

# Which Government?

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Internet Law

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Class 5



# Where We Are

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- Introduction
- Part I: Public Law
  - Jurisdiction
  - Free Speech
  - Intermediaries
  - Privacy
- Part II: Private Law



# Where We Are (zoomed in)

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- Jurisdiction

- Where is Cyberspace?

- No Government?

- Which Government?

- Jurisdiction over Persons, Actions, and Things



# In today's class

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- The Dormant Commerce Clause
  - Taxation (*Quill*)
  - Pornography (*Pataki*)
  - Spam (*Heckel*)
- Big question: uniform national policies?



# The Dormant Commerce Clause

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# The Dormant Commerce Clause

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- Art I, § 8, clause 3: “The Congress shall have power . . . To regulate commerce . . . among the several states . . . ;”
- Corollary: the states can’t act to interfere with interstate commerce
  - Prevent inconsistent overregulation of commerce
  - Prevent protectionist local laws



# The modern test (maybe)

- Apply super-strict scrutiny if the state law discriminates against out-of-staters.
- If the law is neutral, it still has to pass three tests:
  - **Extraterritoriality:** The law must not legislate outside the state's borders.
  - **Benefits vs. burdens:** The burdens on interstate commerce must not be "clearly excessive" compared with the benefits to the state.
  - **Inconsistent laws:** The law must not subject commerce to inconsistent regulations.
- Congress has the final say.

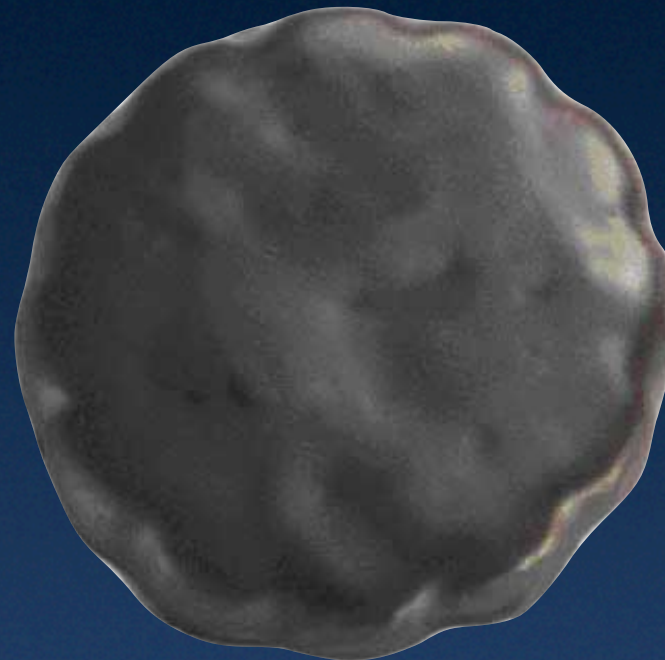


# Internet Taxation

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# Digression on sales tax uniformity



Which of these are candy?



# Taxes and the DCC

- *Gibbons v. Ogden* (1824): the Dormant Commerce Clause is first suggested
- *Brown v. Maryland* (1827): the Clause bars all state taxes on interstate commerce
- *Adams Express* (1897): the Clause bars only indirect state taxes, not direct ones
- *Western Live Stock* (1938): that distinction is silly and formalistic
- *Freeman v. Hewit* (1946): no it isn't
- *Complete Auto Transit* (1977): yes it is



# Recent history

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- 1967: *Bellas Hess* says that states can't force out-of-state mail-order houses to collect sales / use taxes
  - What about sales / use taxes on residents?
- 1992: *Quill* says "we meant it the first time"
  - Does this apply to Amazon? Probably.
- 1998: Internet Tax Freedom Act: no discriminatory state taxes on e-commerce
- 2004: Congress re-ups through November 1, 2007
  - That's soon, isn't it?



# Why do state taxes matter?

- As sales shift from the mall to Amazon . . .
  - . . . what happens to state tax revenues?
- On the other hand, how many jurisdictions in the U.S. have sales taxes?

7,500



# Where things stand

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- Currently, the Internet is mostly off-limits to state taxation
  - The legislation is set to expire soon
  - *Quill* acts as a backstop
  - Since this is the Dormant Commerce Clause, Congress can override *Quill*
- Expect some fireworks!



*A.L.A. v. Pataki*

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# *A.L.A. v. Pataki*

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- New York forbids distributing material harmful to minors over the Internet
  - Probably violates the First Amendment
- But this is a Dormant Commerce Clause case
- Threshold question: does this affect interstate commerce?
  - Interstate: yes, because Internet communications cross state lines
  - Commerce: yes, and in 2007-era hindsight, this argument is too silly to bother with



# *A.L.A. v. Pataki*

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- The three substantive tests:
  - **Extraterritoriality:** New York “projected its law into other states whose citizens use the Net”
  - **Benefits vs. burdens:** Small local benefits vs worldwide chilling effects
  - **Inconsistent regulations:** “[T]he Internet user has no ability to bypass any particular state. The user must comply with the regulation imposed by the most stringent standard or forego Internet communication . . . .”
- Okay, but can we apply this holding in later cases?



# *Washington v. Heckel*



# *Washington v. Heckel*: facts

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- Jason Heckel is a spammer
- He's a deceptive spammer
- He spams Washington residents
- They tell him to stop
- He doesn't
- They sue



# Washington's anti-spam act:

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“No person may [send] . . . a commercial [email] . . . that the sender knows, or has reason to know, is held by a Washington resident that . . . misrepresents or obscures any information in identifying the point of origin.”

By this point, Heckel concedes everything except (a) the law's constitutionality as applied to him, and (b) his knowledge.



# Two of the DCC tests are easy

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- Do the burdens outweigh its benefits?
  - Burdens: truthful header information
  - Benefits: preventing unwanted email
- Does it create a risk of inconsistency?
  - Would some other state explicitly permit what Washington forbids?
  - Are there overlapping requirements?



# But what about extraterritoriality?

- Remember, in *Pataki*, “No user could avoid liability by directing his or her communications elsewhere.”
- Could Heckel “direct his communications elsewhere?”
- That turns on the meaning of “knows or has reason to know.”
- *Pataki* and *Heckel* are inconsistent, aren’t they?



# Lessons learned

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- Knowledge tests are extraordinarily slippery
- Don't put too much weight on the extraterritoriality test
  - Benefit/burden and inconsistency have more bite—if anyone knows what they mean.
- These kinds of problems invite federal legislation—for better and for worse



# Next time

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Where can you be sued?