

THE FEDERAL FRAMEWORK FOR INTERNET GAMBLING

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*As gambling sites proliferate on the Internet and telephone gambling is legalized in more states, an increasingly large fraction of the public can place a bet without ever leaving home at all. Universally available, "round-the-clock" gambling may soon be a reality.... [T]he country has gone very far very fast regarding an activity the consequences of which, frankly, no one really knows much about.*¹

I. INTRODUCTION

{1} It is estimated that 2003 global revenues for Internet gambling² will approach \$4.2 billion,³ while Internet gaming market growth for 2002-2003 was pegged at twenty percent.⁴ The majority of online gamblers in 2002 were American⁵ and fifty-four governments around the world currently sanction some form of Internet gaming.⁶ In the United States, however, state governments have, without exception, currently chosen to forbid most Internet gambling.⁷ Although state law enforcement agents have had some successes in confronting this formidable off-shore business,⁸ states are seeking the assistance of the federal government in order to regain control over the gaming activities that take place within their borders. In response, Congress has not hesitated to propose a battery of Internet gambling legislation.

{2} A common criticism of federal Internet gambling bills is that the bills seemingly represent a power grab by the federal government in the realm of gambling – a domain traditionally regulated by the states.⁹ The purpose of this paper is not only to examine whether further federal intervention in the realm of Internet gambling would be consistent with past federal gaming policy, but also to address the specific aspects of past and present Congressional bills that are most promising in tackling non-tribal Internet gambling.¹⁰

{3} The first step in this analysis is to recognize that Internet gambling did not arise in a legal vacuum. On the contrary, federal gambling policy has a long and complicated history. Consequently, instead of devising novel legal frameworks for online gaming, Part II of this paper considers Congress's historical approach towards gambling and discerns a few trends in federal gaming policy. Part III explores the risks of online gaming using the example of Internet casinos and concludes that these risks need not necessarily be greater than those presented by offline gaming. The underlying federal policy towards online gaming should not, therefore, dramatically differ from the federal policy underlying offline gaming. Part IV, however, will demonstrate that the federal approaches to online and offline gaming are not, in practice, consistent. Consequently, reforms are necessary to bring current legislation and enforcement methods up to date with online gaming's possibilities. A series of reforms that have been presented in Congressional Internet gambling bills will be evaluated in Part V, using criteria such as consistency with past federal gambling policy, efficacy, and precedents for Internet regulation. This paper concludes that Congress should target financial institutions associated with unlawful gambling in order to reinforce state gambling policies; however, federal law should be modified in order to permit

wagers to and from jurisdictions in which the gambling at issue is legal. As in the past, states should remain the principle arbiters of gambling policy.

{4} This paper presents no conclusions as to whether online gaming is “good” or “bad.” Gambling, in general, and online gaming, in particular, can be approached from a variety of angles. There are economic, sociological and moral arguments that have been marshaled by proponents and opponents alike of various forms of gambling.¹¹ These arguments, however, are not emphasized, because they are rarely unique to Internet gambling. As Part III will demonstrate, Internet gaming is largely a variation on gambling rather than a new species of it. The heart of the analysis rests on the assumption that it is the underlying acts of gambling that should or should not be punished, rather than the medium through which these acts are accomplished.

II. THE FEDERAL APPROACH TOWARDS GAMBLING

{5} Gambling regulation is generally recognized as a state, rather than a federal, responsibility pursuant to the Tenth Amendment of the United States Constitution.¹² As one recently proposed piece of Congressional Internet gambling legislation noted:

Since the founding of our country, the Federal Government has left gambling regulation to the States. The last two Federal commissions Congress created to look into gambling have concluded that States are best equipped to regulate gambling within their own borders, and recommended that Congress continue to defer to the States in this respect. The Federal Government has largely deferred to the authority of States to determine the type and amount of gambling permitted.¹³

Generally, there is a perception that gambling issues are best addressed at the local level,¹⁴ and all fifty states and the District of Columbia have enacted some form of gaming regulation, ranging from Nevada’s liberal policy to Utah and Hawaii’s bans.¹⁵

{6} In some situations in the past, federal legislation has addressed gambling in order to assist states with the enforcement of their own gambling legislation. For example, the regulation of lotteries entailed some of the first federal regulatory forays into gambling. Although critics in the nineteenth century argued that lottery bans were not enforceable¹⁶ (a criticism reminiscent of those leveled at Internet gambling regulations),¹⁷ only Missouri and Kentucky had not prohibited lotteries by 1862.¹⁸ However, out-of-state lottery operators avoided state regulations by sending tickets to state residents through the mail. The states, not able to regulate the postal system or to prosecute these out-of-state operators, could not effectively enforce their own anti-lottery policies.¹⁹ Such concerns prompted Congress, using its postal authority, to enact anti-lottery acts that banned sending lottery-related circulars²⁰ and newspapers containing advertisements for lotteries through the mail.²¹ When one infamous lottery²² subsequently moved its operations to Honduras in an effort to avoid state and federal anti-lottery regulations, Congress again supported state anti-lottery policy in 1895 by passing the Federal Anti-Lottery Act,²³ which limited the importation and interstate carriage of materials associated with gambling.²⁴

{7} This deference to and support of state gambling policy is also evident in more recent Congressional gambling-related legislation. For example, Section 320905 of the Public Code, which was part of the Violent Crime Control and Law Enforcement Act of 1994,²⁵ updated the modern incarnation of the aforementioned Federal Anti-Lottery Act²⁶ in order “to protect the sovereignty of State lottery programs” by accounting for “advances in communication technology” and thus “preserving a State’s right to sell its own lottery tickets within its borders and exclude the sale of other States’ tickets.”²⁷

Moving beyond lotteries, the Illegal Gambling Businesses Act, which was enacted as part of the 1970 Crime Control Act, prohibited an “illegal gambling business,” defined as a gambling business that is in “violation of the law of a State . . . in which it is conducted.”²⁸ By making this statute dependant upon state law, Congress allowed states to determine whether to permit or to prohibit certain forms of gambling, while providing federal support for those who opted for the latter.²⁹ 18 U.S.C. § 1511, which was also enacted as part of the 1970 Crime Control Act, states that “[i]t shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business.”³⁰ It, too, was designed to assist states in the enforcement of their gambling laws by avoiding situations where corrupt local officials hamper enforcement.³¹

{8} Lest one think that the federal government, rather than deferring to state gambling policy, has merely used state enforcement weaknesses to push a federal anti-gambling policy, it is informative to examine the federal response when anti-lottery sentiment diminished in the 1960’s and 1970’s and several states began to authorize lotteries.³² This more favorable approach towards lotteries conflicted with the federal anti-lottery legislation that had once supported practically uniform state policies against lotteries. The gap between some states’ support of lotteries and federal anti-lottery legislation even led the Department of Justice in 1974 to warn certain states’ governors that their states may have violated criminal provisions of federal law.³³ Congress avoided a federal-state collision by enacting 18 U.S.C. § 1307, an exception to federal law for state-operated lotteries that allowed the latter to use the mail and certain radio and television broadcasts for lottery promotions. Congress thereby accommodated the pro-lottery policy of certain states while it continued to use its federal powers to limit lottery promotions falling outside of the narrow exception, thus supporting the policy of non-lottery states.³⁴

{9} A Congressional commission that studied America’s national approach towards gambling in 1976 offered the following statement of how the federal government should approach gambling policy: “[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.”³⁵ However, the “identifiable national interests” cited therein might provide the exception that swallows the rule. In particular, there is a tension between federal deference to, and support of, state gambling policies and a perception of gambling as a breeding ground for organized crime and therefore a legitimate target of federal action. Crime syndicates, which prospered during Prohibition, used illegal gambling as a source of wealth and continued to do so well after Prohibition’s repeal.³⁶ In 1950, the Special Senate Committee to Investigate Organized Crime in Interstate Commerce emphasized the link between crime and gambling in a series of sensational hearings,³⁷ and this association has been put forth to justify numerous Congressional pieces of legislation.

{10} The Johnson Act,³⁸ which regulated the interstate transport of certain gambling devices and required federal registration for gambling device manufacturers and dealers, sought to assist local law enforcement agents in combating “[n]ation-wide crime syndicates.”³⁹ In addition, the Wire Act, prohibiting the interstate transmission of wagers, the Travel Act, prohibiting interstate and foreign “travel [or transportation] in aid of racketeering enterprises,” and the Wagering Paraphernalia Act, regulating interstate transportation of various gambling-related devices, were all subsequently enacted in 1961 as part of Attorney General Robert Kennedy’s war on organized crime.⁴⁰ The Wagering Paraphernalia Act was designed “to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws . . . ,”⁴¹ while the Travel Act sought “to bring about a serious disruption in the far-flung organization and management

of coordinated criminal enterprises.”⁴² The Organized Crime Control Act of 1970, enacted during President Nixon’s campaign against crime, followed the trend of legislation combating organized crime by targeting “illegal gambling businesses” regardless of whether there was an explicit connection with interstate commerce.⁴³ The following year, the Racketeering Influenced and Corrupt Organizations Statute (RICO), which was designed to combat “the infiltration of organized crime [and racketeering] into legitimate organizations operating in interstate commerce,”⁴⁴ included gambling violations as predicate acts for RICO prosecutions.

{11} In a system in which some states have prohibited one form of gambling while others have not, federal gambling regulations will not be completely neutral. Preventing “interference by one State with the gambling policies of another” has often meant protecting the anti-gambling policies of one state against the more favorable gambling policies of another state.⁴⁵ For example, the United States Supreme Court applied the Wagering Paraphernalia Act to prohibit the transportation of New Hampshire sweepstake receipts into New York, where such sweepstakes were then illegal.⁴⁶ If carried to an extreme, this approach might justify frequent federal intervention in a wide-range of gambling activities. However, the federal government has, perhaps for pragmatic reasons and out of respect for a traditional federal-state balance, generally settled for policies that limit the size and reach of widespread gambling operations. The Eleventh Circuit noted in *United States v. Farris* with respect to the Travel Act that Congress has adopted the viewpoint that “large-scale gambling is dangerous to federal interests wherever it occurs.”⁴⁷ Although that quotation might seem to be in tension with traditional federal deference to state gambling policy, a House Judiciary Committee Report on the Illegal Gambling Business Act stated that the legislation’s intent:

is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern.⁴⁸

An emphasis on targeting “large-scale” operations has been echoed by Kevin DiGregory, the Deputy Assistant Attorney General, in his Congressional testimony that “federal resources should be spent targeting large gambling operations -- and any organized crime involvement or fraud connected with such activities -- and other more serious offenses.”⁴⁹ Elsewhere, DiGregory has observed, with respect to Internet gambling prosecutions, “a combination of lack of resources and priorities within certain Federal districts and within the Justice Department. We have only so many resources and so many prosecutors to spread around.”⁵⁰

{12} In addition to resource limitations on the federal government’s ability to prosecute gambling,⁵¹ there are other policy-oriented reasons for limiting federal involvement. G. Robert Blakey and Harold Kurland have written, “[t]he national policy toward gambling rests heavily on principles of federalism⁵² [T]he federal criminal statutes define narrow parameters of permissible activity, but afford the states sufficient flexibility to experiment.”⁵³ Thus, even if Congress may, under the Constitution, have the power to prohibit large areas of gambling activities, it has adopted a more conservative approach towards the regulation of gambling operations. The strands of federal gambling policy might be characterized as deference to state gaming policy, support of this policy, and the targeting of large-scale gaming operations in the interest of fighting crime.⁵⁴

III. REGULATED ONLINE GAMING: A VARIATION ON A THEME

{13} Professor Larry Lessig has written, with respect to the Internet, that “the nature of the Net is set in part by its architectures, and that the possible architectures of cyberspace are many.”⁵⁵ One might

similarly say with respect to Internet gaming that its possible architectures are also many. Yet, one frequently encountered problem in the debate surrounding online gaming legislation is that distinctions between online and offline gambling are drawn based upon comparisons between regulated forms of offline gambling and unregulated forms of online gambling. For example, unregulated Internet casinos might be compared to heavily regulated brick and mortar casinos, and the former are unsurprisingly found to be less safe from any number of angles. However, the appropriate comparison is between unregulated online casinos and unregulated offline casinos or between regulated online casinos and regulated brick and mortar casinos.

{14} Having highlighted some federal trends towards gambling in Part II, Part III questions whether these trends should be applied to Internet gaming. In order to make this determination, one must decide whether Internet gaming is a unique and inherently dangerous form of gambling warranting a novel legislative framework. If it is not, then there is little reason to deviate from the principles outlined in Part II for the sake of online gaming. The following section uses the example of Internet casinos to demonstrate that frequently-cited problems with Internet gambling, including (1) fraud, (2) money-laundering, (3) pathological gambling, and (4) underage gambling,⁵⁶ are not necessarily inherent to Internet gambling operations. In particular, regulations similar to those imposed on offline casinos or devised specifically for the technological medium may limit Internet gambling's risks.⁵⁷

{15} The example of Internet casinos was chosen because this form of online gaming arguably presents the greatest differences with offline gaming. Whereas online sports betting is not inherently different with respect to the underlying gambling activity or gambling environment than, for example, sports betting over a telephone, Internet casinos have brought to the living room an activity once confined to entertainment palaces.⁵⁸ Therefore, if it can be shown that the differences between online and offline Internet casinos are not sufficient to warrant novel gambling policy, then it might follow under a "greater includes the lesser" rationale that the fewer differences between other forms of online and offline gambling are even less adequate. Thus, the implication of Part III is that the differences between online and offline gaming, in general, are not sufficient to warrant departures from the federal government's traditional approach towards gaming regulation. While online gaming poses certain possibilities and dangers, these possibilities and dangers differ in degree rather than in kind from those presented by offline gaming.⁵⁹

A. Fraud

{16} Unregulated gambling "affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices."⁶⁰ This concern about fraud is not unique to Internet casinos, but gaming commissions generally oversee offline casinos in the U.S. in order to ensure a fair treatment of gamblers.⁶¹ Integrity concerns about online gambling include Internet casino operators running off with deposits, refusing to pay winnings or misusing a client's private information.⁶² In addition, it is extremely difficult for a gambler to verify whether the stated odds on a virtual game are accurate.⁶³ An Internet casino could easily misrepresent these odds in order to make them seem more favorable to the gambler.

{17} The ways of preventing fraud in Internet casinos are not very different from the ways in which fraud is limited in land-based casinos.⁶⁴ These processes include licensing, inspections and accounting for revenues. For example, under a proposed Australian regulatory framework, each State and Territory, among other requirements, would have to approve the "financial soundness, technical expertise and operational ability" of the operator, the licensing of "key personnel," and income-distribution arrangements.⁶⁵ In Nevada, only licensed land-based casinos of a certain size would be able to operate online casinos.⁶⁶ Licensing of Internet casinos might also include an examination of

the site's software.⁶⁷ In order to obtain a license from the Northern Territory of Australia, Lasseters Online, an Internet casino launched in 1998, was required to pass a series of hurdles, including approval of computer and control systems,⁶⁸ licensing of key employees, financial controls that included keeping transaction records for seven years,⁶⁹ player protection measures, and a prohibition on payments to a customer unless the player's identity, age, and place of residence have been verified.⁷⁰ Fines for each violation are generally AUD \$2,000.

{18} In short, there is little reason to believe that a state gaming commission's regulation of its state's online casinos could not control fraud to the same extent as offline casinos. Furthermore, while licensing imposes costs upon Internet casinos, a government license may also provide a competitive advantage. One survey reported that sixty percent of Americans believed that offshore Internet casinos were fixed, and this concern about fraud is likely to have negative economic consequences for the Internet casino industry.⁷¹ Licensing may translate into a more reputable image for certain Internet casinos and better business.⁷²

B. Money-Laundering

{19} Money-laundering is a process during which the origins of illegally-derived proceeds are concealed and attributed to legitimate sources.⁷³ This process can be broken down into three stages: placement, layering, and integration.⁷⁴ During the first stage, the illicitly-derived funds are either deposited in a financial institution or converted to other monetary instruments.⁷⁵ This placement stage is the first point of entry of the funds into a legitimate financial stream.⁷⁶ Since a sudden, significant amount of value may attract the attention of law enforcement agents, layering, the next stage, often involves breaking up and transferring these funds to different accounts and institutions in order to obscure the funds' origins. In order for layering to be successful, the criminal may take advantage of legislative loopholes or poor coordination between police forces across jurisdictions.⁷⁷ The "integration" stage, during which the funds are used to purchase legitimate assets or to fund further activities, completes the money-laundering process.⁷⁸

{20} Unregulated Internet casinos may pose several money-laundering risks, particularly at the layering stage.⁷⁹ The speed, international character, and possible anonymity of certain Internet gambling transactions, together with the potential of transferring large sums of money, may attract money launderers to online gambling operations.⁸⁰ In addition, some Internet casinos "offer a broad array of financial services to their customers, such as providing credit accounts, fund transmittal services, check cashing services, and currency exchange services."⁸¹ A possible laundering of money could take the following form:

A person in Australia could . . . deposit the proceeds of a drug sale onto his/her credit card, and then transfer the amount via the card to an online casino in a 'tax haven.' The casino opens an account for the person and the account is credited with the amount deposited. The person gambles some of the money and the winnings (or losses) are credited (or debited) to the account. When the person wishes to withdraw the money from the account the casino sends the funds back to the person's credit card as winnings. The . . . money is now clean.⁸²

Since law enforcement authorities must be able to monitor or review a business's transactions in order to detect and prosecute money-laundering,⁸³ and since the records of offshore gambling operators may be difficult for regulatory authorities in another jurisdiction to obtain, law enforcement agents in another jurisdiction would have no means of verifying the suspected money-launderer's claims.⁸⁴

{21} A money-lauderer may not even have to place a bet in order to clean his funds. Depending on the Internet casino, the criminal might be able to place his money in a casino account and then move the funds into another account as “winnings” without ever playing a game.⁸⁵ While this example could work with an Internet gambling site that was oblivious to its client’s money-laudering activity, money-lauderers may also try to operate their own Internet casinos. In such a case, the criminal would transfer his funds to the site which would then deduct a small amount of money (a money laundering “fee”) and attribute the deduction to a “gaming loss.” Without having placed a wager, the money-lauderer, with the assistance of the Internet casino, would have been able to cloak the origin of the illegitimate funds.⁸⁶

{22} A further money-laudering risk, while not unique to Internet gambling operations,⁸⁷ could be exacerbated by government regulations directed towards Internet gambling. Proposed legislation in the U.S. that targets payment methods for Internet casinos may push customers towards more anonymous payment mechanisms.⁸⁸ And while credit cards leave transaction records,⁸⁹ electronic money need not. Electronic money “is a money replacement based on encryption technologies which disguise the electronic information so that only the intended recipient can access its meaning.”⁹⁰ The strength of the encryption technology (and therefore the anonymity of its user) may vary, with the potential to be so strong that the e-money provider cannot track its own customers’ use of the electronic currency.⁹¹ The money-laudering applications of anonymous electronic cash are manifold. Since anonymous electronic money can bypass traditional financial institutions, placement would become easier as criminals avoided the financial transaction reporting systems used by governmental authorities to trace funds.⁹² Furthermore, anonymous electronic money would make it easier to send large monetary sums to poorly regulated countries and then back into the criminal’s jurisdiction, thereby facilitating the integration stage of money laundering.⁹³ While the threat posed by certain forms of electronic money exists independently of Internet casinos, government regulation that targets traditional payment methods threatens to create a larger market for an attractive money-laudering tool.⁹⁴

{23} However, electronic money also has its drawbacks. First, transfer fees for some forms of electronic money run as high as thirty percent of the amount sent.⁹⁵ Second, the lack of a clear market leader among the various forms of electronic money means that players may not be able to use the same form of electronic money provider with whom they have registered at multiple gaming sites.⁹⁶ Third, consumers seem to lack confidence in this complex technology.⁹⁷

{24} These drawbacks may be overcome in time; however, the dangers posed by certain forms of electronic money are not an argument against Internet gaming.⁹⁸ The dangers are, instead, an argument in favor of implementing a national or international approach to address the dangers posed by electronic money’s anonymity.⁹⁹ While federal legislation targeting illegal Internet gaming operations might limit some forms of money laundering, local Internet gaming regulators may also contribute to limiting money laundering. Since money-laudering thrives on poor regulatory oversight and anonymity, a well-regulated environment with extensive record-keeping acts as a deterrent to potential money-lauderers. Player registration, investigations of gaming operators and employees, and transaction records chip away at the anonymity of online casino activity. In addition, deposit and payout rules may further discourage money laundering. Specific provisions at Lasseters Online include:

- ID verification procedures are used.¹⁰⁰
- Records are maintained for when a player enters and leaves the online casino and for what

games were played and how much was wagered, won or lost.¹⁰¹ All account details, including deposits and withdrawals, are also preserved.¹⁰²

- A gambler's monthly deposit is initially capped at \$500 when using credit cards. Once the client has provided pieces of age and residence-verifying identification, the default monthly maximum is raised to \$2,500.¹⁰³
- Credit cards can only be used to deposit funds to a player's account. Lasseters confirms, in real time, whether the cards have been reported stolen and whether sufficient funds are available.¹⁰⁴
- Winnings are paid out in the form of checks written out to the individual whose identity and address have been previously verified.¹⁰⁵

{25} In addition, those efforts currently used to address money laundering at brick and mortar gaming operations might be applied to U.S.-based Internet gaming operations.¹⁰⁶ For example, the Bank Secrecy Act,¹⁰⁷ which was enacted in 1970 to combat money laundering, was extended to include casinos in 1985¹⁰⁸ and strengthened through subsequent legislation.¹⁰⁹ This framework has imposed detailed reporting requirements on currency transactions involving a single individual of more than \$10,000 and has also criminalized efforts to avoid these reporting requirements.¹¹⁰ Reforming this and related legislation to apply to Internet gaming operators¹¹¹ would help to create the audit trails useful to law enforcement agents in tracking money launderers.¹¹² The appropriate regulations promise to make Internet casinos at least as unappealing to money launderers as their brick and mortar counterparts.

C. Pathological Gambling

{26} The Diagnostic and Statistics Manual of Mental Disorders IV (DSM-IV) classifies "pathological gambling" as an impulse control disorder.¹¹³ One who presents this disorder exhibits five or more of the following ten factors. He/she:

- (1) is preoccupied with gambling . . . ,
- (2) needs to gamble with increasing amounts of money in order to achieve the desired excitement,
- (3) has repeated unsuccessful efforts to control, cut back, or stop gambling,
- (4) is restless or irritable when attempting to cut down or stop gambling,
- (5) gambles as a way of escaping from problems or of relieving a dysphoric mood . . . ,
- (6) after losing money gambling, often returns another day to get even . . . ,
- (7) lies to family members, therapist, or others to conceal the extent of involvement with gambling,
- (8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling,
- (9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling, [or]
- (10) relies on others to provide money to relieve a desperate financial situation caused by gambling¹¹⁴

{27} In the United States, the National Research Council of the National Academy of Sciences has estimated that 1.5% of adults have met the criteria for "pathological gambling" at some point in their lives, and 0.9 percent of the adult population has met these criteria within the past year.¹¹⁵ Australia's Productivity Commission similarly noted that 1% of its population had "severe" gambling problems¹¹⁶ (the Productivity Commission opted not to use the DSM-IV nomenclature) that included a combination of depression, serious suicidal thoughts, divorce, debt and poverty, and crime.¹¹⁷ Pathological

gambling is exhibited proportionately more often among young, poor, and less educated individuals,¹¹⁸ although “there are few clear individual factors, other than age, that are associated with a higher likelihood of gambling problems.”¹¹⁹

{28} Unregulated Internet gaming operations may pose greater risks for pathological gambling than their brick and mortar counterparts. In particular, twenty-four hour access, the rapid pace of Internet games, enhanced privacy (and the possibly concomitant diminishment of social constraints), lower outlays on Internet games due to the fewer costs involved in setting up an online casino when compared to a land-based casino,¹²⁰ and the lack of a “‘tangible representation of money’ such as betting chips for users to visualize how much they have won or lost”¹²¹ have been posited as reasons why Internet gambling may pose greater risks than land-based gambling for pathological gamblers. In addition, Internet casino software may examine a player’s past pattern of gaming in order to create a more tailored and attractive gaming experience.¹²² Those with gambling disorders may be particularly attractive clients for Internet gaming sites. Among those who gamble in the U.S., around 6% exhibit pathological or problem gambling;¹²³ yet, according to the National Opinion Research Center, this small percentage provides 15% of the American gambling industry’s revenues.¹²⁴ In a similar fashion in Australia, problem gamblers¹²⁵ constitute 15% of gamblers, but around 33% of the Australian gambling industry’s market.¹²⁶

{29} However, a number of safeguards may be put in place in order to lessen the possible risks posed by Internet casinos to pathological gamblers. Before discussing these safeguards, though, several differences between Internet and brick and mortar casinos that might mitigate pathological gamblers’ problems with Internet gaming sites should be addressed. First, if Internet gaming takes place at home where a family resides, then household members may be more able to survey the family member than if the gambling occurred far from the domicile.¹²⁷ Second, offline casinos often use a range of techniques to encourage betting -- from providing free alcohol, to pumping pleasing scents into slot machine pits, to the use of complex color schemes -- that would be more difficult to implement online.¹²⁸ Brick and mortar casinos are able to compile customer data, such as a client’s average bet, time spent gambling, height, weight, hair color, and corrective eyewear information, that would likely rival anything collected online.¹²⁹ Third, the fewer costs involved in the establishment and operation of Internet casinos, when compared to the establishment and operation of their brick and mortar counterparts, may create better gaming odds for Internet gamblers than for land-based gamblers. This may lead, in turn, to fewer losses and/or more wins for the same duration and amount wagered in cyber and real space. Finally, Australia has noted that many of its problem gamblers prefer to play in social settings, suggesting that, for these problem gamblers, Internet gambling is not a perfect substitute for land-based casinos.¹³⁰

{30} There are several possible safeguards that Internet gaming operators could adopt to minimize the risks to pathological gamblers. At Lasseters Online, clients may set bet limits on a daily, weekly or monthly basis and cannot subsequently raise this limit without contacting the company.¹³¹ Furthermore, credit cards with unlimited lines of credit are not accepted for opening accounts, and Lasseters Online provides a link to a gambling problem counseling service and a self-excluding button that a gambler may press in order to take a mandatory seven day break.¹³² If this feature is activated three times, then the client is permanently excluded from the site.¹³³ However, since a gambler’s ability to self-diagnose is questionable, the Australian Senate Select Committee on Information Technologies recommended that third parties be allowed to exclude gamblers.¹³⁴ Under Queensland’s Interactive Gambling (Player Protection Act) enacted in 1998, “a person who satisfies the chief executive of a close personal interest in the welfare of the person against whom the prohibition is sought” may obtain the exclusion of a third party from an Internet gambling website.¹³⁵ Notice of the

exclusion is sent to all parties concerned and to all Queensland-based Internet gaming operators.¹³⁶ Of course, in order to be effective, an exclusion policy would have to extend across the widest geographical region possible.

{31} In addition, although privacy guidelines would have to be set, an Internet gambling site might use its extensive records of a gamblers' transactions in order to identify, provide information to, and exclude pathological gamblers.¹³⁷ Other proposals by the Australian Committee included:

- Limit the speed and length of gambling activity;
- Enforce breaks (for example, every forty-five minutes);
- Restrict operation hours of online gambling operators;
- Ensure that information obtained about people's gambling habits is not used to encourage irresponsible gambling habits; and
- Improve compiling of customer information, detailing the duration of gambling activity, odds of winning and losing, and the amounts the customer has won and lost.¹³⁸

{32} As the Australian Senate Select Committee on Information Technologies has noted, "[o]nline gambling makes available controls that could in fact mitigate problem gambling. Therefore, although it may lead to increased gambling opportunities and accessibility, it may do so without impacting on problem gambling, as long as suitable regulatory controls are in place."¹³⁹

D. Underage Gambling

{33} Younger people are reported to have higher rates of disordered gambling than their older counterparts,¹⁴⁰ and the National Research Council of the National Academy of Sciences has estimated that a higher percentage of teenagers than adults are pathological gamblers.¹⁴¹ The vulnerability of adolescents and their risk-taking behavior are cited as possible reasons for these differences.¹⁴² While casino gambling has not traditionally been popular among adolescents, relative to other types of gaming, such as lottery or sports pools,¹⁴³ the appeal and accessibility of the Internet to youths,¹⁴⁴ combined with the Internet's possibility of anonymous use, may change this dynamic.

{34} However, according to Australia's Productivity Commission, "[t]he motivation and capacity for unsupervised and *regular* gambling by minors on the internet is weak."¹⁴⁵ The financial incentive may be limited because if the wagering is done via a parent's credit card, then the winnings will likely be sent via check in the name of the cardholder or credited to the card, neither of which will enrich the underage gambler.¹⁴⁶ If the gaming is done using a non-credit method, then the child, in order to maintain a habit and assuming no steady winning streak, must have sufficient funds at his disposal to feed his gambling habit. As for the liability of the parents for their child's gambling debts, a cardholder in the United States is only liable for \$50 of the amount charged via unauthorized use of his or her credit card.¹⁴⁷

{35} In addition to a possibly weak financial motive for minors to engage in Internet casino gambling, ID verification procedures, such as those described below, would limit and deter underage access to casinos. While these methods may not be one hundred percent effective in excluding minors, neither are the current methods by brick and mortar casinos, which are often based on physical appearance.¹⁴⁸ Lasseters Online requires a log-on for each session, meaning that a child whose parents gamble using the service would not be able to access the computer unless he knew the relevant log-on information (or unless the ID and password were automatically stored in the computer). Moreover, under the

Northern Territory's gaming regulation, the Internet gaming licensee must provide the customer with electronic access to filtering software that will prevent minors from accessing the Internet gaming site.¹⁴⁹

{36} Another argument often cited against Internet casinos is that even if children do not win or lose any money, they will become more exposed to gaming that may lead to unhealthy gaming habits later in life.¹⁵⁰ This increased exposure may be due to parents who use Internet casinos at home or because some sites offer gaming practice modules that do not require money.¹⁵¹ Neither of these arguments, though, is sufficient to justify the prohibition of regulated Internet casinos. Gaming regulation may require registration in order for clients to play practice modules; however, given that countless Internet sites, other than Internet casinos, may offer practice versions of casino-style games, it is unlikely that such a regulation would deter an adolescent trying to play, for example, electronic blackjack. And as for prohibiting Internet casinos because a child may be influenced to gamble later in life since his father or mother gambled at the home computer, it is not clear that this would influence a child any more than his parents talking over dinner about their gambling trip to a casino or any more than watching a father play poker with friends at home.¹⁵² Furthermore, although some parents may give their children limited permission to gamble at Internet casinos (a privilege which would be much more difficult to obtain in a land-based casino), "socially restrained consumption of gambling within a family environment, even if notionally illegal, may potentially have the benefit of teaching responsible gambling, as in the case of alcohol consumption."¹⁵³

{37} Internet gambling provides the unique combination of allowing the public to gamble from the comfort of home, while affording the government the opportunity to limit such gambling. Due to the lack of a demonstrated connection between adolescent exposure to parental online gambling and the development of future gambling problems, a paternalistic and invasive policy that would limit such gambling is not warranted.¹⁵⁴

E. Verifying Client Information

{38} Many of the solutions mentioned above require Internet gaming operators to obtain and verify accurate client information. Customer anonymity undermines protective measures against money-laundering, pathological gambling, underage gambling and, more generally, the ability of states to determine their own gambling policies. The importance of accurate identification technology was emphasized by the Nevada Assembly when, in 2001, it enacted legislation according to which:

The [gaming] commission may not adopt regulations governing the licensing and operation of interactive gaming until the commission first determines that ... [i]nteractive gaming systems are secure and reliable, and provide reasonable assurance that players will be of lawful age and communicating only from jurisdictions where it is lawful to make such communications.¹⁵⁵

Similarly, under Australia's Uniform Standards for the Regulation of Interactive Gaming:

All systems must incorporate a method to confirm identity, age and location of the player which complies with the legislation in the licensing jurisdiction. This must include:

- players to hold an account and/or be registered by the licensed provider;
- in order to open an account and be registered, players will be required to provide proof of identity, age and place of residence;

- licensed providers are to require the identification of players each time a player attempts to access the site, using such methods as a personal identification number or password and challenge questions.¹⁵⁶

We may use, once again, Lasseters Online as an example. In order to withdraw money from a casino account within ninety days of registration,¹⁵⁷ Lasseters Online requires a copy (which may be a faxed or a scanned copy) of a valid passport, drivers license, birth certificate or “Age identification card” in order to prove that the player is not a minor.¹⁵⁸ In addition, the company requires a “rent receipt,” electricity, telephone, gas, water bill, “or other” document as proof of address.¹⁵⁹ Internet casinos might also use third party identity, age, and residence verifiers,¹⁶⁰ however, these verifiers’ methods may require credit card information that will obviously not be available if the gambler does not use a credit card.

{39} Payment methods may offer another means of providing a better indication of at least one aspect of a customer’s identification, namely his physical location. For example, Finland required players of an online national lottery to have accounts with Finnish financial institutions.¹⁶¹ Another possibility is for Internet gaming operators to sell stored-value cards (or “smart cards”) at stores located within the state (for example, at locations where lottery tickets are sold) that could be used to gamble at online, intrastate casinos. In fact, the state may have an interest in ensuring that these cards are the only permissible payment methods used at online casinos. If a Nevada resident wants to gamble at a casino located within the state of Nevada, he would have to buy a card from a nearby store with a prefixed amount of cash on it. He would then use this card to deposit funds into his Internet casino account. While this method would not prevent a Utah resident from crossing the border to buy a Nevada state card that he could use at his Utah residence or a Maine resident, on his vacation to Utah, from stocking up on Nevada state cards, these cards, in combination with other sources used for proof of identification and residence, might provide a reliable portrait of a client.

{40} As technology develops, so may the capacity to ensure the accuracy of client information. Internet casinos may one day require digital certificates, which Larry Lessig has described as:

[E]ncrypted digital objects that make it possible for the holder of the certificate to make credible assertions about himself Such a certificate could reside on the owner’s machine, and as he or she tries to enter a given site, the server could automatically check whether the person entering has the proper papers. Such certificates would function as a kind of digital passport which, once acquired, would function invisibly behind the screen, as it were.¹⁶²

Another possible identity verification scheme, although vulnerable to a variety of circumvention techniques, would match Internet Protocol addresses against geographical databases in an effort to locate the physical location of IP address.¹⁶³

{41} The determined and technological-savvy gambler will not be thwarted by client verification procedures. Nor, however, is the determined sixteen-year-old person likely to be thwarted in his efforts to illegally purchase alcohol or a pack of cigarettes. The question is not whether the currently available verification methods for Internet gamblers would be one hundred percent effective. Rather, one should ask whether these verification procedures will increase transaction costs for most Internet gamblers to the point where these procedures will deter most Internet gamblers from accessing out-of-state Internet casinos.¹⁶⁴ While future technology may make client identification more reliable, existing methods seem sufficient to make Internet gambling for out-of-state residents unappealing to all but the most determined gamblers.

IV. CURRENT FEDERAL LAW AS APPLIED TO INTERNET GAMBLING DOES NOT CONFORM TO PAST FEDERAL GAMBLING REGULATORY TRENDS

{42} Part II of this paper attempted to discern guidelines underlying federal treatment of gambling. Part III then demonstrated that regulated Internet casinos need not be more dangerous than regulated offline casinos, thereby supporting the argument that the federal trends towards gambling need not be altered for online gaming activity. Yet, to what extent are online casinos capable of being regulated? Much of the federal gambling legislation discussed in Part II, such as the Wire, Wagering Paraphernalia and Travel Acts, were enacted to support state policy and therefore premised on the assumption that effective gambling regulation sometimes surpasses the states' abilities. To the extent, therefore, that the federal gambling policy designed to support the states and to limit large-scale gambling enterprises is weakened, the states' regulatory framework also becomes less effective. The next step is to combine Parts II and III and to inquire whether the current federal approach towards online gaming is, in practice, consistent with the federal gambling framework.

{43} Since federal gaming policy often defers to state legislatures, one may first inquire how states have responded to Internet gaming. As mentioned above,¹⁶⁵ most Internet gambling is, in theory, illegal in every state. Some states have enacted statutes explicitly targeting Internet gambling,¹⁶⁶ while in other states, Internet gambling may also run afoul of general gambling state statutes.¹⁶⁷ Yet while state attorneys general have not hesitated to pursue Internet gambling operators,¹⁶⁸ a consensus is emerging that expanded federal legislation is necessary to address what Connecticut's state attorney general has called "the sordid, despicable nature of an unregulated, faceless, nameless Internet gambling industry."¹⁶⁹ The National Association of Attorney Generals, whose members include the chief legal officers of all U.S. states, commonwealths, and territories and which is not an association that is often characterized as a strong advocate of increased federal intervention, has called upon the federal government to expand its regulatory powers over Internet gambling.¹⁷⁰ Furthermore, a Congressionally-mandated commission, noting that "it is difficult for states to adequately monitor and regulate such gambling," advocated a federal prohibition on Internet gambling not already authorized in the United States.¹⁷¹

{44} In light of the recognition that the problems of Internet gambling may surpass states' regulatory abilities, one might ask whether, with respect to Internet gambling, the federal government is fulfilling its traditional role of supporting state gambling policy and of limiting the growth of large-scale gambling operations (ostensibly in order to limit crime). One particular concern is the foreign Internet gambling operation because it represents a significant portion of current Internet gambling transactions¹⁷² and raises jurisdictional and enforcement problems. In order to determine whether the federal regulatory framework for Internet gambling is consistent with the trends discussed in the previous sections, the following analysis examines how courts might assert subject matter and personal jurisdiction over a nonresident Internet gambling operation under existing federal gambling law and what enforcement tools are currently available.

A. Establishing Subject Matter Jurisdiction

{45} In a diversity case, a court must determine whether the law of the forum state is applicable to the nonresident defendant in order to exercise jurisdiction over a non-resident defendant.¹⁷³ As noted in Part II, there are an assortment of federal gaming laws; however, many of these laws apply imperfectly to Internet gaming due to changes in technology. Foremost among these laws is the Wire Act.¹⁷⁴ The Wire Act was a federal response to the increasing use of telephones and other communications facilities by illegal bookmaking operations.¹⁷⁵ This Act prohibits the use of:

a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers¹⁷⁶

The Wire Act enables federal, state, or local law enforcement agents to enjoin communications facilities subject to the Federal Communications Commission's jurisdiction from providing service to those who violate the Act.¹⁷⁷

{46} Although the Wire Act, enacted long before the explosion of the World Wide Web, is the federal act most often applied in efforts to prosecute Internet gambling,¹⁷⁸ ambiguity surrounds the Wire Act's applicability to many forms of online gaming. Most notably, the extent of the Act's targeted gambling activities is unclear. Although this Act focuses on "the placing of bets or wagers on any sporting event or contest," it never defines either "sporting event" or "contest."¹⁷⁹ Furthermore, it is unclear whether the adjective "sporting" is intended to modify both "event," as well as "contest."¹⁸⁰ While the Wire Act has been applied to baseball, football,¹⁸¹ and horse races,¹⁸² it is questionable whether it applies to online casino games.¹⁸³ Attorney General Robert Kennedy's explanation of the Wire Act focused almost exclusively on "sporting events,"¹⁸⁴ probably because the possibility of running a casino via wires was unimaginable until the recent past. Although a New York state court applied the Wire Act to an Antigua-based Internet casino accessible to New York residents¹⁸⁵ and although the U.S. Department of Justice does not consider the Wire Act limited to sports-related gambling activities,¹⁸⁶ a federal district court in *In re MasterCard International Inc.*¹⁸⁷ stated that "internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084."¹⁸⁸ The court's view was that "the Wire Act does not prohibit internet casino gambling."¹⁸⁹ The federal court noted the legislative history of the Wire Act¹⁹⁰ and the more recent Congressional efforts to amend the Wire Act to include games of chance as support for its position.¹⁹¹

{47} Even if one were to accept the interpretation that the Wire Act applies to most forms of Internet gaming, this relevance may be of limited duration as the Act is currently formulated. Integral to the Act's definition of "wire communication" is "wire, cable, or other like connection between the points of origin and reception of such transmission."¹⁹² With the advent of wireless Internet connections, Internet gaming operators will be able to bypass "wire communication" all together.¹⁹³

{48} Nonetheless, some commentators believe that, even with the advent of wireless technology, the Wire Act may still be applicable to Internet gaming. As noted above, the statute's definition of "wire communication" refers to "wire, cable, or other like connection."¹⁹⁴ Consequently, even if the signal's voyage is completely wireless, the Wire Act's reference to "other like connection" could be applied to new technologies.¹⁹⁵ However, it might stretch the bounds of credibility to argue that a "wire communication facility" may include a "wireless communication facility."

{49} Yet as long as the communication signal traverses a wire at some point on its journey from the sender to the receiver, the Wire Act becomes applicable,¹⁹⁶ and this process may apply to the Internet connection, as well as to subsequent transactions. For example, in *Cheyenne Sales, Ltd. v. Western Union Financial Services Intern*,¹⁹⁷ the Wire Act was used to justify the termination of wire transfer services from clients in the United States to an offshore gambling business. The court stated that "state and federal courts across the country have upheld a carrier's termination of wire service upon notice from either a state or federal law enforcement official that a customer is using the service in furtherance of illegal gambling operations."¹⁹⁸ Although *Cheyenne Sales* did not involve an Internet gaming operation, it demonstrates the possible legal vulnerability of Internet gaming businesses that

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use wire-based facilities at some point in their transactions with clients.

{50} In sum, evolving technologies have lessened the Wire Act's efficacy. While it may have been difficult in the 1960's to imagine a casino operating via a "wire communications facility," and Congress may therefore have focused on sports betting, the Internet has offered expanded gambling opportunities. In addition, while satellite technology was not an everyday communications reality in the 1960's, it is today. Despite these limitations, the Wire Act can currently be used against a variety of online sports betting sites.

{51} Complications also surround the applicability of another federal gambling law, the Interstate Transportation of Wagering Paraphernalia Act ("Paraphernalia Act"), to Internet gaming.¹⁹⁹ The Paraphernalia Act prohibits everyone, except for "common carriers in the usual course of business," from knowingly carrying or sending "in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in" a variety of gambling related activities.²⁰⁰ In *World Interactive Gaming Corp.*, a gambling operation's sending of promotional materials through the United States' mail and purchase of computers through the United States' mail for use in its Antigua-based Internet casino were found to violate the Paraphernalia Act.²⁰¹ However, even though the Act's purpose was broadly characterized as "to cut off and shut off gambling supplies,"²⁰² and even though in *United States v. Mendelsohn*,²⁰³ a Ninth Circuit Court favored a broad interpretation of the word "device"²⁰⁴ and held that a computer disk containing a sports bookmaking program fell under the definition,²⁰⁵ it is unclear whether an intangible website or gaming software downloaded from a website would qualify as an "other device" under the Paraphernalia Act.²⁰⁶ In *Pic-A-State Pennsylvania, Inc. v. Pennsylvania*,²⁰⁷ a United States district court in Pennsylvania noted that the Wire and Paraphernalia Acts were enacted on the same day, and that while the former specifically refers to wire communications, the latter does not. The court consequently concluded that the Paraphernalia Act applied only to tangible objects and not to computer communications.²⁰⁸

{52} Other federal acts, such as the Travel and Illegal Gambling Business Acts, although largely untested in courts, may be readily applied to Internet gaming. The Travel Act was designed to "suppress . . . unlawful local activities from which organized crime drew its sustenance."²⁰⁹ The provisions that are possibly relevant to Internet gaming sanction the use of "any facility in interstate or foreign commerce" to conduct "any business enterprise involving gambling" that is forbidden by state or federal laws.²¹⁰ The Travel Act may therefore cover a wider range of gambling activities than the Wire Act with its likely limitation to sports gambling.²¹¹ The Travel Act has been used to prosecute illegal brick and mortar casinos,²¹² as well as betting via the telephone.²¹³ In addition, "facility in interstate or foreign commerce" could apply to the Internet.²¹⁴ Furthermore, in *World Interactive Gaming Corp.*, a New York state trial court held that the Travel Act could be used against a Delaware corporation's Antigua-licensed casino that provided gaming opportunities via the Internet to New York residents.²¹⁵ In particular, the court noted, "[b]y hosting this [virtual] casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act and the Travel Act has occurred."²¹⁶

{53} The Illegal Gambling Businesses Act makes it illegal to conduct any gambling business that:

- (i) is a violation of the law of a State or political subdivision in which it is conducted;
- (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.²¹⁷

While section 1955 has yet to be successfully used to prosecute an Internet gaming operation, its minimal requirements may make it a likely candidate for future use. Offering a website for more than thirty days may satisfy the third requirement, and it is possible that the “five or more persons” in the second requirement might include computer support staff.²¹⁸ Furthermore, in contrast to the other statutes, section 1955 reaches purely intrastate gambling activities.²¹⁹ However, since the Illegal Gambling Business Act is predicated on a violation of state or local law, it can be no more effective than the underlying state or local statutes upon which it is based.²²⁰

{54} Finally, the 1970 Crime Control Act, which introduced the Illegal Gambling Businesses Act,²²¹ also included the Racketeer Influenced and Corrupt Organizations Act (RICO), which was designed to combat “the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”²²² RICO targets those who have been linked to “a pattern of racketeering activity”²²³ in association with a number of other prohibited forms of conduct.²²⁴ Racketeering activity is defined to include “any act or threat involving . . . gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year.”²²⁵ Racketeering activity may also include any act indictable under the Wire Act, the Travel Act, the Paraphernalia Act, or the Illegal Gambling Businesses Act.²²⁶ Although RICO differs from the previous gambling legislation because it offers civil causes of action in addition to criminal sanctions,²²⁷ the Act’s complexity may lead state or federal prosecutors to favor the previously mentioned gambling statutes.²²⁸ Moreover, the use of RICO to target third parties, such as credit card companies or issuing banks whose cards are used at online gaming sites, has, so far, been unsuccessful.²²⁹

{55} As the above discussion of various federal statutes suggests, there are a number of laws that might apply to Internet gaming operations (even though certain ones may need to be updated in order to account for changes in technology); however, before a court may conclude that subject matter jurisdiction is appropriate over a nonresident defendant, it must also consider whether Congress intended to reach beyond U.S. borders in the application of a particular piece of legislation. It has long been established that Congress may, under the Commerce Clause, forbid the transfer of gaming-related instruments beyond the boundaries of a state,²³⁰ and it is likely that Congress also has the extraterritorial power to regulate Internet gaming.²³¹ However, although Congress may exercise this extraterritorial power, it does not mean that Congress has done so in all gambling-related legislation.²³² While some Congressional legislation provides an explicit reference or clear legislative intent to target individuals beyond U.S. borders,²³³ the federal, gambling-related legislation is not as clear.²³⁴ However at least two courts have stated that the reference to “foreign commerce” in the Wire Act²³⁵ gives courts extraterritorial subject matter jurisdiction over a foreign-based Internet gambling operator.²³⁶

{56} If no explicit statutory reference or clear legislative intent is found in gambling-related legislation, one must apply the “effects test” as first outlined in *United States v. Aluminum Co. of America (ALCOA)* in order to establish subject matter jurisdiction over a nonresident defendant.²³⁷ According to the court’s decision, subject matter jurisdiction may be found when a nonresident defendant’s activity intends to affect and does affect the U.S. domestic market.²³⁸ While a conflict between U.S. and domestic law is given substantial weight in the court’s analysis of whether subject matter jurisdiction can be exercised, this conflict is but one factor among several that the court should consider in deciding whether to exercise subject matter jurisdiction.²³⁹ The fact that conduct is legal and even strongly encouraged in a foreign state will not necessarily prevent the application of U.S. law.²⁴⁰ A foreign enterprise’s express purpose to affect U.S. commerce and the “substantial nature of the effect produced” may justify the exercise of U.S. subject matter jurisdiction.²⁴¹ Given unregulated Internet gaming’s social consequences,²⁴² possible negative economic impacts on brick and mortar casinos,²⁴³ and possible erosion of state tax revenues,²⁴⁴ subject matter jurisdiction should generally be

found over a non-resident Internet gaming operation.²⁴⁵

{57} In order to evade subject matter jurisdiction, online gaming operations have argued that the targeted gambling activities occurred abroad and in compliance with the laws of a foreign country. The Internet gaming, so the argument goes, was therefore not subject to U.S. federal and state laws.²⁴⁶ However, this argument is unlikely to be successful where there is evidence of a specific illegal transaction between a U.S. resident and an Internet gaming operator.²⁴⁷ For example, in *People v. World Interactive Gaming Corp.*, gamblers in New York wired money to an Antiguan bank account in order to play at an online, Antiguan-licensed casino.²⁴⁸ In making its decision, the district court referred to New York Penal Law under which gambling is considered to take place in New York if the gambler is located in New York.²⁴⁹ The court concluded that bets transmitted from New York to Antigua (where the gambling at issue was legal) via the Internet constituted gambling activity within the State of New York.²⁵⁰ The court considered the virtual casino to be located within the user's computer;²⁵¹ therefore, New York courts had subject matter jurisdiction, and the State of New York's gambling prohibitions, in addition to the provisions of the Wire Act, the Travel Act, and the Wagering Paraphernalia Act, were pertinent.²⁵²

{58} Regardless of whether courts hold that the proscribed casino activity takes place on the resident gambler's computer or whether the prohibited activity is found to take place abroad and an "effects and conflicts of law" analysis is therefore required, courts will likely assert subject matter jurisdiction over Internet gaming operations wherever they may be.

B. Establishing Personal Jurisdiction

{59} If the law of the forum state is applicable to the nonresident, then the second part of the jurisdiction analysis verifies whether the granting of jurisdiction under the forum's law would satisfy the Due Process Clause of the Fourteenth Amendment.²⁵³ The Due Process Clause's constitutional protections extend to foreign defendants who are asked to appear in U.S. courts.²⁵⁴ This second constitutional analysis involves, in turn, a multi-step analysis of its own.²⁵⁵

{60} It is first necessary to examine the relationship between the defendant and the forum. *General jurisdiction* over the defendant may be established if there are "systematic and continuous" activities by the defendant in the forum state, regardless of whether the cause of action's subject matter has any connection to the forum state.²⁵⁶ In the absence of these systematic and continuous activities by the defendant in the forum state, the link between the defendant and the forum may be established under *specific jurisdiction* when "the plaintiff's claim is related to or arises out of the defendant's contact with the forum."²⁵⁷

{61} Regardless of whether general or specific jurisdiction is asserted, the defendant must have established minimum contacts within the state by purposefully availing itself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."²⁵⁸ Examples of such minimum contacts include "designing the product for the market in the forum State, advertising in the forum State, [and] establishing channels for providing regular advice to customers in the forum State"²⁵⁹

{62} Throughout the second part of this analysis, an overarching concern is whether exercising jurisdiction over the nonresident would offend traditional notions of "fair play and substantial justice."²⁶⁰ The defendant's conduct and connection with the forum State must be such "that he could reasonably anticipate being haled into court there."²⁶¹ Others factors to be considered in the imprecise-

sounding calculus of “fair play and substantial justice” include “the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interest of the several States in furthering fundamental substantive social policies.’”²⁶² For nonresidents defendants in particular, a court may look at “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system” and give those burdens “significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”²⁶³

{63} In the context of an Internet transaction, courts have determined personal jurisdiction according to a “sliding scale” by which “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”²⁶⁴ In *Zippo Manufacturing*, the district court described this sliding scale in the following terms:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.²⁶⁵

Subsequent case law has suggested that companies whose websites offer lists of products sold, online sales, ordering information, file downloads, and links to other websites are not considered “passive websites.”²⁶⁶

{64} Internet gambling sites seem to fall into either the “clearly doing business” or “middle ground” categories. For example, in *State v. Granite Gate Resorts Inc.*,²⁶⁷ a Minnesota court found personal jurisdiction over a Nevada Internet gambling corporation, although it did not yet accept bets. Jurisdiction was founded on the grounds that the site advertised on a Nevada tourist information web page,²⁶⁸ maintained an online mailing list to keep potential customers updated on its forthcoming launch of services,²⁶⁹ and displayed online a toll-free number for customer inquiries²⁷⁰ and a declaration that the company reserved the right to sue the customer in his or her home state for breach of contract.²⁷¹ Minimum contacts have also been found when a fully functioning online casino advertised over the Internet, required its customers to enter into contracts before playing games, and subsequently sent prizes via regular mail to the customers’ residences.²⁷²

{65} Furthermore, an Internet casino’s efforts to deny gambling access to residents in a jurisdiction where the gambling at issue is illegal will not be considered proof that the defendant did not knowingly do business in that jurisdiction if the gambler can easily circumvent the casino’s safeguard measures.²⁷³ For example, in *People v. World Interactive Gaming Corp.*,²⁷⁴ users were required to enter their physical address, and access was denied for jurisdictions where land-based gambling was illegal; however, a gambler in a jurisdiction where land-based gambling was illegal only had to change his or her address to a jurisdiction where land-based gambling was legal in order to access the Internet gambling.²⁷⁵ Given the casino’s easily fooled jurisdiction-identification system, the court decided that

the Internet casino could not defend itself by claiming that it had unknowingly accepted bets from residents in New York, where unauthorized land-based gambling was illegal.²⁷⁶

{66} The forum State's interest in limiting fraud or prohibiting gambling has been cited as a substantive social policy justifying the exercise of personal jurisdiction (even if this interest is not, on its own, determinative). In *Thompson v. Handa-Lopez, Inc.*,²⁷⁷ in which a Texas gambler sued an Internet casino for allegedly refusing to pay winnings, the court, in finding personal jurisdiction over the defendant, noted that:

Texas clearly has a strong interest in protecting its citizens by adjudicating disputes involving the alleged breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act by an Internet casino on Texas residents. Furthermore, due regard must be given to the Plaintiff's choice to seek relief in Texas. These concerns outweigh the burden created by requiring the Defendant to defend the suit in Texas.²⁷⁸

Similar language in other Internet gambling cases suggests a strong interest in finding jurisdiction over a nonresident Internet operator.²⁷⁹ It therefore seems that most nonresident Internet gaming operations will have established sufficient minimum contacts with the jurisdiction to justify a court's assertion of personal jurisdiction.

C. Enforcement

{67} A law's actual scope depends upon a nation's ability to enforce that law.²⁸⁰ Even if jurisdiction can be established over a defendant and even though Congress has been willing to sanction a wide range of individuals—from “high level bosses” to “street level employees”²⁸¹ who have knowingly affiliated themselves with a gambling business²⁸²--enforcement of a decision against a non-resident with no presence beyond a website in the United States poses significant problems. Enforcement measures under the current federal gambling legislation include fines, forfeiture of assets, imprisonment, and/or the enjoining of FCC-regulated communications centers.²⁸³ Yet, with the exception of the last measure (and even the Wire Act has only been used against American citizens),²⁸⁴ these penalties may not deter a foreign Internet gaming operator with limited ties to the United States from seeking the business of America's Internet gamblers. An arrest warrant issued by an American court may prevent the owner of a foreign Internet gaming business from visiting the United States or those countries whose extradition treaties and gambling laws might pose a risk for him,²⁸⁵ yet many individuals may conclude that the economic benefits of the business outweigh its risks.

{68} Part of this enforcement problem is due to the underlying architecture of the Internet. As noted in Part II, Congress has, in the past, recruited large communications networks in its efforts to combat illegal gambling, including the postal and telephone systems. One can add radio and television to that list.²⁸⁶ Although these technologies' architectures have significantly changed in the past few years, their design at the time at which the relevant statutes were enacted and for subsequent decades was a far cry from Internet architecture. First, the postal, radio, television, and telephone systems distributed intelligence within the network. Postal service inspectors, telephone companies, and broadcasters could analyze the types of messages sent and could then discriminate against certain types of content or usage patterns. “One could design telephone networks to report with each call who was called, where that person lives, how long the call lasted, and from which line it was made. Indeed, this is how telephone networks today are designed.”²⁸⁷ Second, these systems were oriented towards focal points, whether these were specific transmitters, central switches,²⁸⁸ or sorting facilities. Third, the flow of information through these systems generally followed predictable paths. A letter sent from one specific destination to another via the U.S. Postal Service follows a limited number of well-defined

routes. One used to be able to say the same for telephone calls, television, and radio transmissions. Taken together, these system characteristics enabled law enforcement officials to place pressure on points of control or communication pathways in order to enforce content-based regulations.

{69} In contrast to this architecture:

- The Internet ideally pushes intelligence to the edge of the network so that “the network simply moves the data and leaves the interpretation of the data to the applications at either end.”²⁸⁹ IP protocols do not reveal “who sent the data, from where the data were sent, to where (geographically) the data are going, for what purpose the data are going there, or what kind of data they are.”²⁹⁰
- The Internet is less oriented towards focal points, and individual users can therefore more easily bypass gatekeepers.²⁹¹
- The Internet breaks its messages into packets which are “spewed across the system [N]othing ensures that they will travel in the same way, or along the same path. They take the most efficient path, which depends on the demand at any one time.”²⁹²

Given these characteristics, it is not surprising that the “the Net’s architecture has prominently stymied control efforts.”²⁹³ While existing federal law, subject to minor modifications, supports state Internet gambling policies to the extent that federal law is largely sufficient to establish personal and subject matter jurisdiction over foreign Internet gaming operations, the lack of enforcement abilities over nonresident defendants with few ties to the United States lessens the deterrence value of these judgments.²⁹⁴

V. SUGGESTIONS FOR ENFORCING FEDERAL GAMBLING LEGISLATION AGAINST INTERNET GAMBLING OPERATORS

{70} Given the distributed nature of the Internet and the off-shore locations of possible defendants, attention is often focused on third parties affiliated with Internet gambling businesses. In order to address the inaccessibility of off-shore Internet gaming operators, the House of Representatives and Senate have proposed at least fifteen bills that have directly addressed Internet gambling since 1995, although none have been successful.²⁹⁵ This paper now turns to common suggestions for undermining Internet gambling operators: penalizing individual gamblers, blocking Internet Protocol (IP) addresses via Internet Service Providers (ISPs), and targeting payment providers.

A. Penalizing Gamblers

{71} Sanctions against individual gamblers were proposed in earlier pieces of Congressional Internet gambling legislation. As part of the 1995 Crime Prevention Act, Senator Jon Kyl included an amendment to the Wire Act so that “individuals who gamble or wager via wire or electronic communication are penalized -- not just those who are in the business of gambling.”²⁹⁶ Similarly, under the Internet Gambling Prohibition Act of 1997, the Wire Act would have been expanded to encompass

[w]hoever . . . knowingly uses a communication facility for the transmission or receipt in interstate or foreign commerce of bets or wagers, information assisting in the placing of bets or wagers, or a communication that entitles the transmitter or receiver to the opportunity to receive money or credit as a result of bets or wagers.²⁹⁷

{72} This effort to penalize individual gambling customers was inconsistent with past federal gambling statutes.²⁹⁸ The Wire Act applies to those “engaged in the business of betting or wagering,”²⁹⁹

and it does not apply to individual gamblers, regardless of the size or frequency of their bets.³⁰⁰ Although the language of The Travel Act seems broad enough to cover individuals,³⁰¹ the Fifth Circuit held in *United States v. Roberson*³⁰² that “[t]he purpose of the [Travel] Act is clear: It aims to deny those engaged in criminal business enterprise access to channels of interstate commerce. It is not aimed at individual substantive offenses.”³⁰³ While the Wagering Paraphernalia Act applies to “[w]hoever, except a common carrier in the usual course of its business” sends gambling-related material in foreign or interstate commerce, the Act has, in practice, been applied to gambling businesses instead of individual gamblers.³⁰⁴ As for the Illegal Gambling Business Act, it sanctions, as its title suggests, an “illegal gambling business.”³⁰⁵

{73} Although one might argue that the difficulty of enforcing judgments against Internet gambling operators justifies sanctioning Internet gamblers, prosecuting Internet gamblers may, in fact, be no more feasible or effective than targeting Internet gaming operators. According to the U.S. Department of Justice, legislation targeting bettors would divert resources that could better be spent on large operations, and an over-broad law would result in inconsistent enforcement.³⁰⁶ G. Robert Blakey and Harold Kurland offer a different argument against federal legislation that focuses on individual gamblers: “Only in prosecuting large-scale gambling operations does the federal government possess a significant enforcement advantage Regulation of the individual bettor should remain a matter of state law; no justification appears for deviating from the federal practice of noninterference with state policies.”³⁰⁷ Fortunately, the effort to target Internet gamblers has not appeared in bills proposed subsequent to 1997.

B. ISPs

{74} Under the Wire Act, common carriers, upon law enforcement’s request, are required to refuse or to terminate the service of those transmitting illegal gambling information.³⁰⁸ Many of the proposed Congressional bills, regardless of whether they modify the Wire Act or whether they propose new sections to the U.S. Code, follow this same approach on the Internet.³⁰⁹ An ISP would have an obligation, upon having received specific instructions from law enforcement agencies regarding a particular site, to discontinue or to refuse access to the designated site (presumably by blocking the IP address).³¹⁰ Failure on the part of the ISP to act would place the ISP in violation of, for example, the proposed Unlawful Internet Gambling Funding Prohibition Act.³¹¹

{75} However, there are several problems with updating the Wire Act in order to force ISPs to block IP addresses. First, several websites may share the same IP address, with one researcher estimating that approximately 87% of active .com, .net and, .org web sites use shared IP addresses.³¹² Consequently, while an unlawful Internet casino whose IP address is blocked may not be able to invoke First Amendment rights,³¹³ a site that is the victim of over-inclusive Internet blocking may.³¹⁴ Second, since a site’s URL and IP address are distinct, an Internet gambling operator could change IP addresses without changing its URL. Its clients need never know that their favorite gambling site has changed IP addresses because they would still type the same address into their browser. Of course, an enforcement system, in order to be effective, need not be perfect.³¹⁵ For example, a gambler who connects to an offshore ISP in order to access a gambling site will have to pay a long-distance rate, and an Internet gambling site whose IP address has been blocked will have to spend time and money to find another one if it wants to continue to service American customers. However, given the significant profits to be gained from servicing Americans’ appetite for Internet gambling, the costs associated with IP blocking do not seem likely to encourage compliance with Internet gambling regulations.

{76} A third concern is often raised with respect to state-based ISP regulations. If all states forbade Internet gambling (and had comparable definitions of “Internet gambling”), then Nevada would not object if Utah enjoined an ISP to block the IP address of an Australian Internet gambling site, even if that ISP also served Nevada residents. Utah would, in fact, be helping Nevada to enforce its anti-Internet gambling policy. However, what would happen if Nevada legalized Internet gambling? Utah’s law enforcement actions would then seem like unwelcome intrusions into Nevada and potential violations of the Dormant Commerce Clause.³¹⁶

{77} There is a vision of ISPs as “Internet police, not only cordoning off areas from view when acting as hosts of content, but also more broadly restricting access to particular networked entities with whom their customers wish to communicate -- thus determining what those customers can see, wherever it might be online.”³¹⁷ For better or for worse, that day has not yet come. Absent more accurate technology,³¹⁸ IP blocking is constitutionally dubious and of questionable efficacy regardless of whether it is instituted at the state or federal level.

{78} Even setting aside the problems with IP blocking, there is a strong argument that the Wire Act needs to be reexamined. The extent to which the Wire Act manifests federal disregard for state gambling policy makes it a rarity among federal gambling statutes. The Illegal Gambling Business Act is predicated upon a “violation of the law of the State or political subdivision in which it is conducted;”³¹⁹ the Travel Act applies to a gambling enterprise “in violation of the laws of the State in which they are committed or of the United States;”³²⁰ the Johnson Act, which, as discussed in Part II, regulates the interstate transport of certain gambling devices, has an exception for jurisdictions that have legalized the equipment at issue;³²¹ and the Wagering Paraphernalia Act provides an exception for “the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State.”³²² However, the Wire Act forbids interstate wagering, even when the wager is to and from a jurisdiction where the gambling at issue is legal.³²³ It is difficult to argue, as is generally done with respect to federal gambling policy, that the Wire Act “prevent[s] interference by one State with the gambling policies of another”³²⁴ when both states have legalized the gambling at issue. Instead, the rationale may be one that was put forth by the Fifth Circuit Court of Appeals when it wrote that the Wire Act was “part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control.”³²⁵ Similarly, a Justice Department employee, in his testimony before a House committee in 1950, referred to “a Nationwide policy against gambling, particularly commercialized gambling.”³²⁶

{79} The idea of a nationwide federal policy against gambling, regardless of whether it is sanctioned by the states in which it takes place, is at odds with the traditional deference to state legislatures. Although one might argue that this policy is perfectly consistent with the targeting of large-scale gaming operations in the interest of fighting crime,³²⁷ this connection between legalized gambling and crime is highly debatable.³²⁸ Moreover, it is unclear why a federal statute that required the underlying interstate activity to be illegal in at least one of the jurisdictions would undermine crime-fighting measures. Currently, an Internet gambling business in full compliance with its jurisdiction’s laws that offered its services to a client in another jurisdiction in which Internet gambling was legal might be subject to sanctions under the Wire Act. Although this had been true since the 1960’s with respect to telephone gambling, it is not clear that the original rationale for the Wire Act -- to combat mafia-infiltrated bookmakers³²⁹ -- is still valid several decades later with respect to either telephone gambling or a potentially heavily regulated on-line gambling industry.

{80} To the extent that the Wire Act is still useful in combating large-scale, illegal gambling operations conducted via certain communications facilities, Congress might keep the act but extend the Wire Act's safe harbor provisions³³⁰ to include the transmission in interstate or foreign commerce of bets from a state or foreign country where the betting at issue is legal into a state or foreign country in which that betting is also legal. There are several reasons for doing so. First, permitting the transmission of "information assisting in the placing of bets or wagers," as provided in the Wire Act's safe harbor provision,³³¹ but not the transmission of "bets or wagers" is a tenuous distinction. The exemption for "information assisting in the placing of bets or wagers" was originally designed with horseracing betting in mind,³³² and that industry has subsequently gained the opportunity to accept interstate wagers under certain conditions.³³³ Second, while it was relatively easy to determine whether a wager via telephone was interstate by simply determining the location of the caller and the person being called, it is more difficult to determine the precise location of a single Internet gambling operator that may be incorporated in one state and use a server in another location. If liberally construed or broadly reworded, the Wire Act might constitute a ban on Internet gambling, regardless of individual state policies. Finally, limiting the Wire Act's applicability would accord greater respect to foreign jurisdictions and prevent accusations of international trade agreement violations against the United States, such as that recently leveled by Antigua and Barbuda before the World Trade Organization.³³⁴

{81} By extending the Wire Act's safe harbor to include interstate wagers from and to jurisdictions in which the wagers are legal, the federal government would be able to continue to fight against a wide range of gambling targets while showing greater respect to state policies. Although the Wire Act would be of limited use against Internet gambling operators, an expanded safe harbor provision might be relevant in the event that IP blocking becomes more technologically accurate.

C. Payment Providers

{82} In the past, states have attacked illegal gambling by undermining its payment channels. One way of doing this has been through contract law. In particular, loans for gambling are not enforceable in most states under state statutes or under general public policy.³³⁵ Consequently, casinos have had difficulty recovering money from gamblers even in jurisdictions where the gambling at issue is legal.³³⁶ However, if the lender did not know that the loan was to be used for an illegal purpose, then the debt may be enforceable.³³⁷ This rationale has been used to find that bettors were liable for cash advances from their credit card companies because the latter were not knowing participants in the bettors' gambling.³³⁸ Nonetheless, it should be emphasized that there are no hard and fast rules regarding the enforceability of gambling debts. The analysis is highly fact-specific,³³⁹ and this creates an uncertain legal environment for casinos and payment providers, both off and on the Internet.

{83} This contractual approach has met with mixed success in addressing Internet casino gambling. Since credit cards have been the most frequently used payment method for Internet gambling, cases regarding the enforceability of Internet gambling debt have focused on them.³⁴⁰ For example, a California resident who had been sued by credit card companies for over \$70,000 in Internet gambling expenses spread out over twelve cards argued that her debt was unenforceable because the gambling merchants, whose operations were alleged to be illegal under California law, should never have been given merchant accounts.³⁴¹ The suit settled out of court,³⁴² and several banks have subsequently limited the Internet gambling transactions permitted on their cards.³⁴³

{84} Online gamblers seeking to avoid their credit card debts have used civil suits under RICO,³⁴⁴ but these gamblers have had less success than the aforementioned California plaintiff. One judge

described these online gamblers as “independent actors who made a knowing and voluntary choice to engage in a course of conduct. Litigation over their own actions arose only when the result of those actions became a debt that they did not wish to pay.”³⁴⁵ Furthermore, in *Jubelirer v. MasterCard International, Inc.*, the judge emphasized the distant relationship between the credit card company and its “more than 10 million merchants.”³⁴⁶ Such a characterization may make it difficult for courts to hold that credit card companies had knowledge of a client’s specific gambling expenditures.³⁴⁷

{85} Establishing that the debt at issue involves a contract that is separate from the gambling activity “may serve to rebut arguments that it is illegal, void, or unenforceable.”³⁴⁸ In other words, the more distance that the credit card company can place between its extension of credit to the customer and the customer’s charges to the Internet gambling operation, the better the chances that the credit card loan will be enforceable. Credit card transactions may involve multiple contracts between, for example, credit organizations, issuing banks, merchant banks, the gambler, and the casino, each of which may be located in a different jurisdiction.³⁴⁹ Without delving into the details of the credit card hierarchy, the issuing bank is often the primary party affected when gamblers contest their suits, although the merchant bank has the closest connection to the gambling operator.³⁵⁰ When one also considers that Internet casinos may deceive credit card companies regarding the nature of their transactions³⁵¹ and that intermediate electronic accounts that are established using credit cards can be used to purchase a range of products and services (gambling being one among many),³⁵² it may not be difficult for the issuing bank or other parties in the credit hierarchy to argue for the enforceability of the debts on the grounds that they did not know of the illegal purpose for which the extended credit was eventually used.³⁵³ It should be noted that if clients are nonetheless successful in invalidating their gambling-related debts, this outcome may encourage gambling by creating a win-win situation for gamblers: they would not be obliged to pay their debts but might be able to collect their winnings.

{86} Rather than having residents rely solely upon contractual unenforceability theories, states have also sought the cooperation of payment providers in order to address illegal gambling, both on and off of the Internet. In 1997, the Florida Attorney General’s Office and Western Union entered into an “Agreement of Voluntary Cooperation,” by which the latter agreed to limit money transfers to specified offshore bookmakers, which used the telephone, mail, and the Internet as means of communications.³⁵⁴ More recently, under pressure from the New York Attorney General’s Office, Citibank, and the online payment provider PayPal agreed to block online gambling transactions.³⁵⁵ Furthermore, American Express and Discover prohibit the use of their cards for Internet gambling transactions, while Visa and MasterCard are making increasing efforts to ensure that Internet gambling activities are correctly identified (thereby providing banks with the possibility of refusing these transactions).³⁵⁶

{87} A variety of federal proposals and regulations have been put forth in order to reduce the availability of Internet gambling payment methods. The National Gambling Impact Study Commission recommended national legislation that would have rendered unenforceable credit card debts incurred while gambling over the Internet.³⁵⁷ A feature of Internet gambling bills that first began appearing in 2000 would prohibit all Internet gambling operators³⁵⁸ or all “unlawful” Internet gambling operators from “knowingly accept[ing]” a forbidden payment method.³⁵⁹ These prohibited payment methods are described as broadly as possible so as to include, for example, credit cards, electronic fund transfers, checks, and “any other form of financial transaction as the Secretary [of the Treasury] may prescribe by regulation which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person.”³⁶⁰

{88} The Internet Gambling Payments Prohibition Act would have enabled federal banking agencies to order insured depository institutions not to facilitate the financial transactions of those violating

the Act,³⁶¹ and several bills would have allowed state and federal law enforcement agencies to obtain injunctions against financial intermediaries that were deemed necessary to prevent violations of illegal Internet gambling transactions.³⁶²

{89} A more recent Senate bill even proposes the creation of an “Office of Electronic Funding Oversight” under the Department of Treasury “to coordinate Federal efforts to prohibit restricted transactions.”³⁶³ This office would create compulsory payment system policies and procedures for identifying and blocking restricted transactions which would be enforced by the Federal Trade Commission.³⁶⁴

{90} Is novel federal legislation necessary to ensure the assistance of payment providers in targeting unlawful gambling? Without any new federal legislation, the threat of lawsuits, and perhaps the threat posed by Congressional legislation have significantly reduced the involvement in Internet gambling of U.S.-based banks, credit card companies, and other online payment providers.³⁶⁵ It has been estimated that Internet gambling operators whose business relied on U.S. cardholders saw their revenues decline by 35-40% in 2000.³⁶⁶ Given that many banks and credit cards have operations in multiple states, a change of policy mandated in one state often leads to a change in policy throughout the rest of the company’s operations.³⁶⁷ This is not to state that Americans can no longer play and pay at illegal Internet casinos. Although most U.S.-based merchant banks may block Internet gambling transactions, credit-card association members in jurisdictions where gambling is legal continue to accept Internet gambling merchants.³⁶⁸ A 2002 General Accounting Office survey indicated that 85% of those sites surveyed listed MasterCard and Visa as payment methods.³⁶⁹ However, if the issuing bank is American-based, then the transaction will probably be blocked. It has become more difficult for Internet gambling operations to do business with American consumers because their transactions are subject to greater scrutiny and rejection.³⁷⁰

{91} Yet leaving regulation of payment providers to the states will not be an effective solution if some states legalize Internet gambling. North Dakota, acting alone or in conjunction with South Dakota and Minnesota, might have considerable difficulty influencing payment providers and is unlikely to be as successful as New York has been. Furthermore, the previous paragraph dealt primarily with credit-related transactions, although online payment providers like PayPal can also be linked directly to bank accounts. Internet gambling operators will likely respond to the above trends by shifting to non-credit based payment methods,³⁷¹ such as debit cards or various forms of electronic currency. Allowing law enforcement authorities to enjoin payment providers in a fashion similar to the process used for “common carriers” under the Wire Act is the basic approach envisioned by recent Congressional legislation,³⁷² and this would cover a comprehensive range of financial institutions and payment methods, promising to cut the link between Internet gambling and America’s banking system.³⁷³ While Congress might adopt a wait-and-see approach to determine whether states can reach voluntary agreements with U.S.-based financial institutions to address the next generation of payment providers,³⁷⁴ legislation directly targeting payments to illegal gambling would “put practical enforcement ‘teeth’ in place that could eliminate most of the revenues online gaming operators receive from the U.S. market.”³⁷⁵

D. Online/Offline Neutrality

{92} Any legislation that Congress passes affecting Internet gambling should be faithful to the notion of online/offline consistency. As the Presidential Working Group on Unlawful Conduct on the Internet stated, “substantive regulation of unlawful conduct (e.g., legislation providing for civil or criminal penalties for given conduct) should, as a rule, apply in the same way to conduct in the cyberworld as

it does to conduct in the physical world.”³⁷⁶ Legislation that is built upon a snapshot of an evolving technology may not only inhibit that technology from evolving to address the underlying concerns,³⁷⁷ such legislation also threatens to become less relevant as the technology changes.³⁷⁸ While this notion seems uncontroversial in the abstract, Congress has often hesitated to adopt it in its Internet gambling proposals.

{93} Congressional Internet gambling bills that have proposed bans on Internet gambling activities have often created a double standard. For example, under the Internet Gambling Prohibition Act of 1997,³⁷⁹ a convicted online gambler would have faced a maximum sentence of four years in prison and could have been fined the greater of (i) \$20,000, or (ii) the amount wagered over the Internet.³⁸⁰ In contrast, a gambler who illegally gambled offline would likely be untouched by federal anti-gambling statutes.³⁸¹

{94} This online, offline double standard was also evident in some of the Internet gambling payment provider legislation. One of the bills would have allowed a situation where a gambler could have used one form of payment at a lawful brick and mortar gambling operation but could not have used the same form of payment at a lawful Internet gambling operation.³⁸²

{95} The double standards present in Congressional bills often cannot be justified by the technology at issue. For example, if the argument in favor of the bills that targeted payment providers for Internet gambling operations³⁸³ was that restricting payments was a means to an end,³⁸⁴ then there is no good reason why that “end” should not have been “unlawful gambling” instead of “unlawful Internet gambling.” This might have led payment providers to further develop safeguard measures against all forms of unlawful gambling, rather than just against unlawful Internet gaming, and it would have assisted law enforcement authorities in cutting off access to unlawful, more “traditional” off-shore gaming operations,³⁸⁵ as well as in cutting off access to unlawful, Internet-based gambling operations.

{96} Furthermore, there is little reason for the proposed payment provider bills to focus on the Internet in order to ground themselves in a Constitutionally-permissible exercise of Congressional power. Perhaps the rationale was that Internet gambling, because of its normally cross-border nature, is clearly within Congress’s powers under the Commerce clause, whereas other types of gambling may not be; however, a reference to the Internet may not be sufficient and is not necessary to make such an act constitutionally valid. First, gambling over the Internet may be limited purely to within state boundaries,³⁸⁶ thereby placing Congress in the situation of regulating intrastate activity. Second, while earlier acts like the 1890 Act (banning, among other items, newspapers with gambling advertisements and lottery-related registered letters from the mail) were clearly grounded in Congress’s postal power,³⁸⁷ and while the Wire and Travel Acts both make references to “interstate or foreign commerce,”³⁸⁸ the Organized Crime Control Act was premised upon the broad assumption that “illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof.”³⁸⁹ Courts have subsequently upheld this Act, not requiring an explicit showing of connection with interstate commerce in order to establish a conviction under it.³⁹⁰ Payment providers may be one step removed from gambling operations; however, their link to them and the likelihood that these payment providers, themselves, will be agents of interstate commerce make invocation of the Internet constitutionally unnecessary in the Congressional legislation.³⁹¹

{97} Another argument in favor of the focus on the Internet in payment provider legislation is that credit is dangerous in the hands of Internet gamblers who, in the heat of the game, may rack up enormous debts.³⁹² These concerns, however, extend beyond Internet gaming operations. With respect to brick and mortar casinos, the NGIS Commission noted that

[o]ne of the issues of most concern to this Commission is the ready availability of credit in and around casinos, which can lead to irresponsible gambling and problem and pathological gambling behavior. Forty to sixty percent of the cash wagered by individuals in casinos is not physically brought onto the premises.³⁹³

Congressional legislation that focuses on the dangers of a novel industry, while ignoring similar threats posed by better-established business interests, risks being accused of indulging in inappropriate market protectionism.³⁹⁴

{98} Congressional Internet gambling legislation has been a response to a particular type of Internet gambling -- a loosely regulated one. Such businesses, however, need not be the only model. By outlawing the conduct at issue,³⁹⁵ the legislation might allow the technology to develop in order to address the questionable conduct. If Congress is intent on targeting payment providers, Congress should pass an Unlawful Gambling Funding Prohibition Act instead of proposing an Unlawful *Internet* Gambling Funding Prohibition Act.³⁹⁶ As the Department of Justice has noted, Congressional "legislation . . . should be applied to illegal gambling, whether that gambling occurs over the telephone, or whether that gambling occurs over the internet, or whether that gambling occurs in any other way."³⁹⁷

VI. CONCLUSION

{99} Online gaming has not escaped the states' regulatory abilities, and most prosecutions against online gaming operators have, in fact, been brought by state attorneys general using state law.³⁹⁸ Unregulated Internet gaming, however, has undermined states' abilities to determine their gaming policies, and current federal legislation, while sufficient to establish subject matter and personal jurisdiction over nonresident Internet gaming operators, lacks adequate enforcement mechanisms to support the states. Consequently, reforms to federal gambling legislation that are written in as "medium-neutral" a fashion as possible should focus on empowering law enforcement authorities to enjoin payment providers from servicing gambling businesses that operate in jurisdictions where the gambling at issue is illegal. In contrast, the Wire Act will be of limited use against unlawful Internet gaming because of the constitutional and technological problems underlying IP blocking. Furthermore, Congress should reexamine the assumption of a connection between crime and all gambling -- legal and illegal -- that underlies the Wire Act's broad wording. This might lead Congress to repeal the Wire Act or to expand its safe harbor to include wagers from and to jurisdictions in which the gambling at issue is legal. Should IP blocking technology become more precise, Congress might also consider updating the Wire Act to apply to casino-style games³⁹⁹ and ensuring that the Act applies to a broad range of communications, regardless of whether they are "wired."⁴⁰⁰ Revising the Wagering Paraphernalia Act to include items, such as websites, might additionally be considered; however, since the Act's sanctions are limited to prison and/or fines, it would not be effective against nonresident defendants with few ties to the United States.

{100} In keeping with traditional deference of the federal government to states in the realm of gambling, states should have the discretion to decide whether to permit or prohibit Internet gaming operations within their borders. The relationship between the federal government and states in matters of gambling should be no different after the advent of Internet blackjack than it was before.

{101} The regulations of the Nevada Gaming Commission total over 1,100 pages,⁴⁰¹ and regulations of Internet gaming would probably be no less complex. The above discussion has merely sought to emphasize that the differences between online and offline gaming do not justify radical legislative

departures from federal gambling policy. Consequently, neither federal prohibition nor surrender to the market's invisible hand is warranted. The limited Congressional action suggested above, rather than being an example of Congressional disregard for state powers, would in fact strengthen states' decision-making abilities and would follow in the footsteps of a delicate state-federal government equilibrium in the realm of gaming.

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¹ National Gambling Impact Study Commission, *National Gambling Impact Study Final Report*, at 1-1 (1999), at <http://govinfo.library.unt.edu/ngisc/reports/1.pdf> [hereinafter *National Gambling Final Report*].

² The words "gaming" and "gambling" are used interchangeably in this paper. It should not be overlooked that "gaming" or "gambling" in fact comprises multiple industries, including commercial and tribal casinos, lotteries, pari-mutuel wagering, sports wagering, charitable gambling and electronic gambling devices. The issues surrounding each type of gambling are far from uniform. *See id.* at 1-2.

³ *See Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 108th Cong. (2003), available at <http://www.usdoj.gov/criminal/cybercrime/Malcolmtestimony42903.htm> (statement of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice) [hereinafter *Malcolm Testimony*]. To place this number in perspective, the American Gaming Association estimates that the gross revenue of legalized gambling in the U.S. is around \$50.9 billion. *See American Gaming Association, Is Legalized Gambling a \$600 Billion Industry or a \$50 Billion Industry*, at http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=11 (last visited Nov. 17, 2003).

⁴ *See Lasseters Corporation Ltd., Submission to the Dep't. of Comm. Info. Tech. and the Arts, Rev. of Issues Related to Commonwealth Interactive Gambling Reg.*, Austl. Dep't. of Comm., Info. Tech. and the Arts (May 2, 2003), at 6, available at http://www.dcita.gov.au/download/0,6183,4_114171,00.pdf, 6 [hereinafter *Lasseters' Submissions*].

⁵ *Id.* "In 2002, Christiansen Capital Advisors estimated U.S. online players represented 61 percent of the total online gaming market in terms of player numbers." *Id.*

⁶ *See Sue Schneider, The Market: An Introduction*, in *INTERNET GAMBLING REPORT V* 47, 48 (Mark Balestra ed., 2002). Some of these jurisdictions, such as Antigua, conveniently have an undersea fiber optic link to the U.S. *See Mark D. Lynch, Comment, The Smart Money Is on Prosecutions: Using the Federal Interstate Wire Act to Prosecute Offshore Telephone Gambling Services*, 10 *IND. INT'L & COMP. L. REV.* 177, 181 (1999).

⁷ *See generally* H.R. REP. NO. 108-133 (2003). "Internet gambling currently constitutes illegal gambling activity in all 50 States. Although in June of 2001 the Nevada legislature authorized the Nevada Gaming Commission to legalize on-line, Internet gambling operations if and when such operations can be conducted in compliance with Federal law, the Gaming Commission believes that such compliance cannot be ensured at present." *Id.*

⁸ Schneider, *supra* note 6, at 49.

⁹ For articles that raise issues of federalism surrounding Internet gambling, *see, e.g.*, Steven A. Kish, Note, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, 51 *FED. COMM. L.J.* 449, 456 (1999); Beau Thompson, *Internet Gambling*, 2 *N.C. J.L. & TECH.* 81, 101 (2001).

¹⁰ While this paper discusses many forms of gambling, its primary focus is on gambling events that are conducted purely online and whose outcome is determined by a random number generator (e.g. Internet casino games).

¹¹ *See, e.g.*, Knight v. Margate, 86 N.J. 374, 391-92 (1981) ("Gambling is an activity rife with evil, so prepotent its mischief in terms of public welfare and morality that it is governed directly by the [New Jersey] Constitution itself."); accord Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 *U. DAYTON L. REV.* 163, 170-71 (1996) ("In general, the burdens associated with gambling of any kind are well documented. Addiction, diminished job performance, crime, decreased spending on other forms of entertainment, and

the regressive nature of gambling each pose serious problems for society.”) (citations omitted); *see also* PAUL A. SAMELSON, *ECONOMICS* 425 (10th ed. 1976) (arguing that gambling creates no new wealth and may subtract from the national income); Joseph Kelly, *Gaming Law Symposium: Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 *CHAP. L. REV.* 87, 89 (2002) (“Those who support legalized gambling focus on the community’s need to create economic activity and tax revenue, and on an individual’s freedom to make moral decisions.”) (references omitted) [hereinafter *Gaming Law Symposium*]; *cf.* Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 *WHITTIER L. REV.* 579, 604 (1997) (“For the voting majority, gambling is no longer immoral or sinful conduct, nor is it considered inherently evil.”); Thompson, *supra* note 9, at 85 (“Our free-market economic system has shown that American consumers find casinos to offer a valid and worthwhile product, and these consumers should not be prohibited from participating in a clearly desired activity.”).

¹² *See* Thomas v. Bible, 694 F. Supp. 750, 760 (D. Nev. 1988), *aff’d*, 896 F.2d 555 (9th Cir. 1990) (“Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.”); State v. Rosenthal, 559 P.2d 830, 836 (Nev. 1977) (“We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution”); Chun v. New York, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (“The scope of laws regulating gambling and lotteries is clearly a matter of predominantly state concern.”).

¹³ *See* H.R. REP. NO. 106-655 (2000), available at <http://thomas.loc.gov/cgi-bin/cpquery/0?%20%20dbname=cp106&maxdocs=100&sel=DOC&report=hr655p1.106&> (last visited July 16, 2003); *see also* United States v. King, 834 F.2d 109, 111 (6th Cir. 1987) (“Throughout our history, the regulation of gambling has been largely left to the state legislatures, which have, in turn, treated gambling with ambivalence.”).

¹⁴ *See* National Gambling Impact Study Commission, *Introduction to National Gambling Impact Study Final Report*, at 2 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/intro.pdf> (last visited Nov. 13, 2003); *see also* Winshare Club of Canada v. Dep’t of Legal Affairs, 542 So. 2d 974 (Fla. 1989) (describing gambling as “a matter of peculiarly local concern that traditionally has been left to the regulation of the states”).

¹⁵ *See* Peter Brown, *Regulation of Cybercasinos and Internet Gambling*, 610 *PLI/PAT* 607, 614 (2000) (citing Haw. Rev. Stat. § 712 *et seq.*; UTAH CODE ANN. § 76-10-1101 *et seq.* (1998)).

¹⁶ *See* John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 *TEMPLE L. REV.* 619, 654 (1999).

¹⁷ *See, e.g.*, Joseph M. Kelly, *Internet Gambling Law*, 26 *WM. MITCHELL L. REV.* 117, 169 (2000) (noting that “[s]ome gaming interests have concluded that prohibition of Internet gambling is no longer viable and instead advocate regulation”).

¹⁸ *See* Tara L. Lavery, *Commercial Speech Suffers a First Amendment Blow in United States v. Edge Broadcasting Co.*, 14 *N. ILL. U. L. REV.* 549, 553 n.28 (1994).

¹⁹ *See* G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 *CORNELL L. REV.* 923, 931 (1978).

²⁰ Act of July 27, 1868, ch. 246, 15 Stat. 194, 196.

²¹ Act of September 19, 1890, ch. 908, § 1, 26 Stat. 465 (codified as amended at 18 U.S.C. § 1302 (2003)).

²² This was the Louisiana Lottery whose popularity despite its corruption led one Congressional representative to describe it as a “hydra-headed monster, which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done.” Blakey & Kurland, *supra* note 19, at 939-40 (quoting *CONG. REC.* 8705 (statement of Rep. Moore) (concerning HR 11569, 51st Congress, 1st Session, 1890)).

²³ 18 U.S.C. § 1301 (2003).

²⁴ Act of March 2, 1895, ch. 191, § 1, 28 Stat. 963.

²⁵ The Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²⁶ *See* Kristen D. Adams, *Interstate Gambling: Can States Stop the Run for the Border?*, 44 *EMORY L.J.* 1025, 1033 (1995)

(offering a brief history of the Act).

²⁷ 139 CONG. REC. 15,242, 15,247 (1993) (statement of Sen. Specter).

²⁸ 18 U.S.C. § 1955 (2003).

²⁹ See *Schneider v. United States*, 459 F.2d 540, 542 (8th Cir. 1972) (“Gambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense. Even within a state, some forms of gambling may be federal offenses while other forms of gambling may not be.”).

³⁰ 18 U.S.C. § 1511(a) (2003).

³¹ See, e.g., *United States v. Farris*, 624 F.2d 890, 899 (9th Cir. 1980).

³² DAVID NIBERT, *HITTING THE LOTTERY JACKPOT* 2-5 (2000).

³³ Blakey & Kurland, *supra* note 19, at 951 n.121.

³⁴ See S. REP. NO. 93-1404, at 2 (1974).

³⁵ COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING* 1, 5 (1976) (including organized crime as one of the “identifiable national interests”) [hereinafter *GAMBLING IN AMERICA*].

³⁶ *United States v. King*, 834 F.2d 109, 112 (6th Cir. 1987).

³⁷ See generally ESTES KEFAUVER, *CRIME IN AMERICA* (1968). Around 1950, Senator Kefauver, chairman of the aforementioned Special Senate Committee to Investigate Organized Crime in Interstate Commerce, estimated the American illegal gambling business to be a “\$17,000,000,000 to \$25,000,000,000 annual racket,” and added that “the wire service keeps alive the illegal gambling empire which in turn bankrolls a variety of other criminal activities in America.” *Id.* at 35-36. Kefauver described the wire service as “Public Enemy Number One” because of its alleged ties to organized crime’s gambling businesses. *Id.* at 52.

³⁸ Act of Jan. 2, 1951, ch. 1194, 64 Stat. 1134 (codified as amended at 18 U.S.C. §§ 1171-1178 (2003)).

³⁹ H.R. REP. NO. 2769 (1950).

⁴⁰ Blakey & Kurland, *supra* note 19, at 964. See generally Wire Act, 18 U.S.C. §1084 (2003); Travel Act, 18 U.S.C. §1952 (2003); Wagering Paraphernalia Act, 18 U.S.C. §1953 (2003).

⁴¹ Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492 (1969).

⁴² Letter from Robert F. Kennedy, Attorney General, to the Speaker of the House (Apr. 6, 1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666.

⁴³ Blakey & Kurland, *supra* note 19, at 981.

⁴⁴ S. REP. NO. 91-617, at 83 (1969).

⁴⁵ For example, in *Martin v. United States*, 389 F.2d 895 (5th Cir. 1968), the appellants placed bets via telephone from Texas, where the gambling at issue was illegal, to Nevada, where the gambling at issue was legal. The appellants argued that an application of 18 U.S.C. § 1084 to their case would “defeat the policies of Nevada while not aiding the enforcement of the laws of any other State.” *Id.* at 897. The court responded that “if the policy of Nevada is not ‘defeated’ in some way, then the policy of every other state that prohibits what Nevada allows could be defeated.” *Id.* at 898.

⁴⁶ *United States v. Fabrizio*, 385 U.S. 263 (1966).

⁴⁷ *United States v. Farris*, 624 F.2d 890, 895 (9th Cir. 1980), overruled on other grounds by *United States v. E.C. Inrs.* 77 F.3d 327 (9th Cir. 1996).

⁴⁸ H.R. REP. NO. 1549, at 4029 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4029; *see also* United States v. King, 834 F.2d 114 (noting “the states’ traditional jurisdiction over small gambling operations”).

⁴⁹ *See, e.g., Gambling on the Internet: Before the Subcomm. on Crime, House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division), *available at* <http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm> (last updated July 22, 1999) [hereinafter DiGregory Statement I].

⁵⁰ *See Internet Gambling Funding Prohibition Act: Hearings on H.R. 4419 Before the House Comm. on Banking and Fin. Serv.*, 106th Cong. (2000) (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division), *available at* http://commdocs.house.gov/committees/bank/hba65225.000/hba65225_0.HTM); *see also* Jack L. Goldsmith, *What Internet Gambling Legislation Teaches about Internet Regulation*, 32 INT’L LAW. 1115, 1117 (1998) (stating with respect to the Wire Act that it “has rarely been enforced, because enforcement is costly and the social harms added by telephone gambling have been relatively low”).

⁵¹ *See generally* John C. Jeffries, Jr., *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1098 (1995) (“The most important constraint on federal prosecution is resources.”).

⁵² Blakey & Kurland, *supra* note 19, at 957.

⁵³ *Id.* at 987.

⁵⁴ *See also* 15 U.S.C. § 3001 (2003), which states:

The Congress finds that - - (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests

Id.

⁵⁵ *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 30 (1999).

⁵⁶ *See, e.g., Malcolm Testimony, supra* note 3 (citing “the potential for gambling by minors and compulsive gamblers, the potential for fraud and money laundering, and the potential for infiltration by organized crime.”); Craig Lang, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 546 (2002) (“The traditional concerns include fraud, minors’ access to Internet gambling, and gambling addiction.”); Senator John Kyl, *Kyl Applauds House Passage of Ban on Internet Gambling* (June 10, 2003), *at* <http://kyl.senate.gov/record.cfm?id=205377> (“Internet gambling is not a harmless diversion, but a growing danger that preys on young people, takes advantage of gambling addicts, and encourages criminal activity.”).

⁵⁷ This paper does not overlook the fact that unregulated Internet gambling poses novel law enforcement issues. These issues will be explored in Parts IV and V of this paper.

⁵⁸ *See* Parliament of Australia Senate, *Netbets: A Review of Online Gambling in Australia*, §§ 1.17, 2.3 (March 2000), *at* http://www.aph.gov.au/senate/committee/it_ctte/gambling/report/contents.htm [hereinafter *Netbets*] (noting that an Internet casino-style game “represents a new type of gambling activity” whereas sports gambling “is not a new gambling product, but a new means of placing a bet”).

⁵⁹ *See* Bruce P. Keller, *The Game’s the Same*, 108 YALE L.J. 1569, 1572 (1999) (arguing that “although the Internet may change the mechanics of gambling by a considerable degree, it does not change the nature of gambling itself”).

⁶⁰ *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 213 (N.Y. App. Div. 1964).

⁶¹ *See* R. Scott Girdwood, *Place Your Bets. . . On the Keyboard: Are Internet Casinos Legal?*, 25 CAMPBELL L. REV. 135, 137-38 (2002).

⁶² *See* Productivity Commission 1999, *Australia’s Gambling Industries: Inquiry Report* (Dec. 16, 1999), § 18.23, *at* <http://www.pc.gov.au/inquiry/gambling/finalreport/index.html> [hereinafter *Productivity Inquiry Report*].

⁶³ *Id.* §18.24. The Internet Gaming Commission maintains a list of licensed and accredited Internet gaming sites that adhere

to a code of conduct covering such areas as payouts, consumer privacy and audit trails, which is available at <http://www.internetcommission.com>.

⁶⁴ See Anthony Cabot, *Regulatory Challenges*, in INTERNET GAMBLING REPORT V 211, 216 (2002).

⁶⁵ *Australia: Uniform Standards for the Regulation of Interactive Gaming (The AUS Model)*, at 15 (Apr. 5, 2001), at [http://www.treasury.tas.gov.au/domino/DTF/DTF.nsf/LookupFiles/AUS_Model.pdf/\\$file/AUS_Model.pdf](http://www.treasury.tas.gov.au/domino/DTF/DTF.nsf/LookupFiles/AUS_Model.pdf/$file/AUS_Model.pdf). The AUS Model relies heavily upon state and territory (rather than Commonwealth) regulation of Internet gaming.

⁶⁶ NEV. REV. STAT. 463.750 (2003).

⁶⁷ See *AUS Model*, *supra* note 65, at 17. In addition, some software can provide audits of online games in real time. Craig Lang, *supra* note 56, at 549.

⁶⁸ Lasseters Online, Government License, at <http://www.lasseters.com.au/security/licence.asp>, (last visited Feb. 22, 2004). “Control systems” are defined as “all the rules, terms and conditions and other matters displayed to a player and all internal controls, whether computerized [sic] or otherwise, for the proper conduct of internet games.” *Id.* at Part 3 (6)(1).

⁶⁹ *Id.* at Part 6 (45)(1).

⁷⁰ *Id.* at Part 7 (52).

⁷¹ See Mark. D. Schopper, *Internet Gambling, Electronic Cash & Money Laundering: Unintended Consequences of a Monetary Control Scheme*, 5 CHAP. L. REV. 303, 330 n.195 (2002) (citing Lori Enos, *Most Gamblers Say Fix Is In*, E-COMMERCE TIMES (Sept. 6, 2000), at <http://www.osopinion.com/perl/4204>).

⁷² *But see Lasseters’ Submission*, *supra* note 4, at 7. Lasseters notes:

Regulated service providers had aimed to use the regulatory framework as a competitive point of difference in attracting a player base. However, the lack of a consistent international approach, consumer complacency regarding the safety of internet commerce and the proliferation of unregulated sites offering monetary incentives have made it difficult to gain a commercial return.

Id.

⁷³ See Schopper, *supra* note 71, at 313 (citing Andres Rueda, *The Implications of Strong Encryption Technology on Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1, 7-8 (2001)).

⁷⁴ United Nations Office on Drugs & Crime, *Money Laundering*, at http://www.unodc.un.or.th/money_laundering/, (last visited February 22, 2004).

⁷⁵ See United States General Accounting Office, *Report GAO-03-89 – Internet Gambling: An Overview of the Issues*, at 86, at <http://www.gao.gov/> [hereinafter *GAO Report*].

⁷⁶ United Nations Office on Drugs & Crime, *supra* note 74.

⁷⁷ *Id.*

⁷⁸ *GAO Report*, *supra* note 75, at 86.

⁷⁹ *Id.* at 12.

⁸⁰ *Id.* at 51.

⁸¹ *Malcom Testimony*, *supra* note 3.

⁸² *Netbets*, *supra* note 58, § 4.28.

⁸³ Schopper, *supra* note 71, at 328 (citing Jon Mills, *Internet Casinos: A Sure Bet for Money Laundering*, 19 DICK. J. INT’L L. 77, 96-115 (2000)).

⁸⁴ *Netbets*, *supra* note 58, § 4.29.

⁸⁵ *GAO Report*, *supra* note 75, at 40.

⁸⁶ *Id.* at 86.

⁸⁷ See Jonathan P. Straub, *The Prevent of E-Money Laundering: Tracking the Elusive Audit Trail*, 25 SUFFOLK TRANSNAT'L L. REV. 515, 528 (2002) ("Current money laundering regulations are inadequate in preventing cyberlaundering because they fail to consider e-money's existence or function.").

⁸⁸ For an example of an Internet gaming operation that has redirected its business around certain American business practices, one might look at Lasseters Online's "Players Charter," which gamblers must agree to in order to register. "Lasseters Online may at their discretion restrict Players from particular Countries/States from depositing funds to their Player account via Credit Card or other methods where required. Players who reside in these regions may therefore deposit to their player account via Telegraphic Transfer or bank cheque only." Lasseters Online, *Terms and Conditions*, § 10.6, at <http://www.lasseters.com.au/footer/terms.asp> (last updated May 2002). Rather than forbidding players from jurisdictions where credit card payments to Internet casinos are restricted, Lasseters points its customers to other payment methods. If bank cheques and "telegraphic transfers" are cut off, then it is not difficult to imagine that Internet gaming operators will seek out other payment mechanisms.

⁸⁹ *GAO Report*, *supra* note 75, at 9.

⁹⁰ Schopper, *supra* note 71, at 314.

⁹¹ *Id.* at 314 n.89. Another hard-to-trace payment method is InternetCash, which, using sophisticated cryptography, allows consumers to "pre-fund an anonymous account, without disclosing their identity . . . and then perform payments on-line without risking their anonymity." Yiannis Tsiounis, *Anonymity & Privacy: The InternetCash Example* (Oct. 8, 2003), at <http://www.internetcash.com/fgo/0,1383,white02,00.html>.

⁹² Schopper, *supra* note 71, at 325 .

⁹³ *Id.*

⁹⁴ *Id.* at 324-26.

⁹⁵ Anthony Cabot, *Challenges for Internet Gambling*, in INTERNET GAMBLING REPORT V 25, 31 (Mark Balestra ed., 2002). In comparison, PayPal's fees for receiving funds range between two and four percent. See [Paypal.com, Fees for Receiving Payments \(Premier and Business Accounts\)](http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/fees-receiving-outside), at <http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/fees-receiving-outside> (last visited Oct. 7, 2003).

⁹⁶ Anthony Cabot, *Challenges for Internet Gambling*, in INTERNET GAMBLING REPORT V 25, 31 (Mark Balestra, ed., 2002).

⁹⁷ *Id.*

⁹⁸ See Schopper, *supra* note 71, at 328.

⁹⁹ See, e.g., Christopher D. Hoffman, Note, *Encrypted Digital Cash Transfers: Why Traditional Money Laundering Controls May Fail Without Uniform Cryptography Regulations*, 21 FORDHAM INT'L L.J. 799, 806 (1998) (advocating law enforcement authorities to create a network of key escrow agencies); Straub, *supra* note 87, at 516 ("[G]overnments should focus on adapting the Bank Secrecy Act's reporting requirements that create audit trails in tandem with implementing a government-held key escrow system to identify the transactions."); see also Andres Rueda, *The Implications of Strong Encryption Technology on Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1, 15 (2001) (noting that the USA Patriot Act "could eventually be interpreted to require that issuers of electronic money and other encryption-based payment systems design their tokens so as to detect, impede or prevent money laundering").

¹⁰⁰ See *infra* note 154.

¹⁰¹ *Netbets*, *supra* note 58, § 4.33.

¹⁰² *Id.*

¹⁰³ Lasseters Online, *Terms and Conditions*, §§ 4.1, 4.2, at <http://www.lasseters.com.au/footer/terms.asp> (last updated May 2002).

¹⁰⁴ See Press Release, Lasseters Online, *Lasseters Comment on Credit Card Rejection* (Aug. 11, 2000), at http://koala.lasseters.com.au/mediaroom/releases/11aug00_1.htm.

¹⁰⁵ *Netbets*, *supra* note 66, § 4.31.

¹⁰⁶ Cooperation on an international level is also desirable. For example, the Financial Action Task Force on Money Laundering, an intergovernmental body established by the G-7, has recommended that a series of due diligence and record-keeping requirements be met by “non-financial businesses and professions,” including “Internet casinos.” Financial Action Task Force on Money Laundering, *The Forty Recommendations*, at 7, 14, at <http://www.oecd.org/dataoecd/12/26/2789371.pdf> (last visited Oct. 8, 2003).

¹⁰⁷ Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114, 1118 (1970) (codified as amended at 31 U.S.C. §§ 5311-5326 (2003)).

¹⁰⁸ Casino Regulations, 50 Fed. Reg. 5065 (Feb. 6, 1985) (codified as amended at 31 C.F.R. § 103.11(n)(7)(i) (2002)). However, Nevada casinos enjoy certain exemptions from this Act. See 31 U.S.C. § 5318(a)(5) (2000); see also Nev. Gaming Comm’n § 6A.030 (2003).

¹⁰⁹ See Money Laundering Control Act of 1986, Pub. L. 99-570, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. §§ 1956-1957 (2003)); Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, 108 Stat. 2243 (codified as amended at 31 U.S.C. § 5330 (2003)).

¹¹⁰ See 31 C.F.R. § 103.30(a)(1)(i) (2002) (indicating \$10,000 as reporting figure); 12 U.S.C. §§ 1954-1957 (2002) indicating that federal charges can be brought against violators of statutory requirements).

¹¹¹ The Bank Secrecy Act currently applies only to financial transactions that involve physical transfers of currency. See Straub, *supra* note 98, at 523.

¹¹² For details on how the Bank Secrecy Act and related legislation may be updated to address electronic money laundering, see *id.* at 529-30.

¹¹³ The DSM-IV does not place “problem gambling” in a diagnostic category. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31 (4th ed. 2000).

¹¹⁴ *Id.*

¹¹⁵ *National Gambling Final Report*, *supra* note 1, at 4-5, at <http://govinfo.library.unt.edu/ngisc/reports/4.pdf> (last visited Nov. 13, 2003).

¹¹⁶ *Productivity Inquiry Report*, *supra* note 62, § 6.1.

¹¹⁷ *Id.* § 6.20.

¹¹⁸ *National Gambling Final Report*, *supra* note 1, at 4-11, available at <http://govinfo.library.unt.edu/ngisc/reports/4.pdf> (last visited Nov. 13, 2003).

¹¹⁹ *Netbets*, *supra* note 58, § 3.28.

¹²⁰ *National Gambling Final Report*, *supra* note 1, at 2-5, at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf> (last visited Nov. 13, 2003).

¹²¹ Lang, *supra* note 56, at 550 (quoting Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT’L & COMP. L. 413, 439 (2000)).

¹²² See *Productivity Inquiry Report*, *supra* note 62, §§ 8-11 to 8-12.

¹²³ *National Gambling Final Report*, *supra* note 1, at 4-1, at <http://govinfo.library.unt.edu/ngisc/reports/4.pdf> (last visited Nov. 13, 2003). “The ‘past year’ estimates of American adults who gamble is 125 million. Based on the data available to the Commission, we estimate that about 117.5 million American adult gamblers do not evidence negative consequences.” *Id.* (emphasis added). “Negative consequences” include pathological or problem gambling. See *id.* The Report more specifically defines “problem gambling” as “a wide range of adverse consequences from their gambling, but fall[ing] below the threshold of at least five of the ten APA [American Psychological Association] DSM-IV criteria used to define pathological gambling”). *Id.* “Today the vast majority of Americans either gamble recreationally and experience no measurable side effects related to their gambling, or they choose not to gamble at all.” *Id.* at 1-1, at <http://govinfo.library.unt.edu/ngisc/reports/1.pdf> (last visited Nov. 13, 2003).

¹²⁴ *Id.* at 4-15 to 4-16, at <http://govinfo.library.unt.edu/ngisc/reports/4.pdf> (last visited Nov. 13, 2003).

¹²⁵ The category of “problem gamblers” includes, as discussed by the Productivity Commission, those who demonstrate some of the severe gambling problems previously mentioned, as well as less severe combinations of problems such as chasing losses, guilt, arguments and concealment of gambling. *Productivity Inquiry Report*, *supra* note 62, § 6.20.

¹²⁶ *Id.* § 7.1

¹²⁷ *Id.* § 3.19; see also Tom W. Bell, *Gambler’s Web: Why On-Line Betting Can’t Be Stopped -- and Why Washington Shouldn’t Bother Trying*, REASON, Oct. 1, 1999, at <http://www.cato.org/dailys/12-01-99.html>. In his article, Mr. Bell notes:

Real-world casinos, we hear, lure gamblers into windowless caverns far from the real world, with money traps at every turn and free-flowing booze. Sadly, they give customers places to socialize, creating little communities that console losers and - for a price - minister to the lonely. True or not, such criticisms certainly do not apply to Internet gambling, which must vie with slamming doors, barking dogs, and other household distractions. Online gamblers have to buy their own drinks, too, and console themselves when they lose.

See Bell.

¹²⁸ See James Popkin, *Tricks of the Trade*, U.S. NEWS & WORLD REP., Mar. 14, 1994, reprinted in THE REFERENCE SHELF: GAMBLING (Andrew Riconda ed., 1995).

¹²⁹ *Id.*

¹³⁰ *Productivity Inquiry Report*, *supra* note 62, § 18.21. This does not rule out the possibility that Internet gambling may simply create a new breed of pathological gambler. See Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 336 (1995) (“Rather than providing compulsive gamblers with a legal alternative to the already existing forms of gambling, legalized gambling tends to encourage non-gamblers to begin gambling. This, of course, creates new potential problem gamblers.”) (citation omitted).

¹³¹ David Ohlson, *Internet Gambling* (May 1999) (paper presented at the Second National Gambling Regulation Conference, Australian Institute of Criminology in Conjunction with the Australian Institute for Gambling Research 4), at <http://www.aic.gov.au/conferences/gambling99/ohlson.pdf>.

¹³² *Lasseters’ Submissions*, *supra* note 4, at 20.

¹³³ Ohlson, *supra* note 131, at 4.

¹³⁴ *Netbets*, *supra* note 58, §§ 3.78-3.85.

¹³⁶ Interactive Gambling (Player Protection) Act, 1998, § 137 (Queensl.), available at <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1998/98AC014.pdf> (last visited Oct. 4, 2002). See generally Interactive Gaming Council Online, *Mission Statement*, at <http://www.igcouncil.org/aboutus.php?do=mission> (last visited Oct. 4, 2003) (describing itself as “a non-profit trade association that serves as a collective voice for the interactive gaming industry”). The site also provides suggestions for Internet gambling operators on how to address pathological gambling. See Interactive Gaming Council

Online, *Information for Interactive Gambling Operators*, at http://www.igcouncil.org/info_for_ig_oper.htm (last visited Oct. 4, 2003).

¹³⁷ *Netbets*, *supra* note 58, § 3.82; *see also* Lang, *supra* note 56, at 550 (“Cybercasinos can preserve records of excessive gambling or gambling debts indefinitely. Such tracking is actually more reliable than the pit boss’ memory, which is the current source of reliability that land-based casinos use to combat compulsive gamblers.”)

¹³⁸ *See Netbets*, *supra* note 58, at tbls.1.2 & 3.5.

¹³⁹ *Id.* § 3.34.

¹⁴⁰ *National Gambling Final Report*, *supra* note 1, § 7-24, available at <http://govinfo.library.unt.edu/ngisc/reports/7.pdf> (last visited Nov. 13, 2003).

¹⁴¹ *Id.* § 7-20 (citing HOWARD SHAFFER, ET AL., ESTIMATING THE PREVALENCE OF DISORDERED GAMBLING BEHAVIOR IN THE UNITED STATES AND CANADA: A META-ANALYSIS 5 (1997)).

¹⁴² *Id.* § 7-24.

¹⁴³ *Id.* § 7-20 (citing HOWARD SHAFFER ET AL., ESTIMATING THE PREVALENCE OF DISORDERED GAMBLING BEHAVIOR IN THE UNITED STATES AND CANADA: A META-ANALYSIS 5 (1997)).

¹⁴⁴ *See, e.g., Drugs and the Internet, An Overview of the Threat to America’s Youth*, NATIONAL DRUG INTELLIGENCE CENTER (Dec. 2001), available at <http://www.usdoj.gov/ndic/pubs0/682/internet.htm#Top> (last visited Oct. 4, 2003) (noting that “85 percent of Americans aged 12-24 now use the Internet regularly”).

¹⁴⁵ *Productivity Inquiry Report*, *supra* note 62, § 18.22 (emphasis added).

¹⁴⁶ *Productivity Inquiry Report*, *supra* note 62, §§ 18-22 to 18-23. The contract that players must sign during the registration process may also invalidate any prizes won by minors. For example, Lasseters’ contract states “[w]innings are subject to Lasseters Online verification procedures before payment.” Lasseters Online, *Terms and Conditions*, § 11, at <http://www.lasseters.com.au/footer/terms.asp> (last updated May 2002). Moreover,

All Players must be at least 18 years of age to be eligible to register with Lasseters Online and play for cash or points, and to qualify for any prizes. The placement of any bets by minors is an offence under Australian law the provision of any false particulars to Lasseters Online in relation to age, name and address also constitutes a chargeable offence under law.

Id. § 3.4.

¹⁴⁷ *See* 15 U.S.C. § 1643(a)(1)(B) (2000) (“A cardholder shall be liable for the unauthorized use of a credit card only if ... the liability is not in excess of \$50.”).

¹⁴⁸ *See, e.g.,* John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 219, 238 (2003) (“[T]wo Missouri riverboat casinos, Station and Harrah’s, were each fined \$250,000 for an incident in June, 2000 when a 16-year-old girl used false identification to board and gamble”); John Warren Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 DRAKE L. REV. 51, 75 (1994) (noting that “Despite laws in Atlantic City restricting the casinos to persons twenty-one years and over, a [1985] survey of teenagers in an Atlantic City high school revealed 64% of the teenagers had gambled in a [brick ‘n mortar] casino”); Bell, *supra* note 127 (“[Gambling] [w]eb sites have an advantage over their offline counterparts. The former can automatically check the identity and age of every player who walks through the virtual door. The latter rely, at best, on hunches about high heels and facial hair. State lotteries, which sell tickets through machines, do even less to guard against underage gambling.”).

¹⁴⁹ Gaming Control (Internet Gaming) Regulations § 61 (N. Terr. 2002), available at [http://notes.nt.gov.au/dcm/legislat/legislat.nsf/0/888cad441702eaab69256c670082bac2/\\$FILE/Repg006R7.pdf](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/0/888cad441702eaab69256c670082bac2/$FILE/Repg006R7.pdf) (last visited Oct. 4, 2003).

¹⁵⁰ *Productivity Inquiry Report*, *supra* note 62, § 18.22.

¹⁵¹ *See Netbets*, *supra* note 58, § 4.52.

¹⁵² See Rychlak, *supra* note 130, at 344 (“Some of the newer Mississippi casinos even have playrooms and video arcades for children. If parents begin bringing their children to the casinos on a regular basis, it can become a family tradition just like going to a baseball game or going on a picnic.”).

¹⁵³ *Productivity Inquiry Report*, *supra* note 62, §§ 18.22 to 18.23.

¹⁵⁴ *Id.* (“[H]ome-based gambling does represent an increase in exposure, which may further normalise gambling. Whether this is seen as an adverse outcome depends on complex judgments about community and family norms.”).

¹⁵⁵ 2001 Nev. Stat. 3(2)(b).

¹⁵⁶ AUS Model, *supra* note 65, at 20.

¹⁵⁷ E-mail from Lasseters Online Customer Support to Jonathan Gottfried (June 5, 2003) (on file with Richmond Journal of Law & Technology).

¹⁵⁸ Lasseters Online, *Terms of Use*, § 1.9, at <http://www.lasseters.com.au/defaultnew.asp?bodyPage=terms&pagePath=restricted&ext=asp> (last modified Sept. 2003).

¹⁵⁹ *Id.* § 1.10. Procedures such as that of Lasseters Online are more likely to be effective when the customer base is geographically limited. For example, a Nevada operator is less likely to know whether a water bill from the occasional customer in Liberia is legitimate than to know whether a water bill from his own state is legitimate.

¹⁶⁰ See, e.g., Paymentech L.P., *Address Verification Service*, at http://www.paymentech.com/sol_frapro_carnotpre_carasctoo_page.jsp (last modified Sept. 8, 2003); Paymentech L.P., *Age Verification*, at http://www.paymentech.com/sol_frapro_carnotpre_agever_page.jsp (last modified Sept. 8, 2003).

¹⁶¹ John Edmond Hogan, *World Wide Wager: The Feasibility of Internet Gambling Regulation*; 8 SETON HALL CONST. L.J. 815, 823 n.36 (1998).

¹⁶² Lawrence Lessig, *Privacy, Jurisdiction and the Regulation of Free Expression, What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 649-50 (1998).

¹⁶³ See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1395 (2001) (providing descriptions of various companies that claim to identify the physical locations of individuals based on IP analysis with up to 99% accuracy for targeting states). *But see* Benjamin Edelman, *Shortcomings and Challenges in the Restriction of Internet Transmissions of Over-the-Air Television Content to Canadian Internet Users*, BERKMAN CENTER FOR INTERNET AND SOCIETY, available at <http://cyber.law.harvard.edu/people/edelman/pubs/jump-091701.pdf> (last modified Sept. 8, 2003). Mr. Edelman argues that:

the accuracy of geographic analysis systems – which is substantially impeded in the first place by the lack of reliable information about the location of the devices identified with particular IP addresses – is further hindered by the rise in deployment of proxy servers, tunneling systems, and terminal services. Such systems can cause geographic analysis systems to draw erroneous conclusions about the locations of end users; thus, their increased use reduces the accuracy of geographic analysis tools.

Id.

¹⁶⁴ See, e.g., Goldsmith, *supra* note 50, at 1120 (stating that “government regulates an activity by raising the activity’s costs in a manner that achieves desired ends”).

¹⁶⁵ See *supra* note 7 and surrounding text.

¹⁶⁶ See, e.g., Ill. P.A. 91-257 2g1(A)(C) (criminalizing both the Internet gambling operator as well as the Internet gambler); LA. REV. STAT. ANN. § 14.90.3 (West 1998) (making a misdemeanor a transaction via the Internet involving “a game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit”); South Dakota HB 1110 (Enrolled) sec. 7-9 (sanctioning anyone “engaged in a gambling business”); Oregon SB 318, NRS 465.091 (targeting payment methods to Internet gaming operators as well as collection of gaming debts); NEV. REV. STAT. ANN. § 465.092 (Michie 1997) (sanctioning Internet betting as well as any operator who accepts a wager from a person within Nevada).

¹⁶⁷ See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 861 (N.Y. Sup. Ct. 1999) (holding that an Internet gambling operation violated section 225 of the New York Penal Code, which prohibits “unlawful gambling activity”); see also Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1035-36 (1999) (arguing that Internet gambling is illegal in New York, Indiana, New Jersey and Wisconsin based on general gambling statutes in those states).

¹⁶⁸ See, e.g., *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997) (noting that the Minnesota attorney general filed suit against a Belizean Internet gaming operator); *World Interactive Gaming Corp. supra* note 67 (noting that a New York attorney general filed suit against a Delaware corporation with an Antiguan casino subsidiary). Also, New York attorney general Eliot Spitzer has reached agreements with Citibank and PayPal to limit online payments from New York to gambling operators. See Office of New York State Attorney General Eliot Spitzer, Press Release, *Agreement Reached with PayPal to Bar New Yorkers from OnLine Gambling* (Aug. 21, 2002), at http://www.oag.state.ny.us/press/2002/aug/aug21a_02.html.

¹⁶⁹ *Hearings on Proposals to Regulate Illegal Internet Gambling: Before the Senate Comm. on Banking, Housing & Urban Affairs*, 108th Cong. (2003) (statement of Richard Blumenthal, Connecticut State Attorney General, Representing the National Association of Attorney Generals), available at http://www.senate.gov/~banking/03_03hr/031803/blumenth.htm.

¹⁷⁰ See *id.*; see also *Testimony before the Senate Judiciary Subcomm. on Technology and Terrorism*, 106th Cong. (1999) (statement of Betty, Ohio Attorney General Montgomery), available at <http://judiciary.senate.gov/oldsite/32399bm.htm>. In her testimony, Ms. Montgomery gives, as one rationale for supporting federal gambling legislation, that “law enforcement resources of the State of Ohio, even as part of a coordinated response by several states, can have only a limited effect on Internet gambling.” *Id.*

¹⁷¹ *National Gambling Final Report*, *supra* note 1 at 5-12, at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf>.

¹⁷² See Hogan, *supra* note 161, at 851 (noting that “virtually all known Internet gambling providers remaining within the United States have sold or relocated their sites”).

¹⁷³ *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 742 (W.D. Tex. 1998).

¹⁷⁴ 18 U.S.C. § 1084 (2003).

¹⁷⁵ Exec. Order No. 13,333, App. F § 2 (Aug. 5, 1999), available at <http://www.usdoj.gov/criminal/cybercrime/append.htm>.

¹⁷⁶ 18 U.S.C. § 1084(a) (2003). The Act offers safe-harbor for

the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

Id.

¹⁷⁷ 18 U.S.C. § 1084(d) (2003).

¹⁷⁸ *National Gambling Final Report*, *supra* note 1 at 5-12, at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States Anti-Gambling Laws*, 7 RICH. J.L. & TECH. 32 (2001).

¹⁸¹ *United States v. McDonough*, 835 F.2d 1103, 1104 (5th Cir. 1988).

¹⁸² *Sagansky v. United States*, 358 F.2d 195, 198-99 (1st Cir. 1966).

¹⁸³ See *GAO Report*, *supra* note 75, at 16.

¹⁸⁴ Letter from Robert Kennedy, Attorney General, to the Speaker of the House of Representatives (Aug. 6, 1961) (*reprinted in* 1961 U.S.C.C.A.N. 2631, 2634).

¹⁸⁵ *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850-51 (N.Y. Sup. Ct. 1999).

¹⁸⁶ See *GAO Report*, *supra* note 75, at 3 (stating that the “DOJ generally takes the view that the Wire Act is not limited to sports-related gambling activities, but case law on this issue is conflicting”). *But see* Statement of Kevin V. DiGregory, *supra* note 49 (stating that the Wire Act “may relate only to sports betting and not to the type of real-time interactive gambling (e.g., poker) that the Internet now makes possible for the first time”).

¹⁸⁷ *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001).

¹⁸⁸ *Id.* at 480.

¹⁸⁹ *Id.* at 482.

¹⁹⁰ “As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committed Chairman explained that ‘this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events.’” *Id.* at 480-81 (citing 107 CONG. REC. 16533 (1961)). *But see* Schwarz, *supra* note 167, at 1030. In his article, Mr. Schwarz notes:

[T]he legislative history of the Wire Act indicates that it was intended to be applied broadly so as to prevent any interstate or international transmission of gambling information to or from the United States using wire communication facilities. As former U.S. Attorney General Robert F. Kennedy wrote, “[t]he purpose of [the Wire Act] is to aid . . . in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce.”

Id. (citing H.R. Rep. No. 87-967, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631)).

¹⁹¹ *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 481 (E.D. La. 2001) (citing Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (1999)). In support of the argument that the Wire Act does not cover non-sports-related gambling, one might point to the title of the Wire Act legislation: Sporting Events -- Transmission of Bets, Wagers, and Related Information, Pub. L. No. 87-216, § 2, 75 Stat. 491, 552-53 (1961). One might also compare the Wire Act to the Wagering Paraphernalia Act, both of which were enacted by Congress in 1961 as part of the fight against organized crime. Whereas the Wagering Paraphernalia Act specifically refers in separate subsections to “bookmaking,” “wagering pools with respect to a sporting event,” “numbers, policy, bolita or similar game,” 18 U.S.C. § 1953(a), the Wire Act refers only to “bets or wagers on any sporting event or contest.” 18 U.S.C. § 1084(a) (2003).

¹⁹² 18 U.S.C. § 1081 (2003).

¹⁹³ *GAO Report*, *supra* note 75, at 17.

¹⁹⁴ 18 U.S.C. § 1081 (2003).

¹⁹⁵ Goss, *supra* note 180, ¶ 22.

¹⁹⁶ *Id.* ¶ 21.

¹⁹⁷ *Cheyenne Sales, Ltd. v. Western Union Financial Services Int’l*, 8 F. Supp. 2d 469, 474 (E.D. Pa. 1998).

¹⁹⁸ *Id.* at 474.

¹⁹⁹ 18 U.S.C. § 1953 (2002).

²⁰⁰ 18 U.S.C. § 1953(a) (2002).

²⁰¹ *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 853 (N.Y. Sup. Ct. 1999). It is unclear in this case why the court did not recognize the exception for “the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State.” 18 U.S.C. §

1953(b)(2) (2003).

²⁰² 107 CONG. REC. 16,537 (1961) (statement of Rep. Emmanuel Celler, Chair, House Jud. Comm.). The legislative history of the Paraphernalia Act suggests a broad reading of the statute's applicability based on the fact that it was enacted to close loopholes created by narrow court interpretations of anti-lottery statutes. See H.R. REP. NO. 87-968 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2634.

²⁰³ *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1989).

²⁰⁴ *Id.* at 1187. The Court stated, "Congress employed broad language to 'permit law enforcement to keep pace with the latest developments . . .' because organized crime has shown 'great ingenuity in avoiding the law.'" *Id.* (quoting S. REP. NO. 87-589).

²⁰⁵ *Id.*

²⁰⁶ *Brown*, *supra* note 15, at 635.

²⁰⁷ *Pic-A-State Pa., Inc. v. Pennsylvania*, No. 1: CV-93-0814, 1993 U.S. Dist. LEXIS 12790 (M.D. Pa. July 23, 1993), overruled on separate grounds by *Pic-A-State Pa. v. Pennsylvania Dep't of Revenue*, 42 F.3d 175 (3d Cir. 1994).

²⁰⁸ *Id.* at *9.

²⁰⁹ *United States v. Colacurcio*, 499 F.2d 1401, 1406 (9th Cir. 1974).

²¹⁰ 18 U.S.C. § 1952 (2003). "Facility" has been held to include telephone lines. See *United States v. Smith*, 209 F. Supp. 907 (E.D. Ill. 1962).

²¹¹ The Travel Act does not offer any definition of "gambling," making this a question of statutory interpretation.

²¹² *United States v. Barrow*, 363 F.2d 62 (3d Cir. 1966) (using Travel Act against employees of illegal casinos who crossed state lines in order to commute to their jobs).

²¹³ See, e.g., *United States v. Villano*, 529 F.2d 1046 (10th Cir. 1976); *United States v. Cerone*, 452 F.2d 274 (7th Cir. 1971) (noting the Travel Act was used to prosecute a bookmaker who conducted his illegal interstate operations via telephone).

²¹⁴ *Cabot*, *supra* note 95, at 130.

²¹⁵ *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 851-52 (N.Y. Sup. Ct. 1999).

²¹⁶ *Id.* One of the unsuccessful plaintiffs in *In re MasterCard* alleged a violation of the Travel Act against a credit card company and issuing bank whose card the plaintiff had used at an Internet casino. *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468, 478 (E.D. La. 2001). However, the court never addressed this issue because it failed to find a predicate violation of state or federal law. *Id.* at 482.

²¹⁷ 18 U.S.C. § 1955(b)(1) (2003).

²¹⁸ *GAO Report*, *supra* note 75, at 14; see also *United States v. Schullo*, 363 F. Supp. 246, 249-50 (D. Minn. 1973), *aff'd*, 508 F.2d 1200 (1975), *cert. denied*, 421 U.S. 947 (1975) ("Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles, and whether they be labeled agents, runners, independent contractors or the like.").

²¹⁹ See, e.g., *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) (stating that the Act is nonetheless grounded in the Commerce Clause); *United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975).

²²⁰ *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998). The court reversed a conviction under 18 U.S.C. § 1955 for failure to prove an underlying offense of Texas law.

²²¹ James H. Frey, *Federal Involvement in U.S. Gaming Regulation*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 142 (1998).

²²² S. REP. NO. 91-617, at 80 (1969), *reprinted in* 1969 U.S.C.C.A.N. 38621, 39906.

²²³ 18 U.S.C. § 1961(5) (2003). A “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years [excluding any period of imprisonment] after the commission of a prior act of racketeering activity. *Id.*”

²²⁴ *See* SF42 ALI-ABA 827, 830 (citing 18 U.S.C. § 1962(a)-(d)(2003)). 18 U.S.C. § 1962 states, in part:

(a) Using or investing income that is derived from a pattern of racketeering activity or collection of unlawful debt in an enterprise; (b) Acquiring or maintaining an interest in or control of an enterprise through a pattern of racketeering activity or through collection of unlawful debt; (c) Conducting the affairs of an enterprise through a pattern of racketeering activity or collection of unlawful debt. § 1962 (c); and (d) Conspiring to commit one of these three acts.

Id.

²²⁵ 18 U.S.C. § 1961(1)(A) (2003).

²²⁶ 18 U.S.C. § 1961 (1)(b) (2003).

²²⁷ 18 U.S.C. § 1963-4 (2003).

²²⁸ *See* DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, tit. 9, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm (last visited Oct. 7, 2003) (discussing organized crime and racketeering). The Department of Justice has noted, “[u]tilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application. . . . A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose.” *Id.* With respect to Internet gambling, RICO has been primarily used by private plaintiffs to sue credit card companies that have been associated with Internet gambling operations. *Id.*

²²⁹ *See, e.g., In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 475 (E.D. La. 2001) (stating that the court failed to find credit card companies “directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise though a pattern of racketeering activity and/or collection of unlawful debt . . . as defined by RICO”); *Jubelirer v. MasterCard Int’l Inc.*, 68 F. Supp. 2d 1049 (W.D. Wis. 1999). In *Jubelirer*, the court stated:

[The] Plaintiff has alleged facts which make it apparent that the only relationship between the on-line casino and the defendants is a routine contractual relationship for the provision of consumer financing. That relationship does not constitute a RICO enterprise and the performance of such services does not constitute the operation or management of an enterprise.

Id. at 1052.

²³⁰ *Champion v. Ames*, 188 U.S. 321 (1903).

²³¹ *Goss, supra* note 180, ¶ 39.

²³² *See generally* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), citing *Foley Brothers Inc. v. Filardo*, 336 U.S. 281, 285 (1949). “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States’ We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.” *Id.*

²³³ *See, e.g.,* U.S. Patriot Act, Title III, § 377, Pub. L. No. 107-56, 115 Stat. 272, 342 (2001) (“*Grants the United States extraterritorial jurisdiction* where: (1) an offense committed outside the United States involves an access device issued, owned, managed, or controlled by a financial institution”) (emphasis added).

²³⁴ *See, e.g.,* 18 U.S.C. §§ 1084, 1952 to 1955 (2003). However it could be argued that the references to “foreign commerce” in § 1084(a) and § 1952(a) indicate that Congress intended to exercise extraterritorial jurisdiction. *Id.*; *see also* *Goss, supra* note 180, ¶ 41.

²³⁵ 18 U.S.C. § 1084(a) (2003).

²³⁶ See *United States v. Ross*, 1999 WL 782749, at *8 (S.D.N.Y. Sept. 16, 1999) (asserting jurisdiction over Internet sports betting operator that was based in Curacao); *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 851 (N.Y. Sup. Ct. 1999). In *World Interactive Gaming Corp.*, the court notes:

[F]or respondents' claim that none of the federal statutes apply to operation of an Internet casino licensed by a foreign government, there is nothing in the record or the law to support their contentions. To the contrary, the Wire Act, Travel Act and Paraphernalia Act all apply despite the fact that the betting instructions are transmitted from outside the United States over the Internet.

Id. It should be noted that the defendant in *World Interactive Gaming* was a Delaware corporation and its subsidiary was Antiguan.

²³⁷ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444-45 (2d Cir. 1945).

²³⁸ *Id.* at 444.

²³⁹ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-98 (1993).

²⁴⁰ *Id.* at 799 (holding that London reinsurers' refusal to sell certain types of reinsurance to insurers in the U.S. violated the Sherman Act, despite the legality of the act under British law). The court then balanced this conflict against a situation in which there is a direct conflict between U.S. and another nation's laws. When a foreign law requires a company "to act in some fashion prohibited by the law of the United States," the circumstances may justify refraining from exercising subject matter jurisdiction. *Id.* Considering, however, that no country's law requires an Internet casino to offer its services to U.S. citizens and that verification procedures exist to enable online casinos to exclude the bulk of U.S. clients, it seems unlikely that Internet casinos could invoke a direct conflict of laws as a defense to subject matter jurisdiction.

²⁴¹ *Id.* at 797-98.

²⁴² See *supra* Part III.

²⁴³ See Goss, *supra* note 180, ¶ 47 ("To the extent that online gaming threatens the viability of a significant industry that employs large numbers of Americans and generates considerable profits, such gaming has a significant effect in the United States.").

²⁴⁴ See *id.* ¶ 48 ("As people move from traditional to online gaming, there is likely to be a decrease in taxation revenue generated by gaming unless technology or regulation makes online tax collection possible.").

²⁴⁵ See *id.* ¶ 44. Contrary to what is sometimes claimed, prosecuting foreign Internet gaming operators does not amount to the U.S. imposing its moral views on other countries. If Antiguan want to gamble on Antiguan or other foreign online gaming sites, then they are free to do so. However, foreign gambling operations whose business is deliberately based on an American clientele (by using, for example, advertisements targeted to a U.S. audience) should not be viewed as neutral bystanders who become the unwitting victims of a bullying American policy. In 2001, Antigua had around 100 gaming online operators, in contrast to the approximately 40 remaining today. See Bradley Vallerius, *Antigua Moves Forward with WTO Claim vs. U.S.*, INTERACTIVE GAMING NEWS, June 25, 2003 (on file with the Richmond Journal of Law & Technology). According to Sir Ronald Sanders, an Antiguan foreign affairs representative, "the effect of the United States enforcement of its laws is to hurt the small economy of Antigua and Barbuda." Sir Ronald Sanders, Statement to the Dispute Settlement Body of the World Trade Organization, Geneva, Switzerland (June 24, 2003), available at http://www.antigua-barbuda.com/busnss_politics/body_sirronaldwto_statement.html. This may suggest that a fair number of these Internet gambling operators were dependant upon American revenues. As one commentator has noted, "[t]he United States must not allow individuals to take advantage of advances in communications technology to intentionally violate federal and state laws simply by moving offshore." Lynch, *supra* note 6, at 201.

²⁴⁶ See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850 (N.Y. Sup. Ct. 1999).

²⁴⁷ See *id.* But see *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998) (holding that a Caribbean-based gambling operation that had the potential to accept bets from Texas residents, although there was no specific evidence that it had, did not violate Texas' anti-gambling statutes). In *Truesdale*, the court stated:

Jones and his co-appellants went to great effort to make sure that their operation was legal. They set

up offshore offices and consulted with lawyers in the United States and abroad on the legality of their enterprise; they furnished the Caribbean local offices with desks and telephones and staffed them with personnel to accept international phone wagers; they set up separate phone lines that could be used to place bets in the offshore offices. Under these circumstances, *without specific evidence of any wrongdoing*, it is irrational to conclude beyond a reasonable doubt that after having gone through the effort of fully equipping, staffing, and widely advertising the Caribbean offices, the appellants nevertheless illegally accepted bets in the United States.

Id. at 448 (emphasis added). Absent specific evidence of an illegal transaction, the mere fact that the Internet gaming site can be accessed by a jurisdiction's residents may be insufficient to establish jurisdiction over a nonresident defendant. *Id.*

²⁴⁸ *World Interactive Gaming*, 714 N.Y.S.2d at 847.

²⁴⁹ *Id.* at 850 (citing N.Y. CLS PENAL § 225(2) (2003)).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 852.

²⁵² *Id.* at 851; *see also* Schwarz, *supra* note 167, at 1038-39 (noting that often Internet gamblers try to unsuccessfully argue they are not bound by federal or state laws because they have legally purchased licenses in other countries and have "physically located" hardware there).

²⁵³ *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 742 (W.D. Tex. 1998).

²⁵⁴ *See Galvan v. Press*, 347 U.S. 522, 530 (1954).

²⁵⁵ *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-15 (1984).

²⁵⁶ *Id.* at 414-16.

²⁵⁷ *See Mellon Bank (E.) PSFS v. Kenneth*, 960 F.2d 1217, 1221 (3d Cir. 1992) (construing *Dollar Savings Bank v. First Securities Bank*, 746 F.2d 208, 211 (3d Cir. 1984)).

²⁵⁸ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985).

²⁵⁹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²⁶⁰ *Int'l Shoe Co.*, 326 U.S. at 316.

²⁶¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

²⁶² *Burger King Corp.*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

²⁶³ *Asahi Metal Indus. Co.*, 480 U.S. at 114.

²⁶⁴ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *accord Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Resnick v. Manfredy*, 52 F. Supp. 2d 462, 467-68 (E.D. Pa. 1999).

²⁶⁵ *Zippo*, 952 F. Supp at 1124 (citations omitted).

²⁶⁶ *Am. Homecare Fed'n v. Paragon Scientific Corp.*, 27 F. Supp.2d 109, 114 (D. Conn. 1998). Courts may be moving away from *Zippo* towards a more purely effects-based test. *See Geist, supra* note 171, at 1371-72. Nevertheless, this more recent test would not hinder courts from exercising personal jurisdiction over Internet gambling operations given the numerous effects that such operations may have on a forum. *See supra* Part III.

²⁶⁷ *State v. Granite Gate Resorts Inc.*, 568 N.W.2d 715, 720-21 (Minn. Ct. App. 1997).

²⁶⁸ *Id.* at 720.

²⁶⁹ *Id.* at 719 (noting *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996)).

²⁷⁰ *Id.* at 720.

²⁷¹ *Id.* at 721.

²⁷² *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 744 (W.D. Tex. 1998); *see also* *People v World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 857-58 (N.Y. Sup. Ct. 1999) (finding personal jurisdiction over a New York-headquartered company that had established an Antigua-based Internet casino because all of the administrative and executive decisions were made in New York, advertising had been done nationally and reached thousands of New Yorkers, and the company had received phone calls from New York residents on a toll-free number).

²⁷³ *Goss, supra* note 140, ¶¶ 75-76.

²⁷⁴ 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

²⁷⁵ *Id.* at 855.

²⁷⁶ *Id.* at 861.

²⁷⁷ 998 F. Supp. 738 (W.D. Tex. 1998).

²⁷⁸ *Id.* at 745 (citations omitted).

²⁷⁹ *See, e.g.*, *State by Humphrey v. Granite Gate Resorts*, 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (“The state has an interest in enforcing consumer protection statutes and regulating gambling.”); *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 860 (N.Y. Sup. Ct. 1999) (referring to New York state’s “deep-rooted policy against unauthorized gambling”).

²⁸⁰ Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1216 (1998).

²⁸¹ H.R. Rep. No. 1549, at 4029 (1970).

²⁸² For example, the Sixth Circuit has liberally interpreted the Illegal Gambling Act, holding that janitors as well as “runners, telephone clerks, salesmen, dealers, doormen and watchmen ‘conduct’ gambling businesses within the meaning of the statute.” *United States v. Merrell*, 701 F.2d 53 (6th Cir. 1983).

²⁸³ *See* 18 U.S.C. §§ 1084(a), (d) (2003); 18 U.S.C. § 1952(a)(3) (2003); 18 U.S.C. § 1953(c) (2003); 18 U.S.C. § 1955(a) (2003); 18 U.S.C. §§ 1963-1964 (2003).

²⁸⁴ *Lynch, supra* note 6, at 178. The Wire Act has been used, though, against American citizens living abroad. *See, e.g.*, *United States v. Blair*, 54 F.3d 639 (10th Cir. 1995) (discussing a defendant bookmaker with American citizenship who resided in the Dominican Republic).

²⁸⁵ Extradition requests are often based on treaties that require that the defendant’s action be a crime in both jurisdictions. Goldsmith, *supra* note 280, at 1216-20. This is the case, for example, between the U.S. and the Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines). *See* Extradition Treaty, Oct. 10, 1996, S. Treaty Doc. No. 105-19, art. 2, *available at* 1996 WL 913075. Extradition clearly cannot be relied upon when the defendant’s activity is not only legal in the foreign jurisdiction but even licensed by the foreign government. The same logic would suggest that the legal theory of *comity*, “diplomatic niceties performed by countries out of a sense of international etiquette rather than binding obligation,” would be equally unsuccessful in securing a foreign defendant. Jay Hall, *International Comity and U.S. Federal Common Law*, 84 AM. SOC’Y INT’L L. PROC. 326 (1990).

²⁸⁶ 18 U.S.C. § 1304 (derived from former 316 of the Communications Act of 1934, 48 Stat. 1088-89, repealed by 62 Stat. 862, 866); 47 C.F.R. § 73.1211; 47 C.F.R. § 76.213. However, some of this legislation is facing increased scrutiny. *See*,

e.g., *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999) (The Supreme Court held that the FCC could not prevent a Louisiana broadcasting association from airing advertisements for private, offline casinos in Louisiana, where such gambling was legal, simply because residents in Texas or Arkansas, where private commercial casino gambling was not legal, might hear the emissions.).

²⁸⁷ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 157 (1999). Again, please note that the author is referring to the type of technologies that existed during the enactment of the relevant statutes and up until recently. These generalizations do not apply, for example, to digital telephone networks or cable modems which follow distributed/random transmission models. *Id.* at 44.

²⁸⁸ See ROBERT H. REID, *ARCHITECTS OF THE WEB: 1,000 DAYS THAT BUILT THE FUTURE OF BUSINESS* xx (1997).

²⁸⁹ See LAWRENCE LESSIG, *CODES AND OTHER LAWS OF CYBERSPACE* 32 (1999).

²⁹⁰ *Id.*

²⁹¹ See ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 16 (1999).

²⁹² LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 44.

²⁹³ Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 654 (2003).

²⁹⁴ However, states have succeeded in pursuing third parties, such as payment providers, that are associated with Internet gaming operators. These enforcement measures are discussed in Part V(c).

²⁹⁵ S. 1495, 104th Cong. (1995); H.R. 2380, 105th Cong. (1997); S. 474, 105th Cong. (1997); H.R. 3125, 106th Cong. (2000); S. 692, 106th Cong. (1999); H.R. 4419, 106th Cong. (2000); H.R. 5020, 106th Cong. (2000); H.R. 3004, 107th Cong. (2001); H.R. 556, 107th Cong. (2001); H.R. 2579 107th Cong. (2001); H.R. 3215, 107th Cong. (2002); S. 3006, 107th Cong. (2002); H.R. 1223, 108th Cong. (2003); S. 627, 108th Cong. (2003); H.R. 21, 108th Cong. (2003); H.R. 2143, 108th Cong. (2003).

²⁹⁶ 141 CONG. REC. S19110-07 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl).

²⁹⁷ H.R. 2380, 105th Cong. (1997).

²⁹⁸ While federal statutes do not, in general, criminally sanction the individual gambler, there are other federal efforts that seek to dissuade individuals from gambling. See Charles W. Blau, *Federal Tax Issues*, in *FEDERAL GAMBLING LAW* 283, 286 (Anthony N. Cabot ed. 1999) (suggesting that the federal income tax regulations on gambling are designed “to punish the gambler for participating in an immoral activity”). Furthermore, some state statutes, such as those of Louisiana and Illinois, provide sanctions for Internet gamblers. See LA. REV. STAT. ANN. § 14:90.3(D)(E)(I)(2003); and Ill. Laws 257.

²⁹⁹ 18 U.S.C. § 1084(a) (2003).

³⁰⁰ See *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981)

³⁰¹ It applies to “[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce.” 18 U.S.C. § 1952(a) (2003).

³⁰² *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993).

³⁰³ *Id.* at 1094 (citing *McIntosh v. United States*, 385 F.2d 274 (8th Cir. 1967)); see also *Rewis v. United States*, 401 U.S. 808, 811 (1971) (“[I]t cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act.”).

³⁰⁴ See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239 (1972) (discussing a bookmaking operation that sent scratch sheets across state lines); *United States v. Fabrizio*, 385 U.S. 263 (1966) (noting that a defendant sold New Hampshire sweepstake tickets in New York); *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) (noting that defendants sold a bookmaking computer program across state lines); *United States v. Scaglione*, 446 F.2d 182 (5th Cir. 1971) (noting that a

defendant sent in interstate commerce “flash paper” [paper which could be easily burned in the event of a police search] for use in gambling activities); *United States v. Baker*, 364 F.2d 107 (3d Cir. 1966) (noting that defendants shipped tickets for Haiti-based lottery through the mail).

³⁰⁵ 18 U.S.C. § 1955 (2003); *see also* *United States v. Schullo*, 363 F. Supp. 246, 249-50 (D. Minn. 1973) (“Congress’ intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles, and whether they be labeled agents, runners, independent contractor or the like. Only customers of the business were to be excluded.”).

³⁰⁶ Kelly, *supra*, note 17, at 142 (citing Letter from L. Anthony Sutin, Acting Assistant Attorney General, to Senator Patrick Leahy (May 26, 1998)); *see also* Hogan, *supra*, note 161, at 847 n.152 (“Enforcement problems alone may preclude suits against individuals [L]aw enforcement agencies would wind up pursuing an inexhaustible supply of small time bettors, while a hundred or so sites continue to reap the benefits of the millions who cannot be caught.”)

³⁰⁷ Blakey & Kurland, *supra* note 19, at 957.

³⁰⁸ 18 U.S.C. § 1084 (2003).

³⁰⁹ *See, e.g.*, H.R. 5020, 106th Cong. (2002); S. 692, 106th Cong. (2002); S. 3006, 107th Cong. (2002).

³¹⁰ *See, e.g.*, H.R. 5020, 106th Cong. (2002); S. 692, 106th Cong. (2002); S. 3006, 107th Cong. (2002).

³¹¹ H.R. 21, 108th Cong. (2003).

³¹² Ben Edelman, *Web Sites Sharing IP Addresses: Prevalence and Significance*, at <http://cyber.law.harvard.edu/people/edelman/ip-sharing/> (last updated Sept 12, 2003).

³¹³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563-64 (1980) (citations omitted) (“The government may ban . . . commercial speech related to illegal activity.”).

³¹⁴ R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 772-73 (1999).

³¹⁵ Goldsmith, *supra* note 280, at 1229-30.

³¹⁶ *See* *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 183-84 (S.D.N.Y. 1997).

³¹⁷ Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 655 (2003).

³¹⁸ *See, e.g., id* at 685 (noting that “China’s destination ISPs began to search data packets for particular sensitive keywords”).

³¹⁹ 18 U.S.C. § 1955(b)(1)(i) (2003).

³²⁰ 18 U.S.C. § 1952(b)(1) (2003). The Travel Act is heavily grounded in state law. The United States Supreme Court has stated that the Travel Act reflected “a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem. The legislative response was to be commensurate with the scope of the problem.” *United States v. Nardello*, 393 U.S. 286, 292 (1969); *see also* *United States v. Gonzalez*, 907 F. Supp. 785, 791 (D. Del. 1995) (“[The Travel Act] makes it a federal offense for an individual to travel in interstate commerce with the intent to promote or facilitate the promotion of any activity in violation of the laws of any state.”); *United States v. Garramone*, 380 F. Supp. 590, 592 (E.D. Pa. 1974). (“The statute defines ‘unlawful activity’ to include a business enterprise involving gambling offenses in violation of the laws of the state in which they are committed.”). *But see* *United States v. Campagnuolo*, 556 F.2d 1209, 1212 (5th Cir. 1977) (stating that the Travel Act made it “a federal offense to use interstate facilities to conduct a gambling operation.”).

³²¹ 15 U.S.C. § 1172 (2003).

³²² 18 U.S.C. § 1953(b)(2) (2003). However, the Court of Appeals for the Fifth Circuit has held that the Wagering Paraphernalia Act prohibits the mailing of lottery tickets from a state in which the lottery is legal to any other state. *United States v. Stuebben*, 799 F.2d 225, 228 (5th Cir. 1986).

³²³ See, e.g., H.R. REP. No. 967 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2633 (“Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not”); *United States v. Cohen*, 260 F.3d 68, 73 (2d Cir. 2001) (stating that the Wire Act “provides a safe harbor for transmissions . . . [when]: (1) [the] betting is legal in both the place of origin and the destination of the transmission; and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves”); *United States v. Ross*, No. 98 Cr. 1174-1, 1999 U.S. Dist. LEXIS 22351, at *6 - *7 (S.D.N.Y. Sept. 20, 1999). In *Ross*, the court noted:

The § 1084(b) exemption by its terms applies only to the transmission of ‘information assisting in the placing of bets,’ not to the other acts prohibited in § 1084(a), i.e. transmissions of (1) ‘bets or wagers’ or (2) wire communications entitling the recipient to money or credit as a result of bets or wagers. With regard to transmissions of “information assisting in the placing of bets,” the exemption is further narrowed by its requirement that the betting at issue be legal in both jurisdictions in which the transmission occurs. No exemption applies to the other wire communications proscribed by § 1084(a), even if the betting at issue is legal in both jurisdictions.

Ross, 1999 U.S. Dist. LEXIS 22351, at *6 -*7.

³²⁴ GAMBLING IN AMERICA, *supra* note 36, at 5.

³²⁵ *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968), cert. denied, 391 U.S. 919 (1968).

³²⁶ *Hearings Before the House Comm. on Interstate and Foreign Com. on S. 3357 and H.R. 6736*, 81st Cong. 37 (1950) (statement of Herzel H.E. Plaine, Office of the Assistant Solicitor General, Department of Justice).

³²⁷ See Malcolm Testimony, *supra* note 3, available at <http://cybercrime.gov/Malcolmtestimony42903.htm> (“Traditionally, gambling has been one of the staple activities in which organized crime has been involved, and many indictments brought against organized crime members have included gambling charges.”).

³²⁸ Compare John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 219, 241 (2003) (“Of course, legalized gambling is a catalyst for crime.”) and PENNSYLVANIA CRIME COMMISSION, RACKETEERING AND ORGANIZED CRIME IN THE BINGO INDUSTRY (1992) (providing an example of a link between organized crime and legal gambling) with Mike Roberts, *supra* note 11, at 593 (“Initial suspicion that Nevada, and legalized gaming in general, fell under the control of organized crime early on and thereafter remained under such control is purely speculative [Furthermore,] there appears to be no recent proof that organized crime, presumably existing in the form of large hotels and other publicly traded corporations, still infests the legal gaming business.”), and *National Gambling Final Report*, *supra* note 1, at 7-13, available at <http://govinfo.library.unt.edu/ngisc/reports/7.pdf> (“[B]eyond pathological gambling, tracing the relationship between crime and gambling has proven difficult.”).

³²⁹ See H.R. REP. No. 967 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2632. See also generally ESTES KEFAUVER, CRIME IN AMERICA 52 (1968) (referring to “[t]he fight to keep bookmakers, the scavengers of crime in America, out of business, and to put a crimp in the pocketbooks of the overlords of the underworld who control them”).

³³⁰ 18 U.S.C. § 1084(b) (2003). Section 1084 states:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

Id.

³³¹ 18 U.S.C. § 1084(b) (2003).

³³² H.R. REP. No. 967 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2632.

³³³ The 1978 Interstate Horseracing Act (which was amended in 2000) allows off-track betting operators in State A to accept wagers via telephone or other electronic media for bets on tracks in State B provided that State A’s operators obtain the consent of the appropriate horse racing associations and commissions in State B. 15 U.S.C. §§ 3001-3007 (2000). Congress viewed the wagering at issue to be economically beneficial for the states. See S. REP. No. 95-1117, at 4 (1978),

reprinted in 1978 U.S.C.C.A.N. 4144, 4147 (noting that pari-mutuel “provides substantial revenue to the States through direct taxation . . . provides employment opportunities for thousands of individuals, and contributes favorably to the balance of trade”). The rationale for the Act was that “in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.” 15 U.S.C. § 3001 (2000). The idea seems to be that “[w]hile horseracing is a sport on which one can gamble, it would be erroneous to assume that pari-mutuel wagering is the same as other forms of gambling.” *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 59 (2000) (prepared Statement of Stephen Walters, Chairman, Oregon Racing Commission), available at http://commdocs.house.gov/committees/judiciary/hju65222.000/hju65222_0.htm. (last visited Feb 27, 2004). However, the Department of Justice has recently questioned whether this exception is justified. *Id.* (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division) (“[W]e do not understand why the parimutuel wagering industry should be allowed to accept bets from people in their homes when other forms of gambling have rightly been prohibited from doing so. The same concerns that we have expressed about children and compulsive gamblers having unfettered access to gambling via the Internet is true whether the betting is on horse races or on casino games.”).

³³⁴ See World Trade Organization, *Antigua and Barbuda Request Panel Against U.S. on Gambling and Betting*, at http://www.wto.org/english/news_e/news03_e/dsb_24june03_e.htm (June 24, 2003) (“On 24 June 2003, Antigua and Barbuda made its first request for the establishment of a panel to look at the United States’ measures affecting the cross-border supply of gambling and betting services.”).

³³⁵ Michael Anastasio, *The Enforceability of Gambling Debts: Laws, Policies and Causes of Action*, 6 VA. J.L. & TECH. 6, 8 (2001). Professor Joseph Kelly presents a more nuanced version of this claim, writing that “states that have not legalized casinos retain strict laws forbidding the enforcement of gambling debts, while those that have legalized casinos have slowly relaxed such prohibitions.” *Gaming Law Symposium*, *supra* note 11, at 90.

³³⁶ See, e.g., *Dunes Hotel & Country Club of Las Vegas v. Mayo*, 354 N.Y.S.2d 62 (City Civ. Ct. 1974); *Nat’l Recovery Sys. v. Bryer*, 507 A.2d 1226, 1228 (Pa. Super. Ct. 1986) (holding that debts incurred by gamblers to Nevada casinos were unenforceable under Nevada law).

³³⁷ James L. Buchwalter, Annotation, *Right to Recover Money Lent for Gambling Purposes*, 74 A.L.R. 5th 369 (1999). Nowadays, however, it is possible in Puerto Rico, Nevada and New Jersey to enforce certain legally incurred gambling debts through court action and to have this judgment honored by another jurisdiction’s courts through the Full Faith and Credit Clause. *Gaming Law Symposium*, *supra* note 11, at 97, 114.

³³⁸ See, e.g., *Cie v. Comdata Network, Inc.*, 656 N.E.2d 123 (Ill. App. Ct. 1995). *But see, e.g., Conn. Nat’l Bank v. Kommit*, (stating that “the bank’s alleged and unrefuted deliberate allowance of access to credit from the machine in the gambling area of the casino is a circumstance from which . . . knowledge [that the borrowed money would be used to gamble], could (but need not) be inferred”). 577 N.E. 2d 639,642 (Mass. App. Ct. 1991).

³³⁹ Anastasio, *supra* note 335, at 22.

³⁴⁰ *Internet Gambling Funding Prohibition Act: Hearing on H.R. 4419 Before House Comm. on Banking and Fin. Serv.*, 107th Cong. (2000) (statement of Gregory A. Baer, Assistant Secretary for Financial Institutions, Department of the Treasury), available at http://commdocs.house.gov/committees/bank/hba65225.000/hba65225_0.HTM. (last visited Feb. 27, 2004).

³⁴¹ See Kelly, *supra* note 17, at 163 (describing the arguments put forth by both sides in *Providian*); see also *Providian Nat’l Bank v. Haines*, No. CV9808858 (Cal. Super. Ct.) (filed July 23, 1998) (unpublished opinion).

³⁴² Anastasio, *supra* note 335, at 10.

³⁴³ As noted by Jon Patterson,

Providian, one of the largest credit card issuers in the United States . . . banned the use of its credit or debit cards for Internet gambling . . . Wells Fargo Bank modified its Visa and MasterCard credit agreements and completely banned the use of its cards for online gambling . . . Bank of America has a policy of denying authorization for any transaction that is identified as an Internet gambling transaction.

Jon Patterson, *Internet Gambling and the Banking Industry: An Unsure Bet*, 6 N.C. BANKING INST. 665, 688-89 (2002).

³⁴⁴ RICO prohibits certain conduct, including the “collection of unlawful debt.” 18 U.S.C §§ 1962(a), (c) (2003).

³⁴⁵ *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 497 (E.D. La. 2001) (holding that the plaintiff failed to prove the elements of a RICO claim thus noting the case did not concern an illegal gambling debt).

³⁴⁶ *Jubelirer v. MasterCard Int’l., Inc.*, 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999) (holding that the credit card companies’ relationship with the Internet gaming operator fell short of the requisite participation in the operation or management of an enterprise).

³⁴⁷ As one commentator notes,

It is important to note that parties seeking to bar the enforceability of an Internet gambling debt on grounds of illegality may need to overcome the consequences of their own conduct. Under the *in pari delicto* doctrine, an Internet gambler who engages in Internet gambling that is deemed illegal, may be barred from asserting, for example, a RICO cause of action due to his or her own involvement in the illegal activity.

Anastasio, *supra* note 335, at 63.

³⁴⁸ *Id.* at 26.

³⁴⁹ This is the case for credit card associations, such as Visa or MasterCard, which merely establish operating standards and do not offer credit card services either to cardholders or to merchants. In contrast, full-service credit card companies, including Discover, provide credit card services to both cardholders and merchants, thereby lessening the number of intermediaries in the transaction. *See GAO Report, supra* note 75, at 8-10.

³⁵⁰ *See generally id.* at 10.

³⁵¹ This may involve simply misusing the credit card company’s transaction codes (viz. not identifying themselves as an Internet gambling operator) or illegitimate factoring, where the Internet gambling operator “submits credit card transactions through another merchant’s terminal using that merchant’s identification number and merchant category code, and pays that merchant a percentage of the submitted transactions.” *See GAO Report, supra* note 75, at 22.

³⁵² Anastasio, *supra* note 335, at 31.

³⁵³ Some of these arguments may be undermined by the fact that, due to the riskier nature of Internet gambling charges, Visa and MasterCard have managed to identify several Internet gaming merchants and to charge them a 7% fee of the gross revenue charged in contrast to the 2% fee applied to other Internet merchants. Patterson, *supra* note 344, at 694 n.7. Despite the occasional customer refusing to pay his credit card bill, the credit card companies and banks may have still reaped a healthy profit. It has been estimated that credit card companies and banks made \$112 million from Internet gambling fees in 2000. *Id.* at 668.

³⁵⁴ *See* Press Release, Attorney General Bob Butterworth, Western Union Cuts Off Sports Betting Accounts (Dec. 23, 1997), at <http://myfloridalegal.com/852562220065EE67/0/06268A62EB5817BA852565B50046B857?Open&Highlight=2,Western,Union,Cuts,Off,Sports,Betting,Accounts>.

³⁵⁵ *See* Press Release, Office of New York State Attorney General Eliot Spitzer, Agreement Reached with Paypal to Bar New Yorkers from Online Gambling (Aug. 21, 2002), at http://www.oag.state.ny.us/press/2002/aug/aug21a_02.html. While online gamblers may find it difficult to use PayPal, other third-party online payment providers like NetTeller and FirePay are stepping in to fill PayPal’s place in the realm of online gambling. *See* Fred Faust, *What’s Up (and Down) with Internet Gaming Credit Card Transactions!*, GAMBLING TIMES MAGAZINE, Winter 2002-2003, available at http://www.gamblingtimes.com/writers/ffaust/ffaust_winter2002-03.html.

³⁵⁶ Sebastian Sinclair, *Some Bumps in the E-Gambling Road*, in INTERNET GAMBLING REPORT V 61, 69 (Mark Balestra ed., 2002).

³⁵⁷ National Gambling Final Report, *supra* note 1, at 5-12, at <http://govinfo.library.unt.edu/ngisc/reports/5.pdf>.

³⁵⁸ H.R. 2579 I.H., 107th Cong. (2001).

³⁵⁹ H.R. 4419 R.H., 106th Cong. (2000); *see also* S. 627, 108th Cong. (2003); H.R. 21, 108th Cong. (2003); H.R. 3004 I.H., 107th Cong. (2001); H.R. 2579 I.H., 107th Cong. (2001); H.R. 556 E.H., 107th Cong. (introduced 2001).

³⁶⁰ H.R. 4419 R.H., 106th Cong. (2000); *see also* S. 627, 108th Cong. (2003); H.R. 21, 108th Cong. (2003); H.R. 3004 I.H., 107th Cong. (2001); H.R. 2579 I.H., 107th Cong. (2001); H.R. 556 E.H., 107th Cong. (introduced 2001).

³⁶¹ H.R. 2579 I.H., 107th Cong. (2001).

³⁶² *See, e.g.*, H.R. 3004 I.H., 107th Cong. (2001); S. 627, 108th Cong. (2003); H.R. 21, 108th Cong. (2003).

³⁶³ S. 627, 108th Congress. (2003).

³⁶⁴ *Id.*

³⁶⁵ *See, e.g.*, *GAO Report*, *supra* note 75 (“Many large U.S. credit card issuers also use codes to deny authorization for Internet gambling transactions, and U.S.-based banks do not accept gambling Web sites as merchants. Despite attempts to circumvent these efforts by using improper coding, the success of these restrictions has caused gaming analysts to lower their 2003 revenue projections for the on-line gaming industry.”)

³⁶⁶ Charlies Crawford & Melody Wigdahl, *Internet Payment Solutions*, in *INTERNET GAMBLING REPORT V 77*, 88-89 (2002).

³⁶⁷ Audio Tape: Interview with Dan Feldman, Assistant Deputy Attorney General, and Kenneth Dreifach, Chief of New York Attorney General’s Internet Bureau (Mar. 20, 2003), *available at* <http://www.igamingnews.com/index.cfm?page=desktop3&confid=40> (explaining why these actions have been taken and on what grounds).

³⁶⁸ *See GAO Report*, *supra* note 75, at 24.

³⁶⁹ *Id.* at 34.

³⁷⁰ *See Crawford & Wigdahl*, *supra* note 366, at 85.

³⁷¹ *Id.* at 93.

³⁷² H.R. 21 R.H., 108th Cong. (2003).

³⁷³ *See Schwarz*, *supra* note 167, at 1061-63. In his article *The Internet Gambling Fallacy Craps Out*, Mr. Schwarz notes:

[E]ven if the Internet gambling operation is based entirely outside of the United States, and even if the monetary instruments drawn on United States banks are deposited in accounts outside of the United States, the instruments must still reenter the United States for purposes of clearing. As such, the foreign gambling operation is dependent upon the U.S. banking system for receiving the funds. This reliance therefore provides a mechanism which can be used to eliminate an Internet gambling business’s ability to accept monetary instruments drawn on United States banks.

Id. at 1062.

³⁷⁴ Several states already have legislation that may be helpful. For example, at least eleven states have money-transmitter laws targeting non-bank businesses that offer certain electronic payment methods. *See* Judith Rinearson, *Regulation of Electronic Stored Value Payment Products Issued by Non-Banks under State ‘Money Transmitter’ Licensing Laws*, 58 *BUS. LAW.* 317 (2002). Furthermore, it is a federal criminal offense for an unlicensed money transmitting business to issue payment products. *See* 18 U.S.C § 1960 (2003).

³⁷⁵ Crawford & Wigdahl, *supra* note 367, at 92.

³⁷⁶ President’s Working Group on Unlawful Conduct on the Internet, *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet* (Mar. 2000), *at* <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm#FRAMEWRK> (last visited Dec. 23, 2003).

³⁷⁷ This is a variation on the “technological neutrality” arguments that have been advanced in other contexts. *See, e.g.*,

Thomas J. Smedinghoff & Ruth Hill Bro, *Moving with Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce*, 17 J. MARSHALL J. COMPUTER & INFO L. 723, 734 (1999) (“[L]egislation addressing one particular form of electronic authentication (e.g., digital signatures) may have the unintended consequence of precluding other methods of authentication that might also be appropriate, and thus inhibit the development of other technologies that might be equal or superior to digital signatures.”). *See generally* LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 39 (2002) (“[W]hen future uses of a technology cannot be predicted – then leaving the technology uncontrolled is a better way of helping it find the right sort of innovation.”).

³⁷⁸ DiGregory Statement I, *supra* note 49 (“Legislation that is tied to a particular technology may quickly become obsolete and require further amendment. As a result, we believe it prudent to identify the conduct we are trying to prohibit, and then prohibit that conduct in technology-neutral terms.”).

³⁷⁹ S. 474 R.S., 105th Cong. (2000).

³⁸⁰ *Id.*

³⁸¹ *See supra* Part V(A).

³⁸² H.R. 556 EH, 107th Cong. (2002). For a state example of this double standard, there is Oregon’s legislation against Internet gambling that prohibits the collection of certain Internet gaming debts but permits the collection of non-Internet gaming debts. *See* SB 318, effective July 17, 1997, NRS 465.091.

³⁸³ *See, e.g.*, S. 627, 108th Cong. (2003); H.R. 556 EH, 107th Cong. (2002); H.R. 3004 IH, 107th Cong.(2001).

³⁸⁴ *See, e.g.*, H.R. REP. NO. 107-339, pt. 1 (2001). “Its primary purpose is to give U.S. law enforcement a new, more effective tool for combating offshore Internet gambling sites that illegally extend their services to U.S. residents via the Internet.” *Id.*

³⁸⁵ *See Lynch, supra* note 6, at 180 (noting that the number of telephone sports gambling services in Antigua increased six-fold during the 1990’s). Lynch argues that off-shore telephone gambling operations pose risks of fraud, money laundering, and pathological gambling—problems frequently cited with respect to Internet gambling. *Id.* at 182-83.

³⁸⁶ David H. Lantzer, *Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks?*, 5 CHAP. L. REV. 281, 288 (2002) (asking the question “whether Congress can regulate Internet gaming that is restricted to intrastate systems such as closed circuit Internet gaming, purchasing state lottery tickets via the Internet, or pari-mutuel betting using the Internet”).

³⁸⁷ Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465 (codified as amended at 18 U.S.C. § 1302 (1994)); *see also In re Rapier*, 143 U.S. 110 (1892) (upholding application of 1890 Act under Congress’s power “to establish post-offices and post-roads”).

³⁸⁸ 18 U.S.C. § 1952 (2002); 18 U.S.C. § 1084 (2003); *see also* *United States v. Kelley*, 254 F. Supp. 9, 15-16 (S.D.N.Y. 1966) (holding that application of Wire Act is valid exercise of Congress’ power under the Commerce Clause) (reversed, in part, on other grounds by *United States v. Kelly*, 395 F.2d 727 (2d Cir. 1968)); *Marshall v. United States*, 355 F.2d 999, 1004 (9th Cir. 1966) (holding that the Travel Act does not exceed Congress’s power under the Commerce Clause).

³⁸⁹ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 801, 84 Stat. 922 (codified as amended in scattered sections of Title 18 of the U.S. Code).

³⁹⁰ *See, e.g.*, *United States v. Abramson*, 553 F.2d 1164, 1173 (8th Cir. 1977); *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972); *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972). In *Riehl*, the Court notes:

[G]ambling has been found by Congress to be in the class of activities which exerts an effect upon interstate commerce Congress has chosen to protect commerce and the instrumentalities of commerce not from all illegal gambling activities but from those it deems of major proportions. We may not substitute our judgment as to where the line might have been drawn.

Riehl, 400 F.2d at 458.

³⁹¹ *But see* *United States v. Lopez*, 514 U.S. 549 (1995) (overturning a federal law that had, using the Commerce Clause, criminalized the possession of a gun near a school). *Lopez* may suggest a greater tendency on the part of the Supreme

Court to scrutinize federal powers asserted under the Commerce Clause.

³⁹² One of the “findings” stated in the Unlawful Internet Gambling Funding Prohibition Act was that “Internet gambling is a major cause of debt collection problems for insured depository institutions and the consumer credit industry.” H.R. 556, 107th Cong. § 2(3) (2002). Also found in this bill’s “Background and Need for Legislation” is the following statement: “problem gambling including problem Internet gambling can lead to personal and family hardships, such as lost savings, excessive debt, bankruptcy, foreclosed mortgages, and divorce.” H.R. REP. NO. 107-339 (2001).

³⁹³ NATIONAL GAMBLING IMPACT STUDY COMMISSION, *supra* note 1, at 7-14, available at <http://govinfo.library.unt.edu/ngisc/reports/7.pdf> (last visited Nov. 13, 2003). The Commission also noted that, in the U.S., brick and mortar casinos extend billions of dollars in loans to customers each year with interest rates ranging from 3% to 10%. *Id.*

³⁹⁴ Many brick and mortar casinos in the United States have opposed online gaming and supported the earlier online gaming bans. See Patterson, *supra* note 343, at 681. Cf. Matt Richtel, *Nevada Approves Online Gambling*, N.Y. TIMES, June 5, 2001, available at <http://emoglen.law.columbia.edu/CPC/archive/gambling/05GAMB.html> (“Las Vegas’s casinos are not united in their desire to move onto the Internet. Until recently, in fact, many of them advocated keeping online gambling illegal as a way of trying to kill competition from overseas.”).

³⁹⁵ See *Internet Gambling Prohibition Act of 1999: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 3125*, 106th Cong. 59 (2000) (statement by Kevin DiGregory) (hereinafter “DiGregory Statement II”). While before the House Subcommittee, Mr. DiGregory stated:

The Department [of Justice] urges Congress to identify the conduct that it is trying to prohibit and then to prohibit that conduct in technology-neutral terms. The fact that gambling, an age-old crime, has gone high-tech and can now be done through the Internet is no reason to pass new laws that specifically target the Internet for regulation. Passing laws that are technology-specific can create overlapping and conflicting laws, prohibiting the same activity but with different legal standards and punishments.

Id.

³⁹⁶ H.R. 2143, 108th Cong. (2003).

³⁹⁷ See DiGregory Statement I, *supra* note 57.

³⁹⁸ See Brown, *supra* note 17, at 618-27.

³⁹⁹ For example, the House version of the Internet Gambling Prohibition Act of 1997 defines “bets or wagers,” in part, as “the staking or risking by any person of something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome” S. 474, 105th Cong. (1997). The Leach-LeFalce Internet Gambling Enforcement Act, as passed by the House in 2001, defines “bets or wagers,” in part, as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance” Leach-LeFalce Internet Gambling Enforcement Act, H.R. 556 RFS, 107th Cong. § 3(b)(1)(A) (2002). The Comprehensive Internet Gambling Prohibition Act of 2002 defines “bets or wagers,” in part, as “the staking or risking by any person of something of value upon any contest or game based in whole or part on chance, including a lottery; one or more sporting events or contests, or one or more performances of the participants in such events or contests” Comprehensive Internet Gambling Prohibition Act of 2002, S. 3006, 107th Cong. § 2(9)(A)-(B)(2002).

⁴⁰⁰ This has been suggested in the following bills: Comprehensive Internet Gambling Prohibition Act of 2002, S. 3006, 107th Cong. § 2(2)(B) (2002), (adding “satellite,” “microwave,” and “mobile” to the list of media covered); Comprehensive Internet Gambling Prohibition Act of 2000, H.R. 5020, 106th Cong. § 2(2)(A) (2000) (changing “wire communication” to “communication”); Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. § 2(2)(A) (2002) (changing “wire communication” to “communication”); Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. § 1085 (1997) (changing “wire communication” to “communication”); 1995 Crime Prevention Act, S. 1495, 104th Cong. Title XV § 1501(1)(B) (1995) (changing “wire communication” to “wire or electronic communication”).

⁴⁰¹ See Anthony Cabot, *Why Internet Gambling May Frustrate Public Policy*, in INTERNET GAMBLING REPORT V 187, 196 (2002).