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Because the Internet: Why the Federal Government Cannot Regulate Online Sports Betting

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Cover Page Footnote

I would like to thank my wife, Sara, for her unending support not only during the writing of this Comment, but throughout law school. I would also like to thank my friends, family, and various faculty at the University Dayton School of Law for their feedback and encouragement throughout the writing process.

BECAUSE THE INTERNET: WHY THE FEDERAL GOVERNMENT CANNOT REGULATE ONLINE SPORTS BETTING

*Kris Milner**

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INTRODUCTION

In 2020, the United States economy fell by its largest amount in 74 years.¹ Due to the difficulties faced with the growing Covid-19 pandemic, the economy contracted by 3.5% despite growth in the fourth quarter.² However, while the economy was struggling, not every market and industry suffered. With people spending more time at home, industries such as home

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¹ Martin Crutsinger, *US Economy Shrank 3.5% in 2020 After Growing 4% Last Quarter*, AP NEWS (Jan. 28, 2021), <https://apnews.com/article/us-economy-shrink-in-2020-b59f9be06dcf1da924f64afde2ce094c>.

² *Id.*

improvement, outdoor recreation, food delivery services, and companies specializing in internet meeting platforms flourished.³ One other such industry was sports betting.⁴ In fact, 2020 was the strongest year for sports betting revenues in the country's history, bringing in more than \$1.5 billion in lawful revenue and putting approximately \$240 million into state coffers.⁵ This trend shows no signs of slowing down; current projections have sports betting revenue reaching somewhere between \$2.6 billion to \$3.1 billion in 2021.⁶ This continues a trend that began in 2018 with the Supreme Court's decision in *Murphy v. NCAA*, a ruling which overturned the federal government's blanket ban on sports betting, save for Nevada.⁷ The decision was a watershed moment in the sports betting industry. States began passing their own gaming laws almost immediately.⁸ As of December 2, 2021, 32 states, along with the District of Columbia, have enacted legalized sports betting in some form, and nine other states that have passed legislation waiting for implementation.⁹ Though unlikely to pass the Senate, the House of Representatives for the Commonwealth of Kentucky passed a bill legalizing state-wide sports gambling on March 18, 2022.¹⁰

The changes wrought by the *Murphy* decision have not been purely legislative. Nevada, no longer the sole state offering sports betting, is also no longer the state with the largest revenue take, neither in total money handled nor in money bet per person.¹¹ Not only has *where* the betting is taking place changed, but also *who* is running the sportsbooks. Companies who operated in daily fantasy sports no longer confine themselves to that area of operation. Two such companies, FanDuel and DraftKings, both known for the frequency of their commercials (and the annoyance that accompanies said commercials), have opened sports betting operations.¹² Barstool Sports, originally known

³ Peter Kusnic, *10 Markets That Boomed in 2020 Despite (or Because of) Covid-19*, MARKET RESEARCH (Jan. 4, 2021), <https://blog.marketresearch.com/10-markets-that-boomed-in-2020-despite-or-because-of-covid-19>.

⁴ Natalie Abele, *Sports Betting Overcame COVID for a Record Year in 2020*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/guides/research/sports-betting-record-year/> (Mar. 15, 2021).

⁵ *Id.*

⁶ Wayne Parry, *US Sports Bet Revenue Could Hit \$3B in 2021; NY Backs Mobile*, ABC NEWS (Jan. 6, 2021, 3:31 PM), <https://abcnews.go.com/Sports/wireStory/us-sports-bet-revenue-hit-3b-2021-ny-75091766>.

⁷ Abele, *supra* note 5. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018).

⁸ Patrick Moran, *Anyone's Game: Sports-Betting Regulations After Murphy v. NCAA*, CATO INST. (Mar. 11, 2019), <https://www.cato.org/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa>.

⁹ Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN, https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization (Dec. 2, 2021). Since the writing of this article, Ohio has legalized sports gaming. See *infra* note 81 and accompanying text.

¹⁰ Marcus Green, *Bill Legalizing Sports Gambling Passes Kentucky House*, WDRB (Mar. 18, 2022), https://www.wdrb.com/in-depth/bill-legalizing-sports-gambling-passes-kentucky-house/article_2561abd6-a6d5-11ec-9acc-33b0a1701209.html.

¹¹ Abele, *supra* note 5.

¹² Peter Kafka, *Those DraftKings and FanDuel Ads You're Already Sick of Are Keeping the TV Business Afloat*, VOX (Sept. 18, 2015, 10:38 AM), <https://www.vox.com/2015/9/18/11618706/those-draftkings-and-fanduel-ads-youre-already-sick-of-are-keeping-the-info-on-where-how-&-when-sports>

for being a sports and pop culture website, has opened sportsbooks in 13 different states.¹³

Even with such a monumental shift in a relatively short amount of time, gray areas continue to exist. There remain 18 states that have neither implemented legalized sports betting nor have legislation passed waiting to be enacted.¹⁴ Some states have instead cemented their anti-gambling stances.¹⁵ Utah, one of two states with a blanket ban on all forms of gambling, tabled a proposal in March 2021, that would have allowed so-called “games of skill,” which are normally differentiated in anti-gaming laws from “games of chance.”¹⁶ Further, of the states that have allowed sports betting, not all have adopted mobile/online betting and still require a physical presence within the sportsbook casino to place a wager.¹⁷ This leaves a large portion of the country in a predicament. What is someone who wants to place a sports bet supposed to do if they live in one of the 19 states without legalized sports betting? What if someone lives in a state where sports betting is legal, but mobile betting is not, and they live a great distance from the nearest sportsbook casino? Do they drive across their state’s border into a state that allows sports betting? This option could be feasible if a willing bettor lives within a reasonable drive to the state border but, ultimately, is most likely impractical. Instead, many people turn to online gambling websites.

The first known sports betting website was Everygame, which went live in 1996.¹⁸ As the popularity of the internet grew, so did the popularity of betting sites.¹⁹ Many sites began offering sign-up bonuses and free bets to entice new bettors to join.²⁰ In 2006, Congress dealt a blow to many of these

Betting is Legal, FANDUEL, <https://www.fanduel.com/legal-sports-betting-us-map> (last visited Oct. 17, 2022); *Legal Sports Betting in the United States*, DRAFTKINGS, <https://sportsbook.draftkings.com/help/sports-betting/where-is-sports-betting-legal?wpsrc=Organic%20Search&wpaffn=Google&wpkw=https%3A%2F%2Fsportsbook.draftkings.com%2Fhelp%2Fsports-betting%2Fwhere-is-sports-betting-legal&wpcn=help&wpscnc=sports-betting%2Fwhere-is-sports-betting-legal> (last visited Oct. 16, 2022).

¹³ *Where Can I Use the Barstool Sportsbook & Casino*, BARSTOOL SPORTSBOOK, <https://support.barstoolsportsbook.com/hc/en-us/articles/360044406072-Where-can-I-use-the-Barstool-Sportsbook-Casino#:~:text=Currently%2C%20you%20may%20place%20sports,Pennsylvania%2C%20New%20Jersey%20or%20Michigan.> (last visited Oct. 16, 2022).

¹⁴ Rodenberg, *supra* note 10. Since writing this Comment, Ohio passed its own sports gambling bill, *see infra* note 81.

¹⁵ Rodenberg, *supra* note 10.

¹⁶ Taylor Stevens, *Over Concerns About Gambling, a Utah Senate Committee Declines to Vote on Bill to Allow ‘Skill-Based Games’*, SALT LAKE TRIB. (Mar. 2, 2021, 6:52 PM), <https://www.sltrib.com/news/politics/2021/03/02/over-concerns-about/>. A game of skill is one where a player’s skill can help create a more favorable outcome, rather than games of chance in which the outcome is mainly odds-based. *Is It a Game of Skill or a Game of Chance?*, THOMPSON COBURN LLP (Dec. 1, 2015), <https://www.thompsoncoburn.com/insights/blogs/sweepstakes-law/post/2015-12-01/is-it-a-game-of-chance-or-a-game-of-skill->.

¹⁷ Rodenberg, *supra* note 10.

¹⁸ *Online Gambling History – Development of Gaming on the Internet*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/history/> (last visited Oct. 27, 2022).

¹⁹ *Id.*

²⁰ *Id.*

illegal, offshore betting sites with its passage of the Unlawful Internet Gambling Enforcement Act.²¹ This act, citing concerns about rising debts incurred through illegal gambling operations, outlawed payment institutions from knowingly transferring money to gambling sites in order to fund illegal gambling activities.²² While the law did place a hurdle to those wishing to bet online, the effects were not as swift and absolute as its proponents may have hoped. Many sites continued to operate, and still do so. Even after the legalization of sports betting in certain states, many American bettors still opt to illegally bet through online sites.²³ A quick internet search yields no shortage of sites that will compile and rate the reputation of competing sportsbooks, which operate offshore and offer American players options to play regardless of their geographic location.²⁴

This Comment will address how these sites can continue to operate within parts of the United States where sports betting remains illegal. Though Congress has passed bills to combat the transfer of betting information and money across state lines for gambling purposes, this Comment posits that the legislation as it exists is ill equipped to regulate internet-based gambling. This Comment will briefly address the history of gaming enforcement, recent court cases, and changing technologies to explore why federal enforcement appears non-existent and impractical. Part I of this Comment will provide a background of the federal laws, both currently in enforcement and not, that have shaped the landscape of sports betting within the United States. It will also give a brief overview of cryptocurrency and how it functions. Part II discusses the changes of the sports betting landscape and the changes in technology that have made a federal enforcement scheme to stop illegal bettors difficult. The focus of Part II is to show the shortcomings that exist within the current regulatory framework that allows illegal betting sites to operate within the United States. Part II will focus on the rise of cryptocurrencies and how their use makes it extremely difficult for the federal enforcement schemes to have any practical effect on combatting illegal sports betting. Part III of this Comment will propose differing solutions to the shortfalls identified in Part II. Each proposal includes a discussion of the realities and challenges for each proposal. A brief conclusion follows.

²¹ 31 U.S.C. § 5361.

²² *Id.* §§ 5361(a)(3), 5364(a).

²³ A.J. Perez, *Illegal Bets Still Rule Super Bowl – Even As More States Offer Regulated Action*, USA TODAY (Jan. 28, 2019, 8:45 AM), <https://www.usatoday.com/story/sports/nfl/super-bowl/2019/01/28/super-bowl-2019-betting-gambling/2695616002/>.

²⁴ *See, e.g., Top 5 Online Sportsbooks in 2022*, DRATINGS (Sept. 16, 2022), <https://www.dratings.com/top-5-online-sportsbooks-for-us-gamblers/>; *About Bovada*, BOVADA, <https://www.bovada.lv/about> (last visited Oct. 18, 2022).

I. BACKGROUND: THE FEDERAL WIRE ACT, THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT, THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT, AND CRYPTOCURRENCY

This Section shall provide a brief discussion of three of the more important laws that have governed sports gambling laws at some point in this country. Additionally, this Section shall provide a brief overview of what cryptocurrency is and how individuals can use it. Part I.A discusses the Federal Wire Act, briefly addressing the history of the law's passage and contemporaneous interpretations of the Wire Act's scope via court decisions and competing guidance documents. Part I.B discusses the Professional and Amateur Protection Act, as well as the Supreme Court case that led to its demise. Part I.C discusses the passage of the Unlawful Internet Gambling Enforcement Act. Part I.D discusses the creation and rise in popularity of virtual currencies.

A. *The Federal Wire Act*

In 1961, Congress passed the Federal Wire Act, which was the first federal regulation aimed at regulating sports betting.²⁵ The law's focus was to target organized crime syndicates by criminalizing the transmission of information across state lines for betting purposes.²⁶ For such an important law, its text is quite simple and straightforward:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.²⁷

Due to the rise in the popularity and use of the internet in the 1990s (including for gambling purposes), the federal government had to address an important question: Could the Wire Act be used to prosecute *all* forms of illegal internet-based gambling, such as virtual casinos or poker rooms, or did its scope apply

²⁵ Transmission of Wagering Information Act, 18 U.S.C. § 1084 (1961); John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 679 (2020). For a more in-depth history of this legislation, this author recommends *Through the Wire Act*.

²⁶ Holden, *supra* note 26, at 682.

²⁷ Transmission of Wagering Information Act, 18 U.S.C. § 1084(a).

solely to sports betting?²⁸

The first case to address this question within the federal court system was *In re Mastercard*, in which the plaintiffs, the gamblers, were suing Visa and Mastercard.²⁹ The plaintiffs alleged that the companies' facilitation of credit card payments for online-based gambling activities, which would be otherwise illegal in their home state, violated various federal statutes, including the Wire Act.³⁰ Regarding the plaintiffs' Wire Act claims, Visa and Mastercard argued that the plaintiffs did not show that the funds were used for sports betting, a "fatal defect with respect to their [claim]."³¹ The district court accepted this defense, stating that the plain language of the statute is clear that the Wire Act was to apply to sports betting only.³² The court noted that the statute expressly "qualif[ied] the nature of the gambling activity as [] related to a 'sporting event or contest.'"³³ While noting that the clear language of the Wire Act did not require the court to look at any prior or subsequent legislative history, the court chose to discuss recent efforts by Congress to expand the reach of the federal government's powers in regulating online-based games of chance.³⁴ These efforts by Congress served as additional evidence to the court that the original scope of the Wire Act only applied to sports betting and not all forms of gambling.³⁵ On appeal, the United States Court of Appeals for the Fifth Circuit unanimously upheld the lower court's decision.³⁶

This rationale was seemingly affirmed in an advisory memorandum written by Assistant Attorney General Virginia A. Seitz on September 20, 2011.³⁷ This memorandum was addressed to the states of Illinois and New York, which were seeking to sell lottery tickets online but were concerned that utilizing out-of-state processors could run afoul of the Wire Act.³⁸ The purpose of the memo was to clarify whether the provision prohibiting "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers" was confined to only sports betting.³⁹ The Seitz Memo concluded the relevant provision was limited by the initial requirements that the contest in question was related to a sporting event or contest.⁴⁰ Following the conclusions reached by the courts in *In re*

²⁸ Holden, *supra* note 26, at 683 n.36.

²⁹ See *In re Mastercard Int'l Inc.*, 132 F. Supp 2.d 468, 473 (E.D. La. 2001).

³⁰ *Id.* at 475.

³¹ *Id.* at 480.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 480–81.

³⁵ *Id.* at 481.

³⁶ *In re Mastercard Int'l Inc.*, 313 F.3d 257, 264 (5th Cir. 2002).

³⁷ See *Whether the Wire Act Applies to Non-Sports Gambling* 35 Op. O.L.C. 134, 137–38 (2011) [hereinafter Seitz Memo].

³⁸ *Id.* at 134–35.

³⁹ *Id.* at 138.

⁴⁰ *Id.* at 140.

Mastercard, the header of the advisory memorandum summarizes: “Interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside the reach of the Wire Act. Because the . . . proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them.”⁴¹

These limitations placed upon the scope of the Wire Act were not without opposition. Members of Congress attempted to “restore” the Act to its original purpose: to restrict all forms of interstate gambling activity.⁴² In the most recent of these efforts, Utah Representative Jason Chaffetz introduced the “Restoration of America’s Wire Act” on February 4, 2015.⁴³ The proposed bill garnered 26 co-sponsors (3 Democrats and 23 Republicans) and sought to explicitly broaden the scope of the Wire Act to include all forms of internet gambling.⁴⁴ However, the bill faltered, failing to pass further than the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.⁴⁵

This legislative failure did not signal the end of the efforts of anti-gambling proponents to increase the scope of the Wire Act to cover all forms of gambling. On November 2, 2018, the Assistant Attorney General for the Office of Legal Counsel, Steven A. Engel, issued a second advisory memorandum explicitly reversing the memorandum written by Assistant Attorney General Seitz only eight years earlier.⁴⁶ This second memorandum noted that Congress could have easily made clear whether “the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers . . .” was constricted to only sports betting by utilizing two additional commas.⁴⁷ It proposed, “Congress could have unambiguously extended both prohibitions in the first clause to sports-related gambling: ‘for the transmission in interstate or foreign commerce of bets or wagers[,] or information assisting in the placing of bets or wagers[,] on any sporting event or contest.’”⁴⁸ The memo went even further, clarifying that restriction to sports betting likewise did not apply to the earlier provision “for information assisting in the placing of bets or wagers.”⁴⁹ This proposed guidance would expand the scope of the Wire Act to cover gambling activities beyond sports betting.

⁴¹ *Id.* at 134.

⁴² Jacob Sullum, *Chaffetz Reintroduces Ban on Internet Gambling, a.k.a. the Sheldon Adelson Protection Act*, REASON (Feb. 10, 2015, 4:20 PM), <https://reason.com/2015/02/10/chaffetz-reintroduces-ban-on-internet-ga/>.

⁴³ H.R. 707, 114th Cong. (2015).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Memorandum Op. from the Acting Assistant Att’y Gen., *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling* 42 (Nov. 2, 2018) [hereinafter Engel Memo].

⁴⁷ *Id.* at 10–11.

⁴⁸ *Id.*

⁴⁹ *Id.* at 11.

Any perceived victories of these efforts of anti-gambling proponents were short lived. Following the Engel Memo in 2018, many states were concerned about the memorandum's implications that all gambling activities would now seemingly include their ongoing online state lotteries.⁵⁰ The New Hampshire Lottery Commission and one of its vendors for handling online transactions, NeoPollard, sought declaratory relief in 2019 from this expansion of the Wire Act's reach.⁵¹ Relief was sought and granted at the district court level under the Declaratory Judgment Act and the Administrative Procedure Act, which was appealed by the Attorney General, the Department of Justice, and the United States.⁵² The appeal was unsuccessful in the First Circuit Court of Appeals.⁵³ The court ruled that the qualification "any sporting event or contest" should be read to carry through the entirety of the statute, therefore restricting the application of the Wire Act to only sports betting.⁵⁴ This decision affirmed the interpretation of the earlier Seitz Memo and contradicted the Engel Memo.

While the guidance put forth by the Office of Legal Counsel appears to be subject to the whim of whoever is currently heading the office, the holdings in *In re Mastercard* and *Rosen* indicate that federal courts are likely to continue to apply a narrower approach to the Wire Act's scope.⁵⁵ At the time of this writing, no cases have been found pending in the federal court systems that will challenge these interpretations and there exists no split in the circuits.

B. *The Protection of Amateur and Professional Sports Act*

In 1982, Rick Kuhn, a former collegiate basketball player for Boston College, was sentenced to ten years in prison for his part in a point-shaving scandal during the 1978-1979 college basketball season.⁵⁶ In 1989, baseball fans watched as the pastime's "Hit King" Pete Rose was subjected to a scandal of his own—breaking the game's cardinal rule that baseball players not

⁵⁰ N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 44 (1st Cir. 2021).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 45.

⁵⁴ *Id.* at 57–59.

⁵⁵ *See id.* at 44; *In re Mastercard Int'l Inc.*, 313 F.3d 257, 264 (5th Cir. 2002).

⁵⁶ *Rick Kuhn Sentenced to 10 Years*, N.Y. TIMES (Feb. 6, 1982), <https://www.nytimes.com/1982/02/06/sports/rick-kuhn-sentenced-to-10-years.html>. Point shaving occurs when players (or anyone else affiliated with a sporting contest) act in a way to affect whether a team covers a published point spread. *Point-shaving*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/point-shaving> (last visited Nov. 5, 2022). Point spreads are the predicted number of points that a team will win or lose by that bettors will wager around. Cole Rush, *What Does The Point Spread Mean?*, FORBES BETTING (Aug. 1, 2022, 2:44 PM) <https://www.forbes.com/betting/sports-betting/what-does-point-spread-mean/>. For example, a team given a spread of -8.5 would mean that a team is expected to win by more than 8.5 points. A player engaging in point shaving would try to ensure that their favored team would win by 8.5 points or less, or even lose the contest.

gamble on baseball games.⁵⁷ It was against this backdrop that professional leagues began to lobby Congress to act.⁵⁸ The culmination of these efforts was the Professional and Amateur Sports Protection Act (PASPA) in 1992.⁵⁹

Rather than outright ban sports gambling, PASPA placed a nationwide freeze on state sports gambling laws.⁶⁰ Specifically, the law prohibited states from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing] by law or compact" any sports gambling program that was not in place from January 1, 1976, and August 31, 1990.⁶¹ Excepted from PASPA was New Jersey, which was given a one-year exemption to enact sports betting in Atlantic City.⁶² After New Jersey's failure to act within this window, PASPA left Nevada with a virtual monopoly over the sports betting industry within the United States.⁶³

For such a sweeping piece of legislation, there were few serious challenges to the law's substance. The first major challenge involved Delaware's lottery system.⁶⁴ Delaware, building off of its existing football lottery scheme, sought to expand the lottery system by incorporating baseball teams as well.⁶⁵ The State of Delaware charged that the statute exemptions as written were vague.⁶⁶ The Third Circuit Court of Appeals ruled against the State of Delaware, finding the language within PASPA that limited a "lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, **to the extent that the scheme was conducted by that State** or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990" meant that the state could not expand an existing program under PASPA.⁶⁷

The next major challenge occurred after a 2012 New Jersey law was enacted to legalize sports gambling within the state.⁶⁸ The state was sued by Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL),

⁵⁷ See generally Craig Neff, *Rose's Grim Vigil*, SPORTS ILLUSTRATED (Apr. 3, 1989), <https://vault.si.com/vault/1989/04/03/roses-grim-vigil-as-gambling-charges-and-the-media-engulfed-him-pete-rose-awaited-his-fate>.

⁵⁸ John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling: How America Regulates its Most Lucrative Vice*, WISC. L. REV. 907, 919 (2020).

⁵⁹ Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–04 (2012), invalidated by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. (2018).

⁶⁰ Holden & Edelman, *supra* note 59, at 920.

⁶¹ 28 U.S.C. § 3702.

⁶² Holden & Edelman, *supra* note 59, at 920. It is important to note that Delaware had a quasi-sports betting scheme in place when PASPA was enacted. See *id.* at 924. Players in the lottery system, rather than choosing numbers, would choose winners of NFL games. *Id.* This lottery system was allowed to continue post-PASPA enactment. *Id.* at 924–28.

⁶³ *Id.* at 920.

⁶⁴ See *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 295–96 (3d Cir. 2009).

⁶⁵ See *id.* at 296, 300.

⁶⁶ *Id.* at 302.

⁶⁷ *Id.* at 301, 304 (quoting 28 U.S.C. § 3704(a)) (emphasis in original).

⁶⁸ *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 214 (3d Cir. 2013).

and the National Collegiate Athletic Association (NCAA) for violation of PASPA.⁶⁹ New Jersey challenged PASPA's constitutionality on the basis of the anti-commandeering principle of the Tenth Amendment, the Due Process and Equal Protection Clauses, and the doctrine of equal sovereignty.⁷⁰ New Jersey's challenges were unsuccessful, and the Third Circuit Court of Appeals affirmed the district court's finding that PASPA was constitutional.⁷¹ New Jersey appealed the ruling to the United States Supreme Court, but a writ of certiorari was denied.⁷²

In response to the ruling, New Jersey passed a law that repealed its own state laws prohibiting sports betting.⁷³ Upon the passage, the same group (MLB, NBA, NHL, NFL, and NCAA) once again filed suit, seeking to enjoin New Jersey from repealing its anti-gaming laws, insinuating that the repeal of a law banning gambling in the state was essentially the same as passing laws legalizing sports gambling.⁷⁴ The challenge was initially successful, with the district court finding that, though PASPA did not prohibit states from repealing state gaming laws, the practice had the same effect.⁷⁵ Upon appeal, the ruling of the district court was once again affirmed by the Third Circuit Court of Appeals, after both an initial hearing and an en banc trial.⁷⁶ However, unlike the previous decision in *NCAA v. Governor of N.J.*, New Jersey's appeal was accepted by the United States Supreme Court.⁷⁷ The Court held that PASPA violated the anti-commandeering principle and was therefore unconstitutional.⁷⁸

This monumental decision has paved the way for states to start passing their own gaming laws. Today, over 20 states have enacted their own version of legalized sports betting, and the trend is expected to continue.⁷⁹ On December 22, 2021, Governor Mike DeWine of Ohio signed into law House Bill 29, which will allow sports betting in the state.⁸⁰

C. *Unlawful Internet Gambling Enforcement Act*

The federal government began its efforts to regulate internet-based casinos in 1997, following the rise in both the number and popularity of

⁶⁹ *Id.* at 217.

⁷⁰ *See id.*

⁷¹ *Id.* at 240.

⁷² *Christie v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014).

⁷³ *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488 at 491, 494–95 (3d Cir. 2014).

⁷⁴ *See id.* at 490–91, 494–95.

⁷⁵ *Id.* at 505–06.

⁷⁶ *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 832 F.3d 389, 402 (3d Cir. 2016).

⁷⁷ *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, at 1461 (2018).

⁷⁸ *Id.* at 1475.

⁷⁹ *See Rodenberg*, *supra* note 10.

⁸⁰ *Governor DeWine Signs Bills into Law*, GOVERNOR OF OHIO (Dec. 22, 2021), <https://governor.ohio.gov/media/news-and-media/Governor-DeWine-Signs-Bills-into-Law-12222021>; H.B. 29, 134th Gen. Assemb. (Ohio 2021).

foreign-operated gambling websites.⁸¹ These efforts culminated in the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006, which prohibits companies from knowingly accepting money transfers for gambling activities that are illegal in the places from where the transfer originates.⁸² The UIGEA was the first time the federal government passed a law explicitly targeting internet-based gambling.⁸³ Similar to the Wire Act, the language of the law is relatively simple and straightforward:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—

(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

(4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.⁸⁴

The UIGEA targets many forms of gambling activities and was passed to deal primarily with off-shore sites operating illegally within the United States.⁸⁵ One important aspect of the UIGEA is that it carves out a specific exception for fantasy sports.⁸⁶ Before the repeal of PASPA, this created a quasi-betting market where players would pick multiple players to create fantasy teams which were entered into daily contests to win money—a contest

⁸¹ See generally *Internet Crimes Affecting Consumers: Hearing on S. 474 before the Subcomm. on Tech., Terrorism, and Gov't Info. of the S. Comm. on the Judiciary*, 105th Cong. 1 (1997).

⁸² 31 U.S.C. § 5363.

⁸³ *Governor of Ohio Student Note & Comment: The unlawful Internet Gambling Enforcement Act 2006: A Parlay of Ambiguities and Uncertainties Surrounding the laws of the internet Gambling Industry*, 7 APPALACHIAN J. L. 305, 309.

⁸⁴ *Id.*

⁸⁵ Holden & Edelman, *supra* note 59, at 954.

⁸⁶ Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 660 (2017).

coined “daily fantasy sports.”⁸⁷ However, following the *Murphy* decision, some of the largest daily fantasy sports companies have entered the more traditional sports betting market and now run their own sportsbook.⁸⁸ Unlike the Wire Act, the law targets the companies receiving the transaction, rather than individual bettors.⁸⁹ Beyond cases that litigated and ultimately allowed for the rise of daily fantasy sports, the law has remained unscathed by legal challenges.⁹⁰

D. Virtual Currency

Unforeseen at the passage of the Wire Act and the UIGEA was the creation and rise in popularity of virtual currencies. Virtual currencies, also known as cryptocurrency, in short, are digital tokens that holders can exchange, sell, or buy online.⁹¹ This Section of the Comment will provide a quick review of what a virtual currency is and how it can be used. Current estimates indicate there are nearly 10,000 unique virtual currencies in existence.⁹² Unlike traditional currencies, which are either backed by commodities (i.e. gold standard currencies) or by sovereign governments (fiat currencies), digital currencies are not issued or backed by a sovereign government.⁹³ Though virtual currencies can be exchanged in commerce for goods or services, they generally are not recognized as a legal tender.⁹⁴ The most notable of these currencies is Bitcoin, which attained legal tender status in El Salvador in 2021.⁹⁵ Further, a former Tongan Minister of Parliament announced Tonga is set to adopt Bitcoin as legal tender by the end of 2022.⁹⁶ As a general principle, virtual currencies operate independent of any government or agency oversight.⁹⁷

⁸⁷ See Holden & Edelman, *supra* note 59, at 922–23 (providing a detailed discussion regarding the creation and rise of daily fantasy sports), which the author recommends since the case law and history of the UIGEA and daily fantasy sports is beyond the scope of this Comment.

⁸⁸ See *supra* notes 13–14 and accompanying text.

⁸⁹ 31 U.S.C. § 5363.

⁹⁰ See Holden & Edelman, *supra* note 59, at 924–33.

⁹¹ *Digital Assets*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/digital-assets> (Oct. 25, 2022).

⁹² Raynor de Best, *Quantity of Cryptocurrencies as of Feb. 3, 2022*, STATISTA, (March 22, 2022), <https://www.statista.com/statistics/863917/number-crypto-coins-tokens/>.

⁹³ Matthew Kien-Meng Ly, Note, *Coining Bitcoin’s “Legal-Bits”: Examining the Regulatory Framework for Bitcoin and Virtual Currencies*, 27 HARV. J. LAW & TECH. 587, 589 (2014).

⁹⁴ *Id.* Legal tender is a designation given to a form of payment within a country that “is legally valid for the payment of debts and that must be accepted for that purpose when offered.” *Legal Tender*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/legal%20tender> (last visited Nov. 5, 2022).

⁹⁵ Joe Hernandez, *El Salvador Just Became the First Country to Accept Bitcoin as Legal Tender*, NPR (Sept. 7, 2021, 4:57 PM), <https://www.npr.org/2021/09/07/1034838909/bitcoin-el-salvador-legal-tender-official-currency-cryptocurrency>.

⁹⁶ Darren Parkin, *Bitcoin Set to Be Legal Tender in Tonga by End of the Year*, CITY A.M. (Jan. 14, 2022, 1:21 PM), <https://www.cityam.com/bitcoin-set-to-be-legal-tender-in-tonga-by-end-of-the-year/>.

⁹⁷ Kien-Meng Ly, *supra* note 94, at 589. Please note that for the rest of the Comment, “Bitcoin” will be discussed exclusively and in place of the term “virtual currenc(ies).” Though other currencies exist (Ethereum, Bitcoin Cash, etc.), Bitcoin is the largest and most valuable. The operating principles of Bitcoin apply generally to all other virtual currencies and this Comment could be read with them in mind.

Bitcoin operates in a decentralized manner; there is no administrator for the token, nor is it backed by any sovereign government.⁹⁸ Bitcoins are created (“mined”) through complex computational calculations, in which the first computer to solve an equation is rewarded a batch of coins.⁹⁹ This process is expensive and it is resource (electricity) intensive, which has led to the practice being banned in some countries.¹⁰⁰ Another option for someone to obtain Bitcoin is by purchasing previously released coins through an online exchange.¹⁰¹ Exchanges work similar to the stock market, where people can use either traditional currency to buy or trade other virtual currencies for Bitcoin.¹⁰² At the time of writing, an entire Bitcoin would trade on the exchange for approximately \$43,000.¹⁰³ It is important to note that the price of a Bitcoin is driven by public perception and use of the coin, as there is no sovereignty or commodity backing its value.¹⁰⁴ Once a person has obtained their virtual currency, they are able to trade fractions of it for any sort of good or service that accepts Bitcoin as payment.¹⁰⁵

One reason Bitcoin has gained popularity is due to the amount of security and privacy it affords its users.¹⁰⁶ However, in spite of public perception, Bitcoin transactions are not completely anonymous.¹⁰⁷ Every transaction of Bitcoin is recorded on a public ledger, known as the “blockchain.”¹⁰⁸ This ledger is publicly accessible and records the address of the sender and recipient, the amount of the transaction for every transaction made, and any subsequent transfers/uses via the currency.¹⁰⁹ While a user’s Bitcoin account number (“address”) is private, one could see every transaction made through that address if they were able to associate the address with a person.¹¹⁰ In general, it is best to think of your identity while using Bitcoin as pseudo-anonymous. Current estimates value the total

⁹⁸ Euny Hong, *How Does Bitcoin Mining Work?*, INVESTOPEDIA, <https://www.investopedia.com/tech/how-does-bitcoin-mining-work/> (May 5, 2022).

⁹⁹ *Id.*

¹⁰⁰ See Shawn Tully, *Bitcoin Mining is Being Banned in Countries Across the Globe—and Threatening the Future of Crypto*, FORTUNE (Jan. 5, 2022, 7:00 PM) <https://fortune.com/2022/01/05/crypto-blackouts-bitcoin-mining-bans-kosovo-iran-kazakhstan-iceland/>.

¹⁰¹ See generally Adam Hayes, *How to Buy Bitcoin*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/082914/basics-buying-and-investing-bitcoin.asp> (Aug. 12, 2022).

¹⁰² See generally *id.*

¹⁰³ *Bitcoin Price*, COINBASE, <https://www.coinbase.com/price/bitcoin> (last visited Jan. 13, 2022). It is worth noting that exchanges don’t have to be for an entire coin. A person can buy fractions of a coin, essentially exchanging cash for coins.

¹⁰⁴ See *Frequently Asked Questions*, BITCOIN, <https://bitcoin.org/en/faq#why-do-bitcoins-have-value> (last visited Oct. 21, 2022).

¹⁰⁵ See *supra* note 92 and accompanying text.

¹⁰⁶ See *Frequently Asked Questions*, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; *Protect Your Privacy*, BITCOIN, <https://bitcoin.org/en/protect-your-privacy#:~:text=Since%20users%20usually%20have%20to,to%20trace%20in%20the%20future> (last visited Nov. 5, 2022).

¹¹⁰ *Protect Your Privacy*, *supra* note 110.

amount of existing Bitcoin at over \$1 trillion.¹¹¹

II. PROBLEMS FOR THE FEDERAL GOVERNMENT/ARGUMENTS AGAINST FEDERAL REGULATION

This section will analyze the Wire Act and the UIGEA, as well as more recent technological developments that highlight shortcomings in the federal regulation of the sports betting market.

A. *The UIGEA*

The scope of the UIGEA is ill-equipped to serve as a deterrent for would-be (illegal) sports bettors via foreign-operated, online sportsbooks that were targeted when the law was first enacted. Due to the language of the law, would-be bettors using offshore betting sites can sell their Bitcoin to a website and use those proceeds for betting purposes. Many offshore sites offer this as the quickest, easiest way for players to get money into their account.¹¹² The UIGEA prohibits these companies from knowingly accepting funds for illegal betting purposes through credit cards, electronic fund transfers through a money transmitting business/service, a check (or similar instrument) through a financial institution, or other forms of financial transaction as designated by the government.¹¹³ There is no enforcement mechanism against the bettors themselves, nor does the law actually attempt to regulate the existence of offshore betting sites.¹¹⁴

First, the UIGEA has a limited scope of financial transactions involved. There is no mention of virtual currency.¹¹⁵ Further, the language of the statute indicates that the inclusion of a payment processor of some sort is necessary for the law to apply:

(2) an electronic fund transfer, or funds transmitted *by or through a money transmitting business*, or the *proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person*;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through

¹¹¹ Nathan Reiff, *How Much of All Money is in Bitcoin?*, INVESTOPEDIA, <https://www.investopedia.com/tech/how-much-worlds-money-bitcoin/> (Nov. 26, 2021).

¹¹² See, e.g., *Sports Betting with Bitcoins*, BOVADA, <https://www.bovada.lv/bitcoin> (last visited Nov. 5, 2022).

¹¹³ 31 U.S.C. § 5363.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

any financial institution¹¹⁶

This requirement is extremely important—Bitcoin does not have an intermediary and is instead sent from user to user, a process known as peer-to-peer trading.¹¹⁷

Second, unlike a traditional currency, federal courts may not be willing to find that Bitcoin constitutes an acceptable medium of transfer to be subject to various state gambling laws. Rather than an institution, such as a bank, receiving a request to remit payment and tendering that payment, Bitcoin transfers are in effect no different than trading other digital items that may have a secondary market value. Again, it is public perception, not from the backing of any government or commodity, that drives the price of Bitcoin.¹¹⁸ Many state laws regarding (illegal) gambling requires there needs to be a “thing for value” exchanged to participate in an illegal gambling activity.¹¹⁹ Courts may find that Bitcoins do not have an intrinsic value on their own, and therefore are not regarded as a thing for value. Not being subject to state illegal gambling laws would also remove Bitcoin transactions from the scope of the UIGEA, as there would be no underlying violation of state gambling law as the law requires.¹²⁰

For example, in *Soto v. Sky Union, LLC.*, the plaintiffs sued Sky Union, the operator of an online game called “Castle Clash.”¹²¹ Under various claims under state law, the plaintiffs alleged that the game constituted an illegal gambling activity.¹²² Though Sky Union advertised the game as being free to play, the game offered players the opportunity to spend money to enhance their gameplay.¹²³ Essentially, the game centered around amassing armies of “Heroes” to battle against other armies.¹²⁴ Certain Heroes were stronger than others, making them more valuable to purchase using the in-game currency called “shards.”¹²⁵ This in-game currency was amassed by visiting a dungeon, which had a daily limit on the amount of free visits a player could have.¹²⁶ To advance faster, players could either purchase shards directly or purchase additional visits to the dungeon area.¹²⁷ Additionally, players could purchase and participate in a “Hero Roll” where they would roll a virtual die to win a Hero, which could help them advance quicker in the

¹¹⁶ *Id.* § 5363(2)–(3) (emphasis added).

¹¹⁷ See *supra* notes 98–106 and accompanying text.

¹¹⁸ See *supra* notes 98–106 and accompanying text.

¹¹⁹ See *infra* notes 122–52 and accompanying text.

¹²⁰ The UIGEA specifies that it must be “unlawful Internet gambling.” 31 U.S.C. § 5363.

¹²¹ *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 874 (N.D. Ill. 2016).

¹²² *Id.*

¹²³ *Id.* at 874–75.

¹²⁴ *Id.* at 875.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

game.¹²⁸ The algorithm of the Hero Roll was set in order to make lower-value Heroes a more likely result than their more valuable counterparts.¹²⁹ Thus, a person purchasing a Hero Roll was less likely to get a higher-value Hero, and was more likely to receive a more common, lower-value Hero. An independent, secondary market existed for Castle Clash accounts where users could sell their account to another player.¹³⁰ The rarer the Heroes in the account, the more valuable it was on the secondary market.¹³¹

Plaintiffs argued that the shards were things of value and therefore subject to their respective state laws regarding illegal gambling activities.¹³² The plaintiffs supported this argument by calculating the expected amount of money to win a certain Hero through a Hero Roll.¹³³ The plaintiffs' contention was that, by being able to tie these Rolls to a real-world currency, the Hero Rolls had an intrinsic value and were subject to gaming laws.¹³⁴ Second, and most important to this Comment, the plaintiffs contended that the rewards won in-game had actual intrinsic value because they could increase the value of a Castle Clash account, which could be sold on an open market.¹³⁵ The plaintiffs' theory was that the secondary market was analogous to purchasing tokens in a casino, winning at a slot machine, and then redeeming their tokens for value.¹³⁶ The court disagreed with this logic.¹³⁷ The court reasoned that, when a gambler is at a casino and exchanges tokens to play slot machines, the tokens have a set value and the player redeems these tokens with the casino for real money.¹³⁸ This differs from a secondary market in which the values are set by the public's perception of an item's value and there is no overriding issuing authority.

Contrast this case to *Kater v. Churchill Downs*.¹³⁹ In *Kater*, plaintiffs sued Churchill Downs to recover losses incurred while playing in the virtual "Big Fish Casino."¹⁴⁰ Churchill Downs operated a virtual platform in which users could play various electronic casino games using virtual chips purchased by the user.¹⁴¹ While Churchill Downs stated that its chips retained no monetary value and were not redeemable "for cash or any other tangible value," there existed a mechanism for players to transfer chips to other

¹²⁸ *Id.*

¹²⁹ *Id.* at 875–76.

¹³⁰ *Id.* at 879.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 879–80.

¹³⁸ *Id.*

¹³⁹ See *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788 (9th Cir. 2018).

¹⁴⁰ *Id.* at 785–86. Many states have enacted laws that allow their citizens to sue to recover losses from participating in illegal gambling activities. See, e.g., *id.* at 786.

¹⁴¹ *Id.* at 785–86.

players.¹⁴² For each transaction between players, Churchill Downs would retain a fee for facilitation.¹⁴³ In its defense, Churchill Downs contended its tokens were not things of value, while the plaintiff argued they were things of value because they were a “form of credit . . . involving extension of . . . entertainment or a privilege of playing [] without charge.”¹⁴⁴ The court agreed with the plaintiff.¹⁴⁵ The court reasoned that, without the virtual chips, the players were unable to play various games and were forced to purchase more chips to have “the privilege of playing the game.”¹⁴⁶ Churchill Downs argued that chips only enhanced gameplay, but the court noted that players *must* have tokens in order to play the game.¹⁴⁷ Churchill also argued that free chips were given to players to extend gameplay, but the court did not address this argument as it was not included in the answer to the complaint.¹⁴⁸

While the holding of the Ninth Circuit Court of Appeals does not seem to endorse the rationale advanced in *Soto*, it does offer some insight into the rationale a federal court may use in determining if something constitutes a thing of value.¹⁴⁹ In each case, one of the key issues was control of the tokens.¹⁵⁰ Churchill Downs required and controlled the tokens, giving them an assigned value for purchase for people to pay to play.¹⁵¹ While Churchill Downs did not allow players to directly cash out their tokens, Churchill did take their operation a step further than the defendant in *Soto*. In *Soto*, Castle Clash players were able to sell their entire account in a secondary, unaffiliated market.¹⁵² Churchill Downs was not so hands-off. Churchill Downs’s platform had an internal mechanism that allowed players to affect transfers between one another, while Churchill Downs kept a processing fee for each transaction.¹⁵³ In sum, not only did Churchill Downs require the purchasing of its tokens to play its game, but it also controlled the players’ method of cashing out (the internal transfer) while profiting on the transaction. This amount of control, along with the direct involvement, seems more analogous to a casino operating slot machines with its own tokens, as the *Soto* plaintiffs unsuccessfully put forth in their argument.

We could use this rationale to predict how a court may apply it to a Bitcoin transaction. First, there is no casino/entity a bettor would purchase Bitcoin from. Unlike the players in *Soto* or *Kater*, a player utilizing an offshore betting site does not purchase their coins directly from the company

¹⁴² *Id.* at 786.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 787.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 788.

¹⁵⁰ *Id.* at 786–87.

¹⁵¹ *See id.* at 787.

¹⁵² *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 879 (N.D. Ill. 2016).

¹⁵³ *Kater*, 886 F.3d at 786.

operating the site; coins are either mined or purchased from other users on an open, independent market through an exchange.¹⁵⁴ Second, there is no set value for a Bitcoin; its value is based upon public perception and user confidence and changes daily.¹⁵⁵ When a player deposits Bitcoin with a betting site, the amount of credit the coin (or a fraction of the coin) is worth is dependent on the current value of Bitcoin and is not set by the site.¹⁵⁶ Third, Bitcoin is not redeemed with the company running the site, nor does a holder have to redeem a Bitcoin to use it elsewhere. Bitcoin can be traded for other virtual currencies, exchanged with other people, or traded for traditional currency.¹⁵⁷ These uses are not available to more traditional casino tokens.¹⁵⁸ Instead, when a user “cashes out,” the offshore site simply transfers an amount of Bitcoin at the current market price to offset the amount of credit within the bettor’s wallet.¹⁵⁹ At no point is there a direct transfer of real money/currency between the site and the player. For these reasons, Bitcoin is not likely to be treated as a “thing of value,” like the virtual tokens in *Kater*.

Third, the UIGEA has a scienter requirement that makes it ill-equipped to deal with virtual currency transactions. The act states that “[n]o person engaged in the business of betting or wagering may *knowingly* accept” funds in connection with gambling that is otherwise illegal where the funds originate.¹⁶⁰ This requirement that an operator not *knowingly* accept funds will not be met, or at the least be extremely difficult to prove. While not entirely anonymous, transactions involving Bitcoin are for all intents and purposes anonymous.¹⁶¹ Holders of Bitcoin are identified solely by a wallet address (“ID”). The IDs are not custom, unlike an email address, and are composed of a string of random alphanumeric characters anywhere from 26-35 characters in length.¹⁶² While the platform the wallet is hosted in may ultimately tie the ID to an email address, it is still not the numbers used to send or receive Bitcoin. Instead, each Bitcoin transaction generates an

¹⁵⁴ See *supra* notes 98, 99.

¹⁵⁵ See *supra* note 105 and accompanying text. The value of virtual currency can be quite volatile. See, e.g., *\$300 Billion Bitcoin and Crypto Price Crash After Stark Fed Warning – Ethereum, BNB, Solana, Cardano and XRP in Free Fall*, FORBES (Dec. 3, 2021, 4:45 PM), <https://www.forbes.com/sites/billybambrough/2021/12/03/300-billion-bitcoin-and-crypto-price-crash-after-stark-fed-warning-ethereum-bnb-solana-cardano-and-xrp-in-free-fall/?sh=72b13b4c22fd>.

¹⁵⁶ See Hayes, *supra* note 102. For examples of sport betting sites accepting bitcoin see, e.g., BOVADA, <https://www.bovada.lv/contents/get-bitcoin-to-play-online> (last visited Oct. 24, 2022); BETONLINE, <https://www.betonline.ag/> (last visited Oct. 24, 2022).

¹⁵⁷ *Frequently Asked Questions*, *supra* note 105.

¹⁵⁸ See *Kater*, 886 F.3d at 787–88.

¹⁵⁹ *Cryptocurrency Fluctuation Rate*, BOVADA, <https://www.bovada.lv/help/bitcoin-faq/can-i-lose-all-my-money-if-a-cryptocurrency-fluctuates> (last visited Nov. 2, 2022). See generally Hayes, *supra* note 101.

¹⁶⁰ 31 U.S.C. § 5363 (emphasis added).

¹⁶¹ See *supra* notes 107–12 and accompanying text.

¹⁶² Pryto, *Bitcoin Addresses*, DUMMIES, <https://www.dummies.com/article/business-careers-money/personal-finance/cryptocurrency/bitcoin-addresses-223643> (Aug. 29, 2016); *Using Your Blockchain Wallet*, BLOCKCHAIN, <https://www.blockchain.com/learning-portal/wallet-faq> (last visited Oct. 22, 2022).

address for both the sender and receiver.¹⁶³ Bitcoin transaction addresses are generated randomly, independent of the ID, and each generates a new address for each party.¹⁶⁴ This creates an additional layer of protection of the anonymity of the user. Furthermore, IDs are not tied to physical addresses nor is any physical geographic information considered when affecting transfers of Bitcoin.¹⁶⁵ While all transactions are recorded on the blockchain (acting as a public ledger), this system makes it extremely difficult to identify the user without their ID.¹⁶⁶ Given these levels of protection, it is easy to foresee the difficulties that would arise in the prosecution of a case involving a bettor utilizing Bitcoin; it would be extremely difficult to show that the money was “knowingly” received from a state in which the gambling activities would otherwise be illegal.

Due to the limited scope of the types of payment the UIGEA covers, Bitcoin’s lack of an intrinsic value, and the relative anonymity given to users and transfers, the UIGEA finds itself ill-equipped to regulate offshore gambling.

B. The Wire Act

Difficulties for the Wire Act lie in its age; it has outlived its usefulness. The Wire Act was originally passed to combat a rise in illegal betting and gambling operations controlled by organized criminal syndicates.¹⁶⁷ Seeing that the internet was yet to exist, much less used for betting purposes, Congress could not have imagined that the Wire Act could be used in such a far-reaching manner.

First, it is no longer solely criminal syndicates that may find themselves at risk of violating the Wire Act. Unlike the UIGEA, there is no jurisdictional hook in the Wire Act that concerns itself with the legality of the gambling activities within the states that such communications may occur.¹⁶⁸ Wisely, the UIGEA concerned itself with whether the gambling activities were legal within the state from which the potential bettor initiated the funds transfer.¹⁶⁹ However, the Wire Act does not concern itself with the ultimate origination and destination of the information to help place bets. When enacted, Nevada was the only state to have legalized sports betting operations

¹⁶³ *Using Your Blockchain Wallet*, *supra* note 163.

¹⁶⁴ *Id.*

¹⁶⁵ *See supra* notes 107–12 and accompanying text.

¹⁶⁶ *See supra* notes 107–12 and accompanying text.

¹⁶⁷ *See* Holden, *supra* note 26, at 679.

¹⁶⁸ The language of the Wire Act does not concern itself with whether the betting activity is legal or not. 18 U.S.C. § 1084. The UIGEA reads that it applies to illegal betting activities from which the transfer originates. 31 U.S.C. § 5363.

¹⁶⁹ 31 U.S.C. § 5363.

and largely remained so until the repeal of PASPA.¹⁷⁰ The Wire Act applies to “[w]hoever . . . knowingly uses a wire communication facility for the transmission in interstate . . . commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest”¹⁷¹ The language is brief and clear. *Any* interstate communication may result in a violation of the Act.

This could create a situation that Congress did not envision when drafting the Wire Act. Legal betting enterprises may now find themselves at risk if they operate in multiple states that allow legal sports betting. A company legally operating in Indiana, for example, could find itself in violation of the Wire Act by transmitting information across state lines to another (legal) sports betting operation in Michigan if it is routed through an intermediary state that does not allow sports betting. This is not a far-fetched idea; both states, which border one another, have legal sports betting and companies, such as Barstool, that operate sportsbooks in each state.¹⁷² Computer networking, however, could cross into a jurisdiction that does not allow sports betting, such as Kentucky, and could be a violation of the Wire Act. This creates a situation in which the Wire Act was surely not meant for—punishing business operating legally within their states’ borders. To help combat these concerns, Part (B) of the Wire Act does have a safe harbor provision. It states:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of 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.¹⁷³

On its face, the safe harbor provision would seem to protect companies. The House Report for the Wire Act seems to confirm this. The report stated, “[p]hrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a State where betting on the same horserace is legal is not within the prohibitions of the bill.”¹⁷⁴ However, legislative history is not the law. A court could still hold that the plain meaning of the statute makes any intermediate routing of betting

¹⁷⁰ See *supra* note 64 and accompanying text. Nevada legalized gambling in 1939, though the legality of sports gambling operated in a gray area until the 1950’s. John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 596 (2020).

¹⁷¹ 18 U.S.C. § 1084(a).

¹⁷² BARSTOOL SPORTSBOOK, <https://www.barstoolsportsbook.com/live-states> (last visited Oct. 23, 2022).

¹⁷³ 18 U.S.C. § 1084(b).

¹⁷⁴ H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632.

information into a state where it is illegal a violation under the Wire Act.

Further, this provision does not protect bettors or aid in the placing of bets. The same committee report reads, “[n]othing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not.”¹⁷⁵ This exemption does not apply even if the original location of the bettor and the final destination of the bettor are in the same state if information crosses state lines. In *United States v. Yaquinta*, the defendants were indicted under the Wire Act for running an illegal bookmaking scheme via telephone in West Virginia.¹⁷⁶ Though all parties were located in West Virginia, where horseracing was legal, the telephone lines crossed into Ohio.¹⁷⁷ The court reasoned that the purpose of the Wire Act was to prosecute otherwise illegal gambling activities that crossed into interstate commerce and upheld the conviction.¹⁷⁸ At best, a bettor may find themselves needlessly inconvenienced by this ruling. Sticking with the above scenario, imagine a bettor living in Indiana, but whose closest sportsbook is in Michigan. Under the current safe-harbor language and the *Yaquinta* rationale, it would be illegal for a bettor located in Indiana to place a sports bet in Michigan, even though the activity is legal in each jurisdiction. At worst, if the holding in *Yaquinta* is read in its harshest light, a legal bettor living and placing a bet in Indiana could be subject to a Wire Act violation if their information is routed through Michigan, even though the activity is legal in each jurisdiction and the original and final states were the same.

Second, the federal government has other options to prosecute violations of state gambling laws. The Illegal Gambling Business Act (IGBA) of 1970 was passed to prosecute whoever is operating an “illegal gambling business” that employs five or more people and exceeds \$2,000 of revenue in a single day.¹⁷⁹ An illegal gambling business is defined as a gambling activity that is conducted in “violation of the law of a State or political subdivision in which it is conducted,” which indicates that a violation of state law is required for prosecution.¹⁸⁰ Unlike the Wire Act, which once again does not have a jurisdictional hook, the IGBA requires a potential prosecutor to consider whether the activity is actually illegal within the state the activity is taking place in. The IGBA helps ensure that there is no conflict between federal and state law.

Third, the original purpose of the Wire Act, targeting organized criminal activity, has been supplanted by the Racketeering Influenced and

¹⁷⁵ *Id.* at 2633.

¹⁷⁶ *United States v. Yaquinta*, 204 F. Supp 276, 277 (N.D. W.Va. 1962).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 279.

¹⁷⁹ 18 U.S.C. § 1955.

¹⁸⁰ *Id.* § 1955(b)(1)(i).

Corrupt Organizations Act of 1970 as Title IX of the Organized Crime Control Act (“RICO”).¹⁸¹ Similar to the Wire Act, RICO provides the Department of Justice the authority to bring civil and criminal actions against criminal organizations.¹⁸² It was designed to prosecute the leaders of criminal organizations who would otherwise be insulated from personal liability by directing others to carry out the activities of a criminal enterprise.¹⁸³ An act such as RICO fulfills the original goal of Congress when it passed the Wire Act: to combat the moneymaking operations of organized criminal groups.¹⁸⁴ RICO makes it a criminal offense to:

(1) invest[] proceeds from a pattern of racketeering activity in an enterprise, (2) acquir[e] or maintain[] control over an enterprise through a pattern of racketeering activity, (3) conduct[] or participat[e] in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspir[e] to do any of these types of conduct.¹⁸⁵

In fact, gambling activities that are punishable under state law find themselves included in the definitions of a “racketeering activity” within the statute.¹⁸⁶ Notably, violations of the Wire Act and the IGBA are directly incorporated within the statute as well.¹⁸⁷ RICO allows the federal government to predicate its prosecution of a criminal organization using a network of existing state and federal laws.

The passage of RICO has entirely supplanted the need for the Wire Act. Not only is it furthering the goal of the Wire Act, targeting criminal organizations, it succeeds where the Wire Act falls short: it considers legality of activities at the state level.¹⁸⁸ Within the definition of “racketeering activity” RICO qualifies its scope by stating that it applies to the enumerated activities, including gambling, “chargeable under State law and punishable by imprisonment for more than one year”¹⁸⁹ Further, RICO lists other federal statutes that, if violated, could constitute the basis for a RICO conviction.¹⁹⁰ These direct references are important. Mainly, this allows RICO to succeed where the Wire Act fails; it incorporates other laws, by either direct or indirect reference, and therefore has the ability to accommodate any changes to any other state or federal law. This allows

¹⁸¹ Brianna Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165, 185 (2016).

¹⁸² *Id.*

¹⁸³ Pamela Bucy Pierson, *RICO, Corruption, and White-Collar Crime*, 85 TEMP. L. REV. 523, 525 (2013).

¹⁸⁴ See Holden, *supra* note 26, at 682.

¹⁸⁵ Pierson, *supra* note 184, at 526.

¹⁸⁶ 18 U.S.C. § 1961(1)(A).

¹⁸⁷ *Id.* § 1961(1)(B).

¹⁸⁸ *Id.* § 1961; see Holden, *supra* note 171.

¹⁸⁹ 18 U.S.C. § 1961(1)(A).

¹⁹⁰ *Id.* § 1961(1)(B).

RICO to create harmony between the laws of the federal and state governments. This ability to adapt avoids unnecessary tension between the two entities, unlike the Wire Act and its lack of a clear, unambiguous jurisdictional hook.

The Wire Act has outlived its usefulness. Its simple, yet powerful language does not allow it to adapt to a changing regulatory landscape, leaving companies or bettors that are abiding by the laws in multiple states open to a potential federal violation regardless of the laws of the states involved. The Wire Act has been supplanted by more inclusive, robust, and flexible legislation. The passage of RICO was for the sole purpose of prosecuting criminal enterprises, just as the Wire Act, but is restrained by predicating its prosecution on violations of other enumerated state and federal laws.¹⁹¹ This allows RICO to adapt to a changing regulatory landscape at both the state and federal level, all while respecting the laws of individual states. Further, the Wire Act is no longer the sole act that confers power to the federal government to prosecute gambling operations that are illegal under state laws. The IGBA allows the federal government to pursue violators of gambling laws, all the while having a jurisdictional hook to ensure there is not a conflict between the laws of the federal and state governments.¹⁹² Since the Wire Act can create unnecessary tension between the states and the federal government, the Wire Act, as it stands, is not a practical piece of legislation for dealing with illegal sports betting in today's virtual world.

III. POLICY PROPOSALS

This section of the Comment will discuss different policy proposals for the Wire Act and the UIGEA. The proposals range from increasing the scope of the acts, adding jurisdictional hooks, and outright repeal of the statutes.

A. Addressing the Deficiencies of the UIGEA

As previously discussed, one of the glaring deficiencies of the UIGEA is who the law targets.¹⁹³ The law targets the betting site, the recipient of the funds, through a payment processor that originates from a state where the gambling activity is illegal.¹⁹⁴ This scope becomes inadequate when dealing with Bitcoin transactions, as there is not a payment processor, as all transactions involving sports betting are peer-to-peer, and it is difficult or impossible to prove that a recipient knew where the money was coming

¹⁹¹ *Id.*; see Pierson, *supra* note 184.

¹⁹² CONG. RESEARCH SERV., 97-619, INTERNET GAMBLING: AN OVERVIEW OF FEDERAL CRIMINAL LAW 1, 10 (2012).

¹⁹³ See *supra* Part I.C.

¹⁹⁴ See *supra* Part I.C.

from.¹⁹⁵ Further, a serious question exists whether Bitcoin could be found to be a thing of value to be brought within the jurisdiction of many existing state laws regarding gambling activities.¹⁹⁶ The solution for the UIGEA on its surface would be two-fold: change the scope of the law to apply to individuals who initiate the transfer rather than payment processors, and explicitly add Bitcoin as a form of prohibited payment.

An individual enforcement mechanism for individuals would remove the legal gray area that Bitcoin transactions create. The absence of a payment processor would no longer be an issue. Instead of prosecuting payment offshore sites themselves, this would allow the federal government to prosecute the bettors who choose to attempt to violate the gambling laws of their respective states. This change would further resolve any legal question of whether a Bitcoin transaction involves any sort of processing by its conversion and would thereby be covered under the UIGEA. This would also shield traditional processors, such as banks or credit card companies, from any potential liability due to undetected, unscrupulous behavior by their customers. This would also remove the practical hurdles of attempting to prosecute betting site operators, who are often located outside of the United States and would remove the prosecution's burden of proving these operators knew the gambling activity was illegal in the state from which the transfer was initiated.

It is a general principle that individual policing power is in the purview of the state rather than the federal government, save a few exceptions. One such exception could be Congressional powers under the Commerce Clause to police individual betting activity.¹⁹⁷ Even following the narrowing of the Commerce Clause since the Supreme Court's decision in *United States v. Lopez*, a case could be made that the regulation of sports betting falls within the powers of the legislative branch.¹⁹⁸ *Lopez*, a case involving the constitutionality of federal legislation regarding gun free zones around schools, set forth factors to be considered when deciding if proposed legislation fell within the Commerce Clause powers.¹⁹⁹ The Court considered the following: (1) whether the activity being regulated was economic in nature, (2) whether there was a jurisdictional element showing that the regulated activity was truly interstate, (3) evidence to link the proposed regulated activity and the harm it sought to cure, and (4) the link between the regulated activity and the effects on interstate commerce.²⁰⁰ Sports gambling seems to easily satisfy these elements. It is an economic activity, as it

¹⁹⁵ See *supra* Part I.D.

¹⁹⁶ See *supra* Part I.D.

¹⁹⁷ See U.S. CONST. art. I, § 8, cl. 3.

¹⁹⁸ See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995). This section of the Comment assumes that the court would still adhere to the principles set forth in the *Lopez* decision.

¹⁹⁹ See *id.* at 551–52, 558–59.

²⁰⁰ See *generally id.* at 560–62.

involves wagering money. The jurisdictional element assures this only applies to interstate betting, as the UIGEA only concerns bets made from states from which the gambling activity is illegal. There is assuredly evidence between criminal activity and illegal betting, as we could look to legislative histories of other acts such as RICO and the Wire Act. Finally, as discussed above, the illegal betting market is massive.²⁰¹ Even Justice Thomas, a judge who historically is unwilling to expand the Commerce Clause, appeared to agree that Congress could use its Commerce Clause powers to regulate interstate gambling activities in his concurring opinion in *Murphy v. NCAA*.²⁰²

However, as simple as these proposed fixes may seem, they are unlikely to be successful. First, trying to track Bitcoin transfers to prosecute individuals would be extremely difficult and time consuming. As discussed previously, Bitcoin transfers, while not completely anonymous, are extremely secure and provide their users a high level of quasi-anonymity.²⁰³ This would often leave federal regulators spending a great amount of resources trying to discover the identity of a low-level bettor. Further, the rise of Bitcoin and the lack of regulation that has followed shows that technology advances faster than the law.²⁰⁴ There is little reason to believe that if Bitcoin transactions were regulated, then something else would not quickly take its place.

Besides the impracticality of individual enforcement for Bitcoin transfers, it would not be politically popular for the legislature. As evidenced by the amount of states that have legalized sports betting since the *Murphy* decision, American citizens want to have the ability to bet on sporting events and do so legally.²⁰⁵ These changing attitudes were reflected with the Seton Hall Sports Poll conducted in 2019, which showed that 80% of those surveyed supported legalized sports betting.²⁰⁶ This was a remarkable jump from the poll conducted in February 2017, which showed a support of only 46%.²⁰⁷ With such overwhelming and growing support, it is hard to imagine that a member of the legislature would garner much support in attempting to further regulate/limit American citizens' access to sports betting.

B. Amendment for the Wire Act

The Wire Act's primary flaw is that it potentially criminalizes on the

²⁰¹ See *supra* notes 4–7.

²⁰² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring). Thomas's opinion, while it did not explicitly say this, seemed to take umbrage with the dissent's opinion that Congress could regulate interstate gambling under Commerce Clause powers.

²⁰³ See *Frequently Asked Questions*, *supra* note 105.

²⁰⁴ See generally Mark D. Fenwick et al., *Regulation Tomorrow: What Happens When Technology Is Faster than the Law?*, 6 AM. U. BUS. L. REV. 561, 563 (2017).

²⁰⁵ See generally Rodenberg, *supra* note 10.

²⁰⁶ Michael Ricciardelli, *Nat'l Poll: 80% of Americans Support Legalized Sports Betting*, THE SETON HALL SPORTS POLL (Oct. 10, 2019), <http://blogs.shu.edu/sportspoll/2019/10/10/natl-poll-80-of-americans-support-legalized-sports-betting/>.

²⁰⁷ *Id.*

federal level what is legal at the state level. Without an unambiguous jurisdictional hook, the Wire Act has the potential to put legal businesses or bettors at unnecessary risk should their information cross state lines, whether intentional or not. This is a situation that legally operating businesses and bettors should not be placed in. A simple amendment to the Wire Act could allow the federal government to pursue its interests, prosecuting illegal gambling operations, while respecting the rights of states that have chosen to legalize sports betting since the *Murphy* decision.

The Wire Act's current language is simple, and the needed revisions would be simple as well. The Wire Act could fix itself in one of two possible ways. Either the Wire Act could be amended to state it only applies when the information is for a betting activity not allowed in either the originating or final state, or it could simply state that the Act applies to information for illegal sports betting purposes. This would allow the federal government to retain its powers in prosecuting illegal gambling enterprises while respecting the free flow of information for legally operating businesses and bettors. This simple change would avoid any unnecessary and pointless conflicts between state and federal law. This change would also remove an unnecessary burden on a citizen of a state with legal sports betting who wishes to place a bet in another state that also allows sports betting. And this change would remove any ambiguities about information routing for both the companies and the bettors, even though the risk may seem small.

C. *Repeal both the UIGEA and the Wire Act*

This Comment proposes that, rather than trying to fix the Wire Act or the UIGEA, it would be simpler to get rid of each of them. Both laws, while well-intentioned, do not add anything to the existing landscape of state and federal laws.

The Wire Act's lack of respect for the gaming laws of the states not only flies in the face of our federalist system, but it also does not give the states any additional protection against illegal gambling operations. States can, and do, prosecute illegal gambling operators for violations of their state laws. For example, the Commonwealth of Kentucky recently settled for \$300 million against the operators of Poker Stars for violating state gaming laws.²⁰⁸ Rather than providing an additional system for helping states deter illegal gambling operations, the Wire Act may impede legitimate businesses or bettors regardless of what the relevant state laws say. Sports betting laws are the province of the states, and a federal statute that operates without respect

²⁰⁸ Padraic Halpin, *Flutter Settles Kentucky Court Ruling for \$200 Million*, REUTERS (Sept. 22, 2021, 5:22 AM), [https://www.reuters.com/legal/government/flutter-settles-kentucky-court-ruling-200-million-2021-09-22/#:~:text=DUBLIN%2C%20Sept%202022%20\(Reuters\),Fanduel%20parent%20said%20on%20Wednes%20day](https://www.reuters.com/legal/government/flutter-settles-kentucky-court-ruling-200-million-2021-09-22/#:~:text=DUBLIN%2C%20Sept%202022%20(Reuters),Fanduel%20parent%20said%20on%20Wednes%20day).

to that sovereignty should not be tolerated.

The UIGEA is fighting a battle it cannot win. Technology has left the UIGEA as nothing but a paper obstacle. The ease of a player purchasing Bitcoin, using that Bitcoin to redeem for credit at an offshore betting site, then cashing out that Bitcoin on an open market exchange is too great to serve as a deterrent to illegal sports betting. The level of anonymity provided by these Bitcoin transactions is too great for it to make it worth the resources needed to prosecute sports bettors. The technology is constantly evolving, and there is no reason to believe that the technology behind Bitcoin will cease to continue to develop. Instead of trying to outpace technology to create a federal case, the federal government should once again leave it to the states to punish the bad actors that violate their respective laws.

Even with the repeal of each of these statutes, it would not leave the federal government powerless to prosecute bad actors that operate across state lines. The federal government would still have RICO and the IGBA to combat criminal organizations. Each of these are predicated upon breaking a state law. This is important when dealing with 50 different states, each with their own set of laws. RICO and the IGBA being the main federal mechanisms for enforcement will ensure that the federal government is not overstepping its authority by prosecuting otherwise legal businesses. At the same time, this will not leave the states in the difficult position of combatting interstate criminal organizations operating illegal betting because it allows the federal government to prosecute when necessary.

CONCLUSION

The repeal of these statutes respects one of the main tenants of our country's founding: federalism. With the repeal of PASPA in *Murphy*, the Supreme Court, whether intentionally or not, opened the door for each state to regulate its sports betting laws as they wished. Rather than trying to shoehorn older legislation into a changing regulatory landscape, the federal government would be wise to recognize the Wire Act and UIGEA for what they are: outdated and unnecessary. State sovereignty should be respected, for it "may . . . serve as a laboratory" in the governance of its citizens with their consent.²⁰⁹ Repealing each of these acts would respect that sovereignty and respect the federalist structure of the United States.

²⁰⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

