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# LOTTERIES AND PUBLIC POLICY IN AMERICAN LAW

STEPHEN J. LEACOCK\*

## I. INTRODUCTION<sup>1</sup>

Public policy<sup>2</sup> is a fundamental norm of common-law jurisdictions.<sup>3</sup> Moreover, on more than one occasion,<sup>4</sup> it has been analogized to an “unruly horse.”<sup>5</sup> Actually, in 2007, the Supreme Court of Utah struck a note of caution and categorized its nature as a protean one.<sup>6</sup> This categorization was presumably motivated

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1. “Many have held and hold the opinion that events are controlled by fortune. . . .” NICCOLO MACHIAVELLI, *THE PRINCE* 130 (George Bull, trans., Penguin Books 1961) [hereinafter MACHIAVELLI].

2. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (New Haven: Yale Univ. Press 1963) (“[W]hat is commonly spoken of as public policy [is] the good of the collective body.”). See also Robert F. Brachtenbach, *Public Policy in Judicial Decisions*, 21 GONZ. L. REV. 1, 4 (1985/86) [hereinafter Brachtenbach] (“[Public policy is] shrouded in the fog of English antiquity . . . .”). For a somewhat contrary viewpoint, see W.S.M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207, 207 (1922) (contending that the term “public policy” is a more recent development in English law).

3. See Brachtenbach, *supra* note 2, at 1 (proclaiming the importance of public policy in dispute resolutions).

4. 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.”).

5. *Penunuri v. Sundance Partners, Ltd.*, 257 P.3d 1049, 1053 (Utah Ct. App. 2011), *cert. granted*, 263 P.3d 390 (Utah 2011).

6. See *Rothstein v. Snowbird Corp.*, 175 P.3d 560, 563 (Utah 2007) (emphasis added) (“To pluck a principle of public policy from the text of a

by the observed reality that the contours of public policy are subject to effortless change<sup>7</sup> at the will of the judiciary.<sup>8</sup> That categorization undeniably perceives the fundamental nature of public policy as an amorphous one.<sup>9</sup> Undoubtedly, with respect to the contours of public policy in the laws of the fifty states, each of these individual states in the Federal Union would probably prefer to be the master of its own house. Such sentiments have their supporters.<sup>10</sup> Moreover, identifying and interpreting public policy may be quite a perilous task.<sup>11</sup>

Turning to lotteries,<sup>12</sup> the prevalence and significance of public participation in playing lotteries in modern American life led to Congress's creation<sup>13</sup> of the National Gambling Impact

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. . . .").

7. In Greek mythology, Proteus was a sea god whereas Neptune was the Roman god of the sea. *See, e.g.*, EDITH HAMILTON, MYTHOLOGY 38 (New American Library 1969) [hereinafter HAMILTON: MYTHOLOGY] ("Proteus . . . had the power . . . of changing his shape at will.").

8. *See* Brachtenbach, *supra* note 2, at 17 (arguing that rather than simply beginning and ending a decision without further explanation, courts should instead set forth a detailed description of the public policy underlying their decisions).

9. *See Penunuri*, 257 P.3d at 1053 (emphasis added) (citations omitted) (cautioning that "unless [public policy is] deducible . . . from constitutional or statutory provisions, [it] should be accepted as a basis for judicial determinations, if at all, *only with the utmost circumspection*[,] given its protean nature and the risk that it will be used solely to further a judge's personal preferences). *See also* Brachtenbach, *supra* note 2, at 17 (asserting that the task of defining public policy is an arduous one); RICHARD A. LORD, WILLISTON ON CONTRACTS § 12:2, 1 (4th ed. Thomson Reuters 2011) (stating that *stare decisis* rarely impacts public policy since it changes over time).

10. *See, e.g.*, Percy H. Winfield, *Public Policy in English Common Law*, 42 HARV. L. REV. 76, 102 (1928) (arguing that state legislatures are better able to judge the public policy within the state than the Supreme Court would be able to).

11. *See Penunuri*, 257 P.3d at 1053 (contending that public policy can be difficult to change and should only be modified with caution).

12. *See, e.g.*, 38 AM. JUR. 2D *Gambling* § 7 (2012) (setting forth the elements of a lottery). *See also* KENNETH N. HANSEN & TRACY A. SKOPEK, THE NEW POLITICS OF INDIAN GAMING 169 (U. of Nev. Press 2011) [hereinafter HANSEN & SKOPEK] (citation omitted) ("[L]ottery . . . mean[s] any game of chance involving the elements of prize, chance, and consideration . . . ."); CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA 51 (Harvard University Press 1989) [hereinafter CLOTFELTER & COOK: SELLING HOPE] (stating that lotteries are embodied by individuals buying a chance to win prizes from random drawings).

13. *See Fact Sheet*, NAT'L GAMBLING IMPACT STUDY COMM'N, <http://govinfo.library.unt.edu/ngisc/bio-law.html> (last visited Oct. 29, 2012) [hereinafter *NGISC: Fact Sheet*] (stating that on August 3, 1996, President Clinton signed the law that created the commission).

Study Commission (NGISC) in 1996.<sup>14</sup> In its Lotteries Report,<sup>15</sup> the NGISC referred to the “magical thinking”<sup>16</sup> that two commentators wrote about in their published work.<sup>17</sup> The two commentators seemed to have suggested that in lottery advertising, lottery advertisers seek to “target” this “magical thinking”<sup>18</sup> in an effort to stimulate a demand for lotteries.<sup>19</sup> Arguably, this “magical thinking” engenders and also fuels those beliefs in the power of fortune’s control over events.<sup>20</sup> The alleged widely held opinion regarding fortune’s control of events<sup>21</sup> seems to be confirmed by the vast numbers of persons who play lotteries.<sup>22</sup>

More specifically, in the context of the law applicable to lotteries, historical experience has shown that a number of alternatives may exist in any given state at the time that the controversy is to be resolved by the courts. First, both a state’s constitution and its statutes may be silent with respect to lotteries.<sup>23</sup> Second, lotteries may be prohibited by a state’s

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14. See *Index*, NAT’L GAMBLING IMPACT STUDY COMM’N (Aug. 3, 1999), <http://govinfo.library.unt.edu/ngisc/index.html> [hereinafter “NGISC”] (providing information concerning the National Gambling Impact Study Commission). Congress set the duration of the commission for two years from the date of its first meeting, which took place in 1997. National Gambling Impact Study Commission Act, Pub. L. No. 104-169, §§ 4(b), 10, 110 Stat. 1482, 1484, 1488 (1996). The act mandated a report by the commission to Congress, the President, and the governors two years after the commission held its first meeting. *Id.* § 4(b), 110 Stat. at 1484. This report with the Commission’s Final Report Recommendations was made on June 18, 1999. *National Gambling Impact Study Commission Final Report*, NAT’L GAMBLING IMPACT STUDY COMM’N (June 18, 1999), <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter *NGISC: Final Report*] (describing the development of study recommendations concerning gambling behavior in the United States).

15. See *Lotteries*, NAT’L GAMBLING IMPACT STUDY COMM’N, <http://govinfo.library.unt.edu/ngisc/research/lotteries.html> (last visited Oct. 29, 2012) [hereinafter *NGISC: Lotteries*] (describing the history and evolution of the lottery in the United States).

16. *Id.* (citation omitted) (“[L]ottery play depends on encouraging people’s ‘magical thinking’ . . .”).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. MACHIAVELLI, *supra* note 1.

22. See *NGISC: Lotteries*, *supra* note 15 (explaining that lotteries are the only type of gambling that most adults have participated in). See also Charles T. Clotfelter et al., *State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission*, DUKE UNIV. 3 (Apr. 23, 1999), <http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf> [hereinafter Clotfelter et al.] (“Without doubt, the ‘signature’ lottery product is lotto. . .”).

23. See, e.g., *Stone v. State of Miss.*, 101 U.S. 814, 818-19 (1879) (noting that although there was no related constitutional provision, lotteries were prohibited from 1822 to 1867, and any individual who conducted a lottery during that period was punished for being a gambler).

constitution alone.<sup>24</sup> Third, a state's constitution may be silent but the state may have enacted a statute that prohibits lotteries.<sup>25</sup> Finally, both a state's constitution as well as a statutory enactment may prohibit lotteries.<sup>26</sup>

Notwithstanding these alternatives, gambling has been universally frowned upon throughout the entire United States.<sup>27</sup> This remains the case in the present era.<sup>28</sup> Moreover, “[a]s a result of its unsavory reputation, restrictions on gambling have been adopted by practically every country in the world throughout history.”<sup>29</sup> Specifically, with regard to lotteries, “for the first six decades of [the twentieth] century[,] every [American] state prohibited lotteries.”<sup>30</sup> As a result of public policy disfavoring gambling,<sup>31</sup> the common law's general principle is that the judiciary will not enforce lottery agreements.<sup>32</sup> Fundamentally, when parties are equally at fault, courts will leave them to a

24. *See id.* (noting that a new constitution adopted in 1868 provided that “the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold.”). *See also* MISS. CONST. art. IV, § 98 (repealed 1992) (prohibiting the lottery in Mississippi).

25. *See Stone*, 101 U.S. at 819 (mentioning that from 1822 until 1867, Mississippi had no constitutional provision banning lotteries, rather it only had statutory bans).

26. *See Youngblood v. Bailey*, 459 So. 2d 855, 858-59 (Ala. 1984) (emphasis added) (“Under [ALA. CONST. art. IV, § 65,] the State Legislature is *specifically prohibited* from authorizing any type of lottery and is *affirmatively required* to pass laws prohibiting lotteries.”). *See also* *Troy Amusement Co. v. Attenweiler*, 28 N.E.2d 207, 210-11 (1940) (referring to both the Ohio Constitution and a 1941 statute that provided that “in substance . . . whoever sells or disposes of a ticket or device representing an interest in a lottery, ‘policy’ or scheme of chance by whatever style or title denominated or known, shall be punished as therein provided.”).

27. *See, e.g., Pritchett v. Ins. Co. of N. Am.*, 3 Yeates 458, 1803 WL 757, at \*4 (Pa. 1803) (emphasis added) (stating “[e]very species of gaming contracts . . . are reprobated both by our law and usage.”). *See also* Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAP. L. REV. 87, 122 (2002) [hereinafter Kelly] (noting that the anti-gambling tradition resulted in every state determining that debts arising from gambling are unenforceable).

28. *See, e.g., Ramesar v. State*, 224 A.D.2d 757, 759 (N.Y. App. Div. 1996) (emphasis added) (citations omitted) (stating “[p]ublic policy *continues to disfavor gambling*; thus, the regulations pertaining thereto are to be strictly construed.”).

29. RICHARD MCGOWAN, STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE 4 (Praeger 1994) [hereinafter MCGOWAN].

30. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 235.

31. *See Irwin v. Williar*, 110 U.S. 499, 510 (1884) (citation omitted) (holding that all contracts concerning gambling contravene public policy and are thus illegal and void).

32. *Id.*

lottery agreement where it finds them.<sup>33</sup>

Nevertheless, widespread public playing of lotteries is a tenacious activity.<sup>34</sup> This tenacity may be a result of the power of “self-delusion to which even the best of men are sometimes susceptible.”<sup>35</sup> This power could be a factor in the condition of problem and pathological gambling.<sup>36</sup> The extraordinary financial success of lotteries<sup>37</sup> may be based upon the exploitation of this power of human self-delusion.<sup>38</sup> Alternatively, it could conceivably be the case that the pain of repetitively losing when playing lotteries may have a beneficially cathartic effect.<sup>39</sup> Perhaps it assists human beings in escaping the tenacious grasp of self-delusion.<sup>40</sup> Of course, there may be other alternative perceptions that any one of us could effortlessly formulate.

The historical continuum of the legality of lotteries has imitated a pendulum.<sup>41</sup> This pendulum phenomenon of widespread public playing of lotteries to the abstention from playing them has taken place in synchrony with successive state legalization

33. See *People v. Rosen*, 78 P.2d 727, 728 (Cal. 1938) (citation omitted) (explaining “[i]t is the law in [California] that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity.”).

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

35. *State ex rel. Neb. State Bar Ass’n v. Cook*, 232 N.W.2d 120, 131 (Neb. 1975).

36. See *NGISC: Final Report*, supra note 14, at ch. 4-2 (calling for both public officials and individuals in the private sectors to confront problems and pathological gambling).

37. See *NGISC: Lotteries*, supra note 15 (emphasis added) (citation omitted) (“Lotteries rank *first among the various forms of gambling in terms of gross revenues*: total lottery sales in 1996 totaled \$42.9 billion.”). The \$42.9 billion represents a 15-year increase of 950% between 1982, when the gross revenue was \$4 billion, to 1996. *Id.*

38. See *Neb. State Bar Ass’n*, 232 N.W.2d at 131 (suggesting the motivation to lie may be rooted in self-delusion).

39. See, e.g., DAVID VISCOTT, *EMOTIONAL RESILIENCE* 80 (Harmony Book 1996) (contending that pain is necessary in order to “bring individuals] into the present”). The author provides two examples of such pain: (1) when individuals say “[p]inch me so I know I’m not dreaming,” and (2) when one person slaps another who is hysterical in order to shock the person out of hysterics. *Id.*

40. *Id.*; *Neb. State Bar Ass’n*, 232 N.W.2d at 131.

41. See *infra* Part III, A (noting the rise, fall, and subsequent rise once again of lotteries in America). See also CLOTFELTER & COOK: *SELLING HOPE*, supra note 12, at 43 (portraying the paradox of public policy toward lotteries in that while they are popular, there has always been an underlying opposition to legalizing them).

followed by state prohibition of public lotteries.<sup>42</sup> The sequence may be analogized to pendulum swings from feast<sup>43</sup> to famine<sup>44</sup> and back again to *feast with a vengeance* in the present-day era.<sup>45</sup>

The pendulum phenomenon may very well reflect *political* adaptations by *legislators* to perceived pendulum swings in public attitudes to gambling in general and lotteries in particular.<sup>46</sup> However, in the context of applying public policy by the judicial branch of government to gambling *per se*, the conceptual norm in American common law has remained quite stable.<sup>47</sup> The California Court of Appeals thunderously articulated that stable historical judicial legal posture is the conceptual norm in American common law.<sup>48</sup> The court enunciated that conceptual norm as follows:

California's "strong, long-standing public policy regarding gambling is a broad policy against judicial resolution of civil claims arising out of *lawful or unlawful gambling contracts or transactions*, and in the absence of a statutory right to bring such claims, this policy applies both to actions for recovery of gambling losses and actions to enforce gambling debts.<sup>49</sup>

This Article discusses the common-law principles of public policy applicable to lotteries in America.<sup>50</sup> After the introduction in Part I, Part II examines how public policy is created in principle. Part III then explores the origins of public policy with respect to

42. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 36-38.

43. *See id.* at 36 (citation omitted) ("1832 [was] apparently one of the peak years for lottery play . . .").

44. *See id.* at 38 (citation omitted) ("By 1894[,] no state permitted the operation of lotteries, and thirty-five states had explicit prohibitions in their constitutions against them."). *See also* DENISE VON HERRMANN, THE BIG GAMBLE: THE POLITICS OF LOTTERY AND CASINO EXPANSION 121 (Praeger 2002) [hereinafter HERRMANN] (explaining that gambling laws are the result of both negative and positive public opinions, and they can be impacted by local support or the lack thereof, and the power of interest groups).

45. *See NGISC: Lotteries*, *supra* note 15 ("Currently, 37 states and the District of Columbia have operating lotteries."). By 2011, this number rose to 40. NAT'L SURVEY OF STATE LAW, STATE LOTTERIES 723 (Richard A. Leiter ed., The Gale Group 6th ed. 2008) [hereinafter NAT'L SURVEY OF STATE LAW].

46. *See generally NGISC: Lotteries*, *supra* note 15 (discussing the evolution of the desirability of the lottery system).

47. Stanley v. Cal. Lottery Comm'n, No. C041034, 2003 WL 22026611, at \*19 (Cal. Ct. App. Aug. 29, 2003).

48. *Id.*

49. *Id.* (emphasis in the original) (footnote omitted). *See also* Meyer v. Hawkinson, 626 N.W.2d. 262, 267 (N.D. 2001) (citations omitted) (stating that courts will not enforce contracts that violate public policy). State laws provide assistance for determining whether a contract is contrary to public policy. *Id.* Three examples of when a contract is unenforceable for contradicting public policy are when it is: (1) "inconsistent with fair . . . dealing," (2) "against sound policy," or (3) "offensive to good morals." *Id.*

50. *See* Clotfelter et al., *supra* note 22, at 1 ("Until 1964, lotteries were illegal in every state in this country.").

lotteries in America and presents the history and development of lotteries over a discreet time span of American law. Part IV follows the evolution from past to present of public policy applicable to lotteries in America. Part V assesses the legal impact on public policy of legislative changes in state lottery laws. Part VI reflects upon the current and possible future public policy landscape with respect to lotteries in America. Part VI also ruminates as to whether or not the present era represents any departure or critical turning points in American judicial philosophy in the context of lotteries. Finally, the Conclusion examines the judiciary's prowess in adapting and applying public policy to lotteries throughout American law.

## II. HOW PUBLIC POLICY IS CREATED IN PRINCIPLE

### A. *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 good.”<sup>51</sup> Public policy has even been declared to be synonymous with “the public good.”<sup>52</sup> It has been referred to as the “purpose and spirit of the substantive laws of a state. . . .”<sup>53</sup> Violations of public policy have often been associated with immorality. In fact, some early decisions have made this association bluntly and sometimes sanctimoniously.<sup>54</sup> As explained by one commentator, public policy is neither a local nor a new phenomenon.<sup>55</sup>

“Public policy consists of the ‘principles and standards regarded by the legislature’ as well ‘as by the courts as being of fundamental concern to the state and the whole of society.’”<sup>56</sup> It has been described as a “will-o’-the-wisp of the law [that] varies and changes with the interests, habits, needs, sentiments, and

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51. *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959). *See also* CARDOZO, *supra* note 2, at 72 (explaining that public policy is synonymous with social welfare or the good of the collective body.)

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

53. *Johnston v. Chi. Great W. R. Co.*, 164 S.W. 260, 262 (Mo. Ct. App. 1914).

54. *State v. Clarke*, 54 Mo. 17, 35-36 (1873) (evaluating the regulation of “bawdy houses” in terms of public policy and immorality). *See, e.g.*, *Montgomery v. Montgomery*, 127 S.W. 118, 120 (Mo. Ct. App. 1910) (“[I]t is universally agreed that the promotion of public and private morals is one of the chief purposes of the law . . .”). *See also* *Muschany v. U.S.*, 324 U.S. 49, 66 (1945) (holding that “violations of obvious ethical or moral standards” were contrary to public policy); *Kitchen v. Greenabaum*, 61 Mo. 110, 115 (1875) (evaluating enforceability of contracts by considering them in terms of morality and public policy).

55. *See* Brachtenbach, *supra* note 2, at 4 (footnote omitted) (recognizing that scholars and case law first started acknowledging public policy, as it is known today, in the fifteenth century).

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



fashions of the day. . . .”<sup>57</sup> Essentially, public policy is a manifestation of the values, norms, and ideals of a society.<sup>58</sup> It is therefore pervasive in all aspects of the law.<sup>59</sup> Oliver Wendell Holms described it as “the very essence of law.”<sup>60</sup>

Identifying and declaring violations of public policy is a delicate, subtle, and difficult intellectual task. This task legally implicates calibrating and balancing the intersection of the legal spheres of the legislature, judiciary and executive branches in the constitutional law separation of powers context.<sup>61</sup> It is not all dissimilar to identifying and declaring fundamental constitutional rights under the United States Constitution.<sup>62</sup>

Moreover, the application of public policy principles to lotteries is not at all “static.”<sup>63</sup> It is subject to “change as the relevant factual situation and the thinking of the times change.”<sup>64</sup> Thus, the public policy of one generation will not necessarily be retained either in its entirety or even partially as the public policy of another.<sup>65</sup> The circumstances of human life change. Moreover,

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57. Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. 1954).

58. *Id.*

59. See RONALD DWORKIN, LAW’S EMPIRE 413 (Belknap Press 1986) [hereinafter DWORKIN] (reasoning that the “[law focuses on] the people we want to be and the community we aim to have”).

60. Edith Vieth & James P. Lemonds, *Whence Public Policy*, 52 J. MO. B. 239, 239 (1996). See also Gregory v. Ashcroft, 501 U.S. 452, 466 (1991) (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35-36 (Little, Brown & Co. 1938) (1881)) (stating that principles developed through litigation reflect public policy which is shaped by “our practice and traditions, [and is] the unconscious result of instinctive preferences and inarticulate convictions”).

61. 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, 982-83 (2007) [hereinafter Rand] (mentioning the interplay between separation of powers and public policy and the extent of gambling permitted within a state).

62. See, e.g., Rast v. Van Deman & Lewis Co., 240 U.S. 342, 366 (1916) (emphasis added) (citation omitted) (determining that in order to prevent the Constitution from reflecting only one set of ethical opinions, “considerable latitude must be allowed for difference of view”). Thus, while legislative opinions cannot control courts, courts should be careful not to rule a law unconstitutional simply because it reflects an ethical position with which they disagree. *Id.*

63. Brown v. Snohomish Cnty. Physicians Corp., 845 P.2d 334, 338 (Wash. 1993).

64. *Id.*

65. See Funk v. U.S., 290 U.S. 371, 381 (1933) (emphasis added) (citation omitted) (“The public policy of one generation may not, *under changed conditions*, be the public policy of another.”); Hall v. Baylous, 153 S.E. 293, 295 (W. Va. 1930) (contending that future generations may disagree with the current population as to what does and does not violate public policy). See also F.A. Straus & Co. v. Canadian Pac. R. Co., 254 N.Y. 407, 413 (N.Y. 1930) (asserting that public policy changes over time and that it can be identified by state constitutions, court decisions, and the laws created by the states legislatures).

courts have not been oblivious to these modulations in public policy. For example, explicitly referencing the physician's duty of confidentiality to his patients, the Supreme Court of Missouri, sitting en banc, observed reflectively that "the common law and the public policy of this state are not stagnant but are evolutionary."<sup>66</sup>

Therefore, the quintessential value of public policy must be questioned continually. It must be prospected on an ongoing basis. In this sense, it is not at all dissimilar to prospecting for the precious metal gold. The precious nuggets must be prospected from the surrounding debris. It is an ongoing fundamental judicial obligation. Indeed, as the Missouri Court of Appeals has proposed, "[c]ourts 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."<sup>67</sup> Those modifications, which are legally appropriate in the context of lotteries, will be the ones selected and implemented by the judiciary.

As a result, therefore, courts reach discreet conclusions as they become legally necessary. In some cases, courts may decline to enforce particular components of any contract, rather than nullifying it *in toto*.<sup>68</sup> It is essentially a balancing test.<sup>69</sup> In other cases, where the facts and circumstances are sufficiently decisive and the interpretation and application of public policy clear enough, the court will forcefully rule.<sup>70</sup> If not, the courts may

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66. *Brandt v. Med. Def. Assoc's.*, 856 S.W.2d 667, 670 (Mo. 1993).

67. *Owens v. Owens*, 854 S.W.2d 52, 53 (Mo. Ct. App. 1993) (citation omitted).

68. *See, e.g., Ex parte Thicklin*, 824 So. 2d 723, 732 (Ala. 2002) (concluding that courts can nullify a contract that is unconscionable or contrary to public policy), *overruled by Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997, 1006 (Ala. 2005); *Cont'l Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139-41 (Ind. 1996) (same).

69. *Cont'l Basketball Ass'n, Inc.*, 669 N.E.2d at 139-40.

70. *See MidMichigan Reg'l Med. Ctr.-Clare v. Prof'l Emps. Div. of Local 79, Serv. Emp. Int'l Union, AFL-CIO*, 183 F.3d 497, 506 (6th Cir. 1999) (stating that 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, 1376 (Fed. Cir. 2001) (holding that public policy encouraging the detection of possible criminal activity may legally justify particular action); *Gonsalves v. Nissan Motor Corp. in Haw., Ltd.*, 58 P.3d 1196, 1213 (Haw. 2002) (asserting that 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, 1303 (Ill. 1997) (concluding that indemnity promises in construction contracts violate public policy because they do not provide incentives for the indemnity to exercise care); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (determining that public policy prevented the court from enforcing a contract between spouses regarding frozen embryos since to do so would result in forced procreation); *First Nat'l Ins. Co. of Am. v. Clark*, 899 S.W.2d 520, 521, 523 (Mo. 1995) (determining that the lack of an operator's

simply remand the case for further consideration in light of the guidance provided by the court above.<sup>71</sup>

Arguably, some bargains may be too offensive to society for courts to rule in favor of enforcing them.<sup>72</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>73</sup> It is the judiciary's function to properly conduct such delicate balancing.<sup>74</sup> In the overall analysis, proof that an agreement is injurious to the public or operates against the public good is necessary before a court will eliminate a party's rights to enforcement of such an agreement.<sup>75</sup> This is not the same as nullifying a party's right of freedom of contract. The right of freedom of contract remains intact. Of course, the court will nullify the bargain made when freedom of contract has been *abused* to the point of violating public policy.<sup>76</sup> In instances where freedom of contract has not been abused, such contracts do not violate public policy at all and will be enforced.<sup>77</sup>

Of course, the question as to whether or not a contract is against public policy may very well be provided for by the state constitution or by statute.<sup>78</sup> Undoubtedly, when the court determines that a contract is inconsistent with fair and honorable dealing, it can deny such agreement enforcement.<sup>79</sup> Similarly, if

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policy of liability insurance in an insurance contract did not violate public policy); *Clark v. Columbia/HCA Info. Servs., Inc.*, 25 P.3d 215, 223 (Nev. 2001) (claiming that the court may reverse a grant of summary judgment and remand the case); *Harper v. Healthsource N.H., Inc.*, 674 A.2d 962, 965 (N.H. 1996) (holding that public policy mandates that healthcare maintenance organization's decision to fire a physician must comply with both fair dealing and public policy); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901, 905 (N.M. 2003) (concluding that a mandatory binding arbitration clause does not offend public policy); *Meyer*, 626 N.W.2d at 267 (refusing to enforce contract concerning the division of lottery winnings when gambling and lotteries are against North Dakota's public policy).

71. *See generally Owens*, 854 S.W.2d at 52 (remanding case for further consideration following the court's consideration of public policy as it pertained to the parent-child immunity doctrine).

72. *See, e.g., Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1001 (N.Y. 1993) (holding that some bargains are less repugnant than others and may be enforced while some are more offensive and may not be enforced).

73. *Id.* at 1001-02.

74. *See id.* at 1001 ("It is all a matter of degree.").

75. *Clark*, 899 S.W.2d at 523.

76. *Parker*, 624 N.E.2d at 1001. *See also Clark*, 899 S.W.2d at 521 (holding that the court "will not recognize contractual provisions that are contrary to the public policy of Missouri as expressed by the legislature").

77. *Johnson v. Peterbilt Fargo, Inc.*, 438 N.W.2d 162, 163-64 (N.D. 1989).

78. *Id.* at 163. *See, e.g., N.D. CENT. CODE § 9-08-02* (providing that it is contrary to public policy to exempt individuals from responsibility for their own conduct that constitutes fraud, willful injury to the person or property of another, or willful negligent violation of law).

79. *See also Meyer*, 626 N.W.2d. at 267 (concluding that courts will not

the agreement in issue is ruled by the court to be contrary to sound policy and offensive to good morals, the court has the authority to declare the contract void as against public policy.<sup>80</sup>

The principle that the common law has authoritatively mandated is that one who has participated in a violation of the law will not be granted access to the majestic judicial enforcement machinery of the courts.<sup>81</sup> Such a person will not be permitted to assert in court any right based on or directly connected to the illegal transaction.<sup>82</sup> In this respect, the United States Supreme Court has definitively articulated this fundamental common-law principle as follows. The common law has mandated “the 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.”<sup>83</sup>

Over two hundred years ago, Lord Mansfield led the way.<sup>84</sup> He enunciated the fundamental doctrine of *ex turpi causa*.<sup>85</sup> Fundamentally, the doctrine of public policy is “litigant-blind.”<sup>86</sup> This means that, where litigants are equally at fault, the courts will leave the litigants as the courts find them. None of them will be permitted by the courts to avail themselves of the legal power of the courts. They are simply not worthy of such fundamental assistance.

Therefore, when invalidating a contract on grounds of public policy, courts must *not* apply the individual judge’s own *subjective* views of public policy.<sup>87</sup> Nor are courts permitted the license to grant justices anarchic liberty to promote personal and private

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enforce contracts that are contrary to fair and honorable dealing).

80. *Peterbilt Fargo*, 438 N.W.2d at 164. *See also* N.D. CENT. CODE § 9-08-01 (deeming contracts unlawful if contrary to express law, contrary to policy of express law—although not expressly prohibited, or contrary to good morals).

81. *See, e.g., Troy Amusement Co.*, 28 N.E.2d at 215 (citation omitted) (prohibiting courts of equity from protecting gambling enterprises and nullifying the power of an injunction in such cases).

82. *See id.* at 216 (citation omitted) (holding that courts of equity cannot aid parties involved with gambling enterprises because parties seeking relief in those courts must “come with clean hands, . . . and . . . [the party’s] demand[s] must not rest on a violation of law . . .”).

83. *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884).

84. *See Holman v. Johnson*, 1 Cowp. 341, 343 (Eng. 1775), *available at* <http://www.uniset.ca/other/cs6/98ER1120.html> (proclaiming that courts will not assist a plaintiff whose cause of action is premised on immoral or illegal acts). The *Holman* court further specifies that courts refuse to provide assistance to such plaintiffs, not as a favor to the defendant, but simply because “they will not lend their aid to such a plaintiff.” *Id.*

85. *Id.*

86. A term coined by Professor Leacock by analogy to the biological condition of being colorblind.

87. *Fid. & Deposit Co. of Maryland v. Conner*, 973 F.2d 1236, 1241 (5th Cir. 1992).

notions of what is a good value judgment.<sup>88</sup> Nor is expediency the watchword of judicial behavior.<sup>89</sup> Judges are not set free of all restraints to indulge in the random conception of ideas of what are the viable components of public policy.<sup>90</sup> Indeed, public policy is not determined by the varying opinions of laypeople, lawyers, or judges. Opinion polls are not appropriate as valid instruments for judicial identification of the fundamental interests of the public.<sup>91</sup> Furthermore, public policy is not deduced from “general considerations of *supposed* public interests.”<sup>92</sup>

Of course, the declaration of public policy has tended to display certain evolutionary traits. It has now become largely the province of legislators rather than judges because of the modern era of legislative activism relating specifically to lotteries.<sup>93</sup> The underlying momentum for this imperative is not irrational. It is appropriate because of the following reality. When compared to the judiciary, legislators are supported by facilities for factual investigations perceived to be more responsive to the general public.<sup>94</sup> Courts have openly acknowledged this.<sup>95</sup>

Furthermore, although public policy is an amorphous concept, arguably it is not fundamentally vague and indefinite.<sup>96</sup> In the legislative context, therefore, public policy serves as a cumulative conception for a number of particularly important factors. These are the factors that influence and condition the dynamics of the *legislative* debate. Public policy assists in the formulation and validation of the *legislative* process.<sup>97</sup>

Turning to the judicial context, public policy is concededly not susceptible to the formulation of an entirely precise rule to be used

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88. See *Penunuri*, 257 P.3d at 1053 (discussing the inherent risk that a judge will use public policy to further the judge’s own beliefs or preferences).

89. *Barton v. Codington Cnty.*, 2 N.W.2d 337, 343 (S.D. 1942).

90. *Id.*

91. *Haakinson & Beauty Co. v. Inland Ins. Co.*, 344 N.W.2d 454, 457 (Neb. 1984).

92. *FDIC v. Am. Cas. Co. of Reading, Pa.*, 998 F.2d 404, 409 (7th Cir. 1993) (emphasis added). See also *Fomby-Denson*, 247 F.3d at 1375 (holding public policy is not derived from public interest).

93. *In re Rahn’s Estate*, 291 S.W. 120, 124 (Mo. 1927).

94. RESTATEMENT (SECOND) OF CONTRACTS § 179, cmt. b (1981).

95. *In re Rahn’s Estate*, 291 S.W. at 124 (asserting that the judiciary’s function is simply to determine what is the public policy of a state). The *Rahn* court ruled that it was not against public policy to enforce a will provision, written in 1916, directing that money should be used to “assist widows, orphans, and invalids” of Germany, which was then at war with the United States. *Id.* See also *Brachtenbach*, *supra* note 2, at 4 (“[Public policy is] shrouded in the fog of English antiquity. . .”).

96. See WILLISTON ON CONTRACTS, *supra* note 9 (explaining that public policy is an ever-changing concept).

97. See *Brachtenbach*, *supra* note 2, at 1 (emphasis added) (“[O]nly constitutional limitations restrain legislative policy declarations.”).

in *court* decisionmaking.<sup>98</sup> This makes the effort to attain precise identification, particularization, and definition of relevant policy considerations a challenging prospect for the courts. The judiciary's attainment of success in this intellectual struggle is contextual. In a statutory context, identification of the public policy underlying a statutory provision is predicated upon an examination by the judiciary of the history, purpose, language, and effect of the legislative provision in issue.<sup>99</sup> In all other contexts, the judiciary honors its constitutional assignment and does its best to stay astride the unruly horse of public policy.<sup>100</sup>

## B. Lottery Legalization

### 1. Constitutional and Statutory Position

Of course, in America, there is no fundamental<sup>101</sup> or constitutional right to gamble.<sup>102</sup> Therefore, the state law of any individual state in the United States may rightfully suppress gambling. This fundamental legal right for the state law of each U.S. state to ban gambling is inherent in the police powers of each state.<sup>103</sup> The suppression of gambling, therefore, does not interfere with any of the inherently fundamental rights of citizenship that the government is obligated to protect and secure.<sup>104</sup> This legal starting point places the legal capability to prohibit or restrict gambling<sup>105</sup> firmly within the scope of the state's *inherent* police

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98. *Id.*

99. *See, e.g.,* State v. Brown, No. 37640, 2011 WL 3585530, at \*1 (Idaho Ct. App. Aug. 16, 2011) (citation omitted) (stating that when a court engages in statutory interpretation, it must consider legislative intent, along with the public policy underlying the statute, the legislative history, and the words of the statute).

100. *See Fairfield's Ins. Co.*, 246 S.W.2d at 672-73 (discussing the need for judicial restraint when it comes to public policy considerations because it is an "unruly horse").

101. S.C. Dept. of Revenue & Taxation v. Rosemary Coin Mach., Inc., 500 S.E.2d 176, 242 (S.C. Ct. App. 1998), *rev'd*, 528 S.E.2d 416 (S.C. 2000).

102. *See* Baseball, Inc. v. Ind. Dept. of State Revenue, 672 N.E.2d 1368, 1371 (Ind. Ct. App. 1996) (holding that no constitutional right to gamble exists); Commonwealth of Ky. v. Louisville Atlantis Cmty./Adapt, Inc., 971 S.W.2d 810, 816 (Ky. Ct. App. 1997) (ruling that the Kentucky Constitution does not grant a right to engage in gambling for charitable causes); Durham Highway Fire Prot. Ass'n, Inc. v. Baker, 347 S.E.2d 86, 87 (N.C. 1987) (holding no one has a constitutional right to operate a gambling business).

103. *See, e.g.,* *Stone*, 101 U.S. at 818 (emphasis added) (citation omitted) (determining that rather than giving a general and abstract definition of the police power, each case should be decided on a case-by-case basis). It is clear, however, that the states' police power includes anything "affecting the public health or the public morals." *Id.* (emphasis added).

104. *Ah Sin v. Wittman*, 198 U.S. 500, 505-06 (1905).

105. *See Fendrich v. Van de Kamp*, 227 Cal. Rptr. 262, 268 (Cal. Ct. App. 1986) (determining that the state's police powers permit the state to regulate

power.<sup>106</sup>

As a result, where a state constitutional provision specifically prohibits lotteries, the particular state's legislature cannot legalize any gambling device that in legal effect amounts to a lottery.<sup>107</sup> However, the state's legislature would probably have the power to regulate or to prohibit any and all other forms of gambling not prohibited by the state constitution.<sup>108</sup> This would flow from the fact that the state constitution was silent on these specifics.

Of course, some state constitutional provisions not only forbid lotteries and the sale of lottery tickets, but also any legislative authorization of lotteries.<sup>109</sup> If, however, a prohibition against the creation of a state-run lottery is statutory, rather than constitutional, the legislature has the power to create a lottery at any later time by legislative abrogation or amendment.<sup>110</sup> In such circumstances, the preauthorization legal authority of a constitutional amendment is not required.<sup>111</sup>

A constitutional exception may permit a legislature to authorize lotteries in specific circumstances.<sup>112</sup> Such lotteries may constitutionally require regulation, control, ownership, and

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gambling); *People v. Monroe*, 182 N.E. 439, 446 (Ill. 1932) (same); *Am. Legion Post No. 113 v. State*, 656 N.E.2d 1190, 1194 (Ind. Ct. App. 1995) (same); *Louisville Atlantis Cmty./Adapt, Inc.*, 971 S.W.2d at 818; *Brown v. State Through Dept. of Pub. Safety and Corr., La. Gaming Control Bd.*, 680 So. 2d 1179, 1183 (La. 1996) (explaining that states can regulate lotteries); *Parkes v. Bartlett*, 210 N.W. 492, 494 (Mich. 1926) (holding that the state's police powers permit the state to regulate gambling); *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 437 (Neb. 1991) (same); *State v. Bd. of Com'rs of City of Las Vegas*, 1 P.2d 570, 572 (Nev. 1931) (same); *State v. Felton*, 80 S.E.2d 625, 629 (N.C. 1954) (same); *Rosemary Coin Mach., Inc.*, 500 S.E.2d at 180 (prohibiting gambling is a legitimate governmental purpose under the police power).

106. See, e.g., *Stone*, 101 U.S. at 817 (“[T]he legislature cannot bargain away the police power of a State.”).

107. See generally *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58 (Mo. 1994) (holding that the legislature cannot constitutionally permit certain forms of legalized gambling because it constituted a lottery in violation of state constitution).

108. *Lee v. City of Miami*, 163 So. 486, 490 (Fla. 1935).

109. See *State ex rel. Tyson v. Ted's Game Enters.*, 893 So. 2d 355, 370 (Ala. Civ. App. 2002) (ruling that Article 4, Section 65 of the Alabama Constitution prohibits lotteries and any scheme similar to a lottery); *State v. Nixon*, 384 N.E.2d 152, 197 (Ind. 1979) (stating that Article 15, Section 8 of the Indiana Constitution prohibited the lottery); *Poppen v. Walker*, 520 N.W.2d 238, 240 (S.D. 1994) (discussing a 1986 amendment to Article III, Section 25 of the South Dakota Constitution which permitted the legislature to authorize a state lottery).

110. *State ex rel. Clark v. State Canvassing Bd.*, 888 P.2d 458, 463 (N.M. 1995).

111. *Id.*

112. *State ex rel. Mountaineer Park, Inc. v. Polan*, 438 S.E.2d 308, 318 (W. Va. 1993).

operation by the state. If so, only those lottery operations that are regulated, controlled, owned, and operated in the manner mandated by the statutorily enacted specifics can legally be conducted.<sup>113</sup> Of course, the express provisions of the exception would need to be followed because of the doctrine of strict construction.<sup>114</sup>

An absolute bar imposed by some constitutional provisions may very well include not only lotteries, but also any enterprises, machinations or gaming conceptions based upon the lottery principle.<sup>115</sup> However, interpretation of all measures whether constitutional or statutory, would rest with the judiciary.<sup>116</sup> So, the judiciary may construe a constitutional provision as an absolute bar *only* to lotteries. In such instances, the courts analyze each type of gambling in issue individually and separately in order to determine whether or not it constitutes a lottery.<sup>117</sup> Some gambling devices may be construed to be lotteries while others may be ruled *not* to be lotteries. If a type of gambling is construed as *not* being a lottery, it may very well survive legal nullification by the courts.<sup>118</sup> In such instances, the courts may very well interpret the constitutional measure as excluding the forms of gambling that do not consist of lotteries from the parameters of the constitutional prohibition.

Of course, where lotteries are constitutionally prohibited, and penalties are constitutionally imposed, the legislature of the particular state cannot legitimately diminish any penalties or other punitive measures mandated for the operation of constitutionally prohibited lotteries.<sup>119</sup> Proof of even the fundamental value of financial assistance to charity provided from the proceeds derived from the operation of such a lottery cannot suffice to override this constitutional prohibition.<sup>120</sup> Charitable assistance cannot provide the necessary legal salvation to rescue a proven lottery.<sup>121</sup> Therefore, a lottery will not be saved by the fact that it is conducted for charitable, patriotic, or other worthy

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113. *Id.*

114. *Id.*

115. *Try-Me Bottling Co. v. State*, 178 So. 231, 234 (Ala. 1938).

116. *See State ex rel. Clark v. Johnson*, 904 P.2d 11, 20 (citation omitted) (concluding that the judiciary is the proper forum for interpreting the state constitution's use of the term "lottery").

117. *State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 379 N.E.2d 242, 244 (Ohio 1977).

118. *Id.*

119. *Silberman v. Skouras Theatres Corp.*, 169 A. 170, 172 (Union Cnty. Ct. 1933).

120. *See, e.g., State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 796 (Wash. 1952) (finding that regardless of the charitable function of an organization, if the operation runs contrary to the state constitution, it will be deemed illegal).

121. *Id.*



societal objectives or purposes.<sup>122</sup>

## 2. Sources of Influence on Legalization

Court decisions that implicate public policy result from judicial awareness and evaluation of a number of interactive factors that would have inevitably impacted the legislative process. This decisionmaking may be analogized to the dynamic interaction of demand and supply with respect to a good. In any given common-law jurisdiction, similar dynamics exist by analogy to the demand and supply in the context of legislation. In this situation, the adoption of a state lottery is such an example. With regard to demand, the starting point would be the opinions that individuals possess concerning the adoption of a lottery. The fundamental substratum of any given individual's opinion may very well rest upon a number of factors consisting of multiple components. These components could be a function of the individual's annual income, education, age, and also her perceived impact of the legislation on moral values and issues.

A common feature of any political decision in the United States is that interest groups often play a noticeably significant role in the political process.<sup>123</sup> Their viewpoints are inextricably intertwined with the ultimate positions that elected officials espouse. The emotional and psychological intensity of opinions on an issue determine the degree of individual and interest group involvement.<sup>124</sup> Moreover, the importance—economic and multidimensional as indicated above—of the factors underlying the particular issue motivates that intensity. Interest groups materialize and proceed to agitate the community in an attempt to influence the political decision-making machinery as shown by examples below.<sup>125</sup>

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122. State *ex rel.* Trampe v. Multerer, 289 N.W. 600, 604 (Wis. 1940).

123. Gregory D. Jones, Comment, *Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.Gov*, 62 ADMIN. L. REV. 1261, 1266 (2012) (“Interest groups have played an important role in American politics since the nation’s founding.”).

124. See Allen Hays, *The Role of Interest Groups*, DEMOCRACY, <http://www.ait.org.tw/infousa/zhtw/DOCS/Demopaper/dmpaper9.html> (last visited Nov. 10, 2012) (explaining that interest groups often represent or support issues that have significant public support).

125. *Id.*

### 3. *Lobbying*<sup>126</sup>

The strategic use of lobbying and making monetary political contributions tend to be the mechanisms that interest groups use in their attempt to achieve the greatest political impact.<sup>127</sup> These mechanisms are activated in order to exert the maximum leverage upon the point of view of elected political representatives whose votes enact the particular legislative measure or measures.<sup>128</sup> In addition, lobbyists may attempt to increase popular support at large as well, rather than limiting their impact to the elected representatives of the particular constituency.<sup>129</sup> In this way, individual opinions combined with interest group agitation significantly determine the *demand* side of the graph that charts the supply and demand curves of legislation that delineates the contours of public policy.

### 4. *Influence of Policymakers*

On the *supply* side axis of the graph, the opinions of policymakers may be the most viable starting point of the analysis. These policymakers include the legislators, as well as those persons in the executive branch who can effectuate legislation. Since the majority of these policymakers are elected representatives, with exceptions of course, some may consider individual reelection as a significant political objective.<sup>130</sup> It may therefore be infinitely reasonable to anticipate that their positions will reflect to some degree the present interests of those who elected them. Interest groups routinely rack their brains in order to invent and creatively use the most effective ways to influence the policymakers' decisions. Interest groups also strive to participate in the drafting of legislation if possible.<sup>131</sup>

Another potent factor on the supply side is the nature of the institutional structure of government itself. Legislation is not simply a proposal followed by a vote. It is not that simple. Rather,

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126. See *U.S. v. Harriss*, 347 U.S. 612, 625 (1954) (stating the First Amendment guarantees the right to speak to, publish to, and petition the government). See also CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 12, at 141 (“[A] new element has acted as a catalyst for change: the active lobbying of firms involved in the sale of lottery products.”).

127. See *Interest Groups*, [http://faculty.ucc.edu/egh-damerow/interest\\_groups1.htm](http://faculty.ucc.edu/egh-damerow/interest_groups1.htm) (last updated Jan. 3, 2011) (stating that lobbyists are usually employed by interest groups).

128. *Id.*

129. *Id.*

130. See Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 567 (2003) (alleging that some representatives are as worried about reelection as they are about constitutional issues).

131. Nick Ragone, *Introducing Legislation*, NETPLACES, <http://www.netplaces.com/american-government/making-a-law/introducing-legislation.htm> (last visited Oct. 24, 2012).

it must work its way through the legislative process. As a piece of legislation is subjected to the scrutiny of legislative committees, it is subject to frequent or, perhaps, routine modification.<sup>132</sup> The institutional structure of government also tends to affect the support for a piece of legislation. When enacting bills, one legislator may very well condition his support for one measure upon the support from a second legislator for the legislative initiative of the first legislator. This may very well be a relatively routine political practice. The degree of political control that a specific party has and exercises might also affect garnering political support for adoption of a lottery.

##### 5. *Other Factors*

The synergistic interaction between the decisions reached between the policymakers and voters in the particular state may affect the decisions made in other states. For example, the profitability of lotteries in one state may affect the decision of other states to create and implement their own lotteries.<sup>133</sup> This geographical proximity combined with economics may play a role too. This is because the economic effects of a specific state's lottery may be quite noticeable in nearby states. As a result, citizens and decision makers in nearby states may be influenced to take similar action. Such states may be influenced to create a lottery of their own as a form of financial and economic self-defense.<sup>134</sup> This is because the neighboring states that have enacted the lottery may start siphoning off exigent economic resources.<sup>135</sup> It may also be a matter of emulation in light of the infrastructure and public wealth apparently being accumulated. The adoption and implementation of a lottery by one state may function as a blueprint for another state to take similar action. It may also provide information on the potential consequences of such legislation. This perception may influence the positions of individuals and policymakers from state to state with regard to each state's decision to enact legislation implementing lotteries in the particular state.

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132. Nick Ragone, *Committee Consideration*, NETPLACES, <http://www.netplaces.com/american-government/making-a-law/committee-consideration.htm> (last visited Oct. 24, 2012).

133. See Roland Santoni, *An Introduction to Nebraska Gaming Law*, 29 CREIGHTON L. REV. 1123, 1124 (1996) (stating that western states started permitting lotteries after witnessing their profitability in the northeastern states).

134. *Id.*

135. Ronald L. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 48 (1992) [hereinafter Rychlack].

## 6. Implementation Method

Ultimately, the multiple factors mentioned above interact to produce a decision. The public policy decision is whether to adopt or reject a state lottery. The precise method of approval of lotteries has varied across states. Routinely, state constitutions have needed to be amended.<sup>136</sup> Additionally, many states have used a statewide referendum as part of the adoption process.<sup>137</sup> A referendum taking the form of a popular vote after the issue had already been approved by the legislature was used in the initial lottery in New Hampshire.<sup>138</sup> In New York, a constitutional amendment followed by the endorsement of two separately elected legislatures, as well as a public ratification, was legally necessary.<sup>139</sup> The use of the referendum method, of course, left the final decision to be made by the electorate itself rather than by the electorate's elected representatives acting in the legislature alone.<sup>140</sup>

Secondly, instead of a referendum, states such as California, adopted lotteries through an initiative process.<sup>141</sup> Finally, lottery adoption in some states has simply required approval by each state's legislature and governor without a direct citizen vote.<sup>142</sup>

### C. Where Courts Decline to Apply Public Policy to Nullify Some Agreements Allegedly Connected to Lotteries

The common law is a workable system. It is not ineluctably rigid.<sup>143</sup> As a result, the creative use of exceptions has been its hallmark. Therefore, where the judiciary has concluded that the facts before the court merit enforcement, in spite of the presence of an illegal element, the degree of contamination by the illegal element is assessed by the courts.<sup>144</sup> Nonreprobable degrees of contamination will not necessarily nullify court intervention in the

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136. See, e.g., CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 154-58 (detailing the state constitutional amendment campaigns to allow lotteries in Florida and Virginia).

137. See *id.* at 145 (explaining that referenda and initiatives were often necessary in order to change state policies and laws regarding lotteries because many states had constitutional bans against lotteries).

138. *Id.* at 143.

139. *Id.* at 144.

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

141. *Id.* at 151.

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

143. *Rozell v. Rozell*, 22 N.E.2d 254, 257 (N.Y. 1936) (citation omitted).

144. See generally *Bassidji v. Goe*, 413 F.3d 928 (9th Cir. 2005) (discussing whether illegal contracts can be enforced and whether the facts of case warranted the court enforcing the illegal contract).

cases presented. The judiciary will provide relief where such relief is legally justified. In reality, in the context of each controversy before the courts, the judiciary will assess whether or not enforcement of an entire agreement, or a portion of it, will advance a fundamental public policy objective. Of course, the party seeking enforcement of the agreements affected shoulders the burden of proving to the court that court intervention is fair, equitable and appropriate.

For example, where the judiciary reasons that its intervention meets these criteria, complete or partial enforcement of a claim may be granted. Such enforcement represents performance of the courts' ameliorative function in the interests of justice and is entirely appropriate. In such circumstances, court intervention in the interests of fair and just resolution of the controversy becomes imperative. This judicial intervention becomes an integral part of the public policy principles of the common law itself.

There are therefore exceptions to the general principle of nonenforcement of illegal contracts. These exceptions are fact specific and depend upon proof of meticulously circumscribed specifics.<sup>145</sup> Under the common law, the holding of a lottery is not ordinarily regarded as a penal offense unless either a state constitution or state statute criminalizes such activity.<sup>146</sup> In some jurisdictions, statutes have certainly been enacted that make it a criminal offense to promote or conduct a lottery or similar scheme other than one operated by the state.<sup>147</sup> The Supreme Court of the

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145. See, e.g., *Melton v. United Retail Merchs. of Spokane*, 163 P.2d 619, 627-28 (Wash. 1945) (emphasis added) (“[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.”). The *Melton* court reasoned that it could determine “*as a matter of law*” a promise to pay when a defendant acknowledges that the disputed amount of money belongs to the plaintiff. *Id.* (emphasis added).

146. *Lee*, 163 So. at 489; *Becker v. Wilcox*, 116 N.W. 160, 160 (Neb. 1908); *Parr v. Com.*, 96 S.E.2d 160, 163-64 (Va. 1957).

147. See, e.g., *Forte v. U.S.*, 83 F.2d 612, 614 (D.C. Cir. 1936) (referencing to statute that bars individuals from running, operating, or promoting a lottery); *Waite v. Press Pub. Ass'n*, 155 F. 58, 61 (6th Cir. 1907) (discussing a Michigan statute barring individuals from creating and promoting lotteries and gift enterprises); *State v. Shugart*, 35 So. 28, 29 (Ala. 1903) (mentioning statute that prohibits individuals from setting up a lottery); *Burks v. Harris*, 120 S.W. 979, 980 (Ark. 1909) (determining that pursuant to the state statute, it is illegal to run a lottery); *Ga. Real Estate Comm'n v. Warren*, 262 S.E.2d 570, 571 (Ga. Ct. App. 1979) (setting up lotteries in order to give away real estate is illegal); *L.E. Servs., Inc. v. State Lottery Comm'n of Ind.*, 646 N.E.2d 334, 340 (Ind. Ct. App. 1995) (referencing statute that bars individuals from conducting lotteries); *Commonwealth v. Jenkins*, 166 S.W. 794, 795 (Ky. Ct. App. 1914) (mentioning Kentucky statute that bars lotteries); *Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler*, 460 A.2d 44, 45 (Md. 1983) (“No lottery grant shall ever hereafter be authorized by the General Assembly,

United States has held that laws for the suppression of lotteries are in the interest of the morals and welfare of the people of the state, and are therefore a legitimate exercise of a state's police powers.<sup>148</sup> However, even in the face of the criminalization of lotteries, the common law's recognition of exceptions in deserving cases remains legally viable.

1. *Legal Impact of Differing Degrees of Culpability on Nullification Predicated upon Violations of Public Policy*

First, an agreement is unenforceable on grounds of public policy where the agreement itself constitutes an illegal lottery.<sup>149</sup> Nevertheless, an 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 a violation of public policy. The courts will assess the degree of legal contamination caused by the contact with the public policy violation.<sup>150</sup> Essentially, the judiciary determines whether there is a fatal degree of contamination. If there is, then the courts will not lend their assistance to any of the parties and will leave the parties where the courts find them.<sup>151</sup> If the degree of contamination from any violation of public policy falls below lethal levels, then the courts *may* provide assistance to the less culpable party in appropriate circumstances.<sup>152</sup>

*Youngblood v. Bailey*<sup>153</sup> is helpful in analyzing the common law's resolution of such intertwining issues. In *Youngblood*, at the outset, the Supreme Court of Alabama concluded that in the context of a particular transaction, the component involving the

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unless it is a lottery to be operated by and for the benefit of the State."); *People v. McPhee*, 103 N.W. 174, 175 (Mich. 1905) (analyzing the state statute prohibiting individuals from setting up a lottery); *State v. Lipkin*, 84 S.E. 340, 344-45 (N.C. 1915) (discussing state statute that banned lotteries); *Stevens v. Cincinnati Times-Star Co.*, 73 N.E. 1058, 1060 (Ohio 1905) (analyzing statute that precludes lotteries, wages, and bets).

148. *See Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (emphasis added) (citations omitted) ("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*."). *See also* *Town of Eros v. Powell*, 68 So. 632, 635 (La. 1915) (holding that lotteries fall within the ambit of practices that corrupt morals and the state can therefore regulate it under its police powers); *State v. J.J. Newman Lumber Co.*, 59 So. 923, 929 (Miss. 1912) (referencing Mississippi precedent holding that lotteries can be regulated pursuant to the state's police powers); *State v. Lipkin*, 84 S.E. 340, 345 (N.C. 1915) (citation omitted) (concluding that a state can, pursuant to its police powers, enact laws to suppress lotteries).

149. *Youngblood v. Bailey*, 459 So. 2d 855, 859 (Ala. 1984).

150. *See id.* at 860 (analyzing the two underlying agreements—one that constituted an illegal contract and one in which fraud was present).

151. *Rosen*, 78 P.2d at 728.

152. *See Youngblood*, 459 So. 2d at 860 (refusing to leave parties where the court found them when one party committed fraud).

153. *Id.* at 855.

purchase of a ticket with a chance to win a certain luxury car was void on grounds of public policy.<sup>154</sup> The ticket transaction component was “a lottery and directly violate[d] the public policy of [the] State.”<sup>155</sup> The legal nullification of the lottery component took effect between the *original parties* to such transactions.<sup>156</sup> However, the original purchaser of the ticket had sold the ticket to a subsequent purchaser who had fraudulently purported to pay for the ticket with a legally defective check.<sup>157</sup>

These additional facts raised the issue of exceptions to the fundamental principle of nullification of transactions on grounds of public policy. In exceptional 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>158</sup> Success by plaintiffs in such cases is predicated upon proof by such plaintiffs of two indispensable requirements.<sup>159</sup> First, plaintiffs are required to prove that they are *not* equally at fault with the defendants.<sup>160</sup> Second, plaintiffs must *also* prove that public policy interests are substantively advanced by the court’s assistance to the less culpable party or parties to the particular transaction.<sup>161</sup>

In instances where it is proven to the courts that one party has fraudulently induced another to enter into a particular transaction, the courts *may* provide assistance to the fraudulently induced party.<sup>162</sup> In *Youngblood*, the original purchaser of a lottery ticket had been fraudulently induced to sell the pertinent lottery ticket to a *fraudulent* subsequent purchaser.<sup>163</sup> This fraudulent inducement by the subsequent purchaser invalidated his own purchase of the lottery ticket.<sup>164</sup> Additionally, the subsequent purchaser’s fraudulent conduct left the title to the luxury car that was won by the lottery ticket undisturbed.<sup>165</sup> Title to the luxury car therefore remained securely vested in the plaintiff as the *original* purchaser of the lottery ticket.<sup>166</sup>

The facts and circumstances of the case were appropriate for

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154. *Id.* at 859.

155. *Id.*

156. *Id.*

157. *Id.* at 860 (emphasis added) (finding that trial testimony demonstrated that the underlying incident constituted the *fourth time* that the defendant had perpetuated the scheme in order to defraud individuals out of their lottery tickets).

158. *Id.* at 859.

159. *Id.* at 860.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

judicial relief to be granted to plaintiff as the *original* purchaser of the lottery ticket.<sup>167</sup> Therefore, the common law afforded relief to the *original* purchaser of the lottery ticket against the fraudulent subsequent purchaser, and also against any party whose claim was dependent upon such subsequent purchaser's legal iniquities.<sup>168</sup> The court applied these principles because the subsequent purchaser had made fraudulent representations to the original purchaser of the lottery ticket.<sup>169</sup> The subsequent purchaser's fraudulent representations consisted of assertions to the original purchaser that he had sufficient funds to meet the amount of the check that he tendered to the plaintiff as payment for the purchase of the lottery ticket.<sup>170</sup>

In his defense, the subsequent purchaser claimed 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>171</sup> The subsequent purchaser made this claim because he argued that the illegality of the original purchaser's acquisition of the lottery ticket from its original seller nullified any right that the original purchaser may have had to reclaim title to the lottery ticket from him.<sup>172</sup> The subsequent purchaser therefore asserted that his valid title to the lottery ticket conferred on him *alone* the entire valid legal title to the luxury car.<sup>173</sup>

The court ruled, however, that the common law disabled the fraudulent subsequent purchaser of the lottery ticket from pleading, as a defense, any underlying illegality of the original purchaser's title to the lottery contract.<sup>174</sup> The subsequent purchaser's fraudulent conduct nullified any prospect of a defense predicated upon any legal challenge by him to the original purchaser's title to the lottery ticket.<sup>175</sup> This was the case because the subsequent purchaser's purported defense was nullified by the fraud that he perpetrated on the original purchaser.<sup>176</sup>

The subsequent purchaser's fraudulent conduct when purporting to buy the lottery ticket from the original purchaser did not place the original purchaser's title to the lottery ticket in issue at all.<sup>177</sup> On the contrary, the courts did not permit the subsequent purchaser to legally challenge the original purchaser's title to the

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*



lottery ticket or to the car.<sup>178</sup> Such a challenge by the subsequent purchaser was simply a bridge too far because the suit against him brought by the original purchaser of the lottery ticket was predicated upon the subsequent purchaser's own fraudulent misrepresentations.<sup>179</sup> The original purchaser's suit against the subsequent purchaser was also predicated upon the subsequent purchaser's meretricious conduct consisting of his failure to pay the check that he tendered to the original purchaser of the lottery ticket.<sup>180</sup>

## 2. "Hole-in-One" Agreements Between Golfers and Golf Course Owners or Operators

Not all tournaments are illegal lotteries. Therefore, a distinction needs to be drawn between similar but legally divergent settings. Undoubtedly, an agreement is unenforceable on grounds of public policy where the agreement itself constitutes an illegal lottery. An example of such an unenforceable agreement exists where a promisee has paid a specific sum of money to a promisor and has agreed that, contingent upon the happening of a certain specified event governed by chance, a prize will be paid to the promisee by the promisor.<sup>181</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, in spite of the presence of consideration paid by a promisee to a promisor, combined with the promisor's promise of the award of a prize to the promisee.<sup>182</sup>

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>183</sup> The presence of an element of chance does not per se convert the agreement between the parties into an illegal lottery. *Chenard v. Marcel Motors*<sup>184</sup> is instructive in this regard.

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178. *Id.*

179. *Id.*

180. *Id.*

181. *See, e.g.*, Opinion of the Justices, 397 So. 2d 546, 547 (Ala. 1981) (citation omitted) ("[T]here are three elements to a lottery: '(1) [a] prize, (2) awarded by chance, (3) for a consideration.'").

182. *See* Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 87 (Nev. 1961) (emphasis added) (citation omitted) ("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.*").

183. *Chenard v. Marcel Motors*, 387 A.2d 596, 601 (Me. 1978).

184. *Id.*

In *Chenard*, a party in the State of Maine sponsored a golf tournament at a golf club and invited an automobile dealership to donate an automobile as a prize at the golf tournament.<sup>185</sup> In response, the automobile dealership donated a new automobile in order to promote its business.<sup>186</sup> Advertisements disseminated the applicable terms for winning the automobile, which the automobile dealership imposed upon golfers participating in the tournament.<sup>187</sup> These terms required any golfer in the tournament to make a hole in one drive on a specified hole at the golf course.<sup>188</sup> These terms were posted at the golf club and were also sent to potential participants in the tournament.<sup>189</sup> On the day of the tournament, the automobile dealership arranged for a new vehicle to be driven to the golf club and parked near the golf clubhouse.<sup>190</sup> One of the automobile dealership's advertisements was placed on the new vehicle itself.<sup>191</sup>

The plaintiff paid the required fee and registered for the tournament.<sup>192</sup> At the specified hole, plaintiff shot a hole in one in the presence of his three playing partners.<sup>193</sup> Plaintiff then notified the automobile dealership and claimed the new car as his prize.<sup>194</sup> When the automobile dealership refused to deliver the new car as his prize, plaintiff successfully sued the automobile dealership.<sup>195</sup> The dealership then appealed the Superior Court's refusal to dismiss the plaintiff's complaint based upon Maine's antigambling and antilottery statutes that were in effect at the time of the tournament.<sup>196</sup>

The Supreme Judicial Court of Maine affirmed the judgment of the Superior Court based upon the following reasons.<sup>197</sup> First, the plaintiff's payment of an entrance fee in order to participate in the lawful golf tournament did not, on any legal basis whatsoever, convert the legal golf tournament into an illegal wager or lottery.<sup>198</sup> This was the case because the fees paid by participants in the tournament did not make up a "purse" for the purchase of the new automobile or for any prize to be won by any of the

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185. *Id.* at 598.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 598, 603.

196. *Id.* at 598.

197. *Id.* at 600-01.

198. *Id.* at 600.

tournament participants.<sup>199</sup>

Secondly, the automobile dealership did not compete for the new automobile as a participant in the golf tournament nor on any legal basis whatsoever.<sup>200</sup> Furthermore, the automobile dealership did not derive any profit or any opportunity for profit from the golfers' entrance fees.<sup>201</sup> On the contrary, all entrance fees for the tournament went to the golf club, which was not in contractual privity with the automobile dealership.<sup>202</sup> Instead of contractual privity, the automobile dealership had provided the new automobile to the golf club gratuitously and temporarily, in accordance with the terms imposed by the automobile dealer upon the participants in the golf tournament.<sup>203</sup> Therefore, the new automobile was not offered by the automobile dealership as a lure designed to sever golfers who participated in the tournament from their money for the automobile dealer's financial gain.<sup>204</sup>

Thirdly, the golfers who participated in the tournament paid their entrance fees to the golf club as consideration in order to participate in the golf tournament, and not for any other reason.<sup>205</sup> These golfers were not risking their tournament fees as a mechanism for making a return on their entrance fee money as is done in any illegal wagering transaction.<sup>206</sup> Furthermore, there was no division whatsoever among the golfers in the tournament of the cumulative total of the monies from the entrance fees paid by the golfers participating in the tournament.<sup>207</sup> Neither the cumulative total of the monies from the entrance fees paid by the golfers—nor any fraction or component of those monies—was divided among the golfers as is done in an office “pool.”<sup>208</sup>

Fourthly, neither the cumulative total of the monies from the entrance fees paid by the golfer participating in the tournament, nor any fraction or component of those monies, formed any part of the car as a prize.<sup>209</sup> On the contrary, the automobile, as a prize, was offered by the automobile dealership to the participating golfers separately and in complete isolation from the tournament entrance fees.<sup>210</sup> This offer was for a “unilateral” contract, and was made by the automobile dealership to the golfers participating in

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199. *Id.* at 600-01.

200. *Id.* at 601.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

the tournament.<sup>211</sup>

The plaintiff accepted this offer when he shot the hole-in-one at the designated hole at the golf course during the golf tournament.<sup>212</sup> When the plaintiff shot the hole-in-one, he completed all of the terms bargained for in the offer and thereby created a perfectly valid, binding, and enforceable contract with the automobile dealership.<sup>213</sup> Although it *may* be argued that successfully achieving a hole in one implicates *some* element of chance,<sup>214</sup> nevertheless, on the facts of this case, there was *no* violation of Maine's lottery or gambling laws.<sup>215</sup> The automobile dealer was therefore obligated to perform its own promise under the terms of the contract that was validly created.<sup>216</sup>

### III. ORIGINS OF PUBLIC POLICY WITH RESPECT TO LOTTERIES IN AMERICA

#### A. *History and Development of Lotteries*<sup>217</sup>

Gambling is versatile.<sup>218</sup> Moreover, in the modern era, lotteries are probably the most prevalent form of gambling in the United States.<sup>219</sup> "Both gambling in general and lotteries in particular have long histories in this country and abroad."<sup>220</sup> Actually, the drawing of lots is conceivably the most ancient form of the use of chance to influence particular outcomes.<sup>221</sup>

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 599.

215. *Id.* at 601

216. *Id. Accord Las Vegas Hacienda, Inc.*, 359 P.2d at 87 (affirming the lower court's decision requiring the defendant to perform under the contract and pay the plaintiff the \$5,000 promised to him for getting a hole in one).

217. *See, e.g., Lee*, 163 So. at 488 (citations omitted) ("Lotteries are of ancient origin[.]" and first rose to popularity in the sixteenth century throughout Europe, and later the United States, as governments began recognizing them as a means of raising revenue).

218. *See Kelly, supra* note 27, at 90 (emphasis added) ("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.*").

219. *See NGISC: Lotteries, supra* note 15 ("The lottery industry stands out in the gambling industry . . . . It is the most widespread form of gambling in the U.S. . . .").

220. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 32. *See also* HERRMANN, *supra* note 44, at 9 ("The earliest widespread legal gambling activity in the United States was the lottery.").

221. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 33-34. *See also* NGISC: *Lotteries, supra* note 15 ("[M]aking decisions and determining fates by the casting of lots has a long record in human history (including several instances in the Bible). . . ."). *See, e.g., Leviticus* 16:8 (King James) (discussing the casting of lots to determine fates); *Joshua* 18:6 (King James) (same); *First Samuel* 14:42 (King James) (same); *Proverbs* 16:33 (King James) (same); *First*

Furthermore, it has been proposed that games of chance existed in antiquity.<sup>222</sup> Certainly, the “drawing of lots” probably constitutes the most numerous references to “gambling” in the Holy Bible.<sup>223</sup> Of course, the sophisticated technology of modern gambling was in all likelihood unavailable in biblical times. Additionally, in the historical context, the drawing of lots was probably also a readily available uncomplicated form of decisionmaking.

### 1. *The Rise*

Apparently, in Europe, lotteries may have initially been perceived as pleasurable distractions and were therefore included in ancient celebrations.<sup>224</sup> However, the private commercial potential of lotteries must have become self-evident.<sup>225</sup> This apparently led to the use of lotteries by some merchants in Europe to dispose of excess stock or merchandise that remained unsold for too long, and also for the disposal of items that proved rather difficult to sell.<sup>226</sup>

Moreover, governmental perception of the prospective use of lotteries undoubtedly materialized as well.<sup>227</sup> Governments must have become aware of the potential use of lotteries for revenue enhancement. This awareness could easily have been created by the governmental perception of the comparatively painless impact of lotteries when compared to the less attractive governmental mechanism of raising its revenue by taxation.<sup>228</sup>

Turning more specifically to the North American history of

*Chronicles* 26:13 (King James) (same).

222. See Rychlack, *supra* note 135, at 15 (citation omitted) (explaining that gambling has been prevalent throughout history as evidenced by its existence “among ancient Egyptians, Chinese, Japanese, Hebrews, Greeks, Romans and the early Germanic Tribes”).

223. See also *NGISC: Lotteries*, *supra* note 15 (mentioning the discussions concerning casting lots found in the Bible).

224. See Rychlack, *supra* note 135, at 20-21 (explaining that lotteries first started out simply as party games).

225. See *NGISC: Lotteries*, *supra* note 15 (“[T]he use . . . [of] lotteries for material gain is of more recent origin, although of considerable antiquity.”).

226. See Rychlack, *supra* note 135, at 21 (explaining that merchants used lotteries to help sell excess merchandise).

227. See generally *NGISC: Lotteries*, *supra* note 15 (“The first recorded public lottery in the West was held during the reign of Augustus Caesar for municipal repairs in Rome.”). Sources are not unanimous on the date of the first lottery. Compare *id.* (stating that the first lottery was held in 1466), with *CLOTFELTER & COOK: SELLING HOPE*, *supra* note 12, at 34 (stating that the first lotteries occurred in 1530).

228. See generally *NGISC: Lotteries*, *supra* note 15 (explaining that Belgium was the home of the first lottery that awarded money and the purpose of which was to provide assistance to the poor). But see also *CLOTFELTER & COOK: SELLING HOPE*, *supra* note 12, at 34 (endnote omitted) (“The first lotteries offering prizes of money was held in Florence in 1530, with proceeds going to the state.”).

lotteries, one of the first lotteries was held in London in 1612, for the benefit of the early Virginia Colony in America.<sup>229</sup> Over the life of these lotteries, the Virginia Colony's gain was the British public's loss because the profits redounded to North America and not to the British public.<sup>230</sup> This inevitably led to the termination of these lotteries in due course,<sup>231</sup> and domestic American colonial lotteries replaced the British ones.<sup>232</sup>

Lotteries became popular in the seventeenth and eighteenth centuries in North America.<sup>233</sup> Both the government and private parties used them.<sup>234</sup> Banking institutions and similar financial mechanisms were not fully developed in the colonies in this era.<sup>235</sup> It certainly appears that some institutions used lotteries to finance building projects for both public and private use.<sup>236</sup> Canals,

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229. See DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENTS AND THE TAXING OF DREAMS 19 (Monthly Review Press 2000) [hereinafter NIBERT] ("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 MATTHEW SWEENEY, THE LOTTERY WARS 15 (Bloomsbury 2009) [hereinafter SWEENEY] (describing the first lottery for America); Rychlack, *supra* note 135, at 24 (discussing the purpose of England's lotteries benefiting Virginia in 1612); NGISC: *Lotteries*, *supra* note 15 (analyzing the lottery's importance in providing financial assistance to the colonies).

230. See NIBERT, *supra* note 229, at 19 (endnote omitted) (explaining that by 1620, lotteries accounted for about half of all financial support for the colonies). See also Rychlack, *supra* note 135, at 24 (explaining that the benefits of the British lottery benefited the Colonies, not Britain).

231. See Rychlack, *supra* note 135, at 24 (examining the termination of Virginia Company's charter). See also MCGOWAN, *supra* note 29, at 6 (explaining that the Virginia Company was ordered to stop issuing lottery tickets since its lottery was much more profitable than the fledgling English lottery).

232. See Rychlack, *supra* note 135, at 24 (commenting that once the British lotteries were revoked, the colonies formed domestic lotteries). See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, 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.").

233. See MCGOWAN, *supra* note 29, at 6-8 (discussing the history of lotteries in America). See also NGISC: *Lotteries*, *supra* note 15 (explaining the history of lotteries in America); Rychlack, *supra* note 135, at 25-29 (analyzing early American lotteries).

234. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 34 (discussing the colonial use of lotteries).

235. See Rychlack, *supra* note 134, at 31 (explaining that America did not have a developed banking system in the early nineteenth century). See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 35 ("Capital markets were rudimentary, to say the least, before a national banking system had been firmly established.").

236. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 34 (discussing early Colonial uses of lottery funds).

bridges, and roads were funded through the use of lotteries.<sup>237</sup> So, too, were construction projects for a number of colleges,<sup>238</sup> including “Harvard, Yale, King’s College (Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina and the University of Michigan. . . .”<sup>239</sup>

Colonial authorities tended to use lotteries for specific building projects as well.<sup>240</sup> Of course, some lotteries operated outside of government supervision.<sup>241</sup> To be sure, some lotteries were put to noble or charitable uses.<sup>242</sup> First, some colonies, and later some states, used lotteries to support military activities during the French and Indian Wars of the eighteenth century.<sup>243</sup> Moreover, use of lotteries during the Revolutionary War era also occurred.<sup>244</sup> It seems that the Continental Congress authorized at least one lottery “to support the Continental Army in 1776. . . .”<sup>245</sup>

In the early history of the new American nation in the nineteenth century, lotteries seemed to be particularly popular.<sup>246</sup> In 1810, Thomas Jefferson initially seemed to be opposed to lotteries “however laudable or desirable [their] object[s] may be.”<sup>247</sup> He apparently changed his mind in 1826, however, when he encountered financial turbulence and needed funds to alleviate the exigent needs of his personal estate.<sup>248</sup> He apparently hoped to

237. See *id.* at 34 (analyzing public projects funded by colonial lotteries).

238. *Id.* See also NIBERT, *supra* note 229, at 21 (explaining the purpose of early American lotteries).

239. Rychlack, *supra* note 135, at 25.

240. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 34 (commenting on the fact that “the line between public and private was typically indistinct”).

241. *Id.* (explaining that while some lotteries, the purpose of which was private profit, existed, they were never legalized).

242. See *id.* at 35 (explaining that lotteries were considered to be a voluntary tax that raised money for charitable organizations, such as religious organizations).

243. See NIBERT, *supra* note 229, 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.”).

244. *Id.* at 22-23. See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 34 (recognizing the important function of lotteries during the Revolutionary Wars—raising money to support soldiers).

245. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 36 (discussing Congress’ authorization of a lottery to support the Continental Army in 1776). See also MCGOWAN, *supra* note 29, at 10 (pointing to the creation of the national lottery to raise funds).

246. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 35 (citing the popularity of lotteries during the nineteenth century).

247. *Id.* at 299 (citing THOMAS JEFFERSON, WRITINGS (New York: Library of America 1984)).

248. *Id.* See also MCGOWAN, *supra* note 29, at 9 (referencing Jefferson’s need to initiate a lottery to cover debts).

persuade the Virginia legislature to permit him to operate a lottery for this purpose.<sup>249</sup> In the later years of his career, he may have mellowed on the fundamental nature of lotteries.<sup>250</sup> Jefferson described the lottery mechanism as a “painless tax,” “paid only by the willing.”<sup>251</sup>

Lotteries multiplied in the early decades of the nineteenth century.<sup>252</sup> In 1832, the income received from sales of tickets constituted three percent of the national income.<sup>253</sup> However, the reform movement led by President Andrew Jackson intensified and sharpened opposition to lottery operations as a whole.<sup>254</sup> Imprecise regulations and relatively lax controls had contributed to scandals surrounding a number of lottery operations.<sup>255</sup> This all led to curbs on lotteries and, in 1833, individual states started enacting statutes that prohibited lotteries.<sup>256</sup>

The Civil War era and its economic devastation of the American South led several states to again consider lotteries for statewide financial salvation.<sup>257</sup> Some Southern states established lotteries as means of raising revenues during the period of relatively extensive depressed governmental revenues caused by the Civil War.<sup>258</sup> Defeat and reconstruction played a major role in the difficult financial times experienced in these states.<sup>259</sup> The Louisiana lottery was probably the largest of them all.<sup>260</sup>

249. MCGOWAN, *supra* note 29, at 9.

250. *Id.*

251. *Id.* See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 299 (attributing the phrase “painless tax” to Thomas Jefferson).

252. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 36 (describing the popularity and increase of lotteries during the 19th century).

253. *Id.*

254. See *id.* at 37 (contending that some historians suggest the Jacksonian resentment of privilege was a motivating source for opposition of lotteries).

255. *Id.* See also Rychlack, *supra* note 135, at 32 (contending that lottery opposition began to mount due to the change in social reform and the reaction to the corruption and abuse that existed within the lottery system).

256. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 37-38 (“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.”).

257. See MCGOWAN, *supra* note 29, at 14 (describing how the South turned to lotteries on account of economic distress exacerbated by the end of the Civil War and the North’s unwillingness to lend money or raw materials to aid in the reconstruction).

258. *Id.*

259. *Id.* See also Rychlack, *supra* note 135, at 38-39 (stating that “[t]here was a brief revival of state-run lotteries in the 1860s” due to economic hardships stemming from the Civil War and Reconstruction).

260. See MCGOWAN *supra* note 29, at 14 (describing the Louisiana Lottery as “[t]he most famous and long-lasting” with “tickets hawked in every major city”). See also SWEENEY, *supra* note 229, 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.”); CLOTFELTER & COOK: SELLING



## 2. *The Fall*

In the early 1890's the federal government began to consider legislation to bar lotteries from using the federal mail system.<sup>261</sup> As these efforts opposing lotteries intensified, Louisiana lawmakers were persuaded in 1868 to charter a private company to run a lottery.<sup>262</sup> Of course, the individual states have legal power generally to regulate lotteries within the borders of each state.<sup>263</sup> However, the attempts by states other than Louisiana to raise funds from gambling of this type were relatively short lived and by the end of the Civil War era, no lotteries legally survived,<sup>264</sup> except the Louisiana Lottery, which survived into the 1890s.<sup>265</sup> Other states had by now ended their own lottery initiatives and this development left Louisiana's lottery in a monopoly position in the entire United States.<sup>266</sup>

The Louisiana lottery survived because two private brokers won a charter from the State of Louisiana.<sup>267</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>268</sup> The national reach of the Louisiana Lottery and the fact that it was held on a weekly basis let it to be described as a serpent.<sup>269</sup> The mail system was used to purchase and sell tickets.<sup>270</sup> When the expiration date of the lottery charter

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HOPE, *supra* note 12, at 38 (“[O]ver 90 percent of its revenue [came] from out of state.”).

261. MCGOWAN, *supra* note 29, at 15.

262. Rychlak, *supra* note 135, at 40.

263. *See* HERRMANN, *supra* note 44, at 4 (recognizing that policies concerning gambling mostly fall within the ambit of the Tenth Amendment's police powers).

264. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 38.

265. MCGOWAN, *supra* note 29, at 14-15; CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 38.

266. *See* MCGOWAN, *supra* note 29, at 14 (stating that by the 1880's, Louisiana was the only state with a lottery since the other states had either given up on lotteries or had banned them). *See also* Rychlack, *supra* note 135, at 40-41 (citations omitted) (“Because its books were kept secret . . . it has by now been estimated that at its height of popularity, the Louisiana lottery was a nationwide monopoly making annual profits of up to \$3 million. . .”).

267. *See* MCGOWAN, *supra* note 29, at 14 (explaining that John Morris and Charles Howard were the brokers in charge of the Louisiana Lottery). *See also* Rychlack, *supra* note 135, at 41 (citation omitted) (explaining that while “the Louisiana Lottery was run by a New York gambling syndicate[,] . . . [t]o lend an air of respectability, two former confederate generals . . . were hired to oversee the drawings.”).

268. MCGOWAN, *supra* note 29, at 14.

269. *Id.* *See also* SWEENEY, *supra* note 229, at 54 (“The Louisiana Lottery was known as the Octopus because its arms reached into every state and city.”); Rychlack, *supra* note 135, at 40 (citation omitted) (referencing “The Serpent,” which was the Louisiana Lottery's nickname).

270. *See* MCGOWAN, *supra* note 29, at 14 (stating that “[m]ore than \$3

approached, one of the private brokers sought a renewal by offering the State of Louisiana a sum of one million dollars a year.<sup>271</sup>

This apparently brazen entrepreneurial initiative backfired. Unfortunately, it seemed that considerable opposition to the lottery had developed ubiquitously around the entire United States.<sup>272</sup> The operators of the lottery were accused of corruption and bribery.<sup>273</sup> Additionally, the federal government purported to enact a number of statutes designed to block the sale of tickets outside the State of Louisiana.<sup>274</sup> Initially, these provisions proved to be ineffective and, actually, quite feeble.<sup>275</sup> However, a federal statute enacted in 1890 proved to be the coup de grace,<sup>276</sup> and use of the federal mail system was terminated.<sup>277</sup>

In addition, all efforts to win support for a renewal of the lottery proved to be unsuccessful.<sup>278</sup> The venture had survived for some twenty-five years.<sup>279</sup> However, in 1894, Louisiana itself had finally joined the rest of the country in banning lotteries.<sup>280</sup> Thereupon, the syndicate that operated the lottery moved its operations to Honduras<sup>281</sup> and resorted to “printing and distributing tickets in the United States using private mail couriers.”<sup>282</sup> In 1895, Congress responded by eliminating this loophole in the law.<sup>283</sup> This ended the Louisiana Lottery in 1895.<sup>284</sup> “[E]ventually the federal government stepp[ed] into outlaw lotteries by the end of the nineteenth century.”<sup>285</sup>

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million was distributed to winners annually” and the national scale necessitated the use of the mail system to distribute these winnings).

271. *Id.* at 15.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See* SWEENEY, *supra* note 229, at 59 (stating that in a vote of “157,422 to 4,225[.]” Louisiana voters voted against a twenty-five year extension of the lottery, and thus “exiled the Octopus”).

279. *Id.* at 55.

280. *See* SWEENEY, *supra* note 229, at 59 (explaining that the Louisiana Lottery Company’s charter expired in 1894).

281. *See id.* (“The company pulled stakes for Honduras, renaming itself the Honduras National Lottery.”).

282. *Id.*

283. *See* NGISC: *Final Report*, *supra* note 14, at 2-1 (“The federal government outlawed the use of the mail for lotteries in 1890, and in 1895, invoked the Commerce Clause to forbid shipments of lottery tickets or advertisements across state lines, effectively ending all lotteries in the United States.”). *See also* SWEENEY, *supra* note 229, at 59 (explaining that in 1895, Congress criminalized “the interstate trafficking of lottery materials”).

284. *Id.*

285. *See* CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 12, at 38 (“By

North Dakota's experience is particularly interesting.<sup>286</sup> After its ouster from Louisiana, the Louisiana lottery company made an effort to relocate to the State of North Dakota.<sup>287</sup> Unfortunately, the corruptive practices used in Louisiana were also used in North Dakota, in an effort to relocate the lottery there.<sup>288</sup> These practices included buying legislators' votes for \$500 per vote to gain support for the lottery.<sup>289</sup>

When the Pinkerton Detective Agency performed an investigation that exposed this corruption, the corrupt practices were made public.<sup>290</sup> The Senate bill in favor of establishing the lottery in North Dakota was indefinitely postponed.<sup>291</sup> The exposure of corruption motivated the Senate to enact an amendment to North Dakota's Constitution prohibiting lotteries.<sup>292</sup> The Senate's revulsion by corruption endures to the present.<sup>293</sup> The aftermath of that historical upheaval is still apparent in the North Dakota Constitution<sup>294</sup> and in that state's statutory enactments.<sup>295</sup> In the modern era, "[I]n only one state—North Dakota—has the public consistently voted against a lottery."<sup>296</sup> In 1986, an amendment to authorize a lottery was proposed, which intended to alleviate the tax burden on the citizens of North Dakota.<sup>297</sup> However, when put to the general public, it met strong resistance and was defeated in the 1986

1894[,] no state permitted the operation of lotteries. . . .").

286. See *Meyer*, 626 N.W.2d at 272 (Sandstrom, J., dissenting) (explaining North Dakota's unique history of gambling and the working of the state's gambling laws).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 268.

294. See *id.* 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.'").

295. See *id.* at 267-68 (emphasis in original) (remarking that there is a still a strong antigambling animus toward lotteries as evidenced by "[N.D. CENT. CODE § 12.1-28-02(2)], . . . prohibit[ion on] the sale, purchase, receipt, or transfer of a chance to participate in a lottery, *whether the lottery is drawn in state or out of state, and whether the lottery is lawful in the other state or country*").

296. See *NGISC: Lotteries*, *supra* note 15 (distinguishing North Dakota as the one state where the public has consistently resisted the lottery, despite its popularity among the other states). See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 146 (indicating that North Dakota was the only state to turn down a state-run lottery and depicting North Dakota's resistance to establishing a lottery by public vote in 1986 and 1988 in Table 8.1).

297. *Meyer*, 626 N.W.2d at 268.

general election.<sup>298</sup>

In 1993, North Dakota repealed its ban on lottery advertising, provided that the advertisements related to a lottery that was legal where it was operated.<sup>299</sup> The repeal was cited as support for the conclusion 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>300</sup> In reality, however, although lawful lotteries remained dormant in the United States for almost seventy years,<sup>301</sup> illegal operations survived in many parts of the country.<sup>302</sup>

### 3. *The Rise Again*

Legal lotteries returned with the passage of New Hampshire legislation in 1964.<sup>303</sup> By the end of 1988, lotteries existed in thirty-three states and the District of Columbia.<sup>304</sup> “Virtually every state has required approval by *both* the legislature and the public in a referendum. . . .”<sup>305</sup> Of all the fifty states, North Dakota has repeatedly rejected the enactment of lottery legislation.<sup>306</sup>

In modern times, state and provincial governments rely on lottery revenue for a number of purposes, with supporters emphasizing the general public welfare as the most significant beneficiary.<sup>307</sup> There are, of course, dissenters who tend to question the validity of such claims.<sup>308</sup> Nevertheless, over the past several decades, lotteries have provided quite a steady flow of

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298. *Id.*

299. *Id.* at 273.

300. *Id.*

301. See MCGOWAN, *supra* note 29, at 15 (asserting that lotteries were outlawed until “New Hampshire became the first state to operate a lottery in almost seventy years” in 1964).

302. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 39 (emphasis added) (“Illegal lotteries existed alongside official lotteries from at least the nineteenth century, and, until the reemergence of state lotteries in the 1960s and 1970s . . . In the United States the two dominant illegal games have been *policy* and *numbers*.”). See also SWEENEY, *supra* note 229, at 66 (describing the “policy wheel,” an illegal game that went underground as states banned lotteries).

303. NGISC: *Lotteries*, *supra* note 15. See also CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 22 (tracing the growth of lotteries to New Hampshire in 1964, and explaining that “[b]eginning in New Hampshire in 1964, the lottery movement spread to New York and other northeastern states before jumping to the West and Midwest[, and ] . . . [b]y 1989 lotteries were operating in every section of the country”).

304. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 23. In 2011, this number has now risen to 40. See also NAT’L SURVEY OF STATE LAW, *supra* note 45.

305. NGISC: *Lotteries*, *supra* note 15, at 3 (emphasis added).

306. *Id.*

307. *Id.* at 5.

308. *Id.*

revenue into public coffers, and some states have earmarked portions of the lottery proceeds for specific educational uses.<sup>309</sup>

A more incisive criticism focuses on the conception of “public policy being made piecemeal and incrementally, with little or no general overview.”<sup>310</sup> One question that may be asked in this context is: Well, what’s wrong with such an approach?<sup>311</sup> One answer may be that the NGISC does not seem to be convinced that the approach of incremental and piecemeal development with little or no general overview is an optimal one.<sup>312</sup> The NGISC perceives this approach as one which places “pressures on the lottery officials” for a number of reasons articulated in its Final Report.<sup>313</sup>

In the NGISC’s opinion, these factors have had a critically important impact on the public policy of every state that has embraced lotteries.<sup>314</sup> This viewpoint seems to be shared by two lottery commentators of national stature.<sup>315</sup> In all fairness, however, these two commentators have not concluded that the absence of a coherent overall gambling policy or the absence of a specific lottery policy are necessarily the most significant factors that impact lottery approval.<sup>316</sup>

This state of affairs is not an ideal societal equilibrium and arguably, it is not equilibrium at all. Instead, it seems to constitute an imbalance. Such a state of affairs seems to unevenly allocate power to the lottery industry. The balance of power of the population as a whole probably requires a more appropriate impact of the opinions of elected officials. This would be healthier for the public policy of any common-law democratic society overall.

309. *See id.* at 6 (stating that Georgia has attempted to address this concern by mandating that “the sole designated recipients are programs for college scholarships, pre-kindergarten classes, and technology for classrooms; [and that] it is illegal to use the funds for any other purpose”).

310. *Id.* at 12.

311. One commentator has perceived certain consequences as a result of this incremental development. *See* HERRMANN, *supra* note 44, at 121 (observing that gambling policies have developed incrementally, and that once made legal, most forms of gambling have been quietly expanded, and regulations that could limit revenue growth have been loosened).

312. *NGISC: Lotteries*, *supra* note 15.

313. *Id.* (emphasis added) (“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.*”).

314. *Id.* (“Few . . . states, have a coherent ‘gambling policy’ or even a ‘lottery policy’ . . . [since oftentimes] . . . officials inherit policies and a dependency on revenues that they can do little or nothing about.”).

315. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 43 (“[F]amiliarity itself may mollify opposition [to the lottery as evidenced by] the apparent rise in approval of lotteries in states following adoption.”).

316. *See id.* (indicating that other factors for the increase acceptance of lotteries is the “general liberalization of attitudes” in society on moral and social issues and the “erosion of traditional (i.e. smalltown) American Values”).

It would arguably be healthier than an industry-driven policy juggernaut that exercises the greatest leverage in reaching tipping points relating to significant changes in public policy.<sup>317</sup>

A newer development has been the cooperation of a number of individual states in America banding together in order to offer bigger overall jackpot prizes.<sup>318</sup> This development has assisted some states with populations that may be too small to support an in-state lottery to share in lottery-generated funds along with other American states with larger population sizes.<sup>319</sup> In fact, the first multistate lottery included New Hampshire, Maine, and Vermont.<sup>320</sup> This turned out to be a precursor to the largest modern-day American, multi-state lottery games—Powerball<sup>321</sup> and MegaMillions.<sup>322</sup>

### B. Federal Lottery Laws

In earlier U.S. history, gambling policy was considered the prerogative of state governments for many reasons. First, the fundamental structure of American government under the U.S. Constitution consisted of delegated powers.<sup>323</sup> Moreover, the legislative powers delegated to Congress in Article I, Section 8 of the U.S. Constitution, do not expressly include the regulation of gambling activity.<sup>324</sup> Furthermore, the Tenth Amendment of the U.S. Constitution specifically mandates 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>325</sup> Accordingly, the federal government refrained from regulating

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317. See, e.g., MALCOM GLADWELL, *THE TIPPING POINT* 247 (Little Brown 2000) (emphasis added) (explaining that “[t]he theory of Tipping Points requires . . . that we *reframe the way we think about the world*”).

318. See *NGISC: Lotteries*, *supra* note 15 (“In recent years, the figures for the top prize have continued to increase as multi-state consortia have been formed with a joint jackpot.”).

319. SWEENEY, *supra* note 229, at 98.

320. CLOTFELTER & COOK: *SELLING HOPE*, *supra* note 12, at 113.

321. See *About Us*, MULTI-STATE LOTTERY ASSOCIATION, [http://www.powerball.com/pb\\_about.asp](http://www.powerball.com/pb_about.asp) (last visited Mar. 19, 2012) (providing information as to a multi-state lottery operated by Multi-State Lottery Association (MUSL) that includes thirty-two states and Washington, D.C.).

322. See *History of the Game*, MEGAMILLIONS, <http://www.megamillions.com/about/history.asp> (last visited Mar. 19, 2012) (providing information as to a multi-state lottery operated by Multi-State Lottery Association (MUSL) that includes forty-one states, U.S. Virgin Islands, and Washington, D.C.).

323. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 216 (2009) (citations omitted) (describing the U.S. government’s powers as being limited by the U.S. Constitution, and that “[a]ll powers not granted to it by that instrument are reserved to the States or the people”).

324. U.S. CONST. art. I, § 8.

325. *Id.* at amend. X.

gambling for nearly a century.<sup>326</sup>

This self-imposed congressional restraint was 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 existed.<sup>327</sup>

Congress was given the constitutional power to “establish Post Offices”<sup>328</sup> and under the Commerce Clause to “regulate Commerce . . . among the several States.”<sup>329</sup> Ultimately, Congress’s perception of the potential constitutional regulatory power embedded in those expressly enumerated powers changed. This change was enervated by concerns raised by potential illegal lotteries. The Louisiana Lottery served as a catalyst for the unleashing of these activated federal legislative powers.<sup>330</sup> As a result, the use of the mail system for lottery facilitation was targeted in an effort to cripple the interstate activities of the Louisiana Lottery.<sup>331</sup>

In 1876, President Grant signed into law an act that imposed legal sanctions on persons who circulated advertisements for lotteries through the mail.<sup>332</sup> Then, in 1890, Congress enacted a law that proscribed the publication of any advertisements in newspapers for lotteries.<sup>333</sup> Predictably, the Louisiana Lottery managers hunted for any lacuna that they could find in these anti-lottery statutes. As a result, the Louisiana Lottery managers

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326. In 1988, acting under The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, Congress enacted the federal Indian Gaming Regulatory Act (IGRA) imposing on the several states a federal statutory obligation to negotiate compacts in good faith with the Indian Tribes relating to gaming activities. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(a) (2012). It also created a federal cause of action empowering Indian Tribes to compel states by action brought in the federal courts to perform those duties. *Id.* at § 2710(d)(7). However, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996), the Supreme Court of the United States struck down this grant of jurisdiction to sue a state without its consent. The 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 et al., *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.”).

327. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, 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.”).

328. U.S. CONST. art. I, § 8, cl. 7.

329. *Id.* at art. I, § 8, cl. 3.

330. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 38.

331. *Id.*

332. Act of July 12, 1876, ch. 186, 19 Stat. 90 (1876).

333. Act of September 19, 1890, ch. 908, 26 Stat. 465 (1890).

moved the lottery operations outside the United States to Honduras.<sup>334</sup> Congress responded in 1894,<sup>335</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>336</sup>

Seizure and forfeiture of all such articles was statutorily commanded.<sup>337</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>338</sup> Then, in 1895, Congress enacted an additional statute empowering the suppression of all lottery traffic through national and interstate commerce.<sup>339</sup> Use of the mail was expressly prohibited in this act.<sup>340</sup>

These federal laws proved to be very effective as a result of the severity of the restrictions imposed upon the operators of the Louisiana Lottery.<sup>341</sup> Additionally, the citizens of Louisiana had become aware of the apparent bribing of state political leaders and the extraction of exorbitant profits from operation of the lottery.<sup>342</sup> In contrast, state beneficiaries were being shortchanged.<sup>343</sup> Dishonest games apparently also came to light. Finally, in 1905, as a result of statewide pressure from citizens, the Louisiana legislature terminated state sponsorship of the lottery.<sup>344</sup>

Two U.S. Supreme Court decisions played a significant role in this regard. The constitutionality of the congressional enactments was sustained. Additionally, the judiciary ruled that the pertinent acts of Congress were within the scope of the powers assigned to Congress under the provisions of the U.S. Constitution. First, in 1892, the U.S. Supreme Court ruled, in *Ex parte Rapier*,<sup>345</sup> that the 1872 prohibition was a valid exercise of congressional power to regulate the use of the mail.<sup>346</sup> Then in 1903, the U.S. Supreme Court decided, in *Champion v. Ames*,<sup>347</sup> that Congress had the power to regulate a “species of interstate commerce” that “has

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334. SWEENEY, *supra* note 229.

335. Act of August 15, 1894, ch. 349, 28 Stat. 509 (1894).

336. *Id.*

337. *Id.*

338. *Id.*

339. 53 Cong. Ch. 191, Mar. 2, 1895, 28 Stat. 963.

340. *Id.*

341. See CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 38.

342. See NGISC: *Final Report*, *supra*, note 14, at 2-1 (stating that bribery of state and federal officials occurred during massive Louisiana lottery scandals). See also SWEENEY, *supra* note 229, at 59 (stating that Louisiana’s lottery did little to conceal its bribery of public officials).

343. SWEENEY, *supra* note 229, at 59.

344. See *id.* (“For a number of years the company operated outside the law, until raids on these operations finally killed the Octopus in 1907.”).

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

346. *Id.* at 135.

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



grown into disrepute and has become offensive to the entire people of the nation.”<sup>348</sup> These decisions were perhaps the straws that finally and completely broke the back of the Louisiana lottery.

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. In addition to illegal numbers games in all major American cities,<sup>349</sup> the Irish Sweepstakes, which was created by the Irish Parliament in 1930, had significant participants in the United States as well.<sup>350</sup> At first, the mail was used to promote and sell tickets to customers in the United States.<sup>351</sup> However, the 1895 federal law empowered the U.S. Post Office to intervene with legal action to combat this use of the mail.<sup>352</sup> Ultimately, any residual success of the Irish Sweepstakes met with competition when American states began to launch their own lotteries.

### C. Criticism of Lotteries as Tax Vehicles

In every case where states have adopted lotteries, potential revenues and the beneficial societal deployment of those revenues have been the principal selling points.<sup>353</sup> Certainly, Thomas Jefferson does not seem to rank among the supporters of lotteries, but seems to perceive them as quite an effective taxation-substitution mechanism.<sup>354</sup> The basis for this apparent perception is the fact that payments are made voluntarily by those who *choose* to play lotteries.<sup>355</sup>

Opponents of lotteries have adopted the language of taxation and asserted that lotteries rank poorly according to conventional criteria for judging taxes.<sup>356</sup> Lotteries have also been compared unfavorably to conventional taxes because of their alleged instability and limited revenue potential.<sup>357</sup> Furthermore,

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348. *Id.* at 328.

349. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 39 (describing illegal numbers games in New York and other cities in the northeast).

350. *Id.* at 38. *See also* SWEENEY, *supra* note 229, at 71 (describing the Irish Sweepstakes as “one of the most popular” illegal lotteries in the United States).

351. SWEENEY, *supra* note 229, at 71.

352. An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States, ch. 191, 28 Stat. 963 (1895).

353. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 215 (“Revenue is the *raison d’être* of contemporary state lotteries.”).

354. *Id.* at 299.

355. *Id.*

356. *See* CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 215 (stating that lotteries are said to be a relatively inefficient source of revenue owing to the high ration of administrative costs per dollar raised).

357. *Id.*

opponents assert that lotteries are regressive, “preying on the poor,” whether wittingly by marketing heavily in poor areas, or unwittingly by simply offering a product that appeals to poor people.<sup>358</sup> One Maryland state senator who opposed the lottery stated that “[l]otteries 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.”<sup>359</sup>

Other criticisms of lotteries have been levied.<sup>360</sup> One commentator has suggested that lotteries are an inefficient way to raise money for government.<sup>361</sup> Lotteries are also open to the charge of being regressive taxes,<sup>362</sup> albeit “voluntary” ones, as Thomas Jefferson suggested.<sup>363</sup> The NGISC reserved many of its harshest criticisms for state lotteries. It should be added that lottery organizations were apparently not represented in the membership of the commission.<sup>364</sup> The NGISC strongly protested against lottery advertising both for misleading people and for encouraging them to participate in irresponsible gambling.<sup>365</sup> The NGISC also concluded that lotteries did not produce good jobs.<sup>366</sup> Special criticisms were reserved for convenience gambling involving lotteries, as the commission recommended that instant tickets be banned and that machine gaming outside of casinos, such as video lottery terminals at racetracks, be abolished.<sup>367</sup> Some also criticize lotteries as inappropriate enterprises that redistribute income by taking money from the poor and making millionaires, suggesting that some of these new millionaires are unprepared for their wealth and do not use it responsibly.<sup>368</sup>

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358. *Id.*

359. *Id.* at 215, 299 n.11.2 (quoting Ronald Alsop, *State Lottery Craze Is Spreading, But Some Fear It Hurts the Poor*, WALL ST. J., Feb. 24, 1983).

360. See NGISC: LOTTERIES, *supra* note 15 (emphasis added) (“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.”).

361. See SWEENEY, *supra* note 229, at 133 (explaining that the lottery is the most expensive “tax” for states to collect).

362. See NGISC: Lotteries, *supra* 15 (contending that lottery tickets are regressive since they are the same price to everyone regardless of each individual’s income, and they are “implicit” tax since all revenue received from selling them goes to the state).

363. CLOTFELTER & COOK: SELLING HOPE, *supra* note 12, at 299 n.11.

364. See *Members*, NAT’L GAMBLING IMPACT STUDY COMM’N (Aug. 3, 1999), <http://govinfo.library.unt.edu/ngisc/members/members.html> (providing a list of members).

365. NGISC: *Final Report*, *supra* note 14, at 3-5.

366. See *id.* at 3-4 (stating that lottery play is highest in economically disadvantaged communities and lottery advertising promotes luck over hard work).

367. *Id.* at 3-18.

368. See Clarence Page, *Life Lessons From Sad Lotto Winners*, CHI. TRIB., Apr. 4, 2012, [http://articles.chicagotribune.com/2012-04-04/news/ct-oped-0404-page-20120404\\_1\\_mega-millions-ticket-lotto-missouri-lottery](http://articles.chicagotribune.com/2012-04-04/news/ct-oped-0404-page-20120404_1_mega-millions-ticket-lotto-missouri-lottery) (discussing

#### IV. THE EVOLUTION FROM PAST TO PRESENT OF PUBLIC POLICY APPLICABLE TO LOTTERIES IN AMERICA

##### A. *Lotteries as a Species of Gambling Generally*

In states where lotteries are prohibited, a constitutional or statutory definition of what constitutes a lottery may not have been provided by either the constitution or the state's statutes.<sup>369</sup> However, a lottery may be defined as a scheme in which money is paid in some form for the chance of receiving money or a prize in return.<sup>370</sup> The fact that there is sufficient consideration to qualify for the formation of a valid contract does not per se prevent a bargain from being a wager.<sup>371</sup> In essence, it is characteristic of a lottery that one party pays a definite sum in return for a promise of receiving a greater sum or greater value than that actually paid dependent upon a certain contingency.<sup>372</sup> Therefore, although there may be sufficient consideration, there is no agreed exchange of performances.<sup>373</sup> Of course, although a lottery displays the

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potential problems confronting lottery winners).

369. See, e.g., *Troy Amusement Co.*, 28 N.E.2d at 211 (illustrating the shortcomings of antilottery constitutional provisions and laws for being too vague in defining what constitutes a lottery, and failing to provide a detailed description of what exactly is prohibited).

370. See *People v. Hecht*, 3 P.2d 399, 401-02 (Cal. App. Dep't Super. Ct. 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, 67 (Mich. 1921) (concluding that the elements of a lottery are consideration, chance, and a prize); *Knight v. State ex rel. Moore*, 574 So. 2d 662, 666-68 (Miss. 1990) (refusing to extend the definition of "lottery" to bingo even though chance, a prize, and consideration were present because it is not popularly thought of as a lottery and, therefore, the statute permitting bingo was not unconstitutional); *Harris*, 869 S.W.2d at 62-63 (holding that a lottery consists of "consideration, chance and prize," and, therefore, games requiring skill, such as blackjack or 21, do not constitute lotteries); *State v. Emerson*, 1 S.W.2d 109, 111 (Mo. 1927) (determining that any game or plan in which "anything of value is disposed of by lot or chance"); *CONtact, Inc. v. State*, 324 N.W.2d 804, 807 (Neb. 1982) (holding that certain "pickle cards" constituted lotteries because the element of chance existed since the tickets were drawn from a tub, despite the fact that the winning numbers were predetermined); *Cole v. Hughes*, 442 S.E.2d 86, 89 (N.C. Ct. App. 1994) (affirming the dismissal of a counterclaim concerning a joint venture to purchase lottery tickets because "[t]he 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.'"); *Harris v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 575 N.Y.S.2d 672, 674-76 (N.Y. App. Div. 1991) (holding that a raffle was an illegal lottery, and hence the charitable organization could not be compelled to award the prize); *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412, 414 (Wyo. 1977) (determining a raffle to be a lottery, and thus it was illegal and void).

371. *Williams*, 573 P.2d at 414.

372. *State ex rel. Stephan v. Finney*, 867 P.2d 1034, 1051 (Kan. 1994).

373. *Chenard*, 387 A.2d at 600.

characteristics of a wager or bet, not every wager is necessarily a lottery.<sup>374</sup>

In order for a scheme to be deemed to be a lottery, three elements must exist. First, there must be a distribution of gain by chance, commonly referred to as a prize.<sup>375</sup> Second, the prize must be awarded by lot or chance.<sup>376</sup> Third, the participants must have given consideration for a chance of winning the prize.<sup>377</sup> Unless all three elements are present, the lottery laws have no application.<sup>378</sup> A lottery, it seems, must depend on a purely fortuitous event.<sup>379</sup> But even if elements of skill and chance both exist in a game, it is a lottery if the element of chance predominates.<sup>380</sup> Moreover, it is not an indispensable requirement that, to constitute a lottery, the prize must be in money.<sup>381</sup> Essentially, “whenever the scheme of distribution is such that—if the payment of the prize were in money it would be a lottery[—then], it will be equally so although

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374. *Yellow-Stone Kit v. State*, 7 So. 338, 338 (Ala. 1890); *Wilkinson v. Gill*, 74 N.Y. 63, 67 (N.Y. 1878).

375. *State ex rel. Stephan*, 867 P.2d at 1040.

376. *Id.*

377. *Id.*

378. *State ex rel. Stephan v. Parrish*, 887 P.2d 127, 137 (Kan. 1994) (determining that the Kansas constitutional provision banning lotteries, but permitting bingo, did not authorize legislature to define bingo to include instant bingo pull-tab game, and such legislation was thus unconstitutional); *Knight*, 574 So. 2d at 666-68 (refusing to classify certain games as lotteries simply because chance, prize, and consideration were present when such games were not popularly thought of as being lotteries); *Harris*, 869 S.W.2d at 62-63 (holding that lottery consists of “consideration, chance and prize,” and that legislation allowing gambling falling within the ambit of lotteries was unconstitutional); *CONtact, Inc.*, 324 N.W.2d at 806-08 (holding that certain “pickle cards” constituted lotteries within the meaning of state statute permitting certain sponsors to hold lotteries because the element of chance was met); *McFadden v. Bain*, 91 P.2d 292, 294 (Or. 1939) (recognizing that the essence of a lottery is a chance for a prize for a price); *Commonwealth of Pa. v. Irwin*, 636 A.2d 1106, 1108 (Pa. 1993) (ruling that video blackjack, poker, and other games were not gambling machines *per se* where they lacked the element of reward because the player could not win more money than he or she gambled).

379. *Stoddart v. Sagar*, 2 QB 474, 18 Cox 165, 169-70 (DC 1895). *See also* *People v. Reilly*, 15 N.W. 520, 521 (Mich. 1883) (explaining that lotteries consist of people buying tickets hoping to win a prize solely based on chance); *Harris*, 869 S.W.2d at 64 (holding that games requiring just chance and no skill, such as bingo and keno, were lotteries under Missouri law, but games requiring skill, such as poker and blackjack, did not constitute lotteries); *Cole*, 442 S.E.2d at 89 (stating that any wagers or bets based on chance are unlawful); *Williams*, 572 P.2d at 414 (determining that chance is an essential component to the lottery).

380. *Commonwealth v. Plissner*, 4 N.E.2d 241, 244 (Mass. 1936); *Harris*, 869 S.W.2d at 62.

381. *See Seattle Times Co. v. Tielsch*, 80 Wash. 2d 502, 506 (Wash. 1972) (en banc) (describing lottery awards as constituting either money or other property).

the prize[ is] payable in land or in [goods].”<sup>382</sup>

A variety of raffles and gift enterprises have been found to be obnoxious enough to offend the public policy principles against lotteries. For example, a bargain by which a purchaser pays a fixed sum in return for a promise to convey a number of lots or items—determined by the drawing of lots—has been held legally invalid.<sup>383</sup> Similarly, a raffle, which permitted the plaintiff to buy a chance for a price of \$5 to win a forty-acre plot of land was ruled to be a void gaming bargain.<sup>384</sup> As a result, the plaintiff could not recover when the defendant drew plaintiff’s stub and then, upon

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382. *People v. Psallis*, 12 N.Y.S.2d 796, 798 (N.Y. Mag. Ct. 1939). *See also* *Nelson v. Bryant*, 220 S.E.2d 647, 648 (S.C. 1975) (holding where the parties to the suit 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 413 (holding that gambling contracts are unenforceable).

383. *See* *Glennville Inv. Co. v. Grace*, 68 S.E. 301, 302-03 (Ga. 1910) (determining that an agreement for lots constituted a lottery because the participants paid the same amount of money, and the number and value of lots given to them were based solely upon chance); *Lynch v. Rosenthal*, 42 N.E. 1103, 1103-06 (Ind. 1896) (holding contract to be invalid where the participant’s likelihood of receiving more or less value for his investment was premised on chance); *Commonwealth of Mass. v. Ward*, 183 N.E. 271, 271-72 (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, 107-08 (Mich. 1927) (declaring a contract to be invalid where the defendants printed tickets for a monthly drawing for a car and sold them to their customers to pass on to their customers and clients, regardless of whether they purchased anything); *Emerson*, 1 S.W.2d at 110-13 (upholding prison sentence for lottery contract that called for a payment plan of \$1 a week until customers reached \$55 at which time the furniture would be delivered, but at least once a week, the store would draw names and deliver \$55 worth of furniture without additional payments); *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck*, 257 N.W. 493, 493-95 (Neb. 1934) (declaring a plan illegal when it consisted of businesses issuing a coupon with each 25-cent purchase and then holding a drawing once a week in which the award was a ticket redeemable for a store’s merchandise); *Mkt. Plumbing & Heating Supply Co. v. Spangenberg*, 169 A. 660, 660-61 (N.J. 1934) (concerning a scheme in which a store allowed customers to enter into a raffle for various prizes after they spent at least \$25 in a specified time period); *People v. Miller*, 2 N.E.2d 38, 38-40 (N.Y. 1936) (holding scheme was unlawful lottery when customers purchased movie tickets and also received raffle ticket for drawing in which money was the prize); *Harris*, 575 N.Y.S.2d at 673-77 (holding that raffle was an illegal lottery and thus the sponsor could not be compelled to award prize); *Allebach v. Godshalk*, 9 A. 444, 446 (Pa. 1887) (holding sale and purchase of land worthless when it was based upon lottery contract).

384. *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412, 413-15 (Wyo. 1977).

receiving late entries, conducted a completely new drawing thereby causing the plaintiff to lose his prize.<sup>385</sup>

Moreover, the giving of a ticket for the drawing of prizes has been held illegal, where the ticket was obtained by the purchase of goods,<sup>386</sup> the purchase of an admission ticket,<sup>387</sup> or on merely attending an auction.<sup>388</sup> Additionally, slot machines and other video or computer games are generally held to offend antilottery statutes or constitutional provisions where they do not involve skill, but pay winners solely based on luck.<sup>389</sup> On the other hand, it has been held that the receipt of “Lady Luck” coupons by customers *after* eating their meal was legally different.<sup>390</sup> The receipt of the “Lady Luck” coupons, entitling the customers to draw for prizes, occurred subsequent to the meal.<sup>391</sup> Participation in the drawing was therefore absolutely free.<sup>392</sup> The absence of the

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385. *Id.*

386. *Holmes v. Saunders*, 250 P.2d 269, 269-70 (Cal. Ct. App. 1952); *Bloodworth v. Gay*, 96 S.E.2d 602, 602-03 (Ga. 1957); *Glover*, 213 N.W. at 107-08; *State v. Powell*, 212 N.W. 169, 169-70 (Minn. 1927); *Emerson*, 1 S.W.2d at 110-11; *Retail Section of Chamber of Commerce of Plattsmouth*, 257 N.W. 493, 493-95 (Neb. 1934); *Mrkt. Plumbing & Heating Supply Co.*, 169 A. at 660-61; *Miller*, 2 N.E.2d at 39-40; *Featherstone v. Indep. Serv. Station Ass’n of Tex.*, 10 S.W.2d 124, 126 (Tex. Ct. App. 1928).

387. *Blair v. Lowham*, 276 P. 292, 292-94 (Utah 1929); *State v. Danz*, 250 P. 37, 37-39 (Wash. 1926).

388. *Maughs v. Porter*, 161 S.E. 242, 242-46 (Va. 1931).

389. *See Loiseau v. State*, 22 So. 138, 138-40 (Ala. 1897) (holding that a slot machine constitutes a lottery); *Lee*, 163 So. at 490 (same); *Thompson v. Ledbetter*, 39 S.E.2d 720, 721 (Ga. Ct. App. 1946) (same); *State v. Vill. of Garden City*, 265 P.2d 328, 332 (Idaho 1953) (same); *State v. Barbee*, 175 So. 50, 56-57 (La. 1937) (same); *Commonwealth v. McClintock*, 154 N.E. 264, 264-65 (Mass. 1926) (same); *Harris*, 869 S.W.2d at 58-66 (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 whether they were games of skill, and hence not within the constitutional prohibition against lotteries); *MPH Co. v. Imagineering, Inc.*, 792 P.2d 1081, 1084-85 (Mont. 1990) (refusing to uphold the contract between the manufacturer and purchaser because electronic poker/keno game was a slot machine, and so the contract was void because it was for an illegal machine); *State v. Marck*, 220 P.2d 1017, 1018-19 (Mont. 1950) (declaring that slot machines were banned because they constituted lotteries); *Ex Parte Pierotti*, 184 P. 209, 209-11 (Nev. 1919) (holding that the slot machines fell under the state’s anti-gambling laws); *Hendrix v. McKee*, 575 P.2d 134, 137-40 (Or. 1978) (holding that employment agreement was unenforceable where employee was hired to make devices that he knew were illegal); *State v. Coats*, 74 P.2d 1120, 1120 (Or. 1938) (determining that both pinball machines and slot machines are lotteries); *Queen v. State*, 246 S.W. 384, 386 (Tex. Crim. App. 1922) (holding that slot machines constitute lotteries); *Bhd. of Friends*, 247 P.2d at 796 (determining that slot machines only constitute lotteries when they are played for prizes).

390. *Psallis*, 12 N.Y.S.2d at 797-98.

391. *Id.*

392. *Id.*

element of consideration prevented the scheme from being a lottery.<sup>393</sup>

Constitutional prohibitions on lotteries do not universally include definitions of what constitutes a lottery.<sup>394</sup> Moreover, where constitutional or statutory definitions of a lottery are enacted, such definitions are not necessarily interpreted in a universally identical, similar, or predictable manner. In instances where lotteries are defined by a state's constitution or statutorily, common-law principles of statutory interpretation apply to such definitions.<sup>395</sup> Similar principles of statutory interpretation also apply to state statutes that enact constitutionally permissible exceptions to the constitutional prohibitions relating to lotteries.

For example, a state constitution may prohibit lotteries. It may not, however, have included a constitutional definition of what constitutes a lottery. Additionally, the legislature may not have defined lotteries either. In such a situation, the judiciary is constitutionally obligated to determine what does and does not constitute a lottery.<sup>396</sup>

Of course, numerous states have relatively recently legalized state-run lotteries,<sup>397</sup> and have declared that it is consonant with their public policy to obtain funds for such worthwhile purposes, such as subsidizing educational programs.<sup>398</sup> In such instances,

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393. *Id.*

394. *See In re Request of the Governor*, 12 A.3d 1104, 1111 (Del. 2009) (acknowledging that the Delaware Supreme Court fails to define the term "lottery").

395. *See* Seymour H. Moskowitz, *Symposium on Integrating Responses to Domestic Violence: Reflecting Realty: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 208 (2001) (contending that lottery statutes provide a good opportunity for "statutory interpretation and creative lawyering").

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

397. *See U.S. v. Edge Broad. Co.*, 509 U.S. 418, 423 (1993) (explaining that Virginia has developed a monopoly on a state lottery); *N.Y. State Broad. Ass'n v. U.S.*, 414 F.2d 990-99 (2d Cir. 1969) (stating that New York passed a constitutional amendment in 1966 authorizing a state lottery); *Della Croce v. Ports*, 550 A.2d 533, 533-35 (N.J. 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*, 465 S.E.2d at 828-29 (Va. 1996) (explaining that the fact that the state lottery was legal did not legalize an arrangement to split the winnings).

398. *See, e.g.,* MO. CONST. art. III, § 39(b) (directing that any lottery revenues be distributed to public education at the primary, secondary, and higher levels); N.H. CONST. pt. 2, art. 6-b (directing that lottery proceeds should only be used to for education and administrative purposes); OHIO CONST. art. XV, § 6 (directing proceeds to be used for education); CAL. GOV'T CODE § 8880.1 (2012) (declaring that proceeds from the lottery would be used to supplement educational funding); DEL. CODE ANN. tit. 29, § 4815(b)(2)(c)

lotteries falling outside the express parameters of the statutes<sup>399</sup> remain prohibited.<sup>400</sup> Moreover, to the extent that a federal public policy is expressed in the cases,<sup>401</sup> in the statutes banning the broadcast of lottery information, and in regulations made pursuant to these provisions, it is clear that lotteries are prohibited except as authorized by the states.<sup>402</sup> Thus, federal antilottery statutes sustain and reinforce the public policy of those

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(2012) (directing that lottery proceedings be used to fund programs for the treatment, education, and assistance of compulsive gamblers and their families, among other things); FLA. STAT. §§ 24.102(1), (2)(a) (2012) (directing that the net proceeds from the lottery be used to add additional funding for public education); GA. CODE ANN. § 50-27-32(d) (2012) (directing that any proceeds from the state lottery be used to provide funding for educational programs and purposes); IDAHO CODE ANN. § 33-905(2) (2012) ((directing that lottery proceeds are to be distributed to the various school districts in proportion to that district's average daily attendance rate); IOWA CODE §§ 99G.39(3)(a), 99G.9A (2012) (providing that lottery proceeds are to be distributed to Vision Iowa, to the General Fund, to assist Veterans, and to the school infrastructure fund); NEB. REV. STAT. § 9-812(2) (2012) (providing that lottery proceeds are to be distributed to the "Education Innovation Fund, the Nebraska Opportunity Grant Fund, the Nebraska Environmental Trust Fund, the Nebraska State Fair Board, and the Compulsive Gamblers Assistance Fund"); N.J. REV. STAT. § 5:9-2 (2012) (directing lottery proceeds to be used to fund state institutions and education); N.Y. TAX LAW § 1601 (Consol. 2012) (directing for lottery proceeds to be used for education); OR. REV. STAT. § 461.540 (2012) (setting forth the various areas that lottery proceeds will help fund, such as the creation of jobs, furthering the economic development of Oregon, and financing public education); W. VA. CODE § 29-22-18 (identifying the state interests that are to be supplied with additional funding by the lottery proceeds, some of which include the School Building Debt Service Fund and the Education, Arts, Sciences, and Tourism Debt Service Fund). *See also* *Brown v. Cal. State Lottery Com.*, 284 Cal. Rptr. 108-13 (Ct. App. 1991) (holding that the plaintiff, who was unable to choose his own lottery numbers due to a malfunctioning machine, was not a third-party beneficiary of the contract between the state lottery commission and the store since the California State Lottery Act was passed as a means of providing additional funding for education, and not to assist people "who wish to engage in a capricious fling with fortune").

399. *E.g.*, private lotteries.

400. *See Harris*, 575 N.Y.S.2d at 673 (holding that a raffle sponsored by charitable organization was an illegal lottery and, therefore, the court refused to compel the sponsor hand over the prize); *Keene Convenient Mart, Inc. v. SSS Band Backers*, 427 S.E.2d 322, 324-25 (N.C. Ct. App. 1993) (holding that when an error caused the randomness of an otherwise legal raffle to be compromised, the raffle fell within the ambit of gambling prohibitions and, as such, the proceeds were to be turned over the county).

401. *See generally* *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969) (discussing federal public policy concerns regarding broadcasting).

402. *See* *Broadcasting Lottery Information*, 18 U.S.C. § 1304 (2012) (prohibiting radio and television advertisements of lotteries); *Exceptions Relating to Certain Advertisements and Other Information and to state conducted lotteries*, 18 U.S.C. § 1307 (2012) (exempting state lotteries from the broadcasting ban).



states that ban lotteries.<sup>403</sup>

In the modern era, although some form of lottery is legal in many states, absent legislation specifically authorizing lotteries, they remain subject to the same legal objection as *any* gambling bargain.<sup>404</sup> Gambling exacerbates the tendency that so many people seem to display. Too many people seem to be willing to venture their money in the face of a significantly high probability that they will lose it. Furthermore, the risk of loss of their money is not counterbalanced by the prospect of a sufficiently substantial benefit because the prospect of gain is too remote. Gambling has been banned historically because it tends to impose unacceptably high risks of serious financial injury on certain classes of the community.<sup>405</sup>

Moreover, the NGISC did not appear to detect irrefutable evidence to support the presence of counterbalancing specific community benefits derived from lotteries.<sup>406</sup> However, “[t]here is much *anecdotal* evidence to support the notion that gambling . . . provides economic benefits for the communities that allow it.”<sup>407</sup> This anecdotal evidence, which has apparently not been confirmed by formal data evidencing support,<sup>408</sup> helps to explain the following observation. A vast number of states have enacted laws authorizing lotteries that are run by, or on behalf of, state or local government in order to raise funds for education or other public purposes.<sup>409</sup>

However, this modern trend towards more and more extensive state creation of lotteries has not changed the societal foundation of reprobation towards lotteries. In the more recent past, lotteries have been resoundingly prohibited in many states

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403. See generally *Edge Broad. Co.*, 509 U.S. at 418 (refusing to allow a North Carolina radio station from advertising the lottery because of North Carolina’s ban on lotteries despite the fact that Virginia radio stations broadcasting in North Carolina were able to broadcast such advertisements); *Fed. Comm’n Comm’n v. Am. Broad. Co.*, 347 U.S. 284 (1954) (refusing to ban the advertisements of give-aways because such programs were not considered to be lotteries).

404. See *Williams v. Weber Mesa Ditch Extension Co., Inc.*, 572 P.2d 412 (Wyo. 1977) (concluding that while the lottery is legal, gambling debts are still unenforceable).

405. See *Harris*, 869 S.W.2d at 581 (holding that the legislature cannot constitutionally permit certain forms of legalized gambling because it constituted a lottery in violation of state constitution); *Williams*, 572 P.2d at 412 (holding that wagers are against human welfare).

406. See *NGISC: Lotteries*, *supra* note 15 (emphasis in the original) (“[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.”).

407. *HERRMANN*, *supra* note 44, at 87 (emphasis added).

408. *Id.* at 88.

409. See *NGISC: Lotteries*, *supra* note 15 (“[M]ore common is the ‘earmarking’ of lottery money for identified programs”).

as a form of gambling.<sup>410</sup> In light of this norm of reprobation, laws that legalize any form of gambling, including lotteries, are treated by the courts as exceptions to the general policy against gambling.<sup>411</sup> Such lottery-enabling laws will therefore continue to be very strictly construed.<sup>412</sup> The unabated strength of the state public policy against gambling predicates that statutes and regulations that impact legalized gambling must be construed strictly and narrowly.<sup>413</sup> The judiciary's goal is to limit the powers and rights claimed under such legislative authority to the boundaries set in them by the legislature.<sup>414</sup>

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>415</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>416</sup> The statutory intention is ultimately to foster and assure that honest wagering occurs.<sup>417</sup> This is intended to preserve the public's confidence in perceiving that this is the case.<sup>418</sup> The overall intention is to strictly regulate all parties involved in gaming operations in order to preserve the integrity and credibility of these operations.<sup>419</sup>

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410. 38 AM. JUR. 2D, *Gambling* §§ 5, 10 (2012).

411. *See Boardwalk Regency Corp. v. Travelers Express Co.*, 745 F. Supp. 1266, 1270 (E.D. Mich. 1990) (referring to laws permitting some forms of gambling as exceptions).

412. 38 AM. JUR. 2D, *Gambling* §§ 17, 18 (2012).

413. *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.”).

414. *See West Indies, Inc. v. First Nat’l Bank of Nev.*, 214 P.2d 144, 146-47, 154 (Nev. 1950) (limiting rights granted to licensees to conduct gambling by holding that the right to conduct gambling activities does not confer the right to bring an action to collect gambling debt).

415. *Sports Form, Inc. v. Leroy’s Horse & Sports Place*, 823 P.2d 901, 903 (Nev. 1992).

416. *St. Charles Gaming Co., Inc. v. Riverboat Gaming Comm’n*, 648 So. 2d 1310, 1317 (La. 1995).

417. *Moya v. Colo. Ltd. Gaming Control Comm’n*, 870 P.2d 620, 622 (Colo. 1994).

418. *Id.*

419. *Mastro v. Ill. Dep’t of Revenue*, 667 N.E.2d 594, 597 (Ill. App. Ct. 1996).

*B. Lotteries by Any Other Name Nevertheless Remain Lotteries*<sup>420</sup>

Judicial determinations as to whether or not activities constitute lotteries are issues of substantive law.<sup>421</sup> Categorizations by the operators of the activity are not legally dispositive because the issue is one of substance rather than terminology.

*1. Bingo as Lotteries*

Courts are split on the issue as to whether or not bingo per se constitutes a lottery within the meaning of state antilottery constitutional or statutory provisions. Arguably, a majority of the decisions have concluded that bingo is a lottery.<sup>422</sup> A minority of

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420. The same may be said of roses. See, e.g., WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (quoting “What’s in a name? that which we call a rose [b]y any other name would smell as sweet . . .”).

421. See generally *Gottlieb v. Tropicana Hotel & Casino*, 109 F. Supp. 2d 324 (E.D. Pa. 2000) (determining whether New Jersey or Pennsylvania’s substantive laws applied to the diversity case in which the plaintiffs claimed the defendant resort and casino failed to pay them the \$1 million that they had allegedly won).

422. See *City of Piedmont v. Evans*, 642 So. 2d 435, 436-37 (Ala. 1994) (deciding that municipal ordinance that permitted nonprofit organizations to use instant bingo to raise money was unconstitutional since instant bingo did not constitute “bingo” as intended by the amendment to the Alabama Constitution, but instead constituted a type of lottery and was thus banned by the constitution); *State v. Crayton*, 344 So. 2d 771, 774 (Ala. Civ. App. 1977) (holding that while bingo is a lottery and contrary to the law of the state, an illegal activity can be taxed); *Pruit v. State*, 557 N.E.2d 684, 690-91 (Ind. Ct. App. 1990) (holding that “bingo played for a prize received by chance or lot in exchange for consideration is a lottery and prohibited by [statute]”); *Parrish*, 887 P.2d at 136-37 (explaining the Kansas Supreme Court’s decision that the legislature exceeded its authority by passing a bill permitting instant bingo since instant bingo lacks the same characteristics of regular bingo, and is “far more similar to slow machines, punchboards, and other forms of gaming”); *Harris*, 869 S.W.2d at 64 (holding that bingo, keno, and pull-tab games, among other games involving no skill, constitute lotteries within the meaning of Missouri Constitution, and thus legislation authorizing such types of gambling is unconstitutional); *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 314 S.E.2d 339, 340 (S.C. 1984) (holding that bingo is a lottery and there is no right to conduct bingo under either the state constitution or under the U.S. Constitution); *Bingo Bank, Inc. v. Strom*, 234 S.E.2d 881, 883 (S.C. 1977) (holding that a game of “Bingo Bank” was in violation of the constitutional provision prohibiting lotteries except the “game of bingo,” since there were material differences between “Bingo Bank” and the “game of bingo” in that “Bingo Bank” was “played with one player . . . [t]he cards [were] all identical and the winner [did not] depend upon covering the squares in any configuration”); *Sec’y of State v. St. Augustine Church/St. Augustine Sch.*, 766 S.W.2d 499, 500 (Tenn. 1989) (holding unconstitutional certain statutes enacted in an attempt to legalize bingo under the auspices of various charitable, religious, and fraternal and other non-profit organizations because the state constitution’s “terms are sweeping and absolute[, and] [i]t simply removes from the General Assembly the authority to authorize lotteries for

court decisions has held otherwise in well-reasoned opinions.<sup>423</sup> The present day legal position, in light of the widespread adoption of state-run lotteries, arguably draws a discernible distinction between a “lottery,” “bingo,” and other games of chance in such a way that lotteries stand apart from other games of chance.<sup>424</sup>

## 2. “Bank Nights” as Lotteries

During a period in American history, a variety of so-called “bank night” plans became popular among the operators of movie theaters.<sup>425</sup> Often these plans conferred upon purchasers of an admission ticket the right to participate in drawings for prizes.<sup>426</sup> In some instances, the winner was required to be present at the

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any purpose—charitable, public, private, or any other.”).

423. See *People v. 8,000 Punchboard Card Devices*, 191 Cal. Rptr. 154, 155 (Cal. Ct. App. 1983) (recognizing that in 1976, the California electorate passed legislation permitting “cities and counties to provide for bingo games, but only for charitable purposes,” and that it further expanded the definition of bingo three years later); *Carroll v. State*, 361 So. 2d 144, 147-48 (Fla. 1978) (citation omitted) (affirming that “while the legislature cannot legalize any gambling device that would in effect amount to a lottery . . . the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, and at the same time, has allowed worthy organizations to receive the benefits.”); *St. John’s Melkite Catholic Church v. Comm’r of Revenue*, 242 S.E.2d 108, 113 (Ga. 1978) (citation omitted) (citing the “[t]he “bingo amendment” to the Georgia Constitution which states that “the operation of a nonprofit bingo game . . . shall be legal.”); *Bingo Catering & Supplies, Inc. v. Duncan*, 699 P.2d 512, 513 (Kan. 1985) (upholding the constitutionality of an amendment that placed strict restrictions on bingo operations, which were legalized despite the Kansas Constitution’s prohibition on lotteries); *Bender v. Arundel Arena, Inc.*, 236 A.2d 7, 15 (Md. 1967) (holding that bingo and slot machines were historically exempted from the laws making gambling illegal); *Frank v. Dore*, 635 So. 2d 1369, 1374 (Miss. 1994) (explaining that “[i]t would be [a mockery of the law] . . . to hold that while [one statute] legally permits charitable bingo games, . . . [another statute] completely bars any form of court assisted recovery for participants in legally conducted bingo games”). See generally *Knight v. State ex rel. Moore*, 574 So. 2d 662 (Miss. 1990) (holding that the constitutional provision banning lotteries was not violated by legislation permitting certain forms of bingo after it considered the popular meaning of the terms “lottery” and “bingo” to determine whether the former includes the latter, and determined that it does not).

424. See *Knight*, 574 So. 2d at 669 (deciding bingo is not a lottery).

425. See *Goodwill Adver. Co. v. Elmwood Amusement Corp.*, 133 A.2d 644, 647-48 (R.I. 1957) (finding that there was no additional consideration than the normal price of the ticket because patrons did not have to pay more than the regular ticket price and the drawing was open to nonpatrons as well).

426. See, e.g., *People v. Cardas*, 137 Cal. App. Supp. 788, 789-90, 793 (Cal. App. Dep’t Super. Ct. 1933) (explaining that although some states found “bank nights” to be illegal lotteries where the tickets to win prizes were distributed when a product was purchased, in the case at bar, the theatre was distributing tickets to both ticket purchasing customers as well as non-paying visitors, and the winning number was announced both inside and outside the theatre so the tickets were seen as a promotional effort to increase profits).

theater, while in others, physical presence was not mandatory.<sup>427</sup> Of course, these schemes were supposedly promotional.<sup>428</sup> The ostensible business purpose was to increase the volume of business at theatres.<sup>429</sup> In some cases, such schemes were held not to constitute lotteries.<sup>430</sup> The legal rationale focused on proof that the total consideration that each individual customer of the theater exchanged was the routine price of the ticket purchased for normal admission.<sup>431</sup> There was therefore allegedly no proof of any *additional* consideration over and beyond the usual transaction for the industry.<sup>432</sup> However, most of the decided cases held that bank night schemes were lotteries and therefore illegal.<sup>433</sup>

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427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *See Cardas*, 137 Cal. App. Supp. at 792 (examining similar cases in which the tickets were only available to paying customers, and so part of the consideration paid was for the prize ticket); *St. Peter v. Pioneer Theatre Corp.*, 291 N.W. 164, 170 (Iowa 1940) (deciding that “it is entirely possible that the act, specified by the promisor as being sufficient in his discretion to constitute consideration for and acceptance of his promise, might have no monetary value and yet constitute a legal consideration for the promise”); *State v. Eames*, 183 A. 590, 591 (N.H. 1936) (providing that “[w]hile it is abundantly clear . . . that it is perfectly legal to make a gift the recipient of which is selected by chance, it is equally clear that one may not obtain immunity from prosecution under the lottery law by resort to the device of a pretended gift”); *Simmons v. Randforce Amusement Corp.*, 293 N.Y.S. 745, 747 (N.Y. Mun. Ct. 1937) (permitting recovery premised on promissory estoppel because the plaintiff had attended the bank night and signed the book, which constituted consideration, so defendant could not then refuse to pay on a basis of illegality); *People v. Shafer*, 289 N.Y.S. 649, 654 (N.Y. Cnty. Ct. 1936) (finding where the party merely registers without payment of any admission charge, the courts are more prone to find that no lottery exists); *Goodwill Adver. Co.*, 133 A.2d at 647-48 (holding bank night plan was legal because it was open to nonpaying participants and theater patrons whose admission price was not consideration for a chance at the drawing); *State ex rel. Dist. Atty. Gen. v. Crescent Amusement Co.*, 95 S.W.2d 310, 310-12 (Tenn. 1936) (affirming a lower court ruling that where a theatre held a “bank night” open to anyone, not just paying patrons, it was not a lottery or prohibited game under statutory law since there was no consideration).

432. *See State ex rel. Dist. Atty. Gen. v. Crescent Amusement Co.*, 95 S.W.2d 310, 310-12 (Tenn. 1936) (determining that since the “bank night” was open to anyone, not just paying patrons, there was no consideration and it was thus not a prohibited lottery).

433. *See Affiliated Enters. v. Waller*, 5 A.2d 257, 260-62 (Del. 1939) (declining to enforce a contract because it required patrons to sign a book and be present at the theatre, which constituted consideration, and it thus created an illegal contract); *State v. Mabrey*, 60 N.W.2d 889, 893 (Iowa 1953) (deciding that “[i]t did not cease to be a lottery because some were admitted to play without paying for the privilege, so long as others paid for their chances”); *Hardy v. St. Matthew’s Cmty. Ctr.*, 240 S.W.2d 95, 98 (Ky. 1951) (concluding that even if a lottery is illegal pursuant to a statute, if the purchasing party pays for her ticket and she is selected in the drawing, the offering party must

### 3. Lotteries for Charity

The number of states that enacted constitutional provisions prohibiting lotteries raised an important question. This question is whether or not certain forms of wagering authorized by the legislature constitute a lottery proscribed by the particular state constitution.<sup>434</sup> Irrefutably, the specific language of the

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comply with the contract and deliver the winnings); *Commonwealth of Ky. v. Malco-Memphis Theatres, Inc.*, 169 S.W.2d 596, 598 (Ky. 1943) (“If the chance of winning a prize is part of the inducement to purchase goods or tickets of admission, the scheme is a lottery.”); *Doskey v. United Theatres, Inc.*, 11 So. 2d 276, 278-79 (La. Ct. App. 1942) (finding that the court could not determine the merits of a case because the lottery was illegal, and so the plaintiff could not recover the winnings from the lottery); *Commonwealth of Mass. v. Wall*, 3 N.E.2d 28, 30 (Mass. 1936) (holding “that the price must come from participants in the game in part at least as payments for their chances and that the indirect advantage to the theatre of larger attendance is not in itself a price paid by participants.”); *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enter.*, 267 N.W. 602, 602-03 (Mich. 1936) (affirming the lower court’s injunction against a competing theatre’s lottery because it violated a statute that prohibited lotteries since there was indirect consideration paid to the theatre through the increased attendance and associated financial gains); *State ex rel. Hunter v. Omaha Motion Picture Exhibitors Ass’n*, 297 N.W. 547, 549-50 (Neb. 1941) (“A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances.”); *Furst v. A. & G. Amusement Co.*, 25 A.2d 892, 893 (N.J. 1942) (deciding that the contract under which the plaintiff sought to recover was invalid and unenforceable because it comprised a statutorily illegal lottery because consideration was present since some patrons paid for their ticket and received entry, and other patrons experienced a hardship in having going to the theatre to enter their names); *State v. Jones*, 107 P.2d 324, 326-27 (deciding that a “Bank Night” was a lottery because the three elements of a lottery—consideration, chance, and prize—were present, and patrons who purchased tickets, as well as non-patrons, were entered into the drawing and that was found to be adequate consideration); *Miller*, 2 N.E.2d at 39-40 (affirming that in purchasing a ticket at the regular price, the patron was also purchasing a chance to win the prize therefore the operation was an illegal lottery); *Troy Amusement Co.*, 28 N.E.2d at 214-15 (deciding that even though the patrons paid the regular ticket price for admission, the increased patronage and revenue comprised sufficient consideration and constituted an illegal lottery); *McFadden*, 91 P.2d at 295 (“If it is a lottery as to those who do pay, it necessarily is a lottery as to those who do not pay for their chances.”); *Commonwealth of Pa. v. Lund*, 15 A.2d 839, 845-46, 848 (Pa. Super. Ct. 1940) (deciding that even though some patrons paid for tickets in the drawing and others did not, the operation constituted an illegal lottery); *State v. Robb & Rowley United, Inc.*, 118 S.W.2d 917, 920 (Tex. Civ. App. 1938) (deciding that the small variation in the scheme where non-paying patrons were entered into the drawing along with the ticket paying patrons still constituted consideration in an illegal lottery); *Stern v. Miner*, 300 N.W. 738, 739-40 (Wis. 1941) (deciding that although paying and non-paying patrons could enter the lottery, it was nonetheless an illegal lottery, and the contract was void and unenforceable).

434. See generally *Ex parte Pierotti*, 184 P. 209 (Nev. 1919) (explaining slot machines do not constitute lotteries as defined in the state constitution); *Bhd. of Friends*, 247 P.2d at 796 (providing that the earlier constitution was written

constitutional measure controls the judiciary's interpretation of its meaning. The fact that the enacted statutes license or permit lotteries for charitable, religious, civic, educational, or fraternal purposes is not an automatic "safe harbor" for such statutory enactments.<sup>435</sup> Despite their beneficent purposes, such statutes will be ruled to be unconstitutional under a state constitutional provision whenever the statutes have sought to create constitutionally forbidden lotteries.<sup>436</sup>

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

Of course, the argument can be made that public policy with respect to lotteries has not been fundamentally changed by recent state legislative changes in lottery laws. The precision of the legislation certainly circumscribes its legal reach. State legislatures have targeted the operation of lotteries within the state by restricting their operation to the particular state alone. This is of course a function of state sovereignty. The clear cut legal effect has been to create a state monopoly in each individual state that has taken this course of action. However, the creation of these state-lottery monopolies may nevertheless have left state common law intact. State substantive common-law public policy principles may have survived intact for the following reasons.

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>437</sup> "Voters want states to spend more, and politicians look at lotteries as a way to get tax money for free."<sup>438</sup> The efficacy of this argument has been reinforced by the intensity of modern political pressures created by almost unprecedented economic

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broadly to adjust for developments over time, and that slot machines are illegal as against the constitutional provision); *State v. Tursich*, 267 P.2d 641, 641 (Mont. 1954) (finding a state "purporting to authorize the use of punchboards as trade stimulators upon the purchase of a use tax stamp, is unconstitutional as an attempt to authorize lotteries" in violation of the state constitution).

435. See *Bhd. of Friends*, 247 P.2d at 796 (determining that statute granting charitable organizations exemption from the constitutional ban on gambling was unconstitutional).

436. See, e.g., *id.* (finding that regardless of the charitable function of an organization, if the operation runs contrary to the state constitution, it will be deemed illegal).

437. See *NGISC: Lotteries*, *supra* note 15 (emphasis added) ("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.").

438. *Id.* (citation omitted).

stress.<sup>439</sup> The crucible of this stress requires politicians to traverse a passage between Scylla<sup>440</sup> and Charybdis,<sup>441</sup> commonly referred to as being “between a rock and a hard place.”<sup>442</sup> It consists of excruciating political pressure on states to either increase taxation, in order to maintain public programs at current levels of generosity,<sup>443</sup> or cut these programs.<sup>444</sup> The concomitant public pain and suffering may routinely lead to political upheaval. So, wherever possible, politicians tend to select the alternative of raising taxes using the “free” mechanism, rather than cutting public programs.<sup>445</sup>

Additionally, another critically important set of factors play a role. In its Report on Lotteries,<sup>446</sup> the NGISC has indicated that lottery promoters have argued that “because illegal gambling already exists, a state-run lottery is an effective device both for capturing money for public purposes that otherwise would disappear into criminal hands and also for suppressing illegal gambling.”<sup>447</sup> This may be perceived as the engine that propels legislative conduct to legalize state-run lotteries, since this decision implicates legislative public policy to legalize the lesser of two evils.

Therefore, the lottery structure of the forty or so states that have enacted lottery statutes has been designed to put lottery operations in place as part of each state’s administrative law structure.<sup>448</sup> State lotteries are part of the administrative agency

439. *Id.*

440. *See* HAMILTON: MYTHOLOGY, *supra* note 7, at 222 (stating that “[in mythology, this was a perilous sea passage between] the whirlpool of implacable Charybdis and the black cavern into which Scylla sucked whole ships”).

441. *Id.*

442. *See, e.g., Between the Devil and the Deep Blue Sea*, THEFREEDICTIONARY.COM, <http://idioms.thefreedictionary.com/between+the+devil+and+the+deep+blue+sea> (last visited Sept. 26, 2012) (explaining that in some places this dilemma is referred to as being “between the devil and the deep blue sea”).

443. *See* NGISC: Lotteries, *supra* note 15 (explaining that once lotteries have been introduced, they become a necessary evil to continue state funding of public benefits).

444. *Id.*

445. *See id.* at 2 (stating that politicians view lotteries as a means of attaining tax money for free).

446. *Id.*

447. *See id.* at 3 (citations omitted) (explaining that the creation of a state-run lottery has resulted in the elimination of illegal lotteries throughout the state, except for New York City).

448. *See* Clotfelter et al., *supra* note 22, at 19 (emphasis added) (“Owing to its structure and management orientation, the typical state lottery authority has evolved into a *new breed of governmental agency*[, in which] [v]irtually all state lotteries conform to a single basic model . . .”).



structure of each state's executive branch of government.<sup>449</sup> In the interest of completeness on this point, it is acknowledged that these state administrative agencies do not function under the authority of the Government of the United States. They are therefore *not* subject to the Federal Administrative Procedure Act.<sup>450</sup> However, state lottery authorities—being administrative agencies of the state that created them—are undeniably subject to applicable provisions of the United States Constitution.<sup>451</sup>

In any event, the widespread state embrace of lotteries raises fundamental questions relating to substantive common-law public policy. The most important question may be whether or not a state's embrace of the lesser of two evils thereby transforms that evil in any substantive way. Does this lesser evil now cease to be an evil? Additional questions would be whether or not “lotteries [are] a more or less harmless form of recreation[?]”<sup>452</sup> And whether or not “lottery play is a benign activity[?]”<sup>453</sup> And, does the legislative legalization of lotteries now justify “taxing lottery products [no] more heavily than liquor or tobacco. . . .”<sup>454</sup> The judiciary's answer to these questions seems to be a resounding “no.”<sup>455</sup>

The judiciary's conclusion seems to be that the lesser of two evils nevertheless remains an evil. Its status of being lesser than some greater evil does not per se transform its fundamentally evil genetic code. Therefore the widespread state creation of lottery-operation monopolies that now exist throughout the United States coexist “cheek by jowl” with the prior fundamental judicially-enunciated public policy. That prior public policy disfavoring gambling in general and lotteries in particular<sup>456</sup> remains intact.<sup>457</sup> It is an American legal phenomenon.<sup>458</sup>

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449. *Lotteries-Lottery Administration*, LIBRARY INDEX, <http://www.libraryindex.com/pages/1604/Lotteries-LOTTERY-ADMINISTRATION.html> (last visited Oct. 31, 2012).

450. See 5 U.S.C. §551 (2012) (defining an agency subject to the act as an authority of the United States government).

451. *E.g.*, U.S. CONST. amend. XIV (stating that state action must conform to the constitution).

452. Clotfelter et al., *supra* note 22, at 21.

453. *Id.* at 22.

454. *Id.*

455. *Stanley*, 2003 WL 22026611, at \*19. See also *Meyer*, 626 N.W.2d. at 267 (citations omitted) (explaining that when courts are reviewing contracts, they will turn to the state's constitution and laws to determine whether the contract is “inconsistent with fair and honorable dealing, contrary to sound policy, [or] offensive to good morals[.]” and if it is, the court will not enforce the contract on the grounds that it is contrary to the public good).

456. *Meyer*, 626 N.W.2d. at 267.

457. *Id.*

458. See, *e.g.*, Clotfelter et al., *supra* note 22, at 19 (emphasis added) (“The lottery is in a sense the state governments' biggest business venture, and a

## VI. 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 well into the modern era.<sup>459</sup> In this regard, the opinion of one commentator seems to be that *perhaps* the NGISC<sup>460</sup> “dropped the ball.”<sup>461</sup> The commentator expressed a number of laments.<sup>462</sup> Nevertheless, the commentator acknowledged that “the Commission asserted that individual states *best knew how to regulate themselves*. . . .”<sup>463</sup> This is inevitable because under the Tenth Amendment to the U.S. Constitution,<sup>464</sup> the regulation of gambling remains vested in the several states.<sup>465</sup> There is, of course, the factor of the regulation of Indian gaming.<sup>466</sup> However, Congress has certainly acknowledged the constitutional legal power of the Tenth Amendment to the U.S. Constitution.<sup>467</sup> Congress has acknowledged this palpable legal reality in enacting the Indian Gaming Regulatory Act of 1988 (“IGRA”),<sup>468</sup> “which recognizes tribal sovereignty while giving states a significant role in setting the parameters of *gaming within their borders*.”<sup>469</sup> It is unlikely therefore that Indian Tribes would seek to create and implement lotteries routinely, in competition with state lotteries, without a prior compact with each

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*rather problematic one given widespread ethical and pragmatic concerns about gambling.”*

459. *See Meyer*, 626 N.W.2d at 267 (recognizing that the state legislature still has a significant anti-gambling stance concerning lotteries). *See also* NIBERT, *supra* note 229, 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.”).

460. *NGISC: Final Report*, *supra* note 14.

461. *See* NIBERT, *supra* note 229, 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.”).

462. *See id.* (discussing the commission’s failure to discuss the recent economic and political events that led to “the emergence of lotteries and other forms of gambling as forms of revenue creation and economic development”).

463. *Id.* (emphasis added).

464. U.S. CONST. amend. X.

465. *See id.* (inferring that since there is no enumerated power over gambling, that power is vested in the states).

466. *See* Rand, *supra* note 61, at 971 (citation omitted) (explaining that since Native American tribes are considered sovereign nations, they “ordinarily are not subject to the strictures of state law”).

467. *See supra* note 278 and accompanying discussion.

468. Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2701 (2006).

469. Rand, *supra* note 61, at 971 (emphasis added) (citation omitted) (“Under IGRA, tribes may conduct gaming only in those states that ‘permit[] such gaming for any purpose by any person’ . . . [so] . . . *state law in the first place* dictates the permissible scope of Indian gaming.”).

state in which such Indian lotteries would be created and would operate.

The viewpoint of the commission unavoidably suggests that the tension in the state law of each of the individual states that have legalized lotteries will remain unchanged.<sup>470</sup> This tension consists of the antipathy between the inexorable advancement of lottery legalization by state legislatures on the one hand, and the well-established essentially universal public policy that continues to reprobate gambling generally and lotteries in particular on the other hand.<sup>471</sup> So the well-established principle of law that lottery contracts are, as a general rule, illegal agreements remains intact. Such agreements remain legally null and void.

Currently, and for the perceivable future, arguably no court will allow itself to be made an instrument of enforcing obligations arising out of an agreement or transaction that is illegal. Courts will continue to leave parties who are equally contaminated where they find them.<sup>472</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>473</sup> These prohibitions are then subjected to enacted exceptions empowering state monopolies to conduct these operations.<sup>474</sup> The exceptions have authorized or sponsored lotteries for specific purposes at one time or another in the state's history, such as those lotteries that provide sources of revenue for charitable, educational, or religious purposes.<sup>475</sup> The widespread legalization of lotteries throughout the United States and in other countries such as Canada, has created other tensions between those states where lotteries are lawful and those states where lotteries remain prohibited.<sup>476</sup>

In recent years, a common practice has developed, especially on those occasions when large prizes are offered by various state lotteries. The practice is for friends, relatives, and coworkers to pool their resources and purchase several tickets with the understanding that any winnings will be distributed equally

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470. See *NGISC: Final Report*, *supra* note 14, at 3-1 (suggesting that state law will not adhere to other policies).

471. See, e.g., *CLOTFELTER & COOK: SELLING HOPE*, *supra* note 12, at 11 (comparing state lotteries to Jekyll-and-Hyde due to the conflict between the traditional opinion concerning gambling in which it is seen as a vice and the view that gambling is simply an amusement).

472. 17A AM. JUR. 2D *Contracts* § 310 (2012).

473. 38 AM. JUR. 2D *Gambling* § 44 (2012).

474. *Id.*

475. *Id.*

476. See *Edge Broad.*, 509 U.S. at 433-35 (determining that a federal anti-lottery statute did not violate the First Amendment although it barred a business licensed in a state where lotteries were legal from advertising on the radio when the lottery advertisements were also heard by residents of another state, a state in which the lottery was illegal).

among them.<sup>477</sup> These agreements to jointly participate in lotteries and share in the proceeds, if any, are in many instances informal and oral.<sup>478</sup> They are of course vulnerable to legal challenges leveled at their formation. For example, are these “informal arrangements” legally void of mutual assent or consideration? To put it bluntly, are these agreements legally unenforceable? Or, are they also snared by the provisions of the statute of frauds?<sup>479</sup> If they are, would these agreements also be subject to the ameliorating impact of equitable estoppel and promissory estoppel?

The courts that have confronted these issues have reached differing conclusions. Some courts have refused enforcement of these agreements on the ground that such agreements violate the public policy of the state where the parties to the joint venture reside.<sup>480</sup> The fact that the activity of actually playing the lottery in issue is lawful in the state where the purchase was made has not always saved the agreement from legal nullification.<sup>481</sup>

Other courts have permitted enforcement of such agreements between the parties, reasoning that the parties are not engaged in gambling between or amongst themselves.<sup>482</sup> Instead, such courts have been persuaded that the parties are merely agreeing to participate jointly in a specific enterprise.<sup>483</sup> Since such an enterprise is lawful 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 participants to the joint venture reside is being violated.<sup>484</sup>

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477. See *Maffea v. Ippolito*, 247 A.D.2d 366, 366-67 (N.Y. App. Div. 1998) (concerning an agreement between relatives to split lottery winnings).

478. See *id.* at 366 (describing the agreement as an oral agreement that occurred at an informal family party).

479. See generally Matthew J. Gries, Note, *Judicial Enforcement of Agreements to Share Winning Lottery Tickets*, 44 DUKE L.J. 1000 (1995) (discussing briefly the possibility of the statute of frauds being applied to matters concerning lottery pools).

480. See *Hughes*, 465 S.E.2d at 826-27 (determining that the agreement violated the policy of North Carolina, where the parties resided).

481. See *id.* at 827-29 (holding a joint venture agreement entered into by a North Carolina resident void as violative of a North Carolina antigaming statute since the consideration for the agreement was money won at gambling, the legal lottery in Virginia).

482. *Fitchie v. Yurko*, 570 N.E.2d 892, 900 (Ill. App. Ct. 1991).

483. *Id.*

484. See *Talley v. Mathis*, 453 S.E.2d 704, 705-06 (Ga. 1995) (concluding that it was not contrary to Georgia's public policy for the parties to agree to travel to Kentucky in order to purchase lottery tickets with pooled money and then share any winnings, and that such an agreement is enforceable in Georgia); *Kaszuba v. Zientara*, 506 N.E.2d 1, 3 (Ind. 1987) (holding that a contract was lawful when it called for one individual to travel to Illinois with his friend's money to purchase lottery tickets and then bring them back to his friend in Indiana, where lotteries were illegal because no Indiana law

Of course, provisions authorizing and regulating lotteries remain strictly construed in states that have authorized the creation of lotteries. Additionally, such provisions are subject to interpretation in conjunction with other anti-gambling statutes. As a result, assertions of illegality may nevertheless be leveled at agreements arising from participation in authorized lotteries. Moreover, although a lottery may be authorized in one jurisdiction, the legal validity in one state cannot legally transfer to the sale of lottery tickets in a jurisdiction that forbids such sales.<sup>485</sup> This would violate state sovereignty outright.

Nevertheless, some courts have expressed concern that the refusal to enforce contracts to share in the returns from a winning, state-promoted lottery ticket on public policy grounds is problematic.<sup>486</sup> This refusal of court enforcement makes such agreements perilous. It can be perceived as permitting unscrupulous holders of winning tickets to renege on their agreements. Permitting such unscrupulous actors to escape enforcement of these agreements into which all parties freely entered merits rational inquiry and reflection.<sup>487</sup> The question arises as to whether or not this failure to enforce these agreements confers any measureable benefit on the non-enforcing state.<sup>488</sup>

Arguably, an agreement to divide the proceeds from a

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prohibited such conduct); *Miller v. Radikopf*, 228 N.W.2d 386, 387-91 (Mich. 1975) (enforcing agreement between the parties to split the proceeds of any winnings gained from the two free tickets they received from the Irish Sweepstakes for every 20 tickets they sold in Michigan despite the fact that selling sweepstakes in Michigan was illegal since it would be contrary to public policy not to enforce the agreement because 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); *Pineiro v. Nieves*, 259 A.2d 920, 921 (N.J. Super. Ct. App. Div. 1969) (permitting, by statute, New Jersey residents to possess lottery tickets lawfully bought in lottery states, and noting that public policy was not offended by agreements to share the proceeds of a lottery ticket); *Castilleja v. Camero*, 414 S.W.2d 424, 426-32 (Tex. 1967) (holding that Texas public policy was not violated by an agreement between two individuals in which one of them would travel to Mexico to buy Mexican lottery tickets and that they would split any winnings since it was a Mexican contract and the winnings were to be collected in Mexico).

485. 38 AM. JUR. 2D *Gambling* § 60 (2012).

486. See *Pearsall v. Alexander*, 572 A.2d 113, 117 (D.C. 1990) (stating that since the lottery is legal, the failure to enforce agreements to split proceeds would only benefit individuals who are unjustly benefiting by trying to keep another's winnings for themselves); *Kaszuba v. Zientara*, 506 N.E.2d 1, 2 (Ind. 1987) (believing that it would be bizarre to prevent Indiana residents from entering into an agreement to split the proceeds from an Illinois lottery when the lottery was legal in Illinois and the purchase occurred there).

487. See *Pearsall*, 572 A.2d at 117 (determining that agreements to split lottery proceeds should be enforced because failure to enforce them would result in unscrupulous individuals being allowed to keep someone else's share of the winnings).

488. *Id.* at 117.

successful, legal lottery ticket creates an enforceable oral contract as a number of courts have found.<sup>489</sup> Valid legal support is derived from the evidence of all the facts and surrounding circumstances presented to the courts. Characterization of the conduct of the parties as a joint venture or informal partnership agreement to participate in and divide the profits from lottery ticket purchases is not necessarily legally irrational.<sup>490</sup>

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489. *See id.* (finding that the parties had entered into an oral agreement to share the proceeds from the winning lottery ticket); *Johnson v. Spence*, 286 A.D.2d 481, 482 (N.Y. App. Div. 2001) (finding an oral agreement between a girlfriend and her boyfriend to share any lottery prizes).

490. *See Pearsall*, 572 A.2d at 117 (holding that the record supported the existence of an oral agreement between two friends to share equally in the proceeds from a winning District of Columbia lottery ticket based on their conduct on the evening that the ticket was purchased); *Fitchie v. Yurko*, 570 N.E.2d 892, 900 (Ill. App. Ct. 1991) (holding that there was sufficient evidence of an informal partnership agreement between the claimants and the ticket holder to entitle them to an equal share in the winnings); *Pando v. Fernandez*, 118 A.D.2d 474, 477 (N.Y. App. Div. 1986) (holding that summary judgment for the recipient of the proceeds from a winning state-operated lottery ticket on the ground of the impossibility of the proof of a condition precedent, saintly intervention, was inappropriate where one version of the terms of an oral partnership agreement advanced by the minor could be proven in a court of law); *Yates v. Tisdale*, 3 Edw. Ch. 71, 76 (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) (holding that there was sufficient, competent, and credible evidence to support the finding of an enforceable oral contract between the recipient of the value of an automobile won during her appearance on a "Cash Explosion" television show and two employees who had purchased the "entry" lottery ticket which entitled the holder to appear on the show); *King v. Thomas*, No. CA 90-9, 1990 WL 127935, at \*2 (Ohio Ct. App. Sept. 4, 1990) (holding that 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 was a well-reasoned decision based upon probative and credible evidence); *Johnson*, 286 A.D.2d at 482 (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*, 191 A.D.2d 257, 259 (N.Y. App. Div. 1993) (holding an agreement that was signed and witnessed demonstrated the parties' intent to split any possible winnings from a lottery ticket, and that the said agreement was further supported by consideration in that the parties agreed to "surrender their respective rights to claim the entire prize . . . and . . . to share equally the related tax liabilities"); *Stepp v. 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 the jackpot reached \$8 million had entered into an implied contract from which a member would not be dropped unless he expressed an intent to leave group to the organizer or the organizer dropped him from the group for failure to pay, and which was breached when the organizer unilaterally dropped the coworker from group after they had an unrelated personal dispute); *Domingo v. Mitchell*, 257 S.W.3d 34, 41 (Tex. App. 2008) (holding that coworker's agreement to advance another coworker's share of a group payment for lottery

Certainly, where sufficient evidence necessary to prove the existence of an enforceable oral contract to divide lottery winnings is presented, a court may validly affirm a motion for summary judgment by the parties alleging its existence.<sup>491</sup> Some courts have presumed the existence of an agreement to distribute the proceeds from a winning, legal lottery ticket between parties who pool resources to purchase lottery tickets.<sup>492</sup> This is not an insurmountable task for courts by any stretch of the legal imagination. The same proportion of the parties' contribution to the purchase price of all tickets, the "pooling" agreement, if you like, can be the resolution mechanism.<sup>493</sup> It can simply require proof that the percentage of the purchase price was contributed in order to make the purchase or purchases, unless expressly agreed otherwise.<sup>494</sup>

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tickets, and the coworker's agreement to reimburse her, was an exchange of promises that was sufficient for consideration to create a binding contract).

491. See *Maffea*, 247 A.D.2d at 367 (holding that alleged oral agreement made at informal family gathering to share grand prize in state lottery if either party won was unenforceable due to the lack of evidence that party who eventually won the lottery had assented to agreement at the time of the gathering or any time following it); *Meyer*, 626 N.W.2d at 270 (holding that since the parties had simply promised to share any possible winnings, without actually pooling their money to purchase the tickets, the defendants had not converted the plaintiffs' property when the plaintiffs did not contribute to the funds used to purchase the tickets).

492. See *Cahn v. Kensler*, 34 F. 472, 472-73 (C.C. W.D. Mo. 1888) (discussing that the court's belief that the parties had split the cost of the lottery tickets was what led it to determine that the two parties had jointly owned the winning lottery ticket); *Lomberk v. Lenox*, 19 Phila. Co. Rptr. 562, 570 (Pa. Com. Pl. 1989) (inferring that there was an agreement to split the proceeds from a winning lottery ticket because of the parties' conduct).

493. See *Lomberk*, 19 Phila. Co. Rptr. at 573 (holding that when people pool their money in order to buy lottery tickets, the winnings must be split so that each party receives the same proportion of the winnings as their contribution to the pool, except when there is an express contract that the winnings are to be retained by the purchaser).

494. See *Cahn*, 34 F. at 473 (discussing that if the parties had jointly purchased the two lottery tickets with funds equally contributed by both parties, such a purchase was determinative of the claimant's recovery of a one-half share of the winnings, thus presuming that an agreement to equally divide the winnings was formed under such circumstances); *Lomberk*, 19 Phila. Co. Rptr. at 573 (holding that when people pool their money in order to buy lottery tickets, the winnings must be split so that each party receives the same proportion of the winnings as their contribution to the pool, except when there is an express contract that the winnings are to be retained by the purchaser).

### A. Two Contrasting Cases

In *Cole v. Hughes*,<sup>495</sup> the Court of Appeals of North Carolina declined to exercise in rem jurisdiction over the ticket itself.<sup>496</sup> This made sense because common-law courts will not reach decisions that the court itself is legally incapable of enforcing.<sup>497</sup> The *Cole* court ruled that it was legally precluded by the facts from enforcing any in rem adjudication over legal or equitable title to the lottery ticket.<sup>498</sup> This was the case because the ticket was located outside the jurisdiction of the North Carolina courts.<sup>499</sup> The ticket was in fact located in Virginia.<sup>500</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>501</sup>

The counterclaim by the defendants sought adjudication of "the rights of the parties under the alleged joint venture agreement."<sup>502</sup> The *Cole* court 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>503</sup> The Court therefore applied North Carolina public policy to the joint venture in issue and declared "their joint venture to be illegal."<sup>504</sup>

This determination invoked North Carolina's antigambling and antilottery public policy. The Court made it clear in no uncertain terms that "North Carolina public policy is against gambling and lotteries."<sup>505</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 venture which is illegal and against the public policy of North Carolina."<sup>506</sup>

In *Talley v. Mathis*,<sup>507</sup> the Supreme Court of Georgia reached an antithetical conclusion<sup>508</sup> based upon the facts of that

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495. *Cole*, 442 S.E.2d at 86.

496. *See 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.").

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

498. *Id.*

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

500. *Id.* at 89.

501. *Id.* at 88.

502. *Id.* at 89.

503. *Id.*

504. *Id.*

505. *Id.* (citations omitted).

506. *Id.*

507. *Talley*, 453 S.E.2d at 704.

508. *Id.* at 706.



controversy.<sup>509</sup> In essence, the Supreme Court of Georgia concluded that the contract to purchase the winning ticket was made in Kentucky.<sup>510</sup> It was a contract between the actual purchaser on the one hand, and the State of Kentucky on the other.<sup>511</sup> Furthermore, the contract was perfectly legal in Kentucky.<sup>512</sup> Moreover, such contracts were perfectly legal for persons to enter into in the State of Kentucky.<sup>513</sup> The facts of the case established that two Georgia residents agreed that the defendant's daughter, who lived in Kentucky, would buy lottery tickets for them with money supplied by the Georgia residents.<sup>514</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, and not to the plaintiff.<sup>515</sup> The plaintiff filed suit against the other Georgia resident, the Georgia resident's daughter, and others.<sup>516</sup>

Both the trial court and the court of appeals held that the agreement between the parties violated Georgia's public policy and refused to enforce it.<sup>517</sup> However, the Supreme Court of Georgia reversed the court of appeals.<sup>518</sup>

First, the Supreme Court of Georgia quoted the Georgia antigambling statute which made gambling agreements void.<sup>519</sup> The Supreme Court of Georgia however noted that the parties' bargain did not involve a situation where one of the parties had to lose something, which is a hallmark of a gambling agreement.<sup>520</sup> The Supreme Court of Georgia emphasized that the only gambling contract that might exist in the instant case was that between the State of Kentucky and the holder of the winning ticket.<sup>521</sup> Since the State of Kentucky was not a party to the suit, and since that state had, in any event, agreed to pay the holder of the winning ticket, therefore the agreement was enforceable in Kentucky.<sup>522</sup>

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509. *Id.*

510. *See id.* (determining that the appellant was simply paying an agent to purchase a lottery ticket in Kentucky where it constituted a lawful act).

511. *Id.* at 705.

512. *Id.*

513. *Id.*

514. *Id.* at 705-06; *Talley v. Mathis*, 441 S.E.2d 854, 855 (Ga. Ct. App. 1994).

515. *Talley*, 441 S.E.2d at 855.

516. *Id.*

517. *See id.* at 855 (rebuffing the plaintiff's argument that a 1992 amendment to the Georgia Constitution authorizing the lottery indicated a change in the state's public policy, thereby refusing to discuss the amendment's impact).

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

519. *Id.* at 705.

520. *Id.*

521. *Id.*

522. *Id.*

The lower courts had therefore erred in relying on the Georgia antigambling statute to nullify the parties' agreement.<sup>523</sup>

Secondly, the Supreme Court of Georgia acknowledged that the agreement remained legally vulnerable.<sup>524</sup> In this respect, the agreement could nevertheless be nullified if it were immoral, illegal, or otherwise in violation of the public policy of Georgia.<sup>525</sup> This was the case in light of a Georgia state statute that had codified this fundamental common-law principle. However, the lottery was lawful in Kentucky.<sup>526</sup> Moreover, there were no assertions before the court that the parties had agreed illegally to purchase a Kentucky lottery ticket in Georgia.<sup>527</sup> Nor were any assertions made to the court that there was any conduct or any facts that violated Georgia law or public policy.<sup>528</sup>

On the contrary, the proof presented to the court established that the ticket had been purchased lawfully in Kentucky.<sup>529</sup> Indeed, the Georgia residents had merely used the Kentucky resident as an agent to do an act that was entirely lawful under the laws of Kentucky.<sup>530</sup> The Supreme Court of Georgia made it quite clear that there was nothing illegal where a Georgia resident personally travelled to Kentucky and bought a lottery ticket in Kentucky while being there.<sup>531</sup> Such conduct did not implicate illegal activity of any kind. The Supreme Court of Georgia therefore concluded that there was nothing illegal or legally improper on the facts of the case.<sup>532</sup> The Georgia residents had simply contributed money to the joint purchase of a lottery ticket to be purchased by a third party who lived in Kentucky.<sup>533</sup>

The Supreme Court of Georgia cited a relatively similar Indiana case in which the Indiana courts had upheld the legality of a significantly similar agreement.<sup>534</sup> In the Indiana case cited by the Supreme Court of Georgia, two Indiana residents agreed that one of them would, on behalf of the other, travel to Illinois and purchase lottery tickets in Illinois for the first party.<sup>535</sup> The purchase of lottery tickets in Illinois was perfectly legal for persons in Illinois to do.<sup>536</sup> The Indiana courts therefore ruled that

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523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* at 705-06.

528. *Id.*

529. *Id.* at 706.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.*

535. *Kaszuba*, 506 N.E.2d at 1.

536. *Id.* at 2.

the agreement was not unlawful.<sup>537</sup>

The Supreme Court of Georgia pointed out that a refusal to enforce the agreement would not benefit the citizens of Georgia.<sup>538</sup> In fact, such a refusal by the Supreme Court of Georgia would in fact reward duplicitous conduct on the part of the alleged bargain breaker. Such conduct would itself violate Georgia's public policy.<sup>539</sup> The court thus reversed the decision of the lower court.<sup>540</sup> This reversal permitted the plaintiff to pursue enforcement of the alleged contract in Kentucky.<sup>541</sup> This approach may very well be the emerging view with respect to cases arising under similar circumstances.

There similarly seems to be disagreement over the validity of any agreement to share the proceeds of a lottery ticket or pari-mutuel bet. This is the case in spite of the fact that the wager may be perfectly legal in the state where it was made. There is a divergence of authority as to whether such agreements are enforceable,<sup>542</sup> or not.<sup>543</sup> Individual state sovereignty will perpetuate these antithetical decisions by the courts in the individual states.

## VII. CONCLUSION

"[It] is a common failing of mankind, never to anticipate a storm when the sea is calm."<sup>544</sup> The current financial prosperity and widespread embrace of lotteries could conceivably mask invisible subconscious psychological undercurrents that could prove to be ominous for the future.<sup>545</sup> Every state would do well to remember the pendulum nature of lotteries in light of their history in American law.<sup>546</sup> States must always be wary and remember that it is "when times [are] quiet that they could change."<sup>547</sup> In

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537. *Id.*

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

539. *Id.*

540. *Id.*

541. *Id.*

542. *See Szadolci v. Hollywood Park Operating Co.*, 17 Cal. Rptr. 2d 356, 359 (Cal. Dist. Ct. App. 1993) (dismissing a cause of action in which the plaintiffs' shares in a ticket fell outside the scope of the statutorily authorized pari-mutual betting, and thus constituted illegal gambling).

543. *Id.*

544. MACHIAVELLI, *supra* note 1, at 129.

545. *See HERRMANN*, *supra* note 44, at 121 (emphasis added) ("The expectations and beliefs of the participants in gambling policy are *continually shaped* by both the history and the evolution of gambling . . . [which] . . . continues to experience the consequences of its nineteenth and early twentieth century history of corruption and scandal.").

546. *See Mike Roberts*, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 583-86 (1997) (discussing the rise and fall of efforts to legalize lotteries and gambling).

547. MACHIAVELLI, *supra* note 1, at 129.

light of the history of lotteries in American law, the changeable nature of public policy is inevitable.<sup>548</sup> It is also significantly perpetual.<sup>549</sup> The quintessence of legal norms applicable to human concepts of appropriate national and individual state behavior and philosophy will continue to evolve. After all, evolution inevitably implicates change in varying degrees.<sup>550</sup>

It seems, therefore, that at present, no clear and present danger to the widespread conduct of lotteries by the vast majority of States in America lurks on the horizon. At least, no such danger has reached the stage of galvanizing immediate, or not too distant future, action by any American state to curtail lotteries. Moreover, the NGISC<sup>551</sup> in its report<sup>552</sup> seemed to strike a note of some comfort in concluding that, with two exceptions,<sup>553</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>554</sup> Therefore, should such danger arise, American states are seemingly equipped and presumably capable of meeting it.<sup>555</sup>

In this regard, any present or future obligations placed upon the courts to address legal issues pertaining to lotteries will be met by current fundamental common-law principles applicable to illegal contracts as a genre. These fundamental common-law principles applicable to such contracts are transcendent. They are as follows. The public policy of any given state will continue to be discerned by the *judiciary*. This discernment will be accomplished by the judiciary’s examination of the particular state’s constitution and its statutory enactments. These are the two basic sources of a state’s public policy.

It is therefore safe to assert that the judiciary will continue to confidently execute its constitutionally assigned task to identify, interpret and apply the fundamental common-law concept of public policy. As a result, the courts will not affirmatively assist parties to an illegal lottery contract where both are equally at fault.<sup>556</sup> The common law will therefore neither assist in the

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548. See *supra* note 60 and accompanying discussion.

549. *Id.*

550. See HERRMANN, *supra* note 44, at 121 (recognizing the power public opinion has over the lottery and that “[a]s the public’s view of gambling has softened, the prevalence and availability of gambling have increased”).

551. NGISC: *Final Report*, *supra* note 14 and accompanying text.

552. *Id.*

553. See *id.* at 3-17 (explaining that two exceptions are tribal gambling and internet gambling).

554. *Id.*

555. *Id.*

556. See *Meyer*, 626 N.W.2d at 270 (refusing to enforce a contract whose object violates state anti-gambling statutes); *Troy Amusement Co.*, 28 N.E.2d at 216 (determining that a scheme involving a movie theater “bank night”

enforcement of such agreements while they are executory,<sup>557</sup> nor will the courts intervene to grant any equitable remedies<sup>558</sup> where such contracts have been fully performed.<sup>559</sup> Inevitably therefore, plaintiff prizewinners of lottery money prizes cannot blithely anticipate routine enforcement of agreements by parties who may have agreed to pay such monies over to plaintiffs.<sup>560</sup> Plaintiffs who sue for enforcement of such agreements will have their suits routinely dismissed by the courts.<sup>561</sup> In the same vein, a principal cannot successfully recover from his agent sums of money paid to the agent for sales of lottery tickets.<sup>562</sup>

In light of the societal value to be derived from the ameliorative power of public policy in the hands of the judiciary, a confident assertion may be inescapably valid. Public policy is exigent to the judicial function in common-law jurisdictions. Moreover, the judiciary's prowess in exercising this delicate but overwhelmingly potent legal power has been magnificently adroit and unimpeachable. It continues to be so in the present and the future augurs well in this regard too. The judiciary should therefore stay firmly astride the unruly horse of public policy.<sup>563</sup>

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violated the state statute against lotteries).

557. *Meyer*, 626 N.W.2d at 270 (granting defendants summary judgment and dismissing plaintiffs' claim for enforcement of an alleged contract to share lottery proceeds).

558. *E.g.*, any injunctions or rescissions.

559. *Troy Amusement Co.*, 28 N.E.2d at 270 (refusing to grant injunction where petitioner sought to restrain parties from interfering with petitioner's "bank night" lottery operation).

560. *See Barquin v. Flores*, 459 So. 2d 436, 437 (1984) (dismissing a complaint seeking to enforce a gambling contract "even though the gambling proceeds [the plaintiff] sought to recover derived from a Puerto Rican lottery ticket lawfully purchased by a Puerto Rican resident in Puerto Rico").

561. *Id.*

562. *See Mexican Int'l 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 . . . [and] that is what we are asked to do here.").

563. *See Brachtenbach*, *supra* note 2, at 19.