



# THE HOUSE ALWAYS WINS: THE WORLD TRADE ORGANIZATION, ONLINE GAMBLING, AND STATE SOVEREIGNTY\*

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## I. INTRODUCTION

Gambling law and policy in the United States are at a tipping point. Gambling regulation has traditionally been a power reserved to the states.<sup>1</sup> States are free to have casinos (except for Indian Casinos, which are governed under federal law), pari-mutuel wagering on horses, greyhounds, or jai alai, or have state lotteries.<sup>2</sup> The

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<sup>1</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551, 571 (2013); see also I. Nelson Rose, *The DOJ Gives States a Gift*, UNLV GAMING L.J. 1, 2 (2013). “Historically, it has always been up to individual states to decide their own public policies toward gambling. For example, Utah and Nevada share a common border; yet they have completely different gaming laws.” *Id.*

<sup>2</sup> For example, New Jersey and Pennsylvania have commercial casinos, racetracks, bingos, raffles, and state lotteries, while Utah and Hawaii ban all forms of gambling.

Federal Interstate Wire Act of 1961 (commonly referred to as the Wire Act) was long interpreted as prohibiting online wagering in all forms, but not to prohibit any other type of gaming.<sup>3</sup> However, in 2011, the Department of Justice released a memorandum opinion concluding that the Wire Act would only bar the online taking of bets involving sporting events<sup>4</sup> (which would violate another federal law, the Professional and Amateur Sports Protection Act (PASPA)).<sup>5</sup> However, this opinion is not legally binding and has yet to be tested in the courts.<sup>6</sup>

As more and more jurisdictions begin to offer more and more forms of gambling, traditional stand-alone “convenience” gambling markets have suffered. One need only look down the Garden State Parkway to see how changes in gambling policy and preferences among states have led to a steep decline in profits and revenue in Atlantic City, long the second-largest gambling market in the United States.<sup>7</sup> Indeed, the growth of casinos in Pennsylvania, Connecticut, Delaware, Maryland, and New York has captured the attention of the convenience gamblers that Atlantic City long monopolized. In response to budgetary needs<sup>8</sup> and looking for new ways to attract gamblers following

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<sup>3</sup> 18 U.S.C. § 1084 (1961).

<sup>4</sup> Whether Use of the Internet and Out-of-State Processors to Sell Lottery Tickets Violates the Wire Act, 35 Op. O.L.C. 1 (2011), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> [hereinafter DOJ Memo].

<sup>5</sup> 28 U.S.C. §§ 3701-3704 (1992).

<sup>6</sup> UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006—FACT SHEET, STOP PREDATORY GAMBLING, *available at* <http://stoppredatorygambling.org/wp-content/uploads/2012/12/UIGEA-2006-Fact-Sheet.pdf>.

<sup>7</sup> Christopher Palmeri, *Pennsylvania Passes N.J. to Become No. 2 U.S. Casino Hub*, BLOOMBERG (Jan. 16, 2013, 4:07 PM), <http://www.bloomberg.com/news/2013-01-16/pennsylvania-passes-jersey-to-become-no-2-u-s-casino-market.html>.

<sup>8</sup> Jim Malewitz, *Nevada and New Jersey Jockey for Online Gambling Revenue*, STATELINE (Feb. 11, 2013), <http://www.>

the DOJ's reinterpretation of the Wire Act, many states, including Nevada, Delaware, and New Jersey, have sought to authorize Internet gambling.<sup>9</sup>

However, following a decision by the World Trade Organization (WTO) in 2005, these efforts by states to authorize Internet gambling have been called into question.<sup>10</sup> As a member of the WTO, the United States is bound by certain commitments to prevent barriers to the free trade of goods and certain types of services, which include access to gambling.<sup>11</sup> In 2003, the Caribbean island nation of Antigua brought a challenge in the WTO against the United States, alleging that it violated the General Agreement on Trade in Services (GATS) by prohibiting access to foreign-based online wagering websites.<sup>12</sup> The WTO determined that the United States violated free trade rules by prohibiting access to offshore websites and permitted retaliation by Antigua.<sup>13</sup> The United States has not fully responded to this decision, either legislatively or through negotiation in the WTO, but the decision nonetheless raises serious issues of state sovereignty for the United States if it seeks to enforce compliance on its states under pressure from the WTO and/or other nations. This issue is important as states, the traditional policymakers for gambling policy, seek to reform and retool their individual gambling schemes.

This article will address the apparent conflict between state laws concerning Internet gambling and the WTO's decision. The WTO asserts the authority to scrutinize

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[pewstates.org/projects/stateline/headlines/nevada-and-new-jersey-jockey-for-online-gambling-revenue-85899450023](http://pewstates.org/projects/stateline/headlines/nevada-and-new-jersey-jockey-for-online-gambling-revenue-85899450023).

<sup>9</sup> Discussed further *infra* Section III.

<sup>10</sup> Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Oct. 11, 2004) [hereinafter *Dispute DS285*].

<sup>11</sup> Discussed *infra* Section III.

<sup>12</sup> *Dispute DS285*, *supra* note 10.

<sup>13</sup> *Id.*

individual state laws for compliance with the GATS and to penalize non-conforming states. This raises serious questions of constitutional importance, because such an outcome could threaten the federalist system that underpins our republic. This article will first provide an overview of the various federal laws that exist concerning gambling and Internet gambling, including the 2011 interpretation by the Department of Justice (DOJ) that the Wire Act does not apply to non-sports online gambling. Second, this article will look at state laws concerning Internet gambling. Finally, this article will discuss the WTO dispute between the United States and Antigua and the implications of the decision on state sovereignty. This article concludes that the WTO decision is a serious threat to the individual sovereignty of several states and that the nullification of duly enacted state laws by an international body by way of a treaty would likely be unconstitutional.

## II. THE SCOPE OF FEDERAL AND STATE GAMBLING LAWS

It is important to first define the relative scopes of federal and state authority over gambling regulation. Gambling regulation has long been considered a traditional state police power, which has resulted in a patchwork of gambling schemes across the country.<sup>14</sup> Some states have a complete ban on all forms of gambling (e.g., lotteries, casino gambling, pari-mutuel gambling, and charitable gambling), while other states permit gambling to various degrees.<sup>15</sup> However, simply because a particular policy area is considered to be a traditional state police power does not mean that Congress cannot regulate in that area when it is acting pursuant to the Commerce Clause.<sup>16</sup> As discussed

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<sup>14</sup> NCAA v. Christie, 926 F. Supp. 2d 551, 571 (2013).

<sup>15</sup> This wide variation in state gambling laws will be discussed *infra* Section II(b).

<sup>16</sup> Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 291 (1981). "The Court long ago rejected the suggestion that Congress invades areas reserved to the states by the Tenth Amendment simply because

*infra*, the federal government has decided to regulate gambling only in a limited number of areas, which form part of a larger effort to combat organized crime. In addition, the federal government has passed laws concerning Native American gambling and interstate pari-mutuel gambling on horse racing. However, as discussed *infra*, the federal government has never preempted the field of gambling regulation and has never sought to act in the field of gambling to the exclusion of the states—especially when it comes to traditional casino gambling.

Once an area of authority has been reserved to the states (such as power over gambling policy under the state police power), the federal government must defer to that authority. In order for the federal government to enforce some aspect of international law over state-based gambling schemes, there must be federal authority for the government to do so. Simply because the federal government has enacted several pieces of legislation concerning gambling does not mean that the federal government has the authority to completely displace the states in this area. The question is whether the federal government intends to exercise the power to preempt. “There is an assumption that the historic police powers of the states are not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”<sup>17</sup> In reality, there are two state powers at issue here. The first is regulation and control of gambling; the second is the revenue-generating power of states. While it is important to understand the various federal laws for the purpose of understanding the WTO decision, Congress has never evidenced a clear and manifest purpose of displacing the states’ power over gambling or raising revenue; and Congress has simply never sought to displace state authority over gambling.<sup>18</sup> In fact, the opposite is true: where the federal government has acted concerning

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it exercises its authority under the Commerce Clause in a manner that displaces the states’ exercise of their police powers.” *Id.*

<sup>17</sup> *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008).

<sup>18</sup> David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation of Online Poker*, 12 J. HIGH TECH L. 450, 451 (2012).

gambling, it has expressly delegated the authority over intrastate gambling to the states.

Much of the legislative history of federal gaming regulation can be explained by the apparent emphasis on preventing the rise and establishment of organized criminal operations.<sup>19</sup> Responding to a congressional investigation into organized crime, Congress passed the Johnson Act in 1951,<sup>20</sup> also known as the Transportation of Gambling Devices Act, which was a precursor of the Wire Act.<sup>21</sup> The legislative intent was to support the states in their respective regulation of gambling activity.<sup>22</sup> These regulations “specifically allowed the sovereign states to seek exemption[s], thereby delegating the regulation of gaming to the states.”<sup>23</sup>

With the growth of gambling and organized crime in the 1950s, the federal government enacted laws aimed at cracking down on organized crime-run gambling rings.<sup>24</sup> “While most gambling regulation has been left to the states, notable exceptions are the federal laws enacted to crack down on organized crime.”<sup>25</sup> However, these laws were passed before the advent of the Internet and online gambling, and proved inadequate to address the unique issues surrounding online gambling.<sup>26</sup>

When the federal government has acted in the area of gambling regulation, it has almost exclusively been motivated by the goal of fighting organized crime in the

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<sup>19</sup> ROBERT M. JARVIS ET AL., GAMING LAW CASE AND MATERIALS 4(1st ed. 2003).

<sup>20</sup> 15 U.S.C. §§ 1171-1178 (1951).

<sup>21</sup> JARVIS ET AL., *supra* note 19, at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5.

<sup>24</sup> Kuznick, *supra* note 18, at 451.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 450. The Unlawful Internet Gaming Enforcement Act (UIGEA), to be discussed *infra*, was one such attempt at federal regulation to address the rise in online gambling.

United States. Enacted in 1961, the Interstate Wire Act and the Wire Wager Act (Wire Act)<sup>27</sup> was part of then Attorney General, Robert F. Kennedy's, famous war on organized crime.<sup>28</sup> The Wire Act was intended to be an anti-bookie statute, designed to help the states suppress organized criminal gambling.<sup>29</sup> The pertinent part of the statute reads:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.<sup>30</sup>

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<sup>27</sup> 18 U.S.C. § 1084 (1961).

<sup>28</sup> Larry Josephson, *Betting History 101: the Story Behind the 1961 Wire Act*, COVERS (Jan. 3, 2012), <http://www.covers.com/articles/articles.aspx?theArt=260073>.

<sup>29</sup> I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 116 (2d ed. 2009).

<sup>30</sup> 18 U.S.C. § 1084(a)-(b) (2006).

When the Wire Act was passed, it was intended to cover the use of telegraph wires by bookies,<sup>31</sup> but the federal government always interpreted it to apply to the Internet.<sup>32</sup> Since its application to online gambling began, the Wire Act has been interpreted to apply to all forms of online gambling.<sup>33</sup> However, in December 2011, the Department of Justice released a memorandum, which reinterpreted the Wire Act so that it only reached the interstate transmission of wire communications that relate to a “sporting event or contest,” further reaffirming state control over traditional intrastate gambling.<sup>34</sup>

The Travel Act,<sup>35</sup> passed in 1961, prohibits the use of “any facility in interstate or foreign commerce, including the mail [to] promote, manage establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any un- lawful activity.”<sup>36</sup> As was the case with the Wire Act, the Travel Act was enacted as part of an effort to combat organized crime by then United States Attorney General, Robert Kennedy.<sup>37</sup> “Unlawful activity” is defined to include “any business

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<sup>31</sup> *Bookie*, THEFREEDICTIONARY, <http://www.thefreedictionary.com/bookie> (last visited Feb. 1, 2015). “Bookie” is short for *bookmaker*, which is defined as a person who makes a business of accepting the bets of others on the outcome of sports contests, especially of horse races. *Id.*

<sup>32</sup> I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 661 (2012).

<sup>33</sup> *Id.* at 670.

<sup>34</sup> This reinterpretation will be discussed further, *infra*, in Section III of this article.

<sup>35</sup> 18 U.S.C. § 1952 (2006).

<sup>36</sup> *Id.*

<sup>37</sup> Jeffrey Rodefer, *Federal Travel Act Scope and Predicates*, GAMBLING-LAW-US.COM, <http://www.gambling-law-us.com/Federal-Laws/travel-act.htm> (last visited Feb. 1, 2015).



enterprise involving gambling.”<sup>38</sup> While the Travel Act does not specifically mention wire communications, it has been interpreted to apply to telephonic communications, and it is plausible that it could be interpreted to apply to online gambling.<sup>39</sup> A conviction under the Travel Act requires as a predicate a violation of a state or other federal law, though the prosecution does not need to show intent to violate any state or federal law.<sup>40</sup>

The Illegal Gambling Business Act (IGBA),<sup>41</sup> enacted in 1970, sought to provide the federal government with the authority to prosecute large gambling enterprises by proscribing the operations of illegal gambling businesses in an effort to curtail organized crime.<sup>42</sup> The IGBA explicitly defines “illegal gambling business.”<sup>43</sup> Like the Travel Act, the IGBA does not specifically mention wire communications, but it may be construed broadly enough to incorporate Internet gambling.<sup>44</sup> It is also similar to the Travel Act in that critical for a conviction under the IGBA, the prosecution has the burden of showing a violation of a state or local law.<sup>45</sup>

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<sup>38</sup> See Yevgeniya Roysen, *Taking Chances: The United States’ Policy on Internet Gambling and its International Implications*, 26 CARDOZO ARTS & ENT L.J. 873, 887 (2009).

<sup>39</sup> *Id.*

<sup>40</sup> Rodefer, *supra* note 37.

<sup>41</sup> 18 U.S.C. § 1955 (2006).

<sup>42</sup> See Roysen, *supra* note 38, at 887.

<sup>43</sup> 18 U.S.C. § 1955(b)(1)(i-iii). Illegal gambling business is defined as “(i) is a violation of the law of a State or political sub-division in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.” *Id.*

<sup>44</sup> See Roysen, *supra* note 38, at 888.

<sup>45</sup> Jeffrey Rodefer, *Illegal Gambling Business Act of 1970*, GAMBLING-LAWS-US.COM, <http://www.gambling-law-us.com/Federal-Laws/illegal-gambling.htm> (last visited Feb. 1, 2015).

Passed in 1978, the Interstate Horseracing Act (IHA)<sup>46</sup> sought to encourage cooperation between states that permit off-track wagering on horse races.<sup>47</sup> The IHA only applies to wagers on out-of-state horseraces where those wagers are lawful in each of the states involved.<sup>48</sup> No state that has horseracing is forced to participate, as states must opt-in under the statute.<sup>49</sup> In 2000, Congress amended the IHA to allow states to decide whether to allow their residents to place bets on horseraces by phone or computer.<sup>50</sup> The IHA was found by the WTO to violate the United States' treaty obligations under the GATS, because the IHA prohibited foreign gambling operators from taking wagers.<sup>51</sup> What is clear from the IHA is that Congress explicitly left it up to the states to choose to permit and/or regulate off-track wagering on horse races.

One possible exception to the idea that the federal government has meant to regulate only organized crime is the federal ban on sports gambling. In 1992, President George H. W. Bush signed the Professional and Amateur Sports Protection Act (PASPA)<sup>52</sup> into law, which was spearheaded in Congress by Democratic Senator (and former National

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<sup>46</sup> 15 U.S.C. §§ 3001-3007 (2006).

<sup>47</sup> STOP PREDATORY GAMBLING, *supra* note 6.

<sup>48</sup> *Id.*

<sup>49</sup> 15 U.S.C. § 3004 (2006).

<sup>50</sup> Rose & Bolin, *supra* note 32, at 665-66. The Interstate Horseracing Act (IHA) permits a form of remote wagering known as advanced deposit wagering, where bettors first have to fund the account prior to placing bets. Betting is only legal if both the bettor and the off-track betting operator are located in states that authorize off-track wagering. More than half of the states have opted in under the IHA. *Id.*

<sup>51</sup> *Id.* at 666. The World Trade Organization (WTO) decision will be discussed further *infra* Section V.

<sup>52</sup> 28 U.S.C. §§ 3701-3704 (1992).

Basketball Association (NBA) player, Bill Bradley (D-NJ)).<sup>53</sup> The bill was passed in order to protect “the integrity of our national pastime.”<sup>54</sup> In addition, there were concerns over preventing the growth of gambling by minors, as well as to prevent fans from questioning the legitimacy of the outcome of games and sporting matches.<sup>55</sup>

PASPA made it unlawful for any “governmental entity or a person to sponsor, operate, advertise, or promote a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on one or more competitive games” in which amateur or professional athletes compete or intend to participate.<sup>56</sup> Furthermore, PASPA enabled the Attorney General of the United States, or any professional sports organization or amateur sports organization “whose competitive game is alleged to be the basis” of a violation of PASPA, to commence a civil action to enjoin any violator in a United States District Court.<sup>57</sup> Lastly, PASPA explicitly prohibits sports gambling on lands that are described in Section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. § 2701(4)).<sup>58</sup>

While PASPA is neutral on its face, it does create special exemptions that grandfathered in states that already had sports gambling schemes in place that met certain criteria.<sup>59</sup> To

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<sup>53</sup> Bob Considine, *Could Sports Betting Save New Jersey?*, STAR-LEDGER, Aug. 10, 2010, [http://www.nj.com/insidejersey/index.ssf/2010/08/can\\_sports\\_betting\\_save\\_new\\_je.html](http://www.nj.com/insidejersey/index.ssf/2010/08/can_sports_betting_save_new_je.html).

<sup>54</sup> S. Rep. No. 102-248, at 4 (1992), *reprinted in* U.S.S.C.A.N. 3553, 3555-56.

<sup>55</sup> *Id.*

<sup>56</sup> 28 U.S.C. § 3702 (1992).

<sup>57</sup> 28 U.S.C. § 3703 (1992).

<sup>58</sup> 28 U.S.C. § 3704 (1992).

<sup>59</sup> *Id.* PASPA does not apply to “a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation to the extent that the scheme was conducted at any time during the period beginning January 1, 1976, and ending August 31, 1990,” or where such a scheme was “authorized by a statute as in effect on October 2, 1991” and “actually was conducted at any time during the period beginning September 1, 1989 and ending October 1, 1991.” *Id.*

explain the exemptions, the Judiciary Committee noted in its report that it did not wish to retroactively prohibit legal sports wagering as it had previously existed in Oregon or Delaware or “to threaten the economy of Nevada.”<sup>60</sup> These exemptions applied implicitly to the states of Nevada, Oregon, Montana, and Delaware. In addition to those grandfathering exceptions, PASPA provided for an opt-in period for other states to allow sports gambling, provided that it be conducted “exclusively in casinos located in a municipality” and provided that the commercial casino gaming scheme had been in operation for the previous ten years.<sup>61</sup> Any state attempting to be exempted under this provision had one year from the effective date of PASPA in order to opt-in to the exemption.<sup>62</sup> In effect, this provision could only apply to New Jersey, and was inserted in PASPA at the urging of New Jersey state legislators to give New Jersey the chance to legalize sports gambling at its Atlantic City casinos, though New Jersey failed to opt-in during this one-year period.<sup>63</sup>

Since the passage of PASPA in 1992, there have been many changes in the landscape of sports gambling in the United States. For instance, Oregon, while exempt under the federal law, eliminated its sports gambling scheme in 2007 so that its state universities could host National Collegiate Athletic Association (NCAA) competitions, not because of PASPA.<sup>64</sup> Nevada has been more resistant to modifying its

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<sup>60</sup> S. Rep. No. 102-248, at 8 (1992).

<sup>61</sup> 28 U.S.C. § 3704 (1992).

<sup>62</sup> *Id.*

<sup>63</sup> Larry Josephson, *Righting a Wrong: A History in New Jersey Sports Betting*, COVERS (Nov. 2, 2011), <http://www.covers.com/articles/columns/articles.aspx?theArt=251825>. New Jersey is the only state that met the criteria for this exemption. *Id.*

<sup>64</sup> See Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS LAW. J. 143, 146 (2006). Oregon employed a state lottery that allowed players to place wagers on the success of National Football League (NFL) teams from week to week. *Id.* The revenue generated from the lottery went to support the athletic departments of Oregon’s seven public universities. *Id.* However, in 2005, the Oregon Legislature voted to end the sports gambling scheme because

sports betting scheme.<sup>65</sup> Other federal legislation has been introduced as well, though none have actually been passed.<sup>66</sup> Both Delaware and New Jersey have challenged PASPA in recent years. Delaware was exempt under PASPA, but it is restricted to offering only the multi-game parlay bets that it offered in the decade prior to the enactment of PASPA. In 2009, Delaware unsuccessfully sought to offer single game betting, but various amateur and professional sports leagues successfully sued under PASPA to enjoin Delaware.<sup>67</sup>

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the state wished to host the Men's NCAA college basketball tournament. *Id.* NCAA regulations do not allow for states that have sports gambling schemes to host national championships. *Id.* This regulation applied even though the Oregon scheme only permitted wagering on NFL games, and had no connection to collegiate athletics. *Id.*

<sup>65</sup> *Id.* at 147. Sports wagering is permitted in licensed casinos and gaming establishments. *Id.* Much of the rule making authority is left to the Nevada State Gaming Control Board. *Id.* Some commentators have criticized Nevada for permitting sports gambling on collegiate athletic competitions, but the state continues to permit wagering on these competitions. *Id.*

<sup>66</sup> *Sports Betting*, AM. GAMING ASSOC., <http://www.americangaming.org/government-affairs/key-issues/past-issues/sports-betting> (last updated Oct. 16, 2012). Of note, two congressmen from New Jersey have introduced separate bills to allow New Jersey to implement sports betting. *Id.* Representative Frank Pallone, whose congressional district includes the Monmouth Park Racetrack in Oceanport, New Jersey, has introduced the "New Jersey Betting and Equal Treatment Act of 2012," (H.R. 3809) which would amend Title 28 of the United States Code to exclude New Jersey from the prohibition on sports gambling in PASPA to the extent that it is approved by the legislature in New Jersey. *Id.* Representative Frank LoBiondo, whose congressional district includes the casinos and horse track in Atlantic City, introduced the "Sports Gaming Opportunity Act of 2012," (H.R. 3797), which would re-open the window for states to approve and establish sports betting schemes, and the window would be open until January 1, 2016. *Id.* Rep. LoBiondo's plan would allow for states other than just New Jersey to implement sports gambling schemes. *Id.*

<sup>67</sup> *OFC Comm'r Baseball v. Markell*, 579 F.3d 293 (2009). Without addressing any constitutional issues, the Third Circuit Court of Appeals held that Delaware was restricted to the forms of gambling it offered prior to PASPA and could not expand its sports gambling offerings. *Id.* at 300, 303, 304.

New Jersey, which failed to opt-in to the exception in PASPA, amended its state constitution in 2011 to permit sports gambling,<sup>68</sup> and the National Football League (NFL), NBA, NCAA, National Hockey League (NHL), and Major League Baseball (MLB) sued under PASPA to enjoin the state from implementing sports gambling.<sup>69</sup> The United States District Court for the District Court of New Jersey enjoined the state from implementing sports gambling,<sup>70</sup> and the Third Circuit affirmed.<sup>71</sup> Judge Vanaskie dissented from the panel's decision in the Third Circuit and would have struck down PASPA under the anti-commandeering doctrine of the Tenth Amendment.<sup>72</sup> Judge Vanaskie noted, "[w]hether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court 'has been explicit' that 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."<sup>73</sup> When PASPA was first being considered, the Justice Department was concerned about the legality of the proposal. In a letter written in 1991, Assistant United States Attorney General

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<sup>68</sup> *New Jersey Election Results*, STAR-LEDGER (Nov. 9, 2011, 3:55 PM), <http://www.nj.com/starledger/results-ballot/>.

<sup>69</sup> Chad Millman, *Sports Leagues Sue to Block Betting*, ESPN (July 24, 2009, 8:19 PM), <http://sports.espn.go.com/espn/news/story?id=4353948>.

<sup>70</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551 (2013).

<sup>71</sup> *NCAA v. Governor of New Jersey*, 730 F.3d 208 (2013). The Third Circuit voted 2–1 that PASPA did not violate the principle of equal sovereignty of the states and did not violate the Tenth Amendment's anti-commandeering doctrine. *Id.* New Jersey has since appealed the decision of the Third Circuit to the United States Supreme Court. *NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) *cert. denied sub nom.* *Christie v. NCAA*, 134 S. Ct. 2866, 189 L. Ed. 2d 806 (2014) and *cert. denied sub nom.* *New Jersey Thoroughbred Horsemen's Ass'n, Inc. v. NCAA*, 134 S. Ct. 2866, 189 L. Ed. 2d 806 (2014) and *cert. denied sub nom.* *Sweeney v. NCAA*, 134 S. Ct. 2866, 189 L. Ed. 2d 806 (2014).

<sup>72</sup> *NCAA v. Governor of New Jersey*, 730 F.3d at 241 (Vanaskie, J., dissenting).

<sup>73</sup> *Id.* at 251 (internal citations omitted).

(AAG), W. Lee Rawls, voiced concerns about limiting legalized gambling to a handful of states and noted “that determinations of how to raise revenue have typically been left to the states. The department is concerned that it raises federalism issues.”<sup>74</sup> AAG Rawls’ concerns over PASPA support the idea that gambling and revenue generating are traditional powers reserved to the states.

It is critically important to understand that sports gambling (and gambling on horse racing) is not the same as gambling on casino-type games (which normally include games such as slots, poker, blackjack, roulette, and craps). Traditional casino games do not involve anything outside of the four walls of the casino. Professional sports, and even collegiate basketball and football, however, are national events, and the concerns over regulating gambling in these two wholly separate arenas are vastly different. While the constitutionality of PASPA is questionable, the federal government has seen it fit to intervene here. This decision, however, has no bearing on the states’ ability to regulate traditional casino gambling and lotteries—including when it takes place online within the state’s borders. When the federal government stepped in to ban sports gambling, it was motivated by wanting to protect the integrity of the game and to prevent the spread of gambling by minors. Congress’ intent was not to displace state authority over regulating intrastate gambling. This is a key distinction to remember with regards to the WTO decision, even if the Supreme Court ultimately upholds the constitutionality of PASPA.

The Unlawful Internet Gaming Enforcement Act (UIGEA)<sup>75</sup> was passed in 2006 and tacked onto an unrelated piece of legislation related to national security and port safety.<sup>76</sup> Unlike most other gambling laws, UIGEA does not

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<sup>74</sup> Ryan Hutchins, *U.S. Justice Department Joins Landmark N.J. Sports Betting Case*, STAR-LEDGER, Jan. 23, 2013, [http://www.nj.com/politics/index.ssf/2013/01/us\\_justice\\_department\\_joins\\_la.html](http://www.nj.com/politics/index.ssf/2013/01/us_justice_department_joins_la.html).

<sup>75</sup> 31 U.S.C. §§ 5361-5367 (2006).

<sup>76</sup> Rose & Bolin, *supra* note 32, at 667.

directly regulate betting; rather, it prohibits some financial transactions related to “unlawful Internet gambling.”<sup>77</sup> UIGEA prohibits Internet gambling operators from accepting money related to any online gambling that violates state or federal law; violation of UIGEA is a crime.<sup>78</sup> Importantly for states, UIGEA does not make any gambling activity illegal that was previously legal, and conversely, does not make any gambling activity legal that was previously illegal, because Congress did not intend to preempt the proper state-based authority to regulate intrastate gambling.<sup>79</sup> Intrastate gambling is wholly within the sphere of state authority. Additionally, the law permits states to determine and enforce the gambling policies that will apply within state borders.<sup>80</sup> Some commentators have criticized UIGEA as being filled with loopholes that actually open the door to some types of Internet gambling, including fantasy sports, skill games (such as poker), and intrastate gambling (where the bettor and the Internet gambling operator are in the same state).<sup>81</sup>

Like the IHA, UIGEA is another clear example that Congress did not intend to displace state authority over gambling regulation. First, UIGEA does nothing to alter what states have already determined to be illegal or legal gambling within the states’ own borders. Secondly, UIGEA explicitly permits states to enact intrastate online gambling schemes. It simply prohibits banks from processing gambling transactions that are illegal under state law.

## A. DOJ INTERPRETATION OF THE WIRE ACT

The loopholes and broad definitions contained in UIGEA created a conflict with the strict interpretation of the Wire Act.

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<sup>77</sup> *Id.*

<sup>78</sup> STOP PREDATORY GAMBLING, *supra* note 6.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* However, this does not allow a state to permit sports gambling, which is prohibited under PASPA. *Id.*

<sup>81</sup> *Id.* at 668.



UIGEA seemed to endorse intrastate online gambling, while the Wire Act prohibited the use of “wires” from transmitting bets. How do we reconcile these differences? Prior to 2011, only one court had ever concluded that the Wire Act reached sporting events alone. In *In re MasterCard*,<sup>82</sup> the Fifth Circuit held that the plain reading of the Wire Act expressly qualifies “the nature of the gambling activity as that related to a ‘sporting event or contest.’”<sup>83</sup> However, in *United States v. Lombardo*<sup>84</sup> the United States District Court for the District of Utah expressly rejected the Fifth Circuit’s reasoning and applied the Wire Act to cover all forms of gambling.<sup>85</sup>

In 2011, however, the Office of Legal Counsel for the Department of Justice (DOJ), Criminal Division released a memorandum that sought to clarify its position, concluding, “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside the reach of the Wire Act.”<sup>86</sup> With this new, clearer interpretation of the Wire Act, the DOJ declined to address any potential conflict (or real conflict based on the decisions of the Fifth Circuit and District of Utah courts) between the Wire Act and UIGEA.<sup>87</sup> The memorandum was actually written in response to requests from Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets in-state, and reaffirms state authority over non-sports gambling.<sup>88</sup> Given its new interpretation, and since the lottery proposals put forward by Illinois and New York did not involve sporting events or contests, the DOJ concluded these uses would be

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<sup>82</sup> *In re MasterCard Int’l Inc.*, Internet Gambling Litig., 132 F. Supp. 2d 468 (E.D. La. 2001) *aff’d sub nom.* *In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002).

<sup>83</sup> *Id.*

<sup>84</sup> 639 F. Supp. 2d 1271, 1281 (D. Utah 2007).

<sup>85</sup> *Id.*

<sup>86</sup> DOJ Memo, *supra* note 4, at 1.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.*

permitted without running afoul of the Wire Act. Because the Wire Act no longer conflicts with the provisions of UIGEA that permit intrastate online gambling, states are free to implement intrastate online gambling schemes so long as they do not violate any other federal law (such as PASPA, the IHA, or the Indian Gaming Regulatory Act<sup>89</sup>). In addition, any state law needs to be explicit about authorizing the type of bet or wager, must be reasonably designed to prevent any person located out of the state from accessing the system, and to block access to minors.<sup>90</sup> The requirement to prevent any person located out of the state is not because any federal law might be violated, but rather it is to ensure that the person placing the bet is in a state where it is legal to do so. For example, both Pennsylvania and New Jersey permit traditional casino gambling, but only New Jersey (as of the writing of this article) permits online wagering. If a person in Pennsylvania were to place a bet online on a New Jersey casino's website, that person would be violating both Pennsylvania and New Jersey law.

Under our system of dual federalism, the authority to regulate intrastate gambling is wholly within the sphere of the states. Where the federal government has enacted legislation that touches on gambling, it sought to combat organized crime. The federal government has never had the clear and manifest intent to displace state sovereignty.

## B. STATE GAMBLING LAWS

To illustrate the power that the states have over the regulation of gambling within their borders, it is useful to look at the history of gambling in one state. New Jersey's history of gambling is illustrative.

New Jersey has a long history with legalized gaming.<sup>91</sup> Presently in New Jersey, any form of gambling must be

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<sup>89</sup> 25 U.S.C. §§ 2701-2721 (1988). The Indian Gaming Regulatory Act (IGRA) regulates gambling on Native American lands. *Id.*

<sup>90</sup> STOP PREDATORY GAMBLING, *supra* note 6.

<sup>91</sup> For a history of gaming law in New Jersey, see Carll & Ramagosa, Inc. v. Ash, 23 N.J. 436, 129 A.2d 433 (1957). In *Carll & Ramagosa*, the court

approved by a statewide referendum, and not merely by an act of the state legislature.<sup>92</sup> Pari-mutuel wagering on horse racing was approved in 1939<sup>93</sup> and New Jersey voters next legalized bingo, with nearly seventy percent of voters voting in favor in 1953.<sup>94</sup> In 1969, New Jersey voters overwhelmingly voted to legalize a state lottery, which garnered more than eighty percent of the vote.<sup>95</sup> In 1976, voters in the state were asked whether or not to allow casino gambling in Atlantic City, which, like the other proposals, passed with a majority of the popular vote, as well as sixteen of the twenty-one counties voting in support.<sup>96</sup>

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concluded that boardwalk games such as “ring the coke bottle” and “guess your weight and age” constituted gaming and violated the then very strict gaming laws that were in place. *Id.* Legalized gaming in New Jersey stretches back to colonial times, when lotteries were legalized in New Jersey to finance educational and religious institutions, as well as other causes. *Id.* People in New Jersey then soured on the idea of gambling, and the State Constitution that was adopted in 1844 included provisions prohibiting lotteries. *Id.* This was expanded in 1871 and “all wagers, bets or stakes, made to depend upon any race, or upon gaming by lot or chance or upon any lot, chance casualty or unknown contingent event whatever, shall be unlawful.” *Id.* Towards the end of the nineteenth century, the state legislature eased some of the anti-gaming regulations, but the people responded by adopting a constitutional amendment in 1897 that provided that no “gambling of any kind” shall be “authorized or allowed.” *Id.*

<sup>92</sup> See N.J.S.A. CONST., art. 4, § 7; see also Richard Lehne, *A Contemporary Review of Legalized Gambling in New Jersey*, L(2) J. RUTGERS U. LIBR. 57, 63 (1988), available at <http://ejbe.libraries.rutgers.edu/index.php/jrul/article/view/1678/3117>.

<sup>93</sup> Lehne, *supra* note 92, at 62. “Pari-mutuel wagering has existed for centuries; today, its principal forms are greyhound racing, horse racing, and jai-alai. Although similar to other types of gaming in many respects, pari-mutuels are notable because payouts are tied to the number of players and the amount of their bets.” JARVIS ET AL., *supra* note 19, at 153.

<sup>94</sup> Lehne, *supra* note 92, at 66.

<sup>95</sup> *Id.* at 80. The State sought to legalize the lottery in order to curb the illegal numbers games, where people placed bets on numbers that would be determined the next day. *Id.* The numbers game was heavily influenced by organized crime. *Id.*

<sup>96</sup> *Id.* at 86.

Finally, in 2011, voters in New Jersey voted to legalize sports gambling at New Jersey casinos and race-tracks, with nearly two-thirds of voters supporting the constitutional amendment.<sup>97</sup>

Because regulating intrastate gambling is a traditional police power reserved to the states, the various states have been free to enact, or not to enact, their own gambling schemes. This has led to wide variation in the type and severity of restrictions on gambling among the states. For instance, the state of Utah prohibits gambling in all forms in the state and amended its criminal code to broaden its definition of gambling to include Internet gambling.<sup>98</sup> The state of Hawaii also bans all forms of gambling.<sup>99</sup> However, forty-seven states and the District of Columbia permit some form of charitable gambling<sup>100</sup> and forty-three states and the District of Columbia offer a state-sanctioned lottery.<sup>101</sup> However, forty states<sup>102</sup> offer pari-mutuel wagering.<sup>103</sup> In those states permitting gambling, there are

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<sup>97</sup> *New Jersey Municipal Election Results*, STAR-LEDGER (Nov. 9, 2011, 3:55 PM), <http://www.nj.com/starledger/results-ballot/>. Since New Jersey is not exempted from PASPA, the constitutional amendment was enacted in violation to PASPA, which has led to litigation to enjoin the state from enforcing it. See discussion *supra* Section II.

<sup>98</sup> *2012 Legislation Regarding Internet Gambling or Lotteries*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/econ/2012-online-gambling-legislation.aspx> (last updated Feb. 7, 2013); see UTAH CODE ANN. 1953 § 76-10-1102 (West 2013).

<sup>99</sup> HAW. REV. STAT. § 712-1223 (2013).

<sup>100</sup> *Types of Gaming by State*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Feb. 1, 2015). Charitable gambling includes state-licensed bingo or 50/50 raffles. Tennessee, Hawaii, and Utah do not offer state sanctioned charitable gambling. *Id.*

<sup>101</sup> *Id.* The states of Alabama, Alaska, Hawaii, Mississippi, Nevada, Utah, and Wyoming do not offer state lotteries. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See JARVIS, *supra* note 19, at 153. "Pari-mutuel wagering has existed for centuries; today, its principal forms are greyhound racing, horse racing, and jai-alai. Although similar to other types of gaming in many respects, pari-mutuels

three types of commercial casinos. The first is the traditional stand-alone casino, like the ones that may be found in Las Vegas and Atlantic City.<sup>104</sup> Seventeen states have stand-alone commercial casinos.<sup>105</sup> The second type of commercial casino is relatively new and is known as racetrack casinos or racinos.<sup>106</sup> The third and final type of commercial casino is the Indian casino (Class II and Class III facilities) and is governed by the Federal Indian Gaming Regulatory Act.<sup>107</sup> Currently, 28 states have Indian casinos.<sup>108</sup>

Despite the diversity in gambling schemes<sup>109</sup> among the states, the concern over federalism following the WTO decision is primarily focused on state Internet gambling laws that would permit purely intrastate gambling online. These laws would permit bets to be placed online so long as the bettor is located within a state that permits online gambling and the servers that accept the bet are also located

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are notable because payouts are tied to the number of players and the amount of their bets.” *Id.*

<sup>104</sup> Such as the Revel Casino in Atlantic City or the Venetian Hotel and Casino in Las Vegas.

<sup>105</sup> *Types of Gaming by State*, *supra* note 100. These states include Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota, and West Virginia. *Id.*

<sup>106</sup> *Id.* Currently 14 states have racetrack casinos, including Delaware, Florida, Indiana, Iowa, Louisiana, Maine, Maryland, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, and West Virginia. *Id.* A racetrack casino, or racino, is a combination of a traditional stand-alone casino and a horse racetrack, such as Parx in Bensalem, PA and Dover Downs in Delaware.

<sup>107</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988).

<sup>108</sup> *Types of Gaming by State*, *supra* note 100.

<sup>109</sup> I use the term “gambling scheme” to mean the state-sponsored regulatory scheme enacted in the various states that govern and define the scope of gambling in a state.

within that same state.<sup>110</sup> Currently, Georgia and Illinois offer the sale of lottery tickets online, and Florida and Massachusetts have introduced legislation to do the same.<sup>111</sup> To date, only three states have authorized intrastate online casino-type gambling: Nevada,<sup>112</sup> Delaware,<sup>113</sup> and New Jersey.<sup>114</sup> In addition, legislation was introduced in 2012 and 2013 in several other states concerning intrastate online gambling.<sup>115</sup> Several states, including Washington,

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<sup>110</sup> For example, when online gambling went live in New Jersey in November 2013, a law student at Rutgers-Camden would be able to place a bet online through the online-betting website run by the Borgata if they are studying in the law library, but a Rutgers law student studying from their apartment in Center City Philadelphia would not be permitted to do so.

<sup>111</sup> *2013 Legislation Regarding Internet Gambling or Lotteries*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/econ/2013onlinegaminglegislation.aspx> (last updated Dec. 20, 2013).

<sup>112</sup> NEV. REV. STAT. § 463.160 (2013). Online gambling in Nevada is restricted to poker.

<sup>113</sup> DEL. CODE ANN. TIT. 29, § 4805 (2013). Online gambling in Delaware includes lottery and table games offered in Delaware casinos.

<sup>114</sup> N.J. STAT. ANN. §§ 5:12-95.17-5:12-95.33 (West 2014). Online gambling in New Jersey includes the table games offered in New Jersey casinos.

<sup>115</sup> See *2012 Legislation Regarding Internet Gambling or Lotteries*, *supra* note 98. H.B. 781 was enacted in Vermont and calls for a study on the option of selling lottery tickets online. See also *2013 Legislation Regarding Internet Gambling or Lotteries*, *supra* at note 111. S.B. 51 and S.B. 678 were introduced in California, which if passed, would authorize a framework to permit intrastate Internet gambling. Hawaii, which bans all gambling, introduced two bills that would have commissioned a study on the impact of legalized gambling (including online gambling) and would have authorized Internet gambling respectively. Both bills failed deadlines. S.S.B. 1068 in Iowa would allow licensed gambling operators to apply for a license to conduct poker online. H.C.R. 3 in Louisiana calls for a study on the feasibility of implementing Internet gambling in the state. H.B. 254 in Mississippi, which would have created the Mississippi Lawful Internet Gaming Act of 2013, died in committee. H.B. 1235 and B.H. 1404 have been referred to committee in Pennsylvania; one bill would provide for Internet gambling, while the other would prohibit it. Texas legislators introduced several bills to authorize Internet gambling, which

Illinois, Louisiana, Montana, and Oregon expressly criminalize online gambling.<sup>116</sup>

### C. WHERE DOES INTRASTATE INTERNET GAMBLING FIT?

As previously discussed, it is clear from the legislative histories and purposes of both federal and state laws that traditional casino-based gambling, pari-mutuel gambling, charitable gambling, and lotteries are wholly within the police power of the state. The important question is: where does intrastate Internet gambling fit? Should it fall under the federal scope of authority, in which case, the federal government would be able to enforce international law over Internet gambling? Or should it fall under the state sphere, in which case the federal government must defer to the authority of the states? In the IHA, Congress concluded that intrastate gambling should be dealt with by the states saying the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.<sup>117</sup>

Intrastate Internet gambling should be placed wholly within the scope of state authority. It shares many of the same characteristics as the other forms of gambling that fall under state purview. The bets are placed and received within the same state. You must be physically present within the state to gamble. The licensing and regulatory enforcement is overseen by state agencies. Internet gambling is related to the states' power to generate revenue. Lastly, the DOJ re-interpretation of the Wire Act and the UIGEA make clear that it is up to the states whether to implement intrastate Internet

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bills have been referred to committee. H.B. 1824 in Washington, scheduled for a public hearing, reduces the penalty for a person conducting unlawful Internet gambling in their residence for recreational purposes.

<sup>116</sup> See, e.g., 720 ILL. COMP. STAT. 5/28-1(a)(12)(2013); WASH. REV. CODE § 9.46.240 (2013); LA. REV. STAT. ANN. § 14:90.3(A) (2013); MONT. CODE ANN. §§ 23-5-112(20)(e), -152(1)(b) (2013); OR. REV. STAT. § 167.109 (2013).

<sup>117</sup> 15 U.S.C. § 3001 (a)(1) (2006).

gambling schemes and the rationales that explained prior federal intervention (fighting organized crime and protecting the integrity of sporting events) do not apply. While the question remains unresolved, it seems clear that intrastate Internet gambling should fall wholly within the state police power. Since the regulation of intrastate Internet gambling falls within the scope of state authority, the validity of these laws, and any future laws enacted by states, is now in question following the decision of the Appellate Body of the WTO.

### III. WTO DECISION

The WTO is an international organization that provides a forum for negotiating agreements aimed at reducing obstacles to international trade and promoting economic growth and development.<sup>118</sup> In the Marrakesh Declaration of 1994, which established the WTO and replaced the GATS, the objectives of the signatories were expressed in three statements:

- Providing a stronger and clearer legal framework for the conduct of international trade, including a more effective and reliable dispute settlement mechanism;
- Reducing tariffs globally by 40 percent, promulgating wider market-opening agreements on goods, and increasing predictability and security through a major expansion in the scope of tariff commitments; and
- Establishing a multilateral framework of disciplines for trade in services and for the protection of trade-related intellectual property rights, as well as reinforced

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<sup>118</sup> *What is the WTO-Overview*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last visited Feb. 1, 2015).



multilateral trade provisions in agriculture, textiles, and clothing.<sup>119</sup>

Based in Geneva, Switzerland, the WTO is comprised of 159 member nations and observers, including the United States and Antigua.<sup>120</sup> In 2003, the Caribbean island nation of Antigua and Barbuda (“Antigua”) filed a claim against the United States with the WTO.<sup>121</sup> The claim was made in response to a court case, *United States v. Cohen*,<sup>122</sup> in which an American citizen in Antigua was prosecuted and convicted under the Wire Act for maintaining an Internet gambling website enabling online gambling for citizens in the United States.<sup>123</sup> The *Cohen* case had a tremendous impact on the Antiguan economy. The remote gaming industry in Antigua had been the country’s second largest employer, employing at its height over 4,000 people, and was estimated to be worth more than US\$3.4 billion to the Antiguan economy.<sup>124</sup> Following the *Cohen* case, fewer than 500 people are employed in the gambling sector in Antigua.<sup>125</sup>

Article I of the General Agreement on Trade in Services (GATS) lists four different kinds of supply that each signatory member of the WTO must make available to other members, including:

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<sup>119</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

<sup>120</sup> *Members and Observers*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Feb. 1, 2015).

<sup>121</sup> *Dispute DS285*, *supra* note 10.

<sup>122</sup> 260 F.3d 68 (2d Cir. 2001).

<sup>123</sup> *Id.*

<sup>124</sup> *Antigua to Pursue Sanctions Against the United States in Decade-Long Trade Dispute*, PR NEWSWIRE (Jan. 28, 2013), <http://www.prnewswire.com/news-releases/antigua-to-pursue-sanctions-against-the-united-states-in-decade-long-trade-dispute-188646561.html>.

<sup>125</sup> *Id.*

(1) cross-border supply, from the territory of one member into that of another; (2) consumption abroad, in which the service is supplied in the territory of one member to the consumer of another; (3) supply through commercial presence, in which the service supplier is legally established in the export market; and (4) supply through the movement of natural persons, meaning the temporary presence of individuals without legal personality to supply services in a Member's market.<sup>126</sup>

In addition to the GATS, each signatory member of the WTO created a specific schedule of commitments they were willing to make regarding each individual sector. When it created its Schedule of Specific Commitments, the United States included "other recreational services" but specifically excluded "sporting" activities from its schedule.<sup>127</sup> The United States could have specifically excluded gambling and gambling services from its schedule, which Canada and about ten other countries did when they became signatory members, but it did not.<sup>128</sup>

In its request for a Panel determination,<sup>129</sup> Antigua claimed that certain U.S. measures applied by the federal government and state governments affect "the cross-border

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<sup>126</sup> General Agreement on Trade in Services, Jan. 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

<sup>127</sup> Roysen, *supra* note 38.

<sup>128</sup> *Clash in the Caribbean: Antigua and U.S. Dispute Internet Gambling and GATS, An Interview with Joseph M. Kelly*, 10 UNLV GAMING RES. & REV. J. 1, 16 (2006).

<sup>129</sup> Pursuant to Article 4 of Annex 2, "Understanding on Rules and Procedure Governing the Settlement of Disputes", of the Agreement Establishing the World Trade Organization, a member may request that a Panel be formed to resolve a dispute brought before the WTO. Understanding on Rules and Procedure Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

supply of gambling and betting services” and that the cumulative effect of those measures is to “prevent the supply of gambling and betting services from another WTO Member to the United States on a cross-border basis.”<sup>130</sup> Antigua alleged that the United States was in violation of its obligations under the GATS,<sup>131</sup> as well as the U.S. Schedule of Specific Commitments annexed to the GATS.<sup>132</sup>

A Panel was formed in response to Antigua’s request to examine the complaint. On November 10, 2004, the Panel released its report.<sup>133</sup> The Panel found that the U.S. Schedule of Specific Commitments included specific commitments for gambling services under “other recreational services (except sporting).”<sup>134</sup> The Panel further found that three U.S. federal laws (the Wire Act, the Travel Act, and the IGBA) and the laws of four U.S. states (Louisiana, Massachusetts, South Dakota, and Utah) interfered with the cross-border supply of gambling, which is contrary to the United States obligations under the GATS.<sup>135</sup> Therefore, the Panel concluded that the United States “failed to accord services and service supplies of Antigua treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the U.S. Schedule, contrary to Article XVI:1<sup>136</sup> and Article

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<sup>130</sup> *Dispute DS285, supra* note 10.

<sup>131</sup> Specifically Articles II, VI, VIII, XI, XVI, and XVII of the GATS.

<sup>132</sup> *Dispute DS285, supra* note 10.

<sup>133</sup> Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS258/R (Nov. 10, 2004) [hereinafter Panel Report].

<sup>134</sup> *Id.* at 168.

<sup>135</sup> *Id.* at 227. More specifically, the Panel found that Articles XVI Parts 1 and 2 of the GATS, concerning market access, were violated.

<sup>136</sup> “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.” General Agreement on Trade in Services, *supra* note 126, pt. 3 art. XVI.

XVI:2<sup>137</sup> of the GATS.”<sup>138</sup> Lastly, the Panel found that the United States was not able to invoke the GATS exceptions provisions under Articles XIV(a)<sup>139</sup> and XIV(c)<sup>140</sup> of the GATS

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<sup>137</sup> “In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share- holding or the total value of individual or aggregate foreign investment.”

General Agreement on Trade in Services, *supra* note 126, at pt. 3 art. XVI.

<sup>138</sup> *Dispute DS285, supra* note 10.

<sup>139</sup> “[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order.” General Agreement on Trade in Services, *supra* note 126, art. XIV.

(finding that the laws at issue were not “necessary” for the protection of public morals).<sup>141</sup> The United States appealed the Panel decision on January 7, 2005, and Antigua cross-appealed on January 19, 2005.<sup>142</sup>

The Appellate Body (AB)<sup>143</sup> of the WTO took the appeal and released its decision on April 7, 2005.<sup>144</sup> The AB upheld the Panel’s finding that “gambling and betting services” is within the scope of “other recreational services (except sporting)” in the U.S. Schedule and that a “prohibition on the remote supply of gambling and betting services” is a violation under the GATS.<sup>145</sup> The AB reversed the Panel’s findings as to the state laws.<sup>146</sup> It is

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<sup>140</sup> “Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

- i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
- ii. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
- iii. safety.”

General Agreement on Trade in Services, *supra* note 126, art. XIV.

<sup>141</sup> Panel Report, *supra* note 133, at 271.

<sup>142</sup> *Dispute DS285*, *supra* note 10.

<sup>143</sup> Pursuant to Article 17 of Annex 2, “Understanding on Rules and Procedure Governing the Settlement of Disputes”, of the Agreement Establishing the World Trade Organization, there is a standing Appellate Body that reviews determinations of panels. Understanding on Rules and Procedure Governing the Settlement of Disputes, *supra* note 129, art. 17.

<sup>144</sup> Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter AB Report], available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=77750,57247&CurrentCatalogueIdIndex=1&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=77750,57247&CurrentCatalogueIdIndex=1&FullTextSearch=).

<sup>145</sup> *Id.* at 123.

<sup>146</sup> *Id.*

important to note that the AB reversed this portion of the decision because it determined that Antigua failed to make a *prima facie* case, not because WTO did not purport to have the authority to review these state laws. The AB upheld the Panel's finding that the United States "acts inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) by maintaining certain limitations on market access not specified in its Schedule."<sup>147</sup> However, the AB reversed the Panel's finding that the United States had not shown that the three federal statutes in question were "necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a), though the AB did uphold, on a narrower ground, the Panel's finding that the United States had failed to show that these measures satisfy the conditions of the chapeau of Article XIV.<sup>148</sup> Specifically, the AB was concerned that the IHA, which was amended in 2000 to permit states the option to allow bettors to place bets online, may negate the public morals exception because it permitted intrastate but not international online betting on horseracing.<sup>149</sup> Essentially, the AB gave the United States the option of permitting all online gambling or repealing/amending the IHA.<sup>150</sup>

The United States, however, has not responded to the findings of the AB by either amending or repealing the IHA or by attending negotiations conferences with Antigua. On March 30, 2007, the Panel concluded that the United States had failed to comply with the recommendations issued by the WTO.<sup>151</sup> This led Antigua to seek final WTO approval to carry out sanctions against the United States, in order to compel the U.S. to either comply or negotiate.<sup>152</sup> The

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<sup>147</sup> *Id.* at 124.

<sup>148</sup> *Id.* at 124-26. A *chapeau* is the introductory text in a treaty that broadly defines its principles, objectives, or goals.

<sup>149</sup> *Id.* at 119-20.

<sup>150</sup> STOP PREDATORY GAMBLING, *supra* note 6.

<sup>151</sup> *Id.*

<sup>152</sup> *Antigua to Pursue Sanctions Against the United States in Decade-Long Trade Dispute*, PR NEWSWIRE (Jan. 28, 2013),

remedy, which is provided for under WTO agreements, permits Antigua to suspend certain concessions and obligations under international law to the United States with respect to intellectual property rights.<sup>153</sup> The United States maintains that this is nothing more than “piracy” of intellectual property rights.<sup>154</sup> Antigua defends its actions as permissible under WTO agreements and simply a lawful suspension of intellectual property rights pursuant to a judgment of the WTO.<sup>155</sup> On January 28, 2013, the WTO authorized Antigua to suspend obligations as to intellectual property rights of Americans at a level not to exceed US\$21 million annually, which is the level that an arbitrator determined was the annual level of nullification or impairment of benefits accruing to Antigua.<sup>156</sup>

#### IV. FEDERALISM CONCERNS AND DISCUSSION

Although the WTO AB did not reach any specific state law in its ruling in the Antigua/United States matter, the issue could arise in the future if any other member nation of the WTO chooses to challenge the law with the WTO. Thus, the decision of the WTO has generated concern about the exercise of state sovereignty over intrastate online gambling.<sup>157</sup> Because the WTO found that the United States is committed to free trade in gambling services under the GATS and the U.S. Specific Schedule, it believes it has the power to scrutinize any limitation that federal or

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<http://www.prnewswire.com/news-releases/antigua-to-pursue-sanctions-against-the-united-states-in-decade-long-trade-dispute-188646561.html>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Dispute DS285, supra* note 10.

<sup>157</sup> STOP PREDATORY GAMBLING, *supra* note 6.

state laws place on access to foreign gambling websites.<sup>158</sup> As the AB ruled, limitations for the purpose of “protecting public morality or public order” may be permissible, but the limitations may not be applied in a way that unjustifiably discriminates among countries.<sup>159</sup>

Importantly—and potentially the most troubling for states’ rights—is that the WTO has appointed itself the arbiter of whether any differential treatment of gambling in federal or state law is justified or not. The WTO has asserted that the United States or the individual states cannot be inconsistent in placing restrictions on Internet gambling. States have long been in control of their gambling policies, but now, after this WTO decision, state laws might be challenged by WTO member nations if the state law authorizes intrastate Internet gambling, but not interstate gambling.<sup>160</sup> In addition to the IHA, which permits wagering on horse races across state lines, Tri-State, a conglomerate that links the lotteries of Maine, New Hampshire, and Vermont, allows bettors to wager across state lines on the Internet.<sup>161</sup> However, Tri-State and other multi-state lotteries (such as Mega Millions or Powerball) are still considered intrastate gambling because the bet (either on a horse or the purchase of a lottery ticket) takes place solely in one state. The DOJ has yet to prosecute the operators of Tri-State, and its operators

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*; see AB Report, *supra* note 144, at 18. The burden of proof would be on the United States to prove that the laws are necessary to protect its citizens from organized crime and underage gambling in the context of the services provided from Antigua, which are at issue in this dispute.

<sup>160</sup> James Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, DUKE L. & TECH. REV., No. 13, 17 (2004). Strictly intrastate gambling began in late 2013 in Nevada and New Jersey. Residents and people within the states’ respective borders would be permitted to gamble online with providers located in the state. They would not be permitted to gamble on websites based out-of-state or in another country, and people on other jurisdictions would not be permitted to gamble on Nevada’s or New Jersey’s sites.

<sup>161</sup> *Id.*



contend that it does not violate the Wire Act.<sup>162</sup> Furthermore, New Jersey, Delaware, and Nevada (the only states as of yet to have authorized intrastate online gambling) have explored creating interstate compacts.<sup>163</sup> These are only a few examples of state laws that could potentially be challenged in the WTO.

This raises a key question: should an international organization, to which the United States is a party, have the authority to scrutinize the laws of the individual states and impose sanctions on the United States if the states refuse to alter challenged laws? Unfortunately, the position of the WTO completely ignores the federalist structure of the United States. An affirmative answer to this question would be troubling to the democratic and federalist structure of the United States. The WTO is so far removed from the normal political process that individual American voters have essentially no power to influence or change internal WTO policies. Why then, should this unelected body, based across an ocean, be allowed to review the duly enacted laws passed by local politicians?

Even in instances where the federal government has chosen to legislate in the gambling policy field, it has usually preserved the notion of federalism with respect to intrastate gaming. Both the IHA and UIGEA give individual states the option to authorize certain types of betting schemes. The IHA permits interstate wagers only where lawful in each state involved, and permits each state to choose for itself whether to authorize the activity—though this activity is really intrastate gambling, since the bet is made and received in the same state.<sup>164</sup> UIGEA states that intrastate

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<sup>162</sup> *Id.* Tri-State would appear to violate the Wire Act even after its reinterpretation because it permits interstate, as opposed to intrastate online gambling.

<sup>163</sup> *Nevada/New Jersey Online Poker Compact “Likely” Next Year, Says MGM’s Murren*, ONLINE POKER REPORT (Aug. 7, 2013 10:16 PM), <http://www.onlinepokerreport.com/8068/mgm-online-poker-compacts/>.

<sup>164</sup> Michael Grunfeld, *Don’t Bet on the United States’s [sic] Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 477 (2007).

and intratribal Internet gambling is not “unlawful Internet gambling,” which is a clear conflict with the WTO’s position because the schemes would operate to the exclusion of foreign bettors and gambling service providers.<sup>165</sup> The Wire Act and other anti-organized crime statutes are meant to be used in conjunction with state criminal codes as prosecutorial and investigative tools. Even PASPA, which freezes the legislative field in the context of sports gambling, permitted states that met certain exemptions to either maintain existing sports gambling schemes, or to opt-in during a specified time period. What is clear from the case law and legislative histories is that intrastate gambling of all forms is exclusively within the domain of the states.

While foreign affairs is exclusively within the power of the federal government, the real issue here is the judicial transference of review.<sup>166</sup> There are simply some policy matters where there is a preference for the federal government to act, as opposed to each of the individual states. Foreign affairs is one of those policy areas. However, this is not the only constitutional issue at play here. Under the Constitution, treaties that have been ratified by the Senate are treated as federal law and take precedence over incompatible state laws per the Supremacy Clause.<sup>167</sup> The Supremacy Clause, however, ranks by order of authority the three types of federal law that would be supreme over state laws: (1) the Constitution; (2), the laws of the United States (i.e., those passed by Congress and signed by the President); and (3) treaties. Treaty obligations therefore still may not violate the Constitution. Arguably, the

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<sup>165</sup> *Id.* at 501.

<sup>166</sup> The President “shall have the power, by and with the advice and consent of the Senate, to make treaties.” U.S. CONST. art. II, § 2.

<sup>167</sup> “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.” U.S. CONST. art. VI.

Tenth Amendment<sup>168</sup> conflicts with the WTO's position that it has the power to review state laws. While this specific argument has not been tested, since no other country has yet to challenge a state law in the WTO, the Constitution does not grant the federal government the authority to transfer judicial review of state laws to an international organization with no authority to scrutinize state laws. The reach of international obligations over domestic law is thus unsettled.<sup>169</sup>

## V. CONCLUSION

In terms of gambling policy, the United States has reached a tipping point. With states desperate for additional sources of revenue and the DOJ's re-interpretation of the Wire Act, it is only a matter of time before more and more states authorize Internet gambling schemes. This expansion would take place even more quickly if the Supreme Court were to review and strike down PASPA, which is being challenged as violating the anti-commandeering doctrine and the equal state sovereignty doctrine. This will only increase the odds that another WTO member, seeking to get a piece of the expected revenue gains, will challenge a discriminatory state law. The power claimed by the WTO to scrutinize state laws completely ignores the federalist structure of the United States and runs afoul of the democratic processes that

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<sup>168</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

<sup>169</sup> See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 7 (2014), available at <http://www.fas.org/sgp/crs/misc/RL32528.pdf>. "The extent to which Congress may intrude upon traditional state authority through treaty- implementing legislation remains unclear, though there is reason to believe that it could not enact legislation that infringed upon the essential character of U.S. states, such as through legislation that commandeered state executive and legislative authorities." *Id.* at 9. The Supreme Court has heard oral arguments on a case, *Bond v. United States*, where it must consider the extent to which the Tenth Amendment acts as a constitutional constraint upon Congress's ability to enact treaty-implementing legislation.

underlie our federal republic. To allow the WTO this power would be a serious threat to state sovereignty, which has already steadily been stripped away by an expansive, and at times coercive, federal government. There has been a recent resurgence of Tenth Amendment litigation and success,<sup>170</sup> and states might find success by arguing that allowing the WTO to review state laws would violate both the federalist structure of our nation and the Constitution.

As of now, the federal government has given no indication that it will permit all Internet gambling or repeal/amend the IHA, as the WTO has demanded. Instead of continued non-compliance with the AB decision, which could hurt the reputation of the United States, some have argued that the United States could exercise its right to withdraw from its GATS commitments pursuant to Article XXI in order to renegotiate its specific commitments in its schedule with the WTO.<sup>171</sup> Whichever option the federal government chooses, in the interest of parties involved, the decision should be made as soon as possible as more and more states look to enact intrastate online gambling schemes. On March 26, 2014, the “Restoration of America’s Wire Act” bill was introduced in both houses of Congress, which would reject the DOJ’s reinterpretation of the Wire Act and would extend the Wire Act to prohibit all online gambling.<sup>172</sup> While it is unlikely this bill will become law, the need to define the scope of state authority over intrastate gambling is ever greater. This bill would exempt “fantasy sports” and horse racing, which would still leave the United

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<sup>170</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>171</sup> Roysen, *supra* note 38, at 890. This would require the United States to pay compensation to any party affected by the withdrawal from the specific commitment.

<sup>172</sup> Restoration of America’s Wire Act, H. R. 4301, 113th Cong. (2014), available at <http://www.govtrack.us/congress/bills/113/HR4301>.

States in violation of the GATTS.<sup>173</sup> The stakes here are just too high to leave to chance.

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<sup>173</sup> Anna Palmer & Burges Everett, *Lindsey Graham Does Sheldon Adelson a Solid on Online Gambling*, POLITICO (Mar. 19, 2014, 4:17 PM), <http://www.politico.com/story/2014/03/lindsey-graham-sheldon-adelson-internet-gambling-104825.html>.