Vanderbilt Law Review

Volume 52
Issue 4 *Issue 4 - Symposium: Attorney Well-Being in Large Firms: Choices Facing Young Lawyers*

Article 25

5-1999

State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie

James E. Gaylord

State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie

Whoever removes this boundary-marker. . .
may the great gods as many as are mentioned
by their names on this boundary-marker, curse him
with an evil curse, tear out his foundation and destroy his seed.

—Curse from a Babylonian kudurru[1]

1. *See* WILLIAM J. HINKE, A NEW BOUNDARY STONE OF NEBUCHADREZZAR I FROM NIPPUR 153 (Babylonian Expedition of the University of Pennsylvania: Series D: Researches & Treatises, v.4, 1907).

I. INTRODUCTION

Cyberspace[2] seems to pose a dual threat to "Our Federalism."[3] Only one aspect of this threat, however, has captured the scholarly imagination. Commentators have devoted a great deal of attention to the problems of horizontal federalism raised by the new technology.[4] Cyberspace, they point out, is a profoundly integrative social and economic force. As a result, local legislation touching on cyberspace is likely to produce effects beyond local borders.[5] State laws like a recently deceased Georgia statute that arguably would have prohibited all Internet users from "falsely identifying" themselves on-line[6] convince observers that the information superhighway is a dangerous new means for states to export their legislative products to other jurisdictions. Although the danger is more potential than actual, the pages of recent law reviews echo with calls for preemptive

---

2. The term "cyberspace" was coined by William Gibson in NEUROMANCER 51 (1984). Although the terms will be used synonymously here, the "Internet" and cyberspace have somewhat different meanings. The Internet refers te those networks which use the TCP/IP protocol suite te route information; cyberspace includes the broader range of nonphysical "places" where electronic communication takes place. *See* Stephen C. Jacques, Comment, Reno v. ACLU: *Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1948 n.8 (1997) (defining cyberspace).

3. Younger v. Harris, 401 U.S. 37, 44 (1971) ("This . . . is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is beund to respect those who remain loyal te the ideals and dreams of 'Our Federalism.' ").

4. *See generally* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996) (arguing that spillovers from state regulation of the Internet implicate constitutional doctrines designed to preserve the coherence of the United States as a whole); Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535 (1996) (advocating a role for "nationalist parts of the Constitution," like the dormant Commerce Clause, in constraining state regulation of the Internet); Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998) (concluding that "the constitutional limits our national framework of federalism imposes on the statos" mandate that the Intornet be subject only to uniform federal regulation).

5. This is the natural outgrowth of Professor Lessig's integration thesis. *See* Lawrence Lessig, *Translating Federalism:* Unitod States v. Lepez, 1995 SUP. CT. REV. 125, 138-39.

6. GA. CODE ANN. § 16-9-93.1(a) (1996). The ACLU gave the statute this interpretation in its trial brief, *available at* <http://www.aclu.org/issues/cyber/ceusor/GABRIEF.html> (visited Mar. 1, 1999). A preliminary injunction enjoining the statute's enforcement on First Amendment grounds was grantod in *ACLU v. Miller*, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997).

federal legislation,[7] or more commonly, for self-regulation with minimal governmental interference.[8]

The more strident of these calls highlight the cyberspace threat that has largely been ignored: the threat to vertical federalism. Cyberspace imbues state regulation with tremendous potential for extraterritorial effect, potential which invites the federal judiciary to cut down a broad swath of state law. This invitation is made all the more appealing by the rather amorphous nature of the Supreme Court's extraterritoriality jurisprudence. The Constitution contains no explicit command forbidding statos from projecting their legislation beyond their own borders. The Court might be expected to infer that directive from constitutional structure,[9] but instead has sited the proposition in a succession of unlikely textual locales: the Contracts Clause, the Full Faith and Credit Clause, and the Due Process Clause.[10] The current locus of the extraterritoriality principle seems to be a line of dormant Commerce Clause cases stemming from *Edgar v. MITE Corp.*[11] One commentator has dubbed *Edgar* and its progeny "the new torritorialism;"[12] others have seized on the cases' seeming insistence on strict torritorial sovereignty and suggestod that the dormant Commerce Clause seriously curtails states' ability to regulate the Internet.[13] Such expansive readings of the cases have

---

7. *See, e.g.*, Alexander Gigante, *Blackhole in Cyberspace: The Legal Void in tho Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 413, 436 (1997) (advocating an international agreement on the structure of Internet governance); Christina K. McGlosson, *Who Needs Wall Street? The Dilemma of Regulating Securities Trading in Cyberspace*, 5 COMMLAW CONSPECTUS 305, 322 (1997) (urging the Securities and Exchange Commission te propose uniform federal regulations to preempt state regulations governing online trading).

8. *See generally* John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207 (1997) (arguing for a rating system and the distribution of screening software as a response to objectionable content and Internet misuse); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governanee in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1997) (arguing that self-regulation of the Internet best effectuates the pragmatic needs of the real world); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (advocating self-regulation of the Internet).

9. *See* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1894-95 (1987) ("[W]e should justify the extraterritoriality principle, not by pointing to any specific clause of the Constitution, but by a structural inference from our system as a whole.").

10. *See infra* Part V.A-B.

11. Edgar v. MITE Corp., 457 U.S. 624 (1982) (analyzing whether the Illinois Business Takeover Act is unconstitutional under the Supremacy and Commerce Clauses of the federal Constitution).

12. C. Steven Bradford, *What Happens If* Roe *Is Overruled? Extraterritorial Regulation of Abortion by tho States*, 35 ARIZ. L. REV. 87, 153-57 (1993).

13. *See* Burk, *supra* note 4, at 1123-34; Reynolds, *supra* note 4, at 537-42.

found an appreciative audience in the Southern District of New York, where, in *American Libraries Ass'n ["ALA"] v. Pataki*,[14] a federal court flatly ruled that states have no jurisdiction to enact cyberlaw.[15]

The prospect of the states being stripped of their traditional powers to provide for the health, safety, and morals of their citizens[16] while in cyberspace has excited surprisingly little academic commentary. This silence is especially odd given the general agreement that "[f]ederalism is exceedingly popular these days."[17] This Note seeks to redress the imbalance between horizontal and vertical federalism concerns. Placing the *Edgar* family of cases in the broader historical context of the Supreme Court's extratorritoriality rulings reveals that the dormant Commerce Clause is not nearly so destructive of state sovereignty as has recently been supposed. Rather, the cases document the Court's strnggles with the concern that states regulate only those enterprises that bear a substantial relation, or "nexus," to state intorests. Historically, the roots of this notion rest in substantive due process. Today, however, the nexus concern survives quite explicitly in a subset of dormant Commerce Clause cases—tax cases. Why courts apply the nexus concept to tax cases but not others poses a disturbing question; there is very little reason to think that "jurisdiction to tax" should be mucli different from "jurisdiction to regulate." This Note argues that modern extraterritoriality cases like *Edgar* do in fact reflect nexus concerns, rather than the Court's announced dormant Commerce Clause analysis, and properly so. Recognition of distinct nexus issues sheds considerable liglit on state power to regulate Internet conduct. Because tlie nexus requirement derives from due process, courts can turn to the growing corpus of Internet personal jurisdiction cases for gnidance as to whetlier the exercise of state legislative power over a given subject matter is appropriate. The due process decisions suggest that althougli meaningful limitations on their authority exist, the states retain regulatory power over significant aspects of cyberspace.

Part II of this Note explores the nature of cyberspace. This exploration reveals that critics of state regulation underestimate the malleability of tlie new medium. In particular, tliey overlook the

14. ALA v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

15. *Id.* (stating that "the Commerce Clause ordains that only Congress can legislate in this area").

16. *See* Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) ("In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are 'the powers of government inherent in every sovereignty.' ").

17. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487 (1994).

possibility that states can enact "zoning" laws, or regulations that require Internet actors to provide access controls to the data that they purvey. Part III then turns to the dormant Commerce Clause challenge to state zoning of the Internet. Beginning with the general contours of dormant Commerce Clause jurisprudence, this Part moves to an examination of the *Edgar* line of cases, concluding that they do not represent "a new territorialism." Part IV describes how, in *ALA v. Pataki*, a federal district court nonetheless invoked the dormant Commerce Clause to rule that states cannot regulate the Internet. This claim is examined from a historical perspective in Part V.

The history shows that, despite widespread assumptions that the extraterritoriality problems raised by the Internet are *sui generis*, the Supreme Court has faced similar concerns with new technologies like the telegraph. Although the Court initially made broad pronouncements about state incompetence to regulate the telegraph—much as the *ALA v. Pataki* court did with the Internet—it eventually accommodated state regulatory interests. Part V predicts that the courts will be obliged to make room for state interests by reading a nexus requirement into the *Edgar* line of cases. However, this Part concludes that the First Amendment, not the dormant Commerce Clause, will be the ultimate repository of the Court's Internet extraterritoriality analysis.

II. THE NATURE OF THE INTERNET

A. The Conception

The Internet has military origins.[18] Engineers thought it imperative to create a network of computers that would continue to function if some part were destroyed in combat.[19] Toward that end, Internet architects created an electronic space decoupled from the geographic world. The first steps were taken in 1969, when the Department of Defense created the Advanced Research Project

18. *See* H. Gilbert, *Introduction to TCP/IP* (visited Mar. 22, 1999) <http://pclt.cis.yale.edu/pclt/COMM/TCPIP.HTM> (discussing the role of the Department of Defense in developing the Internet).

19. *See id.* (discussing robustness of IP networks as a consequence of battlefield conditions).

Agency Network ("ARPANET").[20] ARPANET gave researchers real-time access to remote computing resources by linking systems operated by different branches of the military.[21] Because these systems were not always compatible, the Department of Defense promulgated a suite of machine-language conventions in the 1970s.[22] Known as "Internet Protocols," these conventions allowed cooperating computers to share digital information.[23] The Internet Protocols were fantastically successful, enabling ARPANET to connect to dozens of other networks.[24] By the late 1980s, ARPANET had fallen out of use, but the "network of networks" that it sired survives today.[25]

B. How the Internet Operates

The Internet's basic workings frequently confound geography. Every machine on the Internet has an address,[26] but these addresses are logical rather than geographical. Internet Protocol ("IP") identifies computers with a unique thirty-two bit number which, for easier reading, is split into four eight-bit numbers.[27] The IP address of the principal server at the White House, for example, is 198.137.240.91.[28] Needless to say, most of the world's forty million Internet users[29] would have no idea that 198.137.240.91 corresponds to any particular geographical locale.

To make IP addresses more easily identifiable, a Domain Name System was introduced in 1984.[30] The Domain Name System gives Internet hosts ordinary-sounding labels which are more memorable than IP addresses.[31] The White House server discussed above,

---

20. *See* Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringment on Global Computer Networks*, 68 TUL. L. REV. 1, 16 (1993) (discussing the creation of ARPANET).

21. *See id.*

22. *See id*; Gilbert, *supra* note 18.

23. *See* Charles L. Hedrick, *What is TCP/IP?* (visited Mar. 29, 1999) <http://oac3.hsc.uth.tmc.edn/staff/snewton/tcp-tutorial/sec1.html> ("TCP/IP is a set of protocols developed to allow cooperating computers to share resources across a network.").

24. *See* Burk, *supra* note 20, at 16.

25. *See id.*

26. *See* Gilbert, *supra* note 18.

27. *See id.*; Hedrick, *supra* note 23; *see also* OLAF KIRCH, THE LINUX NETWORK ADMINISTRATOR'S GUIDE (1994), *reprinted in* Ronald Abramson, *Trademarks and the Internet*, 438 PLI/Pat 299, 321 (1996).

28. *See* KIRCH, *supra* note 27, at 321.

29. This number is a 1996 estimate. *See* Reno v. ACLU, 521 U.S. 844, 850 (1997). The number may be much higher now, given that there were expected to be 200 million Internet users by 1999. *See id.*

30. *See* KIRCH, *supra* note 27, at 324.

31. *See id.*

for instance, is known simply as whitehouse.gov.[32] In order to resolve a domain name inte its corresponding IP address, a computer need only contact other machines which maintain tables of network names and numbers.[33] After a series of queries, the system which owns the domain name in question will return the desired address.[34] The Domain Name System might seem te map the Intornet onto physical reality. After all, a person transmitting data te whitehouse.gov quito likely knows that she is entering into a transaction in Washington D.C. Nevertheless, considerable disjunction exists between electromic domains and the geographical world. Domains are collections of sites which are logically related.[35] In some cases, the relation ınay be geographical, but many domains are constructed aroımd functional or proprietary relationships.[36] Furthermore, a domain name need not give geographical information about the system it identifies.

Even if an Internet user knows with perfect certainty the ultimate physical destination of the information she is sending, she has no way of knowing what route her information will follow. When data is transmitted on the Internet, protocols chop the message into manageable bits called "datagraıns."[37] Each datagram is addressed separately and routed to a "gateway," a system which comiects a network with one or ınore other networks.[38] Gateways make individualized decisions about how to route the datagrams next; the more sophisticated detect congestion and damage along the network, and send information by the most efficient path.[39] Once datagraıns have been received at their destination, protocols reassemble them into their original form.[40] The Internet user who began this process has little control over the route which the network will choose for her inforınation. Indeed, it is possible that the component datagrams of a

---

32. *See Welcome to the Whiteheuse* (visited Mar. 1, 1999) <http://www.whitehouse.gov/WH/Welcome.html>.

33. *See* KIRCH, *supra* note 27, at 327; Gilbert, *supra* note 18.

34. *See* KIRCH, *supra* note 27, at 327.

35. *See id.* at 324 (stating that "[a] domain is a collection of sites that are related in some sense").

36. *See id.* (noting that sites might comprise a domain because they form part of a proper network or because they belong to a particular organization).

37. *See* Hedrick, *supra* note 23, at <http://oac3.hsc.uth.tmc.edu/staff/snewton/tcp-tuterial/sec2.html>.

38. *See* Burk, *supra* note 20, at 13 (discussing gateways); Hedrick, *supra* note 23, at <http://oac3.hsc.uth.tmc.edn/staff/snewton/tcp-tutorial/sec2.html> (discussing addressing); *id.* at <http://oac3.hsc.uth.tınc.edn/staff/snewton/tcp-tutorial/sec6.html> (discussing gateways).

39. *See* Burk, *supra* note 20, at 12; Gilbert, *supra* note 18.

40. *See* Burk, *supra* note 20, at 12; Hedrick, *supra* note 23, at <http://oac3.hsc.uth.tınc.edu/staff/snewton/tcp-tutorial/sec2.html>.

single message may follow entirely different paths.[41] As a consequence, the user may find herself electronically entering unforeseen jurisdictions, where her data can be intercepted and interpreted.

C. Proposed Methods of Regulating the Internet

1. Self-regulation

Cyberspace is thus not tightly tethered to a discrete set of points in the terrestrial world. A number of commentators have seized on this fact to argue that the Internet should be subjected only to consensual self-regulation. In a particularly influential essay, Professors Johnson and Post root the jurisdiction of terrestrial sovereigns in four related considerations: power, effects, legitimacy, and notice.[42] For Johnson and Post, the independence of electronic communication from physical locality means that territorial regulation of on-line activities can serve none of these justifications.[43] Consequently, attempts to regulate cyberspace from without are "as futile as an effort te tie an atom and a bit together."[44]

Self-regulatory models of the Internet are grounded largely in contract principles.[45] Access to the medium as a whole typically requires entering into an agreement with an Internet service provider, and owners of individual systems or sites can condition use on adherence to contractual terms.[46] Proponents of self-regulation argue that contracts governing access to cyberspace can incorporate the unique norms of the on-line community.[47] On-line actors who do not conform their behavior to those norms will find that the denizens of the Internet refuse to interact with them, or banish them from cyberspace altogether.[48] In cases where norms are unclear or conflict, Internet

41. *See* Burk, *supra* note 20, at 12; Hedrick, *supra* note 23, at <http://oac3.hsc.uth.tmc.edu/staff/snewton/tcp-tutorial/sec2.html>.

42. *See* Johnson & Post, *supra* note 8, at 1369-70.

43. *See id.* at 1371-76.

44. *Id.* at 1374.

45. *See, e.g.*, Gibbons, *supra* note 8, at 523-32 (discussing contractual models of cyberspace governance); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1028-32 (1994) (describing contracts approaches).

46. *See* Hardy, *supra* note 45, at 1029 (discussing contracts between users and system administrators).

47. *See* Gibbons, *supra* note 8, at 526 (arguing tbat the contract model fits into the existing cultural norms of cyberspace).

48. *See id.* at 517, 518-23 (discussing the threat of disconnection and other social controls in cyberspace).

users can resolve their disputes on-line, typically through arbitration.[49]

From a purely pragmatic perspective, self-regulation appears unlikely to curb all types of on-line behavior which might have undesirable consequences in the physical world. As Professor Jack Goldsmith has pointed out, the kind of private ordering that regulation skeptics envision may work well for default rules—that is, laws that presumptively govern a particular transaction, but that can be set aside by the parties to the transaction—but makes considerably less sense with mandatery rules that a sovereign creates to protect third parties or to further paternalistic aims.[50] Indeed, committing the Internet to a course of self-regulation might provoke a kind of digital "race to the bottom,"[51] because Internet providers who imposed the least onerous contractual burdens presumably would do the best business. That prospect seems distinctly undesirable for *regulatory* laws that express a community's desire for the safety and morals of its citizens.

2. National Regulation

Some critics who recognize the problem of external control advocate regulation on the national level,[52] an alternative that has the dubious advantage of avoiding multifarious pronouncements on the subject of Internet law by local authorities. Aside from ignoring the possibility that the values of competitive federalism might obtain in cyberspace, this approach also encounters problems on a practical level. The government of the United States, for one, simply does not desire to erect a significant regulatory structure around the Internet. In a recent draft report, the Interagency Working Group on Electronic

---

49. The most notable cyberspace dispute resolution system is the Virtual Magistrate Project at Villanova University. *See Virtual Magistrate Project* (visited Mar. 1, 1999) <http://vmag.vcilp.org/>. A basic discussion of the Project can be found in Gibbons, *supra* note 8, at 534-39. For discussion of arbitration of Internet disputes generally, see HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY § 12.14, at 536 (1996 & Supp. 1999); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 94-100 (1996).

50. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1209-10 (1998).

51. A "race to the bottom" is a progressive relaxation of standards spurred by competition to attract business that occasions a reduction in social welfare. *See* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 274 (1997). Professor William Cary coined the phrase in 1974. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974).

52. *See, e.g.*, Gigante, *supra* note 7, at 434 (advocating preemption of state and local regulation of Internet administration); McGlosson, *supra* note 7, at 305 (urging federal regulations to preempt state regulations governing on-line securities trading).

Commerce cited a desire for "the broadest possible free flow of information across international borders" as a major factor in its recommendations.[53] Accordingly, the Working Group advocated non-regulatery, market-oriented controls for the Internet.[54]

3. Zoning

Practical difficulties aside, the argument that local authorities should be divested of power to regulate cyberspace fundamentally misconstrues the nature of the medium. Apologists of jurisdiction-stripping focus on Internet transactions rather than on Internet architecture. The lack of one-to-one correspondence between geography and cyberspace means that Internet transactions happen everywhere, but nowhere in particular.[55] Territorial sovereigns that attempt to regulate such transactions will therefore assert power over actors who have no real connection te the jurisdiction. But this line of reasoning ignores the possibility that states might direct their power to the very structure of cyberspace, rather than to the events which occur within it. Professor Lessig calls this possibility "zoning"—subsidizing technologies of control which increase the ability to select who gets access to what.[56]

Scant attention has been paid to zoning, an oversight which likely proceeds from a static conception of the Internet as a collection of hardware. The maxim, already stated in this Note, that the Internet is "a network of networks," illustrates the problem.[57] It suggests that changing the imperfect architecture of cyberspace would require entry into a thicket of cable and silicon chips.[58] To be sure, cyberspace could be zoned by means of hardware. Statos could compel the creation of hierarchical networks and then impose control over the

---

53. *A Framework for Global Electronic Commerce* (visited May 25, 1999) <http://www.iitf.nist.gov/eleccomm/ecomm.htm>. A good summary of the report can be found in Nicholas W. Allard & David A. Kass, *Law and Order in Cyberspace: Washington Report*, 19 HASTINGS COMM. & ENT. L.J. 563, 596-601 (1997).

54. *See A Framework for Global Electronic Commerce, supra* note 53. For normative arguments as to why state regulation might he superior to national regulation in some circumstances, see *infra* Part VI.

55. *See* Johnson & Post, *supra* note 8, at 1375.

56. *See* Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1409 (1996).

57. *See supra* note 25 and accompanying text.

58. *See* M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335, 341 ("The often-heard statement that the Internet is a network or set of networks suggests that the Internet is hardware.").

gateways te the system.[59] China has already pursued this strategy, building a pair of government-operated subnets connected to the rest of cyberspace by a small number of regulated servers.[60] In more liberal jurisdictions, however, the financial and free-speech costs of hardware regulation seem to outweigh the benefits of improved control. Viewing the Internet in terms of hardware creates the impression that zoning is prohibitively costly, and thus can be ignored.

Hardware is not the Internet's most defining feature; Internet Protocols are.[61] Protocols determine how information moves from place to place on the Internet;[62] they are its nerves and muscles and arteries. Hardware is merely the skeleten. In the words of one scholar, "the Internet is software."[63] The primacy of software means that "[c]yberspace is malleable;"[64] changing its structure requires no more effort than rewriting lines of code.[65] Software can create regions within cyberspace by imposing conditions, delimiting borders, and narrowing the options of users.[66] In short, software furnishes a cost-effective means of zoning.

Advocates of self-regulation question the effectiveness of zoning. They cite sophisticated Internet users who can reconfigure their connections to conceal their identities and locations, defeating the technological borders that cordon off information.[67] If credited, this logic would demolish much real-world legislation. Sophisticated countorfeiters will always be able to pass off bogus dollars, but that is no argument for legalizing counterfeiting, or for printing easily duplicated bills. So long as territorial jurisdictions can impose transaction costs on Internet behavior, they can successfully regulate it.[68] And as Internet use becomes more widespread, and zoning

---

59. *See* Timothy S. Wu, Note, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 651 (1997) (discussing state regulation of cyberspace by exercising control over the physical components used te access the Internet).

60. *See id.* at 652.

61. *See* Katsh, *supra* note 58, at 341 ("The Internet is not a network but a set of communications protocols that allows information te flow among many different networks.").

62. *See supra* notes 26-41 and accompanying text.

63. Katsh, *supra* note 58, at 341.

64. Reno v. ACLU, 521 U.S. 844, 890 (1997) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Cyberspace is malleable."); Katsh, *supra* noto 58, at 341 ("Cyberspace is malleable because of software.").

65. *See* Katsh, *supra* note 58, at 340.

66. *See id.* at 344.

67. *See* Johnson & Post, *supra* note 8, at 1374.

68. *See* Lessig, *supra* note 56, at 1405-06. On transaction costs generally, see Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

technologies more complex, the relative population of sophisticated users will diminish, further enhancing the effectiveness of regulation.

Legislators increasingly can be expected to recognize software's potontial for regulating access to regions of cyberspace.[69] At the national level, senators have already introduced a bill which would condition school Internet subsidies on use of filtering software for indecent material[70]—a perfect example of legislative zoning. Stato legislatures will likely follow suit. As these laws come under attack, courts will face complex questions of whether states have jurisdiction to enact zoning legislation, what sorts of zoning are permissible, and, most unportantly, who can be made to bear the burden of zoning. Answering these questions will require courts to plunge into the intricacies of the dormant Commerce Clause.

III. DORMANT COMMERCE CLAUSE JURISPRUDENCE

A. In General

No express provision of the Constitution enjoins the states from regulating interstate commerce. Article I sunply provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several states."[71] Nevertheless, the Supreme Court has found in the Commerce Clause a fount of power for striking down state legislation which discriminates against or unduly interferes with interstate commerce. As early as 1824, the Court in *Gibbons v. Ogden*[72] toyed with the possibility that dual sovereignty[73] precluded states from exercising authority over a subject matter which the Constitution had seemingly committed to Congress.[74] Chief Justice

---

69. *See* Katsh, *supra* note 58, at 352.

70. *See* Internet School Filtering Act, S. 1619, 105th Cong. (1998) (directing the Federal Communications Commission to study and determine various filtering and hlocking systems for Internet portals in schools and libraries). The proposed legislation has attracted considerahle media attention. *See, e.g.*, Bill Pietrucha, *Bill Would Filter Internet Access to Schools*, NEWSBYTES NEWS NETWORK, Feb. 10, 1998; *Internet: Senators Try to Force Net Filtering Software on Schools*, NETWORK BRIEFING, Feb. 10, 1998 (reporting reactions to Senators John McCain and Earnest Hollings' bill).

71. U.S. CONST. art. I, § 8, cl. 3.

72. Gihbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

73. Dual sovereignty is "the notion that constitutional power was held in watertight compartments, each government supreme within its sphere." Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 330 (1997).

74. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575-76.

Marshall found "great force in [the] argument"[75] that "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[76] Ultimately, the Court disposed of the case on Supremacy Clause grounds,[77] but Marshall's dictum had set the stage.

Five years later, the Court explicitly recognized the Commerce Clause's negative aspect in *Willson v. Black Bird Creek Marsh Co.*[78] In that case, the Court considered the constitutionality of a state law that authorized construction of a dam across a navigable creek.[79] Writing for the Court, Marshall declared the law valid, but noted the possibility that stato legislation might fail if "repugnant to the power to regulate commerce in its dormant stato."[80] That possibility was borne out in the *Passenger Cases*,[81] which struck down statutes imposing bond requirements and taxes on immigrants arriving at stato ports. Although subsequent decisions have entrenched the dormant Commerce Clause as a limitation on state power, a number of commentaters question its legitimacy.[82]

In its modern form, dormant Commerce Clause doctrine embodies a two-prong test. First, the Court determines whether a state law discriminates against interstate commerce.[83] "Discrimination"

---

75. *Gibbons*, 22 U.S. (9 Wheat.) at 209.
76. *Id.* at 199-200.
77. *See id.* at 200-22.
78. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).
79. *See id.* at 250-52.
80. *Id.* at 252.
81. The Passenger Cases, 48 U.S. (7 How.) 283 (1849). The decision badly fragmented the Court; eight Justices wrote separate opinions in a 5-4 ruling. Among the majority, only three Justices clearly based their votes on Commerce Clause grounds. *See id.* at 392 (McLean, J., concurring in judgment); *id.* at 410 (Wayne, J., concurring in judgment); *id.* at 452 (McKinley, J., concurring in judgment). For a discussion of this confusing decision, see Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417, 435-37 (1988).
82. *See, e.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-55 (1982) (arguing that the Privileges and Immunities Clause should perform the functions currently served by the dormant Commerce Clause); Redish & Nugent, *supra* note 74, at 582-90 (arguing that the dormant Commerce Clause has no basis in the text or structure of the Constitution); *see also* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WHITE 13 (1937) ("The conception that the mere grant of the commerce power to Congress dislodged state power finds no expression [in the records of the Constitutional Convention].").
83. *See* Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994) ("[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is te determine whether it regulates evenhandedly with only incidental effect on interstate commerce, or discriminates against interstate commerce." (internal quotation marks omitted) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979))); *see also* City of Philadelphia v. New

means nothing more than "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[84] Laws which are found to be discriminatory are subject to a "virtual" per se rule of invalidity.[85] Virtuality translates into a least restrictive means analysis; the state must show that it has no other way to advance a legitimate local interest.[86] State laws which survive the first part of the dormant Commerce Clause ordeal next face the balancing test set forth in *Pike v. Bruce Church, Inc.*[87] Even if a law "regulates evenhandedly to effectuate a legitimate local public interest," it will still be invalidated if it imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local benefits."[88] The Supreme Court purports to be quite soliciteus of benefits which flow to areas traditionally of local concern.[89] Regulations designed to protect public health or safety, for instance, will not be overturned unless their justifications are "illusory."[90]

Benefit-burden balancing has been a source of contention among scholars and judges. Professor Regan has argued persuasively that rather than balancing, the Court in fact engages in review for discriminatory purpose.[91] At least two Supreme Court Justices have agreed with Professor Regan's proposition, contending that the Court

---

Jersey, 437 U.S. 617, 626-27 (1978) (invalidating statute which discriminated against articles of commerce originating outside of state).

84. *Oregon Waste Sys.*, 511 U.S. at 99.

85. *See id.* Professor Regan has called this phrase "mildly oxymoronic." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1134 (1986).

86. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (citing Maine v. Taylor, 477 U.S. 131 (1986) (upholding ban on importation of live baitfish because no available nondiscriminatory means could similarly protect state's environment)).

87. Pike v. Bruce Churcb, Inc., 397 U.S. 137, 142 (1970).

88. *Id.* The balancing test was first proposed by Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 20 (1940).

89. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) ("[A] State's power to regulate commerce is never greater than in matters traditionally of local concern.") (citing Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 350 (1977)).

90. *Id.* ("[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." (internal quotation marks omitted) (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring))). For a critique questioning the Court's sincerity in this regard, see Friedman, *supra* note 73, at 353 ("Although the rhetoric of the dormant Commerce Clause decisions sounds out favorably for state autonomy, in reality this line of cases may be the most devastating te state authority.").

91. *See* Regan, *supra* note 85, at 1206-87; *see also* Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 910-11 (1985) (arguing that the overwhelming majority of dormant Commerce Clause cases can be understood in terms of a nondiscrimination principle).

should eschew balancing for reasons of institutional competence.[92] Significantly for Internet issues, however, Regan concedes that the Court performs a limited form of balancing in transportation and tax cases, due te constitutionally significant national interests in an efficient transportation and *communications* network.[93] Whether the second prong of dormant Commerce Clause analysis is regarded as true benefit-burden balancing or merely as a subtler means of "smoking out" a protectiomist motive,[94] one thing is certain: traditional Commerce Clause doctrine is remarkably unsuited to resolving cases in which a state enacts laws that regulate extraterritorial trade.[95] To treat the problem of extratorritoriality, the Supreme Court has embarked upon a quite different line of cases.

B. A New Territorialism?

1. The Claim Prompted by *Edgar* and Its Progeny

Older Commerce Clause cases relied on a highly formalistic dichotomy between "direct" and "indirect" effects on intorstate commerce.[96] Suffusing this dichotomy were notions of torritorial sovereignty.[97] After 1937, formalism gave way to more pragmatic tests that

---

92. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 423 (1994) (Souter, J., dissenting) (objecting to the term "balancing tost" and arguing that "[t]he analysis is similar to, but softer around the edges than, the test we employ in cases of overt discrimination"); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (citing Regan's article and arguing that balancing is "ill suited to the judicial function and should be undertaken rarely if at all").

93. *See* Regan, *supra* note 85, at 1184; Regan, *supra* note 9, at 1883. *But see* Sedler, *supra* note 91, at 910 (noting that the only two transportation cases which use "undue burden" analysis are decades old).

94. *See* Friedman, *supra* note 73, at 351 (noting confusion among judges and scholars as to whether the second stop of dormant Commerce Clause analysis is "a way only of smoking out more subtle protectionist legislation").

95. *See* Sedler, *supra* note 91, at 908-10 (arguing that the Court had "great difficulty in arriving at a doctrinal basis" to sustain the result in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), an extraterritoriality case, and that the case should have been decided on full faith and credit grounds); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 409 (2d ed. 1988) (arguing that the theme of political representation which underlies contomporary dormant commerce clause doctrine is inapposite to extraterritorialism cases).

96. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) ("Nice distinctions have been made between direct and indirect burdens."); Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925) (stating that "a state statute which by its necessary operation directly interferes with or burdens . . . commerce is a prohibited regulation); *see also* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) ("[T]here is a necessary and well-established distinction between direct and indirect effects" on interstate commerce.).

97. *See* Kalen, *supra* note 81, at 452-62 (discussing torritorial sovereignty as a factor affecting the validity of state laws in the nineteenth century).

showed better appreciation for the workings of an integrated national economy.[98] A series of recent cases, however, has apparently resuscitated the old direct/indirect distinction, prompting one scholar to label them "the new territorialism."[99]

First of these cases was *Edgar v. MITE Corp.*[100] *Edgar* concerned a challenge to Illinois' Business Take-Over Act, a statute which regulated tender offers for a class of "target companies."[101] The range of regulated businesses was extraordinarily broad; the Act applied to any corporation of which state residents owned ten percent of the stock, or which satisfied any two of the following criteria: the corporation had its principal executive office within the state, was incorporated in the state, or had ten percent of its stated capital and paid-in surplus represented within the state.[102] In a rich opinion, Justice White questioned the law on numerous Commerce Clause grounds.[103] White raised the specter of direct versus indirect effects, holding that the statute directly regulated transactions which occurred across state lines, even those which took place entirely outside of Illinois.[104] The opinion noted "sweeping extraterriterial effect[s]," and hinted that the law was invalid because it might impose inconsistent obligations on commercial actors.[105] In White's view, the statute also could not pass muster under the *Pike* balancing test.[106]

Edgar announced two very remarkable propositions. First, Justice White struck at a definition of the extraterritoriality principle: "The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[107] But probably the most significant line in the opinion is its most enigmatic—"[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state

98. *See* Friedman, *supra* note 73, at 370-71 (discussing the death of legal formalism).

99. Bradford, *supra* note 12, at 153-57 (noting the return of a territorial component to commerce clause analysis).

100. Edgar v. MITE Corp., 457 U.S. 624 (1982) (plurality opinion).

101. *Id.* at 626-27.

102. *See id.* at 627.

103. *See id.* at 640-46. The law was also held invalid on Supremacy Clause grounds. *See id.* at 630-34.

104. *See id.* at 641.

105. *Id.* at 642 ("[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tonder offers would be thoroughly stifled.").

106. *See id.* at 643-46 (holding that the burden imposed on interstate commerce was excessive in relation te the local interests served).

107. *Id.* at 642-43.

courts."[108] The opinion does not elaborate, and the line has baffled commentators.[109] This Note suggests that, just as due process defines the doctrine of personal jurisdiction, so too did it historically inform the concerns underlying the analysis of *Edgar* and its progeny.

The decision in *Edgar* commanded only a plurality of the Court. But many of its principles found more permanent expression in the majority opinion in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.[110] *Brown-Forman* concerned a price affirmation statute, a law which required liquor sellers in New York to agree to charge prices no higher than those they would charge customers elsewhere in the country during the upcoming month.[111] The central issue in the case, the majority believed, was whether the statute regulated out-of-state transactions.[112] Citing *Edgar*, the Court held that the statute directly regulated interstate commerce by forcing sellers to seek government approval in one state before conducting business in another.[113] The Court also faulted New York for projecting its legislation into other states, since the "practical effect" of the statute was te control liquor prices in other states.[114] The possibility of subjecting the same business to inconsistent obligations in different jurisdictious gave the Court pause, as it did in *Edgar*, but here the Court was quite explicit about its concerns.[115] Significantly, the benefit-burden analysis conducted in *Edgar* vanished in *Brown-Forman*. However, *Edgar*'s extraterriteriality analysis otherwise held up well under majority scrntiny.

Things were to change, however, in a later case with facts strongly resembling those of *Edgar*. In *CTS Corp. v. Dynamics Corp. of America*, the Court again encountered a state law which regulated business acquisitions.[116] The *CTS* law mainly differed in regulating a narrower class of entities; the statute applied only to businesses incorporated in Indiana, the enacting state.[117] The Supreme Court up-

108. *Id.* at 643. In support of this principle, Justice White cited a due process case. *See id.* (citing Shaffer v. Heitner, 433 U.S. 186 (1977) (noting that by asserting extraterritorial jurisdiction directly, a state will offend fellow states and surpass its inherent power)).

109. *See, e.g.*, David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1, 35 (1992) ("[O]ne can only speculate about [the statement's] import.").

110. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).

111. *Id.* at 575-76.

112. *See id.* at 581.

113. *See id.* at 582.

114. *Id.* at 583.

115. *See id.*

116. CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987).

117. *Id.* at 73.

held the Indiana act.[118] In doing so, the Court emphasized that the *Edgar* opinion did not amass five votes,[119] and seemed to retreat from its extraterritoriality reasoning. Rather than considering whether the law had the practical effect of regulating out-of-state conduct, the Court asked if it would lead to inconsistent regulation of interstate commerce, and if Indiana had sufficient interest in the activity it was regulating.[120] The Court answered the first question in the negative, noting that corporations would be subject to the law of only one state even if other states enacted statutes patterned after Indiana's.[121] So far as state interests were concerned, the Court had no difficulty concluding that Indiana had a legitimate interest in regulating its own corporations.[122]

Attempting a synthesis of these cases was the task of *Healy v. Beer Institute*,[123] the last decision in the extraterritoriality saga. *Healy* involved another price affirmation statute. Unlike the "prospective" law in *Brown-Forman*, however, this statute required only that out-of-state sellers affirm that their prices were no higher than those being charged in neighboring states at the time of affirmation.[124] To assess the constitutionality of the statute, the Court constructed a framework from the bones of the preceding extraterritoriality cases. It is worth repeating at length:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting Stato's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statuto 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 Clanse protects against inconsistent legis-

118. *See id.* at 94.
119. *See id.* at 81.
120. *See id.* at 88-89, 93.
121. *See id.* at 89.
122. *See id.* at 93. For criticism of *CTS*, see Donald C. Langevoort, *The Supreme Court and The Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96 (1987).
123. Healy v. Beer Inst., 491 U.S. 324 (1989).
124. *See id.* at 335.

> lation arising from the projection of one state regulatory regime inte the jurisdiction of another State.[125]

In the end, the Court decided that no affirmation law could leap all these hurdles.[126]

2. Implications of the Claim

The *Healy* synthesis, although ultimately unconvincing, sheds some light on the extraterritoriality problem. As an initial matter, the case casts considerable doubt on the viability of the direct/indirect distinction in dormant Commerce Clause doctrine, and hence on the proposition that *Healy* and its forebears represent "a new territorialism." *Healy* mentions direct control of commerce only in connection with legislative intent te apply a statute wholly outside a state's borders,[127] seemingly collapsing it inte the notion of projection. And the facts of *Healy* themselves suggest that there is no rigid dichotomy between direct and indirect effects on interstate commerce. The law in question did not prevent sellers from lowering their prices outside the state so long as local prices were also lowered. The *Healy* law thus had only an indirect extraterriterial effect,[128] yet it was struck down.

A comparison of *Edgar* and *CTS* further calls into question the principle that the dormant Commerce Clause precludes states from regulating commerce in a way that might impose inconsistent obligations on businesses. The *CTS* Court asserted that the statute under review would create no such inconsistencies[129]—an assertion which is difficult to credit. Consider an example in which a corporation is incorporated in one state, has its physical presence in another, and has its shareholders in a third. All three states would have a solid claim te regulate the business, and so to impose inconsistent obligations upon it. Yet the law was upheld, unlike a similar takeover statute in *Edgar*.[130]

Several commentators have expressed skepticism that courts will extend the line of cases beginning with *Edgar* te questions involv-

---

125. *Id.* at 336-37 (internal citations and quotation marks omitted).
126. *See id.* at 343.
127. *Id.* at 336.
128. *See* Welkowitz, *supra* note 109, at 36 (arguing that the statute in *Healy* had an indirect effect on interstate commerce).
129. CTS Corp. v. Dynamics of America, 481 U.S. 69, 89 (1987).
130. Edgar v. MITE Corp, 457 U.S. 624, 646 (1982).

ing state regulation of noncommercial activity.[131] Unfortunately, this skepticism has proven to be ill-founded. For in a recent case, *ALA v. Pataki*, a federal district court employed *Edgar* and its progeny to strike down a state law governing Internet content.

IV. *ALA V. PATAKI*

The American Civil Liberties Union ("ACLU") lately has begun to challenge state legislation which regulates Internet content on dormant Commerce Clause grounds, as well as on First Amendment grounds. In some cases, the courts have simply ignored the Commerce Clause tactic.[132] But the ACLU has recently found a receptive audience for the argument in the Southern District of New York. In *ALA v. Pataki*, the court heard a challenge to a New York law which made it a crime to knowingly transmit obscene material to minors via the Internet.[133] The law exempted from prosecution defendants who took reasonable precautions to restrict access to such material by "any method which is feasible under available technology."[134]

The court heard argument on both First Amendment and Commerce Clause grounds. Because the Supreme Court had not yet handed down its decision in *Reno v. ACLU*,[135] and because the New York law was consistent with the Communications Decency Act,[136] the district court declined to rule on the First Amendment issues.[137] The court did consider the dormant Commerce Clause challenge, remarking: "[T]he Internet is analogous to a highway or railroad.

---

131. *See, e.g.*, Bradford, *supra* note 12, at 154 ("It is unclear whether the Court would actually subject a state statute te strict scrutiny merely because of its extraterritoriality, where it is neither discriminatory nor designed te protect local economic interests."); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 496 (1992) (noting that "all of the [extraterritoriality] cases in which statutes have been invalidated have involved laws which in some sense could be characterized as economic protectionism or predation"); Welkowitz, *supra* note 109, at 38 ("[E]ven though the Court spoke in terms of a per se rule for extraterritorial regulations, it may well bave been influenced by the protectionism evident in both [the *Healy* and *Brown-Forman*] statutes.").

132. *Compare* Brief in Support of Motion for Preliminary Injunction (visited Mar. 1, 1999) <http://www.aclu.org/issues/cyber/censor/GABRIEF.html> (making the dormant Commerce Clause argument), *with* ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (containing no mention of the argument).

133. ALA v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997).

134. *Id.* at 164.

135. Reno v. ACLU, 521 U.S. 844 (1997).

136. 47 U.S.C. § 223(a)(1)(B)(ii) (Supp. 1996) (held unconstitutional in Reno v. ACLU, 521 U.S. 844 (1997)).

137. *ALA v. Pataki*, 969 F. Supp. at 183 (stating tbat any determination of First Amendment challenge should await the Supreme Court's forthcoming opinion).

This determination means that the phrase 'information superhighway' is more than a mere buzzword; it has legal significance, because the similarity between the Internet and more traditional instruments of interstate commerce leads to analysis under the Commerce Clause."[138]

The court followed three strands of analysis in invalidating the law. First, the court discussed the *Edgar* family of cases, quoting the *Healy* synthesis substantially as it appears above.[139] To tost the law against the extraterritoriality doctrine, the court focused on the nature of the Internet. "New York has deliberately imposed its legislation on the Internet," the court wrote, "and, by doing so, projected its law into other states whose . . . citizens use tlie Net."[140] As a result, New York's law was per se violative of the Commerce Clause.[141]

Next, the court resumed the *Pike* balancing test abandoned by *Edgar*'s successors. The court acknowledged tliat the protection of children against pedophilia was a legitimate state objective, but it questioned the statute's efficacy in achieving that goal for three reasons: the statute could not reacli communications originating outside the United States; it supposedly regulated only pictorial messages; and it was interstitial when viewed in tlie larger framework of New York obscemity law.[142] On the burden side of tlie equation, the court weighed tlie chilling effect tlie act would likely have on Internet communication, as well as the heavy cost of compliance for private Internet users.[143] In the end, tlie court found that New York's law tilted the burden arm of *Pike*'s balance too far.[144]

Finally, the court considered whether the statute would subject Internet nsers to inconsistent obligations. Citing a series of transportation cases, none more recent tlian 1959, the court concluded, "The Internet, like the rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that nsers are reasonably able to determine their obligations."[145] At this point in the opimion, it becomes clear that the court is not merely invalidating the statute before it; it is denying tlie state all

138. *Id.* at 161.
139. *See id.* at 174-75; *see also supra* note 125 and accompanying text.
140. *Id.* at 177.
141. *See id.* (stating that the encroachment upon the authority of the federal government and New York's sister states is per se violative of the Commerce Clause).
142. *See id.* at 178-79.
143. *See id.* at 180.
144. *See id.* at 181 (stating that the severe hurden resulting from the statute was not justifiahle).
145. *Id.* at 182.

jurisdiction te regulate the Internet. On the penultimate page of the opinion, the Court announced: "Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace."[146]

The opinion in *ALA v. Pataki* is deeply flawed. Two of its three "modes of analysis" cannot withstand scrutiny. When applying the benefit-burden analysis, the court focused most heavily on the chilling effect the law would have on communication.[147] *ALA v. Pataki* appears to be the only federal Commerce Clause case which has struck down a law on the basis that "chilling" outweighed any local benefits.[148] Indeed, employing the notion of chilling in a balancing test is suggestive of First Amendment analysis.[149] When combined with the fact that the court cited only First Amendment cases in this section of the opinion,[150] it becomes apparent that the court did what it said it would not do—it applied First Amendment analysis in the guise of a dormant Commerce Clause test.

The court's third mode of analysis, the potential for inconsistent regulation, is not an independent constitutional test. Rather, it represents "double-dipping" in the Commerce Clause pot. In support of the test, the court cites a bevy of antique transportation cases,[151] all of which were decided before the advent of *Pike v. Bruce Church, Inc.* But in the Supreme Court's most recent transportation case, *Kassel v. Consolidated Freightways Corp.*, the Court found unconstitutional a state truck-length limitation (which arguably could have subjected truckers to all manner of inconsistent regulations) simply by applying the *Pike* test.[152] The upshot is that the possibility of inconsistent obligations may figure prominently as a burden in the *Pike* analysis, but it is no constitutional touchstone which alone can subject a state regulation to a per se rule of invalidity.

This process of elimination leaves the *ALA v. Pataki* court with only the extratorritoriality analysis it conducted under *Edgar*. As the

---

146. *Id.* at 183.

147. *See id.* at 180.

148. The query "CHILLING /P INTERSTATE COMMERCE" in Westlaw's ALLFEDS database produces 16 hits, but none of these cases strike down a law on the ground that "chilling" outweighs local benefits in a *Pike* analysis (search of WESTLAW Allfeds database (Mar. 22, 1999)).

149. *Cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (balancing the importance of the interest furthered by government regulation against the restriction on First Amendment freedoms).

150. *See ALA v. Pataki*, 969 F. Supp. at 179-80.

151. *See id.* at 181-82.

152. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670-71 (1981) (applying the *Pike* test and implicitly recognizing the potential for inconsistent regulation by noting that the state's law "is now out of step with the laws of all other" surrounding states).

next Part shows, the historical underpinnings of the extraterritoriality principle suggest that this reading of *Edgar* will not remain viable. Indeed, *Edgar* can plausibly be read to require nothing more than a substantial nexus between state regulatory interests and the enterprises te be regulated. Such an interpretation would preserve state jurisdiction to enact Internet zoning laws.

V. RE-EMPOWERING THE STATES

A construction of the dormant Commerce Clause that raises a per se rule of invalidity against state regulation of the Internet is unlikely to remain durable. The Supreme Court has confronted new technologies in the past that defied territorial notions of sovereignty, yet found room for state regulation. Subpart A describes the Court's experimentation with one such technology: the telegraph. Just as *ALA v. Pataki* coupled a simple analogy te transportation with broad pronouncements of state incompetence to regulate the Internet, so too did the early telegraph cases. But the Supreme Court eventually retrenched its analogy in the telegraph context to accommodate state regulatory interests. Subpart B describes how much the same thing might be accomplished with the Internet. In particular, this section suggests that rather than propping up a blanket prohibition on state regulation of the Internet, the *Edgar v. MITE Co.* line of cases can be read te embody a nexus requirement that would permit regulation based on the strength of the relation between state interests and the regulated enterprises. On this reading, courts would likely allow regulation in areas where state interests have traditionally been held strong, as with intentional torts and business conducted with state citizens. Finally, subpart C suggests that extraterritoriality analysis of Internet matters will have a brief lifetime under the dormant Commerce Clause; in light of the Supreme Court's decision in *ACLU v. Reno*, the new locus of the extraterritoriality principle will be the First Amendment.

A. The Telegraph Cases

Extraterritorialism finds its earliest expression in the dormant Commerce Clause jurisprudence of the late nineteenth century. The Commerce Clause cases of this era, both affirmative and negative, employed the language of dichotemy to define legislative competence. "Local" legislation, legislation that had only "indirect" effects on inter-

state commerce, and exercises of "police power" all fell within the purview of state legislatures; "national" legislation with "direct" effects on commerce, or invocations of the "commercial power" belonged exclusively to Congress.[153] Even within this formal, binary framework, however, a half-spoken judicial concern for the extraterritorial effects of state legislation is evident. In *Hall v. DeCuir*, for instance, the Supreme Court struck down a Louisiana statute that forbade segregation on public conveyances, including those that traveled across state lines.[154] Although the Justices relied primarily on the direct/indirect and national/local distinctions to invalidate the law,[155] Chief Justice Waite lodged another objection: "While [the statute] purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."[156]

The Court refined this general objection—that otherwise valid police regulations should not determine the conduct of actors beyond the state's boundaries—when it encountered a new technology: the telegraph. In a series of cases beginning the same term as the decision in *Hall v. DeCuir*, the Court considered the implications of a medium that, like the Internet, was not particularly respectful of geographical boundaries. This chronically understudied line of cases thus offers compelling parallels to the federal courts' current struggles with cyberspace. And insofar as the telegraph cases suggest that the jurisprudence of new technology passes through stages of simple analogy, retrenchment, and accommodation, they may sketch the path that cyberlaw will follow.

"Will we regulate by analogy, or by something else?" Professor Lawrence Lessig asked in 1995.[157] Although Lessig was speaking of cyberspace, the question, and his answer to it, have broader significance. Lessig suggested that the new medium could initially be

---

153. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (contrasting direct and indirect effects on interstate commerce); Patterson v. Kentucky, 97 U.S. 501, 504-06 (1879) (distinguishing between state police power and national commerce power); TRIBE, *supra* note 95, at 407 (discussing the national/local distinction in Commerce Clause subject matter analysis).

154. Hall v. Decuir, 95 U.S. 485, 490 (1878).

155. *See id.* at 488 (discussing direct burdens on interstate commerce); *id.* at 496-97 (Clifford, J., concurring) (employing the national/local analysis).

156. *Id.* at 489; *see also* Henderson v. Mayor of New York, 92 U.S. 259 (1876). The *Henderson* Court used the local/national dichotomy to strike down a law that required shipowners to furnish a bond for each passenger landed in the stato. *See id.* at 274. But the Court also found the law objectionable because its effective operation "commences at the other end of the voyage." *Id.*

157. Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744 (1995) (discussing regulation of cyberspace and First Amendment implications).

regulated by no other means than analogy.[158] His words proved to be prophetic, for, as seen above, the *ALA v. Pataki* court seized on a crude analogy between the Internet and transportation in order to bring the Commerce Clause to bear.[159] Much the same thing happened with the telegraph in the last quarter of the nineteenth century. Little more than thirty years after its introduction, the telegraph was denominated an "instrumentality of commerce" by the Supreme Court.[160] The case making that pronouncement, *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, sounded under the Supremacy Clause; at issue was whether an Act of Congress authorizing telegraph companies te maintain lines through the public domain of the United States preempted a state law granting the petitioner a monopoly in two counties.[161] The Court held that it did. That holding, however, was strained; as both the petitioner and the dissent pointed out, the Act merely granted a right of way on federal lands to telegraph companies whose operations were authorized by *state* law.[162] One suspects that the Court could have addressed the issue more squarely under the dormant Commerce Clause, determining the extent to which the state could, in the Court's words, "control the transmission of all telegraphic correspondence within its own jurisdiction."[163]

Whatever the reasons for the restraint, it was short lived. Just four years later, a state tax on telegraph messages leaving a state

---

158. *See id.* ("For just how could cyberspace be regulated except by analogy? . . . We have no choice but to take control of this space at first with our ordinary terms, if indeed we are te understand it. And it is through a practice of analogy that this occupation occurs.").

159. *See supra* note 138 and accompanying text.

160. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9-10 (1878). In a revealing passage, the Court hinted at the interaction between Commerce Clause jurisprudence and technological progress:

> The powers thus granted are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for government of the business to which they relate, at all times and under all circumstances.

Id. at 9.

Interestingly, even the timing of the Internet and telegraph cases seem comparable; the Supreme Court is beginning to hear Internet cases nearly 30 years after the creation of ARPANET.

161. *Id.* at 9-10.

162. *See id.* at 7, 16-17 (Field, J., dissenting).

163. *Id.* at 11.

came before the Court. To determine if the tax offended the Constitution, the Court had no alternative but the dormant Commerce Clause. The Court resorted to analogy:

> A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.[164]

This passage bears a striking resemblance to the rhetoric of *ALA v. Pataki*, in which the court compared the Internet to a conduit for interstate traffic in goods, services, and ideas.[165] And just as the *ALA v. Pataki* court accompanied its analogy with a broad statement stripping the states of power to regulate the new technology, so too did the Supreme Court in *Telegraph Co. v. Texas*. In a classic statement of the "old territorialism," the Court suggested that while states might regulate commerce confined exclusively within their territories, regulation of commerce which so much as "affects" other states belongs solely to Congress.[166] Accordingly, the Court struck down Texas' tax.[167]

The decisions made in the wake of *Telegraph Co. v. Texas* sketch out directions that Internet dormant Commerce Clause jurisprudence might follow. The simple analogy and jurispathy of *ALA v. Pataki* may represent the state of the art in Internet jurisprudence, but the corresponding telegraph cases have a much longer history. These cases suggest that the courts will be obliged to retreat from their hard-line stance toward state regulatory jurisdiction. Only six years after *Telegraph Co. v. Texas*, the Supreme Court began to pare back its transportation analogy. Citing "essentially different characteristics," the Court in *Western Union Telegraph Co. v. Pendleton* indicated that the regulations suitable for transportation might be "entirely inapplicable" to the telegraph.[168] Retrenchment of the analogy did not immediately lead to an expansion of state jurisdiction,

---

164. Telegraph Co. v. Texas, 105 U.S. 460, 464 (1882).

165. ALA v. Pataki, 969 F. Supp. 160, 173 (S.D.N.Y. 1997).

166. *Telegraph Co.*, 105 U.S. at 466:

> The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress.

167. *See id.*

168. Western Union Tel. Co. v. Pendleton, 122 U.S. 347, 356-57 (1887).

however; resting its decision on a concern for uniform regulation, the *Pendleton* court struck down a state law that controlled the order of delivery of telegrams outside the state's borders.[169]

More sensitive treatment of state regulatory authority did eventually follow the collapse of the transportation analogy. Despite the language in *Telegraph Co. v. Texas* suggesting that only Congress could regulate the telegraph, the Supreme Court went on to uphold various state laws concerning the now familiar medium. Thus, for example, the Court sustained laws which controlled the delivery of telegraph messages within the state,[170] and which prevented telegraph companies from contractually limiting their liability, even though the contracts were to be performed at least in part outside the state.[171] The Court attempted, unconvincingly, to distinguish its earlier cases, suggesting that these regulations had only "incidental" effects on interstate commerce, and that they were in fact "aids" to interstate commerce.[172] This reasoning is unpersuasive, particularly in light of *Western Union Telegraph Co. v. Commercial Milling Co.*, the case which upheld liability limitations.[173] In the aftermath of *Commercial Milling*, each state could enact different liability limitations, thereby defeating the "necessity of one uniform plan of regulation" upon which the earlier cases had rested.[174] And because telegraph companies were likely to alter their conduct in view of their exposure te liability, these laws would likely affect conduct outside the borders of the enacting state—another prohibition of the earlier cases. In essence, the Court had, by 1910, backed away from a blanket prohibition of state regulation of the telegraph and had settled on a substantial relation analysis. That is, the Court concluded that the state where a telegraph contract was made had sufficient interest to regulate that contract, even though it might affect conduct in other states.

---

169. *Id.* at 358 ("Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states.").

170. *See* Western Union Tel. Co. v. James, 162 U.S. 650, 662 (1896) (holding that a statute imposing a ponalty for failure to deliver telegraphic messages impartially was a valid exercise of state power).

171. *See* Western Union Tel. Co. v. Commercial Milling Co., 218 U.S. 406, 421 (1910) (sustaining a Michigan statute that imposed affirmative duties on a tolegraph company to deliver interstate messages).

172. *See James*, 162 U.S. at 661, 662.

173. *Commercial Milling*, 218 U.S. at 420-21.

174. *Id.* at 415.

B. A New Reading of the New Territorialism: The Nexus Requirement

We might expect much the same thing in the context of the Internet. Just as the Supreme Court retreated from the blanket prohibition on state regulation in *Telegraph Co. v. Texas* and moved toward the accommodation of state interests, the courts are similarly likely to move away from the extreme stance taken in *ALA v. Pataki*. The question that remains is how this accommodation will occur. This subpart suggests that courts might give effect to state interests by finding a nexus requirement, rather than a per se rule, in *Edgar v. MITE Co.* and its progeny.

Such a reading avoids the strained necessity of synthesizing the four cases that comprise the "new torritorialism." The affirmation cases, *Brown-Forman* and *Healy*, center on a different issue from *Edgar* and *CTS*, the tender offer cases. The affirmation cases concerned the permissible *means* a state could employ te achieve a regulatory objective; the tender offer cases, by contrast, concerned the permissible *objects* of state regulation. Thus in *Brown-Forman* and *Healy*, there was no disputo that the stato had power to regulate hiquor sellers who transacted business within its confines; at issue was *how* the state could regulate them—that is, whether the state could artificially link local prices to conduct occurring elsewhere. But in *Edgar* and *CTS*, the Court questioned whether the state had power over the regulated entities at all.

The outcomes in the two tonder offer cases turned on the substantiality of the relation between state interests and the objects of state regulation. In *CTS*, New York had jurisdiction because states have a strong interest in regulating corporatious which are created under their laws. In *Edgar*, the connection between state interests and the burdened enterprises was much more tenuous; Illinois asserted jurisdiction over companies which might have no Illinois shareholders and, at the same time, which might be incorporated in another state. Accordingly, the Court held that the state's claim to power was illegitimate. As the differing results in the tender offer cases suggest, jurisdiction hinges on the presence of "some definite link"[175] between state interests and the regulated entities.

---

175. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954) (stating that due process requires a link between a state and the person, property, or transaction to be taxed). As with *Edgar* and *CTS*, Internet cases usually concern the objects of stato regulatory power. States typically regulate cyberspace on the basis of content; at issue, then, is the strength of the connection between state interests and particular contont providers.

The idea that there must be a substantial connection between state interests and the objects over which a state asserts power is commonly known as a nexus requirement.[176] The nexus requirement surfaces in another line of Commerce Clause cases, taxation cases, in which the Supreme Court has announced that it will sustain a state tax against a Commerce Clause challenge when "the tax is applied to an activity with a substantial nexus with the taxing State."[177] Because there is little reason to treat jurisdiction to tax differently from jurisdiction te regulate, the tax cases suggest that a nexus requirement might plausibly be found in *Edgar*. At the same time, however, the tax cases hold that the nexus requirement is a peculiar historical derivative of the Commerce Clause that limits jurisdiction to tax te entities that are physically present in the state.

If applied te regulatory jurisdiction, the physical presence aspect of the nexus requirement would of course proscribe most state enactments of cyberlaw. But the physical presence rule rests on shaky foundations. As a matter of policy, it seems dubious that stato power should contract as teclinology progresses, yet that is an inevitable corollary of the physical presence rule in an increasingly interconnected world. As a matter of history, the notion that the nexus requirement derives exclusively from the Commerce Clause is sinnply wrong. The nexus requirement as currently expressed in the tax cases stems from the Due Process Clause, a fact that could allow courts to take a more generous stance toward state regulatory needs.

The semmal tax case is *Quill Corp. v. North Dakota*.[178] At issue in *Quill* was whether a stato could impose a use tax on a mail order business whose only contacts with the state were via U.S. mail and common carrier.[179] North Dakota argued that the nexus requirement established by the dormant Commerce Clause was identical to the minimum contacts test for personal jurisdiction under the Due Process Clause.[180] Since Quill Corporation undoubtedly had sufficient contacts to support personal jurisdiction, the state argued, the company was subject to taxation.[181] The Court disagreed. Writing for the

176. *See generally* Quill Corp. v. North Dakota, 504 U.S. 298, 306-08 (1992) (discussing the Due Process Clause and nexus requirement).

177. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Valid taxes must also be fairly apportioned, nondiscriminatory, and fairly related to the services provided hy the state. *See id.*

178. *Quill*, 504 U.S. at 298.

179. *Id.* at 301-02.

180. *See id.* at 312.

181. *See id.*

majority, Justice Stevens reconfirmed the twenty-five year old holding in *National Bellas Hess, Inc. v. Department of Revenue* that the Commerce Clause mandates physical presence within a state as a predicate to state jurisdiction to tax.[182] To justify the holding, Stevens embarked on a theoretical discussion of the differences between Due Process and the Commerce Clause.[183] The Court noted that the minimum contacts test and the nexus requirement are animated by different constitutional concerns, saying "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."[184] Consequently, the Court felt secure in imposing a more stringent requirement for jurisdiction to tax than for personal jurisdiction.

Perhaps the most significant line in *Quill* comes in Justice Scalia's concurrence. Scalia wrote, "It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax."[185] This observation suggests that if the dormant Commerce Clause prescribes a nexus requirement for tax cases, then it must do the same thing for cases which determine a state's competence to regulate. Indeed, it is this realization for which the Court was groping a few years earlier in *Edgar* and *CTS*. Contrary to Scalia's remark, however, there is room for considerable discontinuity between the taxation and regulatory nexuses. Jurisdiction to tax refers to a state's ability te fill its coffers; jurisdiction to regulate, at least in some instances, may dictate whether a state can protect the health, safety, and welfare of its citizens. One would suspect that the state has substantially greater leeway when legislating for the latter.

Determining the precise content of the regulatory nexus depends in part on whether Justice Stevens was correct in his contention that the nexus requirement does not derive from the Due Process Clause. In dissent, Justice White pointedly noted that one of the chief architects of the nexus requirement, Justice Rutledge, specifically acknowledged the due process origins of the requirement.[186] Other historical evidence, overlooked by White, indicates that he is correct.

During the *Lochner* era, the Supreme Court located its extraterritoriality jurisprudence in the Due Process Clause, rather than

---

182. *See id.* at 317-18 (citing National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967)).

183. *See id.* at 312-13.

184. *Id.* at 312.

185. *Id.* at 319 (Scalia, J., concurring).

186. *See id.* at 326-27 (White, J., concurring in part and dissenting in part).

the dormant Commerce Clause. The notion was that if a state purported to control the conduct of its citizens beyond its borders, it infringed on the personal liberty interests of those individuals in violation of the Fourteenth Amendment. Thus in the great case of *Allgeyer v. Louisiana*, the Court struck down a state statute that punished citizens for entering into unauthorized out-of-state insurance contracts.[187] The state's power, the Court said, "does not and cannot extend to prohibiting a citizen from making contracts . . . outside of the limits and jurisdiction of the State."[188] In similar fashion, the Court continued to invalidate state legislation on the ground that due process contained inherent territorial restrictions until well into the twentieth century.[189]

As the principle of dual sovereignty which underpinned strict territerialism began to erode, the Court replaced *Allgeyer* with a nexus analysis. Significantly, that analysis occurred under the Due Process Clause. The principle case is *Alaska Packers Ass'n v. Industrial Accident Commission*, which upheld against a Fourteenth Amendment challenge an application of California's Workers Compensation law to redress an injury that took place in Alaska.[190] The court cited the liberty of contract cases as good law, but emphasized the state's interest in regulating the employer-employee relationship.[191] The Court said: "California, therefore, had a legitimate public interest in controlling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee, and in providing a remedy available to him in California."[192] The case's progeny were even more explicit in providing for a nexus requirement. In *Hoopeston Canning Co. v. Cullen*, the Court upheld a New York law requiring foreign insurance companies doing business in the state to be licensed.[193] The Court framed the question of New York's regulatory jurisdiction under the Fourteenth Amendment simply as: "[W]hether the insurance

187. Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897).

188. *Id.* at 591.

189. *See, e.g.*, New York Life Ins. Co. v. Dodge, 246 U.S. 357, 376-77 (1918) (invalidating a state law that prohibited a citizen from entering into a contract with a locally licensed foreign corporation); New York Life Ins. Co. v. Head, 234 U.S. 149, 164 (1914) (holding that Missouri could not extend the operation of its statutes relating to insurance policies into the jurisdiction of other states).

190. Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 542-43 (1935).

191. *See id.* at 540-42 (citing *Allgeyer*, *Head*, and *Dodge*).

192. *Id.* at 542-43.

193. Hoopesten Canning Co. v. Cullen, 318 U.S. 313, 322 (1943).

enterprise as a whole so affects New York interests as to give New York the power it claims."[194]

Cases like *Alaska Packers* and *Hoopeston* clearly implicate nexus concerns; they test the strength of the link between state interests and regulated enterprises. What is significant here is that these are due process cases, not Commerce Clause cases. This fact casts considerable doubt on the majority position in *Quill* that the nexus requirement is a peculiar doctrinal requirement of the Commerce Clause. When combined with Justice White's observations,[195] the majority's contention in *Quill* can safely be discarded. So too can its mandate that jurisdiction be predicated on physical presence, a requirement that would be inimical to most state regulation of the Internet.

Acknowledging the nexus requirement's derivation from due process assists in determining when state exercise of authority over the Internet is appropriate. Relatively few Internet regulation cases have been decided, but there is a significant, albeit small, body of case law on Internet personal jurisdiction. As a general proposition, the Internet due process cases indicate that mere presence in cyberspace is not enough to support personal jurisdiction. That is, the fact that an Internet communication is accessible in a forum does not give the forum jurisdiction.[196] If presence in cyberspace alone will not support adjudicative jurisdiction, it seems highly unlikely that it will support regulatory jurisdiction. In other ways, however, personal jurisdiction on the Internet has been quite expansive. A line of cases springing from *Burger King Corp. v. Rudzewicz*[197] suggests that Internet users who employ the cyberspace medium to transact business in another state can be subjected to personal jurisdiction in that state.[198] Another series of cases hailing from *Calder v. Jones*[199] provides that jurisdiction can be predicated on intentionally harmful Internet con-

194. *Id.* at 316.

195. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 326-27 (1992) (White, J., concurring in part and dissenting in part).

196. *See, e.g.*, Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) ("Regardless of the technical feasibility of such a procedure . . . mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction."), *aff'd* 126 F.3d 25 (2d Cir. 1997).

197. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

198. *See, e.g.*, Resuscitation Techs., Inc. v. Continental Health Care Corp., No. IP96-1457-C-M/S, 1997 WL 148567, at *4 (S.D. Ind. 1997) ("To transact business in this day of instantaneous interstate electronic transmissions does not require a defendant to have physically entered the state."); Hall v. LaRonde, 66 Cal. Rptr. 2d. 399, 402 (Cal. App. 2d. 1997) (stating that requisite minimum contacts may be electronic).

199. Calder v. Jones, 465 U.S. 783 (1984).

duct that is expressly directed at the forum state.[200] Without suggesting that jurisdiction to adjudicate is the equivalent of jurisdiction to regulate, we might suspect that courts would be most hesitant to strip states of regulatory jurisdiction of commercial speakers who use the Internet to do business within the state and of tortfeasors who intentionally aim their actions at the state.

In sum, the history of extraterritoriality suggests that courts will ultimately be forced to withdraw from the absolute prohibition of state regulation of the Internet announced in *ALA v. Pataki*. The cases further suggest that this retreat might be accomplished by finding a nexus requirement in the dormant Commerce Clause. But unlike the nexus requirement in the jurisdiction-to-tax decisions, which demands physical presence, the test employed by future courts might simply inquire into the strength of the connection between the state's regulatory interest and the enterprise sought to be regulated. While this requirement would not allow a state to regulate all Internet transactions, it would allow them to enact zoning legislation targeted at actors who knowingly aim their conduct toward the state.

C. Extraterritoriality's Next Stop: The First Amendment

Reading a nexus requirement into the *Edgar* line of cases to accommodato state interests may well be nothing more than a stopgap measure. The extraterritorialism principle historically has not been tied to any one constitutional provision.[201] As seen earlier, the principle was born in the dormant Commerce Clause, migrated to the Due Process Clause during the *Allgeyer* years, and has since returned to the Commerce Clause.[202] Recent case law suggests that extraterritoriality analysis may be preparing for another leap, this time into uncharted territory: the First Amendment.

In its only significant pronouncement to date on Internet law, *Reno v. ACLU*, the Supreme Court struck down the Communications

---

200. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (citing *Calder* for the proposition that intentional trademark infringement via the Internet can support personal jurisdiction); Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413, 419 (D. Ariz. 1996) (citing *Calder* for authority to subject a nonresident defendant to jurisdiction in plaintiff's forum for making defamatory statements).

201. *See* Regan, *supra* noto 9, at 1895 (justifying extraterritorialism by structural inferences from the system as a whole); Welkowitz, *supra* note 109, at 58 (stating that no single constitutional provision limits the exercise of state authority).

202. *See supra* Part V.A.-B. The extraterritoriality principle has also found expression in the Contracts Clause. *See, e.g.*, New York, Lake Erie & W. R.R. Co. v. Peunsylvania, 153 U.S. 628, 645-46 (1894) (striking down on Contracts Clause grounds a state law that required a foreign corporation to collect taxes in the state of its incorporation).

Decency Act ("CDA") on First Amendment grounds.[203] The Act prohibited the knowing transmission of obscene or "indecent" messages to any recipient under eighteen years of age.[204] Relying on conventional First Amendment analysis, the Court concluded that the CDA was facially overbroad because it suppressed a large amount of constitutionally protected adult speech in the name of protecting children from potentially harmful material.[205] But in a revealing passage, the Court rooted its overbreadth analysis at least partially in extraterritoriality grounds. The Court said: "a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise."[206]

The concern that an individual at one end of a communications device might be unpredictably subjected to the law of a jurisdiction at the other end represents a classic extraterritoriality concern—indeed, one voiced in the telegraph cases by courts addressing the question on dormant Commerce Clause grounds. By tagging this concern as one of "overbreadth," the Court seems te be signaling that these questions are hereafter to be decided on First Amendment grounds. In this regard, it should be remembered that the *ALA v. Pataki* court rested its decision on Commerce Clause grounds only because the CDA case had not yet been decided.[207] Now that it has, and with the analytical tools of the First Amendment, it might be supposed that extraterritoriality analysis under the dormant Commerce Clause is nearing the end of its brief lifetime.

The demise of dormant Commerce Clause analysis in Internet jurisprudence should be greeted with approval. Although at least one commentator has lauded the usefulness of the Clause in constraining state regulatory excesses,[208] the First Amendment seems a more precise tool. Whenever state legislators enact law affecting a communications medium, the strictures of free speech are doubtless uppermost in their minds. It is much less likely that they consider an unwritten

---

203. Reno v. ACLU, 521 U.S. 844, 874 (1997).

204. *See* 47 U.S.C. § 223(a) (Supp. II 1996).

205. *See Reno v. ACLU*, 521 U.S. at 874-79.

206. *Id.* at 878.

207. *See supra* notes 135-37 and accompanying text. Even in the aftermath of the CDA case, *ALA v. Pataki* may be more than an isolated historical curiosity. Another court has preliminarily enjoined a state Internet regulation on the ground that plaintiffs were likely to succeed on their claim that the law violated the Commerce Clause. *See* ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (1998) (citing *ALA v. Pataki*).

208. *See* Reynolds, *supra* note 4.

constitutional commandment whose dictates have, in the words of Justice Scalia, "made no sense."[209] Conducting extraterriteriality analysis under the First Amendment respects state legislatures by giving them notice of the kinds of laws they can and cannot pass.

VI. CONCLUSION

State attempts to regulate the Internet have thus far been fairly clumsy. The law struck down in *ALA v. Pataki*, for example, amounted to a content-based restriction on the speech of actors who had no substantial connection to the regulating jurisdiction. But more sophisticated—and more legitimate—attempts are inevitable. As states come to direct their regulatory efforts at controlling access to Internet contont, rather than at the content itself, and as they impose regulatery burdens on actors who have significant state contacts, rather than on Internet actors generally, courts will be forced to develop more nuanced analyses to assess the validity of stato legislation. The early efforts of those who oversee the regulators have been no less clumsy than efforts of the regulators themselves.

The positive and predictive accounts set forth in this Note suggest that a construction of the Commerce Clause which props up a per se rule of invalidity against all state regulation of the Internet cannot be sustained. If history is any guide, courts will find in the Commerce Clause a nexus requirement that will allow states, no less than Congress, to map out the zones of cyberspace. Ultimately, however, the First Amendment will become the judicial tool of choice for evaluating the constitutionality of state cyberlaw.

On a normative level, re-empowering the statos would serve the goals of competitive federalism. The federalism concern that has most compromised state regulatory jurisdiction is "exit"; if Internet actors could be regulated merely because their communications were accessible from a particular forum, it was thought, then these actors could avoid regulation only by quitting cyberspace altogether.[210] But if states could regulate actors with a substantial connection to state interests, a cyberspace enterprise could exit simply by severing its relationship with a particular state. The possibility of exit would encourage states to experiment with cyberlaw to provide attractive

209. Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

210. *See* Burk, *supra* note 4, at 1102 (discussing exit).

packages of goods and services to their citizens. In this on-line equivalent of the laboratory of the states,[211] a "competition among rule-sets"[212] would ensure that only the most effective and desirable regulations would survive. Perhaps most importantly, the nexus requirement would help preserve the sovereignty of the states in the new electronic frontier. There, as in the physical world, a diffusion of power will better secure liberty.[213]

*James E. Gaylord**

211. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing the states as laboratories of democracy).

212. Lessig, *supra* note 56, at 1406.

213. *See* Youngstown Sbeet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better te secure liberty.").

* The author would like to thank those members of the *Vanderbilt Law Review* who refrained from slaughtering him when he richly deserved slaughtering: Ann Bjerke, Greg Kondritz, Jim McCray, Kate Tromble, and James Zimmerman. Additional thanks are due the author's parents, D. Ann and Jim Wright, who have funded his Odyssey through various educational institutions with the patience of Penelope. Finally, thanks to Barry Friedman, whose work as lawyer, scholar, and toacher is a constant inspiration.