

Development of the Federal Law of Gambling

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Recommended Citation

G. Robert Blakey and Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978)
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CORNELL LAW REVIEW

Volume 63

August 1978

Number 6

THE DEVELOPMENT OF THE FEDERAL LAW OF GAMBLING

G. Robert Blakey† and Harold A. Kurland††

TABLE OF CONTENTS

INTRODUCTION	924
I. THE LOTTERY STATUTES: CHANGING ATTITUDES AND FEDERALISM	927
A. <i>State-Chartered Lotteries of the Nineteenth Century: The Fight for the Power to Regulate</i>	927
B. <i>Early Federal Attempts to Control Lotteries Through Regulation of the Mails</i>	931
C. <i>Lottery Statutes of the 1890's</i>	938
1. <i>Tightening Antimailing Restraints</i>	938
2. <i>Regulation Beyond the Mails: Legislation Under the Commerce Clause</i>	940

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The authors wish to express their thanks to Barbara H. Bares, Cornell Law School class of 1979, for her assistance in the preparation of this Article.

D.	<i>Modern Reforms of Federal Lottery Laws</i>	943
1.	<i>Overcoming Narrow Judicial Construction</i>	943
2.	<i>Extension to the Broadcast Media</i>	946
3.	<i>Concerns of Federalism: Accommodating Changes in State Law</i>	950
4.	<i>Residual Problems</i>	954
II.	MODERN CRIMINAL STATUTES: AN ATTACK ON ORGANIZED CRIME	958
A.	<i>The Kefauver Committee and the Johnson Act</i>	960
B.	<i>Robert F. Kennedy's Program Against Organized Crime</i>	964
1.	<i>Wire Communications—18 U.S.C. § 1084</i>	965
2.	<i>The Travel Act—18 U.S.C. § 1952</i>	968
3.	<i>Transportation of Wagering Paraphernalia—18 U.S.C. § 1953</i>	972
4.	<i>Strengthening the Johnson Act</i>	975
C.	<i>The Organized Crime Control Act of 1970</i>	977
III.	GAMBLING PROVISIONS UNDER ASSORTED FEDERAL POWERS	987
A.	<i>Criminal Provisions in Federal Enclaves</i>	987
B.	<i>Miscellaneous Noncriminal Provisions</i>	989
IV.	GAMBLING AND TAXATION	994
A.	<i>Special Wagering Taxes</i>	995
1.	<i>Legislative and Enforcement History</i>	995
2.	<i>Constitutional Attack</i>	999
3.	<i>The 1974 Amendments</i>	1002
4.	<i>The Tax Reform Act of 1976</i>	1004
B.	<i>Income Taxation and Gambling</i>	1005
C.	<i>Gambling and Taxation: Policy Alternatives</i>	1007
V.	AN EFFORT AT CODIFICATION AND REFORM—S. 1437 ..	1011
	CONCLUSION	1015

"Those who cannot remember the past
are condemned to repeat it."

*George Santayana*¹

INTRODUCTION

Taking as its basic premise that gambling is inevitable because it "is practiced, or tacitly endorsed, by a substantial majority of

¹ G. SANTAYANA, 1 LIFE OF REASON 284 (1905).

Americans,"² the Commission on the Review of the National Policy Toward Gambling³ recently suggested an approach that the federal government should follow in its regulation of gambling activities:

The Commission believes that the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.⁴

Although this broad recommendation reinforces the role the federal government has traditionally played in regulating gambling, the Commission also proposed specific amendments to the current federal gambling laws.⁵ Should Congress act upon the Com-

² See COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 1 (1976) [hereinafter cited as *GAMBLING IN AMERICA*]. In 1974, 88 million American adults (61% of the adult population) participated in some form of gambling. *Id.* at 3. Nearly 19 million adults (13%) engaged only in social betting with friends. *See id.*, table 4.I, at 59. While 53 million adults (37%) patronized both legal and illegal commercial gambling forms (*see id.*), only 16 million adults (11%) patronized illegal gambling operations exclusively (*see id.*) and under 10 million adults (7%) gambled exclusively at legal establishments (*see id.*). The Commission survey indicated that the total volume or gross handle of money legally wagered in 1974 was \$17.3 billion (*id.* at 63), an increase of over \$12 billion since 1960 (*id.* at 77). The estimates of the gross handle of money illegally wagered range from \$5 billion to \$39 billion. *Id.* at 63. In Nevada, gross taxable casino revenue rose from \$200 million in 1960 to more than \$1 billion in 1974. *Id.* The number of states permitting parimutuel racing increased from 26 to 32 (*id.* at 77, 105); 13 states established lotteries (*id.* at 77); two states instituted off-track betting (*id.* at 105); and one state established the first legal numbers game (*id.* at 77). Nevertheless, there has been little evidence of a widespread desire to expand casino-type games. Recent polls show that a majority of Americans would not welcome legalized casino gambling of the kind now operating in Nevada and Atlantic City, New Jersey. *See* N.Y. Times, June 29, 1978, at A15, col. 4.

³ The Commission was established by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 804-809, 84 Stat. 922, to "conduct a comprehensive legal and factual study of gambling in the United States . . . and to formulate and propose such changes . . . as the Commission may deem appropriate." *Id.* § 805(a).

⁴ *GAMBLING IN AMERICA*, *supra* note 2, at 5. The Commission's suggestion that Congress enact a federal statute to grant to the states the power to regulate gambling within their borders may be political rhetoric. The states have always exercised sovereignty, consistent with the Constitution, over intrastate activities. Further, Congress's powers under the commerce clause to regulate gambling in interstate commerce would remain unaffected by such a law.

⁵ The Commission recommended, *inter alia*, that the federal government not tax gambling winnings and operations, that 18 U.S.C. § 1955 (1976), which prohibits illegal gambling businesses, be amended to limit its reach to large-scale gambling operations, and that the federal government make greater use of civil remedies against gambling offenders. *See* *GAMBLING IN AMERICA*, *supra* note 2, at 2.

mission's report or otherwise attempt a comprehensive review of federal gambling policy—such legislation, S. 1437,⁶ has already passed the Senate—its members ought to bring to their task a firm grasp of what the federal gambling law is, how that law developed, and what policies underlie it.⁷ This Article seeks to shed light on each of these questions.

The more than fifty provisions of federal law that affect gambling are scattered throughout various titles of the United States Code.⁸ As the Code's presentation of these gambling provisions lacks unity, so, too, does their history; the story of their development is not one but several. The earliest congressional concern arose in response to the inability of states acting alone to control the perceived abuses of the nineteenth century state-chartered lotteries. Subsequent federal gambling legislation has manifested a variety of policies that include depriving organized crime of its gambling revenue, harmonizing federal gambling taxes with diverse state gambling policies, and developing a coherent gambling policy to govern federal enclaves. Understanding the development of each of these strands of the federal law of gambling is a first step toward learning the lessons common to all.

⁶ 95th Cong., 2d Sess. (1978).

⁷ Justice Holmes aptly put it: "In order to know what [the law] is, we must know what it has been . . ." O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

⁸ See 7 U.S.C. §§ 1-17b (dealings in commodity futures), 2044(b)(7) (gambling conviction as ground for denial, revocation, or suspension of farm labor contractor registration certificate) (1976); 8 U.S.C. § 1104(f)(4) (1976) (alien whose income principally derived from gambling not of good moral character); 12 U.S.C. §§ 25a (participation by national banks in lotteries and related activities), 339 (participation by state member banks in lotteries and related activities), 1730c (participation by insured institutions in lotteries and related activities), 1829a (participation by state nonmember insured banks in lotteries and related activities) (1976); 15 U.S.C. §§ 1171-1178 (1976) (transportation of gambling devices); 18 U.S.C. §§ 1081-1083 (gambling ships), 1084 (interstate wire communications), 1301-1307 (lotteries), 1511 (obstruction of state or local law enforcement with intent to facilitate illegal gambling businesses), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1953 (interstate transportation of wagering paraphernalia), 1955 (prohibition of illegal gambling businesses), 1961-1968 (racketeer influenced and corrupt organizations), 2516(1)(c) (authorization for interception of wire or oral communications) (1976); 19 U.S.C. § 1305 (1976) (importation of lottery tickets and advertisements); 26 U.S.C. §§ 165(d) (income tax deduction for wagering losses), 4401-4424 (wagering taxes), 4461-4464 (occupational tax on coin-operated devices) (1976); 39 U.S.C. § 3005 (1976) (lotteries conducted through mail); 42 U.S.C. § 3781 (1970 & Supp. V 1975) (definition of "organized crime"); 47 U.S.C. § 312(a)(6) (1970 & Supp. V 1975) (administrative sanctions against radio operation).

I

THE LOTTERY STATUTES: CHANGING
ATTITUDES AND FEDERALISMA. *State-Chartered Lotteries of the Nineteenth Century:
The Fight for the Power to Regulate*

Lotteries flourished in the United States from the colonial period through the 1830's.⁹ Generally condoned by the law at their outset, lotteries were not only popular but also respectable:

For many years after [the lottery] began to prevail it was not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers. It was looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers.¹⁰

Many states soon banned private lotteries, largely because they competed with state lotteries and engendered fraud and corruption.¹¹ To further stifle competition, states also prohibited the in-state sale of tickets for neighboring state lotteries. Nevertheless, reflecting Jacksonian ideals—animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall—the states (and the District of Columbia through congressional regulation), one by one, proscribed lotteries altogether, usually by constitutional amendment.¹²

⁹ See generally NATIONAL INSTITUTE ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 655-734 [hereinafter cited as DEVELOPMENTS]; H. CHAFETZ, PLAY THE DEVIL 297-308 (1960); J. EZELL, FORTUNE'S MERRY WHEEL 177-203 (1960); G. SULLIVAN, BY CHANCE A WINNER: THE HISTORY OF LOTTERIES 12-43 (1972); F. WILLIAMS, LOTTERIES, LAWS AND MORALS 28-44 (1958).

¹⁰ A. SPOFFORD, LOTTERIES IN AMERICAN HISTORY, S. MISC. DOC. NO. 57, 52d Cong., 2d Sess. 174-75 (1893).

¹¹ See *id.* at 193. See generally J. EZELL, *supra* note 9, at 102-05.

¹² See DEVELOPMENTS, *supra* note 9, at 74-88; A. SPOFFORD, *supra* note 10, at 193. The development of the law of lotteries in the District of Columbia—a federal enclave under the jurisdiction of Congress (see U.S. CONST. art. I, § 8, cl. 17)—accurately reflects changing national attitudes and policies toward gambling and lotteries in particular. Washington, D.C. "had a special experience with lotteries." WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEGALIZED NUMBERS IN WASHINGTON 11 (1973). Lotteries were a popular means of financing public improvements at the turn of the nineteenth century,

Two obstacles, however, hampered the efforts of states to shelter their citizens from the perceived evils of the nineteenth century

and Washington, D.C., as a planned city, needed many new buildings. See J. EZELL, *supra* note 9, at 102-08. A number of lotteries were conducted, with scandal associated from the beginning. The most notorious was a lottery operated by Samuel Blodget in the 1790's, which ended with Blodget sacrificing his personal property to cover prizes he was unable to deliver as promised. *Id.* at 102-05. In 1812, Congress authorized lotteries for the District of Columbia, but the amount to be raised on an individual project could not exceed \$10,000, and the President had to approve. See Act of May 4, 1812, ch. 75, § 6, 2 Stat. 721. Congress also authorized specific lotteries. See, e.g., ANNALS OF CONG., 14th Cong., 1st Sess. 90 (1816) (lottery to benefit Georgetown University). Cf. ANNALS OF CONG., 10th Cong., 2d Sess. 501 (1808) (petition for lottery to benefit Alexandria church). For early cases arising from problems associated with lottery ventures, see *Shankland v. Mayor of Washington*, 30 U.S. (5 Pet.) 389 (1831); *Clark v. Mayor of Washington*, 25 U.S. (12 Wheat.) 40 (1827); *Mayor of Washington v. Young*, 23 U.S. (10 Wheat.) 406 (1825); *Brent v. Davis*, 23 U.S. (10 Wheat.) 395 (1825) (irregularities in lottery offering challenged); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (District of Columbia not authorized to sell lottery tickets outside its borders). *Young, Clark*, and *Shankland* all involved attempts by ticket purchasers in the same lottery to collect from its manager.

Congress responded to the corruption associated with gambling ventures in the District of Columbia. In 1831, the first congressional effort to establish comprehensive penal laws for the District of Columbia contained a section limiting the operation of gaming tables. See Act of Mar. 2, 1831, ch. 37, § 12, 4 Stat. 449. In 1842, Congress also outlawed the sale of lottery tickets in the District of Columbia by providing that maintaining a place of business for the sale of such tickets would be unlawful, that contracts for the sale of lottery tickets would be void, and that money paid for such contracts could be recovered. See Act of Aug. 31, 1842, ch. 282, 5 Stat. 578. Despite the new legislation, gambling persisted, and in some cases became legend. The Palace of Fortune, operated by Edward Pendleton, was allegedly the favorite of lobbyists and legislators alike in the decades before the Civil War. When Pendleton died, President Buchanan attended the funeral, and prominent Democrats served as pallbearers. H. CHAFETZ, *supra* note 9, at 182.

During the post-Civil War period, national attitudes toward gambling, and particularly toward lotteries, changed. Congress began to move in earnest against gambling ventures in the District of Columbia. Congress added "gift enterprises" to the list of prohibited activities in 1873 (see Act of Feb. 17, 1873, ch. 148, 17 Stat. 464), strengthened the prohibition regarding lottery tickets in 1878 (see Act of Apr. 29, 1878, ch. 68, 20 Stat. 39), and in 1883, adopted "[a]n act more effectually to suppress gaming in the District of Columbia" (Act of Jan. 31, 1883, ch. 40, 22 Stat. 411). In 1901, Congress largely codified the existing law and prohibited lotteries, gaming tables, three-card monte, and bookmaking. See Act of Mar. 3, 1901, ch. 854, §§ 863-869, 31 Stat. 1189. A Washington court summarized the law and public opinion concerning lotteries as follows:

Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry, and pandering to idleness and vice. . . . The keeping of a shop within this District for the sale of lottery or policy tickets is something affecting the entire country

United States v. Green, 19 D.C. (8 Mackey) 230, 241 (1890). The laws of the District of Columbia continue to prohibit many forms of gambling. See D.C. CODE §§ 22-1501 to -1515 (1973). Before the provision was held unconstitutionally vague in *Holly v. United States*, 464 F.2d 796 (D.C. Cir. 1972), it was also illegal to be present at an "illegal establishment," which was defined to include a "gambling establishment." See D.C. CODE § 22-1515(a) (1973).

lotteries. One was the contract clause of the Constitution.¹³ Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*¹⁴ established that any state's attempt to revoke a state charter would impermissibly impair the obligation of contracts.¹⁵ After *Dartmouth College*, states could forefend new lotteries but had to avoid interfering with existing lotteries.¹⁶

Dartmouth College symbolized the Marshall Court's policy of upholding property and privilege against the power of the people acting through state legislatures. With Marshall's death, however, the Court began to expand the power of state legislatures to pursue the public good at the cost of individual wealth. A line of decisions

¹³ "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. James Wilson is often thought to be the father of the contract clause. See B. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION II & n.25 (1938). Perhaps, he saw in it a means to secure "sure anchors of privilege and of property" to protect against "the irregular and impetuous tides of party and faction." Wilson, *Considerations on the Bank of North America* (1785), reprinted in 2 WORKS OF JAMES WILSON 824, 834 (R. McCloskey, ed. 1967). See B. WRIGHT, JR., *supra*, at 16-18.

¹⁴ 17 U.S. (4 Wheat.) 518, 624 (1819).

¹⁵ *Id.* Although many historians cite *Dartmouth College* as establishing the sanctity of legislatively-granted charters (see, e.g., A. SCHLESINGER, JR., THE AGE OF JACKSON 324-25 (1945)), the careful legal historian must comment on *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), which was, in fact, the first Supreme Court case to hold a state legislative enactment violative of the contract clause. *Fletcher* arose from the so-called "Yazoo Land Fraud" scandals which involved sales of public lands by a corrupt Georgia Legislature. Upon discovering the corruption, subsequent legislatures attempted to rescind the sales, even though the land had since been resold. The purchasers retained Alexander Hamilton, who advised them that the legislature's action contravened the contract clause. See B. WRIGHT, JR., *supra* note 13, at 21-22. In his opinion for the Court, Chief Justice Marshall agreed with Hamilton. See 10 U.S. (6 Cranch) at 136-39. The land grants were, to be sure, executed rather than executory obligations as demanded by the contract clause, but the land grants were attended, in Marshall's opinion, by an "implied contract" on the part of the grantor not to claim again the thing granted. *Id.* at 137. Consequently, the legislature could not act to set aside the sales.

¹⁶ The Missouri Supreme Court, for example, affirmed an acquittal of one selling lottery tickets in *State v. Hawthorne*, 9 Mo. 389, 396-97 (1845), on the ground that the contract clause prevented the Missouri Legislature from repealing prior grants and criminalizing lottery ticket sales formerly permitted. In 1821, the antilottery movement secured a constitutional amendment banning lotteries in New York. See N.Y. CONST. art. 7, § 11 (1821), reprinted in 2 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1341 (2d ed. 1878). Legislation enforced the ban prospectively (see Act of Mar. 15, 1822, ch. 71, § 1, 1822 N.Y. Laws 73), but existing lotteries continued. In 1833, the legislature reached a compromise with the firm of Yates & McIntyre—assignees of all of New York's outstanding lottery grants—whereby all lotteries would cease after one more year of operation. See Act of Apr. 30, 1833, ch. 306, 1833 N.Y. Laws 484. Public pressure on Yates & McIntyre had been building. See J. EZELL, *supra* note 9, at 214-15. McIntyre was a member of the legislature and also State Comptroller from 1806 to 1821. J. B. Yates, in turn, was a member of Congress and his brother was Governor of New York from 1823 to 1825. See *id.* at 86. There was a basis in fact, therefore, for the Jacksonian fear of legislatively-created privilege and profit in the operation of state-chartered lottery systems.

gradually subjected existing state-chartered lotteries to the policy choices of state legislatures. In *Charles River Bridge v. Warren Bridge*,¹⁷ the Court announced that state charters should be narrowly construed. Chief Justice Taney, Marshall's successor and a Jackson appointee, wrote for the Court: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."¹⁸ *Phalen v. Virginia*¹⁹ created a greater threat to existing lotteries. The Court upheld a state's power to impose reasonable limits on the duration of a lottery charter subsequent to granting it.²⁰ *Phalen*, a weak precedent because the charter involved "had become obsolete by non-user,"²¹ received reinforcement in *Stone v. Mississippi*.²² Chief Justice Waite wrote for a unanimous Court:

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not.²³

¹⁷ 36 U.S. (11 Pet.) 420 (1837).

¹⁸ *Id.* at 548. Men of privilege and property immediately recognized the implications of *Charles River Bridge*. Chancellor Kent commented that the decision "undermin[ed] the foundations of morality, confidence and truth." A. SCHLESINGER, JR., *supra* note 15, at 327 (quoting Kent, *Supreme Court of the United States*, 2 NEW-YORK REVIEW 372, 387 (1838)). An article in the *North American Review*, a Whig journal, lamented: "We have fallen under a new dispensation in respect to the judiciary." *Id.* at 328 (quoting Davies, *Constitutional Law*, 46 NORTH AMERICAN REVIEW 126, 153 (1838)).

¹⁹ 49 U.S. (8 How.) 163 (1850).

²⁰ *Id.* The Court's attitude toward lotteries shone through oft-cited language:

The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.

Id. at 168.

²¹ *Id.* at 169.

²² 101 U.S. 814 (1880).

²³ *Id.* at 820-21.

A cycle that began with Marshall, who found implied contracts in order to protect legislative charters, ended with Waite, who found implied understandings in order to overturn them.

Even after *Stone* swept the contract clause from the paths of the antilottery forces, state legislatures faced still another obstacle. Although a state legislature could prohibit lotteries from operating in the state, it could do little to prevent the distribution, through the mails, of tickets for lotteries chartered by other states. The problems of enforcement were too great. Because the antilottery state lacked the power to prosecute out-of-state operators or to regulate the mails, it would have had to attack lotteries at the consumer level—a difficult, expensive, and unpopular task. States seeking a more efficient method of controlling lotteries called upon the federal government to halt the flow of lottery tickets through the mails.²⁴ The antilottery forces found an ally in the United States Post Office. The Postal Service had discovered exploitation of the mails by several fraudulent lottery schemes,²⁵ and was seeking legislation to bolster its regulatory powers.²⁶ Prior to 1868, the only federal legislation concerning use of the mails by lotteries forbade postal authorities from acting as the lotteries' agents.²⁷

B. *Early Federal Attempts To Control Lotteries Through Regulation of the Mails*

Congress enacted its first significant limitation on state lotteries in 1868. Hidden in an "Act to further amend the postal Laws,"²⁸ the provision stated that: "it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning

²⁴ The Constitution grants Congress the "Power . . . To establish Post Offices and post Roads." U.S. CONST. art. I, § 8, cl. 7.

²⁵ For example, a firm in New York would obtain the names of persons living in rural districts throughout the country and send them circulars through the mail advertising a fraudulent "gift enterprise" scheme. The firm would receive in response large amounts of money daily. Whenever a customer complained that he had not received the "gift," the firm would reply either that it had never received the money from the purchasers or that it had already mailed the package, thus placing the blame on the Post Office, which could not disprove the allegations. See S. Misc. Doc. No. 57, 39th Cong., 1st Sess. 2 (1866).

²⁶ See S. 148, 39th Cong., 1st Sess. (1866).

²⁷ See Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238 (current version at 18 U.S.C. § 1303 (1976)). In 1821, the House had passed a resolution calling for a report by the Committee on the District of Columbia on the number and profits of lotteries. ANNALS OF CONG., 16th Cong., 2d Sess. 757 (1821).

²⁸ Act of July 27, 1868, ch. 246, 15 Stat. 194. The Act concerned, *inter alia*, the free return of nondeliverable mail (*id.* § 1), the establishment of postal money orders (*id.* § 2), and a discount for sales of postage stamps to vendors (*id.* § 12).

lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."²⁹ A provision that would have allowed the postmaster to open letters suspected of containing lottery materials was eliminated in conference,³⁰ making the new statute difficult to enforce. A provision imposing penalties on postal employees for unlawfully detaining or delaying mail remained in force,³¹ and, although it did not apply to mail prohibited by the new statute, postal authorities had no way, in the typical situation, to ascertain the contents of suspected letters without contravening the fourth amendment.³² When Congress codified the postal laws in 1872,³³ it reworded the 1868 limitation on the mailing of lottery materials, leaving only illegal lotteries subject to the prohibition.³⁴

During the next few years, while the nation fought a depression, criticism of remaining state-chartered lotteries intensified.³⁵ Between 1872 and 1876, seven additional states enacted constitutional amendments forbidding their legislatures to authorize lot-

²⁹ *Id.* § 13. The Senate had added the antilottery provision to the House bill. *See* CONG. GLOBE, 40th Cong., 2d Sess. 4175 (1868).

³⁰ CONG. GLOBE, 40th Cong., 2d Sess. 4412 (1868). Chairman Farnsworth of the House Committee on the Post-Office and Post-Roads reported that this would be a "dangerous power to confer upon postmasters." *Id.* The limitation on the mailing of lottery tickets, however, sparked little dispute and no open debate.

³¹ *See* REV. STAT. §§ 3890, 3891 (1875). The Attorney General observed:

While it may be lawful . . . to detain and refuse to deliver a letter or circular within the prohibition of the statute, it is unlawful for him to detain or delay any letter which is not . . . within that prohibition The officer may have acted in perfect good faith . . . he may have had reasonable ground to believe . . . that the letter detained was within the prohibition of the statute; and yet I cannot say . . . that such a plea would be a good defence, either to a public prosecution, or to a private suit, by the person aggrieved.

12 Op. Att'y Gen. 538, 539 (1868).

³² *Ex parte* Jackson, 96 U.S. 727 (1878).

³³ *See* Act of June 8, 1872, ch. 335, 17 Stat. 283.

³⁴ The section provided:

That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences

Id. § 149. Because no open debate or report discussed the new language, it is not clear whether Congress intended a policy change. Chairman Farnsworth of the House Committee on the Post-Office and Post-Roads introduced the bill, H.R. 1, 42d Cong., 2d Sess. (1872), and said that it made no major changes in existing law. CONG. GLOBE, 42d Cong., 2d Sess. 15 (1871). The law continued to prohibit postal officials from acting as lottery agents. *See* Act of June 8, 1872, ch. 335, § 79, 17 Stat. 294.

³⁵ *See* J. EZELL, *supra* note 9, at 238-41.

teries for any purpose.³⁶ Yet the populace apparently bought more tickets than ever. The Assistant Attorney General of New York, for example, reported that in New York City alone, thirty-three lottery agencies received an average total of more than 9,500 letters each week.³⁷

In 1876, Congress amended the restriction on the mailing of lottery materials by striking the word "illegal."³⁸ The change reflected a congressional determination to exclude from the mails materials from all lotteries, including those chartered by state legislatures.³⁹ Major and recurring constitutional questions were fervently argued on the Senate floor and decisively answered with a vote adopting the proposed amendment.⁴⁰

A year later, the Supreme Court considered the constitutional-

³⁶ A. SPOFFORD, *supra* note 10, at 193. Eastern states adopted antilottery amendments based on experience with the lotteries. Antilottery provisions in Western constitutions (*see, e.g.,* NEV. CONST. of 1864, art. IV, § 24, *reprinted in* 2 B. POORE, *supra* note 16, at 1247), however, are apparently examples of lawyers copying old documents when drafting new texts (*see* DEVELOPMENTS, *supra* note 9, at 417-18).

³⁷ J. EZELL, *supra* note 9, at 238. The report cited 7,661 ordinary and 1,993 registered letters as the weekly average. *Id.*

³⁸ *See* Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90.

³⁹ "The object of the amendment to [REV. STAT. § 3894] is to secure uniformity and prohibit lottery circulars of any kind from passing through the mails." 4 CONG. REC. 3656 (1876) (remarks of Rep. Cannon, of the House Comm. on the Post-Office and Post-Roads) (reporting H.R. 2575, 44th Cong., 1st Sess. (1876)). For consistent interpretations of congressional intent *see* *Horner v. United States*, 147 U.S. 449, 456 (1893); 15 Op. Att'y Gen. 203, 204 (1877).

⁴⁰ The Senate clearly saw the issues raised by the federal prohibition:

The difficulty which the [Post Office] Department labors under is in determining what are and what are not legal lotteries. A great many schemes are gotten up, some in the Territories, some of them in operation to-day apparently with the forms of law, but yet of doubtful legal force, and they are transmitting their matter through the mails, and the whole thing proves to be a fraud upon the community; and the question arises whether it is not wiser and better to treat all lotteries, whether legal or illegal, as precisely the same, or as a system of gambling which a wise course in legislation will not only justify but demand at our hands shall be stopped.

4 CONG. REC. 4262 (1876) (remarks of Senator Hamlin). Debate in the Senate also touched upon the propriety of congressional action with respect to local lottery activity:

[I]f a State chooses to authorize and legalize a lottery, call it gambling, if you please, and gambling it is, that is a matter entirely for the consideration of that State

Id. (remarks of Senator West). The breadth of the prohibition was a particular concern:

Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme or circular from one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper.

Id. (remarks of Senator Whyte).

ity of closing the mails to lottery materials. The Court, in *Ex parte Jackson*,⁴¹ held that “[t]he power possessed by Congress embraces the regulation of the entire postal system of the country.”⁴² By construing the prohibition as it would any other postal regulation, the Court avoided the issue of interference with prerogatives reserved to the states by the tenth amendment. Instead, the Court warned against the infringement of individual rights:

The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.⁴³

Thus, subject to first and fourth amendment constraints, *Jackson* sustained the power of Congress “to refuse its facilities for the distribution of matter deemed injurious to the public morals.”⁴⁴

⁴¹ 96 U.S. 727 (1878).

⁴² *Id.* at 732.

⁴³ *Id.* The Court discussed potential first and fourth amendment problems under the statute (*see id.* at 733-34), and then announced the limits of permissible interference with the mails, cautioning Congress not to violate constitutional guarantees:

Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution

(*id.* at 733).

⁴⁴ *Id.* at 736. The holding of *Jackson* became the subject of much dispute in ensuing years. The Senate Committee on Post-Offices and Post-Roads reported S. 1017, 48th Cong., 1st Sess. (1884), which would have prohibited the mailing of newspapers containing lottery advertisements. The Report cited *Jackson* as authorizing the enactment of such legislation. *See* 15 CONG. REC. 4380 (1884). The Minority Report limited *Jackson* to the statute it construed (*see id.* at 4383) and emphasized language in the case that spelled out restrictions upon the power of Congress to interfere with freedom of the press:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value

The 1876 statutory change, however, failed to eliminate state-chartered lotteries. The Postmaster General initially instructed postmasters not to accept or deliver letters addressed to lottery companies or their agents on the assumption that such mail concerned lotteries.⁴⁵ Nevertheless, the Attorney General concluded that the statute conferred no powers of seizure or detention; the statute contemplated only one enforcement mechanism—a fine.⁴⁶ The Attorney General also determined that newspapers, which were open to inspection, were not “circulars” and were thus outside the statutory prohibition.⁴⁷ Consequently, the federal statute could not effectively guard against misuse of the mails by lottery companies; it was a watchdog without teeth.

Meanwhile, the Louisiana Lottery, which had helped to spur the 1876 amendment, continued to operate in flagrant violation of the national will. In 1868, a New York gambling syndicate had secured, by bribery, an exclusive lottery franchise from the Louisiana Legislature.⁴⁸ Declaring that the franchise would increase state revenue and stop the flow of gambling dollars out of the state, the legislature gave the syndicate a lucrative monopoly by prohibiting the

(*Ex parte* Jackson, 96 U.S. at 733 (quoted in 15 CONG. REC. 4383 (1884))). Because *Jackson* affirmed the 1876 lottery restrictions, but also cautioned against overextensions of congressional power in violation of constitutional guarantees, Congressmen repeatedly cited the case in an exaggerated fashion to support diametrically opposed positions during the congressional battle with the Louisiana Lottery. See notes 53 & 57 *infra*.

⁴⁵ J. EZELL, *supra* note 9, at 240. In 1895, Congress gave the Postmaster General the explicit authority to refuse to deliver ordinary letters addressed to persons or companies operating lotteries. See Act of Mar. 2, 1895, ch. 191, § 4, 28 Stat. 963. Congress had earlier conferred similar powers with respect to registered mail. See Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 465.

⁴⁶ See 16 Op. Att’y Gen. 5, 6 (1878). See generally 18 Op. Att’y Gen. 306, 308-11 (1885); 17 Op. Att’y Gen. 77, 78 (1881). Ezell reports the following background:

The management [of the Louisiana Lottery] decided to test the legality of the federal law of 1876. Ben Butler, stormy petrel of the Civil War, postwar political king-pin and the brother-in-law of the Secretary of the Treasury, headed a corps of nine lawyers to press the fight. [The Lottery’s agent] reportedly hurried to Washington for personal interviews with President Rutherford B. Hayes and Secretary of the Treasury John Sherman, a move interpreted by northern newspapers as an attempt to inject the lottery into national politics. Despite numerous indications that the lottery was unpopular, the Attorney General handed down a decision which was berated by lottery foes as sustaining the law of 1876 but at the same time preventing its enforcement.

J. EZELL, *supra* note 9, at 247-48.

⁴⁷ I do not think that a newspaper or periodical is rendered non-mailable by containing a lottery advertisement. This does not transform the newspaper into a “circular” within the purview of section 3894

18 Op. Att’y Gen. 306, 309 (1885).

⁴⁸ J. EZELL, *supra* note 9, at 243.

sale of other lottery tickets in the state.⁴⁹ Although the lottery developed foes in Louisiana, its supporters squelched attempts to revoke the franchise or authorize a second lottery.⁵⁰ The lottery embarked on its most profitable decade three years after Congress passed the 1876 statute; the lottery obtained ninety-three percent of its revenue from outside of Louisiana.⁵¹

⁴⁹ *Id.* at 243-44. In exchange for \$40,000 per year for 25 years, the Louisiana Legislature exempted the lottery from all state taxes. *Id.* at 244. The lottery and its shareholders prospered:

This is a private corporation and its affairs are veiled in the greatest secrecy. The number of its stockholders is not known, but they are believed to be less than twenty in number. Some five or six control the great majority of the stock.

All the proceedings and workings of the company are carefully concealed from the public. Four national banks in New Orleans . . . guaranty the prizes drawn.

The stock of the company embraces 12,000 shares at a par value of \$1,200,000. Owing to the large dividends paid by the company the shares are quoted at \$1,200, or an aggregate of \$12,000,000.

The dividends are believed to exceed, on the average, 100 per cent., and [in 1889] . . . were 170 per cent.

This dividend, large as it is, represents only half of the profits of the company for a single year. The other profits go to certain preferred stockholders, very few in number.

. . . . [T]he daily drawings . . . exceed \$2,000,000 annually [in addition to \$28,000,000 from monthly and special drawings] making the enormous annual income of \$30,000,000, or twice the sum that was paid Napoleon by Jefferson in 1801 for the entire Louisiana Purchase.

The remarkable thing about this lottery is the fact that 93 per cent of income is derived outside the State of Louisiana, from other States of the Union and the Territories. There is not a city or considerable village in the country which does not contribute to the enormous revenues of this gigantic gambling concern. It was the boast of the champions of the company in the recent struggle before the Louisiana Legislature that it was "enriching the State by millions."

21 CONG. REC. 8705-06 (1890) (remarks of Rep. Moore).

⁵⁰ See J. EZELL, *supra* note 9, at 245.

⁵¹ *Id.* at 248-49, 251; 21 CONG. REC. 8705-06, 8721 (1890) (remarks of Rep. Moore and Rep. Price). Many smaller schemes were also in operation at the same time, although after 1878 none were legal. See J. EZELL, *supra* note 9, at 241. Two other states, Delaware and Vermont, permitted lotteries when authorized by their own legislatures, but their legislatures authorized no lotteries during this period. See H.R. REP. No. 787, 50th Cong., 1st Sess., pt. 2, at 2 (1888). In 1884, the Senate Committee on Post-Offices and Post-Roads surveyed the extant state lottery statutes and constitutional provisions while considering S. 1017, 48th Cong., 1st Sess. (1884), which would have prohibited the mailing of lottery advertisements. See 15 CONG. REC. 4380-82 (1884). Of 38 states, only Delaware, Vermont, and Louisiana did not completely prohibit lotteries. The Report concluded: "From the foregoing it clearly appears that the bill reported by the committee is not only within the power and duty of Congress, but is also in harmony with and in support of the policy of nearly every State in the Union." *Id.* at 4382.

In reply to a House resolution calling for information regarding the use of the mails for lottery purposes, the Postmaster General reported the existence of over 100 lottery schemes. See H.R. EXEC. DOC. No. 22, 46th Cong., 2d Sess. 16-17 (1880).

Pressure on Congress to take further action against lotteries mounted over the next decade. Scores of petitions begged for congressional eradication of the Louisiana Lottery, by then dubbed the "Serpent."⁵² Countless bills were introduced, but most died in committee.⁵³ In a special appeal to Congress, President Benjamin Harrison urged that without federal aid the states were powerless to control the lotteries:

If the baneful effects of the lotteries were confined to the States that give the companies corporate powers and a license to conduct the business, the citizens of other States, being powerless to apply legal remedies, might clear themselves of responsibility by

⁵² J. EZELL, *supra* note 9, at 268.

⁵³ Approximately ten bills a year concerning lotteries were read and sent to committee from the 48th to 51st Congresses. One such bill was H.R. 5933, 50th Cong., 1st Sess. (1888), which would have prohibited the advertisement of lottery tickets in the District of Columbia. Debate concerning H.R. 5933 typified the arguments and divisions of Congress during this period. *See* 19 CONG. REC. 1153-61 (1888). The bill's opponents relied upon *Ex parte Jackson* to show that the first and fourth amendments imposed restrictions upon Congress with regard to lottery regulation. *See id.* at 1155 (remarks of Rep. Rogers). They further argued:

What is the Louisiana lottery? It is an institution authorized, organized, and created by the organic law of a sovereign State of this Union. It is a legal institution in so far as the State of Louisiana can make it so, as completely as any institution chartered by any State in this broad land. Now, my friend from Illinois [Rep. Cannon] knows that in so far as we can exercise this power in reference to the Louisiana lottery we can equally exercise it with reference to any banking institution chartered in the State of Louisiana or elsewhere. Now, I wish to ask my friend this question: If we can say to this lottery company, a chartered institution, bearing the stamp and impress of the authority of a State law—nay, of the constitution of one of the States of this Union—"Your advertisement shall not be published in any newspaper issued in the District of Columbia," why can we not say to some banking corporation authorized in the State of Louisiana, or if you choose, in the District of Columbia, "You shall not receive the moneys of this lottery company as deposits in your vaults?"

Id. at 1157 (remarks of Rep. Compton). Proponents of the bill often argued emotionally, denying that the bill would violate constitutional guarantees:

I know it will be insisted that the provisions of the bill will be an abridgment of the "freedom of the press;" but, Mr. Speaker, it will not abridge any "freedom of the press" to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong by enticing the young and unsuspecting into habits that will lead them into ruin, as has heretofore been done in many instances. Some of the blackest deeds in the catalogue of crimes have been committed under the plea of liberty. On the way to the guillotine Madame Roland, [*sic*] exclaimed, "O Liberty! Liberty! what crimes are committed in thy name."

Id. at 1156 (remarks of Rep. Glass). The House referred the bill to the Committee on the Judiciary by a vote of 119 to 113, with 91 not voting. *Id.* at 1161.

Some antilottery proposals did succeed. In 1878, Congress eliminated the sale of lottery tickets in the District of Columbia. *See* Act of Apr. 29, 1878, ch. 68, 20 Stat. 39.

the use of such moral agencies as were within their reach. But the case is not so. The people of all the States are debauched and defrauded. The vast sums of money offered to the States for charters are drawn from the people of the United States, and the General Government through its mail system is made the effective and profitable medium of intercourse between the lottery company and its victims. . . . The use of the mails by these companies is a prostitution of an agency only intended to serve the purpose of a legitimate trade and a decent social intercourse.⁵⁴

C. *Lottery Statutes of the 1890's*

1. *Tightening Antimailing Restraints*

The President's urgent request provided the impetus for new legislation to eliminate the Louisiana Lottery. In 1890, Congress banned from the mails newspapers that contained lottery advertisements,⁵⁵ a move it had long contemplated.⁵⁶ The new legislation broadened the definition of prohibited matter, and specifically au-

⁵⁴ Special Message to Congress from President Harrison (July 29, 1890), *reprinted in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 80-81 (J. Richardson ed. 1894) [hereinafter cited as RICHARDSON]. The President had earlier requested new antilottery legislation. *See* First Annual Message to Congress by President Harrison, *reprinted in* 9 RICHARDSON, *supra*, at 44. Harrison's messages reflected the concern of Postmaster General John Wanamaker. In his 1889 annual report, Wanamaker had described the ineffectiveness of existing federal law in dealing with the Louisiana Lottery. *See* REPORT OF THE POSTMASTER-GENERAL, H.R. EXEC. DOC. NO. 1, pt. 4, 51st Cong., 1st Sess. 39-41 (1889). Wanamaker also wrote, in a special report, that the "entire Post-Office Department is in point of fact the principal agent of the Louisiana State Lottery Company." S. EXEC. DOC. NO. 196, 51st Cong., 1st Sess. 3 (1889).

Harrison's role in the battle against the lotteries was ironic. The antilottery movement had begun as a Democratic attack against state-created privilege; it was now ending as a Republican attack against corruption that would have to overcome states' rights objections.

⁵⁵ *See* Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465. The Act provided in pertinent part:

[N]or shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.

Id. In 1888, Congress considered a similar provision for the District of Columbia. *See* note 53 *supra*.

⁵⁶ *See* S. REP. NO. 1579, 51st Cong., 1st Sess. (1890); H.R. REP. NO. 787, 50th Cong., 1st Sess. (1888); H.R. REP. NO. 2678, 49th Cong., 1st Sess. (1886); S. REP. NO. 11, 49th Cong., 1st Sess. (1886); H.R. REP. NO. 826, 48th Cong., 1st Sess. (1884); S. REP. NO. 233, 48th Cong., 1st Sess. (1884).

thorized postal authorities to refuse to deliver registered letters suspected of being lottery-related.⁵⁷

The 1890 Act culminated fifteen years of congressional debate over a recurring issue of federalism.⁵⁸ Advocates of the bill contended that more than Louisiana's rights were at issue; the rights of the other states were also involved. Because federal control of the mails precluded the other states from caging the Louisiana Lottery⁵⁹ only Congress could "crush this hydra-headed monster,

⁵⁷ See Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 465. The Act empowered the Postmaster General to return to the senders all registered mail addressed to any person or company (or agent of same) suspected of conducting a lottery. Although he could not open letters, the Postmaster General could ground his suspicions on any "evidence satisfactory to him." *Id.*

⁵⁸ The Minority Report issued in connection with S. 1017, 48th Cong., 1st Sess. (1884), a bill analogous to that enacted in 1890, cogently framed the issue:

Assuming that the States are competent to protect the *morals* of their people against the corrupting and injurious effects of lotteries and lottery advertisements, and that the duty to furnish such protection rests with them, this bill presents the grave question as to how far Congress may legitimately go in exercising unquestionable powers *for the accomplishment of objects and purposes* that do not come lawfully within its jurisdiction. In other words, can Congress properly regulate the mail service of the country, under its authority "to establish post-offices and post-roads," *for the purpose* of preventing the circulation of newspapers containing lottery advertisements and the suppression of lotteries?

S. REP. NO. 233, 48th Cong., 1st Sess. 13-14 (1884) (emphasis in original). After references to *Ex parte* Jackson, 96 U.S. 727 (1878), the framers of the Constitution, Calhoun, Webster, and other luminaries, the Minority Report concluded that: "The present bill is a long departure from the conservative opinions entertained and acted upon by the great statesmen of 1836. If not unconstitutional it embodies a principle and policy of a most dangerous character and tendency . . ." S. REP. NO. 233, 48th Cong., 1st Sess. 16 (1884). Quoting *Jackson*, the Minority Report directly addressed the freedom of the press issue:

Liberty of circulating is as essential to that freedom [freedom of the press] as liberty of publishing; indeed, without the circulation the publication would be of little value. [Ex parte Jackson, 96 U.S. 727, 733 (1878) (emphasis added by Minority Report).]

. . . The freedom of circulation by the ordinary channels of communication is the *very essence* of the press's freedom . . . Deny to the press the right to circulate through the *mails* and over post-routes, which now include all public highways, railroads, and navigable streams (unless sent as merchandise), and the guarantee thrown around its freedom by the Constitution is worthless.

Id. at 15 (emphasis in original).

⁵⁹ The States are powerless to extirpate the Louisiana lottery. They are powerless even to protect themselves from its insidious brigandage. They have exhausted their resources. The mails, the national banks, and the channels of interstate transportation are controlled by the national authority and by national authority alone. The national Congress and the national Executive are alone equal to the overthrow of this pestilent corporation, which has become the richest, the most audacious, and the most powerful gambling institution that the world has ever known.

21 CONG. REC. 8706 (1890) (remarks of Rep. Moore) (concerning H.R. 11569, 51st Cong.,

which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done."⁶⁰

The 1890 Act broke the back of the Louisiana Lottery. "A fearless man was appointed postmaster in New Orleans and thousands of pieces of mail were seized and immense masses of evidence collected."⁶¹ Business at the New Orleans post office decreased by one-third.⁶² In 1892, the Supreme Court upheld the constitutionality of the Act in *In re Rapier*:⁶³

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.⁶⁴

2. *Regulation Beyond the Mails: Legislation Under the Commerce Clause*

Congress struck at lotteries once again in 1895. Reaching beyond its postal authority to its powers under the commerce

1st Sess. (1890)). In general, the House debates over the 1890 legislation reiterated earlier arguments. *See id.* at 8698-721.

⁶⁰ *Id.* at 8705 (remarks of Rep. Moore). Representative Hays responded in vain, with a federalism argument:

[I]f Congress, in its supremacy, can indirectly undermine, discriminate against, and in effect destroy the legislation of the States in matters exclusively reserved to the States, our system is destroyed, the rights of the States under their reserved powers practically ended, and the Government is centralized, with the States mere figure-heads. To apply it: If a State, for purposes of revenue or from policy, desires to establish, tolerate, or legalize lotteries, which it has an undenied and undoubted authority to do, and which is a matter over which Congress has no earthly concern, and then Congress can, by indirection, through the exercise of another power, practically nullify and invalidate this action and make criminals of those within that State that do the customary and essential acts to its existence and prosperity according to its design and the law of the State, then the State might as well go out of business and cease to exist.

Id. at 8703 (Minority Report of Rep. Hays).

⁶¹ J. EZELL, *supra* note 9, at 263-64.

⁶² *See* REPORT OF THE POSTMASTER-GENERAL, H.R. EXEC. DOC. NO. 1, pt. 4, 51st Cong., 2d Sess. 14-15 (1890). The following year, the Postmaster General reported increased convictions under the lottery statutes. *See* REPORT OF THE POSTMASTER-GENERAL, H.R. EXEC. DOC. NO. 1, pt. 4, 52d Cong., 1st Sess. 18 (1891). The new statutes also drew accolades from the press. Of 2,259 editorials in 850 newspapers, 2,172 opposed the use of the mails by lottery companies and 87 favored such use. *Id.* at 22.

⁶³ 143 U.S. 110 (1892).

⁶⁴ *Id.* at 134.

clause,⁶⁵ Congress outlawed the importation and interstate carriage of lottery-related materials.⁶⁶ The catalyst for the new legislation was, once again, the Louisiana Lottery. Wounded by the 1890 Act and having finally lost its state charter,⁶⁷ the "Serpent" had regenerated in Honduras in an attempt to operate without using the United States mails.⁶⁸

The Supreme Court heard oral argument three times before sustaining the constitutionality of the 1895 law by a five to four majority in *Champion v. Ames*.⁶⁹ Although petitioner argued that the

⁶⁵ "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

⁶⁶ See Act of Mar. 2, 1895, ch. 191, § 1, 28 Stat. 963 (current version at 18 U.S.C. § 1301 (1976)). Sections 2 and 3 of the 1895 legislation integrated the new changes into prior federal antilottery statutes. Section 4 permitted postal officials to refuse to deliver any mail, including ordinary letters, relating to lotteries.

Representative Broderick explained the need for additional legislation:

Mr. Speaker, in 1890 Congress forbade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries This bill has been commended by the Post-Office Department. The law as it exists has given the Department much trouble . . . [An excerpt from the Postmaster General's most recent report was read, urging that a bill such as the one under consideration would "strike at the root of this great evil and eradicate it."]

A few years ago we had but one lottery in the United States. Public sentiment was aroused against it. When the institution was driven out by the legislation of the Congress and by the States it was reorganized in the territory of Honduras, and has been operating from that territory throughout the States of the Union, so that to-day, instead of having one lottery, as we had a few years ago, we have a number. This lottery business has grown to such an extent that it has shocked the moral sense of the people of the entire country, and it ought to be suppressed.

27 CONG. REC. 3013 (1895) (remarks of Rep. Broderick).

⁶⁷ See J. EZELL, *supra* note 9, at 267.

⁶⁸ See 27 CONG. REC. 3013 (1895) (remarks of Rep. Broderick); 26 CONG. REC. 2356 (1894). In attempting to eradicate the Louisiana Lottery, Congress also affected charitable lotteries despite an intention to avoid doing so:

I have not the slightest objection to confining it to the lottery business, but to provide that the offering of prizes shall be a penal offense at innocent church fairs and other little enterprises of that sort, it seems to me, is going beyond what we ought to attempt.

Id. at 4313 (remarks of Senator Gorman). The problem lay in the broad language of the statute.

⁶⁹ 188 U.S. 321 (1903). *Champion* was first argued in early 1901 and then was joined with *Francis v. Ames*, 188 U.S. 375 (1903), for reargument in October 1901 and again in December 1902. In *Francis*, Justice Holmes found that the definition of lottery materials in the 1895 provisions did not encompass the operator's records of numbers chosen by lottery customers. See notes 82-86 and accompanying text *infra*. The ultimate 5 to 4 decision in *Champion* coupled with the restrictive decision in *Francis* shows that the 1895 provisions troubled the Court.

statute infringed upon powers reserved to the states by the tenth amendment,⁷⁰ the Court emphasized the commerce clause and Chief Justice Marshall's opinion in *Gibbons v. Ogden*.⁷¹ Justice Harlan dismissed the tenth amendment issue because "the power to regulate commerce among the States has been expressly delegated to Congress."⁷² Although the propriety of the statute was not for the courts to determine, its constitutionality was clear:

If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.⁷³

Irony characterizes the history of gambling law. At the outset, Chief Justice Marshall's expansive opinion in *Dartmouth College* stalled reform. It took a revolution in constitutional thinking, touched off by Chief Justice Taney in *Charles River Bridge*, to restore power to state legislatures. Ultimately, however, the end of the state-chartered lottery systems was made possible through an expansive reading of the Constitution. That reading came in *Champion*, ironically rooted in Marshall's own opinion in *Gibbons*.

⁷⁰ 188 U.S. at 330-32. *Champion* sought habeas corpus relief from a conviction under the 1895 statute. *Id.* at 325.

⁷¹ 22 U.S. (9 Wheat.) 1 (1824). Writing for the Court in *Champion*, Justice Harlan quoted extensively from *Gibbons*:

[The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution*.

188 U.S. at 347 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 9 (emphasis added in *Champion*)).

⁷² 188 U.S. at 357.

⁷³ *Id.* at 358. The dissenters argued that the tenth amendment prohibited the congressional action and that the "scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest." *Id.* at 372 (dissenting opinion, Fuller, C.J.).

The Court created a federal police power where none existed before. First, federal power grew, and stood in the way; then federal power shrank, and stood aside; finally, federal power grew, and fought the last battle itself.⁷⁴

D. *Modern Reforms of Federal Lottery Laws*

The antilottery acts of the nineteenth century remain part of the federal law of gambling. They have, however, required supplementation and amendment to overcome narrow judicial construction and to accommodate changing state gambling policies. The provisions authorizing specific actions by postal authorities for suspected violations of the antilottery measures are found today in 39 U.S.C. § 3005.⁷⁵ The 1890 Act prohibiting the mailing of lottery-related materials is now 18 U.S.C. § 1302,⁷⁶ while the 1895 Act forbidding the importation and transportation of lottery materials is 18 U.S.C. § 1301.⁷⁷

1. *Overcoming Narrow Judicial Construction*

The definition of prohibited matter in section 1302 is broader than that in section 1301 because at the time of its enactment Congress had greater confidence in its power to regulate what could be sent through the mails than what could pass through

⁷⁴ Many interests that first expressed support for *Dartmouth College*, and then voiced alarm at *Charles River Bridge*, now expressed concern with *Champion*. 3 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 457-60 (1922). A report to the American Bar Association in 1917 characterized *Champion* as

the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly destroy the police powers of the several States, and finally to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply.

3 C. WARREN, *supra*, at 460 (quoting Hardwick, *The Regulation of Commerce Between the States Under the Commerce Clause of the Constitution of the United States* in 42 A.B.A. REP. 215, 221 (1917)).

⁷⁵ (1976).

⁷⁶ (1976).

⁷⁷ (1976).

interstate commerce.⁷⁸ Both sections have been narrowly construed by the courts.

France v. United States,⁷⁹ decided in 1897, involved a lottery operation headquartered in Covington, Kentucky. The lottery's agents in Cincinnati, just across the Ohio River, solicited bets in Ohio and carried individual slips of paper bearing the selected numbers over the bridge to Kentucky each day. After the numbers were drawn, messengers returned to Ohio with payoffs and lists of the successful combinations. Federal agents arrested several messengers enroute to Ohio with payoffs. The messengers were indicted for conspiring to violate the predecessor of section 1301, which prohibited interstate transportation of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery."⁸⁰ The Supreme Court overturned the conviction, holding that the statute applied only to future lotteries and thus allowed interstate carriage of materials relating to a drawing that had already occurred.⁸¹

The Supreme Court again construed the wording of the statute in 1903, in *Francis v. United States*,⁸² decided concurrently with *Champion v. Ames*.⁸³ *Francis* involved a factual situation almost identical to that in *France*. The operator of an Ohio lottery business was convicted for conspiring with his Kentucky agents to transport betting slips from Kentucky across the river to Ohio. Justice Holmes, writing for the Court, distinguished the carriage of lottery materials between states by individuals from the sending of such materials across state lines through a commercial carrier.⁸⁴ When carried by the agents of a company, as in this case, the tickets circulated internally and remained within the lottery company's possession. Justice Holmes suggested that, without a change of possession, such conveyance did not constitute commerce, even though it aided a business. The conviction, however, was reversed on a separate ground. The Court narrowly construed the word "repre-

⁷⁸ See *United States v. McGuire*, 64 F.2d 485, 496-97 (2d Cir.) (dissenting opinion, Manton, J.), cert. denied, 290 U.S. 645 (1933).

⁷⁹ 164 U.S. 676 (1897).

⁸⁰ Act of Mar. 2, 1895, ch. 191, 28 Stat. 963.

⁸¹ 164 U.S. at 681-82. "Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly." *Id.* at 682-83.

⁸² 188 U.S. 375 (1903).

⁸³ 188 U.S. 321 (1903). See note 64 *supra*.

⁸⁴ *Francis v. United States*, 188 U.S. at 377.

sent" in the statute,⁸⁵ holding that the agent's records of the numbers individual bettors had chosen were not encompassed by the statute: "They as little represented the purchasers' chances, as the stubs in a check book represent the sums coming to the payees of the checks."⁸⁶

The Supreme Court did not reconsider the predecessors of sections 1301 or 1302 for nearly fifty years, leaving the decisions in *France* and *Francis* to guide the lower courts. Subsequent lower court cases applying the sections followed the established patterns.⁸⁷ In 1952, the Supreme Court relied heavily on *France* and *Francis* in dismissing an indictment brought under section 1302 against one who had mailed materials pertaining to a proposed lottery venture.⁸⁸ The Court held that section 1302 only applied to existing, rather than hypothetical, lottery enterprises.⁸⁹

In 1961, as part of a general effort to combat organized crime, Congress responded to the narrow constructions given sections 1301 and 1302 by enacting 18 U.S.C. § 1953.⁹⁰ Section 1953 covers a broader range of materials than section 1301 in its prohibition against interstate transportation of gambling paraphernalia.⁹¹

⁸⁵ *Id.*

⁸⁶ *Id.* at 378.

⁸⁷ Among the cases that overturned substantive convictions by relying on *France* and *Francis* and construing the antilottery statutes narrowly were: *United States v. McGuire*, 64 F.2d 485 (2d Cir.), *cert. denied*, 290 U.S. 645 (1933); *United States v. Wade*, 59 F.2d 831 (S.D. Tex. 1932); *United States v. Whelpley*, 125 F. 616 (W.D. Va. 1903). Even where a conviction was obtained under § 1301, *France* and *Francis* required distinguishing at length. *See, e.g.*, *United States v. Bianco*, 103 F. Supp. 867, 870-72 (W.D. Pa. 1952). The standard of narrow construction established in *France* and *Francis* has, however, been questioned in *United States v. Fabrizio*, 385 U.S. 263, 269 (1966).

⁸⁸ *United States v. Halseth*, 342 U.S. 277 (1952). Subsequent court decisions continued to employ strict construction. *See United States v. Sanderlin*, 199 F. Supp. 116, 117 (E.D. Va. 1961). *Cf. United States v. Bergland*, 209 F. Supp. 547, 549-50 (E.D. Wis. 1962) (reliance on *France* misplaced with respect to the construction of 18 U.S.C. §§ 1084, 1952 (1976)), *rev'd on other grounds*, 318 F.2d 159 (7th Cir.), *cert. denied*, 375 U.S. 861 (1963).

⁸⁹ *United States v. Halseth*, 342 U.S. 277, 280 (1952).

⁹⁰ *See Act of Sept. 13, 1961, Pub. L. No. 87-218, § 1, 75 Stat. 492* (current version at 18 U.S.C. § 1953 (1976)). The legislative history of § 1953 clearly demonstrates that Congress intended it to supplement § 1301. *See note 202 and accompanying text infra.*

⁹¹ Section 1953 prohibits interstate transportation of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game." 18 U.S.C. § 1953(a) (1976).

Although § 1953(a) fails to mention lotteries expressly, the section's legislative history indicates that it should be applied to lottery-related materials. *See note 202 infra; cf. United States v. Baker*, 364 F.2d 107 (3d Cir. 1966) (applying § 1953 to lottery without reference to legislative history).

Congress also tightened the language of section 1302,⁹² to exclude from the mails, even when travelling intrastate, "[a]ny article described in section 1953."⁹³

2. *Extension to the Broadcast Media*

Congress enacted the federal prohibition against the broadcasting of lottery-related information, 18 U.S.C. § 1304, as part of the Communications Act of 1934,⁹⁴ two years after an almost identical provision had suffered a pocket veto.⁹⁵ Proponents of the enactment advanced two principal justifications: (1) to promote consistency with the antilottery postal statutes, and (2) to remove any competitive advantage radio stations might have over newspapers as a result of the postal and interstate commerce prohibitions of lottery-related materials.⁹⁶

Although no prosecution has been brought under section 1304, it has undergone considerable administrative and judicial interpretation in connection with the licensing procedures of the Federal Communications Commission (FCC). The FCC has issued administrative decisions under section 1304, for example, disapproving of "give-away" programs sponsored or advertised by radio and television stations.⁹⁷ In *FCC v. American Broadcasting*

⁹² See Act of Sept. 13, 1961, Pub. L. No. 87-218, § 2, 75 Stat. 492.

⁹³ 18 U.S.C. § 1302 (1976).

⁹⁴ Ch. 652, § 316, 48 Stat. 1064 (current version at 18 U.S.C. § 1304 (1976)).

⁹⁵ See H.R. 7716, 72d Cong., 1st Sess. (1932). Part of a bill to amend the Radio Act of 1927, then the principal federal statute regulating broadcasting, the antilottery measure apparently sparked little controversy. For discussion of the bill see H.R. REP. NO. 2106, 72d Cong., 2d Sess. (1933) (Conf. Rep.). The bill passed both Houses of Congress and went to the President in 1933 (76 CONG. REC. 5397 (1933)), who exercised a pocket veto. Congress incorporated a similar provision into the Communications Act of 1934 as § 316. See S. REP. NO. 781, 73d Cong., 1st Sess. 8 (1934); 78 CONG. REC. 10988 (1934). Approved by the Senate (*see id.* at 10912) and the House (*see id.* at 10995), the legislation received the approval of the President.

⁹⁶ The committee does not think that the United States should permit any radio station, licensed and regulated by the Government, to engage in such unlawful practices.

Furthermore, the broadcast of such information is unfair to the newspapers, which are forbidden the use of the mails, if they contain such information.

H.R. REP. NO. 221, 72d Cong., 1st Sess. 8 (1932). For a comparison of the postal and broadcasting antilottery statutes see Haley, *The Broadcasting and Postal Lottery Statutes*, 4 GEO. WASH. L. REV. 475 (1936).

⁹⁷ The first case to treat a giveaway scheme as a lottery under § 1304 was WRBL Radio Station, Inc., 2 F.C.C. 687 (1937). In review of a license renewal request the FCC characterized as lotteries several advertisement campaigns broadcast by the station. The Commission found that the advertisements possessed the three elements essential to a lottery: chance, a prize, and consideration. The FCC has continued to pursue giveaways (*see, e.g.,* Metromedia, Inc., 60 F.C.C.2d 1075 (1976)), finding liability only where the elements of

Co.,⁹⁸ the three major television networks sued to vindicate their extensive broadcasting of "give-away" programs. The Supreme Court upheld a lower court determination that the FCC's regulations were overbroad. Chief Justice Warren, writing for the Court, held that "the Commission's power . . . is limited by the scope of the statute,"⁹⁹ and that a prohibited lottery must involve "chance," "a prize," and "consideration."¹⁰⁰ The Court found no consideration for the "give-aways."¹⁰¹ The FCC, however, continued to in-

lotteries are present (*see id.* at 1079-81; *cf.* Greater Indianapolis Broadcasting Co., 44 F.C.C.2d 37 (1973) (no liability without presence of consideration)).

The FCC possesses varied administrative remedies. The Commission may refuse to renew operating licenses when facilities are not operated in the "public interest." *Cf., e.g.*, Action Radio, Inc., 51 F.C.C.2d 803 (1975) (contested license renewed despite lottery violation because of beneficial public broadcasting). Lottery violations may enter into the renewal calculus. *See, e.g.*, Cosmopolitan Broadcasting, Inc., 59 F.C.C.2d 558 (1976). The FCC "may revoke any station license or construction permit" (47 U.S.C. § 312(a)(6) (Supp. V 1975)), issue cease and desist orders (*id.* § 312(b) (1970)), and impose forfeitures of up to \$1,000 for each day of an infraction (*id.* § 503(b)(1)(E); *see, e.g.*, Metromedia, Inc., 60 F.C.C.2d 1075 (1976) (6 stations fined between \$2,000 and \$3,000 apiece for § 1304 violations)). The Commission may also promulgate declaratory orders (5 U.S.C. § 554(e) (1976)), and regulations (47 U.S.C. § 303(f), (r) (1970)).

The FCC has published regulations relating to lotteries:

(a) No licensee of an AM, FM or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. § 1304, 62 Stat. 763).

47 C.F.R. § 73.1211(a) (1977). A similar regulation extends to stations originating cable television transmissions. *See id.* § 76.213(a). Both provisions contain exemptions for state-conducted lotteries. *See id.* §§ 73.1211(c), 76.213(c).

⁹⁸ 347 U.S. 284 (1954).

⁹⁹ *Id.* at 290. The regulations in question were much broader than those now in force. *See id.* at 288-89.

¹⁰⁰ *Id.* at 290.

¹⁰¹ To be eligible for a prize on the "give-away" programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.

We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime.

Id. at 294 (footnote omitted).

The court adopted a traditional definition of lottery by requiring "chance," "prize," and "consideration." *See, e.g.*, Hull v. Ruggles, 56 N.Y. 424 (1874); People v. Payne, 3 Denio 88 (N.Y. Sup. Ct. 1846). *But see* ROYAL COMMISSION ON LOTTERIES AND BETTING, FINAL REPORT, CMD. NO. 4341, at 4 (1933) ("a distribution of prizes by lot or chance"). The general prohibitions of lotteries found in state law often incorporate the broad, traditional definition. Thus, the Jacksonian antilottery provisions not only catch 19th century, large-scale lotteries in their net, but also, unintentionally, snare 20th century, small-scale commercial "lotteries" such as church raffles and bank nights. Courts must resort to contorted reasoning to limit the general prohibitions to their intended scope. *See, e.g.*, State v. Eames,

interpret section 1304 broadly,¹⁰² and has developed a full body of law on consideration¹⁰³ and on the state of mind required by the statute.¹⁰⁴

The most significant cases to arise under section 1304 have involved state-operated lotteries. Soon after the New York State Lottery began operating in 1967, the FCC ruled in a declaratory judgment that section 1304 applied to state-operated lotteries.¹⁰⁵ Consequently, it barred all lottery-related announcements other than ordinary news reports, public debates, and station editorials.¹⁰⁶ Broadcasters challenged the interpretation on first amendment grounds, but the Second Circuit rejected their constitutional attack in *New York State Broadcasters Ass'n v. United States*.¹⁰⁷ Nevertheless, the court construed the statute narrowly, holding that it barred only the broadcasting of information that "directly pro-

87 N.H. 477, 183 A. 590 (1936) (no consideration present in "Bank Night"; information quashed). *Cf.* *State v. Doran*, 124 Conn. 160, 198 A. 573 (1938) ("Bank Night" violates statutes drawn more broadly than definition of lottery; no consideration present). *See generally* DEVELOPMENTS, *supra* note 9, at 100-02.

¹⁰² The D.C. Circuit restricted an FCC holding in *Caples Co. v. United States*, 243 F.2d 232 (D.C. Cir. 1957). The FCC had found that a television program based on bingo was a lottery, distinguishing *American Broadcasting* because the bingo participant had to obtain cards from local stores handling the sponsor's products in order to play. The court, however, held:

The undesirability of this type of programming is not enough to brand those responsible for it as criminals. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute or in additional legislative authority.

Id. at 234.

¹⁰³ *See* *Metromedia, Inc.*, 60 F.C.C.2d 1075, 1081-83 (1976); *Taft Broadcasting Co.*, 18 F.C.C.2d 186 (1969); *WBRE-TV, Inc.*, 18 F.C.C.2d 96 (1969); *Concerning Applicability of Lottery Statute to Contests and Sales Promotions*, 18 F.C.C.2d 52 (1969). The most fascinating of these 1969 cases may be *United Television Co.*, 20 F.C.C.2d 278 (1969), in which a station carrying religious programs was in reality tipping off local residents to winning numbers by means of carefully selected citations to the Scriptures. *See* *United Television Co.*, 55 F.C.C.2d 416 (1975).

¹⁰⁴ The FCC has shown little sympathy for station managers arguing lack of knowledge. *See* *Metromedia, Inc.*, 60 F.C.C.2d 1075, 1079-81 (1976); *Ohio Quests, Inc.*, 8 F.C.C.2d 859, 860 (1967). *But see* *Meredith Colon Johnston*, 1 F.C.C.2d 720, 724 (1965).

¹⁰⁵ *See* *Broadcasting of Information Concerning Lotteries*, 14 F.C.C.2d 707 (1968). The FCC acted before Congress enacted an exemption from § 1304 for state-authorized lotteries (Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916 (current version at 18 U.S.C. § 1307 (1976))).

¹⁰⁶ "In the category of news, any material broadcast in normal good faith coverage, which is reasonably related to the audience's right and desire to know and be informed of the day-to-day happenings within the community is permissible." *Broadcasting of Information Concerning Lotteries*, 14 F.C.C.2d 707, 710 (1968).

¹⁰⁷ 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

motes" a given lottery,¹⁰⁸ and set aside the FCC ruling for lack of specificity.

In 1972, the Jersey Cape Broadcasting Corp. requested a declaratory ruling from the FCC as to whether a one-sentence announcement during the Thursday evening news broadcast advising New Jersey residents of the winning number in the state lottery's weekly drawing would violate section 1304. The FCC answered in the affirmative,¹⁰⁹ and refused to reconsider.¹¹⁰ The Third Circuit, sitting en banc, held that the proposed broadcast was a news item protected by the first amendment.¹¹¹ The case was argued before the Supreme Court but resolved by Congress. By enacting 18 U.S.C. § 1307,¹¹² Congress withdrew state-operated lotteries from the reach of section 1304 and rendered the case moot.¹¹³

¹⁰⁸ *Id.* at 999. "[W]e think that the section must be strictly construed to go no further." *Id.* at 997. Although "the first amendment does not protect freedom to swindle even though words may be used to accomplish that result" (*id.* at 996), the court noted that "[t]he real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct" (*id.* at 997). The court considered in detail what could be broadcast. A news item that had the "incidental effect of promoting a lottery" would not be banned, but if a lottery announcement contained incidental "news," such as the amount to be realized for education, it would nevertheless be prohibited. *Id.* at 998. The court conceded "that at times the line drawn may be thin." *Id.* An "interview by a television reporter with an excited winner" would be a permissible feature. *Id.* at 999. The Second Circuit also approved of editorial commentary. *Id.* The court found that lottery promotions do not convey information on "matters of highest public interest," and thus fall short of the threshold standard announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for full constitutional protection. *Id.* at 998.

On remand, the FCC issued a more specific declaratory ruling. See *Broadcasting of Information Concerning Lotteries*, 21 F.C.C.2d 846 (1970).

¹⁰⁹ See *Jersey Cape Broadcasting Corp.*, 30 F.C.C.2d 794 (1971).

¹¹⁰ See *Jersey Cape Broadcasting Corp.*, 36 F.C.C.2d 93 (1972).

¹¹¹ *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), *vacated as moot*, 420 U.S. 371 (1975). The Third Circuit held that FCC regulations under § 1304 that infringed upon the editorial discretion of a broadcaster in selecting news items constituted an impermissible prior restraint. *Id.* at 222. "The contention that on Thursday afternoon the winning number in the New Jersey lottery is not 'news,' in a broadcast context, is simply frivolous." *Id.* In dicta, the court concluded that the best construction of § 1304 would restrict its application "to promotion of lotteries for which the licensee receives compensation." *Id.* at 224. It is doubtful whether the guidelines for permissible broadcasts established in *New York State Broadcasters Ass'n* could have survived the Third Circuit's expansive interpretation, and it was for this reason the Supreme Court granted certiorari in the *New Jersey State Lottery* case. See *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371, 373 (1975) (per curiam).

¹¹² Act of Jan. 2, 1975, Pub. L. No. 93-583, §§ 2-3, 88 Stat. 1916 (current version at 18 U.S.C. § 1307 (1976)). See notes 141-44 and accompanying text *infra*.

¹¹³ See *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371, 373 (1975) (per curiam). Justice Douglas dissented; he believed that significant issues remained with respect to the application of the new legislation to nonlottery states. In fact, the State of

3. *Concerns of Federalism: Accommodating Changes in State Law*

The antilottery policies of the federal and state governments united in the nineteenth century to purge the nation of the last vestiges of the corrupt Louisiana Lottery. By the 1960's, however, the Louisiana Lottery was forgotten. Sentiment in certain states swung toward decriminalization. These states perceived the lottery as a relatively harmless and painless means of augmenting state treasuries.¹¹⁴ By 1978, fourteen states had authorized lotteries.¹¹⁵ Lottery income in some states has been thought to be substantial,

New Hampshire had been given permission to intervene on these issues, but the Court refused to consider them in the context of the New Jersey litigation, and remanded the case to the Third Circuit. *Id.* at 373-74. Justice Douglas argued that Congress could not have intended § 1307 to resolve the serious first amendment issues raised by the appeal. *Id.* at 374-75. In a footnote he presented the only judicial analysis to date of problems remaining after the enactment of § 1307:

As the State of New Hampshire points out, the new § 1307 even on its face does not resolve the claims of all parties to this action. New Hampshire, which was granted leave to intervene in the Court of Appeals, conducts a lottery; neighboring Vermont does not. Title 18 U.S.C. § 1307(a)(2) (1970 ed., Supp. IV), upon which the Court relies, applies only to broadcasts by a station in the State which conducts the lottery, or in an adjacent State which also conducts a lottery; presumably, then, § 1304 remains applicable to a Vermont radio station which desires to broadcast information concerning the New Hampshire lottery. The restraint imposed by § 1304 will thus continue to inhibit the New Hampshire lottery with respect to certain groups of prospective participants, including New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

Id. at 375 n.* See also note 129 *infra*.

¹¹⁴ In 1963, New Hampshire became the first state in modern times to establish a lottery to raise revenue. See N.H. REV. STAT. ANN. §§ 284:21-a to -t (1977). From its earliest history, New Hampshire seems to have taken the Devil somewhat less seriously than its Puritan neighbor to the south. Not that New Hampshire was noticeably less devout than the Bay Colony. Indeed, for almost two centuries Congregationalism was for all practical purposes the established religion. But by 1819, it was no longer dominant politically. Post-civil war immigration of Roman Catholics further diluted traditional antigambling sentiment, whether rooted in religion or attitudes reflected in Jacksonian democratic tenets. By 1960, too, the state's population was 58.3% urban and only 3% were actively employed in agriculture. The image of a New Hampshire dominated by rugged Yankee farmers is, therefore, illusory. These demographic changes combined with New Hampshire's peculiar state constitution, which had not been amended in the Jacksonian years, to set the stage for the first modern return to the lottery. New Hampshire's constitution, the oldest in the nation save only that of Massachusetts on which it is based, forbids the levying of a progressive income tax. N.H. CONST. pt. 2, art. 6. The rule was inflexible as well, because until a 1964 amendment only a constitutional convention could alter the basic charter. To avoid excessive taxation on real property, New Hampshire has had to rely heavily on "sin taxes." In 1963, these legal, political, and social forces produced the first modern state-run lottery. See DEVELOPMENTS, *supra* note 9, at 116 n.2.

¹¹⁵ See THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1978-1979, at 73 (1978).

but it has always been small relative to the entire budget.¹¹⁶ The state-conducted lotteries of modern years have been thought efficient and corruption-proof because they are computerized. Indeed, the modern lotteries bear little apparent resemblance to their exploitive nineteenth century ancestors.¹¹⁷ Nevertheless, it can be argued that they rest on governmental policies of unproven wisdom.¹¹⁸

Decriminalization of lotteries in more than one-quarter of the states has posed difficulties for those states and for the federal government. Federal laws, originally enacted to complement states' antilottery efforts, at first hobbled the new state-lottery operations. The federal laws limited the ability of state-operated lotteries to advertise,¹¹⁹ and to purchase and distribute lottery-related mate-

¹¹⁶ See, e.g., *Lottery Termed Bad Bet and Poor State Business*, N.Y. Times, Feb. 9, 1974, at 33, col. 7. After careful study of state decriminalization efforts, the Task Force on Legalized Gambling

found no justification for the highly publicized assertions of a number of state government officials that legalized gambling will be an important new source of substantial revenue for state treasuries. We have determined that neither the early financial returns from the lotteries and from off-track betting nor the economics of the illegal gambling industry support the optimistic assumptions that are now so widespread. Even allowing for a wide margin of error and for differences in the volume of activity from one state to another, the Task Force is convinced that total revenues from comprehensive legalization of gambling would make only a relatively small contribution to state treasuries.

TASK FORCE ON LEGALIZED GAMBLING, *EASY MONEY* 6 (1974) (emphasis deleted) [hereinafter cited as *EASY MONEY*].

¹¹⁷ But Ezell concludes:

[I]f history teaches anything, a study of over thirteen hundred legal lotteries held in the United States proves these things: they cost more than they brought in if their total impact on society is reckoned; and that one hundred and sixty years' experience indicates clearly that the most careful supervision cannot eradicate the inevitable abuses in a system particularly susceptible to fraud.

J. EZELL, *supra* note 9, at 280-81 (footnote omitted).

¹¹⁸ For in depth analysis of the various policy considerations see *DEVELOPMENTS*, *supra* note 9, at 678-734. The ultimate judgment is unfavorable. As presently operated, modern state-conducted lotteries not only raise relatively insignificant amounts of revenue inefficiently but also draw funds from those who can least afford to part with them. In addition, state-conducted lotteries have produced new bureaucracies, staffed through political patronage, that are unresponsive to the demands of the law, and that have stimulated participation in lotteries through deceptive techniques. Lastly, state-conducted lotteries have not displaced their illegal counterparts. Arguably, instead of fighting organized crime, state-conducted lotteries threaten to tarnish the image of government. While the twentieth century lotteries have not been characterized by nineteenth-century-type corruption, twentieth century forms of corruption abound. See *DEVELOPMENTS*, *supra* note 9, at 719-20.

¹¹⁹ Advertisements pertaining to lotteries could not be mailed (18 U.S.C. § 1302 (1976)); broadcasted (*id.* § 1304); or lawfully transported in interstate commerce (*id.* § 1301).

rials.¹²⁰ Despite their attempts to navigate the federal straits, state lotteries frequently appeared to violate federal laws. Open conflict seemed unavoidable in late 1974 when the Department of Justice threatened to prosecute several states for federal crimes.¹²¹

The impending prosecution of states operating lotteries jolted Congress into action. Having considered similar proposals for several years,¹²² Congress quickly exempted state-operated lotteries from the federal laws.¹²³ The new legislation effected two major changes in the federal law of gambling. First, it added 18 U.S.C. § 1307, circumscribing sections 1301-1304 with respect to state-operated lotteries.¹²⁴ Second, the new law amended section 1953,

¹²⁰ Congress had prohibited interstate transportation of lottery-related materials (18 U.S.C. §§ 1301-1302, 1304, 1953 (1976)) as well as use of wire communications (*id.* § 1084) and travel in interstate commerce involving lotteries (*id.* § 1952).

In 1967, Congress amended the federal banking laws to restrict the role of federally-chartered or -insured banks with respect to lotteries. *See* 12 U.S.C. § 25a, 339, 1730c, 1829a (1976). *See generally* notes 289-95 and accompanying text *infra*.

¹²¹ On August 30, 1974, Attorney General Saxbe sent a telegram to the governor of each state that conducted a lottery warning that "[s]erious questions have arisen concerning the legality of the lottery that is being conducted in your state," and that "[t]here is a distinct possibility that there are violations of the criminal provisions of the Federal code." *Saxbe Threatens Suit to Shut Down State Lotteries*, N.Y. Times, Aug. 31, 1974, at 1, col. 1. In September 1974, however, Saxbe announced a 90-day moratorium on federal prosecution under the antilottery statutes in order to allow Congress the opportunity to amend the provisions. *Lotteries Get 90-Day Reprieve*, Wash. Post, Sept. 7, 1974, at 1, col. 8.

State-conducted lotteries have also come into conflict with private interests. *See, e.g.*, *National Football League v. Governor of Del.*, 435 F. Supp. 1372 (D. Del. 1977). *National Football League* reviewed an attempt by the Delaware lottery to transform itself into a football pool without legislative authorization.

¹²² In 1971, Representative Rodino, Chairman of the House Judiciary Committee, introduced H.R. 2374, 92d Cong., 1st Sess. (1971), which would have exempted state-conducted lotteries from federal gambling laws. He held hearings on the measure on October 13, 1971. In 1973, Representative Rodino introduced H.R. 6668, 93d Cong., 1st Sess. (1973) and held hearings on that measure on April 24, 1974. Senator Hart introduced a parallel bill, S. 544, 93d Cong., 1st Sess. (1973). These bills ultimately became law. *See* Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916.

¹²³ *See* Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916.

¹²⁴ *See id.* §§ 2-3 (current version at 18 U.S.C. § 1307 (1976)). Section 1307 currently provides:

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

exempting materials related to state lotteries from that section's prohibition against interstate transportation of gambling paraphernalia.¹²⁵ The legislative history of the act reveals that Congress meant to create only limited exemptions for state lotteries; federal

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

18 U.S.C. § 1307 (1976).

The law also amended 39 U.S.C. § 3005 to allow the mailing of newspapers containing advertisements for state-operated lotteries and to allow letters containing lottery materials to be mailed within states permitting such lotteries. *See* Act of Jan. 2, 1975, Pub. L. No. 93-583, § 4, 88 Stat. 1916. In 1976, Congress amended § 3005 again (*see* Act of Oct. 17, 1976, Pub. L. No. 94-525, § 2, 90 Stat. 2478) in order to harmonize treatment of the broadcast and print media (*see* S. REP. No. 618, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5513). The provision currently reads:

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

39 U.S.C. § 3005(d) (1976).

Amendments to the Internal Revenue Code provide further indicia of congressional intent to avoid interfering with state lotteries. *See* notes 365-69 and accompanying text *infra*.

¹²⁵ *See* Act of Jan. 2, 1975, Pub. L. No. 93-583, § 3, 88 Stat. 1916 (current version at 18 U.S.C. § 1953 (1976)). Section 1953 currently provides:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than \$10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) *equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.*

18 U.S.C. § 1953 (1976) (emphasis added).

laws would continue to reinforce the policies of nonlottery states.¹²⁶ Congress hoped to accommodate the interests of both lottery and nonlottery states by:

1. Permitting transportation and mailing to addresses within the particular State conducting the lottery;
2. Permitting the mailing of newspapers published within the State, notwithstanding lottery promotional or other information contained therein concerning a State-run lottery in that State;
3. Permitting the broadcasting of promotional or other information concerning a lottery within that State from stations licensed to a location within that State; and
4. Permitting a State-run lottery to obtain material necessary to conduct its operation from out-of-State sources.¹²⁷

4. *Residual Problems*

Because section 1307 attempts to harmonize the discordant policies of lottery and nonlottery states,¹²⁸ it may at times produce seemingly confused or even illogical results.¹²⁹ More worrisome

¹²⁶ "The purpose of S. 544, as amended, is to amend present Federal provisions relating to lotteries (18 U.S.C. 1301-1304, 1953; 39 U.S.C. 3005) to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of nonlottery States." S. REP. NO. 1404, 93d Cong., 2d Sess. 2 (1974). See H.R. REP. NO. 1517, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7007.

¹²⁷ S. REP. NO. 1404, 93d Cong., 2d Sess. 3 (1974). Congress recently amended § 1307(a)(1) and 39 U.S.C. § 3005(d) to harmonize the exemption from lottery prohibitions granted to newspapers with that granted to radio and television. See Act of Oct. 17, 1976, Pub. L. No. 94-525, 90 Stat. 2478.

¹²⁸ In conjunction with its Report on amendments to 18 U.S.C. § 1307 and 39 U.S.C. § 3005, the Senate Judiciary Committee commented:

The Department of Justice in its report on H.R. 1607 stated that it has no objection to its enactment. The committee, in reporting this act, endorses the Department's statement regarding State-conducted lotteries, as follows:

This Department's position relating to State-conducted lotteries has always been to object to any erosion of Federal protection to those States which have determined that lotteries are not in the best interests of their citizens. This proposed legislation applies only to States which conduct lotteries and does not upset the balance created by the present law.

S. REP. NO. 618, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5513, 5514.

¹²⁹ A series of hypothetical applications, by no means exhaustive of the possible complexities, best illustrates the operation of § 1307: (1) WBZ Radio, licensed to a location in Massachusetts, may broadcast advertisements, commentary, and news about the lotteries of Massachusetts, Rhode Island, Connecticut, New York, and New Hampshire, but not about those of Maine, New Jersey, or Pennsylvania. Broadcast facilities licensed to a location in a lottery state may broadcast only with respect to the lotteries of that state and adjacent states. See 18 U.S.C. § 1307 (1976); 47 C.F.R. 73.1221(c) (1977). Maine, New Jersey, and

is the possibility that the literal language of the 1975 legislation opened in section 1953 a loophole wider than Congress intended. The Report accompanying the legislation indicated that it would permit "the transportation of equipment, tickets, or materials used or designed for use within a State conducting such a lottery under

Pennsylvania do not hinder Massachusetts. WBZ listeners in Portland, Maine, will hear advertisements for the lotteries of five states, but federal law prevents them from hearing from WBZ anything but legitimate news about their own state lottery. (2) A Portsmouth, New Hampshire television facility, licensed to transmit cable television originating from New York City, has to filter out lottery advertisements and commentary, unless "technically infeasible" (47 C.F.R. § 76.213(a)(3) (1977)), that could legally be broadcast from New York but not from New Hampshire. The cable facility in New Hampshire may broadcast only New Hampshire, Maine, and Massachusetts lottery information despite having its programming source in another state. Its source in New York City, however, could not broadcast information concerning Maine's lottery. Perhaps the New Hampshire facility could interject advertisements for the Maine lottery at each point that it would have to expunge materials about the New York lottery. From the legislative history accompanying the statute, it appears that cable television raises some paradoxes not foreseen by Congress. Subsequent FCC regulations (*see* 47 C.F.R. § 76.213(a) (1977)) have not fully alleviated the problems. (3) Because the state has no lottery, a Virginia radio or television station, or newspaper, could not advertise any lotteries at all, even though readers and listeners from Maryland and Pennsylvania would be interested in information concerning their states' lotteries and Virginians would have numerous alternative media sources from which to obtain the same information. Federal law deprives the Virginia media of considerable revenue available to competitors in neighboring states. (4) A person living in Virginia could not mail a letter containing anything related to any lottery to any address anywhere without violating federal law. Section 1302 prohibits such mailings, and the exemption in § 1307 does not apply. (5) A person living in Massachusetts could mail a letter from his home to any address within the state concerning any aspect of the Massachusetts lottery, but he could not mail to an address within the state any materials concerning any other lottery. Two provisions dictate this result. Section 1307 exempts from §§ 1301-1302 "the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law." 18 U.S.C. § 1307(b) (1976). To come within this exemption, the materials must be mailed or sent to a state that conducts a lottery and the materials so sent must relate to that lottery. Mail relating to lotteries is exempt from 39 U.S.C. § 3005(a) only if such mail remains at all times within that state conducting the lottery to which the materials pertain. *See* 39 U.S.C. § 3005(d) (1970 & Supp. V 1975), *as amended by* Act of Oct. 17, 1976, Pub. L. No. 94-525, 90 Stat. 2478. (6) A printer in Alexandria, Virginia, could prepare tickets and advertising circulars for the New Jersey lottery and ship them to New Jersey without violating federal law. The printer would have to take care not to interrupt the trip to New Jersey by having the materials stored at another location, and he would also have to guard against misdirecting the New Jersey materials to another state. There is no state of mind requirement as to result in §§ 1301-1302. One who knowingly sends lottery-related materials in interstate commerce (having an active appreciation of his actions and the surrounding circumstances) but who falls outside the § 1307 exemptions could thus violate § 1301 even though he has no particular result in mind. Previously, this posed no problem because one could not legally send any lottery-related materials in interstate commerce. One purpose of § 1307 was to allow states conducting lotteries to obtain the necessary materials from beyond their own borders without violating federal law. Otherwise, in order to operate a lottery, a state would first have to enter the lottery-material manufacturing business.

the authority of its State law *to addresses within the State.*"¹³⁰ As enacted, however, section 1953(b)(4) does not apply only to materials entering a lottery state; the provision, read literally, exempts lottery-related material shipped anywhere.¹³¹ Consequently, the exemption leaves only section 1301 to regulate the flow of lottery-related materials into antilottery states.¹³² This result belies the legislative history of section 1953. Congress enacted section 1953 primarily to rehabilitate the narrowly construed section 1301 as a restriction on interstate transportation of lottery materials. Congress should amend section 1953 to perfect its intended design.¹³³

One danger of resurrecting section 1953 is its potential impact on individuals carrying legally purchased lottery tickets in interstate commerce. The individual holder of a state lottery ticket would not now violate section 1953 by carrying it across state lines. But, as discussed in *United States v. Fabrizio*,¹³⁴ such a bettor would have committed a felony under federal law before the recent amendments.¹³⁵ Policy justifications for this harsh result are scant.

¹³⁰ H.R. REP. NO. 1517, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7007, 7010 (emphasis added).

¹³¹ See 18 U.S.C. § 1953(b)(4) (1976), *quoted in* note 125 *supra*.

¹³² Section 1307, which limits the operation of § 1301, is drafted more clearly. It exempts only "the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law." 18 U.S.C. § 1307(b) (1976).

¹³³ For example, 18 U.S.C. § 1953(b)(4) (1976), *quoted in* note 125 *supra*, could be amended to read: "(4) the transportation into a State of equipment, tickets or materials used or designed for use within that State in a lottery conducted by that State acting under authority of State law."

¹³⁴ 385 U.S. 263 (1966).

¹³⁵ Justice Stewart argued in his dissent that the majority construed § 1953 too broadly:

The Government does not contend that federal law makes it a crime for a person from another State to visit New Hampshire, purchase a sweepstakes ticket there, and return to his home. But it has argued that if a visitor to New Hampshire returns home with a receipt that merely acknowledges his personal purchase and in no way affects his eligibility to receive a prize, he has committed a crime punishable by imprisonment of up to five years. Thus the Government requires us to assume that Congress has branded as felons many or most of the thousands of visitors to New Hampshire who have purchased sweepstakes tickets there. I do not believe that Congress intended such an unexpected result, which only the most abjectly literal approach to statutory interpretation could tolerate. No plausible legislative purpose would be served by the Government's construction, for when an individual takes an acknowledgment of purchase home from New Hampshire, merely retaining it as a personal record of his purchase, the anti-gambling policies of other States are in no way undermined, and no opening is provided for the growth of organized racketeering.

Id. at 272-73 (footnote omitted).

Federal policy toward gambling does not require including the state lottery bettor in the sweep of an amended section 1953. The national policy toward gambling rests heavily on principles of federalism and, in most instances, has merely supported the substantive policy choices of the several states. The federal government has attempted to adapt federal law to shifts in public attitudes toward gambling. Because some states have established and encouraged lotteries, but other states still oppose them, Congress has had to balance conflicting state interests. As a rule, the federal government should intervene to support state antilottery policies only when those policies are significantly threatened and require federal reinforcement.

Allowing individual bettors in state-conducted lotteries to carry their tickets or acknowledgements across state borders is not inconsistent with the present national policy toward lotteries. The interstate transportation of lottery tickets by individuals who do not intend to resell them does not threaten state antilottery policies. A state can enact and enforce laws against individual bettors importing lottery tickets just as easily as the federal government can. Only in prosecuting large-scale gambling operations does the federal government possess a significant enforcement advantage. In general, federal gambling legislation reflects this conclusion.¹³⁶ Regulation of the individual bettor should remain a matter of state law; no justification appears for deviating from the federal practice of noninterference with state policies.

If Congress closes the current loophole in section 1953, it should also exempt individual bettors in state-conducted lotteries from the sweep of the statute. Such an amendment should allow an individual to carry lottery tickets from legal state-conducted lotteries across state lines, provided that the individual does not resell or intend to resell the tickets.¹³⁷ These changes would align federal

¹³⁶ Many federal statutes manifest Congress's desire to exempt the individual bettor from federal gambling laws. *See, e.g.*, 18 U.S.C. §§ 1081-1084, 1511, 1952, 1955 (1976).

¹³⁷ For example, the following provision could be appended to § 1953(b)(4): ". . . acting under authority of State law; nor shall this section apply to tickets or other materials concerning a lottery conducted by a State acting under authority of State law when transported personally by an individual not for subsequent resale." This language would exempt individuals from the rule of § 1953, and yet avoid problems relating to interstate transportation of lottery tickets for profit. This exemption could also be drawn as an affirmative defense on which defendant would have to carry some burden of persuasion. *Cf. Patterson v. New York*, 432 U.S. 197 (1977) (affirmative defense on which defendant had burden of persuasion upheld because separate from elements of crime). *But cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975) (affirmative defense that allocates burden of persuasion on element of

lottery law with federal gambling policy.

II

MODERN CRIMINAL STATUTES: AN ATTACK ON ORGANIZED CRIME

The first half of the twentieth century saw the federal government virtually abstain from gambling-related legislation.¹³⁸ The pressure on the national government generated by the Louisiana Lottery and similar enterprises had subsided. Responsibility for regulating gambling returned to the states, where it had rested exclusively before the nineteenth-century lottery scandals.

Since 1948, the federal role in the regulation of gambling has expanded significantly. Federal statutes have dealt with gambling ships,¹³⁹ interstate and foreign transportation of wagering para-

crime to defendant violates due process). In either case, the exemption for the individual bettor would not unduly impede the effectiveness of § 1953 against interstate schemes to distribute lottery tickets for profit in violation of the policies of other states.

¹³⁸ Except for extending the antilottery statutes to radio broadcasting in 1934 (see notes 94-96 and accompanying text *supra*), Congress enacted no federal statute between 1895 and 1948 that directly affected gambling. Congress did include a chapter on gambling in the District of Columbia Code (see Act of Mar. 3, 1901, ch. 854, §§ 863-869, 31 Stat. 1189 (current version at D.C. CODE §§ 22-1501 to -1508 (1967))), as well as restrictions on speculation in futures contracts (see Act of Mar. 1, 1909, ch. 233, 35 Stat. 670 (current version at D.C. CODE §§ 22-1509 to -1512 (1967))). Congress joined many states (see, e.g., Act of Apr. 9, 1913, ch. 236, 1913 N.Y. Laws (current version at N.Y. GEN. BUS. LAW §§ 351 to 351-e (1968 & Supp. 1977))); see generally DEVELOPMENTS, *supra* note 9, at 96-100, 341-44) in limiting "bucketing" transactions, which involved futures speculation. Legislatures apparently theorized that futures contracts involved wagering on the price of commodities at some future time. When parties entered such contracts without a bona fide intention to invest in the underlying commodities, they implicated the antisocial consequences traditionally associated with gambling. See *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 165 Ind. 492, 512, 76 N.E. 100, 107-08 (1905). The Supreme Court generally upheld state regulation of futures trading. See, e.g., *Booth v. Illinois*, 184 U.S. 425 (1902); *Clews v. Jamieson*, 182 U.S. 461 (1901). The distinction between forms of prohibited conduct and insurance, or investments in the securities and commodities markets, is not clear, but perhaps turns on the perceived social utility of a given type of transaction.

The first federal attempt to regulate trading in commodities futures was the Future Trading Act, ch. 86, 42 Stat. 187 (1921), which imposed a heavy tax on certain contracts for the future sale of grain. The Supreme Court promptly declared the Act an unconstitutional use of the taxing power to usurp regulatory powers reserved to the states. See *Hill v. Wallace*, 259 U.S. 44 (1922). Congress relied on its powers under the commerce clause to enact the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (originally enacted as Grain Futures Act, ch. 369, 42 Stat. 998 (1922)) (current version at 7 U.S.C. §§ 1-17b (1976)). Congress has also enacted the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (current version at 7 U.S.C. § 4a (1976)).

¹³⁹ See 18 U.S.C. §§ 1081-1083 (1976). Congress sought an end to the operation of gambling ships floating off the California coast. Such ships were attracting thousands of customers in the 1940s. The floating casinos anchored beyond the three mile limit to avoid

phernalia¹⁴⁰ and gambling devices,¹⁴¹ transmission of wagering information through wire facilities,¹⁴² interstate travel in furtherance of racketeering enterprises,¹⁴³ the business enterprise of gambling,¹⁴⁴ state-conducted lotteries,¹⁴⁵ and wagering taxes.¹⁴⁶ This legislative activity occurred in three cycles that corresponded roughly with the Kefauver investigations of 1950-1951, Attorney General Robert F. Kennedy's program against organized crime in 1961-1962, and anti-crime efforts that occurred in 1969-1970 during the Nixon Administration.

California jurisdiction, and used small "water taxis" to shuttle their customers from shore. Treasury licensing provisions allowed prosecution of only some of the offenders. *See* Comment, *Federal Regulation of Gambling*, 60 *YALE L.J.* 1396, 1406 n.62 (1951).

The new provisions outlawed owning or operating a vessel used as a gambling establishment within federal jurisdiction but outside the jurisdiction of a state:

(a) It shall be unlawful for any citizen or resident of the United States, or any other person who is on an American vessel or is otherwise under or within the jurisdiction of the United States, directly or indirectly—

(1) to set up, operate, or own or hold any interest in any gambling ship or any gambling establishment on any gambling ship; or

(2) in pursuance of the operation of any gambling establishment on any gambling ship, to conduct or deal any gambling game, or to conduct or operate any gambling device, or to induce, entice, solicit, or permit any person to bet or play at any such establishment,

if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State.

18 U.S.C. § 1082(a) (1976). Subsection (b) provides for a fine up to \$10,000 and two years' imprisonment; subsection (c) is a forfeiture provision. Section 1081 contains definitions and § 1083 prohibits "water taxis" from providing transportation to and from illegal gambling ships on the high seas.

The House Committee on the Judiciary, reporting the bill without amendment, emphasized that it proscribed only commercial enterprises:

[T]he committee wants it clearly understood that it is not its intention to provide any agency of the Government with an opportunity to harass the vast number of private yachtsmen, and that the Secretary of the Treasury shall carefully draft any regulations he may issue so as to be sure that the application thereof will be to large-scale commercial gambling alone.

H.R. REP. No. 1700, 80th Cong., 2d Sess. 1, *reprinted in* [1948] U.S. CONG. SERV. 1487, 1488. Only one case arising under the gambling ship statutes has been reported. *See* *United States v. Black*, 291 F. Supp. 262 (S.D.N.Y. 1968) (motion to dismiss § 1082 indictment denied because premature). Congress enacted §§ 1081-1083 to alleviate a specific problem that was beyond the power of state legislatures to control, and therefore, the provisions do not reflect a general congressional policy toward gambling.

¹⁴⁰ 18 U.S.C. § 1953 (1976).

¹⁴¹ 15 U.S.C. §§ 1171-1178 (1976).

¹⁴² 18 U.S.C. § 1084 (1976).

¹⁴³ *See id.* § 1952.

¹⁴⁴ *See id.* §§ 1511, 1955.

¹⁴⁵ *See id.* § 1307.

¹⁴⁶ *See* I.R.C. §§ 4401-4423, 4461-4463.

A. *The Kefauver Committee and the Johnson Act*

In 1950, two events signaled a new federal assault on organized crime¹⁴⁷ generally, and gambling specifically. In February, the Attorney General's Conference on Organized Crime¹⁴⁸ convened to discuss the need for concerted federal action to supplement the various state laws dealing with gambling:

[W]hile practically all of the States have laws prohibiting gambling and gaming, and the use of gambling machines, such as the notorious slot machine, is prohibited, the efforts of the local enforcement officials are usually and often frustrated not only by the hostility and opposition of those who stand to benefit by

¹⁴⁷ "Organized crime" is a phrase with many meanings. It is much like the fictional crime portrayed in Akira Kurasawa's 1950 film, *Rashoman*, in which a ninth century nobleman's bride is raped by a bandit, and the nobleman lies dead. The film portrays versions of the double crime from the perspectives of each of the three participants and a witness. Each version is different. So it is with the definition of organized crime. Some have seen nothing, and decided that nothing was there. See, e.g., Hawkins, *God and the Mafia*, 14 PUB. INTEREST 24 (1969). Others, examining the phenomenon from an anthropological perspective, have seen a "social system." See, e.g., F. IANNI, *A FAMILY BUSINESS* (1972). One commentator, relying on press accounts, has seen only a public relations gimmick. See D. SMITH, *THE MAFIA MYSTIQUE* (1975). The organizational theorist sees a functional division of labor. See D. CRESSEY, *THEFT OF THE NATION* (1969). Some lawyers have seen it as a conspiracy. See, e.g., Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in *THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME—ANNOTATIONS AND CONSULTANTS' PAPERS* 80, 81-83 app. C (1967). The Commission adopted a view that termed conspiratorial behavior "organized crime" when its organizational sophistication reached a level where division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. See *THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME—ANNOTATIONS AND CONSULTANTS' PAPERS* 8 (1967) [hereinafter cited as *TASK FORCE REPORT: ORGANIZED CRIME*]. The Mafia was termed only the "core" of organized crime; it was not identified with it. *Id.* at 6. Nevertheless, the Commission on the Review of the National Policy Toward Gambling equated "organized crime" with Mafia (see *GAMBLING IN AMERICA*, *supra* note 2, at 171), much to the consternation of Senator McClellan (see *id.* at 181-82 ("in none of the hearings or in the processing of legislation in which I have been involved has the term been used in this circumscribed fashion"))).

The Department of Justice has estimated the percentage of gambling controlled by "organized crime" in the sense of Mafia: Far West, 29.2; Midwest 47.4; Northeast, 53.2; Southeast, 35.7; Southwest, 2.0. *EASY MONEY*, *supra* note 116, at 9. For a journalistic review see *TIME*, May 16, 1977, at 32.

¹⁴⁸ The Attorney General had received resolutions from local officials and organizations seeking a conference to discuss law enforcement problems. The proposed conference met during the annual Conference of United States Attorneys and focused principally on large-scale organizations that depended upon syndicated gambling. See *Hearings Before the House Comm. on Interstate and Foreign Commerce on S. 3357 and H.R. 6736*, 81st Cong., 2d Sess. 35 (1950) (statement of Herzog H.E. Plaine, Office of the Ass't Solicitor General, Dep't of Justice) [hereinafter cited as *1950 House Commerce Hearings*].

these operations, but also by the ease with which the paraphernalia, which is essential to gambling operations, can be distributed in interstate commerce.¹⁴⁹

Three months later, the Senate established the Special Senate Committee to Investigate Organized Crime in Interstate Commerce—the Kefauver Committee.¹⁵⁰ Together, these events evoked a flurry of publicity,¹⁵¹ congressional hearings,¹⁵² and legislation.¹⁵³

¹⁴⁹ *Id.*

¹⁵⁰ See S. Res. 202, 81st Cong., 2d Sess. (1950) (submitted by Senator Kefauver). The introduction of the Committee's Third Interim Report stated its purposes:

The function of the committee was to make a full and complete study and investigation to determine whether organized crime utilizes the facilities of interstate commerce or whether it operates otherwise through the avenues of interstate commerce to promote any transactions which violate Federal law or the law of the State in which such transactions might occur.

S. REP. NO. 307, 82d Cong., 1st Sess. 20 (1951).

¹⁵¹ National concern over rising crime rates in general and organized crime in particular characterized the postwar period. See W. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-1952*, at 23-41 (1974). Public unrest led to the formation of numerous local crime commissions (see *id.* at 40-41; S. REP. NO. 725, 82d Cong., 1st Sess. 19-20 (1951)) and the establishment by major newspapers of a clearinghouse to publicize and analyze as much news as possible about national crime syndicates and their leaders (see W. MOORE, *supra*, at 41). The resulting pressure on the federal government led first to the expanded February 1949 meeting of United States Attorneys addressed by President Truman. See note 148 *supra*. Ultimately, Congress established the Kefauver Committee.

The Special Committee to Investigate Organized Crime in Interstate Commerce, which thrust its chairman into presidential politics, held numerous public hearings throughout the country, many of which were televised. The Committee heard over 600 witnesses and collected lengthy testimony in Miami, Tampa, New Orleans, Kansas City, Cleveland, St. Louis, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, Chicago, New York, and Washington, D.C. See S. REP. NO. 307, 82d Cong., 1st Sess. 21 (1951). See generally *Hearings Before a Special Committee to Investigate Organized Crime in Interstate Commerce*, 82d Cong., 1st Sess., pts. 1-19 (1950-51). The Kefauver Committee issued several Reports summarizing its findings, which included the existence of a national crime syndicate; it also made recommendations before ending its investigation on Sept. 1, 1951. See S. REP. NO. 2370, 81st Cong., 2d Sess. (1950); S. REP. NO. 141, 82d Cong., 1st Sess. (1951); S. REP. NO. 307, 82d Cong., 1st Sess. (1951); S. REP. NO. 725, 82d Cong., 1st Sess. (1951). For discussion and evaluation of the Committee's history see Wilson, *The Kefauver Committee 1950*, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974, at 3439 (A. Schlesinger, Jr. & R. Burns eds. 1975). Significantly, at the beginning of the probe, "Attorney General McGrath [had said] that the Justice Department had no persuasive evidence that a 'national crime syndicate' . . . [existed]." *Id.* at 3450.

¹⁵² See *Transmission of Gambling Information: Hearings Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. 3358*, 81st Cong., 2d Sess. (1950); *Anticrime Legislation: Hearings Before the Senate Comm. on Interstate and Foreign Commerce on S. 1563*, S. 1564, S. 1624, and S. 2116, 82d Cong., 1st Sess. (1951) (interstate transmission of gambling information and materials).

¹⁵³ The Johnson Act, 15 U.S.C. §§ 1171-1178 (1976), was a direct outgrowth of the Kefauver investigations. Congress also enacted wagering excise taxes at this time. See notes 324-31 and accompanying text *infra*.

And although Congress enacted only one significant set of provisions relating to gambling at that time, proposals stemming from the Kefauver hearings formed the core of measures enacted decades later.¹⁵⁴

In 1951, responding to the Kefauver hearings, Congress passed the Johnson Act,¹⁵⁵ limiting the interstate transportation of gambling devices. The House Report accompanying the bill declared that "[t]he primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States."¹⁵⁶ The bill sought to combat "[n]ation-wide crime syndicates" thought to be immune from local law enforcement;¹⁵⁷ it did not supplant local gambling policies.¹⁵⁸ A provision allowing states to exempt themselves from the direct impact of the proposed statute by subsequent state legislation¹⁵⁹ countered objections that

¹⁵⁴ Attorney General Kennedy's program to curb organized crime and racketeering included several measures proposed by the Kefauver Committee. See, e.g., notes 221-28 and accompanying text *infra*.

¹⁵⁵ See Act of Jan. 2, 1951, ch. 1194, 64 Stat. 1134 (current version at 15 U.S.C. §§ 1171-1178 (1976)).

¹⁵⁶ H.R. REP. NO. 2769, 81st Cong., 2d Sess. 2, reprinted in [1950] U.S. CONG. SERV. 4240, 4240.

¹⁵⁷ See *id.* at 4-5, reprinted in [1950] U.S. CONG. SERV. 4240, 4243.

¹⁵⁸ Herzel Plaine of the Justice Department, testifying before the House committee, emphasized the limited federal role contemplated under the statute:

Aside from the Federal antilottery laws which were enacted in 1890, 1895, and 1934, and some very recent legislation dealing with gambling ships, the Federal Government has no present enforcement function in the field of gambling. The laws and the policy which by their accumulative effect we might say establish a Nationwide policy against gambling, particularly commercialized gambling, are to be found in the laws and constitutions of the several States. In that sense, this committee and the whole Congress will be approaching the present-day problem just as Congress approached the lottery problem in 1890, and again in 1895, when the so-called national policy against lotteries had been formed in the States by their laws and constitutions, and Congress was asked to enact a Federal law to close the loopholes in interstate and foreign commerce in aid of that policy.

....

Proceeding, then, Mr. Chairman, on the assumption that there is a substantive evil to be corrected, let me say categorically that the purpose of the bill is to support the basic policy of the States which outlaws slot machines and similar gambling devices by prohibiting the interstate shipment of such machines, except into States where their use is legal.

1950 House Commerce Hearings, *supra* note 148, at 37.

¹⁵⁹ See Act of Jan. 2, 1951, ch. 1194, § 2, 64 Stat. 1134 (current version at 15 U.S.C. § 1172 (1976)). Section 1172 contains the following proviso:

Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of

the bill infringed on states' rights.¹⁶⁰

The basic provisions of the Johnson Act defined the affected gambling devices,¹⁶¹ prohibited their interstate transportation under certain conditions,¹⁶² and required elaborate reporting and registration by their manufacturers.¹⁶³ Courts have applied the provisions to a variety of devices.¹⁶⁴ Although the Johnson Act has

such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided, further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

15 U.S.C. § 1172 (1976). In a state where certain gambling devices are lawful, the proviso does not entirely negate the effect of the statute. In the absence of the federal statute, certain activities not expressly proscribed could be conducted within the state. After the enactment of § 1172, state legislatures, in order to benefit from its exemption, had to approve expressly the conduct in question, and vote publicly "in favor of sin." The difference to an elected representative might be substantial.

¹⁶⁰ Leading an unsuccessful fight against the bill, Nevada Congressman Walter S. Baring argued that the law would adversely affect the legal gambling industry and infringe upon states' rights. *See* 96 CONG. REC. 13642-44 (1950). He further argued that the power to regulate gambling came from the states' police powers, and that it would be unreasonable to extend national commerce clause powers into that area. *See id.* at 13651-54. Another opponent of the bill added pragmatically that voting for the proposed bill resembled voting "against sin" because slot machines were likely to be found only where people did not strongly object to them. *Id.* at 13655 (remarks of Rep. Tackett). Proponents of the bill pointed to the requests of many states for federal legislation, quoting from a letter to the House Committee on Interstate and Foreign Commerce From Attorney General McGrath:

The only thing that the Federal Government is being asked to do under this bill is to stop in the channels of commerce the shipment of these machines which the States are powerless to keep out of the channels of interstate commerce. Actual enforcement against those people who gamble or use these machines wrongfully in the States is left to the States

Id. at 13643 (remarks of Rep. Rogers).

¹⁶¹ *See* Johnson Act § 1, 15 U.S.C. § 1171 (1976). The term "gambling device" included not only "slot machines" or similar coin-operated devices dependent upon an element of chance to give a valuable prize, but also any sub-assembly or essential part of such devices. The definition of "gambling device" had been much broader in S. 3357, 81st Cong., 2d Sess. (1950), but the House narrowed it in committee. *See* H.R. REP. NO. 2769, 81st Cong., 2d Sess. 6-7 (1950).

¹⁶² *See* Johnson Act § 2, 15 U.S.C. § 1172 (1976). The Act provides, as a general rule: "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession . . ." *Id.*

¹⁶³ *See* Johnson Act § 3, 15 U.S.C. § 1173 (1976). The provision required manufacturers and dealers of gambling devices to register with the Attorney General, to file monthly records of sales of gambling devices, and to mark each component of such devices. It was unlawful to repair or sell such gambling devices without complying with the provision.

¹⁶⁴ Some courts have read the statute to cover almost any type of gambling device

survived constitutional challenges,¹⁶⁵ its filing requirements—demanding documentation of potentially illegal transactions—have succumbed to the fifth amendment protection against self-incrimination.¹⁶⁶ Courts have also narrowed the permissible scope of the legislation.¹⁶⁷ The narrow construction of the Johnson Act and the invalidation of its filing provisions seriously eroded the statute's effectiveness and led to requests for congressional renovation.¹⁶⁸

B. *Robert F. Kennedy's Program Against Organized Crime*

Robert F. Kennedy's vigorous efforts against organized crime and syndicated gambling brought about a dramatic change at the Justice Department. Kennedy repeatedly testified before congress-

activated by a coin or token, or designed or manufactured as a gambling device. *See* *United States v. 24 Digger Merchandising Machs.*, 202 F.2d 647 (8th Cir.) (applying Act to machine where player operates crane to dig for prizes but exercises minimal control over where crane digs), *cert. denied*, 345 U.S. 998 (1953); *United States v. Brown*, 156 F. Supp. 121 (N.D. Iowa 1957) (applying Act to machine that delivers poker hands redeemable for cash). Other courts, emphasizing the penal character of the Act, construed its language strictly to encompass only traditional slot machines. *See* *United States v. Ansani*, 240 F.2d 216 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957); *United States v. Three Gambling Devices*, 161 F. Supp. 5 (W.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 395 (3d Cir. 1958); *United States v. One Elec. Pointmaker*, 149 F. Supp. 427 (N.D. Ind. 1957); *United States v. McManus*, 138 F. Supp. 164 (D. Wyo. 1952). Thus, a machine might be proscribed in one circuit and allowed in another. For example, courts generally have construed the statute to exclude pinball machines. *See, e.g.*, *United States v. Five Gambling Devices*, 252 F.2d 210 (7th Cir. 1958). *But see* *United States v. 19 Automatic Pay-Off Pinball Machs.*, 113 F. Supp. 230 (W.D. La. 1953) (Act applied to pinball machine used for gambling but lacking any payoff mechanism). For discussion of the treatment of pinball machines at the state level, see DEVELOPMENTS, *supra* note 9, at 359-61, 753, 790.

¹⁶⁵ *See* *United States v. 46 Gambling Devices*, 138 F. Supp. 896, 899 (D. Md. 1956) (forfeiture does not violate due process), *aff'd sub nom.* *North Beach Amusement Co. v. United States*, 240 F.2d 729 (4th Cir. 1957); *United States v. Ansani*, 138 F. Supp. 451, 453-54 (N.D. Ill. 1955) (requiring registration as dealer does not compel self-incrimination because it applies only to future acts; provision requiring monthly reports of unlawful acts unconstitutional), *aff'd*, 240 F.2d 216 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957); *United States v. 65 Slot Machs.*, 102 F. Supp. 922, 924 (W.D. La. 1952) (legitimate exercise of commerce clause power).

¹⁶⁶ *United States v. Ansani*, 138 F. Supp. 451, 453-54 (N.D. Ill. 1955), *aff'd*, 240 F.2d 216 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957).

¹⁶⁷ The statute has been held inapplicable to purely intrastate activities. *See* *United States v. Braun*, 119 F. Supp. 646, 647 (S.D. Ga.), *aff'd sub nom.* *United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Denmark*, 119 F. Supp. 647, 649-50 (S.D. Ga.), *aff'd sub nom.* *United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. 15 Mills Blue Bell Gambling Machs.*, 119 F. Supp. 74, 78 (M.D. Ga. 1953); *United States v. 5 Gambling Devices*, 119 F. Supp. 641, 644 (N.D. Ga. 1952), *aff'd*, 346 U.S. 441 (1953); *United States v. 178 Gambling Devices*, 107 F. Supp. 394 (S.D. Ill. 1952).

¹⁶⁸ *See* notes 221-28 and accompanying text *infra*.

sional committees¹⁶⁹ and sponsored articles urging the enactment of new antigambling legislation.¹⁷⁰ The fruits of his endeavors were three new substantive provisions as well as amendments to the Johnson Act.

1. *Wire Communications—18 U.S.C. § 1084*

The first accomplishment of the Kennedy program was an addition to the gambling chapter of title 18 of the United States Code, which had previously dealt only with gambling ships. Congress added section 1084 to prohibit interstate transmission of wagering information.¹⁷¹ According to its legislative history, the new measure was

to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.¹⁷²

¹⁶⁹ See, e.g., *Legislation Relating to Organized Crime: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039, 87th Cong., 1st Sess. 18-47 (1961)* [hereinafter cited as *House Judiciary Hearings*]; *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Senate Comm. on the Judiciary on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665, 87th Cong., 1st Sess. 1-18 (1961)* [hereinafter cited as *Senate Judiciary Hearings*]; *Gambling Devices: Hearings Before the House Comm. on Interstate and Foreign Commerce on H.R. 3024, H.R. 8410, and S. 1658, 87th Cong., 2d Sess. 9-34 (1962)* [hereinafter cited as *1962 House Commerce Hearings*].

¹⁷⁰ See, e.g., Kennedy, *The Program of the Department of Justice on Organized Crime*, 38 NOTRE DAME LAW. 637 (1963); Kennedy, *Three Weapons Against Organized Crime*, 8 CRIME & DELINQ. 321 (1962); Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37 (1962). See also A. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 222-85 (1978).

¹⁷¹ See Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified at 18 U.S.C. § 1084 (1976)). The first subsection provides in pertinent part:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a) (1976).

¹⁷² H.R. REP. NO. 967, 87th Cong., 1st Sess. 1-2, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2631, 2631.

In addition to supporting state gambling policies, the statute sought to cut off a major source of revenue to organized crime by impeding its gambling activities.¹⁷³

Congress framed section 1084 to reach only those "engaged in the business of betting or wagering,"¹⁷⁴ thus exempting the individual bettor. The provision forbade business gamblers to use any "wire communication facility" to communicate information relevant to gambling and also directed common carriers to aid the government in forcing business gamblers to comply.¹⁷⁵ A key exception to the general policy of the prohibition provided:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.¹⁷⁶

The history of section 1084 in the courts reflects the section's legislative purpose. Although the question has never reached the Supreme Court, lower courts have upheld the statute against fifth and tenth amendment challenges.¹⁷⁷ In construing the section, courts have attempted to accommodate the balance of interests between states prohibiting and states allowing gambling with the congressional policy against the use of interstate facilities for gam-

¹⁷³ Attorney General Kennedy testified: "Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. . . . because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime . . ." *Senate Judiciary Hearings, supra* note 169, at 11. In his prepared statement the Attorney General said: "It is quite evident that modern, organized, commercial gambling operations are so completely intertwined with the Nation's communications systems that denial of their use to the gambling fraternity would be a mortal blow to their operations. This is the precise purpose of the proposed legislation." *Id.* at 6.

¹⁷⁴ The Justice Department bill had originally extended to the social bettor, but was narrowed in committee. Senator Kefauver remarked that the provision ought to focus on the professional, not the social gambler. *See id.* at 278-79.

¹⁷⁵ *See* 18 U.S.C. § 1084(d) (1976). The statute's key provision applies only to *professional gamblers* who knowingly use communication facilities in furtherance of gambling activities. *See id.* § 1084(a).

¹⁷⁶ *Id.* § 1084(b).

¹⁷⁷ Many courts have upheld the Act as within Congress's authority to regulate interstate commerce. *See, e.g.,* *United States v. Kelley*, 254 F. Supp. 9, 14-15 (S.D.N.Y. 1966); *United States v. Borgese*, 235 F. Supp. 286, 296 (S.D.N.Y. 1964), *vacated on other grounds and remanded mem.*, 372 F.2d 950 (2d Cir. 1967). The statute has also survived assertions that it is unconstitutionally vague. *See, e.g.,* *United States v. Brodson*, 390 F. Supp. 774, 779 (E.D. Wis. 1975).

bling.¹⁷⁸ Courts have read broadly section 1084,¹⁷⁹ but have respected its requirement that the defendant be engaged in the business of gambling.¹⁸⁰ The news-reporting exemption in section 1084(b) has also limited prosecutions.¹⁸¹ Although section 1084 has produced a steady number of convictions,¹⁸² its principal impact may be to deter certain forms of gambling.¹⁸³

¹⁷⁸ In *Martin v. United States*, 389 F.2d 895 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968), appellants argued that § 1084 did not prohibit the transmission of wagers into Nevada, because doing so would "defeat the policies of Nevada while not aiding the enforcement of the laws of any other State." *Id.* at 897. The court was unsympathetic, responding that "if the policy of Nevada is not 'defeated' in some way, then the policy of every other State that prohibits what Nevada allows could be defeated." *Id.* at 898. The court also argued that Congress did not enact § 1084 solely to assist the enforcement of state substantive gambling policies:

This section was part of an omnibus crime bill that recognized the need for independent federal action to combat interstate gambling operations. . . . Moreover, this series of legislation does not stand alone, but appears as part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control.

Id. at 898 (footnotes omitted).

¹⁷⁹ See, e.g., *United States v. Bergland*, 318 F.2d 159 (7th Cir.), *cert. denied*, 375 U.S. 861 (1963); *United States v. Yaquina*, 204 F. Supp. 276 (N.D.W. Va. 1962).

¹⁸⁰ See *Cohen v. United States*, 378 F.2d 751, 757 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967).

¹⁸¹ Even "scratch sheets," as long as they are sold to the public, are outside the scope of the prohibition. See *United States v. Kelley*, 328 F.2d 227, 236 (6th Cir. 1964); *Kelley v. Illinois Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963).

¹⁸² See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL REPORT FOR THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 36 (1974). The conviction rate for a composite of gambling cases brought under 18 U.S.C. §§ 1084, 1952, and 1953 is lower than the conviction rate for all federal prosecutions.

GAMBLING CASES CONVICTION RATE

	1967	1968	1960	1970	1971	1972	1973
No. Prosecuted (§§ 1084, 1952-1953)	152	108	122	166	380	360	319
No. Convicted	98	96	73	81	163	213	179
% Convicted	65	70	60	49	43	59	56
% Convicted (All Federal Crimes)	83	80	81	77	72	75	75

The figures are too small for further generalizations.

¹⁸³ Attorney General Kennedy testified in 1963 that the previous year had seen a sharp decline in gambling. *Hearings Before a Subcomm. of the House Comm. on Appropriations, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1964*, 88th Cong., 1st Sess., pt. 2, at 8-9 (1963). Two years later, a Justice Department official stated: "The utility of the 1961 antigambling laws is being demonstrated not only

2. *The Travel Act*—18 U.S.C. § 1952

In April 1961, Attorney General Kennedy submitted to Congress a proposed draft of a bill to prohibit travel in aid of racketeering enterprises.¹⁸⁴ The statute proscribed interstate travel with intent to engage in certain unlawful activities. The Attorney General assured Congress that the social gambler would have little to fear from the proposed law because only the business enterprise of gambling fell within its scope.¹⁸⁵

An early version of the Travel Act defined the gravamen of the offense as travel in interstate commerce with the intent to engage in certain unlawful activities. Congress amended the proposed bill to require not only *intent* but also an *attempt* to engage in such activity.¹⁸⁶ With this restriction, Congress enacted the

by increased prosecutive action, but also by numerous intelligence reports showing that large interstate gambling operations are either shutting down or becoming intrastate and relatively minor in scope and profit." *Hearings Before a Subcomm. of the House Comm. on Appropriations, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1966*, 89th Cong., 1st Sess., pt. 3, at 88 (1965) (statement of Ass't Att'y Gen. Herbert J. Miller).

¹⁸⁴ In his cover letter, Kennedy stated:

Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

....

The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far-flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combatting pernicious undertakings which cross State lines.

Letter from Attorney General Kennedy to the Speaker of the House (April 6, 1961), reprinted in H.R. REP. No. 966, 87th Cong., 1st Sess. 4, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2664, 2666.

¹⁸⁵ See *House Judiciary Hearings*, *supra* note 169, at 24 (statement of Att'y Gen. Kennedy). See generally *Senate Judiciary Hearings*, *supra* note 169, at 255 (statement of Ass't Att'y Gen. Herbert J. Miller). Said Kennedy: "[W]e have carefully delineated an area of law enforcement which will disrupt the organized criminal syndicates without interfering with general travel." *Senate Judiciary Hearings*, *supra* note 169, at 16. Kennedy also stated: "The main target of our bill is interstate travel to promote gambling. It also is aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these funds for corrupting local officials and for their use in racketeering in labor and management." *Id.* at 2. Justifying the role of the national government, the Attorney General noted that "only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials." *Id.* at 16.

¹⁸⁶ The Senate narrowed the definition of "unlawful activity" and added the requirement that action in furtherance of the illicit activity be attempted. S. REP. No. 644, 87th

measure.¹⁸⁷

Defendants have unsuccessfully challenged the constitutionality of the Travel Act on a number of theories.¹⁸⁸ Although the

Cong., 1st Sess. 5-6 (1961). The Senate also broadened its version of the bill, S. 1653, 87th Cong., 1st Sess. (1961), to include the use of any interstate facilities in aid of organized crime activities (*see* S. REP. No. 644, 87th Cong., 1st Sess. 5-6 (1961); 107 CONG. REC. 13943 (1961) (remarks of Senator Eastland)) despite a caution from the Justice Department that such a broad bill would not be politically viable (*see* *Senate Judiciary Hearings, supra* note 169, at 107 (statement of Ass't Att'y Gen. Herbert J. Miller)). After further changes in the House, a conference was held to reconcile differences. *See* H.R. REP. No. 1161, 87th Cong., 1st Sess. (1961) (Conf. Rep.). For criticism and analysis of the impact of this legislative process on the interests of federalism, see Judge Friendly's opinion for the court in *United States v. Archer*, 486 F.2d 670, 678-81 (2d Cir. 1973).

¹⁸⁷ Act of Sept. 13, 1961 (Travel Act), Pub. L. No. 87-228, 75 Stat. 498 (current version at 18 U.S.C. § 1952 (1976)). The statute as enacted read as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Id. Congress has twice amended § 1952, including arson in the definition of unlawful activity (*see* Act of July 7, 1965, Pub. L. No. 89-68, 79 Stat. 212 (codified at 18 U.S.C. § 1952(b) (2) (1976))), and modifying the definition of narcotics (*see* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 701(i)(2), 84 Stat. 1236 (codified at 18 U.S.C. § 1952(b)(1) (1976))).

¹⁸⁸ *See, e.g.*, *United States v. Villano*, 529 F.2d 1046, 1055-56 (10th Cir. 1975) (rejecting first, fifth, and tenth amendment challenges), *cert. denied*, 426 U.S. 953 (1976); *United States v. Bergdoll*, 412 F. Supp. 1308, 1314 (D. Del. 1976) (rejecting first, fifth, and tenth amendment challenges). Several courts have upheld the Act as a valid exercise of power under the commerce clause. *See, e.g.*, *United States v. Nichols*, 421 F.2d 570, 574 (8th Cir. 1970); *Gilstrap v. United States*, 389 F.2d 6, 8 (5th Cir.) (rejecting due process-vagueness challenge), *cert. denied*, 391 U.S. 913 (1968); *United States v. Barrow*, 363 F.2d 62, 65 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *Marshall v. United States*, 355 F.2d 999, 1004 (9th Cir.) (rejecting tenth amendment challenge), *cert. denied*, 385 U.S. 815 (1966); *United States v. Zizzo*, 338 F.2d 577, 579-80 (7th Cir. 1964) (rejecting due process-vagueness challenge), *cert. denied*, 381 U.S. 915 (1965); *Turf Center, Inc. v. United States*, 325 F.2d 793, 795 (9th Cir. 1963) (rejecting tenth amendment challenge); *Bass v. United States*, 324 F.2d 168, 172-73 (8th Cir. 1963) (rejecting tenth amendment challenge). The first amendment does not protect conduct § 1952 defines as criminal. *See, e.g.*, *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972); *Spinelli v. United States*,

Supreme Court has avoided the constitutional merits of the Act, it has addressed matters of construction.¹⁸⁹

Despite its potential for overlapping other federal gambling statutes,¹⁹⁰ the Travel Act has been consistently and straightforwardly applied. It is not a per se violation of section 1952 for one who operates a gambling business to travel between states;¹⁹¹ the interstate travel must relate to the gambling enterprise itself, such as travel to and from work by employees of the establishment.¹⁹² The Act excludes customers, and courts have confined the reach of the statute to those engaged in gambling as a business.¹⁹³ As con-

382 F.2d 871, 890 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *United States v. Corallo*, 281 F. Supp. 24, 28 (S.D.N.Y. 1968); *United States v. Borgese*, 235 F. Supp. 286, 295-96 (S.D.N.Y. 1964), *vacated and remanded mem.*, 372 F.2d 950 (2d Cir. 1967); *United States v. Smith*, 209 F. Supp. 907, 918 (E.D. Ill. 1962).

¹⁸⁹ See *Erlenbaugh v. United States*, 409 U.S. 239, 243 n.9 (1972); *Rewis v. United States*, 401 U.S. 808, 811 n.5 (1971); *United States v. Nardello*, 393 U.S. 286, 287 (1969). The Court has also considered the suppression of evidence obtained through wiretaps. See *United States v. Kahn*, 415 U.S. 143 (1974); *Spinelli v. United States*, 393 U.S. 410 (1969).

¹⁹⁰ Both § 1952 and § 1084 proscribe the use of interstate wire facilities in furtherance of certain gambling-related activities. Nevertheless, courts have dismissed arguments setting forth the danger of double prosecution because the elements of proof differ under the two statutes. See *United States v. McLeod*, 493 F.2d 1186, 1190 (7th Cir. 1974); *United States v. Smith*, 209 F. Supp. 907, 918-19 (E.D. Ill. 1962). In *Nolan v. United States*, 395 F.2d 283 (5th Cir. 1968), the defendant was convicted under § 1084 but acquitted under § 1952. *Cf. United States v. Ruthstein*, 414 F.2d 1079 (7th Cir. 1969) (§ 1084 did not preempt similar state statute which served as grounds of § 1952 conviction). In *Erlenbaugh v. United States*, 409 U.S. 239 (1972), the Supreme Court rejected the defendant's argument that the exemption in § 1953 for "any newspaper or similar publication" (18 U.S.C. § 1953(b)(3) (1976)) applied to § 1952 as well. Section 1952 also seems to overlap 18 U.S.C. § 1082 (1976), the gambling ship provision. Conduct potentially proscribed by both of these statutes was prosecuted under § 1952 in *United States v. Brennan*, 394 F.2d 151 (2d Cir.) ("floating crap game" on vessel sailing between New Jersey and New York), *cert. denied*, 393 U.S. 839 (1968).

¹⁹¹ See *United States v. Hawthorne*, 356 F.2d 740 (4th Cir.) (operator of supper club with gambling facilities held not culpable under § 1952 for interstate trip incident to family move), *cert. denied*, 384 U.S. 908 (1966). *But cf. United States v. Carpenter*, 392 F.2d 205 (6th Cir. 1968) (defendant liable after interstate trip to visit son where "dominant motive" furtherance of gambling activity).

¹⁹² See *United States v. Barrow*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

¹⁹³ See *Rewis v. United States*, 401 U.S. 808, 811 (1971). The operator of an illicit establishment may be liable for the foreseeable interstate travel of an employee (*United States v. Lee*, 448 F.2d 604, 606 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States v. Chambers*, 382 F.2d 910, 913-14 (6th Cir. 1967); *United States v. Barrow*, 363 F.2d 62, 64-65 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States v. Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965)), but not of patrons (see *Rewis v. United States*, 401 U.S. at 811 (dictum)). The interstate traveler who is merely a patron of a gambling club is not himself liable: "[T]he traveler's purpose must involve more than the desire to patronize the illegal activity." *Id.*

strued, the use of an interstate "facility" pursuant to a gambling enterprise (also proscribed by section 1952) includes the use of a telephone,¹⁹⁴ telegraph,¹⁹⁵ or newspaper,¹⁹⁶ but not necessarily the depositing of an out-of-state check.¹⁹⁷ Finally, contact with interstate commerce must be more than incidental.¹⁹⁸ All told, the Travel Act has been reasonably successful in achieving its goals.¹⁹⁹

¹⁹⁴ See *Menendez v. United States*, 393 F.2d 312, 314 n.2 (5th Cir.), cert. denied, 394 U.S. 1029 (1969); *United States v. Winston*, 267 F. Supp. 555, 561 n.8 (S.D.N.Y. 1964). But see *United States v. DeSapio*, 299 F. Supp. 436, 448 (S.D.N.Y. 1969) (count of § 1952 indictment alleging use of telephone in intrastate commerce dismissed).

¹⁹⁵ See *United States v. McMenama*, 403 F.2d 969 (6th Cir.), cert. denied, 394 U.S. 974 (1968); *United States v. Hawthorne*, 356 F.2d 740 (4th Cir.), cert. denied, 384 U.S. 908 (1966).

¹⁹⁶ See *Erlenbaugh v. United States*, 409 U.S. 239 (1972) (causing carriage of publication in interstate commerce with intent to facilitate operation of illegal gambling business proscribed). In *United States v. Arnold*, 380 F.2d 366 (4th Cir. 1967), the Fourth Circuit overturned a conviction under §§ 1952 and 1084 for ordering, by telephone, a publication for gambling purposes. It seems unlikely that other courts will follow *Arnold*.

¹⁹⁷ In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), the Seventh Circuit reversed a § 1952 conviction involving an extortion transaction in which a check had been cleared interstate. The Fourth Circuit, however, has sustained a § 1952 conviction involving a bookmaking operation using out-of-state checks. See *United States v. Salsbury*, 430 F.2d 1045 (4th Cir. 1970). The Fourth Circuit has also upheld a conviction involving a bribe paid with a check moving in interstate commerce. See *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), cert. denied, 392 U.S. 932 (1968). The cases can be reconciled by focusing on the nature of the checks' interstate movement. In *Salsbury* and *Wechsler* the checks' movement in interstate commerce was an integral part of an on-going transaction. In *Altobella*, the check entered interstate commerce only after the close of the transaction and when out of defendant's control.

¹⁹⁸ See *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. McCormick*, 442 F.2d 316, 317-18 (7th Cir. 1971); *United States v. Altobella*, 442 F.2d 310, 314 (7th Cir. 1971); *United States v. Judkins*, 428 F.2d 333, 335 (6th Cir. 1970). See also *United States v. Hawthorne*, 356 F.2d 740, 742 (4th Cir.), cert. denied, 384 U.S. 908 (1966).

¹⁹⁹ Successive Attorneys General have attested to the effectiveness of the Travel Act in House appropriations hearings. The Criminal Division of the Department of Justice requested 30 additional attorneys and support staff in the fiscal year 1962 to meet the increased workload expected under the new statutes. See *Departments of State and Justice, the Judiciary, and Related Agencies, Appropriations for 1962: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 87th Cong., 1st Sess., pt. 2, at 6 (1961) (statement of Att'y Gen. Kennedy). In the first four months after the enactment of §§ 1084, 1952, and 1953 the Justice Department instigated 2,100 investigations. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1963: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 87th Cong., 2d Sess., pt. 2, at 122 (1962) (testimony of Ass't Att'y Gen. Herbert J. Miller). In the fiscal year 1963, the Criminal Division requested funds to expand its Organized Crime and Racketeering Section: "This is where all the emphasis is going in the Attorney General's drive on organized crime." *Id.* at 146 (testimony of Admin. Ass't Att'y Gen. S.A. Andretta). Racketeering convictions, numbering 45 in 1960, rose to 546 in calendar year 1964. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1966: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess., pt. 3, at 7 (1965) (statement of Att'y Gen. Nicholas deB. Katzenbach).

3. *Transportation of Wagering Paraphernalia*—18 U.S.C. § 1953

In 1961, Congress enacted section 1953: "An Act to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia."²⁰⁰ As the third weapon in Attorney General Kennedy's arsenal against organized crime, section 1953 overcame the perceived lack of state jurisdiction to control the widespread use of interstate facilities by bookmakers and lottery operators.²⁰¹ In addition, the new statute revived the prohibitions against the interstate distribution of lottery materials contained in 18 U.S.C. §§ 1301-1302.²⁰²

The operative rule of section 1953 penalizes anyone²⁰³ who

²⁰⁰ Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492.

²⁰¹ See Letter from Attorney General Kennedy to the Speaker of the House (April 6, 1961), reprinted in H.R. REP. NO. 968, 87th Cong., 1st Sess. 3-4, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2634, 2636-37.

²⁰² Sections 1301 and 1302 had been emasculated by narrow judicial construction. Senator Eastland entered into the Congressional Record this statement highlighting the weaknesses of the then existing legislation:

[T]he lottery statutes in their present form [do not] cover the many thousands of sports betting pool slips which are transported daily across State lines, for they do not meet the traditional definition of a lottery—the payment of a consideration must be for a prize to be awarded by chance. Even out-and-out lottery tickets may be shipped across State lines with impunity if they are printed in blank, shipped, and then locally overprinted with the playing numbers.

107 CONG. REC. 13902 (1961).

The legislative history of § 1953 demonstrates that Congress intended to supplement §§ 1301-1302:

This bill is designed to prevent the easy interstate transportation of wagering paraphernalia. Federal laws which are designed to suppress traffic in lottery tickets in interstate or foreign commerce have been on the statute books since 1895 (18 U.S.C., secs. 1301, [1302]). . . . These statutes make illegal the transportation in interstate or foreign commerce of "any paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery . . .". However, over the years the courts have limited narrowly the scope of these statutes. Moreover, under the classic definition of a lottery, the court's interpretation excludes sports' betting slips from existing statutory prohibition against interstate transportation. Thus, it is that the bill is designed to close the most important loopholes resulting from these court decisions.

. . . The language of the proposal makes clear that it will include slips, papers, or paraphernalia which may be used in a lottery scheme not yet in existence or already completed. It also bans the interstate transportation of slips recording the amounts and numbers bet in a numbers lottery and betting slips and other material utilized in a bookmaking operation

H.R. REP. NO. 968, 87th Cong., 1st Sess. 2, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2634, 2635. See notes 90-91 and accompanying text *supra*.

²⁰³ See 18 U.S.C. § 1953(a) (1976). The statute implicates anyone "except a common carrier in the usual course of its business." *Id.* See *Senate Judiciary Hearings, supra* note 169, at 297, 303-04.

knowingly carries in interstate commerce materials relating to bookmaking, sports betting pools, or numbers.²⁰⁴ It is the most broadly drawn of the antigambling provisions, but contains several explicit exemptions. As enacted, section 1953 exempted: equipment and materials relating to legalized parimutuel betting,²⁰⁵ materials relating to sports betting that are transported into a state that permits such betting,²⁰⁶ and the interstate transportation of newspapers and similar publications.²⁰⁷ In 1975, Congress added a fourth exemption that pertained to state-conducted lotteries. The enactment of 18 U.S.C. § 1307, which saved state lotteries from the antilottery statutes,²⁰⁸ necessitated a parallel exemption in section 1953 because of the statutory overlap concerning lottery materials.²⁰⁹ The addition to section 1953, however, fully immunizes materials relating to state-conducted lotteries, rather than merely permitting the importation of such materials into lottery states.²¹⁰

²⁰⁴ Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than \$10,000 or imprisoned for not more than five years or both.

18 U.S.C. § 1953(a) (1976). This prohibition was also incorporated by reference into 18 U.S.C. § 1302 (1976), which now excludes from the mails, *inter alia*, everything proscribed by § 1953. The Post Office Department recommended this addition to § 1302 to eliminate the intrastate mailing of any materials included in the definition of § 1953 that were not included previously in § 1302. Such materials otherwise would be prohibited only when they traveled interstate. See Letter from Postmaster General Brawley to Representative Celler, Chairman, House Comm. on the Judiciary (May 16, 1961), reprinted in H.R. REP. NO. 968, 87th Cong., 1st Sess. 4-5, reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2634, 2637.

²⁰⁵ See 18 U.S.C. § 1953(b)(1) (1976), quoted in note 125 *supra*. The Justice Department argued that companies should be able to ship equipment for use in parimutuel racing to states in which such racing was legal. See *Senate Judiciary Hearings*, *supra* note 169, at 293-95 (statement of Ass't Att'y Gen. Herbert J. Miller). The exemption also permits an individual to redeem a legally-acquired, out-of-state parimutuel ticket.

²⁰⁶ 18 U.S.C. § 1953(b)(2), quoted in note 125 *supra*.

²⁰⁷ *Id.* § 1953(b)(3), quoted in note 125 *supra*. During the hearings on § 1953, a statement by the ACLU warned that without such an exemption one could be prosecuted for carrying a newspaper across state lines because of the information contained within it. See *Senate Judiciary Hearings*, *supra* note 169, at 48 (statement of Lawrence Speiser, Director, Washington, D.C., Office, ACLU).

²⁰⁸ See notes 122-27 and accompanying text *supra*.

²⁰⁹ To the extent that it deals with lottery-related materials that are knowingly carried interstate, § 1953 overlaps the provisions which prohibit the mailing (18 U.S.C. § 1302 (1976)) and interstate transportation (18 U.S.C. § 1301 (1976)) of lottery-related materials. Without an exemption equivalent to those added to the other antilottery statutes, § 1953 would prohibit states from obtaining, from out-of-state sources, tickets and advertising materials for state-conducted lotteries.

²¹⁰ Congress added the following language to the § 1953 exemptions: "or (4) equip-

Congress apparently drew the exemption more broadly than it intended to.²¹¹

Five years after Congress enacted section 1953, the Supreme Court fully analyzed its language and policy in *United States v. Fabrizio*.²¹² Fabrizio had been indicted for knowingly carrying seventy-five purchase acknowledgments for the New Hampshire Sweepstakes from Keene, New Hampshire to Elmira, New York. The Supreme Court noted that in section 1953, "Congress painted with a broad brush,"²¹³ and that to construe the section narrowly "would defeat one of the purposes of the section [which was] to thwart the interstate movement of such paraphernalia,"²¹⁴ regardless of who carried it, in order "to assist local enforcement of laws pertaining to gambling and like offenses."²¹⁵ The Court also refused to confine the statutory prohibition to materials related to *unlawful* activities.²¹⁶

ment, tickets or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law." Act of Jan. 2, 1975, Pub. L. No. 98-583, 88 Stat. 1916 (codified at 18 U.S.C. § 1953(b)(4) (1976)). Unlike § 1953(b)(2), relating to wagers on sporting events, the exemption for materials relating to state-conducted lotteries is not confined to the importation of the exempted materials into a state where such materials are legal.

²¹¹ See notes 130-33 and accompanying text *supra*. The House Report stated that if Congress enacted the law: "[T]he transportation of equipment, tickets, or materials used or designed for use within a State conducting such a lottery under the authority of its State law to addresses within that State would be permitted." H.R. REP. NO. 1517, 93d Cong., 2d Sess. 4, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7007, 7010. The exemption clearly permits more.

²¹² 385 U.S. 263 (1966).

²¹³ *Id.* at 266.

²¹⁴ *Id.* at 267.

²¹⁵ *Id.* at 267 n.4.

²¹⁶ The Court emphasized that "Congress did not limit the coverage of the statute to 'unlawful' or 'illegal' activities" (*id.* at 268), and that Congress had decided not to exempt state-run wagering from the reach of § 1953:

Exemption would also defeat one of the principal purposes of § 1953, aiding the States in the suppression of gambling where such gambling is contrary to state policy. For example, New York prohibits the sale of lottery tickets and the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" that State regardless of the legality of the lottery in the place of drawing. N.Y. Const., Art. 1, § 9, N.Y. Penal Law §§ 1373, 1382. To allow the paraphernalia of a lottery, state-operated or not, to flow freely into New York might significantly endanger that policy. It is clear that the lottery statutes apply to state-operated as well as illegal lotteries, and that § 1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in *France v. United States*, 164 U.S. 676, and *Francis v. United States*, 188 U.S. 375

(*id.* at 269 (emphasis added)). *Fabrizio* was decided before lotteries were lawful in New York and before Congress enacted the § 1953 exemption for state-conducted lotteries.

A number of cases have construed section 1953's exemption for periodicals. They have held that the exemption permits interstate transportation of scratch sheets, which detail horserace information and make picks,²¹⁷ although distribution of such material may violate the Travel Act.²¹⁸ The Supreme Court has confined the newspaper exemption to section 1953; the exemption does not limit prosecutions brought under section 1084 or section 1952.²¹⁹

The three-pronged attack on syndicated gambling had struck at the use of wire communications (section 1084), travel in furtherance of illegal activity (section 1952), and the interstate transportation of wagering paraphernalia (section 1953). Testimony from appropriations hearings established the efficacy of the new Kennedy program.²²⁰

4. *Strengthening the Johnson Act*

When the shortcomings of the Johnson Act became apparent soon after its passage in 1951,²²¹ steps were quickly initiated to clarify its terms and toughen its sanctions. Before disbanding, the Kefauver Committee recommended expanding the coverage of the Johnson Act to reduce the revenues obtained by organized crime through the operation of wagering machines.²²² Of the many bills introduced to accomplish this, none found favor in Congress until the Gambling Devices Act of 1962.²²³ The Johnson Act as amended

²¹⁷ See *United States v. Kelly*, 328 F.2d 227 (6th Cir. 1964). The court, on the basis of legislative history, seemed willing to extend the newspaper exemption to "tout sheets" which merely list race picks. See *id.* at 230-34.

²¹⁸ See *United States v. Azar*, 243 F. Supp. 345 (E.D. Mich. 1964).

²¹⁹ See *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

²²⁰ For instance, the number of cases investigated by the FBI under §§ 1084, 1952, and 1953 rose from 5361 in the first 16 months after enactment to 15,600 in fiscal year 1964. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1964: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 1st Sess., pt. 2, at 8 (1963) (statement of Att'y Gen. Kennedy); *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1966: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess., pt. 3, at 88 (1965) (statement of Ass't Att'y Gen. Herbert J. Miller). Federal enforcement of the gambling laws has virtually eliminated most overt forms of illegal gambling. Two prevalent survivors—numbers and bookmaking—are less open and less easily attacked. See GAMBLING IN AMERICA, *supra* note 2, at 12.

²²¹ See notes 165-68 and accompanying text *supra*.

²²² See S. REP. NO. 307, 82d Cong., 1st Sess. 14 (1951).

²²³ Pub. L. No. 87-840, 76 Stat. 1075 (amending 15 U.S.C. §§ 1171-1173, 1177 (1976)). The impetus again came from Attorney General Kennedy, who testified that:

Ten years of experience in enforcement of this act shows that there are serious flaws and loopholes, and that a major revision is necessary.

The Johnson Act now covers a machine which has a drum or wheel with

contained:

- (1) an expanded definition of "gambling devices";²²⁴
- (2) substantially modified registration and filing requirements;²²⁵
- (3) a complete prohibition against the manufacture or possession of such devices in the District of Columbia and other federal enclaves;²²⁶
- (4) a forfeiture provision;²²⁷ and
- (5) a narrow exemption for devices clearly not associated with gambling.²²⁸

symbols thereon, oranges, cherries, plums, and here and there a jackpot. This is the "one-arm bandit." The Johnson Act describes the operation of this machine as having some element of chance which may deliver or entitle the player to receive money or property. It further describes a machine which is coin operated and, of course, the machine covered by the act. It also covers the so-called digger or crane merchandise machine and some variations thereof. However, it does not cover roulette machines or many other devices common to gambling casinos.

Frankly, Mr. Chairman, there is no logical reason why these devices should not be included within the Johnson Act, or should not be banned from interstate commerce. In addition, the existing definition will not extend to a machine in current use which is in every practical respect a "one-arm bandit"—even to the extent of its physical appearance. The machine I refer to is called a point maker. On its face is a glass on which are painted the traditional slot machine symbols which I mentioned. Behind the glass are [sic] a series of lights which flash on and off until one remains in each column. The machine registers free games which can be played off or paid off. This machine has been contrived by the gamblers to evade the provisions of the Johnson Act. Because it has no drum or wheel, is not coin operated and does not deliver any money directly to the player, it is not covered by the act.

Senate Judiciary Hearings, supra note 169, at 13-14, *quoted in* S. REP. NO. 645, 87th Cong., 1st Sess. 2 (1961). Congress passed the amendments after the House Committee on Interstate and Foreign Commerce had held hearings (*see* 1962 *House Commerce Hearings, supra* note 169) and submitted a Report that considered the impact of syndicated gambling on the gambling machine industry (*see* H.R. REP. NO. 1828, 87th Cong., 2d Sess. 6, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3809, 3811-12; Letter from Assistant Attorney General Miller to Representative Harris, Chairman House Comm. on Interstate and Foreign Commerce (June 8, 1962), *reprinted in* H.R. REP. NO. 1828, 87th Cong., 2d Sess. 16, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS, 3809, 3816).

²²⁴ (a) The term "gambling device" means—

- (1) any so-called "slot machine" . . . or
- (2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property

15 U.S.C. § 1171(a) (1976).

²²⁵ *See id.* § 1173.

²²⁶ *See id.* § 1175.

²²⁷ *See id.* § 1177.

²²⁸ *See id.* § 1178. The provision exempts three categories of devices: (1) machines

The Johnson Act was far more effective after the 1962 amendments. Courts accepted the broad definition of "gambling devices" in applying the Act to numerous types of machines,²²⁹ and have consistently rebuffed attacks on the Act's constitutionality.²³⁰ The courts have also enforced the registration provisions of the Act against intrastate activities having interstate effects.²³¹ This judicial action reflected an expanding interpretation of the scope of federal power under the commerce clause.²³²

C. *The Organized Crime Control Act of 1970*

After enacting Attorney General Kennedy's program, Congress confronted gambling just twice in the decade: in 1964, to penalize bribery in sporting events,²³³ and, in 1967, to restrict bank

designed to be used at a race track in connection with parimutuel betting; (2) machines such as coin-operated bowling alleys and pinball machines that do not give prizes in money or property; and (3) "claw" and "digger" machines "manufactured primarily for use at carnivals or county or State fairs" and not operated by coins. *Id.*

²²⁹ See *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973) ("Bonanza" machine which dispenses coupons redeemable for cash or store discount); *United States v. Various Gambling Devices*, 368 F. Supp. 661 (N.D. Miss. 1973) (pinball); *United States v. 5 Gambling Devices*, 346 F. Supp. 999 (W.D. La. 1972) (pinball); *United States v. 11 Star-Pack Cigarette Merchandising Machs.*, 248 F. Supp. 933 (E.D. Pa. 1966) (device attached to cigarette vending machine that irregularly "pays off" with free package of cigarettes); *United States v. Two Coin-Operated Pinball Machs.*, 241 F. Supp. 57 (W.D. Ky. 1965) (pinball).

²³⁰ See, e.g., *United States v. H.M. Branson Distrib. Co.*, 398 F.2d 929 (6th Cir. 1968) (§ 1177 not unconstitutionally vague or ambiguous); *United States v. 5 Gambling Devices*, 346 F. Supp. 999 (W.D. La. 1972) (§ 1177 forfeiture does not violate due process). *But cf. United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (self-incrimination defense available in forfeiture proceeding enforcing wagering tax laws).

²³¹ *United States v. 5 Gambling Devices*, 346 F. Supp. 999 (W.D. La. 1972).

²³² See *id.* at 1004 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

²³³ See Act of June 6, 1964, Pub. L. No. 88-316, 78 Stat. 203 (codified at 18 U.S.C. § 224 (1976)). The operative provision provides:

Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both.

18 U.S.C. § 224(a) (1976). Major scandals involving the "fixing" of college basketball games and the fear that state governments and athletic associations were powerless to control organized crime, which was believed to be behind such bribery, led to the congressional action. Congress did not seek to preempt local authorities in any way. See *id.* § 224(b).

On December 7, 1950, Bradley University, the top-ranked basketball team in the nation, defeated Oregon State by a score of 77-74 in an important game. Bradley had been favored by nine points. Several months later an investigation of organized crime in New York revealed that Bradley had shaved points in order to win by fewer than nine. Bradley's team captain had been the contact man with an organization headed by Salvatore Tarto Sollazzo, and had distributed \$4,000 among his teammates on this occasion. 108

involvement in state-conducted lotteries.²³⁴ In 1970, however, a comprehensive effort to restrain organized crime began with the enactment of the Organized Crime Control Act of 1970.²³⁵ That the Act devoted one title exclusively to gambling²³⁶ reflected the

CONG. REC. 19175 (1962). Two more scandals marred college basketball in 1960 and 1961. In the first, a New York City lawyer participated in an attempt to fix 25 games in ten states. 110 CONG. REC. 921 (1964). The other involved 50 games in 23 cities and 17 states. 107 CONG. REC. 11705 (1961). In total, 26 men from 15 schools had accepted \$44,000 in bribes. 108 CONG. REC. 19175 (1962). The later scandals revealed that gamblers had become more sophisticated in their methods. Instead of bribing the favored team, they would bribe the underdog to lose by a few extra points. Players confessed that they had gone full-speed on offense so that the score would look good but loafed on defense, allowing the other team to score more freely. This method of point shaving was difficult to detect and nearly impossible to prove. *Id.* See Letter from Deputy Attorney General Byron R. White to Senator Eastland, Chairman, Senate Committee on the Judiciary (Mar. 23, 1962); 110 CONG. REC. 920-23 (1964).

Of the few convictions under this provision, several have involved fixed superfecta in harness racing (*see, e.g.*, *United States v. Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975)), and bribery of football players (*see, e.g.*, *United States v. Nolan*, 420 F.2d 552 (5th Cir. 1969), *cert. denied*, 400 U.S. 819 (1970)).

²³⁴ See Act of Dec. 15, 1967, Pub. L. No. 90-203, §§ 1-4, 81 Stat. 608 (codified at 18 U.S.C. §§ 25a, 339, 1730c, 1829a (1976)). See notes 289-95 and accompanying text *infra*. The Act authorized criminal sanctions for knowing violation of the new provisions. Act of Dec. 15, 1967, Pub. L. No. 90-203, § 5, 81 Stat. 608 (codified at 18 U.S.C. § 1306 (1976)).

²³⁵ Pub. L. No. 91-452, 84 Stat. 922. The Organized Crime Control Act was not exclusively a product of the Nixon Administration. Its intellectual origins lay in the work of the President's Commission on Law Enforcement and Administration of Justice in 1967. See TASK FORCE REPORT: ORGANIZED CRIME, *supra* note 147, at 16-19, 83-91.

²³⁶ See Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 801-811, 84 Stat. 922. The gambling title was originally offered as a separate bill. See S. 2022, 91st Cong., 1st Sess. (1969). Other provisions of the Act sought, *inter alia*, to establish special grand juries (*see* Organized Crime Control Act of 1970, § 101-102, 18 U.S.C. §§ 3331-3334 (1976)), to provide immunity from prosecution for witnesses and informants (*see id.* §§ 201-260, 18 U.S.C. §§ 6001-6005 (1976)), and to extend sentencing for recidivists (*see id.* §§ 1001-1002, 18 U.S.C. §§ 3575-3578 (1976)). Title VIII escaped the controversy that surrounded many of the other provisions. See generally *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 30*, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Senate S. 30 Hearings*]; *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30 and related proposals*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *House S. 30 Hearings*]; S. REP. NO. 617, 91st Cong., 1st Sess. (1969); H.R. REP. NO. 1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007; McClellan, *The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970).

The Act also contained other provisions affecting gambling, including a comprehensive new title pertaining to racketeering activity (*see* Organized Crime Control Act of 1970, §§ 901-902, 18 U.S.C. §§ 1961-1968 (1976)) and the addition of the Act's prohibitions to the list of potential crimes for which wiretap investigations would be authorized under appropriate circumstances (*see* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 810, 84 Stat. 922 (amending 18 U.S.C. § 2516(1)(c) (1976))). Wiretapping has been used extensively in the enforcement of gambling laws. See ADMINISTRATIVE OFFICE OF THE

prevalent feeling that gambling was a steady and lucrative source of revenue for the underworld.²³⁷

The gambling title of the Organized Crime Control Act contained two substantive provisions:²³⁸ 18 U.S.C. § 1955, which prohibits illegal gambling businesses of a prescribed volume;²³⁹ and 18 U.S.C. § 1511, which forbids conspiracy to obstruct state law en-

UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1976 TO DECEMBER 31, 1976, at 18 (1977) (42% of requests pertain to gambling); NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 142-45 (1976); GAMBLING IN AMERICA, *supra* note 2, at 44-46, 52 (surveillance recommended in major investigations).

²³⁷ See, e.g., TASK FORCE REPORT: ORGANIZED CRIME, *supra* note 147, at 2; S. REP. NO. 1310, 87th Cong., 2d Sess. 2 (1962). Senator McClellan remarked upon introducing S. 3564, 90th Cong., 2d Sess. (1968), a precursor of the gambling title, that: "Gambling is the principal source of income for the elements of organized crime and it is the purpose of this bill to seek to shut off this flow of revenue by making it a crime to engage in a substantial business enterprise of gambling." 114 CONG. REC. 15603 (1968).

²³⁸ See 18 U.S.C. §§ 1511, 1955 (1976). The two provisions utilize identical language in their definitional sections. See *id.* §§ 1511(b), 1955(b). Courts have construed the two provisions together. See, e.g., United States v. Becker, 461 F.2d 230, 232 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974).

²³⁹ The provision states in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States.

18 U.S.C. § 1955 (1976). Section 1955(e) exempts activities conducted by tax-exempt organizations from the provision's prohibitions.

forcement with the intent to facilitate an illegal gambling business.²⁴⁰ Together, the two provisions reach gambling enterprises previously untouched by federal law.

Sections 1511 and 1955 are more sophisticated than any prior federal criminal statutes designed to curb gambling. They represent an effort to reach conduct previously thought to be beyond federal criminal jurisdiction.²⁴¹ Relying on expanded notions of federal power under the commerce clause,²⁴² sections 1511 and 1955 do not require a specific showing of a relationship between the proscribed activity and interstate commerce. Instead, federal jurisdiction rests upon a congressional finding that gambling businesses of a given size affect interstate commerce.²⁴³ Despite early concerns that Congress's statutory reach might exceed its constitutional grasp,²⁴⁴ courts of appeals have upheld the legisla-

²⁴⁰ The provision states in pertinent part:

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

Id. § 1511(a) (1976). Subsection (b) contains the same definitions as § 1955(b), subsection (c) exempts from § 1511(a) activities conducted by tax-exempt organizations, and subsection (d) provides penalties.

²⁴¹ Before 1970, the federal government could reach local gambling only if it affected an interstate facility. *See* 18 U.S.C. §§ 224, 1081-1084, 1301-1304, 1952-1953 (1976). The failure of federal wagering excise taxes to expand effectively federal gambling jurisdiction (*see* notes 324-54 and accompanying text *infra*) had increased the pressure for enactment of federal statutes that could reach gambling without requiring a specific showing of interstate impact.

²⁴² *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²⁴³ "The Congress finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 801, 84 Stat. 922.

²⁴⁴ A colloquy between Senator McClellan and Assistant Attorney General Wilson during Senate hearings on the bill is illustrative:

Senator McClellan: I am concerned that the effect of this bill would be to extend Federal jurisdiction so far that it would be virtually the same as local criminal jurisdiction in this area. Now, you have mentioned this problem in your remarks already.

Mr. Wilson: We have tried to head that off, and if we haven't done it, it needs to be done, because it is not our purpose to move all this into Federal courts.

Senator McClellan: Our experience in the past has been that in such situations the expansion of Federal power has tended to supplant, not merely supple-

tion.²⁴⁵ The new approach of sections 1511 and 1955 has practical and theoretical advantages. The separation of jurisdictional elements from the substantive offense simplifies analysis of the elements of the crime.²⁴⁶ Once the prosecutor proves the requisite jurisdictional volume and duration,²⁴⁷ the effect of the activity on interstate commerce becomes irrelevant for purposes of conviction. A further advantage of the statutes is that they proscribe only conduct which "is a violation of the law of a State or political subdivision in which it is conducted";²⁴⁸ theoretically, conflict between federal and local gambling policies is eliminated.²⁴⁹

ment, State criminal jurisdiction. Again, I take it that is what you want to avoid?

Mr. Wilson: Yes, sir.

Senate S. 30 Hearings, supra note 236, at 396. See S. REP. No. 617, 91st Cong., 1st Sess. 70-75 (1969); *Senate S. 30 Hearings, supra* note 236, at 381 (statement of Ass't Att'y Gen. Wilson); *id.* at 394-402 (testimony of Ass't Att'y Gen. Wilson). Senator McClellan testified in the House to the same effect. See *House S. 30 Hearings, supra* note 236, at 105.

²⁴⁵ See, e.g., *United States v. Abramson*, 553 F.2d 1164, 1173 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977); *Powell v. Ward*, 542 F.2d 99, 101 (1st Cir. 1976); *United States v. Hawes*, 529 F.2d 472, 477-78 (5th Cir. 1976); *United States v. Sacco*, 491 F.2d 995, 999-1001 (9th Cir. 1974); *United States v. Smaldone*, 485 F.2d 1333, 1342-43 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *United States v. Hunter*, 478 F.2d 1019, 1020-21 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973); *United States v. Thaggard*, 477 F.2d 626, 630 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States v. Becker*, 461 F.2d 230, 233-34 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972); *Schneider v. United States*, 459 F.2d 540, 541-42 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972). One court, in reversing a § 1955 conviction, has cautioned against abuse of the technique. The Fifth Circuit, in *United States v. Bridges*, 493 F.2d 918 (5th Cir. 1974), held that the government had not proved the jurisdictional requirement necessary to convict a four-man poker and craps ring that had recently added a fifth participant. The court warned: "To construe these provisions as urged by the government would not further the congressional purpose, for such a broad construction could subject almost any small gambling operation to federal regulation. This is clearly not the function of § 1955." *Id.* at 922. See also *Ianelli v. United States*, 420 U.S. 770, 786-91 (1975).

²⁴⁶ For examples of Congress mingling the jurisdictional elements with the substantive offense, see 18 U.S.C. §§ 1084, 1952-1953 (1976).

²⁴⁷ The prosecutor must prove: (1) that five or more persons are involved in the manner required by the statute; (2) that the operation is in violation of local law; and (3) that it has been operating for more than a month or does more than \$2,000 business per day. A disadvantage of this approach is that it grants prosecutors enormous discretion in determining whether federal involvement is appropriate in a particular case. But although many small-scale, local gambling enterprises may meet the minimum criteria for a violation of § 1955, reasonable allocation of federal prosecutorial and judicial resources should militate against prosecuting such operations. If the discretion permitted by § 1955 appears too broad, Congress could remedy the problem simply by raising the jurisdictional requirements. For instance, Congress could raise the \$2,000 per day volume requirement to \$10,000 per day.

²⁴⁸ 18 U.S.C. § 1955(b)(1)(i) (1976).

²⁴⁹ In some situations, however, conflict might occur. For example, obsolete but unre-

Sections 1511 and 1955 presuppose the inability of local law enforcement agencies to deal effectively with gambling. Section 1511 combats one source of that inability—official corruption:

No drive against illegal gambling can even begin to succeed in those instances where it is to be undermined and betrayed by venal law-enforcement officers—police, prosecutors, or even judges.

It is not pleasant to contemplate, but we cannot blind ourselves to the distasteful fact that some bribery and bribery attempts of law-enforcement officials at all levels have been characteristic of the presence of organized crime.

Hence, the necessity to the Congress to enact a law which makes obstruction of State and local law enforcement in such areas a Federal offense.²⁵⁰

Its legislative history emphasizes that section 1511 prohibits only the obstruction of justice in furtherance of gambling activities, and only conduct meeting the traditional requirements of a conspiracy.²⁵¹ Neither section 1511 nor section 1955 purports to reach the individual gambler. He who "conducts, finances, manages, supervises, directs, or owns"²⁵² an illegal gambling business is culpable; he who merely bets is not.²⁵³

pealed local statutes may prohibit conduct that the community no longer condemns. Federal prosecutions based on such statutes would conflict with the community's tacit approval of their nonenforcement.

²⁵⁰ 115 CONG. REC. 10736 (1969) (remarks of Senator Hruska).

²⁵¹ Early drafts of § 1511 used "scheme" instead of "conspiracy." See *Senate S. 30 Hearings*, *supra* note 236, at 397 (testimony of Ass't Att'y Gen. Wilson). Opponents of the legislation criticized the word "scheme" as overly vague. See *House S. 30 Hearings*, *supra* note 236, at 324 (Report by Comm. on Federal Legislation, Ass'n of the Bar of the City of New York). Senator McClellan argued that participation in a scheme was actually more difficult to prove than "conspiracy" because it required participation in the illicit activity, while "conspiracy" only required an overt, perhaps legal, act by one conspirator. See McClellan, *supra* note 236, at 137. The point became academic when the House changed "scheme" to "conspiracy" in its version of the bill.

²⁵² 18 U.S.C. §§ 1511(b), 1955(b) (1976).

²⁵³ "The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 53 (referring to § 1511), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4028-29. Earlier drafts had used "participates" instead of the series of verbs currently contained in the statute. See, e.g., S. 2022, 91st Cong., 1st Sess. (1969), *reprinted in Senate S. 30 Hearings*, *supra* note 236, at 83. In *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974), the court observed: "Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business." *Id.* at 232 (emphasis in original).

Because section 1955 has generated substantial litigation, courts have resolved more questions of its constitutionality and construction than they have with regard to section 1511. In many respects, however, sections 1511 and 1955 may be considered in *pari materia*. Section 1955 has withstood numerous challenges involving commerce clause powers,²⁵⁴ equal protection,²⁵⁵ the right to travel,²⁵⁶ and vagueness.²⁵⁷ Construction of section 1955 has generated little controversy among the circuits.²⁵⁸ Once initial

²⁵⁴ See note 245 and accompanying text *supra*.

²⁵⁵ Courts have found no denial of equal protection in the application of § 1955 to each state according to the laws of that state. See *United States v. Smaldone*, 485 F.2d 1333, 1343 (10th Cir. 1973); *Schneider v. United States*, 459 F.2d 540, 542-43 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972); *United States v. Bally Mfg. Corp.*, 345 F. Supp. 410, 427 (E.D. La. 1972) ("The rule is simply that a variation in state laws does not in any way nullify or render unreasonable a federal antigambling statute which incorporates state law."). The exemption for tax-exempt organizations in §§ 1511(c) and 1955(e) has also been held not to violate equal protection. See *United States v. Thaggard*, 477 F.2d 626, 630-31 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

²⁵⁶ See *United States v. Bally Mfg. Corp.*, 345 F. Supp. 410, 427 (E.D. La. 1972).

²⁵⁷ See *United States v. Riehl*, 460 F.2d 454, 459 (3d Cir. 1972); *United States v. Garrison*, 348 F. Supp. 1112, 1119-20 (E.D. La. 1972); *United States v. Bally Mfg. Corp.*, 345 F. Supp. 410, 427 (E.D. La. 1972).

²⁵⁸ There is one notable exception. Section 1955 defendants have asserted that under Wharton's Rule, they could not be convicted for both the substantive offense created by § 1955, and for conspiracy to commit it, since § 1955 itself requires a minimum number of participants. (Wharton's Rule applies to crimes, such as adultery and bribery, that logically require a minimum of two participants. In such cases, a third party would be required for conspiracy to be a logically separable offense.) The courts did not resolve the issue without confusion. The better rule is that of *United States v. Pacheco*, 489 F.2d 554, 558 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975):

In asking us to apply Wharton's rule to the section 1955 situation, appellants misconceive the import of that section's jurisdictional requirement that five or more persons be involved in the illegal gambling business. Such jurisdictional requirements are unrelated to the criminal character of the conduct and should be separately treated.

Other courts have held that Wharton's Rule presents no problem when more than five defendants are indicted. See *United States v. Iannelli*, 477 F.2d 999, 1002 (3d Cir. 1973), *aff'd*, 420 U.S. 770 (1975); *United States v. Becker*, 461 F.2d 230, 234 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974). For a fallacious argument that Wharton's Rule prohibits a double-count indictment charging conspiracy under 18 U.S.C. § 371 (1976) and violation of § 1955, see *United States v. Greenberg*, 334 F. Supp. 1092, 1095 (N.D. Ohio 1971):

Congress has established several jurisdictional elements for this offense. One, which makes appropriate the application of "Wharton's Rule," is subsection (ii) of the Act. Through this unique section, Congress has made the offense federally cognizable only when there are five or more participants. One of the bases of federal intervention is a concert of action between the parties. In other words, the offense is one involving the element of *concursum necessarium*. That is, it is absolutely necessary that there be a plurality of parties and it is necessary that there be concerted action among them. It therefore appears that a charge of conspiring to commit the offense should not be maintainable.

problems were resolved, the bulk of litigation under the gambling provisions concerned the propriety of law enforcement officers' conduct under federal wiretapping provisions.²⁵⁹

The Organized Crime Control Act of 1970 also dealt with "racketeer influenced and corrupt organizations."²⁶⁰ These provisions, codified at 18 U.S.C. §§ 1961-1968, were primarily, but not exclusively, aimed at curtailing the infiltration of organized crime into legitimate businesses.²⁶¹ Section 1962 prohibits a series of relationships between enterprises affecting interstate commerce and participants in, or money derived from, a "pattern of racketeering activity."²⁶² The title defines "racketeering activity" to include

The Supreme Court resolved the debate in favor of the better rule. See *Iannelli v. United States*, 420 U.S. 770 (1975). See generally Comment, *Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy*, 59 IOWA L. REV. 452 (1973); Note, *Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business*, 30 WASH. & LEE L. REV. 613 (1973).

²⁵⁹ See, e.g., *United States v. Roberts*, 477 F.2d 57 (7th Cir. 1973), cert. denied, 417 U.S. 908 (1974); *United States v. Kleve*, 465 F.2d 187 (8th Cir. 1972); *United States v. Currier*, 363 F. Supp. 430 (D. Md. 1973); *United States v. Bleau*, 363 F. Supp. 438 (D. Md. 1973); *Quintina v. United States*, 359 F. Supp. 769 (D. Mass. 1973).

²⁶⁰ See Organized Crime Control Act of 1970 § 901, 18 U.S.C. §§ 1961-1968 (1976).

²⁶¹ Senator McClellan stated:

Threats, arson and assault are used to force competitors out of business and obtain larger shares of the market. Building contractors pay tribute for the privilege of using nonunion labor, while labor unions infiltrated by organized crime raise no objection. A corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear. Large sums in stocks and bonds are stolen from brokerage houses and banks, and then used as collateral to obtain loans. Income routinely is understated for tax purposes, so that mob businesses have competitive advantages over businesses which report all their income. These methods and others give such a competitive advantage to the mob enterprise that monopoly power is approached or gained, and prices are raised.

House S. 30 Hearings, supra note 236, at 106. The final legislation, of course, prohibited more than the criminal infiltration of legitimate businesses; it prohibited the operation by any person of any enterprise that through a pattern of racketeering activity affected interstate commerce. See *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976) (per curiam) (provision not limited to legitimate businesses), cert. denied, 429 U.S. 1039 (1977); *United States v. Campanale*, 518 F.2d 342 (9th Cir. 1975) (provision not limited to organized crime), cert. denied, 423 U.S. 1050 (1976).

Organized crime has obtained much of its original financing for both legitimate and illegitimate ventures from syndicated gambling. Senator McClellan stated:

We must recognize, too, that La Cosa Nostra's control of gambling ravishes the entire society, not merely the gamblers, since the \$6 or \$7 billion profit organized gambling operators earn each year bankrolls not only the Mafia drug trade, but organized crime's infiltration of legitimate business and other activities, and this is one of the Nation's most serious criminal justice and economic problems.

House S. 30 Hearings, supra note 236, at 87. But see Reuter & Rubenstein, *Fact, Fancy and Organized Crime*, 53 PUB. INTEREST 45 (1978).

²⁶² See 18 U.S.C. § 1962 (1976). Subsection (a) prohibits the investment of income de-

gambling activity prohibited by sections 1084, 1511, 1952, 1953, and 1955, as well as numerous other forms of criminal activity.²⁶³ A "pattern" is two acts of "racketeering" occurring within ten years of each other.²⁶⁴

Civil remedies resembling those available under the antitrust laws are an important aspect of this title of the Act.²⁶⁵ Section 1964 empowers district courts to employ a broad range of equitable remedies to prevent or restrain violations of section 1962.²⁶⁶ In addition, injured parties may bring treble damage actions.²⁶⁷ Further, section 1965 provides liberal venue and service of process for civil actions.²⁶⁸ The only serious question posed by the civil provisions concerns the extent to which their use by the government as substitutes for criminal prosecution may circumvent constitutional guarantees afforded defendants by the criminal justice system.²⁶⁹

rived from a "pattern of racketeering activity" in any enterprise engaged in or affecting interstate commerce. Subsection (b) prohibits the acquisition of an interest in such an enterprise through a "pattern of racketeering activity." The remaining two subsections prescribe conducting the affairs of an enterprise engaged in or affecting interstate commerce through a "pattern of racketeering activity" and prohibit conspiring to violate any of the other subsections of § 1962.

²⁶³ See *id.* § 1961. Subsection (1) defines "racketeering activity" as any threat or act, punishable under state law by imprisonment for more than one year, involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in dangerous drugs. Racketeering activity also encompasses a lengthy list of felonies indictable under Title 18.

²⁶⁴ See *id.* § 1961(5). At least one of these acts must have occurred after the effective date of §§ 1961-1968, and the 10-year period excludes any period of imprisonment.

²⁶⁵ See *id.* § 1964. The Commission on the Review of the National Policy Toward Gambling found the civil provisions "to be cost-effective, thorough, and capable of great success in stemming illegal gambling in the United States." GAMBLING IN AMERICA, *supra* note 2, at 21.

²⁶⁶ See 18 U.S.C. § 1964(a) (1976). The court may force divestiture of any interest in any enterprise held by any person and may prohibit involvement in certain enterprises. The court may also force dissolution or reorganization of any enterprise. For discussion of § 1964 remedies, see *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Section 1964(b) provides that the Attorney General may institute such proceedings; § 1966 permits him to request accelerated disposition. Section 1964(d) estops a defendant from denying in a civil proceeding issues finally determined against him in a criminal proceeding under §§ 1961-1963.

²⁶⁷ "Any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1976).

²⁶⁸ See *id.* § 1965. Nationwide service of process is available if "the ends of justice require." *Id.* § 1965(b).

²⁶⁹ The civil proceedings under §§ 1964-1968 arguably have impact equal to that of many criminal proceedings and possess many advantages for prosecutors:

These time-tested remedies . . . should enable the Government to intervene in

Sharp controversy accompanied the adoption of sections 1961-1968. Opponents condemned the list of crimes constituting "racketeering activity" as overinclusive,²⁷⁰ the statutory definition of "pattern" as overbroad,²⁷¹ the statute as ill-designed for its practically unachievable goals,²⁷² and the civil remedies provided as subject to abuse.²⁷³ The statute's proponents prevailed, however,

many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-injury [sic] adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity. Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated.

Letter from Deputy Attorney General Kliendienst to Senator McClellan (August 11, 1969), reprinted in *Senate S. 30 Hearings*, *supra* note 236, at 404, 408.

Whether the United States will choose to use these measures in marginal situations and, if so, whether such use will be held constitutional remains to be seen. For a sympathetic analysis of the civil provisions, see Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975).

Sections 1964-1968 have had only a short enforcement history. Courts have resolved constitutional challenges to (1) the validity of an order obtained by the United States for civil injunctive relief and (2) the application of the criminal provisions in § 1962 to the acquisition of a foreign corporation. *See, e.g.,* *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974) (dismissing defendants' claim that § 1964 circumvented a failure of proof under criminal standards, citing *In re Debs*, 158 U.S. 564 (1895), for proposition that Congress may authorize injunctive relief to remove obstructions to interstate commerce), *cert. denied*, 420 U.S. 925 (1975). Private treble damage actions under § 1964 have also been litigated. *See, e.g.,* *King v. Vesco*, 342 F. Supp. 120 (N.D. Cal. 1972).

²⁷⁰ One group complained that many of the criminal provisions included in the definition of "racketeering activity" were relatively minor violations that could receive far harsher penalties if prosecuted under § 1962. *See House S. 30 Hearings*, *supra* note 236, at 327-29 (Report by Comm. on Federal Legislation, Ass'n of the Bar of the City of New York). Senator McClellan defended the list, arguing that "[t]he listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime." McClellan, *supra* note 236, at 142-43.

²⁷¹ The requirement that two acts must have occurred within 10 years of each other was added to § 1961(5) in response to ACLU complaints that an earlier version created a "pattern" from one recent occurrence linked without limit to any prior activity enumerated in § 1961(1). *See House S. 30 Hearings*, *supra* note 236, at 499 (statement of Lawrence Speiser, Director, Washington, D.C. Office, ACLU).

²⁷² *See id.* at 328-29 (statement of Sheldon H. Elsen, Chairman, Comm. on Federal Legislation, Ass'n of the Bar of the City of New York); *id.* at 499 (statement of Lawrence Speiser, Director, Washington, D.C. Office, ACLU). *See generally* H.R. REP. NO. 1549, 91st Cong., 2d Sess. 186-87 (Dissenting Views), reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4081-82.

²⁷³ H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187-88 (Dissenting Views), reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4083-84; *House S. 30 Hearings*, *supra* note 236,

placing an effective weapon in the hands of the Department of Justice.

The development of federal criminal statutes manifests a recognition of the importance of balancing state and federal policies in curtailing objectionable forms of gambling. Although overall federal involvement in the regulation of gambling has increased steadily, the basic federal role has been to support state policies. As presently constituted, the federal criminal statutes define narrow parameters of permissible activity, but afford the states sufficient flexibility to experiment.

III

GAMBLING PROVISIONS UNDER ASSORTED FEDERAL POWERS

A. *Criminal Provisions in Federal Enclaves*

The federal government exercises power over Indian reservations,²⁷⁴ military installations, the District of Columbia,²⁷⁵ and United States territories and possessions.²⁷⁶ Only one federal statute deals expressly with gambling in such enclaves: 15 U.S.C. § 1175, enacted as part of the Johnson Act in 1951.²⁷⁷ Although section 1175 regulates only gambling devices, state laws regulating or prohibiting other forms of gambling may also apply in areas of federal jurisdiction. The Assimilative Crimes Act²⁷⁸ adopts state

at 499 (statement of Lawrence Speiser, Director, Washington, D.C. Office, ACLU).

²⁷⁴ U.S. CONST. art. I, § 8, cl. 3.

²⁷⁵ *Id.* § 8, cl. 17.

²⁷⁶ *Id.* art. IV, § 3, cl. 2.

²⁷⁷ Act of Jan. 2, 1951, ch. 1194, § 5, 64 Stat. 1134 (codified at 15 U.S.C. § 1175 (1976)).

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18.

15 U.S.C. § 1175 (1976).

²⁷⁸ Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13 (1976). A revised Assimilative Crimes Act has been included in the pro-

statutes as federal substantive law to govern offenses not covered by the federal criminal code.

Congress has freely exercised its guardianship over Indians,²⁷⁹ asserting its constitutional power under the commerce clause,²⁸⁰ the doctrine of federal preemption,²⁸¹ and the concept of a national police power.²⁸² Even before Congress adopted the Johnson Act, a federal court restricted the use of gambling devices on an Indian reservation by invoking the Assimilative Crimes Act and applying state law.²⁸³ And in *United States v. Blackfeet Tribe*,²⁸⁴ the court found the congressional regulation of gambling devices in section 1175 to be a legitimate exercise of national police power.²⁸⁵ Until Congress abdicates its jurisdiction over the Indian tribes,²⁸⁶ they will remain subject to both federal and state regulation.

The status of military installations in regard to gambling laws resembles that of the Indian reservations. Apart from section 1175, and any state law applicable through the Assimilative Crimes Act, gambling on military installations is also subject to the rules and

posed recodification of Title 18. See S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed 18 U.S.C. § 1862).

²⁷⁹ See generally Waldmeir, *Federal Enclaves in GAMBLING IN AMERICA*, *supra* note 2, app. 1, at 933, 936-950.

²⁸⁰ See, e.g., *United States v. Mazurie*, 419 U.S. 544, 554-55 (1975); *Perrin v. United States*, 232 U.S. 478, 482-83 (1914); *United States v. Forty-Three Gallons of Whiskey (Lariviere)*, 93 U.S. 188, 194-95 (1876); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865).

²⁸¹ See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

²⁸² See *United States v. Kagama*, 118 U.S. 375, 379-80 (1886). *But see* *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

²⁸³ In *United States v. Sosseur*, 87 F. Supp. 225 (W.D. Wis. 1949), a Chippewa Indian was convicted under Wisconsin state law for operating a slot machine on a reservation, even though the Tribal Council had granted him a license to do so.

²⁸⁴ 369 F. Supp. 562 (D. Mont. 1973).

²⁸⁵ "[The police] power is not dependent upon specific constitutional grant and is plenary. Where the police power is found, the control of gambling is a legitimate exercise of it." *Id.* at 564-65.

²⁸⁶ Congress has attempted to relinquish to certain states jurisdiction over reservations within their borders, with the ultimate goal of terminating federal domain. See Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588 (current version at 18 U.S.C. § 1162 (1976)), 28 U.S.C. § 1360 (1976)). Subsequent legislation, however, requires tribal consent before a state may assume civil or criminal jurisdiction over a reservation. See 25 U.S.C. §§ 1321-1326 (1976). The extent to which Public Law 280 shifts jurisdiction from the federal government to the states involved remains unclear. Compare *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) (local land use regulation held inapplicable to tribe and its lands), *cert. denied*, 429 U.S. 1038 (1977) with *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 471 (S.D. Cal. 1971) (county ordinance prohibiting gambling held applicable to card games operated by Indians), *dismissed on other grounds*, 495 F.2d 1 (9th Cir.), *cert. denied*, 419 U.S. 1008 (1974). See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

regulations promulgated by that branch of the armed services having jurisdiction.²⁸⁷ With a few exceptions,²⁸⁸ federal gambling legislation applies to United States possessions in the same manner as it applies to the states.

B. *Miscellaneous Noncriminal Provisions*

In 1967, shortly after New York began to operate its state lottery, Congress amended the federal banking laws to prohibit banks insured by federal agencies from distributing or advertising lottery tickets.²⁸⁹ The extensive legislative history of the amendments²⁹⁰ discloses several intertwined rationales. The committee

²⁸⁷ See *GAMBLING IN AMERICA*, *supra* note 2, at 22, 32 n.119.

²⁸⁸ 15 U.S.C. § 1171(b) (1976) defines only the Virgin Islands and Guam as "states" for the purposes of the Johnson Act. American Samoa and other minor island holdings would seem, therefore, to be the only "possessions" referred to in 15 U.S.C. § 1175 (1976), *quoted in* note 287 *supra*. Micronesia, or the Trust Territory of the Pacific, is under the administrative jurisdiction of the United States, but is not subject to any federal gambling laws. See Waldmeir, *supra* note 279, at 950-51. Congress has extended 18 U.S.C. § 1301 (1976) to the Panama Canal Zone, thereby prohibiting the transportation of lottery tickets to the Zone. *Id.* Through a contractual arrangement with the United States, the Commonwealth of Puerto Rico is excluded from the proscriptions of the Johnson Act, 15 U.S.C. §§ 1171-1178 (1976), and from United States Internal Revenue laws (*see* 48 U.S.C. § 734 (1970)). See *GAMBLING IN AMERICA*, *supra* note 2, at 23. See generally Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L. REV. 219 (1967).

²⁸⁹ See Act of Dec. 15, 1967, Pub. L. No. 90-203, 81 Stat. 608. This Act amended four banking acts. To the National Banking Act, it added Rev. Stat. § 5136A (12 U.S.C. § 25a (1976)); to the Federal Reserve Act, a new § 9A (12 U.S.C. § 339 (1976)); to the National Housing Act, a new § 410 (12 U.S.C. § 1730c (1976)); and to the Federal Deposit Insurance Act, a new § 20 (12 U.S.C. § 1829a (1976)). The Act also added 18 U.S.C. § 1306 (1976), making criminal a violation of any of the other provisions. The new provisions are similarly worded and each aims at a different type of financial institution. An example of the statutory scheme, 12 U.S.C. § 25(a) (1976), reads in pertinent part:

(a) Prohibited activities

A national bank may not—

- (1) deal in lottery tickets;
- (2) deal in bets used as a means or substitute for participation in a lottery;
- (3) announce, advertise, or publicize the existence of any lottery;
- (4) announce, advertise, or publicize the existence or identity of any participant or winner, as such, in a lottery.

(b) Use of banking premises prohibited

A national bank may not permit—

- (1) the use of any part of any of its banking offices by any persons for any purpose forbidden to the bank under subsection (a)

Banks are, however, allowed to perform "lawful banking services" for state-operated lotteries. See *GAMBLING IN AMERICA*, *supra* note 2, at 19.

²⁹⁰ See generally H.R. REP. NO. 382, 90th Cong., 1st Sess. (1967); S. REP. NO. 727, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2228; *Prohibition on Use of Financial Institutions as Lottery Agencies: Hearings on H.R. 10595 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Senate Banking Hearings*]; *To Prohibit Certain Financial Institutions from*

reports viewed the proposals as mere extensions of a preexisting federal policy denying gambling activities the use of federal facilities.²⁹¹ The Chairman of the House Committee on Banking and Currency justified the extension on moral grounds and on his view of appropriate banking functions.²⁹² Others suggested that the

Participating in Gambling Activities: Hearings on H.R. 892 Before the House Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) [hereinafter cited as House Banking Hearings].

²⁹¹ See H.R. REP. NO. 382, 90th Cong., 1st Sess. 2 (1967); S. REP. NO. 727, 90th Cong., 1st Sess. 2-3, reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2228, 2229-30.

²⁹² In introducing the bill, H.R. 9892, 90th Cong., 1st Sess. (1967), Congressman Patman, Chairman of the House Banking Committee, called gambling an "unmitigated evil" (113 CONG. REC. 12,346 (1967)), and argued that bank participation in gambling enterprises "is a great boost to the gambling interests and opens the door to eventual domination or outright takeover of these banks by the gambling syndicates" (*id.*). Patman elaborated:

[T]he purpose of the bill is to reaffirm the traditional policy of Congress and of all branches of the Federal Government to shun gimmickry, deception, gambling, huckstering, and all fast-buck activities; and instead to meet Federal obligations and Federal responsibilities on a high plane of ethics. Between the lines of the legalisms written into this bill, you may read—and I hope Members of Congress and all other citizens will read—this statement: "The Federal Government of the United States is too proud to work as a shill for gamblers."

Id. at 18582. Patman alluded to the federal antilottery policy in effect since President Benjamin Harrison's pleas to Congress in 1890. *Id.* Patman then specifically addressed the New York lottery: "It is not the purpose of this legislation to impede the New York State lottery in any manner, or to question the morality of such a lottery. But, rather, the legislation seeks to keep banks' activities limited to normal banking operations, which certainly do not include selling lottery tickets." *Id.* at 15171. Other Congressmen stressed that bank involvement in lottery-related activities was inappropriate. See *House Banking Hearings, supra* note 290, at 19 (remarks of Rep. Wylie) ("[T]here is a certain element of dignity and trust about a bank and action on the part of the Federal Government, the State and so forth, which would allow banks to sell lottery tickets is not proper . . ."); 113 CONG. REC. 32197 (1967) (remarks of Senator Lausche) ("[T]he Federal Government should not be a participant in pandering to and promoting the passions."); 113 CONG. REC. 18669 (1967) (remarks of Rep. Horton) ("I do not feel this is an appropriate function for financial institutions, the traditional bastions of thrift and frugality.").

Among the bill's opponents was Senator Javits of New York. He argued that "Congress has refrained from asserting its authority where a State has instituted a lottery" (*Senate Banking Hearings, supra* note 290, at 26), and that "[a]nything one wishes could be legislated under the guise of regulating banks on grounds of respectability or morality or ethics" (113 CONG. REC. 32193 (1967)). The minority views appended to the Senate Report were framed in terms reminiscent of the states' rights controversy over the 19th century antilottery legislation. See S. REP. NO. 727, 90th Cong., 1st Sess. 15-16, reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2228, 2240.

Indeed, much in the legislative history of these provisions echoes the old arguments over the legitimacy of the lotteries themselves. See DEVELOPMENTS, *supra* note 9, at 81-88. It is not without a little irony, therefore, that it is recalled that major segments of the financial community trace their origins to 19th century lotteries. See J. EZELL, *supra* note 9, at 82-84. The firm of S & M Allen transformed itself from a lottery-brokerage house into a private banking and stock brokerage firm. Further, S & M Allen was the learning place of Enoch W. Clark, a relative of the Allens, who established E.W. Clark & Co., a private

legislation was necessary to restore the competitive equality upset when savings and loan associations but not other financial institutions abandoned the lottery business.²⁹³

Despite the vehement attacks on the admixture of banking and gambling, the final legislation is an incomplete prohibition of bank involvement with lotteries. The amendments do not forbid banks from performing traditional banking services for lotteries, and the extent of other permissible activities will remain undefined until the amendments receive judicial scrutiny²⁹⁴ or administrative gloss.²⁹⁵

Several other federal statutes not yet mentioned relate to gambling. Although they have little independent policy significance and have not generated great controversy, these provisions are a part of the federal policy toward gambling.

The Farm Labor Contractor Registration Act²⁹⁶ authorizes the Secretary of Labor to deny, revoke, or suspend a prospective agricultural labor foreman's certificate of registration for reasons that include a prior conviction for gambling.²⁹⁷ Congress feared that unscrupulous crew leaders would exploit migrant farm workers through gambling.²⁹⁸

banking firm. The Clark concern was the nation's largest dealer in domestic currency in the mid-1800's. Jay Cooke and Company, which was the leading investment house of the Civil War, was a descendant of E.W. Clark & Co. Other prominent banking concerns with close ties to lotteries include the First National Bank of New York and Chase Manhattan Bank.

²⁹³ The General Counsel of the Federal Home Loan Bank Board had ruled: "[T]he sale of lottery tickets by Federal savings and loan institutions would be inconsistent with their objectives as thrift institutions . . ." Memorandum of Kenneth E. Scott, General Counsel, FHLB (May 15, 1967), *reprinted in* H.R. REP. No. 382, 90th Cong., 1st Sess. 14, 17 (1967). Federal savings and loan associations subsequently halted lottery ticket sales, putting other financial institutions in a superior competitive position. *See* S. REP. No. 727, 90th Cong., 1st Sess. 4-5, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2228, 2231.

²⁹⁴ In *Canal Nat'l Bank v. Mills*, 405 F. Supp. 249 (D. Me. 1975), the court refused to issue a declaratory judgment on legality of banks acting as "escrow agents" for the state lottery. The court found no justiciable controversy because prosecution was unlikely in light of opinions forwarded the banks by regulatory authorities. *Id.* at 351-54. In reviewing a conviction under 18 U.S.C. § 1084 (1976), the Fifth Circuit referred to the banking amendments as examples of the policy against use of facilities within federal control for gambling purposes. *Martin v. United States*, 389 F.2d 895, 898 & n.8 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968).

²⁹⁵ Each statute empowered the supervisory authorities of the subject banks to issue "such regulations as may be necessary." 12 U.S.C. §§ 25a(e), 339(e), 1730c(e), 1829a(e) (1976).

²⁹⁶ 7 U.S.C. §§ 2041-2055 (1976) (originally enacted as Act of Sept. 7, 1964, Pub. L. No. 88-582, 78 Stat. 920).

²⁹⁷ 7 U.S.C. § 2044(b) (1976).

²⁹⁸ Many labor contractors perform their functions in a satisfactory and re-

Immigration and naturalization provisions require findings of "good moral character," which, in certain circumstances, may exclude gamblers.²⁹⁹ The government has used this provision several times in deportation proceedings.³⁰⁰ An analogous section of the Tariff Act of 1922³⁰¹ prohibits the importation of lottery tickets and advertisements.³⁰² The Act establishing the Law Enforcement Assistance Administration to aid in the fight against organized crime includes gambling in its list of target criminal activities.³⁰³ The FCC also has authority to administer sanctions for violations of the antilottery statutes.³⁰⁴

sponsible manner. However, because of their dependency upon the contractors, migrant workers are particularly vulnerable to exploitation and abuse by irresponsible labor contractors. Moreover, the channels and instrumentalities of interstate commerce are being used to perpetrate such exploitation and abuse.

S. REP. NO. 202, 88th Cong., 1st Sess. 2 (1963). "[T]he crew leader . . . is the source of weekend entertainment often consisting of whiskey, women, and 'Georgia skin,' a gambling game." S. REP. NO. 167, 88th Cong., 1st Sess. 12 (1963) (quoting *Migratory Labor: Hearings before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 1st Sess., pt. 1, at 610 (1959) (remarks of Mariana C. Alcock, representative of the American Friends Serv. Comm.)).

²⁹⁹ For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

. . . .

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period

8 U.S.C. § 1101(f) (1976) (originally enacted as McCarran-Walter Act, ch. 477, § 101(f), 66 Stat. 163 (1952)). The inclusion of gambling in § 1101(f) was an attempt to clarify 8 U.S.C. § 1182(a)(12) (1976), which excludes aliens who seek admission to "engage in any . . . unlawful commercialized vice."

³⁰⁰ 8 U.S.C. § 1101(f)(5) (1976) survived constitutional attack in *In re Lee Wee*, 143 F. Supp. 736 (S.D. Cal. 1956), in which it was asserted that the provision made "moral character" turn on whether the jurisdiction where the alien happened to live permitted gambling. See generally *In re A—*, 6 I. & N. Dec. 242 (1954) (Italian alien convicted for "bookmaking and pool selling" and arrested for lottery violations held deportable); *In re S—K—C—*, 8 I. & N. Dec. 185 (1958) (Chinese national employed as dealer in Chinese dominoes and fan-tan at Seattle club in violation of Washington law held deportable).

³⁰¹ Ch. 356, § 305, 42 Stat. 858 (current version at 19 U.S.C. § 1305 (1976)).

³⁰² All persons are prohibited from importing into the United States from any foreign country . . . any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery.

19 U.S.C. § 1305(a) (1976). Congress enacted the predecessor of § 1305 in 1894, when antilottery sentiment was strong. See *Tariff of 1894*, ch. 349, § 10, 28 Stat. 509.

³⁰³ See 42 U.S.C. § 3781(b) (1976) (originally enacted as Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 601, 82 Stat. 197).

³⁰⁴ See note 97 *supra*.

Although the Senate failed to follow suit, the House of Representatives approved the Interstate Horseracing Act of 1976,³⁰⁵ prohibiting a "parimutuel wager being placed or accepted in one State with respect to the outcome of a horserace taking place in another State."³⁰⁶ The bill sought to regulate interstate commerce with respect to parimutuel wagering in order to maintain the stability of the horseracing industry.³⁰⁷ By approving the bill, the House registered its willingness to use federal power³⁰⁸ to protect and promote the business of racetrack gambling.³⁰⁹ Proponents of the

³⁰⁵ The bill, H.R. 14071, 94th Cong., 2d Sess. (1976), passed the House on Sept. 21, 1976. 122 CONG. REC. H10719 (daily ed. Sept. 21, 1976). Its operative provision declares that "[n]o person may accept any interstate off-track parimutuel wager." H.R. 14071, 94th Cong., 2d Sess. § 4 (1976).

³⁰⁶ H.R. REP. NO. 1366, 94th Cong., 2d Sess. (1976). The remedies provided by the Act include the right of the host state or racing association, or a horse owner whose horse ran in the subject race, to sue for "liquidated damages." H.R. 14071, 94th Cong., 2d Sess. § 5 (1976). As a general rule, the liquidated damages are set at treble the amount that would have been distributed to the plaintiff had the wager been properly placed at the track. *Id.* The bill grants federal courts subject matter jurisdiction, permits venue in the state of the event or where the off-track betting facilities are located, and provides for nationwide service of process. *Id.* § 7. The statute of limitations is set at three years from the discovery of the alleged violation, and intervention is allowed as of right for racing associations, states, or horse owners affected by the action. *Id.* § 6.

³⁰⁷ H.R. 14071, 94th Cong., 2d Sess. § 2(6) (1976). The drafters of the bill premised it on a finding that "attendance and wagering at racetracks are adversely affected by off-track parimutuel wagering." *Id.* § 2(4). This premise is based on the unsubstantiated estimate that "if interstate wagering is permitted to develop nationwide, thoroughbred horseracing would be reduced from 99 tracks to two or three, thoroughbreds raced would be reduced from 58,520 to about 5,000, and licensed track employees would be reduced from 101,000 to about 7,500." H. R. REP. NO. 1366, 94th Cong., 2d Sess. 8 (1976).

³⁰⁸ The bill presents several problems. Because it might force a state to defend an action brought without its consent, the bill may violate the eleventh amendment. *See* Letter from Assistant Attorney General Uhlmann to Representative Staggers, Chairman, House Comm. on Interstate and Foreign Commerce (June 14, 1976), reprinted in H.R. REP. NO. 1366, 94th Cong., 2d Sess. 14-15 (1976). The bill also reflects a substantive policy choice that conflicts with the interests of several states. For example, both New York and Connecticut, the only two states where off-track betting is currently legal, oppose the statute. *See, e.g., Interstate Horseracing Act: Hearings on H.R. 11973 and 11610 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 117 (1976)* (testimony of Paul R. Screvane, President and Chairman of the Board of Directors, New York City Off-Track Betting Corp.); *id.* at 153 (statement of Paul Silvergleid, Chairman, Conn. Comm'n of Special Revenue). For other dissenting views, see H.R. REP. NO. 1366, 94th Cong., 2d Sess. 17-22 and 122 CONG. REC. H10696-700 (daily ed. Sept. 21, 1976).

³⁰⁹ The Commission on the Review of the National Policy Toward Gambling has opposed the Interstate Horseracing Act because it conflicts with the Commission's proposed "hands off" policy in regard to the states. The Commission recommends that interstate off-track betting be federally prohibited only in states that prohibit it. *See* GAMBLING IN AMERICA, *supra* note 2, at 140.

measure have resubmitted it to both Houses of the current Congress.³¹⁰

IV

GAMBLING AND TAXATION

The Internal Revenue Code includes a number of provisions expressly addressing gambling.³¹¹ Section 4401 levies a two-percent excise tax on all wagers placed with a gambling business.³¹² The Code also imposes an occupational tax on the operators of gambling businesses,³¹³ and a tax on coin-operated gambling devices.³¹⁴ Other sections provide definitions,³¹⁵ require registration and recordkeeping,³¹⁶ demand confidentiality of information relating to the imposition of the wagering taxes,³¹⁷ and impose penalties.³¹⁸

³¹⁰ See S. 1185, 95th Cong., 2d Sess. (1978); H.R. 8046, 95th Cong., 2d Sess. (1978); S. REP. NO. 1117, 95th Cong., 2d Sess. (1978).

³¹¹ See I.R.C. §§ 4401-4424, 4461-4464.

³¹² See I.R.C. § 4401. I.R.C. § 4402, however, exempts: (1) wagers placed with pari-mutuels licensed by a state; (2) wagers placed on coin-operated devices taxed under I.R.C. §§ 4461-4464; and (3) wagers placed in state lotteries. The exemption for state-operated lotteries currently reads as follows:

No tax shall be imposed by this subchapter—

....

(3) State-conducted Lotteries, etc. On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Id. § 4402(3). Congress added the original version of this provision to the statute after the establishment of the New Hampshire Sweepstakes, to avoid having federal tax laws inhibit a lawful state enterprise. See note 369 *infra*.

³¹³ See I.R.C. § 4411 (tax of \$500 per year on persons liable for taxes under § 4401 or their agents).

³¹⁴ See *id.* § 4461 (tax of \$250 per machine per year). The tax applies to machines of the slot machines genus, but excepts "bona fide vending or amusement" machines, machines that dispense a prize of merchandise valued at under a nickel, and machines dispensing legal tickets from a state-operated lottery. *Id.* § 4462(b).

³¹⁵ See *id.* § 4421.

³¹⁶ See *id.* §§ 4403 (persons liable for excise tax must maintain daily records of gross amount of all wagers placed with them), 4412 (persons liable for occupational tax must provide locations of businesses giving rise to tax, addresses of agents receiving wagers, and other information), 4423 (granting IRS access to books of account of persons subject to wagering taxes).

³¹⁷ *Id.* § 4424.

³¹⁸ The general penalty sections of the Code apply, including I.R.C. § 7201 (penalties for tax evasion), and I.R.C. § 7203 (penalties for failure to file return or provide information). Further, I.R.C. § 4422 provides that the wagering taxes imposed by §§ 4401-4424 should not be construed as preemptively federal, but instead as allowing parallel state taxation.

In addition, gambling winnings,³¹⁹ like all illegal income,³²⁰ come within the statutory definition of gross income.³²¹ A specific provision allows the taxpayer to deduct gambling losses only to offset gambling winnings, and denies him an offset against other types of income.³²² Otherwise, gambling income is treated no differently than income from other sources.³²³

A. *Special Wagering Taxes*

1. *Legislative and Enforcement History*

The current wagering excise and occupational taxes evolved from tax legislation first enacted in 1951.³²⁴ That law imposed a ten-percent tax on wagers placed on sporting events, betting pools, and lotteries conducted for profit.³²⁵ Those who conducted gambling enterprises within the statutory definition had to pay the ten-percent tax,³²⁶ and were expected, in turn, to reduce the odds they gave their customers.³²⁷ The law also required operators to make

³¹⁹ See *Winkler v. United States*, 230 F.2d 766, 776 (1st Cir. 1956).

³²⁰ See *James v. United States*, 366 U.S. 213 (1961) (embezzled funds taxable); *United States v. Sullivan*, 274 U.S. 259 (1927) (gains from illicit liquor traffic taxable).

³²¹ See, e.g., *Droge v. Commissioner*, 35 B.T.A. 829 (1937) (lottery); *Weiner v. Commissioner*, 10 B.T.A. 905 (1928) (card playing). The tax is based on the return on the wager—the gambler's taxable income does not include the recovery of his initial wager, his capital investment. See *Silver v. Commissioner*, 42 B.T.A. 461, 463 (1940).

³²² See I.R.C. § 165(d). See generally *Skeeles v. United States*, 95 F. Supp. 242 (Ct. Cl. 1951).

³²³ Before 1970, income derived from gambling was ineligible for income averaging under I.R.C. §§ 1301-1305, but Congress eliminated this exclusion. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 311(d)(2)(F), 83 Stat. 487.

³²⁴ See Revenue Act of 1951, Pub. L. No. 183, §§ 463, 471, 65 Stat. 452 (current version at I.R.C. §§ 446I, 4401-4424). Only that part of the tax relating to coin-operated gambling devices had existed prior to 1951. See Revenue Act of 1941, ch. 412, § 555, 55 Stat. 687 (current version at I.R.C. §§ 4461-4464).

³²⁵ See I.R.C. § 4421(1). Congress excluded card games, roulette, dice games, and social and friendly wagers, but this did not reflect

any belief that they are not suitable subjects for taxation. However, the method of taxation which the bill proposes, while particularly appropriate to bookmaking and to policy operation, does not appear readily adaptable to these other forms of gambling In any event, your committee believes that the tax it proposes will cover at least 90 percent of total commercial wagering.

H.R. REP. NO. 586, 82d Cong., 1st Sess. 57, reprinted in [1951] U.S. CODE CONG. & AD. NEWS 1781, 1840-41. The Report cited no evidence for the 90% estimate.

³²⁶ I.R.C. § 4401(c).

³²⁷ One might assume that a gambling enterprise would simply add the tax onto the price of the bet, decreasing the customer's expected rate of return. Few illegal gambling operations, however, would face this situation because most would illegally evade such a tax.

elaborate disclosures, including lists of employees and gross amounts of wagers,³²⁸ and to purchase and display occupational tax stamps.³²⁹

Congress had two goals in passing the wagering excise taxes: to tap additional sources of revenue during a period of extreme budgetary pressures,³³⁰ and to combat organized crime by seizing gambling profits.³³¹ Illegal operators affected by the tax would

³²⁸ See I.R.C. §§ 4403, 4412. I.R.C. § 6107 (repealed 1968) placed an affirmative duty on the IRS to make lists of taxpayers under the wagering taxes available to local prosecutors.

³²⁹ I.R.C. § 6806 (repealed 1968) required those liable under §§ 4411 and 4461 to "place and keep conspicuously" occupational tax stamps in their business establishments.

³³⁰ President Truman, in a special message to Congress on Feb. 2, 1951, urged a "pay as we go tax program" ([1951] PUB. PAPERS 134, 136) and asked for increased personal and corporate income taxes and new excise taxes to cover increased government spending (*id.* 136-37). The House Report accompanying the Revenue Act of 1951 stated:

Commercialized gambling holds the unique position of being a multibillion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

H.R. REP. NO. 586, 82d Cong., 1st Sess. 55, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1781, 1838. See S. REP. NO. 781, 82d Cong., 1st Sess. 113, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1969, 2090. The Reports also contained estimates of \$407 million per year in expected revenue from the new taxes, which would ease the budgetary pressures caused by the Korean War. See H.R. REP. NO. 586, 82d Cong., 1st Sess. 54, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1781, 1837; S. REP. NO. 781, 82d Cong. 1st Sess. 112, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1969, 2089.

³³¹ Although House and Senate Reports on the bill framed it as a revenue measure only, floor debates reveal that many Congressmen regarded the bill as a weapon to fight organized crime. See, *e.g.*, 97 CONG. REC. 6892 (1951) (remarks of Rep. Cooper). This second purpose of the wagering excise taxes comports with the Kefauver Committee recommendations. The Committee had believed that gambling was the mainstay of organized crime and that taxation could be used to combat it effectively. See S. REP. NO. 307, 82d Cong., 1st Sess. 9-12, 13-14 (1951) See generally Comment, *The Use of Taxation to Control Organized Crime*, 39 CALIF. L. REV. 226 (1951); Note, *Federal Regulation of Gambling: Betting on a Long Shot*, 57 GEO. L.J. 573 (1969). The IRS disagreed. See INTERNAL REVENUE SERVICE INTELLIGENCE DIVISION, LEGISLATIVE HISTORY OF TAX STATUTES RELATING TO GAMBLING AND INTERNAL REVENUE ENFORCEMENT ACTIVITIES 1953-1973, at 3 (1975) (unpublished report submitted to the Commission on the Review of the National Policy Toward Gambling) [hereinafter cited as IRS LEGISLATIVE HISTORY].

The Kefauver Committee's conclusions continue to reappear at the highest levels of government. In a 1969 message to Congress, President Nixon stated: "[Organized Crime's] economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics." Special Message to Congress on a Program To Combat Organized Crime in America, *reprinted in* [1969] PRES. PAPERS 315, 315, *reprinted in* H.R. DOC. NO. 105, 91st Cong., 1st Sess. (1969), *quoted in* S. REP. NO. 764, 92d Cong., 2d Sess. 6 (1972).

either suffer reduced profits and subject themselves to prosecution for violating local gambling laws, or risk federal prosecution for tax evasion.³³²

Difficulties in enforcement crippled the 1951 wagering tax legislation. The Internal Revenue Service had opposed the legislation from the outset, believing that the new tax would prove unproductive and unenforceable.³³³ IRS Commissioner Dunlap, testifying before the House Appropriations Committee, also felt that a feebly enforced gambling tax would breed contempt for other tax provisions.³³⁴ He requested, without success, that Congress provide

Although Senator Kefauver was himself concerned about converting the IRS into a "crime-control agency" (*see* 97 CONG. REC. 12231 (remarks of Senator Kefauver)), the Kefauver Committee recommendations urged a large role for the IRS in the battle against organized crime:

IV. . . . The Bureau of Internal Revenue should maintain on a current and continuing basis a list of known gangsters, racketeers, gamblers, and criminals whose income-tax returns should receive special attention by a squad of trained experts

V. The Bureau of Internal Revenue should enforce the regulations which require taxpayers to keep adequate books and records of income and expenses, against the gamblers, gangsters, and racketeers who are continually flouting them. Violation should be made a felony

VI. Gambling casinos should be required to maintain daily records of money won and lost to be filed with the Bureau of Internal Revenue. . . . Where the casino is operating illegally, in addition to the aforementioned obligations, the operators of the casino should be required to keep records of all bets and wagers

VII. The law and regulations of the Bureau of Internal Revenue should be amended so that no wagering losses, expenses, or disbursements of any kind . . . incurred in or as a result of illegal gambling shall be deductible for income-tax purposes

IX. The internal revenue laws and regulations should be amended so as to require any person who has been engaged in an illegitimate business netting in excess of \$2,500 a year for any of 5 years previously, to file a net-worth statement of all his assets, along with his income-tax returns

S. REP. NO. 307, 82d Cong., 1st Sess. 9-13 (1951) (*italics deleted*).

³³² In *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), the Court found that the filing provisions violated the fifth amendment, thus ending the use of this tactic. *See* notes 340-46 and accompanying text *infra*.

³³³ *See* IRS LEGISLATIVE HISTORY, *supra* note 331, at 3. Officials of the IRS so testified in 1974 before the Commission on the Review of the National Policy Toward Gambling. *See* GAMBLING IN AMERICA, *supra* note 2, app. III, at 10 (summary of testimony of Donald Alexander, Comm'r of IRS; John Olszewski, Director, Intelligence Div., IRS; and Mervin D. Boyd, Program Analyst, Intelligence Div., IRS).

³³⁴ *Treasury-Post Office Departments Appropriations for 1953: Hearings Before a Subcomm of the House Comm. on Appropriations*, 82d Cong., 2d Sess. 426 (1952) (testimony of John B. Dunlap, Comm'r of Internal Revenue).

thousands of additional agents to properly enforce the new tax.³³⁵

The enforcement history of the 1951 Act fully vindicated the doubts expressed by the IRS. Predicted to yield \$407 million annually, the new taxes yielded less than \$10 million per year over the next decade.³³⁶ Moreover, the enforcement cost to the IRS has been extremely high.³³⁷ The 1951 Act also did not live up to expectations as a weapon against organized crime. Estimates of the national illegal gambling handle have dramatically exceeded the reported income upon which the tax has been collected.³³⁸ The disincentive to reveal potentially unlawful conduct and the shortage of IRS personnel combined to impede enforcement of the statute against the gambling operations of organized crime. Nevertheless, the wagering taxes provided the only jurisdictional beachhead for the federal assault on illegal gambling and organized crime in the 1960's.

³³⁵ In 1952, Commissioner Dunlap requested 4,333 additional revenue agents, the number thought necessary to enforce the new provisions properly. *See id.* at 422-23. *See generally* Caplin, *The Gambling Business and Federal Taxes*, 8 CRIME & DELINQ. 371, 373 (1962). The Senate Committee that recommended the wagering taxes had also foreseen the need for additional IRS manpower. S. REP. NO. 781, 82d Cong., 1st Sess. I, 118, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1969, 2096.

³³⁶ IRS LEGISLATIVE HISTORY, *supra* note 331, at 19. Statistics to 1973 were even lower:

WAGERING TAX COLLECTIONS

Year	Tax Stamps Sold	Seizures	Wagering Tax Collections		
			Occupational	Excise	Total
1965	7,284	1,187,283	\$603,000	\$6,066,000	\$6,669,000
1967	5,197	746,426	672,000	5,624,000	[6,296,000]
1969	3,527	—	354,000	4,328,000	4,682,000
1971	3,089	28,140	369,000	4,572,000	4,941,000
1973	1,675	4,820	376,000	5,533,000	[5,909,000]

Source: Duncan, *Federal Gambling Taxation in GAMBLING IN AMERICA*, *supra* note 2, app. 1, at 887, table 1, at 894.

³³⁷ The IRS estimated that it cost \$18.6 million to collect the wagering taxes between 1952 and 1966. This task consumed between 2.9% and 11.4% of the time of the Intelligence Division, yet produced only a minute fraction of total IRS receipts. *See* IRS LEGISLATIVE HISTORY, *supra* note 331, at 19.

³³⁸ The gross handle of illegal gambling is difficult to estimate, but all seem to agree that it is high. *See* EASY MONEY, *supra* note 116, at 53-54. The handle, however, corresponds only to the volume of business—the gross amount bet. The net profit derived from illegal gambling is much lower, perhaps approximating \$2 billion annually. *See id.* at 55; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 189 (1967). The Commission on the Review of the National Policy Toward Gambling recently concluded that an estimate of \$5 billion for the annual volume of illegal gambling was too low and that an accurate determination of the amount is impossible as long as "extremely popular forms of gambling remain illegal." *GAMBLING IN AMERICA*, *supra* note 2, at 3.

Although they posed both practical and theoretical difficulties, the wagering excise taxes were upheld. Early Supreme Court decisions held that the wagering excise taxes were neither an unconstitutional infringement on the police powers of the states, nor violative of the fifth amendment's protection against self-incrimination.³³⁹

2. Constitutional Attack

In 1968, the Supreme Court decisions in *Marchetti v. United States*³⁴⁰ and *Grosso v. United States*³⁴¹ curtailed the effect of the wagering tax statutes on illegal gambling operations by limiting the statutes' registration requirements on fifth amendment grounds. *Marchetti* involved a conviction for conspiring to evade the fifty dollar occupational tax on persons in the business of accepting wagers, failing to pay that tax, and failing to comply with registration requirements.³⁴² Noting that all states except Nevada had broad penal provisions against gambling and that the registration information was readily available to local authorities, the Court held that: "[T]hese provisions may not be employed to punish

³³⁹ See *United States v. Kahriger*, 345 U.S. 22 (1953), *overruled in part*, *Marchetti v. United States*, 390 U.S. 39 (1968). The Court upheld the \$50 occupational tax (345 U.S. at 25-31) and considered the registration requirements "obviously supportable as in aid of a revenue purpose" (*id.* at 32 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937))). The Court also addressed the defendant's fifth amendment claim:

Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for. . . .

Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. . . . If respondent wishes to take wagers subject to excise taxes. . . he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.

Id. at 32-33 (citations omitted). See *Lewis v. United States*, 348 U.S. 419 (1955), *overruled in part*, *Marchetti v. United States*, 390 U.S. 39 (1968). Regarding the probative value of federal tax stamps in state wagering prosecutions, see *Jefferson v. Sweat*, 76 So. 2d 494 (Fla. 1954). (statute declaring gambling stamp *prima facie* evidence of state gambling violation unconstitutional).

The Supreme Court has refused to extend the occupational tax to runners for a larger enterprise. See *United States v. Calamaro*, 354 U.S. 351 (1957). See generally *United States v. Cooperstein*, 221 F. Supp. 522 (D. Mass. 1963). Congressional efforts to expand the definition to reach runners have failed. See S. REP. No. 764, 92d Cong., 2d Sess. 13 (1972); S. REP. No. 840, 91st Cong., 2d Sess. 10 (1970).

³⁴⁰ 390 U.S. 39 (1968).

³⁴¹ 390 U.S. 62 (1968).

³⁴² 390 U.S. at 40-41.

criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination."³⁴³ The Court insisted that its holding did not limit the right to tax illegal enterprises,³⁴⁴ but was confined strictly to the scope of the fifth amendment privilege.³⁴⁵

Grosso extended the *Marchetti* holding by applying it to a conviction for failure to pay the ten-percent excise tax. The Court noted that the IRS's practice of releasing to local authorities information obtained in enforcing the excise tax raised equally serious self-incrimination problems.³⁴⁶ The Court left it to Congress to decide how to isolate the wagering information from potential state gambling prosecutions and consequent fifth amendment problems.³⁴⁷ The next year, Congress attempted to alleviate the fifth amendment problems by removing the requirement that the IRS disclose registration information³⁴⁸ and altering the provision re-

³⁴³ *Id.* at 42. In so holding, the Court overruled, in part, *Lewis v. United States*, 348 U.S. 419 (1955) and *United States v. Kahriger*, 345 U.S. 22 (1953). *Marchetti v. United States*, 390 U.S. at 54. For a student note anticipating this shift, see Comment, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L.J. 839 (1967).

³⁴⁴ 390 U.S. at 44.

³⁴⁵ "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted . . ." *Id.* at 51.

³⁴⁶ "[T]hose liable for payment of the excise tax reasonably may expect that information obtainable from its payment . . . will ultimately be proffered to state and federal prosecuting officers." 390 U.S. at 66. Thus *Grosso* extended *Marchetti* to a situation in which the statute did not require reporting. Even though no reporting of tax information was required, the question of its confidentiality and use in subsequent prosecution remained.

³⁴⁷ The Court refused to apply judicial restrictions on the use by enforcement authorities of information obtained in connection with the payment of wagering taxes, stating that such restrictions might be difficult to design and were, in any event, the responsibility of Congress. *Grosso v. United States*, 390 U.S. at 69. In *Marchetti*, the Court noted the difficulty of showing that evidence in subsequent prosecutions was not obtained by the exploitation of wagering tax information:

Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.

Marchetti v. United States, 390 U.S. at 59-60 (footnotes omitted).

³⁴⁸ See Act of Oct. 22, 1968, Pub. L. No. 90-618, § 203, 82 Stat. 1213 (repealing I.R.C.

quiring posting of occupational tax stamps.³⁴⁹ These changes failed to achieve their purpose, however, because information used in tax prosecutions could still be volunteered to state and local officials.³⁵⁰ Moreover, after some dispute within the courts of appeals,³⁵¹ the Supreme Court, in *United States v. United States Coin and Currency*,³⁵² extended the *Marchetti-Grosso* rationale to the civil forfeiture proceedings used to enforce the wagering taxes.

Despite the emasculation of the 1951 gambling tax legislation by the Supreme Court, Congress moved slowly to amend the tax laws concerning gambling. One reason for this delay was the IRS's continued lack of enthusiasm for the gambling tax provisions.³⁵³ A

§ 6107). Section 6107 had provided:

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes Such list . . . shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof

The Senate Report accompanying the legislation explained the reason for the repeal:

This section provides for the repeal of section 6107 of the Internal Revenue Code of 1954 relating to disclosure of the identity of persons paying special (occupational) tax which was subjected to criticism in the three cases handed down by the Supreme Court on January 29, 1968. The repeal of this section should make it completely clear that it is not the desire or intent of the Congress that the entire system of Federal taxation be rendered impotent or ineffectual because a State or local jurisdiction has a law rendering aspects of the activity illegal. The Federal taxing power is of such fundamental importance that it is difficult to conceive that it was the intent of the framers of the Constitution that the act of a State or local government could thwart the effective operation of the internal revenue laws of the United States. Since the section no longer serves any useful purpose, and since it now jeopardizes the effective operation of the internal revenue laws, it should be repealed.

S. REP. No. 1501, 90th Cong., 2d Sess. 52 (1968). In addition to *Marchetti* and *Grosso*, the Senate Report referred to *Haynes v. United States*, 390 U.S. 85 (1968), in which the Court found that a gun registration requirement raised fifth amendment problems.

³⁴⁹ See Act of Oct. 22, 1968, Pub. L. No. 90-618, § 204, 82 Stat. 1213 (amending I.R.C. § 6806). This alteration exempts persons subject to wagering occupational taxes and taxes on coin-operated gaming devices from the requirement that tax stamps be posted. See I.R.C. § 6806.

³⁵⁰ In light of the reasoning in *Grosso*, the IRS halted its criminal investigations under the wagering laws. See GAMBLING IN AMERICA, *supra* note 2, app. 11I, at 11 (summary of testimony of Donald Alexander, Comm'r of IRS; John Olszewski, Director, Intelligence Div., IRS; and Mervin D. Boyd, Program Analyst, Intelligence Div., IRS).

³⁵¹ Compare *United States v. United States Coin and Currency*, 393 F.2d 499 (7th Cir. 1968) (extending *Marchetti* reasoning to civil forfeiture), *aff'd*, 401 U.S. 715 (1971), with *United States v. One 1965 Buick*, 392 F.2d 672 (6th Cir. 1968) (*Marchetti* distinguished; civil forfeiture upheld), *vacated*, 402 U.S. 937 (1971). See 33 ALBANY L. REV. 158 (1968).

³⁵² 401 U.S. 715 (1971).

³⁵³ See IRS LEGISLATIVE HISTORY, *supra* note 331, at 4-5.

more important reason was the enactment of the Organized Crime Control Act of 1970.³⁵⁴ The Act dealt specifically with local gambling businesses having national repercussions and thus alleviated the pressure for antigambling provisions in the tax code.³⁵⁵

3. *The 1974 Amendments*

In late 1974, Congress finally revised the wagering tax laws.³⁵⁶ The new legislation lowered the excise tax from ten percent to two percent,³⁵⁷ increased the occupational tax from \$50 to \$500,³⁵⁸ prohibited the disclosure of wagering tax information except to enforce federal tax laws through civil or criminal proceedings,³⁵⁹ and prohibited the use of tax documents, such as stamps, returns, or registration forms, against the taxpayer in criminal prosecutions unrelated to the collection of taxes.³⁶⁰ The new prohibitions on

³⁵⁴ Pub. L. No. 91-452, 84 Stat. 922.

³⁵⁵ See notes 235-45 and accompanying text *supra*.

³⁵⁶ See Act of Oct. 29, 1974, Pub. L. No. 93-499, § 3, 88 Stat. 1549.

³⁵⁷ See I.R.C. § 4401.

³⁵⁸ See *id.* § 4441.

³⁵⁹ I.R.C. § 4424 (amended 1976) provides in part:

(a) General Rule

Except as otherwise provided in this section, neither the Secretary nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person—

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making such return, payment, or registration, which the Secretary is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible Disclosure

A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be—

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

³⁶⁰ I.R.C. § 4424(c) provides:

(c) Use of Documents Possessed by Taxpayer

Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

(1) any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document, shall not be used against such taxpayer in any criminal proceeding.

disclosure of tax-related information cured the self-incrimination problems identified in *Marchetti* and *Grosso*.³⁶¹ In addition, enforcement responsibility for the provisions shifted from the Intelligence Division of the IRS to the Bureau of Alcohol, Tobacco, and Firearms, indicating a renewed interest in enforcing the law and a recognition that the wagering taxes are more important in fighting crime than in raising revenue.³⁶²

One remaining problem concerns local criminal prosecutions of individuals who have paid federal wagering taxes. In such cases, the local authorities must show that their proof is "untainted by any connection with information obtained as a consequence of the wagering taxes."³⁶³ The difficulty of disproving this taint could lead illicit gamblers to pay federal wagering taxes in order to benefit

³⁶¹ See H.R. REP. NO. 1401, 93d Cong., 2d Sess. 5-6 (Conf. Rep.), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6232, 6233. Congress cured a similar deficiency in federal firearms registration legislation. See Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1213 (codified at I.R.C. § 5848). In *United States v. Freed*, 401 U.S. 601 (1971), the Court held that by restricting the use of firearms registration information in unrelated criminal prosecutions, Congress had alleviated self-incrimination problems:

[T]he claimant is not confronted by "substantial and 'real'" but merely "trifling or imaginary hazards of incrimination"—*first* by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and *second* by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies.

Id. at 606. Thus, the Conference Committee on the proposed § 4424 observed that in order to

resolve any remaining doubts which may exist under the rationale of the *Marchetti v. U.S.* (390 U.S. 39 (1968)), and *Grosso v. U.S.* (390 U.S. 62 (1968)) cases, the amendment provides that no Treasury Department official or employee may disclose, except in connection with the administration or enforcement of internal revenue taxes, any document or record supplied by a taxpayer in connection with such taxes, or any information obtained through any such documents or records. Additionally, the amendment provides that certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding, except in connection with the administration or enforcement of internal revenue taxes.

It is expected that these changes in the law will remove any constitutional problems regarding enforcement of the wagering taxes.

H.R. REP. NO. 1401, 93d Cong., 2d Sess. 5-6 (Conf. Rep.), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6232, 6233. The 1974 revisions of the wagering tax laws have been held constitutional. See *United States v. Sabadi*, 555 F.2d 23 (2d Cir. 1977).

Income tax returns have been used in wagering tax prosecutions. See *United States v. O'Brien*, 420 F. Supp. 834 (D. Conn. 1976), *aff'd*, 555 F.2d 136 (2d Cir. 1977). In *Garner v. United States*, 424 U.S. 648 (1976), the Supreme Court held that an income tax return is admissible in a criminal gambling prosecution where defendant did not assert his fifth amendment privilege at the time of filing.

³⁶² See Treas. Order 221-3, 1975-1 C.B. 758. See also Scott, *Enforcing Gambling Tax Pushed*, *Wasb. Post*, Jan. 10, 1975, at A24, col. 1.

³⁶³ *Marchetti v. United States*, 390 U.S. at 59.

from their immunizing effect in subsequent state prosecutions.³⁶⁴

4. *The Tax Reform Act of 1976*

Two provisions in the Tax Reform Act of 1976³⁶⁵ directly affect the federal law of gambling. The Act amends section 3402 to require a twenty-percent withholding of winnings of (1) "more than \$1,000 from a wagering transaction, if the amount of such proceeds is at least 300 times as large as the amount wagered";³⁶⁶ (2) more than \$5,000 from a state-operated lottery;³⁶⁷ and (3) more than \$1,000 from privately-conducted lotteries or wagering pools.³⁶⁸ Previously, such winnings were taxable, but not subject to withholding requirements. The new law also expands the exemption for state-operated lotteries from the wagering excise tax imposed by section 4401,³⁶⁹ and from the section 4461 occupational tax on coin-operated devices.

Although Congress enacted the new withholding provisions to stop the nonreporting of gambling income³⁷⁰ and to raise reve-

³⁶⁴ Absent a clear showing that the subsequent criminal prosecution rests entirely on independent evidence, the defendant may assert that I.R.C. § 4424 has been violated, that proof related to the federal tax registration or payment is inadmissible, and that the subsequent criminal prosecution must be dismissed. *Cf.* *United States v. Schipani*, 289 F. Supp. 43, 54 (E.D.N.Y. 1968) (illegal electronic surveillance). "Once it becomes apparent that the issue [of tainted evidence] is in the case . . . , the government bears the burden of convincing the Court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights." *Id.* at 54.

³⁶⁵ Pub. L. No. 94-455, 90 Stat. 1520.

³⁶⁶ I.R.C. § 3402(q)(3)(A).

³⁶⁷ *See id.* § 3402(q)(3)(B).

³⁶⁸ *See id.* § 3402(q)(3)(C) (amended 1977). In 1977, Congress subjected to withholding "[p]roceeds of more than \$1000 from . . . a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai if the amount of such proceeds is at least 300 times as large as the amount wagered." Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 405, 91 Stat. 126 (to be codified at I.R.C. § 3402(q)(3)(C)(ii)). The withholding on wagering proceeds applies to winnings in excess of the ticket price. *See* I.R.C. § 3402(q)(4). In addition, as a result of a floor amendment proposed by Senator Cannon of Nevada (*see* 122 CONG. REC. 12598 (1976)), winnings from bingo, keno, and slot machines are exempt from the withholding provision (*see* I.R.C. § 3402(q)(5)).

³⁶⁹ *See* I.R.C. § 4402(3). In 1965, with the New Hampshire Sweepstakes in mind, Congress enacted an exemption for state-conducted sweepstakes where winners were determined by the results of a horserace. *See* Act of June 21, 1965, Pub. L. No. 89-44, § 813, 79 Stat. 149. The exemption was retroactive to March 10, 1964, the effective date of the New Hampshire Sweepstakes. *Id.* It proved too narrow, however, because subsequent lotteries did not follow the sweepstakes formula. The 1976 amendment sought to modernize the law and avoid confusion. *See* S. REP. NO. 938, 94th Cong., 2d Sess., pt. 1, at 386-88, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3816-17.

³⁷⁰ Although most wagering transactions have no tax significance since the majority of bettors end up the year with no net wagering gains, the special types of wagers mentioned above represent unique and occasional windfalls that gener-

nues,³⁷¹ they may instead have heightened the competitive advantage of illegal games by discouraging participation in legal games and placing an administrative burden on legal gambling businesses.³⁷² Further, any additional revenues that the withholding provisions generate are ephemeral. Because most gamblers lose more at gambling during a tax year than they gain, the amount of gambling income withheld will probably be returned to the taxpayer.³⁷³

B. *Income Taxation and Gambling*

As a general rule income derived from gambling is taxed like any other form of income. Section 165(d) of the Code, however, allows deduction of gambling losses only from gambling winnings.³⁷⁴ This provision reflects the fear that by allowing the deduction of wagering losses from any type of income, the tax laws would encourage fraudulently or intentionally incurred gambling losses to reduce personal taxes. Still, the limitation does allow taxpayers to offset losses from one form of gambling against winnings from another form of gambling.³⁷⁵ Further, a gambling enterprise

ally produce a significant tax liability. Even with the information reporting requirements, many taxpayers do not report these winnings on their income tax returns. One source of this nonreporting of income is, for example, the use of the so-called "10 percenters" at the racetrack. A 10 percenter is a person hired by the winner to cash his ticket for 10 percent of the winnings and provide fictitious identification so that the reporting on Form 1099 is provided in a name other than that of the actual winner. These 10 percenters themselves seldom pay any income tax either by filing no tax return or claiming sufficient offsetting losses.

S. REP. NO. 938, 94th Cong., 2d Sess., pt. 1, at 383-84, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3813. See STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 2D SESS., TAX REVISION ISSUES, NO. 6, ADMINISTRATIVE MATTERS 13-14 (Comm. Print 1976).

³⁷¹ See S. REP. NO. 938, 94th Cong., 2d Sess., pt. 1, at 384, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3814 (predicting increase in revenues of \$124 million in fiscal year 1977, and of \$78 million in both 1978 and 1981).

³⁷² See GAMBLING IN AMERICA, *supra* note 2, at 16; *Tax Reform Act of 1975: Hearings on H.R. 10612 Before the Senate Comm. on Finance*, 94th Cong., 2d Sess. 2358-59 (1976) (statement of Dr. William Perrault, President, Nat'l Ass'n of State Lotteries).

³⁷³ See GAMBLING IN AMERICA, *supra* note 2, at 16.

³⁷⁴ I.R.C. § 165 provides:

(a) General Rule

There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

....

(d) Wagering Losses

Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

³⁷⁵ See *Drews v. Commissioner*, 25 T.C. 1354 (1956). Although the burden of proof

may deduct expenses not directly related to gambling, such as lease or payroll payments.³⁷⁶

To promote the reporting of income, including gambling winnings, the IRS requires the payor not only to withhold a percentage of winnings,³⁷⁷ but also to submit an information form—Form I099—for all payments over \$600.³⁷⁸ The IRS has conceded that strict enforcement of the Form 1099 requirement would “create recordkeeping burdens of staggering proportions.”³⁷⁹ The form is, in fact, easily subverted and, in many of the most egregious cases, is not even filed.³⁸⁰

Until 1969, the income averaging provisions of the Code excluded gambling income.³⁸¹ Income averaging allows a taxpayer to reduce the rate at which a surge of income is taxed if such income significantly exceeds his average income for the previous four years. The exclusion of gambling income from income averaging exacerbates the tax burden of a “good” year—one in which gambling income caused a significant increase in taxable income. Because gambling winnings are no less cyclical or sporadic than the forms of income for which income averaging was designed, such as

that a loss is properly deductible rests on the taxpayer (*Mack v. Commissioner*, 429 F.2d 182 (6th Cir. 1970); *Donovan v. Commissioner*, 359 F.2d 64 (1st Cir. 1966)), the requisite standard is unclear (*see, e.g., Manzo v. Commissioner*, 31 T.C.M. (CCH) 714, 717-18 (1972) (losing parimutuel tickets not conclusive of gambling losses); *Gallagher v. Commissioner*, 27 T.C.M. (CCH) 124, 125 (1968) (partial losses allowed on theory that racetrack bettor could not win consistently over 5 month period without also suffering heavy losses); *Greenfield v. Petitioner*, 25 T.C.M. (CCH) 471, 472-73 (1966) (deduction supported by taxpayer's accounting records)). Nevertheless, possession of losing parimutuel tickets is still frequently enough to establish losses sufficient to offset any gambling income for the taxable year. *See IRS LEGISLATIVE HISTORY, supra* note 331, at 485.

³⁷⁶ *Commissioner v. Sullivan*, 356 U.S. 27 (1958). *See also Commissioner v. Heininger*, 320 U.S. 467 (1943) (legal expenses incurred in losing defense of fraudulent practices claim deductible).

³⁷⁷ *See* notes 365-68 and accompanying text *supra*.

³⁷⁸ (a) Payments of \$600 or More

All persons engaged in a trade or business and making payment in the course of such trade of business to another person, of . . . \$600 or more in any taxable year . . . shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary

I.R.C. § 6041(a).

³⁷⁹ IRS LEGISLATIVE HISTORY, *supra* note 331, at 25.

³⁸⁰ A common abuse involves the “ten percenters,” described in note 370 *supra*. *See IRS LEGISLATIVE HISTORY, supra* note 331, at 27-28. Further, the IRS has not enforced the information return requirement against legal gambling enterprises in Nevada. *See EASY MONEY, supra* note 116, at 83.

³⁸¹ I.R.C. §§ 1301-1305 (amended 1969).

royalties or breach-of-contract damages, the exclusion reflected a bias against gambling winnings.³⁸² In 1969, the provision succumbed to a comprehensive redrafting of the income averaging sections.³⁸³

C. *Gambling and Taxation: Policy Alternatives*

Both the 1951 wagering tax legislation and the income tax treatment of gambling have received sharp criticism in recent years.³⁸⁴ In light of state-operated lotteries, off-track betting, and increased discussion of decriminalizing other forms of gambling, the existing tax law has been criticized for interfering with state policies toward gambling and for tightening the hold of organized crime on gambling dollars.

Before Congress repaired the *Marchetti-Grosso* damages,³⁸⁵ the federal tax laws were, as a practical matter, enforceable only against legal gambling ventures. Consequently, the tax laws provided an advantage to illegal gambling. With minor exceptions,³⁸⁶ the law required legal gambling ventures to pay a ten-percent tax on gross wagers in their establishments,³⁸⁷ an amount sufficient to foreclose competition with illegal games.³⁸⁸ Although Congress has lowered this tax to two percent and seems to have alleviated the self-incrimination problem, substantial difficulties remain. Despite the glowing predictions about the amount of revenue likely to be raised,³⁸⁹ illegal gambling enterprises have no greater incentive to

³⁸² Prior to 1964, the income averaging provisions applied only to certain sources of income, which did not include gambling. *See id.* §§ 1301-1306 (amended 1964). In 1964, Congress discarded this approach in favor of general provisions. *See* Act of Feb. 26, 1964, Pub. L. No. 88-272, § 232, 78 Stat. 19. The new scheme defined "averagable income" as the amount by which adjusted taxable income from any source exceeded 133⅓% of "average base period income," (defined as average income over the previous four years, with some qualifications) with certain specified exclusions. *See* I.R.C. § 1302 (amended 1969). One exclusion was for wagering income. *Id.* § 1302(b)(3) (amended 1969).

³⁸³ *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 311, 83 Stat. 487 (current version at I.R.C. §§ 1301-1304). The result is that the taxpayer may include wagering income in averagable income for tax years after 1969.

³⁸⁴ *See generally* EASY MONEY, *supra* note 116, at 84; GAMBLING IN AMERICA, *supra* note 2, at 14-15.

³⁸⁵ *See* note 361 and accompanying text *supra*.

³⁸⁶ I.R.C. § 4402. In 1976, Congress expanded the state-conducted sweepstakes exemption to include all state-operated lotteries. *See* note 369 and accompanying text *supra*.

³⁸⁷ I.R.C. § 4401 (amended 1974).

³⁸⁸ *Cf.* note 390 and accompanying text *infra* (2% excise tax and \$500 occupational tax would not necessarily foreclose competition). For discussion of the profit margin in various forms of illegal gambling, see EASY MONEY, *supra* note 116, at 53-60.

³⁸⁹ Figures based on Treasury Department estimates given in conjunction with a 1970

pay the two-percent tax than they did to pay their pre-1968 tax bills. Nor is there indication that the new tax will be enforced more vigorously than in the past. Moreover, the original rationale behind the tax legislation—to supply a basis for federal jurisdiction—collapsed when Congress enacted the Organized Crime Control Act of 1970. At best now, it only supplements, not supplies.

The reduction of the tax rate to two percent has weakened arguments that federal wagering excise taxes preclude effective competition between legal and illegal gambling enterprises.³⁹⁰ Similarly, the \$500 occupational tax is insignificant to any large enterprise. Nevertheless, it can be persuasively argued that Congress should repeal the federal wagering taxes entirely. Absent a dramatic increase in enforcement effort by the IRS, the only function such taxes serve is to impose a special “sin tax” on legal gambling condoned, and often encouraged, by state policy. This result is

effort to enact a provision similar to I.R.C. § 4424 (S. 1624, 91st Cong., 2d Sess. (1970)) and used again in conjunction with a later version (S. 431, 92d Cong., 2d Sess. (1972)) were as follows:

REVENUE (per annum)

	Pre-1968 (actual)	S. 1624 (est.)
Occupational tax	\$ 360,000	\$6,757,500
Voluntary (percent)	60	53
Occupational tax	240,000	6,150,000
Enforced (percent)	40	47
Excise	3,300,000	6,969,000
Voluntary (percent)	59	65
Excise	2,300,000	3,562,500
Enforced (percent)	41	35

S. REP. No. 764, 92d Cong., 2d Sess., table 2, at 12 (1972).

³⁹⁰ A number of noneconomic factors, such as community confidence in the local numbers runner, availability of credit, and convenience make it difficult for a legal game to compete with organized crime. See also EASY MONEY, *supra* note 116, at 57-59. Considering only economic factors, however, to be competitive, the legal game would have to offer odds at least equal to those offered by the illegal game. In a typical numbers game, the odds against a particular number paying off are 999:1. The game operators pay most winners at 600:1, but cut the payoff on heavily wagered numbers to produce a long-term payout equalling 58% of the amount wagered. Of the remaining 42%, runners take 25%, controllers and police protection command 5% each, and office costs absorb 2%. Thus, the operator's normal profit is approximately 5% of the game's handle. *Id.* at 56. Because its fixed overhead exceeds that of most other forms of illegal gambling (*id.* at 53-57), “the numbers game is a vulnerable . . . target for legal competition” (*id.* at 59). The 2% wagering tax and the \$500 occupational tax are insignificant expenses of a legal game, especially in light of typical advertising expenditures. See generally DEVELOPMENTS, *supra* note 9, at 730-33; FUND FOR THE CITY OF NEW YORK, LEGAL GAMBLING IN NEW YORK (1972).

inconsistent with any purpose originally advanced in favor of the legislation. Further, the federal wagering taxes encroach on state policy choices with respect to gambling. The general federal approach has been to avoid interference with state gambling policies where no federal interest is implicated. Given the absence of a significant federal interest in the current wagering tax statutes, they should be repealed.³⁹¹

The policy considerations underlying the application of federal income taxes to gambling differ significantly from those affecting the excise and occupational taxes. Unlike the general income tax, wagering taxes reflect a specific policy choice to impose a special tax on wagering. The theoretical basis of income taxation is to tax all income, "from whatever source derived."³⁹² A repeal of the special taxes, therefore, would not mandate exclusion of gambling income from the general income tax.

Apart from the new withholding provisions,³⁹³ gambling income receives special federal income tax treatment in only one respect—the limitation on the deductibility of gambling losses. The underlying policy—to avoid encouraging fraud or reckless gambling³⁹⁴—seems relatively uncontroversial. The income tax otherwise neither favors nor discriminates against gambling. Some have argued, however, that gambling winnings should not be taxed at all.³⁹⁵ The premise of this position is that few gamblers win over time—this week's gain is next week's loss, and only a rare gambler derives real income from gambling. Taxation of gambling income is essentially confiscatory, because occasional winnings are fully taxed but losses are not fully deductible. Moreover, because the IRS cannot enforce an income tax on illegal gambling winnings,

³⁹¹ Taken together, the existence of alternative means of obtaining federal jurisdiction over moderate-scale local gambling operations, the lack of sufficient manpower to enforce the wagering taxes, and shifting state gambling policies mandate federal abstention. As to the ostensible revenue function, the tax reduction from 10% to 2% indicates that Congress did not contemplate a significant income from this provision.

³⁹² I.R.C. § 61.

³⁹³ See notes 365-68 and accompanying text *supra*.

³⁹⁴ The limitation on the deduction of wagering losses also fits the logic of the Internal Revenue Code. Without the offset provision (I.R.C. § 165(d)), gambling losses would fall under the general rule permitting deduction against ordinary income (*id.* § 165(a); see also § 165(c) (general rule limited for losses by individuals)). Gambling activity, however, closely resembles investment activity—the bettor makes an initial investment on which he hopes to gain but may lose. A losing wager is the analog of a worthless security which is separately treated in § 165. See *id.* § 165(g). Losses on such capital assets must be offset against capital gains, so by analogy, wagering losses are properly offset against winnings.

³⁹⁵ See, e.g., EASY MONEY, *supra* note 116, at 84-85.

an income tax on all gambling winnings encourages illegal gambling.³⁹⁶

Despite its initial appeal, this analysis has serious flaws. Excluding gambling winnings from taxation would discriminate invidiously in favor of gambling as an income-producing activity. Gambling is not the only form of investment that is cyclical and uncertain. To the extent that net winnings would escape taxation, gambling would be favored over almost all other income-producing activities.³⁹⁷ A viable gambling business, for example, may be a profitable enterprise. Any exclusion of gambling income from the income tax, therefore, ought to distinguish personal from professional gambling profits, and then impose normal taxes on income realized from the profession or business of gambling. Nevertheless, the major reason to exclude any form of gambling income from taxation—to avoid putting legal gambling enterprises at a competitive disadvantage—is at best speculative. In light of the many undetermined variables, it is probably unwise, as well as impolitic, to exclude gambling income from taxation.³⁹⁸

A more equitable scheme would be to allow generous gambling loss carryovers. Rather than permitting gamblers to deduct wagering losses only from winnings for the current tax year and to income average over only a short period of time, a provision similar to that in effect for carryback and carryforward of capital losses³⁹⁹ would allow the taxpayer to neutralize any net wagering income in a given year with wagering losses from a prior or subsequent year. Such a provision would tax only sustained gambling winnings. The rare individual bettor who managed to preserve a winning streak would have to pay income taxes on his winnings,

³⁹⁶ This assumes that Form 1099 would be required to be filed by the legal gambling business. The government does not generally enforce this requirement against legal gambling casinos in Nevada. *See id.* at 83.

³⁹⁷ Although I.R.C. § 61 purports to tax all income, the Code contains exceptions. For example, the receipt of gifts does not increase taxable income. *See* I.R.C. § 102.

³⁹⁸ The Commission on the Review of the National Policy Toward Gambling recommended that Congress repeal all federal income (GAMBLING IN AMERICA, *supra* note 2, at 15), excise (*id.* at 18), and occupational stamp taxes (*id.*) on gambling and gamblers. The Commission found that federal taxation inhibited legal gambling operations from effectively competing with illegal gambling. *Id.* at 15, 18. The Commission recommended that only state governments levy gambling taxes. *Id.* They would not, however, exempt the professional gambler from federal income taxation. *Id.* at 15.

³⁹⁹ I.R.C. § 1212. This section generally allows the "net capital loss" of a corporation to be treated as a "short-term capital loss" in each of three preceding years and five subsequent years. Individuals may also carry capital losses forward one year under I.R.C. § 1212(b).

but those suffering counterbalancing losses over time would pay no tax.

V

AN EFFORT AT CODIFICATION AND REFORM—S. 1437

The Criminal Code Reform Act of 1977, better known as S. 1437,⁴⁰⁰ is now under consideration in Congress.⁴⁰¹ The bill represents a comprehensive effort to codify, revise, and reform the federal criminal law.⁴⁰² It is a true recodification, pulling together criminal offenses from all fifty titles of the United States Code, and, as such, is a unique contribution to federal jurisprudence. Although the changes that S. 1437 proposes for many areas of federal law are beyond the purview of these materials, the treatment of gambling under the proposed Code merits consideration.

S. 1437 is an intellectual descendant of the *Model Penal Code*,⁴⁰³ and owes much to the 1971 draft code of the National Commission on Reform of Federal Criminal Laws.⁴⁰⁴ The greatest strength of the proposed new Code is its combination of simplicity and comprehensiveness. S. 1437 uses straightforward language and uniform vocabulary and definitions. It articulates state of mind requirements,⁴⁰⁵ defenses,⁴⁰⁶ jurisdictional bases,⁴⁰⁷ and sentences⁴⁰⁸ expressly and uniformly for each substantive provision.

With respect to gambling, S. 1437 largely succeeds in its effort

⁴⁰⁰ See S. 1437, 95th Cong., 2d Sess. (1978).

⁴⁰¹ The bill passed the Senate on January 30, 1978 by a vote of 72 to 15. See 124 CONG. REC. S. 860 (daily ed. Jan. 30, 1978).

⁴⁰² S. 1437 replaces an earlier version of the bill, S. 1, 94th Cong., 1st Sess. (1975). For a brief history of significant codification efforts leading up to S. 1, see *The Challenge of a Modern Federal Criminal Code*, 117 CONG. REC. 6120-71 (1971).

⁴⁰³ See the epochal article by Professor Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). See 2 SENATE COMM. ON THE JUDICIARY, CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, 93d Cong., 2d Sess. 1-13 (Comm. Print 1974).

⁴⁰⁴ See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971), reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 129-514 (1971). Previously, the Commission had produced a draft of its proposed code and extensive working papers. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT (1970); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (1970).

⁴⁰⁵ See S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed 18 U.S.C. §§ 301-303).

⁴⁰⁶ See *id.* (proposed 18 U.S.C. §§ 501, 502, 511, 512).

⁴⁰⁷ See *id.* (proposed 18 U.S.C. §§ 201-203).

⁴⁰⁸ See *id.* (proposed 18 U.S.C. §§ 2001-2008, 2201-2204, 2301-2306).

to restate current law in simplified form. The bill recodifies almost all of the current federal gambling law, with notable improvements in organization and clarity. Further, the federal law of gambling as recodified in S. 1437 clearly conforms to the two traditional congressional tenets underlying the federal system of criminal justice: (1) S. 1437 maintains a clear federalist policy with respect to gambling, leaving substantive choices largely to the several states;⁴⁰⁹ and (2) S. 1437 carries forward and expands the notion that the federal law should focus primarily on institutional forms of gambling, particularly those aspects of gambling susceptible to exploitation by organized crime,⁴¹⁰ leaving the individual bettor alone as much as possible. Because the statute as originally drafted omitted "government" from its definitions of operations subject to its gambling provisions, the applicability of S. 1437 to state-run lotteries or other publicly-owned or controlled legal forms of gambling was unclear.⁴¹¹ The draft of the bill that recently passed the Senate rectifies this omission by including "government" in its definition of "enterprise."⁴¹²

In contrast to the multiplicity of gambling provisions scattered throughout current law, S. 1437 contains only one basic section concerning gambling.⁴¹³ This provision integrates the essential as-

⁴⁰⁹ The Senate Committee on the Judiciary stated that "a common theme applicable to section 1841 [the proposed basic gambling provision] . . . is that [it is], in whole or in part, linked to a violation of the applicable State law, the Committee viewing the Federal role . . . as primarily one of assisting the States in the enforcement of their laws and policies." S. REP. NO. 605, 95th Cong., 1st Sess. 836 (1977). Congress had drafted the following federal antigambling statutes, *inter alia*, with specific exemptions for differing state law: 15 U.S.C. § 1172 (1976); 18 U.S.C. §§ 1084, 1307, 1511, 1952, 1953, 1955 (1976); and 18 U.S.C. § 4402(3). Nevertheless, Congress, on at least one occasion, acted directly contrary to the professed interests of some states. See 12 U.S.C. §§ 25a, 339, 1730c, 1829 (1976); 18 U.S.C. § 1306 (1976).

⁴¹⁰ For an example of such focus in current law see 18 U.S.C. §§ 1961-1968 (1976).

⁴¹¹ [T]he definition of "enterprise"—sec. 111—does not include a government. Similarly, "person" and "organization" do not include a "government"—sec. 111. If the definitions of "enterprise," "person" and "organization" do not include a "government," it might not be possible to enforce federal gambling policy against government corporations that will appear and are now in operation engaged in various forms of legal gambling.

Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 13, at 8615 (1977) (statement of G. Robert Blakey) [hereinafter cited as *Senate S. 1437 Hearings*].

⁴¹² See S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed 18 U.S.C. § 111). In addition, the redrafted bill would permit the federal government to secure civil injunctions against state-operated gambling activities that violate federal law. See *id.* (proposed 18 U.S.C. § 4011(a)). This technique was suggested during Senate hearings. See *Senate S. 1437 Hearings*, *supra* note 411, pt. 13, at 8616 (statement of G. Robert Blakey).

⁴¹³ S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed 18 U.S.C. § 1841).

pects of many existing statutes, eliminating some completely.⁴¹⁴ Relying to a significant degree on the approach of the Organized Crime Control Act of 1970,⁴¹⁵ the section prohibits the business enterprise of gambling, the transportation of gambling paraphernalia, and the receipt of pay-offs.⁴¹⁶ The section also incorporates several absolute exemptions including: (1) conduct legal in all relevant jurisdictions;⁴¹⁷ (2) information transmitted "solely in connec-

⁴¹⁴ The proposed § 1841 effectively replaces 18 U.S.C. §§ 1084, 1301-1302, 1307, 1952, 1953, and 1955 (1976).

⁴¹⁵ Pub. L. No. 91-452, 84 Stat. 922. For example, the proposed § 1841(b)(1) defines "gambling business" as:

[A] business involving gambling of any kind that, in fact:

"(A) has five or more persons engaged in the business; and

"(B) has been in substantially continuous operation for a period of thirty days or more, or has taken in \$2,000 or more in any single day.

S. 1437, 95th Cong., 2d Sess. § 101 (1978).

Although "gambling device" and "gambling information" are defined, the drafters intentionally left "gambling" itself undefined. They apparently were unwilling to risk the possibility of excluding ingenious schemes. The Senate Report accompanying S. 1437 states that "gambling" is to "be broadly construed." S. REP. NO. 605, 95th Cong., 1st Sess. 843 (1977).

⁴¹⁶ The proposed § 1841(a) provides as follows:

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business;

"(2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling;

"(3) carries or sends:

"(A) a gambling device;

"(B) gambling information; or

"(C) gambling proceeds;

from within a state to any place outside the state; or

"(4) otherwise establishes, promotes, manages, or carries on an enterprise involving gambling.

S. 1437, 95th Cong., 2d Sess. § 101 (1978).

⁴¹⁷ The proposed § 1841(c) provides in pertinent part:

"(c) DEFENSE.—It is a defense to a prosecution:

"(1) under subsection (a)(1), (a)(2), or (a)(4) that the kind of gambling business or enterprise, the manner in which the business or enterprise was operated, and the defendant's participation therein, were legal in all states and localities in which it was carried on, including any state and locality from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any state and locality in which the wager was received or to which it was transmitted.

"(2) under subsection (a)(3) that:

"(A) the gambling device was carried or sent into, or was en route to, solely a state and locality or foreign country in which the use of such a device was legal;

"(B) the defendant was a common or public contract carrier, or an employee thereof, and was carrying the device in the usual course of business;

....

tion with news reporting";⁴¹⁸ and (3) paraphernalia transported by an individual bettor.⁴¹⁹

In addition to the principal gambling section, S. 1437 redrafts other existing gambling-related provisions, such as those dealing with sports bribery⁴²⁰ and civil restraints on racketeering activities.⁴²¹ The bill transfers several provisions to other titles of the United States Code, including the provisions dealing with gambling ships,⁴²² the mailing of lottery information, postal authorities acting as lottery agents,⁴²³ and the broadcasting of lottery information.⁴²⁴ Gambling-related bribery is treated in a general section concerning bribery.⁴²⁵ Finally, S. 1437 affects several provisions relating to gambling but not contained in the current title 18.⁴²⁶

"(E) the transmission of the gambling information was solely from a state and locality in which such gambling was legal into a state and locality in which such gambling was legal; or

"(F) the gambling proceeds were obtained by the defendant as a result of his lawful participation in gambling which was legal in all states and localities in which it was carried on, including any state and locality from which the defendant placed a wager or otherwise participated in gambling activity, and any state and locality in which his wager was received or to which it was transmitted.

Id. (proposed 18 U.S.C. § 1841(c)).

⁴¹⁸ *Id.* (proposed 18 U.S.C. § 1841(c)(2)(D)). This definition differs from that in prior law, and would perhaps cure the first amendment problems inherent in previous definitions. *See* notes 181 & 217 *supra*.

⁴¹⁹ Proposed § 1841(c)(2)(C) provides that it is a defense to § 1841(a)(3) that "the defendant was a player or bettor and the gambling device he was carrying or sending was solely a ticket or other embodiment of his claim." S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed § 1841(c)(2)(C)).

⁴²⁰ *See id.* (proposed 18 U.S.C. § 1753) (to replace 18 U.S.C. § 224 (1976)).

⁴²¹ *See id.* (proposed 18 U.S.C. §§ 4011-4013, 4101) (to replace 18 U.S.C. §§ 1964-1968 (1976)).

⁴²² *See id.* §§ 973-974 (proposed addition to 46 U.S.C.) (to replace 18 U.S.C. §§ 1081-1083 (1976)).

⁴²³ *See id.* § 878(b) (proposed 39 U.S.C. § 6003) (to replace 18 U.S.C. §§ 1302-1303 (1976)). This provision also carries over the exemption of 18 U.S.C. § 1307 (1976) relating to state-conducted lotteries, but does not amend 39 U.S.C. § 3005 (1976). *See* S. 1437, 95th Cong., 2d Sess. § 878(b) (proposed 39 U.S.C. § 6003).

⁴²⁴ *See* S. 1437, 95th Cong., 2d Sess. § 1087(s) (1978) (proposed 47 U.S.C. § 512) (to replace 18 U.S.C. § 1304 (1976)). Proposed § 512 carries forward an exemption for state-operated lotteries similar to that now contained in 18 U.S.C. § 1307 (1976).

Proposed § 511 prohibits common carriers subject to the jurisdiction of the FCC from broadcasting gambling information. *See* S. 1437, 95th Cong., 2d Sess. § 1087(s) (1978).

⁴²⁵ *See* S. 1437, 95th Cong., 2d Sess. § 101 (1978) (proposed 18 U.S.C. § 1351) (to replace 18 U.S.C. § 1511 (1976)).

⁴²⁶ The bill incorporates a penalty subsection into each of the provisions that prohibits financial institutions from engaging in lottery-related activities. *See id.* §§ 331 (to amend 12 U.S.C. § 25a (1976)), 339(c) (to amend 12 U.S.C. § 339 (1976)), 349(f) (to amend 12 U.S.C. § 1730c (1976)), 351(d) (to amend 12 U.S.C. § 1829a (1976)). Thus, 18 U.S.C. § 1306

The provisions of S. 1437 that relate to gambling, therefore, simplify, harmonize, and improve existing law, without making radical changes in scope or policy.

CONCLUSION

The development of the federal law of gambling traced in this Article must now be placed in a larger historical and policy context. The role of chance in the culture of man has been strikingly varied. Sometimes it has played an essentially religious role. The first King of Israel was chosen by lot.⁴²⁷ Other times it has been a secular issue. For example, governments have seen games of chance as a boon⁴²⁸ or a bane⁴²⁹ to military preparedness. During the early history of the United States, our Puritan forefathers eschewed gaming out of distaste for the perceived corrupt lifestyle of the English upperclasses and respect for the harsh necessities of pioneer society.⁴³⁰ Following the lead of England,⁴³¹ aristocratic

(1976) would become unnecessary. The bill also redefines the criteria for certification of farm labor contractors (*see* notes 296-98 and accompanying text *supra*), but it continues to include a gambling conviction as a ground for denial, suspension or revocation (*see* S. 1437, 95th Cong., 2d Sess. § 280(a) (1978) (to amend 7 U.S.C. § 2044(b)(7) (1976)). Further, the bill makes technical amendments to the Johnson Act. *See id.* § 425 (to amend 15 U.S.C. §§ 1172, 1173, 1175, 1176 (1976)).

⁴²⁷ *I Samuel* 10:20-21. The hand of God was seen in the working of chance. "The lot is cast into the lap, but the decision is wholly from the Lord." *Prov.* 16:33 (Rev. Standard).

⁴²⁸ Louisiana, like France, enforces gambling contracts that promote "skill in the use of arms" such as wagers on horseracing, shooting matches, and foot races. LA. CIV. CODE ANN. art. 2983 (West 1952).

⁴²⁹ In 1388, Richard II secured the passage of a statute that directed all laborers and serving men to secure bows and arrows and to abandon the pursuit of "tennis, football, . . . dice . . . , and other such importune games." 12 Rich. II, c. 6 (1388). The problem apparently persisted; in 1541, Henry VIII secured the passage of similar legislation. *See* 33 Hen. VIII, c. 9 (1541).

⁴³⁰ *See* DEVELOPMENTS, *supra* note 9, at 39-49. In 1633, an enactment of the Massachusetts Bay Colony struck at "time idely or unppffitably" spent. 2 RECORDS OF THE COURTS OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY 37 (1904). In 1646, the Colony also promulgated the first law in America directly attacking gambling. COLONIAL LAWS OF MASSACHUSETTS 57 (1890). Despite contrary current opinion, these laws were not religiously motivated. Earthly necessities dictated public policy—those distracted from work could not hope to survive in the new country. *See* F. DULLES, A HISTORY OF RECREATION 5 (2d ed. 1965). Indeed, only after the Puritan Devines lost their political power did a biblical justification for antigambling legislation develop. Some suggested that appeals to chance were a form of blasphemy. *See* DEVELOPMENTS, *supra* note 9, at 49-52 (sermons of Cotton and Increase Mather). Nevertheless, the early gambling laws—unlike the blasphemy laws—survived the decline of the Devines and the rise of the merchant class, arguably demonstrating that their justification transcended religion. For a detailed description of the gradual transformation of the Massachusetts criminal law from the hand of the Lord punishing sin to an agent of the State maintaining public order, *see* Nelson, *Emerging No-*

Tidewater Virginia regulated gambling to promote the public order, but more importantly, to preserve the stability and economic viability of a land-based social and economic system.⁴³² Jacksonian democrats, on the other hand, fought the state-chartered lotteries in an effort to end privilege and corruption as well as to uphold the symbolic relationship between effort and profit in the young Republic.⁴³³ The small-town casino, bordello, and saloon, fitting for the male-dominated cattle and mining community of the American frontier, had to bow to the demands of family life in a developing farming society.⁴³⁴ Modern society has accepted the federal gov-

tions of Modern Criminal Law in the Revolutionary Era, in A. GOLDSTEIN & J. GOLDSTEIN, *CRIME, LAW AND SOCIETY* 72-86 (1971).

⁴³¹ In 1710, Parliament, reflecting the policy perspective of the aristocracy, comprehensively regulated gambling by, *inter alia*, voiding securities and conveyances given in satisfaction of gambling debts, providing for actions to recover losses and prohibiting fraudulent play. See Statute of Anne, 9 Anne, c. 14 (1710). For discussion of the social attitudes reflected in the Statute, see 4 W. BLACKSTONE, *COMMENTARY ON THE LAWS OF ENGLAND* 171-72 (1st ed. 1769); 1 W. HAWKINS, *PLEAS OF THE CROWN*, ch. 32, § 5, at 720 (8th ed. 1824).

⁴³² In 1727, Virginia adopted the Statute of Anne. See Act of Feb. 1, 1727, ch. 8, 4 VA. STAT. 214 (Hening 1814). Virginia later prohibited gambling and betting in public places in an effort to control the grosser incidents of tavern life. See Act of May 6, 1744, ch. 5, 5 VA. STAT. 229 (Hening 1819). South Carolina, in contrast, was more discriminating; it prohibited only gambling for high stakes in taverns. See Act of May 19, 1762, no. 911, 4 S.C. STAT. 158-62 (1838).

⁴³³ See DEVELOPMENTS, *supra* note 9, at 81-88. A connection between freedom and virtue was widely seen in colonial society. See PA. CONST. OF 1776, Plan or Frame of Government, c. 2, § 36, *reprinted in* 2 B. POORE, *supra* note 16, at 1540 (possession of honest trade necessary to preserve man's independence); VT. CONST. OF 1777, Plan or Frame of Government, c. II, § 33, *reprinted in* 2 B. POORE, *supra* note 16, at 1857. These early constitutional ideas found subsequent judicial expression in the opinions of Justice Catron, a Jacksonian appointee to the Supreme Court, when he was still a judge in Tennessee. In *State v. Smith & Lane*, 10 Tenn. (2 Yer.) 272 (1829), he argued that society must promote a system where one acquires property through work and not by the manipulation of chance:

Reduce a man to want by gaming or otherwise, and he is no longer free to exercise the elective franchise, but dependent upon the hand that furnishes himself and family with bread . . . Destroy freedom of thought, and independence of action . . . and the idea of governing by majorities is a farce, the popular will a delusion, bowing to the dictation of the wealthy minority.

Id. at 274.

⁴³⁴ See DEVELOPMENTS, *supra* note 9, at 373-85. As one author crudely put it: "Four things indicate prosperity in a mining town—Hebrews, gamblers, common women and fleas." T. DONALDSON, *IDAHO OF YESTERDAY* 41 (1941). In advocating the end to the licensing of gambling in 1907, the Governor of Arizona recognized that circumstances had changed:

The rule that prevails among men in new communities, that each must stand or fall upon his own merits—that only the strong deserve to stand and that to fall is the natural and deserved fate of the weak—might have much to commend it if the rule concerned men alone. But . . . the fate of women and children has become

ernment as the arbiter of disputes among its several sectors. The potential of organized crime to undermine the arbiter's decision has provoked retaliation against the financial power and official corruption rooted in syndicated gambling. Each of these policy perspectives has helped to mold the current state and federal law of gambling.

If this historical development teaches any lesson, it is that each form of gambling must be examined on its own terms. The law has taken few "gambling positions." Gambling regulation has most often been society's reaction to perceived antisocial consequences. Where little or no harm is evident, gambling is left alone. Generally, the question is one of degree.⁴³⁵ Public or private lotteries, wagering on sporting events or otherwise, machine gambling, and casino-type operations each raise different policy questions. Modern reformers must be sensitive to these distinctions. When evaluating a particular gambling form, they must ask who operates it, who and how many participate in it, where the activity centers, how it is promoted, and what is the degree of expected regulation. A state-operated lottery, promoted through limited public advertisement, selling relatively high-priced tickets to the middle and upper classes, and seeking to finance needed social improvements is gambling in its most benign form. In contrast, a private lottery that fraudulently milks the lower classes for the benefit of organized crime, capitalizes other criminal endeavors and engenders public corruption is gambling in its most malignant form. Reformers should also recognize the limitations of the law in achieving socially desirable ends.⁴³⁶ In short, sweeping generalizations must be

involved . . . [as the territory has developed].

G. KELLY, *LEGISLATIVE HISTORY OF ARIZONA, 1864-1912*, at 248-49 (1926).

⁴³⁵ The Royal Commission on Betting, Lotteries and Gaming aptly put it:

It is in immoderate gambling that the dangers lie; an individual or a community in whose life gambling plays too prominent a part betrays a false sense of values which cannot but impair the full development to the personality of the society. It is the concern of the State that gambling, like other indulgences such as the drinking of alcoholic liquor, should be kept within reasonable bounds

REPORT OF ROYAL COMMISSION ON BETTING, LOTTERIES AND GAMING 1959-51, Cmd. No. 8190, at 45 (1951).

⁴³⁶ The history of English gambling law in the years after the American Revolution is instructive for reformers. The old common law tolerance of gaming had sharply shifted with the rise of Puritanism and Cromwell in the 17th Century. The restoration of the Stuart monarch in 1660, however, turned English society back toward a taste for high life and luxury. Hanover England did not change that basic direction. Queen Victoria, however, ascended to the throne of England in 1837. Unlike some of her predecessors, she abhorred the luxury and idleness that had become typical of the royal court; she believed

swept away; particularized judgments are the hallmark of wise reform.⁴³⁷

in the values of hard work, earnestness, morality, propriety and temperance. In a sense, her ascendance to the throne was akin to a Puritan restoration. The idle occupation of gambling, with its indiscriminate bestowal of riches based not on merit, but chance, shocked and affronted Victorian sensibilities, and it was attacked on a wide front. *See, e.g.*, Act to amend the Law concerning Games and Wagers, 1845, 8 & 9 Vict., c. 109, § 18 (gaming contracts void; no suits allowed to collect wagers or money held by third parties in furtherance of wagers); Act for the Suppression of Betting Houses, 1853, 16 & 17 Vict., c. 119, §§ 1-20 (increasing investigative powers; providing penalties). The basic design of these policies was not rethought until the Royal Commission on Betting, Lotteries and Gaming sat in 1949-1951 "to enquire into the existing law and practice . . . relating to lotteries, betting and gaming." ROYAL COMMISSION REPORT, *supra* note 435, at iii. Largely adopting a moderate version of John Stuart Mill's philosophy of liberty, the Commission recommended "that the object of gambling legislation should be to interfere as little as possible with individual liberty . . . but to impose such restrictions as are desirable and practicable to discourage or prevent excess." *Id.* at 55. Nevertheless, the Commission's recommendations lay dormant for a decade until Parliament adopted the Betting and Gaming Act, 1960, 8 & 9 Eliz. 2, c. 60. The 1960 Act reflected three fundamental policy positions: gambling was an activity that was unseemly if run by the state; it ought not to be encouraged through advertising; and it ought to be largely confined to adults acting in private, and standing on an equal footing, *i.e.*, there should not be any edge for the house. Experience under the 1960 Act, however, was not happy. Gambling activity grew by leaps and bounds; between 1960 and 1961, some 1,000 clubs sprang up in Great Britain. GAMING BOARD FOR GREAT BRITAIN, REPORT OF THE GAMING BOARD FOR GREAT BRITAIN, 1969, at 13 (1970). Organized crime elements began to take over the management of the clubs violently. O. NEWMAN, GAMBLING: HAZARD AND REWARD 51 (1972). Enforcement of the licensing provisions fell short of the expected goals. DEVELOPMENTS, *supra* note 9, at 922-25; EASY MONEY, *supra* note 116, at 68-69; GAMING BOARD FOR GREAT BRITAIN, REPORT OF THE GAMING BOARD FOR GREAT BRITAIN, 1969, at 13-14 (1969). The result was the Gaming Act, 1968, c. 65, which tightened the regulatory provisions of the 1960 legislation. By 1977, the number of licensed casinos dropped from 1,000 to 125 (GAMING BOARD FOR GREAT BRITAIN, REPORT OF THE GAMING BOARD FOR GREAT BRITAIN, 1977, at 11 (1978)); the number of bingo clubs dropped from 3,000 to 1,740 (*id.* at 7). Today, the system seems to be running fairly well, offering a "highly regulated" alternative to the "relatively wide open" operation of Nevada. EASY MONEY, *supra*, note 116 at 69. *See generally* DEVELOPMENTS, *supra* note 9, at 925-29; GAMBLING IN AMERICA, *supra* note 2, at 101-04. For a comprehensive survey of the literature on gambling in England today, see D. CORNISH, GAMBLING: A REVIEW OF THE LITERATURE AND ITS IMPLICATIONS TO POLICY AND RESEARCH, Home Office Research Study No. 42 (1978).

⁴³⁷ It is, of course, commonplace to observe that the law always falls short of realizing its goals. Shortfalls are normally to be expected in such areas as personnel, organization, and ultimate product in any human enforcement machinery. And still more is involved in any society that characterizes itself as free because of constitutional limitations.

In 1974, a referendum in New Jersey defeated, by a three to two margin, a proposal for statewide casino gambling. N.Y. Times, Nov. 7, 1974, at 38, col. 1. The major objection was fear of mob control. Two years later, a proposal limited to Atlantic City was adopted after an intensive publicity campaign. N.Y. Times, Nov. 4, 1976, at 43, col. 1. Governor Byrne observed on signing the statute implementing the referendum (N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1978)) that it would prove successful "if we can keep undesirable elements out of the City." N.Y. Times, June 3, 1977, at B3, col. 1. "Organized Crime," he said, "is not welcome in Atlantic City. I warn them, keep your filthy hands out." *Id.*

Many have observed that the enforcement of criminal provisions in the gambling area is ineffective in comparison with the enforcement of other types of criminal prohibitions.⁴³⁸ This con-

Traditionally, elements of organized crime have been attracted to such gambling activity, largely because of its high cash flow. Violence typically characterizes organized crime's effort to monopolize and control gambling operations. Once in control, elements of organized crime skim profits, thus cheating owners and taxing authorities; manipulate games; and collect debts through extortion. At various times Nevada was beset with each of these incidents of organized crime. See DEVELOPMENTS, *supra* note 9, at 402-67; EASY MONEY, *supra* note 116, at 66-69; GAMBLING IN AMERICA, *supra* note 2, at 78-80. Such incidents of organized-crime involvement can, of course, be attacked directly by criminal laws aimed at violence, theft, tax evasion, cheating, or extortion. In addition, they may be attacked indirectly by "keeping the mob out," that is, by government regulation of ownership, employment, and patronage in a casino industry. Crime control measures are, of course, constitutionally limited in a free society. These limits are widely perceived, if not widely applauded. Less well known are the constitutional limits on civil measures in this area. Traditionally, for example, courts have accorded race tracks wide discretion in dealing with undesirable elements. See *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913) (purchaser of ticket to race track excluded with no recourse); *Fink v. Cole*, 1 N.Y.2d 48, 133 N.E.2d 691, 150 N.Y.S.2d 175 (1956) (past associations with undesirable grounds for denial of horseracing license). Cf. *Marshall v. Sawyer*, 365 F.2d 105 (9th Cir. 1966) (exclusion of plaintiff from Nevada casino because of blacklisting as unsuitable by regulatory agency not violative of due process), *cert. denied*, 385 U.S. 1006 (1967). In *Nevada Tax Comm. v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957), the court expressed a concern similar to that of Governor Byrne:

For gambling to take its place as a lawful enterprise in Nevada it is not enough that this State has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here. . . . [N]ot only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.

Id. at 119, 310 P.2d at 854. These judicial attitudes may not survive modern, broader constitutional interpretations. Compare *Colorado Racing Comm. v. Smaldone*, 177 Colo. 33, 492 P.2d 619 (1972) (exclusion of willful violator of any law violates due process) with *State v. Rosenthal*, ___ Nev. ___, 559 P.2d 830, 836, *appeal dismissed for want of federal question*, 434 U.S. 803 (1977) ("no room for federally protected constitutional rights" in gaming regulation). Careful reformers will take these nascent limitations into account in framing gambling reforms.

⁴³⁸ See generally *Junker, Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972); *Kadish, More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 719 (1972); *Kadish, The Crisis of Overcriminalization*, 374 ANNALS 157 (1967), reprinted in 7 AM. CRIM. L.Q. 17 (1968). For a recent empirical study of gambling enforcement, see F. FOWLER, T. MAGIONE & F. PRATTER, *GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES* (1978), which concludes, *inter alia*:

- (1) Laws against private social gambling are primarily symbolic; they are neither enforced nor enforceable;
- (2) Laws against public social gambling and commercial gambling are enforceable to the extent that other comparable laws are; modest resources (less than 1%) are devoted to the task with modest results;
- (3) Because of the nature of gambling offenses, prosecutors and police, not legislative draftsmen, have the major impact in the area;

clusion demonstrates a pitfall of generalities—usually the speaker will have one form of gambling in mind but neglects to qualify his statement. History shows that in certain cases gambling regulation has succeeded with the commitment of few resources. Federal gambling ship legislation, for example, achieved its goal upon passage.⁴³⁹ The risk of capture and the cost of forfeiture made efforts to evade the law unattractive. Similarly, the government can largely eliminate casino operations and the use of gambling devices at an acceptable cost. It is only when efforts have been made to control clandestine lotteries or sports wagering that the current level of enforcement has not achieved a similar level of success.⁴⁴⁰

Comprehensive reform of the law of gambling must take into account the complexity of evolving legal policies. Seldom can any issue be considered by examining only one body of law. Although the criminal law and its traditional policy of prohibition lies at the heart of the law of gambling, it draws support from a complex network of parallel, and often uncodified, civil rules.⁴⁴¹ Gambling, too, is not governed solely by the will of the sovereign. The calculus of competition and profit, often affected by tax provisions, provides important input. And economic laws draw no distinction between legal and illegal gambling endeavors. Reform of the heart, in short, may not produce the intended effect on the body of gambling policy.

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- (4) Decriminalization has not made the task of the police harder or easier; and
 (5) Police, prosecutor and judicial attitudes that give a low priority to gambling enforcement are not supported by general social attitudes that want effective enforcement, including imprisonment of offenders.

For a discussion of the current societal attitude toward gambling, see *GAMBLING IN AMERICA*, *supra* note 2, at 48-49 (42% of sample survey respond that gambling enforcement "very important"; 55% respond jail appropriate). For recommendations on gambling enforcement organization for police, see *id.* at 42-44, and for prosecutors, see G. BLAKEY, R. GOLDSTOCK & C. ROGOVIN, *TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: THE RACKETS BUREAU CONCEPT* (1977).

⁴³⁹ 18 U.S.C. §§ 1081-1083 (1976), *discussed in* note 139 *supra*.

⁴⁴⁰ See *GAMBLING IN AMERICA*, *supra* note 2, at 169-76.

⁴⁴¹ Gambling contracts based on illegal games or legal games found immoral or against public policy were unenforceable at English common law. See *DEVELOPMENTS*, *supra* note 9, at 829-32. After the Revolution, American courts had to remake English law. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 96-97 (1938). Many American jurisdictions rejected this rule. See, e.g., *Perkins v. Eaton*, 3 N.H. 152, 155 (1825) (Richardson, C. J.). Nevada has consistently refused to enforce gambling contracts. See *Scott v. Courtney*, 7 Nev. 419 (1872). For the current reasons behind the rule, see *DEVELOPMENTS*, *supra* note 9, at 877-80. Changing attitudes in criminal law, however, can spill over into the civil law. See, e.g., *Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 307 A.2d 85 (1973) (valid gambling debt enforced despite law of forum). Reformers should consider gambling policies of the criminal and civil law of gambling together. See *DEVELOPMENTS*, *supra* note 9, at 873-82.

Finally, reformers must be sensitive to the laws of all jurisdictions in their reexamination of gambling policy. The law of any jurisdiction is a chemistry of criminal, civil, and tax policies. The federal law of gambling, historically, has attempted to balance the policies of all jurisdictions, only rarely assuming the policy initiative. And so it should be. Our pluralistic society has adopted a federal system that accords wide latitude to people and states to act wisely or foolishly. Ours has been a nation of many faiths, of skepticism, experiments, accommodations, self-criticism, and piecemeal but constant reform. Reform of the federal law of gambling ought not to undermine this history.

This Article began with a reference to Santayana. It is appropriate that it end with a reference to Shaw,⁴⁴² who suggested, with Hegel,⁴⁴³ that the only thing history teaches is that history does not teach. The development of the federal law of gambling seems to have about it a sense of *déjà vu*. A historian can only comment that it need not be so.

⁴⁴² G. SHAW, *HEARTBREAK HOUSE* 45 (6th ed. 1927).

⁴⁴³ "What experience and history teach is this—that people and governments never have learned anything from history . . ." G. HEGEL, *PHILOSOPHY OF HISTORY* 6 (rev. ed. 1900).