THE DORMANT COMMERCE CLAUSE AND STATE REGULATION OF THE INTERNET: ARE LAWS PROTECTING MINORS FROM SEXUAL PREDATORS CONSTITUTIONALLY DIFFERENT THAN THOSE PROTECTING MINORS FROM SEXUALLY EXPLICIT MATERIALS?

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ABSTRACT

Several states have enacted statutes to protect minors from harmful or obscene materials disseminated over the Internet, as well as from pedophiles seeking to use the Internet to lure them into sexual conduct. State and federal courts have diverged in their analysis of the Dormant Commerce Clause's impact on state regulation in these areas. While state courts have held that the Dormant Commerce Clause does not invalidate state luring statutes, federal courts have been consistent in finding state dissemination statutes unconstitutional. This iBrief summarizes recent state and federal jurisprudence in this area and concludes that state courts have not been successful in distinguishing state luring statutes from federal case law on state dissemination statutes. Therefore, state courts have prematurely aborted the Dormant Commerce Clause examination.

INTRODUCTION

¶1 Of the estimated 10 million children who regularly used the Internet in 2000, the U.S. Department of Justice reported that one in five received a "sexual approach or solicitation" while online and one in four had "an unwanted exposure" to graphic sexual images.[2] In pursuit of the important goal of protecting such minors, several states have enacted criminal prohibitions against the "[d]issemination of material [of a sexual nature]

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[2] U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, OVC BULLETIN: INTERNET CRIMES AGAINST CHILDREN (2001) *at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/internet_2_2001/welcome.html (last visited March 27, 2005).

that is harmful to a minor by computer"[3] over the Internet and against use of the Internet to communicate with minors with the intent to seduce them.[4] Such statutes, known respectively as dissemination statues and luring statutes, have come under constitutional attack as violations of both the First Amendment and the Dormant Commerce Clause. This iBrief examines the Dormant Commerce Clause challenges to these state laws.

¶2 California Associate Justice Alex C. McDonald was among the first to note the divergent treatment of Dormant Commerce Clause challenges to these statutes in federal and state courts.[5] With one exception, all reported Dormant Commerce Clause challenges to state dissemination statutes have occurred in federal courts and all such statutes have been declared unconstitutional.[6] Conversely, all reported Dormant Commerce Clause challenges to state luring statutes have occurred in state courts and such statutes have been found constitutional.[7] Since Justice McDonald's

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[3] Am. Civil Liberties Union v. Johnson, 194 F.3d 1149, 1152 (10th Cir. 1999).

[4] *See, e.g.*, State v. Foley, 731 N.E.2d 123, 127 (N.Y. 2000). Dissemination statutes essentially target sexually explicit materials on the Internet, prohibiting such things as text, images, video, and other communication which a particular state has deemed harmful or obscene from reaching that state's minors. *See, e.g.*, Am. Library Ass'n v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997). Luring statutes generally aim at criminalizing the conduct of pedophiles who use the Internet to seek out and entice minors. *See, e.g.*, *Foley*, 731 N.E.2d at 127-28. An example of the differences between the two types of statutes can be seen by comparing the New York dissemination and luring statutes challenged in *Am. Library Ass'n* and *Foley*, respectively. These statutes essentially mirrored each other in requiring that a person (1) know the "character and content" of his communication (2) which depicts sexual content "harmful to minors" (3) and "intentionally use[] any computer communication system" to (4) "initiate or engage in such communication with a person who is a minor." *See* NY CLS Penal § 235.21 (2005); NY CLS Penal §235.22 (2005). However, the New York luring statute contains an additional requirement that a person, for personal benefit, "importunes, invites or induces" a minor to participate in some type of sexual intercourse, contact, or performance. NY CLS Penal § 235.22. The state courts see a distinction between criminalizing a person's communication of and a minor's subsequent access of harmful material under a dissemination statute and criminalizing such communication and access when a person also has the purpose of seducing a minor. *See, e.g.*, Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 472 (Cal. Ct. App. 2000).

[5] *See* Alex C. McDonald, *Dissemination of Harmful Matter to Minors Over the Internet*, 12 SETON HALL CONST. L.J. 163, 165 (Fall 2001). *See also Hatch*, 94 Cal. Rptr. 2d at 478 (McDonald, J., dissenting).

[6] *See, e.g.*, *Am. Library Ass'n*, 969 F. Supp. at 183. *But see* Simmons v. State, 886 So. 2d 399, 401, 406 (Fla. Dist. Ct. App. 2004) (rejecting a Dormant Commerce Clause challenge to both a Florida dissemination statute and a Florida luring statute).

[7] *See, e.g.*, *Foley*, 731 N.E.2d at 126.

observation, several state and federal courts, including the United States Courts of Appeal for the Second and Fourth Circuits, have further entrenched their respective positions regarding the Dormant Commerce Clause and state regulation of the Internet.

¶3 The procedure by which these cases come into court may shed some light on the lack of federal court review of state luring statutes and the lack of state court review of state dissemination statutes. Generally, because the dissemination cases have resulted from preemptive requests for injunctions from a multitude of interested parties seeking to protect their speech, these parties had the initial choice of forum.[8] On the other hand, the state luring cases have resulted from challenges brought by criminal defendants charged with or convicted of violating the law, thereby dictating a state court forum.[9] Thus, plaintiffs challenging dissemination statutes have been able to fight them on friendly ground in federal court, whereas constitutional challenges to luring statutes come from criminal defendants forced into state court, where they are tainted by the vulgarity of the crimes they are accused of having committed.

¶4 In finding the state luring statutes constitutional, state courts have attempted to distinguish these statutes from state dissemination statutes that the federal courts have found unconstitutional. Whether state dissemination statutes or state luring statutes are, in fact, constitutional under the Dormant Commerce Clause is not addressed in this iBrief. Rather, this iBrief asserts that by failing to consider varying state standards of what constitutes prohibited conduct and who is considered a minor, state courts have not been successful in distinguishing state luring statutes from the federal dissemination cases. Consequently, state courts have too easily found "no legitimate economic impact" and have therefore prematurely aborted the Dormant Commerce Clause analysis.

I. THE DORMANT COMMERCE CLAUSE

A. The Genesis and Development of the Dormant Commerce Clause

¶5 The Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States."[10] This power is typically referred to as Congress' Commerce Clause power. Underlying

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[8] *See, e.g.*, Am. Civil Liberties Union v. Johnson, 194 F.3d 1149, 1153 (10th Cir. 1999).

[9] *See, e.g.*, *Foley*, 731 N.E.2d at 126. Such cases may still come under federal court review through the Supreme Court's discretionary review or upon federal Habeas Corpus review, but to date neither avenue has resulted in a reported opinion.

[10] U.S. CONST. art. I, § 8, cl. 3.

this grant of power was a desire to avoid the economic "Balkanization" of the national economy by the states and to recognize "the importance of the federal government being able to act in areas that affected the economic well being of the nation as a whole."[11] In *Gibbons v. Ogden*,[12] the United States Supreme Court first articulated the principle that the Commerce Clause contained a dormant aspect which limits the states' power to legislate.[13] Even without Congressional action, this dormant aspect implies that states may not discriminate against or unduly burden interstate commerce.[14] Despite this implied limitation, the Court has recognized on many occasions that the states still retained many of their traditional police powers.[15] Thus, where Congress has not regulated commerce, "courts are left to balance the need for laws that allow commerce to freely occur between the states against the power of the states to regulate matters that affect the health, safety, and security of their citizens."[16]

¶6 In the years since *Gibbons*, the Dormant Commerce Clause jurisprudence has gone through several iterations as the Court has attempted to articulate what differentiates permitted and prohibited state regulation.[17] The Court's current jurisprudence has distinguished between those state laws that plainly discriminate against interstate commerce and those state laws that, while neutral, impose a burden upon interstate commerce.[18] Laws that discriminate against "out-of-staters" and which represent a form of

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[11] 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, 208-09 (2003) (citing S. Cent. Timber Dev. v. Wunnicke, 467 U.S. 82, 92 (1984); Quill Corp. v. N. Dakota, 504 U.S. 298, 312 (1992)).

[12] 22 U.S. 1 (1824).

[13] *See, e.g.*, Michelle Armond, Note, *Regulating Conduct on the Internet: State Internet Regulation and the Dormant Commerce Clause*, 17 BERKELEY TECH. L.J. 379, 380 (2003).

[14] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 788 (2001).

[15] Loudenslager, *supra* note 11, at 209 (citing Maine v. Taylor, 477 U.S. 131, 151 (1986); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949); Henderson v. Mayor of N.Y., 92 U.S. 259, 271 (1875); New York v. Miln, 36 U.S. (10 Pet.) 102, 133 (1837)).

[16] *Id.* at 209-10 (citing Healy v. Beer Inst., 491 U.S. 324, 335-37 (1989); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949); S. Pac. Co. v. Sullivan, 325 U.S. 761, 768-69 (1945)).

[17] Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 472-75 (2003) (explaining the "local-national scheme" and the "direct-indirect analysis" once used by the Court).

[18] *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority, 476 U.S. 573, 579 (1986).

economic protectionism are at the core of prohibited state regulation, commanding the strictest level of scrutiny.[19]

B. Facially Neutral Laws Under the Dormant Commerce Clause

¶7 State laws that do not discriminate against nonresidents may still violate the Dormant Commerce Clause. Three lines of analysis are presently used by the courts to evaluate the constitutionality of these statutes. The Court's current test, first articulated in *Pike v. Bruce Church, Inc.*, balances the local benefits provided by the law against the burdens it imposes upon interstate commerce:[20]

> 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. 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.[21]

¶8 However, Dormant Commerce Clause analysis of a state law does not end with the *Pike* test. The Court has also "invalidate[d] state legislation on the ground that it regulates extraterritorially."[22] In *Healy v. The Beer Inst.*, the Court articulated a three-prong analysis to determine whether a state law regulates outside the state's borders:

> First, the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State' . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statue may interact with the legitimate

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[19] Goldsmith & Sykes, *supra* note 14, at 788 (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987)).
[20] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[21] Felmly, *supra* note 17, at 482 (quoting *Pike*, 397 U.S. at 142) (internal citations omitted).
[22] *See, e.g.*, Healy v. The Beer Inst., 491 U.S. 324, 335-40 (1989) (discussing the Supreme Court's prior extraterritoriality jurisprudence).

> regulatory regimes of other states and what effect would arise if not one, but many or every, State adopted similar legislation.[23]

¶9 Finally, many of the Court's Dormant Commerce Clause decisions have invalidated state statutes that potentially subject an area of interstate commerce to inconsistent state regulation.[24] Some courts have cited these cases in decisions concerning state regulation of the Internet, asserting that "certain areas of regulation are so integral to interstate commerce that they require the uniformity throughout the country that only federal legislation can provide."[25] But while the Supreme Court has invalidated some state statutes concerning highways and railways based upon inconsistent state regulation, it has done so while showing deference to the important safety function of such statutes, noting that "[t]hese safety measures carry a strong presumption of validity when challenged in court."[26] The Court has emphasized the "peculiarly local nature of [the] subject of safety, and ha[s] upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce."[27]

¶10 Of the three lines of analysis described above, the *Pike* balancing test is the most clearly articulated by the Court. Some commentators believe that extraterritorial effect and inconsistent state legislation are merely facets of the *Pike* balancing test, where the burdens upon interstate commerce are still weighed against the local benefits provided.[28] Others have treated extraterritorial effect and inconsistent state legislation as separate and distinct tests from *Pike* balancing.[29] As will be shown below, courts evaluating the constitutionality of state dissemination and luring statutes have usually either adopted the latter opinion or have not addressed the issue at all.

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[23] *Healy*, 491 U.S. at 336-37.
[24] *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526-27, 529-530 (1959) (striking down a state highway regulation); S. Pac. Co. v. Sullivan, 325 U.S. 761, 779-82 (1945) (striking down a state railroad regulation).
[25] Loudenslager, *supra* note 11, at 219 (citing Am. Civil Liberties Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Am. Library Ass'n v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997)).
[26] *Bibb*, 359 U.S. at 524, 530. *See also* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-44 (1978).
[27] *Bibb*, 359 U.S. at 523.
[28] *See, e.g.*, Armond, *supra* note 13, at 381.
[29] *See, e.g.*, Loudenslager, *supra* note 11, at 215 (stating that exterritorial effect is a per se Commerce Clause violation).

II. THE FEDERAL COURT DECISIONS ON STATE DISSEMINATION STATUTES

A. American Library Association v. Pataki

¶11 The leading federal dissemination case is *American Library Association v. Pataki*,[30] which concerned a Dormant Commerce Clause challenge to a New York dissemination statute.[31] The court held that the statute was unconstitutional because (1) it impermissibly gave New York jurisdiction over conduct occurring wholly outside of the state, (2) the burdens on interstate commerce exceeded any local benefit, and (3) legislation of this sort potentially subjects Internet users to a multitude of inconsistent state regulations. Before reaching these conclusions, however, the court made a series of observations and findings of fact relevant to the Dormant Commerce Clause discussion.

¶12 The court first noted that Internet users are currently unable to discern facts relevant to determining whether they are violating the statute, such as the "age and geographic location" of those they communicate with.[32] According to the court, the Internet was "designed to ignore rather than document geographic location" and "no aspect of the Internet can feasibly be closed off to users from another state."[33] Even e-mail communication between two residents of the same state "may well pass through a number of states en route" to its destination.[34] Furthermore, Internet features like packet switching[35] and catching[36] increase the Internet's lack of geographic boundaries.[37] Lacking an explicit restriction to intrastate communications, "the [statute] applies to any communication, intrastate and interstate," that falls within New York's criminal jurisdiction.[38] Because the Internet "serves as [a] conduit[]" for many different types of commercial transactions, the court reasoned that the

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[30] 969 F. Supp. 160 (S.D.N.Y. 1997). *See* PSINET, Inc. v. Chapman, 167 F. Supp. 2d 878, 891 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004) (noting that *Pataki* is the leading case in this area).
[31] *Id.* at 163 (evaluating N.Y. PENAL LAW § 235.21 (McKinney 1999)).
[32] *Id.* at 167.
[33] *Id.* at 170-71.
[34] *Id.* at 171.
[35] Method of routing messages over the Internet in smaller packets. These packets are routed over different paths due to the amount of Internet traffic. *Id.*
[36] "Practice of storing partial or complete duplicates of materials from frequently accessed sites to avoid repeatedly requesting copies from the original server." *Id.*
[37] *See id.*
[38] *Id.* at 169-70.

Internet, like railroads and highways, "represents an instrument of interstate commerce."[39]

¶13 Based upon those findings, the court held that the New York statute violated the Dormant Commerce Clause in three ways.[40] First, "the [dissemination statute] represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York."[41] Because Internet users who wish to communicate with the public are unable to exclude New Yorkers from such communication, they are necessarily faced with the prospect of falling under the statute's jurisdiction.[42] This may cause otherwise legal conduct in the user's location to be subject "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."[43] Accordingly, the court held that the statute unconstitutionally regulated in an extraterritorial manner.

¶14 Second, the court reasoned that "although protecting children from indecent material is a legitimate and indisputably worthy subject of state legislation, the burdens on interstate commerce resulting from the [statute] clearly exceed any local benefit derived from it."[44] In defining the local benefit, the court noted that the statute could not prevent the dissemination of harmful materials from international sources and that there would be "practical difficulties" with prosecuting domestic violators "whose only contact with New York occurs via the Internet."[45] Noting that New York had other existing laws intended to protect minors from similar evils, the court stated that the benefit "is therefore confined to that narrow class of cases that does not fit within the parameters of any other law."[46]

¶15 Balanced against this relatively minor benefit was the "extreme burden on interstate commerce" resulting from the statute's global reach, its "chilling effect" on Internet users, "the broad range of Internet communications potentially affected by the [statute]," and the excessive "costs associated with Internet users' attempts to comply with the terms of the defenses that the [statute] provides."[47] The court therefore held that the

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[39] *Id.* at 173.
[40] *Id.* at 169.
[41] *Id.*
[42] *Id.* at 177.
[43] *Id*.
[44] *Id.* at 169.
[45] *Id.* at 178.
[46] *Id.* at 179.
[47] *Id.* at 179-80.

statute struck an unconstitutional balance, finding the burdens "severe" and the benefits "attenuated."[48]

¶16 Finally, the court felt the Internet should be an area of commerce that is "marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether."[49] Internet users, lacking an ability to wall off a certain state's residents, could potentially fall under the regulation of all states.[50] The court therefore reasoned that "[r]egulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations."[51] Hence, even identical statutes would leave individuals "subject to discordant responsibilities" because there are no national standards on what constitutes harmful materials.[52]

¶17 Thus, *Pataki* invalidated the New York dissemination law on all three grounds which the Supreme Court has established as the basis for Dormant Commerce Clause violations: as an excessive burden on commerce with little local benefit, as an impermissible extraterritorial regulation, and as a regulation introducing the possibility for inconsistent legislation.

B. Subsequent Federal Cases

¶18 A number of federal circuit and district courts have since considered the constitutionality of dissemination statutes and many have adopted the reasoning in *Pataki*. For example, the Tenth Circuit in *ACLU v. Johnson*[53] held, following *Pataki*, that a New Mexico statute represented an unconstitutional extraterritorial projection of state policy, an impermissible balance of the local benefits derived versus the burdens imposed on interstate commerce, and an imposition of "inconsistent state regulation" on an area that requires national regulation.[54] In *Cyberspace Communications, Inc. v. Engler*, the Sixth Circuit also adopted *Pataki* in declaring that a Michigan dissemination law violated the Dormant Commerce Clause as an unconstitutional projection of Michigan policy beyond its borders.[55]

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[48] *Id.* at 181.
[49] *Id.* at 169.
[50] *See id*. at 183.
[51] *Id.* at 181.
[52] *Id.* at 182.
[53] 194 F.3d 1149 (10th Cir. 1999).
[54] *Id.* at 1160-61 (evaluating N.M. STAT. ANN. § 30-37-3.2(A)).
[55] Cyberspace Communications, Inc. v. Engler, 142 F. Supp. 2d. 827, 830-31 (E.D. Mich. 2001) (evaluating MICH. COMP. LAWS § 772.675 (2002)). The court in Engler did not address either the inconsistent state regulation of the

¶19 The Second Circuit in *American Booksellers Foundation v. Dean* held that a Vermont dissemination statute similarly represented an impermissible projection of state policy.[56] The court specifically stated that the Internet's lack of "geographic boundaries" makes it "difficult, if not impossible, for a state to regulate internet activities without 'projecting its legislation into other States.'"[57] However, the court did note that "the extraterritorial effects of internet regulations differ from [traditional] extraterritorial-regulation cases " in that "internet commerce does not quite 'occur wholly outside [Vermont's] borders.'"[58] But the court also noted that "at the same time that the internet's geographic reach increases Vermont's interest in regulating out-of-state conduct, it makes state regulation impracticable."[59] Agreeing with *Pataki*, the court viewed the Internet as likely to "soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule,'" but did not hold the statute unconstitutional specifically on that basis.[60]

¶20 In the context of a motion to dismiss for lack of standing, the court in *Southeastern Booksellers Association v. McMaster* recognized that a South Carolina dissemination law "arguably violate[d] the Commerce Clause in at least two ways: (1) it constitute[d] an unreasonable and undue burden on interstate and foreign commerce; and (2) it subject[ed] interstate use of the Internet to inconsistent state regulation."[61]

¶21 The Fourth Circuit in *PSINET, Inc. v. Chapman* invalidated a Virginia dissemination statute as a violation of the Dormant Commerce Clause based upon a balance of benefits and burdens under the *Pike* test.[62] As the Second Circuit did in *Dean*, the court here noted that the Internet's

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Internet or the impermissible balance of benefits versus burdens prongs of the Dormant Commerce Clause analysis. *See id*. Those prongs, however, were addressed in a prior proceeding concerning the granting of a preliminary injunction against the statute. *See* Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d. 737, 752 (E.D. Mich. 1999), *aff'd and remanded by*, 238 F.3d 420 (6th Cir. 2000) (noting the burdens of the law outweighed the benefits and statutes of this type "would subject the Internet to inconsistent regulations across the nation").

[56] Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003) (evaluating 13 V.S.A. § 2802 (1998)).

[57] *Id.* at 103 (quoting Healy v. The Beer Inst., 491 U.S. 324, 334 (1989)).

[58] *Id.* (quoting *Healy*, 491 U.S. at 332).

[59] *Id. at* 104.

[60] *Id.*, (quoting Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1852)).

[61] Southeast Booksellers Ass'n v. McMaster, 282 F. Supp. 2d 389, 396 (D.S.C. 2003).

[62] PSINET, Inc. v. Chapman, 362 F.3d 227, 240 (4th Cir. 2004) (evaluating VA. CODE ANN. § 18.2-391 (Michie Supp. 1999) (amended 2000)).

nature made a construction of the statute amenable to the extraterritorial projection analysis "nearly impossible."[63]

¶22 Together, these cases spanning five federal circuits represent the current federal jurisprudence on Dormant Commerce Clause challenges to state dissemination statutes. Such state statutes have been held to be either one or all of the following: an impermissible burden under the *Pike* balancing test, an unconstitutional projection of state policy extraterritorially, and an inappropriate subjection of interstate commerce to inconsistent state regulation.

III. THE STATE COURT DECISIONS CONCERNING STATE LURING STATUTES

A. New York

¶23 The New York Court of Appeals was the first state court to consider whether the Dormant Commerce Clause is a barrier to state luring statutes, and specifically whether such statutes "unduly burden interstate trade."[64] Even though both dissemination and luring statutes could be characterized as regulating the Internet, the court in *State v. Foley* held that the New York luring statute did "not discriminate against or burden interstate trade; it regulate[d] the conduct of individuals who intend to use the Internet to endanger the welfare of children."[65] In distinguishing *Pataki*, the court found the luring prong of the statute "a significant and distinct feature."[66] The court was "hard pressed to 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" and noted that the conduct prohibited by the statute "is of the sort that deserves no 'economic' protection."[67]

B. California

¶24 *Hatch v. Superior Court*[68] represents a more thorough analysis of Dormant Commerce Clause challenges to state luring statutes. In reference to *Pataki's* assertion that the Internet requires national regulation, the court

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[63] *Id.*
[64] State v. Foley, 731 N.E.2d 123, 132 (N.Y. 2000).
[65] *Id.* (evaluating N.Y. PENAL LAW § 235.22 (McKinney 1999)).
[66] *Id.* at 126.
[67] *Id.* at 133. In a subsequent case later that year, a New York appellate court overturned a lower court's ruling that the same statute violated the Dormant Commerce Clause, citing *Foley* as precedent. State v. Barrows, 709 N.Y.S.2d 573, 574-75 (N.Y. App. Div. 2000).
[68] Hatch v. Superior Court, 94 Cal. Rptr. 2d 453 (Cal. Ct. App. 2000).

distinguish the California law, stating that rather than criminalizing Internet access or mandating communication tailored to specific jurisdictions, the statute merely proscribed certain communication when coupled with the purpose of seducing minors.[69] The argument that the communication may be interstate in nature cannot "be employed . . . to insulate pedophiles from prosecution simply *by reason of* their usage of modern technology."[70] The court refused to consider the *Pataki* analysis controlling, finding "the *intent* to seduce element . . . a distinction of the utmost significance."[71] The court reasoned:

> While a ban on the simple *communication* of certain materials may interfere with an adult's legitimate rights, 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 engage in sex with minors. We have found no case which gives such intentions or the communications employed in realizing them protection under the dormant commerce clause.[72]

¶25 Concerning the claim that the statute projected California law extraterritorially, the court reasoned that state criminal jurisdiction extends to a person who commits any portion of a crime in-state and that such a person is punishable as if the crime were committed wholly in-state.[73] Additionally, the court stated that "there is no reason to suppose California would attempt to impose its policies on other states . . . for wholly extraterritorial offenses" and that "there is no reason at all to assume California prosecutors will attempt to stifle interstate commerce by filing charges for acts committed in other jurisdictions, or where only 'de minimis' acts . . . are committed within this state."[74] Based upon this reasoning, the court concluded that *Pataki's* assumption concerning the extraterritorial projection of state law is "without relevance to [the court's] consideration of the statutes."[75]

¶26 The same California statute was again challenged in *People v. Hsu*.[76] The court in *Hsu* stated that while the "Internet is undeniably an incident of interstate commerce," an interstate burden does not necessarily follow from Internet regulation.[77] In considering the *Pike* balancing test, the court noted difficulty in conceiving what "legitimate commerce [could] be

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[69] *Id.* at 471 (evaluating CAL. PENAL CODE § 288.2 (West 1999)).
[70] *Id.* (emphasis in original).
[71] *Id.* at 471-72. (emphasis in original).
[72] *Id.* at 472. (emphasis in original).
[73] *Id.*
[74] *Id.* at 472-73.
[75] *Id.* at 473.
[76] 99 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 2000).
[77] *Id.* at 190.

burdened" and concluded that any burden on interstate commerce "is incidental at best and far outweighed by the state's abiding interest in preventing harm to minors."[78] Regarding a claim of inconsistent regulation, the court stated that the knowledge requirement as to a person's status as a minor and the requirement of "*intent* to arouse the prurient interest of the sender and/or minor and with the *intent* to seduce the minor" was sufficient to distinguish the California statute from the statute in *Pataki* because such a limited proscription does not burden interstate commerce.[79] The court adopted *Hatch's* reasoning that when the luring statute "is harmonized with the entire California penal scheme, it does not effectively regulate activities beyond California."[80] Together, *Hatch* and *Hsu* represent California's rejection of Dormant Commerce Clause challenges to its state luring statute.[81]

¶27 Beginning in 2003, the courts of North Dakota, Ohio, and Florida reported decisions rejecting Dormant Commerce Clause challenges to their states' luring statutes.[82] These states, along with New York and California, represent the current state court jurisprudence regarding Dormant

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[78] *Id.*

[79] *Id.* at 191 (emphasis in original).

[80] *Id.*

[81] Both decisions were followed by a more recent, unpublished California state court decision, but no significant analysis was added. *See* People v. Hayne, 2002 Cal. App. LEXIS 2650, at *22-28 (Cal. Ct. App. Mar. 27, 2002).

[82] The North Dakota Supreme Court agreed with *Foley* and *Hsu* concerning the lack of legitimate commerce contained within the range of activities prohibited by the state's luring statute because of the luring element. State v. Backlund, 672 N.W.2d 431, 438 (N.D. 2003). In *State v. Snyder*, an Ohio appellate court concluded that the state's luring statute was constitutional because it was "a valid exercise of police power" that is "narrowly tailored to serve the interest of the State in promoting the welfare of children." 801 N.E.2d 876, 886 (Ohio Ct. App. 2003), *appeal denied*, 807 N.E.2d 367 (Ohio 2004). Three additional Ohio state courts examined Dormant Commerce Clause challenges to Ohio's luring statute, but none of the cases engaged in analysis of any additional significance. *See* State v. Cunningham, 808 N.E.2d 488, 493-94 (Ohio Ct. App. 2004), *appeal denied*, 814 N.E.2d 490 (Ohio 2004); State v. Bolden, C.A. Case No. 19943, 2004 Ohio App. LEXIS 2061, at *19-22 (Ohio Ct. App. May 7, 2004); State v. Anthony, Appeal No. C-030510, 2004 Ohio App. LEXIS 3514, at *14-17 (Ohio Ct. App. Jul. 23, 2004), *appeal allowed*, 104 Ohio St. 3d 1408 (Ohio 2004). A Florida appellate court relied upon a lack of legitimate commerce burdened under the *Pike* test and the narrowing effect of the element of intentional seduction under the inconsistent burden test in holding the statute constitutional under both analyses. Cashatt v. State, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 2004), *reh'g denied*, No. 1D02-4638, 2004 Fla. App. LEXIS 11358 (Fla. Dist. Ct. App. Jun. 1, 2004).

Commerce Clause challenges to state luring statutes.[83] *Foley*, *Hatch*, and *Hsu* were decisive in establishing state precedent and subsequent cases have been consistent in following the reasoning they established. Because subsequent state courts have been so uniform in following the reasoning of these three seminal cases, they have effectively ceased any further Dormant Commerce Clause analysis of state luring statutes.

IV. DISCUSSION OF THE STATE COURTS' REASONING IN DISTINGUISHING FEDERAL PRECEDENT

A. Pike Balancing of Local Benefits Against Burdens Upon Interstate Commerce

¶28 The state courts generally see the intent element of state luring statutes as a crucial distinguishing factor in upholding their constitutionality and distinguishing them from state dissemination statutes.[84] Claiming that a requirement of an intent to seduce minors dramatically reduces the potential range of prohibited conduct, the state courts assert that what residual conduct remains cannot be characterized as legitimate commerce.[85] Therefore, any incidental effect on interstate commerce is inconsequential when compared with the legitimate state policy of protecting minors.[86]

¶29 However, the state courts have overstated their position when contending that no legitimate commerce is burdened, as states may have

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[83] Two additional state court cases are worth noting. A Florida appellate court in *Simmons v. State*, 886 So. 2d 399 (Fla. Dist. Ct. App. 2004), is the only reported opinion by a state court regarding a Dormant Commerce Clause challenge to a state dissemination statute. Because a "violator who is not in Florida must know or believe that he or she is transmitting harmful material to a Florida minor," the court held that the statute did not "subject[] interstate use of the Internet to inconsistent state regulation." *Id.* at 406. The court stated that "Congress specifically provides for preemption of state law when it desires" and that there was no argument made that the statute "is contrary to any federal law or that federal law so thoroughly occupies the legislative field as to require a reasonable inference that Congress left no room for it to be supplemented by state law." *Id.* at 406-07. But the court's discussion of direct conflict and preemption are confusing as each are distinct constitutional limitations upon the ability of the states to regulate and the absence of conflict or preemption should not have an effect upon a Dormant Commerce Clause challenge. In *State v. Ansari*, a Utah appellate court also considered a Dormant Commerce Clause challenge to the state's luring statute, but that court declined review of the challenge for standing reasons without reaching the merits of the challenge. 100 P.3d 231, 241-42 (Utah Ct. App. 2004).

[84] *See, e.g.*, State v. Foley, 731 N.E.2d 123, 126 (N.Y. 2000).

[85] *See, e.g.*, People v. Hsu, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000).

[86] *See, e.g., id.*

different policies on what conduct is prohibited.[87] One commentator noted that

> in many states a nineteen-year-old male may have sexual relations with a sixteen-year-old female without violating any law. . . . Moreover, a recent comprehensive survey of the laws in varying states demonstrates the diversity of age of consent laws throughout the country. There is not criminal liability for sexual conduct with children fourteen or older in Hawaii or for sexual conduct with children fifteen years old or older in Colorado.[88]

¶30 Variance in age of consent laws implies that conduct that is legal in one state might be illegal in another state.[89] Hence a blanket assertion that no burden is imposed upon legitimate commerce by a state luring statute that regulates conduct on the Internet oversimplifies the analysis because it fails to recognize the Internet's global reach and the inability of Internet users to prevent their communications from reaching a certain state.

¶31 Additionally, the state courts' definition of the local benefit derived from a state luring statute requires refinement. Generally, such benefit is stated as the protection of minors on the Internet from pedophiles.[90] While such a purpose is clearly legitimate and of central concern to the states, this merely begins the analysis of the local benefit. The existence of other state laws that provide a similar benefit must also be considered. As noted by the court in *Pataki* in its analysis of the New York dissemination statute,

> The Act is, of course, not the only law in New York's statute books designed to protect children against sexual exploitation. The State is able to protect children through vigorous enforcement of the existing laws criminalizing obscenity and child pornography. . . . The local benefit to be derived from the challenged section of the statute is therefore confined to that narrow class of cases that does not fit within the parameters of any other law.[91]

¶32 The local benefit derived from state luring statutes should thus be confined to the same narrow class of cases described in *Pataki*. If a luring statute is merely redundant, providing the same level of protection or deterrence provided by other existing state laws that do not affect interstate

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[87] *See* McDonald, *supra* note 5, at 217.
[88] *Id.*
[89] *See id.* at 216-17.
[90] *See, e.g.*, State v. Foley, 731 N.E.2d 123, 126 (N.Y. 2000).
[91] Am. Library Ass'n v. Pataki, 969 F. Supp. 160, 179 (S.D.N.Y. 1997). In discussing the benefit, the court did note that the plaintiffs were not challenging the New York luring statute. *Id.* But that statement was made in regard to excluding the conduct prohibited by that statute from the measurement of the local benefit. *Id.*

commerce, then the benefit of the law is nonexistent and almost any burden upon interstate commerce would be difficult to justify.

B. Extraterritorial Effect

¶33 The state courts that have addressed the extraterritorial effects of state luring statutes have rejected this challenge to their constitutionality for two reasons: either (1) consideration of the state luring statute in conjunction with the state's criminal jurisdiction statutes leads to the conclusion that the state's criminal jurisdiction extends only to conduct which has sufficient connections with the state and therefore no wholly extraterritorial conduct is ever affected, or (2) no legitimate commerce is affected and therefore there is no extraterritorial effect. [92]

¶34 The assertion that no legitimate commerce is affected was rejected above. As to the argument that "harmonization" of a state luring statute with state criminal jurisdiction statutes effectively insulates the luring statutes from review under the extraterritorial aspect of the Dormant Commerce Clause,[93] this misses the point the federal courts make in their extraterritorial analysis of state dissemination statutes.

¶35 The federal courts' main concern regarding extraterritorial regulation is that an Internet user engaging in activity legal in his or her home state faces the prospect of inadvertently subjecting himself or herself to criminal liability in another state. For example, even though California may lack the power to, and disclaims any intent to, regulate wholly extraterritorial conduct under the it's luring statute, an Internet user is not able to exclude California residents from his communications, is not able to prevent communications not directed at California residents from passing through California because of the design of the Internet, and is not able to ascertain another Internet user's age and geography unless that information is truthfully volunteered.[94] This leaves an Internet user whose conduct is criminal under California's luring statute but legal in his or her home state to be faced with the Hobson's choice of either forgoing conduct acceptable in his home state or exposing himself to possible criminal liability in California.[95] It is this dilemma that the federal courts in the state dissemination cases have uniformly declared a projection of state policy extraterritorially in violation of the Dormant Commerce Clause. [96]

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[92] *See, e.g.*, Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 472-73 (Cal. Ct. App. 2000).
[93] *See id.*; People v. Hsu, 99 Cal. Rptr. 2d 184, 191-92 (Cal. Ct. App. 2000).
[94] *See Am. Library Ass'n*, 969 F. Supp. at 167, 170-71.
[95] *See id.* at 180 (describing the exposure of individuals to a Hobson's choice).
[96] *See id.*

C. Inconsistent State Regulation

¶36 The California state courts are unique in having directly addressed the question of whether a state luring statute unconstitutionally subjects interstate commerce to inconsistent state legislation.[97] In examining the constitutionality of California's luring statute, these courts reasoned that the statute limits the scope of prohibited conduct to a "ban on communication of specified matter to a minor for *purposes of seduction*."[98] Citing an inability to "conceive of any legitimate commerce" which may be derived from such conduct, the California courts concluded that there is no burden upon interstate commerce and hence no threat of inconsistent state legislation.[99]

¶37 But as noted above, this is a questionable determination and cannot be used to avoid the analysis of whether such laws potentially subject interstate commerce to inconsistent state legislation. What California may deem illegitimate, another state may find legitimate, whether based upon different age of consent laws or different definitions of prohibited conduct. Conversely, some conduct permitted by California under their luring statute and that may be the subject of legitimate commerce in California, other states may find illegitimate. If "not one, but many or every, State adopted" legislation similar to California's luring statute, the result might be that the Internet becomes awash in a flood of inconsistent state regulation.[100]

CONCLUSION

¶38 The federal and state courts that have examined the ability of states to regulate, for the purpose of protecting minors, sexually explicit communication conducted on the Internet have reached seemingly divergent conclusions. State courts have claimed that certain aspects of state luring statutes distinguish these laws from the state dissemination statutes evaluated by the federal courts. Though the state courts' ultimate conclusions as to the constitutionality of state luring statutes may prove to be correct, the reasoning used to distinguish these statutes from the federal dissemination cases is inadequate. They have failed to properly consider the implications raised by the variance among states regarding the scope of prohibited conduct and defining who constitutes a minor on the *Pike* balancing of local benefits against burdens on interstate commerce, the extraterritorial effects of the luring statutes, and the specter of an inconsistent patchwork of state Internet regulation. Consequently, the state

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[97] *See Hatch*, 94 Cal. Rptr. 2d at 471-72; *Hsu*, 99 Cal. Rptr. 2d at 191-92.
[98] *Hatch*, 94 Cal. Rptr. 2d at 471-72 (Cal. Ct. App. 2000) (emphasis in original). *See also Hsu*, 99 Cal. Rptr. 2d at 191-92.
[99] *Hatch*, 94 Cal. Rptr. 2d at 472-73; *Hsu*, 99 Cal. Rptr. 2d at 191.
[100] Healy v. The Beer Inst., 491 U.S. 324, 336 (1989).

courts evaluating luring statutes must delve further into the Dormant Commerce Clause analysis then they have been thus far willing to do.