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# Don't Chase Your Losses: Online Gambling Regulation and Solutions in Minnesota

Samuel E. Mogensen

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## DON'T CHASE YOUR LOSSES: ONLINE GAMBLING REGULATION AND SOLUTIONS IN MINNESOTA

Samuel E. Mogensen<sup>†</sup>

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## I. INTRODUCTION

With the advent of the internet as a catalyst, the gambling and sports betting industries have seen massive change. The gambling debate has been ongoing since the beginning of American history, and the debate continues to evolve as the industry itself evolves.<sup>1</sup> At the heart of the issue is a tension between the individual’s personal freedom and the government’s interest in protecting the public from economic hardship and moral complications.<sup>2</sup>

Regulating the gambling industry is a balancing act.<sup>3</sup> Many stakeholders—including state and federal governments, individual citizens, businesses, and Native American tribes—have differing interests that must be considered for successful regulation.<sup>4</sup> Thus, effective solutions that can withstand the test of time need to offer a clear path for gambling regulation as the industry continues to evolve.<sup>5</sup> Policymakers must find and implement such solutions to maximize the social and economic benefits that gambling can have in modern society.<sup>6</sup>

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1. Ruth Graham, *Gambling: An American Love/Hate Story*, BOS. GLOBE (July 13, 2014), <https://www.bostonglobe.com/ideas/2014/07/12/gambling-american-love-hate-story/4Ew8inwsSIzQBLyhRF119H/story.html> [https://perma.cc/2L4L-GB8C] (describing the evolution of gambling in the United States since the seventeenth century).

2. See Emanuel V. Towfigh et al., *Dangerous Games: The Psychological Case for Regulating Gambling*, 8 CHARLESTON L. REV. 147, 153 (2013) (outlining the negative effects widespread gambling can have on problem gamblers).

3. Alex Blaszczynski et al., *A Science-Based Framework for Responsible Gambling: The Reno Model*, 20 J. OF GAMBLING STUD. 301, 303 (2004) (discussing how stakeholders in the gambling industry oftentimes have differing and competing interests and approach gambling regulation from different perspectives).

4. *Id.* (listing the various stakeholders in the field of gambling).

5. William R. Eadington, *The Economics of Casino Gambling*, 13 J. OF ECON. PERSP. 173, 189–90 (1999) (discussing the evolution of the gambling industry and how public policy must evolve with the industry).

6. Blaszczynski, *supra* note 3, at 302, 309 (stating policymakers need to

Minnesota has not legalized online gambling<sup>7</sup> and has struggled to regulate online gambling in ways that are beneficial to our society.<sup>8</sup> This Note focuses on Minnesota as a platform for change in regulation. In doing so, this Note first discusses the history of gambling regulation in the United States,<sup>9</sup> the effect of the internet on gambling and the growth of the online gambling industry,<sup>10</sup> modern attempts at regulation,<sup>11</sup> and the problems technological advances have on these regulations.<sup>12</sup> Next, it discusses gambling context and regulation in Minnesota specifically.<sup>13</sup> An analysis of tribal interests in online gambling regulation follows.<sup>14</sup> Finally, the Note offers a possible solution to increase the consistency and effectiveness of online gambling regulation.<sup>15</sup>

## II. HISTORY OF ONLINE GAMBLING REGULATION IN THE UNITED STATES

### A. Authority

Understanding gambling regulation in the United States requires an understanding of the government's regulatory power. Congress' power to regulate gambling arises from the Commerce Clause of the United State Constitution.<sup>16</sup> Commerce Clause

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“implement a strategic framework that will reduce or eliminate the potential harms that can be associated with gambling while simultaneously maximizing the potential benefits of gambling,” including “recreational, social and economic benefits to individuals and the community”).

7. *Legal US Online Gambling by State*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states> [https://perma.cc/8UYD-RHP3] (last visited June 20, 2018) (charting the fifty states' gambling legality and regulation).

8. See Declan McCullagh, *Minnesota Orders ISPs to Blacklist Gambling Sites*, CNET (May 1, 2009, 11:20 AM), <https://www.cnet.com/news/minnesota-orders-isps-to-blacklist-gambling-sites/> [https://perma.cc/56GL-4G2J] (“The state of Minnesota has handed Internet providers a 7-page blacklist (PDF) of gambling Web sites that they're supposed to prevent customers from accessing . . .”).

9. See *infra* Part II.

10. See *infra* Part II.C.

11. See *infra* Part III.

12. See *infra* Part III.G.

13. See *infra* Part IV.

14. See *infra* Part IV.B.

15. See *infra* Part V.

16. See U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes”).

jurisprudence has evolved over time. In the early 1800s, Congress's power to regulate interstate commerce was characterized in *Gibbons v. Ogden* as broad and virtually absolute.<sup>17</sup> Today, the extent of federal commerce power depends on the factors laid out in the relatively modern Supreme Court decision, *United States v. Lopez*.<sup>18</sup> In *Lopez*, the Court held that Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities having a substantial relation to interstate commerce.<sup>19</sup> Congress has the authority to regulate gambling in the United States because it is an activity that has a substantial relationship to interstate commerce.<sup>20</sup> Though Congress has the authority to regulate interstate commerce, it may choose to delegate its authority to the states.<sup>21</sup> In this way, the United States regulates gambling through both federal and state law.<sup>22</sup>

### B. *Historical Context*

United States gambling jurisprudence originates from English law.<sup>23</sup> Prior to the formation of the United States, the English brought gambling to the colonies, in the form of lotteries, to fund infrastructure projects.<sup>24</sup> Thereafter, the colonies themselves used

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17. See *Gibbons v. Ogden*, 22 U.S. 1 (1824) (analyzing Congress's power to regulate interstate commerce).

18. 514 U.S. 549 (1995).

19. *Id.* at 558–59.

20. *Id.*

21. See *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981) (recognizing Congress' power to give States the authority to restrict the flow of interstate commerce). The Court explained, “[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.” *Id.*

22. See Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–67 (2006) (aiming to restrict the flow of money to and from online gambling websites); see also MINN. STAT. § 609.75 (2017) (outlining Minnesota gambling restrictions).

23. See G. Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211, 214 (1985) (explaining the history and origination of gambling law in the United States from a pre-revolutionary perspective).

24. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 (1992) (describing the use of lotteries to raise revenue for the benefit and support of settlements in Virginia).

lotteries to fund their own public works.<sup>25</sup> Betting on horse racing was also popular at this time, and in 1665, New York became the first state with a racetrack.<sup>26</sup>

Critics took notice of the popularity of gambling in this era. In response, Congress enacted the Statute of Anne,<sup>27</sup> which was incorporated into the laws of every state and made some larger gambling debts uncollectable, slowing gambling's popularity.<sup>28</sup> The nineteenth century marked the decline of public lotteries in the United States, and a complete lottery ban was issued towards the end of the century.<sup>29</sup> The public perception of the morality of gambling at this time is articulated well in the 1905 Supreme Court decision *Marvin v. Trout*,<sup>30</sup> which stated, “[f]or a great many years past gambling has been very generally in this country regarded as a vice, to be prevented and suppressed in the interest of the public morals and the public welfare.”<sup>31</sup> This perception led to a period with little to no legalized gambling and no state-sponsored gambling until New Hampshire reintroduced the United States to the state-run lottery in 1964.<sup>32</sup>

Despite a negative social view of the lottery, non-lottery gambling did not stop. Instead, it moved to an unregulated,

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25. *Id.* at 25 (listing various public works funded by lotteries between 1746 and the Civil War).

26. See Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 484 (2004) (outlining the development of horse racing in the United States). Interestingly, horse racing as a form of gambling faced much less opposition from gambling critics because bettors had to be physically present at the racetrack. See *id.* at 493–94.

27. See Statute of Anne (1710), 8 Ann. c. 19, §§ 1–8 (Eng.) (making gambling debts over ten pounds uncollectible).

28. See Darren A. Prum & Carlin McCrory, *The Technological and Business Evolution of Machine-Based Gambling in America*, 14 WAKE FOREST J. BUS. & INTELL. PROP. L. 237, 244 (2014); Rychlak, *supra* note 24, at 20.

29. See Rychlak, *supra* note 24, at 32–38 (outlining the fall of public lotteries in the United States). This wave of public disfavor culminated with the famous Supreme Court decision, *Champion v. Ames*, which held that Congress can regulate interstate commerce by banning lottery tickets from interstate commerce entirely. 188 U.S. 321, 354 (1903).

30. 199 U.S. 212 (1905).

31. *Id.* at 224.

32. Rychlak, *supra* note 24, at 44. Other states then followed New Hampshire's lead. In 1967, New York introduced a lottery, and New Jersey did in 1970. *Id.* at 44–45.

underground environment.<sup>33</sup> In 1986, the United States Supreme Court ruled that a full-time gambler could declare himself to be in “the trade or business” of gambling for tax purposes, effectively authorizing professional gambling as a legitimate career.<sup>34</sup> Presently, many states offer brick-and-mortar casinos, racetracks, and card rooms where gamblers can legally win and lose money. Most states run lotteries, even though some do not have any other form of legalized gambling.<sup>35</sup> This is where the nuance of online gambling law occurs in contemporary jurisprudence. With no outright federal ban on gambling, the states are left to regulate gambling as they see fit within their borders, leading to inconsistency and inefficacy.

C. *Effect of Modern Technology on Gambling in the United States*

As modern technology continues to advance, regulation of online gambling is becoming increasingly difficult. The advent of the internet created an easily accessible arena for consumers to gamble.<sup>36</sup> Because of the growing customer base, many companies decided to operate online sports betting and other forms of online gambling, such as poker and blackjack.<sup>37</sup> Online poker became especially popular, with millions of daily players throughout the United States.<sup>38</sup> The accessibility of online poker and its relative proximity to the game’s greatest players (such as Chris Moneymaker) contributed to its success in the early 2000s.<sup>39</sup> Like in

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33. See Roger Dunstan, *Gambling in California*, (1997) <http://web.uncg.edu/dc1/courses/viccrime/m2/gambling%20in%20california.html> [<https://perma.cc/PPB9-NE2L>] (last visited June 20, 2018) (noting the ineffectual nature of gambling prohibition on curbing actual betting activities in the United States).

34. *Comm’r v. Groetzinger*, 480 U.S. 23, 35–36 (1987).

35. Rychlak, *supra* note 24, at 45.

36. See David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation of Online Poker*, 12 J. HIGH TECH L. 450 (2012) (discussing the growth of online poker and other forms of online gambling regulations).

37. *Id.* at 463.

38. *Id.* (“An estimated twenty-three million Americans play poker and fifteen million play online for money.” (citing *Topline Findings*, POKER PLAYERS RESEARCH, <http://pokerplayersresearch.com/toplinefindings.aspx> [<https://perma.cc/S2X6-K2EW>] (last visited June 20, 2018))).

39. See *id.* Chris Moneymaker, an amateur poker player, started with \$40 online at Pokerstars.com, won a series of small online satellite tournaments, and eventually won a seat in the 2003 World Series of Poker Main Event. *Id.* at 463–64. Moneymaker placed first in the main event to win \$2,500,000. *Id.* This success story is what attracts so many customers to online poker tournaments and events. See CHRIS MONEYMAKER

early American history, gambling critics noticed this growing market, and federal and state governments attempted to regulate it with inconsistent results.<sup>40</sup>

One major success of this regulation was the events that occurred on “Black Friday” (as it is known in the online poker community).<sup>41</sup> On April 15, 2011, “the U.S. Department of Justice unsealed a 52-page indictment against the top executives of PokerStars, Full Tilt Poker, and Absolute Poker, as well as a [\$3 billion] civil complaint against those companies.”<sup>42</sup> Facing indictment, the companies immediately stopped serving U.S. players, shocking the online poker community and causing outrage among the game’s players.<sup>43</sup>

The perceived moral complications of gambling were amplified by the increase in the availability of gambling.<sup>44</sup> Some of the traditional social barriers to gambling were lessened or removed with the rise in popularity of the internet casino.<sup>45</sup> However, critics emphasized how easier access to gambling could draw in addictive personalities and the financially vulnerable. For example, it is easier

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& DANIEL PAISNER, *MONEYMAKER: HOW AN AMATEUR POKER PLAYER TURNED \$40 INTO \$2.5 MILLION AT THE WORLD SERIES OF POKER 2007–09* (2005); Aaron Angerman, *Great Moments from the World Series of Poker Pt IV: Moneymaker’s Effect on the Main Event*, POKERPAGES.COM, <http://archive.is/3d3Hr> [<https://perma.cc/NZ6V-YNVJ>] (last visited June 20, 2018).

40. See generally Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41 (2010) (discussing the problems of current federal regulations on online gambling, especially with regard to modern technology and states’ rights issues).

41. See Martin Harris, *Black Friday: Reliving Poker’s Darkest Day Five Years Later*, POKERNEWS (Apr. 12, 2016), <https://www.pokernews.com/news/2016/04/black-friday-five-years-later-24506.htm> [<https://perma.cc/66FA-LLNR>] (reflecting on the day several large online poker companies were forced out of the United States after being indicted on federal charges under the UIGEA).

42. *Id.*

43. *Id.*

44. See 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, 790–91 (2006) (designating three categories of the social costs of gambling: (1) adverse effect on individuals, psychological, and financial; (2) underage gambling; and (3) social welfare costs).

45. See *id.* at 798 (“An underage gambler will have an easier time accessing an Internet gambling site than gambling at a casino because it is more difficult for a gambling site to detect if someone is underage than for traditional casinos.”). It is also easier for underage gamblers to work around some forms of age verification procedures online than at a casino. *Id.*



for an underage gambler to access an internet gambling website rather than a casino because gambling sites find it difficult to detect if someone is underage.<sup>46</sup>

Problems with regulation originate from several factors propagated by modern technology: (1) Virtual Private Network (VPN) technologies allowing for geo-location circumvention,<sup>47</sup> (2) off-shore banking and casino websites that operate outside of U.S. jurisdiction,<sup>48</sup> (3) the way in which cryptocurrency adds to user anonymity,<sup>49</sup> and (4) Commerce Clause complications with consistent regulation.<sup>50</sup> More complications with modern regulations are discussed below. With no clear solution to the regulation of online gambling, both federal and state governments have tried to counteract these issues with various pieces of legislation aimed at curbing online gambling. These efforts are examined below.

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46. See *id.* at 791.

47. Brian Pempus, “Screw the Government, Get Yourself a VPN” for Online Poker, *Says Australian Lawmaker*, CARDPLAYER (Feb. 23, 2017), <http://www.cardplayer.com/poker-news/21377-screw-the-government-get-yourself-a-vpn-for-online-poker-says-australian-lawmaker> [<https://perma.cc/89UN-CK72>] (“VPNs are known for helping poker players try to circumvent geo-location restrictions.”).

48. See Tony Batt, *Chances Seem Slim for Passing Net Betting Ban*, CASINO CITY TIMES (Aug. 28, 2006), [www.casinocitytimes.com/article/chances-seem-slim-for-passing-net-betting-ban-55156](http://www.casinocitytimes.com/article/chances-seem-slim-for-passing-net-betting-ban-55156) [<https://perma.cc/E7W3-44Z5>] (“[Internet gambling] has gone from 30 offshore Web sites taking in \$30 million in bets in 1996 to a \$12 billion industry with more than 2,300 Web sites this year.”). See generally King, *supra* note 40, at 55 (discussing the WTO’s ruling against U.S. law in favor of foreign internet gambling operators).

49. Florian Gheorghe, *Is Cryptocurrency the Answer to U.S. Anti-Poker Laws?*, POKERTUBE (Mar. 22, 2016), <https://www.pokertube.com/article/is-cryptocurrency-the-answer-to-us-anti-poker-laws> [<https://perma.cc/EHW4-5Z7S>] (explaining the legal gray area and anonymity associated with cryptocurrency and its impact on online poker games in the United States).

50. See *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 168–69 (S.D.N.Y. 1997) (discussing the application of the Dormant Commerce Clause to state regulation of the internet); see also King, *supra* note 40, at 57 (“[T]he Internet’s architecture seems to force states to choose between two equally unpalatable options [for regulating online gambling]: violating the Dormant Commerce Clause or forgoing enforcement entirely.”).

### III. MODERN ATTEMPTS AT ONLINE GAMBLING REGULATION

There are four main federal statutes that constitute the modern attempts at federal regulation of online gambling: (1) the Wire Act,<sup>51</sup> (2) the Travel Act,<sup>52</sup> (3) the Illegal Gambling Business Act,<sup>53</sup> and (4) the Unlawful Internet Gambling Enforcement Act.<sup>54</sup> These statutes, with the exception of the Unlawful Internet Gambling Enforcement Act, were mostly enacted before the advent of online gambling and have been reinterpreted to make some forms of online gambling illegal.<sup>55</sup> Each of these statutes will be examined in detail below.

#### A. *The Wire Act*

The Wire Act, enacted in 1961, prohibits gamblers from using a wire communication facility to receive bets or send gambling information.<sup>56</sup> Two elements must be present to find a violation of this Act: (1) information transmitted over the wire must assist “in the placing of bets or wagers on any sporting event or contest;” and (2) during the time of transmission, the defendant must have been engaged in the business of wagering.<sup>57</sup> The Wire Act was originally intended for two purposes: (1) to assist states in “the enforcement of their laws pertaining to gambling, bookmaking, and like offenses;” and (2) to “aid in the suppression of organized gambling activities by prohibiting the use of . . . wire communication facilities which are or will be used for the transmission of certain gambling information

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51. See Federal Interstate Wire Act of 1961, 18 U.S.C. § 1084 (2012).

52. See International Travel Act of 1961, 18 U.S.C. § 1952 (2014) (commonly known as the “Travel Act”).

53. See Illegal Gambling Business Act (ILBA) of 1970, 18 U.S.C. § 1955 (2014); see also Jeffrey Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 403 (2002) (explaining the history of the Illegal Gambling Business Act of 1970).

54. See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–67 (2006).

55. See King, *supra* note 40, at 45 (“[The Wire Act, Travel Act, and Illegal Gambling Business Act] have collectively been interpreted to make some, and perhaps all, forms of online gambling illegal.”). The UIGEA, which was enacted in 2006, supplemented these laws by making it illegal for banks to process (and gambling businesses to receive) funds connected to online gambling activities that are illegal under federal or state law. *Id.*

56. See Federal Interstate Wire Act, 18 U.S.C. § 1084 (1994).

57. See Raj, *supra* note 44, at 783.

in interstate and foreign commerce.”<sup>58</sup> It was expected that the Wire Act would serve as an essential tool in combating organized crime syndicates and their related illegal gambling activities.<sup>59</sup> Because the Wire Act was enacted without internet gambling in mind, reinterpretations of the statute were needed in order for it to apply to contemporary illegal gambling.<sup>60</sup>

In the 2001 case *United States v. Cohen*, the United States Court of Appeals for the Second Circuit was asked to decide whether an Antigua-based online sports book company, which operated as a wager platform for popular sports events, violated the Wire Act.<sup>61</sup> The court held that Cohen’s operation of the sports book company involved two distinct wire facilities: the telephone and the internet.<sup>62</sup> These two wire facilities transmitted sports betting information and the wagers themselves, and thus violated the Wire Act.<sup>63</sup> The court’s decision applied the Wire Act to forms of online gambling through express designation of the internet as a wire facility.<sup>64</sup> The Wire Act, a statute designed to hamper organized crime in the 1960s, was therefore interpreted to apply to online gambling.

#### B. *The Travel Act*

The Travel Act, also enacted in 1961, assists states in preventing criminal conduct beyond each state’s individual borders.<sup>65</sup> The Travel Act, when combined with the Wire Act, functions as another tool in the battle against organized crime.<sup>66</sup> The Supreme Court, however, declined to limit the Travel Act to the prosecution of organized crime.<sup>67</sup> In order for a defendant to violate the Travel Act,

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58. *Id.* (citing David B. McGinty, *The Near-Regulation of Online Sports Wagering by United States v. Cohen*, 7 GAMING L. REV. 205, 209 (2003)).

59. Raj, *supra* note 44, at 785.

60. *See id.*

61. *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (discussing the application of the Wire Act to a foreign-based sports book company that did the majority of its business in the United States).

62. *Id.*

63. *Id.*

64. *See id.*

65. 18 U.S.C. § 1952 (2014).

66. *See* Raj, *supra* note 44, at 786 (noting that in order to defeat organized crime and racketeering, the United States needed a way to prosecute organized crime members who resided in one state but engaged in criminal conduct in another).

67. *See* Erlenbaugh v. *United States*, 409 U.S. 239 (1972) (holding that the Travel Act is not limited to the prosecution of organized crime).

there must be: (1) interstate travel or use of a facility in commerce; (2) with the intent to promote an unlawful activity; and (3) the defendant must thereafter perform, attempt to perform, or facilitate an overt act in furtherance of the unlawful activity.<sup>68</sup> This law applies mainly to gambling enterprises and not to individual bettors.<sup>69</sup>

In applying the Travel Act to online gambling, one must analyze the two key sections of the Act: (1) the jurisdictional element of interstate travel; and (2) what constitutes a “business enterprise.”<sup>70</sup> The jurisdictional element of the Travel Act is met with help from the Wire Act, with reference to the “telecommunications component of the internet” or to “any interstate or foreign nexus of payment of the debts resulting from the gambling.”<sup>71</sup> Importantly, an impermissible gambling business enterprise is defined by its continuity and conduct outlawed by a federal or state statute.<sup>72</sup> Thus, the Travel Act has been applied to online gambling in addition to its original purpose of combating organized crime.

### C. *The Illegal Gambling Business Act*

The Illegal Gambling Business Act (ILBA), part of the Organized Crime Control Act of 1970, was enacted in 1970 as a further effort to battle organized crime.<sup>73</sup> The intent of the ILBA, according to the House Report, was to “deal only with large-scale illegal gambling activities and with corrupt state officials that allow them to operate.”<sup>74</sup> “The ILBA makes it a crime to operate an illegal

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68. 18 U.S.C. § 1952 (2000).

69. See Raj, *supra* note 44, at 787 (explaining that a literal reading of the Travel Act precludes its use against bettors or mere customers because they are not engaged in the gambling business either substantively or as accomplices, whereas case law on the Travel Act applying to gambling enterprises is clear that the Act applies to bettors).

70. *Id.*

71. *Id.*

72. *Id.*

73. Pub. L. No. 91-452, § 803(a), 84 Stat. 937 (codified as amended at 18 U.S.C. § 1955 (2012)); Note, *Investigating Dirty Money: Section 1962(A) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1491–92, 1492 n.9 (1974); Raj, *supra* note 44, at 787.

74. Raj, *supra* note 44, at 787 (“The House Report on the ILBA states that the purpose of the statute is to deal only with large-scale illegal gambling activities and with corrupt state officials that allow them to operate.”).

gambling business.”<sup>75</sup> The statute defines an illegal gambling business as any operation that:

- (i) is a violation of the law of a State or political subdivision in which it is conducted;
- (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.<sup>76</sup>

The ILBA can be applied to online gambling, especially the larger website operators. Because internet companies, by their nature, can be run by a relatively small number of people, the most difficult element to meet is the five-person element.<sup>77</sup> However, because courts have broadly construed the terms “conduct” and “finance,” people with attenuated relationships to the gambling business may be counted towards the five-person minimum. Courts have reasoned that “Congress’s intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles . . . . Only customers of the business were to be excluded.”<sup>78</sup> Thus, the ILBA applies to online gambling businesses, as they can meet all the required elements for a violation of the statute.

#### *D. The Unlawful Internet Gambling Enforcement Act*

The Unlawful Internet Gambling Enforcement Act (UIGEA)<sup>79</sup> was added to a maritime and port security bill called the SAFE Port

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75. *Id.*

76. 18 U.S.C. § 1955(b) (2012).

77. Raj, *supra* note 44, at 788 (stating that an online “gambling operation may potentially contract out all of the work necessary to run the operation,” therefore not meeting the five-person requirement of the ILBA). While these contractors might be “aiders and abettors” of the operation, case law clarifies that these people would not count toward the five-person rule of the ILBA. *Id.* (holding that a violation of the statute must exist before an aider and abettor can be found guilty under the ILBA).

78. *United States v. Schullo*, 363 F.Supp. 246, 250 (D. Minn. 1973).

79. Pub. L. No. 109-347, § 802(a), 120 Stat. 1957 (codified as 31 U.S.C. § 5363 (2006)).

Act<sup>80</sup> as a last minute, “unrelated rider.”<sup>81</sup> Unlike previous statutes passed before the internet was created, UIGEA was specifically meant to stifle online gambling rather than combat organized crime and large gambling syndicates.<sup>82</sup> The UIGEA focuses on regulating financial institutions to make it more difficult for United States residents to gamble on offshore internet websites.<sup>83</sup> This is a backdoor way of regulating gambling, and is a last ditch effort to curb some of the perceived negative effects of internet gambling.<sup>84</sup>

The UIGEA “prohibits any person from accepting money from someone who has engaged in unlawful Internet gambling.”<sup>85</sup> Further, the UIGEA allows the Attorney General and the Secretary and the Board of Governors of the Federal Reserve “to prescribe regulations to identify and block gambling-related transactions” at their discretion.<sup>86</sup> This law may help states that ban online gambling enforce their bans more effectively.<sup>87</sup>

Together, the Wire Act, the Travel Act, ILBA, and UIGEA make up the principal federal laws regulating internet gambling in the United States.<sup>88</sup> That being said, federal law does not outright ban online gambling, leaving states to legislate as they think best to serve

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80. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

81. Raj, *supra* note 44, at 789 (first citing Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, § 802, 120 Stat. 1884, 1952-61 (2006)); then citing Jonathan Weisman, *Internet Gambling, Port Deal Reached*, WASH. POST, Sept. 30, 2006, at A08).

82. *Id.*

83. *Id.* (citing 31 U.S.C. § 5361(a) (2006)) (“To justify passage of the Act, Congress relied on four main findings: First, internet gambling is funded primarily through credit cards and wire transfers; second, the National Gambling Impact Study (NGIS) recommended passage of this type of legislation; third, internet gambling is increasing consumer debt problems, and fourth, traditional and former mechanisms of enforcing gambling laws are inadequate.”).

84. *Id.* (citing 31 U.S.C. § 5361(b) (2006)) (explaining that the UIGEA “does not change significantly the current substantive law on Internet gambling”).

85. *Id.* (citation omitted) (noting that this law is aimed at financial institutions and is intended to prevent a gambler from receiving any funds from an offshore casino).

86. *Id.* (citation omitted) (explaining that added specificity results from these officials determining further regulations that identify and block suspected illegal gambling transactions).

87. *Id.* at 790.

88. *Id.* at 783 (“[T]he four main laws that are applicable to Internet gambling: [are] the Wire Act, the Travel Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act.”).

their constituents. In order to fully understand the federal gambling regulation landscape, however, one must analyze gambling on Native American reservations and the Indian Gaming Regulatory Act.<sup>89</sup>

*E. Indian Gaming Regulatory Act*

Native American culture has long supported forms of gambling, and games of skill or athletic events were often combined with wagers.<sup>90</sup> In the late 1970s, Native American tribes turned to high-stakes bingo as a source of revenue in response to declining federal funds and other limited economic development opportunities.<sup>91</sup> These early bingo operations were largely successful, and the increased self-sufficiency of the tribes enticed other tribes to follow suit.<sup>92</sup>

Conflict arose when state governments and the federal government disagreed about which one maintained jurisdiction in taxing or revenue sharing from the tribes' bingo operations.<sup>93</sup> In *Seminole Tribe of Florida v. Butterworth*, the United States Court of Appeals for the Fifth Circuit established a favorable precedent for tribes to continue opening bingo parlors,<sup>94</sup> leading to a steady increase in Indian bingo parlors and other gaming among the tribes.<sup>95</sup> Congress generally supported this tribal interest because it allowed Native Americans greater self-sufficiency<sup>96</sup> and because

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89. See Pub. L. No. 100-497, 102 Stat. 2467–86 (1988) (codified as amended at 25 U.S.C. §§ 2701–21 (2012)).

90. Prum, *supra* note 28, at 250 (explaining that Native Americans had forms of gaming that originated through their own unique culture).

91. *Id.* In 1975, New York's Oneida Tribe started to run bingo parlors, which was followed by Florida's Seminole Tribe in 1979. Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic"*, 1996 BYU L. REV. 407, 434 (1996).

92. Prum, *supra* note 28, at 250.

93. *Id.* at 251; see also *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981) (holding that the Seminole high-stakes bingo games were merely regulated, not prohibited by state law, making bingo a civil issue instead of a criminal issue, and were therefore immune to a shut-down by the Florida sheriff under the Florida statute).

94. *Seminole Tribe of Florida*, 658 F.2d at 316.

95. Dunstan, *supra* note 33 (explaining the growth and evolution of Native American casino gambling on reservations in the United States).

96. Prum, *supra* note 28, at 251. Full support of Congress was not given, however, and some states and lawmakers had concerns about allowing more forms

living conditions were poor on reservations compared to the rest of the United States.<sup>97</sup> There was still some disagreement, however, about the breadth of Native Americans' power to conduct gambling on their reservations, which led to the passage of the Indian Gaming Regulatory Act (IGRA).<sup>98</sup>

IGRA creates three "classes" of gaming that allow for differing levels of approval, oversight, and gambling activities on Native American land.<sup>99</sup> Class I gaming is under complete control of the tribes, and it includes gambling for small prizes and games associated with tribal ceremonies.<sup>100</sup>

Class II gaming includes non-electronic games such as card games, lottery-style games, and bingo.<sup>101</sup> These games are only legal on the reservations if the state itself allows that form of a game, or at least does not expressly prohibit it.<sup>102</sup> Further, tribes must create an ordinance approved by the Chairman of the National Indian Gaming Commission to conduct Class II gaming.<sup>103</sup> While Class II

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of gambling on Native American reservations, claiming that they needed authority to combat organized crime. *Id.* It is speculated, however, that states were mostly concerned with a potential loss in tax revenue. *Id.*

97. See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–18 (1987) ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. . . . These are important federal interests. . . . More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises."); Duane Champagne, *Living or Surviving on Native American Reservations*, INDIAN COUNTRY TODAY (Sept. 27, 2017), <https://indiancountrymedianetwork.com/news/living-or-surviving-on-native-american-reservations/> [https://perma.cc/FRX7-Y9AR] (describing poverty on reservations and discussing some historical reasons for this poverty).

98. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified in scattered sections of 25 U.S.C.). Ronald Reagan signed the IGRA with the intent of permitting bingo halls and other small gaming operations. Prum, *supra* note 28, at 253.

99. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified in scattered sections of 25 U.S.C.).

100. 25 U.S.C. § 2703(7).

101. *Id.*

102. *Id.* § 2703(7)(b)(1)(A).

103. *Id.* § 2703(7)(b)(1)(B).



games are mostly under tribal control, the National Indian Gaming Commission has some oversight capacity.<sup>104</sup>

Class III gaming, which must be negotiated between the state that holds the reservation and the tribe itself, includes casino games.<sup>105</sup> Class III activities have three requirements before they are permitted: (1) the state must allow some form of gaming;<sup>106</sup> (2) the tribe must pass an ordinance authorizing the gaming that will occur;<sup>107</sup> and (3) the gambling must comply with the agreed-upon terms.<sup>108</sup> Further, states are required to act in good faith in constructing a compact with Native American tribes for gambling activities.<sup>109</sup> Thus, though different states have varying levels of agreements with the tribes located within their borders, IGRA allows many tribes to offer a range of gambling activities,<sup>110</sup> further delegating federal authority to the states in regulating forms of gambling as they see fit.

#### F. Differing State Regulations

State regulation of online gambling varies widely between individual states.<sup>111</sup> Some states, like Utah and Hawaii, have banned all forms of gambling, online or otherwise.<sup>112</sup> In fact, Utah's absolute

104. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified in scattered sections of 25 U.S.C.).

105. 25 U.S.C. § 2710(d).

106. *Id.* § 2710(d)(1)(B).

107. *Id.* § 2710(d)(1)(A).

108. *Id.* § 2710(d)(1)(C).

109. *Id.* § 2710(d)(3)(A).

110. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified in scattered sections of 25 U.S.C.).

111. See Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. OF THE NAT'L ASSOC. OF ADMIN. L. JUDICIARY 528, 528 n.5 (2014) (pointing out Congress's understanding, as of 2013, of the "need for federal enforcement [of online gambling] because purely state regulation . . . varies widely between and among states, and states may not be able to adequately meet the challenges inherent in enforcing Internet gambling restrictions within their borders, especially against sophisticated out-of-state operators").

112. See *Legal Online Gambling in Hawaii for 2017*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states/hawaii/> [https://perma.cc/SHH2-Q4U2] (last visited June 20, 2018) ("Hawaii is one of the few states in the US that . . . doesn't have any type of legal gambling entertainment."); *Utah Legal Online Gambling Guide 2017*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states/utah/> [https://perma.cc/2KNL-9BH2] (last visited June 20,

prohibition on gambling is codified in its constitution.<sup>113</sup> Other states—such as Nevada, New Jersey, Delaware, and recently, Pennsylvania—have state-regulated online casino games and sports betting rooms limited by geolocation technology that restricts usage within the geographic limits of the state.<sup>114</sup> Still, other states—such as Tennessee—allow some state-sponsored gambling such as lotteries, raffles, and other games run by the state itself.<sup>115</sup> These states often use tax revenue from the state-sponsored gambling for more “morally appropriate” causes, like school funding.<sup>116</sup> The variety of approaches demonstrates the need for individualized gambling regulation that considers, balances, and prioritizes all appropriate interests.

### G. *Problems with Modern Regulations*

Prior to the passage of UIGEA, there was virtually no way to enforce online gambling prohibitions in the United States, neither at the federal nor state level.<sup>117</sup> This is because off-shore internet gambling firms, who are outside U.S. jurisdiction, had an incentive

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2018) (“[There is] nothing legal in the state of Utah that remotely resembles gambling, not even a state lottery.”).

113. UTAH CONST. art. VI, § 27 (“The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose.”); *see also* Raj, *supra* note 44, at 781 (noting that in 2001, Tennessee amended its Constitution to permit a state lottery). Before this amendment, Tennessee had a complete prohibition on gambling similar to Utah and Hawaii. *Id.*

114. *See* Chris Grove, *PA Online Casino and Poker—Latest News and Analysis*, ONLINE POKER REP. (Jan. 3, 2018, 2:34 PM), <https://www.onlinepokerreport.com/us/pa/> [<https://perma.cc/7MQQ-7LX6>] (noting that the Pennsylvania bill legalizes and/or regulates online lottery, video gaming terminals at truck stops, satellite casinos, daily fantasy sports, and sports betting); *Delaware Legal Online Gambling 2017*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states/delaware/> [<https://perma.cc/6L7H-7489>] (last visited June 20, 2018) (discussing Delaware’s online gambling regulations); *New Jersey Online Gambling 2017*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states/new-jersey/> [<https://perma.cc/N7RT-NT9T>] (last visited June 20, 2018) (discussing New Jersey’s online gambling regulations); *Nevada Online Gambling Guide*, LEGAL BETTING ONLINE, <http://www.legalbettingonline.com/states/nevada/> [<https://perma.cc/QYQ8-USKJ>] (last visited June 20, 2018) (discussing Nevada’s online gambling regulations);

115. *See, e.g.*, TENN. CODE ANN. § 39-17-506 (2014) (exempting the Tennessee Education Lottery from consideration as the illegal running of a lottery).

116. *See* Raj, *supra* note 44, at 781.

117. *Id.* at 806.

to exploit any weaknesses or loopholes in the enforcement of a gambling prohibition.<sup>118</sup> Thus, lawmakers have recently diverted their attention away from the actual gambling websites and moved their attention towards the financial institutions that help them function.<sup>119</sup>

State and federal governments have focused on three areas to enforce prohibitions of online gambling: (1) credit card companies that allow would-be gamblers to deposit money into online gambling websites; (2) online payment providers that are developed to help e-commerce transactions; and (3) measures that hinder the transfer of gambling data across the internet.<sup>120</sup>

The focus on financial institutions avoids the jurisdictional enforcement issues against off-shore companies, which are generally not subject to the laws of the United States.<sup>121</sup> Theoretically, this focus on financial institutions also helps prevent individual U.S. residents who are prohibited from gambling by state law from gambling online.<sup>122</sup> This prevention occurs because it regulates the two main ways U.S. residents fund their internet gambling—credit cards or other online payment providers such as PayPal.<sup>123</sup>

Increased attention given to financial institutions has led to many credit card issuers implementing policies that prohibit internet gambling-related transactions.<sup>124</sup> However, policies to shield

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118. *Id.* Many offshore firms were able to operate their websites in the United States without fear of prosecution. *Id.* Without any meaningful threat to these internet gambling websites, they flourished in the United States despite the bans on gambling businesses that resulted from the Wire Act, Travel Act, and the Illegal Gambling Business Act. *See id.*

119. *See* Adrian Parke & Mark Griffiths, *Why Internet Gambling Prohibition Will Ultimately Fail*, 8 GAMING L. REV. 295, 296–99 (2004) (discussing U.S. efforts to prohibit internet gambling).

120. *See* Raj, *supra* note 44, at 806, 809–10 (noting that most of the enforcement issues are inherently technological in nature and suggesting that the government fining of PayPal for aiding online gambling removed PayPal from online gambling entirely, which transferred the funding mechanism to overseas firms or online casinos themselves).

121. *Id.* at 808 (“Currently, a large problem is that all the online casinos exist outside the effective control of any state or federal government.”); *see also* Parke, *supra* note 119, at 296–97.

122. *See* Raj, *supra* note 44, at 807 (“For U.S. residents to gamble over the Internet, the online casino must have the ability to receive and process payments from within the United States.”).

123. *See id.* at 809–11.

124. *See id.* at 807 (noting that, as a result of increased pressure from law

oneself from liability, detection, and enforcement of these transactions are entirely separate things.<sup>125</sup> These companies struggle to deliver—even with pressure from law enforcement.<sup>126</sup> UIGEA aims to help prevent this problem. In particular, UIGEA allows the Attorney General and the Board of Governors of the Federal Reserve System to help create policies and procedures for detection and enforcement.<sup>127</sup>

Some gamblers use online payment providers such as PayPal and Neteller to get around the prohibition on credit card transactions for internet gambling-related activities.<sup>128</sup> The difference between these transactions and a credit card is that the online payment provider is funded before it is used in a transaction, adding one more step in the process between the individual's money and the online gambling website.<sup>129</sup> As a result, detection and enforcement of bans on internet gambling transactions remains an almost impossible task.<sup>130</sup>

The emergence of cryptocurrency,<sup>131</sup> such as Bitcoin,<sup>132</sup> further complicates the issue. Because the digital currencies use

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enforcement agencies, Bank of America, Fleet, Direct Merchant's Bank, Chase Bank, American Express, and Discover have policies that prohibit their cards from being used for internet gambling purposes).

125. *Id.* at 807–08.

126. *Id.* at 807–11.

127. *Id.* at 808; Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5364 (2006).

128. Raj, *supra* note 44, at 809 (“Gamblers use online payment providers such as PayPal and Neteller to circumvent the system when credit card companies deny their gambling-related transactions.”); *see also* Parke, *supra* note 119, at 296–98 (discussing the efforts of the United States in prohibiting internet gambling).

129. *See* Raj, *supra* note 44, at 809 (noting that these online payment providers also allow a consumer to fund the account via credit card transactions, making determining whether money is deposited for gambling or other legitimate activities impossible).

130. *Id.* at 809–10.

131. *Cryptocurrency*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/cryptocurrency.asp> [<http://perma.cc/2347-KQ8C>] (last visited June 20, 2018) (“A cryptocurrency is a digital or virtual currency that uses cryptography for security.”).

132. *Bitcoin*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/bitcoin.asp> [<http://perma.cc/SKG4-BJT2>] (last visited June 20, 2018) (explaining that Bitcoin is a digital currency created in 2009 that follows a set of ideas written by Satoshi Nakamoto, offering low transactions fees and operated by a decentralized authority). Using peer-to-peer technology, Bitcoin facilitates instant payments, and the total market cap for all bitcoin in circulation is over \$7 billion USD. *Id.* As of February 2018, the value of a single bitcoin was worth about \$8,524. *Bitcoin Price*

cryptography for security, it is extremely difficult to counterfeit.<sup>133</sup> The most defining feature of cryptocurrencies, however, is their decentralized nature.<sup>134</sup> Cryptocurrencies are not issued by a central bank or government, but rather are “mined” through digital means.<sup>135</sup> This leaves cryptocurrencies outside the range of government currency manipulation or other interference.<sup>136</sup> With the added anonymity that cryptocurrency brings<sup>137</sup>—adding yet another step between the individual player, the payment provider, and the online casino—enforcement on financial institutions, credit card companies, and online payment providers becomes increasingly futile.<sup>138</sup>

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⌘ *Updates*, INVESTOPEDIA, <https://www.investopedia.com/bitcoin/> [<https://perma.cc/8Q9C-V7V2>] (last visited June 20, 2018). *See generally* Ameer Rosic, *What is Cryptocurrency: Everything You Need To Know [Ultimate Guide]*, BLOCK GEEKS, <https://blockgeeks.com/guides/what-is-cryptocurrency/> [<https://perma.cc/EU5F-S6N4>] (last visited June 20, 2018) (“[C]ryptocurrencies have become a global phenomenon known to most people.”).

133. *See Cryptocurrency*, *supra* note 131.

134. *See id.*

135. *See Difficulty (Cryptocurrencies)*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/difficultycryptocurrencies.asp#ixzz56kqClisN> [<https://perma.cc/6CT7-96UE>] (last visited June 20, 2018) (“Bitcoin and other cryptocurrencies that use proof-of-work blockchains are maintained through a process called mining. In this system, miners—computers running the cryptocurrency’s software client—compete to find a new block, adding the most recent batch of transaction data to the chain. They receive fees and a (in some cases) a reward of new tokens in return.”); *Bitcoin*, *supra* note 132 (“Bitcoin mining is the process through which bitcoins are released to come into circulation. Basically, it involves solving a computationally difficult puzzle to discover a new block, which is added to the blockchain, and receiving a reward in the form of few bitcoins.”).

136. *See What is Cryptocurrency*, *supra* note 132 (explaining cryptocurrencies “take away the control central banks take on inflation or deflation by manipulating the monetary supply”).

137. *See Cryptocurrency*, *supra* note 131 (noting that the anonymous nature of cryptocurrency transactions makes them “well-suited for a host of nefarious activities, such as money laundering and tax evasion.”). Incidentally, for the same reason that cryptocurrency is well-suited for illegal activities like money laundering and tax evasion, it is also well-suited for online-gambling related transactions. *See Bitcoin*, *supra* note 132.

138. *See* Caroline Winter, *Poker Websites See Bitcoin Currency as Way to Avoid U.S. Laws*, BLOOMBERG NEWS ENTERPRISE (Jan. 3, 2013, 5:00 PM), <https://www.bloomberglaw.com/ms/product/blaw/document/MG2K496S972L> [<https://perma.cc/CDD5-LATT>] (“The online currency may allow American gamblers to avoid running afoul of complex U.S. laws that prevent businesses from knowingly accepting money transfers for Internet gambling purposes.”); Gheorghe,

The other focus of modern regulation on internet gambling is the prohibition of transferring of internet gambling data.<sup>139</sup> One way of stopping the flow of gambling data is through the use of “content filtering technology.”<sup>140</sup> This technology is implemented through “IP Address Blocking” and “DNS Blocking,” both of which require the Internet Service Provider (ISP) to adopt these measures.<sup>141</sup> These measures are, again, largely futile with the advances in technology through the use of “anonymizers” or VPN services that disguise web traffic.<sup>142</sup> This method also leads to troubling censorship concerns in its enforcement, forcing ISPs to filter content that the government deems unseemly.<sup>143</sup> This is a slippery slope and should not be encouraged, especially when its effect on the negative effects of gambling is probably negligible with such easy workarounds by both offshore casinos and individual internet gamblers.<sup>144</sup>

#### IV. ONLINE GAMBLING IN MINNESOTA

##### A. *Gambling Context in Minnesota*

Gambling in Minnesota can be traced back to at least 1857, when the Minnesota Constitution referenced a prohibition on

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*supra* note 49 (explaining the use of cryptocurrency in online gambling-related transactions.).

139. See Raj, *supra* note 44, at 811.

140. *Id.* at 811 (“Content filtering is a technology most notable for preventing children from accessing sensitive web sites. However, as a theoretical matter, content filtering can be used in other areas.”).

141. *Id.* (explaining that IP filtering can be implemented quickly and easily by ISPs, but DNS filtering would take much further effort; and, failure by an ISP to implement such systems creates a problematic loophole).

142. See Pempus, *supra* note 47 (explaining how VPNs allow an individual gambler to evade IP address detection); *Ensuring Complete and Continuous Anonymity Online*, ANONYMIZER, <https://www.anonymizer.com/how-it-works>[<https://perma.cc/LV2K-MWLC>] (last visited June 20, 2018) (“Anonymizer’s personal VPN routes all your traffic through an encrypted tunnel directly from your laptop to our secure and hardened servers and network. We then mask your REAL IP address to ensure that you have complete and continuous anonymity for all your online activities.”).

143. See McCullagh, *supra* note 8 (“[T]here is an abundance of evidence that implementation of the Act [in Pennsylvania allowing the attorney general to force ISPs to filter content] has resulted in massive suppression of speech protected by the First Amendment.”).

144. See *id.*; Pempus, *supra* note 47.

“lotteries.”<sup>145</sup> Where there is gambling, there is pressure to suppress gambling.<sup>146</sup> In fact, when the Minnesota Constitution was adopted in 1858, it had a provision that expressly prohibited the legislature from authorizing “any lottery or the sale of lottery tickets.”<sup>147</sup>

Although gambling was banned by the state, it continued to flourish in underground card games and slot machines—commonly found in restaurants and bars—until gambling was allowed in the form of bingo for charitable purposes.<sup>148</sup> Then, in 1963, the Minnesota Legislature recodified the state’s criminal laws and exempted “private social bets not part of or incidental to organized, commercialized, or systematic gambling” from its general prohibition on gambling, other than bingo.<sup>149</sup> This allowed smaller-scale gambling and demonstrated the state’s increasingly lenient attitude towards gambling.<sup>150</sup> Later, this leniency was further expanded upon as Minnesota legalized raffles, wheel of fortune, tipboards, and pull-tabs.<sup>151</sup> Bingo continued to increase in popularity, and several high-stakes bingo halls opened on Native American reservations.<sup>152</sup> Horse racing was also legalized after a referendum of Minnesota voters allowed the measure to move to a

145. MINNESOTA STATE LOTTERY, OVERVIEW 8 (2013), <https://www.leg.state.mn.us/docs/2013/other/130693.pdf> [<https://perma.cc/D5DL-63P2>] (providing a summary of gambling in Minnesota covering the history and legal status of gambling in the state) [hereinafter MINNESOTA OVERVIEW 2013].

146. JOHN WILLIAMS, GAMBLING IN MINNESOTA: A SHORT HISTORY, MINNESOTA HOUSE RESEARCH DEPARTMENT 7 (2005) (“While the urge to gamble is probably older than written history, in Minnesota the urge to suppress gambling is older than statehood.”).

147. *Id.*

148. MINNESOTA STATE LOTTERY, GAMBLING IN MINNESOTA: AN OVERVIEW 5 (2011), <http://www.northstarproblemgambling.org/wp-content/uploads/2012/01/Gambling-in-Minnesota-2011.pdf> [<https://perma.cc/28QN-98G2>] [hereinafter MINNESOTA OVERVIEW 2011]. Slot machines also saw a rise and fall in Minnesota since their invention in the early 1900s. *Id.* At one point in 1946, the federal government taxed 8,479 slot machines in Minnesota. *Id.* After Luther Youngdahl took office and took action against slot machines in 1952, the federal government taxed only two slot machines in Minnesota. *Id.* at 6; *see also* WILLIAMS, *supra* note 146, at 7–8.

149. WILLIAMS, *supra* note 146, at 8.

150. *See id.*

151. *Id.* at 9.

152. *Id.* at 30. By 1987, at least fourteen high-stakes bingo halls were open on Minnesota reservations, including the Little Six parlor on the Mdewakanton Sioux reservation near Shakopee. *Id.*

ballot.<sup>153</sup> The first track, Canterbury Downs in Shakopee, opened in 1985 and is still operating today.<sup>154</sup>

In 1967, for the first time in Minnesota history, the state itself benefited from gambling when the legislature extended the state's sales tax to bingo games.<sup>155</sup> The idea that the state could raise revenue through gambling was enticing to lawmakers, and efforts to enact a state lottery were put into effect.<sup>156</sup> Finally, in 1988, Minnesota voters approved a constitutional amendment changing the constitution to permit a "lottery operated by the state."<sup>157</sup>

After the federal government passed IGRA in 1988,<sup>158</sup> Native American tribes were given the opportunity to negotiate with states over the regulation of gambling on Native American reservations.<sup>159</sup> Under IGRA, any form of gambling not expressly prohibited by the state for any purpose could be negotiated.<sup>160</sup>

Minnesota entered into IGRA negotiations with eleven Native American tribes between 1989 and 1991.<sup>161</sup> The state and the eleven tribes first reached an agreement governing video games of chance between 1989 and 1991.<sup>162</sup> Later negotiations permitted tribes to conduct blackjack in exchange for a tribal agreement not to pursue other forms of gambling.<sup>163</sup> This was the beginning of the large-scale Native American casino industry in Minnesota. By 1992, there were fourteen casinos in the state with more than 9,000 video gambling machines.<sup>164</sup> A year later, the number of Native American casinos increased to seventeen.<sup>165</sup>

In the mid-1990s, the rapid expansion of gambling caused by IGRA slowed, as Minnesota lawmakers needed to analyze the

153. MINNESOTA OVERVIEW 2011, *supra* note 148, at 6–7. The Minnesota legislature decided that a public referendum to gauge the acceptance of gambling on horse racing was safer than putting the measure to a vote immediately. *Id.* The measure passed 64% to 36%. *Id.*

154. MINNESOTA OVERVIEW 2013, *supra* note 145, at 6.

155. *Id.*

156. MINNESOTA OVERVIEW 2011, *supra* note 148, at 6.

157. MINNESOTA OVERVIEW 2013, *supra* note 145, at 9 (citing MINN. CONST. art. XIII, § 5).

158. WILLIAMS, *supra* note 146, at 31.

159. *Id.*

160. MINNESOTA OVERVIEW 2013, *supra* note 145.

161. WILLIAMS, *supra* note 146, at 32.

162. *Id.*

163. *Id.* at 34.

164. *Id.*

165. *Id.* at 4.



situation.<sup>166</sup> However, in 1999, the government authorized card clubs at licensed racetracks, such as Canterbury Park.<sup>167</sup> In 2005, the government legalized limited Texas Hold ‘em poker tournaments in restaurants and bars.<sup>168</sup> Finally, in 2012, an electronic form of pull-tabs and electronically-linked bingo games were authorized to combat charitable gambling’s declining revenues and to help fund the new Minnesota Vikings stadium.<sup>169</sup>

There was no continuous expansion during this time period, however, and in 2009, Minnesota ordered ISPs to block customer access to certain online gambling sites,<sup>170</sup> citing the UIGEA provisions that allow for state governments to enforce the statute.<sup>171</sup> This and other similar governmental actions raised First Amendment concerns of overbreadth by essentially censoring entire websites, where it is plausible that not everything on the website is illegal speech.<sup>172</sup> The Interactive Media Entertainment and Gaming Association (IMEGA) challenged the action in federal district court.<sup>173</sup> IMEGA argued that: (1) the state’s action violated the right

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166. MINNESOTA OVERVIEW 2011, *supra* note 148, at 7–8. Attorney General Hubert Humphrey III stated at the time, “[w]e’ve been expanding at a very rapid pace. We’ve got to stop, got to take a breath and see what we have, see how well it’s operating.” *Id.* at 8.

167. *Resources on Minnesota Issues: Gambling*, MINN. LEGIS. REFERENCE LIBR. (Oct. 2017), <https://www.leg.state.mn.us/lrl/guides/guides?issue=gambling> [<https://perma.cc/9XA6-MVMC>] (last visited June 20, 2018).

168. MINNESOTA OVERVIEW 2011, *supra* note 148, at 8.

169. *See generally* MINNESOTA OVERVIEW 2013, *supra* note 145, at 6, 8 (describing charitable gambling).

170. McCullagh, *supra* note 8.

171. *See* RUSSELL K. MAYER, TAKING ACTION ON INTERNET GAMBLING: FEDERAL POLICYMAKING 1995–2011, 25 (2014) (using the rise and fall of the internet gambling industry to illustrate a new approach to understanding how public policy is made in the United States).

172. *See* McCullagh, *supra* note 8 (comparing the Minnesota order to an analogous Pennsylvania law which allowed the Attorney General to order ISPs to block possibly illegal websites). A federal judge in Philadelphia struck down the law for violating the First Amendment, stating, “[t]here is little evidence the act has reduced the production of [illegal activity] . . . . On the other hand there is an abundance of evidence that implementation of the Act has resulted in massive suppression of speech protected by the First Amendment.” *Id.* (citing *Ctr. For Democ. & Tech. v. Pappert*, 337 F. Supp. 2d 606, 611 (E.D. Pa. 2004)).

173. *See* *Interactive Media Entm’t & Gaming Ass’n v. Gonzales*, No. CIV.A. 07-2625MLC, 2008 WL 5586713, at \*1–11 (D.N.J. Mar. 4, 2008), *aff’d*, *Interactive Media Entm’t & Gaming Ass’n Inc. v. Att’y Gen. of U.S.*, 580 F.3d 113 (3d Cir. 2009); MAYER, *supra* note 171, at 25.

of Minnesotans to access indisputably legal material contained on these sites and to participate in legal online discussions;<sup>174</sup> and (2) due to the nature of the technology used for blocking access, the statute could not be enforced fairly and comprehensively,<sup>175</sup> and was therefore discriminatory.<sup>176</sup> As a result of the IMEGA challenge, the Minnesota Attorney General rescinded the blacklist order before it was resolved in court.<sup>177</sup> This series of events illustrates the difficulty of enforcing laws like UIGEA when it comes to preventing internet gambling. Attempts to do so are often either cost prohibitive—such that any enforcement is too costly to see any meaningful effect on the diminishing of the illegal activity—or simply overbroad, raising First Amendment concerns.<sup>178</sup>

Today, after near continuous expansion of gambling in Minnesota,<sup>179</sup> Minnesotans have many options to gamble in the state.<sup>180</sup> Slot machines and blackjack are readily available at any of the eighteen casinos located on tribal land.<sup>181</sup> Lottery tickets for the state lottery can be purchased at many retail outlets throughout the state.<sup>182</sup> Card games like Texas Hold ‘em can be played at the

174. *Interactive Media Entm’t & Gaming Ass’n*, 2008 WL 5586713, at \*6–8; MAYER, *supra* note 171, at 25.

175. Brief for Plaintiff at 49, *Interactive Media Entm’t & Gaming Ass’n v. Gonzales*, 2008 WL 5586713 (D.N.J. Mar. 4, 2008) (No. CIV.A. 07-2625MLC), 2010 WL 5916896 at 49.

176. See MAYER, *supra* note 171, at 25. This is because of the way the internet is designed. Many websites share one IP address. *Id.* Blocking one IP address makes the entire shared list inaccessible. *Id.* Thus, blocking an IP address that is used as an internet gambling website may also block other legal websites, making the action overbroad and violating the First Amendment. See *id.*

177. *Id.*

178. See *id.*

179. Summarizing the major developments of Minnesota gambling legislation, the Minnesota Legislative Reference Library provides an excellent guide illustrating the history of this topic and operates as a general timeline. See *Resources on Minnesota Issues: Gambling*, *supra* note 167 (showing legislative progression from HF 1303; Bingo legalized in 1945, to HG1825; Canterbury Park granted authority to establish a card club in 1999).

180. MINNESOTA OVERVIEW 2013, *supra* note 145, at 7. Many Minnesotans participate in these many options of gambling. A survey conducted by the Minnesota State Lottery and St. Cloud State University showed that 76% of Minnesotan adults had participated in at least one form of the available gambling methods in Minnesota in 2012. *Id.*

181. MINNESOTA OVERVIEW 2011, *supra* note 148, at 8.

182. *Id.*

racetrack card clubs or in tournaments in restaurants and bars.<sup>183</sup> Pull-tabs and bingo, even in electronic form, can be enjoyed in many more establishments.<sup>184</sup> Finally, Minnesotans can leave the state to play other casino games, and many Minnesotans participate in the relatively gray area of online gambling.<sup>185</sup>

*B. Minnesota Tribal Compacts*

According to some commentators, Minnesota compacts are some of the most favorable to tribes in the United States today.<sup>186</sup> None of Minnesota's twenty-two separate compacts with eleven Native American tribes require Native American-owned gambling operations to provide any revenue or benefits to the state.<sup>187</sup> And unlike many other states, the Minnesota compacts do not have a provision that requires a periodic opening of the compacts to renegotiation.<sup>188</sup> Accordingly, Minnesota misses out on significant amounts of revenue compared to other states.<sup>189</sup> Connecticut, for example, received between \$300 and \$400 million a year from just two Native American casinos in the mid-2000s.<sup>190</sup> Minnesota also lacks any leverage to renegotiate these compacts, as the Native American tribes have no incentive to change their favorable terms without a mandatory renegotiation period.<sup>191</sup> With the Minnesota government always looking for sources of income, many lawmakers

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183. *Id.*

184. *Id.*

185. *Id.* ("They can leave the state to gamble at resort casinos in places like Nevada or Mississippi, play at riverboat casinos in Iowa or Illinois, visit a 'racino' in Iowa, play gaming machines in bars and restaurants in South Dakota or Manitoba, or play charitable blackjack in North Dakota. And they can, and do, participate in unregulated and possibly illegal activities such as sports pools and wagering on the Internet.")

186. See Briana Bierschbach, *20 Years Later, State-Tribal Gaming Compacts Still Produce Friction*, MINN. LAW. (Sept. 21, 2011), <http://minnlawyer.com/2011/09/21/20-years-later-state-tribal-gaming-compacts-still-produce-friction/> [<https://perma.cc/8YFR-9G7Z>] (noting the differences between Minnesota state-tribal gaming contracts and other state compacts).

187. *See id.*

188. *See id.*

189. *Id.* Some estimate that gambling revenues from Native American casino operations in Minnesota are between \$4 billion and \$10 billion annually. *Id.*

190. *Id.*

191. *See id.* Each Minnesota tribal compact remains in effect until renegotiated. Both parties, however, must be willing to come to the table for any renegotiations to begin.

have shown interest in the untapped source of potential tax revenue that could be gained from renegotiating these compacts.<sup>192</sup>

The problem for the Minnesota government began by underestimating the popularity of gambling.<sup>193</sup> Newspapers at the time did not even publish reports until after the deals were already made.<sup>194</sup> Since few negotiators at the time thought that the tribal compacts were particularly important, the agreements hindered future state interests in gambling revenues.<sup>195</sup>

This problem was compounded when the Native American tribes began accumulating large sums of money, funding a political force in Saint Paul, and fighting any political action aimed at breaking the tribes' monopoly on casino gambling in Minnesota.<sup>196</sup> As Native American gambling interests and influence increased in Minnesota, and as Republican-proposed legislation advocated for state competition with tribal casinos, most of the Minnesota tribes naturally solidified their support for the Democratic-Farmer-Labor Party in the early 2000s.<sup>197</sup> Political ideas to break this monopoly included the creation of a major gambling facility located in the metro area (and off tribal land, therefore allowing taxation), authorizing electronic gambling in bars and restaurants, and the construction of a "racino"—a racetrack with gambling facilities like slot machines, blackjack, or other casino games.<sup>198</sup>

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192. *See id.*

193. *See id.* One of the negotiators at the time, former Democratic-Farmer-Labor (DFL) Party Senate Majority Leader Dean Johnson, remembered that most people "thought [Native American gambling] was going to be a nickel-and-dime operation—just a few machines here and there." *Id.*

194. *Id.*

195. *Id.*

196. *Id.*; *see also* Charlie Vig & Keven Leecy, *Don't Let Tribal Gaming Off the Reservation*, STAR TRIB. (Oct. 27, 2013, 6:31 PM), <http://www.startribune.com/dont-let-tribal-gaming-off-the-reservation/229324201/> [<https://perma.cc/8Q4G-YVY8>] (demonstrating tribal leaders' opposition to any gambling expansion off of tribal land because of their belief that "Indian gaming is and should remain a reservation-based economic development tool that helps fund the vital tasks of tribal governments, create jobs for Minnesotans and improve the lives of Indian people").

197. *See* Bierschbach, *supra* note 186.

198. *Id.* Other attempts at breaking the Native American gambling monopoly included a 2004 bill to ban gambling in the state altogether unless Minnesota tribes renegotiated their compacts to share revenue with the state. *Id.* The Minnesota tribes that benefit the least from the current tribal compacts and the state also made a joint effort to break the monopoly by proposing a state-tribal casino venture that would be located in the metro area (off of tribal land). *Id.* This venture was heavily

Legalizing internet gambling in Minnesota could potentially hurt the tribal monopolies on gambling by creating another accessible opportunity for Minnesotans to gamble outside tribal land.<sup>199</sup> Thus, it is natural for Minnesota tribes to oppose an expansion of internet gambling and view it as a slippery slope, as expansion would lead states to aggressively compete with tribal casinos, which is contrary to the intent of IGRA.<sup>200</sup> Tribes may also argue that “[t]he market in most states simply isn’t big enough to sustain healthy tribal gaming trying to compete with new state authorized or sponsored nontribal gaming.”<sup>201</sup> However, one would have to take the tribes at their word regarding the size of the gambling market because tribes are not obligated by law to release their gambling revenue data.<sup>202</sup>

*C. The Impact of Gambling in Minnesota*

Without question, Minnesota tribal casinos have a positive economic impact on the state.<sup>203</sup> After conducting a study in 2016, the Minnesota Indian Gaming Association (MIGA) noted several key findings on the direct impact of Native American gaming:

- (1) The combined Indian casinos and related ancillary facilities are the fourteenth-largest employer in Minnesota, with an annual average of 15,287 employees;
- (2) Tribally-owned casinos and non-gaming enterprises pay over \$500 million annually in earnings and benefits to their employees and generate approximately \$126 million in payroll-related taxes each year;

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opposed by the Minnesota Indian Gaming Association (MIGA), indicating that not all tribes have equal interests in the current compacts. *Id.*; see also Vig & Leecy, *supra* note 196 (demonstrating MIGA’s opposition to tribal gaming located off tribal land).

199. Vig & Leecy, *supra* note 196.

200. *Id.* (noting that the congressional intent behind the IGRA was to stimulate economic development and job creation on Indian reservations, which in turn would move tribal governments closer to self-sufficiency).

201. *Id.*

202. Bierschbach, *supra* note 186.

203. See MINN. INDIAN GAMING ASS’N, ECONOMIC IMPACT OF INDIAN GAMING IN MINNESOTA, (Aug. 2016), <http://www.mnindiangamingassoc.com/wp-content/uploads/2016/10/2016-MIGA-ECONOMIC-IMPACT-STUDY.pdf> [<https://perma.cc/TKP9-G6MJ>] (presenting an analysis of the economic impact, including tax revenue generated, of Indian gaming on tribal, local, and state economies as well as employment, tourism, and government services).

- (3) Annual purchases for goods and services for ongoing operations are over \$717 million, including over \$482 million from Minnesota vendors;
- (4) Over the past twenty-five years, Minnesota tribes have invested more than \$2.5 billion in their casinos and tribally-owned enterprises, including almost \$200 million in 2015 alone and an investment projection of \$300 million in 2016–2017; and
- (5) Minnesota Indian casinos attract almost 23 million visitors each year, which includes more than 2.4 million visitors from outside Minnesota, making Indian gaming the second-largest tourism attraction in the state (second only to the Mall of America).<sup>204</sup>

This report shows the success and growth of tribal gambling in Minnesota.<sup>205</sup> Further, it shows that, while the State may not directly tax Native American gambling revenues, it still receives money in the form of substantial payroll taxes from what is, combined, the fourteenth-largest employer in Minnesota.<sup>206</sup> Additional money is also undoubtedly spent at casinos and surrounding businesses, as Native American casinos in Minnesota are the second-largest tourist attraction in the state.<sup>207</sup>

The MIGA report further touched on the multiplier effect that Native American gambling has on the Minnesota economy.<sup>208</sup> Key findings in the MIGA report include:

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204. *Id.* at 7.

205. *See id.*

206. Indian employees who live and work on the reservation are exempt from state withholding taxes but pay federal withholding. *Id.* Indian-owned businesses, such as tribal casinos, and their employees are also subject to Social Security and Medicare taxes. *Id.* Further, non-Indian employees and Indian employees not living on the reservation are subject to both federal and state withholding. *Id.* Thus, Indian-owned businesses do in fact make contributions both directly and indirectly to state and federal tax revenue. *See id.* at 16 (noting there is a common misconception that Indian tribes, including those with gaming facilities, operate completely free of taxes).

207. *See id.* at 18 (explaining that when visitors come to Minnesota to gamble, many stay at tribally-owned hotels, which can accommodate over two million visitors annually).

208. *Id.* at 7–8. *See generally The Multiplier Effect*, ECON. ONLINE, [www.economicsonline.co.uk/Managing\\_the\\_economy/The\\_multiplier\\_effect.html](http://www.economicsonline.co.uk/Managing_the_economy/The_multiplier_effect.html) (last visited June 20, 2018) [<https://perma.cc/S3TD-VLNR>] (“The multiplier effect refers to the increase in final income arising from any new injection of spending. The size of the multiplier depends upon . . . marginal decisions to

- (1) Total annual multiplier output of almost \$1.8 billion in the State of Minnesota;
- (2) Stabilized multiplier employment of 11,584 jobs in Minnesota, combined with direct employment, creating total additional stabilized employment impact of 26,871 jobs; and
- (3) Annual multiplier wages of almost \$605 million statewide, combined with direct earnings, creating a total additional annual wages of over \$1 billion.<sup>209</sup>

Money spent at Native American enterprises is redistributed into the economy in the form of wages, taxes, and expenditures for goods and services, effectively multiplying the total amount of money in the economy compared to when the money is saved.<sup>210</sup> Thus, the total economic impact of Native American gambling in Minnesota should not be understated, as the benefits of the industry are positive.

1. *Minnesota State-Sponsored Gambling Revenue Suggests Greater Revenue from Legalized Gambling*

If Minnesota were to legalize online gambling, there would be great economic potential from the tax dollars raised. Since state-run or sponsored gambling activities would occur off Native American tribal land and since no law prohibits taxation on such activities, the State of Minnesota forgoes potential tax revenue by not legalizing all gambling.<sup>211</sup> Regarding recent state-sponsored gambling revenues and how these revenues were used:

- (1) In fiscal year 2016, the tax on lawful gambling raised \$55.8 million;<sup>212</sup>

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spend . . . or to save.”).

209. See MINN. INDIAN GAMING ASS’N, *supra* note 203, at 7–8.

210. See *id.* at 19 (“Money is never actually ‘lost’ in a casino. Rather it too is redistributed back into the economy . . . . In the same manner that the casino redistributes the gaming win and other revenue it receives, the people to whom those wages are paid and from whom the goods and services are purchased further redistribute the money they receive in wages to their employees and purchases for their own operating needs.”).

211. See MINN. HOUSE OF REPRESENTATIVES, GAMBLING TAXES (2017), <http://www.house.leg.state.mn.us/hrd/databook/gambtax.aspx> [<https://perma.cc/T3JX-UTYR>] (reporting gambling taxes on various activities, including lawful (charitable) gambling, pari-mutuel betting, and the state lottery).

212. *Id.*

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- (2) The state tax on pari-mutuel betting (horse racing), which is 6% of the “takeout,” generated less than \$1 million in fiscal year 2015 and no revenue in fiscal year 2016;<sup>213</sup> and
- (3) In fiscal year 2016, the Minnesota State Lottery raised \$144.7 million: \$1.6 million of which was dedicated to problem gambling treatment, \$14 million to game and fish, \$14 million to natural resources, and \$38.3 million to the Natural Resources Trust Fund.<sup>214</sup>

With only about \$200 million raised from Minnesota’s direct gambling taxes on state-sponsored gambling activities, Minnesota could gain considerably greater tax revenue by expanding these activities to include internet gambling or sports betting.

## 2. *Compulsive Gambling and Social Impact in Minnesota*

Problem gambling, as defined by the National Council on Problem Gambling, is the:

[C]ondition known as “pathological” or “compulsive” gambling, a progressive addiction characterized by increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, “chasing” losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences.<sup>215</sup>

The Northstar Problem Gambling Alliance, which is the Minnesota affiliate to the National Council on Problem Gambling, estimates that 0.5% to 1.5% of the Minnesota public has “serious compulsive gambling issues,” with another 1.5% to 4% of the public dealing with “varying levels of gambling problems.”<sup>216</sup> This suggests that about 220,000 Minnesotans are affected by problem

213. *Id.* (defining “takeout” as “the percentage deducted by the racetrack from each pari-mutuel pool before payouts on winnings tickets”). At Canterbury Park, “the takeout averages about 20% of total betting.” *Id.* “The first \$12 million in takeout,” however, “is exempt from tax” under the current rule. *Id.*

214. *Id.*

215. MINN. DEP’T. OF HUM. SERV., COMPULSIVE GAMBLING ANNUAL REPORT: A REPORT TO THE MINNESOTA LEGISLATURE 9 (2014), <https://www.leg.state.mn.us/docs/2014/mandated/140697.pdf> [<https://perma.cc/A9MB-U5VA>] (“In extreme cases, problem gambling can result in financial ruin, legal problems, loss of career and family, or even suicide.”) [hereinafter COMPULSIVE GAMBLING REPORT].

216. *Id.*



gambling.<sup>217</sup> For each individual person affected by problem gambling, spouses, family members, employers, and other members of the community are also affected by the behavior.<sup>218</sup>

Naturally, Minnesota lawmakers want to know how the availability of and access to gambling impacts problem gamblers.<sup>219</sup> Lawmakers want to ensure that the negative consequences of gambling do not outweigh its social and economic benefits.<sup>220</sup> This type of data is difficult to gather in Minnesota, as gambling revenue collected by the state is not collected or identified with patron level detail.<sup>221</sup> However, each year the Department of Human Services (DHS) Commissioner releases a report on the percentage of gambling revenues that come from “problem gamblers” to the chairs and ranking minority members of the legislative committees having jurisdiction over compulsive gambling.<sup>222</sup> This report estimates the proportion of gambling revenues generated from problem gamblers by consulting national and international experts and reviewing studies conducted in locations where the data is easily accessible.<sup>223</sup>

The studies examined in the Compulsive Gambling Report, conducted in jurisdictions such as Australia, New Zealand, and the United States as a whole, estimated that the proportion of revenue raised from problem gamblers ranged from 15% to 33%.<sup>224</sup> With such a wide range of estimates and no data specific to Minnesota, it is hard for lawmakers to accurately assess the situation. The data highlights the need for more resources to be dedicated to research, prevention programs, and treatment programs for problem gamblers.<sup>225</sup>

In Minnesota, DHS runs the Compulsive Gambling Program, a program that has been in place since the Minnesota State Lottery

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217. *Id.*

218. *See id.*

219. *Id.* at 4.

220. *Id.*

221. *See id.* at 5 (“[T]he criteria for participating in any form of gambling does not intersect with any mode of identity.”).

222. *Id.* at 4.

223. *See id.* at 8 (stating that the Department of Human Services (DHS) has “reviewed research studies that demonstrate how to estimate the proportion of gambling revenues generated by problem gamblers”).

224. *See id.* at 10.

225. *See id.* (“[W]hat is primarily needed is the implementation of effective policies to minimize the negative impacts of gambling and substantially reduce the disproportionate financial draw from problem gamblers.”).

began operations in 1990.<sup>226</sup> This program includes a helpline, public awareness efforts, educational activities, and treatment services.<sup>227</sup> These efforts, along with others that reduce the negative effects of gambling, should be continued so that the positive effects of gambling might be enjoyed. Simultaneously striking the right balance between the economic benefits and social costs of gambling, continuing to honor the legislative intent behind IGRA, stimulating tribal economies, and continuing to allow room for innovation and growth in the gambling industry is no small feat. Few jurisdictions have been able to find solutions that work.<sup>228</sup> But there are solutions.

#### V. A PATH FORWARD FOR MINNESOTA LAWMAKERS

Regulating the gambling industry is a balancing act. Policymakers need to be sure that any actions they take to regulate the industry will stand the test of time, as the industry is constantly evolving.<sup>229</sup> To do this, these actions must balance all of the relevant factors—different state and tribal interests, social costs involved with problem gambling, economic benefits, and growth and innovation interests.<sup>230</sup> This is especially true in Minnesota, where history has shown substantial conflicts of interest.<sup>231</sup> While there is likely no

226. *Id.* at 4.

227. *See id.* DHS provides a free, confidential, twenty-four-hour service line reachable at the Minnesota Problem Gambling Helpline at (800) 333-HOPE. *Id.* On the state compulsive gambling program website ([www.nojudgment.com](http://www.nojudgment.com) [<https://perma.cc/33HY-B37A>]), there is a list of Minnesota-approved gambling treatment providers by county, as well as downloadable brochures for communities and treatment counselors to use for educating the public. *Id.* Furthermore, DHS provides funding to individuals who have no other source of payment or insurance coverage for gambling treatment. *Id.*

228. *See, e.g.,* Steve Ruddock, *View: Why New Jersey is Doing a Good Job Combating Problem Gambling*, PLAYNJ (Feb. 9, 2018), <https://www.playnj.com/news/new-jersey-problem-gambling/17469/> [<https://perma.cc/3KPG-EQ5B>]. *But see, e.g.,* *New Jersey's Gambling Problem is Bad, Likely to Get Worse*, PRESS OF ATLANTIC CITY (Jan. 28, 2018), [http://www.pressofatlanticcity.com/opinion/editorials/new-jersey-s-gambling-problem-is-bad-likely-to-get/article\\_3d465ecd-0f18-57d9-ba07-cbdcbc6f1b3d.html](http://www.pressofatlanticcity.com/opinion/editorials/new-jersey-s-gambling-problem-is-bad-likely-to-get/article_3d465ecd-0f18-57d9-ba07-cbdcbc6f1b3d.html) [<https://perma.cc/RB87-GXLN>].

229. *See* Bierschbach, *supra* note 186 (highlighting how poorly-negotiated state-tribal compacts taking no portion of revenue from the tribes with no mandatory renegotiation period has made it difficult for the Minnesota government to raise tax revenue from Native American gambling operations).

230. *Supra* Part IV (describing the different state and tribal interests in Minnesota).

231. The Minnesota state government wants to raise money from gambling

perfect solution to balance all these interests, considering each interest is essential in formulating a way forward. Below is one such solution.

A. *Legalize Online Gambling in Minnesota*

The solution, which may seem obvious, is to legalize online gambling in Minnesota. There are many reasons to consider this option. First, Minnesota stands to gain substantial revenue that could be raised through a direct tax on online gambling proceeds.<sup>232</sup> In addition, the State could also collect licensure fees as companies compete for a strategically limited supply of online gambling licenses.<sup>233</sup> Second, legalizing and regulating online gambling in Minnesota would protect Minnesotans who are currently gambling on potentially unregulated, offshore websites.<sup>234</sup> Third, the growth of the online gambling industry would stimulate the economy by creating jobs and growing wages.<sup>235</sup> Finally, any concern that legalized online gambling would be detrimental to the existing Native American casinos in Minnesota is misguided.<sup>236</sup> In fact, contrary to popular belief, studies have shown that online gambling has a complementary impact on land-based casino revenues.<sup>237</sup>

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revenues while minimizing the negative impact of gambling on society. *See supra* Part IV.C. Larger tribes in Minnesota that benefit from the current tribal compacts want to keep the terms as they are, while other, smaller tribes located in more remote areas want to renegotiate the compacts to allow them to open casinos on state land. *See* Bierschbach, *supra* note 186; Vig & Leecy *supra* note 196. Further, Minnesota has a state interest in promoting innovation and growth where possible and thus should entertain internet gambling possibilities and not enter into lose-lose enforcement situations where enforcement is cost prohibitive, constitutionally unviable, and likely ineffective as a result of evolving technology.

232. *See* Bierschbach, *supra* note 186.

233. *See* Grove, *supra* note 114 (listing some of the possible reasons why the Pennsylvania legislature decided to authorize online gambling, among other things, in its most recent gambling overhaul bill).

234. *See id.*; *see also* MINNESOTA OVERVIEW 2013, *supra* note 145 (noting that a survey conducted by the Minnesota State Lottery and St. Cloud State University showed that 76% of Minnesota adults participated in at least one form of the available gambling methods, including online gambling, in Minnesota in 2011).

235. *See id.*

236. *See* Vig & Leecy, *supra* note 196.

237. Kahlil S. Philander, Brett Abarbanel, & Toni Repetti, *Consumer Spending in the Gaming Industry: Evidence of Complementary Demand in Casino and Online Venues*, 15 INT'L GAMBLING STUD. 23 (June 2015) ("A robust complementary (positive) relationship between online and offline gambling is found."). The authors of the

The first step in legalizing online gambling is authorizing Minnesota residents to participate in online gambling activities on websites that are owned and operated in Minnesota. This express authorization clears up the current gray area<sup>238</sup> in Minnesota law regarding online gambling. It also acts as a form of advertisement for the soon-to-be-available online casinos that the state can use to raise tax revenue.<sup>239</sup>

Minnesota has many of the same goals and interests as Pennsylvania, the most recent state to legalize online gambling within its borders.<sup>240</sup> First, Minnesota has an interest in raising more tax revenue on gambling activities within the state.<sup>241</sup> Second, Minnesota has an interest in protecting its citizens from being deceived by offshore gambling websites that may take advantage of their users.<sup>242</sup> Finally, Minnesota does not want to hurt land-based, tribal casinos by introducing undue competition that would hurt the profits of Native American tribes that rely on gambling income for self-sufficiency.<sup>243</sup> Thus, Minnesota should seek to emulate some of Pennsylvania's methods when crafting its own law—perhaps even using Pennsylvania's bill as a template—while keeping in mind the relevant differences between the two states' economic, legislative, and social contexts.<sup>244</sup>

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study go on to suggest that the economic concerns of some stakeholders that online gambling will result in the cannibalization of brick-and-mortar casino products should be reconsidered. *Id.*; cf. Vig & Leecy, *supra* note 196 (showing tribal leaders stating that the gambling market in Minnesota is too small to accommodate the extra competition that off-reservation gambling operations, including online casinos, can bring).

238. Online gambling is neither expressly authorized nor prohibited by current Minnesota law. See MINN. STAT. § 609.75 (2017) (setting forth the current statutory framework of gambling law in Minnesota).

239. See MINN. HOUSE OF REPRESENTATIVES, *supra* note 211 (listing Minnesota's current tax structure on gambling activities within the state). Note that Federal Law prohibits Minnesota from directly taxing Native American casinos located on tribal land. *Id.*

240. See Grove, *supra* note 114 (stating that Pennsylvania is trying to remain competitive as bordering states have increased competition).

241. See MINNESOTA OVERVIEW 2013, *supra* note 145.

242. See *id.*

243. See Vig & Leecy, *supra* note 196 (noting that the congressional intent behind the IGRA was to stimulate economic development and job creation on Indian reservations, which in turn would move tribal governments closer to self-sufficiency).

244. Some of these differences include a favorable legislative status quo for

B. *Offer Native American Tribes “First Dibs” on Limited Licenses*

The next step is to offer a limited number of licenses to Minnesota businesses, individuals, and Native American tribes, allowing them to own and operate online casinos, subject to Minnesota laws. One narrowly tailored solution is to allow the Native American tribes in Minnesota that will be most impacted by this expansion “first dibs” on a portion of the limited number of operating licenses. One of the tribes’ main arguments against the authorization of off-reservation gambling in Minnesota is that it would be contrary to the intent of IGRA, because expansion would increase competition and cut into the profit margins of tribes.<sup>245</sup> Giving Native American tribes the opportunity to obtain a license for an online casino before other Minnesota residents and businesses helps alleviate this concern. By allowing tribes to leverage their current land-based gambling operations into full-service brands, there will be a competitive advantage for Native American brands. The introduction of online gambling has a positive impact on land-based casinos because it increases the overall interest of all gambling activities within the state.<sup>246</sup> Additionally, legalizing online casinos helps some of the less-advantaged Minnesotan Native American tribes—those who do not have large land-based casino operations due to their remote locations—by giving these tribes an opportunity to break into the gambling market.<sup>247</sup> The positive impact of introducing online gambling in Minnesota to Native American casinos, combined with the competitive advantage of having “first dibs” on the limited number of online casino licenses,

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some Native American tribes with major casinos, Minnesota’s current budget surplus, and local problem gambling statistics. *See generally* MINNESOTA OVERVIEW 2013, *supra* note 145; H.R. 271, Gen. Assemb., Reg. Sess. (Pa. 2017).

245. *See* Vig, *supra* note 196 (“We believe Indian gaming is and should remain a reservation-based economic development tool that helps fund the vital tasks of tribal governments, create jobs for Minnesotans and improve the lives of Indian people.”).

246. *See* Philander, *supra* note 237 (finding a positive growth relationship between online and offline gambling).

247. In fact, some of these tribes have been trying to break into the gambling market in Minnesota for years, without success. *See* Bierschbach, *supra* note 186 (discussing a combined effort by state legislators and some of the location-challenged tribes to create a state-run casino located off tribal land). This effort was eventually thwarted by the DFL, influenced by the powerful Tribal lobby MIGA, which is made up of tribes that benefit from the current legislative status quo. *Id.*

sufficiently addresses the competitive concerns of Native American tribes.

C. *Dedicate a Percentage of Tax Revenue Received from Private Companies and Native American-Run Online Casinos to Education, Healthcare, and Problem Gambling*

Minnesota lawmakers should consider allocating a percentage of the increased tax revenue to causes beneficial to Native American tribes. Despite the competitive advantages and positive impact that online gambling expansion in Minnesota could provide Native American tribes, some tribes—especially those that benefit greatly from the current state-tribal compacts—might still feel disadvantaged. In further efforts to adequately address all interests, a percentage of the tax and/or license revenue raised from this online gambling expansion should be dedicated to a fund specifically designated to supplement tribal education and healthcare. This economic stimulus, combined with the increased revenue of Native American tribes as they expand into online gambling, falls squarely within the intent of IGRA.<sup>248</sup> Thus, this provision could be successful in addressing the interests of Native American tribes. By doing so, it is more likely that online gambling regulation in Minnesota will withstand the test of time.

Finally, Minnesota lawmakers should dedicate a percentage of license and/or tax revenue gained from private companies to a fund designed to continue, improve, and create new programs that combat problem gambling in Minnesota. The social impact of online gambling on problem gamblers is not entirely clear.<sup>249</sup> However, it makes sense that an increase in the availability of gambling would lead to an increase in problem gambling, or at least that it has a negative impact on problem gamblers.<sup>250</sup> Thus, the expansion of online gambling in Minnesota could have some negative social effects that lawmakers should minimize to the greatest extent possible. In order to combat any negative effects, Minnesota

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248. See Vig & Leecy, *supra* note 196 (noting that the intent of the IGRA is economic stimulus and job creation on Native American reservations).

249. See COMPULSIVE GAMBLING REPORT, *supra* note 215, at 5 (noting that estimating the current impact of gambling availability on problem gamblers is difficult because tax revenue data is not collected at the individual level by mode of gambling).

250. See generally *id.*

lawmakers should include a provision in the legislation that provides monetary support for these programs. Allocating a percentage of tax revenue in this manner would allow Minnesota to appreciate the economic benefits of online gambling—tax revenue, job creation, and wage growth<sup>251</sup>—while minimizing the potentially negative effects that gambling expansion could have on society.<sup>252</sup>

Minnesota stands to gain many benefits from online gambling expansion. First, legalizing online gambling in Minnesota would eliminate enforcement costs, which often lead the State into no-win situations where enforcement is cost-prohibitive or constitutionally unviable.<sup>253</sup> Second, expanding online gambling would bring jobs to Minnesotans, stimulate wage growth, and encourage continuous innovation through free-market competition by breaking the Native American tribal monopoly on gambling activities in Minnesota.<sup>254</sup> This economic growth would occur without undue burden on Native American tribes or problem gamblers, as the proposed solution considers and addresses their interests.<sup>255</sup> Third, regulating online gambling adds clarity to a current gray area of law and protects Minnesota citizens from being taken advantage of by offshore websites.<sup>256</sup> Finally, Minnesota will set an example for other jurisdictions by addressing online gambling in a way that is sustainable in the long run and beneficial to society.<sup>257</sup>

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251. See MINN. INDIAN GAMING ASS'N, *supra* note 203, at 7 (presenting an analysis of the economic impact of Indian gaming on tribal, local, and state economies, including tax revenue generated to the local, state and federal government, employment, tourism, and government services).

252. See MICHAEL O. EMERSON ET AL., ADULT SURVEY OF MINNESOTA PROBLEM GAMBLING BEHAVIOR; A NEEDS ASSESSMENT: CHANGES 1990 TO 1994 3–4 (1994); MINN. INDIAN GAMING ASS'N, *supra* note 203 (presenting an analysis of the economic impact of Indian gaming on tribal, local, and state economies, including tax revenue generated to the local, state and federal government, employment, tourism, and government services).

253. See McCullagh, *supra* note 8 (comparing Minnesota's attempt to require ISPs to block online gambling sites to Pennsylvania's attempt to require ISPs to block specific pornographic websites, which was ruled an unconstitutional restriction on Free Speech under the First Amendment).

254. See *supra* Part IV.C.

255. See *supra* Part V.C.

256. See *supra* Part V.A.

257. See *supra* Part IV.

## VI. CONCLUSION

Regulating the gambling industry is a balancing act. The industry is rapidly evolving, and the ongoing debate on the morality and merits of gambling rages on. The regulatory landscape also continues to change, with federal laws being adapted to modern situations and a wide variety of state regulations addressing gambling in a different way. In order to successfully regulate the gambling industry, various stakeholder interests must be considered. But in the end, online gambling expansion can positively impact society in many ways.

Minnesota stands to realize these benefits in a sustainable way by authorizing online gambling and implementing the proposed solution described in this Note. First, the solution suggests authorizing online gambling in Minnesota and distributing a limited number of licenses—first to Native American tribes, then to Minnesota businesses and individuals. Next, Minnesota should dedicate a portion of the increased tax revenue to tribal education and healthcare, which addresses the competition concerns of Native American tribes. Finally, Minnesota should dedicate another portion of the increased tax revenue to programs combatting problem gambling, which minimizes the negative social impact of gambling in Minnesota. Online gambling expansion is part of the evolution of the gambling industry, and the policymakers that understand the varying interests and can adapt their policies to address these interests stand the best chance of finding a sustainable solution that benefits society.



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