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## Washington Supreme Court Upholds State Anti-Spamming Law

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CONSTITUTIONAL LAW — DORMANT COMMERCE CLAUSE — WASHINGTON SUPREME COURT UPHOLDS STATE ANTI-SPAMMING LAW. — *Washington v. Heckel*, 24 P.3d 404 (Wash. 2001), cert. denied, 70 U.S.L.W. 3193 (U.S. Oct. 29, 2001) (No. 01-469).

The Internet has introduced Americans to a host of new terms<sup>1</sup> and given new meanings to some old words.<sup>2</sup> Originally a lunchmeat, the lexicographers of cyberspace have adopted the word “spam” to refer to unwanted commercial email messages.<sup>3</sup> In 1999, Washington state adopted legislation designed to regulate spam,<sup>4</sup> joining seventeen other states that have passed similar laws.<sup>5</sup> In *State v. Heckel*,<sup>6</sup> the Washington Supreme Court held that Washington’s law did not violate the dormant commerce clause.<sup>7</sup> The court’s analysis sidestepped the major question presented by the case and allowed the court to avoid weighing the cost of potentially unconstitutional legislation by simply attaching a negative label to a burdened activity. Other courts grappling with dormant commerce clause challenges to state Internet regulations should not follow the *Heckel* court’s analysis.

The Washington law makes it illegal to send two categories of messages from an email account within the state or to “an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident.”<sup>8</sup> The first is a message that masks the identity of the sender.<sup>9</sup> The second is a message that “[c]ontains false or misleading information in the subject line.”<sup>10</sup> Jason Heckel, an Oregon resident who sent 100,000 to 1,000,000 spam messages each week sell-

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<sup>1</sup> Email, download, website, hacker, domain name, gif, perl, and web address, to name just a few.

<sup>2</sup> Flame, browse, cookie, buffer, and virus, for example.

<sup>3</sup> See *Washington v. Heckel*, 24 P.3d 404, 406 n.1 (Wash. 2001) (discussing the history of the term “spam”).

<sup>4</sup> See WASH. REV. CODE §§ 19.190.005–19.190.030 (1999).

<sup>5</sup> See <http://www.spamlaws.com/state/index.html> (last visited Oct. 26, 2001).

<sup>6</sup> 24 P.3d 404 (Wash. 2001), cert. denied, 70 U.S.L.W. 3193 (U.S. Oct. 29, 2001) (No. 01-469).

<sup>7</sup> *Id.* at 406. The dormant commerce clause refers to a body of judge-made law that has been inferred from the “great silences of the Constitution.” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949) (Jackson, J.). Since its 1852 decision in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), the Supreme Court has held that certain kinds of state regulation violate the Constitution because they impinge on the congressional prerogative to regulate interstate commerce. The Court has generally struck down state laws that on their face discriminate against out of state business. In addition, the Court has held that the negative effects of nondiscriminatory state regulation on commerce occurring outside the state may sometimes violate the constitution. See generally 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 1029–43 (3d ed. 2000).

<sup>8</sup> WASH. REV. CODE. § 19.190.020(1). Violations of the prohibitions are made a violation of the Washington Consumer Protection Act. *Id.* § 19.190.030. Under the act, a violator can be sued for treble damages in a private suit, *id.* § 19.86.090, and be fined up to \$200,000, *id.* § 19.86.140.

<sup>9</sup> *Id.* §§ 19.190.020(1)(a), 19.190.030(1)(a).

<sup>10</sup> *Id.* §§ 19.190.020(1)(b), 19.190.030(1)(b).

ing an online booklet entitled "How to Profit from the Internet," became the first person prosecuted under the law.<sup>11</sup> Generally, email messages contain a "return path" identifying the sender, but Heckel altered this information. Some Washington recipients of Heckel's messages complained to the Washington Attorney General's office.<sup>12</sup> After Heckel ignored an initial request by the State Attorney General's office to stop, the State filed suit, alleging violations of its anti-spamming law.<sup>13</sup>

Heckel moved for summary judgment, arguing that the Washington anti-spamming law violated the dormant commerce clause, and the state cross-filed for summary judgment.<sup>14</sup> On March 10, 2000, Superior Court Judge Palmer issued a terse, handwritten,<sup>15</sup> one-page opinion.<sup>16</sup> He concluded that "the statute in question here violates the Federal Interstate Commerce Clause of the united states [sic] Constitution" because it "is unduly restrictive and burdensome."<sup>17</sup> The state then petitioned the Washington Supreme Court for direct review.<sup>18</sup>

Writing for a unanimous court, Justice Owen rejected the lower court's decision and held that the law did not run afoul of the dormant commerce clause.<sup>19</sup> The court took a two-step approach to its constitutional analysis, looking first to whether the statute discriminated on its face against non-Washington residents. Finding that it did not,<sup>20</sup>

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<sup>11</sup> *Heckel*, 24 P.3d at 406; see also *Spamming and Spoofing: Washington v. Jason Heckel d/b/a Natural Instincts*, at <http://www.netlitigation.com/netlitigation/cases/heckelcase.htm> (last visited Dec. 2, 2001).

<sup>12</sup> See *Heckel*, 24 P.3d at 406-07.

<sup>13</sup> *Id.* at 407. The state also contended that Heckel violated the Consumer Protection Act by failing to provide a usable return email address. *Id.*; see also WASH. REV. CODE § 19.86.020 (prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce"). Heckel's practice was to open anonymous email accounts with free services such as Juno or Hotmail. He would then send spam messages from these accounts. When the accounts became deluged with angry responses, Heckel would simply open a new account. See *Heckel*, 24 P.3d at 407-08. This practice is not specifically forbidden by the state anti-spamming law, but the Attorney General argued that it constituted a deceptive practice in violation of the Consumer Protection Act. See *id.* at 408. The lower court's opinion addressed neither the constitutionality nor the merits of this theory, and the Washington Supreme Court did not discuss it. See *State v. Heckel*, No. 98-2-25480-7 SEA, 2000 WL 979720, at \*1 (Wash. Super. Mar. 10, 2000); see also *Heckel*, 24 P.3d at 413.

<sup>14</sup> *Heckel*, 24 P.3d at 408.

<sup>15</sup> Max P. Ochoa, *Legislative Note: Recent State Laws Regulating Unsolicited Electronic Mail*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 459, 469 (2000).

<sup>16</sup> *Heckel*, 2000 WL 979720.

<sup>17</sup> *Id.* at \*1.

<sup>18</sup> *Heckel*, 24 P.3d at 406.

<sup>19</sup> *Id.* at 413.

<sup>20</sup> *Id.* at 409 ("The Act applies evenhandedly to in-state and out-of-state spammers: 'No person' may transmit the proscribed commercial e-mail messages . . . . Thus, just as the statute applied to Heckel, an Oregon resident, it is enforceable against a Washington business engaging in the same practices." (citation omitted)).

the court applied the balancing analysis required under *Pike v. Bruce Church, Inc.*,<sup>21</sup> weighing the incidental burdens of the statute on interstate commerce against the statute's local benefits.<sup>22</sup>

According to the court, Washington's statute protected three local groups: internet service providers (ISPs),<sup>23</sup> owners of allegedly spoofed domain names, and email users.<sup>24</sup> The court concluded that a mass of deceptive spam messages could clog the ISPs' servers, reducing the quality of service for other customers.<sup>25</sup> Disgruntled recipients may respond to deceptively packaged spam messages,<sup>26</sup> deluging the hapless owner of the misappropriated domain name with thousands of messages.<sup>27</sup> Finally, deceptive spam inconveniences recipients.<sup>28</sup>

Having concluded that the law protected legitimate local interests, the court next analyzed the burdens imposed on interstate commerce. According to the court, "the only burden the Act places on spammers is the requirement of truthfulness, a requirement that does not burden commerce but actually facilitates it by eliminating fraud and deception."<sup>29</sup> The court went on to fault the lower court for looking to the costs that the act imposed on noncompliance, rather than to the costs imposed by compliance with the statute.<sup>30</sup> "This focus on the burden

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<sup>21</sup> 397 U.S. 137 (1970).

<sup>22</sup> *Heckel*, 24 P.3d at 409. *Pike* held that "[w]here the statute regulates evenhandedly 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." *Pike*, 397 U.S. at 142.

<sup>23</sup> An ISP allows individuals to connect to the Internet and receive email messages. The ISP has special computers, known as "servers," which are connected to the network of communication lines that make up the Internet. Individuals can then use their personal computers to connect to these servers and, via the servers, to the Internet as a whole. In addition, the servers often provide space to store email messages until patrons can download them to their personal computers.

<sup>24</sup> *Heckel*, 24 P.3d at 409.

<sup>25</sup> *Id.* In addition, the court noted that "[o]perational costs . . . increase as ISPs hire more customer service representatives to field spam complaints and more system administrators to detect accounts being used to send spam." *Id.* at 410.

<sup>26</sup> Each email address contains a domain name indicating where the message originated. Thus, the email address "lhand@lawreview.org" has the domain name "lawreview.org," showing that this email account is housed on the law review computer server. It is possible electronically to alter the apparent domain name of an email address so that a message originating from one computer appears to be coming from a different computer. The Washington law forbids this practice. See WASH. REV. CODE § 19.190.020(1)(a) (1999).

<sup>27</sup> *Heckel*, 24 P.3d at 410 (relating the story of a domain owner whose computer was shut down for three days by replies to deceptive spam).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 411 (citations omitted).

<sup>30</sup> *Id.* By "noncompliance" the court referred to the costs of continuing to send legal but deceptive spam to non-Washington residents, which necessitates the difficult task of identifying which email addresses belong to Washington residents. See *id.* Note that this is not really non-compliance because sending deceptive email messages to non-Washington residents does not violate the Washington statute. By "compliance" the court meant sending only nondeceptive spam messages to both Washington and non-Washington residents. See *id.* This is really overcompli-

of noncompliance is contrary to the approach taken in the *Pike* balancing test, where the United States Supreme Court assessed the cost of compliance with the challenged statute.<sup>31</sup> The court rejected Heckel's claim that because other states had slightly different anti-spamming provisions, Washington was subjecting him to inconsistent and contradictory laws, noting that "the inquiry under the dormant commerce clause is not whether the states have enacted different anti-spam statutes but whether those differences create compliance costs that are clearly excessive in relation to the putative local benefits."<sup>32</sup>

In *Heckel*, the court neglected the difficult issues posed by the Washington anti-spamming law by failing to recognize the full costs imposed by the statute. The court's conclusory characterization of Heckel's activities as "deceptive" and "fraudulent" masked deeper complexity concerning spam and the dormant commerce clause. The difficulty of the "weighing" required by current doctrine<sup>33</sup> makes it all the more important for courts to adopt a coherent framework within which to carry out their analysis. The *Heckel* court drew on recent scholarship to adopt such a framework but ultimately failed to appreciate the full contours of the problem posed by state Internet regulations.

In an article relied on by the *Heckel* court, Professors Jack L. Goldsmith and Alan O. Sykes offer a way of conceptualizing the *Pike* balancing test.<sup>34</sup> They argue that markets oversupply activities that do

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ance, since it includes messages that conform to the statute even when the statute does not apply, that is, when sending messages to non-Washington residents.

<sup>31</sup> *Id.* at 411 (citations omitted).

<sup>32</sup> *Id.* at 412. Heckel also claimed that the law could subject him to liability for activity occurring completely outside the state of Washington. *Id.* He offered the hypothetical of a Washington resident who downloaded her email while in another state, arguing that applying the statute in such a case would impose liability for completely extraterritorial conduct. *Id.* The court avoided this issue by noting that "the hypothetical mistakenly presumes that the Act must be construed to apply to Washington residents when they are out of the state, a construction that creates a jurisdictional question not at issue in this case." *Id.*

<sup>33</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court held in *Pike* that, "[w]here the statute regulates evenhandedly 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." *Pike*, 397 U.S. at 142. Since *Pike*, the Supreme Court has struggled to conceptualize what this balancing requires. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (upholding a law designed to discourage corporate takeovers); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (striking down a law designed to discourage corporate takeovers). Justice Scalia has criticized *Pike*, noting that while the Court refers to its adjudication as balancing, "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy." *Benedix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting).

<sup>34</sup> See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001); see also *Heckel*, 24 P.3d at 411.

not fully internalize their social costs.<sup>35</sup> Government can solve this problem by imposing a "tax"<sup>36</sup> on the activity that forces those engaging in it to internalize its social costs.<sup>37</sup> When these externalities cross state lines, however, state governments may have an incentive to over-regulate externality-producing behavior in other states because their own citizens are less likely to bear the increased costs.<sup>38</sup> When states impose a "tax" that exceeds the activity's social costs there is a net loss to society.<sup>39</sup> The professors claim dormant commerce clause balancing should be understood in terms of policing these cross-border "taxes" to ensure that they do not exceed the social costs of the activity they aim to curb.<sup>40</sup> Their article explicitly discusses the case,<sup>41</sup> and the Washington Supreme Court borrowed much of its argument from the article.<sup>42</sup> According to Goldsmith and Sykes, the Washington law imposes virtually no costs because "[c]ompliance with the various antis spam statutes is easy compared to noncompliance, which requires the spammer to incur the costs of forging, re-mailing, and the like."<sup>43</sup>

While the conceptual framework posed by Goldsmith and Sykes is promising, their neat solution is problematic for two reasons. First, its definition of costs is too simple. The only cost considered is the actual effort involved in complying with the statute; however, any realistic analysis must also consider the opportunity costs of foregoing *all* deceptive email messages, not simply those prohibited by Washington law. This is because, given the current state of technology, it is virtually impossible to determine the geographic location of any particular email address.<sup>44</sup> In the face of the Washington law, nonresident spammers must either comply with Washington's requirements in all of the spam that they send (and thus forgo legal but deceptive spamming of non-Washingtonians) or run the risk of being brought

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<sup>35</sup> Goldsmith & Sykes, *supra* note 34, at 798–99. See generally ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 624–26 (3d ed. 1995) (discussing the market inefficiencies resulting from negative externalities).

<sup>36</sup> In this context "tax" refers to so-called Pigouvian taxes, which are not revenue raising devices but rather government-imposed costs on socially costly activity. There is no reason that a Pigouvian tax must take the form of an actual tax. Fines, transfers (that is, tort judgments), and other mechanisms that impose increased costs could all serve the same function. See Goldsmith & Sykes, *supra* note 34, at 800.

<sup>37</sup> *Id.* at 800.

<sup>38</sup> *Id.* at 804–05.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 793–94, 818–19. The article appeared after the lower court's decision, but before its appeal.

<sup>42</sup> See *Heckel*, 24 P.3d at 411.

<sup>43</sup> Goldsmith & Sykes, *supra* note 34, at 819.

<sup>44</sup> Some software programs and internet services purport to identify the geographic location of particular domain names using a variety of techniques. However, such techniques are costly and inaccurate at best. See Goldsmith & Sykes, *supra* note 34, at 810–12.

into Washington's courts. The *Heckel* court implies that these costs can be ignored because the lost profits result from "deception and fraud."<sup>45</sup> Yet the fact that deceptive email is an unseemly way to make a living does not imply that one can ignore the costs of discontinuing it. To do so substitutes name-calling for analysis.

The second problem is that the Goldsmith and Sykes analysis assumes that all jurisdictions share Washington's view of deceptive spam. Making a living off of deceptive spam imposes externalities on others. Yet states have long made the decision to favor businesses by allowing them to impose such externalities.<sup>46</sup> Most jurisdictions in the United States have not adopted anti-spamming laws, and such inaction may have "been none the less a choice [by those states]."<sup>47</sup> To the extent that this inactivity reflects a less negative view of deceptive spamming,<sup>48</sup> imposing a "tax" on such messages will result in a decrease in net welfare.

The court could still have concluded that the savings to ISPs and email users were greater than the full costs imposed on spammers like Heckel. Likewise, it could have concluded that, even in the absence of benefits to out-of-state residents who are not adverse to deceptive spam, the benefits realized by Washington's spam-hating residents were so great as to result in a net benefit to society. While there is something surreal about the idea that courts have the resources to justify such empirical claims,<sup>49</sup> these claims seem potentially reasonable in light of common experience.

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<sup>45</sup> See *Heckel*, 24 P.3d at 819. The deceptive messages are not fraudulent in any meaningful legal sense. The purpose of deceptive spam is to advertise a product. Ultimately, Heckel's profits came from voluntary and fully informed transactions. His deceptive messages simply tricked people into opening them, thus defrauding people out of at most a few seconds of their time. Cf. RESTATEMENT (SECOND) OF TORTS §§ 221, 310 (1965) (discussing tortious frauds). Any costs his activity imposed on ISPs would be legally conceptualized as a nuisance or perhaps as a trespass. Cf. *eBay v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) (suggesting that online behavior that threatened to crash a computer server constituted trespass to chattels).

<sup>46</sup> Cf. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-108 (1977) (arguing that nineteenth-century courts provided wholesale subsidies to nascent industries by allowing them to externalize costs through loosened tort rules). For example, some jurisdictions forbid soliciting people in their cars because it inconveniences drivers and imposes on their privacy. Other jurisdictions allow such business techniques. See, e.g., FLA. STAT. ch. 316.2055 (2001) (prohibiting the throwing of advertising material into any motor vehicle on a public roadway).

<sup>47</sup> *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (suggesting that state inaction may be the result of a political or policy choice).

<sup>48</sup> Admittedly, this may be a less than realistic assumption. On the other hand, the alternative is for courts to divine what the people of another jurisdiction "really" think about a given issue. Given this alternative, the assumption — however unrealistic in particular cases — seems justified.

<sup>49</sup> Cf. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (arguing that "the morass of our negative Commerce Clause case law only serves to highlight the need to abandon that failed jurisprudence"). Justices on both ends of the

However, reaching the “right” result in this case does not excuse the flaws in the court’s reasoning. The *Heckel* court’s approach to the *Pike* test is dangerous because it avoids weighing the costs of potentially unconstitutional legislation by simply attaching a negative label to a burdened activity. Far from providing the kind of efficiency promised by the Goldsmith and Sykes economic model of the dormant commerce clause, such analysis would potentially allow states to avoid proper scrutiny for their laws. Other courts grappling with state Internet regulations and the dormant commerce clause would do well to engage in a more complete consideration of costs, rather than using pejorative labels as a conceptual shortcut.

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ideological spectrum have expressed doubt about the ability of the Court to answer the questions posed by the *Pike* test. Justice Scalia has suggested that “[w]hile it has become standard practice . . . to consider . . . whether the burden on commerce imposed by a state statute ‘is clearly excessive in relation to the putative local benefits,’ such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., dissenting) (citations omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Writing in the same vein, Justice Stevens has argued that “speculation about . . . real world economic effects . . . is beyond our institutional competence.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 315 (1997) (Stevens, J., dissenting). Looking at the complex empirical questions involved in a proper analysis of the costs and benefits of the law at issue in *Heckel*, the position of these jurists has a great deal of appeal. Indeed, Goldsmith and Sykes express skepticism on this point, arguing that “there is a growing consensus that courts . . . are ill-suited to make the many difficult value judgments that the balancing test requires. . . . These concerns have particular valence in the Internet context . . . [where] courts have failed properly to identify and weigh the costs and benefits of state Internet regulations.” Goldsmith & Sykes, *supra* note 34, at 820.