

Fall 2012

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Recommended Citation

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THE CURIOUS CASE OF CONVENIENCE CASINOS: HOW INTERNET SWEEPSTAKES CAFES SURVIVE IN A GRAY AREA BETWEEN UNLAWFUL GAMBLING AND LEGITIMATE BUSINESS PROMOTIONS

BY STEVE SILVER¹

ABSTRACT:

Once relegated to the Nevada desert and New Jersey shore, gambling is now everywhere in the United States. State governments strapped for cash and desperate for increased tax revenues are welcoming gambling with open arms as forty-three states sponsor lotteries and twenty-three states house casinos. Despite this gaming boom, the ease of access to casinos has not deterred entrepreneurs from successfully creating an offshoot industry of “convenience casinos.” Convenience casinos are simply Internet cafes that sell Internet time cards attached with instant-win sweepstakes entries, much like the code underneath a Coke bottle or a McDonald’s Monopoly game piece. Although seemingly a legitimate business promotion, convenience casinos exist in a gray zone between sweepstakes and unlawful gambling because they allow customers to reveal their instant-win codes through devices nearly identical to video slot machines. These machines are now attracting the ire of legislators in nearly twenty states who are grappling with how to either outlaw or regulate and tax convenience casinos.

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This Paper earned Steven Silver the International Association of Gaming Advisors’ 2012 Shannon Bybee Scholarship Award for the enhancement of gaming law. Temple Law School professor and veteran casino executive Ed Ellers advised the author’s research.

With 3,000 to 5,000 convenience casinos in the U.S. representing a \$10-15 billion industry, the stakes are high. Does a state regulate the sweepstakes cafes and allow them to compete with traditional brick-and-mortar casinos or does it craft new gaming statutes to ban the sweepstakes? If states choose the latter, however, they must be careful so as not to unintentionally create an overly broad law that wipes out all sweepstakes. Convenience casinos statutes have already drawn conflicting judicial decisions in Florida, South Carolina, Mississippi, Kansas and Massachusetts, with dozens more to follow as the media and state lawmakers learn about this hidden industry. This Paper will analyze the constitutional implications of those decisions and argue that sweepstakes games in convenience casinos are legitimate business promotions that state governments should embrace so long as there is a market-based need for them. If a state chooses to outlaw them, however, then the laws must be narrowly tailored around a truly compelling government interest so as not to ban all sweepstakes.

I. INTRODUCTION

Entering a casino is an unmistakable experience. A dizzying array of lights flash jackpot amounts, a din of electronic tones mixes with the jubilation of winning patrons and the air oozes with the unique scent of perfumed oxygen,² all to signal to the human senses that this is a house of gambling, and Lady Luck reigns supreme. But what happens when the seemingly endless rows of slot machines disappear—when the cocktail waitresses vanish, the dealers are nowhere to be found, and the behemoth gambling floor shrinks to a few hundred square foot convenience store in an economically depressed area of town? Can a drab Internet café in a strip mall really transform into a casino just by selling Internet time cards with sweepstakes entries attached? If so, are these sweepstakes illegal forms of gambling that state governments should shut down immediately or are they legitimate business promotions much like Coca-Cola bottle cap rewards,³ McDonald's Monopoly,⁴ or Subway Scrabble?⁵ Legislators and judges in at least a dozen states are grappling with these very questions due to the emergence of "convenience casinos," which some claim operate in a gray area of the law hovering between

2. Brendan Buhler, *The Man Behind Casinos' Scent Science*, LAS VEGAS SUN (Jan. 11, 2010), <http://www.lasvegassun.com/news/2010/jan/11/hes-behind-casinos-scent-science/>.

3. For a description of how the current Coca-Cola sweepstakes promotion operates, see *How It Works*, MY COKE REWARDS (Feb. 20, 2012), http://www.mycokerewards.com/howItWorks.do?WT.ac=mnuHIW_PO.

4. The official rules of the 2012 Monopoly Game at McDonald's are available at <http://www.playatmcd.com/Inactive> (last visited Nov. 9, 2012).

5. Steve, *How to Play Subway Scrabble*, SCRABBLE BLOG (Jan. 20, 2010), <http://www.scrabblepages.com/blog/scrabble/how-to-play-subway-scrabble/>.

legitimate business promotions and illegal gambling.⁶

Internet cafés sell web-surfing time and offer copy, fax, and print services.⁷ Convenience casinos are simply Internet cafés that also sell sweepstakes entries⁸—the closest thing to gambling that is not actually gambling—in the form of Internet time cards. Typically, a customer purchases a given amount of Internet time, which also includes a proportional amount of sweepstakes entries.⁹ For instance, at an Internet café in Mississippi, one dollar of cyber time equals 100 sweepstakes entries.¹⁰ At the Allied Veterans' café in Seminole County, Florida, twenty dollars yields 100 minutes of Internet time and 2,000 sweepstakes entries.¹¹ That time and the equivalent sweepstakes entry points are then loaded onto a plastic access card containing a “magnetic strip with an electronically encoded, personal identification number (PIN).”¹² The customer swipes the card through an electronic reader that activates the computer terminal.¹³ Once activated, the customer can either access the Internet or check the results of the sweepstakes.¹⁴ There are three ways to do this: the customer can “ask the cashier [to announce the results]; he can use the ‘quick reveal’ option on the computer, which ‘simply displays by alphanumeric text the results of each entry without fanfare’; or he can play a video simulation of a casino game.”¹⁵ These games, such as Cobra Cash, Fruit Paradise, and Irish Luck,¹⁶ simulate traditional slot ma-

6. Don Van Natta, Jr., *Worries About ‘Convenience Casinos’ in Florida*, NEW YORK TIMES (May 6, 2011), http://www.nytimes.com/2011/05/07/us/07sweepstakes.html?_r=4&pagewanted=all.

7. *Id.*

8. A sweepstakes is “simply a lottery with the element of consideration missing: chance and prize are present, but no consideration is necessary to receive the chance to win a prize. Since the element of consideration is missing, a sweepstakes is legal.” Mark Fridman, *Prime Time Lotteries*, 10 TEX. REV. ENT. & SPORTS L. 123, 126 (2009). Whether consideration is present in the Internet sweepstakes offered at convenience casinos is a vital determinant as to their legality.

9. *See Allied Veterans of the World, Inc. v. Seminole Cnty.*, 783 F. Supp. 2d 1197, 1200 (M.D. Fla. 2011) (detailing operations of a Florida convenience casino).

10. *Moore v. Miss. Gaming Comm’n*, 64 So. 3d 537, 539 (Miss. Ct. App. 2011).

11. Felix Gillette, *The Casino Next Door*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2011), http://www.businessweek.com/magazine/content/11_18/b4226076180073.htm.

12. *Allied Veterans*, 783 F.Supp.2d at 1197.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See Van Natta, Jr., supra* note 6 (listing types of games played in Internet cafés); Michael Levenson, *State Cracking Down on Cybercafe Gambling*, BOSTON GLOBE (July 22, 2011), http://articles.boston.com/2011-07-22/news/29803619_1_cybercafes-internet-cafe-cafe-owner (detailing types of games available for use at the computer terminals in Internet cafés).

chine videos¹⁷ or card games such as Royal Poker.¹⁸ Playing these games, however, does not affect the outcome of the sweepstakes; it is “merely an entertaining method of delivering the results.”¹⁹ If a customer wins the sweepstakes, that customer then redeems his or her points for either more Internet time or cash prizes with some jackpots as high as \$15,000.²⁰

Although Internet sweepstakes cafes started popping up around 2005,²¹ the amount of cash changing hands is now drawing the critical eye of many state legislators as industry analysts estimate that convenience casinos gross billions of untaxed dollars each year.²² One long-time Internet sweepstakes insider estimates that there are between 3,000 and 5,000 sweepstakes cafés in the United States representing a \$10-15 billion industry.²³ In the past year, legislators and law enforcement officials in Pennsylvania,²⁴ Virginia, Massachusetts,²⁵ Utah, North Carolina,²⁶ South Carolina,²⁷ Mississippi, Kansas, and Florida

17. For a video depicting how Internet sweepstakes kiosks work, visit SweepsCoach, *Internet Kiosks: Sweepstakes TOTEMS*, YOUTUBE (Sept. 21, 2011), <http://youtu.be/LEq6u9nqSHw>. Additionally, for a photo gallery of various Internet sweepstakes cafés, see *Gallery*, SWEEPS COACH (2010), <http://www.sweepstakesmachines.com/gallery>.

18. Gillette, *supra* note 11.

19. *Allied Veterans*, 783 F.Supp.2d. at 1197.

20. Van Natta, Jr., *supra* note 6.

21. Gillette, *supra* note 11.

22. *Id.*

23. See *id.* (interviewing the director of a company that provides start-up services to sweepstakes café owners and quoting Lee Black, the manager of Allied Veterans #67, a nonprofit that operates thirty-six sweepstakes cafés in Florida, as stating that his Florida cafés gross about \$100,000 per week).

24. With at least nine Internet sweepstakes cafés in Western Pennsylvania alone, the Pennsylvania District Attorneys Association supported a bill that would ban revealing sweepstakes electronically. The State House passed it unanimously and it is up for review in the Senate. Jason Cato, *Internet Sweepstakes Games Concern Pennsylvania Officials*, PITTSBURGH TRIBUNE-REVIEW (Mar. 11, 2012), http://triblive.com/x/pittsburghtrib/news/regional/fayette/s_785915.html#axzz2BmgYBOmT.

25. In the fall of 2011, Massachusetts became the first New England state to pass a broad law allowing resort casinos. Once casinos are built, the market for Internet sweepstakes cafés will likely dwindle, but statutes aimed at banning Internet sweepstakes terminals will need to be rewritten to not also include the forthcoming casino's slot machines. Abby Goodnough, *New Law in Massachusetts Allows for Building Three Casinos*, NEW YORK TIMES (Feb. 25, 2012), http://www.nytimes.com/2012/02/26/us/new-law-in-massachusetts-allows-for-three-casinos.html?pagewanted=1&_r=1.

26. The North Carolina Court of Appeals struck down the state's ban on video sweepstakes in March 2012 for being unconstitutionally overbroad. The matter is headed to the State Supreme Court next. Craig Jarvis, *Video sweepstakes ban upended*, NEWS & OBSERVER (Mar. 7, 2012), <http://www.newsobserver.com/2012/03/07/1910888/ruling-favors-video-sweepstakes.html>.

27. A Senate subcommittee in South Carolina passed a measure in February 2012 to prohibit sweepstakes video games. Cato, *supra* note 24.

have all made moves to outlaw these sweepstakes with varying degrees of success.²⁸ For example, in May 2011, lawmakers in Florida introduced a bill to prohibit “simulated gambling devices,”²⁹ but it never garnered enough support from legislators to pass. One month prior, the Kansas Supreme Court intervened in the legislature’s attempt to prohibit similar gambling devices by passing Kansas’ Expanded Lottery Act.³⁰ The court in *Dissmeyer v. State*³¹ declared a provision of that Act aimed at eliminating unauthorized gambling devices, or “gray machines,” unconstitutionally overbroad in April 2011.³² Yet, in March 2011, the Court of Appeals of Mississippi upheld a law permitting the confiscation of Internet café computers under a law prohibiting owning or operating illegal slot machines.³³

Florida has become a battleground state as legislators and law enforcement grapple with how to treat convenience casinos.³⁴ Florida is unique because it does not shy away from condoning gambling. The state offers a multitude of gaming options including numerous Indian casinos,³⁵ a state-run lottery, and dozens of thoroughbred, harness, and greyhound racetracks, as well as jai alai frontons that operate slot ma-

28. As explained by Gillette, *supra* note 11:

In September [2010], cops in Virginia Beach, Va., raided a dozen game rooms and confiscated more than 400 computers. In March [2011], police in West Valley City, Utah, shut down two sweepstakes cafés, detained sixty-seven people, and seized eighty computers. Lawmakers in North Carolina passed legislation [in 2010] outlawing the business model. In February [2011], Virginia did the same. In April [2011], the Massachusetts Attorney General submitted emergency regulations to shut down the businesses.

29. H.B. 3, 114 Gen. Assemb., Reg. Sess. (Fla. 2012).

30. See KAN. STAT. ANN. § 74-8702 (West 2011) (prohibiting “gray machines” which are “any mechanical, electro-mechanical or electronic device, capable of being used for gambling, that is: (1) Not authorized by the Kansas lottery, (2) not linked to a lottery central computer system, (3) available to the public for play or (4) capable of simulating a game played on an electronic gaming machine or any similar gambling game authorized pursuant to the Kansas expanded lottery act”).

31. *Dissmeyer v. State*, 249 P.3d 444 (Kan. 2011).

32. *Id.* at 449.

33. See *Moore*, 64 So. 3d 537 (holding that computer terminals seized from Internet café were illegal slot machines as defined in the Gaming Control Act).

34. See Van Natta, Jr., *supra* note 6.

35. Another wrinkle in Florida’s handling of sweepstakes cafés is that the state recently signed a contract with the Seminole Tribe granting the Seminoles the exclusive rights to operate slot machines outside of South Florida in exchange for more than \$1.5 billion. The exclusive rights will last for twenty years. Fear of violating such a lucrative contract could also be driving Florida’s reluctance to embrace the Internet sweepstakes. See Mary Ellen Klas, *Three Years in the Making, Crist Completes Seminole Tribe Gambling Agreement*, ST. PETERSBURG TIMES (Apr. 29, 2010), <http://www.tampabay.com/news/politics/stateroundup/three-years-in-the-making-crist-completes-seminole-tribe-gambling-agreement/1091178>.

chines and poker games.³⁶ Also a complicating matter is that some members of the Florida legislature own Internet sweepstakes cafés,³⁷ which is one potential explanation as to why the state legislature did not vote to outlaw convenience casinos.³⁸ Further muddying the question of whether Internet sweepstakes cafés are offering legitimate business promotions or illegal gambling, a federal court in Florida recently upheld a Seminole County ordinance banning simulated gambling devices.³⁹ That district court's ruling in *Allied Veterans of the World, Inc. v. Seminole County*,⁴⁰ and its subsequent affirmation by the eleventh circuit signaled to local governments throughout the state that they have the power to rid their counties and cities of convenience casinos even if the state legislature does not or cannot do so.

Yet for all of this legal pinball,⁴¹ the basic form and function of these convenience casinos is nothing new. In fact, there is a long history of similar sweepstakes with alternative technologies in this country⁴² and

36. Van Natta, Jr., *supra* note 6.

37. See *id.* (reporting that Republican State Representative Peter Nehr owns Fun City Sweepstakes, an Internet sweepstakes café near Tampa Bay).

38. In addition to whatever inside interests might have permeated this legislative decision-making process, a lot of industry money poured into Tallahassee before the vote. See Gillette, *supra* note 11 (detailing since January 2009, Allied Veterans [the plaintiff challenging the Seminole County ordinance outlawing simulated gambling devices] alone has given somewhere between \$120,000 and \$280,000 to the Tallahassee lobbying firm Capital City Consulting, and \$230,000 to \$290,000 over the same period to a lobbying firm called Cruz & Co. In February, two new political fundraising groups popped up in Tallahassee, raising money from sweepstakes cafés and then redirecting the donations to state politicians. Since Feb. 10, a group called Save Our Internet Access has raised \$70,000, while Floridians for Internet Access has raised \$17,700.).

39. See *Allied Veterans*, 783 F.Supp.2d at 1197 (upholding Seminole County Ordinance 2011-1 which makes it illegal for “any person to design, develop, manage, supervise, maintain, provide, produce, possess or use one or multiple simulated gambling devices”). The statute at issue in *Allied Veterans* includes a broad definition of what exactly constitutes a “simulated gambling device,” which will be discussed in greater detail in Part II.H.1, but the key point is that an ordinance banning these devices would shutter the entire Internet sweepstakes industry.

40. *Id.*, *aff'd* by 468 Fed. Appx. 922 (11th Cir. 2012).

41. Ironically, a game often taken for granted as a legal form of amusement — pinball — was the target of many gaming opponents in the 1960s. For a survey of the nation's various anti-gambling laws aimed at pinball machines, see S.R. Shapiro, *Coin-Operated Pinball Machine or Similar Device, Played for Amusement Only or Confining to Reward to Privilege of Free Replays, as Prohibited or Permitted by Antigambling Laws*, 89 A.L.R. 2d 815 (1963).

42. See, e.g., *Moore*, 64 So. 3d at 537 (detailing the operations of a modern Internet café that also sold long-distance telephone cards with attached sweepstakes entries); *Midwestern Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 239 (N.D. 2001) (describing a machine that dispenses two-minute emergency telephone cards plus a chance to win \$500 in cash for every dollar spent on phone time); *State v. Apodoca*, 251 P. 389 (N.M. 1926) (analyzing a chewing gum vending machine that also dispensed chances at winning money).

a corresponding body of common and statutory law,⁴³ particularly in the arena of constitutional overbreadth determinations, that could serve as guidance to Florida and other states struggling to pull convenience casinos out of the gray zone and into either the bright light of government regulation⁴⁴ or the darkness of illegality.⁴⁵

This Paper will explore the history of convenience casinos and their historical underpinnings in the context of legal business promotions and sweepstakes. To do so, Part II will first discuss the history of gambling in this country and define the elements of gambling. Part II will also explain how those components relate to the games offered in convenience casinos and highlight existing laws regarding sweepstakes in several states with an analysis of the judicial reasoning of overbreadth challenges in *Dissmeyer*,⁴⁶ *Moore*,⁴⁷ and *Allied Veterans*.⁴⁸ By looking at these cases and others, this Paper will suggest a uniform approach for Florida as it deals with convenience casinos in the future. Part III will argue that sweepstakes games in convenience casinos are legitimate business promotions that state governments should embrace so long as there is a market-based need for them; but if a state chooses to outlaw them, then laws must be narrowly tailored around a truly compelling government interest so as not to ban all sweepstakes.

II. OVERVIEW

A. THE HISTORY OF GAMBLING IN AMERICA

Gambling is among one of the oldest human rituals.⁴⁹ Evidence of people playing the odds is evident in ancient archaeological discoveries, literary works and laws as early as 321 B.C.⁵⁰ Gambling is just as

43. See Part II.A for a brief history of gambling laws in the United States.

44. North Carolina Governor Beverly Perdue publicly admitted that she is open to legalizing Internet sweepstakes cafés under the state's regulation. One proposal involves allowing the North Carolina Education Lottery take over the industry as a way to raise revenue. See Cullen Browder, *Governor Signs Ban on Sweepstakes Games*, CAPITAL BROADCASTING COMPANY (July 20, 2010), <http://www.wral.com/news/local/politics/story/8000425/>.

45. See S.C. CODE ANN. § 12-21-2710 (2010) (criminalizing the possession or operation of certain types of simulated gambling machines).

46. *Dissmeyer*, 249 P.3d at 444.

47. *Moore*, 64 So. 3d at 537.

48. *Allied Veterans*, 783 F. Supp. 2d at 1197.

49. Ryan P. McCarthy, *Information Markets as Games of Chance*, 155 U. PA. L. REV. 749, 755 (2007).

50. See Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 15 (1992) (describing drawings depicting games of chance in an Egyptian burial vault dating to 2500 B.C. and documentation of one of world's first government-funded gambling regulatory bodies in ancient India).

deeply rooted in America. Chance games, particularly lotteries,⁵¹ were commonplace in American colonial culture and served important private and public fundraising roles.⁵² It is ironic, then, that while the first Puritan colonists⁵³ and current American legislators have long feared the social evils of gambling,⁵⁴ most lawmakers openly embrace lotteries as if state-regulated gambling is somehow more pure than other forms.⁵⁵⁶

Despite the long-recognized social ills of lotteries, forty-three states currently run lotteries,⁵⁷ while only Utah and Hawaii⁵⁸ have blanket bans on gambling.⁵⁹ Even the nation's capital has embraced gambling, as it recently passed legislation authorizing the D.C. Lottery and Charitable Games Control Board to offer games of skill and chance, such as poker, blackjack, and bingo on the Internet.⁶⁰ This American love affair

51. A lottery is a "form of gambling in which consideration is paid for an opportunity at a prize, where skill is absent or only nominally present. 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." *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 62 (Mo. 1994).

52. See McCarthy, *supra* note 49, at 755-56 (referencing lottery that Benjamin Franklin used to raise funds to buy equipment for Pennsylvania militia).

53. See Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 Miss. L.J. 291, 298 (1995) (explaining that Puritans drafted first anti-gambling laws in the New World to attack idleness, the unproductive use of time).

54. See *State v. Dorau*, 198 A. 573, 575 (Conn. 1938) (illustrating the early twentieth century fear of gambling since, "the evil which arises out of such practices is that it fosters in men and women a desire to gain profit, not by their own efforts, not as a reward for skill or accomplishment, but solely by the lucky turn of chance, that it encourages in them the gambling instinct and that it makes it appeal to the baser elements in their nature").

55. See Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 Miss. L.J. 291, 333 (1995) (discussing the changing relationship between the state and gambling. The author explains, "There was a time when gambling had a taint, in respectable America, anyway. At best, the government tolerated it. Today, the states are the casinos, the house. They don't just tolerate gambling anymore. Now, they downright encourage it") (quoting 48 Hours: Lottery Fever (CBS television broadcast Apr. 27, 1989)).

56. The United States Supreme Court provided perhaps the most colorful description of the prevalence of lotteries when Justice Grier remarked in 1850, "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter 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." *Phalen v. Commw. of Va.*, 49 U.S. 163, 168 (1850).

57. *Lottery Results*, UNITED STATES GOVERNMENT (Feb. 29, 2012), http://www.usa.gov/Topics/Lottery_Results.shtml.

58. Nevada is one of the most notable states without a state-sponsored lottery because of fears that it would detract from the casino industry. For commentary on how the latest attempt by the Nevada legislature to amend the state constitution to allow a lottery failed, see Howard Stutz, *Nevada Lottery? Don't Bet on It*, LAS VEGAS REVIEW-JOURNAL, (Jan. 30, 2011), <http://www.lvrj.com/business/nevada-lottery-don-t-bet-on-it-114891734.html>.

59. See McCarthy, *supra* note 49, at 763 (listing each state's lottery laws).

60. D.C. CODE § 3-1313 (a)(1) (2011); see also *iGamingDC*, D.C. LOTTERY (Jan. 18, 2012), <http://www.dclottery.com/AboutUs/igaminginfo.aspx> (explaining the basic operation

with lotteries began to boom in the 1960s as a way for governments to avoid instituting new taxes.⁶¹ Yet, as a revenue-raising device, lotteries are regressive⁶² and target vulnerable populations. The burden of sustaining lotteries “falls disproportionately on the poor [and] places the state in the uncomfortable position of contradicting itself on financial literacy and education by discouraging saving and promoting reliance on luck.”⁶³ Ultimately, the glare of dollar signs⁶⁴ has blinded this country’s lawmakers from creating a coherent gambling policy.⁶⁵ Florida, for instance, runs a lottery that rang up nearly \$4 billion in sales in 2010.⁶⁶ Yet, local city council meetings in the Sunshine State are ripe with fear over the supposed lurking dangers of Internet sweepstakes cafés, particularly the prevalence of gambling addiction among the elderly and the poor.⁶⁷

B. THE PREVALENCE OF SWEEPSTAKES

This contradiction in gaming policy is not unique to Florida. As almost every state struggles with condoning gambling, private companies have used legal sweepstakes for decades⁶⁸ to capitalize on America’s seemingly innate love of seeking out rewards for little or no risk as a successful marketing ploy to promote various products. A sweepstakes is “simply a lottery with the element of consideration missing.”⁶⁹ The three widely accepted elements of a lottery, or gambling, are consideration,

guidelines of proposed Internet gaming through the existing lottery if the Mayor and City Council choose to implement the Lottery Modernization Act of 2010 thereby making D.C. the first American jurisdiction to offer iGaming).

61. See Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 *MISS. L.J.* 291, 303 (1995) (noting that New Hampshire reintroduced America to state-run lottery in 1964 and within ten years, a dozen states had followed suit).

62. McCarthy, *supra* note 49, at 763.

63. *Id.*

64. In financial terms, “legalized gambling is bigger than movies, bigger than spectator sports, bigger than theme parks, bigger than all the books, magazine, and newspapers in the United States put together.” JOHN LYMAN MASON & MICHAEL NELSON, *GOVERNING GAMBLING* 2 (2001).

65. See McCarthy, *supra* note 49, at 763 (highlighting the lack of clarity and coherency in antigambling state policies).

66. For statistics on state lottery sales see *2009-2010 Florida Lottery Annual Report*, FLORIDA LOTTERY (2010), <http://www.flalottery.com/exptkt/annualreport09-10.pdf>.

67. Christopher Curry, *Planning Commission Votes Against Internet Café*, GAINESVILLE SUN (Aug. 18, 2011), <http://www.gainesville.com/article/20110817/ARTICLES/110819474/1002/sitemaps?p=2&tc=pg>.

68. See *Miss. Gaming Comm’n v. Six Elec. Video Gaming Devices*, 792 So. 2d 321, 324 (Miss. Ct. App. 2001) (discussing early controversy in the 1920s about a mint candy machine that dispensed “trade checks” along with the purchase of the candy).

69. Fridman, *supra* note 8, at 126.

chance and a prize.⁷⁰ All of these elements are present in lotteries, but when the element of consideration is removed, the lottery transforms from gambling to a legal sweepstakes.⁷¹ Sweepstakes promotions are a popular and successful marketing tool because they do not require the purchase of a product to play⁷² and appeal to customers' "gambling instinct[s]."⁷³ Consequently, even though purchase is not necessary, there is an extra incentive to buy a product when the chance of winning a prize is attached.⁷⁴

The classic sweepstakes example involves bottle caps with prize codes underneath.⁷⁵ Yet, while sweepstakes are typically used as a promotional tool by soft drink and fast-food companies, even the President of the United States has utilized sweepstakes to solicit campaign contributions. In September 2011 Barack Obama launched a promotion offering anyone who made a donation to his campaign a chance to win a trip to have dinner with him.⁷⁶ Since even the President is not immune to prosecution, no purchase, payment, or contribution—i.e., consideration—was necessary to win the top prize valued at more than \$1,000.⁷⁷ Otherwise, the "Dinner with Barack" sweepstakes would have been illegal gambling. In this instance, a presidential candidate in need of campaign donations wisely chose to attach a chance at winning a valuable prize for the exchange, or consideration, of a campaign donation.⁷⁸

70. See, e.g., *Commw. v. Weisman*, 479 A.2d 1063, 1065 (Pa. Super. Ct. 1984) (listing the three elements of gambling); see Part II.C for a discussion of the three main elements of gambling.

71. Fridman, *supra* note 8, at 126.

72. In fact, "all states permit sweepstakes in connection with promotions of other products or services provided that no consideration is required. Thus, 'No Purchase Necessary' and an explanation of the 'Alternate Means of Entry' ('AMOE') must be prominently disclosed. The chances of winning through the AMOE must be equal to chances of winning through purchase of the product." Richard A. Kurnit, *Advertising and Promotional Liability*, 2008 A.L.I.-A.B.A., 391, 415.

73. *State v. Dorau*, 198 A. 573, 575 (Conn. 1938).

74. See Fridman, *supra* note 8, at 127 (explaining why sweepstakes are successful and popular business promotions).

75. See *F.A.C.E. Trading, Inc. v. Todd*, 903 A.2d 348, 358 (Md. 2006) (describing a Coca-Cola bottle cap promotion as a legitimate sweepstakes and not illegal gambling).

76. *Obama for America "Dinner with Barack II" Sweepstakes*, BARACKOBAMA.COM (2011), <http://www.barackobama.com/page/dinner-with-barack-sept-rules> (containing the rules of the "Dinner with Barack" sweepstakes).

77. See *Obama for America "Dinner with Barack II" Sweepstakes*, BARACKOBAMA.COM (2011), <http://www.barackobama.com/page/dinner-with-barack-sept-rules> (estimating approximate retail value of "Dinner with Barack" trip package as \$1,050.00).

78. President Obama's sweepstakes might not be entirely legal either. The promotion has drawn criticism for potentially violating campaign finance laws. For a report on the controversy, see Natasha Lennard, *Does 'Dinner with Barack and Joe' Break the Rules?*, SALON (June 28, 2011), http://www.salon.com/2011/06/28/dinner_barack_joe_campaign_finance_rules/.

It seems like a reasonable and legal strategy, then, for a private business owner to include a chance of a prize with the purchase of his or her product to increase sales. This is what a convenience casino owner does when attaching sweepstakes entries to an Internet time card. If donating to Obama's campaign online led to a webpage where a slot-machine video played to reveal the results of the sweepstakes, would that too elevate the legitimate business promotion to illegal gambling? Some mainstream sweepstakes already do, such as Coca-Cola's ongoing Internet promotion, My Coke Rewards, which includes video simulations of spinning slot machine reels with the traditional slot machine sounds in its "Instant Win" section that seemingly turns any computer into a gambling device.⁷⁹

What then makes convenience casinos the target of many state lawmakers' ire, but political fundraising sweepstakes and soda bottle promotions can operate unchecked? Further analysis of the elements of gambling—consideration,⁸⁰ chance⁸¹ and prize⁸² will expose the hypocritical policies of state legislatures attempting to outlaw convenience and show that statutes aimed at eliminating or regulating Internet sweepstakes cafés must be narrowly written so as to avoid overbreadth challenges.⁸³

C. THE ELEMENTS OF GAMBLING

1. *Consideration*

Gambling is not gambling unless something of value is at risk.⁸⁴ That element of risk—consideration—comes from the potential loss of what is usually money or another thing of value for the chance of receiv-

79. *Rewards Catalog Instant Win*, MY COKE REWARDS (2012), http://www.mycokerewards.com/instant-win-contests?WT.ac=mnuRC_IW.

80. See Part II.C.1 for a deeper analysis of the definition of consideration.

81. See Part II.C.2 for further discussion on how the element of chance is often determinative of whether or not an operation is unlawful gambling.

82. See Part II.C.3 for examples of what constitutes a prize in the gambling context.

83. See Part III.B for discussion of the proper way to draft anti-gambling statutes to survive overbreadth challenges.

84. The heart of the element of consideration is the risk of "something of value." Almost all states similarly define "something of value." New Jersey, where gambling is legal, defines "something of value" as:

[A]ny money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. This definition, however, does not include any form of promise involving extension of a privilege of playing at a game without charge on a mechanical or electronic amusement device, other than a slot machine as an award for the attainment of a certain score on that device. N.J. STAT. ANN. § 2C:37-1 (West 2011).

ing an award or prize.⁸⁵ Sweepstakes, however, do not traditionally require a fee to participate and thus do not qualify as gambling due to lack of consideration.⁸⁶ Seemingly, then, any business wanting to run a legal sweepstakes should give away free chances⁸⁷ at winning the prize—as in the classic “no purchase necessary” fine print on nearly every sweepstakes. Yet, even allowing free entries⁸⁸ does not automatically exempt sweepstakes from potential anti-gambling law violations.⁸⁹

Whether participants have to pay, however, is not the sole determinative element in evaluating a gambling scheme because consideration is more than just the exchange of money for a chance at winning a prize. Whether consideration goes toward the chance of winning a prize or the product itself is really the main factor in examining a possible gambling operation.⁹⁰ If the consideration is paid for the product, there is no problem as nearly every business transaction involves such an exchange.⁹¹ The trouble arises, however, when the consideration is not for the product, but really for the chance of winning a prize or playing the game.⁹²

85. See *Mid-Atl. Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler*, 460 A.2d 44, 48 (Md. 1983) (defining “consideration” as the “essential element” of lotteries because, “consideration is absent when . . . there is no money or other thing of value given or required to be given for the opportunity to receive an award determined by chance”).

86. See *People v. Shira*, 133 Cal. Rptr. 94, 103 (Cal. Ct. App. 1976) (“[I]n order for a promotional giveaway scheme to be Legal any and All persons must be given a ticket free of charge and without any of them paying for the opportunity of a chance to win the prize.”).

87. Many courts agree that consideration is the payment of money as the time and effort of mailing a request for a game piece or filling out an entry form does not constitute consideration. See, e.g., *Coca-Cola Bottling Co. of Wis. v. La Follette*, 316 N.W.2d 129, 132 (Wis. Ct. App. 1982) (holding that soft drink promotion did not violate lottery laws because sweepstakes entries were available by mail, which negated the consideration requirement).

88. Free entry into a sweepstakes is used in the consideration context here; not to be confused with “free play” in the prize context. The notion of “free play” as a prize is a term of art with varying judicially crafted definition. See, e.g., *State v. Four Video Slot Machs.*, 453 S.E.2d 896 (S.C. 1995) (criminalizing the possession of slot machines with a free play feature); *State v. One Hundred and Fifty-Eight Gaming Devices*, 499 A.2d 940 (Md. 1985) (overruling a prohibition of pinball machines, provided that the machine only awarded free play); *Commw. v. Kling*, 13 A.2d 104 (Pa. Super. Ct. 1940) (finding a mint candy vending machine exempt from anti-gambling laws).

89. See *Stenehjem*, 625 N.W.2d at 239 (ruling that the availability of free play does not exempt a “Lucky Strike” promotional game piece attached to a telephone card from being defined as gambling).

90. See *id.* at 240-41 (explaining that many states find retail promotions offering free play in violation of gambling and lottery statutes due to both the effort required to request a free game piece and whether the product or the chance of winning a prize is really for sale).

91. See *Minn. Souvenir Milkcaps, LLC v. State*, 687 N.W.2d 400, 403-04 (Minn. Ct. App. 2004) (finding that if the payment is for the purchase of a product instead of the chance to win then the promotion is not an illegal lottery, but a lawful sweepstakes).

92. Courts have struggled for decades to determine how much the chance of winning a prize induces a consumer to purchase a product or exchange consideration. See, e.g., *Lang*

2. *Consideration as Viewed From the Entirety of the Sweepstake*

To determine whether consideration went toward the prize or the product, the Supreme Court of Alabama examined the sweepstakes as a whole, rather than individual sales, in *Barber v. Jefferson County Racing Association, Inc.*⁹³ The case involved an Internet sweepstakes café selling cyber time cards carrying various amounts of points that activated computerized slot machine videos to display prize amounts.⁹⁴ The court found that because “the prize may go to someone who has paid nothing *does not negate [sic] the fact that many have paid* for their chance. . . . [T]he opportunity for free plays does not negate the element of consideration.”⁹⁵ The *Barber* court reasoned that if “consumers are paying for the entries, in whole or in part, regardless of the cyber time acquired in conjunction with those entries,” then the element of consideration is present.⁹⁶ Accepting evidence that few customers used the Internet kiosks but most were “lined up for hours” to use the prize readers, the court concluded that customers were purchasing the sweepstakes entries, not the product (cyber time).⁹⁷ Since so many customers paid “to play the readers, rather than to acquire, or in addition to acquiring, cybertime [sic],” the court dismissed evidence that plaintiffs sold cyber time cards at a fair market value.⁹⁸ This ruling provides another obstacle to owners seeking to operate high-payout sweepstakes since nearly every cent of consideration must go toward the product, not the sweepstake.

3. *Consistency and Pricing*

In contrast, the Supreme Court of Maryland created a standard based on consistent pricing to determine if consideration was paid for the product or the game in *Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler*.⁹⁹ The court ruled that if the price of the product is “constant before, during and at the termination of the promotion, the fact that some of its purchasers (or non-purchasers) may receive a prize

v. Merwin, 59 A. 1021 (Me. 1905) (examining whether a machine that in exchange for a nickel distributed one cigar worth a nickel as well as a chance of winning additional cigars qualified as gambling); *People v. Miller*, 2 N.E.2d 38 (N.Y. 1936) (holding that a movie theater that allowed patrons to spin a wheel upon purchase of movie tickets to win various prizes was illegal gambling because the purchase price of the ticket (the consideration) went both toward seeing the movie and a chance of winning a prize on the wheel).

93. *Barber v. Jefferson Cnty. Racing Ass’n, Inc.*, 960 So.2d 599 (Ala. 2006).

94. *Id.* at 605.

95. *Id.* at 613 (internal citations omitted).

96. *Id.* at 611.

97. *Id.*

98. *Id.* at 612.

99. *Mid-Atl. Coca-Cola Co. Bottling Co., Inc.*, 460 A.2d at 44.

awarded on the basis of chance does not violate" state lottery laws.¹⁰⁰

Other courts have found that the product itself must have actual value; otherwise the sole reason for the purchase is to win the prize, not acquire the product.¹⁰¹ While analyzing a promotion involving allegedly collectible milk bottle caps, the Court of Appeals of Minnesota focused on the value of the bottle caps.¹⁰² The court ultimately determined that the milk caps were valueless, and thus, no customer could reasonably have paid consideration to acquire the caps, but rather, the consideration went toward the chance of winning the sweepstakes.¹⁰³

In a case pre-dating the technological ability to sell cyber time cards, the Supreme Court of Mississippi deemed a similar promotion involving telephone time cards as a legitimate sweepstakes in *The Mississippi Gaming Commission v. Treasured Arts, Inc.*¹⁰⁴ The court found that the phone cards were sold based on a per-minute rate comparable to the industry average, although slightly higher.¹⁰⁵ Since the price of phone time was not exorbitant,¹⁰⁶ the court reasoned that no consideration

100. The court focused on three main provisions in reaching its conclusion. These provisions were from Maryland Constitution Article 3, Section 36, which provides that "No lottery grant shall ever hereafter be authorized by the General Assembly, unless it is a lottery to be operated by and for the benefit of the State;" Maryland Annotated Code, Article 27, Sections 356 and 359 that read respectively as follows:

Section 356

No person shall draw any lottery or sell any lottery ticket in this State; nor shall any person sell what are called policies, certificates or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event or on the happening of contingency entitle the purchaser or holder to receive money, property or evidence of debt. (Emphasis added)

Section 359

In addition to the penalties prescribed in § 358 of this article, any person who shall give money or any other thing for any lottery ticket, certificate, or any other device, by which the vendor promises that he or any other person will pay or deliver to the purchaser any money, property or evidence of debt, on the happening of any contingency in the nature of a lottery, such person so giving may recover, as small debts are recoverable, from the person to whom he gave the same, or his aiders or abettors, the sum of fifty dollars for every lottery ticket, certificate or other device in the nature thereof so purchased or obtained by him. (Emphasis added). *Mid-Atl. Coca-Cola Co. Bottling Co., Inc.*, 460 A.2d at 48.

101. See *Minn. Souvenir Milkcaps*, 687 N.W.2d at 404 (discussing whether a promotion involving milk caps was an illegal lottery).

102. *Id.*

103. *Id.*

104. See *Miss. Gaming Comm'n v. Treasured Arts, Inc.*, 699 So. 2d 936, 941 (Miss. 1997) (holding that buyers of telephone time cards did not pay additional considerations for prizes and thus the cards did not constitute a lottery).

105. *Id.* at 940.

106. From a practical business viewpoint it is hard to understand how the phone-card seller could offer cash prizes and remain in business if the price of talk time was on par with the industry average. The margin of profit had to be minimal, but regardless, somehow this promotion turned a profit.

went toward the opportunity to win a prize since the price of the time card remained constant throughout the promotion.¹⁰⁷ Similar to the Maryland decision in *Mid-Atlantic Coca-Cola Bottling Co., Inc.*, the court concluded that if the price of the product is fair and constant, consideration for the chance of winning a prize is missing and the promotion is not an illegal lottery.¹⁰⁸

Now that telephone time cards with scratch or peel-off sweepstakes entries have given way to cyber time cards that can scan digitally into computer terminals, the crucial determination of whether consideration is present rests on the value of the product—Internet access. The average cost of Internet access in Florida is about \$7.50 an hour.¹⁰⁹ Therefore, if the cost of Internet time is close to that average, regardless of how many sweepstakes points or entries are attached,¹¹⁰ then the consideration is being paid for a product of value—Internet time—and not just the chance at winning a prize.¹¹¹ If consideration is absent then there is no gambling.

4. *Chance*

Traditionally for a game to constitute gambling, “it must be a game where chance predominates rather than skill.”¹¹² Since an element of skill implies that a player holds some control over the outcome; chance, therefore, means “a lack of control over events or the absence of controllable causation — the opposite of intention.”¹¹³ In convenience casinos, the chance of winning a prize for purchasing Internet access time is wholly pre-determined and must be present to complete the considera-

107. *Treasured Arts*, 699 So. 2d at 940; see also Fridman, *supra* note 8, at 128-29 for a useful illustration of product pricing during promotions using soda bottles.

108. *Treasured Arts*, 699 So. 2d at 941.

109. This figure is calculated by averaging the prices listed for twenty-three Florida cyber cafés. *Cybercafé Database*, CYBERCAFE (2012), <http://www.cybercafes.com/country.asp?selectcountry=USA&symbol=FL&step=10&state=Florida>. The cost of Internet access time at the Allied Veterans establishments in Florida is well above this average at \$12 per hour according to Plaintiff's Complaint ¶19.

110. The industry standard is one free sweepstakes entry for every penny spent, or 100 entries for each dollar. Although not determinative of any legal issues, it is probably best for business for sweepstakes café owners to not deviate too far from this average. See Cato, *supra* note 23 for a detailed description of how sweepstakes cafés operate.

111. The *Barber* court might not agree. See *supra* part II.C.i.b. for an analysis of the *Barber* court reasoning on how to view an individual payment for an Internet time card in a larger sweepstakes operation.

112. *Commw. of Pa. v. Dent*, 992 A.2d, 190, 193 (Pa. Super. Ct. 2010); see also N.Y. PENAL LAW § 225.00 (McKinney 2011) (defining contest of chance as “any game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein”).

113. *Barber*, 960 So. 2d at 609 (internal citations omitted).

tion/chance/prize trifecta of gambling.¹¹⁴ As previously discussed, the availability of free chances can still mean a game is a gambling scheme.¹¹⁵

Yet, while the element of chance is rarely mentioned in statutes banning real or simulated gambling devices,¹¹⁶ it is an important factor for judges struggling with classifying ambiguous promotions as legitimate business sweepstakes or illegal gambling.¹¹⁷ This is due to judges reacting not to statutes, but to their personal instincts to classify certain promotions as gambling because, “[I]f it looks like a duck, walks like a duck, and sounds like a duck, it is a duck.”¹¹⁸

One of the targets of legislators’ discontent over convenience casinos is not necessarily the scheme of receiving a sweepstakes entry for purchasing a product, but that the entry is deciphered by an electronic terminal¹¹⁹ that simulates slot machines.¹²⁰ Although the computers or type of game simulation chosen has no impact on a player’s chance at winning, courts find the element of chance still present, which when paired with ample consideration, qualifies the sweepstakes as gambling.¹²¹ Therefore, eliminating the simulated gaming machines would not dispose of chance, as chance goes hand-in-hand with both sweepstakes and gambling.

The payout percentage and duration of the promotion can serve as tools to decipher the “true purpose of the game.”¹²² Even though a game’s payout percentage and purpose is not an element of chance,

114. See 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2003) (listing the three mandatory elements of gambling — prize, chance and consideration).

115. *Dent*, 992 A.2d at 193.

116. See, e.g., S.C. CODE ANN. § 12-21-2710 (2010) (prohibiting the possession or operation of unlawful gambling devices in South Carolina with primary focus on consideration, not chance).

117. See, e.g., *Barber*, 960 So. 2d at 612 (comparing traditional “casino-style slot machines” to a MegaSweeps Internet time card sweepstakes based on payout percentage or the chance of winning a prize, despite no mention of payout percentages in the statute at issue); *Midwestern Enters., Inc., v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (examining chance of winning to find that “[I]t does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of sixty-five percent are immune from the definition of a lottery”).

118. *People ex rel. Lockyer v. Pac. Gaming Techs.*, 98 Cal. Rptr. 2d 400, 401 (Cal. Ct. App. 2000).

119. *Allied Veterans*, 783 F. Supp. 2d at 1201 (explaining that the ordinance banning simulated gaming devices requires the connection between an object such as a coin, bill, card or token with a device such as a computer, terminal or electrical contrivance).

120. See *id.* at 1205 (focusing not on the obtainment of a playing card, but on the action of inserting or swiping into a computer or electronic device).

121. *Moore*, 64 So. 3d at 541.

122. *Stenehjem*, 625 N.W.2d at 240.

judges often use such evidence to determine whether a sweepstakes is unlawful gambling or a legitimate business promotion.¹²³ In examining a “MegaSweeps” promotion attaching sweepstake entry points to Internet time cards, the *Barber* court found the payout percentage was about ninety-two percent.¹²⁴ This closely resembled the typical casino slot machine payout of ninety to ninety-eight percent.¹²⁵ Yet, the usual payout for a “temporary promotional sweepstakes” is less than one percent.¹²⁶ Also, the MegaSweeps promotion was seemingly permanent, while promotional sweepstakes offered by fast food chains or soda companies are generally temporary.¹²⁷ Therefore, the actual chance or odds of winning a prize is sometimes dispositive of whether or not illegal gambling is occurring due to judges comparing sweepstake odds to slot machine payouts.

5. Prize

The existence of a prize is essentially a given in any sweepstakes or gambling scheme. Without a prize or a chance at a reward there is no point to risking any consideration without a return. Prizes need not only be cash.¹²⁸ Prizes can be anything with material value such as land, cars, personal services, or food.¹²⁹ However, prizes do not always have to be tangible objects with marketplace value.¹³⁰ A prize is most simply, “something offered or striven for in a contest of chance-something which may be won by chance.”¹³¹ Since prizes are almost always present, consideration and chance are the two elements that elevate a sweepstakes to gambling.

123. *See id.* (explaining that the high pay-out rate of a Lucky Strike telephone time card game is a distinguishing feature of a gambling device).

124. *Barber*, 960 So. 2d at 612.

125. *Id.*

126. *Stenehjem*, 625 N.W.2d at 240.

127. *Barber*, 960 So. 2d at 612.

128. For lottery and sweepstakes purposes, a prize need not be money. It could also be land, goods or anything with material value. 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2003).

129. *See, e.g.*, *Glick v. MTV Networks*, 796 F. Supp. 743 (S.D.N.Y. 1992) (finding a Corvette was the prize); *Classic Oldsmobile v. Maine*, 704 A.2d 333 (Me. 1997) (determining that lease payments for a car as well as a cash payment were adequate prizes); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672 (S.D. Cal. 1999) (classifying certain athletic trading cards as valuable prizes, or “chase cards” because of their high resale prices).

130. *See State v. Pinball Machs.*, 404 P.2d 923, 927 (Ala. 1965) (concluding that the gambling element of “prize” does not need independent monetary value because the intrinsic nature of gambling is the payment of a price for the chance to obtain something unobtainable without that exchange of consideration, such as a free play on a pinball machine).

131. *Id.* at 926.

D. ATTEMPTS TO SHUT DOWN INTERNET SWEEPSTAKES CAFÉS

Internet sweepstakes cafés or convenience casinos have the potential to generate billions of dollars in revenue and employ thousands of people across the nation.¹³² Yet, operating or even patronizing a convenience casino is a risky endeavor. Law enforcement officials are routinely raiding these establishments and seizing computer terminals and cash across the nation in places such as Texas,¹³³ Georgia,¹³⁴ and Massachusetts.¹³⁵ With states unable to produce coherent statutes either regulating or outlawing convenience casinos, these establishments are left in a murky “gray zone” between unlawful gambling and legitimate business promotions.¹³⁶ Conflicting decisions based on similarly written state statutes attempting to outlaw Internet sweepstakes terminals as either illegal gray machines,¹³⁷ slot machines¹³⁸ or simulated gambling devices¹³⁹ are to blame for the creation of this convenience casino gray

132. Matt Dixon & Walter C. Jones, *Internet Cafes in Florida, Georgia Walk a Fine Line on Federal, State Gaming Laws*, FLORIDA TIMES UNION (Sept. 17, 2011), <http://jacksonville.com/news/georgia/2011-09-17/story/internet-cafes-florida-georgia-walk-fine-line-federal-state-gaming>.

133. See Gillette, *supra* note 11 (reporting a federal crackdown on three Internet sweepstakes café owners in East Texas which resulted in a one-year prison sentence).

134. See Winston Skinner, *Newnan Extends Its Internet Café Ban to 12 Months*, NEWNAN TIMES-HERALD (Sept. 19, 2011), <http://www.times-herald.com/local/Newnan-extends-internet-cafe-ban-12-months-1848720> (detailing raids in Coweta County and Fayette County, Georgia in which computer gaming stations and cash were seized).

135. See Levenson, *supra* note 16 (describing a raid by State Police in Chicopee that led to the seizure of computers and more than \$100,000).

136. Even within a single state like Florida, there is no uniform policy as Seminole County (Orlando) passed an ordinance banning “simulated gambling devices” while Jacksonville City Council became the largest city to regulate Internet cafés by capping their numbers, limiting the type of promotional signage, and prohibiting the sale of alcohol. See Dixon, *supra* note 132.

137. See KAN. STAT. ANN. § 74-8702(g) (banning “gray machines,” which are “any mechanical, electro-mechanical or electronic device, capable of being used for gambling, that is: (1) Not authorized by the Kansas lottery, (2) not linked to a lottery central computer system, (3) available to the public for play or (4) capable of simulating a game played on an electronic gaming machine or any similar gambling game authorized pursuant to the Kansas expanded lottery act.”).

138. See MISS. CODE ANN. §75-76-5(ff) (prohibiting slot machines that are any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or anything of value, whether the payoff is made automatically from the machine or in any other manner).

139. See Seminole, Fla., Ordinance 2011-1 § 222.8(b) (outlawing “any device that, upon connection with an object, is available to play or operate a computer simulation of any game, and which may deliver or entitle the person or persons playing or operation the device to a payoff”).

zone.

The next section of this Paper will examine a few of the current laws and legislative proposals aimed at shutting down convenience casinos, with a focus on possible unconstitutional overbreadth violations raised by these laws. In doing so, this Paper will compare legal analysis used by three courts: (1) the Supreme Court of Kansas voiding a law aimed at banning the simulated gaming devices used in convenience casinos;¹⁴⁰ (2) the Mississippi Court of Appeals validating a law classifying convenience casino computers as illegal slot machines;¹⁴¹ and (3) a federal district court in Florida upholding a county's ban on similar "simulated gambling devices."¹⁴²

E. THE OVERBREADTH DOCTRINE

Those opposed to prohibiting convenience casinos often claim that laws targeted at electronic expressions of sweepstakes are unconstitutionally overbroad.¹⁴³ Electronic expressions through videogames or movies are constitutionally protected forms of speech¹⁴⁴ on which challengers to anti-Internet sweepstakes laws rely for First Amendment challenges.¹⁴⁵ Since the use of the overbreadth doctrine is an important tool for owners of Internet sweepstakes cafés battling anti-gambling legislatures, it is necessary to explain this doctrine before this Paper explains how best to use the doctrine to illustrate the unconstitutionality of laws attempting to ban convenience casinos.

The overbreadth doctrine, which is a "departure from traditional rules of standing," permits a criminal defendant to "make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute."¹⁴⁶ Litigants can challenge a statute as applied to their own conduct or as a facial challenge where "the statute's very existence may cause others not before the court to refrain from constitutionally pro-

140. *Dissmeyer*, 249 P.3d at 444.

141. *Moore*, 64 So. 3d at 537.

142. *Allied Veterans*, 783 F. Supp. 2d at 1197.

143. See *infra* Part. II.E.2 for a discussion of how plaintiffs successfully argued that a Kansas law aimed at prohibiting the possession of simulated gambling devices was overbroad.

144. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (ruling that the First Amendment protects video games because, like books, plays, and movies, video games communicate ideas). Note, however, that the *Allied Veterans* court admitted that video games are protected forms of speech, just not when they are directly connected to a monetary payoff. *Allied Veterans*, 783 F. Supp. 2d at 1202.

145. See *infra* Part II.E.1 for a discussion of a successful challenge to an anti-Internet sweepstakes café ordinance based on the overbreadth doctrine.

146. *Alexander v. United States*, 509 U.S. 544, 555 (1993).

tected speech or expression.”¹⁴⁷ In other words, a statute is overbroad if, in seeking to legitimately outlaw non-protected speech, it also hinders protected speech.

Courts measure the appropriateness of facial invalidation due to overbreadth on the existence of a “substantial number of illegitimate potential applications relative to the plainly legitimate sweep of the statute.”¹⁴⁸ This means that for a statute to suffer the “strong medicine”¹⁴⁹ of overbreadth invalidation, the challenged statute must reach a wide array of protected conduct or expression far outside of the statute’s intended target.¹⁵⁰ To properly conduct an overbreadth analysis, a court must clearly determine what the statute covers and whether it criminalizes a “substantial amount of protected expressive activity.”¹⁵¹ Courts, however, are often reluctant to invalidate a law based on overbreadth and invoke the doctrine sparingly and only as a last resort.¹⁵² Challenged statutes can often be saved from complete invalidation by a narrowing construction.¹⁵³

Overbreadth attacks have been allowed not just where a statute directly criminalizes speech, but also where a law regulates the time, place and manner of otherwise lawful expressions.¹⁵⁴ For example, although there are no protections for obscenity or inciting violence, violent videogames are protected manners of speech.¹⁵⁵ In the convenience casino context, the slot-machine videos displaying sweepstakes results are the contested form of speech. Although the overbreadth doctrine is traditionally confined to the First Amendment context—commercial speech notwithstanding¹⁵⁶—it has recently arisen in challenges to Congress’s power to enforce the Fourteenth Amendment, which adds another avenue for challengers to potentially overbroad laws to pursue, namely state

147. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

148. Catherine Carroll, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1034-35 (2003) (citing *Broadrick*, 413 U.S. at 615).

149. *Broadrick*, 413 U.S. at 613.

150. See *United States v. Williams*, 553 U.S. 285, 292-93 (2008) (comparing an overbroad law’s intended target to its actual sweep).

151. See *id.* at 293-97 (detailing the process of an overbreadth analysis in the context of a child pornography statute).

152. *Broadrick*, 413 U.S. at 613.

153. Igor Helman, *Spam-A-Lot: The States’ Crusade Against Unsolicited E-Mail In Light Of The Can-Spam Act and The Overbreadth Doctrine*, 50 B.C. L. REV., 1525, 1548 (2009).

154. *Broadrick*, 413 U.S. at 612-13.

155. *Brown*, 131 S. Ct. at 2733.

156. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (explaining that “justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context particularly in the regulation of commercial speech such as advertising”).

action and due process.¹⁵⁷ For purposes of convenience casino regulation, this Paper will focus on how overbreadth challenges operate in the First Amendment context with the video sweepstakes results as the protected form of expression. As the conflicts in *Dissmeyer*, *Moore* and *Allied Veterans* in the next section illustrate, legislatures need to draft anti-gambling laws narrowly to avoid overbreadth invalidation.

1. *Overbroad in Kansas*

A decision by the Kansas Supreme Court striking down a statute aimed at banning “gray machines” provides a blueprint for future litigation involving expanded gaming regulations and a useful guide for legislators attempting to write viable statutes aimed at ridding their states of unlawful gambling devices. The issue in *Dissmeyer v. State*¹⁵⁸ was whether a new provision of the Expanded Lottery Act¹⁵⁹ prohibiting “gray machines” was unconstitutionally vague and overbroad.¹⁶⁰ The owners and lessees of “amusement game machines”¹⁶¹ sued the state seeking a declaration of the unconstitutionality of the law. The law mandated that the executive director of the Kansas Lottery or the executive director of the Kansas Racing and Gaming Commission confiscate any “gray machine” and charge its owners with a level nine felony.¹⁶²

Even though the vagueness challenge failed,¹⁶³ the plaintiffs managed to convince the Kansas Supreme Court unanimously that the statute was unconstitutionally overbroad.¹⁶⁴ The specific provision challenged outlawed the possession or operation of “gray machines,” defined as any mechanical, electro-mechanical or electronic device, capable of being used for gambling, that is: (1) unauthorized by the Kansas lottery, (2) not linked to a lottery central computer system, (3) available to the public for play or (4) capable of simulating a game played on an electronic gaming machine or any similar gambling game authorized pursuant to the Kansas Expanded Lottery Act.¹⁶⁵

157. See Carroll, *supra* note 148 (illustrating multiple parts of the Constitution that are subject to the overbreadth doctrine).

158. *Dissmeyer*, 249 P.3d at 444.

159. KAN. STAT. ANN. § 74-8733

160. *Dissmeyer*, 249 P.3d at 446-47.

161. By Justice Rosen’s own admission, the pleadings “do not reveal the precise nature” of the machines owned by plaintiffs. *Id.* at 446. Regardless, the statute could include the same machines used in Internet sweepstakes cafés, which makes the court’s analysis highly relevant to any inquiry of the legality of convenience casinos.

162. *Id.*

163. The *Dissmeyer* court essentially rejected the vagueness argument because the statute was so easy to interpret that it could be precisely applied to almost any device, thereby making it overbroad. *Id.* at 447.

164. *Id.* at 449.

165. KAN. STAT. ANN. § 74-8702(g).

Such “gray machines” included the computer terminals used in Internet sweepstakes cafés as well as almost every conceivable electronic device with Internet capabilities.¹⁶⁶ The syntax of this definition implies inserting “the word ‘or’ between each of the four subcategories.”¹⁶⁷ This means that in order to constitute a “gray machine” the device must be “mechanical, electro-mechanical, or electronic and capable of being used for gambling. It must also: (1) not be authorized by the Kansas Lottery or (2) not be linked to a lottery central computer or (3) be available to the public for play or (4) be capable of simulating an authorized gambling game.”¹⁶⁸ The machines used in convenience casinos are exactly the type of “gray machines” Kansas sought to outlaw. They are electronic, theoretically capable of being used for gambling, even if only used for non-gambling sweepstakes, not linked to a lottery central computer, available to the public, and capable of simulating authorized or traditional casino gambling games.

Internet sweepstakes computers fit this definition, but so does a laundry list of devices.¹⁶⁹ A successful overbreadth challenge is no easy task. An overbroad criminal statute violates an individual’s Due Process rights because it “makes conduct punishable which under some circumstances is constitutionally protected from criminal sanctions.”¹⁷⁰ Indeed, it should only “be employed sparingly and only as a last resort.”¹⁷¹ Yet, when the “protected activity is a significant part of the law’s target, and there exists no satisfactory method of severing that law’s constitutional from its unconstitutional applications,” courts should deem a law overbroad.¹⁷² In other words, the statute was overbroad because it deprived citizens of their property rights solely because of the mere potential for that property to be used unlawfully.¹⁷³ The *Dissmeyer* court properly ruled this “gray machine” provision was unconstitutionally overbroad because it would criminalize the possession of household com-

166. See *Dissmeyer*, 249 P.3d at 448 (mocking the overbroad law prohibiting the use of any device with an Internet connection capable of online gambling as “The computer on which this opinion was drafted is a gray machine because it is electronic, it is capable of being used for gambling, and it is not linked to a lottery central computer system”).

167. *Id.*

168. *Id.*

169. *Id.* (listing devices that fit the overbroad definition such as telephones, radios, and the Chutes and Ladders board game).

170. *Id.* at 449 (internal citations omitted).

171. *Smith v. Martens*, 106 P.3d 28, 37–38 (Kan. 2005).

172. *Dissmeyer*, 249 P.3d at 447–48 (internal citations omitted).

173. *Id.* at 449 (finding that a law criminalizing the possession of almost any kind of tool or machine and allows the state to confiscate that property is unconstitutionally overbroad).

puters,¹⁷⁴ pinball machines,¹⁷⁵ or even a board game such as Chutes and Ladders.¹⁷⁶

2. *Mississippi Strikes At The Heart Of Convenience Casinos*

Less than two weeks prior to the *Dissmeyer* decision in Kansas, the Court of Appeals of Mississippi dealt convenience casinos a disastrous hand by ruling that the computer terminals used in the Internet sweepstakes cafés were illegal slot machines subject to seizure by local law enforcement.¹⁷⁷ The appellants in *Moore v. Mississippi Gaming Commission*¹⁷⁸ owned and operated the Paradise Isle Internet Café, which sold long-distance telephone cards and provided Internet access at an hourly rate.¹⁷⁹ For each dollar spent,¹⁸⁰ customers received 100 sweepstakes points redeemable for an instant chance at winning a prize at the point-of-sale register or the customer could swipe the telephone card at a computer terminal and choose to redeem the points through videos that resembled traditional slot machine games.¹⁸¹ Points won through these game simulations could be used to purchase additional phone or Internet time or they could be redeemed for cash.¹⁸² The method or type of game chosen had no impact on the amount of points won, as the sweepstakes

174. *Id.* at 447 (classifying a home computer as a gray machine because it is electronic, capable of being used for gambling, capable of simulating gambling, available to the public and not linked to the state Lottery).

175. *Id.* at 448 (explaining that if a standard pinball machine or any arcade game awarded cash prizes rather than additional free plays, they too, would be illegal gray machines).

176. *Id.* (illustrating that the hand-powered spinners in games such as Chutes and Ladders or Twister are really mechanical devices that could be theoretically be used for gambling).

177. *Id.* at 542.

178. *Id.*

179. *Id.* at 549.

180. Supplemental Brief of Petitioners at 3-4, *Moore*, 64 So. 3d at 537 (Miss. Ct. App. 2011) (2009-CA-00235-COA):

Customers had three options when purchasing a phone card from Appellants: 1. Make a five-dollar purchase of phone time at the point of sale and put any excess money spent on the account which the customer could use to purchase more long-distance phone time over the internet; 2. Make a purchase in any amount and complete the full transaction at the point of sale. The customer could then leave the store at that point without ever entering the sweepstakes; 3. Make a purchase in any amount, complete the transaction at the point of sale and then enter the sweepstakes either at the point of sale or at the individual validation computer terminals. In each case the only time the customer receives free sweepstakes entries is when a purchase is made, nothing for a payment only to the account. . . Any sweepstakes winnings collected by the patron were separate and apart from the money spent on phone time purchased.

181. *Id.*

182. *Id.*

winnings were pre-determined.¹⁸³ Yet the Mississippi Gaming Commission (MGC) believed that outfitting the computers with an electronic card reader and programming them to display traditional slot machine games converted them into illegal slot machines.¹⁸⁴ The MGC subsequently seized thirty-nine of the computer terminals.¹⁸⁵

The entire case hinged upon whether or not modified desktop computers could constitute illegal slot machines.¹⁸⁶ The Mississippi Gaming Control Act¹⁸⁷ defines slot machines in a similar fashion to Kansas' "gray machines." An illegal slot machine in Mississippi is:

Any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or anything of value, whether the payoff is made automatically from the machine or in any other manner.¹⁸⁸

The court found that the phone card scheme included all of the elements of this statute in that the phone card was the object that upon payment of consideration was inserted into an electrical device to play a game that provided the operator with a chance of winning a cash prize.¹⁸⁹ The appellants, however, argued that the elements of consideration and chance were missing — thereby making it impossible to classify the computers as slot machines.¹⁹⁰ The appellants, similar to the plaintiffs in *Dissmeyer*, claimed that upholding the law would criminalize a plethora of other promotions. According to the appellants, their sweepstakes lacked a major element of gambling — consideration — just like any other permissible sweepstakes.¹⁹¹

Their argument, however, failed. The court compared the sweepstakes operation to a nearly identical scheme in Alabama in which an Internet café sold Internet and phone time cards with sweepstakes

183. *Id.*

184. *Id.* at 538.

185. *Id.*

186. See Supplemental Brief of Petitioners at 3-4, *Moore*, 64 So. 3d at 541 (detailing the thirty-nine computers modified with magnetic card readers in the plaintiffs' café).

187. MISS. CODE ANN. §75-76-1.

188. *Id.* at §75-76-5(ff).

189. *Moore*, 64 So. 3d at 542.

190. *Id.* at 540-41.

191. *Id.* at 540 (appellants arguing that their sweepstakes is no different than traditional "scratch-and-win" game pieces from lotteries in that the element of consideration is missing).

points attached that were redeemable in a similar fashion.¹⁹² In the Alabama decision, the Court held that customers paid consideration to “play the [sweepstakes digital] readers,” not to actually acquire cybertime.¹⁹³ The *Moore* court relied on testimony from an MGC investigator to reach a similar conclusion.¹⁹⁴ That investigator testified that there were thirty-nine computer terminals equipped with card readers, but only a single computer devoted to Internet access.¹⁹⁵ Based on his testimony, the court found that customers were not paying for Internet time, but were actually paying for the chance of winning a prize, which is gambling.¹⁹⁶

Additionally, the court also rejected the appellants’ argument that the element of chance was missing.¹⁹⁷ The appellants believed that chance did not exist since the outcomes of the sweepstakes were predetermined before the customer purchased a phone card.¹⁹⁸ Like the *Barber* decision, the *Moore* court reasoned that, “the element of chance is considered from the player’s point of view” and that “what the machine ‘knows’ does not affect the player’s gamble.”¹⁹⁹ Therefore, even though playing the games at the computer terminals did not impact the outcome of the sweepstakes, chance still existed because customers did not know whether the time card contained winning or losing sweepstakes points at the point of sale.²⁰⁰

In *Dissmeyer*, the court deemed the “gray machine” definition overly broad because almost anything from a home computer to a pinball machine could be illegal under the statute in question.²⁰¹ Yet, in *Moore*, the court examined a similarly worded slot machine statute²⁰² without considering its potential overbreadth²⁰³ even though Mississippi’s statute could also apply to regular desktop computers equipped with digital card

192. See *Barber*, 960 So.2d at 605-06 (describing the operation of plaintiff’s MegaSweeps Internet sweepstakes promotion). The key determinant for finding that the consideration element was present was that few customers used the Internet kiosks while customers “lined up at all hours to use the readers.” *Id.* at 611.

193. *Id.*

194. *Moore*, 64 So. 3d at 541.

195. *Id.*

196. The court did not answer what ratio of readers to Internet access terminals would illustrate a non-illegal gambling operation.

197. *Moore*, 64 So. 3d at 541.

198. *Id.*

199. *Id.*

200. *Id.* (the court did not address how this compares to consumer knowledge of the odds of winning the state lottery).

201. See KAN. STAT. ANN. § 74-8702(g) (defining “gray machine”).

202. MISS. CODE ANN. § 75-76-5(ff).

203. *Moore*, 64 So. 3d at 541 (it is unclear from the court’s opinion and appellant filings as to whether an overbreadth challenge was ever raised and if not, why it was not an issue).

readers and slot machine simulation software.²⁰⁴ This split in interpreting similar statutes aimed at banning the use of illegal gambling devices demonstrates the difficulty lawmakers have when writing such statutes and the trouble convenience casino owners face in determining the legality of their businesses.

F. PERILOUS PRECEDENT IN FLORIDA

In *Allied Veterans of the World, Inc. v. Seminole County*,²⁰⁵ the Plaintiffs²⁰⁶ sued Seminole County, Florida in federal court seeking a permanent injunction preventing the enforcement of Ordinance 2011-1 (“the Ordinance”), which became law on January 11, 2011.²⁰⁷ The Ordinance sought to outlaw “simulated gambling devices.”²⁰⁸ The plaintiff, a tax exempt, 501(c)(19) nonprofit veterans’ organization,²⁰⁹ operated Internet cafés, which in addition to selling Internet time with sweepstakes points, also offers printing, faxing and copying services.²¹⁰ The computers targeted by the Ordinance were common desktops including Gateway, Acer and Hewlett Packard brands.²¹¹ Although the number of sweepstakes entries was based upon the amount of money spent, no purchase was necessary to receive sweepstakes entries.²¹² As required by Florida sweepstakes law, anyone over the age of eighteen could obtain free sweepstakes entries upon request in person at an Allied Veterans’ café or mailing in a written request.²¹³ Sweepstakes are permitted in Florida in connection with the sale of consumer products or services so long as the element of consideration is missing — as in, “no purchase necessary to participate.”²¹⁴ Plaintiffs believed they were therefore operating a lawful sweepstakes.

The question of whether Plaintiffs’ sweepstakes cafés housed unlawful simulated gambling devices was of such magnitude that the district

204. *Id.* at 542.

205. *Allied Veterans*, 783 F.Supp.2d at 1197.

206. *Id.* at 1200. Plaintiffs are a non-profit and tax-exempt 501 (c)(19) organization established in Florida in 1979 to promote veterans’ causes through advocacy, fundraising and charitable donations. (Plaintiff’s Complaint ¶¶ 9, 12). Non-profits do enjoy special exemptions to most states’ gaming laws, but that is beyond the scope of this comment as the majority of convenience casino owners are not non-profits.

207. SEMINOLE, FLA., ORDINANCE 2011-1, 2.

208. *Id.*

209. FLA. STAT. ANN. §849.0935 (West 2011) (Florida permits special exemptions to charitable organizations from its gaming regulations. Plaintiff’s status as a charitable organization is not within the scope of this comment or the issue in *Allied Veterans*).

210. Compl. for Plaintiffs at ¶15, *Allied Veterans*, 783 F. Supp. 2d at 1199.

211. *Id.*

212. *Id.* at ¶ 25.

213. *Id.*

214. See FLA. STAT. ANN. §849.094(a)(1); FLA. STAT. ANN. §849.094(2)(e).

court issued a temporary restraining order on February 1, 2011 blocking enforcement of the Ordinance.²¹⁵ In seeking permanent relief from the district court,²¹⁶ Plaintiffs threw the kitchen sink at Seminole County, claiming that the Ordinance violated their First Amendment rights; was void for vagueness and overbreadth; lacked a sufficient criminal *mens rea* requirement; was under-inclusive and defied the Dormant Commerce Clause of Article I, Section 8 of the Constitution.²¹⁷ For purposes of this Paper, the overbreadth argument is the most significant constitutional challenge.

1. *Deciphering the Ordinance*

Seminole County drafted the Ordinance to explicitly shut down Internet sweepstakes cafés.²¹⁸ The County amended the Seminole County Code to create a new prohibition against “simulated gambling devices” in “the interest of the public health, peace, safety and general welfare of the citizens and inhabitants of Seminole County.” The Ordinance made it unlawful for any person to “design, develop, manage, supervise, maintain, provide, produce, possess or use one or multiple simulated gambling devices.”²¹⁹ Simulated gambling device was defined as, “any device that, upon connection with an object, is available to play or operate a computer simulation of any game, and which may deliver or entitle the person or persons playing or operating the device to a payoff.”²²⁰ The Ordinance separately defined nearly every word in this single sentence with the definitions being interpreted cumulatively, meaning, “every condition provided must be met for something to qualify as a ‘simulated gambling device.’”²²¹ Justice Antoon provided the following summary of the Ordinance’s detailed definitions:

215. *Allied Veterans*, 783 F. Supp. 2d at 1199.

216. *Id.* at 1201. *Allied Veterans* provides an interesting contrast to *Dissmeyer* due to the venue. *Dissmeyer* focused on state claims while *Allied Veterans* asserted harms under the United States Constitution. The plaintiff’s choice of a federal venue was unquestioned since the Ordinance was enacted in the Middle District of Florida, and the court has Federal Question Jurisdiction pursuant to 28 U.S.C. § 1331 to hear cases arising under the Constitution of the United States as well as supplemental jurisdiction over plaintiff’s state law claims pursuant to 28 U.S.C. § 1367. *See* Complaint ¶¶ 6-8. Although no proof exists, strategically avoiding a local court in the county that enacted the Ordinance also seems the most logical forum for plaintiff’s complaint.

217. *See id.* at 1201-02.

218. SEMINOLE, FLA., ORDINANCE §2011-1 (The preamble to the Ordinance states that “there is presently in Seminole County an increasing proliferation of establishment that utilize computer or video displays of spinning reels or other simulations of games ordinarily played on a slot machine or in a casino or otherwise in connection with gambling and which show the results of raffles, sweepstakes, contests or other promotions.”).

219. *Id.* at § 222.11.

220. *Id.* at § 222.8(b).

221. *Allied Veterans*, 783 F. Supp. 2d at 1201.

The first part of the definition requires that a person “connect” an “object” to a “device.” A “device” is “any mechanical or electrical contrivance, computer, terminal, video or other equipment that may or may not be capable of downloading games” and includes “any associated equipment necessary to conduct the operation of the device.” An “object” is “a coin, bill, ticket, token, card or similar object, obtained directly or indirectly through payment of consideration, or obtained as a bonus or supplement to another transaction involving the payment of consideration.” The “connection” that must be made between the two can be an “insertion, swiping, passing in range, or any other technical means of physically or electromagnetically connecting.”

Once the connection is made, the device must make “a computer simulation”²²² of a “game” available to “play or operate.” The definition of “game” under the ordinance includes “slot machines, poker, bingo, craps, keno, [or] any other type of game ordinarily played in a casino,” and “a game involving the display of the results of a raffle, sweepstakes, drawing, contest or other promotion, lotto, [or] sweepstakes” and “any other game associated with gambling or which could be associated with gambling.” Playing or operating the computer simulation of a game “includes the use of skill, the application of the element of chance, or both.” Finally, a “payoff” is defined as “cash, monetary or other credit, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether made automatically from the machine or manually.” (internal citations omitted)²²³

Despite that the stated intent of the Ordinance was to “prohibit *broadly* the possession or use of simulated gambling devices. . . [and] is aimed directly at devices that simulate gambling activity, *regardless* of whether the devices or the simulations in and of themselves can be said to constitute gambling as that term may be defined elsewhere,”²²⁴ the district court in *Allied Veterans* did not find the law overbroad.²²⁵

To understand the court’s reasoning, it is crucial to examine how Judge Antoon understood the Plaintiffs’ operation to fit into the Ordi-

222. SEMINOLE, FLA., ORDINANCE § 222.8(b)(5). The court failed to provide the Ordinance’s definition of “computer simulation,” which are “simulations by means of a computer, computer system, video display, video system or any other form of electronic video presentation.” *Id.*

223. *Id.*

224. *Id.* at § 222.10 (2011).

225. *Allied Veterans*, 783 F. Supp. 2d at 1206. The court oversimplified the plaintiffs’ argument in *Allied Veterans* in dismissing the overbroad claim by ruling:

All parties concede that the Ordinance regulates more than just gambling, and Plaintiffs assert that—but for this Ordinance—their conduct would be legal because it is not gambling. This assertion is entirely irrelevant. If legislative bodies were prohibited from regulating previously unregulated conduct, nearly every new law would be declared unconstitutional. Such an absurd result is clearly not contemplated by the overbreadth doctrine. *Id.*

nance. The court viewed the Internet sweepstakes terminals as “computers (devices) [that] are, upon swiping (connecting) an account card (object), available to play (utilizing skill and/or chance) a computer simulation of casino games (for example, a slot machine), which may entitle the player to a payoff (for example, cash) for winning the sweepstakes.”²²⁶ This definition seems to apply to the pinball machine discussed in *Dissmeyer*,²²⁷ as well as a host of other devices such as any arcade game found at popular gaming establishments such as Dave and Busters²²⁸ or Chuck E. Cheese.²²⁹ In such machines, consumers swipe a card into a device that is available to play games like Wheel of Fortune²³⁰ that are often found in traditional casinos that result in the payout of a prize.²³¹ Yet, where the court in *Dissmeyer* found a similar statute overbroad, the *Allied Veterans* court rejected the Plaintiffs’ overbreadth argument.

2. *Surviving an Overbreadth Challenge*

In applying the overbreadth doctrine,²³² Judge Antoon relied on United States Supreme Court precedent that overbreadth is a “strong medicine” that should only be used as a last resort.²³³ This is because declaring a law overbroad renders the whole statute unconstitutional²³⁴ and does not allow room for a “limiting construction or partial invalidation.”²³⁵ The court warned of substantial social costs created by the overbreadth doctrine when it prevents a law from applying to constitutionally unprotected speech or conduct, but it never listed those costs.²³⁶

226. *Id.* at 1201.

227. See *Dissmeyer*, 249 P.3d at 448 (discussing how a pinball machine that grants free plays or any other prize would constitute an illegal “gray machine” not contemplated by the legislature as an example of the statute’s overbreadth).

228. *In-Store Games*, DAVE & BUSTER’S, <http://www.daveandbusters.com/Play/Games.aspx?id=756> (last visited Feb. 28, 2012).

229. *Allied Veterans*, 783 F. Supp. 2d at 1204.

230. PMayerPR, *World record Wheel of Fortune slot jackpot at Hard Rock Casino Biloxi*, YOUTUBE (Nov. 25, 2009), <http://www.youtube.com/watch?v=OzLM0jycQXg>.

231. See *supra* Section II.C.3 for a discussion of what constitutes a prize.

232. See *supra* Section II.E. for an extended analysis of the overbreadth doctrine.

233. *Allied Veterans*, 783 F. Supp. 2d at 1204 (citing *Broadrick v. Oklahoma*, 413 US 601, 613 (1973)).

234. Judge Antoon never considers the possibility of severing part of the Ordinance. When holding a statutory provision unconstitutional, “a court must determine whether to sever the defective provision or to invalidate the entire statute. In order to guide courts, lawmakers often include a severability clause in legislation.” Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997). Yet there is no severability clause in the Ordinance and taking out any part of it would render the whole law meaningless since it is intended to gut the Internet sweepstakes café industry in Florida.

235. *Allied Veterans*, 783 F. Supp. 2d at 1204.

236. *Id.* (citing *Virginia v. Hicks*, 539 US 113, 119 (2003)).

The Plaintiffs argued that because the Ordinance could regulate protected expressive video conduct unintended by its drafters, such as the Chuck E. Cheese arcade games or Internet games like World of Warcraft, the Ordinance must be overbroad.²³⁷ The court focused on whether the Ordinance was an unconstitutional content-based restriction on protected speech such as accessing the Internet or playing videogames.²³⁸

Furthermore, the court disagreed with the Plaintiffs' contention that it cannot regulate simulated gambling just because it can regulate regular gambling.²³⁹ The Plaintiffs tried to rely on *Ashcroft v. Free Speech Coalition*²⁴⁰ in which a statute banning simulated child pornography was declared unconstitutionally overbroad.²⁴¹ The court, however, maintained that the issue with simulated gambling devices involves conduct and not speech because the computer terminals can simulate anything video or sound when browsing the Internet, checking email or playing a game—just not when combined with the elements of consideration, chance and prize.²⁴²

Additionally, the court reasoned that merely paying to play a game does not make the game a simulated gambling device prohibited by the Ordinance.²⁴³ The court believed the consideration mentioned in the Ordinance must relate to obtaining the magnetic card or token that must then pass through the device and not to the actual playing of the game itself.²⁴⁴ This means the customer “must obtain a coin, bill, ticket, token, card or similar object through the payment of consideration, and that coin, bill, ticket, token, card or similar object must then be inserted, swiped, passed in range or otherwise physically or electromagnetically connected to the computer.”²⁴⁵ Although the court interpreted this act of physically connecting the computer to an object as a key feature of a simulated gambling device, its reasoning signaled a possible loophole in the law. Internet sweepstakes café owners could seemingly switch to a system where the customer types in a unique code rather than actually swipe a card or insert a token. Furthermore, the court specified, without

237. *Id.* at 1204–05.

238. *See id.* (stating that promotions including videos such as My Coke Rewards can display the same messages as the Internet sweepstakes terminals, so long as there is not a payout. Yet, the whole point of Coke sweepstakes is to win a prize and to do so through a video simulating a slot machine (http://www.mycokerewards.com/instant-win-contests?WT.ac=mnuRC_IW).

239. *Id.* at 1206.

240. 535 U.S. 234 (2002).

241. *See id.* (holding that provisions of the Child Pornography Prevention Act of 1996 were overbroad).

242. *Allied Veterans*, 783 F. Supp. 2d at 1206.

243. *Id.* at 1205.

244. *Id.*

245. *Id.*

further explanation, that it is only the playing of games “ordinarily played in a casino” such as poker, bingo, craps or keno that make the devices in plaintiffs’ shops illegal.²⁴⁶

In one last attempt at swaying the court, the Plaintiffs argued that the Ordinance was also overbroad because it would prohibit using a computer to look up the state lottery results or any other sweepstakes.²⁴⁷ The court explained that using a computer to view the results is not simulating any game as it is simply displaying results.²⁴⁸ This narrowed the Ordinance once again to the simulation of games in casinos. If the terminals in convenience casinos created a unique way of simply displaying the sweepstakes results without simulating a casino game, they would seemingly remain legal even under the Ordinance. As the court conceded, the Ordinance remained valid only because it targeted conduct, not speech. Therefore, when the elements of gambling are present—consideration, chance and prize—the type of game displayed is the key issue determinant as to whether or not the computer is a prohibited “simulated gambling device.”

III. DISCUSSION

These three cases illustrate that whether an Internet sweepstakes terminal is illegal depends on each jurisdiction’s nuanced reading of highly similar statutes. The text is key. Both the lawmakers who drafted such statutes and the courts that interpret them are responsible for creating a hard-to-decipher gray area in which convenience casinos operate between prohibited conduct and perfectly legal business promotions. Yet, there is no need for such a gray area to exist. States should either regulate the Internet sweepstakes industry or allow it to operate without intrusion much like a soda bottle²⁴⁹ or fast food promotion.²⁵⁰ Outright bans, as attempted in Kansas,²⁵¹ Mississippi,²⁵² and Florida²⁵³ are hypocritical in states that already sanction lotteries and regulate casinos and such prohibitions might also be unconstitutional. The next

246. *Id.* (This is a rather broad statement as casinos have slot machines covering a wide variety of themes such as *Wheel of Fortune*, *Sex and the City*, *Jaws*, *Cleopatra* and the *Wizard of Oz*. See *Poker Room at Seminole Paradise*, SEMINOLE HARDROCK HOTEL & CASINO (2012) <http://www.seminolehardrockhollywood.com/gaming/games.php>. Therefore, what a game “ordinarily played in a casino” means is not clearly defined.).

247. *Id.* at 1205-06.

248. *Id.* at 1206.

249. For a description of how the current Coca-Cola sweepstakes promotion operates, see *How it Works*, My Coke Rewards (Feb. 29, 2012), http://www.mycokerewards.com/howItWorks.do?WT.ac=mnuHIW_PO.

250. See *supra* note 3 for a description of a Scrabble promotion at Subway restaurants.

251. *Dissmeyer*, 249 P.3d at 444.

252. *Moore*, 64 So. 3d at 539.

253. *Allied Veterans*, 783 F.Supp.2d at 1200.

section will address why Internet sweepstakes cafés should be allowed and how states can properly regulate them.

A. TAILORING STATUTES TO CONSTITUTIONALITY

Although invalidating an entire law due to overbreadth is a legitimate judicial remedy, perhaps the more equitable solution is to find a way to narrow or limit the challenged statute. Courts should always look to the possibility of invoking a limiting construction.²⁵⁴ This is particularly applicable regarding statutes aimed at banning Internet sweepstakes machines where the statutes should be void “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.”²⁵⁵ The wording of these anti-sweepstakes statutes almost scream out for limiting constructions. All three of the earlier examined statutes in Kansas,²⁵⁶ Mississippi,²⁵⁷ and Florida²⁵⁸ start with the word “any” and cover devices “available to play” games similar to traditional casino games. Therefore, any mechanical or electric device capable of playing casino games could include just about anything one can imagine.

Kansas’ only attempt at narrowing its law was that the device could not be linked to the central lottery system and that it was capable of “simulating a game played on an electronic gaming machine or any similar gambling game.”²⁵⁹ This language is meaningless because it is so broad that any home computer could fall under the purview of the Expanded Lottery Act.²⁶⁰ The appellants rightfully won their overbreadth challenge. Mississippi, however, skirted an overbreadth invalidation by narrowing its prohibition to devices that connect to an object, and upon payment of consideration, may distribute a prize of money or some other object of value to the player.²⁶¹ This is closer to an ideally narrow statute because it emphasizes the importance of the element of consideration, which is key in differentiating between unlawful gambling and a legitimate business promotion.²⁶² The *Allied Veterans* ruling in Florida is particularly illustrative of how murky it is for business owners to know what promotional sweepstakes are legal and how difficult it is for

254. *Broadrick*, 413 U.S. at 613.

255. *Id.*

256. KAN. STAT. ANN. § 74-8702(g) (West 2007).

257. MISS. CODE ANN. §75-76-5(ff) (West 2011).

258. SEMINOLE, FLA ORDINANCE § 222.8(b).

259. KAN. STAT. ANN. § 74-8702(g) (West 2007).

260. *Dissmeyer*, 249 P.3d at 448 .

261. MISS. CODE ANN. §75-76-5(ff) (West 2011).

262. See *Moore*, 64 So. 3d at 539-40 (detailing the consideration element of the Mississippi Gaming Control Act which successfully narrowed the Act to survive plaintiff’s overbreadth challenge).

legislators to write a proper law serving the government's supposed compelling interests of protecting the elderly and the poor from the supposed social ills of gambling.²⁶³

1. *Flaws in the Allied Veterans Reasoning*

The *Allied Veterans* court warned that a long-accepted principle of statutory construction is that voiding an entire law because of overbreadth should be a remedy of last resort.²⁶⁴ The plaintiff must establish that no set of circumstances exists under which the challenged law would be valid.²⁶⁵ This is a tall task for any challenger and would seemingly make using the overbreadth doctrine impossible. Yet the *Allied Veterans* court was misleadingly selective in its use of citations. Whereas Judge Antoon wrote this rule as if it were set in stone, it is actually only a general principle that is not always applicable. The eleventh circuit case²⁶⁶ from which Judge Antoon drew his inspiration actually cited a U.S. Supreme Court case for the general proposition that “the challenger must establish that no set of circumstances exists under which the Act would be valid.”²⁶⁷ This is not mandatory, however, but just a general proposition.²⁶⁸ As seen in *Dissmeyer*, declaring a law unconstitutionally overbroad to prevent it from criminalizing otherwise legal activity such as playing Twister²⁶⁹ or Chutes and Ladders²⁷⁰ is an acceptable form of judicial rulemaking even if the law worked in some instances.²⁷¹ Most devices are capable of some unlawful use, but until that unlawful activity occurs, seizing that property is unconstitutional.²⁷² Almost any computer terminal in a convenience casino is probably “capable of” being used for gambling. If convenience casinos use

263. See SEMINOLE, FLA. ORDINANCE § 222.7 (stating the purpose of the ban on simulated gambling devices).

264. See *Broadrick*, 413 U.S. at 613 (describing the invocation of the overbreadth doctrine as “strong medicine”); see also *supra* Part II.D.3.ii. for a discussion of the court's reasoning in *Allied Veterans*.

265. *Allied Veterans*, 783 F.Supp.2d at 1203 (citing Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Fla. Office of Legislative Servs., 525 F.3d 107, 1079 n.7 (11th Cir. 2008)).

266. Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Services of the Fla. Office of Legislative Servs., 525 F.3d 1073 (11th Cir 2008).

267. *United States v. Salerno*, 481 US 739, 745 (1987).

268. *Id.*

269. See *Twister*, HASBRO GAMES, http://www.hasbro.com/games/en_US/twister/ (last visited Feb. 25, 2012) (illustrating the classic party game).

270. See *Chutes and Ladders*, HASBRO GAMES, http://www.hasbro.com/shop/details.cfm?R=8EC0A8E0-6D40-1014-8BF0-9EFBF894F9D4;en_US (last visited Feb. 25, 2012) (explaining the children's board game).

271. *Dissmeyer*, 249 P.3d at 448.

272. See *id.* at 449 (summarizing how overbroad laws can lead to violating constitutionally protected property rights).

sweepstakes and not gambling,²⁷³ any statute aimed at outlawing the physical devices that display sweepstakes results in entertaining videos should be challenged as overbroad.²⁷⁴

2. *The Need for a Compelling Interest*

The court further erred in blindly accepting the government's stated interest to protect the health of its citizens from the deceptive nature of commercial simulated gambling devices.²⁷⁵ On paper this interest sounds legitimate and substantial, but if it is applied to convenience casinos, it should be applied to all commercial sweepstakes, lotteries and gambling. In his dismissal of plaintiffs' Motion to Stay Trial Court Proceedings Pending Appeal,²⁷⁶ Judge Antoon admitted that even if the Ordinance is analyzed according to strict scrutiny, the Ordinance is constitutional under the test presented in *United States v. O'Brien*,²⁷⁷ which dealt with people publicly burning their Selective Service registration certificates to protest the Vietnam War.²⁷⁸ In *O'Brien*, the Supreme Court recognized that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²⁷⁹ At what cost though is it worth it for a state, such as Florida, to shutter a legitimate industry to protect its citizens from the social evils of gambling when the state sponsors a lottery and welcomes casinos²⁸⁰ with open arms?

273. See *supra* Part II.C.1. for a discussion of how the lack of consideration keeps sweepstakes legal and separate from gambling; Steven C. Bennett, *An Introduction to Sweepstakes and Contests Law*, 53 No. 4 PRACTICAL LAWYER 39, 40 (2007) www.jonesday.com/files/Publication/69ea168c.../Bennett.P (advising that "to avoid classification as a lottery, a sweepstakes promotion must not involve consideration").

274. Steven C. Bennett, *An Introduction to Sweepstakes and Contests Law*, 53 No. 4 PRACTICAL LAWYER 39, 40 (2007) www.jonesday.com/files/Publication/69ea168c.../Bennett.P (explaining that the variety of laws governing sweepstakes are "often so broadly drafted that they could be applied to almost every type of promotion" and that "official interpretations of these broad statutes and rules . . . vary widely").

275. SEMINOLE, FLA., ORDINANCE 2011-1, 2 (Jan. 11, 2011).

276. 2011 WL 3958437 at *3.

277. 391 U.S. 367 (1968).

278. *Id.*

279. *Id.*

280. See Suzette Parmley, *At Odds: Should South Florida Role the Dice on Casinos?*, PHILADELPHIA INQUIRER (Feb. 12, 2012), http://articles.philly.com/2012-02-12/business/31052358_1_genting-gambling-bill-gambling-interests (depicting that the Florida legislature is so fond of casinos that it is currently considering expanding gambling to Miami-Dade and Broward Counties with a Malaysian Corporation proposing to build a \$3.8 billion casino resort in Miami. Opponents argue that more casinos will ruin the "Florida brand" as a family-friendly vacation destination).

3. *Content Restrictions*

The Ordinance in Florida reflects the government's desire to act as protective parents as the law's language shies away from the fundamental elements of gambling. The Ordinance did not mention consideration. Rather, it prohibited any device available to play a computer simulation of any game that when connected with an object such as a magnetic card, coin or token, entitles the player to a payoff.²⁸¹ This is a perfect illustration of an overbroad statute. First, without any limitations on when, where, or how the game simulation occurs, the Ordinance outlawed the content of the videos displayed in convenience casinos, which is a textbook content-based regulation.²⁸² The Ordinance focused on the content of the video simulation displayed on the computer terminal screens.

Yet, the content of such videos are protected expressions much like books, art, movies, television or theater that depict casino gambling.²⁸³ Along with communicating the results of the promotion, the convenience casino video displays do so in a suspenseful and entertaining manner and such emotional expressions of information are also protected content.²⁸⁴ In simulating casinos games, the computers use narrative, artwork and themes much like traditionally protected forms of expressive content.²⁸⁵ The Supreme Court traditionally rejects such content restrictions, because "any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open.'"²⁸⁶ Furthermore, the digital video displays are no less protected because they require player activation of the device.²⁸⁷ Content restrictions receive a strict scrutiny analysis, meaning that the law must be narrowly tailored to promote a compelling government in-

281. SEMINOLE, FLA., ORDINANCE § 222.8(b).

282. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (classifying regulations on the television broadcast of sexually explicit images as unlawful content-based speech restrictions).

283. See *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957 (8th Cir. 2003) (holding that expressions in video games are protected by the First Amendment).

284. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 n.19 (2d Cir. 2001) (elaborating that "Protected speech may communicate, among other things, ideas, emotions or thoughts").

285. See *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1184 (W.D. Wash. 2004) (holding that communications designed to entertain rather than impart information are protected forms of speech when in a video game that uses artwork, original scores, and a narrative to enhance the player's experience).

286. *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 US 254, 270 (1964)).

287. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (prohibiting the regulation of speech that stems from expressive, physical conduct such as burning an American flag).

terest.²⁸⁸ Yet, the Ordinance is not narrowly tailored, nor does it serve a compelling government interest.

B. IDENTIFYING A COMPELLING INTEREST

The Ordinance's stated interest is to protect "the public health, peace, safety and general welfare" of Seminole County residents.²⁸⁹ The county feared that convenience casinos "deceive" and have an "adverse effect" on the elderly and the economically disadvantaged.²⁹⁰ The government also alleged, "there is often a correlation between establishments that utilize simulated gambling devices and disturbances of the peace."²⁹¹

Yet, the county provided no proof to support this supposed compelling interest in enacting the Ordinance. Such proof is required to regulate the content displayed on the sweepstakes machines. As the Supreme Court stated, "When the Government defends a regulation on speech . . . it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms. . . ."²⁹² Seminole County has yet to provide anything other than anecdotal evidence to prove that convenience casinos are havens for crime, disturb communities, or adversely impact the elderly and poor. There is even evidence to the contrary as the president of Florida's largest police union publicly admitted that crime has not increased due to the emergence of convenience casinos.²⁹³ Seminole County's supposed compelling interest is at best a dubious form of morals legislation.

1. *Avoiding a Hypocritical Government Interest*

Further troubling is that the county never explained why its compelling interest in passing this law does not apply to the state lottery, traditional casinos or any other form of sweepstakes.²⁹⁴ If the county truly fears the possible deception of its elderly and poor citizens, then how is

288. *Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (describing the foundations of strict scrutiny as applied to content-based speech restrictions).

289. SEMINOLE, FLA., ORDINANCE § 222.7.

290. SEMINOLE, FLA., ORDINANCE 2011-1, 2.

291. *Id.*

292. *Turner Broad. Sys., Inc. v. Fed. Comm'n.*, 512 U.S. 622, 664 (1994) (internal citations omitted).

293. See Dixon, *supra* note 132; <http://jacksonville.com/news/georgia/2011-09-17/story/internet-cafes-florida-georgia-walk-fine-line-federal-state-gaming> (quoting Armondo Asulan, president of the state's largest police union, as saying, "I think locally these establishments have been very well regulated. I don't think there are any signs crime has increased").

294. Coincidentally, Walt Disney Co., which is headquartered in Seminole County, is leading the lobbying effort to block state-wide gambling expansion for fear that more casi-

selling lottery tickets permissible? Lotteries are the epitome of deception because the actual odds of winning are never posted and the elderly and the poor almost single-handedly fund the lottery.²⁹⁵ As a fundraising scheme it is “regressive”²⁹⁶ since the burden of supporting the state lottery “falls disproportionately on the poor. It also places the state in the uncomfortable position of contradicting itself on financial literacy and education by discouraging saving and promoting reliance on luck.”²⁹⁷ Although truly protecting the elderly and economically disadvantaged would require outlawing almost every form of gambling, including Internet sweepstakes cafés, the county should not pick and choose. It should prohibit all forms of gambling or none at all.

Similar to the lottery, the popular McDonalds Monopoly sweepstakes does not openly advertise the odds of winning a prize.²⁹⁸ That might not qualify as active deception, but when the best chances of winning a non-food related prize is 1 in 141,²⁹⁹ it seems highly unlikely that customers are fully aware of the actual odds of winning. Additionally, Seminole County seems quite unconcerned with the impact that fast food restaurants have on their “economically disadvantaged”³⁰⁰ residents. It is no secret that those of low socioeconomic classes, particularly residents of urban areas, have diets “monopolized by fast food.”³⁰¹ In addition to having their health jeopardized by a diet monopolized by fast food, the poor residents of Seminole County can also play Monopoly while eating unhealthy foods. Somehow the county is not concerned for their “general health”³⁰² in such scenarios. Yet the wrath of the county will strike business owners if their customers watch a video simulation of a spinning slot reel rather than peeling a Monopoly game piece from a hamburger wrapper.

nos will ruin the state’s “postcard image.” See Parmley, *supra* note 273 for a discussion of the proposed Florida gambling expansion.

295. See McCarthy, *supra* note 49, at 755 for a discussion of how lotteries target vulnerable populations.

296. See *id.* (depicting the negative impact lotteries can have on the poor and elderly).

297. *Id.*

298. The odds of winning or even of finding a certain game piece are not openly disclosed on food wrappers or in restaurants. One has to search the Internet to find such information. See Sandra Grauschopf, *Rare McDonald’s Monopoly Pieces for 2011 – Which 2011 Monopoly Pieces Are Rare?*, ABOUT.COM (Sept. 27, 2011) <http://contests.about.com/b/2011/09/27/rare-mcdonalds-monopoly-pieces-for-2011-which-2011-monopoly-pieces-are-rare.htm>.

299. *Monopoly Game*, McDONALD’S, <http://www.playatmcd.com/Inactive> (last visited Apr. 22, 2013) (the chance of winning My Coke Rewards points is 1 in 141, while the chance at winning the grand prize of a new car is 1 in 154 million).

300. SEMINOLE, FLA., ORDINANCE 2011-1, 2.

301. Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2222 (2007).

302. SEMINOLE, FLA., ORDINANCE §222.7.

2. *Proving the Compelling Interest*

The concerns expressed by the county are the same concerns that arise whenever a casino opens. Fears of an increase in crime as well as becoming a nuisance to the community are almost automatic.³⁰³ Likewise, some studies have shown that casinos do contribute to pathological or compulsive gambling problems.³⁰⁴ This is why states enact various regulations such as gambling caps, loss limits, and mandatory free help lines for those suffering from gambling addiction.³⁰⁵ If Seminole County's compelling interest is in protecting vulnerable classes such as the elderly and poor, then why only target simulated gambling machines? Why not outlaw real gambling machines?

The answer most likely lies in the drafting comments of the Florida House of Representatives Staff Analysis of the proposed prohibition of simulated gambling devices in March 2011.³⁰⁶ In that analysis, the staff of the Business & Consumer Affairs Subcommittee cautioned the law's drafters that one year prior, the state entered into a valuable compact with the Seminole Tribe of Florida. That compact allowed the Seminole Tribe to operate slot machines and "other casino-style games" such as electronic bingo, electronically assisted pull-tab games and video lottery terminals.³⁰⁷ Prohibiting simulated gambling machines must still allow the Seminole Tribe to operate its own real video gambling machines.³⁰⁸ Outlawing simulated gambling devices while authorizing actual gambling machines would not help the County reach its supposed goal of protecting poor and elderly citizens. The Ordinance's stated purpose, then, seems like a pretext for eliminating the Seminole Tribe's competition. If the real purpose of the law is to protect citizens from the evils of gambling, then targeting simulated gambling rather than actual gambling shines a spotlight on the inconsistency in legislation and sway of powerful lobbying by the Seminole Tribe and casino interests.

303. See Marc Belko, *At Casinos, People Looking to Mmake - or Take - a Buck*, PITTSBURGH POST GAZETTE (Aug. 21, 2011) <http://www.post-gazette.com/pg/11233/1168851-53-0.stm> (detailing the current crime rate in Pennsylvania casinos and describing that when the state considered legalizing gambling in 2004, critics "suggested it would lead to an increase in crime. Based on the statistics so far, state police and others don't see a big problem.").

304. See Bradley S. Fiorito, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 N.W. U. L. REV. 1325, 1328-29 (2006) (describing the highly addictive nature of machines found in casinos and what governments have tried to do to stem the increase in gambling addictions).

305. *Id.*

306. Staff of Bus. & Consumer Affairs S. Comm., 1st Sess., Analysis of PCS for HB 217: PROHIBITION OF SIMULATED GAMBLING DEVICES (Fla. 2012).

307. *Id.*

308. *Id.*

3. *Necessary Narrow Tailoring Toward the Compelling Interest*

Even if this hypocritical interest in protecting the poor and elderly from supposed deceptive gaming practices was compelling, the Ordinance restricting the expression of video content is not narrowly tailored, and therefore, is overbroad. The Ordinance relied on an outright ban of many machines capable of displaying simulated casino games. Yet when plausible, a less restrictive alternative is always preferable unless the government proves that the alternative is ineffective to achieve its goals.³⁰⁹ Instead of enacting an Ordinance that could apply to seemingly innocuous sweepstakes promotions like the Subway Scrabble³¹⁰ game that allows customers to play a video simulation of the classic board game or the blatant slot machine simulations of My Coke Rewards,³¹¹ the *Allied Veterans* court should have forced the government to further narrow the Ordinance or make the county prove that such a broad law was the only way to reach its goals.

C. CRAFTING A LIMITED CONSTRUCTION

This limited construction can and should be done in several ways. First, if the stated government interest is a fear of deceiving customers, then the Ordinance should be amended to require convenience casinos owners to post visible signs or some other notification explaining the rules of sweepstakes promotions and detailing the odds of winning. It seems plausible that this could be achieved at minimal cost in a way to properly educate customers about the purpose of the Internet sweepstakes terminals. Any other concerns about gambling addiction can be solved by requiring convenience casino owners to distribute educational material about the dangers of compulsive gambling, train employees to spot troubled gamblers, and provide access to proper psychological and financial services³¹²—regulations that casinos already follow.³¹³

309. See, e.g., *Entm't Software Assoc. v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (invalidating a video game law for failing least restrictive means test).

310. Steve, *How to Play Subway Scrabble*, SCRABBLE BLOG (Jan. 20, 2010) <http://www.scrabblepages.com/blog/scrabble/how-to-play-subway-scrabble/>; see also *Scrabble Slot Machines to Appear in Casinos by Year End*, VEGASNEWS.COM (Sept. 22, 2009) <http://www.vegasnews.com/13187/scrabble-slot-machines-to-appear-in-casinos-by-year-end.html> (reporting on the creation of Scrabble slot machines and their impending use in Las Vegas casinos). Subway's sweepstakes uses the Internet to simulate a popular casino game, which would seemingly turn any home computer into a prohibited "simulated gambling device." That alone is worthy of a more intensive overbroad challenge to the Seminole County Ordinance.

311. MY COKE REWARDS, http://www.mycokerewards.com/instant-win-contests?WT.ac=mnuRC_IW (last visited Jan. 20, 2012).

312. See Bradley S. Fiorito, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1360-61 (2006)

Ultimately, rather than banning all Internet sweepstakes cafes and thereby risking the chance of sweeping popular business promotions into the fold of illegal gambling, local governments could regulate and tax convenience casinos. Jacksonville, for example, is the largest city in Florida to attempt to regulate Internet sweepstakes cafes.³¹⁴ It did so by capping the number of cafes allowed in the city, limiting the type of promotional material it uses and prohibiting the sale of alcohol on premises.³¹⁵ These are logical regulations that do not result in an outright ban on an industry that clearly fills a consumer desire. Although the convenience casino industry would probably not welcome tighter restrictions, local governments could easily limit the hours of operation, set caps on the number of machines in each facility, and potentially even limit the amount of money spent per day. All of these regulations would serve the government's alleged social interests while fostering the economic growth of the convenience casino industry, which is a more productive means of regulation than an outright ban.

Florida already permits businesses to run "game promotions," which are "a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present."³¹⁶ The Department of Agriculture and Consumer Services³¹⁷ oversees such promotions and business owners must comply with a long list of restrictions designed to protect both businesses and consumers.³¹⁸

If this department manages to adequately collect filing fees, oversee promotional operations, and regulate businesses, there is no reason why it could not also include convenience casinos. How a local government can preempt a state law is outside of the scope of this Paper, but Seminole County seems to have capitalized on the state law's failure to either

(describing possible solutions to combat compulsive gambling such as posting odds-of-winning charts, limiting jackpots and setting a maximum loss limit).

313. Regulating Internet sweepstakes cafes would not be difficult for the state as the Florida Department of Business and Professional Regulation is already set up to oversee such regulatory compliance in the pari-mutuel slots, poker, jai alai and greyhound racing industries. See *Division of Pari-Mutuel Wagering*, FLORIDA DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION (2010); see <http://www.myfloridalicense.com/dbpr/pmw/index.html>.

314. See Dixon, *supra* note 132; <http://jacksonville.com/news/georgia/2011-09-17/story/internet-cafes-florida-georgia-walk-fine-line-federal-state-gaming>.

315. *Id.*; see <http://jacksonville.com/news/georgia/2011-09-17/story/internet-cafes-florida-georgia-walk-fine-line-federal-state-gaming>.

316. FLA. STAT. ANN. § 849.094(1)(a) (West 2011).

317. FLA. STAT. ANN. § 849.094(1)(e)(3).

318. See FLA. STAT. ANN. § 849.094 (Florida sweepstakes has specific requirements for how consumers can enter, how prizes should be distributed and how to report finances for proper taxes).

explicitly authorize or prohibit game promotions using electronic devices. The County might soon regret its blanket prohibition of electronic sweepstakes as many businesses will have to be extra cautious about running promotions in the Orlando area—particularly as technological advancements make electronic and Internet promotions more prevalent.

1. *Unintended Consequences*

A “game promotion” in Florida includes only the elements of chance and prize, because if consideration were present then it would be gambling. The law explicitly states that it is unlawful to “require an entry fee, payment, or proof of purchase as a condition of entering a game promotion.”³¹⁹ Put simply, “no purchase is necessary,” otherwise consideration is present and the legitimate business promotion turns into unlawful gambling.³²⁰ Yet Seminole County pushes the limits of the state’s own definition of gambling. The County did not narrowly tailor the element of consideration. The Ordinance ignores free entry, which is permitted in most other sweepstakes, thereby making the Ordinance overbroad. The Ordinance only targeted objects obtained through the payment of consideration that connects to the computers, but does not further define consideration.³²¹

Some sweepstakes operate exclusively on the Internet such as My Coke Rewards.³²² Upon entering a code obtained through the purchase of a soda bottle, a spinning Coke bottle reveals sweepstakes entry points or other prizes with a flashing illustration of stacks of money and fireworks. Very real looking slot machine reels spin if entering an “Instant Win” contest too.³²³ Under Seminole County’s Ordinance, entering a Coke rewards code on a computer, playing the Internet video slot machine and winning a prize makes Coke in violation of the prohibition of simulated gambling devices. Such a reality is not only legally overbroad, but marks a frightening intrusion by the government into routine business promotions.

Furthermore, can the Dave and Busters in Orlando continue to operate its *Wheel of Fortune* and *Deal or No Deal* machines? A customer pays consideration to obtain a magnetic card³²⁴ with points on it. The customer then swipes that card at an electronic game terminal which then

319. FLA. STAT. ANN. § 849.094(2)(a)(2)(e).

320. See *infra* Part II.C.1. for a discussion of how consideration impacts the legality of a promotional sweepstakes.

321. SEMINOLE, FLA., ORDINANCE §222.8(b)(3).

322. MY COKE REWARDS, <http://www.mycokerewards.com/home.do> (last visited Jan. 20, 2012).

323. *Id.*

324. *Powercards*, DAVE AND BUSTER’S, <http://www.daveandbusters.com/play/powercards.aspx> (last visited Jan. 20, 2012).

plays a game through a video simulation and could lead to the customer receiving a payout of tickets which can be redeemed for various prizes. Games such as *Wheel of Fortune*,³²⁵ *Deal or No Deal*,³²⁶ or *Sex and the City*³²⁷ are all commonly found as slot machines in traditional casinos. Under the Seminole County Ordinance, all of those machines should be seized as unlawful simulated gambling devices. Imagine all of the arcade games at Disney World³²⁸ that could fall under this Ordinance because they require a device (magnetic card) to be physically inserted into a machine that is capable of paying out a reward (tickets or points redeemable for tangible prizes). Any of the games that are activated by an “object” that displays an electronic simulation and pay out prize tickets could now be simulated gambling devices. Who knew Mickey Mouse was really Steve Wynn?

2. *The More Specific The Better*

The dangers of upholding such an overbroad statute are almost endless. The Ordinance requires more specificity. Yet, that is impossible since it is purposefully separated from case law and administrative constructions.³²⁹ The Ordinance states that “the term ‘simulated gambling device’ . . . does not incorporate or imply any other legal definition or requirement applicable to gambling that may be found elsewhere.”³³⁰ Without more specific language regarding the type and form of consideration, payout percentages, and the exact operation of illegal simulated gambling devices, the future of all legitimate sweepstakes and arcades looks bleak.

IV. CONCLUSION

As the battle over convenience casinos illustrates, there is a lack of uniformity and sensibility nationally in developing sound policies regarding this lucrative industry. Ideally, legislators in the states grappling with how to treat Internet sweepstakes cafes can ignore the anti-gambling hyperbole and adopt a pragmatic approach to analyze the costs

325. *Games*, INTERNATIONAL GAMING TECHNOLOGY, http://www.igt.com/us-en/games/game-page.aspx?type_id=8156 (last visited Feb. 25, 2012).

326. SLOT MACHINE FINDER, <http://www.slotfinder.org/deal-or-no-deal-slot-machine/> (last visited Feb. 25, 2012).

327. *Games*, *supra* note 325.

328. *Arcades*, WALT DISNEY WORLD, <http://disneyworld.disney.go.com/recreation/arcades/> (last visited Jan. 20, 2012).

329. SEMINOLE, FLA., ORDINANCE, §222.8(b)(8) (2011).

330. *Id.*

and benefits of regulating or prohibiting this enterprise.³³¹ Internet sweepstakes cafes are legal enterprises, whose fate should rest on market demands, not legislators driven by moral empowerment.³³²

A rash decision to ban convenience casinos solely because they resemble gambling is not legally sound and it could impact all businesses engaged in sweepstakes promotions. Whenever a legislature fails to narrowly tailor a simulated gambling device statute to a compelling government interest, the gray zone of legality grows murkier, first engulfing Internet time cards then soon Coke bottles, Subway sandwich wrappers and ultimately shutting down modern arcades like Dave & Busters.³³³ The hypocrisy of states that sponsor lotteries and permit casinos to then pass overbroad laws in the name of protecting the very citizens its own lottery targets—the elderly and the poor—is astounding. If the alleged social evils of gambling are taking a toll on a large population then ban all gambling. Yet if the market dictates a need for slot machines, poker tables or Internet sweepstakes cafes, then regulate such enterprises like any other business. Internet sweepstakes cafes are a \$10–15 billion industry in the United States with no evidence of causing any direct harm to people.³³⁴ In this modern, never-ending recession economy, the convenience casino industry seems ripe for regulation and state revenue-raising taxes.

The varying judicial opinions in *Dissmeyer*, *Moore* and *Allied Veterans* highlight how state legislatures are whiffing on their attempts to tackle the problem and eliminate the gray area in which convenience casinos exist. Writing overbroad laws is not the answer. Not only is it unconstitutional, but also it could eventually backfire to the point where states inadvertently criminalize soda and fast-food promotions. As the plaintiffs in *Allied Veterans* warned in their Complaint, “[h]aving created

331. Anthony Cabot and Robert Hannum, *Poker: Public Policy, Law, Mathematics, and The Future Of An American Tradition*, 22 T.M. COOLEY L. REV. 443, 443-44 (2005) (deciphering the different approaches of politicians in dealing with gambling).

332. The morals-based opponents of gambling often couch their disapproval of gaming on the economic theory of Nobel Laureate Paul Samuelson who argued, “[Gambling] involves simply sterile transfers of money or goods between individuals, creating no new money or goods. Although it creates no output, gambling does nevertheless absorb time and resources. When pursued beyond the limits of recreation, where the main purpose after all is to kill time, gambling subtracts from the national income.” Roger Dunstan, *Gambling in California*, CALIFORNIA RESEARCH BUREAU (1997) available at <http://www.library.ca.gov/crb/97/03/97003a.pdf> (quoting PAUL A. SAMUELSON, *ECONOMICS* 425, (10th ed. 1976)).

333. See *supra* Section II.H.1. for a discussion of the potential overbroad ramifications on popular arcade-like games at restaurants such as Dave & Busters.

334. See Gillette, *supra* note 11.

this unconstitutional bed, Seminole County must sleep in it, and the Court is not in a position to suggest alternate sleeping arrangements.”³³⁵

335. *Allied Veterans of the World, Inc. v. Seminole County, Florida*, 2011 WL 882215, Part VII of Plaintiffs’ Amended Motion for Preliminary Injunction.