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State Regulation of the Internet: Where Does the Balance of Federalist Power Lie?

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COMMENTS

STATE REGULATION OF THE INTERNET: WHERE DOES THE BALANCE OF FEDERALIST POWER LIE?

I. INTRODUCTION

In 1997, in *American Library Association v. Pataki*, a Federal District Court Judge cited the Commerce Clause to void New York's law attempting to protect minors on the Internet and boldly stated "the unique nature of the [Internet] necessitates uniform national treatment and bars states from enacting inconsistent regulatory schemes."[1] Since that time, additional federal court decisions have only reinforced this view, declaring attempts by Michigan and New Mexico to enforce similar content regulations on the Internet to be violations of the Commerce Clause.[2] Most recently, a King County, Washington court struck down a Washington State law attempting to regulate "spam," or unsolicited commercial e-mail, on the same Commerce Clause grounds.[3]

These holdings, however, seem to have done little to restrain efforts of state legislators to make their mark on the Internet phenomena. Hundreds of laws concerning the Internet have been passed at the state level over the last few years, and nearly two thousand Internet related bills are expected to be introduced in state legislatures in the year 2000.[4] While some of these bills cover rather mundane topics, such as requiring certain state information to be placed on the Internet, many bills seek to address some of the most pressing public concerns emerging in the Internet age, including online privacy and consumer protection.[5]

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1. American Library Association v. Pataki, 969 F. Supp. 160, 184 (S.D.N.Y. 1997).

2. *See* ACLU v. Johnson, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd* 194 F. 3d 1149 (10th Cir. 1999), and Cyberspace Communications v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999).

3. *See* Washington State v. Heskel, No. 98-2-25480-7 SEA (Wash Super. Ct., King County 2000) decision published March 10, 2000, and can be found at <*http://www.wa-state-resident.com/agheck02.htm*> (visited April 3, 2000). The written decision in this case was just one page. For a more extensive discussion of the judge's statements in this case, see Carl S. Kaplan, *In Spam Case, Another Defeat for State Internet Law*, N.Y. TIMES ON-LINE EDITION, March 24, 2000 available at <*http://www.nytimes.com/library/tech/00/03/ cyber-law/24law.html* > (visited April 3, 2000).

4. *See* Jeri Clausing, *States to Consider Flurry of Internet Bills*, N.Y. TIMES ON-LINE EDITION, Jan. 4, 2000 available at <http://www.nytimes.com/2000/01/04/technology/04capital.html>.

5. *See id.*

This flurry of legislative activity on the state level is not an unexpected development. It is in fact a natural product of our system of federalism. At the most basic level, our Constitutional system of government places few limits on the powers of states, allowing them broad discretion to protect the health, welfare and safety of their citizens. Many commentators have sung the praises of this division of power between the States and the Federal government.[6] The Supreme Court itself has noted that federalism promotes democracy, makes government more responsive, and provides for a "healthy balance of power between the States and Federal Government" that reduces the risk of "tyranny and abuse" from either.[7]

It is clear that more and more of our communication and commerce is moving onto the Internet.[8] Over 100 million Internet users are sending as many as 6.9 trillion e-mails a year.[9] Total revenue from commercial activities involving the Internet may total $3 trillion by 2003.[10] Of course, the same problems that plague the terrestrial world plague the Internet world as well. Internet users may be solicited by fraudulent business practices, exposed to deceptive advertising; they may gamble, and see "socially harmful" material. These activities are currently viewed as within the regulatory sphere of the states.[11] The reason many state legislators give for authoring Internet regulatory laws is a simple desire to assure state residents that they will be protected on-line as well as off line.[12] What *Pataki* and the cases that follow tell us is that if a citizen moves into cyberspace, that citizen may potentially have moved out of the state regulatory sphere. The Commerce Clause acts as a roadblock to state regulation of Internet activity.

The irony is that these courts have found this immense power residing in the Commerce Clause at just the same time that the Supreme Court is

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6. *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1101-07 (1996); Charles Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416 (1956).

7. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

8. *See infra* notes 9-10.

9. *See* Susan Moran, *Services Rush to Stamp Out Vexing E-Mail Blackouts*, Apr. 28, 1997, available at http://www.internetworld.com/print/1997/04/28/news/rush.html (visited April 5, 2000). Estimate is for the year 2000.

10. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 486 (E.D. Pa. 1999). This case is commonly referred to as "Reno II" to differentiate it from ACLU v. Reno 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997). Both cases concern federal laws regulating Internet content.

11. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17200 et seq. and §§ 17500 et seq. (West 1998) (regulating a variety of business practices for the purpose of protecting consumers and competitors).

12. SB 597, CA 1998 Leg, enacted Jan. 1, 1999, was proposed to "simply apply existing laws governing the conduct of business in California to those persons who conduct their business via the Internet. The goal is to spell out the rules of commerce on the Internet so that California consumers and businesses remain protected using this new and fast growing medium of commerce". *See* Legislative Analyst Report to Assembly Committee on Judiciary, June 30, 1998, available at <http://www.leginfo.ca.gov> (visited April 4, 2000).

finding that clause less powerful and is promoting the power of the States.[13] In the 1995 case of *United State v. Lopez*, the Court for the first time since the New Deal found that an act of Congress exceeded the power granted to it under the Commerce Clause.[14] The power of the Commerce Clause to restrain states at all has even been questioned by a significant minority of Justices in recent cases.[15]

It seems hard to believe that the extreme limits *Pataki* places on state regulatory power will be able to fully withstand Supreme Court scrutiny. Therefore, this paper will take a critical view of *Pataki* and the cases that followed it. As will be seen, the Supreme Court's Commerce Clause jurisprudence is complex and multi-faceted, and presents many opinions which are extremely sympathetic to state regulation, particularly in the area of health and safety. *Pataki* and the cases which followed did not fully explore these opinions.

It should be noted that the New York, Michigan and New Mexico laws invalidated in these cases were each attempts by the states to protect minors from harmful material on the Internet.[16] Each law, therefore, brought forth obvious First Amendment concerns, and two of the laws were struck down on First Amendment grounds, with the Commerce Clause as only a secondary reason for invalidating the laws.[17] As the state regulatory focus, however, moves towards more commercial behaviors, such as online advertising and consumer protection, the focus of judicial analysis seems destined to move away from the First Amendment to rely more exclusively on the Commerce Clause. This trend may have already started with the invalidation

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13. For a more detailed discussion on this trend, see generally Friedman, *supra* note 6.

14. United States v. Lopez, 514 U.S. 549 (1995). *See* Dr. Bill Swinford & Eric N. Waltenburg, *The Supreme Court And The States: Do Lopez And Printz Represent A Broader Pro-State Movement?*, 14 J. L. & POL. 319 (Spring 1998).

15. *See* Sara Sachse, *United We Stand—But for How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 ST. LOUIS U. L.J. 695, 721 (1999) (noting the dissenting opinions in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1994), are significant in showing as many as four Justices—Scalia, Rehnquist, Thomas and Ginsberg—allying to create significant exceptions to the dormant Commerce Clause).

16. New York's law made it a crime to intentionally use any computer to make available "harmful" content to a minor. *See* ALA v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997). The New Mexico statute prohibited the "dissemination of material that is harmful to minors by computer." *See* ACLU v. Johnson, 194 F. 3d 1149, 1152 (10th Cir. 1998). The Michigan statute added language to an existing ban on the distribution of obscene material to children. The 1999 amendment made it a crime to knowingly make available on a computer system "sexually explicit" material. *See* Cyberspace Communications v. Engler, 55 F. Supp. 2d 737, 740 (E.D. Mich. 1999).

17. The exception is *American Library Association v. Pataki*, which was decided solely on commerce clause grounds. At the time the case was decided, the Supreme Court had just heard arguments on a Federal attempt to regulate the Internet in *ACLU v. Reno*. The judge, therefore, refrained from deciding on the First Amendment arguments against the law and focused only on the Commerce Clause. *See* 969 F. Supp. 160, 182. For a discussion of *Pataki* see *infra* notes 27-53 and accompanying text.

of Washington State's "spam" law.[18]

The first part of this Comment will review the Commerce Clause, with a specific focus on those aspects most relevant to the discussion of state Internet laws. The next part will review the holdings of *Pataki* and the cases which have followed it, which have largely made the same arguments in support of applying the Commerce Clause. Each case found the Internet to be analogous to a mode of transportation, and cited a series of cases which deny states the ability to regulate aspects of the national transportation system. Finally, this Comment will explore these transportation cases, and show that they may be much more respectful to state regulation than *Pataki* and its progeny portray them to be.

II. THE COMMERCE CLAUSE

Before discussing the specific aspects of the Commerce Clause the courts have found most relevant to the Internet, it is important to see the Commerce Clause in a broader context. The Commerce Clause gives the Federal government the ability to regulate commerce "among the several states."[19] As early as 1824, the Supreme Court recognized that the clause had a negative sweep as well, placing some limitations on a state's ability to pass a law concerning interstate commerce:

> This principal that our economic unit is a Nation, which alone has the gamut of powers necessary to the vital power of erecting customs barriers against foreign competition, has a corollary that the states are not separate economic units. What is ultimate is the principal that one state in its dealings with another may not place itself in a position of economic isolation.[20]

This negative, or dormant, aspect of the Commerce Clause is intended to play two roles : first, it keeps state laws subordinate to federal regulation of interstate commerce (vertical federalism); and second, it prevents the regulatory actions of one state from encroaching on the sovereignty of another state (horizontal federalism).[21]

The main intention of the Commerce Clause was to solve the problem of a State enacting laws impacting trade with other states or with foreign nations, such as duties and tariffs.[22] Out of this has flown the Court's consistent efforts to strike down laws which have the effect of discriminating against out of state commerce, subjecting these laws to a per se rule of invalidity.[23]

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18. *See infra* Part III.D.

19. U.S. CONST. Art. I § 8.

20. Gibbons v. Ogden, 22 U.S. 1, *92, (1824) (J. Johnson, concurring).

21. *See* ALA v. Pataki, 969 F. Supp. 160, 175-176.

22. *See* West Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994) ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty.").

23. *See* Oregon Waste Systems v. State of Oregon, 511 U.S. 93, 99 (1994).

On the other hand, the Court is sensitive to the fact that states may pass laws for legitimate purposes that may incidentally touch on interstate commerce.[24] The most concise explanation of what courts should do when facing a non-discriminatory, non-protectionist state law which impacts interstate commerce comes from *Pike v. Bruce Church*: "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 on such commerce is clearly excessive in relation to the putative local benefit."[25] This has become known as the *Pike* balancing test, weighing the local benefit of the law against the negative impact on interstate commerce.

Exactly how much the *Pike* balancing test simplifies dormant Commerce Clause analysis in certainly debatable.[26] As one commentator notes, the Supreme Court dormant Commerce Clause jurisprudence is a complex and sometimes contradictory set of principals that Justices themselves have called "hopelessly confused" and "not predictable."[27] Several commentators have called for the doctrine to be abolished and replaced by a more manageable analysis of state laws, perhaps under the privileges and immunities article of the Constitution.[28] Certainly, the complications engendered by adding the Internet to this mix will do little to add coherence to the Commerce Clause. The great challenge for the courts is to find ground between the extreme positions of giving Congress exclusive power to regulate commerce and that of allowing states unlimited power over such commerce.[29]

III. THE CASES INVALIDATING STATE INTERNET LAWS

A. ALA v. Pataki

In *ALA v. Pataki*, several plaintiffs, led by the American Library Association, challenged a New York State law that made it a crime to use a computer to distribute "harmful" content to a minor.[30] The act defined "harmful" as that which "appeals to prurient interests, is patently offensive to prevailing standards in the community and lacks literary, artistic, political or scien-

24. *See id.*

25. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

26. *See infra* notes 27-29.

27. Michael A. Lawrence, *Towards a More Coherent Dormant Commerce Clause*, 21 HARV. J. L. & PUB. POL'Y 395, 397 (1998) (quoting Kassel v. Consolidated Freight, 450 U.S. 662, 706 (1980) (J. Rehnquist, dissenting)).

28. *See* Martin Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L J. 569 (1987) (arguing that the dormant commerce clause undermines the balance of power created by the constitution); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) (advocating the use of the privileges and immunities clause to analyze state regulatory law, rather than the commerce clause).

29. *See* Lawrence, *supra* note 27, at 396.

30. 969 F. Supp. 160, 163.

tific value for minors."[31] The act allowed defenses to liability if the distributor made "reasonable, good faith" efforts to bar minors from viewing the harmful material, such as using blocking software or adult access codes.[32] The judge chose to rule only on the Commerce Clause issues raised in this case, leaving the First Amendment issues for the impending Supreme Court opinion on the Federal Internet content law, the Communications Decency Act.[33]

The first argument of the state was that the law applied only to intrastate communication, and was therefore inappropriate for analysis under the Commerce Clause.[34] After a lengthy discussion, the judge determined that the text of the statute, its legislative history and the realities of the Internet clearly invoke interstate commerce.[35] The text did not limit itself to communication occurring wholly within New York, and the legislative history "clearly evidences the legislators understanding that the Act would apply to communications between New Yorkers and parties outside the state."[36] Most importantly, the judge found that the nature of the Internet itself, "wholly insensitive to geographic distinctions," was the most compelling argument for the application of the act to interstate activity.[37] After reviewing the technological foundations of the Internet, the judge found that the New York act could not effectively be limited to purely intrastate communication, "because no such communications exist."[38]

The judge then moved on to the Commerce Clause, finding three separate reasons why the Clause invalidated the New York Act.[39] First, the burdens that the law placed on interstate commerce greatly exceeded any local benefit from the law.[40] Here, the court applied the *Pike* balancing test.[41] Even though protection of children was a "quintessentially legitimate state objective," the court found that the local benefit of the law was "not overwhelming."[42] The one-half of Internet communications originating outside the United States would be untouched by the law, and much of the activity that

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31. *Id.*

32. *See id.* at 164.

33. *See id.* at 182 ("I believe any determination of the plaintiffs' First Amendment challenge should therefore await the guidance to be provided by the Supreme Court's forthcoming opinion.").

34. *See id.* at 169.

35. *See id* at 169-70.

36. *See* American Library Association v. Pataki, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("The act was in part a response to a case in which an adult male resident of Seattle, Washington communicated about sexually explicit matters by computer with a thirteen year old [New York] resident.").

37. *Id.*

38. *Id.* at 171.

39. *See infra* notes 40-50, 54-59 and accompanying text.

40. *See Pataki,* 969 F. Supp. at 169.

41. *See id.; Oregon Waste Systems, supra* note 23 and accompanying text.

42. *Pataki*, 969 F. Supp. 160, 178.

could be regulated was already covered by state laws prohibiting distribution of pornography to minors.[43] Balanced against this was an "extreme burden on interstate commerce."[44] This burden was the chilling effect that the act would have on communication, forcing self-censorship upon people who may be uncertain that their speech would be prosecutable under New York's standards.[45]

Second, the court equated the Internet with a mode of transportation, and noted several cases holding the regulation of certain modes of transportation to be an area for exclusively national regulation.[46] "The Internet, like rail and highway traffic, requires a cohesive national scheme of regulation so users are reasonably able to determine their obligations."[47] The act attempted to define "indecent" material by referring to prevailing community standards, but such standards varied across the country.[48] The judge noted that even if every state enacted the exact same law, an Internet user would still be facing conflicting standards of what is "indecent," and a user would not know which standard they should meet.[49] The nature of the Internet made it most appropriate for "national, and more likely global" regulation.[50]

As has been noted by other commentators, these first two reasons given by the court actually represent "double dipping" from the same line of Commerce Clause cases.[51] The burden placed on interstate commerce through inconsistent local regulation is more appropriately placed as part of the *Pike* balancing test, rather than its own, separate line of inquiry.[52] The cases cited by the judge for this "exclusive national regulation" proposition were decided before the articulation of the *Pike* balancing test.[53] Even so, as will be discussed below, these cited cases did engage in a balancing of the local interest protected with the burden on interstate commerce before invalidating the local laws.[54] The burden on interstate commerce caused by in-

43. *See id.* at 178. The judge noted that an investigator with the New York State Attorney's office testified that in 600 hours on the computer, he found only two cases of inappropriate contact with minors that could not be prosecuted under existing laws. *Id.*

44. *Id.* at 179.

45. *See id.* at 179-81. It has been noted that this section of the opinion cited only first amendment cases, and may have done what the judge claimed would not be done—that is, make a ruling on first amendment grounds. No other commerce clause cases have used this "chilling effect" on speech to invalidate a law on commerce clause grounds. *See* James E. Gaylord, *State Regulatory Law and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1116 (1999).

46. *See Pataki*, 969 F. Supp. at 169.

47. *Id.* at 182.

48. *See id.*

49. *See id.*

50. *Id.*

51. *See* Gaylord, *supra* note 45, at 1116.

52. *See id.*

53. The court cited *Southern Pacific v. Arizona, ex rel. Sullivan*, 325 U.S. 761 (1945) and *Wabash St. L. & P. Ry. Co v. Illinois.*, 118 U.S. 557 (1886). *See* 969 F. Supp. 160, 181.

54. *See infra* Part IV.A.

consistent local regulation merely weighs heavily on one side of the *Pike* scale.[55]

The third reason for invalidation of the law was the "extraterritorial" effects of the act, in that the law regulated activity occurring wholly outside the borders of the State.[56] Respect for the sovereignty of fellow states demands that the regulatory law of one not encroach on the other.[57] The judge found that due to the borderless nature of the Internet, the necessary effect of the law was to regulate behavior occurring entirely outside of New York.[58] There was no feasible way for an actor on the Internet to prevent New Yorkers from accessing a web site or message, thus every actor, regardless of location, was forced to comply with New York law.[59]

B. Cyberspace Communities v. Engler[60]

In an attempt to modernize an existing statute prohibiting dissemination of sexually explicit materials to minors, the Michigan legislature added language so that the statute would also apply to activity taking place over computers. Perhaps attempting to avoid the "extraterritorial" concerns of *Pataki*, prosecution was possible under the act only if the violation "originates, terminates, or both originates and terminates" in the state of Michigan.[61] After making a number of findings on the nature of the Internet, the judge ruled that the Act violated both the First Amendment and Commerce Clause.[62]

Under the Commerce Clause, the court found that the law did still have improper "extraterritorial" effects.[63] Although on its face the act regulated only communication which originated or terminated in Michigan, "virtually all Internet speech is . . . available everywhere."[64] A publisher could not limit viewing of a web site to everyone except those in Michigan, and thus must follow Michigan's standards to avoid prosecution under the act.[65] The judge also found the act failed the *Pike* balancing test, even though the act did involve a legitimate local interest; echoing *Pataki*, the judge found the act placed a burdensome "chilling effect" on interstate communication, and only potentially regulated the one-half of Internet content originating in the

55. *See id.*
56. *See* American Library Association v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).
57. *See id.* at 174.
58. *See id.* at 177.
59. *See id.*
60. 55 F. Supp. 2d 737 (E.D. Mich. 1999).
61. *Id.* at 740. The act makes it unlawful to "communicate, transmit, display, or otherwise make available by means of the internet or a computer, computer program, computer system, or computer network [sexually explicit material]." *Id.*
62. *Id.* at 753.
63. *Id.* at 751.
64. *Id.*
65. *See id.*

United States.[66]

C. ACLU v. Johnson[67]

The statute in question here was virtually identical to that in *Pataki*, seeking to criminalize the dissemination by computer of material "harmful" to minors and the district court granted an injunction enjoining enforcement of the law, citing both First Amendment and Commerce Clause Grounds.[68] The 10th Circuit affirmed.[69] Both courts cited to *Pataki*, and identified the same three Commerce Clause arguments made in that case.[70] In conducting the *Pike* balancing test, the circuit court stated protection of minors was an "undeniably compelling state interest" but that the burdens imposed by the law were far larger than any potential benefit, again noting the "chilling effect" communication and the international nature of Internet.[71] The court also explicitly adopted the "transportation analogy," comparing the regulation of the Internet to the rail and highway system and citing a scholarly work that had done the same.[72]

D. Washington State v. Heskel

In March of this year, a King County, Washington State Superior Court judge issued a brief ruling which stated Washington State's anti-spam e-mail law violated the Commerce Clause by being "unduly restrictive and burdensome."[73] The statute in question prohibited sending a Washington resident a commercial e-mail which misrepresented the source of the message or contained a misleading subject line.[74]

Though the judge's opinion does not outline on what specific grounds the Commerce Clause was violated, the defendant's attorney in the case made the same three arguments which carried the day in other Commerce Clause cases: first, the Washington State law regulated conduct occurring outside the state, and was therefore invalid; second, the burden of compliance impacted interstate commerce too greatly for the minimal benefit to

66. *See id.* at 752, 759.

67. ACLU v. Johnson, 194 F. 3d 1149 (10th Cir. 1999).

68. ACLU v. Johnson, 4 F. Supp. 2d 1024 (D. N.M. 1998).

69. *See* 194 F. 3d 1149, 1163.

70. *See id.* at 1160-62.

71. *Id.* at 1161.

72. *See id.* The court cited Kenneth D. Bassinger, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998).

73. Washington State v. Heskel, No. 98-2-25480-7 SEA, Superior Court of Washington, County of King, published March 10, 2000, can be found at *<http://www.wa-state-resident.com/agheck02.htm,>* (visited April 3, 2000).

74. *See* WASH. REV. CODE § 19.190.005 (West 1998). For a detailed discussion of this law and privacy concerns raised by it see Steven Miller, *Washington's "Spam Killing" Statute: Does it Slaughter Privacy in the Process?*, 74 WASH. L. REV. 453 (1999).

state residents; and third, the nature of the Internet requires that it be subject to uniform national regulation.[75] Thus it would appear that this case marks the first adoption of the "*Pataki* doctrine" to a law that was not also challenged on a First Amendment basis.

IV. A BETTER APPROACH TO THE BALANCE OF BENEFITS AND BURDENS

As previously stated, *Pataki* and the cases that follow make three claims about the Commerce Clause and the Internet. First, the Internet, because of its technical make up, is one of the modes of commerce which should be subject to uniform national regulation, rather than inconsistent state laws. Second, a state Internet law will fail any sort of *Pike* balancing test, because the local benefits are generally small while the impact on interstate commerce is large. Third, any state law regulating the Internet impacts conduct occurring wholly within other states, and therefore the law will have improper "extraterritorial" effects.

The first part of this section will explore the long line of Commerce Clause cases that form the basis of the first two claims. As will be seen, both claims derive largely from the same series of transportation cases, which are among the few Commerce Clause cases dealing with non-discriminatory and non-protectionist state laws. Within these cases, there is strong support for the argument that States are actually free to regulate every mode of transportation, and therefore the Internet. In balancing the interests protected by the state law, much more weight and deference should be accorded to the state than seems to have occurred in *Pataki* et al. Finally, there is strong support within these cases for the proposition that there should be no balancing test at all. Instead, a non-discriminatory state law, especially in the area of safety, should be presumed valid and subjected to only the most minimal of review. The second part of this section will more briefly review the extraterritoriality concerns raised by the courts.

A. The Transportation Cases

This line of cases has its roots in *Cooley v. Board of Wardens*,[76] an 1851 case challenging a Port of Philadelphia requirement that all boats traveling through the harbor hire a local pilot or pay a fine to the Port of one-half of a pilot fee.[77] The Court upheld the law as constitutional, but did introduce the concept that there they may be aspects of commerce which demand uniform national treatment: "Whatever subjects of [regulatory] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by

75. *See* Kaplan, *supra* note 3, at *1.
76. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. 299 (1851).
77. *See id.*

Congress."[78] The regulation of pilot fees was clearly a regulation of interstate commerce, according to the Court.[79] However, the Court did not believe that piloting fees fell into the category requiring solely national regulation.[80] This conclusion was assisted by the existence of a law passed by Congress in 1789 which explicitly stated that states could continue to regulate local pilots until Congress makes further provisions.[81]

This idea that an aspect of interstate commerce may demand uniform national treatment re-emerged in a series of cases dealing with state regulation of the railroads and the highway system. One of the cases heavily cited in *Pataki* is *Wabash v. Illinois*, an 1886 case about an Illinois law which prohibited price discrimination by railroad companies in setting shipping rates.[82] The railroad company on trial had charged one company 15 cents a pound for transit from in-state to New York, and then charged another shipper a higher rate for a slightly shorter trip along the same route.[83] The Court found the state law unconstitutional, explicitly stating that there are certain issues where local regulation is inappropriate.[84] The Commerce Clause left the power to regulate interstate shipping rates solely in the hands of the federal government.[85]

This holding, however, is limited in several ways.[86] The opinion is clearly dated, and this era has been noted as the height of Court's valuing of "national uniformity."[87] Four years later, the Court would use the Commerce Clause to invalidate a state regulation of alcohol sales.[88] Second, this ruling did not end all state regulation of railroads, which continues to this day, and is the subject of several of the cases discussed below.[89] An extensive and vigorous dissent in *Wabash* also points out that the majority ignores two key aspects of previous holdings.[90] First, the Court is showing none of the traditional deference to state legislative action.[91] Second, the Court is invalidating a state law even when Congress has chosen not to assert its regulatory power

78. *Id.* at 319.

79. *See id.* at 316.

80. *See id.* at 319 ("Some, like the subject now in question demand diversity [of regulation]").

81. *See id.* at 317.

82. Wabash, St. L. & P. Ry. Co. v. State of Illinois, 118 U.S. 557, 578 (1886).

83. *See id.* at 579.

84. *See id.* at 577.

85. *See id.* at 576.

86. *See infra* notes 87-92 and accompanying text.

87. *See* Friedman, *supra* note 6, at 349.

88. *See* Leisy v. Harden, 135 U.S. 100 (1890). The court also invalidated Louisiana's post-reconstruction era law mandating that trains traveling in the state be desegregated. In *Hall v. DeCuir*, 95 U.S. 485 (1878), the Court found this law too burdensome on train operators who were forced to allow mixing of races on their interstate trains while traveling through Louisiana. *Hall* was heavily cited in *Wabash,* 118 U.S. 557.

89. *See infra* notes 106-130 and accompanying text.

90. *See infra* notes 91-92.

91. *See Wabash*, 118 U.S. at 581 (Bradley, J., dissenting).

on the subject.[92]

By 1938, the views expressed in the minority opinion in *Wasbash* emerged in the majority in *South Carolina v. Barnwell Brothers Inc.*[93] Here, the Court refused to invalidate a state law, even when the Court acknowledged it would give rise to an inconsistent regulatory scheme damaging the flow of interstate commerce.[94] South Carolina passed a law prohibiting the use of the state highways by trucks over ninety inches wide or over 20,000 pounds.[95] At the time, 85% to 95% of the trucks used in interstate commerce would exceed these limits.[96] The Court said that the law certainly had a negative impact on the free flow of interstate commerce; however, it was for Congress, and not the Court to decide when the burdens on interstate commerce were such that a uniform national scheme needed to be enacted.[97] The Court also refused to engage in a review to determine if the state law in question effectively accomplished the stated goal of promoting safety.[98] Although there were serious questions raised as to whether the 90 inch width and the 20,000 pound limits would be effective in promoting safety and preserving highways, the Court stated that so long as there was any "rational basis" for the findings of the state legislature, the courts could not overturn it.[99] In perhaps the most important quote of the case, the Court cited *Cooley* for the proposition that "there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress."[100] Regulation of highways was viewed as one of those local issues.[101]

Although later cases would invalidate regulations similar to those in *Barnwell,*[102] the Court has on occasion taken pains to say that the holding has not been overruled. The case has been cited for the proposition that even a state law which burdens 90 percent of the interstate commerce flowing through it may not be too great a price to pay to protect a legitimate local interest.[103] The ideas of deference to state legislative judgment and allowing states discretion to act in the absence of federal legislation have emerged in

92. *See id.*

93. South Carolina State Highway Department et al. v. Barnwell Bros., 303 U.S. 177 (1938).

94. *See id.* at 180.

95. *See id.*

96. *See id.* at 182.

97. *See id.* at 190.

98. *See infra* notes 99-101and accompanying text.

99. *See Barnwell,* 303 U.S. at 191.

100. *Id.* at 185.

101. *See id.*

102. *See* Raymond Motor Transportation v. Rice, 434 U.S. 429 (1977) *and* Kassel v. Consolidated Freight, 450 U.S. 662 (1980) (both holding state laws limiting truck lengths invalid).

103. *See* Bibb v. Navajo Freight, 359 U.S. 520, 523 (1959).

other cases.[104] These ideas have peppered recent Commerce Clause opinions by Chief Justice Rehnquist and Justice Scalia, and could emerge as a powerful force in any Dormant Commerce Clause case on the Internet.[105]

In addition to *Wasbash*, the *Pataki* judge cited two mid-century cases, *Southern Pacific v. Arizona*[106] and *Bibb v. Navajo Freight*[107] for the proposition that certain areas of commerce are off limits to state regulation.[108] These cases do in fact make statements tending to support the idea that certain areas of commerce should be subject to exclusive national regulation.[109] In both of these cases, however, the Court engaged in a balancing test, weighing the value of the state regulation and the burden on interstate commerce before declaring the law invalid.[110] The damage to national commerce from inconsistent local regulation was part of this balancing test, rather than a stand alone factor invalidating the law.[111]

In the 1945 *Southern Pacific* case, the Court invalidated an Arizona law limiting the length of trains within the state. Arizona passed the law in an effort to promote train safety, believing that longer trains caused more "slack action" movement that would endanger rail workers.[112] Over 90 percent of the trains traveling in Arizona were engaged in interstate commerce, and a large percentage traditionally exceeded the new length limit.[113] The Court was sensitive to this effort by the state to promote safety, stating "there is a residuum of power in the state to make laws governing matters of local concern."[114] The Court also noted that Congress had specifically refrained from passing legislation that would limit train length.[115] Nevertheless, the Court invalidated the law for two reasons.[116] First, the Court balanced the value of the law in promoting safety with the cost of the law.[117] After an extensive inquiry into the factual findings of lower courts, the Court declared that "slack action" was only a minor problem, and danger to rail workers would likely increase under this law which would require more train trips across the state.[118] The Court then noted the large burden this law placed on interstate

104. *See id.* at 524.
105. *See* Sachse, *supra* note 15, at 709.
106. 325 U.S. 761 (1945).
107. 358 U.S. 520 (1959).
108. ALA v. Pataki, 969 F. Supp. 160, 181-82.
109. *See infra* notes 119, 122, 137.
110. *See id.*
111. *See id.*
112. *See Southern Pacific*, 325 U.S. 761, 776.
113. *See id.* at 771.
114. *Id.* at 767.
115. *See id.* at 766.
116. *See infra* notes 117-121.
117. *See infra* notes 118-120.
118. *See Southern Pacific,* 325 U.S. at 772. The court noted that over 30 percent more train trips would be needed as a result of this law, and that the number of injuries caused by "slack action" was actually higher in Arizona than in states which had no limits on train lengths. *See id.* at 778.

commerce, finding that the law would cost the plaintiff company nearly $1,000,000 annually.[119] Thus, the local benefit was perhaps non-existent and the burden on the law great.[120] Finally, the Court expressed great concern that allowing each state to legislate the length of trains would create a chaotic system of inconsistent regulation that would be economically inefficient.[121] It is this last point that the *Pataki* court used to support the proposition that certain areas of commerce should be for exclusive national regulation.[122]

Interestingly, the Court specifically noted that it was not overruling *Barnwell Brothers*, despite the opposite holding on similar facts.[123] The difference according to the Court was that highways were an area more traditionally of local concern than railroads: "[i]n [*Barnwell*] we point[ed] out that there were are a few subjects of state regulation . . . which are so peculiarly of local concern as is the use of the states highways."[124] The Court also noted that it was not invalidating some other state laws regulating railroads.[125] State laws requiring a certain number of employees on trains passing through the state could stand because they "did not obstruct interstate transportation or seriously impede it."[126] Thus it seems clear that it was a balance of the benefits and burdens of the Arizona law that caused it to be invalidated. The Court does not hold that railroads are an area for exclusively national regulation.

Justice Black's dissent in *Southern Pacific* again highlights the debate on the role the Court should play in reviewing a state law.[127] He criticizes the majority for engaging in a lengthy review of the safety benefits of the law, which turns the Court into a "super-legislature," questioning the findings of state lawmakers.[128] He also noted that the Court is making the politically charged choice that the economic efficiency created by uniformity of state laws should be given greater weight than a potential peril to train employees.[129] To Justice Black, these difficult choices were better left to legislatures, or Congress.[130]

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119. *See id.* at 772.

120. *See id.*

121. *See id.* at 779.

122. *See* American Library Association v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997).

123. *See infra* note 124.

124. *Southern Pacific*, 325 U.S. 761, 783.

125. *See infra* note 126.

126. *Id.* at 782. The only significant cost imposed by the full crew laws was some higher personnel costs and stopping at the state border to take on the appropriate size crew, which is apparently less costly and burdensome than the train length law. These "full-crew" train laws remain valid to this date. They were once again upheld in *Locomotive Firemen v. Chicago R. I. P. R. & Co.*, 393 U.S. 129 (1968).

127. *See infra* notes 128-30.

128. *See* 325 U.S. 761, 788 (Black, J., dissenting).

129. *See id.* at 789.

130. *See id.* at 794.

The most recent case cited in *Pataki* for the "exclusive national regulation" proposition is *Bibb v. Navajo Freight.*[131] Here, the Court struck down an Illinois law requiring trucks to be equipped with a specific curved type of mudguard around the tires. Forty-five states permitted the conventional straight mudguard instead, and Arkansas specifically required the conventional type.[132] Thus the Illinois law was far out of line with the national norm.[133] The Court again stated that safety measures passed by states had a "strong presumption of validity when challenged in court."[134] The Court found that the Illinois law was one of those cases "few in number" where a local safety regulation was invalid.[135] Here, there was evidence introduced that the curved mudguards mandated by Illinois may actually be harmful.[136] The Court stated that a local law can only be invalidated if the record indicates that the benefit of the law is so "slight or problematic" that is does not outweigh the national interest in keeping interstate commerce free from "interference which *seriously* impede[s] it."[137] The Courts reluctance to interfere with the local legislative process seems clear. Importantly for a discussion of Internet law, the Court in dicta noted that if Illinois was able to prove that their regulation was a true safety breakthrough, the law might be able to stand, even in the face of divergent requirements of other states.[138]

In 1977 and again in 1980, the Court struck down two state laws that limited truck lengths on highways. A Wisconsin law banning the operation of 65-foot double trucks fell in *Raymond Motor Transit v. Rice*,[139] and a very similar Iowa law was invalidated in *Kassel v. Consolidated Freightways.*[140] Both these laws, however, were subjected to less deference by the Court because each law made certain exceptions for trucks traveling exclusively within the state, undermining both the safety argument and raising the specter of discrimination against interstate commerce.[141] Also, when the Court engaged in a balancing test, it found little support for the proposition that 65-foot double trailers posed any safety hazard.[142] In fact, there was extensive

131. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).
132. *See id.* at 523.
133. *See id.*
134. *Id.* at 524.
135. *Id.* at 529.
136. *See id.* at 525.
137. *Id.* at 524 (emphasis added).
138. *See Bibb,* 359 U.S. at 530.
139. Raymond Motor Transportation v. Rice, 434 U.S. 429 (1977).
140. Kassel v. Consolidated Freightways Corporation of Delaware, 450 U.S. 662 (1980).
141. *See id.* at 671 n.12 ("It is highly relevant that here, as in *Raymond*, the state statute contains exemptions that weaken the deference traditionally accorded to a state safety regulation.") The Iowa law had a "border city" exemption to allow larger trucks in certain areas of the state and exempted trucks carrying livestock within the state. *See id.* at 676. The Wisconsin law in *Raymond* allowed 65-foot doubles to operate on intrastate routes. *See Raymond*, 434 U.S. at 446.
142. *See Kassel*, 450 U.S. at 674.

evidence presented by trucking companies that the opposite might be true.[143] In contrast, the burden on interstate commerce was high, clearly increasing the cost of an interstate trucking operation.[144]

It is important to note that although the Court was unanimous in rejecting the state law in *Raymond*, the Justices split four to four on the exact rationale.[145] A group including Justice Rehnquist filed an opinion that gives a state much greater deference when acting in the area of safety.[146] They rejected submitting such a state law to the *Pike* balancing test, which they claimed did not apply to state laws "in the field of safety where the propriety of local regulation has long been recognized."[147] Instead, so long as the "safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with the related burdens on interstate commerce."[148] Here, however, the concurring Justices believed the Court could conclude as a matter of law that the safety benefit was illusory, given the overwhelming empirical evidence presented by the trucking companies, the failure of Wisconsin to refute any of this evidence, and the willingness of the state to make exceptions to the law.[149]

This argument continued in the dissent filed by Rehnquist in *Kassel*.[150] Here, Rehnquist echoed the language of *Barnwell*, stressing that it was not the role of the Court to pass judgement on a state legislative action, in particular when there had been no Congressional action on the subject.[151] In *Kasssel*, Iowa was able to produce at least *some* evidence of a legitimate safety basis for the law (unlike Wisconsin in *Raymond*), so the law should be upheld.[152] Further, Rehnquist argued that the only reason the Iowa law placed a burden on interstate commerce was because bordering states choose to place less restrictive limits on truck size. The Court, he claimed, is essentially forcing Iowa to be bound by the legislative judgements of neighboring

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143. *See id.* at 668 ("The evidence convincingly, if not overwhelmingly, establishes that the 65-foot twin is as safe as, if not safer than, the 60 foot twin and 55 foot semi."); *Raymond*, 434 U.S. at 436-437 ("The appellant presented a great deal of evidence supporting their allegations that 65-foot doubles are as safe as, if not safer than, 55 foot singles. The State, for reasons unexplained, made no effort to contradict this evidence.").

144. The cost of the Wisconsin law to Consolidated Freight was estimated at $2,000,000. *See Raymond*, 434 U.S. at 438 n.14.

145. *See id.* at 429 (Justice Stevens took no part in the decision).

146. *See infra* notes 147-149.

147. Raymond Motor Transportation v. Rice, 434 U.S. 429, 449 (1977). (Blackmun, J. concurring). *Pike* dealt with an Arizona law that mandated all cantaloupes in the state be packed in a specific manner. The stated purpose was "to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging," not the promotion of health or safety. *See* Pike v. Bruce Church, 397 U.S. 137,143 (1970).

148. *Raymond*, 434 U.S. at 449 (Blackmun, J., concurring).

149. *See id.* at 450 (Blackmun, J., concurring).

150. *See infra* notes 151-153.

151. *See* Kassel v. Consolidated Freightways Corporation of Delaware, 450 U.S. 662, 691 (1980) (Rehnquist, J., dissenting).

152. *See id.* at 695 n.6.

states regarding truck length limits.[153]

B. Application to Pataki

In synthesizing these cases, it seems that *Pataki* has clearly gone too far in declaring that courts have held an area of interstate commerce off limits to state regulation. The two modern cases cited for this proposition, *Southern Pacific* and *Bibb*, indicate that a court must at least engage in a balancing test before invalidating a state law for placing too great a burden on interstate commerce.[154] State regulation of railroads and highways continue to this day when the Court has determined the burdens on commerce to not be excessive.[155]

Exactly what weights should be given to different factors in this balancing test, or if the test should be conducted at all is also an open question. It would seem that *Pataki* may have underestimated what weight should be placed on the state benefit side of the scales, particularly when a safety law is involved.[156] Nearly every opinion has stressed the special deference that should be accorded to a state acting in a non-discriminatory way to improve the heath and safety of its citizens. *Barnwell* found that forcing alterations to 90 percent of the trucks using the state highways was not too great price to pay for safety.[157] In the four cases where state safety laws were struck down- *Southern Pacific*, *Bibb*, *Raymond* and *Kassel*- strong evidence was presented that the law may well have the *opposite* effect on safety than the state legislature intended.[158] In *Bibb*, the Court also attempted to resolve the so-called "innovators dilemma," stating that a state safety law could stand, even in the face of inconsistent laws, if it is was shown to be an important safety innovation.[159]

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153. *See id.* at 699 (Rehnquist, J. dissenting). He also noted that several states in the Southeast limited trucks to 55 feet. *See id.* at 688, n.1. There, the burden on interstate commerce of the truck length law would be judged differently simply because of decisions of neighboring states. *See id.*

154. *See supra* notes 106-138 and accompanying text.

155. *See, e.g.*, Locomotive Firemen v. Chicago R. I. P. R. & Co., 393 U.S. 129 (1968).

156. The *Pataki* judge noted that the benefit of the law in question was tempered by the fact that it would at best regulate only the one-half of Internet activity originating within the United States. *See* 969 F. Supp. 160, 178. The 10th Circuit echoed this idea in *ACLU v. Johnson*, 194 F. 3d 1149, 1161 (1998). This claim is based on the perhaps correct presumption that gaining jurisdiction over the other half of Internet activity originating outside the U.S. would be difficult. U.S. law, however, has impacted Internet operators acting outside the country. *See* Denis Caruso, *Case Illustrates Entertainment Industry's Copyright Power*, N.Y. TIMES ON-LINE EDITION, March 13, 2000 available at <http://www.nytimes.com/library/tech/00/03/biztech/articles/13digi.html> (using, as an example, a Canadian Web site re-broadcasting US television signals shut down in the face of threats of lawsuits from the U.S. entertainment industry).

157. *See* South Carolina State Highway Department et al. v. Barnwell Bros., 303 U.S. 177, 180 (1938).

158. *See supra* notes 118, 136, 143.

159. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 530 (1959).

Weighing on the opposite side of the *Pike* balancing scale is the burden on interstate commerce.[160] The *Pataki* cases and other commentators note that the unique nature of the Internet makes any law exceedingly burdensome on interstate commerce. [161] While one can choose to travel around a state with a certain railroad or highway law, one cannot at present avoid entering a state while publishing on the Internet- a web page is equally accessible everywhere. Thus, all Internet communication is subject to the "chilling effect" of complying with the content regulations of a single state.

When moving away from laws raising First Amendment concerns, these burdens may not be viewed as so large. The Washington anti-spam law, for example, required only that someone wishing to send a "deceptive" mass e-mail avoid sending that mail to someone on a list of residents maintained by the state and Internet service providers.[162] The "burden" of the law could be met by either not sending an e-mail meeting the state's definition of deceptive, or by editing out state residents from the mailing list.[163] The judge's short ruling did not state if she found this burden to be greater than the benefit Washington residents derive from finding their e-mail box free of junk e-mail. Technology that promotes "zoning" and filtering on the Internet may also serve to lessen the burden of complying with a state law, allowing residents of certain states to be more readily identified online.[164]

A court could also find support for the proposition that a state Internet law, particularly one involving safety, should not even be subjected to a balancing test. The two opinions signed on to by Rehnquist in the trucking cases above indicate that once a court finds at least a rational basis for the state law, there is a strong presumption in favor of validity.[165] The proper forum for balancing damage to interstate commerce from inconsistent regulation may not be the courts, but Congress.[166] As noted in *Kassel*, the state law's burden on interstate commerce may be caused by other states failing to make prudent choices, rather than one state making a wrong one, and the Court may not be the best forum to decide who is right.[167] The *Bibb* dictum on innovative state laws is also sympathetic to this idea.[168]

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160. *See supra* notes 25-29.

161. *See* Bassinger, *supra* note 72, at 1003.

162. *See* WASH. REV. CODE §§ 19.190.005-.050 (West 1998).

163. *See* Kaplan, *supra* note 3, at *2.

164. For a more extensive discussion of the concept of zoning and filtering on the Internet see LAWRENCE LESSING, CODE AND OTHER LAWS OF CYBERSPACE 176-83 (1999).

165. *See* Kassel v. Consolidated Freightways Corporation of Delaware, 450 U.S. 662, 692 (1980) (Rehnquist, J., dissenting).

166. This proposition was clear from the majority opinion in *Barnwell*. "Congress, in exercise of its plenary powers to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great." South Carolina State Highway Department et al. v. Barnwell Bros., 303 U.S. 177, 189-90 (1938).

167. *See Kassel*, 450 U.S. at 706 (Rehnquist, J., dissenting).

168. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 530 (1959).

C. Extraterritoriality Cases

As the *Pataki* opinion points out, it has long been recognized that a state cannot "enact legislation that has the practical effect of exporting that state's domestic polices."[169] This is the concept of "horizontal federalism," the idea that the Commerce Clause is intended to protect the sovereignty of states by denying one state the power to regulate activity occurring wholly within another state.[170] James Gaylord has explored this area of extraterritoriality and the Internet in great detail, and has criticized the broad reading of precedent made by *Pataki.* [171] This section will only serve to summarize those concerns and supplement them to a degree.

The modern view of extraterritoriality was developed in a series of cases through the 1980's.[172] Two of these cases dealing with state "blue-sky" laws regulating takeovers of local companies illustrate the dilemma faced by the court. The first, *Edgar v. MITE Corp.*,[173] challenged an Illinois act which forced one seeking to make a hostile bid on an Illinois business to comply with certain disclosure and waiting period regulations.[174] An Illinois business was defined as any business more than ten percent owned by residents, which had more than ten percent of capital located within the state or was incorporated or had its principal place of business in Illinois.[175] In his plurality opinion, Justice White stated "the Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state."[176] What troubled the Court was that the Illinois act could apply to a company that did not have a single shareholder in the state.[177] Also, if other states passed similar laws, one company could be subject to a number of competing obligations. In significant dicta, Justice White stated, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt 'directly' to assert extraterritorial jurisprudence over persons or property would offend sister States and exceed the inherent limits of the State's power.'"[178]

The holding of *Edgar* was somewhat limited, however, by *CTS Corp. v. Dynamics Corp. of America.*[179] Here, on facts very similar to *Edgar*, the Court upheld an Indiana law which regulated tender offers to local compa-

169. ALA v. Pataki, 969 F. Supp. 160, 174.
170. *See* Gaylord, *supra* note 45.
171. *See id.*
172. *See infra* notes 173-195 and accompanying text.
173. 457 U.S. 624 (1982).
174. *See id.* at 626-27.
175. *See id.*
176. *Id.* at 642-43.
177. *See id.* at 642.
178. *Id.* at 643 (citation omitted).
179. 481 U.S. 69 (1987).

nies.[180] The difference with the Illinois law in *Edgar* was that Indiana's law applied only to companies incorporated in the State.[181] Thus, even if other states passed similar laws, a company would be subject only to one set of rules.[182]

The principals of extraterritoriality were further developed in a pair of cases dealing with state liquor price affirmation laws. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[183] a New York law required a liquor distiller or producer to affirm that prices charged to wholesalers would not exceed those charged in other parts of the country in upcoming months.[184] The court found the law invalid because the practical effect was to regulate the price of alcohol in other states.[185] Once a seller established a price with the New York Liquor Authority, it could not lower its price in other states during the relevant time period.[186] It did not matter that on its face, the New York law addressed only the sale of liquor in New York.[187]

This "extraterritoriality" analysis would become crystallized in *Healy v. Beer Institute*,[188] which challenged a Connecticut law similar to the New York law struck down in *Brown-Forman*. There were, however, some important differences in the laws.[189] First, the Connecticut law only required the seller to affirm that the local prices were the same as in bordering states at the time of the affirmation.[190] Thus, future pricing decisions in other states were not effected.[191] Second, the state articulated a rational for the law: to prevent residents from crossing the state border to buy lower priced alcohol and escape state taxes and regulatory laws.[192] Still, the Connecticut law was found unconstitutional.[193]

Justice Blackmun, in a portion of the opinion which five Justices joined, put forth this test of extraterritoriality known as the *Healy* synthesis, which would be quoted in its entirety in the *Pataki* decision:

> First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." Second, a statute that directly controls commerce occurring wholly outside the bounda-

180. *See id.* at 94.
181. *See id.* at 72-73.
182. *See id.* at 88.
183. 476 U.S. 573 (1986).
184. *See id.* at 575.
185. *See id.* at 582.
186. *See id.* at 583.
187. *See id.*
188. 491 U.S. 324 (1989).
189. *See infra* notes 190-192 and accompanying text.
190. *See* 491 U.S. at 326.
191. *See id.*
192. *See id.*
193. *See id.* at 337.

> ries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.[194]

The *Pataki* judge found, "The nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York," even if that was what state officials intended, and the law was therefore subject to a per se rule of invalidity.[195] Additionally, if many or all other states passed identical content regulation laws, a publisher on the Internet would be subject to competing regulation, based on the variety of community standards of decency.[196]

Blanket application of the strict standard of extraterritorially to the Internet regulatory law is subject to some criticism.[197] The principle has grown out of a series of cases that challenged laws regulating purely economic activity— business takeovers and beer pricing. The *Pataki* case is believed to be the first to use the concept to invalidate a state law regulating health and safety.[198] Just as the *Pike* test may be inappropriate to apply to a state law in an area such as public safety, where the "'propriety of local regulation has long been recognized',"[199] so too may the *Healy* extraterritoriality test be inapplicable in similar situations.

As has been noted, a "nexus" test or some other type of due process analysis may be a more appropriate for reviewing the extraterritorial reach of a state law.[200] When commenting on state taxation, Justice Scalia has noted, "it is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax."[201] This would seem to indicate there is not a blanket prohibition on state Internet regulation. There is no question that the law in *Pataki* would have forced many people acting exclusively outside the state to conform their behavior to New York law.[202] At the same time, it is recognized that New York does have a legitimate interest in protecting its minor citizens from indecent material entering the State

194. Healy v. Beer Institute, 491 U.S. 324, 336 (1989) (footnotes omitted).

195. American Library Association v. Pataki, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

196. *See id.*

197. *See infra* notes 198-204.

198. *See* Gaylord, *supra* note 45, at 1114.

199. Pike v. Bruce Church, 397 U.S. 137, 143 (1977) (citation omitted).

200. *See* Gaylord, *supra* note 45, at 1129 ("If history is any guide, courts will find in the Commerce Clause a nexus requirement that will allow states, no less than Congress, to map out zones of Cyberspace.").

201. Quill v. North Dakota, 504 U.S. 298, 319 (1992) (Scalia, J., concurring).

202. *See Pataki*, 969 F. Supp. at 177.

through the Internet, just as it can regulate indecent material arriving by mail.[203] The challenge is finding a way to balance these competing concerns. Sufficient to say, this is a subject that is contentious and developing.

VI. CONCLUSION

In one sense, it is difficult to imagine that a single state should have that ability to make laws regarding the Internet. Short of actual purchases of products, nearly all activity on the Internet occurs in an anonymous, borderless world. The person in Taiwan interacts on the Internet in the same places and same way as someone in the United States. Every state and every nation would seem to have an equal claim to impose their regulatory laws on Internet. Such a situation would be chaos, and certainly have a damaging effect on use of the Internet.

On the other hand, it is difficult to imagine that simply because someone has decided to act over the Internet, they have been removed from the regulatory reach of a state. California, for example, has extensive laws regulating deceptive advertising.[204] Is it impossible to extend these laws to protect California residents on the Internet? The answer from *Pataki* and the cases which have followed seems to be yes, the Internet is an area in which it is impossible for a state to project its regulation. This would be a major shift in our system of federalism, which promotes states retaining strength to keep power from concentrating in the federal government and avoid the specter of tyranny. The current Supreme Court would seem to be particularly wary of adopting such a weakening of the states that *Pataki* suggests. The trend of the lower courts seems to be going the other way, however, extending the rationale of *Pataki* to void regulation of commercial behavior.

Exactly where the balance is between state impotence on the Internet and state power to regulate the Internet is difficult to say. This paper has attempted to outline some of the weaknesses in the rational of *Pataki*, and suggest some alternative views that may be taken of a state regulating a mode of commerce. It seems clear that the Commerce Clause is not as hostile to state regulation of commerce as *Pataki* would suggest. A state acting in an area of traditional local concern should be given a great deal of deference by the courts. On the other hand, the present nature of the Internet makes confining regulation to just one state virtually impossible.

One answer to this dilemma would seem to be zoning, or the creation of a system where location and identity of Internet users is much more readily accessible. Through this, someone wishing to publish, solicit or sell on the Internet could know who or where to avoid. On the other hand, the privacy implications of such a perfect system of identity management on the Internet are scary. The irony is that the same system that could create the greatest

203. *See id.*

204. *See, e.g.*, CAL. BUS. & PROF. CODE § 17500 (West 1998).

deal of protection for citizens on the Internet and maintain the balance of our federalism is the same one that could rob people of their civil liberties. Exactly where the balance of power will lie is a long way from being decided.

The issue of state and federal power over the Internet is a long way from being decided. Whether technical advances make enforcement of laws easier or harder, there is still a fundamental question of where regulatory power should be concentrated. The long history of case law demonstrates the reluctance of courts to restrict a state when it acts to protect its citizens. While the nature of the Internet may make state borders more meaningless then ever, courts should be wary before using the Internet as an excuse to make state legislation meaningless as well.

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