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Lotteries as a Voluntary and “Painless” Tax in American Gaming Law and the Prospect of Creating a Federal Lottery to Reduce the Federal Deficit in the Era of Billion Dollar Jackpots

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I. INTRODUCTION¹

The Powerball lottery jackpot climbed to \$1.5 billion on Tuesday [January 12, 2016], making it the largest-ever U.S. lottery prize as well as the world’s biggest potential jackpot for a single winner, according to lottery officials.²

[Too] [l]ittle research has been devoted to lottery ticket buying.³

“[A]CCORDING TO PROPONENTS, THE LOTTERY... is a “painless tax” because it is paid *only by the willing*.”⁴ This perception of lottery playing⁵ as a voluntary and “painless tax” paid only by the willing, apparently stems from Thomas Jefferson.⁶ In 1810, Thomas Jefferson was initially opposed to lotteries,⁷ but later changed his mind to reflect the view⁸ that some proponents have now emphatically embraced.⁹ Indeed, the perception of lotteries as a tax resonates with the view of other

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¹See GEORGE ORWELL, 1984 at 73 (New American Library 1949) [hereinafter ORWELL] (“They were talking about the Lottery. . . . The Lottery, with its weekly pay-out of enormous prizes, was the one public event to which the proles paid serious attention. It was probable that there were millions of proles for whom the Lottery was the principal if not the only reason for remaining alive. It was their delight, their folly, their anodyne, their intellectual stimulant. Where the Lottery was concerned, even people who could barely read and write seemed capable of intricate calculations and staggering feats of memory. There was a whole tribe of men who made a living simply by selling systems, forecasts, and lucky amulets [T]he running of the Lottery . . . was managed by the Ministry of Plenty . . .”).

²See Susannah Gonzales, *Power Ball Hits \$1.5 B, Largest Ever Lottery Jackpot for One Winner*, AOL (Jan. 12, 2016), available at <<http://www.aol.com/article/2016/01/12/powerball-largest-us-world-largest-jackpot-f/21296024/>>.

³See Alvin C. Burns, Peter L. Gillett, Marc Rubinstein, and James W. Gentry, *An Exploratory Study of Lottery Playing, Gam-*

bling Addiction and Links to Compulsive Consumption, 17 *ADVANCES IN CONSUMER RES.* 298–305 (1990), available at <<http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=9828>> [hereinafter Burns, Gillett, Rubinstein, and Gentry].

⁴See CHARLES T. CLOTFELTER AND PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 215 (Harvard University Press 1989) [hereinafter CLOTFELTER AND COOK]. See also *Index*, NAT’L GAMBLING IMPACT STUDY COMM’N (NGISC) (Aug. 3, 1999), <<http://govinfo.library.unt.edu/ngisc/research/lotteries.html>> [hereinafter NGISC] (providing information from the National Gambling Impact Study Commission). NGISC REPORT, CHAPTER 2 (Gambling in the United States), at 2–4 (“In an anti-tax era, many state governments have become dependent on “painless” lottery revenues, and pressures are always there to increase them.”).

⁵See Joseph Kelly, *Symposium on Law Schools and Gaming Law*, 15(12) *GAMING L. REV. AND ECON.* 758 (2011) (“There is an acute need for legal scholarship on . . . modern lotteries.”). Lotteries may be defined as follows. See, e.g., CLOTFELTER AND COOK, *supra* note 4, at 51 (“The essence of a lottery is the purchase of a chance to win a prize, based on a random drawing.”). See also 38 *AM. JUR. 2D Gambling* § 7. See also KENNETH N. HANSEN AND TRACY A. SKOPEK, *THE NEW POLITICS OF INDIAN GAMBLING* 169 (University of Nevada Press 2011) (“[L]ottery . . . mean[s] any game of chance involving the elements of prize, chance, and consideration”) (citation omitted).

⁶See CLOTFELTER AND COOK, *supra* note 4, at 299.

⁷*Id.*

⁸See *id.*

⁹*Id.*

commentators as well.¹⁰ However, in the U.S.¹¹ as well as in Hungary¹² and elsewhere in the world,¹³ it is important to remember that “[s]imilar to tobacco products and to alcohol, gambling is a potentially ‘dangerous operation’ from the perspective of consumers.”¹⁴

Nevertheless, a genuinely voluntary tax would provide a sharp contrast when compared to life in Colonial America, where the British government imposed *involuntary*¹⁵ taxes upon current taxpayers of that era and unleashed hazardous outcomes.¹⁶ That imposi-

tion of taxes by the British colonial government was conducted without any consultation or input by the taxpayers on whom the tax was levied.¹⁷ As a result, imposition of the tax had incendiary consequences.¹⁸

Colonialism in the Caribbean was similarly unpopular in that region, and the involuntary imposition of taxes by the British colonial government on taxpayers in the Commonwealth Caribbean¹⁹ without popular input or consent was unwelcome as well.²⁰ Thus, the actual imposition of involuntary

¹⁰See Kevin Duncan, Alex Raut, and Joseph Henchman, *Fiscal Fact No. 295: Lottery Tax Rates Vary Greatly by State*, TAX FOUNDATION (Mar. 29, 2012), <<http://taxfoundation.org/article/lottery-tax-rates-vary-greatly-state>> [hereinafter Duncan, Raut, and Henchman] (“While no government labels its lottery as a tax ... lottery “profits” are an *implicit tax*.”) (emphasis added).

¹¹See William Ewald, *On a New Theory of Justice*, 82 CAL. L. REV. 231, 238 (1994) (“[T]he winner of a national lottery and the victim of a sky-diving accident must live with the consequences of their freely chosen gambles: society may not expropriate their winnings, nor need it compensate them for their injuries.”) (emphasis added). See also Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. AND POL’Y 385 (2011) (discussing the ramifications of American Prohibition).

¹²See Norbert Katona and Judit Tessényi, *Expanding the Self-Evaluation System of Corporate Social Responsibility on the Basis of Hungarian Lotteries*, 20(4) GAMING L. REV. AND ECON. 339, 340 (May 2016) [hereinafter Katona and Tessényi].

¹³See, e.g., *Gambits*, 20(4) GAMING L. REV. AND ECON. 305 (May 2016) (“According to the UK Gambling Commission, ... a Cambridge University study, for example, found problem gambling rates of up to 11.6% among the homeless. Measures to protect the particularly vulnerable, if even partially effective, will be [a] way for gaming operators to act in a socially responsible fashion.”).

¹⁴See Katona and Tessényi, *supra* note 12, at 340. See also Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAP. L. REV. 87 (2002) [hereinafter Kelly] (discussing the anti-gambling traditions present in state laws in the U.S.).

¹⁵See, e.g., *A Summary of the 1765 Stamp Act*, COLONIAL WILLIAMS FOUNDATION (2012), <<http://www.history.org/history/teaching/tchcrsta.cfm>> (“[W]hat made the [1765 Stamp Act] so offensive to the colonists was not so much its immediate cost but the standard it seemed to set. In the past, taxes and duties on colonial trade had always been viewed as measures to regulate commerce, not to raise money. The Stamp Act, however, was viewed as a direct attempt by England to raise money in the colonies without the approval of the colonial legislatures.”) (emphasis added). See also DAVID McCULLOUGH, 1776, at 11 (Simon & Schuster 2005) [hereinafter McCULLOUGH, 1776] (Indeed, the “seiz[ure of] the public revenue” was a critical condemnation of the American “rebellion”—that culminated in American Independence in 1776—by King George III in his historical address at the opening of the British Parliament in October 1775). See also *id.* at 67 (“On ... January 1, 1776, the first copies of the speech delivered by King George III at the opening of Parliament back in October ... arrived with the ships

from London ... The speech ... [with i]ts charges of traitorous rebellion ... ended any hope of reconciliation ...”).

¹⁶See DAVID McCULLOUGH, JOHN ADAMS 65 (Simon & Schuster 2005) [hereinafter McCULLOUGH, JOHN ADAMS] (“[I]n 1768 ... [the imposition of yet] another round of taxes ... by [the British] Parliament ... [caused] the atmosphere in the city [of Boston to] turn ... incendiary. Incidents of violence broke out between the townsmen and soldiers ... In the melee the soldiers suddenly opened fire ... killing five men.”) (emphasis added).

¹⁷*Id.*

¹⁸*Id.*

¹⁹See, e.g., ISLANDS OF THE COMMONWEALTH CARIBBEAN, A REGIONAL STUDY (Sandra W. Meditz and Dennis M. Hanratty eds., 1987), available at <<http://countrystudies.us/caribbean-islands/2.htm>> (“The Commonwealth Caribbean is the term applied to the English-speaking islands in the Caribbean and the mainland nations of Belize (formerly British Honduras) and Guyana (formerly British Guiana) that once constituted the Caribbean portion of the British Empire.”); see also Edward A. Laing, *Insularity and Success*, 4 CARIB. L.B. 6 (1999) (“[With respect] to economic concerns, most [Commonwealth Caribbean] countries are middle income developing countries.”); see also William C. Gilmore, *The Associated States of the Commonwealth Caribbean: The Constitutions and the Individual*, 11 LAW. AM. 1, 1 n.3 (1979). Typical abbreviations used for these territories are: Antigua (Ant.), The Bahamas (Bah.), Barbados (Bds.), Belize (Blz.), Bermuda (Berm.), the Cayman Islands (Cay.), Dominica (Dom.), Grenada (Gren.), Guyana (Guy.), Jamaica (Jam.), Montserrat (Mont), St. Kitts, Nevis, Anguilla (KNA), St. Lucia (St.L.), St. Vincent (St.V.), Trinidad and Tobago (TT), the Virgin Islands (Virgs.) (British).

²⁰See, e.g., ERIC WILLIAMS, CAPITALISM AND SLAVERY 121 (Andre Deutsch 1944) [hereinafter WILLIAMS] (“The Stamp Act was as unpopular with the merchants of the islands as it was on the mainland; the stamps were publicly burnt, to the accompaniment of shouts of liberty. “God only knows,” wrote Pinney from Nevis as soon as hostilities broke out, “what will become of us. We must either starve or be ruined.” It was worse. They did both. Fifteen thousand slaves died of famine in Jamaica alone between 1780 and 1787, and American independence was the first stage in the decline of the sugar colonies.”) (emphasis added) (footnotes omitted); see also McCULLOUGH, 1776, *supra* note 15, at 13 (referring to the Stamp Act of 1765 as “incendiary”). Opposition to involuntary taxation is as old as history itself. See, e.g., WILLIAMS at 153 (“In 1832 the Trinidad Council petitioned for the abolition of the slave tax of one pound island currency per head. The [British] Colonial Office refused: it was “of great importance that this tax should be continued ...”) (citations omitted).

taxes in the Colonial Caribbean also had incendiary effects²¹ quite similar to those experienced in Colonial America.²² Indeed, the value of ensuring participation and consultation should have been as self-evident then as it is now.

It is therefore persuasive to propose that a present day government’s invention and deployment of a *voluntary* tax mechanism would be an ingenious innovation by any politician.²³ Moreover, lottery playing may very well qualify as such a phenomenon.²⁴ This is the case because jackpot-winning from lottery playing provides human drama²⁵ and, in the opinion of one Nobel Prize-winning Caribbean author, “drama was discovered to be a necessary human nutriment.”²⁶ Indeed, with respect to lottery playing, four commentators also expressed a particularly perceptive point of view some years ago.²⁷ Furthermore, the perception of those four commentators²⁸ may be similar to George Orwell’s own point of view articulated over half a century ago in his world-famous fic-

tional novel, *1984*.²⁹ George Orwell observed that it is unknown whether for “some millions of [players] ... the [l]ottery [was] the principal if not the *only* reason for remaining alive.”³⁰ One may wonder whether a similar observation is also true for millions of present-day lottery players.

Actually, the revenue³¹ generated by modern-day lottery playing in the U.S.³² may be perceived as the fiscal product of an imaginative and successful voluntary tax.³³ Also, the Commonwealth Caribbean has been paying attention to the American lottery playing experience and has been swift to take notice of the beneficial financial effects of lottery playing on governmental revenue enhancement in the U.S.³⁴ Some of the governments in the Commonwealth Caribbean region have sought to achieve similarly positive effects on their own governmental revenue inflows.³⁵ As a result, lottery playing has become quite a financial bonanza in that region as well.³⁶

²¹*Id.*

²²See McCULLOUGH: JOHN ADAMS, *supra* note 16.

²³See, e.g., BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 47 (MJF Books 1990) [hereinafter GOLDWATER] (“Where is the politician who has not promised his constituents *a fight to the death for lower taxes . . .*”) (emphasis added).

²⁴See Duncan, Raut, and Henschman, *supra* note 10.

²⁵See Tony Dokoupil, “*The Drama is Nonstop*”: Powerball Winner ‘Wild Willie’ Wants his Old Life Back, NBC NEWS (Sept. 25, 2013, 3:34 ET), <<http://www.nbcnews.com/news/other/drama-nonstop-powerball-winner-wild-willie-wants-his-old-life-f8C11251444>> [hereinafter Dokoupil].

²⁶See V.S. NAIPAUL, *THE MIMIC MEN* 153 (Andre Deutsch 1967) [hereinafter NAIPAUL, *MIMIC MEN*].

²⁷See, e.g., Burns, Gillett, Rubinstein, and Gentry, *supra* note 3 (“*Very heavy lottery players share characteristics of addicted gamblers, namely they are older, higher in income, fantasize more, and engage in other forms of gambling. A subset of them also exhibits compulsive consumption in the forms of browsing and heavy buying, sensation-seeking, and risk-taking. The dream of winning the lottery seemingly accommodates the strong fantasy need found in them quite well.*”) (emphasis added).

²⁸*Id.*

²⁹See ORWELL, *supra* note 1, at 73.

³⁰See *id.* (emphasis added) (as it was for a fictional group of lottery players referred to in his novel as “proles.”).

³¹See Derek Thompson, *Lotteries: America’s \$70 Billion Shame*, ATLANTIC (May 11, 2015), available at <<http://www.theatlantic.com/business/archive/2015/05/lotteries-americas-70-billion-shame/392870/>>.

³²*Id.*

³³See CLOTFELTER AND COOK, *supra* note 4.

³⁴See JAMAICA BETTING, GAMING, AND LOTTERIES COMMISSION (BGLC), <<http://www.bglc.gov.jm/about/history.html>>

(“It would be wishful thinking to imagine that Jamaica will be immune to the gaming fever, which is taking place in [the U.S.]. The [Jamaica Betting, Gaming, and Lotteries] Commission has been receiving numerous applications from U.S.-based entities for lottery and gaming licences to operate in Jamaica.”); see also V.S. NAIPAUL, *THE MIDDLE PASSAGE* 50 (Andre Deutsch 1962) [hereinafter NAIPAUL, *MIDDLE PASSAGE*] (“[I]n Trinidad ... with more money circulating, gambling has become universal. It is respectable; it is almost an industry . . .”).

³⁵*Id.*

³⁶See, e.g., *Gov’t Continues to Lapse on Deposit of Lotto Funds*, STABROEK NEWS (Apr. 14, 2010), <<http://www.stabroeknews.com/2010/archives/04/14/gov't-continues-to-lapse-on-deposit-of-lotto-funds/>> (“[F]rom 1996 to 2008, ‘amounts totaling \$3.283 billion were received from the Guyana Lotteries Company and deposited into account No. 3119.’ At the end of 2008, the balance on this account was \$186.508 million, which meant that the government has so far spent \$3.097 billion of the money they received during the period in question.”). See also *Lotteries Money Paid into Consolidated Fund*, STABROEK NEWS (Mar. 14, 2007), <<http://www.stabroeknews.com/2007/archives/03/14/lotteries-money-paid-into-consolidated-fund/>> (“A sum of roughly \$12M from the Guyana Lotteries Company was deposited in the Consolidated Fund in December.”). See, e.g., *Barbados Lottery*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Barbados_lottery> (“The Barbados lottery is the national lottery in Barbados. A high percentage of proceeds of the Lottery’s revenue goes to support Beneficiary organizations ... in accordance with its mandate[.]”). See also *Lottery History*, CARIBBEAN LOTTERY, <http://www.thecaribbeanlottery.com/pages/history_2006> (“Today, more than 50 other gaming options have been developed for our growing customer base.”).

However, a note of caution may be prudent at this point. For one may wonder whether the magnitude of modern-day lottery playing revenue³⁷ should also remind us of the proverb of the goose³⁸ that laid golden eggs³⁹ for its owner.⁴⁰ The implementation of a recent rules change in the odds of winning the Powerball jackpot⁴¹ bring this proverb to mind. “The rules change is intended to increase the odds of winning any prize, while making it *more difficult* to win the jackpot prize, the New York State Gaming Commission wrote in a memo supporting the change.”⁴²

In fact, there are no illusions about the goal of this rules change.⁴³ “The purpose of this change was to increase the chances that there would be *no grand prize winner* for any given drawing.”⁴⁴ As a result, jackpots are expected to become larger and larger as winning the grand prize week by week becomes more and more difficult to achieve.⁴⁵ The intention of the lottery industry is probably to prevent “jackpot fatigue”⁴⁶ from setting in. The concept of jackpot fatigue is that “[l]ottery consumers demand higher and higher jackpots so they can stay excited about lotto games.”⁴⁷ So, by enhancing the prospect of larger-and-larger jackpots, the lottery industry probably anticipates the stimulation of greater-and-greater excitement over public lottery playing.⁴⁸

Certainly, the change in the odds of winning jackpots and the anticipated higher jackpots as a result of the change may be intended as a preemptive strike against potential jackpot fatigue.⁴⁹ However, the impact of these changes⁵⁰ on continuing public interest in lottery playing at the current seventy billion dollar level of public expenditures⁵¹ is unknown. Moreover, in light of the opinion of one Nobel Prize-winning Caribbean author relating to the nature of success,⁵² the modern phenomenon of lottery playing may not be mysterious at all, because it may be a governmental tax device that is actually working⁵³—at least, for the time being.

This article discusses some aspects of the impact of billion dollar jackpots on public lottery playing in the U.S., and also explores implications relating to the creation of a federal lottery in the U.S., with a view to reducing the federal deficit. Part I is the Introduction, followed by discussion in Part II of important distinctions between federal and state lottery law in the U.S. Part III highlights the financial success of lottery playing in the four most highly populated states in the U.S., and also mentions some of the success that lottery playing in the Commonwealth Caribbean has achieved. Part IV ex-

plains that some states in the U.S. do not have lotteries, while Part V draws attention to present day public perceptions of lottery playing in the U.S. Part VI ensures that some troublesome developments in the lottery industry are not overlooked. Part VII identifies and discusses some criticisms of lotteries as useful tax devices. Part VIII investigates the legal impact that state legislative lottery

³⁷ See Thompson, *supra* note 31.

³⁸ Or hen. See *Silk Road Fables*, AMERICAN MUSEUM OF NATURAL HISTORY, available at <<http://www.amnh.org/explore/ology/anthropology/silk-road-fables2>>. See also *The Goose That Laid the Golden Eggs*, WIKIPEDIA, <https://en.wikipedia.org/wiki/The_Goose_That_Laid_the_Golden_Eggs>.

³⁹ *Id.*

⁴⁰ In the modern era, state governments are the owner. See, e.g., *Lotteries*, NAT'L GAMBLING IMPACT STUDY COMM'N, 1–17 at 11, available at <<http://govinfo.library.unt.edu/ngisc/research/lotteries.html>> [hereinafter NGISC, *Lotteries*] (“The most important issue regarding lotteries is the ability of government at any level to manage [this] activity from which it profits. In an *anti-tax era*, many state governments have become dependent on “*painless*” lottery revenues . . .”) (emphasis added).

⁴¹ See Judd Legum and Bryce Covert, *Powerball's \$1.5 Billion Swindle of Americans*, THINK PROGRESS (Jan. 11, 2016, 12:10 p.m.), <<http://thinkprogress.org/economy/2016/01/11/3737974/powerball-lotteries/>> [hereinafter Legum and Covert]. See also Joseph Spector, *Odds Are, You Won't Like This Powerball Story*, USA TODAY (July 6, 2015, 10:06 p.m.), available at <<http://www.usatoday.com/story/news/nation/2015/07/06/odds-are-you-wont-like-this-powerball-story/29799555/>>.

⁴² See Legum and Covert, *supra* note 41 (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.*

⁴⁶ See *Lotteries*, ENCYCLOPEDIA.COM, ch. 7 (“A major problem facing the lottery industry is called ‘jackpot fatigue.’”).

⁴⁷ *Id.*

⁴⁸ See Legum and Covert, *supra* note 41 (“Why are Powerball jackpots getting so huge? It's not an accident.”).

⁴⁹ See *Lotteries*, *supra* note 46.

⁵⁰ See Sarah Moses, *Could Powerball Jackpot Reach \$1 Billion?*, SYRACUSE.COM (Jan. 8, 2016), <http://www.syracuse.com/news/index.ssf/2016/01/could_powerball_jackpot_reach_1_billion.html> [hereinafter Moses] (“Since the Powerball game changed in October, the chance of winning the jackpot has decreased. Before October, the odds of winning the Powerball jackpot were 1 in 175,223,338. The odds of winning the Powerball jackpot are now 1 in 292,201,338. Powerball increased the number of white balls from 59 to 69 and decreased the number of red balls from 35 to 26. The change decreased the odds of winning the jackpot, but improved players' chances of winning another prize. Lottery officials say the new rules play a huge role in the size of the jackpot and the frequency of a player winning it.”) (emphasis added).

⁵¹ See Thompson, *supra* note 31.

⁵² See NAIPAUL: MIMIC MEN, *supra* note 26, at 152 (“Success is success; once it occurs it *explains itself*.”) (emphasis added).

⁵³ See NGISC, *supra* note 4; NGISC REPORT, CHAPTER 2, *supra* note 4, at 2–3 (“[T]he lottery industry is the only form of gambling in the United States that is a virtual government monopoly.”).

law changes have had on judicial interpretation of state public policy and Part IX analyzes some constitutional essentials that play a role in the creation by Congress of a legally valid federal lottery. The Conclusion follows in Part X.

II. A RELEVANT DISTINCTION BETWEEN FEDERAL AND STATE LOTTERY LAW IN THE U.S.

In the U.S. at present, there is no competition with state lottery playing from federal lottery playing because no federal lottery exists.⁵⁴ “A new federal lottery would compete with both the individual state and multi-state games and federal revenues would likely be increased at the expense of state income.”⁵⁵ This potential competition with the individual states’ revenue decisions may have inhibited Congress’ enthusiasm in embracing the prospect of creating a federal lottery. Secondly, congressional hesitation in venturing to create a federal lottery to date may stem from the fundamental nature of federal and individual state legal and governmental structures⁵⁶ in light of the Tenth Amendment to the U.S. Constitution.⁵⁷ Unquestionably, the regulation of gambling is vested in the several states.⁵⁸ “[T]his general power of governing, possessed by the States but not by the Federal Government, [is referred to by the judiciary] as the ‘police power.’”⁵⁹

Since gambling and lottery playing in particular profoundly impinge upon the morals of the people in each state,⁶⁰ and “the police power is controlled by 50 different States instead of one national sovereign,”⁶¹ the regulation of gambling therefore inheres in the police powers of each individual state.⁶² A careful analysis of the separate structures of U.S. state and federal governments under the U.S. Constitution reveals that federal governmental powers consist of those powers delegated to the U.S. government by the individual states under the U.S. Constitution.⁶³ “[T]he federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another.”⁶⁴ Moreover, “freedom is enhanced by the creation of two governments, not one. The Framers concluded that allocation of powers between the National Government and the States enhances freedom”⁶⁵

The legislative powers delegated to Congress in Article 1, Section 8 of the U.S. Constitution⁶⁶ do

not expressly enunciate regulation of gambling.⁶⁷ Additionally, the Tenth Amendment of the U.S. Constitution expressly mandates that “powers not delegated to the United States . . . nor . . . prohibited to the States, are reserved to the States respectively, or to the people.”⁶⁸ Congress has therefore not sought to regulate lottery playing generally since it is a type of gambling and is therefore constitutionally preserved within the police powers of each individual state.⁶⁹ “The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.”⁷⁰

However, in *Champion v. Ames*,⁷¹ “the [U.S. Supreme] court made it clear that the power to

⁵⁴See *Why Not a National Lottery?*, STAN COLLENDER’S CAPITAL GAINS AND GAMES (Oct. 15, 2009), <<http://capitalgainsandgames.com/blog/stan-collender/1173/why-not-national-lottery>>.

⁵⁵*Id.*

⁵⁶See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”).

⁵⁷U.S. CONST. amend. X.

⁵⁸See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (“[S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government . . . even though the Constitution’s text does not authorize any government to do so.”).

⁵⁹*Id.* at 2578 (citations omitted).

⁶⁰See *Stone v. Mississippi*, 101 U.S. 814 at 818 (1879) (“[E]xperience has shown . . . the widespread pestilence of lotteries [Lottery playing] infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and the simple. *Happily, under the influence of restrictive legislation, the evils are not so apparent now*”) (citations omitted) (emphasis added).

⁶¹See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

⁶²See *Stone v. Mississippi*, 818. (“No one denies . . . that [each state’s police power] extends to all matters affecting the public health or *the public morals*.”) (emphasis added).

⁶³See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 216 (2009) (enunciating the limitations on U.S. governmental powers by the U.S. Constitution and explaining that “[a]ll powers not granted to [the U.S. government] by [the U.S. Constitution] are reserved to the States or the people.”) (emphasis added) (citations omitted).

⁶⁴See *Bond v. U.S.*, 564 U.S. 211, 221 (2011).

⁶⁵*Id.* at 220–221 (citations omitted).

⁶⁶U.S. CONST. art. 1. § 8.

⁶⁷U.S. CONST. art. 1. § 8.

⁶⁸U.S. CONST. amend. X.

⁶⁹See *Stone v. Mississippi*, 101 U.S. 814 (1879).

⁷⁰See *Bond v. U.S.*, 564 U.S. 211, 221 (2011).

⁷¹See *Champion v. Ames*, 188 U.S. 321 (1903).

regulate interstate commerce includes the ability to prohibit items from being shipped in interstate commerce. The Court concluded that it was within Congress's commerce-clause power to stop lottery tickets from being shipped in interstate commerce."⁷² Notwithstanding this U.S. Supreme Court decision, in light of the fundamentally state-based nature of police powers,⁷³ an amendment of the U.S. Constitution would probably be the best mechanism to empower federal lottery playing. However, Congress could conceivably legislate statutory empowerment into federal law, but such empowerment would need to survive constitutional scrutiny by the federal judiciary in order to become the supreme law of the land.⁷⁴

It is certainly legally correct to propose that *intrastate* commerce in lottery playing by state government entities in accordance with individual state lottery laws is legal.⁷⁵ For, whereas privately operated lotteries are illegal under both federal⁷⁶ and state law,⁷⁷ lotteries operated by state government entities are entirely legal.⁷⁸ Of course, *interstate* commerce in lottery tickets is different because it violates federal law.⁷⁹ Thus, "[s]ince interstate lottery commerce is illegal under Federal law, it is hard to see how state lottery laws can interfere with it."⁸⁰ This point of view is viable because of the 1903 *Champion v. Ames* decision⁸¹ mentioned above, where "[t]he [U.S. Supreme] Court concluded that it was within Congress's Commerce Clause power to stop lottery tickets from being a part of interstate commerce."⁸²

Looking towards the future, however, these developments probably suggest that it is unlikely that congressional enactment of federal lottery-enabling legislation is imminent. This is the case notwithstanding possibly overwhelming congressional impulses to agitate for action to create a federal lottery commission authorized to sell lottery tickets in, perhaps, a desperate effort to raise funds to reduce the federal deficit. Yet, the continuing national threat from the inexorable increase in the federal deficit⁸³ may motivate Congress as a last resort to enact federal legislation creating a federal lottery for exactly that purpose.⁸⁴ Should Congress enact such legislation, positive judicial constitutional support for its legality would probably have to be predicated upon the judiciary's "general reticence to invalidate the acts of the Nation's elected leaders."⁸⁵

III. SUCCESS EXPERIENCED BY THE FOUR MOST POPULOUS STATES IN THE U.S. AND BY THE COMMONWEALTH CARIBBEAN

A. U.S.

Individual state regulation of lottery playing in the four most populous states in the U.S.⁸⁶ has proven to be quite successful financially.⁸⁷ "State lotteries in the United States, for instance, *may* take

⁷²See ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 93 (Viking 2014) [hereinafter CHERMERINSKY] ("The [U.S. Supreme] Court explicitly rejected the argument that the federal law violated the Tenth Amendment and intruded on state prerogatives. It also rejected the argument that according Congress such power would give Congress seemingly limitless authority and would endanger the constitutional structure.").

⁷³See *Stone v. Mississippi*, 101 U.S. 814 (1879).

⁷⁴See Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37, 93 (2012) [hereinafter Leacock, *Lotteries and Public Policy*] ("[U]nder the Tenth Amendment to the U.S. Constitution, the regulation of gambling remains vested in the several states.") (footnotes omitted).

⁷⁵See *Stone v. Mississippi*, 101 U.S. 814 (1879). See also Peter B. Maggs, *The ".US" Internet Domain*, 50 AM. J. COMP. L. 297, 314 (2002) [hereinafter Maggs] ("[It is an] extremely weak theory that [intra]state lottery laws interfere with interstate commerce.") (emphasis added).

⁷⁶18 U.S.C. § 1301.

⁷⁷See Maggs, *supra* note 75, at 314 n.57.

⁷⁸See *Stone v. Mississippi*, 101 U.S. 814 (1879).

⁷⁹See *Champion v. Ames*, 188 U.S. 321 (1903).

⁸⁰See Maggs, *supra* note 75, at 314.

⁸¹See *Champion v. Ames*, 188 U.S. 321 (1903).

⁸²See CHERMERINSKY, *supra* note 72, at 93 ("The [U.S. Supreme] Court explicitly rejected the argument that the federal law violated the Tenth Amendment and intruded on state prerogatives. It also rejected the argument that according Congress such power would give Congress seemingly limitless authority and would endanger the constitutional structure.").

⁸³See, e.g., James Grant, *In Debt We Stand*, TIME, Apr. 25, 2016, at 28.

⁸⁴*I.e.*, fundamentally reducing the federal deficit.

⁸⁵See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). See *infra* Section IX for further discussion of these substantive points.

⁸⁶*Viz.*, California, Texas, Florida, and New York. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, AMERICAN FACTFINDER, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPANNRES&src=pt>.

⁸⁷See NGISC, *supra* note 4; NGISC REPORT, CHAPTER 2, *supra* note 4, at 2–3 ("State governments have become dependent on lottery sales as a source of revenue, and have tried to justify the money by earmarking it for good causes, such as *education*.") (emphasis added).

in two dollars or more for every dollar paid out as prizes.”⁸⁸ First, with respect to California, the most populous state in the U.S.,⁸⁹ “the California Lottery’s sole mandate is to raise supplemental funds for all California public schools.”⁹⁰ On its website, the California Lottery has clarified that funds from orthodox⁹¹ taxes are not allocated to the state’s lottery operations.⁹² Moreover, the most recent public financial specifics on its website indicate that only five percent of California Lottery revenues are consumed by administrative expenditures used to operate it.⁹³ Specifically, its website has declared that “[s]ince [the financial year] 2000–01 ... more than \$1 billion a year [was sent] to public education.”⁹⁴

Texas, the second most populous state in the U.S.,⁹⁵ has also experienced positive results.⁹⁶ Its lottery sales exceeded one billion dollars in the first quarter of 2016, which is the highest level of income achieved in the Texas Lottery’s history.⁹⁷ “The Texas Lottery’s cumulative transfers to the Foundation School Fund surpass \$19 billion since 1997.”⁹⁸

Both Florida⁹⁹ and New York¹⁰⁰ also emphasize providing assistance for funding education.¹⁰¹ Both states have in fact earmarked education as

the recipient activity for funding from lottery earnings.¹⁰² Florida, now hosting the third largest U.S. state population, is thriving on the proceeds from this source of voluntary taxation.¹⁰³ With respect to New York, in its Mission Statement, the New York Lottery enunciates that its “sole mission is to earn revenue for education.”¹⁰⁴

Florida has now surpassed New York in total population growth.¹⁰⁵ However, Florida has not done so in revenue-capture realized from lotteries.¹⁰⁶ For, since its creation almost fifty years ago, the New York Lottery has contributed over \$58 billion to the funding of education in the state.¹⁰⁷ These positive outcomes seem to confirm the observation of one commentator identified earlier, referring to the efficacy of some state lottery operations.¹⁰⁸ This might also seem to make lottery playing cost efficient for some states.

B. Commonwealth Caribbean

In Jamaica, the largest English-speaking former British island colony in the Caribbean, contributing to education financing is also an important goal of the Jamaica Betting, Gaming, and Lotteries

⁸⁸See Maggs, *supra* note 75, at 313 (footnote omitted) (emphasis added). *But see also* MATTHEW SWEENEY, *THE LOTTERY WARS* 133 (2009) [hereinafter SWEENEY] (“No other ‘tax’ costs so much to collect. The state government spends a lot of money on running lotteries.”).

⁸⁹See *Annual Estimates of the Resident Population*, *supra* note 86.

⁹⁰See, *See Where the Money Goes*, CA LOTTERY, <<http://www.calottery.com/giving-back/education/where-money-goes>>. *See also* NGISC, *Lotteries*, *supra* note 4, at 6 (“[In Georgia] the sole designated recipients are programs for college scholarships, pre-kindergarten classes, and technology for classrooms; it is illegal to use the funds for any other purpose.”) (citations omitted). *See also id.* (“New Mexico has adopted a similar approach ... the legislature mandated that 60% of the revenues go towards the construction of public schools and 40% to tuition assistance for residents attending state colleges. None of the money may go to the general fund.”) (citations omitted).

⁹¹*I.e.*, involuntary (e.g., property taxes).

⁹²See, *See Where the Money Goes*, *supra* note 90 ([T]he California Lottery does not receive General Fund or taxpayer dollars. Everything we have, we raise from Lottery ticket sales.”).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵See *Annual Estimates of the Resident Population*, *supra* note 86.

⁹⁶See Press Release, Texas Lottery, Texas Lottery Achieves Record First Quarter Sales (2016), <http://www.txlottery.org/export/sites/lottery/Documents/news_releases/2015/FY_2016_Q1_Results_PR.pdf>.

⁹⁷See *id.*

⁹⁸See *Texas Lottery Commission History*, TEXAS LOTTERY, <http://www.txlottery.org/export/sites/lottery/About_Us/Milestones/>.

⁹⁹The third most populous state. *See Annual Estimates of the Resident Population*, *supra* note 86. *See also Dollars to Education: More Than 29 Billion to Education*, FLORIDA LOTTERY, <<http://www.flalottery.com/education>> (“In fiscal year 2014–2015, the Florida Lottery transferred \$1.5 billion to the Educational Enhancement Trust Fund. For the thirteenth time in Florida Lottery history the agency surpassed the billion-dollar mark in a single year. The Lottery’s total contribution since start-up is more than \$29 billion.”) (Florida emphasizes its education funding).

¹⁰⁰Fourth most populous state, *Annual Estimates of the Resident Population*, *supra* note 86. *See also New York Lottery Mission Statement*, NEW YORK LOTTERY, <<http://nylottery.ny.gov/wps/portal/Home/Lottery/About+Us/Mission+for+Education>> (“The New York Lottery’s sole mission is to earn revenue for education.”).

¹⁰¹See *supra* notes 98, 99.

¹⁰²*Id.*

¹⁰³See *Dollars to Education*, *supra* note 99.

¹⁰⁴See *New York Lottery Mission Statement*, *supra* note 100.

¹⁰⁵See *Annual Estimates of the Resident Population*, *supra* note 86.

¹⁰⁶See *About the New York Lottery*, NEW YORK LOTTERY, <<http://nylottery.ny.gov/wps/portal/Home/Lottery/About+Us/Mission+for+Education>> (“[New York] continues to be North America’s largest and most profitable Lottery, earning over \$58.02 billion in education support statewide since its founding over 48 years ago.”).

¹⁰⁷*Id.*

¹⁰⁸See Maggs, *supra* note 75, at 313 (“State lotteries in the United States, for instance, may take in two dollars or more for every dollar paid out as prizes.”) (footnote omitted) (emphasis added).

Commission through the use of lottery playing. For example, “[t]he Betting, Gaming, and Lotteries Commission (BGLC) established its Education Fund as part of its Corporate Social Responsibility Programme in August 2014 The aim of the Fund is to contribute to the welfare of tertiary level students through education and to ultimately assist in their upliftment.”¹⁰⁹ This contribution to education is an ongoing objective of the Jamaica Betting, Gaming, and Lotteries Commission.¹¹⁰ Trinidad, Guyana, and Barbados have also experienced some success as well.¹¹¹

IV. STATES THAT DO NOT HAVE LOTTERIES

“When the Americans had their revolution and rejected the rule of the English King, political theory required them to say who was sovereign in their new polity.”¹¹² This observation by one commentator is valid for both the federal government and state governments in the U.S. The commentator concluded that with respect to the federal government, “[t]he answer they gave was that “the people themselves” were the ultimate sovereign.”¹¹³ Certainly, similar

conclusions apply to each of the 50 states as well, and the sovereignty of the people can and does vary from state to state with regard to lottery playing.¹¹⁴ Moreover, the federal government must ensure that legally, it neither favors nor disfavors states that have legalized lotteries or states that have not done so.¹¹⁵

Thus, although the vast majority of individual states in the U.S. have legalized lottery playing, a small minority of American states continue to abstain from legalizing it.¹¹⁶ This remains the case in spite of the apparent benefits to state education funding.¹¹⁷ This may stem from a perception that gambling is really *not* just another business activity at all, since “in fact it is almost universally regarded as something different, requiring special rules and treatment, and enhanced scrutiny by governments and citizens alike.”¹¹⁸ This means that each state is free to exercise its police powers to regulate its own state public morality as that particular state sees fit.¹¹⁹ As a result, some state constitutional provisions forbid lotteries, prohibit the sale of lottery tickets, and also preclude any legislative authorization of lotteries.¹²⁰ Of course, the federal government must respect this individual state sovereignty by treating lottery and non-lottery states evenhandedly.¹²¹

¹⁰⁹See Press Release, Betting, Gaming, and Lotteries Commission, BGLC Accepts Education Fund Applications for 2016–2017 Academic Year (Apr. 4, 2016), <<http://www.bglc.gov.jm/sites/default/files/Press%20Release%20BGLC%20Education%20Fund%20APR%204%202016%20with%20link.pdf>>. See also *The Betting, Gaming and Lotteries Act of 1976*, GOV'T OF JAMAICA, BETTING, GAMING, AND LOTTERIES COMMISSION, <<http://www.bglc.gov.jm/laws/bglcact/default.html>> (“It appeared . . . That the Government wished that gambling should make its fair contributions to the revenue of the country, like other sectors, to provide employment and to assist in works of public interest.”).

¹¹⁰*Id.* (“The Betting Gaming and Lotteries Commission (BGLC) advises the public it is now accepting applications from tertiary students for grants from the BGLC Education Fund for the 2016–2017 Year.”) (emphasis added).

¹¹¹See *supra* notes 34, 36.

¹¹²See Randy Barnett, *Faculty Article: Our Republican Constitution*, GEORGETOWN LAW: RES IPSA LOQUITUR, Spring/Summer 2016, at 51 [hereinafter Barnett].

¹¹³*Id.*

¹¹⁴See *Stone v. Mississippi*, 101 U.S. 814 at 818 (1879) (“No one denies . . . that [Each state’s police power] extends to all matters affecting the public health or the public morals.”) (emphasis added).

¹¹⁵The existence and legality of the dichotomy of lottery and non-lottery states is acknowledged by the U.S. Supreme Court in interpreting and applying federal statutory enactments in light of fundamental rights mandated by the U.S. Constitution. See, e.g., *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (“Instead of favoring either the lottery or the nonlot-

tery State, Congress opted to *support the anti-gambling policy of a State* like North Carolina by forbidding stations in such a State from airing lottery advertising. At the same time it sought *not to unduly interfere with the policy of a lottery sponsoring State* such as Virginia.”) (emphasis added).

¹¹⁶E.g., Alabama, Alaska, Hawaii, Mississippi, Nevada, and Utah do not have state lotteries.

¹¹⁷See, e.g., *supra* Section III.

¹¹⁸See NGISC, *supra* note 4; NGISC REPORT, CHAPTER 1 (Overview), at 1–4.

¹¹⁹See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

¹²⁰See *State ex rel. Tyson v. Ted’s Game Enters.*, 893 So. 2d 355, 370 (Ala. Civ. App. 2002) (ruling that Article 4, Section 65 of the Alabama Constitution prohibits lotteries and any scheme similar to a lottery); *State v. Nixon*, 384 N.E.2d 152, 197 (Ind. 1979) (stating that Article 15, Section 8 of the Indiana Constitution prohibited the lottery), *distinguished by* *George v. National Collegiate Athletic Ass’n*, 945 N.E.2d 150 (Ind. 2011); *Poppen v. Walker*, 520 N.W.2d 238, 240 (S.D. 1994) (discussing a 1986 amendment to Article III, Section 25 of the South Dakota Constitution which permitted the legislature to authorize a state lottery), *superseded by constitutional amendment as stated in* *State v. Orr*, 871 N.W.2d 834, 837 (S.D. 2015).

¹²¹See *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) (“[T]he Government has a substantial interest in *supporting* the policy of nonlottery States, as well as *not interfering* with the policy of States that permit lotteries.”) (citations omitted) (emphasis added).

V. PRESENT DAY PUBLIC PERCEPTION OF LOTTERY PLAYING¹²²

Actually, the playing of lotteries¹²³ has come a long way since 1949, when George Orwell wrote his uncannily prescient book of fiction¹²⁴ entitled *1984*.¹²⁵ The recent jackpot for Powerball that reached \$1.6 billion in January 2016¹²⁶ and was won by three particularly fortunate ticketholders¹²⁷ who selected the winning numbers¹²⁸ supports this conclusion. This almost unimaginably large jackpot materialized in spite of earlier action taken by Powerball officials, who made it more difficult to win large jackpots.¹²⁹ These specific changes, designed to decrease the prospects of winning large Powerball jackpots, was accomplished by implementing less-favorable odds of winning.¹³⁰

However, “[t]he concept of man as a rational maximizer of his [economic] self-interest”¹³¹ is an economic assumption that is probably not confirmed by

the American lottery-playing public’s reaction to the increased difficulty and infrequency of winning jackpots. The level of public lottery playing may continue unabated, or it may actually rise even in the face of this apparent disincentive. Four commentators have suggested that “[t]he vast majority of gamblers . . . place limits on their playing and live within [those] limits.”¹³² This would tend to support the view that lottery playing by the vast majority of participants in the U.S. does not suggest a pathological level of gambling as a whole.¹³³ Indeed, in the modern era, lottery playing has now evolved, for almost seven decades, light years from its earlier history of complete illegality in every state in the U.S.,¹³⁴ to the present-day phenomenon that we witness today.¹³⁵

In the earliest history of lottery playing, when the American Colonies were in their infancy, lottery playing was perfectly legal.¹³⁶ Then a pendulum-like evolution from initial legality during the early North American colonial history,¹³⁷ to illegality in every state,¹³⁸

¹²²See, e.g., Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1446 (1997) [hereinafter Hovenkamp] (“Major American campaigns to regulate morals by law, rather than simply through church teaching and authority, developed in the 1820s and 1830s. One result was significant legislation limiting or forbidding gambling and lotteries.”). See also U.S. v. Edge Broadcasting Co., 509 U.S. 418, 421 (1993) (“While lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest, and have long engaged in legislative efforts to control this form of gambling.”).

¹²³See Kelly, *supra* note 14, at 122 (“All states in the Union, influenced by the historical traditions against gambling, have started from the premise that gambling debts are unenforceable”). See also Elizabeth Winslow McAuliffe, *The State-sponsored Lottery, A Failure of Policy and Ethics*, 8(4) PUBLIC INTEGRITY 367–379 (Fall 2006) [hereinafter McAuliffe, *Lottery*], available at <<http://stoppredatorygambling.org/wp-content/uploads/2012/12/The-State-Sponsored-Lottery1.pdf>>, which also cited the passage of George Orwell’s *1984*, see *supra* note 1. George Orwell’s work of fiction is indeed a masterpiece in light of its predictions of prospective changes in modern human life, unanticipated in 1945. See generally Stephen J. Leacock, *Some Reflections on the Past, Present and State-Dependent Future of Lotteries in American Gaming Law*, 18(3) GAMING L. REV. AND ECON. 263 (2014) [hereinafter Leacock, *Lotteries in American Gaming Law*]. See also Stephen J. Leacock, *Lotteries and Public Policy in the United States and Commonwealth Caribbean Law: Scrutinizing the Success of Lotteries as a Voluntary and “Painless” Tax*, 45 INTER-AMER. L. REV. 91 (2013) [hereinafter Leacock, *Lotteries as Painless Tax*]. See generally Leacock, *Lotteries and Public Policy*, *supra* note 74.

¹²⁴See ORWELL, *supra* note 1, at 75 (1949) (“The game of darts was in full swing again, and the knot of men at the bar had begun talking about lottery tickets.”).

¹²⁵*Id.*

¹²⁶See Doug Stanglin and Jessica Estepa, *Winners in 3 States to Split Record \$1.6B Powerball Jackpot*, USA TODAY, Jan. 14, 2016, available at <<http://www.usatoday.com/story/money/nation-now/2016/01/14/powerball-thursday/78779006/#>> (“Lucky ticket holders in three states — California, Florida and Tennessee — will split the record \$1.6 billion Powerball jackpot . . .”).

¹²⁷*Id.* (“The winners beat the 1-in-292.2 million odds by picking the magic combination . . .”).

¹²⁸*Id.*

¹²⁹See Moses, *supra* note 50.

¹³⁰*Id.*

¹³¹See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (3d ed. 1986).

¹³²See Burns, Gillett, Rubinstein, and Gentry, *supra* note 3.

¹³³*Id.*

¹³⁴RICHARD MCGOWAN, *STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE* 15 (Praeger 1994) [hereinafter MCGOWAN].

¹³⁵See Legum and Covert, *supra* note 41 (“Why are Powerball jackpots getting so huge? It’s not an accident.”).

¹³⁶See CLOTFELTER AND COOK, *supra* note 4, at 34 (discussing early colonial use of lotteries in America) (“In colonial America lotteries were a popular and common means of financing public projects.”).

¹³⁷*Id.* at 32. See also DENISE VON HERRMAN, *THE BIG GAMBLE* 121 (Praeger 2002).

¹³⁸See MCGOWAN, *supra* note 134, at 15 (“In 1964, New Hampshire became the first state to operate a lottery in almost seventy years.”). See also CHARLES T. CLOTFELTER, PHILIP J. COOK, JULIE A. EDELL, AND MARIAN MOORE, *STATE LOTTERIES AT THE TURN OF THE CENTURY: REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION* 1 (Duke Univ. 1999), <<http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf>> [hereinafter CLOTFELTER, COOK, EDELL, AND MOORE] (“Until 1964, lotteries were illegal in every state in this country.”).

and a contrary pendulum-swing to the modern era starting in 1964,¹³⁹ has led us to 2016, when lotteries are legal in 44 of 50 states.¹⁴⁰ However, there is a growing reference to a group of young Americans commonly referred to as “millennials,”¹⁴¹ who may be less patient than their forebears.¹⁴² Only time will tell whether or not future lottery playing in the four most populous states in the U.S. will continue to be as successful as the recent past has shown.¹⁴³ It has been a revenue-enhancement vector for the governments that devote funds derived from it to assist in financing education.¹⁴⁴

VI. SOME TROUBLESOME DEVELOPMENTS¹⁴⁵

Actually, a former security director of the Multi State Lottery Association (MUSL) was accused¹⁴⁶ and later convicted of using an electronic device to access the MUSL’s computers in an unauthorized manner in order to unlawfully facilitate winning a lottery jackpot in the state of Iowa.¹⁴⁷ Subsequently, “lottery officials from Colorado, Wisconsin and Oklahoma have indicated that [the former lottery security director] may have also gamed lottery jackpots in their respective states.”¹⁴⁸ The lottery official is “accused of tampering with lottery drawings in four states over six years, and investigators are expanding their inquiry nationwide.”¹⁴⁹

This is an ominous development in light of the historical evolution of lottery playing in the U.S., where the legality of lottery playing has “swung to and fro like a pendulum.”¹⁵⁰ More safeguards may be necessary at the selection stage of the higher echelons of lottery personnel. There is the ongoing risk that such developments could resurrect significantly lethal fears relating to the validity of lottery operations, in spite of the fact that the conduct of all lotteries in the U.S. is actually under the command of state monopolies.¹⁵¹ State administrative agencies that operate lotteries should certainly realize that any compromise of the public trust in the integrity and honesty of lottery operations is probably playing with fire.

VII. CRITICISMS OF LOTTERIES AS USEFUL TAX DEVICES

In the view of two influential commentators, “[r]evenue is the *raison d’être* of contemporary

state lotteries.”¹⁵² However, these two commentators do not seem to be proposing that this means that the fundamental purpose of a lottery is settled.¹⁵³ The two commentators *do* propose that two major selling points for lotteries in the U.S. essentially predominate.¹⁵⁴ These two selling points consist, first, of the potential enhancement of governmental revenues, and secondly, beneficial societal deployment of those revenues particularly to assist in financing educational objectives.¹⁵⁵ As mentioned earlier, Thomas Jefferson was not initially a lotteries-supporter,¹⁵⁶ but seemed to have

¹³⁹*Id.*

¹⁴⁰*See The 6 States Where You Can’t Play Powerball*, ABC NEWS (Jan. 13, 2016, 12:47 p.m. ET), <<http://abcnews.go.com/US/states-play-powerball/story?id=36267614>> (“Forty-four states across the country participate in the multi-state lottery, with Wyoming being the most recent addition to the Powerball game in 2014.”). Washington D.C., Puerto Rico, and the American Virgin Islands also participate in lotteries.

¹⁴¹*See* I. Nelson Rose, *The Next Generation of Compulsive Gamblers*, 20(3) GAMING L. REV. AND ECON. 243 (2016) (“Millennials are generally thought of as those who were born after 1980.”).

¹⁴²*Id.*

¹⁴³*See supra* Section III.

¹⁴⁴*Id.*

¹⁴⁵*See* Yoni Heisler, *How a Security Director Used a Rootkit to Rig the Lottery and Steal Millions of Dollars*, BGR (Dec. 23, 2015), <<http://bgr.com/2015/12/23/lottery-hacker-rootkit-stolen-numbers-investigation/>> (“Eddie Tipton was convicted of hacking into the Multi-State Lottery Association’s computer system in order to rig a nearly \$17 million jackpot in Iowa.”).

¹⁴⁶*See Gambits*, 20(1) GAMING L. REV. AND ECON. 3 (2016).

¹⁴⁷*See* Heisler, *supra* note 145.

¹⁴⁸*See id.*

¹⁴⁹*See* Associated Press, *Lottery Fixing Scandal Spreads Nationwide after Industry Official Convicted of Fraud for Rigging \$16.5 Million Jackpot*, N.Y. DAILY NEWS (Dec. 18, 2015), available at <<http://www.nydailynews.com/news/national/lottery-fixing-scandal-spreads-nationwide-article-1.2470819>>.

¹⁵⁰*See* Leacock, *Lotteries in American Gaming Law*, *supra* note 123, at 264–269.

¹⁵¹*See* NGISC, *supra* note 4, at 1 (“[The lottery industry] is the only form of gambling in the U.S. that is a virtual government monopoly.”). *See, e.g.*, State ex rel. Stephan v. Parrish, 887 P.2d 127, 256 Kan. 746 (1994) (“[T]he recent constitutional amendment . . . authorized the legislature to provide for a *State-owned and operated lottery*.”) (citations omitted) (emphasis added).

¹⁵²*See* CLOTFELTER AND COOK, *supra* note 4, at 215.

¹⁵³*See id.* at 249 (“[T]he basic question is, what is the purpose of a lottery? Should it be evaluated *primarily on the basis of revenue performance* . . . or should other considerations be given weight?”) (emphasis added).

¹⁵⁴*Id.* at 215.

¹⁵⁵*Id.* *See also* NGISC, *supra* note 4, at 2 (“[P]layers voluntarily spending their money (as opposed to the general public being taxed) for the *benefit of the public good*.”) (emphasis added).

¹⁵⁶*See* CLOTFELTER AND COOK, *supra* note 4, at 299.

changed his mind to perceiving lottery playing in the U.S. as a potential tax substitute.¹⁵⁷ Moreover, since the purchase of lottery tickets is *voluntary* by those who play lotteries,¹⁵⁸ conceivably, this volition should arguably suffice to defuse at least *some* opponents’ arguments against lottery playing.

Nevertheless, some lottery opponents may categorize lottery playing as taxation when such an assertion supports arguments that negatively assess the cost-efficiency of lottery income as a tax-generating device.¹⁵⁹ For example, one argument using conventional criteria for judging taxes negatively categorizes the cost-efficiency of lotteries in comparison with conventional involuntary taxes.¹⁶⁰ However, another assessment of the relative profitability of lotteries as a form of gambling¹⁶¹ is quite positive.¹⁶² Some opponents have also asserted that lotteries are regressive,¹⁶³ “preying on the poor,” whether wittingly, by marketing heavily in poor areas, or unwittingly, simply by offering a product that appeals to poor people.”¹⁶⁴

However, the National Gambling Impact Study Commission (NGISC) did not seem to think that this point of view was an ironclad conclusion because

the Commission was apparently not as overwhelmingly convinced as some opponents may seem to be.¹⁶⁵ For example, one Maryland state senator expressed the opinion that it is difficult to agitate for the defense of individuals who have not requested to be defended.¹⁶⁶ Arguably, the Commission adopted a more evenhanded and balanced approach in referring in its report to a definition used by some economists to assess whether or not a tax is regressive.¹⁶⁷ The Commission referred to an empirical study that concluded¹⁶⁸ that “the poor participate in the state lottery games at levels disproportionately *less* than their percentage of the population.”¹⁶⁹ This conclusion seems to effectively refute assertions of any significantly regressive impact of lottery playing as a tax.¹⁷⁰

Of course, regressive effects have not been the only criticism of lotteries as a tax.¹⁷¹ One commentator also criticized lottery playing’s lack of efficiency as a tax mechanism when used by governments as a financial tool.¹⁷² Additionally, the NGISC criticized lottery advertising as well.¹⁷³ The Commission was concerned that advertisements promoting lottery playing could be misleading even if not so intended

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹See CLOTFELTER AND COOK, *supra* note 4, at 215 (“Lotteries are said to be a relatively inefficient source of revenue owing to the high ratio of administrative costs per dollar raised.”).

¹⁶⁰*Id.* (“[This is] because of [lottery playing’s] alleged instability and limited revenue potential.”).

¹⁶¹See Maggs, *supra* note 75, at 313 (“State lotteries in the United States, for instance, *may* take in two dollars or more for every dollar paid out as prizes.”) (footnote omitted) (emphasis added).

¹⁶²See, e.g., NGISC, *supra* note 4, at 1 (“Lotteries have the highest profit rates in gambling in the U.S. . . .”) (emphasis added).

¹⁶³See CLOTFELTER AND COOK, *supra* note 4, at 215 (“[T]he charge that has stung lottery proponents the hardest . . . is that lotteries are regressive.”). See also NGISC, *supra* note 4, at 9 (“[There] is the widespread conception that the lottery is a regressive tax . . .”).

¹⁶⁴*Id.* See also MCGOWAN, *supra* note 134, at 43–44 (“[T]hose who oppose . . . lotteries . . . usually invoke the argument that lotteries . . . prey on the poor Therefore, it is in the best interest of society that lotteries . . . be outlawed. They would maintain that society cannot permit any activity that uses addiction of some segment *even if the rest of society might derive benefit.*”) (emphasis added). See also DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENTS AND THE TAXING OF DREAMS 114 (Monthly Review Press 2000) [hereinafter NIBERT] (“The [NGISC] supported critics’ contentions that state lotteries ‘knowingly target their poorest citizens, employing aggressive and misleading advertising to induce those individuals to gamble away their limited means.’”) (citations omitted) (emphasis added).

¹⁶⁵See NGISC, *supra* note 4, at 9 (“[The] assumption [that lotteries are regressive] . . . *may* not be accurate. Much depends on the definition of ‘regressive’”) (emphasis added).

¹⁶⁶See CLOTFELTER AND COOK, *supra* note 4, at 215 (“[O]ne Maryland state senator who opposed the lottery [stated]: ‘Lotteries place an inordinate burden on the poor to finance state government. But the poor are willing suckers, and it’s hard to defend a group that doesn’t want to be defended.’”) (citation omitted).

¹⁶⁷See NGISC, *supra* note 4, at 9 (“Economists define a regressive tax as one that takes an increasing percentage of income as income falls. In that sense, given the fact that a lottery ticket is the same price to all, regardless of income, it is by definition regressive But this simple approach does not capture such variables as frequency of play and the amounts of money generated by the lottery by income group The data suggests (although [it] is far from conclusive) that the bulk of lotto players and revenues come from middle-income neighborhoods, and that far fewer proportionally come from either high-income or low-income areas.”).

¹⁶⁸*Id.* Citing two nationally prominent commentators’ reference to an empirical study done in the 1970s by John Koza.

¹⁶⁹*Id.* (emphasis added).

¹⁷⁰*Id.*

¹⁷¹See NGISC, *supra* note 4, at 9 (“The focus on *convincing* non-players to *utilize the lottery*, as well as persuading frequent players to *play even more*, is the source of an additional array of criticisms.”) (emphasis added).

¹⁷²See SWEENEY, *supra* note 88 at 133 (“No other “tax” *costs so much money to collect*. The state government spends a lot of money on running lotteries”) (emphasis added).

¹⁷³See NGISC REPORT, CHAPTER 2, *supra* note 4, at 3-4-3-5.

because of the risk that such advertising could promote irresponsible gambling by lottery players.¹⁷⁴ Finally, the Commission was also not convinced that lottery playing created good jobs.¹⁷⁵

The conviction that lottery playing inappropriately takes money from the poor and redistributes that income to create millionaires was also mentioned by two commentators.¹⁷⁶ Certainly, any analysis of redistribution of income focuses attention on the *destination* of proceeds derived from lottery playing, whereas the investigation of regressive impact analyzes on whom the comparative financial *burden* of lottery playing falls. However, lottery winners are chosen by random selection. Such selection effectively refutes redistribution arguments because all lottery players whether they are rich, poor, or neither have equally low statistical prospects of winning. As a result, any assertion of redistribution of income from any one income group to another based upon predictions of winners emerging from one particular income group rather than from any other income group seem to be meaningless. The actual randomness of selecting winning numbers impacts poor, middle income, and rich individuals equally because the overwhelmingly low odds of winning are equal in impact between income groups.

This random selection of winners also makes any concerns about jackpot wins by illegal residents insignificant.¹⁷⁷ Additionally, asserted misuse of governmental welfare payments by recipients also seems to be *de minimis* because there is probably very little left over after basic needs are paid for by such recipients.¹⁷⁸ Finally, the unpreparedness for winning large sums of money and, on occasion, the severe disruption or even disastrous effect of instantaneous wealth on large jackpot winners seems to be marginally relevant to any governmental assessment of lottery playing as a voluntary and “painless” tax.¹⁷⁹

VIII. THE LEGAL IMPACT OF STATE LEGISLATIVE CHANGES MADE TO LOTTERY LAWS ON JUDICIAL INTERPRETATION OF PUBLIC POLICY

“[I]f, in the end, law is policy analysis, to get the right policy outcome requires distinctively legal techniques”¹⁸⁰ This may arguably explain why, in the modern era, the progressively extensive embrace of lottery playing by state legislatures to fund governmental coffers has not fundamentally changed the ju-

diiciary’s widespread disdain of gambling.¹⁸¹ Hence, the application by the judiciary of public policy analysis to the contours of public policy remain separate from and immune to the tax-substitution fiscal objectives of the legislature. This is the case because the motivation that fuels legislative changes in state lottery laws to accommodate political objectives relating to requisite governmental financial exigencies do not necessarily dissolve public policy reprobation of lotteries at all.¹⁸²

Since the legislature and the judiciary are coequal branches of government, judicial conceptions of public policy with respect to lotteries has not been fundamentally changed by recent state legislative changes in lottery laws.¹⁸³ The precision of each state’s legislation pertaining to lotteries circumscribes the legal reach of each statutory enactment.¹⁸⁴ State sovereignty means that state legislatures can legally enact measures governing the operation of lotteries *within the particular state*.¹⁸⁵ This has been used to create a state monopoly in each one of the individual states that legalized lotteries.¹⁸⁶ Restrictions or empowerment are legally valid and tenable in the operation of lotteries in the particular state alone.¹⁸⁷

Yet, “[d]espite the enormous expansion of legal gambling in the last few decades, gambling is still considered to be contrary to the public policy of just about every state.”¹⁸⁸ First, the fundamental

¹⁷⁴*Id.*

¹⁷⁵*Id.*

¹⁷⁶See CLOTFELTER AND COOK, *supra* note 4, at 221.

¹⁷⁷See *id.* at 221–222.

¹⁷⁸*Id.*

¹⁷⁹See, e.g., Dokoupil, *supra* note 25 (“[The] sense of infinite freedom has curdled into regret.”).

¹⁸⁰RICHARD A. POSNER, *CARDOZO* 96 (University of Chicago Press 1990).

¹⁸¹See *Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y.A.D. 3 Dept. 1996) (“Public policy *continues to disfavor* gambling”) (citations omitted) (emphasis added).

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (“[T]he police power is controlled by 50 different States instead of one national sovereign”).

¹⁸⁶See CLOTFELTER AND COOK, *supra* note 4, at 3 (“[F]or the most part [states adhere] to single model for the lottery’s operation and financing. In each state the government has . . . made itself the sole provider, and used the profits from the operation as a new source of revenue.”).

¹⁸⁷See *supra* note 186.

¹⁸⁸See I. Nelson Rose, *A Jackpot not Within the Rules of the Game*, 20(1) *GAMING L. REV. AND ECON.* 4, 5 (2016).

and unanimous individual state motivation for the legalization of lotteries has been the substitution of a *voluntary* tax to take the place of *involuntary taxation*.¹⁸⁹ “Voters want states to spend more, and politicians look at lotteries as a way to get tax money for free.”¹⁹⁰ Modern political pressures caused by governmental financial needs have created almost intolerable economic stress.¹⁹¹ Politicians seem to have to inevitably navigate a passage similar to the mythical passage between Scylla and Charybdis.¹⁹² It consists of political pressures on states to either increase taxation, in order to maintain public programs at current levels of funding, or cut those programs.¹⁹³ It is quite predictable that politicians may tend to select the alternative of the “free” mechanism of legalizing lottery playing,¹⁹⁴ rather than facing the political risks of loss of office that often accompany raising involuntary taxes.

Moreover, the NGISC’s Report on Lotteries refers to an argument by lottery promoters that “because illegal gambling already exists, a state-run lottery is an effective device both for capturing money for public purposes that otherwise would disappear into criminal hands and also for suppressing illegal gambling.”¹⁹⁵ In this sense, legislative enactments legalizing state-run lotteries represent a *legislative policy* to opt for the lesser of two evils.¹⁹⁶ This may make the embrace of lotteries—by the 44 states that have adopted them—a less-reprehensible policy

than it might appear to be at first blush.¹⁹⁷ Making lotteries a part of the state’s administrative agency structure removes this form of gambling from local and national criminal clutches and statutorily transforms it into a legal component of the state’s executive branch of government.¹⁹⁸ Moreover, it may be comforting to know that state lottery authorities—as administrative agencies of the state that created them—are subject to pertinent provisions of the United States Constitution.¹⁹⁹

The extensive scope of the embrace of lotteries by states²⁰⁰ definitely implicates value judgments pertaining to substantive common law public policy. Without question, a state’s embrace of the lesser of two evils cannot legally transform an evil into a non-evil.²⁰¹ Additionally, the question as to whether or not “lotteries [are] a more or less harmless form of recreation”²⁰² is perhaps a personal one for each adult citizen to answer on his or her own. The subjectivity of such a question also extends to whether or not “lottery play is a benign activity.”²⁰³ It is also probably a political determination for the elected representatives of the people of each state to decide whether statutory legalization of lotteries justifies “taxing lottery products [no] more heavily than liquor or tobacco”²⁰⁴ There is no constitutional requirement that the judiciary’s answers to such policy questions mimic the legislature’s value judgments when the courts interpret public policy and apply it

¹⁸⁹See NGISC, *supra* note 4, at 2 (“The principal argument in every state to promote the adoption of a lottery has focused on its value as a source of “painless” revenue: players *voluntarily* spending their money (as opposed to the general public being taxed) for the benefit of the public good.”) (emphasis added). See also GOLDWATER, *supra* note 23, at 49 (“The size of the government’s rightful claim—that is, the total amount it may take in taxes—will be determined by how we define the ‘legitimate functions of government.’”).

¹⁹⁰See NGISC, *supra* note 4, at 2 (citation omitted).

¹⁹¹*Id.*

¹⁹²See EDITH HAMILTON, MYTHOLOGY 222 (New American Library 1969) (“[In mythology this was a perilous sea passage between] the whirlpool of implacable Charybdis and the black cavern into which Scylla sucked whole ships.”). Also referred to as being “between a rock and a hard place,” or in Barbados in the Caribbean, where it is referred to as being “between the devil and the deep blue sea.”

¹⁹³See NGISC, *supra* note 4, at 5.

¹⁹⁴*Id.* at 2.

¹⁹⁵*Id.* at 3.

¹⁹⁶*Id.* (“New York’s lottery, for example, reports that as a result [of the New York state-run lottery], illegal numbers activities have been eliminated for the most part in most areas of the State with the exception of New York City.”) (citations omitted).

¹⁹⁷See CLOTFELTER, COOK, EDELL, AND MOORE, *supra* note 138 at 19 (“Owing to its structure and management orientation, the typical state lottery authority has evolved into a *new breed of governmental agency*. Virtually all state lotteries conform to a single basic model”) (emphasis added).

¹⁹⁸Such state administrative agencies do not *expressly* function under the authority of the Government of the United States and are therefore not *expressly* subject to the Federal Administrative Procedure Act. See 5 U.S.C. § 551 et seq. However, similar administrative law principles are applied to them. See, e.g., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 11 (2011) (“Administrative law comprises the body of general rules and principles governing administrative agencies It exists at *all levels of government—federal, state and local*”) (emphasis added).

¹⁹⁹E.g., U.S. CONST. amend. XIV.

²⁰⁰See, e.g., CLOTFELTER, COOK, EDELL, AND MOORE, *supra* note 138, at 1 (“[Lotteries] are also a worldwide phenomenon: there are 100 countries where lotteries are legal.”).

²⁰¹*Id.* at 19 (“The lottery is in a sense the state governments’ biggest business venture, and a *rather problematic one given widespread ethical and pragmatic concerns about gambling.*”) (emphasis added).

²⁰²*Id.* at 21.

²⁰³*Id.* at 22.

²⁰⁴*Id.*

to cases implicating lotteries.”²⁰⁵ Each one of the three branches of government²⁰⁶ needs to adhere to its *own* constitutional assignment under each state’s constitution and also under the U.S. Constitution.²⁰⁷

The judiciary has therefore concluded that the lesser of two evils does not at all denote a substantive transformation of the legality of lottery playing for public policy purposes.²⁰⁸ The lesser of two evils remains an evil nonetheless.²⁰⁹ Its status of being lesser than a greater evil does not per se transform its fundamentally evil legal status.²¹⁰ Inevitably, therefore, the present-day widespread creation of lottery-operation monopolies by legislatures in a majority of states in the U.S. has not necessarily legally transformed public policy in a universally substantive way.²¹¹ The present-day creation by states of a plethora of lotteries coexists side-by-side with the prior fundamental, judicially enunciated public policy applicable to gambling.²¹² The widespread embrace of lotteries by state legislatures has not wholly transformed public policy in the judiciary’s evaluation.²¹³ The prior public policy disfavoring gambling in general and lotteries in particular remains intact.²¹⁴ It is an American legal phenomenon that the Commonwealth Caribbean is highly likely to emulate in each deserving case.

IX. SOME CONSTITUTIONAL FACTORS THAT IMPINGE UPON THE LEGALITY OF CREATING A FEDERAL LOTTERY

The U.S. is based upon a dual structure consisting of federal and individual state governments.²¹⁵ This is because the nation’s founders created a carefully calibrated separation of powers in order to ensure the survival and effective functioning of the “more perfect Union”²¹⁶ they sought to create. An analysis of the separation of powers structure under the U.S. Constitution discloses that federal governmental powers consist of those expressly and impliedly delegated to the U.S. government by the individual states.²¹⁷

Since there is no express power enumerated in the U.S. Constitution that authorizes Congress to create a federal lottery, therefore, an implied power would need to inhere within the Constitution itself, and that implied empowerment could then be acted upon by Congress to create such a lottery.²¹⁸ Not only would such power to enact federal legislation need to be identified and acted upon by Con-

gress, in light of the precedential legal authority of *Marbury v. Madison*,²¹⁹ the judiciary would need to confirm the existence of such congressional legislative power if a court challenge ensued.²²⁰

Nevertheless, in light of the power of Congress²²¹ under the U.S. Constitution to tax and spend,²²² certain federal constitutional law aspects relating to the creation of a legally valid federal lottery should not be overlooked. As the U.S. Supreme

²⁰⁵See *Ramesar v. State*, 224 A.D.2d 757, 759 (1996) (“Gambling in this State in general is prohibited The Lottery is authorized because it is operated with the specific purpose of raising funds for education [Nevertheless] [p]ublic policy continues to disfavor gambling; thus, the regulations pertaining thereto are to be strictly construed”) (citations omitted) (emphasis added).

²⁰⁶*I.e.*, The legislative, judicial, and executive branches.

²⁰⁷See *Lichter v. U.S.*, 334 U.S. 742, 779 (1948) (“[I]t is essential that . . . the respective branches of the government keep within the powers assigned to each by the Constitution.”).

²⁰⁸See *Ramesar v. State*, 224 A.D.2d 757, 759 (1996) (“Public policy continues to disfavor gambling”).

²⁰⁹*Id.*

²¹⁰*Id.*

²¹¹*Id.*

²¹²See *Citation Bingo, Ltd. v. Otten*, 910 P.2d 281, 287 (1995) (“[W]e presume that the legislature was aware of existing statutory and common law and did not intend to enact a law inconsistent with existing law. . . . [W]hen considering whether the legislature has authorized use of Power Bingo devices, we must, in light of New Mexico’s strong public policy against gambling, construe the terms of the Act narrowly.”) (citations omitted) (emphasis added).

²¹³See *Harris v. Missouri Gaming Com’n*, 869 S.W.2d 58, 61 (1994) (“Of all the forms of gambling, lotteries have been the most condemned by the courts.”) (citations omitted). See also *Ramesar v. State*, 224 A.D.2d 757, 759 (1996) (“[R]egulations pertaining [to gambling] are to be strictly construed.”) (citations omitted). (I.e., each legislative enactment must be strictly construed by the judiciary within the common law’s analytical framework of public policy).

²¹⁴*Id.* See also *Kelly*, *supra* note 14.

²¹⁵See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”).

²¹⁶See U.S. CONST. pmb.

²¹⁷See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

²¹⁸*Id.*

²¹⁹See *Marbury v. Madison*, 5 U.S. 137 (1803).

²²⁰*Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ,” and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”).

²²¹See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“Put simply, Congress may tax and spend.”).

²²²See U.S. CONST., art. I, § 8, cl. 1.

Court has explained, “[t]his [tax and spend] grant gives the Federal Government considerable influence even in areas where it cannot directly regulate.”²²³ Arguably, Congress could enact federal statutory provisions creating a federal lottery commission as a federal administrative agency.²²⁴ Undoubtedly, “[t]he founders [of the nation] may have concluded that certain structural agencies of the executive branch should *evolve* rather than be put in place in the U.S. Constitution immediately ... at the birth of the nation.”²²⁵

One can therefore suggest that the sheer size of the current federal deficit²²⁶ confirms that the U.S. as a nation has evolved to a critical financial and economic point. Essentially, it may be argued that the U.S. has reached the point where federal statutory emergency measures have become exigent in order to address this fiscal governmental phenomenon comprising the federal deficit.²²⁷ It would be difficult to effectively contend that in 1776, at the time of the Nation’s Declaration of Independence,²²⁸ that anything like the size of the present-day federal deficit²²⁹ was imagined by the founders of the nation when they originally created the United States.

Moreover, implied powers under the U.S. Constitution extend the reach of the expressly enumerated powers therein.²³⁰ Thus, the federal government can learn from the approach of the individual states in this respect. Shrewd use of a page from the states’ lottery playbook would mean the following: whereas, condemnation by the judiciary of gambling generally and of lotteries in particular has remained the dominant fundamental principle of the public policy of the 50 states in the modern era,²³¹ nevertheless, 44 states participate in lotteries in each of those states²³²—this clearly means that the legislatures of those 44 states have allocated the highest priority to state economic needs.

Moreover, in the view of one commentator,²³³ in making its recommendations to the president and Congress, the NGISC very carefully evaluated the importance of lottery playing in the economic life of American individual states.²³⁴ In his view, the NGISC emphasized the fundamental significance of state *economic* needs.²³⁵ Congress could similarly emphasize the fundamental significance of federal economic needs in federal deficit reduction. In a similar way, Congress could thereby elevate federal governmental economic needs to reduce the federal deficit to a priority high enough to warrant the creation of a federal lottery. As the U.S.

Supreme Court has enunciated, “[w]e have long read [the federal government’s enumerated powers] to give Congress great latitude in exercising its powers: Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²³⁶

²²³See National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

²²⁴See, e.g., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 11 (2011) (“Administrative law comprises the body of general rules and principles governing administrative agencies It exists at *all levels of government* – federal, state and local”) (emphasis added). See also City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J. dissenting) (“[M]odern administrative agencies fit most comfortably within the Executive Branch [of government]”).

²²⁵See Stephen J. Leacock, *Chevron’s Legacy, Justice Scalia’s Two Enigmatic Dissents, and His Return to the Fold in City of Arlington, Tex. v. FCC*, 64 CATH. U. L. REV., 133, 159 (Fall 2014) (emphasis added) (footnote omitted).

²²⁶See Nancy Gibbs, *A Debt We All Must Pay*, TIME, Apr. 25, 2016, at 4 (“[It would take] a wise economic analyst . . . to explain one of the seemingly incomprehensible numbers around: the \$13.9 trillion in debt the U.S. government is carrying on the national credit card.”) (emphasis in the original).

²²⁷See James Grant, *In Debt We Stand*, TIME, Apr. 25, 2016, at 28, 30 (“America, we have a Problem.”).

²²⁸See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (Simon & Shuster 1978) (“In 1776, the [American] colonies declared themselves independent.”).

²²⁹See Gibbs, *supra* note 226.

²³⁰See National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (“The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.’ Art. I, § 8, cl. 18.”).

²³¹See I. Nelson Rose, *A Jackpot not Within the Rules of the Game*, 20(1) GAMING L. REV. AND ECON. 4, 5 (2016) (“Despite the enormous expansion of legal gambling in the last few decades, gambling is still considered to be contrary to the public policy of just about every state.”). See also Ramesar v. State, 224 A.D.2d 757, 759 (N.Y. App. Div. 1996) (“Public policy continues to *disfavor* gambling”) (citations omitted) (emphasis added).

²³²See *The 6 States Where You Can’t Play Powerball*, *supra* note 140.

²³³See NIBERT, *supra* note 164, at 115 (“The Commission submitted a number of recommendations to the President and Congress for consideration but . . . *economic exigencies* largely eclipsed moral appeals for fairness and justice.”) (emphasis added).

²³⁴See NGISC *supra* note 4; NGISC REPORT RECOMMENDATIONS (June 18, 1999).

²³⁵See NIBERT, *supra* note 164, at 115.

²³⁶See National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (citation and internal quotation marks omitted).

This would lend support to the constitutionality of congressional legislation in this context.

Arguably, the gravity of the present-day need to address reduction of the federal deficit in a more circumscribed way would validate the legitimacy of Congress' goal in creating a Federal Lottery Commission²³⁷ to operate a federal lottery with the objective of deficit-reduction.²³⁸ The blueprint could be similar to the structure of the Securities Exchange Commission²³⁹ created by Congress under the Securities Exchange Act.²⁴⁰ Furthermore, the voluntary nature of lottery playing may be the decisive factor in the debate in favor of the act of creation. Emphasizing the volition of those who choose to play lotteries may very well be the counterbalance to arguments that oppose creation of such a lottery as a tax-substitute for involuntary taxes.

X. CONCLUSION

“[W]hy perfectly sensible people [buy] lottery tickets”²⁴¹ may be an unanswerable question. It may be “that self-deception serves a purely defensive function ... protecting our degree of happiness in the face of reality.”²⁴² Or, as one commentator has observed, “[n]othing succeeds like success”²⁴³ In any event, in both the U.S. and the Commonwealth Caribbean, lotteries have proven to be genuinely successful as a tax-substitute mechanism.²⁴⁴ This success has fostered proliferation of lottery playing in the last half a century or so. However, looking to the future, one must also not overlook the reality that “[t]he only thing that is constant is *change*.”²⁴⁵

In this new era of billion-dollar jackpots and the prospect of even more to come, more and more lottery players may fall prey to expectations that are well known in the field of psychiatry as “false expectations, [where] what you want is never here, never enough.”²⁴⁶ In light of the ever-increasing disappointment that millions of lottery players may experience at not readily winning huge jackpots, the level of public lottery playing may stagnate rather than expand or it might even contract.²⁴⁷

Should the level of lottery playing stagnate, then it may be important to be aware of the counterpoint opinion expressed by the commentator cited earlier,²⁴⁸ where he opines that “nothing stagnates like

stagnation.”²⁴⁹ The stagnation, or the magnitude of any falloff in the level of public lottery playing, would reflect the erosion as a whole in public interest in lottery playing. So, although in modern times, lottery playing has become “the most widespread form of gambling in the U.S.,”²⁵⁰ nevertheless, it is important to remember that lottery playing also remains the form of gambling that is “most condemned by the courts.”²⁵¹ Moreover, it is important to ensure that we do not kill the goose²⁵² that lays us²⁵³ golden eggs.²⁵⁴ Human frailty makes us prone to the moral that “we never miss the water until the well runs dry.”²⁵⁵

This may be too pessimistic a view and may not reflect any prospect of future waning in present day public lottery playing expenditures. The tenacity of lottery playing activity in human life over the centuries remains comforting, and winning larger-and-larger jackpots is “a drama more Americans may experience as state lotteries expand, setting

²³⁷See *supra* note 222.

²³⁸*Id.*

²³⁹See Securities Exchange Act of 1934, § 4(a), 15 U.S.C. § 78d.

²⁴⁰Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq.

²⁴¹CHARLES DUHIGG, SMARTER FASTER BETTER 214 (Random House 2016).

²⁴²ROBERT TRIVERS, THE FOLLY OF FOOLS 54 (Basic Books 2011).

²⁴³See E. F. SCHUMACHER, SMALL IS BEAUTIFUL 73 (Harper & Row 1973) [hereinafter SCHUMACHER].

²⁴⁴See *supra* Section III.

²⁴⁵See *Heraclitus*, GOODREADS, <<http://www.goodreads.com/quotes/336994-the-only-thing-that-is-constant-is-change->> (emphasis added).

²⁴⁶See DAVID VISCOTT, EMOTIONAL RESILIENCE 64 (Harmony Books 1996).

²⁴⁷See I. Nelson Rose, *The Next Generation of Compulsive Gamblers*, 20(3) GAMING L. REV. AND ECON. 243 (2016) (“Except for the life-changing giant jackpots of Powerball, state lotteries have seen the sales of their slowest traditional games plateau and even fall.”) (emphasis added).

²⁴⁸See SCHUMACHER, *supra* note 243.

²⁴⁹See *id.* at 73.

²⁵⁰See NGISC, *supra* note 4, at 1 (“The lottery industry stands out in the gambling industry It is the most widespread form of gambling in the U.S.”).

²⁵¹See *Harris v. Missouri Gaming Com’n*, 869 S.W.2d 58, 61 (1994) (“Of all the forms of gambling, lotteries have been the most condemned by the courts.”) (citations omitted).

²⁵²See *supra* note 38.

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵See, e.g., *Proverbs*, ENGLISH DAILY, <<http://www.englishdaily626.com/proverbs.php?003>>.

records for revenue and exciting politicians desperate for cash but loathe to raise taxes."²⁵⁶

Hopefully it will not mask any tendencies to become complacent only to be taken by surprise by sudden or even subtle and gradual shrinkage in public lottery playing expenditures. Overestimation by governments of future income harvests derived

from anticipated inexorable increases in public lottery playing as a voluntary and painless tax would certainly be politically calamitous. Politicians cannot permit themselves the luxury of permitting self-interest motivated by their aversion to increasing involuntary tax burdens²⁵⁷ to dull the acuity of their political instincts.

²⁵⁶See Dokoupil, *supra* note 25.

²⁵⁷See GOLDWATER, *supra* note 23.