

1986

THE IMPACT OF AMERICAN LAWS ON FOREIGN LEGAL GAMBLING

I. Nelson Rose

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law



Part of the [Administrative Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Gaming Law Commons](#)

Recommended Citation

Rose, I. Nelson (1986) "THE IMPACT OF AMERICAN LAWS ON FOREIGN LEGAL GAMBLING," *NYLS Journal of International and Comparative Law*. Vol. 8 : No. 1 , Article 6.

Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol8/iss1/6

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

THE IMPACT OF AMERICAN LAWS ON FOREIGN LEGAL GAMBLING

I. NELSON ROSE*

At first glance the American laws, both federal and state, which affect foreign legal gambling appear to be irrational, discriminatory, and even hypocritical.¹ While twenty-two states and the District of Columbia spend millions of dollars each year actively promoting their state lotteries, a federal statute prohibits the importation of lottery tickets and advertisements as "immoral articles."² Casinos flourish in Atlantic City, Nevada, and Puerto Rico, yet a gambling debt owed to a legal foreign casino is virtually uncollectible in any American court.³ Though forty-six of the fifty states have legalized at least one form of gambling,⁴ federal bureaucrats have declared it a criminal offense for any legal foreign gambling operation to use the U.S. mails, broadcast media or interstate or foreign commerce.⁵

This paper will first discuss federal statutory and administrative prohibitions that limit foreign legal gambling. It will then discuss the major state constitutional, statutory and common law restrictions. Finally, the latter sections of this paper will offer a framework for understanding where these laws come from and what American response can be expected as legal gambling continues to spread throughout the United States and the world.

I. FEDERAL

The federal government has been primarily concerned with two areas of gambling: the control of interstate lotteries, whether fraudulent

* Associate Professor of Law, Whittier College School of Law; J.D. Harvard Law School 1979; B.A. University of California at Los Angeles 1973.

1. The author has written extensively on American gambling law, including a thorough examination and discussion in his recent book, I. ROSE, *GAMBLING AND THE LAW* (1986) [hereinafter ROSE, *GAMBLING*]. See also I. Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URBAN L.J. 245 (1979-80) [hereinafter Rose, *Casino Gambling*].

2. The Tariff Act of 1930, 19 U.S.C. § 1305(a) (1982). See *infra* discussion of federal anti-lottery laws, text accompanying notes 6-63.

3. See *infra* notes 161-67 and accompanying text.

4. Birmingham, Davis & LaFleur, *U.S. and Canadian Gaming-at-a-Glance*, 7 GAMING & WAGERING BUSINESS 12 (1986).

5. See *infra* text accompanying notes 6-63.

or state sponsored, and the elimination of large criminal organizations which run interstate illegal gambling operations. The federal anti-lottery laws are purposely directed at legal foreign lotteries, although the prevention of foreign lottery sales within the United States was only a minor congressional goal. The federal laws aimed at criminal organizations were not designed to attack foreign legal gambling operations, however, they have had that effect. In addition, Congress has passed a number of miscellaneous, unrelated statutes that have had the incidental, often accidental effect of hampering foreign legal gambling.

What follows is a comprehensive list of every federal statute found in the United States Code that might have an impact on foreign legal gambling.

A. *Anti-Lottery Laws*

Congress has passed a number of statutes which attempt to restrict the scope of any "lottery, gift enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance. . . ."⁶ Congress has also enacted special statutes designed to prevent foreign legal lotteries from sending their tickets, or even advertisements, into the United States.⁷ Furthermore, federal regulatory agencies have expanded the reach of these anti-lottery statutes to the point where almost every form of gambling, whether conceivably a lottery or not, is theoretically barred from the U.S. mails and airwaves. It does not matter, under the statutes and according to the regulators, whether the "lottery" is a legal one.

The federal anti-lottery laws were passed in response to the Louisiana Lottery Scandal and other scandals in the late nineteenth century, associated with legal lotteries licensed by various states.⁸ Although some of the federal postal anti-lottery statutes can be traced back to before the Civil War,⁹ prior to the lottery scandals Congress had felt that the regulation of gambling, both legal and illegal, was a matter solely within the police power of the individual states.¹⁰ It was not even clear in the 1890's whether the federal government had any

6. 18 U.S.C. § 1301 (1982).

7. See, e.g., 18 U.S.C. § 1305(a) (1982).

8. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, 500 *et seq.* (1977) [hereinafter LAW OF GAMBLING: 1776-1976].

9. "In 1827, Congress enacted the antecedent of 18 U.S.C. § 1303 limiting the participation of postal officials in lotteries, Act of March 2, 1827, ch. 61, 4 Stat. 238." *Id.* at 501 n.93.

10. Cf., *id.* at 497.

power to control gambling taking place entirely within a single state.¹¹

Many of the states, and even the District of Columbia, had run or licensed legal lotteries during the nineteenth century.¹² Often these lotteries resulted in scandals, including nonpayment of prizes and widespread corruption.¹³ The Louisiana Lottery was the last, and greatest, both in the size of the lottery and in the magnitude of the scandal.¹⁴ The lottery operators were accused, correctly, of attempting to buy the Louisiana State Legislature.¹⁵ It became clear that the states could not control these legal lotteries, either because they did not wish to do so or because of jurisdictional limits on their power to regulate legal activities originating in other states.¹⁶ Since the states were helpless, President Harrison asked Congress to pass legislation to solve this particular problem.¹⁷

Congress responded to President Harrison's call to close down the Louisiana Lottery by using the various constitutional provisions and federal powers it thought it had at the time. Congress first used its power to regulate the U.S. mails,¹⁸ which was the most powerful weapon the federal government had against the state-licensed Louisiana Lottery. Since the Louisiana Lottery was paying large amounts of money to the State for its license, to succeed financially it had to be able to sell tickets throughout the country, and this meant using the mail.

The law forbidding lotteries from using the U.S. Postal System is codified as Section 1302 of Title 18 of the United States Code. It spe-

11. The question whether the Commerce Clause, U.S. CONST. art. I § 8, could reach gambling material not sent through the U.S. mails was finally answered in the affirmative in a close 5 to 4 U.S. Supreme Court decision in *Champion v. Ames*, 188 U.S. 321, 363 (1903).

12. J. EZELL, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 79 (1960) [hereinafter *FORTUNE'S MERRY WHEEL*]; G. SULLIVAN, *BY CHANCE A WINNER: THE HISTORY OF LOTTERIES*, 28-58 (1972) [hereinafter *BY CHANCE A WINNER*].

13. *BY CHANCE A WINNER*, *supra* note 12 at 44-58.

14. *FORTUNE'S MERRY WHEEL*, *supra* note 12 at 13, 243-257.

15. *Id.*

16. Blakey and Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 931 (1978). "After 1878 every session of Congress saw bills introduced to end the Louisiana Lottery by taxation or other means. . . ." *FORTUNE'S MERRY WHEEL*, *supra* note 12 at 251.

17. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, H. R. MISC. DOC. NO. 210, pt. 9, 53rd Cong., 1st Sess. 80-81 (1894) (J. Richardson ed.); also at 21 CONG. REC. 7916 (1890).

18. Congress at first relied solely on its power to regulate the U.S. mails, U.S. CONST. art. I, § 8, because it was not clear whether the Commerce Clause could reach lottery tickets that were technically legal under the laws of the state licensing the lottery. *LAW OF GAMBLING: 1776-1976*, *supra* note 8, at 500.

cifically prohibits the use of the mails for lottery tickets, checks for the purchase of tickets, and even "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance. . . ." Shortly after this postal statute was enacted in 1890, the United States Supreme Court upheld its use against a foreign legal lottery.¹⁹ The Court held that an advertisement for certain bonds, issued by the government of Austria, could not be sent through the U.S. mails because the bonds were a form of lottery.²⁰

Another statute, aimed at mail fraud, gives the Postal Service the authority to intercept and return lottery mail.²¹ While the Constitution greatly restricts the government from opening private mail,²² publications containing advertisements for foreign legal lotteries and envelopes containing lottery tickets are often intercepted and returned or destroyed.²³

Congress used every iota of its power to regulate the mails in its attempt to close down the corrupt state-licensed lotteries of the nineteenth century. It even passed statutes prohibiting postal employees from selling lottery tickets.²⁴ Later, this prohibition was expanded to include employees of other specified federal agencies.²⁵

The U.S. Postal Service, which enforces the anti-lottery postal statutes, has taken a very extensive view of what is a prohibited "lottery." The Postal Service has stated that any activity having the three elements of consideration, chance and prize is a lottery.²⁶ Under this definition, every form of gambling is indeed a lottery.²⁷ For example, a magazine requesting second-class mail privileges was deemed not entitled to those privileges because it contained advertisements for legal Canadian lotteries and Atlantic City slot-machine and craps gam-

19. *Horner v. United States*, 147 U.S. 449 (1893).

20. *Id.* at 466-67.

21. 39 U.S.C. § 3005(a) (1) (1982).

22. Cases preventing the government from opening private mail simply because it suspects the mail contains lottery material date back well over a hundred years. *See, e.g., Ex parte Jackson*, 96 U.S. 727, 733 (1877).

23. "Last year the U.S. Postal Service confiscated over one million pieces of lottery mail entering the U.S. from Canada, and about 31,000 letters headed for Canada. U.S. Postal Inspector Robert Chalmers admits that for every letter the agency seizes at least four or five get through." Zehr, *Canadian Lotteries Attract U.S. Dollars, As Well As a Lot of American Complaints*, Wall St. J., Apr. 8, 1986, at 33, col. 4.

24. 18 U.S.C. § 1303 (1982).

25. 18 U.S.C. § 1306 (1982).

26. Domestic Mail Manual, § 123.421, No. 19, June 7, 1985.

27. This broad interpretation of what is a "lottery" is being challenged, particularly as it applies to bingo, in *Minn. Newspaper Assoc., Inc. v. Postmaster General of the United States*, No. 86-806 (D. Minn. filed Sept. 15, 1986).

bling.²⁸ Of course, in practice hundreds of millions of pieces of mail containing "lottery" advertisements pass without incident through the mail. In fact, since the anti-lottery statutes are not limited to advertisements, but prohibit any lottery "information" from the mails, every newspaper and magazine that has a story about a lottery winner is technically in violation of the law.

Being barred from the U.S. mails in 1890 did not completely kill the Louisiana Lottery. The Lottery relocated to Honduras and attempted to continue without using the U.S. mails, forcing Congress to push its constitutional powers to the limit to prevent the Lottery from reappearing.²⁹

After the Louisiana Lottery survived the ban on its use of the mails, Congress used its power to regulate interstate and foreign commerce in an attempt to prevent the shipment of lottery tickets or anything that might aid a lottery in its operations. In 1895 Congress made it a federal crime to carry or send a lottery ticket, lottery information, or a list of lottery prizes in interstate or foreign commerce.³⁰ The statute is only haphazardly enforced at best and it may indeed be unconstitutional, given the recent development of the commercial speech doctrine.³¹ However, the law remains a barrier to any foreign legal lottery wishing to sell tickets, or even advertise, within the United States.

A question arose as to whether Congress had the power to regulate activities taking place entirely within a single state, which only incidentally affected interstate commerce. The Supreme Court's decision in *The Lottery Cases*³² not only validated the constitutionality of the anti-lottery statutes, but stands as a monumental expansion of Congress' power under the Commerce Clause.

The prohibition on the transportation of lottery tickets across state and national boundaries has been expanded to encompass recent developments in lottery technology. The Supreme Court constricted the reach of the first Commerce Clause anti-lottery statute³³ by narrowly construing what constitutes a "ticket."³⁴ Sophisticated operators avoided arrest by never shipping an actual ticket across a state line, thereby limiting their interstate commerce to mere records or receipts.

28. *Aimes Publications, Inc. v. United States Postal Service*, No. 86-1434 (D.D.C. filed May 23, 1986).

29. LAW OF GAMBLING: 1776-1976, *supra* note 8 at 520.

30. 18 U.S.C. § 1301 (1982).

31. See *infra* notes 55-58 and accompanying text.

32. This is the common name given to *Champion v. Ames*, 188 U.S. 321 (1903), and its companion case, *Francis v. United States*, 188 U.S. 375 (1903).

33. Now codified as 18 U.S.C. § 1301 (1982).

34. *Francis v. United States*, 188 U.S. 375, 377 (1903).

Congress closed these loopholes when it moved against the interstate shipment of gambling paraphernalia.³⁵ The resulting legislation could eliminate all shipment of foreign legal lottery tickets if it were actively enforced. The Supreme Court has held that the ban applies to legal as well as illegal lotteries and covers receipts and acknowledgments as well as actual tickets.³⁶

With the development of radio technology, Congress sought to regulate the airwaves. The Federal Communications Act of 1934³⁷ carried over the anti-lottery language from the postal statutes. Although the statutory language is limited to broadcasts, not cable, and lottery or similar schemes, not other forms of gambling, the Federal Communications Commission ("FCC") has gone beyond the explicit anti-lottery restrictions found in the federal statutes, stating that it has the power to regulate all broadcast or cable communications that might aid illegal gambling.³⁸ The result has been a confusion of administrative decisions, mostly unwritten, by the FCC.

The FCC interprets the statutory prohibition on lottery broadcasts to cover almost every communication of a commercial nature about every form of gambling, legal or illegal, with the exception of horse racing and tournaments. Like the U.S. Postal Service, the FCC believes that any activity having the three elements of consideration, chance and prize is a "lottery" within the meaning of the federal statutes.³⁹ Horse racing is apparently exempt because it is a sport that people happen to bet upon, like the football Superbowl, and handicapping a race involves a degree of skill.⁴⁰ Tournaments are considered games of skill as well, since the FCC believes that it takes skill to avoid being eliminated and to reach higher levels of the tournament.⁴¹ This treat-

35. 18 U.S.C. § 1953 (1982).

36. *United States v. Fabrizio*, 385 U.S. 263 (1966).

37. Communications Act, ch. 652, 48 Stat. 1064 (1934).

38. *Horseracing*, 36 F.C.C. 1571, 1572-73 (1964).

39. Since the FCC staff decisions are informal and not reported, it is not possible to cite to any case or FCC Report on their decisions striking down every broadcast advertisement for every form of gambling as a "lottery." There are, however, published FCC opinions stating the position that any scheme with the three elements of consideration, prize and chance is a lottery. See *Lottery Broadcasts Involving Savings Accounts*, 39 Radio Reg. 2d 1285, 1286 (1977). The FCC's position is based on overly broad language contained in court cases dealing with actual lotteries, not gambling games. See, e.g., *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954).

40. In the Matter of Elimination of Unnecessary Broadcast Regulation, MM Docket 83-842, G-3 FCC 84-388 34930 (adopted August 8, 1984, released August 17, 1984). A radio station can now run entire races, including the odds, even without a tape delay, and may broadcast any racing advertisements it wishes.

41. Telephone interview with Harvey Speck, Enforcement Division, FCC (Oct. 10, 1984).

ment of what is and is not a lottery leads to the incongruous situation where a legal casino cannot mention blackjack or poker over the air, but it can advertise its slot machine tournaments.

The statute does not cover cable transmissions, and the FCC completely ignores cable broadcasts of legal gambling activities, unless it concludes that the program is aiding illegal gambling. Atlantic City casinos are thus able to run advertisements on cable whenever they wish, those same casinos however cannot even mention the word "casino" on over-the-air broadcasts, unless "casino" is part of their name, because the mere word "casino" somehow falls within the prohibition on lottery broadcasts.⁴²

Under these informal decisions by the FCC, no foreign legal gambling operation can advertise over-the-air, on radio or television in any way. A foreign legal casino or government run or licensed lottery should be able to advertise freely through U.S. cable transmissions, or from a station broadcasting outside U.S. jurisdiction, so long as the advertisement does not attempt to induce viewers to do anything illegal, such as send money through the mail for a lottery ticket.⁴³

The federal government's power to regulate national banks and federally insured financial institutions was used to prevent these institutions from participating in lotteries. Today, these banking institutions may not even "announce, advertise, or publicize the existence of any lottery."⁴⁴

As Congress has expanded its power over new areas of American life, it has expanded the prohibitions on lotteries. Congress even made it illegal to attach a lottery ticket to a package of tobacco products, since it believed it had power regulate this industry.⁴⁵ The federal anti-lottery laws were so successful that all of the lotteries were destroyed and no legal lottery existed in the United States for almost seventy years.⁴⁶

However, with the re-discovery of the legal lottery by New Hampshire in 1963⁴⁷ and the rapid spread of state lotteries throughout much of the country, a direct conflict developed. State governments found that of all legal enterprises, lotteries alone were barred from using many normal business facilities, such as banks and radio stations. Yet

42. Letter from the Legal Department of the National Association of Broadcasters to Members of the National Association of Broadcasters (June, 1981)(discussing advertising of casinos based on conversations with FCC staff).

43. *Cf. Horowitz v. United States*, 63 F.2d 706 (5th Cir. 1933).

44. 12 U.S.C. §§ 25(a)(3), 339, 1730c(a)(3) (1982).

45. I.R.C. § 5723(c) (1982).

46. *BY CHANCE A WINNER*, *supra* note 12, at 58, 98.

47. N.H. REV. STAT. ANN. § 284:2 (1985).

the federal law was clear; it did not matter whether the lottery was run by a private company or by the state. The state lotteries reacted by using their powerful lobbying influence to win special statutory concessions from Congress, but these concessions are only available for lotteries conducted by a state government.⁴⁸ Foreign legal lotteries did not, and do not, have the influence to win similar special treatment from Congress. For example, beginning in 1975, Congress allowed state lotteries to use the U.S. mails, but only when mailing to addresses within their own state.⁴⁹ Legal lotteries run in foreign countries cannot utilize this exemption, and are treated exactly the same as illegal lotteries and fraudulent schemes. The state lotteries were also able to win an amendment from Congress specifically allowing financial institutions to accept money and otherwise act as banks for state lotteries.⁵⁰ Foreign legal lotteries were not given any such privilege, and are completely barred from using federally insured financial institutions. Finally, a legal lottery operated by a state is the only lottery that can send its advertisements across state lines. This concession, however, is not absolute. The states which did not operate lotteries did not want their citizens spending their disposable income in neighboring states' retail stores for lottery tickets. These non-lottery states were able to keep the federal prohibition on shipment of lottery tickets across state lines, as well as retaining some important restrictions on the shipment of lottery advertisements.⁵¹ Thus, state lotteries can only advertise in an adjacent state, meaning in a state that shares a common boundary with the lottery state, and then only if the adjacent state also has a state lottery.⁵² This has led to incongruous situations. For example, retailers in the state of California can advertise California Lottery tickets in Arizona or Oregon, adjacent states with state lotteries. However, the California Lottery cannot be advertised in Washington State because, although the two states are physically near and both operate state lot-

48. 18 U.S.C. § 1307 (1982); Postal Reorganization Act, 39 U.S.C. § 3005(d) (1982).

49. 18 U.S.C. § 1307(b)(1) (1982). Section 1307(b)(2) provides that the transportation and mailing provisions of Sections 1301, 1302 and 1303 do not apply;

to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

The language "designed to be used within that foreign country" has led some foreign lotteries to view this section as permitting Americans to play foreign lotteries direct. Such an interpretation appears to be erroneous, since it would mean that under certain circumstances, Americans would be able to play a foreign lottery even though they could not play a state one.

50. 12 U.S.C. §§ 25(a)(3), 339, 1730(a)(3), 1829(a)(3) (1982).

51. 18 U.S.C. § 1307(b)(1) (1982).

52. *Id.* at § 1307(a)(1)-2(2).

teries, the two states do not share a common boundary. Also, the California Lottery cannot be advertised in the adjacent state of Nevada because, although Nevada has more legal gambling than any other jurisdiction in the United States, it does not have a state lottery. It would be difficult for the federal government to defend this rule on the grounds that it is trying to protect the innocent citizens of Nevada from hearing about the evils of California's legal gambling.

Foreign legal lotteries did not, and do not, have the political influence necessary to win even a limited exemption. Foreign lottery tickets and advertisements are still classified as "immoral articles," and cannot be imported into the United States.⁵³ This is the main tool used to seize millions of pieces of foreign lottery information and tickets each year. If foreign lottery tickets or literature are found in a package; the entire contents of the package are subject to seizure for forfeiture.⁵⁴ Even if the tickets are bought by an American travelling abroad and are for his own use, the Customs Service can seize and destroy the foreign lottery tickets.⁵⁵ Customs has gone so far as to rule that advertisements for foreign legal lotteries cannot be brought into the country, not even for the purpose of being bound into magazines that will be exported and distributed entirely outside of the United States.⁵⁶

To the extent the anti-lottery statutes and regulatory actions prevent a legal gambling business from advertising, they may be unconstitutional as a violation of the commercial speech doctrine. Within the last decade the United States Supreme Court has ruled that legal businesses have some rights to free speech under the First Amendment.⁵⁷ The United States Supreme Court has explicitly stated that government cannot prevent a legal business from advertising.⁵⁸ However, legal gambling has always been considered a suspect enterprise, therefore, the courts give great deference to legislatively-imposed special treatment and rigorous governmental controls. In its first commercial speech case involving legal gambling, the Supreme Court, by a five to four majority, upheld a near-total ban on advertising by licensed casinos in Puerto Rico.⁵⁹ The governmental restrictions on advertising

53. 19 U.S.C. § 1305(a) (1982).

54. *Id.*

55. Prohibited and Restricted Merchandise: Lottery Tickets Purchased Abroad, Cust. Ct. 79-336 (Jan. 10, 1979).

56. Cust. B. & Dec. 83-105 (June 27, 1983).

57. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

58. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).

59. *Posadas de Puerto Rico Associates, dba Condado Holiday Inn v. Tourism Company of Puerto Rico*, 478 U.S. —, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986).

were so broad that they prohibited the use of the word "casino" on matchbooks, stationery, directional signs within the hotel and even in a newspaper photograph taken at a press conference held at a casino.⁶⁰

The federal prohibitions on foreign legal lotteries are in striking contrast to the government's policy toward its own lotteries. The federal government sells its oil by means of a lottery.⁶¹ Lotteries have been used to distribute broadcast licenses and land;⁶² in fact, the most famous lottery of all time—the draft—was run by the U.S. government.⁶³

B. Criminal Organizations

In the last fifty years, Congress has taken an active role in the war against organized crime. The numerous federal statutes were designed to eliminate large-scale criminal enterprises and were not intended to hamper foreign legal gambling operations. However, the latter have found themselves risking federal prosecution if they attempt to conduct business in the United States.

Although some federal laws directly prohibit some forms of otherwise legal foreign gambling, such as on certain ships on the high seas, the main problem is that the federal anti-racketeering statutes are often defined in terms of state laws. Violations of state anti-gambling statutes, under certain conditions, have now become federal marketing offenses. Since every state prohibits the sale of lottery tickets (except the tickets of its own state lottery), a foreign lottery attempting to sell in the United States might be convicted of not only the state crime, but a federal racketeering offense as well.

The federal government began to take an active role in the control of large criminal enterprises during the Prohibition Era. Although there was "organized crime" as far back as the colonial period, it is generally agreed that Prohibition created the first large, organized, criminal syndicates with branches nationwide.⁶⁴ The law against the sale and consumption of alcoholic beverages⁶⁵ led to a widespread demand for a product that was illegal; filling that demand required large-scale production and distribution networks. By definition these organizations were criminal, and they gained national attention for their will-

60. *Id.*, Jurisdictional statement of appellant at 10.

61. Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1353(b)(1) (1982).

62. *By CHANCE A WINNER*, *supra*, note 12, at 76-79.

63. *Id.* at 61-76.

64. Bradley, *Racketeering and the Federalization of Crime*, 22 AMER. CRIM. L.REV. 213, 226 (1984).

65. National Prohibition (Volstead) Act, ch. 85, 41 Stat. 305 (1919).

ingness to use violence to secure their monopolies. Gang wars in Chicago and elsewhere were reported daily in the press, along with such infamous characters as "Scarface" Al Capone and such infamous events as the "Valentine's Day Massacre." The criminal organizations soon branched out into other illegal activities, particularly prostitution and gambling. Local government seemed helpless to prevent wide-open crime, necessitating federal intervention.⁶⁶

In 1933 Senator Copeland of New York held public hearings throughout the nation to investigate racketeers.⁶⁷ Although most witnesses testified that the prevention of crime was a local matter, politically it would have been impossible for Congress to have continued to defer the matter to the states.⁶⁸ Thus, Congress passed the Anti-Racketeering Act⁶⁹ and a large number of other bills designed to frustrate organized crime.⁷⁰

As with the anti-lottery laws, Congress attacked this particular problem with all of the powers granted it under the Constitution. The power to regulate interstate commerce was the source of much of this legislation, particularly after Congress decided that not only could it govern travel across state lines, but it could also control any activity that might conceivably have an impact on interstate commerce, even if all activity took place within a single state.⁷¹ Over the years, as the impact of organized crime continued to fascinate the public and the power of the federal government grew, Congress added more laws to its arsenal, particularly when newspaper headlines were involved.

The present racketeering statutes, including the Hobbs Act⁷² and the Travel Act⁷³ make it a federal offense to travel or use any facility

66. Bradley, *supra* note 64, at 224.

67. *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate*, 73 Cong., 2nd Sess. (1933), 78 CONG. REC. 448 (1934).

68. Bradley, *supra* note 64, at 230, 231.

69. Anti-Racketeering Act, ch. 569, 48 Stat. 979 (1934).

70. "[T]he 73rd Congress added more to the provision of the federal criminal code than all previous congresses." PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 332 (1934). See also remarks of Congressman Young, "[I]t appears that when the Congress does not seem to have anything else to do, we must meet here and make more crimes." 78 CONG. REC. 8131 (1934).

71. In the nineteenth century Congress was able to get federal jurisdiction over lotteries through its power to regulate the U.S. mails. In this century federal jurisdiction over organized illegal gambling rings has been based on a broad view of interstate commerce: "The Congress finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof." Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. VIII, pt. A, § 801, 84 Stat. 936.

72. 18 U.S.C. § 1951 (1982).

73. *Id.* at § 1952 (1982).

in interstate or foreign commerce, including the mail, to collect illegal gambling debts or with intent to promote or carry on any unlawful activity. "Unlawful activity" is specifically defined to include "any business enterprise involving gambling . . . on which the Federal excise tax has not been paid."⁷⁴ Since a foreign gambling enterprise would not normally even consider paying U.S. taxes, the federal racketeering statutes would apply, at least to those gambling activities that take place within the jurisdiction of the United States.

The Organized Crime Control Act of 1970,⁷⁵ made it clear that it is a federal crime to violate state anti-gambling laws, if the gambling activity is large enough to affect interstate commerce. An "illegal gambling business" is defined as "a gambling business which is a violation of the law of a State or political subdivision in which it is conducted," which involves five or more persons, and which has either been in business for 30 days or has a gross revenue of \$2,000 in any day.⁷⁶ The requirements of at least five persons and of a minimum amount of business are designed to meet the constitutional requirements that there be an impact on interstate commerce.

Other racketeering statutes cover the interstate transportation of illegal wagering paraphernalia.⁷⁷ The law also gives the federal government the right to seize and keep all money and property used in the illegal business. The Federal Bureau of Investigation may apply to a federal judge for a wiretap for a suspected violator of the federal gambling laws.⁷⁸

It is a crime if anyone "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. . . ."⁷⁹ This statute prevents Americans from placing bets by telephone on legal races held in foreign countries.

Twenty years ago some entrepreneurs set up a phone link between Houston, Texas, and Las Vegas, Nevada. The gambling operators were convicted of transmitting wagers and wagering information across state lines, even though all of the calls originated in Houston and all bets were to be placed in licensed Nevada sports books. The convictions were upheld upon appeal, with the Court of Appeals for the Fifth Circuit stating clearly that Congress has the power to prohibit all inter-

74. *Id.* at § 1952(b) (1982).

75. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

76. 18 U.S.C. §§ 1911, 1955 (1982).

77. *Id.* at § 1953 (1982).

78. *Id.* at § 2516(1)(b) (1982).

79. *Id.* at § 1084 (1982).

state transmissions of wagers regardless of whether the bets would be legal where received.⁸⁰ The court rejected appellants' argument that the federal statute impermissively defeated the public policy of the state of Nevada. The Court reasoned that if Nevada's pro-gambling policy "is not 'defeated' in some way, then the policy of every other state that prohibits what Nevada allows could be defeated."⁸¹ The Court went on to hold that Congress had the power under the Commerce clause to interfere to some extent with the public policies of the various states.

A case involving bets to be placed at a foreign track would be easier to resolve against the operators. Although one may argue about the extent of Congress' power to regulate interstate commerce, Congress' power over foreign commerce is beyond debate. In addition, a foreign legal enterprise would not be able to raise federalism arguments, since the federal government is under no obligation, other than comity, to respect the public policy of other countries.

Under a strict interpretation of this federal ban on the transmission of wagering information, it is illegal for a licensed race book in Nevada to accept bets on foreign races. The statute clearly makes a distinction between interstate and foreign commerce:

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.⁸²

While news information may be sent to or received from other countries, bets may only go from one part of the United States to another, and then only if the bet is legal in both states. This exemption was meant to allow Nevada's off-track betting books to accept bets on legal races held in other states.⁸³ Race tracks in foreign countries, can neither send wagers into nor receive wagers from the United States since they are not located in "States" within the meaning of the federal statute.

In the late 1940's and early 1950's public interest in organized crime was again aroused. Another ambitious senator, Estes Kefauver,

80. *Martin v. United States*, 389 F.2d 895 (5th Cir. 1968).

81. *Id.* at 898.

82. 18 U.S.C. § 1084(b) (1982).

83. H.R. REP. No. 967, 87th Cong., 1st Sess. 3, *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 2631.

conducted a well-publicized investigation of crime and gambling.⁸⁴ While few of the bills specifically recommended by the Kefauver Commission ever became law,⁸⁵ Congress enacted many other statutes at the time in a continuing effort to respond to the public demand to do something about organized crime. The Johnson Act⁸⁶ makes it a federal crime to transport an illegal gambling device across a state line.⁸⁷ The law requires that even legal manufacturers must register with the Attorney General and keep complete records of all buyers.⁸⁸ The law applies to "any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce."⁸⁹

Congress used its admiralty powers, as well as its power to regulate interstate and foreign commerce, to reach crime, and, incidentally, gambling, beyond the land. Specifically prohibited are the use of gambling devices within U.S. territorial waters.⁹⁰ A foreign flagship must close down its slot machines as soon as it comes within three miles of land claimed by the United States. Violations of the law result in confiscation, forfeiture, up to two years in prison and a \$5,000 fine.⁹¹

The anti-gambling curtain is drawn tightly around U.S. territorial waters and the reach of the federal statutes goes far out to sea. It is unlawful for a U.S. citizen, or anyone on an American vessel, or anyone on any vessel inside U.S. waters, to set up a gambling ship.⁹² This is an American law with worldwide impact in the 1980's and 1990's; the gambling ships that ply the Carribean cannot be American flagships, or run by American citizens, and all gambling must cease within three miles of American land. It is unlawful to operate vessels to transport passengers from any point within the United States to a gambling ship at sea.⁹³ This prohibits direct transportation by boat to a foreign ship

84. See, S. REP. NO. 725, 82nd Cong., 1st Sess. (1951) (The Final Report of the Special Comm. to Investigate Organized Crime in Interstate Commerce, commonly known as the Kefauver Commission).

85. Bradley, *supra* note 64, at 239.

86. 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. § 1171-78 (1982)).

87. *Id.* at § 1172.

88. *Id.* at § 1173.

89. *Id.* at § 1173(a)(1).

90. *Id.* at § 1175. The territorial jurisdiction under the Act extends to "special maritime and territorial jurisdiction of the United States." The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 (1982), and includes "the high seas," and "any vessel belonging . . . to the United States or any citizen thereof." *Id.*

91. 15 U.S.C. § 1176 (1982).

92. 18 U.S.C. § 1082 (1982).

93. *Id.* at § 1083.

operating in international waters. The statute was passed in 1948 for the much more limited purpose of outlawing casino ships that anchored just outside the territorial waters of California.⁹⁴

Congress also used its power over immigration and visas to attack criminal organizations. Although the federal government has made special rules for foreign nationals who have been involved in gambling and wish to enter the United States, the law is almost exclusively concerned with illegal gambling, rather than legal enterprises. Aliens who have been convicted of various specific crimes, including illegal gambling, can be excluded.⁹⁵ The Immigration and Naturalization Service uses these laws against individuals with a history of violations, particularly those it suspects are entering the United States to engage in illegal commercial gambling.⁹⁶

In the past, the legal gambling establishments in Nevada claimed it was necessary to hire individuals with criminal gambling convictions arguing that since gambling was illegal almost everywhere the only people with adequate experience were those who ran illegal games.⁹⁷ It is doubtful that this argument ever had any validity, for if licensing provisions are rigorous and prevent anyone with a criminal gambling conviction from working in a legal casino, economic incentives will no doubt lead to the creation of training schools for dealers and other legal ways to solve the shortage of qualified personnel.⁹⁸ Foreign legal gambling establishments apparently have not felt it necessary to employ individuals with criminal gambling backgrounds and have not run into substantial problems with the federal government's desire to exclude undesirables.

The latest additions to the federal arsenal are the statutes outlawing Racketeer Influenced and Corrupt Organizations, commonly known as RICO.⁹⁹ It is a new federal crime for a person to commit two other specified crimes within ten years of the initial offense. The specified crimes may be state or federal, and include the other federal racketeering statutes affecting gambling. In fact, under RICO, "racketeering ac-

94. Comment, *Federal Regulation of Gambling*, 60 YALE L.J. 1396, 1406 n.62 (1951).

95. 8 U.S.C. §§ 1101(f)(5) and 1182(a)(9) (1982).

96. COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 23 (1976) [hereinafter *GAMBLING IN AMERICA*].

97. Cf. J. SKOLNICK, *HOUSE OF CARDS: LEGALIZATION AND CONTROL OF CASINO GAMBLING* 176 (1978).

98. The legalization of casinos in Atlantic City created an almost overnight demand for hundreds of trained casino dealers. This need was met by offering appropriate salaries to lure experienced personnel from Nevada, and by creating training programs within the casinos and through dealer schools quickly established by independent entrepreneurs.

99. 18 U.S.C. §§ 1961-1968 (1982).

tivity" is defined, in part, as "any act . . . involving . . . gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year."¹⁰⁰ The stiff penalties include prison sentences and the forfeiture of all property associated with the corrupted organization, and convictions are relatively easy to obtain.

RICO also creates a new civil cause of action.¹⁰¹ A state lottery could conceivably bring suit under RICO to prevent a foreign lottery from competing, if the foreign lottery is violating the specified state or federal anti-gambling laws.¹⁰² RICO was intended to give federal prosecutors the power to reach organized crime bosses, the men who gave the orders but never dirtied their hands.¹⁰³ Although successful, to some extent, in convicting the higher-ups, the law is so broad in its reach that private companies have been suing each other under RICO for such things as violations of the federal securities laws.¹⁰⁴ Under RICO the prosecutor (or plaintiff in a civil suit) need only charge that the two predicate crimes have been committed, it is not necessary for the defendant to have been convicted of those crimes.¹⁰⁵

There is little chance that Congress will ever eliminate any of the statutes it has enacted to fight organized crime. Since many of the federal offenses depend on state definitions of what is illegal gambling, any legal foreign gambling operation that wants to do business within this country must see that it does not violate any of the multitude of state laws, or the operators could be charged with being racketeers.

C. *Miscellaneous Federal Laws*

There are a number of miscellaneous federal statutes that have an incidental impact on foreign legal gambling, although this was almost never the intended purpose of Congress in passing these laws.

100. *Id.* at § 1961(1). Many state laws which could be applied against foreign legal gambling operations are misdemeanors, punishable by less than one year imprisonment, not felonies, and thus could not serve as predicate crimes for RICO. *See, e.g., CAL. PENAL CODE* § 321 (1982) (selling unauthorized lottery tickets is a misdemeanor).

101. 18 U.S.C. § 1964(c) (1982).

102. *Cf. Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346, 53 U.S.L.W. 3914 (1985).

103. Act of Oct. 15, 1970, Pub. L. No. 91-452 § 1, 62 Stat. 829; *but see Sedima*, 473 U.S. 479.

104. *See, e.g., Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47 (N.D. Cal. 1982).

105. *Sedima*, 105 S.Ct. at 3284.

1. The Interstate Horseracing Act

The American pari-mutuel industry lobbied Congress to allow a limited form of interstate off-track-betting; the result was the Interstate Horseracing Act.¹⁰⁶ If all the required steps for approval have been taken, bettors can go to a race track in one state and place bets on races run at a track in another state.

The wording of the Interstate Horseracing Act would seem to preclude foreign licensed tracks from participating in this new, profitable inter-track wagering, since the statutory language refers exclusively to betting licensed by a "State." Standard statutory construction leaves no doubts that the term "State" is limited to territories of the United States.¹⁰⁷ Congress apparently did not purposely exclude foreign tracks from the protection of the Act; instead, it simply did not think about the possibilities of international, as well as interstate, wagers.¹⁰⁸ Whatever the actual intent of Congress, without the specific exemptions provided by the Interstate Horseracing Act, the transmission of wagering information in interstate or foreign commerce would be a federal offense.¹⁰⁹

Foreign sovereigns are, of course, free to ignore the laws of the United States, unless bound by treaty or feelings of comity. The Criminal Code of Canada was amended effective November 1, 1985, to specifically allow licensed Canadian race tracks to accept bets on American races,¹¹⁰ despite the U.S. prohibition on transmission of wagering

106. The Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1982). Section 3004(a)(1) generally allows an off-track betting system to accept interstate off-track wagers if consent is obtained from the host racing association, the host racing commission, and the off-track racing commission. Some additional restrictions apply to, and some additional exceptions are provided for, the off-track betting provision. 15 U.S.C. § 3004.

The Interstate Horseracing Act is unique. It appears to be the only federal statute specifically designed to regulate state licensed gambling. The history of the bill is correspondingly unique. It resulted from years of dispute within the racing industry over the financial impact of off-track betting. The final Act is a Congressionally ratified settlement of a basically private dispute. Comment, *The Interstate Horseracing Act of 1978: An Evaluation*, 12 CONN. L.REV. 883 (1980).

107. 15 U.S.C. § 3001 (1982). Congress specifically found that "the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders" and, "the Federal Government should prevent interference by one State with the gambling policies of another." *Id.*

108. Telephone interview with Eugene T. Christiansen, Special Assistant to the New York City Off-Track Betting Corporation (Sept. 4, 1986). For many years, Mr. Christiansen was involved in the negotiations that led up to the Interstate Horseracing Act and helped draft the statute. He stated that the Act's drafters never contemplated the impact on international wagering when they used the word "State."

109. 18 U.S.C. § 1084 (1982); see *supra* note 79 and accompanying text.

110. CRIM. CODE, CAN. REV. STAT. §§ 188(1)(c)(i), 188(6.2)(d), and 188(6.3) (1986).

information in foreign commerce. If the Canadian tracks were simply "pirating" American race results, *i.e.*, taking bets without the permission of the American tracks, the American government could do nothing. However, the Canadian regulations require the Canadian tracks to have written agreements with "the organization conducting the foreign race."¹¹¹ Although American jurisdiction cannot reach the Canadian race tracks, it can reach their contractual partners, the American tracks.

A controversy is brewing over whether American tracks can legally participate in this form of international off-track betting. A licensed betting concern in Bermuda wanted to take bets on New York races simulcasted by satellite. On December 31, 1985, the Attorney General of New York issued a Formal Opinion declaring it illegal for a New York race track to transmit audio and visual signals of New York races to licensed betting concerns in Bermuda.¹¹² Other states and the federal government have not yet acted against the tracks within their jurisdiction, probably because they have not yet been asked to give formal opinions on whether such broadcasting is illegal.

Although there may be doubt about the legality of foreign tracks taking bets on American races, given the limited reach of American jurisdiction, there seems to be no legal way for an American track to accept bets on a race run in a foreign country, although they do. The territorial limitations of the Interstate Horseracing Act should present an insurmountable barrier. When a track takes a bet on a foreign race, in violation of the Interstate Horseracing Act, it also violates state bookmaking statutes, as well as several federal criminal laws.¹¹³ Congress is considering legislation which would amend 18 U.S.C. 1084(b) by permitting the transmission of wagering information into a foreign nation where such betting is legal.¹¹⁴

111. Race Track Supervision Regulations § 143.6(1)(d) (January 1986).

112. 85-F16 Op. N.Y. Att'y Gen. (1985), *reprinted in* 58 N.Y. St. B.J., No. 5, July 1986, at 57.

113. The Interstate Horseracing Act, 18 U.S.C. § 3001 *et seq.*, supercedes prior federal laws preventing the interstate transportation of racing information. Although, it is necessary for the provisions of the Act to be met before allowing inter-track wagering under state law, complying with the provisions does not contemplate an American track taking bets on foreign races. Additionally every state prohibits bookmaking outside of licensed establishments. The federal criminal laws that might come into play if bets were taken on foreign races are, 18 U.S.C. §§ 1084, 1952, 1955, (1982). *See also supra* note 79 and accompanying text.

114. S. 611, 100 Cong., 1st Sess., 133 CONG. REC. S2504 (1987).

2. Tax Statutes and Regulations

The Internal Revenue Code provides that gambling winnings are taxable as income.¹¹⁵ Gambling losses are deductible, up to the amounts won during the taxable year.¹¹⁶ To insure that gambling winnings are reported, the Code has set up standards for both reporting and withholding of winnings in certain cases.¹¹⁷

The withholding and reporting requirements for gambling winnings, along with the new Treasury Department requirements that casinos report cash transactions over \$10,000,¹¹⁸ may be the only parts of federal law which help, rather than hinder, legal foreign gambling. Only American gambling operations, both legal and illegal, are subject to these requirements. Although U.S. taxpayers are supposed to report their gambling winnings on their tax forms each year,¹¹⁹ the reality is that none do, other than those taxpayers whose winnings are reported by the payer.¹²⁰ A big slot machine winner at an American casino will find the casino giving him a W-2G "Certain Gambling Winnings" tax form along with his winnings, with a copy going to the Internal Revenue Service.¹²¹ The same winner at a foreign casino has only his conscience and the fear of a tax audit to spur his reporting the total amount won.

The incentives for gamblers to play outside the U.S. are increased when the American gambling operation has to report winnings and withhold twenty or thirty percent of the big win,¹²² while the foreign gambling operation withholds nothing from foreign gambling winnings. Federal law requires that thirty percent be withheld in certain cases

115. I.R.C. § 61 (1982); *Campodonico v. United States*, 222 F.2d 310 (9th Cir. 1955), *cert. denied*, 350 U.S. 831 (1955) (gambling winnings constitute taxable income).

116. I.R.C. § 165 (d) (1982).

117. I.R.C. §§ 1441, 3402(q) (1982).

118. The U.S. Treasury has declared casinos "financial institutions" under the Bank Secrecy Act, Pub. L. No. 91-508, § 101, 84 Stat. 1114, (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1982) and 31 U.S.C. 5311-5322 (1982)). The Treasury regulations implementing the Act for casinos are 50 Fed. Reg. 25 (1985) (to be codified at 31 C.F.R. 103). For a complete description of this law and its impact on gambling see ROSE, GAMBLING, *supra* note 1, at 221; and Rose, *Turning in the High Rollers: The Impact of the New Cash Regulations*, 1986 NEV. PUB. AFF. REV., No. 2 at 21.

119. See *United States v. Johnson*, 319 U.S. 503, 515-517 (1943).

120. GAMBLING IN AMERICA, *supra* note 94, at 14.

121. Slot machine winnings as well as winnings from keno and bingo are exempt from withholding, I.R.C. § 3402(q)(5); however, a person is required to supply information on a tax form (W-2G) that states, under penalty of perjury, the name, address and social security number of the winner. 26 C.F.R. § 7.6041-1 (1986).

122. I.R.C. § 1441 (1982); Rev. Rul. 58-479, 1958-2 C.B. 60; 70-543 1970-2 C.B. 172.

from gambling proceeds paid to nonresident aliens;¹²³ twenty percent is withheld from American citizens and resident aliens.¹²⁴ The federal government obviously does not trust big winners to pay the taxes due on their gambling winnings, and particularly doubts its ability to collect from nonresident foreigners. The tax statutes were passed before the recent spread of state lotteries; therefore, no thought was given to the incentives built into the Code for Americans to gamble abroad, or the disincentives for foreign nationals to bet in the United States.

The federal government has set up a complicated system for taxing gambling operations, both legal and illegal.¹²⁵ This system is codified as Sections 4401 and 4424 of the Internal Revenue Code in a chapter entitled "Taxes on Wagering." This chapter sets up special taxes on gambling, both on bets placed and on the business side of the operation. There is an excise tax imposed on wagers: one-quarter of one percent of the amount bet legally and two percent of illegal bets.¹²⁶ The operator who runs the gambling game is liable for the tax,¹²⁷ much the way a store owner acts as the tax collector on sales tax. In addition, gambling operators must pay an occupational tax of five hundred dollars per year for illegal games and fifty dollars per year for legal operators.¹²⁸ Every person required to pay these special taxes must register with the Internal Revenue Service and keep a daily record showing the gross amount of all wages.¹²⁹

The excise and occupational taxes apply to everyone who is engaged in the business of accepting wagers, except licensed parimutuels, coin-operated devices, and state lotteries.¹³⁰ The law is mainly concerned with bookies and the numbers game.¹³¹ Games such as craps and poker are exempt under the strict definitions of "wager" and "lottery,"¹³² these definitions would also exempt a foreign casino.

A foreign lottery that sells tickets in the United States may be liable for this tax, while one that requires Americans to send their money out of the country should be exempt. The territorial extent of the subchapter of the Internal Revenue Code on wagering taxes is as follows:

123. *Id.*

124. I.R.C. § 3402(q) (1982); 26 C.F.R. § 31.3402(q)-1 (1986).

125. I.R.C. §§ 4401-4424, 4901, 4904-4906, 6419, 7262 (1982).

126. *Id.* at § 4401(a).

127. *Id.* at § 4401(c).

128. *Id.* at § 4411.

129. *Id.* at § 4412.

130. *Id.* at § 4402.

131. *See United States v. Calamaro*, 354 U.S. 351, 356 (1957).

132. I.R.C. § 4421.

The tax imposed by this subchapter shall apply only to wagers:

- (1) accepted in the United States; or
- (2) placed with a person who is in the United States:
 - (A) with a person who is a citizen or resident of the United States; or
 - (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.¹³³

3. Regulations of Federal Administrative Agencies

Congress has created a number of federal administrative bodies, each with the power in specific areas to make rules and regulations, conduct hearings, and even impose penalties. Often the violation of an administrative regulation is in itself a federal crime.

Many of the federal agency regulations have a potential impact on foreign legal gambling.¹³⁴ The most important are those with the authority to enforce the federal statutes aimed at lotteries and organized crime. The Federal Communications Commission regulates over-the-air and cable broadcasts; the U.S. Postal Service regulates the mails; and the Department of Justice has jurisdiction in both areas. The Department of Justice, which includes the Federal Bureau of Investigation and the United States Attorneys, also prosecutes federal offenses, such as racketeering violations.

Other federal regulators have been given jurisdiction, or have assumed the authority, to regulate gambling. The Internal Revenue Service enforces the reporting and withholding provisions of the Internal Revenue Code, while the Bureau of Alcohol, Tobacco and Firearms has the responsibility for enforcement of the wagering occupational tax and the excise tax on wages. The United States Treasury, which includes the Internal Revenue Service and the Bureau of Alcohol, To-

133. *Id.* at § 4404.

134. The Commission on the Review of the National Policy Toward Gambling listed the federal agencies it found involved in the enforcement or administration of laws relating to gambling, along with the jurisdictional bases of the agencies' authority. COMM'N ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, FIRST INTERIM REPORT 33 (1975). The listed agencies are: Department of Justice, Federal Bureau of Investigation, Customs Service, Immigration and Naturalization Service, Postal Service, Federal Communications Commission, Federal Trade Commission, Department of Labor, Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and Department of the Treasury, including both the Internal Revenue Service and the Bureau of Alcohol, Tobacco and Firearms. *Id.* The list left out the Department of Defense, the Bureau of Indian Affairs, and the Securities and Exchange Commission.

bacco and Firearms, enforces a new regulation requiring casinos to keep detailed records and file reports with the identity of every player involved in a credit extension transaction of over \$2,500.¹³⁵

The Securities and Exchange Commission ("SEC") has extensive power over publicly traded stocks and bonds, including the securities of companies involved in gambling. The SEC also has some power to regulate the widespread speculative gambling common in commodity and security futures and options. Recently, Congress acted to exempt puts, calls, options and other securities traded on a national exchange from state prohibitions.¹³⁶ Speculative trading on foreign legal exchanges are not covered by this federal preemption of state laws and are thus still illegal under some state anti-gambling statutes.¹³⁷ The Federal Trade Commission ("FTC"), which has broad authority to regulate "unfair trade practices,"¹³⁸ once actively restricted advertisements involving gambling. The federal courts upheld the FTC's power to prevent the interstate sale of goods through the use of a lottery.¹³⁹ Although the only formal rule issued by the FTC restricts the use of games of chance in the food retailing and gasoline industries,¹⁴⁰ the FTC has moved against others it believes are using lotteries in interstate commerce.¹⁴¹

Special governmental enclaves, at home and abroad, have to face special federal agencies.¹⁴² The Department of the Interior's Bureau of Indian Affairs plays an important role in gambling on Indian reservations.¹⁴³ The laws relating to gambling on military bases is vast, con-

135. 31 C.F.R. § 103.36 (1986).

136. 15 U.S.C. § 78(b)(b) (1982).

137. Some states, particularly in the South, passed laws against gambling contracts and "bucket shops," brokerage houses that in effect bet with their customers whether stocks would go up or down. Many of the forms of trading in stocks and commodities that are now generally accepted in the financial community would have been outlawed under these state laws as illegal gambling. The state anti-gambling laws required that the purchase accept delivery of the product, clearly an impossibility to the speculator. See, e.g., *Bibb v. Allen*, 149 U.S. 481 (1983); *Dickson v. Uhlmann Grain Co.*, 288 U.S. 188 (1933). The new options on indexes, in which one can bet on such things as an index based on the Standard and Poors 500, do not involve real products: one cannot ask for delivery of the actual stock.

138. 15 U.S.C. §§ 41-58 (1982).

139. *Ostler Candy Co. v. Federal Trade Commission*, 106 F.2d 962 (10th Cir. 1939).

140. *Games of Chance in the Food Retailing and Gasoline Industries*, 16 C.F.R. § 419 (1986).

141. Cf. *In the Matter of the Procter & Gamble Company*, 103 F.T.C. 51 (1984).

142. Waldmier, *Federal Enclaves, GAMBLING IN AMERICA*, *supra* note 96, app. 1, at 933 [hereinafter Waldmier].

143. Gambling on Indian reservations, particularly Indian bingo, has become a multi-million dollar industry and a problem for federal regulators. The industry blossomed

fused, difficult to find and constantly changing. Each branch has power over its own bases, and there are levels of concurrent and exclusive jurisdiction.¹⁴⁴ The leading study of the subject found that the Department of Defense does not allow the selling of lottery tickets on military bases; the Air Force alone allows games of chance, but only if the games do not violate local law or custom; the Army and Air Force prohibit gambling devices while the Navy allows slot machines at clubs overseas, where allowed by the host country's law.¹⁴⁵

Legal gambling is not a high priority for the federal administrative agencies, but it is necessary to examine the regulations and rulings to see if any prohibitions exist. The agencies derive their powers from federal statutes so the first step in any search of administrative regulation of gambling is to go back to the Acts of Congress to see what role the federal government has taken, if any, in regulating the specific activity in question.

II. STATE LAWS

It would be impossible to describe in detail all of the state laws affecting gambling. In no other area are the laws so contradictory and anachronistic, with identical activities subject to radically different treatment by different states, or even within a single state.¹⁴⁶ However, some major common elements do stand out.

First, every state outlaws lotteries, with the prohibitions often found in their respective constitutions. Lotteries are mentioned specifi-

after a federal court ruled that the states can completely outlaw gambling everywhere within their borders, but once the state makes the game legal it has no power to regulate on Indian land; the states have criminal jurisdiction only, not civil. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981). Explosive growth followed the recent Supreme Court affirmation of this doctrine in *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987).

144. Waldmier, *supra* note 142, at 958-69.

145. GAMBLING IN AMERICA, *supra* note 96, at 24. In 1981, the Army completed a test program in Europe which involved tamper-proof slot machines. The success of this program led to a proposal "to place almost 5,000 machines in Army clubs and armed forces recreation centers throughout Germany, Italy, Korea, Japan and Panama." E. Lasseter, *Gaming and the Military* in LAVENTHOL & HORWATH, *SIXTH ANNUAL GAMING CONFERENCE* 1984 16.

146. The card game of poker is a good example, with many laws dating back to the nineteenth century. Some states have outlawed the game, while others permit it to be played in licensed card rooms or allow a criminal defendant to raise social gambling as an affirmative defense. The same game played for the same stakes may face radically different treatment even within a single county. The city of Gardena licenses card clubs for some forms of poker, while all forms of gambling are prohibited across the city line in Los Angeles. For a more thorough discussion see ROSE, GAMBLING, *supra* note 1, at ch.3.

cally, even if there are no references to other forms of gambling.¹⁴⁷ By statute, no lottery ticket may be sold anywhere in the state's jurisdiction, with common statutory exceptions for bingo and raffles run by established charities, as well as the state's own lottery.¹⁴⁸

The state statutory prohibitions on lotteries have been used to prevent the sale of foreign legal lottery tickets¹⁴⁹ even though the statutes and case law date back to the days before the recent spread of state lotteries in the United States. One typical case involved the distribution of circulars for the Louisiana Lottery in New York when New York had no legal lottery.¹⁵⁰

New York today has a billion dollar a year state lottery, yet, the following criminal statute is still on its books:

Any offense defined in this article which consists of the commission of acts relating to a lottery is no less criminal because the lottery itself is drawn or conducted without the state and is not violative of the laws of the jurisdiction in which it was so drawn or conducted.¹⁵¹

Some older precedents indicate a state can exclude legal lottery tickets from foreign jurisdictions.¹⁵² If the state statutes prevent a legal foreign lottery from simply advertising, as opposed to actually selling, the statutes are probably unconstitutional as a violation of the commercial speech doctrine.¹⁵³ Even actual sales probably cannot be prohibited.

All of these ancient cases appear to involve state or federal laws at a time when the target jurisdictions outlawed all lotteries and thus had a public policy reason for excluding foreign tickets. The situation changes when the state is running its own state lottery and thus has a

147. *E.g.* CAL. CONST. art. IV, § 19(a); NEV. CONST. art. IV, § 24.

148. *E.g.* CAL. PENAL CODE § 319-328 (West 1969 & Supp. 1986); CAL. GOV'T CODE § 8880.61(a) (West Supp. 1985).

149. *People v. Noelke*, 94 N.Y. 137 (1883); *See generally* *Horner v. United States*, 147 U.S. 449 (1893), and cases cited therein.

150. *People v. Noelke*, 94 N.Y. 137 (1883).

151. N.Y. PENAL LAW § 225.40 (McKinney 1985).

152. The court, in *People v. Noelke*, 94 N.Y. 137 (1883), held that a state could prevent the advertisement or sale of foreign legal lottery tickets without violating the Commerce Clause of the U.S. Constitution. There is dicta long similar lines from the United States Supreme Court in *Horner v. United States*, 147 U.S. 449 (1893) and *Cohens v. Virginia*, 19 U.S. (6 Wheat) 82 (1821). *Cohens* involved a successful attempt by the state of Virginia to prevent the sale of lottery tickets issued by the District of Columbia. The Court resolved the issue by finding that Congress had not statutorily provided for sales outside the District's boundaries.

153. *See supra* notes 57-60 and accompanying text.

financial interest in protecting its monopoly. The Commerce Clause of the U.S. Constitution would probably prohibit a state statute whose sole purpose is to prevent legal competitors from competing with its business.¹⁵⁴ If the state argued that it needed to exclude lotteries that might be run dishonestly, the constitutional answer might be that a state can set standards for foreign competing products, and can bar those products that do not meet its standards, but a state cannot simply bar all competitors in order to help its home-grown industry.¹⁵⁵

All states prohibit gambling in forms not specifically exempted. The most commonly exempted forms of gambling are charity bingo and raffles, state lotteries, social games, licensed pari-mutuel tracks, and in three jurisdictions, casinos. The states differ widely on which particular forms of legal gambling they allow,¹⁵⁶ but, as a practical matter, racetracks are the only form of foreign legal gambling, other than lotteries, that could allow Americans to place their bets while still in the United States. The state bookmaking statutes prevent bets on races outside of licensed tracks or off-track betting parlors and federal law prevents foreign tracks from participating in inter-track wagering, where patrons at one track place bets on races run at a track in another city or state.¹⁵⁷

The state statutes prohibiting gambling have little impact on foreign casinos, with one notable exception. Since all forms of gambling are illegal, except those exempted by statute, problems constantly arise as to how to treat gambling debts created in jurisdictions where the bet was legally made.¹⁵⁸ Under the common law, as adopted by all of the states, gambling debts were not enforceable in a court of law, regardless of whether the gambling was legal.¹⁵⁹ Many of the states have codified this common law doctrine;¹⁶⁰ the rest, including the courts of Ne-

154. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (even in the exercise of its unquestioned power to protect the health and safety of its people, a municipality may not erect an economic barrier protecting a local industry against competition from outside the state, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.).

155. *Id.*

156. *Bermingham, Davis, LaFleur, supra* note 4 at 12.

157. *See supra* notes 106-113 and accompanying text.

158. Recent cases involving foreign casinos trying to collect gambling debts in American courts include: *Aspinall's Club v. Aryeh*, 86 A.D.2d 428, 450 N.Y.S.2d 199 (1982); *Conado Aruba Caribbean Hotel v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977); *King International v. Voloshin*, 33 Conn. Supp. 166, 366 A.2d 1172 (1976).

159. *The Gaming Act*, 1710, 9 Anne, ch. 14 reprinted in 14 HALSBURY'S STATUTES OF ENGLAND 519 (3rd ed. 1969); *see generally* ROSE, GAMBLING, *supra* note 1. (chs. 6, 11, 12).

160. *See, e.g.,* FLA. STAT. ANN. § 849.26 (West 1976); VA. CODE §§ 11-15 (1985).

vada, have accepted it as part of the received common law.¹⁶¹ Problems arise when the foreign jurisdiction where the gambling debt was incurred takes the position that such a debt is enforceable through legal process.

The typical situation involves an American citizen who gambles in a licensed foreign casino either by using credit issued by the casino or by writing checks. After losing, the gambler refuses to make good on the credit and stops payment on the checks. The casino initiates suit. The Full Faith and Credit Clause of the U.S. Constitution¹⁶² requires the courts of each state to enforce judgments rendered by the courts of the other states. The United States Supreme Court has held that a money judgment for a gambling debt must be given full faith and credit.¹⁶³ However, this constitutional clause does not apply to judgments rendered by courts of foreign countries, nor to claims that arose in other states that have not yet reached final judgment. In those situations the much weaker doctrines of comity and choice of law apply.¹⁶⁴

If judgment has not been rendered by another state of the United States, the forum state court has two questions to decide: should the foreign casino even have access to this court, and, if so, should the court enforce a gambling debt which is legal where made but which would be illegal if made in the forum state?¹⁶⁵ The courts have been sloppy in separating both these two issues and the legal doctrines that define standards for deciding these questions.¹⁶⁶ Yet the ultimate result for the foreign casino is clear; only the courts of New York and New Jersey have found gambling is *not* repugnant to the public policy of their states and have allowed foreign casinos to use their court systems to collect.¹⁶⁷ The rest of the states have uniformly refused to open

161. *Sandler v. Eighth Judicial Dist. Ct. for the State of Nevada*, 90 Nev. 622, 614 P.2d 10, 29 U.C.C. REP. SERV. 1546 (1980); *Evans v. Cook*, 11 Nev. 69 (1876). The Nevada Legislature recently acted to partially amend the Statute of Anne to allow Nevada casinos to collect certain written gambling debts through the courts. NEV. REV. STAT. §§ 463.361-.366 (1985).

162. U.S. CONST. art. IV, § 1, cl. 1.

163. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

164. See Annotation, *Law of Forum Against Wagering Transactions as Precluding Enforcement of Claim Based on Gambling, Transactions Valid Under Applicable Foreign Law*, 71 A.L.R. 3d 178 [hereinafter Annotation]; Comment, *Enforceability of Foreign Gambling Contracts*, 22 U. MIAMI L. REV. 853 (1968); Note, *Claim Arising From Foreign Gambling Contract Held Enforceable in New York*, 33 FORDHAM L. REV. 493 (1965); Comment, *Foreign Gambling Debts Collectable in New Jersey*, 27 RUTGERS L. REV. 327 (1974).

165. See Annotation, *supra* note 164, at 178.

166. *Id.*

167. See, e.g., *Aspinall's Club v. Aryeh*, 86 A.D.2d 428, 450 N.Y.S.2d 199 (1982); *Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 307 A.2d 85 (1973).

their doors to casino gambling debt cases, even if the debt was legal where incurred.¹⁶⁸

III. UNDERSTANDING AMERICAN GAMBLING LAWS

Although the American laws affecting foreign legal gambling appear to be irrational, they can be understood if taken with the historical experience and in the legal context of the American republic. The laws are haphazard in their impact, but they were not passed without justification. Unfortunately, the justifications for many statutes and cases disappeared over one hundred years ago, while the laws remain on the books.

It is impossible to understand the American laws on gambling without first understanding the federal system. Under a federal system, the individual states are encouraged to experiment with laws affecting society, within constitutional limits. If New Jersey wants to try legalizing casinos as a means of revitalizing a dying resort, it is to the common good. If the experiment succeeds, other states are free to copy; if the experiment fails, then only one area has suffered.

The federal government has left the control of gambling to the states, except when it appears that a particular problem has grown too big for the states to handle, as with the anti-lottery laws passed to end the lottery scandals of the nineteenth century, or when there are political reasons for congressional action, as with the racketeering statutes. Since Congress has very little interest in gambling, whether legal or illegal, a statute passed to solve a particular problem will remain on the books forever. Gambling remains a questionable activity, and members of Congress do not win votes by voting to eliminate prohibitions on gambling, particularly if the only beneficiaries will be foreign businesses.

Although it is difficult to predict future scandals, there will probably be no new federal statutes designed to affect legal gambling directly, with the notable exception of legal gambling on Indian reservations.¹⁶⁹ Additional congressional action on illegal gambling, on the other hand, is almost a foregone conclusion.

The federal racketeering statutes appear approximately once each

168. *Cf. Resorts International v. Zonis*, 577 F. Supp. 876, 877 (N.D. Ill. 1984) (the Federal district court, sitting in diversity, recognized Illinois public policy against gambling contracts and refused to enforce claims of New Jersey casino against Illinois resident).

169. The House of Representatives passed and sent to the Senate a bill creating a federal commission to regulate Indian gambling. *L.A. Times*, Apr. 22, 1986, § 1, at 2, col. 1.

decade. The Copeland hearings of the 1930's created the first concerted attacks by Congress after Prohibition gave birth to nationwide syndicates of organized crime.¹⁷⁰ The late 1940's and early 1950's led to the legislation associated with the Kefauver Committee Hearings,¹⁷¹ such as the wager excise taxes,¹⁷² the prohibition against gambling ships,¹⁷³ and the Johnson Act on gambling devices.¹⁷⁴ Attorney General Robert Kennedy's war on organized crime in the early 1960s led to new prohibitions¹⁷⁵ on the wire transmission of race information¹⁷⁶ and on the transportation of wagering paraphernalia.¹⁷⁷ It also resulted in the Travel Act,¹⁷⁸ and the Gambling Devices Act of 1962.¹⁷⁹ The arrival of the Nixon Administration brought a new attack on illegal gambling¹⁸⁰ in which the Organized Crime Control Act of 1970 was passed,¹⁸¹ and gambling was added to the list of crimes which would authorize a wiretap.¹⁸² Some important new federal crimes were also created, such as obstructing state law to facilitate an illegal gambling business,¹⁸³ running an illegal gambling business big enough to impact interstate commerce,¹⁸⁴ and RICO.¹⁸⁵

Organized crime controls much of the illegal gambling in this country, almost by definition.¹⁸⁶ The activity is criminal, and most forms of illegal commercial gambling require organizations to bribe law enforcement officials, handle large bets, and collect from recalcitrant losers. So long as organized crime remains a problem, or perhaps more importantly, is perceived by the public as a problem, elected represent-

170. See *supra* text accompanying notes 64-71.

171. LAW OF GAMBLING: 1776-1976, *supra* note 8, at 562-69.

172. I.R.C. §§ 4401-4423, 4461-4463 (1982).

173. 18 U.S.C. §§ 1981-1983 (1982).

174. 15 U.S.C. §§ 1171-1177 (1982).

175. LAW OF GAMBLING: 1776-1976, *supra* note 8, at 569-91.

176. 18 U.S.C. § 1084 (1982).

177. *Id.* at § 1953 (1982).

178. *Id.* at § 1952 (1982).

179. Gambling Devices Act of 1962, Pub. L. No. 87-840, 76 Stat. 1075. These amendments strengthened The Johnson Act, *supra* note 86.

180. LAW OF GAMBLING: 1776-1976, *supra* note 8, at 591-610.

181. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

182. 18 U.S.C. § 2516 (1982), as amended by Pub. L. No. 98-292, § 8, 98 Stat. 206 (1984) and Pub. L. No. 98-473, 98 Stat. 2152 (1984).

183. 18 U.S.C. § 1155 (1982).

184. *Id.* at § 1955 (1982).

185. *Id.* at §§ 1961-1968 (1982).

186. "A successful illegal gambling enterprise, unlike any other criminal business, requires a freedom to operate in a routinized, scheduled fashion." Rubinstein, *Gambling Enforcement and Police Corruption*, GAMBLING IN AMERICA, *supra* note 96, app. 1 at 600 [hereinafter Rubinstein].

atives in Congress will continue to introduce legislation to close down illegal gambling operations. The explosive growth in gambling on Indian reservations, from million dollar bingo to wide open casinos, may produce a federal crackdown. Several bills have already been introduced in Congress to control gambling on Indian land amid much talk of the dangers of infiltration by organized crime.¹⁸⁷

Although we appear to be overdue for a new round of anti-racketeering statutes, the country's recurring fascination with organized crime has been preempted in the late 1980s by the enormous amount of attention being given to the use of illegal drugs. There is evidence that the widespread use of drugs in America goes through waves remarkably similar to the waves of legalized gambling that periodically sweep the country.¹⁸⁸ The reasons behind the waves are also similar: people discover a "new" form of recreation, forgetting the problems of past generations until use is widespread. When the inevitable problems develop, politicians react by imposing new prohibitions. An examination of the existing federal laws against illegal drugs reveals overlapping layers of statutes which would be more than sufficient to prevent all illegal drug use, if the laws were vigorously enforced.¹⁸⁹

It is somewhat difficult to draft a federal statute that distinguishes between gambling operations which are illegal under state law because they are run by criminals, and those gambling businesses, which, though also technically illegal under state law, are actually legal in a foreign country. Since there is no political incentive for Congress to attempt to make the effort, foreign legal gambling will continue to fall under as yet unwritten federal laws designed to put racketeers out of business. The politically powerful state gambling organizations no longer have the problems of being accidentally hampered by federal legislation.¹⁹⁰

It is not difficult to predict the general course of state laws on gambling, at least for the next decade or two. America's attitudes toward all forms of gambling though ambivalent, contradictory, and constantly changing over time, do follow a pattern.

To a great extent our laws reflect the feelings of the general population: gambling laws are indeed confused, inconsistent, and sometimes even accidentally, or purposely, hypocritical, as are the views of most

187. *State and Federal Concerns in the Regulation of Indian Gambling in America*, Speech by Michael Rumbolz, Chairman Nevada Gaming Control Board at Seventh Int'l Conference on Gambling and Risk Taking (Aug. 24, 1987).

188. L.A. Times, July 31, 1986, § 1, at 1, col. 1.

189. See, e.g., Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1982).

190. See, e.g., 18 U.S.C. § 1397 (1982).

Americans toward gambling.¹⁹¹ This country has had enormous problems in dealing with conflicting urges to outlaw or legalize, prohibit or tax, and those problems are magnified when the legal gambling involved originates in a foreign country.

Americans have always had trouble dealing with "victimless crimes," particularly gambling.¹⁹² The problem arises in part, from an underlying uncertainty as to what should be the basic purpose of criminal law. Should the law contain moral guidelines, telling people what they should or should not do, based on the moral beliefs of those in power to make the laws, even if the majority of the population regularly violate those standards in practice? Or should the law, particularly the criminal codes, be simply prohibitory in nature, telling people what we all agree they cannot do (*e.g.*, murder)? Should laws try to save men's souls, or simply prevent us from harming each other? American laws, since the day of our earliest Puritan ancestors, have favored moral exhortation, presenting an almost paternalistic approach.¹⁹³ Although the Prohibition Era is the best example, American law has always contained limits and prohibitions that large numbers of the population violate on a fairly regular basis, often without even knowing they have broken the law.¹⁹⁴

The anti-gambling prohibitions epitomize the traditional approach taken by American laws. While these laws are designed to protect people from themselves, they are also a part of a greater moral framework designed to reflect the legislators' and courts' views of a paradigm society. The voting public accepts this approach to laws regulating behavior indulged in by a large percentage of population.¹⁹⁵ Surveys and election results have shown that voters want most of the anti-gambling laws to stay on the books, even if they do not want those laws actively enforced.¹⁹⁶

Some understanding of America's shifting attitudes toward gambling, and thus its laws, can be gained from the recent campaigns to

191. Mangione, Fowler, Pratter and Martin, *Citizens Views of Gambling Enforcement*, GAMBLING IN AMERICA, *supra* note 96, app. 1 at 240 [hereinafter Mangione, Fowler, Pratter and Martin].

192. See Peterson, *Obstacles to Enforcement of Gambling Laws*, 269 ANNALS 9 (1950); Bloch, *The Gambling Business: An American Paradox*, 8 CRIME & DELINQ. 355 (1962).

193. Fact Research Inc., *Gambling in Perspective*, GAMBLING IN AMERICA, *supra* note 94, app. 1 [hereinafter Fact Research Inc.].

194. Cf., Helsing, *Gambling—The Issues and Policy Decisions Involved in the Trend Toward Legalization—A Statement of the Current Anachronism of Benign Prohibition*, GAMBLING IN AMERICA, *supra* note 94, app. 1, at 773 *passim* [hereinafter Helsing].

195. Mangione, Fowler, Pratter and Martin, *supra* note 191, at 240.

196. Helsing, *supra* note 194, at 773-78.

legalize state lotteries and casinos. The arguments, both pro and con, are mostly anecdotal.¹⁹⁷ Proponents of legalization argue that people will gamble whether it is legal or not, therefore, legalization will shift enormous amounts of money to legitimate uses and away from the coffers of organized crime. Opponents argue that legalization leads to compulsive gambling, ruined families, moral decay, and infiltration by organized crime.

The two positions are at the ends of the spectrum of Americans' attitudes toward the law. If the state's role is to teach moral lessons even at the cost of most people disobeying the law, then all forms of gambling should be outlawed. On the other hand, if the state has no role in telling competent adults what they can and cannot do, so long as they do not harm others, then all forms of gambling should be allowed. Although few Americans completely accept either of these positions,¹⁹⁸ swings in public attitudes between these two extremes have been mirrored in cycles of absolute prohibition and widespread legalization of gambling.

For the third time in American history legalized gambling is sweeping the nation, in what I call "the third wave."¹⁹⁹ The often unenforced anti-gambling laws found in the statutes and constitutions of the various states, as well as the federal anti-lottery laws, are the residue of the first and second waves.

The first wave began with the earliest settlements of America, funded in part by lotteries, and lasting through the 1820's and 1830's.²⁰⁰ This era of widespread legal lotteries ended with the spread of Jacksonian morality, aided by numerous well-publicized scandals.²⁰¹ By the beginning of the Civil War all but three states had outlawed lotteries, and the first federal anti-lottery laws were adopted.²⁰²

The Civil War and the expansion of the western frontier brought about the second wave. The states of the old South needed a way to raise money to rebuild their devastated economies,²⁰³ while the Wild West allowed legal gambling because it was impossible to outlaw this typical frontier diversion.²⁰⁴ Soon however, the second wave came

197. Fact Research Inc., *supra* note 193, at 73-92. For a concise summary of the arguments on both sides in table form, *see id.* at 99.

198. *Id.*

199. ROSE, GAMBLING, *supra* note 1; Rose, *Casino Gambling*, *supra* note 1.

200. FORTUNE'S MERRY WHEEL, *supra* note 12, at 30-32, 177 204-205.

201. *Id.* at 204 *et seq.*

202. Blanche, *Lotteries, Yesterday and Tomorrow*, 259 ANNALS 72 (1950).

203. FORTUNE'S MERRY WHEEL, *supra* note 12, at ch. 12; LAW OF GAMBLING, 1776-1976, *supra* note 8, at 282 *et seq.*

204. J. FINDLAY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS, ch. 3 (1986) [hereinafter PEOPLE OF CHANCE].

crashing down. The trappings of civilization brought the desire for respectability to the West,²⁰⁵ while large public scandals rocked the legal lotteries.²⁰⁶ Soon only Nevada and the territories of New Mexico and Arizona remained as outposts of casino gambling,²⁰⁷ since the Louisiana Lottery Scandal forced the federal government to shut down the lotteries.²⁰⁸ Even Nevada and the last territories of the Wild West outlawed all forms of gambling shortly after the turn of the twentieth Century.²⁰⁹ At the same time, betting on horse races fell into disfavor and the tracks were closed. By 1910 only Maryland, Kentucky and New York allowed such betting, and in that year New York outlawed it.²¹⁰ The United States was once again virtually free of legalized gambling.²¹¹

The third wave began with the Depression. Nevada re-legalized casino gambling in 1931.²¹² Twenty-one states opened race tracks in the 1930s, with additional states allowing pari-mutuel betting in every decade since.²¹³ The big boom began with the first legal state lottery opening in New Hampshire in 1964.²¹⁴ Today, the majority of the population of the country lives in states with legal lotteries and the majority of the states have race tracks.²¹⁵ Betting on horse races, dog races and jai alai is permitted. Social gambling has been decriminalized in many states, and charity gambling is the rule, not the exception. It is impossible to keep up with the various proposals for additional legalization being discussed in every state.²¹⁶

American gambling laws have had a recurring, consistent pattern

205. *Id.*

206. FORTUNE'S MERRY WHEEL, *supra* note 12, at ch. 12.

207. Act of March 4, 1869, ch. 71, 1869 Nev. Laws 119 (this Act made casino gambling legal in Nevada); Currie, *The Transformation of the Southwest: Through the Legal Abolition of Gambling*, CENTURY MAGAZINE, Apr. 1908, at 905 (describes casino gambling in New Mexico and Arizona) [hereinafter Southwest Transformation].

208. See *supra* text accompanying notes 8-36, 46-49.

209. Act of March 24, 1909, ch. 210, 1909 Nev. Laws 307; Act of March 18, 1909, ch. 92, 1909 Ariz. Laws 231. See also *Southwest Transformation*, *supra* note 207, at 905.

210. KING, GAMBLING AND ORGANIZED CRIME 26 (1969).

211. D. WEINSTEIN & L. DEITCH, THE IMPACT OF LEGALIZED GAMBLING 13 (1974) [hereinafter LEGALIZED GAMBLING].

212. Act of March 19, 1931, ch. 99, 1931 Nev. Laws 165.

213. LEGALIZED GAMBLING, *supra* note 211, at 13-14.

214. V. ABT, J. SMITH & E. CHRISTIANSON, THE BUSINESS OF RISK 56 (1984).

215. *Id.* at 6. "58% of the people in the United States now live in lottery states," according to the advertisements from Scientific Games, PUBLIC GAMING, (March 1986, back cover).

216. Trade publications like Public Gaming, and Gaming and Wagering Business have been fairly successful reporting when a form of gambling becomes legal, but have had trouble keeping up with the flood of bills entered across the country.

throughout the country's history, beginning in the earliest colonial period and persisting through the most recent elections. When all forms of gambling are illegal, there is pressure for legalization, first of one game and then gradually, of all forms. Although it may be illegal, many people are gambling, at either social games or underground commercial lotteries, race books and casinos.²¹⁷ The anti-gambling laws are difficult to enforce,²¹⁸ and the general population does not want enforcement anyway, if it means taking police resources away from more serious crimes.²¹⁹ The result is widespread evasion of the law, leading to disrespect and corruption of law enforcement and the legal system.²²⁰ The public response is a demand for reform, non-involvement by officials in these areas of moral ambiguity, and for legalization.²²¹

Sometimes the breakthrough in the flat prohibition on gambling comes from the legalization of a seemingly benign form. Charity bingo, for example, is often seen as a relatively harmless game, a means of raising needed money for worthy causes, and not as a form of dangerous gambling. The reality can be something far different.²²² Today, charity bingo is the least regulated form of commercial gambling. State lotteries are sold as a voluntary tax; the California Lottery even took the official position that buying a lottery ticket is not gambling, but merely a fun way to raise money for education.²²³

Once one form of gambling has been legalized, the anti-gambling arguments based on morality begin to fade away. It is impossible to argue that it is proper to place a bet at a licensed race track but a moral sin to place the identical bet at a legal off-track betting parlor. People see the state legalization of one game as the moral approval of gambling in all forms and see hypocrisy in the remaining prohibitions.²²⁴ Even the legalization of a game by a neighboring state can

217. Helsing, *supra* note 194, at 778-79.

218. Rubenstein, *supra* note 186, at 610.

219. GAMBLING IN AMERICA, *supra* note 96, at 48.

220. Rubinstein, *supra* note 186, at 611.

221. Duncan, *Gambling-Related Corruption*, GAMBLING IN AMERICA, *supra* note 96, app. 1, at 587-88.

222. LOS ANGELES SOCIAL SERVICES DEPARTMENT, SUPPLEMENTAL REPORT TO THE POLICE, FIRE AND PUBLIC SAFETY COMMITTEE OF THE LOS ANGELES CITY COUNCIL (March 3, 1983). The average bingo player is an older woman, married, divorced or widowed, median income of \$21,500; she risks \$4,500 per year on bingo, over 20% of her pre-tax income. *Id.*

223. Skeleton, *Lottery Ads Speak Not of Gambling: "This Will be Fun!"* L.A. Times, Sept. 9, 1985, at 3, col. 5. "[L]otteries aren't gambling, simple as that." *Id.* (statement of Brad Fornaciari, advertising agent for the California Lottery).

224. *Report on Task Force on Legalized Gambling Sponsored by the Fund for the City of New York and the Twentieth Century Fund*, EASY MONEY 78 (1974).

start the decline of the moral barriers against gambling. It is difficult for a state official to argue that a lottery would be immoral when his constituents are going across the state line by the millions to buy tickets.

The games that have been legalized require constant promotion to survive. The lottery ticket is a consumer item, and not a very good one. Even with the most active advertising, sales can drop fifty percent in the first six months.²²⁵ Once sales drop, the state has to either face reality, that early sales projections will not be met, or act to remedy the situation. The only remedies are even more promotions, a liberalization of the rules to attract more players, or the introduction of new games.²²⁶

Once the idea of legalized gambling has been accepted, even if only with a single game, proponents can direct discussion away from morality and toward cost/benefit analyses of various other games that might be legalized. Once all of the states in a region have the same game, the first to legalize a new game has an advantage and can siphon off the disposable income of its neighbors, until they too, install that game.²²⁷ A domino effect is created, as can be seen by the spread of state lotteries from state to state throughout the Northeast and now across the nation.

Meanwhile, the police and prosecutors are finding it increasingly difficult to enforce those anti-gambling laws that are still on the books, and venality is growing. Even the police begin to see hypocrisy in trying to prohibit a wager when an almost identical game is being actively promoted by the state.²²⁸ Again, there are cries for reform and for a

225. See Malnic, *Lottery Sales Drop as the Novelty Wears Off*, L.A. Times, Apr. 12, 1986, at 30, col. 1.

226. Revenue from a legal game will show a rapid drop if the game is not given constant promotion. The author calls this Phenomenon the "J" curve, since a graph of the game's revenue looks like the letter "J" on its side. For complete description of the "J" curve and its effects, see ROSE, GAMBLING, *supra* note 1, at 14.

227. Rosen, *The Economics of State-Operated Lotteries*, GAMBLING IN AMERICA, *supra* note 96, app 1, at 808-09. "In the first year of operation 80% of the [New Hampshire lottery] tickets were bought by residents of Massachusetts, New York and Connecticut." *Id.*

228.

The police are asked to wipe out gambling with those few exceptions, which exist only for good cause. This is ludicrous. In most states, general laws prohibit virtually every form of gambling, except where special interest groups have been able to win exceptions for themselves. Racing interests have done it everywhere in the Nation. The church and veterans' organizations have been able to get authority to use 'sinful' gambling for their righteous purposes.

And, so what was to have been a genuine prohibition, is so full of exceptions and exemptions that it is now a prohibition against gambling applying only to those

relaxation of the laws against all forms of gambling.

This is where America is in the mid-1980's, with the wave of legalized gambling still rising throughout the nation. In the past, the wave has continued to grow until many forms of gambling become legal, widespread and commercialized. At this state in the cycle everyone seems to be playing and the amounts of money involved are staggering. Those few prohibitions that still exist are virtually ignored by the police, and venality and corruption are widespread and open, with some officials instituting a "licensing" system of posted bribes for gambling establishments.²²⁹

The next stage in the cycle is a devastating deluge of public scandals. Legal gambling is very big business with very few paper records; at least \$159 billion is bet each year, mostly in untraceable cash.²³⁰ It is not difficult to understand the temptation to rig the outcome of a legal game. Players can live with adverse odds, but cheating cannot be tolerated, particularly when it results in the non-payments of winners. Add well-publicized incidents of cheating to public disclosures of official corruption and the result will be a call for sweeping reform, for turning out of office all tainted officials, and for closing down the games.²³¹

What appears to be the final stage of the cycle is the revolt by the majority of the population, sweeping in an era of reform, moral fervor, and attempts to outlaw gambling forever.²³² Statutes and even constitutional amendments are passed to lock in the prohibition on gambling. Of course, this stage of prohibition only leads, inevitably, to the next stage where demand once again builds for a legalization of some forms of gambling.

It is important to realize that although these cycles have repeated themselves throughout American history, different regions of the country are at different stages of the cycle. It is also important to note that different forms of gambling have been thought of and treated differently throughout American history. To understand the American laws affecting foreign legal gambling you must know not only where in the cycle of legalization and prohibition the jurisdiction stands, and whether there was a particular notorious problem sometime in the past that brought federal intervention, but also which form of gambling is

who are not organized. And do you think that prevents others from gambling?

Address by Robert DiGrazia, Police Chief, Montgomery County, Maryland, Spring Conference on Public Gaming (April 13, 1977).

229. Peterson, *Obstacles to Enforcement of Gambling Laws*, 269 ANNALS 9 (1950).

230. Birmingham, Davis, & LaFleur, *supra* note 4, at 24.

231. See, e.g., FORTUNE'S MERRY WHEEL, *supra* note 12, at chs. 11-12 (the public responses to the lottery scandals of the 1830's and the Louisiana Lottery era).

232. *Id.*

involved.

The United States inherited its attitudes and laws toward gambling from the English common law. In the earliest days of the common law all forms of gambling were legal, although the courts could close down as a nuisance any activity that ran the risk of a breach of the peace or of public morals.²³³

Even in the earliest days, different forms of gambling were treated differently. The first English statute to directly affect gambling was signed by King Richard II in 1388 and directed all laborers and serving men to secure bows and arrows and to abandon the pursuit of "tennis or football, . . . coits, dice, casting of stone, kails, and other such importune games."²³⁴ The law reflects the feelings of the society of the time; "gaming", i.e., betting on games of chance, was seen as sapping the country's ability to wage war. Later, gaming and the rowdy houses and saloons where the games were played, was felt to be undermining the strength of the nation by taking working men away from the fields and factories. The strong antagonism toward gambling became part of the common law through the passage of additional ancient statutes.²³⁵

Other forms of gambling did not create the same negative feelings. Horse racing for example, was supposed to "improve the breed," and was thus actively encouraged, or at least tolerated.²³⁶ The agrarian and pre-industrial societies were built around the working horse. Horse races were more tests of endurance than of speed, and the horses were not specifically bred for running. Of course, horses were expensive pieces of property and wagers tended to be limited to bets between the wealthy.²³⁷ It was only with the technological developments of the late nineteenth century, i.e., the telephone, telegraph and pari-mutuel tote machines, freeing the bettors from having to be physically present at the race and creating the commercial bookie and poolroom, that book-making became a social problem.²³⁸

The cycles for the third form of gambling, the lottery, can be tracked back before there even was a United States.²³⁹ Lotteries have repeatedly gained wide acceptance, only to be hit by scandal and swin-

233. LAW OF GAMBLING: 1776-1976, *supra* note 8, at 1.

234. 12 Rich. 2, ch. 6 (1388), *reprinted* in 2 STATUTES AT LARGE, FROM THE FIFTEENTH YEAR OF KING EDWARD III TO THE THIRTEENTH YEAR OF KING HENRY IV INCLUSIVE 302 (1972).

235. The Gaming Act, 1710, 9 Anne, ch. 14, § 1.

236. LAW OF GAMBLING: 1776-1976, *supra* note 8, at 54-56.

237. S. LONGSTREET, WIN OR LOSE: A SOCIAL HISTORY OF GAMBLING IN AMERICA 184-96 (1977).

238. H. CHAFETZ, PLAY THE DEVIL, A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 to 1955 376-78 (1960).

239. PEOPLE OF CHANCE, *supra* note 204, at ch. 1.

dles, leading to public revulsion and a desire to outlaw for all time. Many of the state constitutions were written while the memories were still fresh of the lottery scandals that ended the first wave.²⁴⁰

Thus, many states outlaw only lotteries in their constitutions, with later statutory prohibitions on gaming and bookmaking. The original California constitution, written in 1850 by settlers from the East Coast,²⁴¹ who remembered the lottery scandals, outlaws only one form of gambling, the lottery.²⁴² During the Gold Rush era California allowed and taxed casinos,²⁴³ however, by the end of the 1850's gaming was outlawed by state statute.²⁴⁴ The California legislature did not feel it was necessary to outlaw betting on horse races until 1909.²⁴⁵

The wide swings in the public's attitudes toward gambling and the historical variations on the treatment of the various forms of gambling under the law can lead to some remarkable anomalies.²⁴⁶ Nevada, which has more forms of legal gambling than any other state, has a constitutional prohibition on lotteries.²⁴⁷ In fact, Nevada legislators are strictly forbidden from even legalizing any forms of lottery.²⁴⁸ New Jersey, which has a state lottery, race tracks and casinos, outlaws the game of poker.²⁴⁹ Montana has card rooms for poker, race tracks, sports betting and video poker machines, but no state lottery.²⁵⁰ North Dakota allows the casino game of blackjack but prohibits all betting on races or lotteries.²⁵¹

240. BY CHANCE A WINNER, *supra* note 12, at 49-51.

241. *Id.*

242. CAL. CONST. art. IV, § 19(a) dates back to art. IV, § 27 of the 1849 Constitution which was later amended to allow charity bingo, licensed parimutuel betting, and with the establishment of a state lottery came a specific prohibition on casino gambling.

243. PEOPLE OF CHANCE, *supra* note 204, at 88.

244. *Id.* at 99; CAL. PENAL CODE § 330.

245. H. CHAFETZ, *supra* note 238, at 383 (1960); CAL. PENAL CODE § 33(a) (West 1969 & Supp. 1986).

246. For a comprehensive survey of those forms of legal gambling in the various states, see Bermingham, Davis, & LaFleur, *supra* note 4, at 12.

247. NEV. CONST. ART. IV, § 24.

248. *Id.*

249. See N.J. STAT. ANN. § 5:9-1 *et seq.* (West 1973 & Supp. 1986) (lotteries authorized); N.J. STAT. ANN. § 5:10-1 *et seq.* (West 1973 & Supp. 1986) (horse racing authorized); N.J. STAT. ANN. § 5:12-1 *et seq.* (West Supp. 1986) (casinos authorized); N.J. STAT. ANN. § 2C:37-1 (West 1982) (gambling offenses); N.J. STAT. ANN. § 5:12-5 (West Supp. 1986) (casino games authorized).

250. See MONT. CODE ANN. § 23-4-101 *et seq.* (1985) (horse racing authorized); MONT. CODE ANN. § 23-5-301 *et seq.* (1985) (card games authorized); MONT. CODE ANN. § 23-5-501 *et seq.* (1985) (sports betting authorized); MONT. CODE ANN. § 23-5-601 *et seq.* (1985) (video poker authorized).

251. See N.D. CENT. CODE § 53-06.1-10 (1985 Supp.) (blackjack authorized); N.D. CONST. art. XI § 25 (lotteries prohibited); N.D. CENT. CODE § 12.1-28-01 *et seq.* (wagering

With increased legislation, as the third wave continues to spread, the prohibitions affecting foreign legal gambling will weaken. At the very least foreign legal gambling operations will be able to raise constitutional challenges to laws that prohibit them from advertising or from selling lottery tickets when the only justification appears to be to protect a state lottery from unwanted competition. Until the courts have struck down these remnants of ancient scandals, foreign legal gambling must tread lightly, checking carefully both state and federal laws. The American laws which affect foreign legal gambling are haphazard, discriminatory, and even hypocritical, but they are not necessarily irrational. Careful analysis can show in almost every case why the laws were created. It is then up to the foreign operators, and their American attorneys, to see what can be done to win fair and equal treatment under the law.