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NOTES

VIDEO POKER AND THE LOTTERY CLAUSE: WHERE COMMON LAW AND COMMON SENSE COLLIDE

*This is not a difficult legal question.**

I. INTRODUCTION

On January 20, 1868, delegate Timothy Hurley of Berkeley county introduced a constitutional prohibition on lotteries for consideration before his fellow delegates of the 1868 South Carolina Constitutional Convention in Charleston.¹ The provision eventually passed without a single word of debate.² While this silence seems unfortunate today,³ it is not at all surprising. The delegates had considerably more pressing matters to discuss at the time, given the herculean task before them of rebuilding the state's governmental structure immediately following the Civil War. One hundred and thirty years later, however, the meaning and scope of this constitutional provision have moved to center stage, within the context of a statewide political debate over the legality of video gambling machines.⁴

At publication, United States District Judge Joseph F. Anderson, Jr. certified the question of whether video poker is an unconstitutional lottery for determination by the South Carolina Supreme Court.⁵ In a prompt reply, the

* Charlie Condon, Editorial, *Video Poker's Constitutionality Must Be Resolved Once and for All*, THE STATE (Columbia, S.C.), Jan. 30, 1998, at A13. The question South Carolina Attorney General Condon refers to is whether video poker constitutes a lottery and is therefore prohibited under the South Carolina Constitution. In the Attorney General's opinion, the question is easily answered in the affirmative. *Id.*

1. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 69-70 (J. Woodruff, reporter) (Charleston, S.C., Denny & Perry 1868) [hereinafter 1868 CONVENTION].

2. 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 773 (J. Woodruff, reporter) (Charleston, S.C., Denny & Perry 1868).

3. This omission is especially unfortunate for those attempting to discern the original intent behind the Lottery Clause.

4. Video gambling machines are commonly referred to as "video poker" in South Carolina. See generally Michael Sponhour, 'Video Poker is a Cancer,' Governor's Plan: Ban the Machines, Forgo the Revenues, THE STATE (Columbia, S.C.), Jan. 14, 1998, at A1.

5. Johnson v. Collins Entertainment Co., No. 3:97-2136-17 (D.S.C. Feb. 24, 1998) (order of certification to the Supreme Court of South Carolina) [hereinafter Order of Certification].

state's highest court agreed to answer the certified question, citing the "public interest" in resolving the issue quickly.⁶ The case responsible for Judge Anderson's certification is *Johnson v. Collins Entertainment Co.*,⁷ a class action suit brought in federal court by gamblers against the video poker industry.⁸ By raising the lottery issue, the plaintiffs seek a court-ordered preliminary injunction to discontinue the operation of all video poker machines in the state due to their status as illegal lotteries.⁹ This Comment addresses the certified question—is video poker a lottery?

The answer to this question may determine the livelihood of an estimated \$2 billion per year statewide industry.¹⁰ Video poker has grown over the last two decades from "a back-room game of dubious legality"¹¹ to become a major player in South Carolina's economic and political life.¹² The burgeoning debate over its continuing existence pits those who decry the moral evil and personal destruction wrought by this gambling against those who defend the industry because it provides thousands of jobs and raises state revenues in the form of license fees and taxes.¹³ With these pressing interests at stake, whether or not video poker is an illegal lottery is a question ripe for judicial determination.¹⁴

6. Clif LeBlanc, *Justices Will Rule on Poker: S.C. Supreme Court Puts Lawsuit on Legal Fast Track*, THE STATE (Columbia, S.C.), Mar. 5, 1998, at A1 (characterizing the court's expedited timetable for answering the certified question as "fast-tracking" the issue).

7. No. 3:97-2136-17 (D.S.C. filed June 9, 1997).

8. Michelle R. Davis, *Poker Suit a State Court Issue? Yes, Says U.S. District Judge Anderson*, THE STATE (Columbia, S.C.), Jan. 7, 1998, at B1. The plaintiffs in this class action suit claim to be addicted to the video poker machines. *Id.*

9. Complaint, *Johnson v. Collins Entertainment Co.*, No. 3:97-2136-17 (D.S.C. filed June 9, 1997). This class action suit also seeks multiple damage claims under a number of different causes of action, including the following: RICO (Racketeer Influenced & Corrupt Organizations Act), fraud and deceit, negligent misrepresentation, unfair trade practices, conversion, civil conspiracy, and statutory right to recover gambling losses. *Id.* See generally Clif LeBlanc, *Poker Operators Draw No Aces*, THE STATE (Columbia, S.C.), Jan. 27, 1998, at B1 (discussing Judge Anderson's January 26th ruling allowing the RICO action to proceed, rejecting the defendants' attempt to move the suit back to state court, and permitting Attorney General Condon to intervene in the suit on the side of the plaintiffs). Discussion of these causes of action, and indeed any detailed treatment of this particular suit, is beyond the scope of this Comment.

10. Tony Horowitz, *Dire Straights: In a Bible Belt State, Video Poker Mutates Into an Unholy Mess*, WALL ST. J., Dec. 2, 1997, at A1. The magnitude of the video poker industry is further demonstrated when considering the entire state budget of South Carolina is only \$5.4 billion. *Id.*

11. *Id.*

12. *Id.*

13. See Sponhour, *supra* note 4. See generally Horowitz, *supra* note 10 (characterizing South Carolina's video poker industry as one of the most unregulated and "widest-open" forms of gambling in the country).

14. See LeBlanc, *supra* note 6 and accompanying text. Justice Toal of the South Carolina Supreme Court recently noted these interests and the need for judicial clarity in this area:

The owners of video game machines, as well as law enforcement officials charged with the responsibility of seizing and destroying illegal gambling devices, have a strong interest in knowing from week to week whether

The intent behind this Comment is not to take sides in this political debate, but rather to clarify the meaning and scope of the constitutional lottery prohibition as applied to video poker.¹⁵ Toward this end, a general evolutionary background of lotteries and video poker is provided as a starting point. Part II discusses the history of lotteries in this country and of the constitutional prohibition on lotteries in South Carolina. Part III examines the history of video poker and the statutory scheme designed to regulate the industry. Part IV examines case law from other states to determine whether video poker constitutes a "lottery" under the conventional definition of that term. Part V introduces an alternative approach to defining what constitutes a lottery, taking into consideration the logical inconsistency of the conventional definition of the term.

II. LOTTERIES

A. *History of Lotteries in the United States*

The presence of lotteries¹⁶ in this country predates the American Revolution.¹⁷ As early as 1612, Britain chartered a London company to raise money via a lottery to support the colonial settlement in Jamestown.¹⁸ Upon revocation of this charter in 1624, the Jamestown colonists turned to domestic

certain machines are legal. Neither the owners nor law enforcement benefit from judicial equivocation or vacillation on this issue.

State v. One Coin-Operated Video Game Mach., 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996).

15. The author has no economic, political, or personal ties to either side of the debate.

16. Consultation of legal and English language dictionaries proves unhelpful when attempting to precisely define the term "lottery." *Black's Law Dictionary* is typical of most, providing both broad and narrow definitions of the term. Because it is quite simple for each party in a case like *Johnson* to cite from a particular dictionary definition of "lottery" to support its view of the term (be it narrow or broad), the author does not consider it fruitful to devote substantial space in this Comment to discussing these definitions.

However, for the interested reader, see BLACK'S LAW DICTIONARY 947 (6th ed. 1990), which defines lottery: "A chance for a prize for a price. A scheme for the distribution of a prize or prizes by lot or chance, the number and value of which is determined by the operator of lottery." See also AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 677 (Springfield, Mass., Merriam 1857) ("A scheme for the distribution of prizes by chance, or the distribution itself. Lotteries are often authorized by law."); IX THE OXFORD ENGLISH DICTIONARY 43 (2d ed. 1989) ("An arrangement for the distribution of prizes by chance among persons purchasing tickets. . . . [u]sually intended as a means of raising money for the benefit of the promoters, of the State, or of some charitable institution."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1338 (3d ed. 1993) ("[A] scheme for the distribution of prizes by lot or chance; . . . a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them usu[ally] as determined by the numbers on tickets as drawn at random . . .").

17. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 23 (1992).

18. *Id.* at 24. King James I chartered the Virginia Company of London to create and administer this lottery. *Id.*

lotteries to raise sufficient funds.¹⁹ These lotteries were popular as an alternative to taxes during a period when the country lacked a strong central government.²⁰ "Lottery proceeds were used to build cities, establish universities, and even to help finance the Revolutionary War."²¹ The popularity of these lotteries grew to the point that, by the early 1800s, twenty-four of the thirty-three states in the union sanctioned lotteries as a valid mechanism for supporting local improvement projects.²² A description of how these lotteries commonly operated follows:

The Legislature would first grant a charter to a lottery company for a period of years in consideration of a stipulated sum in cash, annual payment of further sum, and a percentage of the receipts from the sale of tickets. Under such a charter the company was authorized to sell tickets, or certificates of subscription to issue receipts therefor, and to contract with agents to sell them on commission or otherwise. The tickets or certificates entitled the holders to such articles as might be awarded them, the distribution to be made in public, after advertising, by the casting of lots, or by lot, chance, or otherwise in such manner as directed by the by-laws of the corporation.²³

By the mid 1800s the country experienced a backlash against lotteries.²⁴ Two overriding concerns drove this backlash, eventually engulfing the entire country in an anti-lottery fervor: widespread fraud by lottery organizers and operators and the attendant social problems related to gambling.²⁵ In 1821, New York became the first state to pass a constitutional amendment prohibiting lotteries.²⁶ By 1860, all but three states proscribed lotteries by statute or constitutional amendment.²⁷ For most of the following one-hundred years, state involvement in lotteries was virtually nonexistent.²⁸

19. *Id.*

20. *Id.* at 12. The colonists considered lotteries a voluntary tax. *Id.* at 26.

21. *Id.* at 12.

22. *Id.* at 31.

23. *Lee v. City of Miami*, 163 So. 486, 489 (Fla. 1935).

24. *See Rychlak, supra* note 17, at 32. This movement was part of the "general social reform that included movements for temperance, peace, women's rights, educational reform, prison reform and abolition of slavery." *Id.*

25. *Id.* Examples of the social problems attributed to gambling included the following: addiction, poverty, disintegration of families, crime, depression, and even suicide. *Id.* at 32-35.

26. *Id.* at 36-37. The constitutional provision read: "No lottery shall hereafter be authorized in this State; and the legislature shall pass laws to prevent the sale of all lottery tickets within this State, except in lotteries already provided by law." *Id.* at 36 (quoting N.Y. CONST. art. VII, § 11 (1821), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 188 (W. Swindler ed., 1979)).

27. *Id.* at 37-38. The three states were Missouri, Kentucky, and Delaware. *Id.*

28. *Id.* at 44. The one notable exception being the Louisiana Lottery, also known as "The

Starting in the 1960s, lotteries began to reemerge as a popular mechanism for raising state revenues without increasing taxes.²⁹ This reemergence resulted in a domino effect from state to state. As one state amended its constitution to allow for a state-run lottery, neighboring states followed suit fearing a loss of potential revenues from the neighboring lottery.³⁰ In the context of increased competition, some states have recently experimented with video lotteries.³¹ The current popularity of lotteries has reopened the same troubling questions concerning the social costs of gambling that this country struggled with more than a century ago.³²

B. History of Lotteries in South Carolina

Early in its history, South Carolina statutorily prohibited lotteries.³³ Following the national trend, South Carolina added a constitutional prohibition in 1868 ("Lottery Clause").³⁴ Article XIV, section 2 of the South Carolina Constitution read: "Lotteries, and the sale of lottery tickets, for any purpose whatever, are prohibited, and the General Assembly shall prevent the same by penal laws."³⁵ At the 1895 Constitutional Convention, the Lottery Clause was modified slightly and moved to Article XVII, section 7.³⁶ The modified version

Serpent." *Id.* at 40. This notoriously corrupt lottery was finally eradicated after acts of Congress in 1890 and 1895. *Id.* at 43-44.

29. *Id.* at 44-45.

30. Rychlak, *supra* note 17, at 58-60.

31. *See, e.g.,* Poppen v. Walker, 520 N.W.2d 238, 248 (S.D. 1994) (holding video lottery an illegal "game of chance" and not covered by the South Dakota constitutional provision allowing certain forms of lotteries).

32. *See* Rychlak, *supra* note 17, at 60; *see also supra* text accompanying note 25. Professor Rychlak provides an excellent in-depth treatment of the present-day social costs of lotteries and other state-sanctioned forms of gambling. *See* Rychlak, *supra* note 17, at 60-74.

33. Act of May 4, 1751, No. 784, 3 S.C. Stat. 729 (codified as amended at S.C. CODE ANN. §§ 16-19-10 to -20 (Law. Co-op. 1976 & Supp. 1997)) (prohibiting the setting up and adventuring in lotteries). The preamble of the 1751 law, entitled "An Act for Suppressing and Preventing of Private Lotterys," stated:

WHEREAS, many persons have lately, and do daily presume to set up lotterys under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandizes and other things, by chances, which practices are highly prejudicial to the public and to the trade of this Province, and tend to defraud his Majesty's subjects; we therefore pray your most sacred Majesty that it may be enacted . . .

Id. at 729.

In 1846, the General Assembly added a prohibition on the sale of lottery tickets. Act of Dec. 18, 1846, No. 2983, 11 S.C. Stat. 391 (codified as amended at S.C. CODE ANN. § 16-19-30 (Law. Co-op. 1976)).

34. *See* 1868 CONVENTION, *supra* note 1.

35. S.C. CONST. of 1868, art. XIV, § 2.

36. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 252 (Columbia, S.C., Calvo 1895) [hereinafter 1895 CONVENTION]. As with the 1868 Convention, the

read: "No lottery shall ever be allowed, or be advertised by newspapers, or otherwise, or its tickets be sold in this State; and the General Assembly shall provide by law at its next session for the enforcement of this provision."³⁷ Finally, after a referendum on the matter passed in the 1974 general election, the Lottery Clause was amended to permit the game of bingo under certain circumstances.³⁸ Today, the Lottery Clause reads:

No lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State. The game of bingo, when conducted by charitable, religious or fraternal organizations exempt from federal income taxation or when conducted at recognized annual State and county fairs, shall not be deemed a lottery prohibited by this section.³⁹

C. Interpretation of the Lottery Clause

One of the earliest cases discussing South Carolina's lottery prohibition is a pre-Lottery Clause case decided in 1818. In *State v. Pinchback*⁴⁰ the South Carolina Supreme Court took the opportunity to interpret the Lottery Act of 1762,⁴¹ which was the precursor to the constitutional prohibition on lotteries.⁴² The court held that a raffle of watches did not constitute a lottery as it understood the meaning of the term "lottery."⁴³ The court narrowly construed the type of activities that would qualify as a lottery, essentially classifying a lottery as a strict subclass of the larger class of gambling in general.⁴⁴ While the

delegates of 1895 adopted the new version of the Lottery Clause without any debate. *Id.* at 287.

37. S.C. CONST. of 1895, art. XVII, § 7.

38. See Act of Mar. 11, 1975, No. 43, 1975 S.C. Acts 45.

39. S.C. CONST. art. XVII, § 7.

40. 4 S.C.L. (2 Mill) 33 (1818).

41. *Id.* The Lottery Act of 1762 contained essentially the same language as the 1751 act prohibiting lotteries. *Id.*; see *supra* note 33.

42. 7 S.C. JURISPRUDENCE *Gaming* § 2, at 190 (1991) ("[T]he Lottery Act, which has existed since 1762 . . . was made a part of the state constitution of 1868.").

43. *Pinchback*, 4 S.C.L. (2 Mill) at 34.

44. *Id.* The court noted:

The term lotteries, as used in the act, appears to me to be a term of art, for if otherwise it may mean any thing, as in common parlance it is applied to one half of the ordinary occurrences or accidents of life. If, then, it be a term of art, and it is to be applied to the class to which it belongs, it embraces only one class of adventures or hazards, the grand schemes of which our newspapers daily exhibit. I do not mean by this that a lottery cannot exist without this formality and publicity, but I mean only to say that there may be an adventure or hazard without a lottery; every throw of the die, even for an ordinary wager, is an adventure or hazard, and I am sure it never yet entered the mind of any man that it constituted a lottery.

Id.

court was clear on what did *not* constitute a lottery, it was less than clear on an affirmative definition of the term.⁴⁵ Such definitional clarity would have to wait until 1939.

*Darlington Theatres, Inc. v. Coker*⁴⁶ contains the South Carolina Supreme Court's most extensive discussion of the Lottery Clause, and so provides the groundwork upon which the issue of video poker may ultimately be decided. In *Darlington Theatres* the court held that a local theater's practice of drawing names for a cash prize was not a lottery.⁴⁷ The court defined a lottery in terms of three essential elements: "(1) The giving of a *prize*, (2) by a method involving *chance*, (3) for a *consideration* paid by the contestant or participant."⁴⁸ All three elements must be present for a lottery to exist.⁴⁹ Because the theater's promotional scheme did not require the purchase of a ticket, consideration was lacking and thus the raffle was not a lottery.⁵⁰ While the court's three-element test seemed to state clearly a rather broad definition of lotteries for future application, much of the court's language was reminiscent of the narrower construction seen in the *Pinchback* decision.⁵¹ This apparent inconsistency is examined in Part V of this Comment.

Controversy over the Lottery Clause resurfaced in the 1970s amid questions concerning the constitutionality of the game of bingo. After the South Carolina Attorney General issued an opinion in 1970 declaring bingo an illegal

45. In short, *Pinchback* leaves us with no more of a definition than did Justice Potter Stewart in his reference to hard-core pornography: "I know it when I see it . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

46. 190 S.C. 282, 2 S.E.2d 782 (1939).

47. *Id.* at 296, 2 S.E.2d at 788. In *Darlington Theatres* the supreme court affirmed and reported the circuit court's order. *Id.* at 283-97, 2 S.E.2d at 782-88.

48. *Id.* at 291, 2 S.E.2d at 786 (emphasis added). The court went on to quote definitions of the term "lottery" found in dictionaries and case law to support its construction of the term. *Id.* at 291-93, 2 S.E.2d at 786-87; see also *FCC v. ABC*, 347 U.S. 284, 290 (1954) (utilizing the same three-element test to define what constitutes a lottery).

49. *Darlington Theatres*, 190 S.C. at 291, 2 S.E.2d at 786.

50. *Id.* at 296, 2 S.E.2d at 788. Had the theater required the purchase of anything to participate in the drawing, irrespective of whether it was for a ticket or not, then the requisite consideration would have been present and the scheme deemed a lottery. *Id.* at 289-90, 2 S.E.2d at 785.

51. This language is worth noting at some length:

In other words, it seems to me that the statute [prohibiting lotteries] will not bear the construction that any scheme that involves an element of chance comes within the prohibition. . . . *The statute is undoubtedly directed at a particular type of gaming or gambling which has become commonly known as a lottery, and not the prohibition of games of chance of all kinds. . . .* [I]t is apparent that the constitutional and legislative prohibition is directed at a special type of vice . . . —the type that has come to be denominated both in the law and in common parlance by the word lottery.

Id. at 290, 2 S.E.2d at 785-86 (emphasis added).

lottery,⁵² South Carolina passed a constitutional amendment in 1975 carving out an exception to the lottery prohibition for certain types of bingo.⁵³ The South Carolina Supreme Court subsequently endorsed the opinion of the Attorney General by stating that bingo had been illegal lottery up until the passage of the 1975 amendment.⁵⁴ In short, South Carolina has generally accepted with little resistance that the game of bingo is, and always has been, a lottery.

Judicial application of the Lottery Clause to video poker is sparse. Opinions of the Attorney General have taken a consistent stand that video poker is a lottery under the three-element test in *Darlington Theatres* and is therefore unconstitutional.⁵⁵ Several circuit court rulings agree with the Attorney General.⁵⁶ Unfortunately, the reasoning in each of these decisions is conclusory and sheds little light on the rationale behind the rulings.⁵⁷ In the two cases that were appealed, the South Carolina Supreme Court reversed the lower courts on grounds unrelated to the lottery question.⁵⁸ The supreme court stated in each opinion that it need not address the lottery question because the lower courts erred in addressing the matter.⁵⁹ Thus, whether video poker is a lottery presents a matter of first impression for the state's highest court.

52. 1970 Op. S.C. Att'y Gen. No. 3064, at 361. The Attorney General opined that the game of bingo was an illegal lottery even when the proceeds are donated to charitable organizations. *Id.*

53. See *supra* notes 38-39 and accompanying text.

54. *Army Navy Bingo, Garrison* #2196 v. Plowden, 281 S.C. 226, 228, 314 S.E.2d 339, 340 (1984) ("Bingo is a lottery, and it is gambling."); *Bingo Bank, Inc. v. Strom*, 268 S.C. 498, 502, 234 S.E.2d 881, 883 (1977).

55. See 1994 Op. S.C. Att'y Gen. No. 94-21, at 51; 1993 Op. S.C. Att'y Gen. No. 93-19, at 50.

56. *Ardis v. Ward*, No. 93-CP-24-152, slip op. (S.C. Ct. C.P. Greenwood County, July 6, 1994) (action to recover video poker losses under S.C. Code Ann. § 32-1-20 dismissed because the gambling contract was unenforceable as an illegal lottery); *Montjoy v. One Stop of Abbeville, Inc.*, No. 93-CP-01-73, slip op. (S.C. Ct. C.P. Abbeville County, July 6, 1994) (action to recover video poker losses under S.C. Code Ann. § 32-1-20 dismissed because the gambling contract was unenforceable as an illegal lottery); *Bagwell v. Tollison*, No. 91-CP-04-1784, slip op. (S.C. Ct. C.P. Anderson County, Aug. 24, 1993) (action to recover \$250,000 in video poker winnings dismissed because the gambling contract was unenforceable as an illegal lottery). Interestingly, the video poker industry argued that video poker was an unconstitutional lottery to get each of these cases dismissed.

57. The analysis in each case incorporates the exact same language: "The participant puts a quarter in the machine which is consideration, then wins or loses by chance, and is then paid for free games accumulated which is a prize." *Ardis*, slip op. at 7; *Montjoy*, slip op. at 7; *Bagwell*, slip op. at 4. Besides reciting the *Darlington Theatres* three-element test, this language is the extent of the legal analysis utilized by these courts in interpreting the Lottery Clause.

58. *Montjoy v. One Stop of Abbeville, Inc.*, 325 S.C. 17, 478 S.E.2d 683 (1996) (reversing the lower court on the grounds that no contractual claim was at issue and thus dismissal was in error); *Ardis v. Ward*, 321 S.C. 65, 467 S.E.2d 742 (1996) (reversing the lower court on the grounds that no contractual claim was at issue and thus dismissal was in error). No appeal was filed in *Bagwell*.

59. *Montjoy*, 325 S.C. at 19, 478 S.E.2d at 684; *Ardis*, 321 S.C. at 70, 467 S.E.2d at 745.

III. VIDEO POKER

A. *Evolution of Electronic Gambling*

The origins of mechanical and electronic gambling devices can be traced back to the invention of the slot machine in 1887.⁶⁰ The popularity of these “one-armed bandits” quickly grew, finding their way into almost every community in the country by 1910.⁶¹ The majority of states responded rather quickly by passing laws banning slot machines.⁶² Because the *Darlington Theatres*’s three-element test for lotteries is also the standard by which gambling in general is measured,⁶³ these slot machines unquestionably constituted gambling and, thus, were subject to state regulation.⁶⁴ While many slot machine owners attempted to modify their machines to elude these laws, the devices declined in popularity by mid-century.⁶⁵ In their place stepped pinball machines fitted with free replay features.⁶⁶ Rather than offering cash as its prize, these machines offered free replays awarding the player extended playing time on the machine.⁶⁷ As such, many states viewed these pinball machines as forms of entertainment rather than gambling, because no prize of value was being offered.⁶⁸ The introduction of “knock-off” switches and meters, however, clearly transformed the pinball machine into a gambling device.⁶⁹ These additions allowed the player to receive cash for the accumulated free plays from the pinball machine operator.⁷⁰ Once again, however, state

60. Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 559 (1990). The inventor was Charles Fey of San Francisco. *Id.*

61. *Id.*

62. *Id.* at 560-61.

63. *Id.* at 556. Because lotteries and gambling are identically defined, this definition presents difficulties when attempting to distinguish between the two. This problem is discussed in Part V of this Comment.

64. *Id.* at 559.

65. *Id.* at 563, 566.

66. Rychlak, *supra* note 60, at 563.

67. *Id.*

68. *Id.* at 563-64. Other states departed from this reasoning by considering the free plays a reward of value and thus the machines were classified as gambling devices. *Id.* South Carolina followed this reasoning in *Alexander v. Hunnicutt*, 196 S.C. 364, 13 S.E.2d 630 (1941).

69. Rychlak, *supra* note 60, at 564-65.

70. *Id.* Professor Rychlak described the normal procedure as follows:

When the player wants to “cash-in,” he or she goes to the proprietor. The size of the payout will depend on the number of replays registered on the machine. The proprietor then flips the knock-off switch, which erases the free replays from the machine. The meter records the number of free replays that have been erased or “knocked-off.” The machine owner/operator, on a regularly scheduled trip to the location, checks the meter and, from the money in the machine coin box, reimburses the proprietor for all payouts made. Any remaining profits in the coin box are then split between the proprietor and the operator. The operator and the proprietor are thus left in

gambling legislation curtailed the spread of these gambling machines.⁷¹

With the introduction of video games for entertainment purposes in 1977, the gambling industry found yet another tool to market its product.⁷² Video gambling devices are usually referred to as “video poker” or “video lottery” in the various states that permit them.⁷³ Essentially, these video machines replicate common forms of gambling, such as “poker, blackjack, craps, and horse racing.”⁷⁴ Players accumulate credits as they win and are able to redeem these credits for cash with the video poker operator.⁷⁵ In addition, a pre-set pay-out percentage is programmed into each machine.⁷⁶ In South Carolina, a video poker machine is defined as

an electronic video games machine that, upon insertion of cash, is available to play or simulate the play of games as authorized by the [South Carolina Tax C]ommission utilizing a video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash.⁷⁷

The South Carolina General Assembly has responded to the popularity of these machines by statutorily allowing video poker machines, and the Department of Revenue has promulgated regulations to control their proper operation.

B. The South Carolina Statutory Framework

South Carolina has historically adhered to an anti-gambling policy in its statutory code.⁷⁸ The current statutory prohibitions are codified in sections 16-19-10 through 16-19-160 of the South Carolina Code.⁷⁹ These sections, dating as far back as 1802,⁸⁰ specifically ban almost every type of gambling imaginable and carry criminal penalties for violations.⁸¹ Additionally, code

the same position as if the machine itself had made payments to the successful player.

Id. (footnote omitted).

71. *Id.* at 566.

72. Atari Corporation introduced the first video game into the marketplace that year. *Id.*

73. For purposes of simplicity, this Comment will refer to these machines generally as “video poker” unless this description is clearly inappropriate.

74. Rychlak, *supra* note 60, at 566.

75. *Id.* at 567-68. Video poker machines, like pinball machines, are fitted with knock-off switches and meters to allow for the cashing-out of credits. *Id.* at 568; *see supra* note 70.

76. Rychlak, *supra* note 60, at 570; *see infra* notes 143-46 and accompanying text.

77. S.C. CODE ANN. § 12-21-2772(5) (Law. Co-op. Supp. 1997).

78. 7 S.C. JURISPRUDENCE *Gaming* § 2 (1991).

79. S.C. CODE ANN. §§ 16-19-10 to -160 (Law. Co-op. 1976 & Supp. 1997).

80. Act of Dec. 18, 1802, No. 1786, 5 S.C. Stat. 432 (codified as amended at S.C. CODE ANN. § 16-19-40 (Law. Co-op. 1976 & Supp. 1997)).

81. S.C. CODE ANN. §§ 16-19-10 to -160 (Law. Co-op. 1976 & Supp. 1997).

sections 32-1-10 and 32-1-20, dating back to 1712,⁸² allow gamblers to bring civil actions to recover losses exceeding fifty dollars.⁸³ Moreover, a provision in the state constitution prohibits “any person holding an office of honor, trust or profit” from engaging in gambling or suffer removal from office.⁸⁴

South Carolina has two exceptions to the general constitutional and statutory policy against gambling.⁸⁵ First, a constitutional exception permits certain forms of bingo.⁸⁶ Second, a statutory exception protects the type of video poker machine described earlier.⁸⁷ Section 16-19-60 of the South Carolina Code legalizes “coin-operated nonpayout machines with a free play feature” as long as the machine itself does not “disburse[] money to the player.”⁸⁸ Thus, a video poker machine that allows a player to accumulate credits and cash out with the machine operator fits within the statutory exception.⁸⁹ In 1993, the South Carolina General Assembly passed the Video Game Machines Act (VGMA), which established guidelines for the licensing and operation of video poker machines.⁹⁰ These statutes include a maximum payout limit of \$125 per player⁹¹ and a maximum of five machines at any one place or premises.⁹²

82. Act of Dec. 12, 1712, 2 S.C. Stat. 565-68.

83. S.C. CODE ANN. §§ 32-1-10 to -20 (Law. Co-op. 1991).

84. S.C. CONST. art. XVII, § 8. This section was adopted at the 1895 Constitutional Convention without debate simultaneously with section 7 (the Lottery Clause). *See* 1895 CONVENTION, *supra* note 36, at 287.

85. 7 S.C. JURISPRUDENCE *Gaming* § 2 (1991). In addition to these two exceptions, which address the particular *form* of gambling involved, there are two time and place exceptions to the general statutory policy prohibiting gambling. Section 52-1-20 allows “games of chance involving skill” at state and county fairs. S.C. CODE ANN. § 52-1-20 (Law. Co-op. 1976). Section 61-2-180 allows bingo and raffles at special events intended to raise funds for charitable purposes. S.C. CODE ANN. § 61-2-180 (Law. Co-op. Supp. 1997).

86. S.C. CONST. art. XVII, § 7; *see supra* notes 38-39 and accompanying text.

87. S.C. CODE ANN. § 16-19-60 (Law. Co-op. Supp. 1997); *see supra* notes 74-77 and accompanying text.

88. S.C. CODE ANN. § 16-19-60. This section was amended in 1986. *See* Act No. 540, Part II, § 26B, 1986 S.C. Acts 4898, 4900. Prior to 1986, only machines that did not disburse “money or property” to the player were covered by the exception. The 1986 amendment deleted the words “or property.” For an eye-opening account of how this amendment made its way through the General Assembly, see Cindi Ross Scoppe, *Jack Lindsay’s Worst Trick Wasn’t Capital Gains Tax Cut*, THE STATE (Columbia, S.C.), Feb. 4, 1998, at A10.

89. *See* State v. Blackmon, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) (stating that video poker machines that do not directly disburse money to the player are legal under section 16-19-60, even when the player is able to cash-in game credits with the machine operator).

90. Act No. 164, Part II, § 19, 1993 S.C. Acts 1130 (codified at S.C. CODE ANN. §§ 12-21-2770 to -2809 (Law. Co-op. Supp. 1997)).

91. S.C. CODE ANN. § 12-21-2791 (Law. Co-op. Supp. 1997).

92. S.C. CODE ANN. § 12-21-2804 (Law. Co-op. Supp. 1997).

C. *Video Poker Case Law*

South Carolina courts have consistently held that slot and pinball machines, the precursors to video poker, are prohibited forms of gambling.⁹³ Interestingly, these courts did not entertain the issue of whether these mechanical gambling devices constituted a lottery, but rather chose to rely exclusively upon statutes prohibiting gambling activities.⁹⁴ In two recent cases, the supreme court continued this trend by holding that slot machines with video displays are not covered by the statutory exception legalizing video poker and thus constitute illegal gambling.⁹⁵

The leading case construing the legality of video poker is *State v. Blackmon*.⁹⁶ In *Blackmon* the court held that coin-operated nonpayout machines with free play features fall within the exception of section 16-19-60 and thus are not statutorily illegal forms of gambling.⁹⁷ The court held these machines legal even when the player is able to cash-in accumulated credits with the machine owner.⁹⁸ The ruling in *Blackmon* means that any successful attack on the legality of video poker must come from either the state constitution or from legislative modification of the current statutory law.

The South Carolina Supreme Court also dealt with the issue of video poker in *Powell v. Red Carpet Lounge*.⁹⁹ While the *Powell* court applied section 16-19-60 to find video poker machines legal, the court went on to hold that the existence and possession of the machines did not violate the South Carolina Constitution.¹⁰⁰ "A lottery[,] as contemplated by the constitution, simply is not involved."¹⁰¹ However, the court did not address the issue of whether the use

93. See *Holliday v. Governor of South Carolina*, 78 F. Supp. 918, 922 (W.D.S.C. 1948) (citing several older South Carolina Supreme Court decisions holding pinball machines with free play features illegal gambling devices).

94. *Id.* The South Carolina Attorney General has consistently opined that pinball machines that allow a player to cash in accumulated free plays are unconstitutional lotteries. See, e.g., 1973 Op. S.C. Att'y Gen. No. 3544, at 181.

95. See, e.g., *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (finding the "Cherry Master" video-simulated slot machine an illegal gambling device); *State v. Four Video Slot Machs.*, 317 S.C. 397, 400, 453 S.E.2d 896, 898 (1995) (finding the "Lucky 8 Line" video-simulated slot machine an illegal gambling device).

96. 304 S.C. 270, 403 S.E.2d 660 (1991).

97. *Id.* at 274, 403 S.E.2d at 662.

98. *Id.* at 273-74, 403 S.E.2d at 661-62. But see 1994 Op. S.C. Att'y Gen. No. 94-21, at 51, 52 n.1 ("To the extent that [the VGMA] purports to authorize constitutionally proscribed lotteries, the Act is unconstitutional."); 1993 Op. S.C. Att'y Gen. No. 93-19, at 50 (arguing that the cashing-in of accumulated credits on video poker machines makes them unconstitutional lotteries).

99. 280 S.C. 142, 311 S.E.2d 719 (1984) (upholding the legality of the video poker machines "Draw Poker," "Black Jack," and "Bally Double Up").

100. The court noted that neither sections 7 or 8 of Article XVII were violated in this case. *Id.* at 146, 311 S.E.2d at 721.

101. *Id.* The court went on to state: "Argument to the effect that these are gambling machines prohibited under the lottery provisions of the constitution because elements of chance

of these machines for gambling purposes would constitute a lottery under the constitution.¹⁰² To date, that issue remains unresolved in South Carolina.

IV. IS VIDEO POKER A LOTTERY?

As the above discussion illustrates, the answer to this Part's question is not readily apparent from South Carolina jurisprudence.¹⁰³ The South Carolina Supreme Court has yet to apply the *Darlington Theatres* three-element test to video poker, or to any other comparable mechanical or electronic gambling device. With the question now squarely before the supreme court, the experience of other states with this issue is instructive. While only a few state appellate courts have dealt with the precise question of whether video poker machines or similar electronic gaming devices constitute lotteries, a substantial number have discussed the meaning of their constitutional lottery prohibitions as applied to various forms of gambling.

A. *The Conventional Approach*

The majority of state courts, as well as the United States Supreme Court,¹⁰⁴ agree with South Carolina that a lottery is defined by three essential elements: (1) consideration, (2) chance, and (3) prize.¹⁰⁵ "Consideration is the stake, wager, or bet that gamblers risk losing if they are unsuccessful."¹⁰⁶ In the context of video poker, the money deposited into the machine by the player constitutes consideration.¹⁰⁷ Because a player must deposit money into the machine to begin play, consideration is the easiest of the three elements to establish.¹⁰⁸ Likewise, the element of prize is rather simple to ascertain.¹⁰⁹ A prize is something of value, usually money or property, which the player seeks to obtain by participating in the game.¹¹⁰ A video poker machine registers a

and skill are involved is without merit." *Id.*

102. *Id.*

103. See Order of Certification, *supra* note 5, at 2 ("[T]here appears to be no controlling precedent in the decisions of the [South Carolina] Supreme Court.").

104. FCC v. ABC, 347 U.S. 284, 290 (1954).

105. See, e.g., 38 AM. JUR. 2D *Gambling* § 6 (1968) (providing a list of these states and citations to corresponding case law); see also Rychlak, *supra* note 17, at 14.

106. Rychlak, *supra* note 60, at 556.

107. To avoid violating state lottery prohibitions, privately run contests and sweepstakes, such as those found at fast-food establishments like McDonalds, do not require a purchase of any kind to participate. See Rychlak, *supra* note 17, at 14-15.

108. Apparently, the defendants in the *Johnson* case do not dispute the element of consideration. See Order of Certification, *supra* note 5 (discussing the element of chance as the disputed issue between the parties).

109. As with the element of consideration, it appears the parties in the *Johnson* case agree that video poker offers a prize. See Order of Certification, *supra* note 5.

110. See BLACK'S LAW DICTIONARY 1200 (6th ed. 1990) (definition of "prize"); Rychlak,

running total of free replays or credits during the course of a player's time spent on the machine.¹¹¹ When a winning player chooses to discontinue playing, the machine distributes a credit slip, which the machine operator redeems for cash.¹¹² Because the credit slip represents a right to receive cash, it holds value and thus constitutes a prize.¹¹³

Chance is the critical factor in determining whether video poker is a lottery.¹¹⁴ Generally, chance is defined as a lack of control over events or an uncertainty as to the occurrence of those events.¹¹⁵ In other words, chance is present when we lack the means by which to effect a desired outcome (these "means" can be described as "skill"). While the definition of chance is generally understood and accepted, its judicial application is not.¹¹⁶ The problem presents itself as one of degree rather than kind. For what human conduct or action does *not* involve at least some degree of uncertainty as to its ultimate outcome and consequences? Obviously, a measure of both skill and chance coexist in most human activities.¹¹⁷ Many state courts have dealt with this problem within the context of lotteries and gambling devices by measuring the degree of chance involved in a particular game and then applying one of

supra note 60, at 558.

111. *Id.* at 567-68.

112. *Id.*

113. *Id.* at 558. Most states agree that free replays inherently do not represent something of value constituting a prize. However, when these replays can be redeemed for cash, the prize element does emerge. *Id.* at 563-64. *See, e.g.,* Games Management, Inc. v. Owens, 662 P.2d 260, 263 (Kan. 1983) ("[W]e hold a machine offering only free replays as a prize does not offer 'something of value' and is therefore not a gambling device . . ."); Commonwealth v. Two Elec. Poker Game Machs., 465 A.2d 973, 978 (Pa. 1983) (holding the presence of knock-off switches and meters on video poker devices, which allow free credits to be cashed in, satisfy the prize element). *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991), may be distinguished. The *Blackmon* court simply held that video poker machines which do not directly disburse money to the player qualify for the statutory exception under S.C. Code Ann. § 16-19-60 and are thus deemed legal. *Id.* at 274, 403 S.E.2d at 662. The court did not consider whether the credit slip constituted a valuable prize.

The lack of prize is one of the key distinctions between video gambling devices such as video poker and entertainment video games such as "Pac-Man." In essence, the winning of free games on "Pac-Man" is of de minimis value to the player and therefore cannot properly be characterized as a prize. *See* Rychlak, *supra* note 60, at 564. *But see* Holliday v. Governor of South Carolina, 78 F. Supp. 918, 922 (W.D.S.C. 1948) (recognizing the continued amusement provided by a free play on a pinball machine as something of value constituting a reward). However, in the fifty years since *Holliday*, the Attorney General has opined that free plays do not inherently constitute something of value. *See, e.g.,* 1973 Op. S.C. Att'y Gen. No. 3544, at 181 ("A pinball machine would constitute a lottery if a prize were offered or cash consideration were offered as a prize.").

114. Not surprisingly, it is also the most difficult to establish. Rychlak, *supra* note 60, at 556.

115. *See* BLACK'S LAW DICTIONARY 231 (6th ed. 1990) (definition of "chance").

116. *See* I. NELSON ROSE, GAMBLING AND THE LAW 79 (1986).

117. *Id.* at 79-80 (demonstrating that the "skill" game of chess involves a degree of chance, and the "chance" game of roulette involves a degree of skill).

two recognized standards to determine if the chance element is satisfied.¹¹⁸

B. *The American and English Rules*

The majority of states adhere to the American rule, which holds that the element of chance is satisfied when chance is the “dominant” factor in determining the results of the game.¹¹⁹ As long as chance predominates over skill, the American rule is met—regardless of whether a lesser degree of skill is also present in the game.¹²⁰ A state’s selection of the American rule is usually fatal to the party arguing the game in question is not a lottery. This is so because chance predominates over skill in almost all gambling activities,¹²¹ and even in other activities outside the gambling arena.¹²² Not surprisingly, courts applying the American rule to video gambling devices have determined them to be games of chance.¹²³

A second standard, referred to as the English rule, is available to states attempting to ascertain the chance element.¹²⁴ The English Rule requires that skill play no part in the player’s resultant success or failure.¹²⁵ “In other words, as long as some degree of skill is required in a gambling activity, that activity differs from a lottery in kind, rather than in degree. In such a case, the issue is not the *degree* of skill involved, but whether *some* skill is involved.”¹²⁶ Although the party arguing against a lottery classification for gambling devices such as video poker would certainly advocate the adoption of the English rule, it is unclear whether its application would necessarily result in a favorable

118. These two standards are not universally applied by states because not all states define lotteries strictly by the conventional three-element test of consideration, chance, and prize. A minority of states, discussed in Part V of this Comment, adhere to a stricter definition of the term that places less emphasis on the relationship between chance and skill.

119. *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973); 1961 Op. S.C. Att’y Gen. No. 1086, at 157; Rychlak, *supra* note 60, at 557.

120. *Morrow*, 511 P.2d at 129.

121. As mentioned earlier, the element of chance defines not only lotteries, but also gambling in general. See Rychlak, *supra* note 60, at 556.

122. The broad reach of the American rule is demonstrated by applying its standard to the stock market. Arguably, success in “playing the market” is predominately governed by chance, regardless of how much skill a broker or investor may claim to possess. Is it then a lottery? Does this comport with common sense? See *infra* Part V.

123. See *United States v. Marder*, 48 F.3d 564 (1st Cir. 1995); *Score Family Fun Ctr., Inc. v. County of San Diego*, 275 Cal. Rptr. 358 (Ct. App. 1990); *Games Management, Inc. v. Owens*, 662 P.2d 260 (Kan. 1983); *Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm’n*, 451 S.E.2d 306 (N.C. Ct. App. 1994); *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973 (Pa. 1983).

124. See Rychlak, *supra* note 60, at 557.

125. See *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58, 62 (Mo. 1994) (“No player’s choice or will has any part in the lottery’s result, nor can human reason, foresight, sagacity, or design enable a player to affect the game.”).

126. Opinion of the Justices, No. 358, 692 So. 2d 107, 112 (Ala. 1997).

decision. At least one court has described video poker devices as games of chance involving no elements of skill,¹²⁷ and others have seriously questioned the degree of skill involved in the games.¹²⁸

C. *Skill v. Chance*

Two general lines of analysis have emerged from case law questioning the level of skill involved in video poker machines.¹²⁹ The first line of analysis concentrates on the distinction between person-to-person card games and the simulated card games on video poker machines. In the typical video poker game,¹³⁰ the machine displays five randomly selected cards.¹³¹ The player must then make a choice as to which cards to retain and which to discard in exchange for new randomly selected cards.¹³² Many machines possess an "auto suggest" feature recommending which cards to keep and which to exchange.¹³³ Once the player makes the decision, the machine deals out the requested number of new cards, and the player's success depends upon whether the five remaining cards constitute a winning hand, such as "three-of-a-kind" or a "straight."¹³⁴ In addition, some machines possess additional features that give

127. *United States v. 294 Various Gambling Devices*, 718 F. Supp. 1236, 1243 (W.D. Pa. 1989) ("[A]ll the skill elements associated with the ordinary game of draw poker are conspicuously absent in the video version.").

128. *See Score Family Fun Ctr., Inc.*, 275 Cal. Rptr. at 361 ("[T]he Mini-Boy 7 [a video poker game] . . . presents the user with, at most, only an illusion of skill; it is predominately a game of chance."); *Collins Coin Music Co.*, 451 S.E.2d at 308 ("[T]he video game's program, which allows only a predetermined number of winning hands, negates even [a] limited skill element."); *Two Elec. Poker Game Machs.*, 465 A.2d at 978 ("[H]olding, folding, bluffing and raising have no role to play in Electro-Sport poker. Skill can improve the outcome . . . ; it cannot determine it.").

129. The following discussion centers on the card games, such as poker and blackjack, available on video gambling devices. The relative levels of skill and chance in card games is normally a disputed issue, because the player makes decisions about which cards to "hold" and which cards to discard. However, it is rarely argued that other games such as bingo, lotto, and keno involve any degree of skill whatsoever. Thus, applying either the American or English rule, these latter games would constitute lotteries. *See generally* Order of Certification, *supra* note 5, at 8-13 (making the same distinction between card games and bingo/keno/lotto games and stating that the expert witnesses for the video poker industry even testified that this latter category of games operated purely on chance).

130. For purposes of clarity and brevity, the video card game of poker is used to illustrate the way in which a typical card game is played on these machines. Other card games, like blackjack, vary slightly as to when the player makes his decisions and how frequently those decisions are made. *Id.* at 10.

131. The following description of a typical video poker game is taken from Judge Anderson's description in the *Johnson* case. *Id.*

132. *Id.* at 9.

133. *Id.* at 7.

134. *Id.* at 10. Different amounts of credits are awarded depending upon the type of winning hand possessed by the player. *Id.* at 7.

the player the option of splitting a single hand into two hands,¹³⁵ “insuring” a bet,¹³⁶ and “doubling-up” the credits won on the last game.¹³⁷

Video poker lacks the human interaction that is critical in person-to-person poker. Specifically, video poker does not allow a player to mentally challenge an opponent by “bluffing” and “raising” during the progress of the game.¹³⁸ Nor can a video poker player interpret the body language and facial expressions of opponents, as any truly skilled card player would attempt to do.¹³⁹ “Indeed, all the skill elements associated with the ordinary game of draw poker are conspicuously absent in the video version. . . . The player’s only skill is to recognize possible combinations and basic statistical probabilities.”¹⁴⁰ Courts distinguishing video poker from person-to-person poker generally come to the conclusion that the lack of these psychological factors results in chance predominating over skill, and thus the element of chance is satisfied under the American rule.¹⁴¹ Because these same courts recognize at least some marginal degree of skill involved in choosing which cards to hold and which cards to discard,¹⁴² the element of chance does not appear to be satisfied under the English rule.

The second line of analysis that questions the skill involved in video poker centers on the pre-set pay-out percentage programmed into video poker machines. The machines are programmed to pay out a maximum percentage on each dollar wagered based on an “optimum play model.”¹⁴³ Thus, a player using the best possible mathematical strategy (based on the laws of statistics and probabilities) will, on average, realize a return no greater than the pre-set percentage.¹⁴⁴ According to testimony in the *Johnson* case, this percentage on selected machines in South Carolina ranges from ninety-five to ninety-seven

135. Order of Certification, *supra* note 5, at 9-10.

136. *Id.* at 10. Insuring a bet “cuts in half the risk of loss.” *Id.*

137. *Id.*

138. *See Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm’n*, 451 S.E.2d 306, 308 (N.C. Ct. App. 1994) (“Psychology and bluffing have no effect on the final outcome of play when playing electronic video poker.”).

139. *See Score Family Fun Ctr., Inc. v. County of San Diego*, 275 Cal. Rptr. 358, 360 (Ct. App. 1990).

140. *United States v. 294 Various Gambling Devices*, 718 F. Supp. 1236, 1243 (W.D. Pa. 1989).

141. *See United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995); *Collins Coin Music Co.*, 451 S.E.2d at 308; *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 978 (Pa. 1983).

142. An expert witness for the plaintiff in the *Johnson* case testified to the presence of some skill in video poker. According to FBI agent Jerome Simpson, a skilled player could increase his chance of winning by 1 1/2 to 3 percent over a non-skilled player. Clif LeBlanc, *Gaming Expert Says ‘Dumb Luck,’ Not Player Skill, Beats Machines*, THE STATE (Columbia, S.C.), Feb. 10, 1998, at B3.

143. Order of Certification, *supra* note 5, at 7.

144. *Id.* at 7-8.

percent of a player's total wager.¹⁴⁵ As a result, even the best player, over time, will not succeed in winning more money at video poker than the player wagered.¹⁴⁶

Courts that focus on the pre-set pay-out percentage question whether *any* skill, even the skill involved in holding and discarding cards based on basic statistical probabilities, is recognizable in the face of the underlying pre-set pay-out percentage. As the North Carolina Court of Appeals recently stated, "[A]lthough a player's knowledge of statistical probabilities can maximize his winnings in the short term, . . . [i]n the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element."¹⁴⁷ The question whether to recognize skill in the face of the pre-set pay-out percentage is critical, particularly when a court chooses to apply the English rule to the element of chance.¹⁴⁸ Even if an initial degree of skill is acknowledged in the playing of an individual game, does the machine's computer program setting a maximum average pay-out negate this skill for purposes of determining whether a lottery exists? The answer to this question is not clear from a survey of other state case law.

The *Darlington Theatres* three-element test is the conventional approach most states use when determining whether a particular game or activity

145. *Id.* at 8 n.6.

146. However, a player, skilled or unskilled, may win sums in excess of the wager in the short run. The machine's pre-set percentage sets a maximum pay out *on average*. The longer a person plays a video poker machine, the closer the results will mirror the pre-set percentage. *Id.* at 17-18. Professors Haynesworth and Morris illustrated this point in a recently published editorial. Toby Haynesworth & Dick Morris, *Video Poker Needs Better Odds*, THE STATE (Columbia, S.C.), Feb. 10, 1998, at A9 ("As long as the payback is less than 100 percent, the machine will relieve the player of every last cent he has if he plays the game long enough.").

147. *Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n*, 451 S.E.2d 306, 308 (N.C. Ct. App. 1994) (citation omitted). As in the *Johnson* case, representatives of the video poker industry presented expert testimony from mathematicians and statisticians to the effect that video poker is primarily a game of skill. *Id.* The North Carolina court refused to accept this testimony and ruled that the machines were primarily games of chance. *Id.* at 309.

Experts for the defendants in the *Johnson* case testified that, based on mathematical models, the video poker player with the "absolute maximum skill" enjoys a significantly higher winning percentage than a fellow "totally unskilled" player. Order of Certification, *supra* note 5, at 16. However, as Judge Anderson points out, "optimum play in this form is more theoretical than realistic[.] . . . requir[ing] extensive time and mathematical skills (or an appropriately programmed computer) to properly evaluate the various options." *Id.* at 17; *cf. Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) ("Whether chance or skill was the determining factor in the contest must depend upon the capacity of the general public—not experts—to solve the problems presented.") (quoting *McKittrick v. Globe-Democrat Publ'g Co.*, 110 S.W.2d 705, 711 (Mo. 1937))).

148. As the discussion of the first line of analysis demonstrated, the American rule of chance is satisfied by distinguishing between person-to-person poker and video simulated poker. Thus, the further analysis involving pre-set pay-out percentages will not change, but only reinforce, the American rule's determination that video poker satisfies the chance element of a lottery.

constitutes a lottery.¹⁴⁹ Applied to video poker, the conventional approach yields mixed results depending upon which standard is applied to the chance element. Under the broad umbrella of the American rule, video poker is properly classified as a lottery. However, under the less expansive reach of the English rule, the question remains unresolved. As a result, the legality of video poker may be in serious jeopardy if the three-element test is applied in South Carolina.¹⁵⁰

V. DOES THIS MAKE SENSE?: AN ALTERNATIVE APPROACH

A. *The Logical Inconsistency of the Conventional Approach*

Whether the American or English rule is applied, the results of the *Darlington Theatres* three-element test cannot be reconciled with the historical and common sense meaning of the term "lottery."¹⁵¹ This conflict may come from the use of the same test to distinguish a lottery from other activities and to define "gambling" and "games of chance" in general.¹⁵² "Lottery, when defined solely by consideration, chance, and prize, sweeps too broadly and does not distinguish between lotteries and other forms of gambling."¹⁵³ The application of the three-element test, particularly when the American rule determines the chance element, results in most (if not all) gambling activities being labeled as lotteries.¹⁵⁴ This result contradicts South Carolina's constitutional, statutory, and common law history.

Lotteries are a "species" or subset contained within the larger sphere of gambling in general.¹⁵⁵ Whereas all lotteries are necessarily forms of gambling, not all forms of gambling are properly characterized as lotteries.¹⁵⁶ Indeed, the

149. See *supra* note 105 and accompanying text.

150. This fact may explain why the defendants in the *Johnson* case argue that the South Carolina Supreme Court should reject the three-element test in favor of a more restricted historical definition of lotteries. Order of Certification, *supra* note 5, at 4.

151. See *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 292, 2 S.E.2d 782, 786 (1939) ("The word 'lottery' it has been held, has no technical, legal meaning but must be construed in the popular sense.").

152. See ROSE, *supra* note 116, at 75; Rychlak, *supra* note 17, at 14; Rychlak, *supra* note 60, at 556.

153. *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 62 (Mo. 1994).

154. Professor Santi has noted: "Those familiar with traditional forms of gaming know that prize, chance, and consideration are the three characteristics common to all forms of gaming. Therefore, this definition of the term 'lottery' makes all forms of gaming prohibited lotteries." Roland J. Santi, *An Introduction to Nebraska Gaming Law*, 29 CREIGHTON L. REV. 1123, 1129 (1996) (footnote omitted).

155. See *Darlington Theatres*, 190 S.C. at 291, 2 S.E.2d at 786 (referring to the term "lottery" as a "species of gaming").

156. See 9 S.C. JURISPRUDENCE *Lotteries* § 3 (1992) ("The term 'gambling' is broader and encompasses more activities than the term 'lottery.' Therefore, it can be said that a lottery is always gambling, whereas gambling is not always a lottery.") (footnote omitted).

distinction between lotteries and games of chance is found within the South Carolina Constitution. As discussed in Part II of this Comment, Article XVII, Section 7 prohibits lotteries.¹⁵⁷ Section 8 of the same Article prohibits specified office holders from engaging “in gambling or betting on games of chance.”¹⁵⁸ Any argument suggesting the delegates to the 1895 Constitutional Convention simply overlooked the relationship between the two sections is extinguished when the official convention journal is reviewed.¹⁵⁹ Sections 7 and 8 were passed at the very same time on September 30, 1895.¹⁶⁰ Apparently, the framers of the South Carolina Constitution rejected the very results reached by the conventional three-element test—that lotteries and games of chance are the same.

In *Poppen v. Walker*¹⁶¹ the South Dakota Supreme Court recently came to a similar conclusion regarding its own constitutional lottery prohibition. The court held that “video lottery” machines¹⁶² were not lotteries as defined by the South Dakota Constitution.¹⁶³ In doing so, the court identified two different kinds of state lottery prohibitions around the country.¹⁶⁴ When state constitutions *only* prohibit lotteries, the courts of those states have broadly interpreted the prohibition in accordance with the conventional three-element test.¹⁶⁵ In contrast, when the state constitution prohibits lotteries *and* games of chance, courts have narrowly construed the former as “contemplating the sale of tokens or tickets to large numbers of people for the chance to share in the distribution of prizes for the purpose of raising public revenue.”¹⁶⁶ At least according to South Dakota’s analysis, South Carolina falls into this second tier of states narrowly defining lotteries.¹⁶⁷

157. See *supra* notes 34-39 and accompanying text.

158. S.C. CONST. art. XVII, § 8.

159. See *supra* note 36.

160. 1895 CONVENTION, *supra* note 36, at 287. Section 8 (originally adopted as section 9) passed as an entirely new amendment, while Section 7 passed as a modification from its earlier form in the 1868 Constitution. *Id.*

161. 520 N.W.2d 238 (S.D. 1994).

162. According to the description of these machines in the opinion, video lottery machines appear very similar to the types of video poker machines found in South Carolina. *Id.* at 240-41.

163. *Id.* at 248.

164. *Id.* at 244.

165. *Id.*

166. *Id.* at 245.

167. An argument can be made, however, distinguishing *Poppen* on grounds that the distinction between lotteries and games of chance is made *within the same section* of the South Dakota Constitution, while the distinction is accomplished by *separate sections* in the South Carolina Constitution. Compare S.D. CONST. art. III, § 25 (“The Legislature shall not authorize any game of chance, lottery or gift enterprise . . .”), with S.C. CONST. art. XVII, § 7 (“No lottery shall ever be allowed . . . in this State . . .”), and S.C. CONST. art. XVII, § 8 (“It shall be unlawful for any person holding an office of honor, trust or profit to engage in gambling or betting on games of chance . . .”). But see *Poppen*, 520 S.W.2d at 244 (“When a constitution prohibits both games of chance and lotteries, the question arises as to the distinction between the two terms.

South Carolina's statutory framework also clearly distinguishes between lotteries and other forms of gambling. Sections 16-19-10 through 16-19-30 prohibit the "setting up" of, "adventuring in," and "selling" of tickets for lotteries.¹⁶⁸ The *very next set of laws*, sections 16-19-40 through 16-19-160, prohibit various forms of gambling and betting.¹⁶⁹ When considering that these statutory prohibitions on lotteries and gambling pre-date the passage of the Lottery Clause in 1868,¹⁷⁰ the distinction is magnified. If all gambling activities are defined as lotteries by the conventional three-element test, then why has the General Assembly continued to prohibit lotteries and gambling separately?

Several states possessing similar statutory histories regarding separate lottery and gambling prohibitions clearly distinguish between the two terms. In *Lee v. City of Miami*¹⁷¹ the Florida Supreme Court noted the state's statutory framework and concluded that Florida's lottery clause specifically applied to the type of state-chartered lotteries popular in this country up until the mid-1800s.¹⁷² The court in *Lee* refused to adopt a broad "generic" definition of the term.¹⁷³ The Ohio Supreme Court came to a similar conclusion after reviewing its legislative history.¹⁷⁴ Having determined that Ohio's lottery clause specifically prohibited the classic "ticket" lottery,¹⁷⁵ the *Mills-Jennings* court went on to state: "It was only because the legislatures had seen fit to employ the scheme of a lottery for public and private purposes that the people considered it necessary to prohibit lotteries in the Constitution."¹⁷⁶

Perhaps the clearest distinction between lotteries and other types of gambling derives from the opinions of the South Carolina Supreme Court. Ironically, a limited conception of the term "lottery" is found in the very case that first invoked the conventional three-element test in this state.¹⁷⁷ The *Darlington Theatres* court refers to the lottery prohibition as remedying "a special type of vice" and not meant to be a "prohibition of games of chance of all kinds."¹⁷⁸ Moreover, this restricted definition of lotteries is consistent with

When both terms are used, the term 'lottery' has a narrower meaning in that it is a special form of game of chance.") (emphasis added).

168. S.C. CODE ANN. §§ 16-19-10 to -30 (Law. Co-op. 1976 & Supp. 1997).

169. S.C. CODE ANN. §§ 16-19-40 to -160 (Law. Co-op. 1976 & Supp. 1997). As mentioned earlier, section 16-19-60 creates an exception to the general prohibition on gambling for video poker machines. See *supra* note 88 and accompanying text.

170. The lottery statutes date back to 1751. See *supra* note 33 and accompanying text. The general gambling statutes date back to 1802. See *supra* note 80 and accompanying text.

171. 163 So. 486 (Fla. 1935).

172. *Id.* at 489; see *supra* note 23 and accompanying text.

173. *Lee*, 163 So. at 488-89.

174. *Mills-Jennings, Inc. v. Department of Liquor Control*, 435 N.E.2d 407 (Ohio 1982).

175. *Id.* at 410.

176. *Id.*

177. *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939).

178. *Id.* at 290, 2 S.E.2d at 786; see *supra* note 51. However, the structure of the *Darlington Theatres* opinion lends itself to misinterpretation. After setting out the three-element test, the

the language found in the earlier case of *State v. Pinchback*.¹⁷⁹ The court in *Pinchback*, interpreting the Lottery Act of 1762 (the precursor to the Lottery Clause),¹⁸⁰ stated that “there may be an adventure or hazard without a lottery; every throw of the die, even for an ordinary wager, is an adventure or hazard, and I am sure it never entered the mind of any man that it constituted a lottery.”¹⁸¹

Clearly, the conventional approach of defining lotteries solely by consideration, chance, and prize cannot withstand the weight of South Carolina constitutional, statutory, and case-law authority—not to mention common sense. Several states, recognizing the same inconsistencies between a broad lottery definition and their own historically based conception of the term, have attempted to add additional factors in order to achieve a more precise standard by which to define and properly distinguish lotteries from other forms of gambling.

A. *The Alternative Approach*

States questioning the conventional approach in search of a better method for defining lotteries inevitably begin their journeys with a single case. More specifically, with a single quote. In *Phalen v. Virginia*¹⁸² the Court stated:

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the *widespread pestilence* of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.¹⁸³

While these states recognize the essential elements of consideration, chance, and prize common to all forms of gambling, they also understand the unique nature of a lottery requires contemplation of additional factors. These factors are designed to address the inherent characteristics of “widespread pestilence” identified by the Supreme Court.

supreme court quoted different definitions of the term “lottery” from dictionaries and other state case law—some of which were broad and others quite narrow in scope. *Id.* at 291-93, 2 S.E.2d at 786-87. Essentially, a citation to one of these definitions can be used to justify almost any construction of the term “lottery.” Therefore, such citations should be carefully scrutinized. The quotation cited here appears prior to the presentation of the three-element test and is not credited by the court to any authority.

179. 9 S.C.L. (2 Mill) 33 (1818).

180. See *supra* note 42 and accompanying text.

181. *Pinchback*, 4 S.C.L. (2 Mill) at 34.

182. 49 U.S. (8 How.) 163 (1850).

183. *Id.* at 168 (emphasis added).

Foremost among this select group of states is Nevada. In *Ex parte Pierotti*¹⁸⁴ the Nevada Supreme Court added the element of “public nuisance” to its definition of lotteries.¹⁸⁵ Any gambling activity’s inherent ability to reach large segments of a given population placed it within the court’s conception of a lottery.¹⁸⁶ The Supreme Court of Florida took a similar approach in *Lee v. City of Miami*,¹⁸⁷ referring to this widespread effect as the “primary test” of what constitutes a lottery.¹⁸⁸ The Florida court considered its own lottery clause as specifically addressing the type of state-chartered lottery popular in this country prior to the mid-1800s.¹⁸⁹ In *Knight v. State ex rel. Moore*¹⁹⁰ the Mississippi Supreme Court adhered to an even more restrictive approach, identifying the sale of tickets as a necessary factor in its definition of the term “lottery.”¹⁹¹ This narrow reading of its lottery prohibition lead the court to hold that the game of bingo is not a lottery.¹⁹²

In addition to widespread effect and sale of tickets, several other factors addressing the “widespread pestilence” characteristic of lotteries can be identified.¹⁹³ First, the complete absence of any skill in determining whether a player wins or loses.¹⁹⁴ This is essentially the “pure chance” doctrine followed by the English rule discussed in Part IV. Second, the lack of player participation in the activity.¹⁹⁵ While most games of chance require a participant to go to some special place to play or assemble with a certain group of individuals to participate, lotteries are solitary in nature and require no comparable player participation.¹⁹⁶ Third, the placing of “money into a pool for the chance to win a prize.”¹⁹⁷ Other forms of gambling, such as poker and blackjack, do not normally involve pooling, “because the player bets against

184. 184 P. 209 (Nev. 1919).

185. *Id.* at 210 (“A lottery is prohibited by the Constitution as a public nuisance—a crime against the good order and the economy of the state.”).

186. *Id.* The court noted: “It is this extensive reach, and not merely its speculative purposes, which makes lottery gambling so dangerous as to be a proper subject for constitutional prohibition.” *Id.*

187. 163 So. 486 (Fla. 1935).

188. *Id.* at 490.

189. *Id.* at 489-90.

190. 574 So. 2d 662 (Miss. 1990).

191. *Id.* at 669.

192. *Id.* But see Val D. Ricks, *Knight v. State ex rel. Moore: How Bingo Won the Mississippi Lottery*, 61 UMKCL. REV. 463 (1993) (presenting a highly critical assessment of the *Knight* decision).

193. All of the additional factors suggested in Part V are not necessarily meant to be essential elements of all lotteries. Rather, these factors are meant to guide those attempting to distinguish lotteries from other forms of gambling.

194. See *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58, 62 (Mo. 1994).

195. See ROSE, *supra* note 116, at 72.

196. *Id.*

197. *Id.* at 76.

other players or against the house.”¹⁹⁸ Finally, government sponsorship of the gambling activity.¹⁹⁹ With the public resources available to local and state governments, lotteries can reach into almost every segment of a targeted community.²⁰⁰

To summarize, the following factors (in addition to the essential elements of consideration, chance, and prize) should be taken into account when attempting to label a particular activity a “lottery”: (1) widespread effect; (2) sale of tickets or lots; (3) pure chance; (4) lack of player participation; (5) pooling of funds; and (6) government sponsorship.

B. Application of Factors

In light of the above listed factors, does video poker qualify as a lottery? Taking each factor separately, it becomes apparent that the sale of tickets (factor two) and the pooling of funds (factor five) are clearly not present in video poker. Video poker players do not purchase tickets or lots, nor do they pool funds with other players. However, the application of the four remaining factors is not as clear-cut. First, video poker may have a widespread effect (factor one) because of the estimated 31,000 machines in South Carolina.²⁰¹ However, this factor appears to address the *inherent* widespread effect of a particular gambling activity—regardless of its resultant success and subsequent growth. A single video poker machine, or even a large “video parlor” containing many machines, cannot reach an entire community in the same manner as a typical lottery. Attributing the widespread effect factor to video poker essentially penalizes the industry for its commercial growth and success.²⁰²

Part IV of this Comment explored the presence of pure chance (factor three) in video poker, with no resulting clear answer on the issue. The degree of player participation (factor four) in video poker is also unclear. While video poker players must participate by physically traveling to a location in order to play the machines, participation with other players is missing because a video poker player only interacts with a computer program. Finally, the extent of government sponsorship (factor six) of video poker is also arguable. South

198. Santoni, *supra* note 154, at 1129-30.

199. *See Mills-Jennings, Inc. v. Department of Liquor Control*, 435 N.E.2d 407, 410 (Ohio 1982).

200. *See Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850) (“[Lotteries] infest[] the whole community . . . [.] enter[] every dwelling . . . [.] and[] reach[] every class . . .”).

201. Clif LeBlanc, *Video Poker Test Could Be In Supreme Court's Hands*, THE STATE (Columbia, S.C.), Feb. 25, 1998, at A6.

202. The author admits the presence of this factor is arguable. *See State v. Coats*, 74 P.2d 1102, 1111 (Or. 1938) (Kelly, J., concurring) (arguing that the widespread presence of pinball tables in the state qualifies such gambling as a lottery in accordance with the “widespread pestilence” rationale).

Carolina has carved out a statutory exception for video poker²⁰³ and passed an entire act designed to regulate the industry.²⁰⁴ In addition, the state receives revenue in the form of license fees paid by video poker owners.²⁰⁵ Does this rise to the level of government sponsorship? Certainly not to the extent of state-run "ticket" lotteries. In state-run lotteries, the costs of sponsoring the lottery are paid by government and the profits go into the state coffers.²⁰⁶ With video poker in South Carolina, the costs incurred and profits received are the sole domain of the private sector. In addition, South Carolina is not actively promoting and advertising video poker to the public. In states with traditional "ticket" lotteries, the state normally engages in widespread advertising because it has a financial interest in doing so.²⁰⁷

Although several of these factors *may* be present in video poker, no factor is clearly evident. This result is not surprising because the factors suggested by the alternative approach are rooted in the particular history and unique nature of lotteries as they developed in this country. Logically, therefore, video poker seems to fall under the larger sphere of gambling and games of chance in general (defined by the three-element test)—yet not within the specialized subset of lotteries (defined by the three-element test and additional factors). To suggest otherwise would appear to strip the term "lottery" of its historical and common sense meaning.

VI. CONCLUSION

The modern application of the law surrounding lotteries should not be divorced from the historical foundation upon which it lies. The nature and operation of lotteries in the early years of this nation is of no great mystery. Because of their unique ability to reach large masses of people, lotteries were favored by states and local governments that chartered them as an alternative to taxes. However, the unique structure of lotteries also lent itself to rampant fraud and misuse of funds by those chartered to operate them. In response, states like South Carolina chose to constitutionally outlaw lotteries, thereby

203. S.C. CODE ANN. § 16-19-60 (Law. Co-op. 1976 & Supp. 1997); *see supra* note 88 and accompanying text.

204. *See supra* note 90 and accompanying text.

205. License fee revenues are estimated at \$61 million for the upcoming budget year in South Carolina. Sponhour, *supra* note 4, at A1.

206. Rychlak, *supra* note 17, at 47-50.

207. *See* *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 290, 2 S.E.2d 782, 786 (1939) ("[I]t is apparent that the constitutional and legislative prohibition [of lotteries] is directed at a special type of vice in the fields of advertising and gift enterprises—the type that has come to be denominated both in the law and in common parlance by the word lottery.") (emphasis added); *State v. Pinchback*, 4 S.C.L. (2 Mill) 33, 34 (1818) ("[The term lottery] embraces only one class of adventures or hazards, the grand schemes of which our newspapers daily exhibit.") (emphasis added).

foreclosing the ability of future state legislatures to sanction lotteries as revenue raising devices.²⁰⁸

Unfortunately, the conventional common-law test for defining lotteries renders results inconsistent with the historical conception of the term. Application of the conventional three-element test, potentially placing *all* gambling activities under the general label of "lottery," forces a meaning and scope upon the term inconsistent with its historical and popular usage.²⁰⁹ The alternative approach suggested in this Comment attempts to remedy the logical inconsistency of the three-element test by adding additional factors that address the unique nature of lotteries as expressed by the United States Supreme Court's "widespread pestilence" characterization.

The application of the Lottery Clause to video poker ultimately depends upon how the South Carolina Supreme Court chooses to approach the term "lottery." The court's initial selection of an appropriate standard to define the term likely will determine the outcome of the certified question in the *Johnson* case. The sweeping range of the conventional three-element approach places video poker in substantial jeopardy of constitutionally mandated extinction. The more reserved scope of the alternative approach suggests just the opposite result. The court can cite legal authority for either approach. Perhaps the only sure bet is recognizing that, contrary to the Attorney General's belief, the lottery question presented in *Johnson* is indeed "a difficult legal question."²¹⁰

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208. Of course, the General Assembly and the people retain the power to amend the state constitution to sanction new lotteries. See S.C. CONST. art. XVI, § 1 (requiring a two-thirds approval in both the House of Representatives and the Senate and a majority approval by the electorate).

209. See *Darlington Theatres*, 190 S.C. at 292, 2 S.E.2d at 786 ("The word 'lottery' it has been held, has no technical, legal meaning but must be construed in the *popular sense*." (quoting 17 R.C.L. 1209-10) (emphasis added)).

210. See *supra* note * and accompanying quotation; see also ROSE, *supra* note 116, at 75 ("It is safe to say that there is no field of law in the United States today that is as complex and outdated, and as little studied, as the law of gambling.").