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## GEOLOCATION AND FEDERALISM ON THE INTERNET: CUTTING INTERNET GAMBLING'S GORDIAN KNOT

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Conventional wisdom dictates that the Internet is a medium in which federalism is destined to fail. By virtue of its decentralized design, the Internet naturally resists regulation by a diverse set of government actors. Indeed, courts have reasoned that federalism on the Internet is either technologically impossible or constitutionally prohibited. The emergence of geolocation technologies, which make it possible to quickly, cheaply, and accurately identify an Internet user's location, challenges this dominant understanding and opens the door to new approaches that could radically alter the way electronic commerce is governed. To illustrate this point, this Article explores the ways that such technologies could be used to make Internet gambling regulation more responsive to longstanding federalism principles. As demonstrated below, geolocation technologies have the potential to make Internet gambling law both more effective and more efficient by enabling each state to enforce its own substantive regulations

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## I. AN IMPENETRABLE PROBLEM?

Over the last decade, Internet gambling regulation has begun to seem like an impenetrable problem—a Gordian knot—that both state and federal regulators have been unable to solve. Motivated by the moral concerns of their citizens and a desire to protect revenue from casinos within their borders, several states have waged aggressive campaigns against Internet gambling.<sup>2</sup> While states have historically regulated gambling pursuant to their police powers,<sup>3</sup> recent state enforcement efforts have been hindered by the Dormant Commerce Clause, which forbids state regulation of interstate commerce.<sup>4</sup>

The federal government's parallel effort to police Internet gambling has also fallen short, due to a lack of clarity in current law and the difficulties associated with regulation of offshore casino operators.<sup>5</sup> Even if both of those barriers could be overcome, a uniform federal approach might still be viewed as an unwarranted intrusion into an area best left to state regulation.<sup>6</sup> Ultimately, the fact that Americans continue to spend over seven billion dollars on Internet gambling each year demonstrates just how

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<sup>2</sup> See *infra* Part II.A.

<sup>3</sup> See, e.g., *Pasados de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (stating that regulation of gambling concerns a state's "interest in the health, safety, and welfare of its citizens"); *Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999) (noting that gambling restrictions "represent a well-recognized exercise of state police power").

<sup>4</sup> See Scott Olson, *Betting No End to Internet Gambling*, 4 *J. Tech. L. & Pol'y* 2, 7-9 (1999); see also Ari Lanin, Note, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 *S. Cal. L. Rev.* 1423, 1448 (2000) ("[W]hen a state attempts constitutionally to regulate Internet communications, the result will almost inevitably be a gutted, ineffective law.").

<sup>5</sup> See Gary Rotstein, *Despite Law, Computer Bets Beat the Odds*, *Pittsburgh Post-Gazette*, Jan. 31, 2009, at A1; Tony Batt, *Bet Ban Stymies Federal Officials*, *Las Vegas Review-Journal*, Apr. 3, 2008, at 1D ("Federal regulators . . . acknowledged . . . [that] prohibition of online wagering may be ineffective."); see also Jacob Sullum, *Some Bets Are Off: The Strangely Selective and Self-Defeating Crackdown on Internet Gambling*, *Reason*, June 2008, at 38, 41-44; Benjamin C. Wickert, Note, *All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States*, 10 *Vand. J. Ent. & Tech. L.* 215, 235-236 (2007).

<sup>6</sup> See David Goodman, Comment, *Proposals for a Federal Prohibition of Internet Gambling: Are There Any Other Viable Solutions to this Perplexing Problem?*, 70 *Miss. L.J.* 375, 393-399 (2000); see also Cathy McKittrick, *Utahn on Gambling: Deal Us Out*, *Salt Lake Trib.*, Dec. 26, 2008.

unsuccessful recent state and federal enforcement efforts have been.<sup>7</sup> Making matters worse, prohibition has begun to trigger sizeable direct costs for the entire nation via World Trade Organization (WTO) sanctions, as well as indirect costs to states favoring legalized gambling in the form of lost tax revenues and licensing fees.<sup>8</sup>

Like Alexander's sword centuries ago,<sup>9</sup> modern geolocation technologies are poised to solve the problems described above in a single stroke. Geolocation technologies make this remarkable result possible by allowing Web sites to quickly and automatically determine an Internet user's physical location. By customizing content and regulating access according to a user's location, sites can re-create jurisdictional borders on the Internet,<sup>10</sup> thus mitigating the cross-border reach of gambling activities which, prior to the Internet era, were possible only on a local scale. To implement this solution, Congress would need to enact a new regulatory framework with three main features. First, the framework would empower states to choose from a limited "menu" of substantive Internet gambling policies.<sup>11</sup> Second, the framework would require Internet gambling providers doing business within the United States to utilize modern geolocation technologies—thereby enabling sites to identify users by state and allow or deny access accordingly. Third, the framework would provide states with a flexible legal remedy to be used against sites that offer unauthorized gambling services. This three-part approach mirrors the recently proposed Internet Gambling Regulation, Consumer Protection, and Enforcement Act (IGRCPEA)<sup>12</sup> in most respects, while differing in a few key details.<sup>13</sup>

The success of a framework like the one described above depends on the answers to two fundamental questions. First, what is technologically possible? This question centers on architecture—the Internet's design and the consequences of that design for

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<sup>7</sup> See Rich Cholodofsky, *Government Perplexed by Internet Gambling*, Pittsburgh Tribune-Review, Jan. 15, 2006, [http://www.pittsburghlive.com/x/pittsburghtrib/s\\_413664.html](http://www.pittsburghlive.com/x/pittsburghtrib/s_413664.html).

<sup>8</sup> See *infra* Part II.B.

<sup>9</sup> For a brief account of the tale of Alexander the Great and the Gordian knot, see Marshall Monroe Kirkman, *History of Alexander the Great* 153-56 (1913).

<sup>10</sup> See Joel D. Reidenberg, *Symposium: Current Debates in the Conflict of Laws: Choice of Law and Jurisdiction on the Internet: Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951, 1956 (2005); Anick Jesdanun, *Not-Quite-Worldwide Web*, Balt. Sun, July 15, 2004, at 8D (discussing the role of geolocation in modern Internet advertising).

<sup>11</sup> The contents of such a "menu" might include one option permitting all forms of Internet gambling, one option permitting mixed games of skill and chance, such as poker, and one option prohibiting all forms of Internet gambling. For a more detailed discussion of this issue and other details of the proposed framework, see *infra* Part IV.A.

<sup>12</sup> See H.R. 2267, 111th Cong. (2009).

<sup>13</sup> See *infra* Part IV.A.

law.<sup>14</sup> Government regulation of Internet gambling can only succeed if practical means are available to make that regulation effective. For years, scholars and litigants have argued that the decentralized design and global reach of the Internet made it *technologically* (as opposed to legally) impossible to impose differing—and sometimes conflicting—bodies of substantive law on online enterprises.<sup>15</sup> Today’s geolocation software challenges this architectural claim as “[c]ommercial pressures and the dynamic nature of the Internet have resulted in . . . the re-creation of geographic origin and destination” online.<sup>16</sup> Indeed, while Internet content providers may have been unable to tailor their offerings by jurisdiction five or ten years ago,<sup>17</sup> that capability not only exists but is widely used today.<sup>18</sup>

This shift in architecture gives rise to the second question: is a jurisdictionally-differentiated regulatory regime normatively desirable? This Article argues that the clear answer to that question is “yes.” Jurisdictional differentiation would respect important federalism principles and bring a greater degree of democratic legitimacy to Internet gambling law. Such an approach would also be considerably more effective than the current regime as gambling sites would have two extremely powerful incentives to comply with the law: freedom from prosecution by the newly empowered state attorneys general and the reputational benefits associated with a government operating license. Moreover, jurisdictional differentiation would make the law more efficient by internalizing the substantial costs associated with prohibition, thereby eliminating the free rider problem posed by the current regime.

These advantages would not come cost-free, however. Jurisdictional differentiation could threaten the fundamentally open character of the Internet,<sup>19</sup> lead to

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<sup>14</sup> Cf. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 508 (1999) (claiming that the Internet can be regulated to the extent that the architecture is designed to allow for particular kinds of regulation).

<sup>15</sup> See *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997); Reidenberg, *supra* note 10, at 1952 (citing arguments advanced by Yahoo! in Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000 (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>, translated at <http://www.lapres.net/yahen.html>, a case in which Yahoo! was held criminally liable for the display of Nazi memorabilia).

<sup>16</sup> Reidenberg, *supra* note 10, at 1956.

<sup>17</sup> See *Am. Libraries Ass’n*, 969 F. Supp. at 170-71 (“The Internet is wholly insensitive to geographic distinctions. . . . [N]o aspect of the Internet can feasibly be closed off to users from [a particular] state.”).

<sup>18</sup> See *Nat’l Fed’n for the Blind v. Target Corp.*, 452 F.Supp.2d 946, 960 (N.D. Cal. 2006); *Frank Internet Gambling Bill Woos with Federalism*, Wash. Internet Daily, Apr. 27, 2007.

<sup>19</sup> See Mark A. Lemley & Phillip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 804 n.106 (2007); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1370-1376 (1996).

widespread end-user circumvention, and impose onerous compliance costs on Internet gambling providers. Indeed, some commentators have argued that even if electronic borders can be drawn on the Internet, it would be highly unwise to draw them.<sup>20</sup> Though these potential drawbacks should be taken seriously, they are not enough to outweigh the advantages described above.

This Article proceeds in five parts. Part II lays out the content, costs, and justifications associated with the current patchwork of federal and state Internet gambling laws. Part III introduces the concept of geolocation technology and shows that modern geolocation technologies make it possible to re-create accurate jurisdictional borders on the Internet. Part IV argues that jurisdictional differentiation in Internet gambling law is normatively desirable, using a new legal framework in which states are the primary actors to frame the analysis. Part V concludes.

## II. THE LEGAL LANDSCAPE: CURRENT LAW, ITS JUSTIFICATIONS, AND ASSOCIATED COSTS

Currently, four federal statutes make up the principal Internet gambling prohibition regime in the United States: the Wire Act, the Travel Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>21</sup> The first three of these statutes were enacted well before the rise of Internet gambling, though they have collectively been interpreted to make some, and perhaps all, forms of online gambling illegal.<sup>22</sup> The UIGEA, enacted in 2006, extends those laws by making it illegal for a bank to process, and for any Internet gambling operator to receive, funds in connection with gambling activities considered illegal under other federal or state laws.<sup>23</sup> In this sense, the UIGEA does not itself outlaw Internet gambling.<sup>24</sup> These

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<sup>20</sup> See Peter S. Menell, *Regulating "Spyware": the Limitations of State "Laboratories" and the Case For Federal Preemption of State Unfair Competition Laws*, 20 Berkeley Tech. L.J. 1363, 1415-1418 (2005).

<sup>21</sup> See Federal Interstate Wire Act, 18 U.S.C. § 1084 (2000); Travel Act, 18 U.S.C. § 1952 (2000); Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955 (2000); Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361 - 5367 (2006); see also Kiran S. Raj, *Comment: Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 Emory L.J. 777, 783-90 (2006) (providing a brief description of each act).

<sup>22</sup> See, e.g., Bruce Golding, *Web Poker Programmer Folds on \$300M Hand*, N.Y. Post, Dec. 17, 2008 (describing a prominent Internet gambling site founder's \$300 million forfeiture and guilty plea under the Wire Act).

<sup>23</sup> See Raj, *supra* note 21, at 789 ("[UIGEA] does not change significantly the current substantive law on Internet gambling. Rather it focuses on eliminating the financial transactions associated with Internet gambling.") (citation omitted).

<sup>24</sup> Interestingly, many commentators have interpreted these laws to mean that while receiving bets from U.S.-based customers is illegal, the individual act of placing those bets is not. See Rotstein, *supra* note 5, at A1 ("The bonus for bettors is that federal and state laws generally only make it illegal to accept wagers, not to place them.").

federal laws are chiefly enforced via Department of Justice investigations and Treasury Department regulations requiring banks to block transfers to Internet gambling providers.<sup>25</sup>

There are several justifications for this prohibition regime, which can be divided into moral and economic rationales. Prohibition advocates argue that Internet gambling is harmful to minors, a source of bankruptcy and addiction among adults, and a means for illegal money laundering.<sup>26</sup> According to these advocates, prohibiting Internet gambling will cut back on each of these social ills.<sup>27</sup> Such claims are similar to those advanced against gambling in general, though parties favoring prohibition frequently point out that the increased playing speed and immediate at-home availability of Internet gambling makes the potential for harm much greater.<sup>28</sup> Other, less moralistic, justifications for prohibiting Internet gambling also exist. These justifications include protection of offline gambling enterprises from competition and a desire to ensure that profits from gambling activities generate tax revenue.<sup>29</sup> Economic rationales such as these highlight the fact that the U.S. gambling market is extremely profitable and growing, as legalized casino gambling has spread from Las Vegas in the 1930s to sixteen states in 2009.<sup>30</sup> That expansion has brought with it an expansion in the relationships between casino revenues and state budgets. Moreover, as the demise of Jack Abramoff's lobbying empire showed,

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<sup>25</sup> See Golding, *supra* note 22 (covering federal prosecution of a significant gambling executive); Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233; 31 C.F.R. pt. 132). These regulations cover transfers to Internet gambling sites and affiliated payment processors.

<sup>26</sup> See Shailagh Murray & James V. Grimaldi, *House Deals Blow to Internet Gaming*, *Houston Chron.*, July 12, 2006, at A3 ("Proponents of the crackdown said the industry, which is mostly based overseas, provides a front for money laundering, including by drug sellers and terrorist groups, while preying on children and gambling addicts.").

<sup>27</sup> *Id.*

<sup>28</sup> See John M. Moran, *Online . . . Where a Poker Face Doesn't Matter*, *Hartford Courant*, Feb. 13, 2005, at 6.

<sup>29</sup> See *infra* notes 38-40 and accompanying text. Note, however, that some incumbent U.S. casino operators are now arguing in favor of legalized Internet gambling, as linkages between the online and "brick-and-mortar" gambling economies are now creating new opportunities for profit. Harrah's, the owner of a number of casinos throughout the United States and operator of the World Series of Poker, has recently retained lobbyists to argue in favor of legislation to legalize Internet gambling, since online poker rooms tend to feed players to its physical casinos. See Anna Palmer, *A High-Stakes Poker Game; Fighting Over Online Gaming*, *Roll Call*, May 6, 2009.

<sup>30</sup> See I. Nelson Rose & Martin D. Owens, Jr., *Internet Gaming Law* 80-84 (2d ed. 2009).

economic justifications may be the true animating force behind some outwardly morals-based efforts to police Internet gambling.<sup>31</sup>

Immediately following passage of UIGEA in 2006, Internet gambling advocates initiated efforts to amend the Act in Congress or have it overturned in the courts. In 2007, the Interactive Media Entertainment and Gaming Association (IMEGA), a group representing several Internet gambling providers, sued to enjoin enforcement of UIGEA.<sup>32</sup> IMEGA challenged the law on several grounds, including claims that the law is void for vagueness and contrary to U.S. treaty obligations.<sup>33</sup> Nonetheless, a district court upheld the Act in March 2008, and the Third Circuit affirmed that decision in September 2009.<sup>34</sup>

On the legislative front, Members of Congress and an array of industry-sponsored lobbying organizations have sought to amend the Act to permit some forms of Internet gambling.<sup>35</sup> These efforts have intensified over the last two years, during which time multiple hearings have been held on the proposed legislation.<sup>36</sup> Geolocation technologies have played a prominent role in this legislation from the start, as proponents have sought to win support for the amendments by allowing states to choose their own online gambling regime.<sup>37</sup> Nonetheless, as of late 2009, it seems unlikely that these proposals

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<sup>31</sup> See Jim Galloway, *Reed Denies Bid to Oust Gaming Foes; Report: Funds From Gambling Interests Used*, Atlanta Journal-Constitution, Oct. 17, 2005, at 1B.

<sup>32</sup> See *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, No. 07-2625, 2008 U.S. Dist. LEXIS 16903, at \*3 (D.N.J. March 4, 2008), *aff'd*, 580 F.3d 113 (3d Cir. 2009); see also *E-Gambling Fans Won't Fold Hand Congress Dealt*, Nat'l J. Tech. Daily, Oct. 24, 2007.

<sup>33</sup> See *Interactive Media*, 2008 U.S. Dist. LEXIS 16903, at \*3 (describing IMEGA's six-count challenge to UIGEA).

<sup>34</sup> See *Interactive Media Entm't & Gaming Ass'n v. Attorney General of the U.S.*, 580 F.3d 113, 116-119 (3d Cir. 2009); *Gonzales*, 2008 U.S. Dist. LEXIS 16903, at \*37.

<sup>35</sup> See Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009). For a discussion of the content of this proposal, see *infra* Part IV.A.

<sup>36</sup> See, e.g., *Unlawful Internet Gambling Enforcement Act Regulations: Hearing Before the H. Fin. Servs. Subcomm. on Domestic and Int'l Monetary Policy, Trade and Tech.*, 110th Cong. (2008) (debating proposed regulations to implement the UIGEA); *Can Internet Gambling be Effectively Regulated to Protect Consumers and the Payments System?: Hearing on H.R. 2046 Before the H. Fin. Servs. Comm.*, 110th Cong. (2007) (debating whether federal legislation is an appropriate solution to nationwide gambling problems).

<sup>37</sup> See Kara Rowland, *A Winning Hand with Conservatives? Poker Industry Woos CPAC*, Wash. Times, Feb. 27, 2009, at A1; *Frank Internet Gambling Bill Woos with Federalism*, Wash. Internet Daily, Apr. 27, 2007.

will be enacted any time soon.<sup>38</sup> Given this uncertainty and the failure of court challenges to UIGEA, the current policy landscape serves as the dominant frame for most of the federalism questions addressed by this Article.

The current federal law regime does not envision significant enforcement action at the state level, nor does it permit choice by individual states with respect to legalization and regulation of Internet gambling.<sup>39</sup> Furthermore, there is an emerging consensus that either the federal statutes or the Dormant Commerce Clause pre-empt most types of state enforcement actions.<sup>40</sup> Despite these challenges, some states have vigorously undertaken efforts to prohibit Internet gambling within their own borders.

#### A. *Enforcement in the States: the Kentucky Domain Seizure Litigation*

Kentucky offers a leading example of state efforts to regulate Internet gambling, as well as the practical limitations on those efforts. In August 2008, the Commonwealth of Kentucky initiated an *in rem* civil proceeding against 141 Internet domains associated with online gambling operations.<sup>41</sup> The Commonwealth's complaint alleged that the domain names constituted unlawful "gambling devices" under state law<sup>42</sup> and sought a

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<sup>38</sup> See Bob Barr, *Get Ready to Ante up to Congress*, Atlanta Journal-Constitution, Sept. 21, 2009, at 8A ("None of the bills pending in the House and Senate have moved out of the committees to which they were assigned, and none has been scheduled for floor action.").

<sup>39</sup> See Raj, *supra* note 21, at 783.

<sup>40</sup> See, e.g., *id.* at 812-13 (arguing that existing federal statutes are outdated and should be modified to allow states to either ban or regulate Internet gambling); Olson, *supra* note 4, at 7-11 (noting that state legislation over Internet gambling would likely be ineffective because of both the Dormant Commerce Clause and difficulties obtaining jurisdiction over out-of-state Internet gambling businesses); cf. *Am. Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003) (finding that a Vermont law that could make posting materials "harmful to a minor" on the Internet illegal was in violation of the Dormant Commerce Clause because of its likely extraterritorial effects); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033-34 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (holding that New Mexico's attempt to regulate internet content that is harmful to minors violated the Dormant Commerce Clause because "it regulates conduct occurring wholly outside the State of New Mexico[,] is "an unreasonable and undue burden on interstate . . . commerce[,] and "subjects interstate use of the Internet to inconsistent state regulations").

<sup>41</sup> See Second Amended Complaint, *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 (Franklin Cir. Ct. Ky. filed Sept. 18, 2008), available at [http://web20.nixonpeabody.com/np20/np20wiki/PDF\\_Library/ky\\_domain\\_complaint.pdf](http://web20.nixonpeabody.com/np20/np20wiki/PDF_Library/ky_domain_complaint.pdf) [hereinafter Second Amended Complaint].

<sup>42</sup> See Commonwealth's Brief at 2, *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 (Franklin Cir. Ct. Ky. filed Nov. 21, 2008). Specifically, the Commonwealth invoked Kentucky Revised Statutes §§ 528.100 (forfeiture of gambling devices) and 500.090 (process for forfeiture actions). *Id.*



seizure order directing domain registration agencies to transfer control of the domains to the Commonwealth.<sup>43</sup>

Initially, the Commonwealth's suit succeeded. In September 2008, a Kentucky trial court entered a seizure order directed at the registrars for each of the defendant domains.<sup>44</sup> As a result, the domains belonging to at least two online casinos temporarily ended up in the Commonwealth's possession.<sup>45</sup> None of the owners of the defendant domains appeared in this initial action, and it appears that most, if not all, of these owners were completely unaware of the matter at the time.<sup>46</sup>

Following this initial decision, Kentucky Governor Steve Beshear issued a press release stating that "Kentucky loses tens of millions of dollars a year to online gambling" and that "[u]nlicensed Internet gambling significantly undermines and threatens horseracing, Kentucky's signature industry and a key tourism industry, by creating unregulated and untaxed competition . . . ."<sup>47</sup> Beshear also candidly admitted that "Kentuckians likely spend 'tens of millions of dollars' on illegal Internet gambling sites . . . that might otherwise go to Kentucky's horse tracks, charitable events and the state lottery."<sup>48</sup> While much of the case against the domains was predicated on simple enforcement of state law, these statements reveal a different, and likely more honest, explanation. From the perspective of public choice theory, Beshear's statements suggest that states' prime motivation in policing Internet gambling may be to protect the large

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<sup>43</sup> See Second Amended Complaint, *supra* note 41, at 13-14.

<sup>44</sup> See *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 (Franklin Cir. Ct. Ky. Sept. 18, 2008) (order of seizure of domain names), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/KYseizureorder-091808.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/KYseizureorder-091808.pdf).

<sup>45</sup> See Stephenie Steitzer, *Suit Targets Online Gambling*, Courier-Journal (Louisville, Ky.), Sept. 26, 2008, at 1B ("Internet users in Kentucky and the rest of world now are unable to access the two casinos, highrollerslounge.com and luckypyramidcasino.com. The domain-name registration for the sites lists the Kentucky Justice Cabinet as the 'registrant' or operator."). As of April 2009, a WHOIS search indicates that both of these domains remain under the Commonwealth's control. A number of other sites listed in the seizure order, however, were not actually seized by the Commonwealth and have remained in normal operation despite the court's order.

<sup>46</sup> Beth Musgrave, *Net Gaming Sites Appeal Domain Name Seizures*, Lexington Herald-Leader, Nov. 1, 2008, at 1D.

<sup>47</sup> Press Release, Governor Steve Beshear, Kentucky Seizes Domain Names of Illegal Internet Gambling Sites (Sept. 22, 2008), available at <http://www.governor.ky.gov/pressrelease.htm?PostingGUID=%7B6930A5AD-8BF6-499C-A4DB-70A3544BFF7D%7D>.

<sup>48</sup> Stephanie Steitzer, *Beshear Tackles Internet Gambling*, Courier-Journal (Louisville, Ky.), Sept. 23, 2008, at 1A.

monopoly rents which existing casinos and racetracks provide.<sup>49</sup> If this theory is correct, states might take a very different approach if they could extract similar rents from Internet gambling sites.

Although domain owners did not appear in the trial court's initial hearing, they and other interested parties did participate in a subsequent forfeiture hearing.<sup>50</sup> In this later hearing, the domain owners and amici attacked the court's right to exercise jurisdiction over the domains, objected to the Commonwealth's construction of state law, and raised a number of constitutional arguments as to why the case should not proceed.<sup>51</sup> The trial court rejected all of these arguments in a second opinion and order.<sup>52</sup>

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<sup>49</sup> Nearly all of the states that have waged battles against Internet gambling have substantial brick-and-mortar gambling operations within their borders. New York, for instance, is home to numerous racetracks and tribal casinos. Minnesota is home to several poker rooms, and Kentucky has its world-famous racetracks.

<sup>50</sup> See *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 at 2-4 (Franklin Cir. Ct. Ky. Oct. 16, 2008) (order amending the September 18, 2008 seizure order), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/order-Kentuckyvs141InternetDomains.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/order-Kentuckyvs141InternetDomains.pdf).

<sup>51</sup> See *id.* at 10-12, 22, 28.

<sup>52</sup> See *id.* at 39. Specifically, the court found that the domain names constituted property subject to *in rem* proceedings, largely on the basis of a recent federal case law and the Anti-Cybersquatting Consumer Protection Act (ACPA). See *id.* at 12-15, 18 (citing *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) and 15 U.S.C. § 1125(d)). The court also found jurisdiction over the domains was proper, noting that the "Domain Names transport the virtual premises of an Internet gambling casino inside the houses of Kentucky residents" and that such domains "perform a critical role in creating and maintaining [a] connection by way of the various interfaces to transact a game or play." *Id.* at 15-22 (citing 15 U.S.C. § 1125(d)(2)(C)(i)-(ii)). Further, the court cited *Gorman v. Ameritrade Holding Corp., Inc.*, 293 F.3d 506, 510 (D.C. Cir. 2002), for the proposition that "cyberspace is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar." *Id.* at 22.

Interestingly, the court also held that poker constitutes unlawful gambling under KRS § 528.010(3). See *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 at 25-26 (Franklin Cir. Ct. Ky. Oct. 16, 2008) (order amending the September 18, 2008 seizure order), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/order-Kentuckyvs141InternetDomains.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/order-Kentuckyvs141InternetDomains.pdf). This decision conflicts with several recent holdings in other jurisdictions, which have concluded that poker is a game of skill. See Schuyler Kropf, *Poker Players Declared Guilty*, The Post and Courier (Charleston, SC), Feb. 20, 2009, at B1 (describing a South Carolina case wherein a trial judge found "overwhelming" evidence that poker is a game of skill rather than pure gambling based on chance); *Definition Clears Man of Gambling Charges*, Fort Collins Coloradoan, <http://www.9news.com/rss/article.aspx?storyid=108829> (Feb. 3, 2009) (describing a Colorado case in which a man accused of illegal gambling was acquitted under a definition of illegal gambling that exempted "bona fide contests of skill"); Chuck Blount, *Poker Deemed Game of Skill in Pennsylvania*, San Antonio Express-News, Jan. 22, 2009, at 3D (noting a Pennsylvania ruling that poker is "a game of skill [not] subject to . . . state gambling laws.").

The court's second opinion and order tackled the question of whether states should police Internet gambling head-on. The trial judge wrote that the domain owners' argument that "judicial interference of the Internet will create havoc" is a "doomsday argument" which "does not ruffle the Court"; indeed, the order states that "[t]he Internet . . . is still not above the law, whether on an international or municipal level."<sup>53</sup> Despite the court's profession of indifference towards these potentially serious collateral effects, it modified the seizure to mitigate any effects outside of Kentucky. Specifically, the court altered its order to permit gambling sites to retain their domains so long as they installed software that would deny access to users within Kentucky.<sup>54</sup> Thus, the court acknowledged that geolocation technologies might offer a viable alternative to other enforcement measures, such as seizure of the offending domains. In this regard, the court's order appears to be the first example of a U.S. court invoking geolocation technologies as a potential solution to Internet gambling problems.

Following this turn of events, domain owners sought to block enforcement of the trial court's seizure order.<sup>55</sup> In January 2009, the Kentucky Court of Appeals granted the domain owners' petition, holding that domain names do not fall within the meaning of "gambling device" set forth in KRS section 528.100.<sup>56</sup> Even if the Kentucky Supreme Court reverses the court of appeals on this question, or if the state legislature amends section 528.100 to cover Internet domains, Kentucky's seizure effort will still likely fail as an unlawful regulation of interstate commerce under the Dormant Commerce Clause.<sup>57</sup>

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<sup>53</sup> See *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 at 39 (Franklin Cir. Ct. Ky. Oct. 16, 2008) (order amending the September 18, 2008 seizure order), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/order-Kentuckyvs141InternetDomains.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/order-Kentuckyvs141InternetDomains.pdf).

<sup>54</sup> *Id.* at 39-40. The order did condition this option on approval of such measures by the court. *Id.*

<sup>55</sup> See Petition for Writ of Prohibition of Vicsbingo.com and Interactive Gaming Council at 2, *Interactive Media Entm't and Gaming Ass'n, Inc. v. Wingate*, No. 08-CI-01409, (Ky. Ct. App. filed Oct. 28, 2008), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/writpetition.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/writpetition.pdf). The Court of Appeals granted a stay of the trial court's seizure order pending resolution of the appeal. See *Interactive Media Entm't and Gaming Ass'n, Inc. v. Wingate*, No. 08-CI-01409, at 3-4 (Ky. Ct. App. Nov 14, 2008) (order granting defendants' motion for a stay), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/iMEGA--COA Order--11-14-08-1.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/iMEGA--COA Order--11-14-08-1.pdf).

<sup>56</sup> See *Interactive Media Entm't and Gaming Ass'n, Inc. v. Wingate*, No. 08-CI-01409, at 8 (Ky. Ct. App. Jan. 20, 2009) (order granting petition for writ of prohibition), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/kentuckyorder-final.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/kentuckyorder-final.pdf). The Commonwealth has appealed this decision to the Kentucky Supreme Court. See Notice of Appeal to Kentucky Supreme Court, *Interactive Media Entm't and Gaming Ass'n, Inc. v. Hon. Thomas D. Wingate*, , *Franklin Cir. Ct.*, No. 08-CI-01409 (Ky. Ct. App. filed Jan. 21, 2009), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/Notice%20of%20Appeal.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/Notice%20of%20Appeal.pdf).

<sup>57</sup> See, e.g., Olson, *supra* note 4, at 9 (concluding, after a detailed analysis, that the Dormant Commerce Clause likely prevents states from regulating Internet gambling within their borders); cf. *Am. Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003)

Under the Dormant Commerce Clause, states are prohibited from passing legislation that “discriminates against or unduly burdens interstate commerce and thereby ‘impedes free private trade in the national marketplace.’”<sup>58</sup> In the Internet context, state laws tend to run afoul of this prohibition in one of two ways—either by regulating a market sector that is subject only to federal control due to its interstate nature, or by regulating conduct that occurs wholly within other states’ borders.<sup>59</sup> State regulation of Internet gambling raises both of these problems, since it involves the same online market that was held to be an exclusive “national preserve” in *American Libraries Ass’n v. Pataki*,<sup>60</sup> and since enforcement of such regulations would effectively “project[] [the state’s] law into other states.”<sup>61</sup> To illustrate this point, imagine that Kentucky prevailed in its suit, resulting in seizure and deactivation of all 141 domains. That outcome would not only seriously undermine federal legislation aimed at legalizing some forms of Internet gambling,<sup>62</sup> it would also make it impossible for consumers in Nevada to gamble on sites using the seized domains, even if Nevada law permitted them to do so. As a result, commentators have reached a consensus that state regulation of Internet gambling violates the Dormant Commerce Clause.<sup>63</sup>

Kentucky’s experience with Internet gambling regulation is far from unique. As a matter of constitutional law, the Dormant Commerce Clause poses the same limitations on all fifty states. That limitation has caused states to explore creative, though often ineffective, indirect measures to regulate Internet gambling, such as Kentucky’s state law claims or Minnesota’s recent effort to force Internet service providers to block access to

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(concluding that a Vermont statute criminalizing the transfer of sexually explicit materials to children violated the Dormant Commerce Clause as applied to out-of-state operators of internet Web sites); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033-34 (D.N.M. 1998), *aff’d*, 194 F.3d 1149 (10th Cir. 1999) (deciding that a New Mexico provision banning communication of indecent materials to minors violated the Dormant Commerce Clause as applied to Internet users and content providers).

<sup>58</sup> *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (citations omitted)).

<sup>59</sup> See *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997); *cf. Am. Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003) (noting that the Internet’s wide geographic reach causes state regulation to be impracticable).

<sup>60</sup> 969 F. Supp. at 183. For more detail on this point, see *infra* Part III.B.

<sup>61</sup> *Am. Libraries Ass’n*, 969 F. Supp. at 177.

<sup>62</sup> See Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009); Internet Gambling Regulation and Enforcement Act of 2007, H.R. 2046, 110th Cong. § 5387 (2007).

<sup>63</sup> See Olson, *supra* note 4, at 9 (concluding after a detailed analysis, that the Dormant Commerce Clause likely prevents states from regulating Internet gambling within their borders).

gambling sites.<sup>64</sup> While some states have achieved limited success in prosecuting individual gaming sites or blocking payment processing,<sup>65</sup> on the whole Internet gambling has thrived in the United States in spite of state efforts to the contrary.<sup>66</sup> Kentucky's motivations for seeking to prohibit Internet gambling are also typical. Kentucky, like many other states, earns significant revenue from its casinos.<sup>67</sup> Thus, its efforts to block Internet gambling, like those of other states that allow brick and mortar gambling, can be characterized as an effort to protect in-state casino revenue streams from online competition.<sup>68</sup> Though some opponents of Internet gambling focus more on

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<sup>64</sup> See Peter Svensson, *Novel Effort in Minnesota Seeks ISP Gambling Block*, ABC News, <http://abcnews.go.com/Technology/wireStory?id=7461125> (Apr. 29, 2009).

<sup>65</sup> See, e.g., *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (upholding jurisdiction over out-of-state Internet gambling provider); Reidenberg, *supra* note 10, at 1960 (noting New York Attorney General Eliot Spitzer's successful effort to get banks to voluntarily cease processing transfers to Internet gambling providers).

<sup>66</sup> See Tony Batt, *Chances Seem Slim for Passing Net Betting Ban*, Las Vegas Review-Journal, Aug. 28, 2006, at 1D ("[Internet gambling] has gone from 30 offshore Web sites taking in \$30 million in bets in 1996 to a \$12 billion industry with more than 2,300 Web sites this year.").

<sup>67</sup> See *supra* notes 48-49 and accompanying text.

<sup>68</sup> Nevada, the Mecca of brick-and-mortar casino gambling in the United States, merits additional discussion in light of this general theory. Due to the significant revenue Nevada gains through traditional casino gambling, one might expect the state to oppose Internet gambling more vigorously than other states. Yet Nevada has done just the opposite, as it has passed legislation that moves the state towards legalized Internet gambling if and when federal law allows. See *infra* note 91 and accompanying text.

While Nevada's position may at first seem to show that states are *not* seeking to protect in-state casino income through Internet gambling legislation, the state's position is actually consistent with the theory advocated above for two reasons. First, major Las Vegas casino operators, such as Harrah's Entertainment, have calculated that Internet gambling helps fuel their brick-and-mortar businesses. Online poker sites, for instance, have contributed to a major increase in the value and popularity of Harrah's annual World Series of Poker event. See *supra* note 29. While Las Vegas-based casinos may experience a net benefit from Internet gambling due to their status as tourist destinations, other, less-glitzy gambling establishments (e.g., those which rely primarily on local customers, as opposed to tourists) may not reap similar Internet-based rewards. For customers of the latter class of casinos, Internet gambling may be less of a complementary good and more of a substitute.

Second, state sentiment against Internet gambling may be waning. Until recently, major casino operators strongly opposed legalization of Internet gambling. Now, those same companies are beginning to embrace it. See Alan Schmadtke, *Bill Seeks to Legalize Internet Wagering*, Orlando Sentinel, May 8, 2007, at D1 ("Casinos were vehemently opposed to Internet gambling a decade ago but since have relaxed their stance as revenue possibilities emerged for them."). As casino operators' views change, so too may those of state governments. The fact that Nevada has

morality, protection of children, or similar ends,<sup>69</sup> the powerful economic motivations described above suggest that states could change their stance towards Internet gambling if new revenue opportunities were to arise.

### *B. The Costs of State and Federal Regulation*

For all its benefits, whether moral or economic, the current prohibition regime also carries tremendous direct and indirect costs. To date, prohibition of Internet gambling has directly resulted in imposition of large sanctions by the WTO, with the potential for additional sanctions looming on the horizon.<sup>70</sup> The system also prevents states willing to embrace Internet gambling from receiving taxes or licensing fees at a time when Internet gambling is booming and state budgets are routinely in the red.<sup>71</sup>

#### 1. Direct Costs: WTO Sanctions

As a signatory to the General Agreement on Trade in Services (GATS),<sup>72</sup> the United States is obligated to open up its markets to competition from overseas. Under the treaty, member nations may close off particular market sectors from such competition for valid moral reasons.<sup>73</sup> Alternatively, nations may also withdraw entire market segments from treaty coverage altogether.<sup>74</sup> When nations choose the latter route, they must satisfactorily compensate other member nations injured by the withdrawal or submit to binding arbitration.<sup>75</sup> In cases where a signatory nation blocks foreign access to a market

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passed legislation that would permit some Internet gambling may simply reflect the fact that its legislature is more in tune with casino operators' views than other state legislatures.

<sup>69</sup> See Steitzer, *supra* note 48, at 1A.

<sup>70</sup> See D. Ravi Kanth, *U.S. Offers Compensation to India on Internet Gambling*, Business Standard, Dec. 18, 2007, at 2 (describing potential claims against the U.S. by Japan, Canada, Australia, Costa Rica, Macau, and others).

<sup>71</sup> See, e.g., States Need Deep Cutbacks, Buffalo News (New York), Feb. 23, 2009, at A8 (discussing four states facing budget shortages).

<sup>72</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS].

<sup>73</sup> *Id.* at art. XIV(a) (permitting exceptions "necessary to protect public morals or to maintain public order").

<sup>74</sup> See *id.* at art. XXI § 1(a).

<sup>75</sup> *Id.* at art. XXI §§ 2-4.

without having taken either of these courses of action, injured foreign nations may appeal to the WTO for damages.<sup>76</sup>

In 2005, the WTO found that U.S. federal and state gambling laws unfairly discriminated against foreign Internet gambling operators.<sup>77</sup> The United States invoked the GATS moral exception clause in defense of these laws, but the WTO panel rejected that argument because U.S. law permits a wide array of domestic gambling services, including gambling across state lines.<sup>78</sup> If the United States truly had a moral objection to gambling, such laws would never be on the books. As a result, in 2007 a WTO panel awarded Antigua up to \$21 million in annual trade sanctions from the United States.<sup>79</sup> Other WTO members, including Japan, Canada, and the E.U., followed by filing similar WTO claims. In response, the United States announced that it was withdrawing its domestic gambling services market from WTO jurisdiction entirely.<sup>80</sup> Under GATS, this move required the United States to negotiate agreements or else proceed to arbitration with affected WTO members to compensate them for revenues lost as a result of the removal.<sup>81</sup>

After extensive negotiations, the United States Trade Representative (USTR) and the E.U. reached such a settlement in December 2007.<sup>82</sup> However, the USTR kept the settlement terms confidential.<sup>83</sup> The USTR denied a Freedom of Information Act (FOIA) request for the settlement terms on national security grounds.<sup>84</sup> Ultimately, watchdog

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<sup>76</sup> See Julia Qin, *Defining Nondiscrimination Under the Law of the World Trade Organization*, 23 B.U. Int'l L.J. 215, 270-74 (2005).

<sup>77</sup> See Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, P 1.2, WT/DS285/R (Nov. 10, 2004).

<sup>78</sup> See Interstate Horse Racing Act of 1978, 15 U.S.C. § 3001 (2000) (permitting interstate wagers on horse races).

<sup>79</sup> See Alan M. Field, *High Stakes at the WTO; Ruling in Internet Gambling Dispute Could Have Far-Reaching Impact*, J. of Comm., Jan. 14, 2008, at 32. These sanctions are not money damages, but rather come in the form of trade preferences such as the right to sell U.S. copyrighted material without paying royalties to the copyright owners. *Id.*

<sup>80</sup> See EU out of U.S. Online Gambling Market, L.A. Times, Dec. 18, 2007, at C7.

<sup>81</sup> See GATS at art. XXI § 3.

<sup>82</sup> See Joint Letter from the United States of America and the European Communities pursuant to paragraph 5 of the procedures for the implementation of Article XXI of the General Agreement on Trade in Services (GATS)(S/L/80), Dec. 17, 2007. Notably, this agreement has not gone into effect as of April 2009. See Wallach Decl., *infra* note 86, at 7.

<sup>83</sup> See Press Release, Public Citizen, Bush Administration Illegally Withholding Terms of Deal That Binds New Sectors of U.S. Economy to WTO Authority, <http://www.citizen.org/pressroom/release.cfm?ID=2658>, May 19, 2008.

<sup>84</sup> See *id.*

group Public Citizen and journalist Ed Brayton compelled disclosure of the settlement via litigation in November 2008.<sup>85</sup>

The U.S.-E.U. settlement is opaquely worded and does not include a clear dollar value, unlike the judgment secured by Antigua.<sup>86</sup> Nonetheless, the settlement is potentially massive, with estimates running into the billions of dollars.<sup>87</sup> It dramatically expands foreign access to several sectors of the U.S. economy: storage and warehouse services, research and development, postal and courier services, and technical testing and analysis.<sup>88</sup> The storage component has proven to be the most controversial as it opens up the U.S. market for storage of “liquids, gases, gasoline, oils, and chemicals,” including highly sensitive liquid natural gas (LNG) terminals and tank farms containing other types of potentially hazardous substances. The National Conference of State Legislatures has forcefully opposed this change, mainly on security grounds.<sup>89</sup> Further, the settlement’s research and development terms suggest that some current U.S. tax preferences and subsidies for domestic industries may no longer be legal under GATS.<sup>90</sup>

The Antigua judgment and the U.S.-E.U. settlement described above both arose directly as a consequence of U.S. laws prohibiting Internet gambling. Some states, such as Kentucky, strongly support prohibition of Internet gambling, while others, such as Nevada, have enacted laws explicitly allowing it.<sup>91</sup> There is little evidence that states have considered the international trade dimension in arriving at their stance on the issue. Moreover, the nation as a whole, rather than only the anti-gambling states, shoulders the burden of these significant costs—giving rise to a classic free rider problem.

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<sup>85</sup> See Defendant’s Notice of Release of Document, *Brayton v. Office of the U.S. Trade Representative*, No. 08-0855 (D.D.C. filed Nov. 26, 2008).

<sup>86</sup> See Decl. of Lori Wallach, *Brayton v. USTR*, No. 08-0855 (D.D.C. filed Feb. 9, 2009) (noting that it took two months to “decod[e]” the settlement and that the settlement is “indecipherable to the average reader”) [hereinafter Wallach Decl.].

<sup>87</sup> See Letter from Rep. Barney Frank, Chairman of the House Fin. Servs. Comm., to the U.S. Trade Representative (Mar. 14, 2008) (“[S]ome trade experts [have] estimated that the trade concessions could cost the United States many billions of dollars in compensation.”); E-mail from Ed Brayton, Plaintiff in *Brayton v. Office of the U.S. Trade Representative*, to Kevin King (Feb. 28, 2009, 10:07 CST) (on file with author) (“[T]here’s no way to measure the possible benefit to the E.U. but it almost certainly has to dwarf the Antigua settlement.”).

<sup>88</sup> See Wallach Decl. at 8-9.

<sup>89</sup> *Id.* at 10-11.

<sup>90</sup> *Id.* at 11-15.

<sup>91</sup> See Nev. Rev. Stat. § 463.750 (2009); Ed Vogel, *Bill Advancing Internet Gambling Signed by Guinn*, Las Vegas Review-Journal, June 15, 2001, at 10A.



## 2. Indirect Costs: Lost Tax Revenues and Licensing Fees

The current prohibition regime also imposes large indirect costs on states in the form of lost tax revenues and lost licensing fees. Online casinos, card rooms, and sports books generate billions of dollars in revenue from U.S.-based customers each year but pay no U.S. taxes.<sup>92</sup> Assuming an even distribution of gambling activity throughout the U.S. population and tax rates consistent with state taxation of traditional brick-and-mortar casinos, a state like Illinois could theoretically generate \$30 million or more in annual tax revenue.<sup>93</sup> Indeed, some recent estimates have suggested that legalizing and regulating online gambling could generate as much as \$4 billion per year nationally.<sup>94</sup> While legalized gambling over the Internet would carry the potential for more social ills such as addiction, bankruptcy, and underage gambling,<sup>95</sup> the staggering amounts of revenue that could be generated by states favoring legalization simply cannot be ignored.

### III. GEOLOCATION TECHNOLOGIES: RECONSTRUCTING JURISDICTIONAL BORDERS ON THE INTERNET

The Internet's architecture naturally resists classification of users according to geographic or legal jurisdiction. This design feature makes it extremely difficult for one state to enforce its Internet gambling laws without compromising the prerogatives of other states. For example, if Kentucky had succeeded in seizing the 141 gambling domains, it would have effectively imposed its law on citizens in each of the other forty-nine states as well as other countries. In this manner, the Internet's architecture seems to force states to choose between two equally unpalatable options: violating the Dormant Commerce Clause or forgoing enforcement entirely.<sup>96</sup>

Advances in geolocation technology promise to radically alter that picture by making it possible to cheaply and effectively re-create jurisdictional borders on the

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<sup>92</sup> See Raj, *supra* note 21, at 799-802.

<sup>93</sup> According to the U.S. Census Bureau's 2007 estimates, Illinois has 12,852,548 residents—about 4.6% of the nation's population. See Illinois QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/17000.html> (last visited Mar. 7, 2009). Illinois' pro-rata share of the \$7.2 billion spent annually on Internet gambling by U.S. consumers equals over \$330 million. See Cholodofsky, *supra* note 7.

<sup>94</sup> See Stephen A. Murphy, *Report Estimates Online Gambling Could Bring in \$42 Billion*, Card Player Magazine, Nov. 3, 2009, available at <http://www.cardplayer.com/poker-news/7878-report-estimates-online-gambling-could-bring-in-42-billion>; Rowland, *supra* note 37, at A1; Aoife McCarthy, *Online Gambling Draws Opposition*, Politico, <http://dyn.politico.com/printstory.cfm?uuid=17159A41-3048-5C12-0059B69C307BDBAD> (Nov. 6, 2007).

<sup>95</sup> See Raj, *supra* note 21, at 791-99; see also Murray & Grimaldi, *supra* note 26, at A3.

<sup>96</sup> Cf. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997) (discussing the application of the Dormant Commerce Clause to state regulation of the Internet).

Internet. As a result, geolocation technologies may be poised to play the role of the sword in slicing through the heretofore impenetrable Internet gambling Gordian knot. This Part introduces the concept of geolocation on the Internet, traces developments in the technology in recent years, and explores the ramifications of these architectural developments for Internet gambling law.

### A. *Geolocation Technologies Defined*

Geolocation technologies identify an Internet end-user's physical location by an automated means. The most sophisticated and commonly-deployed approach to this process relies on a user's IP address to make the geographical match.<sup>97</sup> One leading article explains the process as follows:

As the access-seeker enters the appropriate Uniform Resource Locator ("URL") into his/her browser, or clicks on the appropriate hyperlink, an access-request is sent to the server operating the requested Web site. As the server receives the access-request, it, in turn, sends a location request (i.e., forwards the access-seeker's Internet Protocol ("IP") address) to the provider of the geo-location service. The provider of the geo-location service has gathered information about the IP addresses in use, and built up a database of geo-location information. Based on the information in this database, the provider of the geo-location service gives the Web site server an educated guess as to the access-seeker's location. Armed with this information, the Web server can provide the access-seeker with <sup>the</sup> information deemed suitable . . . .<sup>98</sup>

Other, less sophisticated geolocation technologies query an end-user's browser settings such as time zone and language to determine the user's physical location.<sup>99</sup> Currently, a wide range of companies use geolocation tools to serve targeted advertising on Web sites,<sup>100</sup> to restrict access to individuals from undesirable locations,<sup>101</sup> and to provide content in a user's native language.<sup>102</sup>

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<sup>97</sup> See Dan Jerker B. Svantesson, *Geo-location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 J. Marshall J. Computer & Info. L. 101, 109-10 (2004).

<sup>98</sup> *Id.* at 110.

<sup>99</sup> *Id.* at 120-21.

<sup>100</sup> *Id.* at 102; see also Lemley & Weiser, *supra* note 19, at 803-05; Reidenberg, *supra* note 10, at 1952, 1961; Jack Goldsmith & Timothy Wu, *Digital Borders*, Legal Aff. Jan.-Feb. 2006 40, at 43.

<sup>101</sup> For example, Party Poker, formerly the most successful online poker site in the U.S., uses IP-based geolocation tools to block U.S. customers from accessing its servers in an effort to avoid liability under the Wire Act. Other major industry players have also used geolocation tools

Most forms of sophisticated, IP-based geolocation technology are extremely accurate. Experts have estimated accuracy rates of between 85 and 98 percent at the state level and over 99 percent at the national level.<sup>103</sup> The level of accuracy necessarily depends on the quality of the data used by the geolocation provider (Akamai, BlackEdge, Quova, etc.),<sup>104</sup> the context in which a content provider is operating,<sup>105</sup> and the prevailing Internet architecture.<sup>106</sup> To some extent, these limitations reflect the fledgling nature of the geolocation industry, as most development in that market has taken place in recent years.<sup>107</sup> Therefore, geolocation technologies will likely become more accurate in the future.

### B. *A Brief History of Geolocation and the Law*

Just over a decade ago, the conventional wisdom was that geographic location detection on the Internet was impossible. In *American Libraries Ass'n v. Pataki*, a widely-cited 1997 district court case, the court stated “[t]he Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location . . . .”<sup>108</sup> Because it

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in the past for similar purposes. See Gary Rotstein, Internet Gambling May Be Illegal but It's Not Going Away, Pittsburgh Post-Gazette, June 11, 2006, at A13 (“MGM Mirage operated an interactive Web site from the Isle of Man . . . in 2001-03, attempting to show it could bar play by users who were . . . based in places that did not permit Internet gambling, including the [U.S.]”).

<sup>102</sup> Svantesson, *supra* note 97, at 120. For example, Google automatically tailors its search page to the end-user's home country and language.

<sup>103</sup> See PricewaterhouseCoopers Completes Annual Audit of Quova IP Geolocation Data, Marketwire, Apr. 14, 2009; *Internet Gambling Safeguards, Social Ills Dominate Hearing*, Washington Internet Daily, June 11, 2007.

<sup>104</sup> Svantesson, *supra* note 97, at 111-13.

<sup>105</sup> For example, IP-based geolocation will work much more effectively in densely populated, industrialized nations such as the U.S. or South Korea, and much less effectively in developing nations with highly decentralized and poorly documented Internet infrastructures. See *id.* at 112-13.

<sup>106</sup> See *id.* at 118-19 (discussing the relative ease of IP-based geolocation under both the IPv4 and IPv6 frameworks).

<sup>107</sup> See *id.* at 101-02.

<sup>108</sup> 969 F. Supp. 160, 170 (S.D.N.Y. 1997); see also *United States v. Lewis*, 554 F.3d 208 (1st Cir. 2009) (“Simply put, it is impossible to say with any certainty that a given packet will take the shortest route in distance; the routers search for the shortest route in time. Further compounding this problem, the network itself was not established with state boundaries in mind, nor does it even recognize them. ‘The Internet is wholly insensitive to geographic distinctions.’”).

was impossible to distinguish between users in different jurisdictions, the court held that a New York law prohibiting various forms of online pornography violated the Dormant Commerce Clause.<sup>109</sup> In so holding, the court reasoned that

The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.<sup>110</sup>

In this regard, the technical reality of the day dictated the legal result<sup>111</sup>—thus illustrating Lawrence Lessig's axiom that "code is law."<sup>112</sup>

Other courts have taken a similar approach. In *ACLU v. Reno*, a case involving the constitutionality of the Communications Decency Act of 1996, a federal district court concluded that "there is no technologically feasible way for an Internet speaker to limit the geographical scope of his speech (even if he wanted to), or to implement a system for

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<sup>109</sup> *Am. Libraries Ass'n*, 969 F. Supp. at 183-84. Though some courts have begun to carve out exceptions, see *Am. Booksellers Found. for Free Expression v. Strickland*, 512 F. Supp. 2d 1082, 1101 (S.D. Ohio 2007), the case remains good law for its core proposition that state-based regulation of the Internet violates the Dormant Commerce Clause. Specifically, the New York law would have criminalized knowingly transmitting images which "in whole or in part, depict[ed] actual or simulated nudity, sexual conduct or sado-masochistic abuse" that were "harmful to minors" via any "computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another . . ." *Am. Libraries Ass'n*, 969 F.Supp. at 163. While the law provided a number of affirmative defenses, these defenses required a party to take particular filtering or verification measures, and thus amounted to a form of indirect regulation. See *id.* at 163-64. More importantly, the law did not "import any restriction that the criminal communication must take place entirely within the State of New York." *Id.* at 169. Thus, the court reasoned, "the Act applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction." *Id.* at 169-70.

<sup>110</sup> *Am. Libraries Ass'n*, 969 F. Supp. at 168-69.

<sup>111</sup> Though she was focusing on the potential for age identification rather than geographic identification, Justice O'Connor expressed a similar sentiment in *Reno v. ACLU*, 521 U.S. 844, 891 (1997) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor wrote that "cyberspace still remains largely unzoned—and unzoneable," and that this technological shortcoming doomed what would otherwise be a valid regulation. *Id.* Justice O'Connor also remarked that "prospects for the eventual zoning of the Internet appear promising," hinting that a change in technological capability could dictate a substantive change in the law as well. *Id.*

<sup>112</sup> Lawrence Lessig, *Code and Other Laws of Cyberspace* 6 (1999).

screening the locale of incoming requests.”<sup>113</sup> Just a few years later, the Third Circuit found the lack of an effective geographic screening mechanism fatal to the constitutionality of another online speech measure, the Child Online Protection Act (COPA).<sup>114</sup> Reflecting the state of the Internet at the time, the court stated that “Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. As soon as information is published on a Web site, it is accessible to all other Web visitors.”<sup>115</sup> Since publishers could not “restrict access to their site based on the geographic locale of the Internet user visiting their site,” the Third Circuit reasoned that sites would be unconstitutionally forced to either “comply with the regulation imposed by the State with the most stringent standard or entirely forego Internet communication . . . .”<sup>116</sup>

Litigation involving several state law variants of COPA elicited similar views regarding online jurisdictional differentiation from the courts. In assessing a New Mexico child protection measure, one district court found that “[i]t is impossible for speakers [on] the World Wide Web to determine the geographic location of persons who access their speech” and that “speakers have no way to prevent speech communicated by . . . the World Wide Web from reaching persons residing in the State of New Mexico.”<sup>117</sup> A district court in Michigan reached largely the same result one year later in *Cyberspace Communications, Inc. v. Engler*.<sup>118</sup> There, the court matter-of-factly stated that “[t]he majority of Internet addresses contain no geographic indicators.”<sup>119</sup> The perceived inability to screen Internet users by jurisdiction also played a key role in the Second Circuit’s decision in *American Booksellers Foundation v. Dean*—a case in which the court enjoined enforcement of a Vermont child protection law on Dormant Commerce Clause grounds.<sup>120</sup> Key to the Second Circuit’s analysis was the fact that “the Internet does not recognize geographic boundaries,” thus making it “difficult, if not impossible,

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<sup>113</sup> *ACLU v. Reno*, 929 F. Supp. 824, 878 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). On appeal, the Supreme Court declared that Internet sites are “located in no particular geographical location.” *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

<sup>114</sup> *ACLU v. Reno*, 217 F.3d 162,166 (2000) (enjoining enforcement of 47 U.S.C. § 231 (2000)), *vacated*, 535 U.S. 564 (2002).

<sup>115</sup> *Id.* at 175.

<sup>116</sup> *Id.* at 176 (internal quotations omitted).

<sup>117</sup> *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1032 (D.N.M. 1998), *aff’d*, 194 F.3d 1149 (10th Cir. 1999).

<sup>118</sup> 55 F. Supp.2d 737, 741-42 (E.D. Mich. 1999), *aff’d and remanded*, 238 F.3d 420 (6th Cir. 2000), *summary judgment and injunction granted on remand*, 142 F. Supp. 2d 827 (E.D. Mich. 2001).

<sup>119</sup> *Id.* at 744.

<sup>120</sup> 342 F.3d 96 (2d Cir. 2003).

for a state to regulate internet activities without projecting its legislation into other States.”<sup>121</sup>

As recently as 2004, federal courts have determined that geolocation techniques were insufficiently accurate for legal purposes. For example, in *Sony Music Entertainment, Inc. v. Does*, Judge Denny Chin of the Southern District of New York expressed skepticism that then state-of-the-art geolocation tools could do anything more than establish the “likelihood” that the John Doe defendants were located outside of the state.<sup>122</sup> A second 2004 district opinion in *United States v. Wagers*, however, presaged the coming revolution in geolocation technology in its conclusion that “[W]eb IP addresses do not *directly* reflect the geographic street address of the office, residence, or building from which an individual accesses . . . the Internet.”<sup>123</sup> The Ninth Circuit illustrated the legal significance of the indirect geolocation measures referenced in *Wagers* when it openly suggested in 2006 that Yahoo! not only had the means to screen content by jurisdiction, but was in fact doing so to comply with a French court order.<sup>124</sup>

Much has changed since *American Library Ass’n* was decided in 1997. Not only are geolocation technologies now widely available, they have been characterized as “accurate enough for legal purposes.”<sup>125</sup> As illustrated in the Kentucky litigation, courts have begun to take judicial notice of this degree of accuracy in holding that Web site operators have both the means and the duty to filter content according to local laws.<sup>126</sup> Other U.S. courts have also recently taken a similar approach to geolocation technologies.<sup>127</sup> These decisions build on a trend set in motion by a seminal French case decided in 2000 regarding display of Nazi paraphernalia on various Web pages hosted by

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<sup>121</sup> *Id.* at 103 (internal quotations omitted).

<sup>122</sup> 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004).

<sup>123</sup> 339 F. Supp. 3d 934, 940 (E.D. Ky. 2004).

<sup>124</sup> *Cf. Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1217 (9th Cir. 2006) (en banc) (“Yahoo! contends that restricting access by French Internet users in a manner sufficient to satisfy the French court would in some unspecified fashion require Yahoo! simultaneously to restrict access by Internet users in the United States. This may or may not be true. It is almost certainly not true if Yahoo! is now complying ‘in large measure’ with the French court’s orders . . .”).

<sup>125</sup> Svantesson, *supra* note 97, at 101; *see also* Dan Jerker B. Svantesson, *Borders On, Or Border Around-The Future of the Internet*, 16 Alb. L.J. Sci. & Tech. 343, 356 (2006) [hereinafter *Borders*].

<sup>126</sup> Recall that the trial court allowed gambling sites to retain their domain names if they blocked access to users based in Kentucky. *See supra* note 54 and accompanying text.

<sup>127</sup> *See, e.g., Nat’l Fed’n for the Blind v. Target Corp.*, 452 F.Supp.2d 946, 960 (N.D. Cal. 2006); *Twentieth Century Fox Film Corp. v. iCraveTV*, No. 00-121, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. Feb. 8, 2000).

Yahoo!.<sup>128</sup> As the technology continues to mature, courts, legislatures, and agencies will increasingly look to geolocation as a means to force Internet content providers to comply with local laws. In this regard, geolocation technology may have developed sufficient commercial and legal momentum as to destroy the “borderless” character of the Internet and usher in a new era in which online content is jurisdictionally differentiated to almost the same extent as that in the offline world.<sup>129</sup>

For evidence of that trend, one need look no further than the leading proposal to reform federal Internet gambling law, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act (IGRCPEA).<sup>130</sup> The Act’s central feature and *raison d’être* is the legalization of Internet gambling services provided by federally-licensed operators. Although the Act would theoretically legalize Internet gambling throughout the United States, it does grant individual states the right to opt out of some or all of the new regulatory regime.<sup>131</sup> To give force to those state choices, the Act would require gambling sites to use geolocation technologies “to ensure that the individual placing a bet or wager is physically located in a jurisdiction that permits Internet gambling at the time the bet or wager is placed.”<sup>132</sup> Importantly, IGRCPEA imposes liability on licensed Internet gambling operators only when they “knowingly” accept wagers from customers in jurisdictions where online gambling is illegal,<sup>133</sup> apparently barring actions for negligence by state attorneys general and immunizing operators that utilize state-of-the-art geolocation systems.

#### IV. IS A JURISDICTIONALLY DIFFERENTIATED INTERNET GAMBLING REGIME DESIRABLE?

As demonstrated in Part III, geolocation technologies are now widely available, extremely accurate, and increasingly utilized by legal actors to force online enterprises to

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<sup>128</sup> See Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000 (Fr.). For a discussion of this case and its implications for jurisdictional differentiation on the Internet, see *Yahoo!*, 433 F.3d at 1201-05; *Borders*, *supra* note 125, at 356-57; Goldsmith & Wu, *supra* note 100, at 42; Alex van Leeuwen, *Geo-targeting on IP Address: Pinpointing Geolocation of Internet Users*, Geo Informatics (July/Aug. 2001).

<sup>129</sup> Cf. Svantesson, *supra* note 97, at 358.

<sup>130</sup> See Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009); Internet Gambling Regulation and Enforcement Act of 2007, H.R. 2046, 110th Cong. § 5387 (2007).

<sup>131</sup> H.R. 2046 § 5385(a).

<sup>132</sup> H.R. 2046 § 5383(g)(2). For a discussion of the specific roles envisioned for geolocation in implementing the Act, see *Can Internet Gambling Be Effectively Regulated to Protect Consumers and the Payments System? Before the H. Comm. on Fin. Servs.*, 110th Cong. (2007) [hereinafter Internet Gambling Hearing].

<sup>133</sup> See H.R. 2046 § 5385(c)(2).

comply with local laws.<sup>134</sup> While it is clear that geolocation technologies will play a role in future regulation of Internet gambling in the United States—whether legalized or not—it is unclear how pervasive that role will ultimately be. To frame that discussion, this Part introduces a hypothetical framework for the regulation of Internet gambling. The proposed framework uses geolocation technologies to re-create state jurisdictional borders on the Internet, while addressing Commerce Clause issues through federal legislation that provides states with control over substantive policy decisions. This Part argues that such a framework is normatively desirable because it is more democratic, more effective, and more efficient than the current regime. Arguments against jurisdictional differentiation based on circumvention, cost, and harm to the Internet's open nature fail to offset these advantages.

### A. Hypothetical Federal-State Framework Governing Internet Gambling

Imagine a federal law that includes the following five provisions. First, all Internet gambling operators doing business in the United States must implement state-of-the-art geolocation technologies, as well as measures designed to defeat end-user circumvention of those technologies. A competent federal agency shall license operators meeting that requirement to do business in the United States, and shall also ensure ongoing compliance. Second, the responsible federal agency shall develop two tiers of licenses for operators: one covering all classes of gambling activities found in U.S. brick-and-mortar casinos, and one covering only games where skill is the primary long-term determinant, such as poker.<sup>135</sup> Third, individual states may elect to legalize either tier of Internet gambling established by the agency (or, as a third option, no gambling at all)—with all other forms of state-based Internet gambling regulation expressly pre-empted. Fourth, Internet gambling operators may not knowingly or recklessly serve customers in states that have not elected either of the tiers described above. Such states shall have a private right of action to enforce this provision in any manner that does not undermine the framework as a whole or the rights of any other state. Fifth, a uniform and exclusive federal tax on all net receipts by licensed Internet gambling operators shall be imposed. Proceeds of this tax shall be apportioned on a per capita basis among the states electing either of the two tiers of legalized Internet gambling. The responsible agency shall

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<sup>134</sup> See *supra* notes 126-127 and accompanying text.

<sup>135</sup> See Rose & Owens, Jr., *supra* note 30, at 17-23. Rose and Owens cite several cases, including *State ex rel. Schillberg v. Barnett*, 488 P.2d 255 (Wash. 1971), for the proposition that outcomes in poker games, unlike lotteries or other forms of gambling, are primarily determined by skill. *Id.* In addition, one can argue, as experts supplied by the Poker Players' Alliance have in recent court cases, that poker is primarily a game of skill because knowledgeable players can both determine and manipulate the expected value of most bets. If a player consistently places wagers when the expected value of a wager is greater than zero and avoids doing so when the expected value is less than zero, then in the long run the player will turn a profit—even if in the short run those decisions may often produce a loss. See *supra* note 52 (describing recent cases in which courts have accepted this reasoning).



coordinate with the United States Trade Representative to ensure that states electing to prohibit Internet gambling primarily bear the direct costs resulting from such laws.

This hypothetical federal-state regulatory framework closely mirrors the IGRCPEA proposal currently under consideration in Congress. There are several important areas in which it differs, however. Whereas IGRCPEA is relatively lax in requiring only “appropriate” measures to identify a customer’s location and immunizes operators taking such measures so long as they do not “knowingly” accept illegal wagers,<sup>136</sup> the proposal above mandates the strongest form of geolocation technology currently available, requires reasonable anti-circumvention efforts,<sup>137</sup> and attaches liability for reckless as well as knowing violations. In taking a slightly more prescriptive course, the proposal above avoids the very real pitfall of compliance in name only, as many less sophisticated forms of geolocation are much less than 100% accurate and offshore operators may be tempted to build negligence into their customer verification processes if only knowing violations are actionable.

Further, the proposal above departs from IGRCPEA in providing three basic choices for states: full legalization, partial legalization, or none at all. IGRCPEA, on the other hand, appears to open the door to an infinite array of differing state laws by authorizing individual states to allow or prohibit “any particular types of gambling activities.”<sup>138</sup> The hypothetical framework also promotes greater efficiency by imposing a single federal tax on Internet gambling proceeds, rather than allowing each state to set its own rate structure, as in IGRCPEA.<sup>139</sup> Taking this approach one step further, the framework above apportions the direct costs of the overall system among the states in a manner consistent with their individual choices, while IGRCPEA is silent on this important issue.

The hypothetical framework described above is obviously only one configuration among a sea of possible alternatives. Yet this example serves as a useful jumping-off point for the normative discussion below for three reasons. To begin with, the hypothetical framework relies heavily on geolocation to create digital borders and places a great deal of weight on state law choices within those borders—thus bringing jurisdictional differentiation to the fore. Additionally, the framework closely tracks the contours of the legislative proposal most likely to be enacted into law in the near future—thus ensuring that the normative discussion retains a degree of real-world applicability. Finally, the framework grants states the ability to pursue any enforcement remedy that does not undermine the rights of other states, thus ensuring that states will be able to modify their prosecution strategies as the technological landscape changes.<sup>140</sup>

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<sup>136</sup> See H.R. 2046 §§ 5383(g)(2), 5385(c)(2).

<sup>137</sup> This requirement would impose an affirmative duty on sites to identify and take measures to prevent common means of defeating geolocation and other verification systems.

<sup>138</sup> H.R. 2046 § 5385(a)(2).

<sup>139</sup> H.R. 2046 § 5383(g)(3)-(4).

<sup>140</sup> See *infra* Part IV.B.1.

### B. *The Argument for Jurisdictional Differentiation in Internet Gambling Law*

The argument in favor of using geolocation technologies to create a jurisdictionally differentiated regulatory model, such as the hypothetical framework introduced above, relies on three main points.

#### 1. Honoring Important Federalism Principles

First, a jurisdictionally differentiated regulatory approach would give much greater weight to the democratic will of citizens on both sides of the Internet gambling debate. As noted at the outset of this Article, gambling is a sensitive social issue that has long been dealt with at the state, rather than federal, level due to the wide range of public opinion on the matter.<sup>141</sup> Using geolocation technology to recreate state borders on the Internet would honor important federalism principles by restoring the historical federal-state balance with respect to regulation of gambling. In this sense, geolocation technologies serve to correct the jurisdictional distortion caused by Internet architecture in the first place,<sup>142</sup> fixing many of the political problems concerning Internet gambling regulation along the way.

Further, in a jurisdictionally differentiated regulatory model, states morally disapproving of gambling would have a much easier time expressing and enforcing that disapproval in law, while those supporting gambling would be able to better serve the individual liberty interests of their citizens.<sup>143</sup> In contrast, regulation of the Internet by a single, undifferentiated set of laws would likely result in a lowest-common-denominator regime with which few would be satisfied.<sup>144</sup> Indeed, the Internet's development over the past decade clearly demonstrates that consumers want precisely the kind of granular experience that jurisdictional differentiation would provide.<sup>145</sup> Aside from the more particular advantages detailed below, this increased responsiveness of the law to the collective will in each state is a desirable end in itself.<sup>146</sup>

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<sup>141</sup> See *supra* note 3 and accompanying text.

<sup>142</sup> See Reidenberg, *supra* note 10, at 1956, 1960-62.

<sup>143</sup> See Goodman, *supra* note 6, at 410; Reidenberg, *supra* note 10, at 1972-73.

<sup>144</sup> See Goldsmith & Wu, *supra* note 100, at 45.

<sup>145</sup> *Id.* at 43-45.

<sup>146</sup> Cf. Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 774-779 (1995) (discussing various advantages of lawmaking at the state, as opposed to federal, level); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1494 (1987) (book review) (illustrating hypothetical scenarios in which decentralized lawmaking results in higher overall social utility).

## 2. Increased Compliance with the Rule of Law

Second, a jurisdictionally differentiated regulatory approach would substantially increase compliance with the rule of law. Currently, countless Internet gambling sites are operating in flagrant violation of federal and state laws.<sup>147</sup> In this regard, the Internet's architecture is being used to defeat the rule of law, or in the words of Joel Reidenberg, to launch a "denial of service attack" on the law itself.<sup>148</sup> While it may be true that "code is law" as a practical matter, the better normative view—at least with respect to divisive issues such as Internet gambling—is that law should be supreme over code. This is so not only because states have a duty to protect their citizens from all forms of harm, whether digital or analog,<sup>149</sup> but also because the law carries a legitimacy that code can never possess<sup>150</sup> and because technology alone is incapable of addressing online harms such as underage gambling.<sup>151</sup>

A jurisdictionally differentiated approach would re-establish the primacy of law over code more effectively than current law because it would offer Internet gambling providers two extremely attractive benefits for compliance. To begin with, a model like the one introduced in Part IV.A would offer Internet gambling sites the opportunity to do business within the United States without fear of prosecution by the newly empowered state attorneys general. Under current law, states—the entities with the greatest financial incentive to police Internet gambling<sup>152</sup>—are prohibited from taking meaningful enforcement action by virtue of the Dormant Commerce Clause.<sup>153</sup> Within the proposed

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<sup>147</sup> See *supra* Part II.A.

<sup>148</sup> See Reidenberg, *supra* note 10, at 1953, 1969.

<sup>149</sup> See *id.* at 1956, 1969; see also *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409 at 39 (Franklin Cir. Ct. Ky. Oct. 16, 2008) (order amending the September 18, 2008 seizure order), available at [http://www.eff.org/files/filenode/ky\\_v\\_domainnames/order-Kentuckyvs141InternetDomains.pdf](http://www.eff.org/files/filenode/ky_v_domainnames/order-Kentuckyvs141InternetDomains.pdf). ("The Internet . . . is still not above the law, whether on an International or municipal level."); see also *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997) (indicating that inventiveness does not excuse Internet technologies from compliance with the law).

<sup>150</sup> See Reidenberg, *supra* note 10, at 1969 ("[T]he rule of law . . . must be supreme over technological claims.").

<sup>151</sup> Cf. *id.*, at 1970. Notably, the same principle is increasingly accepted in the defamation context, as victims of online hate speech have had to turn more and more to the law to address harms that technology simply could not. See, e.g., *Doe v. Ryan*, No. 3:07-cv-00909 (D. Conn. filed June 8, 2007) (suit involving defamation, intentional infliction of emotional distress, and related claims against pseudonymous defendants posting on the "Autoadmit.com" message board).

<sup>152</sup> See *supra* notes 49, 67-68 and accompanying text.

<sup>153</sup> See Olson, *supra* note 4, para. 35. While federal agencies currently have the legal authority to prosecute unlawful Internet gambling, the Department of Justice and the Treasury

framework, however, this limitation on state enforcement would disappear since federal law would give each state full authority over Internet gambling within its own borders.<sup>154</sup> The flexible remedy provided by this framework could be used by states to enjoin Internet gambling sites from providing unauthorized gambling services, and if a site persisted despite such an injunction, could allow for more direct measures. These measures could include targeted physical-layer blockades, which would involve directing Internet Service Providers to block access to a particular site,<sup>155</sup> or a “bad actors list” that would direct banks to block all transactions to or from accounts associated with sites violating the new law.<sup>156</sup> In this way, jurisdictional differentiation would allow robust experimentation at the state level that is not possible under current law and which would not be possible under a new uniform national standard. Eventually, this increased experimentation in the states could yield more effective enforcement techniques, more

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Department are not subject to the same kind of financial and political incentives that state prosecutors, many of whom must run for reelection, typically face. As a result, these federal agencies are likely much less motivated than state officials with regard to prosecution of Internet gambling violations. *Cf. supra* notes 38-41 and accompanying text (detailing Kentucky’s attempt to regulate internet gambling where the Dormant Commerce Clause blocked it from doing so).

<sup>154</sup> *Cf. Goldsmith & Wu, supra* note 100, at 43 (“[W]hat we once called a global network is becoming a collection of nation-state networks—networks linked by the Internet protocol, but for many purposes separate”); Reidenberg, *supra* note 10, at 1973 (“[I]nnovations in information technology will undermine the technological assault on state jurisdiction”); Svantesson, *supra* note 97, at 102-03 (“[G]eo-identification has the advantage of providing the Web site operator with the means to comply with multiple, varying, and even contradictory, local regulations”).

<sup>155</sup> Such measures might mirror Minnesota’s current ISP-blocking effort, *see* Svensson, *supra* note 64, or state-sanctioned technological assaults as proposed by Reidenberg. *See* Reidenberg, *supra* note 10, at 1963 (“States can use filters and packet interceptors as well as hacker tools like viruses and worms to enforce decisions . . .”).

<sup>156</sup> While numerous commenters argued that such a list should have been incorporated into the Treasury Department’s regulations implementing UIGEA, the Department ultimately rejected such a proposal. *See* Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,383 (Nov. 18, 2008) (“About 40 commenters responded to the Agencies’ request for comment on whether to incorporate within the rule a list of unlawful Internet gambling businesses. About 35 commenters of various types—depository institutions and associations thereof, payment system operators and money transmitters, as well as public-policy groups—expressed support for such a list, generally on the grounds that it would reduce the cost of complying with the rule . . .”). Such a list could be operated by the federal government while giving states the option to add new accounts to the list once the state proves that (1) a site violated the state’s law under the framework; and (2) the accounts in question belonged to the site or the site’s owners or affiliates. This arrangement would shift the cost of keeping the list up to date to the more highly motivated state actors, while ensuring that the list would be effectively managed at the federal level.

successful programs to combat money laundering and underage gambling, and other sector-specific benefits.<sup>157</sup>

While the threat of prosecution has not produced overwhelming results under the current prohibition regime, recent evidence shows that this result is far from inevitable. In fact, when prosecutors do focus on a particular Internet gambling operator, they can be extremely effective in bringing about compliance. In December 2008, the founder of Party Gaming LLC, one of the largest online casinos, agreed to pay \$300 million in fines and serve up to two years in prison for Wire Act violations.<sup>158</sup> Party Gaming subsequently entered into a plea agreement of its own, and will pay \$105 million in fines in exchange for reprieve from criminal sanctions.<sup>159</sup> Party Gaming no longer does business in the United States, and the plea agreement is thought to foreshadow Party Gaming's re-entry into the U.S. market if IGRCEA or other legalization measures become law.<sup>160</sup> As further evidence of the compliance that can be brought about by strong enforcement efforts, several other Internet gambling companies voluntarily exited the U.S. market following passage of UIGEA in 2006.<sup>161</sup>

Further, sites complying with a jurisdictionally differentiated Internet gambling regime would reap a tremendously valuable reputational benefit. Presently, Internet gambling sites are subject to little or no regulatory authority, leading to a series of cheating scandals.<sup>162</sup> These scandals have shaken players' confidence in the fairness of some online casinos, causing those casinos' bottom lines to suffer.<sup>163</sup> In a framework such as the one introduced in Part IV.A, sites complying with geolocation and other requirements would receive a government operating license. That license could in turn be used by sites as a signal that the games they offer are both fair and secure. Such an approach would harness competitive forces within the Internet gambling marketplace to

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<sup>157</sup> Cf. Ralph Winter, *Private Goals and Competition among State Legal Systems*, 6 Harv. J.L. & Pub. Pol'y 127, 129 (1982) ("Instead of working through a nationwide body sitting around deciding what ought to be in the U.C.C., the same result would be achieved by finding a way for states to make money by writing a law. In no time, there would be a commercial code, in fact, several commercial codes, perfect for everyone").

<sup>158</sup> See *Party Gaming Founder Pleads Guilty in US*, Bus. World, Dec. 17, 2008.

<sup>159</sup> Jennifer Newell, *PartyGaming Settles With U.S. Dept. of Justice for \$105 Million*, Bluff Mag., Apr. 7, 2009, <http://news.bluffmagazine.com/partygaming-settles-with-us-dept-of-justice-for-105-million-3012/>.

<sup>160</sup> *Id.*

<sup>161</sup> See Fiona Walsh, *Last chance saloon for online gaming firms*, The Guardian, Oct. 13, 2006, available at <http://www.guardian.co.uk/business/2006/oct/13/gambling.newmedia>.

<sup>162</sup> Chuck Blount, *Online Scandals Show Need for U.S. Regulation*, San Antonio Express-News, Dec. 4, 2008, at 3D.

<sup>163</sup> *Id.*

garner compliance. If the law permitted only licensed operators to advertise in the United States, this approach would be even more effective.

### 3. Eliminating Inefficiencies As to Costs and Revenues

Third, jurisdictional differentiation offers a means to eliminate several inefficiencies built into the current prohibition regime. As discussed in Part II.B, prohibition of Internet gambling gives rise to substantial direct costs, or externalities, in the form of WTO sanctions. Despite the fact that support for prohibition is clearly not universal,<sup>164</sup> all fifty states bear the burden of this externality—meaning that states favoring prohibition are free riding on those that oppose prohibition. By doing so, this model would allow states to express the intensity of their preferences regarding Internet gambling in ways that are not possible under current law.<sup>165</sup> This model would have the added benefit of enabling states to express the intensity of their preferences with respect to Internet gambling in ways that are not possible under the current federal law regime.

Turning to indirect costs, a jurisdictionally differentiated system would permit states seeking to improve their bottom line to capture huge amounts of new tax revenue.<sup>166</sup> Though similar revenues could be generated under a national, rather than a jurisdictionally differentiated approach, the latter has the benefit of producing the same result without forcing legalized Internet gambling on states morally opposed to it. Given the magnitude of the financial crisis in most state budgets,<sup>167</sup> a jurisdictionally differentiated approach to Internet gambling is vastly more efficient than the alternative.

Finally, a jurisdictionally differentiated enforcement structure could reduce uncertainty as to the legality of gambling activities such as poker.<sup>168</sup> One of the main reasons many Americans continue to gamble online is a lack of clarity in the law, brought on in part by the complex patchwork of interrelated federal and state laws.

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<sup>164</sup> See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1997); *supra* note 91 and accompanying text.

<sup>165</sup> I use the term “primarily” here because it seems impossible to devise a system whereby states responsible for prohibition bear these costs *exclusively*. To date, direct costs occasioned by prohibition of Internet gambling have not been money damages. Rather, they have been structured trade preferences, as seen in the U.S.-E.U. settlement described in Part II.B.1. Since these preferences often relate to a particular market sector or series of market sectors, it stands to reason that their effects would be felt in any state where those sectors are present. With that principle in mind, the U.S. Trade Representative could theoretically tailor settlement terms to *primarily* affect states favoring prohibition by focusing concessions on industries prominent in those states.

<sup>166</sup> See *supra* Part II.B.2.

<sup>167</sup> See *States Need Deep Cutback*, *supra* note 71, at A8.

<sup>168</sup> See Rotstein, *supra* note 5, at A1; Batt, *supra* note 5, at 1D; see also Sullum, *supra* note 5, at 38; Wickert, *supra* note 5, at 235-236.

Implementation of a jurisdictionally differentiated regulatory structure backed by geolocation technologies would shift compliance costs from individual users to the Internet gambling operators, who are surely the least cost actors with regard to determining and applying the law in each jurisdiction.

*C. The Argument Against Jurisdictional Differentiation in Internet Gambling Law*

As with the argument in favor of jurisdictional differentiation, the argument against such an approach can be broken down into three fundamental points. While these counterarguments must be taken seriously, they fail to outweigh the advantages discussed in Part IV.B.

1. Technological Ineffectiveness

One of the primary arguments made by critics of IGRCPEA specifically and of jurisdictional differentiation generally is that geolocation technologies are unreliable. Despite the massive investment that has been poured into geolocation technologies, critics argue that these technologies still fail twenty to thirty percent of the time.<sup>169</sup> Additionally, geolocation technologies are particularly ineffective at handling “curveball” situations such as increasingly common mobile wireless Internet access cards.<sup>170</sup> On top of that, software devices such as Tor are both widely available and extremely adept at circumventing even the most sophisticated geolocation systems.<sup>171</sup> Thus, the argument goes, it is hardly a good idea to use these unreliable technologies as the linchpin of a new federal regulatory regime.

There are two main responses to these points. First, no mode of regulation, whether jurisdictionally differentiated or not, will be 100 percent effective.<sup>172</sup> The current patchwork of federal and state laws has been extremely unsuccessful, as evidenced by the \$7 billion Americans spend on Internet gambling annually.<sup>173</sup> Thus, the appropriate question is not whether a jurisdictionally differentiated regime will work flawlessly, but rather whether it will work better than current law. Next, though there is no single, authoritative source of data on the reliability of geolocation technologies, there is good reason to believe that the level of effectiveness is much higher than suggested by

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<sup>169</sup> Internet Gambling Hearing, *supra* n. 132 (statement of Jeff Schmidt, Chief Executive Officer of Authis).

<sup>170</sup> *Id.*

<sup>171</sup> See Ira S. Rubenstein, Ronald D. Lee, & Paul M. Schwartz, *Surveillance: Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. Chi. L. Rev. 261, 275 (2008); Svantesson, *supra* note 97, at 113-14.

<sup>172</sup> See Goldsmith & Wu, *supra* note 100, at 45.

<sup>173</sup> See Cholodofsky, *supra* note 7.

prominent critics. Since most estimates run between 85 and 98 percent accurate,<sup>174</sup> and these estimates are generally more recent than those cited by critics, it seems clear that technical limitations are not a valid reason to reject jurisdictional differentiation in Internet gambling law. As the technology improves, this objection will become even less relevant.

## 2. Forcing Debilitating Transaction Costs on Operators

Another prominent counterargument is the claim that differentiation would force debilitating transaction costs on site operators.<sup>175</sup> In the event that Internet gambling sites are subjected to the control of a multitude of jurisdictions, operators would have to know both the procedural and substantive laws in each and every one of those jurisdictions.<sup>176</sup> More than that, operators would also have to conform their conduct to each set of laws, even if those laws contradicted one another in significant ways.<sup>177</sup> These requirements could result in crippling costs for Internet gambling operators, potentially causing some operators to forgo the venture altogether even if it was legal in some, or even most jurisdictions.<sup>178</sup> Making matters worse, operators that do choose to stay in business could be subjected to vigilante-like responses from states opposing Internet gambling, such as state-sanctioned denial of service attacks.<sup>179</sup>

All of these points are valid. The best response is that jurisdictionally differentiated frameworks do not necessarily have to permit a wide range of local regulations. The hypothetical framework described in Part IV.A seeks to address this issue by forcing states to elect one of three principal options: full legalization, partial legalization, or no legalization at all. While this approach would effectively limit transaction costs within the United States, a treaty or other agreement would be necessary to replicate that compromise on an international level. To some degree, GATS may play

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<sup>174</sup> See *supra* note 103 and accompanying text (describing recent studies showing accuracy rates at the state level of between 85 and 98 percent).

<sup>175</sup> Cf. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (“[I]nconsistent regulatory schemes could paralyze the development of the Internet altogether.”).

<sup>176</sup> See Svantesson, *supra* note 97, at 132.

<sup>177</sup> See *Am. Libraries Ass'n*, 969 F. Supp. at 168-69; Lemley & Weiser, *supra* note 19, at 803-05.

<sup>178</sup> Cf. *Am. Libraries Ass'n*, 969 F. Supp. at 181 (“Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations”), Svantesson, *supra* note 97, at 137 (“The reality that different states have different substantive laws simply cannot be ignored, and the regulation of activities on the Internet must in one way or another take account of this reality”).

<sup>179</sup> See Reidenberg, *supra* note 10, at 1963-68.



a role in minimizing this issue as well, given the substantial penalties it levies on nations prohibiting Internet gambling.<sup>180</sup>

### 3. Altering the Fundamental Character of the Internet

Third, jurisdictional differentiation threatens to alter the fundamental character of the Internet as a whole. Viewed broadly, this argument is an extension of the popular 1990s argument that the very essence of the Internet defies imposition of borders of any kind.<sup>181</sup> Some commentators have argued that allowing individual jurisdictions to assert their will over the Internet would invite a “race to the bottom” in which the open and diverse character of the Internet would eventually be lost.<sup>182</sup>

Indeed, such a change could force all Internet content providers, whether in the Internet gambling sphere or other sectors, to shift from a starting assumption of one hundred percent content availability to a default of zero percent availability. Only once an end-user could prove that she was legally permitted to view the content in question would that new default give way.<sup>183</sup> Moreover, even if we accept jurisdictional differentiation as a good idea for Internet gambling, technologies meant for legitimate and socially desirable ends are rarely limited to those uses, meaning that IGRCPEA and the hypothetical framework above may both be a step down a slippery slope towards undesirable regulation of the rest of the Internet.<sup>184</sup> In its most extreme form, jurisdictional differentiation could lead to regulation not at the operator level, but the ISP level, wherein end-users are forcibly authenticated in a manner that would eliminate the relative anonymity they have grown accustomed to.<sup>185</sup> Minnesota began a campaign to impose precisely this type of physical layer blockade on Internet gambling sites in April

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<sup>180</sup> But note that nations that do not allow gambling within their own borders will not be subject to WTO sanctions if they also prohibit provision of foreign gambling services via the Internet. *See* GATS at art. XIV(a) (permitting exceptions “necessary to protect public morals or to maintain public order”).

<sup>181</sup> *See* Reidenberg, *supra* note 10, at 1952 (describing Yahoo!’s argument against jurisdiction in the French Nazi memorabilia case brought in 2000); *see also* *Am. Libraries Ass’n*, 969 F. Supp. at 183.

<sup>182</sup> *See* Goldsmith & Wu, *supra* note 100, at 43.

<sup>183</sup> *See* Svantesson, *supra* note 97, at 132.

<sup>184</sup> *See* Goldsmith & Wu, *supra* note 100, at 45.

<sup>185</sup> *See id.* at 44. One commentator has suggested that more sophisticated forms of geolocation technology may violate European privacy laws. *See* Svantesson, *supra* note 97, at 135.

2009.<sup>186</sup> In essence, this blockade would operate by allowing the state government to instruct ISPs to block in-state users from accessing certain Internet gambling sites.<sup>187</sup>

Unlike the more specific objections raised above, these counterarguments raise questions that go well beyond Internet gambling and reach into the future of the Internet as a whole. To some extent, commentators have been suggesting for years that jurisdictional differentiation powered by geolocation technologies is a foregone conclusion, and that arguments for a “borderless” Internet are a quaint relic of a time when the architecture of the Internet looked very different than it does today. More generally, resolution of these issues seems to depend in part on the interaction between law, markets, code, and norms.<sup>188</sup> While both the market and the law appear to have sided with jurisdictional differentiation thus far,<sup>189</sup> how this issue ultimately will play out in the future remains far from clear.

## V. CONCLUSION

Gambling, like most divisive social issues, is best regulated at the state level.<sup>190</sup> Yet migration of gambling to the Internet has complicated matters greatly, giving rise to difficult questions as to which governmental entities are best suited to regulate and what the proper substantive regulatory regime ought to be. The failure of energetic federal and state efforts to prohibit Internet gambling over the past decade suggests that the issue may present a nearly impregnable problem, or as this Article terms the matter, an Internet gambling Gordian knot.

The rise of geolocation technologies in recent years offers a new opportunity to cut through that Gordian knot via a jurisdictionally differentiated regulatory framework for Internet gambling. Geolocation technologies are not perfect. However, when they are integrated into a federal-state framework in which states choose their own substantive policies from a limited “menu” of options, these technologies can dramatically improve the democratic responsiveness of Internet gambling laws, increase compliance with the rule of law, and internalize the large and increasing costs associated with prohibition of Internet gambling. Such an approach is not immune to criticism, particularly in terms of its potential impact on the fundamental openness of the Internet in the long-term. In light of the market advantages associated with jurisdictional differentiation and the need for law to be supreme over code in divisive areas such as Internet gambling, those drawbacks

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<sup>186</sup> See Svensson, *supra* note 64.

<sup>187</sup> *Id.*

<sup>188</sup> See generally Lessig, *supra* note 14 (exploring the interaction between code and law).

<sup>189</sup> See Svantesson, *supra* note 97, at 134.

<sup>190</sup> Of course fundamental constitutional rights, even those subject to social controversy, should not be subject to state regulation. Unlike those rights, gambling falls into a class of issues that is constitutionally unprotected and subject to widespread variation in state preferences.

fail to outweigh the potential benefits offered by aggressive use of geolocation technologies.

These conclusions carry implications that go well beyond the Internet gambling debate. If jurisdictional differentiation is a normatively superior approach with respect to Internet gambling, then it may be in other market sectors as well. This consequence, along with the degree to which technological advances have undermined previous court decisions on electronic commerce issues, suggests that geolocation technologies may play a role in enabling federalism on the Internet for years to come.