The commerce clause of the U.S. Constitution expressly authorizes the national government to regulate interstate commerce. The Supreme Court has interpreted the commerce clause to mean that the national government has the exclusive authority to regulate commerce that substantially affects trade and commerce among the states. This express grant of authority to the national government, which is often referred to as the “positive” aspect of the commerce clause, implies a negative aspect of the clause—that the states do not have the authority to regulate interstate commerce. This negative aspect of the commerce clause is often referred to as the “dormant” (implied) commerce clause.

The dormant commerce clause comes into play when state regulations impinge on interstate commerce. As mentioned elsewhere, states have the authority to regulate commerce and other activities within their borders, and usually the courts will balance the state’s interest in regulating a certain matter—such as the length of trucks or trains traveling on its highways—against the burden that the state’s regulation places on interstate commerce. An emerging issue has to do with state attempts to regulate Internet transactions.

The Internet used to be referred to as the “Information Superhighway.” This rather inaccurate comparison of the Internet to a highway helps to explain how the commerce clause might apply in cyberspace. The Internet—today’s superhighway—is used to transport speech and information all over the world. Is cyberspace activity therefore interstate commerce? Does the commerce clause restrict states from interfering with cyberspace activity?

According to at least one court, the answer to both of these questions is yes. The case involved a state statute that required state libraries to filter the data their patrons could access over the Internet from the libraries’ computers. The court viewed the case through the lens of the commerce clause and held that the statute was unconstitutional. The court reasoned that “the burdens on interstate commerce resulting from the [statute] clearly exceed any local benefit derived from it. [T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.”

FOR CRITICAL ANALYSIS
Given that the Internet is a global network, could this same reasoning be applied to attempts by national governments to regulate this new “area of commerce”?