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**And They're Off:  
The Legality of Interstate Pari-Mutual  
Wagering and Its Impact on the  
Thoroughbred Horse Industry**

by

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# NOTES

## And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry

BY M. SHANNON BISHOP\*

### INTRODUCTION

Millions of people all over the world place wagers every day. Perhaps the most common form of wager is the kind placed on the stock market. Analysts in countries spanning the globe spend their careers trying to predict when the market will rise and fall, and where they can invest their money to yield the highest return. Some contend that wagering on sporting events such as thoroughbred horseraces is “[n]o different than the way people bet on stocks with options.”<sup>1</sup> The similarity between the two has led some to conclude that wagering on sporting events is “just like the stock market, without the fancy address and the pretension.”<sup>2</sup> The Commission on the Review of the National Policy Toward Gambling found it a “simple, overriding premise”<sup>3</sup> that “[g]ambling is inevitable. No matter what is said or done by advocates or opponents of

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<sup>1</sup> *60 Minutes: Any Given Sunday; Antigua Online Gambling Company's Legitimacy Being Tested in US Court Case* (CBS television broadcast, Jan. 7, 2001) [hereinafter *60 Minutes*].

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

<sup>3</sup> COMM'N ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 1 (1976).

gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.”<sup>4</sup>

Thoroughbred horseracing is a sport rich with tradition and class. Racing is an industry that “includes gambling, sport, recreation and entertainment and is built upon an agricultural base that involves the breeding and training of the horses.”<sup>5</sup> Many fans attending the races place a wager on the horse whose name they most like, or choose the jockey whom they think can ride the best, or pick a trainer who has had the best luck on a given day. Often, racing fans place bets on races that occur at the track where they place their bets, and then go watch the race live on the rail. Other times, fans will place a wager on a race that occurs in another state and watch the race on a television screen, a practice called simulcasting.<sup>6</sup> The bets of this latter group constitute interstate pari-mutuel wagering, the validity of which has been called into question in recent years.

Congress recognized, when it enacted the Interstate Horseracing Act (“IHA”) in 1978, that pari-mutuel wagering on horseracing is a “significant industry which provides substantial revenue to the States through direct taxation . . . , provides employment opportunities for thousands of individuals, and contributes favorably to the balance of trade.”<sup>7</sup> Since the beginning of racing and even since Congress passed the IHA in 1978, the thoroughbred industry has grown dramatically and has taken advantage of the many technological advancements that have been made. Among these advancements is the ability to quickly send information about horses, including wagering information, across state lines. This can be achieved in a myriad of ways, including by fax machine, by telephone and, most recently, via the Internet.<sup>8</sup> As the thoroughbred racing industry continues to promote this popular sport by allowing more fans the opportunity to participate and engage in interstate wagering, it must proceed cautiously because the legality of interstate pari-mutuel wagering via telephone or the

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<sup>4</sup> *Id.*

<sup>5</sup> *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 59 (2000) [hereinafter *Hearing*] (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>6</sup> Eighty percent of money wagered on horseracing is placed on simulcast races broadcast from another state. Mike Bruner, *Net Gambling Ban Falls Short Again* (Dec. 19, 2000), at <http://www.msnbc.com/news/472179.asp>.

<sup>7</sup> S. REP. NO. 95-1117, at 4 (1978), reprinted in 1978 U.S.C.C.A.N. 4144, 4147.

<sup>8</sup> See Andrew Beyer, *In a Time of Transition, the State of Horse Racing Will Be Determined by the States*, WASH. POST, Oct. 11, 2000, at D6.

Internet has not been firmly established.<sup>9</sup> In the words of avid racing fan and columnist Andrew Beyer, “[t]he racing industry has to tiptoe through political minefields” in offering interstate pari-mutuel wagering to its fans via new technology.<sup>10</sup>

Although interstate pari-mutuel wagering has occurred for decades with the federal government’s approval and encouragement,<sup>11</sup> the Department of Justice has recently taken the position that interstate pari-mutuel wagering violates the Interstate Wire Act, indicating that the horseracing industry proceeds in its business at its own risk.<sup>12</sup> The precipitating factor in the Justice Department’s new position may be the advent and explosion of wagering over the Internet, a medium that poses formidable regulatory problems for governments.<sup>13</sup> If Internet sites engage in illegal activities, legal authorities cannot go chain the doors of the cyberspace site, as they would the doors of any other illegally operating business.<sup>14</sup> Regardless of the rationale behind the Justice Department’s about-face, the issue whether interstate pari-mutuel wagering is legal—be it via the Internet, via the telephone, or by simulcast—is unsettled.<sup>15</sup>

<sup>9</sup> See *infra* notes 61-165 and accompanying text; see also *Hearing, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

<sup>10</sup> Beyer, *supra* note 8.

<sup>11</sup> Letter from Gregory C. Avioli, Deputy Comm’r & C.O.O., Nat’l Thoroughbred Racing Ass’n, & James J. Hickey, Jr., President, Am. Horse Council, to W.J. Tauzin, Chairman, Telecomm., Trade & Consumer Prot. Subcomm. of the House Commerce Comm. 1 (June 20, 2000).

<sup>12</sup> See *Hearing, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

<sup>13</sup> 145 CONG. REC. S3144 (daily ed. March 23, 1999) (statement of Sen. Kyl). From the beginning of time, societies have sought to prohibit most forms of gambling. There are reasons for this—and they are especially applicable to gambling on the Internet today. . . .

. . . .

As Bernie Horn, the Executive Director of the National Coalition Against Legalized Gaming, testified . . . : “The Internet not only makes highly addictive forms of gambling easily accessible to everyone, it magnifies the potential destructiveness of the addiction. Because of the privacy of an individual and his/her computer terminal, addicts can destroy themselves without anyone ever having the chance to stop them.”

<sup>14</sup> Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1023 (1999).

<sup>15</sup> 146 CONG. REC. E1304 (daily ed. July 24, 2000) (statement of Rep. Jackson-Lee) (“Under current federal law, it is unclear that using Internet to operate a gambling business is illegal.”).

While providing vast opportunities to the technologically savvy, the Internet also creates challenges for both state and federal legislatures. Very few state or federal statutes contemplate the use of the Internet because the technology is so new.<sup>16</sup> Computer wizards have not yet explained to governments how to master this new technology, which has left the Internet a boundless medium free from regulation.<sup>17</sup> While the number of states authorizing the use of telephones to place interstate wagers has grown, very few states have amended their statutes to encompass wagering on the Internet.<sup>18</sup>

Some countries have prohibited gambling via the Internet in a blanket manner, without considering the benefits to government and communities that the new technology could create.<sup>19</sup> Other governments, such as Australia, have chosen to take time to evaluate the climate for Internet

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<sup>16</sup> See Anthony N. Cabot, *Study Materials for Internet Gaming: Domestic and International Developments*, in *THE GAMING INDUSTRY: CURRENT LEGAL, REGULATORY, AND SOCIAL ISSUES* 179, 183 (ALI-ABA Course of Study 2000); see also Mark G. Tratos, *Gaming on the Internet III: The Politics of Internet Gaming and the Genesis of Legal Bans or Licensing*, in *1 FOURTH ANNUAL INTERNET LAW INSTITUTE* 711, 758 (Ian C. Ballon et al. eds., 2000) [hereinafter Tratos, *Gaming III*] (“Legislation moves slowly. The Internet does not.”).

A few federal statutes do contemplate regulation and control of content on the Internet. See, e.g., 15 U.S.C. § 6502 (1994); Communications Decency Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56, 133 (codified as amended in scattered sections of 47 U.S.C.) (selected provisions codified at 47 U.S.C. § 423 held unconstitutional by *Reno v. ACLU*, 521 U.S. 844 (1997)).

<sup>17</sup> See Mark G. Tratos, *Gaming on the Internet II, the Sequel: Will Greed Create or Kill the Expansion of Virtual Casinos?*, in *1 FOURTH ANNUAL INTERNET LAW INSTITUTE*, supra note 16, at 673, 703-04 [hereinafter Tratos, *Gaming II*]; Tratos, *Gaming III*, supra note 16, at 752. The vast and unregulated nature of the Internet has led at least one court to equate it with the “Wild West.” *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 463 (D. Mass. 1997).

<sup>18</sup> Ten states authorize account wagering by telephone. Letter from Gregory C. Avioli & James J. Hickey, Jr. to W.J. Tauzin, supra note 11, at 2. On the other hand, only two states have enacted statutes regarding Internet gambling. Peter Brown, *Regulation of Cybercasinos and Internet Gambling*, in *1 FOURTH ANNUAL INTERNET LAW INSTITUTE*, supra note 16, at 607, 615-18. Each of these two states, Louisiana and Nevada, generally prohibit Internet gambling while making a specific exception for off-track pari-mutual wagering. LA. REV. STAT. ANN. § 14:90.3 (West Supp. 2001); NEV. REV. STAT. §§ 465.091 - 465.094 (2000).

<sup>19</sup> Cabot, supra note 16, at 183. The United States attempted to prohibit gambling on the Internet in a blanket manner through Senate Bill 692. The bill did not pass. See *infra* note 61.

gaming and possibly regulate the industry.<sup>20</sup> Rather than squander the opportunity for a profitable and ethical new industry by full prohibition, the United States government should lease the newly-available technology and provide a safe environment for the industry. Several technological advances enable close monitoring and regulation,<sup>21</sup> which would allow governments to set limits on an Internet system that the world has heretofore recognized as boundless.

Part I of this Note sets the stage for understanding the legality of state-authorized interstate wagering by explaining the mechanics of a pari-mutuel wagering system and account wagering.<sup>22</sup> Part II discusses the implications of federal law on interstate wagering, including the influence of the Interstate Wire Act of 1961 and the Interstate Horseracing Act of 1978.<sup>23</sup> Part III analyzes the interplay between the federal government's commerce power and the states' historic police power to handle their own gambling policy.<sup>24</sup> Finally, Part IV evaluates the policy considerations implicated when determining how best to handle the explosive and potentially vast nature of wagering on the Internet.<sup>25</sup>

## I. MECHANICS OF THE PARI-MUTUEL SYSTEM AND ACCOUNT WAGERING

When a person attends a racetrack and places a bet on a horse race, the bet is different than an individual's bet on the blackjack table at a casino.<sup>26</sup> Horseracing employs a pari-mutuel system, in which "bettors wager against

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<sup>20</sup> Brown, *supra* note 18, at 648-50; Tratos, *Gaming II*, *supra* note 17, at 694-96. Australia recently placed a moratorium on the issuing of licenses for Internet gambling. Annabel Crabb, *Anger Over Net Bet Ban*, THE AGE (Dec. 7, 2000), <http://www.theage.com.au/news/2000/12/07/FFX45GCQEGC.html>.

<sup>21</sup> See *infra* notes 40-51 and accompanying text.

<sup>22</sup> See *infra* notes 26-60 and accompanying text.

<sup>23</sup> See *infra* notes 61-123 and accompanying text.

<sup>24</sup> See *infra* notes 124-92 and accompanying text.

<sup>25</sup> See *infra* notes 193-209 and accompanying text.

<sup>26</sup> In casino games, such as blackjack, the house is simultaneously financing the game as well as acting as a participant. ROGER DUNSTAN, CAL. RESEARCH BUREAU, GAMBLING IN CALIFORNIA I-6 (1997), <http://www.library.ca.gov/CRB/97/03/97003a.pdf> (part one), <http://www.library.ca.gov/CRB/97/03/97003b.pdf> (part two), <http://www.library.ca.gov/CRB/97/03/97003c.pdf> (part three). Since it acts as a participant, the house has an interest in who wins. *Id.* In contrast, the house in a horserace receives the same return regardless of who wins, so it is entirely disinterested in the outcome. See *infra* notes 27-30 and accompanying text.

one another instead of against the 'house.'"<sup>27</sup> For pari-mutuel wagering, the money bet on a race is pooled, and approximately eighty percent is returned to bettors who won the race.<sup>28</sup> The remaining twenty percent, the "takeout," is distributed among state and local government, the horsemen, and the racetrack owners.<sup>29</sup> The percentage of "takeout" varies between states.<sup>30</sup> Whether a fan bets from the track or from an off-track betting site, he or she can easily obtain information about what the takeout at a particular track is by looking in the front of the racing program.<sup>31</sup>

The pari-mutuel system is set up and operated in a way that gives participants convenient access to information about the race, including the odds of a horse winning.<sup>32</sup> The track prints morning line odds and posts them prior to betting. These odds are a "forecast of how it is believed the betting will go in a particular race."<sup>33</sup> The odds then change as bettors begin to place wagers against each other.<sup>34</sup> These changes are displayed on the tote board, and convey information about how others are betting on the race and how those bets will affect payout on a winning ticket.<sup>35</sup> Additionally, racing programs provide fans with extensive information about a given horse's past performance, any medication the horse will take before the race, the weight of the jockey, and the pedigree of the horse.<sup>36</sup> The overall

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<sup>27</sup> *Hearing, supra* note 5, at 60 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>28</sup> *Id.*

<sup>29</sup> Stephen A. Zorn, *The Federal Income Tax Treatment of Gambling: Fairness or Obsolete Moralism?*, 49 *TAXLAW* 1, 27 n.149 (1995); NAT'L THOROUGHBRED RACING ASS'N, GLOSSARY: HORSE RACING TERMINOLOGY S-T, at <http://www.ntraracing.com/press/glossary/glos-st.html> (last visited May 7, 2001).

<sup>30</sup> *Hearing, supra* note 5, at 60 (statement of Stephen Walters, Chairman, Oregon Racing Commission). For example, the takeout is 15% in New York and Florida, 14% in California, Illinois, Kentucky and Massachusetts, 14½% in New Jersey, 13% in Maryland, and 12% in Delaware. TOM AINSLIE, *AINSLIE'S COMPLETE GUIDE TO THOROUGHBRED RACING* 55 (1968).

<sup>31</sup> *Hearing, supra* note 5, at 60 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>32</sup> *Id.*

<sup>33</sup> *Glossary of Terms*, KEENELAND, at <http://www.keeneland.com/liveracing/glossary.asp> (last visited May 24, 2001).

<sup>34</sup> GERALD HAMMOND, *THE LANGUAGE OF HORSE RACING* 147 (Fitzroy Dearborn 2000) (1992).

<sup>35</sup> *Hearing, supra* note 5, at 60 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>36</sup> For an example of a racing program, see <http://www.equibase.com/products/ffsample2.pdf> (last visited Mar. 23, 2001).

goals of a system such as this are to uphold the integrity of the sport and mandate full disclosure to racing fans so that they have the most information possible to evaluate their chances of winning.<sup>37</sup> This goal is similar to that of the stock market, where securities laws mandate full disclosure of material facts regarding companies' activities so that investors have the most information possible to evaluate the success of their investment.<sup>38</sup>

#### A. Account Wagering and Simulcasting

There are two types of interstate pari-mutuel wagering: account wagering and simulcasting. The first of these two types, account wagering, is "the practice by which a customer of a licensed racing association or off-track betting corporation establishes an account with [an] account wagering facility and causes wagers to be made from that account by sending instructions to the facility operator."<sup>39</sup> Traditionally, account wagering has been conducted via telephone lines, but it is now possible to send the necessary instructions electronically.<sup>40</sup> Once a person opens an account with a licensed racing association or licensed off-track betting facility, he or she has the ability to place a wager without a physical presence at the race.

Simulcasting, on the other hand, occurs when a racetrack picks up a signal of a race being run at another track, often in another state, and racing fans at the racetrack or off-track betting facility place a wager on the race being run at the other location.<sup>41</sup> This leads to the next logical step, and the

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<sup>37</sup> *Hearing, supra* note 5, at 60 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>38</sup> 69 AM. JUR. 2D *Securities Regulation—Federal* §§ 64, 301 (1993). See generally RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 321-47 (5th ed. 1996) (discussing the efficient market theory and its requirement of information).

<sup>39</sup> Memorandum from Gregory C. Avioli, Senior Vice President-Business Affairs for the National Thoroughbred Racing Association 2 (Aug. 3, 1999) (on file with author). Currently, ten states—Connecticut, Kentucky, Louisiana, Maryland, New Hampshire, New York, Nevada, Ohio, Oregon, and Pennsylvania—"have passed specific legislation authorizing account wagering by licensed facilities" within these states. Letter from Gregory C. Avioli & James J. Hickey, Jr. to W.J. Tauzin, *supra* note 11, at 2.

<sup>40</sup> Memorandum of Gregory C. Avioli, *supra* note 39, at 2 n.1.

<sup>41</sup> JOAN S. HOWLAND & MICHAEL J. HANNON, *A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS AND PARTICIPANTS* 156-57 (1998). New York, in 1970, became the first legislature to approve off-track wagering. *Hearing, supra* note 5, at 62 (statement of Stephen

crux of the issue this Note addresses—can a person who holds an account with or places a bet from a racing facility in one state (New York, for example) legally place a wager on a race that is run in another state (perhaps Oregon)? The Justice Department would say that the answer is no, because the wager violates the Interstate Wire Act.<sup>42</sup> However, under the Interstate Horseracing Act of 1978,<sup>43</sup> the answer seems to be yes. This is because account wagering is legal in both Oregon and New York.<sup>44</sup>

### B. *The Internet and Closed-Loop Subscriber-Based Systems*

An even more difficult question arises when contemplating interstate pari-mutuel wagering over the Internet. Society is less accustomed to the Internet than it is to the telephone, and the boundless nature of the Internet causes legislators to take pause to question the moral implications of allowing gambling online and to contemplate how to put reigns on the practice.<sup>45</sup> A system that allows anyone to hop on a computer and type in words that can take him to a website where he could place a wager without prior authorizations would not likely pass muster in Congress or meet societal standards.<sup>46</sup>

The form of Internet wagering that is most viable and most likely to meet societal ethical standards is a “closed-loop subscriber based system.”<sup>47</sup> The closed-loop subscriber-based system is designed to limit the “open nature of the World Wide Web environment.”<sup>48</sup> The system protects patrons by ensuring that operators adhere to the letter of state law regarding

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Walters, Chairman, Oregon Racing Commission).

<sup>42</sup> *Hearing, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division); *see also infra* note 65 and accompanying text.

<sup>43</sup> Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1994).

<sup>44</sup> N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1012 (McKinney 2000); OR. REV. STAT. § 462.142 (1999). A state dictates whether or not its citizens may place wagers on races that occur across state lines. 15 U.S.C. § 3004 (1994).

<sup>45</sup> *E.g.*, 145 CONG. REC. S3144 (daily ed. Mar. 23, 1999) (statement of Sen. Kyl).

<sup>46</sup> *See* 146 CONG. REC. E3104 (daily ed. July 24, 2000) (statement of Rep. Jackson-Lee).

<sup>47</sup> Letter from Stephen S. Walters, Chairman, Oregon State Racing Commission, to Bill McCollum, Chairman, Crime Subcommittee of House Committee on Justice 1 (Apr. 3, 2000) (on file with author).

<sup>48</sup> *Id.* at 2.

pari-mutuel wagering, as well as by ensuring that those placing wagers are of legal age and are qualified to participate.<sup>49</sup> In Oregon, where closed-loop subscriber-based systems are used to facilitate pari-mutuel wagering, the system “precludes businesses or entities not licensed and regulated by state governments from operating [a pari-mutuel wagering site].”<sup>50</sup> The system allows states to control who may offer wagering services and who may participate in placing a wager.<sup>51</sup> Oregon has strict requirements for pari-mutuel wagering operators, and the Oregon Racing Commission keeps an office on-site at each racing facility to ensure that operators remain in compliance with state law requirements.<sup>52</sup>

As for those who use the operator’s services, only registered members may sign on to the site.<sup>53</sup> To register for the Internet wagering services, the applicant must complete a strict application process where she supplies verifiable proof of age, identity, and residency.<sup>54</sup> The applicant must prove she is of legal age by submitting photo identification and a verification of age in a notarized writing.<sup>55</sup> Upon receipt of the requisite authentication, a blind confirmation letter is sent to the address used to open the account.<sup>56</sup> These restrictions enable the wagering facility to prohibit those who are not lawfully allowed to place a wager from doing so.<sup>57</sup> A non-subscriber would either be barred from the website entirely or would be able to get only as far as the secure login page, which requires an account number and PIN security information.<sup>58</sup> This system is similar to procedures the financial industry uses for online trading and online banking.<sup>59</sup>

While the Internet presents society with many opportunities, it also creates many dilemmas over how to ensure that the technology is not misused. Given the mechanics of how wagering facilities operate and protect themselves, as well as issues raised by Internet capability, it becomes critical to examine how federal laws come to bare on interstate pari-mutuel wagering. This examination will illustrate that the horseracing

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2-4.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 3-4.

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

<sup>56</sup> *Id.*

<sup>57</sup> Unauthorized persons include underage people and individuals from states that do not authorize interstate pari-mutuel wagering.

<sup>58</sup> Letter from Stephen S. Walters to Bill McCollum, *supra* note 47, at 2.

<sup>59</sup> *See id.*

industry's efforts to offer racing and wagering to an increased number of fans through the Internet not only complies with federal law, but that the industry's efforts also further Congress's intent to encourage legal interstate pari-mutuel wagering, a viable and beneficial industry.<sup>60</sup>

## II. RELEVANT FEDERAL LAWS<sup>61</sup>

Due to the novelty of Internet technology, there is little legislation specifically contemplating the regulation of Internet wagering.<sup>62</sup> However, in a letter to Senate Judiciary Committee member Patrick Leahy, the Department of Justice acknowledged that physical activity and cyberactivity should be treated in the same way.<sup>63</sup> The Acting Assistant Attorney General noted that "legislation should be technology-neutral."<sup>64</sup> Consequently, if interstate pari-mutuel wagering via a telephone line is legal, then wagering via an Internet connection should also be legal.

When assessing the legality of interstate pari-mutuel wagering, two federal statutes are directly relevant: the Interstate Wire Act of 1961<sup>65</sup> and the Interstate Horseracing Act of 1978.<sup>66</sup> A third, the Indian Gaming

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<sup>60</sup> See *supra* note 7 and accompanying text; *infra* notes 185-92 and accompanying text.

<sup>61</sup> In addition to the federal laws affecting interstate pari-mutuel wagering discussed below, Senator Jon Kyl of Arizona introduced a bill to prohibit Internet gambling completely. Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (2000). The Senate approved the bill in November 1999, including a provision that exempted the horseracing industry from the ban. *Id.* at S. 692. In the House, however, the bill fell short of the majority required for passage. H.R. 3125. The horseracing industry supported Kyl's bill because of its exemption for the racing industry, as it would have firmly established the legitimacy of interstate pari-mutuel wagering on horseracing, which the Justice Department's position currently calls into question. It is unclear whether Kyl or other legislators will try to introduce similar legislation in the 107th Congress. See 145 CONG. REC. S3144 (daily ed. Mar. 23, 1999) (statement of Sen. Kyl).

<sup>62</sup> Only two states, Louisiana and Nevada, have enacted statutes that cover Inter-net wagering. See *supra* note 18. With the failure of last year's Internet Gambling Prohibition Act, no federal statute specifically covers Internet gambling. Brown, *supra* note 18, at 627.

<sup>63</sup> Letter from Jon P. Jennings, Acting Assistant Attorney General, U.S. Department of Justice, to Patrick J. Leahy, Ranking Minority Member, Committee on the Judiciary 1 (June 9, 1999) (on file with author).

<sup>64</sup> *Id.*

<sup>65</sup> Interstate Wire Act of 1961, 18 U.S.C. § 1084 (1994).

<sup>66</sup> Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1994).

Regulatory Act,<sup>67</sup> while not directly relevant, provides valuable insight into congressional attitudes toward gambling and serves as useful analogous authority.

#### A. *The Interstate Wire Act of 1961*

Congress enacted the Interstate Wire Act of 1961 to aid the states “in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities.”<sup>68</sup> Congress’s purpose in doing so was “to prohibit gambling activities from crossing state lines and to combat gambling operations controlled and managed by organized crime.”<sup>69</sup> To effectuate this purpose, the Wire Act criminalizes the use of a “wire communications facility”<sup>70</sup> to place a sports wager between states or from a state to a foreign nation.<sup>71</sup> The Act seeks to

<sup>67</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994).

<sup>68</sup> H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631.

<sup>69</sup> Seth Gorman & Antony Loo, Comment, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667, 670 (1996) (citing H.R. REP. NO. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631).

<sup>70</sup> “Wire communication facility” is defined as:

any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

18 U.S.C. § 1801 (1994).

<sup>71</sup> *Id.* § 1084. In its entirety, the Wire Act provides as follows:

(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 for 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under and laws of any State.

punish only those engaged in the “business of betting or wagering,”<sup>72</sup> not mere recreational or casual bettors.<sup>73</sup>

Despite its general prohibition against using wire communications facilities to place wagers on sporting events, the Wire Act does not criminalize all such conduct. The Act expressly exempts “the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests,”<sup>74</sup> as well as the transmission of information assisting in the placing of sports wagers between states where sports betting is legal.<sup>75</sup> The question then becomes whether a bettor who transmits information about a wager—which horse the bettor picks, how much money the bettor wants to place, and how the bettor wants the horse to finish—is giving information “assisting in the placing of bets or wagers,” which is exempted from the Act. The answer is far from clear, as no court has decided whether the information exception could apply to a person actually *placing* a bet on a horse race.<sup>76</sup> There is no indication that Congress intended for the Wire Act to handicap and render illegal

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(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

*Id.*

<sup>72</sup> *Id.* § 1084(a).

<sup>73</sup> *United States v. Baborian*, 528 F. Supp. 324, 328-29 (D.R.I. 1981) (holding that “Congress never intended to include a social bettor within the prohibition of the statute”).

<sup>74</sup> 18 U.S.C. § 1084(a).

<sup>75</sup> *Id.*

<sup>76</sup> See *infra* note 85; see also ANTHONY CABOT, *THE INTERNET GAMBLING REPORT* 249-50 (4th ed. 2001).

legitimate, state-regulated wagering operations. The Justice Department, however, has recently taken the position that pari-mutuel, interstate wagering violates the Wire Act.<sup>77</sup>

Because the Wire Act is a criminal statute, it must be construed narrowly and consistently with Congress's intent in passing the statute.<sup>78</sup> The legislative history states that Congress passed the Wire Act in order to "assist various states . . . in the enforcement of *their* laws pertaining to gambling, bookmaking, and like offenses."<sup>79</sup> The language of the Wire Act itself also indicates that Congress intended to assist states in enforcing state law.<sup>80</sup> If account wagering or simulcasting is legal under the laws of the two states involved in sending and receiving the wager, then the states need no federal assistance in enforcing their laws because no law has been broken. Simply put, if no crime occurs, no federal sanction becomes necessary to punish and deter the crime.

Additionally, in *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n*,<sup>81</sup> the United States Court of Appeals for the First Circuit recognized that the Wire Act "carves out a specific exception for circumstances in which wagering on a sporting event is legal in both the sending state and the receiving state."<sup>82</sup> As the legislative history indicates and this court confirmed, the Wire Act "did not intend to criminalize acts that neither the affected states nor Congress itself deemed criminal in nature."<sup>83</sup> To conclude that the Wire Act prohibits account wagering *from* a licensed facility in a state where such activity is legal *to* a licensed facility in a state where such activity is also legal would criminalize a licensed, state-regulated activity that generates millions of dollars in tax revenues and jobs.<sup>84</sup>

Another indication that the Wire Act does not prohibit legal interstate pari-mutuel wagering on horseracing through wire communications facilities is that the federal government has never prosecuted any member

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<sup>77</sup> *Hearings, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

<sup>78</sup> See *United States v. Lanier*, 520 U.S. 259, 265-67, 267 n.6 (1997).

<sup>79</sup> H.R. REP. NO. 967, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631 (emphasis added).

<sup>80</sup> 18 U.S.C. § 1084(b).

<sup>81</sup> *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993).

<sup>82</sup> *Id.* at 1272.

<sup>83</sup> *Id.* at 1273.

<sup>84</sup> See *Hearing, supra* note 5, at 59 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

of the horseracing industry for a violation of the Wire Act in the forty years since the Act became law.<sup>85</sup> As Greg Avioli, counsel for the National Thoroughbred Racing Association, noted in a letter to Congressman W.J. Tauzin, state-licensed and regulated entities in over thirty states have been conducting interstate pari-mutuel wagering for more than twenty years with the Justice Department's full knowledge.<sup>86</sup>

### B. *The Interstate Horseracing Act of 1978*

In 1978, Congress passed the Interstate Horseracing Act ("IHA")<sup>87</sup> to "regulate interstate commerce with respect to pari-mutuel wagering on horse races."<sup>88</sup> Congress's goal in passing the legislation was "to further the horseracing and legal off-track betting industries in the United States."<sup>89</sup> The Act defined a legal interstate wager<sup>90</sup> and served to "legalize wagering in one state on a horse race being run in another,"<sup>91</sup> so long as the wager complied with the IHA's definition of a legal interstate wager. Thus, the IHA established the legality of interstate pari-mutuel wagering that complies with certain statutory requirements.<sup>92</sup> The IHA clearly illustrates Congress's recognition and endorsement of legitimate interstate wagering on horseraces. Section 3001 of the Act states:

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<sup>85</sup> An extensive case law search revealed no reported cases of prosecution of any member in the horseracing industry for violating the Wire Act. *But cf.* *Tel. News Sys., Inc. v. Ill. Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1962), *aff'd*, 376 U.S. 782 (1964) (noting that a provider of horse race information to be used in gambling had telephone service discontinued pursuant to § 1084(d)). The government has, however, prosecuted several businessmen for violating the Wire Act by operating a general sports gambling company that derives its success from online wagering. *E.g.*, *United States v. Kaczowski*, 114 F. Supp. 2d 143 (W.D.N.Y. 1999); *United States v. Ross*, No. 98 CR. 1174-1 (KMV), 1999 WL 782749 (S.D.N.Y. Sept. 16, 1999); *see also* *Brown*, *supra* note 18, at 642 (discussing the 1998 indictments of twenty-two "owners, operators and managers of offshore sports books").

<sup>86</sup> Letter from Gregory C. Avioli & James J. Hickey, Jr. to W.J. Tauzin, *supra* note 11, at 1.

<sup>87</sup> Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1994).

<sup>88</sup> S. REP. NO. 95-554, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4132, 4132.

<sup>89</sup> S. REP. NO. 95-1117, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4149.

<sup>90</sup> *Id.* at 7-10.

<sup>91</sup> Alexander M. Waldrop, *Legal Implications of Developments in Gaming and Wagering*, in 12TH ANNUAL NATIONAL EQUINE LAW CONFERENCE G-3 (University of Kentucky College of Law Office of Continuing Legal Education 1997).

<sup>92</sup> 15 U.S.C. § 3004.

(a) The Congress finds that—

(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders;

(2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and

(3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.

(b) It is the policy of the Congress in this chapter to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.<sup>93</sup>

The enactment of the statute alone proves Congress's recognition of the legitimacy and legality of interstate wagering on horseracing between state-authorized facilities. Congress would not have passed a statute regulating an industry it deemed altogether illegal. The legislature recognized a need for federal action in the area of interstate wagering to aid the states in enforcing *state* law.<sup>94</sup> The legislation was enacted "in response to defined needs" and serves as "an extremely valuable reflection of public policy" regarding the beneficial value of the horseracing industry.<sup>95</sup>

Recently, Congress amended the IHA to further clarify the legality of interstate pari-mutuel wagering.<sup>96</sup> The amendment expanded the Act's definition of an "interstate off-track wager."<sup>97</sup> Before this amendment, the IHA defined the term as "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State."<sup>98</sup> The amendment kept that language, but added the following:

... and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other

<sup>93</sup> 15 U.S.C. § 3001 (1994).

<sup>94</sup> *See id.*

<sup>95</sup> 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 56.02 (6th ed. 2000).

<sup>96</sup> The amendment was attached to the Appropriations bill funding the Commerce, Justice, and State departments enacted on December 21, 2000. District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553, § 629, 114 Stat. 2762, 2762A-108 (to be codified at 15 U.S.C. § 3002(3)).

<sup>97</sup> *Id.*

<sup>98</sup> 15 U.S.C. § 3002(3) (1994).

electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.<sup>99</sup>

In making this change, Congress sought to elucidate the legality of wagering activities “made by telephone or other electronic media to be accepted by an off-track betting system in another state,” provided that the wagers are lawful in each state involved.<sup>100</sup> In order to be lawful in each state, the wager must meet the requirements, if any, “established by the legislature or appropriate regulatory body in the state where the person originating the wager resides.”<sup>101</sup> The IHA’s new language seems to clarify that both forms of interstate pari-mutuel wagering—simulcasting and account wagering—are legal, so long as the involved parties meet state legislative requirements.<sup>102</sup>

Courts have held that where a former statute is amended, the amendment is strong, but not conclusive, evidence of the first statute’s legislative intent.<sup>103</sup> In 1978, Congress could not have contemplated the ability to place a wager on a horse race via the Internet because the Internet did not yet exist. The recent amendment clarifies Congress’s intent to permit legitimate interstate wagering on horse races—be it by employing an account over the telephone or through cyberspace (encompassed by the language “other electronic media”) or by wagering on a simulcast race.<sup>104</sup>

### C. *Reconciling the Wire Act and the IHA*

The IHA indicates Congress’s intent to endorse interstate pari-mutuel wagering, yet the Justice Department insists that the Wire Act renders interstate pari-mutuel wagering illegal. Given this conflict, one must determine which statute controls. Viewed by itself, the IHA, which was enacted seventeen years after the Wire Act, seems to erase any doubt regarding whether legitimate forms of interstate pari-mutuel wagering are legal.<sup>105</sup> Interstate pari-mutuel wagering is legal when it complies with the

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<sup>99</sup> District of Columbia Appropriations Act § 629.

<sup>100</sup> 146 CONG. REC. H11271 (daily ed. Oct. 27, 2000).

<sup>101</sup> *Id.*

<sup>102</sup> These requirements are more fully explored later in this Note. *See infra* Part III.B.

<sup>103</sup> 2B SINGER, *supra* note 95, § 49.11.

<sup>104</sup> *See* District of Columbia Appropriations Act § 629.

<sup>105</sup> *See supra* notes 87-104 and accompanying text.

requirements of the IHA.<sup>106</sup> The Wire Act, however, seems to conflict with the IHA in that the IHA encourages legitimate interstate wagering, while the Wire Act states that it is illegal if the participants use wire communications facilities to place the wager.<sup>107</sup> Most likely, any facility transmitting information about a wager across state lines would employ either a telephone or a computer, which would qualify as a wire communications facility and would thus implicate the Wire Act. According to the Justice Department, the Wire Act would prohibit such a wager, notwithstanding the IHA.<sup>108</sup>

When two statutes seemingly conflict, several rules of construction guide the outcome. First, statutory construction is only necessary if the statutes actually conflict.<sup>109</sup> The test for whether two statutes directly conflict is to determine if one can comply with both of them simultaneously.<sup>110</sup> If complying with both is impossible, then the statutes directly conflict.<sup>111</sup> When two statutes directly conflict, the one most recently enacted controls.<sup>112</sup>

Since the Department of Justice has never prosecuted the horseracing industry for violation of the Wire Act, no case law indicates whether the statutes directly conflict. A court's analysis would most likely conclude that the two statutes directly conflict and that the IHA controls. A court would first recognize that the Wire Act prohibits the use of wire communication facilities to send wagering information. Because the definition of "facility" under the Wire Act includes a telephone,<sup>113</sup> a court would most likely find that a computer Internet connection also constitutes a "facility" because an Internet connection uses the phone line to reach the server.<sup>114</sup> The only way one could comply with both of these statutes is if the racing facility mailed the information about the wager across state lines, or utilized a wireless communications facility to send the wager.<sup>115</sup>

<sup>106</sup> See *supra* notes 87-104 and accompanying text.

<sup>107</sup> Compare 18 U.S.C. § 1084 (1994), with 15 U.S.C. §§ 3001-3007 (1994).

<sup>108</sup> *Hearing, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

<sup>109</sup> *Ky. Off-Track Betting, Inc. v. McBurney*, 993 S.W.2d 946, 949 (Ky. 1999).

<sup>110</sup> See *Humana Inc. v. Forsyth*, 525 U.S. 299, 305-08 (1999).

<sup>111</sup> See *id.*

<sup>112</sup> *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

<sup>113</sup> *United States v. Smith*, 209 F. Supp. 907, 918 (E.D. Ill. 1962).

<sup>114</sup> See *Cabot, supra* note 16, at 188; see also *Brown, supra* note 18, at 632-33 (noting that the Department of Justice considers the Internet a "wire communication facilities"); Letter from Jon P. Jennings to Patrick Leahy, *supra* note 63, at 1 (arguing that the Internet is a "wire communication facility").

<sup>115</sup> See *Cabot, supra* note 16, at 188.

On the other hand, a court could find that they do not directly conflict because one could potentially comply with both by the use of the mails or a wireless communications network. In practice, however, a racing facility would not have the time to use the postal service to mail a wager, because the race would be run before the information was received. Further, to send the wager via a wireless communications facility, such as a digital connection, seems to be a technical loophole that complies with the statute only because the statute is outdated. Indeed, legislators could not have foreseen the Internet in 1960 when they passed the Wire Act. If a court were to find that these two statutes do conflict directly, the IHA would likely control because it was enacted most recently.

If a court found the two statutes to conflict, but not directly, rules of construction would guide a court to reconcile the statutes to the greatest extent possible.<sup>116</sup> Again, it seems impossible to reconcile the two federal statutes unless one mails the wager or sends the wagering information via a wireless communications facility.

Whether the statutes conflict or not, when one statute deals with subject matter generally, and the other deals with the same subject matter in a detailed way, rules of construction instruct to harmonize the two statutes if possible.<sup>117</sup> When the two statutes cannot be harmonized, the court should apply the narrower of the two.<sup>118</sup> Given that rule of construction, a court should apply the IHA as opposed to the Wire Act. The IHA authorizes, specifically, interstate pari-mutuel wagering on horseracing;<sup>119</sup> the Wire Act prohibits, generally, sports betting via a wire communications facility.<sup>120</sup> Under these rules, the IHA is the more specific statute, and thus should control. In the language of one California court: "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."<sup>121</sup>

Given the rules of statutory construction and the amendment to the IHA, it seems that the Justice Department would have difficulty arguing that an interstate pari-mutuel wager, when sent in accordance with the

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<sup>116</sup> *Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960).

<sup>117</sup> 2B SINGER, *supra* note 95, § 51.05.

<sup>118</sup> *Id.*

<sup>119</sup> 15 U.S.C. § 3004 (1994).

<sup>120</sup> 18 U.S.C. § 1084 (1994).

<sup>121</sup> *People v. Breyer*, 34 P.2d 1065, 1066 (Cal. Dist. Ct. App. 1934).

requirements of the IHA, constitutes a violation of the Wire Act. If the statutes directly conflict, the IHA controls because it was enacted most recently.<sup>122</sup> If the statutes do not conflict, the IHA still deals with the issue of interstate wagering more specifically than does the Wire Act, so the IHA controls.<sup>123</sup>

### III. RELEVANT STATE-LAW ISSUES AND INTERACTION WITH FEDERAL LAWS

#### A. Commerce Power

Congress claimed the Commerce Clause of the United States Constitution<sup>124</sup> as the authority for both the Wire Act and IHA. Under the Commerce Clause, Congress has the power “[t]o regulate commerce with foreign nations, and among the several States.”<sup>125</sup> The Commerce Clause gives the federal government the power “to prescribe the rule by which commerce is to be governed. This power . . . is complete in itself [and] may be exercised to its utmost extent.”<sup>126</sup> If the Department of Justice were to prosecute a member of the horseracing industry under the Wire Act for accepting or placing an interstate pari-mutuel wager by telephone or the Internet, the evaluating court would have to determine whether Congress has the power to regulate—i.e., whether the activity in the case at hand constitutes commerce.<sup>127</sup> The United States Supreme Court has defined commerce as “the commercial intercourse between nations, and parts of nations, in all its branches . . . regulated by prescribing rules for carrying on that intercourse.”<sup>128</sup> Under that definition, “commerce includes all phases of business.”<sup>129</sup> The placement of wagers is one integral aspect of the business of conducting horse races, and one would have great difficulty arguing that it does not constitute commerce. It generates revenue, has tax implications, and facilitates the exchange of money from the individuals placing the wagers to the receiving racing facility and then back to the individuals who won the wager.

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<sup>122</sup> See *supra* note 112.

<sup>123</sup> See *supra* notes 117-21 and accompanying text.

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 3.

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

<sup>126</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824).

<sup>127</sup> See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.1 (1997).

<sup>128</sup> *Gibbons*, 22 U.S. at 189-90.

<sup>129</sup> CHEREMINSKY, *supra* note 127, § 3.3.2.

The next question a court would pose in determining whether Congress has regulatory power is whether the commerce is conducted "among the states."<sup>130</sup> The Supreme Court in *Gibbons v. Ogden*<sup>131</sup> interpreted "among the states" to mean "concerning more than one state."<sup>132</sup> Thus, if the situation involved an individual wagering from Kentucky on a race that was run in Kentucky, and no other wagers from out-of-state were accepted on that race, then perhaps Congress would be prohibited from asserting its commerce power to regulate. However, interstate wagering accounts for eighty percent of pari-mutuel wagering on horse races,<sup>133</sup> so Congress will inevitably be in a position to regulate pari-mutuel wagering.<sup>134</sup> Courts have held that the placement and acceptance of wagers between states does constitute interstate commerce.<sup>135</sup> In 1993, the Sixth Circuit held that "[g]iven the size and impact of horseracing and off-track betting industries on interstate commerce, Congress clearly has the power to regulate these industries."<sup>136</sup> Accordingly, Congress has exercised its authority to regulate commerce by enacting the IHA.

### B. State Authority

Historically and consistently, the "primary responsibility for deciding gambling policy has been left to the States."<sup>137</sup> One court has held that "state gambling laws express an ancient and deep-rooted public policy . . . established and continued by the legislature."<sup>138</sup> The Senate Report accompanying the Interstate Horse Racing Act recognizes that with regard to interstate pari-mutuel wagering "the prevailing view [is] that these matters are generally of State concern and that the States' prerogatives in the regulation of gambling are in no way [sic] preempted by this or other Federal law."<sup>139</sup>

<sup>130</sup> *See id.*

<sup>131</sup> *Gibbons*, 22 U.S. at 1.

<sup>132</sup> CHEMERINSKY, *supra* note 127, § 3.3.2.

<sup>133</sup> *See supra* note 6.

<sup>134</sup> Memorandum of Gregory C. Avioli, *supra* note 39, at 19-20.

<sup>135</sup> *Champion v. Ames*, 188 U.S. 321, 354 (1903); *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1301 (3d Cir. 1996); *Ky. Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1414 (6th Cir. 1994); *Martin v. United States*, 389 F.2d 895, 899 (5th Cir. 1968).

<sup>136</sup> *Ky. Div., Horsemen's Benevolent & Protective Ass'n*, 20 F.3d at 1414.

<sup>137</sup> *Cabot*, *supra* note 16, at 184.

<sup>138</sup> *Ciampittello v. Campitello*, 54 A.2d 669, 671 (Conn. 1947).

<sup>139</sup> S. REP. NO. 95-1117, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4146.

As a general matter, states retain the power to regulate matters of local concern “[i]n the absence of conflicting federal legislation, . . . even though interstate commerce may be affected.”<sup>140</sup> Congress has used its commerce power to regulate interstate horseracing by passing the IHA, clarifying the federal interest in promoting interstate wagering on horseracing.<sup>141</sup> Congress recognized the “need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.”<sup>142</sup> The most pertinent inquiry is whether state laws regarding interstate wagers on horseraces impede the achievement of federal objectives.<sup>143</sup> A state law will be preempted if it “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.”<sup>144</sup>

Congress’s objective in passing the IHA was to provide guidelines for the states to follow in order to facilitate a legitimate, fair environment for pari-mutuel wagering that crosses states lines. Before a racing facility may legally accept a wager transaction, the IHA requires that three state entities consent.<sup>145</sup> For example, if a person has an account in Louisville, Kentucky, and wishes to place a bet on a race in Oregon, that wager is not legal unless (1) the host racing association, (2) the host racing commission, and (3) the off-track racing commission consent.<sup>146</sup> In other words, (1) the track in Oregon that “pursuant to a license or other permission granted by [Oregon], conducts the horserace subject to the interstate wager”<sup>147</sup> must consent; (2) the Oregon Racing Commission, who is “that person designated by State statute or . . . by regulation[ ] with jurisdiction to regulate the conduct of racing within [Oregon]”<sup>148</sup> must consent; and, finally, (3) the Kentucky Racing Commission, or “that person designated by State statute or . . . by regulation[ ] with jurisdiction to regulate off-track betting in [Kentucky],”<sup>149</sup> must consent. Congress intended these consent requirements “to

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<sup>140</sup> *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980).

<sup>141</sup> Memorandum of Gregory C. Avioli, *supra* note 39, at 9-10. *See also* 15 U.S.C. § 3001(b) (1994) (“It is the policy of the Congress in this chapter to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.”).

<sup>142</sup> 15 U.S.C. § 3001(a)(3) (1994).

<sup>143</sup> *CHEMERINSKY*, *supra* note 127, § 5.2.5.

<sup>144</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>145</sup> 15 U.S.C. § 3004(a) (1994).

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

<sup>147</sup> *Id.* § 3002(9).

<sup>148</sup> *Id.* § 3002(10).

<sup>149</sup> *Id.* § 3002(11).

maintain the stability of the horseracing industry"<sup>150</sup> and to "regulate[ ] interstate commerce with respect to legal interstate wagering on horseraces."<sup>151</sup> The states whose citizens are involved in the transaction decide whether a wager is legal, and can be accepted.

Under the IHA, Congress gave states the authority to determine whether pari-mutuel wagering on horseraces may take place within that state's borders.<sup>152</sup> States are permitted to prohibit their citizens from participating in interstate pari-mutuel wagering,<sup>153</sup> so long as the statute does not discriminate against out-of-state individuals.<sup>154</sup> In other words, a state may prohibit pari-mutuel wagering via the Internet altogether, but it could not allow in-state wagering on horseracing and yet prohibit wagers originating from that state on out-of-state races.<sup>155</sup>

For the horseracing industry, which wants to reach as many people as possible while proceeding within the confines of the law, it is important to determine which state's law must authorize the wager in order for the wager to be legally placed. The conclusion to that determination dictates whether the wager must be legal in both the state from which it is sent and the state in which it is received, or if it is sufficient that the receiving state alone authorize the wager. It seems clear that an interstate wager involving New York and Oregon, which have both authorized pari-mutuel wagering,<sup>156</sup> is legal so long as the off-track betting system obtains the consent of the three state entities as required by the IHA.<sup>157</sup> The wager between New York and Oregon is legal whether or not it is placed on a simulcast race or placed through a wagering account connected by telephone or Internet.

If the wager is sent from Missouri, which does not authorize pari-mutuel wagering, to New York, which does authorize pari-mutuel wager-

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<sup>150</sup> S. REP. NO. 95-1117, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4144.

<sup>151</sup> *Id.* at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4147.

<sup>152</sup> See 15 U.S.C. §§ 3001-3007 (1994).

<sup>153</sup> See, e.g., *Pic-A-State Pa., Inc. v. Pennsylvania*, No. 1:CV-93-0814, 1993 WL 325539, at \*5 (M.D. Pa. July 23, 1993), *rev'd*, 42 F.3d 175 (3d Cir. 1994). The district court opinion was reversed because of an intervening federal statute.

<sup>154</sup> See *Or. Waste Sys., Inc. v. Dep't of Environmental Quality of the State of Or.*, 511 U.S. 93, 99 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

<sup>155</sup> See Memorandum of Gregory C. Avioli, *supra* note 39, at 24-25.

<sup>156</sup> N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1012 (McKinney 2000); OR. REV. STAT. § 462.142 (1999).

<sup>157</sup> 15 U.S.C. § 3004 (1994).

ing, is the wager legal? An abundance of case law indicates that the wager occurs where it is received, so that the latter wager would constitute a legal one.<sup>158</sup> One New York court has held that “[t]he location of the bettor at the time he places his bet is immaterial.”<sup>159</sup> In likening the bet takers in this setting to the “famous betting parlors of London,”<sup>160</sup> the court noted that these betting parlors receive calls from all over the world, but the betting is still said to take place in London.<sup>161</sup> The corporation does not conduct betting in a city merely because bets placed with it via telephone originated from that locality.<sup>162</sup>

While a court could find authority to support a holding that an interstate pari-mutuel wager is legal solely because the state receiving the wager authorizes the transaction,<sup>163</sup> the racing facility accepting the wager would find itself in a safer position if both the sending and receiving states authorize the wager. The new language of the IHA evinces Congressional intent that the wager must be legal under the state law of both the sending and receiving states.<sup>164</sup> The very language of the amendment, which defines a legal interstate off-track wager as one “where lawful in each State involved,”<sup>165</sup> seems to require both states’ consent.

### C. *Correlating the Horseracing Industry Gaming Laws and the Indian Gaming Regulatory Act*

The number of Indian casinos has “mushroomed” over the past thirty years,<sup>166</sup> and Indian casinos now operate in twenty-two states.<sup>167</sup> Estimates

<sup>158</sup> *United States v. Truesdale*, 152 F.3d 443, 447-48 (5th Cir. 1998); *McQuesten v. Steinmetz*, 58 A. 876, 877 (N.H. 1904); *Lescallett v. Commonwealth*, 17 S.E. 546, 547-48 (Va. 1893); *see also* *Burton v. United States*, 204 U.S. 344, 384-86 (1906) (reaffirming the basic tenet of contract law that a contract is formed at the time and place of acceptance).

<sup>159</sup> *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 390 N.Y.S.2d 240, 242 (N.Y. App. Div. 1976).

<sup>160</sup> *Id.*

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

<sup>162</sup> *Id.*

<sup>163</sup> *See supra* notes 156-62 and accompanying text.

<sup>164</sup> *See* District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553, § 629, 114 Stat. 2762 (to be codified at 15 U.S.C. § 3002(3)); *supra* notes 96-102 and accompanying text.

<sup>165</sup> District of Columbia Appropriations Act § 629.

<sup>166</sup> DUNSTAN, *supra* note 26, at IV-1, <http://www.library.ca.gov/CRB/97/03/97003a.pdf>.

<sup>167</sup> *Id.* at I-10.

of gross revenues from Indian gaming put the figure somewhere between \$2.3 and \$8 billion.<sup>168</sup> Although Indian tribes are sovereign entities much like states, the federal government retains jurisdictional authority over them.<sup>169</sup> In exercising this jurisdiction, Congress enacted the Indian Gaming Regulatory Act (“IGRA”)<sup>170</sup> in 1988.

By enacting the IGRA, Congress “attempted to accommodate the interest of the Indian tribes with the legitimate regulatory interests of the states.”<sup>171</sup> The IGRA “established a comprehensive framework for the operation of Indian tribal gaming across the United States.”<sup>172</sup> The legislation was necessary in order to “bring some order to the complex relationship between the Federal government, Indian tribes and the states in relation to gaming.”<sup>173</sup>

While the federal government and the horseracing industry certainly do not have a relationship similar to the federal government and Indian tribes,<sup>174</sup> the IHA is similar to the IGRA because it attempts to provide a framework for the complex relationship between the federal government and states in relation to gaming.<sup>175</sup> By enacting the IHA, Congress attempted to achieve the same function of accommodating the federal

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<sup>168</sup> *Id.* at IV-1.

<sup>169</sup> *Id.*

<sup>170</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994).

<sup>171</sup> *AT & T Corp. v. Coeur d’Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho Cir. 1998) (quoting *Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 693 (9th Cir. 1997)).

<sup>172</sup> S. REP. NO. 106-498, at 1 (2000).

<sup>173</sup> *Id.*

<sup>174</sup> Congress recognized the plight of Indians living on reservations and saw a need for federal legislation that aided Indians seeking to improve their situation. See DUNSTAN, *supra* note 26, at IV-2, <http://www.library.ca.gov/CRB/97/03/97003a.pdf>. Almost half of the families on Indian reservations lived in poverty, compared to 11.5% of the rest of the nation. *Id.* The suicide rate on reservations was 95% higher than the national average, and Indians’ alcoholism rate was 663% higher. *Id.* The thoroughbred racing industry has no comparable statistics and presents a very different set of circumstances.

<sup>175</sup> The relationship between Indian tribes, the federal government, and states is made more complicated by the fact that Indian tribes are considered sovereign powers, as are the states. Indian tribes claim to have similar rights to the states because they are both sovereigns, increasing the need for federal legislation to determine whether an Indian tribe may decide its own gambling policy or whether the state where that tribe is located may exercise its normal police power regardless of the tribe’s sovereign status. See *id.* at IV-1 to IV-11, <http://www.library.ca.gov/CRB/97/03/97003a.pdf> and <http://www.library.ca.gov/CRB/97/03/97003b.pdf>.

government's regulatory interests, the interests of a profitable and beneficial horseracing industry, and the regulatory interests of the states regarding gaming.<sup>176</sup>

Even when confronted with the question whether to let states regulate gambling policies *vis-a-vis* another sovereign entity, the federal government recognized the importance of allowing each state to use its police power to regulate gambling within its borders. In *AT & T Corp. v. Coeur d'Alene Tribe*,<sup>177</sup> the court held that the federal government's Indian commerce power (as exercised through the IGRA) does not prohibit states from enforcing anti-lottery laws.<sup>178</sup> The effect of that holding was that a state could prohibit Indian gaming from occurring within the state's borders, provided the gaming occurred outside tribal lands.<sup>179</sup> The court held that "[w]hether or not the Lottery in fact violates a state's law is, of course, a question of state law that must be determined by a state court in a proceeding where all the necessary parties have been joined."<sup>180</sup>

Although the IGRA controls Indian gaming on Indian lands, it does not preempt state attempts to regulate or prohibit gaming activities on non-Indian lands.<sup>181</sup> The IGRA recognizes "that States have 'significant governmental interests' in Indian gaming, including 'the State's public policy, safety, law and other interests [such as] raising revenue for its citizens.'"<sup>182</sup> Both the IGRA and the IHA recognize the importance of allowing states to regulate gambling policy within their borders.

While case law involving the IGRA focuses on the ability of states to prohibit Indian gaming within its borders (gaming that occurs on non-tribal land),<sup>183</sup> the negative implication is that a state may also permit and provide for Indian gaming within its borders. This signifies Congressional openness to allowing and encouraging forms of gambling when it evinces a positive end, such as ameliorating the poor quality of life on most Indian

<sup>176</sup> See Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1994).

<sup>177</sup> *AT & T Corp. v. Coeur d'Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998).

<sup>178</sup> *Id.* at 999-1004.

<sup>179</sup> *Id.* "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 1004.

<sup>180</sup> *Id.* at 1005.

<sup>181</sup> *State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1108-09 (8th Cir. 1998), *cert. denied*, 527 U.S. 1039 (1999).

<sup>182</sup> *Id.* at 1109 n.5 (alteration in original) (quoting S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083).

<sup>183</sup> *E.g., id.* at 1108-09; *AT & T Corp. v. Coeur d'Alene Tribe*, 45 F. Supp. 2d 995, 1000-05 (D. Idaho 1998).

lands.<sup>184</sup> Allowing and promoting interstate pari-mutuel wagering on horseraces also evinces positive purposes. The horseracing and racehorse breeding industry has a large and beneficial impact on the economy. Racing contributes \$34 billion to the United States economy, and sustains 472,800 full-time jobs.<sup>185</sup> All fifty states have active breeding and training businesses,<sup>186</sup> and forty-three states authorize pari-mutuel wagering on horseraces.<sup>187</sup> In state statutory language authorizing pari-mutuel wagering, states recognize that “the racing, breeding, and pari-mutuel wagering industry is an important sector of the agricultural economy [that] provides substantial revenue for state and local governments, and employs tens of thousands of state residents.”<sup>188</sup> In Kentucky alone, horseracing contributes \$3.4 billion to the economy and provides 42,400 jobs.<sup>189</sup> Charities also benefit from the racing industry. In December 2000, Keeneland Racing Association, located in Lexington, Kentucky, distributed \$755,181 to ninety-one charitable organizations in the Kentucky community.<sup>190</sup> In the previous year, Keeneland gave \$636,300 to seventy-seven charities.<sup>191</sup> In addition to the positive philanthropic impact, direct state and local revenue from pari-mutuel taxes, track licenses, occupational licenses, and admission taxes totals over \$500 million annually.<sup>192</sup> Both the IGRA and the IHA

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<sup>184</sup> DUNSTAN, *supra* note 26, at IV-2, <http://www.library.ca.gov/CRB/97/03/97003a.pdf>. Congress had five objectives in enacting the IGRA. They were to “[p]romote self-sufficiency for the tribes;” to “[e]nsure that Indians were primary benefactors of the gambling;” to “[e]stablish fair and honest gaming;” to “[p]revent organized crime and other corruption by providing a statutory basis for its regulation;” and to “[e]stablish standards for the National Indian Gaming Commission.” *Id.* at IV-3.

<sup>185</sup> *Hearing, supra* note 5, at 59 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

<sup>186</sup> See *The Jockey Club Fact Book*, THE JOCKEY CLUB, at <http://home.jockeyclub.com/factbook/index.html> (last visited May 24, 2001).

<sup>187</sup> Memorandum of Gregory C. Avioli, *supra* note 39, at 4.

<sup>188</sup> N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1000 (McKinney 2000).

<sup>189</sup> Letter from Mitch McConnell and Jim Bunning, United States Senators, to Janet Reno, Attorney General, United States of America 1 (June 7, 2000) (on file with author).

<sup>190</sup> Janet Patton, *After Enjoying a Rich Year, Keeneland Shares Its Wealth*, LEXINGTON HERALD-LEADER, Dec. 20, 2000, at C1.

<sup>191</sup> *Keeneland Distributes \$636,300 to Charities*, LEXINGTON HERALD-LEADER, Dec. 22, 1999, Bluegrass Communities, at 22.

<sup>192</sup> *Hearing, supra* note 5, at 59 (statement of Stephen Walters, Chairman, Oregon Racing Commission).

exemplify the federal power to regulate gaming through the Commerce Clause, as well as Congressional recognition of each state's police power to regulate gambling within its borders, whether the state chooses to prohibit the practice or to endorse the sport.

#### IV. THE POLICY IMPLICATIONS OF INHIBITING THE GROWING PARI-MUTUEL INDUSTRY

Congress enacted the IHA in order to advance a growing and beneficial industry. In 1978, the legislature found that "legal off-track wagering on horse races [was] a relatively new industry in the U.S. which . . . provides additional employment opportunities for thousands of individuals, provides substantial revenue to the states and to local and municipal governments, and has demonstrated both actual and potential benefits to the racing industry."<sup>193</sup> Today, Congress has reaffirmed its support for legitimate interstate pari-mutuel wagering, as evidenced by the amendment to the language updating the IHA to include wagering on the Internet as a viable new outlet for the industry.<sup>194</sup> With many feeling that the racing industry is a business "ailing on many fronts,"<sup>195</sup> the key to the future of the sport "is its ability to bring the product to the consumer."<sup>196</sup> Congress recognized the importance of that, and amended the IHA to permit the industry to reach a broader fan base free from fears that its activities are illegal.

To prohibit pari-mutuel wagering on horseracing via the Internet would deprive both federal and state government of revenue generated by fees and taxes, and would eliminate the federal government's ability to implement its public policy through regulation of the system.<sup>197</sup> By legalizing and regulating Internet gambling, the federal government would place itself in the position to impose strict requirements upon who is authorized to place

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<sup>193</sup> S. REP. NO. 95-1117, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4147.

<sup>194</sup> *See* District of Columbia Appropriations Act of 2000, Pub. L. No. 106-553, § 629, 114 Stat. 2762 (to be codified at 15 U.S.C. § 3002(3)).

<sup>195</sup> Carla Rivera, *Governor Vetoes New Labor Rules for Stable Hands Race-tracks*, L.A. TIMES, Oct. 2, 2000, at B1.

Horseracing was once the kind of the gaming hill. Twenty years ago, it had about 30% of the gaming market. Today, it is struggling with a mere 8%. . . . Where it once was the dominant gaming player in the nation, it has seen its revenues fall more than 55% since 1982.

CABOT, *supra* note 76, at 48.

<sup>196</sup> Beyer, *supra* note 8.

<sup>197</sup> *See* Cabot, *supra* note 16, at 193-95.

wagers and how Internet companies must conduct their business. If, instead, the United States prohibits interstate pari-mutuel wagering in a blanket manner while other countries continue to legalize and regulate the industry, the federal government will be unable to prevent U.S. citizens from accessing gambling websites because of the boundless nature of the Internet.<sup>198</sup> Comprehensively prohibiting Internet wagering would require that the United States obtain cooperation from those legalizing countries to prohibit their licensed operators from accepting wagers from patrons in the United States.<sup>199</sup> That result is highly unlikely, as the United States represents a large population with many individuals who seek to place wagers. This vast market would likely prove too great a temptation for other countries to resist, making complete cooperation an unlikely proposition. In fact, this problem has already materialized, with many Internet companies establishing gambling websites in off-shore locations such as Antigua and then targeting U.S. consumers from abroad.<sup>200</sup>

Legalization and state regulation of wagering on the Internet would lend integrity to the industry through government oversight.<sup>201</sup> Many states used this same line of argument in deciding to monopolize the conduct of state lotteries.<sup>202</sup> One motivation for such state lottery monopolies has been "the desire to keep lotteries free of fraud and criminal influence."<sup>203</sup> State government oversight of Internet wagering would likewise aid in keeping the racing industry free from fraud and criminal influence. State regulation would establish rules by which participants had to play, and would forewarn participants and wagerers of unapproved wagering sites.

The Justice Department has raised several valid arguments against permitting the horseracing industry to conduct wagering on the Internet. One of these concerns is the "virtually instantaneous and anonymous communication that is difficult to trace to a particular individual or organization."<sup>204</sup> The Internet makes it easier for site operators to defraud their customers because legal authorities have more difficulty in locating the site operator.

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<sup>198</sup> See *supra* note 17 and accompanying text.

<sup>199</sup> See Cabot, *supra* note 16, at 193-95.

<sup>200</sup> 60 Minutes, *supra* note 1.

<sup>201</sup> See Cabot, *supra* note 16, at 182-83.

<sup>202</sup> Lawrence Zelenak, *The Puzzling Case of the Revenue-Maximizing Lottery*, 79 N.C. L. REV. 1, 3 (2000).

<sup>203</sup> *Id.*

<sup>204</sup> Hearing, *supra* note 5, at 34 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

This problem is not unique to Internet gambling on horse races; rather, the problem is one for the Internet as a whole. For example, a company such as eBay has most likely faced similar issues in protecting its customer. A consumer may not receive the item on which he believed he was bidding, or the item may be damaged upon receipt. In response to such concerns, eBay has established a Fraud Protection Program that provides limited reimbursements to defrauded consumers, a Feedback Forum where users can leave reports on experiences with other users, and an escrow service, among other things.<sup>205</sup> From this eBay example, it seems the solution to Internet pari-mutuel wagering concerns is to increase consumer protection measures, perhaps by creating heightened requirements to start a wagering e-business. Consumer protection would be an important initiative in any attempt to regulate Internet industries. Examining ways to protect the consumer seems a better solution than foreclosing an industry from using the Internet as a means to reach consumers.

The Justice Department also objects to gambling on the Internet because the practice brings gambling into the home.<sup>206</sup> By allowing participants to use home computers to place a wager, the Justice Department believes compulsive gamblers face a greater danger with "severe financial consequences."<sup>207</sup> While this may be true, without regulation of the industry compulsive gamblers may be even more likely to find themselves in financial trouble as a result of being defrauded by an unregulated Internet gambling system.

The Justice Department and other opponents of Internet wagering also contend that legalizing Internet gambling would make it easier for children and teenagers to place wagers by using their parents' account.<sup>208</sup> Were that argument to stand, it would prohibit a parent from using the Internet to conduct her business for fear of her child using the account to trade stock or transfer funds from a family checking account. The Internet opens many opportunities, and parents must be accountable for protecting their children from engaging in activity on the Internet that is inappropriate for children. Further, the closed-loop subscriber-based system provides a means for parents to virtually eliminate any possibility that a child could access parental accounts.<sup>209</sup> To argue that gambling on the Internet should be

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<sup>205</sup> *Why eBay is Safe*, at <http://pages.ebay.com/help/basics/n-is-ebay-safe.html> (last visited Mar. 8, 2001).

<sup>206</sup> *Hearing*, *supra* note 5, at 34-35 (statement of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division).

<sup>207</sup> *Id.* at 34.

<sup>208</sup> *Id.*; Rivera, *supra* note 195.

<sup>209</sup> *See supra* notes 47-59 and accompanying text.

rendered illegal because of the off-chance that children may access their parents' account is fundamentally unpersuasive.

## V. CONCLUSION

Many might ask why horseracing has succeeded in receiving exemptions from anti-gambling bills in Congress, and why Congress chose to amend the IHA to permit interstate pari-mutuel wagering via the Internet. The Justice Department has the same concern, and fears any type of legislation that authorizes some forms of gambling while prohibiting others.<sup>210</sup> The legislative history behind the proposed Internet Gambling Prohibition Act<sup>211</sup> does not indicate why the racing industry continues to receive exemptions and approval, but the Interstate Horseracing Act alone indicates Congressional endorsement of legal pari-mutuel wagering.<sup>212</sup> Congress recognizes the many benefits the thoroughbred racing industry offers communities, including employment opportunities, philanthropic donations, and a viable agricultural base.<sup>213</sup> Given the newly-amended language of the IHA,<sup>214</sup> the Justice Department will have difficulty arguing that interstate pari-mutuel wagering complying with the IHA violates any other federal statute.

One might find the efforts to quash interstate pari-mutuel wagering via the Internet reminiscent of the nationwide prohibition era that began with the 1919 passage of the Eighteenth Amendment<sup>215</sup> and ended with its repeal in 1933 by the Twenty-first Amendment.<sup>216</sup> During that period, the federal government struggled to pass laws banning alcohol for personal use, and allowed states to enforce their own laws only if they imposed more stringent standards.<sup>217</sup> The result was not what reformers most likely sought. One anecdote is particularly telling:

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<sup>210</sup> *Hearing, supra* note 5, at 35 (statement of Kevin V. DiGregory, Deputy Assistant General, Criminal Division). DiGregory represented that the Justice Department did not support the exemptions in the Internet Gambling Prohibition Act for pari-mutuel wagering. *Id.*

<sup>211</sup> Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. (2000).

<sup>212</sup> *See supra* notes 87-123 and accompanying text.

<sup>213</sup> *See supra* notes 185-92 and accompanying text.

<sup>214</sup> *See supra* note 99.

<sup>215</sup> U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

<sup>216</sup> *Id.* amend. XXI.

<sup>217</sup> W.J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 YALE L.J. & HUMAN. 285, 293 (1996) (book review).

[I]n the evangelical, Republican, and respectable small town in Pennsylvania where my father grew up, the only difference prohibition brought was that the saloon's front door was locked; patrons had to knock on the back door to gain admittance. Throughout prohibition, this town's Veterans of Foreign Wars post served liquor—and had slot machines. Prohibition may be seen as a crusade by reformers whose zeal outran their sense, as the worst kind of pressure group politics, or as an idealistic idea born of naiveté.<sup>218</sup>

In shaping the law regarding gambling on the Internet, those who recommend heavy federal regulation must proceed cautiously and must avoid letting their “zeal outrun their sense.”<sup>219</sup> The lesson of the alcohol prohibition movement was that “reformers, including today's, need to be alert to the way in which the legislative and judicial structures, precedents, and processes encourage certain approaches, bar others, and provide the framework within which outcomes are shaped.”<sup>220</sup>

The government, with the Interstate Horseracing Act, has established a satisfactory framework for regulating interstate pari-mutuel wagering that leaves the states ample power to control gambling within their borders. The current guidelines allow states to utilize their traditional police power over gambling activity, and will allow the United States to embrace the newly-available technology rather than have a viable industry “relegated to lower level countries with weak oversight.”<sup>221</sup> The horseracing industry represents an excellent venue for Congress to assess the efficacy of leaving Internet regulation and gambling policy to the states.

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<sup>218</sup> *Id.* at 293-94.

<sup>219</sup> *Id.* at 294.

<sup>220</sup> *Id.* at 293.

<sup>221</sup> Cabot, *supra* note 16, at 194.