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**END OF THE CHASE: USING NORTH CAROLINA AS
A GUIDE FOR ENDING OTHER STATES' VIDEO
SWEEPSTAKES LEGISLATIVE MERRY-GO-ROUND
IN THE WAKE OF *HEST TECHNOLOGIES V.
NORTH CAROLINA***

WESLEY RYAN SHELLEY*

I. INTRODUCTION

The proliferation of game machines that offer illegal gambling¹ in unconventional and non-casino locations began in the early twentieth century.² The prohibition of slot machines forced the evolution of the gaming industry into video-gambling machines with manufacturers creating additions and modifications to slot machines thus making new games which conform with state laws.³ Commentators and judges have stated that no industry in the history of man has gone to such great lengths as the gambling industry to comply with the letter of the law while defying its spirit and purpose.⁴

While illegal slot machines became rare in the mid-1970's, the first generation of legal video games became popular.⁵ Video arcade games and pinball machines created a new industry of skill-based games played primarily for entertainment.⁶ In short time, gambling operators developed attachments to games in the form of meters and knock-off switches to allow the games to keep track of house payouts in exchange for free plays, transitioning the games from mere entertainment to de facto gambling devices.⁷ It was not long after the

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1. The distinction between the terms "gaming" and "gambling" is debatable, with "gaming" sometimes referring to legal gambling or games that do not involve a wager. For purposes of this article, the terms "gaming" and "gambling" will be used interchangeably.

2. Ronald J. Rychlak, *Video Gambling Devices*, 37 *UCLA L. REV.* 555, 558-59 (1990).

3. *Id.* at 560.

4. *See e.g., id.* at 560 n.23, quoting *City of Moberly v. Deskin*, 169 Mo. App. 672, 678, 155 S.W. 842, 844 (1913).

5. Rychlak, *supra* note 2, at 566.

6. *Id.*

7. *Id.* at 563-65. The meters kept track of how many free replays the owner of the establishment housing the game knocked-out, the amount of which was subtracted from the net pro-

first Atari gaming system in 1972 that gambling operators applied the same technology from entertainment games to resemble traditional Vegas-style gambling games, complete with knock-off switches and meters to facilitate illegal gambling payouts.⁸ Video gambling boomed in the late twentieth century as state law struggled to keep up with advances in technology, and the proliferation of video-gambling machines consumed numerous states including North Carolina, South Carolina, Florida, Texas, Virginia, Massachusetts and Ohio⁹ among others. As lawmakers attempted to regulate video gambling, the industry evolved into today's generation of quasi-legal video-gambling machines: video sweepstakes.¹⁰

The North Carolina General Assembly fought the proliferation of video gambling devices for nearly fifteen years.¹¹ Beginning with attempts to control and eventually outlaw video-gambling devices, members of the video-gambling industry constantly adapted their operations to circumvent each law the legislature passed, most recently with the advent of video sweepstakes.¹² The back-and-forth battle culminated with the Supreme Court of North Carolina holding North Carolina's latest video-sweepstakes law not unconstitutionally vague, despite pleas from the video gambling community that the law was too broad and a violation of their First Amendment right to free expression.¹³ While the video gambling community vowed to alter their games and continue offering their services in conformity with the

ceeds and reimbursed to the establishment owner before he or she and game operators split the remainder. The effective result was the same as a direct payout to the player from the game, with the devices keeping accurate accounting of how many knock-outs the establishment owner paid. Because of the decentralized nature of the payouts, these sort of gray area games long escaped prosecution as gambling devices. For a more detailed explanation of the technical mechanics of early gaming machines, see *id.* at 565 n. 48–49.

8. *Id.* at 566. The Vegas-style games removed any skill associated with pinball or video games, and shifted the appeal from entertainment value derived from the game itself to entertainment derived from the possibility of a payout.

9. Nick Montano, *N.C. Supreme Court Outlaws Sweepstakes Video Gaming; Dec. 14 Ruling Says Games Are Not Protected By Free Speech*, VENDING TIMES Vol. 53 No. 1 (Jan. 2013); available at <http://www.vendingtimes.com/ME2/dirmod.asp?nm=Vending+Features&type=Publishing&mod=Publications%3A%3AArticle&tier=4&id=D6C3466E8BDB401BB45DAA308CCD160F>; see also Darren Barbee, *Critics Call Video Sweepstakes a Bad Bet*, STAR TELEGRAM (Dec. 18, 2011), <http://www.star-telegram.com/2011/12/18/3602599/critics-call-video-sweepstakes.html>.

10. Caroline Denning & Douglas L. Yearwood, *Internet Sweepstakes Cafés: A Survey of Law Enforcement Perceptions*, NORTH CAROLINA CRIMINAL JUSTICE ANALYSIS CENTER GOVERNOR'S CRIME COMMISSION (Oct. 2010), at 1, available at https://www.ncdps.gov/div/gcc/pdfs/internet_cafe.pdf.

11. Richard Ducker, *Zoning and Video Sweepstakes Operations*, UNC-Chapel Hill School of Government (Sept. 2012), <http://www.sog.unc.edu/node/2632>.

12. *Id.*

13. *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 290, ___ S.E.2d__ (2012).

court's decision,¹⁴ it seems that the North Carolina General Assembly finally struck a balance between effectiveness in stopping video gambling and generality in making sure that the law was broad enough to limit loopholes and circumvention from the video-gambling industry. Even if the legislative remedy turns out to be temporary, it seems that other states suffering from the inability to control video gambling devices and their latest iteration video sweepstakes may be able to look to North Carolina as a model for how to effectively end the legislative chase to control video gambling.

This article will begin with a discussion of gambling generally and legislative attempts at prohibiting video gambling. This discussion is followed by a brief history of video gambling and its evolution into video sweepstakes operations. The article will then turn to the legislative history of North Carolina concerning video gambling and video sweepstakes, as well as the recent Supreme Court of North Carolina case *Hest Technologies, Inc. v. North Carolina*, which clarified the constitutionality of recent North Carolina video sweepstakes legislation. Next, the article will analyze the Supreme Court of North Carolina's decision and attempt to prescribe a set of suggestions for other state legislatures to effectively curtail video gambling, using the North Carolina law as a guide. Finally, the article will lay out potential problems for the future of the law in North Carolina that other states should be cognizant of when drafting upcoming legislation.

II. GAMBLING

The history of gambling and games of chance dates back to the days of the ancient Egyptian, Greek, and Roman empires.¹⁵ England used lotteries to finance American colonization and later colonists used lotteries to finance American rebellion against British rule.¹⁶ The proliferation and regulation of gambling in the United States came in waves, first from colonization to the early nineteenth century to fundraise the emerging country, then later in the South to help raise funds to rebuild after the Civil War.¹⁷ States began regulating gambling activity in the late nineteenth century and a second wave of the proliferation of gambling came in order to recover from the Great Depression in the 1930s.¹⁸ A third wave came in the 1960s when legis-

14. Mark Blinker, *Court Upholds Law Banning Video Sweepstakes Gambling*, WRAL.COM (December 14, 2012), <http://www.wral.com/court-upholds-law-on-video-sweepstakes-gambling/11877821>.

15. Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 582 (1997).

16. *Id.* at 582–83.

17. *Id.* at 583–84.

18. *Id.* at 584–85.

latures began allowing state-sponsored lotteries as a successful state revenue source.¹⁹ In each wave, state lawmakers quarreled with private gambling operators to prevent the rise of organized crime and negative social stigmas associated with casinos and gambling.²⁰ One constant remained throughout history; no matter the steps taken by legislators to curb gambling activities, private gambling operators always found ways to evolve their businesses to legal conformity and profitability.

Gambling is defined generally as having three elements: consideration, chance, and reward.²¹ North Carolina General Statute (N.C.G.S.) § 14-292 similarly defines gambling as “any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not.”²² Gambling operators took steps over time to eliminate one or more of the elements from their games in order to avoid legislative restriction.²³ For example, video-sweepstakes companies purportedly removed the consideration element from video-poker machines, thus keeping the environment and market of video-poker gambling while sidestepping its legal restrictions.²⁴

III. VIDEO SWEEPSTAKES

Video-sweepstakes machines evolved as a semi-legal response to video poker prohibition.²⁵ The machines typically worked by allowing users to buy a product such as prepaid phone cards or internet time, which in turn provided the user a free entry or entries into a sweepstakes.²⁶ The sweepstakes provided the purchaser a magnetic stripe card that allowed the user to access a virtual game station terminal, at which the user can play video games that reveal whether they won or lost.²⁷ Customers had the choice of whether to instantly reveal all of their sweepstakes results at once when logging on to the terminal or instead to play games mimicking traditional gambling games one at a time to reveal the sweepstakes results and enjoy the entertainment of

19. *Id.* at 586.

20. *Id.* at 588.

21. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, 366 N.C. 289, 290 n.1, __S.E.2d__ (2012).

22. N.C. GEN. STAT. § 14-292 (2012).

23. *Hest*, 366 N.C. at 291, __S.E.2d at __.

24. *Id.*

25. Ducker, *supra* note 11.

26. Blinker, *supra* note 14.

27. *Hest*, 366 N.C. at 292-93, __S.E.2d at __.

those games.²⁸ Patrons discovered whether they won or lost the sweepstakes through use of the purchased phone or internet time, often displayed by games similar to traditional gambling games such as poker and slot machines, or other video games.²⁹ Unlike live poker and slot machine gambling, the games used to reveal sweepstakes results were merely simulations of traditional gambling games, because they had a predetermined finite pool of entries and winners.³⁰ Operators fixed the sweepstakes outcome and the game did nothing to determine or modify the sweepstakes result.³¹ Software developers designed the video sweepstakes to have similar payouts as lotteries and other traditional gambling games; enough winners to retain customers, but not so many as to significantly cut into the game operator's profits.³² Some games allowed the players to wager their sweepstakes entries for prizes with the greater wager receiving greater cash winnings.³³ The sweepstakes contestants could redeem their prize, if any, for more sweepstakes entries, or could cash out.³⁴

In 2012, insiders estimated video-sweepstakes industry gross revenues around \$1 billion in North Carolina alone.³⁵ Spectrum Gaming Group's, a New Jersey-based gaming research service, cited law enforcement regulation, elimination of internet sweepstakes and cafés as number seven on its list of the twenty-one most important trends that the global casino industry needed to monitor in 2013.³⁶ Indeed, video-sweepstakes gaming was widespread and substantial. Sweepstakes operators contended that they were innocently in the market of selling prepaid telephone and internet service, and the sweepstakes were a legitimate tool to market those services rather than gambling.³⁷ However, the similarity between video sweepstakes machines and tradi-

28. Felix Gillette, *The Casino Next Door*, BLOOMBERG BUSINESSWEEK MAGAZINE (Apr. 21, 2011), available at http://www.businessweek.com/magazine/content/11_18/b4226076180073.htm.

29. Blinker, *supra* note 14.

30. See *Hest*, 366 N.C. at 293, ___ S.E.2d at ___.

31. *Id.* at 293, ___ S.E.2d at ___.

32. Barbee, *supra* note 9. For example, one machine's chance of winning \$1,000 is 2 in 250,000. The odds of winning \$500 are 3 in 250,000. While the odds of winning are displayed on each machine's screen, there is typically no way for the public to ascertain the odds or verify whether the winning prize has been claimed already.

33. Gillette, *supra* note 28.

34. *Hest*, 366 N.C. at 293, ___ S.E.2d at ___.

35. Binker, *supra* note 14.

36. *Spectrum Gaming Group Identifies Top 21 Casino Industry Trends for 2013*, MARKETWIRE (Dec. 10, 2012), <http://www.marketwire.com/press-release/spectrum-gaming-group-identifies-top-21-casino-industry-trends-for-2013-1735758.htm>.

37. *Hest*, 366 N.C. at 292, ___ S.E.2d at ___.

tional gambling was described as “thinly-veiled,”³⁸ s[“pretextual,”³⁹ “a mere subterfuge,”⁴⁰ and “the functional equivalent of gambling.”⁴¹

The popularity of video sweepstakes spawned a secondary industry of internet cafés, essentially hubs of desktop computers, allowing patrons to play sweepstakes games and redeem prepaid internet cards to check sweepstakes results at a single location.⁴² In addition to sweepstakes and gaming use, the internet café computers also offered general internet access.⁴³ Despite internet café insistence not to use terms associated with illegal gambling,⁴⁴ many resembled casinos by utilizing playing cards as wall decorations and desktop computer terminals that looked like traditional slot machines.⁴⁵ Establishments used primarily for gaming in North Carolina, such as internet cafés, generally do not qualify for a state permit to sell alcoholic beverages on the premises.⁴⁶ However, locations that use video sweepstakes machines as an accessory rather than their main source of business, such as a bar or restaurant that contains a machine, may serve alcohol to sweepstakes contestants legally.⁴⁷ Companies formed to assemble video sweepstakes cafés and set up the businesses, and acted as an intermediary between the cafés and sweepstakes software companies.⁴⁸ The companies advised the new café owners, sold new video sweepstakes machines and installed the machines.⁴⁹ Additionally, the companies assisted the new café owners and employees with “compliance training” designed to inform those involved with the business of its possible legal ramifications.⁵⁰

It was initially questionable whether video sweepstakes machines met the traditional definition of gambling.⁵¹ Specifically, operators separated the payment of the games by requiring users to purchase phone and internet time that allowed them to access results of their free sweepstakes entries, rather than purchasing the sweepstakes en-

38. Gillette, *supra* note 28.

39. *Hest*, 366 N.C. at 292, ___ S.E.2d at ___.

40. *Id.* at 294; quoting *United States v. Davis*, 690 F.3d 330, 339-40 (5th Cir. 2012).

41. *Hest*, 366 N.C. at 294, ___ S.E.2d at ___.

42. Gillette, *supra* note 28.

43. *Id.* at 6.

44. *Id.*

45. *Id.* at 2.

46. Ducker, *supra* note 11.

47. *Id.*; citing *Carandola v. Bason*, 303 F.3d 507 (2002). “Note [N.C.]G.S. 18B-1005(a)(6), part of North Carolina’s alcohol control law, was enacted to prevent illegal and disorderly conduct that may arise where alcohol is served to the public requires permit holders to take steps in connection with adult live entertainment to prevent, among other things, prostitution, gambling, fights, and nudity.” at 514-15.

48. *Services*, SWEEPSCOACH, available at <http://www.sweepstakesmachines.com/services>.

49. Gillette, *supra* note 28.

50. *Id.*

51. *Binker*, *supra* note 14 at 2.

tries directly, thus making the consideration element more remote.⁵² Video sweepstakes operators contended, despite the traditional gambling appearance of the sweepstakes machines and internet cafés and even the possibility that users believed they were gambling,⁵³ that the format of the games was a legal sweepstakes rather than illegal gambling.⁵⁴ While the games gave off the illusion of gambling to customers, operators contended that the predetermined and finite pool of prizes, as well as offering methods of free entry, rendered the games sweepstakes and did not constitute illegal gambling operations.⁵⁵

Some have long considered video gambling to be a “victimless crime.”⁵⁶ There is evidence that internet café users saw video sweepstakes as a relatively harmless form of gambling.⁵⁷ To the contrary, a survey issued by the Florida Council on Compulsive Gambling found after increased calls regarding internet cafés and pathological gambling that the average income of those experiencing problems from sweepstakes use was \$26,000, with the average reported gambling losses exceeding \$34,000.⁵⁸ In North Carolina, nine out of ten calls to the state’s Council on Problem Gambling were video sweepstakes related.⁵⁹ It seems that the placement of video-gambling machines in commonly accessible locations such as gas stations and internet cafés created a new class of problematic gamblers, particularly, in those areas where casinos were previously harder to reach. Additionally, by putting video sweepstakes terminals in low-income area strip malls,

52. *Id.*

53. Gillette, *supra* note 28, at 10. Some customers are quoted with reference to internet cafés as saying, “It’s gambling. . . I don’t care what they call it.” and “[The nomenclature]’s a joke. . . It’s gambling.”

54. *Id.* at 7.; *see also* Barbee, *supra* note 9. The video sweepstakes operators often compared their business model to the popular legal Monopoly promotion sweepstakes at McDonald’s fast food restaurants. The promotion requires McDonalds’ customers to purchase an item from the fast food chain, which in turn gives the purchaser a free entry into a predetermined sweepstakes. Customers can win free items as well as cash prizes from a finite and limited prize pool, as opposed to gambling which would have some element of chance. Video sweepstakes operators contended that their customers are merely buying internet time, as McDonalds’ customers buy a Big Mac, both of which were accompanied by free entries into the sweepstakes. A video sweepstakes company president even went as far as to say that state governments have a legitimate state interest in regulating McDonalds’ sweepstakes because they use the Monopoly game to promote fast food and soft drink sales to children in the midst of a nation-wide obesity epidemic.

55. *See* Gillette, *supra* note -28.

56. Rychlak, *supra* note 2, at 572-73. .

57. Gillette, *supra* note 28, at 2. One Central Florida user said of the cafés, “You can come here and get your mind off everything. You’re not going to win the mortgage. You’re not going to lose the mortgage. It’s pretty harmless.”

58. *Fla. Council on Compulsive Gambling, Inc., Internet Sweepstakes Centers* (June 30, 2010), <http://www.ordinancewatch.com/files/LocalGovernment/LocalGovernment54229.pdf>

59. Barbee, *supra* note 9, at 2. Gary Gray, the Council’s executive director, stated “For the most part, these sweepstakes places, they’re kind of like crack cocaine.”

outsiders were prone to view the games as a vice that has negative social impacts.

IV. NORTH CAROLINA VIDEO GAMBLING LAW

A. Legislative History

North Carolina attempted to regulate lotteries and other forms of gambling through the courts and state legislature for over a century.⁶⁰ The North Carolina General Assembly clashed with gambling operators to legislate changes in the gambling industry, first with video-poker gambling and most recently with video sweepstakes.⁶¹ Article 37 of the N.C.G.S. provides relevant state law concerning lotteries, gaming, bingo, raffles and sweepstakes.⁶² North Carolina was once home to numerous video poker machines.⁶³ In 2000, the North Carolina General Assembly passed legislation designed to limit video poker machines to those already in use, and put a moratorium on the installation of any new machines.⁶⁴ Even after the end to video poker growth due to the 2000 law, 10,000 legal video poker machines remained in play throughout the state, along with an estimated additional 20,000 illegal machines.⁶⁵ The proliferation of illegal video poker machines after the 2000 change, as well as enforcement problems differentiating between legal and illegal machines, led to a complete prohibition on video gambling in 2006.⁶⁶ The North Carolina General Assembly extended the prohibition on video gambling to the internet in 2008 by applying the ban to server-based gaming operations making it “unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine. . .or a video gaming machine. . .for the purpose of promoting, operating, or conducting a server-based electronic game promotion.”⁶⁷ The effective result of the video gambling bans was an industry change from video poker machines to seemingly legal video sweepstakes.⁶⁸ By removing the consideration element from the

60. Reed J. Hollander, *An Entertaining Display of Thin and False Apparel: The Dividing Line Between Conduct and Protected Speech in Hest v. State*, THE CONSTITUTIONALIST Vol. 18, No.2 4 (Jan. 2013), available at http://www.nelsonmullins.com/DocumentDepot/Hollander_NCBarConstitutionalist2013.pdf; citing *State v. Perry*, 154 N.C. 616, 70 S.E. 387 (1911).

61. *Hest*, 366 N.C. at 290-91, ___ S.E.2d at ___.

62. N.C. Gen. Stat. §14-289 to 14-309(2005)

63. Mike Baker, *Video Poker a Job Jackpot for N.C.*, *Consultant Says*, STAR NEWS (May 18, 2006, 8:25 AM), <http://www.starnewsonline.com/apps/pbcs.dll/article?AID=/20060518/NEWS/605180349/-1/State>.

64. N.C. Gen. Stat. §14-306.1A; see also Ducker, *supra* note 11.

65. Baker, *supra* note 64.

66. Ducker, *supra* note 11 at 1.

67. N.C. GEN. STAT. § 14-306.3 (2012); see also Ducker, *supra* note 11.

68. Ducker, *supra* note 11.

games and offering them as sweepstakes, operators contended that the new games fell out of gambling legislation's scope.⁶⁹ In essence, this created a cat-and-mouse game between state legislators and video-gambling operators to adjust their gaming model to legally conform to the changing language of anti-gambling laws aimed at ending those gaming activities.⁷⁰

A sweepstakes is defined in North Carolina as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance."⁷¹ North Carolina began its attempt to prohibit video sweepstakes with N.C.G.S. § 14-306.1A(b)(9), outlawing "any. . . video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes."⁷² When the North Carolina General Assembly passed the law banning the simulation of poker and slot machines in sweepstakes systems, the sweepstakes industry in response began offering slightly more creative video games to reveal sweepstakes results, seemingly putting the machines outside the scope of the law banning poker and slot machine simulation.⁷³ To counter video sweepstakes operators new methods of circumvention, the North Carolina General Assembly passed N.C.G.S. § 14-306.4 in 2010 to broaden the law's reach by prohibiting the use of an electronic machine or device to conduct or promote a sweepstakes through the use of an entertaining display.⁷⁴ The law not only prohibited conducting or promoting a sweepstakes through an entertaining display but also included a catch-all provision designed to end the cat-and-mouse game of regulating video gambling stating, "it is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever."⁷⁵ The all-encompassing language of the statute identified the legislature's aim to not only end video sweepstakes operations in their current form but also any potential future conversions to video sweepstakes made with the primary objective of circumventing anti-gambling laws.

Political contributions from video poker and sweepstakes operators added another dimension in the legislation restricting video gambling.

69. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, 366 N.C. 289, 290, ___ S.E.2d ___,

70. Austin Baird & Lynn Bonner, *N.C. Supreme Court Overturns an Earlier Ruling by the State Appeals Court*, NEWS & OBSERVER (December 17, 2012), available at <http://www.newsobserver.com/2012/12/17/2544689/nc-supreme-court-upholds-ban-on.html>.

71. N.C. GEN. STAT. § 14-306.4(a)(5) (2012).

72. N.C. GEN. STAT. § 14-306.1A(b)(9) (2012).

73. *Hest*, at 366 N.C. 289, 290, ___ S.E.2d at ___,

74. N.C. GEN. STAT. § 14-306.4(a)(3) (2012); see also Ducker, *supra* note 11.

75. N.C. GEN. STAT. § 14-306.4(c) (2012).

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Investigation of these contributions gained significant media attention as the legislature attempted to change gaming laws in North Carolina. Commentators often credited Former House Speaker, Jim Black, with preventing changes to gambling laws once they reached the North Carolina House of Representatives, contrary to his acceptance of significant political funds from the video-gaming industry.⁷⁶ Additionally, in 2013, several North Carolina lawmakers, including Governor Pat McCrory, donated funds from their 2012 campaign contributions to charity in 2013 after a considerable campaign donor, who was also a video sweepstakes operator was arrested in Florida for racketeering and money laundering in connection with his video-sweepstakes business.⁷⁷ The contentious and political nature of gambling laws often led to heightened scrutiny from opposing parties, and in turn, negative publicity for those who accepted campaign contributions from the sizeable video gaming and sweepstakes lobbies.

B. *Hest Technologies, Inc. v. State of North Carolina*

1. Background

Hest Technologies, Inc., was a developer and marketer of electronic sweepstakes hardware and software located in Dallas-Fort Worth, Texas.⁷⁸ International Internet Technologies LLC, of Oklahoma, and Sandhill Amusements, Inc. of Pinehurst, North Carolina, joined Hest as plaintiffs.⁷⁹ All of the companies ran video sweepstakes operations in North Carolina.⁸⁰ As slot machine operators practiced decades before,⁸¹ the plaintiffs requested an injunction, granted in 2008, that prevented law enforcement from seizing equipment and otherwise taking adverse action against the video sweepstakes operators.⁸² The North Carolina General Assembly amended North Carolina gaming restrictions, which resulted in the modification of the injunction, further permitting video sweepstakes operators to continue profiting from the machines for years while the matter was litigated.⁸³ The in-

76. Baker, *supra* note 64. Rep. Black eventually was forced to resign and spend three years in federal prison after pleading guilty to one felony count of accepting illegal gratuities related to his connections in the lottery and video poker industries; see also *Former House Speaker Black to Resign, Plead Guilty*, WRAL.COM (Feb. 14, 2007), available at <http://www.wral.com/news/state/story/1202817>.

77. John Frank & Craig Jarvis, *McCrory, Lawmakers Donate Campaign Money Received from Sweepstakes Owner Caught in Gambling Probe*, CHARLOTTE OBSERVER (Mar. 14, 2013), available at <http://www.charlotteobserver.com/2013/03/14/3915342/mccrory-lawmakers-donate-campaign.html>.

78. Barbee, *supra* note 9.

79. Montano, *supra* note 9.

80. See *Id.*

81. Rychlak, *supra* note 2, at 561-62.

82. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, 366 N.C. 289, 291, ___ S.E.2d at ___,

83. *Id.*

junction stood until the trial court determined that November 2010, N.C.G.S. §14-306.4 was constitutionally sound, save for its catch-all provision which the Court declared overbroad.⁸⁴ On appeal, the plaintiffs argued that the entire N.C.G.S. §14-306.4, forbidding the use of an electronic machine to conduct or promote a sweepstakes through the use of an “entertaining display,” was an infringement of their First Amendment free speech rights because it regulated the games’ result displays rather than the games themselves.⁸⁵

2. The Court of Appeals of North Carolina

A divided Court of Appeals panel declared that the 2011 law, which banned electronic machines that conduct sweepstakes through the use of an entertaining display, provided a virtually unlimited definition.⁸⁶ The Court noted that N.C.G.S. §14-306.4 forbade only the sweepstakes using a video game to display its results.⁸⁷ Had the plaintiffs’ sweepstakes used a different method of revealing the outcome, the North Carolina law would permit it as a legal sweepstakes.⁸⁸ Therefore, the same machine the plaintiffs used could conceivably legally operate a sweepstakes so long as the sweepstakes displayed its result with words instead of an entertaining game display.⁸⁹ As such, the Court concluded that the law regulated the speech of the video game result rather than the conduct of operating the sweepstakes.⁹⁰ Additionally, the Court looked at the plaintiffs’ overbreadth argument, claiming that the statute placed no limitations on the definition of an entertaining display and therefore potentially banned all video games which communicated a sweepstakes result.⁹¹ The appellate court affirmed and held that the statute was unconstitutionally overbroad and infringed upon the plaintiffs’ speech protected by the First Amendment.⁹² The Court of Appeals of North Carolina not only affirmed the trial court determination that the catch-all provision was overbroad, but also reversed the trial court holding with regard to the rest of §14-306.4, declaring the entire statute unconstitutional.⁹³ However, the opinion contained a written dissent by Judge Robert C. Hunter on

84. *Id.* at 293

85. Hest, ___ N.C. App. ___, 725 S.E.2d 10, 12 (2012).

86. *Id.* at, Hest, N.C. App. ___, 725 S.E.2d 10, 13 (2012).

87. *Id.*

88. *Id.* at 13. . “[I]f the sweepstakes conducted by plaintiffs were exactly the same in all respects, except that the results were conveyed by means of a scratch off ticket, a motion picture, a cartoon, or a simple verbal acknowledgment, the sweepstakes would be permitted by North Carolina law.”

89. *Id.*

90. *Id.*

91. *Id.* at ___ N.C. App. ___, 725 S.E.2d 10,14.

92. *Id.* at 14-15.

93. *Id.* at 15. .

which the State based its appeal to the Supreme Court of North Carolina.⁹⁴

Judge Robert C. Hunter's dissent concluded that N.C.G.S. §14-306.4 regulated conduct, rather than speech, and was therefore entirely constitutional.⁹⁵ The dissent pointed to a nearly identical case in Florida,⁹⁶ which held that state law did not restrict the sweepstakes' owners' speech but rather the conduct of operating a sweepstakes, an activity unprotected by the First Amendment.⁹⁷ Because the statute regulated conduct rather than speech, it only needed to show a rational basis to be constitutional, which the law expressly contained in its aim to protect the morals of North Carolinians.⁹⁸ The State's restriction of entertaining displays to reveal sweepstakes results was therefore rationally related to the government's power to promote the welfare of society.⁹⁹ Additionally, Judge Hunter concluded that the statute was not overbroad because it only prohibited video games in the context of sweepstakes results, and not video games or sweepstakes generally.¹⁰⁰ The law did not unintentionally restrict any constitutionally protected rights of other businesses, and was not overbroad.¹⁰¹ Judge Hunter's conclusion that the statute was neither overbroad nor an unconstitutional restriction on the plaintiffs' First Amendment rights formed the foundation for the Supreme Court of North Carolina's opinion.¹⁰²

3. The Supreme Court of North Carolina

The Supreme Court of North Carolina heard arguments appealing the Court of Appeals of North Carolina decision on October 17, 2012.¹⁰³ The Court opened its opinion with a near century old foreshadowing quote from *State v. Lipkin*, discussing gambling operators' insistence on creating schemes of evasion "within the mischief, but not quite within the letter of the definition" of a lottery.¹⁰⁴ The court in *Lipkin* provided guidance to the *Hest* court stating, "Look to the substance and not to the form of [gambling], in order to disclose. . .the

94. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, ___ N.C. App. ___, 725 S.E.2d 10 (2012) (Hunter, R., dissenting).

95. *Id.* at 15 (Hunter, R., dissenting).

96. *Hest* N.C. App. ___, 725 S.E.2d 10, 15 (2012) (Hunter, R., dissenting) (citing *Allied Veterans of the World, Inc. v. Seminole County, Fla.*, 783 F. Supp. 2d 1197 (M.D. Fla. 2011)).

97. *Id.* at 16.

98. *Hest*, 725 S.E.2d at 17-18

99. *Id.* at 18-19

100. *Id.* at 19-20

101. *Id.* at 21

102. *Id.* at 22

103. *Hest Techs., Inc. v. State ex rel. Purdue*, 366 N.C. 289, 289 (2012).

104. *Id.* at 289-90, ___S.E.2d at___

pernicious tendencies which the law is seeking to prevent.”¹⁰⁵ Essentially, the *Lipkin* court examined whether the gray area gambling activity the law sought to prohibit enticed its users with an unreasonable sense of hope that they will win a great deal for very little cost.¹⁰⁶ The lure, rather than the game itself, was the activity the law intended to prohibit according to *Lipkin*.¹⁰⁷

The *Hest* court acknowledged that state legislatures have the police power to regulate gambling and reached different levels of regulation in history through weighing the social costs of gambling against its economic benefits.¹⁰⁸ The North Carolina General Assembly originally exercised its power to regulate gambling by placing a complete prohibition on lotteries and casino gaming, and has since evolved to allow a state-sponsored education lottery and one Native American casino.¹⁰⁹ Relying largely on the intent of N.C.G.S. §14-306.4, the Court looked to the substance of video-sweepstakes games rather than the name and form of the games the law made illegal.¹¹⁰ The Supreme Court of North Carolina provided that although the video-sweepstakes games did not constitute gambling, the legislature viewed them in the same light because they presented the same moral harms as traditional gambling.¹¹¹ The Court noted that by adding the language of N.C.G.S. §14-306.4, it was a specific attempt by the legislature to prevent sweepstakes operators from “exploit[ing] a loophole in the state’s gambling laws.”¹¹² Indeed, the Court noted, the continuing clash between legislators and video sweepstakes operators was strikingly similar to the battle that occurred when the legislature attempted to outlaw lotteries and slot machines in prior decades.¹¹³

Despite the strong similarity between video sweepstakes and illegal gambling, the Court refused to hold that the machines were summarily a pretext to circumvent anti-gambling statutes.¹¹⁴ Because the operators offered free sweepstakes entries, removing the bet or

105. *Id.* at 290, __S.E.2d at __

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 290-91, __S.E.2d at __; The court drew comparison to *Lipkin* to look past how “skillfully disguised” the games were to determine if they had the requisite chance element to constitute gambling, including whether the player is lured to the game and enticed by a false hope of chance at great winnings. That “deceptive scheme. . . is what the law denounces as wrong and demoralizing.” *Id.*

111. *Id.* at 294, __S.E.2d at __; *Id.* (“In effect, the General Assembly determined that plaintiffs’ business models, involving sales of Internet time and telephone cards with accompanying “free” sweepstakes entries, are a mere pretext for the conduct of a de facto gambling scheme.”)

112. *Id.* at 290, __S.E.2d at __; see also *Blinker*, *supra* note 15

113. *Id.* at 292, __S.E.2d __

114. *Id.* at 295, __S.E.2d __

consideration element from the games, the video sweepstakes machines technically fell outside the traditional definition of gambling.¹¹⁵ However, the Court did not determine whether the video sweepstakes were illegal gaming because it was within the legislature's purview to regulate business practices which are prone to moral corruption.¹¹⁶ The Court was able to rule on the constitutionality of the statute whether it was considered gambling or not.¹¹⁷

The Court also looked to the few other jurisdictions that previously addressed the legality of video sweepstakes machines.¹¹⁸ In every case, the appellate courts upheld the prohibiting statute because the courts viewed the video sweepstakes as "gambling in disguise."¹¹⁹ However the Court again refused to rule entirely on the precedential cases because it relied largely on factual evidence that the sweepstakes' internet cards went mostly unused, which was a pretext to the covert gambling operation.¹²⁰ *Hest* had no such factual evidence, and the Court refused to assume the internet time was going unused to summarily dismiss the case as "an illegal gambling operation that use[d] the sale of legal products as a pretext to avoid state gambling laws."¹²¹

The Court finally found its reasoning by looking to the First Amendment issue of N.C.G.S. §14-306.4 and whether regulation of the games' display rather than the games themselves was an infringement of *Hest*'s rights to free speech and expression.¹²² *Hest* argued that the games were entertainment and thus deserved full protection under the First Amendment, and that the regulation of the display of the sweepstakes' results was an unconstitutional restriction of free expression.¹²³ The State argued that the law only prohibited the conduct of operating a machine that carries out sweepstakes using an entertaining display.¹²⁴ The Court agreed with the State's argument and determined that operating the video sweepstakes machines, as well as running a sweepstakes, was non-communicative conduct subject to regulation rather than protected speech.¹²⁵ The Court reasoned that

115. *Id.* at 294, __S.E.2d__

116. *Id.* at 296, __S.E.2d at__

117. *Id.*; *Id.* ("It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry.")

118. *Id.* at 297, __S.E.2d at__

119. *Id.* at 294, __S.E.2d at__

120. *Id.* at 295, __S.E.2d at__

121. *Id.*

122. *Id.* at 296, __S.E.2d at__

123. *Id.*

124. *Id.*

125. *Id.*

N.C.G.S. §14-306.4 regulated the conduct of operating a sweepstakes and the communication of the sweepstakes' result, not the video game itself which would be protected entertainment.¹²⁶ The Court determined that the mere communication of the sweepstakes' result and use of words did not automatically implicate the First Amendment's speech protection but was simply a necessary part of the conduct of the greater sweepstakes.¹²⁷ While not all conduct can be labeled "speech" simply because the conduct expresses an idea, conduct may still constitute communication sufficient to fall within the scope of the First and Fourteenth Amendments.¹²⁸ The plaintiffs did not allow customers to play the video games for reasons other than to reveal sweepstakes results, further signaling that the games were a mere disguise for the sweepstakes themselves.¹²⁹ The statute did not prohibit video games, which were protected under the First Amendment, but rather the conduct of sweepstakes operation that coincidentally utilizes a video game to display its result.¹³⁰ Subsequently, the Court analyzed the First Amendment claim under the scrutiny of conduct that incidentally burdens speech, since a regulation may still infringe free speech rights if it legitimately restricts conduct.¹³¹

A law may regulate conduct that incidentally burdens speech if (1) it is within the constitutional power of the Government; (2) it furthers a substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹³² The Court determined in *Hest* that (1) the State has long held the "power to address the health, safety and welfare concerns presented by gambling operations. . .even if they cleverly avoid the traditional definition of gambling;" (2) the State's interest in combating vices associated with video

126. *Id.*; *Id.* (holding a law banning the sale of violent video games to be an unconstitutional restriction of protected speech under the First Amendment). See also *Allied Veterans*, 783 F. Supp. 2d 1197 (2011) (The court quotes a case in Florida dealing with a similar statute designed to limit video sweepstakes operations, stating *Hest* is "free to provide the video games to their patrons and their patrons are free to play them. . .so long as the games are not associated with the conduct of a payoff").

127. *Id.*; *Id.* (The court points out that the substance of the speech was not at issue in this case- that the announcement of results could state whether the patron won or lost, or the amount of money won, and the law would apply equally to the different forms of speech); *Id.* at 300, __S.E.2d at__ (What limited speech is involved with the announcement of a sweepstakes result is no more protected than calling bingo numbers or "21" in a game of blackjack).

128. *Id.* at 298, __S.E.2d at__; *Id.* (The court noted that it may be possible to find some expression in every activity a person undertakes, and therefore refused to apply First Amendment protection to any conduct simply labeled as "speech").

129. *Id.* at 300

130. *Id.* at 13.

131. *Id.* at 13-14, 19-20; *citing* United States v. O'Brien, 391 U.S. 377, 88 S. Ct. 1679 (1968).

132. *Id.*

sweepstakes machines was a substantial interest; (3) the statute aims to control the operation of video sweepstakes machines and therefore is unrelated to any resultant suppression of free expression associated with the sweepstakes result announcement; and (4) the restriction on First Amendment freedoms as a result of the law is no greater than necessary to prevent the specific activity identified by the statute.¹³³ Thus, the Court held the State's interest in regulating "repeated, addictive, gambling-like play through. . . video display" outweighed any resultant restriction on Hest's speech.¹³⁴

Additionally, the Court also dismissed the plaintiffs' overbreadth argument because any consequential restriction on conduct protected by the First Amendment was specifically targeted by the law.¹³⁵ There was no factual showing that the law burdened any speech other than that which it intended: video sweepstakes machines.¹³⁶ Though the Court admitted to the rather broad language of the statute and its catch-all provision, it refused to declare the statute summarily overbroad without any factual showing that some conduct or speech other than the target video sweepstakes machines was unintentionally hampered by the law.¹³⁷

The Court also struck down the plaintiffs' contention that the law could not selectively ban video sweepstakes involving an entertaining display without banning all sweepstakes.¹³⁸ The legislature was within its purview to adopt a law that addressed a specific type of sweepstakes aimed at circumventing state gambling laws, and was under no obligation to outright prohibit all sweepstakes to control only a certain type.¹³⁹ Consequently, the Court reversed the Court of Appeals of North Carolina decision and declared N.C.G.S. §14-306.4 constitutional, making video sweepstakes machines in their present form illegal.¹⁴⁰

133. Hest, *supra* note 11, at 19-21.

134. *Id.* at 20-21.

135. *Id.* at 21. "Where Conduct and not merely speech is involved. . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *quoting* Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918 (1973).

136. Hest Techs., Inc. v. North Carolina ex rel. Perdue, ___ N.C. App. ___, 725 S.E.2d 10, 21 (2012)

137. *Id.*

138. *Id.* at 22.

139. *Id.* "[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied- that the Legislature must be held rigidly to the choice of regulating all or none." *quoting* Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978).

140. *Id.* at 23.

4. Aftermath

After the Supreme Court of North Carolina's decision, video sweepstakes operators contended that their business was no different from traditional sweepstakes games, and they vowed to continue to shape their operations to conform to the changing laws.¹⁴¹ In a matter of weeks, video sweepstakes programmers created a pre-reveal conversion to the old sweepstakes machines which did not use an entertaining display, possibly rendering the games legal and back within the bounds of N.C.G.S. §14-306.4.¹⁴²

In the wake of *Hest*, at least one named plaintiff, International Internet Technologies LLC, decided to stop doing business in North Carolina, citing that "conditions of release and other court orders make it virtually impossible for [International Internet Technologies] to provide day-to-day support for their licensees in [North Carolina]." ¹⁴³ While the decision did not necessarily mean that the internet cafés associated with the company would close, as they could license software from other providers, a spokesman for the North Carolina Sheriff's Association described one of the largest video sweepstakes software company's decision to leave the state to be "huge."¹⁴⁴ The company maintained that its conduct was legal, and instead decided to direct "its full attention and resources" to its ongoing legal battles in Florida.¹⁴⁵ The North Carolina law's success in *Hest* was expected to spawn greater video sweepstakes regulation in other states.¹⁴⁶

V. ANALYSIS & RECOMMENDATION

Legislators face the same problem with video sweepstakes prohibition that they faced when attempting to ban video poker and other gray-area machines decades before: how to draft effective legislation to stop video sweepstakes without infringing on non-gambling video game machines and legitimate sweepstakes. The key to drafting an effective anti-video gambling statute is to be neither over nor under inclusive. Therefore, lawmakers face an array of challenges in drafting video gambling regulations that are balanced and not subject to genuine dispute from video sweepstakes operators.

The overarching law and policy question often associated with gambling is whether regulation is even possible with seeming industry in-

141. Blinker, *supra* note 14.

142. Hollander, *supra* note 61.

143. *Video Sweepstakes Company Leaving N.C.*, PILOTONLINE.COM (March 27, 2013), available at <http://hamptonroads.com/2013/03/video-sweepstakes-company-leaving-nc>.

144. *Id.*

145. *Id.*

146. Montano, *supra* note 9.

sistence on skirting the law as legislators draft it. At the very least, video gaming and sweepstakes operators are able to profit from their products in the interim as legislatures draft laws to conform with mechanical and technological advances. In addition, such operators utilize injunctions against seizure and prosecution while the law is clarified. Therefore, it is imperative that new legislation aimed at restricting video gambling be general enough to prevent video gambling industry circumvention of the law. Legislatures must strike a delicate balance to make new laws specific enough to not be unconstitutionally vague, yet broad enough to encompass offshoot designs and video gambling machine additions aimed at evading the letter of the law.

The Supreme Court of North Carolina hinted in *Hest* that video sweepstakes machines did not constitute illegal gambling in its traditional definition.¹⁴⁷ The Court instead relied on the negative social effects of video sweepstakes separate from gambling, and the legislature's ability to regulate the conduct leading to those social evils. If the Court determined that video-sweepstakes machines constituted illegal gambling, as the Fifth Circuit did in *United States v. Davis*, the discussion of statutory breadth and operator First Amendment rights would be unnecessary. Despite offering free sweepstakes entries to avoid the consideration element of traditional gambling, the vast amount of video sweepstakes entries often come from paid entrants. Additionally, facts in other cases showed that customers rarely used the phone and internet cards for anything other than entering video sweepstakes. While courts generally give sweepstakes ultimate protection from prosecution as illegal gambling operations as long as they allow free entries to the sweepstakes,¹⁴⁸ an exception for sweepstakes with nearly zero percent free entries may be plausible. In such circumstances, a court could determine that the limited free entries constitute a general belief that consideration is necessary to enter the sweepstakes and consider video sweepstakes gambling. The significant problem that arises with such a sweeping test is that most people do not take advantage of the "no purchase necessary" method of entering legitimate sweepstakes and the test may pull many legitimate sweepstakes operations under the umbrella of its authority. Though inconsistent with precedent, by declaring video sweepstakes to have de facto consideration despite their "no purchase necessary" method of entry, states could regulate video sweepstakes operations as illegal gambling.

147. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, ___ N.C. App. ___, 725 S.E.2d 10, 11 (2012) "[O]ne can question whether these systems meet the traditional definition of gambling because plaintiffs have ostensibly separated the consideration or "bet" element from the game of chance feature by offering "free" sweepstakes entries."

148. *Glick v. MTV Networks*, 796 F. Supp. 743 (S.D.N.Y. 1992).

Instead of simply declaring video sweepstakes to have de facto consideration, state legislatures should amend the current gambling elements test of consideration, chance and reward. Rather than an elements test, courts could utilize the same three elements of gambling in a more flexible factors test. By switching from an elemental standard to a factors test, states could hold video sweepstakes operators liable despite the operators ridding themselves of a single gambling element. In the case of video sweepstakes, the mere ridding of consideration by allowing free sweepstakes entries could be outweighed by a showing of substantial chance, through random predetermined sweepstakes results, and reward, through considerable disproportionate payouts. As a result, a court would still likely consider the video sweepstakes operations in *Hest* to be gambling under this test due to the overwhelming resemblance to traditional gaming despite lacking in consideration.

In order to avoid potential First Amendment claims from video sweepstakes operators, it is also imperative that any new law expressly state its purpose. In *Hest*, the legislature strengthened N.C.G.S. §14-306.4 by including the law's aim to "prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever."¹⁴⁹ Additionally, the purpose of the law must further a legitimate governmental interest, allowing the state to overcome any incidental restriction the law places on video-sweepstakes operators' conduct. The *Hest* court explained that the state had the "power to address the health, safety and welfare concerns presented by gambling operations. . . even if they cleverly avoid the traditional definition of gambling."¹⁵⁰ It may be beneficial for legislators to include similar language in its video sweepstakes regulation statute that sets out the specific legislative interest and powers of the legislature to restrict video sweepstakes conduct. Lawmakers must be mindful to draft laws specifically targeted at controlling the conduct of operating a video sweepstakes rather than any speech or expression related to the sweepstakes that may receive greater First Amendment protection.

Another recommendation to state legislatures in drafting video gambling regulations is to define the illegal activity the law seeks to control rather than detailing the physical mechanism, as suggested in *Lipkin*. For example, by leaving ambiguous the exact method of output for a video gambling machine—whether it is by coin, credit, prize, or other payout—and instead focusing on the payout itself, there is

149. N.C.G.S. §14-306.4(c).

150. *Hest Techs., Inc. v. North Carolina ex rel. Perdue*, ___ N.C. App. ___, 725 S.E.2d 10, 19-21 (2012) .

less room for video gambling machine operators to make technical changes to their machines that only act to circumvent the letter of the law. Video poker machine regulation displayed such circumvention in the early history of gambling legislation, where lawmakers outlawed machines utilizing poker or slot machine displays, and video gambling operators simply began using non-casino games to continue gambling operations in conformity with the new laws. Legislators should word laws to regulate the entertaining conduct or entitlement of winnings rather than the method by which the game delivers the winnings. To do this, lawmakers are encouraged not to simply add provisions which disallow only a current problem, but to amend existing anti-gambling laws that will be mindful of general developments in video gambling technology. Along the same lines, anti-video gambling legislation may also include an intent element, of which legislators take emphasis off the operator's conduct and shift it instead to the intent of the operator and effect of the machine. If a video sweepstakes operator intends to closely tie his or her business to resemble a gambling operation, it could be criminalized as such. By creating less conduct-based laws, it will be more difficult for operators to work around the letter of the law because it regulates the result and effects of their actions rather than the specific acts themselves. Instead of focusing legislation on defining gambling devices, lawmakers should turn their attention toward regulating the vice and negative social outcomes of the devices.

In addition, in order to outlaw the conduct of operating video gambling rather than specific games, the legislature should focus on the vices and enticements that gambling and gray area video gaming have in common. By controlling the negative social effects of video sweepstakes, operators will be less able to simply adapt their machines to conform to recent legislation. Essentially, instead of making a certain gray-area gambling machine illegal, the law should prohibit all activities which result in social vices similar to gambling. If video gaming operators are able to modify their machines avoiding the negative social evils commonly associated with gambling, the games would likely no longer need regulation. By focusing the law on the actual problem, = the resulting social harms rather than the specific machines, legislators can more effectively control the areas of gray area gambling where there is a substantial governmental interest.

Next, to increase the effectiveness of anti video sweepstakes law, legislatures should develop a substantial similarity test. The test would assist in determining if the regulated conduct, on its face, appears substantially similar to the sort of illegal gambling the statute aimed to prohibit. Such a test would be comparable to the analysis of the court in *Hest*, allowing the court to avoid questions of whether or not con-

duct fell within the legal definition of gambling, to determine whether its business practices and social consequences were substantially similar to those associated with gambling. While effectively using the same analysis as whether the video sweepstakes operation included de facto consideration, a court would not need to determine whether an activity was gambling in order for a legislature to regulate it. If a type of conduct substantially resembled gambling, it would be punishable in the same manner as traditional gambling. Courts would no longer need to determine whether or not an activity falls within the traditional definition of gambling, but simply whether it substantially resembles gambling.

Another alternative to controlling video gambling, and perhaps gray area gambling altogether, is the criminalization of any operation attempting to circumvent gambling laws. It would seem, under the facts of *Hest* and other video sweepstakes machine operations, that there was sufficient evidence to determine that video-sweepstakes operations evolved largely in response to attempts to outlaw the activity. By criminalizing this sort of loophole-seeking, states could add yet another deterrent to engaging in quasi-gambling activity and penalize those who toe the line of illegal gambling the same way they penalize traditional illegal gambling operations.

An added possible solution is to place a cap on sweepstakes winnings. Though the games would still exist, the primary social evils associated with gambling such as compulsive behavior and extreme financial loss would be limited, if not eliminated. States could also cap winnings by placing a maximum level on the games' returns versus value ratio. In that sense, a prize could not be worth more than a certain amount times the amount paid to enter the sweepstakes, or the value of the good associated with the sweepstakes. A maximum on winnings and losses each play forces the video sweepstakes business to dealing only in de minimis transactions, reducing the likelihood of negative social effects of gambling while permitting non-gambling video gaming. Such a solution may also effectively end the video sweepstakes industry by reducing the games to their limited entertainment value, taking the enticement of riches out of the games and leaving little reason to play them since they do not involve skill. Alternatively, regulations could control the type of prizes awarded through sweepstakes, such as restricting sweepstakes winnings only to products offered by the sweepstakes operator. In the case of internet cafés, the law would allow video sweepstakes, but only with a possibility of winning more prepaid internet time. Admittedly, such a solution could possibly impede on the marketability of legitimate sweepstakes.

Lastly, changing to a more general standard of proof is potentially appropriate to control illegal gambling. As the gambling industry continues its practice of complying with the letter of the law while evading its spirit and purpose, as the court stated in *Moberly v. Deskin*,¹⁵¹ lawmakers may deem it necessary to create laws that lack specifically defined parameters. Justice Potter Stewart made what is now possibly the most memorable standard in the history of the Supreme Court, in reference to obscene material that “I know it when I see it.”¹⁵² Like obscenity, gambling often suffers from a similar inability to define the kinds of activities that constitute gambling. With that in mind, lawmakers are advised to create a similar general standard to apply to video gambling regulations. Rather than attempting in vain to specify what activities fall within the definition of gambling, all the while chasing technological evolutions in the video gambling industry, lawmakers should instead trust courts to “know gambling when they see it.” Like a substantial similarity test, courts would determine that any activity which promotes the same negative effects of gambling, whether it is gambling by definition or not, would still be punishable as gambling. Though an inexact and potentially problematic standard, by reducing the objectivity of the legal test for gambling, lawmakers may finally be able to curb the sort of activities that mirror illegal gambling despite their technical compliance with the law.

VI. POTENTIAL PROBLEMS

Lawmakers must anticipate members of the video gaming industry attempting to continue their business through exploiting possible loopholes in the language of new legislation as they have with past laws. *Hest* displayed the obvious problem in drafting legislation to control video gaming machines in both making the law constitutionally specific and not impeding on First Amendment rights of free speech and expression.¹⁵³ Though North Carolina was successful defending its law against Hest Technologies, other jurisdictions may find differently. State Legislatures’ heavy reliance on potentially unpredictable court interpretations of the law presents uncertainty that lawmakers would likely rather avoid.

One substantial problem facing lawmakers is avoiding inclusion of otherwise legal business practices under the umbrella of legislation designed to prohibit illegal video gambling. Video-sweepstakes machines were difficult to regulate because of their similarity to traditional legal sweepstakes, a similarity that the industry utilized as a defense in

151. *City of Moberly v. Deskin*, 169 Mo. App. 672, 678, 155 S.W. 842, 844 (1913).

152. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Potter, J., concurring).

153. *Hest*, 366 N.C. at 293, ___ S.E.2d at ___.

Hest.¹⁵⁴ Indeed, it can be assumed that gray area gambling operators will continue to base their business models on legitimate activities to serve as a shield from legislative action. By imposing restrictions on winnings or payout limits, lawmakers run the risk of encroaching on non-gambling sweepstakes campaigns. A cap on winnings would likely jeopardize the commonly cited McDonald's sweepstakes' \$1 million grand prize. Likewise, restricting prizes to products and services offered by the sweepstakes operator would endanger all of McDonald's non-instant win prizes. To create laws that effectively restrict video gambling disguised as sweepstakes while not infringing on legitimate sweepstakes from other businesses is a difficult exercise in terminology, magnified by the video gambling industry model of intentionally mirroring legitimate sweepstakes.

Future problems with video gambling regulation may also include the practicality of enforcement. In any scenario where the law allows some form of legal gaming to continue, whether only for entertainment value or by creating a *de minimis* exception, it becomes increasingly difficult to enforce laws against video gambling machines as they are harder to differentiate from legal video gaming. Enforcement will often fall on local law enforcement agencies, adding increased burdens on police and sheriff's departments. To compound the matter, the strategic location of video sweepstakes machines in low-income areas, often accompanied by high crime, makes for even greater difficulty enforcing new legislation because law enforcement is predisposed. Additionally, some localities may fall within the group who believe video sweepstakes to be a harmless and victimless crime and may even substantially benefit from video sweepstakes revenues at the local government level. For these reasons, merely passing legislation may be insufficient to fully halt problematic video sweepstakes.

Many of the previously mentioned suggestions involve a significant amount of deference to the courts to interpret each case's facts to determine if the questionable activity is substantially similar to gambling on its face. Though most of the courts ultimately upheld the laws banning such sweepstakes, or declared the sweepstakes to be illegal gambling operations, the Court of Appeals of North Carolina's decision in *Hest* should serve as a caution for the possibility that a court may rule in favor of sweepstakes operators. District courts in South Carolina are also split on the issue of video sweepstakes legality.¹⁵⁵ Lawmakers will find themselves in a quandary that the more general a law is written in order to include the greatest number of gray area gambling op-

154. Barbee, *supra* note 9.

155. Barbee, *supra* note 9.

erations; the more deference there will be for courts to interpret the law.

The last problem affecting video sweepstakes regulation, and any gambling ban, comes from the pro-gambling community. It is undeniable, aside from the perceived social evils and vices associated with gambling, that the industry can present tremendous potential benefits as well. Governments used lotteries as a legitimate fundraising source throughout the history of the United States.¹⁵⁶ Proponents of video sweepstakes were quick to point out the potential loss of state revenues and employment for North Carolina in the wake of the *Hest* decision.¹⁵⁷ States and localities not only benefit from taxing video sweepstakes businesses but also may charge licensing and operating fees per machine.¹⁵⁸ Less gambling-conservative states may have a harder time convincing their voting constituents that the negative social impacts of gambling outweigh the potentially substantial economic benefits. For example, despite Florida courts finding video sweepstakes operators to be engaged in illegal gambling, the State's residents continue to demand more gambling activities.¹⁵⁹ Increased demand for convenient gambling options in Florida not only gives greater incentive to video sweepstakes operators to find ways around anti-gambling laws in the state but also puts pressure on Florida legislators to tread carefully with voters on laws that will potentially restrict their constituents' access to convenient gambling alternatives. States with similar political makeup may be prone to the same challenges.

VII. CONCLUSION

Regulating video gambling is a problematic necessity for many states. With the growth of the video gambling industry, the amount of money wagered on video gambling machines continues to increase and there is consequentially an increase in the social evils that surround gambling. The unique nature and location of most video gambling machines and its special impact on low-income communities

156. Roberts, *supra* note 15 at 586.

157. *Enforcement of Ban On Video Sweepstakes Machines Varies Across N.C.*, WINSTON-SALEM JOURNAL (Jan. 3, 2013), available at http://www.journalnow.com/news/local/article_f955ddc6-5609-11e2-94df-0019bb30f31a.html. One video sweepstakes industry executive estimated a possible loss of \$1 billion and 100,000 jobs in North Carolina alone.

158. Mark Wineka, *Banned or Not, Video Sweepstakes Mean Money to City*, SALISBURY POST (Feb. 15, 2013), available at <http://www.salisburypost.com/article/20130215/SP01/130219737>. For example, the city of Lumberton, N.C., charged video sweepstakes operators a \$5,000 license fee to house video sweepstakes machines, and an additional \$2,500 fee per machine.

159. Lawrence G. Walters, Esq., *Sweepstakes & Sunshine: A Review of Florida's Game Promotion Statute*, GAMBLING LAW UPDATE (Jan. 2011), at 7-8, available at <http://www.gamblinglawupdate.com/archives/SweepstakesArticle%20-%20Final.pdf>.

further the need to regulate the industry. Due to the insistence of video gambling operators on modeling their businesses after legitimate games and sweepstakes and designing their games to bring gray area gambling operations in conformity with the law, legislators face an uphill battle to regulate video gambling.

As lawmakers tangle with how to regulate the video sweepstakes industry and internet cafés effectively, it is prudent that they look to North Carolina as a successful example. While other jurisdictions may disagree with the Supreme Court of North Carolina's decision in *Hest*, state legislatures can best create sustainable and effective new laws by striking the balance between wide-reaching application and constitutional specificity. States suffering from an inability to control video gambling proliferation can use North Carolina as a model for how to end the legislative chase to curtail video gambling.