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March 25, 2015

Testimony of Andrew Moylan, Executive Director, R Street Institute

"H.R. 707, the Restoration of America's Wire Act"
Hearing of the U.S. House Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

Introduction

Chairman Sensenbrenner, Ranking Member Jackson Lee and distinguished members of the subcommittee, thank you for the opportunity to submit testimony regarding H.R. 707, a bill titled "Restoring America's Wire Act" (RAWA). This measure would expand the 1961 Wire Act to prohibit all gambling conducted by wire or over the Internet.

My name is Andrew Moylan and I am senior fellow and executive director of the R Street Institute, a non-profit, non-partisan think tank with headquarters in Washington and offices in Tallahassee, Fla.; Austin, Texas; Columbus, Ohio; Sacramento, Calif.; and Birmingham, Ala. R Street is a pragmatic institution that strives to advance policy solutions to secure free markets and limited, effective government. It is in pursuit of those goals that I testify before you today regarding concerns that RAWA raises about the appropriate scope of federal law.

My testimony is focused not on the propriety of gambling, per se, but instead on articulating a reasonable conception of limited government and federalism. In such a system, states carry most of the responsibility to exercise powers which are rightfully theirs under the U.S. Constitution. Federal power is appropriately constrained to genuinely national or interstate matters. While my conservative and libertarian brethren hold a wide range of views on the social implications of gambling, we share a broad consensus that the federal government is too large and too powerful. This is in no small part due to a decades-long trend of ever-expanding assertions of federal power by Congress and a compliant judiciary that has validated those assertions. It is this troubling trend, rather than the activity of gambling itself, which motivates my comments to you.

In short, my concern is protecting limited government in the Internet age. While the Internet has proven downright miraculous in its ability to help Americans connect more easily with one another, it must not be used as a pretext for ever-expanding federal or state power. The Internet is unlimited in its scope and borderless. Government power, even in this modern age, ought to be limited and respectful of borders – both geographic borders that delineate one sovereign state from the next, and conceptual borders that delineate truly national, interstate issues from state and local matters. The rise of the Internet need not and should not correspond with and countenance the rise of an all-powerful federal government.

R Street's previous work outlining principles of limited government in the Internet age

R Street's approach to RAWA and the particular questions it raises is heavily informed by years of work articulating limited government and federalist principles on the matter of taxation of Internet sales. That policy debate has been dominated by legislation known in the 113th Congress as the Marketplace Fairness Act, or MFA.

The MFA would – unwisely, in my view – empower state governments to require businesses outside their borders to comply with their sales tax laws. Some supporters have justified such a bill by claiming it would protect "states' rights" in the realm of taxation. But as I testified to the full committee last March, this type of legislation would have two distinct negative impacts.[1]

First, it would grant states a power that stands in contravention to federalist principles and that they generally lack in tax law: the ability to impose their laws on entities with no physical presence inside their borders. For decades, states have aggressively attempted to expand their tax power to ensnare non-resident businesses and individuals. The MFA would explicitly *allow* them to do so for remote sales and implicitly *encourage* them to seek such authority in other areas of taxation, like business and individual income.

Second, by using "destination sourcing," whereby tax is collected based on the residence of the consumer, the bill would create an unlevel playing field between remote and in-person sales. The MFA would force Internet retailers to jump through the hoops associated with complying with the tax rules of 46 states and as many as 9,998 taxing jurisdictions with sales taxes, including attendant audit and enforcement action.[2] Meanwhile, in-person sales, which constitute some 93 percent of retail sales today, would continue to be governed by a simple collection standard that effectively uses "origin sourcing," whereby tax is collected based on the physical location of the

[1] Andrew Moylan, Hearing on Internet Sales Taxation, U.S. House Committee on the Judiciary, March 12, 2014. http://www.rstreet.org/wp-content/uploads/2014/03/Andrew-Moylan-Internet-Sales-Tax-Testimony-3-12-14.pdf

[2] Joseph Henchman and Richard Borean, "State Sales Tax Jurisdictions Approach 10,000," Tax Foundation. March 24, 2014. http://taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000

business.[3] The burdens placed on Internet sellers by a destination-sourcing rule could prove enormous, given the staggering complexity of sales-tax codes nationwide.

Preventing damage to interstate commerce through the 'dormant' Commerce Clause

In the MFA debate, the risk to federalism is one of federal "underreach," in which state power is not appropriately constrained. Similar concerns led to the downfall of the Articles of Confederation and the drafting of our Constitution's federalist system, to prevent states from exercising cross-border authority in ways that cannibalize interstate commerce. Known by legal theorists as the "dormant" Commerce Clause, this well-established realm of law contemplates the necessity of federal action to prohibit state actions that would unduly impede the flow of goods and services across state lines.

A number of recent bills have proposed proper use of this form of federal Commerce Clause power to regulate conduct between the states in other areas of tax law. Two pieces of legislation from the 113th Congress come to mind as exemplifying the appropriate exercise of Commerce Clause authority to restrain cross-border state action in defense of the free flow of interstate commerce.

The first is a bill introduced by Chairman Sensenbrenner, H.R. 2992, known as the Business Activity Tax Simplification Act, or BATSA.[4] BATSA would strengthen so-called "physical presence" requirements for the purposes of business-income taxation. The legislation was intended to address overly aggressive states forcing businesses only tangentially connected to the state to comply with their business-income tax laws. By specifying the conditions that constitute physical presence in a state, BATSA would have established appropriate limits on cross-border tax-enforcement actions that could impede interstate commerce.

The second is H.R. 3724, the Digital Goods Tax Fairness Act, introduced by Rep. Lamar Smith, R-Texas.[5] This bill would clarify that no discriminatory tax rates shall be applied to the sale of digital goods and, importantly, that only one jurisdiction may impose tax for the sale of a given digital good. This was intended to address growing concerns that multiple jurisdictions in several states might attempt to impose tax on the sale of a single digital good, or that digital goods might be targeted for higher tax rates than ordinary goods. By specifying that only one jurisdiction may impose tax, and may not do so discriminatorily, the Digital Goods Tax Fairness Act would have

[3] U.S. Census Bureau, "Quarterly Retail E-Commerce Sales, 4th Quarter 2014," Retrieved March 24, 2015. http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf
[4] H.R. 2992, House Business Activity Tax Simplification Act of 2013, Aug. 2, 2013. https://www.congress.gov/bill/113th-congress/house-bill/2992
[5] H.R. 3724, Digital Goods and Services Tax Fairness Act of 2013, Dec. 21, 2013. https://www.congress.gov/bill/113th-congress/house-bill/3724

established appropriate limits on state tax-enforcement actions that could impede interstate commerce.

Both of these bills rest their constitutional authority on proper utilization of the Commerce Clause in pursuit of the principles of federalism. Absent their passage, states and localities would be free to exercise *too much* power outside their borders, to the detriment of interstate commerce. These bills recognized that there is, indeed, an appropriate role for Congress in mediating such matters, because failure to do so would lead to potentially significant negative impacts. The Commerce Clause was drafted precisely so that Congress would be empowered to mitigate those sorts of impacts.

The long history of and risk associated with Commerce Clause overreach

While there is indeed a proper role for use of the Commerce Clause to address issues between the states, it's more common for Congress to justify their own overreach by citing Commerce Clause authority.

In his treatise on "constitutional irony," University of Tulsa College of Law Professor Steven K. Balman notes that "states cannot serve as laboratories of innovation unless they are afforded a sphere of action that is protected from federal encroachment."[6] He draws upon the famous quote from former Chief Justice John Marshall in the 1824 case of *Gibbons v. Ogden*. In attempting to describe the limits of Commerce Clause power, Marshall said,

> The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the state itself.[7]

In the nearly two centuries that have passed since Marshall penned those words, Congress and the courts have conspired to make mincemeat of the limits he set forth. There is, unfortunately, a sordid, decades-long history of expansive interpretations of the Commerce Clause, each building upon the last, to the point where there are serious questions about whether *any* effective limits to Commerce Clause power still remain.

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[6] Steven J. Balman, "Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause," *Tulsa Law Review*, Vol. 40 Issue 2, 2005. http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2799&context=tlr

[7] Ibid.

The Supreme Court has been almost uniformly permissive of Commerce Clause overreach for going on 75 years. As Professor Balman writes, the broad sweep of Commerce Clause decisions after the court-packing scandal of 1937 found essentially no articulable limit to Congress' power.[8] The World War II-era nadir of this judicial acquiescence to unlimited congressional power came in *Wickard v. Filburn*, a case in which fining a farmer for personal use of wheat in excess of his allotment was found to be a valid exercise of the Commerce Clause, despite the facts that the wheat never crossed state lines and was never sold.[9]

As Chief Judge Alice M. Batchelder of the U.S. Sixth Circuit Court of Appeals suggested in a 2012 lecture, this reasoning could be summed up as, "if we had some ham, we could have a ham sandwich, if we had some bread."[10] She later described it as "building upstairs over a vacant lot," drawing upon the works of Brutus, the anonymous anti-federalist writer of the 1780s. Brutus wrote of his fear that "one adjudication will form a precedent to the next, and this to a following one," a prescient prediction about the course the judiciary would take some 150 years after his writings were published.

There was a brief respite from this trend in the mid-1990s and early 2000s, as the Supreme Court under Chief Justice William Rehnquist filed several decisions heralded as a "new federalism" for articulating limits to Congress' Commerce Clause power.[11] Most notably, the decisions in *United States v. Lopez*[12] and *United States v. Morrison*[13] struck down parts of two federal statutes, on the basis that gun and domestic violence, respectively, did not have sufficient nexus with interstate commerce to justify federal intervention.

While these developments were welcome for devotees of federalist principles, the excitement was short-lived. The 2005 case *Gonzales v. Raich* once again saw the court authorize a Commerce Clause-based intervention, despite the fact that the items in question never crossed state lines and were never sold.[14] *Raich* drew from and reaffirmed much of *Wickard* and thus significantly degraded hopes that federalism may be on the rise in the judiciary.

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[8] Ibid.
[9] U.S. Supreme Court, *Wickard v. Filburn*, Nov. 9, 1942. https://www.law.cornell.edu/supremecourt/text/317/111
[10] Alice M. Batchelder, "Suppose Joseph Story Had Been Right and Brutus Had Been Wrong," The Heritage Foundation, Oct. 10, 2012. http://www.heritage.org/research/lecture/2012/10/suppose-joseph-story-had-been-right-and-brutus-had-been-wrong
[11] Steven J. Balman, "Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause," *Tulsa Law Review*, Vol. 40 Issue 2, 2005. http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2799&context=tlr
[12] U.S. Supreme Court, *United States v. Lopez,* April 26, 1995. http://www.oyez.org/cases/1990-1999/1994/1994_93_1260
[13] U.S. Supreme Court, *United States v. Morrison*, May 15, 2000. http://www.oyez.org/cases/1990-1999/1999/1999_99_5
[14] U.S. Supreme Court, *Gonzales v. Raich*, June 6, 2005. http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/

Subsequent court decisions have built upon the *Raich* precedent, yielding some astonishing statements. In a 2011 Widener University Law Review piece about the U.S. First Circuit Court of Appeals' decision in *United States v. Nascimento*, Kristina A. Miller observed the contortions courts now routinely perform with respect to the English language in Commerce Clause jurisprudence. When discussing the "class of activity" subject to regulation under the Commerce Clause, the *Nascimento* court stated that "the intrastate or noneconomic character of individual instances within that class is of no consequence."[15] In other words, the Commerce Clause is essentially without limit.

As close as the modern Supreme Court has come to defining limits to Commerce Clause authority is in its decision on the so-called Patient Protection and Affordable Care Act, colloquially known as Obamacare. The legislation raised serious questions about the nature of federal power since it had, at its core, a requirement that all individuals purchase health insurance or face financial penalties. Make what you will of the court's creativity in the initial case that tested that law's constitutional authority, *National Federation of Independent Business v. Sebelius*, which upheld the law as a valid exercise of Congress' tax power, but the ultimate decision at least made clear that compelling participation in commerce was not a valid use of Commerce Clause power.[16] This provides precious little comfort for supporters of federalism, but at least offers something of a foothold for constraining the Commerce Clause into the future.

Principles of federalism in the Internet age

Conservatives and libertarians rightly have criticized both Congress and the judiciary for complicity in this vast expansion of Commerce Clause power, which has been used to justify all manner of laws and regulations more properly reserved to the states. Given deep uncertainty about what restraint, if any, the courts are willing to place on such assertions of power, it is incumbent upon Congress to think more deeply about such matters and exercise additional restraint, lest the delicate balance of powers laid out in the Constitution be upset even further.

Congress should indeed be proactive in legislating on matters that genuinely threaten to impact interstate commerce. States should be sovereign within their own borders, generally free to legislate subject to the limits established by the U.S. Constitution, the bounds of their own constitutions and common sense. But when it comes to cross-border actions that threaten to negatively impact interstate commerce and the functional "free-trade zone" that is the United States, Congress might see fit to use its dormant Commerce Clause authority to set out clear rules by which states must operate.

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[15] Kristina Miller, "After Gonzales v. Raich: Can RICO be used to prosecute intrastate noneconomic street gang violence?," *Widener Law Review*, Vol. 16, 2010. http://widenerlawreview.org/files/2011/02/06-MILLER_final.pdf

[16] U.S. Supreme Court, *National Federation of Independent Business v. Sebelius*, June 28, 2012. https://www.law.cornell.edu/supremecourt/text/11-393 >.

In addition to the aforementioned business income and digital goods concerns, Congress could establish guidelines for tax treatment of mobile workers (addressed by the Mobile Workforce Income Tax Simplification Act, H.R. 1129 from the 113th Congress[17]) and tax treatment of telecommuters (addressed by the Multi-State Worker Tax Fairness Act, H.R. 4085 from the 113th Congress[18]), among other issues.

More straightforward exercises of Commerce Clause power should be limited to matters of genuine national scope or those involving multiple states. Professor Balman's treatise quotes Alexander Hamilton, who wrote in Federalist No. 17 that "[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a [national] jurisdiction."[19]

In colloquial form, Hamilton's admonition is translated in the modern age by conservatives and libertarians to say that Congress should respect so-called "states' rights." But states don't have "rights," exactly; they have powers granted to them by the people in order to achieve certain goals. In turn, states have ceded some of that power to the federal government to achieve certain national goals. The essence of our federalist system is a balance in exercising those powers such that the federal government legislates on truly national and interstate matters, and state governments retain the power to legislate on the rest, including the general police power associated with prohibiting conduct like gambling.

Principles of federalism as applied to gambling legislation

Though subsequent jurisprudence has raised questions in this regard, the plain language of the two statutes most directly relevant to RAWA – the 1961 Wire Act that it seeks to amend and the related 2006 Unlawful Internet Gambling Enforcement Act (UIGEA) – were written in such a way as to respect basic principles of federalism.

The 1961 Wire Act was established to help states in their ongoing efforts to combat organized crime and their interstate betting rackets. The matter of interstate betting is, of course, interstate by its very nature and thus beyond the reach of any single state government. While one might object to the law from a policy perspective, it at least met the first threshold federalism test of involving a genuinely national or interstate matter.

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[17] H.R. 1129. Mobile Workforce State Income Tax Simplification Act of 2013, March 13, 2013. https://www.govtrack.us/congress/bills/113/hr1129

[18] H.R. 4085, Multi-State Worker Tax Fairness Act of 2014, Feb. 25, 2014. https://www.govtrack.us/congress/bills/113/hr4085

[19] Alexander Hamilton, "The Same Subject Continued: The Insufficiency of the Present Confederation to Preserve the Union," *The Federalist Papers*, No. 17, Dec. 4, 1787. http://thomas.loc.gov/home/histdox/fed_17.html

Furthermore, the plain language of the Wire Act's prohibitions apply only to interstate betting and not wholly intrastate activity. The legislation denotes "interstate or foreign" commerce as the focus of its restrictions. It also specifically exempts transmissions relating to "bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."[20] As drafted, the Wire Act was quite deferential to states to enforce their own general police powers. It reserves the exercise of federal power only to activity conducted across state or national borders and only where the behavior was illegal in at least one of the jurisdictions in question.

In 2006, Congress passed UIGEA to make it unlawful to process gambling payments over the Internet if the betting was illegal under either federal or state law. In other words, UIGEA also helps states in their ongoing efforts to address the perceived ills of Internet gambling. Interstate payment processing is, of course, interstate by its very nature and thus beyond the reach of any single state government. While there were and are valid policy-based objections to the law, UIGEA also met the first threshold federalism test of involving a genuinely national or interstate matter.

UIGEA was *also* written so that its prohibitions apply only to interstate activity. The bill specifically carves out intrastate transactions and even denotes that so-called "intermediate routing" of electronic data would not be considered relevant to testing whether a transaction crossed state lines.[21] If both sides of a given transaction are located in a state where betting is legal, mere *electronic* transmission across state lines is insufficient to establish an interstate nexus for exercising federal power.

However, subsequent Wire Act jurisprudence and stated policy from Justice Department officials across several presidential administrations have raised important questions about whether the bill's prohibitions apply only to sports-related betting, as the language seems to suggest, or to all gambling activities. Questions also have been raised as to whether intrastate bets that use communications networks are *inherently* interstate even if they serve only to connect two entities in the same state.

In 2011, the Justice Department Office of Legal Counsel was asked by the states of New York and Illinois to clarify these questions in light of their attempts to begin offering state lottery products via the Internet. In the opinion, OLC stated that "[i]nterstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside the reach of the

[20] 18 US Code. §1084, "Transmission of wagering information; penalties," Retrieved Mar. 24, 2015 *https*://www.law.cornell.edu/uscode/text/18/1084

[21] Security and Accountability for Every Port Act of 2006. Pub. L. no. 109-347, 73. Stat. 129, Oct. 13, 2006. http://www.gpo.gov/fdsys/pkg/STATUTE-120/pdf/STATUTE-120-Pg1884.pdf

Wire Act," clarifying their view that only sports betting, and not the broad range of gambling and games of chance, qualified for coverage under the act.[22]

OLC also provided some clarity regarding the interstate/intrastate question. Since the New York and Illinois lotteries proposed using intermediate transaction routing that might cross state lines incidentally, there was a potential risk that the Justice Department would assert the transactions were *interstate* in nature, despite involving buyers and sellers in a single state in which the conduct was legal under state law. By stating their view that the New York and Illinois lotteries would be compliant with the Wire Act, OLC cleared up a potential discrepancy between that law and UIGEA. Absent OLC clarification, such routing might have been considered interstate under the Wire Act and intrastate under UIGEA.

In one 13-page memo, OLC provided a great deal of needed clarity on interpretation of federal gambling law. While the sports/non-sports question has received the most press coverage, the more impactful portion of the memo, from the perspective of federalism, is its treatment of intermediate routing. By confining federal enforcement actions to activities that genuinely involve multiple states, OLC reaffirmed the important principle that federal power must abide by the reasonable limits of the Commerce Clause.

RAWA appears to regulate wholly intrastate activity

Along those lines, RAWA contains potentially problematic language that appears not to carve out wholly intrastate activity, as the Wire Act (and subsequent unsuccessful attempts by Congress to amend it) and UIGEA both do quite clearly. RAWA defines the term "uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager" as including "any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise."[23] Those last three words, "incidentally or otherwise," carry a tremendous amount of weight. They appear to suggest that any use of the Internet whatsoever, even in pursuit of gambling activity that is legal under state law, is unlawful.

From the perspective of federalism, an argument of this nature is problematic, to say the least. To treat all use of the Internet, no matter its nature, no matter the individuals or entities it might connect, as "per se interstate" and thus subject to Commerce Clause regulation, would constitute an enormous shove down the slippery slope toward federal power without meaningful limits. Writing in the McGeorge Law Review, Nathaniel H. Clark suggests that Congress should only exercise its Commerce Clause power on intrastate Internet transmissions with a substantial effect

[22] Virginia Seitz, "Whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act," U.S. Department of Justice, Sept. 20, 2011. http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf

[23] H.R. 707, Restoration of America's Wire Act, Feb. 15, 2015.. https://www.congress.gov/bill/114th-congress/house-bill/707/text

on interstate commerce, thus "allowing Congress to focus on conduct that legitimately affects the national and international economy."[24] While the "substantial effects" test is itself fraught from a federalism perspective, this would at least articulate some sort of framework by which lawmakers and judges could evaluate the proper treatment of intrastate transmissions.

As currently drafted, RAWA would appear to overrule state authority to permit intrastate legal gaming. As Michelle Minton of the Competitive Enterprise Institute recently wrote, gaming attorney Mike Hichar asserts that "the bill would eliminate currently legal lottery offerings, such as online lottery ticket sales and subscriptions (currently available in eight states), online real-time games like pull-tabs (legal in five states when Kentucky launches this year), and of course, online casino-style games legal in New Jersey, Nevada, and Delaware for almost two years now."[25]

To be clear, RAWA could be rewritten in such a way as to protect wholly intrastate activity from federal scrutiny. If it used the UIGEA standard of exempting from regulation any activity entirely conducted in one state, including an appropriate remedy to prevent intermediate routing from triggering Commerce Clause regulation, RAWA would be applied in a manner consistent with principles of federalism. This could be achieved quite readily, simply by deleting "incidentally or otherwise" from the new subsection e(3) it creates in the Wire Act.[26] Deleting that language would effectively exempt both wholly intrastate transactions and any transactions originating and terminating in a state where such activity is legal. This would effectively open the door for states with legal gambling to compact with one another to allow for transactions that are interstate in nature, but do not exist in violation of either state's laws, absent fear of federal sanction under the Wire Act.

States that wish to prohibit gambling have remedies at their disposal

RAWA's potential overreach in failing to exempt intrastate activity is unwise from the perspective of federalism, but it could also prove largely unnecessary. If a state wishes to prohibit gambling within its borders, it has sufficient power to do so and sufficient legal remedies at its disposal. States are free to ban some or all gambling activity within their borders, both on an institutional and individual level. On an institutional level, states are free to prohibit gambling operations from conducting business within their borders. This could include both brick-and-mortar gambling establishments like casinos, as well as offerings via the Internet or

[24] Nathaniel H. Clark, "Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause," *Mcgeorge Law Review*, Vol. 40, 2009. http://www.mcgeorge.edu/Documents/Publications/06_Clark_MasterMLR40.pdf

[25] Michelle Minton, "Chaffetz Tells States and Lotteries: If You Don't Want an Online Gambling Ban, Introduce Your Own," Competitive Enterprise Institute, March 11, 2015. https://cei.org/blog/chaffetz-tells-states-and-lotteries-if-you-don%E2%80%99t-want-online-gambling-ban-introduce-your-own

[26] H.R. 707. Restoration of America's Wire Act, Feb. 15, 2015. https://www.congress.gov/bill/114th-congress/house-bill/707/text

other communications media. Inherent in that power is the ability to regard as unlawful any use of proxies or virtual private networks that would serve to defy the spirit of state prohibitions. Advances in geolocation technology make this easier than was the case when Congress passed UIGEA just nine years ago.

On an individual level, states can criminalize both the conduct of and participation in gambling activities. While most states prefer to target enforcement activities to institutional purveyors of prohibited services, they are well within their rights to target individual users as well. That they generally do not expend great effort subjecting individuals to enforcement action says a great deal about their law-enforcement priorities. In other words, revealed preferences suggest that states do not invest as much importance in gambling elimination as proponents of such laws profess. They instead focus their granular enforcement activities on violent crime and other more impactful behavior.

To the extent that there are cross-border issues relating to gambling – say, a betting website that operates in a state where such conduct is legal but allows individuals from out-of-state to access its services – there is a legitimate federal role to address such behavior. The laws to do so are already on the books. As previously stated, the combination of the Wire Act and UIGEA effectively make all remote interstate gambling activity illegal, including processing of payments for services. These tools allow the federal government to assist states in enforcing their own laws in a manner consistent with the Commerce Clause and principles of federalism.

Furthermore, the most prominent tests to the mistaken notion that federal law ought to reach down to wholly intrastate commerce in the realm of gambling come not from private purveyors, but from state-run institutions like lotteries. In what is surely one of the more delicious ironies of the modern era, several states that have not yet generally licensed gambling institutions within their borders nonetheless offer lotteries for which the odds of winning are infinitesimally small. Participation in these lotteries – which skews markedly toward the poor and working class[27] – generates significant revenue for services like education, making states dependent on gambling for substantial portions of their budgets. While private operators would surely love the ability to provide legal intrastate gambling services, it is, in fact, the states themselves that have the greatest interest in Congress exercising appropriate deference to state law.

None of this is to say that states *should* ban gambling. While I don't pretend to be an expert on the societal impacts of such behavior, my general sense is that there both are and ought to be higher law-enforcement priorities than further criminalizing betting and games of chance. There is clear evidence that federal lawmakers at least tacitly accept that conclusion, given the

[27] Grace M. Barnes, et al., "Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan," *Journal of gambling studies / co-sponsored by the National Council on Problem Gambling and Institute for the Study of Gambling and Commercial Gaming*, April 27, 2011. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103646/

widespread exclusion of state-run lotteries, fantasy sports and betting on horse racing, among other activities that are largely indistinguishable from the kind that are not excluded from bans. If gambling were indeed such a powerful evil as to justify its prohibition, one would think that governments would prohibit the entire range of conduct, rather than just a portion.

Conclusion

Federalism is under serious threat in two directions. First, there are several instances where there exists a need for federal legislation to rationalize the powers of states, as applied across borders. Second, there are innumerable instances where the Commerce Clause is cited as granting the federal government authority to regulate conduct which is entirely intrastate, and sometimes even non-commercial in nature.

As written, RAWA is a problematic use of Commerce Clause power that threatens to substitute the judgment of the federal government for that of states, which are the rightful holders of the power to regulate intrastate activity. If limited government and federalism are to have any meaning in the 21st century and beyond, Congress must exercise restraint in claims of such power. This would help protect the Internet and the citizens who use it from unwise government intrusions, helping to make real the "new federalism" that so briefly flourished two decades ago.