

NOTE

Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling

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Respect for the law is among the most precious qualities a decent society can adorn and protect itself with, and when that respect is at-

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tenuated by attempted enforcement of moral principles widely flaunted by the otherwise law abiding, foolishness is surely at work.¹

I. INTRODUCTION

Recognizing that gambling was spreading and gaining greater acceptance among many Americans, the 1976 Commission on the Review of the National Policy Toward Gambling (1976 Gambling Commission) recommended that the legality of gambling should be determined by individual state governments as a better method for capturing the will of the people.² Since the issuance of that report, gambling has flourished in the United States to the extent that every state, except Hawaii and Utah, has some form of legalized gambling.³ In the intervening years since that study, an entirely new industry has developed—Internet gambling. Because of the borderless, interstate nature of the Internet,⁴ its recent union with gambling renews the controversy surrounding an issue thought to have been resolved by the 1976 Gambling Commission—whether gambling policy should be formed primarily at the state or national level. Congress currently appears poised to settle this state versus national debate within the realm of Internet gambling in favor of the federal government.

Somewhat reminiscent of Congress's earlier effort to establish a federal ban of all indecent materials on the Internet, congressional lawmakers are now seeking a blanket ban on Internet gambling.⁵ Asserting not only that states are unable to address the issue adequately on their own, but that existing federal anti-gambling laws are insufficient and that children must be protected from this vice, the Senate passed the Internet Gambling Prohibition Act (IGPA) in July 1998.⁶ As currently written, the IGPA makes Inter-

1. N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 178 (1997) (quoting COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 757 (1976)).

2. *Id.* at 172.

3. *Id.* at 172-73. Today 24 states have gambling casinos; 38 states have lotteries; and several permit bingo, pari-mutuel wagering, and horse racing. *See, e.g., Internet Gambling Prohibition Act of 1997: Hearings on S. 474 Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 105th Cong. 18 (statement of Ann Geer, Chairperson of the National Coalition Against Gambling Expansion) [hereinafter *S. 474 Hearings*]; Scott M. Montpas, Comment, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 166 (1996).

4. *See generally* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Joanna Zakalik, *Law Without Borders in Cyberspace*, 43 WAYNE L. REV. 101 (1996).

5. *See* Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.

6. *See S. 474 Hearings, supra* note 3, at 1-3 (statement of Sen. Jon Kyl, Chairman of

net gambling a federal crime and thereby removes state governments from having a role in determining whether or not such an activity should be legal in a particular state.⁷

This Note asserts that a federal ban on Internet gambling is problematic because of its impact on principles of federalism, its possible unconstitutionality in light of *Reno v. ACLU*,⁸ and its unlikely enforceability. First, since the IGPA makes Internet gambling a federal crime, states cannot permit their citizens to gamble over the Internet even if all the gambling occurs within states that have legalized various forms of traditional gambling.⁹ The Internet Gambling Prohibition Act would also prohibit Internet gambling between residents of states that already permit the use of telephone wires for placing bets.¹⁰ Second, recent language of the Supreme Court in *Reno* suggests that Congress should not dismiss Internet gambling as merely a vice activity that is undeserving of any First Amendment protection. Finally, the IGPA could meet with considerable enforcement difficulty because of the ability of Internet users to disguise their identities¹¹ and the fact that most online gambling services are currently based outside the United States.¹² These significant enforcement problems could cause the IGPA to be only a national moral proclamation lacking legitimacy because it does not reflect the will of the citizenry—the very situation against which the National Gambling Commission cautioned in 1976.

Part II of this Note describes the nature of Internet gambling including its rise and continued development as well as some of the concerns that such gambling raises. Part III outlines the Senate's response to the issue of Internet gambling, the Internet Gambling Prohibition Act, and explains several difficulties inherent in this blanket ban. Finally, Part IV suggests an alternative, state-centered method for addressing gambling on the Internet.

the Judiciary Committee Subcommittee on Technology, Terrorism, and Government Information).

7. See S. 474. While this Act did not become law in 1998, it is slated to be reintroduced in identical form in 1999.

8. *Reno*, 117 S. Ct. 2329 (1997).

9. See S. 474.

10. *Id.* Currently, eight states allow the use of telephone wires for betting services. See Karl Vick, *Maryland Tracks Want to Offer TV Betting*, WASH. POST, Jan. 4, 1998, at B1.

11. See Richard Raysman & Peter Brown, *Cyber-Casinos: Gambling Meets the Internet*, N.Y. L.J., Aug. 12, 1997, at 3.

12. See L.A. Lorek, *Virtual Casino Gambling on the Internet Sparks Worries About Who's Playing and Who's Dealing*, SUN-SENTINEL (Ft. Lauderdale, FL), July 6, 1997, at 1F.

II. NATURE OF INTERNET GAMBLING

A. *The Development of Internet Gambling*

With the growth of state lotteries, riverboat gambling, racetrack betting, and Native American casinos in the United States over the last several years, the opportunity to gamble no longer requires an excursion to Las Vegas. With the development of the Internet, the opportunity to gamble no longer even requires a person to leave his or her home. A computer, a modem, and a credit card are all that one needs to engage in a variety of online betting activities such as casino games, sports wagers, and lotteries.¹³ Indeed, every traditional gambling activity appears to have an Internet counterpart: Virtual Vegas;¹⁴ Internet Casino;¹⁵ Lottery.com;¹⁶ and Paradise Sports Book.¹⁷

The fact that gambling has combined with the Internet is certainly not surprising from an economic perspective. In 1993, it was estimated that "more Americans visited casinos than attended a major league baseball game"; revenue from non-Internet based gambling reached nearly \$550 billion in the United States in 1996.¹⁸ It was economically inevitable that an activity with this level of demand would be combined with a medium such as the Internet, which has the capacity to reach an audience of millions throughout the United States alone.¹⁹ Currently, only about 100 gambling Web sites exist²⁰ with a combined estimated yearly profit of between \$100 and \$200 million.²¹ However, industry analysts predict that by the year 2000, Internet gambling will become a billion-dollar business worldwide.²²

B. *Concerns Raised by Internet Gambling*

Internet gambling presents essentially many of the same concerns that traditional gambling activities have raised throughout the years: uneasiness

13. See Senator Jon Kyl, *Internet Legislation Brings Prohibition of Interstate Gambling into the Cyber Age*, ROLL CALL, July 28, 1997.

14. Located at <<http://www.virtualvegas.com>>.

15. Located at <<http://www.casino.org>>.

16. Located at <<http://www.lottery.com>>.

17. Located at <<http://www.paradisports.com>>.

18. Senator Kyl, *supra* note 13.

19. In the United States, 50 million households have computers, and "25 million of those computers have access to the Internet." *S. 474 Hearings*, *supra* note 3, at 5 (statement of Sen. Richard H. Bryan).

20. The majority of gambling sites are based outside the United States. See Lorek, *supra* note 12, at 1F.

21. Senator Kyl, *supra* note 13.

22. *Id.*

about the morality of the activity; the likelihood of addiction; the possibility of fraud; and the conflict between state versus national regulation.²³ Questions of morality primarily surface in connection with Internet gambling's accessibility to children and are reminiscent of arguments made during the passage of the Communications Decency Act. Because children have potentially unlimited access to computers and the Internet, it is possible that without proper monitoring they will access gambling Web sites as readily as they could access indecent materials. Supporters of a ban of Internet gambling maintain that outlawing the activity for all individuals is the only way to insure that a segment of the population, children, will be adequately protected from corruption.²⁴

The likelihood of addiction to Internet gambling among both children and adults is another area of concern. For example, the video game-like nature of virtual casinos, labeled the "crack cocaine of gambling,"²⁵ could make online gambling a temptation difficult to resist. Furthermore, the fact that the Internet gambler need not leave the comfort and privacy of his or her home could mean that an individual might become easily addicted.²⁶ While it may still be too early to determine that addiction levels for Internet gambling will be higher than addiction levels for traditional types of legalized gambling, advocates of a ban warn that the economic devastation to compulsive Internet gamblers could be so great that the federal government should not wait to act. According to the Senate testimony of Ann Geer, Chairperson of the National Coalition Against Gambling Expansion, "Addicts could literally click their mouse and bet the house."²⁷

Fraud is another aspect of Internet gambling that poses a danger to the Internet gambler. Unlike traditional gambling activities, such as Las Vegas casinos or state-run lotteries, which are highly regulated by state gaming commissions, Internet gambling, for the most part, exists without any significant regulation.²⁸ This lack of regulation means that Internet gamblers do not know whether the games they are playing are legitimate and cannot be assured a payout if they do win online.²⁹ Other experts also warn of the po-

23. See *S. 474 Hearings*, *supra* note 3, at 1-3 (statement of Sen. Jon Kyl).

24. *Id.* at 5 (statement of Sen. Richard H. Bryan).

25. See *id.* at 2 (statement of Sen. Jon Kyl) (quoting Robert Goodman, Urban Planning Professor at Hampshire College).

26. *Id.* at 19 (statement of Ann Geer).

27. *Id.*

28. See Montpas, *supra* note 3, at 171.

29. "At least a tourist trying to keep his eye on the queen of diamonds as it flitters through the hands of a sidewalk con man in Manhattan can lay his hands on the culprit. An online bettor has nothing but faith." Matthew McAllester, *High-Tech Gambling*, NEWSDAY, May 4, 1997, at F8.

tential for money loss due to the use of credit cards when gambling online, as credit card numbers may be intercepted by hackers.³⁰ Describing this present state of Internet gambling, Wisconsin Attorney General James E. Doyle cautioned, "If gambling, in general, is a dumb bet, then gambling on the Internet is a very dumb bet."³¹

Assuming that Internet gambling is dangerous enough to warrant some type of regulation, another vexing problem posed by the activity is determining who should have the authority to address it. While pursuant to the Tenth Amendment, a state can decide whether gambling is legal or not within its borders, gambling that affects interstate commerce can be regulated by Congress under the authority granted to it by the Commerce Clause.³² Such a balance between state and national regulation operates seamlessly where traditional gambling is concerned because a lottery or a casino can generally be contained within the definitive borders of a state. On the contrary, the Internet cannot even be contained within a particular country.³³ According to Senator Kyl, "The global information revolution has created the opportunity to gamble across state lines in a way . . . the law could not have anticipated."³⁴ Because of this global nature of Internet gambling, supporters of a blanket ban maintain that the federal government is in a better position than the individual states to address this issue.³⁵

30. See *Internet Crimes Affecting Consumers: Hearings on S. 474 Before the Subcomm. on Technology, Terrorism and Government Information of the Senate Comm. on the Judiciary*, 105th Cong. 12-15 (1997) (testimony of Robert S. Litt, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice) [hereinafter *Internet Crimes Hearing*].

31. *S. 474 Hearings*, *supra* note 3, at 9 (statement of James E. Doyle).

32. The Interstate Wire Act is an example of such legislation. This Act prevents the use of telephone wires for betting between states unless both states permit such activity. 18 U.S.C. §§ 1081-1084 (1994).

33. See Montpas, *supra* note 3, at 164.

34. Senator Kyl, *supra* note 13.

35. However, states have not felt constrained in addressing Internet gambling. State attorneys general in Missouri, Minnesota, and Wisconsin are continuing to pursue either civil lawsuits or criminal charges against Internet gambling operators. See Don Bauder, *Odds Might Be Against Gambling on the Internet*, SAN DIEGO UNION-TRIBUNE, Nov. 16, 1997, at 12. Likewise, Nebraska, California, Connecticut, Louisiana, New York, and Virginia have proposed legislation to outlaw Internet gambling. See Henry J. Cordes, *Bill Would Prohibit Gambling Via Internet*, OMAHA WORLD-HERALD, Jan. 10, 1998, at 30; Raysman & Brown, *Cyber-Casinos*, *supra* note 11, at 3.

III. INTERNET GAMBLING PROHIBITION ACT

A. Provisions

Congressional proponents of the Senate's Internet Gambling Prohibition Act describe it as an update of federal law rather than a pointed attack on the Internet.³⁶ Defending the IGPA, Senator Kyl stated, "Our gambling laws must be consistently written, applied and enforced so that activity which is illegal in one forum is not allowed in another."³⁷ An update of federal law is thought to be warranted because existing federal anti-gambling provisions were written long before the development of the Internet, and therefore, their present applicability to the Internet is uncertain.³⁸

The Internet Gambling Prohibition Act was introduced in the Senate Judiciary Committee by Senator Kyl in March 1997, as an amendment to existing sections of the Interstate Wire Act³⁹—a federal law that prohibits the use of telephone wires in gambling operations.⁴⁰ This original proposal would have clarified existing language of the Interstate Wire Act to insure that a law originally designed to stop organized crime's use of telephones for betting could now be used to prohibit gambling over a communication medium such as the Internet.⁴¹ However, the version ultimately passed by the Senate in July 1998, not only corrects ambiguous language but creates a new section in the federal criminal code that specifically addresses gambling through the Internet.⁴² Specifically, the IGPA adds section 1085 to the U.S. Code making it unlawful for a person to place, receive, or otherwise make a bet or wager, or for parties engaged in the business of betting or wagering to do so via the Internet or a non-closed circuit interactive computer service in any state.⁴³

36. See *S. 474 Hearings*, *supra* note 3, at 2-3, 5 (statements of Sen. Jon Kyl and Sen. Richard H. Bryan).

37. Tom W. Bell, *Internet Gambling Ban Faces Losing Odds*, *TIMES-UNION* (Albany, NY), Jan. 6, 1998, at A7 (quoting Sen. Jon Kyl).

38. See Interstate Wire Act, 18 U.S.C. §§ 1081-1084 (1994); Travel Act, 18 U.S.C. § 1952 (1994); Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (1994); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1994). See also Raysman & Brown, *Cyber-Casinos*, *supra* note 11, at 3.

39. The bill was to amend 18 U.S.C. sections 1081 and 1084 to cover the transmission and receipt of data and other information by "communication" facilities rather than "wire communication" facilities, which are covered under the existing statute. See Richard Raysman & Peter Brown, *Pending Key Internet Legislation*, *N.Y. L.J.*, Dec. 9, 1997, at 3.

40. See Interstate Wire Act, 18 U.S.C. §§ 1081-1084 (1994).

41. *Senate Judiciary Committee Approves Internet Gaming Prohibition Act*, *GAMING DEV. BULL.* (Nat'l Ass'n of Attorneys Gen.), Sept.-Oct. 1997, at 1.

42. See Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.

43. *Id.* § 3.

This new section is a significant addition because, unlike the existing Interstate Wire Act, which targets only those persons involved in an interstate gambling business,⁴⁴ the IGPA imposes substantial penalties on the individual, amateur gambler.⁴⁵ This new section is also notable because of the inclusion of the phrase "Internet" or "interactive computer service in any state."⁴⁶ Unlike the existing Interstate Wire Act, which permits the use of telephone wires for betting purposes within a state that legalizes such usage or between two states if legal in both,⁴⁷ section 1085 closes the possibility of similar activity via the Internet. Specifically, other than an exception for closed-circuit lotteries and racetrack betting, the IGPA prohibits states from choosing to permit Internet gambling within their own borders and prevents gambling transmissions from occurring between two states that have legalized phone betting.⁴⁸ The fact that the IGPA targets not only the Internet but any interactive computer service, appears to create a curious anomaly, as one observer noted: "E-mail your picks to the office football pool, and under Kyl's bill you would face a \$2,500 fine and six months in jail. Phone in your picks and you would remain free."⁴⁹

B. *Difficulties Inherent in the Internet Gambling Prohibition Act*

1. Principles of Federalism

Because the U.S. government was designed as a federalist system, the national government and the individual state governments coexist, each placing limits on the other's power. The power held by states can be described as a general police power to protect the health, safety, and welfare of their citizens. In contrast, the ability of the federal government to regulate the activities of citizens originates not from a general police power but instead must stem from a specific power enumerated within the Constitution, such as the power to lay and collect taxes, the power to provide for the de-

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

45. Anyone who gambles on the Internet can be fined an amount equal to the greater of the amount the person wagered via the Internet or \$2,500, imprisonment of no more than six months, or both. Any individual who operates an Internet gambling Web site can be fined an amount equal to the greater of the amount the provider received in bets or wagers as a result of posting gambling information on the Internet or \$20,000, imprisonment of no more than four years, or both. See S. 474.

46. *Id.*

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

48. See S. 474.

49. Bell, *supra* note 37, at A7.

fense of the country, and the power to regulate commerce with foreign nations or among the several states.⁵⁰

Generally, states can determine whether and what type of gambling activity will be legal within their borders as such a decision is thought to be a part of their police power obligation to promote the health, safety, and welfare of their citizens. However, gambling is an activity that can have both intrastate and interstate characteristics. Advertising aside, casinos, bingo halls, and racetracks can usually be contained within the borders of a state with minimal economic effect on citizens of neighboring states. Yet, when gambling is combined with communication devices such as televisions, radios, or telephones, it takes on a decidedly interstate nature. If gambling in one state will substantially affect the economic affairs of another state, perhaps one that chooses to prohibit gambling entirely, the federal government is permitted to intervene to regulate the activity via the specifically enumerated power granted to Congress in the Commerce Clause.⁵¹ This is precisely the power on which the Senate relied in passing the IGPA.

As discussed in Part II, the Internet is a communication medium that by its very nature connects individuals in one state with individuals in another state or another country. A gambling Web site created in Texas is not only viewed by Texans, but by Floridians, Canadians, and Russians as well. Thus, it might seem at first glance that given the nature of the Internet, the IGPA is a flawless congressional application of the Commerce Clause.

However, to assume that the IGPA poses no Commerce Clause difficulties would be a mistake in light of the Supreme Court's most significant recent decision regarding the Commerce Clause and federal regulation in *United States v. Lopez*.⁵² In overturning a federal law that criminalized the possession of a gun near a school, the Court maintained that the activity being regulated must "*substantially* affect interstate commerce" for the federal government's involvement to be constitutional.⁵³ The Court cautioned that, without this substantial effect on interstate commerce test, the power of Congress through the Commerce Clause would be virtually unlimited, and the "distinction between what is truly national and what is truly local" would be erased.⁵⁴

Applying *Lopez*'s substantial effect test to the IGPA shows that the Senate may have overstepped its bounds in its zeal to ban the entire activity. First, the fact that many states allow the types of gambling now being of-

50. See U.S. CONST. art. I, § 8.

51. See *id.* cl. 3.

52. *Lopez*, 514 U.S. 549 (1995).

53. See *id.* at 559.

54. See *id.* at 567-68.

ferred over the Internet weakens the government's argument that Internet gambling would have any more of a substantial negative economic impact than existing legalized gambling. Second, the IGPA does not permit purely intrastate gambling via the Internet and restricts efforts by states to offer intrastate gambling through the use of an interactive computer service. For example, the IGPA prevents a lottery state like Indiana from selling its state lottery tickets to Indiana residents via the Internet.⁵⁵ Furthermore, states that might wish to install closed-circuit interactive computer gambling systems are prohibited from doing so under the IGPA unless the type of gambling offered is either pari-mutuel wagering or a lottery.⁵⁶ Finally, past federal action in the area of gambling has generally provided some exemptions for gambling between states that have legalized the activity. An example of such an exemption is the ability of New York to accept horse racing bets via telephone from residents of seven other states that have legalized wire wagering.⁵⁷ The Internet Gambling Prohibition Act forecloses any possibility of similar activity between two states through the Internet and also questions the continuing legality of the exemption described above.

Though decided entirely on First Amendment commercial speech grounds, the treatment of gambling advertisements that have interstate effects provides a comparative framework for examining Commerce Clause difficulties in the IGPA. For example, in *Valley Broadcasting Co. v. United States*, the Ninth Circuit held that a federal ban of broadcast advertisements by private casino gambling establishments was unconstitutional despite the government's argument that a total ban was the only way to prevent advertisements originating from a state where casino gambling is legal from spilling over into a state where it is illegal.⁵⁸ The court observed that the government's interest in assisting states that do not have casino gambling could not be significantly advanced since advertisements for state lotteries and Native American casinos were already being received by these states without violating federal law.⁵⁹ This reasoning is helpful to a Commerce Clause assessment of the federal ban on Internet gambling because, like *Lopez*, it demonstrates that the government must provide more support for its exercise of federal power over the states than merely the argument, "We can do it better than you."

55. See Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.

56. See *id.*; Mike Farrell, *Betting Online No Sure Thing*, RECORD (Bergen County, NJ), Oct. 27, 1997, at S13.

57. See Joe Salkowski, *Kyl's Bill to Make Gambling on Internet a Crime Advances*, ARIZ. DAILY STAR, Nov. 20, 1997, at 4A.

58. *Valley Brdcast. Co.*, 107 F.3d 1328, 1333 (9th Cir. 1997).

59. See *id.* at 1336.

Additionally, because an Internet gambling Web site is essentially an advertisement until an individual takes the affirmative step of releasing his credit card information, federal legislation regulating interstate lottery advertisements is useful to an examination of Commerce Clause difficulties existing in the IGPA. As explained by the Supreme Court in *United States v. Edge Broadcasting Co.*,⁶⁰ the federal government's response to interstate lottery advertisements,⁶¹ which the Court accepted as constitutionally legitimate, is one that neither favors the lottery nor the non-lottery state.⁶² Instead, the federal government supports the anti-gambling policies of non-lottery states by prohibiting radio and television stations located in these states from airing lottery advertisements.⁶³ At the same time, Congress has refused to interfere with the gambling policies of a lottery state by allowing these states to advertise their lotteries *even if* these advertisements could be heard or viewed in *non*-lottery states.⁶⁴

As this advertising legislation shows, a constitutionally appropriate exercise of federal power through the Commerce Clause in the area of Internet gambling would not favor the interests of non-gambling states to the complete detriment of the interests of states that might want to allow Internet gambling. Indeed, the fact that gambling advertisements can legally enter a non-gambling state through pervasive media such as television and radio and reach a captive audience, would support an assertion that states should be able to decide whether they want to permit Internet gambling. Unlike television and radio advertisements, Internet gambling Web sites do not reach unwilling listeners and viewers, but only those people who actively seek out such sites. Thus, if Nevada chose to allow Internet gambling, the impact on a non-gambling state like Utah would not be substantially different from the impact that incessant television and radio advertising by Circus Circus in Nevada has on a neighboring Utah citizen.

2. First Amendment Challenges

Because of gambling's traditional status as a "vice," First Amendment challenges to various restrictions placed upon it in the past have not been successful. Thus, both state and national governments have been relatively free to regulate gambling as they wished with little concern that the Supreme Court would find their actions to be unconstitutional violations of free speech. With this constitutional history of gambling's inferior status in mind,

60. *Edge Brdcst. Co.*, 509 U.S. 418 (1993).

61. *See* 18 U.S.C. §§ 1304, 1307 (1994).

62. *See Edge Brdcst. Co.*, 509 U.S. at 428.

63. *Id.*

64. *See id.*

the Senate passed the IGPA believing that restricting gambling over the Internet was equivalent to restricting any other type of traditional gambling activity and, therefore, would not implicate any First Amendment concerns.

However, proponents of the IGPA failed to consider properly the impact of the fact that in the intervening years since the Supreme Court last decided a case involving restrictions on traditional gambling, the Court, via *Reno v. ACLU*, has clearly noted its displeasure with any regulation that treats Internet users as second-class citizens.⁶⁵ Indeed, while deciding only the issue of personal jurisdiction in a civil lawsuit by Minnesota against an Internet gambling service provider, the Minnesota Appellate Court acknowledged, "We are mindful that the Internet is a communication medium that lacks historical parallel in the potential extent of its reach and that regulation across jurisdictions may implicate fundamental First Amendment concerns."⁶⁶ Thus, the possibility remains that the broad protection given to the Internet in *Reno* could have substantial implications in the realm of Internet gambling.

For Internet gambling, the significance of the decision in *Reno* is the Court's rejection of the government's primary justification for the Communications Decency Act—the protection of minors.⁶⁷ Despite recognizing that technology was currently incapable of keeping all indecent materials from the view of all minors, and thereby admitting that minors would continue to have access to such materials, the Court still held that a complete ban of those materials would be too great a suppression.⁶⁸ Citing an earlier case, Justice Stevens remarked in *Reno*, "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"⁶⁹

Thus, proponents of the IGPA may be stymied if they continue to rely on the protection of minors as justification for their total ban on Internet gambling. Indeed, unlike the viewing of most indecent materials on the Internet, Internet gambling has a built-in method for insuring that its Web sites are only accessed by individuals over the age of eighteen—the credit card. The ability of a credit card to limit children's access to age-inappropriate materials was recognized by the Court in *Sable Communications of California, Inc. v. FCC*.⁷⁰ In *Sable*, the Court rejected a blanket ban on indecent telephone messages offered by Dial-a-Porn services, in part, because it noted

65. See *Reno*, 117 S. Ct. 2329 (1997).

66. *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 718 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998).

67. See *Reno*, 117 S. Ct. at 2346.

68. *Id.*

69. *Id.* at 2346 (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)) (alteration in original).

70. *Sable Comm.*, 492 U.S. at 128-30.

that the use of credit cards, access codes, and scrambling devices may be able to serve the government's interest in protecting children nearly as well as a total ban could.⁷¹ Furthermore, the Court observed that reliance on credit cards, unlike a total ban, would still permit adult access to indecent materials, thereby preventing the scenario of "'burn[ing] the house to roast the pig.'"⁷²

Because Internet gambling requires the use of a credit card or an even more complex wire transfer of money, children, for the most part, can be effectively blocked from spinning the Internet roulette wheel. In fact, the only way for minors to gamble on the Internet would be to steal a credit card, most likely one belonging to their parents. Such action not only involves a level of deception incomparable to a child innocently stumbling upon indecent materials on the Internet, but would also certainly be noticed by the child's parents long before the child became a candidate for Gamblers Anonymous.

The Court's emphasis in *Reno* on the vagueness of the term "indecent" in the Communications Decency Act is also relevant to the proposed Internet gambling ban. In *Reno*, the Court believed that this vagueness was problematic not only because it could lead to discriminatory enforcement of the law, but also because of the "obvious chilling effect" the threat of criminal sanctions would have on free speech.⁷³ Essentially, if an individual is uncertain whether the material on his Web page might be considered indecent in one particular locality, rather than face the possibility of prison, the individual will choose not to post the materials at all. Ultimately, the Court determined that this burden on speech could not be justified when it would have been just as possible to have made a "more carefully drafted statute."⁷⁴

The Internet Gambling Prohibition Act may also face similar vagueness difficulties. Specifically, the IGPA not only subjects an individual to criminal penalties for actively gambling via the Internet, but also for the transmission of information assisting in the placement of bets or wages.⁷⁵ Such legislation appears to be an attempt to regulate the content of the Internet. Legislators tried to define "information" by saying that if the information relates to a traditional gambling activity that is currently legal within the state, then it could be transmitted over the Internet.⁷⁶ However, such an ex-

71. *Id.*

72. *Id.* at 131 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)) (alteration in original).

73. *Reno*, 117 S. Ct. at 2344-45.

74. *Id.* at 2346.

75. See Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.

76. *Id.* § 3.

ception only further enhances the chilling effect problem warned about in *Reno*. Specifically, an individual in Oregon, where sports wagering is legal, might want to post odds on the next Trailblazers game or have a chat room discussion about sports betting, but will refrain because of the possibility that such information will be viewed by an individual in Utah—a state that outlaws all forms of gambling.

3. Enforcement Problems

If the Internet Gambling Prohibition Act manages to deflect attacks on its constitutionality, difficulty in enforcing its provisions could severely limit its effectiveness. While the IGPA would deter companies from locating their Internet gambling operations within the United States, Internet gambling would still flourish, as companies would simply base their businesses in countries with more hospitable gambling laws.⁷⁷ Thus, Internet gambling will continue as a prospering industry abroad while the U.S. government spends significant amounts of time, money, and energy attempting to subject these foreign operations to the jurisdiction of U.S. courts.⁷⁸ Federal law enforcement officials themselves apparently doubt whether such international efforts would meet with much success. As Justice Department spokesman John Russell explained, ““We have no jurisdiction The offense has not been made on U.S. soil.””⁷⁹ Furthermore, the IGPA would also force the U.S. government into an awkward international position where it criticizes countries that try to subject foreign Web site operators to their indecency laws while simultaneously demanding all foreigners to adhere to the gambling laws of the United States.⁸⁰

77. Internet gambling is legalized in Liechtenstein, Gibraltar, and a few Caribbean islands. See Philip Palmer McGuigan, *Stakes Are High in Battle to Bar Internet Gambling*, NAT'L L.J., Nov. 3, 1997, at B8. Witness the decision of American, Michael Simone, executive of Interactive Gaming and Communications Corp. (an Internet gambling company with its firm headquarters in Pennsylvania), who, after months of legal battles with Missouri over the legality of his gambling Web site, sold the operations to a Canadian company. John Wilen, *Embattled Web Gambling Firm to Sell Subsidiaries*, 16 PHILADELPHIA BUS. J. 1 (Dec. 15, 1997).

78. See Nicholas Robbins, Note, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. 7, 51 (1996). Currently, only one individual has been convicted under U.S. gambling laws for operating an offshore Internet gambling service. Michael Saul, an American and an employee of an Internet gambling company in the Caribbean, recently pled guilty to violating 28 U.S.C. § 3072, which prohibits sports wagering. See *Guilty Plea in Offshore Gambling*, ST. PETERSBURG TIMES, Apr. 10, 1998, at 6E.

79. Brett Pulley, *Some Bookies Heading Offshore to Make a Quick, Tax-free Buck*, DALLAS MORNING NEWS, Feb. 6, 1998, at 42A.

80. See Johnson & Post, *supra* note 4, at 1394.

As a result of limited success overseas pursuing online gambling businesses, law enforcement would be left to focus its efforts primarily on the activities of the individual Internet gambler. Such prosecutions could elicit substantial criticism from the American public for their incongruity. For example, explaining why one individual should serve prison time for buying tickets via his home computer for an Internet lottery, while his neighbor can freely purchase interstate Powerball tickets at the local Seven-Eleven, would present a challenging task.

Finally, law enforcement officials may face substantial problems in detecting the identities of Internet gamblers as increased prosecution of individual gamblers could encourage greater use of encryption technology by gambling operations to insure the anonymity of their customers and the continued viability of their businesses.⁸¹ Offshore gambling operations might stop accepting credit cards, whose receipts leave more easily detectable records, and devote resources to developing other money transfer methods, such as electronic cash, stored value cards, and anonymously numbered bank accounts, whose paper trails are more difficult to trace.⁸² Thus, if the IGPA becomes law, it might be nothing more than a national moral proclamation—incapable of being enforced and contrary to the traditional views of gambling expressed by most states and their citizens.

IV. ALTERNATIVE TO THE INTERNET GAMBLING PROHIBITION ACT

As discussed in Part III, the Senate's Internet Gambling Prohibition Act raises a number of specific concerns regarding its constitutionality in light of *Reno v. ACLU*, its capability of being enforced, and its impact on the principles of federalism. It is this last concern, arguably more than the others, that should make observers most apprehensive of this federal attempt to implement a nationwide blanket ban on Internet gambling. By outlawing the activity nationally, Congress would prevent state governments from making individual assessments about the desirability and viability of Internet gambling within their particular states. The better approach would be a recognition of the long-held federal position that gambling should be permitted to exist in those states whose citizens choose to have it. Specifically, the decision to legalize or prohibit Internet gambling is one that should be left solely to the states.

The immediate objection raised by proponents of a federal ban to this state-by-state assessment is that it will provide insufficient protection for

81. See Seth Gorman & Antony Loo, Comment, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667, 695 (1996).

82. See *id.* at 696-700.

those states that choose not to have Internet gambling within their borders from states that decide to allow Internet gambling.⁸³ However, this problem is not significantly different from the one the United States would face as a whole if Congress bans Internet gambling outright while the rest of the on-line world continues to permit the activity. In contrast, state-by-state assessment, resulting in some states finding it economically beneficial to legalize Internet gambling, would mean that legitimate gambling operators would be willing to locate in states where they would be taxed and properly regulated.⁸⁴ Consumer protection would be enhanced because Internet users would certainly choose to gamble with a regulated, legitimate gambling operation rather than an unknown, perhaps unscrupulous, offshore company.

Once such Internet gambling operations are existing and operating legally in particular states, these companies would have a vested interest in adhering not only to the operating guidelines implemented by the state in which they are located but also to the laws of states that prohibit Internet gambling. Not wanting to subject themselves to liability for violating the laws of these gambling-free states, which could in turn threaten the continued existence of their legitimate operations, such companies would likely be willing to take the necessary steps to insure that residents of non-gambling states and minors do not use their services. These steps might include posting warnings on their Web sites that list those states that do not permit Internet gambling, thereby making their Web sites appear clearly as mere advertisements in states that do not allow Internet gambling. Also, all Internet gamblers could be required to submit biographical information such as age, phone number, and address. Upon verification of this information by the gambling Web site operator, the Internet gambler would be issued a password that must be supplied every time he wishes to gamble, much like the access code procedures discussed in *Sable*. Finally, legalizing Internet gambling in some states could also benefit those states that outlaw it because, as mentioned above, such legalization would drive out unscrupulous operators and leave only legitimate businesses in the marketplace. Thus, the interests of states that outlaw the activity may be better protected by state-by-state assessment than they would have been under a national ban.

Another objection to leaving the Internet gambling issue to the states to decide is that this approach might offend the Dormant Commerce Clause as recognized in *American Libraries Association v. Pataki*.⁸⁵ In this case, the

83. See *S. 474 Hearings*, *supra* note 3, at 1-3 (statement of Sen. Jon Kyl).

84. See *Internet Gambling Prohibition Act: Hearing on H.R. 2380 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (Feb. 4, 1998) (testimony of Sue Schneider, Chairwoman of the Interactive Gaming Council), available in 1998 WL 58226.

85. *American Libraries Ass'n*, 969 F. Supp. 160 (1997).

Southern District Court of New York held that a New York state law that prohibited the dissemination of obscene or indecent materials to a minor on-line violated the Dormant Commerce Clause because (1) it subjected Internet users to inconsistent regulations among the fifty states; and (2) it placed burdens on interstate commerce that exceeded any local benefit.⁸⁶ However, *American Libraries Association* can be distinguished from the issue of state regulation of Internet gambling in some important ways.

First, state Internet gambling laws, unlike obscenity and indecency laws, can be construed narrowly so that they only restrict the activity of gambling and not the content of speech related to gambling. This would eliminate the concern that free speech would be impeded because an individual would be fearful of saying something online that could be deemed illegal in any state where his message might be received. Second, while obscenity and indecency laws as judged by community standards could truly have fifty variations, laws regarding Internet gambling would likely be less complex—either a state legalizes the use of the Internet for gambling purposes or it does not. Even if a state decided to legalize lotteries over the Internet but not casino-style gambling, verifying this information is not nearly as nebulous as trying to gauge the level of offensiveness of a particular Web site. Furthermore, gambling has traditionally existed as an area of law where wide variation among individual states has been accepted. Thus, if a state were to restrict Internet gambling, it appears unlikely that such a regulation would be viewed as a burden on interstate commerce that exceeds the local benefits.

Lastly, Congress should defer federal legislation on Internet gambling in favor of individual state choice because the call for federal intervention is premature. Many members of Congress and attorneys general from several states maintain that quick action is necessary because the states are powerless to stop the burgeoning problem on their own. However, with some states, such as Missouri, Minnesota, and Wisconsin, pursuing either civil or criminal charges against Internet gambling Web site operators under existing state laws, and other states having passed or currently seeking to pass specific Internet gambling legislation,⁸⁷ states may not be as helpless in the matter as proponents of the Internet Gambling Prohibition Act assume. For example, in a fraudulent advertising action brought by the attorney general of Minnesota against an Internet gambling operation based in Nevada, Minnesota has been able to cross that most difficult of hurdles in Internet cases—the assertion of personal jurisdiction.⁸⁸ Enacting a federal ban on

86. *Id.* at 184.

87. See Bauder, *supra* note 35; see also Cordes, *supra* note 35.

88. See *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App.

Internet gambling now will mean that the opportunity for state experimentation in this area will be lost—replaced by a national law incapable of reflecting the will of citizens of a particular state on an issue where their needs and views have traditionally been given great deference.

V. CONCLUSION

The confluence of the Internet and gambling has revived the debate, once thought to have been settled in favor of the states, over whether the implementation of gambling policy should be the primary responsibility of the state or federal government. Citing a host of concerns believed to be inherent in Internet gambling, the Senate passed the Internet Gambling Prohibition Act, apparently convinced that only the federal government can properly address these perceived problems. However, rather than resolving the issue, this federal ban on Internet gambling raises only more concerns about its impact on federalism, its questionable constitutionality, and its unlikely enforceability. Given the problematic nature of a federal ban, Congress should leave the issue of whether Internet gambling should be legalized to the individual states where it is much more likely that the wills of both the citizens who favor Internet gambling, as well as those who oppose it, will be adequately captured.