4-1996

Virtual Realities and Virtual Welters: A Note on the Commerce Clause Implications of Regulating Cyberporn

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Virginia Law Review

April, 1996

Essay

***535** VIRTUAL REALITY AND "VIRTUAL WELTERS": A NOTE ON THE **COMMERCE CLAUSE**

IMPLICATIONS OF REGULATING **CYBERPORN**

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IN recent months, there has been a great deal of publicity regarding the availability of pornography over the Internet and other computer networks, along with proposals for regulation. [FN1] Recent months have also seen the prosecution of one couple, located in California, by authorities in Memphis, Tennessee, for the contents of a computer bulletin board they operated. [FN2] According to media accounts, the Memphis location was chosen for its conservative juries, who were expected to be unsympathetic to Bay Area pornographers. [FN3] No doubt more such prosecutions, by both federal and state and local authorities, are on the horizon.

***536** As the first of its kind, this prosecution raises interesting questions regarding the appropriateness and nature of "community standards" [FN4] developed to deal with local entities like bookstores [FN5] and movie theaters [FN6] as applied to almost locationless entities such as computer bulletin board systems. Indeed, the American Civil Liberties Union has argued in court that the appropriate community standard for such cases is that of the online community, rather than of any particular geographic area. [FN7]

My point here, though, is a narrower one: that we need not even reach the First Amendment to discover serious difficulties with locality-based regulation of computer bulletin board systems. Instead, we may look to the Supreme Court's **Commerce Clause** jurisprudence for some useful guidance on the inappropriateness of such regulation. Only where regulations pass the **Commerce Clause** test is it even necessary to address First Amendment issues, and, as I will suggest, even there the test provides significant guidance.

Computer Bulletin Boards

Most readers by now are familiar with computer networks and bulletin boards, but a brief review may nonetheless be helpful. Traditional publishing of books, magazines, and movies gave the publisher near-complete control over their markets and destinations.

Typically, sales required local distributors (bookstores, movie theaters, etc.), who would be knowledgeable concerning local laws and mores and who could limit purchases by minors.

***537** Computer bulletin boards, on the other hand, work quite differently. When accessed via the Internet, all computers are virtually equidistant: as I can attest from personal experience, it is no more trouble to browse the collection of a library in Sydney, Australia than of the one next door. Computer "publishers" do not distribute the product to their customers; their customers come to them. A user desiring to acquire sexual images (or, for that matter, plans for building birdhouses) must seek out the service in question and download the product, having it sent over the network to his or her computer. Not only do the operators of such services have no local presence, nothing takes place in the customer's geographic location that is not initiated by the customer. Thanks to the proliferation of computer technology, computer bulletin board services (both free and for profit) have become numerous. An individual service might, in a given day, reach millions of users in scores of different states and nations.

The Interstate Sales Tax Analogy

Although this fact has generated a great deal of interesting First Amendment literature already, with more certain to be on the way, it raises another issue that has so far received no attention. In short, the trading of information (including, but not limited to, sexually explicit information) among states is interstate **commerce**. State regulation of interstate **commerce** is subject to limits, even where Congress has not acted, under the so-called "dormant" **Commerce Clause**. [FN8]

In a strikingly similar situation, the Supreme Court has repeatedly struck down state laws aimed at commercial activity that, but for its multistate character, would otherwise be subject to state power. These cases involve state efforts to apply sales tax laws to interstate catalog merchants.

The leading case is Quill Corp. v. North Dakota, [FN9] decided in 1992. Quill involved an effort by North Dakota's taxing authorities to levy sales taxes on Quill's catalog sales in North Dakota, a somewhat cheeky effort in light of the Supreme Court's 1967 ***538** National Bellas Hess decision that barred just that sort of thing. [FN10] Quill had no physical presence in the state. Its only contact was the mailing of catalogs and flyers to customers in North Dakota. North Dakota maintained that this was sufficient contact with the state to support taxation. Quill Corp. argued that such taxation violated its due process rights, and furthermore was inconsistent with the **Commerce Clause**.

The Supreme Court rejected the due process argument, holding that the purposeful mailing of 24 tons of catalogs and flyers per year into North Dakota was sufficient contact with the state to support taxation. According to the Court, this conduct indicated that "Quill has purposefully directed its activities at North Dakota residents." [FN11] In light of this behavior, the Court held, subjecting Quill to taxation did not offend due process.

Nonetheless, the Court found the taxation impermissible on the distinct ground of interstate **commerce**. Although the Court found sufficient "minimum contacts" to satisfy due process, it also found that there was not the "substantial nexus" needed to satisfy the **Commerce Clause**. "Despite the similarity in phrasing," the Court said, "the nexus requirements of the Due Process and **Commerce** Clauses are not identical. The two standards are animated by different constitutional concerns and policies." [FN12] In short, although due process relates to individual fairness, **Commerce Clause** concerns in this context have to do with "structural concerns about the effects of state regulation on the national economy." [FN13]

In the case of state sales taxes, the Court's concern was that subjecting interstate businesses to a multiplicity of inconsistent state sales tax laws would place a substantial burden on interstate ***539 commerce** even if each individual sales tax were reasonable. As the Court said:

On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the Bellas Hess rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection

duty. What is more significant, similar obligations might be imposed by the Nation's 6,000-plus taxing jurisdictions. [FN14]

The Court went on to quote Bellas Hess to the effect that the resulting "many variations in rates of tax, in allowable exemptions, and in administrative record-keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations." [FN15] Because such complexity would subject interstate **commerce** to a burden that would not apply to intrastate operators, it constitutes a discrimination against interstate **commerce** that cannot be permitted under the **Commerce Clause**. [FN16] As a result, the Court struck down North Dakota's effort to tax Quill.

From the Quill and Bellas Hess cases, then, we learn that even uses of state authority that are otherwise unexceptionable, such as the application of sales taxes, can be impermissible where the existence of multiple standards would create a significant burden for entities whose activities cross multiple states. [FN17] If this "interstate burden" ***540** analysis is sufficient to bar state action in the extremely important area of taxation, then it is difficult to see why it should not apply with equal force in the area of obscenity law. Taxation, after all, is the lifeblood of the state; regulation of obscenity can certainly rank no higher on the scale of state interests, and quite probably falls several steps further down even if the important First Amendment aspects are not taken into account.

These cases, and the principles that lie behind them, raise two important points. Most obviously, it would appear that state or local regulation of communication over computer networks on obscenity grounds is very likely a violation of the dormant **Commerce Clause** because of the variations produced by the community standards doctrine. After all, if it is too much of a burden for interstate merchandisers to keep track of variations in state sales tax rates and classifications, it certainly must be too great a burden for interstate publishers to keep track of variations in the far less certain "community standards" of obscenity and indecency.

The second and perhaps more important point is that if we are willing to grant interstate sellers of office equipment and porcelain "collector" dolls such extensive protection from local interference in the name of protecting **commerce**, surely we should be even more

willing to provide such protection in the name of free speech. For the protection provided by the dormant **Commerce Clause** is merely a matter of judicial inference; the value of a free press, on the other hand, is explicitly spelled out in the First Amendment.

Such an approach would, of course, limit the ability of communities to develop unique standards of obscenity, and move us closer toward a uniform national standard. [FN18] While that development is not without its drawbacks, neither are the many other movements toward ***541** uniformity mandated by the Constitution. But we have accepted them nonetheless. [FN19]

Taking this approach seriously would mean barring prosecutions, under state or local law, of out-of-state individuals and entities for obscenity where the material in question came via computer connections. More interestingly, it would also mean that courts should regard even federal prosecutions that employ local community standards with a considerable degree of suspicion. For while Congress is generally regarded as having the power to override dormant **Commerce Clause** considerations through appropriate legislation, we should be reluctant to assume that it has done so by implication, simply because of the existence of federal criminal laws. [FN20] The idea of a national market, after all, is one that Congress may override through the passage of appropriate legislation, [FN21] but that is a far cry from saying that federal prosecutors should be able to do the same.

Whether my suggestion will be taken seriously, on the other hand, is an open question at best. For one thing, it must overcome the natural tendency of academics, journalists, and judges to rush to the First Amendment whenever an issue involving speech or publication appears. For another, it must overcome the equally natural tendency to forget that parts of the Constitution outside the Bill of Rights ***542** -even the **Commerce Clause**-may serve as important guarantors of liberty. And aside from these hurdles, it requires a recognition that there is still a role for the nationalist parts of the Constitution, despite today's resurgence of interest in the powers of states and in limitations on the federal government. [FN22]

Despite all of these trends and tendencies, I think that there is still room to ask whether it is appropriate, or even constitutional, to allow states to govern expression under

circumstances in which they would not be permitted to collect sales taxes on sales of Elvis dolls or K-Tel merchandise. Where it has been necessary, we have managed to update our view of the Constitution to accommodate changes in technology. It is time that we do so again.

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[FN1]. Two cover stories in national news magazines fueled this interest. See Philip Elmer-Dewitt, On a Screen Near You, Time, July 3, 1995, at 38; Steven Levy, No Place for Kids?, Newsweek, July 3, 1995, at 47. The Time story, based on a heavily-criticized study at Carnegie-Mellon University, itself came in for a great deal of criticism. See, e.g., Jeff Cohen & Norman Solomon, Time Magazine Pulls Cyberhoax on America, Ariz. Republic, July 24, 1995, at B5; William Webb, Too Much Porn on Internet-or in the Press?, Editor and Publisher, July 22, 1995, at 30. For more on the Carnegie-Mellon study itself see Bill Schackner and Dennis Roddy, Internet Brouhaha Entangles Researcher, Pittsburgh Post-Gazette, July 24, 1995, at A1. This publicity led to the passage of the so-called Communications Decency Act while this article was approaching publication. See Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 133, codified at 47 U.S.C. §223(a)-(h) (signed Feb. 8, 1996). If ultimately upheld, this Act may answer some of the questions raised in this Essay, since Congressional action eliminates dormant **Commerce Clause** concerns. Important parts of the Act have been enjoined, however, by American Civil Liberties Union v. Reno, Civ. A. 96-963, 1996 WL 65464, 1996 U.S. Dist. LEXIS 1617 (Feb. 16, 1996). In another sense, the points raised by this Essay remain important even if the Communications Decency Act is upheld. Legislation comes and goes, after all, but constitutional concerns are far more permanent.

[FN2]. United States v. Thomas, Nos. 94-6648, 94-6649, 1996 U.S. App. LEXIS 1069 (6th Cir. Jan. 29, 1996).

[FN3]. Joshua Quittner, Computers in the 90s, Newsday, Aug. 16, 1994, at B27.

[FN4]. See generally Miller v. California, 413 U.S. 15 (1972) (establishing the Miller test for obscenity, and stating that reference to community standards is constitutionally adequate, as people in different states vary in their tastes and their attitudes).

[FN5]. See, e.g., American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

[FN6]. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) (involving film Carnal Knowledge).

[FN7]. Brief Amicus Curiae of the American Civil Liberties Union Foundation at 20-31, Thomas v. United States, Nos. 94-6648, 94-6649, 1996 U.S. App. LEXIS 1069 (6th Cir. 1996) (Copy on file with Virginia Law Review Association). In the interest of full disclosure, I should admit that I consulted with the ACLU attorneys working on this brief, and suggested that they make this argument. It is thus not surprising that I find it interesting. For a more general discussion on the kinds of free-speech problems raised by

new technologies see Robert P. Merges & Glenn H. **Reynolds**, News Media Satellites and the First Amendment: A Case Study in the Treatment of New Technologies, 3 High Tech. L.J. 1 (1989).

[FN8]. For a good overview of the Supreme Court's dormant **Commerce Clause** jurisprudence see Donald Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant **Commerce Clause**, 84 Mich. L. Rev. 1091 (1986).

[FN9]. 112 S. Ct. 1904 (1992).

[FN10]. National Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967).

[FN11]. 112 S. Ct. at 1911. In National Bellas Hess, supra note 10, the Court had endorsed such a due process argument. Although it is beyond the scope of this brief Essay, I note that while the mailing of flyers in quantity was found in Quill to indicate that the corporation had "purposefully directed" its activities toward North Dakota residents, the same could not be said to apply to the connection of a computer bulletin board system to the Internet or to telephone lines. Because computer systems are equally accessible from almost anywhere, the mere operation of such a system could not fairly be characterized as "purposeful direction." As a result, a Bellas Hess type due process argument might find considerably more purchase in this context.

[FN12]. 112 S. Ct. at 1913.

[FN13]. Id.

[FN14]. Id. at n.6.

[FN15]. Id.

[FN16]. Id. at 1913.

[FN17]. It is this principle that distinguishes a Quill approach. Although there is one recent case that might superficially appear inconsistent, on closer examination it turns out to fit the Quill mold as well. In Goldberg v. Sweet, 488 U.S. 252, 267 (1989), the Supreme Court upheld a state sales tax on interstate telephone calls against a dormant **Commerce Clause** challenge. However, Goldberg's outcome was based on precisely the same considerations that I have laid out by reference to Quill. In Goldberg, the court stated that the tax on instate consumers was permissible under the **Commerce Clause** because such an approach resulted in fair apportionment of the taxes, and no excessive burden on interstate **commerce**, since only two states (the originating state and the terminating states) would be allowed to tax interstate calls. Id. at 265. Indeed, the Court noted that any other approach (for example, one based on the path taken by the call)

would violate the **Commerce** **Clause** because the billions of possible electronic paths that a call might take could otherwise "produce insurmountable administrative and technological barriers." Id. at 264-65. This is consistent with the "virtual welter" language of Quill, which no doubt explains why the Court itself did not view the two cases as inconsistent. Such an approach, I might add, also supports the "online community" standard urged by the ACLU, which would have an analogous simplifying effect by subjecting a single service to only one standard, rather than a multiplicity of conflicting standards. See infra note 18.

[FN18]. Or maybe not. The American Civil Liberties Union's brief suggests that community standards might vary among online communities, or, alternatively, that some kinds of online obscenity might be placed effectively beyond regulation as a result of Stanley v. Georgia's privacy in the home doctrine. See Brief of the ACLU, supra note 7, at 27-31 (citing Stanley v. Georgia, 394 U.S. 557 (1969) (holding that a state may not punish mere possession of obscene materials in home)).

[FN19]. Note that we already have a uniform national standard for indecency in broadcasting. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[FN20]. Cf. South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 91 (1984) (requiring clear evidence of congressional intent to allow state regulations inconsistent with dormant **Commerce** **Clause**). As one leading treatise puts it:

[T]he Court will not find that Congress has removed state or local regulations from the limits of dormant **Commerce** **Clause** principles unless Congress has expressly stated in legislative actions that the type of state regulation at issue is approved by Congress or unless the Court otherwise finds that Congressional intent to allow such state regulations of **commerce** is "unmistakably clear."

John E. Nowak & Ronald D. Rotunda, Constitutional Law 282 (4th ed. 1991). Such analysis is, obviously enough, not legally binding on federal prosecutors. But it should suggest caution where the kinds of prosecution discussed in this Essay are considered, by prosecutors or courts.

[FN21]. The dormant **Commerce** **Clause** is, of course, no barrier to congressional action. Congress remains free to legislate on the subject, and even to incorporate local standards of obscenity into such legislation-subject to whatever other constitutional provisions may apply. See Sable Communications of Cal. v. FCC, 492 U.S. 115, 124-126 (1989). Indeed, although I would oppose the Communications Decency Act, see supra note 1, on other grounds, there is no question that it answers these concerns and, if ultimately upheld, would largely eliminate them.

[FN22]. An interest, I stress, that is often justified. See generally Glenn H. **Reynolds**, Is Democracy Like Sex? 48 Vand. L. Rev. 1635 (1995) (calling for restoration of nondelegation and enumerated powers doctrines).

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