GAMBLING TAXES: THE PHILOSOPHY, THE CONSTITUTION AND HORIZONTAL EQUITY

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I. Taxation Moves Gambling Policy

A majority of Americans are repulsed by the notion that government should hold the public responsible, financially or otherwise, for delivering health care services to individuals.[1] Yet, the same majority seems to accept, without question, the notion that governments should be, directly or indirectly, delivering gambling services to the American public.[2] This author finds this to be quite ironic, yet he also finds a very simple explanation for the anomaly. It can be summed up in one word: taxation.

No matter how national health care plans are put together, their sponsors cannot get away from the gnawing beliefs of most, that the plans must involve increased taxes being imposed upon the population. Yet gambling proposals are sold as means of gaining taxation revenues for governments without making the public pay.[3] In 1819, Chief Justice John Marshall opined in *McCulloch v. Maryland*, that the "power to tax involves, necessarily, a power to destroy."[4] Oh! How wrong the chief justice was. The power to tax has not destroyed gambling, but rather it has become the very lifeblood of a vibrant and growing gambling industry.

This author's study, *The Last Resort: Success and Failure in Campaigns for Casinos*, written with John Dombrink, found that in case

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1. *See* Adam Nagourney, *Republicans Face Drawbacks of United Stand on Health Bill*, N.Y. Times, Mar. 22, 2010, at A1, *available at* http://www.nytimes.com/2010/03/23/us/politics/23repubs.html?hp (stating that polls show most Americans are unenthusiastic or opposed to recent health care bill).

2. *See generally* John Dombrink & William Thompson, The Last Resort: Success and Failure in Campaigns for Casinos 8-12 (University of Nevada Press 1990) (describing how Americans enjoy and ask for opportunity to gamble).

3. *See* Cathy H.C. Hsu, Legalized Casino Gaming in the United States: The Economic and Social Impact 119-124 (Routledge 1999) (outlining promises that were made to Atlantic City New Jersey regarding economic and tax benefits of gambling and actual results of Atlantic City casinos).

4. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819) (emphasizing historic passage detailing ability of taxes).

after case the public demonstrated that it did not want casinos.[5] Business elites also railed against proposals for casinos.[6] At the time the book was written, in 1990, most campaigns were opposed by political elites as well, as the elites were reticent to endorse gambling when public voices were expressing notions that gambling was adverse to "the public interest."[7] Things have changed. Public voices have become muted and business elites have become silent, as political elites now respond to calls for gambling in order to avoid having to impose new or increased taxes on the public and business community.[8] At the same time, the political elites have convinced themselves that gambling enterprise can bring new revenues to support public budgets.

In 1968, the United Kingdom passed a gambling act authorizing casinos for selected locations in England, Wales, and Scotland.[9] The act created a very powerful Gaming Board; however, the act did not authorize the Board to collect any special casino taxes. Therefore, the casinos could not tax the money won by players. Instead, each individual casino business paid taxes as if it was any other business, conducting any other type of business activity. Licensing fees were also very low. On the other hand, there were strict rules for the casinos for many of the gambling activities. Advertising was essentially prohibited, as were most promotional endeavors. Competition among the top casinos in London became fierce, and several engaged in efforts to take players away from one another.[10] They were often found to have violated the regulations on advertising. The Gaming Board met and instituted charges against three companies, who were subsequently prosecuted.[11] As a

5. *See* Dombrink & Thompson, *supra* note 2 (noting contradiction between public's abhorrence of casinos and adoration of state lotteries).

6. *See* Dombrink & Thompson, *supra* note 2, at 181.

7. *See* Dombrink & Thompson, *supra* note 2 at 35 (discussing law enforcement officials concern over organized crime).

8. *See* Dennis Cauchon, *Cities Gamble on Casinos for Tax Revenue*, USA TODAY, 2007, *available at* http://www.usatoday.com/news/nation/2007-08-13-casinos_N.htm (finding that major cities are attracting casinos in order to increase tax revenue).

9. Gaming Act, 1968, c. 65 (Gr. Brit.) (regulating casinos through the United Kingdom except for Northern Ireland).

10. *See generally* ROGER MUNTING, AN ECONOMIC AND SOCIAL HISTORY OF GAMBLING IN BRITAIN AND THE USA, (Manchester University Press) (1996) (detailing history of gambling within United Kingdom); *see also* John Clithero, et al., *Gaming Enforcement II Regulation of Casino Gaming in Great Britain and its Dependencies*, N98GENB ABA-LGLE B-37 (1998) (reviewing regulations in Great Britain including Gambling Act of 1968).

11. *See* Associated Press, *London Casinos Hit Losing Streak After Gambling Cleanup*, THE TELEGRAPH, Apr. 10, 1981, at 27, *available at* http://news.google.

result, the three most prominent casino companies lost their licenses permanently. Corals saw four of its casinos closed, Ladbroke lost licenses for three casinos, and Hugh Hefner lost his two London casinos — which incidentally, had produced most of the profits for his Playboy "Empire." The Board did not, however, have to worry that they were killing a public revenue "golden goose," since the public did not receive much revenue from the casinos. Even so, a public outcry against the casinos did result in passage of a new Gaming Act in 1981 that implemented casino-profit taxation after all. Under the new system, the government instituted a sliding scale of casino taxes — from two percent to thirty-three percent — depending upon the size of casino win profits.[12]

Contrast the actions taken in Great Britain in the face of casino violation of civil regulations, and the action taken in Pennsylvania following criminal wrongdoing in its gambling operations. The Pennsylvania lottery was established in 1971 as a government run entity.[13] The state government selected and oversaw personnel running the lottery games — from sales of tickets to selections of winning numbers to awarding of prizes. The state treasury retained approximately thirty-five percent of all ticket sales after it paid sales commissions, it selected winners and it gave out prizes to lucky players. In 1979, persons selected by the lottery to run the machine, which was a ping-pong ball device that selected winning numbers, rigged the selection of the winning number.[14] They violated not only the law, criminally, as they had confederates who bet on the numbers they caused to be generated by the machine, but they also violated the essential principle of any good gambling operation. They cheated the players: in this case all the people of Pennsylvania.

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com/newspapers?nid=2209&dat=19810410&id=g6grAAAAIBAJ&sjid=Bv0FAAAAIBAJ&pg=7132,2412542. (reporting on Scotland Yard's investigation that caused casinos to shutdown).

12. *See* William N. Thompson, THE INT'L ENCYCLOPEDIA OF GAMBLING 482-85 (2d ed. ABC-CLIO) (2010) [hereinafter Encyclopedia of Gambling] (noting political pressure against casinos, balanced with casinos' ability to raise state revenue produced sliding taxation scale); Ken Polson, *Chronology of Gambling*, ISLANDNET.COM, http://www.islandnet.com/~kpolsson/gambling/ (last visited Apr. 1, 2010) (detailing entire history of gambling from 3000 BCE to present day); *see also* David Miers, *Great Britain*, in INT'L CASINO LAW, 383-405 (A. Cabot, W.N. Thompson, A. Tottenham, & C. Braunlich, eds., 1999) (explaining new system of regulating casinos in Great Britain).

13. *See* Pennsylvania Department of Aging, Pennsylvania Lottery, http://www.portal.state.pa.us/portal/server.pt?open=514&objID=616678&mode=2 (last visited Apr. 1, 2010) (discussing history of Pennsylvania Lottery).

14. *See* Encyclopedia of Gambling, *supra* note 12, at 584-86 (discussing lottery rigging cheated entire population of Pennsylvania).

No legal gambling game can survive if it cheats the players. Las Vegas attracts around forty million tourists a year.[15] Consider how many would come if cheating on games was known to be tolerated in the Las Vegas casinos. The criminal cheaters in Pennsylvania — who were contractors to the state — were discovered, and several were convicted of felonies and sent to prison.[16] But what happened to the game? The next week Pennsylvania continued to run its numbers game, as well as the week after that and the week after that.[17] After all, the games were essential for bringing tax revenues to the state, so the gambling energizer bunny marched on and on and on.

The driving force of casino taxation on the spread of casinos was propelled by the United States Supreme Court in 1996 as a result of *Seminole v. Florida*.[18] The Indian Gaming Regulatory Act of 1988 held that Native American tribes could offer the same gambling games that the state permitted others to have.[19] If they wanted to offer casino games, they could do so only under terms of "compact" negotiated between the tribe and the state government. The 1988 Act provided that the tribes could sue the states in federal courts if the states refused to negotiate compacts. Many tribes did so, which often resulted in court-ordered negotiations. In one case, however, Florida claimed that the Eleventh Amendment did not grant the federal courts jurisdiction to hear such lawsuits.[20] The United States Supreme Court agreed. It appeared that the tribes had no remedy if states refused to negotiate.

Not so fast. Casinos make a lot of money. Consequently, tribes approached states with a different, more persuasive bargaining tool — the promise to share casino revenues if the state agreed to allow

15. *See* Tim Richardson, *Number of Visitors to Las Vegas Dropped 3 Percent Last Year*, LAS VEGAS SUN, Feb. 9, 2010, *available* at http://www.lasvegassun.com/news/2010/feb/09/number-visitors-las-vegas-dropped-3-percent-last-y/ (noting that thirty six million visitors came to Las Vegas in 2009, which was lower than normal).

16. *See Encyclopedia of* Gambling, *supra* note 12, at 188 (discussing that lottery was rigged and numbers "666" came up).

17. *See id.* (noting that lottery kept going in order to ensure tax revenue).

18. *See* Seminole Tribe v. Fla., 517 U.S. 44 (1996) (addressing issue arising from Indian Gaming Regulatory Act of 1988). In the case of Native American casinos, the term is casino "revenue sharing."

19. *See* Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, § 1166, 102 Stat. 2487 (1988) ("[A]ll State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.").

20. *See* Seminole Tribe v. Fla., 11 F.3d 1016 (Fla. 1994) ("whether Congress successfully abrogated the states' Eleventh Amendment sovereign immunity from suit by enacting the Indian Gaming Regulatory Act . . . .")

them to offer casino games.[21] While the 1988 Act provided that states could not levy taxes as a condition of signing compact agreements, the states circumvented the language of the statute to raise revenues.[22] As a result, the taxes are not called taxes, rather, they are said to be agreements for things other than compacts — things like exclusive rights to have machine gaming, or rights to have machine gaming while non-tribes are limited in their gaming offerings.[23] Whatever the niceties were, the states now have an incentive to tolerate Native American casinos, and they did so more and more and more. And so more, the words of Chief Justice Marshall are rendered meaningless vis-a-vis the gambling industry.

We find the contemporary scene in American politics replete with case after case of states yielding to industry desires for more gambling based on gaining tax revenue. Ohio voters said "yes" to casinos in 2009 for tax money.[24] West Virginia was driven to allow table games at its racinos, race track casinos, by its desire for more revenue, Maryland endorsed slot machines for race tracks for the same reason.[25] Delaware allows table games and sports betting at its racetrack casinos for one reason and one reason only — taxation.[26] Finally, we cannot end the discussion without mentioning Pennsylvania. On January 7, 2010 Governor Rendell signed legislation allowing license holders for the states racetrack and free standing casinos to have table games: up to two hundred and fifty tables for the race track casinos and fifty tables for the other casinos.[27]

21. *See* David Hackett, *State, Seminoles Near Gambling Deal*, HERALD-TRIBUNE.COM, Mar. 24, 2010, *available at* http://legislaturetoday.blogs.heraldtribune.com/10068/state-seminoles-near-gambling-deal/ (discussing Florida's deal with Seminoles that would use $435 million in casino revenues for state budget).

22. *See id.* (detailing Florida's plan to reduce taxes in exchange for agreement for revenues from casinos).

23. *See* Encyclopedia of Gambling, *supra* note 12, at 139-49 (indicating ways states have subverted Indian Gaming Regulatory Act of 1988).

24. *See* Tom McKee, *Ohio Issue 3: Casinos Will Come to Ohio*, WCPO.COM, Nov. 11, 2009, http://www.wcpo.com/news/local/story/Ohio-Issue-3-Casinos-Will-Come-To-Ohio/YPNV7Ks920ujgxFrSKTcyg.cspx (expressing that Ohio passed vote for allowing casinos in Cincinnati, Columbus, Cleveland, and Toledo).

25. *See* Encyclopedia of Gambling, *supra* note 12, at 528, 544, 582, 596 (describing ways states have tolerated gambling as tax generator

26. *See* Randall Chase, *Delaware House Approves Table Games*, ABCNEWS, Jan. 22, 2010, http://abcnews.go.com/Business/wireStory?id=9632400 (stating that Delaware Governor wanted table games to boost state revenue).

27. *See* John Hurdle, *Pennsylvania Lawmakers OK Table Games for Casinos*, REUTERS, Jan. 6, 2010, http://www.reuters.com/article/idUSTRE6055ME20100106 (reporting on passage of bill to legalize games like poker and blackjack at casinos in move to generate $250 million in revenue and balance state budget).

II. WITH GAMBLING, THE 'PUBLIC INTEREST' MEANS ONLY ONE THING — TAXES

In 2003, a citizen's group invited me to write a report and make a presentation to the finance committees of the Pennsylvania General Assembly in Harrisburg. I did so on April 30, 2003. I tried to couch the issue of whether the state should authorize thirty thousand slot machines for up to fourteen casinos in terms of the public interest.

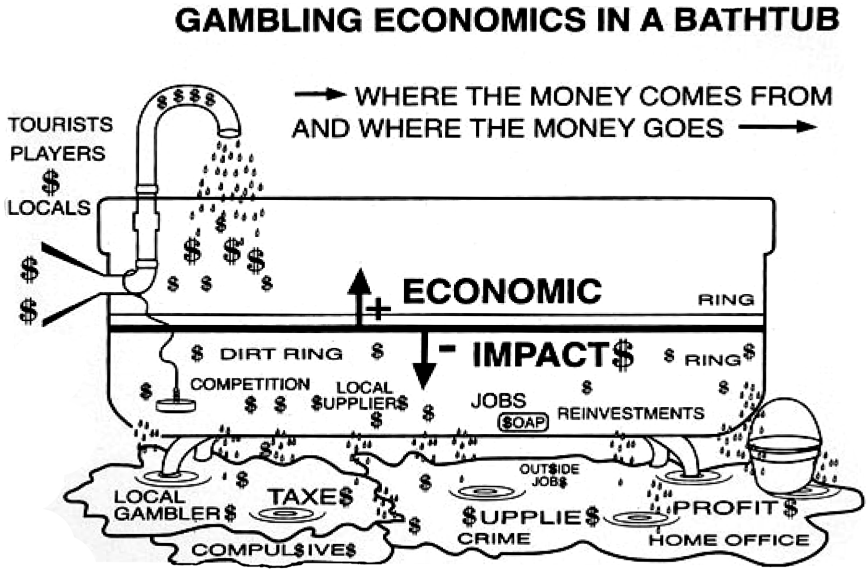
I think I began by reciting lyrics from a Tom T. Hall song. The song goes something like this: "She loved me like the trees loved Philadelphia, and I loved her, like Philadelphia loved the trees." I told the legislators that I did love coming to Pennsylvania from Las Vegas, because when I came to the state I could enjoy all the beautiful trees. You see, we do not have "real" trees in Las Vegas. Oh, a truck might bring in a tree, and then another truck has to bring in the water so the tree can survive. We did not have trees in Las Vegas, but then we did have money — lots of money. I loved the Pennsylvania trees, but I was sorry that Pennsylvania was broke and did not have our money. I paused, and no one seemed to get the point. Therefore, I had to spell it out. The point is that money does not grow on trees.

Then I told an old Frank Sinatra story. Frank was walking on Fremont Street in downtown Las Vegas when a "down and outer" approached him and asked, "Sir, could you spare a dollar, so I could get a cup of coffee." Frank looked at the poor soul, but then he looked right behind him at a casino, and in the window was a sign that said, "Play our One Dollar Slot Machines." Ole Blue Eyes laughed, and said, "Come on, this is Frank, baby, tell me the truth. You are not going to spend the dollar for coffee, you just want money to gamble in the slot machine." "No no no, honest, Mr. Sinatra, I want the dollar for a cup of coffee." So Frank says, "Yeah right, how do I know you are telling the truth?" The man replied. "Honest, I'm telling you the truth, it's for coffee. See. I got my gambling money right here." He pulled five dollars out of his pocket: The point is that casino money comes out of the pockets of people.

I offered that if one wants to understand if a gambling enterprise will be good or bad for a city, state, or region, one must understand two things: 1) where the gambling money comes from, and 2) where the gambling money goes.

The two questions can be analyzed by using a model I developed. It is called "Gambling Economics in a Bath Tub." It may be designated with a chart.

TABLE I.



Several items go into the Bath Tub. First, we determine, or estimate, how much money will be gambled. Looking at other states where there are slot machines we get an indication about how much a machine can take away from a player — player losses — in a day or year. Then we estimate where the players come from. Are they residents of the local area, or are they tourists who come from faraway places. If they are locals, we can ask if they are now gambling somewhere else and hence bringing their money home by gambling locally. In this way, we estimate how much "new" money is coming into the state. Then we turn to where the money goes: it goes away in taxes: to the local, state, and national governments. It goes to employees, almost all of whom will live in the local area. It goes for supplies, many of whom purchased locally. But then slot machines are made in Nevada. Each costs fifteen thousand dollars; ergo, thirty thousand new machines at fifteen thousand dollars each means that four hundred and fifty million dollars leaves the state. Then there are the casino profits: they go to the owners. Some of the owners may be Pennsylvania companies like Penn National, but some will be out of state firms like MTR in Erie, or Sands in Bethlehem. If they are out of state firms, Pennsylvania can kiss the profits goodbye. On top of it all, more gambling in Pennsylvania means more social problems. According to a national survey study, putting in a casino double the rate of compulsive gambling within fifty miles. Compulsive gamblers do not pay debts, miss work, steal, and use public services. Each imposes a cost of about ten thousand dollars on the non-gambling public each year.

Throw all of these factors together, and the result is not usually very good. Casinos work for the Las Vegas economy because ninety percent of the play is from visitors, Nevada makes the slot machines, the employees and locals, and many of the owners are based in Nevada.[28] State taxes are low so not too much Las Vegas gambling money escapes to Carson City.[29] If a given gambling location cannot get half its gambling money from overnight tourists, it probably will not work for the economy. The more money the casinos make, the worse the situation might become.

I concluded that the introduction of thirty thousand machines would result in an economic loss of several hundred million dollars a year for Pennsylvania, even though the slot machines would win a lot of money and the state would get a big share of the money in taxes. I then explained that I could best represent and express the "Public Interest" by explaining the loss of money to the state; by looking at where the money came from, pockets and not trees; and by noting where it went, to Nevada, to Washington, D.C., to absentee owners as well as to Harrisburg.

To my surprise Frank Farenkopf, who is the president of the American Gaming Association, which is the chief lobbying group for America's commercial casinos, attended both legislative hearings were I gave my presentations. I greeted him, knowing he did not appreciate my remarks, and asked why he was there. After all, I said, we are not talking about casinos but racetracks and slot machine halls. He told me he was there to be able to correct my falsehoods. Six years later, I can correct one of the falsehoods I had in April 2003. I thought we were talking about racetracks and slot machine halls. We were not. It turns out we were talking about casinos after all. Moreover, Mr. Farenkopf's version of the conversation included not just casinos, but the biggest casinos, casinos that, incidentally, he represented. After all, the world's biggest

28. *See* Encyclopedia of Gambling, *supra* note 12, at 102 (noting that Los Vegas' economic strength comes from high amounts of visitors to casinos).

29. *See* Bill Minor, *Tax Money from Legal Casino Gambling Now Appreciated*, Mar. 26, 2010, http://www.clarionledger.com/article/20100326/OPINION/3260318/Tax-money-from-legal-casino-gambling-now-appreciated (finding that low taxes in Las Vegas attracts big casinos with hotels).

casino is owned by the gentleman who owns the casino in Bethlehem, Pennsylvania, so Mr. Farenkopf had a lot at stake in Pennsylvania.

I was not sure exactly who was pushing the slot machine legislation that April. However, a few weeks later I got a call from the Governor Rendell's Office. They had my report. They were interested in my research. They wanted me to do some more research. I was flattered, and I thought, "Hey, maybe, just maybe, they are concerned with the 'public interest.'" A staff member soon straightened me out. They were most interested in the part of my report where I indicated how much money a slot machine made in various venues around the United States. They asked me if I could refine that part of the report, and if I could examine slot revenues and taxes. Additionally, they asked if there was a possibility that a proposed *thirty-five thousand* machines could result in taxation revenues of a billion dollars a year for Pennsylvania. I said I could do all of the above, but I would merely report the numbers, that I would not indicate approval or disapproval of the proposal on that basis alone. They said that was all right. They offered me a small commission — for the record, three thousand dollars — and I produced a report for them. I looked at revenues of machines in New Jersey, West Virginia, Connecticut, and I examined local populations and national estimates about how many people gambled and how often in various regions. I concluded that thirty-five thousand machines would win between two and four fifths billion dollars and three and three fifths billion dollars a year, and that with a one-third tax, the state would receive between nine hundred and thirty-three million and one and one fifth billion dollars a year as its share. I absolutely did not endorse the proposal. In exchange for my research, I received my promised compensation, along with a bit of angst from the citizens' group that first invited me to the state.

The only thing the governor's office wanted to know about was taxes, not the public interest. A month or so later, I was surprised when the governor's office released a statement revising their proposal. They now wanted the state to authorize *sixty-thousand* machines. I guess they really liked my report.

III. THE CASINOS COME TO PENNSYLVANIA — FIRST WITH SLOTS — NOW WITH TABLE GAMES

On July 5, 2004, Pennsylvania governor Ed Rendell signed Act 71, known as the Pennsylvania Racehorse Development and Gaming Act.[30] The law authorized the creation of fourteen casinos. They would be located at existing racetracks, four new racetracks, and seven additional sites.[31] The casino facilities would be allowed to have up to five thousand slot machines each, with a maximum of sixty-one thousand machines for the state. To become authorized to conduct the machine gaming, each casino applicant had to give the state a onetime fee of fifty million dollars. The winnings of the machines were taxed fifty-five percent, with thirty-four percent going to the state government — most for property tax relief, five percent going to an economic development fund, twelve percent to horse breeders in the state, and four percent to local governments — counties, cities and school districts.[32] The first casino opened in 2006.[33] During the first full year of operations in 2008, seven casinos produced machine revenues of one and three fifths billion dollars, which yielded tax revenues of seven hundred and sixty-six million dollars. By the end of 2009, the revenues of the machines exceeded those achieved by machines in all other commercial gaming states with the exception of Nevada. The Pennsylvania tax revenues were the sixth largest of the commercial gaming states.[34]

While no one denied the "success" of slot machine casinos, albeit not all had been opened, the state wanted more casino gambling. Quite simply, even with gaming tax revenues in excess of those of the state of Nevada, they were not enough. In late 2009, legislative leaders were given a proposed budget of twenty-seven and four fifths billion dollars.[35] A calculation of anticipated taxes revealed a potential deficit gap of two hundred and fifty million

30. *See* Pennsylvania Gaming Control Board, *PA Gaming Control Board Fines Casino $100,000 for Underage Gambling Violations*, http://www.pgcb.state.pa.us/?pr=321 (last visited Apr. 1, 2010) (detailing Race Horse Development and Gaming Act).

31. *See Pennsylvania's New Race Horse Development and Gaming Law, Economic Development, Property Tax Relief, and so Much More*, http://www.issue spa.net/articles/9353 (last visited Apr. 1, 2010) (listing additions made by Race Horse Development and Gaming Law Act).

32. *See* WN Thompson, ed. *Industry Information, State Information Statistics: Pennsylvania*, AM. GAMING ASS'N, 2008-09, www.americangaming.org/industry/state/statistics.cfm (last visited Apr. 1, 2010) (detailing 2008 economic impact data for twelve states with commercial casinos and twelve states with racetrack casinos).

33. *See Gamblers Press their Luck as Pa.'s First Casino Opens*, USA TODAY, Nov. 14, 2006, http://www.usatoday.com/news/nation/2006-11-14-pa-casino_x.htm (discussing first casino opening in Pennsylvania).

34. *See* Charles Thompson, *Table Games Will Help Pennsylvania Casinos Compete for Regional Business*, THE PATRIOT NEWS, Jan. 10, 2010, http://www.pennlive.com/midstate/index.ssf/2010/01/table_games_will_help_pennsylv.html (reporting on success of Pennsylvania casinos and impact on region).

35. *See* Amy Worden, *Dueling Predictions on Proposed Pa. Budget*, PHILLY.COM, Apr. 1, 2010, http://www.philly.com/philly/news/local/89667207.html ("Republi-

dollars.[36] The governor took out his knife and warned that slashing would begin.[37] He foresaw that if the gap was not closed, one thousand state workers would have to be laid-off. He had envisioned requesting that the casinos be allowed to have table games, but he wished not to introduce tables until after all fourteen of the casinos were open. He recognized that West Virginia slot machine casinos, at racetracks, had authorized tables and they were in operation, and that Delaware racetrack casinos had also given a go-ahead for table games alongside their slot machines. The budget situation forced his hand; he told the legislators that he wanted table games now. He indicated that fees and taxes for the table games would have to fill the budget gap — indeed they were to be designed around the budget gap. In the late summer of 2009, the legislative work began.[38]

Proponents of table gaming saw great advantages to Pennsylvania casinos, as they sought to compete with casinos in rival states, particularly those in Atlantic City, New Jersey, West Virginia, and Delaware.[39] The CEO of one Pennsylvania casino was eager for tables. George Toth of the Mt. Airy Casino Resort offered that the expansion to tables "makes us full gaming houses." He continued stating, "We can compete with Atlantic City on equal footing. This is what we've been waiting for . . . . Our customer database from New York will skyrocket."[40]

Charles Thompson, a reporter with the Patriot News, added that the legislation was coming "at a critical time," and that it could help Pennsylvania casinos "lure more out of state gamblers and keep home grown customers in the face of increasing competition

cans say they want to see a spending plan closer to the current year's $27.8 billion budget).

36. *See Pennsylvania Lawmakers OK Table Games Bill For Casinos*, ONLINE-POKER.NET, Jan. 7, 2010, http://www.onlinepoker.net/poker-news/poker-law-industry-news/pennsylvania-lawmakers-table-games-bill-casinos/4111 (determining that Pennsylvania needs to generate $250 million to balance state budget).

37. *See* Nell McCormack Adom, *Pa's Budget – A Fiscal Tsunami*, Feb. 12, 2010, http://www.witf.org/news/smart-talk/3130-pas-budget-a-fiscal-tsunami (quoting Governor Rendell describing how he would cut spending in Pennsylvania).

38. *See Casino Table Games Are Coming to Pennsylvania*, LOTTERY POST, Jan. 8, 2010, www.lotterypost.com/news/206714 ("[D]eal is done, table games are coming to Pennsylvania by the end of the year.").

39. *After-Effects: A Gambling Arms Race*, *United to Stop Slots in Massachusetts*, http://uss-mass.org/gambling_arms_race.html (last visited Apr. 2, 2010) (discussing that due to Pennsylvania installing slot machines, revenue has dropped in New Jersey, West Virginia, and Delaware.)

40. Donald Wittkowski, *Table Games in Pennsylvania Likely to Pull Atlantic City Gamblers*, PRESSOFATLANTICCITY.COM, Sept. 21, 2009 (discussing excitement about completion Pennsylvania table games will give Atlantic City).

from neighboring states" because "[w]hile slots are still the most popular game among all gamblers, industry studies show that table games draw younger gamblers, and specifically younger men."[41]

Others cited jobs as a rationale for table games, with indications that the casinos might hire as many as ten thousand new workers. Reporter Laura Vecsey of the Patriot-News wrote, "Minnesota may be the land of ten thousand lakes, but Pennsylvania could soon be the land of ten thousand new casino jobs."[42] An industry report suggested that each gaming table would result in the employment of nine and three fourths jobs.[43] Mark Belko of Pittsburgh's Post-Gazette cited a spokesperson for one casino saying that table games were "incredibly labor intensive."[44] The casino official offered that the new law would have to take that into consideration as tax policy was considered.[45] Most of the legislative debate did focus on taxes and fees for the table games. At one point, Governor Rendell suggested he would veto any bill that did not give the state sufficient revenue to meet the budget gap.[46]

At the end of the legislative process the House voted one hundred and three to eighty-nine, and the Senate twenty-eight to twenty-two.[47] The bill went to the governor's desk on January 6, 2010, and the next day Governor Rendell signed it into law.[48] The bill permitted casinos to operate tables for twelve casino games. Larger casinos would be able to have as many as two hundred and fifty tables each, while smaller, resort-casinos would have fifty tables. The larger casinos are required to pay a onetime fee of sixteen-and-

41. Thompson, *supra* note 34. Thompson added, "Casino operators here will be able to appeal to all gamblers, from senior citizens taking a bus trip once a month to play to slots to those willing to bet six figures or more in the baccarat lounge." *Id.*

42. Laura Vecsey, *Legalization of Table Games Could Mean 10,000 New Jobs in Pennsylvania Casinos*, PENNLIVE.COM, Sept. 22, 2009, http://www.pennlive.com/midstate/index.ssf/2009/09/legalization_of_table_games_co.html.

43. *See id.* (reporting on plethora of new jobs created by introduction of table gaming).

44. Mark Belko, *Table games at Casinos on the Table*, POST-GAZETTE.COM, Sept. 12, 2009, http://www.post-gazette.com/pg/09255/997504-454.stm.

45. *See id.* (citing casino official).

46. *See* Robert Swift, *Casino Concerns Weigh on Table Games Debate*, TIMES TRIB., Nov. 9, 2009, http://thetimes-tribune.com/news/casino-concerns-weigh-on-table-games-debate-1.403946 (noting Governor's principle goal of table game legislation was to close budget gap).

47. *See* Hurdle, *supra* note 27 (reporting on legislature's vote).

48. *See* Mark Scolforo, *Gov. Ed Rendell Signs Bill Allowing Table Games at Casinos*, ABC NEWS MONEY, Jan. 7, 2009, http://abcnews.go.com/Business/wireStory?id=9500657 (reporting on Governor Rendell signing bill in private) (last visited Mar. 31, 2010).

one-half million dollars, and the smaller casinos a fee of seven-and-one-half million dollars in order to have the table games. The revenues from the table games — the gaming win — are to be taxed at a rate of sixteen percent for the first two years of operation, and fourteen percent in subsequent years. Two percent of the tax money will go to local governments, while the major portion will go to the state.[49]

However, the adoption of table games must wait for the writing and application of new rules by the state gaming control board. Many believe that the rule making process will take up to six months.[50] Roger Quigley is just one commentator who illustrates the complex nature of developing table-gaming laws. He wrote in the Patriot-News,

> The money the state receives from slots is monitored by a central computer. With table games, money is exchanged at the table for chips and [then] taken to a count room. Additional surveillance will be required for both the count room and the tables to ensure the money goes where it should.[51]

Therefore, with their special counting needs and relatively new status as a casino game, table games certainly complicate the regulatory process.

IV. THE PHILOSOPHY OF THE GOOD TAX

Taxation moved gambling expansion in Pennsylvania.[52] As gambling taxation and revenue sharing policies are the moving forces behind the spread of gambling everywhere, we should ask if gambling taxes meet the criteria for "good" taxes. The concepts of casino taxation and revenue sharing should be considered within the context of general theories of taxation. The American political system achieved its independent status as a result of the Revolution-

49. *See* Lottery Post, *supra* note 38; Hurdle, *supra* note 27 (reporting where tax money from table games will be used).

50. *See* Lottery Post, *supra* note 38 ("A spokesman for the state Gaming Control Board said it would take from six to nine months to get table games up and running in the nine operating casinos . . . .").

51. Roger Quigley, *Arrival of Table Games at Pennsylvania Casinos Depends on Gaming Control Board*, THE PATRIOT NEWS, Jan. 9, 2010, http://www.pennlive.com/midstate/index.ssf/2010/01/arrival_of_table_games_at_penn.html (last visited Jan. 31, 2010).

52. For a further discussion on tax revenue being a motivating force behind gambling expansion in Pennsylvania, see *supra* notes 30 to 38 and accompanying text.

ary War, which was inspired by the idea that a sovereign could not tax the people without their consent.[53] Their consent would never be given for "bad" taxes.[54] So what is a "good" tax? While most would agree that the imposition of no taxes might be preferable to having any taxes, there is a necessity for acquiring resources to support government programs. Thus, some taxation is inherently inevitable.

There are several features of a good tax. First, a tax should have a yield; that is, it should produce revenue.[55] Revenue production must be the quintessential purpose of taxation.[56] Taxes should have an aspect of sufficiency.[57] Moreover, the revenue from taxation should be reliable.[58] The government should have some expectation that the anticipated revenue will manifest itself, and that it will recur as it is predicted.[59] Stability is a preferred trait for taxation.[60] Good taxation results in money going to needed programs.[61] Good taxation finds some relationship between levels of taxes levied and benefits received, either individually or collec-

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53. *See* Tex. v. Johnson, 491 U.S. 397, 435 (1989) (Rehnquist, W., dissenting) ("The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation . . . .").

54. *See* Phil Hart, *No Taxation Without Our Consent*, IDAHO OBSERVER, http://proliberty.com/observer/20020911.htm (last visited Mar. 31, 2010) (explaining mantra of American Revolution is qualified: no "good" taxation without consent).

55. *See id.* (outlining features of good tax, including generation of revenue).

56. *See* Steve Buckstein, *Guiding Principles for Taxation*, OREGONCATALYST.COM, Nov. 21, 2008, http://www.oregoncatalyst.com/index.php?/archives/1874-Guiding-Principles-for-Taxation.html (last visited Feb. 26, 2010) (outlining principles of taxation, in face of Oregon's $1 billion budget deficit) [hereinafter Universal Guiding Principles].

57. *See id.* (noting collected taxes should be enough to sustain government activities).

58. *See id.* (explaining that tax systems run more efficiently when predicted revenue actually comes in).

59. *See id.* ("A stable tax system is better than an unstable one. Revenue sources that grow faster than the economy in good times, or sing faster in bad times should be avoided."); *see also* American Institute of Certified Public Accountants, GUIDING PRINCIPLES OF GOOD TAX POLY: A FRAMEWORK FOR EVALUATING TAX PROPOSALS 13, (2001), *available at* http://www.aicpa.org/download/members/div/tax/Tax_Policy_st mt1.pdf. ("The tax system should enable the government to determine how much tax revenue will likely be collected and when.").

60. *See* Universal Guiding Principles, *supra* note 56 (referring to ability of tax to produce revenue in face of changing economic circumstances).

61. *See* Richard K. Vedder, and Lowell E. Gallaway, *Out of Work: Unemployment and Government in Twentieth-Century America*, NEW YORK: HOLMES AND MEIER (1993) (explaining true value of taxes and benefit on society with respect to public funding).

tively.[62] As all receive benefits from governmental services, a claim can be made that all should participate in taxation to some degree. Such participation has an effect of making persons more aware and concerned about government activities, resulting in enhancing their citizenship responsibilities.[63]

Good taxes are easy to collect and hard to dodge.[64] The payment structure of a good tax may be less painful than the payment structure of a bad tax.[65] Good taxes engender willingness on the part of taxpayers to offer payments, perhaps grudgingly, but at least without serious acrimony and challenge.[66] Further, good taxes encourage good activities and discourage bad activities.[67] As indicated above, a good tax should promote desired economic activity and development.[68] Bad taxes discourage economic development.[69]

A last point, what constitutes a "fair tax," concerns the major point that will be discussed below. The assertion is very important in taxation debates. A good tax should be "fair," meaning first and foremost that the tax should encompass notions of equity.[70] The United States Constitution provides that all federal taxes must be uniform, as does the Pennsylvania Constitution.[71] In a sense, this is a mandate for horizontal equity.[72] Persons or organizations similarly situated should pay the same tax rates. There is also a notion of vertical equity; the parties most able to pay taxes should have a greater tax burden than those less able to pay.

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62. *See id.* at 4, 7; Universal Guiding Principles, *supra* note 57 (explaining relationship between taxes and benefit to society, the individual and other specific advantages).

63. *See* Vedder & Gallaway, *supra* note 61, at 1-8. (explaining that taxes are a catalyst for citizens to be updated on current events).

64. *See id.* at 5. (discussing importance of well drafted tax statute).

65. *See* Universal Guiding Principles, *supra* note 57 (explaining that a poorly drafted tax statute will have a more substantial and generally worse effect on public).

66. *See id.* (explaining that a good tax will appropriately draw money from the public, and more uniformly because a good tax is difficult to circumvent).

67. *See* Vedder & Gallaway, *supra* note 61, at 3, 6 (explaining government can use taxes to coax public to participate in specific activities)

68. *Id.* at 6.

69. *Id.* at 3 – 6.

70. *Id.*; *see also* Universal Guiding Principles, *supra* note 57 (explaining taxes should be fair to all those to whom taxes are applies).

71. U.S. CONST. art. I, § 8, cl. 1.

72. *See id.*; s*ee also* Vedder & Gallaway, *supra* note 61, at 7; Universal Guiding Principles, *supra* note 57 (arguing the Constitution requires taxes be equally applied to all).

V. MEETING THE TEST OF THE GOOD TAX WITH PENNSYLVANIA AND OTHER GAMBLING

A discussion of the "goodness" or "appropriateness" of the Pennsylvania casino taxation policy will focus upon the question of horizontal equity. Before getting to that essential, however, it is necessary to look at the other criteria as well.

A. Sufficiency and Stability of Yield

With the exception of gambling taxes in the state of Nevada, few other states, and few world jurisdictions, these taxes do not constitute major sources of revenue for public coffers. While a bit dated, the situation now is not different from that in 2005, when this author, along with Professor Christopher Stream, analyzed gambling taxes for casino type games. In that study we showed that Nevada raised roughly forty-three percent of its general funds from gambling taxes, South Dakota thirteen percent, Louisiana ten percent, Mississippi nine percent, Delaware eight percent, and West Virginia eight percent. Three other states rose between six percent and seven percent, while no other state raised as much as five percent from gambling taxes.

At the beginning of 2010, slot machines at Pennsylvania casinos were producing over one billion dollars in state revenue, while table games were projected add another $250 million to the states $27.9 billion proposed budget.[73] Table revenues could add an additional percentage to that number. Yet even with the windfall of slot machine taxes over the last two years, the state could not avoid a fiscal crisis that has left it facing a deficit of two hundred and fifty million dollars. Casino taxes were not enough to pay the state's bills. We can note, however, that with table taxes added, they may be enough to temporarily fill a budget gap for the state. It is problematic if they can keep filling the gap in all years to come solely with taxes, unless we see a general economic recovery.

But this raises the additional point of economic fluctuation, of economies going up and down in cyclical business waves. Will the state be ready to stop gambling when a strong economy arrives and other sources of public revenue are more than sufficient to meet the public's needs? If that happened, it would be a first.

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73. *See* Hurdle, *supra* note 27; *see also* Thompson, *supra* note 34; Worden, *supra* note 35.

B. Benefits and Participation

Gaming taxes find many beneficiaries. Sometimes the funds go to the general state budget, while at other times they go to specific funds.[74] Rarely, however, do many funds go for programs targeting either the casinos or the players. To be sure, the taxes do pay for regulation of the games, and in some cases a minor portion, almost always less than one per cent of the taxes, may go to support programs for problem gamblers. That being said, it should be noted that while casino taxes pass through the casino operators' hands, the tax money is always derived from money coming out of the pockets of the gamblers. The gamblers are paying the taxes. The tax burden is not shared by the general population. Surveys show that nearly two-thirds of the American population participates in gambling activities each year, with almost half buying lottery tickets.[75] On the other hand only twenty percent of the population will gamble at a casino each year. Casino taxes do not require a wide participation in government support by the general public.

On the one hand, some might find this shift of burden away from the general citizen to the gambler to be evidence of good taxation. Some might indeed subscribe to the philosophy that "that government is best that governs least."[76] Accordingly they may buy the notion that the best tax is no tax at all. The second best tax is the tax that only others pay. (Liberals as well as Libertarians love this one — ergo, "Tax (only) the Rich)." The idea was best expressed by Louisiana's Senator Russell Long, decades ago, when he said "Don't tax you, don't tax me, let's tax the fellow behind the tree."[77] Following that kind of taxation, preference might be for a very small tax, or at least a painless tax, one hidden from view, or hidden in the price of the ticket — in lotteries or at the race track or in the wager made at the casino.

A good tax, however, might be something else. It might be a tax that makes the citizen feel enough pain that paying it generates

74. *See* International Encyclopedia of Gambling, *supra* note 12, at 235-36.

75. *See* Jeffrey M. Jones, *Gambling a Common Activity for Americans, Gallup News Service*, May 24, 2004, *available at* http://www.gallup.com/poll/11098/Gambling-Common-Activity-Americans.aspx (last visited April 9, 2010).

76. *See The Government is Best Which Governs Least*, THOMAS JEFFERSON ENCYCLOPEDIA, http://wiki.monticello.org/mediawiki/index.php/That_government_is_best_which_governs_least (last visited April 9, 2010) (A quotation sometimes attributed to Thomas Jefferson, but not found in his writings; also attributed to Thomas Paine).

77. Herb Dunsel, *Tax That Man Behind the Tree*, ASSOCIATED CONTENT, http://www.associatedcontent.com/article/418533/tax_that_man_behind_the_tree.html?cat=9 (last visited March 23, 2010).

a true concern for the effectiveness of government, and a true desire to participate in government to some degree, for instance by voting. The "wonderful" general taxes of Nevada are very low due to the fact that much of the budget is supported by casino taxes. The result has not been better government, but rather a government finding low levels of voting and muted outrage over low levels of government services, at least when compared with other states. Whenever there is a crisis over services, the public cry is that the casinos should pay more.

C. Efficiency and Ease of Collection

The "good" tax is easy to collect. The author suggested above that table taxes are more difficult to collect than machine taxes. Las Vegas casino history reveals how criminals diverted casino winnings away from the count room and into their pockets before the tax authorities could assess the value of the winnings.[78] A "painless" tax is easier to collect than one that might require a large out of pocket expenditure at a single time. Gambling taxes come out of the players' pockets gradually, a bit with each gambling loss. Also, as players choose to play, some call the gambling tax a voluntary tax. Thomas Jefferson said that taxes paid through lotteries represented taxes "laid on the willing only, that is to say, on those who can risk the price of a ticket . . . ."[79] While this factor might make the tax easier to collect, being that it is not "painful," it is a stretch to call the casino taxes voluntary; at least any more so than another tax. If it was voluntary, so too would be an income tax, as we voluntarily decide to work, or a sales tax, as we choose which specific products to purchase in our free enterprise society. A property tax would also be considered voluntary, as we freely purchase our dwellings and we freely choose to live where we live. Gambling taxes are not voluntary taxes.

D. Promoting the Good through Good Taxes

A good tax has benefits for the public, directly and indirectly. Taxation should discourage bad things and promote good things. High taxes on liquor, for instance, have been justified on the basis that the tax will add to the cost of liquor and thereby discourage consumption of a "bad" thing. This logic, however, is turned on its

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78. *See* International Encyclopedia of Gambling, *supra* note 12, p. 28. This activity called "skimming" was featured in the film "Casino." *See id.*

79. CHARLES CLOTFELTER & PHILIP COOK, SELLING HOPE 215 (Cambridge: Harv. U. Press 1991) (1989).

head when the government legalizes an activity otherwise considered bad, ergo illegal, simply to gain tax revenue. In this scenario, the government becomes the major party in promoting the renegade activity. On the other hand, a share of the "renegade" Pennsylvania Casino taxes on slot machines funds economic development, and thus, this tax is used in a very positive, "good" way.

To expound upon this idea, economic development in the area of tourism is a good thing. But how else might casino taxes be related to this economic development? A passage from premier gaming financial expert Eugene Christiansen outlines a hypothesis that was subjected to simple analysis by this author and Professor Nathan Myers.[80]

> In deciding on tax rates, lawmakers should ask themselves this question: what kind of gambling industry do the people . . . want? Tax rates north of fifty percent mean . . . straight machine gaming undiluted with entertainment. . . . Tax rates this high mean minimal capital investment and minimal job creation. Lawmakers . . . are trading jobs for government revenues. They are also imposing maximum social costs on the communities hosting machines. Tax rates in the twenty percent range shift the policy emphasis away from revenue generation and toward economic development . . . . Rates below twenty percent. . . maximize job creation and capital investment. . . . Single digit tax rates . . . make the development of labor-intensive diversified entertainment properties possible. . . . Lawmakers . . . are putting economic development . . . first and government revenue second. They are saying their communities want a new Bellagio . . . not storefront video poker.[81]

When a person or organization is taxed, money shifts from the person to the government. The person loses the money (minus one hundred dollars), and the government gains the money (plus one hundred dollars). The total is zero. As a tax burden is shifted

80. *See* William Thompson & Nathan Myers, *It's This Simple: Casino Taxes Stifle Development*, CASINO ENTERPRISE MGMT, Nov. 2006, at 92-95 (discussing hypothesis about Eugene Christiansen's passage).

81. Eugene Christiansen, *"The Impacts of Gaming Taxation in the United States,"* AMERICAN GAMING ASSOCIATION 10TH ANNIVERSARY WHITE PAPER SERIES, 2005., pp. 18-19, *available at* www.americangaming.org/assets/files/studies/The_Impacts_of_Gaming_Taxation.pdf. (last visited April 9, 2010).

from one person to another, one wins (gets to keep one hundred dollars), while the other loses (has to spend one hundred dollars). For each winner in the tax game, there is a loser.

But do the words of Eugene Christiansen really ring true? The tax rates of eleven casino states were examined for the 2003 tax year along with the gaming revenues. Casino City's Worldwide Casino Guide provided a listing of the commercial casinos in the eleven states along with numbers of hotel rooms, restaurants, entertainment facilities, and areas of convention space at each casino.[82] To the figures listed we have added the space in the convention centers of Las Vegas, Reno, and Atlantic City, as these facilities are directly supported by the casinos.

In order to test our simple proposition, we examine the following four ratios:(1) Casino revenues to hotel rooms; (2) Casino Revenue to convention space in casinos (or supported by casinos); (3) Casino revenues to numbers of restaurants at casinos; (4) Casino revenues to numbers of entertainment venues at casinos.

We arranged the states according to given tax rate for casino gambling revenue and the actual rate.

TABLE II: COMMERCIAL CASINOS—REVENUES AND TAX COLLECTIONS

	Gambling Revenue	Casino Tax Revenue (CTR)	Tax Rate Formal Casino
Colorado	$698,200,000	$95,600,000	20.00% (actual 14%)
Illinois	$1,709,000,000	$779,900,000	42.50%
Indiana	$2,299,000,000	$702,000,000	25.00%
Iowa	$1,024,000,000	$209,700,000	20.00%
Louisiana	$2,017,000,000	$448,900,000	21.50%
Michigan	$1,130,000,000	$91,547,195	8.10%+9.9 (local)
Mississippi	$2,700,000,000	$325,000,000	8.00%
Missouri	$1,330,000,000	$369,000,000	20.00%
Nevada	$9,625,000,000	$776,500,000	6.75%
New Jersey	$4,490,000,000	$414,500,000	8.00%
S Dakota	$70,400,000	$5,450,000	8.00%
	$27,092,600,000	$4,218,097,195	17.08%

The arrangement of the states from lowest to highest taxes therefore is considered to be Nevada, South Dakota, New Jersey, Mississippi, and Colorado, followed by Michigan, Missouri, Iowa, Louisiana, Indiana, and Illinois. For a simplified analysis we compare low tax states (Nevada, South Dakota, New Jersey, Mississippi,

82. *See* CASINO CITY'S WORLDWIDE CASINO GUIDE (Casino City Press 2004) (detailing cities with casinos and amenities within those casinos).

and Colorado) to high tax states (Michigan, Missouri, Iowa, Louisiana, Indiana, and Illinois).

i. *Hotel Rooms and Casino Taxation.*

In the low tax states, we find that three hundred and ninety thousand dollars in casino revenue will produce one hotel room, whereas in the high tax states, it takes two million dollars to have a single hotel room at a casino. When Nevada is taken away from the low tax states, the revenue required for a hotel room still pales in comparison to the high tax states - four hundred and seventy thousand.[83] Therefore, higher taxes stifle development of hotel amenities.

ii. *Conventions and Casinos*

The small tax states offer one square foot of convention space for each fourteen thousand dollars of gambling revenue, while the large tax states exhibit one square foot of convention space only when they have ninety-five thousand dollars in casino gambling revenues.

iii. *Restaurants and casinos.*

The five low tax states find one casino restaurant for every eighteen million dollars lost by players. If Nevada is excluded, the amount is twenty million dollars. The six high tax state casinos require about twice as much in revenues to produce one restaurant — forty-one million dollars.

The trend line follows taxation when we look at the states individually, with the exception of New Jersey where it can be assumed that their fewer restaurants probably have larger capacities than elsewhere.

iv. *Entertainment and Casinos.*

As with restaurants, the Casino City reports did not consider the size and seating capacity of entertainment facilities, but rather simply the number of entertainment facilities with each casino. The same differentiations persist. The five small tax states find a casino entertainment facility for each fifty-one million dollars in casino revenues, while the six high tax states require one hundred and two million dollars in gaming losses for each entertainment facility at a casino.

83. *See* Thompson and Myers, *supra* note 80, at 93.

The proposition advanced is found to be valid. Lower casino taxes are associated with greater tourism development.[84]

E. Vertical and Horizontal Equity—and the Constitution(s)

i. *Vertical Equity*

The principle of vertical equity holds that those best able to pay taxes should pay a greater share of the taxes — or at least, they should be taxed at higher rates than others. The concept is used to justify progressive tax rates for income taxes. However, the sense of the notion comes with the idea that wealthy persons have greater shares of "extra," or expendable money available for taxation. The concept of vertical equity does not resonate well when we turn away from taxes on individuals and shift to corporations or business organizations. Quite simply, a high income corporation may be owned by low income individual stockholders (perhaps through a pension fund). On the other hand, a small corporation, one that is closely (privately) held, is very likely to have personally wealthy owners. Many venues have progressive taxation scales to apply to casino revenues. For instance, in Nevada, the gambling earnings of a small casino are taxed at a rate of four percent, while the larger casinos pay six and three fourths percent on their earnings. While one might have thought that the small casino could be a "mom and pop" type operation, this is simply untrue. Only rich people own small casinos, while poorer people do not own casinos at all. The Bahamas have offered a twist in the vertical casino tax idea. As revenues of the casino increase, the tax rates on the revenues are lowered. The notion there is that the larger casinos must spend money advertising to and recruiting players, while the small casinos just open their doors and welcome "walk-by, drop-in" customers.[85]

By considering that casino taxes are really being paid by players, we can ask if the higher taxed, usually slot-machine, players in Pennsylvania are wealthier than the table game players who are taxed lower amounts. Most assessments of the situation would hold that the exact opposite is true.

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84. *See id.* at 92-95 (discussing correlation between casino taxes and tourism development).

85. *See* ANTHONY N. CABOT ET. AL, INTERNATIONAL CASINO LAW 101-21, 224-29 (Reno: Institute for Study of Gambling 3d. ed. 1999) (describing casino law in Nevada and Bahamas).

ii. *Horizontal Equity*

The concept that all taxes must be applied equally is called horizontal equity. The principle was set forth by our founding fathers in 1787. The original United States Constitution stipulates that "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."[86]

In 1833 Chief Justice Marshall held in *Barron v. Baltimore* that the provisions of the Constitution speak to relationships between persons and the federal government, and any protections in the Constitution only protect people from actions of the federal government, not actions of the state governments.[87] Hence the provision on horizontal protection spoke only to federal taxes, not to state or local government taxes. This judicial landscape changed in 1868 with the ratification of the Fourteenth Amendment. That Amendment, among other things, stipulated that no state should "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[88]

The door was open to apply parts of the Bill of Rights and the taxation equity clause to actions of state and local governments. The notion of incorporating the personal liberties of the Bill of Rights into the Fourteenth Amendment's due process clause became a major force in litigation beginning in the early twentieth century. However, even before parts of the Bill of Rights protected people from inappropriate actions of states, the courts incorporated the taxation equity clause into the equal protection of the laws clause of the Fourteenth Amendment.

The first case to pose the idea of such incorporation was in 1878 with *Davidson v. New Orleans.* The court refused to impose the United States constitutional restriction on state action in the case.[89] Finally, six years later in *Edye v. Robertson*, the Court enunciated that the uniformity of Article I did apply to state action because of the equal protection clause of the Fourteenth Amendment.[90] The

86. U.S. CONST. art. 1, § 8, cl. 1.

87. *See* Barron v. Baltimore, 32 U.S. 243, 250 (1833) (describing Supreme Court's holding that Bill of Rights protects people only from federal governments, not from states).

88. U.S. CONST. amend. XIV, § 1.

89. *See* Davidson v. New Orleans, 96 U.S. 97, 105-6 (1878) (discussing Supreme Court's decision not to restrict state action).

90. *See* Edye v. Robertson, 112 U.S. 580 (1884) (describing Supreme Court's application of Fourteenth Amendment to state actions).

Court has not looked back on that ruling since and it still applies today.[91]

Many states also have their own constitutional provisions similar to the one in Article I. The Pennsylvania Constitution of 1873 has a clause mandating horizontal equity in taxation. Article VIII, Section 1 provides that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax . . . ."[92] Rulings regarding when taxation must be uniform and what exceptions can be allowed flow from both state and federal justices.

In *Fernandez v. Weiner*, the U.S. Supreme Court recognized that different states could tax the same items differently.[93] Hence, we see in the table just above in Section 5(d), in Table II above, that casino taxes range from a low of six and three fourths percent in Nevada to a high approaching fifty percent in Illinois. Also classifications may permit discrepancies within a state. It may be argued that horse race wagers should be taxes at the same rate as purchases of lottery tickets or plays on a slot machine at a casino, but such challenges have not been made. The places of such gambling are quite different, and while a claim might be made that there is discrimination, the arguments won't be addressed here. Nor will we address the topic of graduated taxes, where the same scale of taxation is found in all casinos.

Our concern will instead focus upon gambling inside of casinos, or at casino style games. Researchers do see disparities in rates of taxation in several states. We might look at Iowa where slot machine gaming and other casino gaming is now taxed at twenty-two percent of the win on riverboats, but twenty-four percent at racetrack casinos. The race track casino tax was raised to thirty-six percent in 1994, but lowered after a court action.[94] Louisiana taxes vary considerably with eighteen and a half percent placed on slot

91. *See* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 236-37 (1890) (holding that law does not discriminate in regard to which state is not competent to make); Giozza v Tiernan, 148 U.S. 657, 662 (1893) (stating that right to sell intoxicating liquors is not one of rights growing out of citizenship); Royster Guano Co. v. Virginia, 253 U.S. 412, 420 (1920) (stating that natural citizens domiciled within state are subject to taxation on income whether earned within or outside state); Colgate v. Harvey, 296 U.S. 404, 423 (1934) (holding that "all tangible corporate property lying within the state is subjected to a property tax.").

92. PA Const. art. VIII, § 1.

93. *See* Fernandez v. Weiner, 326 U.S. 340, 359 (1945) (detailing Supreme Court's holding that "the uniformity in excise taxes exacted by the Constitution is geographical uniformity, not uniformity of intrinsic equality and operation.").

94. *See* Fitzgerald v. Racing Ass'n, 539 U.S. 103, 105 (2003) (discussing increase in Iowa's race track casino tax and subsequent litigation).

machines at racetracks, twenty-one and a half percent on riverboats, twenty-one and a half percent on a land based casino in New Orleans (with a minimum overall tax amount), twenty-six percent for slot machines in restaurants and bars, and thirty-two and a half percent on machines at truck stops.[95] We noted the Pennsylvania tax differentials above, with slot machine gaming tax at fifty-five percent and new table gaming revenue taxed at sixteen percent.

In Wisconsin, the Governor's office negotiated compacts with the state's several tribes at different times, and seemingly on an ad hoc basis.[96] Some tribes paid a revenue sharing amount as little as two percent while others paid as much as eight percent on their casino wins. Michigan tribes agreed to pay a tax of ten percent, eight percent to the state and two percent to local governments, on slot machine revenue as long as there were no commercial casinos. Then commercial casinos were allowed in Detroit. The tribes ceased to pay the state its eight percent share, but continued to pay the local governments two percent. Even so, four new tribes were authorized to have casinos after the Detroit casinos opened. They reached an agreement with the state authorizing revenue sharing at the previous ten percent level. Some pay ten percent, some pay two percent.[97] Additionally, in California, tribes arguably even have more choice and variation in their taxation. California tribes can choose which of two plans they want to determine their casino taxation and other governing terms: either 1) a general compact approved by voters in 2000 or 2) an agreement that the governor later detailed which allowed them to have more gaming devices.[98]

Are these discrepancies permissible? The Native American agreements have not been challenged. All have been signed by the U.S. Secretary of the Interior. It might be suggested even though each arrangement involves state action that the individual sovereign nature of each tribe might give them a standing similar to that of

95. *See* American Gaming Association, Industry Statistics, *available at* http://www.americangaming.org/Industry/state/statistics.cfm?stateid=5 (describing tax rates of Louisiana riverboat casinos, land-based casinos, and racetrack casinos); American Gaming Association, *The Impacts of Gaming Taxation in the United States*, at 6, *available at* http://www.americangaming.org/assets/files/studies/The_Impacts_of_Gaming_Taxation.pdf (describing Louisiana tax rates in restaurants and truck stops).

96. *See* WILLIAM N. THOMPSON AND ROBERT SCHMIDT, 2002 "NOT EXACTLY 'A FAIR SHARE: REVENUE SHARING AND NATIVE AMERICAN CASINOS IN WISCONSIN." (Thiensville, WI: Wisconsin Policy Research Center 2002) (describing compacts with tribes).

97. *See Encyclopedia of* Gambling, *supra* note 12, at 546-47 (detailing agreements with Detroit tribes).

98. *See id.* at 522-523 (detailing taxation of California tribes).

separate states, meaning, according to the *Fernandez v. Weiner* ruling, that discrepancies are permissible. We will not debate the issue.

Regarding the disparities in state tax rates for commercial casino within the same state, we will look first at principles set forth in court cases. The Supreme Court has suggested that the Fourteenth Amendment allows a "wide range and flexibility" to the states in their taxation policies.[99] States are permitted to classify persons and businesses for different rates of taxation. However, when they do make classifications, those must be based upon a real and substantial difference.[100] The key principle found in case after case is that any classification must be reasonable and not arbitrary.[101]

The subject of differential gambling taxes has reached the nation's highest court in only one case. This involved Iowa, and followed the state's action in raising horserace track slot machine taxes from two percent on an annual basis up to thirty-six percent, while taxes on riverboat gaming remained at twenty-two percent.[102] The state supreme court reversed a district court ruling on behalf of the state and upheld the tax differential. The state then sought a writ of certiorari from the U.S. Supreme Court. The highest court heard the case and reversed the ruling of the Iowa Supreme Court, remanding the case. They asked the lower court to make a new ruling consistent with their opinion that the tax rate could be sustained under a rational basis examination.[103]

In 2004 the Iowa Supreme Court heard the case again. In an unusual decision, not in terms of policy, but in terms of sequence, the Iowa Supreme Court stuck to its guns and ruled as it had done before. In effect the Iowa Supreme Court reversed the U.S. Su-

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99. *See* Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928) (describing Court's holding that "the power of the state to classify for purposes of taxation is of wide range and flexibility").

100. *See* S. Ry. v. Greene 216 US 400, 417 (1910) (discussing Court's holding that classifications "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed").

101. Colgate v. Harvey, 296 U.S. 404, 422 (1934) (expressing Court's holding that if tax legislation is changed to a "fair and reasonable degree of equality, the constitutional requirement is satisfied."); S. Ry. v. Greene, 216 U.S. 400, 417 (1910) (detailing Court's decision that the classifications must have "reasonable and just relation to the things in respect to which such classification is imposed"); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (describing Supreme Court's holding that "the classification must be reasonable, not arbitrary").

102. *See* Racing Ass'n v. Fitzgerald, 648 N.W.2d 555, 56-57 (2002) (describing tax differences between riverboats and horserace tracks in Iowa).

103. Fitzgerald v. Racing Ass'n, 539 U.S. 103, 105 (2003) (discussing disposition of case as Supreme Court remanded case for further proceedings).

preme Court. The case ended as the state of Iowa returned the race track gaming tax to its previous level of twenty-four percent. The Iowa Court did its clever dance by claiming that their ruling was based upon the Iowa constitution which had a provision for horizontal tax equity that was almost identical to that in the federal constitution. The Iowa court examined the legislative process and discovered that the legislature's rationale for the increase was a desire to favor economic development in river boat cities. The Iowa court dismissed this position as being illogical as two of the three race track casinos were also in river boat cities, and one of the river boats was on a lake far away from the state's two major rivers. The Iowa court also doubted that the tax differential would result in river city developments just because tracks were paying a higher rate. The legislative action was deemed arbitrary and not reasonable. It can be noted that a differential of twenty-two percent and twenty-four percent persists and has not been challenged in Iowa.[104]

The case in point then is Pennsylvania. The differential in the Keystone state is much greater than that found anywhere else in any state in the gaming industry — sixteen percent and fifty-five percent. Would the difference stand scrutiny if challenged on the basis of the Fourteenth Amendment or on the basis of Section VII, Section 1 of the Pennsylvania Constitution? A wrinkle that would have to be considered is that the tax rates apply to the same casino bodies. However, among the casinos the differential taxes will have impacts on revenues, as some casinos will have two hundred and fifty tables while others will have fewer than fifty. Perhaps the court could consider that the taxes will fall upon individuals, the players. While some players will play both slot machines and table games, many, probably most, will not. In either case is it appropriate and reasonable, and not arbitrary, to tax the slot players more heavily. We have noted above that these players are collectively older, more likely to be female, and more likely to be less affluent. If we are considering notions of vertical equity, slot taxes should be lower than table taxes.

Also, we noted that the slot players are more likely to be local residents. Does the state wish to tax them at a much higher rate than persons who might visit the state from other venues? Consider that the visitors will be beneficiaries of other state services. For example, the visitors receive the protections of the state public safety and health departments. But they will not pay other state general

104. Racing Ass'n v. Fitzgerald, 675 N.W. 2d 1 (Iowa 2004).

taxes, which will be paid by local slot players. Additionally, we noted that the state will incur much greater costs in regulating table games than in monitoring gaming at the computerized slot machines. In terms of cost of regulation, table players should pay higher taxes.

One difference might support the differential. The table games require more labor, one study suggested nine and a half persons per table (which has six gaming spots).[105] Slots require perhaps one employee per five machines. If there were no other factors at play, some differences would be justified. However there are other factors at play. Nonetheless, if labor costs were considered and also the revenues of the machines and tables were considered, should a differential be permitted? It might be suggested that the revenue variations favor increased taxation for the table games and not the slot machine gaming wins.

Consider first that the Nevada Gaming Abstract, of 2008, reports that per-square-foot revenues for Las Vegas Strip casinos are five thousand two hundred and twenty-two dollars for the table areas, and only one thousand nine hundred and fifteen dollars for the slot machine areas.[106]

A slot machine represents one gaming position. A slot machine has an annual cost of five thousand dollars, a total of fifteen thousand over a life of three years. With a labor cost of twenty percent of one job, and assuming an annual wage and benefits of forty thousand dollars, annual profits of one machine can be further discounted by eight thousand dollars. Therefore annual gaming profits for one machine, consuming one gaming position, are twenty-seven thousand one hundred and fifty dollars.

The Bear Stearns 2002-2003 North American Gaming Almanac indicated that the Las Vegas daily table win is two thousand two hundred and twenty-seven dollars, or seven hundred and seventy-six thousand dollars for one year.[107] A single table represents six gaming positions. From this we can discount labor costs of nine and a half jobs, or three hundred and eighty thousand dollars at a

105. *See* Laura Vecsey, *"Legalization of table games could mean 10,000 jobs in Pennsylvania casinos,"* MIDSTATE NEWS WITH THE PATRIOT NEWS, Sept. 22, 2009. www.pennlive.com/midstate/index.ssf/2009/09/legalization_of_table_games_co.html (last visited February 2, 2010).

106. *See* Nevada Gaming Abstract of 2008, *available at* http://gaming. nv.gov/documents/pdf/2008_abstract.pdf (describing revenues from table games and slot machines).

107. *See* BEAR STEARNS 2002-2003 NORTH AMERICAN GAMING ALMANAC (Ader 2003) (describing gaming statistics for 2002-2003 years).

wage of forty thousand dollars. The annual profits for six positions on the tables are therefore three hundred and ninety-six dollars. Translated to one position, the table makes sixty-six thousand dollars, or two hundred and forty-three percent that of one slot machine position.

Using this same logic, the Atlantic City slot machine win was two hundred thirty-two dollars per day, or eighty-five thousand dollars annually.[108] Discounting machine cost and labor, the machine produces profits of seventy-two thousand dollars, for the one gaming position occupied by the machine. The Atlantic City table produces daily wins of two thousand five hundred dollars, or nine hundred and four thousand dollars annually. Discounted by the cost of nine and a half jobs, the profit is five hundred and twenty-four thousand dollars, for six gaming positions, or eighty-seven thousand dollars for one table gaming position. This is one hundred and twenty-two percent higher than the revenue for one slot position.

In both the Las Vegas revenue scenario and the Atlantic City revenue scenario, it would be ludicrous to place a higher tax on slot machine players than placed upon table games players. To do so might be said to be unreasonable and arbitrary. The only rationale for the taxation rates of table games is simply that the amount was negotiated to produce revenues equal to the current one-year gap in the Pennsylvania state budget between revenues and expenditures. It is offered that this rationale might not stand in face of a properly made court challenge.

VI. A Post Thought

In 1980, the author served as the Supervisor of Kalamazoo Township, Michigan. Among my duties, I was charged to assess the value of property for taxation. Business property (including land, buildings and equipment) was by standard accepted procedures to be assessed on a "cost to replace" basis. We would add the cost of any new equipment, new lands, or new structures to the previous year's assessment. We would also consider the general increase in the value of land or buildings due to inflation, and we would also allow for a depreciation of equipment value over time.

The value assessed for taxation was fifty percent of its true value. The tax rate was about fifty mills, or five percent of the assessed value. In 1979 we had assessed Checker Motors (makers of

108. *See id.* at 100.

Yellow Cabs) two million dollars for their factory and its equipment located in the township. They had not objected to the assessment. They paid taxes of approximately one hundred thousand dollars. A general survey of the township in 1980, including a consideration of inflation numbers in Michigan, led to our conclusion that all business property should be assessed at a value ten percent higher than it was assessed in 1979 (remember Jimmy Carter's "double digit" inflation years). There had been no additions at Checker, so we sent them their assessment — roughly two million dollars. Their new tax bill would be one hundred and ten thousand dollars.

They protested. I asked their financial officer, what he believed the value should be, perhaps two million one hundred thousand dollars, or maybe the same as the previous year's value — which they had not protested. I was shocked when he told me the value should be one million dollars — which would have yielded a tax of fifty thousand dollars. "Wait just a minute," I remember saying. "You didn't protest two million last years, and now you say it should be one million. You won't get far in court on that one." The financial officer responded, "Just wait and see. If you don't lower the assessment, we intend to go to court to get it lowered — to one million."

I figured there was no way Checker could win in court, and I talked to the Township lawyer who agreed, but added. "You know, if we go to court, and then follow an appeal up to Lansing, it will cost us over ten thousand dollars in court costs and lawyer fees."

Our share of the sixty thousand dollars in dispute (a tax bill of fifty thousand dollars versus one hundred and ten thousand dollars) was fifteen percent or nine thousand dollars. The School district's share, on the other hand, was forty thousand dollars. It made sense, so I phoned the school superintendent. He had his attorney call me back. The attorney told me that I should pursue the matter, as the school district really needed all the money it could get. He wished "us" luck, but then added that while he agreed that they "should" participate in supporting the case action, they could not promise us any funds to do so. He said while it would make sense to do so, the law was clear. It was the township's duty to assess property and collect taxes and engage in any disputes regarding taxes — without the school district's help. Indeed, he added that lacking any statutory duty to be involved in the case, the school district would be violating the law by spending its money in the case. Fair enough, that was the law. The township attorney then confided to me that in his discussions with Checker Motors he had learned that they were trying to sell their facility, as they were losing a lot of money on their operations. They had hired a Chicago firm to give them an appraisal of its value. The appraisal firm was interested in determining what someone would pay to purchase the facility — not in its replacement cost, but its market value. They determined that it was worth two million, or an assessed value of one million dollars. Even through assessors "typically" did not use the market approach for determining a business's value they would share the appraisal with the court. Then the CFO of Checker told our attorney that without their tax payment going down to fifty thousand dollars, they would probably have to close their doors now, or at least very soon. They had four hundred employees.

The law was clear, but it could be murky in court. But the constitution was very clear — our taxes, and that meant our assessment procedures, had to be uniform for all businesses. However, even thought this principle was clear, it just could not fly. I was not going to be the one to "close down Checkers," especially not if I was going to incur more expenses than the tax was worth to the Township. I yielded. The assessment was cut in half. I might add that while it was all a matter of public record, I did not release a press statement, and I asked Checkers not to do so either, indicating that I could not stop them if they chose to do so. They didn't. In the situation, it is difficult to determine if any party in the township would have had standing to sue the township on the basis of the decision. Another business might wish to do so, but courts have ruled that one business cannot sue to have another's tax bill increased. As an aside, Checkers closed its door permanently one year later.[109]

The notion that uniformity of taxes is a universal condition has little standing in the real world of politics. A final question to be asked is: who would have standing to void Pennsylvania's uneven taxation policy regarding table gaming and machine gaming? Casinos choosing to have tables are enjoying a tax advantage. Ones not choosing to have tables might do so, but they would incur the wrath of state policy makers by taking such an action. The general public would be hard pressed to launch an action as the policy to have tables at all would seem to benefit to state treasury and hence the general public. A casino in New Jersey or West Virginia might desire to see higher taxes for Pennsylvania tables, but then the fact that their states charge different taxes rates for their tables repre-

109. *See* WILLIAM N. THOMPSON & JAMES LEIDLEIN, ETHICS IN CITY HALL 105-10 (Jones & Bartlett 2009) (detailing Checkers closing).

sents no violation of constitutional standards and they are not residents of Pennsylvania. As the courts might not get to make a decision, action might come from a public official in a request for an attorney general's opinion. Then again, the attorney general of the commonwealth might exercise wisdom by declaring the matter to be a "political question" to be decided by legislative policy makers alone.