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## Washington v. Heckel First Draft

Note: For editing purposes, the footnote citations are tentative and/or in short citation form for the first draft and will be converted to appropriate short/long citation forms after an initial revision.

### Introduction

Under *ALA v. Pataki*, courts had generally disfavored state Internet regulations and struck them down under the dormant Commerce Clause. In the aftermath of *Pataki*, academics have increasingly worried about courts being “overly aggressive” in striking down otherwise worthwhile state Internet regulations.<sup>1</sup> State regulations which regulate the Internet indirectly by prohibiting fraudulent trade practices both in the real world and on the Internet are increasingly favored.<sup>2</sup> Commentators point out that although these indirect state regulations do impose some costs on other states, this is true of many other types of state regulations permissible under the dormant Commerce Clause.<sup>3</sup>

*State v. Heckel*, a Washington court decision upholding a state regulation of fraudulent email, has marked out a path whereby a state regulations may pass muster under the dormant Commerce Clause. This Note will address the intersections of *Pataki* and *Heckel* and hypothesize what types of state Internet regulations are compatible with the demands of the dormant Commerce Clause.

### I. Background

#### A. Spam

The Internet is a collection of local computer systems connected to high-capacity national and international networks.<sup>4</sup> Data is transmitted via packets that can be routed according to available bandwidth.<sup>5</sup> As many academics have pointed out, the Internet’s structure “confounds geography.”<sup>6</sup> Internet host computers are identified by logical Internet Protocol (“IP”) addresses,<sup>7</sup> not geographic location. Even knowing locations of sender and recipient computers

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<sup>1</sup> See Farber 817-18(?); Goldsmith at 786-87(?) (noting that the reasoning of *Pataki* extends far beyond the New York regulation at issue and threatens to invalidate nearly ever state regulation of Internet communications on extraterritorial grounds).

<sup>2</sup> See Goldsmith at 785-86(?).

<sup>3</sup> Goldsmith at 795(?); Blake at 146(?).

<sup>4</sup> Burk, 28 CONN. L. REV. at 1097.

<sup>5</sup> Burk, 28 CONN. L. REV. at 1097.

<sup>6</sup> Gaylord, 52 VAND. L. REV. at 1100.

<sup>7</sup> Gaylord, 52 VAND. L. REV. at 1100 (defining IP addresses as unique 32-bit numbers divided into four 8-bit numbers identifying individual host computers).

gives no insight to the digital routes packets will follow as they are relayed among intermediate hosts.<sup>8</sup>

The Internet originated as product of the Cold War, linking U.S. Department of Defense researchers, and until relatively recently was used primarily by the academic and scientific research community.<sup>9</sup> With the emergence of private Internet Service Providers (ISPs), increasing numbers of consumers entered cyberspace.<sup>10</sup> As the Internet has increased in popularity, it has become an increasingly commercial.<sup>11</sup>

This communication network has spawned two principle types of communications: directed and indirect communication.<sup>12</sup> Directed communication includes email and “listserv” mail exploders which send email to all addresses in a list.<sup>13</sup> Indirect communication includes newsgroups, chat rooms, and webpages posted on the World Wide Web.<sup>14</sup>

“Spam” is an unsolicited email message,<sup>15</sup> most commonly defined as unsolicited commercial email (UCE) or unsolicited bulk email (UBE).<sup>16</sup> These terms highlight important aspects of spam. For an email to be unsolicited, no prior relationship exists between the sender and recipient and the recipient has not explicitly consented to the communication.<sup>17</sup> Commercial refers to the content of the email, which usually promotes the sale of goods or services, rather than the actual or presumed motivation of the sender.<sup>18</sup> “Bulk” email is a single message sent to a large number of recipients.<sup>19</sup>

Spam is widely condemned as practice to be regulated or eradicated.<sup>20</sup> It is estimated that three to thirty percent of email messages are spam.<sup>21</sup> It has been criticized as a burden on

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<sup>8</sup> Gaylord, 52 VAND. L. REV. at 1101. *See* Bassinger, 32 GA. L. REV. at 894 (noting that because of packet switching, “it is impossible to limit Internet communications to a particular geographic area or state.”).

<sup>9</sup> *See* Burk, 28 CONN. L. REV. at 1099. In 1969, the Department of Defense created the Advanced Research Project Agency Network (ARPANET), the parent of the existing Internet, which fell out of use by the late 1980s. Gaylord, 52 VAND. L. REV. at 1099-1100.

<sup>10</sup> *See* Burk, 28 CONN. L. REV. at 1099.

<sup>11</sup> *See* Burk, 28 CONN. L. REV. at 1100 (from 1996: noting “businesses of all types routinely use the Internet for commercial transactions, and consumer services have begun to appear . . .”); Sorkin, 35 U.S.F. L. REV. at 342 (“commercial activities became generally accepted on the Internet and ultimately far surpassed the volume of academic and research usage . . .”)

<sup>12</sup> *See* Bassinger, 32 GA. L. REV. at 892-93 (defining two methods of communications: “communication directed by one person to another person or group” and “communication . . . broadcast for all to see.”).

<sup>13</sup> Bassinger, 32 GA. L. REV. at 893.

<sup>14</sup> Bassinger, 32 GA. L. REV. at 893.

<sup>15</sup> *See* Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 915. The term “spam” was originally derived from a Monty Python skit. *Id.* at 918 n.13.

<sup>16</sup> *See* Sorkin, 35 U.S.F. L. REV. at 325 (noting difficulties in defining spam due to differing perspectives among Internet users and discussing arguments for defining spam as UCE or UBE).

<sup>17</sup> *See* Sorkin, 35 U.S.F. L. REV. at 329.

<sup>18</sup> *See* Sorkin, 35 U.S.F. L. REV. at 329-30.

<sup>19</sup> *See* Sorkin, 35 U.S.F. L. REV. at 330-31 (finding no distinction between a message addressed to large numbers of recipients or separate but identical copies of a message sent to a large number of recipients).

<sup>20</sup> [cite]

<sup>21</sup> *See* Sorkin, 35 U.S.F. L. REV. at 336 n.48.

Internet resources, a security threat, and interfering with legitimate business.<sup>22</sup> Messages may contain sexually-explicit content or solicitations for “questionable ventures” that many users find objectionable.<sup>23</sup>

The costs of spam are high and “widespread.”<sup>24</sup> causing wasted productivity as recipients skim and delete spam. ISPs bear a large proportion of costs as spam, consumes large amounts of “network bandwidth, memory, [and] storage space” requiring ISPs to have greater hardware capabilities than otherwise necessary.<sup>25</sup> ISP employees spend large amounts of times filtering and blocking spam, fixing server crashes and service outages, and resolving spam-related consumer complaints; consequentially consumers pay more for Internet access.<sup>26</sup>

### *B. Regulatory Attempts*

Various measures have been advocated and implemented to counteract spam, including self-regulation, technical approaches, litigation, and legislation.<sup>27</sup> Self-help and technical defense mechanisms against spam include self-regulation,<sup>28</sup> technical approaches,<sup>29</sup> private legal responses.<sup>30</sup> These measures have largely proved ineffective, as spammers have succeeded in adapting their techniques to evade anti-spam technology.<sup>31</sup> Likewise, expensive individualized litigation has only been effective relatively large entities in eradicating “relatively large, highly visible, and persistent spammers”.<sup>32</sup>

As of October 2000, thirty-three states have considered and seventeen have enacted anti-spam laws.<sup>33</sup> Some of these laws include opt-out systems, content regulation, and civil and/or criminal penalties.<sup>34</sup> [give examples for each law?]

Many bills have been proposed in the House and Senate, but none have become law. In 1999 alone, the Email User Protection Act, Netizen Protection Act, Inbox Privacy Act, and

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<sup>22</sup> See Sorkin, 35 U.S.F. L. REV. at 336-40.

<sup>23</sup> Sorkin, 35 U.S.F. L. REV. at 336.

<sup>24</sup> Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 919.

<sup>25</sup> Sorkin, 35 U.S.F. L. REV. at 336.

<sup>26</sup> See Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 919; Sorkin, 35 U.S.F. L. REV. at 336-37.

<sup>27</sup> See Sorkin, 35 U.S.F. L. REV. at 341-83.

<sup>28</sup> See Sorkin at 325(?) and 342-45(?) and 356(?) (describing imposition of social norms and community self-regulation on the Internet, hiding, retaliation); Kelin.

<sup>29</sup> See Sorkin 344(?) (describing ISP and third-party filtering, blocking, blacklisting); Graydon 85-88(?) (filtering programs, cancelling accounts); Kelin.

<sup>30</sup> See Sorkin 352(?) (describing private lawsuits by ISPs, destination operators, relay operations, forgery victims utilizing theories such as trespass to chattels and standard contract/tort); Fogo at 920 (private ISP suits); D’Ambrosio at 235(?) (describing ISP lawsuits where ISPs used state common law and novel legal theories to combat spammers); Kelin.

<sup>31</sup> See Sorkin, 35 U.S.F. L. REV. at 356; Graydon 85-88(?) (describing spammers using “guriella tactics” to evade responses).

<sup>32</sup> See Sorkin, 35 U.S.F. L. REV. at 367. See Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 922 (noting that “scattershot private suits by ISPs” using “novel legal theories” have not worked against spammers).

<sup>33</sup> See Fogo.

<sup>34</sup> See Sorkin, 35 U.S.F. L. REV. at 368-379.

Unsolicited Electronic Mail Act were co-pending.<sup>35</sup> During the current session, the Unsolicited Commercial Email Act of 2001, Anti-Spamming Act of 2001, and CAN SPAM Act of 2001 are under consideration.<sup>36</sup> [need cites for all listed legislation]

### C. The Dormant Commerce Clause

The Commerce Clause, found in Article I of the Constitution, expressly grants Congress the power “[t]o regulate Commerce . . . among the several states.”<sup>37</sup> Beginning with *Gibbons v. Ogden*,<sup>38</sup> courts have found an implied power in the Commerce Clause and struck down state regulations which interfere with interstate commerce by effectuating policies of economic discrimination.<sup>39</sup> This implied power, known as the dormant Commerce Clause, have significant impact on state regulations of the Internet communications.

Congress’ commerce clause power is drawn directly from Article I of the Constitution.<sup>40</sup> By contrast, the dormant commerce clause limitation on state regulation of interstate commerce has been implied from the text and structure of the Constitution.<sup>41</sup> The dormant commerce clause has been used to enjoin states from impeding the flow of interstate commerce, practicing “economic protectionism”, and discriminating against outsiders.<sup>42</sup>

When evaluating a state statute relating interstate commerce, courts must determine whether the statute facially discriminates against interstate commerce.<sup>43</sup> If not, the court must apply the balancing test from *Pike v. Bruce Church*<sup>44</sup> to determine whether the local benefits outweigh the burdens on interstate commerce.<sup>45</sup> Two lines of cases have emerged where the Court has struck down state statutes under the dormant Commerce Clause: the transportation cases and extraterritoriality cases.

#### 1. Transportation Cases

*Cooley v. Board of Wardens*<sup>46</sup> introduced the concept that there were some aspects of commerce requiring uniform national regulation. [cite] The transportation cases are the progeny

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<sup>35</sup> See Dreben at 8.

<sup>36</sup> See [www.spamlaws.com/federal/summ107.html](http://www.spamlaws.com/federal/summ107.html).

<sup>37</sup> U.S. CONST, art. I § 8 cl. 3 (commerce clause)

<sup>38</sup> *Gibbons v. Ogden*, [cite].

<sup>39</sup> See Burk at 1124(?); Gaylord at 1106-07.

<sup>40</sup> U.S. CONST, art. I § 8 cl. 3.

<sup>41</sup> Lawrence, 21 HARV. J.L. & PUB. POL’Y at 403. The Supreme Court’s dormant commerce clause jurisprudence has been criticized as “erratic”, with “complex exceptions” and “dubious consistency”. See *id.* at 397. Lawrence proposed an alternate, cohesive “Unitary Framework” to remedy the jurisprudential confusion. *Id.* at 416-18.

<sup>42</sup> See Burk, 28 CONN. L. REV. at 1123-24.

<sup>43</sup> Gaylord at 1107 (quoting *Oregon Waste* at 99).

<sup>44</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>45</sup> See *Pike*, 397 U.S. 137 ( ). Biddle, 37 CAL. W. L. REV. at 165; Gaylord, 52 VAND. L. REV. at 1108-09.

<sup>46</sup> *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851). The case challenged the constitutionality of a requirement that all boards traveling through the Philadelphia harbor hire a local pilot of pay a fine. The Court upheld the law. See Biddle, 37 CAL. W. L. REV. at 170. For an analysis of the transportation cases, see Bassinger, 32 GA. L. REV. at 898-904.

of *Cooley*.<sup>47</sup> In a more-recent decision in *Kassel v. Consolidated Freightways*,<sup>48</sup> the Supreme Court invalidated state laws that limited truck lengths on highways based on safety rationales. The Court acknowledged that states retain power to regulate matters of local concern that to some extent affect interstate commerce, it was extremely reluctant to invalidate “regulations touching on safety.”<sup>49</sup> Nonetheless, the Court found no compelling safety evidence and pointed to exceptions given to trucks traveling wholly intrastate as “raising the specter” of interstate discrimination.<sup>50</sup> Thus a statute that imposed a burden on interstate commerce without a strong countervailing safety concerns, a strong state interest, the statute violated the Commerce Clause.<sup>51</sup>

## 2. Extraterritoriality Cases

Beginning with *Edgar v. MITE Corp.*,<sup>52</sup> the Court’s extraterritoriality cases<sup>53</sup> proposed that the “commerce clause . . . precludes the application of a state statute to commerce that takes place wholly outside the state’s borders, whether or not the commerce has effects within the State.”<sup>54</sup> These cases held that a statute that directly controls commerce occurring outside a state’s boundaries exceeds the enacting state’s authority and is invalid regardless of whether the legislature intended the extraterritorial reach.<sup>55</sup>

*Edgar* concerned an Illinois statute that required takeover tender offers of Illinois corporations to be registered with the Illinois Secretary of State.<sup>56</sup> The Court recognized that states traditionally regulated companies incorporated under its law, including intrastate securities regulations.<sup>57</sup> The Court nonetheless invalidated the law, noting the Illinois law because it could regulate transactions occurring wholly outside the state, thus having “sweeping extraterritorial effects” and tender offers would be stifled if all states enacted such regulations.<sup>58</sup>

In a more recent decision, the Court in *Healy* struck down a Connecticut law that required companies to affirm that prices charged for liquor in Connecticut were no higher than charged in

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<sup>47</sup> See Biddle, 37 CAL. W. L. REV. at 172-75(?) (describing these cases in more detail). See, e.g. *Wabash Railway Co v. State of Illinois*, 118 U.S. 558 (1886); *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938) (refusing to invalidate a state law that admittedly burdened interstate congress by placing width and weight restrictions that 85% to 95% of trucks currently in use would exceed); *Southern Pacific v. Arizona*, 325 U.S. 761 (1945) (invalidating an Arizona law that limited the length of trains within the state); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (striking down an Illinois law that required trucks to be equipped with a specific, curved type of tire mudguard).

<sup>48</sup> *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1980).

<sup>49</sup> *Kassel* at 670(?).

<sup>50</sup> *Kassel* at 676-77(?). Biddle, 37 CAL. W. L. REV. at 175.

<sup>51</sup> *Kassel* at 679(?).

<sup>52</sup> *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

<sup>53</sup> See, e.g. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987); *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

<sup>54</sup> *Edgar v. MITE Corp.*, 457 U.S. at 642-43.

<sup>55</sup> See Gaylord, 52 VAND. L. REV. at 1112.

<sup>56</sup> *Edgar* at 627(?). [include more details about Ill. statute]

<sup>57</sup> *Edgar* at 641(?).

<sup>58</sup> *Edgar* at 641-42(?).

bordering states.<sup>59</sup> In its decision, the Court summed up its extraterritoriality jurisprudence, finding that the commerce clause precludes application of a state statute to commerce occurring wholly outside the state's borders, regardless of the commerce's effects within the state.<sup>60</sup> Secondly, statutes regulating commerce outside its borders exceeds the state's authority and is invalid even if the extraterritorial effects were not intended by the legislature.<sup>61</sup> Finally, the Court should consider not just the practical effects of the statute itself but how a challenged statute would interact with regimes of other statutes and the effects if many other states adopted similar legislation.<sup>62</sup> Finding the statute controlled commerce outside Connecticut and had troublesome interactions with New York regulations, the Court struck it down.<sup>63</sup>

#### *B. Applying the Dormant Commerce Clause to the Internet*

Some commentators have noted "striking similarities" between the Internet and transportation<sup>64</sup> or expressed concern over the extraterritorial implications of state Internet regulations.<sup>65</sup> These commentators tend to find that state Internet regulations do violate the dormant commerce clause.<sup>66</sup> By contrast, others have noted that many state Internet laws relate to traditional state police powers, including regulation of fraud and deceptive trade practices.<sup>67</sup> These commentators tend to find that state Internet regulations don't violate the dormant commerce clause.<sup>68</sup>

## **II. Recent Internet Cases Decided Under the Dormant Commerce Clause**

### *A. Washington v. Heckel*

#### **1. Background**

In 1997, Jason Heckel, an Oregon resident doing business as Natural Instincts, developed a forty-six page online booklet entitled "How to Profit from the Internet." In it he described how to set up an online promotional business, acquire free email accounts, and obtain software for sending bulk email.<sup>69</sup>

Beginning in June 1998, Heckel used the methods described in his own pamphlet and began marketing the booklet by sending between 100,000 and 1,000,000 unsolicited email messages per week. [cite] Heckel used the Extractor Pro software program to "harvest" email addresses from various online messages and send bulk-mail messages using only simple commands.<sup>70</sup> Heckel's email text was a long sales pitch including testimonials from satisfied

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<sup>59</sup> [Healy cite]

<sup>60</sup> [Healy cite] 336?

<sup>61</sup> [Healy cite] 336?

<sup>62</sup> [Healy cite] 336?

<sup>63</sup> [Healy cite]

<sup>64</sup> See Burk, 28 CONN. L. REV. at 1125.

<sup>65</sup> See Gaylord, 52 VAND. L. REV. at 1096.

<sup>66</sup> burk 1127(?); biddle; gaylord at 1096(?)

<sup>67</sup> See Burk, 28 CONN. L. REV. at 1124; Biddle, 37 CAL. W. L. REV. at 162.

<sup>68</sup> farber; goldsmith at 795(?)

<sup>69</sup> Heckel, 24 P.2d at 406.

<sup>70</sup> Id. at 406. The Extractor Pro software required the user to enter only a return email address, subject line, and message text.

purchasers and an order form that the user could download, print, and mail (along with \$39.95) to Heckel's Salem, Oregon mailing address. Heckel sold thirty to fifty pamphlets per month using these marketing methods.

In June 1998, the Washington State Attorney General's Office, Consumer Protection Division ("the Division") began receiving complaints from Washington residents who had received Heckel's email. The complaints alleged that his "messages contained misleading subject lines and false transmission paths."<sup>71</sup> The Division sent Heckel a letter advising him of the Act.<sup>72</sup> In response, Heckel called the Division and discussed procedures that bulk emailers could follow to avoid emailing Washington residents. Nonetheless, the Division continued to receive complaints that Heckel was violating [Washington's Commercial Electronic Mail—see below] Act.<sup>73</sup>

The State of Washington filed suit against Jason Heckel, a resident of Oregon, alleging that his transmission of e-mail to Washington residents violated RCW 19.190, Washington's commercial electronic mail act ("the Act").<sup>74</sup> In particular, the State alleged three causes of action: (1) violation of RCW 19.190.020(1)(b) by using false or misleading subject headers;<sup>75</sup> (2) violation of RCW 19.190.020(1)(a) by misrepresenting email transmission paths;<sup>76</sup> (3) commission of a deceptive trade practice under RCW 19.86.020 by failing to provide a valid email address to which recipients could respond.<sup>77</sup> The State sought a permanent injunction under RCW 19.86.140 and 19.86.080, civil penalties, costs, and attorneys fees.

On cross-motions for summary judgment, the lower court dismissed the suit against Heckel, concluding in a brief opinion "that the statute in question here violates the Federal Interstate Commerce clause" and it "is unduly restrictive and burdensome."<sup>78</sup>

Challenging the trial court's finding, the State sought direct appeal and Heckel cross-appealed seeking reversal of the trial court's denial of his request for attorneys fees.<sup>79</sup> The Washington Supreme Court granted direct review. It reversed the trial court's decision and remanded the matter for trial, holding that the Act did not "unduly burden interstate commerce."<sup>80</sup>

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<sup>71</sup> *Id.* at 406.

<sup>72</sup> *Id.* at 407. The act provides that persons sending an email message may not use a third party's domain name without permission, misrepresent or disguise the message's point of origin or transmission path, or use a misleading subject line.

<sup>73</sup> *Id.* In total, twenty documented complaints were received.

<sup>74</sup> *Heckel*, 24 P.3d at 405. [give description or quotes from RCW 19.190]

<sup>75</sup> *Heckel*, 24 P.3d at 407. The two misleading subject lines used were, "Did I get the right email address?" and "For your review--HANDS OFF!" *Id.*

<sup>76</sup> *Id.* at 407. Nine of the messages generating complaints used the domain name "13.com" as the originating ISP. However, 13.com had been registered to another user since November 1995 and at the time of Heckel's bulk emails was inactive. Thus no messages could have been sent through 13.com. *Id.*

<sup>77</sup> *Id.* at 407.

<sup>78</sup> *Id.* at 408; *State v. Heckel*, 2000 WL 979720 \*1 (Wash. Super. Ct. 2000).

<sup>79</sup> *Heckel*, 24 P.3d at 408.

<sup>80</sup> *Id.* at 406.

## 2. Supreme Court Decision

The single issue facing the Washington Supreme Court was whether the Act's limitations on bulk emailing activities violated the dormant Commerce Clause and unconstitutionally burdened interstate commerce.<sup>81</sup>

The court reviewed the trial court's summary judgment *de novo*, viewing all facts in the light most favorable to the State.<sup>82</sup> Under the Commerce Clause, the court noted an implicit dormant Commerce Clause principle that when states enact laws that unduly burden interstate commerce, they "impermissibly intrude" on the federal government's regulatory powers.<sup>83</sup> The court used a two-step test to analyze the Act under the dormant Commerce Clause: First, they determined whether the Act "openly discriminate[d] against interstate commerce in favor of intrastate economic interests." If they determined the law is facially neutral, then they balanced the local benefits against the intrastate burdens.<sup>84</sup>

Based on the language of RCW 19.190.120, the court quickly concluded that the Act applied evenhandedly to in-state and out-of-state spammers and thus was not facially discriminatory.<sup>85</sup> The court then declared that the Act survived the *Pike* balancing test because its "local benefits surpass[ed] any alleged burden on interstate commerce."<sup>86</sup> Noting that the Act protected the interests of Internet Service Providers (ISPs), owners of forged domain names, and email users, the court cited dicta from other cases that disfavored bulk email on a theory of trespass to chattels.<sup>87</sup> [is last sentence relevant?]

The court discussed actual costs to these parties, noting that hardware and consumer service costs on ISPs. [cite] Additionally, it cited instances where owners whose domain names had been forged in spam headers and consequentially had their computers shut down by spam responses. Finally, when "e-mail recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailings) their efforts cost time and hamper their ability to use computer time most efficiently. The court used a weak analogy that spam was equivalent to sending junk mail with postage due or telemarketing calls to a pay-per-minute cellular phone.<sup>88</sup>

The court noted that the only burden placed on spammers was a requirement of truthfulness, and that this requirement didn't burden commerce but actually facilitated it by removing fraud and deception. [cite] It argued that the trial court erred when its inquiry focused on the sanctions for noncompetition on the burden of competition. [cite]<sup>89</sup>

The court also dismissed Heckel's arguments that the Act could create inconsistency among the states or could regulate commerce occurring wholly outside of Washington. It stated

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<sup>81</sup> *Id.* at 408.

<sup>82</sup> *Id.* at 408.

<sup>83</sup> *Id.* at 409.

<sup>84</sup> *Id.* at 409. The balancing portion is drawn from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>85</sup> *Heckel*, 24 P.3d at 409.

<sup>86</sup> *Id.* at 409.

<sup>87</sup> *Id.* at 409 (discussing *Compuserve v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) and *Am. Online, Inc. v. IMS*, 24 F. Supp.2d 548, 550 (E.D. Va. 1998)).

<sup>88</sup> *Heckel*, 24 P.3d at 410.

<sup>89</sup> *Id.* at 411.



that the imposition of “additional, but not irreconcilable obligations” doesn’t make the requirements “irreconcilable” and hence barred by the dormant Commerce Clause. Likewise, the court focused on the Act’s requirements that illegal bulk messages be read by a Washington resident or be initiated from a Washington computer. Thus, the court argued, that statute didn’t extend to emails routed through Washington computers which didn’t meet the other requirements of the Act.<sup>90</sup>

On these grounds, the court reversed the trial court, vacated the order relating to attorneys’ fees, and remanded the matter for trial.

The Supreme court approved/denied cert in this case on [date].<sup>91</sup>

## *B. American Libraries Association v. Pataki*<sup>92</sup>

### **1. Background**

In [year], N.Y. Penal Law § 235.21 prohibiting the dissemination of obscene or indecent materials to minors was amended to make it a felony for an individual to “intentionally use[] any computer communication system . . . to initiate or engage in [sexual] communication with a minor.”<sup>93</sup> (“the Act”) The statute provided numerous defenses to liability.<sup>94</sup>

Fearing liability under the amended Act, a broad spectrum of individuals and organizations utilizing the Internet for communications sued the Governor and Attorney General of New York seeking declaratory and injunctive relief.<sup>95</sup>

### **2. District Court Decision**

The U.S. District Court for the Southern District of New York struck down the Act on dormant commerce clause grounds.<sup>96</sup> The court analyzed the Internet and different means of Internet communication, including email, listservs, newsgroups, chat rooms, and the World Wide Web.<sup>97</sup> It noted that “Internet users have no way to determine the characteristics of their audience that are salient under the New York Act--age or geographic location.”<sup>98</sup> The court discussed Internet legislation and prosecution attempts by various states, pointing out that inconsistent state standards and state regulatory overreaching invited commerce clause analysis.<sup>99</sup>

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<sup>90</sup> *Id.* at 412-13.

<sup>91</sup> [From KeyCite history] In early October 2001, Heckel filed cert petition with U.S. Supreme Court.

<sup>92</sup> *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

<sup>93</sup> *Pataki*, 969 F. Supp. at 163.

<sup>94</sup> An affirmative defense is established if the obscene or indecent material contained “scientific, educational, governmental or other similar justification” for distributing the material; regular defenses if the defendant made a reasonable efforts to ascertain the true age of a minor, restrict access, labeling or segregating material to facilitate blocking; an exemption was made for “providing [Internet] access or connection”. *Pataki*, 969 F. Supp. at 163-64.

<sup>95</sup> *Pataki*, 969 F. Supp. at 161-63 (listing plaintiffs, including book sellers and publishers, software trade associations, Internet service providers, and civil rights organizations).

<sup>96</sup> *Pataki*, 969 F. Supp. at 183-84.

<sup>97</sup> *Pataki*, 969 F. Supp. at 165-66.

<sup>98</sup> *Pataki*, 969 F. Supp. at 167.

<sup>99</sup> *Pataki*, 969 F. Supp. at 168-69. The court noted: “The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.” *Id.* at 168.

The Court invalidated the statute on four commerce clause grounds. First, the Act represented “an unconstitutional projection of New York law into conduct occur[ing] wholly outside New York.”<sup>100</sup> The Court considered the legislative history and concluded legislators understood and intended the Act to apply to communications between New York residents and individuals outside the state. Additionally, it found the Internet’s “insensitiv[ity] to geographic distinctions” would make it difficult for Internet regulations to apply to wholly intrastate activities.<sup>101</sup>

Second, the Court relied on Supreme Court extraterritoriality jurisprudence prohibiting states from projecting their legislation into other states.<sup>102</sup> The court felt that website owners were unable to close their sites to New York users,<sup>103</sup> and as a result, residents of other states could be prosecuted for conduct perfectly legal in their home state.<sup>104</sup> Thus, the New York statute overreached and impermissibly undermined other states’ regulatory authority.<sup>105</sup> Even if the Act didn’t have extraterritorial effects, it was impermissible under the *Pike* balancing test because to burdens imposed on interstate commerce outweighed the local benefits.<sup>106</sup> The court conceded that “the protection of children against pedophilia is a quintessentially legitimate state objective.”<sup>107</sup> Nonetheless, the court felt that Act’s “worldwide” scope lead to a widespread chilling effect whereby Internet users fearing prosecution would self-censor and “steer clear of the Act by a significant margin.”<sup>108</sup> Further, it found the costs required to comply with the Act’s defenses were excessive.<sup>109</sup>

Finally, the court found the Act subjected the Internet to inconsistent regulations.<sup>110</sup> It felt the Internet was analogous to other types of commerce that demanded consistent treatment and was only “susceptible to regulation on a national level.”<sup>111</sup> The court discussed several transportation cases,<sup>112</sup> and feared that inconsistent regulatory schemes could paralyze the Internet’s development.<sup>113</sup>

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<sup>100</sup> *Pataki*, 969 F. Supp. at 169.

<sup>101</sup> *Pataki*, 969 F. Supp. at 170.

<sup>102</sup> *Pataki*, 969 F. Supp. at 173-74. The court discusses *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), *Healy v. Beer Institute*, 491 U.S. 324 (1989).

<sup>103</sup> *Pataki*, 969 F. Supp. at 174.

<sup>104</sup> *Pataki*, 969 F. Supp. at 177.

<sup>105</sup> *Pataki*, 969 F. Supp. at 176.

<sup>106</sup> *Pataki*, 969 F. Supp. at 177.

<sup>107</sup> *Pataki*, 969 F. Supp. at 177.

<sup>108</sup> *Pataki*, 969 F. Supp. at 180.

<sup>109</sup> *Pataki*, 969 F. Supp. at 181.

<sup>110</sup> *Pataki*, 969 F. Supp. at 181.

<sup>111</sup> *Pataki*, 969 F. Supp. at 181.

<sup>112</sup> The court discussed *Wabash v. Illinois*, 118 U.S. 557 (1886), *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). *Pataki*, 969 F. Supp. at 181-82.

<sup>113</sup> *Pataki*, 969 F. Supp. at 181.

### 3. Progeny Cases

Following *Pataki*, two appellate decisions used the dormant commerce clause to strike down Internet regulations. *ACLU v. Johnson*<sup>114</sup> relied heavily on *Pataki* to strike down a New Mexico statute criminalizing the dissemination of sexual material harmful to minors.<sup>115</sup> The New Mexico statute had very similar structure, language, and purpose as the New York regulation in *Pataki*.<sup>116</sup> Likewise in *Cyberspace Communications, Inc. v. Engler*,<sup>117</sup> the court struck down an amendment to a Michigan statute by adding computers and the Internet as prohibited means of obscene and sexually-explicit material to children.<sup>118</sup> [should Engler really be included—full dist ct opinion and memo app ct opinion?]

### III. Dormant Commerce Clause Analysis

In the wake of conflicting opinions in *Heckel* and *Pataki*, it is unclear to what extent the dormant Commerce Clause precludes state-level Internet regulations. Some commentators have noted the danger of courts perceiving every Internet regulation in the wake of *Pataki* as extraterritorial and aggressively striking down worthwhile state regulations that place only minor burdens on outsiders.<sup>119</sup>

The *Heckel* decision indicates that there may be room under the dormant Commerce Clause for states to utilize their police powers to regulate the Internet within the boundaries. This section analyzes the tensions and synergies between *Heckel* and *Pataki* and finds that the broad reasoning of *Pataki*, although purporting to cover a broad range of Internet communications including email, is not appropriate for directed communications such as email. Further, state Internet regulations of directed communications with appropriate geographic limitations and tailored to further legitimate state interests could be compatible with the dormant Commerce Clause.

#### A. The Facts and Reasoning of *Pataki* is Not Compatible With State Email Regulation

##### 1. Facial Discrimination and the Pike Balancing Test

*Heckel* and *Pataki* differed on the issue of whether their respective statutes facially discriminated among state residents and outsiders. *Heckel* concluded that the statute wasn't facially discriminatory because the statute applied evenhandedly to spammers inside and outside the state.<sup>120</sup>

In applying the *Pike* test, the *Heckel* court concluded that the local benefits surpassed any burdens on interstate commerce. The court discussed the problem of spam, citing costs to ISPs, owners of “impermissibly used domain names and e-mail addresses”, and individual users.<sup>121</sup>

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<sup>114</sup> *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

<sup>115</sup> *See Johnson*, 194 F.3d at 1160-62.

<sup>116</sup> *See Johnson*, 194 F.3d at 1152 (quoting N.M. Stat. Ann. § 30-373.2). [maybe a compare ... with ... ?]

<sup>117</sup> *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (unpublished opinion).

<sup>118</sup>

<sup>119</sup> Farber at 817-18,

<sup>120</sup> *Heckel*, 24 P.3d at 409 (“‘*No person*’ may transmit the proscribed commercial e-mail messages ‘from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident.’”) (citation omitted) (emphasis in original).

<sup>121</sup> *Heckel*, 24 P.3d at 410.

The court was concerned about cost-shifting from deceptive spammers to businesses and consumers.<sup>122</sup> It found truthfulness requirements would make spamming unattractive to fraudulent spammers and thus reduce of the volume of spam while making spam easier to identify and delete.<sup>123</sup> The court balanced this benefit against a single burden—that of truthfulness.<sup>124</sup> The court didn't perceive this requirement as a burden, finding that it would facilitate interstate commerce by eliminating fraud and deception.<sup>125</sup> The court disagreed with the trial court's focus on the burden of noncompliance with the Washington Act as contrary to the *Pike* test's focus on compliance. Thus, the fact that a spammer must filter out Washington recipients before sending fraudulent emails in noncompliance with the Act wasn't a burden that should be considered.<sup>126</sup> The court concluded that the defendant had failed to prove that the burden was "clearly excessive" in relation to the putative local benefits.<sup>127</sup>

*Pataki* didn't explicitly address the first prong of the dormant Commerce Clause analysis: whether the statute discriminates against interstate commerce, but its approach indicates an implicit belief that the statute discriminated against interstate commerce. Although the court spent some time identifying that the statute was aimed at regulating interstate commerce, the court proceeded directly to the balancing inquiry as one of its alternate bases for why the statute was invalid under the dormant Commerce Clause.<sup>128</sup>

The *Pataki* court applied the balancing test as an alternate basis, along with extraterritoriality and transportation analogies, to invalidate the New York statute. The court started by recognizing the "quintessentially legitimate state objection" of protecting children from pedophilia.<sup>129</sup> Nonetheless, the court was underwhelmed the local benefits likely to arise from the New York statute, finding the practical difficulties of obtaining criminal jurisdiction over out-of-state defendants whose only contact with New York is over the Internet.<sup>130</sup> According to the court, other New York laws and the unchallenged parts of the statutes<sup>131</sup> left only a small category of cases that uncovered, and the court doubted due to jurisdictional concerns the state would be able to prosecute them.<sup>132</sup>

Balanced against these "limited local benefits" was "an extreme burden on interstate commerce."<sup>133</sup> The "New York Act casts its net worldwide" and produced a "chilling effect"

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<sup>122</sup> *Heckel*, 24 P.3d at 410.

<sup>123</sup> *Heckel*, 24 P.3d at 411.

<sup>124</sup> *Heckel*, 24 P.3d at 411.

<sup>125</sup> *Heckel*, 24 P.3d at 411.

<sup>126</sup> *Heckel*, 24 P.3d at 411.

<sup>127</sup> *Heckel*, 24 P.3d at 411 (BB note: quoted phrase is from middle of a source quoted in the opinion—internal quotations omitted/citation omitted?).

<sup>128</sup> *Pataki*, 969 F.Supp. at 177.

<sup>129</sup> *Pataki*, 969 F.Supp. at 177.

<sup>130</sup> *Pataki*, 969 F.Supp. at 178.

<sup>131</sup> These parts of the statute criminalize the sale of obscene materials to children (including over the Internet) and prohibit adults from luring children into sexual contact via Internet communication. *Pataki*, 969 F.Supp. at 179.

<sup>132</sup> *Pataki*, 969 F.Supp. at 179.

<sup>133</sup> *Pataki*, 969 F.Supp. at 179.

broader than New York's ability to prosecute.<sup>134</sup> The court was also concerned that the costs with Internet users' attempts to comply with the Act's defenses were excessive.<sup>135</sup> The court concluded that the costs outweighed the benefits and mandated issuance of an injunction.<sup>136</sup>

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Narrowly-tailored state regulations which rely on state police powers should easily pass the *Pike* balancing test. Many state laws enacted to regulate Internet activities invoke the traditional police powers of the state. These police powers involve areas of strong state interests that Courts generally give deference to, notably health and safety concerns and fraudulent or deceptive trade practices.

A state Internet regulation targeting behavior only within its borders and relying on state police powers would easily be permitted under the *Pike* test. [more on directed Internet communication regulations and police powers]

## 2. Extraterritoriality Concerns

Because of the Internet's ambiguous relationship to physical geography, both the *Heckel* and *Pataki* decisions were forced to deal with extraterritoriality concerns.

The *Pataki* opinion traced the Supreme Court's extraterritoriality decisions.<sup>137</sup> The court noted that "the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies."<sup>138</sup> The court analogized the New York Internet regulations to the Illinois corporate regulatory statute in *Edgar v. MITE Corp.* which "stifled . . . transactions" and had the extraterritorial practical effects.<sup>139</sup> The court focused on evidence that many website owners, unable to exclude New York visitors, felt a chill from the New York statute.<sup>140</sup> The court summarized the *Edgar/Healy* analysis into vertical and horizontal prongs: (1) the Commerce Clause subordinates each state's authority over interstate commerce to federal regulatory power; (2) the Commerce Clause embodies a principle of comity that mandates one state shall not expand its regulatory power to encroach upon the sovereignty of other states.<sup>141</sup>

The *Pataki* court was particularly concerned with the second, horizontal prong that New York statute potentially interfered with other states' policies.(?) Under this analysis, the court noted that "the nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York."<sup>142</sup> The court proposed a hypothetical that conduct

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<sup>134</sup> *Pataki*, 969 F.Supp. at 179.

<sup>135</sup> *Pataki*, 969 F.Supp. at 180.

<sup>136</sup> *Pataki*, 969 F.Supp. at 181.

<sup>137</sup> See *Pataki*, 969 F.Supp. at 173-77 (discussing *Edgar v. MITE Corp.* and *Healy v. Beer Institute* in greatest detail).

<sup>138</sup> *Pataki*, 969 F.Supp. at 174. [space in F. Supp. ?]

<sup>139</sup> *Pataki*, 969 F.Supp. at 174.

<sup>140</sup> *Pataki*, 969 F.Supp. at 174.

<sup>141</sup> *Pataki*, 969 F.Supp. at 175-76.

<sup>142</sup> *Pataki*, 969 F.Supp. at 177.

legal in an individual's home state could potentially subject them to prosecution in New York—thus subordinating home state policy to New York's local concerns.<sup>143</sup>

The *Heckel* court expressly disagreed with *Pataki*, finding “no sweeping extraterritorial effect” of the Washington Act.<sup>144</sup> It characterized the extraterritoriality and transportation arguments introduced by the defendant as “‘unsettled and poorly understood’ aspects of the dormant Commerce Clause analysis.”<sup>145</sup> It found the defendant's hypothetical of a Washington resident who downloaded the deceptive spam while in another state, thus regulating the recipient's conduct while out of state, to be unpersuasive.<sup>146</sup> The court found that Act didn't burden interstate commerce by regulating when or where recipients may open the UCE messages, but rather regulating the conduct of spammers targeting Washington consumers.<sup>147</sup> The court was further unconvinced that the statute must be construed to apply to Washington residents while out of state.<sup>148</sup>

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Many commentators have agreed with *Pataki* that local Internet regulations are bound to produce extraterritorial effects.<sup>149</sup> In the realm of conflicting state regulations of undirected Internet content, this is a persuasive argument. Numerous states restrictions on Internet content akin to *Pataki* regulation would could make compliance with all state regulations very burdensome or impossible, thus chilling out-of-state behavior in much the way feared by the *Pataki* court.

Extraterritoriality is less of a concern with directed Internet communications. If regulations are narrowly tailored to criminalize sending certain types of spam to state residents, rather than use of servers or networks located in a particular state, sending a given piece of email should only invoke the regulatory regime of one state. At this point, the analogy between state regulation of electronic and ordinary mail becomes strongest. Although nationwide spammers may have to comply with the regulations of 50 different states, the same is true of nationwide advertisers who solicit customers through the mails. Assuming regulating states create registries to identify registries giving spammers the opportunity for actual notice of which addresses are state residents, compliance would be relatively straightforward. Further, state regulations of fraudulent spam like Washington's, would be roughly compatible among the 50 states and impose only a slight burden for compliance.

Even with geographic limitations and strong state interests, many commentators have argued that generic state laws regulating Internet content would likely run afoul of the dormant Commerce Clause analysis.<sup>150</sup> Because undirected web communications, like webpages on the World Wide Web, are accessible anywhere, a law regulating content would have serious

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<sup>143</sup> *Pataki*, 969 F.Supp. at 177.

<sup>144</sup> *Heckel*, 24 P.3d at 412 (internal quotations omitted).

<sup>145</sup> *Heckel*, 24 P.3d at 411.

<sup>146</sup> *Heckel*, 24 P.3d at 412.

<sup>147</sup> *Heckel*, 24 P.3d at 412.

<sup>148</sup> *Heckel*, 24 P.3d at 412.

<sup>149</sup> Gaylord at 1096(?) (“internet is profoundly integrative force” thus local legislation likely to produce extraterritorial effects(?)).

<sup>150</sup> blake 141-42(?).

extraterritorial effects and force content providers to comply with a superset of all state regulations.<sup>151</sup>

These assumptions are becoming outdated as technology moves forward. New scholarship points out that technologies do exist to regulate content based on geography. Content providers can and do control information flow by requiring presentation of payment information or personal identity to access webpages.<sup>152</sup> Likewise, new technologies are being developed to allow web content providers to discern geographic locations from IP addresses.<sup>153</sup> However, these new technologies are expensive<sup>154</sup> and may impose too great a burden on interstate commerce, thus failing the *Pike* balancing test.

### 3. Transportation Analogy

*Pataki* drew upon the Supreme Court's transportation cases as an alternate basis for striking down the New York statute. It noted that "certain types of commerce demand consistent treatment" and demand national regulation, and worried that "inconsistent regulatory schemes" could paralyze Internet development.<sup>155</sup> After running through the transportation cases, the court pointed out Internet regulatory efforts emerging in Oklahoma and Georgia, and predicted that local regulations "would leave users lots in a welter of inconsistent laws[] imposed by different states with different priorities."<sup>156</sup>

The *Heckel* court didn't explicitly address the transportation cases, but it did acknowledge that seventeen other states had passed spam laws.<sup>157</sup> The court found that the Washington Act didn't conflict because it only imposed a truthfulness requirement and found it "inconceivable" that any state regulations would require falsified subject lines or transmission paths.<sup>158</sup> The court found the additional requirements of other states, such as requiring subject line labeling, were not irreconcilable and thus inconsistent for purposes of the dormant Commerce Clause analysis.<sup>159</sup>

Many commentators have agreed with the *Pataki* Court and drawn analogies between Internet regulations and those at issue in the transportation cases. They perceive the Internet as a instrument of commerce like the railroads and trucks of the transportation cases, which because of its nature requires national regulation.<sup>160</sup>

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<sup>151</sup> blake 141-42(?). See Goldsmith at 809-10 (describing new technologies to discern geographic identity from IP addresses).

<sup>152</sup> Goldsmith at 809-10(?).

<sup>153</sup> Goldsmith at 809-10(?).

<sup>154</sup> Goldsmith at 809-10(?).

<sup>155</sup> *Pataki*, 969 F.Supp. at 181.

<sup>156</sup> *Pataki*, 969 F.Supp. at 181.

<sup>157</sup> *Heckel*, 24 P.3d at 411-12.

<sup>158</sup> *Heckel*, 24 P.3d at 412.

<sup>159</sup> *Heckel*, 24 P.3d at 412.

<sup>160</sup> Burk at 1126(?); bassinger 890/903(?); Lanin 1424(?) (Internet is "in the realm" of interstate commerce and thus states have little power to regulate the Internet).

Some state laws have been criticized for their potential inclusion of wholly interstate activities.<sup>161</sup> For example, Lanin argues that inadvertent routing of interstate communications via California equipment could invoke California statutes.<sup>162</sup> These regulations which seek to regulate equipment and network interconnectivity physically located within state boundaries are most prone to being analogized to the transportation cases and struck down.

Otherwise, directed Internet communications have little resemblance to the transportation cases and their reasoning is wholly inapplicable. [more]

### **Conclusion**

Although *Pataki* has been widely followed and many Internet regulations have been struck down, *Heckel* illustrates that a narrowly-tailored state Internet regulations could survive the dormant Commerce Clause analysis. Thus, state regulations like the Washington Act which rely on state police powers, include geographic restrictions, and target directed Internet communications should be upheld.

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<sup>161</sup> Lanin 1446+(?)

<sup>162</sup> Lanin 1446+(?)