

## Must the House Always Win?: A Critique of *Roussso v. State*

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“[A]ny American with a broadband connection and a checking account can engage in any form of Internet gambling from any state.”<sup>1</sup>

### I. INTRODUCTION

Gambling enthusiasts in Washington may be dismayed to learn that while it is legal to place a wager at one of the numerous brick-and-mortar casinos located in the state,<sup>2</sup> placing the same wager over the Internet is a crime.<sup>3</sup> This result arises from a 2006 amendment to Washington Revised Code 9.46.240 (the Gambling Act), which effectively bans individuals from placing bets or wagers over the Internet from Washington.<sup>4</sup> In addition to prohibiting bets made by individuals, the law also prohibits Internet gambling businesses from receiving bets placed by individuals in Washington—even if those gambling businesses operate far from the state’s borders.<sup>5</sup>

Washington’s Gambling Act is merely one component in a complex—and often contradictory—regulatory scheme on Internet gambling. Internet gambling laws operate at both the state and federal levels in

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\* J.D. Seattle University, 2012; A.B. Mount Holyoke College, 2006. I would like to thank my mother, whose enthusiasm for all forms of gambling is both an inspiration and a concern. I am also grateful for the thoughtful critiques given to me by the members of the *Seattle University Law Review*, including Carrie Hobbs, Ryan Castle, Brian Pinkerton, and Elliot Watson. Hello, Claire.

1. Sewell Chan, *Congress Rethinks Its Ban on Internet Gambling*, N.Y. TIMES, July 28, 2010, <http://www.nytimes.com/2010/07/29/us/politics/29gamble.html>.

2. “[W]hile Lee Roussso can walk into any of Washington’s licensed card rooms and lawfully compete with other patrons in a game of poker, if he turns on his computer and plays the same game over the Internet, he commits a felony under the Gambling Act and can be imprisoned for five years.” Brief for the Poker Players Alliance as Amicus Curiae in Support of Lee H. Roussso at 2, *Roussso v. State*, 239 P.3d 1084 (Wash. 2010) (No. 83040-1), 2010 WL 2206096.

3. See WASH. REV. CODE § 9.46.240 (criminalizing Internet gambling); WASH. REV. CODE § 9A.20.021 (defining the punishment associated with Internet gambling).

4. See WASH. REV. CODE § 9.46.240.

5. See *id.*

what is best described as a “regulatory and enforcement quagmire.”<sup>6</sup> At the locus of this regulatory scheme are two federal laws that purport to ban Internet gambling businesses from operating in the United States by criminalizing the interstate transmissions of bets and wagers.<sup>7</sup> Both federal laws, however, recognize the authority of states to pass laws on the subject of gambling.<sup>8</sup> Against this backdrop, some states, like Washington, prohibit Internet gambling.<sup>9</sup>

But not all states agree that online gambling should be banned. Some states, perhaps looking to increase tax revenues and close budget deficits, have recently considered legalizing the activity. In 2011 alone, lawmakers in Iowa, California, Florida, and New Jersey introduced bills to legalize certain forms of online gambling.<sup>10</sup> Given the alluring prospect of Internet gambling operations to be a source for local jobs and revenue, other states may soon follow with similar proposals.<sup>11</sup> Should these proposals become law, it is possible that some states may permit individuals to place bets over the Internet, while other states forbid such activity—a result that may have inconsistent consequences in light of the “borderless” nature of the Internet.

In addition to the potential for inconsistencies within this regulatory quagmire, state Internet gambling regulations raise constitutional questions that invoke federalism<sup>12</sup> concerns. Whereas Internet gambling is of federal purview because the funds wagered pass over state lines,<sup>13</sup> regulation of gambling has traditionally been an exercise of state police pow-

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6. Chan, *supra* note 1.

7. *See infra* Part II.B.

8. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529, 532–47 (2010).

9. At least eight states have made Internet gambling illegal. *See* Jonathan Conon, Comment, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in “Dead Man’s” Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legalization*, 99 J. CRIM. L. & CRIMINOLOGY 1157, 1173 (2009).

10. Alexandra Berzon, *States Make Play for Web Gambling*, WALL ST. J., Mar. 2, 2011, <http://online.wsj.com/article/SB10001424052748703409904576174730883294102.html?KEYWORDS=internet+gambling>. In 2001, Nevada considered legalizing all forms of Internet gambling in a law that would allow for “interactive gaming.” Ciaccio, *supra* note 8, at 548. But the state dropped this proposal after the Department of Justice announced that it considered all interstate Internet gambling illegal under the Wire Act. *Id.* In 2011, the state renewed its attempt to become the center of the gambling industry when it proposed regulations that would permit certain forms of intrastate online gambling. Alexandra Berzon, *Nevada Sets Framework for Internet Poker*, WALL ST. J., Dec. 22, 2011, <http://online.wsj.com/article/SB10001424052970204464404577115182815513366.html>.

11. NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT ch. 1, at 6 (June 18, 1999), <http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>.

12. Federalism is defined as “the legal relationship and distribution of power between the national and regional governments within a federal system of government.” BLACK’S LAW DICTIONARY 687 (9th ed. 2009).

13. *See* U.S. CONST. art. I, § 8.

er within an individual state's borders.<sup>14</sup> Before the Washington State Supreme Court's recent opinion in *Rouso v. State*, it was uncertain whether a state such as Washington could regulate Internet gambling without running afoul of federal constitutional authority. Yet in *Rouso*, the supreme court affirmed the state's authority to regulate Internet gambling.<sup>15</sup> Ultimately, the court upheld the law under the dormant Commerce Clause, determining that the Gambling Act did not impermissibly interfere with the federal government's authority to regulate interstate commerce.<sup>16</sup>

As the first decision addressing the constitutionality of a state Internet gambling law,<sup>17</sup> the Washington State Supreme Court's decision in *Rouso* is significant. In light of recent state proposals to legalize Internet gambling, *Rouso* will likely become persuasive precedent as other courts struggle to determine whether other state Internet gambling laws will share a similar fate. However, the Washington State Supreme Court's reasoning in *Rouso* may leave these states with more questions than answers. Specifically, the court's conclusory and incomplete reasoning provides little guidance for how future courts may assess the constitutionality of state Internet gambling laws.

This Note critiques the Washington State Supreme Court's decision in *Rouso* and proposes that future courts should adopt the reasoning articulated by the Washington Court of Appeals when assessing the constitutionality of state Internet gambling laws. To that end, this Note proceeds in five Parts. Part II explains the social concerns associated with Internet gambling and outlines the federal and state laws that seek to address those concerns. Part III outlines the origin, principles, and legal standard of the dormant Commerce Clause, the doctrine used by Washington courts to assess the constitutionality of the state's Internet gambling ban. Part IV then discusses the legal challenge in *Rouso*, beginning with a background of the case and concluding with the court's application of the dormant Commerce Clause. In particular, this Part argues that although the court reached the correct conclusion, its analysis was unfaithful to precedent and incomplete. Part V argues that future courts should adopt the reasoning applied by the Washington State Court of Appeals when assessing the constitutionality of state Internet gambling regulations. Part VI concludes.

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14. Conon, *supra* note 9, at 1164.

15. *Rouso v. State*, 239 P.3d 1084, 1095 (Wash. 2010).

16. *Id.*

17. A Westlaw search yields no results for cases other than *Rouso* that address the constitutionality of a state's Internet gambling law.

## II. AN UNCERTAIN REGULATORY SCHEME

Internet gambling raises a host of social concerns that both federal and state laws have sought to address. This Part first identifies these concerns and then explains how current legislation operates to address these concerns. In particular, section B provides an overview of two federal statutes on the subject of Internet gambling, while section C provides an overview of Washington's Gambling Act.

*A. Social Concerns Associated with Internet Gambling*

The Internet gambling industry is estimated to bring in over \$24 billion a year.<sup>18</sup> Fueling the success of this industry is the fact that gambling online is simply easier than in traditional "brick-and-mortar" casinos.<sup>19</sup> Instead of having to travel to a casino or lottery outlet to place a bet, individuals can simply gamble while sitting at a home computer.<sup>20</sup> Placing bets online allows individuals to avoid not only the inconvenience and other costs of traveling to a gambling venue, but also the reputational harm sometimes associated with gambling in a public place.<sup>21</sup> And while roughly 86% of Americans have gambled or will gamble at some point in their lives,<sup>22</sup> this figure may soon increase as individuals are able to gamble "in every home and every bedroom and every dorm room, and on every iPhone, every BlackBerry, every laptop."<sup>23</sup>

For lawmakers, the popularity of Internet gambling, coupled with technological advancements, raise regulatory concerns in three particular areas. First, children are susceptible targets of Internet gambling operations.<sup>24</sup> Children are particularly captive audiences who spend considerable amounts of time on the Internet, often sitting unsupervised in front of computer screens.<sup>25</sup> Exacerbating this unsupervised access is the fact that most gambling websites rely on a user to truthfully disclose his or her correct age prior to gambling, often making little or no attempt to verify the accuracy of the information before permitting the user to gamble.<sup>26</sup> Because Internet gambling websites can be used anonymously, these un-

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18. Anthony S. Broadman, *Washington State Outbids Betcha.com*, 14 GAMING L. REV. & ECON 685, 687 (2010).

19. Jack Goldsmith, *What Internet Gambling Legislation Teaches About Internet Regulation*, 32 INT'L LAW. 1115, 1116 (1998).

20. *Id.*

21. *Id.*

22. NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 11, ch. 1, at 1.

23. Chan, *supra* note 1.

24. NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 11, ch. 5, at 4.

25. Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 637 (2011).

26. NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 11, ch. 5, at 4.

derage users may access—and potentially abuse—gambling websites even if such websites request age verification.<sup>27</sup>

Second, compulsive gamblers are particularly vulnerable to the allure of Internet gambling.<sup>28</sup> Internet games are available twenty-four hours a day and offer instant gratification to individuals in the privacy of their homes.<sup>29</sup> This instant gratification, coupled with the ease with which gambling information can be transmitted over the Internet, may “magnify the potential destructiveness” of existing gambling addictions.<sup>30</sup>

Lastly, the lack of accountability and transparency associated with Internet gambling may result in criminal abuse of online gambling operations. As one user describes, the absence of face-to-face interaction reduces the legitimacy of gambling online:

Not only are you not looking at your opponents, you’re not looking at the cards being dealt, you’re not looking at who’s dealing them to you. So, you don’t know if the whole thing is legitimate, even if all the players sitting with you are just as legitimate as you are. Maybe the whole game isn’t.<sup>31</sup>

Because Internet gambling businesses currently operate out of foreign jurisdictions, these businesses could quickly alter, move, or entirely remove sites without users catching on.<sup>32</sup> The ease of mobility and lack of transparency associated with foreign Internet gambling operations thus makes it possible for dishonest operators to take users’ money and promptly close down without ever paying winnings.<sup>33</sup>

### *B. The Federal Response to Internet Gambling*

In light of these social hazards, at least two federal statutes have sought to prevent the interstate transmission of online gambling information: the Wire Act and the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>34</sup> Both statutes, however, are vague and attempt to regu-

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27. *Id.*

28. *Id.* ch. 5, at 5.

29. *Id.*

30. *Id.* (quoting *Internet Gambling Prohibition Act: Hearing on H.R. 2380 Before the Subcomm. on Crime, Comm. on the Judiciary*, 105th Cong. (1998) (statement of Bernard P. Horn, Director of Political Affairs of the National Coalition Against Gambling Expansion)).

31. *How Online Gamblers Unmasked Cheaters*, CBS NEWS, (June 28, 2009, 9:27 PM), <http://www.cbsnews.com/stories/2008/11/25/60minutes/main4633254.shtml>.

32. NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 11, ch. 5, at 5.

33. *Id.*

34. Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH L. REV. 41, 45 (2010). The Travel Act and the Illegal Gambling Business Act also touch on the subject of gambling. *See id.* Because the applicability of these statutes to state Internet gambling laws was not addressed by the Washington courts in *Rouso*, they are beyond the scope of this Note.

late Internet gambling only indirectly; neither operates as an outright ban of Internet gambling.

### 1. The Wire Act

The Wire Act of 1961 (the Wire Act) was one of the first federal statutes used to question the legality of Internet gambling.<sup>35</sup> Although the Wire Act does not explicitly target gambling over the Internet, the statute makes it a federal crime to knowingly use wire communications to place bets or wagers through interstate or foreign commerce.<sup>36</sup> The relevant portion of the Wire Act provides:

Whoever being engaged in the business of betting or wagering knowingly uses 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 wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>37</sup>

The statute also contains a rule of construction that exempts the transmission of a bet or wager between two or more states that each permit gambling,<sup>38</sup> which implicitly acknowledges the authority of the states to regulate gambling within their borders.

Although the Wire Act was passed long before the advent of the Internet,<sup>39</sup> many scholars believe that the statute's reference to "a wire communication facility" is sufficiently broad such that the statute could also be read as prohibiting Internet gambling activities.<sup>40</sup> Notably, the

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35. Craig P. Grahmann, *Betting on Prohibition: The Federal Government's Approach to Internet Gambling*, 7 NW. J. TECH. & INTELL. PROP. 161, 167 (2009).

36. 18 U.S.C. § 1084(a).

37. *Id.* "The purpose of [the Wire Act] is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce." H.R. Rep. No. 967, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631.

38. 18 U.S.C. § 1084(b) ("Nothing in this section shall be construed to prevent . . . the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State . . . where betting on that sporting event or contest is legal into a State . . . in which such betting is legal.").

39. *Rousso v. State*, 204 P.3d 243, 248 (Wash. Ct. App. 2009).

40. *See* Ciaccio, *supra* note 8, at 532–33. Notwithstanding this view, there are at least three other interpretations to the Wire Act, including that the statute (1) prohibits all Internet betting; (2) prohibits only Internet sports betting; or (3) prohibits only Internet sports gambling that is not sanctioned by the Interstate Horseracing Act of 1978. *Id.* at 541.

Department of Justice took the position that the Wire Act's reach extended to all forms of gambling.<sup>41</sup> Yet the Office of Legal Counsel (OLC) within the Department of Justice recently cast doubt on such an interpretation when it concluded in an advisory opinion that the Wire Act extends only to the transmission of bets or wagers on a sporting event or contest.<sup>42</sup> Thus, at least according to the OLC, the Wire Act does not prohibit any online gambling activity that is not a sporting event or contest.<sup>43</sup> Because the OLC's opinion is merely advisory,<sup>44</sup> it is unclear whether courts will accept this interpretation.

## 2. The UIGEA

The UIGEA<sup>45</sup> is the most recent federal statute to regulate the interstate transfer of funds used for gambling purposes. Enacted in 2006, the UIGEA extends the reach of the Wire Act and specifically addresses the subject of Internet gambling.<sup>46</sup> Under the UIGEA,

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmit-

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41. Dep't of Justice, Office of Legal Counsel, *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*, 35 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 1, 1 (Sept. 20, 2011), <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

42. *Id.* at 3. The OLC refrained from answering whether such a ruling would conflict with the UIGEA, although that issue was brought to its attention. *Id.*

43. *Id.* at 4. The OLC read the relevant portion of the Wire Act as consisting of two broad clauses. Under the first clause, anyone engaged in the business of betting or wagering is barred from knowingly using 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." *Id.* (quoting 18 U.S.C. § 1084(a)). "The second [clause] bars any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to 'receive money or credit' either 'as a result of bets or wagers' or 'for information assisting in the placing of bets or wagers.'" *Id.* (quoting 18 U.S.C. § 1084(a)). Notably, the phrase "on any sporting event or contest" appears in the first clause, but not the second. *Id.* Despite the absence of this phrase in the second part of the statute, the OLC opined that in light of the statute's text and legislative history, the phrase "bets or wagers" in the second clause was best read as a reference to the phrase "bets or wagers on any sporting event or contest" in the first clause. *See id.* at 5–12.

44. The OLC's opinions are, however, generally considered binding on the Executive Branch. Joseph Marchesano, Note, *Where Lawfare Meets Lawsuit in the Case of Padilla v. Yoo*, 34 SEATTLE U. L. REV. 1575, 1583 (2011).

45. 31 U.S.C. § 5361–67.

46. Ciaccio, *supra* note 8, at 542. Several years after gambling first appeared on the Internet, the National Gambling Impact Study Commission recommended that Congress pass legislation that would prohibit wire transfers either to Internet gambling websites or from the banks that represent such websites. 31 U.S.C. § 5361(a)(2).

ting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.<sup>47</sup>

Although it criminalizes the processing or receipt of funds used in Internet gambling, the UIGEA does not altogether ban online gambling.<sup>48</sup> Instead, by targeting the transfer of funds used for gambling purposes, the UIGEA indirectly prohibits Internet gambling businesses from operating in the United States.<sup>49</sup>

Despite its name, the UIGEA does little to clarify what types of Internet gambling are “unlawful gambling operations.”<sup>50</sup> The statute does not define what activities constitute “unlawful internet gambling,” leaving that determination to existing federal and state law.<sup>51</sup> Moreover, the statute only targets funds that flow to Internet gambling operators; it does not apply to the individuals who place bets online.<sup>52</sup>

The UIGEA does not explicitly preempt state laws that regulate Internet gambling. Instead, the statute contains a rule of construction acknowledging that states may regulate Internet gambling within their borders: “No provision [of the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”<sup>53</sup> Thus, the UIGEA, like the Wire Act, envisions that states will continue to regulate gambling to some degree.<sup>54</sup>

### C. Washington’s Internet Gambling Ban

Washington responded to the social harms associated with Internet gambling in 2006 when the state legislature proposed an amendment to

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47. 31 U.S.C. § 5363.

48. King, *supra* note 34, at 45.

49. Grahmann, *supra* note 35, at 1.

50. Ciaccio, *supra* note 8, at 542.

51. *Id.* The statute defines “unlawful internet gambling” as “plac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362(10)(a).

52. Ciaccio, *supra* note 8, at 543.

53. 31 U.S.C. § 5361(b).

54. *Rouso v. State*, 204 P.3d 243, 248 (Wash. Ct. App. 2009).



the state's Gambling Act of 1973.<sup>55</sup> The purpose of the amendment was to “reaffirm[] and clarify[] the prohibition against internet and certain other interactive electronic or mechanical devices to engage in gambling.”<sup>56</sup> Testimony on the bill urged that the bill was needed to reaffirm the state's policy “prohibiting gambling that exploits . . . new technologies.”<sup>57</sup> The amendment received overwhelming support from the legislature, passing by a vote of forty-four to three.<sup>58</sup>

In its current form, the Gambling Act is a sweeping prohibition against all aspects of online gambling. The Act provides, “Whoever knowingly transmits or receives gambling information by . . . the internet, a telecommunications transmission system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony . . . .”<sup>59</sup> Thus, not only is it illegal for Washington residents to gamble online, but it is also illegal to operate an Internet gambling website; to install or maintain equipment to send or receive gambling information; and to facilitate Internet gambling in any way.<sup>60</sup>

The Act criminalizes the transmission of “gambling information,” a phrase that encompasses “any wager made in the course of and any information intended to be used for professional gambling.”<sup>61</sup> Under this

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55. S.B. 6613, 59th Leg., Reg. Sess. (Wash. 2006).

56. *Id.* The senate's recommendation to modify the Gambling Act arose partly out of its concern that the judiciary might find that the state's existing gambling laws permitted certain forms of online gambling. *Id.* The state was a defendant to a case where it was argued that the state's existing gambling laws empowered the Washington Lottery Commission to authorize electronic gambling devices. *Id.*

57. *Id.* In addition to this concern, the legislature also stated that prohibiting all forms of Internet gambling was necessary to support the state's policy against lawsuits and other legal challenges. *Id.* Specifically, the legislature feared challenges brought under various international trade agreements; challenges in enforcement actions prosecuted in cooperation with federal law enforcement agencies; and challenges in negotiations under the Indian Gaming Regulatory Act. *Id.*

58. *Id.*

59. WASH. REV. CODE § 9.46.240.

60. WASH. STATE GAMBLING COMM'N, GC5-228, ILLEGAL INTERNET GAMBLING 1 (Oct. 2011), [www.wsgc.wa.gov/newsletters/5-228.pdf](http://www.wsgc.wa.gov/newsletters/5-228.pdf).

61. WASH. REV. CODE § 9.46.0245. A person is defined as engaging in professional gambling when:

- (a) Acting other than as a player or in the manner authorized by this chapter, the person knowingly engages in conduct which materially aids any form of gambling activity; or
- (b) Acting other than in a manner authorized by this chapter, the person pays a fee to participate in a card game, contest of chance, lottery, or other gambling activity; or
- (c) Acting other than as a player or in the manner authorized by this chapter, the person knowingly accepts or receives money or other property pursuant to an agreement or understanding with any other person whereby he or she participates or is to participate in the proceeds of gambling activity; or
- (d) The person engages in bookmaking; or

expansive definition, any wager placed over the Internet from Washington—whether for a penny or for several hundred dollars—could subject a user to criminal penalties.<sup>62</sup> In addition, because the Act criminalizes the “receipt” of gambling information, the law could apply to any Internet gambling operator that receives a bet from an individual located in Washington,<sup>63</sup> even if that business operates far outside the state’s borders.<sup>64</sup>

The Gambling Act is striking not only because of its scope, but also because of the severity of the punishment associated with violations. Violations of the Act range from a misdemeanor to a felony,<sup>65</sup> and persons convicted of Internet gambling in Washington may face a maximum penalty of five years in prison, a \$10,000 fine, or both.<sup>66</sup> Some have characterized this punishment as particularly harsh: “[In] Washington[] . . . Internet gambling is a class C felony, the same as third-degree rape.”<sup>67</sup> Others have characterized the law as hypocritically excessive: “Martians might have a difficult time understanding that if you play poker online for money in the state of Washington, you’re committing a class C felony.”<sup>68</sup>

Notwithstanding the myriad of reasons the legislature may have had to ban Internet gambling in Washington, the state’s law enforcement nonetheless may face significant hurdles in its efforts to curb or eliminate the activity.<sup>69</sup> Most Internet gambling businesses operate in foreign jurisdictions under licenses granted by those jurisdictions,<sup>70</sup> making it chal-

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(e) The person conducts a lottery; or

(f) The person violates [Wash. Rev. Code] § 9.46.039.

WASH. REV. CODE § 9.46.0269. Furthermore, in Washington, funds do not need to be wagered for a ‘bet’ to be placed; the mere opportunity to gamble may fall within this definition. *See* Internet Cmty & Entm’t Corp. v. Wash. State Gambling Comm’n, 238 P.3d 1163, 1167 (Wash. 2010).

62. Appellant’s Opening Brief at 4, *Rouso v. State*, 239 P.3d 1084 (Wash. 2010) (No. 83040-1), 2009 WL 6083567.

63. WASH. REV. CODE § 9.46.240.

64. Whether the state could prosecute an out-of-state actor for such a violation raises a jurisdictional question that is beyond the scope of this Note.

65. WASH. REV. CODE § 9.46.240; WASH. REV. CODE § 9A.20.021.

66. WASH. REV. CODE § 9A.20.021.

67. Ciaccio, *supra* note 8, at 549.

68. Michael Hiltzik, *Calling America’s Bluff on Internet Gambling*, L.A. TIMES, Oct. 19, 2009, <http://articles.latimes.com/2009/oct/19/business/fi-hiltzik19> (quoting Joseph M. Kelly).

69. In Washington, enforcement of the Gambling Act is focused on “larger, higher level internet gambling activities,” which includes the operation of gambling websites and service providers. WASH. STATE GAMBLING COMM’N, GC5-165, ILLEGAL INTERNET GAMBLING 2 (Feb. 2012), [http://www.wsgc.wa.gov/newsletters/internet\\_gambling\\_brochure.pdf](http://www.wsgc.wa.gov/newsletters/internet_gambling_brochure.pdf). Although the state does not currently have an active campaign against individuals who gamble online in the state, the state does warn that such players run the risk of prosecution. *Id.*

70. NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 11, ch. 2, at 16.

lenging—if not impossible—for state law enforcement officials to effectively prosecute violations of the Act.<sup>71</sup>

### III. THE DORMANT COMMERCE CLAUSE: A NUCLEAR BOMB OF STATE INTERNET REGULATIONS

In *Rouso*, the Washington State Supreme Court noted that, although neither the Wire Act nor the UIGEA purports to preempt state Internet gambling laws, this does not mean that Washington can regulate Internet gambling with impunity.<sup>72</sup> Accordingly, both the Washington Court of Appeals and the Washington State Supreme Court applied the dormant Commerce Clause to assess whether the Gambling Act impermissibly interfered with the federal government’s constitutional authority over interstate commerce.<sup>73</sup>

This Part provides an overview of the dormant Commerce Clause, beginning with the origins of the Clause, along with the legal standard that courts apply. It then discusses how courts have applied the dormant Commerce Clause with regard to state regulations affecting the Internet.

#### *A. Origin and Policies Behind The Dormant Commerce Clause*

Despite its name, the dormant Commerce Clause does not appear in the Constitution; instead, it is a negative inference drawn by the Supreme Court in recognition of powers granted to the federal government under Article I of the United States Constitution.<sup>74</sup> Article I grants the federal government the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>75</sup> Although this language speaks in terms of a positive grant of power to the federal government, the Supreme Court has long recognized that this positive grant of authority also implies a limitation on the power of the states to

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71. *Id.* Notably, some state officials have sought to address these enforcement difficulties by calling for a national response to online gambling. *See id.* In its plea for a federal response to Internet gambling, the National Association of Attorneys General (NAAG) noted that state laws on Internet gambling are frustratingly ineffective. *Id.* Citing “[t]he jurisdictional uniqueness of the Internet,” the NAAG called on Congress to enact a national response to Internet gambling activities that evade state regulations. *Id.*

72. *Rouso v. State*, 239 P.3d 1084, 1088 (Wash. 2010).

73. *See infra* Part IV.

74. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

75. U.S. CONST. art. I, § 8, cl. 3. The Founding Fathers also recognized the need to “restrain[] by national control . . . injurious impediments to the intercourse [among the States].” THE FEDERALIST No. 22, at 144-45 (Alexander Hamilton).

erect barriers against interstate trade.<sup>76</sup> It is from this negative implication that the dormant Commerce Clause arose.

The dormant Commerce Clause is thus a judge-made doctrine<sup>77</sup> aimed at prohibiting “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>78</sup> Hailed as “essential to the foundations of the Union,”<sup>79</sup> the dormant Commerce Clause serves as a bulwark against state laws that interfere with or impede a strong national economy.<sup>80</sup> To that end, the doctrine reflects the policies that one state should not foreclose others from access to its market; that states may not enact laws to give themselves competitive advantages; and that states should not rival one another for favored status of citizens.<sup>81</sup>

While originalists may scoff at the existence of a doctrine not found in the Constitution,<sup>82</sup> two justifications underlie the existence and application of the dormant Commerce Clause. First, the doctrine ensures economic efficiency of a national market.<sup>83</sup> By analyzing whether state regulations cast economic burdens on out-of-state businesses, the judiciary’s recognition of the dormant Commerce Clause is a means of protecting unrestricted trade among the states and securing the economic benefits of a free market.<sup>84</sup> Second, the doctrine preserves the representative process of law making.<sup>85</sup> By analyzing the effect a state law has on out-of-state businesses, the judiciary’s application of the doctrine is a means of ensuring that out-of-state actors do not bear the costs of a law that passed without the votes of their representative legislatures.<sup>86</sup>

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76. *Hughes*, 441 U.S. at 326 (“The Commerce Clause has . . . been interpreted by th[e] Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.”).

77. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 786 (2001).

78. *Granolm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

79. *Id.*

80. *See id.* (noting that the dormant Commerce Clause reflects a central concern of the Framers, which was that in order to succeed, the Union would have to avoid tendencies toward “economic Balkinization”).

81. *Id.*

82. Justice Scalia, for example, has criticized the dormant Commerce Clause as requiring an inquiry into “whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

83. Goldsmith & Sykes, *supra* note 77, at 790.

84. *Id.* at 788.

85. *Id.*

86. *Id.*

*B. The Legal Standard*

Under the dormant Commerce Clause, a statute may be invalidated if it discriminates against interstate commerce, and courts look for two types of discrimination: express discrimination and implicit discrimination.<sup>87</sup>

To determine whether a state regulation withstands scrutiny under the dormant Commerce Clause, a court first scrutinizes the language of the challenged law. In doing so, the court looks to see whether the language of the challenged law draws distinctions between in-state and out-of-state economic interests.<sup>88</sup> If the state law discriminates against out-of-state businesses in favor of local interests, it will be subjected to “the strictest scrutiny” to determine whether there is a legitimate local purpose and an absence of nondiscriminatory alternatives.<sup>89</sup>

If the language of the state law is nondiscriminatory, a court examines whether the law nonetheless “impinges on interstate commerce”<sup>90</sup> in its practical effect. To determine if the effect of a state law is to discriminate against interstate commerce, a court must weigh the state’s interests in passing the law against the burdens the law imposes on interstate commerce.<sup>91</sup> If a state statute regulates “even-handedly” to promote a legitimate state interest and affects interstate commerce only incidentally, it is upheld.<sup>92</sup> However, if the statute imposes burdens on interstate commerce that are clearly excessive in relation to the state benefits, a court will examine whether the state’s objective could have been accomplished in a less burdensome manner.<sup>93</sup> If the state has a legitimate purpose in the regulation, then the extent of the burden on interstate commerce that a court will tolerate depends on both the nature of the state interest and whether that interest could be promoted equally by less restrictive means.<sup>94</sup>

In analyzing the burdens that a state law imposes on interstate commerce, a court is not limited to considering the financial costs imposed on out-of-state actors. Goldsmith and Sykes, two leading scholars on state Internet regulations under the dormant Commerce Clause, have also opined that the Clause prohibits conduct that (1) creates inconsisten-

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87. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (explaining that courts must inquire whether a state statute discriminates against interstate commerce either on its face or in practical effect).

88. *See id.*

89. *Id.* at 337.

90. Goldsmith & Sykes, *supra* note 77, at 788.

91. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

92. *Id.*

93. *Id.*

94. *Id.*

cies among the states and (2) regulates conduct occurring wholly outside of the state.<sup>95</sup> The scholars' arguments are rooted firmly in Supreme Court jurisprudence. For example, in *CTS Corporation v. Dynamics Corporation of America*, the Court held that the Clause also prohibited state regulations that "adversely affect interstate commerce by subjecting activities to inconsistent regulations."<sup>96</sup> This maxim does not mandate uniformity among state laws,<sup>97</sup> but instead looks to whether the inconsistencies between state laws create compliance costs that are clearly excessive in relation to local benefits.<sup>98</sup> In addition, in *Healy v. Beer Institute*, the Supreme Court struck down a Connecticut law that had the effect of limiting the ability of out-of-state beer shippers to alter their prices outside of Connecticut.<sup>99</sup> The "critical inquiry," the Court held, was "whether the practical effect of the regulation [was] to control conduct beyond the boundaries of the State."<sup>100</sup>

### C. The Internet and the Dormant Commerce Clause

When applied to state Internet regulations, the scope of the dormant Commerce Clause is not always clear. This uncertainty has led critics to deem the doctrine a "nuclear bomb of a legal theory" of state Internet regulations.<sup>101</sup>

That metaphor is an apt description of early judicial decisions on Internet regulations. For example, in *American Libraries Association v. Pataki*,<sup>102</sup> one of the most controversial cases on state Internet regulations, a district court enjoined enforcement of a New York statute that prohibited the transmission of pornographic communications over the Internet.<sup>103</sup> In doing so, the court reasoned that because the Internet had no jurisdictional boundaries, New York's law might subject an actor to "haphazard, uncoordinated, and even outright inconsistent regulations" by states.<sup>104</sup> According to the court, "[t]he nature of the Internet ma[de] it impossible to restrict the effects" of the Internet regulation that fall outside the regulating state.<sup>105</sup> Exacerbating this concern was the fact that

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95. Goldsmith & Sykes, *supra* note 77, at 789.

96. 481 U.S. 69, 88 (1987).

97. Goldsmith & Sykes, *supra* note 77, at 790.

98. *State v. Heckel*, 24 P.3d 404, 411 (Wash. 2001) (adopting the analysis of Goldsmith and Sykes and recognizing that the inconsistent regulations and extraterritoriality inquiries are proper facets of the dormant Commerce Clause).

99. 491 U.S. 324, 336 (1989).

100. *Id.*

101. Goldsmith & Sykes, *supra* note 77, at 787.

102. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

103. *Id.* at 178-79.

104. *Id.* at 168.

105. *Id.* at 177.

information transmitted over the Internet appeared simultaneously in every state: “Once a provider posts content on the Internet, it is available to all other Internet users worldwide.”<sup>106</sup>

*American Libraries* thus stands for the extreme proposition that states simply may not pass laws affecting the Internet. Under the approach in *American Libraries*, “the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state’s domestic policies.”<sup>107</sup> This bright-line rule prohibits any state law concerning economic activity conducted over the Internet because, under the court’s line of reasoning, Internet service providers could send content into every state, and state governments could not stop the flow of this content at the borders.<sup>108</sup> Like the Internet itself, the reach of the court’s logic has no boundaries: any state law affecting the Internet would likely be unconstitutional.

While some jurisdictions have followed the *American Libraries* approach regarding state regulation of the Internet,<sup>109</sup> the view is not without criticism. Some scholars maintain that *American Libraries* represents “an impoverished understanding” of the Internet, misreads dormant Commerce Clause jurisprudence, and misunderstands the economics of state regulation of transborder transactions.<sup>110</sup> Despite these criticisms, the reasoning in *American Libraries* continues to be invoked by those who argue that state regulations of the Internet have effects beyond a state’s borders, create inconsistent obligations, and impose burdens on interstate commerce that outweigh their local benefits.<sup>111</sup>

Yet the bright-line rule of *American Libraries* view has largely given way towards a more balanced approach. As the Washington courts’ analyses in *Roussio* demonstrates, the dormant Commerce Clause provides an appropriate vehicle for assessing whether state Internet gambling laws impose impermissible burdens on interstate commerce.

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106. *Id.* at 167 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)).

107. *Id.* at 174.

108. Goldsmith & Sykes, *supra* note 77, at 785.

109. *See, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239–40 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161–62 (10th Cir. 1999); *Cyberspace Comm’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751–52 (E.D. Mich. 1999), *aff’d and remanded*, 238 F.3d 420 (6th Cir. 2000).

110. Goldsmith & Sykes, *supra* note 77, at 787; *see also* Laura Vanderstappen, Note, *Internet Pharmacies and the Specter of the Dormant Commerce Clause*, 22 WASH. U. J.L. & POL’Y 619 (2006); Presidents and Fellows of Harvard College, *Recent Development—The Dormant Commerce Clause and the Internet*, *American Booksellers Foundation v. Dean*, 17 HARV. J.L. & TECH. 296 (2003).

111. Goldsmith & Sykes, *supra* note 77, at 787.

IV. *ROUSSO V. STATE*: THE CONSTITUTIONAL CHALLENGE TO  
WASHINGTON'S INTERNET GAMBLING BAN

This Part begins with an overview of *Roussou's* factual and procedural background. It then discusses in turn how the Washington Court of Appeals and the Washington State Supreme Court applied a dormant Commerce Clause analysis to *Roussou's* constitutional challenge.

A. *Case Background and Procedural History*

Lee Roussou, a poker enthusiast, began his gambling career in 2003 after learning of the rags-to-riches story of Chris Moneymaker, a World Series of Poker Champion.<sup>112</sup> From 2003 until 2006, Roussou participated in poker games with people around the world through the website pokerstars.com.<sup>113</sup> While on the website, Roussou played in "ring" or "cash" games where the chips on the virtual table represented actual money.<sup>114</sup> Roussou deemed himself a "skilled amateur" who managed to win a qualifying tournament for the 2005 World Series of Poker.<sup>115</sup>

Yet Roussou's aspirations of a World Series of Poker Title were short-lived. After July 6, 2007, the effective date of Washington's Internet gambling ban, Roussou committed a criminal act of professional gambling each time he paid fees to play poker online.<sup>116</sup> Thus, on the opening day of the 2007 World Series of Poker Main Event, Roussou filed an action in King County Superior Court, seeking a declaration that Washington's ban on Internet gambling was unconstitutional.<sup>117</sup> Roussou based his claim on two theories: that the Gambling Act was a mere protectionist measure designed to discriminate against otherwise legal out-of-state businesses and in favor of Washington businesses; and that the Gambling Act interfered with Congress's authority to regulate interstate and international commerce.<sup>118</sup>

The trial court denied Roussou's request for relief,<sup>119</sup> and Roussou appealed. On appeal, Roussou argued that the lower court "failed to recog-

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112. Appellant's Opening Brief at 2, *Roussou v. State*, 239 P.3d 1084 (Wash. 2010) (No. 83040-1), 2009 WL 6083567. In 2003, Chris Moneymaker defeated 839 players in the World Series of Poker Main Event and won \$2,500,000. Moneymaker qualified for the Event by playing poker over the Internet. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Complaint at 1-5, *Roussou v. State*, 239 P.3d 1084 (Wash. 2010) (No. 07-2-22438-6 KNT), 2007 WL 5754725 at \*1-5.

117. *Id.*

118. *Id.*

119. Order Denying Plaintiff's Motion for Declaratory Judgment and Granting Defendant's Cross-Motion for Summary Judgment, *Roussou v. State*, 239 P.3d 1084 (Wash. 2010) (No. 07-2-22438-6 KNT), 2008 WL 4690005.



nize the State's hypocrisy with respect to gambling . . . or chose to reward it."<sup>120</sup>

*B. The Decision of the Washington Court of Appeals*

Rouso's request for relief fared no better with the Washington Court of Appeals. First, after determining that the dormant Commerce Clause provided the appropriate standard with which to review the claim,<sup>121</sup> the court quickly disposed of the argument that the language of the Gambling Act discriminated against interstate commerce.<sup>122</sup> As the court correctly noted, the language of the Act applied equally to in-state and out-of-state actors and businesses.<sup>123</sup>

Second, the court addressed Rouso's argument that the effect of the Act was to discriminate against interstate commerce by restricting Washington poker players to gamble in state.<sup>124</sup> According to Rouso, the purpose of the state's ban on Internet gambling was mere economic protectionism.<sup>125</sup> To illustrate this alleged economic protectionism, Rouso pointed out that the volume of legal gambling in Washington increased from \$33.5 million to \$1,695.3 million within a thirty-year period, "a staggering fifty-fold increase in legal gambling!"<sup>126</sup> These figures, Rouso claimed, showed that the state had a significant economic interest in protecting its brick-and-mortar gambling operations.<sup>127</sup> Thus, he argued, when "[st]ripped of legislative pretensions," these figures demonstrated that "prosecutions under the Gambling Act [did] not serve the purpose of policing public morals, but, instead, punished encroachments on the State's monopoly."<sup>128</sup>

The court disagreed with Rouso's characterization of the Gambling Act's effects. First, the court examined Washington's long history of regulating gambling, as well as its legitimate need to regulate an activ-

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120. Appellant's Opening Brief at 12, *Rouso v. State*, 239 P.3d 1084 (Wash. 2010) (No. 84040-1), 2009 WL 6083567. The "hypocrisy" Rouso referred to was the fact that Washington law permitted him to play poker in a licensed card room, but not online. Brief for the Poker Players Alliance as Amicus Curiae in Support of Lee H. Rouso at 1, *Rouso*, 239 P.3d 1084 (No. 83040-1), 2010 WL 2206096.

121. The court concluded that the dormant Commerce Clause applied because, although various federal laws affect Internet gambling, none of those laws expressly authorized otherwise unconstitutional state laws regulating Internet gambling. *Rouso v. State*, 204 P.3d 243, 246 (Wash. Ct. App. 2009).

122. *Id.*

123. *Id.*

124. Appellant's Opening Brief at 11-12, *Rouso v. State*, 239 P.3d 1084 (Wash. 2010) (No. 84040-1), 2009 WL 6083567.

125. *See id.* at 11.

126. *Id.*

127. *Id.* at 11-12.

128. *Id.* at 11.

ity that fell into “the category of social and economic evils.”<sup>129</sup> A review of the history of Washington’s gambling laws demonstrated that the state had a longstanding and legitimate interest in controlling gambling.<sup>130</sup> That interest was a “pure exercise of the traditional police power,” and it was justified by the state’s desire to safeguard its citizens both from the harms of gambling itself and from professional gambling’s “historically close relationship with organized crime.”<sup>131</sup> These long-standing and legitimate interests in controlling gambling made it doubtful that the state could effectively address the harms associated with Internet gambling without directly regulating the transmission of gambling information.<sup>132</sup>

Having found that the state had a legitimate interest in regulating online gambling, the court then addressed the burdens imposed by the Gambling Act. The court recognized that the Gambling Act was problematic in at least one regard: the Gambling Act purported to impose criminal liability on Internet gambling businesses that were not located in Washington and on businesses that did not actively solicit wagers from Washington residents.<sup>133</sup> Accordingly, the Gambling Act implicated the dual Commerce Clause prohibitions against legislation that creates inconsistencies among the states and regulates conduct occurring wholly outside of Washington.<sup>134</sup> The court noted that this standard was established by the Washington State Supreme Court in *State v. Heckel*, a case in which the court expressly adopted Goldsmith and Sykes’ inconsistent regulations and extraterritoriality tests for purposes of state Internet regulations.<sup>135</sup>

Despite recognizing that the Act implicated the potential to create inconsistencies among the states, the court focused its analysis on how the Act regulated conduct occurring outside the state.<sup>136</sup> Specifically, the court recognized that the Gambling Act’s criminal penalties could apply to a passive website like pokerstars.com, a business that operates far beyond Washington’s borders.<sup>137</sup> Nonetheless, the court found solace in the fact that an Internet business such as pokerstars.com could easily deter-

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129. *Rousso v. State*, 204 P.3d 243, 250 (Wash. Ct. App. 2009).

130. *Id.* at 251. The court noted that from its inception, the state had considered gambling to be an activity with significant negative effects—a view expressed in the original form of article II, section 24 of the Washington constitution. *Id.* at 250.

131. *Id.* at 251.

132. *Id.* Specifically, the court questioned whether the state would be able to regulate Internet gambling indirectly, as to do so might require discerning when residents are engaged in gambling over the Internet—an inquiry that might implicate residents’ privacy rights. *See id.*

133. *Id.* at 251–52.

134. *Id.* at 252.

135. *Id.* (citing *State v. Heckel*, 24 P.3d 404 (Wash. 2001)).

136. *Id.* at 252–53.

137. *Id.* at 253.

mine a user's geographical location based on the Internet protocol (IP) address of his or her computer.<sup>138</sup> To the court, the criminal penalties associated with violations of the Gambling Act were assuaged by the fact that technology made compliance with the Act relatively simple.<sup>139</sup>

At its core, the court reasoned, Rousso's constitutional claim was based on the notion that the borderless nature of the Internet rendered unconstitutional any state law that attempted to regulate it.<sup>140</sup> This argument reflected a "simplistic understanding" of the Internet's architecture.<sup>141</sup> Drawing heavily from Goldsmith and Sykes, the court characterized as "overbroad" all formulations of the dormant Commerce Clause doctrine that precluded state Internet regulations.<sup>142</sup> In doing so, the court rejected the *American Libraries* view of state Internet regulations.<sup>143</sup> The proper test for state regulations of the Internet, the court concluded, was the dormant Commerce Clause approach: a balancing test that looked to whether regulation imposed burdens on commerce that were "clearly excessive."<sup>144</sup>

Applying this balancing test, the court determined that Washington's Gambling Act withstood Rousso's constitutional challenge. The court concluded: "[G]iven the importance of the State's interests in protecting its citizens from the ills associated with gambling, and the relatively small cost imposed on out-of-state businesses by complying with the Gambling Act, Rousso has failed to meet his burden of showing that the Gambling Act is 'clearly excessive.'"<sup>145</sup>

### C. The Washington State Supreme Court's Decision

On appeal, the Washington State Supreme Court affirmed the constitutionality of Washington's Internet gambling ban.<sup>146</sup> The court's reasoning, however, differed slightly from that of the court of appeals.

As a threshold matter, the court determined that the dormant Commerce Clause applied.<sup>147</sup> It reasoned that although the Wire Act and UIGEA also regulated interstate Internet gambling, neither statute dele-

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138. *Id.* For a compelling argument regarding how geolocation technologies—which make it possible to quickly, cheaply, and accurately identify an Internet user's location—could allow states to make Internet gambling laws more effective and efficient, see King, *supra* note 34.

139. *Rousso*, 204 P.3d at 253.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 252–53 (declining to follow those cases that view the Internet as entirely off-limits to state regulation).

144. *Id.* at 253.

145. *Id.*

146. *Rousso v. State*, 239 P.3d 1084, 1095 (Wash. 2010).

147. *Id.* at 1088.

gated to the states the express authority to do so.<sup>148</sup> Furthermore, although these federal statutes recognized the authority of the states to regulate Internet gambling within their borders, neither permitted the states to do so with impunity.<sup>149</sup>

Accordingly, the court then analyzed whether the Gambling Act discriminated against interstate commerce either in its language or in its effect. Like the court of appeals, the supreme court concluded that the language of the Act was not discriminatory.<sup>150</sup> The Act, the court reasoned, prohibited Internet gambling equally, drawing no distinctions with regard to where the gambling occurred.<sup>151</sup>

Next, the court addressed whether the Gambling Act discriminated against interstate commerce in its practical effect.<sup>152</sup> Although Rousso argued that discrimination could be found in the economic protectionism at work behind the Act, the court rejected this argument as both misconstruing and misapplying the legal standard.<sup>153</sup> To Rousso, the Act affected interstate commerce by walling off the Washington market from the Internet gambling market to preserve the state's local gambling operations.<sup>154</sup> But the relevant inquiry, the court claimed, was "*how* the effects of the [Gambling Act] are imposed on in-state and out-of-state entities, not *what* the effect is on those entities' revenue."<sup>155</sup> Furthermore, an increase in business for Washington's in-state gambling businesses was merely a secondary effect of the Gambling Act, not a direct effect.<sup>156</sup> Moreover, the court distinguished Internet gambling and brick-and-mortar gambling as two different activities that presented different risks and concerns, and thus created different regulatory challenges.<sup>157</sup> In light of these differences, the state did not need to regulate Internet gambling and brick-and-mortar gambling in the same manner.<sup>158</sup>

While the court found no economic protectionism at work in the Act, it nonetheless recognized that the Act imposed a burden on interstate commerce by "walling off the Washington market for Internet gam-

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148. *Id.*

149. *See id.* (noting that the Wire Act and the UIGEA "recognize and expressly preserve a state's authority to criminalize some or all gambling activities *within the state's borders*, but nothing more").

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.* at 1089.

155. *Id.*

156. *Id.* The court noted that the U.S. Supreme Court had rejected a similar secondary effects argument. *Id.* at 1089–90 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)).

157. *Id.* at 1091–92.

158. *Id.*

bling.”<sup>159</sup> Yet to the court, two facts mitigated the extent of this burden. First, the Act did not prevent or hinder Internet gambling business from operating outside the state.<sup>160</sup> And second, Internet gambling business could “easily exclude Washingtonians.”<sup>161</sup> Such exclusion, the court reasoned, could be achieved if Internet gambling businesses required a user to identify his or her location before placing a bet online.<sup>162</sup> In sum, the court concluded that the Act’s burden on interstate commerce equated to but did not outweigh the substantial state interest stemming from the state’s police power to protect the health, welfare, safety, and morals of its citizens.<sup>163</sup>

Lastly, the court found that Washington could not achieve its interest in protecting the health, safety, and morals of its citizens through a means less restrictive than the Gambling Act. Although Rousso argued that the state could have accomplished its interest in a manner less restrictive than an outright ban on Internet gambling,<sup>164</sup> the court refrained from second-guessing legislative policies in such a manner. To the court, it was unclear whether a less restrictive regulation could address the social harms of Internet gambling as effectively as a complete ban.<sup>165</sup> In addition, even if such a less restrictive regulation was possible, it was not clear that such a regulation would decrease the burden on interstate commerce.<sup>166</sup>

Having concluded that the Act did not impose excessive burdens on interstate commerce and that the state could not regulate Internet gambling as effectively with a less restrictive means, the supreme court held that Washington’s Gambling Act did not violate the dormant Commerce Clause.<sup>167</sup>

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159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1091. The court noted,

[T]he legislature balanced public policy concerns and determined the interests of Washington are best served by banning Internet gambling. The legislature chose the advantages and disadvantages of a ban over the advantages and disadvantages of regulation. The evidence is not conclusive. Many may disagree with the outcome. But the court has no authority to replace the legislature’s choice with its own.

*Id.* at 1095.

167. *Id.*

## V. CRITIQUE AND PROPOSAL

The decision set forth by the Washington State Supreme Court suffers from three significant flaws. First, the Washington State Supreme Court did not identify or otherwise articulate that the inconsistent regulations test and extraterritoriality analysis were facets of the dormant Commerce Clause. Yet as the court of appeals noted, the supreme court's earlier decision in *Heckel* makes clear that the supreme court has adopted these tests for purposes of assessing state laws affecting the Internet.<sup>168</sup> While it is possible that the supreme court may have collapsed these tests into its general discussion of the burdens imposed by the Gambling Act, the opinion does not hint that such a synthesis actually occurred. Instead, the court's failure to specifically identify these tests suggests that it strayed from its own precedent and turned instead to a less rigorous dormant Commerce Clause analysis.

It may be that the Washington State Supreme Court simply failed to consider inconsistencies and extraterritorialities for a practical reason: because federal law indirectly prohibits Internet gambling businesses from operating in the United States, all Internet gambling businesses operate in foreign jurisdictions.<sup>169</sup> Thus, because there are currently no Internet gambling businesses operating in the United States, there is little risk that the state's Gambling Act will render inconsistent outcomes or impose costs of compliance beyond the state's borders. But in light of the recent attempts by other states to legalize Internet gambling, it may be necessary, if not crucial, for future courts to assess these factors. For example, because Washington's law applies to the receipt of gambling information by Internet gambling websites,<sup>170</sup> it could be possible that if New Jersey legalized Internet gambling, Washington's criminal penalties would apply to those New Jersey businesses that were operating lawfully in that state.<sup>171</sup> But under the Washington State Supreme Court's decision, there is no articulated basis for future courts to consider whether such an outcome is a burden by virtue of the inconsistencies imposed. Yet the Washington Court of Appeals explicitly acknowledged that courts must apply the inconsistent regulations and extraterritorialities tests in a dormant Commerce Clause analysis.<sup>172</sup> Adopting the reasoning of the court of appeals would provide future courts with a more struc-

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168. *See* State v. Heckel, 24 P.3d 404, 412 (Wash. 2001) ("The inconsistent-regulations test and the extraterritoriality analysis are appropriately regarded as facets of the Pike balancing test . . .").

169. *See supra* Part II.B–C.

170. WASH. REV. CODE § 9.46.240.

171. *See id.*

172. Rousso v. State, 204 P.3d 243, 251 (Wash. Ct. App. 2009).

tured basis for resolving potential conflicts among state Internet gambling laws.

Second, the Washington State Supreme Court's conclusion that the Gambling Act did not "prevent or hinder" Internet gambling businesses from operating outside the state was overbroad. As the court of appeals recognized, the Gambling Act *does* hinder such businesses from operating insofar as Washington attaches criminal penalties for knowing violations of the Act.<sup>173</sup> The supreme court, however, confined its analysis to considering the extent to which "walling off the Washington market" was a burden on interstate commerce.<sup>174</sup> The court's failure to recognize this potential externality suggests that it did not rigorously consider the extent to which Washington's Gambling Act might impose costs beyond the state's borders. The court of appeals, however, specifically acknowledged as problematic the fact that the Act exported criminal penalties to passive websites that operated far outside of Washington's borders.<sup>175</sup> The appellate court's treatment of this factor shows that, although a law's exportation of criminal liability is a burden courts must consider in a dormant Commerce Clause challenge, the existence of such criminal liability can also be mitigated by other factors, such as the relative ease of compliance.<sup>176</sup>

Third, the supreme court's method of measuring how the burdens imposed by the Act could be mitigated rests on shaky grounds. To the supreme court, the burdens imposed by the Gambling Act were not excessive because Internet gambling businesses could "easily" comply with the state's ban by requesting age verification before permitting users to gamble.<sup>177</sup> While this may be true, the supreme court overlooks the anonymous nature of Internet use. Because the Internet can be used anonymously, individuals—including children—could lie about their ages to bypass such verifications,<sup>178</sup> and it is thus unclear whether a website that relies solely on self-reported age verifications could be said to knowingly violate the Gambling Act and thus be subject to criminal penalties.

Instead, the court of appeals' rationale that Internet websites could determine user location based on IP addresses provides a more useful basis for measuring the burden imposed by the Act. Such measures would permit Internet gambling businesses to exclude users based on the

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173. *Id.*

174. *Rouso v. State*, 239 P.3d 1084, 1091-92 (Wash. 2010).

175. WASH. REV. CODE § 9.46.240.

176. *Rouso*, 204 P.3d at 251.

177. *Id.*

178. *See supra* Part II.A.

state of origin,<sup>179</sup> which in turn could prevent such businesses from becoming unknowing recipients of unlawful transmissions of gambling information from those states. Although the court vaguely cited the “relatively small cost” of adopting such a measure,<sup>180</sup> its proposition that Internet businesses can exclude users based on IP address provides a more accurate and concrete example for future courts to follow when measuring the cost of compliance with similar state Internet gambling acts.

Although both courts ultimately concluded that Washington’s Internet gambling statute survives a dormant Commerce Clause challenge, the means by which they arrived at their conclusions differ greatly. Whereas the Washington State Supreme Court’s decision suffers from several flaws, the decision of the court of appeals rests squarely on precedent and provides a more concrete basis for future courts to measure state Internet gambling laws. Thus, future courts should adopt the rationale of the court of appeals in *Rouso* when analyzing the constitutionality of a state Internet gambling regulation under the dormant Commerce Clause.

## VI. CONCLUSION

Current political pressure for states to pass laws legalizing Internet gambling<sup>181</sup> makes it all too likely that other state courts will soon face constitutional challenges similar to that in *Rouso*. Although the dormant Commerce Clause is not a novel doctrine, courts faced with such challenges will almost inevitably look to *Rouso* as persuasive precedent on how to apply this doctrine to a state Internet gambling law. Those courts, however, should not look to the Washington State Supreme Court’s opinion for such guidance; instead, courts should adopt the reasoning set forth by the Washington Court of Appeals.

As the decisions in *Rouso* show, the dormant Commerce Clause is an appropriate vehicle for assessing the constitutionality of state Internet gambling laws. Applying a rule that prohibits any state regulation affecting the Internet is likely overbroad, which is illustrated by both Washington courts’ rejections of the *American Libraries* decision. Moreover, such a rule is not faithful to the current statutory scheme: both the Wire Act and the UIGEA envision that states will regulate gambling to some degree.<sup>182</sup>

Ultimately, the decision of the court of appeals provides a more rigorous application of the dormant Commerce Clause for future courts

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179. *Rouso*, 204 P.3d at 251.

180. *Id.*

181. *See supra* Part I.

182. *Rouso*, 204 P.3d at 248.



to look to. Most significantly, the court of appeals, unlike the supreme court, recognized that state Internet gambling laws implicate the potential for inconsistencies among the states and costs imposed beyond state borders, both of which are proper components of the dormant Commerce Clause.<sup>183</sup> In light of the “jurisdictional uniqueness” of the Internet,<sup>184</sup> the appellate court’s decision provides a clearer and more rigorous standard that courts should look to when applying the dormant Commerce Clause to similar laws.

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183. *Id.* at 251.

184. NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 11, ch. 2, at 16.