

# PUBLIC POLICY AND THE INEVITABILITY OF INTERNET GAMBLING

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## I. INTRODUCTION

Iowa has been a gaming industry leader for many years. A state lottery, riverboats, land-based casinos, pari-mutuel gambling, and racinos are all now part of the gaming experience in Iowa.<sup>1</sup> In its last two legislative sessions Iowa entered the online gaming controversy and considered bills that would allow Internet poker to be offered on an intrastate basis. In the 2012 legislative session, a bill authorizing Internet poker even passed the Iowa Senate only to die without consideration in the Iowa House.<sup>2</sup> Nevertheless, there exists a strong sentiment that Internet gambling is inevitable, and it is not a matter of if but when it will be adopted.<sup>3</sup> It also seems nearly certain that 2013 will see Internet poker initiatives presented in the Iowa legislature. Of course, many disagreements about the adoption of Internet gambling remain. Perhaps the most basic and most contentious issue is whether the model for Internet gambling regulation should be federal or state based.<sup>4</sup> Aside from

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1. IOWA CONST. amend. XXXIV (amending the state constitution to repeal the ban on lotteries); IOWA CODE §§ 99D.4, 99F.3 (2011) (legalizing pari-mutuel betting and gaming at racetracks); IOWA ADMIN. CODE r. 491-7 to -11 (2012) (establishing regulations for greyhound racing, wagering and simulcasting, harness racing, thoroughbred and quarter horse racing, and gambling games); Opinion No. 02-9-1, 2002 WL 3143789 (Iowa A.G. Sept. 10, 2002) (authorizing video slot machines at race tracks).

2. S. File 2275, 84th Gen. Assemb., Reg. Sess. (Iowa 2012); Jason Noble & Jason Clayworth, *Lawmakers Tally Their Hits, Misses: A Look at the Most Recent Session and What Happened to Various Measures*, DES MOINES REG., May 13, 2012, at 8B.

3. See, e.g., Shylene B. D'Addario, Note, *The Legalization of Internet Gambling: Why the Clock is Ticking on Prohibition*, 38 RUTGERS COMPUTER & TECH. L.J. 90 (2012); Peter J. Kulick, *I-Gaming in the U.S.: What About Tax Policy?*, CASINO ENTERPRISE MGMT., Jan. 2012, available at <http://www.casinoenterprisemanagement.com/articles/january-2012/i-gaming-us-what-about-tax-policy>; Abram Sauer, *Online Casino Platforms: GigaSpaces*, CASINO ENTERPRISE MGMT., Feb. 2011, available at <http://www.casinoenterprisemanagement.com/articles/february-2011/online-casino-platforms-gigaspace>.

4. See Josh Chumbley, Comment, *Follow the Yellow Chip Road: The Path to Legalizing Internet Poker*, 36 S. ILL. U. L.J. 547, 564-68 (2012) (basing authority for federal regulation on the Commerce Clause despite traditional state regulation). Compare Jamisen Etzel, *The House of Cards is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 199, 243 (2012) (proposing

this, however, recent experience in Iowa raises other questions about the nature of the push for Internet-based gambling. Specifically, what is the public policy narrative that supports government legalization and regulation of Internet gambling? Is the inevitability of Internet gambling a reason *in itself* for its adoption? If it isn't, what are the justifications for Iowa adopting Internet gambling? This Article argues that proponents of Internet gambling in Iowa have not made a convincing case for it and that substantial opposition to this form of gambling in Iowa reflects uncertainty about what the state stands to gain from its adoption. This is unfortunate and unnecessary. Proponents need to lay out clearly what is at stake with Internet gambling in Iowa. They need to convince Iowans that, while adoption of Internet gaming is a calculated risk for the state, it is an appropriate and necessary one. Until that message is clearly imparted, Internet gambling will not have the support of Iowans. As inevitable as Internet gambling may seem, the narrative supporting it must offer more than inevitability. At this important and even transformational point in the regulation of gambling, the future of the state's gaming industry depends on effective leadership on this issue.

## II. IOWA'S MOVE TOWARD INTERNET POKER

### A. 2011: Senate Files 458 & 526

Iowa's legislature begins its regular session in January.<sup>5</sup> Under state law, the legislature meets for 110 calendar days in odd-numbered years and

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cooperative state compacts to regulate Internet gambling and reduce the need for federal intervention or regulation), *with* Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006, 31 U.S.C. §§ 5361–67 (2006) (outlining the current federal stance on Internet gambling), D'Addario, *supra* note 3, at 115–16 (projecting that legalization of Internet gambling will eventually occur at both the federal and state level), and Kevin K. Washburn, *Testimony on the Regulation of Indian Gaming, Oversight Hearing on the [NIGC] Minimum Internal Control Standards, Before the United States House of Representatives, Committee on Resources, 109th Congress, 2nd Session (May 11, 2006)* (Minn. Legal Studies Research Paper No. 07-49, 2010), available at <http://ssrn.com/abstract=1030926> (noting that state gaming regulation has been virtually nonexistent in most states and pointing out that, while state regulation is easier, conflicts of interest with Indian tribes may arise, making federal regulation necessary and likely more effective despite the fact that tribal sovereignty may be impaired). *But see* John D. Andrie, Note, *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 (2004) (proposing that online gambling be regulated at the international level).

5. IOWA CONST. art. III, § 2; IOWA CODE § 2.1 (2011).

100 days in even-numbered years, with recesses as allowed by the state constitution.<sup>6</sup> Consequently, there is a relatively short period of time for bills to make their way through the legislative morass.<sup>7</sup> In 2011, Senate File 458 addressed three important issues affecting gambling in Iowa.<sup>8</sup> First, the bill would have legalized advance deposit wagering at pari-mutuel facilities.<sup>9</sup> This was part of the continuing effort to stanch the drain of revenues out of the horse racing betting pools in the state.<sup>10</sup> Second, the bill would have eliminated the requirement that counties periodically conduct referenda to decide whether to continue to offer gambling in the county.<sup>11</sup> Finally, the bill would have legalized Internet poker games conducted within Iowa.<sup>12</sup>

While parts one and two of the proposal were eventually enacted, the legislature balked at the Internet poker provision.<sup>13</sup> Instead, the legislature approved a law that required the Iowa Racing and Gaming Commission (IRGC) to report on “the creation of a framework for the state regulation

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6. The statute sets the length of time legislators are compensated and the number of days for which they can recover per diem expenses. IOWA CONST. art. III, § 14; IOWA CODE § 2.10(1).

7. See, e.g., Kenneth Steely, *Step by Step: Florida's Path to More (or Less) Gaming*, CASINO ENTERPRISE MGMT., Apr. 2012, available at <http://www.casinoenterprisemanagement.com/articles/april-2012/step-step-florida%E2%80%99s-path-more-or-less-gaming> (“Moving government to act, for any purpose, is a difficult and time-consuming process [and] changing the status quo in government is done by inches, not feet, and definitely not miles.”).

8. S. File 458, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

9. *Id.* § 6. Advance deposit wagering was later legalized. 2011 Iowa Acts 307–08 (codified at IOWA CODE § 99D.11, amended by 2012 Iowa Legis. Serv. ch. 1023, 84th Gen. Assemb., 2d Reg. Sess.); see also *Iowa Brings Parimutuel Wagering Home*, QUAD-CITY TIMES (Nov. 16, 2011, 2:00 AM), [http://qctimes.com/news/opinion/editorial/iowa-brings-parimutuel-wagering-home/article\\_e652ac94-101a-11e1-9e4a-001cc4c002e0.html](http://qctimes.com/news/opinion/editorial/iowa-brings-parimutuel-wagering-home/article_e652ac94-101a-11e1-9e4a-001cc4c002e0.html).

10. See IOWA RACING & GAMING COMM’N, HANDLE BY CALENDAR YEAR REPORT: PRAIRIE MEADOWS 2005–2011 (2011), available at <http://www.iowa.gov/irgc/PMHandle05-11.pdf> (showing how total pari-mutuel betting at Prairie Meadows Racetrack and Casino in Altoona, Iowa dwindled from \$54.9 million in 2008 to \$36.5 million in 2011).

11. S. File 458, § 10. An amended version of this provision later became law. While referenda are no longer required, they are still permitted. 2011 Iowa Acts 310 (codified at IOWA CODE § 99F.7(11)).

12. S. File 458, § 14(1)–(2).

13. Compare *id.* §§ 12–36, with S. File 526, ch. 111, § 15, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

of intrastate poker.”<sup>14</sup> The IRGC discharged its duties admirably. In a report exceeding 100 pages, the IRGC consulted with numerous groups both within and outside Iowa, reviewed the vast range of legal issues and practical problems in regulating the activity, considered different possible models for Internet poker in Iowa, and examined revenue projections.<sup>15</sup> The report was thorough, balanced, and comprehensive, and it was not an advocacy study. Rather, its objective was simply “to identify the pros and cons of key regulatory points that may be part of any framework when regulating intrastate internet poker in the State of Iowa.”<sup>16</sup> The IRGC submitted the report to the Iowa General Assembly on December 1, 2011, approximately one month before the Iowa legislature’s 2012 regular session began.<sup>17</sup>

#### B. December 2011: The Department of Justice Changes Course

After the Iowa legislature received the IRGC Report, the stage was set for it to consider the possibility of Internet poker in the state. Support for such a law received an unexpected boost right before Christmas. As noted in the IRGC Report, the United States Department of Justice (DOJ) had maintained for years that the Interstate Wire Act of 1961<sup>18</sup> forbade Internet gambling of all types.<sup>19</sup> Although this position lacked substantial support in the courts,<sup>20</sup> the DOJ had aggressively applied the Interstate Wire Act in prosecutions against operators of Internet poker sites.<sup>21</sup> In a

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14. 2011 Iowa Acts 311.

15. IOWA RACING & GAMING COMM’N, REPORT ON THE POSSIBLE REGULATION OF INTRASTATE INTERNET POKER IN THE STATE OF IOWA (2011) [hereinafter IRGC REPORT], available at <http://www.iowa.gov/irgc/Intrastate%20Internet%20Poker.pdf>. In addition, researchers at the Center for Social and Behavioral Research at the University of Northern Iowa prepared a report for the Iowa Department of Public Health exploring “potential public health issues related to legalizing Internet poker in Iowa,” which was included in the IRGC Report as Appendix D.

16. IRGC REPORT, *supra* note 15, at 5.

17. IRGC REPORT, *supra* note 15 (citing information from the cover page).

18. Interstate Wire Act of 1961, 18 U.S.C. § 1084 (2006).

19. IRGC REPORT, *supra* note 15, at *ii*; see also *United States v. Corrar*, 512 F. Supp. 2d 1280, 1288–89 (N.D. Ga. 2007); *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1289 (D. Utah 2007).

20. See, e.g., *In re MasterCard Int’l Inc.*, 132 F. Supp. 2d 468, 479–81 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).

21. After UIGEA was enacted, it was often used in tandem with the Interstate Wire Act to prosecute Internet poker and other Internet betting operators. See, e.g., *United States v. PokerStars*, No. 11 Civ. 2564(LBS), 2012 WL 1659177, at \*1

December 2011 opinion, the DOJ reversed its position on the Interstate Wire Act, stating that it applied only to sports bets.<sup>22</sup> Although the opinion was issued in response to questions from state lotteries about online lottery sales, this shift in the DOJ's position eliminated a big legal hurdle for all forms of Internet gambling beyond sports betting.

C. 2012: Senate File 2275

The Iowa legislature soon had the opportunity to address whether Internet poker was right for Iowa. Senate File 2275, sponsored by Senator Jeff Danielson, would have authorized Internet poker within Iowa under the regulatory auspices of the IRGC.<sup>23</sup> Senator Danielson was an active and persuasive advocate of the proposed legislation, and it moved to a vote in the state senate in mid-March 2012.<sup>24</sup> On March 13, by a vote of 29–20, the Iowa Senate approved the bill.<sup>25</sup> Although Democrats controlled the Iowa Senate, the legislation received both support and opposition from each side of the aisle.<sup>26</sup>

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(S.D.N.Y. May 9, 2012); *Segal v. Bitar*, No. 11 Civ. 4521(LBS), 2012 WL 273609, at \*1 (S.D.N.Y. Jan. 30, 2012) (explaining the background of the poker players' civil action to recover frozen assets by discussing parallel criminal seizure and indictment accompanying the *PokerStars* civil suit); *accord* *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 860–63 (Sup. Ct. 1999) (applying federal violations in a case otherwise prosecuted under state law); *see also* *United States v. Cohen*, 260 F.3d 68, 76–77 (2d Cir. 2001); *United States v. Elie*, No. S3 10 Crim. 0336(LAK), 2012 WL 383403, at \*1 (S.D.N.Y. Feb. 7, 2012).

22. The opinion is dated September 20, 2011, but it was not released until December of that year. U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL COUNSEL, WHETHER PROPOSALS BY ILLINOIS AND NEW YORK TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT 12 (2011) [hereinafter DOJ OPINION], *available at* <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf> (concluding that “the Act’s prohibitions relate solely to sports-related gambling activities”).

23. S. File 2275, 84th Gen. Assemb., Reg. Sess. (Iowa 2012). The bill would have authorized existing licensees to partner with online hub operators and offer Internet wagering on poker only, and it included a provision limiting player participation to those physically within Iowa or at any other location authorized by law.

24. S. JOURNAL, 84th Gen. Assemb., Reg. Sess. 539–41 (Iowa Mar. 13, 2012), *available at* <https://www.legis.iowa.gov/DOCS/Pubs/sjweb/pdf2/2012/03-13-2012.pdf>.

25. *Id.*

26. The final vote included twenty-one Democrats and eight Republicans in support, with five Democrats and fifteen Republicans opposed. *See id.* (reporting roll call votes by senator name); *Senate: General Assembly: 84 (01/10/2011–01/13/2013)*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/Legislators/senate.aspx> (last visited Oct. 3, 2012) (noting party affiliation of senators).

After approval, the bill went to the Iowa House for consideration, but it was immediately evident that the proposal was going nowhere in that chamber. House State Government Committee Chairman Peter Cownie said: “We really didn’t expect it to come over from the Senate. . . . There are deadlines and this really was a victim of the funnel.”<sup>27</sup> The “funnel” is the Iowa legislature’s “self-imposed deadline” by which “non-spending measures [must] clear one legislative chamber and a committee of the other” to remain eligible for consideration.<sup>28</sup> According to Cownie, the proposal simply came to the house too late for consideration. Speaker of the Iowa House Kris Paulsen said there was a “general lack of interest” in the issue in the house, and that few house members had even mentioned Internet poker to him “until [the past week] when the big hubbub was.”<sup>29</sup> The proposal was not revived in the 2012 legislative session.

### III. INTERNET POKER LEGISLATION IN IOWA: THE MUDDLED MESSAGE

The ambivalence Speaker Paulsen expressed about Internet poker in Iowa should not by any means be read as indicating the issue is dead in the state. But it does provide an opportunity to reflect on the public policy interests that Internet poker implicates. Specifically, why is Internet poker a good thing for the state?

#### A. *Income*

The most obvious reason to legalize Internet poker is potential tax revenue. There are two basic models for taxing Internet poker: gross gaming revenue tax and a deposit tax.<sup>30</sup> Under the former approach, online poker operators pay tax on the revenues from the fees charged and “rakes” collected in the games they conduct.<sup>31</sup> The deposit tax approach collects taxes based on the money players deposit through the operator’s website.<sup>32</sup> Under either approach, a state could obtain substantial revenues from

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27. James Q. Lynch, *Speaker: Iowa House Won’t Ante Up; Online Poker is Dead*, CEDAR RAPIDS GAZETTE (Mar. 15, 2012, 8:30 PM), <http://thegazette.com/2012/03/15/online-poker-is-dead-iowa-house-speaker-says/>.

28. *Id.*

29. *Id.*

30. Law Offices of Sanford I. Millar, *Online Poker Should be Taxed, But How?*, JDSUPRA (July 9, 2011), <http://www.jdsupra.com/legalnews/online-poker-should-be-taxed-but-how-69362/>.

31. *Id.*; see generally FLA. STAT. ANN. § 849.086(2)(1) (West Supp. 2012) (defining “rake”).

32. Millar, *supra* note 30.

taxing the activity in some way. Yet in Iowa, proponents of online poker legislation have downplayed the revenue angle as a basis for approving Internet poker. For example, Senator Danielson stated: “We are not doing this to expand our state budget.”<sup>33</sup> More emphatically, he asserted: “I don’t give two hoots about the revenue for the state. Absolutely not. . . . I’m sorry. We’re in the black. We have a surplus. There’s zero evidence. I don’t think that’s the reason to do this.”<sup>34</sup> A lobbyist for U.S. Digital Gaming, a company that could operate an Internet poker hub in Iowa, echoed this sentiment: “The primary aim of Internet poker legislation is not to generate revenue for the state.”<sup>35</sup>

Some people doubted the “it’s not about the money” statements were genuine.<sup>36</sup> But some would argue there was good reason not to emphasize the revenue potential of Internet poker: the revenue potential may, at least initially, be quite modest. The IRGC Report examined the revenue issue in considerable detail, but also acknowledged “the lack of historical data relating to the topic of regulation of intrastate internet poker” was among several limiting factors.<sup>37</sup> The report referred to “a number of sources” that estimated, during the 2011 legislative session, a “potential tax revenue of \$30 million to \$35 million to the state annually.”<sup>38</sup> This

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33. Michael Cooper, *As States Weigh Online Gambling, Profit May Be Small*, N.Y. TIMES, Jan. 18, 2012, at A1, available at <http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html>.

34. Lynn Campbell, *Iowa Will Attempt to Follow Lead of Nevada, DC in Legalizing Online Poker*, IOWAPOLITICS.COM (Feb. 1, 2012), <http://www.iowapolitics.com/index.html?Article=259831>.

35. GAMBLING COMPLIANCE LTD., IOWA REPORT DOUBTS INTRASTATE POKER’S REVENUE POTENTIAL 1 (2011) [hereinafter GAMBLING COMPLIANCE], available at [http://www.uni.edu/csbr/sites/default/files/Iowa\\_Report\\_Doubts\\_Intrastate\\_Poker\\_\\_s\\_Revenue\\_Potential.pdf](http://www.uni.edu/csbr/sites/default/files/Iowa_Report_Doubts_Intrastate_Poker__s_Revenue_Potential.pdf).

36. Rep. Jeff Kaufmann, a teacher and livestock operator who is a member of the House State Government Committee, stated:

“I don’t buy that. . . . I think it’s about dollars coming into the state coffers. I think it’s about dollars going into the pockets of people that own these casinos. A lot of those owners are in Nevada and they’re on the west coast, and they’re not here in this state. I’d rather talk about property tax for the rest of the session rather than spend two days talking about gambling.”

Campbell, *supra* note 34.

37. IRGC REPORT, *supra* note 15, at 48. Another limitation included in the report was the difficulty of estimating the current Internet poker market in the state. *Id.*

38. *Id.* at v.

projection came from U.S. Digital Gaming, the California-based company that, as noted above, maintained Internet poker in Iowa was not about the money.<sup>39</sup> When the IRGC pressed U.S. Digital Gaming for the basis of this projection, however, the company demurred, telling the IRGC “they could not give their revenue projection methodology as they viewed it as a trade secret.”<sup>40</sup> The IRGC’s own projections were quite a bit lower than the \$30–\$35 million annual take U.S. Digital Gaming suggested. In fact, the IRGC projected “approximately \$3 million to \$13 million in potential tax revenue to the state annually.”<sup>41</sup> No state would turn its back on tax revenues of any amount, of course. But in a state with fiscal year 2010 revenues of nearly \$6 billion,<sup>42</sup> these revenue projections deflated any hopes that Internet poker would offer an instant financial bonanza for the state. This substantial drop in financial projections may help explain why proponents downplayed revenue as a justification for legalized Internet poker in Iowa.<sup>43</sup>

B. *Consumer Protection, Supporting Domestic Businesses, or Individual Liberty*

But if tax revenue does not supply the animating narrative for Internet poker, what does? According to some proponents of the legislation, it is a consumer protection issue. Senator Bill Dix defended his favorable vote on the senate bill by stating: “We have a situation here in Iowa where Iowa citizens are not being protected and this bill will do that. . . . We have unscrupulous operators from off-shore accounts who are preying on the citizens of Iowa and this bill seeks to solve that problem.”<sup>44</sup> Senator Danielson offered a similar view, stating: “We are not doing this to expand our state budget. . . . Our purpose is to make sure every Iowan who wants to play poker has a fair game, has protections, and, if they win,

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39. GAMBLING COMPLIANCE, *supra* note 35, at 1.

40. IRGC REPORT, *supra* note 15, at 43.

41. *Id.* at v.

42. LEGISLATIVE SERVS. AGENCY, FISCAL SERVS. DIV., SUMMARY OF FY 2012 BUDGET AND DEPARTMENT REQUESTS 10 (Dec. 2010), *available at* <https://www.legis.iowa.gov/DOCS/lsaReports/BudgetAnalysis/BudgAnalysis2012.pdf>.

43. US Digital Gaming said its projections were “perfectly defensible,” were based on a “three-year ramp-up phase,” and were developed before the April 15, 2011 indictments of several online poker websites. GAMBLING COMPLIANCE, *supra* note 35, at 1.

44. O. Kay Henderson, *Senate Panel Endorses Internet Poker Play, Run by Iowa Casinos*, RADIOIOWA.COM (Feb. 22, 2012), <http://www.radioiowa.com/2012/02/22/senate-panel-endorses-internet-poker-play-run-by-iowa-casinos-audio/>.

is able to retain those earnings in a fair and safe way.”<sup>45</sup> Danielson further stated that whether poker participants “play online or in a casino,” they have a right to a “fair game and a level playing field.”<sup>46</sup> U.S. Digital Gaming lobbyist Kirk Uhler offered a variation on this theme, saying the legislation would be about “regulating activity that is sending U.S. dollars overseas at the expense of licensed businesses in Iowa.”<sup>47</sup> The licensed businesses mentioned are the state-licensed Iowa casinos, which would be authorized to operate online poker games.<sup>48</sup>

The “sending dollars overseas” angle is far more persuasive than the “fair deal for online poker players” theme. Concern for people engaging in the marginally illegal activity<sup>49</sup> of playing online poker through an offshore gaming company’s platform seems oddly misplaced among the consumer issues plaguing a state like Iowa. Poker players in Iowa who are concerned that they are not going to get a fair game online have several outlets for their hobby, because nearly all land-based and riverboat casinos offer poker games on site.<sup>50</sup> Of course, a state shouldn’t be indifferent to consumers being defrauded. But it strains credulity to advance consumer protection as the primary impetus for state legislative action. Similarly, one can argue it is none of the government’s business if a person wants to play poker online in the privacy of his home.<sup>51</sup> But to offer that as the justification for establishing online poker seems disingenuous.

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45. Cooper, *supra* note 33.

46. O. Kay Henderson, *Iowa Senate Votes in Favor of Legalizing Online Poker Play*, RADIOIOWA.COM (Mar. 13, 2012), <http://www.radioiowa.com/2012/03/13/iowa-senate-votes-in-favor-of-legalizing-online-poker-play/>.

47. GAMBLING COMPLIANCE, *supra* note 35, at 1. Senator Danielson also spoke of the money going to overseas companies that run the online games as “leakage,” noting that “billions of dollars are leaking out of the state to unregulated . . . websites.” Henderson, *supra* note 46.

48. See S. File 2275 §§ 3–5, 84th Gen. Assemb., Reg. Sess. (Iowa 2012).

49. See, e.g., Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34, 40–44 (2006) (discussing the lack of clarity as to whether individual online poker players can be assured they are acting legally).

50. See IOWA RACING & GAMING COMM’N, TRACK GAMING REVENUE REPORT—JULY 2012 (2012), available at <http://www.iowa.gov/irgc/JULY%202012.pdf> (reflecting the existence of poker tables at all tracks and riverboat casinos in the state).

51. Senator Rick Bertrand seemed to champion this idea when he maintained, “I don’t see this as an expansion of gaming. I see this as an expansion of an existing freedom.” Henderson, *supra* note 44.

## IV. A CONTRASTING NARRATIVE: PARI-MUTUEL GAMBLING IN IOWA

The confused nature of the narrative supporting online poker—tax revenue, consumer protection, individual liberty, or something else—can be sharply distinguished from the adoption of another form of Internet gaming in Iowa. As noted above, advance deposit wagering (ADW) became legal in Iowa in 2011.<sup>52</sup> In short, this allows a person in the state to establish an account with Prairie Meadows, the pari-mutuel horseracing facility in Altoona, Iowa, and to place bets online on horse races *around the world* through the TVG wagering platform.<sup>53</sup> There is no mistaking the story behind the adoption of ADW; it is purely a function of the “racino” business model first developed in Iowa.

A. *Prairie Meadows: From Bankruptcy to Bonanza*

Prairie Meadows opened in 1989 amid expectations that horse racing would generate considerable interest, patrons, and revenue.<sup>54</sup> Yet within a few months, the facility had burned through its cash reserve and was effectively bankrupt.<sup>55</sup> Only by borrowing money from the county was the facility able to remain open for another two years.<sup>56</sup> The facility filed for

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52. See *supra* note 9.

53. *Id.* TVG describes itself as “the #1 wagering website and horse racing TV network in the USA.” TVG, <https://ia.tvg.com/learning-center/about-tvg-online-horse-racing#tab:aboutTvg>. (last visited Oct. 3, 2012).

54. See, e.g., Steve Davidowitz, *Parimutuel Racing Charges Out of Snowy Gate in Iowa*, STAR TRIB. (Minneapolis), Mar. 2, 1989, at 05C, available at 1989 WLNR 2442380 (estimating that opening day at Prairie Meadows drew more than 7,000 people in attendance and earned more than \$430,000 in total wages); Steve Davidowitz, *Canterbury’s Errors Help New Iowa Track*, STAR TRIB. (Minneapolis), Mar. 1, 1989, at 03C, available at 1989 WLNR 2442203 (projecting 4,600 fans per day betting up to \$100 per person at spring and fall Prairie Meadows thoroughbred meets and noting a soft opening drew more than double the expected attendance because of “deep and real” patron enthusiasm).

55. See, e.g., Steve Davidowitz, *Canterbury Not Alone in Its Suffering: Racing Industry Hit by Higher Costs, Loss of Betting Fans*, STAR TRIB. (Minneapolis), Feb. 4, 1990, at 01D, available at 1990 WLNR 3519568 (estimating Prairie Meadows’ losses as of that date at nearly \$12 million); Bob Wolff, *Iowa Track to Close Sunday*, CHI. SUN-TIMES, July 7, 1989, at 89, available at 1989 WLNR 3423450 (reporting that Prairie Meadows would end its inaugural season early “due to lack of business”); Dan Johnson, *History—Bankruptcy and Beyond: Born in Farm Crisis, Track Flopped at First*, DES MOINES REG. (Apr. 18, 2009, 11:58 PM), <http://www.desmoinesregister.com/article/20090419/NEWS/904190342/1001> (noting that the facility spent its entire original reserve by May 1989).

56. Johnson, *supra* note 55.

Chapter 11 protection in late 1991.<sup>57</sup> County taxpayers were potentially on the hook for millions of dollars of revenue bond interest payments.<sup>58</sup> But in 1994, a solution for this undesirable situation emerged when Iowa voters authorized slot machines at Iowa horse and greyhound racetracks.<sup>59</sup> After this referendum passed, the Prairie Meadows facility converted the clubhouse into a casino where more than 1,100 slot machines were installed.<sup>60</sup> Upon completion, the racino opened for business on April 1, 1995.<sup>61</sup> Revenues were so great that the bonds that paid for the clubhouse casino conversion and the track's initial bonds issued were both paid off within a year of opening.<sup>62</sup>

### B. Racinos Support Agriculture and Create Jobs

At its inception, the primary motivation for developing the racino was the desire not to saddle county taxpayers with significant debt. This was an interest clearly communicated to the public.<sup>63</sup> After paying off those initial bonds, the casino has continued to contribute millions in taxes and charity.<sup>64</sup> But the justification for continuing to subsidize horse racing

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57. *Id.*

58. *Id.*

59. Codified at IOWA CODE § 99F.4A(1)–(3) (2011); *see also* Stephen Braun, *Iowa County Hits Jackpot with Casino*, L.A. TIMES (July 21, 1997), <http://articles.latimes.com/1997/jul/21/news/mn-14784> (noting the 1994 ballot referendum passed with an approximate 60% majority).

60. Johnson, *supra* note 55; *see also* Dan Johnson, *\$1 Billion Later, Iowa is Hooked on Prairie Meadows Payouts*, DES MOINES REG. (Apr. 18, 2009, 11:56 PM), [http://www.desmoinesregister.com/article/20090419/NEWS/904190350/1001?nclck\\_chck=1](http://www.desmoinesregister.com/article/20090419/NEWS/904190350/1001?nclck_chck=1).

61. Johnson, *supra* note 55; Chris Lincoln, *Iowa's New 'Field of Dreams,'* ESPN.COM (June 29, 2004, 2:58 PM), <http://sports.espn.go.com/sports/horse/columns/story?id=1831563>.

62. Johnson, *supra* note 55 (noting that \$89.3 million in debt was paid off by December 1996). The success of Prairie Meadows continues. In the twelve-month period ending June 30, 2012, the casino took in \$194.7 million in gross gambling revenue, its highest yearly amount ever. This allowed the casino to pay off the mortgage on its \$32 million hotel that opened in 2012. William Petroski, *Prairie Meadows Casino Rakes in Record Cash; Pays Off New Hotel*, DES MOINES REG. (July 12, 2012, 1:45 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2012/07/12/prairie-meadows-rakes-in-record-cash-pays-off-new-hotel/>.

63. Braun, *supra* note 59; *see also* Chris Grenz, *The Racing Business at Prairie Meadows . . .*, TOPEKA CAP. J., Mar. 3, 2002, at 1, *available at* 2002 WLNR 5369221 (recalling that “a judge ruled that county taxpayers were liable for paying off” the Prairie Meadows debt upon bankruptcy).

64. *See* PRAIRIE MEADOWS, COMMUNITY IMPACT: MAKING A DIFFERENCE

through racinos evolved fairly quickly into one that emphasized the benefits to the agricultural economy of the state.<sup>65</sup> The horse breeding industry produced jobs, as did the greyhound breeding industry.<sup>66</sup> One may, and some do, quarrel with these justifications. Critics contend that the money generated through the casino operations of racinos should not be diverted to subsidize industries that cannot pay their own way<sup>67</sup> and that

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IN POLK COUNTY (Spring 2012), available at [http://www.prairiemeadows.com/downloads/newsletter/Community\\_Betterment\\_Newsletter\\_2nd\\_Quarter\\_2012.pdf](http://www.prairiemeadows.com/downloads/newsletter/Community_Betterment_Newsletter_2nd_Quarter_2012.pdf).

65. Grenz, *supra* note 63; see Braun, *supra* note 59 (quoting gaming commissioner Harold White as saying “[t]he whole reason we allowed Prairie Meadows to have slots was to prop up horse racing in Iowa”); see also William N. Thompson, *Gambling Taxes: The Philosophy, the Constitution and Horizontal Equity*, 17 VILL. SPORTS & ENT. L.J. 389, 398 (2010) (noting that 12% of taxed revenue from Pennsylvania racinos went to horse breeders); Mark Fischenich, *Day Boosts Jobs, Revenue, Racino*, MANKATO FREE PRESS (Mankato, Minn.), Mar. 4, 2010, available at <http://mankatofreepress.com/local/x275795493/Day-boosts-jobs-revenue-racino> (projecting revenue from proposed Minnesota racino legislation, which would benefit agriculture and rural development); Dylan Belden, *Racino Would Benefit Horse Racing, Backers Say*, STAR TRIB. (Minneapolis) (Feb. 9, 2010, 5:28 PM), <http://www.startribune.com/local/south/83806252.html?page=1&c=y> (noting that adding slots to a Minnesota racetrack facility, as was done at Prairie Meadows, may make a \$1 billion economic impact on the state’s equine industry annually).

66. Cf. Eugene Martin Christiansen, *Gambling and the American Economy*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 43 (1998) (estimating that the national horse breeding and pari-mutuel industry employed 119,000 people and contributed over \$7 billion to GDP in 1996); Nancy R. Hoffman & Robin C. McGinnis, *2007–2008 Legislative Review*, 15 ANIMAL L. 265, 285 (2009) (noting that when Massachusetts banned greyhound racing, 1,000 jobs were projected to be lost); Stephanie N. Wurdock, Comment, *DePaul v. Commonwealth: A Look at Political Contributions Associated with the Horse-Racing Industry*, 3 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 169, 176–77 (2010–2011) (stating that Pennsylvania’s allowance of racinos created thousands of jobs and reinvigorated the state’s horse industry); Matt Eloffson, *Ebro Track Owner Pushes for Slot Machines; Vote Set*, DOTHAN EAGLE (Dothan, Ala.), Jan. 13, 2012, available at 2012 WLNR 900381 (estimating that converting an Alabama greyhound track into a racino would add between 1,200 and 1,500 jobs); Don Jensen, *Live Racing’s Future in Jeopardy*, TAMPA BAY TIMES, Jan. 28, 2012, at 5C, available at 2012 WLNR 2055342 (reporting that Florida’s “dog-racing industry [provided] 3,000 jobs and \$5 million in state income”); *U.S. to Reopen Menominee Kenosha Casino Plan Under Settlement*, BUS. J. (Milwaukee, Wis.), Aug. 16, 2011, available at 2011 WLNR 16224505 (approximating the benefits of reopening a closed Wisconsin greyhound track as a racino and hotel at 3,000 new jobs and “\$2 billion in payments to state and local government” over several years).

67. See, e.g., Chris Andrews, *Gambling Proposal’s Impact is Hot Debate*, LANSING STATE J. (Lansing, Mich.), Oct. 27, 2004, available at 2004 WLNR 23153401 (quoting a local politician as saying there is “no reason to prop up the [equine] industry by adding casinos”); *NJ Reaches Temporary Deal on Meadowlands Racing*, DAILY

the jobs data may actually be strained.<sup>68</sup> Despite these criticisms, Iowa has nevertheless embraced the racino model for the reasons noted. Consequently, the development of ADW is a logical and even necessary step toward advancing the interests and objectives furthered by racinos. The pari-mutuel narrative has been clearly communicated and accepted in Iowa.

## V. WHY IS AN INTERNET GAMING NARRATIVE IMPORTANT?

Even if the narrative supporting expanded Internet pari-mutuel betting can be clearly identified, while that supporting Internet poker cannot, does it really matter? How critical is it for proponents to articulate a coherent public policy rationale for Internet poker in Iowa? Why isn't it enough simply to tell people that Internet gambling is inevitable? There are several reasons why this is important.

### A. Social Costs

First, while Internet gambling revenues in some measure will flow to the state, it isn't a free ride. The IRGC Report included a *Public Health Perspective Report (Public Health Report)* prepared by the Center for Social and Behavioral Research at the University of Northern Iowa.<sup>69</sup> The paper's purpose was "to provide an overview of potential health issues related to legalizing Internet poker in Iowa."<sup>70</sup> This report examined,

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RECORD (Morristown, N.J.), Dec. 18, 2010, available at 2010 WLNR 25003281 (estimating New Jersey racetrack losses at over \$17 million and quoting Governor Chris Christie as saying "[w]e want to make sure . . . we do not have a subsidy going any further"); Bill Ruthhart, *'Racinos' Place Bet on Multimillion Tax Break*, INDIANAPOLIS STAR, Mar. 8, 2009, available at 2009 WLNR 17137937 (reporting criticism of a proposed tax break for racinos as bailing out undeserving industries).

68. See, e.g., Scott Harshbarger & Michael Dukakis, Op-Ed., *What's the Big Hurry?*, BOS. GLOBE, Apr. 10, 2010, at 17, available at 2010 WLNR 7433674 (comparing proposed jobs data in Massachusetts with actual gambling industry jobs in other states and concluding that the promises could not be fulfilled); David Lombardo, *Report on Casino Benefits Questioned*, DAILY GAZETTE (Schenectady, N.Y.), Feb. 29, 2012, at B1, available at 2012 WLNR 4353683 (expressing skepticism that a gambling industry study projecting new jobs and revenue was nothing more than "guesstimates"); John J. Monahan, *House Committee Hears Debate on 'Racino' Bill: Proponents Say Slot Machine Dollars Going Out of State*, WORCESTER TELEGRAM & GAZETTE (Worcester, Mass.), Oct. 19, 2005, at A2, available at 2005 WLNR 24407365 (describing claims that adding slots to racetracks would save jobs as "exaggeration if not outright fabrication," as noted by investment banker Jeff Hooke).

69. IRGC REPORT, *supra* note 15, at App. D.

70. *Id.* App. D, at 1.

among other things, the likelihood that Internet gambling would exacerbate the problematic gambling issues in the state.<sup>71</sup> The authors noted that “the number of empirical studies [on Internet gambling] is still relatively small.”<sup>72</sup> On the one hand, “[s]everal studies . . . found higher levels of problem and pathological gambling among those who engage in Internet gambling compared to non-Internet gamblers.”<sup>73</sup> On the other hand, “the literature cannot support a claim that Internet poker *will cause* people to become problem or pathological gamblers.”<sup>74</sup> Because Internet gambling has developed only recently, the scientific literature examining its effects on problem gambling is meager.

A related issue the *Public Health Report* examined was the incidence of Internet gambling by adolescents.<sup>75</sup> According to findings of the Iowa Youth Survey, which was included in this report, “an estimated 4% of Iowa’s youth in 6th, 8th, and 11th grades reported that they had ‘bet or gambled for money or possessions’ on the Internet in 2010.”<sup>76</sup> This number was “7% in 2008.”<sup>77</sup> One study the *Public Health Report* referenced found that “[a]mong adolescents, Internet gambling has been associated with higher levels of heavy alcohol use and poorer academic performance compared to non-Internet gambling.”<sup>78</sup> Another study noted that adolescents who had gambling problems said “that, when they gamble, they ‘enter a “different world,” a world without problems and stresses.”<sup>79</sup> Once again, the cause and effect connection was tenuous. But the *Public Health Report* noted that “the characteristics of Internet gambling and Internet poker *may* be particularly attractive to adolescents with gambling

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71. *Id.* App. D, at 1–2.

72. *Id.* App. D, at 2.

73. *Id.* App. D, at 29.

74. *Id.* App. D, at 30.

75. *Id.* App. D, at 14–18.

76. *Id.* App. D, at 14 (citing Iowa Consortium for Substance Abuse Research and Evaluation, 2011).

77. *Id.* (citing Iowa Consortium for Substance Abuse Research and Evaluation, 2009).

78. *Id.* App. D, at 15 (citing Marc N. Potenza et al., *Correlates of At-Risk/Problem Internet Gambling in Adolescents*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 154 (2011)).

79. *Id.* App. D, at 16 (quoting Rina Gupta & Jeffrey L. Derevensky, *A Treatment Approach for Adolescents with Gambling Problems*, in GAMBLING PROBLEMS IN YOUTH: THEORETICAL AND APPLIED PERSPECTIVES 165, 177 (Jeffrey L. Derevensky & Rina Gupta eds., 2004)).

problems to find escape from the problems in their ‘offline’ reality.”<sup>80</sup>

The *Public Health Report* is appropriately cautious in its analysis.<sup>81</sup> Attempts to link Internet gambling with problem gambling are numerous, but the social science world simply has not developed sufficient data to reach more definitive conclusions.<sup>82</sup> The problem is also made more complex because there is a “high level of comorbidity of problem gambling with other mental health conditions.”<sup>83</sup> In other words, a person with a gambling problem will also often have clinical symptoms of other conditions such as depression.<sup>84</sup> This complicates the ability to determine whether excessive gambling causes depression or is merely a symptom of it.

Because of the important public policy issues raised, further careful study of these matters is both necessary and warranted. But there is no question that, at least to some extent, Internet gambling will contribute to existing gambling problems and possibly create new problem gamblers—and some of these problem gamblers may be the youth of our state. With these interests and potential social costs at stake, it is reasonable to expect proponents of additional Internet gambling to articulate the important public policies such action would serve. It is inadequate to justify gambling expansion simply by saying it is inevitable.<sup>85</sup>

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80. *Id.*

81. For example, the report itself disclaims that “making an exact determination about the size and scope of potential social and public health impacts exclusively attributable to Internet poker in Iowa is not currently possible.” *Id.* App. D, at 31.

82. See, e.g., MAX ABBOTT ET AL., A REVIEW OF RESEARCH ON ASPECTS OF PROBLEM GAMBLING 10 (2004), available at [http://www.aut.ac.nz/resources/research/research\\_institutes/niphmhr/summary\\_of\\_auckland\\_report.pdf](http://www.aut.ac.nz/resources/research/research_institutes/niphmhr/summary_of_auckland_report.pdf); ALLEN CONSULTING GRP., FINAL REPORT ON ISSUES RELATED TO COMMONWEALTH INTERACTIVE GAMBLING REGULATION 6 (2003, amended 2004), available at [http://www.archive.dbcde.gov.au/\\_data/assets/pdf\\_file/0014/10922/Final\\_Report\\_on\\_Issues\\_Related\\_to\\_Commonwealth\\_Interactive\\_Gambling\\_Regulation.pdf](http://www.archive.dbcde.gov.au/_data/assets/pdf_file/0014/10922/Final_Report_on_Issues_Related_to_Commonwealth_Interactive_Gambling_Regulation.pdf); Roslyn Corney & Janette Davis, *The Attractions and Risks of Internet Gambling for Women: A Qualitative Study*, 24 J. GAMBLING ISSUES 121, 123 (2010).

83. IRGC REPORT, *supra* note 15, App. D, at 28.

84. See Sandra L. Momper et al., *The Association of At-Risk, Problem, and Pathological Gambling with Substance Use, Depression, and Arrest History*, 24 J. GAMBLING ISSUES 7, 19–21 (2010).

85. Even the *Public Health Report* gives implicit support to the inevitability message when it says “[r]egardless of whether . . . Internet poker games [are legalized], the fact remains that some Iowans currently are, and likely will continue to be, engaging in real-money poker games online.” IRGC REPORT, *supra* note 15, App. D, at 27.

### B. *Job Creation: Fact or Fiction?*

Another reason it is important to know what public policies support Internet gambling is illustrated by comparing Internet gambling to pari-mutuel betting on one important point: job creation. As noted above, a justification for the investments made in the pari-mutuel industry in Iowa, including ADW on horse races, was that they helped create jobs in the industry.<sup>86</sup> Important state interests were at stake that warranted these steps. What about Internet poker? Does it similarly create jobs? A “White Paper” prepared in 2011 by the American Gaming Association, asserted that “[l]egalizing online poker will create, directly and indirectly, an estimated 10,000 high-tech jobs in this country, the sort of jobs that our citizens urgently need.”<sup>87</sup> But the IRGC Report makes no mention of job creation flowing from the adoption of Internet poker, other than in reviewing existing literature.<sup>88</sup> Indeed, the IRGC Report addresses concerns that online gambling would cannibalize the bricks and mortar casinos in the state, resulting in a loss of jobs.<sup>89</sup> The difficulty in predicting the effect of Internet poker on the bricks and mortar casinos is a function of the same uncertainties that make Internet gaming revenue projection so problematic—the projections are based on a number of assumptions that cannot yet be tested.<sup>90</sup> In any event, it seems fanciful to predict an Iowa jobs bonanza will result if Internet poker is adopted.

### C. *Public Opposition*

The most significant reason why proponents need to articulate a compelling public policy interest for Internet gambling is that it appears Iowans are far from sold on the idea. In a 2011 *Des Moines Register* poll, 73% of Iowans polled opposed legalizing Internet gambling for adults.<sup>91</sup> In

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86. See *supra* Part IV.B.

87. DAVID O. STEWART, AM. GAMING ASS’N, ONLINE GAMBLING FIVE YEARS AFTER UIGEA 3 (2011), available at [http://www.americangaming.org/files/aga/uploads/docs/whitepapers/final\\_online\\_gambling\\_white\\_paper\\_5-18-11.pdf](http://www.americangaming.org/files/aga/uploads/docs/whitepapers/final_online_gambling_white_paper_5-18-11.pdf).

88. IRGC REPORT, *supra* note 15, at 9, 57–58 (citing STEWART, *supra* note 88). Referring to Stewart’s jobs estimate from the AGA report, the IRGC Report says “it is unknown what assumptions [the author] and his colleagues used to determine this.” *Id.* at 57–58.

89. See *id.* at 41 (noting that full-scale casino gambling on the Internet could be a threat to traditional casinos); *id.* at 39, 77 (detailing concerns about Internet gambling from an Iowa standpoint).

90. *Id.* at 48–49.

91. Jennifer Jacobs, *Online Gambling? Iowans Say No, Poll Finds*, DES MOINES REG., Mar. 22, 2011, at A1, available at 2011 WLNR 5739874.

a February 2012 poll, the opposed number fell slightly to 69%.<sup>92</sup> Iowans are by no means opposed to gambling, as many forms of it are permitted, and recent gambling referenda produced only one county opposing the continuance of gambling.<sup>93</sup> But history teaches that Iowans have their limits.

The cautionary tale for testing Iowans' gambling tolerance is the notorious "TouchPlay" game offered by the Iowa Lottery. TouchPlay was a game that dispensed lottery tickets from vending machines that often resembled slot machines.<sup>94</sup> Unlike slot machines, the winning and losing tickets had been predetermined and were loaded onto the machines electronically.<sup>95</sup> In response to the Iowa legislature's desire to receive more Lottery revenue, the Lottery added the TouchPlay game, and the number of TouchPlay machines in the state increased from thirty machines in 2003 to more than 6,400 machines in 2006.<sup>96</sup>

The rapid expansion of TouchPlay machines to venues like grocery stores was met with vocal opposition in the state.<sup>97</sup> In January 2006, Governor Vilsack ordered a sixty-day moratorium on new TouchPlay licenses and appointed a task force to study the issue.<sup>98</sup> Although the task force recommended restrictions on the machines, the state legislature did the task force one better and sent a bill to the Governor *totally eliminating* the TouchPlay game.<sup>99</sup> Governor Vilsack signed the bill on March 20,

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92. Jason Noble, *Iowa Poll: Iowans Narrowly Favor Bans on Red Light, Speed Cameras*, DES MOINES REG. (Feb. 21, 2012, 5:23 AM), <http://www.desmoinesregister.com/article/20120221/NEWS09/302210018/Iowa-Poll-Iowans-narrowly-favor-bans-on-red-light-speed-cameras>.

93. *Gambling Game Referendums*, IOWA.GOV, <http://www.iowa.gov/irgc/Referendum.htm> (last visited Oct. 3, 2012) (noting that Wapello County opposed gambling in 2010).

94. See *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 435 (8th Cir. 2007) (describing how TouchPlay machines operated).

95. *Id.*

96. *Id.*

97. *Id.* at 439 ("As TouchPlay expanded, the public became concerned about protecting minors and compulsive gamblers."); William Petroski, *TouchPlay Pull is Too Strong to Resist, Iowa Gamblers Say*, DES MOINES REG. (Jan. 25, 2006, 5:11 AM), <http://www.desmoinesregister.com/article/20060125/NEWS10/601250372/TouchPlay-pull-too-strong-resist-iowa-gamblers-say> (outlining opposition to TouchPlay machines and criticizing the game for enticing children and problem gamblers).

98. *Hawkeye Commodity Promotions*, 486 F.3d at 436.

99. *Id.*; IOWA CODE § 99G.30A(4) (2011).

2006, and the ban took effect on May 4, 2006.<sup>100</sup> Rounds of litigation followed, with the state paying over \$15 million in settlements.<sup>101</sup> This is an episode not to be repeated. Even when the TouchPlay revenue was demonstrably large and not simply projected, Iowans reacted swiftly and negatively when they thought gambling had gone too far.

## VI. WHAT CAN BE LEARNED FROM OTHER STATES?

Among the lessons from the TouchPlay experience in Iowa, one important lesson is that there are limits to Iowans' tolerance for the expansion of gambling. The numbers opposing Internet gambling in the *Des Moines Register* polling<sup>102</sup> mean that, at the very least, proponents have failed to communicate the merits of Internet gambling to people in the state. Another disconnect along the lines of the TouchPlay experience would be disastrous. Consequently, it is important to identify the public policy interests that support Internet gambling. In evaluating this, it is instructive to look at some of the other states that have taken on the Internet gambling issue.

### A. *California, New Jersey, and Nevada*

#### 1. *California*

In its most recent legislative session, California considered a bill that would have legalized Internet poker on an intrastate basis.<sup>103</sup> Under the language of the bill, “[o]nly poker [would] be offered for play on an intrastate Internet gambling [website].”<sup>104</sup> As part of its findings, the legislature justified the bill in terms of revenue and consumer protection, noting that Internet poker licensing fees would provide the state with \$200 million in revenue annually,<sup>105</sup> and state-sanctioned games would protect

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100. *Hawkeye Commodity Promotions*, 486 F.3d at 436.

101. *See State Settling With More TouchPlay Litigants*, IOWA DEP'T JUST., OFF. ATT'Y GEN. (July 18, 2008), [http://www.state.ia.us/government/ag/latest\\_news/releases/july\\_2008/more\\_Touchplay\\_stmt2.html](http://www.state.ia.us/government/ag/latest_news/releases/july_2008/more_Touchplay_stmt2.html). For a detailed analysis of the TouchPlay saga, see Keith C. Miller, *The Iowa Lottery's TouchPlay Debacle*, 11 GAMING L. REV. 88 (2007).

102. *See supra* notes 91–92 and accompanying text.

103. S.B. 1463, 2011–2012 Reg. Sess. (Cal. 2012) (to be codified at CAL. BUS. & PROF. CODE §§ 19990.01–.96).

104. *Id.* (to be codified at CAL. BUS. & PROF. CODE § 19990.14(a)).

105. *Id.* (to be codified at CAL. BUS. & PROF. CODE § 19990.02(h)).

consumers from fraud.<sup>106</sup> Independent of the bill's stated findings, these justifications were major selling points for legislators and voters alike.<sup>107</sup>

However, the California constitution prohibits commercial casinos;<sup>108</sup> only Native American tribes may operate casinos in the state.<sup>109</sup> Fifty-nine tribes operate sixty Indian casinos in California,<sup>110</sup> and in 2010, these tribes generated nearly \$7 billion in gaming revenues.<sup>111</sup> Pursuant to compacts negotiated with the state of California, a portion of these revenues went to the state.<sup>112</sup> Likewise, California authorizes "card" or poker rooms.<sup>113</sup> Although not all are currently operating, there are approximately ninety card rooms in the state<sup>114</sup> and they generated nearly \$700 million in revenue

106. *Id.* (to be codified at CAL. BUS. & PROF. CODE § 19990.02 (a)–(g)).

107. Patrick McGreevy, *Offering a Cut from Internet Poker: Casino Operators Push Legalization Bill that Could Raise Hundreds of Millions for State*, L.A. TIMES, May 15, 2012, at 1, available at 2012 WLNR 10218204; see also Ron Cottingham, Op-Ed., *Regulating Internet Poker Adds Revenue, Protection*, SACRAMENTO BEE, Apr. 12, 2012, available at 2012 WLNR 7674896 (relaying results of a study reporting that legal Internet poker in California would raise \$1.4 billion in new revenue, stimulate economic activity, and also add e-commerce jobs). *But see* Op-Ed., *State Shouldn't OK Online Gambling*, FRESNO BEE, Jan. 20, 2012, available at 2012 WLNR 1306150 (opining that increased revenue "is not enough to pay for the host of ills that state-sanctioned Internet gambling would spawn").

108. CAL. CONST. art. 4, § 19(e).

109. *Id.* at art. 4, § 19(f).

110. CAL. GAMBLING CONTROL COMM'N, TRIBAL CASINO LOCATIONS, ALPHABETICAL BY TRIBE (Aug. 16, 2012), available at [http://www.cgcc.ca.gov/documents/tribal/2012/201200816\\_Tribal\\_Casino\\_Locations-Alpha\\_by\\_TRIBE.pdf](http://www.cgcc.ca.gov/documents/tribal/2012/201200816_Tribal_Casino_Locations-Alpha_by_TRIBE.pdf).

111. Dale Kasler, *Indians' 2010 Casino Revenue Fell in California*, *Rose Nationally*, SACRAMENTO BEE, Mar. 7, 2012, at 6B, available at <http://www.sacbee.com/2012/03/07/4317181/indians-2010-casino-revenue-fell.html>.

112. See, e.g., TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE PINOLEVILLE POMO NATION § 4.3.1 (2011), available at [http://www.cgcc.ca.gov/documents/compacts/original\\_compacts/Pinoleville\\_Compact.pdf](http://www.cgcc.ca.gov/documents/compacts/original_compacts/Pinoleville_Compact.pdf) (reflecting typical revenue contribution percentages).

113. See CAL. BUS. & PROF. CODE § 19960(b) (West 2008 & Supp. 2012) (stating that a city or county may issue gambling license if a local ordinance expressly authorizes card rooms); see also CAL. DEP'T OF JUSTICE, BUREAU OF GAMBLING CONTROL, GAMBLING LAW, REGULATIONS, AND RESOURCE INFORMATION: 2012 EDITION 453 (2012) [hereinafter GAMBLING LAW, REGULATIONS, AND RESOURCE INFORMATION: 2012 EDITION], available at [http://oag.ca.gov/sites/all/files/pdfs/gambling/gambling\\_law\\_2012.pdf](http://oag.ca.gov/sites/all/files/pdfs/gambling/gambling_law_2012.pdf) (showing a map and list of all card rooms located in California).

114. GAMBLING LAW, REGULATIONS, AND RESOURCE INFORMATION: 2012 EDITION, *supra* note 113, at 453.

per year in the mid-2000s.<sup>115</sup> Card rooms—especially those run by Indian tribes in California—could be left out of any potential Internet Poker revenues.<sup>116</sup> Due to such opposition, the sponsor of the 2012 Internet poker legislation withdrew it from consideration before it came up for a vote in committee.<sup>117</sup>

## 2. *New Jersey*

The New Jersey General Assembly overwhelmingly passed an online poker bill in March 2011, but Governor Chris Christie vetoed the legislation, expressing concern that the bill was perhaps unconstitutional, would unfairly subsidize the struggling horse-racing industry, and would improperly expand gaming in New Jersey beyond Atlantic City.<sup>118</sup> In February 2012, the state saw another attempt with an Internet gaming bill introduced in the New Jersey Senate.<sup>119</sup> This bill would allow existing Atlantic City casinos to offer Internet poker “under certain circumstances.”<sup>120</sup> The bill passed in the senate, and its companion legislation in the assembly<sup>121</sup> gained approval from an assembly committee in mid-June.<sup>122</sup> The full assembly is expected to consider the bill during the fall 2012 session, and proponents of the legislation are hopeful that

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115. CHARLENE WEAR SIMMONS, CAL. RESEARCH BUREAU, *GAMBLING IN THE GOLDEN STATE: 1998 FORWARD* 111 (2006), available at <http://ag.ca.gov/gambling/pdfs/GS98.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/35d8865a-4948-41d7-84a5-41e3d991af90/5/hilite/> (detailing card room revenues). Current California statistics relating specifically to card rooms are scarce; however, it is likely that these revenues have increased since then and now approach \$1 billion yearly.

116. See, e.g., Op-Ed., *California’s Problem With Online Poker*, SAN MATEO DAILY J. (San Mateo, Cal.), June 23, 2012, available at 2012 WLNR 13139090 (“[S]ome contend that legitimizing online poker will threaten the revenue and jobs created by tribal gambling.”).

117. *The Buzz: Rod Wright Folds on Current Attempt to Legalize Internet Poker in California*, SACRAMENTO BEE, June 13, 2012, available at 2012 WLNR 12344974.

118. Jennifer Jacobs, *New Jersey Governor Vetoes Internet Gambling Bill, Iowa’s is Still Alive*, DES MOINES REG. (Mar. 4, 2011, 8:34 AM), <http://blogs.desmoinesregister.com/dmr/index.php/2011/03/04/new-jersey-governor-vetoes-internet-gambling-bill/?odyssey=mod%7Clateststories>.

119. S.B. 1565, 215th Leg., 1st Ann. Sess. (N.J. 2012).

120. *Id.*

121. Assemb. B. 2578, 215th Leg., 1st Ann. Sess. (N.J. 2012).

122. Hoa Nguyen & Donald Wittkowski, *Assembly Committee OKs Online Gambling*, PRESS OF ATLANTIC CITY, June 19, 2012, at A1, available at 2012 WLNR 12928532.

Governor Christie's objections to the 2011 bill have been eliminated in the current version.<sup>123</sup>

### 3. *Nevada*

Nevada has expressly legalized Internet poker.<sup>124</sup> In fact, the state's gaming commission has already approved its first two licensees.<sup>125</sup> In late June 2012, Bally Technologies in Las Vegas and International Game Technologies (IGT) in Reno received approval for licenses to operate state-sanctioned Internet poker websites.<sup>126</sup> Bally expects to be operational by the end of 2012 or early 2013.<sup>127</sup> Before Bally and IGT's systems go live, the licensees must "prove their systems are capable of identifying players by location and that players are of legal age."<sup>128</sup> Nevada has also reconvened its once-dormant Gaming Policy Committee to stay up-to-date with the evolving field of Internet gaming.<sup>129</sup>

### 4. *Comparison Between States*

California, New Jersey, and Nevada have very different interests from each other, and from Iowa, that inform their respective Internet gaming efforts. California casino gaming is currently limited to Indian tribes.<sup>130</sup>

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123. *Id.* New Jersey has also been active on other gambling issues. Earlier this year the assembly passed and the Governor signed a bill that would allow betting on sports at New Jersey's casinos and racetracks. Donald Wittkowski, *New Jersey Governor Signs Law to Legalize Sports Betting*, PRESS OF ATLANTIC CITY (Jan. 18, 2012, 12:15 AM), [http://www.pressofatlanticcity.com/news/breaking/new-jersey-governor-sings-law-to-legalize-sports-betting/article\\_38365360-4146-11e1-84c9-0019bb2963f4.html](http://www.pressofatlanticcity.com/news/breaking/new-jersey-governor-sings-law-to-legalize-sports-betting/article_38365360-4146-11e1-84c9-0019bb2963f4.html). On August 7 2012, the NCAA and the four major sport professional leagues sued New Jersey, alleging the law was a clear violation of the Professional and Amateur Sports Protection Act. *New Jersey Sued Over Sports Betting*, ESPN.COM (Aug. 7, 2012, 5:47 PM), [http://espn.go.com/espn/story/\\_/id/8243013/ncaa-4-pro-leagues-sue-new-jersey-sports-betting](http://espn.go.com/espn/story/_/id/8243013/ncaa-4-pro-leagues-sue-new-jersey-sports-betting).

124. NEV. REV. STAT. § 463.016425(1)(a) (2011) (noting that permissible "[i]nteractive gaming . . . [i]ncludes, without limitation, Internet poker").

125. Richard N. Velotta, *Nevada Issues First Licenses for Online Poker Within State*, LAS VEGAS SUN (June 21, 2012, 4:04 PM), <http://www.lasvegassun.com/news/2012/jun/21/nevada-issues-first-licenses-online-poker-within-s/>.

126. *Id.*

127. *Id.*

128. *Id.*

129. Howard Stutz, *Gaming Policy Committee Meeting Slated*, LAS VEGAS REV.-J., Mar. 24, 2012, at 2D, available at 2012 WLNR 6375819.

130. See *supra* notes 108–09.

The state is stuck in a seemingly bottomless economic malaise.<sup>131</sup> A revenue stream from Internet gambling is badly needed, but until there is a reconciliation of the interests of the Indian tribes, legislative action may be limited.

New Jersey casinos, especially in Atlantic City, have experienced staggering reductions in revenue over the past few years.<sup>132</sup> As evidenced by the sports-betting legislation passed there,<sup>133</sup> along with continuing efforts to authorize Internet poker, few gambling stones are being left unturned. New Jersey is distinguished from California in that it does not have the Indian tribe issue. And, while its population of nearly 9 million people<sup>134</sup> is dwarfed by California's nearly 38 million,<sup>135</sup> 9 million potential Internet poker players is a substantial pool from which to draw.

Nevada's population of 2.7 million<sup>136</sup> is closer to Iowa's figure of slightly over 3 million people.<sup>137</sup> But the similarities for Internet poker purposes, and no doubt others, end there. Nevada has been the undisputed leader in establishing gaming control standards and the infrastructure needed to implement such standards.<sup>138</sup> If other states were to authorize

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131. See, e.g., Erica Goode, *In a Gang-Ridden City, New Efforts to Fight Crime While Cutting Costs*, N.Y. TIMES, Jan. 30, 2012, at A10, available at 2012 WLNR 2019057 (discussing the "economic malaise that has engulfed California").

132. See Nguyen & Wittkowski, *supra* note 122.

133. See S. Con. Res. 132, 214th Leg., 2d Ann. Sess. (N.J. 2010) (amending N.J. CONST. art. IV, § VII(2)(D) to allow sports wagering). This resolution was signed into law by Governor Christie. Wittkowski, *supra* note 123. However, it has since been challenged as flagrantly disregarding federal law. See Complaint for Declaratory and Injunctive Relief at 10, NCAA v. Christie, No. 2:12CV04947, 2012 WL 3191255 (D.N.J. Aug. 7, 2012).

134. 2010 Census Interactive Population Search: NJ-New Jersey, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=34> (last visited Oct. 3, 2012) (showing that as of 2010, New Jersey's population is 8,791,894).

135. 2010 Census Interactive Population Search: CA-California, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=06> (last visited Oct. 3, 2012) (showing that as of 2010, California's population is 37,253,956).

136. 2010 Census Interactive Population Search: NV-Nevada, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=32> (last visited Oct. 3, 2012) (showing that as of 2010, Nevada's population is 2,700,551).

137. 2010 Census Interactive Population Search: IA-Iowa, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmptext.php?fl=19> (last visited Oct. 3, 2012) (showing that as of 2010, Iowa's population is 3,046,355).

138. See, e.g., Op-Ed., *Internet Gaming*, LAS VEGAS REV.-J., Jul. 19, 2012, at 6B, available at 2012 WLNR 15368453 (noting "that Nevada leads the horse race to control the online gaming revolution" and concluding that Nevada has been a leader

Internet poker they would likely look to Nevada for assistance in licensing investigations.<sup>139</sup> Nevada's gaming industry has an unmistakable interest in being at the forefront of Internet poker issues, even with a modest-sized population.

B. *Comparison to Iowa: Instructive or Inapplicable?*

When comparing these states to Iowa, there are few, if any, common elements. California is a large-population state desperately in need of gaming revenues, New Jersey is a state concerned about its floundering land-based casinos, and Nevada is a state with a clearly identifiable need to be on the cutting edge of Internet gaming. Iowa lacks similarity to these situations—and should be happy that it does.

Delaware may also be a good reference point for Iowa. Certainly as a matter of size, Delaware's population of just less than 900,000 people<sup>140</sup> compares more to Iowa<sup>141</sup> than New Jersey<sup>142</sup> or California.<sup>143</sup> During the second regular assembly session of the year, legislators in Delaware introduced the Gaming Competitiveness Act of 2012 (GCA), allowing casinos in the state to offer online versions of table games like blackjack, slot machines, and poker, under the direction of state lottery officials.<sup>144</sup>

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“in regulatory infrastructure that may prove insurmountable for other jurisdictions”); Brian Sandoval, Op-Ed., *State Showing Positive Signs for Business Growth*, LAS VEGAS SUN, Aug. 26, 2012, at 5, available at 2012 WLNR 18258964 (detailing commitment “to ensure Nevada stays at the forefront of online gaming” and pledging that “Nevada will preserve its leadership role in the gaming industry”).

139. *Internet Gaming*, *supra* note 138. See also Lori Chapman, Comment, *Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely “Fool’s Gold?”*, 26 U. TOL. L. REV. 387, 389 (1995) (referring to Nevada as an industry leader and source for regulatory models); Craig Lang, Note, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 542 (2002) (“Nevada has been the standard by which other states have modeled their regulations regarding legalized gambling.”).

140. *2010 Census Interactive Population Search: DE-Delaware*, U.S. CENSUS BUREAU, <http://0-2010.census.gov.iii-server.ualr.edu/2010census/popmap/ipmtext.php?fl=10> (last visited Oct. 3, 2012).

141. *2010 Census Interactive Population Search: IA-Iowa*, *supra* note 137 (showing Iowa's population to be 3,046,355).

142. *2010 Census Interactive Population Search: NJ-New Jersey*, *supra* note 134 (showing New Jersey's population to be 8,791,894).

143. *2010 Census Interactive Population Search: CA-California*, *supra* note 135 (showing California's population to be 37,253,956).

144. The Delaware Gaming Competitiveness Act of 2012, H. B. 333, 146th Gen. Assemb., 2d Reg. Sess. (Del. 2012) (codified at DEL. CODE ANN. tit. 29, § 4801

Governor Jack Markell signed the GCA into law on June 28, 2012.<sup>145</sup> The GCA is intended to keep Delaware competitive in the quickly expanding online gaming market and to reverse the downward trend in lottery and gambling revenues.<sup>146</sup> The law's supporters maintain it is a "viable way to help preserve the state's embattled casino industry, which is facing aggressive competition from new venues in Maryland and Pennsylvania."<sup>147</sup> Another stated purpose of the GCA is to protect and regulate an activity in which Delaware citizens would otherwise participate illegally.<sup>148</sup> The Delaware Department of Finance estimated the state would take in \$7.75 million in online gambling revenue in the 2013 fiscal year.<sup>149</sup>

Because both states have smaller populations and similar revenue projections, comparisons between Delaware and Iowa are easy to make. But the challenges that inspired Delaware's passage of Internet gaming are not evident in Iowa. Gaming revenues in Iowa are not currently declining,<sup>150</sup> and Iowa faces no significant competition from neighboring states<sup>151</sup> or from Indian tribes within the state.<sup>152</sup> Thus, unlike Delaware,

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(2012)); *see also* Doug Denison & Jonathan Starkey, *Online Gaming Proposal Gathers Support*, THE NEWS J. (Wilmington, Del.), Apr. 1, 2012 (outlining the legislation).

145. Doug Denison, *Delaware to Allow Online Gambling*, USA TODAY (June 28, 2012, 6:07 PM), <http://www.usatoday.com/news/nation/story/2012-06-28/delaware-online-gambling/55897914/1>.

146. *See DEFAC General Fund Revenue Worksheet*, DEL. ECON. & FIN. ADVISORY COUNCIL (June 18, 2012), <http://finance.delaware.gov/defac/june2012/revenues.pdf> (recording a 6% drop in lottery collections between the 2011 and 2012 fiscal years, and projecting a further drop of 7% for the 2013 fiscal year).

147. Denison & Starkey, *supra* note 144.

148. The Delaware Gaming Competitiveness Act of 2012, H.B. 333 (noting that "[t]he Act requires . . . the security and effective administration of Internet gaming, including procedures for verifying the location and identity of players" and excluding minors).

149. Denison, *supra* note 145.

150. *See* TONI URBAN ET AL., IOWA RACING AND GAMING COMMISSION: 2011 ANNUAL REPORT 17, 24 (2012), *available at* <http://www.iowa.gov/irgc/Annual%20Report%202011.pdf> (reflecting an increase in total revenue across both racetrack casinos and other excursion gambling boat-gambling structures).

151. Nebraska has limited pari-mutuel gambling, and the borders with Minnesota and Missouri are not populous. Only Illinois could be deemed a competitor for Iowa's gaming dollars, and even then, only one casino, Jumer's in Rock Island, is near the Iowa-Illinois border. ILL. GAMING BD., 2011 ANNUAL REPORT 26 (2012), *available at* <http://www.igb.illinois.gov/annualreport/2011igb.pdf> (showing the location of all Illinois casinos).

152. Only three tribal casinos exist in Iowa, and only two are currently in operation. *Indian Gaming*, IOWA RACING & GAMING COMM'N, <http://www.iowa.gov>

Iowa does not face any apparent threat in the land-based betting world. As is the case with the other states noted above, the specific interests, circumstances, and interests of a state supply the impetus for the legislative initiatives.<sup>153</sup> This is instructive for proponents of Internet gaming in Iowa; their emphasis needs to be directed specifically at the interests of *this* state making Internet gambling a proper choice for Iowa. What do Iowans need to know about the value and benefits of Internet gambling?

## VII. IOWA'S PATH FORWARD ON INTERNET GAMBLING

It is nearly certain that legislation authorizing Internet poker will be offered in Iowa's next legislative session. In the meantime, the course of action for the state needs to be carefully thought out and evaluated. By the time Iowa's legislature convenes in January 2013, legislators will know whether the U.S. Congress has passed legislation authorizing Internet poker. However, some argue states should wait to see whether Congress passes legislation that would make state legislation unnecessary.<sup>154</sup>

### A. Federal Initiatives and Potential Preemption

One federal legislative proposal is the Internet Gambling Prohibition,

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[/irgc/indian.htm#top](#) (last visited Oct. 3, 2012).

153. Other states besides Iowa, Delaware, California, Nevada, and New Jersey have waded into the Internet gaming morass. Florida, H.B. 77, 113th Reg. Sess. (Fla. 2011); Hawaii, H.B. 2422, 26th Leg., Reg. Sess. (Haw. 2012); Illinois, H.B. 4148, 97th Gen. Assemb., 1st Reg. Sess. (Ill. 2012) (amended May 25, 2012); Massachusetts, H.B. 3711, 187th Gen. Ct. (Mass. 2011); and Mississippi, H.B. 1373, 127th Leg., Reg. Sess. (Miss. 2012), have all considered bills in recent legislative sessions. All of these legislative efforts were withdrawn or otherwise stalled. And, a District of Columbia Council repealed an Internet gambling law in February 2012. Tim Craig, *D.C. Council Votes to Repeal Internet Gambling Law*, WASH. POST (Feb. 7, 2012), [http://www.washingtonpost.com/local/dc-politics/dc-council-votes-to-repeal-internet-gambling-law/2012/02/07/gIQAh5waxQ\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-council-votes-to-repeal-internet-gambling-law/2012/02/07/gIQAh5waxQ_story.html).

154. See Chumbley, *supra* note 4, at 564–68; Kulick, *supra* note 3; D'Addario, *supra* note 3, at 116 (“[I]f states wait until a federal law is enacted, they will no longer be required to keep Internet gambling activity intrastate.”); see also Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 48 (2010) (“there is an emerging consensus that . . . federal statutes” have preemptive effect on state regulation); Rotem Nicole Moran, Note, *Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA*, 31 LOY. L.A. ENT. L. REV. 55, 80 (2011) (arguing that the federal government should regulate Internet gambling first for tax and revenue reasons and to “benefit a troubled United States economy”).

Poker Consumer Protection, and Strengthening UIGEA Act of 2011.<sup>155</sup> This proposal would give the U.S. Department of Commerce the authority to establish a program for state licensing of Internet poker.<sup>156</sup> All other types of Internet gambling would be prohibited.<sup>157</sup> While this might be viewed as an attempt to federalize Internet poker, states would retain considerable control over their own regulation of the activity: they would be free to opt out and forbid Internet poker within their borders.<sup>158</sup> For the first two years, licenses could only be issued to those who already have land-based operations.<sup>159</sup> The proposal also contains the expected provisions regarding consumer protection, fraud, and money laundering prevention.<sup>160</sup>

The other proposal, H.R. 1174, would establish a federal regulatory and enforcement framework under which Internet gambling operators could obtain licenses authorizing them to accept bets and wagers from individuals in the United States.<sup>161</sup> Under this proposal, the Secretary of the Treasury would hold the ultimate authority to grant licenses to operate an Internet gaming facility.<sup>162</sup> The Secretary of the Treasury could then delegate suitability and licensure determinations to qualified state or tribal authorities.<sup>163</sup> Internet gambling would not be limited to poker; only sports betting would remain prohibited.<sup>164</sup>

If federal legislation is passed, likely state legislation would be preempted, although states, as noted above, would maintain considerable authority. The question of whether legislative treatment of Internet gambling of any type should be found in the halls of Congress or in the respective states goes far beyond this Article. States' rights arguments butt up against interstate commerce regulation and concerns about a lack of

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155. Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, H.R. 2366, 112th Cong. (2011).

156. *Id.* § 103(b) (“The Secretary shall establish an office in the Department of Commerce, to be known as the ‘Office of Internet Poker Oversight’”).

157. *Id.* § 107.

158. *Id.* § 104(a)(3)(A).

159. *Id.* § 104(f)(3).

160. *Id.* § 104(d).

161. Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 1174, 112th Cong. (2011).

162. *Id.* § 5383(f).

163. *Id.* § 5383(o).

164. *Id.* § 5388.

uniformity.<sup>165</sup> Questions of Indian tribes' authority under federal law to offer Internet gambling are of paramount concern in California.<sup>166</sup> It would also be surprising if this legislation makes it through one of the most partisan Congresses in recent memory. In any event, if a federal law is passed, Iowa legislators will be looking at a much different set of issues when they reconvene in January 2013.

If Congress does not act either before the 2012 elections or in a lame duck session, Iowa would gain very little by continuing to wait for federal legislation. As more states consider and pass Internet laws, the clock will be ticking and support for a federal bill will become even more elusive. Eventually a tipping point will be reached and federal action will be foreclosed. So, if an Internet poker bill is brought forward in Iowa's next legislative session, what is the supporting narrative its proponents need to articulate? How should this proposal be presented to Iowans? Several important considerations can be identified.

#### B. *Acknowledge the Calculated Risk*

Legislators should start by acknowledging that Internet poker is primarily a way of raising revenue for the state. A regulated online environment would certainly provide protection against fraud to those currently playing poker online, but it should be made clear that this is a secondary objective. Convincing Iowans of the need for legislation to protect people who choose to play poker online with an offshore service provider rather than in a state-sanctioned casino is an unnecessary distraction. Online poker proponents likely deemphasized the revenue rationale because of the IRGC Report's rather blunt statement that earlier revenue projections from a potential vendor for a state system were far too high.<sup>167</sup> The IRGC Report did not validate the assertion that by failing to regulate Internet poker the state was losing out on \$30–\$35 million in tax

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165. Compare Chumbley, *supra* note 4 (arguing for federal regulation), with Etzel, *supra* note 4 (proposing cooperative state compacts).

166. See, e.g., *Bill to Regulate Online Poker and Gambling Introduced in Congress*, DESERT SUN (Palm Springs, Cal.), June 24, 2011, available at 2011 WLNR 12680509 (reporting the California Online Poker Association's opposition to any federal gaming legislation); Ben Goad & Jim Miller, *Bono Mack's Panel Grapples with Online Gambling*, PRESS-ENTER. (Riverside, Cal.), Oct. 26, 2011, available at 2011 WLNR 21992427 (noting that "[t]he association representing California tribes with casinos opposes the federal measures," as does the Tribal Alliance of Sovereign Indian Nations).

167. IRGC REPORT, *supra* note 15, at v.

revenue each year.<sup>168</sup> Instead, according to the report, the figure was closer to \$3–\$13 million of tax revenue.<sup>169</sup> While this is a much more modest sum, it seems counterproductive to jettison the revenue justification for the consumer protection conceit. Statements that the legislation “isn’t about the money,” that the state doesn’t need the money, and that the proponents don’t give “two hoots” about the money come across as disingenuous.<sup>170</sup> Legalizing another form of gambling simply to protect people who are already gambling online is a justification that is simply not credible.

So, if proponents backed away from a revenue justification because of the disparity in the earlier estimates from the IRGC Report, what should they do next time around? Proponents should acknowledge these modest revenue projections. They should tell Iowans that adoption of Internet poker legislation is somewhat of a calculated risk because no one can be certain whether these figures have upward potential. A major reason for this uncertainty relates to the matter of liquidity. As the IRGC Report succinctly summarized the issue:

Liquidity, as discussed in this study, is the direct effect the amount of players on a network has on the diversity of the betting limits and game types offered. A network that does not have a high level of liquidity may not meet expectations of internet poker players that are familiar with other internet poker sites. Subsequently, players may not make the transition to a network with less perceived or actual liquidity.<sup>171</sup>

In thinking of liquidity, one may imagine an insomniac poker player in Des Moines who, at 2:00 A.M., unable to sleep, logs in online to play poker. He has accounts at one or more offshore betting sites. These sites accept deposits from players all over the world, and when logging on our player may well be matching wits in Texas Hold ‘em with players in the United Kingdom before they go to work in the morning. Or he may be playing Omaha Hi/Lo with players in Asia who are in the middle of their day. In short, the variety of available games, the potential stakes, and the number of other poker players to compete against, are what make an online poker website desirable.<sup>172</sup>

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168. *Id.* at v 58.

169. *Id.* at v–vi.

170. *See supra* notes 33–36 and accompanying text.

171. IRGC REPORT, *supra* note 15, at vi.

172. First Amended Complaint for Relief Under: (1) Racketeer-Influenced

The online poker legislation proposed in 2012 included provisions specifically limiting play to those persons physically located in the state of Iowa.<sup>173</sup> To accomplish this, geo-location software technology is employed.<sup>174</sup> Though far from infallible, it, along with other controls, can reduce the number of out-of-state players. In other words, if our insomniac player were to visit a state-approved online poker portal, he would be able to compete with people from Des Moines, Creston, Albia, Stanhope, and other cities in the state, but he would not be playing with British or Asian competitors. One can disagree with how many online poker players there currently are in Iowa,<sup>175</sup> or how many new players there would be if a state-approved online poker portal existed,<sup>176</sup> but as long as the gaming is limited to those within the state, Iowa's population numbers severely limit the potential for market growth. The online insomniac might find that the games the state portal offers are not nearly as attractive as the games his worldwide site offers<sup>177</sup>—he will not have as many games to play, as many opponents to play against, or as many stakes to win.

What would make him want to shift his allegiance to the state system? Perhaps he would be relieved to “go legal” and not worry about questions of the legality of his gambling. Or he may not feel that the deposits are secure with the offshore site. He would not be unreasonable in his

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Corrupt Organizations Act (RICO), 18 U.S.C. § 1964 et seq.; (2) Florida Anti-Trust Act; (3) The Cartwright Act at 8, *Cardroom Int'l LLC v. Scheinberg*, No. CV12-02870, 2012 WL 1080639 (C.D. Cal. Apr. 2, 2012) (“The most important features of an Internet poker company are reliability, creditworthiness, and liquidity.”); *see also* Plaintiff MMJK, Inc.’s Reply Memorandum of Points and Authorities in Support of Its Motion for Preliminary Injunction at 18, *MMJK, Inc. v. Ultimate Blackjack Tour, L.L.C.*, No. C 07 03236 BZ, 2007 WL 2890743 (N.D. Cal. Aug. 1, 2007) (arguing that the “ability to succeed in the online poker market requires . . . achie[ving] ‘critical mass’ or ‘player liquidity’ before the other market entrants”).

173. S. File 2275, 84th Gen. Assemb., Reg. Sess. § 10 (Iowa 2012).

174. Geo-location technology tracks a user’s physical location through the IP address they use to access the Internet, and it also evaluates Internet browser settings such as time zone and language. King, *supra* note 154, at 58–59. Most forms of geo-location technology “are extremely accurate.” *Id.* at 59.

175. IRGC REPORT, *supra* note 15, at 40 (“Ameristar expressed concern over the liquidity of the number of players,” indicating they believed there might not be enough “to warrant a proper return-on-investment”); *see also id.* at 58 (reporting an estimated 150,000 people in Iowa already play online poker illegally).

176. *Id.* at 51 (“[N]ew interest would support a legal poker network.”); *see also id.* at App. B (projecting 172,500 Iowa players).

177. *Id.* at 51 (“A network less liquid . . . may not be as attractive for the internet poker player . . .”).

concerns.<sup>178</sup> But if he has confidence in the integrity of his funds, can we expect him to shift to the state-sanctioned games solely because of a desire to be law-abiding? A player shifting to the state games will likely be surrendering information such as his Social Security number, which would certainly make it easier for the government to ensure gambling income is reported for tax purposes. Without a very good reason to make the jump to the state games, a player satisfied with his current online poker experience may simply stay put. The IRGC Report candidly acknowledged this conundrum:

IRGC is limited in its abilities to understand or predict the reactions of Iowans to additional registration hurdles poker players may face that differ from the current sign-up process offered by off-shore poker websites. Currently, poker players simply register for an account and provide a mailing address for any winnings or deposits that come in the form of checks, credit cards, or electronic funds transfers. The liquidity of an Iowa poker network may be impacted if the registration process deviated from what is currently being used by off-shore websites.<sup>179</sup>

The liquidity problem should not be explained away by saying that whoever plays, plays, and that migration from the offshore sites can be expected to increase. Such an approach involves the state sponsoring a form of gambling that is set up to fail. A state should not authorize or even be complicit in gambling unless there are good reasons to do so because, as noted above, gambling is not without social costs.<sup>180</sup>

The credible reason for offering Internet poker can only be that it will produce revenue for the state. But if the revenue potential is modest due to Iowa's population and these liquidity realities, does that necessarily lead to the conclusion that it is not worth the social costs exacted? Perhaps not. While legislators need to be candid with Iowans about these issues and not diminish their significance, they might also tell citizens that acting now is still a calculated risk worth taking. In communicating this, they should emphasize several additional points.

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178. See, e.g., Nate Silver, *After 'Black Friday,' American Poker Faces Cloudy Future*, N.Y. TIMES (Apr. 20, 2011, 8:47 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/after-black-friday-american-poker-faces-cloudy-future/?partner=rss&emc=rss> (discussing the seizure and shutdown of three offshore poker sites, the criminal indictment of their operators, and the players' uncertainty as to the status of their funds).

179. IRGC REPORT, *supra* note 15, at 59.

180. See *supra* Part V.

First, though few states have yet to move forward with Internet poker or other gambling, one can expect that these numbers will grow.<sup>181</sup> The discussion above indicates how Iowa has little in common with most of the states that have moved forward with Internet gambling.<sup>182</sup> But this will also likely change. One can anticipate that other states with liquidity concerns similar to Iowa's may want to band together to offer multistate online poker games.<sup>183</sup> Even states with populations sufficient to overcome liquidity issues might find it appealing to expand their player base and divide tax revenues generated. A model for this exists in the growth of lottery products such as Powerball.<sup>184</sup> Multistate compacts have the potential for adding considerable revenue to the state.

This is far from certain, however, and thus, legislation adopting Internet poker must be presented to Iowans as a calculated risk. If multistate compacts do not develop, the liquidity puzzle may present an intractable problem. If they do, the revenue from Internet poker may be substantial enough to outweigh the social problems created. This is what Iowans must decide.

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181. See *supra* note 153. Several states have already considered measures, and after the DOJ Opinion of fall 2011 opened the figurative door, analysts expect many more states to introduce Internet gaming bills. See generally *supra* note 22 and accompanying text. For example, Massachusetts has formed an Online Products Task Force to determine the propriety of legalizing intrastate Internet poker. Jerry Kronenberg, *Poker on the Table as State Mulls Online Bets*, BOS. HERALD, Feb. 23, 2012, at 3, available at 2012 WLNR 3967138. This Task Force held public forums in May and June 2012 to address questions and concerns posed by citizens. *The Treasurer's Online Products Task Force*, TREASURER & RECEIVER GEN. OF MASS., <http://www.mass.gov/treasury/about/media-pubs/treas-news/the-treasurers-online-products-task-force.html> (last visited Oct. 3, 2012). The Task Force expects to issue a report in the same vein as the IRGC Report near the end of 2012. E-mail from Massachusetts Online Products Task Force to David Ranscht, Research Assistant to Author (June 26, 2012, 5:03 PM) (on file with author). Mississippi is another state likely to reintroduce Internet gaming measures in its next legislative session. Sid Salter, *Failed Online Gambling Bill Will Very Likely Return Next Year*, PRESS-REG. (Mobile, Ala.), May 14, 2012, at A5, available at 2012 WLNR 10088423.

182. See *supra* Part VI.

183. See Etzel, *supra* note 4, at 243–45; see also Denison & Starkey, *supra* note 144.

184. See MULTI-STATE LOTTERY ASS'N, <http://www.musl.com/> (last visited Oct. 3, 2012) (showing forty-three states and the District of Columbia in a multistate compact for Powerball); see also David H. Lantzer, Comment, *Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks?*, 5 CHAP. L. REV. 281, 296–300 (2002) (evaluating the pros and cons of modeling Internet gaming regulation on multistate lottery compacts).

### C. *Admit Further Expansion is Probable*

Another piece of the puzzle that Iowans need to be aware of is that Internet poker is the proverbial camel's nose under the tent. They should be skeptical of anyone who tells them the line for online gaming will be drawn at poker. Casino games, in which liquidity is not an issue, offer the attractive promise of revenue.<sup>185</sup> The only form of betting that is a long shot for expansion is sports betting—whether it is placed on the Internet or otherwise. Iowans need to be told that poker will in fact be the gateway game to the development of other forms of electronic gambling.

### D. *Accept Expanding Technology but Maintain Bricks and Mortar Connection*

Iowans must also be made aware that the Internet gamer of the future will not be a person merely sitting in front of a computer screen. For better or worse, the same force that made a dinosaur out of traditional pari-mutuel betting at a track—the need to travel to a particular site to gamble—will dramatically affect the future of casino gambling. Proponents of online gambling must inform Iowans that the gaming world is already moving to a more mobile platform. Smartphones, handheld mobile units, and dedicated devices will be the gambling platform for the next generation of gamblers.<sup>186</sup> The casinos of tomorrow will likely not resemble the gaming halls of today. If one doubts this, ask a group of people in their twenties how much cash they carry. The answer is very little. Debit cards rule, and soon even those will be obsolete. As we move toward a cashless society, online gaming, not physical casinos, will be the logical outlet for gambling.

However, although Internet gaming may not create jobs, the

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185. Liquidity is not an issue for other casino games such as blackjack and roulette because players compete only against the house and not against one another.

186. Nevada already authorizes betting from mobile devices while on casino premises. NEV. REV. STAT. § 463.0176 (2011). New Jersey “is poised to introduce mobile gaming” in the same fashion. Kenneth F. Oettle & Jason K. Gross, *New Jersey Close to Approving Mobile Gaming*, CASINO ENTERPRISE MGMT., Sept. 2012, available at <http://www.casinoenterprisemanagement.com/articles/september-2012/new-jersey-close-approving-mobile-gaming>. Approved devices could be a patron's own smartphone, laptop, or tablet, in addition to casino-supplied devices. *Id.*; see also David Briggs, *A Candid Discussion on Mobile Gambling*, CASINO ENTERPRISE MGMT., Aug. 2012, available at <http://www.casinoenterprisemanagement.com/articles/august-2012/candid-discussion-mobile-gambling> (“The stage seems set for mobile [devices] to compete for a chunk of the gaming pie in the U.S.”).

proposed legislation that linked online gaming licenses to existing licensees would help the bricks and mortar casinos. Including existing facilities in the structure of online gaming means strategies and synergies between the different forms of gaming can protect the land-based operations from the changes on the horizon.

### VIII. CONCLUSION

Until Internet gambling issues are presented to Iowans in a forthright manner, there is little reason to think opposition to Internet gambling will decline. When Internet poker proponents diminish the 70% opposition figure by saying that once Iowans understand the proposal they will support it,<sup>187</sup> they are risking a replay of the TouchPlay episode. Iowans need to hear a convincing rationale for Internet gambling and be made aware of the trade-offs that are involved. Only then can Iowans decide whether the possibility of significant revenue in the future is worth the modest return that can be expected in the near term. They may decide every little bit helps, or they may decide it simply isn't worth the social costs involved.

As Internet poker legislation is offered in early 2013, it will be important to consider these issues with a clear understanding of what is at stake. There are costs to be considered, balances to be struck, and important decisions to be made. It would be a failure of leadership to tell the 70% that the sole reason to adopt Internet gaming in Iowa is because it is inevitable. Decisions about gambling must be informed by the interests of our state and not purported inevitabilities.

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187. See, e.g., Rod Boshart, *Online Poker Bill Clears Senate Panel*, QUAD CITY TIMES (Feb. 20, 2012, 6:44 PM), <http://qctimes.com/news/local/eabceb44-5c25-11e1-80d6-001871e3ce6c.html> (noting Senator Danielson's response to assertions that "[t]he people of Iowa do not want [Internet poker]" was to explain the contents of the bill more clearly and point out that the current policy appeared to be "do nothing by default," creating an "environment of unregulated online [gaming]").