Libraries Ass'n appears to have reached the correct result. But this hardly guarantees that courts in future cases will do the same. For these reasons, congressional regulation of Internet commerce is both appropriate and timely.