The Dormant Commerce Clause and the Internet
American Booksellers Foundation v. Dean

In holding unconstitutional a Vermont statute that punished the transfer of sexually explicit material to minors in *American Booksellers Foundation v. Dean*, the Second Circuit remarked 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.'"[1] This observation may be an accurate description of the path of the law. However, as the court's usage of the term "falling" suggests, this development is happening passively, with little analysis or nuance. Courts should not follow this reasoning, but instead should allow experimentation by the states before forcing a uniform rule upon us all.

The statute at issue in *Dean* had criminalized the distribution of indecent materials to minors through electronic means.[2] The statute applied when either the recipient or the sender was situated in Vermont at the time of the communication.[3] The ACLU and various out-of-state website operators brought suit in the federal district court in Vermont to enjoin the enforcement of the statute on the grounds that it violated both the First Amendment and the Commerce Clause.[4] In response, the Vermont legislature amended the statute by dividing it into two parts: one imposing liability for disseminating indecent material to a minor in the presence of the minor, and the other for disseminating indecent material to a minor outside the presence of the minor.[5] The district court found that the plaintiffs had no standing to challenge the former provision because that provision did not apply to communications over the Internet, but allowed the suit to proceed against the latter.[6]

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1. 342 F.3d 96, 104 (2d Cir. 2003) (quoting Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

2. *See* 13 V.S.A. § 2802 (2000) (amended 2001). The statute read

> No person may, with knowledge of its character and content, . . . distribute . . . to a minor . . . [a]ny picture, photograph, . . . 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 . . . .

Id. See Am. Booksellers Found. v. Dean, 202 F. Supp. 2d 300, 303 (D. Vt. 2002).

3. *See* 13 V.S.A. § 2 (2003); *Dean*, 202 F. Supp. 2d at 304.

4. *Dean*, 202 F.Supp. 2d at 304.

5. 13 V.S.A. §§ 2802, 2802a (2003); *see Dean*, 202 F. Supp. 2d at 305–06. In splitting the statute, the Vermont legislature explicitly acknowledged that there might be constitutional problems with imposing liability for disseminating indecent material through electronic communications. *See id.* at 305 n.3 (quoting 2001 Vt. Acts & Resolves 41 § 1 ("Legislative Intent")).

6. *See Dean*, 202 F. Supp. 2d at 314.

The district court then found that the second part of the statute was overbroad and thus violated the First Amendment. The court noted that speech that is indecent but not obscene is protected expression, and that the statute is thus a content-based restriction on speech subject to strict scrutiny.[7] Vermont's interest in the statute was in preventing pedophiles from "grooming" children by exposing them to pornography, but the court found the provision too broad to serve this legitimate and compelling interest because the statute also restricts speech by adults that does not serve this purpose.[8] Moreover, the court stated that the "indecency" standard varies across the nation, making it difficult to comply with,[9] and without readily available age verification tools, the statute carried the risk of imposing the "heckler's veto" that the Supreme Court recognized in *ACLU v. Reno*.[10] The limited affirmative defenses provided for defendants by the law failed to rescue the statute from overbreadth.[11] The court also noted that the Vermont legislature had recently enacted a narrower statute that more neatly fits Vermont's asserted interest in this statute.[12]

The district court also found the statute invalid under the dormant Commerce Clause doctrine. The court held that the statute regulated wholly out-of-state conduct because web publishers cannot effectively prevent the flow of information to Vermont.[13] The court also found that the statute failed the *Pike v. Bruce Church* balancing test.[14] The relevant local interest was the aforementioned prevention of pedophiles conditioning minors, but the court found that this interest was served just as well by the more narrowly drawn statute.[15] The burdens on out-of-state commerce were high because "commercial website

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7. *See id*. at 316.

8. *See id*.

9. *See id*. at 317.

10. 521 U.S. 844, 880 (1997). The "heckler's veto" is what happens when a statute confers power to a private party to shut down speech of which he disapproves; for example in *Dean*, a potential heckler could shut down a website by simply informing a website operator that a 17-year-old child would be party to the communication.

11. *See Dean*, 202 F. Supp. 2d at 318. The affirmative defenses were provisions preventing defendant liability in cases (1) where the minor exhibited an official document to the defendant purporting to establish their age, (2) where the defendant was the minor's parent or the minor was accompanied by a parent, or (3) where the defendant was a bona fide school, museum, or public library. *Id.* at 306 (citing 13 V.S.A. § 2805(b)(1)–(3) (1998)).

12. *Dean*, 202 F. Supp. 2d at 318–19. The narrower statute "targets the 'knowing[] utilitiz[ation] [of] an electronic communication to solicit, lure, or entice, or attempt to solicit, lure, or entice, a child under the age of 16 . . . to engage in a sexual act . . . .'" *Id.* (quoting 13 V.S.A. § 2828 (2001)).

13. *See Dean*, 202 F. Supp. 2d at 320.

14. 397 U.S. 137 (1970). *See infra* note 38 and accompanying text. The *Pike* balancing test weighs the burden on out-of-state commerce against the local interest in the legislation, and if the burden is "clearly excessive" in relation to the local interest, then the law will be found violative of the dormant Commerce Clause. *Pike*, 397 U.S. at 142.

15. *See Dean*, 202 F. Supp. 2d at 320.

operators such as [plaintiff] Sexual Health Network must either remove all speech of a sexual nature that is protected for adults but arguably 'harmful to minors' or else risk a heckler's veto or potential criminal prosecution."[16] Accordingly, the district court enjoined enforcement of the statute on both First Amendment and Commerce Clause grounds.

The Second Circuit affirmed the district court's ruling, but narrowed the scope of the injunction to "the kind of internet speech presented by the plaintiffs."[17] The court followed the reasoning of the district court with respect to the First Amendment, but used different grounds to conclude that there was a dormant Commerce Clause violation.[18]

The court found that the dormant Commerce Clause problem in this case was that "the internet's boundary-less nature means that internet commerce does not quite 'occur[] wholly outside [Vermont's] borders.'"[19] Thus, Vermont has an interest in out-of-state Internet activities because out-of-state websites are always available to Vermonters.[20] Explaining that the dormant Commerce Clause protects the Internet against inconsistent regulation among the states, the Second Circuit concluded that Vermont's statute was therefore unconstitutional.[21] The court declined to proceed with the *Pike* balancing test because it was unnecessary.

In light of the Second Circuit's strong stand against any state regulation of the Internet, it is hard to explain why the court limited the injunction to a prohibition against enforcing the statute against "the kind of Internet speech presented by the plaintiffs."[22] The court reasoned that the plaintiff's complaint was properly viewed as an as-applied challenge to Vermont's regulation.[23] Analysis of the statute for substantial overbreadth was deemed inappropriate where plaintiffs' challenge was "based on their own speech."[24] The court then

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16. *Id*. at 321.

17. *Dean*, 342 F.3d at 105. The Internet speech presented by the plaintiffs was sexuality-related and sexual health materials. *See id*. at 98.

18. *See id.* at 102, 104.

19. *Dean*, 342 F.3d at 103 (quoting Healy v. Beer Inst., 491 U.S. 324, 332 (1989)).

20. *Id.* at 103, 104.

21. *See id*. at 104. The court stated:

> [A]t the same time that the internet's geographic reach increases Vermont's interest in regulating out-of-state conduct, it makes state regulation impracticable. 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."

Id. (quoting Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

22. *See id*. at 105.

23. *See id*. at 104.

24. *Id*.

cited several cases for the proposition that overbreadth challenges should not be decided unnecessarily, but all of these cases addressed First Amendment challenges.[25] The court did not cite any cases involving an "as-applied" challenge under the dormant Commerce Clause. Given that the court found the statute in violation of both the First Amendment and the dormant Commerce Clause, it is unclear why the court only restricted its application in terms of the free speech violation. Had the court wanted to narrow the injunction on Commerce Clause grounds, it could have also limited enforcement to situations in which either the sender is in Vermont, or the recipient is in Vermont and the sender has reason to believe that that is the case. While this limitation may not have satisfied the Second Circuit's view of the dormant Commerce Clause as a complete bar to state Internet regulation, it would serve the goals of the Commerce Clause by eliminating Vermont's regulation of wholly out-of-state activities.[26] That the Second Circuit placed any limitation on the injunction in the first place is unusual; that it restricted the application in such a vague and discordant manner while seeming to ignore its Commerce Clause objections is inexplicable.

Even setting aside the narrowing of the injunction, the Second Circuit's approach to the dormant Commerce Clause on the Internet is troubling. It took a superficial look at "the Internet" and concluded that it was wholly beyond the regulation of the states. Courts have considered Internet regulations with varying degrees of nuance, and the better opinions have sought to find the appropriate role for state regulation.

Courts have analyzed state regulations targeted at the Internet on three dormant Commerce Clause grounds: (1) the state law regulates wholly out-of-state conduct, (2) the valid local interests are substantially outweighed by the burden placed on out-of-state conduct, and (3) the Internet is subject to regulation only at the national level because it is inherently an instrument of interstate commerce. The dormant Commerce Clause also prevents states from enacting facially discriminatory[27] or protectionist[28] legislation, but to date courts have not had to consider such statutes in the context of the Internet.

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25. *See id*. at 105 (citing Bd. of Trustees v. Fox, 492 U.S. 469, 484–85 (1989); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

26. This limitation would arguably continue to subject a website operator to a "heckler's veto" because someone could claim they were a minor in Vermont. *See supra* note 10. However, it is unlikely that telling a passive website that you are from a particular state would confer personal jurisdiction over that website, under the conventional "sliding scale" test, because that added information does not make the website any more or less interactive. *See* Zippo Mfg., Inc. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

27. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down a New Jersey law banning the importation of waste from out of state).

The dormant Commerce Clause prohibits a state from enacting legislation that will have the practical effect of regulating behavior that occurs wholly out-of-state.[29] An example of a court applying this test in an online context is *American Libraries Association v. Pataki*, in which a New York law prohibiting distribution of sexually explicit material to a minor was struck down on First Amendment and dormant Commerce Clause grounds.[30] A website operator has no control over whether a visitor to the website is a New York resident, so in order to avoid liability, the district court found he must conform his behavior to the New York statute, whether or not the website operator is located in New York, intends his message to reach New York, or in fact delivers his message to New York.[31] In this way, New York "project[s] its law into other states whose citizens use the Net."[32]

Commentators have criticized this analysis for ignoring the jurisdictional and choice-of-law limitations on a state's extraterritorial reach, thus exaggerating the claim of out-of-state regulation.[33] Choice-of-law requires a sufficient "aggregation of contacts" for the forum state to apply its law,[34] and personal jurisdiction requires that the defendant "purposefully avail[]" himself of the state asserting jurisdiction.[35] In the criminal context, federal extradition law requires a person to have committed the crime within the complaining state in order for a second state to extradite that person.[36] However, these limitations on a state's extraterritorial power may provide little refuge to online actors planning their future conduct, and may also prevent a state from protecting its citizens. The inability of website operators to screen by geographic location prevents them from choosing specific states with which to interact. Conversely, the ability of online perpetrators to act in ignorance of a target's physical location precludes the state from protecting that target.

It is likely that when courts purport to apply this test, they are in fact applying the *Pike* balancing test described below. There is a difference between state regulation that has extraterritorial effects and state regulation that is in fact extraterritorial regulation, a distinction

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28. *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992) (striking down an Oklahoma law requiring state coal power plants to burn a mixture containing at least 10 percent Oklahoma-mined coal).

29. *See* Healy v. Beer Inst., 491 U.S. 324 (1989) (striking down a Connecticut law setting a maximum price on beer for out-of-state shippers in relation to the lowest price in neighboring states).

30. 969 F. Supp. 160 (S.D.N.Y. 1997).

31. *See id.* at 177.

32. *Id.*

33. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1216 (1998).

34. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion).

35. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

36. *See* Goldsmith, *supra* note 33, at 1220.

made clear by the Second Circuit in *Dean* and *Healy*. In *Healy*, a Connecticut statute set a maximum price on beer by reference to the minimum price in neighboring states. A distributor faced penalties if he subsequently lowered prices in the neighboring states, so the Connecticut statute effectively regulated extraterritorially.[37] While a website operator's "broadcasts" may in fact originate out-of-state, they are nonetheless available to those in-state, so these activities are never wholly out-of-state the way price setting activities are. Courts applying a "wholly out-of-state" line of reasoning should pay careful attention to this distinction, and explicitly state when applying this test or the *Pike* balancing test.

The *Pike* test involves balancing the local interest in the regulation against the burden on interstate commerce. If the burden on interstate commerce is "clearly excessive in relation to the putative local benefits," then the state regulation is unconstitutional.[38] An example of a court applying this balancing test to an Internet regulation and ultimately upholding that regulation is *State v. Heckel*.[39] The Washington statute in question in *Heckel* imposed civil liability for misrepresenting the origin of a commercial electronic message, using a misleading subject line on a commercial electronic message, or using a third party's domain name without permission.[40] The law was applied to an Oregon resident who sent bulk email with allegedly misleading subject lines.[41] The legitimate local interests the court cited were in preventing extra traffic for local Internet Service Providers to handle, protecting the reputation of domain name owners against misappropriation, and saving local email users from wasting time sorting spam from "legitimate personal or business messages."[42] The only effect the Washington Supreme Court found on interstate commerce was the burden for actors to refrain from deception — an effect which the court found does not burden commerce at all, "but actually facilitates it 'by eliminating fraud and deception.'"[43] The court went on to assert that the law relieved spammers of the time they would spend

37. *See Healy*, 491 U.S. at 338.

38. Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970) (citing Huron Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

39. 24 P.3d 404 (Wash. 2001). For a similar analysis and conclusion, relying on *State* v. *Heckel*, see Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258 (Cal. Ct. App. 2002).

40. *Heckel*, 24 P.3d at 407.

41. *Id.* The subject lines in question were "Did I get the right e-mail address?" and "For your review--HANDS OFF!" The state's theory was that the first subject line implied a personal connection with the recipient and the second subject line suggested that the message contained confidential information. *Id.*

42. *Id.* at 410.

43. *Id.* at 411 (quoting Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 819 (2001)).

forging information into the header of the message, so there was no related increase in the cost of interstate commerce.[44]

The *Heckel* court may have been somewhat conclusory in its treatment of the burden on interstate commerce, but it came to the right conclusion in upholding the law. It was too dismissive of the burden on interstate commerce: deceptive advertising arguably has some economic benefit,[45] and presumably spammers can decide for themselves whether forging the header information is, for their businesses, a net cost or benefit. However, the balancing test of the dormant Commerce Clause does not require a simple analysis of the efficiency of a given regulation: "the negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade."[46] The required analysis is of the burdens of the regulation on interstate commerce *as* interstate commerce; that is, the ability of a business to act in a cross-border fashion, and not simply the overall hypothesized drag on the economy. The Washington statute had no more risk of impairing the ability of a business to act across borders than would an ordinary consumer protection statute barring deceptive advertising such as a bait-and-switch. The statute only applied to electronic messages when the sender knew or has reason to know that the recipient would be a Washington resident.[47] It requires little effort to remove a person from an email list once a spammer has notice that the person is a resident of a particular state, and thus the benefits of any such statute would almost certainly outweigh any burden.[48]

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44. *See id*.

45. *See* Note, *Washington Supreme Court Upholds State Anti-Spamming Law*, 115 HARV. L. REV. 931, 934 (2002) (arguing that the court should have considered the economic benefits of deceptive advertising rather than dismissing them out of hand).

46. LAURENCE H. TRIBE, AMERICAN CONST. LAW § 6-5 at 1057, 1058 n.2 (3d ed., 2000) (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 417 n.6 (Souter, J., dissenting) (quoting TRIBE, AMERICAN CONST. LAW § 6-6 at 417 (2d ed., 1988))). Professor Tribe does acknowledge, however, that "at best, one may say only that *laissez faire* principles may influence — but certainly do not control — the contours of the dormant Commerce Clause." TRIBE, AMERICAN CONST. LAW § 6-5 at 1058 n.2 (3d ed., 2000).

47. Wash. Rev. Code Ann. § 19.190.010 (West 2003).

48. Note that the statute might be overinclusive if the spammer receives notice that someone is a Washington resident and removes him from the bulk mailing list, but that resident then checks his e-mail from an out-of-state location. The state would then be regulating wholly out-of-state conduct, which conflicts with the first form of dormant Commerce Clause analysis. While it is tempting to dismiss this problem as *de minimis*, it deserves further analysis. If the Washington resident is transiently checking his e-mail out-of-state, it is possible that he would be exposed to any deceptive messages again when he returns to the state, so Washington's interest in that resident is still legitimate. If he has permanently removed to another state, however, he may be blocked from receiving the message which may be deceptive under Washington law, but which would not be deceptive under the law of his new state, for example, Oregon. In this scenario, the spammer is unable to lawfully contact an Oregon resident due to Washington law. Yet, if the spammer receives new notice that a certain e-mail address no longer belongs to a Washington resident and now belongs to an

Courts have applied this balancing test to a variety of Internet statutes with varying results. Laws that impose liability for allowing a minor to view indecent material have generally been struck down.[49] These laws fail the balancing test because out-of-state actors, generally website operators, are forced to develop elaborate screens to prevent minors from the regulating state from viewing the site,[50] and may have trouble identifying which parts of their site are considered indecent in particular jurisdictions.[51] The state's interest in such laws is described as minimal because the screening devices may be easily circumvented,[52] and the risk of exposure to out-of-country websites means that the regulation is largely ineffective.[53] Courts have generally upheld laws prohibiting the intentional communication of indecent materials to minors with the intent to lure the minor into sexual conduct.[54] In these cases, courts have generally found that the statutory requirement that the defendant intend to seduce a minor removes the burden on interstate commerce,[55] and have also limited the geographic scope of the statute to acts committed within the state.[56]

This balancing test has been criticized as unworkable and unjudicial. As Justice Antonin Scalia famously put it, "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[57] The competing forces seem to be particu-

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Oregon resident, they can then add that address back to the bulk e-mail list. This problem is no different from that posed to an ordinary mailer when a person on their mailing list moves from place to place. Requiring a bulk e-mailer to rediscover a person when they have moved from state to state is no greater a burden than bulk snail mailers face, so this problem should not be viewed as an excessive burden on interstate commerce.

49. *See, e.g.*, Am. Libraries Ass'n. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).

50. These screens may be ineffective at screening out minors, in any event. *See*, *e.g.*, *Dean*, 342 F.3d at 99, 103.

51. *See Pataki*, 969 F. Supp. at 182–83 (discussing the Pulitzer and Tony-winning play "Angels in America" which was well-received in New York City but was denounced by the Charlotte, North Carolina government for "expos[ing] the public to perverted forms of sexuality") (citing ACLU v. Reno, 929 F. Supp. 852–53 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997)).

52. *See, e.g.*, *Dean*, 342 F.3d at 99.

53. *See* ACLU v. Johnson, 194 F.3d 1149, 1162 (10th Cir. 1999) (citing ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997)); *Pataki*, 969 F. Supp at 178.

54. *See, e.g.*, People v. Hsu, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000); Hatch v. Superior Court, 94 Cal. Rptr. 2d at 453 (Cal. Ct. App. 2000); *see also Pataki*, 969 F. Supp. at 179 (explaining that a New York statute barring the use of the Internet to "lure" children into sexual contact using the Internet was not being challenged); People v. Foley, 692 N.Y.S.2d 248 (App. Div. 1999) (upholding that statute).

55. *See Hsu*, 99 Cal. Rptr. 2d at 190; *Hatch*, 94 Cal. Rptr. 2d at 472.

56. *See Hsu*, 99 Cal. Rptr. 2d at 191–92; *Hatch*, 94 Cal. Rptr. 2d at 472–73.

57. Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 897 (1988) (concurring opinion); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (criticizing balancing tests generally); Donald H. Regan, *The Su-*

larly abstract in the case of the Internet, where much of the harm is non-economic. However, the *Pike* balancing test may be closer to what judges do in fact when they claim to apply "per se" dormant commerce clause rules, so the balancing test may at least have the advantage of judicial candor. By encouraging candor about the appropriate scope of dormant Commerce Clause limitations on state regulation of the Internet, this test would encourage a dialogue amongst policymakers and commentators.[58]

The final potential line of analysis considers the Internet to be an inherently interstate entity, incapable of regulation by the states. In *Pataki*, the court also rested its conclusion on the finding that "[t]he Internet, like the rail . . . , requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."[59] The *Pataki* court relied on two Supreme Court cases stating that there exist some "'phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.'"[60] This analysis has been rejected by other courts evaluating state laws regulating the Internet, and wisely so.[61] The *Pataki* court was correct to be concerned that "[h]aphazard and uncoordinated state regulation can only frustrate the growth of cyberspace."[62] But the same can be said about viewing "the Internet" as one monolithic entity. Such a view ignores the subtleties of potential interactive communities that can develop over the Internet, and ignores any nuanced construction of the appropriate government body to regulate those communities given their individuality. Some communities can develop wholly within the state,[63] and cer-

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preme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091 (1986) (criticizing the balancing test in the dormant Commerce Clause context); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 820 n.147 (2001) (noting that the balancing rationale has only been relied on by the Supreme Court twice out of the forty or so dormant Commerce Clause cases decided over the last 20 years).

58. *Cf.* Frank I. Michelman, *The Supreme Court, 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34–35 (1986).

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

60. *Id.* at 181–82 (quoting S. Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 767 (1945)).

61. *See* Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258, 265 (Cal. Ct. App. 2002) ("[W]e join the other California courts that have addressed this issue by rejecting *Pataki*'s holding that any State regulation of Internet use violates the dormant Commerce Clause." (citing *Hatch*, 94 Cal. Rptr. 2d at 471–72; *Hsu*, 99 Cal. Rptr. 2d at 190)); *Foley*, 94 N.Y.2d at 984 (implicitly rejecting the notion that the Internet is an instrument of interstate commerce). *But see* ACLU v. Johnson, 194 F.3d 1149, 1162 (10th Cir. 1999) (agreeing with *Pataki*'s conclusion); *Dean*, 342 F.3d at 103–04; *Hatch*, 94 Cal. Rptr. 2d at 485–86 (McDonald, J., dissenting on this point).

62. *Pataki*, 969 F. Supp. at 183.

63. For example, craigslist.org, started in San Francisco, has set up similar websites for many different communities around the country. *See*, *e.g.*, www.craigslist.org; boston.craigslist.org; losangeles.craigslist.org (last visited Nov. 17, 2003). Much of the com-

tainly some communications occur wholly within the state. These elements of the Internet are more appropriately regulated by local governments than by one nationalized regime. Different communities may have different standards for decency and conduct, and, within the limits of their citizens' federal rights, these communities should be able to experiment with various ways to regulate their Internet communications.

State legislatures should be free to regulate the Internet when they limit the regulations to those situations in which the actor knows, or has reason to know, that a harm will occur in the regulating state. This requirement provides enough notice for actors to regulate their conduct and provides states with room to protect their citizens.[64] The *Dean* court could have limited the scope of the injunction in this manner in order to satisfy the demands of the dormant Commerce Clause. This approach would not stultify the growth of the Internet — as many commentators have noted, regulation is inevitable,[65] and allowing states to experiment with different regulatory regimes ultimately could be best for the Internet's growth. Finally, courts should not rely on formalisms such as the possibility of a message passing through another state to remove it from any given state's jurisdiction, as many courts surprisingly have.[66]

The doctrine endorsed in *Dean* that the Internet is an inherently unregulable entity of interstate commerce should not be followed. Once Congress does decide to legislate in the area of the Internet,[67] normal pre-emption doctrines should apply. Congress may even decide to use its pre-emption powers to keep the Internet free from regulation, but until Congress does so, courts should not impose deregulation on the states. Also, courts should not continually raise the specter of inconsistent regulation when other doctrines such as personal jurisdiction and choice-of-law will insulate a defendant from liability when there is no purposeful availment or minimum contacts with a relevant jurisdiction. As a result, the development of appropriate regulation on the Internet should not be consigned to one national overseer; instead it should lie with our fifty laboratories of sover-

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munication, commerce, and expression that occurs on these websites occurs wholly within one state.

64. As discussed earlier, when combined with the "purposeful availment" requirement or the *Zippo* "sliding scale" test for personal jurisdiction, this solution avoids the "heckler's veto" problem that arises when the First Amendment is implicated. *See supra* note 26.

65. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

66. *See Johnson*, 194 F.3d at 1161; *Pataki*, 969 F. Supp. at 171; *cf. Hatch*, 94 Cal. Rptr. 2d at 471–72 (rejecting this argument).

67. At press time, the House and Senate did, indeed, pass national anti-spam legislation that would pre-empt all state legislation. *See* Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, S. 877, 108th Cong. (2003); Jennifer 8. Lee, *Antispam Bill Passes Senate by Voice Vote*, N.Y. TIMES, Nov. 26, 2003, at C3.

eignty until superior regulations emerge.[68] As with other areas of the law, the genius of our federal system should be used to its fullest to find the best regulatory regime for our fastest-developing area of commerce, communication, and expression.

68. *Cf.* New State Ice v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").