PIECEMEAL STATE LEGISLATION: THE WRONG WAY TO DIVIDE THE INTERNET POKER PIE?♦

INTRODUCTION

Poker may have evolved from a French eighteenth-century parlor game, but it is a decidedly American pursuit wherein one takes his or her chances to strike it rich based on the turn of a card.[1] Online poker is the modern day iteration of the version popularized by nineteenth-century Mississippi steamboats and Wild West cowboys, except guns and ten-gallon hats have been exchanged for mice and multiple monitors flashing a dozen tables at once. Despite the popularity and long-standing history of poker in this country, the Department of Justice ("DOJ") effectively ended the online version of one of the "Great

1 James McManus, Op-Ed., *No More Bluffing*, N.Y. TIMES (Aug. 24, 2012), http://www.nytimes.com/2012/08/25/opinion/poker-an-american-pastime-and-a-game-of-skill.html.

American pastime[s]"[2] by indicting the three largest Internet poker websites with charges of conspiracy to violate the Unlawful Internet Gambling Enforcement Act ("UIGEA"), operation of an illegal gambling business, conspiracy to commit bank fraud, conspiracy to commit wire fraud, and money laundering conspiracy.[3] American poker players who logged onto their favorite Internet poker site on April 15, 2011 were greeted by a message stating, "We are sorry but, due to government regulations, playing real money ring games is not allowed in your area."[4] With these words, the DOJ decisively struck a heavy blow to the United States Internet poker market, an industry worth an estimated $1 billion.[5]

Since that day (known as "Black Friday" in the poker world),[6] attempts have been made to regulate Internet poker and other forms of online gambling, but none have been successful at the federal level.[7] It has taken two years, but some progress is being made, this time via legislation at the state level. The current legal climate for Internet poker and Internet gambling in general is still in its infancy, but this Note will attempt to parse through the state of the current regulation, likely problems the states will face and will decide whether or not the current methodology is best. The biggest problem that states will face comes in the form of liquidity, and the most feasible solution is to create multistate compacts, unless the federal government decides to repeal the UIGEA or otherwise institute national online gambling regulations.

Part I will describe the background and history of online gambling up to the present. Part II will provide the current state of regulation and discuss past federal failed attempts. Part III will describe the problems facing the current path of piecemeal regulation, primarily liquidity and Commerce Clause concerns. Part IV will describe the multistate compact solution as well as alternative solutions to these problems and

2 Diane Dimond, *America's Pastime a Crime? Time to Re-Shuffle Laws!*, HUFFINGTON POST (Sept. 12, 2012), http://www.huffingtonpost.com/diane-dimond/americas-pastime-a-crime-_b_1877872.html.

3 Press Release, Preet Bharara, U.S. Att'y S.D.N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), http://www.justice.gov/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf.

4 *PokerStars Blocks U.S. Players in Response to Indictment*, PART TIME POKER (Apr. 15, 2011), http://www.parttimepoker.com/pokerstars-blocks-u-s-players-in-response-to-indictment. This message appeared when a player based in the United States attempted to open a new real money cash table. A similar prompt occurred upon attempting to register for a tournament.

5 SCOTT LONGLEY, GAMBLING DATA, US ONLINE POKER DATA REPORT (Oct. 2011), http://www.gigse.com/sites/default/files/USOnlinePoker_GCAmericas.pdf.

6 Nate Silver, *After 'Black Friday,' American Poker Faces Cloudy Future*, N.Y. TIMES (Apr. 20, 2011), http://fivethirtyeight.blogs.nytimes.com/2011/04/20/after-black-friday-american-poker-faces-cloudy-future/.

7 *US Online Poker / Gambling Bills & Legislation*, LEGAL US POKERSITES, http://www.legaluspokersites.com/state-laws/bills/ (last visited Mar. 1, 2015) (listing failed federal bills).

consider whether there are any possible attacks that can successfully repeal the UIGEA to restore the pre-Black Friday status. Part V will provide a brief conclusion.

I. BACKGROUND

Thanks in part to the implementation of hole card cameras embedded in poker tables[8] and ESPN's televised broadcast of amateur poker player Chris Moneymaker's 2003 World Series of Poker ("WSOP") win,[9] the poker industry experienced a significant boom period.[10] Moneymaker had earned his entry via an online satellite at PokerStars.com, the largest online poker site in the world.[11] Within two years, online poker was a multi-billion dollar industry, with American players comprising between seventy-five and ninety percent of total wagers.[12] Participants in the WSOP $10,000 Main Event had skyrocketed from 839 players in 2003 to 8,773 players in 2006.[13] Yet online poker was a legal gray area; questions such as whether the Wire Act of 1961 applied to online poker had not yet been settled.

In 2006, Senator Bill Frist piggybacked the Unlawful Internet Gambling Enforcement Act into the otherwise unrelated Security and Accountability for Every Port Act.[14] The UIGEA required U.S. banks to track, monitor and block transactions from online gambling sites.[15] The UIGEA did not outlaw online poker, however, and even after the

8 Definition of *Hole Cam*, POKER TERMS, http://pokerterms.com/hole-cam.html (last visited Aug. 21, 2014). While used sporadically before that, the World Poker Tour's use of the camera during its first season in 2002–03 created the spectator sport format that is commonplace today. *Id.*

9 *WSOP Main Event Winners 1970-2013*, THE HENDON MOB, http://pokerdb.thehendonmob.com/ranking/wsop_main_event_winners (last visited Aug. 21, 2014).

10 Silver, *supra* note 6 (stating boom period lasted from 2003–06).

11 *About Chris Moneymaker*, POKER LISTINGS, http://www.pokerlistings.com/poker-player_chris-moneymaker (last visited Aug. 21, 2014); *About Pokerstars*, POKERSTARS.COM, http://www.pokerstars.com/about (last visited Aug. 21, 2014) ("PokerStars is the world's largest poker site and home of tournament poker."); *Online Poker Traffic Report*, POKERSCOUT.COM, http://www.pokerscout.com (last visited Mar. 1, 2015) (noting that PokerStars is #1 in players online and cash players traffic).

12 Judy Xanthopoulos, Internet Poker Industry and Revenue Analysis (Prepared for Poker Players Alliance, 2006) ("Estimates indicate that, worldwide, amounts wagered in online poker games were nearly $60 billion in 2005 with approximately $3 billion in commission revenues.").

13 Silver, *supra* note 6 ("More people played in the event in 2006 than in the first 33 years of the tournament combined." The overall online player pool fared similarly, doubling nearly every year.).

14 *See Exploring the UIGEA and How it Affects U.S. Online Gambling*, FREE SPEECH CONFERENCE, http://www.freespeechconference.org/exploring_the_uigea.php (last visited Aug. 23, 2014); H.R. REP. NO. 109-711, at 70 (2006) (Conf. Rep.); Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 801, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361–67 (2006)).

15 Stephen A. Murphy, *What's Next? The Future of Online Poker in the United States—Part 1*, CARDPLAYER (Sept. 11, 2009), http://www.cardplayer.com/poker-news/7523-whats-next-the-future-of-online-poker-in-the-united-states-part-1.

banks became legally obligated to comply in 2009, the UIGEA only served to slow the withdrawal and deposit times for players.[16] That all changed on Black Friday, when the DOJ issued an indictment against the three largest U.S.-operating online poker companies.[17] The DOJ charged the sites with bank fraud, money laundering, and illegal gambling offenses.[18] Over seventy-five bank accounts used by the sites' payment processors (middlemen between the U.S. banks and the offshore online poker websites) and the companies' domain names were seized.[19]

This essentially ended online poker for nearly all Americans, as continuing to play online post-Black Friday was a very risky proposition in terms of deposits and withdrawals. Pre-Black Friday, players could deposit and withdraw via credit or debit card, direct bank account transfers, Neteller, ePassporte or other eWallets.[20] All of these options vanished.[21] Players could still find ways to deposit, with money transfer companies such as Western Union and MoneyGram serving as viable—albeit cumbersome—options.[22] On the other hand, withdrawals

16 *Id.* To be fair, a large number of the online sites did leave the U.S. market, including PartyPoker, the former market leader. Websites who did stay generally picked up the business PartyPoker and others left behind, with PokerStars and Full Tilt Poker benefitting most. The UIGEA passage is generally considered the end of the boom, with poker levels generally flattening out from 2006 until Black Friday. International growth is credited with maintaining poker's popularity post-UIGEA. *See* Jason Kirk, *The Poker Boom Part 4: U.S. Lowers the Boom*, POKER LISTINGS (Feb. 15, 2008), http://www.pokerlistings.com/the-poker-boom-part-4-us-lowers-the-boom-23625; Jason Kirk, *The Poker Boom Part 5: The Global Game*, POKER LISTINGS (Feb. 20, 2008), http://www.pokerlistings.com/the-poker-boom-part-5-the-global-game-23737; *Weekly Online Poker Traffic Update*, POKERSCOUT.COM (Aug. 16, 2010), http://www.pokerscout.com/news/weekly-traffic-update.aspx?year=2010&week=34 (evidencing that the market was stagnating and that PokerStars and Full Tilt Poker had obtained the lion's share of the market).

17 Bharara, *supra* note 3.

18 *Id.*

19 *Id.*

20 Toby Bochan, *PokerStars Online Poker Tour—Screenshots from PokerStars Online Poker Site*, ABOUT.COM, http://poker.about.com/od/onlinepoker/ss/pokerstarsscrn_6.htm (last visited March 1, 2015) (posting a screenshot listing available deposit options on PokerStars pre-Black Friday, including credit cards, Neteller, and other eWallets).

21 *See* Press Release, Michael J. Garcia, U.S. Att'y S.D.N.Y., U.S. Charges Two Founders of Payment Services Company With Laundering Billions of Dollars of Internet Gambling Proceeds (Jan. 16, 2007), http://www.justice.gov/usao/nys/pressreleases/January07/netellerarrestspr.pdf (indictment of Neteller); Lance Bradley, *ePassporte Leaves U.S. Market for Fear of Pending Investigation*, BLUFF (Apr. 14, 2008), http://www.bluff.com/news/epassporte-leaves-us-market-for-fear-of-pending-investigation-1325/.

22 *Best Online Poker Sites*, U.S. POKERSITES.NET, http://www.uspokersites.net (last visited Aug. 21, 2014). One post-Black Friday site, Seals with Clubs, has found a way around the cash-out problem. All deposits, withdrawals, transactions, and gameplay are all handled using Bitcoins, an electronic currency. The anonymous nature of Bitcoins allows U.S. players to move Bitcoins on and off the website with almost no hassle. However, the site is very small and the Bitcoin currency is very unstable, so it still remains a risky proposition for very different reasons. Seals has already been forced to shut down once after experiencing technical problems combined with a police raid at the founder's Nevada home. It has since reopened as SwC Poker. *See* Giovanni

may take months to process, are sometimes never processed at all, and even if a player does receive a withdrawal within a reasonable timeframe, there is a good chance the check can bounce.[23] This analysis does not even consider the very real possibility that these renegade poker sites might go out of business or be shut down by the DOJ, resulting in a complete loss of U.S. player balances a la Black Friday.[24]

Since 2011, there has been advancement toward proper online poker legislation. The UIGEA is a federal statute, thus it only governs interstate activity.[25] This leaves state legislatures with the option to pass laws legalizing intrastate online gambling. The Obama administration has supported the decision to leave poker legislation up to the states and in response, three states have legalized online poker or a broader online gambling scheme (Nevada, Delaware, and New Jersey).[26] At this time, only these three states have begun website operations, with less than impressive results thus far.[27]

Angioni, *Seals With Clubs Chairman Bryan Micon: "The Police Raid Was Completely Unnecessary"*, POKERNEWS (Feb. 23, 2015), http://www.pokernews.com/news/2015/02/seals-with-clubs-chairman-bryan-micon-police-raid-20740.htm; *SwC Poker Launches. Bitcoin Poker 2.0 Begins.*, SWC POKER (Feb. 27, 2015), http://swcpoker.eu/swc-poker-launches-bitcoin-poker-2-0-begins/.

23 For examples of players' withdrawal experiences *see* the following internet poker forum subsections: *Lock Poker "Pending Cashouts" Report (>2 months)*, 2+2, http://forumserver.twoplustwo.com/28/internet-poker/lock-poker-pending-cashouts-2-months-report-1359432 (last visited Aug. 21, 2014); *Bodog (Bovada) Payout Thread for US Players*, 2+2, http://forumserver.twoplustwo.com/28/internet-poker/bodog-bovada-payout-thread-us-players-do-not-post-bank-names-1553 (last visited Aug. 21, 2014).

24 *Lock Poker: The End is Near For This U.S. Poker Site*, BET AMU (Sept. 17, 2013), http://betamu.org/news/lock-poker-the-end-is-near-for-this-us-poker-site.

25 31 U.S.C. § 5362(10)(B) (2006) (defining the term "unlawful Internet gambling" to not include bets or wagers that are made exclusively within a single state).

26 Brian Deese, *What We Have to Say About Online Poker*, Official White House Response to *protect consumers, create jobs and generate revenue by licensing and regulating online poker*, THE WHITE HOUSE, https://petitions.whitehouse.gov/response/what-we-have-say-about-online-poker (last visited Aug. 21, 2014); Julianne Pepitone, *Online Gambling Toes a Confusing Legal Line*, CNN MONEY (June 10, 2013), http://money.cnn.com/2013/06/10/technology/innovation/online-gambling-poker/index.html.

27 *See* Jocelyn Wood, *Delaware Online Poker: The First Week of Action*, POKERFUSE (Nov. 14, 2013), http://pokerfuse.com/news/industry/delaware-online-poker-the-first-week-of-action-14-11/; Jocelyn Wood, *Geolocation Service Outage Disrupts Online Poker in Nevada*, POKERFUSE (Oct. 24, 2013), http://pokerfuse.com/news/industry/geolocation-service-outage-disrupts-online-poker-in-nevada-24-10/; Chris Grove, *New Jersey Online Gambling Soft Launch Lineup Revealed, Play Begins*, ONLINEPOKER REPORT (Nov. 21, 2013), http://www.onlinepokerreport.com/9239/nj-online-casino-and-poker-test-launch-lineup/. In addition to technical hiccups, traffic is relatively underwhelming. As of March 1, 2015, the two major New Jersey websites, WSOP NJ and Party Borgata, combine to have weekly averages of approximately 380 cash game players with peak traffic cresting at over 700 cash game players. In aggregate, New Jersey would rank as approximately the 26th largest poker site in the world. For comparison, market leader PokerStars averages between 20,000 and 30,000 cash game players. *See generally Online Poker Traffic Report*, POKERSCOUT, http://www.pokerscout.com/ (last visited Mar. 1, 2015); *All American Poker Network (New Jersey)*, POKERSCOUT (Mar. 1, 2015), http://www.pokerscout.com/SiteDetail.aspx?site=WSOP-888-NJ&ab=86244557; *Party Borgata Network (New Jersey)*, POKERSCOUT (Mar. 1, 2015), http://www.pokerscout.com/SiteDetail.aspx?site=PartyPokerNJ

II. CURRENT STATE OF REGULATION

A. *Federal Legislation*

The most commonly cited solution to the state-by-state method is a federal bill legalizing and regulating poker. However, this is more of a pipe dream than a plausible solution at this point. At least seven federal bills relating to regulating or licensing Internet gambling have failed to make it out of committee,[28] and two of the more recent proposals in 2013 failed to even make it past the introduction stage.[29] Previous federal bills have been complicated, mixed between being poker-only or general gambling, and generally have been catered to the entrenched brick and mortar casino interests.[30]

Nevada Congressman Harry Reid is one particularly important Internet gambling critic, whose past campaigns have been funded heavily by Nevada casino groups.[31] Reid has actively sought to block federal bills that allowed all forms of casino gambling on the Internet.[32] He believes that federal bills that allow all types of casino gambling, as opposed to poker only bills, are "an invitation to crime" and "very bad for children."[33] Reid and Senator Jon Kyl even drafted an updated version of a failed 2011 bill[34] that would legalize online poker, but at the expense of a strengthened Wire Act, and licenses would be subject to sixteen percent fees and would only be granted to established brick

&ab=86244564.

28 *U.S. Online Poker & Gaming Legislation History*, 2+2, http://forumserver.twoplustwo.com/showpost.php?p=18487068&postcount=1 (last visited Aug. 21, 2014);

29 *H.R. 2282: Internet Gambling Regulation, Enforcement, and Consumer Protection Act of 2013*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr2282 ("Status: Died in a previous Congress"); *H.R. 2666: Internet Poker Freedom Act of 2013*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr2666 ("Status: Died in a previous Congress").

30 Darren Heitner, *Federal Online Poker Legislation: Coming to America Or Shipwrecked in Congress?*, FORBES (Sept. 19, 2013), http://www.forbes.com/sites/darrenheitner/2013/09/19/federal-online-poker-legislation-coming-to-america-or-shipwrecked-in-congress/; Bob Pajich, *The Rebuilding of Online Poker in America*, CARDPLAYER (July 4, 2013), http://www.cardplayer.com/poker-news/15846-the-rebuilding-of-online-poker-in-america.

31 *Nevada Senate Race 2010, Top Contributors*, OPENSECRETS.ORG, http://www.opensecrets.org/races/contrib.php?cycle=2010&id=NVS2&spec=N (last visited Aug. 21, 2014) (noting that MGM Resorts International, Caesars Entertainment, Station Casinos, and Boyd Gaming were all top contributors to Congressman Reid's 2010 campaign).

32 Pajich, *supra* note 30.

33 Steve Tetreault, *Reid Expects More Bids to Ban Online Gaming*, LAS VEGAS REVIEW JOURNAL (Dec. 12, 2014, 2:41 PM), http://www.reviewjournal.com/business/casinos-gaming/reid-expects-more-bids-ban-online-gaming ("Sen. Harry Reid said Friday that Congress next year will take up legislation to outlaw Internet gambling, and he plans to support a ban while trying to gain an exemption for online poker.").

34 The Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening of UIGEA Act of 2011, H.R. 2366, 112th Congress (2011) *available at* https://www.govtrack.us/congress/bills/112/hr2366/text.

and mortar casino groups.[35] Further, the updated bill would invalidate any state law regarding online gambling, unless the state law was already passed, and at the time only Nevada and Delaware had passed laws.[36] Fortunately for online poker enthusiasts, Reid failed to formally introduce this extremely stringent bill, even though it was the "best shot ever to have pushed the bill through Congress."[37] The odds are even longer to pass in future Congressional sessions.[38]

Sheldon Adelson, billionaire owner of the Las Vegas Sands Corporation,[39] is another key player looking to enact federal online gambling legislation, albeit legislation completely prohibiting all online gambling, including poker.[40] Adelson has built his fortune via brick-and-mortar casinos, and sees online gambling as a danger to his empire.[41] Adelson backed the Restoration of America's Wire Act in 2014 ("RAWA"), whose policy was to "restore long-standing United States policy that the Wire Act prohibits all forms of Internet gambling."[42] It failed to get out of committee status,[43] but with Adelson's support, Representative Jason Chaffetz has reintroduced the bill in the first 2015 session as HR 707.[44]

If HR 707 is successfully passed, it would be a heavy blow to pro-poker interests, effectively returning the poker climate to that of immediately post-Black Friday. It would serve to primarily shut down the legal state-authorized poker websites in Nevada, Delaware, and New Jersey, while being unlikely to have any effect on the offshore rogue websites that currently operate in defiance of the UIGEA.[45]

35 Full text of "The Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2012" *available at* http://www.jdsupra.com/post/fileServer.aspx?fName=7d590054-cdeb-4d20-9e3b-3ebab5d64396.pdf [hereinafter Internet Gambling Prohibition Act of 2012].

36 Michelle Minton, *Harry Reid's Online Poker Folds on Freedom*, BREITBART (Nov. 18, 2012), http://www.breitbart.com/Big-Government/2012/11/16/Harry-Reid-s-online-poker-bill-makes-a-mockery-of-American-freedom; Internet Gambling Prohibition Act of 2012, *supra* note 35.

37 Steve Friess, *How Reid Lost His Internet Poker Gamble*, POLITICO (Jan. 23, 2013), http://www.politico.com/story/2013/01/how-reid-lost-his-internet-poker-gamble-86595.html.

38 *Id.*

39 *Sheldon Anderson*, FORBES, http://www.forbes.com/profile/sheldon-adelson/ (last visited Mar. 1, 2015).

40 Dustin Volz, *Congress Revives Sheldon Adelson-backed Plot to Kill Online Gambling*, NATIONAL JOURNAL (Feb. 4, 2015), http://www.nationaljournal.com/tech/congress-revives-sheldon-adelson-backed-plot-to-kill-online-gambling-20150204.

41 *Id.*

42 H.R. 4301, 113th Cong. (2014); *see* Part IV.D-1 for a further discussion of the Wire Act.

43 *H.R. 4301: Restoration of America's Wire Act*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr4301 ("Status: Died in a previous Congress").

44 H.R. 707, 114th Cong. (2015).

45 Yaël Ossowski, *House of Cards: Feds Aim to Overrule States, Ban Online Gambling*, WATCHDOG (Mar. 5, 2015), https://watchdog.org/203447/house-of-cards-2.

B. *Current State Legislation*

Current state legislation favors in-state casino interests as well. Licenses are only granted to entities that have a corresponding in-state presence.[46] Due to the nature of the business, prior to Black Friday, all the major poker websites were stationed offshore.[47] As such, none of these established operators can re-enter the U.S. market without being connected to a brick-and-mortar casino. The world's largest online poker website, PokerStars, has been repeatedly frustrated in their attempts to re-enter the U.S. market, costing them over $800 million in settlements, fees, and fines, and further attempts may increase that bill to over $1 billion.[48]

PokerStars has also tried and failed to purchase the Atlantic Club, an Atlantic City based casino, after they were unable to obtain regulatory approval for interim casino authorization.[49] Each step of the way, PokerStars faced heavy resistance from established New Jersey casinos both in their efforts to purchase a casino and to obtain a license.[50] The American Gaming Association ("AGA") argued that granting a license to PokerStars, which had a history of operating inside the United States post-UIGEA, "would send a damaging message to the world of gaming" and "would dramatically undermine public confidence in gaming regulation and could cripple the industry's public image for many years."[51] This was an obvious attempt to protect established casino interests, as PokerStars had already settled with the U.S., forfeiting $547 million but admitting no wrongdoing.[52] The DOJ

46 NEV. REV. STAT. ANN. § 463.750(3) (West, Westlaw through 2013 Legis. Sess.); DEL. CODE ANN. tit. 29, § 4801(c) (West, Westlaw through 79 Laws 2014, ch. 383); N.J. STAT. ANN. § 5:12-95.17 (West, Westlaw through L.2014, C.21 and J.R. No. 1).

47 Poker companies are incorporated in places such as Gibraltar, the Netherland Antilles, Antigua, and the Isle of Man in order to take advantage of favorable licensing arrangements, favorable regulations, lesser fees, and the ability to avoid unfavorable laws (such as the UIGEA in the U.S.).*See* Adrian Sterne, *Top 10 Poker Licensing Authorities*, TOP10 POKERSITES, http://www.top10pokersites.net/top-10-poker-licensing-authorities (last visited Aug. 21, 2014).

48 Steve Ruddock, *US Return Could End Up Costing PokerStars Over $1 Billion*, ONLINE POKER REPORT (Jan. 25, 2014), http://www.onlinepokerreport.com/10477/pokerstars-may-cough-up-1-billion.

49 Donal Wittkowski, *PokerStars' Parent Company Gives Up Bid to Buy Atlantic Club Casino*, PRESS OF ATLANTIC CITY (Aug. 3, 2013), http://www.pressofatlanticcity.com/communities/atlantic-city_pleasantville_brigantine/pokerstars-parent-company-gives-up-bid-to-buy-atlantic-club/article_0f42af04-fbc5-11e2-a863-0019bb2963f4.html.

50 Dan Katz, *AGA Trying to Stop PokerStars' New Jersey Casino Purchase*, POCKET FIVES (Mar. 5, 2013), http://www.pocketfives.com/articles/aga-trying-stop-pokerstars-new-jersey-casino-purchase-588180.

51 *Id.* Unsurprisingly, the AGA counts several brick and mortar casino companies among their membership, including Boyd Gaming (owners of the Borgata in Atlantic City), Caesars Entertainment (owners of four Atlantic City Casinos), Las Vegas Sands, MGM Resorts International, and Churchill Downs.

52 Stipulation and Order of Settlement, PokerStars, U.S. v. PokerStars et al., WL 1659177 (S.D.N.Y. May 9, 2012), http://assets.espn.go.com/poker/PSSettlement.pdf.

and the U.S. government no longer had a continuing legal issue with PokerStars, yet their lack of a physical presence in New Jersey and their former U.S. operations were being held against them. PokerStars then attempted to partner up with Resorts Casino Club to be their online poker provider.[53] Initially, it appeared that PokerStars would be granted a license. However, the New Jersey Division of Gaming Enforcement ("NJDGE") suspended PokerStars' license application when court documents from the failed Atlantic Club sale surfaced showing that co-founder Isai Schienberg, who remained a target of an unresolved federal indictment for UIGEA violations, was still involved with PokerStars.[54]

However, the NJDGE's objections to Schienberg's involvement might be moot now as the Amaya Gaming Group Inc. acquired the Oldford Group Limited for $4.9 billion in August 2014.[55] The Oldford Group is the parent company of the Rational Group, which owns and operates both PokerStars and its sister brand, Full Tilt Poker.[56] Amaya has already restarted licensing talks with the New Jersey Division of Gaming Enforcement and the outlook is much more positive than before.[57] Other entities that wish to enter the U.S. Internet poker market may not have the funds or willpower to overcome the myriad obstacles that PokerStars had to endure. Furthermore, there are a limited number of brick and mortar New Jersey casinos, so even partnering up to enter New Jersey may not be possible.

Outside of the three currently regulated states, other future state bills will need to consider the interests of Indian casino operators in states where Indian gaming is legal.[58] This is also a large part of why states have favored state-by-state legislation as opposed to lobbying for a federal poker bill. States with a tribal presence found little support for bills that had "opt-in" or "opt-out" clauses, as this would force the tribes to go along with state decisions without further input.[59] Indian gaming is legal on tribal lands in twenty-nine states, but has yet to have much of

53 Steve Ruddock, *Timeline: PokerStars' Attempts to Join the Regulated US Online Poker Market*, ONLINE POKER REPORT (Aug. 7, 2014), http://www.onlinepokerreport.com/13270/timeline-of-pokerstars-attempts-in-us.

54 *Id*.

55 Press Release, Amaya Gaming Group Inc., Amaya Completes Acquisition of PokerStars and Full Tilt (Aug. 1, 2014), http://www.amayagaming.com/2014/08/amaya-completes-acquisition-of-pokerstars-and-full-tilt; Chris Grove, *PokerStars New Jersey: Questions and Answers*, ONLINE POKER REPORT (Feb. 12, 2015), http://www.onlinepokerreport.com/13408/pokerstars-new-jersey-answers.

56 *Id.*

57 Grove, *supra* note 55.

58 Consider that tribes may only offer gaming on "Indian lands." The Internet does not reside within Indian lands. Special language will be required in any bill that wishes to cater to Native American interests. *See* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2703(4), 2710(b)(1), 2710(d)(1)(West, Westlaw through Pub. L. 113-125 (excluding Pub. L. 113-121)).

59 Heitner, *supra* note 30.

an impact on passed Internet gaming regulations because New Jersey and Delaware have no Indian gaming and Nevada's Indian presence is relatively small.[60] However, other states that do have a large Indian gaming presence have legislation pending, such as California.[61] Indian tribes in California generated $6.9 billion in revenue in 2011, [62] giving them significant influence over California online gambling bills. It is difficult to believe that such a large entity would agree to any interstate compacts that would disallow or minimize their participation (as they would not be able to participate in New Jersey or Delaware for lack of Indian gaming). Deciding how to handle this situation will require quite a bit of time and effort as there can even be varying regulation opinions among tribes within a state.[63]

C. *2009 Challenge to the UIGEA's Constitutionality*

Challenges to the constitutionality of the UIGEA have also failed. In *Interactive Media Entertainment and Gaming Ass'n. Inc.* v. *Attorney General of the United States*,[64] the plaintiff, Interactive, claimed three injuries under the UIGEA: (1) a threat of criminal prosecution or civil liability; (2) a chilling effect on the exercise of First Amendment rights; and (3) "imminent financial ruin."[65] More specifically, Interactive alleged seven causes of action regarding the constitutionality of the UIGEA: (1) expressive association rights; (2) commercial speech; (3) over breadth and vagueness; (4) privacy; (5) World Trade Organization claims; (6) an *ex post facto* clause claim; and (7) a Tenth Amendment challenge.[66] The district court held that Interactive had standing to

60 *Gaming Tribe Report*, NATIONAL INDIAN GAMING COMMISSION, http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/listandlocationoftribalgamingops/statex.pdf(last visited Aug. 26, 2013) (Nevada has only two registered tribes).

61 A.B. 9, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-0050/ab_9_bill_20141201_introduced.html; A.B. 167, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* http://www.californiaonlinepoker.com/wp-content/uploads/2015/01/2015-iPoker-Bill.pdf.

62 Gale Courey Toensing, *Latest Gaming Industry Report: Indian Gaming Made Small Gains in 2011*, INDIAN COUNTRY (Mar. 26, 2013), http://indiancountrytodaymedianetwork.com/2013/03/26/latest-gaming-industry-report-indian-gaming-made-small-gains-2011-148353.

63 *See* Tuari N. Bigknife, *Internet Gaming: Join the Debate*, INDIAN GAMING (Sept. 2012), at 26, http://indiangaming.com/istore/Sep12_Bigknife.pdf ("Certain tribes contend that Internet gaming should be legislated, licensed and regulated on an intrastate basis. Other tribes assert that a federal interstate solution is best."); *see also* Dave Palermo, *Second Thoughts*, GLOBAL GAMING BUS., Sept. 2012 http://ggbmagazine.com/issue/vol-11-no-9-september-2012/article/second-thoughts1 ("[M]any tribes . . . are split over whether indigenous governments would benefit more from a federal regulatory scheme or state legislation.").

64 Interactive Media Entm't and Gaming Ass'n Inc. v. Att'y Gen. of the U.S., 580 F.3d 113 (3d Cir. 2009) [hereinafter iMEGA].

65 Interactive Media Entm't & Gaming Ass'n v. Gonzales, No. 07-2625, 2008 U.S. Dist. WL 5586713, at *2 (D.N.J. Mar. 4, 2008).

66 *Id.* at *6–*11.

bring these claims, but dismissed Interactive's complaint, holding the UIGEA to be constitutional.[67] On appeal, the court limited review to the claims of vagueness and privacy violations; both were dismissed on the merits. [68]

In regard to Interactive's claim of unconstitutional vagueness, a plaintiff must prove that a statute is impermissibly vague in all possible applications.[69] According to the Third Circuit, the UIGEA was not impermissibly vague because a person who read the UIGEA would know to consult his or her own state's gambling laws and would be able to determine whether an activity constituted unlawful Internet gambling.[70] Specifically, the court stated that whether a transaction constitutes "unlawful Internet gambling turns on how the law of the state from which the bettor initiates the bet would treat that bet, i.e., if it is illegal under that state's law, it constitutes unlawful Internet gambling under the [UIGEA]."[71]

Interactive's privacy argument claimed a constitutional right for individuals to gamble within the privacy of their homes.[72] Interactive cited cases upholding a right to privacy for "sexual conduct between consenting adults in the privacy of the home" to support this contention.[73] The Third Circuit distinguished this line of cases by stating that unlike sexual behavior, which is most private, "[g]ambling, even in the home, simply does not involve any individual interests of the same constitutional magnitude."[74]

The Third Circuit's decision has been criticized as failing to fully clarify the meaning of the UIGEA and for oversimplifying the issue of how to handle inconsistencies between state laws.[75] However, pro-Internet poker advocates can take some solace in the *iMEGA* ruling as under the court's standard, the state needs to explicitly ban Internet gambling in order for wagering to be illegal under the UIGEA.[76]

67 *Id.* at *11. The court also did not speculate as to UIGEA's wisdom or effectiveness as law.

68 iMEGA, *supra* note 64, at 115–18.

69 *Id.* at 116 (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)).

70 iMEGA, *supra* note 64, at 116.

71 *Id.* at 117 (internal quotation marks omitted).

72 *Id.*

73 *Id.* at 118.

74 iMEGA, *supra* note 64, at 118.

75 *See* Rotem Nicole Moran, *Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA*, 31 LOY. L.A. ENT. L. REV. 55, 67–72 (2010).

76 iMEGA, *supra* note 64, at 117 ("Simply put, a gambling business cannot knowingly accept the enumerated financial instruments in connection with a bet that is illegal under any Federal or State law applicable in the jurisdiction in which the bet is initiated or received.").

III. PROBLEM

A. *Liquidity*

If the United States continues to attempt to regulate online poker via a state-by-state piecemeal method, the poker sites that become operational are likely to fail, or, at the very least, be much less successful than they otherwise would be. In fact, the first post-state legislation poker room, Ultimate Poker, has already closed their doors in both Nevada and New Jersey.[77]

The potential for business failure is primarily due to the lack of liquidity a state-by-state approach would cause. Liquidity, a term familiar to markets, has a unique definition in the poker economy as it relates to players. Player liquidity is simply the number of poker players playing at any particular poker site at a given time.[78] Poker sites with low liquidities offer less variety in stakes, fewer game types, and fewer options.[79] In turn, future players will see that the particular game or stake that they wish to play either has few or no options and will look elsewhere or simply not play.[80] This stands in contrast to other casino games (e.g. blackjack, roulette, etc.) wherein the player opposes the gambling website or casino.[81] House-banked games will run with only a single player, since the casino is always available to play against and does not require any additional players to begin.[82]

Additionally, piecemeal regulation will harm player liquidity by keeping player pools segregated. If players are limited to playing with those in their state, each state's population will necessarily restrict poker site traffic. This may not be a major issue for very populous states such as New York or California,[83] but it is more than enough to seriously damage the probability of robust game options in smaller states. This is due to the fact that a relatively small percentage of the U.S. population actually played online poker for real money before Black Friday.[84] In

77 Chris Grove, *Ultimate Poker Closes in Nevada: Reactions and Impacts*, ONLINE POKER REPORT (Nov. 14, 2014), http://www.onlinepokerreport.com/14461/ultimate-poker-closes-nevada-reactions-impacts.

78 *Frequently Asked Questions*, POKERPROPS, http://www.pokerprops.com/faq (last visited Aug. 21, 2014).

79 *Id.*

80 *Id.*

81 WILLIAM NORMAN THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY 188 (2001).

82 *Id.*

83 U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2012, (2012), http://www.census.gov/popest/data/state/totals/2012/index.html (last visited Sept. 2, 2014).

84 Ingo Fiedler and Ann-Christin Wilcke, *The Market for Online Poker*, 16 UNLV GAMING RES. & REV. J, 7, 13 (2012) ("For the USA, it is striking that it is by far the biggest market in absolute terms, but rank only 36th considering the number of internet users in a country. 0.596% of all

Ultimate Poker's case, while there were complaints about its software platform, a lack of player liquidity was by far the overwhelming reason for their demise, especially in the Nevada market.[85]

To further illustrate the liquidity problem, consider the following issues. First, poker websites typically offer both tournaments and cash games around the clock.[86] Some poker players prefer to exclusively play tournament or cash style poker, while others prefer to dabble in both.[87] It is common practice for poker websites and casinos alike to place guaranteed dollar amounts on their tournament prize pools in order to attract players.[88] A poker website that cannot afford to place guarantees on their biggest tournaments due to a small player pool will have difficulty maintaining a healthy tournament player population.[89] Secondly, intrastate poker will serve to limit reasonable playing times.[90] Casual players play primarily during peak times,[91] and any who show up outside of these intervals will likely find an insufficient mass of players.[92] These players may even go searching for unlicensed sites that still illicitly serve the general American population in defiance of the UIGEA, thus frustrating the intent of state legislation by perpetuating

American internet users (1 out of 168) are online poker players.").

85 Grove, *supra* note 77 ("There's also the cold reality that underpins population-restricted markets: they can only support so many operators. It was, in many views, inevitable that Nevada would eventually reduce to a single major online poker site, simply because that's arguably all the state's population can support.").

86 *See* Tom Leonard, *Cash Games vs. Tournaments*, POKEROLOGY, http://www.pokerology.com/lessons/cash-games-vs-tournaments (breaking down the differences between the two poker types).

87 *Id.*

88 For example, PokerStars guarantees a $1,000,000 prize pool for their weekly "Sunday Million" tournament. *PokerStars Sunday Million*, POKERSTARS, http://www.pokerstars.com/poker/tournaments/sunday-million (last visited Sept. 2, 2014). The tournament averages over 7,000 players each week.. Robbie Strazynski, *Crunching the Numbers Behind the PokerStars Sunday Million*, CARD PLAYER LIFESTYLE (Jan. 17, 2011), http://cardplayerlifestyle.com/crunching-the-numbers-behind-the-pokerstars-sunday-million.

89 Robert DellaFave, *NJ Online Poker Year One: In-Depth Analysis of Tournament Traffic [CHART]*, ONLINE POKER REPORT (Dec. 17, 2014), http://www.onlinepokerreport.com/14883/nj-online-poker-mtt-traffic-analysis (noting that in part due to a greater guaranteed buyin-to-prize pool ratio, WSOP tournament turnout generally outperforms Party Borgata by 30-35% despite having less cash game traffic; finding 888 Poker's conservative guarantees as a reason for reduced traffic; noting that Party Borgata's large guaranteed special tournament series draw large surges in traffic).

90 Sue Schneider, *Sometimes Bigger is Better*, 15 GAMING L. REV. & ECON. 5, 5-6 (Jan./Feb. 2011).

91 *Id.* Peak times is defined here as nights from 6-10pm and weekends.

92 *Id.* Many poker players, especially professionals, tend to be more nocturnal, which would further increase the difficulty of finding games earlier in the day. For example, the largest regulated poker rooms, WSOP NJ and Party Borgata, each have times during 24-hour periods where their cash game traffic dips nearly to zero. *All American Poker Network (New Jersey)*, POKERSCOUT (Mar. 1, 2015), http://www.pokerscout.com/SiteDetail.aspx?site=WSOP-888-NJ&ab=86244557; *Party Borgata Network (New Jersey)*, POKERSCOUT (Mar. 1, 2015), http://www.pokerscout.com/SiteDetail.aspx?site=PartyPokerNJ&ab=86244564.

the status quo of Americans playing on unlicensed websites.[93] Lastly, small websites dry up much more quickly as the money funnels up to the better players, who generally avoid playing one another. Weaker players benefit from larger player pools as their weaknesses are covered by smaller relative skill differences.

Statistician Nate Silver analyzed the economics of the poker bubble in his book *The Signal and the Noise*.[94] Silver accumulated a random sampling of no-limit hold 'em players from 2008 and 2009, and then calculated players' win rates.[95] Silver split the players into ten equal-sized groupings and analyzed how much the best players were winning relative to the amount the worst players were losing.[96] Silver found that the worst players at the table were losing money much, much faster than the best ones were making it.[97] Due to the presence of a house rake,[98] these better regular players are always on the lookout for weaker players in order to continue making a profit. Regular players account for the lion's share of a poker website's traffic,[99] but if there is a lack of weak players, the regulars are not incentivized to play many hands, start tables, or otherwise contribute the traffic needed to keep a site running. Removal of the worst players (or the failure to attract them) can have a cascading effect on the win rates of the remaining players.[100] Thus, to sustain a poker economy, there must be either very large donators (wealthy, untalented players) at the top of the poker pyramid whose large losses trickle down to lower levels,[101] or a constant

93 Schneider, *supra* note 90 at 6; *Online Poker Traffic Report*, *supra* note 11 (listing networks which generally accept US players such as Bodog, Merge, Winning and Chico).

94 NATE SILVER, THE SIGNAL AND THE NOISE 315-319 (2012).

95 *Id.* at 315. For more information about win rates, *see* Greg Walker, *Poker Winrates*, THE POKER BANK, http://www.thepokerbank.com/strategy/other/winrate/ (last visited Aug. 21, 2014).

96 SILVER, at 316.

97 *Id.* at 317. Silver's sample of $5/$10 no-limit hold 'em players had the best player at the table earning about $110 per one hundred hands, and five out of the ten players were profitable. The worst player lost at more than $400 per one hundred hands, which is more than a player who simply folded every hand would lose.

98 *See e.g.*, *Pokerstars Poker Table Rake*, POKERSTARS.COM, http://www.pokerstars.com/poker/room/rake/ (last visited Aug. 21, 2014) (providing an example of an online rake structure).

99 *See* SILVER, *supra* note 94, at 316 ("[A]bout 80 percent of the hands in the database were dealt to just 2 percent of the total players.").

100 *Id.* at 318. Silver removed the worst 10 percent of players and found that now only one of the remaining nine players actually remained profitable. Each player's win rate was less or more negative after removal of the worst ten percent of players.

101 James Guill, *Poker's Greatest All-Time Whales: Guy Laliberté*, POKER LISTINGS (Sept. 23, 2013), http://www.pokerlistings.com/poker-s-greatest-all-time-whales-guy-laliberte. Laliberté is alleged to have lost $17.1 million in 2008 alone, and $26 million lifetime online. Laliberté's reputation as a bad player helped drive traffic to the high stakes games including enticing lesser regular players from lower stakes to play higher with Laliberté and others like him. These regulars would then bring their winnings back to their normal stakes, thereby helping to maintain those games better. In poker parlance, this is called "taking a shot" and this practice effectively happens in varying degrees at all poker stakes as regular players hunt for rich, bad players (i.e.

flow of weak players who lose smaller amounts at all levels of the poker pyramid.[102]

As it stands, the first online intra-state poker websites, Nevada's Ultimate Poker and WSOP.com, have battled these very issues related to liquidity since their inception.[103] Mid and high-stakes games[104] are almost nonexistent[105] with tournament liquidity not faring much better.[106] Intrastate poker websites that cannot draw players from huge population bases are destined to flounder about with these low player pools, barring some kind of huge change in marketing or legislation.

B. *Commerce Clause Concerns*

The Constitution gives the federal government the ability "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[107] Essentially this means that Congress can regulate interstate commerce. The Framers of the Constitution inserted this clause to end the hostile state restrictions, retaliatory trade regulations, and protective tariffs on imports from other states that plagued early America under the Articles of Confederation.[108] Congress' Commerce Power is quite broad, though not unlimited. The Tenth Amendment in particular pushes back in some areas, stating that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[109] What powers are reserved to the states has been the topic of much debate throughout American history, but the general rule is that there is underlying state sovereignty that limits an otherwise valid

"whales").

102 SILVER, *supra* note 94 at 318–319.

103 Vince Martin, *Review: Nevada's Online Poker Websites Disappoint*, CALVINAYRE.COM (Oct. 2, 2013), http://calvinayre.com/2013/10/02/poker/nevada-online-poker-websites-disappoint. Ultimate Poker has since closed, and WSOP Nevada has daily peaks of around 300 players and weekly averages of about half that. Grove, *supra* note 77; *WSOP (Nevada)*, POKERSCOUT (Mar. 1, 2015), http://www.pokerscout.com/SiteDetail.aspx?site=WSOP&ab=9686237.

104 "Mid-stakes" is defined here as No Limit Hold'Em games with small and large blinds ranging from $1 and $2 to $5 and $10. "High-stakes" is any game with blinds above this amount. *Mid Stakes*, FLOPTURNRIVER (Dec. 1, 2009), http://www.flopturnriver.com/poker-dictionary/mid-stakes.php; *High-Stakes*, FLOPTURNRIVER (Dec. 1, 2009), http://www.flopturnriver.com/poker-dictionary/high-stakes.php.

105 Martin, *supra* note 103 ("Note that higher-limit tables were essentially empty: there was one 3-handed table at 5/10 and 2 players at a 6-handed 2/4 table." "Liquidity issues became even more pronounced at off-peak times . . . at 6 am on a Friday morning, there were just six players on [WSOP.com], 5 of them at a single cash table.").

106 *Id.* ("[Tournament] liquidity is far below what US players saw before Black Friday, and light years from supporting any sort of profitable grinding.").

107 U.S. CONST. art. I, § 8, cl. 3.

108 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 82 (17th ed. 2010)

109 U.S. CONST. amend. X.

action under the Commerce Clause.[110] State sovereignty protects states against having to regulate toward federal standards (also known as "commandeering"), especially if the commerce Congress is seeking to regulate is being done in conjunction with a State's executive functions or legislative discretionary functions.[111] In practice, the federal government is usually able to regulate as they wish, unless they are affirmatively commanding a state to regulate or enforce.[112] Gambling is traditionally a state function, mostly because the federal government has decided that the representatives of that state are best equipped to decide gambling law within a state's borders.[113] This does not necessarily preclude government regulation in this area, unless it falls into the commandeering exception; the UIGEA is an obvious example of governmental regulation of Internet gambling.

IV. SOLUTION

A. *Multistate Compacts*

One of the more common proposals to solve the liquidity problems posed by piecemeal legislation is to create multistate compacts. In contrast to a brick and mortar casino, which resides completely within a state and thus makes sense to be state-regulated, if states agreed to compact and share player pools, Internet gambling would exist across state lines. States who agree to join their player pools would effectively be participating in a channel of commerce with each other.[114] But not every state will have the same Internet poker regulation structure.[115] Courts have invalidated state laws under the Commerce Clause where a single actor operating in multiple states is subject to "haphazard, uncoordinated, and even outright inconsistent regulation by states."[116] Poker vendors who cater to multiple states will be subject to the laws of each state and may even be subject to unfair burdens, such as in the realm of operating costs.[117] Smaller states, like Delaware, are likely at

110 *See* New York v. U.S., 505 U.S. 144 (1992).

111 *See id. See also* Reno v. Condon, 528 U.S. 141 (2000) (finding that Congress cannot tell a state how to regulate information in state DMV database); Printz v. U.S., 521 U.S. 898 (1997) (finding that Congress cannot force state officials to perform background checks).

112 *Printz*, 521 U.S. 898.

113 Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 246 (3d. Cir. 2013) ("States can authorize and regulate some forms of gambling, e.g., lotteries and casinos").

114 *See* United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006).

115 *Compare* NEV. REV. STAT. ANN. § 463.370 (1) (West 2013) (website license taxes range from 3.5 to 6.75 percent of gross revenue), *and* NEV. REV. STAT. ANN. § 463.765(1) (website license fee of $500,000 for two-year period), *with* 2012 A.B. 2578, 215th Leg., 2nd Sess. (N.J. 2013) (annual tax of 10 percent of gross revenue and initial license fee of $200,000 with a renewal fee of $100,000).

116 Am. Libraries Ass'n v. Pataki, 969 F.Supp 160, 168 (S.D.N.Y. 1997).

117 Overstock.com, Inc. v. New York State Dep't of Taxation and Fin., 20 N.Y.3d 586 (N.Y.

the greatest risk of being discriminated against. Delaware has a population only a tenth as large as New Jersey and thus their bargaining power will be limited.[118] Therefore, any compacts going forward ought to be scrutinized heavily for protectionist purpose or effects benefitting larger states.[119] Any compacts that assist in-state players to the detriment of out-of-state players will likely be invalidated.[120]

Multistate compacts fall under the Compact Clause, which provides that no state shall enter into an agreement or compact with another state without the consent of Congress.[121] The Supreme Court limited the scope of this clause to agreements "directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[122] It is unclear exactly when an interstate agreement will fail this federal supremacy test, but the creation of an administrative body[123] (such as a commission to oversee online gambling websites) or the mere presence of a federal interest[124] (such as failed past attempts to regulate online gambling) is not enough to invalidate the agreement. To be certain, states technically need to request Congressional approval, which historically has been granted with little resistance.[125] States may not wish to request congressional approval, thereby giving up influence and power in a field the federal government has shown little interest in regulating. In regards to online poker, any compact made without approval will probably stand up to legal scrutiny as courts have allowed agreements that lack congressional consent to stand.[126]

However, multistate compacts are still subject to the Commerce

2013) (considering the constitutionality of states forcing online retailers to collect customers' sales taxes when the companies do not have physical locations in a state); Direct Mktg. Ass'n v. Huber, WL 1079175 (2012) (statute struck down).

118 U.S. CENSUS BUREAU, *supra* note 83.

119 *See* Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

120 *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978) ("[S]ince there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless.").

121 U.S. CONST. art. I, § 10, cl. 3.

122 United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978) (quoting Com. of Va. v. State of Tenn., 148 U.S. 503 at 519 (1893)).

123 *Id.* at 472.

124 *Id.* at 479 n.33.

125 Andrews Kurth LLP, *Andrews & Kurth Climate Change Outline*, 8 (2010), http://www.andrewskurth.com/assets/htmldocuments/10164_CCO_17.pdf.

126 Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 289 (2003) ("The judicial decisions that have to date sustained those arrangements fit a consistent pattern: even though most compact litigation seems to have arisen over unapproved compacts, it appears that no court has ever voided a state agreement for failure to obtain congressional consent.").

Clause issues noted earlier.[127] Consider that thus far, the three states with legalized online gambling have created three unique pieces of legislation. Each legalizes different games and each has a different tax and fee system. Nevada has only legalized online poker, Delaware has legalized lottery, keno, bingo and table games (including poker), and New Jersey has legalized all Internet gaming (including games such as craps and roulette).[128] Nevada is asking $500,000 for a two year license and up to 6.75 percent of revenue, Delaware requires an amount proportional to the amount generated statewide, and New Jersey requires $200,000 for a first year's license and ten percent of total revenue.[129] States must find a way to reconcile the various revenue tax amounts. Assuming all three states agree to share a player pool, no poker operator would agree to give up ten percent of its gross revenue to New Jersey, another 6.75 percent to Nevada and an additional portion to Delaware, considering New Jersey will likely provide the vast majority of the players. No site would agree to give up a large portion of their revenue for the marginal gains these smaller states would bring. In fact, poker sites that do get up and running would likely object to any compact that increases their tax burden without providing much of a return.[130] Whatever scheme the governments create needs to be profitable first and foremost for the poker website operators, otherwise they are not properly incentivized to continue servicing these states. If states cannot reconcile these differences, surely certain states will face discriminatory effects in interstate commerce and the compacts will be invalidated under the Commerce Clause.

One way states could keep their respective tax structures while preventing discrimination against less populated states would be to avoid a flat percentage of total revenue and instead take that percentage based on the amount of rake paid by players from that state. Nearly every online poker room already monitors rake paid per player via a VIP program.[131] It would be a simple matter to sum the total rake contributions for all the players in a state and then assess the tax out of this number, rather than the total amount. This way, states that contribute more players will get a larger piece of the pie, but players from smaller states still gain access to a poker room with greater

127 *See supra* Part III.B.

128 A.B. 114, 77th Leg., Reg. Sess. (Nev. 2013); H.B. 333, 146th Gen. Assemb. (Del. 2012); 2012 N.J. A.B. 2578, *supra* note 115.

129 NEV. REV. STAT. ANN. §§ 463.370, 463.765, *supra* note 115; H.B. 333, *supra* note 128; A.B. 2578, *supra* note 115.

130 Recall the constitutional challenges brought by Internet retailers, *supra* note 117. Those constitutional challenges were in response to merely assessing state sales taxes to customers. Consider the uproar created by a tax that cuts into operating profits.

131 *See, e.g.*, *My Borgata iRewards: Earning Points*, BORGATA POKER, http://poker.theborgata.com/vip-rewards/earning-points.html (last visited Mar. 1, 2015).

liquidity.The current state of regulation lends itself naturally toward multistate compacts and as long as these tax issues and procedural irregularities are smoothed out, this solution is the most practical and likely resolution to the liquidity problem.

1. The First Step: The Nevada/Delaware Compact

On February 25, 2014, Nevada and Delaware took the first step toward a greater multistate compact regime when their respective governors signed the Multi-State Internet Gaming Agreement ("MSIGA").[132] The MSIGA is a poker-only agreement[133] and gives licensed websites the option to take players from any state that is a member of the MSIGA.[134]

Under the MSIGA, Nevada and Delaware have agreed to receive revenue generated by their respective state patrons on a licensed website regardless of whether the licensee is in Nevada or Delaware.[135] Each state may still set their own tax terms on licensees[136] and in turn, each licensee is still free to set their own rake structure so long as this rake is taxed appropriately with Nevada and Delaware state law.[137] This makes it clear that all revenue generated by licensees will be taxed in relation to the players' locations who generated that revenue, and not by where that licensee is located. Thankfully this avoids the multiple taxation problem outlined above, but forces licensees to be diligent about

132 Multi-State Internet Gaming Agreement, Feb. 25, 2014 *available at* http://governor.delaware.gov/docs/MultistateInternetGamingAgreement140224.pdf.

133 *Id.* ("the Initial Member States plan to pursue Internet poker as the initial Internet Gaming offering under this Agreement").

134 *Id.* ("A Licensee may pool the liquidity of its Internet Poker Patrons located in any Licensing State, subject to the laws and regulations of the applicable Licensing States, to allow its Patrons from those Licensing States to play Internet Poker against each other.").

135 *Id.* ("Each Member State shall be entitled to receive the Internet Poker State Revenue generated from the provision of Internet Poker to Patrons of that Member State, regardless of the location of the Licensee that provided those services.").

136 *Id.* ("Each Member State shall be entitled to determine the Internet Poker State Revenue Structure (including rate and base of calculation) due as the result of the provision of Internet Poker to its Patrons.").

137 *Id.* ("For the purpose of calculating the Internet Poker State Revenue due by the Licensee to each member State, the following shall apply – (a) where Internet Poker State Revenue is calculated on the basis of commissions collected by a Licensee from participating players per round of play ('rake'), such commission shall be individually attributed to players who had placed wagers within that round of play on a pro rata basis reflecting each player's weighted contribution to the commission collected within that round of play; and (b) where Internet Poker State Revenue is calculated on the basis of tournament fees, such fees shall be attributed to each Patron State in accordance with the physical presence of each tournament entrant at the time of entry into said tournament."). For example, if a licensee had a tournament with ten players, eight of which were from Nevada and two from Delaware, and charged a $10 entrance fee, $80 would be taxed according to Nevada's poker laws and $20 would be taxed according to Delaware's poker laws. *See* Part IV.A *supra* for a discussion of the individual laws.

tracking their players and to make sure their accounting procedures are correct. This compact is also clarifies that licensees are subject to the state laws of the states where they pool player liquidity[138] and individual players are subject to laws of their home state,[139] unless the player has a dispute with a player from another state, in which case the law of the licensee's state governs.[140]

Unfortunately though, at the time of the MSIGA's signing, the gambling platforms operating in Nevada and Delaware were not interoperable, so the compact has yet to be implemented.[141] Technical and legislative issues over the year since the MSIGA's signing have plagued its implementation, but Nevada Governor Sandoval believes that the implementation should be "imminent."[142] Until this compact is actually implemented, it is impossible to tell how much it will boost player liquidity for Nevada and Delaware poker operators, but since these states have very low player bases, most are not predicting a large boost in popularity.[143] The fact that New Jersey has not joined the MSIGA also leaves open the question as to whether or not a multistate compact solution could thrive if states with sufficient player populations joined.[144] The most important takeaway from the Nevada/Delaware compact is that it could function either as model for future compacts or a base to join for states that do legalize poker. With all the states that have proposed legislation or are considering legislation,[145] it will not be long until another state offers legal poker within its borders. If the MSIGA is even moderately successful, these new states will have an example to work from when negotiating new compacts, or can easily

138 Multi-State Internet Gaming Agreement, *supra* note 132 ("A Licensee may pool the liquidity of its Internet Poker Patrons located in any Licensing State, subject to the laws and regulations of the applicable Licensing States, to allow its Patrons from those Licensing States to play Internet Poker against each other.").

139 *Id.* ("The authority to resolve any dispute between a Patron of any Member State and a Licensee shall reside with the relevant authorities of the Patron State, in accordance with the laws and regulations of that state.").

140 *Id.* ("The authority to resolve any dispute between or among Patrons who are Patrons of different Patron States shall reside with the relevant authorities of the Member State where the Licensee was operating the game in which the dispute arose.").

141 Internet Gambling, § 15.06, CCH Law of Electronic Commerce, 2014 WL 2531610 (Jul. 2014)

142 Rich Ryan, *Five Thoughts: Nevada/Delaware Compact, Aviation Club Closes, and Jason Somerville*, POKER NEWS (Feb. 27, 2015), http://www.pokernews.com/news/2015/02/five-thoughts-nevada-delaware-compact-20784.htm.

143 *Id.* (Nevada is averaging 125 real money cash players and Delaware is averaging 10 over the previous six months).

144 *Id.*

145 Jonathan Griffin, *2014 Internet Gambling and Lotteries Legislation*, NCSL (Nov. 20, 2014), http://www.ncsl.org/research/financial-services-and-commerce/2014-internet-gambling-and-lotteries-legislation.aspx.

join[146] the MSIGA to boost the new state's initial player pool. Legislation and compact negotiations are slow processes, and it is much more desirable to simply add a state to an existing compact than to have each state draft a compact agreement from scratch.

2. Treatment of In-state and Bad Actors

One drawback of the MSIGA and potential compacts like it is that the three current states with legal online gaming limit potential licensees to in-state actors.[147] This limits the pool of potential licensees to brick and mortar casinos and state-run lotteries.[148] Furthermore, under the MSIGA, licensees cannot be "bad actors."[149] A "bad actor" in this context is essentially any poker operator that serviced the United States after UIGEA implementation.[150] These two clauses work in tandem to give brick and mortar casinos the edge in the U.S. Internet poker market, and also work to keep the world's largest poker website PokerStars out of the U.S.[151]

If states truly want to overcome the player liquidity problem, they should consider whether it is worth it to limit free competition by placing hurdles like requiring an in-state interest and blocking PokerStars through a "bad actor" clause. PokerStars is the world's largest pokersite for a reason,[152] and if players are dissatisfied with the in-state options, they may decide to simply not play which would further exacerbate the liquidity problem. If the states are truly focused on generating the most revenue, then states should want the operators who attract the most players to have a fair shot, rather than be preemptively locked out by in-state provisions and "bad actor" clauses. Any states that pass legislation without a "bad actor" clause[153] must

146 *See* Multi-State Internet Gaming Agreement, *supra* note 134 ("Article IV: Requirements to Join").

147 *See generally* N.R.S. § 463.750(3); 29 Del.C. § 4801(c), STATEMENT OF PURPOSE; N.J.S.A. 5:12-95.17.

148 *Id.*

149 Multi-State Internet Gaming Agreement, *supra* note 134 ("Licensees shall be of good character, honesty and integrity, and shall not be persons or organizations whose prior activity or criminal records, reputation, habits, memberships or associations pose a threat to the public interest of or to the effective regulation and control of Internet Gaming").

150 Barry Greenstein, *The Bad Actor Clause*, BARRY GREENSTEIN BLOG (Aug. 11, 2014), http://www.barrygreenstein.com/bad-actor-clause.

151 Christine Davies, *PokerStars Seeks California Poker Site Deal, Must Avoid "Bad Actors" Law*, USPOKERSITES.COM, http://www.uspokersites.com/poker-news/pokerstars-seeks-california-poker-site-deal-must-avoid-bad-actors-law/2381 (last visited Mar. 7, 2015); *See also* Part II.B *supra*.

152 *Biggest Poker Sites*, POKER NEWS, http://www.pokernews.com/sites/biggest.htm (last visited Mar. 7, 2015) ("There are many reasons that Pokerstars is the largest internet poker site. Some of these reasons are great software, good customer service, sound security, and frequent bonuses and promotions.").

153 California has bills pending both with and without "bad actor" clauses and has the population

consider the effects of compacting with states with "bad actor" clauses and how that will affect liquidity.

B. *European Precedent*

While not binding authority in the United States, the Court of Justice of the European Union ruled on a similar Internet gaming issue: whether European Union Member States were free to restrict cross-border gambling services among Member States. Italy had denied Italian gaming licenses to operators established outside Italy, particularly refusing e-gaming companies based in Malta.[154] In *Biasci et al. v. Italy*, the court found restricting national gambling markets to favor incumbent actors within a certain Member State to be a violation of EU law.[155] Here, Italy was attempting to favor its own gambling operators by protecting a €2 billion state and approved private partners controlled monopoly from outside interests.[156]

The court found authority for its ruling in a set of international treaties, of which Articles 49 and 56 of the Treaty on the Functioning of the European Union are relevant.[157] Article 49 sets out the freedom of establishment, and Article 56 sets out the freedom to provide cross border services.[158] In tandem, they function similarly to the Commerce Clause. The freedom of establishment article allows persons or companies to carry on economic activity in various Member States, and the freedom to provide services article allows operators to offer services in other Member States on a temporary basis where the operators are not yet established.[159] Essentially, one Member State cannot discriminate against the interests of another by passing a law preventing the flow of commerce to that state to the benefit of in-state operators.

American courts could look to this example and apply the *Biasci* ruling toward interstate compacts to stamp out this sort of problem prior to any future interstate compacts. For example, if Nevada, New Jersey,

to provide excellent liquidity for the current struggling states. If they choose to go without the "bad actor" clause and PokerStars establishes a foothold, it seems likely that New Jersey and Nevada will ditch their "bad actor" provisions in order to try to compact with California. *See* Davies, *supra* note 151.

154 *Italy Cannot Block Online Gambling, Says EU Court*, MALTA TODAY (Sept. 23, 2013), http://www.maltatoday.com.mt/en/businessdetails/business/businessnews/Italy-cannot-block-online-gambling-says-EU-court-20130923.

155 *Id.*; Case C-660/11, Biasci et al. v. Italy, (Sept. 12, 2013), http://curia.europa.eu.

156 MALTA TODAY, *supra* note 154.

157 Consolidated Versions of the Treaty on the Functioning of the European Union, art. 49, 56, Oct. 26, 2012, 2012 O.J. (C 326) 55, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

158 *Id.*

159 Description of freedoms to establish and provide services, *The EU Single Market*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm (last visited Aug. 25, 2014).

and Delaware all compacted to pool their players, yet restricted market participants to operators who already had a land-based presence (or could have a land-based presence) in each state, this would plausibly be unconstitutional in the vein of *Biasci*. Like *Biasci*, this would effectively be catering to incumbent, private interests by erecting a barrier to new operators. A large operator like Caesars Entertainment that owns properties in many states[160] would have no problem with compacts like this, but an operator that maintains a presence in only a single state or an overseas operator like PokerStars could potentially be locked out.

C. *Tenth Amendment Challenge to the UIGEA*

A theoretically better but less practical solution would be a repeal of the UIGEA, which would place all States and interested parties back on the same ground (except in states that have expressly prohibited Internet poker). There has been resistance to the UIGEA since its inception, but nothing strong enough to pass any of the several federal bills intent on overturning it.[161] However, the only constitutional attack on the UIGEA was the iMEGA suit in 2009.[162] States have generally sat idly by during this time except for the three that have already passed legislation and a scant few that have prohibited Internet gambling, but a Tenth Amendment challenge may have a chance to repeal the UIGEA.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[163] The ability to generate revenue through gambling regulation has traditionally been a state power.[164] There are state-run lotteries, state racetracks, and states have decided whether or not to allow commercial gambling within their borders and to what extent. A statute like the UIGEA, which indirectly purports to regulate this area, therefore appears to be in conflict with the Tenth Amendment.

However, UIGEA defenders will likely successfully argue that despite gambling being a traditionally state-regulated activity, the UIGEA is a valid exercise of Congress' Commerce power. Recently, the Supreme Court decided that Congress may regulate any activity which (1) uses the channels of interstate commerce; (2) is an instrumentality of interstate commerce; or (3) is an activity having

160 *Casino Locator*, https://www.totalrewards.com/our-casinos (last visited Aug. 25, 2014).

161 Jennifer Newell, *Frank to Fight for UIGEA Repeal in Congress*, BLUFF (Feb. 4, 2009) http://www.bluff.com/news/frank-to-fight-for-uigea-repeal-in-congress-2014/.

162 iMEGA, *supra* note 64.

163 U.S. CONST. amend. X.

164 *See supra* Part III.B.

substantial relation to interstate commerce.[165] The Internet is a channel of interstate commerce and gambling—the exchange of money for entertainment—is certainly commercial in nature, so any attack on this front is likely to fail.[166]

D. *Shelby County Framework Applied to the UIGEA*

With the recent decision in *Shelby County v. Holder*, a different avenue may have opened up. *Shelby* declared Section 4(b) of the Voting Rights Act of 1965 unconstitutional for conflicting with federalism and equal sovereignty of the states, as it was based on "old facts having no logical relation to the present day."[167] This equal protection argument could be applied to online poker. The state-by-state method forced upon legislators is inevitably going to lead to inconsistencies and preferential treatment toward established casino interests. This problem will only become exacerbated when interstate compacts come into play as it will give in-state actors a head start on building a player base. Perhaps the *Shelby* approach would prevent these issues from even coming to light.

While the Nevada/Delaware compact appears to be facially fair for both parties, this is likely due to the fact that neither state was exactly thriving and the compact might simply keep them from going out of business all together.[168] However, this will change when largely populated states join the fray. Allowing each state to dictate their rules with no federal oversight and only vague allusions as to how to even create interstate compacts[169] will naturally lead to inequities among the states. For example, Nevada can add only a fraction of the players that New Jersey can, despite sharing a lot of the same operators. New Jersey has little incentive to join the MSIGA or create a "fair" framework to distribute revenue since the majority of the player pool will come from New Jersey residents. Under a *Shelby* equal protection framework, states should be able to protect themselves from missing out on an equal part of revenue.

1. The Wire Act and UIGEA Are Obsolete

Even more telling, the Wire Act, and in turn the UIGEA, can no longer maintain constitutionality due to their basis upon "old facts

165 U.S. v. Lopez, 514 U.S. 549, 558–59 (1995).

166 *See* Chil Woo, *All Bets Are Off*, 31 CARDOZO ARTS & ENT. L.J. 569, 577–86 (2013) for a more in-depth discussion of a Tenth Amendment challenge in the related area of sports wagering.

167 Shelby County v. Holder, 133 S.Ct. 2612, 2629–30 (2013).

168 *See* Part IV.A-1.

169 *See supra* note 128. Interstate compacts may be negotiated by the Governor under the New Jersey and Nevada laws.

having no logical relation to the present day."[170] The UIGEA was enacted in a time when it was unclear whether the Wire Act of 1961 applied to Internet poker, and there were staunch supporters on both sides of the debate.[171] Prior to 2011, the DOJ had consistently relied on the Wire Act to argue that all forms of Internet gambling are illegal.[172] They have sent letters explaining that media businesses who advertise Internet gambling within the U.S. are in violation of federal law, settled with large media corporations who were advertising offshore gambling operations (resulting in large fines for the corporations), indicted individuals and corporations who operated Internet gambling websites, inter alia.[173] However in 2002, the Fifth Circuit resolved *In re MasterCard International Inc.*, affirming a district court finding that the Wire Act only applied to Internet gambling on sporting events or contests.[174] Proponents of Internet gambling have relied upon this ruling, limiting the ruling to apply *only* to wagering on sporting events, and not to other forms of online gambling, such as poker.

The Supreme Court has yet to speak on the matter, and since Circuit Court of Appeals decisions are merely persuasive and do not bind on district courts in other circuits, the question of how far the Wire Act reaches is still somewhat open. In fact, a district court in the Tenth Circuit purposefully declined to follow *In re MasterCard* when deciding *United States v. Lombardo*.[175] That court noted the Fifth Circuit's decision, but distinguished that holding both on the facts[176] and via the statute.[177] This decision further muddied the waters regarding the Wire Act's applicability to Internet wagering, but this ruling is more likely to be an aberration rather than a precursor to widespread Wire Act application against online gambling.[178] *Lombardo* was decided in Utah,

170 *Shelby*, at 2629.

171 VERONICA ROSE, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMB., LEGALITY OF ONLINE POKER (2011) *available at* http://www.cga.ct.gov/2011/rpt/pdf/2011-R-0229.pdf (noting that the Wire Act and UIGEA were unclear as to whether Internet poker is legal and briefly summarizing relevant case law and differing opinions on the statutes).

172 *Id.*

173 *Id.*

174 In re MasterCard Int'l. Inc., 313 F.3d 257, 262 (5th Cir. 2002) ("The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling. We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.").

175 U.S. v. Lombardo, 639 F. Supp. 2d 1271 (D. Utah 2007).

176 *Id.* at 1280 (noting the plaintiffs in *MasterCard* were trying to avoid gambling debts they voluntarily took on).

177 *Id.* at 1281–2 (finding that the term "sporting event or contest" modified only one of three prohibited uses in § 1084(a) meant the section included uses beyond wagering on sporting events online).

178 Although the Sheldon Adelson backed RAWA bill is doing its best to change this. *See* Part II.A.

long known for its harsh stance against gambling in any form.[179]

Even the DOJ has softened its stance on Internet wagering over the years. In 2011, the DOJ wrote a memorandum opinion concluding that the Wire Act did not prohibit Illinois and New York from selling lottery tickets to adults over the Internet, "[b]ecause the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests[.]"[180] The 2011 memorandum opinion declined to read the statute as strictly as the *Lombardo* court had, instead reading the Wire Act to mean that Congress intended to prohibit the transmission of bets and wagers on sporting events and the transmission of information on sporting events alone, rather than prohibiting the transmission of bets and wagers generally.[181]

The UIGEA was enacted in the midst of these litigations and at a time when the DOJ still relied upon the Wire Act to govern online wagers. The Wire Act was passed in 1961, when the Internet was only theoretical in nature.[182] The first American computer network connected in 1965, far after the Wire Act's passage and well before any person could conceive of transmitting bets or wagers across a computer network.[183] U.S. Attorney General Robert F. Kennedy also suggested the passage of the Wire Act primarily to stop organized crime's bookmaking activities.[184]

So in sum, the Wire Act could not have been intended to prohibit Internet gambling, since the Internet did not exist when it was passed, the DOJ has admitted that the Wire Act does not apply to poker[185] and the provisions in the UIGEA that proposed to expand the Wire Act to prohibit online casinos and poker were struck from the bill prior to passage.[186] Therefore, current regulation of the federal poker climate

179 UTAH CODE ANN. § 76-10-1102 (West 2013); H.B. 108, 2012 Gen. Sess. (Utah 2012) (explicitly banning online gambling).

180 Memorandum Opinion, Asst. Att'y Gen., Crim. Div., Dept. of Justice, On Whether Proposals by Illinois and New York to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act (Sept. 20, 2011) http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf.

181 *Id.* at 5–6.

182 *See Brief History of the Internet*, INTERNET SOCIETY, http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet (last visited Aug. 25, 2014); Leonard Kleinrock, Information Flow in Large Communication Nets (May 31, 1961) (unpublished Ph.D. thesis, MIT) (on file with MIT) (first paper on packet switching theory).

183 *Brief History of the Internet*, *supra* note 182.

184 David Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. & ECON. 533 (1964) ("It is also important to note that Kennedy never suggested that interstate gambling transmissions themselves were the problem ... they were undesirable because they were used by hoodlums.").

185 Memorandum Opinion, *supra* note 180.

186 Lawrence G. Walters, *On Second Thought…What Does the UIGEA Really Mean for Internet Gambling?*, WALTERS LAW GROUP, http://www.firstamendment.com/site-articles/commerce-

has no foundation whatsoever in the Wire Act, and since the UIGEA did not expressly regulate poker (only bank transactions with Internet gambling operators) but was enacted under the guise that the Wire Act had power to support the UIGEA's take on Internet gambling, it is nonsensical to effectively federally ban online poker and force glacially slow legislation to overcome that ban. The UIGEA effectively ended online poker in America and did so in a time when the only other on point law was the Wire Act, and that has been rendered toothless by the DOJ. Current attacks on Internet wagering using the UIGEA are fundamentally flawed and, applying *Shelby*, we can confidently state that it should no longer be applicable based on these "present day facts."[187]

This solution seems to offer some promise from a theoretical perspective, but considering that the ball is already rolling down the state-by-state legislation path, it is probably best to focus efforts on interstate compacts. Invalidating this statute would be very costly and time consuming, and will have to overcome standing issues.[188] Notwithstanding that courts may simply decline to extend a *Shelby* argument (which concerns the universal right to vote) to Internet gambling, as the "right to gamble" is far from a bedrock fundamental constitutional right. Multistate compacts will not require litigation or any constitutional rights focus, save the minor Compact clause question.

2. California: A Special Case

California is the world's eighth largest economy[189] with a vibrant poker scene.[190] The state is home to nearly one hundred separate card rooms and has never shied away from passing controversial legislation.[191] California has already attempted to pass several bills

clause/#_ftnref10 (last visited Mar. 7, 2015) ("In order to ensure passage of the Bill without debate, distraction, or delay, the proponents were required to remove more controversial the portions of the Bill that sought to expand the Wire Act to include prohibitions on online casinos and poker rooms.").

187 *Shelby*, at 2629.

188 States would have to bring the equal protection argument and it seems unlikely a state would, as each could legalize intrastate online gambling under the current rules.

189 CENTER FOR CONTINUING STUDY OF THE CALIFORNIA ECONOMY, CALIFORNIA POISED TO MOVE UP IN WORLD ECONOMY RANKINGS IN 2013 1 (July 2013), http://www.ccsce.com/PDF/Numbers-July-2013-CA-Economy-Rankings-2012.pdf.

190 Tim Gage et al., *Fiscal Impact of Legalizing Online Poker in California* (Prepared for The California Online Poker Association, Jan. 5, 2011), http://www.blueskyconsultinggroup.com/storage/OnlinePokerReport%2020110105%20w%20note%20for%20web.pdf (stating that California card rooms had gross revenues of $655 million in 2004, with Indian casinos bringing in approximately $6 billion overall).

191 *Card Rooms List*, STATE OF CAL. DEPT. OF JUSTICE, OFFICE OF THE ATT'Y. GEN., http://oag.ca.gov/gambling/cardroomlist (last visited Aug. 21, 2014) (listing ninety-six card rooms); California has passed many controversial bills in the past, such as medicinal marijuana laws, three strikes laws, same-sex marriage, equal access for transgendered persons, bans on lead

legalizing online gambling,[192] but has had trouble passing a bill that unifies the various gambling parties' interests.[193] Interested parties recognize that legalizing online gambling would be worth billions in gross revenue, so the question should be when and not if online poker will be legalized.[194] However, even Mike Gatto, the lawmaker who has introduced the most recent California poker, is pessimistic about passing any kind of legislation, setting the odds of passing legislation before the end of 2016 at about 35 percent.[195]

Because of California's size, should it successfully pass an Internet gaming bill, it would have little incentive to even compact with other states. Even if California does compact, it has almost no incentive to give other states a fair deal to join in. California is one of the few states that could regulate alone and avoid liquidity issues. But should California or other high-population states compact, a *Shelby*-type equal protection framework for compacts might be one of the only ways to achieve the dream of a national poker landscape.

CONCLUSION

Any way you slice it, Internet poker is back in the United States, at least for the time being. The UIEGA struck a major blow to the United States' online poker industry, but it was not a fatal one. Renegade websites continue to operate in defiance of the UIGEA in states that have yet to pass legislation, and a growing number of states are legalizing Internet gambling of various types. Whether current legislative efforts will rejuvenate the poker economy after its disastrous collapse in 2011 or fracture it further remains to be seen.[196] Barring a radical shift in federal principles, this state-by-state method is the best hope for America to regain even a semblance of the pre-UIGEA poker economy. It will be slow, inefficient and likely prone to litigation in the future as American online gambling jurisprudence develops.

The biggest questions will arise when the initial state websites truly get going and when smaller states decide to compact. At that

ammunition and more.

192 *California Legal Poker*, BLUFF, http://www.bluff.com/legal-poker/california (last updated Feb. 7, 2015).

193 *See* A.B. 167, *supra* note 60; Kirby Garlitos, *2014 Could be the Year California (Finally) Legalizes Online Gambling*, CALVINAYRE.COM (Oct. 7, 2013), http://calvinayre.com/2013/10/07/business/2014-could-be-the-year-california-finally-legalizes-online-gambling. Any bill will have to account for the interests of commercial casinos, Indian tribal gaming, and independent card rooms.

194 Garlitos, *supra* note 193.

195 Brian Pempus, *Don't Bet On California Online Poker This Year or Next Year*, POKER NEWS (Mar. 5, 2015), http://www.cardplayer.com/poker-news/18506-don-t-bet-on-california-online-poker-this-year-or-next-year.

196 *See supra* Part II.B.

point, many of the topics discussed here will be handled, along with any unforeseen issues. In the meantime, the UIGEA is likely here to stay, despite the fact that there are good arguments that have not yet been made for repealing it. Litigation costs are too high and any plaintiffs bringing suit may have trouble finding standing since the *Shelby* equal protection arguments are state-based.[197] Proponents of online gambling will likely avoid these uphill battles, since state legislation to legalize online gambling is already happening, albeit at a very slow pace. It is quite unfortunate that the simplest solution, allowing Americans to play on any poker site they wish, will never come to fruition. I. Nelson Rose, professor of law at Whittier College, succinctly sums up most states' feelings on the matter: "[w]e're in favor of Internet poker as long as we're the ones that get the money."[198] Let's hope that the states figure out how to get their money sooner, rather than later.

*Peter T. Busch**

197 *See* iMEGA, *supra* note 64 (plaintiffs had several issues with regards to standing).

198 Pajich, *supra* note 30.

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