State Spam Laws and the Dormant Commerce Clause

I. Introduction

II. Email and the Rise of Spam
   - magnitude of email usage
   - bulk email/spam
   - cost-shifting
   - magnitude of spam and its costs

III. Private and Legislative Responses to Spam
   A. Private Responses to Spam
      1. Technology – Filtering Software
      2. Norms – Netiquette and Internet Use Policies
         (and intro to conflicting obligations)
      3. Organizations – CAUCE, RECA, and the Realtime Blackhole List
   B. Legislative Responses to Spam
      1. Categories of Spam Laws
         a. Laws That Explicitly Regulate Spam
         b. Consumer Protection Statutes
         c. Other Laws Which Affect Spam
      2. Overview of State Anti-Spam Laws
      3. California Anti-Spam Laws
         a. California Business and Professions Code § 15738.4
         b. Ferguson v. Friendfinder, Inc.
      4. Washington Anti-Spam Law
         a. Revised Code of Washington § 19.190
         b. Washington v. Heckel d/b/a Natural Instincts

IV. The Dormant Commerce Clause
   A. Introduction
   B. Doctrine
      1. The Scope of the Commerce Power
      2. The Test – Discriminating Against or Excessively Burdening Interstate Commerce
         a. Discriminating Against Interstate Commerce and the Extraterritoriality Doctrine
         b. Excessive Burden on Interstate Commerce
            i. Local Benefits
            ii. Burden on Interstate Commerce
V. Analysis

A. Applying the Dormant Commerce Clause to Internet Regulations and State Spam Laws

1. Scope of the Commerce Power
   a. Internet Regulations in General
      - Pataki says that Internet is transportation mechanism for interstate commerce
   b. State Spam Laws in Particular
      - some spam is commercial
      - it frequently crosses state lines between sender and recipient

2. Does State Law Discriminate Against Interstate Commerce?
   a. Internet Regulations in General
      - Pataki says there’s a problem with one state imposing its laws on other states (extraterritoriality)
   b. State Spam Laws in Particular
      - seem to have extraterritorial effects as well

3. Does State Law Place an Excessive Burden on Interstate Commerce?
   a. Internet Regulations in General
      - Pataki – protecting children from porn was legitimate purpose
      - there’s a possibility of conflicting laws
   b. State Spam Laws in Particular
      i. Pike Balancing Test
         - protect users from spam vs. burden on spammers
      ii. Legitimacy of State’s Interest
         - not really a police power, but maybe if it’s approached from a consumer fraud angle
      iii. Need for Uniformity
         - possibility of conflicting laws

B. Using Federal Legislation to Control Spam

- federal legislation is needed b/c state laws probably won’t withstand DCC scrutiny

1. Federal Spam Bills
   - bills that have failed in past
   - bills that are currently pending

C. Other Issues Related to Spam

1. First Amendment
2. Personal Jurisdiction Over Internet User
3. Does DCC Completely Prevent States from Regulating Internet?

VI. Conclusion