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**THE DORMANT INTERNET:
ARE STATE REGULATIONS OF MOTOR
VEHICLE SALES BY MANUFACTURERS ON THE
INFORMATION SUPERHIGHWAY OBSTRUCTING
INTERSTATE AND INTERNET COMMERCE?**

INTRODUCTION

Tired of driving from dealership to dealership when looking for a new or used car? Hoping for a pressure-free, no-haggle experience? The solution may be a click away with automobile manufacturers going online and setting up virtual showrooms that provide consumers the opportunity to buy cars direct from the factories.¹ According to automobile manufacturers, Internet showrooms benefit consumers by reducing their search time, eliminating sales pressure, and ensuring confidence in the transaction because a credible, major manufacturer operates the Web site.² However, this type of e-commerce faces roadblocks as more than forty states have passed legislation that restricts Internet sales by automobile manufacturers.³

1. See Keith Bradsher, *Ford and Dealers Start Net Retailer that Will Focus on Fixed Prices*, N.Y. TIMES, Aug. 26, 2000, at sec. C. Ford announced the creation of FordDirect.com, which helps consumers locate Ford vehicles at fixed prices. *Id.* At the Ford Web site, customers can choose options, receive a price quote and arrange for financing. *Id.* To complete the transaction, customers must either visit a local dealer or have the dealer deliver the vehicle. *Id.*

2. See Motion for Summary Judgment of Plaintiff Ford Motor Company at 8-9, 21, Ford Motor Co. v. Texas Dep't of Transp., 106 F. Supp. 2d 905 (W.D. Tex. 2000) (No. A-99-CA-764-SS) [hereinafter Ford Summary Judgment].

3. Solveig Singleton, *Will the Net Turn Car Dealers into Dinosaurs? State Limits on Auto Sales Online*, 58 CATO INST. 1, 2 (July 25, 2000) (citing Patrick Danner, *Right of Way Fight: State Law Bans Carmakers from Selling Directly to Public, but Consumers and Manufacturers Want Change*, BROWARD DAILY BUS. REV., Mar. 24, 2000, at A12), available at <http://www.cato.org>. Many of these laws, implemented in the form of franchise laws, prohibit automobile manufacturers from operating or controlling a dealership or acting in the capacity of a dealer and do not specifically address Internet sales. *Id.*; see also Ford Motor Co. v. Texas Dep't of Transp., 106 F. Supp. 2d 905, 908 (W.D. Tex. 2000) (discussing the Texas Motor Vehicle Commission Code prohibition of manufacturers engaging in dealership activities).

States contend that regulating automobile sales falls within a state's general police power.⁴ Consequently, states enact franchise laws to protect consumers from potential fraud, to protect local dealers from vertical integration under circumstances where manufacturers' hold disproportionate market power over dealers, and to connect consumers with dealers who serve as their best chance for a trustworthy and long-term relationship.⁵ However, the growth of commercial activity on the Internet has produced challenges to federalist principles on grounds that these state laws interfere with interstate commerce and thus violate the Commerce Clause of the United States Constitution.⁶ Furthermore, many citizens opposing these regulations argue that these laws limit consumer choice and competition in the marketplace.⁷

This Note examines the impact state franchise laws have on automobile manufacturers in their efforts to connect with consumers via the Internet and analyzes these laws under the Commerce Clause. Part I provides an overview of the Commerce Clause and addresses whether its negative component, the dormant commerce clause, will continue to play a role in the twenty-first century. Part II discusses the Commerce Clause and the Internet, specifically *American Libraries*

4. Singleton, *supra* note 3; see also *Ford Motor Co.*, 106 F. Supp. 2d at 913. See generally Ford Summary Judgment, *supra* note 2, at 8-9, 21; Brett Bray's Response to Ford's Motion for Summary Judgment at 22, *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000) (No. A-99- CA-764-SS) [hereinafter Bray Response to Summary Judgment].

5. See Singleton, *supra* note 3, at 3-6.

6. See *Ford Motor Co.*, 106 F. Supp. 2d at 908-09; discussion *infra* Part I. Automobile manufacturers also invoke their First Amendment right to commercial free speech and the Due Process Clause; however, such a discussion is beyond the scope of this Note. See also Charles R. Topping, Note, *The Surf Is Up, But Who Owns the Beach? —Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 179, 193-95 (1999). The estimated expenditure for the Internet economy in the year 2000 was \$200 billion. See *id.* at 194. See generally Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998) (concluding that the Internet should be subject only to uniform federal regulations, rather than state regulations).

7. See Singleton, *supra* note 3, at 4. A telephone survey in Texas revealed that sixty-seven percent of those polled opposed a state regulation that prohibited Ford from selling used cars to Texas consumers on its Web site, www.fordpreowned.com. See *id.* at 9, n.19. Furthermore, economic studies show that under franchise laws, consumers pay higher car prices. See *id.* at 4-5.

Ass'n v. Pataki,⁸ in which a federal judge called for federal regulation of the Internet.⁹ Part III looks at the aftermath of *Pataki* and how other courts have answered the call to remove legislative power over the Internet from the states and place it with the federal government. Part IV examines the impact that analogous wine and petroleum industry cases have had on interstate commerce law. Finally, Part V reviews state legislative reaction to automobile manufacturers' control of local dealers and examines whether this recent legislative trend interferes with interstate commerce.

I. THE COMMERCE CLAUSE

A. An Overview

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the states.¹⁰ When a federally enacted statute applied through the Commerce Clause conflicts with state legislation, the federal law trumps state power under the Supremacy Clause.¹¹ However, the Constitution fails to express limitations on state economic regulations in the absence of congressional legislation.¹² Although the Constitution does not expressly instruct states to refrain from regulating interstate commerce, the Supreme Court has interpreted the Clause to grant Congress the power to invalidate state legislation that produces a discriminatory effect or unduly interferes with interstate commerce.¹³

8. 969 F. Supp. 160 (S.D.N.Y. 1997).

9. *Id.* at 184.

10. U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .").

11. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.1, at 130-31 (3d ed. 1999); *see also* U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .").

12. ROTUNDA & NOWAK, *supra* note 11, at 131.

13. James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1106 (1999); *see also Pataki*, 969 F. Supp. at 169 (noting that the Commerce Clause's negative aspect dates as far back as 1824 in Justice Johnson's concurring opinion in *Gibbons v. Ogden*, 22 U.S. 1 (1824)); ROTUNDA & NOWAK, *supra* note 11, at

Thus, the Commerce Clause contains a negative command, known as the dormant commerce clause, which forbids states from practicing economic protectionism and blocking interstate trade in the wake of congressional silence.¹⁴

Dormant commerce clause analysis occurs only when state regulations appear discriminatory.¹⁵ Courts typically recognize the following three forms of discriminatory legislation: (1) facially discriminatory; (2) facially neutral but containing a discriminatory purpose; and (3) facially neutral but producing a discriminatory effect.¹⁶

In *Pike v. Bruce Church, Inc.*,¹⁷ the Supreme Court explained the modern standard for determining whether state regulatory power complies with the dormant commerce clause.¹⁸ *Pike* involved a facially non-discriminatory statute that banned interstate shipment of cantaloupes that failed to meet Arizona packaging requirements.¹⁹ Specifically, Arizona stopped the plaintiff from carrying uncrated cantaloupes out of state to California for packing and processing.²⁰ The *Pike* Court indicated that a state regulation supported by a

131 (commenting that "Congress may later express its consent to state regulation which would otherwise be barred by the dormant commerce clause and, in effect, reverse a decision of the Supreme Court . . . [by] adopting a new, valid federal regulation."); Amy M. Petragani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1240 (1994) (observing that the Court has interpreted the Commerce Clause as enabling the judiciary to construe Congress' silence).

14. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); Topping, *supra* note 6, at 223-24. The Clause has three functions: to create and preserve a "federal free trade unit," cultivate "material success," and advance "the peace and safety of the Union." Topping, *supra* note 6, at 205 (quoting Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 398-99 (1989)).

15. Topping, *supra* note 6, at 227. "[A] regulation is discriminatory if 'it imposes greater economic burdens on those outside the state to the economic advantage of those within.'" *Id.* (quoting Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1213 (1986)).

16. See *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 470 (Cal. Ct. App. 2000).

17. 397 U.S. 137 (1970).

18. See RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW, § 8.9, at 300 (4th ed. 1991).

19. *Pike*, 397 U.S. at 142-43. The statute was promulgated to promote and protect the reputation of Arizona growers by banning misleading packaging. *Id.* at 143. The Act addressed the fear that some growers would deceptively package fruit by placing top quality products on the outer layer while including inferior products underneath. *Id.* at 142-43.

20. *Id.* at 138.

legitimate local interest and producing only an incidental effect on interstate commerce will be upheld so long as the local benefit outweighs any burden imposed on interstate commerce.²¹ The Court added that when “a legitimate local purpose is found, then the question becomes one of degree.”²² Thus, the Court applied a balancing test to determine whether Arizona’s valid state interest overburdened interstate commerce.²³

With the advent of this balancing technique, courts now engage in a fact-gathering process to establish the following: (1) whether the intent behind the state law involves a legitimate state interest or discriminates against out-of-state commerce; and, if the law is facially neutral, (2) whether the state objective offsets the negative impact on interstate commerce.²⁴ If the state enacts legislation with the sole intent to benefit local interests over out-of-state concerns, then the statute is facially discriminatory and per se invalid.²⁵ When a court finds a law facially discriminatory, the burden shifts to the state to justify the legislation.²⁶ The state must meet the following three criteria to rationalize any discriminatory effect: (1) that the regulation serves a legitimate interest; (2) that the legislation substantially reaches the interest; and (3) that alternative measures are unavailable to reduce the discriminatory effect.²⁷

Courts recognize several legitimate state interests that outweigh the burdens on interstate commerce.²⁸ Legitimate non-economic state

21. *Id.* at 142.

22. *Id.*

23. *See generally id.* The court held that Arizona’s interest in having the produce marked as coming from the state did not outweigh the financial burden imposed on the grower in building an unnecessary packing plant. *Id.* at 145; *see also* Bassinger, *supra* note 6, at 896 (noting that “[t]he Court’s Dormant Commerce Clause jurisprudence seeks to strike a balance between . . . national economic principles and the power of the states to regulate local activity”).

24. JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUTSHELL* 90 (3d ed. 1995).

25. *Id.*; Bassinger, *supra* note 6, at 896; Gaylord, *supra* note 13, at 1107-08.

26. Gaylord, *supra* note 13, at 1108; Topping, *supra* note 6, at 231.

27. Topping, *supra* note 6, at 231 (citing Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1231 (1986)); *see also* Gaylord, *supra* note 13, at 1108.

28. Topping, *supra* note 6, at 232.

interests include the health, safety, and general welfare of the community arising under state police powers, racial equality, household privacy, and preservation of natural resources.²⁹ Courts also recognize statutes that serve economic interests aimed at protecting consumers from fraud, confusion, and suspect sellers.³⁰

B. Dormant Commerce Clause in the Twenty-First Century

The dormant commerce clause has faced increasing scrutiny, with many critics suggesting that the judiciary should abandon the doctrine altogether.³¹ Focusing on the Constitution's text, opponents argue that the dormant commerce clause is not an expressed provision of the Constitution, but rather a creation of the judiciary.³² Opponents of the doctrine also contend that the Framers intentionally left out the Clause's negative aspect.³³ Thus, to permit judicial enforcement of the dormant aspect encroaches upon state autonomy.³⁴ A further constitutional argument against recognition of a dormant commerce clause concerns the principle of separation of powers.³⁵ When courts invoke the *Pike* test, balancing states' interests against the burdens on interstate commerce, judges are engaging in policy decisions and thus performing a quasi-legislative function.³⁶ Recent United States Supreme Court decisions reveal a trend away from judicial exercise of dormant commerce clause power and toward judicial deference to state legislation.³⁷

29. *Id.*

30. *Id.*

31. See generally Petragani, *supra* note 13, at 1237-48; Topping, *supra* note 6, at 205 n.116, 224.

32. See Petragani, *supra* note 13, at 1237-39; Topping, *supra* note 6, at 224.

33. Petragani, *supra* note 13, at 1239-40.

34. *Id.* The federalism argument emphasizes that the Constitution merely grants Congress a general power to regulate commerce among the states. *Id.* at 1240-41; Topping, *supra* note 6, at 224.

35. See Petragani, *supra* note 13, at 1243-47.

36. *Id.* at 1243-44. A major opponent of the dormant commerce clause is Justice Scalia, who believes courts that apply the clause take on a legislative role. *Id.* at 1243. *But see* Topping, *supra* note 6, at 224. Due to historical acceptance of the dormant commerce clause, however, it is unlikely that the Court will invalidate the clause. See *id.* Courts have consistently upheld balancing tests despite the tendency to consider policy in the process. *Id.*

37. Petragani, *supra* note 13, at 1248-52.

II. THE DORMANT COMMERCE CLAUSE AND THE INTERNET: *AMERICAN LIBRARIES ASSOCIATION V. PATAKI*

The development of the Internet challenged both the legislature and judiciary to find and apply workable legal guidelines to Internet-based conflicts.³⁸ As the Internet became more and more popular, many states enacted regulatory schemes targeting the Web.³⁹ Analysts contend that Internet laws that vary by state increase business costs and consequently deter companies from entering the fray.⁴⁰ Some argue that the combination of inconsistent state regulations and the Web's global reach justify Internet regulation under federal rather than state authority.⁴¹

Pataki was the first case to find state regulation of the Internet unconstitutional under the dormant commerce clause.⁴² *Pataki* involved a New York regulation that made it a crime to knowingly disseminate sexually explicit material to minors.⁴³ Although the case appeared to involve noncommercial purposes, the court invalidated the statute on Commerce Clause grounds.⁴⁴ The court noted the Internet's unique environment and the effect of the Web's "borderless" boundaries on issues of federalism.⁴⁵ With this tension between the states and federal government at the forefront, the court cited several reasons why the statute violated the Commerce Clause,

38. See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 161 (S.D.N.Y. 1997); Topping, *supra* note 6, at 204.

39. Spencer Kass, *Regulation and the Internet*, 26 S.U. L. REV. 93, 93-94 (1998).

40. *Id.* In particular, legal costs increase due to the complexity of varied laws governing cyberspace. *Id.* Kass contends that Internet growth is stunted as a result. *Id.*

41. *Id.* at 99.

42. Bassinger, *supra* note 6, at 916; see also Kass, *supra* note 39, at 105 (noting that *Pataki* was the first case to suggest that Internet regulation be removed to the federal level); Topping, *supra* note 6, at 204 (indicating that *Pataki* was the first judicial attempt to resolve commerce-related problems on the Internet without congressional guidance while Congress stood silent).

43. *Pataki*, 969 F. Supp. at 163.

44. *Id.* at 169. The judge noted that the United States Supreme Court has defined commerce broadly. *Id.* at 172. Although the statute restricted sexually explicit information, the Act invoked dormant commerce clause analysis, which can apply to non-profit activities. *Id.* at 173 (citing *Edwards v. California*, 314 U.S. 160, 172-73 (1941)).

45. *Id.* at 168 (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

including that: (1) the Act regulated conduct wholly outside New York; (2) the Act placed an undue burden on interstate commerce that outweighed any local benefit; and (3) the Act could conflict with other states' requirements and subject out-of-state users to inconsistent obligations.⁴⁶

The court relied on *Edgar v. MITE Corp.*⁴⁷ and *Healy v. The Beer Institute*⁴⁸ to determine whether the Act regulated conduct occurring outside of New York.⁴⁹ *Edgar* involved the Illinois Business Takeover Act, which required a "tender offeror" to notify the Secretary of State and the targeted company⁵⁰ of its intent to make an offer twenty days prior to an attempted takeover.⁵¹ MITE, a Delaware corporation, offered to buy all remaining shares of an Illinois company, but failed to comply with the Act.⁵² The Court ruled the Act unconstitutional under the Commerce Clause because the statute not only delayed offers to in-state shareholders, but also affected contact with out-of-state shareholders; thus, the regulation resulted in "a direct restraint on interstate commerce and . . . [had] a sweeping extraterritorial effect."⁵³

Healy involved a Connecticut statute that ordered out-of-state beer distributors to confirm that their Connecticut prices did not exceed prices levied in bordering states.⁵⁴ The plaintiffs, beer producers, importers, and a trade association, challenged the statute as a

46. *Id.* at 169; see also Andrea Kline Glickman, Comment, *American Libraries Association v. Pataki: Will States Be Prohibited from Internet Regulation?*, 18 J.L. & COM. 151, 161-62 (1998).

47. 457 U.S. 624 (1982).

48. 491 U.S. 324 (1989).

49. See *Pataki*, 969 F. Supp. at 174-76.

50. The Act defined a "target company" as a corporation in which Illinois shareholders own ten percent of the stock subject to takeover, or under a combination of any two of the following conditions: (1) the corporation's main office is in Illinois; (2) the corporation formed under Illinois law; or (3) the corporation has "at least 10% of its stated capital and paid-in surplus represented" within the state. *Edgar*, 457 U.S. at 627.

51. *Id.* at 634-35; see also *Pataki*, 969 F. Supp. at 174.

52. *Edgar*, 457 U.S. at 627-28; see also Glickman, *supra* note 46, at 156.

53. *Edgar*, 457 U.S. at 642; see also *Pataki*, 969 F. Supp. at 174.

54. *Healy v. The Beer Inst.*, 491 U.S. 324, 326-27 (1989); see also *Pataki*, 969 F. Supp. at 175.

violation of the Commerce Clause.⁵⁵ The Court condensed prior case law into specific guidelines to evaluate state legislation that facially hindered commerce occurring outside state lines.⁵⁶ The guidelines set forth were as follows: (1) to determine whether the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State’s borders”; (2) to ascertain “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State,” and (3) to evaluate the effect of the statute itself as well as to determine whether the challenged statute could coexist with similar legislation in other states.⁵⁷ The Court found the price-affirmation statute unconstitutional because it effectively regulated commercial activity that took place entirely outside Connecticut.⁵⁸

In applying standards established in *Edgar* and *Healy*,⁵⁹ the *Pataki* court noted that due to the Internet’s expansiveness, New York could not restrict the statute’s application to conduct occurring only within New York.⁶⁰ Thus, the court held the statute to be a per se violation of the Commerce Clause, because, by specifically legislating the Internet, New York had imposed “its law into other states whose citizens use the Net.”⁶¹ Additionally, the court addressed the issue of whether the Act substantially burdened interstate commerce when weighed against legitimate local interests.⁶²

55. *Healy*, 491 U.S. at 327-28.

56. *Id.* at 336.

57. *Id.* (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)); see also Glickman, *supra* note 46, at 157-58.

58. *Healy*, 491 U.S. at 343; see also *Pataki*, 969 F. Supp. at 175.

59. The court extrapolated the following two Commerce Clause components from the “*Edgar/Healy* extraterritoriality analysis”: (1) “it subordinates each state’s authority over interstate commerce to the federal power of regulation (a vertical limitation)” and (2) “it embodies a principle of comity that mandates that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states (a horizontal limitation).” *Pataki*, 969 F. Supp. at 175-76.

60. *Id.* at 177.

61. *Id.* A person may intend but be unable to render Internet material inaccessible to New Yorkers due to the effusive technology available. See *id.*

62. *Id.*

Applying the *Pike* standards,⁶³ the court acknowledged that protecting children from pedophilia and sexually explicit material was a legitimate state interest.⁶⁴ However, the court ruled that the local interests did not outweigh the restraints the Act placed on interstate commerce.⁶⁵ The court reasoned that the Act “casts its net worldwide” resulting in a “chilling effect” that deters individuals who are uncertain as to the Act’s reach from utilizing the Internet.⁶⁶ The court concluded that the Act’s burden on interstate commerce was too severe to justify the local benefit.⁶⁷

The court then reached its final, and arguably most controversial, mode of analysis.⁶⁸ The court defined the Internet as an area of commerce, much like transportation, that “demand[s] consistent treatment and [is] therefore susceptible to regulation only on a national level.”⁶⁹ The court feared that leaving regulation of Internet commerce to the states would “result in chaos” and expose users to inconsistent standards.⁷⁰ In turn, varying state regulations could effectively “paralyze the development of the Internet.”⁷¹ Under the *Pike* test, the court concluded that users exposed to inconsistent obligations might decide to withdraw from the Internet rather than face potential liability.⁷²

63. *See supra* Part I.A.

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

65. *Id.* at 179.

66. *Id.* at 179-80. The court noted that valued speech, such as art posted on the Web by libraries, museums, and academia, could fall within the Act’s sphere and therefore concluded that the statutory terms were too broad. *Id.* at 180. The court also believed the expenses shouldered by users in pursuit of defenses identified in the Act were extreme. *Id.*

67. *Id.* at 181. *But see* *People v. Foley*, 731 N.E.2d 123 (N.Y. 2000) (finding a criminal statute that regulates predatory pedophile activity and contains a “luring” prong is not economic protectionism against out-of-state commerce, but rather falls under a state’s general police powers in targeting individuals who use the Internet to solicit children).

68. *See infra* Part III.

69. *Pataki*, 969 F. Supp. at 181-83.

70. *Id.* at 181. The court reviewed railway and trucking industry cases that struck down state regulations as burdening interstate commerce and advocated the need for uniform regulations on a national scale. *Id.* at 181-82; *see also* Glickman, *supra* note 46, at 162.

71. *Pataki*, 969 F. Supp. at 181.

72. *Id.* at 183. The court acknowledged that the threat of liability resulting from inconsistent regulations could leave a user no alternative but to comply with the most stringent state standard. *Id.*

III. THE AFTERMATH OF *PATAKI*

A. *Advocates of a Federal Regulatory System*

Pataki's call for federal regulation of the Internet has stirred debate on both sides of the issue.⁷³ Due to the Internet's expansive reach, the Web has been characterized as an "integrat[ed] social and economic force."⁷⁴ Some label the Internet as a "national field" and therefore believe it should be regulated by national standards.⁷⁵ Additionally, as a result of this borderless technology, *Pataki* supporters think local legislation affecting the Internet—whether directly or indirectly—is likely to extend beyond state boundaries.⁷⁶ *Pataki* adherents contend that uniform regulations will result in a predictable Internet environment and will foster commercial transactions.⁷⁷ A national standard could make Internet users more secure by subjecting them to uniform governing regulations.⁷⁸ Supporters believe that individuals are more willing to accept a means of commerce when regulations are easy and comprehensible.⁷⁹

73. See generally Kass, *supra* note 39 (providing arguments for and against federal regulation of the Internet).

74. Gaylord, *supra* note 13, at 1096.

75. Kass, *supra* note 39, at 111; see also Bassinger, *supra* note 6, at 926 ("The Internet . . . embodies the same national interests and demands the same uniform federal regulation as the more traditional channels of interstate commerce. These national interests justify a uniform base of laws rather than the menace of inconsistent state regulation."). See generally Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096-97, 1127-32 (1996), cited in Gaylord, *supra* note 13, at 1096 n.4, 1097 (commenting that extraterritorial effects resulting from state regulation of the Internet infringe upon constitutional principles established to maintain congruity of the United States as one entity).

76. See Gaylord, *supra* note 13, at 1096 (noting that in some contexts "the information superhighway is a dangerous new means for states to export their legislative products to other jurisdictions"); Glickman, *supra* note 46, at 152.

77. Topping, *supra* note 6, at 223 (noting that a primary reason for uniform Internet legislation is to encourage commerce); see also Kass, *supra* note 39, at 109.

78. Kass, *supra* note 39, at 109. Kass contends that varying state regulations might create hesitant users who abstain from entering Internet commerce because of the increased possibility of incurring criminal or civil liability. *Id.*

79. *Id.* (arguing that the technology has flourished from a military communications device into a thriving industry because of the Internet's freedom from regulation).

Another argument in favor of federal regulation evolved as a result of the Internet's international presence.⁸⁰ Users face not only the possibility of conflicting domestic laws but also conflicting international laws, as countries around the world impose their own Internet restrictions.⁸¹ Separate international laws can create political tension between nations when foreign governments want to prosecute outsiders for violating their Internet laws.⁸² Some believe that "[t]he federal government is in the best position to deal with foreign countries" and "as a single unified voice, [the federal government] has more influence on foreign governments than any single state"⁸³

B. Supporters of States' Rights: Pataki Goes Too Far

The primary objection to federal legislation of the Internet is that such action interferes with vertical federalism.⁸⁴ Under this constitutional principle, states hold the "ability to regulate activities, which occur within their borders."⁸⁵ Supporters of states' rights claim that the federal government uses the Commerce Clause as a vehicle to circumvent federalism.⁸⁶ Because of the Internet's broad reach, state regulation can easily have extraterritorial effects, thus inviting the federal judiciary to intervene and nullify state laws.⁸⁷ States are unwilling to accept *Pataki's* assertion reserving Internet laws to the federal government because this concept encompasses activities

80. *Id.* at 109.

81. *Id.*

82. *Id.* International differences exist with respect to criminal liability for the display of pornographic material on the Internet and varying business standards for Internet advertising. *Id.*

83. *Id.*

84. *See* Gaylord, *supra* note 13, at 1097. Vertical federalism is the constitutional division of power between the central government and local governments, in which the central government addresses national concerns and local authorities control local affairs. *Id.*

85. *Kass, supra* note 39, at 110.

86. *See id.*

87. *See id.*

normally subject to state regulation.⁸⁸ Additionally, one attorney general expressed concern over allowing the federal government to act as the sole consumers' protector of e-commerce, believing that the federal government would not dedicate "the time, resources, or interest, nor . . . provide the expertise, to become cyber-consumer advocates."⁸⁹

Another criticism of *Pataki*'s limited reading regarding state authority over the Internet concerns the separation of governmental powers.⁹⁰ Critics believe that the judiciary overstepped its bounds in *Pataki* and made policy when it declared the Internet an area only to be regulated by the federal government.⁹¹ States' rights advocates have long argued that the judiciary is not the proper governing body to make policy decisions and that the interplay between state interests and interstate commerce is best addressed by Congress.⁹²

While some critics focus on the theoretical problems with *Pataki*, others direct attention to the decision's technical flaws.⁹³ Some opponents contend that *Pataki* rings of First Amendment rather than Commerce Clause analysis, because it "appears to be the only federal Commerce Clause case which has struck down a law on the basis that 'chilling' outweighed any local benefits."⁹⁴ Critics also argue that *Pataki*'s third analytical method, concerning the potential for inconsistent obligations under a state regulatory structure, is not an

88. See generally *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905, 913 (W.D. Tex. 2000) ("If the Court were to accept the plaintiff's arguments about the interplay between the [I]nternet and the Commerce Clause, all states' regulatory schemes would be nullified. This is an absurdity that the Court declines to accept.").

89. Jeffrey A. Modisett & Cindy M. Lott, *Cyberlaw and E-Commerce: A State Attorney General's Perspective*, 94 NW. U. L. REV. 643, 648 (2000). Modisett and Lott reached their conclusion after analyzing the federal government's control over traditional state criminal laws, which resulted in an "unimpressive" track record of cases actually brought. *Id.*

90. Topping, *supra* note 6, at 223-24.

91. *Id.* at 224.

92. See *supra* Part I.A; see also Topping, *supra* note 6, at 224-25 (indicating that congressional silence pertaining to federal regulation of the Internet shows a willingness to leave this type of legislation up to the states).

93. Gaylord, *supra* note 13, at 1116.

94. *Id.* (noting that "chilling" is usually a notion used in First Amendment cases).

independent test.⁹⁵ Rather, this concern may be a burden under the *Pike* analysis, but the possibility of inconsistent obligations cannot stand on its own in striking down a state regulation.⁹⁶

C. Subsequent Case Interpretations of *Pataki*

Since *Pataki*, several courts have followed its lead and found state regulation of the Internet unconstitutional on Commerce Clause grounds.⁹⁷ In *PSINet, Inc. v. Chapman*,⁹⁸ the plaintiffs challenged a Virginia statute banning the knowing display of sexually explicit materials used for commercial purposes through electronic files or messages that were harmful to children.⁹⁹ Although the court invalidated the statute through First Amendment analysis, it independently addressed the statute under the Commerce Clause, applying the three methods established in *Pataki*.¹⁰⁰ The court first determined that the statute burdened interstate commerce because access to online information could not be limited by geographic region; thus, in order to comply with the Virginia statute, Web site owners would have to alter commercial materials in all states.¹⁰¹ Further, the court believed that the statute placed an undue burden on interstate commerce by subjecting citizens to inconsistent obligations.¹⁰² The court declared “[t]his potential hazard of

95. *Id.*

96. *See id.* Gaylord analogizes the Internet to past developing technology, such as the telegraph, in which the Court found room for state regulatory interests. *Id.* at 1117. Instead of prohibiting state regulation of the Internet, Gaylord suggests that courts apply a nexus requirement, placing an emphasis on the link between the state’s regulatory interest and the targeted organization. *Id.* at 1127. Using this application, “courts would likely allow regulation in areas where state interests have traditionally been held strong, as with . . . business conducted with state citizens.” *Id.* at 1117.

97. *See* *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999).

98. 108 F. Supp. 2d 611 (W.D. Va. 2000).

99. *PSINet*, 108 F. Supp. 2d at 617.

100. *Id.* at 626-27.

101. *Id.* The court, borrowing a phrase from *Pataki*, held that the Virginia statute “attempt[ed] to regulate commercial conduct wholly outside of Virginia’s borders.” *Id.* at 627.

102. *Id.*

inconsistent Internet regulation by individual states begs Congress to declare this area as one of the few that, based on the need for national uniformity, are reserved for regulation by a single authority.”¹⁰³

*Cyberspace Communications, Inc. v. Engler*¹⁰⁴ dealt with a similar statute in which Michigan prohibited the use of computers or the Internet to disseminate sexually explicit materials to children.¹⁰⁵ The state argued that the Act did not violate the Commerce Clause because it did not discriminate against out-of-state businesses, but rather banned all electronic distribution of sexually explicit material whether from within Michigan or across its borders.¹⁰⁶ The court, relying on *Pataki*, held the statute unconstitutional and granted a preliminary injunction against the Act’s enforcement.¹⁰⁷ The court focused on the Internet’s limitless reach and observed that the Commerce Clause operates to prevent a state statute from touching commerce wholly outside the state’s borders regardless of whether that commerce also affects in-state commerce.¹⁰⁸ The court repeated *Pataki*’s concern regarding the “chilling effect” that inconsistent state regulations could have on the Internet and stated that “[i]nformation is a commodity and must flow freely.”¹⁰⁹

103. *Id.*

104. 55 F. Supp. 2d 737 (E.D. Mich. 1999) [*“Cyberspace I”*].

105. *Id.* at 740.

106. *Id.* at 751. Additionally, the State believed that local interests outweighed any burdens placed on interstate commerce. *Id.*

107. *Id.*

108. *Id.* (citing *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1999)). The court added that even if Michigan’s interest in the Act was valid, the Act would remain ineffective “because nearly half of all Internet communications originate overseas.” *Id.*

109. *Id.* at 752. Governor John Engler of Michigan and Jennifer Granholm, Michigan’s Attorney General, appealed the injunction to the Sixth Circuit Court of Appeals. *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (unreported opinion) [*“Cyberspace II”*]. The Sixth Circuit affirmed the district court’s order and remanded the case for final resolution of the injunction. *Id.* On remand, the district court affirmed its initial ruling and found the Act in violation of the dormant commerce clause because the Act would impermissibly control communication beyond Michigan’s borders. *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827, 830-31 (E.D. Mich. 2001) [*“Cyberspace III”*].

*ACLU v. Johnson*¹¹⁰ dealt with a New Mexico statute criminalizing computer dissemination of material harmful to minors.¹¹¹ The court agreed with the *Pataki* court, which had commented that geography determines states' jurisdictional limits, and that these are "virtually meaningless . . . on the Internet."¹¹² This characteristic foreclosed the possibility that a statute governing the Internet could apply only to intrastate communications and commerce.¹¹³ Due to the Internet's expansiveness, the court called for federally consolidated Internet regulation.¹¹⁴

In contrast, California has rejected the court's reasoning in *Pataki*.¹¹⁵ *People v. Hsu*¹¹⁶ involved a statute that criminalized the knowing distribution of sexually explicit, harmful matter to a minor through electronic mail, the Internet, or a commercial online service with the intent to both seduce and arouse either the sender or receiver.¹¹⁷ Hsu relied on *Pataki* to challenge the statute on Commerce Clause grounds, arguing that state Internet laws subject users to inconsistent regulations.¹¹⁸ The court rejected this argument and distinguished the California statute from the statute at issue in *Pataki*.¹¹⁹ The court acknowledged that the Internet was a form of

110. 194 F.3d 1149 (10th Cir. 1999).

111. *Id.* at 1152.

112. *Id.* at 1161 (quoting *Pataki*, 969 F. Supp. at 168-69). The court later addressed the nature of the Internet and stated that even if a statute applies to only one-on-one e-mail communication, there is no guarantee that the message, while intended for intrastate communication, "will not travel through other states en route." *Id.*

113. *Id.*

114. *Id.* at 1162. The court also applied the *Pike* balancing test and found that the state's interest in protecting minors was minimal because jurisdictional problems would interfere with enforcement and the benefit would be small because the statute was so narrow in scope. *Id.* at 1161-62.

115. *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 471 (Cal. Ct. App. 2000); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000).

116. 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000).

117. *Id.* at 189.

118. *Id.* at 190-91.

119. *Id.* at 191. The court read the New York statute broadly in that it banned Internet dissemination of harmful material to minors; whereas, California tailored the statute narrowly, prohibiting communication only when sending material to a known minor with the intent to arouse (either the sender or the minor) and with the intent to seduce. *Id.* The court deemed the statute's limited construction sufficient to preclude Internet users from inconsistent obligations. *Id.*; see also *Hatch*, 94

interstate commerce, but maintained that a statute reaching Internet use did not automatically burden the Commerce Clause.¹²⁰ Asserting federalist principles, the court declared that absent any opposing federal law, states retain jurisdiction “to regulate matters of legitimate local concern” by virtue of their general police powers.¹²¹

Similarly, Washington’s Supreme Court distinguished *Pataki* when it ruled a statute banning the use of misleading information in the subject line of commercial e-mail messages sent to Washington residents or from a Washington computer, did not violate the dormant commerce clause.¹²² The court held that unlike the New York statute in *Pataki*, in which the regulation extended to all Internet activity, Washington’s law covered only acts directed toward Washington residents or originating from a computer in Washington.¹²³ Thus, Washington confined its regulation within its borders and did not levy liability on transmissions that passed through Washington.¹²⁴

IV. COMMERCE CLAUSE GUIDANCE FROM OTHER INDUSTRIES

A. *The Wine Defense*

As automobile manufacturers fight to break down protective state barriers, courts and litigants may look to other industries that have faced similar challenges for guidance.¹²⁵ For example, many states have imposed direct shipment laws that severely affect the wine industry because the laws prohibit alcohol producers from shipping

Cal. Rptr. 2d at 472 n.21 (noting that statutes in *Pataki*, *Cyberspace I*, and *Johnson* were broad in scope and “not limited to persons attempting to seduce minors”).

120. *Hsu*, 99 Cal. Rptr. 2d at 190.

121. *Id.* The court found that the statute did not regulate activities beyond the state’s border because California only prosecuted conduct that occurred “wholly or partially” within California. *Id.* at 191.

122. *State v. Heckel*, 24 P.3d 404, 412-13 (Wash. 2001). The supreme court reversed the trial court’s finding that the statute violated the dormant commerce clause because, relying on *Pataki*, the trial court found the statute overly burdensome. *Id.* at 408.

123. *Id.* at 412.

124. *Id.*

125. See generally Ford Summary Judgment, *supra* note 2; Bray Response to Summary Judgment, *supra* note 4.

directly to interstate consumers.¹²⁶ One author speculated that a federal court would likely strike down statutes banning wine sales over the Internet because these laws possibly discriminate against out-of-state commerce.¹²⁷ Although the following cases do not deal directly with the Internet, they provide some insight into how courts have dealt with wine regulations that arguably impeded interstate commerce.

In *Dickenson v. Bailey*,¹²⁸ the court addressed a Texas statute that prohibited consumers from receiving direct shipments of more than three gallons of wine from out-of-state wineries and distributors.¹²⁹ Texas wine drinkers brought suit and argued that the statute was overly burdensome because it barred them from participating in interstate commerce.¹³⁰ Texas argued that the statute played an important role in preventing alcoholic beverage companies from acquiring a monopoly in the industry and was within the State's core Twenty-First Amendment powers.¹³¹ The court proclaimed that the statute amounted to economic protectionism because it facially discriminated against out-of-state wineries and wine distributors by forcing them to ship their products through Texas retailers.¹³² The statute benefited local wholesalers and retailers and, by interfering with interstate commerce, subjected Texas consumers to higher prices

126. Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 356 (1999). See generally Ford Summary Judgment, *supra* note 2.

127. Topping, *supra* note 6, at 233-34.

128. 87 F. Supp. 2d 691 (S.D. Tex. 2000).

129. *Id.* at 693; see also TEX. ALCO. BEV. CODE ANN. § 107.07 (Vernon 1995). The statute allowed Texas residents to personally accompany wine into the state. *Id.*

130. *Dickenson*, 87 F. Supp. at 695.

131. *Id.* at 699, 702. Texas has a three-tier system for distribution of alcoholic beverages: suppliers manufacture the alcohol and then sell it to wholesalers/distributors, who then sell it to retailers and other wholesalers. *Id.* at 696. Texas implemented this system to combat "monopolistic tendencies" within the alcohol industry. *Id.* at 699 (quoting S.A. Discount Liquor, Inc. v. Tex. Alcoholic Beverage Comm'n, 709 F.2d 291, 293 (5th Cir. 1983)).

132. *Id.* at 709-10.

because of a limited wine supply.¹³³ The court found these burdens on interstate commerce far outweighed the state's interests, and thus ruled that the statute per se violated the Commerce Clause.¹³⁴

In *Bridenbaugh v. O'Bannon*,¹³⁵ Indiana wine collectors challenged a state law criminalizing direct shipments from out-of-state wine sellers to Indiana consumers.¹³⁶ The district court, in striking down the Indiana statute under the dormant commerce clause, ruled that the law favored in-state distributors.¹³⁷ On appeal, however, the Seventh Circuit reversed the district court and reinstated the Indiana law via the Twenty-First Amendment.¹³⁸ The appellate court refused to apply the dormant commerce clause, reasoning that the Twenty-First

133. *Id.*; see also Shanker, *supra* note 126, at 377-78. Courts often invalidate laws when economic protectionism substantially contributed to the law's creation. *Id.* A state's political process cannot be trusted to halt legislative perversion when the law conveys some favor on in-state interests. *Id.* at 366.

134. See *Dickenson*, 87 F. Supp. at 698, 710. The court reasoned that the state could impose less burdensome, more neutral alternatives, dismissing as "boilerplate" the State's assertion that it exercised its "police power to protect the health, safety, welfare, morals and temperance of its citizens." *Id.* at 710. Additionally, at least one other case indicates that direct alcohol shipment laws may impose too heavy a burden on interstate commerce to evade the dormant commerce clause. *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N.D. Ill. 2000). In *Kendall-Jackson Winery*, the out-of-state wine supplier plaintiffs challenged the Illinois Wine and Spirits Industry Fair Dealing Act and argued that the statute discriminated against out-of-state wineries by regulating transactions between distributors and suppliers that involved out-of-state players, but not applying similar scrutiny to in-state wineries. *Id.* at 863. The court granted a preliminary injunction enjoining enforcement of the Act because the statute employed economic protectionism by burdening contractual relationships between out-of-state wineries and distributors but relieving in-state wineries from similar restrictions. *Id.* However, the court indicated that a statute might pass constitutional muster if it equally impose burdens on in-state and out-of-state suppliers. See *id.*

135. 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd sub nom.* *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir. 2000) [*"Bridenbaugh I"*].

136. *Id.* at 829.

137. *Id.* at 832. Indiana argued it had the right under the Twenty-First Amendment to regulate alcohol import and transportation within its borders. *Id.* at 831. The district court said the Amendment did not "immunize state liquor control laws from . . . the [C]ommerce [C]ause." *Id.* According to the district court, the Twenty-First Amendment did not authorize states to give preferential treatment to local businesses by establishing obstacles to outside competition. *Id.* Although the district court proclaimed a reluctant disposition "to wield the Federal Constitution ax against State legislation," it struck down the Indiana law as a violation of the Commerce Clause because the statute was facially discriminatory and granted in-state distributors a competitive advantage. *Id.* at 832.

138. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir. 2000) [*"Bridenbaugh II"*]. The Twenty-First Amendment of the U.S. Constitution provides: "The transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

Amendment precluded the dormant commerce clause from shielding “interstate shipments of liquor from regulation.”¹³⁹ The court reviewed the Twenty-First Amendment’s history and noted that “[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.”¹⁴⁰ The court explained that the statute’s economic impact on out-of-state alcohol sellers was to accrue excise taxes equally from both in-state and out-of-state sellers, by directing sales through Indiana distributors.¹⁴¹ The court concluded that the Twenty-First Amendment authorized Indiana’s direct-shipment statute.¹⁴²

139. *Bridenbaugh II*, 227 F.3d at 853. The court justified this conclusion because the Twenty-First Amendment comes from the Constitution and the dormant commerce clause does not. *Id.* at 849. *But see* *Bolick v. Roberts*, No. 99-CV755, 2001 U.S. Dist. LEXIS 11118, at *38, *43 (E.D. Va. July 27, 2001); *Swedenburg v. Kelly*, No. 00-Civ-0778, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y. Sept. 5, 2000). *Swedenburg* involved a New York statute that allowed only state-licensed businesses to distribute alcoholic beverages to consumers; out-of-state wineries were not eligible to obtain the statute’s necessary license. *Swedenburg*, 2000 U.S. Dist. LEXIS 12758, at *4. The defendants moved to dismiss for failure to state a claim upon which relief could be granted and argued that states are immune from claims involving regulation of alcoholic beverage distribution under the Twenty-First Amendment, and that states are merely operating within the sphere of this “core power.” *Id.* at *3. Citing to *Bridenbaugh I*, *Dickerson*, and *Kendall-Jackson Winery*, the court rejected the motion to dismiss and allowed the plaintiff’s case to proceed. *Id.* at *26, *29 n.18. The plaintiffs in *Bolick* were individual consumers as well as out-of-state wine producers who challenged the Virginia direct shipment law prohibiting outside alcohol sellers from shipping directly to Virginia residents. *Bolick*, No. 99-CV755, 2001 U.S. Dist. LEXIS 11118, at *3-5. The court rejected the *Bridenbaugh II* approach and found that under Supreme Court precedent alcoholic beverages “are articles of interstate commerce.” *Id.* at *22. Accordingly, the court concluded state discriminatory laws regulating alcohol must be analyzed under the dormant commerce clause even with respect to the Twenty-First Amendment. *Id.* at *43. Ultimately, the court recommended that the sections of the Virginia statute that favored in-state alcohol sellers be declared unconstitutional under the Commerce Clause. *Id.* at *109-10.

140. *Bridenbaugh II*, 227 F.3d at 853.

141. *Id.* at 854.

142. *Id.* The court noted that “[i]f the product were cheese rather than wine, Indiana would not be able . . . to close its borders to imports or to insist that the shippers collect its taxes, despite the effect on its treasury” *Id.* at 851. The court explained that the Twenty-First Amendment allows Indiana to regulate alcohol by means not applicable to other products, such as cheese. *Id.* Similarly, a Florida district court upheld that state’s direct shipment laws under the Twenty-First Amendment. *Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1315 (M.D. Fla. 2001). Florida’s law prohibited out-of-state alcohol sellers from shipping directly to in-state Florida consumers. *Id.* at 1308. Unlike the *Bridenbaugh II* court, here the district court initially applied dormant commerce clause analysis and concluded that the statute impermissibly discriminated against out-of-state retailers. *Id.* at 1312. However, despite declaring Florida’s law as a per se violation of the commerce clause, the court ultimately upheld the statute as “a permissible regulation under the Twenty-First Amendment.” *Id.* at 1315. The court

B. Exxon Corp. v. Governor of Maryland: An Argument for State Regulation

States looking to justify regulating automobile Internet sales will probably invoke the holding of *Exxon Corp. v. Governor of Maryland*.¹⁴³ There, the Supreme Court held that a state ban on vertical integration between oil producers and retail outlets did not contravene the dormant commerce clause.¹⁴⁴ *Exxon* involved a state regulation prohibiting petroleum product producers or refiners from owning or operating gas stations in Maryland.¹⁴⁵ *Exxon* challenged the statute under the Commerce Clause, claiming that the law: (1) discriminated against interstate commerce; (2) placed an undue burden upon interstate commerce; and (3) imposed controls on nationwide commercial activity involving the type of product that should not be regulated by the states.¹⁴⁶ The Court found that the statute neither discriminated against interstate commerce nor favored local producers or refiners because none existed within Maryland.¹⁴⁷ The Act only prohibited gasoline producers from owning local stations while allowing out-of-state independent dealers to compete in the marketplace.¹⁴⁸ The Court rejected *Exxon's* claim that the statute would alter the petroleum market by shielding local dealers

reasoned that Florida's interests in "temperance, revenue protection, and the . . . [elimination of] bootlegging," trumped "the minimal burden placed on interstate commerce." *Id.* at 1315.

143. 437 U.S. 117 (1978); *see, e.g.*, Brett Bray's Motion for Summary Judgment at 2, 23, *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000) (No. A-99-CA-764-SS) [hereinafter *Bray Motion for Summary Judgment*]. *But see* Response of Ford Motor Company to the Motion for Summary Judgment of Defendant Brett Bray at 7, *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000) (No. A-99-CA-764-SS) [hereinafter *Ford Response to Summary Judgment Motion*] (distinguishing *Exxon* from auto-manufacturer sales in that "Exxon engaged in preferential allocation and price treatment in the retail gasoline market . . . [and] was a dominant market force [under difficult economic circumstances]").

144. *Exxon Corp.*, 437 U.S. at 119-21.

145. *Id.* at 119-20. The statute was an outgrowth of the 1973 gas shortage. *Id.* at 121. Maryland enacted legislation to protect local independent dealers from out-of-state competition. *Id.* A state-commissioned study revealed producer-owned gas stations received favorable treatment during the shortage. *Id.*

146. *Id.* at 125.

147. *Id.*

148. *Id.* at 126.

from competition by producers, saying, “[w]e cannot . . . accept . . . [the] notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”¹⁴⁹ Exxon also argued that states should not be allowed to regulate the retail gasoline market because state laws might expose producers to inconsistent regulations that would seriously interfere with their national marketing efforts.¹⁵⁰ Although the Court rejected the need to apply a national standard to the retail gasoline market, the Court foreshadowed *Pataki*’s holding when it noted that the Commerce Clause “pre-empts an entire field from state regulation . . . when a lack of national uniformity would impede the flow of interstate goods.”¹⁵¹

V. STATE REACTION TO DIRECT SALES BY AUTOMOBILE MANUFACTURERS TO CONSUMERS

A recent trend in motor vehicle sales involves automobile manufacturers entering the retail market by either owning local dealerships or selling directly to consumers via the Internet.¹⁵² As a result, more than forty states have enacted legislation that restricts

149. *Id.* at 127-28. The Court added that although the statute may hurt the public’s wallet by eliminating high-volume sellers, such is an issue to take up with the legislature and not a reason to invalidate the Act on constitutional grounds. *Id.* at 128. The Court stated “[the] argument relates to the wisdom of the statute, not to its burden on commerce.” *Id.*

150. *Id.*

151. The Court explained that Exxon did not complain about the possibility of inconsistent obligations under differing state regulations, but rather feared that the each state would enact divestiture provisions. *Id.*

152. *Automotive Franchise Law: Hearing on S. 1819 Before Senate*, 1999-00 Reg. Sess., at 4 (Cal. 2000) (California Committee Analysis) (stating the reason for a bill regulating conduct between an auto manufacturer and local dealers materialized because a carmaker used a “dealer development” exception” to buy and operate nine of twelve dealerships in the San Fernando Valley); Patrick Danner, *Right of Way Fight; State Law Bans Carmakers From Selling Directly to Public, But Consumers and Manufacturers Want Change*, BROWARD DAILY BUS. REV., Mar. 24, 2000, at A12 (noting that automobile manufacturers’ attempts to join the retail market by buying and operating dealerships has led to recent state efforts to strengthen franchise laws); see also *Auto Dealers Log On*, POST & COURIER (Charleston, S.C.), Jan. 22, 2000, at B7 (commenting that the Internet is an important source in the competition for auto consumers).

automobile manufacturers from selling directly to consumers.¹⁵³
 Although a majority of these laws do not specifically target Internet

153. See ALA. CODE § 8-20-4(3)(s) (Supp. 2000) (“[T]he following acts or conduct shall constitute unfair and deceptive trade practices: . . . For any manufacturer . . . to make direct sales or leases of new motor vehicles to the public in Alabama”); ARIZ. REV. STAT. ANN. § 28-4460 A, B(1)-(2) (West Supp. 2000) (“A factory shall not directly or indirectly compete with . . . its dealers. . . . [Which] includes . . . : (1) The factory having an ownership interest or franchise interest in, or operating or acting in the capacity of, a new . . . or a used motor vehicle dealer (2) The factory selling . . . vehicles . . . to any retail consumer”); ARK. CODE ANN. § 23-112-403(a)(2)(M)(i) (Michie Supp. 2001) (“It shall be unlawful: . . . For a manufacturer . . . [T]o offer to sell or to sell any motor vehicle to a consumer, except through a licensed new motor vehicle dealer holding a franchise for the line make covering such new motor vehicle”); CAL. VEH. CODE § 11713.3(o)(1) (West Supp. 2001) (“It is unlawful and a violation of this code for any manufacturer . . . [t]o compete with a dealer in the same line-make operating under an agreement or franchise from a manufacturer . . . in the relevant market area.”); CONN. GEN. STAT. ANN. § 42-133cc(8) (West 2000) (“No manufacturer . . . shall: . . . Unfairly compete with a dealer in the same line make operating under an agreement or franchise from such manufacturer or distributor in the relevant market area.”); DEL. CODE ANN. tit. 6, § 4913(b), (b)(7) (1999) (“It shall be a violation of this chapter for any manufacturer: . . . To unfairly compete with a new motor vehicle dealer in the same line-make operating under an agreement or franchise from the aforementioned manufacturer in the relevant market area.”); FLA. STAT. ANN. § 320.645(1) (West 2001) (“No licensee . . . [or] manufacturer . . . shall own or operate, either directly or indirectly, a motor vehicle dealership in this state for the sale . . . of motor vehicles which have been or are offered for sale under a franchise agreement with a . . . dealer in this state.”); O.C.G.A. § 10-1-664.1(c) (2000) (“[N]o manufacturer . . . shall offer to sell or sell, directly or indirectly, any new motor vehicle to a consumer in this state, except through a new motor vehicle dealer holding a franchise for the line make covering such new motor vehicle.”); IDAHO CODE § 49-1613(3)(g) (Michie 2000) (“It shall be unlawful for any manufacturer licensed under this chapter to: . . . Unfairly compete with a dealer in the same line make, operating under an agreement or franchise from the aforementioned manufacturer, in the relevant market area.”); 815 ILL. COMP. STAT. ANN. 710/4(f) (West Supp. 2001) (“It is deemed a violation for a manufacturer, . . . directly or indirectly, to own or operate a place of business as a motor vehicle franchisee”); IND. CODE ANN. § 9-23-3-23(3) (Michie Supp. 2000) (“It is an unfair practice for a manufacturer . . . to . . . [e]stablish or acquire wholly or partially a franchisor owned outlet engaged in a substantially identical business to that of the franchisee within the exclusive territory granted the franchisee by the franchise agreement”); IOWA CODE ANN. § 322.3(14) (West Supp. 2001) (“A manufacturer . . . shall not directly or indirectly be licensed as, own an interest in, operate, or control a motor vehicle dealer.”); KAN. STAT. ANN. § 8-2438 (2000) (“[A] . . . manufacturer of vehicles . . . may not directly or indirectly: (1) Own an interest in a new vehicle dealer or dealership; (2) operate a new vehicle dealer or dealership; or (3) act in the capacity of a new vehicle dealer or dealership, or otherwise sell new vehicles at retail.”); KY. REV. STAT. ANN. § 190.070(2)(j) (Michie Supp. 2000) (“It shall be a violation of this section for any manufacturer . . . [t]o own, operate, or control any motor vehicle dealership in the Commonwealth”); LA. REV. STAT. ANN. § 32:1254(N)(6)(l) (West Supp. 2000) (“It shall be a violation of this Chapter: . . . For a manufacturer of motor vehicles: . . . [t]o sell or offer to sell a new or unused motor vehicle directly to a consumer”); ME. REV. STAT. ANN. tit. 10, § 1174(3)(K) (West Supp. 2000) (“It shall be unlawful for any: . . . Manufacturer . . . [t]o compete with a motor vehicle dealer operating under an agreement or franchise from the manufacturer . . . in the relevant market area”); MD. CODE ANN., TRANSP. II § 15-305(f) (1999) (“A manufacturer . . . may not sell a new vehicle to a retail buyer.”); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(k) (West 1997) (“It shall be deemed a violation . . . for a manufacturer . . . To own and operate, either directly or indirectly .

.. a motor vehicle dealership within the relevant market area of a motor vehicle dealer of the same line make"); MICH. COMP. LAWS ANN. § 445.1574(1)(i) (West Supp. 2001) ("A manufacturer . . . shall not do any of the following: . . . Sell any new motor vehicle directly to a retail customer other than through its franchised dealers"); MINN. STAT. ANN. § 80E.13(i) (West Supp. 2001) ("It is unlawful and an unfair practice for a manufacturer . . . to . . . compete with a new motor vehicle dealer in the same line make operating under an agreement or franchise from the same manufacturer"); MONT. CODE ANN. § 61-4-208(3)(a) (2000) ("[A] manufacturer of new motor vehicles . . . may not own or operate, directly or indirectly, a motor vehicle dealership in Montana that is for sale or has been for sale under a franchise agreement with a new motor vehicle dealer in Montana."); NEB. REV. STAT. ANN. § 60-1438.01(2) (Michie Supp. 2000) ("[A] manufacturer . . . shall not directly or indirectly: (a) Own an interest in a franchise (b) Operate or control a franchise (c) Act in the capacity of a franchisee."); NEV. REV. STAT. ANN. § 482.36385(1) (Michie Supp. 1999) ("It is an unfair act or practice for any manufacturer, . . . directly or through any representative, to: [c]ompete with a dealer."); N.H. REV. STAT. ANN. § 357-C:3(III)(k) (Supp. 2000) ("It shall be deemed an unfair method of competition and unfair and deceptive practice for any: . . . Manufacturer . . . to: . . . [c]ompete with a motor vehicle dealer operating under an agreement or franchise from such manufacturer . . . in the relevant market area"); N.J. STAT. ANN. § 56:10-28 (West Supp. 2001) ("It shall be a violation . . . for a motor vehicle franchisor, directly or indirectly, . . . to own or operate a place of business as a motor vehicle franchisee"); N.M. STAT. ANN. § 57-16-5(V) (Michie 2000) ("It is unlawful for any manufacturer . . . to: . . . [b]e licensed as a dealer"); N.C. GEN. STAT. § 20-305.2(a) (1999) ("It is unlawful for any motor vehicle manufacturer . . . to directly or indirectly . . . own any ownership interest in, operate, or control any motor vehicle dealership in this State"); N.D. CENT. CODE § 39-22-24 (Supp. 2001) ("A manufacturer . . . may not own, operate, or control a motor vehicle dealership in this state."); OHIO REV. CODE ANN. § 4517.59(E) (Anderson 1999) ("[N]o franchisor shall: . . . Sell, lease, or rent goods or motor vehicles, . . . in unfair competition with the franchisee"); OKLA. STAT. ANN. tit. 47, § 565(A)(11) (West Supp. 2001) ("The Commission may . . . impose a fine . . . against a manufacturer . . . for any of the following reasons: . . . Being a factory that sells directly or indirectly new motor vehicles . . . to any retail consumer in the state except through a new motor vehicle dealer"); OR. REV. STAT. § 650.130(10) (1999) ("[I]t shall be unlawful for any manufacturer . . . to: . . . Unfairly compete with a dealer in any matters governed by the franchise including, but not limited to, the sale or allocation of vehicles"); 63 PA. CONS. STAT. ANN. § 818.12(c)(1) (West Supp. 2001) ("[A] manufacturer or distributor shall not: (i) own or hold an interest, . . . in a dealer licensed under this act which is engaging in the business of buying, selling or exchanging vehicles; or (ii) operate or control a dealer licensed under this act"); R.I. GEN. LAWS § 31-5.1-4(c)(9) (2000) ("It is a violation . . . for a manufacturer . . . to: . . . Compete with a new motor vehicle dealer operating under an agreement or franchise from the manufacturer in . . . Rhode Island, through the ownership, operation, or control of any . . . dealers in this state or by participation in . . . any . . . dealer in this state."); S.C. CODE ANN. § 56-15-45(D) (Law. Co-op. Supp. 2000) ("[A] manufacturer . . . may not sell, directly or indirectly, a motor vehicle to a consumer in this State, except through a new motor vehicle dealer holding a franchise for the line make that includes the motor vehicle."); S.D. CODIFIED LAWS § 32-6B-80 (Michie Supp. 2001) ("[N]o manufacturer . . . may directly or indirectly: (1) Own an interest in a vehicle dealer or dealership; (2) Operate or control a vehicle dealer or dealership; or (3) Act in the capacity of a vehicle dealer."); TENN. CODE ANN. § 55-17-114(c)(17) (Supp. 2000) ("[T]he commission may deny an application for a license, or revoke or suspend the license of a manufacturer . . . who has: . . . Competed with a dealer in the same line-make operating under an agreement or franchise from a manufacturer . . . in the relevant market area."); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02C(c) (Vernon Supp. 2001) ("[A] manufacturer . . . may not directly or indirectly: (1) own an interest in a dealer or dealership; (2) operate or control a dealer or dealership; or (3) act in the capacity of a dealer."); UTAH CODE ANN. § 13-14-201(1)(u) (Supp. 2001) ("A franchisor may not in this state: . . . directly or

sales, these statutes still impact e-commerce by generally prohibiting manufacturers from selling to consumers.¹⁵⁴

A. Arguments for State Regulation

Supporters of legislation prohibiting direct sales by manufacturers contend that any concerns about these bills' adverse effects upon the Internet are diversions from the real purpose, which is to preclude carmakers "from competing with their own dealers."¹⁵⁵ Many states enacted protective measures in an attempt to reduce "disproportionate market power held by manufacturers."¹⁵⁶ These laws responded to fears that, if allowed to participate in the retail market, manufacturers would hold an unfair advantage over dealers since they control the production, inventory, and distribution of the product and may

indirectly: (i) own an interest in a new motor vehicle dealer or dealership; (ii) operate or control a new motor vehicle dealer or dealership; (iii) act in the capacity of a new motor vehicle dealer"); VT. STAT. ANN. tit. 9, § 4097(8) (1993) ("It shall be a violation of this chapter for any manufacturer . . . to unfairly compete with a new motor vehicle dealer in the same line-make operating under an agreement or franchise from the aforementioned manufacturer in the relevant market area."); VA. CODE ANN. § 46.2-1572 (Michie 1998) ("It shall be unlawful for any motor vehicle manufacturer, . . . to own, operate, or control any motor vehicle dealership in the Commonwealth."); WASH. REV. CODE ANN. § 46.96.185(1)(f) (West 2001) ("[A] manufacturer, . . . shall not: . . . Compete with a new motor vehicle dealer by acting in the capacity of a new motor vehicle dealer"); W. VA. CODE ANN. § 17A-6A-10(2)(i) (Michie 2000) ("A manufacturer may not . . . directly or indirectly: (i) Own an interest in a dealer or dealership; (ii) Operate a dealership; or (iii) Act in the capacity of a new motor vehicle dealer"); WIS. STAT. ANN. § 218.0121(2m) (West 2001) ("A factory [manufacturer] shall not, directly or indirectly . . . operate . . . a motor vehicle dealership in this state."); WYO. STAT. ANN. § 31-16-108(c)(vii) (Michie 2001) ("No manufacturer licensed under this act shall: . . . Unfairly compete with a new vehicle dealer in the same line make and operating under an agreement or franchise from the manufacturer in the relevant market area."); *see also* Danner, *supra* note 152 (noting that thirty-three states have laws prohibiting carmakers from selling directly to consumers).

154. *See* Danner, *supra* note 152; Singleton, *supra* note 3, at 2.

155. Walter C. Jones, *Dealers vs. Manufacturers; Barnes Asked to Pick Which Will Win Edge*, FLA. TIMES-UNION (Jacksonville), Apr. 6, 1999, at B1. The sponsor of Georgia's franchise bill, Representative DuBose Porter, put an expiration date of 2002 on the bill in case the industry changes. *Id.* Representative Porter added, "the issue of Internet sales, I think, is a brilliant way for the manufacturers to say why the bill should not be passed." *Id.*; Stump Martin, *Gov. Barnes Signs Bill to Protect Independent Auto Dealers*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, May 5, 1999, at B1. Governor Barnes said that opponents of Georgia's bill attempted to sway public opinion by disbursing misinformation that the bill would prohibit Internet sales. *Id.* The Governor responded that this allegation was false because the statute allowed Internet sales through a dealer. *Id.*

156. *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905, 908 (W.D. Tex. 2000).

reserve better quality products for themselves.¹⁵⁷ In Texas, legislative hearings culminated in the enactment of a statute that protected local dealers from manufacturer competition.¹⁵⁸ During the hearings, a Texas Automotive Dealers Association representative reiterated the concern about manufacturer competition.¹⁵⁹ He testified that manufacturers have access to inside information on dealership operations because they require franchisees to provide monthly reports itemizing each automobile sold, the purchaser, the price, and other cash flow components.¹⁶⁰ Access to nationwide dealership information would provide manufacturers with a commercial advantage over dealers in determining consumer trends and formulating “car-choice and pricing decisions.”¹⁶¹ Some believe that the manufacturer’s financial staying power coupled with their access to dealership information would eventually eliminate dealers and in the long run hurt consumers.¹⁶²

157. See Bray Response to Summary Judgment, *supra* note 4, at 2; Danner, *supra* note 152.

158. See Bray Response to Summary Judgment, *supra* note 4, at 3-4, 8.

159. *Id.*

160. *Id.* at 8 (arguing that “[Ford] has more information about each of its franchised dealers than any dealer has about his or her fellow dealers or about Ford”); Hal Mattern, *Internet Changing Way Auto Dealers Do Business; Car-Buying Habits Shift*, ARIZ. REPUBLIC, Jan. 30, 2000, at D1. An Arizona dealer, advocating for the state legislature to pass House Bill 2101, argued that dealers cannot compete with manufacturers who control distribution and have dealers’ financial information and customer lists. *Id.*

161. Bray’s Response to Summary Judgment, *supra* note 4, at 8-9.

162. See *id.* Texas Representative Siebert expressed the fear that manufacturer control of dealerships would pose “a very serious threat to [Texas’] regulatory structure . . . , to meaningful competition in the marketplace, and to the livelihood of many Texans.” *Id.* at 3 (quoting *Hearing on H.B. 3093 Before the House Comm. On Transportation*, 1999 Leg., 76th Sess. 10, 15 (Tex. 1999) (statement of Rep. Siebert)); Danner, *supra* note 152. Dealerships argue that competition with manufacturers will run dealers out of business and harm consumers because buyers will be left “with one entity [that] will have no incentive to compete.” *Id.* (alteration in original); Bill Swindell, *Bill Aims to Stop Carmakers from Owning Dealerships*, POST & COURIER (Charleston, S.C.), Apr. 26, 2000, at B3. Senate Majority Leader John Land of the South Carolina legislature said a state bill prohibiting manufacturer sales to consumers would ultimately benefit consumers. *Id.* Land added that the bill was important in keeping rural dealerships afloat, “where they can remain a participant in the community . . .” *Id.*

B. Arguments Against State Regulation

Opponents of state regulation contend that such legislation is anti-competitive and anti-consumer.¹⁶³ Manufacturers argue that states designed these laws to protect local interests and stifle interstate commerce.¹⁶⁴ South Carolina Attorney General Charlie Condon agreed and suggested that his state's effort to enact such legislation served as "pernicious protectionism" that allowed the state to control the marketplace.¹⁶⁵ Condon believed the South Carolina statute was unconstitutional under the Commerce Clause and commented, "certainly the Internet portion of the Bill would undoubtedly be struck down by a court as violating the [C]ommerce [C]lause Other portions of the Bill, particularly the provision prohibiting a manufacturer . . . from operating a dealership, would likely also fall as discriminating against interstate commerce."¹⁶⁶ Ultimately, opponents to franchise laws argue that restricting the marketplace to local dealers harms consumers by limiting their choices and thus raising car prices.¹⁶⁷ Manufacturers claim that states' protectionist attitudes make franchise laws per se invalid.¹⁶⁸ Rather than abolishing transactions between manufacturers and consumers, manufacturers

163. See Ford Summary Judgment, *supra* note 2; Swindell, *supra* note 162, at B3.

164. See Ford Summary Judgment, *supra* note 2.

165. Swindell, *supra* note 162, at B3.

166. Singleton, *supra* note 3, at 8 (quoting Letter from Charles Condon, Attorney General, South Carolina, to the Honorable W. Greg Ryberd, State Senator, District No. 24 (Apr. 5, 2000)); see also S.C. CODE ANN. § 56-15-45(D) (Law. Co-op. Supp. 2000); Mark Steele, *Too Many Take Easy Way*, ARIZ. REPUBLIC, Apr. 30, 2000, at B10. Arizona Representative Mark Steele wrote an editorial suggesting that effort by local dealers to protect themselves from competition by manufacturers led to the state's approval of House Bill 2101. *Id.* Steele added that "[t]his type of deal undermines our traditional belief in free-market economics, open competition and limited government. This year's scorecard of winners and losers . . . shows both consumers and e-commerce advocates in the losers' column." *Id.*

167. See, e.g., Danner, *supra* note 152, at A12; Singleton, *supra* note 3. In 1986, before the popularity of the Internet, Florida conducted a study on franchise laws and recommended that they be repealed. Danner, *supra* note 152, at A12. In a later state report, the Office of Program Policy Analysis and Government Accountability favored a free market rather than government regulation in determining competition. *Id.* The report suggested that nullification of franchise laws would benefit consumers. *Id.* Although Florida did not follow the recommendation, a deputy director with the state's policy office recently proposed that the state revisit its franchise laws because of the growth of e-commerce. *Id.*

168. See Ford Summary Judgment, *supra* note 2, at 15.

suggest less restrictive methods to further the state's asserted interest in consumer protection.¹⁶⁹ Such methods would include statutory deceptive trade practice measures or common-law fraud and misrepresentation.¹⁷⁰

C. Ford Motor Co. v. Texas Department of Transportation

These arguments came to fruition when Ford Motor Company challenged a Texas statute that prohibited automobile manufacturers from competing with dealers for retail sales.¹⁷¹ Ford raised various constitutional objections to the statute, including a challenge under the dormant commerce clause.¹⁷² Ford equated the Internet to "phone lines and the mail . . . [as] an instrumentality of interstate commerce."¹⁷³ Ford argued that the state legislators enacted the law to protect local dealers' economic interests while unduly burdening interstate commerce and out-of-state interests.¹⁷⁴ Ford also invoked *Pataki* and called for federal regulation of the Internet, as state regulations subject users to inconsistent obligations.¹⁷⁵ The state, relying heavily upon *Exxon*, asserted that the law promoted a valid

169. *Id.*

170. *See id.* at 19.

171. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02C (Vernon Supp. 2001); Ford Motor Co. v. Texas Dep't of Transp., 106 F. Supp. 2d 905, 907-08 (W.D. Tex. 2000). The case arose when Texas filed an administrative complaint against Ford stating that it illegally offered pre-owned automobiles to consumers via the Internet without a dealer's license. *Id.* *See generally* Ford Summary Judgment, *supra* note 2. The Web site, www.fordpreowned.com, allowed consumers to buy used cars through dealers voluntarily participating in the program. *Id.* at 5-6. While on the Web site, a consumer could make a deposit to hold a car and then select a participating dealer to whom Ford would deliver the car for inspection and a test-drive. *Id.* at 6-7. If the customer decided to buy the car, he would make an offer to the dealer at the "no haggle" price listed on the Web site. *Id.* at 7-8. Ford would then transfer title to the dealer who passes it on to the consumer. *Id.* at 8.

172. *See generally* Ford Motor Co., 106 F. Supp. 2d at 908. Other constitutional arguments against the statute include the following: equal protection under the Fourteenth Amendment, substantive and procedural due process under the Fourteenth Amendment, and commercial free speech under the First Amendment. *Id.*

173. *Id.*; *see also* Ford Summary Judgment, *supra* note 2, at 13.

174. Ford Motor Co., 106 F. Supp. 2d at 908; Ford Summary Judgment, *supra* note 2, at 14.

175. Ford Summary Judgment, *supra* note 2, at 25-27. Counsel argued that the federal government already recognized the importance of national consolidation of Internet regulation by enacting the Internet Tax Freedom Act, which precluded states from placing new taxes on e-commerce. *Id.* at 25.

state interest to control disproportionate market power held by manufacturers.¹⁷⁶

The court, siding with Texas, held that the statute was “[b]ased on valid legislative findings.”¹⁷⁷ The court tried to neutralize the power struggle between manufacturers and dealers while also furthering the public interest of Texas citizens.¹⁷⁸ The court rejected Ford’s claim that the law favored in-state interests and characterized the statute as a general prohibition that applied to all manufacturers.¹⁷⁹ The court strongly rejected Ford’s interpretation of *Pataki*, commenting that if activities traditionally regulated by states became untouchable when accomplished via the Internet, “then all state regulatory schemes would fall before the mighty altar of the [I]nternet.”¹⁸⁰

CONCLUSION

The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce between the states.¹⁸¹ However, Congress’ silence on a particular matter does not concede to the states unrestrained freedom to enact laws affecting interstate

176. *Ford Motor Co.*, 106 F. Supp. 2d at 908; see also Bray Response to Summary Judgment, *supra* note 4. Texas argued that the state law impartially regulated and showed no favoritism toward local manufacturers because the law prohibited sales by a Dallas General Motors factory. See Motion for Summary Judgment of Defendant Brett Bray at 24-25, *Ford Motor Co. v. Texas Dep’t of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000) (No. A-99-CA-764-SS) [hereinafter Bray Summary Judgment].

177. *Ford Motor Co.*, 106 F. Supp. 2d at 908.

178. *Id.*

179. *Id.* at 909.

180. *Id.*; see also *Santa Fe Natural Tobacco Co., Inc. v. Spitzer*, No. 00-Civ.-7274, 2000 U.S. Dist. LEXIS 21104 (S.D.N.Y. Nov. 13, 2000). In *Santa Fe Natural Tobacco Co.*, the court granted a temporary restraining order against the enforcement of a New York statute, which restricted cigarette sales in New York to in-state merchants, because the statute most likely discriminated against interstate commerce. *Id.* at *1, *14-15. Although the court temporarily prohibited the state from enforcing the Act, it noted that unlike *Pataki*, this law was not directed toward regulating the Internet. *Id.* at *4 n.2. Consequently, the court adopted the majority’s opinion in *Ford Motor Co.* that “although the [I]nternet is a mighty powerful tool, it is not so potent as to demolish every state’s regulatory schemes as they apply to the sale of goods and services” *Id.* (quoting *Ford Motor Co. v. Texas Dep’t of Transp.*, 106 F. Supp. 2d 905, 909 (W.D. Tex. 2000)).

181. U.S. CONST. art. I, § 8, cl. 3.

commerce.¹⁸² In the absence of congressional action, the United States Supreme Court has interpreted within the Commerce Clause a dormant or negative aspect that allows the judiciary to protect national interests against discriminatory and burdensome state laws.¹⁸³ The Commerce Clause's dormant power has surfaced in laws regulating the Internet.¹⁸⁴ With the explosion of e-commerce, automobile manufacturers have jumped online and found the Internet a cost-effective means of contacting and fostering lasting relationships with consumers nationwide.¹⁸⁵ In response, many states have enacted franchise laws that directly or indirectly restrict or prohibit manufacturers' sales of automobiles through the Internet.¹⁸⁶ Since Congress has not specifically addressed this issue, courts will analyze challenged statutes under the dormant commerce clause to determine if such acts are discriminatory and operate for local protectionism.¹⁸⁷

The constitutional determination may depend upon the level of a statute's restriction.¹⁸⁸ A complete ban on Internet sales, as in Texas, aimed solely at protecting local dealers, appears to facially discriminate against interstate commerce.¹⁸⁹ Unlike alcohol sales, over which states do have constitutional authority to control within their borders pursuant to the Twenty-First Amendment, states do not enjoy the same constitutional protection regarding motor vehicle sales regulations.¹⁹⁰ However, under *Exxon*, complete bans of Internet sales

182. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

183. Petragani, *supra* note 13, at 1215, 1240.

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

185. See *Ford Summary Judgment*, *supra* note 2, at 8-9, 21.

186. See statutes cited *supra* note 153.

187. See *supra* Part I. See generally *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000).

188. See *supra* notes 26-29 and accompanying text.

189. See *Singleton*, *supra* note 3, at 7.

190. See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) (stating "[i]f the product were cheese rather than wine, Indiana would not be able . . . to close its borders to imports . . ."); *Bolick v. Roberts*, No. 99-CV755, 2001 U.S. Dist. LEXIS 11118, at *36 (E.D. Va. July 27, 2001) (noting that "[a] state enjoys constitutional protection for no other article of commerce like the authority

that are applied only to manufacturers may survive constitutional challenges.¹⁹¹ States may be able to satisfy the Commerce Clause by structuring statutes regulating Internet automobile sales to include both in-state and out-of-state manufacturers while still allowing Web sales by out-of-state dealers.¹⁹² Such a statute seems to treat in-state and out-of-state manufacturers equally and allows interstate commerce to flow through unrestrained competition between local and out-of-state dealerships.¹⁹³ States like Georgia appear to impose a less burdensome alternative by allowing Internet sales when a manufacturer incorporates a local dealer in the transaction.¹⁹⁴

If courts uphold state regulations restricting Internet sales by automobile manufacturers, will Amazon.com and other online merchants arguably threatening in-state employment be next? Constitutional validation of state regulations governing automobile manufacturers may hamper the Internet's potential by discouraging companies from entering the Internet fray, thus producing a dormant Internet.¹⁹⁵ To avoid the possibility of inconsistent state regulations and ensure consistency in the marketplace, automobile manufacturers should follow *Pataki's* lead and lobby for national Internet regulation.

*Derek E. Empie*¹⁹⁶

that it has under the Twenty-First Amendment to control the regulation of alcoholic beverages within its borders").

191. See generally *Ford Motor Co. v. Texas Dep't of Transp.*, 106 F. Supp. 2d 905 (W.D. Tex. 2000).

192. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); *Ford Motor Co.*, 106 F. Supp. 2d at 909; see also Singleton, *supra* note 3 (noting that sales by traditional dealers to consumers via the Internet are legal and that few state franchise laws directly discriminate against out-of-state dealers).

193. See *supra* Part IV.B.

194. See O.C.G.A. § 10-1-664.1(c) (2000).

195. See *supra* Part II.

196. The author expresses his deep gratitude and love to his wife Amber for her patience and support throughout this process. He also thanks his family for their love and support. The author also thanks Professor Neil Kinkopf for assistance in selecting this topic.