

NO. 31564

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GREENBRIER COUNTY COALITION  
AGAINST GAMBLING EXPANSION;  
AND CABELL COUNTY COALITION  
AGAINST GAMBLING EXPANSION,  
UNINCORPORATED ASSOCIATIONS,**

**PETITIONERS,**

vs.

**ORIGINAL JURISDICTION**

**WEST VIRGINIA LOTTERY COMMISSION;  
and ITS DIRECTOR, JOHN MUSGRAVE,**

**RESPONDENTS.**

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**FINAL BRIEF OF PETITIONERS IN SUPPORT OF  
PETITION FOR WRIT OF MANDAMUS**

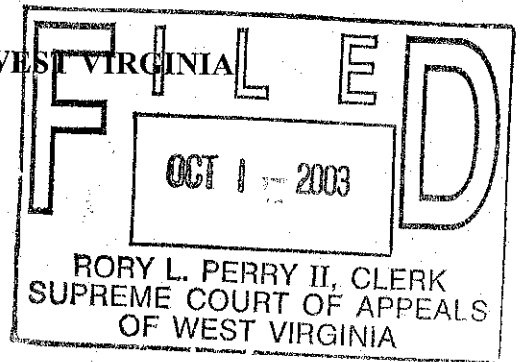
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I. STATEMENT OF CASE

This is an original proceeding in mandamus under the *W. Va. Code* §§ 53-1-1, *et seq.*, and this Court's Rule 14.

II. STATEMENT OF FACTS

The facts are as recounted in the accompanying Petition for Writ of Mandamus.

### III. ARGUMENT

#### A. VIDEO GAMBLING IS NOT A "LOTTERY" WITHIN THE MEANING OF THE *W. VA. CONST.*, ART. VI, § 36

##### 1. Video Gambling: "No Relation whatsoever To A Lottery...."

Although, of course, statewide gambling is exceptionally momentous and far-reaching, the key issue here of whether this video gambling is a "lottery" under the *W. Va. Const.*, Art. VI, § 36, is disposed of rather simply and straightforwardly. Indeed, the cases of *Mountaineer Park v. Polan*, 438 S.E.2d 305 (W. Va. 1993) and *U. S. v. Dobkin*, 423 S.E.2d 612 (W. Va. 1992), and the consistent progeny of the latter, answer this dispositive question with a resounding and unequivocal No.

"Video poker machines ... have no relation whatsoever to a lottery ...," held this Court unanimously in *U. S. v. Dobkin*, 423 S.E.2d at 615 (W. Va. 1992), in regard to the 1984 amendment to the *W. Va. Const.*, Art. V, § 36, which allows the State to "own, operate, control and regulate" only a "lottery." The Court clarified that this holding encompassed as well "any facsimile thereof" of these gambling machines. *Id.*

##### 2. Video Gambling: "Significantly Different ..." From Lottery

In *Mountaineer Park, supra*, 438 S.E.2d at 315-316, a unanimous Court observed:

Electronic video lottery, by its very nature, is significantly different from common state-run lottery games.... We are not convinced that *W. Va. Const.*, Art. VI, § 36 contemplated a form of lottery which in some states has included gambling activities such as slot machines and Keno.

*Id.* at 315-316.

Further, in this vein, significantly:

While we recognize that the voters, upon ratifying the amendment to Article VI, § 36 of the *West Virginia Constitution* authorized the legislature to pass laws establishing a state-run lottery, we question whether the voters were approving video lottery operations.

438 S.E.2d at 318, n. 22.

3. **Dobkin and South Dakota Supreme Court: Video Gambling  
“Not A Lottery.”**

In *Poppen v. Walker*, 520 N.W.2d 238 (S.D. 1994), the South Dakota Supreme Court, directly relying on *Dobkin, supra*, held as follows:

In the recent case of *U. S. v. Dobkin*, 188 W. Va. 209, 423 S.E.2d 612 (1992), the court addressed the question of whether video poker machines violated a statutory provision prohibiting lotteries. The court flatly stated: “However, *W. Va. Code* 61-10-11 (1939) is not violated ... because such machines have no relation whatsoever to a lottery or a raffle.” *Dobkin*, 423 S.E.2d at 615.

We are firmly convinced beyond any reasonable doubt that video lottery is not a “lottery” as contemplated under our constitution ....

520 N.W.2d at 248. Such machines do, however, violate the criminal *W. Va. Code* § 61-10-1.

*Dobkin, supra*.

The next year, in *State ex rel. Clark v. State Canvassing Bd.*, 888 P.2d 458, 463 (N.M. 1995), the New Mexico Supreme Court held that:

A state-operated lottery ... is a single, limited form of gambling involving the purchase of chances and a drawing of lots to determine a winner. *See, e.g., Poppen v. Walker*, 520 N.W.2d 238, 247 (S.D. 1994) (reviewing both the history of lotteries and the predominant state-run lotteries in the midwest, and concluding that the term lottery does not include video games of chance).... *See, e.g., Ronald J. Rychlak, Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L.Rev. 11, 48-49 (1992).

In comparison, the category of "video machine games of chance" is extremely expansive. It would encompass video poker, black jack, keno, slot machines and potentially any other form of gambling that incorporates video technology.

*Id.* at 463.

4. **Nor Is Keno A "Lottery."**

A year later, the Supreme Court of California in *Western Telecon v. California State Lottery*, 917 P.2d 651 (Cal. 1996), having previously ruled that video poker was not a lottery, employed much the same rationale to hold that Keno is not a lottery either:

"Keno is a 'house percentage banking game' in which the house pays all winners and collects from all losers. The house essentially acts as a player in the game which 'takes on' all other players. Thus, the house has a stake in the outcome of the game." (*Sisseton-Wahpeton Sioux Tribe v. U.S.* (D.S.D. 1992) 804 F.Supp. 1199, 1202; see also *Poppen v. Walker* (S.D. 1994) 520 N.W.2d 238, 247 ["video lottery" machines that played keno and other games held to be "game of chance" rather than "lottery," in part because each individual player played against the machine, rather than in large group as typical of a lottery]; 1981 Ops. N.Y. Atty. Gen. 68, 77 [proposed video games not authorized under state lottery law because, among other reasons, the player does not play against other participants, but "plays only against the 'house'"].

CSL makes several arguments for characterizing its Keno game as a lottery rather than a banking game. None is persuasive.

*Id.* at 658-59

The high California court in its opinion makes clear indeed that no conceivable "argument" could be "persuasive" on this critical score of allowing the State a strong and direct monetary incentive to overreach its individual citizens in head-on gambling against them. *Id.*

5. **South Carolina Supreme Court: Video Gambling Not A Lottery**

Two years later, the South Carolina Supreme Court in *Johnson v. Collins*, 508 S.E.2d 575 (S.C. 1998) held that:

We find lottery is a term of art and video gaming devices do not come within the plain and ordinary meaning of “lottery” because they do not involve a drawing and “tickets” or other indicium of entitlement to a prize. We have made this finding based on the longstanding definitions and distinctions.... This Court is constrained to give the words of our Constitution their plain and ordinary meaning. *See Davis v. County of Greenville*, 313 S.C. 459, 443 S.E.2d 383 (1994) (language of constitution given its plain and ordinary meaning).

Thus did the judicial decisions and dominoes from the 1992 *Dobkin* case, *supra*, 423 S.E.2d 612, fall with some comprehensiveness and briskness.

**B. HISTORICAL AND COMMONSENSICAL CONSTITUTIONAL CONSTRUCTION AS EMPLOYED IN THE ABOVE CASES IS THE CORRECT MODEL.**

Aside from the above cases’ consistent holdings that video gambling is not a lottery, their consistently historical and commonsensical constitutional construction is noteworthy as well. States the high South Carolina Court in this vein:

The South Carolina statutory scheme includes sections that specifically deal with lottery, gaming, and betting.... This distinction between lottery and other forms of gaming ... supports the conclusion that its framers used the term “lottery” in a narrow sense.

*Johnson v. Collins*, 508 S.E.2d 575, 578 (S.C. 1998). Of course, as recognized by *Mountaineer Park* as well, 438 S.E.2d at 316, our constitutional “framers used the term, ‘lottery,’ in a narrow sense.” In this respect, compare the *W. Va. Code* § 61-10-11 (lottery) (1849, 1868) with the *W. Va. Code* § 61-10-1 (gaming machine) (1849, 1868), *Dobkin, supra*.

1. **Lottery: “The Sale Of Tickets To Large Numbers Of People For The Chance Of Prizes.”**

Continues the high South Carolina Court on the Framers’ intent:

This conclusion accords with that of the South Dakota Supreme Court in a similar case:

The framers of ... the term ‘lottery’ in the narrower sense contemplated the sale of tokens or tickets to large numbers of people for the chance to share in the distribution of prizes ....

*Poppen v. Walker*, 520 N.W.2d 238, 245 (S.D. 1994).

\* \* \*

Historically, in the early 1800's, a lottery was typically a government-sponsored means of raising revenue by selling tickets for prizes awarded by lot. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L.Rev. 11 (1992). A “lottery” in its narrowest sense is commonly defined as “a gambling game ... in which a large number of tickets are sold and a drawing is held for certain prizes.” Since its original ratification in 1868 the constitutional provision has specified “tickets” as part of the prohibited lottery activity. See 1868 S.C. Const. Art. XIV, § 2. Use of the word “tickets” indicates the framers’ narrow conception of a lottery as commonly understood, i.e., gambling involves “tickets” and a drawing by lot. (*emp. added*)

508 S.E.2d at 578-79.

The *W. Va. Const.*, Art. VI, § 36, as well “specified ‘tickets’ as part of lottery activity.” *Id.*

2. **The Key Voters’ Intent.**

On the key voters’ intent level, the South Dakota Supreme Court states:

The 1986 amendment provides that the state lottery may be regulated, controlled, owned, and operated by South

Dakota, either separately or jointly or in cooperation with one or other states. We may take judicial notice of historical facts which are matters of general knowledge and specially those peculiarly connected with or affecting the state. SDCL 19-10-2(1); 1 Spencer A. Gard, *Jones on Evidence*, § 2:35 (1972); *Cummings*, 495 N.W.2d at 496. We may also consider the circumstances under which a constitutional provision was formed, the general spirit of the times, and the prevailing sentiment of the people. *Maynard v. Board of District Canvassers*, 84 Mich. 228, 47 N.W. 756 (Mich. 1890).

We take judicial notice that at the time the 1986 amendment was proposed, the predominant forms of state-sanctioned lotteries in the Midwest region were the “scratch and match” and “on-line” lotteries operated either by individual states or by several states cooperatively. That fact in conjunction with the manner in which the 1986 amendment is phrased (“[e]ither separately or jointly or in cooperation with one or other states”) leads to the conclusion that instant lottery and on-line lottery were the forms of lottery contemplated. There is no evidence from any source in the record that any form of video gaming was envisioned when the 1986 amendment was proposed to the people.

(*Emp. add.*) *Poppen v. Walker*, 520 N.W.2d 238, 246-247 (S.D. 1994). Similarly, on “the (1984) amendment ... proposed to the people” of this State, *id.*, this Court observed that there was no such evidence, either. *Mountaineer Park, supra*.

Please note that the *W. Va. Const.*, Art. VI, § 36 at its outset refers to “tickets,” and in its second clause to lotteries conducted “either separately or jointly ... with one or other states.” Obviously the latter refers to “ticket lotteries,” since no cooperation with another state is at all required for video gambling. In this regard, the popular interstate Powerball “ticket lottery” is a principal example of such an interstate “ticket lottery.”

Please note as well that the *S.D. Const.*, Art. III, § 25 (1986) and the *W. Va. Const.*, Art. VI, § 36 (1984) were virtually identical en toto, and verbatim in this respect. And, see, Mountaineer Park, supra, 438 S.E.2d at 318 (“[W]e question whether the voters were approving video lottery operations;” and “We are not convinced that *W. Va. Const.*, Art. VI, § 36 contemplated a form of lottery which in some states has included gambling activities such as slot machines and Keno.” *Id.* at 316.)

3. **The Supreme Court Alone to Determine the Meaning of Constitutional Terms.**

In summary of the constitutional construction by the various high courts noted above is the certain and settled principle recognized by the Supreme Court of South Dakota:

It is the duty of the Supreme Court, not the Legislature, to determine the meaning of constitutional terms. *South Dakota Automobile Club v. Volk*, 305 N.W.2d 693, 700 (S.D. 1981). The legislature cannot define the scope of a constitutional provision by subsequent legislation. *Edge v. Brice*, 113 N.W.2d 755 (Ia. 1962). “The Constitution is the mother law. It is not the baby. Statutes must conform to the Constitution, not vice versa.” *Cummings v. Mickelson*, 495 N.W.2d 493, 507 (S.D. 1993), (Henderson, J., concurring in part; dissenting in part).

In determining the meaning of a constitutional provision, courts are guided by applicable rules of construction. First and foremost, the object of construing a constitution is to give effect to the intent of the framers of the organic law and of the people adopting it. (*emp. add.*)

*Poppen, supra*, 520 N.W.2d at 241-242.

See the *W. Va. Code* §§ 29-22A-2 and 29-22B-103, 201 and 202 for how our Legislature most presumptuously purports to transform, or deform, the statutory “baby” into the constitutional

“mother,” with its self-conscious and labored prolixity on how the Legislature interprets the constitution betraying an effective admission that it knew it was violating Art. VI, § 36. See *Mountaineer Park* (1993) and *Dobkin* (1992).

4. **The Constitutional Intent of the Framers and the Adopting People.**

In regard to the judicial obligation “to give effect to the intent of the framers ... and of the people adopting” a constitutional provision, 520 N.W.2d at 241-42, this Court in *Mountaineer Park, supra*, declared:

The fundamental principle in constitutional construction is that effect must be given to the intent of the framers and of the people who ratified and adopted it.... *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 241, 247 (W. Va. 1973).

438 S.E.2d at 311.

*In accord: K.M. v. W. Va. Dept. of Health and Hum. Serv's.*, 575 S.E.2d 393, 403 (W. Va. 2002).

To be sure, the unanimous framers of the *W. Va. Const.*, Art. VI, § 36, *Mountaineer Park, supra*, were they alive today, would be as shocked and outraged as the 1984 amendment voters at these State-sponsored poker games, blackjack games, Keno games, and similar, hard-nosed gambling games in every community of the State's 55 counties, *Mountaineer Park* and *K.M. supra*, if not perhaps quite as outraged as the statewide community citizens who endure them now.

Indeed, in *Mountaineer Park* itself this Court gives pause and emphasis to the proposition that in this State “there has been a long-standing general prohibition against gambling of any kind” (*emp. add.*). 438 S.E.2d at 316. Well it may have. For what is now the *W. Va. Code* §§ 61-10-1 through 11 (1849, 1868) carried over from Virginia these multiple

criminal bans on gambling in all its forms. It was in this precise and verboden context that the anti-lottery Art. VI, § 36 was unanimously adopted in 1863. *Id.*

The reason a “ticket ... lottery” (*id.*) was so singled out is as clear as mountain spring water. For it obviously could never have occurred to the 1863 framers in this perennial constitutional-criminal context that their new State in this sphere would ever seek to do, if anything, other than perhaps resume the historic state-run ticket lotteries which were in vogue from earliest colonial times up to around 1850. See *State-Sponsored Lotteries*, 34 B.C.L. Rev. 11 (1993) cited and quoted in *Mountaineer Park*, 438 S.E.2d at 313, n. 7.

Obviously, the 1863 framers’ certain mind-set was that legalized, state-run non-lottery gambling games were so historically unknown, so legally unprecedented and so prospectively unanticipated that inserting such an explicit ban in their 1863 or 1872 constitution would never have occurred to them as necessary to maintain such an overall ban. *Id.*

Rather, and most closely analogous to *K.M.*, *supra*, 575 S.E.2d at 403, they simply “presumed” colonial and statehood Virginia’s “long-standing” policy and practice of outlawing non-lottery gambling without explicitly acknowledging as much, just as they “presumed” under Art. IX, § 2, that the historic “overseers of the poor” had duties materially to assist the poor without at all specifying them. *Id.*

Please note, too, that just as the new State promptly after 1863 enacted Virginia-patterned statutes continuing the “overseers of the poor,” *K.M.*, 575 S.E.2d at 404, it as well promptly reenacted the preexisting Virginia criminal statutes of 1849 and earlier outlawing gambling in all its forms. See *W. Va. Code* §§ 61-10-1 through 11. As this Court said in *K.M.*, *supra*, 575 S.E.2d at 404, “we attach some significance to the fact that ... this (‘overseers of the

poor') statute remained essentially unchanged when the Legislature recodified it after the Constitution." *Id.* The same is so here.

The Court in the *K.M.* case as well identified the framers' traditional Christian beliefs on charity as one of its bases for recognizing a state constitutional right to subsistence. The *K.M.* case states that "we know that their (framers') view of ... Christianity placed an emphasis on care for the least fortunate." *Id.* at 404, n. 16. It would, of course, be totally unrealistic and inconsistent to recognize the framers' charitable Christian impulses as manifested in the "overseers of the poor" regime without at the same time recognizing their religious aversion to hardcore gambling. *Id.* See, also, the 1960 Preamble to the *W. Va. Const.* (such constitutional construal required).

The certain and significant upshot is that the perennial criminal ban on such non-lottery type gambling over a full 2 1/4 centuries from 1619 Virginia, and overlapping 1863, by the same reenacted statutes and by unbroken and hallowed custom and usage had by 1863 congealed into an absolute constitutional ban on such one-on-one, head-on gambling games. *K.M. vs. DHHR, supra.*

And, of course, the 1984 voters who approved the strictly construed "exception" to Art. VI, § 36 on State-run "ticket" lotteries, *Mountaineer Park*, assuredly did not in the remotest intend its distinctly narrow scope to embrace the head-on, hard-nosed, state-sponsored gambling involved here. No further authorities than the conclusive, on-point cases in Section III.A., supra, are at all needed in this regard, and the issue is for that matter fully disposed of by the unanimous *Mountaineer Park* Court in 438 S.E.2d at 315-16: "We are not

convinced that the *W. Va. Const.*, Art. VI, § 36 contemplated ... gambling activities such as slot machines and Keno.” *Id.* at 315-316.

**C. A Civilized State With A Constitution For The People Simply Cannot Engage In Head-On, Hard-Core Gambling With Its Individual Citizens Where The Citizen’s Financial Loss Is The State’s Financial Gain And The Citizen And His Or Her Family Are Overreached And Harmed By The State In Significant Ways.**

Fundamentally underlying this “one-on-one” (State-on-citizen) hard-nosed gambling under the guise of a lottery, as criminalized by the colony-forward *Virginia Code* (1849) and the *W. Va. Code* § 61-10-1 (1860, 1868), is the crucial fact that “electronic video lottery, by its very nature, is significantly different from common state-run lottery games.” *Mountaineer Park, supra*, 438 S.E.2d at 315-16.

For, unlike in a State-run lottery, this State has a direct financial stake in the outcome of each individual “hand” of video poker, blackjack, Keno, etc. This inevitably means that it has an economically irresistible incentive to overreach the individual against whom it is “playing.”

By contrast, in the State-run lottery, the ticket monies of the numerous players are pooled, the State at the outset extracts its share and the subsequent “drawing” of the winner(s) is randomly made. It matters not a whit to the State who wins or loses. Its “take,” or financial share, is pre-set and remains the same. *Western Telecom* and *Poppen, supra*. Thus there is no incentive at all for the State to lie, conceal, cheat, steal, and addict the individual player out of his money, unlike here. *Pet.*, Para. 7 through 44.

For lottery tickets are not “dealt” to any individual player who then remains at the wagering site to “draw” replacement tickets to try to beat the State, with the financial loss of the

one precisely the gain of the other. This far-reaching and dominant feature of video poker, blackjack, Keno, "slots" and other such gambling games distinctly and dispositively separates them from common State-run lottery games since in the latter a large pool of "players" simply and only buy their individual tickets and go on their way elsewhere, without any interaction at all with the ticket machine. *Id.*

The unanimous California Supreme Court obviously considers this evil of direct state-versus-the-citizen gambling so palpable and incurable that it flatly holds that no legal "argument" to the contrary could be "persuasive." *Western Telecom v. Cal. State Lottery Comm.*, 917 P.2d 651, 658-59 (Cal. 1996); *supra*. For in contrast to a relatively innocuous lottery:

The (State) house pays all winners and collects from all losers. The (State) house essentially acts as a player in the game which 'takes on' all other players .... *Poppen v. Walker*, 520 N.W.2d 238, 247....

*Id.*

Similarly, the South Dakota Supreme Court in the *Poppen* case (1994), 520 N.W.2d 230, as relied upon in large part by the high California court, *id.*, similarly explains in substantive terms precisely how this video gambling lacks of any "relation whatsoever to a lottery," citing *Dobkin, supra*, 423 S.E.2d at 615, in the same tenor as does the high California court.

Nor was the advent of sports betting at private racetracks incongruous with this proposition. For, in full consonance with ticket lotteries, the players do not train or ride the horses or otherwise interact in any way or at all with the "race." The winning horse, or dog, is directly analogous to the winning ticket in the lottery. The respective players have not the slightest real, or illusionary, control over the outcome. "[W]hen horse race gambling is

conducted on a pari-mutuel basis, the scheme might be considered a lottery (since) the payouts at the various tracks are determined by the pari-mutuel system under which all bets are pooled and the net prize (after the operator's deduction) is shared by all the winning bettors.... *Western Telecom, supra*, 917 P.2d at 656-657.

In addition, such sports betting is incidental to the sport itself and in no way may the "house" affect the outcome. Indeed, the popular football "parley" ticket players have never been known to run onto the field to try to recover a fumble or kick a field goal, unlike a mesmerized video poker player for hours trying to win the head-to-head gambling contest with the State.

Of course, this avalanche of statutory and criminal violations by the State respondents in such areas as proscribed advertising and promotion; deliberate concealment of the true playing "odds," "standard probability," "house percentage" and other critical "rules of play" and "games rules" (*Pet.*, para. 7-33), are due mainly to the strong economic incentive of the State in gambling head-on with its individual citizen, with one's loss precisely the other's gain. *Id.*

The same is true, of course, for the universal lack of required postings for players on "how to contact or locate" treatment clinics for gambling addictions and problems; and for many of these gambling sites not "conspicuously" or at all posting the required warning: "CAUTION: Playing this machine can be hazardous to your health, your income and your future," as well as for the respondents' numerous other statutory and criminal violations. (*Pet.*, para. 34-44) But, of course, the State fulfilling its own law here would, of course, mean leaning its own coffers.

Indeed, this financial incentive and direct stake of the State in individualized, manipulatable gambling have reached such a renegade pitch that its entire video gambling enterprise has become an entirely lawless one. As explained, and held, by the South Carolina Supreme Court in this precise factual and legal context, the State respondents here have by their pervasive illegal and criminal misconduct stripped and divested themselves of any colorable benefit, protection or pretense of law, and have squid-like fatally infected their entire video gambling enterprise with illegal rigor mortis:

... Even though video poker was a legal gambling business, it could *become* an illegal gambling business if it was operated in a manner which violated VGMA. Section 12-21-2710 makes gambling devices generally illegal, except for those video game machines “which meet the technical requirements provided for in sections 12-21-2782 and 12-21-2783.” Therefore, if the video poker business did not fall within the express license of the law, it would *not* be “a legal gambling business.” If a person operated his video poker machines in violation of the limits set forth in VGMA, and if those violations carried criminal penalties under South Carolina law, then that person has conducted an “illegal gambling business ... [in] violation of the law of [South Carolina].”

*Johnson v. Collins Entertainment Co., Inc.*, 564 S.E.2d 653, 664 (S.C. 2002).

Since these State respondents have not adhered to the letter of the law by which they are privileged to operate, and have not conducted their State business precisely as decreed by that legal letter and substance, they have forfeited any claim to legality in this matter. *Id.*

Every single one of their numerous acts beyond the pertinent statutory law brings them under the full force of the applicable criminal penalties, and moves them from narrow protected legality to unprotected broad lawlessness, rendering this statutorily illegal and criminal gambling enterprise onerous to the criminal common law as well, and condemning it as a statewide public nuisance which must be abated. *Johnson, supra.*

No conceivable exit or dodge is at all possible for them here because the *W. Va. Const.*, Art. VI, § 36 itself mandates that they, and they alone as the charged State agency, must “own, operate and control” this so-called lottery, while the *W. Va. Code* § 29-22A-2(g) mandates that “the responsibility for the control ... of any video lottery games and video lottery terminals ... rests with the Commission.”

So it is that empirical practice as well as simple common sense show that the melanomic cancer of the monetarily incentivized State gambling head-on with its individual citizens will inevitably continue to engender this multiplying swarm of human and socioeconomic ills until the judicial scalpel cleanly excises it. As proven, no statutory cosmetic surgery or regulatory vaccine are equal to this insidious, persistent disease, and Art. VI, § 36 requires this full excisionist remedy.

If a statewide emergency “911” call ever went ringing throughout the hills and hollows of West Virginia, it went out by the State respondents’ recent reports that this video gambling increased by over 100% the last two years, and is increasing even faster today.

Since West Virginia lags behind other states in most measurable socioeconomic indices, perhaps the State respondents would feel complemented that small West Virginia now “leads” all other states in its number of gambling sites, and in the percentage of its public revenues due to gambling. New York Times, June, 2003. Next year? The next five years? The correlation, of course, between this increasing gambling and the proliferating harms and miseries it causes are perfect and inexorable. (See the Economic Appendix, *infra*, on how such gambling devastates the entire state economy, both short-term and long-term.)

**D. THE PRIVATE ENTITIES INVOLVED, NOT THE STATE, MAINLY OWN, OPERATE AND CONTROL THIS SO-CALLED VIDEO LOTTERY, CONTRARY TO THE W. VA. CONST., ART. VI, § 36.**

**1. State Alone To “Own, Operate and Control” State “Lottery.”**

As to the “exception” in the *W. Va. Const.*, Art. VI, § 36 for solely a lottery “owned, operated and controlled” by the State, *Mountaineer Park, supra*, surely the State’s voters in 1984, as recognized by the present Attorney General’s Opinion cited in *Mountaineer Park*, intended for the State itself to own all “devices” involved in such a “lottery.” Surely the voters who trekked to the polls in the 1984 general election, where the “state lottery” amendment was approved, were obviously of a mind with the Attorney General. But these gambling devices and artifacts are in fact and law owned, of course, by the private manufacturers, operators and retailers. The same accurately may be said for “operated by.” *See, e.g., West’s Words and Phrases*, and *see Poppen v. Walker*, 520 N.W.2d 238 (S.D. 1994), *supra* (Court did not reach this alleged issue because of its “non-lottery” holding).

Of course, the same historical and commonsensical principles of constitutional construction which condemn this video gambling as a non-lottery as well dictate that the State, as conjunctively required by Art. VI, § 36, must “own, operate and control” these so-called “video lottery” devices. (*emp. add.*) See all cases cited in Sections A. and B. *supra*.

This centuries’ old, “custom and usage” in regard to state ownership of a legalized lottery, but only a lottery, is constitutionally most significant now. *K.M. v. WV DHHR*, 275 S.E.2d 393 (W. Va. 2002), *supra*.

No doubt the mind-set of the 1984 voters reflected such as the closely analogous State-owned-and-operated “A.B.C.” enterprise in vogue at the time where State

employees in State-owned or State-leased stores shelved and sold State-owned liquor on State-owned cash registers after it was hauled in from State warehouses.

Surely it may not be the case that the present regulatory "A.B.C.," merely by licensing today's private liquor retailers ipso facto "owns and operates" them. If that is so, then the State "DMV" by same "logic" must "own and operate" every vehicle it licenses within the State's borders.

Not one of these 15,000 machines is "owned" or "operated" by the State. Nor does the State even rent any of these gambling sites or any part of them, per the former State "ABC" stores. Neither does the State have any employees at any of these 1,300-plus gambling sites.

True, "the primary responsibility for the control and regulation of any video lottery games and video lottery terminals ... rests with the Commission," *W. Va. Code* § 29-22A-2(g), but that by its own terms does not include the "ownership and operation" required as well by the conjunctive Art. VI, § 36. Of course, such "control" does enable the State to overreach the video gamblers.

Perhaps the State, should it defer to its own Constitution, could consider a lottery-like statewide "pari-mutuel" system incidental to WVU, Marshall and other state sports' games, since these are truly State "owned and operated" enterprises as required by Art. VI, § 36. The monies could be "pooled," lottery-style, with the "parley card" system based on fair and reasonable probabilities with a pre-set percentage of the monies to be taken by the State. *Western Telecom, supra*. For unlike the one-on-one, head-on video gambling involved here, the State

would be powerless to affect any outcomes of such athletic contests, and thus would have no incentive to overreach the individual player.

2. **State Alone To Receive Net Profits Of State "Lottery."**

Since solely the State itself may "own, operate and control" a so-called video lottery, assuredly its net profits (revenues minus costs) are due to the State. *See, Poppen, 520 N.W.2d 230, supra*, where this issue was raised but not resolved because of its dispositive non-lottery holding.

The respondents are caught here in the "Catch 22" web of a constitutional dilemma from which there is "No Exit." For in trying to defend their necessary contention that they are complying with the "State ... owned, operated and controlled" mandate of Art. VI, § 36, they must reckon with the fact that during the past twelve (12) months the private owners and operators raked in \$512 million while the State received \$369 million.

But if the respondents insist that this extremely lopsided arrangement is not conclusive or substantial evidence that this video gambling apparatus is "operated" as well as "owned" by private entities rather than the State, Art. VI, § 36, they necessarily are admitting that this \$512 million was far in excess of any legitimate costs incurred by these private entities in "operating" this gambling enterprise. Thus, their receipt of such unearned and unmerited State monies over the fair and reasonable, "arm's length" amounts required for the so-called video lottery's "operation" runs afoul of Art. VI, § 36, and must be repaid to the State upon their rendering such accurate accountings to the Commission.

The *W. Va. Const.*, Art. X, § 6 as well forbids such gratuitous, unearned and unmerited state aid to private corporations and persons. See, e.g., *Ohio County Commission v. Samol*, 275 S.E.2d 2 (W. Va. 1980) and cited cases.

All such monies taken by them in excess of the fair, reasonable and “arm’s length” value of their necessary goods and services provided for this so-called lottery must by the *W. Va. Const.*, Art. VI, § 36, and Art. X, § 6 be disgorged and rebated for the use and benefit of the State of West Virginia. The provisions of the *W. Va. Code* §§ 29-22A-1, *et seq.*, and 29-22B-1, *et seq.*, to the contrary are unconstitutional.

**E. “POLICY, MORALITY AND VALUE” COMBINE TO COUNSEL, IF AT ALL LEGITIMATELY POSSIBLE, THAT THE STATE’S CITIZENS THEMSELVES DEMOCRATICALLY DECIDE THE FATE OF COMMUNITY VIDEO GAMBLING IN WEST VIRGINIA.**

The Connecticut Supreme Court in *Moore v. Ganim*, 660 A.2d 842 (Conn. 1995) notes its precedents that “policy, morality and value” may be considered in constitutional adjudication. In this respect, the petitioners here have assuredly, at a minimum, raised a most serious if not compelling position as to whether video gambling is a “lottery,” and whether it is “owned and operated” by the State, under the *W. Va. Const.*, Art. VI, § 36, *supra*.

But should the Court find the balance nice or even here, it should rule in favor of petitioners. For the Legislature would then be virtually certain to put a proposed constitutional amendment to the contrary before the State’s voters at the next election. Yet, should the Court rule against petitioners, it is virtually certain as well that the true contemporary voice of the State’s voters on this paramount issue of great statewide import will not be so heard in any such referendum.

It is notable in the above vein that for the "destination" video gambling at the four (4) racetracks in the State to have been initiated by statute required a citizens' referendum in each such county. Indeed, for the racetracks themselves to have been installed by statute required as well such a county referendum.

However, the far more pervasive and detrimental "convenience" video gambling throughout the communities of the State's 55 counties (3,500 more machines to go) has been and is occurring without any democratic referenda whatsoever. "Let the people decide," should be the guiding polestar if at all legitimately possible.

**F. THE RECENT SOUTH CAROLINA VIDEO GAMBLING EXPERIENCE: FROM 37,000 VIDEO POKER MACHINES TO THEIR TOTAL SHUTDOWN BY STATE'S SUPREME COURT**

Truly and by far the most complete, scholarly and practical legal treatise on video gambling is "FROM MAD JOY TO MISFORTUNE: The Merger of Law and Politics in the World of Gambling," 72 *Miss.L.J.* 569-729 R. Randall Bridwell, J.D., L.L.M.; and Dr. Frank L. Quinn, Ph.D.), (Apr. 2003), which brilliantly recounts and documents in all its phases the recent video gambling experience in South Carolina until a ringing decision of the South Carolina Supreme Court shut down all of the 37,000 video gambling machines in that state which were taking in \$3 billion a year, effective July, 2000. *Joytime Distributors and Amusement Co. v. State of South Carolina*, 528 S.E.2d 647 (S.C. 1999). Thousands of those machines soon found their way to West Virginia. *See W. Va. Code* §§ 29-22B-1, *et seq.* (April, 2001).

This entire treatise is with emphasis respectfully referred to the Court, and particularly its pp. 565-615, and pp. 692-729. *And, see Economic Appendix, infra.*

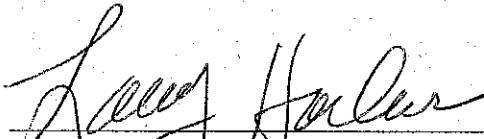
**IV. CONCLUSION**

In view of the foregoing authorities and reasons, it is respectfully requested that the subject writ of mandamus be awarded.

**GREENBRIER COUNTY COALITION  
AGAINST GAMBLING EXPANSION;  
AND CABELL COUNTY COALITION  
AGAINST GAMBLING EXPANSION,  
UNINCORPORATED ASSOCIATIONS**

**PETITIONERS**

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### Legalized Gambling as Diminishing or Negating the Multiplier Effect of "Consumer Dollars"

While the spending of consumer dollars in an economy constitutes a positive economic multiplier effect (usually between "2" and "3" in most scenarios), during the 1990s academics postulated that the multiplier effect was less when those same consumer dollars were spent in decriminalized gambling activities—thus, constituting a net drain on an economy. In 1991, academics even theorized that legalized gambling activities, such as casino activities, might constitute a negative economic "multiplier effect."<sup>6</sup> The potential negative multiplier effect associated with legalized gambling

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3. See National Press Foundation, *Gambling—the New American Pasttime*, Presentation at the National Press Foundation Conference (Jan. 13-15, 1997). For a 2003 study sponsored by pro-gambling interests in Illinois, see REG'L ECON. APPLICATIONS LAB., *ECONOMIC IMPACT OF THE CASINO GAMING INDUSTRY ON THE STATE OF ILLINOIS AND LOCAL COMMUNITIES*, Jan. 2003 (REAL 2003 Casino Study). While the REAL 2003 Casino Study made some valid points, the public relations "spin" on this report that was promulgated by pro-gambling interests (including the Illinois Chamber of Commerce) claimed a de facto job multiplier of "5" as well as other nonsensical claims. Press Release, Jasculca/Terman and Associates, University of Illinois Study Shows Casinos' *Better Deal for Illinois* Would Inject \$2.2 Billion, 26,000 New Jobs into State Economy, available at [www.ilchamber.org/ic/news/NR030129.asp](http://www.ilchamber.org/ic/news/NR030129.asp) (Jan. 29, 2003) (part of a \$500,000 public relations campaign). The savvy Illinois news media were not deceived and editorialized against the claims of the pro-gambling interests. See, e.g., Editorial, *Expanded Gambling Won't Boost Illinois*, NEWS-GAZETTE, Feb. 11, 2003, at A6. Academics, such as Economics Professor Fred Gottheil at the University of Illinois, also rejected the nonsensical claims of the pro-gambling interests. See, e.g., Phil Luciano, *Diamonds in Clubs: Tavern Poker Machines Could Mean Millions for State*, PEORIA J. STAR, Feb. 19, 2003, at A1 (citing Economics Professor Fred Gottheil), available at 2003 WL 8549465.

4. See Casino Industry Advertisement, *Employment Opportunities*, ST. LOUIS POST-DISPATCH, Jan. 19, 1997, at 17G.

5. See BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, *REGIONAL MULTIPLIERS* (3d ed. 1997) [hereinafter RIMS 1997].

6. See Paul Teske & Bela Sur, *Winners and Losers: Politics, Casino Gambling, and Development in Atlantic City*, 10 POL'Y STUD. REV. 130, 135-36 (1991); see also Thomas P. Hamer, *The Casino Industry in Atlantic City: What Has It Done for the Local Economy?*, BUS. REV., Jan.-Feb. 1982, at 3.

activities received new emphasis in a 1994 University of Massachusetts report,<sup>7</sup> as well as in United States Congressional Hearings before the United States House Subcommittee on Small Business.<sup>8</sup>

In the context of the "diminished multiplier effect," it was reported in 1993 on the floor of Congress that the multiplier effect for Atlantic City's experience with casinos was low.<sup>9</sup> A couple of years earlier in 1991, co-authors Paul Teske of the Southern University of New York and Bela Sur of the University of Nebraska had reported that the multiplier effect of the casinos in Atlantic City not only was less than what was anticipated, but also was limited to the area around the casinos' enclave, which operated to the overall detriment of the regional economy.<sup>10</sup>

The economic benefits have not spread beyond the casinos; the anticipated "multiplier effect" has not moved much beyond the core industry. Many local residents are still poor and unemployed, half of the population still receives public assistance, and city services continue to be substandard. Social problems, including increased crime and prostitution, are worse than ever. Since most people holding the better casino jobs live in Atlantic City suburbs, they contribute little directly to the city.<sup>11</sup>

Without considering the socio-taxpayer costs that accompany decriminalized gambling (but which do not accompany consumer industries), the economic drain itself can be demonstrated by a sample scenario. By 2002 pro-gambling interests, such as the Osage Tribe, were publicly admitting a negative regional cash flow to be caused by the tribe's proposed Kansas casino. Specifically, it was evident that the planned "casino would drain \$37 million to \$46 million from the surrounding 50 mile radius region annually, obviously a serious detrimental economic impact."<sup>12</sup> This scenario was analyzed at a June 2002 meeting of the National Council of Legislators

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7. See ROBERT GOODMAN, *LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT* 51-56 (1994).

8. See *The National Impact of Casino Gambling Proliferation: Hearing Before the House Comm. on Small Bus.*, 103d Cong. 77 (1994) [hereinafter *Congressional Gambling Hearing 1994*]; see also *National Gambling Impact and Policy Commission Act: Hearing on H.R. 497 Before the House Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Congressional Gambling Hearing 1995*].

9. See *Legalized Gambling in D.C. Is a Real Loser*, 139 CONG. REC. H6500, H6501 (1993) (statement of Rep. Wolf) [hereinafter *Gambling a Loser*].

10. See Teske & Sur, *supra* note 6, at 136; see also *Gambling A Loser*, *supra* note 9, at H6500, H6501.

11. *Gambling A Loser*, *supra* note 9, at H6501 (quoting Teske & Sur, *supra* note 6, at 130).

12. Glenn O. Thompson, *Economic Impact of Convenience Casinos on Surrounding Communities*, Remarks at the Summer Meeting of the National Council of Legislators from Gaming States 3 (June 1, 2002) [hereinafter *Thompson to Legislators from Gaming States*] (on file with author).

from Gaming States.<sup>13</sup> By utilizing "revenue and payroll data from the tribe's press release,"<sup>14</sup> the following cash flow data was [sic] developed for the two revenue estimates, \$75 million and \$100 million, discussed in the press release:<sup>15</sup>

**Economic impact of Osage tribe casino  
on surrounding 50 mile radius region<sup>16</sup>**

	Low (\$ M)	High (\$ M)
<b>Money into casino (\$ M annually)</b>		
Revenue from within region (85%)	\$64	85
Revenue from outside region (15%)	<u>11</u>	<u>15</u>
<b>Total cash into casino (net revenue after prizes)</b>	<b>\$75</b>	<b>\$100</b>
<b>Money out of casino (\$ M annually)</b>		
Payroll (Assume 100% remains within region)	\$16	\$24
Other expense spent within region (15% of revenue)	11	15
Money that leaves region	<u>48</u>	<u>61</u>
<b>Total cash out of casino</b>	<b>\$75</b>	<b>\$100</b>
<b>Region net cash flow (\$ M annually)</b>		
Cash into region	\$11	\$15
Cash out of region	<u>(48)</u>	<u>(61)</u>
<b>Net cash flow</b>	<b>\$(37)</b>	<b>\$(46)</b>

This type of casino scenario involved bringing "convenience gambling" to the local population base, which means that the gambling would be conveniently accessible to the public. The analysis also demonstrated that for the state's regional community to break-even economically, the gambling activities had to attract approximately 50 percent more *new* tourists (not pre-existing tourists) from *out-of-state*.<sup>17</sup> This problem was one reason why the 1996-1999 National Gambling Impact Study Commission (NGISC or 1999 United States Gambling Commission) unanimously recommended the recriminalization of

13. *See id.*

14. *See* Press Release, Osage Tribe, Land Acquired in Chautauqua County for Possible Casino (May 8, 2001), at <http://www.osagetribe.com/gaming.htm> [hereinafter Osage Tribe Press Release 2001].

15. Thompson to Legislators from Gaming States, *supra* note 12, at 3.

16. *Id.* (citing Osage Tribe Press Release 2001, *supra* note 14).

17. *See infra* notes 30-32 and accompanying text. *See generally* John Warren Kindt, *Legalized Gambling Activities: The Issues Involving Market Saturation*, 15 N. ILL. U. L. REV. 271 (1995) [hereinafter Kindt, *Market Saturation*].

"convenience gambling."<sup>18</sup> The exceptions were Las Vegas (80 to 90 percent out-of-state tourists), Atlantic City (approximately 50 to 60 percent out-of-state tourists), and Windsor, Ontario (70 to 80 percent out-of-country United States tourists and which did not involve "convenience gambling").<sup>19</sup> However, even these gambling communities still constituted strategic economic drains on the overall United States economy.<sup>20</sup>

In the application of BEA methodologies to gambling activities, the most comprehensive and insightful study was a leading edge 1994 report co-authored by a large team of Florida government economists and titled *Casinos In Florida: An Analysis of the Economic and Social Impacts*<sup>21</sup> (*Florida Governor's Report*). The methodology utilized by the *Florida Governor's Report*, as headed by Dr. Subhasis Das, was delimited as follows:

The cornerstone of this approach is the estimation of the amount of net new spending in Florida by casino visitors. First, the number of casino visits and amount of per capita spending will be estimated separately. The next step will be the determination of the proportion of casino expenditures substituted from current expenditures on other entertainment choices. The substituted expenditures will be deducted to obtain the actual new spending. The total direct impact of casinos can then be obtained by multiplying the per capita new spending due to casinos by the number of casino visitors. The direct impact will be multiplied by RIMS II<sup>22</sup> output, employment, and earnings multipliers to obtain the total economic impact in terms of output, jobs, and income.<sup>23</sup>

Into the 21st century, the *Florida Governor's Report* remained a consistent model for economists examining the interface between BEA methodologies and legalized gambling activities.

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18. See, e.g., NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT, recommendation 3.6, at 3-18 (1999) [hereinafter NGISC FINAL REPORT]; NAT'L GAMBLING IMPACT STUDY COMM'N, EXECUTIVE SUMMARY, recommendation 3.6, at 30 (1999) [hereinafter NGISC EXECUTIVE SUMMARY]. For the legislation, see National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996) (codified at 18 U.S.C. § 1955) (signed into law Aug. 3, 1996).

19. See generally *infra* notes 30-32 and accompanying text.

20. For an example of the economic "cannibalization" and 196,000 lost jobs in Southern California caused by Las Vegas see CAL. GOVERNOR'S OFFICE OF PLANNING & RESEARCH, CALIFORNIA AND NEVADA: SUBSIDY, MONOPOLY, AND COMPETITIVE EFFECTS OF LEGALIZED GAMBLING (1992). For an overview of decriminalized gambling's cannibalization of the United States economy see John Warren Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567 (1995) [hereinafter Kindt, *Strategic Economic Base*].

21. See OFFICE OF PLANNING & BUDGETING, FLA. EXECUTIVE OFFICE OF THE GOVERNOR, CASINOS IN FLORIDA: AN ANALYSIS OF THE ECONOMIC AND SOCIAL IMPACTS (1994) [hereinafter FLA. GOV. REPORT].

22. For explanations of the RIMS system, see CLARIFICATION OF GOALS *infra* Part II.

23. FLA. GOV. REPORT, *supra* note 21, at 25.

C. Legalized Gambling as Creating a Negative Socio-Economic "Crime Multiplier" for Cost/Benefit Analyses

Not only was there the question of whether there should be less of a multiplier for legalized gambling activities, such as casinos, but also there was the question of whether there should be a socio-economic "crime multiplier." In a definitive "before and after" study of all relevant United States casinos in their feeder markets called *Casinos and Crime*, Professor Earl Grinols, Professor David Mustard, and Cynthia Dilley highlighted these issues.<sup>24</sup> First, *Casinos and Crime* indicated that casinos could "raise crime by harming economic development."<sup>25</sup> Casinos could be criticized "for draining the local economy, attracting unsavory clients, and for outgrowths like prostitution and illegal gambling-related activities."<sup>26</sup> Second, casinos could "increase crime by lowering the information costs and increasing the potential benefits of illegal activity."<sup>27</sup> Third, crime could "increase because casinos attract visitors who may commit and be victims of crime."<sup>28</sup> Finally, criminal activities could "increase through problem and pathological gamblers."<sup>29</sup>

Paralleled to earlier economic reports done in 1995<sup>30</sup> and 1996<sup>31</sup> by Professor William Thompson, Ricardo Gazel, and Dan Rickman, an analysis in 2000 of video gambling in South Dakota summarized Professor Thompson's interpretation of a negative socio-economic "crime" multiplier in legalized gambling scenarios. First, Professor Thompson calculated the "social costs" per South Dakota adult from legalized video gambling,<sup>32</sup> as the following chart indicates:

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24. See generally Earl L. Grinols et al., *Casinos and Crime* (1999) [hereinafter Grinols et al., *Casinos and Crime*] (on file with author).

25. *Id.* at 5.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See, e.g., WILLIAM THOMPSON ET AL., WIS. POL'Y RESEARCH INST., WISCONSIN POLICY RESEARCH INSTITUTE REPORT: THE ECONOMIC IMPACT OF NATIVE AMERICAN GAMING IN WISCONSIN, April 1995 [hereinafter THOMPSON ET AL., WIS. POL'Y RES. INST.].

31. See, e.g., William N. Thompson & Ricardo C. Gazel, *The Monetary Impacts of Riverboat Casino Gambling in Illinois* (1996) (on file with author).

32. See Presentation by Professor William N. Thompson, Presentation to the Annual Conference of the National Coalition Against Legalized Gambling, Sioux Falls, S.D., Oct. 13, 2000 [hereinafter Thompson Analysis]; Professor William N. Thompson, Searching for a Theory from and for Studies of Gambling, Presentation to the Symposium on Gambling: Betting on the Future: Taking Gaming and the Law into the 21st Century, Benjamin N. Cardozo School of Law (Nov. 15, 1999).

**Social Costs<sup>33</sup>**  
(Cost per adult in South Dakota)

Crime (Deloitte & Touche) <sup>34</sup>	\$ 54
Treatment (Deloitte & Touche) <sup>35</sup>	\$ 16
Divorce	\$ 1
Civil Cases (Bankruptcy)	\$ 3
Productivity	\$ 31
Theft (e.g., Embezzlement)	\$ 10
Bad Debt	\$ 5

[Approximately] \$120

For 2000, the total calculated social costs<sup>36</sup> were approximately \$120 per South Dakota adult.<sup>37</sup> When \$120 was multiplied by the population base of 525,000 adults, the total costs were \$63 million.<sup>38</sup> Then utilizing the State of South Dakota's own calculations, Professor Thompson summarized the economic costs.<sup>39</sup>

**Economic Costs<sup>40</sup>**

	\$ In	\$ Out
Locals	\$190 million	\$171 million
Profits Out 20%		\$ 19 million
Machine Costs		\$ 4 million
Employment Taxes		\$ 1 million
Regulation Costs		\$ 2 million
Excess Profit Tax		\$ 19 million
Total		(\$216 million)
Total Benefit/Cost (per machine)	\$23,750	(\$28,000)

Thus, Professor Thompson calculated the economic benefit to South Dakota as a net economic loss of \$26 million (or \$4,250 per machine).<sup>41</sup> Adding the social costs of \$63 million to the net economic loss of \$26 million equaled a total loss of \$89 million per year.<sup>42</sup> Interestingly, Professor Thompson then applied a multiplier of "2" to this total by calculating that dollars circulated

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33. Thompson Analysis, *supra* note 32.  
34. DELOITTE & TOUCHE, ECONOMIC AND FISCAL IMPACTS OF THE SOUTH DAKOTA GAMING INDUSTRY: FINAL REPORT 138-43 (1998) [hereinafter S.D. GAMING REPORT 1998].  
35. *Id.* at 126-35.  
36. *See generally id.* at 126-43.  
37. *See* Thompson Analysis, *supra* note 32.  
38. *See id.*  
39. *See id.*  
40. *See id.*  
41. *See id.*  
42. *See id.*

twice before leaving the economy—resulting in a net annual loss of \$178 million (or \$22,250 per machine) to the South Dakota economy.<sup>43</sup> While this analysis was a basic summary, the gravamen was that Professor Thompson was calculating a combined socio-economic multiplier of “2” as part of a normal cost/benefit analysis of legalized gambling activities.

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43. See Thompson Analysis, *supra* note 32. In a similar cost/benefit analysis for a proposed Native American casino for Beloit, Wisconsin in 1999-2000, Professor Thompson calculated the total *net* socio-economic loss to the state at \$7,182,887, and with a multiplier of “2” the net loss was \$14,365,774. Beloit itself would experience concentrations of the socio-economic costs. William Thompson, *Economic and Social Costs of Beloit Casino: A Local Region Analysis* (2000) (on file with author).

Furthermore, a 2000 report from Australia, the most saturated gambling country in the world, revealed that for every three video gambling machines (which technically created zero casino jobs), two net consumer jobs were lost from the surrounding "feeder market."<sup>74</sup>

Finally, the REAL 1998 Report indicated that "[e]ach dollar of direct income provided to employees in the casino industry generate[d] about \$1.5 of additional income"<sup>75</sup> (that is, a multiplier effect of "2.5"). However, a "consumer dollar" multiplier effect would be similar; that is, between "2" and "3." Furthermore, throughout the 1990s between 80 to 90 percent of casino revenues were generated by automation—video gambling "machines"—whose revenues did not require employees with concomitant job salaries, health benefits, uniforms, retirement benefits, vacations, and other benefits that would be required in the consumer jobs economy.<sup>76</sup>

While there were equivocations and exceptions to each of these observations, an in-depth review of those considerations is beyond the scope of the present analysis. These observations were highlighted for future academic discussion.

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74. See, e.g., Royce Millar, *Councils Eye Odds on Pokie Damage*, AGE COMPANY LIMITED 2000, Oct. 22, 2000. For analyses of the large percentages of pathological (addicted) and problem gamblers in Australia and the increasing associated costs, see AUSTL. INST. FOR GAMBLING RESEARCH, *SURVEY OF THE NATURE AND EXTENT OF GAMBLING AND PROBLEM GAMBLING IN THE ACT* (July 2001).

75. REAL 1998 REPORT, *supra* note 56, at 2.

76. See S.D. GAMING REPORT 1998, *supra* note 34, at 116-19.

77. See, e.g., GOODMAN, *supra* note 7; Meir Gross, *Legal Gambling as a Strategy for Economic Development*, 12 ECON. DEV. Q. 203 (1998).

78. See, e.g., GOODMAN, *supra* note 7, at exec. summary (analyzing fourteen reports).

79. See *id.* at 68.

Wisconsin.<sup>89</sup> Within the “feeder markets” for the casinos, the results indicated that gambling patrons were spending 10 percent less on food and 25 percent less on clothing, and 37 percent had depleted their savings in order to gamble.<sup>90</sup> The net cost/benefit of the legalized gambling was that Wisconsin was in a lose-lose socio-economic scenario<sup>91</sup> due to local casinos. The in-house or “secret” studies<sup>92</sup> of pro-gambling interests apparently support these economic principles, including the economic “cannibalization” and new “feeder markets” created by new legalized gambling facilities.<sup>93</sup>

Historical economics indicated that state-sanctioned or “decriminalized” gambling activities created a monopoly export economy.<sup>109</sup> The appearance of new net jobs, higher tax revenues, and other benefits would generally be created for the gambling community by tourists from other communities.<sup>110</sup> However, the economic and social problems of gambling remained hidden, and of course, pro-gambling interests had large financial incentives not to reveal the socio-economic problems that decades of licensed gambling activities in Nevada and Atlantic City had exposed.

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89. See, e.g., THOMPSON ET AL., WIS. POL’Y RES. INST., *supra* note 30.

90. See *id.* at 25.

91. See *id.* at 42.

92. See Gary Thompson, *Secret Study: Nationwide Spread of Gaming Hurts LV*, LAS VEGAS SUN, May 15, 1998, available at <http://www.lasvegassun.com/sunbin/stories/text/1998/may/15/507218527.html>.

93. See *id.*

94. See, e.g., PAUL A. SAMUELSON, *ECONOMICS* 425 (10th ed. 1976).

103. *Casino Offers \$300 Million to State*, *supra* note 102.

104. *Id.*

105. *Id.*

106. Editorial, *Resist the Casino Squeeze*, CHI. TRIB., May 9, 2002, § 1, at 30.

107. *Id.*

108. *Id.*

109. See 142 CONG. REC. H1675, H1678 (daily ed. Mar. 5, 1996) (statement of Rep. LaFalce) [hereinafter Statement of Rep. LaFalce].

110. See *id.*

As United States gambling spread, it became more publicly apparent that the monopoly export economic model was not a valid strategy for economic development.<sup>112</sup> The original casinos that brought the illusion of net benefits and economic growth in 1994 were going bankrupt by 1996,<sup>113</sup> which meant that they continually had to focus on increasing the geographic scope of the gambling as well as the *speed* of the gambling to increase the flow of gambling dollars.<sup>114</sup>

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111. Significantly, in 2003 Nevada Governor Kenny Guinn's speech on the "State of the State" revealed:

For years, our economy has depended almost exclusively on tourism and gaming, rather than by exporting goods and services. Three out of every four of our tax dollars are collected from sales and gaming taxes; taxes vulnerable to swings in the economy. Implicit in this tax strategy was a belief that the revenues from gaming and tourism could keep pace with our growing and diverse population. Unfortunately, this [tax] strategy has failed. . . . [T]he lesson from the last 20 years is clear; our revenue system is broken because it has relied on regressive and unstable taxes [largely from gambling operations].

Nevada Governor Kenny Guinn, State of the State, Address to Nevada (Jan. 20, 2003), at [http://www.nga.org/governors/1,1169,C\\_SPEECH^D\\_4953,00.html](http://www.nga.org/governors/1,1169,C_SPEECH^D_4953,00.html) [hereinafter Nev. Governor's Address to the State]. The Nevada Governor then intimated that taxes would have to increase to address a \$1 billion shortfall that was projected to continue to increase. *See id.*

112. *See supra* note 77 and accompanying text.

113. *See* Statement of Rep. LaFalce, *supra* note 109, at H1678.

114. *See, e.g.,* U.S. and International Costs, *supra* note 1.

As delimited by the United States gambling industry itself, the proper foci for cost/benefit analyses were the 35-mile and 100-mile "feeder markets" around the gambling facilities.<sup>116</sup> When these "feeder markets" were extrapolated throughout regional United States economies, they created what the gambling industry referred to as "convenience gambling."<sup>117</sup> In convenience gambling scenarios, discretionary spending and nondiscretionary "addicted gambling" dollars were transferred from other forms of consumer expenditures into the convenient gambling facilities.<sup>118</sup> Local competing businesses were thereby losing revenue.<sup>119</sup> In other words, economic loss, rather than economic growth, was occurring in many communities with gambling establishments.<sup>120</sup> This process of gambling activities "cannibalizing" the consumer economy was recognized in the 1996 United States Congressional debates:<sup>121</sup>

What we now have is an economic model of gambling that the casino industry itself refers to as "convenience" gambling. Rather than confining gambling to specific locations for purposes of economic development, gambling is made readily available to all potential customers. In a convenience gambling economy, discretionary spending is diverted from other forms of entertainment and consumer expenditures to casinos and other gambling establishments. Restaurants, hotels, and other competing local businesses lose revenues and fail. Scarce resources are diverted to the least productive local activities and economic wealth becomes concentrated in fewer and fewer hands. In short, rather than the economic panacea promised by

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116. See, e.g., HARRAH'S CASINOS, HARRAH'S SURVEY OF CASINO ENTERTAINMENT 20-21 (1996).

117. See generally NGISCFINALREPORT, *supra* note 18, at 3-18 (recommendation 3.6), 7-10, 7-11.

118. See *id.*

119. See *id.*

120. See *id.*

121. See ANDERSEN MACRO STUDY, *supra* note 80. The Arthur Andersen Macro Study financed by the American Gaming Association lobbying group was designed in part to discredit economic experts who indicated that legalized gambling activities "cannibalized" the consumer economy. Paradoxically, the American Gaming Association/Andersen Macro Study was itself discredited, particularly after the demise of the Arthur Andersen Company in 2001 and 2002 due to scandals involving the company's reporting practices. See *id.*

gambling promoters, the opposite of economic development appears to be occurring in many communities.<sup>122</sup>

These conclusions were largely confirmed by the 1999 United States Gambling Commission in its *Final Report*,<sup>123</sup> and accompanying *Executive Summary*.<sup>124</sup> In fact, even the pro-industry Commissioners on the NGISC joined with the entire Commission to recommend unanimously that convenience gambling activities be recriminalized,<sup>125</sup> and that there be a moratorium on the expansion of United States gambling.<sup>126</sup>

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122. Statement of Rep. LaFalce, *supra* note 109, at H1678.

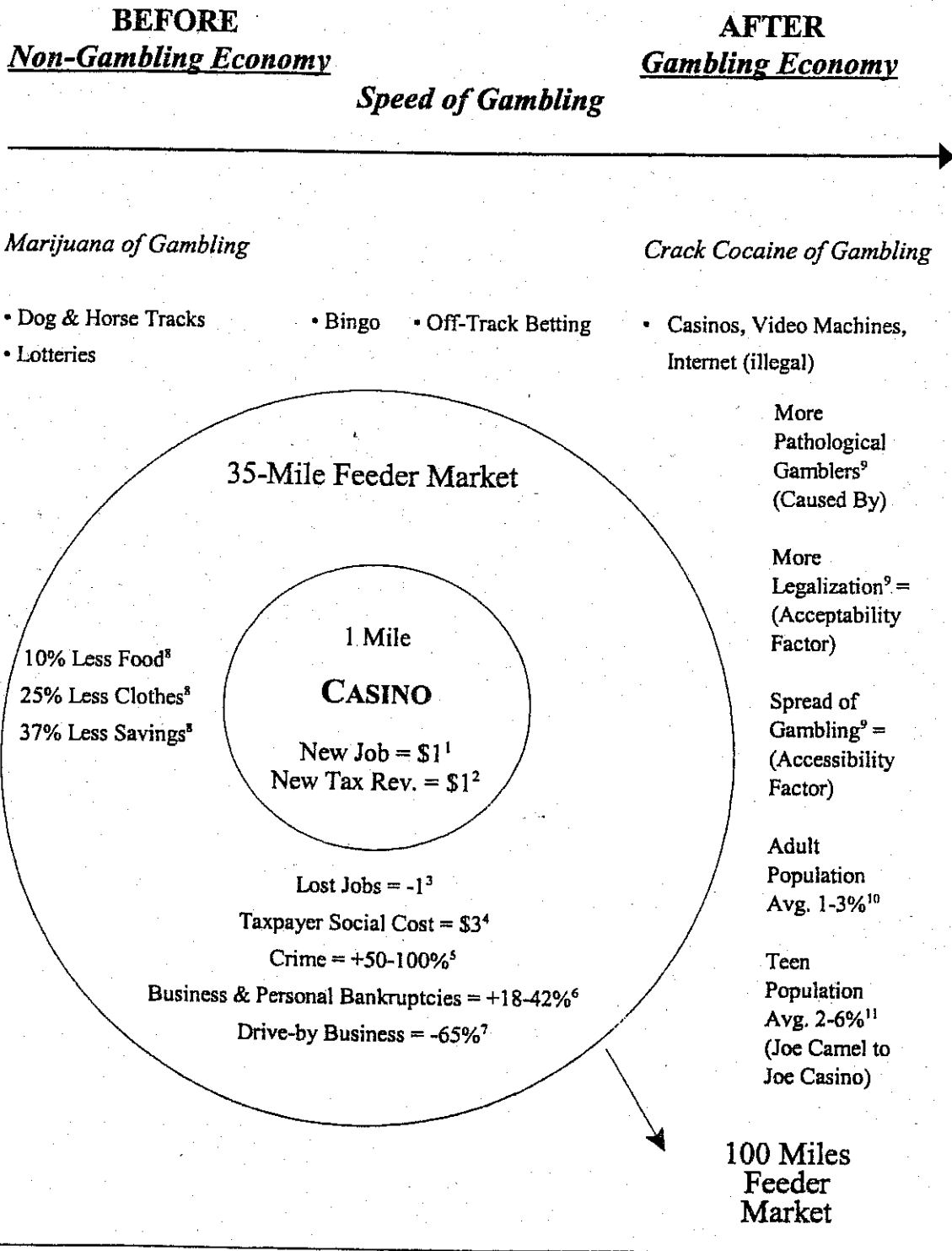
123. See NGISC FINAL REPORT, *supra* note 18, at 2-4, 2-5.

124. See NGISC EXECUTIVE SUMMARY, *supra* note 18, at 30.

125. See *id.* (recommendation 3.6).

126. See NGISC FINAL REPORT, *supra* note 18, at introduction by Commission Chair

**Appendix: Business Economics of Licensed Organized Gambling**



1. See *National Gambling Impact & Policy Commission Act: Hearing on H.R. 497 Before the House Comm. on the Judiciary*, 104th Cong. 367-405 (1995); Earl L. Grinols, *Bluff or Winning Hand? Riverboat Gambling and Regional Employment and Unemployment*, ILL. BUS. REV., Spring 1994, at 8, 8-11; see also Earl L. Grinols, *Gambling as Economic Policy: Enumerating Why Losses Exceed Gains*, ILL. BUS. REV., Spring 1995, at 6, 6-11.

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## Would Re-Criminalizing U.S. Gambling Pump-Prime the Economy?

### I. Defining the Problems

#### A. 21st Century Governmental Policymakers: Forgetting or Ignoring the Economic History of Gambling

The rapid decriminalization of U.S. gambling during the 1990s was not driven by economists, but rather by over \$200 million in lobbying, campaign contributions, and public relations from pro-gambling interests.<sup>74</sup> Many economists and members of the academic community cautioned against the governmental trend toward decriminalization.<sup>75</sup>

Increasingly, taxpayers and businesses began to realize that, as Professor Jack Van Der Slik summarized in 1990 for much of the academic community, state-sponsored gambling "produces no product, no new wealth, and so it makes no genuine contribution to economic development."<sup>76</sup> Business-economic history supports this proposition. To paraphrase Georg Hegel's common quote, "those who forget the lessons of economic history are condemned to relive them."<sup>77</sup>

Despite these economic caveats, during the 1980s and 1990s the U.S. military and state and local governments appeared to forget the reasons why gambling in the United States was criminalized for almost 100 years. Implying that the state constitutional safeguards against gambling were based only on some type of moralist movement, pro-gambling interests denied the historical obvious.<sup>78</sup> The pro-gambling interests conveniently compared the criminalization of gambling to the prohibition of alcohol during the 1920s. However, prohibition lasted only a few short years, while the criminalization of gambling lasted for almost a century. The criminalization of gambling activities remained practical, workable, and necessary. If this were not the case, gambling would have been legalized throughout the United States during the 1930s, paralleling the legalization of alcohol. The fact that gambling activities remained criminalized for generations stands as testimony to the

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<sup>75</sup> See generally *National Gambling Impact & Policy Comm'n Act: Hearing on H.R. 497 Before the House Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Congressional Gambling Hearing 1995*]; *The National Impact of Casino Gambling Proliferation: Hearing Before the House Comm. on Small Business*, 103d Cong. (1994) [hereinafter *Congressional Gambling Hearing 1994*].

<sup>76</sup> Jack Van Der Slik, *Legalized gambling: predatory policy*, *ILL. ISSUES*, Mar. 1990, at 30.

<sup>77</sup> JOHN BARTLETT, *FAMILIAR QUOTATIONS* 507 (14th ed. 1968).

<sup>78</sup> See, e.g., *Casino Backlash*, *supra* note 60, at A1.

economic history of legalized gambling activities, creating new addicted gamblers, new bankruptcies, and new crime and corruption.<sup>79</sup> In other words, the socio-economic costs of decriminalized organized gambling outweighed the benefits.<sup>80</sup>

Furthermore, if legalized gambling actually constituted a genuine strategy for economic development, then policymakers should ask why gambling was not decriminalized during the most desperate economic timeframe in U.S. history—the Great Depression of the 1930s. Following the logic of pro-gambling interests, gambling should have been decriminalized during the time-frame in which alcohol was decriminalized. Gambling was not decriminalized because economic history clearly demonstrated that legalized gambling activities are inherently recessionary and can catalyze economic and social downturns.

As Nobel-Prize economist Paul Samuelson<sup>81</sup> has reiterated for many years, it is just basic textbook economics that

[Gambling] involves simply *sterile transfers of money or goods* between individuals, *creating no new money or goods*. Although it creates no output, gambling does nevertheless absorb time and resources. When pursued beyond the limits of recreation, where the main purpose after all is to “kill” time, *gambling subtracts from the national income*.<sup>82</sup>

Corollary principles to Professor Samuelson’s observations are enumerated in the following analysis.

## **B. Governmental Policy and the Economic Principles of Decriminalized Organized Gambling: Re-Educating the U.S. Public**

### **1. Strategic Economic Principles Governing Gambling Activities**

Governmental policymakers and the public should be aware of the strategic economic principles governing gambling activities. These principles apply to both illegal and legal gambling activities—although legalized gambling activities are of greater impact because they are more widespread due to the governmental “acceptability factor” that accompanies their exercise.

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<sup>79</sup> See *infra* notes 83-90 and accompanying text.

<sup>80</sup> See *infra* notes 86-87 and accompanying text.

<sup>81</sup> Paul Samuelson won the Nobel Prize in Economic Science in 1970.

<sup>82</sup> PAUL A. SAMUELSON, *ECONOMICS* 425 (10th ed. 1976) (emphasis added) [hereinafter SAMUELSON].

- ◆ Gambling is inherently recessionary<sup>83</sup>
- ◆ Gambling catalyzes economic downturn<sup>84</sup>
- ◆ When "consumer dollars" become lost "gambling dollars" there is a negative economic multiplier impact<sup>85</sup>
- ◆ Gambling's socio-economic costs outweigh the benefits by 3:1<sup>86</sup>
- ◆ Government-legalized gambling is a net drain on the economy.<sup>87</sup>
- ◆ Taxpayers/society necessarily must subsidize all gambling<sup>88</sup>
- ◆ Recriminalizing gambling pump-primers the consumer economy<sup>89</sup>
- ◆ Government-legalized gambling intensifies all of the economic consequences of gambling activities<sup>90</sup>

<sup>83</sup> For analyses of this principle, see *Congressional Gambling Hearing 1995*, *supra* note 75 (providing economic analyses); *Congressional Gambling Hearing 1994*, *supra* note 75 (providing economic analyses). For a further discussion see FLA. OFF. GOV., CASINOS IN FLORIDA: AN ANALYSIS OF THE ECONOMIC AND SOCIAL IMPACTS (1994) [hereinafter FLA. GOV. REPORT]; John W. Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567 (1995) [hereinafter *Strategic Economic Base*]. See also *Gambling's Destabilization of Financial Institutions*, *supra* note 15.

<sup>84</sup> See sources cited *supra* note 83.

<sup>85</sup> See sources cited *supra* note 83. For early analyses of the potential negative multiplier for gambling facilities, see Paul Teske & Bela Sur, *Winners and Losers: Politics, Casino Gambling, and Development in Atlantic City*, 10 POL'Y STUD. REV. 130 (1991) [hereinafter *Teske & Sur*]; CED REPORT, *supra* note 4, at 49-53. See also ROBERT GOODMAN, *THE LUCK BUSINESS* (1995) [hereinafter *LUCK BUSINESS*].

<sup>86</sup> For the authoritative 2001 cost/benefit ratios of "at least" 2:1, see Earl L. Grinols & David B. Mustard, *Business Profitability Versus Social Profitability: Evaluating Industries with Externalities - The Case of Casinos*, 22 MANAGERIAL & DECISION ECON. 143 (2001) [hereinafter *The Case of Casinos*]; Earl L. Grinols & David B. Mustard, *Management and Information Issues for Industries with Externalities: The Case of Casino Gambling*, 22 MANAGERIAL & DECISION ECON. 1 (2001) [hereinafter *The Case of Casino Gambling*]. See also CED REPORT, *supra* note 4, at 64 (costs/benefit ratio = 2:1). For cost/benefit ratios of 3:1, see *Congressional Gambling Hearing 1994*, *supra* note 75, at 77, 79-81 (Statement of John W. Kindt); John W. Kindt, *The Business-Economic Impacts of Licensed Casino Gambling in West Virginia: Short-Term Gain but Long-Term Pain*, 13 W. VA. U. PUB. AFF. REP. 22, 23 (1996) [hereinafter *Business-Economic Impacts of Gambling*]. For cost/benefit ratios greater than 3:1, see, for example, FLA. GOV. REPORT, *supra* note 83, at executive summary. See also John W. Kindt, *Increased Crime and Legalized Gambling Operations: The Impact on the Socio-Economics of Business and Government*, 30 CRIM. L. BULL. 538 (1994) [hereinafter *Increased Crime and Legalized Gambling*].

<sup>87</sup> See *supra* notes 83-86 and accompanying text. See generally John W. Kindt, *U.S. and International Concerns over the Socio-Economic Costs of Legalized Gambling: Greater than the Illegal Drug Problem?*, Statement to the National Gambling Impact Study Commission (May 21, 1998) [hereinafter *U.S. and International Costs*].

<sup>88</sup> For an analysis of informational sources and data, see John W. Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 ARK. L. REV. 889 (1995) [hereinafter *Gambling Subsidized*].

<sup>89</sup> For analyses of informational sources and data, see *Strategic Economic Base*, *supra* note 83, 567 et seq.; *Increased Crime and Legalized Gambling*, *supra* note 86, at 538 et seq. See also John W. Kindt, *Legalized Gambling Activities: The Issues Involving Market Saturation*, 15 N. ILL. U. L. REV. 271 (1995) [hereinafter *Gambling Saturation*]; John W. Kindt, *The Negative Impacts of Legalized Gambling on Businesses*, 4 U. MIAMI BUS. L.J. 93 (1994) [hereinafter *Impacts On Businesses*].

In depth discussions of each of these principles may be found in the source materials as referenced. As the 21st century continues, the economic history of U.S. gambling activities will impress these principles upon a re-educated public.

## 2.      Basic Economic Principles Governing Gambling Activities

The basic problems with gambling activities are that they are nonproductive and actually subtract from other productive economic sectors. Gambling also creates opportunity costs plus social costs that overwhelm any illusory benefits that accompany the zero-sum redistribution of wealth from patrons to the owners/sponsors of the gambling.

- ◆ Gambling creates no product<sup>91</sup>
- ◆ Faster methods of gambling cannibalize slower methods<sup>92</sup>
- ◆ Gambling transfers money from the patrons to the organized owners/sponsors of the gambling<sup>93</sup>
- ◆ Organized owners/sponsors of gambling design all gambling along zero-sum guidelines to leave the owners with the sum and the patrons with zero<sup>94</sup>
- ◆ Organized gambling must expand to survive via continual increases in: (1) geographic scope, (2) new varieties, (3) faster wagering methods<sup>95</sup>
- ◆ Ad hoc gambling between individuals transfers wealth by creating an artificial risk, but its socio-economic impacts are minor when compared with organized gambling sponsored by governmental entities<sup>96</sup>

Further analyses discussing these principles may be found in the sources specifically cited herein.

## 3.      Socio-Economic Principles Dominating the Governmental Interface with Gambling Interests

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<sup>90</sup> For analyses of informational sources and data, see *Economic Impacts*, *supra* note 4, at 51 et seq.; *Strategic Economic Base*, *supra* note 83, at 567 et seq.

<sup>91</sup> See, e.g., SAMUELSON, *supra* note 82, at 425.

<sup>92</sup> For analyses of informational sources and data, see, for example, *Gambling Saturation*, *supra* note 89. See also John W. Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling over the World Wide Web*, 80 DENV. U.L. REV. 111 (2002) [hereinafter *Destabilization of Economies*].

<sup>93</sup> For analyses of informational sources and data, see, for example, SAMUELSON, *supra* note 82, at 425; *Gambling Subsidized*, *supra* note 88.

<sup>94</sup> For analyses of informational sources and data, see, for example, *Congressional Gambling Hearing 1995*, *supra* note 75 (statement of William Jahoda); *Gambling Saturation*, *supra* note 89.

<sup>95</sup> For analyses of informational sources and data, see, for example, *Gambling Saturation*, *supra* note 89. See also *Destabilization of Economies*, *supra* note 92.

<sup>96</sup> For analyses of informational sources and data, see, for example, *Congressional Gambling Hearing 1995*, *supra* note 75; *Congressional Gambling Hearing 1994*, *supra* note 75; *Economic Impacts*, *supra* note 4.

It was difficult to find any reasonable excuse for U.S. governmental units to decriminalize gambling activities during the last two decades of the 20th century. The illusory benefits touted by pro-gambling interests were simply a reshuffling of money and resources with the owners/sponsors of the gambling receiving inordinate amounts of the reshuffled wealth. Some of the socio-economic principles dominating the governmental interface with gambling interests follow.

- ◆ Government-authorized gambling cannibalizes the non-gambling/consumer economy and its business<sup>97</sup>
- ◆ When governments authorize, sponsor, and promote organized gambling, a classic "boom and bust" economic cycle is initiated<sup>98</sup>
- ◆ Unless severely limited in scope, government-authorized gambling activities will always precipitate a "bust" in a classic "boom and bust" economic cycle<sup>99</sup>
- ◆ Government-sponsored gambling will collapse unless it continues to expand both in: (1) acceptability via the legalization of various new forms of gambling and (2) accessibility via placing the gambling in maximum contact with large population bases<sup>100</sup>
- ◆ As government-authorized gambling expands market saturation will be approached, and the gambling will become increasingly recessionary<sup>101</sup>
- ◆ Government and private sponsors of organized gambling must lobby to remove prohibitions on the scope and forms of gambling or pre-existing gambling will stagnate and eventually collapse<sup>102</sup>
- ◆ Historically, gambling's expansionary needs have ultimately corrupted governments<sup>103</sup>
- ◆ Public policy must be predicated on a non-gambling economy, because the only other options with government-authorized gambling are

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<sup>97</sup>See *Business-Economic Impacts of Gambling*, *supra* note 86; *Gambling Saturation*, *supra* note 89; *Impacts on Businesses*, *supra* note 89; sources cited *supra* note 96.

<sup>98</sup>For analyses of informational sources and data, see *Follow the Money*, *supra* note 74, at 85; *Strategic Economic Base*, *supra* note 83. See also *Gambling's Destabilization of Financial Institutions*, *supra* note 15.

<sup>99</sup>See sources cited *supra* note 98.

<sup>100</sup>For analyses of informational sources and data, see, for example, *Gambling Saturation*, *supra* note 89. See also *Gambling's Destabilization of Financial Institutions*, *supra* note 15.

<sup>101</sup>See sources cited *supra* note 100.

<sup>102</sup>For analyses of informational sources and data, see, for example, *Follow the Money*, *supra* note 74. See also John W. Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L. J. 219 (2003) [hereinafter *Gambling Industry Perpetual Non-Compliance*]; *Destabilization of Economies*, *supra* note 92; *Gambling's Destabilization of Financial Institutions*, *supra* note 15.

<sup>103</sup>See sources cited *supra* note 102.

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matters of degree—from a slow to a fast gambling economy culminating in an economic downturn and eventual bust<sup>104</sup>

- ◆ Saturation gambling occurs when all feeder markets have achieved maximized acceptability and accessibility and gambling cannot expand in geographic scope, new varieties, or faster wagering methods<sup>105</sup>
- ◆ From a political science perspective, government-authorized gambling must be re-criminalized before saturation gambling occurs via maximized acceptability and accessibility<sup>106</sup>
- ◆ Once government-authorized saturation gambling occurs, the saturated economy will experience a dramatic downturn<sup>107</sup>

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<sup>104</sup> See *supra* note 102. See generally *Congressional Gambling Hearing 1995*, *supra* note 75; *Congressional Gambling Hearing 1994*, *supra* note 75.

<sup>105</sup> For analyses of informational sources and data, see generally *Gambling Saturation*, *supra* note 89.

<sup>106</sup> *Id.*; *Gambling Industry Perpetual Non-Compliance*, *supra* note 102; *Strategic Economic Base*, *supra* note 83, at conclusion.

<sup>107</sup> For analyses of informational sources and data, see for example, *supra* note 106; *U.S. and International Costs*, *supra* note 87.

C. *The Implications of Legalized Gambling Activities in History*

According to Nobel Prize-Winning Economist Paul Samuelson,<sup>188</sup>

[Gambling] involves simply *sterile transfers of money or goods* between individuals, creating no new money or goods. Although it creates no output, gambling nevertheless absorbs time and resources. When pursued beyond the limits of recreation, where the main purpose after all is to "kill" time, gambling subtracts from the national income.<sup>189</sup>

While John Kenneth Galbraith referred to Samuelson as the "most influential [economics] teacher of our time,"<sup>190</sup> his view of gambling has been attacked by the American Gaming Association. The American Gambling Association, lobbying for the gambling industry, has claimed that gambling has an economic multiplier effect of "four,"<sup>191</sup> an absurd claim. The increased commentary,

which Samuelson devotes to the gambling/economic interface, is significant. Samuelson reaffirmed his position in a later edition of his text which is significant enough to quote at length:

Gambling has historically been a "vice" that was, along with illegal drugs, commercial sex, alcohol and tobacco, a "consumption activity" discouraged by the state. Attitudes about such vices ebb and flow. Over the last two decades, attitudes toward gambling became permissive as those toward drugs and tobacco hardened . . . . [The] spread [of gambling] was accompanied by the rapid growth of state lotteries. Overall, gambling has been one of the fastest growing sectors of the (legal) economy in the last two decades.

Gambling is a different animal from speculation. While ideal speculative activity increases economic welfare, gambling raises serious economic issues. To begin with, aside from recreational value, gambling does not create goods and services. In the language of game theory . . . gambling is a "negative-sum game" for the players—the customers are (almost) sure to lose in the long run because the house takes a cut of all bets. In addition, by its very nature gambling increases income inequality. People who sit down to the gambling table with the same amount of money go away with widely different amounts. A gambler's family must expect to be on top of the world one week only to be living on crumbs and remorse when luck changes. Some observers also believe that gambling has adverse social impacts. These include addiction to gambling, neighborhood crime, political corruption, and infiltration of gambling by organized crime.

Given the substantial economic case against gambling, how can we understand the recent trend to legalize gambling and operate government lotteries? One reason is that when states are starved for tax revenues, they look for new sources; they rationalize lotteries and casinos as a way to channel private vices to the public interest by skimming off some of the revenues to finance public projects. In addition, by bringing gambling above ground, legal gambling may drive out illegal numbers rackets and take some of the profitability out of organized crime. Notwithstanding these rationales, many

observers raise questions about an activity in which the state profits by promoting irrational behavior among those who can least afford it.<sup>192</sup>

While individualized gambling activities are reflected throughout the history of mankind, government-sanctioned gambling activities have historically resulted in socio-economic negatives that outweighed any positives. Furthermore, gambling activities constitute a "sterile transfer of wealth" that hinders genuine economic growth. The opportunity cost to those governments that legalize gambling activities consists, in part, of lost worker productivity as well as lost "consumer dollars." While the introduction of gambling-oriented dollars into a local economy may have a multiplier effect, there is a growing body of evidence that in most economic scenarios the gambling multiplier is significantly less than the lost multiplier associated with lost consumer dollars.

In his essay, *What is Seen and What is not Seen*, the 19th Century economist Frederic Bastiat wrote:

In the economic sphere an act, a habit, an institution, a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; *it is seen*. The other effects emerge only subsequently; *they are not seen*; we are fortunate if we *foresee* them.

There is only one difference between a bad economist and a good one: the bad economist confines himself to the *visible* effect; the good economist takes into account both the effect that can be seen and those effects that must be *foreseen*.

Yet this difference is tremendous; for it almost always happens that when the immediate consequence is favorable, the later consequences are disastrous, and vice versa. Whence it follows that the bad economist pursues a small present good that will be followed by a great evil to come, while the good economist pursues a great good to come, at the risk of a small present evil.<sup>249</sup>

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<sup>188</sup> Paul Samuelson won the Nobel Prize for Economics in 1970.

<sup>189</sup> PAUL A. SAMUELSON, *ECONOMICS* 398 (11th ed. 1980).

<sup>190</sup> GALBRAITH, *supra* note 1, at 4.

<sup>191</sup> Panel Discussion at the American Gaming Assoc. and Casino Company

<sup>249</sup> Frederic Bastiat, *What Is Seen and What is Not Seen*, reprinted in *SELECTED ESSAYS ON POLITICAL ECONOMY I* (George B. de Huszar ed., 1995).

In public issue areas, government officials are charged with promoting the public health, safety, and welfare. When there is a product or mechanism that experience has proven to be potentially harmful to the public, it is the duty of public officials to investigate and determine the costs and benefits to society that the product or mechanism presents. Those who man the heights of power can see farther than the people below, and ethically, they must use this vision for the advantage of the people.

As Professor Earl Grinols has observed:

The essence of the gambling debate from an economic perspective can be understood by asking the question: Does America need another form of entertainment so badly that it is willing to add crime, alcoholism, teen pregnancy, illegal drug use and so on?<sup>161</sup>

The government has a duty to inform and educate its citizenry of the effects of new legislation.<sup>162</sup> During the 1990s and subsequently, studies commissioned by the gambling industry focused on the supposed benefits of legal gambling casinos in a 35-mile radius around the proposed casino. However, Professor Grinols reported that the annual benefits per person were dramatically exceeded by the socio-economic costs that accompany legalized casino gambling.<sup>163</sup> The consequences of gambling are an increase in pathological gamblers, bankruptcies, and corruption.<sup>164</sup>

Governmental entities can dramatically improve their performance in this area by accurately reporting these costs and benefits to their citizenry. Many state governments sell the legalization of various forms of gambling to their citizens by presenting it as a "cash cow" for social programs, such as public education or senior citizens' benefits. However, a 1996 study conducted by the news magazine *Money* established that states linking educational funding to legalized gambling revenues had less real funding of education than states that had no legalized gambling, or that had not so linked education and gambling.<sup>165</sup>

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<sup>161</sup> *Congressional Gambling Hearing 1994*, *supra* note 141, at 8 (testimony of Econ. Prof. Earl Grinols, Univ. Ill.).

<sup>162</sup> *See id.*

<sup>163</sup> *See Development or Dreamfield Delusions*, *supra* note 11, at 81 (stating that the annual per capita benefits are equal to \$55.58; the per capita costs are, at minimum \$112, and at maximum \$338).

<sup>164</sup> *See supra* Part I and accompanying notes.

<sup>165</sup> *See* Peter Keating, *Lotto Fever: We All Lose!*, *MONEY*, May 1996, at 142, 142.

<sup>166</sup> *See* William J. Miller & Martin D. Schwartz, *Casino Gambling and Street Crime*, 556 *ANNALS AM. ACAD. POL. & SOC. SCI.* 124, 125 (March 1998).

**CERTIFICATE OF SERVICE**

I hereby certify that this Final Brief of Petitioners in Support of Petition for Writ of Mandamus was served by first-class mail on October 1, 2003, upon the following:

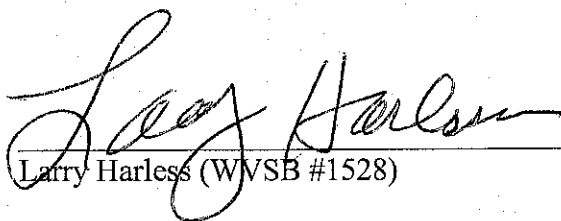
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