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GAMBLING AND THE LAW®:
THE THIRD WAVE OF LEGAL GAMBLING*

I. NELSON ROSE**

I. INTRODUCTION

In the author's 1986 book, *GAMBLING AND THE LAW*, the proliferation of gambling was described as a third wave.¹ Twice before in American history, legal gambling has spread across the nation, only to crash down in scandal and complete prohibition.² In the 21st century, the description of the spread of legal gaming as a "wave" appears too conservative. A tsunami seems like a more appropriate description.

In 2008, Americans bought about \$10 billion in tickets at the nation's approximately 36,000 movie screens.³ By comparison, in the same year, forty-two states, the District of Columbia, and three U.S. possessions operate lotteries⁴, which combined sold more than \$60.6 billion in lottery tickets.⁵ And the comparison is appropriate.

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1. See I. NELSON ROSE, *GAMBLING AND THE LAW* 1 (1986) (describing current proliferation of gambling as third wave since colonial times).

2. See *id.* First wave refers to public and private lotteries held during colonial times to finance public operations without national government; second wave refers to public lotteries established in South following Civil War as means for acquiring funding needed to rebuild. See *id.*

3. See Movie Market Summary - 1995 to 2010, <http://www.the-numbers.com/market/> (last visited Mar. 29, 2010) (detailing theater industry revenues).

4. See Official United States of America Lotteries Web Sites, http://www.fraudaid.com/scampam/lottery/US_lottery_websites.htm (last visited Mar. 29, 2010) (listing US States running legitimate lotteries). These three territories are Puerto Rico, Virgin Islands, and the Northern Mariana Islands. See North American Association of State and Provincial Lotteries, <http://www.naspl.org/index.cfm?fuseaction=content&PageID=3&PageCategory=3> (last visited Mar. 29, 2010) (hereinafter, North American Lotteries) (listing US States and territories running lotteries).

5. See North American Lotteries, *supra* note 4. Fiscal year 2008 lottery sales for the U.S. states and District of Columbia were reported as \$60.6 billion. See *id.* (breaking down lottery sales for 2008). Despite losses in other areas of gaming during 2008, two-thirds of lotteries reported an increase in profits. See Patricia McQueen, *Amid Difficult Times, U.S., Canadian Lotteries Are Holding Their Own*, CASINO JOURNAL, NOV. 1, 2008, available at <http://www.casinjournal.com/Articles/>

A potential customer can decide to spend about \$7 for a little entertainment by buying a movie ticket, or can buy seven \$1 lottery tickets.⁶ The figures show that while Americans spent a record \$10.49 billion on 1.46 billion movie tickets in 2009,⁷ they spent approximately six times as much, buying 40 times as many lottery tickets.⁸

When the lottery ticket sales are added to all the additional “action” in casinos and on slot machines — such as pari-mutuel bets on horses, dogs, and jai-alai; legal wagers on sports; bets made in licensed card rooms; and expenditures before prize payments in charity gaming and Indian bingo — the total amount wagered legally in the United States is well over a trillion dollars.⁹

The amount wagered, called the “handle,” is inflated because it includes all bets. Thus, if a player bets \$25 and wins and then bets \$25 and loses, a total of \$50 has been wagered, even though no money has changed hands. A more accurate number for making comparisons with other industries is the gross revenue or “win,” i.e. the amount players lose. Since this is money left behind by customers after the gambling transaction, it corresponds nicely with gross revenue or sales from other retail businesses. Looking just at revenue, Americans spent more money on gambling, \$92.3 billion, than they did on all live events — i.e. concerts, plays, all movie theaters, all spectator sports, and all forms of recorded music — combined.¹⁰ It may say something about us as a nation, or it may just be that Baby Boomers’ children are growing up. Either way, in 1994, for

Cover_Story/BNP_GUID_9-5-2006_A_1000000000000452519 (noting overall growth in lottery revenue despite downturns in other parts of gaming market).

6. See Ticket Statistics, National Association of Theater Owners, <http://www.natooline.org/statisticstickets.htm> (listing national average ticket prices between 1949 and 2009).

7. See Movie Market, *supra* note 3 (detailing US movie ticket revenues for 2009).

8. See North American Lotteries, *supra* note 4 (detailing US lottery revenues). The numbers are only approximate for state lotteries, since some tickets do cost more than \$1 each, and a few states have Video Lottery Terminals (“VLTs”), which operate like slot machines and do not dispense paper tickets. See e.g., Oregon Lottery, <http://www.oregonlottery.org/video/info.html> (last visited Mar. 29, 2010) (naming games and providing links to History and Myths & Facts about VLTs).

9. It was estimated to be \$638.6 billion in 1997, when the gaming industry was much smaller. See Eugene Martin Christiansen, *The United States Gross Annual Wager: 1997*, INTERNATIONAL GAMING & WAGERING BUSINESS, Aug. 1998, at 3 (examining US gambling revenue in 1997).

10. See Eugene Martin Christiansen, *Consumer Spending on U.S. Gaming Surpassed \$90 Billion in 2006*, INTERNATIONAL GAMING & WAGERING BUSINESS, Nov. 1, 2007, available at <http://www.highbeam.com/doc/1G1-170280791.html> (discussing consumer spending on gaming in 2006).

the first time, adults in America spent more money on gambling than they did on toys for their children.¹¹

It is not just the money, but rather the general availability of gambling venues that is the real story. At least twelve states have commercially owned riverboat, dockside or land-based casinos and another five have card clubs. Tribal Class II gaming, primarily bingo, poker and other non-banking card games, and Class III casinos are open and operating in 29 states. "Racinos," usually indistinguishable from traditional casinos, are in twelve states.¹² There is legal gambling in the territories and possessions of the United States, including major casinos in Puerto Rico and the Commonwealth of the Northern Mariana Islands. Every state except Utah and Hawaii has some form of commercial gambling, and Hawaii is currently considering allowing casinos to help native Hawaiians.¹³

Imagine telling someone from 1909, when there was virtually universal prohibition on legal gambling in this country, or even a visitor from the America of President Dwight D. Eisenhower, that there is a state in the United States that has the following forms of legal gaming:

- Casinos,
- A state lottery,
- Charity bingo,
- Video poker machines in nearly every bar,
- Racetracks and pari-mutuel betting on dog racing,
- Racetracks and pari-mutuel betting on horse racing,
- Internet betting within the state and across state lines on racing,
- And the State itself takes bets on sports events.

Then, tell him or her that this state is not Nevada, but Oregon.

11. See Eugene Martin Christiansen & William E. Cummings, *The United States Gross Annual Wager*, INTERNATIONAL GAMING & WAGERING BUSINESS, Aug. 1, 1995, at 29 (analyzing gambling revenues and toy revenues). Total sales of durable toys & goods were \$39.0 billion compared to the \$39.9 billion in gross revenue for gambling. See *id.* (examining ratio of durable goods revenues to gambling revenues).

12. See State of the States: The AGA Survey of Casino Entertainment, American Gaming Association, <http://www.americangaming.org/assets/files/uploads/agasos2009webFINAL.pdf> (last visited Mar. 29, 2010) (surveying and summarizing American casino statistics for 2009). "Racino" is a term meaning a casino with a racetrack. See *id.* (defining racino).

13. See Katherine Nichols, *Gambling Bill Designed to Lift Native Hawaiians*, HONOLULU STAR BULLETIN, Feb. 6, 2010, available at http://www.starbulletin.com/news/20100204_Gambling_bill_designed_to_lift_native_Hawaiians.html (exploring Hawaii's consideration of casino legalization).

Legal gambling has become such an accepted part of American life that it is often not even noticed, even when its impact is extraordinary. The May 20, 1996 issue of *Forbes* magazine featured a cover story on "Getting rich outside corporate America." The editors did not feel it newsworthy to point out that two of the four individuals pictured on the cover made their money from gambling: A professional poker player and the chairman of a tribe with a casino.

The most dramatic reversal of the law's traditional antipathy toward gambling may have been as early as 1986, when, in *Commissioner v. Groetzinger*, the U.S. Supreme Court ruled that a full-time gambler could declare himself to be in the trade or business of gambling for tax purposes.¹⁴

Even Indian gaming has become so commonplace and respectable that it has passed the ultimate test: gaining access to legitimate financing. The Mohegan Sun was the first tribal casino to receive financing from Wall Street, placing \$175 million in high-yield bonds with institutional investors. The Mashantucket Pequots rattled the bond markets in 2009 when they announced that they could not make payments on billions of dollars in loans, bringing into question whether gaming tribes are legally obligated to pay back anything (and even if they are, whether there any remedies available to lenders).

The proliferation of legal gambling is shaped by such factors as historical legal baggage, feelings of morality and tradition, demographics, social and psychological factors, and pure irrationality. Gambling spreads in a haphazard manner, with long-term recurring patterns played out against a background of local politics and unpredictable technology.

Except for compulsive gamblers, this proliferation looks like an unmixed blessing. With only a little effort, bettors can find any type of game or bet they want, and since these wagers are legal and usually heavily regulated, they know that the game is honest. They will be paid if they win and they will not be robbed on the way to the car or arrested for simply making a bet. But, we really do not know where players are getting the money to wager on the new forms of gambling. A small but significant portion is money that would have otherwise been spent on long-established operations, like race-tracks. Most people appear to not treat gambling money as merely part of their entertainment budget. The amount spent on movies

14. See 480 U.S. 23, 35-36 (1986) (holding that gambling can be considered profession for purposes of achieving tax write-offs).

and beer is about the same as it was before the current gambling boom. So where is the money coming from? A large state lottery, for example, sells more than \$4 billion in tickets each year, and keeps half. Two billion dollars is spent on useful items such as teachers' salaries; but, it had to come from somewhere. Perhaps part of the answer is that, with locally owned and operated gaming creating local jobs, and especially if winners are also locals, the two billion dollars never left the state.

For legal gambling operations, the explosive spread of gaming jurisdictions is definitely a mixed blessing. New games introduce new players to gambling, but competition for the gambling dollar is fierce. The more available betting opportunities are, the more people will wager. However, players can only lose their gambling dollar once.

These factors raise the significant question on how the spread of gambling will impact future generations. In attempting formulate an answer, it is important to remember that the prior two gambling waves ended with nationwide prohibitions on virtually all forms of gaming. Is the current boom headed toward the same bust?

II. CYCLES OF LEGALIZATION

Like a prophecy fulfilled, it looks like we are doomed to repeat our history, having failed to learn the lessons of the past. Twice before in American history, players could make legal bets in almost every state, but these waves of legal gambling came crashing down in scandal, ruin, and ultimately prohibition.

Americans are not sure of what role law should have in society. Should the law be used only against acts that everyone agrees should be illegal, like murder? Or, should law be used as a tool to enforce morality, like Prohibition? This distinction is most troubling with the morally suspect industries — alcohol, drugs, abortion and gambling. Although the Prohibition Era is the best example, there have always been limits and prohibitions in American law that large numbers of the population violated on a fairly regular basis, often without even knowing they have broken the law.

The anti-gambling prohibitions epitomize the traditional approach taken by American laws. These laws are not only designed to protect people from themselves, but are part of a greater moral framework designed by policy-makers to create an imagined ideal society. Surveys and election results have shown that voters want most of the anti-gambling laws to stay on the books, even if they do

not want those laws to be actively enforced (unless they are used against a noisy neighbor).¹⁵

Perhaps our cycles of complete prohibition to complete permissiveness and back again can be explained by the tendency of Americans to go to the limits, and beyond. Congress passed the Indian Gaming Regulatory Act with the image of tribal bingo halls in mind. Entrepreneurs took the poorly written law and used it to create some of the largest casinos in the world. Similarly, legislators in Missouri and Mississippi thought they were legalizing picturesque riverboats. Operators brought in 40,000-square-foot barges and built dockside casinos and boats-in-a-moat that are indistinguishable from non-floating casinos.

Sometimes it is unfortunate that our memories are so short. We believe that what we see about us has always existed and will continue unchanged indefinitely. Of course, there are natural restrictions. Even the best memory cannot stretch beyond a human lifetime. Historical writings allow us to reach backwards in time, but we lose the emotional feel associated with those past writings.

Gambling has had a recurring, consistent pattern throughout the country's history. When gambling is illegal, there is pressure for legalization, first of one game and then, gradually, of all forms. Although it may be illegal, many people are gambling at social games, underground commercial lotteries, race books or casinos. The laws are difficult to enforce and the general population does not want arrests made if it means taking police resources away from more serious crimes. The result is widespread evasion of the law, leading to disrespect, bribery, and corruption. The response by the public is a demand for reform; for something to be done to prevent involvement by officials in these areas of moral ambiguity. The perceived solution is often a demand for legalization — if it is not a crime, there would be no reason to bribe law enforcement or public officials.

Sometimes the breakthrough comes from the legalization of a seemingly benign form, such as charity bingo. Once one form of gambling has been legalized, the anti-gambling arguments based on morality begin to fade away. Legalization of gambling seems to correspond with a general trend toward permissiveness in society. The Victorian morality that says *nothing is permitted* is replaced by

15. See T.W. Mangione, et al., *Citizen Views of Gambling Enforcement*, GAMBLING IN AMERICA, Appendix 1, 240-300 (1976) (identifying that most Americans prefer gambling laws).

the belief that *everything is permitted, so long as you do not hurt another person*. And gambling is the least harmful of the victimless crimes.

People see hypocrisy in the remaining prohibitions. Mark Curriden notes that, “[J]urors in Atlanta in the mid-1990s started acquitting sports bookmaking defendants on a regular basis, even though such cases were usually slam dunks. In post-trial interviews, jurors said they saw no moral difference between sports betting and playing the Georgia lottery.”¹⁶ Even the legalization of a game by a neighboring state can start the decline of the moral barriers against gambling. It is difficult for a state official to argue that a lottery would be immoral when his constituents are going across the state line by the millions to purchase tickets.

Proponents can direct discussion toward cost/benefit analyses of various other games that might be legalized. Once all of the states in a region have the same game, the first to legalize a new game has an advantage and can siphon off the disposable income of its neighbors. A domino effect is created.

Meanwhile, the police and prosecutors are finding it increasingly difficult to enforce those anti-gambling laws that are still on the books, and venality is growing. Even the police begin to see hypocrisy in trying to prohibit a wager when an almost identical game is being actively promoted by the state.

Most of the states are presently at this point in the cycle. The wave of legalized gambling is still rising throughout the nation, although some forms, like state lotteries, have already captured virtually every state. In the past, the wave continued to grow until many forms of gambling became legal, widespread and commercialized. In the past, everyone seemed to be playing and the amounts of money involved were staggering. Those few prohibitions that still existed were virtually ignored by the police, and venality and corruption became widespread and open.

Historically, the next stage has been a devastating deluge of public scandals. Legal gambling is very big business with very few paper records; of the \$90 billion that is bet each year, most is in the form of untraceable cash. It is not difficult to understand the temptation to try and go beyond what is allowed, both by inventing new, faster forms of gambling or even rigging the outcome of a legal game.

But cheating can be fatal to the industry. In the past, the combination of highly publicized scandals and a reawakened morality

16. Mark Curriden, *Power of 12*, ABA JOURNAL, Aug. 2001, at 39.

closed down the games. Constitutional amendments were passed with the intent of outlawing gambling forever. Of course, constitutions can be re-amended. Prohibition only leads, inevitably, to the next stage where demand once again builds for the legalization of some forms of gambling.

III. HISTORY AND HISTORICAL BAGGAGE FROM THE FIRST WAVE

America's first wave of legal gambling began even before there was a country. The earliest settlements were funded, in part, by lotteries in England.¹⁷ The first race track was set up in New York in 1666.¹⁸ Gaming was usually outlawed by statute; the Massachusetts Bay Colony banned the possession of cards, dice, or gaming tables, even in private homes.¹⁹ But the colonies were awash in lotteries, licensed by both states and the newly formed federal government.²⁰ In part this was because, during the colonial period and even after the American Revolution, America lacked a fiscal infrastructure. There simply were too few banks and other large financial institutions to provide capital for building roads, or even mortgages for homes. Running a lottery, which more closely resembled a raffle, might be the only way for an individual to sell a house. It appears to have been easier to buy a lottery ticket during George Washington's time than the present.

Technological and social developments radically changed the nation's attitude toward gambling between the colonial period and the Civil War. The invention of the steamboat led to the establishment of riverboat commerce. The Golden Age of the almost always dishonest riverboat gamblers ended with Civil War blockades and the invention of the railroad.²¹

Lotteries were everywhere, including older, larger cities. Private individuals ran early American lotteries with no government

17. See John Samuel Ezell, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 30-32, 177, 204-405 (Harvard University Press 1960) (exploring history of American gambling).

18. See NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976* 41 (U.S. Govt. Print 1977) [hereinafter *The Development of the Law of Gambling*] (chronicling colonial period gambling efforts).

19. See *id.* (reciting records of court assistants of Colony of Massachusetts Bay regarding ban on gambling forms).

20. See Henry Chafetz, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES: FROM 1492 TO 1955* Section IV (Bonanza Books 1960) (detailing prevalence of colonial lotteries).

21. See John Philip Jones, *GAMBLING YESTERDAY AND TODAY: A COMPLETE HISTORY* 23 (David & Charles PLC 1973) (exploring emergence of riverboat gambling and dockside casinos).

oversight. A fee was paid to the state for a license, but no one except the operators looked at the books. Licensed by the state, but without any regulation or governmental controls, the lotteries were hit by widespread scandals, the worst being that drawings were often not held at all. Operators would stall for months and years, claiming they had not sold enough tickets, and then disappear. A gambler will put up with terrible odds, or even a rigged game, if it is the only game in town. But no one tolerates the lottery con game where there is no winner at all.

The 1820s and 1830s saw the birth of a reform movement. The movement became centered on Andrew Jackson's call for a clean sweep and to "throw the rascals out." Although Jackson himself was a noted gambler, his movement to bring in the common man, and to eliminate corruption, lent support to growing anti-lottery feelings.

The mix of the two — lottery scandals and a newfound morality — led to the near-complete prohibition of lotteries. The feelings of emotional revulsion were so strong that reformers attempted to lock out lotteries, for what they thought was forever, by writing bans into their state constitutions. As new states were born, their constitutions also contained flat prohibitions on lotteries. Settlers in frontier states like Nevada, Texas and California brought strong anti-lottery feelings with them. Delegates to the constitutional conventions creating these new states had personal knowledge of lottery scandals back East.

In the state constitutions of the era, there is usually no mention of other forms of gambling. Casino games might not have been legal (the author has been unable to find a single statute permitting riverboat gambling), but the public felt betting at games of chance, where players had to go to a place to participate, was a relatively easy problem that could be handled by the legislature. The lottery, on the other hand, was viewed as particularly insidious. By 1862 Missouri and Kentucky were the only states that had not banned lotteries altogether.²²

The most important pieces of legal debris from the fall of the first wave of legal gambling are the state constitutional bans on lotteries. So much time has passed that sometimes the meaning of the term "lottery" has been lost or warped to include other forms of gambling, creating enormous problems for proponents of bingo, pari-mutuel wagering and casinos.

22. See George Sullivan, *BY CHANCE A WINNER: THE HISTORY OF LOTTERIES* 50-51 (Dodd, Mead 1972) (considering ban of lotteries by Missouri and Kentucky).

Amending a state constitution is difficult, requiring a vote of the people. A century after the anti-lottery provisions were written and long after the memory of the scandals that led to their creation died away, proponents of state lotteries were able to win constitutional elections in more than three dozen states.

Proponents of casinos have not fared as well. Voters have almost always rejected amending their state constitutions to bring in high-stake casinos. However, many state legislatures have been able to legalize casinos, where no vote was required. These include some of the leading casino states, including Nevada, Mississippi, and now Pennsylvania, where the constitutional ban on “lotteries” has been interpreted as being limited to true lotteries, enabling state legislatures to legalize casinos without a statewide vote.

The crash of the first wave also led to the enactment of the first federal anti-lottery statutes. The federal laws were weak because in the 1840s, 1850s and 1860s, it was widely believed that the federal government did not have much power.

IV. HISTORY AND HISTORICAL BAGGAGE FROM THE SECOND WAVE

The second wave began with the Civil War and the continuing expansion of the western frontier. The South turned to state-licensed lotteries as a painless way to raise revenue.²³ Legal gambling is often seen as a painless, or voluntary, tax. Many southern states resumed state-licensed lotteries.²⁴ State constitutional prohibitions were ignored or rewritten by the governments imposed by the victorious North to allow state statutes to be rewritten during the Reconstruction era to allow lotteries. Lotteries were viewed as being for primarily good purposes, such as the founding of the University of Mississippi.

Throughout the Wild West, gambling was ubiquitous. When the frontier developed, it was common to see casino games being played openly. Whether these games were technically legal was not a major issue at the time. Licensed casinos dominated the heart of San Francisco during the Gold Rush. Frequently, gaming houses were explicitly made legal so that government could raise revenue through licensing and avoid the problems epitomized by Prohibition, which created criminal statutes that no one obeyed. Though

23. See Ezell, *supra* note 17, at Ch. 12 (detailing ways to raise revenue during second wave); see The Development of the Law of Gambling, *supra* note 18, at 282 (considering state-licensed lotteries as revenue vehicles).

24. See Ezell, *supra* note 17, at Ch. 12 (discussing start of second wave of gambling in southern United States following Civil War).

the gaming houses were legal, the games often were not. However, the illegal games were ignored by law enforcement because it was difficult to outlaw this typical frontier diversion.²⁵

Based on memoirs of 19th century casino operators, it appears that nearly all casino games were crooked. In addition, neither laymen nor lawmakers understood the mathematics required to calculate probabilities. The debate over prohibiting not only banking games, where the house takes on all players, but percentage games, where the house participates as a player but has a percentage advantage, shows that there was a general perception that having a built-in edge was considered the same as cheating. Poker and other round games, where players play against each other with no participant having a continuous advantage, were normally allowed to continue. These games are still legal in California today.²⁶

The establishment of permanent cities in the West brought the desire for law and order. Westerners wanted to be viewed as respectable in the eyes of their established East Coast counterparts.²⁷ With this desire for civilization often came statutory prohibitions on casinos.

Betting on horse races was not viewed as a problem, considering that bettors had to be physically present at the track. The invention of the telegraph, telephone, and totalizer machines in the late 19th century, however, made it possible for the average working man to bet on races taking place in another part of the country. The establishment of "pool rooms" that took these bets led to the passage of anti-bookie statutes prohibiting the transmission of gambling information.

The 19th century ended with a second round of lottery scandals. The Louisiana Lottery was the greatest, both in the size of its operation and in the magnitude of the scandal. The lottery operators were accused, correctly, of attempting to buy the Louisiana state legislature. Operators promoted their legal lottery tickets throughout the nation. Technological advances had allowed the

25. See generally Virgil W. Peterson, *Obstacles to Enforcement of Gambling Law*, 269 ANNALS OF THE AM. ACAD. OF POLITICAL AND SOC. SCI.: GAMBLING 9 (1950) (describing difficulty of outlawing gambling in unsettled frontier areas); see also Virgil W. Peterson, *Gambling — Should It Be Legalized?* 40 J. CRIM. L. & CRIMINOLOGY 259, 290 (Sept. 1949) (exploring ability of government to regulate gambling in Wild West).

26. See CAL. CONST. art. IV, § 19(f) (noting authority to create and regulate card rooms in California).

27. See John M. Findlay, *PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS* Ch.3 (Oxford University Press 1986) (exploring Western reformation in favor of Eastern methodologies).

Louisiana Lottery to operate without being in close geographic proximity to its customers.

Some states, like New York, reacted to the opening of Louisiana Lottery stores in their major cities by enacting statutes which made it a crime to sell a lottery ticket within their borders, even if the lottery was legal where the drawing was being held. These statutes still exist today, although they are of questionable constitutionality, since they interfere with interstate commerce.²⁸ Furthermore, the laws had little effect. The states were no more able to stop the selling of Louisiana Lottery tickets in the 1880s and 1890s than they were in the 1950s and 1960s with the Irish Sweepstakes. It became clear that the states could not control this state-licensed lottery, either because they did not wish to do so, or because of jurisdictional limits on their power to regulate legal activities originating in other states.

Because the states were helpless, President Benjamin Harrison asked Congress to pass legislation to close down the Louisiana Lottery. Congress responded by using the various constitutional provisions and federal powers it thought it had at the time to address President Harrison's concerns. Congress first used its power to regulate the U.S. mails, which was the federal government's most powerful weapon at the time.²⁹ In 1890, Congress passed a law barring the distribution of lottery material via the mails. At that time, 45% of the entire New Orleans post office business concerned the Lottery. The law, codified as section 1302 of title 18 of the United States Code, specifically prohibits the use of the mails for lottery tickets, for checks for the purchase of tickets, and even for "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance."³⁰ In 1893, the United States Supreme Court upheld the

28. See N.Y. PENAL LAW § 225.40 (McKinney 2008) (stating that "Any offense defined in this article which consists of the commission of acts relating to a lottery is no less criminal because the lottery itself is drawn or conducted without the state and is not violative of the laws of the jurisdiction in which it was so drawn or conducted.").

29. See 18 U.S.C. §1302 (2010) (outlining Congress' power over U.S. mails).

30. *Id.* The main mail fraud statute gives the Postal Service the authority to intercept and return lottery mail. See 39 U.S.C. §3005(a)(1) (2006) (criminalizing false representations in the mail concerning lotteries). Publications containing advertisements for foreign legal lotteries and envelopes containing lottery tickets are often intercepted and returned or destroyed. See I. Nelson Rose, *The Impact of American Law on Foreign Legal Gambling*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 129, 132 (1986) (remarking on actions by Post Office officials).

Act's use against a foreign legal lottery.³¹ The Court held that an advertisement for certain bonds, issued by the government of Austria, could not be sent through the U.S. mails because they were considered a form of lottery. The prohibitions of the act have been expanded as technology has developed. Its prohibitions now reach radio, television and the use of agents.³²

The rise of Victorian morality, scandals, and the desire for respectability brought the second wave crashing down in the West. The territories of New Mexico and Arizona were told that to gain statehood they would have to close their casinos.³³ In 1909, even the Nevada legislature outlawed casinos.³⁴ By 1910 only Maryland, Kentucky and New York were left, and in that year New York closed its racetracks. The United States was once again virtually free of legalized gambling.³⁵

The most important legal debris of the crash of the second wave were the federal anti-lottery laws passed in response to the Louisiana Lottery scandal and other problems in the late 19th century associated with legal lotteries licensed by various states. The federal anti-lottery laws were so successful that all lotteries were destroyed and no legal lottery existed in the United States for almost 70 years. These laws also helped create the modern United States.

The 1892 Louisiana Legislature passed a bill prohibiting ticket sales after December 31, 1893.³⁶ In October 1893, the organizers of the Lottery announced that after January 1, 1894 the business would operate out of Honduras. However, they used a loophole in Florida's anti-lottery law to distribute the tickets out of Port Tampa, while holding the drawings in Honduras or at sea. Having relocated, the Lottery switched to using private express carriers, to con-

31. See generally *Horner v. United States*, 147 U.S. 449, 466-67 (1893) (applying 18 U.S.C. § 1302 to foreign lotteries).

32. See 18 U.S.C. §1301 (2010) (tracing development of law).

33. See B.W. Currie, *The Transformation of the Southwest: Through the Legal Abolition of Gambling*, CENTURY MAGAZINE, April 1908, at 905 (addressing transformation of western united states gambling regulations). Nevada made casino gambling legal on March 4, 1869. See *Id.*

34. See *id.* (noting that March 24 Act prohibits gambling and provides for "the destruction of gambling property and other matters relating thereto"); see also *West Indies v. First Nat. Bank of Nevada*, 67 Nev. 13, 23 (1950) (discussing Nevada's changing public policy towards gambling during early nineteenth century).

35. See David Weinstein and Lillan Deitch, *THE IMPACT OF LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING* 13-14 (Praeger Publishers Inc 1974) (detailing US's near freedom from gambling during turn of nineteenth century).

36. See Rose, *supra* note 30, at 133 (noting that Louisiana passed ban on lottery ticket sales that failed to completely stop Louisiana Lottery).

tinue operation without violating U.S. postal laws. Congress was thus forced to push its constitutional power to the limit to prevent the Lottery from reappearing.³⁷

Congress specifically turned to the Interstate Commerce Clause to counter these new practices of the Louisiana Lottery. At that time, the prevailing thought of the law was that “interstate commerce” was limited to commerce that was inter-state, for example, shipping on rivers between states. The idea that Congress could regulate legal commerce that happened to cross a state line was a truly a radical idea for the time. Nevertheless, Congress passed the bill and it was signed in 1895 with two minutes to spare. It was now a federal crime to carry or send a lottery ticket, or lottery information, or a list of lottery prizes in interstate or foreign commerce.³⁸ The Supreme Court, in *The Lottery Case*, upheld this great expansion of the federal government’s power in 1903.³⁹

V. THE THIRD WAVE: THE DEPRESSION TO THE PRESENT

The Great Depression gave birth to the third wave of legal gambling. Nevada re-legalized casino gambling in 1931.⁴⁰ Twenty-one states opened racetracks with pari-mutuel betting in the 1930s, with additional states allowing pari-mutuel betting in every decade since.⁴¹ Charities played Bingo, at first illegally, until many of the states changed their laws in the 1940s and 1950s to permit charitable and social gambling. New Hampshire re-discovered the state lottery in 1964.

For the last sixty years, the fight has been over everything from bingo, lotteries and horse and dog racing to poker, Internet gaming and casinos. The big money prize today, however, would be to legalize gaming machines, which has been difficult to this point.

37. See THE DEVELOPMENT OF THE LAW OF GAMBLING, *supra* note 18, at 520 (exploring Congress’ efforts to discourage reappearance of gambling).

38. See 18 U.S.C. §1301 (2010) (making it federal crime to send lottery ticket via interstate commerce).

39. This is the common name given to *Champion v. Ames*, 188 U.S. 321 (1903), and its companion case, *Francis v. United States*, 188 U.S. 375 (1903). See *Rose*, *supra* note 30, at 133 (describing Lottery Cases).

40. See generally Nevada Act of March 4, 1869, 71, Nev. Laws 119 (making casino gambling legal); Act of March 24, 1909, c. 210, Nev. Laws 307 (outlawing casinos for short period of time); Act of March 19, 1931, c.99, Nev. Laws 165 (reestablishing casino gambling as legal).

41. See JOHN DOMBRINK & WILLIAM N. THOMPSON, *THE LAST RESORT: SUCCESS AND FAILURE IN CAMPAIGNS FOR CASINOS* 11 (1990) [hereinafter *Dombrink & Thompson*] (noting rapidly increasing number of racetracks in state); see also JOSEPH F. McDONALD, *Gambling in Nevada*, in *Annals of the American Academy of Political and Social Science: Gambling* 30 (1950).

Part of the problem comes from sloppy legal work done decades ago. Operators of roulette wheels and conventional slot machines were sometimes convicted of running illegal “lotteries.” In some jurisdictions the states’ highest courts ruled that the word “lottery” was synonymous with “gambling.”

Today, state attorneys general find themselves making exactly the opposite argument.⁴² Federally-recognized Indian tribes are allowed to operate any form of gambling permitted by state law.⁴³ A federal judge in Wisconsin ruled that “lottery” means any game of prize, chance and consideration.⁴⁴ The state operates a lottery; therefore, the state had to negotiate to allow Indian tribes to have any games of prize, chance and consideration, including blackjack and video poker machines.⁴⁵

VI. WHAT HAPPENS WHEN PROHIBITION IS REPEALED?

It is widely believed in this Third Wave of Legal Gambling that anyone, including governments, can get rich quick. All one needs to do to grab a piece of the action is to own, operate or tax some form of legal gambling. An endless flow of instant, unlimited wealth will follow. This delusion is a typical symptom of a classic speculative bubble.

All bubbles grow out of unrealistic expectations, like the ones preceding the Great Crash of 1929, the South Sea Bubble and Dutch Tulipmania.⁴⁶ Fortunes can be made during such wild speculation. The word *millionaire* came into use for the first time during France’s Mississippi Company bubble of 1716-1720.⁴⁷ And the dream of instant, unending riches is not limited to Americans. Ca-

42. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (exhibiting evidence as to how lotteries are different from other forms of gambling).

43. See Indian Gaming Regulatory Act, Pub. L. 102 Stat. 2467, 100-497 (Oct. 17, 1988) (legalizing all forms of gambling for Indians as are legal for others).

44. See *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wisc. 1991), appeal dismissed 957 F.2d 515 (7th Cir. 1992) (dismissing case for lack of jurisdiction).

45. See *id.* (noting balancing of state interests with private casino owners interest).

46. See JOHN KENNETH GALBRAITH, *THE GREAT CRASH 1929* (1961) (explaining how stock market crash affects gambling) [hereinafter Galbraith]; see also J. BULGATZ, *PONZI SCHEMES, INVADERS FROM MARS & MORE EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* 101 (1992) [hereinafter Bulgatz] (noting how events like stock market crash cause mass hysteria).

47. See DAVID DREMAN, *CONTRARIAN INVESTMENT STRATEGY: THE PSYCHOLOGY OF STOCK MARKET SUCCESS* 63 (1979) (analyzing stock market tendencies and responses to changes in market).

nada, Australia, and Europe have been hit by the legal gambling bug just as badly, or worse. Interestingly, "With the opening of Ontario's Casino Niagara, Canada's gaming industry employs more than 46,000 people — 12 times the size of the nation's commercial fishing industry."⁴⁸ And nothing compares to the percentage growth of lotteries, casinos, and pari-mutuel betting in the newly freed former Soviet bloc and the truly fantastic developments in Macau and Singapore.

Unlike tulip bulbs, commodities or stock index futures, legal gambling can, in fact, generate revenue.⁴⁹ That revenue, however, will not be on the scale imagined nor can it expand endlessly in the face of direct competition. Not every town can become the next Las Vegas. There is a big difference between being the only legal casino on the East Coast and owning a riverboat in Iowa when there is a competing riverboat only ten minutes away in Illinois with unlimited stakes.

Suppose Prohibition of alcohol had just been repealed. The hypothetical owner of the first and only liquor store in a state would make a fantastic return on investment. But soon, if there were no government controls, there would be liquor stores throughout the state, as few barriers to entry would exist. Excess profits would soon disappear and returns on investment would descend back to normal levels.

Government regulation makes the situation worse. The fantasy that there is an infinitely elastic demand for gambling seems to hit politicians harder than entrepreneurs. From a representative's perspective, sin taxes are always viewed as an easy revenue source. Casinos, like liquor stores and tobacco retailers, are easier targets than more politically acceptable businesses. Government thinking is that people should not be gambling and those that do, will continue to make wagers, regardless of the additional cost. Thus, even though a quarter of the gaming establishments in a jurisdiction might go bankrupt, the state continues to consider raising taxes on gaming.

Resorts International opened the first legal casino on the East Coast on May 26, 1978, spending \$45.2 million to refurbish the old Chalfonte-Haddon hotel in Atlantic City.⁵⁰ Its first year gross reve-

48. *National Gaming Summary*, CASINO J., Dec. 23, 1996 at 10.

49. See Galbraith, *supra* note 46 at 1929 (explaining reference to tulip bulbs as evidence of speculative behavior).

50. See M. Satchell, *Atlantic City's Great Gold Rush*, PARADE, June 10, 1979, at 8 (describing refurbishment of old Chalfonte-Haddon hotel).

nue of \$224.6 million made it the most profitable casino in the world.⁵¹ The state of New Jersey collected \$18 million in taxes that first year.⁵² Twelve more casinos quickly followed. The Trump Taj Mahal, the thirteenth Atlantic City casino to open, cost over \$1.1 billion in 1990.⁵³ The Taj opened in April 1990; it declared bankruptcy in July 1991. Of the thirteen casinos that had opened in Atlantic City, eight have been involved in formal bankruptcy proceedings.⁵⁴

The explosion of legal gambling has finally settled the question of whether availability creates demand. The metropolitan area of Biloxi-Gulfport-Pascagoula, near the Mississippi casinos, has a population of 112,993.⁵⁵ Consequently, this area ranks eighth in the nation as the most important feeder market for casino gaming, far above such massive cities as Houston and Seattle, which did not even make the top ten.⁵⁶ Although availability creates demand, that demand is not endless. Even a casino in New Orleans will fail if Louisiana and Mississippi are already saturated with competing forms of gambling.

In February 1992, the small Mashantucket Pequot tribe opened the Foxwoods High Stakes Bingo & Casino in Connecticut.⁵⁷ In January 1993, the tribe began operating the only legal slot machines between Atlantic City and Canada. The initial 260 machines produced slightly over \$2 million that first month. By July 1993,

51. See N.J. Casino Control Comm'n, ANNUAL REPORT 3 (1979) (noting Resort International's first year gross revenue of \$224.6 million); see also David Janson, *Resorts Wins a Permanent License to Operate a Casino in Atlantic City*, N.Y. TIMES at A1, B5 (Feb. 27, 1979) (noting success of some casinos in gaining licenses).

52. See Janson, *supra* note 51. In their first 15 years in operation, the casinos of Atlantic City, which never numbered more than thirteen, claim they paid a total of six billion dollars in local, state and federal taxes. See *id.*

53. See A. Sloan, *And Now, Trump's Taj Mahal: The Soap Opera*, L.A. TIMES NOV. 12, 1990 at D5 (noting Taj Mahal's difficulty in obtaining gambling license).

54. See *Atlantic City's Sands Declares Chapter 11 Bankruptcy*, CASINO J., Feb. 1998 at 30 (detailing Sands' declaration of Bankruptcy); see also *Playboy Tangles With Casino in Chapter 11*, L.A. TIMES, Nov. 16, 1985, at IV 1 (discussing issues with bankrupt casinos); see also Hancock Institutional Equity Services, *Industry Review, United States Casino Gaming Industry Update: Hedge Your Bets*, June 19, 1992, at 4 (considering investment and casino bankruptcy); see also *Resorts International Files for Bankruptcy under Chapter 11*, L.A. TIMES, Dec. 23, 1989, at D1 (detailing Resorts' Chapter 11 filing); *International-Bankruptcy*, AP NEWSWIRE, Mar. 21, 1994, at 2013 (describing unprofitability of Resorts casino).

55. See WORLD ALMANAC AND BOOK OF FACTS 381, 403 (Mahwah, New Jersey: Funk & Wagnalls 1995) (relating population of metropolitan area of Biloxi-Gulfport-Pascagoula).

56. See Casino J., *Top Ten Casino Feeder Markets*, NAT'L GAMING SUMMARY, Apr. 3, 1995 (quoting Harrah's Survey of Casino Entertainment (1995)).

57. The tribe grew from 150 to more than 250 members after getting the right to open a casino.

Foxwoods had 1,471 operating machines, earning \$26.2 million for the month, for an average profit of \$575 per machine per day. The slot machines at Foxwoods were earning twice as much per device as the slot machines in Atlantic City.⁵⁸ Further, they were earning four times the \$140 per day won by \$1 slot machines on the Las Vegas strip.⁵⁹ By October 1993 the numbers had doubled again. The tribe now had 3,137 slot machines generating \$1.625 million per day.⁶⁰

Foxwoods demonstrates the power of a monopoly (now an oligopoly), as well as the dangers.⁶¹ Foxwoods reported that \$660 million was wagered (the "slot handle") at its 4,585 slot machines during November 1996, resulting in a "slot win" of \$38 million for the month.⁶² Although the number of machines is comparable, the Trump Plaza's slots attracted less than half the amount wagered at Foxwoods; the slot handle was \$272 million, producing a slot win of \$22 million.⁶³ By 1997, no one disputed that Foxwoods was the most profitable casino in the world. The tribe is only required to report the amounts wagered on slot machines and bingo, but the numbers support the conclusion that Foxwoods is the first casino in history to win over \$1 billion from its patrons. The state of Connecticut failed to include any restrictions in its compact with the tribe, so Foxwoods keeps growing, swallowing up nearby forested land for parking lots, hotels, and more casino games. As of 2010, Foxwoods has three hotels with 1,916 rooms, 344,000 square feet of casino gaming space including 7,200 gaming machines and 380 table and poker games.⁶⁴ Placing these numbers into some context, Foxwoods is currently double the size of the largest Las Vegas casino.

58. *See Atlantic City Slots Win a Daily Average of \$275. Slots Yield Bonanza for Foxwoods Casino*, RENO-GAZETTE J., Aug. 7, 1993, at 8B (describing profitability of Atlantic City slot machines).

59. *See id.* (comparing Atlantic City slot machines to Las Vegas slot machines).

60. *See J. Diamond, Indian Casino's Take far Exceeds Industry Norm*, RENO-GAZETTE J., Oct. 11, 1993, at 2 (highlighting peak of Foxwoods' success).

61. *See Casino Revenue November 1996*, 10 CASINO J., Mar. 1997, at 21 (considering dangers of casino monopolies). On October 12, 1996 a second federally recognized tribe in Connecticut opened a casino. *See id.* (describing new entrant in Connecticut casino market). The count in November 1996 was 4,585 slots in Foxwoods and 2,548 in the Mohegan Sun. *See id.* (detailing competition between Foxwoods and Mohegan Sun).

62. *See id.* (reporting Foxwoods' slot win for November 1996).

63. *See id.* (comparing Foxwoods with Trump Plaza).

64. *See Foxwoods Casino Reports*, <http://foxwoods.casinocity.com/> (last visited Feb. 26, 2010) (stating facts and figures of Foxwoods' casino in Connecticut).

Political and economic pressure to break Foxwoods' monopoly in the Northeast U.S. market has made competition inevitable. Even before the Mohegan Sun opened the second casino in Connecticut, another tribe, the Oneidas, opened Turning Stone in 1993 in the middle of New York. Casino ships with slots started operating out of ports in Connecticut. Tribes in Rhode Island, Massachusetts, and Maine fought in court and sought political allies in their battles to open casinos. Legislation for slot machines, Video Lottery Terminals, and more casinos on riverboats and on land were introduced in state legislatures in New York, New Hampshire, Massachusetts, Pennsylvania, Connecticut and every other jurisdiction north of Atlantic City.

The Mashantucket Pequot Tribal Nation expected its casino gaming to grow indefinitely. This expectation was also strangely held by its banks and other sophisticated lenders. Today, Foxwoods is in default on billions of dollars in loans.⁶⁵

VII. ELECTIONS SHOW A TIDAL CHANGE IN ATTITUDES TOWARD LEGAL GAMBLING

Until the November 1996 elections, all high-stakes, casino-style gambling in America, with the exception of Atlantic City, had been created without the approval of the electorate of a state. High-stake casinos were authorized by state legislatures acting on their own — even Nevada voters were never asked whether they wanted casinos — as well as Indian Tribes.⁶⁶ Prior to 1996, high-stakes casinos had won only one statewide election: 1976 in New Jersey.⁶⁷ And that was not really a contest. The opposition was so over-confident, having defeated casinos at the polls by 60% only two years earlier, that they literally ran no campaign against the Atlantic City proposal. Committees opposing casinos took in only \$23,230 and did not even spend it all, while proponents spent \$1,330,615. Thus, it was possible to say that no state had ever voted to amend its state constitution to allow high-stake casinos in the face of active opposition.

65. See Gale Courey Toensing, *Mashantucket and Lenders Extend Debt Forbearance Agreement*, INDIAN COUNTRY TODAY, available at <http://www.indiancountrytoday.com/home/content/82383472.html> (last visited Jan. 25, 2010) (reporting on debt agreement in Mashantucket that led to huge debt).

66. Other political players have been involved. In the case of Indian casinos, for example, tribal governments, state governors, federal agencies and Congress have given their approval, often because of adverse court rulings.

67. See Dombrink & Thompson, *supra* note 41, at 37 (explaining New Jersey's election to be one of few gambling wins of time period).

There had been a few successful elections at the local level, with cities and counties approving high-stakes casinos; however, the only way to win a casino election statewide had been to promise the voters that gaming would be isolated onto a mountaintop or surrounded by water with low stakes. Colorado and South Dakota voters approved five-dollar maximum blackjack and slot machines, while Missouri voters accepted riverboats with \$500 loss limits. Yet even these casino's electoral victories all occurred in the prior decade.

Every attempt to raise the stakes had also been soundly rejected by voters. In South Dakota, for example, to justify building a massive casino-resort, Dan and Kevin Costner attempted to have bet limits raised from five to one-hundred dollars and to allow more slot machines per casino. Low-stakes casinos were already operating in Deadwood and on Indian land, while the state was operating thousands of Video Lottery Terminals. The Costner's spent at least ten times as much as their opponents. Yet, in September 1993 only 42% of South Dakota's voters voted in favor of bringing in high-stakes casinos.

Part of the reason for such electoral defeats in the past can be viewed as a result of Americans' attitudes toward legal gambling. It is still the overwhelming rule that most people do not take gambling seriously, unless they are asked to approve it in their own backyards. Then, it will be allowed only if it is viewed as one of the "safe kinds," such as bingo or a state lottery. If it can be isolated to a mountain town, or somehow sanitized by surrounding it with 30 feet of river water, it is somehow also viewed as acceptable. But, if the general population is asked to vote for casino gambling or slot machines where their children might be tempted to play them, then it is no longer acceptable.

November 1996 marked a turning point and the greatest victory in American history for legal gambling. Unprecedented breakthroughs in gambling laws occurred in virtually every area of the country. For the first time in American history, the citizens of a state (actually two states: Michigan and Arizona) voted, in the face of active opposition, to bring in new, high-stakes casinos. Also for the first time in American history, local citizens throughout a state (Louisiana) voted unanimously, in the face of active opposition, to retain high-stakes casinos.

News articles written immediately after the election called the results mixed — contrasting these wins against an even greater number of losses, including casino initiatives losing in Arkansas,

Colorado, Guam and Ohio. What is not recognized is that twenty years earlier casino gambling would have lost every election. The vote to keep and establish new casinos indicates that there has been a tidal wave of change in the way Americans feel about legal gambling. Voters, for the first time ever, have accepted local gaming as a normal part of their lives. Voters have in the past approved state lotteries. They often vote in favor of horse racing. But, it deserves repeating: In dozens of attempts over the last 200 years, never before had the citizens of a state voted, in the face of active opposition, to bring in new, high-stakes casinos.

Despite their claims, organized anti-gambling activists have almost never been a significant factor.⁶⁸ In 1990, professors William N. Thompson, University of Nevada Las Vegas, and John Dombrink, University of California Irvine, published their study, *The Last Resort: Success and Failure in Campaigns for Casinos*.⁶⁹ Examining virtually every election up to the date of publication, Thompson and Dombrink found that statewide casino campaigns never succeeded, as long as a single powerful political actor was opposed. Thompson and Dombrink called this the veto factor. Until November 1996, the veto factor had held true for all statewide votes for high-stakes casinos. Thus, the campaigns to bring casinos to Ohio and Arkansas in 1996 had as little chance of succeeding as the Florida campaigns had in 1978 or 1994.

In 1996, something unprecedented occurred in Michigan and Arizona. In these states, all political voices seemed to be unified in opposition to casinos. The governors of both states actively campaigned against the initiatives. Yet, statewide voters approved allowing new casinos without limiting the size of wagers or restricting the gaming onto riverboats or mountaintops.

Also, for the first time in American history, local citizens throughout a state voted unanimously in the face of active opposition to retain their high-stakes casinos. Six parishes in Louisiana have riverboat casinos and the Orleans Parish has a land-based casino. All seven voted, by enormous margins of up to 71%, to keep

68. Opponents of legal gambling have become more organized and do, occasionally, make a difference in a close election. In November, 1999, anti-gambling activists, led by churches and the National Coalition Against Legalized Gambling, won a surprising victory against a proposed state lottery in Alabama. Of course, the massive casino industry in neighboring Mississippi and Alabama's own racetracks might also have played a role in blocking the creation of a new competitor.

69. Dombrink & Thompson, *supra* note 41, at 11.

their casinos; statewide, voters approved riverboat casinos by 58% to 42%.⁷⁰

In November 1996, commercial gambling won scattered victories in every region of the country, even in the most conservative states. Twenty-three additional parishes in Louisiana approved the option of establishing new riverboat casinos. Jefferson County, West Virginia approved up to 1,000 Video Lottery Terminals (“VLTs”) at the Charles Town racetrack. Michigan rejected a ban on bingo for political fund-raisers. Likewise, Marion County, Indiana, voted in favor of building a harness racetrack outside Indianapolis.

The remaining question is why voters accept legal gambling as a regular part of their lives. One answer is the power of incremental change; the unthinkable becomes commonplace if taken in small doses. In November, 1996, when Michigan voters approved casinos for Detroit, the state already had eleven high-stakes Indian casinos. Two of the most profitable casinos in the world were already open in Windsor, Ontario, across the river from Detroit. Arizona’s Governor Symington had already signed compacts with sixteen tribes; in 1996, voters told him to let the five tribes that had been left out also have casinos. West Virginia already allowed VLTs at four other racetracks. Indiana already had other racetracks.

It can be argued that the unprecedented casino victories in Michigan and Arizona were the result of special factors. But, every election has special factors; the issue is whether there are unique factors in Michigan and Arizona. This question can be answered in the affirmative by noting that both states already had tribal casinos within their borders and privately operated casinos next door. Ohio, Arkansas, and Florida, on the other hand, had no tribal casinos. Furthermore, every state either already has casino-style gaming or is near another state with tribal, land-based or riverboat casinos.

The tidal change in the public’s attitude toward legal gambling was confirmed two years later. Proponents of legalized gaming won virtually every race in the November 1998 elections. Proposition 5 in California received the most attention. Proponents of Indian casinos had enormous financial and political resources, but the size of the landslide, sixty-three percent to thirty-seven percent, shows

70. See Gary L. Burhop, *In ‘96, Gambling Gained New Voter Acceptance*, N.Y. Times, Nov. 26, 1996, at A12 (noting change in acceptance of gambling and change in attitude of public towards gambling venues due to revenues).

California voters simply do not fear casinos or slot machines.⁷¹ In Missouri, voters approved “riverboat” (actually “boats in moats”) casinos for the third time. In New Jersey, voters approved off-track phone betting; in 1980 they had voted down innocuous Sunday racing. In Arizona, a large majority voted to extend the state lottery, despite repeated crises and religious opposition.

Gaming opponents rarely can gather enough signatures to get repeal on the ballot. They failed in 1998 in both Michigan and Mississippi, but the vocal opposition can sometimes force fearful legislators to let the voters decide. But while the instances are few, anti-gambling forces did have a few victories. A heated fight in Maryland ended with a win for incumbent Governor Parris Glendening, a vocal opponent of racetrack slot machines. Even here, surveys showed that gambling was not an issue; voters were most concerned about education. The only wins in 1998 were in Arizona and Missouri where voters outlawed cockfighting.

The November 2000 elections reconfirmed the tidal change in the way voters view legal gambling. In a self-congratulatory newsletter to its followers, the Reverend Tom Grey, Executive Director of the National Coalition Against Legalized Gambling, portrayed the results of the November 7, 2000 races as follows: “By their votes at the polls Americans proved that they are waking up to the threat facing our country and have soundly rejected legalized gambling in Arkansas, Maine, West Virginia, New Mexico and Wisconsin.”⁷² This statement is not exactly correct. Arkansas certainly was an election defeat, but the proposal was so bizarre that it was not a fair test of the voters’ feelings toward legal gambling. West Virginia’s election was even stranger. Only voters in rural Greenbrier County cast ballots. There were only 7,065 “No” and 5,109 “Yes” votes. The citizens of Greenbrier County rejected the plan to put a casino, which would be open only to registered guests of the Greenbrier Hotel, in a converted bomb shelter.⁷³

71. See *Hotel Employees and Restaurant Employees Int’l. Union v. Davis*, 981 P.2d 990 (1999) (citing example of Indian gambling voters swaying election result). The state’s tribes easily gathered enough signatures to put the issue back on the ballot, this time as an amendment to the State Constitution. *Id.* (describing voter turnout for state constitutional amendment). Voters approved Proposition 1A in March, 2000 by an overwhelming margin, giving tribes a monopoly on casinos in California. *Id.* (noting approval of Proposition 1A).

72. Letter dated November 2000 to “Dear Friend”, N CALG NEWSLETTER, Nov. 2000, at vol. 8, No. 3.

73. See West Virginia Limited Gaming Facility Act, W. VA. CODE §§29-25-1 (1999) (describing Greenbrier county’s gambling rejection).

Elsewhere, legal gambling won big. In South Dakota, voters approved keeping their video lottery terminals and raising the maximum betting limits in casinos in Deadwood from five to one hundred dollars. South Carolinians voted to establish a state lottery. Voters in Colorado approved joining multi-state lotteries, and those in Massachusetts voted to keep their greyhound racing.

The best the Reverend Grey could say about these smashing state-wide defeats of the anti-gambling movements was, "In those states where gambling was defeated, it was by a much higher margin than in those states where gambling initiatives passed." The margins of victory could be significant if they were part of a national trend. But history has demonstrated that the trend is exactly the opposite of what opponents want. Fifty years ago, every one of these pro-gambling proposals would have been defeated at the polls, and by margins of two or three-to-one. The fact that any of them made the ballot, let alone won, shows that voters have come to accept legal gambling as merely another part of everyday life.

One of the most interesting results of the Fall 2000 election shows how political power has shifted in the last decade. Democrat Maria Cantwell beat Washington State's most powerful politician, incumbent Senator Slade Gorton, by less than one-tenth of one percent, with the help of \$1 million from gaming tribes.

Most proposals for legalization still do fail. For example, a plan in 2010 for an Indian casino to be opened in Youngstown, Ohio, has gone nowhere, in part, because there are no federally recognized tribes in Ohio, and in part because the plan comes from a former member of Congress who had been convicted of corruption.⁷⁴ Still, the fact that even such a ridiculous proposal could get any attention at all shows how widespread the dream of legalizing gaming has spread.

The tsunami nature of the third wave of legal gambling has been confirmed in actual, as well as potential, developments over the past few years, including events which would have been considered impossible a decade or two earlier. Voters approved amending the state constitution to allow high-stakes casinos in Ohio's four largest cities, while the governor got the state legislature to approve

74. See *Ohio Casino Plan from Convicted Ex-Rep. Draws No Interest*, THE ASSOCIATED PRESS: THE HERALD-DISPATCH, available at <http://www.herald-dispatch.com/news/briefs/x802129380/Ohio-casino-plan-from-convicted-ex-Rep-draws-no-interest> (last visited Feb. 26, 2010) (explaining lack of Ohio interest in casinos and gambling benefits to state).

gaming machines for the state's racetracks.⁷⁵ Kansas became the first state to own true casinos, considered "lotteries" under Kansas state law, which therefore could be operated by the State Lottery.⁷⁶ Delaware legalized and opened massive sports books, the only ones east of the Mississippi, and then approved table games to add to its "racinos." Maryland approved slot machines and is on the verge of allowing table games. Tracks and other operators of certain gaming devices opened magnificent casinos in Alabama, using machines that may or may not be legally bingo. The governor of Pennsylvania worked hard to get table games approved, to join the 60,000 slot machines at that state's casinos. In a world on the brink of an economic depression, where attention is naturally drawn to casino bankruptcies and gaming tribes defaulting on multi-million dollar loans, it is natural that almost no one noticed that in 2009 the legal, licensed slot machines in Pennsylvania made more money than all the slot machines in Atlantic City.

VIII. REASONS FOR THE SPREAD OF LEGAL GAMBLING

A. The Morality Argument is Dead

It is no longer considered acceptable to oppose gambling on the ground that it is immoral. This reflects a general trend throughout the United States of the rise of situational ethics. But gambling opponents lost their main moral spokesmen, once churches started running bingo games and government began selling lottery tickets. Ninety years ago all gambling was illegal and it was a crime to sell someone a drink. Today, governments are selling lottery tickets and taking bets on football games and there is talk of legalizing, or at least decriminalizing, drugs. On November 5, 1996, voters in California and Arizona approved the use of marijuana for medical treatment.⁷⁷ With no one to say what is right or wrong, everything has become a cost/benefit analysis. Gambling makes money, even accounting for social costs, particularly if it is run as a monopoly.

75. See Alexandra Berzon, *Casino Bid in Recession-Battered Ohio*, WALL ST. J., Nov. 3, 2009, available at <http://online.wsj.com/article/SB125711668815121609.html> (explaining need for Ohio to allow gambling in order to produce revenues).

76. See *Casino's First Week Stirs Cautious Optimism*, ASSOCIATE PRESS, Feb. 16, 2010, available at <http://www.kansas.com/2010/02/16/1183145/casinos-first-weeks-stir-cautious.html> (describing hesitant acceptance of Kansas casino).

77. See J. Balzar, *Voters Approve Measure to Use Pot as Medicine*, L.A. TIMES, Nov. 6, 1996, at A1 (comparing acceptance of marijuana laws to protesting on gambling law).

B. Government Has Said it is Okay

A large segment of society believes that the government knows best. With all the talk about forbidden fruit, it is important to remember that most people will not break the law, even if they will not get caught; drivers stop at red lights at 3 a.m. in the open desert. There are also millions of adults who believe government knows best and will protect them; it is not a coincidence that George Orwell called his 1984 dystopia dictator “Big Brother.”

C. The Outrageous Becomes Acceptable if Taken in Small Doses

As mentioned previously, there is tremendous power in incremental change. The first state lottery of this century, the New Hampshire Sweepstakes in 1964, cost \$3, required players to fill out a form and was held twice-a-year; it was a financial failure. But drawings went from twice-a-year to weekly to daily to rub-off tickets. We now have Video Lottery Terminals, where the lottery player can put money into a machine and be paid on the spot. Thirty years ago it would have been unthinkable that states would be operating such slot machines.

D. The Domino Effect.

New Hampshire was the first with a state lottery this century, but 80% of its players came from New York, Massachusetts and Connecticut. The second lottery was New York and the third, its neighbor, New Jersey. When every state has lotteries, the first to introduce off-track betting or casinos has an advantage, until that spreads.

E. The Easy Money is Not so Easy; States are Hooked on Gambling Revenues.

Lottery tickets are poor consumer items — people buy them for a while and stop. States are forced constantly to come up with more promotions and new games. States like Iowa that thought they could sit back and make millions on \$5 maximum casinos on riverboats, only later to find that the state has to constantly support the enterprises, particularly during the winter, and come to the rescue of failing operations. After half its casino riverboats sailed south, the Iowa legislature raised the betting limits to match nearby Illinois.

F. Gambling Begets Gambling

Players always want games that are faster and easier, with at least the illusion of player control. Many casinos are becoming nothing more than video slot machine warehouses. Eventually, we may well see video poker machines and lottery terminals in every city.

G. Competition for the Gambling Dollar is Fierce.

Casinos in Nevada have had to introduce Megabucks and million dollar Keno games to compete against California's lottery. The racing industry has been particularly hard hit by the introduction of lotteries and tribal casinos. The surviving tracks are asking state legislatures to let them have slot machines and Internet betting to avoid putting hundreds of people out of work.⁷⁸

H. Operators Push to the Limits

If the law allows "pull-tabs," operators will construct devices with a slot and video screen and call the machines "video pull-tabs." Every time the rules are relaxed for one form of gambling political opponents immediately demand "a level playing field."

IX. THE IMPACT OF TECHNOLOGY ON LEGAL GAMBLING

Although it is possible to see the general trends and cycles in gambling, it is impossible to predict how exactly it will develop because the games are inherently dependent on technology. Daniel J. Boorstin analyzed the differences between what he calls the new "Machine Kingdom," and the traditional designations of the "Animal, Vegetable and Mineral Kingdoms" in his book *CLEOPATRA'S NOSE*.⁷⁹ The development of the Internet in general, and online gaming in particular, illustrates how invention creates a demand that did not formally exist because the technology itself did not exist.

Inventions redefine experience. Modern technology has played havoc with traditional legal categories. The New Jersey State Lottery and casinos in Atlantic City battled over which would have the right to run Keno games. The law can react to unexpected technological developments. However, inventions cannot be un-

78. See 63 *Bulletin of the Association of Racing Commissioners International, Inc.*, at 1 (No. 16, May 9, 1997) (asking for Internet betting).

79. See Daniel J. Boorstin, *CLEOPATRA'S NOSE: ESSAYS ON THE UNEXPECTED*, c. 14 (1994) (analyzing impact of technology on gambling).

vented. If the demand has been created, technology will eventually find ways of getting around the legal barriers.

Boorstin points out that the “most potent machines assimilate all environments.” Every form of gambling can now be played on a computerized video screen. Inventions expand experience — technology creates its own demand. One of the most popular forms of gambling in 2010 is on video poker machines: Did anyone want to play video poker before it was invented? Video games and home computers created the ability to play faster games more conveniently; the video poker machine created the need for games that play like video poker machines. Inventions are increasingly intrusive and “the advance of technology in our times attests our increasing inability to exclude novelties or their consequences from our daily lives.”

Whether this is a bad thing is difficult to judge because “our nation has grown by its need for the unnecessary, another name for human progress. Law constantly has to adjust to technological developments in gambling, designing new means of control. As Boorstin put it, “For us invention has become the mother of necessity.”

Changes in the law always trail changes in society. As gambling becomes more accepted, and technology makes the games more interesting, intrusive and easily available prohibitions will continue to fall. History tells us that this is the Golden Age of Legal Gambling. But “golden ages” are always recognized only in retrospect, after everything has once again been made illegal.