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LEGALIZED GAMING AND POLITICAL CONTRIBUTIONS: WHEN THE DICEMAN COMETH, WILL CORRUPTION GOETH?

BONNY BUMILLER*

I. INTRODUCTION

You are an officer of a company that owns several riverboat casinos. Your best friend is running for State Representative and you want to make a financial contribution to her campaign. Would it surprise you to find out that you may be prohibited from doing so? Don't be so shocked — several states have statutes that prohibit political contributions from key persons in the gaming industry.¹ One of the main reasons for such statutes is to reduce corruption or the appearance of corruption.²

Part II of this comment explores the history of legal and illegal gaming in our country and illustrates some of the reasons that state legislatures have enacted statutes forbidding political contributions from persons in this industry. Part III analyzes several key cases and statutes that courts have struggled to interpret. Part IV proposes a statute that may serve as a model for states seeking to enact similar statutes. Part V concludes that such statutes, in spite of their restriction on First Amendment rights, are constitutional.

* Bonny Bumiller is a 2007 graduate of the John Marshall Law School. She dedicates this article, and gives great thanks, to her parents, Jim and Sylvia, and to everyone at DPOP (the Democratic Party of Oak Park), all of whom encouraged and supported her along the way.

1. See, e.g., IND. CODE § 4-33-10-2.1 (2002) (prohibiting contributions from any officer or person who holds an interest in a gaming entity); N.J. STAT. ANN. § 5:12-138 (West 2005) (prohibiting contributions from casino officers, directors, or key employees).

2. See, e.g., *In re Soto*, 565 A.2d 1088, 1096 (N.J. Super. Ct. App. Div. 1989) (describing the concern that political contributions by casino licensees, whether individuals or organizations, give the appearance of buying influence and favoritism). The *In re Soto* court discussed this phenomenon of influence at great length. *Id.* at 1096-97. The court was as concerned with actual impropriety and corruption as it was with the appearance of such corruption, which is far more subtle. *Id.*

II. BACKGROUND

Why limit political contributions from persons in the gaming industry? What's wrong with gaming, if anything, anyway?

A. A Brief History of Gaming

The United States has a long history with the gaming industry, both legal and illegal.³ In fact, the history of gaming in the United States began long before we became a nation.⁴

Nelson Rose, a professor at Whittier Law School, provides some background to United States gaming history and explains that there were three waves of legalized gambling in North America.⁵ The first wave began with the earliest settlers in the 1600s and lasted approximately until the 1860s.⁶ The Spanish and the Dutch brought cards and dice with them to the New World in the sixteenth and seventeenth centuries.⁷ Some of our earliest settlements were funded in part by English lotteries.⁸ From approximately 1607 to 1820, private lotteries and sweepstakes benefited the Continental Army, various charities, and even colleges such as Harvard University and what is today Columbia University.⁹ Also in the Northeast, New York was the home of the first racetrack in 1666.¹⁰ In the South, New Orleans was recognized as a gaming capital shortly after it was founded in 1716.¹¹

3. See, e.g., RICHARD SASULY, *BOOKIES AND BETTORS: TWO HUNDRED YEARS OF GAMBLING* 55-56 (Holt, Rinehart & Winston 1982) (describing New Englanders' gambling in the nineteenth century); ROBERT K. DEARMENT, *KNIGHTS OF THE GREEN CLOTH: THE SAGA OF THE FRONTIER GAMBLERS* 60-61 (Univ. of Okla. Press 1982) (relating a near-lynching that took place over a horse racing controversy in the territory of Colorado in the 1860s); STEPHEN LONGSTREET, *WIN OR LOSE: A SOCIAL HISTORY OF GAMBLING IN AMERICA* 30-31 (Bobbs-Merrill Co. 1977) (describing games of chance in the colonies such as dice, cards, and horse racing as well as the laws that quickly followed, which outlawed games, especially during church services).

4. I. Nelson Rose, *Gambling and the Law: The New Millennium*, in *GAMBLING: WHO WINS? WHO LOSES?* 113, 117 (Gerda Reith ed., Prometheus Books 2003).

5. Rose, *supra* note 4, at 117-20.

6. *Id.* at 117-18.

7. LONGSTREET, *supra* note 3, at 29-30.

8. Rose, *supra* note 4, at 117. See also JOHN M. FINDLAY, *PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS* 12 (Oxford Univ. Press 1986) (stating that the third charter of the Virginia Company of London, granted in 1612, permitted lotteries in order "to raise money for the colonial venture").

9. Stephanie A. Martz, *Note: Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & POL. 453, 458 (1997).

10. Rose, *supra* note 4, at 117.

11. TIMOTHY L. O'BRIEN, *BAD BET: THE INSIDE STORY OF THE GLAMOUR, GLITZ, AND DANGER OF AMERICA'S GAMBLING INDUSTRY* 99-100 (Random

Why was gaming so popular? It was a successful way to raise money for public projects, and it provided a handsome profit to private operators as well.¹² But scandals, including lottery drawings that were never held, advance tip-offs of winning numbers to friends, as well as a newfound morality, led to all but two states banning lotteries by state constitution.¹³

If gambling is bad, then prohibiting it must be good, right? Perhaps idealists thought there was some truth to this in theory. However, in practice the situation was much different. Prohibiting gambling had serious drawbacks. Illegal gambling was often run by organized crime figures and public officials, both of whom often accepted bribes in order to allow gaming to go unchecked.¹⁴

The second wave of legalized gambling in America lasted from approximately 1860 until 1910.¹⁵ Gaming was a “painless” revenue-builder for the South, and popular frontier entertainment in the West¹⁶ (home to such legendary gamblers as Wyatt Earp, Doc Holliday, and Bat Masterson).¹⁷ Meanwhile, in Louisiana, lottery operators attempted to literally buy the state legislature.¹⁸ Technological advances allowed lotteries to sell tickets nationwide, but Congress has since eliminated lottery sales through the U.S. mail and interstate and foreign commerce.¹⁹ By 1910, all but three states had once again outlawed gaming.²⁰

The third wave of legalized gambling began during the Depression and continues to this day.²¹ Nevada legalized casino gaming in 1931.²² Parimutuel gaming, charity bingo, and state lotteries soon followed.²³

House 1998).

12. Martz, *supra* note 9, at 458-59.

13. *See* Rose, *supra* note 4, at 118 (explaining that by 1862, every state but Missouri and Kentucky had completely banned lotteries).

14. Martz, *supra* note 9, at 459.

15. Rose, *supra* note 4, at 118-19.

16. *Id.*

17. DEARMENT, *supra* note 3, at 102.

18. Rose, *supra* note 4, at 119.

19. *Id.* (citing what are now 18 U.S.C. §§ 1301, 1302 (2005), first adopted Mar. 4, 1909).

20. *See id.* (explaining that by 1910, only Maryland, Kentucky, and New York had not outlawed gaming).

21. *Id.* at 120.

22. *Id.*

23. *Id.*

B. Gaming Today

The pervasiveness of gaming in today's society hardly means that its image is completely sanitized.²⁴ Many critics have suggested that gaming is immoral,²⁵ that a state's use of revenue from gaming is unethical,²⁶ that compulsive gambling is a serious addiction rendered even more serious by legalized gaming,²⁷ and

24. See generally JACKSON LEARS, *SOMETHING FOR NOTHING: LUCK IN AMERICA* 4 (Viking Penguin 2003) (citing William Safire, *Now: Bet While You Booze*, N.Y. TIMES, Jan. 11, 1993, at A17) (arguing that hard work, talent, and merit lead to success, while relying on chance and luck lead to a lifetime of failure); B. Grant Stitt et al., *Community Satisfaction With Casino Gambling: An Assessment After the Fact*, in *GAMBLING: WHO WINS? WHO LOSES?* 96, 107 (Gerda Reith ed., Prometheus Books 2003) (reporting that perceptions of residents of communities that have adopted casino gaming is mixed, but varies widely across the country). Residents of Biloxi, Mississippi, reacted favorably in general toward casinos, while residents of Sioux City, Iowa, and East Peoria, Illinois, reacted negatively. *Id.*

25. See generally Alberta Conference of Catholic Bishops, *Gambling Is Morally Questionable*, in *GAMBLING: OPPOSING VIEWPOINTS* 20, 21-22 (James D. Torr ed., Greenhaven Press 2002) (arguing that gambling promotes anti-Christian values such as exploiting the poor, and encouraging greed and covetousness); *Chapter 1 Preface: Is Gambling Immoral?*, in *GAMBLING: OPPOSING VIEWPOINTS* 19, 19 (James D. Torr ed., Greenhaven Press 2002) (quoting Ralph Reed, former director of the Christian Coalition, who stated that "[gambling is] a cancer on the body politic, stealing food from the mouths of children, turning wives into widows").

26. See Michael Nelson, *State Lotteries Are an Unethical Source of Government Revenue*, in *GAMBLING: OPPOSING VIEWPOINTS* 31, 33 (James D. Torr ed., Greenhaven Press 2002) (arguing that state involvement with gaming is a deal with the devil, and that gaming patrons are disproportionately poor, uneducated, and black); see also Stanton Peele, *Is Gambling an Addiction Like Drug and Alcohol Addiction? Developing Realistic and Useful Conceptions of Compulsive Gambling*, in *GAMBLING: WHO WINS? WHO LOSES?* 208, 216 (Gerda Reith ed., Prometheus Books 2003) (asserting that gambling is a state-sponsored addiction that is aggressively marketed by appealing to escapist fantasies, causing family and society harm while appealing to personal gratification).

27. See Ronald M. Pavalko, *Compulsive Gambling Is an Addiction*, in *GAMBLING: OPPOSING VIEWPOINTS* 49, 51 (James D. Torr ed., Greenhaven Press 2002) (arguing that the symptoms of pathological gambling — including illegal acts, lies, job losses, and dysfunctional relationships — are remarkably similar to those of alcoholism). See also Bernard P. Horn, *The Gambling Industry Preys on Compulsive Gamblers*, in *GAMBLING: OPPOSING VIEWPOINTS* 69, 70-71 (James D. Torr ed., Greenhaven Press 2002) (asserting that the gaming industry not only is fully aware of the addictive nature of its product, but actively works to hook, exploit, and keep addicts); Mark Griffiths and Jonathan Parke, *The Environmental Psychology of Gambling*, in *GAMBLING: WHO WINS? WHO LOSES?* 277, 278-82 (Gerda Reith ed., Prometheus Books 2003) (discussing situational determinants and sensory factors that induce gambling, such as sound effects and noise, music, lighting, color, and even aroma); Henry R. Lesieur, *The Social Costs of Compulsive Gambling Are Enormous*, in *GAMBLING: OPPOSING VIEWPOINTS* 82, 83-85 (James D. Torr ed., Greenhaven Press 2002) (stating that the social ills of compulsive gambling include embezzlement, family disruption, bankruptcy, emotional stress, and

that legalized gaming harms local economies.²⁸

On the other hand, some commentators argue that gaming is a harmless form of amusement,²⁹ that its use as a revenue-generating device is ethical,³⁰ that compulsive gambling is not an

job loss); Tom Grey, *Compulsive Gambling Is a Serious Problem Among Teenagers*, in GAMBLING: OPPOSING VIEWPOINTS 77, 78 (James D. Torr ed., Greenhaven Press 2002) (stating that more than one million teens are addicted to gambling, and that the addiction rate in teen gamblers is three times that in adults); *Chapter 2 Preface: How Serious Is the Problem of Compulsive Gambling?*, in GAMBLING: OPPOSING VIEWPOINTS 48, 48 (James D. Torr ed., Greenhaven Press 2002) (describing the personal story of a compulsive gambler, "Denise," who had amassed over eighty thousand dollars in gambling debts, declared bankruptcy, and made a suicide attempt before she sought help). Ironically, Denise was a social worker who counseled others on addictions. *Id.*

28. See Economist, *Legalized Gambling Harms Local Economies*, in GAMBLING: OPPOSING VIEWPOINTS 99, 102 (James D. Torr ed., Greenhaven Press 2002) (contending that increases in jobs, tax revenues, and economic development are illusionary because consumer dollars are merely cannibalized away from the rest of the economy). See also David Pace, *Indian Gaming Does Not Benefit Most Native Americans*, in GAMBLING: OPPOSING VIEWPOINTS 123, 124-27 (James D. Torr ed., Greenhaven Press 2002) (asserting that gaming has neither significantly reduced unemployment nor increased tribal revenues); Earl L. Grinols, *Cutting the Cards and Craps: Right Thinking About Gambling Economics*, in GAMBLING: WHO WINS? WHO LOSES? 67, 84 (Gerda Reith ed., Prometheus Books 2003) (calculating that a local economy loses one hundred and fifty-six dollars per capita when it permits casino gambling); Robert Goodman, *Grand Illusions*, in GAMBLING: WHO WINS? WHO LOSES? 88, 93 (Gerda Reith ed., Prometheus Books 2003) (criticizing the "grand illusion" of gaming as a viable strategy for economic development because of gaming's costs to communities). For example, about one third of Atlantic City's retailers went out of business within four years after casino gaming began. *Id.*; see also *Chapter 3 Preface: How Does Legalized Gambling Affect Communities?*, in GAMBLING: OPPOSING VIEWPOINTS 98, 98 (James D. Torr ed., Greenhaven Press 2002) (stating that since the first casino opened in Tunica County, Mississippi, the results have been mixed). On one hand, the casino revenue has been used to build new schools, roads, an airport, and more. *Id.* On the other hand, the community still has no major grocery store, pharmacy, or movie theater, and its public schools have the lowest scores in the country. *Id.*

29. See Frank J. Fahrenkopf Jr., *Responsible Gambling is Harmless Fun*, in GAMBLING: OPPOSING VIEWPOINTS 26, 27 (James D. Torr ed., Greenhaven Press 2002) (arguing that gambling, like television game shows, is just "[f]un, fun, fun"). Mr. Fahrenkopf is president and CEO of the American Gaming Association. Not unexpectedly, much of the pro-gaming literature has been written by those within the industry itself. Mixed and negative analyses of gaming generally come from independent studies, universities, and other disinterested sources. *Id.* See also Kathryn Gabriel, *Playing the Gods: Gambling and Spirituality, a New Anthropological Perspective*, in GAMBLING: WHO WINS? WHO LOSES? 334, 344-45 (Gerda Reith ed., Prometheus Books 2003) (comparing gambling to prayer, noting that each is a method of seeking both divine affirmation and reversal of fortune).

30. See N. Am. Ass'n of State & Provincial Lotteries, *State Lotteries Are an Ethical Source of Government Revenue*, in GAMBLING: OPPOSING VIEWPOINTS

addiction,³¹ and that the gaming industry works to reduce compulsive gambling.³² Those who support this view also argue that the problem of compulsive gambling is exaggerated,³³ that casino gambling does not increase crime rates,³⁴ and that legalized gambling benefits the economy.³⁵

37, 38 (James D. Torr ed., Greenhaven Press 2002) (arguing that lottery revenues benefit a wide variety of causes, including education, economic development, the environment, senior citizens' programs, health care, and cultural activities).

31. See Michael Walker, *Compulsive Gambling Is Not an Addiction*, in GAMBLING: OPPOSING VIEWPOINTS 58, 59-60 (James D. Torr ed., Greenhaven Press 2002) (arguing that compulsive gambling as a behavior is substantially different from substance addiction). See also Howard J. Shaffer, *A Critical View of Pathological Gambling and Addiction: Comorbidity Makes for Syndromes and Other Strange Bedfellows*, in GAMBLING: WHO WINS? WHO LOSES? 175, 178-85 (Gerda Reith ed., Prometheus Books 2003) (stating that there is no agreement in the mental health community regarding whether compulsive gambling is an addiction, and that it is difficult to tell whether a behavior that is not controlled is one that is uncontrollable); Mark Dickerson, *Pathological Gambling: What's In a Name? Or, How the United States Got It Wrong*, in GAMBLING: WHO WINS? WHO LOSES? 191, 201 (Gerda Reith ed., Prometheus Books 2003) (suggesting that the model of pathological gambling as an illness, a primarily American view, from which the only recovery is total abstinence, is a result of social and political forces). This model, Dickerson suggests, is analogous to the disease model of alcoholism. *Id.* Dickerson argues that when the disease model is well accepted in the medical community, scientists are likely to view quitting as the only way for problem gamblers to recover. *Id.* Such scientists are far less willing to evaluate the possibility of problem gamblers modifying or reducing their gaming behavior. *Id.*

32. See American Gaming Ass'n, *The Gambling Industry Is Working to Reduce Compulsive Gambling*, in GAMBLING: OPPOSING VIEWPOINTS 73, 74-76 (James D. Torr ed., Greenhaven Press 2002) (asserting that the gaming industry makes diligent efforts to combat problem gambling by funding research and educational awareness of the problem).

33. See Nick Gillespie, *The Problem of Compulsive Gambling Is Exaggerated*, in GAMBLING: OPPOSING VIEWPOINTS 91, 95 (James D. Torr ed., Greenhaven Press 2002) (stating that less than five percent of all adults exposed to gaming may develop into pathological gamblers).

34. See Jay Albanese, *Casino Gambling and Crime*, in GAMBLING: WHO WINS? WHO LOSES? 149, 150 (Gerda Reith ed., Prometheus Books 2003) (documenting a decrease in Atlantic City's crime rate after the addition of casinos, offset by the population increase).

35. See Frank J. Fahrenkopf Jr., *Legalized Gambling Benefits Local Economies*, in GAMBLING: OPPOSING VIEWPOINTS 107, 110 (James D. Torr ed., Greenhaven Press 2002) (arguing that gaming is good for local economies). For example, in counties that have established casinos, welfare payments and unemployment have dropped dramatically, while tax revenues and the number of jobs have greatly increased. See also Economics Resource Group, *Indian Gaming Benefits Native Americans*, in GAMBLING: OPPOSING VIEWPOINTS 116, 118-19 (James D. Torr ed., Greenhaven Press 2002) (arguing that casino gaming has become a boon to Native Americans, allowing them to build wealth and to reduce unemployment, poverty, and other social ills).

At least one economist, Richard Sasuly, has suggested that the respectability of gaming fell as that of debt formation rose.³⁶ This is somewhat ironic, in light of the fact that gaming and debt have much in common.³⁷

Problems with gaming were not restricted to any one particular geographic location; arguably, any gambling city has had problems dealing with the “effects” of gaming. For example, Atlantic City began as an oceanfront resort town in 1854.³⁸ By the 1880s, it was home to numerous gambling establishments and brothels, often frequented by gangsters.³⁹ By the early twentieth century, it was known for crooked elections, extortion, lucrative contracts awarded to supporters of those in power, as well as payoffs to conduct illegal gaming.⁴⁰ When New Jersey governor Brendan Byrne signed the Casino Control Act in 1977, which authorized gambling in Atlantic City, he said to organized crime: “keep your filthy hands out of Atlantic City and keep them the hell out of our state.”⁴¹

C. Dealing with Legalized Gaming

Statutory attempts to combat corruption are nothing new.⁴² After a number of political scandals, in the 1970s Congress passed a law limiting political contributions.⁴³ This law was an attempt to

36. SASULY, *supra* note 3, at 40.

37. *See id.* at 40-43 (explaining that in seventeenth century Massachusetts, both gaming and debt formation, or money lending with interest, were viewed with disdain, as they diverted people from labor, promoted unearned wealth, contradicted religious teachings, and carried risk. However, they both also fostered the accumulation of capital and economic growth).

38. Ovid Demaris, *THE BOARDWALK JUNGLE* 15-16 (Bantam Books 1986).

39. *Id.* at 18, 22.

40. *Id.* at 23.

41. Editorial, *A Brave, New Atlantic City*, WASH. POST, June 7, 1977, at A16.

42. *See* Christopher James Kane, *Analyzing the Campaign Finance Debate: The Spectrum of Reform and Louisiana's Trump Card*, 4 LOY. J. PUB. INT. L. 27-28 (2003) (citing the Tillman Act of Jan. 26, 1907, Ch. 420, 34 Stat. 864 (current version at 2 U.S.C. § 4416 (2005)), which attempts to curb corporate influence and eliminate corporate political contributions without shareholder consent); Comment, *Problems in Corporate and Union Spending in Federal Elections*, 31 ROCKY MTN. L. REV. 370 (1959) (discussing the types of political activities prohibited by federal statute which regulate the financial contributions of corporations and labor unions); Federal Corrupt Practices Act of 1925, Ch. 368, tit. III, 43 Stat. 1070 (recodifying and strengthening the Tillman Act); Hatch Political Activities Act of 1940, Ch. 640, 54 Stat. 767 (current version at 5 U.S.C. § 1502(a)(3), 1503 (2005)) (attempting to reduce the ability of politicians to influence elections); Taft-Hartley Act of 1947, Ch. 120, 61 Stat. 136 (current version at 29 U.S.C. § 141 (2005)) (extending prohibitions to include expenditures as well as contributions because of the congressional investigations into the 1944 and 1946 elections); Law of June 25, 1948, Ch. 645, 62 Stat. 723 (revising the judicial code).

43. *See* Scott Mason, *Casenote: Casino Ass'n of La. v. State: The Louisiana*

thwart quid pro quo corruption.⁴⁴ Many states quickly followed Congress' lead.⁴⁵ Some states have further chosen to enact statutes that prohibit or limit political contributions specifically from persons in the gaming industry.⁴⁶

In those states that have chosen to legalize gambling, there is some evidence that legalization does not remove corrupt public officials.⁴⁷ Rather, "[legalization] transfers [corruption] from the local law-enforcement level to state legislatures and administrative agencies."⁴⁸ For this reason, in several states that allow gaming, the legislatures have chosen to enact statutes that prohibit or limit contributions from persons in the gaming industry to elected officials, candidates, or parties.⁴⁹ These states include Indiana,⁵⁰ Iowa,⁵¹ Kentucky,⁵² Louisiana,⁵³ Michigan,⁵⁴ Nebraska,⁵⁵ New Jersey,⁵⁶ and Virginia.⁵⁷ Courts have often upheld the constitutionality of such statutes.⁵⁸ On the other hand, courts have generally found statutes that attempt to limit or prohibit contributions supporting or opposing ballot measures or referenda

Supreme Court's Retreat From First Amendment Protection For Campaign Contributors, 48 LOY. L. REV. 795, 795 (2002) (citing Fed. Election Campaign Act amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (current version at 21 U.S.C. § 441a (2005))).

44. Mason, *supra* note 43, at 795.

45. *Id.*

46. *See id.* (citing *Casino Ass'n of La.*, 820 So.2d at 503-04, which identified a number of state statutes prohibiting political contributions by persons in the gaming industry).

47. Martz, *supra* note 9, at 458.

48. *Id.* at 455.

49. *Casino Ass'n of La. v. State ex rel. Foster*, 2002-0265, p. 13 (La. 6/21/02); 820 So.2d 494, 503.

50. *See* IND. CODE § 4-33-10-2.1 (2005) (prohibiting contributions from any officer or person holding an interest in a gaming entity).

51. *See* IOWA CODE § 99.F6(4)(a) (2005) (prohibiting contributions from riverboat gambling corporations).

52. *See* KY. REV. STAT. ANN. § 154A.160 (West 2005) (prohibiting contributions from persons owning lottery contracts).

53. *See* LA. REV. STAT. ANN. § 18:1505.2 (2005) (prohibiting contributions from owners and employees of casinos).

54. *See* MICH. COMP. LAWS § 432.207(b)(4)-(5) (2005) (prohibiting contributions from any licensee or person with an interest in a gaming entity).

55. *See* NEB. REV. STAT. § 49-1469.01 (2005) (prohibiting contributions from lottery contractors, both during the contract as well as for three years after the contract).

56. *See* N.J. STAT. ANN. § 5:12-138 (West 2005) (prohibiting contributions from casino officers or key employees).

57. *See* VA. CODE ANN. § 59.1-375, 376 (2005) (prohibiting contributions from pari-mutuel corporations, executives, their husbands, wives, and family members).

58. *See generally In re Soto*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989) (upholding a ban on political contributions from a key employee of a casino); *Casino Ass'n of La. v. State ex rel. Foster*, 2002-0265 (La. 06/21/02); 820 So.2d 494 (upholding a ban on political contributions from the casino industry).

unconstitutional.⁵⁹ These rulings are based largely on the fact that ballot measures are not “candidates,” and thus there is no chance for “corruption” stemming from how a ballot measure is funded.⁶⁰

For example, a New Jersey statute provides:

[No] officer, director, casino key employee or principal employee of an applicant for or holder of a casino license . . . shall directly or indirectly, pay or contribute any money or thing of value to any candidate for nomination or election to any public office . . . or to any group, committee or association organized in support of any such candidate or political party.⁶¹

This statute was found constitutional in *In re Soto*.⁶²

D. Campaign Finance Reform

Statutes prohibiting contributions from persons with interests in the gaming industry are not isolated; they are part of a larger picture of campaign finance reform.⁶³ Champions of campaign finance reform praise this reform as a necessity to curb excessive influence and corruption.⁶⁴ Supporters of campaign finance reform, such as Richard Briffault, admit that the restrictions it imposes implicate rights of free speech and association.⁶⁵ However, these supporters argue that such limitations are justified by the government’s interest in preventing corruption or even the appearance of corruption.⁶⁶ In support of this argument, pro-reformers cite examples of corporate executives who testified before the United States Senate Committee on Commerce in 1998, stating that they gave political donations specifically when valuable government contracts were at stake.⁶⁷ Other donors

59. See Colin L. Black, *Recent Development: Brown v. State: The Louisiana Supreme Court Considers Free Speech, Campaign Finance, and Legalized Gambling*, 71 TUL. L. REV. 1593, 1604 (1997) (citing *Brown v. State ex rel. Dep’t of Pub. Safety & Corr.*, 96-2204, (La. 10/15/1996); 680 So. 2d 1179, which found unconstitutional a state statute that prohibited contributions supporting or opposing ballot measures from a video gaming licensee).

60. *Id.* at 1605.

61. N.J. STAT. ANN. § 5:12-138 (2005).

62. *In re Soto*, 565 A.2d at 1088.

63. See generally, John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L. J. 115 (2004) (applauding the U.S. Supreme Court’s decision in *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), which upheld major provisions of the Bipartisan Campaign Reform Act of 2002 (107 P.L. 155, 116 Stat. 81 (2002) [hereinafter BCRA]).

64. See Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L. J. 147 (2004) (praising *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, calling the decision a “stunning triumph for campaign finance reform”).

65. Briffault, *supra* note 64, at 147.

66. *Id.*

67. Stephen Ansolabehere, James M. Snyder, Jr., & Michiko Ueda, *Did Firms Profit From Soft Money?*, 3 ELECTION L. J. 193 (2004).

feared that their firms would lose competitive advantages due to regulations if they did not contribute.⁶⁸

Critics of campaign finance reform claim that it unconstitutionally abridges free speech.⁶⁹ Indeed, one critic of the *McConnell* decision, Lillian R. BeVier, went so far as to state that “[t]here is little point in attempting one more time to persuade either the victorious litigators or their many academic champions that they are the ones that have got the First Amendment backwards and that the majority opinion is wrong on just about every point.”⁷⁰ Another critic of campaign finance reform, Cecil C. Kuhne, III, argues that “[t]he federal election campaign laws . . . are already . . . so voluminous, so detailed, so complex, that no ordinary citizen dare run for office.”⁷¹ Kuhne skeptically advises that no one should “even contribute a significant sum, without hiring an expert advisor in the field,”⁷² and that campaign finance reform “can be expected to grow more voluminous, more detailed, and more complex in the years to come - and always, always, with the objective of reducing the excessive amount of speech.”⁷³

Critics of campaign finance reform also argue that such reform goes beyond merely interfering with speech but also interferes with association.⁷⁴ Robert F. Bauer argues that the *McConnell* decision took an extremely limited view of the right of association, and that this interpretation may signal the demise of the right of association in the context of campaign finance law.⁷⁵

As we shall see, both arguments supporting and opposing reforms have merit.

68. *Id.*

69. See Mitch McConnell, *The Future Is Now*, 3 ELECTION L. J. 123 (2004) (criticizing the U.S. Supreme Court's decision in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, in which the author was the lead plaintiff). McConnell states that the U.S. Supreme Court, by a one-vote margin in the *McConnell* decision, “stifle[d] political discourse” and “bestowed upon Congress extraordinary authority to regulate speech.” *Id.*

70. See Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L. J. 127, 127-28 (2004) (arguing that the majority in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, did not engage in strict scrutiny, as it should have, but rather gave far too much deference to BCRA, like it would to other regulations affecting commercial economic activity).

71. See Cecil C. Kuhne, III, *Rethinking Campaign-Finance Reform: The Pressing Need For Deregulation and Disclosure*, 38 J. MARSHALL L. REV. 633 (2004) (arguing that corruption can be prevented or at least substantially reduced by full disclosure of campaign contributions).

72. *Id.* at 639.

73. *Id.*

74. Robert F. Bauer, *McConnell, Parties, and the Decline of the Right of Association*, 3 ELECTION L. J. 199, 199-200 (2004).

75. *Id.* at 199.

III. ANALYSIS

The main legal issue concerning statutes that attempt to limit political contributions from persons in the gaming industry is a constitutional one. On the one hand, political contributions have long been viewed as a form of political speech and association.⁷⁶ As such, political contributions are entitled to great protection under the First Amendment.⁷⁷ On the other hand, there is a strong state interest in eliminating corruption or the appearance of corruption.⁷⁸ Is the interest in eliminating corruption strong enough to outweigh the individual's freedom to make contributions? The answer is, "it depends."

A. *The First Phase: Courts Support Legislation Banning Contributions*

One of the earliest cases to examine the constitutionality of a state statute prohibiting contributions from key persons in the gaming industry was *In re Soto*.⁷⁹ In that case, the court found that Ms. Soto was prohibited from both making political contributions as well as from donating free legal services to a

76. *In re Soto*, 565 A.2d at 1096.

77. See U.S. CONST. amend. I. (stating that Congress shall abridge neither freedom of speech nor the people's right to peaceably assemble).

78. *In re Soto*, 565 A.2d at 1088.

79. *Id.* The Casino Control Commission of New Jersey had designated Ms. Soto as a key employee because she held several key positions in the gaming industry. *Id.* at 1092. Ms. Soto had been associate general counsel for Trump Casino Hotel, and later she was Vice President for Compliance and Legal Affairs for the Claridge Casino Hotel. *Id.* In both positions, she was a key casino employee and had the required license. *Id.* Ms. Soto appealed the Commission's decision that she was statutorily prohibited both from making political contributions as well as from donating free legal services to a political party. *Id.* at 1093. The statute provided:

No applicant for or holder of a casino license, nor any holding, intermediary or subsidiary company thereof, nor any officer, director, casino key employee or principal employee of an applicant for or holder of a casino license or of any holding, intermediary or subsidiary company thereof nor any person or agent on behalf of any such applicant, holder, company or person, shall directly or indirectly, pay or contribute any money or thing of value to any candidate for nomination or election to any public office in this State, or to any committee of any political party in this State, or to any group, committee or association organized in support of any such candidate or political party.

N.J. STAT. ANN. § 5:12-138 (2006).

Ms. Soto had sought a declaratory judgment that she could participate in four political activities: (1) She wanted to serve on the Platform Resolutions Committee of the New Jersey Hispanic Democratic Party; (2) She wanted to provide free legal services to the New Jersey Hispanic Democrats; (3) She wanted to be a member of the "Committee of 200," costing one thousand dollars annually; and (4) she wanted to serve on the Affirmative Action Committee of the New Jersey Democratic Party. *In re Soto*, 565 A.2d at 1093.

political party.⁸⁰ However, the court ruled that Ms. Soto was free to participate in committees and activities that primarily involved assembly, advocacy, and expression of political views.⁸¹

In its ruling, the court analyzed several issues raised on appeal. First, it evaluated the constitutionality of the statute in light of both the state and federal constitutions.⁸² Although the court noted a balancing test under the state constitution in *In re Soto*, it also noted that the state courts look to both federal courts as well as courts of other states when interpreting constitutional issues.⁸³

The court began by stating that political activity and association, of which contributions are a part, are among this country's most broadly protected First Amendment rights.⁸⁴ When a state limits such a protected interest, its action is subject to the strictest scrutiny.⁸⁵ Such action by a state will be allowed only if the state has an important conflicting interest sufficient to justify it, and if the state limits the protected interest in the least restrictive manner possible.⁸⁶

Ms. Soto's first argument on appeal was that the complete prohibition of political contributions violated her First Amendment rights.⁸⁷ In *Buckley v. Valeo*, the United States Supreme Court held that caps on contributions to federal candidates were not unconstitutional. The *In re Soto* court agreed with the Court's reasoning in *Buckley* that the contributor is still afforded the ability to express his views and engage in political association, and that the quantity of the *contribution* does not affect the quantity of the *communication*.⁸⁸ In addition, the *In re Soto* court observed

80. *In re Soto*, 565 A.2d at 1093.

81. *Id.* The court found that Ms. Soto could participate in both the Platform Resolutions Committee and the Affirmative Action Committee of the New Jersey Democratic Party. *Id.* The court reasoned that these activities primarily involved assembly, advocacy, and political expression of views. *Id.*

82. *Id.* at 1094-95. In analyzing fundamental rights under New Jersey's Constitution, the state has developed a three-part balancing test. *Id.* at 1095 (citing *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985)); N.J. CONST. art. I, para. 1. The courts consider "the nature of the affected right, the extent to which the governmental restriction intrudes upon the right[,] and the public need for the restriction." *In re Soto*, 565 A.2d at 1095.

83. *In re Soto*, 565 A.2d at 1095.

84. *Id.*; U.S. CONST. amend. I.

85. *In re Soto*, 565 A.2d at 1094-95.

86. *Id.* at 1095.

87. *Id.*

88. *Id.* at 1096 (emphasis added). Further, while a contribution to a candidate shows the donor's support of the candidate, it does not show the underlying basis for that support. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976)). Rather, the contributor's expression is symbolized by the *act* of contributing. *Id.* A financial limit does not limit the contributor's other rights of expression, association, or the discussion of issues. *Id.* Further, the *Buckley* court reasoned that the prevention of corruption or the appearance of

that “gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the Constitution itself.”⁸⁹

Another of Ms. Soto’s specific challenges to the statute was that a limit on contributions, as opposed to a total ban, should be the means to regulate the political activity of key casino personnel.⁹⁰ However, the court rejected this suggestion in no uncertain terms.⁹¹ The *In re Soto* court refused to “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”⁹² Defining ‘corruption’ as “a subversion of the political process,” the *In re Soto* court was not only concerned about *quid pro quo* corruption—dollars for favors—but the appearance of corruption as well.⁹³ Thus, because gaming is a “nonessential and inherently dangerous commodity,” the court concluded that the State had great concern and thus great constitutional power in regulating public health, safety, morals, and general welfare.⁹⁴

corruption was a governmental interest important enough to justify restrictions on contributions. *Buckley*, 424 U.S. at 25-29.

89. *In re Soto*, 565 A.2d at 1097 (quoting *Knight v. Margate*, 431 A.2d 833, 842 (N.J. 1981)). See N.J. CONST. art. IV, § 7, para. 2 (1947) (prohibiting gambling in New Jersey unless the voters allow it through a referendum). Ms. Soto further argued that section 138 was overbroad in prohibiting contributions to political parties as well as to candidates. *In re Soto*, 565 A.2d at 1099. To determine whether her argument was valid, the court then analyzed the role of the modern political party. *Id.* at 1097-98. According to the court, a political party can no longer be seen as merely a private association of citizens. *Id.* at 1097. Rather, the modern political party is a quasi-governmental organization, inseparable from our representative form of government. *Id.* It is formed for the purpose of influencing policy and nominating candidates for office, and its activities are regulated by our legislatures. *Id.* Such policy-making could reasonably include matters affecting or attempting to affect the casino industry. *Id.* at 1098. Therefore, the state has a compelling interest in maintaining the integrity of political parties, and restrictions such as those found in section 138 are justified. *Id.*

90. *In re Soto*, 565 A.2d at 1098. That is, she argued that a less restrictive means of regulation was available. *Id.*

91. *Id.*

92. *Id.* (quoting *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 210 (1982)).

93. *Id.* (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). The court went on to reason that because the casino industry is particularly vulnerable to organized crime, there is “no viable alternative” to a total ban of political contributions in order to maintain the public trust of that industry in particular, and in the state regulatory process in general. *Id.*

94. *Id.* at 1099 (citing *In re Application of Boardwalk Regency Corp. for Casino License*, 434 A.2d 1111, 1119-20 (N.J. Super. Ct. App. Div. 1981)). Ms. Soto further argued that section 138 was overbroad in that it prohibited contributions to all political candidates and committees, whether or not they had anything to do with casino regulation. *In re Soto*, 565 A.2d at 1099. The court rejected this argument, reasoning that elected representatives often

Next, Ms. Soto argued that the phrase “thing of value” was void for vagueness.⁹⁵ In its interpretation, the court determined that the legislature intended the phrase “thing of value” to extend beyond material items such as money or property, and to include other more subtle forms of personal advantage.⁹⁶ Therefore, when read in context, the court held that the phrase “thing of value” was not unconstitutionally vague.⁹⁷

Ms. Soto also challenged the phrase “professional services” for vagueness.⁹⁸ The court decided that section 138 gave Ms. Soto

have influence that extends beyond their official powers. *Id.* (citing *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 67 (Ill. 1976)). Thus, it is impossible to tell which officeholders will be in a position to actually influence or participate in regulating the casino industry. *Id.* at 1099. Therefore, it was reasonable for the legislature to proscribe contributions to any candidate. *Id.* at 1100.

95. *In re Soto*, 565 A.2d at 1101. The court noted that this phrase was used in over 40 other New Jersey statutes. *Id.* at 1102. The court reasoned that such a commonplace phrase could not be said to be vague *per se*. *Id.* Rather, the court interpreted it using common sense within the context of the statute. *Id.*

96. *Id.* at 1102 (quoting *People v. Hochberg*, 386 N.Y.S.2d 740 (N.Y. 1976)).

97. *Id.*

98. *Id.* The court defined a “professional service” as one that (1) is performed by a person authorized by law to practice a recognized profession; (2) is regulated by law; (3) requires advanced knowledge and learning by lengthy formal specialized study. *Id.* at 1103 (citing N.J. STAT. ANN. § 40A:11-2(6)). For example, technical and scientific computer services were held to be professional, while electrical inspection and enforcement services were not. *Id.* (citing *Autotote Ltd. v. N.J. Sports & Exposition Authority*, 427 A.2d 55, 59 (N.J. 1981)), which describes technical and professional computer services as “professional services” *Id.* See *Burlington Twp. v. Middle Dep’t Inspection Agency*, 421 A.2d 616, 626 (N.J. Super. Ct. Law Div. 1980) (ruling that electrical inspection and enforcement services were not “professional services”). The *In re Soto* court recognized that the practice of law is not limited to litigation, but rather encompasses a wide variety of services requiring legal knowledge and ability. *In re Soto*, 565 A.2d at 1103. Indeed, even some other state courts could not define the practice of law with certainty. See, e.g., *Rhode Island Bar Ass’n v. Lesser*, 68 R.I. 14, 17, 26 A.2d 6 (1942) (defining the practice of law as “all advice to clients and all action taken for them in matters connected with the law,” though noting that it is difficult to define precisely); *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 90 Ariz. 76, 87, 366 P.2d 1, 9 (Ariz. 1961) (defining the practice of law as “those acts, whether performed in court or law office, which lawyers customarily have carried on from day to day through centuries,” while noting that it is not possible to define the term exhaustively). The New Jersey court reasoned that Ms. Soto could not seek to invalidate section 138 for vagueness because in so doing, “she [was] seek[ing] to have the undefinable specifically defined.” *In re Soto*, 565 A.2d at 1103. The court also applied another common sense test: Did the statute give a person of ordinary intelligence fair notice that his conduct was forbidden? *Id.* (quoting *In re Suspension of DeMarco*, 414 A.2d 1339 (N.J. 1980)). This is not “a linguistic analysis conducted in a vacuum.” *Id.* (quoting *In re Suspension of DeMarco*, 414 A.2d at 1345). Rather, it includes the statute’s language, related provisions, and the facts of the

sufficient notice that her contributions would be interpreted as legal, and therefore professional services.⁹⁹ Although the “practice of law” cannot be precisely defined, its indistinct definition did not automatically make the statute void for vagueness.¹⁰⁰

Finally, Ms. Soto argued that section 138 violated her right to equal protection under the Fourteenth Amendment of the United States Constitution.¹⁰¹ Arguing that similarly situated persons should be treated alike, she contended that casino employees were wrongfully singled out and prohibited from making political contributions.¹⁰² However, the court rejected her argument, reasoning that the legislative and judicial branches have both recognized that the crime and corruption in the casino gaming industry are unique and thus subject to different treatment.¹⁰³

If a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny.¹⁰⁴ Because a limitation on a person’s financial contribution to a candidate or committee does not involve direct restraint on his political communication, the court determined that this statute has only an indirect effect on a fundamental right.¹⁰⁵ Therefore, the statute need only be rationally related to a state’s legitimate interest.¹⁰⁶ Section 138 prohibits contributions by key members of the casino industry. The court held that this statute was rationally related to the State’s interest in preventing political corruption as well as any negative impact upon public welfare and morals.¹⁰⁷

It is interesting to note that in deciding *In re Soto*, the New Jersey court relied heavily on an Illinois decision regarding a

controversy. *Id.* at 1103.

99. *In re Soto*, 565 A.2d at 1103.

100. *Id.*

101. *Id.* at 1104; U.S. CONST. amend. XIV, § 1.

102. *In re Soto*, 565 A.2d at 1104. Ms. Soto attempted to liken casino gaming to the horseracing and liquor industries — also highly regulated industries with a strong state interest in maintaining their integrity — noting that persons in those industries were not subject to such prohibitions. *Id.*

103. *Id.* In determining whether a law violates the Equal Protection Clause, the U.S. Supreme Court has applied a three-part test, as defined in *Dunn v. Blumstein*: [1] the character of the classification in question; [2] the individual interests affected by the classification; and [3] the governmental interests asserted in support of the classification. *Id.* (citing *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)).

104. *In re Soto*, 565 A.2d at 1104 (citing *Greenberg v. Kimmelman*, 494 A.2d at 300-01). In order to justify the restriction, the state must establish a compelling state interest supporting the classification, and that no less restrictive alternative is available. *Id.*

105. *Id.* Also, key persons in the gaming industry did not constitute a suspect class. *Id.*

106. *Id.*

107. *Id.* Nevertheless, the court also remarked that even if section 138 were subject to strict scrutiny analysis, it would pass the three-part *Dunn v. Blumstein* test. *Id.* at 1105.

different industry (liquor), *Schiller Park Colonial Inn, Inc. v. Berz*.¹⁰⁸ The New Jersey court found great similarity between the industries of casino gaming, horseracing, and liquor, all of which are susceptible to corruption and can be particularly harmful to citizens if improperly regulated.¹⁰⁹

In *Schiller Park Colonial Inn*, the Illinois Supreme Court upheld a state statute that banned liquor licensees from making political contributions.¹¹⁰ The Illinois Supreme Court reasoned that there was a substantial state interest involved in regulating the sale of alcohol and protecting citizens from the dangers associated with alcohol.¹¹¹ The *Schiller Park Colonial Inn* court also reasoned that the State had an interest in preventing liquor licensees from gaining influence over elected officials.¹¹² Finally,

108. *Id.*; *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976). Perhaps this is because at the time *In re Soto* was being decided, New Jersey and Nevada were the only states with casino gaming. Nevada was the first state to allow casino gaming. Act of Mar. 19, 1931, ch. 99, 1931 NEV. STAT. 165. In 1976, New Jersey became the second state to allow casino gaming, with a voter referendum. However, interestingly, voters initially rejected a casino referendum in 1974. Sullivan, *Jersey Rejects Casino Proposal*, N.Y. TIMES, Nov. 6, 1974, at 1. The 1976 version allowed for much more security and regulation. The New Jersey legislature then passed the Casino Control Act in 1977, N.J. STAT. ANN. § 5:12-1 *et seq.*, and the first casino opened in 1978. New Jersey was the only state at that time with such a statute barring key employees from political contributions. In fact, this was the first time that the New Jersey courts were asked to interpret section 138. Perhaps, too, New Jersey relied on Illinois authority because, although there were many New Jersey cases regarding regulation of the gaming industry (casinos, horse racing, etc.), none had dealt with political contributions and therefore were not on point. See, e.g., *Niglio v. N.J. Racing Comm'n*, 385 A.2d 925, 929 (N.J. Super. Ct. App. Div. 1978) (barring the spouse of a disqualified person from owning horses for the harness racing industry); *Jersey Downs, Inc. v. N.J. Racing Comm'n*, 246 A.2d 146, 148 (N.J. Super. Ct. App. Div. 1968) (refusing to review the applicant's harness racing license application because a harness racing referendum had been defeated by the voters); *Costanzo v. N.J. Racing Comm'n*, 313 A.2d 618, 619 (N.J. Super. Ct. App. Div. 1974) (approving the commission's power to revoke licenses if it is in the public interest to do so).

109. *In re Soto*, 565 A.2d at 1099, n.3 (citing *In re Boardwalk Regency Casino License Application*, 434 A.2d 1111, 1119-20 (N.J. Super. Ct. App. Div. 1981)).

110. An Act relating to alcoholic liquors (The Liquor Control Act), ILL. REV. STAT. 1973, ch. 43, para. 132. art. VI, § 12a.

It is unlawful for any licensee [or officer, associate, representative, agent or employee], where more than 5% of the licensee's gross income is derived from the sale of alcoholic liquor, . . . to become liable for, pay or make any contribution directly or indirectly toward the campaign fund or expenses of any political party, or candidate for public office . . . Any such [person who violates] any of the provisions of this Section shall be guilty of a Class A misdemeanor, and the issuing authority shall revoke the license.

Id.

111. *Schiller Park Colonial Inn*, 349 N.E.2d at 65.

112. *Id.*

the *Schiller Park Colonial Inn* court expressed concern that without the ban, liquor licensees might be pressured to make contributions.¹¹³

The licensees argued that the statute infringed upon their constitutional right of free speech.¹¹⁴ However, because the statute did not prevent the licensees from participating in the political process, voting, joining political parties, or otherwise advocating their views, the court determined that the statute was not unconstitutional.¹¹⁵ In addition, the court upheld a total ban, rather than a limit, on contributions, reasoning that licensees who aggregated smaller contributions could otherwise thwart the purpose of the statute.¹¹⁶

It is quite interesting to note that although the *In re Soto* court found *Schiller Park Colonial Inn* to be persuasive authority, there are two notable differences between the cases. First, the Illinois statute did not define contributing “thing[s] of value” as did the New Jersey statute. The *Schiller Park Colonial Inn* court interpreted that a “contribution,” as used in the Illinois statute, referred strictly to money.¹¹⁷

Hypothetically, it is not clear whether the New Jersey court would consider such professional services a “thing of value” (and thus prohibited under section 138) if provided for valuable consideration, but at a discounted rate. The state statute itself

113. *Id.* at 65-66. Regarding the last point, that liquor licensees might feel pressure to make political contributions, the *Schiller Park Colonial Inn* court did not elaborate on where this pressure might come from. *Id.* Did the court think pressure might come from other licensees? Perhaps if a licensee knows his competitors may contribute, he may feel obligated to do so as well, to “keep up with the Joneses.” Or did the court think this pressure might come from officials themselves, who would offer to consider more favorable regulations for contributors, or threaten stricter regulations for non-supporters? The court was silent on these points, but perhaps it considered both possibilities.

114. *Id.*

115. *Id.* at 66.

116. *Id.*

117. *Id.* at 69. The *Schiller Park Colonial Inn* court remarked that one other way that the liquor licensees could have participated in the political process, in addition to voting, joining parties, etc., would be volunteering services to political parties or groups. *Id.* Yet this is exactly what the *In re Soto* court rejected! However, the *In re Soto* court distinguished between providing personal, non-professional services incidental to membership in a political organization (which would not have violated section 138) and providing professional legal services (which did violate section 138). *In re Soto*, 565 A.2d at 1100. The *In re Soto* court reasoned that free legal services were valuable not because of the volunteer’s personal ideological beliefs and advocacy of these beliefs, as is much of political volunteering, but rather because of the volunteer’s professional skill and expertise. *Id.* at 1101. Because a candidate or party would otherwise have to pay for legal services, the *In re Soto* court reasoned that such services, when provided at no charge, were indistinguishable from money. *Id.*

does not make this distinction. However, the United States Supreme Court noted that such discounts were “financial support” to campaigns.¹¹⁸

The Supreme Court of New Jersey held that lenders’ discounts were a “thing of value,” according to the Retail Installment Sales Act of 1960 (RISA).¹¹⁹ Because the *In re Soto* court seemed determined to interpret the statute strictly against political contributions from key casino employees, it is quite possible that the court would find that discounted professional services would be a “thing of value.” Their “value” would arguably be the difference between the market rate and the rate actually charged. If this indeed were the case, such services would be likely to be violative of section 138.

It is also unclear whether the New Jersey courts would permit casinos to hire lobbyists to influence legislators. That is, is a lobbyist’s service a “thing of value”? Other jurisdictions have considered similar issues.¹²⁰ The court did not discuss whether subjective intent of the *donor* might assist in determining if an item was a “thing of value.” This is a factually difficult issue. Indeed, the recipient official in this case argued that he did not value the items given to him!¹²¹

118. ‘Financial Support’ means a direct or indirect contribution where the purpose, object or foreseeable effect of the support is to influence the election of a candidate. Financial support includes, but is not limited to:

1. Contributions of money, securities, or any material *thing of value*;
2. Payments to or subscription for fund raising events of any kind (e.g. raffles, dinners, beer or cocktail parties and so forth);
3. Discounts in the price or cost of goods or services, except to the extent that commercially established discounts are generally available to the customers of the supplier.

United Steelworkers of Am. v. Sadlowski, 457 U.S. 102, 126 (1982) (emphasis added)(interpreting article V, § 27, of the 1978 USWA Constitution).

119. Sherman v. Citibank, 668 A.2d 1036, 1055 (1995)(interpreting N.J. STAT. ANN. § 17:16C-50 (2004)).

120. In *State v. Hoebel*, 41 N.W.2d 865, 867 (Wis. 1950), the Wisconsin Supreme Court held that spending by lobbyists to give food to friends of legislators for the purpose of influencing the legislators on behalf of their cause was a “thing of value.” Similarly, a Connecticut court included lobbyists’ services as “thing[s] of value.” *ABC, LLC v. State Ethics Comm’n of Conn.*, 2001 Conn. Super LEXIS 3531 at **26-27 (Dec. 12, 2001). In a federal district case in Pennsylvania, the court ruled that whether an item was a “thing of value” was based on the recipient official’s subjective interpretation. *United States v. McDade*, 827 F. Supp. 1153, 1174 (E.D. Pa. 1993).

121. *McDade*, 827 F. Supp. at 1174. Perhaps the closest tie between the terms “lobbying” and “thing of value” was the definition of lobbying below:

A lobbyist is a person who in return for money or other *thing of value* agrees to attempt to influence, directly or indirectly, the passage or defeat of any legislation which may include investigations by the Congress. Lobbying is lawful activity permitted and regulated by the Congress. A lobbyist may not, however, endeavor corruptly to influence, obstruct or impede a Congressional investigation.

With New Jersey's stance on strict regulation of the casino industry, it seems likely that the court would broadly interpret "thing[s] of value" to include lobbyists' services, and thus prohibit them under section 138.

A second way in which *Schiller Park Colonial Inn* is distinguishable from *In re Soto* is that the Illinois court refused to rule on whether the statute was overbroad in banning officers, associates, representatives, agents, employees of licensees, as well as the licensees themselves, from making such contributions.¹²² The *Schiller Park Colonial Inn* court stated that only an employee or associate of a liquor licensee could bring such an argument, not the licensees themselves.¹²³ Ms. Soto, on the other hand, was such an officer/employee. The *In re Soto* court explained that section 138 was not overbroad in including casino officers and key employees because the statute was narrowly drawn and precisely tailored to apply to persons in a supervisory position and to empower those making discretionary decisions that regulate casino operations.¹²⁴

Thus, the clear theme throughout the *In re Soto* decision was that "a constitutional interest may be impeded by a state only if the state has a conflicting interest sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right."¹²⁵ The *In re Soto* court reasoned that the right to make political contributions might be forgone for the greater purpose of avoiding impropriety or its appearance.¹²⁶ This is particularly true in the casino gaming industry, in which large sums of money might appear to influence the government and elected officials.¹²⁷

(emphasis added) *United States v. Mitchell*, 877 F.2d 294, 300 n.6 (4th Cir. 1989).

122. *Schiller Park Colonial Inn*, 349 N.E.2d at 67. The licensees in *Schiller Park Colonial Inn* argued that, in the alternative, even if the statute was not unconstitutional as it applied to them, it was overbroad as it applied to their employees and associates. *Id.* However, because it was the licensees themselves who were bringing the suit, the court said that the licensees did not have standing to raise the issue regarding constitutionality as to their associates and employees. *Id.* That is, those who challenge the constitutionality of a statute must be within a class of persons who claim to suffer harm by its alleged unconstitutionality. *Id.*

123. *Id.*

124. *In re Soto*, 565 A.2d at 1100. In fact, the court even estimated the number of persons likely to be affected by the section 138 ban on contributions to be only 3.5% of all casino employees. *Id.* at n.4. Thus, the court reasoned that the statute did not extend too far in fulfilling the state's interest. *Id.* at 1100.

125. *Id.* at 1095 (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)).

126. *Id.* at 1106.

127. *Id.*

Although *In re Soto* was the first decision to analyze a statute prohibiting contributions from casino personnel, other courts soon analyzed similar issues. While the questions were similar, the results were not.

*B. The Second Phase: Courts Find Legislation Banning
Contributions Unconstitutional*

In recent years, Louisiana courts have had the opportunity to interpret several of their statutes and administrative rules regarding the regulation of political contributions from persons in the gaming industry.¹²⁸ In these cases, the Supreme Court of Louisiana has interpreted the regulations in very different ways.

First, in *Brown v. State ex rel. Dept. of Public Safety & Corrections*,¹²⁹ the Louisiana Supreme Court affirmed the trial court's finding that a state statute prohibiting video gaming licensees from making contributions to committees supporting or opposing issues was unconstitutional.¹³⁰ On its face, the statute at issue was very similar to section 138, which the New Jersey court found constitutional in *In re Soto*. So why did the two courts rule differently?

First, the facts of the two cases are quite distinct. In *Brown*, the plaintiff, Charles Brown was a video gaming licensee who wished to promote video poker by contributing to an advertising fund.¹³¹ The *Brown* court closely examined the ruling of *In re Soto* but distinguished it.¹³² The Louisiana court reasoned that while the New Jersey statute prohibited contributions to candidates or groups supporting candidates, the *Brown* case dealt with contributions promoting a point of view.¹³³

128. *Brown v. State ex rel. Dep't of Pub. Safety & Corr.*, 680 So.2d 1179 (La. 1996); *Penn v. State ex rel. Foster*, 751 So.2d 823 (La. 1999); *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002).

129. *Brown*, 680 So.2d at 1179.

130. No member or board employee nor a member of the immediate family of a board member or board employee shall make a contribution or loan to, or expenditure of behalf of, a candidate or committee.
LA. REV. STAT. ANN. § 27:13(C)(6).

131. *Brown*, 680 So.2d at 1180. The procedural history of *Brown* was that the trial court had found the statute unconstitutional and issued a preliminary injunction. *Id.* A suspensive appeal had been granted. *Id.*

132. *Id.* at 1182.

133. *Id.* As author Colin Black pointed out, this distinction is important because spending to influence a referendum will not have the same potential for corruption as spending on behalf of a candidate; this is because there is simply no candidate to corrupt. Colin A. Black, *Recent Development: Brown v. State: The Louisiana Supreme Court Considers Free Speech, Campaign Finance, and Legalized Gambling*, 71 TUL. L. REV. 1593, 1605 (1997). Several U.S. Supreme Court cases have also recognized this difference. *See, e.g.*, *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (holding that expenditures to advocate views and money

The *Brown* court also took a different position from that of *In re Soto* regarding a state's interest in regulating the gaming industry. The *Brown* court relied in part on another case concerning the liquor industry, *44 Liquormart, Inc. v. Rhode Island*, a United States Supreme Court decision.¹³⁴ This case was somewhat factually similar in that it dealt with the prohibition on the advertising of liquor, which, like gaming, is something that some people consider a "vice."¹³⁵ The *Brown* court agreed with the United States Supreme Court in ruling, "[t]he fact that many consider gambling and liquor vices does not justify the suppression of differing views. There is no vice exception to the right of free speech."¹³⁶ Indeed, the United States Supreme Court stated in *44 Liquormart* that it is "paternalistic" to suppress truthful commercial information simply because the state assumes that the public will misuse it.¹³⁷ The *Brown* court recognized that gaming itself is strictly regulated and may be suppressed.¹³⁸ However, it was quick to note that "the State may not ban commercial speech simply because the State may constitutionally prohibit the underlying conduct."¹³⁹

While the *Brown* court also recognized that prevention of corruption was an important state objective, it reasoned that corruption was only likely to be a problem when licensees made contributions to candidates or their committees, giving the appearance of *quid pro quo* dollars for political favors. However, the court stated that corruption was not likely to be an issue when contributions are made to committees supporting or opposing ballot measures.¹⁴⁰ Not only did the *Brown* court say that there is "no significant state interest" in prohibiting contributions for ballot measures,¹⁴¹ it further stated that communicating such ideas

contributed to a candidate are fundamentally different); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *aff'd*, 454 U.S. 1130 (1982) (holding that contributions to political committees organized to urge passage of a casino gambling amendment was unconstitutional); *Colo. Republican Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 614 (1996) (holding that there is a distinct difference between expenditures coordinated with a candidate and independent expenditures).

134. *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996).

135. *Id.* at 508.

136. *Brown*, 680 So.2d at 1183 (citing *44 Liquormart*, 517 U.S. at 514).

137. *44 Liquormart*, 517 U.S. at 497.

138. *Brown*, 680 So.2d at 1183.

139. *Id.* (citing *44 Liquormart*, 517 U.S. at 511). Similarly, in *Greater New Orleans Broad. Ass'n v. United States*, 519 U.S. 801 (1996), the U.S. Supreme Court overturned a 5th Circuit court case from Louisiana banning casino advertising, relying on the *44 Liquormart* decision.

140. *Brown*, 680 So.2d at 1183 (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981)).

141. *Id.* at 1181.

requires the expenditure of money.¹⁴² Thus, the court reasoned, Louisiana may not restrict contributions to committees organized to communicate ideas. For this reason, the *Brown* court found the statute to be unconstitutional.

Nevertheless, there was a strong dissenting opinion in *Brown* by Justice Joseph Bleich.¹⁴³ Although he appreciated the paramount importance of First Amendment protections to both political association and political speech, he also recognized that these constitutional interests might be impeded in certain instances.¹⁴⁴ When the state has a sufficiently compelling countervailing interest and the restriction is narrowly tailored to meet the state's interest, the constitutional interest may be limited.¹⁴⁵ However, Justice Bleich voted against the majority, not because he expressly disagreed with their decision, but because he felt their decision was premature.¹⁴⁶

It is interesting that Justice Bleich correctly foreshadowed the litigation that would follow.¹⁴⁷ While he noted that the validity of contributions to candidates was not questioned in that case, he predicted that the issue would ultimately be presented to the court. Thus, he reasoned that the Louisiana courts had not heard

142. *Id.* at 1183. There may be other reasons why the *Brown* decision was different from the court's decision in *In re Soto*. First, Ms. Soto was a "key employee" in the casino industry. *In re Soto*, 565 A.2d at 1092. Perhaps because of her powerful position, the New Jersey court seemed to view her contribution as if it were made symbolically from the wealthy casino industry itself. *Id.* at 1097. Because of the need to regulate such huge sums of money, the New Jersey court perhaps felt that the potential for corruption was greater, and that therefore greater restrictions were acceptable. On the other hand, Charles Brown was merely the owner of a lounge. *Brown*, 680 So.2d at 1179. Perhaps the Louisiana court thought that because he was an individual acting alone and not as a representative of a huge industry, the potential for corruption was less, and that therefore such restrictions were not acceptable.

143. *Brown*, 680 So.2d at 1183-85 (Bleich, J., dissenting).

144. *Id.*

145. *Id.* at 1183 (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)). Justice Bleich wrote at length about Louisiana's tumultuous 300-plus-year history with gaming, most notably the Louisiana Lottery, also known as the "Golden Octopus." *Id.* The Louisiana Lottery Co. was said to have bribed legislators and paid off state newspaper editors to ensure a good public image. *Id.* at 1185. Its owners made millions, but Louisiana received almost nothing. *Id.* Wherever gambling went, other problems followed. Vices such as prostitution, crime, corruption, and other societal ills, including poverty and negative impact on families and communities, arose wherever gambling was legal. *Id.*

146. *Id.* at 1183. Bleich noted that the case was "not factually ripe for decision." *Id.* He was concerned that the controversy needed a full trial on the merits, not merely a hearing for a preliminary injunction. *Id.* He felt that this decision should not have been rendered before a complete and fully developed record had been presented to the court. *Id.*

147. *Id.* at n.1.

the last on the controversy of political contributions by those in the gaming industry.

As predicted by Justice Bleich in his dissenting opinion in *Brown*, in *Penn v. State ex rel. Foster*, the Louisiana Supreme Court considered the constitutionality of a statute restricting the right of holders of video-draw-poker licenses to contribute to candidates or political committees of candidates.¹⁴⁸

For reasons very similar to those in *Brown*, the court affirmed the lower court's ruling that such a statute was unconstitutional, reasoning that it violated the First and Fourteenth Amendments.¹⁴⁹

Although the court was again concerned with preventing corruption or the appearance of corruption, the court's focus centered on the restrictions of the First Amendment rights of those affected.¹⁵⁰ The majority ruled that the First Amendment does not permit the State to target certain groups and exclude them from the political process.¹⁵¹ The majority also reasoned that attempts to regulate speech pose a constitutional threat that is greater than attempts to regulate conduct.¹⁵²

The *Penn* court was also concerned that the statute was not uniform in its application to members of the video poker industry.¹⁵³ The fact that some groups were excluded while others

148. *Penn. v. State ex rel. Foster*, 751 So.2d 823, (La. 1999).

No person to whom this Subsection is applicable . . . shall make a contribution, loan, or transfer of funds, including but not limited to any in-kind contribution . . . to any candidate, any political committee of any such candidate, or to any political committee which supports or opposes any candidate.

LA. REV. STAT. ANN. § 18:1505.2(L)(2) (2006).

The persons to whom the statute applied were defined as follows:

Any person who holds a license or permit as a distributor of gaming devices, who holds a license or permit as a manufacturer of gaming devices, who holds a license or permit as a device service entity, and any person who owns a truck stop or licensed pari-mutuel or off-track wagering facility which is a licensed device establishment, all pursuant to the Video Draw Poker Devices Control Law.

LA. REV. STAT. ANN. 18:1505(L)(3)(a)(i).

149. *Penn*, 751 So.2d at 824; U.S. CONST. amend. I, XIV § 2.

150. *Penn*, 751 So.2d at 826. Indeed, the court was committed to including campaign contributions as a form of political speech. *Id.* The court recognized that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

151. *Id.* Again, the court was concerned that the complete prohibition on contributions was far more restrictive than the contribution limits upheld in *Buckley*. *Id.* (citing *Buckley*, 424 U.S. at 21).

152. *Id.* at 831. "The State cannot legalize several forms of gambling in one fell swoop and then shortly thereafter limit the First Amendment rights of some persons in the gambling industry by claiming that the now legal, licensed and highly regulated industry is corrupt." *Id.* at 839 (Lemmon, J., concurring).

153. *Id.* at 830 (Johnson, J., concurring). The statute prohibited

were not would seem to defeat the purpose of preventing corruption.¹⁵⁴ The *Penn* court, like the earlier *Brown* court, rejected the reasoning of *In re Soto* and *Schiller Park Colonial Inn* that the state's interest in regulating certain "vice" industries sufficiently outweighed First Amendment rights.¹⁵⁵

As could have been predicted from *Brown*, there were strong dissents in *Penn*. The dissenters found support for the statute's constitutionality through the *In re Soto* and *Schiller Park Colonial Inn* decisions.¹⁵⁶ Above all, the dissenters reasoned that political speech by association and activity is much more strongly protected than the giving of contributions.¹⁵⁷

The dissenters argued that the ban on contributions was closely drawn to achieve a compelling state interest: the prevention of, or appearance of, corruption.¹⁵⁸ In arguing so, the dissenters rejected the petitioners' argument that campaign disclosure regulations sufficiently met this goal.¹⁵⁹ Thus, the dissenters asserted that they would have refused to second-guess the legislature's measure in banning certain contributions altogether.¹⁶⁰ In particular, they noted that gambling is an "absolute revocable privilege" and that it has a unique, if not infamous, place in the State's history.¹⁶¹

With strong arguments on both sides, the debate surrounding political contributions from those in the gaming industry was still far from settled in Louisiana.

contributions from distributors, manufacturers, service entities, pari-mutuel facilities, off-track wagering facilities, and truck stops. *Id.* However, the statute did not prohibit contributions from owners of devices, bars, restaurants, lounges, and clubs. *Id.*

154. *Id.*

155. *Id.* at 836-37. Instead, the *Penn* court again looked to *44 Liquormart*, which found no vice exception to the protection of commercial speech. *Id.* (citing *44 Liquormart*, 517 U.S. at 513-14).

156. *Penn*, 751 So.2d at 848 (Knoll, J., dissenting); *Id.* at 844-45, 847 (Victory, J., dissenting).

157. *Id.* at 848 (Knoll, J., dissenting); *Id.* at 844-45 (Victory, J., dissenting). Indeed, the dissenters likened financial support to candidates as "speech by proxy," and noted, "The transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 848 (Knoll, J., dissenting) (citing *Buckley*, 424 U.S. at 21). Justice Skelly Wright has also advocated this viewpoint. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

158. *Penn*, 751 So.2d at 852.

159. *Id.*

160. *Id.* As Bleich had noted in his dissent in *Brown*, the *Penn* dissenters commented on Louisiana's history with gambling. *Id.*

161. *Id.*

C. *The Third Phase: Courts Support Legislation Banning Contributions — Again*

In *Casino Association of Louisiana v. State ex rel. Foster*, the Louisiana Supreme Court once again confronted the issue of the constitutionality of statutes barring political contributions from members of the gaming industry.¹⁶² The statute evaluated was the same as that in *Penn.*¹⁶³ however, the parties contesting the statute's constitutionality were a different group: a casino association and its members.¹⁶⁴ This time, they challenged the applicability of the statute as it applied to a different contributing class.¹⁶⁵ The statute stated that the ban also applied to contractors, spouses, key employees, holding companies, and persons with direct or indirect interest in the activities listed.¹⁶⁶

This time, the court departed from precedent in earlier cases and reversed the trial court, holding that the statute was constitutional.¹⁶⁷ Why did the *Casino Association of Louisiana* court radically depart from its previous rulings in *Brown* and *Penn.*?

First, the *Casino Association of Louisiana* court observed that in *Penn.* and *Brown*, only some portions of the statute were under attack.¹⁶⁸ Just as *Brown* had foreshadowed *Penn.*, *Penn.* had foreshadowed *Casino Association of Louisiana* in noting that the court was only ruling on the validity of certain portions of the statute.¹⁶⁹ This implied that future courts evaluating different parts of the statute would not be bound by past decisions.

162. *Casino Ass'n of La.*, 820 So.2d at 494.

163. LA. REV. STAT. ANN. 18:1505.2(L)(2).

164. *Casino Ass'n of La.*, 820 So.2d at 494.

165. LA. REV. STAT. ANN. § 18:1505.2(L)(3)(a)(ii) (2007) holds:

Any person who holds a license to conduct gaming activities on a riverboat, who holds a license or permit as a distributor or supplier of gaming devices or gaming equipment including slot machines, or who holds a license or permit as a manufacturer of gaming devices or gaming equipment including slot machines issued pursuant to the Louisiana Riverboat Economic Development and Gaming Control Act [La. R.S. 27:41 et seq.], and any person who owns a riverboat upon which gaming activities are licensed to be conducted.

Id.

166. *Casino Ass'n of La.*, 820 So.2d at 496-97 (citing LA. REV. STAT. ANN. § 18:1505.2(L) et seq. (2007)).

167. *Casino Ass'n of La.*, 820 So.2d at 495.

168. *Id.* at 497, 499 (citing *Penn.*, 751 So.2d at 824, n.2); *Brown*, 680 So.2d at 1182.

169. *Casino Ass'n of La.*, 820 So.2d at 497, 499. For example, the *Casino Ass'n of La.* court distinguished the video poker industry, which had been at issue in *Penn.*, from the casino industry, which was at issue in *Casino Ass'n of La.* *Id.* First, the number of video poker licensees was potentially unlimited. *Id.* On the other hand, the state legislature had authorized only one land-based casino and 15 riverboats. *Id.* (citing LA. REV. STAT. ANN. §§ 27:241, 27:65).

Second, prohibitions in *Penn* did not apply equally to all persons in the video poker industry, thus they were held to be unconstitutional.¹⁷⁰ On the other hand, the restrictions on those in the casino industry were uniform and thus upheld.¹⁷¹

The *Casino Association of Louisiana* court, like its *Brown* and *Penn* predecessors, focused on whether there was a compelling state interest in restricting First Amendment rights.¹⁷² However, this time, the court favored the state's interest over that of the petitioners. The *Casino Association of Louisiana* court stated that the legislature's ability to license, regulate, and suppress gaming was a legitimate exercise of police power, the purpose of which was to protect the public welfare by keeping the state free from criminal and corrupt elements.¹⁷³

This court, unlike its predecessors in *Brown* and *Penn*, recognized the validity of *In re Soto* and *Schiller Park Colonial Inn*.¹⁷⁴ Perhaps *Casino Association of Louisiana* recognized the decisions' validity in part because a significant body of case law had been developing throughout the country in the immediate aftermath of *Brown* and *Penn*, both of which upheld bans or limits on contributions.¹⁷⁵

170. *Casino Ass'n of La.*, 820 So.2d at 509.

171. *Id.* Indeed, as author Scott Mason points out, as a result of *Penn* and *Casino Ass'n of La.*, there now exists the anomalous situation that Louisiana video poker licensees may contribute up to \$5,000 to a candidate, but casino and riverboat interests can contribute nothing. Scott Mason, *Casenote: Casino Ass'n of Louisiana v. State: The Louisiana Supreme Court's Retreat From First Amendment Protection for Campaign Contributors*, 48 LOY. L. REV. 795, 818 (2002); LA. REV. STAT. ANN. § § 18:1505.2(H)(1)(a), 18:1505.2(H)(2)(a) (1981). Mason predicts that because *Casino Ass'n of La.*, the latter decision, approved the bans, this dichotomy will likely be resolved in the future by uniform bans rather than uniform repeal of the bans. Mason, *supra* note 43, at 818.

172. *Id.* (citing *Buckley*, 424 U.S. at 24).

173. *Casino Ass'n of La.*, 820 So.2d at 505 (citing *Theriot v. Terrebonne Parish Police Jury*, 436 So.2d 515, 516 (La. 1983)); LA. REV. STAT. ANN. § 27:2(A) (1996). The court also emphasized that any license or permit for gaming was an "absolute revocable privilege and not a right, property or otherwise." *Casino Ass'n of La.*, 820 So.2d at 505 (citing LA. REV. STAT. ANN. § 27:2(B)). The *Casino Ass'n of La.* court also pointed out that because this particular statute would only affect one land-based casino and 15 riverboats, a ban would have a "very minimal effect on candidates' ability 'to amass the resources necessary for effective advocacy.'" *Casino Ass'n of La.*, 820 So.2d at 503 (citing *Buckley*, 424 U.S. at 21).

174. *Casino Ass'n of La.*, 820 So.2d at 503.

175. *See id.* (citing *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999)) (upholding the complete ban on campaign contributions by out-of-district lobbyists); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (upholding the constitutionality of the complete ban of campaign contributions by lobbyists); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp.2d 1183 (E.D. Cal. 2001) (upholding the constitutionality of the complete ban of campaign contributions by lobbyists); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000)

Additionally, the *Casino Association of Louisiana* court examined the legislature's intent in passing the statute.¹⁷⁶ In advocating for the passage of this bill, Senator Dardenne had emphatically stated that the purpose of the bill was to limit the gambling industry's influence in the political process.¹⁷⁷

Further, the *Casino Association of Louisiana* court rejected the petitioners' position that the statute served no legitimate purpose.¹⁷⁸ The petitioners argued that other statutes providing for extensive background checks and strict licensing restrictions for casino licensees were sufficient to ensure that such individuals were suitable and honest.¹⁷⁹ Like the court in *In re Soto*, the *Casino Association of Louisiana* court refused to second-guess the legislature.

But because the policy issues and arguments for each side were essentially the same as those in *Brown and Penn* — whether the state's regulatory interest outweighed the individuals' speech interest — how did the tide shift from *Penn* in 1999 to *Casino Association of Louisiana* in 2002? Did the court really find distinguishing facts between the video poker and casino industries, or was there a change in policy?

To answer this question, an examination of the individual justices' rulings may be helpful. Both cases were decided by the narrowest of margins: four to three.¹⁸⁰ Piecing together the authors of the majority, concurring, and dissenting opinions, one may determine that none of the justices who wrote in *Penn* changed their positions in *Casino Association of Louisiana*.¹⁸¹ Another justice who concurred with the majority in *Penn*, Justice

(upholding constitutionality of limits on campaign contributions). The *Casino Ass'n of La.* court even recognized the validity of similar restrictions in *Blount v. SEC*, which had been decided in 1995—before *Brown and Penn*, and yet ignored by both of them. *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995) (upholding restrictions on municipalities securities professionals from contributing or soliciting contributions for campaigns of officials from whom they might obtain business).

176. *Casino Ass'n of La.*, 820 So.2d at 506-07 (citing Committee on Senate and Governmental Affairs, Verbatim Transcript, Senate Bill 12, Senator Dardenne (Mar. 26, 1996)).

177. *Id.* He had noted that such a ban had been successful in New Jersey (a reference to *In re Soto*), and he emphasized that this limitation was of paramount importance to the people of Louisiana as well. *Id.*

178. *Id.* at 508.

179. *Id.*; LA. REV. STAT. ANN. § 27:310(B)-(C) (1999).

180. *Penn*, 751 So.2d at 823; *Casino Ass'n of La.*, 820 So.2d at 494.

181. *Penn*, 751 So.2d at 823; *Casino Ass'n of La.*, 820 So.2d at 494. That is, the justices who wrote for the majority or concurrence in *Penn* (Johnson, Calogero, and Kimball, JJ.), who found the statute unconstitutional, dissented in *Casino Ass'n of La.* for all the same reasons. *Penn*, 751 So.2d at 823; *Casino Ass'n of La.*, 820 So.2d at 494. Similarly, Justice Victory, who dissented in *Penn*, wrote the majority opinion in *Casino Ass'n of La.* *Penn*, 751 So.2d at 823; *Casino Ass'n of La.*, 820 So.2d at 494.

Lemmon was no longer on the bench when *Casino Association of Louisiana* was decided.¹⁸² Would it be reasonable to conclude that the only difference between the outcomes of *Casino Association of Louisiana* and *Penn* is the “chance” replacement of one justice? One will never know how Justice Lemmon would have decided *Casino Association of Louisiana*, so perhaps this question is unanswerable.

It is notable that omitted from *Casino Association of Louisiana* was any reference to the scandals that plagued Louisiana in recent history.¹⁸³ Perhaps rather than guessing that the replacement of one justice might have been the reason for the difference between the *Casino Association of Louisiana* and *Penn* decisions, it may be plausible to say that the tide of public policy was truly turning. Perhaps the court was not just giving lip service to the importance of preventing corruption or even the appearance of corruption, especially now that it was a reality.

One author has questioned whether *Casino Association of Louisiana* might have opened a Pandora’s box of additional regulation of political contributions aimed at even more industries having a tendency toward corruption.¹⁸⁴ Another author suggested that there is no meaningful difference between a vote cast by an

182. *Penn*, 751 So.2d at 823, *Casino Ass’n of La.*, 820 So.2d at 497, n.4. Although *Casino Ass’n of La.* does not mention the names of the other three justices who sided with Victory in constituting the majority, we know from other Louisiana Supreme Court opinions that Justice Weimer was the newcomer, replacing Justice Lemmon. *State v. Harris*, 820 So.2d 471 (La. 2002); *In re Bolton*, 820 So.2d 548 (La. 2002). Therefore, we can also conclude that Justices Traylor and Knoll, who dissented in *Penn*, concurred in *Casino Ass’n of La.* *Penn* 751 So.2d at 823; *Casino Ass’n of La.*, 820 So.2d at 494.

183. For example, the *Casino Ass’n of La.* court did not mention whether it considered that Louisiana Governor, Edwin Edwards, and several aides had been convicted in 2000 for accepting bribes to grant casino licenses. Michelle Millhollon, *Corruption Suit to Go On*, THE ADVOCATE (Baton Rouge, La.), p. 11-A (June 11, 2002). Nor did *Casino Ass’n of La.* reference ex-senator Larry Bankston’s conviction in 1997 for accepting payments from a truck stop owner in return for assistance in halting a local option vote. Joe Gyan, Jr., *Prosecutors Oppose Retrial for Ex-senator Bankston*, THE ADVOCATE (Baton Rouge, La.), p. 4-B; (June 13, 2001). Nor did *Casino Ass’n of La.* mention Representative Sebastian Guzzardo’s resignation in 1996 after he admitted accepting payments from organized crime-affiliated video poker companies in exchange for trying to influence the Louisiana Gaming Board to grant licenses to them. Joe Gyan, Jr., *Guzzardo Quits After Guilty Plea*, THE ADVOCATE (Baton Rouge, La.), p. 1A (May 2, 1996).

184. Christopher James Kane, *Comment: Analyzing the Campaign Finance Debate: The Spectrum of Reform and Louisiana’s Trump Card*, 4 LOY. J. PUB. INT. L. 27, 54 (Spring 2003). Kane asks whether the recent ENRON and WorldCom scandals will cause legislatures to more strictly regulate contributions from corporations. *Id.* Kane further notes that because *Casino Ass’n of La.* gives the legislatures more power to regulate campaign contributions, it also gives them the power to reduce the political voice of select groups, as long as a compelling public interest can be shown. *Id.* at 55.

elected official against the will of the majority of his or her constituents because of a bribe and the same vote cast because of a campaign contribution.¹⁸⁵ There is probably some truth to this statement. However, until a more viable alternative is established, the constitutionality of bans on campaign contributions from those in the gaming industry will probably be upheld.

IV. PROPOSAL

Although there are compelling arguments for allowing unrestricted political contributions, this comment favors the restrictions that have been upheld in cases such as *In re Soto* and *Casino Association of Louisiana* discussed above.¹⁸⁶ This section proposes that the New Jersey statute evaluated in *In re Soto* be adopted as a model statute.¹⁸⁷ Such a model statute might be considered by the legislatures of states that have allowed gaming, or at least by those states that have experienced real problems with corruption where gambling has been involved.

The New Jersey statute proposed as a model statute for other states reads as follows:

No applicant for or holder of a casino license, nor any holding, intermediary . . . or subsidiary company thereof, nor any officer, director, casino key employee . . . or principal employee of an applicant for or holder of a casino license or of any holding, intermediary . . . or subsidiary company thereof . . . nor any person or agent on behalf of any such applicant, holder, company . . . or person, shall . . . directly or indirectly, pay or contribute any money or thing of value to any candidate for nomination or election to any public office in this State, or to any committee of any political party in this State, or to any group, committee . . . or association organized in support of any such candidate or political party.¹⁸⁸

The reasons supporting the adoption of such a statute are numerous.

First and most importantly, the proposed statute is strictly drawn to meet a compelling state need. The judges who authored opinions in the *Schiller Park Colonial Inn*, *In re Soto*, and *Casino Association of Louisiana* decisions, correctly expressed deep concern over corruption and the appearance of corruption.¹⁸⁹ These judges recognized that certain industries such as liquor and

185. David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 143 (1995).

186. *In re Soto*, 565 A.2d at 1088; *Casino Ass'n of La.*, 820 So.2d at 494.

187. N.J. STAT. ANN. § 5:12-138.

188. N.J. STAT. ANN. § 5:12-138.

189. *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 66-67 (Ill. 1976); *In re Soto*, 565 A.2d at 1100; *Casino Ass'n of La.*, 820 So.2d at 508.

, gaming are inherently riskier to society than others, and for this reason, stronger regulation of such industries is appropriate.¹⁹⁰

A state's needs addressed by the proposed model statute are several. First, a state has a compelling interest in regulating gaming and protecting its citizens from the dangers associated with gaming.¹⁹¹ Second, a state has a compelling interest in preventing or attempting to prevent gaming licensees from gaining influence over legislators or other political officials.¹⁹² Third, a state has a compelling interest in protecting the gaming licensees themselves from being pressured into making such political contributions.¹⁹³

The nature of the gaming industry itself allows for broad discretion on the part of a legislative body to regulate the industry.¹⁹⁴ Indeed, the *In re Soto* court boldly states that because "gambling is an activity rife with evil" to the extent that it is governed by the New Jersey constitution,¹⁹⁵ the state's regulatory power over such an industry is virtually without limit.¹⁹⁶

190. See generally *Schiller Park Colonial Inn, Inc.*, 349 N.E.2d at 69 (upholding the constitutionality of an Illinois state statute banning liquor licensees from making political contributions); *In re Soto*, 565 A.2d at 1098 (upholding the constitutionality of a New Jersey state statute banning casino key employees from making political contributions); *Casino Ass'n of La.*, 820 So.2d at 497 (upholding the constitutionality of a Louisiana state statute banning gaming licensees from making political contributions).

191. See *Schiller Park Colonial Inn, Inc.*, 349 N.E.2d at 65 (arguing that the state had a compelling interest in regulating alcohol and in protecting the citizens from the dangers associated with alcohol).

192. See *id.* (concluding that the state had a compelling interest in preventing liquor licensees from gaining influence over legislators and political figures).

193. See *id.* (finding that the state had a compelling interest in protecting liquor licensees from being pressured into making political contributions).

194. See *In re Soto*, 565 A.2d at 1105 (citing *Knight v. Margate*, 431 A.2d 833, 842 (N.J. 1981))(noting that gambling's effect and potential for harm to the public welfare and morals is substantial). The *In re Soto* court stated that gambling, even when legalized, "has been traditionally associated with criminality and misconduct." *Id.* See also *Schiller Park Colonial Inn, Inc.*, 349 N.E.2d at 65 (citing *Daley v. Berzanskis*, 269 N.E.2d 716, 718 (Ill. 1971))(noting that the business of selling intoxicating liquor is "attended with danger to the community" and is "closely related to certain evils in society"). Because of the problems inherent in such an industry, it is subject to any regulation that has substantial relation to public health, safety, and welfare. *Id.*

195. See *In re Soto*, 565 A.2d at 1105 (citing *Knight*, 431 A.2d at 842)(noting that "[g]ambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the Constitution itself").

196. See *id.* (citing *Grand Union Co. v. Sills*, 204 A.2d 853, 860 (N.J. 1964)) (stating that the power of the legislature to regulate a dangerous and nonessential industry is virtually without limit); accord *In re Boardwalk Regency Casino License Application*, 434 A.2d 1111, 1119-20 (N.J. Super. Ct. App. Div. 1981) (following *Grand Union*, 204 A.2d at 853).

Critics of campaign finance reform would most likely cry foul at the statute proposed. Like the dissenters in *Casino Association of Louisiana*, such critics argue that a statute like this unconstitutionally impinges on donors' rights of speech and association under the First Amendment.¹⁹⁷ However, more persuasive is the majority's reasoning that the "careful exercise of legislative power [is necessary] to protect the general welfare of the state's people by keeping the state free from criminal and corrupt elements."¹⁹⁸

Such a model statute would be useful not only in states such as Louisiana and New Jersey but also in Illinois, which has seen its share of allegations of corruption involving persons in the casino industry.¹⁹⁹

Mr. Kuhne, an author and commercial litigator, is an advocate for "deregulation" in the world of campaign finance.²⁰⁰ Kuhne believes that the mere disclosure of those persons contributing to elected officials, candidates, and political parties will be sufficient to deal with corruption, by exposing the "primary actors" to a "bright light."²⁰¹ Indeed, Kuhne advocates for a laissez-

197. *Casino Ass'n of La.*, 820 So.2d at 510 (Calogero, J., dissenting); *Id.* at 511 (Kimball, J., dissenting); *Id.* at 512 (Johnson, J., dissenting).

198. *See id.* at 505 (describing how the development of a controlled gaming industry required strong control by the legislature). The *Casino Ass'n of La.* court, quoting the Louisiana legislature, went on to state that "the legislature further finds and declares it to be the public policy of the state that to this all persons, locations, practices, associations, and activities related to the operation of licensed and qualified gaming establishments and the manufacture, supply, or distribution of gaming devices and equipment shall be strictly regulated." *Id.* at 505-06. The *Casino Ass'n of La.* court further quoted the legislature's statement that "any license, casino operating contract, permit, approval, or thing obtained or issued pursuant to the provisions of [the statute in question] or any other law relative to the jurisdiction of the board is expressly declared by the legislature to be a[n]... absolute revocable privilege[,] . . . not a right[.]" *Id.* at 506.

199. *See, e.g.,* Mike Dorning, *Justice Department Nominee Linked to Lobbyist Withdraws*, CHI. TRIBUNE, Oct. 8, 2005, at C11 (stating that a lobbyist is under federal investigation for allegedly misappropriating Native American funds in an effort to lobby for casino interests); *See also* Christi Parsons & Ray Long, *Her Own Space; Having a Powerful Father Isn't Necessarily a Blessing For Lisa Madigan*, CHI. TRIBUNE, Sept. 11, 2005, at Magazine, C10 (describing Attorney General Lisa Madigan's report of possible corruption in Rosemont, the location of a proposed new casino, in which political figures of that suburb may be affiliated with organized crime).

200. *See* Kuhne, *supra* note 71, at 633 (stating that the First Amendment's purpose is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail").

201. *See id.* at 634 (stating that such disclosure will allow for a better-informed electorate). This author agrees that disclosure is vital in educating voters, but disagrees that mere disclosure is enough to eradicate the evil of corruption. *Id.*

faire attitude toward campaign contributions.²⁰² Kuhne claims that such deregulation has worked with “eminent success” in other industries, such as transportation, energy, and financial services.²⁰³

Mr. Kuhne’s argument is flawed. Kuhne is basically suggesting that campaign finance regulation is paternalistic because people are smart enough to determine who donates to whom, just by reading mandatory disclosure reports.²⁰⁴ He argues that “the voters themselves can decide whether the fact that a candidate has been heavily supported by a particular individual or group should weigh against his candidacy.”²⁰⁵ However, prior to this assertion, he states that the “total campaign spending for all local, state, and federal elections combined amounts to no more than fifteen dollars per eligible voter,” and that “[t]otal expenditures therefore constitute about 0.05 percent of gross domestic product.”²⁰⁶ His argument in setting forth these figures is that such spending is much lower on a per-voter basis in the United States than in other affluent democracies in the world, and that Americans’ perception of campaign finance spending is overestimated.²⁰⁷ However, it is more likely that the average American would not understand such dollars-per-eligible-voter and percent-of-gross-domestic-product calculations. What sounds like a good argument by Kuhne — let the marketplace of ideas regulate voters’ perceptions of candidates and elected officials, by giving voters all the information they need to make informed choices — is likely to fail in practice, if not in theory.

In Kuhne’s scenario, with disclosure attempting to do what regulation should do, it is more likely that voters would be unable to use the information provided by such disclosure meaningfully. This is not paternalistic; it is realistic. If voters cannot understand such disclosure, then voters cannot determine whether a candidate or elected official is beholden to special interest groups such as casinos. And if voters are unable to determine whether

202. See *id.* (citing *McConnell*, 540 U.S. at 259) (Scalia, J., concurring in part and dissenting in part)(arguing that the “American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate or ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth.”). This author means no disrespect toward either Justice Scalia specifically or to the American people generally, but campaign finance reports are not easy to read. The average person, without a mathematical, bookkeeping, or accounting background, would have a very difficult time reading and understanding such campaign disclosure reports.

203. *Id.* at 646.

204. *Id.*

205. *Id.*

206. *Id.* at 645.

207. *Id.*

candidates or officials are indebted to such special interest groups, these voters will not be able to make meaningful choices at the polls.

V. CONCLUSION

Gaming regulation is necessary to protect voters, especially where casinos and industries prone to influence and corruption exist. *Laissez-faire* and the invisible hand of the market place are insufficient to regulate the market of political ideas, where an industry such as gambling is concerned.

By analogy, regulation is necessary in our economy, to prevent drastic downturns and depressions. It is necessary to prevent huge corporations and trusts from monopolizing certain industries. It would be disingenuous to suggest that regulation is unnecessary in our economy, or that full disclosure in the form of annual reports and filings with the Securities and Exchange Commission are sufficient to prevent wrongdoing. No one is likely to suggest that regulation is unnecessary in our economy just because employees, stockholders, and other members of the public can read those reports and file a complaint if they do not like what they find.

The potential for evil is so sufficiently dangerous that it must be prevented from happening altogether, not merely from being reported. Statutes such as the one proposed, upheld by our courts and enforced by our executives, can help ensure a government that is as free as possible from corruption without sacrificing the rights guaranteed by the First Amendment.

