

# Breaking the Bank: The Tax Benefits of Legalizing Online Gambling

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## INTRODUCTION

A recent survey indicates that the prohibition of online gambling goes against the will of the American people, with over 80% of respondents reporting being against the current ban.<sup>1</sup> Following “free choice,” the most strongly favored argument for lifting the ban was increased tax revenue for state and federal governments<sup>2</sup>—and for good reason. The federal government currently does not have sufficient funds to sustain projected long-term programs such as Social Security, Medicare, and Medicaid.<sup>3</sup> And state governments are not performing much better, collectively owing more than \$4 trillion.<sup>4</sup> Federal and state governments could continue to borrow money as they have to an unprecedented degree in recent years,<sup>5</sup> but government

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<sup>1</sup> Only 18.9% of respondents favored an across the board ban of online gambling. *CasinoFYI Finds 81% of Americans Do Not Support Online Gambling Prohibition*, MARKETWIRED (July 17, 2012, 9:00 AM), <http://www.marketwired.com/press-release/casinofyi-survey-finds-81-of-americans-do-not-support-online-gambling-prohibition-1680743.htm> [hereinafter *CasinoFYI*]. When asked how online gambling should be regulated, 46.1% favored letting states decide, while 24.9% favored regulating and taxing it at the federal level. *Id.*

<sup>2</sup> The strongest arguments in support of legalization were free choice (45.1%), increased tax revenue (20.5%), the failure of prohibition (19.7%), job creation (9.2%), and the promotion of additional safeguards (5.4%). *Id.* The strongest arguments against online gambling were increased gambling addiction (31.8%), the potential for unfair or rigged games (28.9%), access by minors (22.4%), immorality (9.1%), and the potential for money laundering (7.9%). *Id.*

<sup>3</sup> See LEONARD E. BURMAN & JOEL SLEMROD, *TAXES IN AMERICA: WHAT EVERYONE NEEDS TO KNOW* 17-18 (2013) (reporting the gap between promised benefits and taxes to be \$50 trillion in the next seventy-five years).

<sup>4</sup> See *10 States With Enormous Debt Problems: Report*, HUFFINGTON POST (Aug. 28, 2012, 3:08 PM), [http://www.huffingtonpost.com/2012/08/28/state-debt-report\\_n\\_1836603.html](http://www.huffingtonpost.com/2012/08/28/state-debt-report_n_1836603.html). The ten states with the worst debt problems (in billions) are California (\$617), New York (\$300), Texas (\$287), New Jersey (\$282), Illinois (\$271), Ohio (\$239), Pennsylvania (\$142), Florida (\$134), Michigan (\$124), and Massachusetts (\$102). *Id.* Vermont ranked “last” with only \$5.85 billion owed. *Id.*

<sup>5</sup> See Veronique de Rugy, *How Much of Federal Spending is Borrowed for Every Dollar?*, GEORGE MASON U. MERCATUS CENTER (July 11, 2011), <http://mercatus.org/publication/how-much-federal-spending-borrowed-every-dollar> (federal debt); Tami

borrowing does not eliminate the problem; rather, it simply postpones the burden. There are ways for the government to raise revenue other than through taxation (printing money, for example); however, non-tax revenue often presents its own problems.<sup>6</sup>

Various governments throughout history have enacted many seemingly nonsensical taxes often in a desperate effort to either raise tax revenue or promote social change.<sup>7</sup> In fact, the fifty states have continued this tradition by imposing unusual taxes with arbitrary distinctions on almost everything: nudity, fur, bagels, tattoos, playing cards, blueberries, and even litigation.<sup>8</sup> Furthermore, states commonly impose many varying types of taxes, such as excise taxes,<sup>9</sup> sin taxes,<sup>10</sup> and Pigouvian taxes.<sup>11</sup> This being the case, many experts have begun urging for the adoption of a new voluntary tax that only affects those who choose to participate—the taxation of legalized online gambling.<sup>12</sup> Nelson Rose, a recognized gambling expert, has concisely explained the rationale behind this proposal: states “can’t cut services anymore, can’t raise taxes, so [the gambling tax] raises some money, particularly for states that are desperate.”<sup>13</sup>

This Article argues for the legalization of online gambling by emphasizing the potential tax revenue available for state and federal governments. Part I of this Article discusses the history of gambling in the United States, and the manner in which state

Luhby, *States Go Deeper into Debt*, CNN MONEY (July 30, 2010, 12:34 PM), [http://money.cnn.com/2010/07/30/news/economy/state\\_debt\\_levels/](http://money.cnn.com/2010/07/30/news/economy/state_debt_levels/) (state debt).

<sup>6</sup> See, e.g., BURMAN & SLEMROD, *supra* note 3, at 11–12 (printing money leads to inflation).

<sup>7</sup> See *Strange & Unusual Taxes Throughout History from Around the World*, EFILE, <http://www.efile.com/unusual-strange-funny-taxes-throughout-the-world-and-history/> (last visited Feb. 12, 2014) (listing unusual taxes from Ancient Egypt to today).

<sup>8</sup> Alan Farnham, *A Tax on Arrows? Nuttiest New Taxes*, ABC NEWS (Apr. 9, 2012), <http://abcnews.go.com/Business/strangest-taxes-50-states/story?id=16089204> (listing taxes on various items); see also Emma Beck, *Cutting That Bagel Will Cost You: Weird State Tax Laws*, USA TODAY (Mar. 31, 2013, 10:51 AM), <http://www.usatoday.com/story/money/personalfinance/2013/03/31/odd-state-tax-laws/1951911/> (listing taxes by state).

<sup>9</sup> BURMAN & SLEMROD, *supra* note 3, at 96 (defining “excise taxes” as consumption taxes on particular items, such as the taxation of diesel, tires, and airline tickets).

<sup>10</sup> *Id.* (defining “sin taxes” as a subcategory of excise taxes that is specifically intended to discourage certain behavior, such as the taxation of alcohol, cigarettes, and gambling).

<sup>11</sup> *Id.* at 97 (defining “Pigouvian taxes” as taxation designed to reduce negative externalities, such as pollution, by setting the tax rate equal to the social damage caused).

<sup>12</sup> See, e.g., Jennifer Booton, *Online Gambling Won’t Solve State Debt Woes, But It Could Help*, FOX BUS. (June 25, 2012), <http://www.foxbusiness.com/technology/2012/06/22/online-gambling-might-not-solve-state-debt-but-it-could-help/> (quoting a tax specialist as saying “[a]lmost every state with few exceptions is struggling right now” and “[t]his is a source of tax revenue that people actually want to pay”).

<sup>13</sup> *Id.*

and federal governments regulate it. Part II examines recent events that have altered the discussion, explains why the ban on online gambling has failed, and surveys states that already successfully tax gambling within their borders. Part III analyzes recent legislative attempts, considers the effects of legalization, and provides recommendations for moving forward.

### I. WHAT HAS BEEN DONE?

Gambling is not a new phenomenon, dating back to antiquity.<sup>14</sup> Dice have been recovered next to mummified bodies in Egyptian tombs,<sup>15</sup> while the Chinese, Greeks, and Romans all were known to play games of skill and chance.<sup>16</sup> A lottery was authorized in France in 1638, and casinos were legalized in the Republic of Venice that same year.<sup>17</sup> In 1806, Napoleon legalized gambling clubs, raising millions of francs for the government.<sup>18</sup> Gambling revenue has been used to finance numerous projects, such as the bridge over the Seine and the Continental Army of the American Revolution.<sup>19</sup> In fact, when the English traveled to America they brought gambling with them, financing much of America's initial development through lotteries.<sup>20</sup> In more modern times, with the Internet proving to be the fastest growing mass transmission tool in history,<sup>21</sup> it is no surprise that gambling has developed a foothold there, too.

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<sup>14</sup> See generally WILLIAM N. THOMPSON, *LEGALIZED GAMBLING: A REFERENCE HANDBOOK* 5 (2d ed. 1997). Interestingly, it has been argued that mankind's first real gamble dates back even further to Adam and Eve's choice to eat forbidden fruit from a tree in the Garden of Eden. VICKI ABT ET AL., *THE BUSINESS OF RISK: COMMERCIAL GAMBLING IN MAINSTREAM AMERICA* 4 (1985).

<sup>15</sup> THOMPSON, *supra* note 14. Similarly, bone dice have been discovered in Native American ruins located in Arizona, New Mexico, and Utah. DAVID D. ALLEN, *THE NATURE OF GAMBLING* 35–36 (1952).

<sup>16</sup> THOMPSON, *supra* note 14, at 5–6.

<sup>17</sup> Charles T. Clotfelter, *Gambling Taxes*, in *THEORY AND PRACTICE OF EXCISE TAXATION* 84, 85 (Sijbren Cnossen ed., 2005).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> ALLEN, *supra* note 15, at 44. The illegalization of lotteries in America did not begin until Pennsylvania and Massachusetts prohibited the sale of lottery tickets in 1833, with the last lottery company ceasing lottery ticket sales in 1890. *Id.* at 46. See generally THOMPSON, *supra* note 14, at 89–105 (providing a chronology of gambling history in the United States); THOMAS BARKER & MARJIE BRITZ, *JOKERS WILD: LEGALIZED GAMBLING IN THE TWENTY-FIRST CENTURY* (2000) (providing a history of gambling from the colonists to today).

<sup>21</sup> JOHN LYMAN MASON & MICHAEL NELSON, *GOVERNING GAMBLING* 80 (2001). Radio did not reach fifty million users until it had been around for thirty-eight years, while it took television thirteen years to reach that same audience. *Id.* In contrast, the Internet reached fifty million users in only five years. *Id.*

## A. State Regulation

Under their police powers, states have traditionally had almost unchecked authority to regulate gambling within their borders.<sup>22</sup> The Supreme Court supported states' rights in *United States v. Edge Broadcasting Co.* when it stated that gambling is a vice that states have the right to ban, rather than a right that is constitutionally protected.<sup>23</sup> For this reason, the fifty states have taken various approaches to gambling, ranging from complete bans to full embraces.<sup>24</sup> For instance, while Delaware, Nevada, and New Jersey have recently legalized online gambling, in Hawaii and Utah all forms of gambling continue to be illegal.<sup>25</sup>

## B. Federal Regulation

In other areas of public policy, state and local governments are often restricted by conditions that the federal government puts on aid.<sup>26</sup> In regard to traditional gambling, however, the federal government has historically played the role of a passive observer.<sup>27</sup> For instance, the federal government stood by as a majority of states enacted lotteries, even those that were quasi-national such as Powerball and Big Game lotteries.<sup>28</sup> When the federal government has chosen to intervene, the legislation has been largely designed to support state law.<sup>29</sup>

While federalism concerns are certainly valid in the context of traditional intrastate brick-and-mortar casino gambling, the argument is less applicable to online gambling—an activity that easily evades the regulation of a single state. Thus far, however, the federal government has failed to effectively determine its role in this area, even though *Wired Magazine* declared the Internet

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<sup>22</sup> See I. Nelson Rose, *Gambling and the Law: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, 1173 (2007).

<sup>23</sup> *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

<sup>24</sup> See *The United States of Gambling*, PEW CHARITABLE TR. (June 14, 2013), <http://www.pewstates.org/research/data-visualizations/the-united-states-of-gambling-85899483576> [hereinafter PEW] (providing an infographic of the gambling laws in all fifty states).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Kathryn A. McDermott & Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, 80 PEABODY J. EDUC. 39 (2005) (discussing the No Child Left Behind Act).

<sup>27</sup> See MASON & NELSON, *supra* note 21, at 79.

<sup>28</sup> *Id.*

<sup>29</sup> See CHARLES DOYLE, *INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW* (Susan Boriotti & Donna Dennis eds., 2003).

to be “gambling’s next frontier” back in 1995,<sup>30</sup> the same year the first gambling website opened.<sup>31</sup>

### 1. The Wire Act

The Federal Interstate Wire Act of 1961 (the “Wire Act”)<sup>32</sup> prohibits the use of a wire communication to receive bets or to send gambling information.<sup>33</sup> For a violation of the Wire Act to occur: (1) the wire transmission must assist in the placing of a bet or wager, and (2) the defendant must have been engaged in the business of wagering during the time of the transmission.<sup>34</sup> Although the Wire Act has been applied to online gambling in the past,<sup>35</sup> a recent announcement by the Department of Justice (DOJ) limits its application to sports wagering.<sup>36</sup>

### 2. The Travel Act

The Travel Act of 1961, which prohibits intentionally conducting unlawful activity using a facility of interstate commerce,<sup>37</sup> was enacted to help states effectively combat crime

<sup>30</sup> Evan I. Schwartz, *Wanna Bet?*, WIRED (Oct. 1995), [http://www.wired.com/wired/archive/3.10/gambling\\_pr.html](http://www.wired.com/wired/archive/3.10/gambling_pr.html).

<sup>31</sup> See *The Birth of Online Casino Gambling*, LEGISLATEGAMBLING.COM, <http://www.legislatetgambing.com/the-birth-of-online.html> (last visited Feb. 13, 2014).

<sup>32</sup> 18 U.S.C. § 1084(a) (2012). See generally DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET (2005) (discussing how the Wire Act developed).

<sup>33</sup> The Federal Interstate Wire Act of 1961 states:

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

18 U.S.C. § 1084(a).

<sup>34</sup> *Id.*; see also Kiran S. Raj, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 783 (2006) (stating the elements of the Wire Act); *Truchinski v. United States*, 393 F.2d 627, 630 (8th Cir. 1968) (same).

<sup>35</sup> See, e.g., *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (“Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information . . . No matter what spin he puts on ‘transmission,’ his conduct violated the statute.”).

<sup>36</sup> See *infra* Part II.A.1.

<sup>37</sup> The Travel Act states:

Whoever travels in interstate or foreign commerce or . . . any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, [or] carry on . . . any unlawful activity . . . shall be fined under this title, imprisoned not more than 5 years, or both . . . “[U]nlawful activity” means . . . any business enterprise involving gambling, [or] liquor on which the Federal excise tax has not been paid . . .

18 U.S.C. § 1952 (2012).

that extended past their borders.<sup>38</sup> To prosecute an individual under the Travel Act, the government must prove that the defendant: (1) traveled interstate or used a facility of interstate commerce, (2) had the intention of promoting an unlawful activity, and (3) performed or attempted to perform an overt act in furtherance of the unlawful activity.<sup>39</sup> Ultimately, though, the Travel Act is antiquated in relation to the modern fight against online gambling. While courts have interpreted the term “facility” to include the use of the mail,<sup>40</sup> telephones,<sup>41</sup> and newspapers,<sup>42</sup> it remains unclear whether the Travel Act would apply to the use of wireless Internet.<sup>43</sup>

### 3. Illegal Gambling Business Act

In an attempt to target organized crime,<sup>44</sup> Congress enacted the Illegal Gambling Business Act (the “IGBA”)<sup>45</sup> as part of the Organized Crime Control Act of 1970.<sup>46</sup> The IGBA defines an illegal gambling business as any operation that: (1) violates state law,<sup>47</sup> (2) involves five or more persons, and (3) has been in continuous operation for more than thirty days or has gross revenue of \$2,000 in a single day.<sup>48</sup> The term gambling is defined as including, but not limited to, pool selling, bookmaking, slot machines, roulette, dice tables, lotteries, number games, and selling chances.<sup>49</sup> Seeing that most states currently have laws prohibiting online gambling,<sup>50</sup> the IGBA is a tool that can be used

<sup>38</sup> See *United States v. Nardello*, 393 U.S. 286, 290-91 (1969) (explaining the purpose of the Travel Act).

<sup>39</sup> See *United States v. Childress*, 58 F.3d 693, 719 (D.C. Cir. 1995) (stating the elements of the Travel Act).

<sup>40</sup> *United States v. Heacock*, 31 F.3d 249, 255 (5th Cir. 1994) (mailings).

<sup>41</sup> *United States v. Villano*, 529 F.2d 1046, 1050-51 (10th Cir.) (telephones), *cert. denied*, 426 U.S. 953 (1976).

<sup>42</sup> *United States v. Erlenbaugh*, 452 F.2d 967, 970-73 (7th Cir. 1971) (newspapers transported by train), *aff'd* 409 U.S. 239 (1972).

<sup>43</sup> See Mark B. Dubnoff, *State Bans on Internet Gambling May Be Unconstitutional*, 12 GAMING L. REV. & ECON. 207, 208-09 (2008) (arguing that the Travel Act does not apply to online gambling); Kraig P. Grahmann, *Betting on Prohibition: The Federal Government's Approach to Internet Gambling*, 7 NORTHWESTERN J. TECH. & INTELL. PROP. 162, 168 (2009) (same). *But see* Susanna F. Fischer, *Internet Gambling*, in 2 HANDBOOK OF INFORMATION SECURITY: INFORMATION WARFARE; SOCIAL, LEGAL, AND INTERNATIONAL ISSUES; AND SECURITY FOUNDATIONS 428, 435 (Hossein Bidgoli ed., 2006) (stating that commentators have argued the Travel Act should be interpreted broadly because it was enacted “to prohibit the use of interstate commerce for immoral or illegal purposes”).

<sup>44</sup> H.R. REP. NO. 91-1549, at 1-2 (1970).

<sup>45</sup> 18 U.S.C. § 1955 (2012) (“Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.”).

<sup>46</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 937.

<sup>47</sup> 18 U.S.C. § 1955(b).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See PEW, *supra* note 24.

by the federal government to target online gambling operations—but it has its limitations. For instance, Congress intended for the IGBA to be used only against business-type operations that violated local state law,<sup>51</sup> rather than individual bettors.<sup>52</sup>

#### 4. Unlawful Internet Gambling Enforcement Act

The Unlawful Internet Gambling Enforcement Act of 2006 (the “UIGEA”)<sup>53</sup> was added at the last minute as an unrelated rider to Title VIII of the SAFE Port Act,<sup>54</sup> which otherwise regulated port security.<sup>55</sup> The reported reasons for its passage were concerns about fraud, money laundering, pathological gambling, and underage gambling.<sup>56</sup> The UIGEA, however, does not directly regulate gambling; rather it prohibits any person from accepting money from someone who has engaged in “unlawful internet gambling.”<sup>57</sup> The UIGEA defines “unlawful internet gambling” as a bet or wager placed over the Internet that is unlawful under federal or state law.<sup>58</sup> The UIGEA,

<sup>51</sup> See Richard P. Shafer, Annotation, *Requirement of 18 USCS § 1955, Prohibiting Illegal Gambling Businesses, That Such Businesses Involve Five or More Persons*, 55 A.L.R. FED. 778, 782 (1981).

<sup>52</sup> See *United States v. Schullo*, 363 F. Supp. 246, 249–50 (D. Minn. 1973), *aff’d sub nom.* *U.S. v. Thomas*, 508 F.2d 1200 (8th Cir. 1975).

<sup>53</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–67 (2012).

<sup>54</sup> Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884.

<sup>55</sup> *Id.*; see also Edward Kim, *President Signs Bill Aimed at Limiting Online Gambling*, PBS NEWSHOUR (Oct. 13, 2006, 4:52 PM), [http://www.pbs.org/newshour/updates/law/july-dec06/gambling\\_10-13.html](http://www.pbs.org/newshour/updates/law/july-dec06/gambling_10-13.html).

<sup>56</sup> See Jonathon Conon, Comment, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in “Dead Man’s” Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legalization*, 99 J. CRIM. L. & CRIMINOLOGY 1157, 1158 (2009).

<sup>57</sup> The UIGEA states that

[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. § 5363 (2012).

<sup>58</sup> 31 U.S.C. § 5362(10)(a) (defining “unlawful internet gambling” as “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any

however, includes many exceptions, such as games of skill,<sup>59</sup> fantasy sports,<sup>60</sup> and intrastate gambling.<sup>61</sup>

Despite the passage of the UIGEA, online gambling continues to grow in prevalence, especially among youth.<sup>62</sup> The UIGEA's failure to accomplish its objectives stems from a lack of serious enforcement, vague terms,<sup>63</sup> numerous exemptions that imply a comprehensive online gambling ban was not intended, and the decision not to subject individual bettors to criminal penalties.<sup>64</sup>

## II. WHY SHOULD WE CARE?

### A. Recent Events

#### 1. The DOJ Announcement

For years, scholars and courts contested the reach of the Wire Act,<sup>65</sup> but in 2011 the DOJ announced that the Wire Act applied only to sports betting.<sup>66</sup> The announcement came after<sup>67</sup>

applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made").

<sup>59</sup> 31 U.S.C. § 5362(1)(A) (defining "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome").

<sup>60</sup> 31 U.S.C. § 5362(1)(E)(ix) ("[B]et or wager . . . does not include . . . participation in any fantasy or simulation sports game or educational game . . .").

<sup>61</sup> 31 U.S.C. § 5362(10)(B)(i) ("[U]nlawful internet gambling' does not include placing, receiving, or otherwise transmitting a bet or wager where . . . the bet or wager is initiated and received or otherwise made exclusively within a single State . . .").

<sup>62</sup> See Dan Romer, *Internet Gambling Grows Among Male Youth Ages 18 to 22; Gambling Also Increases in High School Age Female Youth, According to National Annenberg Survey of Youth*, ANNENBURG PUB. POLY CENTER (Oct. 14, 2010), <http://editor.annenbergpublicpolicycenter.org/wp-content/uploads/Card-Playing-2010-Release-final.pdf>.

<sup>63</sup> See *Interactive Media Entm't & Gaming Ass'n v. Attorney Gen. of U.S.*, 580 F.3d 113, 114, 117 (3d Cir. 2009).

<sup>64</sup> See Conon, *supra* note 56, at 1159.

<sup>65</sup> See, e.g., *Establishing Consistent Enforcement Policies in the Context of Online Wagers: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 13–18 (2007) (statement of Catherine L. Hanaway, U.S. Attorney, Department of Justice) (insisting that under the Wire Act all online gambling by bettors was illegal); DOYLE, *supra* note 29, at 7 (stating that the case law interpreting the Wire Act is sparse and often conflicting).

<sup>66</sup> Memorandum from Virginia A. Seitz, Assistant Attorney Gen., Dep't of Justice, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act* (Sept. 20, 2011) [hereinafter *DOJ Announcement*], available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>; see also Nathan Vardi, *Department of Justice Flip-Flops on Internet Gambling*, FORBES (Dec. 23, 2011, 3:56 PM), <http://www.forbes.com/sites/nathavardi/2011/12/23/departement-of-justice-flip-flops-on-internet-gambling/> ("[T]he Department of Justice revealed that it had changed one of its most important and long-held positions on Internet gambling, stating that the federal Wire Act of 1961 only applies to sports betting.").

New York and Illinois, each seeking to enact state lotteries that would use out-of-state processors,<sup>68</sup> prompted the DOJ to resolve the possible conflict of law between the Wire Act and UIGEA.<sup>69</sup> Ultimately, the DOJ determined that it was not necessary to address this possible conflict; rather, it altered its interpretation to hold that the Wire Act applies only to sports wagering, not state lotteries.<sup>70</sup> This determination appears to have given approval to those states that wish to permit wholly intrastate, non-sports online gambling.<sup>71</sup> For this reason, online gambling supporters hailed this announcement as a victory.<sup>72</sup> As a result, a majority of experts agree that Congress is left with only two options: enact legislation of its own, or watch the states enact their own patchwork approach.<sup>73</sup>

## 2. “Black Friday”

On April 15, 2011, the DOJ and the Federal Bureau of Investigation rocked the poker world<sup>74</sup> by disclosing its grand jury indictment of the three largest poker websites—PokerStars, Absolute Poker, and Full Tilt Poker—as well as their founders, payment processors, and a bank official.<sup>75</sup> Three defendants that

<sup>67</sup> In addition, the Fifth Circuit had also recently held that key statutory language in the Wire Act only referred to sports wagering. *In re MasterCard Int’l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002).

<sup>68</sup> *DOJ Announcement*, *supra* note 66.

<sup>69</sup> *See supra* Parts I.B.1, I.B.4 (explaining that the Wire Act applies to intrastate activity, but the UIGEA does not).

<sup>70</sup> *DOJ Announcement*, *supra* note 66.

<sup>71</sup> *See* Chad Holloway, *U.S. Department of Justice Opinion: Wire Act Only Applies to Sports Betting (Updated)*, POKERNEWS (Dec. 23, 2011), <http://www.pokernews.com/news/2011/12/us-department-of-justice-wire-act-applies-to-sporting-events-11711.htm>.

<sup>72</sup> *See* Press Release, Poker Players Alliance, PPA Applauds DOJ Ruling: Online Poker Does Not Violate the Wire Act Calls on Congress to Act Quickly to Pass Federal Legislation (Dec. 23, 2011), *available at* <http://www.scribd.com/doc/76396794/Press-Release-PPA-Applauds-DoJ-Ruling-Online-Poker-Does-Not-Violate-the-Wire-Act-Calls-on-Congress-to-Act-Quickly-to-Pass-Federal-Legislation-12-2> (“[T]he leading poker grassroots advocacy group . . . today applauded the ruling by the U.S. Department of Justice that online poker does not violate the Wire Act.”).

<sup>73</sup> *See* GLOBAL GAMING EXPO, EXECUTIVE SUMMARY (2012) [hereinafter EXECUTIVE SUMMARY], *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/futurewatch/futurewatch\\_vol\\_10\\_exec\\_summ.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/futurewatch/futurewatch_vol_10_exec_summ.pdf).

<sup>74</sup> *See* I. Nelson Rose, *Poker’s Black Friday*, 15 GAMING L. REV. & ECON. 327, 327 (“The impact on the online gaming world was immediate and dramatic. Many players were panicked. ‘Headlines in the poker media say it all: “The Sh\_t Hits the Fan,” “Poker Panic ‘11,” “Thunderstruck: The Day It All Changed for Online Poker.”’) (internal citation omitted).

<sup>75</sup> Press Release, U.S. Attorney S. Dist. of N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011) [hereinafter Black Friday Press Release], *available at* <http://www.justice.gov/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf>.

could be located in the United States were arrested.<sup>76</sup> The websites were charged with nine counts, including bank fraud, money laundering, and illegal gambling offenses.<sup>77</sup> The companies in question were accused of carrying out fraudulent transactional measures to circumvent the UIGEA's prohibition of money transfers from players to operators.<sup>78</sup> The federal government sought at least \$3 billion in forfeitures and penalties, and it seized approximately seventy-six bank accounts in fourteen countries that contained funds from the charged offenses.<sup>79</sup> In addition, five of the largest online poker sites had their domain names seized, which prevented players worldwide from using these websites.<sup>80</sup> Full Tilt Poker and PokerStars were able to use their domain names once again after they pledged to no longer serve U.S. players.<sup>81</sup> Ultimately, however, Black Friday changed the landscape of online gambling. It resulted in a loss of marketing and advertising money, the loss of player sponsorship, lower competitor numbers for the World Series of Poker event, and major, reputable companies being replaced with small, black market operators.<sup>82</sup>

### 3. *United States v. DiCristina*

On August 21, 2012, in *United States v. DiCristina*, the federal court for the Eastern District of New York overturned a defendant's conviction under the IGBA.<sup>83</sup> Lawrence DiCristina, a New York resident, had previously been convicted for operating a "No-Limit Texas Hold'em" game in the back of his warehouse.<sup>84</sup> The court, after conducting an extensive analysis, held that poker is a game of skill and therefore does not fall within the

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<sup>76</sup> Rose, *supra* note 74, at 327. The online poker operators have since reached a settlement requiring the forfeiture of assets to reimburse "victims." Gary Wise, *PokerStars Settles, Acquires FTP*, ESPN (July 31, 2012, 5:25 PM), [http://espn.go.com/poker/story/\\_/id/8218085/pokerstars-reaches-settlement-department-justice-acquires-full-tilt-poker](http://espn.go.com/poker/story/_/id/8218085/pokerstars-reaches-settlement-department-justice-acquires-full-tilt-poker). In addition, many of the individuals indicted have pled guilty and received reduced sentences. See, e.g., Chad Holloway, *Ray Bitar Pleads Guilty; Sentenced to Time Served and Must Forfeit Assets*, POKERNEWS (Apr. 15, 2013), <http://www.pokernews.com/news/2013/04/ray-bitar-pleads-guilty-sentenced-to-time-served-and-must-fo-14764.htm> (Ray Bitar, former Full Tilt Poker CEO); *Online Poker Middleman Pleads Guilty in NYC*, WALL ST. J. (Feb. 28, 2012, 4:39 PM), <http://online.wsj.com/article/APf9aa3157d00d4a128ab39dfb382d467e.html> (Ryan Lang, bank processor).

<sup>77</sup> Black Friday Press Release, *supra* note 75.

<sup>78</sup> *Id.*

<sup>79</sup> Rose, *supra* note 74, at 327.

<sup>80</sup> *Id.* at 329.

<sup>81</sup> *Id.*

<sup>82</sup> See Darren Rovell, *Insider Breakdown of Poker's Black Friday*, CNBC (Apr. 18, 2011, 3:06 PM), <http://www.cnbc.com/id/42649117/> (analyzing the effects of Black Friday).

<sup>83</sup> *United States v. DiCristina*, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012).

<sup>84</sup> *Id.* at 168.

scope of the IGBA.<sup>85</sup> The court stated that the “fundamental question is not whether some chance or skill is involved in poker, but what element predominates.”<sup>86</sup> Relying on the “rule of lenity,”<sup>87</sup> the holding was based on the legal conclusion that the IGBA’s definition of gambling does not include games predominated by skill.<sup>88</sup> This ruling represented the first time a federal court had recognized poker as a game of skill,<sup>89</sup> and some authors at the time argued that it “may have blunted an arrow in the quiver of federal prosecutors.”<sup>90</sup>

Perhaps predictably, on August 6, 2013, the Second Circuit overturned the lower court’s ruling.<sup>91</sup> The court held that whether or not poker was expressly included in the IGBA was inconsequential, stating all that is required under the IGBA is that state law prohibit the activity.<sup>92</sup> While the ruling will allow the DOJ to continue prosecuting poker operations under the IGBA, many in the gambling community maintain that there is a “silver lining”: the court did not reverse the lower court’s finding that poker is a game of skill, it merely held that fact to be inconsequential under an IGBA analysis.<sup>93</sup> According to Poker Player Alliance’s Executive Director John Pappas, that poker is a game of skill “is a key point distinguishing poker from the types of gambling games that Congress and state legislatures have often tried to prohibit” and the decision only furthers the “growing call for federal clarity on the definition of gambling.”<sup>94</sup>

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<sup>85</sup> *Id.* at 234–35.

<sup>86</sup> *Id.* at 231.

<sup>87</sup> *Id.* at 199–200. As the Supreme Court stated in *United States v. Bass*, when it is unclear what Congress has made criminal “it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Therefore, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Id.* (quoting *United States v. C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)).

<sup>88</sup> *DiCristina*, 886 F. Supp. 2d at 226–29.

<sup>89</sup> See Press Release, Poker Players Alliance, PPA Applauds Federal Court Ruling that Poker Is a Game of Skill and Not Illegal Gambling (Aug. 21, 2012), available at <http://theppa.org/press-releases/2012/08/21/press-release-ppa-applauds-federal-court-ruling-that-poker-is-a-game-of-skill-and-not-illegal-gambling-08212012/>.

<sup>90</sup> LINDA J. SHOREY & ANTHONY R. HOLTZMAN, WHEN IS GAMBLING NOT GAMBLING?: AN EXAMINATION OF *UNITED STATES V. DICRISTINA* 7 (2012), available at <http://www.jd-supra.com/legalnews/when-is-gambling-not-gambling-an-examin-90466/>.

<sup>91</sup> *United States v. DiCristina*, 726 F.3d 92, 106 (2d. Cir. 2013), cert. denied, 134 S. Ct. 1281 (2014).

<sup>92</sup> *Id.* at 98–99.

<sup>93</sup> Matthew Kredell, *U.S. Appeals Court Overrules Decision in Lawrence DiCristina Poker Case*, POKERNEWS (Aug. 6, 2013), <http://www.pokernews.com/news/2013/08/u-s-appeals-court-overrules-decision-in-lawrence-dicristina-16052.htm>.

<sup>94</sup> *Id.*

#### 4. States Growing Impatient

While efforts to pass a national bill have stalled, states appear to be racing to legalize online gambling.<sup>95</sup> As previously mentioned, several states have recently passed laws allowing online gambling within their borders,<sup>96</sup> and on April 30, 2013, Nevada officially launched the nation's first legal gambling website.<sup>97</sup> Other states, such as Delaware and New Jersey, quickly followed suit, launching their own websites later that same year.<sup>98</sup> In addition, lawmakers in California, Hawaii, Illinois, Iowa, Massachusetts, Mississippi, Pennsylvania, and Texas are reportedly considering similar proposals.<sup>99</sup> And, since states often look to neighboring states when facing a common problem,<sup>100</sup> this trend will likely continue. This state-by-state approach raises concerns, however, because a majority of experts agree that it will negatively impact potential online operators' businesses.<sup>101</sup>

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<sup>95</sup> For a comprehensive list of recent state legislation, see STEVEN TITCH, *INTERNET GAMBLING: KEYS TO A SUCCESSFUL REGULATORY CLIMATE* app. A at 20–27 (2012), available at [http://reason.org/files/internet\\_gambling\\_regulation.pdf](http://reason.org/files/internet_gambling_regulation.pdf).

<sup>96</sup> See Colleen Curry, *Pokerstars' Bid to Buy Casino Could Signal Gambling Gold Rush*, ABC NEWS (Mar. 12, 2013), <http://abcnews.go.com/Business/pokerstars-bid-buy-casino-signal-gambling-gold-rush/story?id=18702613>; Sue Zeidler, *Congress in a Race with States to Pass Online Gambling Law*, REUTERS (Mar. 8, 2013, 8:21 PM), <http://www.reuters.com/article/2013/03/09/net-us-onlinepoker-federal-idUSBRE92800M20130309/>.

<sup>97</sup> See Bill O'Driscoll, *Nevada Opens Door of Online Gambling with Poker Launch*, USA TODAY (Apr. 30, 2013, 1:08 PM), <http://www.usatoday.com/story/news/nation/2013/04/30/nevada-poker-online-gambling/2123213/>. Gaming is currently limited to poker, and players must be at least twenty-one years old and within the state's borders in order to participate. *Id.*

<sup>98</sup> Brett Collson, *Delaware Becomes First State to Launch Full-Scale Real-Money Online Gambling*, POKERNEWS (Nov. 8, 2013), <http://www.pokernews.com/news/2013/11/delaware-becomes-first-state-to-launch-full-scale-gambling-16741.htm> (noting that on November 8, 2013, Delaware became the second state to launch gambling websites); Colleen Curry, *Online Gambling Rolls the Dice in New Jersey Today*, USA TODAY (Nov. 26, 2013), <http://abcnews.go.com/US/online-gambling-rolls-dice-jersey-today/story?id=21016842> (noting that on November 26, 2013, New Jersey became the third state to launch gambling websites).

<sup>99</sup> See *2013 Legislation Regarding Internet Gambling and Lotteries*, NCSL (Dec. 20, 2013), <http://www.ncsl.org/issues-research/econ/2013onlinegaminglegislation.aspx>.

<sup>100</sup> See MASON & NELSON, *supra* note 21, at 14 (discussing diffusion theory as applied to state policy). Political scientists have found that a state is more likely to adopt a lottery of its own if the surrounding states have done the same. See Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395, 410–11 (1990). For example, after Illinois created a lottery, neighboring states like Iowa, Indiana, and Wisconsin enacted lotteries of their own. See MASON & NELSON, *supra* note 21, at 38.

<sup>101</sup> See EXECUTIVE SUMMARY, *supra* note 73 (reporting that a state-by-state approach would result in liquidity issues and a lack of consistent regulation).

## B. Prohibition Is Not Working

Despite the passage of the UIGEA<sup>102</sup> and the events of “Black Friday,”<sup>103</sup> ten million Americans were estimated to have gambled online in 2011.<sup>104</sup> That same year, Americans were estimated to have spent \$4 billion on online gambling,<sup>105</sup> while the global online gambling market saw revenue of over \$33 billion.<sup>106</sup> In addition, Americans are estimated to spend more than \$100 billion annually through offshore websites with no consumer protection or taxation benefits for the United States.<sup>107</sup> Just as the prohibitions of alcohol<sup>108</sup> and prostitution<sup>109</sup> have been dismal failures, the prohibition of online gambling does not prevent such activity.<sup>110</sup> To the contrary, attempted enforcement simply exhausts valuable government resources, while requiring taxpayers to foot the increased bill.<sup>111</sup>

Representative Jim McDermott (D-WA) summarized this issue at a recent hearing of the House Ways and Means Committee: “Prohibition hasn’t prevented the millions of Americans who want to gamble online from doing it. It has forced online gambling operators to work offshore, it has put consumers

<sup>102</sup> See *supra* Part I.B.4.

<sup>103</sup> See *supra* Part II.A.2.

<sup>104</sup> Richard Grenell, *It’s Time to Tax Internet Gambling and Make It Legal*, HUFFINGTON POST (Nov. 8, 2011, 4:39 PM), [http://www.huffingtonpost.com/richard-grenell/tax-internet-gambling\\_b\\_1082598.html](http://www.huffingtonpost.com/richard-grenell/tax-internet-gambling_b_1082598.html).

<sup>105</sup> EXECUTIVE SUMMARY, *supra* note 73.

<sup>106</sup> MARKETLINE, GLOBAL ONLINE GAMBLING: MARKETLINE INDUSTRY PROFILE (2012) (analysis of the global market).

<sup>107</sup> See Michelle Hirsch, *Internet Gambling: Betting on New Tax Revenue*, FISCAL TIMES (May 20, 2010), <http://www.thefiscaltimes.com/Articles/2010/05/20/Internet-Gambling-Betting-on-New-Tax-Revenue#page1>.

<sup>108</sup> See Michael Lerner, *Unintended Consequences*, PBS, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Feb. 12, 2014) (analyzing the negative consequences that resulted from alcohol prohibition). Furthermore, Mark Thornton, an economist, has stated that the alcohol prohibition was a disaster because [a]lcohol became more dangerous to consume; crime increased and became “organized”; the court and prison systems were stretched to the breaking point; and corruption of public officials was rampant. No measurable gains were made in productivity or reduced absenteeism. Prohibition removed a significant source of tax revenue and greatly increased government spending.

Guy Calvert, *The Government Should Respect Individuals’ Freedom to Gamble*, in GAMBLING: OPPOSING VIEWPOINTS 144, 153 (James D. Torr ed., 2002); see also Rose, *supra* note 74 (“It is important to remember that not only did Prohibition create modern organized crime, it did not stop people from drinking.”).

<sup>109</sup> See *The Prostitution Statistics You Have to Know*, LAWS.COM, <http://sex-crimes.laws.com/prostitution/prostitution-statistics> (last visited Feb. 10, 2014) (estimating that 10% of men have “purchased” a prostitute and that prostitutes suffer from a murder rate twenty times higher than the national average).

<sup>110</sup> See Romer, *supra* note 62 (examining the increase in gambling among youth in recent years).

<sup>111</sup> See Calvert, *supra* note 108, at 153–54 (examining the “perils of prohibition”).

at risk, and it sends billions in dollars of revenue to other nations.”<sup>112</sup> He continued, “We tried prohibition in the 1920s and it didn’t work. This is the same case with gambling. Why not legalize it and tax it just like you do alcohol or cigarettes or a lot of other things?”<sup>113</sup> The prohibition of online gambling has not, and will not, stop the activity; rather, it will simply push the activity overseas.<sup>114</sup>

### C. States Already Tax Gambling

In 2011, brick-and-mortar casinos contributed \$7.93 billion in tax revenue to state and local governments, representing a 4.5% increase from the year before.<sup>115</sup> H2 Gambling Capital, the leading data supplier regarding global gambling, projects that regulating most forms of online gambling in the United States would generate revenue of \$67 billion over five years.<sup>116</sup> Other estimates that involve solely online poker reveal it is a \$6 billion a year business, providing states with an opportunity to take a piece of the pie.<sup>117</sup> In addition, 47% of community leaders nationwide have reported that the introduction of casinos within their jurisdiction surpassed their expectations, and 70% have stated that casinos are a good source of tax revenue.<sup>118</sup>

For instance, in 2011, Pennsylvania trumped all other states with the most tax revenue from commercial casinos, collecting close to \$1.5 billion.<sup>119</sup> Currently, for every dollar produced as revenue from slot machines, \$0.55 is returned to

<sup>112</sup> Hirsch, *supra* note 107.

<sup>113</sup> *Id.*

<sup>114</sup> See Tom W. Bell, *The Government Should Not Prohibit Gambling on the Internet*, in *GAMBLING: OPPOSING VIEWPOINTS*, *supra* note 108, at 164, 168–69 (explaining how online gambling can escape domestic prohibitions).

<sup>115</sup> Booton, *supra* note 12; see also AM. GAMING ASS’N, 2013 STATE OF THE STATE: THE AGA SURVEY OF CASINO ENTERTAINMENT 6 (2013) [hereinafter STATE OF THE STATE], available at [http://www.americangaming.org/sites/default/files/uploads/docs/aga\\_sos2013\\_fnl.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/aga_sos2013_fnl.pdf) (comparing state tax revenue between 2011 and 2012).

<sup>116</sup> *Congressional Hearing Focuses on Need for Internet Gambling Regulation to Protect Consumers*, SAFEANDSECUREIG.ORG (Oct. 25, 2011), <http://safeandsecureig.org/content/congressional-hearing-focuses-need-internet-gambling-regulation-protect-consumers/>.

<sup>117</sup> Booton, *supra* note 12. Randy Fine, managing director of the largest management and consulting firm in the gaming industry, was quoted as stating, “I’ve heard estimates of online poker being a \$6 billion a year business, if a state could take a third, that’s \$2 billion.” *Id.*

<sup>118</sup> Melissa Daniels, *PA Gambling Tax Revenue Highest in the Country*, PENNSYLVANIA INDEP. (June 1, 2012), <http://paindependent.com/2012/06/pa-gambling-tax-revenue-highest-in-the-country/>.

<sup>119</sup> Matt Assad, *Pennsylvania Leads the Way in Casino Taxes*, MORNING CALL (May 29, 2012), [http://articles.mcall.com/2012-05-29/news/mc-pennsylvania-gambling-casino-taxes-20120529\\_1\\_tax-rate-property-tax-rebates-tax-bill](http://articles.mcall.com/2012-05-29/news/mc-pennsylvania-gambling-casino-taxes-20120529_1_tax-rate-property-tax-rebates-tax-bill).

Pennsylvanians<sup>120</sup> for real property tax relief, economic development, tourism development, a volunteer fire company grant program, and a gambling addiction program.<sup>121</sup>

In Nevada, gambling was legalized in March of 1931 in response to the Great Depression.<sup>122</sup> Since then, the state has arguably become the entertainment and gambling capital of the world, receiving a majority of its tax revenue from gambling taxation.<sup>123</sup> For instance, in 2012, Nevada received \$868 million in tax revenue with a maximum tax rate of 6.75%, which went to programs like education, problem gambling programs, and local governments.<sup>124</sup>

That same year, New York acquired over \$822 million in gambling tax revenue, which went mainly to fund educational programs.<sup>125</sup> Thanks to New York's 68% tax rate, the state collected \$620 million in revenue from gambling during the first half of 2012 alone.<sup>126</sup> And since the first casino opened over a decade ago, gambling has generated approximately \$5 billion in tax revenue for the state.<sup>127</sup>

Likewise, in 2012, Louisiana experienced almost \$580 million in tax revenue with a 21.5% tax rate, which helped to fund the city of New Orleans, public retirement programs, and the general fund.<sup>128</sup> In addition, over 40% of the police budget for the state comes from gambling taxes;<sup>129</sup> and in 2001, gambling

<sup>120</sup> *Gaming Benefits for Pennsylvanians*, PA. GAMING CONTROL BOARD, <http://gamingcontrolboard.pa.gov/?p=52> (last visited Feb. 12, 2014); see also *Pennsylvania*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/pennsylvania> (last visited Feb. 12, 2014).

<sup>121</sup> *Pennsylvania*, *supra* note 120.

<sup>122</sup> See *This Day in History: Nevada Legalizes Gambling*, HIST. CHANNEL, <http://www.history.com/this-day-in-history/nevada-legalizes-gambling> (last visited Feb. 12, 2014).

<sup>123</sup> *Id.*

<sup>124</sup> *Nevada*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/nevada> (last visited Feb. 12, 2014).

<sup>125</sup> *New York*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/new-york> (last visited Feb. 12, 2014).

<sup>126</sup> Carl Campanile, *Slots o' Luck Nets NY \$620M in Taxes*, N.Y. POST (July 24, 2012, 4:00 AM), [http://www.nypost.com/p/news/local/slots\\_luck\\_nets\\_ny\\_in\\_taxes\\_sh7g72jAWEoM1ZHbu0qk5J](http://www.nypost.com/p/news/local/slots_luck_nets_ny_in_taxes_sh7g72jAWEoM1ZHbu0qk5J).

<sup>127</sup> Since implementation in 2004, gambling in New York has generated \$4.6 billion in aid to education and over \$198 million in aid to local governments. *New York Gaming Association*, N.Y. GAMING ASS'N, <http://newyorkgaming.org/investing-education> (last visited Apr. 20, 2014) (education); *New York Gaming Association*, N.Y. GAMING ASS'N, <http://newyorkgaming.org/investing-gov> (last visited Apr. 20, 2014) (local governments).

<sup>128</sup> *Louisiana*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/louisiana> (last visited Feb. 15, 2014).

<sup>129</sup> *How Louisiana Wins*, LA. CASINO ASS'N, <http://www.casinosofla.com/how-louisiana-wins.asp> (last visited Feb. 15, 2014).

tax revenue helped fund a \$50 million teacher pay increase.<sup>130</sup> Overall, since 1994, riverboats have contributed over \$2.02 billion in state taxes and \$557 million in local taxes.<sup>131</sup>

In 2012, with a graduated tax rate ranging from 15% to 40%, Indiana received \$806 million in tax revenue. In 2009, gambling revenue accounted for about 5% of the state's general fund, and has been used to help fund economic development and local governments.<sup>132</sup> Overall, since legalization in 1990, gambling taxation has brought in over \$10 billion for the state.<sup>133</sup>

With a relatively low tax rate of 8% to 12%, the state of Mississippi received \$272 million in gambling revenue in 2012. This revenue helped fund programs such as housing, education, transportation, health care, youth counseling, and public safety.<sup>134</sup> Moreover, between 2006 through 2009 the state received over \$1 billion in revenue from gambling taxation.<sup>135</sup>

When considering these numbers, it is important to remember that legalization will likely further increase the amount that consumers are willing to spend on gambling. For instance, in California, tribal casinos received legal status in 2000, and by 2004 their gross revenue had increased from \$1.4 billion to \$6 billion.<sup>136</sup> During that same period, however, revenue for casinos in Nevada remained steady, establishing that the new revenue source in California did not stem from depletions at competing casinos.<sup>137</sup> The legalization of online gambling would likely create a similar effect.<sup>138</sup> In fact, the United States market is expected to reach \$14 to \$17 billion

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<sup>130</sup> *Id.*; see also Kay Bell, *Louisiana Gambling Could Fund Teachers*, BANKRATE (Mar. 15, 2001), <http://www.bankrate.com/brm/itax/state/20010315a.asp> (stating that teachers would receive, on average, a \$2,000 pay raise).

<sup>131</sup> See *How Louisiana Wins*, *supra* note 129.

<sup>132</sup> *Indiana*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/indiana> (last visited Feb. 15, 2014); see also IND. LEGISLATIVE SERVS. AGENCY, OFFICE OF FISCAL & MGMT. ANALYSIS, *INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 3* (2009), available at [http://www.in.gov/legislative/pdf/TaxHandbook09\\_online.pdf](http://www.in.gov/legislative/pdf/TaxHandbook09_online.pdf) (providing an in-depth analysis of Indiana revenue for fiscal year 2009).

<sup>133</sup> See Christine Davies, *Indiana Eyes Casino Expansion*, POKER SITES, <http://www.uspokersites.com/poker-news/indiana-eyes-casino-expansion/419> (last visited Feb. 15, 2014).

<sup>134</sup> *Mississippi*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/state-information/mississippi> (last visited Feb. 15, 2014).

<sup>135</sup> See *Mississippi Tax Analysis: Gaming Industry Pays \$1 Billion over Last Three Years*, MISS. GAMING LAW (Dec. 28, 2009), <http://msgaminglaw.com/mississippi-tax-analysis-gaming-industry-pays-1-billion-over-last-three-years/>.

<sup>136</sup> See William R. Eadington, *The Future of Online Gambling in the United States and Elsewhere*, 23 J. PUB. POL'Y & MARKETING 214, 216 (2004).

<sup>137</sup> *Id.*

<sup>138</sup> For a brief discussion about cannibalization, see *infra* Part III.B.3.

annually by 2018, if Congress passes legislation legalizing and regulating online poker.<sup>139</sup>

### III. WHAT SHOULD WE DO?

#### A. Proposed Legislation

Multiple federal legislative proposals have recently attempted to deal with the online gambling crises, none of which have proven successful—yet.

In 2009, Representative Barney Frank (D-MA) introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act.<sup>140</sup> The proposal was designed to roll back the UIGEA because, as Frank stated, “Americans ought to be free to do what they wish without this kind of intrusion.”<sup>141</sup> The proposal, however, was not a free-for-all—it prohibited those who had previously violated the law from receiving licenses, banned sports betting, prohibited the use of credit cards to make bets, and required safeguards to prevent underage and compulsive gambling.<sup>142</sup> The bill died in committee.<sup>143</sup>

Likewise, Representative Jim McDermott (D-WA) introduced the Internet Gambling Regulation and Tax Enforcement Act in 2011.<sup>144</sup> The proposal required online gambling operators to pay a 2% tax to the federal government and a 6% tax to states,<sup>145</sup> earning the federal government an estimated \$42 billion over ten years.<sup>146</sup> Under this plan, revenue was slated to go to state social service programs, such as foster care and children’s health insurance.<sup>147</sup> However, the proposal depended on full house passage of Representative Frank’s proposal,<sup>148</sup> and ultimately died in committee.<sup>149</sup>

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<sup>139</sup> EXECUTIVE SUMMARY, *supra* note 73.

<sup>140</sup> *H.R. 2267 (111th): Internet Gambling Regulation, Consumer Protection, and Enforcement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr2267> (last visited Feb. 15, 2014) [hereinafter *H.R. 2267*].

<sup>141</sup> Catherine Dodge, *House Panel Passes Measure to Legalize Some Internet Gambling*, BLOOMBERG (July 28, 2010, 9:00 PM), <http://www.bloomberg.com/news/2010-07-28/house-panel-passes-frank-backed-measure-to-legalize-some-internet-gambling.html>.

<sup>142</sup> *Id.*

<sup>143</sup> *H.R. 2267, supra* note 140.

<sup>144</sup> *H.R. 2230 (112th): Internet Gambling Regulation and Tax Enforcement Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2230> (last visited Feb. 15, 2014) [hereinafter *H.R. 2230*].

<sup>145</sup> Dodge, *supra* note 141.

<sup>146</sup> Hirsch, *supra* note 107.

<sup>147</sup> *Id.*

<sup>148</sup> Dodge, *supra* note 141.

<sup>149</sup> *H.R. 2230, supra* note 144.

The next year, in 2012, Senator Harry Reid (D-NV) and Former Senator Jon Kyl (R-AZ) proposed the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act.<sup>150</sup> Contrary to previous proposals, this bill would have strengthened the UIGEA for all gambling activity except poker and horse racing.<sup>151</sup> In addition, it would have amended the Wire Act and the IGBA to apply to all forms of unlicensed online gambling.<sup>152</sup> The proposal was set to tax online poker activity at a rate of 16%—the states were to receive 14% of this tax, while the federal government was to receive 2%<sup>153</sup>—with the federal share being allocated to a regulatory agency tasked with oversight and enforcement.<sup>154</sup> The bill also required licensees to report and withhold online poker winnings in order to ensure that players paid applicable taxes on their winnings.<sup>155</sup> Ultimately, though, the bill was pronounced dead at the end of the 2012 lame-duck session of Congress.<sup>156</sup>

Most recently, Representative Joe Barton (R-TX) introduced the Internet Poker Freedom Act of 2013,<sup>157</sup> which would establish the Office of Internet Poker Oversight within the Department of Commerce in order to license and regulate poker websites.<sup>158</sup> The proposed legislation references *United States v. DiCristina*<sup>159</sup> to bolster its argument that poker, as a game of skill, is inherently different, and therefore safer, than other forms of gambling.<sup>160</sup> The legislation would require poker websites to demonstrate that

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<sup>150</sup> Matthew Kredell, *Summary Text of Reid-Kyl Internet Gambling Bill Goes Public*, POKERNEWS (Sept. 14, 2012), <http://www.pokernews.com/news/2012/09/summary-text-of-reid-kyl-internet-gambling-bill-13407.htm>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Nick Jones, *The Reid/Kyl Online Poker Bill Revealed*, POKERFUSE (Sept. 12, 2012), <http://pokerfuse.com/news/law-and-regulation/the-reidkyl-bill-revealed/>.

<sup>154</sup> *Id.*

<sup>155</sup> Michael Jones, *Summary of Reid/Kyl Online Poker Bill Surfaces*, PART TIME POKER (Sept. 13, 2012), <http://www.parttimepoker.com/summary-of-reidkyl-online-poker-bill-surfaces>.

<sup>156</sup> Todd Wilkins, *Reid-Kyl Bill Laid to Rest*, POKERSITES (Dec. 18, 2012), <http://www.pokersites.us/reid-kyl-bill-laid-to-rest/>.

<sup>157</sup> Representative Barton introduced similar legislation in 2011, but it never made it out of committee. See *H.R. 2366 (112th): Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2366> (last visited Feb. 15, 2014).

<sup>158</sup> See Internet Poker Freedom Act of 2013, H.R. 2666, 113th Cong. § 103(b) (2013) [hereinafter H.R. 2666], available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2666ih/pdf/BILLS-113hr2666ih.pdf>.

<sup>159</sup> See *supra* Part II.A.3.

<sup>160</sup> See Darren Heitner, *U.S. Government Seeks To Set Internet Poker Free . . . Through New Regulations*, FORBES (July 15, 2013, 9:45 AM), <http://www.forbes.com/sites/darrenheitner/2013/07/15/u-s-government-seeks-to-set-internet-poker-free-through-new-regulations/>; see also Anjeanette Damon, *Congressman Takes One More Run at Legalizing Online Poker*, LAS VEGAS SUN (July 17, 2013, 2:00 AM), <http://www.lasvegassun.com/news/2013/jul/17/congressman-takes-one-more-run-legalizing-online-p/>.

they have the appropriate safeguards in place—including age and jurisdictional verifications,<sup>161</sup> and anti-cheating devices—before being offered a license.<sup>162</sup> Those associated with an operation without a license would be subject to fines and/or imprisonment.<sup>163</sup> The bill would also prohibit the use of credit cards in order to prevent players from amounting large quantities of debt.<sup>164</sup> Lastly, a license would only be valid for five years,<sup>165</sup> allowing for repeated inquiry into, and verification of, the websites safeguards. Unlike previous proposals, Representative Barton's bill does not establish an overall tax rate; rather, authorities at the state level are left to make this critical determination.<sup>166</sup>

Representative Barton's bill is currently being considered by a congressional committee, where it is projected to have a mere 2% chance of enactment.<sup>167</sup> Moreover, following his bill's failure, Senator Reid has publicly stated that he believes "the chances of legalizing online poker at the federal level are exceedingly slim."<sup>168</sup> Representative Barton, on the other hand, remains optimistic that some form of federal legislation is in our future, stating: "I can't say when that general mass will occur, but I can

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161 Representative Barton's proposal would allow licensed websites to operate on a national level, with an opt-out provision for states that choose not to participate. See *Internet Poker Freedom Act Aims for Federal Regulation*, INDIAN COUNTRY (July 14, 2013), <http://indiancountrytodaymedianetwork.com/2013/07/14/internet-poker-freedom-act-aims-federal-regulation-150412>.

162 See Heitner, *supra* note 160.

163 See *id.*

164 See Matthew Kredell, *Rep. Joe Barton: U.S. Federal Online Poker Legislation Not Far Away*, POKERNEWS (July 18, 2013), <http://www.pokernews.com/news/2013/07/rep-joe-barton-federal-online-poker-legislation-not-far-away-15955.htm>.

165 See Heitner, *supra* note 160. In June, Representative King (R-TX) introduced similar legislation entitled the Internet Gambling Regulation, Consumer Protection and Enforcement Act of 2013. *H.R. 2282: Internet Gambling Regulation, Consumer Protection and Enforcement Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2282> (last visited Feb. 15, 2014) [hereinafter *H.R. 2282*]. Like Representative Barton's bill, it would establish a federal regulatory scheme for online gambling websites and would punish those websites that operate without a proper license. Julian Hattem, *King, Capuano Looking for Online Gambling Bill Cosponsors*, HILL (July 31, 2013, 2:53 PM), <http://thehill.com/blogs/regwatch/legislation/314761-king-capuano-looking-for-online-gambling-bill-cosponsors> (discussing the contents of the bill). A chief difference is that it would legalize all forms of gambling, except sports betting. *Id.* However, like Representative Barton's bill, it is currently sitting in committee. *H.R. 2282, supra* (providing the status of the bill).

166 See H.R. 2666, *supra* note 158; see also Nick Jones, *Barton's New Federal Online Poker Bill Introduced*, POKERFUSE (July 12, 2013), <http://pokerfuse.com/news/law-and-regulation/bartons-new-federal-online-poker-bill-introduced-12-07/>. Presumably, omitting an overarching tax rate is meant to entice otherwise hesitant states to participate rather than opt-out.

167 See H.R. 2666, *supra* note 158.

168 Damon, *supra* note 160.

say it will occur and that it won't be 20 years from now. It will be, if not next year, the year after or soon after that."<sup>169</sup>

## B. Striking a Balance

While raising revenue is an important governmental objective, it is not the only consideration. Accordingly, both proponents and opponents of legalized online gambling raise many public policy arguments in support of their positions. On the one hand, gambling serves as a form of entertainment that has been used to raise funds for many years.<sup>170</sup> On the other hand, gambling has been condemned as one of society's worst vices.<sup>171</sup> Ultimately, industry experts are confident that effective safeguards exist that can be implemented to dissuade opponents' concerns.<sup>172</sup>

### 1. Addiction

It was researcher Robert Detlefsen who perhaps summed it up best when he said, "We have alcoholics, shopaholics, and workaholics in our midst, and thus far we have not seen fit to ban the activities that cause these maladies. Why should gambling be different?"<sup>173</sup> In response, opponents of prohibition argue that online gambling is equivalent to "crack cocaine"<sup>174</sup> for those prone to excessive gambling,<sup>175</sup> because it makes gambling

<sup>169</sup> Kredell, *supra* note 164.

<sup>170</sup> See *supra* Part I, II.C.

<sup>171</sup> See generally ALLEN, *supra* note 15, at 123-25 (arguing that gambling is a harmful activity that should be suppressed by the government); EDMUND BERGLER, *THE PSYCHOLOGY OF GAMBLING* 18-19 (1958) (arguing that gamblers are neurotic and weak individuals with an unconscious wish to lose). In many ways, though, the morality issue is beside the point—if gambling is a vice then that is a matter for religious groups, individuals, and each state to decide for itself. See Danny Sheridan, *The Government Should Not Ban Betting on College Sports*, in *GAMBLING: OPPOSING VIEWPOINTS*, *supra* note 108, at 180, 181 (arguing that the government should not ban betting on college sports because "in a free society people do these things, sometimes to excess").

<sup>172</sup> EXECUTIVE SUMMARY, *supra* note 73.

<sup>173</sup> Timothy A. Kelly, *Chapter Preface: The Government Should Halt the Spread of Legalized Gambling*, in *GAMBLING: OPPOSING VIEWPOINTS*, *supra* note 108, at 130, 130.

<sup>174</sup> *Id.* at 139. One researcher stated, "As smoking crack cocaine changed the cocaine experience, I think electronics is going to change the way gambling is experienced." *Id.*; see also John Kyl, *The Government Should Prohibit Gambling on the Internet*, in *GAMBLING: OPPOSING VIEWPOINTS*, *supra* note 108, at 156, 163 ("It's the crack cocaine of creating new pathological gamblers."). Crack cocaine is purported to be the riskiest form of cocaine. *The Truth About Crack Cocaine*, FOUND. FOR A DRUG-FREE WORLD, <http://www.drugfreeworld.org/drugfacts/crackcocaine.html> (last visited Feb. 15, 2014). It is 75% to 100% pure, thereby reaching the brain more quickly and causing more rapid addiction. *Id.*

<sup>175</sup> The American Psychiatric Association has created three categories that classify individuals based on the severity of their gambling disorder. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR)* 671 (4th ed. 2000). Level 3 gamblers are considered "pathological gamblers," suffering from a persistent and recurring failure to resist gambling behavior that is harmful to the

easy to do from the comfort of one's own home.<sup>176</sup> Numerous studies, however, have found that the prevalence rate of pathological gambling is only approximately 1% of the United States's population,<sup>177</sup> a prevalence rate much lower than that of alcohol abuse.<sup>178</sup> Furthermore, the prevalence rate of pathological gambling has remained steady even during periods of gambling expansion.<sup>179</sup> In addition to the low prevalence rate, the social costs of problem and pathological gambling on average are estimated to be only about \$900 per year, per gambler.<sup>180</sup>

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individual and others. *Id.* Level 2 gamblers experience problems with their gambling, but not to the extent that Level 3 gamblers do. *Id.* Level 1 gamblers are those individuals that gamble without experiencing adverse effects. *Id.*

<sup>176</sup> Kyl, *supra* note 174, at 158. Bernie Horn, the Executive Director of the National Coalition Against Legalized Gambling, stated that “[t]he internet not only makes highly addictive forms of gambling easily accessible to everyone, it magnifies the potential destructiveness of the addiction. Because of the privacy of an individual and his/her computer terminal, addicts can destroy themselves without anyone ever having the chance to stop them.” *Id.*

<sup>177</sup> See, e.g., Howard J. Shaffer et al., *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Research Synthesis*, 89 AM. J. PUB. HEALTH 1369, 1373 (1999) (estimating that 1.29% of the adult population in the United States and Canada could be classified as pathological gamblers); Nancy M. Petry et al., *Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 J. CLINICAL PSYCHIATRY 564, 564 (2005) (estimating that the lifetime prevalence rate of pathological gambling is 0.42%); Ronald C. Kessler et al., *DSM-IV Pathological Gambling in the National Comorbidity Survey Replication*, 38 PSYCHOL. MED. 1351, 1353 (2008) (estimating that 0.6% of the population could be classified as pathological gamblers, and 2.3% of the population could be classified as problem gamblers); see also PUB. SECTOR GAMING STUDY COMM'N, FINAL REPORT 35 (2000), available at <http://fliog.govoffice3.com/vertical/Sites/%7BAAE2D2A5-8082-4BA9-9915-A43E05212106%7D/uploads/%7B1FBDCF-FC-AC56-4FBD-B16F-4CB51D5E0D22%7D.PDF> (“[T]here is no solid basis for concluding that the wider legalization of gambling . . . has caused a concomitant increase in pathological gambling. In fact, it appears that pathological gambling is quite rare . . . and does not appear to be increasing in frequency.”).

<sup>178</sup> See Debra S. Hasin et al., *Prevalence, Correlates, Disability, and Comorbidity of DSM-IV Alcohol Abuse and Dependence in the United States: Results From the National Epidemiologic Survey on Alcohol and Related Conditions*, 64 ARCHIVES GEN. PSYCHIATRY 830, 837 (2007) (estimating the twelve-month prevalence rate of alcohol abuse to be 4.7% of the population and the lifetime prevalence rate of alcohol abuse to be 17.8%, with over 30% of the population suffering from some form of alcohol abuse or dependence at some time in their life). It is well known that alcoholism can result in the same negative consequences attributed to problem gambling; yet, we as a society have determined that alcoholism is best addressed on an individual basis, rather than through prohibition.

<sup>179</sup> See, e.g., WEFA GRP., A STUDY CONCERNING THE EFFECTS OF LEGALIZED GAMBLING ON THE CITIZENS OF THE STATE OF CONNECTICUT 9 (1997), available at [http://www.ct.gov/dosr/lib/dosr/gamblingstudy\\_1997.pdf](http://www.ct.gov/dosr/lib/dosr/gamblingstudy_1997.pdf) (finding that pathological gambling rates did not rise, and may have actually fallen, even after one of the largest casinos in the world was opened in the state); see also Serge Sevigny et al., *Links Between Casino Proximity and Gambling Participation, Expenditure, and Pathology*, 22 PSYCHOL. ADDICTIVE BEHAV. 295, 295 (2008) (“In a setting in which many types of gambling activities are available, casino proximity in itself does not appear to explain the rate of gambling-related problems.”).

<sup>180</sup> See CMTY. RES. PARTNERS, THE SOCIAL IMPACT OF CASINOS: LITERATURE REVIEW AND COST ESTIMATES 3 (2010), available at [http://fife.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=436&meta\\_id=29784](http://fife.granicus.com/MetaViewer.php?view_id=2&clip_id=436&meta_id=29784).

It has been determined that many gambling addicts also suffer from other types of addictions.<sup>181</sup> This supports the theory that pathological gambling is a manifestation of an underlying general addiction syndrome, which could manifest itself in an addiction to drugs, alcohol, food, shopping, or gambling.<sup>182</sup> Ultimately, gambling addicts suffer from an addiction like any other and should seek professional help. The prohibition of gambling will do next to nothing to deter truly compulsive gamblers from gambling. In order to prevent an increase in problem gambling, however, additional safeguards should be implemented.

For instance, the Reno Model was developed as a practical application to analyze addiction research and uses a science-based strategic framework to guide responsible gambling policy, with the goal of reducing gambling-related harm in the community without excessively limiting gambling.<sup>183</sup> Furthermore, there are many responsible gaming features currently available that Congress could require the implementation of: limits on the amounts that can be deposited or bet over a certain period of time, warning signs for prolonged play or high expenditures, self-assessments, information about addictions and the probability of winning, clear displays of past expenditures, and self-exclusion from certain websites.<sup>184</sup> In addition, because online gambling has low overhead, websites are able to offer players high quality casino games at a lower cost, with about 75% of players spending less than \$50 during each gaming session.<sup>185</sup>

## 2. Minors

Opponents of online gambling raise the concern that vulnerable minors will more easily be able to participate in illegal gambling activity from the their homes.<sup>186</sup> Fortunately,

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<sup>181</sup> See Howard J. Shaffer et al., *Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology*, 12 HARV. REV. PSYCHIATRY 367, 368-70 (2004) (claiming that all addictive disorders follow the same development pattern, share similar risk factors, and result in similar consequences).

<sup>182</sup> *Id.*

<sup>183</sup> See Alex Blaszczynski et al., *A Science-Based Framework for Responsible Gambling: The Reno Model*, 20 J. GAMBLING STUD. 301, 302 (2004).

<sup>184</sup> See Sally Gainsbury et al., *Consumer Attitudes Towards Internet Gambling: Perceptions of Responsible Gambling Policies, Consumer Protection, and Regulation of Online Gambling Sites*, 29 COMPUTERS HUMAN BEHAV. 235, 236 (2013).

<sup>185</sup> In addition to offering low-cost games, online gambling websites also offer better returns when compared to brick-and-mortar casinos. See TITCH, *supra* note 95, at 8.

<sup>186</sup> See Timothy A. Kelly, *The Government Should Halt the Spread of Legalized Gambling*, in GAMBLING: OPPOSING VIEWPOINTS 11, *supra* note 108, at 131, 138-39 (comparing online gambling to online pornography). Access to gambling equipment by minors is not a novel concern. State lottery opponents cite a Massachusetts survey that

this is a concern that is easily mitigated by requiring online gambling websites to implement procedures that will hamper such access. For instance, the government could require state-issued photo identification, along with a notarized statement of identification, before an account is opened.<sup>187</sup> After authorization, the website could issue a password for further protection.<sup>188</sup> With that said, just as underage individuals are able to obtain alcohol and cigarettes illegally, these methods are not fail-proof. Procedures such as these, however, will prevent access by all minors, except those who intentionally violate the law and should therefore be subject to strict punishment.

### 3. Cannibalization

It is important, when examining possible tax revenue, to look at the effect that legalizing online gambling will have on brick-and-mortar casino operations. Contrary to speculation, a recent survey found that online gambling may actually generate an increase in casino visitors: 8% of New Jersey respondents stated they would increase their casino visits in response to the legalization of online gambling, while only 4% stated they would visit a casino less often.<sup>189</sup> In addition, only 23% of experts believe that the legalization of online gambling will cannibalize business from existing casinos.<sup>190</sup> This is mainly because visitors widely report that non-gaming activities are an important part of the casino experience—namely fine dining, shopping, live entertainment, and recreational facilities, such as spas and pools.<sup>191</sup> In fact, 26% of casino visitors report that they never or rarely gamble during their trips.<sup>192</sup> There is clearly more to casinos than just gambling.

In the end, even if online gambling does displace traditional brick-and-mortar businesses, it would be because people overwhelmingly prefer online gambling as their chosen form of

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found minors were able to successfully purchase lottery tickets within the state on 80% of their attempts. *Id.* at 137. Nonetheless, forty-three states continue to sell lottery tickets to the public. *Lottery Results*, USA.GOV, <http://www.usa.gov/Topics/Lottery-Results.shtml> (last visited Feb. 15, 2014).

<sup>187</sup> See BARKER & BRITZ, *supra* note 20, at 111.

<sup>188</sup> *Id.*

<sup>189</sup> See Kahlil S. Philander, *The Effect of Online Gaming on Commercial Casino Revenue*, 15 UNLV GAMING RES. & REV. J. 23, 24 (2011); see also Donald Wittkowski, *Poll: Online Gambling May Draw More to Brick-and-Mortar Casinos*, PRESS OF ATLANTIC CITY (Apr. 27, 2013, 12:31 AM), [http://www.pressofatlanticcity.com/news/press/casinos\\_tourism/poll-online-gambling-may-draw-more-to-brick-and-mortar/article\\_133807c2-aef3-11e2-8fd2-0019bb2963f4.html](http://www.pressofatlanticcity.com/news/press/casinos_tourism/poll-online-gambling-may-draw-more-to-brick-and-mortar/article_133807c2-aef3-11e2-8fd2-0019bb2963f4.html).

<sup>190</sup> EXECUTIVE SUMMARY, *supra* note 73.

<sup>191</sup> See STATE OF THE STATE, *supra* note 115, at 3.

<sup>192</sup> *Id.*

entertainment. This is a matter of consumer taste, not a reason for the prohibition of competition. Furthermore, those businesses that would theoretically suffer from cannibalization could launch their own gambling website in conjunction with the in-person amenities they already offer.

#### 4. Entertainment

The entertainment value of gambling is often lost in these debates, even though that is most often what motivates players to play. Gambling allows players to experience exhilaration and excitement, just as sporting events do. While gambling does involve the real prospect of losing money, the willingness to pay significant sums for entertainment is not exclusive to gamblers. For example, sports fans often spend several thousand dollars per year to call themselves season ticket holders.<sup>193</sup> Even though many people who gamble do not ultimately win, that does not make the activity “any more ‘wasteful’ or irrational than, say, playing video games, eating candy bars, or attending a hockey game. [Gamblers] play because they evidently get something out of it.”<sup>194</sup> In fact, 77% of casino visitors report receiving good value and entertainment for their money.<sup>195</sup>

Often times, gambling is a form of adult entertainment enjoyed in moderation by those who can afford it. For instance, casino players are reported to be more educated and maintain a higher average household income than the general population.<sup>196</sup> Furthermore, contrary to popular belief, rather than withdrawing from society, “[g]amblers devote more time to opera, lectures, museums, nightclubs, dancing, movies, theater and

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<sup>193</sup> See, e.g., *2014 Season Tickets*, DODGERS, <http://mlb.mlb.com/la/ticketing/season.jsp#pricing> (last visited Feb. 15, 2014) (listing Dodgers baseball season ticket prices as ranging from \$738 to \$9,020) (on file with publisher).

<sup>194</sup> Clotfelter, *supra* note 17, at 113.

<sup>195</sup> *2011 Report Shows Stable Commercial Casino Industry Following Three Challenging Years: Polling Data Profiles the Modern Casino Patron*, AM. GAMBLING ASS'N (May 4, 2011), <http://www.americangaming.org/newsroom/press-releases/2011-report-shows-stable-commercial-casino-industry-following-three>; see also STATE OF THE STATE, *supra* note 115, at 28 (reporting that almost 70% of casino visitors stated that they receive “excellent” or “very good” value for their money at a casino, compared to other entertainment activities).

<sup>196</sup> Calvert, *supra* note 108, at 148-50; see also STATE OF THE STATE, *supra* note 115, at 24 (finding that more than 52% of casino visitors have finished college, compared to only 46% of the overall survey sample). *But see* CLOTFELTER ET AL., STATE LOTTERIES AT THE TURN OF THE CENTURY: REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 13 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf> (finding that those purchasing lottery tickets were disproportionately African-American, poor, and uneducated).

active sports . . . [and] also socialize more with friends and relatives and participate more in community activities.”<sup>197</sup>

### C. Moving Forward

Gambling is hardly the type of danger that requires either heavy-handed federal interference or prohibition. In accordance with history, the states should be responsible for determining what forms of gambling, if any, legally take place within their borders.<sup>198</sup> This fundamental principle does not change with the advent of the Internet.<sup>199</sup> It must be acknowledged, however, that online gambling does make regulation an issue of national significance. While some argue that the international character of online gambling requires a global resolution,<sup>200</sup> a clear federal approach is the more plausible first step. With this in mind, the role of the federal government should be limited to establishing, licensing,<sup>201</sup> and overseeing a national regulatory framework that allows states to opt-in to the extent that they choose.<sup>202</sup> The federal government’s “role should be likened to that of a sports referee—posting the rules of the game and mediating potential disputes between [those] players” who wish to play.<sup>203</sup>

The tax rate adopted could ultimately prove determinative of whether a national framework is successful. In the brick-and-mortar casino realm, lower taxes are associated with increased tourism, while higher taxes stifle development.<sup>204</sup> A

<sup>197</sup> Calvert, *supra* note 108, at 149.

<sup>198</sup> When asked how online gambling should be regulated, 46.1% of respondents favored letting states decide, while 24.9% favored regulating and taxing it at the federal level. See *CasinoFYI*, *supra* note 1. Only 18.9% of respondents favored an across-the-board ban of online gambling. *Id.*

<sup>199</sup> For example, by legalizing and regulating online gambling, the government could require that licensed websites use security systems that screen out non-residents, protecting the interests of those states that wish to maintain their current bans. DAVID O. STEWART, AN ANALYSIS OF INTERNET GAMBLING AND ITS POLICY IMPLICATIONS 10-11 (2006), available at [http://www.americangaming.org/sites/default/files/uploads/docs/white\\_papers/wpaper\\_internet\\_0531.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/white_papers/wpaper_internet_0531.pdf). Such a security system could include disclosure of address, confirmation of address through a commercial database, and confirmation of address through software that tracks the IPS address. *Id.*

<sup>200</sup> See, e.g., Harley J. Goldstein, *On-Line Gambling: Down to the Wire?*, 8 MARQ. SPORTS L.J. 1, 51 (1997) (“In order to regulate Cyberspace, and prevent an international conflict of laws, a regulatory framework must be formed on the international level.”).

<sup>201</sup> Licensing and regulating online gambling would protect consumers who are currently placing a growing number of bets with offshore operators, by providing them with a safe and legal alternative.

<sup>202</sup> *But see* MASON & NELSON, *supra* note 21, at 93 (arguing for the criminalization of online gambling).

<sup>203</sup> BARKER & BRITZ, *supra* note 20, at 112.

<sup>204</sup> A 2011 article found that the rate of casino taxes is inversely correlated with tourism development, with a higher tax rate resulting in fewer jobs, fewer hotel rooms, less convention space, and fewer entertainment opportunities. William N. Thompson, *Casino Taxes—Accentuating the Negative*, 15 GAMING L. REV. & ECON. 599, 603 (2011).

similar principle applies to online gambling—higher tax rates on legal games will likely have the unintended consequence of driving players to illegal games, resulting in revenue loss. Likewise, if legal websites are to compete with illegal ones, then the taxation scheme must be favorable enough to entice them to participate.<sup>205</sup> With that said, the tax rate ultimately adopted must be high enough to counter any perceived negative impacts, thereby persuading more states to opt-in to a federal program.<sup>206</sup> Whatever tax rate is ultimately adopted, a smaller federal tax should be earmarked for costs related to enforcement and the development of better strategies to ensure compliance. At the state level, a larger tax should be set aside for local programs, such as ones that promote education, treat gambling addictions, or rectify cannibalization.

### CONCLUSION

The legalization and taxation of online gambling will be insufficient to solve all of the current state and federal deficit problems—but it is a start. The fact is that a number of American citizens already participate in illegal gambling activity online, and will continue to do so. In addition to putting players in harm's way, this behavior results in a loss of tax revenue for state and federal governments, which are already struggling to make ends meet. While the advent of online gambling should not strip the states of the ability to determine if legal gambling occurs within their borders, the federal government is best able to establish a national framework and regulate the market. Ultimately, the tax rate adopted will determine the success of a federal scheme, which will require the consideration and balancing of multiple competing factors.

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<sup>205</sup> In Europe, where most forms of gaming are legal, it has been determined that a taxation rate of 15–20% on gross gaming revenue is seen as reasonable, where higher rates reduce applicants. See TITCH, *supra* note 95.

<sup>206</sup> See, e.g., Wayne Parry, *Christie: Gambling Law Vetoed Until Tax Rate Increased*, CHRISTIAN SCI. MONITOR (Feb. 7, 2013), <http://www.csmonitor.com/USA/Latest-News-Wires/2013/0207/Christie-Gambling-law-vetoed-until-tax-rate-increased> (reporting that New Jersey's Governor Chris Christie vetoed a gambling law, in part, because the tax rate was too low).

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