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Some Reflections on the Past, Present and State-Dependent Future of Lotteries in American Gaming Law

Stephen J. Leacock

*There is an acute need for legal scholarship on...modern lotteries.*¹

I. INTRODUCTION²

LOTTERY PLAYING IS NOT THE ONLY FORM of gambling taking place in America.³ Yet, although gambling has been universally frowned upon throughout the history of the United States,⁴ nevertheless, lottery playing has evolved into “the most widespread form of gambling in the U.S.”⁵ In fact, the modern revolution in technology is cer-

tainly one of “the great changes...beyond human imagining [in the seventeenth century]”⁶ that has made widespread lottery playing commonplace in the U.S. in the twentieth and twenty-first centuries.⁷ The vast numbers of persons in the U.S. who play lotteries⁸ confirm the evolutionary success of lotteries that has led to their emergence as the predominant form of gambling activity in the U.S.⁹ This modern success seems to vindicate Machiavelli’s

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¹See Joseph Kelly, *Symposium on Law Schools and Gaming Law*, 15 GAMING L. REV. & ECON. 758 (2011). Lotteries may be defined as follows. See, e.g., 38 AM. JUR. 2D *Gambling* § 7. See also KENNETH N. HANSEN AND TRACY A. SKOPEK, *THE NEW POLITICS OF INDIAN GAMBLING*, 169 (2011) (“[L]ottery...mean[s] any game of chance involving the elements of prize, chance, and consideration....”) (citation omitted). See also CHARLES T. CLOTFELTER AND PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA*, 51 (1989) [hereinafter CLOTFELTER AND COOK: *SELLING HOPE*] (“The essence of a lottery is the purchase of a chance to win a prize, based on a random drawing.”).

²See NICCOLO MACHIAVELLI, *THE PRINCE*, 130, translated with an introduction by George Bull (Penguin Books 1961) (“Many have held and hold the opinion that events are controlled by fortune and...that one should submit to the *rulings of chance*. This opinion has been more widely held in our own times, because of the great changes...*beyond human imagining*....”) (emphasis added). In this article “gambling” and “gaming” will be treated as synonyms.

³See NAT’L GAMBLING IMPACT STUDY COMM’N (NGISC) REPORT, 2-1[hereinafter NGISC: FINAL REPORT], available at <<http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>> (“[T]he gambling landscape is varied and complex.... [L]egal gambling activities in the [U.S.]...occur...in a variety of places and take...many forms.”).

⁴See *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.”). See also *Irwin v. Williar*, 110 U.S. 499, 510 (U.S. 1884) ([I]n *this country*, all wagering contracts are held to be illegal and void as against public policy.”) (citation omitted) (emphasis added). 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, 122 (2002) [hereinafter Kelly] (“All states in the Union, influenced by the historical traditions against gambling, have started from the premise that gambling debts are unenforceable.”).

⁵See Nat’l Gambling Impact Study Comm’n, *Lotteries*, at 1 (“The lottery industry stands out in the gambling industry.... It is the most widespread form of gambling in the U.S....”), available at <<http://govinfo.library.unt.edu/ngisc/reports/research/lotteries.html>> [hereinafter NGISC: *Lotteries*]. See also *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).

⁶See MACHIAVELLI, *supra* note 2.

⁷See NGISC: *Lotteries*, *supra* note 5 (“Since New Hampshire initiated the modern era of state lotteries in 1964, no state lottery has been abolished.”).

⁸*Id.* at 1 (“Lotteries rank *first among the various forms of gambling in terms of gross revenues*: total lottery sales in 1996 totaled \$42.9 billion. In 1982 gross revenues were \$4 billion, representing an increase of 950% over the preceding 15 years, 1982–1996.”) (citation omitted) (emphasis added).

⁹See generally Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 JOHN MARSHALL L. REV. 39, 63–73 (2012). [hereinafter: *Leacock: Lotteries and Public Policy*].

seventeenth century views expressed in his extensively popular book entitled *The Prince*.¹⁰ These apparently “ageless” views resonate with us in this modern age of technology.¹¹

Moreover, the proliferation of lottery playing may also be driven by the profitability of lotteries in one state influencing other states to create their own lotteries. The profitability of a state’s lottery would be readily noticeable in nearby states. Geographical proximity may also be a pivotal factor. Undoubtedly, border-crossing by adults from a state with no lotteries to play lotteries in a neighboring state that has lotteries tends to siphon off economic resources from one neighboring state to another. Consequently, citizens and decision makers in nearby states may be influenced to create lotteries as a form of financial and economic self-defense. The lottery structure adopted by one state may also serve as a blueprint for neighboring states to emulate.

This article discusses the past, present, and possible future of lottery playing in the U.S. in the legal context. After the introduction in Part I, Part II examines the history and development of lottery playing in the U.S. Part III discusses the development of lottery playing in the U.S. and the role that public policy plays in court determinations of the legality of lotteries. Part IV discusses lottery legalization in the U.S., while Part V addresses an example of the financial success of lotteries and presents some criticisms of lotteries as tax vehicles in lieu of taxation by legislative mandate. Part VI defines lotteries as a type of gambling in the U.S., and Part VII assesses the legal impact on public policy of legislative changes in state lottery laws. Part VIII reflects upon some of the consequences of state legalization of lotteries; then Part IX is the conclusion.

II. HISTORY AND DEVELOPMENT OF LOTTERIES IN THE U.S.¹²

The history of lotteries in the U.S. has swung to and fro like a pendulum. Gambling is, first of all, a versatile activity¹³ and in modern times, lotteries have become the most prevalent form of gambling in the U.S.¹⁴ Furthermore, “[b]oth gambling in general and lotteries in particular have long histories in [the U.S.] and abroad.”¹⁵ It seems that the drawing of lots may have been the earliest use of chance in

human decision making.¹⁶ There are certainly a number of references in the Holy Bible to the “drawing of lots.”¹⁷ Furthermore, it has been proposed that games of chance existed in antiquity¹⁸—although, of course, the sophisticated technology of modern gambling in general, and lottery playing in particular, was not available for use in antiquity.

A. The rise of lottery playing

Lotteries were probably pleasurable distractions in Europe and tended to be included in ancient celebrations,¹⁹ until the commercial potential of

¹⁰See MACHIAVELLI, *supra* note 2.

¹¹See NGISC: *Lotteries*, *supra* note 5, at 3 (“[L]otteries [have] also develop[ed] extensive specific constituencies, including convenience store operators (the usual vendors for lotteries)...”) (emphasis added).

¹²See, e.g., Lee v. City of Miami, 163 So. 486, 488 (1935) (“Lotteries are of ancient origin. They were common in the festivals of Roman emperors, were used by the feudal princes of Europe, by the court of Louis XIV, and were appropriated in the Italian republics of the sixteenth century to encourage the sale of merchandise. They early became popular in France, Belgium, Sweden, and Switzerland as a means of raising government funds. They were established in England as early as 1569, and were one of her most popular sources of revenue. They were at one time employed in every state of the Union and in the District of Columbia to raise money for public purposes, the erection of buildings, making public improvements, for educational and sometimes for religious purposes. In 1828 the territorial Legislature of Florida created Union Academy in Jackson county and authorized its trustees to raise \$1,000 for its benefit by lottery.... During the Revolution the Continental Congress on one occasion authorized the raising of funds by lottery.”) (citations omitted).

¹³See Kelly, *supra* note 4, at 90 (“Gambling can take a nearly infinite number of forms, and each State generally has the freedom to decide whether to legalize any form of gambling.”) (emphasis added).

¹⁴See NGISC: *Lotteries* *supra* note 5, at 1.

¹⁵See CLOTFELTER AND COOK: *SELLING HOPE*, *supra* note 1 at 32. See also DENISE VON HERRMANN, *THE BIG GAMBLE*, 121 (2002) at 9 (“The earliest widespread legal gambling activity in the United States was the lottery.”).

¹⁶CLOTFELTER AND COOK: *SELLING HOPE* *supra* note 1, at 33–34. See also NGISC: *Lotteries*, *supra* note 5, at 1 (“[M]aking decisions and determining fates by the casting of lots has a long record in human history (including several instances in the Bible)...”). See, e.g., *Leviticus* 16:8; *Joshua* 18:6; 1 *Samuel* 14:42; *Proverbs* 16:33; 1 *Chronicles* 26:13.

¹⁷See NGISC: *Lotteries*, *supra* note 5, at 1.

¹⁸See Ronald L. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L. REV. 11, 15 (1992) (“Gambling activity has certainly been prevalent for a long time. Various games of chance existed among ancient Egyptians, Chinese, Japanese, Hebrews, Greeks, Romans and the early Germanic Tribes.”) (citation omitted).

¹⁹See Rychlack, *id.*

lotteries was realized.²⁰ This realization apparently triggered the use of lotteries by merchants in Europe to dispose of excess stock or merchandise that remained unsold for too long, as well as for disposal of items that were difficult to otherwise sell.²¹ Lotteries also attracted governmental attention and were used²² to “painlessly” generate governmental revenue rather than by using what—in modern times—amounts to the more painful governmental approach of raising revenue by taxation or other mandatory legislative enactments.

With respect to U.S. lottery history, one of the first lotteries was held in 1612 in London, for the benefit of the Virginia Colony in America.²³ However, the Virginia Colony’s monetary gain was the British public’s financial loss, because the profits derived from this lottery were used in North America rather than enriching the British public.²⁴ Predictably, this ultimately led to termination of these lotteries by British legislation,²⁵ followed by their replacement by American colonial ones.²⁶

The popularity of lotteries increased in the seventeenth and early eighteenth centuries in the U.S.²⁷ at both governmental and private levels.²⁸ Banking institutions or similar financial mechanisms were not fully developed at this stage of colonial history.²⁹ Moreover, it appears that some institutions used lotteries to finance both public and private building projects, such as canals, bridges, and roads.³⁰ Additionally, construction projects were completed for a number of well-known colleges,³¹ including “Harvard, Yale, King’s College (Columbia University), Princeton, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina and the University of Michigan....”³²

Lotteries were most likely operated outside of governmental supervision³³ and were used for charitable purposes too.³⁴ Of course, some colonies and later some states used lotteries to support military activities during both the French and Indian Wars of the eighteenth century.³⁵ Secondly, lotteries

²⁰See *NGISC: Lotteries*, *supra* note 5, at 1 (“[T]he use [of] lotteries for material gain is of more recent origin, although of considerable antiquity.”).

²¹See Rychlack, *supra* note 18, at 21.

²²See *NGISC: Lotteries*, *supra* note 5, at 1 (“The first recorded public lottery in the West was held during the reign of Augustus Caesar for municipal repairs in Rome.”). Sources are not unanimous on the date of the first lottery. See *Id.* (“The first recorded lottery to distribute prize money was held in 1466...in what is now Belgium, for the announced purpose of providing assistance to the poor.”). But see also CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 34 (“The first lotteries offering prizes of money was held in Florence in 1530, with proceeds going to the state.”) (citation omitted).

²³See DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENTS AND THE TAXING OF DREAMS, 19 (2000) (“In 1612, James I, the king of England, granted the Virginia Company a charter that permitted the establishment of a lottery to fund the struggling colony.”). See also Rychlack, *supra* note 18, at 24. See also *NGISC: Lotteries*, *supra* note 5, at 1 (“Lotteries held a prominent place in the early history of America, including an important role in financing the establishment of the first English colonies.”). See also MATTHEW SWEENEY, THE LOTTERY WARS, 15 (2009).

²⁴See NIBERT, *supra* note 23, at 19 (“By 1620, lottery proceeds provided almost half the revenues necessary for this colonial undertaking.”) (citation omitted). See also Rychlack, *supra* note 18, at 24.

²⁵*Id.* See also RICHARD MCGOWAN, STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE 6 (1994) (“In 1620, the House of Commons ordered the Virginia Company to stop selling tickets since the compa-

ny’s lotteries were competing with [English] government lotteries that were not bringing in the amount of revenue that legislators had expected.”).

²⁶See Rychlack, *supra* note 18, at 24 (“When the Virginia Company’s charter was revoked in 1624, the colonists turned to domestic lotteries.”) (footnotes omitted). See also CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 34 (“In colonial America lotteries were a popular and common means of financing public projects...All of the colonies authorized lotteries at one time or another, and a few of them used the device on many occasions.”).

²⁷See MCGOWAN, *supra* note 25, at 6–8. See also *NGISC: Lotteries*, *supra* note 5, at 1. See also Rychlack, *supra* note 18, at 25–29.

²⁸See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 34 (“[A]lthough the line between public and private was typically indistinct.”).

²⁹Rychlack, *supra* note 18, at 31. See also CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 34 (“Capital markets were rudimentary, to say the least, before a national banking system had been firmly established.”).

³⁰*Id.* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1.

³¹*Id.* See also NIBERT, *supra* note 23, at 21.

³²See Rychlack, *supra* note 18, at 25.

³³*Id.* (“Lotteries run for private profit also existed but were never legalized.”).

³⁴*Id.* at 35.

³⁵See NIBERT, *supra* note 23, at 22 (“The global struggles for empire that embroiled the colonists in the French and Indian War also brought considerable hardship and expense, and lotteries were used to subsidize colonial war-related activities.”).

were also used during the Revolutionary War era.³⁶ It also appears that the Continental Congress authorized at least one lottery “to support the Continental Army in 1776....”³⁷

In the nineteenth century, lotteries seemed to have become particularly popular in the U.S.³⁸ Thomas Jefferson, in 1810, was apparently initially opposed to lotteries “however laudable or desirable [their] object[s] may be.”³⁹ However he may have changed his mind by 1826, when he apparently experienced financial difficulties and therefore needed financial assistance in meeting personal obligations.⁴⁰ He apparently hoped to persuade the Virginia legislature to authorize him to operate a lottery for this purpose.⁴¹ Still later in his career, he apparently changed his mind altogether about lotteries⁴² and referred to lotteries as a “painless tax, paid only by the willing.”⁴³

By 1832 the income received from sales of tickets apparently constituted three percent of U.S. national income.⁴⁴ However, the reform movement led by President Andrew Jackson intensified and sharpened opposition to lottery operations as a whole.⁴⁵ Imprecise regulations and relatively lax controls had contributed to scandals surrounding a number of lottery operations.⁴⁶ This all led to curbs on lotteries, and in 1833, individual states started enacting statutes prohibiting the operation of lotteries.⁴⁷

The Civil War Era and its economic devastation of the American South led several states to again consider lotteries for statewide financial relief.⁴⁸ Some Southern States established lotteries as a means of raising revenue during this historic period of extensively depressed governmental revenue caused by the Civil War Era.⁴⁹ The defeat and later reconstruction of the Southern States played a major role in their difficult financial experiences.⁵⁰ The Louisiana Lottery, sometimes referred to as the “serpent”⁵¹ or the “octopus,”⁵² was probably the largest lottery of them all.⁵³

B. The fall of lotteries

In the 1860s, the federal government began to consider legislation to bar lotteries from using the federal mail system.⁵⁴ Of course, the individual states have legal power generally to regulate lotteries within the borders of each individual state.⁵⁵ However, the attempts by states—other than Louisiana—to raise funds from gambling of this type were

relatively short-lived. By the end of the Civil War Era, no lotteries legally survived,⁵⁶ except the Louisiana Lottery, which survived into the 1890s.⁵⁷ Other states had by now terminated their own lottery operations and this development left Louisiana’s lottery with a monopoly in the United States.⁵⁸

³⁶*Id.* at 22–23. *See also* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 34 (“During the Revolution lotteries were used to supply and support troops in the field....”).

³⁷*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 36. *See also* MCGOWAN, *supra* note 25, at 10.

³⁸*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 35.

³⁹*Id.* at 299.

⁴⁰*Id.* *See also* MCGOWAN, *supra* note 25, at 9.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 36.

⁴⁵*Id.* at 37.

⁴⁶*Id.* *See also* Rychlack, *supra* note 18, at 9–10.

⁴⁷*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 37 (“First the northeastern states, then the southern and western states abolished lotteries until by 1860, only three states—Delaware, Missouri, and Kentucky—still allowed them.”).

⁴⁸*See* MCGOWAN, *supra* note 25, at 14.

⁴⁹*Id.*

⁵⁰*Id.* *See also* Rychlack, *supra* note 18, at 10 (“There was a brief revival of state-run lotteries in the 1860s. Expenses stemming from the Civil War and Reconstruction created a great need for funds to finance government projects primarily in Southern and Western states.”).

⁵¹*See* MCGOWAN, *supra* note 25, at 14.

⁵²*See also* SWEENEY, *supra* note 23, at 55.

⁵³*See* MCGOWAN, *supra* note 25 at 14. *See also* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1 at 38 (“[O]ver 90 percent of its revenue [came] from out of state.”). *See also* SWEENEY, *supra* note 23, at 55 (“By some estimates...the Octopus brought in as much as \$30 million a year from customers, more than 90 percent of whom lived in other states.”).

⁵⁴*See* MCGOWAN, *supra* note 25, at 15 (“The primary piece of legislation that would cripple the Louisiana lottery was to deny the operators the use of the federal mails.”).

⁵⁵*See* *Stone v. State of Mississippi*, 101 U.S. 814, 818 (“No one denies, however, that [the police power of each state] extends to all matters affecting...public morals.”). *See also* HERRMANN, *supra* note 15, at 4 (“Gambling policy is largely, although not entirely, state policy.... [M]ost gambling policy regulation falls within the rubric of the ‘police powers’ clause of the Tenth Amendment.”).

⁵⁶*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 38.

⁵⁷*Id.* at 14–15.

⁵⁸*See* MCGOWAN, *supra* note 25, at 14. *See also* Rychlack, *supra* note 18, at 11 (“Because its books were kept secret...it has been estimated that at its height of popularity, the Louisiana lottery was a nationwide monopoly making annual profits of up to \$13 million....”) (citations omitted).

The Louisiana Lottery survived based upon a charter from the State of Louisiana that was won by two private brokers⁵⁹ who hired two retired Confederate generals to oversee the lottery drawings and to operate a nationwide campaign to popularize drawings.⁶⁰ “[I]t was truly the first national lottery held on a weekly basis,”⁶¹ using the mails for the purchase and sale of tickets.⁶² On the expiration of the lottery charter, one of the private brokers sought its renewal by offering the State of Louisiana \$1 million a year.⁶³

The timing was not propitious because significant opposition to lotteries had started to develop throughout the United States,⁶⁴ fueled by accusations of corruption and bribery leveled against the operators of the Louisiana Lottery.⁶⁵ This national opposition to lotteries motivated the federal government to enact a number of statutes to block the sale of tickets outside the state of Louisiana.⁶⁶ Initially, these provisions proved to be insufficient and were therefore ineffective.⁶⁷ Eventually, however, a federal statute enacted in 1890 proved to be lethal to the lottery⁶⁸ and use of the mails was eliminated.⁶⁹

Subsequent efforts to renew the lottery were unsuccessful⁷⁰ and its twenty-five year record of success ended.⁷¹ After Louisiana joined the rest of the U.S. in banning lotteries in 1893,⁷² the syndicate that had earlier operated the Louisiana Lottery moved its operations to Honduras⁷³ and began “printing and distributing tickets in the United States, using private mail couriers.”⁷⁴ Congress took action in 1895 by closing this loophole in the law⁷⁵ and thereby ended operations of the Louisiana Lottery in 1895.⁷⁶ Thus, “the federal government stepp[ed] in to outlaw lotteries by the end of the nineteenth century.”⁷⁷

1. North Dakota's experience

After the Louisiana Lottery's ouster from the State of Louisiana, its operators tried to relocate it to North Dakota.⁷⁸ However, their resort to corrupt practices on par with those used in Louisiana—including the secret payment of sums to North Dakota legislators in order to garner support—were discovered and publicized by the Pinkerton Detective Agency, which had been privately hired by the governor of North Dakota.⁷⁹

Although North Dakota's State Senate passed a bill in favor of establishing the lottery, once the corrupt practices were made public, the North Dakota

House indefinitely postponed its creation.⁸⁰ The ensuing statewide political upheaval motivated the enactment of an amendment to the North Dakota Constitution prohibiting lotteries in the state.⁸¹ The political revulsion triggered by the exposure of corruption on such a scale in the North Dakota Senate reverberates to the present day and its

⁵⁹See MCGOWAN, *supra* note 25, at 14. See also Rychlack, *supra* note 18, at 11 (“From the beginning, the Louisiana Lottery was run by a New York gambling syndicate. To lend an air of respectability, two former confederate generals...were hired to oversee the drawings.”) (citation omitted) (emphasis added).

⁶⁰*Id.*

⁶¹*Id.* See also SWEENEY, *supra* note 23, at 54 (“The Louisiana Lottery was known as the Octopus because its arms reached into every state and city.”). See also Rychlack, *supra* note 18, at 11 (“[T]he Louisiana Lottery [was] also known as ‘The Serpent.’”) (citation omitted). See also MCGOWAN, *supra* note 25, at 14 (“[T]he Louisiana lottery...[was] known as the Serpent....”).

⁶²*Id.* (“More than \$3 million was distributed to winners annually, while profits for the brokers averaged between \$3 and \$5 million.”).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰See SWEENEY, *supra* note 23, at 59 (“The Louisiana Lottery[s]...dream of another twenty-five year run was dashed by a popular vote that went against it, 157,422 to 4,225. The voters of Louisiana exiled the Octopus.”).

⁷¹*Id.* at 55.

⁷²See also SWEENEY, *supra* note 23, at 59.

⁷³See U.S. v. Edge Broadcasting Co., 509 U.S. 418, 422 (1993) (“[T]he Louisiana Lottery moved its operations to Honduras....”). See also SWEENEY, *supra* note 23, at 59. (“The company pulled stakes for Honduras, renaming itself the Honduras National Lottery.”).

⁷⁴*Id.*

⁷⁵See NGISC: FINAL REPORT, *supra* note 3, ch. 2 at 2-1 (“The federal government outlawed the use of the mail for lotteries in 1890 and, in 1895, invoked the Commerce Clause to forbid shipments of lottery tickets or advertisements across state lines, effectively ending all lotteries in the United States.”). See also SWEENEY, *supra* note 23, at 59. (“Congress responded in 1895 by making the interstate trafficking of lottery materials a crime.”)

⁷⁶*Id.*

⁷⁷See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 38 (“By 1894 no state permitted the operation of lotteries....”).

⁷⁸See Meyer v. Hawkinson, 626 N.W.2d 262, 272 (N.D. 2001) (Sandstrom, J. dissenting).

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

consequences remain dominant in the North Dakota Constitution⁸² and in its statutory enactments.⁸³ “[I]n only one state—North Dakota—has the public consistently voted against a lottery.”⁸⁴ An amendment to the North Dakota constitution proposed in 1986 in an attempt to authorize a lottery to alleviate the tax burden on the citizens of North Dakota was soundly defeated in the 1986 general election.⁸⁵

However, in 2002, section 25 of Article XI of the North Dakota Constitution was amended by Initiated Constitutional Measure No. 2, which was approved by the North Dakota voters at the November 5, 2002, general election. The amendment empowered the State of North Dakota “to join a multi-state lottery for the benefit of the State of North Dakota.”⁸⁶ North Dakota is therefore now a member of both Powerball⁸⁷ and Mega Millions,⁸⁸ as well as some other multi-state lotteries,⁸⁹ but intra-state-only lotteries remain prohibited.⁹⁰

North Dakota also repealed an earlier ban on lottery advertising, provided that the advertisements were restricted to lotteries that are legal in the state in which such lotteries operate.⁹¹ This legislative measure was cited—in addition to other factors—by a dissenting Justice in the North Dakota Supreme Court as support for the Justice’s assertion that “North Dakota’s legalization of advertising of out-of-state lotteries cannot be reconciled with the majority’s claimed public policy against [lotteries].”⁹² However, the Supreme Court’s recent decision⁹³ clearly enunciates North Dakota’s continuing public policy against the legality of state lotteries.⁹⁴

C. The rise again

In reality, however, although lawful lotteries remained dormant in the United States for almost seventy years,⁹⁵ illegal operations survived in many parts of the country.⁹⁶ This reality presumably played a role in the resurrection of lotteries in the modern era; legal lotteries started again with the passage of New Hampshire legislation in 1964.⁹⁷ Furthermore, by the end of 1988, lotteries existed in thirty-three states plus the District of Columbia.⁹⁸ By 2013, the number has now risen to forty-three.⁹⁹ “Virtually every state has required approval by both the legislature and the public in a referendum....”¹⁰⁰ Of the fifty states in the U.S., only North Dakota has repeatedly rejected the enactment of *intra-state* lottery legislation.¹⁰¹

In this modern era, governments have come to rely on lottery revenue for a number of purposes, with supporters emphasizing the general public welfare as the most significant beneficiary.¹⁰² Of course, dissenters continue to question the validity of such claims.¹⁰³ Nevertheless, over the past several decades, lotteries have generated a steady flow of public revenue, with a number of states

⁸²See *Meyer v. Hawkinson*, 626 N.W.2d 262, 266 (N.D. 2001) (“[The North Dakota] state constitution expressly forbids lotteries and games of chance unless the entire net proceeds are devoted to public-spirited uses statutorily specified as educational, charitable, patriotic, fraternal, and religious. N.D. CONST. art. XI, § 25....”).

⁸³*Id.* at 267 (“N.D. C.C. § 12.1-28-02(2)...criminalizes sales, purchases, receipt, or transfer of lottery chances, comprehensively forbids such activities whether the lottery is in state or out of state. By express terms, the statute prohibits these activities even if the lottery is legal in the other state or country.”).

⁸⁴See *NGISC: Lotteries*, *supra* note 5, at 17. See also *CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 146.

⁸⁵*Meyer v. Hawkinson*, 626 N.W.2d 262, 268 (N.D. 2001).

⁸⁶N.D. CONST. art. 11, § 25.

⁸⁷See <http://www.powerball.com/pb_about.asp>.

⁸⁸See <<http://www.megamillions.com/about/history.asp>>.

⁸⁹See *supra* note 86.

⁹⁰*Id.*

⁹¹*Meyer v. Hawkinson*, 626 N.W.2d at 273 (Sandstrom, J. dissenting).

⁹²*Id.*

⁹³*Meyer v. Hawkinson*, 626 N.W.2d 262 (N.D. 2001).

⁹⁴*Id.*

⁹⁵See *McGOWAN*, *supra* note 25, at 15 (“In 1964, New Hampshire became the first state to operate a lottery in almost seventy years.”).

⁹⁶See *CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 39 (“Illegal lotteries existed alongside official lotteries from at least the nineteenth century.... In the United States the two dominant illegal games have been *policy* and *numbers*.”) (emphasis added). See also *SWEENEY*, *supra* note 23 at 66.

⁹⁷See *NGISC: Lotteries*, *supra* note 5, at 2. See also *CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 22 (“Beginning in New Hampshire in 1964, the lottery movement spread to New York and other northeastern states before jumping to the West and Midwest. By 1989 lotteries were operating in every section of the country.”).

⁹⁸*CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 23. In 2011 this number rose to 40. See *RICHARD A. LEITER*, 0020 *SURVEYS* 21, 1 (2011) (“Forty states permit lotteries.”), and in 2013, the number has risen further, to 43. See <<http://www.nhlottery.com/About-Us/History.aspx>> (The New Hampshire lottery “was the first in the nation; now 43 states, plus the District of Columbia, Puerto Rico and the U.S. Virgin Islands have [lotteries].”) (emphasis added).

⁹⁹*Id.*

¹⁰⁰See *NGISC: Lotteries*, *supra* note 5, at 3 (emphasis added).

¹⁰¹*Id.* See also *supra* note 90.

¹⁰²*Id.* at 5.

¹⁰³*Id.*

earmarking a portion of lottery proceeds for educational uses.¹⁰⁴

An even newer development has been the banding together of a number of states in the U.S. to offer bigger overall jackpot prizes.¹⁰⁵ This development has assisted some states which have populations that may be too small to support an in-state lottery, allowing them to share in lottery-generated funds along with other states with larger populations.¹⁰⁶ In fact, the first multistate lottery included New Hampshire, Maine, and Vermont.¹⁰⁷ This turned out to be a precursor to the modern-day largest American multi-state lottery games: Powerball¹⁰⁸ and Mega Millions.¹⁰⁹

D. The impact of federal lottery laws on lottery history

Under federal law, gambling law and policy were both perceived as the bailiwick of state governments because under the U.S. Constitution, the legal structure of American government consists of delegated powers.¹¹⁰ Additionally, the legislative powers delegated to Congress in Article I, Section 8¹¹¹ do not expressly include the regulation of gambling.¹¹² Furthermore, the Tenth Amendment of the U.S. Constitution enunciates that the “powers not delegated to the United States...nor prohibited...to the states, are reserved to the States respectively, or to the people.”¹¹³ As a result, with a few exceptions,¹¹⁴ the federal government refrained from seeking to regulate gambling under the Commerce Clause for nearly a century.¹¹⁵

Of course, under the U.S. Constitution, Congress was expressly assigned the constitutional power to “establish post offices...”¹¹⁶ and—under the Commerce Clause—to “regulate commerce...among the several States....”¹¹⁷ Congress therefore realized that a degree of regulation of gambling could be exercised by the judicious use of the Commerce Clause in spite of the absence of expressly enumerated powers to do so. This constitutionally valid regulatory power over gambling could be exercised based upon the use of the powers expressly assigned to Congress under the Commerce Clause,¹¹⁸ combined with the expressly assigned power to Congress to “establish post offices....”¹¹⁹ This realization was undoubtedly motivated by concerns raised by the success of the Louisiana Lottery—and also conceivably by the threat of a proliferation of illegal lotteries imitating the Louisiana Lottery.

The Louisiana Lottery therefore served as a catalyst for Congress to unleash its embedded federal legislative powers in an effort to fatally cripple the Louisiana Lottery’s interstate operations by targeting the lottery’s use of the mails in its operations.¹²⁰

¹⁰⁴*Id.* at 6 (“One state which has recently addressed this problem is Georgia. In establishing its lottery in 1994...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.”).

¹⁰⁵*See NGISC: Lotteries*, *supra* note 5, at 17 (“In recent years, the figures for the top prize have continued to increase as multi-state consortia have been formed with a joint jackpot.”).

¹⁰⁶*See SWEENEY*, *supra* note 23, at 98.

¹⁰⁷*See CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1 at 113.

¹⁰⁸A multi-state lottery operated by Multi-State Lottery Association (MUSL) that includes thirty-two states and Washington, D.C. *See* <http://www.powerball.com/pb_about.asp>.

¹⁰⁹A multi-state lottery operated by MUSL which includes forty-one states, the U.S. Virgin Islands, and Washington, D.C. *See* <<http://www.megamillions.com/about/history.asp>>.

¹¹⁰*See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2519 (2009) (“The government of the United States is one of delegated powers *alone*. Its authority is *defined and limited* by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.”) (citation omitted) (emphasis added).

¹¹¹*See* U.S. CONST., art. I, § 8.

¹¹²*Id.*

¹¹³*See* U.S. CONST. amend. 10.

¹¹⁴*See CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 36 (“The only exceptions...were a lottery to support the Continental Army in 1776 and a series of lotteries approved by the federal government between 1792 and 1842 to fund projects in the District of Columbia.”) (citation omitted).

¹¹⁵In 1988, acting under U.S. CONST., art. I, § 8 cl. 3, the Indian Commerce Clause, Congress enacted the federal Indian Gaming Regulatory Act (IGRA) imposing on the several states a federal statutory obligation to negotiate compacts in good faith with the Indian tribes relating to gaming activities. It also created a federal cause of action empowering Indian tribes to compel states by action brought in the federal courts to perform those duties. However, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) the U.S. Supreme Court struck down this grant of jurisdiction to sue a state without its consent. The U.S. Supreme Court also made it abundantly clear that these provisions of IGRA could not be validly used to enforce certain statutory provisions of IGRA against a state official. *See e.g.* Steven Andrew Light, Kathryn R.L. Rand, and Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 665 (2004) (“In effect, the Court invalidated Congress’ carefully crafted compromise between state interests and tribal and federal interests.”).

¹¹⁶U.S. CONST., Art. I, § 8 (7).

¹¹⁷U.S. CONST., Art. I, § 8 (3).

¹¹⁸*Id.*

¹¹⁹*See supra* note 111.

¹²⁰*See CLOTFELTER AND COOK: SELLING HOPE*, *supra* note 1, at 38.

Accordingly, in 1876, President Grant signed into law an act imposing legal sanctions on persons using the mails to circulate advertising for lotteries.¹²¹ Then, in 1890, a Federal Act was enacted that proscribed the publication of any newspaper advertisements for lotteries.¹²² The U.S. Supreme Court sustained the constitutionality of these congressional enactments by ruling that the pertinent acts of Congress were within the scope of powers assigned to Congress under the provisions of the U.S. Constitution. In 1892, the U.S. Supreme Court ruled in *In re Rapier*¹²³ that Congress had validly exercised its constitutionally assigned power to regulate the use of the mails.¹²⁴

In the quest for survival, the Louisiana Lottery operators moved their lottery operations outside the U.S. to Honduras, renaming it the Honduras National Lottery.¹²⁵ In response, in 1894, Congress enacted legislation prohibiting the importation “into the United States from any foreign country...[of] any lottery ticket or any advertisement of any lottery.”¹²⁶ The legislation authorized the seizure and forfeiture of all lottery materials and imposed fines with a maximum of \$5,000 or imprisonment up to ten years, or both.¹²⁷ Finally, in 1895, Congress enacted legislation empowering the suppression of all lottery traffic through national and interstate commerce¹²⁸ and expressly prohibiting use of the mails for disseminating lottery materials.¹²⁹

Then in 1903, the U.S. Supreme Court decided in *Champion v. Ames*,¹³⁰ that Congress had the power to regulate a “species of interstate commerce” that “[had] grown into disrepute and [had] become offensive to the entire people of the nation.”¹³¹ In addition, the citizens of Louisiana became aware of the apparent bribing of state political leaders and the extraction of exorbitant profits from operation of the lottery, while shortchanging the State’s financial benefit from its operation.¹³² Finally, in 1905, the Louisiana legislature terminated state sponsorship of the lottery.¹³³

No other legal state-authorized or state-operated lotteries existed until New Hampshire initiated its lottery in 1964,¹³⁴ but illegal numbers games probably operated in all major American cities.¹³⁵ Additionally, other lotteries sought a market in the U.S., including the Irish Sweepstakes.¹³⁶ The mails were initially used to promote and sell tickets in the U.S.,¹³⁷ but, the enactment of the 1895 federal law¹³⁸—empowering the U.S. Post Office to inter-

vene with legal action to combat this use of the mails—stamped this out.

III. THE DEVELOPMENT OF LOTTERY PLAYING AND THE ROLE OF PUBLIC POLICY

The modern success of lottery playing among adults¹³⁹ in the U.S. has not transformed lottery playing into legal activity for all purposes.¹⁴⁰ The determination of the legality of lottery playing rests within the legal authority of the judiciary,¹⁴¹ as a *settled* conclusion regarding the separation of powers.¹⁴² Essentially, “[v]iolations of public

¹²¹44th Cong. Ch. 186.

¹²²51st Cong. Ch. 908.

¹²³143 U.S. 110 (1892).

¹²⁴*Id.*

¹²⁵See SWEENEY *supra* note 23, at 59.

¹²⁶53rd Cong. ch. 349.

¹²⁷*Id.*

¹²⁸53rd Cong. ch. 191.

¹²⁹*Id.*

¹³⁰188 U.S. 321 (1903).

¹³¹*Id.* at 328.

¹³²See NGISC: FINAL REPORT, *supra* note 3, ch. 2 at 2-1. See also SWEENEY, *supra* note 23, at 59.

¹³³See SWEENEY, *supra* note 23, at 59. (“For a number of years the company operated outside the law, until raids on these operations finally killed the Octopus in 1907.”).

¹³⁴See MCGOWAN, *supra* note 25, at 15.

¹³⁵See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 39.

¹³⁶*Id.* at 38. See also SWEENEY, *supra* note 23, at 71.

¹³⁷*Id.*

¹³⁸53rd Cong. ch. 191.

¹³⁹See NGISC: Lotteries, *supra* note 5, at 1 ([Playing lotteries] is the *only* form of commercial gambling [in the U.S.] which a majority of adults report having played.”) (emphasis added).

¹⁴⁰See Leacock: Lotteries and Public Policy, *supra* note 9 at 42 (explaining that at common law—in appropriate instances—the judiciary continues to view contracts relating to lotteries as violative of public policy).

¹⁴¹See *Irwin v. Williar*, 110 U.S. 499, 510 (U.S. 1884) (“[I]n [the U.S.], all wagering contracts are...illegal and void as against public policy.”) (citation omitted).

¹⁴²See *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2519 (2009) (“The government of the United States is one of delegated powers *alone*. Its authority is *defined and limited* by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.”) (citation omitted) (emphasis added). See also, e.g., *Lichter v. United States*, 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.”).

policy have often been associated with immorality.¹⁴³ The judiciary has conceptualized the legal phenomenon of public policy¹⁴⁴ as the appropriate mechanism to resolve issues applicable to lottery playing.¹⁴⁵ The judiciary has settled the legal question by respecting the constitutionally assigned power of each state's legislature.¹⁴⁶ Without doubt, the interpretation of constitutional, or statutory measures, inheres within the powers of the judiciary.¹⁴⁷ The judiciary therefore determines whether or not the legislature of each state is empowered by each state's constitution to enact statutes creating and legalizing the operation of *intrastate* lotteries.¹⁴⁸

When the judiciary rules that a lottery has been validly created by the legislature, a second analytical step often becomes necessary because an alleged contract implicating some aspect of the particular

lottery may be in dispute. A judicial decision related to the controversy before the courts often requires the judiciary to apply and interpret public policy in resolving such disputes.¹⁴⁹ In 2007, the Supreme Court of Utah categorized public policy as "protean,"¹⁵⁰ because its contours in the hands of the judiciary can be subject to significant change.¹⁵¹ That makes public policy somewhat amorphous,¹⁵² and therefore intensifies the judiciary's difficulty in identifying and interpreting it.¹⁵³

Additionally, the post-1964 surge in public participation in playing lotteries in modern American life led Congress to create¹⁵⁴ the National Gambling Impact Study Commission (NGISC) in 1996.¹⁵⁵ The Commission's Lotteries Report¹⁵⁶ referred to a certain form of "magical thinking"¹⁵⁷ identified by two commentators in their published work.¹⁵⁸

¹⁴³See *Leacock: Lotteries and Public Policy*, *supra* note 9, at 43.

¹⁴⁴See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (1963) ("[W]hat is commonly spoken of as public policy [is] the good of the collective body."). See also Hon. Robert F. Brachtenbach, *Public Policy in Judicial Decisions*, 21 GONZ. L. REV. 1 at 4 (1985/86) ("[Public policy is] shrouded in the fog of English antiquity...."). For a somewhat contrary viewpoint, see W. S. M. Knight, *Public Policy in English Law*, 38 L.Q.R. 207 at 207 (1922) ("The expression 'public policy' is not one of very old standing in English law.").

¹⁴⁵State ex rel. Stephan, 867 P.2d at 1038 (1994) ("[The judiciary has] construed the word *lottery*...with a view of remedying the mischief intended to be prevented.") (citation omitted) (emphasis added).

¹⁴⁶*Id.*

¹⁴⁷*Marbury v. Madison*, 1 Cranch 137, 171 (1803) ("[A] legal question [is] properly determinable in the courts....") (emphasis added).

¹⁴⁸State ex rel. Stephan, 867 P.2d at 1038 (1994).

¹⁴⁹See Brachtenbach, *supra* note 144, at 1 (emphasizing the vital role that public policy has played at common law in dispute resolution.). However, it should be borne in mind that public policy has been characterized by the judiciary as an "unruly horse." See, e.g., *Penunuri v. Sundance Partners, Ltd.*, 2011 WL 2276243 at *4 (Utah App. 2011). See also *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W. 3d 653, 672-673 (Tex. 2008) ("According to the well-known dictum of an English judge, public policy is a very unruly horse, and when once you get astride it you never know where it will carry you.").

¹⁵⁰See *Rothstein v. Snowbird Corp.*, 175 P.3d 560, 563 (Utah 2007) ("To pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief. Like its cousin legislative history, public policy is a *protean* substance....") (emphasis added).

¹⁵¹In Greek mythology, Proteus was a sea-god, whereas Neptune was the Roman god of the sea. With respect to Greek mythology, see, e.g., EDITH HAMILTON, *MYTHOLOGY* 38 (1969) [hereinafter HAMILTON, *MYTHOLOGY*] ("Proteus...had the power...of changing his shape at will.").

¹⁵²See *Penunuri*, *supra* note 149 ("[P]ublic policy is a protean substance that is too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature.... [T]he theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis for judicial determinations, if at all, *only with the utmost circumspection*...") (citations omitted) (emphasis added). See also RICHARD A. LORD, *WILLISTON ON CONTRACTS*: 5 WILLSTN-CN § 12:2, 1 (4th ed. May 2011) West Database ("[P]ublic policy is, by its nature, variable with time and place and, except in broad pronouncements, relies little on stare decisis.") (citation omitted).

¹⁵³See *Penunuri*, *supra* note 149.

¹⁵⁴See *Archive*, NATIONAL GAMBLING IMPACT STUDY COMMISSION: MESSAGE FROM THE CHAIR [hereinafter NGISC: MESSAGE FROM THE CHAIR] ("The Commission was created by the 104th Congress through Public Law 104169, which was signed by President Clinton on August 3, 1996."). Available at <<http://govinfo.library.unt.edu/ngisc/news/chairman.html>>.

¹⁵⁵See *Index*, Nat'l Gambling Impact Study Comm'n (Aug. 3, 1999). Available at <<http://govinfo.library.unt.edu/ngisc/index.html>> [hereinafter NGISC]. Congress enacted the duration of the Commission to last for two years (from the date of its first meeting, which took place in 1997). National Gambling Impact Study Commission Act, Pub. L. No. 104-169, §§ 4(b), 10, 110 Stat. 1482, 1484, 1488 (1996). The act required the Commission to report to Congress, the President, and the governors two years after the Commission held its first meeting. *Id.* at § 4(b), 110 Stat. at 1484. The report (accompanied by the Commission's Final Report Recommendations) was made on June 18, 1999. See National Gambling Impact Study Commission, Final Report (1999), available at <<http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>>.

¹⁵⁶See NGISC: *Lotteries*, *supra* note 5, at 17.

¹⁵⁷*Id.* ("[L]ottery play depends on encouraging people's 'magical thinking'....") (citation omitted). See also MACHIAVELLI, *supra* note 2.

¹⁵⁸*Id.*

The two commentators seem to suggest that lottery advertisers may try to tap this “magical thinking”¹⁵⁹ as a means to increase demand for lottery playing in the U.S.¹⁶⁰ These two commentators may be right,¹⁶¹ because the large number of people who play lotteries may confirm their viewpoint.¹⁶²

Actually, the widespread lottery playing witnessed in modern times was not always the norm in the U.S. In early American history, certain state constitutions prohibited lotteries.¹⁶³ However, state constitutions were not unanimous in banning lotteries.¹⁶⁴ Of course, a particular state can mandate provisions against lotteries in both the state’s constitution and in statutory enactments prohibiting lotteries.¹⁶⁵ In any event, notwithstanding these alternatives, in the modern era, in both the U.S. and elsewhere, there has been some movement towards less negative attitudes about gaming generally, which may signify movement towards broader acceptance of gaming.¹⁶⁶ However, the underlying public policy relating to court enforcement of con-

tracts connected to gaming—enunciated by the judiciary¹⁶⁷—remains essentially constant into the present era.¹⁶⁸

More specifically, with regard to lotteries, “for the first six decades of [the twentieth] century every [American] state prohibited lotteries.”¹⁶⁹ As a result of American public policy disfavor of gambling,¹⁷⁰ the common law’s general principle is that the judiciary will not enforce lottery agreements.¹⁷¹ Fundamentally, at common law, when parties are equally at fault, courts will leave the parties where it finds them.¹⁷² In spite of these norms, widespread public playing of lotteries remains a tenacious activity¹⁷³ that may confirm the power of “self-delusion to which even the best of men are sometimes susceptible.”¹⁷⁴ It may also be a factor in the cluster of dynamics that lead to the extreme condition of problem and pathological gambling.¹⁷⁵ The continuing financial success of lotteries¹⁷⁶ may also be evidence of the conviction of the role of “chance” in human life,¹⁷⁷ combined with some

¹⁵⁹See *NGISC: Lotteries*, *supra* note 5, at 17.

¹⁶⁰*Id.*

¹⁶¹See *NGISC: Lotteries*, *supra* note 5, at 1 (“[The lottery] is the only form of commercial gambling which a majority of adults report having played.”) (emphasis added).

¹⁶²*Id.*

¹⁶³See, e.g., MISS. CONST. art. 12, § 15.

¹⁶⁴See *Leacock: Lotteries and Public Policy*, *supra* note 9, at 64.

¹⁶⁵See *Youngblood v. Bailey*, 459 So.2d 855, 858-859 (Ala. 1984) [“Under [Ala. Const. art. IV, § 65] the state legislature is specifically prohibited from authorizing any type of lottery and is affirmatively required to pass laws prohibiting lotteries.”] (emphasis added).

¹⁶⁶See *Harrah’s Club v. Toshi Van Blitter*, 1988 U.S. Dist. LEXIS 18348, at 2 (“Nevada recognizes gaming as a legitimate recreational and business activity, as do other states and nations.”) (citations omitted). See also Kelly, *British Gaming Act of 1968*, 8 N.Y. L. SCH. J.INT’L & COMP. LAW 33 (1986).

¹⁶⁷See Kelly, *supra* note 4.

¹⁶⁸See, e.g., *Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y.A.D. 3 Dept. 1996) (“Public policy continues to disfavor gambling; thus, the regulations pertaining thereto are to be strictly construed.”) (citations omitted) (emphasis added). See also McGOWAN, *supra* note 25, at 4 (“[a]s a result of its unsavory reputation, restrictions on gambling have been adopted by practically every country in the world throughout history.”) (emphasis added).

¹⁶⁹See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 235.

¹⁷⁰*Irwin v. Williar*, 110 U.S. 499, 510 (U.S. 1884) ([I]n this country, all wagering contracts are held to be illegal and

void as against public policy.”) (citation omitted) (emphasis added).

¹⁷¹*Id.*

¹⁷²*People v. Rosen*, 78 P.2d 727, 728 (CA. 1938) (“It is the law in this state that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity.”) (citation omitted) (emphasis added).

¹⁷³Indeed, it may not be unlike the power of the American population’s almost addictive taste in another context. See, e.g., Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. & POL. 385 (2011).

¹⁷⁴See, e.g., *State ex rel. Nebraska State Bar Ass’n v. Cook*, 232 N.W.2d 120, 131 (Neb. 1975).

¹⁷⁵See *NGISC: FINAL REPORT*, *supra* note 3, at ch. 4-2 (“Despite the lack of basic research and consensus among scholars, the Commission is unanimous in its belief that the incidence of problem and pathological gambling is of sufficient severity to warrant immediate and enhanced attention on the part of public officials and others in the private and non-profit sectors.”). Available at <<http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>>.

¹⁷⁶See *NGISC: Lotteries*, *supra* note 5, at 1 (“Lotteries rank first among the various forms of gambling in terms of gross revenues: total lottery sales in 1996 totaled \$42.9 billion. In 1982 gross revenues were \$4 billion, representing an increase of 950% over the preceding 15 years, 1982–1996.”) (citation omitted) (emphasis added).

¹⁷⁷See MACHIAVELLI, *supra* note 2.

measure of addiction to the pain of repetitively losing.¹⁷⁸

As indicated earlier, historically, the legality of lotteries has imitated the swinging of a pendulum,¹⁷⁹ swinging from legalization¹⁸⁰ to state prohibition¹⁸¹ and in the modern era, back to state legalization again.¹⁸² Arguably, the pendulum-like legislative swings reflect *political* adaptations by *legislators* towards detected pendulum swings in public attitudes to gambling in general and lotteries in particular.¹⁸³ However, with respect to the interpretation and application of public policy to gambling *per se*—by the judicial branch of government—the conceptual norm in U.S. common law has remained remarkably stable.¹⁸⁴ Analyzing public policy is intrinsic to the judicial function in

common law jurisdictions, and the judiciary applies public policy concepts in order to protect the state from immoral conduct based upon the principle that “no one can lawfully do that which tends to be injurious to the public or against the public good.”¹⁸⁵

Public policy is legally synonymous with “the public good”¹⁸⁶ and is therefore the “purpose and spirit of the substantive laws of a state....”¹⁸⁷ It consists of the principles and standards regarded by both the legislature and the courts as integral to the societal fabric of the state.¹⁸⁸ It has been likened to a “will-o’-the-wisp of the law [that] varies and changes with the interests, habits, needs, sentiments, and fashions of the day....”¹⁸⁹ This means that public policy is a manifestation of the values,

¹⁷⁸See, e.g., DAVID VISCOTT, EMOTIONAL RESILIENCE, 80 (1996) (“It is an odd thing, but as much as you avoid pain, you need it to help you sort out your experience. ‘Pinch me so I know I’m not dreaming,’ reflects how people use pain. Slapping a person in hysterics can arrest the escalation of panic by focusing the person on his physical hurt. *The power of pain is that it brings you into the present.*”) (emphasis added).

¹⁷⁹See *supra* Part II. See also CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 43 (“The public attitude toward lotteries is and apparently has long been one of *fundamental paradox*. On the one hand, lotteries have enjoyed sustained and widespread popularity.... Yet on the other hand, there remained an abiding opposition to the legalization of lotteries.”) (citation omitted) (emphasis added).

¹⁸⁰*Id.* at 36 (“1832 [was] apparently one of the peak years for lottery play....”).

¹⁸¹*Id.* (“By 1894 no state permitted the operation of lotteries, and thirty-five states had explicit prohibitions in their constitutions against them.”) (citation omitted). See also HERRMANN, *supra* note 15, at 15 (“Gambling policies are responsive to negative public opinion as well [as positive public opinion]: Numerous state and local votes against lotteries, casinos, and convenience gambling provide stark evidence that politicians are generally unwilling to enact gambling policies in the absence of demonstrated local majority support, or where strong groups such as pro-family or church groups can mobilize strong opposition.”).

¹⁸²See NGISC: Lotteries, *supra* note 5, at 2 (“Currently, 37 states and the District of Columbia have operating lotteries.”). In 2011 this number had risen to 40. See RICHARD A. LEITER, 0020 SURVEYS 21, 1 (West 2011) (“Forty states permit lotteries.”) and in 2013 to 43. See <<http://www.nhlottery.com/About-Us/History.aspx>>.

¹⁸³See NGISC: Lotteries, *supra* note 5, at 13.

¹⁸⁴See *Stanley v. California Lottery Comm.*, 2003 WL 22026611, 19 (Cal.App. 3 Dist. 2003) (“California’s ‘strong, long-standing public policy regarding gambling is a broad policy against judicial resolution of civil claims arising out of *lawful or unlawful gambling contracts or transactions, and in the absence of a statutory right to bring such claims*, this policy applies both to actions for recovery of gambling losses and actions to enforce gambling debts.”) (emphasis in the original) (footnote omitted). See also *Meyer v. Hawkinson*, 626 N.W.2d 262, 267 (Sup. Ct. ND 2001) (“Public policy is a principle of law whereby contracts will not be enforced if they have a tendency to be injurious to the public or against the public good...Whether the contract is against public policy is generally provided for by the state constitution or statute...However, when a contract is inconsistent with fair and honorable dealing, contrary to sound policy, and offensive to good morals, the courts have the authority to declare the contract void as against public policy.”) (citations omitted).

¹⁸⁵*Browner v. Browner*, 327 S.W.2d 808, 812 (1959). See also CARDOZO, *supra* note 144.

¹⁸⁶*Dille v. St. Luke’s Hosp.*, 196 S.W.2d 615, 629 (1946). See also CARDOZO, *supra* note 144.

¹⁸⁷*Johnston v. Chicago Great Western R. Co.*, 164 S.W. 260, 262 (1914). See also *State v. Clarke*, 54 Mo. 17, 36 (1873) (where the court considered the regulation of “bawdy houses.”). See also *Kitchen v. Greenbaum*, 61 Mo. 110, 116 (1875). See, e.g., *Montgomery v. Montgomery*, 127 S.W. 118, 119 (1910) (“[I]t is universally agreed that the promotion of public and private morals is one of the chief purposes of the law.”). See also *Muschany v. United States*, 65 S.Ct. 442, 451 (1945) (holding that “violations of obvious ethical or moral standards” were contrary to public policy).

¹⁸⁸*Bolz v. State Farm Mut. Auto. Ins. Co.*, 52 P.3d 898, 902 (2002).

¹⁸⁹*Wallihan v. Hughes*, 82 S.E.2d 553, 558 (1954).

norms, and ideals of a society and is the very essence of law.¹⁹⁰

It also means that the public policy conclusions of one generation will not necessarily coincide with those of another generation.¹⁹¹ Therefore, the application of public policy principles to lotteries will not necessarily be static. For example, interpreting and applying public policy to lotteries may be similar to articulating a physician's duty of confidentiality to his patients, which has also changed over time; as the Supreme Court of Missouri, *en banc*, explained "the common law and the public policy of this state are not stagnant but are evolutionary."¹⁹² This means that in applying public policy, the judiciary *may decline* to enforce particular *components* of a contract, rather than nullifying

the contract in its entirety.¹⁹³ In other instances, the application of public policy may mandate different solutions altogether.¹⁹⁴

Certainly, bargains that are too offensive to society will not be enforced by the judiciary.¹⁹⁵ For example, the courts will not affirmatively assist parties to an illegal lottery contract where both are equally at fault.¹⁹⁶ The common law will neither assist in the enforcement of such agreements, while they are executory,¹⁹⁷ nor will the judiciary intervene to grant any equitable remedies¹⁹⁸ where such contracts have been fully performed.¹⁹⁹ This means that plaintiff prizewinners of lottery money prizes cannot anticipate routine enforcement of agreements made by parties who may have agreed to pay such monies to plaintiffs.²⁰⁰ A plaintiff who sues to

¹⁹⁰See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35–36 (Little, Brown & Co. 1938) (1881), *as cited in* Gregory v. Ashcroft, 501 U.S. 452, 466 (1991) ("The very considerations which judges most rarely mention, and always with an apology, are the secret root from which law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.").

¹⁹¹Funk v. U.S., 290 U.S. 371, 381 (1933) ("The public policy of one generation may not, *under changed conditions*, be the public policy of another.") (citation omitted) (emphasis added); Hall v. Baylous, 153 S.E. 293, 295 (1930) ("The public policy of to-day may not be the public policy of to-morrow. The notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. In the language of Justice Field of the Supreme Court of the United States: 'There can be no public policy which contravenes the law of the land.'"). F.A. Straus & Co. v. Canadian Pac. R. Co., 254 N.Y. 407, 413 (N.Y.1930) ("Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the Legislature contained in statutory enactments....[A] state can have no public policy except what is to be found in its constitution and laws. Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the constitution, the statutes, or judicial records.") (citation omitted).

¹⁹²Brandt v. Medical Defense Assocs., 856 S.W.2d 667, 670 (1993). See also Owens v. Owens, 854 S.W.2d 52, 53 (1993) ("Courts have a duty to criticize and reexamine the relationship of the rule[s] [enunciated in earlier court decisions applicable] to public policy and to make modifications.") (citation omitted).

¹⁹³Continental Basketball Ass'n, Inc. v. Ellenstein Enterprises, Inc., 669 N.E.2d 134 (Ind. 1996) (The Supreme Court can nullify or reform a contract to eliminate any unconscionable provi-

sions or terms that violate public policy). Ex parte Thicklin, 824 So.2d 723 (Ala. 2002).

¹⁹⁴MidMichigan Regional Medical Center—Clare v. Professional Employees Div. of Local 79, Service Employee Intern. Union, AFL-CIO, 183 F.3d 497 (1999) (public policy may not unambiguously support the permanent separation of a medical care professional from further provision of medical care to the general public, in spite of some proven acts of negligence); Fomby-Denson v. Dept. of Army, 247 F.3d 1366 (Fed. Cir. 2001) (public policy encouraging the detection of possible criminal activity may legally justify particular action); Gonzales v. Nissan Motor Corp in Hawaii, Ltd., 58 P.3d 1196 (2002) (promises which are offensive to public policy will not be enforced by the judiciary); Braye v. Archer-Daniels-Midland Co., 676 N.E.2d 1295 (1997); A.Z. v. B.Z., 725 N.E.2d 1051 (2000); First Nat. Ins. Co. of America v. Clark, 899 S.W.2d 520 (1995); Clark v. Columbia/HCA Information Services, Inc., 25 P.3d 215 (2001) (the court may of course reverse a grant of summary judgment and may remand the case); Harper v. Healthsource New Hampshire, Inc., 674 A.2d 962 (1996); Padilla v. State Farm Mut. Auto. Ins. Co., 68 P.3d 901 (2003); Meyer v. Hawkinson, 626 N.W.2d 262 (2001).

¹⁹⁵See, e.g., Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995 (1993).

¹⁹⁶See Meyer v. Hawkinson, 626 N.W.2d 262 (2001); Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207 (1940).

¹⁹⁷Meyer v. Hawkinson, 626 N.W.2d 262 (2001) (summary judgment granted by the court to defendants dismissing plaintiffs' claim for enforcement of an alleged contract to share lottery proceeds).

¹⁹⁸E.g., Any injunctions or conceivably rescission.

¹⁹⁹Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207 (1940) (injunction refused by the court where petitioner sought to restrain parties from interfering with petitioner's "bank night" lottery operation.).

²⁰⁰Barquin v. Flores, 459 So.2d 436, 437 (1984) ("[E]ven though the gambling proceeds he sought to recover derived from a Puerto Rican lottery ticket lawfully purchased by a Puerto Rican resident in Puerto Rico," nevertheless, the court dismissed the complaint because it was filed to enforce a gambling obligation.).

enforce such an agreement to pay may have the suit dismissed by the courts.²⁰¹ Similarly, in spite of the existence of fiduciary duties under agency law that obligate an agent to hand over to the principal monies received in the course of the agency, nevertheless, a principal cannot necessarily recover—from his agent—sums of money paid to the agent for sales of lottery tickets.²⁰²

This differs from nullification of a party's legitimate rights created under the fundamental doctrine of freedom of contract. The fundamental right of freedom of contract is the starting point of the judiciary's decision making in contract controversies. Therefore, convincing proof that an agreement is injurious to the public or otherwise operates against the public good is necessary before a court will nullify a party's rights to the enforcement of an agreement freely made.²⁰³ However, a court will not hesitate to nullify an agreement made by parties in circumstances where freedom of contract has been *abused* to the point of violating public policy. However, where freedom of contract has not been abused, such contracts do not violate public policy and will be readily enforced by the judiciary.²⁰⁴

Circumstances can also arise where the question to be resolved by the courts relates to whether or not a contract is against public policy because of the provisions of a state's constitution or the provisions of a state statute.²⁰⁵ This is not the same as a court determination that a contract is inconsistent with fair and honest dealing. Of course, in both of these instances, courts will deny such agreements judicial enforcement, because with respect to all agreements that the courts find to be offensive to good morals, the courts have the legal authority to declare such agreements void as against public policy.²⁰⁶

Arguably, this is not the same as applying the *subjective* individual viewpoint of any particular judge.²⁰⁷ Under the constitutions of each of the fifty states, no judge is empowered to use personal, private, prejudiced conceptions of what is public policy.²⁰⁸ Furthermore, expediency is *not* a permitted standard of judicial behavior, and judges are *not* granted the freedom to apply random conceptions of what constitutes public policy.²⁰⁹ Finally, public policy is not the same as the personal opinions of laypeople, lawyers, or even judges.²¹⁰

A particular criticism of public policy expressed in its study by the National Gambling Impact Study Commission relates to the conception of "public policy being made piecemeal and incrementally,

with little or no general overview."²¹¹ However, the same observation may be true about the development of gambling policies.²¹² The National Gambling Impact Study Commission may prefer an overall or general approach, rather than an incremental and piecemeal development²¹³ that places "pressures on the lottery officials."²¹⁴ Each state that has embraced lotteries seems to have fallen into this predicament.²¹⁵ Two commentators on lot-

²⁰¹*Id.*

²⁰²*See* Mexican International Banking Co. v. Lichtenstein, 37 P. 574, 576 (1894) ("[This court will not] sit to take an account between two thieves from San Francisco...that is what we are asked to do here.").

²⁰³First Nat. Ins. Co. of America v. Clark, 899 S.W.2d 520 (1995).

²⁰⁴Johnson v. Peterbilt Fargo, Inc., 438 N.W.2d 162, 163 (1989).

²⁰⁵*Id.*; *see e.g.*, N.D. CENT. CODE § 9-08-02 (providing that all contracts which have for their object exemption of persons from responsibility for their own fraud or willful injury to the person or property of another, or willful negligent violation of law, are against the policy of the law).

²⁰⁶Johnson, 438 N.W.2d at 164; *see also* N.D. CENT. CODE § 9-08-01 (deeming contracts unlawful if contrary to express law; contrary to policy of express law, although not expressly prohibited; or contrary to good morals). *See also* Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 215 (1940) ("A court of equity will not extend its powers to protect a gambling enterprise from unfair competition.... The law will not aid a party to a lottery contract either in its enforcement while executory or in its rescission when executed.... Injunction will not lie to prevent an officer of the law from enforcing an order discontinuing the use of [a] gambling device....") (citations omitted).

²⁰⁷Fidelity & Deposit Co. of Maryland v. Conner, 973 F.2d 1236 (1992).

²⁰⁸*Id.*

²⁰⁹Barton v. Codington County, 2 N.W.2d 337 (1942).

²¹⁰Haakinson & Beauty Co. v. Inland Ins. Co., 344 N.W.2d 454 (1984). *See also* F.D.I.C. v. American Cas. Co. of Reading, Pa., 998 F.2d 404 (1993); Fomby-Denson v. Dept. of Army, 247 F.3d 1366 (2001).

²¹¹*See* NGISC: *Lotteries*, *supra* note 5, at 13.

²¹²One commentator has perceived certain consequences as a result of this incremental development. *See* HERRMANN, *supra* note 15, at 121 *observing that* ("Gambling policies have developed incrementally; once made legal, most forms of gambling have been quietly *expanded*, and regulations that could limit growth have been *loosened*.") (emphasis added).

²¹³*See* NGISC: *Lotteries*, *supra* note 5, at 13.

²¹⁴*Id.* ("Authority...is divided between the legislature and executive branches and further fragmented within each, with the result that the general public welfare is taken into consideration *only intermittently, if at all*.") (emphasis added).

²¹⁵*Id.* ("Few, if any states, have a coherent "gambling policy" or even a "lottery policy." Policy decisions taken in the establishment of a lottery are soon overcome by the ongoing evolution of the industry. It is often the case that public officials inherit policies and a dependency on revenues that they can do little or nothing about.").

tery development in the U.S. apparently think so, too²¹⁶—although, these two commentators have apparently not concluded that the absence of a general lottery policy is conclusively the most important reason behind lottery approval.²¹⁷

A more important question is whether or not the lottery industry has succeeded in causing a shift in the correlation of power by diminishing to some degree the political power of the people in each state that has adopted a lottery. Elected officials should ordinarily possess and exercise such power on behalf of the people who live in any given state, leading to the preservation of a coherent and healthy public policy for the particular state. An industry-driven policy could be an unsettling tipping point²¹⁸ that could lead to unforeseeable future negative changes in public policy. After all, legislators play the dominant role in creating lotteries by statute in response to the public's mandate.²¹⁹ Of course, legislators do have access to facilities for factual investigations that may be responsive to the needs of the general public, or to the needs of a particular class of persons that merit legislative protection.²²⁰ The judiciary is certainly aware of this.²²¹ So, although public policy may be a somewhat amorphous concept,²²² it is also an important part of the *legislative* debate and provides assistance in the formulation and validation of the *legislative* process.²²³

Finally, in the judicial context, public policy represents a challenge for the courts. In a statutory context, public policy is part of the foundation of the particular statutory provision under examination. This means that the judiciary must honor its constitutional assignment and do its best to explore the history, purpose, language, and effect of the legislative provision being interpreted.²²⁴

IV. METHODS USED TO LEGALIZE LOTTERIES

A state must first legalize a lottery before the particular state can lawfully operate one.²²⁵ Moreover, the adoption method for legal approval of a lottery has varied from state to state; sometimes, state constitutions must be amended.²²⁶ A number of states have used a statewide referendum as part of the adoption process; a referendum taking the form of a popular vote after the issue had been approved by the legislature was used in the initial lottery in

New Hampshire.²²⁷ New York enacted a constitutional amendment, followed by the endorsement of two separately elected legislatures as well as a public ratification.²²⁸ The use of the referendum method leaves the final decision to the electorate itself, rather than by the electorate's elected representatives in the legislature alone.²²⁹ Alternatively, instead of a referendum, states such as California

²¹⁶See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 43 ("One reason to believe that *familiarity itself* may mollify opposition is the apparent rise in approval of lotteries in states following adoption.") (emphasis added).

²¹⁷*Id.* ("[T]he major share of the increasing acceptance of lotteries in the United States must surely be due to...factors, which might be contained under the rubric of the general liberalization of attitudes on social and moral questions in society. The 'erosion of traditional (i.e., small town) American values' is frequently referred to in analyses of social change, and there is in fact evidence of significant change on a number of fronts.") (citations omitted).

²¹⁸See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT* at 247 (2000) ("The theory of Tipping Points requires...that we *reframe the way we think about the world.*") (emphasis added).

²¹⁹See *supra* note 100.

²²⁰See, e.g., RESTATEMENT SECOND, *Contracts* § 179, Comment c.

²²¹In *re Rahn's Estate*, 291 S.W. 120, 124 (1927) ("[I]t is not the function of the judiciary to create or announce a public policy of its own, but solely to determine and declare what is the public policy of the State or Nation as such policy is found to be expressed in the Constitution, statutes, and judicial decisions of the State or Nation.") (where the court ruled that it was not against public policy to enforce a will provision, written in 1916, directing that money should be used to "assist widows, orphans, and invalids" of Germany, then at war with the United States.).

²²²See *supra* note 24.

²²³See Brachtenbach, *supra* note 144, at 1 ("[O]nly constitutional limitations restrain legislative policy declarations.") (emphasis added).

²²⁴See, e.g., *State v. Brown*, 2011 WL 3585530 at *1 (Idaho App. 2011) ("When [a] Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history.") (citation omitted).

²²⁵See NGISC: FINAL REPORT, *supra* note 3, at 3-4 ("To date, each state that has authorized a lottery has granted itself a monopoly....").

²²⁶See e.g., CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 145 ("Because the antilottery sentiment of the nineteenth century had resulted in constitutional bars against lotteries in most states, referenda or initiatives were often required to bring about the necessary changes in state constitutions.").

²²⁷*Id.* at 143-144.

²²⁸*Id.*

²²⁹*Id.* at 146 ("Of the nearly thirty referenda on lotteries since 1964, only a handful have failed....").

have adopted lotteries through an initiative process.²³⁰ Finally, lottery adoption in some states has simply required approval by the state's legislature and governor without a direct citizen vote.²³¹

These varying adoption methods were legally necessary because under the common law, there is no legal right to gamble.²³² Furthermore, where a constitution is silent on the issue, there is no constitutional right to gamble, either.²³³ Therefore, the state law of any individual state in the U.S. may rightfully suppress gambling under the police powers of each state.²³⁴ The suppression of gambling, therefore, does not interfere with any of the inherently fundamental rights of citizenship that the government must protect and secure.²³⁵ This is the legal starting point of the prohibition of, or the placing of restrictions on, gambling.²³⁶ Moreover, "the legislature cannot bargain away the police power of a State."²³⁷

This means that where a state constitutional provision specifically prohibits lotteries, the particular state's legislature cannot legalize any gambling device that legally amounts to a lottery.²³⁸ Moreover, state constitutional provisions can expressly forbid lotteries, the sale of lottery tickets, or any legislative authorization of lotteries.²³⁹ However, a state's legislature would arguably have the inherent power to regulate or to prohibit any and all other forms of gambling that are not expressly or impliedly prohibited by the state constitution.²⁴⁰ This would be the case where the state constitution was *silent* on such specific non-lottery activity.²⁴¹

If, on the other hand, a prohibition against the creation of a state-run lottery is statutory, rather than constitutional, the pre-authorization legal authority of a constitutional amendment would not be required.²⁴² Rather, the legislature would have the power to create a lottery by legislative abrogation or amendment.²⁴³ Additionally, where a constitutional provision prohibiting the creation of lotteries generally also includes an exception, the exception could permit a legislature to authorize lotteries in the specified circumstances enunciated in the constitution. However, in such circumstances, the doctrine of strict construction would apply.²⁴⁴

Certainly, an absolute bar imposed by a constitutional provision could also include a bar on any enterprises, machinations, or gaming conceptions based upon the lottery principle.²⁴⁵ The interpretation of all of these provisions—whether constitutional or statutory—rests with the judiciary.²⁴⁶ So, the judiciary may conclude that a constitutional pro-

vision is an absolute bar *only* to lotteries.²⁴⁷ In such instances, the courts must analyze each type of gambling individually and separately in order to determine whether or not it constituted a lottery.²⁴⁸ Some gambling devices may be construed to be lotteries, while others may be ruled *not* to be lotteries

²³⁰*Id.* at 151.

²³¹*See, e.g., id.* at 5 ("In December 1973 the [Illinois] state legislature passed a lottery bill, and the governor signed it into law with assurances that the lottery would be run honestly.").

²³²South Carolina Dept. of Revenue & Taxation v. Rosemary Coin Machines, Inc., 500 S.E.2d 176, 180 (1998) ("[Under state common law] [t]here is no fundamental right to gamble."). *See also id.* ("[T]he State's power to suppress gambling is *practically unrestrained*." (citations omitted) (emphasis added)).

²³³Com. v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810, 817 (1997) ("[T]here is no constitutional right to engage in...gaming."). Durham Highway Fire Protection Ass'n, Inc. v. Baker, 351 S.E.2d 744 (1987).

²³⁴*See, e.g.,* Stone v. State of Mississippi, 101 U.S. 814, 818 (U.S. 1879) ("Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that *it extends to all matters affecting...the public morals.*" (citation omitted) (emphasis added)).

²³⁵Ah Sin v. Wittman, 198 U.S. 500 (1905).

²³⁶Fendrich v. Van de Kamp, 227 Cal. Rptr. 262 (1986); People v. Monroe, 182 N.E. 439 (1932); American Legion Post No. 113 v. State, 656 N.E.2d 1190 (1995); Com. v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810 (1997); Brown v. State Through Dept. of Public Safety and Corrections, Louisiana Gaming Control Bd., 680 So. 2d 1179 (1996); Parkes v. Bartlett, 210 N.W. 492 (1926); State v. Board of Com'rs of City of Las Vegas, 1 P.2d 570 (1931); State v. Felton, 80 S.E.2d 625 (1954); South Carolina Dept. of Revenue & Taxation v. Rosemary Coin Machines, Inc., 500 S.E.2d 176 (1998). Prohibiting gambling is a legitimate governmental purpose under the police power. State ex rel. Spire v. Strawberries, Inc., 473 N.W.2d 428 (1991).

²³⁷*See* Stone v. State of Mississippi, 101 U.S. 814, 817 (U.S., 1879).

²³⁸State ex rel. Tyson v. Ted's Game Enterprises, 893 So.2d 355 (2002) (Ala. Const. art. 4, § 65); Poppen v. Walker, 520 N.W.2d 238 (1994) (S. Dakota Const. art. III § 25); State v. Nixon, 384 N.E.2d 152 (1979) (Ind. Const. art. 15 § 8).

²³⁹*Id.*

²⁴⁰Lee v. City of Miami, 163 So. 486 (1935).

²⁴¹*Id.*

²⁴²State ex rel. Clark v. State Canvassing Bd., 888 P.2d 458 (1995).

²⁴³*Id.*

²⁴⁴State ex. Mountaineer Park, Inc. v. Polan, 438 S.E.2d 308 (1993).

²⁴⁵Try-Me Bottling Co. v. State, 178 So. 231 (1938).

²⁴⁶*See supra* note 147.

²⁴⁷State ex rel. Gabalac v. New Universal Congregation of Living Souls, 379 N.E.2d 242 (1977).

²⁴⁸*Id.*

because they fall outside the parameters of the constitutional prohibition.²⁴⁹ Therefore, in instances where a type of gambling is construed as *not* being a lottery, it may very well survive legal nullification by the courts.²⁵⁰

Of course, where lotteries are constitutionally prohibited, and penalties are constitutionally imposed, the legislature of the particular state cannot legitimately diminish any penalties or other punitive measures imposed for the operation of constitutionally prohibited lotteries.²⁵¹ Proof that financial assistance to a charity was provided from proceeds derived from the operation of such a lottery would not be enough to override a constitutional prohibition.²⁵² Therefore, a lottery will not be saved from nullification by the fact that it is conducted for charitable, patriotic, or other worthy societal objectives or purposes.²⁵³

V. AN EXAMPLE OF FINANCIAL SUCCESS OF LOTTERIES AND SOME CRITICISMS OF LOTTERIES AS TAX VEHICLES

Florida's experience in using lottery proceeds derived from lottery-playing as a "voluntary tax"²⁵⁴—rather than imposing involuntary taxes²⁵⁵—has been quite successful. For example, "[i]n 1986, Florida voters authorized a lottery through a constitutional amendment, enacted by a two-to-one margin that would use its proceeds to enhance public education in Florida...."²⁵⁶ One of the missions in establishing the Florida Lottery was to "maximize[e] revenues for education...."²⁵⁷ The Florida experience is undoubtedly a success story. For, "[o]ver the...history of the Florida Lottery, [this] goal...[has] been accomplished."²⁵⁸ Indeed, over the lifetime of the Florida lottery, "[i]n total, Florida's schools and students have received more than \$25 billion in Lottery profits...."²⁵⁹ However, the unknown nature of the future must be borne in mind. The psychological factors that have motivated the continued financial success of widespread playing of lotteries by the public are unknown. As observed—in a different psychological context, but pertinent to this context as well—with respect to the future, "[t]he past [is] not predictive nor [is] the present confirmatory."²⁶⁰

Nevertheless, in practically every case where states have adopted lotteries, potential revenues and the beneficial societal deployment of those revenues have been the principal selling points.²⁶¹ In

fact, Thomas Jefferson seems to have perceived lotteries as a mechanism that might be used by a state as a substitute for mandatory taxes,²⁶² because revenue from lotteries would be provided to the state *voluntarily* by those who *choose* to play lotteries.²⁶³

On the other hand, opponents of lotteries have asserted that lotteries rank poorly according to conventional criteria for judging taxes.²⁶⁴ Lotteries have also been compared unfavorably to conventional taxes because of their alleged instability and limited revenue potential.²⁶⁵ Furthermore, opponents assert that lotteries are regressive, "preying on the poor," whether wittingly, by marketing heavily in poor areas, or unwittingly, simply by offering a product that appeals to poor people.²⁶⁶ However, one Maryland state senator who opposed the lottery lamented that "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."²⁶⁷

The National Gambling Impact Study Commission identified other criticisms of lotteries.²⁶⁸

²⁴⁹*Id.*

²⁵⁰*Id.*

²⁵¹*Silberman v. Skouras Theatres Corp.*, 169 A. 170 (C.P. 1933).

²⁵²*State ex rel. Trampe v. Multerer*, 289 N.W. 600 (1940).

²⁵³*Id.*

²⁵⁴*See generally* Stephen J. Leacock, *Lotteries and Public Policy in United States and Commonwealth Caribbean Law: Scrutinizing the Success of Lotteries as a Voluntary and "Painless" Tax*, 45 IALR 91 (2013).

²⁵⁵*E.g.*, levying additional property taxes to finance public education.

²⁵⁶Available at: <<http://flalottery.com/history.do>>.

²⁵⁷*Id.*

²⁵⁸*Id.*

²⁵⁹*Id.*

²⁶⁰*See* VISCOTT, *supra* note 178, at 283.

²⁶¹*See* CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 215 ("Revenue is the *raison d'être* of contemporary state lotteries.").

²⁶²*Id.* at 299, note 11: A "Painless Tax"?

²⁶³*Id.*

²⁶⁴*Id.* at 215 (Lotteries are said to be a relatively inefficient source of revenue, owing to the high ratio of administrative costs per dollar raised.).

²⁶⁵*Id.*

²⁶⁶*Id.*

²⁶⁷*Id.* (quoting Ronald Alsop, "State Lottery Craze Is Spreading, but Some Fear It Hurts the Poor," *Wall Street Journal*, Feb. 24, 1983).

²⁶⁸*See* NGISC: *Lotteries*, *supra* note 5, at 17 ("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).

Additionally, one commentator concluded that lotteries are an inefficient way for governments to raise money.²⁶⁹ Lotteries have also been criticized for being regressive taxes,²⁷⁰ in spite of the “voluntary” nature of lottery playing cited by Thomas Jefferson.²⁷¹ The National Gambling Impact Study Commission also had harsh criticism for lottery advertising, which can be misleading and can encourage some people to engage in irresponsible gambling.²⁷² The commission recommended that instant tickets should be banned and that machine gaming outside of casinos—such as video lottery terminals at racetracks—should be abolished.²⁷³

VI. LOTTERIES DEFINED²⁷⁴

A. Lotteries as a type of gambling

In states where lotteries are prohibited, a constitutional or statutory definition of what constitutes

a lottery may not have been provided by either the constitution or the state’s statutes.²⁷⁵ In such a situation, the judiciary is constitutionally obligated to determine what does and does not constitute a lottery.²⁷⁶ Moreover, where constitutional or statutory definitions of a lottery are expressly provided, such definitions are not necessarily interpreted in a universally identical, or even similar or predictable, manner.²⁷⁷ Of course, in instances where lotteries are defined by a state’s constitution or statutorily, common law principles of legal interpretation apply to such definitions.²⁷⁸ Additionally, similar principles of legal interpretation also apply to state statutes that enact constitutionally permissible *exceptions* to the constitutional prohibitions relating to lotteries.²⁷⁹ For example, at common law, proof that there is sufficient consideration to qualify for the formation of a valid contract does not *per se* prevent a bargain from being gambling.²⁸⁰ At common law, in order for a scheme to be deemed to be a

²⁶⁹See SWEENEY, *supra* note 23, at 133 (“No other “tax” costs so much money to collect. The state government spends a lot of money on running lotteries”) (emphasis added).

²⁷⁰See NGISC: Lotteries, *supra* 5, at 9.

²⁷¹See CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 299 note 11.1.

²⁷²See NGISC: FINAL REPORT ch. 2, *supra* note 3, at 3-4–3-5.

²⁷³*Id.* at 3-18.

²⁷⁴State ex rel. Stephan v. Parrish, 887 P.2d 127, 132 (1994) (In order to prove a lottery, three elements must be clearly established: [i] the participants must have provided consideration; [ii] for a chance of winning a distribution or gain commonly referred to as a prize; and [iii] the prize must be awarded by lot or chance). See also Federal Communications Com’n v. American Broadcasting Co., 347 U.S. 284, 291 (1954) (“[T]here are three essential elements of a ‘lottery... (1) the distribution of prizes; (2) according to chance; (3) for a consideration.’”) (citations omitted).

²⁷⁵See, e.g., Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 211 (1940) (“[N]either the Constitution nor the statutes attempt to describe in detail the devices or schemes that are prohibited. The Constitution prohibits ‘lotteries’ but gives no definition of what a lottery is. The sections... make it an offense to dispose of a ticket or device representing an interest in a lottery... or to promote such... or advertise a lottery or scheme of chance or give publicity to such lottery or scheme of chance by whatever name, style or title denominated or known.”).

²⁷⁶See, e.g., Lichter v. United States, 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.”).

²⁷⁷People v. Hecht, 3 P.2d 399 (1931) (holding that where the winners of a lottery are determined, not by chance, but at the will of the promoter, the enterprise is, nevertheless, a lottery); People v. Wassmus, 182 N.W. 66 (1921); Knight v. State ex rel. Moore, 574 So.2d 662 (1990) (refusing to define the term “lottery” so broadly as to include all transactions where chance,

a prize, and a consideration exist, where to do so would embrace numerous games which, while classifiable as gambling, are not popularly thought of as lotteries; therefore, bingo was not a lottery, and a statute passed by the legislature authorizing certain games of bingo did not unconstitutionally violate the Mississippi constitutional provision banning lotteries); Harris v. Missouri Gaming Com’n, 869 S.W.2d 58 (1994) (holding that lottery consists of “consideration, chance and prize,” the court detailed the extent to which skill plays a part in various games authorized by legislation challenged as coming within the constitutional prohibition against lotteries, ruling that several games constitute lotteries, that poker and blackjack or 21 do not, and remanding for factual determinations with respect to the skill—if any—required for several other games; and, as to those games deemed to be lotteries, ruling that legislature could not authorize their playing on riverboats in violation of constitutional prohibition of lotteries); State v. Emerson, 1 S.W.2d 109 (1927); CONTACT, Inc. v. State, 324 N.W.2d 804 (1982) (holding that certain “pickle cards” constituted lotteries within meaning of state statute permitting certain sponsors to hold lotteries, in that element of chance existed when winning tickets were drawn from a tub, despite fact that winning numbers were predetermined); Harris v. Economic Opportunity Com’n of Nassau County, Inc., 575 N.Y.S.2d 672 (1991) (raffle was illegal lottery, hence charitable organization could not be compelled to award prize); Cole v. Hughs, 442 S.E.2d 86 (1994) (the court, in affirming a decision dismissing a counterclaim based upon a joint venture to purchase lottery tickets, stated: “The parties to the case at hand paid money and entered into an agreement, the outcome of which was dependent upon the Virginia Lotto, a contingent event, a chance, a lot, however ‘high tech.’”); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (1977) (raffle held to be lottery, illegal and void).

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰*Id.*

lottery, three elements must be present,²⁸¹ and unless all three elements are present, the lottery laws have no application.²⁸² Also, although a lottery displays the characteristics of a wager or bet, not every wager is necessarily a lottery.²⁸³

Of course, proof of a lottery requires proof that winning is dependent upon chance.²⁸⁴ However, where elements of chance *and skill* both exist in a game, the court will rule that a lottery is proven only if the element of chance predominates.²⁸⁵ Moreover, it is not an indispensable requirement that a prize must consist of money in order for the courts to rule that a game constitutes a lottery, because in appropriate circumstances, a prize payable

in land or in goods—rather than in money—*could* be a lottery.²⁸⁶ So, some cases have established that raffles and gift enterprises have been sufficiently offensive to public policy principles to constitute lotteries.²⁸⁷ For example, one raffle, which permitted the plaintiff to buy a chance—for a price of \$5—to win a 40 acre plot of land was ruled to be a void gaming bargain.²⁸⁸ As a result, plaintiff could not recover when the defendant initially drew plaintiff's stub as the winner and then—upon receiving late entries—conducted a completely new drawing, thereby causing plaintiff to lose the prize.²⁸⁹

Moreover, the giving of a ticket for the drawing of prizes has been held illegal, where the ticket

²⁸¹State ex rel. Stephan v. Parrish, 887 P.2d 127, 132 (1994).

²⁸²State ex rel. Stephan v. Parrish, 887 P.2d 127 (1994) (Kansas constitutional provision banning lotteries, as amended to permit bingo, did not authorize legislature to define bingo to include instant bingo pull-tab game, and legislation enacted by Kansas legislature was therefore unconstitutional); Knight v. State ex rel. Moor, 574 So.2d 662 (1990) (the court refusing to define the term "lottery" so broadly as to include all transactions where chance, a prize, and a consideration exist, where to do so would embrace numerous games which, while classifiable as gambling are not popularly thought of as lotteries; therefore, bingo was not a lottery, and a statute passed by the legislature authorizing certain games of bingo did not unconstitutionally run afoul of Mississippi constitutional provision banning lotteries); Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (1994) (holding that lottery consists of "consideration, chance and prize," declaring unconstitutional so much of legislation as purported to authorize certain gambling found to be lotteries within meaning of Missouri constitution); Contacts, Inc. v. State, 324 N.W.2d 804 (1982) (holding that certain "pickle cards" constituted lotteries within the meaning of state statute permitting certain sponsors to hold lotteries, the court focusing principally on whether the element of chance was met, holding that it was); McFadden v. Bain, 91 P.2d 292 (1939) (the essence of a lottery is a chance for a prize for a price); Com v. Irwin, 636 A.2d 1106 (1993) (video blackjack, poker, and other games were not gambling machines *per se* where they lacked the element of reward; gambling requires consideration, chance, and reward, and if machine has these three elements it is intrinsically related to gambling; but where player could never win more than he played, since tokens earned were carefully calculated by computer to require more to be spent playing than the value of prizes which could be redeemed, aspect of reward was absent).

²⁸³Stone v. State of Mississippi, 101 U.S. 814 (1879); Yellow-Stone Kit v. State, 7 So. 338 (1890); Grove Mfg. Co. v. Jacobs, 103 A. 14 (1918); Roselle v. McAuliffe, 39 S.W. 274 (1897); Wilkinson v. Gill, 1878 WL 12627 (1878); Ex parte Kameta, 60 P. 394 (1900).

²⁸⁴Stoddart v. Sagar, 2 QB 474, 18 Cox 165 (DC); People v. Reilly, 15 N.W. 520 (1883); Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (1994) (those games authorized by legislation that involved no skill, but only chance, such as bingo, keno, and pull-tabs, fell within the definition of a lottery for

purposes of the Missouri constitutional prohibition against lotteries, while other games involving skill, such as poker and blackjack or 21, did not, the court remanding to determine whether skill played a party in several other games so as to insulate them from the prohibition); Cole v. Hughes, 442 S.E.2d 86 (1994); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (1977).

²⁸⁵Commonwealth v. Plissner, 4 N.E.2d 241 (1936); Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (1994).

²⁸⁶People v. Psallis, 12 N.Y.S.2d 796 (1939); Nelson v. Bryant, 220 S.E.2d 647 (1975) (holding where appellant and respondent, relatives by marriage, agreed independently that if respondent won an automobile at a drawing held in conjunction with a fair, they would make a particular disposition of it, it was unnecessary to determine whether the drawing constituted an illegal lottery, since the transaction between the parties was separate from the drawing, and did not depend upon any illegality); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (1977).

²⁸⁷Willis v. Paul, 3 P.2d 39 (1931); Glennville Inv. Co. v. Grace, 68 S.E. 301 (1910); Lynch v. Rosenthal, 42 N.E. 1103 (1896); Guenther v. Dewien, 1860 WL 309 (1860); Commonwealth v. Ward, 183 N.E. 271 (1932) (holding that a miniature shovel, purportedly to be used for the customer's amusement, which permits the one paying for the privilege of picking up and retaining valuable objects, where the objects seldom are obtained, offends a statute against lotteries); Glover v. Malloska, 213 N.W. 107 (1927); State v. Powell, 212 N.W. 169 (1927); State v. Emerson, 1 S.W.2d 109 (1927); Retail Section of Chamber of Commerce v. Plattsmouth v. Kieck, 257 N.W. 493 (1934); Market Plumbing & Heating Supply Co. v. Spangenberg, 169 A. 660 (1934); People v. Miller, 2 N.E.2d 38 (1936); Harris v. Economic Opportunity Com'n of Nassau County, Inc., 575 N.Y.S.2d 672 (1991) (holding that raffle was an illegal lottery and thus the sponsor could not be compelled to award prize); Allebach v. Godshalk, 9 A. 444 (1887); Campbell v. Beaman, 1917 WL 3442 (1917); Featherstone v. Independent Service Station Ass'n of Texas, 10 S.W.2d 124 (1928); Blair v. Lowham, 276 P. 292 (1929); Maughs v. Porter, 161 S.E. 242 (1931); State v. Danz, 250 P. 37 (1926).

²⁸⁸Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (1977).

²⁸⁹*Id.*

was obtained by the purchase of goods,²⁹⁰ the purchase of an admission ticket,²⁹¹ or even mere attendance at an auction.²⁹² Additionally, slot machines and other video or computer games are generally held to offend anti-lottery statutes or constitutional provisions where they do not involve any skill, but rather pay winners based solely on luck.²⁹³ On the other hand, it has been held that the receipt of "Lady Luck" coupons by customers—*after* eating their meal—was legally different.²⁹⁴ The receipt of the "Lady Luck" coupons, entitling the custom-

ers to draw for prizes, occurred subsequent to the meal.²⁹⁵ Participation in the drawing was therefore absolutely free.²⁹⁶ The absence of the element of consideration therefore prevented the scheme from being a lottery.²⁹⁷

Of course, numerous states have relatively recently legalized state-run lotteries,²⁹⁸ and have declared that it is consonant with their public policy to obtain funds for such worthwhile purposes as subsidizing educational programs.²⁹⁹ In such instances, lotteries falling outside the express

²⁹⁰Holmes v. Saunders, 250 P.2d 269 (1952); Bloodworth v. Gay, 96 S.E.2d 602 (1957); Glover v. Malloska, 213 N.W. 107 (1927); State v. Powell, 212 N.W. 169 (1927); State v. Emerson, 1 S.W.2d 109 (1927); Retail Section of Chamber of Commerce of Plattsburgh v. Kieck, 257 N.W. 493 (1934); Market Plumbing & Heating Supply Co. v. Spangenberg, 169 A. 660 (1934); People v. Miller, 2 N.E.2d 38 (1936); Featherstone v. Independent Service Station Ass'n of Texas, 10 S.W.2d 124 (1928).

²⁹¹Blair v. Lowham, 276 P. 292 (1929); State v. Danz, 250 P. 37 (1926).

²⁹²Maughs v. Porter, 161 S.E. 242 (1931).

²⁹³Loiseau v. State, 22 So. 138 (1897); Lee v. City of Miami, 164 So. 486 (1935); Thompson v. Ledbetter, 39 S.E.2d 720 (1946); State v. Village of Garden City, 265 P.2d 328 (1953); State v. Brown, 244 P.2d 1190 (1952); State v. Barbee, 175 So. 50 (1937); Commonwealth v. McClintock, 154 N.E. 264 (1926); Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (1994) (collecting cases declaring that slot machines are lotteries, and ruling that record evidence was unclear respecting newer video games as to whether they constituted pure games of chance, and were thus lotteries, or games of skill, and hence not within the constitutional prohibition against lotteries); MPH Co. v. Imagineering, Inc., 792 P.2d 1081 (1990) (holding that electronic poker/keno game was a slot machine, not within various statutory exceptions permitting certain machines, and contract between manufacturer and purchaser of such machines, because it was for purchase of illegal machine, was void; thus, buyer of such machines could have no recovery for breach of warranty); State ex rel Harrison v. Deniff, 245 P.2d 140 (1952); State v. Marck, 220 P.2d 1017 (1950); Ex parte Pierotti, 184 P. 209 (1919); State v. Lowe, 101 S.E. 385 (1919); Hendrix v. McKee, 575 P.2d 134 (1978) (holding that employment agreement was unenforceable where employee was hired to make devices knowing them to be illegal); State v. Coats, 74 P.2d 1120 (1938); Queen v. State, 246 S.W. 384 (1922); Callison v. State, 146 S.W.2d 468 (1940); State ex rel. Evans v. Brotherhood of Friends, 247 P.2d 787 (1952); State v. Hudson, 37 S.E.2d 553 (1946).

²⁹⁴People v. Psallis, 12 N.Y.S.2d 796 (1939).

²⁹⁵*Id.*

²⁹⁶*Id.*

²⁹⁷*Id.*

²⁹⁸*See, e.g.,* U.S. v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) ("[T]he [Federal] Government has a substantial

interest in...not interfering with the policy of States that permit lotteries."). *But see also* New York State Broadcasters Ass'n v. U.S., 414 F.2d 990 (1969); Della Croce v. Ports, 550 A.2d 533 (1988) (although New Jersey has legalized lotteries as well as numerous other forms of gambling, activity falling outside the statutes' scope, such as an agreement to sell an interest in a lottery ticket at more than the ticket's purchase price, remains illegal); Hughes v. Cole, 465 S.E.2d 820 (1996) (holding that the fact that the state lottery was legal did not legalize an arrangement to split the winnings).

²⁹⁹*See, e.g.,* CAL. GOV'T CODE § 8880.1 (education); DEL. CODE ANN. tit 29, § 4815 (Division of Alcoholism, Drug Abuse and Mental Health of the Department of Health and Social Services for funding programs for the treatment, education, and assistance of compulsive gamblers and their families); FLA. STAT. § 24.102 (improvements in public education, proceeds are not to be used as a substitute for existing resources for public education); GA. CODE ANN. § 50-27-32 (educational programs and purposes); IDAHO CODE § 33-905 (education); IOWA CODE § 99E.10 (gamblers assistance program, and funds directed to Clan Fund for benefit of Iowa's environment); MO. CONST. art. III, § 39(b) (education); NEB. REV. STAT. § 9-812 (education, gambling assistance, and environment); N.H. CONST. pt. 2, art. 6-b (education); N.J. REV. STAT. § 5:9-2 (education); N.Y. C.L.S. TAX LAW § 1601 (education); OHIO CONST. art. XV, § 6 (education); OR. REV. STAT. § 461.540 (creating jobs, furthering the economic development of Oregon, and financing public education); W.VA. CODE § 29-22-18 (school building debts, state ten year bonds, education); Brown v. California State Lottery Com., 284 Cal. Rptr. 108 (1991) (in an action against the California State Lottery Commission and a store whose malfunctioning terminal would not allow plaintiff to pick his own lottery numbers, plaintiff had no cause of action as a third-party beneficiary of the contract between the commission and the store, since the purpose of the California State Lottery Act of 1984, Cal. Gov't Code §§ 8880 et seq., was to benefit the state's public education system, not those who wished to engage in a capricious fling with fortune; plaintiff was not a creditor beneficiary, since the state did not contract with the store to discharge any legal duty that it owed to him; nor was he a donee beneficiary, since the state neither intended to bestow a gift on him nor did it seek to assign an enforceable right against the store).

parameters of the pertinent statutes³⁰⁰ remain prohibited.³⁰¹ Moreover, to the extent that a federal public policy is expressed in the cases,³⁰² in the statutes banning the broadcast of lottery information and in regulations made pursuant to these provisions, it is clear that lotteries are prohibited except as authorized by the states.³⁰³ Thus, federal anti-lottery statutes sustain and reinforce the public policy of those states that ban lotteries.³⁰⁴

In the modern era, although some form of lottery playing is legal in many states, nevertheless, in the absence of legislation specifically authorizing lotteries, they continue to remain subject to the same legal objection as *any* gambling bargain.³⁰⁵ Gambling exacerbates the same unfortunate tendencies that many people seem to display.³⁰⁶ Too many people seem to be willing to venture their money in the face of a significantly high probability that they will lose it. Furthermore, the risk of loss of their money is not counterbalanced by the prospect of a sufficiently substantial benefit because the prospect of gain is too remote. Gambling has been banned historically because it tends to impose unacceptably

high risks of serious financial injury on certain classes of the community.³⁰⁷

Moreover, the NGISC did not appear to detect irrefutable evidence to support the presence of counterbalancing specific community benefits derived from lotteries.³⁰⁸ However, "[t]here is much *anecdotal* evidence to support the notion that gambling...provides economic benefits for the communities that allow it."³⁰⁹ This anecdotal evidence, which has apparently not been confirmed by formal data evidencing support,³¹⁰ helps to explain the following observation. A vast number of states have enacted laws authorizing lotteries which are run by, or on behalf of, state or local government, in order to raise funds for education or other public purposes.³¹¹

Nevertheless, this modern trend towards more and more extensive state-creation of lotteries has not changed the societal foundation of reprobation towards lotteries.³¹² In the more recent past, lotteries have been resoundingly prohibited in many states as a form of gambling.³¹³ In light of this norm of reprobation, laws that legalize any form

³⁰⁰*E.g.*, (private lotteries).

³⁰¹*Miller v. Radikopf*, 228 N.W.2d 386 (1975); *Harris v. Economic Opportunity Com'n of Nassau County, Inc.*, 575 N.Y.S.2d 672 (1991) (holding that raffle, sponsored by charitable organization, was illegal lottery, and sponsor could not be compelled to award prize; rather, plaintiff was limited to statutory recovery of twice his wager, or \$20); *Keene Convenient Mart, Inc. v. SSS Band Backers*, 427 S.E.2d 322 (1993) (organization held raffle that comported with state law; during drawing, an error caused the randomness of the raffle to be compromised, and the organization then refused to give the prize; the lower court had ruled that the organization could keep the proceeds, but this was reversed on appeal, the court ruling that once the randomness was compromised, the raffle was no longer a valid activity, and hence fell within the general prohibition against gambling; therefore, another statute, providing that gambling monies were subject to seizure and distribution the county general fund applied, and the money was to be turned over the county); *Hughes v. Cole*, 465 S.E.2d 820 (1996).

³⁰²*See, e.g.*, *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ("[T]he [Federal] Government has a substantial interest in supporting the policy of nonlottery States...."). *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Lamont v. Postmaster General of U.S.*, 381 U.S. 301 (1965); *Champion v. Ames*, 188 U.S. 321 (1903).

³⁰³18 U.S.C.A. § 1304; 18 U.S.C.A. § 1307 (exempts state lotteries).

³⁰⁴*See, e.g.*, *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ("[T]he [Federal] Government has a substantial interest in supporting the policy of nonlottery States...."). Federal

Communications Com'n v. American Broadcasting Co., 347 U.S. 284 (1954).

³⁰⁵*Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412 (1977).

³⁰⁶*State ex rel. Stephan v. Parrish*, 887 P.2d 127, 133 (1994) ("[There are] those who cannot refrain from the *instinctive weakness of humanity to gamble*." (emphasis added)).

³⁰⁷*Harris v. Missouri Gaming Com'n*, 869 S.W.2d 581 (1994) (holding that legislature cannot constitutionally permit certain forms of legalized gambling because it constituted a lottery in violation of state constitution); *People v. Psallis*, 12 N.Y.S.2d 796 (1939); *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412 (1977) (holding that wagers are against human welfare).

³⁰⁸*See NGISC: LOTTERIES*, *supra* note 5, at 17 ("[I]t appears that the public's approval of lotteries rests more on the *idea* of lotteries reducing the potential tax burden on the general public than it is on any specific instance of relief.") (emphasis in original).

³⁰⁹*See HERRMANN*, *supra* note 15, at 87 (emphasis added).

³¹⁰*Id.* at 88.

³¹¹*See NGISC: Lotteries*, *supra* note 5, at 5 ("[M]ore common is the 'earmarking' of lottery money for identified programs.").

³¹²*See, e.g.*, *Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y.A.D. 3 Dept. 1996) ("Public policy *continues to disfavor gambling*...."). *See also State ex rel. Stephan*, 867 P.2d at 1038 (1994) ("[The judiciary has] construed the word *lottery*...with a view of remedying the *mischief* intended to be prevented.") (citation omitted) (emphasis added).

³¹³*See AM. JUR. 2D Gambling* §§ 5, 10.

of gambling—including lotteries—are treated by the courts as exceptions to the general policy against gambling.³¹⁴ Such lottery-enabling laws will therefore continue to be very strictly construed.³¹⁵ The unabated strength of the state public policy against gambling predicates that statutes and regulations that impact legalized gambling must be construed strictly and narrowly.³¹⁶ The judiciary's goal is to limit the powers and rights claimed under such legislative authority to the boundaries set in them by the legislature.³¹⁷

In this regard, statutorily authorized gaming entities are the intended beneficiaries of statutes requiring the fair and equitable dissemination of gambling information to the public.³¹⁸ Statutes legalizing gambling have the purpose of authorizing, licensing, and controlling gaming activities in order to stimulate and promote the growth of the particular state's economy.³¹⁹ The statutory intention is ultimately to foster that goal while assuring that honest wagering takes place. This is intended to create and maintain the public's confidence in gaming.³²⁰ The overall intention is to strictly regulate all parties involved in gaming operations, in order to preserve the sustainability and integrity of lottery operations.³²¹

VII. THE LEGAL IMPACT ON PUBLIC POLICY OF LEGISLATIVE CHANGES IN STATE LOTTERY LAWS

Arguably, the substantive legal landscape of public policy with respect to lotteries has not been fundamentally changed by recent state legislative changes in lottery laws. State legislatures have enacted measures that are limited to the operation of lotteries *within the state*.³²² This is, of course, a function of state sovereignty.³²³ The legal effect has been to create a state monopoly in each state that has pursued this course of action.³²⁴ Arguably, the creation of these state lottery monopolies have nevertheless left state common law intact.³²⁵ State substantive common law applicable to public policy principles has arguably survived intact for the following reasons.

First, the fundamental and unanimous individual state motivation for the legalization of lotteries has been the substitution of what is essentially a *voluntary* tax to take the place of *involuntary taxation*.³²⁶ "Voters want states to spend more, and politicians

look at lotteries as a way to get tax money for free."³²⁷ The support for this argument is the almost unbearable present day political pressure created by economic limitations that force politicians to navigate between Scylla³²⁸ and Charybdis,³²⁹ commonly referred to as being "between a rock and a hard place."³³⁰ These political pressures require states to either increase taxation, in order to maintain public programs at current levels of generosity,³³¹ or cut these programs to the bone.³³² The resulting public pain and suffering could lead to

³¹⁴See *supra* note 312.

³¹⁵See *id.* See also AM. JUR. 2D *Gambling* at §§ 17, 18.

³¹⁶*Citation Bingo, Ltd. v. Otten*, 910 P.2d 281, 287 (1995) ("[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."). See also *Ramesar v. State*, 224 A.D.2d 757, 759 (1996) ("Public policy continues to disfavor gambling; thus, the regulations pertaining thereto are to be strictly construed.") (citation omitted).

³¹⁷*West Indies, Inc. v. First Nat. Bank of Nev.*, 214 P.2d 144 (1950) (distinguished by *Pearsall v. Alexander*, 572 A.2d 113 (1990)).

³¹⁸*Sports Form, Inc. v. Leroy's Horse and Sports Place*, 823 P.2d 901 (1992).

³¹⁹*St. Charles Gaming Co., Inc. v. Riverboat Gaming Com'n*, 648 So.2d 1310 (1995).

³²⁰*Moya v. Colorado Ltd. Gaming Control Com'n*, 870 P.2d 620 (1994).

³²¹*Mastro v. Illinois Dept. of Revenue*, 667 N.E.2d 594 (1996).

³²²See *Meyer v. Hawkinson*, 626 N.W.2d 262, 275 (N.D. 2001) (Sandstrom, J. dissenting).

³²³*Id.*

³²⁴See, e.g., *State ex rel. Stephan v. Parrish*, 887 P.2d 127, 137 Kan.1994 ("[T]he recent constitutional amendment...authorized the legislature to provide for a *State-owned and operated lottery*." (citations omitted) (emphasis added)).

³²⁵See *supra* Section III.

³²⁶See NGISC: *Lotteries*, *supra* note 5, 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).

³²⁷*Id.* (citation omitted).

³²⁸See HAMILTON: MYTHOLOGY, *supra* note 151 at 222 ("[In mythology this was a perilous sea passage between] the whirlpool of implacable Charybdis and the black cavern into which Scylla sucked whole ships.").

³²⁹*Id.*

³³⁰Or, in Barbados in the Caribbean, where this dilemma is referred to as being "between the devil and the deep blue sea."

³³¹See NGISC: *Lotteries*, *supra* note 5, at 5.

³³²*Id.*

the political sentiment to throw the rascal politicians out of office. This leads politicians to opt for the alternative of raising tax revenue via the “free” mechanism of gaming,³³³ rather than daring to cut public programs.

Secondly, the NGISC Report on Lotteries³³⁴ explains that promoters of lotteries have argued 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.”³³⁵ This may be a powerful engine propelling legislative action to continue the march to legalize state-run lotteries as the lesser of two evils, by placing state lottery structures securely under each state’s administrative law and procedure.³³⁶ State lotteries are part of the administrative agency structure of each state’s executive branch of government and are not part of the Federal Government of the United States.³³⁷ They are therefore subject to the State Administrative Act of each particular state rather than the Federal Administrative Procedure Act.³³⁸ As administrative agencies of the state that created them, state lottery structures are certainly subject to pertinent provisions of the U.S. Constitution.³³⁹

As the lesser of two evils, lotteries still fall within the condemnation of gambling generally and the reprobation of lotteries in particular.³⁴⁰ One commentator seems to think that the National Gambling Impact Study Commission did not go far enough when it “submitted a number of recommendations to the President and Congress for consideration but...economic exigencies largely eclipsed moral appeals for fairness and justice.”³⁴¹ The same commentator expressed additional criticisms of the NGISC’s conclusions,³⁴² but acknowledged awareness that “the Commission asserted that individual states *best knew how to regulate themselves*....”³⁴³ This Recommendation by the NGISC in its Final Report³⁴⁴—to which the commentator referred—acknowledged the legal impact of the Tenth Amendment to the U.S. Constitution which leaves the regulation of gambling vested in the law of the Several States.³⁴⁵

The viewpoint of the Commission³⁴⁶ recognizes that the following tension in the state law of each state to have legalized lotteries will remain unchanged. This tension is caused by the schism between the legalization of lotteries by state legislatures on the one hand, and on the other, the well-

established common law public policy that continues to disfavor gambling generally and lotteries in particular.³⁴⁷ So the well-established common law principle that lottery contracts are—as a general rule—illegal agreements remains intact.³⁴⁸ In principle, such agreements remain legally null and void,³⁴⁹ and at common law, courts will continue to leave parties that are equally at fault where it finds them.³⁵⁰

The Commission’s report³⁵¹ also acknowledges that, in the context of lotteries, the regulation of Indian gaming might be somewhat problematic, since Indian tribes are sovereign nations and the interaction between the gaming law of the Indian tribes

³³³*Id.* at 2.

³³⁴*Id.* at 3.

³³⁵*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).

³³⁶*See* Granton v. Washington State Lottery Com’n, 177 P.3d 745, 748 Wash.App. Div. 2 (2008).

³³⁷*Id.*

³³⁸*Id.*

³³⁹*E.g.*, U.S. CONST. amend. XIV.

³⁴⁰*See supra* Section III.

³⁴¹*See* NIBERT, *supra* note 23 at 115.

³⁴²*See id.* (“[T]he [Commission’s] report made no mention of the tumultuous economic and political events of the last quarter century that prompted the emergence of lotteries and other forms of gambling as forms of revenue creation and economic development.... [T]he Commission muted its critique by lauding the wonders of gambling as a form of economic development....”).

³⁴³*See id.* (emphasis added).

³⁴⁴*See* NGISC: FINAL REPORT *supra* note 3, at 3-17 (“Recommendation...3.1 The Commission recommends to state governments and the federal government that states are best equipped to regulate gambling within their own borders with two exceptions—tribal and Internet gambling.”).

³⁴⁵*See supra* Section III.

³⁴⁶*See supra* note 344.

³⁴⁷*See, e.g.*, CLOTFELTER AND COOK: SELLING HOPE, *supra* note 1, at 11 (“There exists, in short, an undeniable Jekyll-and-Hyde quality to state lotteries. It arises from our ambivalence toward gambling itself. On the one side is the traditional view of gambling as a vice and the opprobrium directed toward those who overindulge. On the other is the wide acceptance of gambling in moderation as an innocent form of amusement.”).

³⁴⁸*See supra* Section III.

³⁴⁹*Id.*

³⁵⁰AM. JUR. 2D Contracts § 216.

³⁵¹*See supra* note 344.

and state gaming law is not straightforward.³⁵² Congress sought to address this potential legal problem in enacting the Indian Gaming Regulatory Act of 1988 (IGRA), “which recognizes tribal sovereignty while giving states a significant role in setting the parameters of *gaming within their borders*.”³⁵³

However, in *Seminole Tribe v. Florida*, the U.S. Supreme Court “upset Congress’s carefully constructed balance between state and tribal power....”³⁵⁴ It is unlikely therefore that Indian tribes would seek to create and implement lotteries routinely—in competition with state lotteries—without a prior compact with each state in which such Indian lotteries would be created and would operate.

VIII. SOME CONSEQUENCES OF STATE LEGALIZATION OF LOTTERIES

The widespread legalization of lotteries throughout the U.S. and in other countries, such as Canada, has created other tensions between those states where lotteries are lawful and those where lotteries remain prohibited.³⁵⁵ In recent years, a common practice has developed, particularly when large prizes are offered by various state lotteries: friends,

relatives, and/or co-workers pool funds and orally agree to jointly purchase several tickets, with the understanding that any winnings will be distributed among them. Such agreements are subject to legal challenge based upon assertions that they violate public policy in lottery-prohibition states.³⁵⁶ Such agreements would arguably also be subject to the provisions of the statute of frauds³⁵⁷ and would be disabled—on grounds of public policy³⁵⁸—from activating the ameliorating principles that are ordinarily available using equitable estoppel and promissory estoppel.³⁵⁹

The courts that have decided cases based upon these issues have reached differing conclusions. Courts in some states have refused enforcement of these agreements on the ground that such agreements violate the public policy of the state where the parties to the joint venture reside.³⁶⁰ The fact that the purchase of tickets to play the lottery in issue is lawful in the state where the pertinent tickets are bought has not necessarily saved the agreement from legal nullification.³⁶¹ However, courts in other states have permitted enforcement of such agreements, reasoning that the parties are not engaged in gambling between or among themselves, but, rather, that the parties are merely agreeing to participate jointly in an enterprise that is lawful in

³⁵²See Kathryn R. L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQUETTE L. REV. 971 (2007) (“A basic tenet of federal Indian law is that, as sovereign nations, tribes *ordinarily* are not subject to the strictures of state law.”) (citation omitted) (emphasis added).

³⁵³See *id.* (emphasis added) (“Under IGRA, tribes may conduct gaming only in those states that “permit[] such gaming for any purpose by any person.” As a result, *state law in the first place* dictates the permissible scope of Indian gaming.”) (citation omitted) (emphasis added).

³⁵⁴See Rand, *supra* note 352, at 981.

³⁵⁵*U.S. v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (upholding against constitutional attack the federal anti-lottery statute which prohibits broadcasting of lottery advertising by licensees licensed in states which do not allow lotteries, even though licensees licensed in states that do allow lotteries may so broadcast); Federal

Communications Com’n v. American Broadcasting Co., 347 U.S. 284 (1954).

³⁵⁶*Cole v. Hughes*, 442 S.E.2d 86 (1994); *Hughes v. Cole*, 465 S.E.2d 820, 825 (1996) (holding void as violative of Virginia’s anti-gaming statute—and in the alternative void under the public policy of North Carolina—joint venture agreement entered into by North Carolina residents relating to the Virginia lottery, since the consideration for the agreement was money won at gambling by playing the Virginia lottery).

³⁵⁷AM. JUR. 2D *Contracts* §§ 18, 85; AM. JUR. 2D *Statute of Frauds* § 3.

³⁵⁸See *supra* note 356.

³⁵⁹See generally Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WILLIAM & MARY BUS. L. 73 (2011).

³⁶⁰See, e.g., *supra* note 356.

³⁶¹*Id.*

another state.³⁶² Since such an enterprise is lawful in the state where the lottery tickets are sold, these courts have concluded that no public policy of the state in which the participants to the joint venture reside is being violated.³⁶³ Where an agreement is made between parties who reside in a state that *has* legalized lotteries, a court has concluded that the force of this argument is intensified.³⁶⁴

The courts that have permitted enforcement of such agreements have apparently been motivated by the concern that refusal—based upon on public policy grounds—to enforce agreements to share in proceeds derived from the legal purchase of a state-promoted lottery ticket is troublesome.³⁶⁵ The refusal of court-enforcement can be seen as permitting unscrupulous holders of winning tickets to

³⁶²Talley v. Mathis, 453 S.E.2d 704 (1995); Kaszuba v. Zientara, 506 N.E.2d 1 (1987) (upholding as lawful an agreement between two Indiana residents that one would travel to Illinois and, using money given him by the other, would purchase lottery tickets for the latter. Notwithstanding the fact that participating in a lottery in Indiana would be unlawful under both statutory and constitutional provisions, the majority of the court ruled that it was not unlawful or violative of public policy where one party agreed to purchase tickets for another in Illinois, where lottery playing was legal. The court concluded that refusing enforcement of such an agreement would “reward people who convert the property of others to their own use,” since the defendant had merely agreed to use plaintiff’s money to lawfully purchase a lawful item for the plaintiff, and then refused to transfer that lawful item to plaintiff as agreed); Miller v. Radikopf, 228 N.W.2d 386 (1975) (where plaintiff alleged that he and defendant had agreed to sell Irish Sweepstakes tickets in Michigan, which was illegal, and for which they were given two free tickets for every twenty they sold, with the understanding that they would share the prize if one of the free tickets won. When one free ticket won and defendant refused to split the prize, plaintiff sued. The court enforced the agreement, perceiving the issue to be whether or not public policy would be offended by enforcing an agreement to share money legally paid to the holder of a ticket legally possessed. The court acknowledged that while it was illegal for the parties to sell sweepstakes tickets, it was not illegal under Irish law to pay the proceeds to the holders of tickets, nor was it illegal—under Michigan law—to be paid the proceeds voluntarily. Although no action to *compel* payment was legally permitted, nevertheless, the court concluded that an agreement to share amounts so paid would not violate public policy. The court further noted that to hold otherwise would reward “promissory default”); Pineiro v. Nieves, 259 A.2d 920 (1969) (Where, by statute, New Jersey residents were permitted to possess lottery tickets lawfully bought in lottery states and also New Jersey had recently adopted lottery legislation, the court held that New Jersey’s public policy was not offended by an agreement to share proceeds of a lottery ticket lawfully bought in New York); Castilleja v. Camero, 414 S.W.2d 424 (1967) (Texas residents, allegedly agreed that one would go to Mexico and purchase Mexican lottery tickets, and that they would split the winnings, which were to be collected in Mexico. The court ruled that the contract was a valid Mexican contract and that no Texas public policy was violated. The court distinguished an earlier decision where the parties had illegally purchased a Honduran lottery ticket in Texas, because in the case presently before the court, the purchase money used to buy the ticket was lawfully located in a Mexican bank. The court therefore ruled that the transaction was simply one to enforce a right that arose extra-territorially; the dissent disagreed arguing that the agreement being enforced was not a Mexico agreement at all, but that it was a Texas bargain performable wholly in Texas, to split the proceeds of a lottery, and therefore unenforceable in Texas).

³⁶³*Id.*

³⁶⁴Pearsall v. Alexander, 572 A.2d 113, 117 (1990) (“[T]he force of this reasoning is only *increased* where, as in this situation, the gambling at issue is legal *in the court’s own jurisdiction*.”) (emphasis added).

³⁶⁵Pearsall v. Alexander, 572 A.2d 113 (1990) (holding that the record supported the existence of an oral agreement between two friends to share equally in the proceeds from a winning District of Columbia lottery ticket based on their conduct on the evening that the ticket was purchased); Fitchie v. Yurko, 570 N.E.2d 892 (1991) (holding that there was sufficient evidence of an informal partnership agreement between the claimants and the ticket holder to entitle them to an equal share in the winnings); Pando v. Fernandez, 499 N.Y.S. 2d 950 (1986) (holding that summary judgment for the recipient of the proceeds from a winning state-operated lottery ticket on the ground of the impossibility of the proof of a condition precedent was inappropriate where one version of the terms of an oral partnership agreement advanced by the minor could be proven in a court of law); Hamilton v. Long, (1990) (holding that there was sufficient competent and credible evidence to support the finding of an enforceable oral contract between the recipient of the value of an automobile won during her appearance on a “Cash Explosion” television show and two employees who had purchased the “entry” lottery ticket which entitled the holder to appear on the show); Johnson v. Spence, 730 N.Y.S.2d 334 (2001) (holding that live-in girlfriend stated cause of action for breach of oral argument by alleging that she and her partner had agreed to purchase lottery tickets jointly and to share proceeds of any winning lottery ticket); Johnson v. Johnson, 594 N.Y.S.2d 259 (1993) (holding that signed and witnessed agreement clearly established intent of parties to share joint ownership of proceeds from winning lottery ticket and agreement was supported by consideration, that is, forbearance and mutual promises made by parties to surrender their respective rights to claim entire prize as their own due to lottery’s “sole claimant” rule, and their agreement to share equally the related tax liabilities); Stepp v. Freeman, 694 N.E.2d 510 (1997) (holding that an informal group in which coworkers pooled their resources to purchase lottery tickets when jackpot reached \$8 million had entered implied contract that member would not be dropped from group unless he expressed intent to leave group to organizer or organizer dropped him from group for failure to pay, which was breached when organizer unilaterally dropped coworker from group after they had unrelated personal dispute); Domingo v. Mitchell, 257 S.W.3d 34 (2008) (holding that coworker’s agreement to advance another coworker’s share of a group payment for lottery tickets, and the coworker’s agreement to reimburse her, was an exchange of promises that was sufficient for consideration to create a binding contract).

renege on their earlier agreements.³⁶⁶ An additional question certainly relates to whether or not the failure to enforce such agreements will confer any noticeable benefit on a lottery-prohibiting state that sufficiently justifies non-enforcement in the state where the pertinent litigation is adjudicated.³⁶⁷

IX. CONCLUSION

The current financial prosperity and growing embrace of lotteries by an ever-increasing number of states remain firmly in place. So also does the judiciary's invocation of public policy constraints whenever it concludes that it is appropriate to do so.³⁶⁸ Unquestionably, the future is unknown, and the past pendulum nature of lottery history in U.S. law should be remembered.³⁶⁹ Just as lottery playing has increased beyond all expectations,³⁷⁰ future decreases, accompanied by the fiscal devastation of state tax revenues that would follow, should be anticipated and contingency plans should be developed. In this regard, the NGISC's report³⁷¹ seemed to express a comfortable level of confidence in concluding that, with two exceptions,³⁷² "[t]he Commission recommends to state governments and the federal government that *states* are best equipped to regulate gambling within their own borders...."³⁷³ Therefore, if reductions in tax revenues run rampant in the future as a consequence of decaying interest in lottery playing, American states are seemingly equipped to—and presumably capable of—responding effectively. However, legislators and other policymakers must make contingency plans now. They must be prepared to use their last resort of substituting tax increases³⁷⁴ to replace any state revenue derived from lottery playing that may be lost in the future. They must also be prepared to face the potentially caustic political consequences that might thereby ensue.

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³⁶⁶*Id.*

³⁶⁷Pearsall v. Alexander, 572 A.2d 113 (1990).

³⁶⁸See HERRMANN, *supra* note 15, at 121 ("The expectations and beliefs of the participants in gambling policy are *continually* shaped by both the history and the evolution of gambling. Gambling continues to experience the consequences of its nineteenth and early twentieth century history of corruption and scandal.") (emphasis added). See also MACHIAVELLI, *supra* note 2, at 129 ("[It] is a common failing of mankind, never to anticipate a storm when the sea is calm.").

³⁶⁹See *id.* ("[W]hen times [are] quiet...they could change.").

³⁷⁰See HERRMANN, *supra* note 15, at 121 ("Gambling policy can be seen as responsive to mass public opinion, when one defines responsiveness in terms of policy adoption in which a majority expresses support. As the public's view of gambling has softened, the prevalence and availability of gambling have increased.").

³⁷¹See *supra* note 3.

³⁷²*Id.* ch. 3 at 3-17 (The two exceptions are tribal gambling and Internet gambling).

³⁷³*Id.* (emphasis added).

³⁷⁴E.g., *Mandatory* taxes such as property, sales, and similar tax increases rather than the "*voluntary*" tax of lottery playing.