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# Lotteries and Public Policy in United States and Commonwealth Caribbean Law: Scrutinizing the Success of Lotteries as a Voluntary and “Painless” Tax

Stephen J. Leacock

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# Lotteries and Public Policy in United States and Commonwealth Caribbean Law: Scrutinizing the Success of Lotteries as a Voluntary and “Painless” Tax

Stephen J. Leacock\*

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“Nothing succeeds like success . . .”<sup>1</sup>

I. INTRODUCTION<sup>2</sup>

A government’s imposition of *involuntary*<sup>3</sup> taxes on its subjects can have an incendiary impact on its subjects’ reaction to such taxes.<sup>4</sup> This is the case in both the U.S.<sup>5</sup> as well as in the Commonwealth Caribbean.<sup>6</sup> It is therefore every politician’s quest

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

2. V.S. NAIPAUL, *THE MIMIC MEN* 152 (Andre Deutsch 1967) [hereinafter NAIPAUL: *THE MIMIC MEN*] (“Success is success; once it occurs *it explains itself*.”) (emphasis added); see also NICCOLO MACHIAVELLI, *THE PRINCE* 130 (George Bull Trans., Penguin Books 1961) (“Many have held and hold the opinion that *events are controlled by fortune* . . .”) (emphasis added).

3. See, e.g., *A Summary of the 1765 Stamp Act*, THE COLONIAL WILLIAMSBURG FOUNDATION (2012), <http://www.history.org/history/teaching/tchrsta.cfm> (“[W]hat made the [1765 Stamp Act] so offensive to the colonists was not so much its immediate cost but *the standard it seemed to set*. In the past, taxes and duties on colonial trade had always been viewed as measures to regulate commerce, not to raise money. The Stamp Act, however, was viewed as a direct attempt by England to *raise money in the colonies without the approval of the colonial legislatures*.”) (emphasis added); see also DAVID McCULLOUGH, 1776 at 11 (Simon & Schuster 2005) [hereinafter McCULLOUGH: 1776] (Indeed, the “seiz[ure of] the public revenue” was a critical condemnation of the American “rebellion” – that culminated in American Independence in 1776 – by King George III in his historical address at the opening of the British Parliament in October 1775). See also *id.* at 67-8 (“On . . . January 1, 1776, the first copies of the speech delivered by King George III at the opening of Parliament back in October . . . arrived with the ships from London. . . . The speech . . . [with i]ts charges of traitorous rebellion . . . ended any hope of reconciliation . . .”).

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

5. *Id.*

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

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for the holy grail of a perfect tax-substitute<sup>7</sup> source of governmental revenue.<sup>8</sup> As a result, lotteries<sup>9</sup> have become a modern-day Midas<sup>10</sup> for governmental use<sup>11</sup> in this regard. In fact, lotteries currently provide purportedly “painless”<sup>12</sup> tax-substitute<sup>13</sup> sources of revenue for governments<sup>14</sup> in the U.S.<sup>15</sup> as well as the Common-

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

8. See *Lotteries*, NAT’L GAMBLING IMPACT STUDY COMM’N, 1-17 at 11, <http://govinfo.library.unt.edu/ngisc/research/lotteries.html> (last revised Aug. 3, 1999) [hereinafter NGISC: *Lotteries*] (“The most important issue regarding lotteries is the ability of government at any level to manage [this] activity from which it profits. In an *anti-tax era*, many state governments have become dependent on “painless” lottery revenues . . .”) (emphasis added).

9. See, e.g., 38 AM. JUR. 2D *Gambling* § 7 (2013); see, e.g., *Lee v. City of Miami*, 163 So. 486, 488 (1935) (“[A] typical legislative definition [of a lottery is] [a] scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise, or by some other name.”) (citation omitted); see also Kathryn R.L. Rand, *Why State Law Matters: Indian Gaming and Intergovernmental Relations in Wisconsin*, in *THE NEW POLITICS OF INDIAN GAMBLING* 169 (Kenneth N. Hansen & Tracy A. Skopek eds., 2011) [hereinafter Hansen & Skopek] (“[L]ottery . . . mean[s] any game of chance involving the elements of prize, chance, and consideration.”) (citation omitted); see also CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 51 (Harvard Univ. Press 1989) [hereinafter CLOTFELTER & COOK: *SELLING HOPE*] (“The essence of a lottery is the purchase of a chance to win a prize, based on a random drawing.”).

10. See, e.g., EDITH HAMILTON, *MYTHOLOGY* 279 (New American Library 1969) [hereinafter HAMILTON: *MYTHOLOGY*] (“Midas wished that whatever he touched would turn into gold.”).

11. See CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 16 (“[G]ambling is a worldwide activity that is supported by . . . official sanction.”) (emphasis added).

12. See CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 215 (“[A]ccording to proponents, the lottery . . . is a “painless tax” because it is paid *only by the willing*.”) (emphasis added); see generally RICHARD MCGOWAN, *STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE* 4 (Praeger 1994) [hereinafter MCGOWAN].

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

14. See NGISC: *Lotteries*, *supra* note 8, at 1 (“[In the U.S.] lotteries rank *first* among the various forms of gambling in terms of gross revenues: total lottery sales in 1996 totaled \$42.9 billion. 1982 gross revenues were \$4 billion, representing an increase of 950% over the preceding 15 years, 1982-1996.”) (emphasis added) (footnotes omitted).

15. See generally Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37 (2012) [hereinafter Leacock: *Lotteries and Public Policy*]; see also CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 3 (“[T]oday three-fourths of the U.S. population lives in states where lotteries are not only legal

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wealth Caribbean.<sup>16</sup> After all, lotteries constitute a voluntary<sup>17</sup> rather than an involuntary tax.<sup>18</sup> Moreover, winning lottery-jackpots may provide human drama for both the winners themselves as well as the general public at large, “and drama was discovered to be a necessary human nutriment.”<sup>19</sup>

Actually, in the U.S. lotteries serve as present day tax-substitute financial vectors.<sup>20</sup> In the Commonwealth Caribbean, the pace is picking up as well.<sup>21</sup> Unquestionably, public playing of lotteries is widespread in the U.S.<sup>22</sup> and in the Commonwealth Caribbean too.<sup>23</sup> Lottery playing is both tena-

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but provided by state government itself. One after the other *states have embraced this form of public finance . . .*” (emphasis added).

16. See, e.g., ISLANDS OF THE COMMONWEALTH CARIBBEAN, A REGIONAL STUDY (Sandra W. Meditz & Dennis M. Hanratty eds., 1987), available at <http://country.studies.us/caribbean-islands/2.htm> (“The Commonwealth Caribbean is the term applied to the English-speaking islands in the Caribbean and the mainland nations of Belize (formerly British Honduras) and Guyana (formerly British Guiana) that once constituted the Caribbean portion of the British Empire.”); see also Edward A. Laing, *Insularity and Success*, 4 CARIB. L.B. 6 (1999) (“Turning now to economic concerns, most of our [Commonwealth Caribbean] countries are middle income developing countries.”); see also William C. Gilmore, *The Associated States of the Commonwealth Caribbean: The Constitutions and the Individual*, 11 LAW. AM. 1, 1 n.3 (1979). Typical abbreviations used for these territories are: Antigua (Ant.), The Bahamas (Bah.), Barbados (Bds.), Belize (Blz.), Bermuda (Berm.), the Cayman Islands (Cay.), Dominica (Dom.), Grenada (Gren.), Guyana (Guy.), Jamaica (Jam.), Montserrat (Mont), St. Kitts, Nevis, Anguilla (KNA), St. Lucia (St.L.), St. Vincent (St.V.), Trinidad & Tobago (TT), the Virgin Islands (Virgs.)(British). See also Stephen J. Leacock, *Essentials of Investor Protection in the Commonwealth Caribbean and the United States*, 6 LAW. AM. 662, 686 n.2 (1974).

17. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 215. .

18. See THE COLONIAL WILLIAMSBURG FOUNDATION, *supra* note 3.

19. See NAIPAUL: THE MIMIC MEN, *supra* note 2, at 153.

20. See Duncan, Raut & Henchman, *supra* note 13.

21. See, e.g., *History*, THE BARBADOS LOTTERY, <http://www.mybarbadoslottery.com/pages/history> (last visited Sept. 17, 2013) (“In 2005, GTECH introduced its newly-developed Pick ‘n Play games, which bring visibility to new and existing online games. Today, more than 50 other gaming options have been developed for our growing customer base.”).

22. See NGISC: *Lotteries*, *supra* note 8, at 1 (“[Lottery playing] is the *most widespread form of gambling in the U.S.*: lotteries operate in 37 states and the District of Columbia. It is the *only form of commercial gambling which a majority of adults report having played.*”) (emphasis added); see also *id.* (“[P]laying the lottery, is . . . potentially addictive . . .”). Actually, lottery playing may be almost on par with America’s almost addictive attraction to another activity (*i.e.* alcohol ingestion); 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).

23. See, e.g., *About Us*, BETTING, GAMING & LOTTERIES COMMISSION, <http://www.bglc.gov.jm/about/> (last modified Mar. 2009) (“The Betting Gaming & Lotteries Commission is a statutory body established in 1975. under the provisions of the Betting Gaming & Lotteries Act to regulate and control the operations of betting and gaming and *the conduct of lotteries in the island . . .*”) (emphasis added); see BETTING,

cious<sup>24</sup> and extraordinarily successful financially in the U.S.<sup>25</sup> and also in the Commonwealth Caribbean.<sup>26</sup> As a result, both the U.S.<sup>27</sup> and Commonwealth Caribbean<sup>28</sup> have enthusiastically

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GAMING & LOTTERIES COMMISSION, <http://www.bglc.gov.jm/about/history.html> (last modified Mar. 2009) (“*It would be wishful thinking to imagine that Jamaica will be immune to the gaming fever, which is taking place in [the U.S.]. The [Jamaica Betting, Gaming & Lotteries] Commission has been receiving numerous applications from U.S.-based entities for lottery and gaming licences to operate in Jamaica.*”) (emphasis added); see, e.g., V.S. NAIPAUL, *THE MIDDLE PASSAGE* 50 (Andre Deutsch 1962) (“In . . . 1959 . . . in Trinidad . . . with more money circulating, gambling has become universal. It is respectable; it is almost an industry . . .”).

24. This tenacity may be a function of a certain human frailty; see, e.g., *State ex rel. Neb. State Bar Ass’n v. Cook*, 232 N.W.2d 120, 131 (Neb. 1975) (“[T]he self-delusion to which even *the best of men are sometimes susceptible.*”) (emphasis added). The tenacity may also be a function of “magical thinking.” See NGISC: *Lotteries*, *supra* note 8, at 8. It may also be the case that the pain of repetitively losing - when playing lotteries - is a necessary precondition to *escaping* the tenacity of self-delusion; see, e.g., DAVID VISCOTT, *EMOTIONAL RESILIENCE* 80 (Harmony Books 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); see also NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT: PROBLEM & PATHOLOGICAL GAMBLING, Ch. 4 at 4-2, <http://govinfo.library.unt.edu/ngisc/reports/4.pdf> (last revised Aug. 3, 1999) [hereinafter NGISC: FINAL REPORT].

25. See NGISC: *Lotteries*, *supra* note 8, 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. 1982 gross revenues were \$4 billion, representing an increase of 950% over the preceding 15 years, 1982-1996.”) (emphasis added) (citation omitted).

26. See, e.g., *Gov’t Continues to Lapse on Deposit of Lotto Funds*, STARBOEKNEWS.COM (Apr. 14, 2010), <http://www.stabroeknews.com/2010/archives/04/14/govt-continues-to-lapse-on-deposit-of-lotto-funds> (“[F]rom 1996 to 2008, ‘amounts totaling \$3.283 billion were received from the Guyana Lotteries Company and deposited into account No. 3119.’ At the end of 2008, the balance on this account was \$186.508 million, which meant that the government has so far spent \$3.097 billion of the money they received during the period in question.”); see also *Lotteries Money Paid into Consolidated Fund*, STARBOEKNEWS.COM (Mar. 14, 2007), <http://www.stabroeknews.com/2007/archives/03/14/lotteries-money-paid-into-consolidated-fund/> (“A sum of roughly \$12M from the Guyana Lotteries Company was deposited in the Consolidated Fund in December.”); see, e.g., *Barbados Lottery*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Barbados\\_lottery](http://en.wikipedia.org/wiki/Barbados_lottery) (last modified Apr. 16, 2012, 8:10 PM) (“The Barbados lottery is the national lottery in Barbados. A high percentage of proceeds of the Lottery’s revenue goes to support Beneficiary organizations . . . in accordance with its mandate[.]”); see also *History of Lottery*, THE CARIBBEAN LOTTERY, <http://www.the.caribbeanlottery.com/pages/history> (last visited Sept. 18, 2013) (“Today, more than 50 other gaming options have been developed for our growing customer base.”); see also BETTING, GAMING & LOTTERIES COMMISSION, *supra* note 23.

27. See NGISC: *Lotteries*, *supra* note 8, at 1.

28. See *Gov’t Continues to Lapse on Deposit of Lotto Funds*, *supra* note 26. This is not to say that the Commonwealth Caribbean consists of “mimic men of the New World . . .”; see NAIPAUL: *THE MIMIC MEN*, *supra* note 2, at 175.

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embraced this financial evolution in lottery use.<sup>29</sup>

Additionally, in the U.S., public policy<sup>30</sup> has played a transcendent role in both the state<sup>31</sup> and federal judiciary's<sup>32</sup> fidelity to constitutional mandates requiring scrupulous adherence to valid legal use of state and federal judicial machinery.<sup>33</sup> The Commonwealth Caribbean's experience in creating, articulating and applying public policy to lotteries is more truncated<sup>34</sup> than the U.S. experience, because the U.S. earned its independence from Great Britain by force of arms in 1776.<sup>35</sup> The U.S. therefore has almost

29. See NGISC: *Lotteries*, *supra* note 8.

30. See *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994) ("The existence of . . . public policy may be discerned by the . . . judiciary based on sources such as the Constitutions of [the pertinent State] and the United States, legislation, administrative rules and regulations, and the common law."); see, e.g., Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 25, 59-60 (Fall 1993) ("[T]he very nature of the judicial function and the obligation of the judges [are] to decide *what is just*, not to choose the best [politically popular] policy nor the course of action *most desired by the public*." (emphasis added); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (1963) [hereinafter CARDOZO]; see also Hon. Robert F. Brachtenbach, *Public Policy in Judicial Decisions*, 21 GONZ. L. REV. 1 (1985/86) [hereinafter Brachtenbach]; see also W.S.M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207 (1922).

31. See *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994); see also *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 421 (1993) ("While lotteries have existed in this country since its founding, *States* have long viewed them as a *hazard to their citizens and to the public interest*, and have long engaged in legislative efforts to control this form of gambling." (emphasis added); see also Leacock: *Lotteries and Public Policy*, *supra* note 15.

32. To the degree permitted by the U.S. Constitution. See *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 421 (1993) ("Congress has, since the early 19th century, *sought to assist the States* in controlling lotteries." (emphasis added).

33. See, e.g., *Pearsall v. Alexander*, 572 A.2d 113, 116 (D.C. Cir. 1990) ("[P]ublic policy . . . is to deny use of judicial process to those who would undermine laws meant to prevent gambling by using the courts to collect on gambling debts." (emphasis added) (citations omitted); see also *infra* note 516; see, e.g., Hansen & Skopek, *supra* note 9, at 165 ("State courts have been asked to answer important questions related to separation of powers and other dimensions of state constitutional law and public policy.").

34. See, e.g., ISLANDS OF THE COMMONWEALTH CARIBBEAN, A REGIONAL STUDY 387 (Sandra W. Meditz & Dennis M. Hanratty eds., 1987), available at <http://countrystudies.us/caribbean-islands/83.htm> ("British control over Barbados lasted from 1625 until independence in 1966."); see, e.g., ERIC WILLIAMS, *DOCUMENTS OF WEST INDIAN HISTORY VOL. I*, 1492 - 1655, 300-304 (PNM P1963) (It appears that early efforts made by Lord Willoughby and the Legislature of Barbados to procure independence in 1651 from Great Britain and later efforts by others in 1652 to ensure that two representatives from the island should be chosen to sit and vote in the English Parliament did not come to fruition.).

35. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (Simon & Schuster 1978) ("In 1776, the colonies declared themselves independent. The bitter war that followed *ended in an American victory*." (emphasis added); see also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 146 (Harvard Univ. Press 2003)

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two centuries of additional judicial experience in interpreting and articulating the application of public policy to lotteries in this regard.<sup>36</sup>

It is therefore quite rational that the U.S. judicial experience in shaping its public policy would also serve as an emphatic blueprint for emulation by the Commonwealth Caribbean territories.<sup>37</sup> The U.S. experience in developing and applying public policy concepts and principles to lotteries should and would arguably be followed by the courts in the Commonwealth Caribbean wherever rational and convincing to do so.<sup>38</sup>

Indeed, public policy<sup>39</sup> is fundamental to common law<sup>40</sup> jurisdictions as a whole.<sup>41</sup> However, it is a hearty challenge for the judiciary to interpret and apply it in any given case.<sup>42</sup> This has triggered its analogy to an “unruly horse.”<sup>43</sup> Its nature<sup>44</sup> is cer-

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(“Distance and estrangement from Britain had fostered self-government . . . democratic republicanism *emerged as the default solution* to the problem of how America would be governed after the break with Britain.”) (emphasis added).

36. The Commonwealth Caribbean territories only achieved Independence, by agreement and negotiation, from Great Britain beginning with Jamaica and Trinidad and Tobago in 1962; see, e.g., Francis R. Alexis, *The Basis of Judicial Review of Legislation in the New Commonwealth and the United States of America: A Comparative Analysis*, 7 LAW. AM. 567, 591 n.2 (1975). Nevertheless, see David Simmons, C.J. of Barbados, *Aspects of Judicial Independence and Accountability – Lessons for the Commonwealth Caribbean?* 33 Commonwealth L.B. 657, 670 (2007) (“It is for the judiciary and the legal profession to guard the independence of the judiciary jealously . . .”).

37. It has done so before in another context; see, e.g., Stephen J. Leacock, *Public Utility Regulation in a Developing Country*, 8 LAW. AM. 338, 339 (1976) [hereinafter Leacock: *Public Utility Regulation*] (“In search of guidance the [Public Utilities] Board looked to United States . . . utility regulation decisions and drew on these in coming to its own conclusions.”) (emphasis added) (footnotes omitted).

38. See Leacock: *Public Utility Regulation*, *supra* note 37.

39. See *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994).

40. See *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (Mass. 1807) (“[T]he common law of *England* . . . and . . . the statutes . . . amending or altering it . . . may be considered as forming the body of the common law of Massachusetts [subject to] alterations by . . . provincial and state legislatures, and by the provisions of [the *Massachusetts*] constitution.”) (emphasis in original). The common law of each of the forty-nine common law jurisdictions in the U.S. (Louisiana law is significantly impacted by Civil Law) may be defined similarly.

41. See Brachtenbach, *supra* note 30, at 1 (“For centuries, the principle of public policy has played a vital role in dispute resolution.”).

42. See *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 672-73 (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.”) (emphasis added).

43. *Id.*; see also *Penunuri v. Sundance Partners, Ltd.*, 2011 UT App 183, ¶15, 257 P.3d 1049, 1053.

44. See *Boston & A.R. Co. v. Mercantile Trust & Deposit Co.*, 34 A. 778, 785 (Md.

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tainly “protean.”<sup>45</sup> Therefore, its categorization and subsequent application in any given case when contrasted with its use in any other case can display almost infinite change in the hands of the judiciary.<sup>46</sup>

Of course, these characteristics may seem to suggest that public policy is amorphous,<sup>47</sup> which is not necessarily the case. The reality is that public policy principles are most essentially a function of the state law of each of the fifty individual states of the U.S.,<sup>48</sup> rather than being a monopoly of Federal law. In this sense, each one of the fifty states is indeed the “master of its own house.”<sup>49</sup> Arguably, the same observation is valid for the Commonwealth Caribbean states as well.<sup>50</sup> In the arena of public policy, each state must navigate the interplay between the judiciary and the legislature as two of the three coequal branches of government.<sup>51</sup>

However, the search for answers to the question of the degree

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1896) (“No *exact definition* of public policy has ever been given or can be found.”) (emphasis added); *see also* Brachtenbach, *supra* note 30, at 2

45. *See Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶10, 175 P.3d 560, 563 (“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); *see also* HAMILTON: MYTHOLOGY, *supra* note 10, at 38 (“Proteus . . . had the power . . . of changing his shape at will.”).

46. *See* Brachtenbach, *supra* note 30, at 17 (“Courts need to [more] *sharply define the policy being invoked*: What is the *precise principle* upon which the policy is based?”) (emphasis added).

47. *See Penunuri*, 2011 UT App 183, ¶151; *see also* Brachtenbach, *supra* note 30, at 17; 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §12.2 (4th ed. 2013) (“[P]ublic policy is, *by its nature, variable with time and place* and, except in broad pronouncements, relies little on stare decisis.”) (citation omitted) (emphasis added).

48. *See* Brachtenbach, *supra* note 30 at 2; *see also* Meyer v. Hawkinson, 2001 ND 78, ¶56, 626 N.W.2d 262, 275 (Sandstrom, J, dissenting) (“[A state’s] public policy applies *neither extraterritorially, nor . . . internationally*.”) (emphasis added).

49. *See, e.g.*, Percy H. Winfield, *Public Policy in English Common Law*, 42 HARV. L. REV. 70, 102 (1928-29) (“It has been urged with some acidity that *a state legislature is a better judge of its own “public policy”* than the Supreme Court is likely to be.”) (emphasis added). As such, public policy in the Commonwealth Caribbean would be the purview of *each individual territory* of the Commonwealth Caribbean.

50. *See, e.g.*, Ezra Alleyne, *The Developing Framework of the CSME: Two Legal Issues Considered*, 11 ILSA J. INT’L & COMP. L. 49, 56 (2004) [hereinafter: Alleyne: Developing Framework] (referring in a different context to the desire of the Commonwealth Caribbean’s judiciary “to chart its own course in jurisprudence.”); *see also* Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 226 (2005) (assessing Caribbean judicial aspirations in a different context as a “quest for self-determination.”).

51. The executive is the third branch. *See* U.S. CONST. art. II.

of social and economic impact of legalized gambling on states is not an easy one.<sup>52</sup> In the U.S., widespread public playing of lotteries led to the creation by Congress<sup>53</sup> of the National Gambling Impact Study Commission (NGISC).<sup>54</sup> This Commission referred to the role of “magical thinking,”<sup>55</sup> cited by two distinguished commentators in published work,<sup>56</sup> in increasing and intensifying lottery playing.<sup>57</sup> The two commentators seemed to have suggested that through advertising, lottery advertisers seek to “target” this “magical thinking”<sup>58</sup> in efforts to create and stimulate ever-increasing demand for lottery-playing.<sup>59</sup> Arguably, this “magical thinking”<sup>60</sup> launches and exacerbates beliefs in the power of fortune to exert control over events in human life.<sup>61</sup> Fortune’s *perceived* control over events may be confirmed by the sheer numbers of the present-day lottery-playing public.<sup>62</sup>

With respect to the legal status of lotteries in any given state in the U.S., a number of alternative situations may exist. For

52. See NGISC: *Lotteries*, *supra* note 8, at 3 (“[T]he state faces an inherent conflict in its desire to increase revenues and its duty to protect the public welfare.”).

53. See National Gambling Impact Study Commission, Message From the Chair, <http://govinfo.library.unt.edu/ngisc/news/chairman.html> (last visited September 21, 2013) [hereinafter NGISC: Message From the Chair] (“The Commission was created by the 104th Congress through Public Law 104169 . . . signed by President Clinton on August 3, 1996. . . Specifically, the Commission [was] tasked with producing a comprehensive and factual study of the social and economic impacts of legalized gambling on states, tribes, communities and individuals.”).

54. See National Gambling Impact Study Commission, <http://govinfo.library.unt.edu/ngisc/index.html> (last visited September 21, 2013) [hereinafter NGISC]; see, e.g., *supra* note 23 (demonstrating that in Jamaica, the legislature moved beyond study and created the Betting Gaming & Lotteries Commission in 1975 to regulate and control lotteries in Jamaica).

55. See NGISC: *Lotteries*, *supra* note 8 (“[L]ottery play depends on encouraging people’s ‘magical thinking’. . . .”) (citation omitted); see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 71 (“[P]art of the answer to *why* people play [lotteries] is suggested by evidence on *how* they play . . . . [T]he evidence on how they play suggests that ancient superstitions and fallacious beliefs about numbers are still thriving in this modern age . . . . [L]ottery agencies do nothing to educate the public on these matters; if anything they seek to encourage magical thinking.”)

56. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 71.

57. *Id.*

58. *Id.*

59. *Id.* at 189.

60. *Id.* at 71. .

61. See MACHIAVELLI, *supra* note 2, at 13.

62. See NGISC: *Lotteries*, *supra* note 8 (“[The lottery] is the only form of commercial gambling which a majority of adults report having played.”); see also Charles T. Clotfelter, Philip J. Cook, Julie A. Edell, & Marian Moore, *State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission*, 1, 3 (Duke Univ. 1999), <http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf> [hereinafter CLOTFELTER, COOK, EDELL & MOORE].

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example, the constitution of a particular state may be silent with respect to lotteries. Additionally, that particular state's statutes may also be silent with respect to lotteries.<sup>63</sup> Another state's constitution *alone* may prohibit lotteries.<sup>64</sup> Yet another state's constitution may be silent on lotteries, but the pertinent state may have enacted a *statute* prohibiting lotteries. Finally, *both* a state's constitution *and* a state statute may prohibit lotteries.<sup>65</sup>

These alternatives demonstrate that in the U.S., gambling has been universally frowned upon.<sup>66</sup> Outside of the U.S., "[a]s a result of its unsavory reputation, restrictions on gambling have been adopted by practically every country in the world throughout history."<sup>67</sup> More specifically, with regard to lotteries, "for the first six decades of [the twentieth] century every [American] state prohibited lotteries."<sup>68</sup> Public policy's disfavor of gambling<sup>69</sup> represents the common law's fundamental principle that the judiciary will not enforce lottery agreements.<sup>70</sup> This is the case because lottery agreements are often illegal<sup>71</sup> and therefore the parties to such agreements may be equally at fault in making such agreements.<sup>72</sup> At common law, when parties have acted illegally and additionally, such parties are equally at fault<sup>73</sup>—as parties to a

63. See e.g., *Stone v. State of Mississippi*, 101 U.S. 814, 818-19 (1879).

64. *Id.*; see also Miss. Code Ann. § 97-33-31 (West 2010).

65. See *Youngblood v. Bailey*, 459 So. 2d 855, 858-859 (Ala.1984); see also *Troy Amusement Co. v. Attenweiler*, 28 N.E.2d 207, 210-211 (Ohio Ct. App. 1940) (citing Ohio Const. Section 6 of Art. XV and Section 13063 of the Ohio General Code).

66. See, e.g., *Pritchett v. Insurance Co. of North America*, 3 Yeates 458, 464 (Pa. 1803) ("*Every species of gaming contracts . . . are reprobated both by our law and usage.*") (emphasis added); see also *Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y. App. Div. 1996); 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, 90 (2002) [hereinafter: Kelly].

67. See McGowan, *supra* note 12, at 4; see also BETTING, GAMING & LOTTERIES COMMISSION, <http://www.bglc.gov.jm/about/history.html> (last modified Mar. 2009), *supra* note 23 ("[In Jamaica] [t]he Gambling Act of 1899 defined 'unlawful gambling'. . . There were few places in Jamaica where public betting could *legally* take place.") (emphasis added).

68. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 235.

69. *Irwin v. Williar*, 110 U.S. 499, 510 (1884) (noting that "in *this country*, all wagering contracts are held to be illegal and void as against public policy.") (citation omitted) (emphasis added).

70. *Id.*

71. *Id.*

72. *Id.*

73. When parties have both acted illegally and are both at fault they can be said to be in *pari delicto*. See *Karel v. JRCK Corp.*, No. 304415, 2012 WL 1648871, at \*2 (Mich. Ct. App. May 10, 2012) ("[A]s between parties in *pari delicto*, [which means] equally wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.").

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lottery agreement often are—a court will leave such parties to a lottery agreement where it finds them.<sup>74</sup>

Historically, in the U.S., the legality of lotteries has been pendulum-like.<sup>75</sup> Successively, there has been state legalization<sup>76</sup> followed by state prohibition of public lottery play,<sup>77</sup> followed by a return to legality.<sup>78</sup> The Commonwealth Caribbean experience is not as extensive historically, because independence is a much more recent legal and political phenomenon there.<sup>79</sup> Nevertheless, in the Commonwealth Caribbean, the almost irresistible lure of the apparent impulse to gamble is alive and well too.<sup>80</sup> With respect to the U.S., the modern era consists of a *return* to widespread legality.<sup>81</sup> The modern era in the Commonwealth Caribbean experience has been quite similar to that of the U.S.<sup>82</sup> In contrast to the legislative pendulum-like legality/illegality swings in the U.S., the judiciary's application of public policy to gambling *per se* has actually remained quite stable.<sup>83</sup>

74. *People v. Rosen*, 78 P.2d 727, 728 (Cal. 1938).

75. *See infra* Part VI; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 43.

76. CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 36 (“1832 [was] apparently one of the peak years for lottery play . . .”).

77. *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* DENISE VON HERRMANN, THE BIG GAMBLE 121 (2002) [hereinafter HERRMAN].

78. *See* NGISC: *Lotteries*, *supra* note 8, at 2 (“Currently, 37 states and the District of Columbia have operating lotteries.”). As of 2011 this number had risen to 40. *See* GALE, STATE LOTTERIES, 0020 SURVEYS 21 (West 2011) (“Forty states permit lotteries.”).

79. *See* Alexis, *supra* note 36.

80. *See e.g.* GOVERNMENT OF JAMAICA BETTING GAMING & LOTTERIES COMMISSION: OUR HISTORY, *supra* note 23 (“[In Jamaica] [i]t was [therefore] *inevitable that illegal gambling would flourish* in an environment where opportunities for gambling were few and beyond the reach of most persons.”) (emphasis added).

81. *See* NGISC: *Lotteries*, *supra* note 8, at 2 (“Currently, 37 states and the District of Columbia have operating lotteries.”). As of 2011 this number had risen to 40. *See* GALE, STATE LOTTERIES, 0020 SURVEYS 21 (West 2011) (“Forty states permit lotteries.”).

82. *See, e.g.*, Government of Jamaica Betting, Gaming & Lotteries Commission, *Our History*, *supra* note 23 (“Technological advances in radio, and telephone *brought the gambling activities of Great Britain and the U.S.A. closer to Jamaica* . . . . The norms and attitudes of the early 1900s could no longer be expected to remain unchanged in the face of these exposures.”) (emphasis added), *available at* <http://www.bglc.gov.jm/about/history.html>.

83. *See, e.g.*, Stanley v. California Lottery Comm., No. C041034, 2003 WL 22026611, 19 (Cal. Ct. App. 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

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An almost irreconcilable contradiction has therefore continued to coexist.<sup>84</sup> It consists of—on the one hand—the judiciary’s almost intractable opposition to perceiving gambling generally as a viable legal pursuit.<sup>85</sup> On the other,<sup>86</sup> is the legislature’s intensified resort to the raising of revenue from lotteries and the use of this revenue in order to finance public expenditures as a substitute<sup>87</sup> for involuntary taxation<sup>88</sup> and its consequences.<sup>89</sup> Nevertheless, as this article proposes,<sup>90</sup> there exists a seemingly tolerable intellectual coexistence between the legislative and judicial approaches to lotteries in the U.S.,<sup>91</sup> which the Commonwealth Caribbean arguably should emulate.<sup>92</sup>

This article explores the remarkable success of lotteries as a voluntary and “painless” tax in the U.S. and the Commonwealth Caribbean.<sup>93</sup> It also discusses the common law principles of public policy applicable to lotteries in the U.S.<sup>94</sup> and the Commonwealth

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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 (N.D. 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).

84. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 11 (“There exists, in short, an *undeniable* Jekyll-and-Hyde quality to state lotteries.”) (emphasis added). *See* NGISC: Lotteries, *supra* note 8, at 12 (“[L]ottery officials are . . . not free agents operating on their own; they must respond to directions from state officials, which often contain conflicting goals . . . . This *schizophrenic approach can lead to many problems*.”) (emphasis added).

85. *See* NGISC: Lotteries, *supra* note 8, at 12 (“It arises in part 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.”).

86. *See id.* (“On the other is the wide acceptance of gambling *in moderation* as an innocent form of amusement.”) (emphasis added).

87. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 11 (“In legalizing a *widely popular* form of gambling, the states are accommodating consumer preferences.”) (emphasis added).

88. *See* A Summary of the 1765 Stamp Act, *supra* note 3; DAVID McCULLOUGH, JOHN ADAMS, *supra* note 4; ERIC WILLIAMS, CAPITALISM AND SLAVERY, *supra* note 6.

89. *See supra* note 88, all of the sources cited therein.

90. *See infra* section X and the discussion therein.

91. *See infra* section X and the discussion therein.

92. *See, e.g.,* Leacock, *supra* note 37, at 39 (discussing how the Board looked to United States utility regulation decisions in interpreting the Public Utilities Act).

93. *See generally* NGISC: Lotteries, *supra* note 8 (“The principal argument used 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.”).

94. *See* Clotfelter, *supra* note 62, at 1 (“Until 1964, lotteries were illegal in every

Caribbean, proposing that American public policy approaches will be embraced and emulated by the Commonwealth Caribbean territories.<sup>95</sup> Part I is the Introduction. Part II discusses lotteries as prospective tax vehicles. Part III analyzes how public policy is conceived and enunciated by the U.S. judiciary and how it will be emulated by the Commonwealth Caribbean territories on a case by case basis as the need arises. Part III also analyzes the origins of public policy as it is applied to lotteries in the U.S. and will probably be applied in the Commonwealth Caribbean as well. It explains that the U.S. fracture from Great Britain preceded the Commonwealth Caribbean's later separation from Great Britain by almost two centuries. This section anticipates the Commonwealth Caribbean's embrace and emulation of the U.S. experience now that freedom from Great Britain has been attained. Part IV explores the evolution from past to present of legislative statutory enactments applicable to lotteries in U.S. law and refers to the Commonwealth Caribbean's engrafting of these U.S. solutions onto modern Commonwealth Caribbean legislative measures.

Part V discusses instances where the judiciary may decline to nullify lottery agreements in some factual settings. Part VI chronicles the history and legal significance of lotteries in U.S. and Commonwealth Caribbean law and highlights the tax-substitute dependency on lotteries in the U.S. Part VII focuses on the impact of federal law on lotteries in the U.S., which has no counterpart in the Commonwealth Caribbean. Part VIII discusses the evolution of public policy relating to lotteries in the U.S. and assesses the judiciary's success both in shaping public policy and applying it to lotteries in the U.S. It also discusses the prospects that the Commonwealth Caribbean will emulate and fully embrace the U.S. judiciary's approach. Part IX adds aspects of federal law to the lottery law discussion.

Part X examines the legal impact of tax-substitution objectives on legislative policies leading to statutory changes in the law relating to lotteries and assesses the impact that these changes have on public policy as enunciated by the judiciary earlier in the article. Part XI compares and contrasts the approaches of courts that have nullified agreements pertaining to lotteries—on the one hand—and courts that have declined to nullify such agreements in appropriate circumstances—on the other. It also assesses

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state in this country.”). This reality sets the stage for post-1964 legal developments relating to public policy.

95. See *supra* notes 37, 38, all of the sources cited therein.

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future prospects with regard to the judiciary's application of public policy principles to agreements implicating lotteries. It then discusses the influence of tax factors on public policy and on lottery law in the U.S. and the Commonwealth Caribbean in light of the success of the lottery-proliferation phenomenon as a voluntary and "painless tax." Part XII is the Conclusion.

II. LOTTERIES AS PROSPECTIVE TAX VEHICLES<sup>96</sup>

The legal definition of a lottery is one of substance rather than terminology.<sup>97</sup> However, the purpose of a lottery is enigmatic.<sup>98</sup> In the U.S., two selling points for lotteries tend to predominate.<sup>99</sup> Indeed, in essentially every case where states have adopted lotteries, potential revenues and the beneficial societal deployment of those revenues have been the two principal selling points.<sup>100</sup> Thomas Jefferson hardly ranks as a lottery-supporter; nevertheless, he may have perceived them as potentially a very potent tax-substitute.<sup>101</sup> It is certainly irrefutable that payments—for the purchase of lottery tickets—are made *voluntarily* by those who *choose* to play lotteries.<sup>102</sup>

Opponents of lotteries have also tended to embrace the categorization of lotteries as taxation since this categorization tends to suit their purposes.<sup>103</sup> Lottery-opponents have also claimed that—based upon the conventional criteria for judging taxes—lotteries have to be perceived in a negative light when compared to conven-

96. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 215 ("Revenue is the *raison d'être* of contemporary state lotteries."); see also *Did You Know*, N. AM. ASS'N OF STATE & PROVINCIAL LOTTERIES, <http://www.naspl.org/index.cfm?fuseaction=content&menuid=14&pageid=1020> (last visited Sep. 19, 2013) ("During fiscal year 2010 . . . U.S. lottery sales totaled \$58 billion . . .").

97. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 51 ("The essence of a lottery is the purchase of a chance to win a prize, based on a random drawing."); see, e.g. WILLIAM SHAKESPEARE, ROMEO AND JULIET 22 ("What's in a name? That which we call a rose [b]y any other name would smell as sweet . . .").

98. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 249 ("[T]he basic question is, what is the purpose of a lottery? Should it be evaluated *primarily on the basis of revenue performance* . . . or should other considerations be given weight?") (emphasis added).

99. *Id.* at 215.

100. *Id.*; see also NGISC: *Lotteries*, *supra* note 8, at 2 ("[P]layers *voluntarily* spending their money (as opposed to the general public being taxed) for the *benefit of the public good*." ) (emphasis added).

101. See *id.*; see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 299.

102. *Id.*

103. *Id.* at 215 ("[L]otteries are said to be a relatively inefficient source of revenue owing to the high ratio of administrative costs per dollar raised.").

tional taxes.<sup>104</sup> The conventional criteria used for the comparison of one tax with another seem to differ fundamentally from a simple assessment of the comparative profitability of lotteries as a form of gambling.<sup>105</sup>

Furthermore, opponents assert that lotteries are regressive,<sup>106</sup> “preying on the poor,” whether wittingly, by marketing heavily in poor areas, or unwittingly, simply by offering a product that appeals to poor people.<sup>107</sup> However, the National Gambling Impact Study Commission does not seem to be as adamant<sup>108</sup> as a Maryland state senator—cited as an opponent of the lottery—seems to be.<sup>109</sup> The Commission made the effort to be balanced in its report and referred to a definition used by economists relating to the nature of a regressive tax.<sup>110</sup> The Commission then indicated that one empirical study concluded<sup>111</sup> that “the poor partici-

104. *Id.* (“[This is] because of their alleged instability and limited revenue potential.”).

105. *See, e.g.* NGISC: *Lotteries*, *supra* note 8, at 1 (“Lotteries have the highest profit rates in gambling in the U.S. . . .”) (emphasis added).

106. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 215 (“[T]he charge that has stung lottery proponents the hardest . . . is that lotteries are regressive.”); *see also* NGISC: *Lotteries*, *supra* note 8, at 9 (“[There] is the widespread conception that the lottery is a regressive tax. . . .”).

107. *Id.* *See also* MCGOWAN, *supra* note 12, at 43-44 (“[T]hose who oppose . . . lotteries . . . usually invoke the argument that lotteries . . . prey on the poor. . . . Therefore, it is in the best interest of society that lotteries . . . be outlawed. They would maintain that society cannot permit any activity that uses addiction of some segment even if the rest of society might derive benefit.”) (emphasis added); *see also* DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENTS AND THE TAXING OF DREAMS 114 (2000) [hereinafter: NIBERT] (“The [NGISC] supported critics’ contentions that state lotteries “knowingly target their poorest citizens, employing aggressive and misleading advertising to induce those individuals to gamble away their limited means.”) (citations omitted) (emphasis added).

108. *See* NGISC: *Lotteries*, *supra* note 8, at 10 (“[The] assumption [that lotteries are regressive] . . . may not be accurate. Much depends on the definition of ‘regressive.’”) (emphasis added).

109. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 215 (“[O]ne Maryland state senator who opposed the lottery [stated]: ‘Lotteries place an inordinate burden on the poor to finance state government. But the poor are willing suckers, and it’s hard to defend a group that doesn’t want to be defended.’”) (citation omitted).

110. *See* NGISC: *Lotteries*, *supra* note 8, at 10 (“Economists define a regressive tax as one that takes an increasing percentage of income as income falls. In that sense, given the fact that a lottery ticket is the same price to all, regardless of income, it is by definition regressive . . . . But this simple approach does not capture such variables as frequency of play and the amounts of money generated by the lottery by income group. . . . The data suggests (although [it] is far from conclusive) that the bulk of lotto players and revenues come from middle-income neighborhoods, and that far fewer proportionally come from either high-income or low-income areas.”).

111. *Id.* (citing two nationally prominent commentators’ reference to an empirical study done in the 1970s by John Koza).

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pate in the state lottery games at levels disproportionately less than their percentage of the population.”<sup>112</sup>

Other criticisms of lotteries have been voiced as well.<sup>113</sup> In the opinion of one commentator, lotteries are not an efficient way to raise money for government at all.<sup>114</sup> This is additional to the charge that lotteries are arguably regressive taxes,<sup>115</sup> even if they are “voluntary” as Thomas Jefferson has allegedly suggested.<sup>116</sup> The National Gambling Impact Study Commission was created by Congress in 1996<sup>117</sup> and included the Chairman of Nevada’s State Gaming Control Board as one of the nine Commissioners.<sup>118</sup> The Commission was assigned specific tasks by the pertinent legislation creating it.<sup>119</sup>

The commission strongly protested against lottery advertising.<sup>120</sup> It suggested that this advertising was at times misleading and that such advertising also encouraged *some* lottery players to engage in irresponsible gambling.<sup>121</sup> Moreover, the Commission concluded that lotteries did not necessarily produce good jobs.<sup>122</sup> Particular criticisms were directed towards convenience gambling involving lotteries, and the Commission also recommended that instant tickets should be banned.<sup>123</sup> Additionally, the Commission

112. *Id.*

113. *Id.* (“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).

114. See MATTHEW SWEENEY, *THE LOTTERY WARS* 133 (2009) [hereinafter SWEENEY] (“No other ‘tax’ *costs so much money to collect*. The state government spends a lot of money on running lotteries.”) (emphasis added).

115. See CLOTFELTER & COOK, *SELLING HOPE*, *supra* note 106.

116. See *Id.*, at 299 n. 11.1.

117. See Archive, NATIONAL GAMBLING IMPACT STUDY COMMISSION: MESSAGE FROM THE CHAIR, <http://govinfo.library.unt.edu/ngisc/news/chairman.html> (last visited Sept. 30, 2013) [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.”).

118. See National Gambling Impact Study Commission: Fact Sheet, <http://govinfo.library.unt.edu/ngisc/bio-law.html> (last visited Sept. 30, 2013) (listing nine members of the commission) [hereinafter, NGISC].

119. See *Id.* In the statute, Congress set the duration of the Commission for two years from the date of its first meeting, which took place in 1997. The statute mandated a report by the Commission to Congress, the President, and the governors two years after the Commission held its first meeting. This report with the Commission’s Final Report Recommendations was made on June 18, 1999 and the Commission thereafter archived its website in September 2001.

120. See NGISC: FINAL REPORT, *supra* note 24, at 3-4-3-5.

121. *Id.*

122. *Id.* at 3-10.

123. *Id.* at 3-18.

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recommended that machine gaming outside of casinos—such as video lottery terminals at racetracks—should be abolished.<sup>124</sup>

The criticism of lotteries as inappropriate redistributive-income devices—that take “a disproportionate amount of [their] revenues from lower-income groups”<sup>125</sup>—has also been levied.<sup>126</sup> This redistribution of income point is somewhat different from the regressivity issue.<sup>127</sup> Redistribution of income focuses on the *destination* of the lottery funds, whereas regressivity examines on whom does the *cost-burden* of lottery-play comparatively fall? In this sense, redistribution is neutral because of the entirely random incidence of winners. There is no conceivable way to predict any redistribution of income from any particular income-group to any other. The poor, middle-income and rich win as randomly as each one or the other wins.

Other issues such as the avoidance of jackpot wins by illegal residents,<sup>128</sup> or the potential misuse by welfare-recipients of government-provided funds<sup>129</sup> are probably too infrequent to merit public policy consideration. Similarly, the unpreparedness for the magnitude of the wealth that winning lottery jackpots may bring and the concomitant possible lack of responsible use of the winnings are not fatal criticisms of the use of lotteries for funding governmental-expenditures.

### III. ANALYSIS OF THE CREATION OF PUBLIC POLICY AND ITS IMPACT ON LOTTERIES

#### [i] Commonwealth Caribbean Public Policy

“Law is . . . more than the sum of its separate parts: it is an organic whole which is not solely dependent upon legislatures for its development, but is in the process of constant, if not always obvious or rapid growth, through the activities of those who . . . administer it in any given country over a period of time.”<sup>130</sup> This

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124. *Id.*

125. See NGISC: *Lotteries*, *supra* note 8, at 10.

126. See CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 221.

127. See *supra* note 106–108.

128. See CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 221–22.

129. *Id.*

130. See Sir Roy Marshall, *The Response of the Law to the Challenging of Independence: A Review of the Past and an Agenda for the Future, with Particular Reference to Barbados*, in COMMONWEALTH CARIBBEAN LEGAL STUDIES: A VOLUME OF ESSAYS TO COMMEMORATE THE 21ST ANNIVERSARY OF THE FACULTY OF LAW OF THE UNIVERSITY OF THE WEST INDIES 1 (Gilbert Kodilinye & P.K. Menon eds., 1992) [hereinafter Sir Roy Marshall]. See also F.A. HOYOS, *BARBADOS OUR ISLAND HOME* 177

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organic evolution of law in the territories of the Commonwealth Caribbean reflects the fact that these territories remained colonies long after the American colonies won independence from British rule.<sup>131</sup> During this extensive colonial period, decisions relating to tax sources of revenue—as well as to all other significant political and economic decisions—were made in Great Britain as the colonial power.

In fact, the earliest date of independence for any of the former colonies of the Commonwealth Caribbean was 1962,<sup>132</sup> which falls within the modern era of lottery history and development. As a result of the relatively recent acquisition of independence from Great Britain, litigation implicating public policy in the context of the legal validity of lotteries would tend to reflect the quest for autonomy from Great Britain. This affinity for judicial autonomy would therefore tend to instill the confidence to draw on the judicial experience of other common law jurisdictions such as the extensive experience of the U.S. in this regard.<sup>133</sup> This is the case because the extensive judicial decisions—throughout the legal history of lotteries in the U.S.—have no counterpart in the Commonwealth Caribbean experience.<sup>134</sup> As a result, the courts in the Commonwealth Caribbean territories would, on a case by case basis, as the need arises, in all likelihood look to the U.S. judiciary's experience and expertise for guidance.<sup>135</sup>

## [ii] U.S. Public Policy Generally

Public policy is the principle that “no one can lawfully do that which tends to be injurious to the public or against the public

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(1960) (“[N]o form of government can be effective unless the laws are observed and justice administered.”). See also Hon. David Simmons, *Judicial Legislation for the Commonwealth Caribbean: The Death Penalty and the Judicial Committee of the Privy Council*, 3 CARIB. L.B. 10 (1998). (“Law is . . . a response to social needs and pressures.”).

131. See *supra* notes 34–36 and accompanying text.

132. See *supra* note 36; see also CARIBBEAN ISLANDS: A COUNTRY STUDY (Sandra W. Meditz & Dennis M. Hanratty eds., 1987), available at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID@x0018\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID@x0018)) (“[An] uneasy federation of ten island territories (Jamaica, Trinidad and Tobago, Barbados, Grenada, St. Kitts-Nevis-Anguilla, Antigua and Barbuda, St. Lucia, St. Vincent and the Grenadines, Dominica, and Montserrat) lasted from 1957 to 1961, when Jamaica opted to leave.”).

133. See Leacock: *Public Utility Regulation*, *supra* note 37, at 339.

134. The judiciary in British Colonies cannot—during colonial subjugation—display the judicial freedom and creativity of independent former colonies such as the unique experience of the U.S. subsequent to gaining independence from Great Britain.

135. See Leacock: *Public Utility Regulation*, *supra* note 37, at 339.

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good.”<sup>136</sup> Public policy has even been declared to be *synonymous* with “the public good.”<sup>137</sup> It has been referred to as the “purpose and spirit of the substantive laws of a state. . . .”<sup>138</sup> Violations of public policy have often been associated with immorality.<sup>139</sup> Public policy is essentially statewide in scope<sup>140</sup> and therefore embraces the principles perceived by both the legislature and the judiciary as the foundation on which the particular state and its entire society stand.<sup>141</sup> It consists of the values, norms, and ideals of each individual society.<sup>142</sup> Actually, it resembles the parsing by the judiciary of fundamental constitutional rights created by the U.S. Constitution.<sup>143</sup>

The application of public policy principles to lotteries is therefore evolutionary<sup>144</sup> and subject to change as times change.<sup>145</sup> Inevitably, therefore, the public policy of one generation may be discarded entirely or partially by a later generation.<sup>146</sup> An important reason why this may be the case is the fact that the size of the

136. *Browner v. Browner*, 327 S.W.2d 808, 812 (Mo. 1959); *see also* CARDOZO, *supra* note 30.

137. *Dille v. St. Luke's Hosp.*, 196 S.W.2d 615, 629 (Mo. 1946).

138. *Johnston v. Chicago Great Western R. Co.*, 164 S.W. 260, 262 (Mo. Ct. App. 1914).

139. *State v. Clarke*, 54 Mo. 17, 36 (1873) (court consideration of the regulation of “bawdy houses”); *see also* *Kitchen v. Greenabaum*, 61 Mo. 110, 116 (1875); *see, e.g.* *Montgomery v. Montgomery*, 127 S.W. 118, 120 (1910) (“[T]he promotion of public and private morals is one of the chief purposes of the law.”); *see also* *Muschany v. United States*, 324 U.S. 49, 66-7 (1945) (holding “violations of obvious ethical or moral standards” contrary to public policy).

140. *See* Brachtenbach, *supra* note 30, at 4 (“[A]s early as the beginning of the fifteenth century[,] [l]egal scholars . . . endorsed seemingly parallel concepts which may well have been the rudimentary beginnings of our present “public policy” concept.”).

141. *Bolz v. State Farm Mut. Auto. Ins. Co.*, 52 P.3d 898, 902 (Kan. 2002); *see also* *Wallihan v. Hughes*, 82 S.E.2d 553, 558 (Va. 1954).

142. *See* RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986). *See also* *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35-36 (1938)).

143. *See, e.g.*, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (“[I]t may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights.”).

144. *Brown v. Snohomish County Physicians Corp.*, 845 P.2d 334, 338 (Wash. 1993) (“The term ‘public policy,’ . . . embraces all . . . contracts which tend clearly to injure . . . the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights. . . . Public policy is not static, but may change as the relevant factual situation and the thinking of the times change.”) (citations omitted) (emphasis added).

145. *Id.*

146. *Funk v. United States*, 290 U.S. 371, 381 (1933); *see also* *Hall v. Baylous*, 153 S.E. 293, 295 (W. Va. 1930); *see also* *Straus & Co. v. Canadian Pac. R. Co.*, 254 N.Y. 407, 413 (1930).

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population of a state tends to progressively increase over time, with a concomitant impact on the *financial exigencies* of human needs in the particular state. Courts must therefore be cognizant of such changes and must be responsive by acknowledging the scope of any necessary adjustments to the contours of the particular state's public policy.<sup>147</sup>

This inevitably leads to continual questioning of public policy, by analogy to prospecting for the precious metal gold. In the context of contract disputes generally, just as gold nuggets must be prospected from the surrounding debris, the judiciary's task is to do the same with regard to a state's public policy.<sup>148</sup> Legally appropriate modifications pertaining to lotteries will therefore be selected, examined and implemented by the judiciary as the need arises.<sup>149</sup> In analyzing lottery contracts as well as any other type of contract, courts may employ a balancing test<sup>150</sup> and may refuse to enforce *components* of a particular contract, rather than nullifying the *entire* contract.<sup>151</sup> By the same token, where the facts and circumstances are convincing to the judiciary, the application of public policy by the court can be decisive.<sup>152</sup> Alternatively, the

147. See, e.g., *Brandt v. Medical Defense Assocs.*, 856 S.W.2d 667, 670 (Mo. 1993) (referring to a physician's duty of confidentiality to her/his patients, and enunciating that "the common law and the public policy of this state are not stagnant but are evolutionary.").

148. *Owens v. Owens*, 854 S.W.2d 52, 54 (Mo. Ct. App. 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).

149. *Id.*

150. See, e.g., *Continental Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 140 (Ind. 1996) ("[W]e take the same balancing approach . . .").

151. Irrefutably, in appropriate circumstances, the Supreme Court certainly has the legal power to nullify or reform a contract to eliminate any provisions or terms that violate public policy. See *id.* at 139-140; see also *Ex parte Thicklin*, 824 So.2d 723, 732 (Ala. 2002) ("This Court . . . can . . . nullify or reform a contract to eliminate any . . . terms that violate public policy.").

152. See, e.g., *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412, 413 (Wyo. 1977) ("The trial judge left the parties where he found them on what he held to be a gambling contract . . . and [we] affirm."); see also *MidMichigan Regional Medical Center—Clare v. Professional Employees Div. of Local 79, Service Employee Intern. Union, AFL-CIO*, 183 F.3d 497, 504 (6th Cir. 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, 1377-78 (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, 1217 (Haw. 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, 303 (Ill. 1997); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000); *First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. 1995); *Clark v. Columbia/HCA*

courts can remand a particular case for further consideration in light of the guidance provided by the superior court.<sup>153</sup>

At one end of the contract spectrum, some aspects of bargains may be much too offensive to society for courts to rule in favor of enforcing these aspects at all.<sup>154</sup> However, enforcement of a *settlement agreement* relating to such violative bargains *may* nevertheless be fully enforceable based upon a state's affirmative public policy favoring settlements.<sup>155</sup> It falls squarely within the judicial function to properly conduct and effectuate this delicate balancing expertise.<sup>156</sup> Proof that an agreement is injurious to the public or operates against the public good must be judicially convincing before a court will nullify a party's right to the enforcement of such an agreement.<sup>157</sup> This is separate and distinct from any nullification of a party's fundamental legal right of *freedom of contract*.<sup>158</sup> The party's fundamental right of freedom of contract endures undamaged and intact.<sup>159</sup> It is the *abuse* of freedom of contract to the point of violating public policy that the court will nullify.<sup>160</sup> In instances where freedom of contract has *not* been abused, such contracts do not violate public policy at all and will be fully enforced.<sup>161</sup>

Of course, an unambiguous mandate in a state's constitution or state statute must be judicially honored.<sup>162</sup> It is legally appropriate for the question as to whether or not a contract is against

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Information Services, Inc., 25 P.3d 215, 220 (Nev. 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, 964 (N.H. 1996); Padilla v. State Farm Mut. Auto. Ins. Co., 68 P.3d 901, 905 (N.M. 2003); Meyer v. Hawkinson, 626 N.W.2d 262, 277 (N.D. 2001).

153. *Id.*

154. *See, e.g.*, Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1000 (N.Y. 1993) ("In sum, we agree with the Appellate Division that *subparagraph 18(a)* is unenforceable as against public policy.") (Emphasis added).

155. *Id.*

156. *Id.* at 1001 ("It is all a matter of degree.").

157. First Nat. Ins. Co. of America v. Clark, 899 S.W.2d 520, 521 (Mo. 1995) ("[T]he Court *will not recognize* contractual provisions that are contrary to the public policy of [the state] as expressed by the legislature.") (Emphasis added).

158. *Id.* ("This Court . . . recognize[s] freedom of contract.").

159. *Id.*; *see also* Johnson v. Peterbilt Fargo, Inc., 438 N.W.2d 162, 164 (N.D. 1989) ("When a court is faced with deciding whether a contract is against public policy, it must also be mindful of an individual's right to enter into a contract.").

160. *Johnson*, 438 N.W. 2d at 164.

161. *Id.*

162. *Id.* at 169; *see, e.g.*, N.D. CENT. CODE ANN. § 9-08-02 (West 2013) (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).

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public policy to be explicitly provided for by a state's constitution or by a statute.<sup>163</sup> This means that when the court determines that a contract is inconsistent with fair and honorable dealing, it can deny such agreement's enforcement.<sup>164</sup> Therefore, where the agreement in issue is ruled by the court to be contrary to sound policy, and offensive to good morals, the courts have the authority to declare such a contract void as against public policy.<sup>165</sup>

In the absence of a constitutional or statutory mandate, the common law has concluded that lottery contracts will not be judicially honored.<sup>166</sup> Rather, the courts will not assist the parties to such agreements and will leave such parties where the courts find them.<sup>167</sup> This is the case in state courts as well as in the U.S. Supreme Court.<sup>168</sup> Public policy is neither a function of the *subjective* view of any individual judge<sup>169</sup> nor of any speculative conception of the public interest.<sup>170</sup> Nor does the judiciary of a single state perceive itself as the *exclusive* source<sup>171</sup> of the fundamentals that are components of public policy.<sup>172</sup> This has been judicially

163. See, e.g., N.D. CENT. CODE ANN. § 9-08-02 (West 2013).

164. *Johnson*, 438 N.W.2d at 164; see also N.D. CENT. CODE ANN. § 9-08-01 (West 2013) (deeming contracts unlawful if contrary to express law; contrary to policy of express law, although not expressly prohibited; or contrary to good morals).

165. N.D. CENT. CODE ANN. § 9-08-01 (West 2013).

166. See, e.g., *Troy Amusement Co. v. Attenweiler*, 28 N.E.2d 207, 215 (Ohio Ct. App. 1940) ("The law will not aid a party to a lottery contract either in its enforcement while executory or in its rescission when executed.") (citation omitted).

167. *Id.* at 216 ("[E]quity keeps its hands off, and leaves the parties where it finds them . . . . [P]arties wanting [equity's] aid must come with clean hands. Courts of equity require honesty, good faith, and legality in transactions . . . .") (citation omitted).

168. *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884) ("[It is an] elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.") (citations omitted); see also *Holman v. Johnson*, 98 Eng. Rep. 1120 (1775).

169. *Fidelity & Deposit Co. of Maryland v. Conner*, 973 F.2d 1236, 1241 (5th Cir. 1992). See also *Bartron v. Codington Cnty.*, 2 N.W.2d 337, 348-49 (S.D. 1942). See also *Haakinson & Beauty Co. v. Inland Ins. Co.*, 344 N.W.2d 454, 457 (Neb. 1984) ([P]ublic policy must be determined . . . not by the varying opinions of laymen, lawyers, or judges.") (citation omitted).

170. See, e.g., *F.D.I.C. v. American Cas. Co. of Reading, Pa.*, 998 F.2d 404, 409 (7th Cir. 1993). See also *Fomby-Denson v. Dept. of Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001).

171. See, e.g., *Talley v. Mathis*, 453 S.E.2d 704, 706 (Ga. 1995) (The fundamental policies of a sister state can be judicially significant. Therefore a joint venture to buy lottery tickets in a sister state does not necessarily violate the public policy of the state where suit is filed when the sale of lottery tickets is lawful in that sister state). *Discussed infra* Sec. XI [iii].

172. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. c (1981) (advocating that members of a class of protected parties may be recognized by the

acknowledged.<sup>173</sup> This does not in any way suggest that public policy is amorphous, vague or indefinite.<sup>174</sup> On the contrary, it is legally sturdy and venerable in the hands of the judiciary as the challenge of each decision is met.<sup>175</sup>

#### IV. LOTTERY LEGALIZATION IN THE COMMONWEALTH CARIBBEAN AND THE U.S.

##### Commonwealth Caribbean

With independence and concomitant legal autonomy dating only from the 1960s,<sup>176</sup> the Commonwealth Caribbean has not needed the extensive provisions required in the U.S. to effect lottery legalization. Since there were no constitutional or statutory barriers to the creation of lotteries in the Commonwealth Caribbean comparable to the U.S. provisions, legislation sufficed. For example, Jamaica passed “the Betting Gaming & Lotteries Act, 1965 . . . [with] [t]he main aims of . . . provid[ing] that lotteries, on the whole, though explicitly termed illegal, may be exempted from illegality and allowed to be conducted under certain conditions and subject to certain strict safeguards.”<sup>177</sup>

##### U.S.

##### [i] Constitutional and Statutory Factors

In the U.S., there is no common law<sup>178</sup> or constitutional right to gamble.<sup>179</sup> As a result, the suppression of gambling resides within the state law of each of the fifty states in the U.S. and

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judiciary as exempt from specific nullifications - imposed on outsiders to the protected class - in light of the protected status of the members of the protected class).

173. *In re Rahn's Estate*, 291 S.W. 120, 124 (Mo. 1927) (holding 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).

174. See Leacock: *Lotteries and Public Policy*, *supra* note 15, at 48.

175. *Id.* at 48–49.

176. See Alexis, *supra* note 36, at 591 n.2; see also Simmons, *supra* note 36, at 670.

177. See *The Betting, Gaming & Lotteries Act of 1976*, GOV'T OF JAMAICA, BETTING, GAMING & LOTTERIES COMMISSION, <http://www.bglc.gov.jm/laws/bglcact/default.html> (last modified Mar. 2009) (“It appeared . . . that the Government wished that gambling should make its fair contributions to the revenue of the country, like other sectors, to provide employment and to assist in works of public interest.”).

178. See *South Carolina Dept. of Revenue & Taxation v. Rosemary Coin Machines, Inc.*, 500 S.E.2d 176, 180 (S.C. Ct. App. 1998) (“There is no fundamental right to gamble.”).

179. *Baseball, Inc. v. Indiana Dept. of State Revenue*, 683 N.E.2d 593 (Ind. 1997); *State v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810, 817 (Ky. Ct. App. 1997) (noting no one has a constitutional right to operate a gambling business). No

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inheres within the police powers of each state.<sup>180</sup> State suppression of gambling does not infringe upon any fundamental rights of citizenship<sup>181</sup> and states can therefore either prohibit or restrict gambling<sup>182</sup> as a legitimate exercise of the state's *inherent* police power; but, "the legislature cannot bargain away the police power of a State."<sup>183</sup>

Some state constitutions may forbid lotteries, the sale of lottery tickets, as well as any legislative authorization of lotteries.<sup>184</sup> A particular state's legislature cannot legalize any device that in substantive effect amounts to a lottery<sup>185</sup> in the face of an unambiguous state constitutional provision that specifically prohibits lotteries.<sup>186</sup> Therefore, in those instances where a state's constitution forbids lotteries, a constitutional provision would be necessary<sup>187</sup> in order to permit a legislature to authorize lotteries operated either privately or by the state itself.<sup>188</sup> However, if the

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one has a constitutional right to operate a gambling business. *Durham Highway Fire Protection Ass'n, Inc. v. Baker*, 351 S.E.2d 744 (N.C. 1987).

180. See *Rosemary*, 500 S.E.2d at 179 ("The government is imbued with the power to legislate for the protection of the public health, welfare and morals."). *Stone v. Mississippi*, 101 U.S. 814, 818 (1879) ("[The police power] *extends to all matters affecting the public health or the public morals.*") (emphasis added) (citation omitted).

181. *Ah Sin v. Wittman*, 198 U.S. 500, 504 (1905).

182. *Fendrich v. Van de Kamp*, 227 Cal. Rptr. 262, 268 (Cal. Ct. App. 1986); *People v. Monroe*, 182 N.E. 439 (Ill. 1932); *American Legion Post No. 113 v. State*, 656 N.E.2d 1190, 1194 (Ind. Ct. App. 1995); *State v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810, 819 (Ky. Ct. App. 1997); *Brown v. State*, 680 So. 2d 1179 (La. 1996); *Parkes v. Bartlett*, 210 N.W. 492, 495 (Mich. 1926); *State ex rel. Grimes v. Board of Com'rs of City of Las Vegas*, 1 P.2d 570 (Nev. 1931); *State v. Felton*, 80 S.E.2d 625 (N.C. 1954); *South Carolina Dept. of Revenue & Taxation v. Rosemary Coin Machs., Inc.*, 500 S.E.2d 176, 179 (S.C. Ct. App. 1998) (holding prohibiting gambling is a legitimate governmental purpose under the police power); *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428 (Neb. 1991).

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

184. See, e.g., *State ex rel. Tyson v. Ted's Game Enters.*, 893 So.2d 355, 368 (Ala. Civ. App. 2002) (citing Ala. CONST. art. 4, § 65); *Poppen v. Walker*, 520 N.W.2d 238, 248 (S.D. 1994) (citing S.D. CONST. art. 3, § 25); *State v. Nixon*, 384 N.E.2d 152, 155 (Ind. 1979) (citing Ind. CONST. art. 15, § 8).

185. See *supra* note 9, all of the sources cited therein.

186. *Lee v. City of Miami*, 163 So. 486, 490 (Fla. 1935) (However, the state's legislature would probably have the inherent power to regulate or to prohibit any and all other forms of gambling not expressly or impliedly prohibited by the state constitution.).

187. See, e.g., *Hansen & Skopek, supra* note 9, at 169 ("Six constitutional amendments in three decades modified Wisconsin's strict [constitutional] ban on all forms of gambling . . . Two amendments to the state constitution authorized a state-operated lottery . . .") (citations omitted).

188. *Id.*; see also *West Virginia ex rel. Mountaineer Park, Inc. v. Polan*, 438 S.E.2d 308, 311-12 (W. Va. 1993) (of course, the doctrine of strict construction would require that *only* the express or implied mandate of the provision is to be honored).

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prohibition against creation of a state-run lottery is statutory, rather than constitutional, the legislature retains the legal power to create a lottery at any later time by legislative abrogation or amendment.<sup>189</sup>

An absolute constitutional bar to the creation of a lottery *could* extend beyond lotteries to include any gaming conception based upon the lottery principle.<sup>190</sup> However, the interpretation of constitutional, or statutory measures, inheres within the powers of the judiciary.<sup>191</sup> By virtue of the separation of powers mandated by the U.S. and state constitutions, this constitutional allocation of legal capacity to the judiciary would empower the judiciary to construe a constitutional provision as an absolute bar to lotteries where such a construction is appropriate to the accurate interpretation of the specific provision.<sup>192</sup> In such instances, the courts would need to analyze each type of gambling in issue in order to determine whether or not it substantively constituted a lottery.<sup>193</sup> Some devices may constitute lotteries while others may *not*.<sup>194</sup> If a type of gambling were to be construed as *not* being a lottery it would survive legal nullification by the courts,<sup>195</sup> provided that the type of gambling in issue fell outside the parameters of the constitutional prohibition.<sup>196</sup>

However, the express or implied prohibition of lotteries by the state constitution is different.<sup>197</sup> Such prohibitions—when combined with the constitutional imposition of penalties for specified

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189. *State ex rel Clark v. State Canvassing Bd.*, 888 P.2d 458 (N.M. 1995) (In such circumstances, any pre-authorization legal authority by a constitutional amendment would not be required.).

190. *See Try-Me Bottling Co. v. State*, 178 So. 231, 235 (Ala. 1938).

191. *Marbury v. Madison*, 5 U.S. 137, 171 (1803) (“[A] legal question [is] properly determinable in the courts . . . .”) (emphasis added).

192. *See State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 379 N.E.2d 242, 244 (Ohio Ct. App. 1977) (“We conclude that [the pertinent section of the state constitution] prohibits *only one type of gambling namely, lotteries*. Therefore, the legislature can pass laws, legalizing other forms of gambling.”) (emphasis added) (citation omitted).

193. *Id.*

194. *Id.*

195. Provided that the type of gambling did *not* violate the public policy of the particular state.

196. *See Gabalac*, 379 N.E.2d at 244 (“[The lower court’s decision] is predicated upon an expanding of the definition of the word “lottery” to include all gambling. We cannot adhere to this view. A lottery is a scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance. A lottery is a *species* of gambling. The term “gambling” is broader and encompasses more than the term “lottery.”) (citations omitted) (emphasis added).

197. *See Silberman v. Skouras Theatres Corp.*, 169 A. 170, 172 (N.J.Com.Pl. 1933).

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violations—disable the legislature of the particular state from legitimately diminishing any of the constitutionally mandated penalties; or other punitive measures mandated for the operation of constitutionally prohibited lotteries.<sup>198</sup> The nature of the use of the proceeds is not at all a decontaminant of unconstitutionality.<sup>199</sup> Therefore, proof that the proceeds derived from the operation of a lottery support the fundamental societal value of financial assistance to charity is not enough to overcome the presence of a constitutional prohibition.<sup>200</sup>

## [ii] Some Influences on the Legalization of Lotteries

The forces that impact the adoption of a state lottery are not unknown to the judiciary, and the judiciary is also conversant with the factors that legislators may take into account in deciding whether or not to create a state lottery.<sup>201</sup> Additionally, in the U.S., interest groups routinely play a significant role in shaping the electorate's willingness to support the passage of specific legislative enactments, including those targeting the legalization of lotteries.<sup>202</sup> The viewpoints of interest groups inevitably influence the voting decisions of elected officials. In addition, interest groups use *inter alia* lobbying,<sup>203</sup> advertising<sup>204</sup> and political contributions to the election campaigns of politicians in the effort to achieve maximum political impact on important decisions made by politicians.

Furthermore, decisions reached by policymakers and voters in a particular state may influence decisions made in other states.

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198. *Id.*

199. *State ex rel. Trampe v. Multerer*, 289 N.W. 600, 603-04 (Wis. 1940).

200. *Id.*

201. These statewide norms relate to annual income, education and age of the electorate. They also relate to the anticipated reactions of the electorate to the legislation itself in addition to the legislation's potential influence on moral values and issues.

202. *See e.g.*, CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 42 ("The depression spawned a flurry of proposals for lotteries at the state and federal levels. At the same time a group of lottery supporters . . . formed the National Conference for Legalizing Lotteries, to push for lotteries at the state and national levels . . ."); *see id.* at 11 ("For most of the country the central policy question concerning lotteries today is no longer whether states should legalize them – voters in state after state have answered that [in the affirmative] . . .") (emphasis added).

203. *See United States v. Harriss*, 347 U.S. 612, 625, (1954) (The First Amendment guarantees the right to speak to, publish to and petition the government); *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 141("[A] new element has acted as a catalyst for change: the active lobbying of firms involved in the sale of lottery products.").

204. *See e.g.* NGISC: *Lotteries*, *supra* note 8, at 6.

Lottery profitability in one state may impact the decision of other states to create and implement lotteries of their own, because the geographical proximity of one state to another may impact the economic prosperity of both neighboring states.<sup>205</sup> In particular, economic prosperity generated by a state's lottery may be noticeable and influential politically in neighboring states<sup>206</sup> and may trigger similar action therein.<sup>207</sup>

Additionally, adoption and implementation of a lottery by one state may serve as a stimulus for a neighboring state to amend its constitution<sup>208</sup> to create a lottery of its own and may also provide a blueprint for a neighboring state to emulate. Use of the referendum method has been particularly successful,<sup>209</sup> which has made statewide referenda a popular state legal-adoption device.<sup>210</sup> In other states, a referendum in the form of a popular vote combined with approval by the state legislature may be used to create the lottery as was done in New Hampshire.<sup>211</sup> Arguably, use of a referendum might be the most decisive method because it allocated the final decision to be made by the electorate itself rather than vicariously by the electorate's elected representatives acting in the legislature alone.

New York was more complex, requiring a constitutional amendment in addition to endorsement by two separately elected

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205. See e.g., SCHUMACHER, *supra* note 1, at 73 ("The successful province drains the life out of the unsuccessful . . ."); see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 150 ("[A] lottery in one state will attract players from neighboring states."); see also *id.* at 4 ("The idea of having a state-run public lottery in Illinois began to receive serious attention in the early 1970s. Lotteries had already appeared in the Northeast, and by 1972 seven states were operating them . . . the success of the New Jersey lottery seems to have captured the attention of the Illinois legislature, *as it did in other states.*") (emphasis added).

206. CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 150 ("The idea of having a state-run public lottery in Illinois began to receive serious attention in the early 1970's. Lotteries had already appeared in the Northeast, and by 1972 seven states were operating them . . . the success of the New Jersey lottery seems to have captured the attention of the Illinois legislature, *as it did in other states.*") (emphasis added).

207. *Id.* Neighboring states may create their own lotteries as financial and economic self-defense because of the number of border-crossings by residents from neighboring states that might siphon off needed funds totaling in the millions annually. See, e.g., SCHUMACHER, *supra* note 1, at 73 ("[N]othing stagnates like stagnation.").

208. See, e.g., CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 154–58.

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

210. *Id.* at 145 ("Because the anti-lottery 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.").

211. *Id.* at 143.

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legislatures as well as public ratification.<sup>212</sup> California was different too. California adopted its lotteries through an initiative process.<sup>213</sup> In Illinois, lottery adoption was achieved in the orthodox legislative manner by the combination of the state's legislature and governor without a direct citizen vote.<sup>214</sup>

V. COURTS IN SOME INSTANCES MAY DECLINE TO APPLY  
PUBLIC POLICY TO NULLIFY AGREEMENTS  
CONNECTED TO LOTTERIES

Under the common law, the holding of a lottery is not ordinarily regarded as a penal offense unless either a state constitution criminalizes such activity or alternatively a state statute imposes criminal penalties.<sup>215</sup> However, in a number of jurisdictions, the legislature *has* by statute made it a *criminal offense* to promote or conduct a lottery or similar scheme other than one operated by the state.<sup>216</sup> The United States Supreme Court has confirmed that state laws for the suppression of lotteries are valid in the interests of promoting good morals and preserving the welfare of the citizens of such states.<sup>217</sup> Such statutes therefore represent a legitimate exercise of a state's police powers.<sup>218</sup> Nevertheless, even in the face of criminalization of lotteries, the common law's recognition of exceptions in deserving cases remains legally viable because, the common law is a workable system rather than a rigid

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212. *Id.*

213. *Id.* at 151.

214. *See 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.").

215. *See generally* Lee v. City of Miami, 163 So. 486 (Fla. 1935); Becker v. Wilcox, 116 N.W. 160 (Neb. 1908); *see also* Parr v. Commonwealth, 96 S.E.2d 160 (Va. 1957).

216. Forte v. U.S., 83 F.2d 612 (D.C. Cir. 1936); Waite v. Press Pub. Ass'n, 155 F. 58 (6th Cir. 1907); State v. Shugart, 35 So. 28 (Ala. 1903); Burks v. Harris, 120 S.W. 979 (Ark. 1909); Georgia Real Estate Commission v. Warren, 262 S.E.2d 570 (Ga. Ct. App. 1979); L.E. Services, Inc. v. State Lottery Com'n of Indiana, 646 N.E.2d 334 (Ind. Ct. App. 1995); Commonwealth v. Jenkins, 166 S.W. 794 (Ky. Ct. App. 1914); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler, 460 A.2d 44 (Md. 1983); People v. McPhee, 103 N.W. 174 (Mich. 1905); State v. Lipkin, 84 S.E. 340 (N.C. 1915); Stevens v. Cincinnati Times-Star Co., 73 N.E. 1058 (Ohio 1905).

217. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916) ("It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but *obstacles to a greater public welfare.*") (citations omitted) (emphasis added). *See also* Town of Eros v. Powell, 68 So. 632, 364 (La. 1915); State v. J.J. Newman Lumber Co., 59 So. 923, 928 (Miss. 1912); *see generally* State v. Lipkin, 84 S.E. 340 (N.C. 1915).

218. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916).

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and immutable one.<sup>219</sup>

Therefore the common law's orthodox exceptions to the general principle of non-enforcement of illegal contracts are also applicable to agreements involving lotteries.<sup>220</sup> These exceptions are fact-specific and depend upon proof of meticulously circumscribed details.<sup>221</sup> This means that the presence of an illegal element is not invariably fatal to judicial enforcement in every case.<sup>222</sup> The judiciary will acknowledge and recognize exceptions on successful proof that the facts and circumstances of a specific case justify enforcement of a particular agreement.<sup>223</sup> The degree of contamination by the illegal element is determinative.<sup>224</sup>

An insufficient degree of contamination will not be enough to mandate court intervention to nullify the entire suit in such cases.<sup>225</sup> The judiciary may provide *some*<sup>226</sup> relief where the requested relief is appropriate because it is legally justified.<sup>227</sup> In the context of each controversy, the judiciary will assess whether or not enforcement of an entire agreement or a portion of it will advance a fundamentally *positive* public policy goal.<sup>228</sup> It is certainly conceded that the party seeking enforcement—whether partially or completely—must shoulder the burden of proof to the court's satisfaction that the quantum of enforcement sought is fair and equitable. This is entirely appropriate because it would represent performance of the courts' ameliorative function in the interests of justice and fairness. Complete or partial enforcement

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219. See e.g., *Simon v. Mullin*, 380 A.2d 1353, 1357 (Conn. 1977) ("The common law is viable, capable of growing and developing."); see also *Rt. Hon. P.J. Patterson, Towards a New Jurisprudence*, 2 CARIB. L. B. 1, 3 (1997) ("Relevant jurisprudence cannot remain static. It must forever be unfolding if we are to ensure that the Law is a vehicle for justice and not an instrument of oppression.").

220. See e.g., *Melton v. United Retail Merchants of Spokane*, 24 Wash.2d 145, 162 (Wash. 1945).

221. See e.g., *Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984).

222. See e.g., *Melton*, 24 Wash. 2d at 162 ("[A] plaintiff *may* recover a sum of money from a defendant who has acknowledged that it belongs to plaintiff even if that sum be plaintiff's share of the profits of some *illegal* business or transaction in which both were engaged and *equally* culpable.") (Emphasis added).

223. See *id.* ("This is so because the plaintiff, in such a situation, *need prove nothing illegal*, but has only to prove that the defendant has acknowledged the sum sued for to belong to him, and the court will then, *as a matter of law*, imply the promise to pay.") (emphasis added).

224. *Id.*

225. See generally *Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984).

226. Even if *complete* relief is not legally substantiated.

227. See generally *Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984).

228. *Id.* at 860 ("[E]ven though the contract between the plaintiffs and the defendant is based on an illegal lottery, we believe these plaintiffs are *deserving of relief* because of the fraud perpetrated on them by the defendant.") (emphasis added).

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in such circumstances advances the interests of justice because it is an integral part of the public policy principles of the common law itself.<sup>229</sup>

[i] Analysis of Differing Degrees of Culpability and The Impact on Nullification by the Courts

It is conceded that an agreement is unenforceable on grounds of public policy where the agreement itself constitutes an illegal lottery.<sup>230</sup> Nevertheless, assertion of a cause of action may be treated by courts as valid even though the facts of the case establish that there is *some* contact with illegality.<sup>231</sup> The courts will assess the *degree* of legal contamination arising from the illegality.<sup>232</sup> Essentially, the judiciary determines whether or not the degree of contamination is legally fatal.<sup>233</sup> If it is, the courts will not assist any of the parties to the dispute and instead will leave them where the courts find them.<sup>234</sup> If the degree of contamination from any violation of public policy is below legally fatal levels, the courts *may* provide assistance to the less culpable party in appropriate circumstances.<sup>235</sup>

*Youngblood v. Bailey* effectively analyzes the common law's approach to resolving these intertwined issues.<sup>236</sup> In *Youngblood v. Bailey*, the Supreme Court of Alabama concluded that in the context of the facts of the particular case, the transaction consisting of the purchase of a ticket—conferring upon the purchaser a chance to win a certain luxury car—was void on grounds of public policy.<sup>237</sup> The transaction consisting of the purchase of the ticket was “a lottery and directly violate[d] the public policy of [the] State.”<sup>238</sup> This violation triggered court-nullification of the legal status of the ticket-purchase but the legal nullification took effect

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229. See Patterson, *supra* note 219.

230. See *generally* *Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412, 413 (Wyo. 1977) (“The trial judge left the parties where he found them on what he held to be a gambling contract . . . and [we] affirm.”). See also *Gridley v. Dorn*, 57 Cal. 78, 79 (Cal. 1880) (“[W]agers [are] contrary to good morals and sound public policy, and therefore invalid.”).

235. *Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984).

236. *Id.*

237. *Id.* at 859.

238. *Id.*

between the *original parties* to the ticket-purchase transaction.<sup>239</sup>

However, in the suit before the courts, additional facts were legally relevant. The original purchaser of the ticket had sold the ticket to a *subsequent* purchaser who fraudulently purported to pay for the ticket with a legally defective check.<sup>240</sup> These additional facts implicated the issue of potential *exceptions* to the fundamental principle of nullification of transactions on grounds of public policy.<sup>241</sup> In legally appropriate instances, under the common law, “contracts offensive to the public policy of the state may be enforced because of the inability of an affected party to plead their invalidity.”<sup>242</sup>

In such cases, any success by plaintiffs is predicated upon proof by such plaintiffs of two mandatory requirements.<sup>243</sup> First, plaintiffs must prove that they are *not* equally at fault with the defendant(s).<sup>244</sup> Secondly, plaintiffs must *also* prove that public policy interests are substantively advanced by the discretionary grant of court assistance to the less culpable party or parties to the particular transaction.<sup>245</sup>

In those instances where it is proven to the courts’ satisfaction that one party has fraudulently induced another to enter into a particular transaction, in their discretion, the courts *may* provide assistance to the fraudulently-induced party.<sup>246</sup> In *Youngblood v. Bailey*, the courts concluded that the original purchaser of a lottery ticket had been defrauded.<sup>247</sup> The original purchaser had been fraudulently induced, by the *fraudulent* perpetrations of the subsequent purchaser, to sell the pertinent lottery ticket to the subsequent purchaser of the ticket.<sup>248</sup> This fraudulent inducement by the subsequent purchaser legally invalidated his own purchase of the lottery ticket.<sup>249</sup> This fraudulent conduct by the subsequent purchaser of the lottery ticket left the title to the luxury car won

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239. *Id.*

240. *Id.* at 860 (“Testimony was . . . produced at trial to indicate that this was in fact the *fourth time* the defendant had utilized the same scheme to defraud persons out of lottery tickets.”) (emphasis added).

241. *Youngblood*, 459 So. 2d. at 860.

242. *Id.* at 859; *see also* Melton v. United Retail Merchants of Spokane, 163 P.2d. 619, 627 (Wash. 1945).

243. *Youngblood*, 459 So. 2d. at 860.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Youngblood*, 459 So. 2d at 860.

249. *Id.*

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by the lottery ticket undisturbed.<sup>250</sup> Title to the luxury car therefore remained securely vested in the plaintiff as the *original* purchaser of the lottery ticket.<sup>251</sup>

The facts and circumstances of the case justified the grant of judicial relief to plaintiff as the *original* purchaser of the lottery ticket.<sup>252</sup> The invocation of common law exceptions by the courts therefore provided relief to the *original* purchaser of the lottery ticket against the fraudulent subsequent purchaser, as well as against any party whose claim was dependent upon such subsequent purchaser's legal iniquities.<sup>253</sup> These principles were applied by the courts because the subsequent purchaser's fraudulent representations to the original purchaser of the lottery ticket induced the subsequent sale of the ticket.<sup>254</sup> The fraudulent representations made by the defendant as subsequent purchaser consisted of assertions to the original purchaser that the defendant had sufficient funds to meet the amount of the check actually tendered to plaintiff by the defendant as payment for the purchase of the lottery ticket.<sup>255</sup>

The subsequent purchaser's substantive defense was predicated upon a claim that under the terms of his subsequent purchase-contract with the original purchaser of the lottery ticket, valid legal title to the lottery ticket was transferred to him *alone*.<sup>256</sup> The subsequent purchaser argued that the illegality of the *original* purchaser's acquisition of the lottery ticket legally nullified all the original purchaser's rights.<sup>257</sup> According to the defendant, since the original purchase of the ticket was void of any legal effect, this therefore nullified any right that the original purchaser *may* have had to *reclaim* title to the lottery ticket from him.<sup>258</sup> The defendant therefore asserted that his possession of the lottery ticket constituted valid title to it because the ticket conferred on him *alone* the entire valid legal title to the luxury car symbolically represented by the lottery ticket.<sup>259</sup>

The court disagreed.<sup>260</sup> It ruled that, on the contrary, the

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250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Youngblood*, 459 So. 2d. at 860.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Youngblood*, 459 So. 2d. at 860.

defendant's fraud at common law disabled him from pleading—as a defense—*any* underlying illegality of plaintiff's title to the lottery ticket that plaintiff purchased from the Northport Chamber of Commerce.<sup>261</sup> The defendant's fraudulent conduct completely nullified any prospect of a defense predicated upon any legal challenge by him to plaintiff's title to the lottery ticket.<sup>262</sup> This was the case because defendant's purported defense was nullified by the fraud that he perpetrated on plaintiff.<sup>263</sup>

Defendant's fraudulent conduct—when purporting to buy the lottery ticket from plaintiff—did not place plaintiff's title to the lottery ticket at issue.<sup>264</sup> On the contrary, the courts did not permit the defendant to legally challenge the *purity* of plaintiff's title to either the lottery ticket or to the car.<sup>265</sup> Such a challenge by defendant was beyond his legal reach.<sup>266</sup> This legal challenge was beyond defendant's grasp because substantively, plaintiff's suit against him was predicated solely upon defendant's own fraudulent misrepresentations *alone*.<sup>267</sup>

Plaintiff's suit against him was based substantively upon defendant's meretricious conduct, consisting of his dishonor of his obligations to pay the check that he tendered to plaintiff for the purchase of the lottery ticket.<sup>268</sup> At common law, the moral turpitude implicated in the defendant's fraudulent misrepresentations was much too perturbing for the court to ignore or overlook. In essence, the defendant's conduct was the greater of the two evils and was therefore legally unforgivable.<sup>269</sup>

## [ii] Legal Validity of Prizes Based Upon a Combination of Both Skill and Chance

With respect to “hole-in-one” competitions at golf tournaments, such tournaments do not necessarily constitute illegal lotteries at all.<sup>270</sup> An example of an unenforceable agreement exists where a promisee has paid a specific sum of money to a promisor

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Youngblood*, 459 So. 2d. at 860.

267. *Id.*

268. *Id.*

269. *Id.*

270. *See, e.g.*, Opinion of the Justices, 397 So.2d 546, 547 (Ala. 1981) (“[T]here are three elements to a lottery: (1) A prize, (2) awarded by chance, (3) for a consideration.”) (citation omitted).

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and has agreed that—contingent upon the happening of a certain specified event *governed exclusively by chance*—a prize will be paid to the promisee by the promisor.<sup>271</sup> However, in circumstances where chance is not the *dominant* factor in the happening of the contingent event, an enforceable contractual right *can* arise in the context of a tournament.<sup>272</sup> It is not simply a question of whether there is the presence of a consideration paid by a promisee to a promisor, combined with the promise by the promisor of the award of a prize to the promisee.<sup>273</sup>

Therefore, in instances where a promisee's performance of an act is bargained for by a promisor—as the agreed exchange for a prize promised to be awarded by the promisor, on the occurrence of a specified event—*some* elements of chance *may* conceivably play a role in the happening of the specified event that is the contingency which triggers the payment of a prize.<sup>274</sup> However, the presence of an element of chance does not *per se* convert the agreement between the parties into an illegal lottery.<sup>275</sup>

For example, in *Chenard v. Marcel Motors*,<sup>276</sup> an automobile dealership was invited by a golf club in Maine to donate an automobile as a prize at one of the golf club's tournaments.<sup>277</sup> The automobile dealership complied in order to promote its own business interests<sup>278</sup> and advertised the applicable terms for winning the automobile.<sup>279</sup> These terms were sent to potential tournament participants and were also posted at the golf club and required any golfer in the tournament to make a successful hole-in-one drive at a specifically designated hole.<sup>280</sup> On the tournament day, the automobile dealership arranged for a new vehicle to be driven

271. See e.g. *Ellison v. Lavin*, 71 N.E. 753, 754-755 (N.Y. 1904) (“[The court] concluded that the [scheme did] not depend *exclusively* on chance, but, to some extent at least, [it was] affected by the *exercise of judgment*, and . . . therefore, the scheme did not constitute a lottery. ‘Pure chance’ is . . . ‘the entire absence of all means of calculating results,’ and . . . to constitute a lottery, it is necessary that the distribution should be *purely by chance, without any other element affecting the result* . . . .”) (citations omitted) (emphasis added).

272. See *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961) (“The test of the character of a game is not whether it contains an element of chance or an element of skill, but *which is the dominating element*.”) (citation omitted) (emphasis added).

273. See e.g., *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

274. *Id.*

275. *Id.*

276. See generally *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

to the golf club and parked near the golf clubhouse, with one of the automobile dealership's advertisements *conspicuously* placed on the new vehicle.<sup>281</sup>

Plaintiff paid the tournament fee, required by the golf club and registered for the tournament.<sup>282</sup> In the presence of his three playing partners, plaintiff succeeded in making a hole-in-one drive at the designated hole and claimed the new car as his prize by notifying the automobile dealership.<sup>283</sup> Plaintiff successfully sued the dealership when it refused to deliver the new car as advertised,<sup>284</sup> and the dealership appealed the Superior Court's refusal to dismiss plaintiff's complaint.<sup>285</sup> The Supreme Judicial Court of Maine affirmed the judgment of the Superior Court for four reasons.<sup>286</sup>

First, plaintiff's payment of an entrance fee to participate in the golf tournament was lawful and did not convert the golf tournament into an illegal wager or lottery.<sup>287</sup> The Court concluded that the entrance fees paid by tournament participants neither comprised nor contributed to a "purse" for the purchase of the new automobile. Nor did any of the funds from the entrance fees constitute or contribute to any prize to be won by any of the tournament participants.<sup>288</sup>

Second, the automobile dealership was not a participant in the golf tournament and did not compete for the new automobile at all. Moreover, the dealership did not derive any profit or legally identifiable opportunity for profit from entrance fees paid by tournament participants.<sup>289</sup> In fact, all tournament entrance fees were paid to the golf club as the contracting party with each tournament participant.<sup>290</sup> Furthermore, the golf club was not in contractual privity with the automobile dealership at all.<sup>291</sup> Instead, the automobile dealership had provided the new automobile to the golf club *gratuitously* and *temporarily*.<sup>292</sup> Therefore, the provision

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281. See generally *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* Plaintiff's appeal was based upon anti-gambling and anti-lottery statutes that were in effect in the State of Maine's laws at the time of the tournament.

286. See generally *Chenard v. Marcel Motors*, 387 A.2d 596, 600-01 (Me. 1978).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. See generally *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

292. *Id.*

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and placement of the new automobile at the golf club comprised an integral part of a completely separate contract between the automobile dealer and each of the golf tournament participants.<sup>293</sup>

Third, the tournament golfers paid their entrance fees directly to the golf club as consideration for the creation of a valid contract in which chance was *not* the *dominant* factor.<sup>294</sup> Tournament golfers were not risking their entrance fees as a mechanism for making a return on their money as is done in any illegal wagering transaction.<sup>295</sup> Neither the cumulative total of the entrance fee monies nor any fraction of it was divided among the golfers as is done in an office “pool.”<sup>296</sup>

Fourth, none of the entrance fee money formed any part of the value of the car as a prize.<sup>297</sup> On the contrary, the automobile was offered exclusively by the automobile dealership to each tournament golfer as a prize for the formation of a “unilateral” contract.<sup>298</sup> Plaintiff accepted this offer when he successfully shot the hole-in-one at the designated hole at the golf tournament.<sup>299</sup> Although it *may* be argued that successfully achieving a hole in one implicates some element of chance,<sup>300</sup> it was not the *dominant* element, so there was no violation of Maine’s lottery or gambling laws,<sup>301</sup> nor was Maine’s public policy violated.<sup>302</sup>

## VI. HISTORICAL SIGNIFICANCE OF LOTTERIES IN THE U.S. AND THE COMMONWEALTH CARIBBEAN

The following history refers almost exclusively to the history and development of lotteries in the U.S. because the U.S. earned its independence from Great Britain<sup>303</sup> almost two hundred years, before any Commonwealth Caribbean territory achieved independence.<sup>304</sup> Therefore, autonomous government in the Commonwealth Caribbean started with the advent of full independence

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293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *See generally* *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

299. *Id.*

300. *Id.* at 599. *See Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961).

301. *Chenard*, 387 A.2d at 601.

302. *Id.*

303. *See generally* FRIEDMAN, *supra* note 35; *see also* POSNER, *supra* note 35 at 146.

304. *See* Alexis, *supra* note 36.

beginning in the 1960s.<sup>305</sup> Prior to this time, the history of lotteries the U.S. is extensive and volatile as chronicled below.

A. *The Roller-Coaster Rise, Fall and Rise Again in the History and Development of Lotteries in the U.S.<sup>306</sup> and the Commonwealth Caribbean's Limited Experience in this Regard.*

Gambling is versatile<sup>307</sup> and has an extensive and somewhat turbulent history in human affairs.<sup>308</sup> In modern times, lotteries are probably the most prevalent form of gambling in the United States<sup>309</sup> and also in the Commonwealth Caribbean.<sup>310</sup> Both gambling in general and lotteries in particular have long histories in the U.S. and abroad.<sup>311</sup> The drawing of lots may conceivably be the most ancient form of the use of chance to impact particular outcomes<sup>312</sup> and it has been proposed that games of chance existed

305. See Sir Roy Marshall, *supra* note 130, at 1–2 (“Before independence the sovereignty of a country is subject to a number legal constraints, particularly in relation to the conduct of its own . . . *financial affairs*.”) (emphasis added).

306. See, e.g., *Lee v. City of Miami*, 163 So. 486, 488 (Fla. 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).

307. See Kelly, *supra* note 66, 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).

308. See, e.g., CLOTFELTER & COOK: SELLING HOPE *supra* note 9, at 33–34. See also NGISC: *Lotteries*, *supra* note 8, 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. HOLY BIBLE, KING JAMES VERSION, (Barbour Publishing Inc. 2002) [hereinafter HOLY BIBLE] Leviticus 16:8; Joshua 18:6; First Samuel 14:42; Proverbs 16:33; First Chronicles 26:13.

309. See NGISC: *Lotteries*, *supra* note 8, at 1 (“The lottery industry stands out in the gambling industry. . . . It is the most widespread form of gambling in the U.S. . . .”).

310. See *About Us*, BETTING, GAMING & LOTTERIES COMMISSION *supra* note 23; see also *Gov’t Continues to Lapse on Deposit of Lotto Funds*, *supra* note 26.

311. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 32. See also HERRMANN *supra* note 77, at 9 (“The earliest widespread legal gambling activity in the United States was the lottery.”).

312. See NGISC: *Lotteries*, *supra* note 8, at 1.

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in antiquity.<sup>313</sup> The “drawing of lots” probably constitutes the most numerous references to “gambling” in the Holy Bible.<sup>314</sup>

## [i] The Rise

[a] *Lotteries in the American and Commonwealth Caribbean Colonial Period*

In ancient times in Europe, initially, lotteries seemed to have been occasionally included in *private* celebrations.<sup>315</sup> Later, the *commercial* potential was recognized,<sup>316</sup> leading to the use of lotteries by merchants to get rid of excess accumulations of merchandise that went unsold for overly long periods.<sup>317</sup> Governmental awareness of the prospective use of lotteries also became evident,<sup>318</sup> especially the potential use of lotteries to raise revenue.<sup>319</sup> Governments are as adept as anyone else in appreciating the comparatively *painless* impact of the use of lotteries<sup>320</sup> for the purpose of raising its revenue rather than by involuntary taxation.<sup>321</sup>

Even more specific to the North American history of lotteries, one of the first lotteries was held in 1612 in London to benefit the early Virginia Colony in America.<sup>322</sup> However, the Virginia Col-

313. See Ronald L. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. Rev. 11, 15 (1992) [hereinafter: Rychlack] (“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).

314. See NGISC: *Lotteries*, *supra* note 8, at 1.

315. See Rychlack, *supra* note 313.

316. See NGISC: *Lotteries*, *supra* note 8, at 1 (“[T]he use [of] lotteries for material gain is of more recent origin, although of considerable antiquity.”).

317. Or stock that proved difficult to dispose of. See Rychlack, *supra* note 313, at 21.

318. See NGISC: *Lotteries*, *supra* note 8, at 1 (“The first recorded public lottery in the West was held during the reign of Augustus Caesar for municipal repairs in Rome.”).

319. Sources are not unanimous with regard to accurately identifying the date of the first lottery or the first use of lotteries to raise governmental revenue.

320. When compared to that other less attractive governmental mechanism of *involuntary* taxation and its potential political impact. See *A Summary of the 1765 Stamp Act*, *supra* note 3.

321. See NGISC: *Lotteries*, *supra* note 8, at 1 (“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 & COOK: *SELLING HOPE*, *supra* note 9, at 34 (“The first lotteries offering prizes of money was held in Florence in 1530, with proceeds going to the state.”) (citation omitted).

322. See NIBERT, *supra* note 107, at 19 (“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 313, at 24. See also NGISC: *Lotteries*, *supra* note 8, at 1 (“Lotteries held a prominent place in the early

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ony's gain was the British public's loss,<sup>323</sup> which predictably led to termination of these lotteries in due course.<sup>324</sup> Of course, domestic American colonial lotteries soon replaced the British ones.<sup>325</sup>

Thereafter, lotteries became more popular in the seventeenth and eighteenth centuries in North America.<sup>326</sup> At this time, the Commonwealth Caribbean territories were still colonies of Great Britain.<sup>327</sup> Both the government and private parties used lotteries during this period in colonial America, however, private lotteries were not legal.<sup>328</sup> Banking institutions and similar financial mechanisms were not fully developed in the American or Commonwealth Caribbean colonies in this era.<sup>329</sup> In the absence of

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history of America, including an important role in financing the establishment of the first English colonies.”); *see also* SWEENEY, *supra* note 114, at 15.

323. Essentially because the profits benefitted the British colonies in North America rather than the British public at home in Britain. *See* NIBERT, *supra* note 107, at 19 (“By 1620, lottery proceeds provided almost half the revenues necessary for this colonial undertaking.”) (citation omitted). *See also* Rychlack, *supra* note 313, at 24.

324. *Id.*; *see also* MCGOWAN, *supra* note 12, at 6 (“In 1620, the House of Commons ordered the Virginia Company to stop selling tickets since the company’s lotteries were competing with [English] government lotteries that were not bringing in the amount of revenue that legislators had expected.”).

325. *See* Rychlack, *supra* note 313; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, 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.”).

326. *See* MCGOWAN, *supra* note 12, at 6–8. *See also* NGISC: *Lotteries*, *supra* note 8, at 1; *see also* Rychlack, *supra* note 313, at 25–29. In this colonial era, the West Indies’ commercial significance to British capitalism was almost inestimable. *See, e.g.*, WILLIAMS: CAPITALISM AND SLAVERY, *supra* note 6, at 54 (“The amazing value of [the] West Indian colonies can more graphically be presented by comparing individual West Indian islands with individual mainland colonies. In 1697 . . . Little Barbados, with its 166 square miles, *was worth more to British capitalism than New England, New York and Pennsylvania combined.*”) (emphasis added); *see also*, CARIBBEAN ISLANDS: A COUNTRY STUDY, WASH.: GPO FOR LIBRARY OF CONGRESS: THE EUROPEAN SETTLEMENTS (Sandra W. Meditz & Dennis M. Hanratty eds., 1987) *available at* <http://countrystudies.us/caribbean-islands/6.htm> (“[However] [b]y 1750 Jamaica was the most important of Britain’s Caribbean colonies, having eclipsed Barbados in economic significance.”).

327. WILLIAMS: CAPITALISM AND SLAVERY, *supra* note 6, at 121 (“The commerce of the West India Islands,” wrote Adams, “is a part of the American system of commerce. *They can neither do without us, nor we without them.* The creator has placed us upon the globe in such a situation that we have occasion for each other.”) (citations omitted) (emphasis added).

328. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 34 (“In colonial America lotteries were a popular and common means of financing public projects. *Lotteries run for private profit* also existed but *were never legalized.*”) (emphasis added) .

329. Rychlack, *supra* note 313, at 31; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 35 (“Neither debt finance *nor taxation* appeared to be an attractive alternative *for the financing of large capital projects.* Capital markets were

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such institutional sources of capital for major projects “[a]ll of the [American] colonies authorized lotteries at one time or another, and a few of them used the device on many occasions.”<sup>330</sup> Building projects for both public and private use, such as canals, bridges, and roads were funded through the use of lotteries.<sup>331</sup> This included construction projects for a number of colleges,<sup>332</sup> 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 . . . .”<sup>333</sup>

The modern “public/private” distinctions had not yet crystallized in the law.<sup>334</sup> However, the lotteries that operated during this era did so outside of government supervision and were not legalized.<sup>335</sup> Predictably, some lotteries were adapted to charitable uses.<sup>336</sup> Additionally, some colonies and later some states used lotteries to support military activities during both the French and Indian Wars of the eighteenth century.<sup>337</sup> Lotteries were also used during the Revolutionary War era<sup>338</sup> and the Continental Congress authorized at least one lottery “to support the Continental Army in 1776 . . . .”<sup>339</sup>

[b] *Lotteries after American Independence*

After American Independence, lotteries grew in popularity.<sup>340</sup> Apparently, Thomas Jefferson, in 1810, initially opposed lotteries “however laudable or desirable [their] object[s] may be.”<sup>341</sup> How-

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rudimentary, to say the least, before a national banking system had been firmly established.”) (emphasis added).

330. CLOTFELTER & COOK: SELLING HOPE *supra* note 9, at 34.

331. *Id.*

332. *Id.*; see also NIBERT, *supra* note 107, at 21.

333. See Rychlack, *supra* note 313, at 25.

334. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 34 (“[T]he line between public and private was typically indistinct.”).

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

336. *Id.* at 35.

337. See NIBERT, *supra* note 107, 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.”).

338. *Id.* at 22-23; see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 34 (“During the Revolution lotteries were used to supply and support troops in the field . . . .”).

339. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 36. See also MCGOWAN, *supra* note 12, at 10.

340. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 35.

341. *Id.* at 299.

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ever, he apparently changed his mind in 1826 when he suffered financial setbacks and as a result needed funds to meet the needs of his personal estate.<sup>342</sup> He hoped to persuade the Virginia legislature to permit him to operate a lottery for this purpose.<sup>343</sup> In his later years, he changed his opinion regard lotteries completely, stating that lotteries constituted a “painless tax, paid only by the willing.”<sup>344</sup>

The prevalence of lotteries increased in the early decades of the nineteenth century.<sup>345</sup> In 1832, income received from sales of lottery tickets constituted three percent of the national income.<sup>346</sup> In fact, “[t]he distinguishing feature of nineteenth-century lotteries was the emergence of [private] firms specializing in organization and marketing. The number of dealers selling tickets as a *primary* activity increased.”<sup>347</sup>

Due in part to the emergence of fraud and dishonesty in the operation of lotteries,<sup>348</sup> opposition to lotteries materialized and progressively increased.<sup>349</sup> It has been suggested that the reform movement led by President Andrew Jackson intensified and sharpened opposition to lottery operations altogether.<sup>350</sup> The lack of strict regulations and the presence of overly lax controls contributed to scandals in a number of lottery operations.<sup>351</sup> Curbs on lotteries followed and in 1833 individual states started to enact statutes prohibiting lotteries.<sup>352</sup>

The Civil War era and its economic devastation of the American South stimulated a number of states to reconsider lotteries for statewide financial relief.<sup>353</sup> The defeat of the southern states and

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342. *Id.*; see also MCGOWAN, *supra* note 12, at 9.

343. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 299. See also MCGOWAN, *supra* note 12, at 9.

344. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 299.

345. See *id.* at 36 (“Between 1790 and 1833, for example, Pennsylvania authorized sixty lotteries to benefit church groups, including Lutheran, Presbyterian, Episcopal, Reformed, Baptist, Catholic, Universalist, and Jewish congregations.”).

346. *Id.* at 35 (“At the same time, there was *little organized opposition to lotteries* as a means of raising money.”) (emphasis added).

347. *Id.* (emphasis added).

348. *Id.* (“Whether as a result of the entrance of private enterprise into lottery business or as an accompanying trend, *there was increasing evidence of fraud and dishonesty in the operation of lotteries.*”) (emphasis added).

349. *Id.* at 37.

350. *Id.*

351. *Id.*; see also Rychlack, *supra* note 313, at 9-10.

352. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, 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.”).

353. See MCGOWAN, *supra* note 12, at 14.

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the need for reconstruction played a major role in these difficult financial times.<sup>354</sup> Some southern states therefore used lotteries to raise revenue during this period of depressed governmental revenues caused by the Civil War.<sup>355</sup> The Louisiana lottery became probably the largest of them all,<sup>356</sup> until it too was later eliminated.<sup>357</sup>

[ii] The Fall of Legal Lotteries<sup>358</sup>

With regard to legally operated lotteries, the Louisiana experience is the most vivid example of the *fall* of legal lotteries. In this respect, discussion and analysis of lotteries in this section relates to the demise of lotteries in the U.S. until they were legally resurrected almost a century later.<sup>359</sup> It is acknowledged that after the fall discussed in this section, illegal lottery operations survived in many parts of the country during the almost seventy year period when lotteries were banned in the U.S.<sup>360</sup>

## [a] Louisiana's Lottery Experience

The regulation of gambling activity, including the operation of lotteries, is a species of *morality* policy,<sup>361</sup> and therefore falls under the individual states' "police powers under the 10th Amendment

354. *Id.*; see also Rychlack, *supra* note 313, 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.").

355. See Rychlack, *supra* note 313, at 10.

356. See McGOWAN, *supra* note 12, at 14; see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 38 ("[O]ver 90 percent of its revenue [came] from out of state."). See also SWEENY, *supra* note 114, 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.").

357. See NIBERT, *supra* note 107, at 30 ("By the end of the [nineteenth] century the Louisiana lottery was effectively ended, as was virtually all lottery activity in the [U.S.].").

358. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 37 ("[T]he reformers prevailed, with states first and eventually the federal government stepping in to outlaw lotteries by the end of the nineteenth century.").

359. See McGOWAN, *supra* note 12, at 15 ("In 1964, New Hampshire became the first state to operate a [legal] lottery in almost seventy years.").

360. *Id.*; see also CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, 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 SWEENY, *supra* note 114, at 66.

361. See *Stone v. State of Mississippi*, 101 U.S. 814, 818 (U.S., 1879); see also HERRMANN, *supra* note 77, at 17 ("[G]ambling is among the various *morality policies* placed within the [individual states'] jurisdiction by the police powers under the 10th Amendment to the U.S. Constitution.") (emphasis added).

to the U.S. Constitution.”<sup>362</sup> In the 1860s, the federal government began to consider legislation to bar lotteries from using the federal mail system as a result of growing national opposition to lotteries because the federal government has no express or implied constitutional power to regulate gambling.<sup>363</sup> As the efforts opposing lotteries intensified, Louisiana lawmakers decided to charter a private company to run its lottery in 1868.<sup>364</sup> The individual states have legal power generally to regulate lotteries within the borders of each state.<sup>365</sup> Nevertheless, the efforts by States other than Louisiana to bolster state revenues from lotteries were less than stellar and by the end of the Civil War era, only the Louisiana Lottery legally survived<sup>366</sup> into the 1890s.<sup>367</sup> This development left the Louisiana lottery with a very profitable monopoly position in the U.S.<sup>368</sup>

The Louisiana lottery survived because two private brokers acquired the charter for the lottery from the State of Louisiana.<sup>369</sup> These two private brokers then hired two retired Confederate generals to oversee the lottery drawings and to promote a nationwide campaign to popularize drawings.<sup>370</sup> “[I]t was truly the first national lottery held on a weekly basis”<sup>371</sup> and the mails were used to purchase and sell tickets.<sup>372</sup> When the expiration date of the

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362. See HERRMANN, *supra* note 77, at 17.

363. See *Stone v. State of Mississippi*, 101 U.S. 814, 818 (U.S., 1879); see also HERRMANN, *supra* note 77, at 17; see also MCGOWAN, *supra* note 12, at 15.

364. See MCGOWAN, *supra* note 12, at 14.

365. See HERRMANN, *supra* note 77, 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 10th Amendment.”) (emphasis added).

366. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 38; see, e.g., SWEENEY *supra* note 114, at 47 (“Only the Louisiana Lottery, approved in 1868, would thrive.”).

367. See HERRMANN, *supra* note 77, at 14–15.

368. See MCGOWAN, *supra* note 12, at 14; see also Rychlack, *supra* note 313, 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).

369. See MCGOWAN, *supra* note 12, at 14; see also Rychlack, *supra* note 313, 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).

370. See Rychlack, *supra* note 313, at 11.

371. See Rychlack, *supra* note 313, at 11; see also SWEENEY, *supra* note 114, at 54 (“The Louisiana Lottery was known as the Octopus because its arms reached into every state and city.”); see also Rychlack, *supra* note 313, at 11 (“[T]he Louisiana Lottery [was] also known as “The Serpent.”) (citation omitted). See also MCGOWAN, *supra* note 12, at 14 (“[T]he Louisiana lottery . . . [was] known as the Serpent . . .”).

372. See MCGOWAN, *supra* note 12, at 14. (“More than \$3 million was distributed to winners annually, while profits for the brokers averaged between \$3 and \$5 million.”).

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lottery charter approached, one of the private brokers sought a renewal by offering the State of Louisiana a sum of \$1 million a year.<sup>373</sup>

This entrepreneurial approach was reported nationally throughout the U.S. and evidently backfired.<sup>374</sup> The resulting national publicity generated—or contributed to the generation of—extensive national opposition to the Louisiana lottery and precipitated action by a number of state legislatures around the U.S. to pass resolutions urging Congress and the President to terminate Louisiana's lottery.<sup>375</sup> In light of barriers presented by the Tenth Amendment of the U.S. Constitution,<sup>376</sup> the federal government responded by enacting a number of statutes calculated to block the use of the federal mails that had facilitated the sale of tickets outside the state of Louisiana.<sup>377</sup> In actuality, these initial statutory provisions were too weak and therefore failed to accomplish their statutory goal;<sup>378</sup> however, a later federal statute enacted in 1890 provided the *coup de grace* to the Louisiana lottery by terminating its use of the federal mail system.<sup>379</sup> Subsequent Louisiana state efforts to renew the lottery failed as well.<sup>380</sup> Thus, in 1893, after some twenty-five years of operation,<sup>381</sup> Louisiana finally joined the rest of the U.S. in banning lotteries.<sup>382</sup>

Thereupon, the lottery syndicate moved its operations to Hon-

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373. See MCGOWAN, *supra* note 12, at 15.

374. *Id.* (The Governor of Louisiana had denounced the first offer, presented by one of the founders of the lottery—ostensibly made to be used to assist in funding the construction of levees along the banks of the Mississippi river—as a bribe and the founder had then doubled the offer to \$1 million a year).

375. See MCGOWAN, *supra* note 12, at 15 (The Louisiana lottery was certainly a drain on the financial resources of other states by siphoning up to \$5 million per year from other states into Louisiana). See e.g. SWEENEY, *supra* note 114, at 47 (“New York [had] banned lotteries in 1833. The Pennsylvania legislature soon followed, prohibiting lotteries after December 31, 1834. . . . Nine states had stopped holding lotteries by 1835. The rest would follow suit over the next several decades. . . . *By the start of the Civil War nearly every state in the country had repudiated the lottery.*”) (emphasis added).

376. See *Stone v. State of Mississippi*, 101 U.S. 814, 818 (U.S., 1879); see also HERRMANN, *supra* note 77, at 17.

377. See *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 421-422 (1993); see MCGOWAN, *supra* note 12, at 15.

378. See *Edge Broad. Co.*, 509 U.S. at 421-22.

379. *Id.*

380. See SWEENEY *supra* note 114, 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.”)

381. *Id.* at 55

382. *Id.* at 59.

duras<sup>383</sup> and began “printing and distributing tickets in the United States, using private mail couriers.”<sup>384</sup> However, in 1895 Congress responded by deftly closing this loophole in the law<sup>385</sup> and this federal legislation finally ended the Louisiana Lottery in 1895.<sup>386</sup>

[b] *North Dakota’s Lottery Experience*

North Dakota’s experience relating to the former Louisiana lottery is intriguing.<sup>387</sup> Subsequent to its ouster from Louisiana, the then defunct Louisiana lottery company sought to relocate to the state of North Dakota.<sup>388</sup> However, unhelpful practices<sup>389</sup> tainted by corruption were employed in North Dakota in an attempt to successfully relocate the lottery there.<sup>390</sup> These practices included making payments to some legislators in an effort to garner legislative support for relocating the lottery there.<sup>391</sup> Unfortunately, these practices were discovered and publicized by the Pinkerton Detective Agency, privately hired by the North Dakota Governor.<sup>392</sup>

Therefore, although a bill supporting the relocation of the lottery in North Dakota was successfully passed in the State Senate, it was *indefinitely postponed* in the House on publication of the corrupt practices that were used by the lottery supporters.<sup>393</sup> The disclosures of corruption led to political upheaval in North Dakota, triggering the enactment of an amendment to the North Dakota Constitution prohibiting lotteries there.<sup>394</sup> The aftershocks

383. *Id.* (“The company pulled stakes for Honduras, renaming itself the Honduras National Lottery.”)

384. *Id.*

385. See NGISC: FINAL REPORT, *supra* note 24, 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 NGISC: Lotteries, *supra* note 8, at 2; see also SWEENEY, *supra* note 114, at 59 (“Congress responded in 1895 by making the interstate trafficking of lottery materials a crime.”); see also NIBERT, *supra* note 107, at 30.

386. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 38.

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

388. *Id.*

389. Somewhat similar to those used earlier in Louisiana. See, e.g., SWEENEY *supra* note 114, at 59 (“The Louisiana Lottery’s barely concealed bribery and corruption of government and courts made lotteries a pariah in most state legislatures.”).

390. See, e.g., Meyer, 626 N.W.2d at 272 (Sandstrom, J., dissenting).

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

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of this traumatic political revulsion still reverberate in North Dakota today.<sup>395</sup> In the aftermath of that historical upheaval, the prohibition on lotteries remains embedded in the North Dakota Constitution<sup>396</sup> and in the State's statutory enactments.<sup>397</sup> In fact, in the modern era, "in only one state—North Dakota—has the public consistently voted against a lottery."<sup>398</sup>

Statewide political opposition persists to the present day.<sup>399</sup> Indeed, a recently proposed amendment to the North Dakota constitution—purporting to authorize a state lottery predicated on alleviating the tax burden on the citizens of North Dakota<sup>400</sup>—was defeated in the 1986 general election.<sup>401</sup>

In contrast, North Dakota has repealed an earlier ban on lottery advertising, provided that such advertisements relate to lotteries that are legal in the particular states in which they operate.<sup>402</sup> This legislative measure was recently cited—in addition to other factors—by a dissenting Justice in the North Dakota Supreme Court as evidence of a purported statewide political change of heart.<sup>403</sup> The Justice argued that "North Dakota's legalization of advertising of out-of-state lotteries *cannot be reconciled* with the majority's claimed public policy against [lotteries]."<sup>404</sup>

## [iii] The Rise Again

Legal lotteries returned to the U.S. with the passage of New Hampshire legislation in 1964.<sup>405</sup> However, once they returned,

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395. *Id.*

396. *See Meyer*, 626 N.W.2d at 266 ("[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 . . .").

397. *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.").

398. *See NGISC: Lotteries*, *supra* note 8, at 3; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 146 ("The only state to turn down a state-run lottery is North Dakota, where voters said no in 1986 and again in 1988.").

399. *See NGISC: Lotteries*, *supra* note 8, at 3; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 146 ("The only state to turn down a state-run lottery is North Dakota, where voters said no in 1986 and again in 1988.").

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

401. *Id.*

402. *Id.* at 273 (Sandstrom, J., dissenting).

403. *Id.*

404. *Id.* (emphasis added).

405. *See NGISC: Lotteries*, *supra* note 8, at 2; *see also* CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 22 ("Beginning in New Hampshire in 1964, the lottery

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legal lotteries proliferated with a vengeance and by the end of 1988 they had spread to thirty-three states plus the District of Columbia.<sup>406</sup> In order to accomplish legalization, “[v]irtually every state has required approval by *both* the legislature and the public in a referendum. . . .”<sup>407</sup> Of all the fifty American states, North Dakota alone has repeatedly rejected the enactment of lottery legislation.<sup>408</sup>

In this modern era, both state and provincial governments have come to rely very heavily on lottery revenue for a number of purposes.<sup>409</sup> Supporters of legal lotteries emphasize the general public welfare as the most significant beneficiary.<sup>410</sup> Dissenters tend to question the validity of such claims.<sup>411</sup> Nevertheless, over the past multiple decades, lotteries have provided a steady flow of revenue into public coffers with some states purporting to earmark a percentage of lottery proceeds for specific educational uses.<sup>412</sup>

In the context of public policy, some dissenters lament about “public policy being made piecemeal and incrementally, with little or no general overview.”<sup>413</sup> Of course, the question that may be asked—in this context—is: Well, what’s wrong with such an approach?<sup>414</sup> One answer may be that the National Gambling Impact Study Commission does not seem to be convinced that the approach of incremental and piecemeal development with little or no general overview is the optimal one.<sup>415</sup> The Commission per-

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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.”).

406. CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 23. As of 2011, this number had risen to 40. See RICHARD A. LEITER, 0020 SURVEYS 21, at 1 (West 2011) (“Forty states permit lotteries.”).

407. See NGISC: *Lotteries*, *supra* note 8, at 3 (emphasis added).

408. See NGISC: *Lotteries*, *supra* note 8, at 3; see also The North Dakota Experience *supra* Section VI [ii][b].

409. See NGISC: *Lotteries*, *supra* note 8, at 5.

410. *Id.*

411. *Id.*

412. *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.”).

413. *Id.*

414. One commentator has perceived certain consequences as a result of this incremental development. See HERRMANN, *supra* note 77, at 121 (“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).

415. See NGISC: *Lotteries*, *supra* note 8, at 13.

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ceives a piecemeal approach as one that places “pressures on the lottery officials” for a number of reasons articulated in the Commission’s Final Report.<sup>416</sup>

In the opinion of the Commission, inevitably, these factors have had an unavoidably significant impact on the public policy of every state that has so ardently embraced lotteries.<sup>417</sup> Moreover, two nationally prominent lottery commentators seem to share this viewpoint.<sup>418</sup> However, apparently, the two commentators have not finally concluded that the absence of a coherent overall gambling policy is fatally flawed.<sup>419</sup> Nor does it seem that, in their opinion, the absence of a *specific* lottery policy is necessarily the most significant factor that should control or impact lottery approval.<sup>420</sup>

One may propose that this widespread governmental financial dependence upon lottery revenue is not an ideal societal equilibrium. It is, arguably, not an equilibrium at all. It continues to be evolutionary but it is certainly of unknown permanence. Instead, it may even constitute an *imbalance* by virtue of its allocation of too much power to the lottery industry. The balance of societal power is probably healthier where a more appropriate impact of the opinions of elected officials is present. This configuration of power in decision-making could be more healthy for the public policy of any common law democratic society overall. This would arguably be healthier than the presence of an industry-driven policy juggernaut. Such an aggregation of power when leveraged against elected officials can reach a tipping point<sup>421</sup>

416. *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).

417. *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.”).

418. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, 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).

419. *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).

420. *Id.*

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

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relating to significant decision-making in the context of public policy.

There is also a more recent development where a number of individual states in the U.S. cooperate by banding together in order to offer bigger overall jackpot prizes.<sup>422</sup> This development can also assist states with small populations, essentially those States with populations that acting alone may be too small to support an in-state lottery. By banding together, such states can share in lottery-generated funds along with other U.S. states with larger population sizes.<sup>423</sup> In fact, the first multistate lottery included New Hampshire, Maine, and Vermont.<sup>424</sup> This turned out to be a precursor to the largest modern-day American multi-state lottery games of Powerball<sup>425</sup> and Mega Millions.<sup>426</sup>

## VII. THE IMPACT OF FEDERAL LAW ON LOTTERIES

Gambling policy is the prerogative of state governments because of the fundamental structure of delegated powers under the U.S. Constitution.<sup>427</sup> Moreover, the legislative powers delegated to Congress in Article I, Section 8,<sup>428</sup> do not expressly include the regulation of gambling activity. Furthermore, the Tenth Amendment of the U.S. Constitution has specifically mandated that the “powers not delegated to the United States . . . nor prohibited . . . to the states, are reserved to the States respectively, or to the people.”<sup>429</sup> Accordingly, the federal government refrained from efforts to regulate gambling for nearly a century.<sup>430</sup>

422. See NGISC: *Lotteries*, *supra* note 8, 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.”).

423. See SWEENEY *supra* note 114, at 98.

424. See CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 9, at 113.

425. A multi-state lottery operated by Multi-State Lottery Association (MUSL) that includes thirty-two states and Washington D.C. See FAQ & History, POWERBALL, [http://www.powerball.com/pb\\_info.asp](http://www.powerball.com/pb_info.asp) (last visited Nov. 27, 2013).

426. A multi-state lottery operated by Multi-State Lottery Association (MUSL) that includes forty-three states, U.S. Virgin Islands and Washington D.C. See History of the Game, MEGAMILLIONS, *available at* <http://www.megamillions.com/about-us>

427. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (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).

428. See U.S. CONST. art. I, § 8.

429. See U.S. CONST. amend. X.

430. In 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

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This self-imposed congressional restraint was apparently a function of a particular interpretation of the Commerce Clause. In this era, Congress did not seem to perceive the Commerce Clause as an enabling constitutional source of legal regulatory power. A small number of exceptions did indeed exist.<sup>431</sup>

Congress has certainly been assigned the constitutional power to “establish post offices”<sup>432</sup> and under the Commerce Clause to “regulate commerce . . . among the several States”<sup>433</sup> So, ultimately, Congress’ perception of the potential constitutional regulatory power embedded in those expressly enumerated powers changed over time. This change was significantly influenced by concerns emanating from potentially illegal lotteries. The Louisiana Lottery served as a catalyst for implementing these federal legislative powers. As a result, the use of the mails for lottery facilitation was the chosen mechanism to legally eliminate the interstate activities of the Louisiana Lottery.<sup>434</sup>

In 1876, President Grant signed into law an act imposing legal sanctions upon persons using the mails to circulate advertising for lotteries through the mails.<sup>435</sup> Then in 1890, an act was passed proscribing publication—in newspapers—of advertisements for lotteries.<sup>436</sup> At this time, managers of the Louisiana Lottery may have tried to find lacuna in the law that they could legally utilize and probably finding none, the Louisiana Lottery managers moved lottery operations outside the U.S. to Hondu-

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with the Indian Tribes relating to gaming activities. Congress 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, & 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’s carefully crafted compromise between state interests and tribal and federal interests.”).

431. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, 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).

432. U.S. CONST. art. I, § 8 cl. 7.

433. U.S. CONST. art. I, § 8 cl. 3.

434. See *supra* note 432.

435. WILLIAM NORMAN THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY 120 (2001).

436. *Id.*

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ras.<sup>437</sup> Congress responded in 1894,<sup>438</sup> by enacting legislation that prohibited the importation “into the United States from any foreign country . . . [of] any lottery ticket or any advertisement of any lottery.”<sup>439</sup>

Seizure and forfeiture of all such articles was statutorily commanded.<sup>440</sup> Additionally, penalties of fines with a maximum of \$5,000 and imprisonment up to ten years, or both, were statutorily empowered against violators.<sup>441</sup> Then, in 1895,<sup>442</sup> Congress enacted an additional statute empowering the suppression of all lottery traffic through national and interstate commerce.<sup>443</sup> Use of the mails was expressly prohibited in this act.<sup>444</sup>

The cumulative effect of these federal laws was ultimately decisive as a result of the severity of the restrictions imposed upon the operators of the Louisiana Lottery. Additionally, Louisiana citizens had apparently become aware of the bribing of state political leaders and the extraction of exorbitant profits from operation of the lottery.<sup>445</sup> In contrast, state beneficiaries were apparently less fortunate financially.<sup>446</sup> Finally, in 1905, as a result of state-wide pressure from citizens, the Louisiana legislature terminated state sponsorship of the lottery.<sup>447</sup>

Two U.S. Supreme Court decisions played a significant role in this regard as well.<sup>448</sup> The constitutionality of the congressional enactments was sustained.<sup>449</sup> The judiciary ruled that the perti-

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437. See, e.g., SWEENEY, *supra* note 114, at 59 (“When the [Louisiana Lottery] company’s charter expired in 1894 . . . [t]he company pulled stakes for Honduras, renaming itself the Honduras National Lottery. The business continued printing and distributing tickets in the [U.S.] using private mail couriers.”).

438. See THOMPSON, *supra* note 435.

439. *Id.*

440. *Id.*

441. *Id.*

442. See e.g. SWEENEY, *supra* note 114, at 59 (“Congress responded in 1895 by making the interstate trafficking of lottery materials a crime.”).

443. 53rd Cong. Ch. 191.

444. *Id.*

445. See NGISC: FINAL REPORT, *supra* note 24, Ch. 2 at 2-1; see also Sweeney *supra* note 114, at 59.

446. See NGISC: FINAL REPORT, *supra* note 24, Ch. 2 at 2-1; see also Sweeney *supra* note 114, at 59.

447. See SWEENEY, *supra* note 114, at 59 (“For a number of years the company operated outside the law, until raids on these operations finally killed the Octopus in 1907.”); see also *id.* (“[A] popular vote . . . went against it, 157,422 to 4,225.”).

448. See THOMPSON, *supra* note 435, at 121(citing *Ex parte Rapier*, 143 U.S. 110 (1892); *Champion v. Ames*, 188 U.S. 321 (1903)).

449. See *Ex parte Rapier*, 143 U.S. 110 (1892); *Champion v. Ames*, 188 U.S. 321 (1903).

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nent acts of Congress were within the scope of the powers assigned to Congress under the provisions of the U.S. Constitution.<sup>450</sup> First, in 1892, the U.S. Supreme Court ruled in *In re Rapier*,<sup>451</sup> that the 1872 prohibition was a valid exercise of congressional power to regulate the use of the mails.<sup>452</sup> Then, in 1903, the U.S. Supreme Court decided in *Champion v. Ames*<sup>453</sup> that Congress had the power to regulate a “species of interstate commerce” that “has grown into disrepute and has become offensive to the entire people of the nation.”<sup>454</sup> These decisions were perhaps the straws that finally and completely broke the back of the Louisiana lottery.<sup>455</sup>

Although there were no other legal state-authorized or state-operated lotteries until New Hampshire began its sweepstakes in 1964, there were other lotteries that sought markets in the United States.<sup>456</sup> In addition to illegal numbers games in all major American cities,<sup>457</sup> the Irish Sweepstakes—created by the Irish Parliament in 1930—had significant participants in the United States as well.<sup>458</sup> At first, the mails were used to promote and sell tickets to customers in the United States,<sup>459</sup> however, the 1895 federal law<sup>460</sup> empowered the U.S. Post Office to intervene with legal action to combat this use of the mails. Ultimately, any residual success of the Irish Sweepstakes met with competition when American states began to launch their own lotteries.

### VIII. THE EVOLUTION OF PUBLIC POLICY APPLICABLE TO LOTTERIES IN THE COMMONWEALTH CARIBBEAN AND THE U.S.

#### [i] Commonwealth Caribbean

With respect to the judicial philosophy of judges in the Commonwealth Caribbean, two points of view may be mentioned.

450. See *Ex parte Rapier*, 143 U.S. 110 (1892); *Champion v. Ames*, 188 U.S. 321 (1903).

451. *Ex parte Rapier*, 143 U.S. 110 (1892).

452. *Id.*

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

454. *Id.* at 328.

455. See SWEENEY, *supra* note 114, at 59.

456. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 39.

457. See SWEENEY, *supra* note 114, at 59.

458. CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 38; see also SWEENEY *supra* note 114, at 71.

459. See SWEENEY, *supra* note 114, at 59. CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 38; see also SWEENEY, *supra* note 114, at 71.

460. See THOMPSON, *supra* note 435.

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First, there is the point of view that “[t]he commonplace adherence of courts in the countries of the Commonwealth Caribbean to the decisions of the English courts is rooted in profound psychological and jurisprudential considerations of colonial domination.”<sup>461</sup> Secondly, this point of view resonates harmoniously with one commentator’s view of the judiciary’s approach to precedent in the Commonwealth Caribbean, where he observes that: “[t]he judicial approach to the operation of precedent in the West Indies has been rather assuming and mechanical . . . [and] closely associated with a colonial tendency to assume that if it is English it is right, irrespective of the theoretical or analytical implications.”<sup>462</sup>

Yet, the same commentator has expressed the opinion that there is “the pervasive and persistent search for a West Indian identity among West Indians [that] imbues decisions of courts in the region with a socio-psychological content which make them quite different from decisions of any other courts.”<sup>463</sup> This commentator’s apparently contradictory views may be reconciled by viewing his first comments as addressing the Commonwealth Caribbean judiciary’s approach to the doctrine of precedent,<sup>464</sup> whereas his second comments<sup>465</sup> address the Commonwealth Caribbean judiciary’s approach to respecting non-Commonwealth Caribbean court decisions as *persuasive authority*. The quest for helpful persuasive authority located in decisions of other common law court decisions is a substantive and autonomous one.

Moreover, acquisition by the Commonwealth Caribbean territories of independence from Great Britain dates from the 1960s.<sup>466</sup> This has arguably empowered the judiciary of the Commonwealth Caribbean territories to select the decisions of those common law jurisdictions—that meet the needs of the particular controversy—for emulation.<sup>467</sup> This therefore suggests that the extensive experi-

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461. See Dr. Winston Anderson, *Double Renvoi and the Circulus Inextricabilis*, COMMONWEALTH CARIBBEAN LEGAL STUDIES: A VOLUME OF ESSAYS TO COMMEMORATE THE 21ST ANNIVERSARY OF THE FACULTY OF LAW OF THE UNIVERSITY OF THE WEST INDIES 313 (Butterworths 1992); see also Rose-Marie B. Antoine, *Opting out from the Optional Protocol – Is this Humane?* 3 CARIB. L. B. 37 (1998) (“The excessive and voluntary reliance of Commonwealth Caribbean judges on English precedent . . . has been well documented in Commonwealth Caribbean jurisprudence.”).

462. See A.D. Burgess, *Judicial Precedent in the West Indies*, 7 ANGLO-AM. L. R. 113, 135 (1978).

463. *Id.* at 114.

464. See *id.* at 135.

465. See *id.* at 114.

466. See sources cited *supra* note 36.

467. See, e.g., Honorable Sir David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 171, 182 (2005).

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ence of the U.S. judiciary—particularly the rich sources of state court decisions in relation to the adjudication of lottery controversies—would be a ready and likely *rich* source of assistance when needed.<sup>468</sup>

## [ii] U.S.

In states where lotteries are *expressly* prohibited, constitutional or statutory definitions of lotteries may not have been included in the state's constitution or its statutes.<sup>469</sup> Nevertheless, the definition of a lottery is a *substantive* rather than a procedural determination.<sup>470</sup> Moreover, the presence of sufficient considera-

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(“[H]aving regard to [the Commonwealth Caribbean’s] colonial past, considerations of sovereignty and independence (independence that is both legal and psychological) are . . . central to the self-respect, self-confidence, and self-definition of Commonwealth Caribbean people.”); *see also* SIR ROY MARSHALL, *supra* note 130, at 18 (“[T]he benefits which the individual gets from judicial review are shared by society as a whole . . .”).

468. *See* LEACOCK, *supra* note 37.

469. *See, e.g.*, *Troy Amusement Co. v. Attenweiler*, 28 N.E.2d 207, 211 (Ohio 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.”).

470. For a definition of “lottery,” *see supra* note 9. *See also, e.g.*, *People v. Hecht*, 3 P.2d 399 (Cal. 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 (Mich. 1921); *Knight v. State ex rel. Moore*, 574 So.2d 662 (Miss. 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. Mo. Gaming Comm’n*, 869 S.W.2d 58 (Mo. 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 (Mo. 1927); *Contact, Inc. v. State*, 324 N.W.2d 804 (Neb. 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. Econ. Opportunity Comm’n of Nassau Cnty., Inc.*, 575 N.Y.S.2d 672 (N.Y. App. Div. 1991) (raffle was illegal lottery, hence charitable organization could not be compelled to award prize); *Cole v. Hughes*, 442 S.E.2d 86 (Ga. 1994) (the court, in

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tion, required for the formation of a valid contract, does not *per se* nullify the conclusion that a wager was the legal outcome of a particular transaction.<sup>471</sup> The determinative characteristics of a lottery require that one party pays a definable sum in exchange for a promise to transfer a greater sum or value than that actually paid, triggered by an agreed contingency.<sup>472</sup> Finally, although a lottery is a function of a wager or bet, not every wager is necessarily a lottery.<sup>473</sup>

A lottery requires three indispensable elements.<sup>474</sup> First, there must be a distribution of gain.<sup>475</sup> Second, the prize must be *awarded* by lot or chance.<sup>476</sup> Third, the participants must have provided consideration for a chance of winning the prize.<sup>477</sup> In the absence of all three elements, lottery law is inapplicable.<sup>478</sup>

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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 (Wyo. 1977) (raffle held to be lottery, illegal and void).

471. *See supra* note 470, all of the sources cited therein.

472. *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

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

474. *See FCC v. ABC*, 347 U.S. 284, 291 (1954) ("[T]here are three essential elements of a 'lottery, gift enterprise, or similar scheme': (1) the distribution of prizes; (2) according to chance; (3) for a consideration.") (citations omitted); *see also* sources cited *supra* note 9.

475. *See* sources cited *supra* note 9.

476. *Id.*; *see also Stoddart v. Sagar*, 2 QB 474, 18 Cox 165 (D.C.); *People v. Reilly*, 15 N.W. 520 (Mich. 1883); *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58 (Mo. 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 (Ga. 1994); *Williams v. Weber Mesa Ditch Extension Co.*, 572 P.2d 412 (Wyo. 1977) (A lottery must depend upon a purely *fortuitous* event).

477. *FCC*, 347 U.S. at 291.

478. *See State ex rel. Stephan v. Parrish*, 887 P.2d 127 (Kan. 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. Moore*, 574 So.2d 662 (Miss. 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

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Indeed, even if elements of skill—in addition to chance—exist in an event or game, the event or game nevertheless constitutes a lottery if the elements of chance predominate.<sup>479</sup> Furthermore, to constitute a lottery, the prize need not be exclusively money.<sup>480</sup> Instead, wherever the distribution mechanism is the payment of a prize that is quantifiable in monetary terms, a lottery is proven, even though the prize may be payable in forms of property other than money, such as land or goods.<sup>481</sup>

For example, where a purchaser is required to pay a fixed sum in return for a promise to convey a number of items—determined by the drawing of lots—an illegal lottery is proven.<sup>482</sup> Also,

bingo did not unconstitutionally run afoul of Mississippi constitutional provision banning lotteries); *Harris*, 869 S.W.2d at 58 (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); *Contact, Inc. v. State*, 324 N.W.2d 804 (Neb. 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 (Or. 1939) (the essence of a lottery is a chance for a prize for a price); *Commonwealth v. Irwin*, 636 A.2d 1106 (Pa. 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).

479. *Commonwealth v. Plissner*, 4 N.E.2d 241 (Mass. 1936); *Harris*, 869 S.W.2d at 58.

480. The term “money” is used here to refer to the coin of the realm, or the legal money of a particular country.

481. See *People v. Psallis*, 12 N.Y.S.2d 796 (N.Y. Magis. Ct. 1939); see also *Nelson v. Bryant*, 220 S.E.2d 647 (S.C. 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*, 572 P.2d at 412.

482. *Willis v. Paul*, 3 P.2d 39 (Cal. Dist. Ct. App. 1931); *Glennville Inv. Co. v. Grace*, 68 S.E. 301 (Ga. 1910); *Lynch v. Rosenthal*, 42 N.E. 1103 (Ind. 1896); *Guenther v. Dewien*, 11 Iowa 133 (1860); *Commonwealth v. Ward*, 183 N.E. 271 (Mass. 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 (Mich. 1927); *State v. Powell*, 212 N.W. 169 (Minn. 1927); *State v. Emerson*, 1 S.W.2d 109 (Mo. 1927); *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck*, 257 N.W. 493 (Neb. 1934); *Market Plumbing & Heating Supply Co. v. Spangenberg*, 169 A. 660 (N.J. 1934); *People v. Miller*, 2 N.E.2d 38 (N.Y. 1936); *Harris v. Econ. Opportunity Comm’n of Nassau Cnty.*, 575 N.Y.S.2d 672 (N.Y. App. Div. 1991) (holding that raffle was an illegal lottery and thus the sponsor could not be compelled to award prize); *Allebach v.*

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a raffle that entitled the plaintiff to buy (for a price of five dollars) a chance to win a forty acre plot of land was ruled to be a void gaming transaction.<sup>483</sup> This transaction disabled plaintiff from successful recovery when defendant drew plaintiff's stub and then subsequently, upon receiving late entries, conducted an entirely new drawing that led to plaintiff's loss of the designated prize.<sup>484</sup>

Moreover, the gift of a ticket for the drawing of prizes has been held illegal where the ticket was a gift accompanying either the purchase of goods,<sup>485</sup> the purchase of an admission ticket,<sup>486</sup> or simply attending an auction.<sup>487</sup> Actually, slot machine video or computer games are generally held to violate anti-lottery statutes or constitutional provisions where they do not involve a sufficient element of skill, but instead are based solely or predominantly on luck.<sup>488</sup>

In contrast, the receipt of "Lady Luck" coupons by customers—*after* eating their lunch-wagon meal—has been held to be

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Godshalk, 9 A. 444 (Pa. 1887); *Campbell v. Beaman*, 68 Pa. Super. 30 (1917); *Featherstone v. Indep. Serv. Station Ass'n of Tex.*, 10 S.W.2d 124 (Tex. Civ. App. 1928); *Blair v. Lowham*, 276 P. 292 (Utah 1929); *Maughs v. Porter*, 161 S.E. 242 (Va. 1931); *State v. Danz*, 250 P. 37 (Wash. 1926).

483. *Williams*, 572 P.2d at 412.

484. *Id.*

485. *See, e.g.*, *Holmes v. Saunders*, 250 P.2d 269 (Cal. Dist. Ct. App. 1952); *Bloodworth v. Gay*, 96 S.E.2d 602 (Ga. 1957); *Glover*, 213 N.W. at 107; *Powell*, 212 N.W. at 169; *Emerson*, 1 S.W.2d at 109; *Kieck*, 257 N.W. at 493; *Spangenberg*, 169 A. at 660; *Miller*, 2 N.E.2d at 38; *Featherstone*, 10 S.W.2d at 124.

486. *See Blair*, 276 P. at 292; *Danz*, 250 P. at 37.

487. *Maughs*, 161 S.E. at 242.

488. *Loiseau v. State*, 22 So. 138 (Ala. 1897); *Lee v. City of Miami*, 164 So. 486 (Fla. 1935); *Thompson v. Ledbetter*, 39 S.E.2d 720 (Ga. Ct. App. 1946); *State v. Vill. of Garden City*, 265 P.2d 328 (Idaho 1953); *State v. Brown*, 244 P.2d 1190 (Kan. 1952); *State v. Barbee*, 175 So. 50 (La. 1937); *Commonwealth v. McClintock*, 154 N.E. 264 (Mass. 1926); *Harris*, 869 S.W.2d at 58 (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 (Mont. 1990) (holding that electronic poker/keno game was 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 (Mont. 1952); *State v. Marck*, 220 P.2d 1017 (Mont. 1950); *Ex parte Pierotti*, 184 P. 209 (Nev. 1919); *State v. Lowe*, 101 S.E. 385 (N.C. 1919); *Hendrix v. McKee*, 575 P.2d 134 (Or. 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 (Or. 1938); *Queen v. State*, 246 S.W. 384 (Tex. Crim. App. 1922); *Callison v. State*, 146 S.W.2d 468 (Tex. Civ. App. 1940); *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787 (Wash. 1952); *State v. Hudson*, 37 S.E.2d 553 (W. Va. 1946).

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legally different.<sup>489</sup> The receipt of the “Lady Luck” coupons, entitling the diners to draw for prizes, was *subsequent* to the meal.<sup>490</sup> As a matter of law, therefore, the participation by diners in the drawing was entirely *gratuitous*.<sup>491</sup> The absence of contractual consideration disqualified the behavior from constituting a lottery.<sup>492</sup>

Irrefutably, the courts are constitutionally obligated to determine what does and does not constitute a lottery.<sup>493</sup> Therefore, when courts interpret either constitutional or statutory definitions of a lottery, the outcomes can be disparate and unpredictable. This is compounded by the fact that principles of statutory interpretation apply *both* to the definitions themselves as well as to any constitutional exceptions to the express prohibitions of lotteries.

In recent times, a number of states have legalized state-run lotteries,<sup>494</sup> and declared such lotteries consonant with the particular state’s public policy in favor of generating funds for worthwhile pursuits, such as educational programs,<sup>495</sup> or other public pur-

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489. See *People v. Psallis*, 12 N.Y.S.2d 796 (N.Y. Magis. Ct. 1939);

490. *Id.*

491. *Id.*

492. *Id.*

493. See, 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.”); see also *supra* note 193.

494. *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *N.Y. State Broadcasters Ass’n v. U.S.*, 414 F.2d 990 (1969); *Della Croce v. Ports*, 550 A.2d 533 (N.J. Super. Ct. Law Div. 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 (Va. 1996) (holding that the legality of the state lottery itself did not legalize an arrangement to split the winnings).

495. See, e.g., CAL. GOV’T CODE § 8880.1 (West 2013) (education); DEL. CODE ANN. tit. 29, § 4815 (West 2013) (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. ANN. § 24.102 (West 2013) (improvements in public education, proceeds are not to be used as a substitute for existing resources for public education); GA. CODE ANN. (West 2013) § 50-27-32 (educational programs and purposes); IDAHO CODE ANN. § 33-905 (West 2013) (education); IOWA CODE ANN. § 99E.10 (repealed 2003) (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. ANN. § 9-812 (West 2012) (amended 2013) (education, gambling assistance, and environment); N.H. CONST. pt. 2, art. 6-b (education); N.J. STAT. ANN. § 5:9-2 (West 2013) (education); N.Y. TAX LAW § 1601 (Consol. 2013) (education); OHIO CONST. art. XV, § 6 (education); OR. REV. STAT. ANN. § 461.540 (West 2013) (creating jobs, furthering the economic development of Oregon, and financing public education); W.VA. CODE § 29-22-18

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poses.<sup>496</sup> Nevertheless, such provisions are strictly construed by the judiciary; and, lotteries, or factors related to them, that fall outside the express legalizing parameters of the statutes<sup>497</sup> remain illegal.<sup>498</sup>

In substance, the judiciary has made it clear that the elimination of opprobrium with respect to *one* aspect of gambling—including lotteries—is *not* an automatic legalization of *all* factors applicable to the particular type of gambling.<sup>499</sup> Indeed, although a lottery may have been made legal in Virginia, other aspects of gambling, including those relating to lotteries, are not automati-

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(West 2013) (school building debts, state ten year bonds, education); *Brown v. Cal. State Lottery Comm'n*, 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, §§ 8880.1–14, 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).

496. See also NGISC: *Lotteries*, *supra* note 8, at 5 (“[M]ore common is the “earmarking” of lottery money for identified programs.”).

497. Extrapolation is severely circumscribed, if not entirely excluded by the judiciary altogether. See *Kennedy v. Annandale Boys Club, Inc.*, 272 S.E.2d 38, 39 (Va. 1980) (“[The legislature] did not see fit to make available the state’s legal machinery necessary to enforce gaming contracts. On the contrary, it expressly withheld the right to enforce a gaming contract by a civil action.”) (citation omitted).

498. See, e.g., *Miller v. Radikopf*, 228 N.W.2d 386 (1975); *Harris v. Econ. Opportunity Comm’n of Nassau Cnty.*, 575 N.Y.S.2d 672 (N.Y. App. Div. 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 twenty dollars); *Keene Convenient Mart, Inc. v. SSS Band Backers*, 427 S.E.2d 322 (N.C. Ct. App. 1993) (holding invalid a raffle where, during drawing, an error caused the randomness of the raffle to be compromised, because once the randomness was compromised, the raffle was no longer a valid activity, and hence fell within the general prohibition against gambling); see also *Hughes*, 465 S.E.2d at 820.

499. See *Hughes*, 465 S.E.2d at 828 (discussing *Kennedy*, 272 S.E.2d at 38, and observing that “[b]y statute, the [legislature] removed the taint of illegality from the operation of a bingo game by certain organizations and under certain conditions, and the taint of illegality from participating in and playing bingo, and in giving and receiving prizes and consideration incident thereto . . . . While [the legislature’s] action may be construed as *legalizing* bingo . . . it nevertheless did *not* render valid and enforceable the contract between the operators of the game and those who play.”) (emphasis added) (citations omitted); see also *Szadolci v. Hollywood Park Operating Co.*, 17 Cal. Rptr. 2d 356 (1993) (holding illegal the plaintiffs’ purchase of shares in a ticket, even though the better lawfully obtained the ticket, because when the underlying bet that gave rise to the ticket was later cancelled, the purchase of the shares in the ticket was considered outside the scope of statutorily authorized pari-mutual betting).

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cally legalized, unless the specific language of the statute so provides.<sup>500</sup> Moreover, the legal validity of lotteries in one state does not transfer legal validity to the sale of lottery tickets in a jurisdiction that forbids such sales, because this would be an outright violation of state sovereignty.<sup>501</sup>

However, with regard to the identification of a *federal* public policy embedded in the case law, caution is the watchword.<sup>502</sup> At the federal level, the judiciary treats lottery and non-lottery states evenhandedly and scrupulously respects the public policy of each individual state to ban or empower lotteries as the individual state sees fit.<sup>503</sup> Therefore, even federal statutes and their implementing regulations are strictly construed.<sup>504</sup> Under this approach, such bans must simultaneously respect non-lottery states' power to prohibit lotteries<sup>505</sup> and lottery states' power to legalize lotteries.<sup>506</sup> This even-handedness must also acknowledge that both lottery and non-lottery states' power ends at each particular state's borders. As a result, federal anti-lottery statutes that ban lottery advertising work to conserve and reinforce state public policy banning lotteries,<sup>507</sup> while respecting a state's power to legalize lotteries within its own borders.<sup>508</sup> Such judicial even-handedness ensures a narrow application of any federal legisla-

500. *Hughes*, 465 S.E.2d at 827 (“[The Virginia statutory language voids] *any* contract where the whole or any part of the consideration is money won at any game . . . .”).

501. 38 AM. JUR. 2D *Gambling* §60 (2013).

502. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Red Lion Broad. Co. v. FCC*, 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).

503. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Red Lion Broad. Co. v. FCC*, 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).

504. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Red Lion Broad. Co. v. FCC*, 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); See also 18 U.S.C.A. § 1304 (West 2013), *recognized as unconstitutional by* *Utah Licensed Beverage Ass’n v. Leavitt* (10th Cir. 2001); 18 U.S.C.A. § 1307 (West 2013) (exempts state lotteries).

505. See *Edge Broad. Co.*, 509 U.S. at 421 (“Congress has, since the early 19th century, *sought to assist the States* in controlling lotteries.”) (emphasis added).

506. *Id.* (“[L]otteries have existed in this country since its founding.”).

507. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Red Lion Broad. Co. v. FCC*, 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); See also *FCC v. ABC*, 347 U.S. 284, 291 (1954).

508. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Red Lion Broad. Co. v. FCC*, 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); See also 18 U.S.C.A. § 1304 (West 2013), *recognized as unconstitutional by* *Utah Licensed Beverage Ass’n v. Leavitt* (10th Cir. 2001); 18 U.S.C.A. § 1307 (West 2013) (exempts state lotteries).

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tion banning lottery-related advertising.<sup>509</sup>

Today, lotteries retain the legal status of a gambling bargain.<sup>510</sup> Thus, even though legal in the majority of states in the U.S, a lottery remains illegal unless specifically authorized by legislation.<sup>511</sup> This requirement endures because of the perception that gambling exacerbates an unrealistic tendency that, supposedly, too many poor people seem to display.<sup>512</sup> It is also supported by a potent criticism.<sup>513</sup> Furthermore, since the prospect of gain is so remote, the risk of losing the money spent on lotteries is not counterbalanced by a sufficient prospect of a substantial benefit. Gambling has been banned historically because it tends to impose unacceptably high risks of serious financial injury upon certain vulnerable classes of the community.<sup>514</sup> Certainly, the NGISC did not detect evidence supporting the existence of specific counterbalancing community benefits derived from lotteries.<sup>515</sup>

However, “[t]here is much *anecdotal* evidence to support the notion that gambling . . . provides economic benefits for the com-

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509. *Id.*

510. *See Williams v. Weber Mesa Ditch Extension Co.*, 572 P.2d 412, 415 (Wyo. 1977) (“[It is] the duty of the trial court to *determine the character of a contract*, even though its illegality or its validity, as being in violation of law, was not raised by the pleading in the absence of a statute requiring such a defense to be pleaded.”) (emphasis added) (citations omitted).

511. *Id.*

512. Supposedly, too many poor people seem to be willing to venture their money in the face of a significantly high probability that they will lose it. *Cf. Jack Ludwig, Charge That Gambling Industry Preys on the Poor Not Borne Out in Gallup Survey, High-income and high-education Americans play heavily*, GALLUP NEWS SERV. (July 8, 1999), <http://www.gallup.com/poll/3733/charge-gambling-industry-preys-poor-borne-gallup-survey.aspx>.

513. *See NGISC: Lotteries*, *supra* note 8, at 9 (“The image of the state promoting a highly regressive scheme *among its poorest citizens by playing on their unrealistic hopes* is a highly evocative one.”) (emphasis added). Indeed, the NAACP chapter in Dallas has claimed that “the [lottery] drains the finances of low-income ticket-buyers who can least afford it, especially minorities” and the chapter has conducted an ongoing lobbying campaign in an attempt to persuade the Texas legislature to eliminate the Texas lottery. *See Dugald McConnell & Brian Todd, Dallas NAACP seeks end to Texas lottery*, CNN (June 30, 2012, 12:06 PM), <http://www.cnn.com/2012/06/29/us/texas-naacp-lottery/index.html>.

514. *See Harris v. Mo. Gaming Comm’n*, 869 S.W.2d 58 (Mo. 1994) (holding that legislature cannot constitutionally permit certain forms of legalized gambling because it constituted lottery in violation of state constitution); *People v. Psallis*, 12 N.Y.S.2d 796 (N.Y. Magis. Ct. 1939); *Williams*, 572 P.2d at 412 (holding that wagers are against human welfare).

515. *See NGISC: Lotteries*, *supra* note 8, 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.”).

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munities that allow it.”<sup>516</sup> This anecdotal evidence has apparently not been confirmed by scientifically evaluated data.<sup>517</sup> Certainly, the modern trend towards more and more extensive state-creation of lotteries has not changed the general societal reprobation towards lotteries.<sup>518</sup> This is exemplified by the fact that, in recent years, lotteries have been resoundingly prohibited in many states as a form of gambling.<sup>519</sup> Because of this societal norm of reprobation in the U.S., courts treat laws that legalize lotteries as *exceptions* to the general policy against gambling. As a result, such lottery-enabling laws will continue to be very strictly construed.<sup>520</sup> The unabated strength of the state public policy against gambling demands that statutes and regulations that impact legalized gambling be strictly and narrowly construed.<sup>521</sup> The judiciary’s goal is to limit the powers and rights claimed under such legislative authority to the narrowest possible legislative boundaries.

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.<sup>522</sup> 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.<sup>523</sup> The legislative intent is ultimately to foster and assure that honest wagering takes place,<sup>524</sup> and to create and maintain the public’s confidence in perceiving that such is the case.<sup>525</sup> The overall intention is to

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516. See HERRMANN, *supra* note 77, at 87 (emphasis added); see also Jonah Lehrer, *Cracking the Scratch Lottery Code*, WIRED (Jan. 31, 2011, 12:00 PM), [http://www.wired.com/magazine/2011/01/ff\\_lottery/all/1](http://www.wired.com/magazine/2011/01/ff_lottery/all/1) (“Since 1964, when New Hampshire introduced the first modern state lottery, governments have come to rely on gaming revenue . . . . In some states, the lottery accounts for more than 5 percent of education funding.”).

517. See HERRMANN, *supra* note 77, at 88.

518. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (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 . . . .”) (emphasis added).

519. See 38 AM. JUR. 2D *Gambling* §§ 5, 10 (2013).

520. See 38 AM. JUR. 2D *Gambling* §§ 17, 18 (2013).

521. See *Citation Bingo, Ltd. v. Otten*, 910 P.2d 281, 287 (N.M. 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 (N.Y. App. Div. 1996) (citation omitted) (“Public policy continues to disfavor gambling; thus, the regulations pertaining thereto are to be strictly construed.”).

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

523. *St. Charles Gaming Co. v. Riverboat Gaming Comm’n*, 648 So. 2d 1310 (La. 1995).

524. *Id.*

525. *Moya v. Colo. Ltd. Gaming Control Comm’n*, 870 P.2d 620 (Colo. App. 1994).

strictly regulate all parties involved in gaming operations in order to preserve the integrity and credibility of these operations where states have made them legal to pursue.<sup>526</sup>

### IX. FEDERAL LAW, PUBLIC POLICY, AND LOTTERIES

The U.S. Constitution includes neither express nor implied provisions relating to lotteries or lottery law. Furthermore, because lottery laws implicate moral fundamentals, it is generally a function of state law.<sup>527</sup> Of course, where constitutional dimensions such as freedom of speech are implicated, substantive, orthodox constitutional law applies.<sup>528</sup> This means that, for example, federal legislative enactments applicable to lottery advertising cannot infringe upon fundamental constitutional rights such as the right to free speech under the U.S. Constitution.<sup>529</sup> Therefore, although lottery advertising regulation falls squarely under federal communications law, constitutional free speech rights cannot be unlawfully infringed upon by such measures.<sup>530</sup>

In this federal law context, the federal judiciary is not legally empowered to favor or disfavor the public policy of any one state over that of any other state.<sup>531</sup> The public policy of each state is equally viable under the U.S. Constitution and the federal judiciary must be disinterested and neutral in its evaluation of the legal impact of lottery advertising upon the right to free speech under the U.S. Constitution.<sup>532</sup>

### X. THE LEGAL IMPACT OF TAX-SUBSTITUTION GOALS ON LEGISLATIVE CHANGES IN STATE LOTTERY LAWS AND PUBLIC POLICY

The tax-substitution fiscal objectives, which may motivate changes in state-lottery laws, do not necessarily dissolve the pub-

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526. *Mastro v. Ill. Dep't of Revenue*, 667 N.E.2d 594 (Ill. App. Ct. 1996).

527. *See Rosemary*, 500 S.E.2d at 179 ("The government is imbued with the power to legislate for the protection of the public health, welfare and morals."). *Stone v. Mississippi*, 101 U.S. 814, 818 (1879) ("[The police power] *extends to all matters affecting the public health or the public morals.*") (emphasis added) (citation omitted).

528. *See United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

529. *Id.*

530. *Id.*

531. *Id.*

532. *See id.* at 434 ("[Congress can enact statutes that] accommodate non-lottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States . . . [w]ithin the bounds of the general protection provided by the Constitution to commercial speech . . .").

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lic-policy reprobation of lotteries at all.<sup>533</sup> Therefore, the argument can be made that public policy regarding lotteries has not been fundamentally changed by recent legislative changes in state lottery law.<sup>534</sup> In fact, the precision of each state's legislation in turn circumscribes the legal reach of each statutory enactment.<sup>535</sup> For example, principles of state sovereignty dictate that state legislatures may enact measures governing the operation of lotteries *only within the particular state*.<sup>536</sup> This is used to create a state monopoly in each one of the individual states that have legalized and regulated lotteries.<sup>537</sup> Restrictions or empowerment are legally valid and tenable in the operation of lotteries in the particular state alone.<sup>538</sup>

First, the fundamental and unanimous individual state motivation for the legalization of lotteries has been the substitution of a *voluntary* tax to take the place of *involuntary taxation*.<sup>539</sup> "Voters want states to spend more, and politicians look at lotteries as a way to get tax money for free."<sup>540</sup> Modern political pressures—caused mainly by government financial needs in order to finance its policy goals—have created almost intolerable economic stress.<sup>541</sup> Politicians inevitably navigate a passage similar to the mythical passage between Scylla and Charybdis.<sup>542</sup> It consists of

533. See *Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y. App. Div. 1996) ("Public policy continues to disfavor gambling; thus, the regulations pertaining thereto are to be strictly construed . . .") (emphasis added) (citations omitted); see also Kelly, *supra* note 66.

534. *Id.*

535. *Id.*

536. See sources cited *supra* note 48.

537. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 9, at 3 ("[F]or the most part [states adhere] to single model for the lottery's operation and financing. In each state the government has . . . made itself the sole provider, and used the profits from the operation as a new source of revenue.").

538. See sources cited *supra* note 48.

539. See NGISC: Lotteries, *supra* note 8, at 2 ("The principal argument in every state to promote the adoption of a lottery has focused on its value as a source of "painless" revenue: players *voluntarily* spending their money (as opposed to the general public being taxed) for the benefit of the public good.") (emphasis added); see also GOLDWATER, *supra* note 7, at 49 ("The size of the government's rightful claim—that is, the total amount it may take in taxes—will be determined by how we define the 'legitimate functions of government.'").

540. See NGISC: Lotteries, *supra* note 8, at 2 (citation omitted).

541. *Id.*

542. See HAMILTON: MYTHOLOGY, *supra* note 10, 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."). This is also referred to as being "between a rock and a hard place," or in Barbados in the Caribbean, where it is referred to as being "between the devil and the deep blue sea."

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political pressures on states to either increase taxation in order to maintain public programs at current levels of funding, or cut them.<sup>543</sup> Quite predictably, politicians tend to select the alternative of the “free” mechanism,<sup>544</sup> rather than take the political risks of losing their office that accompany raising taxes.

Moreover, the NGISC’s Report on Lotteries refers to an argument by lottery promoters that “because illegal gambling already exists, a state-run lottery is an effective device both for capturing money for public purposes that otherwise would disappear into criminal hands and also for suppressing illegal gambling.”<sup>545</sup> In this sense, legislative enactments legalizing state-run lotteries represent a *legislative* policy to opt for the lesser of two evils.<sup>546</sup> This may make the embracement of lotteries by the forty or so states that have adopted them a less reprehensible administrative-law policy than it might have appeared to be at first blush.<sup>547</sup> Making lotteries a part of the state’s administrative-agency structure rescues this form of gambling from the grasp of local and national criminal elements, and transforms it safely and legally into a segment of the state’s executive branch of government.<sup>548</sup> However, state lottery authorities, as administrative agencies of the state that created them, are certainly subject to pertinent provisions of the United States Constitution.<sup>549</sup>

The scope of the embrace of lotteries by states<sup>550</sup> implicates issues pertaining to substantive common law public policy.

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543. See NGISC: *Lotteries*, *supra* note 8, at 5.

544. *Id.* at 2.

545. *Id.* at 3.

546. *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).

547. See CLOTFELTER, COOK, EDELL & MOORE, *supra* note 62, at 19 (“Owing to its structure and management orientation, the typical state lottery authority has evolved into a *new breed of governmental agency*. Virtually all state lotteries conform to a single basic model. . . .”) (emphasis added).

548. These state administrative agencies do not *expressly* function under the authority of the Government of the United States and are therefore not *expressly* subject to the Federal Administrative Procedure Act. See 5 U.S.C. § 551 (West 2011) (defining “agency” to mean each authority of the Government of the United States). However, similar administrative law principles are applied to them. See WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW; CASES AND COMMENTS* 11 (2011) (“Administrative law comprises the body of general rules and principles governing administrative agencies . . . . It exists at *all levels of government* – federal, state and local. . . .”) (emphasis added).

549. *E.g.*, U.S. CONST. amend. XIV.

550. See CLOTFELTER, COOK, EDELL & MOORE, *supra* note 62, at 1 (“[Lotteries] are also a worldwide phenomenon: there are 100 countries where lotteries are legal.”).

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Whether, for example, a state's embrace of the *lesser of two evils* transform the evil embraced into a non-evil.<sup>551</sup> Another question is whether "lotteries [are] a more or less harmless form of recreation[?]"<sup>552</sup> Yet another would be whether "lottery play is a benign activity[?]"<sup>553</sup> Or, whether legislative legalization of lotteries justify "taxing lottery products [no] more heavily than liquor or tobacco. . . ."<sup>554</sup> The judiciary's answer seems to be that these questions are beside the point with respect to the analytical application of public policy to cases implicating lotteries.<sup>555</sup>

Thus, the judiciary has concluded that the lesser of two evils does not at all denote a substantive transformation.<sup>556</sup> But the lesser of two evils remains an evil nonetheless.<sup>557</sup> Its status of being lesser than a greater evil does not per se transform its fundamentally evil legal status.<sup>558</sup> Inevitably, therefore, the present-day, widespread creation of lottery-operation monopolies by legislatures in a majority of states in the U.S. has not necessarily transformed public policy in any universally substantive way.<sup>559</sup> Instead, the present day creation of lotteries by states coexists side-by-side with the prior, fundamental, judicially-enunciated public policy applicable to gambling.<sup>560</sup> The widespread embrace of lotteries by state legislatures has not wholly transformed public policy in the judiciary's evaluation.<sup>561</sup> Rather, the prior public policy disfavoring gambling in general and lotteries in particular

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

552. *Id.* at 21.

553. *Id.* at 22.

554. *Id.*

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

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

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

561. See *id.* (explaining that each legislative enactment must be strictly construed by the judiciary within the common law's analytical framework of public policy).

remains intact.<sup>562</sup> It is an American legal phenomenon that the Commonwealth Caribbean is highly likely to emulate in each deserving case.<sup>563</sup>

# XI. TAX FACTORS IN THE CURRENT AND FUTURE PUBLIC POLICY LANDSCAPE

Condemnation of gambling generally, and of lotteries in particular, has arguably remained the dominant fundamental of public policy in the modern era.<sup>564</sup> Indeed, the opinion of one commentator is that perhaps the NGISC<sup>565</sup> may have over emphasized state economic needs.<sup>566</sup> Counterbalancing arguments relating to the regressive nature of lotteries may not have been presented with sufficient tenacity.<sup>567</sup> Moreover, the potentially unfair use of lotteries as tax-substitutes may have been under-emphasized.<sup>568</sup> The commentator expressed a number of laments.<sup>569</sup> Nevertheless, the commentator did acknowledge that “the Commission asserted that individual states *best knew how to regulate themselves* . . . .”<sup>570</sup>

This is probably inevitable in light of the Tenth Amendment to the U.S. Constitution.<sup>571</sup> Thus, the regulation of *lotteries* remains vested in the Several States,<sup>572</sup> although, some other

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562. *Id.*

563. See sources cited *supra* note 37.

564. See sources cited *supra* note 69; see also NIBERT, *supra* note 107, at 114 (“[T]raditional religious condemnation of gambling and lotteries ostensibly was supported by a conservative, Republican-controlled Congress, which, in 1996, created the National Gambling Impact Study Commission . . . to examine the social implications of gambling.”).

565. See *supra* note 8.

566. See NIBERT, *supra* note 107, at 115 (“The Commission submitted a number of recommendations to the President and Congress for consideration but . . . economic exigencies largely eclipsed moral appeals for fairness and justice.”).

567. *Id.* (“Notably, criticism . . . especially about the regressive nature of lotteries, did not figure prominently in the debates in the . . . U.S.”).

568. *Id.* (“In the future, it will be particularly important . . . to articulate [the regressive nature of lotteries] if true consideration of the public interest is to be brought into discussions about the future of state lotteries, [and] the entire system of unfair taxation . . . .”).

569. *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 . . . .”).

570. *Id.* (emphasis added).

571. See sources cited *supra* note 378 and accompanying discussion.

572. *Id.*

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forms of gambling may be somewhat different.<sup>573</sup> Congress has acknowledged the constitutional power of the Tenth Amendment to the U.S. Constitution 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*.”<sup>574</sup> This therefore makes competition with state lotteries<sup>575</sup> from Indian gaming an unlikely prospect.<sup>576</sup>

## [i] Future Prospects

The Commission seems to anticipate that the public policy tension<sup>577</sup> in the state law of each of the individual states—that legalized lotteries—will remain unchanged.<sup>578</sup> This public policy tension is inevitable because of continuing lottery-legalization by state legislatures on the one hand and the judiciary’s continuing reprobation of gambling generally and lotteries in particular.<sup>579</sup> This means that the well-established common law principles categorizing lottery contracts as illegal agreements will remain intact and such agreements will also remain legally null and void.<sup>580</sup>

This also means that each court will continue to leave parties—that are equal participants in the illegality—where it finds them.<sup>581</sup> A number of states still have constitutional or statutory provisions prohibiting the promotion or conduct of lotteries or the sale of lottery tickets.<sup>582</sup> In some states, such prohibitions are then

573. *E.g.*, Orthodox taxation of Indian gaming would probably swell state tax coffers significantly in addition to lottery-derived revenues, however, with respect to the regulation of Indian gaming. See Kathryn R. L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. 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.”) (emphasis added) (citation omitted).

574. *Id.* (“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.”) (emphasis added) (citation omitted).

575. Without state input.

576. *Id.*

577. See *supra* notes 84–91, and accompanying discussions.

578. See NGISC: FINAL REPORT, *supra* note 24, at 3–1.

579. See, *e.g.*, CLOTFELTER & COOK, SELLING HOPE, *supra* note 9, 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.”).

580. See sources cited *supra* note 83.

581. See sources cited *supra* note 73; see also 17 AM. JUR. 2D *Contracts* § 216 (2013).

582. See, *e.g.*, *Cole v. Hughes*, 442 S.E.2d 86 (N.C. Ct. App. 1994).

subjected to enacted exceptions empowering state monopolies to conduct these otherwise prohibited operations.<sup>583</sup> States that have authorized lotteries have done so for specifically identified purposes, such as charitable, educational, or religious purposes.<sup>584</sup> Now, the widespread legalization of lotteries throughout the U.S. has created other tensions between lottery states, where lotteries are lawful and non-lottery states where lotteries remain prohibited.<sup>585</sup>

One example of these other tensions is a recent practice that has developed when large prizes are offered by lottery-jackpots in various lottery-states.<sup>586</sup> This practice may consist of agreements between friends, relatives, or co-workers to pool resources and purchase lottery tickets subject to terms that winnings will be distributed among them.<sup>587</sup> The validity and legality of such agreements have been subjected to legal challenge and courts that have decided such cases have reached differing conclusions.<sup>588</sup>

One group of courts has refused to enforce such agreements—if *made* in a non-lottery state—on the ground that such agreements violate the public policy of the state where the parties to the joint venture reside.<sup>589</sup> The fact that playing the lottery in

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583. The existence and legality of the dichotomy of lottery and non-lottery states is acknowledged by the U.S. Supreme Court in interpreting and applying federal statutory enactments in light of fundamental rights mandated by the U.S. Constitution. *See, e.g.,* U.S. v. Edge Broadcasting Co., 509 U.S. 418, 428 (1993) (“Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State like North Carolina by forbidding stations in such a State from airing lottery advertising. At the same time it sought *not to unduly interfere with the policy of a lottery sponsoring State* such as Virginia.”) (emphasis added).

584. 38 AM. JUR. 2D *Gambling* §§ 57–60 (2013).

585. *See, e.g.,* Edge Broadcasting Co., 509 U.S. at 433-34 (upholding against constitutional attack the federal anti-lottery statute which prohibits broadcasting of lottery advertising by licensee licenses in state which does not allow lotteries even though licensee licenses in state which does allow lotteries may so broadcast); FCC v. ABC, 347 U.S. 284 (1954).

586. *See, e.g.,* Pearsall v. Alexander, 572 A.2d 113, 118 (D.C. Cir. 1990) (“News accounts and personal observations reveal that it is common practice for friends, relatives, and coworkers to pool their resources and purchase large blocks of tickets on those occasions when various state lotteries present exceptionally large prizes.”); *see also* Cole, 442 S.E.2d at 86; Talley v. Mathis, 453 S.E.2d 704 (Ga. 1995). These agreements to jointly participate in particular lotteries and share the winnings may be informal and oral.

587. Pearsall, 572 A.2d at 113, 118.

588. *Id.*

589. *See* Hughes v. Cole, 465 S.E.2d 820 (Va. 1996) (holding void—since it was violative of North Carolina anti-gaming laws—joint venture agreement entered into in North Carolina by North Carolina residents in spite of the legality of gambling on the lottery in Virginia).

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issue is lawful in the state where the *purchase* was made has not necessarily saved the agreement from legal nullification.<sup>590</sup>

[ii] Courts that Refuse Enforcement

For example, in *Cole v. Hughes*,<sup>591</sup> the Court of Appeals of North Carolina declined to exercise in rem jurisdiction over the lottery ticket in issue.<sup>592</sup> This made sense because common law courts will not reach decisions that the court itself is legally incapable of enforcing.<sup>593</sup> Similarly, the Court of Appeals of North Carolina ruled that it was legally precluded from enforcing any in rem adjudication over legal or equitable title to the lottery ticket because the ticket was located outside the jurisdiction of the North Carolina courts in Virginia.<sup>594</sup> Unavoidably, therefore, a decision by the Court of Appeals of North Carolina declaring ownership of the ticket would be nullified if the Virginia courts disagreed with the North Carolina court's decision.<sup>595</sup>

The counterclaim by the defendants sought adjudication of "the rights of the parties under the alleged joint venture agreement."<sup>596</sup> The Court of Appeals of North Carolina clearly had jurisdiction over *this issue* for the following reasons. First, at the time of the litigation "all parties to the agreement [were] North Carolina residents, and they entered into the venture in North Carolina."<sup>597</sup> The Court therefore applied North Carolina public policy to the joint venture at issue and declared it "illegal."<sup>598</sup>

This determination invoked North Carolina's anti-gambling and anti-lottery public policies.<sup>599</sup> The Court made it clear in no uncertain terms that "North Carolina public policy is against gambling and lotteries."<sup>600</sup> Inevitably, therefore, the Court of Appeals of North Carolina affirmed the trial court's dismissal of the defendants' counterclaim "because it sought to enforce a contract or joint

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590. *Id.*

591. 442 S.E.2d at 86.

592. *Id.* at 89 ("It is indisputable that [the lottery ticket in issue] had been presented to the lottery authorities in Virginia, and that it is there now.").

593. *Id.* ("We do not have the jurisdiction to assert, or the power to enforce . . . a decision [of the North Carolina courts] in Virginia.").

594. *Id.* at 88 ("In rem jurisdiction may not be invoked over property located outside this state.") (citations omitted).

595. *Id.*

596. *Cole*, 442 S.E.2d at 89.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.* (citations omitted).

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venture which is illegal and against the public policy of North Carolina.”<sup>601</sup>

After staying its resolution until final adjudication in North Carolina was complete,<sup>602</sup> the Virginia courts dealt with the agreement in controversy that was made in North Carolina and nullified it.<sup>603</sup> In final resolution of the case, the Virginia Supreme Court affirmed both the primary decision of the Virginia trial court,<sup>604</sup> as well as the trial court’s alternative ground for nullifying the agreement made in North Carolina.<sup>605</sup>

[iii] Courts that Permit Enforcement in Judicially Tolerable Circumstances

The shroud of uncertainty as to whether courts will enforce agreements relating to ‘pooling’ funds to buy lottery tickets and share in the winnings, if any, makes such agreements perilous. Court-refusal on public policy grounds to enforce such agreements in spite of the fact that such lottery tickets are purchased in the context of a state-promoted lottery is problematic. In fact, the courts in some states have permitted enforcement of similar agreements between comparable parties, reasoning that the parties to such agreements are really not engaged in gambling between or among each other.<sup>606</sup> Because it is lawful to purchase

601. *Cole*, 442 S.E.2d at 89.

602. *Hughes v. Cole*, 465 S.E.2d 820, 825 (Va. 1996) (“In the meantime, the [Virginia] trial court had stayed proceedings in the Virginia case pending the outcome of the North Carolina litigation.”).

603. *Id.*

604. *Id.* at 835 (discussing Virginia trial court’s ruling that “under Virginia’s choice of law doctrine, the law of the place of making governs the determination of a contract’s validity, [and] that “the law of North Carolina shall govern the validity of the agreement and the obligation between the parties . . .” and holding that, because, the “North Carolina courts having decided that the agreement is illegal and against the public policy of North Carolina [it] is accordingly void and unenforceable in [North Carolina and] there exists no agreement which may be enforced in Virginia”).

605. *Id.* (“Alternatively, the trial court ruled that if North Carolina law did not apply, the agreement was void and unenforceable under Virginia law.”) This was the case because any modification of Virginia gambling law by the Virginia legislature was precisely circumscribed in the modifying legislation and did not include the legalization of agreements such as the one entered into by the pertinent parties embroiled in the case before the Virginia courts.

606. *See Talley v. Mathis*, 453 D.E.2d 704, 704 (Ga. 1995); *see also Kaszuba v. Zientara*, 506 N.E.2d 1 (Ind. 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; although participating in a lottery in Indiana would be unlawful under both statutory and constitutional provisions, the majority of the court found nothing unlawful or violative of public policy in one person agreeing to purchase tickets for another in Illinois, where lottery was legal; the case is

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lottery tickets *in* the state where the lottery tickets are sold, the courts in some states have concluded that no public policy of the state in which the joint venturers reside is substantively violated.<sup>607</sup> Instead, such courts have been persuaded that the parties are merely agreeing to participate jointly in a specific enterprise that is legal in the state where performance is to be consummated under the agreement.<sup>608</sup>

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obviously different; refusal to sanction such an agreement would, as the court put it, “reward people who convert the property of others to their own use,” since the defendant had merely agreed to use the plaintiff’s money to purchase a lawful item for the plaintiff, and then refused to give the item to him); *Miller v. Radikopf*, 228 N.W.2d 386 (Mich. 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 it did, defendant refused to split the prize and plaintiff sued; the court enforced the agreement, stating the issue to be whether public policy would be offended by enforcing an agreement to share money legally paid to the holder of a ticket legally possessed; the court noted 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 or illegal under Michigan law to be paid the proceeds voluntarily, though no action to compel payment could be brought; that being so, an agreement to share amounts so paid would not violate public policy either; this, of course, ignores the fact that the manner of the ticket’s acquisition depend on illegality though the court pointed out that it need not have done so; the court also noted that to hold otherwise would reward “promissory default;” it buttressed its view on the position of some courts permitting enforcement, though gambling is illegal where the action is brought, of a gambling debt incurred where gambling is legal; the analogy is at best imperfect, since the “debt” involved in the instant case was incurred in Michigan where gambling was illegal; it is worth noting too that Michigan, as pointed out by the dissenting opinion, sponsors a state run lottery, suggesting that the public policy against lotteries may not be as strong as in such jurisdiction as North Carolina where lotteries remain prohibited); *Pineiro v. Nieves*, 259 A.2d 920 (N.J. App. Div. 1969) (by statute, permitting New Jersey residents to possess lottery tickets lawfully bought in lottery states, noting also that New Jersey had recently adopted lottery legislation, and holding that public policy was not offended by agreement to share proceeds of lottery ticket); *Castilleja v. Camero*, 414 S.W.2d 424 (Tex. 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 Mexican contract, valid there, and that no Texas public policy was violated; distinguishing an earlier decision where the parties had illegally purchased a Honduran lottery ticket in Texas; the money in the instant case was located in a Mexican bank, having been paid in Mexico to the defendant, and the court viewed the transaction as simply one to enforce a right that arose extra-territorially; the dissent argued that the agreement being enforced was not a Mexico agreement at all, but a Texas bargain performable wholly in Texas, to split the proceeds of a lottery, and therefore unenforceable in Texas).

607. *See, e.g., Castilleja*, 414 S.W.2d at 426 (focusing on legality in the state of *performance* of the agreement rather than focusing *exclusively* on the state where the agreement may have been *made*).

608. *See id.*

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Motivating these courts is the concern that permitting holders of winning tickets to renege on their agreements in such instances should not be overlooked or ignored because it is unscrupulous conduct.<sup>609</sup> Arguably, unscrupulous conduct is immoral and merits attention and evaluation by the judiciary.<sup>610</sup> In these circumstances, allowing unscrupulous actors to escape enforcement of an agreement into which all parties freely entered is itself a public policy concern.<sup>611</sup> The question thus becomes whether the failure to enforce these agreements confers any public policy benefit on the non-enforcing state.<sup>612</sup>

Depending upon the facts and circumstances presented to courts, these agreements may be characterized as a joint venture<sup>613</sup> to participate in and divide the *profits* from lottery ticket purchases.<sup>614</sup> Arguably, an agreement to divide the proceeds aris-

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609. *Id.*

610. *Id.*

611. *Id.*

612. See *Pearsall v. Alexander*, 572 A.2d 113, 116–17 (D.C. Cir. 1990).

613. The term “joint venture” is used here to refer to an informal partnership agreement.

614. See *Pearsall*, 572 A.2d at 117 (affirming lower court’s holding that oral agreement existed 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); see also *Fitchie v. Yurko*, 570 N.E.2d 892 (Ill. App. Ct. 1991) (affirming lower court’s finding 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 (N.Y. App. Div. 1986) (reversing lower court’s grant of 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, saintly intervention, where one version of the terms of an oral partnership agreement advanced by the minor could be proven in a court of law); *Yates v. Tisdale*, 3 Edw. Ch. 71 (N.Y. Ch. 1838) (holding that there was sufficient evidence presented of a clear, positive, and unconditional agreement to sell a share of the lottery ticket, and that the purchaser was entitled to the same share of the prize); *Hamilton v. Long*, 588 N.E.2d 942, 943 (Ohio Ct. App. 1990) (affirming lower court’s 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); *King v. Thomas*, 566 N.E.2d 173 (Ohio 1991) (affirming without opinion lower court’s conclusion that the parties had agreed to jointly purchase and share equally in the proceeds from both Super Lotto and kicker lottery tickets); *Johnson v. Spence*, 730 N.Y.S.2d 334 (N.Y. App. Div. 2001) (holding that live-in girlfriend stated cause of action for breach of oral agreement 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 (N.Y. App. Div. 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.*

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ing from the legal purchase of a lottery ticket creates an enforceable oral<sup>615</sup> contract, as many courts have held.<sup>616</sup> For example, where there is sufficient evidence proving the existence of an enforceable contract to divide lottery winnings, a court may validly affirm a motion for summary judgment in favor of parties who alleged and proved such a contract.<sup>617</sup> Moreover, courts are free to conclude that pooling resources to purchase lottery tickets legally in a lottery state presumes the existence of an agreement to distribute the proceeds from a winning, legal lottery ticket between such parties.<sup>618</sup>

A Georgia Supreme Court case, *Talley v. Mathis*,<sup>619</sup> is helpful in this regard. In *Talley*, two Georgia residents agreed that the defendant's daughter, who lived in Kentucky, would buy lottery tickets for the two Georgia residents with money provided by each

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Freeman, 694 N.E.2d 510, 514 (Ohio Ct. App. 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 (Tex. Ct. App. 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).

615. In circumstances where parties choose instead to put their agreement in writing, such agreements arguably qualify as enforceable written contracts as well.

616. See cases discussed in note 614.

617. See, e.g., *Maffea v. Ippolito*, 247 A.D.2d 366, 367 (N.Y. App. Div. 1998) (holding enforceable alleged oral agreement made at informal family gathering to share grand prize in state lottery if either party won despite absence of evidence that party who eventually did win lottery assented to agreement at time of gathering or any time subsequent thereto); *Meyer v. Hawkinson*, 626 N.W.2d 262, 270 (N.D. 2001) (holding that couple who won Canadian lottery did not convert the property of former friends who alleged they had contract with winners to share in lottery proceeds, where parties did not pool their money to purchase winning lottery ticket jointly, but allegedly exchanged promises to share any winnings from their individually owned lottery tickets).

618. See *Cahn v. Kensler*, 34 F. 472, 473 (C.C.W.D. Mo. 1888) (holding that a joint purchase of two lottery tickets with funds equally contributed by both parties was determinative of the claimant's recovery of a one-half share of the proceeds delivered by the lottery company to the recipient, thus arguably presuming that an agreement to equally divide the winnings was formed under such circumstances); see also *Lomberk v. Lenox*, 1989 WL 817148 (Pa. Com. Pl. 1989) (holding that in any situation where the purchaser of lottery tickets is given a sum of money by another, and several tickets are purchased with both of the parties' money, the proceeds from any winning ticket must be divided in the same proportion as the contribution by each party to the total amount spent on the tickets by the purchaser on that date, unless there is an express contract or agreement that all winnings are to be retained by the purchaser).

619. 453 S.E.2d 704 (Ga. 1995).

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of them.<sup>620</sup> When a ticket the defendant's daughter purchased won a six million dollar prize in the Kentucky lottery, the defendant told the plaintiff that the ticket belonged to his daughter and others, not to the plaintiff.<sup>621</sup> Plaintiff filed suit against the other Georgia resident, the Georgia resident's daughter, and others.<sup>622</sup>

The superior court held that the agreement between the parties violated Georgia's public policy and granted the defendants' motion to dismiss.<sup>623</sup> Although the decision was affirmed on appeal,<sup>624</sup> the Georgia Supreme Court ultimately reversed.<sup>625</sup>

Concluding that a contract to purchase the winning ticket was validly made in Kentucky, the court enforced the agreement at issue.<sup>626</sup> The court declared that a contract was made between the actual purchaser on the one hand and the State of Kentucky on the other.<sup>627</sup> Moreover, the court ruled that the contract was perfectly legal in Kentucky<sup>628</sup> because such contracts were perfectly legal for persons to enter into in the State of Kentucky.<sup>629</sup>

In its analysis, the court first quoted the Georgia anti-gambling statute, which made gambling agreements void.<sup>630</sup> However, the court noted that the parties' bargain did not involve a situation where one of the parties had to lose—a hallmark of gambling agreements.<sup>631</sup> The only gambling contract that conceivably existed, the court concluded, was between the state of Kentucky and the holder of the winning ticket.<sup>632</sup> Because the state of Ken-

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620. *Id.* at 705–706.

621. *Id.*

622. *Id.*

623. *See* Talley v. Mathis, 441 S.E.2d 854, 855 (Ga. Ct. App. 1994), *vacated*, 457 S.E.2d 715 (Ga. App. Ct. 1995). Since the agreement in controversy was allegedly made in 1991 and the pertinent lottery tickets were purchased in March 1992, the court of appeals rebuffed plaintiff's argument that a constitutional amendment authorizing a Georgia state lottery and passed in 1992, had indicated a modification of Georgia's public policy. *Id.* The court of appeals did not find plaintiff's argument persuasive because the constitutional amendment was enacted *subsequent* to the lottery-ticket purchase and the amendment did not specifically mandate any retroactive effect. *Id.* The court of appeals therefore concluded that the constitutional amendment was *prospective only*. The Supreme Court of Georgia did not discuss the legal impact of the Georgia lottery-authorization amendment.

624. *Talley*, 441 S.E.2d at 856.

625. *Talley*, 453 S.E.2d at 706.

626. *Id.* ("Under those circumstances, appellant was merely using appellees as his agents for engaging in the lawful act of gambling in Kentucky.").

627. *Id.* at 705.

628. *Id.*

629. *Id.*

630. *Id.*

631. *Talley*, 453 S.E.2d at 705.

632. *Id.*

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tucky was not a party to the suit, and because the state agreed to pay the holder of the winning ticket, the agreement was enforceable in Kentucky.<sup>633</sup> This meant that both lower courts erred in relying on the Georgia anti-gambling statute to nullify the parties' agreement.<sup>634</sup>

Secondly, the court acknowledged that the agreement was indeed legally vulnerable to nullification if it were immoral, illegal, or otherwise in violation of the public policy of Georgia.<sup>635</sup> However, the Supreme Court concluded that the parties had *not* made any illegal agreement or agreements in Georgia to purchase a Kentucky lottery ticket.<sup>636</sup> On the contrary, playing the Kentucky lottery by purchasing lottery tickets in Kentucky was entirely lawful and there was no proof that there was any conduct or facts that violated Georgia law or public policy.<sup>637</sup>

Rather, there was proof that the ticket had been lawfully purchased in Kentucky.<sup>638</sup> On the facts presented, the two Georgia residents had simply arranged for a Kentucky resident, as an agent, to do an act that was entirely lawful under the laws of Kentucky.<sup>639</sup> The Supreme Court of Georgia reasoned that there would have been nothing illegal for a Georgia resident to personally travel to Kentucky and buy a lottery ticket there.<sup>640</sup> The Supreme Court of Georgia therefore concluded that the two Georgia residents had merely pooled money for the joint purchase<sup>641</sup> of a Kentucky lottery ticket, by a third party who lived in Kentucky.<sup>642</sup>

The Supreme Court of Georgia cited a similar Indiana case where the Indiana courts had upheld the legality of a factually similar agreement.<sup>643</sup> In the Indiana case, two Indiana residents agreed that one of them would travel to Illinois and purchase lottery tickets in Illinois for the first party.<sup>644</sup> Since the purchase of lottery tickets in Illinois was legal, the Indiana courts ruled that

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633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.* ("[Plaintiff] did not contract with [defendants] for the illegal purchase in Georgia of the Kentucky lottery ticket.").

637. *Talley*, 453 S.E.2d at 705.

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.* The court also found that this happened in Kentucky.

642. *Id.*

643. *See Kaszuba v. Zientara*, 506 N.E.2d 1 (Ind. 1987).

644. *Id.*

the agreement was not unlawful.<sup>645</sup>

The Supreme Court of Georgia emphasized the point that a refusal to permit suit to enforce the agreement would not benefit the citizens of Georgia.<sup>646</sup> On the contrary, a refusal by the Supreme Court of Georgia to reverse dismissal of the suit to enforce the agreement would irrefutably reward duplicitous conduct on the part of the alleged bargain-violator.<sup>647</sup> Therefore court interpretation of breach of the agreement as lawful behavior would unquestionably violate Georgia's public policy.<sup>648</sup> In reversing the decision of the Court of Appeals, the Supreme Court of Georgia permitted plaintiff to lawfully seek recovery of a share of the proceeds of the winning ticket in a lottery sponsored by the State of Kentucky.<sup>649</sup>

[iv] Future of the Lottery-Proliferation Phenomenon as a Voluntary and "Painless Tax"

In both the Commonwealth Caribbean and the U.S., lotteries have proliferated in the last half a century or so. Moreover, they have proven to be genuinely successful as a tax-substitute mechanism. They are certainly voluntary, although being "painless" may be a matter of individual opinion. Nevertheless, notwithstanding the apparent perception<sup>650</sup> of lotteries as a "voluntary and painless tax," they will continue to be subjected to the relentless judicial scrutiny that the courts have conducted as the need has arisen in the past. Moreover, the individual state sovereignty, of lottery states on the one hand and of non-lottery states on the other, will continue to propel antithetical decisions by state courts in lottery-controversies arising in the individual states in the U.S.

The growing governmental reliance on lottery revenue in lieu of involuntary taxes may not be a panacea at all. The current financial prosperity and widespread state embrace of lotteries in the U.S. and the Commonwealth Caribbean may lull both the electorate and its political representatives into overlooking the invisible hand of subconscious and potentially treacherous

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645. *Id.*

646. *Talley*, 453 S.E.2d at 705.

647. *Id.*

648. *Id.*

649. *Id.*

650. The term "perception" is used here to refer generally to state legislatures throughout the United States and also by legislatures throughout the Commonwealth Caribbean territories.

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psychological undercurrents.<sup>651</sup> The future may be exhilarating or ominous and every state needs to remember the pendulum nature of lotteries in U.S. legal history.<sup>652</sup> The public view of gambling and lotteries in particular can reverse itself, so, states must remain wary and remember that it is often calm just before a storm.<sup>653</sup>

## XII. CONCLUSION

Resignation to the purpose of lotteries as tax-substitute vehicles seems widespread and enduring in both the Commonwealth Caribbean and the U.S. Indeed, governmental revenue needs—in both instances—are colossal and will fuel perpetuation and expansion of lotteries in both for the foreseeable future. In this regard, the insuperable uncertainty of the future may be good reason to pause and reflect.<sup>654</sup> Of course, in the U.S., the NGISC report noted that, with two exceptions<sup>655</sup> “[t]he Commission recommends to state governments and the federal government that *states* are best equipped to regulate gambling within their own borders . . . .”<sup>656</sup>

This conclusion may reflect the Commission’s acknowledgment of the legal supremacy of the Tenth Amendment of the U.S. Constitution in the context of each state’s exercise of its “police powers.”<sup>657</sup> The Commission’s conclusion may also be based upon its confidence and faith in the resilience and genius of the common law and in particular the judiciary’s effective management of each state’s public policy.<sup>658</sup>

651. See HERRMANN, *supra* note 77, 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).

652. See *supra* Section VI. A; see, e.g., HERRMANN, *supra* note 77, 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.”).

653. See MACHIAVELLI, *supra* note 2, at 129 (“[W]hen times [are] quiet . . . they could change.”).

654. See *id.* (“[It] is a common failing of mankind, never to anticipate a storm when the sea is calm.”).

655. See NGISC: FINAL REPORT, *supra* note 24, at Ch. 3, 3–1 (The two exceptions are tribal gambling and internet gambling.).

656. *Id.* (emphasis added).

657. See, e.g., sources cited *supra* note 180.

658. See, e.g., Meyer v. Hawkinson, 626 N.W.2d 262 (N.D. 2001) (granting summary judgment to defendants and dismissing plaintiffs’ claim for enforcement of

The implications of this conclusion by the NGISC are that any radical changes in the law relating to public policy and lotteries in the U.S. would be wishful thinking. This prospect of “steady as she goes” stability may very well be a good prospect for the future. Moreover, the Commonwealth Caribbean’s future decisions-profile relating to agreements implicating lotteries, will, in all likelihood, emulate the U.S.’ lottery law jurisprudence.

Therefore, the future resolution of lottery controversies may be best left in the capable hands of the judiciary in light of the exemplary track record of excellence that the entire history of case resolution in the U.S. has confirmed. This is the case because the societal value to be derived from the ameliorative power of public policy in the hands of the judiciary in both the Commonwealth Caribbean and in the U.S. is irrefutable. The interpretation of lottery law and the application of public policy to lottery controversies must remain central to the judicial function in these two clusters of common law jurisdictions. This is an enduring dimension of the judiciary’s prowess in exercising public policy’s delicate and potent power with integrity and consummate skill. It should continue.<sup>659</sup>

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an alleged contract to share lottery proceeds); *Troy Amusement Co. v. Attenweiler*, 28 N.E.2d 207 (Oh. Ct. App. 1940) (refusing to grant injunction where petitioner sought to restrain parties from interfering with petitioner’s ‘bank night’ lottery operation.); *see also* *Barquin v. Flores*, 459 So. 2d 436, 437 (Fla. Dist. Ct. App. 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,” the court dismissed the complaint because it sought to enforce a gambling obligation.); *Mexican International Banking Co. v. Lichtenstein*, 37 P. 574, 576 (Utah 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.”).

659. *See* Brachtenbach, *supra* note 30, at 19.