

CHAPTER 3. GAMBLING REGULATION¹

Over the past quarter century, legalized gambling in America has undergone a rapid expansion. Once an infrequent experience tinged with the exotic—a trek to the distant Nevada desert once was a common requirement for those seeking casino gambling—it has since become a common feature of everyday life, readily accessible in one form or another to the vast majority of Americans. As it has grown, it has become more than simply an entertaining pastime: The gambling industry has emerged as an economic mainstay in many communities, and plays an increasingly prominent role in state and even regional economies. Although it could well be curtailed or restricted in some communities, it is virtually certain that legalized gambling is here to stay.

Despite its increasing familiarity, nowhere is gambling regarded as merely another business, free to offer its wares to the public. Instead, it is the target of special scrutiny by governments in every jurisdiction where it exists, including even such gambling-friendly states as Nevada. The underlying assumption—whether empirically based or not—is that, left unregulated and subject only to market forces, gambling would produce a number of negative impacts on society and that government regulation is the most appropriate remedy. Thus, the authorization of

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legalized gambling has almost always been accompanied by the establishment of a corresponding regulatory regime and structure.

GOVERNMENTS SET THE RULES

Much of gambling regulation is focused on policing functions that differ little from community to community. The most immediate of these is ensuring the integrity of the games offered, a function often valued most by the proprietors of gambling establishments themselves. In the popular imagination, the “con” man forever hovers in the shadows of gambling; and, in truth, without the stern presence of independent regulators, it would require little effort to conjure methods of conflating “games of chance” with outright deception. Thus, to the extent that governments assume a general responsibility to shield their populations from fraud, regulation is the most effective means of ensuring that such legal gambling as does exist is fair and honest.

A second area of government concern is crime, especially organized crime. Fairly or not, Nevada's casinos were once closely linked in the popular mind with organized crime, a bias given substance by repeated federal and state investigations and prosecutions of casino owners and operators. Because of the volume of cash transactions involved in casino gambling, and in order to minimize any resulting potential for money laundering, casinos must comply with requirements regarding the reporting of these transactions. All of the evidence presented to the Commission indicates that effective state regulation, coupled with the takeover of much of the industry by public corporations, has eliminated organized crime from the direct ownership and operation of casinos.

GAMBLING AND THE PUBLIC INTEREST

In addition to these relatively well-defined policing functions, a broader and far more important role for government regulation is

determining the scope and manifestation of gambling's presence in society and thus its impact on the general public. In this sense, regulation can be broadly defined to include the political process by which the major decisions regarding legalized gambling are arrived at, the corresponding legislation and rules specifying the conditions of its operation, and the direction given to regulatory bodies. Through such means as specifying the number, location, and size of gambling facilities; the types of games that can be offered; the conditions under which licensed facilities may operate; and so forth, governments have considerable control over the benefits and costs legalized gambling can bring with it. These measures can be as simple and straightforward as attempting to prevent underage gambling or as ambitious and contentious as promoting traditional social values.

If this basic responsibility is to be adequately met, government decisions regarding the introduction and regulation of legalized gambling would best be made according to a well-defined public policy, one formulated with specific goals and limits in mind. While governments have established a variety of regulatory structures, it is not at all clear that these have been guided by a coherent gambling policy or even that those making the decisions have had a clear idea of the larger public purpose they wish to promote. Generally, what is missing in the area of gambling regulation is a well thought-out scheme of how gambling can best be utilized to advance the larger public purpose and a corresponding role for regulation. Instead, much of what exists is far more the product of incremental and disconnected decisions, often taken in reaction to pressing issues of the day, than one based on sober assessments of long-term needs, goals, and risks.

There are a number of factors contributing to this gap between measures actually taken and any guiding public purpose, however conceived. One such factor is the existence of multiple decisionmakers: Federal, state, tribal, and local officials all have a say in gambling policy, and coordination among any of them is far more the exception than the rule. In addition, the gambling

industry is not monolithic; each segment—lotteries, Native American casinos, convenience gambling, and so forth—comes with its own particular set of issues, concerns, and interest groups, one result being that the respective regulatory structures and objectives often differ considerably from segment to segment. Further, the dynamism of the industry as a whole requires continuous adaptation on the part of regulation: In addition to a rapid pace of expansion, technology continues to produce new and different forms, often directly aimed at any weak links in government restrictions and regulation.

Far more worrisome than these factors, however, is that most government decisionmaking has been chasing rather than leading the industry's growth and evolution and has often focused on less-than-central concerns, to the neglect of the larger public interest. One of the more damning criticisms of government decisionmaking in this area is the assertion that governments too often have been focused more on a shortsighted pursuit of revenues than on the long-term impact of their decisions on the public's welfare.

Not unexpectedly, the results of decisions regarding legalizing gambling often produce results that surprise even the officials responsible for making them. And not all of these results are positive. Without constant adaptation to this changing industry, time alone will produce a mismatch between the stated goals of government regarding gambling and the actual effects resulting from its decisions. Given the rapid accumulation of decisions regarding gambling, most of the respective governments—and certainly their respective communities—would be well-served by a thorough review of their public policy toward gambling. This review should focus on determining the specific public purpose regarding legalized gambling and an assessment, in that context, of the existing regulatory structure in its entirety: laws, rules, agencies, and so forth. The objective of this review is to identify what changes, if any are needed, with a goal to maximizing the benefits and minimizing the costs.

Although wide-scale legalized gambling is a relatively recent phenomenon, the large number

of jurisdictions involved, operating under many different conditions, has produced a useful variety of experience for other communities to draw on. By examining this variety of positive and negative experiences, governments can draw the appropriate lessons from the successes and mistakes of others and thereby reduce the need to experiment on their communities.

REGULATING GAMBLING

The Federal Role

Until relatively recently, the federal government largely deferred to the states in matters relating to gambling; Washington's attention focused largely on criminal matters, including organized crime, fraud, and the like, especially when these involved activities across state lines.²

In the early 1950's, Congressional investigations into the activities of organized crime in the gambling industry resulted in an enhanced federal role, including the creation of the Special Rackets Squad of the FBI and the enactment of the Gaming Devices Act of 1951 (commonly referred to as the Johnson Act).³

In the 1960's the federal government expanded its regulatory role over gambling activity through such measures as the 1961 Wire Communications Act ("Wire Act"), which prohibits the use of wire communications (telephones, telegrams, etc.) by persons or organizations engaged in the business of wagering to transmit bets or wagers, or information that assists in the placing of bets or wagers, taking care to specifically mention "sporting events or contest."⁴ Similarly, the Travel Act prohibits travel or the use of mail, either inter-state or internationally, for "any

business enterprise involving gambling."⁵ Other federal laws add to these measures, such as the prohibition on the inter-state transportation of wagering paraphernalia.⁶

One of the best known federal measures is the Racketeering Influenced and Corrupt Organizations statutes (RICO).⁷ Enacted in 1971 under the Crime Control Act, the RICO were aimed at combating "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce," including gambling.⁸

In 1985, the Bank Secrecy Act was amended to include casinos, used car dealers, money transfer services, and a number of other "cash-intensive" businesses in the list of financial institutions subject to special requirements that are designed to prevent money laundering. Among other things, the Act requires casinos to report each deposit; withdrawal; exchange of currency, gambling tokens or chips, or other payment; or transfer that is made by, through, or to the casino in amounts greater than \$10,000.⁹ As its name indicates, the Money Laundering Control Act of 1986 was aimed at strengthening federal efforts in this area; it was followed in 1990 by the creation of the Treasury Department's Financial Crimes Enforcement Network (FinCEN) to "establish, oversee and implement policies to prevent and detect money laundering."¹⁰

In the late 1980's, the federal government became directly involved in the area of Native American gambling. Here, federal involvement was an outgrowth of the federal government's responsibility for, and legislative authority over,

²James H. Frey, Introduction, *Federal Gambling Law*, Anthony N. Cabot (ed) 2 (1999), citing an unpublished paper by Cabot.

³Among its other provisions, the Johnson Act prohibits the transportation of gambling devices across state lines. It was amended to exempt cruise ships but not airlines either originating from or bound for the U.S.

⁴18 U.S.C. § 1084.

⁵18 U.S.C. § 1952.

⁶18 U.S.C. § 1953.

⁷18 U.S.C. § 1961 et seq.

⁸Senate Report No. 91-617, 91st Congress, 1st Session 80 (1969).

⁹31 U.S.C. § 103. Also known as the Currency and Foreign Transactions Reporting Act

¹⁰U.S. Treasury Order No. 105-08.

<http://www.ustreas.gov/fincen/faqs.html> (last visited May 8, 1999).

Native American reservations, and that direct involvement continues to the present.¹¹

THE STATE ROLE

Lotteries

In the modern era, lotteries have been the unique province of state governments. To date, each state that has authorized a lottery has granted itself a monopoly; none has seen fit to allow competitors. In part, the impetus behind this exclusivity is to ensure that the state can capture monopoly profits. But an important additional motive, especially at the dawn of the modern era of lotteries in the 1960's and 1970's, was the assumption that only direct government ownership and control of gambling could guarantee the exclusion of criminal elements. That concern has faded over time with the growth of commercial gambling, but it reappears in states taking up the issue for the first time.

With only minor variations, states with lotteries have implemented remarkably similar regulatory structures. Some are organized as arms of a particular state agency, others exist as separate organizations, with varying degrees of independence.¹² But regardless of their administrative form, all state lotteries share a common subordination to elected state officials, with the responsibility for the form, goals, and operations of lotteries firmly in the hands of the latter. But this arrangement has created a number of problems of its own.

For example, lottery directors are under constant pressure from state political authorities to at least maintain the level of revenues and, if possible, to increase them. Some observers have alleged that, as a result, considerations of public welfare at best take second place. This has often been cast as an inherent conflict of interest: How can a state government ensure that its pursuit of revenues does not conflict with its responsibility

to protect the public? For some, state governments have exceeded their stated objective of using the lottery to modestly enhance public services, and instead have irresponsibly intruded gambling into society on a massive scale through such measures as incessant advertising and the ubiquitous placement of lottery machines in neighborhood stores. In this view, states have become active agents for the expansion of gambling, setting the stage for the introduction of commercial gambling in all its forms. The question arises: Is this a proper function of government?

Particular attention has been devoted to the extent to which, in pursuit of enhanced revenues, lotteries have allegedly targeted vulnerable populations, such as the economically disadvantaged and possible pathological gamblers. The data suggests that lottery play is heaviest among economically disadvantaged populations and among some ethnic groups, such as African-Americans, but it is not clear that these have been deliberately targeted by lottery officials.

With the lottery being such a widely available form of gambling, one area of concern is play by minors. Although illegal in every state, the sale of lottery tickets to minors nevertheless occurs with a disturbing frequency. For example, one survey in Minnesota of 15- to 18-year-olds found that 27 percent had purchased lottery tickets.¹³ Even higher levels of 32 percent, 34 percent, and 35 percent were recorded in Louisiana, Texas, and Connecticut, respectively.¹⁴ In Massachusetts, Connecticut, and other states, lottery tickets are available to the general public through self-service vending machines, often with no supervision regarding who purchases them. Thus, it is not surprising that a survey conducted by the Massachusetts Attorney

¹¹ See the Chapter 6, on "Native American Tribal Gambling" for a full discussion of the IGRA and the classes of gambling.

¹² Clotfelter and Cook, *supra* note 2 at 12.

¹³ Robyn Gearey, "The Numbers Game," *The New Republic*, May 19, 1997, p. 19.

¹⁴ Joe Gyan, Jr. "More Louisiana Youths Try Gambling than Drugs," [Baton Rouge, La.] *Advocate*, August 8, 1997; Lynn S. Wallisch, "Gambling in Texas: 1995 surveys of Adult and Adolescent Gambling Behavior," *Texas Commission on Alcohol and Drug Abuse*, August 1996, p. 78; Lyn Bixby, "Lottery Pitch See as Luring Kids," *Hartford Courant*, October 23, 1997, p. A4.

General's office found that minors as young as 9 years old were able to purchase lottery tickets on 80 percent of their attempts, and that 66 percent of minors were able to place bets on keno games. Seventy-five percent of Massachusetts high school seniors report having played the lottery.¹⁵

A further criticism is that, in pursuit of revenues, some lotteries have employed overly aggressive—and even deceptive—advertising and other marketing methods. Lottery advertising has advanced in recent years from simple public-service announcement type ads to sophisticated marketing tools. Critics charge that they are intentionally misleading, especially regarding such matters as the minuscule odds of winning the various jackpots. (As an agency of government, lotteries are not subject to federal “Truth-in-Advertising” standards). Others assert that lottery advertising often exploits themes that conflict with the state's obligation to promote the public good, such as emphasizing luck over hard work, instant gratification over prudent investment, and entertainment over savings.

CASINOS¹⁶

As commercial casino gambling has spread from its original base in Nevada to New Jersey, the Gulf Coast, the Midwest, and to locations such as Deadwood, South Dakota, a variety of different regulatory structures has emerged. As with the lotteries, most of the administrative differences are more superficial than substantive, and basic tasks such as ensuring the integrity of the operations and policing against infiltration by

organized crime vary little from state to state. Of far greater importance are the differences in public purpose that supposedly guide government decisionmaking in this area, with corresponding consequences for each state's economy and society.

Two contrasting, if simplified, approaches can be identified. The first, dubbed here the “Nevada” model, can be characterized as weighted toward viewing gambling as a business, albeit one requiring its own set of safeguards. In this model, the public purpose of legalizing gambling is to secure the maximum possible economic benefits for the state and its citizens, including investment, jobs, and tax revenues. Reserving to government the policing functions—ensuring the integrity of the games, combating organized crime, etc.—this approach emphasizes granting gambling a relatively free hand to respond to the demands of the market regarding the numbers of facilities, their location, and so forth. This welcoming approach—much like that accorded to favored industries in other states—has been a key factor in Nevada's long-time prominence as a center of casino gambling in the United States.

A contrasting approach, dubbed here the “New Jersey” model, focuses on gambling's potential negatives and emphasizes its differences from other businesses. One consequence is a broader and more in-depth role for government in the making of key decisions. In this view, casino gambling is viewed as a potentially dangerous phenomenon, but one nevertheless capable of producing significant benefits under carefully controlled conditions. In New Jersey's case, the legalization of casino gambling in 1976 was a highly controversial issue, but was eventually accepted for the narrow purpose of helping to revive the declining resort community of Atlantic City. It was accompanied by the establishment of a strict and comprehensive regulatory structure, with few areas free from government oversight and approval. Significantly, even after two decades, casino gambling has not been allowed to expand beyond its original base of Atlantic City. As a result, it has never reached its economic

¹⁵ Scott Harshbarger, Attorney General of the Commonwealth of Massachusetts, “Report on the Sale of Lottery Tickets to Minors in Massachusetts,” July 1994, pp. 3-4; Scott Harshbarger, Attorney General of the Commonwealth of Massachusetts, “Kids and Keno are a Bad Bet: A Report on the Sale of Keno Tickets to Minors in Massachusetts,” October 1996, p. 1; Howard J. Shaffer, “The Emergence of Youthful Addiction: The Prevalence of Underage Lottery use and the Impact of Gambling,” Massachusetts Council on Compulsive Gambling, January 13, 1995, p. 9.

¹⁶ Casinos in the United States can be divided into two major groups: Native American tribal casinos and non-Indian “commercial” casinos. This chapter focuses on the latter; Native American tribal casinos will be discussed in the Chapter VI, “Native American Tribal Gambling.”

potential, but neither has it been woven into the state's social fabric.

These two approaches can be seen in other states. Most states with riverboat casinos adopted the "New Jersey" approach, employing gambling for purposes of targeting economic development to a finite number of specific communities or to a finite number of communities along specific waterways. According to this approach, casino gambling is akin to enterprise zones intended to deliver economic benefits—in the case of casinos, these benefits are job creation, capital investment, public sector revenue, and increased tourism—to a finite number of specified locations. These states have subjected their gambling industries to relatively strict controls: The fact that gambling was confined to riverboats, symbolically and physically separate from the surrounding communities, underscored the desire to employ gambling for relatively narrow purposes while mitigating perceived potential negative effects. In these states, the limited number of approved licenses has meant that gambling remains confined to a handful of cities.

Mississippi, by contrast, adopted more of a "Nevada" approach, although in fact the approach is something of a Nevada/New Jersey hybrid. There are limits on where casinos may be located (in counties along the Mississippi River or on the Gulf Coast), but there is no limit on the number of permitted casinos either within a particular county or statewide. This regulatory climate has proved favorable: Mississippi's casino industry now ranks among the state's major industries in terms of revenues, taxes, and employment.

Administrative Structure

In some jurisdictions, the gambling board or commission exercises final administrative authority. Other jurisdictions, most notably Nevada, have adopted a two-tiered system in which one body (the Nevada Gaming Control Board) exercises administrative authority, subject to a separate entity (the Nevada Gaming

Commission) that serves as the due process oversight body.¹⁷

Much of casino regulation is concentrated on the day-to-day operations of casinos. Typically, each casino is required to adopt and adhere to a comprehensive set of state-designated procedures, commonly termed the "Minimum Internal Control Standards" (MICS). These MICS focus on the range of gambling-related activity, including the conduct of games, the movement and handling of cash and cash equivalents, and the accounting and record trail of all transactions. State regulators often rely upon the casinos to maintain logs that document irregularities and to "self-report" violations.

In addition to internal control and surveillance, casino regulatory agencies direct and review audits of casino operations. In some states, private sector audit firms are engaged by the regulatory body (usually at the expense of the casino) to conduct compliance audits. The audits measure operator conformity with MICS requirements. These audits are in addition to required annual financial audits conducted by certified public accounting firms that are selected by casino operators, subject to regulatory approval.

Furthermore, the regulatory structure of most states includes statutory language that restricts gambling by those under 21. The state levies fines and other punishments for the failure to adhere to this code of conduct. The casino industry itself self-regulates with regard to underage gambling in an attempt to ensure that its patrons and employees understand that only those 21 and older are permitted to gamble. Some casinos perform this function more effectively than others; those that do not tend to be the recipients of fines and sanctions. In addition, many states have gambling statutes requiring casinos to address pathological gambling.

There is considerable variability across the states regarding the scope of the individuals and entities subject to licensure to work in casinos.

¹⁷ Belletire document.

Some jurisdictions license only persons engaged in gambling-related duties. In other states, all employees, regardless of work duties or work location (i.e. hotel rooms) are subject to licensing. In most jurisdictions, licensure for rank-and-file gambling personnel entails a standardized criminal background check. Upper management casino personnel and other key persons of a licensed operation are subjected to more extensive background examinations. Most jurisdictions have statutory provisions specifying disqualifying criteria for persons seeking to work in casinos. Typically, any felony conviction disqualifies an individual. In some cases a misdemeanor conviction, or the denial or revocation of licensure in another gambling jurisdiction, are also cited as disqualifying factors.

The depth of regulatory investigations and oversight of suppliers also varies across the states. The licensure of gambling industry suppliers is primarily concentrated on the business entities that provide gambling devices and equipment. Most regulatory bodies are also granted the statutory authority to license entities that provide non-gambling-related goods or services to casinos. Such authority is not routinely utilized. Only the State of New Jersey currently requires licensure of certain non-gambling casino contractors.

At the Commission's request, a guide to model regulation was developed by Michael Belletire, the former Administrator of the Illinois Gaming Board (see Attachment A at the end of this chapter).¹⁸

PARI-MUTUEL GAMBLING

The pari-mutuel industry, which includes greyhound racing and jai alai, has a long history in the United States, but horse-racing remains by far the largest and most financially healthy segment.

¹⁸This regulatory model relies heavily on the paper submitted by Michael A. Belletire entitled "Legislating and Regulating Casino Gaming: A View from State Regulators."

Administrative Structure

While the exact form varies, all states with legal pari-mutuel operations regulate the activity through a racing commission or other state gambling regulatory body. The purposes of regulation include maintaining the integrity of the races or events, ensuring the state receives its tax revenues, overseeing the licensing of tracks and operators, and preventing an infiltration by criminal elements.¹⁹

To obtain a license to operate, state racing commissions perform background checks on track owners, horse owners, trainers, jockeys, drivers, kennel operators, stewards, judges, and backstretch personnel. Once the license is extended, racing commissioners retain the authority to suspend or revoke licenses. Reasons for denying, suspending, or revoking a license include criminal infractions, false representations, failure to disclose ownership of a horse or greyhound, inadequate training, or a history of concerns pertaining to an individual's integrity.²⁰

Underage gambling also is a concern. In most states, children under 18 years of age must be accompanied by an adult in order to enter a pari-mutuel facility, and the minimum age requirement for betting varies from 17 to 21 years of age. Most states have set the minimum at 18.²¹

The Kentucky Racing Commission provides a prominent example of the comprehensiveness of state regulation of the pari-mutuel industry. Laws that fall under the enforcement authority of this commission pertain to virtually every aspect of races and include the presence and placement of specific race officials such as timers, placing judges, starters, and patrol judges. There also are laws governing owners, trainers, jockeys, horses, and ticket sellers. Individuals must meet standards set by the commission for each

¹⁹R. Anthony Chamblin, Testimony for the National Gambling Impact Study Commission, Del Mar, California (July 29, 1998) (on file with the Commission).

²⁰Ibid.

²¹Ibid.

position and be licensed in order to be eligible to participate in pari-mutuel betting events. The commission itself has the power to deny, suspend, revoke, or declare void the license of any person involved in a violation of an administrative regulation. The commission also approves three stewards who make determinations regarding all questions, disputes, protests, complaints, or objections that arise during a race meeting. They are granted extensive disciplinary powers: For example, the stewards can declare a horse ineligible or a race void.

One of the key controversies in pari-mutuel gambling are proposals to introduce electronic gambling devices (EGD's), such as slot machines, at racetracks. Some track owners maintain that increased competition from state lotteries, nearby casinos, and other forms of gambling have hurt their business and that EGD's are needed in order to allow their businesses to survive. Opponents within and outside of the industry counter that by introducing such games, racetracks in effect become mini-casinos. Four states—Delaware, South Carolina, Rhode Island, and West Virginia—have legalized the operation of EGD's at racetrack facilities. Several other states are currently considering similar provisions.

Federal involvement in pari-mutuel regulation focuses on issues of interstate and foreign commerce. Specifically, the federal government provides regulation through two federal statutes that address or exempt interstate wagering within the pari-mutuel industry. According to the Interstate Horse Wagering Act of 1978²² and in compliance with the “Wire Act” of 1961,²³ racetracks can broadcast events to other licensed establishments and provide for a commingling of wagers on races. The industry broadcasts these races through satellite technology to other racetracks and off track betting parlors (OTBs). Bettors can then place wagers on a particular race hosted at a participating track that may be located outside

the state. This system has enabled the industry to create larger wagering pools and therefore larger purses. Under the authority provided by the federal government within these two statutes, several states have permitted the pari-mutuel industry to broadcast races in the home and have also provided for account wagering. Further discussion on account wagering and at-home devices is included in the chapter on the “Gambling in the United States.”

Several organizations set industry standards and codes of conduct. As early as 1934, racing commissioners from a number of states formed the National Association of State Racing Commissioners (NASRC) to provide a more coordinated approach to regulatory efforts. Out of this body grew the Association of Racing Commissioners International, Inc. (RCI). Today, RCI's membership includes commissioners from 24 states and 5 neighboring territories or countries.²⁴ Other industry organizations include the National Thoroughbred Racing Association, the Thoroughbred Racing Associations of North America, The American Quarter Horse Association and the American Horse Council. These organizations address issues including integrity of racing, underage concerns, and concerns regarding problem and pathological gambling.

SPORTS WAGERING²⁵

The Professional and Amateur Sports Protection Act (Pub.L. 102-559) is the primary regulatory document for sports wagering activity. The law was passed to ensure the integrity of athletic events. At the time of the passage, Sen. Bill Bradley (D-NJ) said:

“Based on what I know about the dangers of sports betting, I am not prepared to risk the

²⁴Supra note 1.

²⁵Sports wagering refers to betting on the outcome of a contest. People bet on the outcome of many events, whether the outcome of the Academy Awards, individual athletic performances, or team play. For the purposes of this section on sports wagering regulation, the term does not cover pari-mutuel activity, which is legal in many states.

²²15 U.S.C. § 3001-3007.

²³18 U.S.C. § 1084.

values that sports instill in youth just to add a few more dollars to state coffers.... State-sanctioned sports betting conveys the message that sports are more about money than personal achievement and sportsmanship. In these days of scandal and disillusionment, it is important that our youngsters not receive this message...sports betting threatens the integrity of and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling...sports gambling raises people's suspicions about point-shaving and game-fixing.... All of this puts undue pressure on players, coaches, and officials."²⁶

The Act was signed by the President on October 28, 1992. Section 3702 of the Act makes it illegal for a government entity or a person to operate or authorize any wagering scheme based on "competitive games in which amateur or professional athletes participate."²⁷

Federal legislation also addresses the use of wire communications for sports wagering. The "Wire Act" of 1961 prohibits gambling businesses from using wire communications to transmit bets or wagers or information that assists in the placing of bets or wagers either interstate or across U.S. national borders. By specifying bets or wagers on "sporting events or contests," the statute expressly determines the illegality of the use of wire communications for the purposes of interstate or international sports wagering. Penalties for breaking this law include fines and imprisonment for not more than two years or both.

While these federal Acts imply federal jurisdiction over sports wagering, states retained the right to determine the scope of legalized sports wagering until 1992. Currently, sports wagering is legal in four states but offered only in Nevada and

Oregon. Nevada offers sports wagering through casino sports books and Oregon runs a state lottery game based on games played in the National Football League. Nevada prohibits the placing of wagers on teams from within the state in an attempt to avoid any hint of impropriety when Nevada teams are included and to protect the integrity of contests involving such teams. Delaware and Montana are allowed to have sports books by statute, but currently neither state offers legalized sports wagering. Because these four states had pre-existing statutes providing for sports gambling, they were unaffected by enactment in 1992 of the federal legislation prohibiting sports betting in all other states.²⁸

Despite Being Widespread, Most Sports Wagering Is Illegal

The popularity of sports wagering in most states, both legal and illegal, makes it a regulatory challenge. Legal sports wagering—especially the publication in the media of Las Vegas and offshore-generated point spreads—fuels a much larger amount of illegal sports wagering.²⁹ Although illegal in 48 states, office betting is flourishing. This type of informal or small-scale betting, which is often considered innocuous and not worth prosecuting from a law enforcement standpoint, is often ignored and goes largely unregulated.

²⁸The Professional and Amateur Sports Protection Act, (Pub.L. 102-559), signed by the President on October 28, 1992. Section 3702 of the Act stipulates the following:

"It shall be unlawful for 1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or 2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."

See Linda S. Calvert Hansen, *Sports, Athletics, and the Law: A Selected Topical Bibliography of Legal Resources Published During the 1990s*, 4 *Seton Hall Law and Sports Journal* 763 (1994).

²⁹James H. Frey, "Gambling on Sports: Policy Issues," *Journal of Gambling Studies*, Winter 1992, p. 355, as cited in the testimony of Nancy Price before the NGISC in Las Vegas, NV, November 10, 1998.

²⁶Submitted with the testimony of Nancy Price to the NGISC in Las Vegas, NV, November 10, 1998.

²⁷Pub.L. 102-559, Sec. 3702.

In addition to being largely informal, widespread and illegal, sports wagering is difficult to regulate since anyone in any state can access legal sports books via telephone or Internet. Because sports wagering is illegal in most states, reliable figures on the scope of sports gambling are difficult to find.

This Commission heard testimony that sports gambling is a serious problem which has devastated families and careers.³⁰ Many Americans do not know that the majority of sports wagering in America is illegal. In addition, many do not know about the risks and impacts of sports wagering and about the possible legal consequences. Even when Americans understand the illegality of sports wagering, it is easy to participate in, widely accepted, very popular, and, at present, not likely to be prosecuted.

One reason Americans may not be aware of the illegality of sports wagering is that the Las Vegas “line,” or point spread, is published in most of the 48 states where sports wagering is illegal.³¹ Some have argued that the point spread is nothing more than a device that appeals to those who make or solicit bets. Critics claim that the point spread does not contribute to the popularity of sports, only to the popularity of sports wagering.

Because sports wagering is illegal in most states, it does not provide many of the positive impacts of other forms of gambling. In particular, sports wagering does not contribute to local economies or produce many jobs. Unlike casinos or other destination resorts, sports wagering does not create other economic sectors.

However, sports wagering does have social costs. Sports wagering threatens the integrity of sports, it puts student athletes in a vulnerable position, it can serve as gateway behavior for adolescent gamblers, and it can devastate individuals and careers.

It is important that the regulation of sports wagering be strengthened and enforced. Illegal sports betting should be contained in order to keep the remaining 48 states free from this form of gambling. Government and law enforcement agencies in particular could increase their efforts to deal with this area of illegal gambling.

One argument for strengthening sports wagering regulation is that athletes themselves are often tempted to bet on contests in which they participate, undermining the integrity of sporting contests. According to the findings of a University of Michigan survey on collegiate sports gambling, more than 45 percent of male collegiate football and basketball athletes admit to betting on sporting events, despite NCAA regulations prohibiting such activities. More than 5 percent of male student-athletes provided inside information for gambling purposes, bet on a game in which they participated, or accepted money for performing poorly in a game.³²

There is considerable evidence that sports wagering is widespread on America’s college campuses. Cedric Dempsey, executive director of the NCAA, asserts that “every campus has student bookies. We are also seeing an increase in the involvement of organized crime on sports wagering.”³³

Students who gamble on sports can be at risk for gambling problems later in life. There is evidence that sports wagering can act as a gateway to other forms of gambling. Therefore, it is important to understand the scope of the problem and educate students to the dangers of sports wagering. The Commission needs to know how widespread the phenomenon of underage sports gambling is now, the relationship between sports wagering and other forms of gambling, and the ways to prevent its spread. Those who attempt to draw adolescents into illegal sports wagering schemes deserve the full attention of law enforcement efforts.

³⁰ Testimony of Mitzi Schlichter before the NGISC, Las Vegas, NV, November 10, 1998.

³¹ Define the point spread and Vegas “line” here.

³² The Extent and Nature of Gambling Among College Student Athletes. Michael E. Cross and Ann G. Vollano, University of Michigan Athletic Department, 1999.

³³ Cited in Gary Lundy, NCAA Says Lady Vols Not Safe from Gamblers, Knoxville News-Sentinel, August 6, 1998, p. C1.

What Is Being Done and What Can Be Done

The importance of regulating legal sports wagering and stifling illegal sports wagering has been acknowledged by professional and amateur sports organizations, which have strict regulations regarding sports wagering. For example, the National Football League, Major League Baseball, and the National Basketball Association have all issued rules stating that betting on your own sport is grounds for dismissal for any athlete or coach. Each league also offers referral services for treatment of problem or pathological gambling and other addictions.³⁴

The National Collegiate Athletic Association has adopted legislation prohibiting university athletics department members, athletics conference office staff, and student athletes from engaging in wagering activities related to intercollegiate or professional sporting events. Violations of NCAA gambling regulations carry stringent penalties. The NCAA also has created a full-time staff position devoted to agent and gambling issues.³⁵

Current NCAA initiatives recognize the importance of raising awareness of the problems associated with sports wagering and problem and pathological gambling. Television broadcast has proven to be a powerful tool for educating the public about the problems associated with sports wagering. The NCAA contracts with CBS and ESPN to run public service announcements (PSA's) during the broadcast of popular sporting events, such as the Division I men's basketball tournament.³⁶ In 1998, CBS, in conjunction with the NCAA, developed a lengthy segment on sports wagering that aired between the Division I men's basketball semifinal games. These

announcements are only a part of the larger gambling education programs that the NCAA plans to develop.³⁷

CONVENIENCE GAMBLING³⁸ AND STAND-ALONE ELECTRONIC GAMBLING DEVICES

Stand-alone EGD's are seldom well regulated outside Nevada. Because EGD's can be placed in a wide variety of locations, they can be difficult to monitor. State regulation of convenience gambling includes licensing, regulation of the placement of machines within an establishment, age restrictions, regulation of operations, and taxation of revenues. States that permit convenience gambling have various methods of regulating the operation, distribution, and allocation of machines. Licensure is usually processed in state gambling commissions. An exception is South Carolina, where the Department of Revenue administers the machines. Applicants' character, past criminal records, business competence, and experience is evaluated during the licensing process. In addition, the operation and number of machines is regulated, since many states allow only a limited number of convenience gambling machines in certain locations. For example, in Nevada, locations with non-casino gambling licenses may operate a maximum of 15 devices. South Carolina machine operators are limited to only five machines per "single place or premise."

State regulations also dictate the qualifications and specifications of convenience gambling machines that are permitted. Some states also limit the amount of money played and the value of prizes. In Montana, each video draw poker or keno machine is not allowed to credit more than \$800. In Oregon, to ensure age-controlled access

³⁴ See Jeff Pash, Executive Vice president of the NFL, Testimony before the Senate Subcommittee on Technology, Terrorism and Governmental Information, Washington, DC, July 28, 1997.

³⁵ See letter from Cedric Dempsey, Executive Director of the NCAA to Commissioner McCarthy, NGISC, October 16, 1997, on file with the NGISC.

³⁶ See letter from Cedric Dempsey, Executive Director of the NCAA, to Kay James, NGISC, April 28, 1999, on file with the NGISC.

³⁷ Ibid.

³⁸ Most commonly, "convenience gambling" is defined as any gambling activity that encompass various electronic versions of bingo, keno, blackjack, lottery, video poker, or any other electronic, electromechanical, or mechanical games that operate by chance and that award the player with game award credits or free games. It is legal in Nevada, South Carolina, Montana, Louisiana, Oregon, and South Dakota.

to video lottery, locations are off-limits to minors.

The fees that convenience gambling operators have to pay to the state government vary state by state. For example, Oregon collects excise taxes from retailers who operate the video lottery games and since 1992, the EGD's excise taxes have provided \$8.5 million to the state.³⁹ In Louisiana, license fees paid to the state and local governments for the period of July 1998 through March 1999 were \$148,848,000.⁴⁰

Attempts to regulate legal convenience gambling in South Carolina have been marginally successful. In an attempt to curb the growth of gambling, state officials decreed that no business could have more than five EGD's and limited daily payouts to \$125. However, these attempts at regulation are easily circumvented by establishments that partition their outlets into separate rooms, each containing five machines and an attendant.⁴¹ Video poker outlets often advertise and offer jackpots much greater than the \$125 limit allowed by law. In addition to being difficult to regulate, convenience gambling revenues are not evenly distributed. One quarter of South Carolina's machines are owned by just three operators: Collins, McDonald's Amusements of Little River, and Tim's Amusement of Greenville.⁴²

Illegal and quasi-legal EGD's (or so-called gray machines) are often considered a challenging yet low-priority law enforcement problem. Some states report bribery of police and other law enforcement officers. Confiscation is one method of enforcement but has proven ineffective since the confiscated machines are easily replaced. Moreover, penalty fees are usually low in comparison to the profit or "payoff."

In Illinois, with an estimated 65,000 illegal or quasi-legal EGD's,⁴³ video slot machines are classified as games of chance and are banned throughout the state. Supporters of video poker machines, however, claim that since poker requires some skill and does not rely on chance alone, the machines are therefore not illegal under existing law. The distinction is clear to the many bar and club owners who earn significant, largely untaxed profits from video poker machines. Owners of competing establishments contend that illegal gambling devices give some businesses an unfair advantage because the profits can be used to subsidize prices on food, drinks, or even gasoline.⁴⁴

Some states have considered replacing the EGD's with state-approved machines provided by commercial distributors. This would allow the regulation and taxation of the machines. In South Dakota, the state government gets 49.5 percent of the profits from the machines, while local bar owners and machine operators split the other 50.5 percent.⁴⁵ In Oregon, a 1992 law gives the state, which owns the machines outright, 67 percent of the profit. Local proprietors get 33 percent.⁴⁶ Some recommendations in improving the regulation of illegal convenience gambling include that of improving the local licensing, numbering and tracking of machines. Also targeting the manufacturers and distributors as well as organized crime and shop-owners could improve the regulation of convenience gambling.

ADVERTISING

Current restrictions limit the scope of advertising allowed by gambling facilities, but do not completely ban it. For example, casinos are allowed to advertise their restaurant and

³⁹Source: Response from Governor Kitzhaber on April 26, 1999.

⁴⁰Source: Response from Governor foster on April 28, 1999.

⁴¹"Industry Stirs Money, Controversy: South Carolina Illustrates How Video Gambling Can Impact a State," *Sarasota Herald-Trib.*, February 22, 1999, p. 1A.

⁴²"Video Poker generates millions for some South Carolina entrepreneurs," *The State*, March 21, 1999.

⁴³Cam Simpson, "Gambling raid in west suburbs," *Chicago Sun-Times*, November 17, 1997.

⁴⁴"Bars warily consider return of video poker: Court has struck down ban on the machines." *St. Louis Post-Dispatch*, February 10, 1999.

⁴⁵"Video Poker: Why reward vendors." *The Charleston Gazette*, March 5, 1999, P. 4A.

⁴⁶*Ibid.*

entertainment venues but not their gambling activities. Native American tribes, church bingo nights, and state-run lotteries are permitted to advertise gambling.

Supporting a Restriction on Advertising

The reason for the uneven restrictions on gambling advertising stems from differing interpretations of First Amendment protections, as well as exemptions granted in regulatory statutes. The rationale for existing prohibitions is complex, but rests on two assumptions: first, the federal prohibition on commercial gambling advertising assumes that casino gambling has a causal relationship with social ills; and ⁴⁷ second, that advertising increases gambling behavior both by enticing people to do more gambling than they otherwise would do and by recruiting people to gamble who otherwise might not.

The Foundation for the Ban: The Federal Communications Act

The Federal Communications Act of 1934 was the first attempt to provide a statutory basis for restrictions on gambling advertising. Although the Act has been significantly changed and a number of exceptions added, there continue to be federal restrictions on many forms of gambling advertising. The Federal Communications Act prohibited lottery advertisements, extending an earlier prohibition on the use of the U.S. Postal Service to radio.⁴⁸ As a result, Title 18 of the United States Code §1304 provides:

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcast of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes

drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prize, shall be fined under this title or imprisoned not more than one year, or both.

The Federal Communications Commission (FCC) is the agency authorized to enforce Title 18.⁴⁹ In that capacity, the FCC implemented regulation 47 C.F.R. §73.121 prohibiting broadcasting advertising of any “lottery, gift enterprise, or similar scheme.” Title 18 states, in part:

- (a) No license of an AM, FM, or television broadcast station...shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

A number of exceptions undercut the original sweeping scope of the Act. The exceptions include state lotteries,⁵⁰ fishing contests,⁵¹ gambling conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act,⁵² a lottery, gift enterprise or similar scheme by a not-for-profit organization or a governmental organization⁵³ or conducted as a promotional activity by a commercial organization.⁵⁴ Additional exceptions include horse racing and off-track betting.⁵⁵

⁴⁷ 988 F. Supp 497 (D.N.J. 1997).

⁴⁸ See Anthony N. Cabot, et al., supra note 2 at 51-80.

⁴⁹ FCC rule 73.1211. See 47 C.F.R. §76.213

⁵⁰ (18 U.S.C. 1307 (a); 102 Stat. 3205).

⁵¹ 18 U.S.C. 1395.

⁵² 25 U.S.C. 2701 et seq.

⁵³ (18 U.S.C. 1307 (a); 102 Stat. 3205).

⁵⁴ Ibid.

⁵⁵ 41 F.C.C 2d 172 (1973) and 47 U.S.C. §307.

Federal Appeals courts are split on the constitutionality of the Act. Therefore, the ban is currently in effect in only some parts of the United States. Some jurisdictions have struck down the ban outright. For example, in *Valley Broadcasting Co. v. United States*,⁵⁶ the 9th U.S. Circuit Court of Appeals struck down the ban in 1998, blocking enforcement in nine Western states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. As a result of the Valley case, the FCC stated it would not enforce the ban in Nevada.⁵⁷ In *Players International Inc. v. United States*,⁵⁸ the U.S. District Court in New Jersey ruled that the federal ban violates the First Amendment rights of casinos and broadcasters. As a result of the *Players* case, the FCC stated it would not enforce the advertising ban in New Jersey, where the case had jurisdiction.⁵⁹

Other jurisdictions have upheld the ban. In *Posadas de Puerto Rico Associates v. Tourism Co.*,⁶⁰ the U.S. Supreme Court in 1986 upheld the constitutionality of a Puerto Rico law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico, but permitted such advertising aimed at tourists. In *United States v. Edge Broadcasting Co.*,⁶¹ the U.S. Supreme Court also upheld a federal statute that prohibited the airing of lottery advertising by broadcasters licensed in states that prohibit lotteries, while allowing such advertising by broadcasters in states where lotteries were permitted.

Is the Ban an Indirect Gambling Regulation?

Given these assumptions, the ban on gambling advertising can be interpreted as an indirect

attempt to regulate people's gambling behavior and, in turn, minimize gambling's social costs. The interpretation of the ban as an indirect gambling regulation has led to differing arguments for and against the ban, all challenging or supporting the two underlying assumptions outlined above.

In *United States v. Players International*, the plaintiffs argued that a ban on gambling advertising can be interpreted as an indirect attempt to regulate people's gambling behavior by regulating commercial speech about gambling. The main thrust of the plaintiff's argument in *Players* revolved around the contention that there exist non-speech regulating "alternatives" to the broadcast ban on gambling casinos. They argued that because people's gambling behavior can be regulated through non-speech means, then non-speech regulating policy alternatives should be considered. In short, the *Players* case encourages the direct regulation of people's conduct rather than a ban on speech about that conduct, particularly when it is legal conduct. This case also questions the primary assumption that the federal government can show "any causal connection between casino gambling and the social ills that the federal government seeks to prevent."⁶²

The argument supporting the ban makes similar assumptions with one major difference. Supporters of the ban assume that gambling advertising does influence (or induce) gambling behavior and that there is a causal relationship between gambling behavior and social ills. Therefore, states, in their role of protector of their citizens, need "legislative flexibility" in order to allow them to protect their citizens from the advertisement of the private gambling industry, which recruits new players and encourages new ones, thereby contributing to social ills through advertising.

⁵⁶ 107 F.3D 1328 (9th Cir. 1997), cert. denied, 118 S.Ct. 1050 (1998).

⁵⁷ Nora FitzGerald, "Gambling Fever," *Adweek* (Eastern Edition), January 26, 1998.

⁵⁸ 988 f. supp 497 (D.N.J. 1997).

⁵⁹ FitzGerald, *supra*, note 52.

⁶⁰ 478 U.S. 328 (1986).

⁶¹ 409 U.S. 418 (1993).

⁶² *Ibid.*

The New Orleans Case

Recently, in the much-discussed case of *Greater New Orleans Broadcasting v. United States*,⁶³ the 5th U.S. Circuit Court of Appeals has upheld the ban.⁶⁴ In this case, the Greater New Orleans Broadcasters Association challenged federal restrictions barring gambling advertising from crossing state lines and FCC regulations providing additional sanctions. The Federal District Court had earlier found in summary judgment that governmental interests were sufficient to override free speech concerns. The Appellate Court agreed in 1995.⁶⁵ In a 1996 ruling, the Supreme Court sent the case back to the lower courts. However, on remand, the 5th Circuit again upheld the advertising ban, precipitating the upcoming review by the Supreme Court.⁶⁶ As a result of these exceptions and contradictory decisions, “what remains of that prohibition is a vague regulatory scheme propped up by obscure, often unpublished rulings and undermined by a hodgepodge of congressionally approved exceptions.”⁶⁷ The Supreme Court recently heard the Greater New Orleans Broadcasting case and is expected to offer a decision shortly.⁶⁸

Interpretations of New Orleans

There are at least two sides to the argument about the ban on gambling advertising expressed in the *New Orleans* case. The American Association of Advertising Agencies argues that gambling advertising is commercial speech, protected under the First Amendment, and

should not be banned or restricted. Relying on the *44 Liquormart v. Rhode Island* decision,⁶⁹ in which the Supreme Court struck down a state ban on advertising the price of alcoholic beverages, they believe that the Court will find the restriction on gambling to be analogous and, therefore, unconstitutional.

The Clinton Administration continues to support the ban, arguing that there is a compelling state interest in banning gambling advertising. In an appeal of the *Players* case, the government attorney argued that broadcast advertising of casino gambling “would directly contribute to compulsive gambling by reaching into the homes of current and potential compulsive gamblers.”⁷⁰

Lottery Advertising

While gambling advertising is generally a controversial topic, it is even more controversial when state governments themselves actively promote gambling through advertising. Running a lottery places states in a new business. Many states “have adopted the tools of commercial marketing, including product design, promotions, and advertising” to promote their lotteries.⁷¹ In 1997 state lotteries spent a total of \$400 million to advertise, about one percent of total sales.⁷² Unlike many governmental promotions, which are straightforward, low-tech, and serious, lottery advertising can be characterized as persuasive, glitzy, and humorous. This attempt to make gambling attractive is sanctioned by the state, promoted by the state, and paid for by the state. (See Table 3-1.)

One particularly troublesome component of lottery advertising is that much of it is misleading, even deceptive. State lotteries are

⁶³ 149 F.3d 334 (5th Cir. 1998).

⁶⁴ Richard Carelli, Law Banning Casino Ads Reviewed, AP Online, January 15, 1999.

⁶⁵ *Greater New Orleans Broadcasting Association v. United States*, 69 F.3d 1296 (5th Cir. 1995).

⁶⁶ See Alicia Mundy, “Court Rules on Vice Ads; Supreme Court May Rule on Casino Advertising,” Adweek, August 10, 1998.

⁶⁷ Argument of New Orleans Broadcasters, cited in Scott Ritter, Supreme Court Refuses to Review Ban on Casino Gaming Ads, Dow Jones Newswires, January 11, 1999.

⁶⁸ *Greater New Orleans Broadcasting v. United States*, Supreme Court of the United States, 98-387, writ of certiorari granted, January 15, 1999. See Associated Press, Supreme Court to Consider Advertising Ban on Casinos, wire copy, January 18, 1999.

⁶⁹ 517 U.S. 484 (1996).

⁷⁰ Richard Carelli, “Gambling Ad Ban Full of Exceptions,” AP Online, December 28, 1998.

⁷¹ Clotfelter and Cook, supra note xx at 9.

⁷² Patricia A. McQueen, Investing in Tomorrow, International Gaming and Wagering Business at 48 (January 1998), cited in Clotfelter and Cook, supra note xx at 11.

Table 3-1

Advertising Themes Used in Marketing Plans of State Lottery Agencies, 1998

	Plans using theme (%)
Size of the prize or the jackpot	56
Fun and excitement of playing the lottery	56
Winner Awareness	46
Benefits to state of lottery dollars	28
Sports themes	28
Product Awareness	24
How to Play	20
Playing responsibly	16
Odds of winning	16
Tie-in with fairs and festivals	12
Play more often	12
Emotions of Winning	12
Answer to your Dream	12
Benefits of Winning	8
Instant gratification	8
Social interaction of playing	4
Low Price	4

Source: Charles T. Clotfelter, Philip J. Cook, Julie A. Edell, and Marian Moore, "State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission." Duke University, 1999. Table 13.

exempt from the Federal Trade Commissions' truth-in-advertising standards because they are state entities and, in terms of their advertising, can in fact operate in a manner that true commercial businesses cannot.⁷³ While the Federal Trade Commission requires statements about probability of winning in commercial sweepstakes games, there is no such federal requirement for lotteries. Lottery advertising rarely explains the poor odds of winning. Many advertisements imply that the odds of winning are even "better than you might think." For example, one video presented to the Commission stated that "chances are good you can be \$10,000 richer". An ad aired in Texas compared the odds of winning the lottery to the odds of some everyday events, implying that winning the lottery is possible, perhaps even probable.⁷⁴

In addition to being misleading, lottery advertising messages often exploit themes that conflict with the state's role as protector of the public good. For example, many advertisements emphasize luck over hard work, instant gratification over prudent investment, and entertainment over savings. New York's "All you need is a dollar and a dream" ad campaign was particularly emblematic of the theme that lotteries provide an avenue to financial success. The idea that the lottery is an investment in your future is particularly troublesome when targeted toward populations that are least able to afford to play.

Lottery advertising is also manipulative when it encourages players to play the lottery in order to contribute to state programs. Because lottery revenues are often earmarked for specific purposes, such as education, lottery advertising sometimes exploits the idea that playing the lottery can make you "feel good." This message implies that buying a lottery ticket is akin to supporting social programs, with the added benefit that you could become a millionaire

⁷³Ellen Perlman, "Lotto's Little Luxuries," *Governing*, December 1996, p. 18.

⁷⁴Testimony of Philip Cook, before the NGISC, March 18, 1999, Washington, DC.

yourself in the process. One video clip presented to the Commission emphasized that lottery dollars provide education and job training, encouraging the idea that by playing the lottery, a gambler can help other people improve their lives.⁷⁵

There is also concern that lottery ads target particularly vulnerable populations, specifically youth and the poor. Some lottery ads presented to the Commission showed young people playing the lottery.⁷⁶ The appeal of such images, and the illegality of underage lottery purchases in most states, raises justifiable concerns about the role of state governments as a promoter and participant in this type of gambling promotion.

The concern over lottery marketing themes and messages prompted several states to place restriction on what kind of advertising its lottery agency could do. In particular, Virginia, Minnesota, and Wisconsin ban ads designed to induce people to play. A few other states require odds of winning to be displayed or ads to be accurate and not misleading.⁷⁷

Time for an Advertising ‘Pause’

Underlying the legal arguments for and against the ban on gambling advertising are larger questions about the relationship between commercial speech and legalized behavior. While many states have legalized gambling activity, some states continue to support the ban on advertising for that very activity. In addition, some states actively promote their lotteries while continuing to support the ban on gambling advertising for commercial casinos. Although contradictory on the surface, conflicting policies are often the product of incremental decisionmaking rather than uncertainty. It is important that states ensure that their gambling policies and regulations match their objectives

while simultaneously protecting the public interest.

This Commission is aware that the legal landscape may change with the Supreme Court’s decision in the Greater New Orleans case. This Commission is preparing for the possibility of the Supreme Court lifting the advertising ban. If the ban is lifted, there could be a proliferation of gambling advertising across the United States. Given this rare advertising “pause” prior to the Court’s decision, this Commission has an opportunity and responsibility to address the issue of gambling advertising. One suggestion is the adoption of a “best practices” paradigm for gambling advertising, possibly modeled after the guidelines created by both the North American Association of State and Provincial Lotteries and the American Gaming Association (see Attachments A, B, and C at the end of this chapter).

RECOMMENDATIONS

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. (See separate recommendations on tribal and Internet gambling in their respective chapters.)

3.2 The Commission recommends that all legal gambling should be restricted to those who are at least 21 years of age and that those who are under 21 years of age should not be allowed to loiter in areas where gambling activity occurs.

3.3 The Commission recommends that gambling “cruises to nowhere” should be prohibited unless the state from which the cruise originates adopts legislation specifically legalizing such cruises consistent with existing law.

3.4 The Commission recommends that warnings regarding the dangers and risks of gambling, as well as the odds where feasible, should be posted in prominent locations in all gambling facilities.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission. Charles T. Clotfelter, Philip J. Cook, Julie A. Edell and Marion Moore, April 1, 1999.

3.5 The Commission recognizes the difficulty of campaign finance reform in general and an industry-specific contribution restriction in particular. Nonetheless the Commission believes that there are sound reasons to recommend that states adopt tight restrictions on contributions to state and local campaigns by entities—corporate, private, or tribal—that have applied for or have been granted the privilege of operating gambling facilities.

3.6 The Commission received testimony that convenience gambling, such as electronic devices in neighborhood outlets, provides fewer economic benefits and creates potentially greater social costs by making gambling more available and accessible. Therefore, the Commission recommends that states should not authorize any further convenience gambling operations and should cease and roll back existing operations.

3.7 The Commission recommends that the betting on collegiate and amateur athletic events that is currently legal be banned altogether.

3.8 The Commission recommends that in states where there is little regulatory oversight for organizations contracted to help manage or supply the lottery, states should put all individuals, entities, and organizations involved with managing or supplying the lottery through a rigorous background check and licensing process.

3.9 The Commission recommends to states with lotteries that the states should publicly develop and review model regulations for their lottery in the form of “best practices,” designed to be adopted legislatively.

3.10 The Commission urges states with lotteries to disallow instant games that are simulations of live card and other casino-type games. Generally, the outcome of an instant game is determined at the point of sale by the lottery terminal that issues the ticket.

3.11 The Commission recommends that all relevant governmental gambling regulatory

agencies should ban aggressive advertising strategies, especially those that target people in impoverished neighborhoods or youth anywhere.

3.12 The Commission recommends that states should refuse to allow the introduction of casino-style gambling into pari-mutuel facilities for the primary purpose of saving a pari-mutuel facility that the market has determined no longer serves the community or for the purpose of competing with other forms of gambling.

3.13 The Commission recommends to state and tribal governments, the NCAA, and other youth, school, and collegiate athletic organizations that, because sports gambling is popular among adolescents and may act as a gateway to other forms of gambling, such organizations and governments should fund educational and prevention programs to help the public recognize that almost all sports gambling is illegal and can have serious consequences. The Commission recommends that this effort should include public service announcements, especially during tournament and bowl game coverage. The Commission recommends that the NCAA and other amateur sports governing bodies adopt mandatory codes of conduct regarding sports gambling education and prevention. The Commission also calls upon the NCAA to organize U.S. research universities to apply their resources to develop scientific research on adolescent gambling, sports gambling, and related research.

3.14 The Commission recommends that each gambling operation, state lottery, tribal government, and associations of gambling organizations voluntarily adopt and then follow enforceable advertising guidelines. These guidelines should avoid explicit or implicit appeals to vulnerable populations, including youth and low-income neighborhoods. Enforcement should include a mechanism for recognizing and addressing any citizen complaints that might arise regarding advertisements. Additionally, the Commission recommends that Congress amend the federal truth-in-advertising laws to include Native

American gambling and state-sponsored lotteries.

3.15 The Commission recommends that the Congress should delegate to the appropriate federal agency the task of annually gathering data concerning lottery operations in the United States, including: volume of purchase; demographics of lottery players and patterns of play by demographics; nature, content, accuracy, and type of advertising spending regarding problem and pathological gamblers; spending on regulation; and other relevant matters.

3.16 The Commission recommends that states and tribal governments should conduct periodic reassessments of the various forms of gambling permitted within their borders for the purpose of determining whether the public interest would be better served by limiting, eliminating, or expanding one or more of those forms.

3.17 The Commission recommends that federal, state, and tribal gambling regulators should be subject to a cooling-off period that prevents them from working for any gambling operation subject to their jurisdiction for a period of 1 year. Federal, state, or tribal lottery employees should be subject to a cooling-off period that prevents them from working for any supplier of lottery services for a period of 1 year.

3.18 The Commission recommends that jurisdictions considering the introduction of new forms of gambling or the significant expansion of existing gambling operations should sponsor comprehensive gambling impact statements. Such analyses should be conducted by qualified independent research organizations and should encompass, in so far as possible, the economic, social, and regional effects of the proposed action.

3.19 The Commission recommends that states with lotteries reduce their sales dependence on low-income neighborhoods and heavy players in a variety of ways, including limiting advertising and number of sales outlets in low-income areas.

3.20 The Commission recommends that states with lotteries create a private citizen oversight board. The board would make data-based policy decisions on types of games to offer, marketing strategies to follow, etc.

3.21 The Commission recognizes that lotteries and convenience gambling may play a significant role in the development of youthful gamblers. Further, with respect to all forms of legal and illegal gambling, the Commission recommends that all relevant governmental gambling regulatory agencies enact and enforce harsh penalties for abuse in this area involving underage gamblers. Penalties and enforcement efforts regarding underage gambling should be greatly increased.

3.22 Heavy governmental promotion of lotteries, largely located in neighborhoods, may contribute disproportionately to the culture of casual gambling in the United States. The Commission therefore recommends that states curtail the growth of new lottery games, reduce lottery advertising, and limit locations for lottery machines.

ATTACHMENT A

A “BEST PRACTICES” MODEL FOR CASINOS

At the Commission’s request, a guide to model regulation was developed by Michael Belletire, the former Chairman of the Illinois Gaming Board. His major points include:

LEGISLATIVE CLARITY OF PURPOSE

In crafting gambling statutes, a clear articulation of public purpose or legislative intent is essential. A statement of intent serves to clarify the standards by which the long-term acceptability of authorizing gambling activity may be measured. This type of statement may also serve to reconcile the adoption of statutory provisions that face potential constitutional challenges. Even more importantly, clarity of purpose provides the grounding against which to test regulatory and administrative decisions at the time of initial decisionmaking, as well as upon review or appeal. Integral with a statement of public purpose should be an explicitly stated commitment to the overarching principle of integrity.

Constitutional Considerations

Each state’s elected officials must carefully weigh constitutional history and language and contemporary public sentiment before enacting gambling legislation.

Organization of Regulation

The principle of integrity demands that administrative decisionmaking be placed in the hands of an appointed independent body, rather than a single individual subject to political influence. The decisionmaking body itself should exercise operating and administrative authority and must be further subject to appeal or oversight of its decisions.

Extent of Gambling Authorized

According to Belletire, “Perhaps the single most significant factor in shaping the dynamics of the regulatory process is the scope of legislatively authorized casino gambling.” However, by restricting the market and putting decisions in the hands of regulators and others, a statute intended to “limit the spread” of casino gambling could increase the potential for inappropriate influence in the awarding of licenses. Therefore, statutory safeguards should include consideration of the following:

- Independence in licensure decisionmaking.
- Placing the burden to prove suitability for licensure upon the applicant.
- An explicit requirement for competitive proposals for limited availability licenses.
- Carefully articulated policy standards for deciding among competing applications.

- Comprehensive disclosure of financial and political relationships.
- Explicit powers to review, investigate, and approve contractual relationships entered into by applicants and licensed operators.
- Requirements that ensure confidentiality in the treatment of sensitive personal and financial information balanced by appropriate public meeting requirements.
- In-depth and independent investigative practices and personnel.

Suitability and Investigations

A foundation of contemporary casino gambling regulation is the presumption that those involved in the ownership or control of casino operations must be deemed “suitable” for licensure or involvement in gambling. Appointed boards or commissions should be given broad powers to assess the background and integrity of owners and others deemed “key persons” of a gambling company.⁷⁸ The chief regulatory body should be empowered to establish which individuals or entities are deemed key persons. In order to be effective, regulators must be authorized to conduct in-depth background investigations. Legislation should mandate “full cooperation” from applicants, wherein the failure to provide information is grounds for determining unsuitability. It is advisable that persons with a felony conviction be statutorily prohibited from serving as a key person. It is also advisable for gambling statutes to explicitly authorize the gambling regulatory authority to compel the “disassociation” of persons found “unsuitable” for involvement, in addition to the authority to deny licensure to an entity. Personnel assigned to conduct investigations should be law enforcement officers of the state, as they have wide-ranging access to criminal and background information.

Enforcement

On-site agents enhance the ability of a regulatory body to identify operating irregularities. One of the most powerful tools in overseeing the conduct of gambling operations is the video camera surveillance system. Typically, surveillance requirements are imposed by rules and regulation rather than by statute.

Conformance with Anti-Gambling Statutes

Every state has statutory provisions that criminalize various forms of gambling activity. In enacting legislation authorizing gambling, proper attention should be paid to crafting appropriate exemptions to existing gambling prohibitions. Enforcing the honesty and integrity of legalized casino gambling requires an ability to prosecute those who engage in cheating at otherwise legal games. Attention must be paid to ensuring that appropriate and clearly enforceable criminal statutes exist to prosecute casino gambling cheaters.

Non-Gambling Business Relationships

A casino, like any large business, engages in a diverse set of outside business relationships in order to conduct operations. For this reason, it is important that casino jurisdictions—by statute, by rule, or both—exert a measure of oversight over all procurement decisions made by operators. This oversight might

⁷⁸ A key person may be an individual or an entity that, by position, office, ownership, or relationship can exercise control or significant influence over, the broad policies, management or operations of a licensed entity. (Belletire)

entail licensure of (non-gambling) provider entities or other regulatory measures. It is preferable that casino gambling enabling legislation expressly require that financing for casino operations be approved by the regulatory authority as being “appropriate and from a suitable source.”

Problem and Underage Gambling

States acting to authorize legalized casinos should consider statutory and regulatory policies that acknowledge problem gambling and seek to offset its impact. Measures to draw awareness to problem gambling should be initiated by the regulatory agency.

Statutes dealing with the age for legalized casino gambling should take a two-pronged direction. First, those licensed to operate casinos should be subject to strict regulatory oversight and held accountable for failing to consistently and diligently deter and detect attempts by underage persons to enter casinos or engage in gambling. Secondly, statutes should place responsibility upon young persons seeking to intentionally frustrate the law by gaining access to casino gambling. Specifically, states should consider promulgating petty or misdemeanor offense provisions that can be applied to persons gambling or facilitating entry by intent or deception.

ATTACHMENT B

NASPL ADVERTISING STANDARDS

The North American Association of State and Provincial Lotteries (NASPL) approved a list of advertising standards for their members on March 19, 1999.⁷⁹ These standards address the content and tone of lottery advertising, including the use of minors in ads, the inclusion of game information and a clear listing of lottery revenue beneficiaries. According to the NASPL, signatory NASPL members “will conduct their advertising and marketing practices in accordance with the provisions of these standards.”⁸⁰ These advertising standards are outlined below:

Content:

- Advertising should be consistent with principles of dignity, integrity, mission, and values of the industry and jurisdictions.
- Advertising should neither contain nor imply lewd or indecent language, images or actions.
- Advertising should not portray product abuse, excessive play, nor a preoccupation with gambling.
- Advertising should not imply nor portray any illegal activity.
- Advertising should not degrade the image or status of persons of any ethnic, minority, religious group nor protected class.
- Advertising by lotteries should appropriately recognize diversity in both audience and media, consistent with these standards.
- Advertising should not encourage people to play excessively nor beyond their means.
- Advertising and marketing materials should include a responsible play message when appropriate.
- Responsible play public service or purchased media messages are appropriate, especially during large jackpot periods.
- Support for compulsive gambling programs, including publications, referrals and employee training is a necessary adjunct to lottery advertising.
- Advertising should not present, directly nor indirectly, any lottery game as a potential means of relieving any person’s financial or personal difficulties.
- Advertising should not exhort play as a means of recovering past gambling nor other financial losses.
- Advertising should not knowingly be placed in or adjacent to other media that dramatize or glamorize inappropriate use of the product.

⁷⁹In addition to the national standards provided by NASPL, many state lotteries have created their own guidelines for advertising. The advertising codes for 24 lottery states were forwarded to the NGISC on April 20, 1999.

⁸⁰See NASPL Advertising Standards, sent to NGISC by George Anderson, April 1999.

Tone:

- The lottery should not be promoted in derogation of nor as an alternative to employment, nor as a financial investment, nor a way to achieve financial security.
- Lottery advertisements should not be designed so as to imply urgency, should not make false promises, and should not present winning as the probable outcome.
- Advertising should not denigrate a person who does not buy a lottery ticket nor unduly praise a person who does buy a ticket.
- Advertising should emphasize the fun and entertainment aspect of playing lottery games and not imply a promise of winning.
- Advertising should not exhort the public to wager by directly or indirectly misrepresenting a person's chance of winning a prize.
- Advertising should not imply that lottery games are games of skill.

Minors:

- Persons depicted as lottery players in lottery advertising should not be, nor appear to be, under the legal purchase age.
- Age restriction should, at a minimum, be posted at the point of sale.
- Advertising should not appear in media directed primarily to those under the legal age.
- Lotteries should not be advertised at venues where the audience is reasonably and primarily expected to be below the legal purchase age.
- Advertising should not contain symbols nor language that are primarily intended to appeal to minors or those under the legal purchase age.
- The use of animation should be monitored to ensure that characters are not associated with animated characters on children's programs.
- Celebrity or other testimonials should not be used that would primarily appeal to persons under the legal purchase age.

Game information:

- Odds of winning must be readily available to the public and be clearly stated.
- Advertising should state alternative case and annuity values where reasonable and appropriate.

Beneficiaries:

- Lotteries should provide information regarding the use of lottery proceeds.
- Advertising should clearly denote where lottery proceeds go, avoiding statements that could be confusing or misinterpreted.

ATTACHMENT C

“BEST PRACTICES” PARADIGM FOR ADVERTISING AND MARKETING

In January 1999, the Board of Directors of the American Gaming Association approved Voluntary Guidelines for Casinos Marketing and Advertising. These voluntary guidelines apply to the advertising and marketing of gambling in casinos. While they are intended for casino gambling, these guidelines can serve as a model for all forms of gambling advertising.

The purpose of these voluntary guidelines is two-fold:

- 1) To ensure responsible and appropriate advertising and marketing of casinos to adults that reflects generally accepted contemporary standards; and
- 2) To avoid casino advertising and marketing materials⁸¹ that specifically appeal to children and minors.

GENERAL GUIDELINES

- All casino advertising and marketing will contain a responsible gambling slogan and the toll-free telephone number for those individuals in need of assistance.
- Casino advertising and marketing materials are intended for adults who are of legal age to gamble in casinos.
- Casinos advertising and marketing materials should reflect generally accepted contemporary standards of good taste.
- Casino advertising and marketing materials should not imply or suggest any illegal activity of any kind.
- Casino advertising and marketing materials shall strictly comply with all state and federal standards to not make false or misleading claims or exaggerated representations about gambling activity.
- Casino advertising and marketing materials should not contain claims or representations that individuals are guaranteed social, financial, or personal success.
- Casino advertising and marketing materials should not feature current collegiate athletes.

UNDERAGE GUIDELINES

- Casino advertising and marketing materials directed to or intended to appeal to persons below the legal age are prohibited.

⁸¹For the purposes of the AGA guidelines, the terms “advertising” and “marketing” are defined to include, but are not limited to, radio and television broadcast off the premises, print, direct mail, billboard, and Internet promotions.

- Casino advertising and marketing materials should not contain cartoon figures, symbols, celebrity/entertainer endorsements, and/or language designed to appeal specifically to children and minors.
- Casinos should not be advertised or promoted by anyone who is or appears to be below the legal age to participate in gambling activity. Models or actors should appear to be 25 years of age or older.
- Casino gambling should not be advertised or promoted in media specifically oriented to children and/or minors.
- Casino advertising and marketing should not be placed in media where most of the audience is reasonably expected to be below the legal age to participate in gambling activity.
- Where reasonably possible, casino advertising and marketing materials should not appear adjacent to or in close proximity to comics or other youth features.
- Casino gambling activity should not be advertised to or promoted at any U.S. venue where most of the audience is normally expected to be below the legal age to participate in gambling activity.
- Unless in response to a charitable request, clothing, toys, games, or other materials that appeal primarily to children or minors should not be given away at events where most of the audience is reasonably expected to be below the legal age to participate in gambling activity.
- Participation in casino gambling should not be promoted on college or university campuses or in college or university publications. This voluntary guideline is not intended to cover sponsorships sought by the institutions or their agents, legal employment ads or job fair participation, college scholarship offerings or other legitimate business, scholarship or employment relationships.
- Casino gambling activity should not be advertised or promoted on billboards or other outdoor displays that are adjacent to schools or other primarily youth-oriented locales.

