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Julie Sorenson Stanger

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Salvaging States' Rights To Protect Children from Internet Predation: State Power To Regulate Internet Activity Under the Dormant Commerce Clause

I. INTRODUCTION

In June 2000, the National Center for Missing and Exploited Children ("NCMEC") released a sobering report, indicating that sexual predators on the Internet are targeting more children than previously thought. The report, entitled *Online Victimization: A Report on the Nation's Youth*,¹ concluded that in the United States, approximately one in five children ages ten to seventeen received a sexual solicitation or approach over the Internet in the past year alone.² The study also found that of children the same age, three percent had received an aggressive sexual solicitation, meaning that the solicitor had sought to meet the child, successfully talked to the child on the telephone, or sent the child letters, money, or gifts.³ One child in seventeen was threatened or harassed.⁴ Of children who received such Internet solicitations, twenty-

1. DAVID FINKELHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH (2000), available at http://www.missingkids.com/en_US/publications/NC62.pdf [hereinafter ONLINE VICTIMIZATION]. The studies included in the report were supported by a congressional grant to the National Center for Missing and Exploited Children. *Id.*

2. *Id.* at ix. These statistics are based on a representative sample of 1,501 children who use the Internet regularly. *Id.* Specifically, nineteen percent of the children surveyed reported receiving a sexual solicitation while using the Internet. *Id.* at 1. Three percent of respondents claimed to have created a friendship with an adult over the Internet. *Id.* at 2.

Girls were targeted for sexual solicitation sixty-six percent of the time, while only thirty-four percent of targeted victims were boys. *Id.* Most of the targeted youth were over the age of fourteen, but the twenty-two percent who were ages ten to thirteen found the episodes to be much more distressing. *Id.*

Although only twenty-four percent of solicitations came from adults, the report indicates that this statistic may be misleading because "given the anonymity the Internet provides, . . . individuals may easily hide or misrepresent themselves." *Id.* at 3. And, in fact, in twenty-seven percent of the cases, the child did not know the age of the person making the solicitation. *Id.*

3. *Id.* at ix. Of the aggressive solicitors, thirty-four percent identified themselves as adults to the victims. *Id.* at 3. In ten percent of the cases, the solicitor would ask to meet the child, and in two percent of the cases, the solicitor would call the child. *Id.* at 4.

4. *Id.* at ix. Boys and girls were targeted for harassment in nearly equal proportions (fifty-one percent and forty-eight percent, respectively). *Id.* at 21. A majority of harassing episodes (seventy percent) were targeted at children between the ages of fourteen and seventeen. *Id.*

five percent reported the incident to a parent, but fewer than ten percent of the victims ever reported these sexual solicitations to law enforcement authorities or to the Internet provider.⁵

In light of these problems, the report concluded that many traditional attempt and solicitation statutes may not sufficiently address Internet solicitation and that “[a]lthough it is a daunting task, criminal statutes need to be systematically reviewed with the Internet in mind to make sure that relevant statutes cover Internet behaviors.”⁶ In response to these concerns, state legislatures have revised their criminal statutes to create a new species of crime called “Internet luring,” or “enticement.”⁷ Such a crime is patterned after the traditional crimes of solicitation and attempt but specifically addresses the sexual solicitation of a minor over the Internet.

However, a recent series of federal cases threatens the validity of these statutes. Several federal courts have held that similar state laws, which prohibit the dissemination of pornography to minors via the Internet, are per se invalid under the dormant Commerce Clause because they impose an undue burden on interstate commerce. The severe limitation on state police power posed by these decisions threatens to block the ability of state governments to protect their citizens. As one scholar explained, “the dormant Commerce Clause argument, if accepted, threatens to invalidate nearly every state regulation of Internet communications This explains why the dormant Commerce Clause has been called a ‘nuclear bomb of a legal theory’ against state Internet regulations.”⁸

Although luring statutes have not yet been struck down under the dormant Commerce Clause, this line of reasoning provides Internet predators with grounds to challenge the constitutionality of these statutes. This Comment concludes that such challenges should fail because the per se approach used by certain federal courts is not warranted by Supreme Court jurisprudence.⁹ As such, courts should rely on the balancing

5. *Id.* at ix.

6. *Id.* at 40.

7. *See infra* Part II.A.

8. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (internal quotation marks omitted) (quoting Declan McCullagh, *Brick by Brick*, TIME DIGITAL DAILY (Jan. 31, 1997), at <http://www.time.com/time/digital/daily/0,2822,11738,00.html>).

9. *See infra* Part III.A.

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approach set forth in *Pike v. Bruce Church, Inc.*,¹⁰ which would generally uphold state regulation of the Internet stemming from a legitimate concern to protect minors from sexual predation.

Part II of this Comment describes state Internet luring statutes and the Supreme Court's dormant Commerce Clause jurisprudence, and Part III demonstrates the confusion resulting from the divergent federal and state applications of the dormant Commerce Clause to state Internet regulation. Part IV argues that the per se approach used by federal courts is improper in this context and that the *Pike* balancing test provides a more suitable analysis. Finally, Part V offers a brief conclusion that reviews the constitutionality and necessity of state Internet statutes.

II. BACKGROUND

A. *Internet Luring Statutes*

Many states have recently enacted what may be termed Internet luring statutes, which criminalize any attempt to knowingly solicit a minor to engage in sexual activity by communicating through the Internet.¹¹ These statutes come in a variety of forms but generally punish

10. 397 U.S. 137, 142 (1970) ("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.").

11. To date, seventeen states have enacted Internet luring statutes:

[A] person is guilty of solicitation of a child by a computer if the person is 19 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, induces, persuades, seduces, prevails, advises, coerces, or orders, by means of a computer, a child who is less than 16 years of age and at least three years younger than the defendant, to meet with the defendant or any other person for the purpose of engaging in sexual intercourse, sodomy, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit.

ALA. CODE § 13A-6-110(a) (2004);

(a) A person commits computer child pornography if the person . . . (2) Knowingly utilizes a computer online service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct.

ARK. CODE ANN. § 5-27-603(a)(2) (Michie 2003);

A person is guilty of enticing a minor when such person uses an interactive computer service to knowingly persuade, induce, entice or coerce any person under sixteen years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense.

CONN. GEN. STAT. § 53a-90a(a) (2003);

A person is guilty of sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly . . . transmits, receives, exchanges, . . . including by means of computer, any notice, statement, document, advertisement, file or data containing the name, . . . e-mail address, . . . or other descriptive or identifying information pertaining to any child who has not yet reached his or her sixteenth birthday for the purpose of facilitating, encouraging, offering or soliciting a prohibited sexual act involving such child and such person or any other person.

DEL. CODE ANN. tit. 11, § 1112A(a)(3) (2004);

Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act . . . relating to sexual battery[,] . . . relating to lewdness and indecent exposure[,] or . . . relating to child abuse, commits a felony of the third degree

FL. STAT. ch. 847.0135(3) (2004);

Any person who, using a computer or any other electronic device: (a) Intentionally or knowingly communicates (i) With a minor known by the person to be under the age of eighteen years; (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or (iii) With another person who represents that person to be under the age of eighteen years; and (b) With the intent to promote or facilitate the commission of a felony . . . ; and (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time; is guilty of electronic enticement of a child in the first degree.

HAW. REV. STAT. § 707-756(1) (2003);

Any person who, using a computer or any other electronic device: (a) Intentionally or knowingly communicates (i) With a minor known by the person to be under the age of eighteen years; (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or (iii) With another person who represents that person to be under the age of eighteen years; and (b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years . . . ; and (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time; is guilty of electronic enticement of a child in the second degree.

id. § 707-757(1);

(a) As used in this section, "solicit" means to command, authorize, urge, incite, request, or advise an individual . . . by using a computer network . . . to perform an act described in subsection (b).

(b) A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person; commits child solicitation, a Class D felony.

IND. CODE § 35-42-6 (2004);

1-A. A person is guilty of soliciting a child by a computer to commit a prohibited act if:

A. The actor: (1) Uses a computer knowingly to solicit, entice, persuade or compel another person to meet with the actor; (2) Is at least 16 years of age; (3) Knows or believes that the other person is less than 14 years of age; and (4) Is at least 3 years older than the expressed age of the other person; and

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B. The actor has the intent to engage in any one of the following prohibited acts with the other person: (1) A sexual act; . . . (2) Sexual contact; . . . or (3) Sexual exploitation of a minor . . .

ME. REV. STAT. ANN. tit. 17-A, § 259 (Supp. 2004);

(3)(a) A person is guilty of computer luring when:

(i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and

(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

MISS. CODE ANN. § 97-5-27(3)(a) (2004);

(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer . . . , to engage in an act which would [constitute sexual assault].

NEB. REV. STAT. § 28-320.02 (2004);

4. A person who violates or attempts to violate the provisions of this section through the use of a computer, system, or network: (a) With the intent to engage in sexual conduct with the child or mentally ill person or to cause the child or mentally ill person to engage in sexual conduct, is guilty of a . . . felony . . .

NEV. REV. STAT. 201.560.4 (2004);

Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, lure, or entice, a child or another person believed by the person to be a child, to commit any of the following is guilty of a class B felony:

I. Any offense . . . relative to sexual assault and related offenses.

II. Indecent exposure and lewdness . . .

III. Endangering a child . . .

N.H. REV. STAT. ANN. § 649-B:4 (2004);

Child luring consists of a person knowing and intentionally inducing a child under sixteen years of age, by means of computer, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least three years older than the child.

N.M. STAT. ANN. § 30-37-3.2(B) (Michie 2004);

(a) Offense.—A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child who is less than 16 years of age and at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.

(b) Jurisdiction.—The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

N.C. GEN. STAT. § 14-202.3 (2004);

An adult is guilty of luring minors by computer when:

(1) The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts,

any person who (1) uses a computer or similar device; (2) to contact a person whom he knows or believes to be a minor; (3) to solicit, encourage, entice, or lure him or her; (4) for the purposes of engaging in sexual activity in violation of state laws.¹²

Internet luring statutes are necessary because most state statutes punishing the solicitation or attempted rape of minors impose stringent requirements on state prosecutors. Many attempt statutes, for example, require that evidence strongly corroborate an intent to commit a crime.¹³

sexual contact . . . and uses any computer communication system that allows the input, output, examination, or transfer of computer data or computer programs from one computer to another to initiate or engage in such communication with a person the adult believes to be a minor; and (2) By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.

N.D. CENT. CODE § 12.1-20-05.1 (2003);

(1) A person commits enticement of a minor over the Internet when the person knowingly uses a computer to solicit, seduce, lure, or entice, or attempts to use a computer to solicit, seduce, lure, or entice a minor or a person the defendant believes to be a minor to engage in any sexual activity which is a violation of state criminal law. (2) It is not a defense to the crime of enticing a minor under Subsection (1), or an attempt to commit this offense, that a law enforcement officer or an undercover operative who is working with a law enforcement agency was involved in the detection or investigation of the offense.

UTAH CODE ANN. § 76-4-401 (2004);

(1) Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual . . . is guilty of a Class D felony. (2) This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.

WIS. STAT. § 948.075 (2004). The federal government has also enacted legislation prohibiting the sexual enticement of minors:

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined . . . and imprisoned.

18 U.S.C. § 2422 (2004).

12. Notably, Hawaii requires the additional element that the defendant travels to an agreed meeting place at an agreed time. *See* HAW REV. STAT. § 707-756, -757 (2004).

13. Generally,

[a] defendant's "act" qualifies as an attempt when, for example, it constitutes a "substantial step", and "overt act", or an "act" toward the commission of a crime; or when it "tends to effect" the commission of a crime. In accordance with some statutes, an act amounts to a "substantial step" only if "it is strongly corroborative of the actor's criminal purpose."

CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 696 (15th ed. 1996 & Supp. 2004).

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Internet luring statutes, on the other hand, require a reduced evidentiary burden¹⁴ and consequently impose a lesser penalty on the perpetrator.¹⁵ Thus, Internet luring statutes allow states to convict predators whose sexual enticement of minors would otherwise fail to meet the solicitation or attempt requirements.¹⁶

B. The Dormant Commerce Clause

State regulation of the Internet presents issues of federalism, particularly under the Commerce Clause. The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States”¹⁷ and is traditionally understood to have two facets: an affirmative power and a negative power. On one hand, the affirmative grant of power allows Congress to regulate interstate and foreign commerce.¹⁸ Courts and Congress have interpreted interstate commerce to include a variety of technologies in transporting materials and signals,

14. Unlike attempt statutes, Internet luring statutes do not require evidence of a “substantial step.” The prosecutor need only prove that the defendant knowingly used a computer to communicate with a person the defendant believed to be a minor and that the defendant intended on engaging in sexual activity with the minor. Compare *supra* note 11 (listing state statutes) with *supra* note 13 (describing state attempt statutes).

15. Generally, penalties for Internet luring are reduced by one degree from the underlying crime. See, e.g., UTAH CODE ANN. § 76-4-401 (2004).

16. The Utah Court of Appeals provides an explanation of the distinction between traditional solicitation or attempt statutes and Internet luring:

For example, the crime of Internet [luring] would be more appropriate in a case where, as here, a defendant solicits sex from an undercover police officer on the Internet believing he is communicating with a minor. In such a case, attempt, conspiracy, and solicitation may be difficult to prove because the State must establish the defendant’s actions are “strongly corroborative” of an intent to commit a felony or involve an “overt act.” The charge of Internet enticement would be more appropriate because it does not require “strong corroboration” of intent.

In contrast, the defendant may contact a minor via the Internet, meet the minor, and be on the verge of consummating a felonious sexual act with the minor before being stopped by police. In that case, the higher crime of attempt, for example, would be appropriate because the State could probably prove “strong corroboration” of an intent to commit the underlying felony.

State v. Ansari, 2004 UT App. 326, 100 P.3d 231, 237–38 (citations omitted).

17. U.S. CONST. art. I, § 8, cl. 3.

18. This power is generally divided into three categories: (1) power to “regulate the use of the channels of interstate commerce,” (2) power to “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “power to regulate those activities having a substantial relation to interstate commerce.” *United States v. Morrison*, 529 U.S. 598, 609 (2000) (citations omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)); see also *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003).

including telecommunications.¹⁹ On the other hand, the “negative” or “dormant” aspect²⁰ of the Commerce Clause prohibits states from enacting any law that “discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace.”²¹ Thus, courts may presume that state action is prohibited even though Congress has not enacted pertinent legislation.

1. Dormant Commerce Clause analysis

Dormant Commerce Clause jurisprudence has developed into two primary tests. First, courts consider whether the regulation is facially discriminatory against out-of-state commerce, in which case the state regulation is subject to “the strictest of scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”²² Since discriminatory regulations seldom, if ever, withstand strict scrutiny, courts typically consider them per se invalid.²³

Second, if a state statute is not facially discriminatory, it may still be invalid if it unduly burdens interstate commerce. In *Pike v. Bruce Church, Inc.*,²⁴ the Supreme Court articulated the test for determining

19. See, e.g., *Adair v. United States*, 208 U.S. 161, 177 (1907) (noting that the Commerce Clause allows Congress to regulate “traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph”). Congress has also included telecommunications as modes of interstate commerce as explained in its legislative findings to the Telecommunications Act. See 47 U.S.C. § 901(b) (2001).

20. *Gen. Motors v. Tracy*, 519 U.S. 278, 287 (1997) (noting that the dormant aspect of the Commerce Clause is only triggered when the burden on interstate commerce is excessive).

21. *Id.* at 287 (alteration in original) (citation omitted). For a more general overview of the purposes of the dormant Commerce Clause, see Goldsmith & Sykes, *supra* note 8, at 2.

22. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (striking down an Oklahoma statute favoring in-state over out-of-state minnow fishers on grounds of facial discrimination).

23. *Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978) (“The opinions of the Court through the years have reflected an alertness to the evils of ‘economic isolation’ and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders.” (citations omitted)).

Examples of invalid state statutes include those aimed at erecting barriers to outside competition, such as in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); keeping industries in the state to promote job growth, as in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); advantaging local companies with a compensatory tax, as in *So. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); requiring businesses to use state products, as in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); or preventing the export of state resources, as in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

24. 397 U.S. 137 (1970).

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when state regulations unduly burden interstate commerce, explaining that “[w]here 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.”²⁵ The Court went on to indicate that these factors were to be assessed as part of a balancing test:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of “direct” and “indirect” effects and burdens.²⁶

The difficulties of performing such a balance and determining the appropriate “weight” of its different elements were illustrated in *Kassel v. Consolidated Freightways Corp.*,²⁷ a plurality opinion in which the Justices divided over how to factor a state’s interest in public safety. The case involved an Iowa law limiting the length of trucks passing through the state, a law that the state claimed was motivated by safety concerns.²⁸ Justice Powell’s opinion, which received four votes,²⁹ emphasized that a state’s interest in health and safety is a substantial factor in determining the extent of a state’s police power: “[A] State’s power to regulate commerce is never greater than in matters traditionally of local concern,”³⁰ and, in particular, a state’s interest in safety is among “those that ‘the Court has been most reluctant to invalidate.’”³¹ Those challenging such interests must “overcome a ‘strong presumption of validity,’”³² but the Powell opinion also warned that “the incantation of a purpose to promote the public health or safety does not insulate a state

25. *Id.* at 142 (citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)).

26. *Id.* (citing *So. Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925)).

27. 450 U.S. 662 (1981).

28. Consolidated Freightways, a major nationwide trucking company, challenged an Iowa statute prohibiting the use of “65-foot doubles” within its borders. *Id.* at 664–65. Because most of the states in the Midwest permitted such trucks, Consolidated would be forced to switch its fleet to either fifty-five foot singles or sixty-foot doubles, or change trucks before entering Iowa. *Id.*

29. Justice Powell was joined by Justices White, Blackmun, and Stevens. *Id.* at 664.

30. *Id.* at 670 (citing *Hunt v. Wash. Apple Adver. Comm’n*, 432 U.S. 333, 350 (1977)).

31. *Id.* (quoting *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 443 (1978)).

32. *Id.* (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)).

law from Commerce Clause attack.”³³ Powell concluded that a court’s analysis should include “a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”³⁴ In striking down the statute, Justice Powell concluded that the state’s safety interest was insufficient to justify its burden on interstate commerce for two reasons. First, the state was unable to prove that sixty-five-foot double trailers were less safe than fifty-five-foot single trailers. Second, the Court also noted that the Iowa law was “out of step with the laws of all other Midwestern and Western States.”³⁵

In a concurring opinion, Justice Brennan³⁶ seemed generally to agree with Justice Powell’s approach but explained that “[t]he burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel.”³⁷ In a dissenting opinion, Justice Rehnquist³⁸ warned that any “balancing” of safety versus costs to commerce is an illusion.³⁹ Rather, the court must give deference to the safety determination of the state unless it is “merely a pretext for discrimination against interstate commerce.”⁴⁰

In sum, *Kassel* demonstrates the Court’s willingness to recognize a state’s safety interest but leaves unclear how much weight that interest should be given. This ambiguity suggests that the relative importance of the state safety interest should be determined on a case-by-case basis.

33. *Id.*

34. *Id.* at 670–71 (quoting *Raymond*, 434 U.S. at 441).

35. *Id.* at 671.

36. Justice Brennan was joined by Justice Marshall. *Id.* at 679.

37. *Id.* at 679–80. (“For me, analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation. (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.”).

38. *Id.* at 687. Justice Rehnquist was joined by Chief Justice Burger and Justice Stewart.

39. *Id.* at 691 (noting the impropriety of attempting to “directly compare safety benefits to commerce costs and strik[ing] down the legislation if the latter can be said in some vague sense to ‘outweigh’ the former”).

40. *Id.* at 692. Justice Rehnquist went on to explain that evidence of pretext exists when the state’s safety benefits are “slight or problematical.” *Id.*

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2. *Additional considerations*

In recent years, the Court has taken into account additional considerations without explaining how they affect the *Pike* balancing analysis. Primary among these factors is concern for state regulations that either (1) regulate wholly extraterritorial activity or (2) subject users of interstate commerce to inconsistent regulations.

a. Extraterritorial effect. First, the Court has scrutinized state legislation that allows a state to enforce its regulatory standards extraterritorially. In *Healy v. Beer Institute*, the Court struck down a Connecticut statute that, in essence, required out-of-state beer shippers to establish on a monthly basis that their prices were not higher than those in the three neighboring states.⁴¹ Although the Court concluded that the statute was facially discriminatory against interstate beer shippers,⁴² the Court also explained that “the ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders.’”⁴³ Such state statutes “exceed[] the inherent limits of the enacting State’s authority and [are] invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”⁴⁴ In sum, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”⁴⁵

b. Inconsistent regulation of interstate commerce. Second, the Court has expressed a concern that certain forms of state regulation “adversely affect interstate commerce by subjecting activities to inconsistent

41. 491 U.S. 324, 326–27 (1989).

42. *Id.* at 340–41.

43. *Id.* at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (omission in original)). The Court concluded that the Connecticut statute had “the practical effect of controlling Massachusetts prices” because “when a brewer posts his . . . prices for Massachusetts, that brewer must take account of the price he hopes to charge in Connecticut.” *Id.* at 338; *see also Edgar*, 457 U.S. at 643 (plurality opinion) (“[A]ny attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.” (quoting *Schaffer v. Heitner*, 433 U.S. 186, 197 (1977))).

44. *Healy*, 491 U.S. at 336. Justice Cardozo summed up this concern by noting that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

45. *Healy*, 491 U.S. at 336 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

regulations.”⁴⁶ In *Healy*, the Court recognized that “the Commerce Clause protects against inconsistent legislation arising from the projection of one state[’s] regulatory regime into the jurisdiction of another State.”⁴⁷ Although not specifying the necessary factors to consider, the Court emphasized its desire to avoid the scenario in which “an out-of-state merchant [must] seek regulatory approval in one State before undertaking a transaction in another.”⁴⁸

Although the Court’s consideration of the extraterritorial effects and inconsistent regulations resulting from state laws appears to be an important aspect of the dormant Commerce Clause analysis, it remains unclear whether these play a part in the *Pike* balance or whether they stand as independent tests.⁴⁹ Commentators have acknowledged this confusion and have also noted, moreover, that the exact scope of these two factors is uncertain because most businesses expect to operate under some degree of inconsistent extraterritorial regulations.⁵⁰

III. RECENT DECISIONS REGARDING STATE REGULATION OF THE INTERNET

Recent cases in which federal courts have greatly reduced the ability of states to regulate the Internet have called into question the constitutional viability of state Internet luring statutes. However, several state courts have asserted the rights of states to regulate the Internet when the state has a strong local interest. This has created a conflicting body of case law that threatens to impede, or at least confuse, a state’s ability to protect minors from Internet predation.

46. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (finding that differing regulations from state to state does not necessarily imply problematic inconsistent regulations).

47. *Healy*, 491 U.S. at 336–37 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–89 (1987)).

48. *Id.* at 337 (citing *Brown-Forman*, 476 U.S. at 582).

49. See Goldsmith & Sykes, *supra* note 8, at 789–90 (citing Daniel R. Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 88–90; Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884 (1987)).

50. *Id.* at 790 (“[F]irms that operate in interstate commerce often face different regulations in different states. To take two of dozens of examples, the dormant Commerce Clause permits states to apply local conceptions of tort law (say, strict liability) to multistate corporate activity with a local contact, even if other states apply different tort regimes (say, negligence), and it permits states to apply different blue-sky laws to the same multistate securities offering.” (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982))).

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A. Federal Cases: State Regulation of the Internet Per Se Invalid

Beginning with *American Library Ass'n v. Pataki*,⁵¹ federal courts have adopted an approach that makes state regulation of the Internet per se invalid. Although federal courts have not yet reviewed the validity of state Internet luring statutes, they have struck down other statutes intended to protect minors from sexually explicit and harmful Internet material. Nonetheless, the following discussion ends by noting that this trend may be weakening, as evidenced by the Fourth Circuit's recent holding in which it relies on *Pataki*, yet opts to apply the *Pike* balancing test.

1. American Library Ass'n v. Pataki

In one of the most influential cases on this issue, a New York district court in *American Library Ass'n v. Pataki* determined that a state statute outlawing the dissemination of pornography to minors was per se invalid because the state law imposed, at least in theory, its limits extraterritorially to all Internet users.⁵² In *Pataki*, a group of individuals and organizations—who regularly use the Internet to communicate, disseminate, and display information—brought an action challenging a New York statute (the “New York Act”) criminalizing the dissemination of information that is harmful to minors.⁵³ The plaintiffs claimed the

51. 969 F. Supp. 160 (S.D.N.Y. 1997).

52. *Id.*

53. *Id.* at 161–62; see also N.Y. PENAL LAW § 235.21(3) (McKinney 2004). The Act in question amended section 235.21 of the New York Penal Law. Dissemination of Indecent Material to Minors Through Any Computer Communication System § 5, 1996 N.Y. Laws 600 § 210-E (codified at N.Y. PENAL LAW § 235.21). The amendment added a new subdivision, making it a crime for an individual:

Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, [to] intentionally use[] any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

N.Y. PENAL LAW § 235.21 (McKinney 2004). Violation of the Act is a Class E felony, punishable by one to four years of incarceration. The Act applies to both commercial and noncommercial dissemination of materials. Section 235.20(6) defines “harmful to minors” as:

that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

New York Act was unconstitutional because it unduly burdened interstate commerce,⁵⁴ and the court agreed, holding that the statute was per se invalid.⁵⁵ To further support its conclusion, the court held in the alternative that the statute was invalid under the *Pike* balancing test.⁵⁶

a. Per se analysis. The court began by reasoning that, as an “information superhighway,” the Internet is “an instrument of interstate commerce, albeit an innovative one,”⁵⁷ and therefore naturally triggers dormant Commerce Clause concerns.⁵⁸ Relying heavily on *Healy*, the court then determined that the New York Act was “per se violative of the Commerce Clause”⁵⁹ because any incident of extraterritorial regulation automatically invalidates a state statute. In essence, the nature of the Internet makes “it impossible to restrict the effects of the New York Act to conduct occurring within New York.”⁶⁰ Therefore, “conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user’s home state’s policy—perhaps favoring freedom of expression over a more protective stance—to New York’s local concerns.”⁶¹

b. Pike balancing and inconsistent regulations. The court further explained that even if the Act were not a per se violation of the Commerce Clause on grounds of its extraterritorial impact, the Act would fail under the *Pike* balancing test because “the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers.”⁶² In applying this test, the court readily accepted the “quintessentially legitimate state objective” of protecting children against

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

N.Y. PENAL LAW § 235.20(6) (McKinney 2004).

54. *Pataki*, 969 F. Supp. at 161. Plaintiffs also asserted a First Amendment argument, which the court declined to address. *Id.* at 183.

55. *Id.* at 177.

56. *Id.* at 177–81.

57. *Id.* at 161, 173.

58. *Id.* at 169, 173.

59. *Id.* at 177. The court also relied on *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982), a case which concluded that an Illinois statute was a “direct restraint on interstate commerce and . . . ha[d] a sweeping extraterritorial effect” because the statute would prevent a tender offeror from communicating its offer to shareholders both within and outside of Illinois.

60. *Pataki*, 969 F. Supp. at 177.

61. *Id.*

62. *Id.* at 177.

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pedophilia,⁶³ but ultimately determined that “[t]he local benefits likely to result from the New York Act are not overwhelming.”⁶⁴ The Act would “almost certainly fail to accomplish” the state interest of protecting minors from sexual material on the Internet because “nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography.”⁶⁵

Similarly, the court noted that the benefits of the Act are attenuated because New York would have difficulty asserting jurisdiction over parties whose only contact with the state occurred through incidental Internet communications.⁶⁶ Next, the court considered the extreme burden resulting from the Act—primarily the chilling effect on Internet users worldwide.⁶⁷ Based on the above factors, the court concluded that the “severe burden on interstate commerce . . . is not justifiable in light of the attenuated local benefits arising from it.”⁶⁸ Finally, the court noted that “certain types of commerce *demand* consistent treatment and are therefore susceptible to regulation only on a national level”⁶⁹ because any state’s regulation is likely to conflict with laws enacted by any other

63. *Id.* (citing *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

64. *Id.* at 178.

65. *Id.* (quoting *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996)).

66. *Id.*

[I]n the present case, New York’s prosecution of parties from out of state who have allegedly violated the Act, but whose only contact with New York occurs via the Internet, is beset with practical difficulties, even if New York is able to exercise criminal jurisdiction over such parties. The prospect of New York bounty hunters dragging pedophiles from the other 49 states into New York is not consistent with traditional concepts of comity.

Id.

67. *Id.* at 179–80.

The New York Act casts its net worldwide; moreover, the chilling effect that it produces is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by [a] significant margin. . . . [The court concluded that] the range of Internet communications potentially affected by the Act is far broader than the State suggests.

Id. at 180. “For example, many libraries, museums, and academic institutions [regularly] post art on the Internet that some might conclude was ‘harmful to minors.’” *Id.* Furthermore, the costs incurred by organizations and institutions to comply with the Act are excessive. *Id.*

68. *Id.* at 181.

69. *Id.* (emphasis added).

state and because such inconsistent regulation can “only result in chaos.”⁷⁰

2. *Post-Pataki federal cases*

The *Pataki* analysis provided the framework for subsequent federal cases involving challenges to Internet statutes. To date, few federal circuits have reviewed dormant Commerce Clause challenges to state Internet regulations protecting minors, yet of those that have, each has adopted the *Pataki* per se line of reasoning.

a. *ACLU v. Johnson*. Two years after *Pataki*, the Tenth Circuit in *ACLU v. Johnson* invalidated an Internet dissemination statute as per se unconstitutional.⁷¹ Following the dormant Commerce Clause analysis in *Pataki*, the Tenth Circuit struck down a New Mexico statute designed to criminalize the dissemination of material by computer that is harmful to a minor.⁷² Because the statute at issue represented an attempt to regulate

70. *Id.* To support its assertion that the Internet requires a “cohesive national scheme of regulation so that users are reasonably able to determine their obligations,” the court relied heavily upon numerous historical cases in which “the Supreme Court has acknowledged the need for coordination in the regulation of certain areas of commerce [e.g., trains, highways].” *Id.* at 182.

71. 194 F.3d 1149, 1161 (10th Cir. 1999). The case involved various organizations and individuals who used and accessed the Internet for a variety of purposes. *Id.* at 1149. Plaintiffs argued that the New Mexico legislature enacted a statute that limited their “discussions of women’s health and interests, literary works and fine art, gay and lesbian issues, prison rapes, and censorship and civil liberties issues.” *Id.* at 1153. New Mexico contended, however, that the statute, designed to criminalize the dissemination of sexually explicit material to minors, served the compelling state interest of protecting minors from harmful material. *Id.* at 1161.

72. *Id.* at 1164. The New Mexico legislature enacted section 30-37-3.2(A), which provided as follows:

Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.

N.M. STAT. ANN. § 30-37-3.2 (Michie 1998). The statute provided the following defenses:

In a prosecution for dissemination of material that is harmful to a minor by computer, it is a defense that the defendant has:

- (1) in good faith taken reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to indecent materials on computer, including any method that is feasible with available technology;
- (2) restricted access to indecent materials by requiring the use of a verified credit card, debit account, adult access code or adult personal identification number; or

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interstate commerce occurring outside the borders of New Mexico, the court invalidated the statute as a per se violation of the Commerce Clause.⁷³ The court first stated that the statute “contains no express limitation confining it to communications which occur wholly within its borders,”⁷⁴ and thus “applies to any communication, intrastate or interstate, that fits within the prohibition and over which [New Mexico] has the capacity to exercise criminal jurisdiction.”⁷⁵ Accordingly, the Tenth Circuit agreed with the *Pataki* court that state Internet regulation “cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist.”⁷⁶

b. American Booksellers Foundation v. Dean. The Second Circuit also adopted the *Pataki* reasoning in *American Booksellers Foundation v. Dean*, a case involving a Vermont dissemination statute similar to New Mexico’s.⁷⁷ The court found that the statute violated the dormant

(3) in good faith established a mechanism such as labeling, segregation or other means that enables the indecent material to be automatically blocked or screened by software or other capability reasonably available to persons who wish to effect such blocking or screening and the defendant has not otherwise solicited a minor not subject to such screening or blocking capabilities to access the indecent material or to circumvent screening or blocking.

N.M. STAT. ANN. § 30-38-3.2(C) (Michie 1998).

73. *ACLU*, 194 F.3d at 1161.

74. *Id.*

75. *Id.* (citations omitted) (quoting *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 169–70 (S.D.N.Y. 1997)).

76. *Id.* (quoting *Pataki*, 969 F. Supp. at 171). The court further discussed the *Pike* balancing test as outlined in *Pataki* and concluded that the regulation imposed burdens on interstate commerce that exceeded any local benefits conferred by the statute. *Id.* at 1161–62. The court also agreed with *Pataki* that the regulation violated the Commerce Clause because “it subject[ed] the use of the Internet to inconsistent regulations.” *Id.* at 1162.

77. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 98 (2d Cir. 2003). Vermont Governor Howard Dean signed into law Act No. 124, “An Act Relating to Internet Crimes,” in 2000. *Id.* at 99. The Act extended title 13, section 2802 of the Vermont statute’s prohibition against distributing to minors sexually explicit materials that are “harmful to minors” to include distribution or dissemination through the Internet. *Id.* In 2001, as a response to plaintiff’s declaratory and injunctive relief from enforcement of the statute, the Vermont General Assembly passed Act No. 41, which

limited 13 V.S.A. § 2802 to dissemination of indecent material to a minor “in the presence of a minor” and created a new provision, 13 V.S.A. § 2802a, which prohibited dissemination to minors of indecent material that is “harmful to minors” when the dissemination occurs “outside the presence of the minor” but the disseminator has “actual knowledge” that the recipient is a minor.

Id. (quoting 2001 Vt. Acts & Resolves 41). The entirety of title 13, section 2802a(a) of the Vermont statute reads as follows:

Commerce Clause and was per se invalid because of its burden on interstate commerce. In closely examining the factors that “may burden interstate commerce,”⁷⁸ the court concluded that the statute does not incidentally burden interstate commerce, nor does it “discriminate against interstate commerce on its face.”⁷⁹ Instead, Vermont “ha[d] ‘projected its legislation’ into other States, and *directly regulated* commerce therein.”⁸⁰ Accordingly, the Second Circuit struck down the statute as per se unconstitutional. The court considered only one factor in its per se analysis: the statute’s extraterritorial effects.⁸¹ Similar to *Pataki*, the court reasoned that because “[a] person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material,” those “outside Vermont must comply with Section 2802a or risk prosecution

(a) No person may, with knowledge of its character and content, and with actual knowledge that the recipient is a minor, sell, lend, distribute or give away:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image, including any such representation or image which is communicated, transmitted, or stored electronically, of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

VT. STAT. ANN. tit. 13, § 2802a(a) (2000). “Harmful to minors” is defined by title 13, section 2801(6) of the Vermont Statutes Annotated as material that:

(A) Predominately appeals to the prurient, shameful or morbid interest of minors; and

(B) Is patently offensive to prevailing standards in the adult community in the state of Vermont as a whole with respect to what is suitable material for minors; and

(C) . . . [T]aken as a whole, lacks serious literary, artistic, political, or scientific value, for minors.

VT. STAT. ANN. tit. 13, § 2801(6) (2000).

Sexual Health Network, Inc. (SHN) provided sex-related information, particularly to those “with disabilities, illnesses, and changes in their lifestyle” and dispersed such information primarily through an Internet website. *See Am. Booksellers Found.*, 342 F.3d at 98. The Web site contained information on a variety of sex-related topics, some even considered controversial and inappropriate for minors. *Id.* The Vermont government argued that the content was “harmful to minors” because some of the topics included “sexual addiction, advice for making safe sex practices more erotic, guidelines on the safe practice of bondage sadomasochistic activities, and information on how those with disabilities can experience sexual pleasure.” *Id.*

78. *Id.* at 102.

79. *Id.* at 104.

80. *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986)).

81. *Id.* at 103.

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by Vermont.”⁸² Consequently, although Vermont intended only to protect its minors with Section 2802a, Vermont “projected”⁸³ its regulation on the rest of the nation and forced all citizens of any state to comply or risk prosecution.⁸⁴ In reaching its conclusion, the court emphasized its assumption that the “internet’s boundary-less nature means that internet commerce does not quite ‘occur[] wholly outside [Vermont’s] borders.’”⁸⁵

In the alternative, the court asserted that the statute failed to pass constitutional muster because “the [Commerce] Clause ‘protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another.’”⁸⁶ The court then reached the bold conclusion that states have no authority to regulate the Internet: “We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they ‘imperatively demand[] a single uniform rule.’”⁸⁷

c. *PSINET, Inc. v. Chapman*. Contrary to the per se approach applied by some other federal circuits, the Fourth Circuit in *PSINET, Inc. v. Chapman* utilized the *Pike* balancing test to strike down a Virginia dissemination statute.⁸⁸ Interestingly, the court mentioned *Pataki* but did

82. *Id.*; see also *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 171 (S.D.N.Y. 1997) (“An internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page and will not even know from what state visitors to that site hail. Nor can a participant in a chat room prevent other participants from a particular state from joining the conversation.”).

83. *Am. Booksellers Found.*, 342 F.3d at 103; see *Healy v. Beer Inst.*, 491 U.S. 324, 332–34 (1989) (“A state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause [A state is] ‘prohibited by the Commerce Clause from project[ing] its legislation into [other States].’” (second and third alterations in original) (quoting *Brown-Forman*, 476 U.S. at 583 (internal quotation marks omitted) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)))).

84. *Am. Booksellers Found.*, 342 F.3d at 103.

85. *Id.* (quoting *Healy*, 491 U.S. at 332).

86. *Id.* at 104 (quoting *Healy*, 491 U.S. at 337).

87. *Id.* (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851)) (noting that the mere grant of power to Congress compatible with the existence of similar power in states does not “imply prohibition on states to exercise the same power”).

88. 362 F.3d 227, 239–40 (4th Cir. 2004). The Virginia dissemination statute was reenacted as amended in 2000 and in its present form makes it unlawful to “‘sell, rent or loan to a juvenile’ . . . or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse” the following:

1. Any picture, photography, drawing, sculpture, motion picture [film], electronic file or message containing an image, or similar visual representation or image of a person or

not reference or make use of its per se test; rather, it simply balanced the two-fold *Pike* inquiry, which “first looks at the legitimacy of the state’s interest and secondly weighs the burden on interstate commerce in light of the local benefit derived from the statute.”⁸⁹ The court held that the burden—of applying the regulation to all Internet users, even those in other states—outweighed any local benefit derived from the statute.⁹⁰

B. State Cases: No Per Se Rule

Unlike federal cases addressing dormant Commerce Clause challenges to state Internet regulations, state courts have consistently rejected the *Pataki* reasoning and upheld state police power to regulate Internet activity harmful to minors.⁹¹ These state cases have adopted various approaches ultimately concluding that either Internet luring of a minor is not legitimate commerce, and thus not subject to a dormant Commerce Clause analysis, or that the state’s safety interest outweighs the incidental burden on commerce.

I. People v. Foley

In *People v. Foley*, the Court of Appeals of New York upheld, under the state’s police power, the constitutionality of a state luring statute because the court determined the statute did not affect any legitimate commerce.⁹² The New York luring statute copied the language of the New York dissemination statute struck down in *Pataki* but added the

portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

2. Any book, pamphlet, magazine, printed matter however reproduced, electronic file or message containing words, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

VA. CODE ANN. § 18.2-391 (Michie 1999) (amended 2000).

89. *PSINET*, 362 F.3d at 239–40.

90. *Id.* at 240.

91. See *People v. Hsu*, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000); *People v. Foley*, 731 N.E.2d 123 (N.Y. 2000); *State v. Heckel*, 24 P.3d 404 (Wash. 2001).

92. *Foley*, 731 N.E.2d 123 (N.Y. 2000). In this case, a fifty-one-year-old man discussed sexually explicit acts and desires in an Internet chatroom with a person he believed to be a fifteen-year-old girl but who was actually an undercover police officer. *Id.* at 126. “During the conversation, [Foley] sent ‘Aimee’ several pictures of ‘preteen girls and men’ engaging in sexual acts.” *Id.* As Foley and “Aimee” engaged in their fifth online conversation within eight weeks, the police executed a no-knock search warrant at Foley’s residence and found him typing at his computer, engaged in a conversation discussing where he and Aimee could meet to have sex. *Id.*

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requirement that the communication be used to induce a minor to engage in sexual or obscene performance for the benefit of the sender.⁹³ The court held that the statute did not implicate the dormant Commerce Clause because the court could not “ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity.”⁹⁴ The court emphasized that without an effect on any legitimate commerce, the conduct “deserves no ‘economic’ protection” and was thus subject to the state’s police power.⁹⁵

2. Hatch v. Superior Court

In *Hatch v. Superior Court*, a case similar to *Foley*, the California Court of Appeals concluded that *Pataki* was inapplicable to the California Internet luring statute for two reasons.⁹⁶ First, the court considered whether the state statute would subject Internet users to inconsistent regulations. Although the court conceded that the *Pataki* court’s analysis may be valid for bans “on the simple *communication* of certain materials [which] may interfere with an adult’s legitimate rights,”⁹⁷ the court held that luring statutes fundamentally involve a different purpose for communicating. The court explained that “a ban on communication of specified matter to a minor *for purposes of seduction* can only affect the rights of the very narrow class of adults who intend to

93. *Id.* New York Penal Law section 235.22 provides:

A person is guilty of disseminating indecent material to minors in the first degree when:

1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he *intentionally uses any computer communication system* allowing the input, output, examination or transfer, of computer data or computer programs from one computer program to another, *to initiate or engage in such communication with a person who is a minor; and*
2. by means of such communication he *importunes, invites or induces* a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct *for his benefit*.

N.Y. PENAL LAW § 235.22 (McKinney 2004) (emphasis added). The statute was enacted to address the growing concern that pedophiles are using the Internet as a forum to lure children. *Foley*, 731 N.E.2d at 128 (citing Governor’s Memorandum approving L. 1996, ch. 600, 1996 N.Y. LAWS 1900–01).

94. *Foley*, 731 N.E.2d at 133.

95. *Id.* (citing *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (upholding a New York statute under strict scrutiny to protect minors from dissemination of harmful materials)).

96. *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 471 (Cal. Ct. App. 2000).

97. *Id.* at 472.

engage in sex with minors.”⁹⁸ Accordingly, the court refuted the inconsistent regulation argument from *Pataki* because “no case gives such intentions or . . . communications”⁹⁹ protection under the dormant Commerce Clause. Second, the court held that the *Pataki* court’s concerns for extraterritorial effects did not apply because all parties involved in the solicitation were domiciled in California and were thus subject to California law.¹⁰⁰

3. *People v. Hsu*

In a subsequent case, the California Court of Appeals in *People v. Hsu* upheld a state luring statute for different reasons.¹⁰¹ Unlike the *Foley* court, the *Hsu* court conceded that state regulation of the Internet triggers dormant Commerce Clause concerns because the “Internet is undeniably an incident of interstate commerce.”¹⁰² Moreover, unlike the *Hatch* court, the *Hsu* court applied the *Pike* balancing test to determine the burden on interstate commerce.¹⁰³ However, it concluded that the mere “fact that communication . . . can affect interstate commerce does

98. *Id.*

99. *Id.*

100. *Id.* at 483–84.

101. 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000). The California Penal Code states:

Every person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet . . . , or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail. A person convicted of a second and any subsequent conviction for a violation of this section is guilty of a felony.

CAL. PENAL CODE § 288.2(b) (West 1997). The code defines “harmful matter” as:

matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 313(a).

In *People v. Hsu*, undercover law enforcement personnel caught a man in ongoing sexual communications involving explicit images with a teenage boy over the Internet. *Hsu*, 99 Cal. Rptr. 2d at 188–89. The defendant offered to engage in specific sexual acts with the boy and invited the boy to meet him at his house. *Id.* at 189. Defendant appealed his conviction of two counts of attempting to distribute or exhibit lewd matter to a minor through the Internet. *Id.*

102. *Id.* at 190.

103. *Id.*

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not automatically cause a state [Internet] statute . . . to burden interstate commerce.”¹⁰⁴

In its analysis, the court refuted each of the three dormant Commerce Clause arguments presented in *Pataki*. First, the court rejected the *Pataki* court’s per se analysis finding that “[a]bsent conflicting federal legislation, states retain their authority under their general police powers to regulate matters of legitimate local concern, even if interstate commerce may be affected.”¹⁰⁵ To the extent the statute resulted in extraterritorial effects, the court determined that such effects should be factored into the *Pike* balancing test.¹⁰⁶ Second, under the *Pike* test, the court determined that California has a “compelling [state] interest in protecting minors from harm generally and certainly from being seduced to engage in sexual activities.”¹⁰⁷ The court found it difficult to conceive any burden on legitimate commerce imposed by penalizing the transmission of such harmful material to minors.¹⁰⁸ Consequently, the statute’s burden on commerce was “incidental at best and far outweighed by the state’s abiding interest in preventing harm to minors.”¹⁰⁹ Finally, the court determined that the statute would not subject Internet users to inconsistent regulations because the defendant generally is aware of the victim’s location and the laws of that jurisdiction.¹¹⁰ Additionally, the California statute reflected most jurisdictions’ laws prohibiting solicitation of a minor.¹¹¹

4. State v. Backlund

Synthesizing the reasoning from *Foley* and *Hsu*, the North Dakota Supreme Court in *State v. Backlund* affirmed its state’s power to narrowly regulate certain Internet communications by upholding the

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 191.

111. See *supra* note 11. See generally CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 285 (15th ed. 1995); 65 AM. JUR. 2D *Rape* § 11 (2004). Under the California statute, “[o]nly when the material is disseminated to a *known* minor with the *intent* to arouse the prurient interest of the sender and/or minor and with the *intent* to seduce the minor does the dissemination become a criminal act.” *Hsu*, 99 Cal. Rptr. 2d at 191. Coupling this narrow scope with the penal scheme, which requires the act to “occur wholly or partially within the state” to prosecute, the court found the statute constitutional because it did not burden interstate commerce. *Id.*

North Dakota luring statute.¹¹² First, the court followed *Foley*, in finding it “difficult to ascertain any legitimate commerce that is derived from the willful transmission of explicit or implicit sexual communications to a person believed to be a minor in order to willfully lure that person into sexual activity.”¹¹³ Second, the court held that even if the state Internet

112. *State v. Backlund*, 672 N.W.2d 431 (N.D. 2003). In this case, Backlund participated from his home in Minnesota in an Internet chatroom, using the screen name “backdaddyO.” *Id.* at 433. He exchanged multiple messages with an individual using the screen name “Fargobabe 22,” who identified herself as a fourteen-year-old girl, but who in actuality was a West Fargo police officer. *Id.* Backlund solicited “Fargobabe 22” to engage in a sexual act, offering to pick her up and take her home when they were done. *Id.* North Dakota charged Backlund with luring a minor by computer in violation of the North Dakota luring statute, which criminalized the solicitation of minors over the Internet. *Id.* The North Dakota Code provides the following:

An adult is guilty of luring minors by computer when:

1. The adult knows the character and content of a communication that, in whole or in part, explicitly or implicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system that allows the input, output, examination, or transfer of computer data or computer programs from one computer to another to initiate or engage in such communication with a person the adult believes to be a minor; and
2. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult’s benefit, satisfaction, lust, passions, or sexual desires.
3. A violation of this section is a class A misdemeanor, but if the adult is twenty-two years of age or older or the adult reasonably believes the minor is under the age of fifteen, the violation of this section is a class C felony.

N.D. CENT. CODE § 12.1-20-05.1 (2001). As originally introduced, the North Dakota statute proscribed luring “a minor” but was amended during the legislative process to criminalize luring “a person the adult believes to be a minor” to deal with situations in which minors misrepresent their age to adults engaged in Internet solicitation of sexual acts. *Hearing on S.B. 2035 Before the Senate Judiciary Committee*, 57th N.D. Legis. Sess. (Jan. 16, 2001) (oral testimony of Ladd Erickson, Assistant Morton County State’s Attorney).

The Supreme Court of North Dakota, therefore, construed the code section to provide that an adult is guilty of luring a minor by computer when

- (1) the adult knows the character and content of a communication that explicitly or implicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances, (2) the adult willfully uses any computer communication system to initiate or engage in such communication with a person the adult believes to be a minor, and (3) by means of that communication, the adult willfully importunes, invites, or induces the person the adult believes to be a minor to engage in sexual acts or have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult’s benefit, satisfaction, lust, passions, or sexual desires.

Backlund, 672 N.W.2d at 442.

113. *Backlund*, 672 N.W. 2d at 438.

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luring statute were to implicate the dormant Commerce Clause, “its effect is incidental at best and far outweighed by the state’s abiding interest in preventing harm to minors.”¹¹⁴

IV. ANALYSIS

The above review of state and federal dormant Commerce Clause analyses demonstrates the variety of approaches courts have used, ranging from the rigid per se analysis in *Pataki* and *American Booksellers* to *Foley*’s determination that the dormant Commerce Clause does not even apply to some state Internet statutes. The diverse reasoning and interpretation of law in these cases leave us with the following questions: (1) Do all forms of Internet activity constitute interstate commerce for purposes of dormant Commerce Clause analysis? (2) In reviewing state Internet statutes, when should courts apply a per se analysis, and when should they apply the *Pike* balancing test? (3) How should the *Pike* balancing test be applied to state luring statutes?

Ultimately, the best approach should balance state authority to protect the welfare of their citizens against the federal interest of facilitating interstate commerce by providing uniform Internet regulations. This Comment concludes that the proper balance is struck when courts understand that (1) not all Internet activity constitutes “interstate commerce”; (2) the *Pike* balancing test should be applied rather than the per se analysis in reviewing state Internet statutes intended to protect citizens; and (3) state luring statutes should generally be upheld under the *Pike* balancing test.

A. Not All Internet Activity Constitutes Interstate Commerce

Internet activity involving no economic trade—such as luring and other forms of sexual predation—should not be subject to dormant Commerce Clause scrutiny. However, as seen particularly in *Pataki* and *Hsu*, many courts assume that Internet communication of any kind involves interstate commerce. For example, *Pataki* held that the Internet, by its nature, is entwined with interstate commerce because: (a) “many users obtain access to the Internet by means of an on-line service provider . . . , which charges a fee for its services,” and (b) “[t]he Internet is more than a means of communication; it also serves as a conduit for transporting digitized goods” similar to other “instruments of commerce”

114. *Id.*

such as railroads, highways, and trucks.¹¹⁵ Thus, in *Pataki*, “[t]he inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations.”¹¹⁶ Similarly, but without any analysis at all, *Hsu* also determined that “[t]he Internet is undeniably an incident of interstate commerce.”¹¹⁷ Although these courts may be justified in reaching their conclusions, the Internet, which encompasses almost every aspect of modern life, demands a more refined approach.

The problem lies in the fact that “interstate commerce” is a term used to define both the extent of congressional power under Article I and the limits of state power under the dormant Commerce Clause. Under Article I, Congress can regulate a universe of subjects as long as they involve “interstate commerce.” By contrast, the dormant Commerce Clause prevents states from discriminating against “interstate commerce.” Because both analyses depend on the meaning of “interstate commerce,” an ill-defined and nebulous term, a reworking of terminology is necessary. “Interstate commerce” should be defined, on the one hand, as an enabling power and, on the other, as a blocking power. The following discussion will illustrate how the term “interstate commerce,” at least for purposes of the dormant Commerce Clause, is narrowly understood to apply only to strictly commercial activities.

1. The Commerce Clause as an enabling power

Under Article I of the United States Constitution, Congress has power to regulate commerce “among the several States.”¹¹⁸ The Supreme Court has defined the scope of “interstate commerce,” for the purposes of the Article I Commerce Clause analysis, into three general areas: channels of interstate commerce,¹¹⁹ instrumentalities of interstate

115. *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 173 (S.D.N.Y. 1997).

116. *Id.*

117. *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000). Notably, the *Hsu* court reviewed and upheld a state luring statute as opposed to the dissemination statute that was struck down in *Pataki*, 969 F. Supp. at 173.

118. U.S. CONST. art. I, § 8, cl. 3.

119. *See United States v. Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (“Congress may regulate the use of the channels of interstate commerce.”).

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commerce,¹²⁰ and “those activities that substantially affect interstate commerce.”¹²¹ The Court generally interprets these three areas broadly to include noneconomic activity. For example, “channels of interstate commerce” include not only “intercourse and traffic between . . . citizens, and . . . the transportation of persons and property,” but also “the authority . . . to keep the channels of interstate commerce free from immoral and injurious uses.”¹²² Thus, Article I enables Congress to regulate nearly any activity, even those with marginal economic impact.

2. *The Commerce Clause as a blocking power: the dormant Commerce Clause*

Contrary to the enabling power described above, the “negative” aspect of the Commerce Clause—referred to as the dormant Commerce Clause—acts to block state laws that discriminate against “interstate commerce.” Because the dormant Commerce Clause is a blocking power that limits a state’s sovereign police powers,¹²³ “interstate commerce” is

120. *Id.* (“Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” (quoting *Lopez*, 529 U.S. at 558)). Common examples of Congress’s authority over such instrumentalities include the regulation of aircraft and thefts from interstate shipments. *See Perez v. United States*, 402 U.S. 146, 150 (1971). This authority also extends to “interstate carriers as instruments of interstate commerce” and

embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

Houston E & W Texas Ry. v. United States, 234 U.S. 342, 351 (1914). Thus, for example, a railroad is subject to congressional regulation as a “highway[] of both interstate and intrastate commerce” because “[c]ars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both.” *S. Ry. v. United States*, 222 U.S. 20, 27 (1911).

121. *Morrison*, 529 U.S. at 609 (quoting *Lopez*, 514 U.S. at 559). This category of congressional authority has been recently limited to activities constituting “some sort of economic endeavor,” *id.* at 611, or “apparent commercial character.” *Id.* at 611 n.4.

122. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964) (quoting *Hoke v. United States*, 227 U.S. 308, 320 (1913)); *see also* *United States v. Darby*, 312 U.S. 100, 114 (1941) (“Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”).

123. As sovereign entities, states have inherent police powers. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (“[A] State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory” (quoting *United States v. State Tax Comm’n*, 412 U.S. 363, 377–78 (1973))); *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 715 (1985) (“[W]e start

defined narrowly to include only strictly commercial activity.¹²⁴ More precisely, “the dormant Commerce Clause’s fundamental objective [is to] preserve[] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.”¹²⁵

3. *Enabling and blocking powers as applied to state police powers*

Pataki and *Hsu* both failed to use the narrower, “blocking,” definition of “interstate commerce” appropriate to the dormant Commerce Clause.¹²⁶ They assumed that, because a state regulation

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (internal quotation marks omitted) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 351 (1939) (“One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state’s citizens.”).

124. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (dealing with state regulation of truck lengths); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (considering state regulation of truck mud flaps).

125. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). The Court explained that [o]ur system, fostered by the [dormant] Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 299–300 (internal quotation marks omitted) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)); see also *Dennis v. Higgins*, 498 U.S. 439, 448–49 (1991) (noting that “[t]he Court has often described the Commerce Clause as conferring a ‘right’ to engage in interstate trade free from restrictive state regulation” because it “was intended to benefit those who . . . are engaged in interstate commerce”); *Am. Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 280 (1987) (“The Commerce Clause by its own force created an area of trade free from interference by the States.” (internal quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (“[T]he very purpose of the Commerce Clause was to create an area of free trade among the several States.” (internal quotation marks omitted)); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (“The very purpose of the Commerce Clause was to create an area of free trade among the several States.”).

126. See, e.g., *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 172–73 (S.D.N.Y. 1997) (reasoning that one participates in interstate commerce, for purposes of the dormant Commerce Clause, by mere “consumption” of the Internet). Even state courts, other than *People v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000), concede that the Internet must be interstate commerce under the dormant Commerce Clause. *Foley*, however, focused on the noneconomic act of luring and solicitation and found that such behavior is not legitimate commerce and, therefore, “deserves no economic protection.” *Id.* Although the *Foley* court recognized the role of legitimate commerce (economic activity), it failed to distinguish the goal of free trade under the dormant Commerce

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involves the Internet, the statute must be regulating “interstate commerce” in the broad enabling power sense. However, luring a minor over the Internet is generally a noncommercial activity because it does not involve commercial transactions and, as such, should not be subject to the dormant Commerce Clause blocking power. Unfortunately, *Pataki* and its progeny have interpreted interstate commerce as coextensive with Congress’s power to regulate under the Commerce Clause. This understanding subjects state regulations to dormant Commerce Clause scrutiny whenever a state regulation involves the Internet.¹²⁷ If courts were to more clearly understand the distinction between the enabling and blocking powers of the Commerce Clause, they would likely determine that state luring statutes and many other forms of noncommercial state Internet regulation do not involve “interstate commerce” and are thus free from dormant Commerce Clause scrutiny.

B. The Pike Balancing Test Should Be Applied Rather than the Per Se Analysis

The trend in federal courts to hold Internet regulatory state statutes per se invalid when they have extraterritorial effects or the potential for inconsistent regulation may prove to be too harsh, particularly when state statutes aim at protecting the welfare of citizens. The *Pike* balancing test is superior to a per se rule for four reasons.

First, the Supreme Court has never endorsed a per se test, except in cases of facially discriminatory statutes. Although *Pataki* relies on *Edgar v. MITE Corp.* and *Healy v. Beer Institute* to conclude that extraterritorial regulation occurring wholly outside the states’ borders is per se invalid,¹²⁸ the Supreme Court has never mandated such a brightline rule.

Clause from the broad interpretation of “interstate commerce” under the Commerce Clause. *See id.* at 132–33.

127. *See, e.g.,* Am. Booksellers Found. v. Dean, 342 F.3d 96, 102–04 (2d Cir. 2003).

128. *Pataki*, 969 F. Supp. at 177. The court cited *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982), which struck down the Illinois Business Take-Over Act because it imposed an excessive burden on interstate commerce by regulating conduct occurring wholly outside of the state. In *Edgar*, the Illinois Business Take-Over Act required corporations to secure a percentage of Illinois shareholders before an out-of-state corporation could purchase an in-state company. *Id.* The Supreme Court struck down the Act for two reasons. First, the Act “directly regulate[d] and prevent[ed], unless its terms [were] satisfied, interstate tender offers which in turn would generate interstate transactions.” *Id.* Second, the Act imposed an excessive burden on interstate commerce. *Id.* The Court further explained that “directly” regulating interstate tender offers included those tender offers in other states and those “having no connection with Illinois.” *Id.* at 642 (emphasis added).

The *Pataki* court also cited *Healy v. Beer Institute*, 491 U.S. 324, 338 (1989), which held a state statute unconstitutional when it “tie[d] pricing to the regulatory schemes of other states.” *Healy*

In fact, the *Edgar/Healy* Courts balanced the state's interest against the burdens imposed on interstate commerce and invalidated the statute after determining the burden was excessive because it regulated "commerce occurring wholly outside that State's borders."¹²⁹

Second, the Supreme Court has recognized the importance of allowing states to regulate matters of local concern. As noted by Justice Powell in *Kassel*, a state's interest in safety is among "those that 'the Court has been most reluctant to invalidate.'"¹³⁰ His further explanation that such state interests carry a "strong presumption of validity"¹³¹ suggests that a balancing approach is preferred in such cases because a per se approach would impose a myopic focus on the interest of interstate commerce.

Third, the extraterritorial effects should be considered as part of a balancing, rather than per se, analysis because all state Internet regulations have extraterritorial effects to some degree or another. *Pataki* is correct in noting that there is no way to limit the effects of a statute to one state, but the mere fact that it has an extraterritorial effect does not mean the state will not have an overriding interest.

Finally, when the extraterritorial effect of a state statute imposes inconsistent regulations on Internet users, such an effect should not render a statute per se invalid. Rather, the burden created by the inconsistency should be balanced against its benefits, particularly when the state seeks to protect the welfare of its citizens or when the inconsistencies are relatively minor, as in dissemination and luring statutes.

invalidated a statute that required only "out-of-state shippers [to] affirm that their prices [were] no higher than the prices being charged in the border States as of the moment of affirmation." *Id.* at 335.

Pataki and its progeny, however, misleadingly interpret the *Edgar/Healy* reasoning as mandating a per se analysis whenever there is an extraterritorial effect. Rather, the *Edgar/Healy* extraterritorial argument is only valid when "a state law . . . has the 'practical effect' of regulating commerce occurring wholly outside that State's borders." *Healy*, 491 U.S. at 332. Consequently, although a court may strike down a statute for regulating extraterritorial activity, it may only do so when the state is attempting to regulate activity of which no part occurs within the regulating state. Statutes aimed at protecting a state's citizens, particularly minors, from harmful Internet activity, such as pornography and luring, are clearly aimed at regulating communication partly, if not wholly *within* the State. Therefore, it is improper to apply extraterritorial regulations as an independent test in such circumstances.

129. *Healy*, 491 U.S. at 332.

130. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (quoting *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 443 (1978)).

131. *Id.*

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C. State Luring Statutes Should Withstand the Pike Balancing Test

Because the per se analysis is improper, dormant Commerce Clause challenges to state Internet luring statutes should be reviewed, and generally upheld, under the *Pike* balancing test. Under the *Pike* analysis, a state's compelling interest to protect minors from the psychological and physical damage caused by sexual predators easily outweighs any burden imposed on Internet commerce. Courts and commentators are only beginning to understand the types of burdens such regulations may impose,¹³² but the following discussion will describe the most pertinent benefits and burdens that should enter into this analysis.

1. States have a compelling interest in protecting minors from sexually explicit Internet materials

Backlund, Foley, Hatch, and Hsu each held that a state's interest in protecting minors from sexually explicit elements of the Internet was a compelling one.¹³³ The Supreme Court reached a similar conclusion in *New York v. Ferber*, noting that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"¹³⁴ The Court

132. For a discussion of unique ways in which the dormant Commerce Clause operates within the context of the Internet, see Goldsmith & Sykes, *supra* note 8, at 814; Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 *BYU J. PUB. L.* 191, 243–56 (2003).

Loudenslager suggests that courts should recognize and account for "(1) the interactivity of a Web site, (2) the type of goods sold on the site (whether tangible or electronic), and (3) the availability of technology to verify the geographic location of site users." Loudenslager, *supra*, at 197. Ultimately, he proposes that these three factors make up the substance of a *Pike* balancing analysis. This Comment argues that although those three factors should be considered under *Pike*, the *Pike* balance should additionally include factors such as extraterritorial regulation and inconsistent regulations.

Goldsmith and Sykes, on the other hand, present *Pike* balancing, extraterritorial regulation, and inconsistent regulations as three separate analyses for the constitutionality of state Internet regulation. Goldsmith & Sykes, *supra* note 8, at 822–23. Unfortunately, the authors fail to recommend specific factors under each analysis. The Goldsmith and Sykes article lacks a discussion about which factors courts should consider under a benefit/burden analysis of the Internet and dormant Commerce Clause. Although this Comment relies in part on and reaches essentially the same conclusion as Goldsmith and Sykes, it differs from their article because it advocates specific factors to consider under *Pike*.

133. See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000); *People v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000); *State v. Backlund*, 672 N.W.2d 431, 437 (N.D. 2003).

134. 458 U.S. 747, 756–57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)) (permitting New York to prohibit the distribution of sexually explicit material depicting minors engaged in sexual performances).

further emphasized that it has repeatedly “sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”¹³⁵

Although the Court decided *Ferber* over twenty years ago, the advent of the Internet has more urgently made “[t]he prevention of sexual exploitation and abuse of children . . . a government objective of *surpassing* importance.”¹³⁶ The year 2000 report of the National Center for Missing and Exploited Children emphasized a state’s need to protect its minor citizens.¹³⁷ Although one-third of parents involved in the case study had filtering or blocking software on their computer(s) at the time of the interview, predators still accessed many of their children online because filtering systems provide inadequate protection.¹³⁸ This inadequacy demonstrates the urgent need for state governments to bring their resources to bear in preventing and ending the sexual solicitation of minors over the Internet.

Furthermore, state luring statutes are likely to successfully protect minors. Although *Pataki* suggested that dissemination statutes are doomed to fail due to the multiple sources of Internet pornography, the same cannot be said of state luring statutes. Such statutes are effective because they allow law enforcement agencies, which are generally aware of the predator through undercover chatroom contacts, to use investigative resources to track down the identity of the offender and keep logs of all online interactions as evidence of the crime.¹³⁹

135. *Id.* at 757.

136. *Id.* (emphasis added).

137. *See supra* notes 1–2. The research concluded that approximately twenty percent of children who use the Internet regularly were exposed to some form of sexual approach or solicitation on the Internet. In that same year, one in thirty-three children received an aggressive solicitation, defined as “offline contact,” in which the solicitor telephoned, sent letters, provided money or gifts, or invited the child to meet somewhere. *Id.*

138. *Id.* For a discussion of the effectiveness of software filters, see *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2802 (2004) (Breyer, J., dissenting) (“[F]iltering software, as presently available, does not solve the ‘child protection’ problem.”). In dissent, Justice Breyer, joined by Chief Justice Rehnquist and Justice O’Connor, described four inadequacies of filter systems. First, filtering is often faulty, permitting some pornographic material “to pass through without hindrance.” *Id.* Second, filtering software costs money, an often large expense most American families are unable to afford. *Id.* Third, parents must take an active role in regulating the filtering system to ensure its effectiveness and utility—unfortunately, most parents are far too little involved in their children’s lives. *Id.* Finally, “software blocking lacks precision.” *Id.*

139. *See* DAVID FINKELHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CENTER, INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT (2003), available at <http://www.unh.edu/ccrc/pdf/CV70.pdf>.

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2. *The effects on interstate commerce are incidental*

Admittedly, it is difficult to balance the interest of protecting a child from exploitation against the interest of commerce. However, in cases involving luring statutes, the burdens on interstate commerce are incidental, compared to the costs that local communities would otherwise incur when Internet predators are not checked. Courts should consider the following factors when determining whether a state luring statute imposes an undue burden on interstate commerce under the *Pike* test: (a) the degree to which states may regulate activities occurring wholly outside their borders, (b) the degree to which Internet users will be subject to inconsistent regulations, and (c) the degree to which state regulation will “chill” Internet use.¹⁴⁰

First, a state Internet luring statute may affect, in theory, communications occurring wholly outside the state, but this danger is greatly reduced by most criminal jurisdiction statutes, which limit the reach of state criminal laws to conduct occurring wholly or partly within the state.¹⁴¹ Although Internet businesses may not always be able to accurately determine the state in which a client lives, an Internet predator is usually well aware of the location of his or her victim—especially when proposing a meeting location. Thus, there is little danger that an Internet predator will be unaware of the jurisdiction with which he is dealing.

Moreover, there is little danger that an Internet predator will be subject to conflicting state regulations because soliciting sex from a minor is illegal in all jurisdictions.¹⁴² Against this uniform condemnation of the sexual solicitation of minors, the fact that one state’s Internet luring statute may differ from another’s does not impose a significant burden on Internet users. As the Washington Supreme Court concluded in *State v. Heckel*, a state Internet regulation that does nothing more than

140. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (providing the specific language upon which *Backlund*, *Hsu*, and *Hatch* rely in their *Pike* analysis concerning the compelling state interest to protect minors from harmful materials).

141. See, e.g., UTAH CODE ANN. § 76-1-201(1)(a) (2003).

142. The common law has long-recognized the crime of rape and statutory rape, and all fifty states apparently recognize such crimes. See generally, TORCIA, *supra* note 13, § 285 (citing state law prohibiting statutory rape); 65 AM. JUR. 2D *Rape* §§ 11, 20 (2004) (noting that most jurisdictions prohibit attempted statutory rape).

impose a preexisting duty on Internet users is not an undue burden on interstate commerce.¹⁴³

143. *State v. Heckel*, 24 P.3d 404, 405 (Wash. 2001). In this antispy case, the Supreme Court of Washington also rejected *Pataki*'s handling of the Internet and dormant Commerce Clause. The Washington Attorney General's Office began investigating Jason Heckel after numerous recipients of his mass e-mails filed complaints. As early as 1996, Jason Heckel of Oregon began sending unsolicited commercial e-mail (UCE), or "spam," over the Internet as part of his Natural Instincts business. *Id.* at 406. "The booklet described how to set up an on-line promotional business, acquire free e-mail accounts, and obtain software for sending bulk e-mail. . . . Heckel marketed the booklet by sending between 100,000 and 1,000,000 UCE messages per week." *Id.* Between 1997 and 1998, Heckel developed, marketed, and sold a forty-six page online booklet entitled "How to Profit from the Internet." *Id.* The State of Washington filed three causes of action against Heckel, including a claim under its state Consumer Protection Act ("the Act"). *Id.* at 407. The Act makes sending spam a per se violation:

- (1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message 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 that:
 - a. Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
- (2) For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

Id. at 407 n.6 (quoting WASH. REV. CODE § 19.190.020 (1999)).

In considering the constitutionality of the Act, the court noted that even though some statutes may "create additional, but not irreconcilable, obligations," they "are not considered to be inconsistent" for purposes of the dormant Commerce Clause analysis." *id.* at 412 (citations omitted) (quoting *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994)). To support its reasoning, the court relied on *Pike* and disregarded *Pataki*. The court first established that the Act was not facially discriminatory because it applied evenhandedly to all in-state and out-of-state spammers. *Id.* at 408-09. Additionally, the court examined the *Pike* balancing test and noted that contrary to recent Internet and Commerce Clause developments, which treat extraterritorial regulation and inconsistent regulations as separate Commerce Clause tests, each of those two "unsettled and poorly understood" aspects of the dormant Commerce Clause" is actually a facet of the *Pike* balancing test. *Id.* at 411. Consequently, in its *Pike* analysis, the court looked to other states and found that most have also "passed legislation regulating electronic solicitations." *Id.* at 411-12. Moreover, the truthfulness requirement of the Act did not conflict with any requirements in other states, and some other states' statutes included additional requirements. *Id.* at 412.

Finally, in its *Pike* analysis, the court determined that spam causes economic harm to ISPs, to actual users of forged domains, and to e-mail users. Weighing the economic harms to citizens against the incidental burden of requiring truthfulness, the Washington Supreme Court found the Act constitutionally sound under the *Pike* balancing test. The court heavily weighed the following factual descriptions of burdens spam places on Internet users:

A federal district court described the harms a mass e-mailer caused ISP CompuServe:

In the present case, any value CompuServe realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base [H]andling the enormous volume of mass mailings that CompuServe

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Finally, luring statutes are unlikely to have any type of “chilling effect” on Internet commerce because they proscribe only a narrow range of Internet activity. Most luring statutes are limited to Internet communications in which the sender intends to engage in sexual activity with the recipient knowing that the recipient is a minor. Thus, absent such intent, most communications, including sexually explicit communications between adults or even between adults and minors, would not be affected. Similarly, *Pataki*’s concern that “costs of compliance, coupled with the threat of serious criminal sanctions for failure to comply, could drive some Internet users off the Internet altogether”¹⁴⁴ fails to justify placing commerce above the welfare of children. People who use the Internet to solicit minors will not lose any legitimate commercial gains, and legitimate businesses will likely not run afoul of Internet luring statutes.

V. CONCLUSION

As the “nuclear bomb of legal theory against state Internet regulations,”¹⁴⁵ the dormant Commerce Clause demands immediate attention. As seen with the contrasting reasoning found in the recent federal and state cases, the dormant Commerce Clause dilemma has federal courts pitted against state supreme courts in a battle over authority to regulate Internet communications. With staggering statistics revealing that approximately twenty percent of children are solicited over the Internet, three percent of whom receive aggressive sexual

receives places a tremendous burden on its equipment. Defendants’ more recent practice of evading CompuServe’s filters by disguising the origin of their messages commandeers even more computer resources because CompuServe’s computers are forced to store undeliverable e-mail messages and labor in vain to return the messages to an address that does not exist. To the extent that defendant’s multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff’s computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants’ conduct.

Id. at 409 (citations omitted) (quoting *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (granting a preliminary injunction against a bulk e-mailer on the theory of trespass to chattels)); *see also* *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (relying on the reasoning of *CompuServe* and finding that a bulk e-mailer “injured AOL’s business goodwill and diminished the value of its possessory interest in its computer network”).

144. *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 180 (S.D.N.Y. 1997).

145. *Goldsmith & Sykes*, *supra* note 8 (internal quotation marks omitted) (quoting *McCullagh*, *supra* note 8).

solicitations,¹⁴⁶ states should be allowed to protect children from such threats.

Indeed, the Commerce Clause was never intended to impede states' ability to protect children from sexual predators. Nevertheless, the growing trend in federal courts is to preclude states from creating Internet regulations. This narrow interpretation of the dormant Commerce Clause, particularly one that allows courts to strike down state statutes using a harsh *per se* approach, renders states powerless to protect citizens from Internet harms. This Comment demonstrates that a proper interpretation of the dormant Commerce Clause requires courts to employ a balancing approach, which takes into consideration the state's purpose, the degree to which it regulates citizens of other states, the danger of inconsistent regulations, and the potential for chilling Internet commerce. Only when all these factors are considered will a court be able to appropriately assess the validity of state Internet statutes in the context of the federal system and the global communication network. Within this framework, state and federal courts should readily uphold state Internet luring statutes.

Julie Sorenson Stanger

146. ONLINE VICTIMIZATION, *supra* note 1, at 1.