STATE INTERNET REGULATION AND THE DORMANT COMMERCE CLAUSE

By Michelle Armond

In *American Libraries Association v. Pataki*,[1] a U.S. District Court struck down a state statute prohibiting the Internet dissemination of obscene materials to minors on dormant Commerce Clause grounds. Over the next few years, courts followed the reasoning of *Pataki* and invalidated a wide range of state Internet regulations. Although some commentators argued otherwise,[2] it seemed that state Internet regulations were categorically invalid under the dormant Commerce Clause. However, the Washington Supreme Court recently issued the first major decision upholding a state Internet regulation on dormant Commerce Clause grounds: *State v. Heckel*[3] upheld a Washington regulation that prohibited the Internet transmission of fraudulent e-mail.[4]

This Note will consider the intersections of *Pataki* and *Heckel* and propose that some narrow classes of state Internet regulations are compatible with the demands of the dormant Commerce Clause. Part I will examine dormant Commerce Clause jurisprudence, notably the *Pike* balancing test, and the Supreme Court's transportation and extraterritoriality cases. Part II will analyze categories of state Internet regulation, especially obscenity and spam, and present *Pataki* and *Heckel* in greater detail. Part III will consider the dormant Commerce Clause as applied in these decisions, addressing underlying statutory and geographic concerns and discussing how they affect the dormant Commerce Clause analysis of state Internet regulations.

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1. 969 F. Supp. 160 (S.D.N.Y. 1997).

2. *See, e.g.*, Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789, 818 (2000) (arguing for a more restrained application of the dormant Commerce Clause in striking down state Internet regulations).

3. 24 P.3d 404 (Wash. 2001).

4. Recently, a California appellate court followed suit and reversed a trial court's sustainer of a demurrer on the ground that California Business & Professions Code § 17538.4, prohibiting the transmission of unsolicited electronic mail, violated the dormant Commerce Clause. Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258 (Cal. Ct. App. 2002). The court distinguished the dispute from *Pataki* and looked favorably on the reasoning in *Heckel*, which the court characterized as "a case upholding a statute analogous to section 17538.4 against a dormant Commerce Clause challenge." *Id.* at 266.

I. THE DORMANT COMMERCE CLAUSE

The Commerce Clause expressly grants Congress the power "[t]o regulate Commerce . . . among the several states."[5] Beginning with *Gibbons v. Ogden*,[6] courts have found an implied power in the Commerce Clause and struck down state regulations that interfere with interstate commerce by effecting policies of economic discrimination.[7] This implied power, known as the dormant Commerce Clause, has been used to enjoin states from impeding the flow of interstate commerce, practicing "economic protectionism," and discriminating against outsiders.[8] The dormant Commerce Clause has had significant impact on state regulation of Internet communications.

When evaluating a state statute under the dormant Commerce Clause, a court must determine whether the statute facially discriminates against interstate commerce.[9] If the statute facially discriminates, the statute is deemed "virtually *per se* invalid."[10] If it does not, the court must apply the balancing test from *Pike v. Bruce Church*[11] to determine whether the local benefits outweigh the burdens on interstate commerce.[12] Under the *Pike* test, the court must determine whether "the burden imposed . . . is clearly excessive in relation to the putative local benefits."[13] Another factor in the balancing test is whether the local interest can be promoted by other regulations that have a lesser impact on interstate activities.[14]

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5. U.S. CONST. art. I, § 8, cl. 3.

6. 22 U.S. (9 Wheat.) 1 (1824).

7. Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 403 (1998); James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1106 (1999). The Supreme Court's dormant Commerce Clause jurisprudence has been criticized as "erratic," with "complex exceptions" and "dubious consistency." Lawrence, *supra*, at 397-98.

8. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-24 (1996).

9. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

10. *Id.*

11. 397 U.S. 137 (1970).

12. *Id.* at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). *See also* William Lee Biddle, Comment, *State Regulation of the Internet: Where Does the Balance of Federalist Power Lie?*, 37 CAL. W. L. REV. 161, 165 (2000); Gaylord, *supra* note 7, at 1108-09.

13. *Pike*, 397 U.S. at 142.

14. *Id.*

Two lines of cases have emerged where courts have struck down state statutes under the dormant Commerce Clause: the transportation cases and the extraterritoriality cases. Some scholars view these two lines of cases as specialized applications of the *Pike* test.[15] *Cooley v. Board of Wardens*[16] introduced the concept that some aspects of commerce require uniform national regulation.[17] The transportation cases are the progeny of *Cooley*.[18] In a leading decision, *Kassel v. Consolidated Freightways*, the Supreme Court invalidated a state law that limited truck lengths on state highways based on safety rationales.[19] The Court acknowledged that states may regulate matters of local concern that affect interstate commerce to some extent and was extremely reluctant to invalidate "regulations that touch upon safety."[20] Nonetheless, the Court found no compelling safety evidence[21] and pointed to exceptions given to trucks traveling wholly intrastate as raising the specter of interstate discrimination.[22] Thus, a statute

15. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1184 (1986) (noting that the transportation cases involve limited application of *Pike* benefit/balancing in consideration of the significant interest in a national transportation system); Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits On State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 897 (1998) (noting that *Pike* balancing principles appear in transportation cases).

16. 53 U.S. 299 (1851). The Court found that a requirement that all boats traveling through the Philadelphia harbor hire a local pilot or pay a fine did not violate the dormant Commerce Clause. *Id.* at 312. For an overview of the transportation cases in the state Internet regulation context, see Bassinger, *supra* note 15, at 898-904; Biddle, *supra* note 12, at 170-77.

17. *Cooley*, 53 U.S. at 316-17 ("[T]his subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several states, over which it was *one main object of the Constitution to create a national control.*") (emphasis added).

18. *See, e.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (invalidating an Illinois law that required trucks to be equipped with a specific, curved type of tire mud guard); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (invalidating an Arizona law that limited the length of trains within the state); S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding a South Carolina law that admittedly burdened interstate commerce by placing width and weight restrictions that 85% to 95% of trucks currently in use would exceed); Wabash Ry. Co. v. Illinois, 118 U.S. 557 (1886) (invalidating an Illinois law that prohibited price discrimination by railroad companies in setting their shipping rates).

19. 450 U.S. 662, 678-79 (1980).

20. *Id.* at 670.

21. *Id.* at 671 ("[T]he State failed to present any persuasive evidence that 65-foot doubles are less safe than 55-foot singles.").

22. *Id.* at 677 ("The origin of the 'border cities exemption' also suggests that Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic.").

that imposed a burden on interstate commerce and was not justified by a strong state interest violated the dormant Commerce Clause.[23]

In another line of cases beginning with *Edgar v. MITE Corp.*,[24] the Court 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."[25] These extraterritoriality cases[26] 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.[27] *Edgar* concerned an Illinois statute that required tender offers of Illinois "target" companies subject to corporate takeovers to be registered with the Illinois Secretary of State.[28] The Court acknowledged that states traditionally regulated companies incorporated under their laws, including intrastate securities regulations.[29] It nonetheless struck down the law because it could potentially regulate transactions occurring wholly outside the state. It had "sweeping extraterritorial effects," and tender offers would be stifled if all states enacted such regulations.[30]

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23. *Id.* at 678-79.

24. 457 U.S. 624 (1982).

25. *Id.* at 642-43.

26. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324 (1989) (invalidating a Connecticut liquor price affirmation statute on grounds that the statute controlled commerce occurring outside Connecticut and conflicted with other states' regulatory programs); CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) (holding that Indiana corporate takeover law did not violate the dormant Commerce Clause by creating inconsistent regulations); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (holding that a New York price affirmation law was invalid under the dormant Commerce Clause because it had the practical effect of regulating prices in other states, since sellers could not lower their prices in other states during the relevant time period).

27. Gaylord, *supra* note 7, at 1112.

28. *Edgar*, 457 U.S. at 626-27. The Illinois statute defined a target company as any corporation where shareholders located in Illinois owned at least 10% of the equity securities subject to the tender offer, or met two of the following conditions: had a principal executive office in Illinois, was incorporated in Illinois, or had at least 10% of its capital located in the state. *Id.* at 627. A tender offer was "registered" twenty days after a registration statement was filed with the Secretary of State. The Secretary was empowered to call a hearing any time during the twenty-day period to "adjudicate the substantive fairness of the offer" if it believed it necessary to protect the target company shareholders. *Id.*

29. *Id.* at 641.

30. *Id.* at 642.

In *Healy v. Beer Institute*,[31] a widely-followed decision, the Court invalidated a Connecticut law requiring liquor distributors to affirm that prices charged in Connecticut were no higher than those charged in bordering states.[32] Summarizing its extraterritoriality jurisprudence, the Court found that the dormant Commerce Clause precluded application of a state statute to commerce occurring wholly outside the state's borders, regardless of the statute's effects within the state.[33] Second, state statutes regulating extraterritorial commerce exceeded state authority and were invalid even if the extraterritorial effects were not intended by the legislature.[34] Finally, courts should consider not just the practical effects of the statute itself but also how a challenged statute could interact with regimes of other states, both existing regimes and theoretical regimes adopting conflicting legislation.[35] Finding that the statute controlled commerce outside Connecticut and had troublesome interactions with comparable New York regulations, the Court invalidated it.[36]

II. INTERNET REGULATORY CASES DECIDED UNDER THE DORMANT COMMERCE CLAUSE

Obscenity and spam regulations are the two types of state Internet regulations that have primarily been subject to dormant Commerce Clause analyses. The following section will examine *Pataki* and *Heckel*, two leading decisions in these areas involving significant dormant Commerce Clause concerns. In addition to spam and obscenity, states have regulated other types of conduct that occur over, or are facilitated by, the Internet. Some examples include Internet gambling, attorney advertising, online pharmacies, alcohol and cigarette sales, and state sales taxes.[37] Before the

31. 491 U.S. 324 (1989).

32. *Id.* at 326. As amended in 1984, the Connecticut statute required out-of-state beer shippers to affirm that their posted prices were no higher than prices in bordering states at the time of posting. Another provision explicitly stated that while nothing prohibited shippers from changing their out-of-state prices after the affirmed price was posted, a different statute continued to make it unlawful for out of state shippers to sell beer in Connecticut at a higher price than charged in bordering states during the month covered by the posting. *Id.* at 328-29.

33. *Id.* at 336.

34. *Id.*

35. *Id.*

36. *Id.* at 337-39.

37. *See, e.g.*, Ari Lanin, Note, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423, 1443-46 (2000) (providing a good overview of Internet gambling issues and the dormant Commerce Clause). *See generally* Ron N. Dreben & Johanna L. Werbach, *Senators Versus*

Internet, many of these areas were traditionally regulated by states.[38] These topics will not be discussed in more detail because there are no major decisions containing appreciable dormant Commerce Clause analysis.

A. Obscenity Regulations: American Libraries Association v. Pataki

1. Background: State Regulation of Decency

The Internet is a collection of local computer systems connected to high-capacity national and international networks.[39] Data is transmitted via packets that are routed according to available bandwidth.[40] As some commentators have pointed out, the Internet's structure "confounds geography."[41] Internet host computers are identified by logical Internet Protocol (IP) addresses,[42] not geographic location. Even knowing locations of sender and recipient computers gives no insight into the digital routes packets will follow as they are relayed among intermediate hosts.[43]

Federal and state governments have made numerous attempts to regulate obscenity and child pornography on the Internet. General federal laws regulating these two areas ostensibly apply to the Internet.[44] Congress explicitly tried to regulate Internet content via the Communications Decency Act of 1996 (CDA),[45] parts of which were subsequently struck down by

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Governors: State and Federal Regulation of E-Commerce, 17 No. 6 COMPUTER LAW. 3 (2000).

38. *See, e.g.*, Dreben & Werbach, *supra* note 37, at 5 ("States traditionally have regulated pharmacies and doctors doing business within their borders via licensing requirements."); *id.* ("With the exception of Prohibition, states traditionally have regulated alcohol sales within their borders, and state laws can affect direct shipping, licensing, advertising, and taxes."); Lanin, *supra* note 37, at 1443 ("states have traditionally been left to decide the extent to which gambling will be permitted within their borders").

39. *See* Reno v. ACLU, 521 U.S. 844, 849-853 (1997) (describing the structure of the Internet); Burk, *supra* note 8, at 1097-1100 (discussing the origins and evolution of the Internet).

40. Burk, *supra* note 8, at 1097.

41. *See, e.g.*, Gaylord, *supra* note 7, at 1100.

42. Gaylord, *supra* note 7, at 1100 (defining IP addresses as unique 32-bit numbers identifying individual host computers).

43. Gaylord, *supra* note 7, at 1101; Bassinger, *supra* note 15, at 894 (noting that because of packet switching, "it is impossible to limit Internet communications to a particular geographic area or state").

44. *See* Dreben & Werbach, *supra* note 37, at 8.

45. Communications Decency Act of 1996, S. 652, 104th Cong. Title V (1996).

Reno v. ACLU.[46] In an attempt to remedy earlier infirmities in the CDA, Congress passed the Child Online Protection Act (COPA) in 1998, making it a federal crime for commercial websites to communicate "harmful" material to minors.[47] Last year, the United States Court of Appeal for the Third Circuit upheld an injunction against the enforcement of COPA on grounds it violated the First Amendment. The Supreme Court later granted certiorari.[48]

Since *Reno*, several states, including New York, have passed statutes in an attempt to fill the void of Internet content regulation.[49] Virginia's law, for example, prohibits the Internet dissemination of commercial material considered harmful to minors.[50] The statute prohibits the knowing sale, rental, or loan to a juvenile of electronic files depicting sexual images and the commercial display of such material in ways that juveniles can access.[51] Several state regulations have been struck down on First Amendment and dormant Commerce Clause grounds.[52] Nonetheless, similar laws continue to be enacted.[53]

2. *The Case*

In 1996, the New York legislature amended its penal law, which prohibited the dissemination of obscene or indecent materials to minors, to include general Internet communications.[54] Under the New York law, it was a felony for an individual, "[k]nowing the character and content of the communication which [depicts sexual subject matter and] is harmful to minors, [to] intentionally use[] any computer communication system . . .

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46. Reno v. ACLU, 521 U.S. 844, 874 (1997) ("We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.").

47. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231).

48. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.* Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

49. *See, e.g.*, N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001); MICH. COMP LAWS ANN. § 722.671a (West Supp. 2001); N.Y. PENAL LAW § 235.22 (McKinney 1999). *See also* Dreben & Werbach, *supra* note 37, at 9 (noting New Mexico, Michigan, Virginia, and New York have enacted their own "little CDAs").

50. VA. CODE ANN. § 18.2-391 (Michie Supp. 2001).

51. *Id.*

52. *See, e.g.*, ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (First Amendment); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (dormant Commerce Clause).

53. *See* Dreben & Werbach, *supra* note 37, at 9.

54. N.Y. PENAL LAW § 235.21 (McKinney 1999).

to initiate or engage in [sexual] communication with a . . . minor."[55] The New York law provided numerous defenses to liability,[56] and violations were class E felonies punishable by one to four years of incarceration.[57] Fearing liability under the amended statute, a broad spectrum of individuals and organizations using the Internet for communications sought declaratory and injunctive relief.[58]

3. District Court Decision

In a widely followed opinion,[59] the U.S. District Court for the Southern District of New York struck down the Act on dormant Commerce Clause grounds.[60] The court discussed the Internet[61] and noted that "Internet users have no way to determine the characteristics of their audience that are salient under the New York Act—age and geographic location."[62] The court discussed various states' Internet legislation and prosecution

55. *Id.* The Act defined "harmful to minors" as "that quality of any [sexual] description or representation" which appealed to minors' prurient interests, is patently offensive to community standards, and lacks serious literary, artistic, political, and scientific value for minors. N.Y. PENAL LAW § 235.20(6) (McKinney 1999).

56. An affirmative defense is established if the obscene or indecent material contained "scientific, educational, governmental or other similar justification" for distributing the material. N.Y. PENAL LAW § 235.15(1) (McKinney 1999). A regular defense is established if the defendant made reasonable efforts to ascertain the true age of a minor, restrict access, label, or segregate material to facilitate blocking. N.Y. PENAL LAW § 235.23(3) (McKinney 1999). An exemption was made for "providing [Internet] access or connection." N.Y. PENAL LAW § 235.24 (McKinney 1999). *See also Pataki*, 969 F. Supp. at 163-64.

57. N.Y. PENAL LAW § 235.21 (McKinney 1999); *Pataki*, 969 F. Supp. at 163.

58. *Pataki*, 969 F. Supp. at 161-63 (naming plaintiffs, including book sellers and publishers, software trade associations, Internet service providers, and civil rights organizations).

59. Following *Pataki*, two appellate decisions used the dormant Commerce Clause to strike down Internet decency regulations. *ACLU v. Johnson* relied heavily on *Pataki* to strike down a New Mexico statute criminalizing the dissemination of sexual material harmful to minors. 194 F.3d 1149, 1160-62 (10th Cir. 1999). The New Mexico statute had very similar structure, language, and purpose as the New York regulation in *Pataki*. *Id.* at 1152 (quoting N.M. STAT. ANN. § 30-37-3.2 (Michie 1999)). Likewise in *Cyberspace Communications, Inc. v. Engler*, the Sixth Circuit invalidated an amendment to a Michigan statute that added computers and the Internet as prohibited means of distributing obscene and sexually explicit material to children. 238 F.3d 420 (6th Cir. 2000) (unpublished).

60. *Pataki*, 969 F. Supp. at 183-84.

61. In analyzing the Internet's structure, the Court discussed different means of Internet communication, including e-mail, listservs, newsgroups, chat rooms, and the World Wide Web. *Pataki*, 969 F. Supp. at 165-66.

62. *Id.* at 167.

attempts, pointing out that inconsistent state standards and overreaching state regulations invited dormant Commerce Clause analysis.[63]

The Court invalidated the statute on four dormant Commerce Clause grounds. First, the Act represented "an unconstitutional projection of New York law into conduct occur[ing] wholly outside New York."[64] The Court considered the legislative history and concluded that legislators intended the Act to apply to communications between New York residents and individuals outside the state.[65] Additionally, it found that the Internet's "insensitiv[ity] to geographic distinctions" would make it difficult for Internet regulations to apply to wholly intrastate activities.[66]

Second, the *Pataki* court relied on Supreme Court extraterritoriality jurisprudence that prohibited states from projecting their legislation into other states.[67] The court concluded that website owners were unable to close their sites to New York users;[68] as a result, residents of other states could be prosecuted for conduct perfectly legal in their home states.[69] It found the dormant Commerce Clause precluded a state from expanding its regulatory powers to encroach on other states.[70] The court noted that "[t]he nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York."[71] It proposed a hypothetical scenario where conduct legal in an individual's home state could potentially subject him to prosecution in New York—thus subordinating his home state's policy to New York's local concerns.[72] Thus, the New York statute overreached and impermissibly undermined other states' regulatory authority.[73]

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63. *Id.* 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.

64. *Id.* at 169.

65. *Id.* at 170.

66. *Id.*

67. *Id.* at 173-74 (discussing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and *Healy v. Beer Institute*, 491 U.S. 324 (1989)).

68. *Id.* at 174.

69. *Id.* at 177.

70. *Id.* at 175-76 (summarizing the *Edgar/Healy* extraterritoriality analysis into two prongs, vertical and horizontal: (1) the Commerce Clause subordinates each state's authority over interstate commerce to federal regulatory power; and (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).

71. *Id.* at 177.

72. *Id.*

73. *Id.* at 176.

Third, the New York law was impermissible under the *Pike* balancing test because the burdens imposed on interstate commerce outweighed the local benefits.[74] *Pataki* recognized the "quintessentially legitimate state objective" of protecting children from pedophilia.[75] Nonetheless, the court doubted that the statute would realize actual local benefits. According to the court, other New York laws and the unchallenged parts of the statute[76] left only a small category of cases uncovered, and the court predicted that jurisdictional limitations would constrain the state's ability to prosecute offenders in that category.[77] Balanced against these "limited local benefits" was "an extreme burden on interstate commerce."[78] The court concluded that the "New York Act casts its net worldwide" and produced a "chilling effect" broader than New York's ability to prosecute.[79] The court was also concerned that the costs associated with website owners' attempts to comply with the Act's enumerated defenses were excessive.[80]

Finally, the court held that the Act subjected the Internet to inconsistent regulations.[81] It analogized the Internet to other types of commerce that demanded consistent treatment and were only "susceptible to regulation on a national level."[82] The court considered Internet regulatory efforts emerging in Oklahoma and Georgia and predicted that local regulations "will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities."[83]

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74. *Id.* at 177.

75. *Id.*

76. The unchallenged 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.

77. *Pataki*, 969 F. Supp. at 179. The court noted the practical difficulties of obtaining criminal jurisdiction over out-of-state defendants whose only contact with New York was over the Internet. *Id.* at 178.

78. *Id.* at 179.

79. *Id.*

80. *Id.* at 180.

81. *Id.*

82. *Id.* This is a similar argument to that used in the transportation cases. *See supra* notes 15-23 and accompanying text.

83. *Pataki*, 969 F. Supp. at 182.

B. Spam Regulations: State v. Heckel

1. Background: Spam and the Internet

"Spam" is an unsolicited e-mail message,[84] most commonly defined as unsolicited commercial e-mail (UCE) or unsolicited bulk e-mail (UBE).[85] Spam distribution is widely condemned as a practice to be regulated or eradicated.[86] Both Internet Service Providers (ISPs)[87] and recipients[88] bear spam's high and "widespread" cost.[89] Various measures have been advocated and/or implemented to counteract spam, including self-regulation,[90] technical approaches,[91] litigation,[92] and state or federal legislation.[93] As of

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84. Credence E. Fogo, *The Postman Always Rings 4,000 Times: New Approaches to Curb Spam*, 18 J. MARSHALL J. COMPUTER & INFO. L. 915, 915 (2000). The term "spam" was originally derived from a Monty Python skit. *Id.* at 918 n.13.

85. These terms highlight important aspects of spam. For an e-mail to be "unsolicited," no prior relationship can exist between the sender and recipient, and the recipient cannot have explicitly consented to the communication. David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 329 (2001). "Commercial" refers to the content of the e-mail, which usually promotes the sale of goods or services, rather than the actual or presumed motivation of the sender. *Id.* at 329-30. "Bulk" e-mail is a single message sent to a large number of recipients. *Id.* at 330-31 (finding no distinction between one message addressed to a large number of recipients and separate but identical copies of a message sent to a large number of recipients). *See also id.* at 327, 333 (noting difficulties in defining spam due to differing perspectives among Internet users and discussing arguments for defining spam as UCE versus UBE).

86. It is estimated that three to thirty percent of e-mail messages are spam. Sorkin, *supra* note 85, at 336 n.48. Spam has been criticized as a burden on Internet resources, a security threat, and an interference with legitimate business. *Id.* at 336-40. Also, spam may contain sexually explicit content or solicitations for "questionable ventures" that many users find objectionable. *Id.* at 336.

87. 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. Sorkin, *supra* note 85, at 336. ISP employees spend large amounts of time filtering and blocking spam, fixing server crashes and service outages, and resolving spam-related consumer complaints; consequently consumers pay more for Internet access. Fogo, *supra* note 84, at 919; Sorkin, *supra* note 85, at 336-37.

88. Fogo, *supra* note 84, at 919 (noting decreased productivity as recipients are forced to skim and delete spam).

89. *Id.*

90. Sorkin, *supra* note 85, at 342-43, 350-56 (describing imposition of social norms and community self-regulation on the Internet, including hiding and retaliation); Sabra-Anne Kelin, Note, *State Regulation of Unsolicited Commercial E-mail*, 16 BERKELEY TECH. L.J. 435, 438 (2001).

91. Technical approaches have largely proved ineffective, as spammers have succeeded in adapting their techniques to evade anti-spam technology. Sorkin, *supra* note 85, at 356; Scot M. Graydon, *Much Ado About Spam: Unsolicited Advertising, The Internet, and You*, 32 ST. MARY'S L.J. 77, 87 (2000) (describing spammers using "guer-

February 2002, nineteen states had enacted anti-spam laws.[94] Some of these laws include opt-out systems, content regulation, and civil and/or criminal penalties.[95]

2. *The Case*

When its Commercial Electronic Mail Act (CEMA)[96] went into effect in 1998, Washington became the first state to regulate spam.[97] CEMA applies to e-mail transmissions initiated from computers located in Washington or sent to an e-mail address that the sender knew was held by a Washington resident.[98] CEMA prohibits using a third-party domain name without permission, falsifying the transmission path, or using a false or misleading subject line.[99] Sending e-mail in violation of CEMA also violates

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rilla tactics" to evade responses). *See also* Sorkin, *supra* note 85, at 346-48 (describing ISP and third-party filtering, blocking, and blacklisting); Graydon, *supra*, at 86-87 (describing filtering programs and canceling accounts).

92. Expensive individualized litigation has been effective for only relatively large entities eradicating "relatively large, highly visible, and persistent spammers." Sorkin, *supra* note 85, at 367. *See* Fogo, *supra* note 84, at 922 (noting that "scattershot private suits by ISPs" using "novel legal theories" have not worked against spammers). *See also* Sorkin, *supra* note 85, at 357-67 (describing private lawsuits by ISPs, destination operators, relay operations, and forgery victims using theories such as trespass to chattels and standard contract/tort); Fogo, *supra* note 84, at 920-22 (discussing private ISP suits); Joseph D'Ambrosio, *Should "Junk" E-mail be Legally Protected?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 231, 235-37 (2001) (describing ISP lawsuits where ISPs used state common law and novel legal theories to combat spammers).

93. Sorkin, *supra* note 85, at 368-83. Numerous bills have been proposed in Congress, but none have become law. For a good treatment of current federal regulation, see Fogo, *supra* note 84, at 934-40.

94. *See* Spam Laws, *at* http://www.spamlaws.com/state/summary.html (last visited Feb. 6, 2002).

95. Sorkin, *supra* note 85, at 368-379. *See* Max P. Ochoa, Note, *Recent State Laws Regulating Unsolicited Electronic Mail*, 16 SANTA CLARA COMPUTER & HIGH TECH L.J. 459, 464-67 (2000) (discussing examples of state regulations including legitimate e-mail header information, subject line labeling, and opt-out systems allowing users to remove themselves from mailing lists).

96. WASH. REV. CODE ANN. § 19.190 (West 1999 & Supp. 2000).

97. Kelin, *supra* note 90, at 446.

98. WASH. REV. CODE ANN. § 19.190.020(1) (West Supp. 2000). Under CEMA, the sender "knows" that the intended recipient is a Washington resident if the information is available upon request from the registrant of the Internet domain name. WASH. REV. CODE ANN. § 19.190.020(2) (West Supp. 2000).

99. WASH. REV. CODE ANN. §§ 19.190.020(1)(a)-(b) (West Supp. 2000).

Washington's Consumer Protection Act.[100] CEMA provides statutory or actual damages to e-mail recipients or ISPs[101] and immunity to ISPs that block commercial e-mail that they reasonably believe was or will be sent in violation of CEMA.[102]

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."[103] In it, he described how to set up an online promotional business, acquire free e-mail accounts, and obtain software for sending bulk e-mail.[104] 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 e-mail messages per week.[105] Heckel used the Extractor Pro software program to "harvest" e-mail addresses from various online message boards and send bulk mail messages using only simple commands.[106] Heckel's e-mail text was a long sales pitch including testimonials from satisfied purchasers and an order form that the user could download, print, and mail (along with $39.95) to Heckel's Salem, Oregon mailing address.[107] Heckel sold thirty to fifty pamphlets per month using these marketing methods.[108]

In June 1998, the Washington State Attorney General's Office, Consumer Protection Division began receiving complaints from Washington residents who had received Heckel's e-mail.[109] The complaints alleged that his "messages contained misleading subject lines and falsified transmission paths."[110] The Division sent Heckel a letter advising him of CEMA.[111] In response, Heckel called the Division and discussed procedures that bulk e-mailers could follow to avoid e-mailing Washington

100. WASH. REV. CODE ANN. § 19.190.030 (West Supp. 2000); State v. Heckel, 24 P.3d 404, 407 (Wash. 2001) ("RCW 19.190.030 makes a violation of [CEMA] a per se violation of the Consumer Protection Act, chapter 19.86 RCW").

101. WASH. REV. CODE ANN. § 19.190.040 (West 1999).

102. WASH. REV. CODE ANN. § 19.190.050 (West 1999).

103. *Heckel*, 24 P.3d at 406.

104. *Id.*

105. *Id.*

106. *Id.* The Extractor Pro software required the user to enter only a return e-mail address, subject line, and message text. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 407.

residents.[112] Nonetheless, the Division continued to receive complaints that Heckel was violating CEMA.[113]

The State of Washington filed suit against Heckel, alleging that his transmission of e-mail to Washington residents violated CEMA.[114] In particular, the State alleged three causes of action: (1) violation of CEMA by using false or misleading subject lines;[115] (2) violation of CEMA by misrepresenting e-mail transmission paths;[116] and (3) commission of a deceptive trade practice by failing to provide a valid e-mail address to which recipients could respond.[117] The State sought a permanent injunction, civil penalties, costs, and attorney's fees.[118]

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 that it "is unduly restrictive and burdensome."[119] 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 motion for attorney fees.[120] The Washington Supreme Court granted direct review. It held that CEMA did not "unduly burden interstate commerce" and reversed and remanded the matter for trial.[121]

3. *Washington Supreme Court Decision*

The single issue confronting the Washington Supreme Court was whether CEMA's limitations on bulk e-mailing activities violated the dormant Commerce Clause and unconstitutionally burdened interstate

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112. *Id.*

113. *Id.* In total, the Division documented twenty complaints from seventeen recipients. *Id.*

114. *Id.* at 405.

115. *Id.* at 407; WASH. REV. CODE ANN. § 19.190.020(1)(b) (West Supp. 2000). The two misleading subject lines used were, "Did I get the right e-mail address?" and "For your review—HANDS OFF!" *Heckel*, 24 P.3d at 407.

116. *Heckel*, 24 P.3d at 407; WASH. REV. CODE ANN. § 19.190.020(1)(a) (West Supp. 2000). 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 was inactive at the time of Heckel's bulk e-mail advertising campaign. Thus, no messages could have been sent through 13.com. *Heckel*, 24 P.3d at 407.

117. *Heckel*, 24 P.3d at 407; WASH. REV. CODE ANN. § 19.86.020 (West 1999).

118. *Heckel*, 24 P.3d at 408.

119. State v. Heckel, 2000 WL 979720, at *1 (Wash. Super. Ct. 2000).

120. *Heckel*, 24 P.3d at 408.

121. *Id.* at 406.

commerce.[122] The court began by noting that when states enact laws that unduly burden interstate commerce, they "impermissibly intrude" on the federal government's regulatory powers.[123] The court then used a two-step test to analyze CEMA under the dormant Commerce Clause.[124] First, they determined whether CEMA "openly discriminate[d] against interstate commerce in favor of intrastate economic interests."[125] Based on CEMA's statutory language,[126] the court concluded that CEMA applied evenhandedly to in-state and out-of-state spammers and thus was not facially discriminatory.[127]

Second, the court applied the *Pike* balancing test.[128] The court was concerned about the costs of spam and who bore them[129] and looked favorably on measures that would reduce the volume of deceptive spam while making it easier to identify and delete.[130] It first noted that CEMA protected the interests of ISPs, owners of forged domain names, and e-mail users.[131] The court then discussed the actual costs spam imposed on these parties, including increased hardware and consumer service costs to ISPs.[132] 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.[133] The court analogized distributing spam to sending junk mail with postage due or making telemarketing calls to a pay-per-minute cellular phone.[134]

The court found that the only burden placed on spammers was a requirement of truthfulness and that this requirement did not burden commerce but actually facilitated it "by eliminating fraud and deception."[135] The court disagreed with the trial court's emphasis on the burden of noncompliance with the Washington Act, finding that it was contrary to the

122. *Id.* at 408. The court reviewed the trial court's summary judgment de novo, viewing all facts in the light most favorable to the State. *Id.*

123. *Id.* at 409.

124. *Id. See supra* Part I.

125. *Heckel*, 24 P.3d at 409.

126. WASH. REV. CODE § 19.190.020 (West Supp. 2000).

127. *Heckel*, 24 P.3d at 409.

128. *Id. See supra* note 12 and accompanying text.

129. *Heckel*, 24 P.3d at 410.

130. *Id.* at 411.

131. *Id.* at 409.

132. *Id.* at 409-10. Additionally, it cited instances where owners whose domain names had been forged in spam headers had had their computers shut down by large numbers of e-mail responses. *Id.* at 410.

133. *Id.*

134. *Id.*

135. *Id.* at 411 (internal quotes omitted).

Pike test's focus on compliance.[136] Thus, that a deceptive spammer is required to filter out Washington recipients to evade CEMA is not a burden to be considered.[137]

The court also dismissed Heckel's extraterritoriality arguments that CEMA could create inconsistency among states or regulate commerce occurring wholly outside of Washington.[138] It stated that the imposition of "additional, but not irreconcilable obligations" did not violate the dormant Commerce Clause.[139] The court reasoned that since CEMA requires that illegal bulk messages be read by a Washington resident or initiated from a Washington computer,[140] the statute did not extend to e-mail merely routed through Washington computers that did not otherwise meet these conditions.[141]

The court then declared that CEMA survived the *Pike* balancing test because its "local benefits surpass[ed] any alleged burden on interstate commerce."[142] On these grounds, the court reversed the trial court, vacated the order relating to attorney fees, and remanded the matter for trial.[143] On appeal, the United States Supreme Court denied certiorari without comment.[144]

III. DORMANT COMMERCE CLAUSE ANALYSIS

Following *Pataki*, the extent to which the dormant Commerce Clause preempted state-level Internet regulations was unclear. Some commentators noted the danger of courts blindly relying on *Pataki*—they will perceive every Internet regulation as extraterritorial and aggressively strike down worthwhile state regulations that place only minor burdens on outsiders.[145] The *Heckel* decision demonstrated that states can use their police powers in limited circumstances to regulate the Internet without violating

136. *Id.*
137. *Id.*
138. *Id.* at 412.
139. *Id.*
140. *Id.* at 413.
141. *Id.* at 412-13.
142. *Id.* at 409.
143. *Id.* at 413.
144. Heckel v. Washington, 122 S. Ct. 467 (2001) (mem.). For news coverage of the Supreme Court decision, *see* Carl S. Kaplan, *Ruling Sets Stage for E-mail Trial*, NEW YORK TIMES ON THE WEB, Nov. 2, 2001, *at* http://www.nytimes.com/2001/11/02/technology/02CYBERLAW.html; Katherine Pfleger, *High Court Won't Hear Espam Case*, LA TIMES, Oct. 29, 2001, *at* http://www.latimes.com/technology/wire/sns-ap-scotus-spam1029oct29.story.
145. *See, e.g.*, Farber, *supra* note 2, at 818.

the dormant Commerce Clause. On closer inspection *Pataki* and *Heckel* were both appropriately decided, their different holdings a result of different underlying statutory and geographic concerns. This section analyzes the tensions and synergies between the two cases and finds that the broad reasoning of *Pataki*, although purporting to cover a wide range of state Internet regulations, is not appropriate for narrowly-tailored regulations such as that at issue in *Heckel*. At the same time, these decisions demonstrate that the dormant Commerce Clause likely prohibits extraterritorial state Internet regulations that impose affirmative requirements on Internet communications.

A. The Impact of Different Statutes

The first part of the dormant Commerce Clause analysis asks whether the statute facially discriminates against interstate commerce.[146] The *Heckel* and *Pataki* courts decided that the statutes at issue did not facially discriminate against nonresidents. *Heckel* concluded that CEMA was not facially discriminatory because it applied evenhandedly to spammers inside and outside the state.[147] Although *Pataki* did not explicitly address this issue, in proceeding directly to the *Pike* balancing test[148] it presumably did not find facial invalidity.

If the statutes are not facially invalid, courts next apply the *Pike* balancing test.[149] Here, the *Heckel* and *Pataki* courts reached different outcomes; this was due to the characteristics of the different statutes at issue rather than inconsistent reasoning between the courts. On the local benefits side, both state regulations attempted to further important state interests, namely protecting children from pedophilia in *Pataki*[150] and reducing the high costs of fraudulent e-mail in *Heckel*.[151] The child-protection statute struck down in *Pataki* furthered a state interest at least as important as that in *Heckel*. Thus, *Pataki* illustrated that the existence of a strong state interest is not determinative. *Pataki* was consistent with previous cases in

146. *See supra* note 9 and accompanying text.

147. *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.'") (quoting WASH. REV. CODE ANN. § 19.190.020(1) (West Supp. 2000)).

148. *See* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

149. *See supra* notes 11-14 and accompanying text.

150. *See supra* note 75 and accompanying text.

151. *See supra* notes 129-134 and accompanying text.

holding that an important state interest will not ultimately prevail if the regulation severely burdens interstate commerce.[152]

Two other factors influenced the *Pike* test burdens: the types of communications regulated by the statute and the ease of compliance. *Heckel* regulated a smaller set of Internet communications than *Pataki*, and thus imposed a lesser burden on interstate commerce. CEMA was limited to regulating "commercial electronic mail messages," while the New York statute regulated communications transmitted over "any computer communication system."[153] The *Pataki* court was explicitly concerned that the New York statute could stifle a broad range of Internet communications.[154] By contrast, CEMA regulated only a subset of one type of Internet communications: fraudulent commercial e-mail.[155] Thus, the burden on interstate communications imposed by CEMA was less than that imposed by the New York law and was thus more likely to pass the *Pike* test.

A second difference is that it is likely easier for parties to comply with CEMA than the New York statute. A commercial e-mail will comply with CEMA if it does not use a third-party domain name without permission, misrepresent the transmission path, or contain misleading information in the subject line.[156] With the possible exception of the domain name requirement,[157] it is more difficult for parties to defy CEMA's requirements than to obey them: some level of deceptive intent is implicated in such efforts. For example, special software or technical sophistication is needed to falsify e-mail transmission paths. By contrast, parties wishing to shield themselves from liability under the New York statute must affirmatively conform to one of the enumerated defenses.[158] Such adherence could require substantial financial and technological investments to verify ages, restrict access, or segregate material to facilitate content filtering.[159]

152. *See supra* notes 11-14 and accompanying text.

153. *Compare* WASH. REV. CODE ANN. § 19.190.020(1)(a) (West Supp. 2000) *with* N.Y. PENAL LAW § 235.21(3) (McKinney 1999).

154. *See supra* Part II.A.3.

155. *See supra* notes 98-99 and accompanying text.

156. *See supra* note 99 and accompanying text.

157. For example, accidental violation of CEMA may occur if a sender unwittingly includes a legitimate return e-mail address including a third-party ISP domain name (e.g., sender@aol.com) without the ISP's permission or in violation of a user agreement.

158. *See supra* note 56 and accompanying text.

159. *Id.*

B. Geographic Concerns

As specialized applications of the *Pike* balancing test, the transportation and extraterritoriality cases are particularly concerned with the geographic impact of state regulations. In particular, the transportation cases prohibit state regulations that could collectively result in the imposition of inconsistent standards.[160] Extraterritoriality jurisprudence prohibits states from overreaching their geographic boundaries and regulating transactions occurring wholly outside their borders and directs courts to consider the practical effects of other states adopting conflicting regulations.[161] Geographic concerns were key elements in the *Heckel* and *Pataki* balancing analyses. In both cases, but particularly *Pataki*, the geographic scope was correlated with the size of the burden on interstate commerce. This section will focus on the imposition of potentially inconsistent regulations and affirmative requirements and discuss the impact of geographic concerns on the burdens imposed by state statutes.

1. Regulating Commerce Outside State Borders

Many commentators have agreed with the *Pataki* court that local Internet regulations are bound to produce extraterritorial effects.[162] Based on the opposite outcomes in *Heckel* and *Pataki*, this presumption should be reevaluated in light of particular statutory characteristics. Statutes with meaningful geographic restrictions are less likely to implicate extraterritorial concerns. The New York statute had no explicit geographic restrictions on what types of Internet communications were subject to regulation.[163] Other states, like California, regulate communications delivered to state residents via equipment physically located in that state.[164] By contrast, CEMA expressly limited its applicability to commercial e-mail sent "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

160. *See supra* notes 16-23 and accompanying text.

161. *See supra* notes 24-25 and accompanying text.

162. *See, e.g.*, Christopher S.W. Blake, Note, *Destination Unknown: Does the Internet's Lack of Physical Situs Preclude State and Federal Attempts to Regulate It?*, 46 CLEV. ST. L. REV. 129, 141-42 (1998) ("Because Internet users generally cannot prevent their communications or content from being accessed by a geographical section of the country, any state law that regulates Internet content or communications within a state runs the risk of having an extraterritorial effect on Internet sites outside that area."); Gaylord, *supra* note 7, at 1096 (noting that, because "cyberspace is a profoundly integrative . . . force," local legislation "is likely to produce effects beyond local borders").

163. *See* N.Y. PENAL LAW § 235.21(3) (McKinney 1999).

164. CAL. BUS. & PROF. CODE § 17538.4(d) (West Supp. 2001).

resident."[165] The *Heckel* court's interpretation of CEMA reinforced the statute's narrow geographic reach.[166] The Court concluded that there was no liability for data merely routed through Washington servers.[167] Likewise, it disregarded extraterritoriality arguments that liability could be imposed on out-of-state residents for sending spam ultimately read by Washington residents outside state borders.[168]

Statutes with meaningful geographic limitations, such as CEMA, are less susceptible to arguments that they could regulate Internet communications occurring wholly outside their respective borders. CEMA's explicit requirements that the communication originate or be received in Washington forecloses most extraterritorial arguments. The New York and California laws have not effectively addressed extraterritorial concerns. For example, data packets routed through or stored in equipment physically located in a state could potentially expose the sender to liability under a geographically unrestricted statute. If the equipment is merely a conduit for communications between a sender and recipient located in third-party states, such a statute raises troubling extraterritorial issues and may violate the dormant Commerce Clause.

2. *Inconsistent Regulations and Affirmative Requirements*

Another geographical concern is the danger of competing state Internet regulatory regimes imposing inconsistent standards and conflicting affirmative requirements on Internet communications. Addressing these requirements is key to evaluating the burdens on interstate commerce. In *Pataki*, the court confronted a broad statute regulating the dissemination of obscene materials via the Internet. As the only geographic limitation was its implicit jurisdictional reach, the New York law could potentially conflict with other states' regulatory regimes. Currently, it is technically difficult to exclude website visitors based on real world geography.[169] Thus, a website operator could be subject to overlapping and potentially conflicting content regulations in all the states from which the website is accessi-

165. WASH. REV. CODE ANN. § 19.190.020(1) (West Supp. 2000).

166. *See supra* notes 140-141 and accompanying text.

167. *Id.*

168. *See supra* notes 138-141 and accompanying text.

169. However, the technology to geographically identify IP addresses is now being developed. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 810-11 (2001). Many websites currently condition entry on payment information (e.g., credit card numbers) that could easily be correlated with geographic data. *Id.* at 809. However, this new technology is expensive and not completely effective, boasting only 80-95% accuracy in identifying IP addresses with states. *Id.* at 811.

ble. In order to insulate themselves against liability under the New York statute, defendants would need to comply with one of the statutory affirmative defenses,[170] which are likewise not guaranteed to be consistent with the defenses of other states. *Pataki* noted the danger of such inconsistent standards and weighed it heavily in the burden on interstate commerce.[171]

CEMA was well-crafted to avoid concerns of inconsistent standards and conflicting requirements. The statute imposed no affirmative requirements, such as subject line labeling.[172] Under the guise of consumer protection, the regulations only prohibited falsified transmission paths and misleading subject lines,[173] requirements that are unlikely to conflict with other states' Internet regulatory programs. Thus, the simultaneous transmission of nonfraudulent e-mail to Washington and other states would not likely cause conflicts between CEMA and other state consumer protection statutes.

As discussed in *Pataki*, numerous states regulating obscene Internet communications could make compliance with all regulations very burdensome or even impossible, thus chilling out-of-state behavior.[174] Due to current technological limitations which make it difficult and expensive to identify website visitors' geographic location, it would be burdensome to exclude residents of particular states in order to avoid those states' content regulations.[175] If states imposed affirmative requirements on all Internet communications accessible within their state borders, to avoid potential liability Internet content providers would be forced to comply with a superset of all state regulations or withdraw the regulated communications.

A similar conflict of affirmative requirements has arisen in state regulation of unsolicited commercial e-mail. Some state regulations now require subject line prefixes labeling e-mail advertisements as such[176] or demand certain content in the body of an e-mail message, such as opt-out instructions.[177] It is just as difficult to correlate geography with e-mail ad-

170. *See supra* note 56 and accompanying text.

171. *See supra* notes 81-83 and accompanying text.

172. *See infra* notes 176-177.

173. *See supra* note 99 and accompanying text.

174. *See supra* notes 81-83 and accompanying text.

175. *See supra* note 169 and accompanying text.

176. *See, e.g.*, CAL. BUS. & PROF. CODE § 17538.4(g) (West Supp. 2001) (requiring advertising material to have the subject line prefix "ADV: " and advertising material for goods and services suitable for those over age 18 to be labeled with the subject line prefix "ADV: ADLT").

177. *See, e.g.*, CAL. BUS. & PROF. CODE § 17538.4(b) (West Supp. 2001) (requiring an unsolicited e-mail to include a statement providing a toll-free telephone number or

dresses and thus screen potential recipients of unsolicited commercial e-mail as it is to exclude website visitors based on residency. When states impose affirmative requirements on commercial e-mail, senders are in the same difficult position as website operators, forced to comply with a superset of all state regulations or not send e-mail altogether. CEMA's proposed methods of compliance, checking mailing lists against a limited access Washington e-mail registry[178] or requesting assistance from individual ISPs, would be heavy burdens under the *Pike* test. Thus, measures that go beyond Washington's limited regulation of falsified e-mail to impose affirmative requirements are in serious danger of conflicting with other states' regulatory programs. This would impose substantial burdens on Internet communications and would likely render the law unconstitutional under the dormant Commerce Clause. Due to this danger of conflict, affirmative requirements are perhaps better handled via federal regulation imposing uniform national standards.

IV. CONCLUSION

Heckel demonstrates that *Pataki*'s broad reasoning that state Internet regulations are preempted by the dormant Commerce Clause is not applicable to all types of regulation. Together, *Heckel* and *Pataki* show that state statutes based on important state interests, limited in geographic coverage, and not imposing inconsistent affirmative requirements have a good chance of surviving a dormant Commerce Clause analysis. However, the dormant Commerce Clause's geographic sensitivity imposes a significant limitation on the reach of state Internet regulations. Statutes that impose affirmative requirements on Internet communications raise significant extraterritorial concerns and should be promulgated by Congress to assure consistent standards.

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valid return address notifying the sender not to e-mail any further unsolicited documents); IOWA CODE ANN. § 714E.1(2)(d) (West Supp. 2001) (requiring an unsolicited e-mail advertisement to provide, "at a minimum," a readily-identifiable e-mail address where the recipient may send a message declining such e-mail).

178. Washington Association of Internet Service Providers, WAISP Registry Page, *at* http://registry.waisp.org (last visited Feb. 6, 2002).