The Commerce Clause of the United States Constitution, which empowers Congress to regulate commerce among the several states, was intended to prevent states from erecting barriers to trade. State laws that discriminate against out-of-state products or destroy the unity of a national market to reap local benefits have been found unconstitutional, a doctrine which is known as the “dormant commerce clause.” The courts have recognized that state regulation of the Internet is especially problematic under the dormant commerce clause, because the Internet is not only a national but an international network.

**Background.** As firms that sell products or services over the Internet push into new industries and markets, their old-line rivals are fighting back. One tactic is to use dubious “consumer protection” arguments to urge state legislators to attack the use of the Internet to move goods across state lines. Another is for regulators to apply existing consumer-protection laws, which suppress competition to the Internet. The efficacy of these laws in protecting consumers is questionable, but their result of limiting consumers’ choices and forcing them to pay higher prices is certain.

**On-line wine sales.** Restrictions on the interstate sale of alcoholic beverages are products of the Prohibition Era. The 21st Amendment to the US Constitution (repeal of prohibition), enacted in 1933, specifically prohibits the “transportation or importation” of liquor into a state in violation of the state’s laws, a provision originally intended to give “dry” states the power to maintain that status. (Without such a provision, the Commerce Clause of the Constitution might well have compelled all states to permit alcohol sales.)

No state is now totally dry, but the power is still being used, primarily to protect in-state liquor monopolies and state tax revenues. Thirty-three states restrict direct shipments of alcohol from out-of-state on-line retailers or direct-mail operations to customers. In seven of these states, the offense is a felony. Penalties can be stiff; New York violators face a fine and jail time of up to one year.
addition, the Twenty-First Amendment Enforcement Act, passed by Con-
gress in October 2000, enables a state to get a federal civil injunction
against an out-of-state company that makes shipments into the state.\textsuperscript{4} It
does not expand the substantive authority of existing laws, however.

These restrictions on direct shipment impose serious costs on wine
sales. Customers in states that forbid direct shipments must purchase
their wine from state-licensed wholesalers. In some states, Massachusetts
for example, liquor licenses are limited in number or by other restrictions;\textsuperscript{5}
in about 17 states (the number is dropping in the face of privatization initia-
tives) the state itself owns the liquor stores.\textsuperscript{6} Either approach results in
higher prices for consumers.\textsuperscript{7}

Prohibitions on direct shipment also deny customers access to many
of the products offered by the nation’s 1,600 wineries. Consumers must
either request that a wholesaler in their state special order out-of-state
products at a markup rate of up to 25 percent, or they must visit the out-of-
state retailers themselves. Meanwhile, small wineries languish because
their wines may not be carried by major liquor distributors, and because
they lack access to a nationwide market. The typical retail store handles
wines from only about 50 wineries.\textsuperscript{8}

Ostensibly, restrictions are designed to prevent the sale of alcohol to
minors. But states have another powerful incentive—protecting state rev-
enues. During 2000, Texas collected $5.4 billion in tax revenue from the
sale of wine.\textsuperscript{9} Also, wholesalers have considerable political power, and
this muscle is used to protect their competitive turf. The biggest whole-
saler, based in Miami, has annual revenues of $2.3 billion, which is seven
times the $300 million annual nationwide total of direct wine shipments.\textsuperscript{10}

The Supreme Court found in \textit{State Board of Equalization v. Young’s
Market Co.}, that the 21st Amendment gives states \textit{carte blanche} to deal
with liquor as they choose.\textsuperscript{11} However, a later case, Hostetter \textit{v. Idlewild
Bon Voyage Liquor Corp.}, said the conclusion that the 21st Amendment
“has somehow operated to ‘repeal’ the Commerce Clause” with respect
to liquor would be “an absurd oversimplification.”\textsuperscript{12} Subsequent decisions
have extended this theme, making it clear the 21st Amendment is not
a license to discriminate against out-of-state products because “the cen-
tral purpose of the Twenty-first Amendment was not to empower states to
favor local liquor industries by erecting barriers to competition.”\textsuperscript{13}
Using these cases, wine lovers and wineries are fighting against the restrictions, coordinating their efforts through organizations such as Free the Grapes, the Coalition for Free Trade, and the Wine Institute. Recently, they have collected appellate-court victories in Florida and trial-court wins in Massachusetts, Texas, Illinois, and Indiana. The Institute for Justice has challenged a law in New York, second only to California as a wine market, that permits in-state wineries to advertise and ship to consumers but forbids comparable activities by out-of-state wineries. A US district judge recently denied a state motion to dismiss the case, using language that seems to presage another decision against restrictive laws.

Automobiles. About 40 states have enacted franchise laws that prohibit direct sales of new cars by manufacturers across state lines. Most states also limit the number of dealerships that can sell new cars within their borders. Many states have “Relevant Market Area” laws. These laws provide existing dealers with a regulatory forum to object to, and perhaps prevent, the opening of a new dealership within their local market. The laws also allow protests against an existing dealer trying to expand or to build an innovation such as a service center into his dealership.

Manufacturers had planned to establish on-line outlets for their vehicles, partly to offer innovations such as “no haggle” pricing. Ford and General Motors scrapped their plans to sell directly to consumers, under heavy pressure from existing dealerships waging a nationwide campaign. Ford’s Texas website did not sell directly to consumers, but instead offered information about prices and options, referring the customer to local dealers for the sale. Even so, dealerships participating in these partnerships with Ford were threatened with a $10,000-per-day fine. Recently, the manufacturers have been trying to make a deal with their dealers. A new website, FordDirect, which will offer a price somewhere between the invoice price and the manufacturer’s suggested retail price, is 80 percent owned by dealers, 20 percent by Ford. The Internet also creates the promise of huge virtual used-car lots like CarsDirect.com; these companies are affected mainly by state laws that ban the “brokering” of cars or require that brokers be licensed.

Even before their application to the Internet, automobile franchise laws imposed unnecessary costs on consumers. An FTC study found that “Relevant Market Area” laws raise prices, sometimes by up to 25 percent. Some franchise laws are being challenged in the courts. For example,
Arizona's bans on on-line sales, on-line direct manufacturer referrals of leads for new sales, and on manufacturer financing of buyers who make purchases independently of local dealers are being challenged.23

Inhibitions on competition and escalation of costs has nothing to do with protecting consumers, and everything to do with protecting the profits of automobile dealers. The structure of restriction is built on two Supreme Court cases from 20 years ago. Exxon Corp. v. Governor of Maryland 24 upheld a law forbidding ownership of retail gasoline stations by integrated oil companies, and New Motor Vehicle Board of California v. Orrin W. Fox Co.25 upheld a scheme that allowed existing auto dealers to prevent the establishment of competing dealerships.

Given the increasing protectionism evident in state laws since Exxon and Fox, plus the potential gains for consumers created by the Internet and obstructed by these laws, it is inevitable the Supreme Court will be called upon to revisit the constitutionality of these restrictions.

Cigarettes. Although state restrictions on on-line cigarette sales have not faced the same level of scrutiny as restrictions placed on wine, courts have been more willing to strike down these laws under the dormant commerce clause because there is no 21st Amendment giving the state special power over cigarettes. In November of 2000, a federal district judge issued a temporary restraining order preventing a New York ban on the direct sale of cigarettes via the Internet from taking effect, concerned that the law violated the Commerce Clause.26 She stated that “the papers do not demonstrate that the state’s interest in improving adult health by decreasing smoking will be achieved by this statute.”

Policy recommendation. State restrictions hindering the expansion of electronic commerce harm consumers. They raise prices and reduce consumer choice. They also hurt small businesses whose only chance to reach a national market may come through the Internet.

The argument that restrictions are necessary to prevent minors from obtaining alcohol and cigarettes on-line is not enough to justify a ban on interstate liquor sales. On-line retailers already try to exclude minors. The American Vintners Association has created a new website called creditcards.com that enables retailers to verify customer ages without violating privacy.27 Although a minor might circumvent this restriction by borrowing a parent's credit card, the development of electronic signatures under the Global and National Commerce Act could resolve this issue.28
Likewise, the argument that local automobile dealers can best offer trustworthy, long-term relationships to car purchasers should not be allowed to prevent consumers from having a larger range of choices. If consumers find local dealers better, they will buy from them; if they do not, then why should they? Furthermore, on-line car outlets will be able to contract with service centers in the customer's area to arrange for cars to be serviced, and many consumers would be reassured by the knowledge that the seller is exercising continuing supervision over the service outlet.

Realistically, in a highly mobile society, a local dealer may assume a customer will move before he needs a new car, and has little incentive to invest in the relationship. Conversely, a manufacturer which sells nationwide has strong incentives to make the ownership experience pleasant.

Hopefully, the courts will invalidate these protectionist laws and reaffirm the validity of the Commerce Clause; judges analyzing these issues have done a good job so far. Congress might also step in where state legislatures face “capture” by influential groups such as automobile dealers in ways that significantly inhibit interstate commerce. The fact that the United States is one big common market has brought us incredible benefits. We should keep it that way.

~ MICHAEL MALLINGER


2 The Wine Institute website, www.wineinstitute.org/shipwine/analysis/intro_analysis.htm, has a summary of state wine-shipment laws. Twelve states allow interstate shipments by wineries from states that reciprocate; 10 allow some shipping under other circumstances; 17 have no restrictions; 30 states allow direct shipment by in-state wineries. Wine is treated somewhat more permissively than other types of alcohol.


7 Julian L. Simon and David M. Simon, "The Effects of Regulations Upon State Liquor Prices," 11 April 1996 (finding that consumers pay higher prices under highly regulated systems of distributing liquor through state-run stores, and as states have relaxed liquor regulation, prices have fallen); available at www.inform.umd.edu/EdRes/Colleges/BMGT/Faculty/JSimon/Articles/LIQRPM.txt.
10 Institute for Justice, *Uncorking Freedom*, p. 3.
15 Florida Dept. of Business Regulation v. Zachy's Wine and Liquor, Inc., 126 F.3d 1399 (11th Cir. 1997); State of Florida v. Sam's Wines and Liquors, 731 So.2d 655 (1st Dist. Fla. 1999); Dickerson v. Bailey, 87 F.Supp.2d 691 (SD Tex. 2000); Kendall-Jackson Winery, Ltd. v. Branson, 82 F.Supp.2d 844 (ND Ill. 2000); Bridenbaugh v. O'Bannon, 78 F. Supp.2d 828 (ND Ind. 1999). The Florida and Massachusetts cases were decided on jurisdictional grounds, and triggered the passage in Congress of the Twenty-First Amendment Enforcement Act. The other cases were solid substantive wins on Commerce Clause grounds.
20 Singleton, "Will the Net Turn Car Dealers into Dinosaurs?" pp. 2-3.
22 Singleton, "Will the Net Turn Car Dealers into Dinosaurs?" p. 5.
29 See generally Singleton, "Will the Net Turn Car Dealers into Dinosaurs?"
Gambling is essentially a risk-taking activity, in which someone offers something of value, usually money, in exchange for a chance to win something of greater value, usually more money. In its many forms gambling has long existed, but before the 20th century it was confined primarily to those present at a specific physical site.

The telephone and the telegraph greatly expanded the possibilities; it is no longer necessary to be there in the flesh to bet on a football game. Now, the Internet is expanding the possibilities still further. One can play poker or roulette from a computer in one’s den, or place a real-time bet on a cricket game in India.

The technology. Internet gambling sites enable one to wager on sporting events, political races, and other contests. On-line casinos accommodate patrons who would otherwise be forced to travel long distances to bet at bricks-and-mortar casinos. This technology gives customers the convenience and privacy of gambling from their own homes. This accessibility raises concerns for two reasons. First, there is a fear that it makes gambling too easy. The sport who would travel to Atlantic City to blow a wad only once a year can now do it every night without stirring from home. Second, most states have decided that citizens should not have easy access to casinos; Internet gambling undermines this governmental decision and flouts authority.¹

Background. Despite its dubious legality in most of the US, Internet gambling attracts one million American customers daily. Already, 4.5 million people have gambled on-line, according to the Pew Internet and American Life Project. On-line gaming grew to a $2.2 billion-a-year business in 2000, with experts predicting a rise to $6.3 billion by 2003. The total number of gambling sites has grown to over 21,000, although this number may be inflated by franchises that allow several sites to operate under the aegis of one parent site. The actual number of distinct sites may be closer to 700.² Still, according to the Pew report, when people list their favorite on-line activities, gambling is at the bottom of the list.³
The US first tried to regulate the ability to communicate wagers using electronic means with the federal Wire Wager Act of 1961, which prohibits the use of a "wire facility for the transmission of...bets or wagers" or even for the transmission "of information assisting in the placing of bets or wagers." The US Justice Department has contended that the Wager Act also applies to Internet gambling. In fact, this law was used in August 2000 to sentence Jay Cohen, chief executive of World Sports Exchange, to 21 months in prison. However, because the law was written and passed before the Internet existed, the applicability of the law to on-line gaming remains dubious.

To date, only one bill regarding Internet gambling has passed either chamber. The Internet Gambling Prohibition Act (S. 474), sponsored by Senator John Kyl (R-Ariz.), passed the upper body in 1997. Corresponding House efforts have failed, despite several attempts in the 106th Congress. The most notable of these was H. R. 3125, which fell short despite modifications to make it acceptable to social conservatives. This bill at first held bettors liable for wagering on-line. Then, amid concerns that this provision would be unenforceable, Internet Service Providers were made liable if they did not remove or disable gambling sites once aware of them. This revision raised several issues about government using ISPs as its policemen. Rumors soon spread that the language had been changed again to make credit-card companies the law enforcers, requiring these companies to review customer purchases and report charges incurred while gambling. The ISP requirements and these rumors raised serious red flags for privacy advocates. Rep. Bob Goodlatte (R-Va.) reportedly is reworking the bill and hopes to bring it to a vote sometime during 2001.

Despite warnings that gambling is addictive, many continue to engage in betting of every kind on the Web. To see its popularity, type "gambling" or "casino" into a search engine, and you'll return a plethora of sites offering easy access to betting on sporting events or more traditional, casino-style games. Even The Gambler's Kenny Rogers is in on the action, having started his own Internet gambling site, www.kennyrogerscasino.com. Microsoft and Playboy have done the same.

Attempts at prohibition in the US have frightened many away from this type of enterprise. Other nations allow casinos, requiring business
licenses but otherwise leaving them alone. They are legally treated like members of most other industries. Among the most popular places for Internet gaming sites are Antigua, Australia, and Costa Rica. This year the Australian government planned a 12-month freeze on Internet gambling, but strong opposition led to the squelching of these plans. 

In the US, bricks-and-mortar casinos are allowed to operate in Las Vegas, Atlantic City, Detroit, many Indian reservations, and several other locations. Internet gambling firms that offer betting to US citizens do so at their peril. Since Jay Cohen was sentenced, many operators, including Cohen's business partners, have refused to travel to the US. They ply their trade outside the reach of US law enforcement, without fear of prosecution or extradition. This nose-thumbing has state and federal legislators upset, but there is nothing they can do to prevent on-line gambling. Rrouting a browser to a foreign proxy server will evade blockages by an ISP or anyone else. Furthermore, encryption technology and even low-tech measures such as code words can bypass attempts at prevention.

Despite the impossibility of enforcement, many state and federal legislators will continue to try to erect parchment barriers to on-line gaming. Their motivations may be pressure from powerful lobbies, such as bricks-and-mortar casino associations and state lotteries hoping to stifle competition. Many socially conservative groups, such as the Family Research Council, also pressure lawmakers to protect people from their own "bad" decisions—a classic "Baptists and Bootleggers" alliance.

The prohibitionists are getting some help from unlucky gamblers and credit-card companies. Credits cards are the chief vehicles of payment for off-shore gambling. Some American citizens want to skip on their losses by arguing that the credit-card company should not have let them bet over the Internet when such activity is, perhaps, against US law. Some financial institutions have issued policies stating that ATM or check cards cannot be used to fund accounts that "facilitate on-line gambling." Then, if the credit-card holder objects to his losses, the financial institution can legally withhold payment to the gambling establishment.

**Policy recommendation.** Pushing gambling sites off shore is a bad idea. It results in a net economic loss for the US and in a lack of redress for any US victims of fraudulent sites. Regulation or outright banning of industries for the good of the people is a misuse of law. With respect to gambling, it also reeks of hypocrisy. State governments that purport to be
so concerned about protecting people routinely sell lottery tickets, often to their poorest citizens, which carry rates of return so low that they would embarrass a Mafia numbers-racket operator.

Attempted regulation of gambling on the Internet also sets a dangerous precedent for restricting free speech and association. Furthermore, the enforcement of such regulation/legislation can only lead to invasions of individuals' privacy. Gambling is a conscious choice. It may be a bad one, but telling citizens what to think instead of encouraging them to think for themselves is a mistake. In addition, state governments should be encouraged to abandon their gambling schemes, which tend to attract those who can least afford them. Internet gambling sites should be able to operate in the US just as any other legitimate business, controlled only to protect people against theft and fraud.

~ Thomas Pearson

5 Sinrod, "Cracking down on Internet gambling."
6 H. R. 3125 is available at thomas.loc.gov.
11 Ledbetter and Viuker, "Gambling online? You bet!"
The term "digital divide" has become commonplace in the media echo chamber. It expresses concern that some people have superior access to the Internet, or that some people use the Internet more than others, and that "something must be done" (by the government, of course). The reality is that any digital divides in existence are the product of natural forces, and are closing rapidly. The only threat to this benign trend is the possibility of government programs directed at "the problem."

**Background.** "Digital divide" is a term applied to a variety of possible imbalances in Internet use, such as: Asian- or Caucasian-Americans vs. African- or Hispanic-Americans; rich vs. poor; men vs. women; urban vs. suburban vs. rural; people of different ages; people of different education levels; people with disabilities; developed vs. underdeveloped nations; America vs. Europe vs. Asia.

A common factor unites most discussions of these possible divides—a concluding plea for a government program of regulation or subsidy to close whatever divide is under consideration.

**Analysis.** For anyone who believes in equality, and who wants the magnificent opportunities of the Internet to become available to as many people as possible as rapidly as possible, the response to all proposals for government meddling in the name of "closing the digital divide" should be adamant and unvarying: Don't do it.

It is axiomatic that the educated and the rich adopt new technologies more rapidly than other people. This is always the pattern of technology diffusion. It is also a good and necessary thing. These early adopters pay a premium price, provide innovators with a return on investment that makes enterprise possible, and serve as beta testers. Bugs are worked out, lessons learned, quality improved, and costs cut. Thereafter, the technology gets cheaper and better and more people sign up as it falls into their price range and as they perceive the utility.

This familiar process has put color televisions into 98 percent of US households. It has put VCRs into 85 percent, cooking ranges
into 99 percent, self-cleaning ovens into 66 percent, water heaters into 100 percent, and stereos into 68 percent of households.\(^1\) As of 2000, 51 percent of households had computers, up from 15 percent in 1990, and 42 percent had access to the Internet, up from zero in 1997.\(^2\)

The personal computer has reached 50-percent household penetration faster than any other technology in history. This penetration is indeed higher among upper-income and educated groups, but the Employment Policy Foundation's recent review of the numbers and trends concludes that "95 percent household penetration for computers will occur between 2003 and 2007 for upper income households and between 2005 and 2009 for the lowest income households."\(^3\) Any government program that tries to short-circuit this already quite rapid process will retard diffusion across economic lines rather than promote it. Nor do other purported "gaps" require action, because they dissolve under analysis:

- **Rural/Urban.** How can a rural/urban gap exist when anyone with a telephone has access to the Internet, and the telephone is ubiquitous? The argument is sometimes made that a rural user might be required to make a long-distance call to reach an ISP, and that this is unacceptable. But the distinction between local calls and long-distance calls is a product of government regulation, not of technology or cost, and could be cured easily. A program, such as a subsidy, to cure a problem that is completely an artifact of the regulatory system would border on lunacy.

- **Broadband.** A variation of the "rural gap" argument is that a "broadband gap" disfavors rural areas because telephone companies are giving priority to urban areas in broadband deployment. But satellite broadband is coming on-stream rapidly. (See chapter 12, "High-Speed Internet Access Policy.") Other options are also developing; some rural telephone companies are deploying DSL broadband, and may be moving ahead of urban areas.\(^4\) A government program, with its nitpicking and uncertainty, will delay such efforts.

- **Disabled.** Disabled Americans do need better access to the Internet, but this need is being met by an outpouring of private initiatives. (See chapter 21, "Internet Access for the Disabled.")

- **Racial.** The discrepancy in computer ownership and Internet access between Asian- and Caucasian-Americans on the one hand and African- and Hispanic-Americans on the other is the most sensitive issue.
Minority groups are behind at the moment, but their connectivity is increasing rapidly. The nation is on course to produce the result envisioned by one Internet analyst: "Everybody who wants to get online will have gotten online in the next five years, and it does not matter whether they’re yellow, pink, or green."

Underdeveloped World. Several companies are providing connectivity tailored to the needs of the underdeveloped world. For example, the Simputer Project is developing a handheld 32MB computer, more powerful than most PDAs, which can run on three AAA batteries and be set up so that every person in a village can have his own e-mail account (price: US $200). Hewlett-Packard has introduced a worldwide network that brings buyers and sellers from all over the world together to trade. Called E-Inclusion, it enables anyone with Internet access to buy products from remote villages, communicate ideas, and collaborate on projects with people around the world.

Existing efforts. To the extent that special efforts are needed, the federal e-rate program is pouring billions of dollars into connecting schools and libraries, with emphasis on less affluent areas. Technology grants to schools are also available through the Department of Education. Community colleges are providing not just technical training but educational packages that integrate technology with other skills, such as basic reading and mathematics. (Over 40 million adults in the US are functionally illiterate; access to the Internet is not their top priority.)

Private companies are putting together extensive partnerships. At the end of last year, Microsoft donated $100 million to the Boys & Girls Clubs of America to set up a Club Tech program to teach and encourage inner-city children to use personal computers and explore the Internet. Other companies, such as U.S. West, Ford Motor Company, and Visa are deeply involved in efforts to provide training to low-income people.

Conclusion. A recent report by the US Commerce Department concluded that “overall, our Nation is moving toward full digital inclusion,” and that more Americans are using “electronic tools” at an increasing rate.

Policy recommendation. Congressional efforts to mandate progress are certain to backfire, inhibiting current efforts and turning into unproductive welfare schemes for favored constituencies and corporations.

~ James V. DeLong
9 Singleton and Mast, “How Does the Empty Glass Fill?”
12 US Department of Commerce, Falling Through The Net. The report laments that “a digital divide still remains,” but, as noted, any such divide is closing rapidly.
Introduction. Some advocates believe increased use of graphics, video clips, color-contrasted links, and pages that require high levels of motor control exclude the disabled from utilizing the Internet. These groups want to improve access by expanding to private sites rules already imposed on federal web pages.

This proposed expansion should be rejected. The costs of applying these rules to privately owned and operated websites would stifle the Internet. Ironically, it would harm disabled Americans by inhibiting the market-driven development of technologies that benefit them. The market, not regulations, should react to users' special needs in cyberspace.

Practicalities aside, rules requiring private websites to communicate with everyone in the world if they want to communicate with anyone, regardless of cost, would be an egregious violation of the First Amendment to the United States Constitution.

Background. Two recent developments raise the issue of regulating private websites to make them more accessible for the disabled. First, the National Federation of the Blind (NFB) filed a lawsuit against America Online (AOL) that alleged the ISP leader was violating the Americans with Disabilities Act. Passed in 1990, ADA is a complex statute designed to make public accommodations accessible to disabled Americans. The NFB claimed that text-reading software enabling blind users to access information on websites is not compatible with AOL's site. The case was settled in July 2000. AOL agreed to make the next version of its software compatible with screen-reader technology. No ruling confirming or denying the applicability of ADA to the Internet was made in the case, and no other court has ruled on this matter. Nevertheless, in a September 9, 1996, communication, Assistant Attorney General Deval L. Patrick wrote, "Covered entities [under ADA] that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."
Second, in 1998 the federal government undertook to ensure the "electronic and information technology developed, procured, maintained, or used by the Federal government be accessible to people with disabilities."³ In December 2000, the US Access Board published standards to require agencies to provide technology that is fully usable by employees and citizens with disabilities. Agencies have until June 21, 2001, to comply. The standards dictate that, among other things, agency websites provide a text alternative to any video components, animated media, and all tables and charts. They also limit the frequency with which pages may flicker (flickering text may induce seizures in persons with photosensitive epilepsy), set standards for levels of color contrast, and mandate that when a timed response is required, users be able to indicate more time is needed.⁴ The Access Board explains the rules this way: "In general, an information technology system is accessible to people with disabilities if it can be used in a variety of ways that do not depend on a single sense of ability."⁵

Requirements. The practical results of the parameters laid out in the government provisions are that streaming audio or audio files must be accompanied by simultaneous text; that streaming video be captioned; that the use of color to convey information be restricted in some ways; and that webmasters provide at least one mode that does not require user vision formatting all information so that it is compatible with Braille and speech synthesis devices. A second mode of conveying information would have to accompany everything posted to the Web. The provisions may mean a ban on touch screens, moving text, or animation (unless the user can go to a static display with the same information), and require all websites to provide at least one mode that minimizes the cognitive and memory skills required of the user.⁶

Any requirements imposed on private sites could well mirror these federal guidelines, and the field of disabilities law is so expansive and open-ended that a number of arguments could be used to support including the private world. For example, websites might be classified as public accommodations. Or the government might impose on its contractors the requirements it imposes on itself; this would sweep in almost every large business in the nation.

Effect on the disabled. Proponents of regulation argue there are 54 million Americans with disabilities in danger of missing out on the Internet
revolution. But this suggests that the market will have plenty of incentives (54 million of them, to be exact) to cater to those with special needs. The unregulated marketplace has already produced new technologies and countless opportunities on-line for people with disabilities. For example, "Internet access for the blind has become possible due to the availability of screen access software," and this technology was not developed to comply with regulations, but rather came about in the marketplace.

But if sites are regulated now, the incentives to create and distribute new technologies may be reduced. Federal law will "lock in" a minimum accessibility standard that may soon be well below what new technologies or innovations are capable of providing for disabled users. Who knows what software engineers and programmers will invent to aid disabled users? We will never find out, if the market incentives for them to create are taken away. Better to let market incentives bring everyone along (although maybe not everyone at the same time), than to stifle progress across the board.

Absent any regulatory obligations, many web page creators are being motivated to make their sites more accessible by various private organizations. For example, the World Wide Web Consortium (W3C) publishes technical guidelines for accessibility for content developers, authors of pages and sites, and developers of authoring tools. There are various other groups reaching out to the technology community in the interests of accessibility.

The practical realities of the trade-off for accessibility. The possible benefits of enforcing ADA on privately owned websites are much touted, but what about the costs? In testimony to Congress, Walter Olson, editor of www.overlawyered.com and Manhattan Institute senior fellow, said "it would be hard to find a better way to curb the explosive upsurge of this new publishing and commercial medium than to menace private actors with liability if they publish pages that fail to live up to some expert body's idea of accessibility in site design." Mr. Olson offers a picture of what would happen if "every technically literate American woke up tomorrow determined to publish on the Web in compliance with expert accessibility guidelines, or not at all." His predictions include:

- Hundreds of millions of websites would be torn down. Some of these would eventually be put back up after being made compliant. Countless others would never resurface.
The posting of new pages, by the tens of millions, would screech to a near halt. A relative few, mostly larger organizations that have made it up the accessibility learning curve would continue to publish, but everyone else (except for entities exempt from ADA) would put publishing plans on hold while they trooped off to remedial tutorials, or at least sent their techies there.

Amateur publishing, as by the owner of a small business or a community group that relies on volunteers, would become more of a legal hazard. The tendency would be for more entities to turn their web-publishing function over to paid professionals.

Many widely used and highly useful features on websites would be compromised in functionality or simply dispensed with for reasons of cost, delay, or cumbersomeness. To take but one example, a small-town newspaper or civic organization might feel itself at legal risk if it put audio or video clips of the city council meeting on-line without providing text translation and description. Such text translation and description are expensive and time consuming to provide. The alternative of not running the audio and video clips at all remains feasible, however, and that is the alternative some will adopt.

**Free speech implications of applying ADA to private websites.**

The First Amendment to the United States Constitution provides: “Congress shall make no law...abridging the freedom of speech or of the press...” Whether this language permits Congress to impose an accessibility mandate on the Internet is a complicated question under Supreme Court case law.

Common sense would indicate it is extremely unlikely such a requirement could survive constitutional attack. Could it be seriously argued, for example, that Congress could enact a law providing that people could say anything they desire over the airwaves, but only if they also provide a written text to anyone who wants one? Or provide a written text in Japanese? Could all publishers of books, magazines, newspapers, pamphlets, brochures, or anything else, be forced to publish in Braille in addition to a regular printing? Could Congress require that all movies release a book version of their story so those who (for whatever reason) couldn’t make it to the theater could be entertained by blockbusters or educated by documentaries? ADA regulations on the Internet are analogous to regulating the everyday decisions newspapers make about the layout of their paper.
To phrase the issue in terms of the formalities of First Amendment jurisprudence, those who argue for the constitutionality of broad access requirements claim they are “content neutral,” and thus would be reviewed by the courts under a deferential standard. However, broad access rules would flunk even under this test. In explicating it, the Supreme Court has said, “Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” The practical reality that millions of sites will be torn down if ADA standards are enforced on the Internet causes the proposal to fail this test. Reducing the amount of content on the Web through burdensome rules cannot possibly serve the goal of enhancing access.

In any event, a strong argument exists that the content-suppressing nature of the rules would be so great that they must be judged under a standard called “strict scrutiny.” Under this, the goal of the government—access for the disabled to information on the Internet—must be accomplished by the least restrictive means. Forcing all private websites to become accessible does not qualify as the least restrictive means for accomplishing increased accessibility. Less restrictive options might include targeted aid for the disabled, assistance through public libraries, a needs-based program for the disabled in their homes, or government grants.

**Policy recommendation.** Rather than risk violating free speech and imposing the harmful unintended consequences of regulation, Congress should not allow ADA to be applied to private websites. Instead, it should simply allow the market to continue to respond to the special needs of disabled Americans.

~ **Jessica P. Melugin**

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2 Correspondence to Sen. Tom Harkin (D-Iowa) from Deval L. Patrick, assistant attorney general, Civil Rights Division, 9 September 1996; available at www.usdoj.gov/crt/foia/cltr204.txt.

3 P.L. 105-220, Workforce Investment Act of 1996, was signed into law on 7 August 1998.

4 “Electronic and Information Technology Accessibility Standards; Final Rule,” Architectural and Transportation Barriers Compliance Board, Federal Register, vol. 65, no. 246, pp. 80500-80527.
5 Taken from “Questions and Answers about Section 508 of the Rehabilitation Act Amendments of 1998”; available at www.access-board.gov/etiaac/section-508-q&a.htm.


9 Some examples include Equal Access to Software and Information (EASI; www.rit.edu/-easi/) and the Center for Rehabilitative Technology (CRT; www.aroh.gatech.edu/crt/crthome.htm).


11 Ibid.


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