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INTERNET GAMBLING: A ROAD TO STRENGTHENING TRIBAL SELF-GOVERNMENT AND INCREASING TRIBAL SELF-SUFFICIENCY WHILE PROTECTING AMERICAN CONSUMERS

*Chris J. Thompson**

I. Introduction

In 2009, Indian gaming generated an estimated \$26.5 billion in profit while employing over 600,000 people in tribal gaming-related jobs.¹ Over the same time period, commercial gaming in the United States generated \$30.7 billion in revenue, meaning Indian gaming represents approximately 86% of the total gaming market in the United States.² Indian tribes used that \$26.5 billion to build tribal independence, update existing infrastructure, fund education programs, and benefit tribal communities in many other positive ways.

Apart from the commercial gaming market, the American Internet gaming market generated approximately \$6 billion in revenues in 2010.³ Assuming tribes could profit from Internet gaming the same percentage they gain from regular gaming, tribes would generate another \$2.5 billion in revenues by breaking into this field. Although potential Internet gaming earnings are small in comparison to the gaming market as a whole, \$2.5 billion is still a worthwhile venture because tribes could invest it toward improving the lives of Indian people economically, socially, and politically.

But breaking into the Internet gaming market has been complicated by the passage of the Unlawful Internet Gambling Enforcement Act (“UIGEA”) of 2006, which makes it illegal in America to fund unlawful Internet gambling activities.⁴ The UIGEA’s definition of unlawful Internet gambling is vague because it depends on existing federal and state laws. This creates practical problems for Indian tribes, states, and existing entities offering Internet gambling because gambling laws vary from state to state,

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1. GEIGER JOHNS ASSOCS. LLC., *ONLINE GAMING & INDIAN COUNTRY: AN ANALYSIS & BUSINESS FORECAST 4* (2010), available at <http://www.indiangaming.org/info/alerts/Geiger-Study.pdf>.

2. *Id.*

3. *Id.*

4. *Id.* (showing that in 2006, prior to passage of the UIGEA, the Internet gaming industry generated \$6 billion in revenues, approximately the same amount that it generated in 2010).

and federal statutes are interpreted differently across jurisdictions. Also, the Interstate Wire Act of 1961, one of the main federal statutes defining unlawful Internet gambling, was recently interpreted by the Department of Justice (“DOJ”) to apply *only* to sport-related gambling.⁵ In the wake of this opinion, some states are positioning themselves to begin operating online, in-state lotteries as early as 2012.⁶ Indian tribes should be able to access the Internet gaming market because it would further the stated goals of the Indian Gaming Regulatory Act (“IGRA”), namely, to increase tribal self-sufficiency and strengthen tribal governments.⁷

In addition to the murky waters of the Internet gaming industry, Indian tribes wishing to operate traditional gambling establishments are subject to the provisions of the IGRA. This Act has allowed the Indian gambling market to grow to the huge industry that it is today; however, many Indian advocates see this Act as an imposition on the sovereignty of the tribes.⁸ The Act organizes gambling activities into classes of games, and requires the tribes to enter into tribal-state compacts in order to host certain classes of gaming.⁹ Since the IGRA was passed before the inception of Internet gambling, it is unclear how the IGRA’s regulatory provisions interact with the vague provisions contained in the UIGEA.

This comment proposes that Congress should grant tribes the authority to operate interstate Internet gaming under its plenary power over the tribes. Doing so will promote tribal independence and self-governance, two goals proclaimed by Congress in the IGRA. This comment examines the existing environment surrounding Indian gaming and introduces the federal framework set forth by the IGRA in Part II. Part III introduces Internet gambling and discusses the current legal state of Internet gaming in the U.S, with great emphasis on the effects of the UIGEA on consumers and financial transactions providers. Part IV proposes that Congress should grant tribes the authority to operate interstate Internet gaming, subject to the existing frameworks contained in the IGRA and the UIGEA, and discusses some of the legal hurdles that such a grant of authority would have to overcome.

5. See *infra* Part III.C.3.

6. Steven Stradbroke, *States Scramble to Make Online Gambling Plans Following DoJ Wire Act Reversal*, CALVINAYRE.COM, <http://calvinayre.com/2011/12/28/business/states-plan-online-gambling-following-doj-wire-act-reversal> (last visited Nov. 7, 2012).

7. See 28 U.S.C. § 2701(4) (2006).

8. See Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711 (1996).

9. See *generally infra* Part II.

This comment concludes in Part V.

II. Indian Gaming and the Indian Gaming Regulatory Act

A. History

The term Indian gaming refers to the expansion of tribal gaming facilities since the passage of the IGRA.¹⁰ The term is grounded in “a tradition of social games and wagering common to many tribes.”¹¹ Today, the term embodies “a means of tribal economic development,” a trend that began in the 1970s and 1980s prior to the passage of the IGRA, when gaming activities on Indian lands primarily included poker and bingo halls.¹² These gaming facilities were, for the most part, only regulated by the tribes in accordance with the federal government’s policy of “self-determination” toward tribes, including encouragement of tribal economic development.”¹³

In this environment of non-regulation, tribes began operating high stakes bingo halls as a means of producing high revenues for relatively little cost.¹⁴ At the same time, many states allowed the operation of bingo halls, but placed strict regulations on these operations through criminal and civil penalties.¹⁵ However, many of the bingo halls operated by Indian tribes offered games that did not comply with state gambling regulations because of “federal Indian law’s general prohibition against State regulation of tribes”¹⁶ Whether states had power to enforce their criminal and civil laws on Indian tribes was an issue that led to much debate, and culminated in three cases in the 1980s.

The first of these cases dealt with Public Law 280 and Indian bingo halls in Florida. Some argued that Public Law 280 gave states congressional authority to regulate this gaming.¹⁷ Public Law 280 gave some states a

10. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* 17 (2006).

11. *See id.* at 17-19 (stating that traditional games are rooted in cultural creation stories and myths and “reflect a profound relationship between the game, the community, and spirituality”).

12. *Id.*

13. *Id.* at 20.

14. *Id.* at 21.

15. *Id.*

16. *Id.*

17. *Id.*

“broad grant of criminal jurisdiction and a limited grant of civil jurisdiction over tribes within their borders.”¹⁸

This first case came about when the Seminole Tribe contracted to open a high stakes bingo hall in Florida in violation of state regulations.¹⁹ The local sheriff planned to enforce the state’s bingo laws on the tribe’s reservation, so the tribe sued to enjoin the sheriff’s action.²⁰ Florida’s defense relied on Public Law 280, which it argued allowed the State to assume criminal and civil jurisdiction over tribes located within the state.²¹ However, the Fifth Circuit disagreed, “reason[ing] in *Seminole Tribe v. Butterworth* that the State only had authority to enforce criminal prohibitions on tribal land.”²² It could not enforce its civil regulatory laws against the tribe.²³ “Because Florida . . . allowed bingo . . . the game did not violate the state’s public policy and thus did not fall within Public Law 280’s ambit of allowable State jurisdiction.”²⁴

A year after the *Butterworth* decision, a similar case arose out of California, in which the Ninth Circuit adopted the *Butterworth* court’s reasoning and held that “because California generally allowed bingo games, bingo did not violate state policy and thus the state lacked authority to enforce its bingo regulations against the tribe.”²⁵ Despite these court holdings, “some states continued to enforce their gambling regulations on reservations.”²⁶

Then, in 1987, the Supreme Court decided *California v. Cabazon Band of Mission Indians*.²⁷ The case arose when two tribes in California challenged the state’s enforcement of bingo regulations in federal court.²⁸ “California law permits bingo games to be conducted only by charitable and other specified organizations Violation of any of these provisions

18. *Id.* at 21-22; see also Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590 (as amended at 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006), and others).

19. RAND & LIGHT, *supra* note 10, at 21.

20. *Id.*

21. *Id.* at 21-22.

22. *Id.* at 22.

23. *Id.* at 21-22 (citing *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 313 (5th Cir. 1981)).

24. *Id.* at 22.

25. *Id.* at 23 (citing *Barona Grp. of the Capitan Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982)).

26. *Id.* at 24.

27. 480 U.S. 202 (1987).

28. *Id.* at 203.

is a misdemeanor.”²⁹ California was a Public Law 280 state, which meant that California had criminal jurisdiction over all Indian Country in the state.³⁰ California argued that regulating gaming activities on tribal lands fell within the power granted to it by Public Law 280.³¹ However, the Court had earlier reasoned in *Bryan v. Itasca County* that “Public Law 280’s grant of civil jurisdiction was not a blanket authority for the state to regulate the tribes generally; instead, it applied only to private civil litigation in state court.”³² The Court then adopted reasoning from the Ninth Circuit’s *Duffy* decision and held that California’s gaming laws were civil in nature because they did not prohibit all types of gaming.³³ The Court left open the possibility that extraordinary circumstances might allow the states to regulate the tribes in the absence of congressional authority, but only if “the state interests at stake are sufficient to justify the assertion of state authority.”³⁴

The *Cabazon* holding meant that other states would be unable to regulate gaming activities in Indian Country unless the state had a full prohibition-type scheme. The post-*Cabazon* result was the growth of Indian gaming. Many states still wanted to regulate gaming on Indian lands, so they lobbied Congress to authorize state regulation of Indian gaming.³⁵ At the same time, sensing that Congress may authorize such state regulation, Indian tribes lobbied Congress to pass legislation protecting their sovereignty and to preserve gaming as a tool for economic development.³⁶

In response to this debate, Congress passed the IGRA to promote tribal economic development and self-sufficiency, as well as to protect tribes from the influence of organized crime.³⁷ And while the IGRA has allowed an enormous tribal gaming market to develop,³⁸ the Act has also been construed as a large imposition on the sovereignty of Indian tribes because of the power it gives states over Indian gaming. IGRA’s general framework is outlined in the following sections.

29. *Id.* at 208-09.

30. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

31. RAND & LIGHT, *supra* note 10, at 24.

32. *Id.* at 24 (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976)).

33. *Id.* at 25.

34. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 203 (1987).

35. RAND & LIGHT, *supra* note 10, at 30.

36. *Id.* at 30.

37. 25 U.S.C. §§ 2701-2702 (2006); *see also* RAND & LIGHT, *supra* note 10, at 31.

38. *See infra* Part I.

B. The IGRA Establishes Three Classes of Gaming

1. Class I – Traditional Tribal Games

The IGRA defines Class I as “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”³⁹ This class of gaming is within the exclusive jurisdiction of Indian tribes, and is not subject to the IGRA.⁴⁰

2. Class II – Bingo and Non-Banked Card Games

This class of games includes “the game of chance commonly known as bingo (whether or not electronic)”⁴¹ The IGRA contains three subsections detailing how bingo is to be played.⁴² Class II gaming also includes non-banked card games which are explicitly authorized by the laws of the state, or which are not explicitly prohibited by state laws, and are played in conformity with regulations regarding hours of operation and limitations on wagers or pot sizes.⁴³ The IGRA explicitly states that Class II games do not include any banking card games (this includes blackjack, or “21” as it is commonly known), electronic games of chance, or slot machines of any kind.⁴⁴

The IGRA gives Indian tribes the ability to license and regulate Class II gaming on Indian lands within the tribe’s jurisdiction. This license is subject to oversight by the National Indian Gaming Commission (“NIGC”). The tribe must meet three requirements.⁴⁵ First, such gaming must be permitted by the state in which the tribal land is located, and may not be “specifically prohibited on Indian lands by Federal law.”⁴⁶ Otherwise, “IGRA does not authorize the tribe to conduct such games, even on the tribe’s reservation.”⁴⁷ Second, before opening a casino that offers Class II games, a tribe must adopt a regulatory ordinance or resolution approved by the Chairman of the NIGC and must also issue a separate license for each location hosting Class II games.⁴⁸ The IGRA goes on to list six conditions

39. 25 U.S.C. § 2703(b).

40. *Id.* § 2710(a)(1).

41. *Id.* § 2703(7)(A)(i).

42. *Id.* § 2703(7)(A)(i)(I)-(III).

43. *Id.* § 2703(7)(A)(ii).

44. *Id.* § 2703(7)(B).

45. *Id.* § 2710(b); *see also* RAND & LIGHT, *supra* note 10, at 47.

46. 25 U.S.C. § 2710(b)(1)(A).

47. RAND & LIGHT, *supra* note 10, at 50.

48. 25 U.S.C. § 2710(b)(1)(B).

that the ordinance/resolution must contain.⁴⁹ Lastly, the IGRA allows tribes to apply to the NIGC for “self-regulation” of Class II establishments after satisfactory operation and regulation of the establishment for three years.⁵⁰ The tribe’s petition must conform to regulations promulgated by the NIGC,⁵¹ and the tribe must prove to the NIGC that it meets the three requirements⁵² before a certificate of self-regulation will be issued.

3. Class III – Casino-style Games

Class III gaming includes all types of games that are not included in Class I or Class II gaming.⁵³ These are the most highly regulated forms of gaming under the IGRA, and typically include “slot machines, banked card games such as baccarat, chemin de fer, blackjack, and pai gow poker, lotteries, pari-mutuel betting, jai alai, and other casino games such as roulette, craps, and keno.”⁵⁴ The requirements for Class III gaming under the IGRA are nearly identical to those required for Class II gaming.

Class III gaming is subject to the state permitting such type of gaming for any purpose by any person, and “Class III gaming encompasses only ‘such gaming [that] is not otherwise specifically prohibited on Indian lands by Federal Law.’”⁵⁵ Also like Class II games, before opening a Class III establishment, a tribe must adopt an ordinance, approved by the Chairman of the NIGC, which adheres to the same specific provisions as an ordinance for Class II games.⁵⁶

In addition to the requirements for Class II games, a tribe must enter into an agreement with the state (a tribal-state compact) in order to conduct Class III gaming.⁵⁷ It should be noted that, “[a]lthough many casino games ordinarily are illegal under the Johnson Act, games offered in compliance with the IGRA’s provisions are exempt from Federal proscription.”⁵⁸

49. *See id.* § 2710(b)(2)(A)-(F); *see also* RAND & LIGHT, *supra* note 10, at 50-51.

50. 25 U.S.C. § 2710(c)(3)(A).

51. 25 C.F.R. §§ 518.2, 518.3 (2012).

52. 25 U.S.C. § 2710(c)(4) (including provisions for 1) a reputation for fairness and honesty, 2) implementation of adequate systems of operation, accounting, and monitoring, and 3) the casino must be fiscally and economically sound).

53. *Id.* § 2703(8).

54. RAND & LIGHT, *supra* note 10, at 53 (citing 25 C.F.R. § 502.4 (2012)).

55. *Id.* at 54 (citing 25 U.S.C. §§ 2710(d)(1)(B) & (A)(ii)).

56. 25 U.S.C. § 2710(d)(1)-(2).

57. *Id.* § 2710(d)(3)(A); *see also infra* Part II.D.

58. RAND & LIGHT, *supra* note 10, at 54.

C. The IGRA Establishes the National Indian Gaming Commission and Vests Power in the Secretary of the Interior

The NIGC is an independent federal regulatory agency consisting of three members.⁵⁹ There are a number of roles that the IGRA empowers the NIGC to carry out.⁶⁰ Perhaps most important, the NIGC is empowered to promulgate rules and regulations to implement the IGRA.⁶¹ The NIGC has set up a system of minimum internal control standards that tribes must meet to conduct Class II and Class III gaming, and those standards can be found in the Federal Register.⁶² The NIGC also plays a role in determining whether a proposed gaming type is Class II or Class III. This distinction is important because Class III gaming must be included in a Tribal-State Gaming Compact.

The IGRA also requires the Secretary of the Interior to perform three important tasks. First, the Secretary must approve where gaming revenue is allocated.⁶³ Second, the Secretary may issue gaming procedures when the tribe and state cannot agree on a gaming compact. Third, the Secretary has the power to approve or disapprove tribal-state gaming compacts within forty-five days of being submitted for his approval.⁶⁴ The Secretary can disapprove a compact when it violates the IGRA or other federal laws.⁶⁵

D. Tribal-State Compacts and Class III Gaming Activities

In the wake of the *Cabazon* decision, states had little ability to affect the gaming activities occurring on Indian land within state borders. The IGRA recognized this, and included the states in the process by requiring tribes and states to enter into gaming compacts, subject to the approval of the Secretary of the Interior, in order for tribes to host Class III gaming on Indian lands.⁶⁶ Federal law governs the overall structure of the negotiating process, and state law applies to the extent that it authorizes an agent of the

59. *About Us*, NATIONAL INDIAN GAMING COMMISSION, http://www.nigc.gov/About_Us.aspx (last visited Jan. 14, 2013).

60. See generally 25 U.S.C. §§ 2705-2715 (2006).

61. *Id.* § 2706(b)(10).

62. 25 C.F.R. §§ 501.1-599 (1999).

63. 25 U.S.C. § 2710(b)(3)(B).

64. *Id.* § 2710(d)(8)(C).

65. *Id.* § 2710(d)(8)(B).

66. *Id.* § 2710(d)(3)(A).

state to bind the state to the compact.⁶⁷ It is unclear whether a state could retroactively void tribal-state compacts by making all gaming unlawful.

The substantive material that can be included in a tribal-state compact varies, and is codified in the IGRA as follows:

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.⁶⁸

The last section is a catch-all provision that allows wide discretion as to what may be included in a tribal-state gaming compact. "More than 200 tribal-state compacts have been approved, and they are often subject to amendments . . . [i]t is thus impossible to generalize about the content of provisions"⁶⁹ Cohen goes on to say that many current compacts include "provisions that deal with,

tribal and state licensing and certification for employees; tribal and state enforcement of compact provisions; allocation of civil,

67. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 872 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

68. 25 U.S.C. § 2710 (d)(3)(C).

69. COHEN, *supra* note 67, at 873.

regulatory, and criminal jurisdiction and law enforcement; the tribe's sovereign immunity and whether or to what extent it is waived for gaming activities; size of gaming operations; which game are authorized; technical requirements of electronic gaming devices; state inspection, testing, and approval of gaming devices and facilities; tribal payment of state regulatory costs; casino security and monitoring; tribal and state access to records and reports . . . day-to-day rules of operation⁷⁰

Judging from the above list, it is easy to see that there is quite a bit of variation in the content of tribal-state compacts. Creating an exception to the UIGEA for Indian tribes to host Internet gaming that originates on Indian land would add to the potential contents of a compact. However, there are immense benefits that could be realized by tribes *and* states if an exception were adopted. Many tribal-state compacts contain provisions dealing with state demands for payments from the tribes, as allowed by the IGRA.⁷¹ From these demands, tribes and states have found ways to participate in revenue sharing where tribes share revenue from gaming activities with states in exchange for exclusive rights to game within a state.⁷² These agreements have become prevalent and are known as "exclusivity agreements."⁷³ Internet gaming could lead to increased revenues for tribes, resulting in larger amounts of revenue to share with the state.

E. States Must Negotiate in Good Faith, Remedies

When an Indian Tribe with Indian land within a state decides to host Class III gaming on that land, the IGRA requires that the tribe negotiate a compact with the state.⁷⁴ Most of the problems that arise in the negotiations process revolve around what types of gaming can be allowed.⁷⁵ The IGRA imposes on the state an obligation to negotiate with the tribe in good faith.⁷⁶

70. *Id.*

71. 25 U.S.C. § 2710(d)(3)(C)(vii).

72. Kevin Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 441 (2001).

73. See Gatsby Contreras, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue Sharing or Illegal State Taxation*, 5 J. GENDER RACE & JUST. 487, 495 (2002).

74. 25 U.S.C. § 2710(d)(3)(A).

75. *In re Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003); see also *infra* Part II.F.

76. *Id.*

Although “good faith” is not precisely defined, the IGRA provides that in making a determination of whether a state negotiated in good faith, the court may look at the public interest, public safety, criminality, financial integrity, and economic impacts on existing gaming activities.⁷⁷ A state’s demand to directly tax an Indian tribe is *per se* evidence of bad faith negotiation.⁷⁸ Failing to negotiate at all is also *per se* evidence bad faith.⁷⁹

When a state fails to negotiate in good faith, the IGRA provides a complex scheme of remedies and allows the tribe to sue the state in federal court.⁸⁰ This “right to sue” portion of the IGRA was found unconstitutional by the Supreme Court in *Seminole Tribe of Florida v. Florida* because it effectively blocked a state’s sovereign immunity claim.⁸¹ After *Seminole*, tribes may only bring suit against a state if the state waives its sovereign immunity.⁸² Courts have found that the rest of the IGRA is still valid, and if a state waives its sovereign immunity, then the other provisions of the IGRA dealing with remedies for the tribes will apply as originally intended.⁸³ If a state has not negotiated in good faith, the IGRA requires the district court to order the tribe and state to create a compact within sixty days.⁸⁴ If the state still refuses to enter into a compact, a mediator is appointed to hear proposals from both sides and select a compact that best suits both parties.⁸⁵ If the state refuses to listen to the mediator’s suggestion, then the mediator must refer the matter to the Secretary of the Interior who may issue additional procedures for the parties.⁸⁶ In issuing its decision in *Seminole Tribe of Florida*, the Supreme Court avoided the question of what remedies a tribe may have if a state refuses to waive its sovereign immunity.⁸⁷ In the wake of that decision, the Ninth and Eleventh Circuits have adopted the view that the Secretary of the Interior could issue gaming procedures upon the request of a tribe if the tribe’s suit was dismissed on sovereign immunity grounds,⁸⁸ and those views have now

77. *Id.* § 2710(d)(7)(B)(iii).

78. *Id.*

79. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990).

80. 25 U.S.C. § 2710 (d)(7)(A)(i) & (B)(i).

81. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44 (1996).

82. *Id.* at 72-73.

83. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998).

84. 25 U.S.C. § 2710(d)(7)(B)(iv).

85. *Id.*

86. *Id.*

87. *Seminole Tribe of Fla.*, 517 U.S. at 76.

88. *See generally* *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016 (11th Cir. 1994); *see also* *Spokane Tribe of Indians*, 139 F.3d 1297.

been codified in the Federal Register.⁸⁹ The regulations allow states to involve themselves in the administrative process as if they were operating under the IGRA.⁹⁰ The regulations do not require the Secretary to find that the state negotiated in bad faith; but rather, the Secretary must make a scope of gaming determination by considering whether the proposed gaming activities are permitted by the state.⁹¹

F. Scope of Gaming

The IGRA provides that “Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person”⁹² “The meaning of ‘permits such gaming’ is highly controversial. . . .”⁹³ There is a split among appellate courts on how to interpret the meaning of the foregoing phrase.

First is the expansive approach articulated in *Mashantucket Pequot Tribe v. Connecticut*.⁹⁴ Under this approach, Class III gaming is allowed in a state if the state’s gaming laws do not prohibit gaming activity as a matter of public policy.⁹⁵ The expansive interpretation allows the possibility that a tribe may operate games that would otherwise be illegal under state law through a valid tribal-state compact for Class III gaming.⁹⁶ Second is the narrow approach articulated in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*.⁹⁷ In that case the court read “permits such gaming” narrowly to mean that state law must allow a certain type of game before it can be

89. 25 C.F.R. § 291.1 (2012).

90. *Id.* § 291.7.

91. *Id.*

92. 25 U.S.C. § 2710(d)(1)(A)–(B) (2006).

93. RAND & LIGHT, *supra* note 10, at 70 (“Does ‘such gaming’ refer to casino-style gaming in general, so that if a state allows some Class III games, a tribe may conduct *any* Class III game on its reservation? Or is ‘such gaming’ game-specific, so that a tribe may conduct only those games allowed under state law?”) (emphasis added).

94. 913 F.2d 1024 (2d Cir. 1990); *see also* Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 539 (9th Cir. 1994) (adopting a categorical approach) (“[T]he state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees.”).

95. RAND & LIGHT, *supra* note 10, at 70.

96. *Id.* at 71 (citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1994) (Canby, J., dissenting from the denial of rehearing en banc) (“[U]nder IGRA a compact may permit the tribe to operate games that state law otherwise prohibits.”)).

97. 64 F.3d 1250 (9th Cir. 1994).

included in a tribal-state compact.⁹⁸ Under this narrow approach, the test requires a “careful examination of state law to determine which games are allowed and which are not.”⁹⁹ If a game is allowed under state law, then that type of game can be part of the tribal-state compact negotiations process.

III. Internet Gambling – From the Wire Act to the UIGEA

A. Introduction

The Internet has radically altered gambling around the globe. Before the Internet, a person in the U.S. would have to physically travel to a casino in Las Vegas, Atlantic City, or one of the many Indian casinos dotting the national landscape in order to gamble. The Internet now allows millions of people to gamble from the comforts of their own home.¹⁰⁰ Whether this is a desirable trend has sparked great debate among society and legislators alike.¹⁰¹

Online gambling began sometime during the mid-1990s.¹⁰² The first country to pass any sort of legislation to regulate and license online gambling was Antigua & Barbuda, which passed an online gambling licensing act in 1994.¹⁰³ That same year, Microgaming, the first online gambling software provider, was founded and launched software and support for online gambling sites.¹⁰⁴ Microgaming is still in existence today.¹⁰⁵

Later, in 1995 or ‘96, the first online casinos and sports-books appeared.¹⁰⁶ The first online sports-book, Intertops, began operations in 1996 from the island of Antigua, and is “still going strong today — offering

98. RAND & LIGHT, *supra* note 10, at 74; *see also* *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (“The ‘such gaming’ language of [IGRA] does not require the state to negotiate with respect to forms of gaming it does not presently permit.”).

99. RAND & LIGHT, *supra* note 10, at 75.

100. *See* Nicholas Bamman, *Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL’Y 231, 231 (2010).

101. *See id.*

102. Anne Von Lehman, *American Entrepreneurs and Internet Gambling: Are the Odds Stacked Against Them?*, 3 ENTREPREN. BUS. L.J. 135, 135 (2008).

103. *The History of Online Gambling*, ONLINEGAMBLING.COM (Aug. 31, 2008), <http://www.onlinegambling.com/online-gambling-history.htm>.

104. *Id.*

105. *Welcome to Microgaming*, MICROGAMING, <http://www.microgaming.com/home.aspx?pid=1> (last visited Jan. 4, 2012).

106. *The History of Online Gambling*, *supra* note 103.

over 4,000 daily wagers . . . and boasting satisfied customers in over 180 countries.”¹⁰⁷ Next, online poker rooms developed, sometime during 1998 or 1999.¹⁰⁸ U.S. sites such as PokerStars and Full Tilt Poker, as well as “e-wallets” such as Neteller, saw tremendous growth over the early part of the 2000s.¹⁰⁹ “Internet gambling has quickly become the highest grossing Internet-based industry.”¹¹⁰ Prior to the passage of the Unlawful Internet Gambling Enforcement Act in 2006, it was estimated that the U.S. Internet gambling market alone grossed approximately \$6 billion USD.¹¹¹

With the advent of Internet gambling came an uncertain legal climate due to the DOJ’s prosecution of online gambling executives pursuant to antigambling legislation passed before the Internet.¹¹² As a result, Internet gambling moved offshore, leaving the social costs of Internet gambling here, but draining the American economy of any benefits.¹¹³ To make matters murkier, the World Trade Organization ruled against the U.S. in 2005 in a case brought by Antigua & Barbuda claiming the U.S. was violating the 1994 General Agreement on Trade in Services (GATS) treaty.¹¹⁴ As a result, the United States rescinded its GATS obligations with respect to Internet gambling.¹¹⁵ Finally, the United States passed the UIGEA in 2006 as an add-on to the SAFE Port Act, in an effort to stop financial transactions for unlawful Internet gambling.¹¹⁶

The Unlawful Internet Gambling Enforcement Act (31 U.S.C. §§ 5361-5367) was passed in order to combat the offshore movement of Internet gambling.¹¹⁷ The UIGEA attempts to prevent unlawful Internet gambling by prohibiting American financial institutions from processing fund transfers to known Internet gambling companies, thus cutting off the

107. *Id.*

108. *Id.*

109. *Id.*; see also Anne Von Lehman, *American Entrepreneurs and Internet Gambling: Are the Odds Stacked Against Them?*, 3 *ENTREPREN. BUS. L.J.* 135 (2008). [NOTE TO AUTHOR: THE LEHMAN ARTICLE DOES NOT MENTION EITHER OF THOSE WEBSITES.]

110. Bamman, *supra* note 100, at 231 (citing Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 *CARDOZO J. INT’L & COMP. L.* 533, 533 (2009)).

111. GEIGER JOHNS ASSOCS., LLC, *supra* note 1, at 5.

112. Bamman, *supra* note 102, at 232.

113. *Id.*

114. *Id.* at 246.

115. *Id.* at 246-47.

116. GEIGER JOHNS ASSOCS., LLC, *supra* note 1, at 3.

117. Bamman, *supra* note 100, at 232.

funding for such activities.¹¹⁸ Under the UIGEA, the burden to prevent these unlawful transfers has fallen on American financial institutions.¹¹⁹ It should be noted that the UIGEA does not criminalize Internet gambling at the customer level.¹²⁰ While the UIGEA was somewhat successful initially, it was estimated by 2010, the Internet gaming industry in the U.S. would be back to nearly \$6 billion USD in revenues.¹²¹ The effect of the UIGEA has been to force U.S. Internet gamblers to use websites that are located offshore.¹²²

In order to determine whether the UIGEA has been beneficial to the United States, this section will discuss the many problems accompanying Internet gambling, and then analyze the costs and benefits of legislation relating to those problems. “To the extent benefits exceed costs, the legislation bestows a net benefit to the United States.”¹²³ This section will also discuss more recent legal developments relating to Internet gambling and analyze the potential costs and benefits flowing from those developments.

B. Internet Gambling in the United States

This section discusses the technical aspects of Internet gambling, then gives a synopsis of the problems that currently exist with the current prohibitionist policy of Internet gambling in the United States.¹²⁴

1. The Internet Gambling Process

In order to gamble online, most sites require customers to set up an account with the site before they can place any wagers, download any

118. *Id.*; see also 31 U.S.C. § 5363 (2006).

119. 31 U.S.C. § 5363.

120. *Id.* §§ 5361-5367.

121. GEIGER JOHNS ASSOCS., LLC, *supra* note 1, at 3.

122. *Id.*

123. Bamman, *supra* note 100, at 233.

124. MALCOLM K. SPARROW, CAN INTERNET GAMBLING BE EFFECTIVELY REGULATED? MANAGING THE RISKS at v (2009) (“This study . . . examines a range of harms potentially associated with online gambling, and alternative methods for mitigating or minimizing them. Recognizing that the current U.S. prohibitionist regime with respect to online gambling is largely ineffective in achieving its aims, and provides no platform or opportunity for the implementation of most of the relevant harm-reduction strategies, [it] find[s] that an alternative regime of legalization and regulation of online gambling would likely improve consumer welfare and protections. The body of this report evaluates a range of strategies, both regulatory and technological, that could be used to mitigate potential harms associated with online gambling more effectively.”).

gaming software, or play any games.¹²⁵ After creating an account, a customer may not participate in or play any games until they have deposited sufficient funds into their account.¹²⁶ Prior to the passage of the UIGEA, these accounts were funded with “credit cards, checks, e-checks, money orders, ‘e-wallets,’ or other transaction devices.”¹²⁷ In order to withdraw funds from their account, the player requested a withdrawal from the cashier page of their account up to the full balance of their account, and such funds would be deposited back to the player through the same funding process.¹²⁸ This process allows Internet gambling sites to “accept[sic] deposits, process[sic] wagers, and transmit[sic] payouts without ever physically touching American soil . . . creat[ing] enormous jurisdictional problems for American law enforcement officials.”¹²⁹ Since these companies are often in compliance with their respective country’s Internet gambling laws, “foreign governments are unlikely to extradite company executives for prosecution in the United States.”¹³⁰

2. *Economic and Social Problems Associated with Internet Gambling*

Money laundering and problem gambling are inherent issues with gambling. Along with traditional methods of gambling, Internet gambling raises other issues such as underage gambling, location tracking, and fraud.¹³¹ These are problems with Internet gambling regardless of whether it is legalized, as Internet gambling is still available to U.S. consumers through overseas operators.¹³² “The net effect of the current approach is to push Internet gambling underground and offshore, out of the reach of U.S. courts and regulators and exposing American consumers to significant risks.”¹³³

125. See, e.g., *Terms of Service*, BOVADA, <http://www. Bovada.lv/terms-of-service> (last visited Nov. 4, 2012).

126. *Id.*

127. Bamman, *supra* note 100, at 234.

128. *Id.* at 234.

129. *Id.* at 234-35 (citing Michael J. Vener, Comment, *Internet Gambling Law: Is Prohibition Really Good Policy?*, 15 SW. J.L. & TRADE AM. 199, 211-14 (2008)).

130. See *id.*

131. SPARROW, *supra* note 124.

132. *Id.*

133. *Id.*

a) Underage Gambling

One of the main issues raised by online gambling is how to keep minors from accessing the websites.¹³⁴ In 2008, 3.3% of American male youth aged fourteen to twenty-two played poker online for money, almost a 1.0% increase from 2007.¹³⁵ This problem is enhanced by the fact that many online gambling sites do not have adequate age verifications in place to keep minors from gaining access to them; and many of the ones that do are easily manipulated by minors who obtain credit card information from their parents.¹³⁶

b) Problem Gambling

Another issue associated with Internet gambling is problem gambling.¹³⁷ “Problem gambling is a term . . . that refers to the fact that some individuals who gamble do so irresponsibly and damage or disrupt personal, financial, or social pursuits.”¹³⁸ Serious problem gambling is constant at about 1% in most countries.¹³⁹ The percentage of problem gamblers in the United States is thought to be 100% to 200% higher than global averages.¹⁴⁰

c) Site Operator Fraud

An inherent issue of Internet gambling is fraud by site operators.¹⁴¹ Fraud occurs where the gambling host “fixes” the game to be unfair to the participant, and exists in both traditional and online gambling environments. Currently, strict regulations of brick-and-mortar casinos effectively control this problem.¹⁴² However, operator fraud in the Internet context may fall into one of three unique categories that are harder to regulate: “1.) Individuals can set up unlicensed gambling websites that either refuse to return customer’s money or operate unfair games;” 2) operators can create fraudulent websites modeled after licensed sites to trick players into using the fraudulent site, and 3) insiders within licensed sites “can exploit inside information to cheat players.”¹⁴³

134. *Id.* at 2.

135. *Id.* at 17.

136. *Id.* at 17-19.

137. *Id.* at 60.

138. *Id.*

139. *Id.* at 61.

140. *Id.*

141. *Id.* at 24.

142. *Id.* at 10.

143. *Id.* at 24.

d) *Player Fraud*

Player fraud exists in both the traditional and online realms; however, it may be exacerbated through online gambling websites. Historically, players were able to cheat other players, or the operator, by “fixing the dice” or having an “ace up their sleeve.” In the Internet context, players may cheat through the use of “[p]oker bots” (automated programs that can play for a player at an advanced level), player collusion, or “multi-tabling” (where a player uses multiple accounts to enter the same game as two or more players).¹⁴⁴ Other types of player cheating may include computer hacking and “super-users.”¹⁴⁵

e) *Money Laundering*

“*Money laundering* is a process through which proceeds derived from illegal activity are legitimized.”¹⁴⁶ It usually involves “three stages[:] 1) the placement stage, 2) the layering stage, and 3) the integration stage.”¹⁴⁷ Online gambling site operators are forced overseas, and out of the reach of U.S. law enforcement. This may make it difficult to discover money laundering by both site operators and customers.

f) *Jurisdictional Issues*

Historically states have had the power to determine which forms of gambling to allow within their jurisdiction.¹⁴⁸ However, the Internet presents a unique problem with both the location of the gambling operator and the location of the player.¹⁴⁹ An important issue is ensuring that players are not able to access Internet gambling in states that do not legalize Internet gambling.¹⁵⁰ The UIGEA somewhat addressed this issue by “increas[ing] the federal government’s control over online gambling . . . casting a broad net over any state attempts to legalize online gambling.”¹⁵¹ Also, “states have no recourse against offshore sites that provide gambling

144. *Id.* at 30.

145. *See id.* at 31.

146. *Id.* at 37.

147. *See id.* (citing *The SAR Activity Review – Trends, Tips & Issues*, FIN. CRIMES ENFORCEMENT NETWORK, May 2008, http://www.fincen.gov/news_room/tp/files/sar_tti_13.pdf).

148. *See* U.S. CONST. amend. X; *see also* 18 U.S.C. § 1084 (2006).

149. SPARROW, *supra* note 124, at 45.

150. *Id.*

151. *Id.* at 45-46.

services to their residents.”¹⁵² Recent technological advances have created ways to combat this problem through geo-location technology, which can identify the physical location of a user by using their IP address, and help prevent access to certain sites.¹⁵³

Another important issue is the physical location of the operator and what licensing strictures and regulations apply. Authorities could resolve this issue by using the physical location of the operator as determined by the operator’s domicile, primary place of business, or place of maintenance, which could all be determined using the aforementioned geo-location technology.¹⁵⁴

g) Data Confidentiality and Website Security

The problem of data confidentiality and website security is unique to the online gambling environment. “Online gambling websites often hold personal and confidential information of their customers, including credit card and bank account numbers, names, addresses, and other sensitive information.”¹⁵⁵ Consumers want to know that they are protected, and that the site with which they register will not share their personal information with third parties. The U.S. federal government allows the states to enact laws to protect consumer’s personal data.¹⁵⁶ However, since most online gambling sites currently originate offshore, consumers’ only data protection is whatever the online gambling site decides to implement.¹⁵⁷

This problem further presents itself through the online gambling website’s security.¹⁵⁸ “There are currently no U.S. Federal laws regarding data breaches, and the issue is left to individual states. However, acts of hacking and computer fraud are addressed by the Computer Fraud and Abuse Act . . . [which] criminalizes a wide range of computer fraud.”¹⁵⁹ Similar to the problem of data confidentiality, website security also suffers from the fact that most online gambling sites currently originate offshore.¹⁶⁰

152. *Id.* at 46.

153. *Id.* at 47.

154. *Id.* at 47-49.

155. *Id.* at 50.

156. *Id.*

157. *Id.* at 50-51.

158. *Id.* at 53.

159. *Id.*

160. *Id.* at 53.

C. Gambling Legislation in the United States

This section provides an overview of the legal landscape of Internet gambling by discussing applicable laws passed prior to the UIGEA, during passage of the UIGEA, and then the most recent developments. Since state gambling laws vary from state-to-state, the emphasis is on federal legislation and its effects on Americans in general.

1. American Gambling Law Prior to the UIGEA

Gambling laws in America exist at the federal, state, and tribal levels, creating much confusion as to how they interrelate. For the most part, states have the ability to regulate gambling within their borders, leading to a wide variety of differing rules.¹⁶¹ Forty-eight out of fifty states have some form of legal gambling, with the only exceptions being Hawaii and Utah.¹⁶² The relationship between the states and Indian tribes, along with federal regulations, has further complicated matters.¹⁶³ The federal government also has the power to pass gambling legislation when it affects interstate commerce,¹⁶⁴ and mostly does so “to protect State sovereignty.”¹⁶⁵

One of the most important pieces of gambling legislation passed by Congress is the Interstate Wire Act.¹⁶⁶ This Act, passed in 1961, makes it unlawful for anyone to knowingly use a wire communication facility for the transmission of bets or wagers in interstate or foreign commerce.¹⁶⁷ The Act was originally passed in order to prohibit bookmakers “from taking bets in a State where gambling is illegal and delivering those bets via the telephone ‘wire’ to states where the bets are legal.”¹⁶⁸ Even though the Act was passed before the advent of the Internet, “providers of on-line gambling would likely fall under the ‘wire communication’ language of the statute since Internet communications are transmitted over phone lines.”¹⁶⁹ The DOJ takes the position that the act covers Internet gambling.¹⁷⁰

161. Bamman, *supra* note 100, at 235.

162. *Id.*

163. *See supra* Part II.

164. U.S. CONST. art. I, § 3, cl. 8.

165. Bamman, *supra* note 100, at 235.

166. *See* 18 U.S.C. § 1084 (2006).

167. *Id.*

168. Bamman, *supra* note 100, at 235-36.

169. Jeffrey A. Dempsey, *Surfing for Wampum: Federal Regulation of Internet Gambling and Native American Sovereignty*, 25 AM. INDIAN L. REV. 133, 135 (2000-2001).

170. Bamman, *supra* note 100, at 236 (citing Katherine A. Valasek, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 MICH. ST. L. REV. 753, 757).

As far as types of gambling, the Act specifically mentions sporting events and contests, but does not mention any traditional types of casino games of luck or skill, causing confusion about whether it applies only to bets related to sporting events and contests, or all traditional types of gambling. Early judicial opinions on the issue seemed to limit the Act's application to instances of gambling related to sports betting only.¹⁷¹ In *In re Mastercard Int'l Inc., Internet Gambling Litigation*, the U.S. District Court for the Eastern District of Louisiana held that the plain language of the Wire Act "clearly requires that the object of the gambling be a sporting event or contest."¹⁷² This case stands for the proposition that the Wire Act does not apply to transmissions of bets or wagers knowingly placed using a wire communication facility when the bets or wagers are on games of skill or chance, such as casino games and poker. However, the DOJ's stance on the Wire Act, until just recently, was that it applied to all types of gaming.¹⁷³

Another important federal law relating to online gambling is the Illegal Gambling Business Act, an act passed in 1970 that makes it illegal to: "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business."¹⁷⁴ The Act relies on state law to determine whether a certain activity is illegal.¹⁷⁵ This Act protects state sovereignty by saying that state's gambling laws will determine what gambling activities are legal or illegal within the state's jurisdiction, unless Congress has specifically spoken on the matter.

Other federal laws that may apply to Internet gambling include "the Travel Act; the Interstate Transportation of Wagering Paraphernalia Act; the Professional and Amateur Sports Protection Act; and the federal aiding and abetting statute."¹⁷⁶ These acts may be relevant to Internet gambling because the UIGEA uses other federal laws to define "unlawful Internet gambling."¹⁷⁷ Therefore, conduct that falls under any of these statutes automatically triggers the UIGEA. Congress has also passed at least one

171. Bamman, *supra* note 100, at 236; see *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (convicting an Internet sports gambling company president for violation of the Wire Act).

172. *In re MasterCard Intern. Inc., Internet Gambling Litigation*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 254 (5th Cir. 2002).

173. See *supra* Part III.C.3.

174. See 18 U.S.C. § 1955 (2006).

175. *Id.*

176. Dempsey, *supra* note 169, at 135; see 18 U.S.C. § 1952 (2006); see also 18 U.S.C. § 1953 (2006); and 28 U.S.C. § 3702; and 18 U.S.C. § 2 (2006).

177. See 31 U.S.C. § 5362 (2006); see also *supra* Part III.C.2.

law that promotes Internet gambling, the Interstate Horseracing Act of 1978.¹⁷⁸ The UIGEA contains an explicit exemption for horseracing, showing that Congress did not intend all types of Internet gambling to be prohibited.¹⁷⁹

2. UIGEA

In 2006, Congress passed the UIGEA in response to findings of the National Gambling Impact Study Commission recommending laws prohibiting wire transfers to Internet gambling sites and the banks which serve them, as well as other pressures.¹⁸⁰ The UIGEA was a late attachment to the largely popular SAFE Port Act,¹⁸¹ after previous attempts to prohibit the funding of Internet gambling had failed.¹⁸² The Act cited Internet gambling as a cause of debt collection problems in the consumer credit industry, and also cited the fact that traditional restrictions on gambling are ineffective in the context of Internet gambling.¹⁸³

The UIGEA says, “No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling . . . credit, or the proceeds of credit . . . an electronic fund transfer . . . any check . . . [or] the proceeds of any other form of financial transaction”¹⁸⁴ This prohibition, covering a wide range of financial transactions, attempts to cut off the funding of Internet gambling sites. The Act goes on to prohibit financial transaction providers (“FTPs”) from allowing transactions to fund unlawful internet gambling sites.¹⁸⁵ An FTP is considered to be in compliance with the Act if they meet certain requirements set out in the legislation that “identify and block restricted transactions, or otherwise prevent or prohibit . . . restricted transactions. . . .”¹⁸⁶ Also important, the legislation requires the Federal Reserve Board to promulgate regulations to effectuate its provisions, and requires the Federal Trade Commission to enforce those requirements.¹⁸⁷

178. Bamman, *supra* note 100, at 236.

179. *Id.* at 236-37.

180. See 31 U.S.C. § 5361-5367 (2006).

181. Security and Accountability for Every Port Act, 6 U.S.C. §§ 901-973 (2006).

182. Ryan S. Landes, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 931-32 (2007); see also Bamman, *supra* note 100, at 237.

183. 31 U.S.C. § 5361 (2006).

184. *Id.* § 5363.

185. See *id.* § 5364.

186. See *id.* § 5364(c).

187. *Id.* § 5364.

Placing the burden of implementing the provisions of the UIGEA on the FTPs, along with the burdens of the regulations stemming from the Act, has caused much discontent among FTPs.¹⁸⁸ One complicating factor is “the meaning of unlawful internet gambling itself is vague.”¹⁸⁹ The UIGEA depends on other federal, state, and tribal laws in that it defines unlawful Internet gambling as meaning “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use . . . of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands. . . .”¹⁹⁰

This means that FTPs must know the laws of all fifty states, as well as the different judicial interpretations of federal laws from jurisdiction to jurisdiction.¹⁹¹ Further complicating matters is that the UIGEA makes exceptions for transactions funding horseracing, fantasy sports, or wagers made exclusively within a single state.¹⁹² Some authors believe that FTPs will over-restrict in an effort to avoid non-compliance with the UIGEA, resulting in many legitimate transactions being restricted.¹⁹³

In addition to the requirements imposed by the UIGEA, the Federal Reserve Board implemented rules in November of 2008, as required by the UIGEA, titled the Prohibition on Funding of Internet Gambling (“PFUIG”).¹⁹⁴ PFUIG requires FTPs to perform due diligence checks for restricted transactions.¹⁹⁵ It also contains exceptions for some FTPs due to cost considerations. However, there are no exemptions for card systems or money transmitting businesses.¹⁹⁶

3. Recent Developments - The DOJ Wire Act Opinion

Originally, the DOJ considered an intrastate Internet gambling operation to be illegal under the Wire Act.¹⁹⁷ The DOJ opined that the Wire Act applied to all types of Internet gambling that crossed state lines.¹⁹⁸ This

188. Bamman, *supra* note 100, at 238.

189. *Id.* at 239.

190. 31 U.S.C. § 5362.

191. Bamman, *supra* note 100, at 239.

192. 31 U.S.C. § 5362.

193. Bamman, *supra* note 100, at 239; *see also* Jason A. Miller, *Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling*, 12 N.C. BANKING INST. 185, 206-08 (2008).

194. *See generally* Bamman, *supra* note 100, at 239-42.

195. *Id.* at 240.

196. *Id.*

197. *Id.* at 235-36; *see also supra* Part III.C.1.

198. Bamman, *supra* note 100, at 235-36.

opinion was in tension with the recently passed UIGEA, which seems to allow intrastate wagers to be placed over the Internet even if there is a momentary intrastate transmission of information necessary for the transaction.¹⁹⁹ The DOJ addressed this tension in a recent DOJ opinion interpreting the Wire Act.

The DOJ took the position that the Wire Act applied only to transmissions involving wagering on sporting events or contests, and that intrastate transmissions of wire communications unrelated to a “sporting event or contest” fall outside the reach of the Wire Act.²⁰⁰ The DOJ stated that its opinion did not address the Wire Act’s interaction with the UIGEA, and did not analyze the UIGEA in any other respect.²⁰¹ However, because the UIGEA depends on the Wire Act for its definition of unlawful Internet gambling, this development has potentially far-reaching effects for Internet gambling.

D. Effects of the UIGEA

1. Benefits

Although it is very hard to determine the extent of the Internet gambling market due to the large number of foreign-owned enterprises, the UIGEA has slowed the growth rate of Internet gambling in the United States.²⁰² In 2006, prior to the UIGEA, the Internet gambling market in the United States was near \$6 billion per year, and it took until 2010 to get back to that same number.²⁰³ The UIGEA was successful in the sense that it slowed the growth rate of Internet gambling in the United States, even though, in reality, the market is approximately the same size now as it was immediately prior to the UIGEA.

Another benefit is that the UIGEA has increased accessibility costs to Internet gambling, thus discouraging that problem gambling.²⁰⁴ A study by the National Gambling Impact Study Commission found that problem gamblers are more likely to file bankruptcy, commit crimes, and be

199. See *supra* Part III.C.2.

200. Memorandum from Assistant Att’y Gen. Virginia A. Seitz to Assistant Att’y Gen., Criminal Div. (Sept. 20, 2011) <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

201. *Id.*

202. GEIGER JOHNS ASSOCS., LLC, *supra* note 1, at 3; see also Bamman, *supra* note 100, at 242-43.

203. GEIGER JOHNS ASSOCS., LLC, *supra* note 1, at 3.

204. Bamman, *supra* note 100, at 244.

arrested.²⁰⁵ Assuming that the study's statistics apply at a similar rate to Internet gambling, making it more expensive to access Internet gambling should help curb problem gambling and many of the social problems that flow from it, as well as other problems inherent in gambling such as underage gambling and player fraud.²⁰⁶

2. Costs

One of the main economic costs of the UIGEA has been the imposition of expensive regulations on American FTPs.²⁰⁷ The regulations set out by the Federal Reserve Board in PFUIG have forced FTPs to implement expensive monitoring systems in order to avoid liability for breaching the legislation.²⁰⁸ These increased costs, in turn, decrease the competitiveness of American FTPs on a global scale.²⁰⁹ Also, consumers still wishing to gamble over the Internet will be encouraged to use foreign FTPs in order to avoid the UIGEA's regulations, further decreasing the global competitiveness of American FTPs.²¹⁰ FTPs are losing large amounts of revenue streams in the form of lost fund transfer fees, which one estimate values at approximately one-half billion dollars.²¹¹ By putting the burden on American FTPs to monitor unlawful Internet gambling, the UIGEA has had the unintended effect of increasing the FTP's costs and decreasing their revenues, thus decreasing their global competitiveness.

Another unintended effect of the UIGEA is that it has put American consumers at risk by forcing them to use under-regulated foreign Internet gambling sites.²¹² Many of the countries that allow Internet gambling have non-specific regulations that create confusion, and do not provide the same level of protection to consumers as envisioned by the drafters of the UIGEA.²¹³ Many of the problems associated with Internet gambling such as operator fraud, player fraud, and underage gambling go unabated, as

205. *Id.* at 243 (citing NAT'L GAMBLING IMPACT STUDY COMM'N, NAT'L GAMBLING IMPACT STUDY COMM'N FINAL REPORT ch. 5 (1999)).

206. *Id.*

207. *Id.* at 245 (citing Miller, *supra* note 193).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 246 (citing Miller, *supra* note 193).

212. *Id.* at 248.

213. PeterPaul Shaker, Note, *America's Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House*, 12 FORDHAM J. CORP. & FIN. L. 1183, 1200-01 (2007); see also Bamman, *supra* note 100, at 248.

foreign regulations do not address those issues.²¹⁴ For instance, many foreign Internet gambling sites attempt to restrict access only to customers under the age of eighteen, whereas most states require gamblers to be at least twenty-one to gamble in traditional casinos.²¹⁵ Many of those restrictions are “cursory at best.”²¹⁶ By forcing Internet gambling offshore into under-regulated jurisdictions, the UIGEA decreases protection for American consumers who still wish to participate in Internet gambling, even though the UIGEA intended to protect American consumers.²¹⁷

IV. A Proposed Grant of Authority to Indian Tribes and the Legal Ramifications

The debate over tribal sovereignty has been developing for decades. Justice John Marshall, in *Cherokee Nation v. Georgia*,²¹⁸ stated that tribes are domestic dependent nations because they “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”²¹⁹ This case, along with the other two cases of the Marshall Trilogy, stands for the proposition that

“[t]ribes are domestic dependent nations whose right to occupy their lands is subject to the ‘ultimate domain’ of the federal government; they may not form treaties with foreign nations, but may govern their affairs *without interference from the states*, except when limited by treaties or by the acts of Congress.”²²⁰

This plenary power enjoyed by the federal government over the Indian tribes derives from the language of the Commerce Clause. The United States Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*.”²²¹ However, the Court has departed from the doctrines of inherent sovereignty and trust responsibility for Indian tribes and has instead adopted a

214. See *supra* Part III.B.2.

215. Bamman, *supra* note 100, at 249-50.

216. *Id.*

217. *Id.*

218. 30 U.S. (5 Pet.) 1 (1831).

219. *Id.* at 17.

220. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 817 (1996) (emphasis added).

221. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

sovereignty-by-consent approach.²²² This approach narrows tribal sovereignty to exist only over those who expressly or implicitly consent to it, and infringes upon the goals of tribal self-government and self-sufficiency sought by the drafters of the IGRA.

The explicit goals sought by the drafters of the IGRA were to “promote tribal economic development, tribal self-sufficiency, and strong tribal government”²²³ The IGRA further states that Indian tribes “have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not . . . prohibit such gaming activity.”²²⁴ This language plainly indicates that a tribe has two legal hurdles to overcome in order to host a certain class of gaming: federal statutory law and state gambling laws. If the tribe can clear those hurdles, the tribe can reap the rewards of increased revenues from gaming. However, it has been argued, “by allocating some control of gaming rights to the states, the IGRA necessarily redistributes sovereignty. And by subjecting tribal gaming to Federal regulation and oversight, the IGRA asks tribes to sacrifice some presumed sovereignty in exchange for a new Federal right to exercise sovereignty.”²²⁵

This section proposes that Congress can fulfill the goals set forth in the above-cited sections of the IGRA by granting tribes the authority to operate interstate Internet gambling facilities, subject to existing federal regulations contained in the IGRA and the UIGEA. Doing so would further the federal policies of tribal self-government and self-sufficiency, increase protections for consumers who continue to use off-shore gambling websites, and lower costs for FTPs in compliance with the UIGEA by creating a list of known, legal, Internet gambling entities.

At the same time, this grant of authority will balance the tribe’s interests with the state’s interests in protecting its sovereignty by continuing to subject tribes to the provisions of the IGRA. This section will show that Congress has the power to grant such authority to the tribes because of its plenary power over the tribes. Further, this section will address the

222. See Gould, *supra* note 220, at 814 (discussing a series of cases indicating that “[a]bsent a congressional delegation of authority, federal preemption, or a finding of inherent civil jurisdiction, the sovereign rights of tribes are sufficient to prevail in disputes between tribes and tribal members *only*.”) (emphasis added).

223. 25 U.S.C. § 2701(4) (2006).

224. *Id.* § 2701(5).

225. Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 713 (1996).

interplay between the two main legal hurdles the Indian tribes will encounter when operating interstate Internet gambling and the role the states will play.

A. Congress has Commerce Clause Authority to Grant Indian Tribes the Right to Regulate Interstate Internet Gambling

In the wake of the recent DOJ opinion, it appears that states will be able to operate in-state gambling activities so long as they are not related to sporting events, and so long as the state legalizes Internet gambling.²²⁶ In fact, the Nevada has already approved online poker regulations and Illinois and New York already have concrete plans to start state lotteries online.²²⁷ Allowing states to host in-state online gaming will, in theory, help solve the problems created by the UIGEA, where all the benefits of Internet gambling went offshore while all the costs remained. States should now be able to collect tax revenues on in-state gambling.

This setup, however, will leave Indian tribes around the nation at a competitive disadvantage because states will have larger markets for gaming than tribes. Instead of allowing the majority of the benefits of Internet gaming to be realized by the states, Congress should grant tribes the authority to operate interstate Internet gambling sites, subject to the existing regulatory framework existing in the IGRA and the prohibition on unlawful internet gambling in the UIGEA.

Congress has the power to grant such authority to tribes from its Commerce Clause powers. First, Congress has the power to regulate the flow of interstate commerce under the U.S. Constitution.²²⁸ Because of the open-access nature of the Internet, nearly any type of Internet gambling site will affect the flow of interstate commerce unless expensive technological measures are implemented. Second, the Indian Commerce Clause is understood as “granting to the federal government a plenary power in Indian [C]ountry. . . .”²²⁹ Congress could rely on this source to grant Indian tribes the authority to host interstate Internet gaming. And to quell any notion that this is an unconstitutional intrusion on state sovereignty, Congress would need to include the limitations set out in the IGRA, which already protect state sovereignty.²³⁰ This would allow any tribal regulation

226. Stradbroke, *supra* note 6.

227. *Id.*

228. U.S. CONST. art. I, § 8, cl. 3.

229. RALPH A. ROSSUM, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* 37 (2011).

230. *See supra* Part II.

to pass a Dormant Commerce Clause challenge,²³¹ while at the same time, setting up two main legal hurdles that tribes would have to overcome.²³²

B. Two Main Legal Hurdles Tribes Must Overcome; the IGRA & the UIGEA

Under the proposed system, tribes will have to meet the existing regulations set forth in the IGRA. This is beneficial because tribes and states already have knowledge of the provisions therein, and the law establishes a regulatory agency that would be equipped to handle the influx of new gaming opportunities for tribes. Further, tribes will have to work their operations around the definition of unlawful Internet gaming contained in the UIGEA. This section looks at each of these hurdles in turn.

1. The IGRA Sets up a Regulatory Scheme that Should be Applied to Internet Gambling

The IGRA contains a number of provisions governing the relationships between the tribes and states in their gaming operations.²³³ Perhaps most important is the limitation that a tribe may not host Class II or Class III games unless the state allows such gaming.²³⁴ If Congress granted tribes the authority to host interstate Internet gaming, it would be contingent upon the relevant state allowing such gaming, thus protecting state sovereignty. For instance, if State A regulates Internet gambling, then State A would automatically have to deal with Indian tribes wishing to host Internet gambling under the IGRA. However, State A would be limited to operating in-state Internet gambling while the authority from Congress would allow Indian tribes to operate Internet gambling serving customers in any state that allows Internet gambling, as well as foreigners wishing to use the Indian site.

One of the foreseeable problems with IGRA's application to Internet gambling is the issue of Internet gambling's classification. State regulators may wish to classify Internet gambling as Class III, thus giving them greater ability to influence Indian tribes' operations. Others may wish to classify it as a separate class of gaming. However, the only difference between Internet and traditional gaming is the medium through which it is offered. Instead of using the medium to classify the gaming, the tribes and

231. See *supra* Part IV.C.1.i.

232. See *supra* Part IV.B.

233. See *supra* Part II.

234. See *supra* Part II.

states should instead look to see what actual game is being offered, and whether that game could be classified under the existing IGRA framework. If a tribe wishes to host a Class III game over the Internet, the tribe will have to enter a tribal-state compact in order to do so.²³⁵

A benefit of using the existing IGRA framework is that IGRA contains a provision exempting valid Class III games from the Johnson Act.²³⁶ This means that so long as Internet games classified as Class III are offered in compliance with IGRA, they would be exempt from the Johnson Act and their operation would not be in contradiction with federal law.

2. The UIGEA - The Definition of "Unlawful Internet Gambling" Depends on State Law and Other Federal Laws

The second legal limitation is the definition of unlawful Internet gambling contained in the UIGEA.²³⁷ Because the definition depends on existing federal, state, and tribal laws for its definition, the Indian tribes would have to be careful not to violate this definition; otherwise, they may be subject to conviction under the UIGEA.

For example, Indian tribes could not operate Internet gambling related to sporting events or contests based on the explicit language contained in the Wire Act.²³⁸ Also, Internet gambling would be unlawful in a state, under the UIGEA, if that state did not opt-in to allow it. This means that tribes would have to track which states have opted-in, and would also have to implement geo-location technology to exclude residents of states that did not opt-in.

C. The Role of States

Because the gaming laws of a state have such a pivotal impact on the possibilities and limitations of Indian Internet gambling, whether states regulate or prohibit Internet gambling is an important factor in this analysis. This section looks at the legal hurdles states face when opting in or out of Internet gambling.

The Tenth Amendment, and language in federal gambling legislation, gives states the ability to regulate purely intrastate gambling.²³⁹ However, because of the Internet's nature, it is likely that prohibition or regulation of

235. See *supra* Part II.A.

236. See *supra* Part II.B.

237. See *supra* Part III.C.2.

238. 18 U.S.C. § 1084(a) (2006).

239. See U.S. CONST. amend X; see also Wire Act, 18 U.S.C. § 1084; Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).

gambling will affect interstate commerce. This may lead to a dormant Commerce Clause challenge of any state regulation or prohibition, so states must be sure they can confine their regulations to purely intrastate matters. This section discusses a dormant Commerce Clause challenge to a state prohibition of Internet gambling and attempts to define what is considered purely intrastate gambling.

In *Rouso v. State of Washington*, a Washington resident challenged the constitutionality of the State's statutory ban on Internet gambling. The statute in question was section 9.46.240 of the Revised Code of Washington, "which criminalizes the knowing transmission and reception of gambling information by various means, including use of the Internet."²⁴⁰ The constitutional challenge was based on the statute being in violation of the dormant Commerce Clause.

The court in *Rouso* determined that the Washington ban on Internet gambling did not violate the dormant Commerce Clause.²⁴¹ First, the court found that Congress had not delegated authority to the states to regulate online *interstate* gambling, but that states did have the power to regulate online gambling, only *within* the state.²⁴² The court cites two federal statutes that recognize this power of the state to regulate the types of gambling allowed *within* state borders.

Second, the court considered whether section 9.46.240 of the Revised Code of Washington discriminated against interstate commerce in favor of in-state interests. The court looked at the language of the statute and the effects of the statute separately. The language of the statute "is not discriminatory; it equally prohibits Internet gambling regardless of whether the person or entity hosting the game is located in Washington, another state, or another country."²⁴³ The court also found, "[t]he statute prohibits Internet gambling evenhandedly, regardless of whether the company running the web site is located inside our outside the State of Washington."²⁴⁴

Third, the court considered whether the burden on interstate commerce was clearly excessive in relation to a legitimate state interest protected by the statute. The court says that a state "wields police power to protect its citizens' health, welfare, safety, and morals. On account of ties to organized crime, money laundering, gambling addiction, underage

240. *Rouso v. Washington*, 239 P.3d 1084, 1086 (2010).

241. *Id.* at 1095.

242. *Id.* at 1080.

243. *Id.* at 1088.

244. *Id.*

gambling, and other societal ills, “[t]he regulation of gambling enterprises lies at the heart of the state’s police power.”²⁴⁵ In determining whether the burden on interstate commerce is “clearly excessive,” the court looks at “whether the burden is clearly unnecessary to achieve the state interest, whether that same interest could be protected in another way while imposing a lesser burden on interstate commerce.”²⁴⁶ In conducting this analysis, the court looks at whether an alternative system of “regulation of online gambling” could protect the state’s legitimate interests in a way less burdensome on interstate commerce than the statutory prohibition completely banning online gambling in the State.

The court also addresses some of the issues with creating a regulatory system to address Internet gambling, such as the significant time and resources that would be needed to develop and enforce such a scheme and the loopholes that may be created by the regulations. The court says that “[u]nder the dormant commerce clause . . . it is not clear that regulation of Internet gambling could protect state interests as fully as . . . a complete ban.”²⁴⁷ The court then assumes that the above issues could be addressed adequately by imposing the state’s current regulatory scheme for traditional “brick and mortar” casinos on Internet gaming entities, and the court then looks at the burden such a scheme would impose on interstate commerce.²⁴⁸

The Washington regulations of traditional gambling operations include state inspections that can occur without notice to the gambling operation.²⁴⁹ These inspections help protect legitimate state interests. However, if Washington were to apply these same regulations to Internet gambling operations, every gambling operation, irrespective of origin, would have to comply with the regulations in order to service Washington residents. The *Roussio* court concluded that “[r]egulation of Internet gambling comparable to that currently imposed on brick and mortar gambling would require Washington to export its considerable regulations to the world – a major burden on interstate commerce.”²⁵⁰

Also, the Washington regulations may be directly contradictory to a foreign country’s regulations and imposing them on foreign online operations would effectively blacklist that country from Washington online gambling. This would likely be an unconstitutional infringement of the

245. *Id.* at 1090 (citing *Johnson v. Collins Entm’t Co.*, 199 F.3d 710, 720 (4th Cir. 1999)).

246. *Id.* at 1091.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1092.

federal government's plenary power to enter into treaties with foreign nations. In fact, the Supreme Court has struck down another state's law that restricted the purchase of goods from a foreign country under Article II, Section 2, Clause 2 of the United States Constitution.²⁵¹

This case illustrates two of the main constitutional hurdles that states will have to overcome in order to allow or prohibit Internet gambling. As outlined above, a state will have to set up any potential regulations in a way that they will not infringe on the dormant commerce clause. However, states should be willing to do so in order to realize the estimated increase in tax revenues that will arise from opting in to allow Internet gambling.²⁵²

V. Conclusion

In order for tribes to realize the immense benefits of Internet gambling, Congress should grant tribes the authority to operate interstate Internet gambling sites under the existing IGRA framework. Doing so would be positive for all parties involved. It would reduce costs for because a list of accepted gambling sites would be created. The states could partake in revenue sharing with tribes under tribal-state compacts. American consumers wishing to gamble online would enjoy increased protection because they would no longer be forced to use foreign under-regulated Internet sites. Perhaps most pertinent to this comment, the tribes could realize an immense benefit in the form of approximately \$2.5 billion in increased revenues and thousands of support jobs for the operation of Internet gaming. So long as some of the increased revenue goes toward combating problems inherent in gambling, the benefits of authorizing tribes to operate Internet gambling greatly outweigh the costs.

251. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 370-80 (2000).

252. *See Bamman, supra* note 100, at 251-52 (estimating that states could receive, in summation over the next ten years, nearly \$40 billion in revenues).

