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## State Regulation of Unsolicited Bulk Commercial E-mail and the Dormant Commerce Clause

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# State Regulation of Unsolicited Bulk Commercial E-mail and the Dormant Commerce Clause

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The meteoric rise of the Internet as a communication medium has profoundly affected American culture. The Internet has forever changed the way that Americans communicate, consume information and media, and purchase goods and services. In particular, electronic mail, or "e-mail" has become a ubiquitous part of American life. Written messages that, just ten years ago, would have been painstakingly handwritten or typed and mailed out to arrive at the recipient two to three days later are now sent in a matter of seconds. The benefits of e-mail are countless. Friends can quickly and conveniently stay in contact. Pictures and documents can be attached to e-mail messages and sent instantly over the Internet. One's entire social group may be notified in one fell swoop of a social happening by simply pressing a "send" button.

There is a downside to e-mail, however. Just as the average American may expect to find her mailbox stuffed with unsolicited junk mail on a daily basis, so too may the average American expect to find

her e-mail inbox stuffed with commercial unsolicited bulk e-mail on a daily basis. Pitching everything from libido-enhancing herbal drugs of dubious effectiveness to online universities to penny stock schemes, unsolicited bulk e-mail, known popularly as "spam,"<sup>1</sup> is nearly as old as the Internet itself.<sup>2</sup>

Many find the daily process of sifting through spam to be a maddening and unnecessarily time-consuming process. Sometimes, e-mail users will accidentally delete legitimate, important e-mails while deleting spam messages. Many people's moral sensibilities are offended by the intrusion into their e-mail inboxes of spam messages containing pornographic or salacious themes.

Spam's costs to society go beyond simple annoyance and offense, however. Some estimates place the cost of spam to U.S. businesses in 2003 anywhere from \$10 billion to \$87 billion.<sup>3</sup> Each spam message that a company's employee is forced to read and delete costs the company approximately \$.70 to \$1 in lost productivity.<sup>4</sup> Approximately forty percent of all e-mail messages sent in the United States in 2003 were spam, up from eight percent in 2001.<sup>5</sup> By 2005, spam was estimated to comprise a mind-boggling eighty percent of all e-mail messages sent.<sup>6</sup> In 2004, estimates placed the number of sent unsolicited bulk e-mail messages at approximately two billion per day.<sup>7</sup> Not everyone suffers from spamming. Spamming is quite a lucrative business for the spammers themselves.<sup>8</sup> In fact, in the absence of laws prohibiting such activities, there is little financial incentive to stop.

1. Throughout this note, I will refer frequently to unsolicited bulk commercial e-mail by its popular name, "spam." I will also use the term "spammer" to denote someone who is engaged in the business of sending unsolicited bulk commercial e-mail.

2. See Sameh I. Mobarek, Note, *The CAN-SPAM Act of 2003: Was Congress Actually Trying to Solve the Problem or Add to It?*, 16 LOY. CONSUMER L. REV. 247, 248 (2004) (discussing the etymology of the term "spam" as applied to unsolicited bulk e-mail).

3. Jordan M. Blanke, *Canned Spam: New State and Federal Legislation Attempts to Put a Lid On It*, 7 COMP. L. REV. & TECH. J. 305, 305 (2004).

4. Charles E. Ramirez & Karen Dybis, *Anti-spam Battle Saps Businesses; Junk E-Mails Cost Companies \$10 Billion a Year; Michigan Debates New Laws to Stem Assault*, DETROIT NEWS, June 10, 2003, at 1A.

5. Jonathon Krim, *Spam's Cost to Business Escalates; Bulk E-Mail Threatens Communication Arteries*, WASH. POST, Mar. 13, 2003, at A1.

6. Tom Zeller, Jr., *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. TIMES, Feb. 1, 2005, at A1.

7. Jon Swartz, *Net Providers Sue Scads of Spammers*, USA TODAY, Mar. 11, 2004, at 1B.

8. Prosecutors estimated an arrested spammer's personal fortune from spamming at \$24 million. See Emma Schwartz, *Virginia Hopes Spam Verdicts Send Message; A New State Law Makes Fraudulent, Unsolicited Mass E-mailings a Felony, and in Prosecutors' First Conviction, the Jury Urges Prison Time*, L.A. TIMES, Nov. 7, 2004, at A20.

Over the past several years, numerous states and the Federal Government have enacted measures to combat the growing tide of spam. One of the major issues that such state legislation raises is that of the dormant Commerce Clause as applied to anti-spam regulation. This note will analyze the implications of the dormant Commerce Clause as applied to Virginia's stringent anti-spam law, under which two spammers have already been convicted of felony spamming. Part I will lay out the background of anti-spam legislation, case law involving other state statutes, and a brief history of United States Supreme Court dormant Commerce Clause jurisprudence. Part II will examine the validity of state spam regulation under the Federal CAN-SPAM Act of 2003 and current dormant Commerce Clause jurisprudence, using Virginia's anti-spam law as an example. Finally, Part III will examine the shortcomings of the CAN-SPAM Act and will assert that anti-spam regulation is an area best left to states and their police powers.

## I. BACKGROUND

In response to the growing problem of spam, on April 29, 2003, the Virginia legislature passed a stringent anti-spam law.<sup>9</sup> The statute states:

A. Any person who:

1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers; or

2. Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or distribute software that (i) is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or (iii) is marketed by that person acting alone or with another for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information is guilty of a Class 1 misdemeanor.

B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:

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9. See Saul Hansell, *Virginia Law Makes Spam, With Fraud, A Felony*, N.Y. TIMES, April 30, 2003, at C1.

1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period; or

2. The revenue generated from a specific UBE transmission exceeded \$1,000 or the total revenue generated from all UBE transmitted to any EMSP exceeded \$ 50,000.

C. A person is guilty of a Class 6 felony if he knowingly hires, employs, uses, or permits any minor to assist in the transmission of UBE in violation of subdivision B 1 or subdivision B 2.<sup>10</sup>

This statute made possible prison terms of one to five years and forfeiture of all gains connected with spamming activities proscribed under the statute.<sup>11</sup> The law replaced a 1999 Virginia statute that mandated mere civil sanctions for spammers.<sup>12</sup> Virginia's governor signed the bill enacting the statute at Internet provider America Online's Virginia headquarters.<sup>13</sup> At this ceremony, Governor Mark R. Warner hailed the passage of the statute stating, "it is appropriate that we give our prosecutors tools to go after this costly and annoying crime."<sup>14</sup>

#### A. *The Virginia Law in Action*

On December 11, 2003, Virginia authorities arrested Jeremy Jaynes, a North Carolina resident, on four counts of transmitting spam fraudulently through servers based in Virginia, in violation of section 18.2-152.3:1 of the Virginia Code.<sup>15</sup> According to spam watchdog organization, Spamhaus.org, Jaynes, who went by the alias "Gaven Stubberfield," was the eighth most prolific spammer in the world.<sup>16</sup> Jaynes was the first person to be charged under the Virginia law and was the first felony spam indictment in the United States.<sup>17</sup> Virginia authorities also charged a business associate of Jaynes', Richard Rutkowski, at that time.<sup>18</sup> On April 7, 2004, Virginia

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10. VA. CODE ANN. § 18.2-152.3:1 (2005).

11. See Hansell, *supra* note 9, at C1.

12. See Steven Ginsberg & R.H. Melton, *Va. Blocks Bulk E-Mailers; Warner Hails New Law to Attack 'Spam Invasion'*, WASH. POST, Apr. 30, 2003, at B1.

13. See *id.*

14. See *id.*

15. *Virginia Charges 2 Under New Spam Law*, CHI. TRIBUNE, Dec. 12, 2003, at C1 [hereinafter *Virginia Charges 2*].

16. Karin Brulliard, *Jury Finds 2 Guilty of Felony Spam; Loudoun Convictions Are First in Nation*, WASH. POST, Nov. 4, 2004, at E1.

17. Dan Thanh Dang, *Spammer Suspect Arrested in N.C.; Felony Indictment Under New Va. Law is Called First for Nation*, BALT. SUN, Dec. 12, 2003, at 1D.

18. *Id.*

authorities charged and arrested a third suspect in the spam ring, Jessica Jaynes DeGroot, Jaynes' sister.<sup>19</sup> The three allegedly sent more than 100,000 unsolicited e-mails in a 30-day period during summer 2003, promoting penny stocks and software to erase Internet browsing records, among other things.<sup>20</sup>

On June 16, 2004, counsel for the charged parties appeared before Judge Thomas D. Horne of the Loudoun County (Va.) Circuit Court, to argue that Virginia's anti-spam law violated the First Amendment, violated Due Process, offended double jeopardy principles, and was inconsistent with the dormant Commerce Clause.<sup>21</sup> On the last point, lawyers for the defendant contended that the Virginia law constituted a *per se* violation of the dormant Commerce Clause because it had the practical effect of controlling the commerce of other states, the burden of the law on interstate commerce outweighed any local benefits provided by the statute, and application of the law subjected distributors of unsolicited bulk e-mail to inconsistent state regulation.<sup>22</sup>

Judge Horne held that the statute's practical effect was not to regulate commerce occurring outside the Commonwealth of Virginia and was therefore not a *per se* violation of the dormant Commerce Clause.<sup>23</sup> Employing the two-step inquiry set forth by the United States Supreme Court in *Pike v. Bruce Church* (discussed below), Judge Horne found that the local benefits of the statute far outweighed the burden placed on interstate commerce, which is that bulk e-mails may not contain falsified routing information.<sup>24</sup>

Judge Horne's ruling, generally upholding the Virginia statute against all constitutional challenges, paved the way for Jaynes, Rutkowski, and DeGroot to stand trial.<sup>25</sup> On October 25, 2004, the trial for the three accused began.<sup>26</sup> On November 3, 2004, a jury recommended a sentence of nine years in prison for Jeremy Jaynes, a \$7,500 fine for Jessica Jaynes DeGroot, and acquitted Richard Rutkowski.<sup>27</sup> Jaynes and DeGroot became the first individuals in the United States to be convicted of felony spam charges.<sup>28</sup>

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19. *Woman Indicted on Anti-Spam Laws*, DAILY PRESS (VA.), Apr. 8, 2004, at C7.

20. *See Virginia Charges 2*, *supra* note 15, at C1.

21. *Virginia v. Jaynes*, 65 Va. Cir. 355, 356 (Va. Cir. Ct. 2004).

22. *Id.* at 367.

23. *Id.* at 369-70.

24. *Id.* at 368-69.

25. *See id.* at 371.

26. Jon Swartz, *First Felony Spam Trial Begins in Virginia*, USA TODAY, Oct. 26, 2004, at 3B.

27. Brulliard, *supra* note 16, at E1.

28. *Id.*

### B. Dormant Commerce Clause Jurisprudence

Article I, Section 8, Clause 3 of the United States Constitution provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”<sup>29</sup> It is now well-settled that the Commerce Clause prevents states from legislating in certain manners, lest they should infringe on Congressional prerogative to regulate commerce.<sup>30</sup> This restriction on state power is known as the dormant Commerce Clause.<sup>31</sup> Over the years, the Court has devised a variety of tests to determine which types of state regulations pass dormant Commerce Clause muster.<sup>32</sup>

When a state law’s purpose is to discriminate against out-of-state commerce, either on its face or in effect, the Court has adopted a test whereby “such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”<sup>33</sup> Obviously, this is a high hurdle for a statute to overcome.

In *Pike v. Bruce Church*, the Court set forth its test to be applied when a statute is not facially discriminatory:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>34</sup>

Finally, the Court has used the dormant Commerce Clause to invalidate regulations that would have an adverse impact on interstate commerce by subjecting activities to inconsistent regulations.<sup>35</sup> The theory underpinning this area of dormant Commerce Clause jurisprudence is that some aspects of the national commercial infrastructure require uniformity, which in turn requires

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29. U.S. CONST. art. I, § 8, cl. 3.

30. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

31. *See id.*

32. *Id.*

33. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

34. 397 U.S. 137, 142 (1970) (internal citations omitted).

35. *CTS Corp.*, 481 U.S. at 88; *see also* *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (stating that a statutory scheme that allows a state to project its legislation beyond its borders would subject merchants to inconsistent obligations in different states); *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852) (“[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress”).

that a single authority, Congress, prescribe all regulations in this area.<sup>36</sup> This area of dormant Commerce Clause jurisprudence is somewhat less clearly defined than the tests applied to facially discriminatory statutes and *Pike* statutes, but it is important to Internet regulation.<sup>37</sup> In *Healy v. The Beer Institute*, the Court affirmed the dormant Commerce Clause consideration that regulations with the effect of projecting state regulation beyond its borders offend the dormant Commerce Clause, since they interfere with the legitimate regulatory regimes of other states.<sup>38</sup>

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

The Internet presents unique and important issues in dormant Commerce Clause jurisprudence, especially with regard to the regulation of spam. One of the seminal holdings in the area of the dormant Commerce Clause's interaction with the Internet came in *American Library Ass'n v. Pataki*.<sup>39</sup> This case involved a challenge to a New York statute designed to protect minors from pornographic images on the Internet.<sup>40</sup> In this case, the district court held that the New York statute "seeks to regulate communications occurring wholly outside New York, imposes a burden on interstate commerce that is disproportionate to the local benefits it is likely to engender, and subjects plaintiffs, as well as other Internet users, to inconsistent state obligations."<sup>41</sup>

Particularly relevant to the *Pataki* court's analysis was its observation that the Internet's amorphous geography presented a unique likelihood that an individual might be subject to inconsistent regulations by states regulating beyond their borders, a notion offensive to the Commerce Clause.<sup>42</sup> The *Pataki* court asserted that the Internet was one of the mediums of commerce that demanded complete consistency in its regulation, and that Congress was the only governmental entity that could legislate in this area with the necessary level of consistency.<sup>43</sup> The consequence of inconsistent

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36. S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).

37. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001).

38. 491 U.S. 324, 336 (1989).

39. 969 F. Supp. 160 (S.D.N.Y. 1997).

40. *Id.* at 161-65.

41. *Id.* at 167.

42. *Id.* at 168-69.

43. *Id.* at 169.



regulation, the court stated, was the risk of paralyzing development of the Internet.<sup>44</sup>

The court also emphasized that the amorphous nature of the Internet made it impossible for the New York statute to be limited to purely intrastate communications over the Internet or for someone to avoid liability by preventing New Yorkers from accessing materials proscribed under the statute.<sup>45</sup> Thus, someone who was acting within the law of his own state might run afoul of the New York law and be subject to prosecution in New York despite compliance with his home state's regulatory policies. The court conceptualized the Internet as a mode of commerce analogous to highways or railroads.<sup>46</sup> As such, the Internet "requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."<sup>47</sup>

Further, the *Pataki* court seemed to suggest that all state regulation of the Internet would face almost *per se* invalidity, since the Internet's nature demands the sort of cohesive regulatory scheme that only Congress can provide.

But in 2001, the Washington Supreme Court arrived at a very different conclusion in *State v. Heckel*.<sup>48</sup> Jason Heckel, an Oregon resident, was engaged in the business of sending spam to Washington residents, among others.<sup>49</sup> Washington residents who had received Heckel's spam complained to the Washington State Attorney General's Office that Heckel's messages contained misleading information, including misleading subject lines and false transmission paths.<sup>50</sup> Heckel was charged in violation of Washington's Commercial Electronic Mail Act.<sup>51</sup> The statute provides that anyone falsifying a commercial e-mail's point of origin, transmission path, or employing a misleading subject line is in violation of the law.<sup>52</sup>

The trial court granted Heckel's motion for summary judgment, finding that the Washington act violated the Commerce Clause and was "unduly restrictive and burdensome."<sup>53</sup> Engaging in the relevant dormant Commerce Clause analysis, the Washington Supreme Court quickly found that the statute was not facially discriminatory, in that

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44. *Id.*

45. *Id.* at 171.

46. *Id.* at 182.

47. *Id.*

48. 24 P.3d 404 (Wash. 2001).

49. *Id.* at 406.

50. *Id.* at 406-07.

51. *See id.* at 406.

52. *Id.* at 467 (citing Wash. Rev. Code § 19.190.030 (2004)).

53. *Id.* at 408.

it regulated evenhandedly between Washington residents and out-of-state residents.<sup>54</sup>

Employing the second prong of dormant Commerce Clause analysis, the court held that the Washington law also passed muster under the balancing test set forth in *Pike* since the Act's local benefits far outweighed any purported burden on interstate commerce.<sup>55</sup> In finding a legitimate local benefit, the court emphasized the physical and economic damage done to businesses and individuals by deceptive commercial e-mail practices such as those employed by Heckel.<sup>56</sup> In this regard, the court likened the sending of deceptive spam, and its accompanying cost-shifting from advertisers to potential consumers, to the sending of junk mail, postage due, or telemarketing calls to a pay-per-minute cell phone.<sup>57</sup>

In examining the burdens placed on interstate commerce, the court observed that the only burden the Washington Act placed on spammers was the requirement of truthfulness.<sup>58</sup> Far from burdening commerce, the court noted, this requirement actually *facilitated* commerce by reducing fraud and deception.<sup>59</sup> Furthermore, such a requirement would serve to redress the problems caused by spam since spamming would be a far less attractive endeavor were spammers required to be truthful in all of their information.<sup>60</sup>

The court addressed Heckel's contention that the statute created an inconsistency among the states and that it regulated conduct occurring wholly outside of Washington.<sup>61</sup> The court found that the statute did not conflict with any of the requirements of other states and that it would be inconceivable that any state would pass a law requiring the use of deceptive practices in commercial e-mail.<sup>62</sup> The court further found that the differences between the act and the anti-spam laws of other states did not impose extraordinary costs on businesses employing spam.<sup>63</sup> As for regulating extraterritorially, the court found that the act did not have a "sweeping extraterritorial effect" that would outweigh the local benefits of the act.<sup>64</sup>

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54. *Id.* at 410.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 411.

59. *Id.*

60. *Id.* (quoting Goldsmith & Sykes, *supra* note 37, at 819).

61. *Id.* at 411-12.

62. *Id.* at 412.

63. *Id.*

64. *Id.*

Finally, the court distinguished this case from that in *Pataki*.<sup>65</sup> The court noted that the statute in *Pataki* dealt not just with e-mail messages, but with the Internet as a whole, subjecting individuals to liability based on unintended access, whereas the statute in *Heckel* reached only deceptive spam directed to a Washington resident or initiated from a computer located in Washington.<sup>66</sup>

*Washington v. Heckel* set a valuable precedent; one that the California Court of Appeals noted in *Ferguson v. Friendfinders, Inc.*<sup>67</sup> In that case, Mark Ferguson brought suit against Friendfinders for sending him spam that was allegedly deceptive and misleading in violation of California's Business and Professions Code section 17538.4.<sup>68</sup> Ferguson contended that Friendfinders had neglected to include the prefix "ADV" in the subject line as required by law; that the first line in the text of the messages had failed to contain information about how recipients could have their e-mail addresses removed from future promotions; that the e-mail messages failed to provide a valid return e-mail address to which the recipient could respond; and that the headers of the e-mails were altered to mask the identity of the sender.<sup>69</sup>

As in *Heckel*, the lower court found that California's law violated the dormant Commerce Clause.<sup>70</sup> And just as in *Heckel*, the court of appeals upheld the law against the Commerce Clause challenge.<sup>71</sup> The court disposed of the first prong of the dormant Commerce Clause analysis quite handily, since Friendfinders conceded that the law was not facially discriminatory.<sup>72</sup> Instead, Friendfinders contended that the law regulated extraterritorially, forcing spammers who do business in California to always comply with California law regardless of the recipient's actual address.<sup>73</sup>

Friendfinders pointed out that the amorphous geography of the Internet makes geographic limitations on the scope of the California law ineffectual.<sup>74</sup> The court dismissed this argument, opining that the California law did not regulate the amorphous Internet *per se*, but that it did regulate individuals and entities that did have concrete

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65. *Id.*

66. *Id.*

67. 115 Cal. Rptr. 2d 258 (Ct. App. 2002).

68. *Id.* at 259.

69. *Id.* at 260-61.

70. *Id.* at 259-60.

71. *Id.* at 260.

72. *Id.* at 263.

73. *Id.*

74. *Id.* at 264.

geographic locations.<sup>75</sup> The court rejected the proposition in *Pataki* that any state regulation of Internet use violates the dormant Commerce Clause, holding that the fact that the Internet is an incident of interstate commerce does not automatically render a state statute regulating Internet use violative of the dormant Commerce Clause.<sup>76</sup>

The court went on to distinguish *Pataki* (as did *Heckel*) on the basis that the California law, unlike the law at issue in *Pataki*, did not regulate the Internet as a whole, with all of its amorphous geographical boundaries.<sup>77</sup> The court rejected the argument that spammers would be subjected to inconsistent regulation, reasoning that since the geographical limitations in the law are effectual, one could theoretically comply with each individual state regulation of spam, without any inconsistent obligations.<sup>78</sup>

Tracking the *Pike* analysis in *Heckel*, the court held that stemming the flow of deceptive spam and its physical and economic effects on individuals and businesses incident to its cost-shifting from advertisers to consumers was a legitimate state interest.<sup>79</sup> The court further noted that the burden posed by a law requiring spam to employ no deception was minimal and did not outweigh the local benefits.<sup>80</sup> Both *Heckel* and *Ferguson*, and what they represent doctrinally, are extremely important and relevant to consideration of Virginia's anti-spam law, as the Virginia law is very similar in many regards.

Despite the analysis in both *Heckel* and *Ferguson*, controversy remains as to the proper scope of state power to regulate the Internet. As recently as 2003, the Second Circuit stated in *American Booksellers Foundation v. Dean* that it is "likely that the Internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.'" <sup>81</sup> Although *Dean* did not involve Internet spam, the court's sweeping proclamation seems to suggest that all state Internet regulation is prohibited.

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75. *Id.*

76. *Id.* at 265.

77. *Id.*

78. *Id.* at 266.

79. *Id.* at 268.

80. *Id.* at 268-69.

81. 342 F.3d 96, 104 (2d Cir. 2003).

## II. ARE STATE SPAM STATUTES STILL GOOD LAW?

A. *The CAN-SPAM Act: Content and Criticisms*

On December 16, 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act, popularly known as the "CAN-SPAM Act" ("the Act").<sup>82</sup> The Act officially took effect on January 1, 2004.<sup>83</sup> The federal government adopted the Act, in part, because of findings that the receipt of unsolicited e-mail messages accounts for over half of all e-mail traffic, results in added costs to recipients and Internet service providers, results in the risk that legitimate messages will be lost in a flood of unwanted messages, and often contains fraudulent or misleading information.<sup>84</sup> The Act established measures designed to combat spam such as a Do-Not-E-Mail registry<sup>85</sup>.

As soon as the Act was passed, however, one particular provision of the Act became a lightning rod for criticism. The provision at issue stated that the Act supersedes all state statutes, rules, and regulations that regulate the sending of commercial e-mail, except to the extent that any such regulation addresses falsification or deception in spam e-mails.<sup>86</sup> While this measure had the advantage of increasing the uniformity of commercial e-mail regulation, it raised immediate concern that tough state anti-spam measures would be gutted and rendered ineffectual by the Act.<sup>87</sup> The Act preempted statutes such as California's, which did not particularly relate to deceptive or fraudulent e-mailing practices.<sup>88</sup> Before the passage of the Act, the Attorneys General of forty-four states came out strongly against the Act, arguing that it was minimally protective to consumers and contained too many exceptions and loopholes for effective enforcement.<sup>89</sup> Fears regarding the Act have proven to be well-founded. Perversely, since the passage of the Act, spam has *increased* from comprising fifty-sixty percent of all e-mails sent to eighty percent of all e-mails sent.<sup>90</sup>

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82. 15 U.S.C. § 7701 (West 2005).

83. *Id.*

84. *Id.* § 7701 (2)-(4), (8).

85. *See id.* § 7708(1).

86. *Id.* § 7707(a)(2), (b)(1).

87. Blanke, *supra* note 3, at 317.

88. *Id.*

89. *Id.*

90. Zeller, *supra* note 6, at A1.

### B. The Virginia Law and Federal Preemption

The question remains whether the Act preempts Virginia's anti-spam statute. For Jeremy Jaynes and Rutkowski, the issue is moot since Virginia charged them under the Virginia law just days before the Act passed.<sup>91</sup> For those seeking to determine the continuing viability of Virginia's law under the dormant Commerce Clause, the issue is quite important since the statute will only raise dormant Commerce Clause issues if it is still in force. Some commentators suggest that Virginia's law must give way before the federal law.<sup>92</sup> In all likelihood, however, the Act did not preempt the Virginia law. The relevant portion of the Act states:

This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.<sup>93</sup>

The relevant portions of the Virginia law state:

A. Any person who:

1. Uses a computer or computer network with the intent to *falsify* or *forge* electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers; or

2. Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or distribute software that (i) is primarily designed or produced for the purpose of facilitating or enabling the *falsification* of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the *falsification* of electronic mail transmission information or other routing information; or (iii) is marketed by that person acting alone or with another for use in facilitating or enabling the *falsification* of electronic mail transmission information or other routing information is guilty of a Class 1 misdemeanor.<sup>94</sup>

Clearly, the language of the Virginia statute deals with falsification and deceptive practices in sending spam e-mails. Thus, this would place the Virginia law within the exception for preemption contained within 15 U.S.C. § 7707 for statutes that address such

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91. See *supra* Part I.A

92. See Paul Rubell, *Technology Law and Practice; New Federal Law to Take Effect, But Will Spam Be Conquered?*, N.Y. L.J., Dec. 23, 2003, at 16 ("It would seem that the heart of the Virginia statute under which the indictments against Mssrs. Jaynes and Rutkowski were brought . . . will be preempted by the CAN-SPAM Act.").

93. CAN-SPAM Act, 15 U.S.C. § 7707(b)(1) (West 2005).

94. VA. CODE ANN. § 18.2-152.3:1 (2004) (emphasis added).

falsification practices. Other state laws may not be so fortunate in surviving 'the Act's preemption.

*C. The Virginia Law and the Dormant Commerce Clause: Defusing the "Nuclear Bomb"*

Some commentators have characterized the dormant Commerce Clause as "a nuclear bomb of a legal theory against state Internet regulations."<sup>95</sup> Despite its appearance, this statement proves not to be a great exaggeration, at least where the courts in *American Library Ass'n v. Pataki*<sup>96</sup> and *American Booksellers Found. v. Dean*<sup>97</sup> are concerned. *Dean's* clear and explicit proposition that it is "likely that the Internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule,' "<sup>98</sup> would certainly appear to doom any measures on the part of states such as Virginia to regulate unwanted bulk e-mails. *Dean* also stated that "[b]ecause the Internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without 'projecting its legislation into other States.' "<sup>99</sup> While this case is from a different federal circuit than Virginia, a closer examination of the statute and regulated activities at issue here reveal that the Virginia statute would probably pass muster even in the Second Circuit, the locale of the *Dean* ruling, in spite of any sweeping and perhaps overly broad pronouncements to the contrary.

While it is technically true that spam is an omnipresent part of the Internet landscape, it presents some very different issues than the activities in *Dean* and *Pataki*, which led to the *Dean* court's pessimistic view of the constitutionality of any state attempts to regulate the Internet. In *Dean*, the activity at issue was the maintenance of sexually oriented websites accessible to minors, in violation of Vermont law.<sup>100</sup> The court found that because the websites at issue were accessible to Vermont residents, website operators in states outside of Vermont would have to comply with the Vermont law to avoid incurring liability.<sup>101</sup> Thus, Vermont had

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95. Goldsmith & Sykes, *supra* note 37, at 78.

96. 969 F. Supp. 160 (S.D.N.Y. 1997).

97. 342 F.3d 96 (2d Cir. 2003).

98. *Id.* at 104 (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852)).

99. *Id.* at 103 (quoting *Healy v. Beer, Inst.*, 491 U.S. 324, 334 (1989)).

100. *See id.* at 98-101.

101. *Id.* at 103-104.

effectively projected its legislation into the rest of nation, and indeed the world.<sup>102</sup> Every website in the world would be required to comport with the Vermont law. Furthermore, the court found that there is no practical way, with existing technology, for the purveyors of a website to prevent Vermont minors from accessing the site, in order that they might comply with the Vermont law.<sup>103</sup> The pervasive problem with websites is the fact that their passive nature allows people to access them with very little control by the website's creators and maintainers.<sup>104</sup> It is this problem that led the court in *Dean* to pronounce broadly that there could be no state Internet regulation.

Spam, however, presents a slightly different issue than passive websites; passive websites involve two-way communications between a computer and a server on which a website is stored, while unwanted e-mails involve a one-way transmission from sender to receiver.<sup>105</sup> There are suggestions that, while there are many ways emerging for a website operator to determine the geographical origins of users downloading content from their websites, it is practically impossible for senders of spam e-mail to identify in advance and delete from their mass e-mail lists any recipients in jurisdictions with laws unfavorable to their activities.<sup>106</sup> Since there are no jurisdictions at present that completely prohibit spam e-mail, one wishing to "play it safe" in all jurisdictions need only comply with the requirements of each jurisdiction.

Judge Thomas D. Horne, who upheld the Virginia law against a dormant Commerce Clause challenge in *Virginia v. Jaynes*, noted that "[a] survey of state laws regulating bulk electronic mail finds that none conflict with the Virginia statute . . . [it] can be harmonized with all such state statutes."<sup>107</sup> Assuming that Judge Horne's statement is true, the mere fact that Virginia's statute is consistent with other state statutes, or that one may continue to engage in the sending of unsolicited bulk e-mail so long as proper precautions are taken, does

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102. *Id.*

103. *Id.* at 103.

104. It currently appears to be the case that website operators have little control over who may access the content of their sites. See Goldsmith & Sykes, *supra* note 37, at 808-13 for their insightful discussion on emerging technologies which will allow, among other things, for the purveyors of websites to identify people's geographic origin by identifying the source of the Internet protocol (IP) address of their computer. Goldsmith and Sykes suggest that such geographical identification technologies could be used to tailor content by geography and comply with various state laws regulating the Internet. See *id.*

105. *Id.* at 812.

106. *Id.*

107. *Virginia v. Jaynes*, 65 Va. Cir. 355, 369 (Va. Cir. Ct. 2004).



not immunize the Virginia statute from dormant Commerce Clause problems.

### 1. Facially Discriminatory?

A state statute may violate the dormant Commerce Clause in several ways. First, when a state statute is facially discriminatory toward out-of-state commerce, it is nearly always *per se* invalid under the dormant Commerce Clause.<sup>108</sup> The Court has adopted a test whereby "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."<sup>109</sup>

The Virginia law is not facially discriminatory, nor has there been any contention that it is. Certainly, this was not Jaynes' argument when he brought his constitutional claim.<sup>110</sup> For the Virginia statute to be facially discriminatory, it would have to do something akin to allowing Virginia residents to send unsolicited bulk e-mail with falsified information to Virginia residents, while disallowing the residents of other states to send unsolicited bulk e-mail with falsified information to Virginia residents. Considering the deleterious effects of unsolicited bulk e-mail, one might argue compellingly for the importance of the legitimate local purpose. Arguing that such a discriminatory measure was the only option available, however, would present a greater hurdle.

### 2. An Undue Burden Under the *Pike* Balancing Test?

In contrast to a facially discriminatory statute, a law may violate the dormant Commerce Clause if it unduly burdens interstate commerce in relation to the local benefit sought to be achieved.<sup>111</sup> In such a case, the reviewing court is charged with applying the balancing test laid out in *Pike v. Bruce Church*, whereby a court looks to the legitimacy of the state's regulatory interest in the statute, and the burden on commerce is weighed against the local benefit.<sup>112</sup>

Judge Horne, in his *Pike* analysis of the Virginia statute, quoted commentators stating:

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108. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

109. *Id.*

110. *Cf. Jaynes*, 65 Va. Cir. at 367 (not describing the statute as facially discriminatory while asserting the unconstitutional defense).

111. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

112. *Id.*

Even assuming that the antispam laws do not significantly further the state's interest, it is hard to see how the anti-spam laws burden interstate commerce at all. The spam laws essentially require truthfulness in the header, return address, and subject line of the e-mail. Far from burdening commerce, the truthfulness requirement facilitates it by eliminating fraud and deception.<sup>113</sup>

It is difficult to take serious issue with the result reached here that a requirement of honesty in sending unsolicited bulk e-mails is minimally burdensome, especially when taken in light of the local interest in eliminating such deceptive practices.

### 3. Projecting Legislation Beyond Virginia's Borders?

The next means by which a state law may run afoul of the dormant Commerce Clause is by projecting state legislation outside the state's borders.<sup>114</sup> Legislation that regulates extraterritorially is, like facially discriminatory legislation, nearly always subject to *per se* invalidity.<sup>115</sup> Here, Judge Horne points out that the Virginia statute only reaches those who send unsolicited bulk e-mail to Virginia residents; that it must be established that the e-mail reached a Virginia resident.<sup>116</sup> In other words, the Virginia law would never penalize someone from North Carolina for sending an unsolicited bulk e-mail message to someone in Tennessee, for example, assuming that at no time the e-mail passed through Virginia.

This, however, may not be the only way the Virginia statute could potentially regulate extraterritorially. Assume for a moment, using the North Carolina/Tennessee example, that there is no law against sending unsolicited bulk e-mail in either of those states. The normal functioning of the Internet often results in sent e-mail messages being routed through servers in places other than the locale of the intended recipient or sender. The sender of the e-mail has little or no control over how and when this occurs. Thus, a lawfully sent e-mail with falsified information might unintentionally pass through Virginia, thus subjecting the sender to criminal liability in Virginia, even though both sender and recipient lived in states in which such activities were perfectly legal.

In this regard, this example would be more akin to the objectionable website content cases, such as *Dean* and *Pataki*, in which the courts seemed to suggest wholesale that the states could not

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113. *Jaynes*, 65 Va. Cir. at 370 (quoting Goldsmith & Sykes, *supra* note 37, at 819).

114. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

115. *Id.* at 332.

116. *Jaynes*, 65 Va. Cir. at 368.

regulate the Internet.<sup>117</sup> In both of those cases, one of the important considerations was that the state subjected the operators of a website to liability in a state where they did not seek to do business.<sup>118</sup> These arguments are probably similar to the arguments Jaynes's attorneys made in his case, which did not carry the day.

Even where it is relatively easy to comply with state regulations, such as by adding specialized information to the subject line, it is difficult to see how a state is not regulating to some extent an activity occurring wholly outside its borders. At present, dormant Commerce Clause jurisprudence says that extraterritorial regulation is *per se* invalid. Where the burden is relatively light, however, the courts seem to apply a less stringent standard than *per se* invalidity.

In support of his position rejecting the argument that the Virginia law regulated extraterritorially, Judge Horne cited a U.S. Supreme Court case upholding an Arkansas law requiring railroads to have a specific number of crewmembers aboard a train, even though the train was merely passing through the state en route to some final destination.<sup>119</sup> In that case, one might argue that the railroad had some control over the way its trains were routed, so that if it elected not to abide by Arkansas law, it could simply incur the expense of taking an alternate route that did not pass through Arkansas. The cost-benefit analysis would be the railroad's to make. In the case of a sender of unsolicited bulk e-mail, the sender could conceivably have far less control over where her message is routed, and through what jurisdictions it might pass. This is just one example of how the extraterritorial regulation inquiry would require a much more sensitive, fact-specific inquiry in cases involving the Internet. This is not to suggest that the Virginia statute is illegal by virtue of its potential tendency to regulate extraterritorially, but rather simply that the possibility exists. This may require courts to take a fresh look at extraterritorial regulation doctrine, in light of the unique issues that the Internet poses.

#### 4. Subjecting Spammers to Inconsistent Regulations?

The final means by which a law regulating unsolicited bulk e-mail might violate the dormant Commerce Clause is by subjecting activities to inconsistent regulations when taken in conjunction with

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117. See *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 187-88 (S.D.N.Y. 1997).

118. See *Dean*, 342 F.3d at 103; *Pataki*, 969 F. Supp. at 183.

119. *Jaynes*, 65 Va. Cir. at 370 (citing *Bhd. Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R.*, 393 U.S. 129, 135 (1968)).

other state statutes.<sup>120</sup> Judge Horne found that the Virginia law did not subject senders of unsolicited bulk e-mail to inconsistent regulation, since the Virginia law's requirements of truthfulness in the header, return address, and subject line of the e-mail did not conflict with any other state statutes on the books.<sup>121</sup> The difficulty with this doctrine is that it upholds Virginia law when taken alone, but when considered with other laws, it then becomes invalid under the doctrine. By the same token, every other state law might be valid when taken alone, but when viewed as a unitary whole, they all become invalid if they are inconsistent with one another. Either all could be seen as invalid, or courts could strike down the newcomer statute that raises the inconsistency. This could raise a quandary, although it does not for the Virginia statute. The Virginia statute's saving grace with regard to consistency of regulation would seem to be that it does not ban unsolicited bulk e-mail outright, but that it targets e-mail with falsified information. This allows it to mesh relatively easily with other state statutes, since it is inconceivable that a state anti-spam law would require e-mails to have falsified information.

In sum, it appears that the drafters of the Virginia statute have succeeded in carefully crafting a statute, based on the experiences of Washington and California, that will withstand dormant Commerce Clause scrutiny.<sup>122</sup> This is not to say that the statute may not eventually be overturned on some other constitutional grounds, such as Free Speech or substantive Due Process, but it appears that any statute that follows Virginia's lead will at the very least pass dormant Commerce Clause scrutiny.<sup>123</sup>

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120. *CTS Corp. v. Dynamics of Am.*, 481 U.S. 69, 88 (1987); *see also* *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (stating that a statutory scheme that allows a state to project its legislation beyond its borders would subject merchants to inconsistent obligations in different states); *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852) ("[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress").

121. *Jaynes*, 65 Va. Cir. at 370.

122. *See, e.g.,* *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258 (Ct. App. 2002); *State v. Heckel*, 24 P.3d 404 (Wash 2001).

123. While this Note does not examine the First Amendment implications of the Virginia law, one may intuit quite easily that since the Virginia law does not ban unsolicited bulk e-mail outright, but only deceptive practices in sending unsolicited bulk e-mail, that it would probably safely withstand a First Amendment challenge. To suggest otherwise is to suggest that the First Amendment protects the right of individuals to make all manner of fraudulent claims, a proposition that is untenable. In fact, *Jaynes* and his co-defendants did bring a First Amendment challenge to the Virginia law, which did not prevail. *See Jaynes*, 65 Va. Cir. at 357-62 for the discussion of Jeremy Jaynes's First Amendment challenge to the Virginia law.

## III. DO WE WANT THE STATES REGULATING THE INTERNET?

The question that remains after a dormant Commerce Clause analysis of the Virginia law is this: Virginia and other states may technically be able to legislate against unsolicited bulk e-mail . . . but should they?

The courts in *Dean* and *Pataki* seem to think that it is unwise, given the nature of the Internet as an instrumentality of commerce, to allow states to regulate in this arena at all.<sup>124</sup> Indeed, there is some undeniable logic to this view. If the federal government steps in to legislate against spam, as it did with the CAN-SPAM Act, it eliminates the dormant Commerce Clause problem altogether, since the dormant Commerce Clause applies only to state legislation.<sup>125</sup> Certainly, it would give those who wish to engage in the practice of unsolicited bulk e-mailing the ability to work with greater certainty. With a single, federal standard, senders of unsolicited bulk e-mail would have to deal only with a unitary standard of regulation, as opposed to the patchwork of state regulations that existed before the CAN-SPAM Act's preemption, and to some extent (at least where statutes dealing with fraud and deceptive practices are concerned) after the passage of the Act.

Herein lies the first reason why it may be wise to continue to allow states to legislate against unwanted bulk e-mails. To the extent that a single, federal standard would make it easier for spam e-mailers to ply their trade, this will be an economically undesirable result. The tendency of spam e-mail is to shift the cost of promotion and advertisement from businesses advertising to the consumer.<sup>126</sup> Like unwanted faxes, spam e-mails impose a cost on the recipient by co-opting space on servers and networks, employee time spent deleting them, and countless other ways.<sup>127</sup> Perhaps one of the best solutions to the problem is simply to shift some of the cost of spamming back to the spammers by forcing them to negotiate a vast array of slightly varying but nonetheless consistent state laws. Currently, spamming is such a lucrative and low-cost endeavor that there is little economic incentive to not become involved in some way in spamming.<sup>128</sup> Perhaps, by not allowing purveyors of spam the certainty that a single

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124. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

125. *CTS Corp.*, 481 U.S. at 87.

126. *Krim*, *supra* note 5, at A1.

127. *Id.*

128. *Id.*

federal standard would provide, society might be able to provide some financial and legal disincentive to become involved in spamming.

If socially and economically destructive Internet behavior has shown one tendency thus far, it is its ability to adapt with fiendish speed to outstrip any efforts to regulate it. For example, it seems that every time a peer-to-peer media file-sharing network is shut down, another steps up to fill the void. With the money to be had spamming, it is in spammers' best interest to apply their time, energies, and talents to quickly circumvent any attempt at regulation.<sup>129</sup> The federal government should not make it easier for spammers to engage in their business by handing them the ability, on a silver platter, to work with greater certainty. This is especially true when, as some argue, the current federal statute regulating spam does not go far enough in achieving its ends.

The fact that a patchwork of state regulations would reduce the ability of spammers to work with greater certainty, and thereby produce a financial disincentive to continue an activity which has substantial social costs, is just an ancillary benefit to states legislating against spam. Another benefit to allowing states to legislate in this arena is greater local accountability. Where state legislatures and state attorneys general are directly accountable to their constituencies for the passage and enforcement of robust anti-spam laws, it would seem that there would be greater likelihood of those laws being enforced. While it is true that the CAN-SPAM Act contains a provision providing for state attorneys general to bring a civil action against violators of the CAN-SPAM Act and reap substantial damages, there is no mention of the possibility of criminal liability under the CAN-SPAM Act.<sup>130</sup> To a spammer, like Jeremy Jaynes, who amassed an estimated \$24 million personal fortune from spamming, it would have taken a very large damage award indeed to serve as a deterrent.<sup>131</sup>

Thus, local lawmakers and law enforcement officials, whose activities are more likely to be closely scrutinized by their local electorates, have a substantial incentive to pass and enforce tough laws such as Virginia's, which mandate criminal penalties for spam insofar as the federal government is unwilling or unable to do so. Furthermore, it is unlikely that the federal government, busy with more pressing and immediate concerns, would have a great deal of

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129. See Schwartz, *supra* note 8, at A20.

130. 15 U.S.C. § 7706 (West 2005).

131. Prosecutors estimated Jeremy Jaynes's personal fortune from spamming at \$24 million. See Schwartz, *supra* note 8, at A20.

time or energy to spend going after spammers, especially if lawmakers and those charged with enforcing the law are relatively insulated from local constituencies and the accountability they demand.

Finally, the greatest advantage to having spam regulation and enforcement in the hands of states is adaptability. The Internet has shown itself, as a medium, to be notoriously difficult to regulate due to its high level of adaptability and innovation. Laws designed to regulate Internet activity are almost inevitably destined for near-obsolence within months due to the ability of Internet users to adapt their methods, practices, technologies, and even geographical locations to quickly skirt any regulation attempt. The only hope that exists for even approaching a workable standard of Internet regulation is to leave states free to quickly innovate and adapt in order to meet changing circumstances and shifting technologies.

Justice Brandeis once said of the American federal system: "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>132</sup> This comment means, in the context of spam regulation, that instead of having one "laboratory," the federal government, working on the problem of effective spam regulation. Internet users could have 50 separate "laboratories," each working to provide innovations, each working with great accountability to the local constituency.

It is in these 50 laboratories that the greatest hope for actually approaching the effective regulation of spam lies, since it will simply prove too unwieldy and slow to attempt to engage the machinery of the United States Congress to pass a new federal statute every time spammers manage to innovate their way around the latest statute. Additionally, as discussed above, even if a new statute were passed to deal with each new innovation, spammers would only have to concentrate their time, talents, and energies on overcoming the strictures of a single statute. They would not have to go through the time and trouble of staying abreast of new developments in state spam regulation.

In each of these state "laboratories," states would be free to experiment with regulation schemes and various types of penalties, both civil and criminal. From these testing grounds would eventually emerge evidence regarding which methods work best in restricting and regulating spam. This would avoid the current situation, where a

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132. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

federal statute contains a provision preempting many state anti-spam laws before they see the light of day, certainly before they have had very much time to prove their effectiveness (or lack thereof). At the very least, it would maintain the federal system, whereby states retain the police power to regulate in the best interest of their citizenry, and any of the advantages that system holds.

Virginia's law shows that it is possible for states to regulate spam, despite the amorphous, geographically fluid nature of the Internet, and not violate the dormant Commerce Clause. This is not to say, however, that the tests the courts currently use to analyze dormant Commerce Clause problems will continue to be applicable to future Internet cases and spam regulation cases. The dormant Commerce Clause is, at its core, a judge-made doctrine.<sup>133</sup> Judges should continue to be sensitive of the unique demands of Internet regulation, and the unique abilities of the various states to experiment and meet those demands, in determining whether the current tests, as traditionally applied, are appropriate to the challenges presented by this communication medium.

Finally, if Congress is to insist on replacing state anti-spam statutes with a single, overarching statute, it should go to great lengths to ensure that it is providing Internet users with at least as much protection as they would receive if they lived in a state that took a hard-line on spam. For example, Congress should look to Virginia's lead in creating criminal penalties for spammers, the likes of which will hopefully deter spamming even where monetary penalties will do little.

In sum, Virginia's experience shows that it is possible for states to pass laws regulating unsolicited bulk e-mail while staying within the bounds of the dormant Commerce Clause, even as it is currently applied. It would be best for states to continue to regulate against spam, as they are able to be more responsive in a speedier manner and experiment with various regulatory schemes without requiring the participation of the entire United States Congress. It is at the state legislative level that regulatory schemes will best be able to meet new innovations in spamming that would render a single federal law obsolete. Finally, a desirable by-product of a patchwork of varied state spam legislation would be that those wishing to engage in the business of spamming would have to continually stay abreast of new developments in the law and incur the costs of compliance with such a web of laws.

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133. CTS Corp. v. Dynamics of Am., 481 U.S. 69, 87 (1987).



## IV. CONCLUSION

Whatever the attempted solution to the spam problem, the unavoidable conclusion is this: spam has to stop, or at the very least, it cannot continue to exist in its current form. It is simply too destructive to the infrastructure and functioning of the Internet to allow individuals to reap financial reward by sending unsolicited bulk e-mail in such a manner so as to shift costs from the advertiser to the targeted consumer. Coupled with this threat to the functioning of the Internet is the fact that the nature of the Internet quite easily allows for spamming operations to be moved overseas, beyond the reach of American authorities.

The time may have arrived for the Supreme Court to fundamentally rethink and retool its dormant Commerce Clause jurisprudence to account for the geographical amorphousness of the Internet. Gone are the days in which the dormant Commerce Clause applied to the regulation of such concrete mediums of commerce such as railroads and highways. The information superhighway is a very different animal, presenting very different issues. If current dormant Commerce Clause jurisprudence is too inflexible to deal with the unique issues presented by spam and legislative attempts to regulate it, the time may have arrived to reshape those doctrines to meet a changing world.

A fundamental rethinking, however, may not even be necessary. Perhaps all that is necessary is for courts to take a very hard look at the actual functioning of statutes, combined with a solid grasp of the precise workings of the Internet. The Virginia statute provides an excellent example of a statute that appears to be able to pass muster even under current dormant Commerce Clause thinking and law. There is one substantial potential shortcoming in the Virginia statute, however: the statute only regulates fraudulent or misleading spam. The problem here is that, while fraudulent spam may end up creating greater costs to businesses and consumers, perfectly legitimate spam employing no deceit, fraud, or artifice whatsoever also entails substantial costs to society and businesses. It is apparent that something must be done about this problem as well. Virginia's statute, for all of its strictness, probably is not tough enough. As can be seen from the fact that spam now accounts for 80 percent of all e-mails sent, even after the CAN-SPAM Act was passed and Jaynes was prosecuted<sup>134</sup>, one may easily conclude that laws such

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134. Zeller, *supra* note 6, at A1.

as Virginia's that touch only on fraudulent spam may not even be sufficient to stem the tide of spam.

It also seems quite apparent that there is no "magic pill" that will cure the problem of spam. Indeed, it may require a highly coordinated combination of statutory regulation, tax schemes, and other legislative solutions to reduce or eliminate the costs that spam imposes upon businesses and society. Legislators must be informed about the issues attendant to spam and educated on the way that the Internet functions. The only way to fight the ability of those who would use the Internet to destructive ends and innovate their way around regulation is to counter with high levels of legislative innovation and responsiveness.

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