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State Spam Laws and the Dormant Commerce Clause

Briefing Paper (background on spam laws and dormant commerce clause)

A. Spam

1. Email and the Rise of Spam

As of January 2000, approximately **NUMBER** million people in the United States were connected to the Internet. Although the Internet comprises many telecommunications technologies (such as the World Wide Web, telnet, and Internet Relay Chat), the most widely used technology is electronic mail ("email").[1] Virtually every person who uses the Internet owns an email account, through which she can send and receive email.

Email is similar to conventional (paper-based) mail. They can both be used to send either a personalized message to one person (such as a birthday greeting) or an impersonal message to many people at the same time (such as an advertisement). Sending "bulk mail" (impersonal messages with many recipients) is an easy way to reach a large audience. Bulk mail frequently consists of advertisements or solicitations for charitable donations. Since bulk mail is often unwanted by its recipients,[2] sometimes it is referred to as "junk mail." Bulk emails are commonly referred to as "unsolicited commercial email" (UCE), junk email, or spam. People who send spam are called "spammers."

One important difference between spam and conventional junk mail is that it is much cheaper to send bulk mail via email than it is via conventional mail. With

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[1] Junk E-mail: Hearings Before the Senate Subcommittee on Communications of the Senate Committee on Commerce, Science and transportation, 105th Congress (1998), available at 1998 WL 12761269 [hereinafter Hearings] (testimony of Deirdre Mulligan, Staff Counsel, The Center for Democracy and Technology).

[2] A survey of over 1,000 Internet users reported that 43% of users hate bulk email, and 25% consider it bothersome; 68.5% of respondents reported that junk email is not useful at all. Barry D. Bowen, Controlling Unsolicited Bulk E-mail, Sun World, Aug. 1997, at 1, available at http://www.sunworld.com/sunworldonline/swol-08-1997/swol-08-junkemail.html.

conventional mail, each additional piece of mail sent requires both another paper copy and additional postage.[3] With email, however, the only cost (to the sender) is typing one more email address into the recipient list. This cost differential arises because the cost of bulk email is shifted to other parties, such as the sender's Internet Service Provider (ISP), the recipient's ISP, and the recipient herself.[4] Each additional email must be sent by the sender's ISP, received by the recipient's ISP, and read (or deleted) by the recipient. This additional cost, as reflected in computer processing time (for the ISPs)[5] and Internet access time (for the recipient), is never borne by the sender.

Recently, advertisers have begun to take advantage of the low-cost characteristic of bulk email. The number of email advertisements sent has grown from approximately **NUMBER** thousand in 1995 to **NUMBER** million in 1999.[6] As the number of bulk emails sent has grown, so has the burden imposed by these emails on ISPs and recipients.

2. Legislative Responses to Spam

Many spam laws have been passed in an attempt to cut down on spam and reduce its burden on ISPs and recipients. These laws have been enacted in both the United States and in foreign countries.[7]

i. Categories of Spam Laws

Spam laws can be categorized based on how they address the spam problem. For example, some spam laws require that emails not contain falsified (or "spoofed") return email addresses and routing information. Another type of spam law requires spam to be

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[3] *Hearings*, *supra* note 1.
[4] *Id. See also* Bowen article at 5.
[5] Spam can cost ISPs hundreds of thousands of dollars per year. Bowen article at 4.
[6] Approximately thirteen billion pieces of junk email are sent over the Internet each year. Jon Swartz, Reputed King of Junk E-mail Says He's Through Spamming, S.F. Chron., June 4, 1998, at D3.
[7] For information on anti-spam activities in foreign countries, see http://www.spamlaws.com/eu.html (EU) and http://www.spamlaws.com/world.html (other countries).

labelled as such. One proposed way to do this is to require spammers to put the phrase "ADV:" in the subject line of spam emails. Other spam laws allow ISPs and recipients to sue spammers for damages.

ii. Federal Spam Bills

As of September 2000, no federal spam laws existed, but many had been proposed in previous years. The first federal spam bill, **BILL**, was introduced in the **HOUSE/SENATE** in **YEAR**. **BILL** died in the **H/S**. Since then, there have been approximately seventeen federal spam bills.[8] All have failed to become law.

<S. 771, Murkowski, introduced 5-21-97?>

As of September 2000, there are ten federal spam bills that are pending.[9] One of these is the Unsolicited Commercial Electronic Mail Act of 2000 (H. R. 3113) ("UCEMA"). UCEMA's goal is "[t]o protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail."[10]

UCEMA requires that unsolicited emails be labeled as such and include opt-out instructions. UCEMA would also prohibit these emails from containing false routing information. It would also give ISP policies legal bite. If an ISP's policies are clearly posted on a web site at the domain name included in the recipient's email address or are made available by an FTC-approved standard method, then using an ISP's facilities to send unsolicited commercial email in violation of the ISP's policies would be prohibited.

The House passed UCEMA on July 18, 2000. As of September 2000, UCEMA has been referred to the Senate Committee on Commerce, Science, and Transportation.

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[8] *See* http://www.spamlaws.com/federal/index.html (current) and http://www.jmls.edu/cyber/statutes/email/fedtable.html (past).
[9] *See* http://www.spamlaws.com/federal/index.html.
[10] UCEMA (title).

iii. State Spam Laws

As of September 2000, **NUMBER** of the fifty United States had passed spam laws. Many commentators have hypothesized on the constitutionality of these state spam laws. The most frequently mentioned issues in this area center on the First Amendment and the Dormant Commerce Clause. Although, in the past, some cases have addressed the problem of email regulation and the Commerce Clause, only recently have any state spam laws been held to be unconstitutional based on a violation of the Dormant Commerce Clause.

B. The Dormant Commerce Clause

1. In General

Over the years, the Supreme Court has claimed that the Dormant Commerce Clause prohibits states from regulating interstate commerce.[11] However, this prohibition is not explicitly present in the Constitution. Instead, the Dormant Commerce Clause stems from the negative implication of the Commerce Clause.[12]

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."[13] The negative implication of the Commerce Clause is that since Congress has the power to regulate interstate commerce, states cannot pass laws that interfere with interstate commerce. This implication was first noted in the

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[11] "[T]he negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." 519 U.S. 278, 287 (1997) (internal quotation marks omitted).

At this point, it is important to note that some commentators doubt the legitimacy of the Dormant Commerce Clause. *See, e.g.,* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-55 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575-76 (1987); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745 (1991); Amy M. Petragnani, *Comment, The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1243 (1994).

[12] *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317-319 (1851); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 5-6 (1824).

[13] U.S. CONST. art. I § 8 cl. 3.

dicta of Gibbons v. Odgen,[14] when Chief Justice Marshall noted that "when a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[15] However, the Court did not officially acknowledge the negative aspect of the Commerce Clause until Willson v. Black Bird Creek Marsh Co.[16] In *Willson*, Marshall noted that state legislation might fail if it were "repugnant to the power to regulate commerce in its dormant state."[17] Such legislation did fail in the *Passenger Cases*.[18]

As a threshold question, before analyzing a state law based on Dormant Commerce Clause jurisprudence, one should ask whether the state law falls within Congress' Commerce Power. This determination should be based on the law's language and legislative history. According to *Gibbons*, the Commerce Power encompasses "interstate commerce itself" (such as items shipped across state lines) and "that which affects interstate commerce" (such as shipping and transportation mechanisms).[19] Although the Commerce Power has traditionally had a very broad scope, that scope has narrowed a bit in recent years.[20] For the doctrinal discussion in Part B.2, assume that the state law concerns interstate commerce.

2. Doctrine

[14] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
[15] *Id*. at 199-200.
[16] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).
[17] *Id*. at 252.
[18] Passenger Cases, 48 U.S. (7 How.) 283 (1849).
[19] *See Gibbons*, 22 U.S. at **PINCITE**.
[20] See United States v. Lopez, 514 U.S. 549 (1995).

In its modern form, the Dormant Commerce Clause prohibits states from discriminating against or unduly burdening interstate commerce.[21] The test for determining whether a state law is unconstitutional based on the Dormant Commerce Clause is clearly laid out in Oregon Waste Systems v. Department of Environmental Quality.[22] "The first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effect on interstate commerce, or discriminates against interstate commerce."[23]

Thus, we must first determine whether the state law discriminates against interstate commerce.[24] If the law passes this test (i.e., the answer is "no"), then we analyze the effect the law has on interstate commerce.[25]

a. Discrimination Against Interstate Commerce

"Discrimination" in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[26] State laws that discriminate are usually invalid. The law will be held invalid per se unless the state can show that it has no other way to advance a legitimate local interest.[27]

Edgar case, Healy case, extraterritoriality doctrine

b. Excessive Burden on Interstate Commerce

Once a law has been held to regulate evenhandedly and not discriminate, we analyze the effect the law has on interstate commerce. This analysis uses a balancing test to compare the local benefits that are conferred by the law versus the burdens that the law

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[21] *See infra*.
[22] Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93 (1994).
[23] *Id*. at 99.
[24] *See infra* Part B.2.a.
[25] *See infra* Part B.2.b.
[26] *Oregon*, 511 U.S. at 99.

places on interstate commerce. The balancing test is set forth in Pike v. Bruce Church, Inc.[28] In *Pike*, the Court stated that even if a law "regulates evenhandedly to effectuate a legitimate local public interest," it will still be invalidated if it imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local benefits."[29]

Many factors are considered in the *Pike* balancing test. For example, if the law benefits an area of traditional local concern (such as a police power), then it is more likely that the law will be held valid.[30] Thus, regulations designed to protect public health or safety will probably not be overturned unless their justifications are "illusory." [31]

On the other hand, if the area sought to be regulated is national in scope, then the law will likely be held invalid. This is because using state laws to regulate national interests may result in inconsistent obligations. National interests need to be regulated in a uniform way, which can be done only at a federal level. This factor has been considered most often in cases involving transportation, communications, and taxes.[32]

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[27] For a law that was held valid despite its being found discriminatory, see C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994).
[28] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[29] *Id*.
[30] *See, e.g.,* Kassel v. Consolidated Frieghtways Corp., 450 U.S. 662, 670 (1981).
[31] *Id*.
[32] *See infra*.