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## Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause

*Michael W. Loudenslager*<sup>1</sup>

*“Invocation of ‘the Internet’ is not the equivalent to a cry of ‘sanctuary’ upon a criminal’s entry into a medieval church.”*

*– Judge Diane A. Lebedeff*<sup>2</sup>

### I. INTRODUCTION

The Internet<sup>3</sup> currently is one of the fastest growing methods of communication in the United States.<sup>4</sup> According to a survey taken by the United States Department of Commerce Census Bureau, over 53 percent of the United States population (143 million people) used the Internet as of September 2001.<sup>5</sup> At the touch of a button, the Internet provides users with accessibility to a greater amount of information than ever before.

The Internet provides an inexpensive method of communication allowing a person to publish information worldwide with minimum start-

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2. *People v. Lipsitz*, 663 N.Y.S.2d 468, 475 (Sup. Ct. 1997).

3. “The Internet” is a term coined from the “interconnected network” that makes up this computer system. Ari Lanin, Note, *Who Controls The Internet? States’ Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423 n.1 (2000). “The Internet is a diverse set of independent networks, interlinked to provide its users with the appearance of a single, uniform network.” COMM. ON THE INTERNET IN THE EVOLVING INFO. INFRASTRUCTURE ET AL., THE INTERNET’S COMING OF AGE 29 (2001) [hereinafter THE INTERNET’S COMING OF AGE]. See also Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 8 (1993) (“[T]he Internet is not a single integrated entity; rather, it is a loosely connected web of local, regional, and national computer networks that share certain procedures for addressing and routing computer data.”).

4. See U.S. DEP’T OF COMMERCE, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 1, 10 (2002) (stating that, according to a Census Bureau survey taken in September 2001, “[t]he rate of growth of Internet use in the United States is currently two million new Internet users per month” and that “Internet use has grown at a rate of 20 percent a year since 1998”), at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (Feb. 2002).

5. *Id.* at 10.

up time and expense. All a person needs in order to communicate or publish information worldwide is a personal computer with Web browser software, a telephone line, a computer modem, and Internet access provided by an Internet service provider.<sup>6</sup> Much of this can be obtained free of charge.<sup>7</sup>

A whole new segment of the economy has sprung up due to the creation of the Internet. Many existing companies with traditional brick and mortar stores now also provide services and products over the Internet, and numerous new companies exist that provide their services and products only over the Internet. As a result, Americans now conduct a significant amount of commerce over the Internet.<sup>8</sup> Almost 70 percent of American Internet users search for product and service information through this medium, and almost 40 percent of Internet users purchase products and services while online.<sup>9</sup> With the United States teen population engaging in, proportionally, the largest amount of Internet use,<sup>10</sup> one can expect the amount of commerce occurring over the Internet only to increase as this segment of the population continues to mature and to integrate even more into the economy.

While the growth in Internet use has brought with it many positive effects, this growth in Internet use also has drawbacks. Due to the existence of the Internet, pornographic materials are more accessible to minors.<sup>11</sup> Minors are more susceptible to pedophiles.<sup>12</sup> Various types of gambling are now more readily available to gambling addicts and those

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6. See *infra* notes 68-74 and accompanying text (describing how the World Wide Web works).

7. For example, people can obtain access to all of these necessities at many public libraries, and some Internet service providers give people Internet access for little or no fee.

8. See U.S. DEP'T OF COMMERCE, *supra* note 4, at 30 (finding that 21 percent of the United States population "made online purchases and 8.1 percent conducted banking online" and "approximately one-third of Americans used the Internet to search for product and service information"). But see Lorrie Grant, *Online Sales Up, But Expectations Down*, USA TODAY, May 31, 2002, at B7 (stating that in the first quarter of 2002 only 1.3 percent of total retail sales in the United States occurred online).

9. U.S. DEP'T OF COMMERCE, *supra* note 4, at 31 fig. 6 (showing that as of 2001 67.3 percent of individuals online used the Internet to search for product and service information and 39.1 percent of these individuals used the Internet to purchase products and services).

10. *Id.* at 43 (stating that 58.5 percent of children between the ages of 5 and 17 use the Internet). The rate of Internet use among teens and pre-teens is even higher, with over 75 percent of 14 to 17 year olds and over 65 percent of 10 to 13 year olds using the Internet. *Id.* The Department of Commerce study concluded that "the Internet has become integrated into children's daily routines" and that "[a]s a result, teenagers and young adults in school are now among the highest Internet users." *Id.* at 53.

11. See *infra* notes 236-39 and accompanying text (describing New York statute designed to prevent minors from accessing sexually explicit material on the Internet).

12. See *infra* note 326 and accompanying text (listing cases dealing with state Internet regulations intended to protect children from contact with pedophiles).

who cannot afford gambling debts,<sup>13</sup> and more opportunities exist for scam artists to defraud consumers under the guise of legitimate businesses.<sup>14</sup>

State and local governments have traditionally addressed these social ills. In fact, the rectification of such problems historically has called on states to exercise what is known as their “police powers” through state legislation or regulations.<sup>15</sup> However, several courts have held that state governments cannot protect their citizens from such problems through regulation of Internet activity due to the negative or “dormant” aspect of the Commerce Clause.<sup>16</sup>

The dormant commerce clause is an implicit aspect of the Commerce Clause of the United States Constitution.<sup>17</sup> This doctrine maintains that because Congress has the power to regulate and promote trade among states, state governments cannot promulgate legislation or regulations that frustrate or inhibit trade between states, even in the absence of Congressional legislation.<sup>18</sup> Several courts have held that virtually any

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13. See *infra* note 337 and accompanying text.

14. See *infra* note 327 and accompanying text (listing cases dealing with the application of state regulations to the Internet to protect against unfair business practices).

15. See *infra* notes 328-29, 336 and accompanying text (explaining the areas in which the United States Supreme Court has recognized that states exercise their police powers).

16. See *ACLU v. Johnson*, 194 F.3d 1149, 1160-63 (10th Cir. 1999) (holding that statute making dissemination of harmful material to minors by computer a misdemeanor was unconstitutional under the dormant commerce clause and the First Amendment); *Am. Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300, 306, 320-321 (D. Vt. 2002) (holding that a Vermont statute criminalizing the dissemination of images “communicated, transmitted, or stored electronically” that are “harmful to minors” was unconstitutional under the dormant commerce clause); *PSINet v. Chapman*, 167 F. Supp. 2d 878, 882, 891 (W.D. Va. 2001) (holding that a Virginia statute making it a misdemeanor to display an “electronic file or message containing an image” or words depicting sexually explicit material “harmful to juveniles” violated the dormant commerce clause); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 739-40, 751-52 (E.D. Mich. 1999) (holding that amendments to a Michigan statute that criminalized the use of computers or the Internet “to disseminate sexually explicit materials to minors” violated the dormant commerce clause), *aff’d*, 238 F.3d 420 (6th Cir. 2000); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (holding that a New York statute criminalizing the dissemination of harmful material to minors by computer was unconstitutional under the dormant commerce clause); *State v. Barrows*, 677 N.Y.S.2d 672, 679-80, 684-86 (N.Y. Sup. Ct. 1998) (stating that section 235.22 of the New York Penal Code, which made it a crime to disseminate harmful material over the Internet to a minor in order to induce a minor to engage in sexual intercourse or sexual contact with the disseminator, violated the dormant commerce clause to the extent that the statute applied to interstate transmissions).

17. U.S. CONST. art. I, § 8.

18. See *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945) (“For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, [the Supreme Court of the United States], and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.”). See also *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (recognizing that the Commerce Clause has “a negative sweep as well,” which “prohibits certain state actions that interfere with interstate commerce”); 2 RONALD D. ROTUNDA & JOHN E. NOWAK,

state regulation of the Internet will sufficiently frustrate interstate commerce to invalidate such regulation.<sup>19</sup>

Several commentators have latched on to these cases to make numerous broad assertions. One has stated, “the Internet should be marked off as a national preserve subject only to uniform federal regulation.”<sup>20</sup> Other commentators have asserted that “states have very little leeway to control the Internet and Internet-related activities,”<sup>21</sup> and that states have “very little hope of ever validly restricting materials on the Internet.”<sup>22</sup> Yet another commentator has suggested that self-regulation by Internet content providers is the only viable method of combating the problems mentioned above.<sup>23</sup> However, such views virtually strip the states of any power to protect their citizens from harms traditionally dealt with by state and local governments and remove any concept of federalism from the regulation of the Internet. Under these views, in the absence of federal regulation, the Internet becomes a safe haven for actors wishing to perpetuate various social ills on state citizens, and state governments are left powerless to stop such actors and protect their residents.

Clearly, the view that the dormant commerce clause leaves no room for state regulation of Internet activity is too broad. Such a view fails both to give sufficient deference to states’ abilities to exercise their police powers to protect their citizenry and to recognize that certain Web sites that interact with residents of particular states or conduct trade in tangible goods can and should comply with the laws and regulations of those states. Several recent cases have recognized this and held that state

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TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 11.1, at 133 (3d ed. 1999) (“When local legislation thwarts the operation of the common market of the United States, the local laws have then exceeded the permissible limits of the dormant commerce clause.”); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 396-97 (1998) (“The Court has responded to these uncertainties ‘by interpreting the affirmative grant of commerce powers to [Congress] as imposing some self-executing limitations on the scope of permissible state regulation.’”) (quoting an earlier edition of ROTUNDA & NOWAK).

19. *ACLU*, 194 F.3d at 1162 (“The Internet is surely such a medium [that requires national regulation].”); *Am. Libraries Ass’n*, 969 F. Supp. at 181 (“The Internet represents one of those areas [demanding consistent treatment]; effective regulation will require national, and more likely global, cooperation.”).

20. Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 890 (1998) (quoting from *Am. Libraries Ass’n*, 969 F. Supp. at 169).

21. Lanin, *supra* note 3, at 1424.

22. Jennifer LaMaina, Note, *Wipe Out in ACLU v. Johnson: Can Any Regulation of Surfing the Net Withstand Constitutional Scrutiny?*, 8 VILL. SPORTS & ENT. L.J. 137, 159 (2001).

23. Christopher S.W. Blake, Note, *Destination Unknown: Does the Internet’s Lack of Physical Situs Preclude State and Federal Attempts to Regulate It?*, 46 CLEV. ST. L. REV. 129, 156-57 (1998).

statutes applicable to Internet activity do not violate the dormant commerce clause.<sup>24</sup>

This article begins by explaining how the Internet operates, focusing especially on those aspects that present issues for state regulation under the dormant commerce clause. Next, it reviews the Supreme Court's dormant commerce clause jurisprudence. The case law to date applying the Supreme Court's dormant commerce clause principles to state regulation of the Internet follows. This article explains why case law and commentators finding that virtually no state regulation of the Internet can comply with the dormant aspect of the Commerce Clause overstate the case and why the states should be allowed to protect their interests and their citizens by exercising their police powers as the states have done for the last two hundred years. This article then explains how considering the proper factors involved in Internet commerce would affect the courts' analysis in several cases analyzing state regulation of the Internet under the dormant commerce clause.

## II. INTERNET BACKGROUND INFORMATION

### A. *How the Internet Works*

One must understand how the Internet operates to appreciate fully the issues posed by state regulation of this communications network under the dormant commerce clause.<sup>25</sup>

#### 1. *Packet-switching technology and distributed networks*

Two characteristics of Internet operations raise particular issues for state regulation. First, unlike other communications networks, the Internet uses a "packet-switched" network,<sup>26</sup> as opposed to being

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24. *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 499-505 (5th Cir. 2001) (holding that application of Texas motor vehicle code to car manufacturer operating a Web site in order to sell cars in Texas did not violate the dormant commerce clause); *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 473 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190-92 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); *People v. Foley*, 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999) (holding that New York statute criminalizing the dissemination of indecent material to minors through the Internet in order to lure minors to engage in sexual activity passed dormant commerce clause analysis); *People v. Lipsitz*, 663 N.Y.S.2d 468, 475 (Sup. Ct. 1997) (holding that the application of New York consumer protection laws to New York business due to Internet solicitations was proper under the dormant commerce clause).

25. For a comprehensive discussion of the origins and growth of the Internet, see *infra* APPENDIX.

26. For further explanation of "packet-switching," see *infra* notes 28-33 and accompanying text.

“circuit-switched”<sup>27</sup> like the telephone network. The Internet transports “packets”<sup>28</sup> of computer data across shared communication lines and then reassembles these packets when they arrive at their destination.<sup>29</sup> The “irregular, bursty characteristics of computer-generated data traffic” are not especially compatible with a circuit-switched network.<sup>30</sup> Using a circuit-switched line, which is reserved for the communication until completed, for the transportation of “bursty” computer data would leave the line idle for large periods of time and be very inefficient.<sup>31</sup> Therefore, packet-switched networks decrease costs because they require fewer connections for transferring computer data.<sup>32</sup> The downside to such

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27. “Circuit-switched” means that “a communications line [is] reserved for one call at a time and held open for the duration of that session.” KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET*, 60 (1996). *See also* KIERSTEN CONNER-SAX & ED KROL, *THE WHOLE INTERNET: THE NEXT GENERATION* 13 (1999) (stating that in a circuit-switched network like the telephone system “[w]hen you make a call, you get a piece of the network dedicated to you”); Morse, *supra* note 27, at 1120 (“Circuit-switched networks, such as found in telephone systems, are based on forming dedicated connections, or ‘circuits,’ between the two users.”).

28. Donald Davies, a physicist at Britain’s National Physics Laboratory, coined this term for the “short pieces of data which traveled separately” throughout the network. *See* HAFNER & LYON, *supra* note 27, at 64, 67 (quoting Davies).

29. CONNER-SAX & KROL, *supra* note 27, at 16 (describing how “information sent across [the Internet] is broken up into bite-sized pieces called *packets*” and then is “paste[d]” back together at its destination); Morse, *supra* note 27, at 1120 (“Packet-switching involves a process of breaking down electronic files into separate parts, encasing these parts in electronic envelopes or ‘packets’ that are routed through the network, and then reassembling the packets into a coherent whole at the destination.”); Burk, *supra* note 3, at 12 (“Packet switching allows efficient and economical use of a single communication channel by breaking messages into packages that are transmitted among host computers on a network; the hosts then reassemble the packages received.”). *See also* HAFNER & LYON, *supra* at 61 (describing how initial plans for an interconnected network envisioned computer messages that “would be divided into specific blocks, which would then be sent out individually over the network through multiple locations, and reassembled at their destination”).

Some authors compare packet-switched networks to the operations of the United States Postal Service. CONNER-SAX & KROL, *supra* note 27, at 13; Morse, *supra* note 27, at 1116-17. “You have no dedicated piece of the network. What you want to send is mixed together with everyone else’s stuff, put in a pipeline, transferred to another post office, and sorted out again.” CONNER-SAX & KROL, *supra* note 27, at 13. “[The Postal Service] collects mail from a sender’s address, sorts it, and then routes it to a collection point near the destination, where it is further sorted and delivered to a particular address.” Morse, *supra* note 27, at 1116-17.

30. HAFNER & LYON, *supra* note 27, at 66. *See also* Burk, *supra* note 3, at 12 (stating that circuit-switched networks are “poorly adapted to the speed of computer communications and data processing”).

31. *See* HAFNER & LYON, *supra* note 27, at 60-61 (describing the incompatibility of circuit-switched networks with computer data which “pours out in short bursts followed by empty pauses that leave the line idle much of the time, wasting its ‘bandwidth,’ or capacity”). “The advantage of [circuit-switched] networking lies in its guaranteed capacity: once a circuit is established, no other network activity will decrease the capacity of that circuit. One disadvantage of [circuit-switched] technology arises from cost: circuit costs are fixed, independent of use.” DOUGLAS E. COMER, *INTERNETWORKING WITH TCP/IP: PRINCIPLES, PROTOCOLS, AND ARCHITECTURES* 18 (4th ed. 2000).

32. COMER, *supra* note 31, at 18.

networks is that “whenever a packet switched network becomes overloaded, computers using the network must wait before they can send additional packets.”<sup>33</sup>

Second, the Internet uses a “distributed” network,<sup>34</sup> as opposed to a centralized one, to transport packets of computer data. This network consists of “numerous stand alone computers or nodes” with each computer interconnected to several other computers, forming a fishnet or spider web if laid out graphically.<sup>35</sup> “Routers” are the computers that comprise the “nodes” of the Internet that transport data packets from one location to another.<sup>36</sup> Thus, information ultimately is contained, stored and used in the computers at the end of each network, and the routers in between are responsible only for transporting information packets in the most efficient manner possible.

The Internet developed in this manner in order to decrease the amount of resources used by the host computers for network functions and to route data efficiently between computers that used different operating systems and programming languages.<sup>37</sup> A distributed network also has the positive effect of better protecting against a network-wide outage.<sup>38</sup> A distributed network, thus, allows the different computer data packets that comprise a single message to “take many different routes [getting] from point A to point B.”<sup>39</sup> Consequently, the packet-switched and distributed network causes computer data to travel in a transient manner through numerous state borders whenever anyone uses the Internet.

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33. *Id.*

34. Paul Baran of RAND originally developed the term “distributed” for such networks. HAFNER & LYON, *supra* note 27, at 58.

35. Michael A. Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 527 (1998). *See also* HAFNER & LYON, *supra* note 27, at 58 (describing Paul Baran’s idea for a computer network comprised of “interconnected nodes resembling a distorted lattice, or fish net”).

36. *See* THE INTERNET’S COMING OF AGE, *supra* note 3, at 32 (“Routers are computer devices located throughout the Internet that transfer information across the Internet from a source to a destination.”); CONNER-SAX & KROL, *supra* note 27, at 14 (“The different pieces of the Internet are connected by a set of computers called *routers*, which connect networks together.”). In the ARPAnet, the routers originally were known as “IMPs,” pronounced “imps,” which was short for “interface message processors.” HAFNER & LYON, *supra* note 27, at 75.

37. *See* HAFNER & LYON, *supra* note 27, at 73 (explaining why the creators of the ARPAnet used a distributed as opposed to a centralized network).

38. *See* Geist, *supra* note 35, at 527 (stating that in a distributed network, “[i]f part of the network was incapacitated, a message could still travel through an alternate route”).

39. *Id.*



## 2. Routers, Internet protocols and the domain name system

The routers used in the Internet's distributed network transport computer data in the following manner. The routers communicate with one another about where to send data packets and whether the destination computer has actually received data packets sent.<sup>40</sup> Based on previously determined criteria, the routing software determines the best routers to use to send data from one location to another.<sup>41</sup> The path that a router uses to send data to the next router depends on the information that the router receives from other routers about how many data packets are being sent along a particular path at that particular time.<sup>42</sup> In this manner, data sent from one computer in a location to a computer at another physical location can proceed through an almost limitless variety of routers that changes with the amount of traffic that each router along the way is experiencing at any point in time. This increases the reliability of the Internet "because it allows the network to dynamically reconfigure its routing state continually (including routing around links that have failed) yet still deliver [data] packets."<sup>43</sup>

The creators of the Internet had to develop a computer language, or set of "protocols,"<sup>44</sup> for the routers to be able to communicate with each other, with the host computers, and for host computers to communicate with one another.<sup>45</sup> Ultimately, an additional set of protocols had to be

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40. See HAFNER & LYON, *supra* note 27, at 75 (describing the functions of the original IMPs as being "interconnecting the network, sending and receiving data, checking for errors, retransmitting in the event of errors, routing data, and verifying that messages arrived at their intended destinations"). See also CONNER-SAX & KROL, *supra* note 27, at 14 (stating that routers "make decisions about how to route data (or packets), just like a postal substation decides how to route envelopes containing mail").

41. THE INTERNET'S COMING OF AGE, *supra* note 3, at 32. See also CONNER-SAX & KROL, *supra* note 27, at 14 ("[A] router looks at where your data is going, decides which of the routers it is directly connected to will get it most efficiently closer to its destination, and sends it down the pipeline to that router.").

42. THE INTERNET'S COMING OF AGE, *supra* note 3, at 32.

43. *Id.* at 40.

44. One set of authors defines a "protocol" as a "standardized method of information transmission." CHRISTOS J.P. MOSCHOVITIS ET AL., HISTORY OF THE INTERNET, 294 (1999).

45. Some commentators have recognized these computer protocols as one of the most significant developments of the ARPAnet because they standardized communications between computers using different operating systems and computer languages. See HAFNER & LYON, *supra* note 27, at 227 (stating that the development of transmission-control protocol was "absolutely crucial to networking"); Burk, *supra* note 3, at 16 ("During the 1970s, DARPA promulgated the set of computer communication standards known as the 'Internet protocols,' which were quickly adopted by independent networks attached to the ARPAnet backbone."); Morse, *supra* note 27, at 1119 ("The desire to provide communication between computers in different networks—internetwork communication or internetworking—is essential to understanding the Internet as it is known today.").

developed to allow not only computers, but also different networks to communicate with one another and exchange information.<sup>46</sup>

TCP/IP is the set of computer protocols that facilitates the transportation of data packets across networks. The protocols are divided into two distinct categories that serve different functions: Internet Protocol (“IP”) and Transmission Control Protocol (“TCP”). Typically, computer files of any significant size need to “be broken into many packets that are sent across the network one at a time.”<sup>47</sup> The different data packets for the file “carr[y] identification that enables the [routers] to know how to send [them] to the specified destination.”<sup>48</sup> IP is the part of the computer protocols that contains this identification that “handles the routing of individual” data packets.<sup>49</sup> The routers then “deliver[] the packets to the specified destination, where software reassembles them into a single file again.”<sup>50</sup> If a particular data packet does not “arrive or [is] garbled during transmission, and the sending” computer does not receive an acknowledgment that the end computer received the packet, the sending computer sends the data packet again.<sup>51</sup> TCP is the portion of the protocols that takes care of these latter functions of breaking computer files up into different packets and reassembling the packets at the destination computer as well as addressing any errors that occurred in the transmission of the data.<sup>52</sup>

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46. See generally HAFNER & LYON, *supra* note 27, at 223-27 (describing the development of “transmission-control protocol,” or “TCP,” in order to allow networks to communicate with one another). “Gateways” are the routers that transport computer data between different networks, as opposed to just transporting data within a network. *Id.* at 223. See also Burk, *supra* note 3, at 13 (“[N]etworks with different protocols may be linked by special packet switches, called gateway computers, that pass packets between networks while accommodating differences in network speed, packet length, and error correction.”).

47. COMER, *supra* note 31, at 18. See also CONNER-SAX & KROL, *supra* note 27, at 16 (stating that “the information within a [data] packet is usually between 1 and (approximately) 1,500 characters long” and that “[m]ost information transfers are longer than 1,500 characters long”).

48. COMER, *supra* note 31, at 18.

49. MOSCHOVITIS ET AL., *supra* note 44, at 91. See also HAFNER & LYON, *supra* note 27, at 236 (stating that IP is “responsible for routing individual datagrams”); CONNER-SAX & KROL, *supra* note 27, at 14 (“The Internet Protocol takes care of addressing—they make sure that the routers know what to do with your data when it arrives.”); Morse, *supra* note 27, at 1121 (“IP (internet protocol) provides the rules for computer communication by specifying how the packet must be formed and providing the process for forwarding packets to the intended destination.”).

50. COMER, *supra* note 31, at 18.

51. HAFNER & LYON, *supra* note 27, at 227.

52. *Id.* at 236 (stating that TCP is “responsible for breaking up messages into [data packets], reassembling them at the other end, detecting errors, resending anything that [gets] lost, and putting packets back in the right order”); Morse, *supra* note 27, at 1121 (“TCP (transmission control protocol) provides additional support to solve problems that may occur in transmission, such as lost or duplicate packets, or packets that may be received out of order.”).

TCP takes the information you want to transmit and breaks it up into pieces. It numbers each piece so you can verify receipt and the data can be put back in the proper order. . . .

On the receiving side, the TCP protocol collects the [data packets], extracts the data, and

At the IP level, Internet addresses consist of a series of numbers that indicate, among other things, the network sending the computer data and the computer that is supposed to receive the data.<sup>53</sup> However, these series of numbers are not very user friendly.<sup>54</sup> Therefore, the Internet utilizes a Domain Name System (“DNS”) that assigns textual names to Internet addresses for user convenience.<sup>55</sup> Special computers then translate, or “resolve,” these textual names into numerical IP addresses for Internet routers.<sup>56</sup> “Each level in this system is called a *domain*,” and these levels or domains indicate, among other things, the particular computer that is to receive the communication as well as the organization on whose network the computer is located.<sup>57</sup> “Domain names reflect a hierarchical structure with each part separated by a period. These parts are organized so that the highest level domain name appears last, and the lowest level name appears first.”<sup>58</sup> Therefore, as a person proceeds to read a complete domain name, from left to right, the domains go from the most specific or local to the most generalized.<sup>59</sup> Thus, the first name on the left might indicate the actual computer that is supposed to receive the communication while the last name at the far right of the textual name, the “top-level” domain, indicates the type of organization that runs the network where the computer receiving the communication is located.<sup>60</sup> In the United States, different types of organizations are given different top-level domain names.<sup>61</sup> For example, commercial organizations use the “.com” domain, educational institutions use “.edu,” and United States

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puts it in the proper order. If some of the [data packets] are missing, it asks the sender to retransmit them. Once it has all the information in the proper order, it passes the data to whatever application program is using its services.

CONNER-SAX & KROL, *supra* note 27, at 16-17.

53. *Id.* at 15. “IP addresses contain four fields, with each field containing a value between 0 and 255.” Morse, *supra* note 27, at 1121. “Each computer with an Internet connection has an ‘IP address’ which functions much like a specific telephone number.” *Id.*

54. See Morse, *supra* note 27, at 1121 (stating that “[t]he numeric format of IP addresses . . . is difficult for human beings to remember”).

55. See CONNER-SAX & KROL, *supra* note 27, at 17-18 (describing the need for and the workings of the DNS); COMER, *supra* note 31, at 465 (“The mechanism that implements a machine name hierarchy for TCP/IP internets is called the *Domain Name System (DNS)*.”).

56. See JOE HABRAKEN, ABSOLUTE BEGINNER’S GUIDE TO NETWORKING, 240 (3d ed. 2001) (“DNS servers . . . supply the actual mechanism for resolving [domain names] to IP addresses.”).

57. CONNER-SAX & KROL, *supra* note 27, at 18.

58. Morse, *supra* note 27, at 1122.

59. See COMER, *supra* note 31, at 466 (“[D]omain names are written with the local label first and the top domain last.”).

60. CONNER-SAX & KROL, *supra* note 27, at 18.

61. See HABRAKEN, *supra* note 56, at 242 (providing a table describing the different top-level domains).

governmental entities use “.gov.”<sup>62</sup> By organizing Internet addresses into “manageable pieces,” the DNS allows users to more easily locate the computers, among the hundreds of thousands connected to the Internet, with which they desire to communicate.<sup>63</sup>

### 3. *The operation of the World Wide Web*

Within the Internet system just described, several types of communications can occur.<sup>64</sup> However, this article will explain in detail only the operation of the World Wide Web (the “Web”) over the Internet because it is the most widely used part of the Internet,<sup>65</sup> it is the most important component of the Internet to national commerce,<sup>66</sup> and it holds the greatest promise for business growth. Because the specifications of the Web are public, any business, or any person for that matter, can create a document on the World Wide Web, or a “Web page,” that “can contain text, graphics, sounds, video clips, and more.”<sup>67</sup> “Documents available on the Web” are stored on computers located all over the world “running Web server software.”<sup>68</sup> In order to access Web documents, or Web pages, a Web user must have a computer with Web “browser”

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62. *Id.* The other top-level domains are: “.org” for “noncommercial organizations and institutions,” “.mil” for the United States military, “.net” for “companies involved in the Internet infrastructure,” and “.int” for “registering organizations as defined by international treaties.” *Id.* Additionally, outside the United States, a “[t]wo-letter country code” can be used for “a country’s top-level domain.” *Id.*

63. CONNER-SAX & KROL, *supra* note 27, at 19.

64. The types of communications that can occur over the Internet include the World Wide Web, e-mail, listservs, newsgroups, Internet Relay Chat and File Transfer Protocol, among others. Lanin, *supra* note 3, at 1429. *See generally* HABRAKEN, *supra* note 56, at 226-238 (describing e-mail, newsgroups, the World Wide Web, and File Transfer Protocol in more detail); CONNER-SAX & KROL, *supra* note 27, at 22-44, 47-63, 98-99, 108-134 (describing in detail e-mail, listservs, newsgroups, Internet Relay Chat, and the World Wide Web in that order).

65. Lanin, *supra* note 3, at 1430. *See also* PSINET, Inc. v. Chapman, 108 F. Supp. 2d 611, 615 (W.D. Va. 2000) (stating that the Web “is currently the most popular way to provide and retrieve information on the Internet”); CONNER-SAX & KROL, *supra* note 27, at 107 (“The World Wide Web, or WWW, is the most popular, powerful, and easily navigable portion of the Internet.”); COMER, *supra* note 31, at 4 (“Some service providers estimate that the Web now accounts for 80% of their Internet traffic”); Barry Fraser, *Regulating the Net: Case Studies in California and Georgia Show How Not to Do It*, 9 LOY. CONSUMER L. REP. 230, 233 (1997) (“[B]y far the most popular [Internet] retrieval method today is the World Wide Web.”).

66. *See* Morse, *supra* note 27, at 1128 (stating that “commercial transactions” on the Internet “generally occur on the World Wide Web”).

67. Lanin, *supra* note 3, at 1430. *See also* CONNER-SAX & KROL, *supra* note 27, at 107 (“Because the specifications [of the World Wide Web] are public, anyone can build a web client or server.”); HABRAKEN, *supra* note 56, at 236 (“HTML [Hypertext Markup Language,] offers a rich environment for creating documents that can include graphics, sound, video, and links to other HTML documents, such as other Web sites.”).

68. *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996).

software which will interpret and display hypertext documents,<sup>69</sup> and a connection to the various networks that comprise the Internet, usually through an Internet Service Provider (“ISP”) or an Internet Access Provider (“IAP”).<sup>70</sup> The Web browser will send a request from the “client” computer to a particular Web “server” computer using the DNS of the server, which on the Web is known as the Universal Resource Locator (“URL”),<sup>71</sup> and then the browser will download a file from the Web server onto the user’s client computer which will result in a copy of the Web page appearing on the user’s computer screen.<sup>72</sup> Hypertext Transmission Protocol (“HTTP”) “serves as the protocol for accessing data and traversing hypertext links” in this process.<sup>73</sup> The user of the

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69. CONNER-SAX & KROL, *supra* note 27, at 108. A Web “browser” is “client software, such as Netscape Navigator, Mosaic, or Internet Explorer, capable of displaying documents formatted in ‘hypertext markup language’ (‘HTML’), the standard Web formatting language.” *Shea*, 930 F. Supp. at 929.

70. HABRAKEN, *supra* note 56, at 248-49.

ISPs typically serve the little guy, such as a home user or small business, who wants to connect to the Internet and take advantage of Internet e-mail, the [Web], and other Internet services. . . . An IAP would be a communications company that only provides a connection to the Internet. The companies served by an IAP (usually larger companies and even ISPs) would be responsible for their own DNS servers, mail servers, and so on. The IAP only provides the onramp to the Internet and actually connects to the Internet backbone via a *network access point* (NAP). An [sic] NAP is a public exchange facility that provides connections for any number of IAPs to the Internet backbone.

*Id.* at 249.

71. *Id.* at 236 (describing how a Web client computer communicates with a Web server computer); MOSCHOVITIS ET AL., *supra* note 44, at 164 (stating that Universal Resource Locators are known as “URLs”). In computer network lexicon:

A *client* is a computer that allows a user or users to log on to a network and take advantage of the resources available on the network. . . . The purpose of the client is to get a user onto the network; therefore, client computers don’t usually have the processing power, the storage space, or the memory found on a server because the client does not have to serve up resources to other computers on the network.

A *server*, on the other hand, is typically a much more powerful computer . . . . The server provides centralized administration of the network and serves up the resources that are available on the network, such as printers and files . . . . The administrator of the server decides who can and cannot log on to the network and which resources the various users can access.

HABRAKEN, *supra* note 56, at 15-16.

A URL is “an address scheme for pointing the system to a particular location within [‘the Web’] information space.” MOSCHOVITIS ET AL., *supra* note 44, at 164. “To make a long story short, the URL is the name that you type into your Browser address windows. DNS handles the resolution of the URL to an IP address.” HABRAKEN, *supra* at 236. Some authorities refer to the URL as the *Uniform* Resource Locator as opposed to the *Universal* Resource Locator. *Shea*, 930 F. Supp. at 929; HABRAKEN, *supra* at 236; COMER, *supra* note 31, at 528 .

72. CONNER-SAX & KROL, *supra* note 27, at 108.

73. MOSCHOVITIS ET AL., *supra* note 44, at 164. *See also Shea*, 930 F. Supp. at 929 (“Because Web servers are linked to the Internet through a common communications protocol, known as hypertext transfer protocol (‘HTTP’), a user can move seamlessly between documents, regardless of their location.”); HABRAKEN, *supra* note 56, at 236 (stating that HTTP “is the TCP/IP

client computer then can click on the hypertext links embedded in the text of the Web page or use different functions that the Web browser itself provides to repeat this process and go from Web page to Web page or “surf” the Web.<sup>74</sup> The ease of use of the Web largely is responsible for its popularity.<sup>75</sup> Moreover, the uniform facade of the Web allows communications to occur anonymously because the DNS and URLs do not inform Web users about the physical location of both people accessing a Web site and people or organizations providing content on a Web site. This anonymity makes it difficult for both a person accessing a Web site or a person or organization that sponsors or operates a Web site to discern the specific state regulations with which they must comply.

*B. Consequences of Operations of Internet and Web for State Regulation of the Internet*

The above explanation of the manner in which the Web and the Internet operate is important for an understanding of the specific issues that the Internet poses for state regulation. The manner in which the Web and Internet operate gives rise to two characteristics, transience and anonymity, that raise issues for state regulation of commercial activity on the Internet under the dormant commerce clause. These two characteristics make it burdensome for Web site operators to comply with different state regulations. However, as explained below, the anonymity of Internet commerce can be minimized depending on the interactivity of the Web site or the Internet activity in which one engages, the type of commerce conducted over the Internet, and the technology available to determine the location of an Internet user.

*1. Transience and anonymity of Internet communications*

First, the packet-switching technology and the distributed network that the Internet uses cause computer data to travel in a transient manner through state borders when any one person accesses a Web site.<sup>76</sup> The

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stack member that provides the connection between an HTTP client (a computer outfitted with a Web browser) and server (which would be a Web server in this case”).

74. See *PSINET, Inc. v. Chapman*, 108 F. Supp. 2d 611, 616 (W.D. Va. 2000) (“Online users may also ‘surf’ the Web by ‘linking’ directly from one Web page to another.”); *Shea*, 930 F. Supp. at 929 (“[W]hen a user viewing a document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document.”); *CONNER-SAX & KROL*, *supra* note 27, at 109-11, 113 (describing how to access Web pages by clicking on hypertext links, typing a URL in the location bar of a Web browser, and clicking on the entries of “bookmarked” Web sites).

75. See *infra* note 424 and accompanying text.

76. Lanin, *supra* note 3, at 1429. See also *supra* notes 26-39 and accompanying text (describing the packet-switched and distributed networks that the Internet uses). Some other

routers that transport data across the Internet and the Internet protocols that control the paths that routers access do not distinguish between geographic borders, and the paths that routers use are constantly changing because routers choose them according to Internet traffic at any particular moment in time.<sup>77</sup> Therefore, in the process of a computer in one state communicating with a computer in another state, the data sent between the two computers can travel through an almost infinite variety of states.<sup>78</sup> This transient nature of Web communication gives Web commerce its interstate, or even international, character, similar to a highway or railroad system.<sup>79</sup>

Second, communications over the Web largely can occur anonymously.<sup>80</sup> The uniform facade of the Web causes users to be unaware of the physical location of the computers used to transmit information from one location to another. This anonymity occurs from the vantage point of both a person accessing a Web site with a Web browser and a person or organization that is providing Internet content on a Web site. Upon accessing a Web site, the browser user has no knowledge of the geographic location of the server whose computer files the browser is accessing. The DNS and the URLs used on the Web simply provide a hierarchical structure for computers to translate textual names to IP addresses and do not necessarily correspond to any particular geographic location.<sup>81</sup> Therefore, a browser user will not

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commentators have used the term "transience" in a slightly different manner to describe the constantly changing nature of Web sites. Fraser, *supra* note 65, at 236 ("The third important characteristic of the Internet is that it is constantly changing. . . . Web sites, for instance, do not remain static, but are constantly in a state of flux."); Patrick Weston, *American Civil Liberties Union of Georgia v. Miller*, 14 BERKELEY TECH. L.J. 403, 410-11 (1999) ("Any web page or e-mail address can be changed or removed by its owner without notice to other users of the Internet. . . . Hence, the transient nature of the Internet can eliminate much of the evidence trail and the costs of physical relocation which would burden a fraudulent operation in more traditional marketplaces.").

77. See *supra* notes 41-42 and accompanying text explaining how routers decide which path to use in transporting computer data packets.

78. Geist, *supra* note 35, at 527 ("The distributed model ensured that a single message could take many different routes to get from point A to point B."); Bassinger, *supra* note 20, at 894 ("[T]he same picture sent from the same host computer to the same destination computer will likely travel a different route of telephone lines each time it is sent.").

79. See Lanin, *supra* note 3, at 1429 ("The practical import of all of this is that while an Internet transaction is taking place, it is practically impossible geographically to locate the ingress and egress of the transmission."); Bassinger, *supra* note 20, at 895 ("Through the use of logical addresses and the global network of telephone lines, the Internet abandons the traditional confines of physical geography in favor of a borderless world of international scope.").

80. Lanin, *supra* note 3, at 1428 ("Particularly notable is the practical anonymity Internet users and hosts enjoy.").

81. *Id.* ("[Each IP or domain name address] may provide little or no information about the physical and geographic location of the host computer"); Bassinger, *supra* note 20, at 893-94 ("Every web site is located using a logical address that may provide little or no information about the physical location of that site or the entity maintaining it."); Weston, *supra* note 76, at 409 ("Many e-mail addresses and web sites contain little, if any, information that reveals the true identity or

necessarily know of the physical location of a Web server from the URL typed into the browser or the link clicked.<sup>82</sup> Instead, due to the organization of the top-level domain names, the Web user may have some idea of the type of entity—commercial, nonprofit or governmental—operating the Web site being accessed.<sup>83</sup> The location of the entity or the entity's computer hardware, however, remains unknown to the browser user. Similarly, a person or entity that operates a Web site will not know automatically the geographic location of people who access the server that allows them to view the site.<sup>84</sup> By itself, the transporting of computer data across the Web from a server to a computer using Web-browser software does not provide the site operator with any information about the location of the person using the Web browser.<sup>85</sup> In fact, in some circumstances, the operator of a Web site may not even know of the location of the computer server that facilitates access to the Web site.<sup>86</sup>

## 2. *Factors mitigating anonymity*

Several factors can mitigate the anonymous nature of Internet commerce. First, in a more interactive Web site, it is less likely that a transaction will take place anonymously, and there is more opportunity for the operator of the site to obtain valid information regarding the geographic location of the user of the site. Some Web sites are merely “passive” and do little more than publish information which others can view on the site,<sup>87</sup> so the operator or host of the site has little or no opportunity to obtain information about the location of people who access the site. However, other sites are “interactive” and allow, or perhaps require, the user to exchange information with the computer

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physical location of their owners.”); Fraser, *supra* note 65, at 236 (“Web sites typically contain little if any indication or reference to the true identity of the individual or organization responsible for the site or even the physical location of the owner.”).

82. Lanin, *supra* note 3, at 1428 (“The result is that a user will not likely be able to tell which server is handling its transaction or where that server is.”). *See also* Weston, *supra* note 76, at 409 (“It is quite simple for users of the Internet to communicate or exchange information anonymously or under a pseudonymous identity.”).

83. *Supra* notes 53-63 and accompanying text (describing the Domain Name System).

84. Lanin, *supra* note 3, at 1428 (“A host computer . . . has little way of knowing who is logging on to its site.”); Fraser, *supra* note 65, at 236 (“It is relatively simple for Internet users to communicate or make information available anonymously or under an alias identity or ‘handle.’”).

85. *See supra* notes 47-54 and accompanying text (describing how Internet protocols facilitate the transportation of computer data across the Internet).

86. This would be the case if the creator of the Web site utilized an ISP to create the site and not its own computer hardware and network.

87. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (describing a “passive Web site” as a site “that does little more than make information available to those who are interested in it”).



server.<sup>88</sup> The more interactions that occur between the user and the Web site, the more opportunities the host or operator of the site has to obtain information from the user about the user's physical location.

Second, operators of Web sites that sell tangible goods that cannot be transported via the Internet, but must be shipped physically to the buyer in a particular geographic location, will likely know the locality of a Web customer.<sup>89</sup> In such Web transactions, the host of the Web site must obtain accurate information about the geographic location of the buyer (assuming the designated shipping address corresponds with the buyer's location), and the buyer has every incentive to provide the host with accurate shipping information in order to receive the goods purchased. Such Web transactions are akin to mail-order commerce that has been subject to state regulation for some time.

More problematic are Web transactions that involve the sale of electronic goods, such as where a site user downloads software for a fee, or where the Web site sells services or information to the user for a fee.<sup>90</sup> Even operators of these Web sites, however, can use several available technologies to obtain the user's geographic location if they wish to discover this information. Thus, an additional factor mitigating the anonymity of the Internet is the availability of technologies to verify Web users' geographic locations.

Even in electronic transactions, the host of the Web site must obtain payment from the user.<sup>91</sup> If the user pays with a credit card, technology presently allows the host of the Web site to verify the user's billing address.<sup>92</sup> However, maintaining such a credit card identification system presently can be costly.<sup>93</sup> A less expensive option for a Web host to obtain the geographic address of a user is to condition access to the Web

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88. *See id.* (discussing "interactive Web sites where a user can exchange information with the host computer").

89. *See Geist, supra* note 35, at 559 ("The sale of tangible products has minimal legal impact on the traditional buyer-seller dynamic. Notwithstanding the online character of the transaction, the sale of such products requires physical transportation from seller to buyer, maintaining the traditional customs inspection, taxation levies, and easy identification of both buyer and seller.").

90. *See Geist, supra* note 35, at 555 ("[T]he conversion of certain goods from atoms to bits—that is, the ability to transport products solely via the Internet—has significant implications for the regulatory framework for such digitized products.").

91. Although a Web site operator may not be willing to take a check as payment, if the buyer pays with a check, the host will learn of the location of the user upon receipt of the check via the United States Postal Service.

92. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 810 (2001).

93. *Id.* The possibility also exists that the user accesses the Web site from a computer located in a state other than the state indicated in their billing address, "[b]ut this will very much be the exception rather than the rule." *Id.*

site on the user providing a personal identification number (“PIN”).<sup>94</sup> A Web host can get software for such a system free of charge from several firms.<sup>95</sup> “To obtain an adult PIN, one must pay by credit card online, or fax or mail an application and a check and a copy of a passport or driver’s license” to the entity running the identification site.<sup>96</sup> While “[t]he online process [only] takes a few minutes,”<sup>97</sup> this process does require the potential user of the site to spend some time, minimal as it might be, obtaining the PIN and spending money for the PIN.<sup>98</sup> Some potential users also may not want to disclose the personal information required to obtain a PIN.<sup>99</sup> Any of these factors may dissuade some potential users from accessing the Web site and its goods or services.<sup>100</sup> However, it is important to recognize that such technology is available and that its use simply increases the costs to the user or the host of the Web site of engaging in commerce over the site.<sup>101</sup>

A developing technology also holds promise for allowing hosts of Web sites to determine the geographic location of users. This technology uses “software with algorithms that identify the geographical source of [the] IP address” of the user’s computer instantly.<sup>102</sup> This technology would allow the host of the Web site to obtain the user’s geographic

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94. *Id.* at 809.

95. *Id.*

96. *Id.* at 809 n.103.

97. *Id.*

98. *Id.* at 810. Some firms, though, apparently “are . . . beginning to offer the . . . PINs for free.” *Id.* at 809.

99. *Id.* at 810.

100. *Id.*

101. *Id.* at 809. Another option, albeit less attractive to potential site users due to the increased time it would take to access the Web site, would be to require users of the site to first provide their postal address. Then the host could send the user an access code through the United States Postal Service. Upon receipt of the access code in the mail, the person could access the site. The advantage to this means of verifying a user’s address is that it relies on presently available technology and is very accurate. One disadvantage to this process is that it greatly reduces the speed at which an Internet transaction can take place, taking away one of the main appeals of conducting commerce over the Internet. Again, similar to the use of a PIN, the slowing down of the transaction as well as requiring the divulgence of personal information may dissuade some people from using the Web site. This process also would increase the costs to the host of the Web site because the host would have to pay for postage, envelopes, paper and so on.

102. *Id.* at 810.

The algorithms determine the geographical identity of the content receiver by cross-comparing results from (1) mapping of IP addresses in the content receiver’s header with IP address databases, and (2) a tracer analysis of the path of the Internet transmission, which is checked against a database of the nodes through which the transmission traveled and their geographic location. While neither method, taken alone, is sufficiently accurate, redundant cross-referencing of these databases holds the promise to be extraordinarily accurate. This software can be installed in the content provider’s webpage, allowing the provider to tailor content to comply with differing regulations in each geographical unit.

*Id.* at 810-11.

information without the time and privacy costs to the user described above.<sup>103</sup> However, this technology presently is “significantly more expensive” to hosts than requiring the use of PINs and is accurate “at the state level only eighty to ninety-five percent of the time.”<sup>104</sup> However, one set of commentators proclaims, “there is good reason to believe that geographical identification technology will be precise and inexpensive in the near future.”<sup>105</sup>

### III. SUPREME COURT DORMANT COMMERCE CLAUSE JURISPRUDENCE

The transience and anonymity of Internet communications make it difficult under the dormant commerce clause for states to protect against the harms that the Internet brings and to further the legitimate interests of the states. In order to understand how these characteristics of the Internet pose difficulties for state Internet regulation under the Commerce Clause, it is important to have some background on the policies behind the recognition of the dormant aspect of the Commerce Clause, to understand the basic test that the United States Supreme Court applies in cases implicating this doctrine, and to understand how the Supreme Court has applied this test in some specific circumstances. Because some courts have asserted that the transience and anonymity of Internet communications cause states’ Internet regulations to operate extraterritorially, this section briefly examines cases dealing with state regulations that allegedly operate extraterritorially. Some courts have also analogized Internet regulations to regulations of interstate transportation, so this section also discusses Supreme Court cases dealing with interstate transportation regulations.

#### *A. Initial Recognition of the Dormant Aspect of the Commerce Clause and the Policies Behind Its Adoption*

The United States Supreme Court has recognized that the Commerce Clause has a dormant aspect that restricts the ability of the States to regulate interstate commerce even in the absence of federal legislation.<sup>106</sup> The Commerce Clause was written in order to avoid the “Balkanization” of the United States economy that resulted after the institution of the Articles of Confederation.<sup>107</sup> The country’s experience after the

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103. *Id.* at 811.

104. *Id.* “[T]hese geographical identification technologies [also] can presently be defeated by Internet anonymizers, remote sessions via Telnet, and remote dial-up connections.” *Id.*

105. *Id.* at 812.

106. *See infra* notes 107-133 and accompanying text.

107. *South Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 92 (1984) (“The Commerce Clause was designed ‘to avoid the tendencies toward economic Balkanization that had plagued

enactment of the Articles of Confederation emphasized the importance of the federal government being able to act in areas that affected the economic well being of the nation as a whole.<sup>108</sup> Conversely, under the Constitution, states and their citizens also retained all powers not expressly given to the federal government.<sup>109</sup> Among the powers that the states retained were their “police powers,” which included the ability to regulate activities that affected the health, safety, security and general welfare of their residents.<sup>110</sup> Thus, in the absence of Congressional

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relations among the Colonies and later among the States under the Articles of Confederation.”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)); ROTUNDA & NOWAK, *supra* note 18, at 133 (“[T]he rationale of the commerce clause was to create and foster the development of a common market among the states, eradicating internal trade barriers, and prohibiting the economic Balkanization of the Union.”); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 131 (stating that the nation’s “free trade unit can be maintained only if the states are barred from enacting laws that are designed to raise the relative prices of, or decrease the share of the local market obtained by, out-of-state goods”).

108. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (“Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.”); *Di Santo v. Pennsylvania*, 273 U.S. 34, 43-44 (1927) (Stone, J., dissenting) (“[T]he purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.”); William Lee Biddle, Comment, *State Regulation of the Internet: Where Does the Balance of Federalist Power Lie?*, 37 CAL. W. L. REV. 161, 164 (2000) (“The main intention of the Commerce Clause was to solve the problem of a State enacting laws impacting trade with other states or with foreign nations, such as duties and tariffs.”).

109. U.S. CONST. amend X (stating that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”). See also Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592 (“Congress’s enumerated powers in article I, section 8, when read in conjunction with the terms of the supremacy clause, make clear that those powers neither expressly nor conditionally denied to the states may be exercised by them, subject to reversal or preemption by legislation enacted pursuant to one of Congress’s enumerated powers.”). “[The Framers] envisioned a federalist system, a system where power would be divided among the state and federal governments so as to allow the inherent benefits of both while preventing either from oppressing the other.” Lawrence, *supra* note 18, at 401 n.25.

110. See *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“As long as a State does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”) (quoting *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511, 527 (1935)); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949) (recognizing the “broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce”); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 271 (1875) (describing a state’s “police power” as those powers “for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character”); *New York v. Miln*, 36 U.S. (10 Pet.) 102, 133 (1837) (stating that “the powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state”). See also Lawrence, *supra* note 18, at 418 n.102 (“The Court has long recognized the idea that States have an inherent ‘police power’ that allows them to regulate for the health, safety, and welfare of its [sic] citizens.”). “Inspection laws, quarantine laws, health laws of every description, as

regulation of a particular commercial activity, the courts are left to balance the need for laws that allow commerce to freely occur between the states against the power of the states to regulate matters that affect the health, safety, and security of their citizens.<sup>111</sup>

This tension between these two important interests has been apparent since the Supreme Court began formulating its dormant commerce clause jurisprudence. In *Gibbons v. Ogden*,<sup>112</sup> the Court stated that the United States Congress and the state legislatures could not concurrently hold the power to regulate commerce because state regulation would subsume the power that the Commerce Clause grants to Congress.<sup>113</sup> In this way, a state's regulation of commerce, as the Commerce Clause defines that term,<sup>114</sup> is inconsistent with the affirmative grant of power to Congress in the Commerce Clause.<sup>115</sup> However, *Gibbons v. Ogden* dealt with a situation where a state law was in direct conflict with a federal law, and therefore, the dormant aspect of the Commerce Clause was not at issue.<sup>116</sup> Instead, the Court, in effect, held that the federal statute preempted the state law.<sup>117</sup> Justice Johnson, however, stated in a concurring opinion that even if Congress repealed the federal law concerned in the case, the state regulation at issue would still be invalid.<sup>118</sup> His belief was based on the context in which the Constitution was created: "If there was any one object riding over every other in the

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well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

111. See *Healy v. Beer Inst.*, 491 U.S. 324, 335-37 (1989) (stating that "[t]he principles guiding" the Court's assessment of state statutes under the Commerce Clause "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.") (citations omitted); *H.P. Hood & Sons, Inc.*, 336 U.S. at 533 ("This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 768-69 (1945) ("[B]etween these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.").

112. 22 U.S. (9 Wheat.) 1 (1824).

113. *Id.* at 199-200.

114. The Commerce Clause applies to "commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8.

115. *Gibbons*, 22 U.S. at 199-200.

116. *Id.* at 200.

117. *Id.* at 210, 221. "In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer against a right given by a law of the Union, must be erroneous." *Id.* at 210. "[T]he act of a State inhibiting the use of either [navigable waters and ports] to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act." *Id.* at 221.

118. *Id.* at 231-32 (Johnson, J., concurring).

adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints [imposed by state governments.]”<sup>119</sup>

Nevertheless, the Supreme Court also recognized that the states’ police powers allowed states to pass legislation regulating matters concerning the health and safety of their residents even when those matters may affect commerce. In *Gibbons v. Ogden*, the majority opinion acknowledged that the power that the Commerce Clause invests in Congress does not deprive the states of their “police powers” which allow the states to regulate the health and safety of their residents.<sup>120</sup> “No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.”<sup>121</sup> Moreover, the Court implied that states could pass legislation regulating commerce as long as the legislation is not contrary to federal legislation.<sup>122</sup>

In *Willson v. Blackbird Creek Marsh Co.*,<sup>123</sup> in which the dormant aspect of the Commerce Clause was at issue, the Court upheld a Delaware statute that authorized the construction of a dam across a creek, even though it obstructed federally licensed boats in their navigation of the creek.<sup>124</sup> The owners of a boat that had been sued for damaging the dam argued that the Commerce Clause included power over navigation of rivers and deprived Delaware of the power to close a “navigable river.”<sup>125</sup> Chief Justice Marshall, writing the opinion of the Court, found that the dam enhanced the value of property on the banks of the creek and that “the health of the inhabitants probably [had been] improved.”<sup>126</sup> Chief Justice Marshall then recognized, “[m]easures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states.”<sup>127</sup> Thus, the Court held that “[t]he power given by the constitution to congress to regulate commerce,” in the

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119. *Id.* at 231 (Johnson, J., concurring).

120. *See id.* at 203 (“Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass [of laws not surrendered to the federal government].”).

121. *Id.*

122. Lawrence, *supra* note 18, at 408-09 (“Chief Justice Marshall suggested that States may sometimes enact laws to regulate commerce, as long as the regulation does not interfere with, or is not contrary to, an Act of Congress passed pursuant to the Constitution.”).

123. 27 U.S. (2 Pet.) 245 (1829).

124. *Id.* at 249-50.

125. *Id.* at 248.

126. *Id.* at 248.

127. *Id.*

absence of conflicting federal legislation, did not invalidate the Delaware statute authorizing the erection of the dam.<sup>128</sup>

The Supreme Court also recognized the states' police powers in *New York v. Miln*.<sup>129</sup> In *Miln*, a New York statute required ships arriving in New York City to provide the mayor of New York with a report listing all of the people that the ship had brought from foreign countries and other states.<sup>130</sup> The Court held that the statute did not violate the dormant commerce clause because New York had enacted the statute under the authority of its police power.<sup>131</sup> “[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends.”<sup>132</sup> The Court reasoned that in enacting the statute, New York was protecting itself from “the moral pestilence of paupers, vagabonds, and possibly convicts” and “the evil of thousands of foreign emigrants arriving [in New York], and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor.”<sup>133</sup> Thus, even as early as 1837, the Court recognized that state legislation enacted through its police powers could pass muster under dormant commerce clause analysis even when the statute directly regulated foreign commerce. One could theorize that such a statute would not pass Constitutional muster today.<sup>134</sup> However, *Miln* still is important in that it indicates just how deferential to a state's exercise of its police powers the Supreme Court was when first delineating the boundaries of the dormant commerce clause and how reluctant the Court was to invalidate state laws that concern such powers, even when the exercise of those powers affected interstate commerce. In fact, all of these early cases demonstrate that, upon first recognition of the dormant aspect of the Commerce Clause, the Supreme Court showed deference to the states' powers to protect the health and welfare of their residents.

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128. *Id.* at 249-50. See also Lawrence, *supra* note 18, at 409 (stating that in *Willson* “the Court held that in the absence of a conflicting Act of Congress, States may regulate pursuant to the police power activities affecting interstate commerce”).

129. 36 U.S. (10 Pet.) 102 (1837).

130. *Id.* at 130-31.

131. *Id.* at 139-43.

132. *Id.* at 139.

133. *Id.* at 141-42.

134. See *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273-75 (1875) (invalidating, under the dormant commerce clause, New York and Louisiana statutes that required boat owners to either provide a large bond or pay a smaller lump sum for each passenger from a foreign country or another state); *Smith v. Turner*, 48 U.S. (7 How.) 283, 572-73 (1849) (invalidating as unconstitutional New York and Massachusetts statutes requiring the payment of specified sums of money for each boat passenger on boats arriving from ports outside of each respective state).

*B. The Modern Dormant Commerce Clause Test: Balancing the Local Benefits Against the Burdens to Interstate Commerce*

Early on, in analyzing the competing state and national interests in dormant commerce clause cases, the Court distinguished between activities of a national nature “demanding a single uniform rule” and those of a distinctly local nature requiring diverse regulation by the states.<sup>135</sup> The Court introduced this analysis in *Cooley v. Board of Wardens of the Port of Philadelphia*.<sup>136</sup> One set of commentators has noted that this “approach simultaneously avoided confrontation with states’ rights advocates, yet reserved for the Court the ability to invalidate objectionable state legislation under a theory” that the power to regulate interstate commerce was partially exclusive to Congress.<sup>137</sup> This distinction has now given way to a test that balances the state regulation’s local benefits against the burden the regulation places on interstate commerce.<sup>138</sup> “The Court’s reasoning in *Cooley* endures [in its dormant commerce clause jurisprudence], however, in the sense that the resolution of a particular case today will turn in large part on a consideration of the local (state) interest in regulating local affairs as it relates to the national interest in promoting interstate commerce.”<sup>139</sup>

The Court’s modern test balances these interests in a slightly different and less formalistic manner though. Basically, when facially nondiscriminatory legislation is concerned, the Court weighs the putative benefits of the state regulation against the burden that the statute places on interstate commerce: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden

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135. *Cooley v. Bd. of Wardens of the Port of Phila.*, 53 U.S. (12 How.) 299, 319 (1851).

136. *Id.* See also ROTUNDA & NOWAK, *supra* note 18, at 139-40 (stating that *Cooley* distinguished between “those subjects of commerce which demand a uniform rule throughout the country and those subjects which permit diversity of treatment in order to fulfill local needs” and that *Cooley* “set the direction for commerce clause adjudication for almost the next 100 years”); LAWRENCE, *supra* note 18, at 409 (stating that in *Cooley* “the Court attempted to merge its previous dormant-commerce-clause holdings into a single doctrine standing for the proposition that, in the absence of conflicting congressional action, States may regulate those aspects of interstate commerce that are so local as to require diverse treatment, whereas Congress alone may regulate those aspects of the same that require a single, uniform rule”). One set of commentators has asserted that in *Cooley* the Court effectively subsumed the role of Congress in applying dormant commerce clause analysis to state regulations. See REDISH & NUGENT, *supra* note 109, at 581 (“Under *Cooley*, when Congress has not regulated the objects of commerce in question, the Court itself determines whether the nature of the commerce requires exclusive federal regulation. Thus, the Court, in testing state legislation, essentially makes what amounts to an intrinsically legislative determination as to whether a particular type of commerce requires exclusive federal regulation.”).

137. Redish & Nugent, *supra* note 109, at 579.

138. See *infra* notes 139-142 and accompanying text.

139. Lawrence, *supra* note 18, at 410.



imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>140</sup>

Conversely, the Court has stated that state regulations that directly or facially discriminate against interstate commerce are a “per se” violation of the Commerce Clause.<sup>141</sup> At least one commentator, though, has suggested that even state statutes that directly discriminate against interstate commerce are subject to a balancing test but that such statutes must show an incredibly strong state interest that can be accomplished by almost no other manner of regulation.<sup>142</sup> The Court has recognized that:

[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.<sup>143</sup>

Thus, at base, the Supreme Court’s dormant commerce clause analysis always involves balancing the benefits of the state regulation against the burdens that the regulation will cause to interstate commerce.

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140. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In *Pike*, the Court went on to explain that once the Court determines that the “local purpose” is “legitimate,” “the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.* at 142. *See also* Tushnet, *supra* note 107, at 131 (“Beyond the proscription of purposeful discrimination, the commerce clause has been held to authorize judicial invalidation of state laws that unduly burden interstate commerce.”).

141. *See* *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”). *See also* *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 87 (1987) (“The principal objects of dormant commerce clause scrutiny are statutes that discriminate against interstate commerce.”); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (“Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.”).

142. *See* Lawrence, *supra* note 18, at 426-27 (“If the statute discriminates on its face, . . . it is considered to be virtually *per se* invalid. At this point, the State may overcome the heavy presumption of invalidity only upon a showing that the measure is virtually certain to achieve the legitimate purpose and that the purpose could not be served as well by available less discriminatory means.”) (citations omitted). *See also* *Healy v. Beer Inst.*, 491 U.S. 324, 340 (1989) (“[T]his Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”) (citations omitted); *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (upholding Maine statute that prohibited the importation of live baitfish into Maine from out of state). “A facially discriminatory measure is not absolutely per-se [sic] invalid because it is at least remotely possible that a facially discriminatory statute may have a nondiscriminatory purpose.” Lawrence, *supra* note 18, at 426 n.137.

143. *Brown-Forman*, 476 U.S. at 579.

*C. The Extraterritorial Effect Cases*

The Supreme Court treats state regulations that have the effect, intended or not, of regulating commerce that occurs “wholly outside of the State’s borders” as *per se* violations of the Commerce Clause.<sup>144</sup> However, some cases analyzing whether a statute had an extraterritorial effect still have engaged in the balancing analysis described above and weighed the state interests promoted by the statute against the burdens that the statute placed on interstate commerce.<sup>145</sup> Nevertheless, the “critical inquiry” in such cases “is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”<sup>146</sup>

[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.<sup>147</sup>

The Supreme Court generally has analyzed whether a state statute regulates extraterritorially in a few particular circumstances. One specific area in which the Court has examined these principles is price-affirmation statutes.<sup>148</sup> These statutes usually required liquor distributors to affirm that the prices charged in the particular state concerned were no

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144. *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion). *See also Healy*, 491 U.S. at 336 (“[A] statute that directly controls commerce occurring wholly outside of the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”).

145. *See Edgar*, 457 U.S. at 643-46 (analyzing under the *Pike* test an Illinois statute regulating tender offers for corporate stock of corporations of which Illinois stockholders held a 10 per cent ownership interest and stating that “even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute”). This portion of the *Edgar* opinion was the only portion joined in by a majority of the Court. *See also CTS Corp.*, 481 U.S. at 89-93 (weighing the interest of Indiana in regulating the shareholder rights of corporations created under Indiana law against the burden such regulation had on interstate commerce).

146. *Healy*, 491 U.S. at 336.

147. *Id.* at 336-37.

148. *See id.* at 326, 335-341 (invalidating Connecticut statute requiring out-of-state beer shippers to affirm that the price charged to Connecticut wholesalers, at the time of posting, was no higher than the price charged in the states bordering Connecticut); *Brown-Forman*, 476 U.S. at 575, 582-84 (invalidating New York statute requiring liquor producers to affirm that the price charged to New York wholesalers was “no higher than the lowest price” charged to wholesalers anywhere else in the United States); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding a New York statute requiring liquor-label owners to affirm that the price of their liquor in New York was no higher than the lowest price at which their liquor was sold in the United States in the preceding month).

higher than those charged in other states.<sup>149</sup> An example of such a case is *Healy v. Beer Institute, Inc.*<sup>150</sup> In *Healy*, Connecticut's affirmation statute required out-of-state beer shippers to affirm that the price they charged in Connecticut, at the time of posting the price, was no higher than the price in the states bordering Connecticut.<sup>151</sup> The Court found that the Connecticut affirmation statute had an extraterritorial effect because in conjunction with Massachusetts' pricing regulations with regard to beer, the statute "'prospectively' preclude[d] the alteration of out-of-state prices after the moment of affirmation."<sup>152</sup> Thus, the statute "prevent[ed] brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions" because in setting the Massachusetts price, the brewer also had to take into account what price it wanted to charge in Connecticut.<sup>153</sup> The Court also examined what would occur if several states enacted legislation similar to Connecticut and found that "[t]he short-circuiting of normal pricing decisions based on local conditions would be carried to a national scale."<sup>154</sup> The Court found that the Commerce Clause reserves this type of regional and national "pricing mechanism for goods" to the federal government and that states cannot achieve this "piecemeal through the extraterritorial reach of individual state statutes."<sup>155</sup> Therefore, the Court held that the Connecticut statute was invalid under the Commerce Clause.<sup>156</sup>

Another area in which the Court has examined the potential extraterritorial effect of state statutes is state regulation of corporate stock and shareholders' rights. In *Edgar v. MITE Corp.*, the Court invalidated an Illinois statute that halted tender offers for up to 20 days and allowed the Illinois Secretary of State "to adjudicate the substantive fairness of the offer."<sup>157</sup> The statute applied to takeover offers for

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149. See, e.g., *Healy*, 491 U.S. at 326 (requiring out-of-state beer shippers to affirm that the price charged to Connecticut wholesalers, at the time of posting, was no higher than the price charged in the states bordering Connecticut); *Brown-Forman*, 476 U.S. at 575 (requiring liquor producers to affirm that the price charged to New York wholesalers was "no higher than the lowest price" charged to wholesalers anywhere else in the United States).

150. 491 U.S. 324 (1989).

151. *Id.* at 326.

152. *Id.* at 338. Massachusetts required "brewers to post their prices on the first day of the month to become effective on the first day of the following month," while Connecticut required brewers five days later to affirm their prices in Connecticut for the following month. *Id.*

153. *Id.*

154. *Id.* at 340.

155. *Id.*

156. *Id.* at 337. The Court also held that the Connecticut statute on its face discriminated "against brewers and shippers of beer engaged in interstate commerce" because the statute only applied to interstate brewers and shippers of beer and would not have applied to brewers that only sold beer in Connecticut. *Id.* at 340-41.

157. 457 U.S. 624, 627, 646 (1982).

corporations when “shareholders located in Illinois own[ed] 10% of the class of equity securities subject to the offer.”<sup>158</sup> A plurality of the Court found that the statute “directly regulate[d] transactions which take place across state lines, even if [occurring] wholly outside of the State of Illinois.”<sup>159</sup> The communication of tender offers uses interstate facilities “which, if accepted, would result in transactions occurring across state lines,” and the statute sought to prevent entities from making tender offers to people living outside of and not connected with Illinois.<sup>160</sup> Therefore, the plurality found that the Illinois statute directly restrained interstate commerce and had “a sweeping extraterritorial effect.”<sup>161</sup> The plurality found that allowing Illinois and other states to regulate tender offers in such a manner would stifle interstate securities transactions initiated through tender offers.<sup>162</sup>

A majority of the Court found the Illinois statute unconstitutional under the *Pike* balancing test. The majority portion of the opinion explained that the Illinois statute burdened interstate commerce by giving “Illinois the power to determine whether a tender offer may proceed anywhere” in the United States.<sup>163</sup> This led to many “substantial” effects including depriving shareholders “of the opportunity to sell their shares at a premium,” as well as hindering “[t]he reallocation of economic resources to their highest valued use” and reducing the incentive provided by tender offers for “incumbent management to perform well so that stock prices remain high.”<sup>164</sup> On the other hand, the Court found that “there [was] nothing to be weighed in the balance to sustain the law” because “the State [had] no legitimate interest in protecting nonresident shareholders.”<sup>165</sup> Moreover, the Court was not convinced that the statute enhanced the position of shareholders because the statute provided similar protections to those already afforded by federal law.<sup>166</sup> Thus, the

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158. *Id.* at 627. The statute alternatively applied to corporations when two of the following three conditions were met: (1) the principal executive office of the corporation was in Illinois, (2) the corporation was organized under Illinois law, or (3) “at least 10% of [the corporation’s] stated capital and paid-in surplus” was “represented” in Illinois. *Id.*

159. *Id.* at 641.

160. *Id.* at 642.

161. *Id.*

162. *Id.*

163. *Id.* at 643.

164. *Id.*

165. *Id.* at 644 (the Court recognized that there was a state interest, but the state interest only balanced against the resident shareholders, not non-resident shareholders).

166. *Id.* Furthermore, the Court found “incredible” Illinois’ contention that the statute allowed it to regulate the internal affairs of corporations formed under Illinois law because the regulations could apply “to corporations that are not incorporated in Illinois and have their principal place of business in other States.” *Id.* at 645. “Illinois has no interest in regulating the internal affairs of foreign corporations.” *Id.* at 645-46.

Court held that the statute was “invalid under the Commerce Clause” because the “substantial burden” placed on interstate commerce outweighed “its putative local benefits.”<sup>167</sup>

Conversely, in *CTS Corp. v. Dynamics Corp.*, the Court upheld an Indiana statute that required “a majority vote of all disinterested shareholders” in order for a person or entity acquiring “control shares” of a corporation to acquire voting rights for that stock despite allegations that the statute had extraterritorial effect.<sup>168</sup> The statute applied only to a business incorporated under Indiana law that had “one hundred (100) or more shareholders,” that had “its principal place of business, its principal office, or substantial assets within Indiana,” and that met one of three different thresholds of stock held by shareholders resident in Indiana.<sup>169</sup> In analyzing the statute under the Commerce Clause, the Court first found that the Indiana statute did not discriminate against interstate commerce because the statute treated both Indiana residents and non-residents that made tender offers in the same manner.<sup>170</sup> Second, the Court found that the statute did not subject interstate commerce to inconsistent regulations because the Indiana statute only applied to businesses incorporated under Indiana law.<sup>171</sup> If each state only regulates the voting rights in corporations created under that state’s laws, “each corporation will be subject to the law of only one State.”<sup>172</sup> The Court also noted that “[n]o principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.”<sup>173</sup>

Third, in balancing the effect of the statute on interstate commerce against the state interests promoted by the statute, the Court recognized the states’ traditional and accepted “regulation of corporate governance” as the “regulation of entities whose very existence and attributes are a product of state law.”<sup>174</sup> The Court explained that it “is an accepted part of the business landscape in this country for States” to define the rights of shareholders in corporations created under their laws.<sup>175</sup> Moreover, the

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167. *Id.* at 646.

168. 481 U.S. 69, 73-74, 94 (1987) (citations omitted).

169. *Id.* at 73.

170. *Id.* at 87.

171. *Id.* at 89.

172. *Id.*

173. *Id.*

174. *Id.* at 89-90.

175. *Id.* at 91. The Court even stated that the “beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.” *Id.* at 90.

Court found that “a State has an interest in promoting stable relationships among parties involved in the corporations” created by its laws “as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.”<sup>176</sup> While Indiana would have “no interest in protecting nonresident shareholders of *nonresident corporations*,” the Indiana statute applied “only to corporations incorporated in Indiana.”<sup>177</sup> The Court found that “Indiana ha[d] a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.”<sup>178</sup> Therefore, the Court held that “the limited extent that the Act affects interstate commerce” was “justified by the State’s interests in defining the attributes of shares in its corporations and in protecting shareholders.”<sup>179</sup> These cases dealing with allegations of statutes having extraterritorial effect demonstrate that the Court often uses the *Pike* balancing test to resolve such situations and that in examining such statutes the Court still considers whether a state is exercising one of its traditional police powers.

#### D. *The Transportation Cases*

Another group of Supreme Court cases has dealt specifically with state regulation of the United States railroad and highway systems. These decisions have become known as the “transportation cases,” and some courts dealing with state regulation of the Internet have cited them for the proposition that certain areas of regulation are so integral to interstate commerce that they require the uniformity throughout the country that only federal legislation can provide.<sup>180</sup> Summing up these cases in such cursory fashion, though, greatly oversimplifies the Court’s analysis in these cases. The Court in these cases did not stake out the railroad and highway systems as “national preserves” that the states were not to touch, but instead engaged in the balancing analysis described in *Pike*

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176. *Id.* at 91.

177. *Id.* at 93.

178. *Id.* Furthermore, the Court distinguished the Indiana statute from the Illinois statute in *Edgar* because the Indiana statute applied “only to corporations that have a substantial number of shareholders in Indiana” and, therefore, “every application of the Indiana Act will affect a substantial number of Indiana residents.” *Id.*

179. *Id.* at 94.

180. See *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (“As we observed, *supra*, certain types of commerce have been recognized as requiring national regulation.”); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (“The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level.”). However, this proposition begs the question because the task left to the court in almost every dormant commerce clause case is to distinguish between activities of a national nature “demanding a single uniform rule” and those of a local nature requiring diverse regulation by the states. *Cooley v. Board of Wardens of the Port of Phila.*, 53 U.S. (12 How.) 299, 319 (1851).

*Church*, weighing the putative local benefits of the state law at issue against the burden that the law placed on interstate commerce.<sup>181</sup>

In fact, especially in the area of regulation of interstate highway safety, the Court has recognized the states' ability to regulate matters that affect interstate commerce.<sup>182</sup> In *South Carolina State Highway Department v. Barnwell Bros.*, the Court explained:

Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few [activities], local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. . . .

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected.<sup>183</sup>

In *Bibb v. Navajo Freight Lines, Inc.*, the Court stated that “[t]he power of the State to regulate the use of its highways is broad and pervasive” and that the Court had upheld state statutes in this area “applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce.”<sup>184</sup> More recently, the Court recognized that “[i]n no field has this deference to state regulation been greater than that of highway safety regulation” and that “those who would challenge state regulations said to promote highway safety must overcome a ‘strong presumption of [their] validity.’”<sup>185</sup>

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181. See *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 441 (1978) (“Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (“Unless we can conclude on the whole record that ‘the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it’ we must uphold the statute.”) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945)); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945) (“[T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce and . . . the relative weights of the state and national interests involved.”).

182. See *Lawrence*, *supra* note 18, at 430 (stating that “the Supreme Court has long accepted the proposition that States may regulate their transportation facilities as long as the legislative intent was to protect public safety.”).

183. 303 U.S. 177, 187 (1938).

184. 359 U.S. at 523.

185. *Raymond*, 434 U.S. at 443-44 (quoting *Bibb*, 359 U.S. at 524).

“[R]egulations that touch on safety – especially highway safety – are those that ‘the Court has been most reluctant to invalidate.’”<sup>186</sup>

In light of the Court’s deference to state regulation of highways, it should not be surprising that the Court has, at times, upheld state statutes regulating this area that affected interstate commerce. For example, in *South Carolina State Highway Department v. Barnwell Bros.*, the Court upheld a South Carolina statute that prohibited the use on its highways of trucks exceeding 90 inches in width and 20,000 pounds in weight.<sup>187</sup> As mentioned above, the Court acknowledged the deference due a state’s regulation of its highways and that “regulations of the use of the highways are akin to local regulation of rivers, harbors, piers, and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.”<sup>188</sup> The Court emphasized that it was Congress’s role to “determine whether the burdens imposed on [interstate commerce] by state regulation, otherwise permissible, are too great” and whether to pass federal legislation “to secure uniformity or in other respects to protect the national interest in the commerce.”<sup>189</sup> In contrast, the judiciary’s role “stops with the inquiry” of whether the state “has acted within its province, and whether the means of regulation are reasonably adapted to the end sought.”<sup>190</sup> Finding that “it [was not] possible to say that the legislative choice [was] without rational basis,” the Court upheld the South Carolina highway width and weight requirements for trucks.<sup>191</sup> As one commentator has set out, under the *Barnwell* formulation, the Court will give a large amount of deference to the state regulation “as long as the State acts within its established police power right to regulate motor vehicles for safety purposes,” and will overturn the state legislature’s decision “only if the regulation is not plausibly ‘reasonably related’ to the safety goal.”<sup>192</sup>

One of two circumstances usually has existed when the Supreme Court has applied the dormant commerce clause to invalidate state regulation of railways or highways: (1) the state regulation at issue is widely out of step with most other states’ regulation of the subject matter, even conflicting with other states’ regulations in some instances, and compliance can only come at great expense, or (2) the state’s

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186. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (quoting *Raymond*, 434 U.S. at 443).

187. 303 U.S. at 180, 195.

188. *Id.* at 187-88.

189. *Id.* at 189-190.

190. *Id.* at 190.

191. *Id.* at 192.

192. Lawrence, *supra* note 18, at 431.



motivation in enacting the regulation appears to have been, at least in part, to discriminate against interstate commerce or advance local interests at the expense of out of state interests.<sup>193</sup> However, the invalidation of state regulations under these circumstances is not peculiar to the transportation arena. Any state regulation, regardless of the area concerned, presenting either of these two circumstances generally is ripe for invalidation.<sup>194</sup>

An example of the first circumstance existed in *Southern Pacific Co. v. Arizona*.<sup>195</sup> In *Southern Pacific*, the Court invalidated an Arizona regulation that prohibited the operation of passenger trains longer than fourteen cars long and freight trains longer than seventy cars long.<sup>196</sup> At the time of the case, “seventy freight car laws” were only enforced in two states, including Arizona, and Arizona was the only state with “a fourteen car passenger car limit.”<sup>197</sup> Furthermore, the Court found that compliance with Arizona’s car limit law cost the two railroads that operated in the state “\$1,000,000 a year” in 1940s dollars,<sup>198</sup> imposing “a serious burden on the interstate commerce conducted by” those railroads.<sup>199</sup>

Similarly, in *Bibb*, the Supreme Court held that an Illinois statute conflicted with the Commerce Clause when the statute prohibited the use of a straight mudflap, which was legal in “at least 45 States,” on trucks or trailers.<sup>200</sup> The Court distinguished this statute from the statute at issue in *Barnwell Bros.* because the Illinois statute conflicted with Arkansas regulations that required trailers to have straight mudflaps.<sup>201</sup> The Court further found that the Illinois statute “seriously interfere[d] with the ‘interline’ operations of motor carriers—that is to say, with the interchanging of trailers between an originating carrier and another carrier when the latter serves an area not served by the former.”<sup>202</sup> This “massive showing of burden on interstate commerce” made the Illinois

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193. See *infra* notes 195-227 and accompanying text.

194. See Redish & Nugent, *supra* note 109, at 598 (“When, one might ask, are state regulations likely to impose an undue burden? The answer is, when state regulations differ markedly from the regulations imposed by its neighboring states, for it is then that those moving in interstate commerce would have to adjust each time they crossed a new state line.”); Lawrence, *supra* note 18, at 419 (asserting that the Court effectively treats as *per se* invalid state regulations enacted with the purpose of discriminating against interstate commerce).

195. 325 U.S. 761 (1945).

196. *Id.* at 763, 781-82.

197. *Id.* at 774.

198. *Id.* at 772.

199. *Id.* at 773.

200. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523, 529-30 (1959).

201. *Id.* at 526-27.

202. *Id.* at 527.

statute “one of those cases – few in number – where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce.”<sup>203</sup> “A state which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory.”<sup>204</sup> In this case, the Court held that Illinois’ showing of the safety merits of the statute was “far too inconclusive” to outweigh “the heavy burden” that it placed on interstate commerce.<sup>205</sup>

Finally, *Raymond Motor Transportation, Inc. v. Rice*<sup>206</sup> and *Kassel v. Consolidated Freightways Corp.*<sup>207</sup> provide examples of the Court’s invalidation of state statutes regulating highway traffic due, at least in part, to states attempting to advance in-state interests at the expense of out-of-state interests.<sup>208</sup> In *Raymond*, the Wisconsin statute at issue set a limit of 55 feet on the length of vehicles pulling one trailer, and any person desiring to operate a “single-trailer unit” longer than this had to obtain a permit from the Wisconsin Highway Commission.<sup>209</sup> Wisconsin law also required people who wished to pull more than one trailer through the state to obtain a permit.<sup>210</sup> The plaintiffs to the lawsuit had applied to Wisconsin officials “for annual permits to operate 65-foot doubles” within Wisconsin.<sup>211</sup> State officials denied their permits because their “proposed operations were not within the narrow scope of the administrative regulations that specif[ied] when ‘trailer train’ permits [would] be issued.”<sup>212</sup> The Court noted that “Wisconsin’s regulatory scheme contain[ed] a great number of exceptions to the general rule that vehicles over 55 feet long cannot be operated on highways within the State.”<sup>213</sup> The Court concluded that these exceptions evidenced an intent to favor in-state interests:

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203. *Id.* at 528, 529.

204. *Id.* at 529-30.

205. *Id.* at 530.

206. 434 U.S. 429 (1978).

207. 450 U.S. 662 (1981).

208. *See* Biddle, *supra* note 108, at 175 (stating that both of the laws examined in *Raymond* and *Kassel* “were subjected to less deference by the Court because each law made certain exceptions for trucks traveling exclusively within the state, undermining both the safety argument and raising the specter of discrimination against interstate commerce”).

209. 434 U.S. at 432.

210. *Id.* at 432-33.

211. *Id.* at 434-35.

212. *Id.* at 435.

213. *Id.* at 446.

At least one of these exceptions discriminates on its face in favor of Wisconsin industries and against the industries of other States,<sup>214</sup> and there are indications in the record that a number of the other exceptions, although neutral on their face, were enacted at the instance of, and primarily benefit, important Wisconsin industries. . . . Exemptions of this kind, however, weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce.<sup>215</sup>

The Court also found that the trucking companies "produced a massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety" and that "[t]he State, for its part, virtually defaulted in its defense of the regulations as a safety measure."<sup>216</sup> The Court further concluded that "the regulations impose[d] a substantial burden on the interstate movement of goods."<sup>217</sup> Therefore, the Court held that the Wisconsin regulations violated the Commerce Clause.<sup>218</sup>

The Supreme Court also discovered evidence of a state's attempt to advance local interests at the expense of out of state interests in *Kassel*. At issue in this case was an Iowa statute that, similar to *Raymond*, prohibited the use of 65-foot doubles in the State and restricted most truck combinations to 55 feet in length.<sup>219</sup> Despite this limit, the statute allowed "cities abutting the state line by local ordinance to adopt the length limitations of the adjoining State."<sup>220</sup> In defending the law, Iowa "asserted that 65-foot doubles [were] more dangerous than 55-foot singles and, in any event, that the law promote[d] safety and reduce[d]

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214. The exception allowed the issuing of "permits to Wisconsin industries and their agent motor carriers to transport goods in trucks over 55 feet long from plants in Wisconsin to the state line"; however, the exception did not allow the issuing of permits "to industries with plants in other States to transport goods in trucks over 55 feet long through Wisconsin to markets in other States." *Id.* at 446 n.24. See also Tushnet, *supra* note 107, at 158-59 (stating that this exemption "was discriminatory in the classic sense" because "[i]n-state interests . . . secured a benefit that was totally unavailable to out-of-state interests").

215. *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 446-47 (1978). The Court, however, declined to decide the case "solely on the basis of the discrimination against interstate commerce embodied in" these regulatory exceptions. *Id.* at 447 n.24.

216. *Id.* at 444.

217. *Id.* at 445.

218. *Id.* at 447. Arguably, *Raymond* could also belong to the first class of cases explained above because the use of 65-foot doubles was allowed "on interstate highways and access roads in Michigan, Illinois, Minnesota, and all of the States west from Minnesota to Washington through which Interstate highways 90 and 94 [the main interstates crossing Wisconsin between Illinois and Minnesota] run." *Id.* at 432. Moreover, "at the time of trial only 17 States and the District of Columbia did not allow 65-foot doubles on their highways." *Id.* at 437 n.9.

219. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 665 (1981).

220. *Id.* at 666.

road wear within the State by diverting much truck traffic to other States.”<sup>221</sup>

Four justices found that “[t]he origin of the ‘border cities exemption’ also suggest[ed] that Iowa’s statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic.”<sup>222</sup> This segment of the Court noted that Iowa’s governor had vetoed a bill that would have allowed the use of 65-foot doubles in the state because the legislation “would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors.”<sup>223</sup> The legislature passed the “border cities exemption” and the Governor signed it into law after the veto.<sup>224</sup> These justices went on to find that because the Iowa statute imposed a substantial burden on interstate commerce “without any significant countervailing safety interest,” the statute violated the Commerce Clause.<sup>225</sup> Two other justices concurred in judgment and found that the Iowa statute was invalid simply because “Iowa sought to discourage interstate truck traffic on Iowa’s highways,”<sup>226</sup> and “Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways.”<sup>227</sup> These justices felt that “Iowa’s attempt to deflect interstate traffic” should be subject to “a virtually *per se* rule of invalidity.”<sup>228</sup>

Therefore, the Supreme Court has treated cases dealing with state regulation of interstate transportation in much the same manner as it has treated state regulation of other areas. The Court has invalidated regulation of interstate transportation under the Commerce Clause when the regulation was widely out of step with other states’ regulations and imposed a great burden on interstate commerce or when a state’s motive

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221. *Id.* at 667.

222. *Id.* at 677.

223. *Id.*

224. *Id.*

225. *Id.* at 678-79. Evidence existed that Iowa’s prohibition also was out of step with the regulations of other states in its region of the country because no other state “in the West and Midwest prohibit[ed] the use of 65-foot double-trailer trucks within [their] borders.” *Id.* at 662. However, the dissent noted that “[m]ost truck limits are between 55 and 65 feet, and Iowa’s choice is thus well within the widely accepted range.” *Id.* at 694 (Rehnquist, J., dissenting) (citation omitted). The dissent also pointed out that “17 States and the District of Columbia, including all of New England and most of the Southeast” prohibited the use of 65-foot doubles on their highways. *Id.* at 688 (Rehnquist, J., dissenting).

226. *Id.* at 681 (Brennan, J., concurring).

227. *Id.* at 686 (Brennan, J., concurring).

228. *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

behind the regulation was to discriminate against interstate commerce or favor in-state interests at the expense of out-of-state interests.

#### IV. CASE LAW APPLYING THE DORMANT COMMERCE CLAUSE TO STATE REGULATION OF THE INTERNET

Several federal and state courts have analyzed whether the application of state regulations to the Internet complied with the dormant commerce clause. The leading case on this issue is *American Libraries Association v. Pataki*.<sup>229</sup> Several commentators have used Federal District Court Judge Preska's analysis to assert that under dormant commerce clause principles states cannot and should not regulate the Internet at all.<sup>230</sup> However, several courts have held that state regulation of the Internet can withstand dormant commerce clause scrutiny in certain situations.<sup>231</sup> These latter cases demonstrate that it is possible for states to protect their citizenry on the Internet through legislation, especially when exercising their traditional police powers, consistent with the Supreme Court's dormant commerce clause jurisprudence. Courts should view the Internet similarly to any other form of commerce in light of traditional dormant commerce clause principles and not necessarily as forbidden territory on which the states can never tread.

##### A. *Cases Invalidating State Statutes under the Dormant Commerce Clause*

In *American Libraries Association*, several Internet related organizations filed suit seeking a declaratory judgment and an injunction

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229. 969 F. Supp. 160 (S.D.N.Y. 1997).

230. Bassinger, *supra* note 20, at 890 (stating that "the Internet should be marked off as a national preserve subject only to uniform federal regulation"); Blake, *supra* note 23, at 156-57 (stating that self-regulation is the only viable method of Internet regulation); LaMaina, *supra* note 22, at 159 (stating that states can never "validly [restrict] materials on the Internet").

231. Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 499-505 (5th Cir. 2001) (holding that application of Texas motor vehicle code to car manufacturer operating a Web site to sell cars in Texas did not violate the dormant commerce clause); People v. Hayne, 2002 WL 470853 at \*\* 8-9 (Mar. 27, 2002) (holding that California statute criminalizing pedophile's activities on the Internet did not violate the dormant commerce clause); Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 473 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); People v. Hsu, 99 Cal. Rptr. 2d 184, 190-92 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); People v. Foley, 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999) (holding that New York statute criminalizing the dissemination of indecent material to minors through the Internet in order to lure minors to engage in sexual activity passed dormant commerce clause analysis); People v. Lipsitz, 663 N.Y.S.2d 468, 475 (Sup. Ct. 1997) (holding that the application of New York consumer protection laws to New York business pursuant to Internet solicitations was proper under the dormant commerce clause).

concerning New York Penal Law section 235.21(3).<sup>232</sup> The plaintiffs contended that this statute violated the First Amendment and the Commerce Clause.<sup>233</sup> Judge Preska, sitting in the Southern District of New York, held that the statute violated the dormant commerce clause but declined to address any First Amendment issues that the statute posed.<sup>234</sup>

The majority of the plaintiffs ran passive, informational Web sites.<sup>235</sup> However, some plaintiffs ran interactive Web sites where they sold products to site visitors, and the sites presumably required visitors to provide certain information in order to access the site or in order to purchase products.<sup>236</sup> The statute at issue made it a felony to “intentionally use [] any computer communication system” to communicate to a minor material depicting “actual or simulated nudity, sexual conduct or sado-masochistic abuse . . . which is harmful to minors.”<sup>237</sup>

Material had to meet three requirements to be considered “harmful to minors.”<sup>238</sup> Relying on the United States Supreme Court’s First Amendment obscenity test, the material had to: (1) “appeal[] to the prurient interest in sex of minors;” (2) be “patently offensive to prevailing standards in the adult community as a whole” with regard to “suitable material for minors;” and (3) “lack[] serious literary, artistic, political and scientific value.”<sup>239</sup> The statutory scheme also provided a defense (1) if the material “was disseminated” for “scientific, educational, governmental or other similar” purposes, (2) “[t]he defendant made a reasonable effort to ascertain the true age of the minor,” (3) the defendant had taken “reasonable, effective and

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232. *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 161-62 (S.D.N.Y. 1997).

233. *Id.*

234. *Id.* at 169, 183.

235. *See id.* at 161-62. The description of the plaintiffs’ Web sites provided in the decision do not necessarily allow for a definitive determination as to the interactivity of each plaintiff’s Web site. However, it appears that the following plaintiffs ran passive Web sites where site operators only provided information to site visitors or facilitated communication between visitors through chat rooms and where operators did not require visitors to provide any information to the site operator in order to view this information or enter any chat rooms: American Libraries Association, Association of American Publishers, Public Access Networks Corporation, ECHO, New York City Net, Art on the Net, and the ACLU.

236. *See id.* at 162. The plaintiffs that ran what appeared to be interactive sites, given the description of the functions of the sites, were: American Booksellers Foundation for Free Expression, BiblioBytes, Magazine Publishers of America, Interactive Digital Software Association. *Id.* The decision did not mention whether or not Peacefire, an organization that “protect[ed] the rights of citizens under the age of 18 to use the Internet,” operated a Web site. *Id.*

237. *Id.* at 163 (alteration in original).

238. *Id.*

239. *Id.*

appropriate actions . . . to restrict or prevent access by minors,” (4) “[t]he defendant . . . restricted access . . . by requiring use of a verified credit card, debit account, adult access code or adult personal identification number,” or (5) the defendant “established a mechanism” that allowed the material to be “blocked or screened by software or other capabilities reasonably available.”<sup>240</sup>

The court found that the New York statute violated the dormant commerce clause in three distinct ways: (1) the statute was a *per se* violation of the dormant commerce clause, (2) under *Pike*, the burdens on interstate commerce that the statute imposed outweighed its local benefits, (3) the statute placed inconsistent regulations on commerce that demanded consistent treatment throughout the nation.<sup>241</sup> First, in an extensive analysis spanning eight pages, Judge Preska presented her view that the statute regulated interstate commerce and conduct occurring outside the borders of the state of New York.<sup>242</sup> The court concluded that the statute was “necessarily concerned with interstate communications.”<sup>243</sup> The court interpreted the statute to apply “to any communication, intrastate or interstate that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction.”<sup>244</sup> Moreover, the court noted that the transient and anonymous nature of the Internet, with its insensitivity to geographic borders and the difficulty in closing off a Web site to particular states, prevented the application of the New York statute to “purely intrastate communications over the Internet because no such communications exist.”<sup>245</sup> For example, the court explained that even an e-mail message that travels from one person in New York to another person in New York “may well pass through a number of states en route.”<sup>246</sup> The court then determined that the Internet communications affected by the New York statute constituted commerce under the Commerce Clause.<sup>247</sup>

Judge Preska went on to explain how the New York statute purportedly affected commerce occurring wholly outside of the borders of New York. The court talked about the chilling affect that the statute would have on the plaintiffs to “refrain[] from engaging in particular types of interstate commerce.”<sup>248</sup> Judge Preska theorized that because

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240. *Id.* at 163-64.

241. *Id.* at 169.

242. *Id.* at 169-77.

243. *Id.* at 172.

244. *Id.* at 169-70.

245. *Id.* at 170-71.

246. *Id.* at 171.

247. *Id.* at 172-73.

248. *Id.* at 174.

“no Web siteholder is able to close his site to New Yorkers,” the threat of being prosecuted under the New York statute would cause Web site operators and users who were physically located outside of New York to refrain from communicating or displaying material that presumably would be legal in the web site operator or user’s physical location.<sup>249</sup> This subordinated “the user’s home state’s polic[ies] . . . to New York’s local concerns.”<sup>250</sup> Therefore, the court determined that through the statute New York “deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.”<sup>251</sup> The court held that this extraterritorial effect of the statute was “per se violative of the Commerce Clause.”<sup>252</sup>

Second, Judge Preska held that the burdens that the statute imposed on interstate commerce were “excessive” when compared with its local benefits.<sup>253</sup> The court applied the balancing test from *Pike* in making this determination. The court started by recognizing “that the protection of children against pedophilia is a quintessentially legitimate state objective.”<sup>254</sup> However, while under the first ground for nullifying the statute the court amplified the threat to potential violators located outside of New York of being prosecuted under the statute, the court minimized the effect that the statute would have on potential violators in analyzing this second ground. The court noted that even if New York could exercise jurisdiction over parties located out of state, the prosecution of such parties “is beset with practical difficulties” because bringing violators physically to New York for prosecution was unlikely.<sup>255</sup> The court found that the statute could “have no effect on communications originating outside of the United States.”<sup>256</sup> The court also emphasized the number of other New York laws that criminalized obscenity and child pornography.<sup>257</sup> “The local benefit to be derived from the challenged section of the statute is therefore confined to that narrow class of cases that does not fit within the parameters of any other law.”<sup>258</sup>

On the other hand, the court found that the “chilling effect” that the statute caused would be an “extreme burden on interstate commerce.”<sup>259</sup>

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249. *Id.* at 174-75.

250. *Id.* at 177.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 178.

256. *Id.*

257. *Id.* at 179.

258. *Id.*

259. *Id.*



“Individuals who wish to communicate images that might fall within the Act’s proscriptions must thus self-censor or risk prosecution, a Hobson’s choice that imposes an unreasonable restriction on interstate commerce.”<sup>260</sup> However, Judge Preska did not explain why individuals would self-censor when the risk of prosecution in New York was so minimal due to the practical difficulties of being brought physically before the New York courts. The court further found that the defenses provided in the statute did not sufficiently lessen this burden because the cost of complying with those defenses “could drive some Internet users off the Internet altogether.”<sup>261</sup> Therefore, Judge Preska held that the “severe burden” that the statute placed on interstate commerce was “not justifiable in light of the attenuated local benefits arising from it.”<sup>262</sup>

Third, Judge Preska held that the New York statute would place inconsistent regulations on a type of commerce that demanded consistent treatment and stated that only the federal government could regulate the Internet.<sup>263</sup> Using what some courts have described as effectively a preemption analysis,<sup>264</sup> the court stated that “[t]he courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level.”<sup>265</sup> Comparing the Internet to the United States railway and highway systems, the court stated that the Internet “requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.”<sup>266</sup> Apparently, this need for uniformity would cause Judge Preska to not allow state regulation of the Internet in any form. Judge Preska stated that “[r]egulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.”<sup>267</sup> Because Web site operators cannot cut off access to their web sites from specific states, they would have to meet the “most stringent [state] standard.”<sup>268</sup> Judge Preska stated that “[w]ithout the limitation’s [sic] imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of

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260. *Id.* at 180.

261. *Id.*

262. *Id.* at 181.

263. *Id.* at 181-83.

264. *Hatch v. Sup. Ct.*, 94 Cal. Rptr. 2d 453, 471 (Cal. Ct. App. 2000) (“*Pataki’s* [argument] . . . is a sort of preemption argument: that simply logging on the Internet automatically places one beyond the reach of state criminal prosecution.”); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000) (describing *Pataki’s* analysis on this point as “essentially a preemption analysis”).

265. *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997).

266. *Id.* at 182.

267. *Id.* at 181.

268. *Id.* at 183.

the Internet altogether.<sup>269</sup> Judge Preska held that this need for cohesive, federal regulation required striking down the New York statute as a violation of the dormant commerce clause.<sup>270</sup> Several other courts have adopted Judge Preska's analysis and have invalidated similar statutes on these same three grounds.<sup>271</sup>

*B. Cases Holding State Statutes are Valid Under the Dormant Commerce Clause*

Despite Judge Preska's view that only the federal government should regulate the Internet, several decisions from the California Court of Appeals have held that a statute criminalizing the activity of pedophiles on the Internet passed dormant commerce clause scrutiny.<sup>272</sup> These cases examined California Penal Code section 288.2(b), which made it a felony to distribute "any harmful matter to a minor" over the Internet knowing a minor is receiving the matter with the intent of arousing or appealing to "passions or sexual desires of that person or of a minor" and with the purpose or intent of seducing a minor.<sup>273</sup> In *Hatch v. Superior Court*, the

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269. *Id.* at 181.

270. *Id.* at 183.

271. See *ACLU v. Johnson*, 194 F.3d 1149, 1160-63 (10th Cir. 1999) (holding that statute making dissemination of materials harmful to minors by computer a misdemeanor was unconstitutional under the dormant commerce clause and the First Amendment); *Am. Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300, 305-06, 319-321 (D. Vt. 2002) (holding that a Vermont statute criminalizing the dissemination of images "communicated, transmitted or stored electronically" that are harmful to minors was unconstitutional under the dormant commerce clause); *PSINet v. Chapman*, 108 F. Supp. 2d 611, 617 (W.D. Va. 2000) (holding that a Virginia statute making it a misdemeanor to display an "electronic file or message" containing an image or words depicting sexually explicit material "harmful to juveniles" violated the dormant commerce clause) (alteration in original); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 739-40, 751-52 (E.D. Mich. 1999) (holding that amendments to a Michigan statute that criminalized the use of computers or the Internet "to disseminate sexually explicit materials to minors" violated the dormant commerce clause), *aff'd*, 238 F.3d 420 (6th Cir. 2000); *State v. Barrows*, 677 N.Y.S.2d 672, 679-80, 684-86 (N.Y. Sup. Ct. 1998) (stating that section 235.22 of the New York Penal Code, which made it a crime to disseminate harmful material over the Internet to a minor in order to induce a minor to engage in sexual intercourse or sexual contact with the disseminator, violated the dormant commerce clause to the extent that the statute applied to interstate transmissions).

272. *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 473 (Cal. Ct. App. 2000); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000). See also *People v. Hayne*, 2002 WL 470853 at \*\* 8-9 (Mar. 27, 2002) (holding that the same statutory section as analyzed in *Hatch* and *Hsu*, section 288.2(b), did not violate the Commerce Clause). *Hayne* is an unpublished decision, and pursuant to California Rule of Court 977, courts and parties cannot cite or rely on unpublished opinions, except in limited circumstances.

273. See *Hatch*, 94 Cal. Rptr. 2d at 464; *Hsu*, 99 Cal. Rptr. 2d 1at 189 n.3. *Hatch* also examined the constitutionality of section 288.2(a), which did not expressly regulate Internet communications. 94 Cal. Rptr. 2d at 463. The California legislature added subdivision (b) to expressly apply the prohibitions of the statute to the Internet. *Id.* at 464. The defendant in *Hatch* had committed alleged offenses both before and after the enactment of subdivision (b), and therefore, only subdivision (a) applied to a large part of his conduct and subdivision (b) applied to his

defendant, a California resident, initially communicated with a woman representing herself as being two different thirteen year-old girls in a private Internet chat room, and the defendant discussed engaging in specific sexual conduct with her in several subsequent Internet communications.<sup>274</sup> The defendant also met with the woman in person twice.<sup>275</sup> In *People v. Hsu*, the defendant initiated several “instant messages” over the Internet from his residence in Walnut Creek, California in which he “offered to engage in specific sexual acts” with a police officer pretending to be a 14 year-old boy.<sup>276</sup> Through these Internet communications, the defendant also “invited the boy to meet him at his house.”<sup>277</sup>

These cases found that Judge Preska’s analysis in *American Libraries Association* did not apply to the California statute.<sup>278</sup> Countering the *American Libraries Association* finding that the New York statute regulated extraterritorially and was, therefore, a *per se* violation of the dormant commerce clause, the court in *Hatch* stated that, “[t]he assumption that extraterritorial enforcement of state criminal statutes is normative is incorrect.”<sup>279</sup> The court explained that in order to be subject to prosecution under California’s criminal jurisdiction statutes a person must have committed at least part of the crime within the state.<sup>280</sup> The court found that “there [was] no reason to suppose California would attempt to impose its policies on other states” in light of these jurisdictional statutes, “which generally bar punishment for wholly extraterritorial offenses.”<sup>281</sup>

In weighing the burden on interstate commerce in relation to the local benefits from the statute, the *Hatch* court further commented that the requirements for criminal jurisdiction, along with the statute’s intent element, minimized the statute’s burden on interstate commerce. “[G]iven the requirement that those charged must intend to seduce and

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remaining activities. *Id.* at 460-62, 464. However, the court interpreted subdivision (a) to also apply to communications occurring over the Internet. *Id.* at 478-79.

274. *Id.* at 460-61, 470.

275. *Id.* at 461-62.

276. *Hsu*, 99 Cal. Rptr. 2d at 188-89.

277. *Id.* at 189.

278. *Hatch*, 94 Cal. Rptr. 2d at 471; *Hsu*, 99 Cal. Rptr. 2d at 190-192. See also *Hayne*, 2002 WL 470853 at \*8-9 (distinguishing the statute at issue in *Am. Libraries Ass’n* from section 288.2(b)).

279. *Hatch*, 94 Cal. Rptr. 2d at 472.

280. *Id.* at 472. See also *Hayne*, 2002 WL 470853 at \*9 (“[S]ection 288.2, in the context of the Penal Code as a whole, only penalizes acts that occur within the state.”).

281. *Hatch*, 94 Cal. Rptr. 2d at 473. Accord *Hsu*, 99 Cal. Rptr. 2d at 192 (“Section 288.2 subdivision (b) makes no reference to place of performance, so courts must assume the Legislature did not intend to regulate conduct taking place outside of the state.”).

the additional requirement that they must commit at least an attempt [in California], no rational analysis supports the proposition section 288.2 imposes any burden on interstate commerce.”<sup>282</sup> The court found that “[w]hile a ban on the simple *communication* of certain materials may interfere with an adult’s legitimate rights, a ban on communication of specified matter to a minor *for the purposes of seduction* can only affect the rights of a very narrow class of adults who intend to engage in sex with minors.”<sup>283</sup>

In comparing the local benefits of the statute with the burden placed on interstate commerce, the *Hsu* court started by recognizing that state “[s]tatutes affecting public safety carry a strong presumption of validity.”<sup>284</sup> “Absent conflicting federal legislation, states retain their authority under their general police powers to regulate matters of legitimate local concern, even if interstate commerce may be affected.”<sup>285</sup> Furthermore, the court found that “[s]tates have a compelling interest in protecting minors from harm generally and certainly from being seduced to engage in sexual activity.”<sup>286</sup> On the other hand, the *Hsu* court found it difficult to discern how criminalizing “the transmission of harmful sexual material to known minors in order to seduce them” would burden “any legitimate commerce.”<sup>287</sup> The court found that the California statute was distinguishable from the New York statute at issue in *American Libraries Association* due to its additional intent requirements.<sup>288</sup> “Only when material is disseminated to a *known* minor with the *intent* to arouse the prurient interest of the sender and/or minor and with the *intent* to seduce the minor does the dissemination become a criminal act.”<sup>289</sup> Therefore, the courts in *Hatch* and *Hsu* held that the California statute did not unduly burden interstate commerce.<sup>290</sup>

Neither court agreed with Judge Preska’s view that the states should not regulate the Internet for fear that Internet users would be subject to inconsistent regulations that would paralyze Internet development. The *Hatch* court stated, “[w]hile it may be true that Internet communications routinely pass along interstate lines, we do not believe this general

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282. *Hatch*, 94 Cal. Rptr. 2d at 473. See also *Hayne*, 2002 WL 470853 at \*8 (“[T]he intent to seduce requirement greatly narrows the scope of the law and its effect on interstate commerce.”).

283. *Hatch*, 94 Cal. Rptr. 2d at 472.

284. *People v. Hsu*, 99 Cal. Rptr. 2d 184, 189 (Cal. Ct. App. 2000).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 191.

289. *Id.*

290. *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 473 (Cal. Ct. App. 2000); *Hsu*, 99 Cal. Rptr. 2d at 190-92.

proposition can be employed . . . to insulate pedophiles from prosecution simply *by reason of* their usage of modern technology.”<sup>291</sup> Finding that the California statute had little or no impact on interstate commerce, both courts held that the regulation at issue would not subject Internet users to onerous and inconsistent regulation.<sup>292</sup>

Two New York state courts similarly have held that New York statutes applied to conduct occurring on the Internet were valid under dormant commerce clause principles. In *People v. Foley*, the Appellate Division of the New York Supreme Court held that a different section of New York’s penal law than the section analyzed in *American Libraries Association* passed muster under the Commerce Clause.<sup>293</sup> The case dealt with New York Penal Law section 235.22 which criminalized “disseminating indecent material to minors” over the Internet and through such dissemination inviting or inducing a minor to engage in sexual activity.<sup>294</sup> The court found that this second “luring” element of the statute narrowed the scope of the statute, lessened any burden on interstate commerce, and distinguished the statute from the provision at issue in *American Libraries Association*.<sup>295</sup> “The purpose of Penal Law § 235.22 was not to regulate commerce, but to protect the children of this State who use the Internet. The statute is not an economic protectionist measure, but rather is directed at a legitimate local concern.”<sup>296</sup>

Similarly, in *People v. Lipsitz*, a New York trial court held that the application of New York consumer protection laws to a New York business that engaged in consumer fraud through e-mail solicitations was proper under the dormant commerce clause.<sup>297</sup> The court found that the consumer protection laws at issue “were not designed nor aimed at

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291. *Hatch*, 94 Cal. Rptr. 2d at 471.

292. *See Hsu*, 99 Cal. Rptr. 2d at 190-91; *Hatch*, 94 Cal. Rptr. 2d at 471-72.

293. 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999), *aff’d*, 731 N.E.2d 123 (N.Y. 2000).

294. *Id.* at 251.

295. *Id.* at 256.

296. *Id.*

297. 663 N.Y.S.2d 468, 473, 475 (Sup. Ct. 1997). Although *Lipsitz* dealt strictly with e-mail solicitations, its analysis is also important to state regulation of other types of Internet activity due to its emphasis on the states’ interests in enforcing consumer protection legislation over the Internet. *See infra* notes 332-336 and accompanying text. Two other decisions also have dealt with the constitutionality under the Commerce Clause of state regulation of e-mail. In *Ferguson v. Friendfinders, Inc.*, the California Court of Appeals held that a California statute that regulated “conduct by persons or entities doing business in California who transmit unsolicited advertising materials” through electronic mail and fax machines was valid under the Commerce Clause. 115 Cal. Rptr. 2d 258, 260, 264-69 (Cal. Ct. App. 2002). In *State v. Heckel*, the Washington Supreme Court upheld a Washington statute that prohibited “sending a commercial e-mail message from a computer located in Washington or to an e-mail address held by a Washington resident” that misrepresented or disguised “the message’s point of origin or transmission path, or [used] a misleading subject line” after analyzing it under dormant commerce clause principles. 24 P.3d 404, 407, 409-13 (Wash. 2001).

regulating conduct outside [New York's] borders, not even indirectly."<sup>298</sup> "The claims are of local concern, as recognized by the nationwide system of state consumer protection laws. There is no compelling reason to find that local legal officials must take a 'hands off' approach just because a crook or con artist is technologically sophisticated enough to sell on the Internet."<sup>299</sup> Thus, the court concluded that the application of the New York consumer protection provisions to the defendant was constitutional.<sup>300</sup>

The United States Court of Appeals for the Fifth Circuit also has held that the application of Texas's motor vehicle code to a car manufacturer's operation of a Web site used to sell cars within the state did not violate the dormant commerce clause.<sup>301</sup> In *Ford Motor Co. v. Texas Department of Transportation*, Ford Motor Company ("Ford") set up a Web site through which consumers could view used vehicles for sale or lease at a "no-haggle price."<sup>302</sup> Consumers in the Houston metropolitan area could place a "hold" on a particular vehicle and then view the vehicle in person at a specified local dealership.<sup>303</sup> If the consumer chose to purchase the vehicle after viewing it in person and going on a test drive, then Ford would transfer title to the car to the dealership that then would transfer title to the consumer.<sup>304</sup> The agreement between local dealerships in Houston and Ford prohibited the dealerships from "attempting to interest the customer in any of the dealer's inventory until after the customer [had] declined to purchase the Ford Internet vehicle."<sup>305</sup> The Texas government filed an administrative complaint with the Texas Motor Vehicle Board alleging that Ford had violated Texas law prohibiting anyone from serving as a car dealer without a license and prohibiting car manufacturers from acting in the capacity of a car dealership.<sup>306</sup> Ford then filed a declaratory judgment action and sought injunctive relief in the federal district court alleging, among other things, that applying Texas law to Ford's Web site activities violated the Commerce Clause.<sup>307</sup>

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298. *Lipsitz*, 663 N.Y.S.2d at 475 (citations omitted).

299. *Id.*

300. *Id.* at 475.

301. *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001).

302. *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905, 907 (W.D. Tex. 2000), *aff'd*, 264 F.3d 493 (5th Cir. 2001).

303. *Id.*

304. *Ford Motor*, 264 F.3d at 499.

305. *Id.*

306. *Ford Motor*, 106 F. Supp. 2d at 908.

307. *Id.*

In analyzing the dormant commerce clause issue, the Fifth Circuit started by finding that the application of Texas motor vehicle law to Ford's initiation of car sales through its Web site did not discriminate against "out-of-state interests."<sup>308</sup> The court found that the purpose of the Texas statute was "to prevent manufacturers from utilizing their superior market position to compete against retailers in the retail car market" and to prevent the "vertical integration of the automobile market."<sup>309</sup> The court found that the applicable Texas law treated out-of-state car manufacturers in the same manner as in-state manufacturers.<sup>310</sup> Similarly, "[o]ut-of-state corporations, which are non-manufacturers, have the same opportunity as in-state corporations to obtain a license and operate a dealership in Texas."<sup>311</sup> Thus, the court held that the Texas law did not discriminate "either facially or in practical effect" against interstate commerce and was not a *per se* violation of the Commerce Clause.<sup>312</sup>

The Fifth Circuit then went on to analyze the burden placed on interstate commerce compared to the "putative local benefits."<sup>313</sup> First, the court found that the statute's purpose of preventing "vertically integrated companies from taking advantage of their incongruous market position" was a legitimate state interest.<sup>314</sup> Second, the court found that evidence existed "from which a reasonable legislator could believe that [the Texas statute] would further the State's legitimate interest in preventing manufacturers from utilizing their superior market position to compete against dealers."<sup>315</sup> With regard to the cars, largely "preowned vehicles that were originally leased by a Ford dealer to a consumer" and "to which Ford never relinquished title," sold through Ford's Web site, the court found that "Ford seems to remain in a superior market position to [sell versus] its dealers."<sup>316</sup> Moreover, the court found that the price that Ford set for the cars posted on its Web site would "certainly affect the price of preowned vehicles sold by independent dealers."<sup>317</sup> Additionally, the Fifth Circuit found that the statute did not burden interstate commerce because "[t]he number of out-of-state vehicles retailed in Texas [would] not decrease" due to the Texas statute.<sup>318</sup> Thus,

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308. *Ford Motor*, 264 F.3d at 499.

309. *Id.* at 500.

310. *Id.* at 502.

311. *Id.*

312. *Id.*

313. *Id.* at 503.

314. *Id.*

315. *Id.* at 504.

316. *Id.*

317. *Id.* at 503 n.3.

318. *Id.* at 503.

the court held that the burden on interstate commerce, if any, was not “clearly excessive in relation to the putative local benefits.”<sup>319</sup>

The Fifth Circuit dealt with Ford’s assertion that “the need for nationwide uniformity [in regulating the Internet outweighed] the State’s interests in regulating.”<sup>320</sup> The court stated that applying that principle to the case “would lead to absurd results” and “would allow corporations or individuals to circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the Internet.”<sup>321</sup> The court noted that the Texas statute prohibited “all forms of marketing and sales by manufacturers, not just those conducted via the Internet.”<sup>322</sup> The court held that the statute’s “incidental regulation of Internet activities” did not violate the dormant commerce clause.<sup>323</sup> Therefore, despite the broad assertions that *American Libraries Association* and several commentators have made regarding the inability of states to regulate Internet activity under the Commerce Clause, courts have found such regulation to be valid in several situations.

#### V. PROPOSED DORMANT COMMERCE CLAUSE ANALYSIS OF STATE REGULATION OF THE INTERNET

Courts dealing with state regulation of the Internet should examine such regulation on a case-by-case basis considering the proper factors. As explained above in section III. B., the Supreme Court’s analysis of the validity of state regulations under the dormant commerce clause, at base, constitutes a balancing test in which the Court weighs the regulation’s local benefits to the state against the burden that the state regulation places on interstate commerce.<sup>324</sup> The larger the benefit to the state from the regulation, or the more important the state interest the regulation furthers, the more permissive the Court will be in allowing the regulation to stand despite any burden to interstate commerce. Thus, any analysis of a state statute that regulates the Internet should begin by

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319. *Id.*

320. *Id.* at 504.

321. *Id.* at 505.

322. *Id.*

323. *Id.*

324. *See supra* notes 138-143 and accompanying text. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (setting out the modern balancing test that governs dormant commerce clause jurisprudence). The application of this balancing test assumes that the state did not enact the statute with the purpose of discriminating against interstate commerce. *See also Lawrence, supra* note 18, at 416 (presenting a framework for understanding the Supreme Court’s analysis of dormant commerce clause cases which always applies the balancing test of *Pike* except when the state enacted the regulation with the purpose of discriminating against interstate commerce).



analyzing the state interest that the regulation furthers and the putative local benefits that the regulation provides.

In examining the benefits of state Internet regulations, courts should be deferential to a state's judgment concerning the benefits derived from a regulation when the legislation deals with an area concerning states' police powers, such as protection of children from pedophiles, consumers' protection against unfair business practices, and regulation of gambling activities. Additionally, when analyzing the burdens of state Internet regulation on interstate commerce, courts should weigh the factors that decrease the anonymity of Internet communications. These factors are the interactivity of the Web site, the type of goods sold on the site (whether tangible or electronic), and the availability of technology to verify the geographic location of site users. Courts also should recognize that state Internet regulations do not necessarily have an extraterritorial effect. Once a court has examined these factors and weighed these considerations, the court can properly conclude whether the benefits of the regulation at issue outweigh the burdens that the regulation puts on interstate commerce.

*A. Important Considerations in Analyzing the Benefits of State Internet Regulation*

As long as a state does not enact legislation for the purpose of discriminating against interstate commerce, in the absence of congressional legislation on the topic concerned, the state has latitude to exercise its police powers under the Commerce Clause, even if such regulation affects interstate commerce.<sup>325</sup> The Court has recognized this rule throughout its history of applying the dormant commerce clause.<sup>326</sup> In several cases concerning the validity of state regulation of Internet activity under the Commerce Clause, courts have dealt with two topics that fit firmly within the states' traditional police powers: protection of children from pedophiles<sup>327</sup> and consumer protection against unfair

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325. See *supra* notes 140, 168-179, 182-92 and accompanying text.

326. *Supra* notes 112-140 and accompanying text.

327. See *People v. Hayne*, No. F036401, 2002 WL 470853, at \*\* 8-9 (Cal. Ct. App. Mar. 27, 2002) (holding that California statute criminalizing pedophile's activities on the Internet did not violate the dormant commerce clause); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190-92 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 473 (Cal. Ct. App. 2000) (holding that California statute criminalizing pedophiles' activities on the Internet did not violate the dormant commerce clause); *People v. Foley*, 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999), *aff'd*, 731 N.E.2d 123 (N.Y. 2000) (holding that New York statute criminalizing the dissemination of indecent material to minors through the Internet in order to lure minors to engage in sexual activity passed dormant commerce clause analysis).

business practices.<sup>328</sup> Courts traditionally have recognized the states' strong interests in protecting the welfare of their children<sup>329</sup> and in protecting their citizens from deceptive and fraudulent business practices.<sup>330</sup> Moreover, when a state regulation concerns the safety of its citizens, the Supreme Court is generally deferential to a state legislature's judgment regarding the putative benefits of its regulation, even in areas that might have a significant impact on interstate commerce such as transportation and corporate regulation.<sup>331</sup>

A state's interest in protecting the well being of its children and its citizens from fraudulent and manipulative business transactions exists whenever an Internet communication is received within the state's geographical boundaries. The mere fact that a communication occurs in cyberspace does not make these state interests vanish.<sup>332</sup> Internet activity

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328. See *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 499-505 (5th Cir. 2001) (holding that application of section of Texas motor vehicle code prohibiting car manufacturers from acting as dealers in Texas to car manufacturer operating a Web site to sell cars in Texas did not violate the dormant commerce clause); *People v. Lipsitz*, 663 N.Y.S.2d 468, 475 (Sup. Ct. 1997) (holding that the application of New York consumer protection laws to New York business due to Internet solicitations was proper under the dormant commerce clause).

329. See, e.g., *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. Super. Ct.*, 457 U.S. 596, 607 (1982)); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate. . . ."); *Hsu*, 99 Cal. Rptr. 2d at 190 ("States have a compelling interest in protecting minors from harm generally and certainly from being seduced to engage in sexual activities."); *People v. Foley*, 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999) (holding that "any incidental effects" of a New York statute that prohibited the "luring" of minors into engaging in sexual activity was "not unduly burdensome in relation to the compelling interest of the State in protecting children").

330. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (recognizing a state's "strong" interest "in protecting consumers and regulating commercial transactions"); *Head v. N.M. Bd. of Exam'rs of Optometry*, 374 U.S. 424, 445 (1963) (Brennan, J., concurring) ("Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected."); *Lipsitz*, 663 N.Y.S.2d at 475 (stating that "local consumer fraud laws touch upon no known federal policy which requires uniformity" and that the consumer complaints in the case were "of local concern, as recognized by the nationwide system of state consumer protection laws").

331. See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987) ("We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) ("[R]egulations that touch upon safety . . . are those that 'the Court has been most reluctant to invalidate.'" (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978))); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978) ("[T]he Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970))).

332. See *Hatch*, 94 Cal. Rptr. 2d at 471 (stating that pedophiles should not be insulated from prosecution by the State of California "simply by reason of their usage of modern technology"); *Lipsitz*, 663 N.Y.S. 2d at 475 ("There is no compelling reason to find that local legal officials must

“produce[s] harmful, real-world effects” for the citizens of states,<sup>333</sup> among them subjecting children to the influence of pedophiles and subjecting consumers to scam artists.<sup>334</sup> One could argue that federal regulation may not be proper in such areas or may not even be effective in dealing with these deleterious effects of Internet activity.<sup>335</sup> Even if federal regulation would be proper and effective if enacted, in its absence, state regulation in these areas prevents a “legal vacuum” from occurring and prevents these interests from going unprotected.<sup>336</sup>

Another area that concerns the states’ exercise of their traditional police powers is gambling.<sup>337</sup> This subject has great significance for Internet regulation because of the high number of gambling Web sites available to Internet users.<sup>338</sup> When a state citizen visits a gambling Web site, the site has the potential to produce deleterious effects in that state such as increasing “family strife,” decreasing “in-state gambling revenues” if the state allows gambling,<sup>339</sup> increasing “addictive or compulsive behavior,” and even increasing “parental failure to support or adequately care for children.”<sup>340</sup> Therefore, the states’ strong interests in

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take a ‘hands off’ approach just because a crook or con artist is technologically sophisticated enough to sell on the Internet.”).

333. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1216 (1998).

334. *See id.* at 1242 (“Cyberspace users solicit and deliver kiddie porn, launder money, sexually harass, defraud, and so on. It is these and many other real-space costs – costs that cyberspace communities cannot effectively internalize – that national regulatory regimes worry about and aim to regulate.”).

335. *See* Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 476-77 (1998) (noting Congress’s inability to regulate the subsection of minors to indecent materials on the Internet under the Communications Decency Act).

336. *See id.* at 476 (“As expansive federal legislative or regulatory effects are precluded on constitutional grounds, erosion of state authority could create a legal vacuum.”).

State authority confers flexibility on the nation’s laws and regulations, so that the Internet’s inevitable local effects can be monitored by representatives of the local communities affected. When the law’s emphasis on regional or local community standards hinders legislative monitoring, state laws may be needed to fill the breach.

*Id.* at 477.

337. *See, e.g.*, *Pasados de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (recognizing that Puerto Rico’s regulation of gambling concerned its “interest in the health, safety, and welfare of its citizens” and constituted a “‘substantial’ government interest”); *Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999) (noting that gambling restrictions “represent a well-recognized exercise of state police power” because they “are aimed at promoting the welfare, safety, and morals” of a state’s citizens).

338. However, as of the summer of 2002, a court decision had yet to determine the validity of state regulation of gambling sites under the Commerce Clause.

339. Goldsmith, *supra* note 332, at 1216 (“Internet gambling can decrease in-state gambling revenues and cause family strife.”).

340. Salbu, *supra* note 334, at 445 (“Because gambling can become an addictive or compulsive behavior, it may contribute to parental failure to support or adequately care for children if parents lose their money or divert their time from child-rearing in order to gamble.”).

It is irrelevant to the state that seeks to discourage the sloth, waste, sinfulness, or evil of

regulating gambling activity still exist when a citizen gambles over the Internet as opposed to in a physical structure located in the state.<sup>341</sup>

When a state statute regulating Internet activity involves the exercise of a state's traditional police powers – such as protecting the welfare of children, protecting state consumers from unfair business practices, and controlling the deleterious effects of gambling – a court should recognize the strong state interests involved and give some deference to the state legislature's judgments regarding the local benefits of the statute. In this manner, the delicate balancing of state and national interests involved in the federal system will stay intact. *American Libraries Association* and its progeny failed to give proper deference to such states' interests in exercising their state police powers. One commentator has recognized that Judge Preska in *American Libraries Association*,

underestimated what weight should be placed on the state benefit side of the scales, particularly when a safety law is involved. Nearly every [dormant commerce clause] opinion has stressed the special deference that should be accorded to a state acting in a non-discriminatory way to improve the health and safety of its citizens.<sup>342</sup>

While the statute involved in *American Libraries Association* may have failed under dormant commerce clause analysis for other reasons,<sup>343</sup> Judge Preska erred in not giving New York's strong interest in protecting the well-being of its children enough significance when weighing the putative local benefits side of the *Pike* balancing test.<sup>344</sup> Much of the progeny of *American Libraries Association* have made this same mistake.<sup>345</sup>

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gambling whether such activities are facilitated by live croupiers or computer programs. . . . Opportunities to squander child support resources are as extensive in cybercasinos as in real ones. Thus, while computerized gambling may confer some marginal potential advantages over real-space gambling with regard to the parental neglect rationale [in that parents have a greater ability to supervise children from a home computer than in a brick and mortar casino], a state's basic interest in protecting its underage citizens remains strong.

*Id.* at 446-47. However, Salbu does note that Internet gambling does decrease a state's interest in regulating gambling due to organized crimes entanglement with this activity because "organized crime tends to be linked to a geographic proximity among participants that enables efficient physical retribution." *Id.* at 447.

341. *Id.* at 448 (concluding that "computerization of gambling does not destroy the legitimacy of traditional state police power").

342. Biddle, *supra* note 108, at 177.

343. *See infra* section VI. C.

344. *See supra* notes 253-257 and accompanying text (discussing Judge Preska's analysis in *Pataki* of the local benefits of a New York statute criminalizing the dissemination of harmful material to minors by computer).

345. *See* *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999) (minimizing the local benefits of a statute making dissemination of harmful material to minors by computer a misdemeanor); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878, 882, 891 (W.D. Va. 2001) (failing to

*B. Important Considerations in Analyzing the Burdens of State Internet Regulation on Interstate Commerce*

As explained in section II. B., two particular characteristics of the operation of the Internet and the Web, transience and anonymity, increase the chances that state regulation of Internet activity will burden interstate commerce significantly. Transience refers to the almost infinite number of paths, through numerous states, that data can travel when two computers on the Internet communicate with one another.<sup>346</sup> Transience gives the Internet its interstate, or even international, character.<sup>347</sup> Anonymity refers to the inability of Internet or Web users to determine the physical location of the computers used to transport data from one computer to another.<sup>348</sup> When a browser user accesses a Web site, the user has no knowledge of the geographic location of the server whose computer files the browser is accessing. Similarly, people and entities that operate a Web site have difficulty determining the geographic location of people who access the Web site.

Transience and anonymity give rise to concerns that the states' regulation of Internet activity will greatly burden a person or entity's operation of a Web site because the operator, not being able to determine the geographic location of a particular user of the site or the states through which the computer data traveled, will have to comply with the standards of the state with the most stringent requirements.<sup>349</sup> Moreover, the Web site operator would have to comply with the regulations of that state regardless of whether a particular person accessing the site actually is located in that state.<sup>350</sup> Transience and anonymity also increase the chances that a Web site operator will be subject to inconsistent Internet regulations from several different states.<sup>351</sup> This "chilling effect" on Internet activity is what Judge Preska in *American Libraries Association* noted as the major burden placed on Web site operators by state Internet regulations.<sup>352</sup>

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even examine the local benefits of a Virginia statute making it a misdemeanor to display an "electronic file or message containing an image" or words depicting sexually explicit material "harmful to juveniles"); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 739-40, (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (minimizing the local benefits of amendments to a Michigan statute that criminalized the use of computers or the Internet "to disseminate sexually explicit materials to minors").

346. *Supra* notes 76-79 and accompanying text.

347. *Supra* note 79 and accompanying text.

348. *Supra* notes 80-86 and accompanying text.

349. *See supra* notes 247-57, 266-68 and accompanying text.

350. *See supra* notes 247-51 and accompanying text.

351. *See supra* notes 266-268 and accompanying text.

352. *See Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 179 (S.D.N.Y. 1997). *See also supra* notes 258-59 and accompanying text.

However, the cases addressing state Internet regulation under the Commerce Clause have failed to recognize and account for, at least explicitly, several different factors that affect the anonymous nature of Web commerce. These factors include (1) the interactivity of a Web site, (2) the type of goods sold on the site (whether tangible or electronic), and (3) the availability of technology to verify the geographic location of site users.<sup>353</sup>

*1. The importance of the interactivity of a Web site to the burden of state regulation*

The more interactive a Web site, the more opportunity the operator of the Web site will have to obtain accurate information on the geographic location of a particular user of the site. An “interactive” Web site allows a site user to exchange information with the site’s computer server.<sup>354</sup> Thus, the operator of an interactive Web site has more ability than the operator of a “passive” site, which simply makes information available to a site user, to obtain accurate information on the geographic location of a particular user and comply with the specific regulations of the user’s state or prevent access to particular users located in states that prohibit activities facilitated by the Web site. Consequently, the operator of an interactive Web site bears less of a burden in complying with the regulations of different states.

Courts examining the validity of state Internet regulations under the Commerce Clause to determine the burden placed on Web sites by the regulations concerned should consider whether or not the sites affected are more interactive or passive. Many courts already consider the interactivity of a Web site under the Due Process Clause when examining whether a court may properly assert personal jurisdiction over the person or entity operating a Web site.<sup>355</sup> While the policy

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353. Another consideration with the transient nature of Internet communications that decreases the burden of state Internet regulations on interstate commerce is the lack of desire of states to regulate commercial transactions whose only contact with the state is the physical transportation of computer data through the state. The limits that criminal jurisdiction places on the practical ability of the states to apply their regulations to Internet activity also decrease the burden of state Internet regulations on interstate commerce. This article examines these concepts when discussing the potential extraterritorial effect of state Internet regulations. *See infra* section V. C. These two considerations will not change from case to case, and therefore, a court would not have to separately analyze them in each case like the three factors noted here.

354. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. PA. 1997).

355. *See id.* (holding “that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet” such as “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site”). *See also, e.g., Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296-97 (10th Cir. 1999) (applying *Zippo* analysis to determine whether a defendant’s contacts with Utah through its Web site were sufficient for a court’s exercise of personal

considerations under the Commerce Clause are different from Due Process considerations,<sup>356</sup> courts' consideration of the interactivity of Web sites under another branch of constitutional analysis in deciding whether a person or entity running a Web site has sufficient notice of the site's operation in a particular geographic location lends credibility to this distinction.<sup>357</sup> Recognizing the significance of the interactivity of Web sites in determining the burden placed on interstate commerce by state Internet regulations will help prevent courts from overstating the need for uniform regulation and failing sufficiently to respect the states' legitimate exercise of their police powers.

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jurisdiction); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (adopting *Zippo* analysis to determine whether a defendant's contacts with Texas through its Web site were sufficient for a court's exercise of personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (stating that "the common thread [in cases examining the exercise of personal jurisdiction due to the operation of a Web site], well stated by the district court in *Zippo*, is that 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet'" (quoting *Zippo*, 952 F. Supp. at 1124)); *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 613 (E.D. Va. 2002) (stating that in wrestling "with applying the principles of personal jurisdiction to a defendant's conduct with the forum state through a Web site . . . many courts have applied the 'sliding scale' test set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*", which distinguishes between passive and interactive Web sites); *Rainy Day Books, Inc. v. Rainy Day Books & Cafe, L.L.C.*, 186 F. Supp. 2d 1158, 1163 (D. Kan. 2002) ("One way a plaintiff can establish that a defendant has the requisite minimum contacts with the forum state is to use the Internet website sliding scale analysis set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*"); Yvonne Beshany & Sean Shirley, *Cyber-Jurisdiction: When Does Use of the Internet Establish Personal Jurisdiction?*, 63 ALA. LAW. 36, 38 (2002) ("The 'sliding scale' adopted by the *Zippo* court has been adopted by a majority of the circuits facing the same determinations of personal jurisdiction.").

356. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (holding that "the nexus requirements of the Due Process and Commerce Clauses are not identical" for the purpose of examining state taxation of commercial activity because the "two standards are animated by different constitutional concerns and policies").

Due process centrally concerns the fundamental fairness of governmental activity. . . . We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.

*Id.*

357. *See, e.g., Soma Med. Int'l*, 196 F.3d at 1299 ("[W]e cannot conclude that SCB's maintenance of a passive website, merely providing information to interested viewers, constitutes the kind of purposeful availment of the benefits of doing business in Utah, such that SCB could expect to be haled into court in that state."); *Rainy Day Books, L.L.C.*, 186 F. Supp. 2d at 1165 ("Defendant's alleged intentional infringement of Plaintiff's service mark on its website, from which Kansas residents can purchase books, combined with its knowledge that Plaintiff's main retail bookstore is located in Kansas, puts Defendant on notice that it should reasonably anticipate being haled into this court.").

*2. The importance of the type of Internet commerce involved to the burden of state regulation*

In determining the burden that a particular state's Internet regulation places on interstate commerce, courts should also examine the type of Internet or Web commerce that the regulation affects. As explained in section II. B. 2., Web sites that simply receive orders from customers for tangible goods over the Internet have less difficulty in determining the physical location of a particular site user than Web sites that sell electronic goods or provide services or information on the Internet for a fee.<sup>358</sup> When the sale of a tangible good is involved, for example a paperback book, the seller must ship the product to the customer at a particular postal address. Thus, in order to complete the transaction, the seller must obtain accurate information about the geographic location of the customer, and the buyer has an incentive to provide accurate shipping information in order to actually receive the product purchased.<sup>359</sup> In such situations, the seller, similar to mail order businesses, can more easily comply with different regulations from various states. However, Web sites on which users may download software or receive information or services, such as legal advice or other professional services, do not have the same opportunity to verify the location of the site user, and users do not have the same incentive to provide accurate information about their geographic location, even if such information is sought. Again, courts can avoid overstating the burden placed on interstate commerce by a state's regulation if they consider whether the regulation affects transactions involving tangible versus electronic goods sold over the Internet. This consideration is important because the buyer of tangible goods cannot remain anonymous as easily as the purchaser of electronic goods.

*3. The significance of Internet identification technology to the burden of state regulation*

Courts should also begin to recognize that methods do exist for the operators of Web sites to determine the geographic location of a site user and decrease the anonymity present in Internet communications. This is especially important when a Web site is passive or when a Web site sells electronic goods or services. As explained above in section II. B. 2., Web

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358. See Geist, *supra* note 35, at 559 ("The sale of tangible products has minimal legal impact on the traditional buyer-seller dynamic.").

359. See *id.* ("Notwithstanding the online character of the transaction, the sale of such [tangible] products requires physical transportation from the seller to the buyer, maintaining . . . easy identification of both buyer and seller.").



operators presently can obtain information about a user's residence through credit card verification technology or by requiring the use of personal identification numbers in order to access the site.<sup>360</sup> Moreover, developing technology exists using algorithms to determine instantly the geographic location of a user's computer.<sup>361</sup> This technology would allow Web hosts to get such information without the time and privacy costs involved with PINs, but presently is more expensive than credit card verification and PIN systems. However, there is reason to believe that the cost of this emerging technology will decrease significantly in the future.<sup>362</sup>

The availability of these different technologies further decreases the burden of complying with a particular state's regulatory regime. While the use of such technology does cause the operators of Web sites to incur monetary costs, as well as sometimes requiring site users to incur time and privacy costs, these costs are not unlike those commonly incurred by other brick and mortar businesses in order to comply with the regulations of different states.<sup>363</sup> Courts in a couple of contexts have already found it reasonable for Web site operators to screen out residents from specific jurisdictions in order to avoid violating the law in those jurisdictions.<sup>364</sup> Thus, in analyzing state regulations that affect Internet activity under the Commerce Clause, courts should recognize that technology does exist that can decrease the burden on Web site operators of complying with different state's regulatory regimes and that it is not unreasonable to expect Web site operators to incur some monetary costs in implementing such technology. If courts begin to consider the three factors discussed

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360. See *supra* notes 92-101 and accompanying text.

361. *Supra* notes 102-105 and accompanying text.

362. See Goldsmith & Sykes, *supra* note 92, at 812 (stating that "there is good reason to believe that geographical filtering technology will be precise and inexpensive in the near future").

363. See *id.* at 823 ("As we have emphasized, it is common for firms doing business in the United States to incur costs learning about and complying with fifty state regulations."); Goldsmith, *supra* note 332, at 1230 ("It is relatively uncontroversial that a newspaper publisher is liable for harms caused wherever the newspaper is published or distributed."); Redish & Nugent, *supra* note 109, at 598-99 (stating that under the federalist system set up under the Constitution "those involved in interstate commerce are put on notice that they may be subjected to different regulations in different states" and that "[t]his is simply the cost of our having chosen a federal system of government").

364. See *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (stating in a case involving a pornographic Web site that "[i]f Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability"); *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1040 (S.D.N.Y. 1996) (stating in a contempt action to enforce a prior judgment, "[w]hile this Court has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in *this* country. Therefore, while [the defendant] may continue to operate its Internet site, [the defendant] must refrain from accepting subscriptions from customers living in the United States.") (emphasis in original).

above in each case, they can better evaluate the true burden of a particular state Internet regulation on interstate commerce.

*C. State Internet Regulations Do Not Necessarily Have an Extraterritorial Effect*

In analyzing state Internet regulations under the Commerce Clause, courts generally have failed, at least explicitly, to recognize the factors just explained which lessen the burden on Internet activities. Several courts have overstated the desire of states to regulate transient Internet communications and the ability of courts to exercise criminal jurisdiction over Internet activities. In this manner, some courts, such as the district court in *American Libraries Association*, have overstated the burden to interstate commerce of state Internet regulation and asserted that applying state statutes to Internet activity constitutes extraterritorial regulation.

One manner in which the potential reach of state Internet regulations has been overblown deals with the transient nature of Internet and Web operations. Due to the packet-switching technology and distributed network that the Internet uses in transporting computer data, the data sent between two computers can travel through numerous states regardless of the physical location of the originating and receiving computers. In theory, a state could attempt to regulate all Internet communications whose data transiently passes through the state. Some cases dealing with state regulation of Internet activity under the dormant commerce clause have used this theoretical possibility to overstate the potential reach of state Internet regulations.<sup>365</sup> However, transient data that passes through a state en route to its end recipient in another state does not cause any practical effect in the first state. Therefore, a state generally would not have any interest in regulating Internet communications with such a tangential relationship to that state.<sup>366</sup> A state only has an incentive to regulate Internet communications that either originate or are received physically within the geographic boundaries of that state because those

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365. See *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (noting that the statute at issue “contains no express limitation confining it to communications which occur wholly within [New Mexico’s] border” and that “there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route”); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 171 (S.D.N.Y. 1997) (noting that “a message from an Internet user sitting at a computer in New York may travel via one or more other states before reaching a recipient who is also sitting at a terminal in New York” and that “a user has no way to ensure that an e-mail [or any other Internet communication for that matter] does not pass through New York even if the ultimate recipient is not located there”).

366. See *State v. Heckel*, 24 P.3d 404, 413 (Wash. 2001) (recognizing that the statute at issue “does not impose liability for messages that are merely routed through Washington”).

are the situations when the activity can cause harmful effects in that state.

The second aspect of state enforcement of Internet regulations that courts have overstated is the limit of a state's criminal jurisdiction. More courts should acknowledge the limits that criminal jurisdiction place on the ability of the states to apply their regulations to Internet activity. As several courts and commentators have recognized, the reach of a state's regulatory power is limited by the practicalities of a state's criminal jurisdiction. Generally, states do not attempt to enforce their criminal statutes on activities that occur wholly outside of the state.<sup>367</sup> Normally, in order to be subject to prosecution in a particular state, a person must have committed at least part of the crime within that state.<sup>368</sup> A state further would have to extradite a person located in another state normally in order to prosecute them.<sup>369</sup> However, "extradition from one state to another is limited to individuals who have fled the state that seeks extradition."<sup>370</sup> Thus, it seems very unlikely that "[a] Web site operator who has never had a presence in the regulating state" would face prosecution there.<sup>371</sup> Nevertheless, states have, in limited circumstances, prosecuted defendants who, while located outside of the geographic boundaries of the state, engaged in intentional activity that affected residents of the forum state.<sup>372</sup> Despite these instances, it is very unlikely that a state could prosecute the operator of a Web site unless a court

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367. *People v. Hayne*, No. F036401, 2002 WL 470853, at \*\*9 (Cal. Ct. App. Mar. 27, 2002) (noting that "California law generally bars punishment for wholly extraterritorial offenses"); *Hatch v. Super Ct.*, 94 Cal. Rptr. 2d 453, 472 (Cal. Ct. App. 2000) ("The assumption that extraterritorial enforcement of state criminal statutes is normative is incorrect.").

368. *See People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000) ("California prosecutes only those criminal acts that occur wholly or partially within the state."); *Hatch*, 94 Cal. Rptr. 2d at 472 (stating that under California law a person "may be punished 'under the laws of this state' if they 'commit, in whole or in part, any crime within this state'" (quoting *People v. Morante*, 975 P.2d 1071, 1081 (Cal. 1999))).

369. *Goldman & Sykes*, *supra* note 128, at 815 ("For New York to enforce its criminal law against an offender in California, it must extradite him.").

370. *Id.* *See also Goldsmith*, *supra* note 332, at 1220 (recognizing that "the extradition obligation only extends to fugitives who have fled [a state], and these terms have long been limited to persons who were physically present in the demanding state at the time of the crime's commission").

371. *Goldman & Sykes*, *supra* note 128, at 815. *See also Goldsmith*, *supra* note 332, at 1217 ("A defendant's physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws.").

372. *See, e.g., Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the person] had been present at the effect."); *State v. Rossbach*, 288 N.W.2d 714, 715 (Minn. 1980) (holding that Minnesota court had jurisdiction to prosecute a defendant who fired a high powered rifle from inside an Indian reservation at a deputy sheriff standing on Minnesota land); *State v. Winckler*, 260 N.W.2d 356, 362 (S.D. 1977) (holding that South Dakota court had jurisdiction over defendants who fired several shots from Indian trust land at police authorities located in South Dakota).

could find that the operator had conducted some act in that state, and courts should stop overstating the states' enforcement capabilities.

Moreover, when a Web site operator interacts with a state resident using a Web browser, the Web site operator arguably conducts an activity in the state in which the browser user is located. One commentator has noted that:

Transactions in cyberspace involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity in one jurisdiction that causes real-world effects in another territorial jurisdiction. To this extent, activity in cyberspace is functionally identical to transnational activity mediated by other means, such as mail or telephone or smoke signal.<sup>373</sup>

In fact, some courts have held that a person who conducts an activity over the telephone at least partially "acts" within the state in which the telephone transmission is received.<sup>374</sup> Similarly, a Web site operator that interacts with a person using a Web browser in a particular state "acts," at least partially, in that state. Therefore, even if a state were able to overcome the difficulties of exercising criminal jurisdiction over the operator of a Web site whose computer server was located outside of that particular state, the state arguably would not be regulating extraterritorially if the operator of the Web site had projected itself into that state by allowing residents of that state to access the Web site. Accordingly, cases such as *American Libraries Association* have exaggerated the potential extraterritorial effect of state Internet regulations.<sup>375</sup>

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373. Goldsmith, *supra* note 332, at 1239-40.

374. See *United States v. Pezzino*, 535 F.2d 483, 484 (9th Cir. 1976) (holding that federal statute prohibiting the "transmission" of bets or wagers on sporting events over interstate communication facilities forbids both the "use of interstate facilities for sending or receiving wagering information."); *United States v. Synodinos*, 218 F. Supp. 479, 481 (D. Utah 1963) (holding a federal district court in Utah to be a proper venue for a case involving a federal statute prohibiting the "transmission" of bets or wagers on sporting events over interstate communication facilities because "the District of Utah [was] where the use of the interstate wire facilities had its ultimate impact, i.e., it was here that the messages . . . were actually received"); *State v. Meyers*, 825 P.2d 1062, 1064-65 (Haw. 1992) (upholding a conviction in Hawaii for terrorist-like threats when the defendant, while located in California, threatened a judge and his family in a telephone call to her probation officer in Hawaii).

375. One commentator further has noted that the Supreme Court cases examining the extraterritorial effect of state regulation dealt with "laws regulating purely economic activity - business takeovers and beer pricing" and that the *Am. Libraries Ass'n* case "is believed to be the first to use the concept to invalidate a state law regulating health and safety." Biddle, *supra* note 108, at 181. For that reason and the reasons noted in the textual analysis above, it can be argued that Judge Preska incorrectly held that the statute at issue in *Am. Libraries Ass'n* was a *per se* violation of the Commerce Clause. Lanin, *supra* note 3, at 1436.

*D. Transportation Cases Utilize the Pike Balancing Test and are Not a  
Monolith Prohibiting State Regulation of Specific Areas*

As explained in section III. D., when the Supreme Court has analyzed state regulations dealing with the United States highway and railway systems under the Commerce Clause, the Court has not staked these areas out as subject only to federal regulation, but instead has engaged in the same balancing analysis used in analyzing other types of state regulations.<sup>376</sup> Moreover, the Court has tended to invalidate a state's regulation of railways and highways when the regulation is widely out of step with most other states' regulation of the subject matter, thus greatly raising the cost of compliance with the regulation, or when the state's motivation in enacting the regulation was, at least in part, to discriminate against interstate commerce or to advance local in-state interests at the expense of out-of-state interests.<sup>377</sup> Therefore, asserting that the Internet should be staked out as an area solely for regulation by the federal government by analogizing the Internet to the highway or railway system greatly oversimplifies the analysis of the transportation cases. Instead, courts should analyze state Internet regulations on a case by case basis, as the Supreme Court analyzed the statutes at issue in the transportation cases, and balance the local interests furthered by the regulations against the burden that the regulations have on interstate commerce, taking into account the considerations set out in sections V. A, and V. B. State legislatures should be mindful, though, that regulation of Internet activity that is widely out of step with other state regulations of similar activity has a good chance of being invalidated.

VI. APPLYING THE PROPER CONSIDERATIONS OF BENEFITS AND  
BURDENS TO THE PIKE BALANCING TEST IN ORDER TO RECONCILE  
CASES ANALYZING STATE REGULATION OF THE INTERNET UNDER THE  
DORMANT COMMERCE CLAUSE

Taking into account the factors presented above concerning the putative local benefits of state laws that regulate Internet and Web

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376. See *supra* note 180 and accompanying text. See also Goldsmith & Sykes, *supra* note 92, at 808 ("In sum, inconsistent-regulations cases, like extraterritoriality cases, should be viewed as just another variant of balancing analysis."); James E. Gaylor, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1116 (1999) (noting that *Am. Libraries Ass'n's* "third mode of analysis, the potential for inconsistent regulation, is not an independent constitutional test" and "represents 'double-dipping' in the Commerce Clause pot").

377. See *supra* notes 193-227 and accompanying text. See also Goldsmith & Sykes, *supra* note 92, at 806-07 ("A more plausible interpretation of the inconsistent-regulations concern is that non-uniform state regulations might impose compliance costs that are so severe that they counsel against permitting the states to regulate a particular subject matter.").

activity and the burden on interstate commerce from such laws can help reconcile the case law examining state regulation of the Internet under the dormant commerce clause. Explicitly considering these factors also will bring this analysis more in line with the federalist governmental structure set out in the Constitution. This section applies these factors to the facts of three cases applying the dormant commerce clause to state regulations of the Internet: *Hatch v. Superior Court*, *Ford Motor Co. v. Texas Department of Transportation*, and *American Libraries Association v. Pataki*.

#### A. *Hatch v. Superior Court*

In *Hatch v. Superior Court*, the California statute at issue prohibited a person from knowingly subjecting a minor to harmful material over the Internet in order to seduce the minor.<sup>378</sup> The statute involved a strong interest on the part of California, protecting the health and well-being of children, and involved the exercise of a traditional police power of the state.<sup>379</sup> Therefore, a court analyzing the statute should be deferential to the California legislature's judgment regarding the local benefits of the statute.

In analyzing the burden to interstate commerce from the statute, a court, first should analyze the interactivity of the Internet behavior being regulated. Because the statute required a person to *knowingly* subject minors to harmful material with the purpose of seducing the minor, the statute required a person to engage in interactive behavior over the Internet in order to be covered by the statute. For people to know that they are communicating with a minor, they must receive some information from the other person. Receiving information that the other person is under the age of majority takes away some of the anonymity of the Internet communication. Moreover, being put on notice that the other person is a minor, the person involved could discontinue his or her communications if he or she did not wish to subject a minor to such material. Therefore, the statute regulated interactive Internet communications and lessened the burden of complying with the California law because interactivity decreases the anonymity of the communication.

In examining the second factor, the type of commerce involved, whether more tangible or electronic, the nature of the activity that the California legislature attempted to address in the statute, pedophilia,

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378. *Hatch v. Supr. Ct.*, 94 Cal. Rptr. 2d 453, 459 (Cal. Ct. App. 2000).

379. *See supra* note 328 and accompanying text.

ultimately would take a more tangible form.<sup>380</sup> A person interested in engaging in such activity will desire ultimately to meet in person with the minor with whom he or she is communicating. Such a face-to-face meeting will take away any remaining anonymity and alert the person to the jurisdiction in which he or she is carrying out the prohibited acts. Furthermore, in order to meet face-to-face, the person will need to obtain information about the geographic location of the person with whom he or she is communicating. In fact, not only did the defendant in *Hatch* communicate with a person he believed to be a minor over the Internet, but the defendant also met face to face with the supposed minor twice. Moreover, pedophiles most likely will want to communicate with minors located in close geographic proximity to them, and therefore, much of the Internet communication will be initiated and received in the same state. Thus, it is very unlikely that a person prosecuted under the statute would be unaware of the jurisdiction regulating their activities. Because the statute ultimately regulates a more tangible activity, the burden of complying with the California statute, again, is decreased due to anonymity being lessened.

The third factor, availability of technology to verify the geographic location of Internet users, is inapplicable in *Hatch*. Because the statute regulated interactive Internet communications and dealt with a more tangible type of commerce, the use of technology was not necessary to decrease the anonymity of the communications.

When the proceeding factors are considered, the putative benefits of the California statute outweighed the minimal burden that the statute placed on interstate commerce. The statute involved the exercise of a traditional state police power and concerned a strong state interest, protecting children. Moreover, because the statute was aimed at interactive Internet behavior and ultimately involved activity of a more tangible nature, the burden on interstate commerce was slight because these two attributes take away much of the anonymity of the communications. Therefore, the court in *Hatch* correctly held that the California statute was valid under the dormant commerce clause.

#### B. Ford Motor Co. v. Texas Department of Transportation

Similarly, applying the factors explained above to *Ford Motor Co. v. Texas Department of Transportation* better explains the result reached. In *Ford*, the Texas motor vehicle code prohibited car manufacturers from

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380. However, admittedly, this type of activity can only meet the very loosest definition of commerce.

acting in the capacity of a car dealership.<sup>381</sup> However, Ford had set up a Web site in which residents of the Houston metropolitan area initially could view vehicles that had been leased previously and to which Ford still owned title, and then these residents could have a specified vehicle delivered to a local dealership to view the vehicle in person and test drive it.<sup>382</sup> The Texas regulations concerned a strong state interest, protecting Texas residents from unfair business practices. Even so, since the regulations smacked somewhat of economic protectionism—protecting local Texas dealerships from competition with out-of-state car manufacturers—a court might weigh this interest slightly less heavily than the interest involved in *Hatch*. Because of this, a court might not give the Texas legislature's evaluation of the local benefits of the regulations in this situation quite the deference that the California legislature received in *Hatch*.

Nevertheless, in examining the burden on interstate commerce created by applying the Texas Motor Vehicle Code to Ford's Web site activity, one finds that the burden was even less than the burden imposed by the California statute in *Hatch*. First, the Ford Web site was interactive, allowing Ford to discover the geographic location of the potential buyer through the buyer's request to have the car delivered to a local Houston dealership. Second, Ford's Web site involved a tangible form of commerce, the sale of an automobile, as opposed to electronic commerce, allowing Ford the opportunity to verify the geographic location of the buyer. Third, the high degree of interactivity of the Web site and the tangible nature of the commercial transaction taking place on the Web site made the availability of technology to verify the geographic location of the user of the Web site inapplicable because Ford already was aware of the site user's geographic location.<sup>383</sup>

Ultimately, the Fifth Circuit correctly upheld the application of the Texas Motor Vehicle Code to the Ford Web site under the Commerce Clause. Arguably the benefits from the application of the Texas motor vehicle code are not as significant as those in *Hatch* because the state interest that the Texas regulations furthered is weaker. However, the interactivity of the Ford site and the tangible commerce that the Web site facilitated greatly decreased any anonymity concerning the physical location of users of the site. Consequently, the burden of the Texas regulation on interstate commerce was minimal. Therefore, the local

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381. *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905, at 908 (W.D. Tex. 2000), *aff'd*, 264 F.3d 493 (5th Cir. 2001).

382. *Ford Motor*, 264 F.3d at 499; *Ford Motor*, 106 F. Supp. 2d at 907.

383. This factor presumably would become relevant only when the regulation concerned affects Web sites that are more passive or involve strictly in electronic commerce.



benefits of the regulations outweighed the minimal burden on interstate commerce.

C. *American Libraries Association v. Pataki*

Applying these same factors to *American Libraries Association* would result in invalidation of the statute at issue, although it becomes a much closer determination, without staking out the Internet as a federal preserve and upsetting the delicate balance of the federalist governmental structure set out in the Constitution. In *American Libraries Association*, the New York statute at issue criminalized the intentional use of the Internet to communicate to a minor material of a sexual nature that was “harmful to minors.”<sup>384</sup> The statute provided a defense if the defendant, among other things, “made a reasonable effort to ascertain the true age of the minor,” “had taken reasonable and effective” actions to prevent minors from accessing the site, or restricted access to the site by utilizing a credit card identification system or by requiring users to have a PIN.<sup>385</sup> Thus, like *Hatch*, the New York statute concerned a strong state interest, protecting the health and welfare of children, and the exercise of a traditional state police power.

In examining the first factor of the analysis, the interactivity of the Web sites and Internet conduct that the statute affected, the statute arguably could reach information posted by passive Web sites if the “intent” requirement was read liberally. Read liberally, the statute could reach a person or entity that simply intended to post or communicate the material considered “harmful to minors” and did not necessarily intend for such material to reach a minor. Because under such a construction of the statute the operator of a Web site would not have to know of the age of the recipient, the statute would cover passive Web sites that simply provide information and do not interact with users of the sites. In fact, it appears that the majority of the plaintiffs in *American Libraries Association* ran passive Web sites.<sup>386</sup> Therefore, the statute did burden interstate commerce more than the statutes in *Hatch* and *Ford* because the operator of a passive Web site may have a difficult time in determining the age or the physical location of a user of the site and the anonymity of the user is more likely to remain. Therefore, the operators of these sites would have difficulty determining whether or when they needed to comply with the New York law.

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384. *See Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997).

385. *Id.* at 163-64.

386. *Supra* note 234 and accompanying text.

With regard to the second factor of analysis, the type of commercial transactions covered by the New York statute, the statute appeared to reach purely electronic transactions. The statute would affect situations where "harmful" material, such as sexually explicit pictures, information concerning sexual conduct, and so on, was communicated to minors simply by being posted on an Internet site. These situations would not concern the physical transportation of some type of tangible good through the postal system, or some other type of carrier, to the site user.

Because the statute affected passive Web sites and strictly electronic commercial transactions, this implicated the third factor of the analysis, the availability of technology to verify the geographic location of site users. As set out in section V. B. 3., a court should take into account, when determining the burden that a state Internet regulation places on interstate commerce, the current availability of certain technology, such as credit card verification systems and PINs, that allows the operator of a Web site to get rid of the anonymity of site users and determine the physical location and other characteristics of users. In fact, the statute provided a defense to Web site operators that used such technology. However, the use of such technology would be more costly to operators of passive Web sites. Because such Web sites generally just provide information to site users, the implementation of a credit card verification system or the use of PINs would require a much larger investment in the site than the operator initially made or even contemplated.<sup>387</sup> Some of the plaintiffs in *American Libraries Association* that ran passive Web sites were non-profit organizations<sup>388</sup> with presumably less financial resources than commercial entities to implement such technology. Consequently, the costs of complying with the New York statute were relatively high for the Web sites potentially affected by the statute.<sup>389</sup>

Therefore, although the New York statute at issue in *American Libraries Association* implicated a strong state interest, protecting the health and welfare of children, the susceptibility of the statute to a liberal interpretation that would affect passive Web sites places a high burden on interstate commerce occurring over the Internet. Thus, Judge Preska was correct in invalidating the statute at issue in that case.

While the court was correct in its ruling, as has been demonstrated, the court's reasoning was flawed. In light of the proceeding factors, the

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387. Should the price of this type of technology decrease, though, it might be more reasonable to expect even a passive Web site to use it.

388. From the description of the plaintiffs provided in the case, it appears that Art on the Net and the ACLU were nonprofit organizations that ran passive Web sites. *Am Libraries Ass'n*, 969 F. Supp. at 162.

389. Presumably, if the cost of this technology decreased, the burden on interstate commerce from such a statute would decrease, and the regulation might be constitutional.

court's use of the extraterritorial analysis and the broad assertion that the Internet requires only regulation by the federal government is unwarranted. The court could have held that the statute was unconstitutional under the Commerce Clause in a manner that showed more deference to the states legitimately exercising their police powers in a manner more consistent with the federalism principles of the Constitution.

#### VII. CONCLUSION

Although the manner in which the Internet and the Web operate raises some issues with regard to state Internet regulation due to the transient and anonymous nature of Internet communications, state Internet regulations that affect more interactive Internet communications and Internet commerce dealing with more tangible types of goods can still pass muster under the Commerce Clause when the state regulations further strong state interests. In analyzing such statutes, courts do not have to engage in sweeping generalizations about the appropriateness of all state regulation of Internet activity. Instead, to more appropriately balance the states' interests in protecting the safety and welfare of their residents against the need for uninhibited commerce to occur between states, courts should examine state Internet regulations on a case-by-case basis taking into account the considerations explained above.

## Appendix

### ORIGINS AND GROWTH OF THE INTERNET

The manner in which the Internet came into being helps explain why it operates in the way that it does, and understanding the operations of the Internet allows one to appreciate fully the issues that the Internet creates for state regulation under the dormant commerce clause. This appendix provides a brief explanation of how the Internet was developed. Although most articles dealing with state regulation of the Internet do not discuss this topic in much detail, some readers may find that this brief history of the Internet provides helpful context for the issues discussed in this article.

The first computer network was developed through funding from a scientific research branch of the United States Department of Defense called the Advanced Research Projects Agency (“ARPA”).<sup>390</sup> ARPA, created by the Eisenhower administration in 1958, was a special scientific research section of the Defense Department whose stated purpose was “the bolstering of national defense.”<sup>391</sup> Nevertheless, some of ARPA’s research did not deal strictly with military capabilities.<sup>392</sup> For example, ARPA supported “leading edge” computer research,<sup>393</sup> which led to the development of the ARPANET. The ARPANET resulted from a need for time-sharing of computers.<sup>394</sup> Consequently, the ARPANET

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390. See Walt Howe, *A Brief History of the Internet*, in *THE INTERNET 3* (Gray Young ed., 1998). See generally KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1996) (providing an in-depth description of the development of the first interconnected computer network called the ARPANET). In 1971, ARPA’s name was changed to Defense Advanced Research Projects Agency (“DARPA”), and then in 1993, the agency’s name was changed back to ARPA. Barry M. Leiner et al., *A Brief History of the Internet* n.4 (2000), at <http://www.isoc.org/internet/history/brief.shtml> (Aug. 4, 2000). However, in 1996, the agency’s name was changed back to DARPA once again. *Id.* The author will refer to this agency as ARPA throughout this article.

391. See MOSCHOVITIS ET AL., *supra* note 44, at 34.

392. See *id.* (stating that because Eisenhower was a “passionate believer in scientific exploration” ARPA received some “government funds to carry out open-ended research”).

393. See HAFNER & LYON, *supra* note 27, at 12-13 (stating that ARPA’s Information Processing Techniques Office, the section of ARPA “charged with supporting the nation’s most advanced computer research-and-development projects,” had a “strong connection to the leading edge of the computer research community”).

In all, there were some twenty principal investigators, supporting dozens of graduate students, working on numerous projects, all of them funded by [ARPA’s Information Processing Techniques Office]. Most of [this section’s] \$19 million budget was being sent to campus laboratories in Boston and Cambridge, or out to California, to support work that held the promise of making revolutionary advances in computing.

394. *Id.* at 10 (stating that the purpose of the ARPANET was “to link computers at scientific laboratories across the country so that researchers might share computer resources”); MOSCHOVITIS ET AL., *supra* note 44, at 34-35 (stating that an ARPA manager, Bob Taylor, directed the agency to

initially connected researchers at various universities and research institutes and allowed them to access computers in other locations.<sup>395</sup> By 1979, more than a hundred different sites were connected by the ARPANET.<sup>396</sup>

In order to increase the usefulness of the ARPANET, ARPA supported the development of computer messages, called protocols, that not only allowed several computers to communicate, but that allowed different networks to communicate with one another.<sup>397</sup> This protocol

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create the ARPANET due to “a very real need to share scarce computer resources”). *See also* *Shea v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996) (stating that the ARPANET developed out of an “experimental project” of ARPA “designed to provide researchers with direct access to supercomputers at a few key laboratories”). In the late 1960s, the large mainframe computers used for scientific research were very expensive, “ranging from \$500,000 to more than \$1 million each.” Morse, *supra* note 27 at 1118. Due to the high cost of computers at the time, it made sense financially to attempt to network several of the then existing computers to allow for greater use of these computers rather than purchasing new computers. *See* HAFNER & LYON, *supra* note 27, at 43-44 (“Researchers were duplicating, and isolating, costly computing resources. Not only were the scientists at each site engaging in more, and more diverse, computer research, but their demands for computer resources were growing faster than [ARPA’s] budget.”); Morse, *supra* note 27, at 1118 (“The demand for costly computer resources, coupled with duplication of effort caused by independent operating systems, required some means to permit a sharing of resources and research.”).

A common misconception exists that the Defense Department created the ARPANET in order to develop a communications network that could withstand a nuclear attack. HAFNER & LYON, *supra* note 27, at 10 (“Rumors had persisted for years that the ARPANet had been built to protect national security in the face of a nuclear attack. It was a myth that had gone unchallenged long enough to become widely accepted as fact.”); MOSCHOVITIS ET AL., *supra* note 44, at 35 (“It is worth noting that ARPANet was not, as is often repeated, created as part of some Cold War doomsday scenario.”); Leiner, *supra* note 390, n.5 (discussing “the false rumor started claiming that the ARPANet was somehow related to building a network resistant to nuclear war”). This misunderstanding probably arose from papers drafted in the 1960s by Paul Baran, an employee of the RAND Corporation, that conceived of developing such a computer network for this purpose. *Id.* at 25, n.5 (“It was from [Baran’s] RAND study that the false rumor started claiming that the ARPANet was somehow related to building a network resistant to nuclear war.”). *See also* HAFNER & LYON, *supra* note 27, at 54-56 (discussing in-depth Baran’s idea for a computer network, separate from ARPA’s project, for the purpose of having communications facilities that could survive a nuclear attack); MOSCHOVITIS ET AL., *supra* note 44, at 35 (“Although Baran’s work was extremely influential on the ARPANet founders, his imagined network never came to fruition.”).

The RAND Corporation was a prominent civilian defense think tank. “It was the original think tank, a strange hybrid of which the unique mission was to apply rational analysis and the latest quantitative methods to the problem of how to use the terrifying new nuclear weaponry to forestall war with Russia—or to win a war if deterrence failed.” SYLVIA NASAR, *A BEAUTIFUL MIND* (1998).

395. The architects of the ARPANET in 1969 connected computers at four different research sites, Stanford Research Institute; University of California Los Angeles, University of California at Santa Barbara and the University of Utah. Morse, *supra* note 27, at 1119; Howe, *supra* note 390, at 3. *See also* HAFNER & LYON, *supra* note 27, at 155 (describing the initial networking of these first four sites). By the end of 1971, twenty more sites were connected to the network, MOSCHOVITIS ET AL., *supra* note 44, at 35, and by August 1972, twenty-nine different sites were connected. Morse, *supra* note 27, at 1119.

396. MOSCHOVITIS ET AL., *supra* note 44, at 102.

397. *See* *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996) (“Having successfully implemented a system for the reliable transfer of information over a computer network, ARPA began to support the development of communications protocols for transferring data between

was dubbed transmission control protocol (“TCP”).<sup>398</sup> After TCP was tested in 1977,<sup>399</sup> the ARPANET finally converted to the protocol in 1983,<sup>400</sup> and several other networks began connecting with ARPANET.<sup>401</sup> At that point, a set of interconnected networks—a true “Internet” —existed. Therefore, while the Internet today may appear to be a “single, uniform network,” numerous independent networks really comprise the Internet.<sup>402</sup>

Over time, the Defense Department tired of the administrative expense of operating the network<sup>403</sup> and in 1989 dismantled the ARPANET.<sup>404</sup> By that time, though, the technology of the ARPANET had given rise to several other computer networks. One of the most significant of these was NSFNET.

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different types of computer networks.”); HAFNER & LYON, *supra* note 27, at 223-27 (describing the development of transmission control protocol, known as “TCP,” which allowed information to be exchanged between different networks); MOSCHOVITIS ET AL., *supra* note 44, at 80-82 (describing the development of transmission control protocol (“TCP”). Transmission control protocol “is the only element of the international network that must be uniform among the small networks, and it is the crucial element that makes global networking possible.” MOSCHOVITIS ET AL., *supra* note 44, at 82.

398. HAFNER & LYON, *supra* note 27, at 226 (stating that the protocol that allowed information to be transferred between networks was “called transmission-control protocol, or TCP, messages”); MOSCHOVITIS ET AL., *supra* note 44, at 65 (“A way had to be found for the three systems to communicate, and that way was the transmission control protocol (TCP).”). Later, programmers broke off the portion of TCP that dealt specifically with routing information between networks into a separate protocol called “Internet protocol” (“IP”). HAFNER & LYON, *supra* at 238. *See also* MOSCHOVITIS ET AL., *supra* at 91 (“In 1978 an idea put forth by engineers from Xerox Corporation cause[d] a TCP enhancement: Internet Protocol (IP), a separate program that handles the routing of individual messages. The TCP portion [was] now responsible only for the construction and unloading of datagrams.”). Thus, TCP became TCP/IP. HAFNER & LYON, *supra* at 238. *See also* MOSCHOVITIS ET AL., *supra* at 91 (“Together, the protocols become known as TCP/IP and represent the standard system used in most large networks.”). *See supra* notes 47-52 and accompanying text for a further explanation of the differences between IP and TCP.

399. MOSCHOVITIS ET AL., *supra* note 44, at 90-91 (describing the testing of transmission control protocol in 1977).

400. HAFNER & LYON, *supra* note 27, at 248-49 (describing the transition of the ARPANET to TCP/IP in 1983); Leiner, *supra* note 390 at 10 (“One of the more interesting challenges was the transition of the ARPAnet host protocol from NCP [Network Control Protocol] to TCP/IP as of January 1, 1983.”).

401. *See Shea*, 930 F. Supp. at 926 (stating that after TCP was developed “[u]niversities, research facilities, and commercial entities began to develop and link together their own networks implementing these protocols”).

402. THE INTERNET’S COMING OF AGE, *supra* note 3, at 29.

403. *See* HAFNER & LYON, *supra* note 27, at 255 (stating that the ARPANET “cost ARPA \$14 million a year to run” and describing the decision by the Defense Department to take the ARPANET offline).

404. *See id.* at 255-56 (describing the manner in which the Defense Department took the ARPANET offline); Leiner, *supra* note 390, at n.10 (stating that the University of California at Los Angeles commemorated the decommissioning of the ARPANET in 1989 with a symposium celebrating the twentieth anniversary of the network’s existence).

NSFNET was “a high-speed ‘backbone’ network,”<sup>405</sup> which the National Science Foundation (“NSF”) sponsored.<sup>406</sup> The NSF “was created in 1950 to promote progress in science by funding basic research and strengthening education in science,” and by the late 1970s, the NSF was an important player in the computer programming field.<sup>407</sup> NSFNET arose out of a desire of those scientists and researchers that did not do defense-related work to access other networks and better communicate with one another.<sup>408</sup> Because only people doing research for the Defense Department were able to access the ARPANET,<sup>409</sup> NSFNET allowed a new segment of the population, academics and researchers not involved in defense research, to access the Internet. NSFNET then spawned several regional networks that connected to one another through NSFNET.<sup>410</sup> This caused the number of sites connected to the Internet, mainly at universities, to increase dramatically, and by 1989, more than 100,000 sites were connected to the Internet.<sup>411</sup>

The NSF then encouraged regional networks to allow commercial use while at the same time enforcing an “Acceptable Use Policy” on NSFNET “which prohibited Backbone usage for purposes ‘not in support

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405. Networks comprised of very large communication links “that can carry relatively large amounts of traffic, typically via optical fiber cables” commonly are referred to as the Internet “backbone.” THE INTERNET’S COMING OF AGE, *supra* note 3, at 31. *See also* Burk, *supra* note 3, at 9 (“The major conduit or superhighway for a computer network is referred to as a ‘backbone’ network, which is a high capacity network linking other networks together.”).

There is no easy way to specify which networks [currently] comprise the Internet backbone. For instance, in some countries a rather modest link may serve as the local backbone. Nor do all connections between providers take place through the backbone—there is no assurance that any particular data packet will flow through any part of the Internet’s backbone.

THE INTERNET’S COMING OF AGE, *supra* note 3, at 31 n.3.

406. *Shea*, 930 F. Supp. at 926. *See also* MOSCHOVITIS ET AL., *supra* note 44, at 145 (“In 1986 the National Science Foundation (NSF) had implemented NSFnet, a faster network, to allow more connections to the ARPAnet (or Internet as it was by then popularly known).”; HAFNER & LYON, *supra* note 27, at 245 (describing how NSF came to agree “to build the backbone network, to be called NSFNET”).

407. HAFNER & LYON, *supra* note 27, at 240.

408. *See id.* at 241 (“[T]he ARPAnet was threatening to split the community of computer researchers into haves and have-nots. In 1979 there were about 120 academic computer science departments around the country, but just fifteen of the sixty-one ARPAnet sites were located at universities.”); MOSCHOVITIS ET AL., *supra* note 44, at 125 (“NSFnet allowed researchers who were *not* working on defense-related projects to get connected [to the Internet].”).

409. HAFNER & LYON, *supra* note 27, at 242 (“To be assigned a site [on the ARPANET], universities had to be involved in specific kinds of government-funded research, typically defense-related.”).

410. [T]he NSF offered that if the academic institutions in a geographic region put together a community network, the agency would give the community network access to the backbone network. . . . In response, a dozen or so regional networks were formed around the country. Each had the exclusive franchise in that region to connect to the NSFNET backbone.

*Id.* at 245.

411. MOSCHOVITIS ET AL., *supra* note 44, at 134.

of Research and Education.”<sup>412</sup> “The predictable (and intended) result of encouraging commercial network traffic at the local and regional level, while denying its access to national-scale transport, was to stimulate the emergence” and growth of several private “long-haul networks.”<sup>413</sup> The NSF finally ceased funding NSFNET in 1995, completing the transformation of the Internet “backbone” from a federally funded network primarily serving the research community to a privatized network run completely by commercial entities.<sup>414</sup> By this time, “the Internet [had grown] to over 500,000 networks on all seven continents and outer space, with approximately 29,000 networks in the United States.”<sup>415</sup>

One particular invention—the World Wide Web—helped increase the amount of traffic on NSFNET and the eventual privatized backbone networks. Up until the early 1990s, only the computer literate could use the Internet.<sup>416</sup> The World Wide Web helped change this. Tim Berners-Lee, a British network programmer at CERN, a physics institute in Geneva, Switzerland, created the “World Wide Web” (the “Web”) in order to access in a more efficient manner information stored in the institute’s various computers.<sup>417</sup> The Web used “a hypertext system to provide ‘a single user-interface to many large classes of stored

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412. Leiner, *supra* note 390 at 12.

413. *Id.* See also J. Neil Weintraut, *Introduction, in Architects of the Web: 1,000 Days that Built the Future of Business* xiii, xxi-xxii (Robert H. Reid, 1997) (describing how NSFNET technology “permeat[ed]” into corporations through engineers bringing “their university accounts and electronic mail (E-mail) addresses with them to their jobs subsequent to graduation” and how the Acceptable Use Policy “set the stage for a number of Internet engineers to start businesses to provide ‘turnkey’ Internet access services to a local region”).

414. Leiner, *supra* note 390, at 12. See also *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996) (describing how NSFNET eventually gave rise to “large commercial networks run by organizations such as Sprint, IBM, and Performance Systems International”); Weintraut, *supra* note 413, at xxii (stating that “what today we loosely call the Internet is predominately a collection of nationwide and international networks independently operated by UUNET, PSInet, NETCOM, BBN, and MCF”).

415. Leiner, *supra* note 390, at 13.

416. See *CONNER-SAX & KROL*, *supra* note 27, at 5 (stating that “the Internet of the late 80s and early 90s was hard to use,” and that while “[s]ending an email message or posting a thought to a newsgroup was fairly simple for the computer literate . . . doing anything else required a hefty knowledge of commands and options”).

417. See MOSCHOVITIS, *supra* note 44, at 149 (describing how Berners-Lee had created the Web because he had “frustrated with the absence of a network to link the massive stores of data at the institution” and because he was “[t]ired of struggling with the numerous platforms used to hold and manipulate information on isolated machines”); ROBERT H. REID, *ARCHITECTS OF THE WEB: 1,000 DAYS THAT BUILT THE FUTURE OF BUSINESS* 3 (1997) (stating that Berners-Lee “reckoned that he could come up with a better way of organizing documents and other professional information than the usual haphazard methods”); JOE HABRAKEN, *supra* note 56, at 236 (“Scientists at the CERN research laboratory developed the *Hypertext Markup Language (HTML)* so that they could exchange information about their projects over their TCP/IP network.”).



information.”<sup>418</sup> In developing the Web, Berners-Lee used special software that allowed users to display “a page on a computer screen exactly as it appears on the printed version.”<sup>419</sup> The most important part of his work on the Web was Hypertext Markup Language (“HTML”), which gave programmers a way to tell computers “how to display a document.”<sup>420</sup> Berners-Lee’s work also gave rise to the concept of “links,” which allowed people to connect to other documents through a word on, and several commands embedded in, the computer screen.<sup>421</sup> “Berners-Lee used hypertext technology to link together a web of documents that could be traversed in any manner to seek out information.”<sup>422</sup>

After Berners-Lee completed his work, others made the Web easier to use by creating Web browsers<sup>423</sup> that allowed people to better access the Web with personal computers. In the early 1990s, the National Center for Supercomputing Applications at the University of Illinois created the web browser Mosaic that added graphics to Web documents and that used software compatible with computers that ran several different types of operating systems, including Unix, Windows, and Macintosh.<sup>424</sup> Marc Andreessen, who “as an undergraduate” was “one of the original programmers” of Mosaic, then founded the Netscape company to sell the Mosaic web browser under the name “Netscape

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418. MOSCHOVITIS ET AL., *supra* note 44, at 149-50. The “interface” that Berners-Lee developed consisted of “a rasterized display of iconographic or pictorial [sic] symbols and objects typically manipulated on-screen by a pointer controlled by a pointing device such as a mouse or trackball.” Lanin, *supra* note 3, at 1426 n.18 (citing conversation with Nathan Raymond (Feb. 21, 1999)).

419. MOSCHOVITIS ET AL., *supra* note 44, at 150.

420. CONNER-SAX & KROL, *supra* note 27, at 6.

421. *See id.* at 6 (“But what really caught people’s imagination was the idea of a *link*. Now, documents could embed relationships; you could jump from one document to another, make lists of your favorite web sites, and even build some simple games.”); Howe, *supra* note 390, at 6 (stating that Berners-Lee’s new protocol “was based on hypertext—a system of embedding links in text to link to other text”). Berners-Lee also created Hypertext Transfer Protocol, known as “HTTP,” and the Universal Resource Locator, known as “URL.” MOSCHOVITIS ET AL., *supra* note 44, at 150. HTTP “serves as the protocol for accessing data and traversing hypertext links.” MOSCHOVITIS ET AL., *supra* note 44, at 164. An URL is “an address scheme for pointing the system to a particular location within ‘the Web’ information space.” MOSCHOVITIS ET AL., *supra* note 44, at 164. *See infra* notes 103-110 and accompanying text for further explanation of how the Web works.

422. CONNER-SAX & KROL, *supra* note 27, at 107.

423. “[B]rowsers are [software] programs that allow users to seek, retrieve, and read hypertext documents.” MOSCHOVITIS ET AL., *supra* note 44, at 172. *See also* Lanin, *supra* note 3, at 1426 n.20 (describing “Web browsing” as “the process by which a computer user connected to the Internet may view hypertext information presented in ‘pages’ of content, and call up other ‘pages’ through links embedded in the hypertext”).

424. CONNER-SAX & KROL, *supra* note 27, at 6; Weintraut, *supra* note 413, at xxiv-xxv. *See also* MOSCHOVITIS ET AL., *supra* note 44, at 171-73 (describing the creation of the Mosaic web browser).

Navigator.”<sup>425</sup> The combination of the Web and browsers that made the Web more user-friendly caused “the explosive growth that has made the Internet what it is today.”<sup>426</sup>

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425. CONNER-SAX & KROL, *supra* note 27, at 6. *See also* MOSCHOVITIS ET AL., *supra* note 44, at 176-77 (describing the founding of Netscape Communications Corporation).

426. CONNER-SAX & KROL, *supra* note 27, at 6. *See also* Howe, *supra* note 390, at 6 (“The development in 1993 of the graphical browser Mosaic by Marc Andreessen and his team at the National Center For Supercomputing Applications (NCSA) gave the [Web] protocol its big boost.”).