

# SKILL, DUMB LUCK, AND THE LEGAL AMBIGUITY OF NORTH CAROLINA SWEEPSTAKES LAW: WHY MUNICIPAL ORDINANCES AND NOT STATE STATUTES SHOULD PROVIDE THE FRAMEWORK FOR REGULATING ILLEGAL GAMBLING

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## I. INTRODUCTION

In the United States, the gaming industry has grown exponentially over the past 25 years.<sup>1</sup> Although it has become a popular hobby nationally, with widespread acceptance since the mid-1990s,<sup>2</sup> the recent decade has seen numerous jurisdictions, including the federal government, attempt to strictly regulate or even prohibit various forms of gaming.<sup>3</sup> This wave of regulation has predominately been contained at the local and state level,<sup>4</sup> and North Carolina's recent legislative and judicial history reflects this trend.<sup>5</sup>

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<sup>1</sup> R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 *MISS. L.J.* 565, 567 (2002) (noting the predominance of the institution of gambling throughout history as compared to its recent rise in economic significance in the United States).

<sup>2</sup> Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 *LOY. L.A. ENT. L. REV.* 53, 58–59 (2009).

<sup>3</sup> Lisa Boikess, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 *N.Y.U. J. LEGIS. & PUB. POL'Y* 151, 152–53 (2008) (noting that the trend of legalizing gambling slowed in 2006 after new, stricter federal regulations on gambling were passed).

<sup>4</sup> Theresa A. Gabaldon, *John Law, with a Tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 *J. CORP. L.* 225, 252 (2001) (noting that regulation of gambling in America has predominately been the domain of local and state government bodies).

<sup>5</sup> Ashleigh N. Renfro, Comment, *All In with Jack High: DiCristina as the Final Surge to Federally Legalize Online Texas Hold'em Poker*, 1 *TEX. A&M L. REV.* 751, 763-764 (2014) (noting that most gambling regulation is left to the states and most states allow some form of gambling. North Carolina fits into this category as although its gambling regulations prohibit gambling, the statutes do make exceptions for some activities).

Under North Carolina law, any form of gambling—save for state sanctioned lotteries or gambling that takes place at one of the state’s two Indian casinos—is illegal.<sup>6</sup> From video poker to slot machines and faro tables, there are only a handful of exceptions under which games of chance or luck may legally be played or operated within the state of North Carolina. While this might seem like one of the few clearly explicated laws on the state’s books, North Carolina has seen much legal ambiguity rise out of its attempts to control the rapid proliferation of video poker and sweepstakes parlors that continually open and operate in strip malls throughout the state.<sup>7</sup>

While there have been several attempts by the state legislature to outlaw all types of electronic gambling within state lines, each attempt is marked by legal challenges and product evolution ensuring that the implementation of each new statute is either delayed by pending litigation or is inapplicable to new gaming technology. The most recent and contentious of these battles has surrounded sweepstakes parlors: gambling parlors that originally opened due to loopholes in a 2007 state statute that outlawed video poker.<sup>8</sup> Featuring “vivid graphics [that] often resemble slot machines or card games,”<sup>9</sup> these quasi-Internet cafes have morphed, in response to subsequent legislative attempts to close the industry, into parlors where customers buy long-distance telephone cards or time on computers that have pre-installed gaming software.<sup>10</sup> After purchasing pre-paid phone cards or time on the computer, customers receive “entries” to play a variety of luck or skill-based games.<sup>11</sup> However, to circumvent anti-gambling legislation, the parlor randomly predetermines the outcomes of these games before the customer buys the product and receives his or her entries, allowing the parlor to claim that it is running a sweepstakes, which does not involve gambling.<sup>12</sup> Although parlor owners allege that such activity is not gambling, every appellate court that has considered the issue has found otherwise, focusing on the concept that customers exchange money, even if indirectly, for the chance to possibly win a prize.<sup>13</sup> These “convenience casi-

<sup>6</sup> N.C. GEN. STAT. § 14-292 (2014); *see also* Pamela M. Prah, *States Battle Illegal Gambling at Internet Cafes*, USA TODAY (Mar. 24, 2014), <http://www.usatoday.com/story/news/nation/2014/03/24/stateline-illegal-gambling-internet-cafes/6829731/>.

<sup>7</sup> *See* N.C. GEN. STAT. §§ 14-304, 295–96, 294 (2014); *see also* Letter to Sen. Soles, Op. N.C. Att’y Gen., N. C. Dep’t of Justice, *available at* <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Video-Games-or-Video-Poker-Machines.aspx> (June 7, 2000) (advising Senator Soles that the applicable anti-video poker statutes prohibit the storing or warehousing of video poker machines). *But see* N.C. GEN. STAT. § 18C (2014) (providing exceptions to the general prohibition on gambling in North Carolina).

<sup>8</sup> Cleve R. Wootson, Jr., *Lights Out at Most Gaming Parlors - Sunday Was Deadline to Comply with Latest Court Ruling or Close Shop*, CHARLOTTE OBSERVER, Dec. 2, 2013, at 1B.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; *see also* *Internet Sweepstakes Cages*, AM. GAMING ASS’N, <http://www.americangaming.org/government-affairs/priority-issues/internet-sweepstakes-cafes> (last visited March 2, 2015) (explaining the concept of sweepstakes cafes).

<sup>11</sup> Wootson, *supra* note 8.

<sup>12</sup> *Internet Sweepstakes Cages*, *supra* note 10.

<sup>13</sup> *See, e.g.*, *Telesweeps of Butler Valley, Inc. v. Kelly*, 2012 U.S. Dist. LEXIS 146157, No. 3:12-CV-1374, at \*29 (M.D. Pa. Oct. 10, 2012) (“Plaintiffs attempt to separate the consideration from the chance to win by inserting a step between the two elements is clever, but it

nos” have created legal ambiguities in almost every state where they operate, including North Carolina, forcing legislatures and judges to draw often immediately anachronistic legal distinctions that are quickly skirted by new technological developments.<sup>14</sup>

These sweepstakes parlors invite suspicion from public figures, including sheriffs, state legislators, and federal authorities all of whom fear that the parlors violate gambling regulations, fail to properly account for their income, and harm the communities in which they are located.<sup>15</sup> The situation in North Carolina has been particularly demonstrative of the difficult public policy, legal, and economic concerns that states, municipalities, and law enforcement officials face when deciding how best to control the industry.<sup>16</sup>

The second part of this article will explain the complex legal and procedural background of sweepstakes law in North Carolina, particularly by focusing on the state’s recent legislative restrictions on gaming, and relevant case law. It will also address the changes the sweepstakes industry has made in its effort to place parlor activities outside the purview of the state regulations. Because this article contends that the regulation of unlawful sweepstakes parlors should be the responsibility of local communities, the third and final part of this article will explore the different legal mechanisms that municipalities throughout the state have employed or can employ to try and regulate an industry that has successfully avoided state-wide efforts at regulation in the past.

## II. SWEEPSTAKES LAW IN NORTH CAROLINA

For the past decade, the North Carolina legislature has attempted to curb the widespread proliferation of gambling parlors that continue to open and operate in the state. As a result of these efforts, the legislature, state regulators, and those who operate sweepstakes parlors have engaged in a continuing cat and mouse game, each trying to stay ahead of the other. This process began in 2006 when the North Carolina General Assembly passed a bill that outlawed video gambling, including a prohibition on the operation of video poker

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merely elevates form over substance. At bottom, what Telesweeps is doing constitutes gambling”).

<sup>14</sup> Steve Silver, *The Curious Case of Convenience Casinos: How Internet Sweepstakes Cafes Survive in a Gray Area Between Unlawful Gaming and Legitimate Business Promotions*, 29 J. MARSHALL J. COMPUTER & INFO. L. 593, 595 (2012) (introducing the term ‘convenience casino’ and discussing the difficulty state legislatures and judges have had with regulating them and interpreting said regulations).

<sup>15</sup> See Felix Gillette, *The Casino Next Door*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2011), [http://www.bloomberg.com/bw/magazine/content/11\\_18/b4226076180073.htm](http://www.bloomberg.com/bw/magazine/content/11_18/b4226076180073.htm) (noting the various concerns that authorities have had surrounding the recent, but widespread proliferation of sweepstakes parlors).

<sup>16</sup> See, e.g., Sharon McBrayer, *Sweepstakes Swept Out: N.C. Supreme Court Says Games Illegal*, HICKORY DAILY REC. ONLINE (Dec. 17, 2012, 12:33 PM), [http://www.hickoryrecord.com/article\\_058234c2-4648-11e2-aca7-0019bb30f31a.html](http://www.hickoryrecord.com/article_058234c2-4648-11e2-aca7-0019bb30f31a.html) (noting, among other things, the widespread economic impact that closing the state’s 1,000-1,500 sweepstakes parlors would have on their 15,000 employees and the communities in which they operate).

machines.<sup>17</sup> However, game parlor operators quickly implemented new steps to skirt this blanket prohibition, by opening up electronic gaming shops where entrants could use computers and not “lever-pulling poker machines.”<sup>18</sup> This noticeable difference, game parlor operators argued, meant that they were complying with the statute.<sup>19</sup>

Exploiting this legal ambiguity, many video poker parlors quickly became sweepstakes parlors whose owners argued that their customers paid for Internet time on servers, not the games themselves, and because the games’ prizes were predetermined, the sweepstakes fell outside the purview of the 2006 video poker legislation.<sup>20</sup> In response to these industry changes, the state legislature, in 2010, again attempted to enact a broad ban on electronic gaming and video gambling by prohibiting the possession of terminals that either mimic slot machines without the levers, or that conduct sweepstakes-type games.<sup>21</sup> Despite numerous attempts by the legislature to ensure the industry’s death, by 2012, the video-sweepstakes industry in North Carolina had grown to an industry worth approximately \$1 billion annually.<sup>22</sup>

#### A. Legislative Efforts to Eliminate Sweepstakes Gaming

To counter the rapid changes that sweepstakes industry professionals were making to keep their games outside the purview of state regulation, the legislature passed a comprehensive video gaming ban in 2010, which specifically targeted sweepstakes operations.<sup>23</sup> The focal point of anti-sweepstakes regulation in North Carolina is embodied in § 14-306.4 of the North Carolina General Statutes, which specifically outlaws the use of any electronic machine or device that is owned or leased by a promoter, is used by an entrant, and that “uses energy, and that is capable of displaying information on a screen or other mechanism.”<sup>24</sup> The text of the legislation is broad in nature, creating a blanket prohibition on the use of such machines and specifically noting that the law prohibits

<sup>17</sup> Parker Dozier, *Video Sweepstakes Try to Stay Ahead of the North Carolina Legislature*, CAMPBELL L. OBSERVER (Mar. 10, 2013), <http://campbelllawobserver.com/video-sweepstakes-try-to-stay-ahead-of-the-north-carolina-legislature/>.

<sup>18</sup> Emily Weaver, *Seven Years Later, Sweepstakes Battles Continue*, BLUE RIDGE TIMES-NEWS (June 30, 2013, 4:30 AM), <http://www.blueridgenow.com/article/20130630/ARTICLES/130629779>.

<sup>19</sup> See *id.*

<sup>20</sup> Caroline Denning & Douglas L. Yearwood, *Internet Sweepstakes Cafes: A Survey of Law Enforcement Perceptions*, N.C. DEP’T OF PUB. SAFETY GOVERNOR’S CRIME COMM’N, 4 (Oct. 2010), available at [https://www.ncdps.gov/div/gcc/pdfs/internet\\_cafe.pdf](https://www.ncdps.gov/div/gcc/pdfs/internet_cafe.pdf) (explicating the arguments for legality made by sweepstakes advocates after the 2006 anti-video poker legislation was passed).

<sup>21</sup> N.C. GEN. STAT. § 14-306.4 (2014).

<sup>22</sup> Mark Binker, *Court Upholds Law Banning Video Sweepstakes Gambling*, WRAL.COM (Dec. 14, 2012), <http://www.wral.com/court-upholds-law-on-video-sweepstakes-gambling/11877821>.

<sup>23</sup> Wesley Ryan Shelley, *End of the Chase: Using North Carolina as a Guide for Ending Other States’ Video Sweepstakes Legislative Merry-Go-Round in the Wake of Hest Technologies v. North Carolina*, 36 N.C. CENT. L. REV. 41, 49 (2013) (noting that the 2010 legislation passed by the state was an attempt to close the loopholes left in the 2007 bill that sweepstakes parlors exploited).

<sup>24</sup> § 14-306.4(a)(1).

their use even if sweepstakes operators attempt to employ commonly used exceptions to sweepstake rules.<sup>25</sup> Later sections of the statute have formed the basis for part of the legal ambiguity of the law, stating that it is unlawful to operate an electronic machine or device to either conduct or promote a sweepstakes through use of an entertaining display, including the entry process or the reveal of a prize.<sup>26</sup> However, the legislature seemed to account for the possibility of technological development by inserting a catch-all provision in the statute that states: “It is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pre-tense whatsoever.”<sup>27</sup>

Although the legislature clearly intended this portion of the statute to cure the legal ambiguity relied on by sweepstakes parlors, there has been little judicial notice of the efficacy of such a provision. Even with the seemingly pre-scient catchall text of the statute, the judiciary has not universally accepted anti-sweepstakes legislation in North Carolina. In fact, it went through a fairly rocky period of judicial review after its passage.<sup>28</sup>

## *B. Judicial Override, then Acceptance of Anti-Sweepstakes Legislation*

### *1. Initial Judicial Reluctance to Uphold Legislative Ban on Sweepstakes*

In *Hest Techs., Inc. v. State of N.C. ex rel. Perdue* (“*Hest Techs I*”), the North Carolina Court of Appeals heard legal challenges raised by two companies that operated Internet cafes in North Carolina.<sup>29</sup> The companies sold high-speed Internet access and long-distance telephone time, and developed sweepstakes software as a method to promote the sales of other products in their Internet cafes.<sup>30</sup> According to the court, when entrants purchased Internet access or long-distance phone time, they received sweepstakes entries, or alternatively, could fill out forms to get free entries; the sweepstakes software had predetermined the result of each entry.<sup>31</sup> The software then allowed the contestant to choose to either have the predetermined outcome “pre-revealed” or have it displayed after the game was played, although neither option changed the predetermined outcome of the sweepstakes.<sup>32</sup> Regardless of the outcome of a particular entry, the customer was able to retain the benefit of the purchased Internet time or phone.<sup>33</sup> In defense of the sweepstakes, plaintiffs challenged the constitutionality of section 14-306.4, alleging that it was both an unconsti-

<sup>25</sup> § 14-306.4(a)(1)(a)–(n).

<sup>26</sup> § 14-306.4(b).

<sup>27</sup> § 14-306.4(c); *see also* Shelley, *supra* note 23, at 49.

<sup>28</sup> The North Carolina Court of Appeals originally overturned the seminal piece of anti-sweepstakes legislation in *Hest Techs., Inc. v. State ex rel. Perdue*, 725 S.E.2d 10 (N.C. 2012). However, later that year, the North Carolina Supreme Court overruled the Court of Appeals, finding the statute a constitutional regulation of gambling. *Hest Techs., Inc. v. State ex rel. Perdue*, 749 S.E.2d 429 (N.C. 2012).

<sup>29</sup> 725 S.E.2d at 11–12.

<sup>30</sup> *Id.* at 11 (noting that the proprietary sweepstakes software developed by the plaintiffs was done as a means of “marketing their products at the point of sale”).

<sup>31</sup> *Id.* at 11–12.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.*

tutional restriction of speech and overbroad.<sup>34</sup> The Court of Appeals agreed with the plaintiffs and struck the statute down.<sup>35</sup>

The appellate court focused on two important legal theories: (1) that the regulation was an infringement on sweepstakes owners' First Amendment rights; and (2) that the regulation was facially overbroad.<sup>36</sup> Although the defendants attempted to argue that the statute regulated conduct and not speech, the Court of Appeals held that the statute's regulation of the "dissemination of sweepstakes *results* through entertaining displays cannot be characterized as merely a regulation of conduct . . . [the] portion of N.C. Gen. Stat. § 14-306.4 which forbids the 'reveal of a prize' by means of an entertaining display directly regulates protected speech under the First Amendment."<sup>37</sup> Following the United States Supreme Court's decisions extending First Amendment protections to video games, the North Carolina Court of Appeals held that the statutory prohibition on the conveyance of sweepstakes results through "an entertaining display," as opposed to another medium such as words on a screen, scratch off ticket, or verbal acknowledgement, warranted First Amendment scrutiny.<sup>38</sup> Additionally, the Court of Appeals found the statute to be unconstitutionally overbroad, noting that the prohibition created by the statute "nearly encompasses all forms of video games, from the simplest simulation to a much more complex game requiring substantial amounts of interactive gameplay by the player, and thus, operates as a categorical ban on all video games for the purposes of communicating a sweepstakes result."<sup>39</sup>

The Court of Appeals' determination that First Amendment protections apply to sweepstakes is at odds with the conclusions that other state and federal courts have arrived at when considering similar legislative prohibitions on sweepstakes. For example, in *Crisante v. Coats*, a federal court in Florida surveyed cases in which challengers of state sweepstakes laws raised First Amendment defenses, and found that numerous courts agree that anti-sweepstakes regulations affect conduct, not speech, and are thus not eligible for First Amendment protections.<sup>40</sup> The United States District Court for the Middle Dis-

<sup>34</sup> *Id.* (noting that after the July 2010 amendment of House Bill 80, which outlawed the use of entertaining displays by sweepstakes operators, the plaintiffs amended their complaint to include arguments that N.C. Gen. Stat. § 14-306.4 was "an unconstitutional regulation of plaintiffs' protected First Amendment speech").

<sup>35</sup> While this Court has recognized, and we agree, that "[i]t is the legislature's prerogative to establish the conditions under which bingo, lotteries, or other games of chance are to be permitted," the portion of [N.C. Gen. Stat. § 14-306.4] in the instant case regulates solely how a sweepstakes result is communicated, rather than the underlying circumstances under which the sweepstakes are permitted. . . . N.C. Gen. Stat. § 14-306.1 is unconstitutionally overbroad in these circumstances and must be declared void.

*Id.* at 14–15 (alteration in original) (internal citations omitted).

<sup>36</sup> *Id.* at 12–13.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 14–15.

<sup>40</sup> No. 8:11-CV-2007-T-17TBM, 2012 U.S. Dist. Lexis 53646, at \*33–34 (M.D. Fla. Apr. 17, 2012) (noting that in *Allied Veterans of the World, Inc.: Affiliate 67 v. Seminole Cnty.*, 783 F.Supp.2d 1197 (M.D. Fla. 2011), *aff'd* 468 F. App'x 922 (11th Cir. 2012), the district and federal appellate courts had rejected the argument that local sweepstakes ordinances

trict of Pennsylvania also found that a state statute proscribing phone cards for sweepstakes entries was a regulation of conduct rather than speech, and was thus subject to rational basis review, not the strict scrutiny required when First Amendment protections are triggered.<sup>41</sup> The Superior Court of Massachusetts reached the same conclusion when it considered whether anti-sweepstakes statutes merited First Amendment protection.<sup>42</sup> In upholding the anti-sweepstakes statute, that court found that regulating of the use of entertaining displays was not a regulation of expression per se, because it was the “expression as an incidental part of the conduct of a game of chance that [was] banned.”<sup>43</sup>

## 2. *The North Carolina Supreme Court Weighs In*

Although the North Carolina Court of Appeals ruled in favor of sweepstakes operators and promoters, its decision brought the industry only eight months of hassle-free operation before the state Supreme Court changed course. In *Hest Techs., Inc. v. State ex rel. Purdue* (“*Hest Techs II*”), the North Carolina Supreme Court joined the prior-mentioned courts and held that N.C. Gen. Stat. section 14-306.4 regulated non-communicative conduct, not protected speech.<sup>44</sup> For the Supreme Court, the statute’s constitutionality rests on what the statute actually prohibits: the operation of machines for the purpose of conducting sweepstakes by using entertaining displays.<sup>45</sup> To the Court, a prohibition on operation of a machine is a prohibition on conduct, not speech.<sup>46</sup> However, this determination was not the end of the Court’s inquiry, it subsequently held that in certain situations, conduct can trigger First Amendment protections just as traditional speech can.<sup>47</sup>

The Court, in searching for supportive case law, relied on *There to Care, Inc. v. Comm’r of Ind. Dep’t of Revenue*, a Seventh Circuit Court of Appeals case that determined that the speech involved in a game of bingo did not warrant First Amendment protection.<sup>48</sup> According to the North Carolina Supreme

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regulated speech and denied them First Amendment protections because, per the courts’ reasoning, the ordinance at issue outlawed the conduct of paying a prize after the use of a game device, not the speech underlying the sweepstakes itself).

<sup>41</sup> *Telesweeps of Butler Valley, Inc. v. Kelly*, No. 3:12-CV-1374, 2012 U.S. Dist. LEXIS 146157, at \*33–34 (M.D.Pa. Oct. 10, 2012) (“In sum, Act 81 regulates conduct and not speech. As such, Act 81 need only bear a rational relation to its legitimate interest in regulating gambling, and the Court is satisfied that [it does].”).

<sup>42</sup> *See City Cyber Café, LLC v. Coakley*, No. SUCV2012-04194-BLS1, 2012 Mass. Super. LEXIS 346, at \*1, 22–23 (Mass. Super. Ct. Dec. 17, 2012) (denying plaintiff’s request for preliminary injunction on the grounds that Mass. Gen. Laws. ch. 271, § 5B (2012) was a constitutional regulation of conduct).

<sup>43</sup> *Id.* at \*20.

<sup>44</sup> 366 N.C. 289, 296 (2012).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (“[T]he act of running a sweepstakes is conduct rather than speech, despite the fact that sweepstakes participants must be informed whether they have won or lost. ‘It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.’” (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

<sup>47</sup> *Id.* at 297.

<sup>48</sup> 19 F.3d 1165, 1167 (7th Cir. 1994) (“[The] words do not convey ideas; any other combination of letters and numbers would serve the purpose equally well. They employ vocal

Court, telling sweepstakes entrants that they won or lost was analogous to shouting “Bingo!”<sup>49</sup> Therefore, the Court was able to distinguish the case at hand from cases that the appellant had argued applied, effectively denying the First Amendment protections that the North Carolina Court of Appeals had so readily embraced. In effect, this decision reconciled North Carolina law with the law of other jurisdictions that had considered the issue both before and after the Court of Appeals decided *Hest I*.

By foreclosing the possibility of First Amendment protection and holding that the statute was not overbroad, the Court gave the North Carolina Legislature’s seminal anti-sweepstakes legislation constitutional approval for regulatory implementation.<sup>50</sup> However, the gaming industry, traditionally marked by ingenuity, did not sit idly by after the decision in *Hest Techs II*.<sup>51</sup> In fact, sweepstakes operators have subsequently implemented two primary methodologies to subvert the (now) constitutional anti-sweepstakes statute and evade prosecution, or at least, to muddy the regulatory waters: (1) using pre-reveal systems; and (2) transitioning to games of skill.<sup>52</sup> Potential legal challenges are sure to await these new alternatives to the traditional sweepstakes model, and the catchall clause inserted into the statute by the Legislature could become the basis for future civil and criminal actions against sweepstakes operators.<sup>53</sup>

### 3. *Clarity or Confusion: Do Recent Preliminary Injunctions Signal a Reversal in Judicial Interpretation of North Carolina’s Gaming Law?*

Although the battery of litigation surrounding the 2010 legislation seems to have ended the debate on the state’s authority to enforce the statute, a recent pre-trial decision from a state trial court—affirmed on interlocutory appeal—again casts doubt on the state’s ability to enforce anti-sweepstakes legislation.<sup>54</sup> In *Sandhill Amusements, Inc. v. Sheriff of Onslow Co.*, Sandhill and Gift Surplus, operators of sweepstakes parlors in Onslow County, North Carolina, filed for a preliminary injunction to prevent the sheriff’s department from closing their operations and seizing their video kiosks.<sup>55</sup> This dispute arose when officers from the Alcohol Law Enforcement and Sheriff’s Department investi-

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cords but are no more ‘expression’ than are such statements as ‘21’ in a game of blackjack or ‘three peaches!’ by someone who has just pulled the handle of a one-armed bandit.”).

<sup>49</sup> *Hest Techs II*, 366 N.C. at 300.

<sup>50</sup> *Id.* at 302–33 (denying First Amendment protection to sweepstakes owners seeking protection from state statute prohibiting the operation of sweepstakes).

<sup>51</sup> See Dan Way, *Court Ban has not Ended Sweepstakes Operations*, CAROLINA J. ONLINE (Feb. 5, 2013), [http://www.carolinajournal.com/exclusives/display\\_exclusive.html?id=9870](http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9870) (noting that sweepstakes operators began to change their software to elude the anti-sweepstakes statute *Hest Techs II* upheld).

<sup>52</sup> Jeff Welty, *Sweepstakes Update*, N.C. CRIM. L. BLOG (Nov. 25, 2013, 1:40 PM), <http://nc.criminalaw.sog.unc.edu/sweepstakes-update>.

<sup>53</sup> See *id.*

<sup>54</sup> See Michael D. Abernethy, *Internet Sweepstakes Businesses Opening Again*, TIMES-NEWS (Jan. 12, 2014, 9:02 PM), <http://www.thetimesnews.com/news/top-news/internet-sweepstakes-businesses-opening-again-1.261496> (noting that a recent decision determined that software changes made the sweepstakes machines “promotional device[s],” and therefore legal.).

<sup>55</sup> 762 S.E.2d 666, 670-71 (N.C. Ct. App. 2014).

gated Sandhill after receiving complaints that it was operating video kiosks that paid out money winnings after patrons played games, in violation of the 2010 anti-sweepstakes legislation.<sup>56</sup> The appellate panel described with accuracy the type of video kiosk that was at issue:

The kiosks each include a 19” touch-screen display, an audio speaker, a control panel with “print ticket and play buttons,” a receipt printer, and a currency acceptor. The kiosks allow patrons the opportunity to purchase gift certificates that may be used at Gift Surplus’s online store, [www.gift-surplus.com](http://www.gift-surplus.com). When a patron inserts currency into the kiosk, a receipt is printed with equivalent credits (\$1 is equivalent to 100 sweepstakes entries). The receipts printed also contain a “quick response code,” which users may scan to enter a weekly drawing on the Gift Surplus website. Patrons may also use the kiosk to request a free entry request code, which allows for 100 free sweepstakes entries.<sup>57</sup>

A gaming expert testified that the sweepstakes games the patrons played with the given codes were the traditional “pre-reveal variety” and the “animate/play” variety, both of which require the patron to use skill in that they must nudge the play wheel in the correct direction in order to win the prize.<sup>58</sup>

What is especially interesting about this case is the level of legal protection that the trial court afforded the sweepstakes parlors in granting the preliminary injunction. In the order, the trial court, concluded as a matter of law that “[t]he Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.”<sup>59</sup> The implications and inferential conclusions of this statement were that the trial court—either accidentally or purposefully—declared that the plaintiffs’ businesses and similar operations were legal under North Carolina law, and therefore the Sheriff had no authority to prosecute.<sup>60</sup>

The appellate panel, after hearing the Sheriff’s appeal, recognized the potential effects of this definite and legally binding language, particularly the potential for the trial court’s finding to delay the prosecution of all sweepstakes parlors throughout the state.<sup>61</sup> Fearing the potential wide-spread implications of the trial court’s overreach, the appellate panel struck the legally determinative language from the preliminary injunction, and instead issued an order that merely upheld the status quo by protecting only Sandhill’s video kiosks from prosecution until the pending litigation provided a final outcome.<sup>62</sup>

<sup>56</sup> *Id.* at 669.

<sup>57</sup> *Id.* at 670.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 676.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (“[T]his conclusion of law makes a declaration concerning the lawfulness of these kiosks and would cast doubt upon every prosecution by the State throughout North Carolina.” (internal quotation omitted)).

<sup>62</sup> *Id.* (“As these portions of the preliminary injunction go beyond maintaining the status quo by declaring that Plaintiffs’ conduct was *lawful* or *valid*, these portions affect Sheriff Brown’s substantial right to enforce the laws of North Carolina. Thus, we exercise jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word ‘validly’ from the third item in the decretal section of the preliminary injunction.” (emphasis in original)).

Thus, the question for legal scholars (and sweepstakes owners) is whether the trial court's decision and the appellate court's review of Sandhill's preliminary injunction signals another shift in North Carolina's sweepstakes law. While the trial court's conclusory statements of law may demonstrate a judicial reluctance (at least at the local level) to strictly interpret and apply N.C. Gen. Stat. section 14-306.4, the appellate panel's decision is even less clear. While the decision to strike the trial court's conclusory statement of law may have stemmed from the appellate panel's interpretation of the underlying gaming law, it may have also been merely to preserve the overarching principle behind preliminary injunctions, from which the trial court had strayed.<sup>63</sup> Until the issue is tried and the full appellate court issues a statement of law that has finality, the only fundamental principle of gaming law that the *Sandhill* decision promulgates is that the North Carolina sweepstakes industry is again able to transform their software and operations quickly enough to stifle statewide regulation based on already anachronistic statutes.

### III. MUNICIPAL ORDINANCES AS A SOURCE OF REGULATORY CONTROL

Although the legal battle between regulators and gaming parlor operators has created a host of legal ambiguities surrounding North Carolina gaming law, there is one clear trend that has emerged: statewide gaming laws have failed and will continue to fail to outlaw gaming parlors. There is simply too much incentive and creativity on the part of gaming parlor operators, who consistently modify software, consoles, and games, for the state to ever be able to create an effective comprehensive ban on parlor gambling.<sup>64</sup> Instead of a comprehensive regulatory scheme that requires constant legislative updates and tremendous financial and resource commitment for enforcement, the primary arrow in the state's regulatory quiver should be municipal ordinances. In recent years, municipalities throughout North Carolina have attempted to create what this article will refer to as "soft prohibitions" on gaming within the municipal legislature's limits, namely by using its power of taxation as a regulatory enforcement mechanism.<sup>65</sup>

#### A. Local Taxes as an Enforcement Mechanism

For a state whose name is not synonymous with gambling, North Carolina has a body of case law that, although small, is surprisingly well developed on the taxation of gambling activities.<sup>66</sup> Municipal legislative attempts to tax gaming—or more specifically, to tax sweepstakes parlors—have forced North Carolina's courts to consider the constitutional limits of taxation several times.<sup>67</sup>

<sup>63</sup> See, e.g., *A.E.P. Industries, Inc. v. McClure*, 302 S.E.2d 754, 759 (N.C. 1983); *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 261 S.E.2d 908, 913 (N.C. 1980) ("The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits.").

<sup>64</sup> See *supra* Part II.

<sup>65</sup> See discussion *infra* Part III.A–B.

<sup>66</sup> See, e.g., *Smith v. City of Fayetteville*, 743 S.E.2d 662, 663 (N.C. Ct. App. 2013); *IMT, Inc. v. City of Lumberton*, 738 S.E.2d 156 (N.C. 2013).

<sup>67</sup> See discussion *infra* Part III.A.1.a–b.

Predictably, in their efforts to limit gaming, municipalities have levied higher than usual privilege license fees against electronic gaming operations.<sup>68</sup> Owners of gaming parlors have challenged these quasi-regulatory actions as unconstitutional, forcing the courts to provide in-depth legal analyses of the constitutionality of taxes as applied to gambling activities. Throughout these legal opinions, North Carolina appellate courts have employed the doctrine of the “Just and Equitable Tax Clause,” found in North Carolina’s Constitution.<sup>69</sup> This section will discuss the two unique and distinct sub-sections of this constitutional clause; the first requires that “the power of taxation shall be exercised in a just and equitable manner,” while the second part necessitates that this taxation power may be exercised “for public purposes only.”<sup>70</sup>

1. “*In a Just and Equitable Manner*”

a. *IMT, Inc. v. City of Lumberton*<sup>71</sup>

In 2013, the North Carolina Supreme Court had its first opportunity to clarify the legal implications of the Just and Equitable Tax Clause when an Internet café/gaming parlor in Lumberton, North Carolina challenged the city’s new privilege license fee increase for electronic gaming operations.<sup>72</sup> Pursuant to a state law allowing municipalities to levy privilege licenses for the carrying on of a business,<sup>73</sup> the City of Lumberton drastically increased the licensing fee for businesses that allowed “persons [to] utilize electronic machines . . . to conduct games of chance, including . . . sweepstakes.”<sup>74</sup> The fee was raised from a flat fee of \$12.50 per year to \$5,000 for each business location, plus an additional \$2,500 for each computer terminal operated at the location—essentially creating a new minimum tax of \$7,500 per location and raising the effective tax rate for such businesses 59,900%.<sup>75</sup> The four plaintiff Internet cafes challenged the constitutionality of the statute; however, the Court of Appeals held for the appellees on the grounds that the appellants failed to proffer evidence that the tax was *prohibitive* on their particular businesses.<sup>76</sup>

The North Carolina Supreme Court began its analysis in *IMT* with an abbreviated discussion of the prior judicial history surrounding article V, section 2 of the North Carolina Constitution.<sup>77</sup> Dividing the judicial history of the

<sup>68</sup> Dan Way, *Cities Using Hefty Tax Rates to Discourage Internet Sweepstakes*, CAROLINA J. ONLINE (Jul. 24, 2012), [http://www.carolinajournal.com/exclusives/display\\_exclusive.html?id=9325](http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9325) (noting that municipalities in North Carolina, fearing the potentially negative impact of the proliferation of sweepstakes parlors within their city limits, have used increased privilege license fees to discourage internet cafes/sweepstakes parlors from opening).

<sup>69</sup> N.C. CONST. art. V, § 2.

<sup>70</sup> *Id.*

<sup>71</sup> 738 S.E.2d 156 (N.C. 2013).

<sup>72</sup> *Id.* at 157 (“The question before this Court is whether the City of Lumberton’s privilege license tax violates the Just and Equitable Tax Clause of Article V, Section 2(1) of the North Carolina Constitution.”).

<sup>73</sup> See N.C. GEN. STAT. § 105-109(e) (2007).

<sup>74</sup> *IMT*, 738 S.E.2d at 157.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 158.

<sup>77</sup> *Id.*

section into three parts, the court noted that it had already interpreted the Public Purpose Clause and the Contracting Away Clause, but had not yet issued a definitive interpretation of the Just and Equitable Tax Clause.<sup>78</sup> The court was quick to delineate the importance of the Just and Equitable Tax Clause, noting that it—like the entire article of the constitution—functions as a limiting provision on the exercise of government power, and thus cannot be treated as “mere precatory language.”<sup>79</sup>

After establishing its importance in a full legal analysis of the clause’s substance, it became immediately clear that the patchwork and often indirect treatment of the clause by prior courts had left the state Supreme Court with no definitive framework for its analysis.<sup>80</sup> To remedy this lack of legal framework, the Court adopted the framework established by a 1947 case, *Nesbitt v. Gill*, in which the Court analyzed the effect of a tax on the purchase of horses and mules.<sup>81</sup> In *Nesbitt*, the Court predominantly considered whether the tax had been uniformly applied,<sup>82</sup> but also considered factors such as the population of the city or town, the gross and aggregate sales of the good, and any available alternative taxes.<sup>83</sup> However, the Supreme Court did not consider the *Nesbitt* factors to be binding or exhaustive.<sup>84</sup> Instead, it also considered the absolute size of the tax increase, along with the disparity between the amount of tax levied against electronic gaming establishments and other businesses, ultimately concluding that the tax violated article V, § 2 of the North Carolina Constitution.<sup>85</sup>

*b. Later Cases*

In the wake of the *IMT* decision, the assertion that higher privilege taxes for electronic gaming operations are unconstitutional under the Just and Equitable Tax Clause may become the basis for more legal challenges against municipal ordinances designed to regulate the video sweepstakes industry.<sup>86</sup> For

<sup>78</sup> *Id.* (“In the past, we have construed two of the three limitations enumerated [in N.C. Const. art. V, § 2(1)]. The Public Purpose Clause limits the State’s ability to use tax revenue for private enterprises. . . . Similarly, the Contracting Away Clause limits the State’s ability to delegate its taxing power. . . . The Just and Equitable Tax Clause, however, has avoided a similarly thorough analysis.”).

<sup>79</sup> *Id.* (noting that failure to treat the Just and Equitable Clause as a substantive limit on the power of taxation would “create internal inconsistency within [N.C. Const. art 5, § 2].” *Id.*).

<sup>80</sup> *See id.* at 159.

<sup>81</sup> 41 S.E.2d 646 (N.C. 1947).

<sup>82</sup> *Id.* at 650 (“The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax. However, the tax must apply equally to all persons belonging to the prescribed class upon which it is imposed.”).

<sup>83</sup> *Id.*

<sup>84</sup> *IMT*, 738 S.E.2d at 160 (“In cases arising under the Just and Equitable Tax Clause, trial courts should look to *Nesbitt* for guiding factors in assessing such claims. But those factors should not be viewed as exhaustive.”)

<sup>85</sup> *Id.* (“[W]e conclude the companies here have shown that the present tax . . . constituted an abuse of the City’s tax-levying discretion.”)

<sup>86</sup> *See* Chris McLaughlin, *NC Supreme Court Strikes Down Lumberton’s Tax on Video Sweepstakes*, UNC SCH. OF GOV’T COATES’ CANONS: NC LOC. GOV’T. L. BLOG (Mar. 14, 2013), <http://canons.sog.unc.edu/?p=7037> (“[C]ities that levy privilege license taxes on video sweepstakes at rates similar to those levied by Lumberton (\$5,000 per location, \$2,500

example, in *Smith v. City of Fayetteville*, a gaming parlor owner challenged a 2010 ordinance passed by the City of Fayetteville that raised the privilege license for electronic gaming operations from a flat tax of \$50.00 per year to a rate of \$2,000 per location, plus \$2,500 per computer terminal.<sup>87</sup> However, for the purposes of deciding the case, the court determined the minimum tax increase on each sweepstakes parlor was 8,900%.<sup>88</sup> Even the comparatively lower tax increase could not save the municipality's privilege license fee increase, however, as the court held that the ordinance "violates the Just and Equitable Tax Clause for the [same] reasons stated in *IMT*."<sup>89</sup>

Unfortunately, the 2013 Court of Appeals decision did not further elaborate on the *Nesbitt* balancing test, or conduct its own analysis of why an 8,900% increase was so analogous to the 59,000% increase in *IMT* as to not warrant independent consideration of its reasonableness.<sup>90</sup> Instead, the Court of Appeals in *Smith* appeared content to accept a "gut check test" as to the rate increase's reasonableness or non-reasonableness.<sup>91</sup> Arguably, therefore, if a tax increase forces a reasonable person to cringe, it violates the Just and Equitable Tax Clause.

## 2. "For Public Purposes Only"

The second part of North Carolina's Just and Equitable Tax Clause requires that the power of taxation be exercised "for public purposes only."<sup>92</sup> Although the public purposes doctrine guides the exercise of governmental tax policies, it has often been muddied by jurisprudence that conflates it with the similarly named but distinct doctrine of public use.<sup>93</sup> The Supreme Court of North Carolina attempted to distinguish the two doctrines in *Piedmont Triad Airport Auth. v. Urbine*, in which the defendant/appellant challenged the exercise of eminent domain, on the grounds that there was no public purpose for the airport authority to constitutionally condemn and seize his land.<sup>94</sup> The North Carolina Supreme Court immediately entered into a discussion about the distinction between the public use requirement that underlies the doctrine of emi-

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per machine) are now on notice that those taxes might be held unconstitutional if they are challenged in court.").

<sup>87</sup> 743 S.E.2d 662, 665 (N.C. Ct. App. 2013).

<sup>88</sup> *Id.* (noting that, although the minimum tax increase for a business with one terminal would be 8,900%, most businesses operated multiple terminals. For example, the *Smith* plaintiff's business had 12 computer terminals and was therefore "taxed \$32,000 under the new ordinance—almost a 64,000% increase from the previous \$50 tax." *Id.*).

<sup>89</sup> *Id.* ("[T]he city's 8,900% 'minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just an equitable tax.'" (quoting *IMT*, 738 S.E.2d at 160.)).

<sup>90</sup> *Id.*

<sup>91</sup> *See generally id.* (declining to further elaborate on evaluation methodology, and appearing to rely on the shock-value of the rate increase numbers alone to determine whether a tax violates the Just and Equitable Clause).

<sup>92</sup> N.C. CONST. art. V, § 2(1).

<sup>93</sup> *See, e.g., Piedmont Triad Airport Auth. v. Urbine*, 554 S.E.2d 331, 332 (N.C. 2001); *Charlotte v. Heath*, 40 S.E.2d 600, 604 (N.C. 1946).

<sup>94</sup> *Piedmont*, 554 S.E.2d at 332.

ment domain and the public purpose requirement that underlies the state constitution's Just and Equitable Tax Clause.<sup>95</sup>

Generally, if it is the public purpose requirement at issue, North Carolina courts construe the term "public purpose" broadly. For example, the State Supreme Court has said that, "a tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government."<sup>96</sup> According to the court, this requires only a "reasonable connection with the convenience and necessity of the particular municipality" and allows for taxation where the tax will be exercised for the "benefit, welfare, and protection" of a municipality's inhabitants.<sup>97</sup>

So what exactly is the connection, if any, between gaming—particularly sweepstakes parlors—and the public purpose doctrine of state taxation? Simply put, this article contends that courts should view article V, section 2 of the North Carolina Constitution as a balancing test when evaluating the constitutionality of a particular tax or expenditure. The significance of the public purpose for the tax should be viewed as inversely proportional to how just and equitable the suggested tax would be. This would accomplish the dual objectives of the State Judiciary and the opponents of sweepstakes gaming parlors because the balancing test precludes *carte blanche* imposition of unjust tax rates,<sup>98</sup> while giving municipalities the flexibility to accommodate pressing public concerns through their tax and spend powers.<sup>99</sup> As presently construed, however, the Just and Equitable Clause would override its companion Public Purpose Clause in any judicial challenge, essentially handcuffing any municipality's use of its taxation power to regulate for the public welfare.

### *3. Would Another Interpretation of Article V Alleviate Concerns of Unjust Taxation while Preserving Municipalities' Power in Protecting Its Citizens?*

Although state courts are rightfully concerned about the dangerous potential of a legislative body's unchecked power to tax, a different interpretation of the Just and Equitable Tax Clause by the court could give municipalities the power to regulate gaming and simultaneously protect business enterprises from unjust taxation. In its seminal *IMT* decision, the North Carolina Supreme Court pressed the concept of the Just and Equitable Tax Clause as a powerful limitation on the State's power to tax, as evidenced by its prominent placement in the

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<sup>95</sup> *Id.* ("There remains a distinction between the terms 'public purpose' and 'public use.' Although the analysis in determining both is often similar, the term 'public purpose' pertains to governmental expenditures of tax monies, while the term 'public use' pertains to the exercise of eminent domain.").

<sup>96</sup> *Green v. Kitchin*, 50 S.E.2d 545, 549 (N.C. 1948).

<sup>97</sup> *Greensboro-High Point Airport Auth. v. Johnson*, 36 S.E.2d 803, 809 (N.C. 1946). *See also Morgan v. Town of Spindale*, 118 S.E.2d 913, 914 (N.C. 1961).

<sup>98</sup> *See State v. Jones*, 290 S.E.2d 675, 679 (N.C. 1982) (noting that a balancing test counters unquestioned approval of the exercise of police powers).

<sup>99</sup> *See In re Miller*, 584 S.E.2d 772, 785 (N.C. 2003) (explaining that one of the principal benefits of employing balancing tests is that they "provide trial courts with the flexibility to respond to unique circumstances and unanticipated situations," while "bright-line rules . . . limit future judicial discretion. . .").

State Constitution.<sup>100</sup> However, the *IMT* court interprets the clause in precisely the way it sought not to. By treating the three clauses of the constitutional article's section as independent legal principles and evaluating each outside the context of the other, it deliberately omitted words chosen by the people to be placed in the State Constitution. More importantly, in *IMT*, the North Carolina Supreme Court departed from long held tenants of North Carolina constitutional interpretation. Previous cases adopting rules of constitutional interpretation for later courts to follow demanded that, "greater regard is to be given to the dominant purpose than to the use of any particular words."<sup>101</sup> In fact, North Carolina courts are supposed to rely on "the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."<sup>102</sup> Additionally, the *IMT* court's interpretation of the Just and Equitable Clause violated another canon of state constitutional interpretation, namely that:

In searching for the will and intent of the people as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.<sup>103</sup>

In *IMT*, the North Carolina Supreme Court considered whether the increased cost of the city's privilege license violated the Constitution's Just and Equitable Tax Clause, not whether it violated the section of the constitutional article as a whole. The *IMT* court's opinion effectively severed the Just and Equitable Clause from the remaining Contracting Clause and Public Purpose Clause instead of reading one in light of the others. Given that the clauses are all interconnected parts of the same section in the same article, the court apparently deviated from its previously espoused principles of constitutional interpretation.

Had the court correctly interpreted the constitutional clause at issue in *IMT*, it could have both protected citizens from arbitrary and unreasonable taxation and simultaneously allowed municipalities to use the tax code as a regulatory mechanism. A balancing test between two competing clauses could have crafted a more comprehensive vision of limitations on the government's taxing and spending power by viewing the Just and Equitable Clause in conjunction with the Public Purpose Clause, as indicated by the comma separating the neighboring clauses in the section.<sup>104</sup> This would have enabled the court to conduct an inversely proportional analysis where a stronger public purpose would yield a lower reasonableness factor imposed by the Just and Equitable

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<sup>100</sup> *IMT, Inc. v. City of Lumberton*, 738 S.E.2d 156, 158 (N.C. 2013) ("The people of North Carolina placed the Just and Equitable Tax Clause in their Constitution, and we are not at liberty to selectively dismiss its relevance.").

<sup>101</sup> *Perry v. Stancil*, 75 S.E.2d 512, 514 (N.C. 1953) (citations omitted).

<sup>102</sup> *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 110 (N.C. 1980).

<sup>103</sup> *Stephenson v. Bartlett*, 562 S.E.2d 377, 410 (N.C. 2002) (quoting *State v. Emery*, 31 S.E.2d 858, 860 (N.C. 1944) (citations omitted)) (internal quotation marks omitted).

<sup>104</sup> See N.C. CONST. art. V, § 2(1) ("The power of taxation shall be exercised in a just and equitable manner, for public purposes only . . .").

Clause. As a result, a strong public purpose could overcome a seemingly high tax rate and allow for a constitutional tax, whereas a weak public purpose would require an increased degree of reasonableness in the marginal or actual tax rate/increase. By adopting such a balancing test—instead of strictly construing each clause as an independent and insular limitation on municipal taxing and spending power—the North Carolina Supreme Court could have created a system that both protects the public from inequitable taxation and allows municipalities to wield the tax code as a tool in regulatory enforcement.

Even if the state Supreme Court had interpreted the North Carolina Constitution to allow municipalities, under the Just and Equitable Clause, to levy higher taxes against sweepstakes, several practical considerations make the privilege license method of regulating sweepstakes parlors impractical. For one, a state statute prohibits municipalities from charging any privilege license fee at all for games deemed illegal.<sup>105</sup> This statutory prohibition, however, is widely ignored, yielding significant tax revenue for municipalities, forcing municipalities to face the dilemma of whether to raise privilege license fees or to fully prosecute the sweepstakes parlors to drive them out of business.<sup>106</sup> For example, since 2007, the City of Raleigh has collected over \$1.76 million in privilege license fees from sweepstakes parlors<sup>107</sup>—that essentially represents 1.76 million reasons not to prosecute or continue raising licensing rates to a level that would put this lucrative tax base completely out of business. Further, and most importantly, another legislative shift would have to occur in the state to allow higher privilege taxes on sweepstakes parlors, as the State Legislature has recently abolished the power of municipalities to sell any privilege license at all.<sup>108</sup>

#### *B. Municipal Land Use Ordinances as a Potential Source of Regulatory Control*

The controversial battle between municipalities and sweepstakes parlors has necessitated the use of municipal law doctrines, which are often either devoid of precedent or employed in a manner that would not allow appellate courts to rule on their constitutionality. As Professor David Owens, from the

<sup>105</sup> N.C. GEN. STAT. § 14-307 (2007).

<sup>106</sup> See generally, Chris Berendt, *Legislators Say Sweepstakes Illegal, but Continue Operations Under Uncertainty*, CLINTONNC.COM (last updated Jan. 29, 2014, 1:50 PM), [http://www.clintonnc.com/news/home\\_top-news/3485554/Legislators-say-sweepstakes-illegal-but-continue-operations-under-uncertainty](http://www.clintonnc.com/news/home_top-news/3485554/Legislators-say-sweepstakes-illegal-but-continue-operations-under-uncertainty) (noting that under the terms of N.C. GEN. STAT. § 14-307, the small town of Clinton, North Carolina lost revenue of \$70,000 per year once sweepstakes parlors were “considered illegal and, thus, not subject to be taxed”); Thomasi McDonald, *Raleigh Issues Licenses for an Industry Banned by NC Lawmakers*, THE NEWS & OBSERVER (June 3, 2014), at 1A (noting that the City Attorney for Raleigh “declined to comment when asked whether the city’s willingness to issue a license to a sweepstakes parlor contradicts the General Assembly’s ban,” and further noting that each privilege license issued by Raleigh costs \$20,000.00).

<sup>107</sup> McDonald, *supra* note 106.

<sup>108</sup> Joe Killian, *Greensboro to Lose \$3.2 Million in Privilege-License Taxes*, NEWS & REC. (June 3, 2014, 12:27 AM), [http://www.news-record.com/news/government/article\\_5965308c-ead7-11e3-8fbc-0017a43b2370.html](http://www.news-record.com/news/government/article_5965308c-ead7-11e3-8fbc-0017a43b2370.html) (noting that in the summer of 2014, the state legislature passed and the governor signed a bill abolishing business privilege-license taxes).

University of North Carolina School of Government has hypothesized, it is possible for municipalities within the state to use zoning ordinances to prohibit the operation of sweepstakes parlors within their jurisdiction, although the concept certainly forces municipal legislatures to wade in murky legal waters.<sup>109</sup>

*1. Could the Legal Reasoning of Robins v. Town of Hillsborough<sup>110</sup> Make a Comeback?*

Although not directly connected to gaming law, in *Robins v. Town of Hillsborough*, the North Carolina Court of Appeals considered whether a zoning ordinance banning otherwise lawful activity within its borders was a valid exercise of the Municipal Legislature's authority.<sup>111</sup> In its discussion, the Court of Appeals noted that "[z]oning authority under the police power 'is subject to the limitations imposed by the Constitution upon the legislative power forbidding arbitrary and unduly discriminatory interference with the rights of property owners,'"<sup>112</sup> because zoning regulations, "restrict the use of private property to promote the health, the public safety, the public morals, or public welfare."<sup>113</sup> However, the Court of Appeals realized that the zoning power that Hillsborough attempted to exercise by completely prohibiting manufacturing asphalt within its territory warranted a higher level of scrutiny, and thus turned to other states to find the applicable standard.<sup>114</sup>

The appellate court looked to Pennsylvania and Michigan law for guidance in situations where zoning ordinances *totally* prohibited legitimate businesses from operating.<sup>115</sup> Adopting their reasoning, the North Carolina Court of Appeals determined that if an applicant can show that an ordinance is a total ban on a legitimate use, the burden shifts to the municipality to show that the ordinance is valid.<sup>116</sup> While this might seem like a clear and concise statement of the law, the North Carolina Supreme Court abandoned the appellate court's reasoning by deciding the case on other grounds, vacating the appellate court's

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<sup>109</sup> David Owens, *Land Use Regulation of Internet Sweepstakes Cafes*, UNC SCH. OF GOV'T COATES' CANONS: NC LOC. GOV'T. L. BLOG (Apr. 17, 2012), <http://canons.sog.unc.edu/?p=6577> (enunciating the possibility that, at least in theory, cities and towns in North Carolina could pass land use ordinances to ban sweepstakes parlors from operating within city limits).

<sup>110</sup> 625 S.E.2d 813 (N.C. Ct. App. 2006) [hereinafter *Hillsborough I*], *rev'd on other grounds*, 639 S.E.2d 421 (N.C. 2007).

<sup>111</sup> *Id.* at 815 (stating that the facts that gave rise to the dispute occurred when the Hillsborough Board of Commissioners adopted an ordinance that banned the manufacturing and processing of asphalt within the city limits).

<sup>112</sup> *Id.* at 818 (quoting *Zopfi v. City of Wilmington*, 160 S.E.2d 430, 434).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 818–19.

<sup>115</sup> *Id.* at 819 (quoting *Kropf v. City of Sterling Heights*, 215 N.W. 2d 179, 185 (Mich. 1974) ("[A]n ordinance which *totally* excludes from a municipality a use recognized by the Constitution . . . as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal property of the law as to the excluded use.") (emphasis in original); *Exton Quarries Inc., v. Zoning Bd. of Adjustment*, 228 A.2d 169, 179 (Pa. 1967) (citations omitted) ("The constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . should be regarded with particular circumspection.")).

<sup>116</sup> *Id.* at 818.

standard of review.<sup>117</sup> As a result, there is no North Carolina common law to reference when analyzing whether municipalities have the constitutional power to pass ordinances completely banning sweepstakes parlors from operating within their borders.

There is no doubt that on account of their police powers, North Carolina municipalities have the authority to enact ordinances designed to protect the health, safety, and welfare of the target population.<sup>118</sup> Therefore, when a municipality seeks to enact an ordinance that completely bans an activity like sweepstakes operations, the only remaining questions are: (1) whether the ordinance was enacted pursuant to police powers; and (2) the standard of review to apply.<sup>119</sup>

As to the first question, there is little doubt that such an ordinance would be found to be within the municipality's police power. Although North Carolina courts have found an absence of police power where municipalities have attempted to ban activities that were neither a nuisance, nor a threat to the health, safety, or welfare of the public, an ordinance banning sweepstakes gaming would likely be a distinctive case.<sup>120</sup> Nevertheless, the census data surrounding the placement of sweepstakes parlors in North Carolina is staggering: most parlors are placed in neighborhoods with strict, though informal, racial boundaries, and whose residents are lucky if they have incomes that touch the

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<sup>117</sup> *Robins v. Town of Hillsborough*, 639 S.E.2d 421, 425 (N.C. 2007) [hereinafter *Hillsborough II*] ("Because of our holding, we need not address the portion of the Court of Appeals opinion concerning the constitutionality of the amended zoning ordinance except to note that the Court of Appeals unnecessarily addressed the issue.").

<sup>118</sup> *G.I. Surplus Store, Inc. v. Hunter*, 125 S.E.2d 764, 767 (N.C. 1962) (noting that sovereigns, including municipalities, have, through their police power, the authority to enact legislation to "protect or promote the health, morals, order, safety, and general welfare of society" (quoting *State v. Balance*, 51 S.E.2d 731, 734 (N.C. 1949))).

<sup>119</sup> It appears that, although the case law certainly still remains open to interpretation, a municipal ordinance—even one banning businesses from operating outright—might be considered constitutional if the ordinance was deemed to be a valid exercise of the municipal police power and was not seen as "arbitrary and capricious." See *Hillsborough I*, 625 S.E.2d 813 at 818 (noting that municipal zoning ordinances are to be evaluated as an exercise of municipal police powers); Owens, *supra* note 109 (explaining that there is legal ambiguity surrounding what standard of review would be applicable to evaluating municipal zoning ordinances that ban sweepstakes parlors). This is because North Carolina precedent suggests that determining the validity of an exercise of police power only requires an evaluation of the legislative intent behind an act or ordinance, while evaluating the same action under a given standard of review—such as whether the action is arbitrary or capricious—is a test of the constitutional "fit." See *State v. Kerner*, 107 S.E. 222, 226 (N.C. 1921) (Allen, J., concurring) ("The right to bear arms, which is protected and safeguarded by federal [sic] and state [sic] Constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate; but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety."). *Kerner*, therefore, is evidence of a judicial bifurcation of (1) police power and (2) independent standard of review when reviewing state acts or ordinances, requiring both to have adequate authority and reasonable relation to government interest for a law to pass constitutional muster.

<sup>120</sup> See *Town of Conover v. Jolly*, 177 S.E.2d 879, 881 (N.C. 1970) (finding that a municipality was not acting pursuant to police powers where it banned residents from maintaining a mobile home in some places, as mobile homes were neither a public nuisance, nor a threat to the health, safety, or welfare of the population).

poverty line.<sup>121</sup> Investigations into sweepstakes parlors in other states have shown a link between lax laws concerning sweepstakes and the proliferation of crime.<sup>122</sup> This has caused at least one town's counsel to question whether sweepstakes parlors had a direct negative effect on the well being of the town's citizens.<sup>123</sup> Concerns about the potentially negative financial impact that sweepstakes parlors have on a vulnerable citizenry were, in fact, a factor when the State Senate decided to ban the operations in 2010.<sup>124</sup> Beyond these concerns, opponents of these parlors complain that the businesses almost uniformly contribute to urban blight, as many have blacked out windows, operate on a temporary basis in strip malls, and hinder the ability to attract "legitimate" commercial businesses.<sup>125</sup>

Given the more than adequate factual basis supporting the notion that a municipality attempting to ban sweepstakes parlors through a zoning ordinance would be acting within its police powers, the only question would be as to what standard of review the ordinance would be examined under. Professor Owens believes that the reviewing court would adopt the "arbitrary and capricious standard" when evaluating the ban.<sup>126</sup> After an in-depth consideration of potentially applicable standards, this author believes that Professor Owens is likely correct.

The key question to determine if a case would trigger a *Hillsborough I* burden-shifting standard is if the ordinance was a complete ban of a legitimate,

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<sup>121</sup> See Lisa Sorg & Joe Schwartz, *Sweepstakes Cafes: Coming to Your Low-Income Neighborhood*, *INDYWEEK* (Feb. 24, 2010), <http://www.indyweek.com/indyweek/sweepstakes-cafes-coming-to-your-low-income-neighborhood/Content?oid=1300495> (noting that sweepstakes parlors in Raleigh and Durham were often located near pawn shops or similar businesses, in communities where 25-50% of residents live in poverty, and whose populations are 80-96% African-American).

<sup>122</sup> Tom Abate, *California Deems Internet 'Sweepstakes' Illegal but Alameda County Looks Sideways*, *CASTRO VALLEY PATCH* (May 7, 2013, 2:20 PM), <http://patch.com/california/castrovalley/california-deems-internet-sweepstakes-illegal-but-alameda-county-looks-sideways> (noting that the California DOJ's Bureau of Gambling Control experiences a large increase in reported crimes when new sweepstakes parlors open); Walter Jones, Op-Ed., *Sweepstakes Industry Floods Georgia and Florida Drawing Fans and Foes*, *TIMES-HERALD* (Sept. 24, 2011), <http://www.times-herald.com/opinion/op-ed/jones/Sweepstakes-industry-floods-Georgia--and-Florida-drawing-fans-and-foes--1856471> (noting that the Ga. Bureau of Investigation found that some sweepstakes parlor owners had out-of-state criminal records).

<sup>123</sup> See generally, Nash Dunn, *Town to Rule on Clayton Sweepstakes Parlor*, *CLAYTON STAR-NEWS* (Aug. 29, 2014), <http://www.claytonnewsstar.com/2014/08/29/4102605/town-to-rule-on-clayton-sweepstakes.html> (noting that Councilman Michael Grannis of Clayton had questioned, when determining whether or not to issue a business license to a sweepstakes, how the business would affect the "safety and well-being" of the town's citizens).

<sup>124</sup> See Patrick Gannon, *N.C. Senate Vote to Ban Sweepstakes Parlors Likely*, *STAR-NEWS ONLINE* (last updated June 17, 2010, 9:24 PM), <http://www.starnewsonline.com/article/20100617/ARTICLES/100619668> (stating that proponents of anti-sweepstakes bill focused on the "predatory" nature of the industry).

<sup>125</sup> See generally, e.g., Lisa Sorg, *The Hayti Mural and the Durham Divide*, *INDYWEEK* (Sept. 10, 2014), <http://www.indyweek.com/indyweek/the-hayti-mural-and-the-durham-divide/Content?oid=4242301> (noting that areas affected by urban blight have trouble attracting economic invest from legitimate businesses and instead are only attractive to places such as sweepstakes parlors).

<sup>126</sup> Owens, *supra* note 109.

lawful business enterprise.<sup>127</sup> Despite the legal ambiguity that currently exists on account of software evolution, the North Carolina legislature has declared sweepstakes parlors to be unlawful enterprises. In fact, police are permitted to arrest, and district attorneys are permitted to charge, those who operate sweepstakes parlors in violation of the law.<sup>128</sup> Therefore, it is highly unlikely that any sweepstakes parlor promoter or operator who challenges the law will be able to successfully argue that the municipality is specifically targeting and excluding their *legitimate* business interest. Instead, the reviewing court will likely conclude that the ordinance, if exercised within the municipality's police power, is constitutional so long as the ordinance is not arbitrary and applies uniformly to all persons similarly situated.<sup>129</sup> This standard only requires the court to engage in a rational basis review.<sup>130</sup> As long as the municipality could link any of the above-mentioned negative effects to sweepstakes parlors, it is likely that an ordinance completely banning their operation from within the city limits would be upheld.

## 2. *What Would Such an Ordinance Look Like?*

After determining that a North Carolina municipality has the constitutional power to pass an ordinance banning the operation of all sweepstakes parlors, the question then becomes: What would such an ordinance look like? A sample constitutional ordinance might read:

WHEREAS, the Town of \_\_\_ has decided, through reasoned analysis and decision, that the operation of gambling operations, including sweepstakes parlors, has a detrimental effect on the health, safety, and welfare of its citizens;

THEREFORE, the operation of a business which uses one or more machines, whether mechanical or electronic, for the purposes of allowing the public, invited customers, or any other person to engage in sweepstakes, games of chance, or games of luck that produces, as its main objective, a prize tendered in cash or cash equivalent, to be used as commonly accepted currency, irrespective of whether the prize is predetermined and not dependent on whether entries are provided free of charge, purchased outright, or tied to the purchase of a related or unrelated product sold in, by, or for use in the same or similar establish-

<sup>127</sup> See *supra* notes 112–19 and accompanying text.

<sup>128</sup> Julian March, *Sweepstakes Operators Face Crackdowns after Change in Law*, STAR-NEWS ONLINE (Jan. 21, 2013, 12:43 PM), <http://www.starnewsonline.com/article/20130121/ARTICLES/130129973> (noting that sweepstakes operators have received cease and desist letters threatening steep fines and/or prosecution).

<sup>129</sup> For North Carolina's standard of review of municipal ordinances, see *Shuford v. Town of Waynesville*, 198 S.E. 585, 588 (N.C. 1938) (noting that a municipal ordinance is valid as long as it is not arbitrary and applies uniformly to all people similarly situated).

<sup>130</sup> See *Town of Atlantic Beach v. Young*, 298 S.E.2d 686, 690-91 (N.C. 1983) (“In order to determine whether this ordinance is unconstitutionally arbitrary and unreasonable we look to see if the ordinance is reasonably related to the accomplishment of a legitimate state objective” (citing *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 174 S.E.2d 542 (N.C. 1970); *State v. Whitaker*, 45 S.E.2d 860 (N.C. 1947))).

ment, is expressly prohibited in the Town of \_\_\_\_ and its extraterritorial zoning jurisdiction.<sup>131</sup>

Although, not designed to be a complete recitation of what an ordinance would look like, the above ordinance is demonstrative of one that would likely pass constitutional muster. Such an ordinance would avoid the constitutional trappings of First Amendment regulation, as it focuses on the ban of conduct incidental to speech, not expression.<sup>132</sup> In addition, such an ordinance bans all games, even if their outcomes are predetermined or based on the customer's skill. The above ordinance would also prohibit sweepstakes parlors from skirt-ing the regulation by arguing that customers are simply buying an unrelated product, not a sweepstakes entry.

Finally, although sweepstakes promoters and courts in North Carolina have made arguments that section 14-306.4 is unconstitutionally overbroad because it could be interpreted to prohibit other legal activities—like the operation of traditional video games—the model ordinance proposed above should protect a municipality from such challenges because it only prohibits the use of games that give prizes in cash or readily transferrable currency. Arcade games that distribute tickets would not be banned, as the main purpose of these games is not necessarily to win a prize but to play a game of skill. The prizes given at arcades—normally in the form of tickets, coins or vouchers—are not readily redeemable as cash or its equivalent outside of that particular establishment. While it is possible that a gaming parlor could transition to a ticket-based prize system, the ordinance should still bar the operation of such an establishment on the premise that the primary purpose of all of its games is to win tickets for a prize. By tying the decree to a proclamation that the ordinance is strictly tied to the municipality's exercise of its police power, such an ordinance should—when drafted in a manner that fully explicates the terms of the text—survive constitutional challenges while simultaneously remaining broad enough to ban targeted activities, protect permitted ones, and stifle (at least for a short time) creative attempts to reconfigure the sweepstakes so as to fall outside a municipal ordinance.

#### IV. CONCLUSION

This article offers no opinions or judgments on the morality of legal gambling; North Carolina, however, has made its public policy concerns about gambling clear through a series of recent legislative and judicial decisions. In an effort to end gambling, the state legislature passed, and the judiciary upheld, a series of statutes designed to prohibit most forms of gambling. However, through a loophole in a 2007 statute, sweepstakes parlors began to form and

<sup>131</sup> For an example of a proposed, although not adopted, ordinance placing strict regulations on sweepstakes operations without banning them outright, see Lumberton, N.C., Ordinance Regulating Electronic Gaming Operation (Jan. 13, 2014), *available at* <http://lumbertoncitync.iqm2.com/Citizens/FileOpen.aspx?Type=30&ID=4424>.

<sup>132</sup> See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘non-speech’ [sic] elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech [sic] element can justify incidental limitations on First Amendment freedoms.”).

operate, morphing into an industry that employs thousands of people and generates revenue estimated at \$10 billion per year.<sup>133</sup>

Despite the best efforts by North Carolina legislators, district attorneys, and law enforcement personnel, the creativity and ingenuity of sweepstakes operators continues to place sweepstakes in a gray area of the law. Because of the perpetual cat-and-mouse game played between sweepstakes parlors and the state legislature, this article argues that the only truly effective regulation of the industry can come at the municipal level.

This article has identified two primary methodologies which municipalities can use to try and effectively prohibit sweepstakes parlors: (1) increasing privilege tax burdens; and (2) using restrictive land use ordinances. However, since the state legislature recently revoked municipal power to levy privilege license fees, and because the state Supreme Court has narrowly defined the scope of the state constitution's Just and Equitable Clause, taxation is not a readily available regulatory tool for municipalities. Despite this, localities remain free to employ land use regulations to prohibit sweepstakes parlors from operating within their jurisdictions.<sup>134</sup> Although these types of ordinances may face constitutional challenges, and although there is little case law on the subject, if written well, these ordinances can pass constitutional muster and effectively accomplish what the State Legislature has failed to do.

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<sup>133</sup> Peter J. Kulick & Robert W. Stocker II, *The Wild West of Unregulated Gambling: Binary Options and Internet Cafés*, CASINO ENTER. MGMT (Feb. 3, 2014), <http://www.casinoenterprisemanagement.com/articles/february-2014/wild-west-unregulated-gambling-binary-options-and-internet-cafes>.

<sup>134</sup> See, e.g., THOMASVILLE, N.C., MUN. CODE ch. 18, art. 14, §§ 18.285–295 (2013), available at [www.thomasville.org/DocumentCenter/Download/City\\_Ordinances/Chapter\\_18\\_Taxation\\_Revenue\\_\\_Miscellaneous\\_Business\\_Regulations/Chapter\\_18\\_Taxation\\_Revenue\\_and\\_other.pdf](http://www.thomasville.org/DocumentCenter/Download/City_Ordinances/Chapter_18_Taxation_Revenue__Miscellaneous_Business_Regulations/Chapter_18_Taxation_Revenue_and_other.pdf); Amanda Dolasinski, *Lumberton Officials Take Aim at Video Gambling with New Ordinance*, FAYETTEVILLE OBSERVER, [http://www.fayobserver.com/news/local/lumberton-officials-take-aim-at-video-gambling-with-new-ordinance/article\\_7b1909e8-e573-5322-abb1-ef6e5be44542.html](http://www.fayobserver.com/news/local/lumberton-officials-take-aim-at-video-gambling-with-new-ordinance/article_7b1909e8-e573-5322-abb1-ef6e5be44542.html) (last updated May 12, 2014, 11:00 PM).