

CURRENT EVENT

THE ECONOMIC INCENTIVE BEHIND THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

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ABSTRACT

This piece examines the difference between the stated and underlying purposes of the Unlawful Internet Gambling Enforcement Act of 2006. While the Act's proponents cite the protection of family values and the prevention of money laundering and terrorism as the motivation for the legislation, the underlying purpose of the Act appears to be economic in nature. The number of Internet gamblers has grown in recent years to over twenty million, with as many as 80 percent of players residing in the United States. Further, because of federal laws prohibiting domestic, remote gambling, most, if not all, Internet gambling companies operate outside of the United States. Consequently, American money is constantly leaving the United States to be deposited at offshore sites, and the government misses out on tax and other revenue from this lucrative phenomenon. While supporters claim that the Act preserves family values, legislators promoting the Act recognize the profit that can be made from Internet gambling, outside of the United States, by keeping that money in the country, to stimulate the domestic economy. If the Act were solely about protecting the morals of society, it would have banned all gambling; instead, the Act carves out exceptions for State lotteries, horseracing, gambling on Tribal land, and fantasy sports. This Act has several stated intentions, yet one unstated purpose: to exclude foreign gambling entities while allowing domestic gambling to continue. Although the Act does not make Internet gambling illegal, it effectively does just that by preventing Americans from funding their online accounts.

I. INTRODUCTION

Internet gambling is a global economic phenomenon creating revenue which has increased exponentially over the past decade,

today earning more than any other Internet-based business.¹ Not surprisingly, Americans have jumped at the chance to “make a buck” from the comfort of their own homes.² They have embraced this phenomenon to such an extent that “as much as 80 percent of [Internet gaming] traffic—and profit—comes from the U.S.”³ In 2006 alone, “Internet gambling revenues from the U.S. [are expected to] reach about \$7.2 billion, nearly half of the world-wide total of \$15 billion.”⁴ What astounds many Americans is that, due to the fact that Internet gaming companies are based outside of the United States, American money leaves the country every time an American gambles on one of these websites.⁵ As a result, in September of 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“the Act”), which prohibits financial institutions from allowing Americans to transact with Internet gaming companies.⁶ Hoping to ban Internet gambling by attacking payment methods Americans use to fund online accounts, legislators promoting the Act cited Internet gambling’s “ill effects on society” as the incentive for the creation of this law.⁷ This comment argues that, in actuality, the underlying purpose of this Act is economic in nature, serving only to exclude foreign gambling entities, thereby keeping American money in the United States and further segregating Americans from the rest of the world.

Part II of this piece gives a brief history of Internet gambling as an international phenomenon. Part III details the status of U.S.

¹ John D. Andrie, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT'L L. 1389, 1390 (2004).

² See Joel Weinberg, Comment, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 295-96 (2006) (“The United States has been transformed from a nation in which legalized gambling was a limited and a relatively rare phenomenon into one in which such activity is common and growing.”) (citations omitted).

³ *60 Minutes: I-Gaming: Illegal and Thriving*, (CBS television broadcast Sept. 17, 2006), <http://cbsnews.com/stories/2005/11/17/60minutes/printable1052420.shtml>. See also Bill Britt, *Barred in US; Set to Blossom in UK*, MARKETING, Oct. 11, 2006, at 21 (“The world’s leading online gambling companies may be based in the UK and Gibraltar, but until now, the bulk of their revenues have come from the US.”); Jason Gross, *Internet Gambling & the Law—Prohibition vs. Regulation*, 14.8 METROPOLITAN CORP. COUNS., Aug. 2006, at 11, available at <http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=November&artYear=2006&EntryNo=5431> (“Despite the international locales of Internet gaming firms, they derive most of their income from Americans.”).

⁴ Gross, *supra* note 3.

⁵ *60 Minutes*, *supra* note 3.

⁶ SAFE Port Act, Pub. L. No. 109-347, §§ 801–03, 120 Stat. 1884, 1952–62 (2006).

⁷ Frank Ahrens, *New Law Cripples Internet Gambling*, WASH. POST, Oct. 14, 2006, at A1.

laws before the new legislation and the effect of each of these laws on Internet gambling. Part IV analyzes the Act itself, including the legal underpinnings and legislative intent behind its passage. Part V argues that the legislators' expressed intent in creating such legislation is misleading because the underlying purpose of the Act is economic in nature. This Part will evaluate the existence of carve-outs in the Act, the economic standpoint that the Act encompasses, and the ongoing World Trade Organization ("WTO") dispute between the United States and Antigua and Barbuda, which the Act has intensified. Finally, this Part will explain how the Act further segregates the United States from the rest of the world.

II. BRIEF HISTORY OF INTERNET GAMBLING

Internet gambling establishments began operating in the late 1990s, with the first opening on August 18, 1995.⁸ By 2000, "250 to 300 companies operated more than 1800 Internet gambling websites."⁹ Due to U.S. laws that potentially prohibit Internet gambling, discussed in Part III, many, if not all Internet gambling companies operate overseas.¹⁰ Currently, "[t]here are more than 80 countries outside the United States that have legalized Internet gambling,"¹¹ and these jurisdictions license some 500 companies operating approximately 2300 sites.¹²

These websites have been lucrative from the beginning. For example, "[i]n 2003, Internet gambling revenue was estimated at \$5.905 billion globally, and is projected to reach \$20.659 billion in 2008."¹³ By 2010, Internet gambling revenue is expected to reach more than \$24 billion.¹⁴ Accordingly, "[i]t was estimated in 2003

⁸ Jonathon Schwartz, Essay: *Click the Mouse and Bet the House: The United States' Internet Gambling Restrictions Before the World Trade Organization*, 2005 U. ILL. J.L. TECH. & POL'Y 125, 125 (2005).

⁹ Weinberg, *supra* note 2, at 296.

¹⁰ Joseph J. McBurney, Comment, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 CONN. J. INT'L L. 337, 357 (2006).

¹¹ Gross, *supra* note 3.

¹² Michael McCarthy & Jon Swartz, *New Legislation May Pull the Plug on Online Gambling*, USA TODAY, Oct. 2, 2006, http://www.usatoday.com/news/washington/2006-10-02-internet-gambling-usat_x.htm.

¹³ Weinberg, *supra* note 2, at 296 (citations omitted). See also McBurney, *supra* note 10, at 338 ("[A]bout \$12 billion in revenue was collected over the Internet in 2005, or close to 5% of the world's total gross gambling yield.")

¹⁴ Gross, *supra* note 3. It should be noted that these projected calculations were determined before the passing of the Unlawful Internet Gambling Enforcement Act.

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that nearly 50 to 70 percent of Internet gamblers were wagering from within the United States,”¹⁵ and with that number growing over the next few years, Americans show no intention of slowing their Internet gambling activities.¹⁶

To combat what they consider to be “bad” behavior,¹⁷ legislators have consistently attempted to prohibit American participation in Internet gambling.¹⁸ However, due to the international character of Internet gambling, lawmakers have encountered numerous problems in obtaining jurisdiction over online gaming companies.¹⁹ In fact, the only significant setback for the industry occurred in 2001 when Visa, MasterCard, and various banks began refusing to transact directly with Internet gambling sites.²⁰ Nonetheless, this did not unsettle the industry; U.S. customers turned to non-U.S., third party “e-wallets,” which process payments and transfer money to gambling sites.²¹ “E-wallets” are based off-shore much like Internet gambling operators, and thus, “[t]he U.S. government has no authority [to regulate third party] processors . . . that are operating legally” outside of the United States.²²

At the most basic level, “[t]he primary problem with enforcing any sort of ban on Internet gambling is in exercising jurisdiction and in enforcing any civil or criminal judgments.”²³ While many legislators and government officials feel that current federal laws reach international gambling entities in terms of jurisdiction, ambiguity surrounding the scope of these laws has prevented courts from applying the laws to many Internet gaming activities.²⁴

¹⁵ Weinberg, *supra* note 2, at 296.

¹⁶ Weinberg, *supra* note 2, at 296.

¹⁷ McBurney, *supra* note 10, at 342.

¹⁸ Weinberg, *supra* note 2, at 296.

¹⁹ McBurney, *supra* note 10, at 342. *See also* Weinberg, *supra* note 2, at 307.

Since all Internet gambling websites have located themselves outside the United States, any judgment would go unenforced unless the nation in which the Internet gambling operator was located gave full faith and credit to the American court’s judgment. Foreign governments which license and draw revenue from Internet gambling would most likely not enforce an American judgment against an Internet gambling operator, as enforcement would have a negative effect on profits.

Id. (internal citations omitted)

²⁰ Adam Goldman, *Experts: Ban Won’t Stop Online Gambling*, ASSOC. PRESS, Oct. 24, 2006, http://www.usatoday.com/tech/news/techpolicy/2006-10-24-web-gambling_x.htm.

²¹ *Id.*

²² *Id.*

²³ Weinberg, *supra* note 2, at 306–07.

²⁴ *Id.* at 303.

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III. CURRENT U.S. LAWS PERTAINING TO INTERNET GAMBLING

Three federal laws are purported to regulate Internet gambling: the Wire Act of 1961,²⁵ the Travel Act,²⁶ and the Illegal Gambling Business Act.²⁷ The Wire Act of 1961²⁸ “prohibits the knowing use of any ‘wire communication facility’ to transmit bets or wagers, use of information assisting betting or wagering on a sports event or contest, or any communication which entitles the recipient to receive money or credit resulting from betting or wagering.”²⁹ While many legislators believe that the Wire Act prohibits Internet gambling, some critics say “the law, created in 1961 to combat illegal bookmaking by the Mafia, is outdated and does not readily apply to (a) the Internet, which did not exist as a form of communication in the 1960s, or (b) traditional casino-style games, such as blackjack and poker that are played online.”³⁰ Furthermore, ambiguity in the construction of the law has kept courts from enforcing the Wire Act against Internet gambling; instead, courts use it to prohibit sports betting.³¹ As a result, for Internet gambling to be included in the scope of the law, Congress would have to amend the Wire Act to specifically prohibit foreign and domestic Internet gambling.³²

Additionally, legislators claim that two additional federal statutes ban Internet gambling.³³ First, the Travel Act³⁴ “outlaws distribution of proceeds from an unlawful activity across state lines or

²⁵ 18 U.S.C. § 1084 (2006).

²⁶ 18 U.S.C. § 1952 (2006).

²⁷ 18 U.S.C. § 1953 (2006).

²⁸ 18 U.S.C. § 1084.

²⁹ Marc S. Friedman & Athena Cheng, *From Poker to the Pokey: The Laws Governing Online Gambling*, LAW.COM, July 14, 2006 (on file with author).

³⁰ Gross, *supra* note 3.

³¹ Ahrens, *supra* note 7 (“Courts have disagreed [with legislators], saying that betting on sports teams over the Internet is illegal, but wagering on casino games, such as poker, is not.”); Friedman & Cheng, *supra* note 29. See, e.g., Weinberg, *supra* note 2, at 303–04.

For example, in *In re MasterCard Int'l, Inc.*, the Fifth Circuit Court of Appeals interpreted the Wire Act to cover only sporting events, which excludes Internet gambling casinos from the Wire Act. Furthermore, the Wire Act’s language, “transmission of a wire communication,” is ambiguous because it could be construed to include both receiving and sending information, or only sending information.

Id.

³² Weinberg, *supra* note 2, at 304.

³³ Gross, *supra* note 3.

³⁴ 18 U.S.C. § 1952 (2006).

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international borders.”³⁵ In particular, the Travel Act would punish gambling operations explicitly prohibited by the states in which they operate. Second, the Illegal Gambling Business Act³⁶ makes it a crime to conduct a gambling enterprise that is “prohibited in the state where the activity occurs, with five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business, and is in continuous operation for more than 30 days or [has] gross revenues of \$2,000 in any single day.”³⁷ Because it is unclear whether Internet gambling is illegal in the states, both the Travel Act and Illegal Gambling Business Act have been unsuccessful in prohibiting it. Most simply, the Acts fail to cover the relevant “process by which electronic gambling fundamentally occurs.”³⁸

Moreover, even if the ambiguity of these Acts was resolved, the question of jurisdictional reach of each would still be controversial. Because Internet gambling operators conduct their business solely through Internet communication, they never have to physically enter the United States to complete a business transaction. Furthermore, it is unclear whether the United States has the authority to prosecute gambling operators located offshore who reach into the United States via the Internet to conduct business. Consequently, (and with the exception of sports betting, which is clearly covered by the Wire Act,³⁹ until Congress’ recent legislation, Internet gambling has flourished, remaining unregulated and largely free from prosecution.⁴⁰

³⁵ Gross, *supra* note 3. See also Friedman & Cheng, *supra* note 29 (“The Travel Act regulates Interstate and foreign commerce related to any unlawful activity, including illegal gambling in a state prohibiting the activity. When online gambling crosses state lines via the Internet with the intent to participate in illegal gambling, then the Travel Act is violated.”).

³⁶ 18 U.S.C. § 1953 (2006).

³⁷ Friedman & Cheng, *supra* note 29.

³⁸ Andrie, *supra* note 1, at 1397.

³⁹ 18 U.S.C. § 1084 (2006).

⁴⁰ Because it is explicitly stated in the Wire Act that sports betting is illegal, government officials have begun to prosecute large Internet sports books. See Goldman, *supra* note 20.

British BetOnSports PLC folded after its chief executive was arrested in July by U.S. authorities. David Carruthers faces 22 counts of fraud and racketeering charges and remains under house arrest in the St. Louis area. London-based Sportingbet’s chairman was detained last month in New York on a state fugitive warrant charging him with illegal online gambling. He was eventually freed.

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IV. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

A. *What the Act Does*

To combat the jurisdictional issues discussed above, legislators turned to payment methods used to fund Internet gambling to fulfill their goal of keeping Americans from gambling online. On September 30, 2006, just before Congress was to recess, legislators opposing Internet gambling passed the Unlawful Internet Gambling Enforcement Act of 2006⁴¹ by a vote of 409 to 2.⁴² Signed by President Bush on October 13, 2006⁴³ and tacked on to the SAFE Port Act,⁴⁴ an unrelated bill that enhances port security, the Act prohibits the “acceptance of any financial instrument for unlawful Internet gambling.”⁴⁵

Specifically, the Act amends 31 U.S.C. § 53, Monetary Transactions,⁴⁶ by adding section 802, subchapter IV, entitled “Prohibition on Funding of Unlawful Internet Gambling.”⁴⁷ Section 5363, the “[p]rohibition on acceptance of any financial instrument for unlawful Internet gambling,” reads:

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—

(1) credit . . . extended to or on behalf of such other person . . .

⁴¹ SAFE Port Act, Pub. L. No. 109-347, §§ 801–03, 120 Stat. 1884, 1952–62 (2006).

⁴² Security and Accountability for Every Port (SAFE) Act, *available at* <http://www.congress.org/congressorg/issues/votes/?votenum=516&chamber=H&congress=1092> (last visited Nov. 2, 2006). Because the Act was attached to the SAFE Port Act, legislators voted for the Act as a whole, meaning that the number of votes is not necessarily a reflection of how legislators felt about online gambling.

⁴³ President’s Statement on H.R. 4954, the Security and Accountability For Every Port Act of 2006, 42 Weekly Comp. Pres. Doc. 42 (Oct. 13, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061013-12.html> (last visited Oct. . 21, 2007).

⁴⁴ Legislators were smart to attach a relatively controversial bill to one destined to ensure national security. See Matt Scuffham, *ROUNDUP Online Gaming Stocks Plummet After Anti-gaming Legislation Passed*, AFX NEWS, Oct. 2, 2006, *available at* <http://www.forbes.com/business/feeds/afx/2006/10/02/afx3059915.html>.

It’s pretty clear how this piece of legislation got through. . . . “[Legislators] couldn’t vote down a piece of national security legislation and their hands were forced,” . . . [T]he Safe Port Act had been seen by most U.S. politicians as essential to the country’s security amid heightened concerns over global terrorism.

Id.

⁴⁵ SAFE Port Act § 802.

⁴⁶ 31 U.S.C. § 5301–67 (2005).

⁴⁷ SAFE Port Act § 802.

- (2) an electronic fund transfer . . . from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.⁴⁸

Although the Act fails to specify the exact procedures that financial institutions must follow to be in compliance with the Act, section 5364(a) states:

Before the end of the 270-day period beginning on the date of the enactment of this subchapter, the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations . . . requiring each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions⁴⁹

Section 5362 defines key terms for interpreting the Act:

- (1) **BET OR WAGER**—The term ‘bet or wager’—
 - (A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;. . . .
- (4) **FINANCIAL TRANSACTION PROVIDER**—The term “financial transaction provider” means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

⁴⁸ SAFE Port Act § 802, subch. IV, § 5363(1–4).

⁴⁹ SAFE Port Act § 802, subch. IV, § 5364(a).

....

(10) UNLAWFUL INTERNET GAMBLING—

(A) IN GENERAL—The term ‘unlawful Internet gambling’ means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.⁵⁰

Finally, the Act carves out exceptions for securities transactions,⁵¹ fantasy sports,⁵² State lotteries,⁵³ gambling on Tribal lands,⁵⁴ and horseracing.⁵⁵

Instead of explicitly making Internet gambling illegal, which would raise the same jurisdictional issues as earlier discussed, this Act “merely speaks to the *mechanism* by which an online account is funded.”⁵⁶ Additionally, section 5361 plainly states that “[n]o provision of this [Act] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”⁵⁷ Basically, by controlling the mechanisms linked to funding Internet gambling, Congress is attempting to “enforce laws that already exist.”⁵⁸

B. Congressional Findings and Purpose

The Act is based on House Bill 4411,⁵⁹ the Internet Gambling Prohibition and Enforcement Act, passed by the House of Repre-

⁵⁰ SAFE Port Act § 802, subch. IV, § 5362(1–10).

⁵¹ SAFE Port Act § 802, subch. IV, § 5362(1)(E)(i).

⁵² SAFE Port Act § 802, subch. IV, § 5362(1)(E)(ix).

⁵³ SAFE Port Act § 802, subch. IV, § 5362(10)(B).

⁵⁴ SAFE Port Act § 802, subch. IV, § 5362(10)(C).

⁵⁵ SAFE Port Act § 802, subch. IV, § 5362(10)(D)(1).

⁵⁶ Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER, Oct. 5, 2006, http://www.cardplayer.com/poker_law/article/1446.

⁵⁷ SAFE Port Act § 802, subch. IV, § 5361(b).

⁵⁸ Shulman, *supra* note 56. Although legislators who support the Act already believe internet gambling is illegal under the Wire Act, they still feel that preventing U.S. customers from funding their online accounts will stop these customers from gambling, even though the jurisdictional reach of the Wire Act formerly prevented them from doing so. “This new law applies, if and only if, the gambling is already illegal under current law. . . . In a nutshell, sports betting is made illegal by the 1961 Wire Act, but poker is not.” *Id.* While many believe online poker is not illegal, the Attorney General believes poker is prohibited by the Wire Act. *Id.*

⁵⁹ Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, 109th Cong. (2005).

sentatives on July 11, 2006 by a vote of 317 to 93.⁶⁰ “The Internet Gambling Prohibition and Enforcement Act, which [was] part of the Republican’s American Values Agenda, combine[d] H.R. 4411 introduced by Representative Jim Leach (R-Iowa) and H.R. 4777 introduced by Representative Bob Goodlatte (R-Va.)” Like the Senate’s version of the Act passed by Congress, House Bill 4411 attacked payment methods used to fund online gambling.⁶¹

Proponents of both the Act and House Bill 4411 believe that Internet gambling harms the United States as a whole. In creating House Bill 4777, Representative Goodlatte “said he opposes all gambling, citing its ‘ill effects on society,’ but particularly Internet gambling.”⁶²

“All the problems that manifest themselves with gambling, even in heavily regulated states, are even worse on the Internet,” Goodlatte said “There are family problems, bankruptcy problems, gambling addiction, gambling by minors, using gambling to launder money for criminal and terrorist organizations and organized crime. It does not help our society.”⁶³

Moreover, former Representative Leach has said that “[i]t is extraordinary how many American families have been touched by large losses from Internet gambling.”⁶⁴ Further, he echoed the opinion of one business professor at the University of Illinois who explained that “the Internet is ‘crack cocaine’ for gamblers. ‘There are no needle marks There is no alcohol on the breath. You just click the mouse and lose your house.’”⁶⁵ Representative Leach also sees Internet gambling as a danger to national security, claiming “it can be used to launder money, evade taxes and finance criminal and terrorist activities.”⁶⁶ Lastly, he believes that passage of the Act is a major victory for the country at large.

⁶⁰ Sarah Polson, *House Approves Bill to Stem Online Gambling*, POKERLISTINGS.COM, July 11, 2006, <http://www.pokerlistings.com/house-approves-bill-to-stem-online-gambling-7354>.

⁶¹ *Id.* However, unlike the Senate’s version, House Bill 4411 would have amended the Wire Act to specifically prohibit Internet gambling, enabling Internet service providers to block access to gambling websites. *Id.*

⁶² Ahrens, *supra* note 7.

⁶³ *Id.*

⁶⁴ Press Release, Rep. Jim Leach, Leach Wins Ban on Internet Gambling; Bill Caps Years-Long Drive to Protect Families (Sept. 30, 2006) (on file with author) [hereinafter Leach Wins Ban].

⁶⁵ *Id.*

⁶⁶ *Id.*

Internet gambling's characteristics are unique. Never has it been so easy to lose so much money so quickly at such a young age. The casino is in effect brought to the home, office and college dorm. Children may play without verification, and betting with a credit card can undercut a player's perception of the value of cash, which too easily leads to bankruptcy and crime.⁶⁷

In terms of the expressed legislative intent behind the Act, section 5361 of Public Law 109-347 outlines the congressional findings and purpose in enacting it:

(a)(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.

(a)(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.

(a)(3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.

(a)(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.⁶⁸

Arizona Republican Senator Jon Kyl,⁶⁹ the Act's author⁷⁰ and chief sponsor in the Senate, pushed to prohibit Internet gambling because he considers it a "moral threat."⁷¹ Also comparing the use of Internet gambling to that of crack cocaine, Kyl believes the Act is designed to strictly control a "social pathology," when the big-

⁶⁷ *Id.* "Unlike brick-and-mortar casinos in the United States, where legal protections for bettors exist and where there are some compensatory social benefit[s] in jobs and tax revenues, Internet gambling sites principally yield only liabilities to America and to Americans." *Id.*

⁶⁸ SAFE Port Act, Pub. L. No. 109-347, § 802, subch. IV, § 5361(a)(1-4), 120 Stat. 1884, 1952-53 (2006).

⁶⁹ *60 Minutes*, *supra* note 3.

⁷⁰ Stephen Foley, *How Protectionism and Puritanism Put Paid to Online Gaming Industry*, INDEPENDENT (LONDON), Oct. 3, 2006, at 36.

⁷¹ *Bush to Sign Bill to Prevent Internet Gambling*, AGENCE FRANCE PRESSE (ENGLISH WIRE), Oct. 2, 2006, available at <http://www.turkishpress.com/news.asp?id=144678> [hereinafter *Bush*].

gest dangers posed by gambling are its addictive nature and effect on children.⁷²

Finally, former Senate majority leader Bill Frist, the Tennessee Republican who is credited with attaching the bill to the SAFE Port Act,⁷³ believes that,

[g]ambling is a serious addiction that undermines the family, dashes dreams, and frays the fabric of society. Congress has grappled with this issue for 10 years, and during that time we've watched this shadow industry explode. . . . Although we can't monitor every online gambler or regulate offshore gambling, we can police the financial institutions that disregard our laws.⁷⁴

In a statement made on the floor of Congress before it was to vote on the Act, Senator Frist explained: "The bottom line is that [Internet gambling is] illegal. But most Americans don't know that. It's our responsibility to remind them that it is. The only way we can do that is to put teeth in the laws already on the books through effective enforcement."⁷⁵

To legislators supporting prohibition, Internet gambling has become as important an issue as the country's other leading social problems.

Once a small, tight-knit group of hard-core sports bettors, Internet gamblers, attracted by celebrity players and incessant television coverage of poker tournaments, have grown into a largely mainstream group of amateur bettors. But in the eyes of the U.S., they have joined the ranks of people who transport illegal drugs or sell unregistered firearms.⁷⁶

Additionally, the Act's proponents are concerned that Internet gambling provides an avenue for money laundering and tax evasion.⁷⁷ Furthermore, congressional members supporting the Act "framed it as a sensible response to a 'mushrooming epidemic' of

⁷² 60 Minutes, *supra* note 3.

⁷³ SAFE Port Act; Chris Reiter, *Gamblers Adapt to Loss of U.S. Online Sites*, REUTERS, Oct. 4, 2006.

⁷⁴ Press Release, Sen. Bill Frist, *Frist Statement on Passage of Internet Gambling Legislation*, (Sept. 29, 2006) (on file with author), [hereinafter *Frist Statement*].

⁷⁵ Press Release, Sen. Bill Frist, *Frist Touts Internet Gambling Legislation*, (Sept. 29, 2006) (on file with author) [hereinafter *Frist Touts*].

⁷⁶ Liz Benston, *Congress Deals Poker Fans a Hand They Can't Bet*, LAS VEGAS SUN, Oct. 3, 2006, available at <http://www.lasvegassun.com/sunbin/stories/text/2006/oct/03/566611199.html>.

⁷⁷ Weinberg, *supra* note 2, at 313 ("They believe that Internet gambling is 'vulnerable to money laundering . . . [and] tax evasion . . . [because] the gambling sites are frequently located in areas with weak or nonexistent supervisory regimes.'").

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underage gambling and a burgeoning ‘national-security problem’ (since some Internet bookies are allegedly terrorist fronts).⁷⁸ Essentially, critics believe that Internet gambling “is the equivalent of putting a slot machine in every home, providing an easy chance to lose money with a few mouse clicks, all without the social controls at a bricks-and-mortar casino.”⁷⁹

For a number of other reasons, various groups have supported the Act from its outset: “(1) casinos, racetracks, and other gaming industries [that] wanted to avoid competition; (2) religious and social conservatives [that] worried about the moral decay of the communities; and (3) professional sports leagues [that] saw Internet gaming as a serious threat since the leagues ostensibly opposed betting on games.”⁸⁰ Commenting on their allegiance, Representative Leach opined:

The reason the NCAA, NFL, NBA, MBA and NHL support this legislation is that they are concerned with the integrity of the games. The reason the religious community—from Baptists and Methodists to Muslims—has rallied to this cause is because it is concerned for the unity of the American family. Internet gambling is not a subject touched upon in the Old or New Testament or the Koran. But the pastoral function is one of dealing with families in difficulty and religious leaders of all denominations and faiths are seeing gambling problems erode family values.⁸¹

Considering the stated purpose of the Act is to protect the general welfare of society, it is not surprising that legislators and societal groups alike offered their support for its passage.

V. THE UNSTATED, YET UNDERLYING PURPOSE OF THE ACT IS ECONOMIC IN NATURE

Several factors have contributed to the author’s conclusion that the underlying purpose of this Act is not the stated concern for the general welfare of society. These factors range from exceptions

⁷⁸ James Surowiecki, *Wagers of Sin*, NEW YORKER, Sept. 25, 2006, available at http://www.newyorker.com/printables/talk/060925ta_talk_surowiecki.

⁷⁹ Matt Richtel & Heather Timmons, *U.S. May Push Its Crackdown, But Internet Casinos Won’t Die Easily*, N.Y. TIMES, July 25, 2006, at C1.

⁸⁰ McBurney, *supra* note 10, at 347; McBurney, *supra* note 10, at 348 (Today, many casinos support Internet gambling. “[B]rick and mortar casinos saw how Internet gambling had exploded, and realized they were missing out on a potentially lucrative revenue stream.”).

⁸¹ Leach Wins Ban, *supra* note 64.

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within the Act to the fundamental economic nature of Internet gambling itself.

A. *The Act Carves Out Exceptions*

Contrary to legislative statements, this Act is not entirely about Internet gambling's alleged "ill effects on society."⁸² In reality, the Act is simply economic in nature. The underlying purpose of the legislation is to keep foreign Internet gambling companies from accessing U.S.-based customers, thereby ensuring that money formerly used to gamble outside of the United States will stay in the U.S. economy. If the stated intent reflected the true motivations of legislators, the Act would not have carved out exceptions for specific American gambling entities. These carve-outs, when combined with the absence of any articulated means for treating gambling problems, indicate that the Act "looks to be more focused on keeping gaming revenue within U.S. borders"⁸³

As previously discussed in Part III, the Act seems inconsistent with its stated purpose because it carves out exceptions for fantasy sport leagues, State lotteries, gambling on Indian Tribal lands, and bets placed on inter-state horseracing.⁸⁴ The Poker Players Alliance, a group opposing the legislation, believes that the Act "picks and chooses between types of gambling" it seeks to prohibit.⁸⁵ The Alliance argues that Internet gambling and domestic gambling share many of the same attributes that legislators claim are harmful to society, but they are only choosing to attack Internet gambling. Thus, it follows that exemptions are permitted for purely economic reasons since they provide both state and federal governments with an exceptional amount of revenue each year.⁸⁶ For example,

⁸² Ahrens, *supra* note 7.

⁸³ Reiter, *supra* note 73.

⁸⁴ Dominic Walsh & Tom Bawden, *Bankers and Players in America Hedge Their Bets on Internet Law*, *TIMES (LONDON)*, Oct. 3, 2006, at 44. *See also* Gross, *supra* note 3 ("Internet gambling companies criticize the glaring inconsistencies in the [Act], which provides exemptions for buying lottery tickets and placing 'authorized' bets on horse races over the Internet"); Eric Pfanner, *Online-Gambling Shares Plunge on Passage of U.S. Crackdown Law*, *N.Y. TIMES*, Oct. 3, 2006, at C3 ("Online operators based in Britain complain that Washington has been inconsistent in its opposition to online gambling, allowing horse racing operators and state lottery systems to run Internet operations, for instance.").

⁸⁵ Polson, *supra* note 60.

⁸⁶ Alicia Hansen, *Lotteries are Another State Tax—But With Better Marketing*, *CRAIN'S CHI. BUS.*, Jan. 3, 2005, available at <http://www.taxfoundation.org/research/show/234.html>. *See* Michael Bolcerek, *I'm Just a Bill, I'm Only a Bill . . . Sittin' Up Here on Capitol Hill . . .*, *BLUFF*, Oct. 2006, at 56 ("[Lotteries] are allowed because they provide valuable tax reve-

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“[s]tate governments nationwide kept almost \$14 billion of the nearly \$45 billion spent on lotteries in fiscal 2003.”⁸⁷ Consequently, “the recent moves [are] little more than an elaborate cat-and-mouse game serving only to benefit Las Vegas and Atlantic City casinos, along with Indian gambling operations, rather than seriously protecting Americans from falling prey to excessive gambling.”⁸⁸

B. *The Key Motivation: Money*

If the Act is not wholly about protecting the morals of society, what is it about? Money. Simply stated, “‘Internet gambling diverts revenue—and taxes—from lawfully authorized gaming within the United States’ [m]erely illustrat[ing] the reason for prohibition: federal and state governments are not currently receiving any revenues from Internet gambling.”⁸⁹ Moreover, Internet gambling “sucks billion[s] of dollars per year out of the U.S. economy.”⁹⁰ The money is not going into the U.S. economy because Internet gambling operators are prohibited from operating within U.S. borders. As a result, Internet gambling profits reside in for-

nues for state governments.”). If this Act were entirely about protecting morality, domestic gambling would be prohibited as well. See, e.g., McBurney, *supra* note 10, at 346–47 (discussing how U.S. domestic casinos pose the same problems that legislators claim to be preventing by enacting legislation to prohibit the funding of online gambling accounts).

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⁸⁷ Hansen, *supra* note 86.

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⁸⁸ Richtel & Timmons, *supra* note 79. See Shulman, *supra* note 56 (discussing H.R. 4777, Representative Goodlatte’s bill which also included similar exclusions).

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In one breath, Rep. Goodlatte says that gambling destroys the moral fiber of our society. In the next breath, his bill contains carve-outs for such things as lotteries, horse racing, and the stock market. It is offensive to hear a legislator preach about morality and then condone things like lotteries, which have long been held to be the most insidious form of gambling.

Allyn Jaffrey Shulman, *A Comprehensive Analysis of the Internet Gambling Prohibition Act*, CARDPLAYER.COM, May 2, 2006, <http://www.cardplayer.com/magazine/article/15416>. Because of the economic benefits derived from domestic gambling, Republican legislators did not want to ban it altogether. Instead, to appear as if they believe that gambling is immoral, they decided only to ban Internet gambling. See Benston, *supra* note 76 (“But with Republican lawmakers nervous about the Nov[ember] 7 elections and eager to find issues that will please conservative religious groups, former Senate Majority Leader Bill Frist and other Republican leaders saw an opportunity to adopt the ban.”).

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⁸⁹ Weinberg, *supra* note 2, at 312 (internal citation omitted). See also McBurney, *supra* note 10, at 341–42 (“In the United States, state governments compete with Internet gaming sites for gaming revenue, leading them to adopt ‘the position that the entire system of wagering over the Internet was inherently fraudulent.’” (internal citation omitted)).

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⁹⁰ Shulman, *supra* note 88.

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eign economies where the companies operate legally, even though “the bulk of their revenues have come from the U.S.”⁹¹

Legislators supportive of the Act have even commented on the economic takeoff of Internet gambling. Representative Leach has said that “[t]here is nothing in Internet gambling that adds to the G.D.P. or makes America more competitive in the world Everyone loses if this industry continues its remarkable growth trends.”⁹² Additionally, many of the world’s largest Internet gaming companies are listed on the London Stock Exchange or the Alternative Investment Market.⁹³

Billions of dollars of these stocks are traded each year. While the majority of the players on these sites of the large publicly traded companies are Americans, it is foreign brokers and traders that are earning this revenue. Furthermore, many investors in these stocks are Americans, who are choosing to invest in foreign, rather than domestic stock exchanges.⁹⁴

After the news that Congress had passed the Act in the United States, most of these stocks plummeted.⁹⁵ For example, “[P]artygaming PLC, the world’s biggest online gaming firm, was the most dramatic loser, declining by over half its market value.”⁹⁶ This is significant; in the last year alone, PartyGaming derived 84

⁹¹ Britt, *supra* note 3, at 21. *See also* Bolcerek, *supra* note 86 (In terms of the Internet poker industry, “[i]t seems blatantly absurd for lawmakers to decry that \$12B (the value of the iGaming market) is going overseas, when they penalize U.S. companies from competing for the business of poker players.”).

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⁹² Pfanner, *supra* note 84.

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⁹³ Bolcerek, *supra* note 86. *See* Pfanner, *supra* note 84 (“Over the last few years, Internet gambling operators, many of them based outside Britain, rushed to list their shares on the London Stock Exchange, taking advantage of a change in British law that legalized and regulated the business.”).

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⁹⁴ Bolcerek, *supra* note 86. *See also* Richtel & Timmons, *supra* note 79 (“The investors in the companies have included some of America’s largest investment houses, among them Goldman Sachs and the FMR Corporation, parent of Fidelity Investments, which bought shares of some for its mutual funds.”).

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⁹⁵ Scuffham, *supra* note 44. *See* Goldman, *supra* note 19 (“‘The time has been one of rapid growth,’ said Sebastian Sinclair, president of Christiansen Capital Advisors, a gambling consultant. ‘This industry was well on its way to becoming mainstream in a great part of the world. Capital was tripping over itself to fund these companies.’”).

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⁹⁶ Scuffham, *supra* note 44. On Monday, October 2, 2006, the first business day after the Act passed, “PartyGaming’s shares fell 59 percent by 0725 GMT, while Sportingbet lost 64 percent, 888 was down 45 percent and gaming software provider Playtech fell 55 percent. Austria’s bwin.com Interactive Entertainment fell as much as 22 percent in the first few minutes of trading.” Pete Harrison, *Online Gaming in Crisis after U.S. Ban is Passed*, REUTERS, Oct. 2, 2006.

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percent of its revenue, \$977.7 million, from U.S.-based customers.⁹⁷ American legislators hope that after the passage of the Act, \$977.7 million dollars will be placed in the U.S. economy, either through domestic gambling channels or through any other legal, non-gambling means desirable to citizens.

C. The WTO Dispute

Internet gambling was the subject of the World Trade Organization dispute between the United States and Antigua and Barbuda, conciliated by the Dispute Settlement Body (DSB) of the WTO in 2005.

Antigua and Barbuda (Antigua) challenged several U.S. state and federal laws that, Antigua argued, imposed a “total prohibition” on cross-border delivery of gambling services. In considering those laws, the panel found that all three of the federal laws and four of the eight state laws resulted in U.S. violations of its commitments under Article XVI, which prohibits certain quantitative restrictions on market access. Further, the panel found that the United States had failed to make out a defense under Article XIV of GATS that the U.S. measures were necessary to protect public morals.⁹⁸

The decision allowed the United States eleven months and two weeks to “implement the recommendations and rulings of the DSB.”⁹⁹ To date, and despite the persistence of Antigua and Barbuda, the United States has not complied with the WTO ruling.¹⁰⁰ Instead of fulfilling its obligations, the United States passed this Act, which seems to further violate the WTO ruling.¹⁰¹

In making its decision, the DSB panel focused on the carve-outs included in existing federal laws.¹⁰² “The WTO held that the

⁹⁷ Britt, *supra* note 3 (“Similarly, in the six months to 30 June, 52% of 888.com’s dollars 163.5m (pounds 86.6m) net gaming revenue came from US punters. And according to Sportingbet, whose brands include Paradise Poker, 54% of its revenue in its latest quarter came from the Americas.”).

⁹⁸ Daniel Bodansky, *International Decision: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 99 AM. J. INT’L L. 861, 862 (2005).

⁹⁹ World Trade Organization, Dispute Settlement Body, Dispute *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Apr. 20, 2005), http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds285_e.htm.

¹⁰⁰ *Id.*

¹⁰¹ Stephanie Kirchgaessner & Daniel Pimlott, *US Could Face WTO Pressure Over Online Protectionism*, FIN. TIMES, Oct. 7, 2006, at 19. “Antigua and Barbuda’s lawyer in the case said the new bill made the U.S. more clearly in breach of the WTO’s rules.” *Id.*

¹⁰² See generally McBurney, *supra* note <CITE _Ref163739786>.

United States failed to show that it applied its prohibition on remote wagering on horse races in a nondiscriminatory manner.”¹⁰³ As with the current Internet Gambling Act, exemptions proved to be a turning point in the international community. “The exemptions targeted at the internal U.S. gambling industry help to back claims by the Caribbean islands of Antigua and Barbuda that the U.S. unfairly discriminates against foreign internet gambling companies.”¹⁰⁴ If the United States outlawed all remote gambling, foreign and domestic, the international community could not have supported a claim of discrimination. But the Act does discriminate in order to benefit the U.S. economy, excluding only foreign entities that provide remote gambling services.

D. *Exclusion of Foreign Entities Segregates the United States from the Rest of the World*

Although the Act does not explicitly make Internet gambling illegal, prohibiting Americans from funding their gambling accounts accomplishes just that. Furthermore, by enacting legislation that excludes foreign gambling entities while permitting domestic gambling, the United States is ultimately segregating itself from the international economic community. In particular, because of the indictments brought against two foreign CEOs of online sports books, the Internet gambling community feels uncomfortable transacting with the United States. Calvin Ayre, CEO of a top Internet gaming company, Bodog.com, stated, “the U.S. government has made it clear that anybody that’s involved in Internet online gambling is not welcome in the U.S.”¹⁰⁵

Moreover, the international community is upset over what they consider to be another discriminatory law.¹⁰⁶ After the passage of the Act, the Caribbean Community, known as Caricom, “thr[ew] its support behind Antigua and Barbuda in its dispute with the U.S. over Internet gambling, saying the issue touched the entire region.”¹⁰⁷ A statement issued by Antigua and Barbuda said

¹⁰³ *Id.* at 361. . See Kirchaessner & Pimlott, *supra* note 100 (“The island republics, which license offshore internet gambling operations that make money from the US, won a ruling last year that US laws on online betting broke international trade rules and were protectionist.”).

¹⁰⁴ *Id.*

¹⁰⁵ Gross, *supra* note 3.

¹⁰⁶ *Caricom Backs Antigua in On-line Gambling Dispute with USA*, BBC MONITORING LATIN AM., Oct. 15, 2006.

¹⁰⁷ *Id.*

that Caricom officials told the United States that the region “‘views with concern the U.S.’ response to date to the WTO rulings and recommendations in the Internet gaming case,’ and the issue ‘should not be regarded as bilateral but as a regional one.’”¹⁰⁸ As a result, Caricom vowed to initiate further WTO proceedings regarding the Internet gambling dispute, “pointing out that America’s new legislation is in contravention of global free trade rules.”¹⁰⁹ Likewise, the European Union has identified itself as an “interested party” in the WTO dispute, believing that the passage of the Act “confirms the existing legislation, which was already found to be discriminatory.”¹¹⁰

Above all, passage of the Act caused some leading Internet gambling operators to halt all business with customers based in the United States, significantly affecting the operators’ revenue opportunities.¹¹¹ For example, it was recently reported that since the passage of the Act, “[s]everal London-based Internet gambling companies and a handful in Europe and Australia subsequently sold off or shut down their U.S. operations, losing around 80 percent of their combined business in the process.”¹¹² For smaller gaming companies, the situation could be even worse.

Roughly half [of] the estimated 500 companies operating 2,300 gambling websites across the Caribbean, Central America and Europe could be wiped out The survivors will have to make do on sharply reduced revenue, while seeking ways around the U.S. ban and building up their business in Asia.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Kirchgaessner & Pimlott, *supra* note 100.

¹¹¹ Jane Wardell, *Britain Criticizes U.S. Online Bet Ban*, ASSOCIATED PRESS, Oct. 27, 2006. *See, e.g.*, McCarthy & Swartz, *supra* note 12 (“PartyGaming generated 80% of its \$1 billion in 2005 revenue from the U.S. market. During the first half of 2006, American bettors accounted for 78% of \$662 million in revenue . . .”). *See also* Pfanner, *supra* note 84 (“As a result [of the recent legislation], several online-gambling companies said . . . that they planned to stop doing business with customers in the United States—by far the largest market for Internet gambling.”).

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¹¹² Wardell, *supra* note 111. *See* McCarthy & Swartz, *supra* note 12 (“PartyGaming, the world’s largest online-gambling company, said it will stop taking bets from 920,000 active U.S. customers . . .”). *Cf.* Marianela Jimenez, *Online Gambling Flourishes in Costa Rica*, ASSOCIATED PRESS, Oct. 16, 2006, (“‘VegasPoker247 is pleased to announce that it’s business as usual . . .’”).

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¹¹³ McCarthy & Swartz, *supra* note 12. *Cf.* Britt, *supra* note 3 (“The situation in the U.S. will not affect every firm equally; while it has been a lucrative territory, several operators were already experiencing their fastest growth in new players elsewhere.”); Pfanner, *supra* note 84.

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Basically, “[i]f you lop off 80% of somebody’s revenues, it’s going to hurt,”¹¹⁴ and when companies begin to go under as a result, the U.S. government will be blamed.

VI. REGULATION WILL ACHIEVE BOTH THE STATED AND UNSTATED PURPOSES OF THE ACT

A. *Will the Act Be Effective?*

The Act serves to exclude foreign gambling entities, thereby segregating Americans from the rest of the world. With this in mind, the larger question is, whether the Act will actually prevent Americans from gambling online? Although it is a minority view, some say that removing the means by which customers fund their accounts will impede, if not altogether stop, Americans from participating in Internet gambling.¹¹⁵

Conversely, others feel that, “[l]ike the prohibition of alcohol, which did not work, the prohibition of Internet gambling is destined to fail.”¹¹⁶ The Act by no means criminalizes Internet gam-

As the United States puts up more barriers, online gambling companies have been emphasizing growth in other markets. 888 Holdings said 68 percent of new customers who registered on its sites in the first half of the year were from outside the United States, 56 percent more than a year earlier. PartyGaming says it now has as many players outside the United States as it had in America in 2004.

Id.

¹¹⁴ See McCarthy & Swartz, *supra* note 12

¹¹⁵ Harrison, *supra* note 96 (“We believe that this will have a very material impact on the long-term prospects of online gambling, and in particular poker,” said analyst Julian Easthope at UBS. “This will lead to a rapid decline in the use of online poker sites.”). See also Walsh & Bawden, *supra* note 83 (Mr. Kane, a former advisor to the U.S. Federal Reserve, believes that because the Act does not impose liability on the individual gambler (and only on the financial institution), the individual will not curb his activities. However, “[t]here will obviously be some people—maybe 30 percent at a very rough estimate—who are law abiding citizens and will stop online gambling immediately.”).

¹¹⁶ Gross, *supra* note 3. Likewise:

Britain’s culture secretary . . . compared the U.S. crackdown on online gambling to the failed alcohol ban of the Prohibition as she prepared to host an international summit on Internet gambling . . . Tessa Jowell warned that the U.S. ban on Internet gambling would make unregulated offshore sites the “modern equivalent of speakeasies,” illegal bars that opened in 1920s America when alcohol was banned.

Wardell, *supra* note 111. See also Weinberg, *supra* note 2 at 315:

Alcohol prohibition is a clear example that when the United States government attempts to stop its citizens from participating in an allegedly illicit activity, it will fail. Furthermore, the War on Drugs has demonstrated that the threat of punishment is not a practical deterrent. “History has proven the dangers of prohibition.”

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bling, although it does make it more difficult for Americans to fund their online accounts.¹¹⁷ But even with the funding complications, “these sites are not just going to walk away from a \$12 billion-a-year industry.”¹¹⁸ Foreign gaming companies feel that they can succeed through loopholes in the Act; “when one funding source is blocked, they will open another [T]here are already offshore third-party companies in place that are more than happy to handle [American gamblers’] financial transactions.”¹¹⁹ Even Representative Leach admitted:

Having new overseas processors . . . spring up does present a problem But [the Act] also prohibit[s] American financial institutions from transferring money to overseas payment processors known to do a lot of business with casinos. In turn, it *could* make people work harder to place bets.¹²⁰

Others say that the Act will be ineffective to prevent Internet gambling because it is inherently unworkable.

The bill passed by Congress could allow regulators to exempt checks and money transfers because they are more difficult to track. “Analyzing 40 billion checks a year would be a largely manual process,” [according to a spokeswoman for the American Bankers Association]. If checks are not exempt, this would break our banks as it would be too costly to enforce. If checks *are* exempt, players could simply send a check to an online site.¹²¹

Ahrens, *supra* note 7 (“While proponents decried the effects of gambling on society, opponents pointed to the enormous popularity of Internet gambling and compared the new law to the Prohibition amendment of 1919, which led to the rise of illegal speak-easies and organized crime.”).

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¹¹⁷ To prohibit Internet gambling, Congress would have had to modify the Wire Act to explicitly ban such gambling, but that provision in the House version of the Act was dropped in the Senate. Given the current state of the law, the government still lacks the jurisdictional reach to prosecute foreign gaming sites. Allyn Jaffrey Shulman, *What’s NOT Included in Anti-Gaming Legislation*, CARDPLAYER, Oct. 6, 2006, http://www.cardplayer.com/poker_law/article/1428 See also Shulman, *supra* note 56 (“The statute is primarily no big deal since poker players stopped using credit cards a few years ago and found other ways to get their money into their favorite gaming sites.”).

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¹¹⁸ Shulman, *supra* note 115.

¹¹⁹ *Id.* See Goldman, *supra* note 19 (“Gamblers may look over their shoulder now, but experts say a new Internet gambling ban won’t keep bettors from ponying up, just turn them on to overseas payment services out of the law’s reach.”).

¹²⁰ Richtel & Timmons, *supra* note 79 (emphasis added) (“But even [Representative Leach] concedes that Washington’s best efforts will lead only ‘to a reduction but not necessarily to an ending’ of online gambling.”).

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¹²¹ Shulman, *supra* note 56 (emphasis added) (“Representatives of the financial services industry worry about a heavy regulatory burden being placed on banks. ‘The bill sets up

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The consensus seems to be that, although at the Act was initially aimed toward preventing Americans from funding their Internet gambling accounts, in effect, it will only slow the funding process for the time being.¹²²

B. Legislators Should Regulate, Not Prohibit

As noted above, “[h]istory teaches us that regulation, not prohibition, is the responsible solution for our lawmakers to pursue.”¹²³ Furthermore, while prohibition may not address legislative concerns with Internet gambling, many experts believe that regulation will solve the social problems often associated with it; “[a] system of licensing and regulation would require that sites maintain objective standards, safeguards for age verification, identity verification, financial solvency, fairness of game, and even measures to help problem gamblers.”¹²⁴ Additionally, by regulating Internet gambling the government will have the opportunity to ensure that

banks to police a social issue,’ said Laura Fisher, spokeswoman for the American Bankers Association. ‘It’s not something we want to encourage.’”). Furthermore, the Act may be impractical because it “puts enforcement on the shoulders of banks and other U.S. financial institutions, some of which fought the legislation.” Ahrens, *supra* note 7.

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¹²² Reiter, *supra* note 73 (“[A]nti-gambling activists say the legislation will do little to stop problem gamblers.”). Similarly, Coleen Moore, the resource development coordinator at the Illinois Institute for Addiction Recovery, believes that “[i]f the gambling sites do shut down, compulsive gamblers, like other addicts, will seek out a new way to gamble, even if it means doing something illegal.” *Id.* See also Richtel & Timmons, *supra* note 79 (“Sebastian Sinclair, an analyst with Christiansen Capital Advisors, which tracks online gambling trends, said offshore gambling could be ‘curtailed but it cannot be stopped.’”).

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¹²³ Bolcerek, *supra* note 86, at 56. See Adam Goldman & Ryan Nakashima, *New Law on Web Gambling May Hurt Poker*, ASSOC. PRESS, Oct. 24, 2006. Michael Bolcerek, President of the Poker Players Alliance, a 130,000-member group that opposes the Act, believes that prohibition is the wrong approach (“The hardcore ones will find somewhere, they won’t care whether it’s regulated . . . That’s what a prohibition does. It drives everything underground.”). *Id.*

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¹²⁴ Bolcerek, *supra* note 86. See also Gross, *supra* note 3 (“Instead of fighting to ban Internet gambling, the government should regulate Internet gaming and adopt a regulatory structure that ensures that Internet gambling is conducted honestly, fairly and competitively, safeguards the rights of players, casinos and others and enforces age and identity verification.”); Weinberg, *supra* note 2, at 326 (“Money laundering would be eliminated from regulated Internet gambling websites.”). Cf. 60 Minutes, *supra* note 3 (Senator Kyl believes that regulation would not solve social problems associated with Internet gambling. “Most [Internet gambling] is done in foreign countries. So even if we try to create some kind of standards, it’s not to say that it’s going to be enforced by a foreign government.”). If Congress chooses to regulate Internet gambling, companies may open inside U.S. borders, alleviating Senator Kyl’s fears. Additionally, even if companies did not operate inside the United States, the statute could provide for jurisdiction over companies that do business within the United States.

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all online gambling transactions are appropriately reported and taxed, creating substantial revenue for both state and federal entities.¹²⁵ Finally, regulation will actually fulfill an important goal of the legislators in creating this Act: keeping American money in the U.S. economy.¹²⁶

Currently, there are approximately eighty countries in the world that regulate or license Internet gambling.¹²⁷ Leading the field are Australia, the Caribbean nations, and most recently, the United Kingdom.¹²⁸ “Australia opted for regulation over prohibition because, similar to the situation in the United States, online gambling was already taking place by Australian users.”¹²⁹ By doing this, Australia was able to address social considerations like underage gambling while ensuring that “companies are solvent, the games are fair, and the winners can claim their loot.”¹³⁰ Likewise,

¹²⁵ Weinberg, *supra* note 2, at 293.

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Regulation means that the federal and State governments gain revenue from this booming economic activity, and that those people who wish to pursue Internet gambling can do so knowing that the games are as safe as they are in any land-based casino. Considering the recurring problem of the national debt, the United States must consider any means by which tax revenue can be raised.

Id. See generally Gross, *supra* note 3 (suggesting that a “pay-to-play” tax may be an effective way of taxing Internet gambling); Weinberg, *supra* note 2, at 320–26 (discussing methods by which to tax). See also Bolcerek, *supra* note 86 (An analysis of Internet poker alone “found that more than \$3.3 billion in revenue could be generated annually for the federal government, and another \$1 billion for state coffers.”). Adding in traditional casino games and online sportsbooks, could even double these stated estimates. See *60 Minutes*, *supra* note 3 (“[W]ere America to have regulated the industry in 2004, the American states would have earned \$1.2 billion in tax.”).

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¹²⁶ Bolcerek, *supra* note 86 (“In addition to the tax dollars that are lost by not regulating online poker, the U.S. economy is also missing out on keeping domestic revenue in the country as well as attracting substantial foreign investment to the NASDAQ or NYSE.”).

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¹²⁷ Gross, *supra* note 3. Italy recently announced that Internet gambling will be regulated and legalized as of January 1, 2007. John Caldwell, *Italy to Legalize and Regulate Online Poker and Gambling*, POKERNEWS, Sept. 28, 2006, <http://www.pokernews.com/printable/2240>.

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¹²⁸ McBurney, *supra* note 10, at 352–59. See Andrle, *supra* note 1, at 1409 (“Of the approximately sixty-eight offshore Internet gambling sites in the Caribbean and Central America, about twenty-seven are in Antigua.”).

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¹²⁹ Andrle, *supra* note 1, at 1411. The Caribbean nations had different reasons for regulating Internet gambling. See Bolcerek, *supra* note 86 (“Caribbean nations embraced online gaming for the revenue potential and jobs it brought their countries, as well as the high-tech internet infrastructure that online gaming companies brought with them.”).

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¹³⁰ Andrle, *supra* note 1, at 1411. “The specifics of the Australian system demonstrate how a regulatory schema can accomplish many of the protective measures that a prohibition system aims to achieve while not completely eradicating the option to gamble online.” *Id.* at 1412.

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the United Kingdom followed and enacted legislation regulating Internet gambling.¹³¹

Under new British gambling laws, online operators have a 'social responsibility' duty written into licenses and policed by the independent Gambling Commission watchdog. It requires them to work to prevent underage gambling, give prominent warnings about addiction and inform users how much time and money they have spent on the site¹³²

Essentially, "[e]veryone's a winner' if Internet gambling is regulated."¹³³ By prohibiting rather than regulating, legislators are creating a situation where Internet gambling companies will be subject to foreign, rather than domestic laws.¹³⁴

If internet gambling operators are not regulated by the federal government, foreign governments that may not regulate the operators as strictly will control the market. Furthermore, the United States would not collect tax revenue from an activity in which many American citizens participate. As long as it is possible, Americans will find a way to pursue Internet gambling.¹³⁵

This author proposes that Congress should amend the Act to regulate payment methods, rather than prohibit the funding of American Internet gambling accounts. The tax revenues would be available to fund programs that assist problem gamblers, strengthen the American family, and ensure that minors are prevented from gambling online.¹³⁶ The revenue derived from regu-

¹³¹ Wardell, *supra* note 111.

¹³² *Id.* Believing that regulation provides a better solution than prohibition, the United Kingdom is hosting a gambling summit in London, where lawmakers from 30 countries will discuss ways to regulate the industry, including the protection of minors and keeping the industry free of crime [The summit] intended to discuss ways to stop criminals from defrauding online gamblers and to prevent sites being used for money laundering.

Id.

¹³³ Weinberg, *supra* note 2, at 326.

¹³⁴ *Id.* at 311. Currently there are entities in place to assist countries in regulating the industry, ensuring that all companies involved comply with determined guidelines. *See, e.g.,* Interactive Gaming Council (IGC), <http://www.igcouncil.org/aboutus.php?id=2> (The IGC is a "non-profit trade association that serves as a collective voice for the interactive gaming industry. The IGC builds credibility in the industry and creates member benefits by aggressively addressing legislative and regulatory challenges and opportunities in order to promote fair and responsible gambling.").

¹³⁵ Weinberg, *supra* note 2, at 311.

¹³⁶ A feasible solution would be to require financial information to match an individual's state driver's license, valid passport, or U.S. birth certificate.

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lating Internet gambling would stimulate the U.S. economy and reduce the ever-growing national deficit.

VII. CONCLUSION

Although legislators claimed to promote the Act for the moral good of society, many facts point to the notion that, though their concerns may be valid, legislators enacted the law mainly for the economic benefit of the United States. Enacting legislation to promote the American economy at the expense of others in the world is both contrary to U.S. international policy and the GATS provisions of the WTO. Thus, to meet the stated purpose of the Act and simultaneously bring the United States back into the good graces of the international community, the United States should voluntarily amend the Act to license and regulate Internet gambling in the United States.

