PLACE YOUR BETS ON THE CONSTITUTIONALITY OF RIVERBOAT GAMBLING ACTS: DO THEY VIOLATE THE COMMERCE CLAUSE?

"Once again, a little fish has caused a commotion."[1] The fish in this case is a riverboat casino. The prospect of increased revenue prompted several states to legalize gambling in a limited form on riverboats.[2] Illinois,[3] Indiana,[4] Iowa,[5] Louisiana,[6] Mississippi,[7] and Missouri[8] each enacted riverboat gambling acts, and many other states are seriously considering similar legislation.[9] Competition in the riverboat casino industry is fierce

---

1. Maine v. Taylor, 477 U.S. 131, 132 (1986) (noting the recurrence of dormant Commerce Clause analysis of state statutes interfering with interstate shipments of minnows). *See infra* note 12 (defining the dormant Commerce Clause).

2. I. Nelson Rose, *Gambling and the Law — Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 99 (1993).

3. ILL. ANN. STAT. ch. 230, para. 10 §§ 1-23 (Smith-Hurd 1993) ("Riverboat Gambling Act").

4. IND. CODE ANN. §§ 4-33-1-1 to 4-33-15-4 (Burns Supp. 1994) ("Riverboat Gambling").

5. IOWA CODE ANN. §§ 99F.1-99F.18 (West Supp. 1994) ("Excursion Boat Gambling").

6. LA. REV. STAT. ANN. §§ 4:501-4:562 (West Supp. 1994) ("Louisiana Riverboat Economic Development and Gaming Control Act").

7. MISS. CODE ANN. §§ 75-76-1 to 75-76-313 (1991 & Supp. 1993) ("Mississippi Gaming Control Act" permitting gambling on "vessels"). *See* Op. Att'y Gen. (Miss. July 19, 1991), n.1.

8. MO. REV. STAT. §§ 313.800-313.850 (Supp. 1993) ("Excursion Gambling Boats"). *But see* Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 62, 64 (Mo. 1994) (en banc) (holding Missouri's riverboat gambling act invalid, in part, on grounds that it was passed in violation of Missouri's Constitution which requires a state constitutional amendment to legalize any lotteries because games of chance fit within the definition of lotteries).

9. *See* James Ragland & Liz Spayd, *D.C. Considering Casino Gambling*, WASHINGTON POST, Aug. 20, 1993, at A1 (describing the interest of Maryland, Virginia, and the District of Columbia in riverboat gambling); John F. Harris, *Virginia Legislative Panel Wants to Clear the Decks for Riverboat Gambling*, WASHINGTON POST, Jan. 20, 1993, at A5; *Inside Talk — Rolling (dice) on the*

among the states,[10] the operators, and the private parties seeking licenses to operate the casinos. The Commerce Clause of the United States Constitution[11] may be just the check needed to keep the competition fair.

Riverboat gambling acts raise two types of dormant Commerce Clause[12] issues. First, a state-licensed riverboat casino may violate a neighboring state's gambling laws by crossing into that state's territorial waters,[13] even if riverboat gambling is legal in the neighboring state.[14] Second, the present riverboat gambling acts include licensing requirements that promote in-state economic interests, and impede out-of-state operators' attempts to obtain licenses to operate legally in the state's waters.[15] This Note addresses the dormant Commerce Clause issues raised by existing riverboat gambling acts[16] and concludes with a proposed

---

River, STAR TRIB., Sept. 9, 1991, at 3B (Minnesota); *NY City Ponders Riverboat Gambling*, N.Y. TIMES (J. OF COMMERCE), Aug. 26, 1991, at B1; *Riverboat Gambling Coming to Winona?*, SUCCESSFUL BUS., Mar. 16, 1992, at 5 (Minnesota).

10. Patrick T. Reardon, *States Betting on Riverboat War*, CHICAGO TRIB., July 2, 1993, at 1.

11. U.S. CONST. art. I, § 8, cl. 3.

12. The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980). This limitation on the states in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state activity is called the dormant Commerce Clause. Norfolk S. Corp. v. Oberly, 822 F.2d 388, 392 (3d Cir. 1987).

13. *See, e.g.*, Op. Att'y Gen. 92-001 (Ark. Jan. 27, 1992) ("If a casino riverboat crosses into Arkansas waters while the gambling activity is occurring, it will be in violation of Arkansas law and subject to prosecution."); Op. Att'y Gen. 38-90 (Wis. Dec. 28, 1990) ("Should an Iowa licensed riverboat enter Wisconsin water while its 'gambling games' are in play, this would constitute a violation of [Wisconsin's criminal gambling statutes] by the operator as well as the employes [sic] and patrons of the riverboat."); *see also infra* part II.B (discussing problems associated with concurrent jurisdiction on interstate waterways).

14. An operator must be *licensed* by the state to lawfully operate a casino or even carry gambling equipment into the state. *See* ILL. ANN. STAT. ch. 230, para. 10 § 20 (Smith-Hurd 1993); IND. CODE ANN. § 4-33-9-1 (Burns Supp. 1994); IOWA CODE ANN. § 99F.15.1.a (West Supp. 1994); LA. REV. STAT. ANN. § 4:502.A(4) (West Supp. 1994); MISS. CODE ANN. § 75-76-55 (1991 & Supp. 1993); MO. REV. STAT. § 313.830 (Supp. 1993).

15. For a discussion of these statutory provisions, see *infra* text accompanying notes 28-39.

16. In addition to Commerce Clause challenges, riverboat gambling acts may be subject to challenges based on, inter alia, laws prohibiting restraints of trade and the Privileges and Immunities Clauses of Article IV, Section 2

Model Riverboat Gambling Act designed to avoid Commerce Clause violations.[17] The proposed Model Act includes licensing requirements that achieve local purposes of promoting in-state economic interests and ensuring close regulation of riverboat gambling without discriminating against out-of-state operators.

Part I of this Note details problems the riverboat gambling acts raise for casino operators seeking to conduct gambling in interstate waters and discusses jurisdictional issues that arise when riverboat casinos cross state borders. Part II of this Note highlights several points in the development of dormant Commerce Clause analysis, focusing on issues particularly relevant to existing riverboat gambling acts. Part II also includes a statement of the combined test for dormant Commerce Clause analysis of the acts. Part II concludes with a discussion of *National Association of Fundraising Ticket Manufacturers v. Humphrey*,[18] a Minnesota Federal District Court opinion that serves as an example of modern Commerce Clause analysis as it applies to state gambling regulations. Part III concludes that riverboat gambling acts are subject to constitutional scrutiny and that riverboat gambling is a subject of interstate commerce. Part III then applies the test articulated in Part II to several barriers to multistate operation of riverboat casinos. Finally, Part IV presents a proposed Model Riverboat Gambling Act that avoids discriminating against out-of-state operators while still promoting a state's own economic interests and protecting the state's public welfare.

I. The Problems

A. *Impediments to Multi-State Licensing of Riverboat Casinos*

A riverboat casino operator must surmount a number of legal and financial obstacles before operating the casino in more than one state. Although state legislators commonly argue that legalizing riverboat gambling will promote state tourism, state government's ultimate purpose is to earn revenue.[19] To collect

---

and the Fourteenth Amendment to the U.S. Constitution. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385 (1948) (invalidating state fishing regulations because they violated both the Commerce Clause and the Privileges and Immunities Clause). Consideration of such additional challenges, however, is beyond the scope of this Note.

17. *See infra* part IV.

18. 753 F. Supp. 1465 (D. Minn. 1990).

19. *See* Ill. Ann. Stat. ch. 230, para. 10 § 2(a) (Smith-Hurd 1993) ("This Act is intended to benefit the people of the State of Illinois by assisting

revenue, states impose licensing fees that can cost up to $50,000,[20] taxes on riverboat operators' revenue of up to 20% of adjusted gross receipts,[21] and admission fees of up to $3.00 per passenger, regardless of whether the passenger gambles.[22] Riverboat gam-

---

economic development and promoting Illinois tourism."); Transcript of debate on Illinois Senate Bill 572, H.R. 89 (June 22, 1989) (statement of Rep. Giorgi) (enumerating benefits of riverboat gambling including, inter alia, spurring economic development, creating jobs, boosting tourism, revitalizing rivers, and beautifying riverfronts); IND. CODE ANN. § 4-33-1-2 (Burns Supp. 1994) (explaining legislative intent); LA. REV. STAT. ANN. § 4:502.A(1) (West 1992) (explaining public policy behind the state's development of riverboat gambling industry); Barbara Powell, *The New Era of Riverboat Gambling*, 36 FED. BAR NEWS & J. 395, 395 (1989) (discussing Iowa legislature's hope that riverboat gambling will boost tourism and help state's economy recover from farm crisis); *see also infra* note 80 (discussing the difficulties in determining true legislative purposes behind statutes and the relevance of legislative purposes to dormant Commerce Clause analysis).

20. ILL. ANN. STAT. ch. 230, para. 10 §§ 6(d), 7(a), 10 (Smith-Hurd 1993) (charging $50,000 application fee for background investigation, $25,000 non-refundable license fee, $5,000 annual license renewal fee, and requiring the licensee to post a $200,000 bond); IND. CODE ANN. §§ 4-33-6-8(1), (2), 4-33-6-9 (Burns Supp. 1994) (requiring a $25,000 licensing fee for first year, $5,000 annual license renewal fee, and a bond); IOWA CODE ANN. §§ 99F.5.2, 99F.8 (West Supp. 1994) (charging annual license fee based on calculation of $5 per person multiplied by the capacity of the riverboat and requiring a bond); LA. REV. STAT. ANN. § 4:550.B(1), (2) (West 1994) (charging licensing fees of $50,000 for first year, $100,000 for each year thereafter, plus 3.5% of net gaming proceeds); MISS. CODE ANN. §§ 75-76-177, 75-76-183, 75-76-191 (1991 & Supp. 1993) (charging $5,000 application fee and a $5,000 annual license fee, plus additional license fees according to a schedule based on the number of games operated in the casino, plus an additional license fee, in lieu of a tax, based on gross revenues of licensee according to a graduated percentage schedule); MO. REV. STAT. §§ 313.807, 313.815 (Supp. 1993) (requiring non-refundable licensing fee of the greater of $50,000 or $15,000 for each person to be investigated for the license, additional fees the gaming commission deems appropriate if the cost of the investigation exceeds the initial licensing fee, an annual renewal fee to be set by the gaming commission at a minimum of $25,000, and a bond). For a discussion of calculating state taxes, see *infra* note 21.

21. ILL. ANN. STAT. ch. 230, para. 10 § 13(a) (Smith-Hurd 1993) (20% tax on adjusted gross receipts); IND. CODE ANN. § 4-33-13-1(a) (Burns Supp. 1994) (20% tax on adjusted gross receipts); IOWA CODE ANN. § 99F.11 (West Supp. 1994) (5% tax on first $1 million of adjusted gross receipts, 10% tax on next $2 million, and 20% tax on adjusted gross receipts over $3 million); MISS. CODE ANN. § 75-76-177(1) (1991 & Supp. 1993) (4% license fee on all gross revenue for first $50,000 per month, 6% license fee on next $84,000 per month, and 8% license fee on monthly gross revenue over $134,000); MO. REV. STAT. § 313.822 (Supp. 1993) (20% tax on adjusted gross receipts). "'Adjusted gross receipts' means the [total sums wagered] on the riverboat less winnings paid to wagerers." IOWA CODE ANN. § 99F.1.1, .11 (West Supp. 1994). *See also* ILL. ANN. STAT. ch. 230, para. 10 § 4(g) (Smith-Hurd 1993) (defining gross receipts as "the total amount of money exchanged for the purchase of chips, tokens or electronic cards by riverboat patrons").

22. ILL. ANN. STAT. ch. 230, para. 10 § 12(a) (Smith-Hurd 1993) ($2 per

bling states are cashing in on this new industry in a frenzy reminiscent of the boom in dram shops following the end of prohibition.[23]

While the cost of multistate licensing is steep, the penalties for operating a casino without a proper license are even steeper. For example, an operator who crosses into the waters of a neighboring state risks forfeiture of adjusted gross receipts, gambling equipment, and even the vessel itself. A riverboat operator also risks criminal prosecution for operating a gambling establishment in violation of the neighboring state's gambling laws.[24] Furthermore, an operator may face federal prosecution

---

person); IND. CODE ANN. § 4-33-12-1 (Burns Supp. 1994) ($3 per person); IOWA CODE ANN. § 99F.10.2 (West Supp. 1994) (admission fee set by Iowa's state racing and gaming commission); LA. REV. STAT. ANN. § 4:552.A (West Supp. 1994) (up to $2.50 per person); MO. REV. STAT. § 313.820.1 (Supp. 1993) ($2 per person).

23. U.S. CONST. amend. XXI, § 1 (repealing prohibition). *See* Rose, *supra* note 2, at 99-100 (discussing the likelihood of rapid saturation of the legalized gambling market based on a comparison to the end of prohibition).

24. State statutes enumerate penalties for violating state gambling laws, including, inter alia, fines, seizure and destruction of gambling equipment, forfeiture of gambling establishment, and imprisonment. *See* ALA. CODE § 13A-12-30 (1994); ALASKA STAT. §§ 11.66.200-.66.280 (1989); ARIZ. REV. STAT. ANN. § 13-3310(A)(2) (1989); ARK. CODE ANN. § 5-66-107 (Michie 1993); CAL. PENAL CODE § 330 (West 1981); COLO. REV. STAT. ANN. §§ 18-10-101, 18-10-104 (1990); CONN. GEN. STAT. ANN. § 53-278c(a) (West 1985); DEL. CODE ANN. tit. 11, § 1405 (Supp. 1992); D.C. CODE ANN. § 22-1505(c) (1989); FLA. STAT. ANN. § 849.232 (West 1976); GA. CODE ANN. § 16-12-30 (1992); HAW. REV. STAT. §§ 712-1220 to -1231 (1985 & Supp. 1992); IDAHO CODE § 18-3804 (1987); ILL. ANN. STAT. ch. 720, para. 5 § 28-5 (Smith-Hurd 1993); IND. CODE ANN. §§ 35-45-5-3 to -4 (Burns 1994) (IND. CODE ANN. § 35-45-5-10 (Burns 1994) (exempts riverboat gambling authorized by § 4-33)); IOWA CODE ANN. §§ 725.5, 725.8 (West 1993); KAN. CRIM. CODE ANN. §§ 21-4304, 4305, 4307 (Vernon Supp. 1989); KY. REV. STAT. ANN. § 528.100 (Baldwin 1993); LA. REV. STAT. ANN. § 15:31 (West 1992); ME. REV. STAT. ANN. tit. 17-A § 956 (West 1983); MD. CODE ANN., CRIM. LAW §§ 246A, 264 (1988); MASS. ANN. LAWS ch. 271, § 5A (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 750.308 (West Supp. 1994); MINN. STAT. ANN. § 609.762 (West 1987); MISS. CODE ANN. § 97-33-17 (Supp. 1993); MO. REV. STAT. § 572.120 (1986); MONT. CODE ANN. §§ 23-5-152, -161, -162 (1993); NEB. REV. STAT. § 28-1111 (1989); NEV. REV. STAT. §§ 179.1165, 465.088, 465.100 (1991); N.H. REV. STAT. ANN. § 647:2 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:37-4 (West 1982); N.M. STAT. ANN. § 30-19-10, -15 (Michie 1978); N.Y. PENAL LAW § 225.30 (McKinney 1989); N.C. GEN. STAT. § 14-298 (1993); N.D. CENT. CODE § 12.1-28-02(4)(c) (Supp. 1993); OHIO REV. CODE ANN. § 2915.03(B) (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 960 (West 1983); OR. REV. STAT. § 167.162 (1990); 18 PA. CONS. STAT. ANN. § 5513(b) (1983); R.I. GEN. LAWS §§ 11-19-24, 11-19-26, 11-19-28 (1981 & Supp. 1993); S.C. CODE ANN. §§ 16-19-80, 16-19-120 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-25-1 (1988); TENN. CODE ANN. §§ 38-6-11, 39-11-116, 39-17-505 (1991 & Supp. 1994); TEX. PENAL CODE ANN. § 47.04 (West 1994); UTAH CODE ANN. §§ 76-10-1107, 76-10-1108 (1990);

for unlawful transportation of gambling equipment,[25] or for operating an illegal gambling business.[26] These risks to riverboat operators increase in some instances because riverboat casinos cruise on waterways so narrow that riverboats inevitably cross into a neighboring state's waters.[27]

VT. STAT. ANN. tit. 13, §§ 2137, 2138 (1974 & Supp. 1993); VA. CODE ANN. § 18.2-336 (Michie 1988); WASH. REV. CODE ANN. § 9.46.230 (West 1988); W.VA. CODE § 61-10-1 (1992); WIS. STAT. ANN. § 945.03 (West 1982); WYO. STAT. § 6-7-103 (1988). *See generally* State v. Gambling Equip., 40 P.2d 746, 747 (Ariz. 1935) (recognizing destruction of illegal gambling equipment as within state police powers).

25. *See* 15 U.S.C. § 1172.

> It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such state or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

15 U.S.C. § 1172(a) (Supp. V 1993). When Section 1172 was first enacted, the statute applied even in states that permitted gambling, unless the state gambling statute expressly provided an exemption from the federal statute. *See* North Beach Amusement Co. v. United States, 240 F.2d 729, 731 (4th Cir. 1957) (refusing to find an exemption where state statute made no reference to Section 1172 of the Johnson Act); United States v. Two Hollycrane Slot Machines, 136 F. Supp. 550, 551 (D. Mass. 1955) (holding that Massachusetts did not have a Section 1172 exemption, since it would have been so easy to explicitly enact such an exemption). Although a subsequent amendment to Section 1172 did away with requiring explicit exemptions in state statutes, some riverboat gambling states still provide Section 1172 exemptions explicitly in their riverboat gambling acts. *See* LA. REV. STAT. ANN. § 4:667 (West Supp. 1994); MISS. CODE ANN. § 75-76-59 (1993).

26. *See* 18 U.S.C. § 1955 (1988). Section 1955(b)(1)(i) requires a business to be "a gambling business which is *a violation of the law of a State . . . in which it is conducted*" before it can be found to be an "illegal gambling business." *Id.* (emphasis added). In Maine v. Taylor, 477 U.S. 131, 132-33, the defendant challenged a conviction for violating and conspiring to violate the Lacey Act, 16 U.S.C. §§ 3371-3378 (1988), making it a federal crime to "import, export, transport . . . any fish or wildlife taken, possessed, transported, or sold *in violation of any law or regulation of any State.*" 16 U.S.C. § 3372(a)(2)(A) (emphasis added). A Maine statute prohibited importing live baitfish. *Taylor*, 477 U.S. at 133 n.1 (quoting ME. REV. STAT. ANN., tit. 12, § 7613 (1981)).

27. *See, e.g.*, Powell, *supra* note 19, at 398 (explaining that the Mississippi

States also impede multistate operation by requiring riverboat casino operators to comply with licensing requirements designed to promote in-state economic interests.[28] Iowa's act, for example, requires "that a substantial amount of all resources and goods used in the operation of an excursion gambling boat come from Iowa."[29] Iowa's act further requires that "a substantial amount of all services and entertainment be provided by Iowans."[30] Missouri's act had a similar requirement.[31] Mississippi requires employment of Mississippi residents as gaming employees and other employees in riverboat casino operations "to the extent practicable."[32] Louisiana requires operators to preferentially treat Louisiana firms when they seek resources, goods, services, and entertainment for riverboat casinos "to the extent allowable by law."[33]

River is so narrow at some points between Iowa and Illinois "it would be impossible for Iowa gambling boats not to cross into Illinois territory").

28. *See, e.g.*, ILL. ANN. STAT. ch. 230, para. 10 § 7(b)(3) (Smith-Hurd 1993) (requiring Gaming Board to consider potential state revenue when deciding whether to grant a license); IND. CODE ANN. § 4-33-6-4(3) (Burns Supp. 1994) (same).

29. IOWA CODE ANN. § 99F.7.4 (West Supp. 1994). Iowa also requires that the riverboat casino has a gift shop selling "arts, crafts, and gifts native to and made in Iowa." IOWA CODE ANN. § 99F.7.5.d (West Supp. 1994). *Cf.* MO. REV. STAT. § 313.812.5 (Supp. 1993) (requiring a "Missouri theme gift shop").

30. IOWA CODE ANN. § 99F.7.4 (West Supp. 1994).

31. In 1992, Missouri adopted a riverboat gambling act requiring the state gambling commission to

> require that an applicant [for a license] use Missouri resources, goods, and services in the operation of an excursion gambling boat where feasible and obtainable . . . [and requiring the commission to] develop standards to assure that a substantial amount of all resources and goods used in the operation . . . come from Missouri and that a substantial number of the staff and entertainers employed are Missouri residents.

L. 1991, H.B. 149 § 6.4 (reprinted in MO. ANN. STAT. § 572.010 (Vernon Supp. 1993). This section has been repealed. S.B. 10 & 11, 87th Gen. Assembly (1993). The new act provides that "[t]he commission shall encourage through its rules and regulations the use of Missouri resources, goods and services in the operation of any excursion gambling boat." MO. REV. STAT. § 313.812.4 (Supp. 1993). *See also* Harris v. Missouri Gaming Comm'n, 864 S.W.2d 58, 61 (Mo. 1994) (explaining that S.B. 10 & 11 deleted the requirement that riverboat operators use Missouri resources, goods, services, and employees).

32. MISS. CODE ANN. § 75-76-3(4) (1991 & Supp. 1993).

33. LA. REV. STAT. ANN. § 4:511(2)(g) (West Supp. 1994). *Cf.* Davis v. Davis, 452 F. Supp. 44, 47 (D. Pa. 1978) (applying Pennsylvania long arm statute, 42 PA. CONS. STAT. ANN. § 8309(b), authorizing in personam jurisdiction over foreign corporations "to the fullest extent allowable under the Constitution"); Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 585 (S.D. Fla. 1990) (interpreting Florida's obscenity statute as intending to regulate

Riverboat gambling states impose additional requirements that further disadvantage out-of-state operators. For example, Iowa, Illinois, Indiana, Louisiana, and Missouri require licensed riverboats to be replicas of nineteenth century riverboats of their home state.[34] Moreover, each riverboat gambling state requires operators to acquire all gambling equipment through suppliers licensed by that state.[35] Other conflicts between the existing acts include wager and loss limits,[36] dock-side gambling privileges,[37]

---

obscenity to maximum extent allowed by the Constitution), *rev'd on other grounds sub nom.*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992) (per curiam), *cert. denied*, 113 S.Ct. 659 (1992).

34. IND. CODE ANN. § 4-33-6-6(b) (Burns Supp. 1994) (requiring riverboats to "replicate, as nearly as possible, historic Indiana steamboat passenger vessels of the nineteenth century"); IOWA CODE ANN. § 99F.7.3 (West Supp. 1994) (requiring riverboats to resemble Iowa's riverboat history as nearly as practicable); LA. REV. STAT. ANN. § 4:504(23)(d) (West Supp. 1994) (defining riverboat as a vessel that replicates, "as nearly as practicable historic Louisiana [riverboats]"); MO. REV. STAT. § 313.812.3 (Supp. 1993) (requiring riverboats to resemble Missouri's riverboat history as nearly as practicable, unless the boat is continuously docked in an exempted zone). *Cf.* ILL. ANN. STAT. ch. 230, para. 10 § 6(f) (Smith-Hurd 1993) (requiring a riverboat used in a gambling operation to be "either a replica of a 19th century Illinois riverboat or of a casino cruise ship design"). *But see Harris*, 869 S.W.2d at 66 (ordering Missouri Gaming Commission to show a substantial justification for treating certain St. Louis boats, that are exempt from the Missouri riverboat history design requirement, differently from all other boats regarding their appearance).

35. ILL. ANN. STAT. ch. 230, para. 10 § 8(e) (Smith-Hurd 1993); IND. CODE ANN. § 4-33-9-8 (Burns Supp. 1994); IOWA CODE ANN. § 99F.17.2 (West Supp. 1994); LA. REV. STAT. ANN. § 4:525.B(4) (West Supp. 1994); MISS. CODE ANN. § 75-76-79 (1991 & Supp. 1993); MO. ANN. STAT. § 572.010 (Vernon Supp. 1993), L. 1991, H.B. 149, § 4(4), *repealed and amended by* S.B. 10 & 11 (codified at MO. REV. STAT. § 313.807.3 (Supp. 1993)).

36. ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(3) (Smith-Hurd 1993) (no wager or loss limits, but licensees must set minimum and maximum wagers on games); IND. CODE ANN. § 4-33-9-4 (Burns Supp. 1994) (no wager or loss limits, but licensees determine minimum and maximum wagers); IOWA CODE ANN. §§ 99F.4.4, 99F.9.2 (West Supp. 1994) (maximum wager of five dollars per hand and a maximum loss limit of two hundred dollars per person per excursion); MO. REV. STAT. § 313.805(3) (Supp. 1993) (maximum loss of five hundred dollars per individual player per gambling excursion).

37. ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(1) (Smith-Hurd 1993) (prohibiting dock-side gambling); IND. CODE ANN. § 4-33-9-2 (Burns Supp. 1994) (prohibiting dock-side gambling except for periods up to thirty minutes during passenger embarkation and disembarkation or when weather or water conditions present danger); IOWA CODE ANN. § 99F.9.7 (West Supp. 1994) (prohibiting dock-side gambling except when the riverboat is temporarily docked for mechanical problems, adverse weather, or water conditions, or during off season); LA. REV. STAT. ANN. § 4:525.B(1)(a) (West Supp. 1994) (prohibiting dock-side gambling except when docked for less than forty-five minutes or when weather or water conditions present danger); MO. REV. STAT. § 313.805(15) (Supp. 1993) (prohibiting dock-side gambling unless permanently

minimum age limits,[38] and permissible locations for exchange booths to comply with each state's cashless wagering system requirement.[39] As a result of these conflicts between state gambling statutes, no riverboat casino has been licensed to operate in more than one state.

B. *Riverboat Gambling States and Concurrent Jurisdiction*

Despite all the impediments to multistate licensing of riverboat casinos discussed above, many licensed operators want to conduct gambling in adjoining states' waters. If operators do conduct gambling in more than one state, a jurisdictional issue arises: can operating a riverboat casino in an open, interstate waterway that borders two states be perfectly legal on the side of the waterway that borders the riverboat gambling state, and criminal on the side that borders the non-riverboat gambling state?

Upon admitting states into the Union, Congress granted them concurrent jurisdiction over criminal acts committed on portions of interstate waterways bordering two states.[40] Where an act on

---

docked between specified points on Mississippi Riverfront). *But see Harris*, 869 S.W.2d at 66 (requiring a substantial justification for the special exception).

38. ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(10) (Smith-Hurd 1993) (employees may be 18 and older, but no employee under 21 may perform any gambling function; no one else under 21 is permitted in a gambling area); IND. CODE ANN. §§ 4-33-9-12, -13 (Burns Supp. 1994) (employees may be 18 and older, but no employee under 21 may perform any gambling function; no one else under 21 is permitted in a gambling area); IOWA CODE ANN. § 99F.9.6 (West Supp. 1994) (18 or older to gamble); LA. REV. STAT. ANN. § 4:525.B(a) (West Supp. 1994) (no one under 21 is permitted in a gambling area); MISS. CODE ANN. § 75-76-155 (1991 & Supp. 1993) (no one under 21 is permitted); MO. REV. STAT. § 313.817.4 (Supp. 1993) (employees may be 18 and older, but no one under 21 may serve as a dealer or accept wagers; no one else under 21 is permitted in a gambling area).

39. ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(12) (Smith-Hurd 1993) (exchange center may be located aboard the riverboat or at an approved onshore facility); IND. CODE ANN. § 4-33-9-15 (Burns Supp. 1994) (exchange center may be located on board or at approved on-shore facility where the riverboat docks); IOWA CODE ANN. § 99F.4.14 (West Supp. 1994) (requiring cashless wagering system without specifying exchange location); LA. REV. STAT. ANN. § 4:525.B(11) (West Supp. 1994) (requiring tokens, chips, or electronic cards to be purchased aboard the riverboat); MISS. CODE ANN. § 75-76-101 (1991 & Supp. 1993) (requiring cashless wagering system without specifying location); MO. REV. STAT. § 313.817.3 (Supp. 1993) (requiring cashless wagering system without specifying exchange location).

40. *See, e.g.*, Act of Aug. 6, 1846, ch. 89, 9 Stat. 56, 57 (admitting Wisconsin to the Union). Congress also granted states concurrent jurisdiction over civil actions. However, state jurisdiction over civil actions arising out of events in a riverboat casino is potentially limited. Article III, Section 2 of the U.S. Constitution and 28 U.S.C. § 1333(1) (1988) grant exclusive federal

a waterway is *malum in se*, "a wrong in itself,"[41] concurrent jurisdiction gives primary jurisdiction over defendants to the first state to assert jurisdiction.[42] This avoids double jeopardy by prohibiting prosecution in two states for the same offense.[43] However, concurrent jurisdiction is not guaranteed where an act is merely *malum prohibitum*, not inherently bad but wrong because it is prohibited by law.[44] When an activity such as operating a riverboat casino is prohibited by one state's laws, but authorized and even licensed by another state, the Supreme Court has held that criminal jurisdiction only extends to each state's border.[45]

When one considers the impediments to multistate licensing, the jurisdictional issue arises even where two riverboat gambling states border the waterway. One riverboat gambling commentator, Barbara Powell,[46] hypothesized that because Iowa and Illinois legalized riverboat gambling on the Mississippi River "a person could gamble freely" on the river between the two states.[47] According to Powell, the concurrent jurisdiction problem arises only when one state legalizes riverboat gambling and another does not.[48] Powell oversimplified the issue of concurrent jurisdiction. Riverboat gambling is still *malum prohibitum* when the operator is not licensed, even in a riverboat gambling state.[49] Because unlicensed gambling is *malum prohibitum*, concurrent

---

jurisdiction over admiralty and maritime cases. To invoke federal admiralty jurisdiction under § 1333(1), two elements must be met. First, events giving rise to the civil action must occur on the navigable waters of the United States, and second, the events must have a significant relationship to traditional maritime activity. *Id. See generally* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972) (requiring a tort to bear a "significant relationship to traditional maritime activity" for a federal court to invoke its admiralty jurisdiction over the case). It is unclear whether a court would find that a civil action arising out of events in a riverboat casino bears a significant relationship to traditional maritime activity.

41. BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

42. Nielsen v. Oregon, 212 U.S. 315, 320 (1909); Op. Att'y Gen. 38-90 (Wis. Dec. 28, 1990).

43. *See Nielsen*, 212 U.S. at 320.

44. BLACK'S LAW DICTIONARY 960 (6th ed. 1990).

45. *Nielsen*, 212 U.S. at 321. *See also* Op. Att'y Gen. 38-90 (Wis. Dec. 28, 1990) (concluding that gambling is *malum prohibitum* on the Mississippi River in Wisconsin water, despite the fact that gambling is legalized in Iowa).

46. Barbara Powell is a partner with the law firm of Thompson and Mitchell and is a former Assistant General Counsel with the Maritime Administration. Powell, *supra* note 19, at 395, 395 n.*.

47. *Id.* at 397.

48. *Id.*

49. *See supra* note 14 and accompanying text (listing riverboat gambling states' requirements for operators to have licenses to operate casinos).

jurisdiction does not apply. A riverboat gambling state still has criminal jurisdiction over nonlicensed operators within that state's borders.[50]

II. Introduction to Dormant Commerce Clause Analysis

A. *Development of the Dormant Commerce Clause*

Riverboat gambling acts are designed to promote in-state economic interests. Consequently, licensing requirements usually result in the exclusion of out-of-state operators. Such discrimination against out-of-state operators makes riverboat gambling acts immediately suspect under the Commerce Clause of the United States Constitution.[51] The framers of the Constitution drafted the Commerce Clause in response to post-Revolutionary War competition between the states.[52] In fact, "tendencies toward economic Balkanization," including mounting interstate tariff wars, influenced the framers' decision to call the Constitutional Convention.[53] The framers intended the Commerce Clause to prevent conflicting regulation at state borders, protect the free flow of interstate trade, and generally promote interstate comity and cooperation in the interest of Union solidarity.[54] In

---

50. *See supra* note 24 and accompanying text (discussing criminal sanctions for violating a state's gambling laws).

51. U.S. Const. art. I, § 8, cl. 3.

52. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949). *H.P. Hood & Sons* involved a challenge to New York's denial of a license to an out-of-state business on the grounds that it would promote the local economy. *Id.* at 526. The Court stated that "[t]he sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to consider how uniform regulation of commerce might promote national interests." *Id.* at 533.

53. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (citing *H.P. Hood & Sons*, 336 U.S. at 533-34). The defendant in *Hughes* challenged an Oklahoma statute prohibiting export of minnows. *Id.* at 323. The Court explained that the Commerce Clause reflects one of the framers' central concerns. *Id.* at 325.

54. *See generally H.P. Hood & Sons*, 336 U.S. at 533-34 (discussing the adoption of the Commerce Clause); Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511, 522 (1935) (attributing the Commerce Clause to interstate tariffs and retaliation); Maine v. Taylor, 477 U.S. 131, 153 (1986) (Stevens, J., dissenting) (arguing that when a state must justify an action burdening interstate commerce by showing a legitimate local purpose and a lack of nondiscriminatory alternatives, the state should not pursue its legitimate interest in a manner "offensive to the notions of comity and cooperation underlying the Commerce Clause").

1824, in *Gibbons v. Ogden*,[55] Chief Justice Marshall provided the Commerce Clause with much of its present force by interpreting the phrase "among the several states" to include a federal power to regulate commerce not only on the jurisdictional boundary lines of the states, but also *within* the territories of the states.[56] *Gibbons* supplemented Congress' power to uniformly regulate interstate commerce by giving the Supreme Court an unprecedented power to put limits on state authority.[57]

Commerce Clause review of state actions in the absence of federal congressional regulation was the dawn of what is currently known as dormant Commerce Clause analysis.[58] In *Willson v. Black Bird Creek Marsh Co.*,[59] the Marshall Court reviewed a challenge to Delaware's authorization for a company to construct a dam across a navigable creek. The Court reasoned that in the absence of a congressional act controlling state legislation over intrastate navigable waterways, Delaware's authorization would violate the Commerce Clause "in its dormant state" if the authorization burdened interstate commerce.[60] The Court determined that Delaware's authorization did not burden interstate commerce because there were many alternate waterways in Delaware.[61] Thus, the Court refused to find a Commerce Clause violation.

In contrast to the Marshall Court, the Court under Chief Justice Taney took a categorical approach to dormant Commerce Clause analysis.[62] The Court analyzed a statute challenged on

---

55. 22 U.S. (9 Wheat.) 1 (1824).

56. *Gibbons*, 22 U.S. (9 Wheat.) at 194. *Gibbons* involved a challenge to New York's grant of an exclusive right to operate steamboats in New York waters despite a congressional act regulating the licensing of vessels.

57. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 18-19 (1937) (stating that Marshall's doctrine that the Court had power to "place limits on state authority" was "an audacious doctrine," even though it furthered national interests).

58. *See supra* note 12 (defining the dormant Commerce Clause).

59. 27 U.S. (2 Pet.) 245 (1829).

60. *Id.* at 252. Writing for the Court, Chief Justice Marshall stated that, absent a conflict with federal legislation, "[t]he repugnancy of the law . . . to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states . . ." *Id.*

61. *Id.* The Court concluded that "under the circumstances of the case," Delaware's action was not repugnant to the Commerce Clause. The act incorporating the company recognized that the creek in question was one of many similar waterways. *Id.* at 251.

62. The Marshall Court resisted dividing state actions into either police power or commerce power activities. *See* FRANKFURTER, *supra* note 57, at 30-31. Marshall may even have recognized the paramount importance of the effect of state action, even though he deferred to the state's police power in *Willson*. *Id.* at 27-31. *See supra* notes 59-61 (discussing *Willson*).

Commerce Clause grounds by fitting the statute into one of two categories: A valid exercise of the state's police power, or an invalid attempt to regulate commerce.[63] For example, in *Cooley v. Board of Wardens*,[64] the Court upheld a Philadelphia law requiring owners of vessels to pay a piloting fee and allow a local pilot to maneuver the vessels while in the harbor.[65] The Court reasoned that the law was constitutional because, on its face, it was a valid exercise of the police power.[66]

In 1951, the Court in *Dean Milk Co. v. Madison*[67] questioned the Taney Court's categorical approach and injected into Commerce Clause analysis the question of whether the state could achieve police power objectives by less discriminatory alternatives. The *Dean Milk* Court found that an ordinance requiring that milk be pasteurized and bottled within a five mile radius of the center of the city violated the Commerce Clause.[68] The Court invalidated the ordinance, despite its public health purpose, because "reasonable and adequate" alternatives were available that did not discriminate against out-of-state milk producers.[69] The Court reasoned that upholding a state action because it professed to be a health regulation would leave the Commerce Clause unable to limit state action except "for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[70] The existence of less discriminatory alternatives thus became an important part of dormant Commerce Clause analysis.[71]

Since 1950, the Supreme Court has attempted to formulate a workable dormant Commerce Clause test.[72] The test courts apply

---

63. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 407 (2d ed. 1988) (explaining the Court's approach of characterizing a state regulation as local or national in character to determine whether the regulation violated the Commerce Clause).

64. 53 U.S. (12 How.) 299 (1851).

65. *Id.* at 321.

66. *See id.* at 325-26 (Daniel, J., concurring). *Cf.* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding a New York law requiring incoming passenger ships to provide detailed information about all passengers on grounds that the statute protected public health).

67. 340 U.S. 349 (1951).

68. *Id.* at 356.

69. *Id.* at 354-56.

70. *Id.* at 354.

71. *See infra* text accompanying note 75 (describing part of the dormant Commerce Clause analysis).

72. *See generally* Maine v. Taylor, 477 U.S. 131 (1986); Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

today provides two standards for review. The *Pike v. Bruce Church*[73] standard applies when a challenged state action only incidentally burdens interstate commerce. However, when a challenged state action discriminates on its face or in its practical effect, the heightened scrutiny standard from *Hughes v. Oklahoma* applies.[74]

The test for the dormant Commerce Clause analysis of the riverboat gambling acts performed in Part III of this Note can be summarized as follows:

Step 1. Determine whether the state action's burden on interstate commerce is merely incidental, or whether the state action discriminates against out-of-state operators either on its face or in its practical effect.

Step 2. If the burden is merely incidental, the state action does not violate the Commerce Clause unless the burden is clearly excessive in relation to the local benefits of the action. If nondiscriminatory alternatives to achieve the same local benefits exist, the burden on interstate commerce is presumptively much greater than when no such alternatives exist.

Step 3. If the state action discriminates against out-of-state operators on its face or in its practical effect, the action violates the Commerce Clause unless: (a) the statute serves a legitimate local purpose; and (b) the purpose could not be achieved through nondiscriminatory alternatives.[75]

---

73. 397 U.S. 137 (1970). In *Pike*, the Court held that an evenhanded state statute only violates the Commerce Clause if the statute's burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* at 142. If a statute regulates evenhandedly (as between in-state and out-of-state parties or articles of commerce), usually the burden of the statute on interstate commerce is incidental and the *Pike* standard applies. *Id.*

74. 441 U.S. 322 (1979). In *Hughes*, the Court stated that the burden falls on the state to demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by non-discriminatory alternatives. *Id.* at 336. For further discussion of the *Pike* Test and the *Hughes* Test in dormant Commerce Clause analysis, see Lisa J. Petricone, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443, 451-52 (1987).

In National Ass'n of Fundraising Ticket Mfrs. v. Humphrey, 753 F. Supp. 1465 (D. Minn. 1990), the court differentiated the two tests as follows:

> The analytic distinction between [the *Hughes* test] and the less demanding *Pike* test is somewhat indistinct since both examine burdens on commerce in light of local purposes and available alternatives. It is apparent . . . however, that a closer means-end relationship is required of facially discriminatory regulation than that which has only an incidental effect on interstate commerce.

Id. at 1467 n.2.

75. *See generally* Maine v. Taylor, 477 U.S. 131, 138 (1986) (applying current dormant Commerce Clause doctrine to a Maine statute prohibiting importation of baitfish).

B. *Example of Modern Dormant Commerce Clause Analysis*

A recent federal district court opinion provides an excellent example of modern dormant Commerce Clause analysis of gambling-related statutes. In *National Association of Fundraising Ticket Manufacturers v. Humphrey*,[76] the United States District Court for the District of Minnesota considered a Commerce Clause challenge to Minnesota statutes that required all pull-tab tickets sold in Minnesota to be manufactured in Minnesota and all tickets to bear markings "For Sale in Minnesota Only" or "Manufactured in Minnesota For Sale in Minnesota Only."[77] The parties agreed that the in-state manufacturing requirement was discriminatory on its face and was subject to heightened scrutiny under the *Hughes* Test.[78] The State argued, however, that requiring pull-tabs to be manufactured in Minnesota served the legitimate state interest of ensuring the security and integrity of pull-tab gambling by allowing close in-state monitoring of the manufacturing processes and industry practices.[79] Based on a newspaper report that the commissioner who proposed the manufacturing requirement had announced Minnesota's interest in bringing jobs to Minnesota by producing pull-tabs locally rather than sending the money out of the state, the court concluded that the state's purpose was discriminatory.[80]

The State further argued that the manufacturing requirement was necessary because the state did not have regulators who could travel to all the sixteen states where the pull-tabs were manufactured. The court noted, however, that the legislature had just appropriated increased funding to the gambling authority for additional personnel. Thus, the court held that the manufacturing requirement was not necessary to achieve the State's monitoring objectives and violated the Commerce Clause.[81]

---

76. 753 F. Supp. 1465 (D. Minn. 1990).

77. *Humphrey*, 753 F. Supp. at 1466. Pull-tab tickets are cards with randomly selected symbols concealed by perforated pull-tabs. If the configurations on the tabs match the revealed configurations, the player wins. *See* Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 63 (Mo. 1994) (en banc) (classifying pull-tab as a lottery).

78. *Humphrey*, 753 F. Supp at 1468-69.

79. *Id.* at 1469.

80. *Id.* at 1470-71. Courts are not limited to considering the purposes enumerated in a statute to determine the true legislative intent of a statute. *Humphrey*, 753 F. Supp. at 1471 (citing Hughes v. Oklahoma, 441 U.S. at 336; Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 476 n.2 (1981) (Powell, J., concurring in part)). *See also* City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) (deciding that a dispute about ultimate legislative purpose need not be resolved for Commerce Clause analysis because "the evil of protectionism can reside in legislative means as well as legislative ends").

81. *Humphrey*, 753 F. Supp. at 1473.

The court next analyzed the "For Sale in Minnesota Only" labeling requirement. The court applied the *Pike* standard because the labelling requirement applied equally to pull-tabs manufactured in Minnesota and those manufactured out of state.[82] The labeling requirement failed the *Pike* test, and thus violated the Commerce Clause, because the state ignored less discriminatory alternatives.[83]

III. Dormant Commerce Clause Analysis of Riverboat Gambling Acts

A. *Riverboat Gambling Acts Are Subject to Constitutional Scrutiny*

A threshold issue in analyzing riverboat gambling acts is whether gambling laws are even subject to constitutional scrutiny. One argument against constitutional analysis of gambling laws, raised in *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*,[84] a case involving a First Amendment challenge to a law prohibiting casinos from advertising to Puerto Rico citizens, is that because gambling is generally regarded as a vice, the power to suppress it belongs to the states.[85] From

---

82. *Id.* at 1474. Because the court found the statute applied evenhandedly to tickets manufactured both in state and out of state, the court correctly applied the *Pike* standard. *See supra* note 73. The court held the "Manufactured in Minnesota For Sale in Minnesota Only" labeling requirement unconstitutional because its validity was predicated on the constitutionality of the in-state manufacturing requirement. *Id.* at 1473, n.4.

83. *Id.* at 1475. Specifically, the court noted the less discriminatory alternative of omitting of the word "Only" from the labeling requirement (because the pull-tabs would at least be marketable outside of Minnesota). *Id. Cf.* Pic-A-State PA. Inc. v. Pennsylvania, Civ. A. No. 1:CV-93-0814, 1993 WL 325539 (M.D. Pa. July 23, 1993). The *Pic-A-State* court held that strict regulations on out-of-state sale of state lottery tickets violates the dormant Commerce Clause. *Id.* at *8. The court further found that purposes of protecting against fraud and theft in gambling operations, specifically in lottery ticket sales, could be achieved through less discriminatory alternatives such as requiring sellers to demonstrate financial responsibility and security; requiring sellers to have clear criminal records; requiring proof of sellers' good character; requiring sellers to be experienced in lottery ticket sales; requiring that sellers have fitness consistent with the public interests to sell tickets; and requiring that lottery tickets are not sold at higher than the regulated price. *Id.* at *7.

The *Humphrey* court also cited "the obvious protectionist motives" behind Minnesota's statutory scheme as a reason for finding a Commerce Clause violation. 753 F. Supp. at 1475.

84. 478 U.S. 328 (1986).

85. *See, e.g.*, Marvin v. Trout, 199 U.S. 212, 224-25 (1905) (upholding, against a constitutional challenge, a state statute making a building owner who permits gambling on his premises liable to make good the loss sustained there).

this, states might argue that their power to allow or prohibit gambling gives them the right to regulate legalized gambling in any way they see fit. While the Supreme Court acknowledged states' broad power to regulate gambling, state gambling laws, like all other laws, are subject to constitutional constraints.[86] Consequently, riverboat gambling states should not have carte blanche to discriminate against out-of-state operators on the premise that states have no obligation to legalize riverboat gambling.[87]

State gambling laws are subject to constitutional challenges because states are unlikely to opt out of riverboat gambling altogether. Constitutional restrictions of a state's powers do not create "such a Hobson's Choice"[88] for a state permitting an activity, such as gambling, that it is not obligated to create. Specifically, a state does not have to choose between having no power to regulate the activity as it sees fit, or prohibiting the activity. Because riverboat gambling is a lucrative industry, it is

---

86. 478 U.S. at 331-33. In *Posadas*, a hotel organization challenged Puerto Rico legislation allowing casino gambling but prohibiting advertising of gambling to the Puerto Rican public. *Id.* at 331-33. The hotel group argued that once the government decided to permit gambling, it could not use speech restrictions to regulate that activity. *Id.* at 346. The Court responded that it is "precisely because [Puerto Rico] could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.*

Despite its seeming deference to Puerto Rico's police power, the Court reviewed the advertising restriction under the First Amendment. *Id.* at 340 (citing Central Hudson Gas & Elec. Corp. v. Public Srv. Comm'n, 447 U.S. 557 (1980)). Thus, it is clear that while a state does not lose its power to regulate gambling by permitting it, a state's regulations must comply with constitutional standards. *But cf.* Thomas v. Bible, 694 F. Supp. 750, 759-60 (D. Nev. 1988) ("Licensed gaming is a privilege conferred by the state . . . [It] is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution. 'Within this context, we find no room for federally protected constitutional rights.'" (quoting State v. Rosenthal, 559 P.2d 830, 836 (Nev. 1977)). Several state codes provide that a riverboat gambling license is a revocable privilege granted by the state and does not create a property right. IND. CODE ANN. § 4-33-6-17 (Burns Supp. 1994); LA. REV. STAT. ANN. § 4:502.B (West 1994); MISS. CODE ANN. § 75-76-3(5) (Supp. 1993).

87. *Cf.* Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 516 (1841) (Baldwin, J., dissenting) (arguing that although slave states could prohibit importing slaves entirely, a slave state could not grant its own citizens a privilege it denied to citizens of other states).

88. City of Philadelphia v. New Jersey, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) (arguing the Commerce Clause should not be used to force New Jersey to choose between prohibiting all landfill operations in the state and accepting waste from all states if it chooses to permit some landfill operations).

unlikely that a state would overturn its decision to legalize riverboat gambling simply because one of its regulations is found unconstitutional. On the other hand, there may be some interests considered so important by a state that a successful constitutional challenge to a regulation promoting those interests would cause the state legislature to repeal its legalization of riverboat gambling. For the above reasons, this Note proceeds on the presumption that riverboat gambling acts are subject to constitutional scrutiny.

B. *Riverboat Gambling is a Subject of Interstate Commerce*

Before dormant Commerce Clause analysis may be applied, a state must burden an activity that can be considered interstate commerce.[89] The existing riverboat gambling acts impede the interstate traffic of riverboat casinos between legalized states.[90] But is riverboat gambling a subject of interstate commerce?

The courts have broadly defined interstate commerce. *Gibbons v. Ogden*[91] broadened the legal definition of commerce beyond merely the exchange of goods involving transportation from place to place.[92] According to Chief Justice Marshall, "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse."[93] Marshall added that commerce includes navigation,[94] not only because shipping often involves the movement of goods, but also because shipping itself is a form of gainful economic activity.[95] In *Champion v. Ames*,[96] the Court held that because lottery tickets are subjects of traffic, they are subjects of commerce.[97] Illegal gambling equipment is recognized as a subject of interstate commerce,[98] and a court has held that a statute prohibiting the out-of-state manufacture of pull-tab

---

89. *See* New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist., 874 F.2d 1018, 1022 (5th Cir. 1989) (noting that substantial burden on interstate commerce is a prerequisite for applying dormant Commerce Clause analysis).

90. *See supra* part I.A (discussing impediments to multistate licensing and interstate operation of riverboat casinos).

91. 22 U.S. (9 Wheat.) 1 (1824).

92. 15A AM. JUR. 2D *Commerce* § 3 (1976).

93. *Gibbons*, 22 U.S. (9 Wheat.) at 189.

94. *Id.* at 190. *See also* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

95. Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 812 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

96. 181 U.S. 321 (1903).

97. *Id.* at 354.

98. *See, e.g.*, Stockton v. United States, 205 F. 462, 464 (7th Cir. 1913) (recognizing that even marked cards and loaded dice are lawful objects of commerce).

games violated the Commerce Clause.[99] By combining the well-settled understanding that navigation is commerce, and the cases recognizing movement and manufacture of gambling equipment as interstate commerce, it becomes clear that riverboat gambling qualifies as interstate commerce.[100] Therefore, impediments to multistate operation of riverboat casinos burden interstate commerce.

C. *System of Required Licenses Does Not Violate the Commerce Clause*

Riverboat casinos must be licensed by each state in which they operate.[101] If riverboat casinos could meet the licensing requirements of more than one state, the fees required to obtain licenses in more than one state would heavily burden multistate operators.[102] The requirement that an operator be licensed by the state, however, does not discriminate against out-of-state operators, either on its face or in its practical effect, because the requirement applies evenhandedly.[103] Licensing fees are not higher for out-of-state operators than for in-state operators.[104] Furthermore, the burden of having to pay multiple states' licensing fees, although expensive, is merely an incidental burden on interstate commerce.

The *Pike v. Bruce Church* standard applies to riverboat gambling because the burden on interstate commerce is even-handed and incidental.[105] Accordingly, the state licensing requirement

---

99. *See supra* part II.B.

100. Another argument supporting classification of riverboat gambling as interstate commerce analogizes casino gambling to other forms of entertainment that already qualify as interstate commerce. *See, e.g.*, 15A AM. JUR. 2D *Commerce* § 4 (1976); 4 AM. JUR. 2D *Amusements and Exhibitions* § 13 (1962 & Supp. 1993) (interstate production and transportation of motion picture films is interstate commerce, although actual showing of movies is only in individual states; productions of stage performances can be interstate commerce; production of professional boxing events is interstate commerce, but production of major league baseball games is not interstate commerce).

101. *See supra* note 14 (listing state licensing statutes).

102. *See supra* notes 20, 28-39 and accompanying text. A system for calculating state taxes on gambling receipts from riverboat casinos operating in multiple states is beyond the scope of this Note.

103. *See* Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970) (stating that evenhanded state regulations are valid unless they excessively burden interstate commerce); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) (stating that evenhanded state regulation is permitted unless preempted by federal law); *see also supra* note 73 (discussing *Pike*).

104. *Cf.* Hughes v. Oklahoma, 441 U.S. 322, 323 n.1, 336-37 (1979) (finding a statutory licensing scheme charging $100 to residents and $300 to nonresidents facially discriminatory).

105. For a discussion of *Pike*, see *supra* note 73 and accompanying text.

does not violate the Commerce Clause unless the burden is clearly excessive in relation to the local benefits. The availability of less discriminatory alternatives determines whether the burden of a state licensing fee is excessive. States cannot reap the benefit of the income generated by licensing fees through less discriminatory alternatives if states limit the total number of licenses issued to riverboat casinos.[106] Unless a reviewing court rejected a state's strong interest in limiting the number of licensed casinos, the court would sustain an even-handed license fee.

To demonstrate that a license requirement's burden on interstate commerce is not clearly excessive, consider three contiguous states: *A*, *B*, and *C*. States *A* and *B* are riverboat gambling states and state *C* is not. The burden on an operator licensed in state *A* of having to pay additional licensing fees to state *B* for the privilege of operating in both states is not excessive because a state *B* operator would likewise have to pay additional fees to state *A* to operate in both states.[107] Furthermore, neither state *A* nor state *B* operators would be able to operate in state *C*'s waters. In short, the burden on interstate commerce is not clearly excessive because operators have to pay the same amount for the same privileges. A state's license requirement, therefore, does not violate the Commerce Clause.[108]

D. *Substantial Resources, Goods, and Services Requirements Violate the Commerce Clause*

Riverboat gambling acts commonly require that a substantial amount of resources, goods, and services used in the operation

---

106. *See* ILL. ANN. STAT. ch. 230, para. 10 § 7(e) (Smith-Hurd 1993) (allowing only up to ten licenses to operate riverboat casinos); IND. CODE ANN. § 4-33-6-1(a) (Burns Supp. 1994) (allowing a maximum of eleven licenses at a time); LA. REV. STAT. ANN. § 4:525.A (West Supp. 1994) (allowing a maximum of fifteen licenses); MO. REV. STAT. § 313.812.1 (Supp. 1993) (allowing one license per city for first three years).

107. *But see* Pic-A-State PA., Inc. v. Pennsylvania, Civ. A. No. 1:CV-93-0814, 1993 WL 325539, at *7 (M.D. Pa. July 23, 1993) (noting that the Supreme Court does not recognize reciprocity agreements as an alternative to improper discrimination against interstate commerce (citing New Energy Co. v. Limbach, 486 U.S. 269, 274-75 (1986)).

108. *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 439 (2d ed. 1988). A state may require out-of-state corporations to qualify as "foreign corporation[s]" in order to do business within the state, typically involving payment of a licensing fee, filing information with the state, and submitting to the state's taxing jurisdiction as well as to in-state service of process. *Id.* However, such a requirement may be unconstitutional when the corporation "seeks to enter a state solely to engage in exclusively interstate commerce there." *Id.* (citing Leloup v. Mobile, 127 U.S. 640, 645 (1888); Crutcher v. Kentucky, 141 U.S. 47, 56, 57 (1891)).

of riverboat casinos come from inside the state. Under Iowa's act, riverboat operators must get a "substantial amount" of goods, resources, services, and entertainment from within the state.[109] Louisiana's act calls for operators to give "preferential treatment . . . to Louisiana firms *to the extent allowed by law*" when procuring goods and resources for their riverboats, and when awarding contracts for services and entertainment.[110] Mississippi requires operators to employ Mississippi residents as gaming employees and other employees in the riverboat casino operations "to the extent practicable."[111] Missouri's riverboat gambling act only requires the Missouri gaming commission to "encourage" casino operators to use Missouri resources, goods, and services.[112]

Some of these local preference statutes are more likely than others to survive Commerce Clause scrutiny. The Iowa and Mississippi acts have the most stringent requirements because they *mandate* the use of a substantial amount of state resources or a substantial number of state residents as employees. The Missouri act's "state resources" language, on the other hand, is effectively precatory, and the Louisiana act claims that its requirements only apply to the extent allowed by law, presumably including Commerce Clause restrictions.[113] Local preference requirements like Iowa's are susceptible to Commerce Clause challenges not only because they impede multistate licensing of a riverboat casino, but also because they discriminate against all out-of-state goods and job applicants.[114]

The Supreme Court has addressed Commerce Clause challenges to local preference requirements in employment. In *White v. Massachusetts Council of Construction Employers*,[115] the Court upheld an executive order by the mayor of Boston requiring that fifty percent of all construction work on any project funded by the City of Boston be performed by Boston residents. The

---

109. IOWA CODE ANN. § 99F.7.4 (West Supp. 1994). The Iowa act provides:

> The commission shall require that an applicant utilize Iowa resources, goods and services in the operation of an excursion gambling boat. The commission shall . . . assure that a substantial amount of all resources and goods used . . . come from Iowa and that a substantial amount of all services and entertainment be provided by Iowans.

Id.

110. LA. REV. STAT. ANN. § 4:511(2)(g) (West Supp. 1994).

111. MISS. CODE ANN. § 75-76-3(4) (1991 & Supp. 1993).

112. MO. REV. STAT. § 313.812 (Supp. 1993). *See supra* note 31 (describing repeal of more restrictive language).

113. For comparisons to Louisiana's exemption, see *supra* note 33.

114. *See* Powell, *supra* note 19, at 397.

115. 460 U.S. 204 (1983).

Court exempted the executive order from Commerce Clause analysis because the city acted as a market participant and not as a market regulator.[116] Accordingly, if a state qualified as a market participant in the riverboat gambling industry, the provisions of the state act would qualify for the market participant exception to the Commerce Clause.[117]

It is difficult at times to discern whether a state is acting as a market participant or as a market regulator.[118] In the case of riverboat gambling, however, the state's role is clearly regulatory.[119] Economic benefits to the state from legalizing riverboat gambling and the state's role in the licensing process are insufficient to justify applying the market participant exception.[120]

State resources, goods, and services requirements, such as those in the Iowa act,[121] violate the Commerce Clause under dormant Commerce Clause analysis.[122] Although the require-

---

116. *Id.* at 210.

117. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 98-99 (1984) (rejecting "the contention that a State's action as a market regulator may be upheld against [a] Commerce Clause challenge on the ground that the State could achieve the same end as a market participant"). *Accord White*, 460 U.S. at 214-15; Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

118. *White*, 460 U.S. at 217-18 (Blackmun, J., dissenting) (quoting *Reeves*, 447 U.S. at 440).

119. *See* ILL. ANN. STAT. ch. 230, para. 10 § 2(b) (Smith-Hurd 1993) (stating that the Riverboat Gambling Act was designed to strictly regulate gambling); IND. CODE ANN. § 4-33-1-2 (Burns Supp. 1994) (stating that the statute was designed to regulate); LA. REV. STAT. ANN. § 4:502.A(4) (West Supp. 1994) (describing regulatory purposes); MISS. CODE ANN. § 75-76-3 (1993) (describing the state's interest in tight regulation of riverboat gambling to protect the public's trust and confidence in the industry).

120. *See White*, 460 U.S. at 218 (Blackmun, J., dissenting).

> The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. . . . The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt . . . to govern the State's own economic conduct and to determine the parties with whom it will deal.

Id.

121. *See supra* note 109 and accompanying text (discussing Iowa's gambling statute).

122. *Cf.* Hughes v. Oklahoma, 441 U.S. 322, 345 (1979) (Rehnquist, J., dissenting) (arguing a state requirement that out-of-state businesses use state resources in the course of their business for the benefit of the local economy is a strong indication of a Commerce Clause violation). *See also* Toomer v. Witsell, 334 U.S. 385 (1948) (finding a South Carolina statute requiring out-of-state shrimpers to unload and pack their shrimp catch in South Carolina

ments do not discriminate against interstate commerce on their face, they discriminate in their practical effect and are subject to heightened scrutiny under *Hughes*. The requirements violate the Commerce Clause unless they serve legitimate local purposes that cannot be achieved through nondiscriminatory alternatives.[123] The requirements serve legitimate local interests including promoting the state's economy and reducing unemployment. However, because nondiscriminatory alternative means exist to achieve these ends, the requirements violate the Commerce Clause.[124]

E. *Historical Replica Requirements Violate the Commerce Clause*

Riverboat gambling acts also commonly require that a licensed riverboat be designed as a replica of that state's nineteenth century riverboats.[125] Practically, this requirement only burdens operators in states that do not have such 'historical replica' requirements. Nineteenth century riverboats were built to meet demands for interstate transportation of goods, people, and livestock.[126] The nineteenth century riverboats of all states looked similar,[127] so meeting one state's replica requirement should satisfy the replica requirements of other riverboat gambling

---

before transporting out of state violated the Commerce Clause); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (finding Louisiana's statute requiring that shrimps be shelled in the state before being shipped out of state violated the Commerce Clause); Johnson v. Haydel, 278 U.S. 16 (1928) (finding Louisiana's prohibition on out-of-state shipments of oysters violated the Commerce Clause).

123. *See supra* text accompanying note 75 (stating step three of dormant Commerce Clause analysis).

124. *See White*, 460 U.S. at 225 (Blackmun, J. Dissenting) (enumerating nondiscriminatory alternatives to local preference requirements in employment including, inter alia, creating training programs for unemployed residents).

125. *See supra* note 34 (listing state historical replica requirements).

126. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat) at 194 (discussing the competitiveness of the riverboat industry and the importance of Robert Fulton's invention of the steamboat for interstate shipping); Powell, *supra* note 19, at 395 (explaining that most of the glamour of nineteenth century riverboating is merely folklore because riverboats, only in wide use from 1835-1865, were an unpleasant form of transportation and quickly replaced by railroads). *See generally* WILLIAM J. PETERSEN, STEAMBOATING ON THE UPPER MISSISSIPPI, 381-90 (1968) (describing cargoes of nineteenth century steamboats); MILDRED L. HARTSOUGH, FROM CANOE TO STEEL BARGE ON THE UPPER MISSISSIPPI, 41-47 (1934) (detailing the historical development of the riverboat industry).

127. *See, e.g.*, PETERSEN, *supra* note 126, illus. 17 (illustrating Robert Fulton's steamboat, the *Clermont*, and Nicholas J. Roosevelt's steamboat, the *New Orleans*).

states.[128] Historical replica requirements apply evenhandedly to both in-state and out-of-state operators. Thus, any burden placed on interstate commerce by the replica requirements is merely incidental, and the *Pike* standard applies for dormant Commerce Clause analysis.[129] Without a replica requirement, an operator only has limited incentives to make a riverboat casino with a historical design. But an operator might do so simply in order to comply with other states' requirements or to sway sentiments in a municipality voting on whether to permit the riverboat casino.[130]

The purposes behind historical replica requirements include the promotion of state tourism and the beautification of riverbanks.[131] It is unclear whether these purposes are legitimate under dormant Commerce Clause analysis in light of the ultimate economic interests behind riverboat gambling acts. Also, there are less discriminatory alternatives to promoting state tourism and achieving riverfront beautification, such as advertising and allowing aesthetic, modern-looking casino cruise ship designs in addition to historical replicas.[132] In light of states' economic motives and these less discriminatory alternatives, Step 2 of the dormant Commerce Clause analysis discussed in Part II presumes the burden on interstate commerce from the replica requirements to be high. Under the *Pike* standard, the historical replica requirements are clearly excessive in relation to the purported purposes of promoting local tourism and beautification, and thus violate the Commerce Clause.

---

128. Riverboat gambling states have different design requirements that may still prevent interstate licensing of riverboat casinos, despite operators meeting historical replica requirements. *See* IOWA CODE ANN. § 99F.7.5.a (West Supp. 1994) (limiting gambling area on riverboats to thirty percent of square footage); LA. REV. STAT. ANN. § 4:504(23)(c) (West Supp. 1994) (defining riverboats as vessels having a minimum length of one hundred fifty feet).

129. *See supra* note 73 (describing the *Pike* standard).

130. Most riverboat gambling statutes require some form of local approval before an operator may receive a license. *See* ILL. ANN. STAT. ch. 230, para. 10 § 7(j) (Smith-Hurd 1993) (requiring local approval before the Gaming Board may authorize riverboat docking); IND. CODE ANN. § 4-33-6-18(b) (Burns Supp. 1994) (same); IOWA CODE ANN. § 99F.7.10(a) (West Supp. 1994) (requiring local approval to conduct gambling on a boat); MO. REV. STAT. § 313.812.10 (Supp. 1993) (requiring city approval for docking rights). *But see* LA. REV. STAT. ANN. § 4:552.C(1)(a) (West Supp. 1994) (requiring a petition signed by 25% of registered voters in a municipality in order to call an election to prohibit riverboat gambling in that municipality).

131. *See supra* note 19 (discussing state legislative justifications for legalization of riverboat gambling).

132. *See, e.g.*, ILL. ANN. STAT. ch. 230, para. 10 § 6(f) (Smith-Hurd 1993) (permitting casino cruise ship designs as well as replicas of nineteenth century Illinois riverboats).

F. *Supplier's License Requirements Do Not Violate the Commerce Clause*

The existing riverboat gambling acts require operators to acquire all their gambling equipment through state-licensed suppliers.[133] Illinois requires suppliers to file annual inventories and keep careful records of gambling equipment sales, and requires suppliers to permanently affix their name to all equipment, devices, and supplies used in gambling operations.[134] Iowa requires suppliers to have representatives in the state to take delivery of gambling equipment before delivery to operators.[135] Unlike the labeling requirements in *National Association of Fundraising Ticket Manufacturers. v. Humphrey*,[136] the supplier's license requirements of the riverboat gambling acts do not impose burdens that interfere with suppliers selling gambling equipment in other states.[137]

Supplier's license requirements might burden interstate commerce by charging suppliers cumulative license fees if they sell gambling equipment to casinos operating in multiple states. This is an incidental burden and survives scrutiny under the *Pike* standard of dormant Commerce Clause analysis.[138] The burden is not clearly excessive in relation to the state's purpose: Maintaining confidence and trust in the riverboat gambling industry by licensing and regulating operators, manufacturers, and distributors.

---

133. *Supra* note 35 and accompanying text. States also charge fees for supplier's licenses. *See* ILL. ANN. STAT. ch. 230, para. 10 § 8(a) (Smith-Hurd 1993) (requiring an application fee to be set by state gaming board and a $5,000 annual license fee); IND. CODE ANN. § 4-33-7-1(B), (C) (Burns Supp. 1994) (requiring an application fee set by the state gaming commission and a $5,000 annual license fee); IOWA CODE ANN. § 99F.17.1 (West Supp. 1994) (requiring a $1,000 annual license fee for distributors and a $250 annual license fee for manufacturers); LA. REV. STAT. ANN. § 4:550.A(1), (2), (3) (West Supp. 1994) (charging $5,000 annual license fee for manufacturers of slot machines; $2,500 annual license fee for manufacturers of other gambling devices or equipment; $1,500 annual license fee for suppliers of gaming devices or equipment); MISS. CODE ANN. § 75-76-79(4)(a), (b) (1993) (requiring $1,000 annual license fee for manufacturers; $500 annual license fee for suppliers); MO. REV. STAT. § 313.807.3 (Supp. 1993) (requiring application fee and annual license fee in an amount to be set by state gaming commission).

134. ILL. ANN. STAT. ch. 230 para. 10 § 8(e) (Smith-Hurd 1993). Indiana and Louisiana have similar requirements. IND. CODE ANN. § 4-33-7-5 (Burns Supp. 1994); LA. REV. STAT. ANN. § 4:541.E (West Supp. 1994).

135. IOWA CODE ANN. § 99F.17.5 (West Supp. 1994).

136. 753 F. Supp. 1465 (D. Minn. 1990). *See supra* text accompanying note 77 (state required all pull-tab tickets be labelled "For Sale in Minnesota Only").

137. *See Humphrey*, 753 F. Supp. at 1473-75.

138. *See supra* note 73 (discussing *Pike*).

On the other hand, cumulative licensing of suppliers is unnecessary. Manufacturers can be sufficiently regulated by single states at the point gambling equipment is initially put into the stream of commerce, and distributors can be regulated by states at the points of sale, delivery, and service of gambling equipment. In short, supplier's license requirements do not violate the commerce clause, but if multistate operation of riverboat casinos becomes feasible, cumulative licensing of suppliers would no longer be necessary.

G. *Other Impediments to Multistate Operation of Riverboat Casinos Do Not Violate the Commerce Clause*

In summary, a state's requirement that riverboat gambling operations be licensed does not violate the Commerce Clause; local goods, services, and resources requirements in riverboat gambling acts violate the Commerce Clause; historical replica requirements may violate the Commerce Clause; and supplier's license requirements would only violate the Commerce Clause to the extent they interfere with suppliers' ability to sell gambling equipment to operators in multiple states.

Several other inconsistencies among the existing riverboat gambling acts either impede multistate licensing or interfere with interstate operation of riverboat casinos.[139] A riverboat casino licensed in both Illinois and Iowa could not, for example, move from Iowa waters, where the minimum gambling age is eighteen,[140] into Illinois waters, where the minimum gambling age is twenty-one,[141] if there are gambling patrons on board between the ages of eighteen and twenty-one, unless these patrons were suddenly removed from the gambling area when the riverboat crossed the state border. The same riverboat casino could not allow wagers above five dollars per hand or losses of over two hundred dollars for a single gambling excursion in Iowa,[142] but Illinois has no such wager or loss limits.[143] Perhaps the casino tables could change stakes on gambling games depending on the riverboat's location. However, even an excursion that began and ended in Illinois would technically have to comply with Iowa's maximum loss requirement if the riverboat crossed into Iowa waters at any time. In addition, states adopt different pay-out

---

139. *See supra* notes 36-39 and accompanying text.

140. IOWA CODE ANN. § 99F.9.6 (West Supp. 1994).

141. ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(10) (Smith-Hurd 1993).

142. IOWA CODE ANN. §§ 99F.4.4, 99F.9.2 (West Supp. 1994).

143. *See* ILL. ANN. STAT. 10 § 5(b)(11) (giving the Illinois Gaming Board a year to recommend to the Governor "whether limits on wagering losses should be imposed").

rates for gambling games such as slot machines.[144] A casino operator is unlikely to be able to reset the pay-out rates of all gambling games in the casino upon crossing into a different state's waters.

These inconsistencies merely illustrate some of the regulations in existing riverboat gambling acts that interfere with interstate riverboat casinos.[145] Because operators seeking licenses in multiple states must comply with the most stringent requirements of all states in which they operate, the option of challenging the statutory inconsistencies as violating the Commerce Clause[146]

---

144. IOWA CODE ANN. § 99F.4.15, .16 (West Supp. 1994) (delegating to the state racing and gaming commission the power to determine pay-out rates for slot machines and other gambling games); MO. REV. STAT. § 313.805(12) (Supp. 1993) (requiring pay-outs on all gambling games to be at least eighty percent of all wagers).

145. Another major and volatile inconsistency is allowance of dock-side gambling. *Compare* ILL. STAT. ANN. 10 § 11(a)(1) (Smith-Hurd 1993) (prohibiting dock-side gambling) *with* MO. REV. STAT. § 313.805(15) (allowing dock-side gambling if vessel is continuously docked at certain locations). *But see* Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 66 (Mo. 1994) (requiring state to show a substantial justification for the special exemption from the cruising requirement).

See also supra note 37 (listing dock-side gambling provisions of riverboat gambling acts); Op. Att'y Gen. 91 (Miss. July 29, 1991) (interpreting a provision of Mississippi's gaming control act requiring vessels to comply with U.S. Coast Guard criteria for cruise vessels in order to receive gambling licenses, together with the legislative history of Mississippi's gaming act, to possibly prohibit permanently moored vessels from obtaining licenses, and thus potentially prohibit dock-side gambling). *But see* Op. Att'y Gen. 91 (Miss. Sept. 24, 1991) (recognizing legal dock-side gambling in Mississippi only where expressly approved by voters).

Operators desire dock-side gambling privileges for several reasons. First, operation costs of dock-side gambling are less expensive. Second, dock-side gambling may attract more patrons who are dissuaded by the length of the off-shore excursions. *Cf.* ILL. ANN. STAT. ch. 230, para. 10 § 11(a)(2) (Smith-Hurd 1993) (cruises may not exceed four hours, except for expressly approved extended excursions); IND. CODE ANN. § 4-33-9-3 (Burns Supp. 1994) (limiting maximum excursion to four hours, with the exception of expressly approved extended cruises); IOWA CODE ANN. § 99F.4.17 (West Supp. 1994) (requiring the Iowa racing and gaming commission to set the duration of gambling excursions at a minimum of three hours during the excursion season); LA. REV. STAT. ANN. § 4:525.B(2) (West Supp. 1994) (requiring cruises to be between three and eight hours in duration, except for expressly approved extended excursions). Finally, some potential gamblers may simply be afraid of the water. *See* Transcript of debate on Illinois Senate Bill 572, H.R. 108 (June 22, 1989) (statement of Rep. Stephens) (criticizing legalized gambling on riverboats with a slippery-slope argument that some day a "land lover" will bring a successful constitutional challenge to the distinction between gambling in boats and gambling on dry land and the result will be legalized gambling throughout Illinois).

146. U.S. CONST. art. I, § 8, cl. 3.

seems attractive. Mere lack of uniformity among state regulations, however, is not grounds for finding a Commerce Clause violation.[147]

Minimum age, maximum wagers, loss limits, standardized pay-out rates, and similar requirements are much less likely to fail scrutiny under dormant Commerce Clause analysis than those requirements discussed previously. The state's police power played an important role throughout the development of the dormant Commerce Clause doctrine.[148] When states legalized riverboat gambling, they did so with a careful eye toward the evils associated with gambling. Required age limits, wager and loss limits, and minimum pay-out rates for slot machines and other games were legislative concessions that arguably made legalized riverboat gambling possible in those states. Such requirements provided legislators and voters with the assurances they needed to approve the gambling acts.

If the power to enact even these fundamental protections into riverboat gambling acts is undermined by the dormant Commerce Clause, or any other constitutional doctrine, states would be put much closer to what Chief Justice Rehnquist referred to as a "Hobson's Choice."[149] This small category of regulations protect such important in-state interests that, without the regulations, many states would forseeably choose not to legalize gambling at all. Iowa's excursion boat gambling provisions, for example, are codified among Iowa's "police powers" statutes.[150] This placement is indicative of the local nature of legalized gambling. The federal government and courts should not second-guess state legislatures or try to hypothesize less discriminatory

---

147. *See* Specialized Carriers & Rigging Ass'n v. Virginia, 795 F.2d 1152, 1160 (4th Cir. 1986) ("Policy decisions are for the state legislature, absent federal entry into the field.") (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)). *Specialized Carriers* ruled that a state's requirement for flashing lights on oversize trucks did not violate the Commerce Clause, despite fact that the requirement was more stringent than other states' laws, because the purpose of the statute was to promote highway safety. However, the Court grants special deference to regulations concerning highway safety. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-44 (1978) (stating that a challenge to a state regulation said to promote highway safety must overcome a "strong presumption of . . . validity" (quoting *Bibb*, 359 U.S. at 524)).

148. *See supra* notes 62-71 and accompanying text (discussing the role of the police power through the Taney Court Era and beyond).

149. City of Philadelphia v. New Jersey, 437 U.S. 617, 631 (Rehnquist, J., dissenting). *See supra* note 88 and accompanying text (explaining how the Commerce Clause might require a state to face absurd alternatives).

150. IOWA CODE ANN. §§ 80-122B (1984).

alternatives to local matters such as determining when citizens are mature enough to gamble responsibly and determining what protections may be necessary to keep gambling from causing serious economic injury to patrons.[151]

IV. Proposed Model Riverboat Gambling Act[152]

The following proposal for a Model Riverboat Gambling Act is modeled after the six riverboat gambling acts discussed in this Note, with improvements based on the dormant Commerce Clause findings in Part III. Like existing acts, the goals of the Model Act are to promote in-state economic interests and provide sufficient regulatory protections. The Model Act, however, achieves these goals without discriminating against out-of-state operators. By considering out-of-state operators and interstate movement of riverboat casinos when drafting a riverboat gambling act, a state can avoid dormant Commerce Clause review of its statutory scheme for legalizing the lucrative riverboat gambling industry.

§ [1] Short Title. This Act shall be entitled the [State] Riverboat Gambling Act.

§ [2] Purpose. This Act is intended to promote [State's] economic development by legalizing gambling on riverboats. In order to maintain the public's confidence and trust in the riverboat gambling industry, this Act provides strict licensing requirements, strict regulatory provisions, and comprehensive law enforcement for all riverboat gambling operations.[153]

§ [3] Definitions.

[(a)] "Adjusted gross receipts" means the total sums wagered on the riverboat, less winnings paid out to wagerers.[154]

[(b)] "Cheat" means to alter the selection of criteria that determine the result of a gambling game or the amount or frequency of payment in a gambling game. This includes altering bets after the time in which bets must be placed, altering the outcome of a game by use of fraud, trickery, deceit, or device,

---

151. *Compare Specialized Carriers & Rigging Assoc.*, 795 F.2d at 1160 (leaving policy decisions in the area of highway safety to states).

152. State legislatures have debated the issue of whether to adopt riverboat gambling acts of other states. *See, e.g.*, Transcript of debate on Illinois Senate Bill 572, H.R. 95 (June 22, 1989) (statements of Reps. Sieben and Giorgi). States drafting riverboat gambling legislation should take local considerations into account to determine what additional provisions to add to their riverboat gambling acts, taking care not to discriminate against out-of-state riverboat casino operators.

153. *See supra* note 119 (citing statutes that assert regulatory purposes).

154. *Adapted from* Iowa Code Ann. § 99F.1.1, .11 (West Supp. 1994). *See supra* note 21 (discussing definitions of "adjusted gross receipts").

or otherwise utilizing methods designed to beat the odds on a particular game by, for example, counting cards.[155]

[(c)] "Compulsive gambler" means any person who is chronically and progressively preoccupied with gambling and the urge to gamble.[156] A person may still be a compulsive gambler despite never or rarely losing money while gambling.

[(d)] "Dock" means any location where a riverboat moors for the purpose of embarking and disembarking passengers.[157]

[(e)] "Gambling" or "gaming" means an agreement between persons to risk money, converted to tokens, chips, or electronic cards, in a contest of chance in which one may be the winner and the other the loser.[158]

[(f)] "Gambling game" or "gaming activity" includes [baccarat, twenty-one, poker, craps, slot machine, video poker, roulette wheel, punchboard, pull-tab].[159]

[(g)] "Home dock" means a designated location within this state reserved for a riverboat casino for mooring for any reason while on an excursion within this state.

[(h)] "Operator" or "licensee" means a person or persons, including natural persons, corporations (foreign or domestic), sole proprietorships, partnerships (including limited partnerships), firms, fiduciaries, trusts, or other business entities, licensed under this act to operate a riverboat casino in this state.[160]

[(i)] "Riverboat casino" means a self-propelled vessel on which lawful gambling is permitted under the provisions of this act.[161]

---

155. *Adapted from* ILL. ANN. STAT. ch. 230, para. 10 § 4(i) (Smith-Hurd 1993); IND. CODE ANN. § 4-33-2-4 (Burns Supp. 1994); IOWA CODE ANN. § 99F.1.3 (West Supp. 1994); LA. REV. STAT. ANN. § 4:664 (West Supp. 1994); MISS. CODE ANN. § 75-76-5(ll) (1993); MO. REV. STAT. § 313.800(3) (Supp. 1993).

156. *Adapted from* MO. REV. STAT. § 313.842 (Supp. 1993).

157. *Adapted from* ILL. ANN. STAT. ch. 230, para. 10 § 4(f) (Smith-Hurd 1993); IND. CODE ANN. § 4-33-2-7 (Burns Supp. 1994); IOWA CODE ANN. § 99F.1.6 (West Supp. 1994).

158. *See generally* 38 AM. JUR. 2D *Gambling* § 1 (1968) (discussing definitions of gambling).

159. *See* ILL. ANN. STAT. ch. 230, para. 10 § 4(c) (Smith-Hurd 1993); IND. CODE ANN. § 4-33-2-9 (Burns Supp. 1994). *Cf.* IOWA CODE ANN. § 99F.1.10 (West Supp. 1994) (defining "gambling game" as "any game of chance authorized by the [state racing and gaming] commission"); LA. REV. STAT. ANN. § 4:504(10) (West Supp. 1994).

160. *Adapted from* IND. CODE ANN. §§ 4-33-2-12, -16 (Burns Supp. 1994); IOWA CODE ANN. § 99F.1.13 (West Supp. 1994); LA. REV. STAT. ANN. § 4:504 (13) (West Supp. 1994) (including persons "applying for a gaming license to conduct gaming activities"); MISS. CODE ANN. § 75-76-5(t), (aa) (1993); MO. REV. STAT. § 313.800(11) (Supp. 1993).

161. *Adapted from* ILL. ANN. STAT. ch. 230, para. 10 § 4(d) (Smith-Hurd

[(j)] "Supplier" means a distributor, seller, lessor, or manufacturer of gambling equipment licensed and regulated by a riverboat gambling state.[162]

§ [4] Wager / Loss Limits. The maximum wager on any gambling game is [$10]. The maximum amount a player can lose on a gambling excursion is [$500].[163]

§ [5] Age Limits. A person must be at least [18] years old to enter the gambling facility of a riverboat casino, and must be at least [21] years old to make a wager. Employees must be at least [18 years old, but may not be employed as a dealer or accept wagers on gambling games unless at least 21 years old].[164]

§ [6] Pay-out Rates. All gambling games shall be set to pay out at a rate of [eighty] percent of all wagers.[165]

§ [7] Licensing Requirement. An operator must be licensed by this state to operate a riverboat casino anywhere within this state.[166]

[(a)] Qualifications. To qualify for a riverboat gambling license, an operator must meet the following requirements:

[(1)] Fees. The operator must pay a licensing fee of [$50,000] for the first year and a renewal fee of [$10,000] per year thereafter.[167]

[(2)] Investigation. An applicant must submit to a [four month] investigation by this state's [licensing authority / state gaming commission] including close examination of the applicant's financial responsibility, criminal record, character, and fitness to operate a riverboat casino consistent with the public interest. The applicant must also be able to demonstrate financial security and to project the extent of riverboat cruises in this state's waters.[168]

1993); IND. CODE ANN. § 4-33-2-17 (Burns Supp. 1994); IOWA CODE ANN. § 99F.1.7 (West Supp. 1994); LA. REV. STAT. ANN. § 4:504(23) (West 1992); MISS. CODE ANN. §§ 27-109-1, 75-76-5(ii) (1993). *But see* MO. REV. STAT. § 313.800(6) (Supp. 1993). In Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 66 (Mo. 1994) (en banc), however, the Missouri Supreme Court demanded a substantial justification for the state's exemption to the cruising requirement. *See also supra* note 37 (discussing Missouri's cruising exemption).

162. *Adapted from* ILL. ANN. STAT. ch. 230, para. 10 § 8 (Smith-Hurd 1993); IND. CODE ANN. § 4-33-2-18 (Burns Supp. 1994); IOWA CODE ANN. § 99F.1.14 (West Supp. 1994); LA. REV. STAT. ANN. § 4:541 (West Supp. 1994); MISS. CODE ANN. §§ 75-76-5(w), 75-76-79 (1993); MO. REV. STAT. § 313.800(12) (Supp. 1993).

163. *See supra* note 36 (citing statutory wager and loss limits).

164. *See supra* note 38 (citing statutory age restrictions).

165. *Adapted from* MO. REV. STAT. § 313.805(12) (Supp. 1993).

166. *See supra* note 14 (discussing statutory licensing requirements).

167. *See supra* note 20 (listing state license fees).

168. *See supra* note 83 (discussing less-discriminatory alternatives for effec-

[(b)] Licenses are subject to revocation for violation of any state riverboat gambling act.

§ [8] Limited Out-of-State Operator Licenses. Out-of-state riverboat casino operators are eligible for limited licenses. Under a limited license, operation of riverboat gambling in this state's waters is allowed, subject to the same license fees as in-state operators. However, no taxes on wagers or admissions charges will be assessed on limited licensees. No dock-side gambling is allowed in this state on limited-licensed riverboat casinos.[169]

§ [9] Law Enforcement. All riverboat casinos licensed under this Act shall be subject to boarding and searches by law enforcement personnel of this state, members of the [licensing authority / state gaming commission], and by the U.S. Coast Guard.

[§ [10] Declaration of State's Exemption from Operation of Provisions of 15 U.S.C. § 1172. Anywhere within this state that gambling is authorized in accordance with this act is exempt from the provisions of 15 U.S.C. § 1172, the federal act prohibiting the interstate transportation of gambling devices.][170]

§ [11] Riverboat Design. The State has interests in beautifying its riverbanks, promoting tourism, ensuring that, while docked, riverboat casinos do not give false appearances of being gambling venues in permanent structures, and preventing gambling on floating barges merely to comply with the vessel requirement of § [3(i)] of this act. Therefore, riverboat casinos that are replicas of nineteenth century passenger steamboats or riverboats with modern casino cruise ship designs are given preference in licensing.[171]

§ [12] Compulsive Gamblers Fund. An outpatient center shall be established to provide services for compulsive gamblers and their families in any city or county that licenses riverboat casinos. The centers shall be financed by a percentage of the state income from riverboat gambling license fees, admissions fees, and wagering taxes, to be set by the [licensing authority / state gaming

---

tively regulating interstate gambling operations in a manner that could protect the public from evils sometimes associated with gambling operations, such as theft and fraud, suggested in Pic-A-State PA., Inc. v. Pennsylvania, Civ. A. No. 1:CV-93-0814, 1993 WL 325539, at *7, *8 (M.D. Pa. July 23, 1993)).

169. This section attempts to alleviate current barriers to multi-state licensing of riverboat casinos. *See supra* part I.A (listing impediments to multi-state licensing).

170. *See supra* note 25 and accompanying text (discussing federal penalty for interstate transportion of gambling equipment, 15 U.S.C. § 1172 (Supp. V 1993), and lack of necessity of state waiver of § 1172).

171. *See supra* part III.E (arguing that strict historical replica requirements violate the Commerce Clause).

commission] and deposited into the compulsive gamblers' fund.[172]

§ [13] Excluded Persons. There shall be a list of persons who are to be excluded or ejected from any licensed riverboat casino. The list may include any person who has previously violated this act, has engaged in cheating as defined by § [3(b)] of this act, has been convicted of a felony involving organized crime or racketeering, or who is a recovering compulsive gambler and has requested that his or her name be added to the list.[173]

§ [14] Maximum Number of Licenses. The [licensing authority / state gaming commission] may issue up to [15] operator's licenses and an unlimited number of limited out-of-state operator's licenses.[174]

§ [15] Supplier's Licenses. A supplier shall furnish a list of any gambling equipment and supplies offered for sale or lease to state-licensed operators. A supplier shall keep books and records for the furnishing of gambling equipment separate from other records and shall permanently affix its name to all its gambling devices, equipment, and supplies for riverboat casinos.[175] A supplier of gambling equipment to a limited out-of-state licensee need not be licensed under this provision, unless called upon to service gambling equipment on a riverboat in this state's waters.[176]

§ [16] Cashless Wagering System. All wagers must be made using tokens, chips, or electronic cards. Such tokens, chips, or electronic cards must be purchased or encoded by the operator either aboard the riverboat or at an approved on-shore facility.[177]

§ [17] Presence Requirement. "Wagers may be received only from a person present on a licensed riverboat. A person present on a licensed riverboat may not place or attempt to place a wager on behalf of another person who is not present on the riverboat."[178]

*Jeremy Robert Kriegel**

---

172. *Adapted from* MO. REV. STAT. § 313.842 (Supp. 1993).

173. LA. REV. STAT. ANN. § 4:520 (West 1992); MISS. CODE ANN. § 75-76-35 (Supp. 1993).

174. *See supra* note 106 (listing state limits on the number of licenses).

175. LA. REV. STAT. ANN. § 4:541.E (West Supp. 1994).

176. *See supra* part III.F (discussing supplier's license requirements).

177. *Adapated from* ILL. ANN. STAT. ch. 230 para. 10 § 11(a)(9), (12) (Smith-Hurd 1993).

178. IND. CODE ANN. § 4-33-9-10 (Burns Supp. 1994).

* J.D. 1995, Washington University.