

# 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