

## WILL THE COMMERCE CLAUSE SAVE ONLINE GAMBLING?

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In the context of online gambling, most discussion and analysis focuses on United States federal law. However, most commentators have ignored the myriad of potentially applicable state laws. Thus far, at least seven states have passed some form of statutory prohibition of online gambling.<sup>1</sup> Given the deep prohibitionist streak that runs through the American legal landscape, future state-level prohibitions are likely. For example, New Jersey is currently considering the adoption of online gambling restrictions,<sup>2</sup> and more are sure to follow.

Given the global nature of the Internet, an online gambling operator in a jurisdiction where such activities are fully legal should not consider his geographic disconnection from a prohibitionist jurisdiction to be of great protective value. For example, an online gaming operator in jurisdiction “A” may be legal and licensed in that jurisdiction, yet still could be subjected to the jurisdiction of the courts in state “B,” where the operators activities are prohibited. Some state attorneys general have begun asking questions about the legality of Internet gambling services, directed at their citizens from offshore casinos, and others have raised the issue of gambling age restrictions unique to the particular state involved.<sup>3</sup> Any attorney general with a lust for headlines, or perhaps in an effort to energize a sagging political campaign, could easily decide to mount a prosecution under state law against a given Internet

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<sup>1</sup> Illinois: 720 ILCS 5/28-2(a-5); Indiana: SB 92; Louisiana: 14 Louisiana Revised Statute § 90.3; Nevada: NRS 463.016425(1); Oregon: Oregon Revised Statutes 167.109; South Dakota: South Dakota Codified Laws 22-25A-1-4; Wisconsin: Wisconsin Statutes § 945.03(g).

<sup>2</sup> S-1013.

<sup>3</sup> Well-documented enforcement efforts have emanated from the New York Attorney General, and sources indicate that the State Attorney in Louisiana is questioning the availability of online gambling services to its residents aged 18 through 20, while state law prohibits gambling by anyone under the age of 21.

gambling site with customers residing in, or promotional efforts directed to, their particular state.<sup>4</sup> While issues such as international treaties, extraterritorial statutory application, and comity<sup>5</sup> may pose difficult (if not insurmountable) barriers to the application of state law to a licensed offshore gambling enterprise with no other presence in the United States, another barrier may be lurking in the United States Constitution. The individual states may lack the constitutional authority to regulate the offering of online gambling services to their residents under the somewhat esoteric principal known as the “dormant” Commerce Clause.<sup>6</sup>

Under the dormant Commerce Clause, in order to preserve some degree of uniformity and consistency in such commercial transactions, the individual states may not inconsistently regulate commercial activities that are national (or international), in nature.<sup>7</sup> The policy underlying this constitutional restriction is well-considered: Merchants should not be expected to discern and attempt to comply with a hodgepodge of inconsistent, varying state-level restrictions on the same commercial activity.<sup>8</sup> Instead, interstate commerce must be governed by uniform federal regulation. Examples of commercial activity that must be subject to uniform national regulation include navigation, transportation, and the purchase or sale of commodities.<sup>9</sup> Accordingly, any state statute that imposes discriminatory restrictions on interstate commerce is *per se* invalid. In addition, state laws that impose multiple, inconsistent burdens on interstate

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<sup>4</sup> Although the issues of international application of U.S. law are beyond the scope of this article, there have been examples of various U.S. laws being applied to individuals or companies residing in foreign jurisdictions, if their activities cause some sort of “effect” in this country. See, generally, *US v. Noriega*, 746 F.Supp. 1506, 1512 (S.D. Fla. 1990); *U.S. v. Wright-Barker* 784 F.2d 161, 168 (3d Cir. 1986).

<sup>5</sup> “Comity” is a legal term essentially meaning co-operation between two countries, out of deference for each other’s laws.

<sup>6</sup> The dormant Commerce Clause restricts the powers of states to regulate interstate commerce. *Barclays Bank, PLC v. Francise Tax Bd. of California.*, 512 U.S. 298, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994).

<sup>7</sup> *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557, 574-75, 7 S.Ct. 4, 12, 30 L.Ed. 244 (1886) “For the regulation of [commerce with foreign countries and among the states] there can be only one system of rules, applicable alike to the whole country.”

<sup>8</sup> *Id.*

<sup>9</sup> *Wasbash*, 188 U.S. 574-75.

commerce may also be invalid.<sup>10</sup> While states are free to regulate commercial transactions occurring within their own borders, they are not as free to export their domestic policy into other states if such effort results in an undue burden on interstate commerce.<sup>11</sup>

Federal courts consistently apply this well-settled principle of constitutional law to strike down attempted state regulation of online services and commerce; particularly in the arena of commercial adult Websites.<sup>12</sup> The courts uniformly rule that online services are, by their very nature, “interstate commerce” requiring a cohesive national scheme of regulation, and are therefore subject to dormant Commerce Clause analysis.<sup>13</sup> In all cases where the issue was raised, the courts accepted the argument that state restrictions on the commercial display of adult-oriented Websites unduly burden interstate commerce and are thus unconstitutional.<sup>14</sup>

Under this reasoning, a state attorney general who attempted to enforce a state statute restricting or prohibiting online gambling may be constitutionally prohibited from doing so given the discriminatory treatment towards, or undue burden on, interstate commerce that such prohibition would impose. There can be no legitimate dispute that online gambling meets the definition of “interstate commerce.” International commerce is subject to Commerce Clause restrictions just like interstate commerce.<sup>15</sup> Imposing a ban on Internet gambling would certainly discriminate against and burden those commercial gaming transactions.

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<sup>10</sup> *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-90, 107 S.Ct. 1637, 95 L.Ed.2d. 67 (1987); *Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1945).

<sup>11</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 79 L.Ed. 1032 (1935).

<sup>12</sup> See *Reno v. ACLU*, supra, *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 2006 (E.D. PA 2004); *Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005)

<sup>13</sup> Eg, *Pataki* at 182.

<sup>14</sup> See FN 9 and the cases cited therein.

<sup>15</sup> *Wasbash*, 118 U.S. at 574-75.

The Commerce Clause argument becomes even stronger if another state in the country decided to legalize some form of online gambling activity. Such legalization by a single state could open the floodgates for legalization of online gambling throughout the country under the recent United States Supreme Court decision in *Granholm v. Herald, et. al.*<sup>16</sup> In that case, the High Court held that individual states cannot discriminate against out-of-state wineries by prohibiting Internet sale of wine from outside the state, while allowing in-state wineries to sell their products so long as they did not ship them across state borders. A narrowly-divided Court determined that if a state allows in-state wineries to ship directly to residents, the Commerce Clause requires out-of-state vintners to be treated equally.<sup>17</sup> The full impact of this decision is not yet known – particularly its applicability to international transactions – but following the Court’s reasoning, one state would not likely be permitted to prohibit the provision of online gambling activities to its citizens by out-of-state (or potentially offshore) entities, if some form of online gambling was permitted within the state.

As is evident, the dormant Commerce Clause has the potential for opening a “Pandora’s Box” of legal difficulties for regulators, and a “Genie’s Bottle” full of creative arguments for online gambling attorneys. As individual states start enforcing online gambling restrictions against players and gambling enterprises, Commerce Clause issues are certain to be raised as a defense. Legal experts and the courts will likely debate these issues for years to come, but one thing is certain: The dormant Commerce Clause creates significant uncertainty regarding the ability of state governments to constitutionally regulate Internet gambling activities.

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<sup>16</sup> 125 S.Ct. 1885, 2005 WL 1130571 (2005).

<sup>17</sup> *Id.*

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