Georgia State University Law Review

Volume 16
Issue 4 *Summer 2000*

Article 2

6-1-2000

Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech

Daniel C. Farber

Follow this and additional works at: https://readingroom.law.gsu.edu/gsulr

 Part of the Law Commons

Recommended Citation

Daniel C. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 Ga. St. U. L. Rev. (2000).
Available at: https://readingroom.law.gsu.edu/gsulr/vol16/iss4/2

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

EXPRESSIVE COMMERCE IN CYBERSPACE: PUBLIC GOODS, NETWORK EFFECTS, AND FREE SPEECH

Daniel A. Farber†

"Breaking down barriers is controversial work."[1]

INTRODUCTION

"[S]peech should not be treated as a simple commodity,"[2] warns a leading scholar. Indeed, a stark line separates the legal regimes governing commodities and speech. Currently, restrictions on property, for example, are considered mere economic regulations and subject to scant judicial review. Restrictions on speech, in contrast, are constitutionally suspect and often subject to strict scrutiny.[3] Generally, it is not difficult to distinguish the regulation of commodities from the regulation of expression.[4] True, the same transaction may involve both—selling a book involves the transfer of both a physical object and of ideas. Usually, however, it is easy enough in today's world to say which aspect is the target of a particular regulation.

In tomorrow's world, however, the two categories will probably be more difficult to distinguish, a change that is already underway.[5] Expressive commodities—economically

---

† McKnight Presidential Professor of Public Law and Associate Dean for Faculty and Research, University of Minnesota. Thanks are due to Dan Burke, Gil Grantmore, David McGowan, and Suzanna Sherry for their very helpful comments, and to Katie Moerke for research assistance.

1. *Storm over Globalization,* THE ECONOMIST, Nov. 27, 1999, at 15.

2. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 Yale L.J. 1757, 1780 (1995). *Cf.* RONALD COLLINS & DAVID SKOVER, THE DEATH OF DISCOURSE 77, 80, 114 (1996) (arguing that the marketplace of ideas has become a "junkyard of commodity ideology").

3. *See* DANIEL A. FARBER, THE FIRST AMENDMENT (1998) (summarizing modern First Amendment doctrine); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 387-93 (5th ed. 1995) (discussing the rational basis test).

4. Commodities are usually physical things—wheat, cars, or cash—or else services that modify those things—threshing for wheat, tune-ups for cars, or storage for cash. Expression, on the other hand, is designed to change people's minds rather than (at least directly) their bodies.

5. For a useful recent overview of the Internet and its legal implications, see

Published by Reading Room, 2000

HeinOnline -- 16 Ga. St. U. L. Rev. 789 1999-2000

valuable information transmissions—often can be seen as either commodities or expression. Speech regulations may no longer seem so sharply unlike commercial regulations, as the boundary between commerce and speech erodes.

In an information economy, many transactions do not involve physical "things" but only the transmission of information. Rather than cash changing hands, a buyer may make a financial transfer electronically—which is to say, by sending an encrypted message of a certain kind. At the same time, many of the products sold are themselves information packages rather than "things": goods such as movies, music, and software.[6] Even today, "work increasingly is work with information rather than work with tangible goods."[7] In short, "[i]n an economy in which the core activity is informational,"[8] distinguishing commodities from expression becomes ever more difficult.

The increasingly permeable boundary between expression and commodity may change the way we look at each. On the one hand, we may sometimes find it useful to focus on the ways in which a restriction on expression (such as restrictions on "adult" information content) functions like some familiar forms of economic regulation. On the other hand, conventional economic regulations may begin to pose First Amendment issues when applied to cyberspace activities rather than "things." Thus, the eroding boundary poses both intellectual opportunities and doctrinal challenges.

Part I of this Article considers the threat that First Amendment doctrine poses to the goals of economic regulation. Constitutional doctrines governing economic regulations are quite permissive. But as informational transfers replace traditional commodity activities, those doctrines may be displaced by First Amendment rules. First Amendment rules are far more libertarian—indeed, an information economy governed by the First Amendment would not look much different from the laissez faire world championed by economic libertarians. Assuming that our political culture will not support

---

Developments in the Law—The Law of Cyberspace, 112 HARV. L. REV. 1574 (1999).

6. *See* Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 948 (1998).

7. M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1697 n.48 (1995).

8. *Id.*

the elimination of the modern regulatory state, the challenge will be to rebuild the wall between speech and commodity in a way that prevents censorship of one without constricting regulation of the other.

Part II reexamines some familiar problems of online speech regulation by analogizing them to an equally familiar form of commodity regulation, international trade barriers. The basic thought is that the Internet is to the production of local culture what international trade is to the local manufacture of goods. By allowing ready import and export of information, the Internet widens the "marketplace of ideas," thereby introducing new competitors and allowing more efficient production, but also imperiling the values of local communities. The resulting issues have generated vigorous discussion in the trade arena, a discussion that may have implications for First Amendment thought. Thus, Part II considers how the blurring boundary between trade in ideas and trade in commodities creates a potentially useful intellectual opportunity to improve our understanding of efforts to protect local culture.

It may be helpful at the outset to see how these perspectives on the Internet are connected. A posting on the Internet has three stages, each with its own economic characteristics and associated legal regime. First, someone must produce the posting. This production process will probably have decreasing returns to scale: spending twice as much money on content is unlikely (at least past a certain point) to double the value of the presentation. The legal regime governing physical production, content creation, contracts between producers, anticompetitive conduct, and so forth, generally is not sharply distinguished from that governing other production processes.

Second, the material must be posted. As discussed in Part I, distribution of information has the attributes of a public good because it is difficult for the distributor to recover the information's full value to users. Law responds to this difficulty with two quite distinct strategies. Copyright law assists the producer by creating intellectual property rights, thereby broadening the producer's ability to recover the value of information from consumers. This is a particularly useful solution for certain kinds of uses, such as copying of digital material. But this solution is less efficient and more difficult to implement for other uses, such as oral repetition of material,

HeinOnline -- 16 Ga. St. U. L. Rev. 791 1999-2000

reuse of the ideas contained in material, or creative refashioning of the material. To prevent excessive burdens on these uses, the First Amendment largely deregulates those aspects of the materials that are most susceptible to reuses other than direct copying. The big problem here for expressive commodities is identifying which commodities the First Amendment should protect.

Third, consumption of the material may involve network effects. Humans are social animals, and information may have more value when they share it. Being the only person in an Internet discussion group is essentially valueless; only the participation of others makes the activity worthwhile. More generally, participation in an activity may gain value because of its role in a local culture—if you see the same movies as your friends, then you share a common set of cultural references, jokes, allusions, and subjects for conversation. Because of these network effects, the Internet significantly impacts the formation and the maintenance of cultural norms. By reducing communication barriers between people, it can have effects not unlike those of lowered trade barriers. Like the World Trade Organization (WTO), the Internet is a powerful instrument of globalization. International trade law and its domestic analogue, the dormant commerce clause, may provide useful perspectives on regulatory issues. These issues are considered in Part II. Here, the big problem for expressive commodities is that the Internet threatens what limited power local communities currently have to maintain their cultural integrity.

This Article is intended as an exploration of these emerging issues, not as a definitive resolution.[9] The Internet is young, and much of the speculation about its further development will undoubtedly turn out to be wrong. Our thinking about the Internet is equally young, and trying to resolve the issues at this early point would be foolhardy. As the Internet evolves, our legal culture will also evolve in ways that are not easily foreseeable.[10] Clearly, however, it is not too early to begin

9. To the extent it seeks to use the law relating to "things" to help illuminate the law relating to ideas, this Article can be considered a continuation of the project begun in Daniel A. Farber, *Afterword: Property and Free Speech*, 93 NW. U. L. REV. 1239 (1999).

10. *See* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744-45 (1995).

grappling with the issues. Indeed, we have very little choice as a society but to do so.

I. COMMERCE VERSUS SPEECH: INFORMATION AS PUBLIC GOOD

As discussed later in Part II, it may sometimes be helpful to focus on the "commodity" aspect of Internet expression. The converse situation—the expressive aspect of Internet commodities—poses a more serious problem. Putting aside federalism doctrines like the dormant commerce clause, governments have almost a free hand in regulating commodity transactions. However, the First Amendment sharply limits their ability to regulate expression. To the extent that it becomes difficult to tell the difference between commodity transactions and expression—because both are merely transmissions of digital strings—the First Amendment regime may begin to encroach upon areas previously considered merely economic regulation. The result could be a substantial reduction in the government's regulatory power over the economy.

We begin by observing how an overly enthusiastic application of the First Amendment online could turn the e-world into Epstein's world[11]—a haven for unregulated economic activity. We then briefly consider some of the current pressure points, where the line between speech and economic conduct is under stress. Finally, we consider two possible solutions to this problem. One is the commercial speech doctrine, which currently covers the intersection between speech and economic transactions. This doctrine does not, however, provide a satisfactory resolution of the broader problem. The other possible solution, which seems more promising, is borrowed from economics and focuses on the public good aspect of information.

A. The Transformation of Commerce into Speech

Defining the appropriate domain of the First Amendment has never been completely straightforward: the line between speech

11. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

and conduct can prove an elusive one. But the problem is much more pressing on the Internet because of the nature of Internet regulations. Although hardware regulations could conceivably raise free speech concerns, the kinds of Internet regulations that are most likely to cause concern generally do not involve the purely "conduct" element of the transmission. No one, for example, has First Amendment concerns about the rules governing the voltage of the electronic signal. Rather, the problematic rules are concerned with what would be considered content in other contexts: a digital sequence that could be precisely transcribed into print as a sequence of symbols. Yet, if we hold that the transmission of these sequences is always "speech," a huge number of commercial and financial transactions (none of which would enjoy First Amendment protection if accomplished through non-electronic means) suddenly qualify for First Amendment protection. The problem, then, is where to draw the line between speech and conduct online. Failure to draw such a line, as we will see, would go far toward eliminating the modern regulatory state. Whether or not that is considered a desirable goal, it seems unlikely that our current political culture would countenance this result.

Admittedly, the goal of curtailing the regulatory state is not without its enthusiasts. During the past two decades, many Americans have thought that government regulation has gone too far, that the federal government has become too powerful, and that we need to "get the government off peoples' backs." The Reagan presidency was at least, in part, dedicated to implementing that viewpoint. Although the policy perspective is commonplace, it was less than obvious even to most of its advocates that the Constitution itself banned most forms of government regulation. Richard Epstein has argued, however, that most government regulations violate the Takings Clause of the Constitution and its companion, the Contracts Clause.[12]

An anonymous critic once suggested that what Epstein really wants is to shorten the First Amendment to its initial five words: "Congress shall make no law." Although Epstein's views are

12. Epstein makes the case for this vision in his book TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN. For a more extensive discussion of his theory, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS ch. 4 (forthcoming).

more complex—for instance, he does see some role for environmental regulation—his version of the Constitution would eliminate most of the laws passed during and since the New Deal. He is not alone, either in taking this position as a matter of policy or even in his interpretation of the Constitution, but he has been by far the most articulate advocate for this constitutional vision.

Indeed, the anonymous witticism offers a grain of insight because Epstein's constitutional vision looks very much like what we would expect if First Amendment doctrine applied to all transactions, rather than being limited to speech. Epstein's world, in a sense, is the First Amendment "writ large."[13] He explains his vision in a recent book, *Simple Rules for a Complex World*.[14] The simple rules are, in a nutshell, "self-ownership, or autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; and takings of property for public use on payment of just compensation."[15] The overlap with the regime for speech regulation is striking. The First Amendment stresses autonomy[16] but provides exceptions where speech merges into aggression in the form of violence[17] or some other torts.[18] It also recognizes a more general basis for regulation when necessary to serve a compelling government interest.[19] Restrictions on the distribution of speech to the public are also subject to judicial scrutiny (the "free exchange" element of Epstein's list).[20] The

13. Notably, Coase has called for eliminating the difference in standards of review for speech regulation and economic regulation. *See* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2, 14, (1977).

14. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

15. *Id.* at 53. For a critique of Epstein's views, see Eric W. Orts, *Simple Rules and the Perils of Reductionist Legal Thought*, 75 B.U. L. REV. 1441 (1995).

16. *See* FARBER, *supra* note 3, at 4 (describing autonomy value); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591 (1982) (defending autonomy theory of First Amendment); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

17. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a state may only prohibit speech inciting imminent violence); FARBER, *supra* note 3, at 68-72.

18. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (allowing defamation actions against public officials under limited circumstances); FARBER, *supra* note 3, at 79-101 (explaining current law regarding application of First Amendment to tort actions).

19. *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991) (recognizing "compelling interest" exception to First Amendment but finding exception inapplicable on facts of case).

20. Distribution restrictions often seem to take the form of "time, place, or manner"

"first possession" element for speech is supplied by copyright law and similar doctrines, which are considered consistent with the First Amendment.[21] About the only element arguably missing from the speech regime is one that actually makes Epstein's regime arguably a bit *less* libertarian: the just compensation principle.

The conventional wisdom is that the New Deal banished the ghost of *Lochner*.[22] This is surely correct, to the extent that *Lochner* is considered a general approach to constitutional issues.[23] Yet, something very much like *Lochner*—an intensely libertarian approach to judicial review—reigns in the more limited arena of First Amendment law. The risk is that this particular ghost may get loose in cyberspace, where speech and conduct are more difficult to distinguish.[24]

There is no immediate likelihood that the entire economy will be moved online and blanketed with First Amendment protection. But there are signs of increasing difficulty in distinguishing speech from conduct on the Internet. The trouble spots seem to fall into two categories.

The first category involves functional components of the cyberworld, such as computer code of various kinds.[25] Encryption software provides a striking example. A panel of the Ninth Circuit recently held that the First Amendment protects the posting of this software on the Internet, at least under some circumstances.[26] In contrast, another court held that domain

---

restrictions, which are subject to intermediate scrutiny under the First Amendment. *See* FARBER, *supra* note 3, at 176-77.

21. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (upholding law protecting rights of performer against media infringement).

22. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum hours law as violation of freedom of contract). *Lochner* was effectively overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding the constitutionality of a minimum wage law for female workers).

23. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 3, at 374-93.

24. Epstein would presumably view this risk as a desirable opportunity rather than a threat. A different threat of *Lochnerism* is presented by the possibility that online materials will be designed in a way that in effect gives the producer iron-clad property rights over any use. *See* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998).

25. *See* Dan L. Burk, Patenting Speech (on file with author).

26. Bernstein v. United States Dept. of Just., 176 F.3d 1132 (9th Cir. 1999), *opinion withdrawn and reh'g en banc granted*, 192 F.3d 1308 (9th Cir. 1999). *But see* Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) (rejecting a similar First Amendment claim).

names are not protected speech.[27] At present, this poses a somewhat esoteric problem. However, it promises to become more widespread as computer operations are more integrated into the Internet, so that it will become more difficult to draw a line between software and databases held by the user and Internet transmissions.

The second category involves the burgeoning provision of services online. One flourishing example is online gambling, which has been the subject of considerable debate.[28] Another example (some would say a variant of the first) is the creation of online stock exchanges.[29] Online auctions are now beginning to pose the same issue. Similar problems are presented in the professions, such as telemedicine consultations by physicians[30] or interstate client-contacts by lawyers.[31] In one sense, these transactions involve nothing but the transmission of information, a form of speech; in another sense, however, they are exactly the sort of economic transactions that the government has long been accustomed to regulating. Where to draw the line?

B. A Possible Halfway Point: Commercial Speech Online

Until now, the most extensive judicial experience with the speech/commodity boundary has taken place in the realm of commercial speech.[32] Applying the commercial speech doctrine to Internet transactions seems in some ways an attractive solution: it builds on previous judicial experience with the

---

27. *See* PGMedia, Inc. v. Network Solutions, Inc., 51 F. Supp. 2d 389 (S.D.N.Y. 1999), *aff'd sub. nom*, Name Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000) (finding that existing domain names are not protected speech but declining to adopt categorical rule).

28. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, at 1222 n.98, 1223 n.101, 1238 (1998).

29. *See* Tamar Frankel, *The Internet, Securities Regulation, and Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1340-53 (1998).

30. *See* Kristin B. Keltner, *Networked Health Information: Assuring Quality Control on the Internet*, 50 FED. COMM. L.J. 417, 425-26 (1998); Deborah Pergament, *Internet Psychotherapy: Current Status and Future Regulation*, 8 HEALTH MATRIX 233, 263-64 (1998).

31. *See* Michael P. Malakoff & David W. Snyder, *Lawyer Advertising on the Internet: Ethical Quagmires and Global Opportunities*, 1047 PRAC. L. INST. 131 (1998).

32. For overviews of commercial speech doctrine, see FARBER, *supra* note 3, at 149-66; NOWAK & ROTUNDA, *supra* note 3, at 1062-89.

speech/commodity boundary, and it provides something of a compromise to the extent that commercial speech receives less than full constitutional protection.[33] Unfortunately, as we will see, this solution faces some severe difficulties.

1. Does the Doctrine Apply?

The first question is whether the doctrine applies at all. The Supreme Court's most extensive discussion of commercial speech can be found in *Bolger v. Youngs Drug Products Corp.*,[34] which struck down a federal ban on unsolicited mailings of contraceptive advertisements.[35] The mailings in question promoted the use of contraceptives and described the seller's products.

The Court noted that these pamphlets could not be considered "merely as proposals to engage in commercial transactions."[36] Moreover, the fact that they were advertisements did not necessarily make them commercial speech; after all, political ads are not uncommon.[37] Nor was it sufficient that the manufacturer had an economic motive for the mailing, or that the materials identified a specific product.[38] Nevertheless, the Court held that the combination of these factors supported the conclusion that the mailings were commercial speech.[39] The fact that they also discussed issues of broader concern was not enough to exempt them from this classification: "A company has the full panoply of protections available to its direct comments on public issues, so there is no

33. *See* Kristen Green, *Marketing Health Care Products on the Internet: A Proposal for Updated Federal Regulations*, 24 AM. J.L. & MED. 365, 382 (1998) (discussing hypertext links from drug industry promotional pages); Katsh, *supra* note 7, at 1681, 1697 n.48.

34. 463 U.S. 60 (1983).

35. *See id.* at 62. A condom manufacturer proposed to mail pamphlets promoting its products but also discussing sexually transmitted diseases and birth control. One pamphlet described the use of condoms and provided detailed descriptions of some of the manufacturer's products. The other pamphlet was entitled "Plain Talk about Venereal Disease" and discussed the use of condoms as means of preventing disease. The second pamphlet contained no identification of the manufacturer or its products except at the bottom of the last page, which identified the pamphlet as a public service by the manufacturer and also gave the brand name of the product. *See id.* at n.4.

36. *Id.* at 66.

37. *See id.*

38. *See id.*

39. *See id.*

reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.[40]"

The Court in *Bolger* was fairly cautious in its treatment of the definitional question. On the one hand, the Court seemed somewhat diffident in classifying the pamphlets as commercial speech. On the other hand, it carefully reserved the question of whether all three of the characteristics had to be present to justify a finding of commercial speech, leaving open whether "corporate image" advertising could be regulated as commercial speech.[41] Thus, after *Bolger*, we know that commercial speech includes any direct proposal of a commercial transaction, as well as economically motivated ads that identify a specific product. The precise boundary between commercial and noncommercial speech, however, is yet to be defined.

Nevertheless, it would be a considerable stretch to classify as commercial speech the furnishing of online services or software. Posting encryption software on a Web site and online gambling are a far cry from the kinds of commercial solicitation that the Court has previously considered. Moreover, a good many offline transactions involve speech—for instance, negotiations between firms—and the commercial speech doctrine has never been thought to govern those transactions. Thus, it seems unlikely that the Court would apply the commercial speech doctrine.

2. Would the Doctrine Work?

A more serious problem is that the commercial speech doctrine would probably provide very little assistance in resolving Internet issues (apart from those merely involving advertising). The Supreme Court announced the current test for regulations of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[42] In an effort to encourage electrical conservation, a state utility commission banned almost all promotional advertising by utilities. In the course of striking down this ban, the Court announced the following standards for reviewing regulations of commercial speech:

40. *Id.* at 66.
41. *See id.* at 67 n.14.
42. 447 U.S. 557 (1980).

HeinOnline -- 16 Ga. St. U. L. Rev. 799 1999-2000

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[43]

The ban on utility advertising failed the final element of this test because it was broader than necessary to serve its conservation goal.[44]

The *Central Hudson* test can be broken into two parts. The threshold inquiry is whether the regulated speech is misleading or concerns an illegal activity. If the regulation passes this threshold, it then faces a three-prong inquiry: (a) Is the interest identified by the government a "substantial" one? (b) Does the regulation "directly" advance the governmental interest? (c) Is the regulation tailored to the governmental interest? This three-prong inquiry is essentially a watered-down version of the compelling interest test, which requires a less substantial interest to justify regulation and less precision in the targeting of the regulation. Thus, under *Central Hudson,* speech that truthfully advertises a lawful activity receives less constitutional protection than other forms of speech.

Uneasiness over the status of truthful commercial speech was reflected in *44 Liquormart, Inc. v. Rhode Island,*[45] in which the

---

43. *Id.* at 566.

44. This element of the *Central Hudson* test might be confused with a "least restrictive alternative" analysis. In a later case, however, the Court made it clear that the government does not need to demonstrate that it used the least restrictive means. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989). The Court reaffirmed that regulations of commercial speech are not subject to the overbreadth doctrine. What the government does need to show is that speech regulations are narrowly tailored to achieve their goals. Thus, it is not *necessarily* fatal to a regulation that a court can imagine a less restrictive means of achieving the goal, or that the court can imagine examples of speech covered by the regulation that might not cause the kind of harm that the regulation is designed to curb. On the other hand, when the state has obviously less restrictive ways to achieve its goal, or much of the speech governed by the regulation is harmless to the state's asserted interest, it is difficult to maintain with a straight face that the regulation is narrowly tailored. *See id.* at 474-77.

45. 517 U.S. 484 (1996).

Court struck down a statute forbidding price advertising for alcohol except at the place of sale.[46] The Court was badly divided, with five Justices indicating unhappiness with the reduced constitutional protection given truthful commercial speech.[47] Should the Court reject this prong of *Central Hudson* in favor of more searching review, the gap between commercial speech doctrine and the remainder of the First Amendment will narrow. Even if the reduced level of scrutiny for regulations of truthful, lawful speech does survive, it still greatly exceeds the scrutiny generally applied to economic regulations, the "rational basis" test.[48] Thus, if we are looking for a means to avoid economic libertarianism on the Internet, we have to look elsewhere.

The other portions of *Central Hudson* allow relatively free regulation of deceptive speech and of speech relating to illegal transactions. The deceptive prong is not particularly helpful, but the illegal transactions concept seems more promising. One might well say, for example, that posting encryption software is part of an illegal transaction and therefore subject to regulation even if the posting is akin to commercial speech. But this analysis has some significant problems.

The first problem is the difficulty of defining when speech is part of an illegal transaction. The idea seems to be that the Internet is used as one step in a transaction beginning and ending in the "real world."[49] This rationale would empower the

---

46. *See id.*

47. *See* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: the Implication of* 44 Liquormart, 1996 SUP. CT. REV. 123 (1996). Although seven Justices agreed that the advertising ban failed to pass the *Central Hudson* test, four Justices thought that "special care" was required in reviewing regulations designed to prevent truthful information from reaching the public (including Justice Thomas, who argued that regulations designed to keep consumers ignorant are per se invalid). Four other Justices believed that the normal *Central Hudson* test applied, while Justice Scalia argued that the Court should revisit the entire area of commercial speech and attempt to discover whether advertising was regulated at the time the First Amendment was adopted. *See id.*

48. *See id.*

49. *Cf.* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). The Sixth Circuit in *Thomas* rejected the defendant's claim that, because a GIF file is composed of an "intangible string of 0's and 1's," it is an "intangible" which is exempt from the federal statute governing transportation of certain goods in interstate commerce. *Id.* at 706. The Court reasoned that "the transmissions began with computer-generated images in California and ended with the same computer-generated images in Tennessee. The manner in which the images moved does not affect their ability to be viewed on a

state to regulate Internet transactions so long as the end result of the transaction is an unlawful physical event. But the reason for regulating speech is usually the fear that it will lead to some harmful result, so this rationale sweeps too widely. The solution would seem to be a requirement that the harmful outcome be a *direct* result of the transmission; in other words, the transmission serves as an integral part of the illegal transaction. However, making these distinctions sufficiently firm for First Amendment purposes would not be an easy task.

The second problem relates to the prohibited harmful outcome. Here, the difficulty is that commercial speech is unlawful in connection with an illegal transaction only when the government also has authority to ban the transaction itself.[50] Quite often, however, the objectionable part of the transaction will occur in another state, as when the government fears that posted software will be misused when downloaded elsewhere. This raises vexing issues of jurisdiction over extraterritorial events, which so far remain unanswered.[51] (It also involves a problem considered in Part II, the extent of federalism's limitation on state regulation of the Internet).[52] An even more serious difficulty will arise when life in cyberspace becomes sufficiently well developed that people can accomplish many of their purposes completely online without ever performing a physical act that the government would otherwise regulate in "real space."

---

computer screen in Tennessee or their ability to be printed out in hard copy in that distant location." *Id.* at 706-07; *see also* United States v. Gilboe, 684 F.2d 235, 238 (2d Cir. 1982), *cert. denied,* 459 U.S. 1201 (1983) (holding that the transmission of electronic signals can be prosecuted as fraudulent transfer of money where the "beginning of the transaction is money in one account and the ending is money in another"). The intangibility of digital transmissions also raises similar questions about whether Internet access is a "distribution" under the copyright statute. *See* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet,* 22 U. DAYTON L. REV. 547, 556-57 (1997).

50. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (ruling that the state cannot ban advertising of out-of-state abortions when such abortions are lawful in the state where they will be performed but illegal in the state where advertised).

51. *See, e.g., Developments, supra* note 5, at 1696-1703.

52. See *infra* Part II; *see also* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 167 (S.D.N.Y. 1997) (discussing state efforts to regulate out-of-state postings by attorneys); Lawrence Lessig, *The Zones of Cyberspace,* 48 STAN. L. REV. 1403 (1996) (discussing extraterritoriality issues in regulating cyberspace).

In short, the "illegality" prong of the commercial speech doctrine seems to be the only part of the doctrine suited for identifying Internet transactions subject to valid regulation, and even this prong is of dubious assistance. Thus, commercial speech doctrine, even if it can be stretched to cover Internet transactions besides advertising, seems to provide little help on where to draw the line between protected speech and unprotected economic activities. Even assuming it eventually provides a formal framework for drawing the line, commercial speech doctrine seems unlikely to help with any of the difficult judgments involved in actually conducting this enterprise.

C. Economics to the Rescue? The Public Good Model

Undoubtedly, finding the limits of First Amendment protection of cyber-transactions will require careful consideration of individual cases, the use of analogy, and the other devices in the common-law repertory. But we may be able to derive at least some general guidance from economic theory.[53]

From an economic perspective, what is most distinctive about speech is that it involves the creation and transmittal of information. Information is often what economists call a public good, meaning that once it is created, it can be disseminated at comparatively low cost to an indefinite number of people. In general, markets tend to under- produce public goods because the producer is in no position to recapture the full benefits produced. For example, the creator of a new joke cannot charge a fee every time the joke is repeated to someone else.[54] Beyond mere copying of the joke, other uses are even more elusive in terms of the original author's control: the joke may be modified, combined with other forms of expression, used to change the listener's perspective on its subject, or otherwise merged into the broader stream of discourse. It is these creative uses of the

53. The theory of the First Amendment discussed in this subsection grows out of work by Richard Posner and Ron Cass and is discussed at greater length in Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

54. *See id.* at 558-62. However, the technology might now allow an efficient charging mechanism for electronic copying. *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 215 (1996).

HeinOnline -- 16 Ga. St. U. L. Rev. 803 1999-2000

original joke, even more than copying, that are most public-good-like in their nature.[55]

As it turns out, much of First Amendment doctrine can be understood, at least in part, as an effort to counter the tendencies toward underprotection and overregulation of public goods such as information.[56] In particular, unprotected communications often seem to lack this public good character. For instance, the benefits (such as they may be) of pornography mostly inure to the consumer and therefore can be captured in the price charged for the material, so pornography has relatively little public good character.[57] There is little risk that pornography will be underproduced because of the producer's inability to capture the full value received by consumers collectively.[58]

If the non-privatizable value of specific information were easily determined, we could apply the public good model on a case-by-case basis. But, in part for the same reasons that uses are difficult to monitor and measure, the value of information is often difficult to determine. For example, a really bad idea may nevertheless be socially useful if it provokes a powerful, creative critique. In addition, unpopular ideas may not find their audiences for a long time. Moreover, the degree of interest in an idea may be difficult to estimate *ex ante*. Finally, we may have reasons to distrust the ability of courts to make unbiased determinations about the value of speech. For all these reasons, the public good approach is best applied at a categorical level—to determine, for example, whether the First Amendment protects contractual warranties or political arguments as a class.

The public good analysis is helpful in sorting out which categories of Internet communications should be considered economic transactions and which should receive at least some degree of First Amendment protection. For instance,

---

55. The joke itself might be considered a meme (the symbolic equivalent of a gene that spreads itself through copying). *See* Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE (forthcoming 2000) (discussing nature of memes). But the most important aspect of the joke is its capacity to recombine with other memes. Recombinant memes are particularly difficult to treat as private property.

56. *See* Farber *supra* note 53 at 568-79.

57. *See id.* at 562-68.

58. Whether regulation is justified then depends on the extent of externalities caused by pornography. For a thoughtful discussion, see MICHAEL S. TREIBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 64-77 (1993).

communication of medical information for use in treating a particular individual has relatively little capacity for wide third-party use and, therefore, should not be considered a public good. Thus, telemedicine should receive no more protection by the First Amendment than the ordinary activities of physicians. The same is true, for instance, of Internet banking and securities transactions.

The public good model may also shed some light on the vexing question of First Amendment protection for computer code. Because it is so readily copied, computer code has a public good aspect—once produced, it is cheaply reproduced and transmitted to others. Our society's primary response to this problem, however, has been to privatize the code through the creation of intellectual property rights. Thus, we need to consider the relationship between the First Amendment and intellectual property rights.

To the extent that the intellectual property regime can efficiently privatize the value of information, First Amendment protection is no longer necessary. An efficient intellectual property regime cures the underproduction problem that plagues public goods. Ideally, the First Amendment would protect only those aspects of speech that the property regime does not efficiently protect. Thus, for instance, in an ideal system, an optimal copyright system would protect the form of expression, and the First Amendment regime would protect the intellectual content.[59]

However, in reality, the line between intellectual property and free speech is not so clear for three reasons.[60] First, it may not be possible to recapture all of the benefits of speech, even if some uses can be effectively regulated. As the muddiness of the fair use doctrine shows, the boundaries of intellectual property law are often unclear.[61] Thus, First Amendment protection may be warranted in the gray area. Second, for some types of speech, content and expression may be so intertwined that it is almost

---

59. *See* 37 C.F.R. § 202.1(b) ("ideas . . . as distinguished from the particular manner in which they are expressed" are not subject to copyright); *see also* Parker v. Flook, 437 U.S. 584 (1978) (holding that a mathematical algorithm cannot be patented); CAI v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

60. For a discussion of some of the complexities of the relationship between intellectual property and the First Amendment, see BURK, *supra* note 25.

61. *See* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999).

impossible to tell them apart. For example, the precise language of a poem, which is clearly protected as intellectual property, is inextricably intertwined with its content, which is protected by the First Amendment. Third, the intellectual property regime, rather than being optimal, may be excessively enthusiastic, leading to inefficient restrictions on the uses of information. In that situation, the First Amendment could act as a check on the over extension of the property regime.

Posting software for others to copy does not in general raise any of these issues. Such copying is (under normal circumstances) well suited to privatization by the intellectual property regime. Hence, it should normally be outside the scope of the First Amendment. True, even the copying of software might involve some uses that should not be subject to privatization, such as using the software to investigate non-copyrightable design concepts. The question is whether these relatively fringe uses are sufficiently important to justify First Amendment scrutiny of the posting, where the government has valid reasons to prevent consumer use of the software. Even assuming that the investigative use of code by other researchers is sufficiently common and significant to make some First Amendment protection appropriate, the level of scrutiny should probably be moderated.[62]

The tentative conclusion would be that the use of the code as a way of communicating design concepts should be protected speech, whereas its reproduction for functional use should be considered peripheral to the First Amendment.[63] Where both uses are mixed together and the government regulation is aimed at the functional use of the code rather than its communicative use, courts should review the regulation, at

62. In essence, this approach seeks to distinguish between form (protected by intellectual property laws) and content (protected by the First Amendment). This line is probably least meaningful when dealing with emotive or aesthetic expression, where form and content are often indistinguishable.

63. The relationship between intellectual property restrictions and First Amendment protections is, however, a complex one, which cannot be fully discussed here. *See* BURK, *supra* note 25 for further discussion. For instance, overly expansive intellectual property laws may impair the spread and free use of ideas, thereby benefitting the producer but harming third parties whose interests may be diffused and under-represented in the political process. So at least at the extremes, we might view certain intellectual property laws themselves as violating the First Amendment, where they begin to curtail the spread of ideas that the First Amendment is intended to foster.

most, under the lenient standard for content-neutral regulations of speech.

The public good approach does not purport to be a complete or exclusive theory of the First Amendment. The First Amendment clearly involves other considerations, such as personal self-expression and public self-governance, that are at best partially captured by the economic analysis. This approach may, however, provide some assistance in determining when the transfer of information online should receive First Amendment protection.

II. EXPRESSION AS COMMERCE: NETWORK EFFECTS AND GLOBALIZATION

At least since the time of Balzac, critics have complained about publishers who treated books like commodities rather than works of art.[64] Thus, the commercialization of expression is nothing new. What is new, however, is the extent to which commerce now involves information exchanges rather than transfers of material objects. As we saw in Part I, this development often makes it difficult to determine whether a given "commodity" is sufficiently expressive to deserve some level of First Amendment protection. Conversely, the growing similarity between information-intensive industries and conventional expressive activities means that trade issues and emerging First Amendment issues are beginning to bear at least a family resemblance. Whether this growing resemblance is purely superficial, or whether it sheds any light on the problem of Internet regulation, will be explored below.

One of the most obvious effects of the Internet is to lower communication costs, making it much cheaper and more convenient to obtain information from all over the world.[65] Suddenly, each local marketplace of ideas is opened to a flood of imports from the larger world. This is a new situation for information, but less novel with respect to commodities which have been increasingly traded in a global economy. Thus, the

64. *See* HONORE´ BALZAC, LOST ILLUSIONS 272-76 (Herbert J. Hunt, trans., Penguin Books 1971) (1843).

65. *See* Goldsmith, *supra* note 28, at 1237. This observation is not technology-independent; sufficiently strong filtering technology might recreate trade barriers.

HeinOnline -- 16 Ga. St. U. L. Rev. 807 1999-2000

effect of the Internet on information is much like the effect of free trade on commerce. The goal of this section is to explore this similarity, seeking to relate free speech problems to recurring issues in trade law.

A. Two Forms of Globalization

Internet issues are often, in the end, merely examples of the stresses of globalization. Opponents of global trade argue that it weakens the national community in favor of outside interests.[66] Similarly, the Internet threatens to disrupt local marketplaces of ideas, forcing traditional communities to redefine themselves.[67] In the case of commodities, globalization may threaten the family farm; in the other, it is "family values." Both disruptions are met by similar efforts to defend traditional patterns of production and consumption, whether of wheat or of photographic images.[68] In both cases, the legal regime must decide how much to allow local communities to protect their values at the expense of free trade. Because of the public good aspect of information, as we saw in Part I, speech regulations require a special legal regime. But some speech problems bear enough similarity with trade issues to make comparison fruitful.

Global trade has grown by a factor of sixteen in the past fifty years.[69] No longer restricted to goods, international trade now encompasses services from phone calls to architectural designs to increasing levels of direct foreign investment.[70] Though it has helped promote unprecedented levels of economic prosperity, globalization has also had its victims: unskilled workers whose jobs can be more cheaply performed abroad, family farmers whose production methods are not competitive, and workers in outmoded occupations whom superior technology can replace.[71] In short, foreign competition puts stress on traditional economic

66. *See* Benjamin M. Friedman, *The New Demon*, NEW YORK REVIEW OF BOOKS, Sept. 9, 1998, at 32, 36.

67. For a discussion of the impact of the Internet on concepts of community, see Developments, *supra* note 5, at 1596-1603, 1688-97.

68. For a wide-ranging discussion of globalization and its impact on local economic, social, and ecological communities, see Chen, *supra* note 55.

69. *See Survey: World Trade*, THE ECONOMIST, Oct. 3, 1998, at 1 [hereinafter Economist Survey].

70. *See id.* at 2.

71. *See* Chen, *supra* note 55, at 5-14.

arrangements. Traditional political arrangements may also be affected, as international capital flows weaken the ability of national communities to manage their own economies.

Local communities have felt particularly threatened by communications-related industries. Even apart from the Internet, globalization also has its cultural component. Europeans and Canadians fear that their local cultural institutions will be overwhelmed by American imports. In response, the European Union has tried to require at least half of all television programming to be locally produced.[72] Canada has defended its cultural identity with a series of restrictions on American cultural imports.[73]

Within the United States, similar cultural issues play out as disputes over local versus national communities. For example, French art films do not threaten to overwhelm our popular culture, but we are in danger of having local newspapers replaced by *USA Today* and local television stations replaced by direct satellite feeds. One of the major goals of federal communication policy has been localism: favoring local ownership of media in the hope of fostering a fit between programming decisions and local community needs and values.[74] Localism has been called the "most sacred cow of communications regulatory policy."[75] And yet, as the same author remarks, "in a world where information can be pulled or pushed from every corner of the planet, there is something almost quaint about the idea of linking localism and modern information services."[76]

In the Internet context, we also see efforts to maintain local values in the face of newly accessible imports. Libraries, which could previously filter out materials considered inappropriate by the community, now struggle to recover that control when their computers provide access to the entire Internet.[77] Similarly, the

72. Council Directive 89/522, 1989 L.J. (L. 298) 23.

73. *See* Chen, *supra* note 55, at 17.

74. *See* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 938 (1998).

75. *Id.* at 938.

76. *Id.* at 942-43.

77. *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998) (holding such an effort to restrict access to sexually explicit Internet sites unconstitutional).

incorporation of local community standards into the legal definition of obscenity, which was designed to provide local communities leeway in defining acceptable speech, now comes under increasing pressure because a Web site can be accessed from anywhere in the world.[78] As elsewhere in the world, cultural globalism threatens efforts to protect local cultural communities.[79]

B. Economic Models of Globalization

But is there a genuine structural similarity or only a superficial resemblance between the Internet and other forms of globalization? To explore that question, it is helpful to examine current trade theory.

The traditional economic theory of trade was based on comparative advantage. Suppose it takes twice as much labor to produce a widget as a gadget in America but three times as much in Canada. Then it makes sense for America to produce only widgets, trading them for Canadian gadgets. Similarly, it makes sense for the Canadians to specialize in gadgets, trading them for American-made widgets. Strikingly, this result holds even if the Canadians are less efficient than the Americans in producing both items—what matters is the comparative efficiency of production for the two goods within each country, not the overall efficiency of either economy.[80]

The theory of comparative advantage, though a great success in many respects, does not account for some important features

---

78. *See* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1652-55 (1995); Erik G. Swenson, *Comment, Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855 (1998).

79. *See* Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 51-52 (1993) (commenting on claims of info-imperialism).

80. For explanations of the theory of comparative advantage and its implications for trade policy, see ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 17-50 (5th ed. 1995); Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 WASH. U. L.Q. 1127, 1142-60 (1996). An excellent popular presentation of the theory (featuring Gilligan and the Skipper) can be found in TODD G. BUCHHOLZ, NEW IDEAS FROM DEAD ECONOMISTS: AN INTRODUCTION TO MODERN ECONOMIC THOUGHT 66-67 (1990).

of the modern global economy.[81] Newer models attempt to fill the gaps. These models typically assume that some industries are subject to increasing returns to scale—that it is more efficient to produce large amounts of something rather than small amounts.[82] (Such returns to scale might arise either within individual firms, because of the technology used, or within regions, because of spillover effects between firms, as when innovation is fostered by a concentration of firms in a small area such as Silicon Valley.)[83] This assumption in turn implies deviations from purely competitive markets, which affect the incentives to trade.[84]

Two of these models are particularly relevant for present purposes. One model involves product differentiation.[85] If firms can differentiate their products without additional costs, then each will produce something a little different from its competitors, giving it a "monopoly" on that particular variety of the good. In this model, trade benefits consumers by allowing an increase in the number of available product varieties.[86] A second model focuses directly on economies of scale. In this model, industries with increasing returns will be concentrated in certain countries, perhaps in a single country if one is big enough to satisfy the entire world demand. Here, the benefits of trade largely take the form of allowing increased specialization and lower production costs.[87]

To the extent that content providers have increasing returns to scale, we could expect similar results in the market for expressive commodities. Geographic economies of scale in production might help explain, for instance, the global

---

81. *See id.* at 71-91.

82. For a summary of these theories, see DENNIS R. APPLEYARD & ALFRED J. FIELD, JR., INTERNATIONAL ECONOMICS—TRADE THEORY AND POLICY 171-79 (3d ed. 1995).

83. *See* PAUL R. KRUGMAN, RETHINKING INTERNATIONAL TRADE 64, 85 (1994).

84. *See id.* at 3-4, 11-22.

85. *See id.* at 23-27.

86. *See id.* at 26, 79. Increasing returns enter this model because they provide an incentive for firms to focus investments on a limited number of varieties, rather than spreading out among all possible varieties. If returns were constant, there would always be multiple firms producing every variety consumers desired. By providing an incentive for firms to produce varieties that only approximate consumer desires, increasing returns then make it possible for an expansion in market size (created by trade) to increase the fit between production and consumer preferences.

87. *See id.* at 59.

dominance of Hollywood in the film industry. Having a large number of actors, directors, writers, investors, and technical workers in the locale may lower costs, not unlike the "Silicon Valley" effect. But this analysis does not seem directly relevant to the Internet, where speech is still comparatively cheap and untied to geography. Still, analogous factors may play a role even on the Internet.

Rather than economies of scale for production, what we tend to see on the Internet instead are economies of scale in consumption, or what are now called network externalities.[88] Some of these externalities simply arise because a network is more valuable, all things being equal, if more people are connected to it. Thus, a larger phone system is better than a smaller one. Similarly, a posting on the Internet can reach more people, for about the same cost, as a posting on an internal company network. These network externalities provide an incentive to technical standardization and wide availability. Other externalities arise because people are sociable and like to connect with others who share their particular interests; these externalities represent the value of community to individuals. (Community here is a morally neutral term—it could be a community of human rights activists or a community of pederasts). For instance, the more friends who have seen a movie, the better it is to see it yourself, so you may participate in discussions and "get" references to the movie. We might think of the Internet as akin to the sudden joining of many local communication "networks." Given network externalities and differentiations in consumer taste, how would this move toward internetwork "free trade" affect available speech?

Consider a world of many local communities, with varying compositions in terms of individual consumer tastes. Suppose that content producers within each community face decreasing returns to scale, when scale is measured in terms of quantity or quality of content. However, once produced, content can be provided at constant cost to anyone in the local network. Now also assume that content comes in varieties, and that there are

88. *See* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 551-562 (1998). An accessible introduction appears in CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 173-86 (1999).

economies of scale in consumption—that is, consumer demand tends to snowball, so that a product becomes more attractive when others consume it.[89]

To see the impact of the Internet, imagine two such communities, one predominantly composed of mystery fans, the other of science- fiction fans. In the first community, there will be a high demand for mysteries (disproportionate even to the difference in the number of fans between the two communities, due to the economies of scale in consumption). Science fiction fans may find little to their tastes, however, if they are too small a group to support a high quality production in their community. Just the opposite situation will occur in the other community. When we join the two local networks, however, fans in each locality find themselves linked with those in the larger community. It becomes worthwhile to supply quality content to mystery and science fiction fans in both localities.

The effects are different when a group has the same size in both communities. Poetry fans, who were too small a group to generate any more than marginal production in *either* community, may find that they have reached "critical mass" when the two communities combine. Meanwhile, self-help sites, which were popular in both communities before the network merger, may experience only a small increase in quality of service (because of the decreasing returns on content production). But because distributing product to both communities costs no more than getting it to any individual community, we expect either efforts at greater product differentiation (now practical because of the larger mass of consumers) or a smaller number of producers (decreasing the total cost to society of producing the same content).

In summary, when the two networks combine, we expect the following. First, the combined network will offer a more diverse content than the previous sub-networks, but, by the same token, local "cultural" variations will no longer be observable. Second, some tastes that were relatively uncommon, and hence almost invisible, will now be the targets of significant content

89. This seems to be increasingly true even of ordinary consumer goods, which today are often purchased not only for their utility but as a means of social and cultural identification. *See* John Seabrook, *Nobrow Culture*, THE NEW YORKER, Sept. 20, 1999, at 103, 109.

providers. This may be good news if the "taste" is for classical Greek drama, but bad news if it is for depictions of sexual violence against children.[90] Third, the highest production values will be associated with the most widely shared tastes, but the increase in quality may not be substantial except in the form of increased specialization, so there will be more varieties of the same uninspiring genres (or else fewer providers).

In short, highbrows will complain that there is more and glossier trash than ever. They will applaud the increased amount of content aimed at them but bemoan the relative unpopularity of that content. (There will be Proust Web sites, but they will not get as many hits as Crichton). Like everyone else, they also will worry about the increase in the number of "weirdos" who have crawled out from under the rocks since the local networks combined.

All of these effects have a ring of familiarity in the Internet context. The erosion of distinctive local mixes of expression, combined with new (and sometimes repugnant) social groupings, may look like an assault on local communities. The fear is that distinctive local cultures may disappear, replaced by a combination of "McCulture" and a fringe of marginal global communities with interests ranging from left-handed knitting to foot fetishism. The mechanism and the effects are different in detail from the effect of free trade in commodities, but the overall picture is similar, and for good reason, because product differentiation and varying returns to scale help drive both forms of globalization.[91]

C. Free-Trade Perspectives on Familiar Issues

Given the fundamental similarity of the Internet and free trade—of cultural and economic globalization—it is not surprising that a number of Internet issues have analogues in

90. With respect to "antisocial" preferences, the move online also helps participants avoid both formal and informal social sanctions.

91. Of course, significant differences also exist. In particular, because comparative advantage still explains a good deal about trade economics, free trade has substantial wage and employment effects, which in turn have major political repercussions. So far, the Internet does not have sufficient economic clout to cause similar impacts.

the trade context. We will consider three examples in this section.[92]

The first issue relates to standardization. Differences in local requirements for goods create significant trade barriers and hence a pressure toward standardization. This pressure has been particularly strong within the European Community.[93] Local governments have resisted this pressure, however, in the name of protecting local traditions and culture. For instance, they have fought hard, but usually unsuccessfully, to maintain barriers against the import of foreign foods and drinks that do not respect entrenched local standards.[94] It is no surprise to see similar efforts to protect the distinctive nature of local communities' cultures from the homogenizing effects of the Internet.[95]

Second, efforts to regulate imports based on their local effects often give rise to trade disputes. While the goods may cause genuine health, safety, or environmental problems, expressed concerns about these problems may only be a guise for protectionism. For instance, a European exclusion of American beef containing hormone traces was based on purported health concerns that the WTO found to be illusory.[96] Tribunals have struggled to find the appropriate mode of analysis for such trade restrictions; this has proved particularly difficult when the regulations do not draw distinctions based on place of origin.[97] Similar problems could arise when, in the interests of protecting local consumers such as children, jurisdictions impose content

---

92. Another example, not considered here, where trade theory may illuminate issues of Internet regulation, involves the "race to the bottom" sparked by fears of disinvestment. *See* Burk, *supra* note 6, at 943.

93. *See* Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 36-40 (1999).

94. A classic example is the ECJ decision striking down the German Reinheitsgebot (purity law) for beer. *See* Commission v. Germany, case 178-84 1987 E.C.R. 1227. For another case involving an equally vital national tradition, see 3 Glocken Gmblt v. USL Centro-Sud, Case 407/85, 1988 E.C.R. 4233 (striking down Italian standards for pasta); *see also* Schutzverband v. Weinvertriebs-Gmblt, Case 59/82, 1983 E.C.R. 1217 (ruling that Italian vermouth cannot be excluded from German market despite low alcohol content).

95. *See* text accompanying *supra* notes 85 to 91.

96. *See* Sykes, *supra* note 93, at 1-2.

97. For an extensive discussion, see Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulation*, *in* JAGDISH N. BHAGWATI & ROBERT E. HUDEC, FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 2 LEGAL ANALYSIS 59 (1996).

restrictions that disfavor unpopular outside content providers. Although intended to prevent a legitimate local harm, the regulations may place a substantial burden on outside speakers. Efforts to restrict transmission of "adult" material to children provides the classic example.

Third, trade regulations may be designed to affect conduct that occurs outside the jurisdiction. In a series of cases involving United States efforts to protect endangered marine species, international trade panels have drawn into question the legitimacy of these extraterritorial regulatory goals.[98] Other issues are likely to arise in connection with biodiversity preservation or efforts to deal with the greenhouse effect or other threats to the global commons.[99] Similar problems of extraterritoriality plague Internet law.[100]

We are so used to seeing speech as special that it is somewhat surprising to see how many speech-related problems have parallels in the world of international trade. Of course, this does not mean that the legal outcomes should be the same; we have many reasons for thinking that speech deserves additional protection from government regulation compared to other activities.[101] But trade law may at least provide a floor for protecting speech. It may also help us understand why certain speech disputes are simply inevitable when "trade barriers" in the marketplace of ideas are suddenly lowered.

D. The Dormant Commerce Clause: A Possible Preferred Ground?

The United States has its own free-trade rules, long predating the WTO. Those rules, created by the Supreme Court over the past two centuries, are commonly known as the "dormant

98. The proper analysis of these restrictions under the WTO remains unsettled. For a recent summary, see Benjamin Simmons, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413 (1999). For earlier analysis, see Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* BHAGWATI & HUDEC, *supra* note 97, at 95, 100-06, 116-20.

99. *See* Economist Survey, *supra* note 69, at 20-25.

100. *See, e.g.*, Goldsmith, *supra* note 28, at 1241-42.

101. For a brief, if uninspired, summary of those reasons, see FARBER, *supra* note 3, at 2-8.

commerce clause."[102] Given the similarities between trade restrictions and some restrictions on Internet speech, it is worth considering whether this doctrine could play a useful role in deciding speech disputes.

For most readers, the main lines of commerce clause doctrine are hopefully familiar enough to eliminate the need for extensive explanation or exhaustive documentation.[103] Roughly speaking, current doctrine divides state regulations into two groups. Courts closely scrutinize state regulations that on their face or in obvious effect discriminate against interstate transactions and rarely uphold them.[104] The Supreme Court is particularly hostile to what it views as efforts at extraterritorial regulation.[105] In contrast, facially neutral state regulations are subject to a more lenient balancing test.[106] Such regulations tend to survive this balancing test,[107] except where a regulation seems to unduly burden the national transportation network.[108]

Not surprisingly, courts have begun to apply the dormant commerce clause to Internet speech regulations. In *American Libraries Ass'n v. Pataki*,[109] the court struck down a New York statute designed to protect minors from sexually explicit communications online. The court viewed the law as an invalid attempt to regulate Internet transmissions outside of the state. The court deemed the law's benefits small in comparison with its burden on commerce because of New York's inability to sanction sources absent other connections to New York. The

---

102. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 3, at 281-311.

103. For a somewhat more expansive doctrinal review, see Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1411-18 (1994).

104. The leading case is *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

105. *See* Farber, *supra* note 98, at 1265-66.

106. Here, the leading case is *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

107. *See* FARBER & HUDEC, *supra* note 97 at 1415.

108. *See* Kenneth D. Bassinger, *Note, Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 895-913 (1998).

109. 969 F. Supp. 160 (S.D.N.Y. 1997). *But cf.* People v. Foley, 692 N.Y.S.2d 248 (App. Div. 1999) (upholding a somewhat similar law that also required an intent to lure the minor into sexual activities with the defendant).

HeinOnline -- 16 Ga. St. U. L. Rev. 817 1999-2000

Pataki analysis has been endorsed by other districts courts[110] and, more recently, by the Tenth Circuit.[111]

If courts view every state Internet regulation as extraterritorial, they may be overly aggressive, striking down worthwhile state regulations that place only minor burdens on outsiders.[112] The result could short-circuit the useful role that states might play as laboratories for testing regulatory innovations. But a more restrained application of the dormant commerce clause, featuring a careful balancing of interests, may play a useful role. Without some commerce clause restrictions, states that wish to experiment with more lenient regulation may find their efforts frustrated because of the chilling effects of stricter regulations in other states.[113]

Indeed, good arguments exist why such an analysis might well be preferred as the initial basis for reviewing state Internet speech regulations, with the First Amendment invoked only if they pass that first test. As Professor Lessig has pointed out, the common-law process can be especially useful in dealing with new technologies or social innovations, which both courts and the larger culture may be slow to digest.[114] The *Pike* balancing test has the advantage of requiring the court to immerse itself in a full evidentiary record. In contrast, First Amendment doctrine is often criticized for being formalistic and insensitive to facts;[115] this has its advantages in terms of offering a secure shield for speech but also has its disadvantages in terms of leaving the court uneducated about the factual setting.

Moreover, if the court strikes down the regulation on commerce clause grounds, it leaves the door open for reenactment by Congress, thereby providing an opportunity for society to deliberate more fully before a final decision is made about the permissibility of the regulation. If the statute passes muster under the dormant commerce clause or is reenacted at

---

110. *See* Cyberspace Comm., Inc. v. Enger, 55 F. Supp. 2d 737 (E.D. Mich. 1999); ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

111. *See* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).

112. *See* James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095 (1999).

113. *See* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1133-34 (1996).

114. *See* Lessig, *supra* note 10, at 1743, 1744-45.

115. *See, e.g.*, Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125, 1187 (1998).

the federal level, the court can then proceed to the First Amendment issues, having provided as much opportunity as possible to educate itself and society about the implications of the regulation.[116] Thus, when the state regulates expressive commodities, it may be useful to apply the rules governing commodity regulations before turning to those governing regulations of expression.

A final advantage is that this approach may eliminate the need to determine whether an expressive commodity is indeed protected by the First Amendment. As we saw in Part I, that is sometimes no easy matter.

The direct doctrinal payoff of the trade analogy is relatively limited. However, by showing that the problems the Internet causes for community values are just a special case of globalization, the analogy provides a broader context in which to evaluate those problems. Thus, the analogy may provide a deeper understanding of the Internet's promise and of its possible threat to local cultures.[117]

III. WHO'S AFRAID OF THE FIRST AMENDMENT?

This Article has been less concerned with applying the First Amendment to the Internet and more about how to postpone or avoid applying the First Amendment to various aspects of the Internet. In Part I, we considered how the First Amendment might swallow up ordinary economic regulations in the Internet context, unless reasonably kept under check. We then considered how to limit application of the First Amendment to prevent the Internet from becoming the last bastion of the *Lochner* approach. In Part II, we saw how the law and economics of international trade might provide a useful vantage point on Internet speech. One implication is that we should not view the First Amendment as the exclusive analytic perspective

116. Like most prudential devices, this one has its limits. It is pointless, for instance, to use it when a state regulation blatantly violates the First Amendment and will obviously be struck down in any event. But in less obvious First Amendment cases, turning initially to the dormant commerce clause may be a useful technique.

117. This is not, of course, the only useful perspective for understanding these cultural clashes. For reflections on the First Amendment dimensions of such clashes from a different perspective, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 89-116, 144-50, 164-78 (1995).

on speech issues. Indeed, Part II argued that the dormant commerce clause might sometimes be better deployed than the First Amendment to analyze certain speech restrictions.

This effort to avoid or postpone of First Amendment analysis is not based on any lack of enthusiasm for free speech. The Supreme Court was surely right in *Reno v. American Civil Liberties Union* [118] that the First Amendment should apply with full force to the Internet. The problem is that we do not yet know what this means. First Amendment rules have never been wholly blind to context, and this is a very new context. We can buy more time for deliberation about these issues by using postponement devices, such as an initial preference for the dormant commerce clause over the First Amendment. Moreover, the First Amendment presumably is not the only part of constitutional doctrine that fully applies online: another is, presumably, the rational basis test for evaluating economic regulations. Hence, in shaping the contours of First Amendment doctrine online, we need to keep in mind the need to preserve the vitality of other constitutional doctrines as well. Thus, though the *Reno* Court was right to reject any concept of lower First Amendment protection online, we should not assume that existing doctrine will solve all of our problems in this new realm.

CONCLUSION

Undoubtedly, a variety of novel issues will arise as the Internet not only expands but also develops new capabilities. This Article has focused on only one set of issues: the ability of the same Internet transmission to share attributes that we conventionally view as separate—the attributes of a commodity as well as those of a form of communication. Such expressive commodities are potentially subject to two sets of rules. One set of rules, the First Amendment, has traditionally applied to expression. The other rules—the rational basis test for economic regulations and the dormant commerce clause for state regulatory power—have traditionally applied to commodities. Learning how to coordinate these two sets of rules in a novel

118. 521 U.S. 844 (1999).

environment is one of the basic challenges the Internet poses. This Article is only an initial step toward the resolution of this challenge, which seems likely to face us well into the next decades.

HeinOnline -- 16 Ga. St. U. L. Rev. 821 1999-2000

https://readingroom.law.gsu.edu/gsulr/vol16/iss4/2
HeinOnline -- 16 Ga. St. U. L. Rev. 822 1999-2000