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## NOTE

# SB 568: Does California’s Online Eraser Button Protect the Privacy of Minors?

*James Lee\**

*In late 2013, the California legislature passed SB 568 to increase privacy protections for minors on the Internet. Dubbed the “online eraser button,” this legislation provides minors in California with a legally protected right to permanently remove personally posted content from websites and other online services. Proponents of the legislation suggest that this would protect the academic and professional reputation of minors in California.*

*Under the dormant Commerce Clause of the U.S. Constitution, courts prohibit states from passing legislation that improperly burdens or discriminates against interstate commerce. This Note argues that the online eraser violates the dormant Commerce Clause. The online eraser would impose significant burdens on websites and other online services hosted outside of California, while providing minimal benefits to minors in California. This Note concludes by briefly discussing alternative methods to protect the privacy of minors on the Internet.*

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## INTRODUCTION

According to a 2013 report, eight in ten teens who use the Internet use some kind of social media.<sup>1</sup> These teens are increasingly sharing personal information, such as photos, email addresses, and cell phone numbers, on these social media websites.<sup>2</sup> Further, 59% of teens have deleted or edited something that they posted in the past, while 19% of teens report they have posted updates, comments, photos, or videos that they later regretted sharing.<sup>3</sup>

These statistics come to life with a quick look at social media sites such as Facebook and Twitter. Internet users often inundate these sites with pictures and posts depicting lewd, risky, or even illegal activities, sometimes accompanied by the expression, “YOLO.”<sup>4</sup> Minors may not understand the risks of posting such embarrassing or damaging personal information until it is too late.<sup>5</sup>

In response, California recently passed legislation that aims to protect minors from content that may damage their reputation by imposing

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<sup>1</sup> MARY MADDEN ET AL., PEW RESEARCH CTR., TEENS, SOCIAL MEDIA, AND PRIVACY 19 (2013), available at <http://www.lateledipenelope.it/public/52dff2e35b812.pdf>. See generally *Social Media Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Nov. 9, 2013) (stating that social media is a form of electronic communication typically through websites, where users share information, ideas, personal messages, and other content with other users).

<sup>2</sup> MADDEN ET AL., *supra* note 1, at 30.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> “YOLO” is a popular term among teenagers and is an acronym of the phrase “you only live once.” It embodies a sentiment similar to the phrase “carpe diem,” encouraging adventurous activities with little regard for their risks or consequences. See Maura Judkis, #YOLO: The Newest Acronym You’ll Love to Hate, WASH. POST STYLE BLOG (Apr. 6, 2012, 2:23 PM), [http://www.washingtonpost.com/blogs/arts-post/post/yolo-the-newest-abbreviation-youll-love-to-hate/2012/04/06/gIQA3QE2zS\\_blog.html](http://www.washingtonpost.com/blogs/arts-post/post/yolo-the-newest-abbreviation-youll-love-to-hate/2012/04/06/gIQA3QE2zS_blog.html); Sydney Lupkin, Young Adults Tweet #YOLO When They Don’t Study, Get Drunk or Drive Too Fast, ABC NEWS (Dec. 21, 2012), <http://abcnews.go.com/Health/young-adults-tweet-yolo-live-engaged-reckless-behavior/story?id=18027279>. See generally Megan Walsh, YOLO: The Evolution of the Acronym, HUFFINGTON POST: THE BLACK SHEEP ONLINE BLOG (May 17, 2012, 3:31 PM), [http://www.huffingtonpost.com/the-black-sheep-online/yolo-the-meaning-and-evolution\\_b\\_1524721.html](http://www.huffingtonpost.com/the-black-sheep-online/yolo-the-meaning-and-evolution_b_1524721.html) (describing the development of the YOLO trend).

<sup>5</sup> See John Walsh, Nat’l Ctr. for Missing & Exploited Children, *New Research Reveals Risky Internet Behavior Among Teens, but There Are Encouraging Signs of Improvement with Increased Involvement of Parents and Guardians*, COX COMM’NS (May 10, 2007), [http://www.cox.com/wcm/en/aboutus/datasheet/takecharge/archives/2007-risky-behavior.pdf?campcode=takecharge-archive-link\\_2007-risky-behavior\\_0511](http://www.cox.com/wcm/en/aboutus/datasheet/takecharge/archives/2007-risky-behavior.pdf?campcode=takecharge-archive-link_2007-risky-behavior_0511); see also Newsdesk, *California “Eraser Law” Lets Minors Remove Embarrassing Online Content*, PBS: THE RUNDOWN BLOG (Sept. 25, 2013, 5:21 PM), <http://www.pbs.org/newshour/rundown/2013/09/california-eraser-law-lets-minors-remove-embarrassing-online-content.html>.

regulations on all websites that accommodate minors.<sup>6</sup> On September 23, 2013, California Governor Jerry Brown signed SB 568, a bill that increases privacy protections for California minors on the Internet.<sup>7</sup> SB 568 contains two major sets of provisions.<sup>8</sup> First, the bill prohibits websites and other online services from advertising products that minors cannot legally purchase, such as alcohol, tobacco, or firearms.<sup>9</sup> Second, the bill gives minors in California a legally protected right to permanently remove personally posted content from websites and other online services.<sup>10</sup> This means that a website may be required to make certain content invisible to other online users.<sup>11</sup> These websites must also provide minors with notice and clear instructions on how to remove this personally posted content.<sup>12</sup> California designed the law to protect minors who post inappropriate personal pictures or messages due to a youthful lack of judgment.<sup>13</sup> This set of provisions has been aptly described as the online “eraser button.”<sup>14</sup>

Effective January 1, 2015,<sup>15</sup> the online eraser button is the first of its kind, garnering both support and criticism from various commentators.<sup>16</sup> James P. Steyer, CEO of Common Sense Media, a child advocacy group, has lauded the legislation as a milestone in Internet privacy.<sup>17</sup> He argues that minors do not fully understand the

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<sup>6</sup> See generally S.B. 568, 2013 Leg., 2013–14 Sess. (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568) (requiring websites to take certain measures to protect the privacy of minors).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* § 22580. A discussion of these provisions is beyond the scope of this article.

<sup>10</sup> See *id.* § 22581.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Katy Steinmetz, *Lucky Kids: California Gives Minors the Right to Delete Things They Put Online*, TIME (Sept. 23, 2013), <http://techland.time.com/2013/09/23/lucky-kids-california-gives-minors-the-right-to-delete-things-they-put-online/>.

<sup>14</sup> See, e.g., Kathleen Miles, *Teens Get Online ‘Eraser Button’ with New California Law*, HUFFINGTON POST (Sept. 24, 2013, 12:54 AM), [http://www.huffingtonpost.com/2013/09/24/teens-online-eraser-button-california\\_n\\_3976808.html](http://www.huffingtonpost.com/2013/09/24/teens-online-eraser-button-california_n_3976808.html) (noting that the “eraser button” will require websites to allow minors to delete post, photos, and comments); Steinmetz, *supra* note 13 (describing the “eraser button” the bill is designed to give minors).

<sup>15</sup> CAL. BUS. & PROF. CODE § 22581 (West 2015).

<sup>16</sup> See Erika Aguilar, *UPDATE: Gov. Jerry Brown Signs Bill Increasing Online Privacy for Minors in California*, S. CAL. PUB. RADIO (Sept. 23, 2013, 3:01 PM), <http://www.scpr.org/news/2013/09/23/39426/california-teenagers-could-get-an-online-eraser-bu/>.

<sup>17</sup> Somini Sengupta, *Sharing, with a Safety Net*, N.Y. TIMES (Sept. 19, 2013), <http://>

ramifications of their online posts.<sup>18</sup> However, the legislation also faces criticism.<sup>19</sup> Professor Eric Goldman from Santa Clara University School of Law has questioned the efficacy of the bill.<sup>20</sup> He observed that the bill only allows the deletion of personally posted content and ignores the greater problems of content posted or reposted by third parties.<sup>21</sup>

Beyond public debate over the merits of the online eraser button, SB 568 faces even greater challenges when examined under the United States Constitution.<sup>22</sup> Under the dormant Commerce Clause, courts prohibit states from passing legislation that improperly burdens or discriminates against interstate commerce.<sup>23</sup> A statute is deemed to have discriminated against interstate commerce if it provides for differential treatment of in-state and out-of-state economic interests.<sup>24</sup> Since the online eraser button is not limited to websites based in California, websites based in other states that service California users would be forced to follow these provisions or otherwise face liability. Accordingly, the provisions likely discriminate against these websites.

This Note argues that the online eraser button is unconstitutional under the dormant Commerce Clause of the United States Constitution and suggests alternative means of promoting the same interests. Part I discusses the history of state regulation of the Internet and its evaluation

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[www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html](http://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html).

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., Damon Brown, *Is California's Social Media 'Eraser' Law a Losing Battle?*, AL JAZEERA AM. (Nov. 8, 2013, 5:00 AM), <http://america.aljazeera.com/articles/2013/11/8/is-california-s-socialmediaeraserlawalosingbattle.html> (raising questions and concerns about the new law); Eric Goldman, *California's New 'Online Eraser' Law Should Be Erased*, FORBES (Sept. 24, 2013, 1:35 PM), <http://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/> (stating that the dormant Commerce Clause, an illusion of control, and possible collateral damage are all problems with the new law); Katy Waldman, *California's Internet Eraser Law: Nice Idea, but It Won't Work*, SLATE XX FACTOR BLOG (Sept. 25, 2013, 3:07 PM), [http://www.slate.com/blogs/xx\\_factor/2013/09/25/sb\\_568\\_california\\_digital\\_eraser\\_law\\_for\\_minors\\_is\\_unlikely\\_to\\_work.html](http://www.slate.com/blogs/xx_factor/2013/09/25/sb_568_california_digital_eraser_law_for_minors_is_unlikely_to_work.html) (arguing that the eraser law is “undercooked and unworkable”).

<sup>20</sup> See Goldman, *supra* note 19.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (holding that North Dakota had no right to impose liability on an out-of-state firm for the collection of use tax); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967) (holding that Illinois had no right to impose liability on an out-of-state firm for the collection of use tax), *overruled on other grounds by Quill Corp.*, 504 U.S. 298; *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (striking down an Illinois statute that required the use of certain type of fenders on trucks and trailers).

<sup>24</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970).

under the dormant Commerce Clause.<sup>25</sup> Part II discusses both the practical and constitutional limitations of enforcing the online eraser button and examines the broader difficulties of enacting constitutional Internet regulations in the United States.<sup>26</sup> Part III introduces several alternative solutions, including a federal approach to the online eraser button akin to the European Union's "right to be forgotten" and a more fundamental approach of educating minors about Internet privacy.<sup>27</sup>

## I. BACKGROUND — DORMANT COMMERCE CLAUSE

This Part discusses the background of the dormant Commerce Clause. First, it discusses the origins of the dormant Commerce Clause. Second, it presents the *Pike* balancing test, which is the main rule courts utilize to evaluate dormant Commerce Clause challenges. Third, it discusses additional concerns raised in dormant Commerce Clause cases. Finally, it discusses cases that examine the Internet regulation under the dormant Commerce Clause.

### A. Dormant Commerce Clause Jurisprudence

The Commerce Clause of the United States Constitution gives Congress the power to regulate commerce with foreign nations and among the several states.<sup>28</sup> The United States Supreme Court has held that the Commerce Clause also contains a dormant aspect that limits the states' power to legislate.<sup>29</sup> This dormant aspect, known as the dormant Commerce Clause, prohibits states from enacting any law that discriminates against or unduly burdens interstate commerce.<sup>30</sup> Courts impose this restriction even if Congress has not specifically regulated an area of interstate commerce.<sup>31</sup>

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<sup>25</sup> See *infra* Part I.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> See *infra* Part III.

<sup>28</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>29</sup> See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); *Pike*, 397 U.S. at 142; Michelle Armond, Note, *Cyberlaw: Regulating Conduct on the Internet: State Internet Regulation and the Dormant Commerce Clause*, 17 BERKELEY TECH. L.J. 379, 380 (2002).

<sup>30</sup> See *Gen. Motors Corp.*, 519 U.S. at 287; *Brown-Forman Distillers Corp.*, 476 U.S. at 578-79; *Pike*, 397 U.S. at 142; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 788 (2001).

<sup>31</sup> See *Gen. Motors Corp.*, 519 U.S. at 279 (noting that Congress did not regulate gas prices); Goldsmith & Sykes, *supra* note 30, at 788.

Dormant Commerce Clause jurisprudence has distinguished between state regulations that facially discriminate against interstate commerce and those that, while facially neutral, impose a burden upon interstate commerce.<sup>32</sup> A state law facially discriminates against interstate commerce when it explicitly provides for differential treatment of in-state and out-of-state economic interests.<sup>33</sup> Courts subject these discriminatory laws to the strictest level of scrutiny and apply a per se rule of invalidity.<sup>34</sup> The state can only overcome this presumption by showing that the state had no other means to advance the legitimate local purpose of the law.<sup>35</sup> State laws that do not facially discriminate against interstate commerce may still violate the dormant Commerce Clause if they unduly burden interstate commerce.<sup>36</sup> The Supreme Court articulated the primary test to determine whether a neutral state statute violates the dormant Commerce Clause in *Pike v. Bruce Church, Inc.*<sup>37</sup>

The *Pike* test dictates that a state law that serves a legitimate local public interest will be upheld, unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.<sup>38</sup> The Court held that it would assess these factors as part of a balancing test.<sup>39</sup> The Court also considered both the nature of the local interest involved and whether the state could promote the local interest with a lesser impact on interstate activities.<sup>40</sup>

#### B. Additional Dormant Commerce Clause Considerations

Since *Pike*, the Court has taken into account additional considerations when determining whether a state statute violates the dormant Commerce Clause.<sup>41</sup> In *Healy v. Beer Institution, Inc.*, the Court explained that the dormant Commerce Clause precludes a state law that has an extraterritorial reach.<sup>42</sup> State laws that have an extraterritorial reach apply to commerce that occurs wholly outside of the state's

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<sup>32</sup> See *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

<sup>33</sup> See *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>37</sup> See *Pike*, 397 U.S. at 142.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *Healy*, 491 U.S. at 336.

<sup>42</sup> *Id.*

borders.<sup>43</sup> According to the Court, these statutes exceed the limit on the state's authority to legislate interstate commerce.<sup>44</sup> Further, they are invalid regardless of whether the legislature intended the statute's extraterritorial reach.<sup>45</sup> Therefore, the key inquiry under the extraterritorial approach is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.<sup>46</sup>

Further, the Court has invalidated state statutes that potentially subject an area of interstate commerce to inconsistent state regulation.<sup>47</sup> According to the Court, this inconsistent legislation may arise from the projection of one state's regulatory regime into the jurisdiction of another state.<sup>48</sup> This principle does not require absolute uniformity among state laws.<sup>49</sup> However, the Court has recognized that certain types of commerce demand consistent treatment under national regulation, such as commerce involving railroads and highway traffic.<sup>50</sup> Therefore, the Court has emphasized it will not impose inconsistent state regulation on an area that inherently requires national regulation.<sup>51</sup>

Both the extraterritorial effects and inconsistent regulations inquiries are important in the Court's overall dormant Commerce Clause analysis.<sup>52</sup> However, commentators have noted that the weight and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 582 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982).

<sup>47</sup> See *Healy*, 491 U.S. at 337; *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Brown-Forman Distillers Corp.*, 476 U.S. at 582-84.

<sup>48</sup> See *Healy*, 491 U.S. at 337; *Brown-Forman Distillers Corp.*, 476 U.S. at 582-84; see also *CTS Corp.*, 481 U.S. at 88-89.

<sup>49</sup> See *Healy*, 491 U.S. at 337; *CTS Corp.*, 481 U.S. at 88-89; *Brown-Forman Distillers Corp.*, 476 U.S. at 583; Carmen E. Lewis, *My Computer, My Doctor: A Constitutional Call for Federal Regulation of Cybermedicine*, 32 AM. J.L. & MED. 585, 602 (2006).

<sup>50</sup> See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528 (1959) (noting that it is a "massive" burden on interstate commerce for motor carriers when some states require contour guards and some states do not); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 779 (1945) (stating that the regulation of length of trains causes substantial increases in cost and decreases in efficiency); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 574-75 (1886) (stating that commerce between states requires uniformity of regulations).

<sup>51</sup> See *CTS Corp.*, 481 U.S. at 88-89 (citing *S. Pac. Co.*, 325 U.S. at 774 and *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)).

<sup>52</sup> See Goldsmith & Sykes, *supra* note 30, at 788; Lewis, *supra* note 49, at 602; Michael W. Loudenslager, *E-Lawyering, the ABA's Current Choice of Ethics Law Rule & the Dormant Commerce Clause: Why the Dormant Commerce Clause Invalidates Model Rule 8.5(B)(2) when Applied to Attorney Internet Representation of Clients*, 15 WM. &



scope of these factors are unclear.<sup>53</sup> Some scholars suggest that courts should merely consider these factors under the *Pike* balancing test; others suggest that they are independent tests.<sup>54</sup> Ultimately, while the treatment of these factors often varies, courts nevertheless consider them in their dormant Commerce Clause analysis.<sup>55</sup>

### C. *The Dormant Commerce Clause and the Internet*

As the Internet developed during the late twentieth century, courts faced the difficult task of determining how states could regulate Internet activities without violating the dormant Commerce Clause.<sup>56</sup> Traditionally, dormant Commerce Clause cases dealt with state laws that regulated the transfer of tangible goods in interstate commerce.<sup>57</sup> Consequently, dormant Commerce Clause jurisprudence was relatively antiquated and unprepared to provide a clear set of rules applicable to the virtual nature of Internet activities.<sup>58</sup> *American Libraries Association v. Pataki* and the cases that follow it are the earliest and most influential cases applying the dormant Commerce Clause to Internet regulations.<sup>59</sup>

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MARY BILL RTS. J. 587, 627-29 (2006); Julie Sorenson Stanger, Comment, *Salvaging States' Rights to Protect Children from Internet Predation: State Power to Regulate Internet Activity Under the Dormant Commerce Clause*, 2005 BYU L. REV. 191, 203.

<sup>53</sup> See Goldsmith & Sykes, *supra* note 30, at 789-90; Lewis, *supra* note 49, at 602; Stanger, *supra* note 52, at 203; see also Loudenslager, *supra* note 52, at 627-29.

<sup>54</sup> See Stanger, *supra* note 52, at 203 (noting that "it remains unclear whether [the factors] play a part in the Pike balance or whether they stand as independent tests"). Compare Goldsmith & Sykes, *supra* note 30, at 804-08 (treating the factors as prongs of the balancing test), with Lewis, *supra* note 49, at 602-04 (treating the factors as independent tests), and Loudenslager, *supra* note 52, at 624-30 (treating each factor as a different test used to analyze the state statute's validity under the commerce clause).

<sup>55</sup> See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *CTS Corp.*, 481 U.S. at 88-89; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79, 582-83 (1986); Goldsmith & Sykes, *supra* note 30, at 804-08; Lewis, *supra* note 49, at 601-02; Loudenslager, *supra* note 52, at 624-30; Stanger, *supra* note 52, at 203.

<sup>56</sup> See generally *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (holding that plaintiffs would likely prevail on their dormant Commerce Clause challenge to a New Mexico Internet censorship statute); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (holding that a New York Internet luring statute violated the dormant Commerce Clause); *People v. Hsu*, 99 Cal. Rptr. 2d 184 (2000) (holding that a California Internet luring statute did not violate the dormant Commerce Clause).

<sup>57</sup> See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528 (1959); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 574-75 (1886).

<sup>58</sup> See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 958-60 (N.D. Cal. 2006); *Pataki*, 969 F. Supp. at 161.

<sup>59</sup> See Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH.

These cases primarily involve state Internet luring statutes that aim to protect minors from the harmful dissemination of pornography on the Internet.<sup>60</sup>

1. *American Libraries Association v. Pataki*

In *American Libraries Association v. Pataki*, the Southern District Court of New York reviewed one of the earliest dormant Commerce Clause challenges to a state Internet luring statute.<sup>61</sup> The New York statute criminalized any communications with a minor depicting sexually explicit matter that is harmful to minors.<sup>62</sup> The statute defined a communication “harmful to minors” as one that appealed to minors’ prurient interest in sex and was patently offensive to prevailing standards in the adult community.<sup>63</sup> When considered as a whole, this communication also lacked serious literary, artistic, political, and scientific value.<sup>64</sup> A potential perpetrator could establish an affirmative defense if he or she restricted a minor’s access to the communication.<sup>65</sup> Plaintiff organizations, who used the Internet to disseminate a broad range of communications, argued that the statute violated the dormant Commerce Clause.<sup>66</sup>

The court found that the statute violated the dormant Commerce Clause for three reasons.<sup>67</sup> First, it had an extraterritorial reach because it sought to regulate conduct that occurred wholly outside of New York.<sup>68</sup> Second, it unduly burdened interstate commerce under the *Pike* balancing test.<sup>69</sup> Finally, it unconstitutionally subjected interstate Internet users to inconsistent state regulations.<sup>70</sup>

The court began its discussion by noting that the Internet is subject to dormant Commerce Clause scrutiny because it is an instrument of interstate commerce.<sup>71</sup> Similar to railroads, trucks, and highways, the

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61, 106 (2011); Lewis, *supra* note 49, at 602-03; Stanger, *supra* note 52, at 203-04.

<sup>60</sup> See *Pataki*, 969 F. Supp. at 163; Hsu, 99 Cal. Rptr. 2d at 190-91; *People v. Foley*, 731 N.E.2d 123, 126 (N.Y. 2000).

<sup>61</sup> See *Pataki*, 969 F. Supp. at 163.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 163-64.

<sup>66</sup> See *id.* at 161-62.

<sup>67</sup> See *id.* at 177-81.

<sup>68</sup> See *id.* at 174-77.

<sup>69</sup> See *id.* at 177-81.

<sup>70</sup> See *id.* at 181.

<sup>71</sup> See *id.* at 173.

Internet is an instrument of commerce because it serves as a conduit for the transportation of goods, services, and ideas.<sup>72</sup> Although the court admitted that the Internet was novel and innovative, it concluded that state laws regulating the Internet were still subject to traditional dormant Commerce Clause considerations.<sup>73</sup>

*a. Extraterritorial Impact Analysis*

In determining the extraterritorial impact of the New York statute, the court found that the nature of the Internet made it impossible to restrict the effects of the statute to conduct occurring within the state.<sup>74</sup> The court noted that an Internet user in another state had no ability to prevent New York residents from visiting a particular website because standard Internet protocols did not document geographic location.<sup>75</sup> Consequently, an activity that might have been legal for an Internet user in another state could result in prosecution in New York.<sup>76</sup>

The court held that this extraterritorial impact had a chilling effect on Internet activity.<sup>77</sup> For example, a California artist that wanted to display his provocative work to a prospective purchaser in Oregon could not use his website to do so without risking prosecution under the New York law.<sup>78</sup> If a minor in New York accessed the artist's website and the state deemed the art "harmful to minors," then the artist would be in violation of the statute.<sup>79</sup> According to the court, this subordinated the user's home state policy to New York's restrictive policy.<sup>80</sup> Such an extraterritorial reach was an encroachment upon the federal government's authority to regulate commerce and upon the other states' sovereignty.<sup>81</sup> Therefore, the court held that the statute's extraterritorial impact was a per se or automatic violation of the dormant Commerce Clause, independent of the *Pike* balancing test.<sup>82</sup>

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<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 177.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 179.

<sup>78</sup> See *id.* at 174, 180.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 177.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

*b. Pike Balancing Test Analysis*

The court also held that even if the statute's extraterritorial reach was not a per se violation of the dormant Commerce Clause, the statute would still be unconstitutional under the *Pike* balancing test.<sup>83</sup> First, the court examined the legitimacy of the state's interest in enacting the law.<sup>84</sup> It held that the protection of children against pedophilia is an undeniable legitimate state interest.<sup>85</sup> In so holding, the court noted that protecting both the physical and psychological well-being of minors is a legitimate interest.<sup>86</sup>

Next, the court weighed the burdens on interstate commerce with the benefits derived from the statute.<sup>87</sup> The court found that the local benefits of the statute were minimal for several reasons.<sup>88</sup> First, the statute did not regulate communications originating outside the United States.<sup>89</sup> This was significant because almost half of all Internet communications originated outside the United States, and some of those communications included pornographic content.<sup>90</sup> Further, New York interpreted the statute to reach only pictorial messages that were harmful to minors, ignoring possible textual communications of a pedophile.<sup>91</sup> Finally, the court questioned the need for the statute, noting that New York was able to protect children under its existing laws criminalizing obscenity and child pornography.<sup>92</sup>

On the other hand, the court found that the statute imposed an extreme burden on interstate commerce.<sup>93</sup> First, the statute had a chilling effect on Internet activities.<sup>94</sup> Internet users might refrain from communicating certain literary works or lascivious art to New York residents because they would fear that the state may deem these works "harmful to minors."<sup>95</sup> These normally legitimate acts would, therefore,

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<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 178.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 178-79.

<sup>92</sup> See *id.* at 179; see also *United States v. Thomas*, 74 F.3d 701, 704-05 (6th Cir. 1996) (affirming defendants' convictions and sentences for violating federal obscenity laws under 18 U.S.C. §§ 1462, 1465).

<sup>93</sup> See *Pataki*, 969 F. Supp. at 179-81.

<sup>94</sup> See *id.* at 179-80.

<sup>95</sup> See *id.*

pose a serious threat of prosecution to the Internet user.<sup>96</sup> The court suggested that this would burden interstate Internet communications because it would cause people to self-censor and avoid communicating through the Internet altogether.<sup>97</sup>

Second, although an Internet user could establish an affirmative defense by restricting a minor's access to certain content, the costs of implementing such restrictions were excessive.<sup>98</sup> An Internet user could determine the age of the minor and thus restrict his access by requiring a verified credit card, debit account, or adult access code.<sup>99</sup> However, the financial costs of such methods were excessive in comparison with the benefits of the statute.<sup>100</sup> The court found that the statute's burden on interstate commerce was not justifiable compared to the minimal local benefits arising from it.<sup>101</sup> Accordingly, the statute failed the *Pike* balancing test and was struck down under the dormant Commerce Clause.<sup>102</sup>

*c. Inconsistent Regulations Analysis*

Finally, the court examined whether the New York statute unconstitutionally subjected interstate Internet users to inconsistent regulations.<sup>103</sup> The Supreme Court has recognized both railroads and highway traffic as areas of commerce that are only susceptible to national regulation because of a need for national uniformity.<sup>104</sup> Because at least some states would likely enact laws subjecting Internet users to conflicting obligations, the Internet was similar to railroads and highway traffic.<sup>105</sup> For example, Oklahoma enacted a similar statute that prohibited the online transmission of material deemed harmful to minors.<sup>106</sup> However, the Oklahoma statute defined "harmful to minors" under a more stringent standard.<sup>107</sup> Because an Internet user cannot geographically limit their content, these inconsistent obligations would

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<sup>96</sup> See *id.* at 180.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* (citing *ACLU v. Reno*, 929 F. Supp. 824, 855-56 (E.D. Pa. 1996)).

<sup>99</sup> See *id.* at 164.

<sup>100</sup> See *id.* at 181.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* at 183.

<sup>103</sup> See *id.* at 181.

<sup>104</sup> See *id.* at 181-82; see also *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 (1945).

<sup>105</sup> See *Pataki*, 969 F. Supp. at 182.

<sup>106</sup> See *id.*; see also OKLA. STAT. tit. 21, § 1040.76 (2013).

<sup>107</sup> See *Pataki*, 969 F. Supp. at 183.

lead users to comply with the most stringent standard, regardless of their home state's policies.<sup>108</sup> The court held that this result would stifle the overall development of the Internet.<sup>109</sup> Accordingly, it concluded that the Internet required national regulation and barred the application of the New York statute.<sup>110</sup>

## 2. Cases Following *Pataki*

Since *Pataki*, several courts have struck down similar Internet luring statutes for violating the dormant Commerce Clause.<sup>111</sup> In *ACLU v. Johnson*, the U.S. Court of Appeals for the Tenth Circuit invalidated a similar New Mexico statute that criminalized the dissemination of material over the Internet that was harmful to minors.<sup>112</sup> The court also found that this type of statute attempted to regulate interstate commerce occurring wholly outside the state's borders because Internet users could not geographically limit the dissemination of their communications.<sup>113</sup> Consequently, the court held that this was a per se violation of the dormant Commerce Clause under an extraterritorial impact analysis.<sup>114</sup> Under the same reasoning, the U.S. Court of Appeals for the Second Circuit struck down a similar statute in *American Booksellers Foundation v. Dean*.<sup>115</sup> Finally, in *PSINet, Inc. v. Chapman*, the U.S. Court of Appeals for the Fourth Circuit struck down a Virginia dissemination statute.<sup>116</sup> In contrast to the previous cases, the court subsumed the extraterritorial reach analysis into the burdens portion of the *Pike* balancing test.<sup>117</sup> Although the court recognized the importance of the extraterritorial reach analysis, it treated this analysis as another factor in the *Pike* balancing test.<sup>118</sup> Under this analysis, it still

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<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See, e.g., *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (finding that a statute failed under the *Pike* dormant Commerce Clause test); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (finding that a statute presented a per se violation of the dormant Commerce Clause); *ACLU v. Johnson*, 194 F.3d 1149, 1164 (10th Cir. 1999) (affirming the issuance of an injunction against a statute criminalizing the dissemination of material harmful to minors over the Internet).

<sup>112</sup> See *Johnson*, 194 F.3d at 1161-64.

<sup>113</sup> See *id.* at 1161.

<sup>114</sup> See *id.*

<sup>115</sup> 342 F.3d 96.

<sup>116</sup> See *PSINet, Inc.*, 362 F.3d at 240.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

noted the *Pataki* rationale and agreed that the borderless nature of the Internet made it difficult for a state to regulate the Internet without projecting its law into other states.<sup>119</sup> The court struck down the statute at issue, holding that the burden of applying the regulation to all Internet users, including out-of-state users, outweighed the local benefit from the statute.<sup>120</sup>

### 3. *People v. Hsu*

Contrary to the *Pataki* decision and the subsequent cases striking down Internet luring statutes, a California Court of Appeal upheld a state Internet luring statute in *People v. Hsu*.<sup>121</sup> Like the New York statute in *Pataki*, the California statute criminalized the transmission of harmful sexual material to known minors through the Internet.<sup>122</sup> However, the California statute was distinguishable because it only imposed criminal liability when an Internet user intended to lure a known minor into sexual conduct.<sup>123</sup> Primarily relying on *Pataki*, the plaintiff argued that this statute violated the dormant Commerce Clause.<sup>124</sup>

The court found that the statute did not violate the dormant Commerce Clause under the *Pike* balancing test.<sup>125</sup> First, similar to *Pataki*, the court accepted that the Internet is subject to dormant Commerce Clause scrutiny because it is an incident of interstate commerce.<sup>126</sup> Second, the California statute pursued a legitimate local public interest — “[s]tatutes affecting public safety carry a strong presumption of validity.”<sup>127</sup> Therefore, the state had a “compelling interest in protecting minors from harm generally and from being seduced to engage in sexual activity.”<sup>128</sup>

In balancing the burdens on interstate commerce and the benefits derived from the statute, the court found that the local benefits outweighed the burdens on interstate commerce.<sup>129</sup> Although the court did not explicitly mention the statute’s benefits, the court mentioned

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<sup>119</sup> *See id.*

<sup>120</sup> *See id.* at 240-41.

<sup>121</sup> 99 Cal. Rptr. 2d 184 (2000).

<sup>122</sup> *See id.* at 188.

<sup>123</sup> *See id.* at 191.

<sup>124</sup> *See id.* at 190-91.

<sup>125</sup> *See id.* at 190.

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

that the statute would generally protect minors from harm.<sup>130</sup> Further, the court found that the burdens on interstate commerce were so minimal, and at best incidental, that the benefits of the statute outweighed the burdens.<sup>131</sup>

Unlike the *Pataki* court, the *Hsu* court began its discussion of burdens by narrowly characterizing the type of commerce burdened by the statute.<sup>132</sup> In *Pataki*, the court reasoned that the New York statute would affect a broad range of Internet communications, including the transmission of classical art and literary works.<sup>133</sup> In *Hsu*, however, the court reasoned that the statute would only burden the transmission of harmful sexual material to minors in order to seduce them.<sup>134</sup> Because the California statute specifically required the intention to seduce a minor, the statute had a much narrower scope in comparison to the New York statute.<sup>135</sup> Under this limited scope, the court could not conceive of any legitimate commerce that the statute would harm by penalizing the transmission of harmful sexual material to minors in order to seduce them.<sup>136</sup> Therefore, the court declined to factor any burdens on such transmissions into the *Pike* balancing.<sup>137</sup>

Next, the court included the inconsistent regulation and extraterritorial reach of the statute, as factors to consider under the burdens of the *Pike* balancing test.<sup>138</sup> By distinguishing the California statute and penal code from New York's, the court found that these factors were not unduly burdensome on interstate commerce under *Pike* balancing.<sup>139</sup> First, in discussing the potential inconsistent regulations, the court noted that the California statute contained a knowledge and intent element that was absent from the New York statute.<sup>140</sup> According to the court, these additional knowledge and intent requirements sufficiently narrowed the scope of the law as to not subject individuals

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<sup>130</sup> See *id.*

<sup>131</sup> *Id.*

<sup>132</sup> Compare *id.* at 191 (stating that the statute would only affect the transmission of harmful sexual material to minors in order to seduce them), with *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164, 168-69 (S.D.N.Y. 1997) (stating that the statute would affect a broad range of Internet communications, including the transmission of classical arts and literature).

<sup>133</sup> See *Hsu*, 99 Cal. Rptr. 2d at 191; see also *Pataki*, 969 F. Supp. at 169, 174, 177.

<sup>134</sup> *Hsu*, 99 Cal. Rptr. 2d at 190-91.

<sup>135</sup> See *id.* at 190-91.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* at 190-92.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 190-91.



to inconsistent state regulation.<sup>141</sup> The California statute only criminalized the dissemination of material to a *known* minor with the *intent* to arouse or seduce.<sup>142</sup> The court reasoned that this did not subject individuals to inconsistent state regulation because it was specifically defined and was for a limited purpose.<sup>143</sup> Second, in discussing the statute's extraterritorial impact, the court noted that California's penal system would not allow California to regulate activities wholly outside its borders.<sup>144</sup> Generally, a state does not impose punishment for acts committed outside its territory.<sup>145</sup> Consequently, the enforcement of the statute would be limited to communications in California.<sup>146</sup> In light of the minimal impact of all possible burdens, the court concluded that the statute did not unduly burden interstate commerce and withstood the dormant Commerce Clause challenge.<sup>147</sup>

#### 4. *National Federation of the Blind v. Target Corp.*

Although the principles discussed in *Pataki* and *Hsu* are still controlling, the underlying premises of both cases regarding the limitations of Internet technology have become outdated.<sup>148</sup> Six years after *People v. Hsu*, the Northern District Court of California applied a more modern discussion on the limitations of regulating the Internet in *National Federation of the Blind v. Target Corp.*<sup>149</sup> While this case did not involve state Internet luring statutes, the court considered both *Pataki* and *Hsu* and their application to other state Internet regulation.<sup>150</sup>

In this case, the plaintiff National Federation of the Blind sued Target Corp., alleging that the retailer's website was inaccessible to the blind in violation of California's Unruh Act and California's Disabled Persons Act.<sup>151</sup> Relying on *Pataki*, Target moved to dismiss the action, arguing that the plaintiff's application of the statutes violated the dormant

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<sup>141</sup> See *id.* at 190-92.

<sup>142</sup> *Id.* at 191.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.* at 191-92.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 962 (N.D. Cal. 2006); see also *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997).

<sup>149</sup> 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>150</sup> See *id.* at 959-62.

<sup>151</sup> See *id.* at 949-50; see also Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2014); Disabled Persons Act, CAL. CIV. CODE § 54.1 (West 2014).

Commerce Clause.<sup>152</sup> Although the court declined to officially rule on the dormant Commerce Clause challenge, it offered a modernized discussion on Internet regulation in light of advancing Internet technologies.<sup>153</sup>

In reviewing the motion to dismiss, the court concluded that the dormant Commerce Clause did not bar the plaintiff's claim.<sup>154</sup> Although the court did not employ the *Pike* balancing test, it conducted the extraterritorial impact and inconsistent regulation analyses discussed in *Pataki* and *Hsu*.<sup>155</sup> First, the court noted that the statute did not reach conduct that occurred wholly outside the state's boundaries.<sup>156</sup> Discussing the general principle in *Hsu* that criminal laws are not enforced against conduct occurring outside the state, the court noted that this principle also applied to civil statutes.<sup>157</sup> Accordingly, the California statutes did not have an extraterritorial reach.<sup>158</sup>

Second, the court reasoned that the statutes did not subject Target to inconsistent state regulations because Target could feasibly create a separate website for California customers that complied with California law.<sup>159</sup> The court attacked the underlying premise in *Pataki* that Internet users could not geographically limit who could access their content.<sup>160</sup> Using modern Internet technologies, the court reasoned that Target Corp. could direct California Internet users to a California-specific website, thus eliminating the potential for inconsistent regulation.<sup>161</sup>

To demonstrate these capabilities, the court noted that websites could geographically locate and thus geographically control access to the website by jurisdiction.<sup>162</sup> For example, websites for entities operating in multiple countries often use geolocation to have a single site that directs customers to different versions based upon language.<sup>163</sup> It also noted that websites could use information provided by Internet service providers ("ISPs") or information provided by users, such as credit card

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<sup>152</sup> See *Target Corp.*, 452 F. Supp. 2d at 950, 961-62.

<sup>153</sup> See *id.* at 961-62.

<sup>154</sup> See *id.* at 964.

<sup>155</sup> See *id.* at 958-62.

<sup>156</sup> See *id.* at 961.

<sup>157</sup> See *id.* at 960.

<sup>158</sup> See *id.* at 961.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.* at 961-62.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 961.

numbers, to geographically locate its users.<sup>164</sup> Based on these capabilities, the court reasoned that Target could simply design a website specifically for California and thus avoid inconsistent state regulation.<sup>165</sup> Accordingly, the court concluded that the motion to dismiss was unwarranted on dormant Commerce Clause grounds.<sup>166</sup>

## II. EXAMINING THE ONLINE ERASER PROVISIONS UNDER THE DORMANT COMMERCE CLAUSE

The *Pike* balancing test dictates that a state regulation that affects interstate commerce must serve a legitimate local public interest.<sup>167</sup> Further, it must not impose a burden on interstate commerce that is clearly excessive in relation to the putative local benefits derived from the statute.<sup>168</sup> While courts primarily utilize the *Pike* balancing test in determining the validity of a state statute under the dormant Commerce Clause, courts also consider the extraterritorial impact of the legislation and the potential for inconsistent regulations.<sup>169</sup> Like *Hsu*, this Note will examine these additional considerations under the burdens analysis of the *Pike* balancing test.<sup>170</sup>

This Part argues that California's SB 568 online eraser provisions violate the dormant Commerce Clause under the *Pike* balancing test. First, it establishes that the online eraser provisions serve a legitimate local public interest. Second, it notes that the provisions do not have an extraterritorial reach. Third, it examines the burdens the provisions impose on interstate commerce. Fourth, it examines the local benefits derived from the provisions. Finally, it compares these benefits and burdens and concludes that the burdens on interstate commerce outweigh the benefits derived from the statute. Based on this analysis, it concludes that the online eraser provisions violate the dormant Commerce Clause.

### A. *The Online Eraser Provisions Serve a Legitimate Public Interest*

The online eraser provisions likely serve a legitimate local public interest, satisfying the first part of the *Pike* balancing test, because they

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<sup>164</sup> See *id.* at 961-62.

<sup>165</sup> See *id.* at 960-61, 964.

<sup>166</sup> See *id.* at 964.

<sup>167</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>168</sup> See *id.*

<sup>169</sup> See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336, 337 n.14 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982).

<sup>170</sup> See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (2000) (citing *Pike*, 397 U.S. at 142).

aim to protect California's minors.<sup>171</sup> Courts generally recognize that states have a compelling interest in protecting minors from harm.<sup>172</sup> Specifically, the legislature designed the online eraser provisions to protect minors from personal mistakes that may impede future academic or employment opportunities.<sup>173</sup>

In discussing the online eraser provisions, the Senate Judiciary Committee cited two surveys that suggested the provisions serve a legitimate public interest.<sup>174</sup> First, a 2012 Kaplan survey reported that 27% of college admission officers check Google and 26% check Facebook as part of the applicant review process.<sup>175</sup> Second, a CareerBuilder study reported that over a third of employers would not hire a prospective employee whose Facebook page included photos of that person drinking or in provocative dress.<sup>176</sup> These studies show that employers and university admissions officers regularly scrutinize minors for mistakes that can negatively influence their chances of academic and professional success.<sup>177</sup>

As seen in *People v. Hsu*, a statute that protects children on the Internet serves a legitimate public interest because it protects the safety and welfare of minors within the state.<sup>178</sup> The *Hsu* court emphasized the importance of protecting minors from the transmission of harmful

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<sup>171</sup> See CAL. S. JUDICIARY COMM., BILL ANALYSIS OF PRIVACY: INTERNET: MINORS, S.B. 568, 2013–14 Sess., at 5 (2013) [hereinafter S.B. 568 BILL ANALYSIS], available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0551-0600/sb\\_568\\_cfa\\_20130422\\_141430\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0551-0600/sb_568_cfa_20130422_141430_sen_comm.html).

<sup>172</sup> See, e.g., *People v. Garelick*, 74 Cal. Rptr. 3d 815 (2008) (upholding section 288.2(b) of the California Penal Code, which protects minors from being seduced to engage in sexual activity); *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 473 (2000) (upholding section 288.2(b) of the California Penal Code, which protects minors from being seduced to engage in sexual activity); *Hsu*, 99 Cal. Rptr. 2d at 190-92 (2000) (upholding section 288.2(b) of the California Penal Code, which protects minors from being seduced to engage in sexual activity).

<sup>173</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>174</sup> See *id.*

<sup>175</sup> See Russell Schaffer & Carina Wong, *Kaplan Test Prep Survey Finds that College Admissions Officers' Discovery of Online Material Damaging to Applicants Nearly Triples in a Year*, KAPLAN TEST PREP (Oct. 4, 2012), <http://press.kaptest.com/press-releases/kaplan-test-prep-survey-finds-that-college-admissions-officers-discovery-of-online-material-damaging-to-applicants-nearly-triples-in-a-year>.

<sup>176</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8; see also *Employers Are Scoping Out Job Candidates on Social Media — But What Are They Finding?*, IDLELIST, <http://infographics.idlelist.com/employers-are-scoping-out-job-candidates-on-social-media-but-what-are-they-finding/> (last visited Dec. 1, 2014).

<sup>177</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>178</sup> See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (2000).

sexual material intended to seduce them.<sup>179</sup> This reasoning suggests that Internet content is harmful to minors when the content has harmful ramifications in the physical world.<sup>180</sup> The online eraser provisions similarly attempt to nullify harmful ramifications in the physical world by eliminating material that is harmful to a minor's professional and academic reputation.<sup>181</sup> Accordingly, the online eraser provisions serve the legitimate public interest of protecting a minor's professional and academic reputation.

*B. The Burdens Imposed by SB 568 on Interstate Commerce Outweigh the Local Benefits*

A state regulation that serves a legitimate local public interest is presumptively valid unless its burden on interstate commerce outweighs its local benefits.<sup>182</sup> Thus, although the online eraser provisions likely serve a legitimate local public interest, they may still fail the *Pike* balancing test because their burden on interstate commerce outweighs their local benefits.<sup>183</sup> The benefits of the online eraser provisions are relatively minimal, especially considering the fact that they do not affect third-party content.<sup>184</sup> In contrast, the burdens of tailoring websites to California's online eraser provisions would be costly and unworkable.<sup>185</sup>

*1. The Statute Does Not Have an Extraterritorial Reach*

As a preliminary matter, a court is unlikely to find that the online eraser provisions have an extraterritorial reach. The court in *Hsu* noted that a statute regulating commerce wholly outside the state would be unduly burdensome.<sup>186</sup> However, it also noted that the California penal system would bar such an extraterritorial reach because it would

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<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>182</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997); *Hsu*, 99 Cal. Rptr. 2d at 190.

<sup>183</sup> See generally *Pike*, 397 U.S. 137 (holding that a state statute that serves a legitimate public interest will be upheld unless its burdens on interstate commerce outweigh the local benefits).

<sup>184</sup> See S.B. 568, 2013 Leg., 2013-14 Sess. § 22581(b) (Cal. 2013), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568).

<sup>185</sup> See *infra* Part II.B.4.

<sup>186</sup> See *Hsu*, 99 Cal. Rptr. 2d at 191.

prevent California from prosecuting wholly out-of-state conduct.<sup>187</sup> The court in *Target* extended this rationale to include a bar on civil liability as well.<sup>188</sup> Thus, because a state would not impose civil liability under the online erasers provisions outside of the state, SB 568 would likely survive an extraterritorial impact analysis.<sup>189</sup> However, this does not preclude a finding that the online eraser provisions violate the dormant Commerce Clause under the *Pike* balancing test.<sup>190</sup>

## 2. The Statute Imposes Significant Burdens on Interstate Commerce

The online eraser provisions impose a significant burden on interstate commerce. As seen in *Pataki*, a court may find that a statute is unduly burdensome on interstate commerce when it imposes significant costs on Internet users.<sup>191</sup> SB 568 implicitly requires websites hosted on servers outside of California to comply with the online eraser provisions.<sup>192</sup> To comply with these provisions, websites would have two feasible options: (1) provide an online eraser only for minors in California; or (2) provide an online eraser for minors in all states.<sup>193</sup> Both options are unduly burdensome upon interstate commerce because they impose significant compliance costs on website owners.<sup>194</sup>

### a. Limiting the Online Eraser to Only Minors in California

If websites were to provide an online eraser only for minors in California, website operators would be required to geographically locate users to determine whether the online eraser is available to a specific user.<sup>195</sup> Earlier cases, such as *Hsu*, considered the difficulty in determining the characteristics of a website's audience, such as age and

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<sup>187</sup> See *id.* at 191-92.

<sup>188</sup> See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 960 (N.D. Cal. 2006).

<sup>189</sup> See *generally id.* (indicating that the court would not enforce a civil statute outside of California).

<sup>190</sup> See *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>191</sup> See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 180-81 (S.D.N.Y. 1997).

<sup>192</sup> See *generally* S.B. 568, 2013 Leg., 2013-14 Sess. (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568) (neglecting to distinguish between websites hosted in state and out of state).

<sup>193</sup> See *generally* Goldman, *supra* note 19 (noting that this law creates an open question for "future fights and a potential Constitutional challenge").

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

geographic location.<sup>196</sup> Channeling *Pataki*, the court in *Hsu* noted that it was technologically infeasible to geographically limit users on the Internet.<sup>197</sup>

Relying on *National Federation of the Blind v. Target Corp.*,<sup>198</sup> proponents of the bill may argue that the *Pataki* reasoning is a relic of the past, rooted in a technical misunderstanding of the Internet.<sup>199</sup> The court in *Target* reasoned that advances in Internet technology now allow website owners to geographically locate and thus distinguish among Internet users.<sup>200</sup> Accordingly, the court noted that Target could create a website that directed California users to a California-specific website.<sup>201</sup>

While it is feasible to geographically locate Internet users, the court's reasoning in *Target* does not apply to the online eraser provisions. First, the *Target* court conflated geographically distinguishing between countries with geographically distinguishing between states.<sup>202</sup> Studies show that while determining the nation of an Internet user is 95%–99% accurate, determining the city or the state is far more difficult.<sup>203</sup> Even a mainstream social media site like Facebook admits the possibility of obtaining inaccurate geographic information.<sup>204</sup> Geographical location becomes even more inaccurate when attempting to locate mobile users.<sup>205</sup> Second, the *Target* court noted that websites could use certain information like a user's credit card number to determine the state in which the Internet user resides.<sup>206</sup> This reasoning would not be pertinent to the online eraser provisions because, unlike Target's retail

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<sup>196</sup> See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191-92 (2000).

<sup>197</sup> See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997); *Hsu*, 99 Cal. Rptr. 2d at 191-92; see also *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878, 891 (W.D. Va. 2001).

<sup>198</sup> 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>199</sup> See *id.* at 961.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* at 961-62.

<sup>203</sup> See Yuval Shavitt & Noa Zilberman, A Study of Geolocation Databases 3 (July 1, 2010) (unpublished manuscript), available at <http://arxiv.org/pdf/1005.5674v3.pdf>; *How Accurate Is IP GeoLocation?*, WHATISMYPADDRESS.COM, <http://whatismyipaddress.com/geolocation-accuracy> (last visited Oct. 18, 2014).

<sup>204</sup> See *What Does It Mean if I Don't Recognize a Location in Where You're Logged in Section of My Account?*, FACEBOOK, <https://www.facebook.com/help/224047177607864> (last visited Oct. 18, 2014).

<sup>205</sup> See Mahesh Balakrishnan, Iqbal Mohamed & Venugopalan Ramasubramanian, *Where's That Phone?: Geolocating IP Addresses on 3G Networks*, in PROCEEDINGS OF THE 9TH ACM SIGCOMM CONFERENCE ON INTERNET MEASUREMENT CONFERENCE 294, 297 (2009).

<sup>206</sup> See *Target Corp.*, 452 F. Supp. 2d at 961-62.

website, websites that allow minors to post personal content do not regularly ask for a credit card number. Thus, even taking into account the methods proposed in *Target*, geographically distinguishing California Internet users would still be difficult.

Further, these issues all arise without any user input.<sup>207</sup> Geographical location becomes even more inaccurate when users intentionally mask or alter their geographic location.<sup>208</sup> For example, a user may reroute her IP address through a proxy resulting in a false geographic location.<sup>209</sup> Accordingly, this would further confound a website's attempt to comply with the online eraser provisions.

These geographic location methods burden websites in several ways. First, they may burden websites with costs associated with tracking individual users.<sup>210</sup> Second, even if geographical location methods were completely accurate, websites would have to purchase additional server space just to host a separate website that complies with California law.<sup>211</sup> Thus, providing the online eraser specifically for California residents would impose a financial burden on websites.

The court in *Pataki* noted that the financial cost of complying with a state statute imposes an undue burden if the costs are excessive.<sup>212</sup> Although the court did not define what was excessive, it examined the cost of compliance in relation to the accuracy of such compliance.<sup>213</sup> Here, as in *Pataki*, a website owner would have to employ special services to geographically distinguish California users and provide the online eraser provisions to California minors.<sup>214</sup> However, such technology does not accurately determine the specific state in which the user resides.<sup>215</sup> Accordingly, this would put an excessive burden on interstate commerce.

*b. A National Online Eraser Button*

In the alternative, an operator may decide to have a single website that provides California's online eraser button to all users, even those outside of California. However, this would still prohibitively burden

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<sup>207</sup> See King, *supra* note 59, at 119-21.

<sup>208</sup> See Justice S. Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 INDIAN J.L. & TECH. 1, 3 (2010).

<sup>209</sup> See *id.*

<sup>210</sup> See *Target Corp.*, 452 F. Supp. 2d at 961-62.

<sup>211</sup> See *id.* at 960-62.

<sup>212</sup> See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 180-81 (S.D.N.Y. 1997).

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> See *How Accurate Is IP GeoLocation?*, *supra* note 203.



websites.<sup>216</sup> The Supreme Court has held that a state statute unduly burdens interstate commerce if it subjects interstate commerce to inconsistent state regulation.<sup>217</sup> Under this compliance scheme, websites based outside of California may be compelled to abide by California's online eraser provisions because they do not want to risk liability with inaccurate geographical location software.<sup>218</sup> In effect, with this option, California would be imposing its law on all other states.<sup>219</sup> This result impermissibly undermines the other states' law, while simultaneously usurping Congress's power to regulate the United States.<sup>220</sup> Therefore, the statute burdens interstate commerce under the *Pike* balancing test.

### 3. Local Benefits

The actual local benefits of the online eraser provisions are difficult to discern because they are currently unobservable.<sup>221</sup> Since the statute only becomes effective on January 1, 2015, one can only speculate as to the potential benefits derived from the statute.<sup>222</sup> The provisions' legitimate local public interest is to protect the academic and professional reputation of minors.<sup>223</sup> Therefore, the provisions' overall benefit will presumably be to bolster the academic and professional prospects of California minors.<sup>224</sup> SB 568 arguably allows California minors to pursue their desired career without being inhibited by damaging personally posted pictures or messages.<sup>225</sup>

The benefits the public receives from the online eraser provisions are significantly less than the benefits provided by other statutes involving minors that have withstood Commerce Clause challenges.<sup>226</sup> Courts

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<sup>216</sup> See Amalson, *Delete Button for Internet? New California Law Says Yes*, MICH. TELECOMM. & TECH. L. REV. BLOG (Oct. 1, 2013, 1:53 PM), <http://www.mtlrblog.org/2013/10/01/delete-button-for-the-internet-new-california-law-says-yes/>; Goldman, *supra* note 19; Miles, *supra* note 14.

<sup>217</sup> See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-84 (1986).

<sup>218</sup> See King, *supra* note 59, at 113-14.

<sup>219</sup> See Goldman, *supra* note 19.

<sup>220</sup> See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 320 (1851).

<sup>221</sup> See S.B. 568, 2013 Leg., 2013-14 Sess. (Cal. 2013), *available at* [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568).

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* § 22581(a); S.B. 568 BILL ANALYSIS, *supra* note 171, at 8.

<sup>224</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>225</sup> See *id.*

<sup>226</sup> Compare *People v. Hsu*, 99 Cal. Rptr. 2d 184, 188 (2000) (upholding a statute

have established that states have a compelling interest in protecting minors from being seduced to engage in sexual activity.<sup>227</sup> For example, California Courts of Appeal have held that statutes prohibiting the intentional dissemination of sexual material via the Internet satisfy the *Pike* balancing test.<sup>228</sup> The court in *People v. Hsu* also noted that statutes “affecting public safety carry a strong presumption of validity and that the enforcement of criminal laws lied primarily with states.”<sup>229</sup>

However, the benefits of California’s online eraser button are significantly less than those provided by provisions such as in *Hsu*.<sup>230</sup> The legislature designed the statutes in these cases to protect minors from sexual or psychological harm rather than professional or academic harm.<sup>231</sup> Unlike the provision in *Hsu*, the legislature designed the online eraser provisions to only protect a minor’s academic and professional reputation.<sup>232</sup> While the previous cases dealt with protecting minors from becoming a victim of a predator, the online eraser provisions simply protect minors from self-inflicted non-physical harm.<sup>233</sup> Although such reputation is important, the benefits to the public interest are less than those previously recognized by California courts.<sup>234</sup> As a result, a court applying the *Pike* balancing test would

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that protects minors from sexual harm), with S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9 (arguing that the statute will protect minors from harm to their academic or professional reputation).

<sup>227</sup> See *Hsu*, 99 Cal. Rptr. 2d at 190; see also *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

<sup>228</sup> For cases that uphold section 228.2(b), see, for example, *People v. Garelick*, 74 Cal. Rptr. 3d 815, 827-28 (2008); *Hsu*, 99 Cal. Rptr. 2d 184 at 188, 190; *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 473 (2000).

<sup>229</sup> *Hsu*, 99 Cal. Rptr. 2d at 190 (citations omitted).

<sup>230</sup> Compare *Hsu*, 99 Cal. Rptr. 2d 184 (upholding a statute that protects minors from sexual harm), with S.B. 568 BILL ANALYSIS, *supra* note 171 (arguing that the statute will protect minors from harm to their academic or professional reputation).

<sup>231</sup> See, e.g., *Garelick*, 74 Cal. Rptr. 3d at 827-28 (upholding section 228.2(b) of the California Penal Code); *Hsu*, 99 Cal. Rptr. 2d at 190-91 (same); *Hatch*, 94 Cal. Rptr. 2d at 473 (same).

<sup>232</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>233</sup> Compare *Hsu*, 99 Cal. Rptr. 2d 184 (upholding a statute that protects minors from sexual harm), with S.B. 568 BILL ANALYSIS, *supra* note 171 (arguing that the statute will protect minors from harm to their academic or professional reputation).

<sup>234</sup> See, e.g., *Garelick*, 74 Cal. Rptr. 3d at 827-28 (upholding a statute prohibiting the transmission of “harmful matter” to minors); *Hsu*, 99 Cal. Rptr. 2d at 190-91 (upholding a statute criminalizing the transmission of harmful sexual material to known minors); *Hatch*, 94 Cal. Rptr. 2d at 473 (protecting minors from the intent to seduce did not burden any protected right of interstate commerce).

weigh the benefits of the online eraser provisions less heavily than in preceding cases dealing with protection of minors using the Internet.<sup>235</sup>

Further, in examining the overall efficacy of the online eraser provisions, the benefits are minimal.<sup>236</sup> Removal options already exist for the most visible aspects of primary social media sites like Facebook and Twitter.<sup>237</sup> Minors can easily navigate these websites and find options to delete personally posted pictures and information.<sup>238</sup>

Proponents of the bill may argue that websites like Facebook do not allow minors to delete all personally posted content, such as messages between users or in a group chat.<sup>239</sup> Further, although popular social media sites like Facebook and Twitter already have options to delete personally posted content, other popular websites do not have these options.<sup>240</sup> Accordingly, they may suggest that the online eraser provisions provide benefits to minors on all major websites.

However, when examining the intended benefit of the bill, the deletion of Facebook messages would neither affect nor further this goal.<sup>241</sup> Although the intended benefit of the bill is to allow minors to hide personally posted content from college admissions officers and future employers, such options already exist.<sup>242</sup> Facebook messages already have a certain level of privacy, as they are limited to the

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<sup>235</sup> See Hsu, 99 Cal. Rptr. 2d at 190 (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

<sup>236</sup> See Goldman, *supra* note 19.

<sup>237</sup> See *Deleting a Tweet*, TWITTER, <https://support.twitter.com/articles/18906-deleting-a-tweet> (last visited Oct. 18, 2014); *How Do I Delete a Photo?*, FACEBOOK, <https://www.facebook.com/help/www/208547132518386> (last visited Oct. 18, 2014); *How Do I Hide or Delete Posts I've Shared from My Page? What's the Difference?*, FACEBOOK, <https://www.facebook.com/help/252986458110193> (last visited Oct. 18, 2014).

<sup>238</sup> See, e.g., *Deleting a Tweet*, *supra* note 237 (providing the step-by-step process for deleting a tweet); *How Do I Delete a Photo?*, *supra* note 237 (providing a step-by-step process for deleting Facebook photos); *How Do I Hide or Delete Posts I've Shared from My Page? What's the Difference?*, *supra* note 237 (providing a step-by-step process for deleting Facebook posts).

<sup>239</sup> See *How Do I Delete Messages or a Conversation?*, FACEBOOK, <https://www.facebook.com/help/www/192631610782421> (last visited Oct. 18, 2014).

<sup>240</sup> See, e.g., *Frequently Asked Questions*, 4CHAN, <http://www.4chan.org/faq> (last visited Jan. 8, 2014) (noting that some boards and threads on the website do not allow a user to delete their posts).

<sup>241</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9.

<sup>242</sup> See, e.g., *Who Can See My Messages?*, FACEBOOK, <https://www.facebook.com/help/212388195458335> (last visited Oct. 18, 2014) (stating that only you and the people that you message can view the contents and history of your messaging).

correspondents of the message.<sup>243</sup> A future employer would not be able to view a minor's message containing personally posted content, unless she was an intended recipient of the message or unless the message was reposted by a third party.<sup>244</sup>

Further, even if minors are able to delete personally posted content, it is not uncommon for online users to repost content that they find particularly interesting, embarrassing, or inappropriate.<sup>245</sup> Both Twitter and Tumblr have developed a reputation for users who legally "retweet" or "reblog" other users' content.<sup>246</sup> Further, in some instances, efforts to minimize a person's exposure on the Internet can have the opposite effect and cause unwanted online content to become "viral."<sup>247</sup> Ultimately, this exposes a person's photos or personal information to an even greater audience than previously intended.<sup>248</sup> A minor that is subject to this type of repost would not recognize a substantial benefit from the online eraser because the statute does not allow a minor to remove this third-party content.<sup>249</sup> Even if the minor erased personally posted content, future employers and colleges could still view the personal content if it was reposted by a third party.<sup>250</sup> Accordingly, the minor would not derive a substantial benefit from the provisions.

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<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

<sup>245</sup> See Dan Nienaber, *Charges Filed for Topless Facebook Video*, MANKATO FREE PRESS (Jan. 8, 2014, 3:52 PM), [http://www.mankatofreepress.com/news/local\\_news/article\\_eea1f43d-7b52-544b-bb78-fc20ab5b7460.html](http://www.mankatofreepress.com/news/local_news/article_eea1f43d-7b52-544b-bb78-fc20ab5b7460.html); Rebecca Shapiro & Jack Mirkinson, *Beyonce's Publicist Asks BuzzFeed To Remove 'Unflattering' Photos and We're Confused*, HUFFINGTON POST (Feb. 6, 2013, 10:52 AM), [http://www.huffingtonpost.com/2013/02/06/beyonce-publicist-buzzfeed-remove-photos\\_n\\_2630184.html](http://www.huffingtonpost.com/2013/02/06/beyonce-publicist-buzzfeed-remove-photos_n_2630184.html); Russ Van Arsdale, *Houlton Police Chief Wants Maine to Make Revenge Porn Criminal*, BANGOR DAILY NEWS (Jan. 4, 2014, 2:30 PM), <http://bangordailynews.com/2014/01/04/business/houlton-police-chief-wants-maine-to-make-revenge-porn-criminal>.

<sup>246</sup> See Michael Thomsen, *What the Internet Has Done to Our Sense of Free Time*, COMPLEX (Oct. 29, 2013), <http://www.complex.com/pop-culture/2013/10/internet-free-time>.

<sup>247</sup> See Gregory W. Herbert, *How to Combat Cybersmears and Online Attackers*, CHIEF EXEC. (Oct. 18, 2013), <http://chiefexecutive.net/how-to-combat-cybersmears-and-online-attackers>; Ruth Houston, *Unflattering Beyonce Super Bowl Photos Go Viral After Demand They Be Removed*, EXAMINER (Feb. 6, 2013, 6:21 PM), <http://www.examiner.com/article/unflattering-beyonce-super-bowl-photos-go-viral-after-demand-they-be-removed>. Although these examples do not pertain to personally posted content or information, they nevertheless demonstrate the potential backlash people face when attempting to remove online content.

<sup>248</sup> See Herbert, *supra* note 247; Houston, *supra* note 247.

<sup>249</sup> See S.B. 568, 2013 Leg., 2013–14 Sess. § 22581(b)(2) (Cal. 2013), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568).

<sup>250</sup> See *id.*

Overall, although the online eraser provisions provide some benefit to minors, they are relatively minimal. Protecting a minor's professional or academic reputation is not as imperative as protecting a minor's safety.<sup>251</sup> Further, the online eraser provisions are largely unnecessary because most major websites already allow minors to easily remove personally posted content.<sup>252</sup> Finally, the online eraser provisions do not remove third-party content, effectively circumventing any perceived gain or protection for the minor.<sup>253</sup>

#### 4. Weighing the Local Benefits Against the Burdens on Interstate Commerce

In weighing these burdens against the benefits of the online eraser provisions, the law fails the *Pike* balancing test and violates the dormant Commerce Clause. The costs to comply with the online eraser provisions are relatively high.<sup>254</sup> For example, Neustar IP Intelligence, formerly Quova, charges websites between \$6,000 and \$500,000 per year to accurately locate website users.<sup>255</sup> The range varies significantly based on the number of Internet users that the service locates and the required accuracy of the information.<sup>256</sup> Services that geographically distinguish users based on state can range from \$200 to \$500,000 per year.<sup>257</sup>

Proponents of the bill may argue that this is a small cost to websites such as Facebook or Twitter — large, publicly traded companies with significant cash reserves.<sup>258</sup> However, the law would impede the development of smaller websites such as individually-owned blogs.<sup>259</sup>

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<sup>251</sup> Compare *People v. Hsu*, 99 Cal. Rptr. 2d 184 (2000) (upholding a statute that protects minors from sexual harm), with S.B. 568 BILL ANALYSIS, *supra* note 171 (arguing that the statute will protect minors from harm to their academic or professional reputation).

<sup>252</sup> See *Deleting a Tweet*, *supra* note 237; *How Do I Delete a Photo?*, *supra* note 237; *How Do I Hide or Delete Posts I've Shared from My Page? What's the Difference?*, *supra* note 237.

<sup>253</sup> See Cal. S.B. 568, § 22581(b)(2).

<sup>254</sup> See *King*, *supra* note 59, at 72.

<sup>255</sup> See *id.* (citing *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 807 (E.D. Pa. 2007)).

<sup>256</sup> See *Database Product*, IP2LOCATION, <http://www.ip2location.com/buy> (last visited Oct. 18, 2014); *GeoIP2 Databases*, MAXMIND, <https://www.maxmind.com/en/geoip2-databases> (last visited Oct. 18, 2014); *Products Comparison*, IPLIGENCE, <http://www.ipligence.com/products> (last visited Oct. 18, 2014).

<sup>257</sup> See *GeoIP2 Databases*, *supra* note 256; *King*, *supra* note 59, at 72 (citing *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 807 (E.D. Pa. 2007)); *Products Comparison*, *supra* note 256.

<sup>258</sup> See *King*, *supra* note 59, at 72.

<sup>259</sup> See *id.*

As it stands, the online eraser provisions do not distinguish between the financial positions of websites.<sup>260</sup> Presumably, all websites that host personally posted content would have to abide by these laws.<sup>261</sup> This would be especially damaging to smaller websites that could not afford such exorbitant overhead costs.

In the context of *Hsu*, this burden would seem acceptable when considering the local benefit of protecting minors from being seduced to engage in sexual activity.<sup>262</sup> However, the online eraser provisions merely intend to protect the academic and professional reputations of minors.<sup>263</sup> Even if websites were to comply with these provisions, the provisions only have a marginal benefit on California's minors.<sup>264</sup> As discussed earlier, major websites like Facebook and Twitter already allow users to delete personally posted content.<sup>265</sup> Further, the law would have no effect on content that a third party reposted.<sup>266</sup> Accordingly, the burdens on these websites significantly outweigh the benefits to local minors.

### III. SOLUTIONS

Although California's online eraser provisions are likely unconstitutional under the dormant Commerce Clause, the state may still protect the reputation of minors on the Internet through alternative means. This Part briefly introduces alternative solutions to protect the academic and professional reputation of minors. First, it advocates a Congressional scheme that implements the online eraser provisions. Second, it advocates for more extensive Internet education programs that prevent minors from posting personally scathing content.

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<sup>260</sup> See S.B. 568, 2013 Leg., 2013–14 Sess. § 22581(a) (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568) (noting that “the operator of an Internet Web site” is required to follow the provisions of the law).

<sup>261</sup> See generally *id.* (failing to distinguish between websites hosted in state and out of state).

<sup>262</sup> See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (2000).

<sup>263</sup> See S.B. 568 BILL ANALYSIS, *supra* note 171, at 8-9; see also Cal. S.B. 568, § 22581(a)(1).

<sup>264</sup> See Goldman, *supra* note 19.

<sup>265</sup> See *supra* Part II.B.3.

<sup>266</sup> See *id.*

A. *Congress Can Enact National Online Eraser Provisions*

To avoid a dormant Commerce Clause challenge, California may push Congress to pass a national scheme that implements similar online eraser provisions. If federal legislation required all websites hosted in the United States to offer deletion options akin to the online eraser, websites would not have to distinguish between users from different states.<sup>267</sup> These websites would only have to distinguish between users in the United States and users outside of the United States.<sup>268</sup> As discussed earlier,<sup>269</sup> it is relatively easy for websites to determine a user's country of origin.<sup>270</sup> Accordingly, websites would not be subject to the geographic location burdens associated with the California law.<sup>271</sup>

Further, the European Union ("EU") has proven that distinguishing based on a user's country of origin is a workable scheme through their legal "right to be forgotten."<sup>272</sup> The EU's right to be forgotten is relatively expansive compared to California's online eraser provisions.<sup>273</sup> Under the right to be forgotten, both minors and adults in the EU may request the deletion of personally posted content and third-party content relating to the individual.<sup>274</sup> U.S. courts would likely deem such broad legislation unconstitutional, because it would violate third parties' First Amendment speech.<sup>275</sup> However, commentators have noted that a right to be forgotten that only applied to minors and only affected personally posted content would both receive general approval and be deemed constitutional.<sup>276</sup> Because California's online eraser provisions only apply to minors and only affect personally posted content, a national regulation that utilized California's framework could act as a US analogue to the EU's right to be forgotten, albeit a limited version.<sup>277</sup> Accordingly, this national online eraser button could protect

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<sup>267</sup> See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006).

<sup>268</sup> See *id.*

<sup>269</sup> See *supra* Part II.B.2.a.

<sup>270</sup> See *Target Corp.*, 452 F. Supp. 2d at 961.

<sup>271</sup> See *id.*

<sup>272</sup> See Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 161-63 (2012); Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten*, 39 N. KY. L. REV. 119, 120-22 (2012); Ashley Messenger, *What Would a "Right to Be Forgotten" Mean for Media in the United States?*, COMM. LAW., June 2012, at 29, 29.

<sup>273</sup> See Bennett, *supra* note 272, at 161-63.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* at 170.

<sup>276</sup> See *id.* at 166-67.

<sup>277</sup> See *id.* at 164-68.

minors on the Internet, without facing dormant Commerce Clause challenges.

*B. States Can Provide More Extensive Internet Education*

Even if Congress imposed national Internet regulations akin to the right to be forgotten, some may argue that increased regulation of the Internet would undermine the free flow of information between users, including adults.<sup>278</sup> Arguably, online eraser provisions could encourage minors to brashly post potentially scathing material, because it would provide them with a legal safety net to remove this content in the future.<sup>279</sup> This could potentially give minors a false sense of security, especially considering that the statute does not allow for the removal of third-party reposted content.<sup>280</sup> Even under a Congressional scheme, it would be difficult to allow minors to delete third-party reposted content due to potential First Amendment conflicts.<sup>281</sup> Accordingly, state regulators may better protect minors by implementing programs that take a preventative approach to Internet postings.

To prevent minors from carelessly posting personal content, California should educate minors about proper Internet use and the eternal nature of the Internet. Common Sense Media, a supporter of SB 568, notes that minors create a “digital footprint” that can last a long time on the Internet when they post content or information on the Internet.<sup>282</sup> In collaborating with Disney Media, Common Sense Media educates minors both on its website and on the Disney Television Channel.<sup>283</sup> They stress that nothing is private online and encourage minors to assume that everyone is watching their online activity.<sup>284</sup> Rather than offering a retroactive solution to damaging Internet

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<sup>278</sup> See Larry Downes, *Government Control of Net Is Always a Bad Idea*, CNET (June 4, 2012, 7:39AM), [http://news.cnet.com/8301-13578\\_3-57446383-38/government-control-of-net-is-always-a-bad-idea/](http://news.cnet.com/8301-13578_3-57446383-38/government-control-of-net-is-always-a-bad-idea/); Goldman, *supra* note 19; Larry Magid, *Magid: Government Regulation of Internet a Bad Idea*, SAN JOSE MERCURY NEWS (Nov. 12, 2012, 6:14:04 AM), [http://www.mercurynews.com/ci\\_21958433/magid-government-regulation-internet-bad-idea](http://www.mercurynews.com/ci_21958433/magid-government-regulation-internet-bad-idea).

<sup>279</sup> See Sengupta, *supra* note 17 (stating that although this is a well-meaning statute, there are concerns about it).

<sup>280</sup> See Goldman, *supra* note 19.

<sup>281</sup> See Bennett, *supra* note 272, at 173-74.

<sup>282</sup> *Digital Footprint*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/videos/digital-footprint> (last visited Dec. 6, 2014).

<sup>283</sup> See *Get Cybersmart with Phineas and Ferb*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/videos/get-cybersmart-with-phineas-and-ferb> (last visited Dec. 4, 2014).

<sup>284</sup> See *id.*



content, a program that educates minors on safe Internet practices would serve as a preventative solution to the problem.<sup>285</sup> For example, privacy filters are available on major social networking websites and would minimize the risk of future employers or colleges examining a minor's illicit or otherwise inappropriate behavior.<sup>286</sup> These programs are thus able to protect minors online while encouraging safer, more profound Internet communities.

#### CONCLUSION

States have a legitimate interest in protecting minors from harm on the Internet. Under California's online eraser provisions, the socioeconomic burden to out-of-state websites that must tailor their sites specifically to the California law outweighs this interest. To protect minors from harm on the Internet and bypass a dormant Commerce Clause challenge, Congress could preempt the field and pass national regulations that provide similar online eraser provisions. Alternatively, states should attempt to prevent these types of online problems by educating minors about the Internet and promoting safe Internet practices.

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<sup>285</sup> See, e.g., *Relevant and Timely Topics Focusing on Kids and the Electronic World*, EKIDS CONSULTING (2014), <http://www.ekidsconsulting.com/topics.html> (providing a strategy for parents and caregivers).

<sup>286</sup> See *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Oct. 18, 2014); *Choose Who You Share with*, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (last visited Oct. 18, 2014).