

Comments

CALLING A LEMON A LEMON: REGULATING ELECTRONIC GAMBLING MACHINES TO CONTAIN PATHOLOGICAL GAMBLING

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PROLOGUE

With a gun in her purse, sixty-one-year-old Loretta Herrera Martinez entered the Camel Rock Casino in New Mexico on April 21, 1997.¹ She approached one of the casino’s cashiers, who, when Mrs. Martinez opened her purse to withdraw a note she had written demanding money, noticed the gun nestled inside.² Soon thereafter, Mrs. Martinez walked out of the casino with \$7100 cash.³ In all her years before, Mrs. Martinez had never committed a single offense.⁴

What led her to such an uncharacteristically rash act? Until the day she robbed the casino, “Mrs. Martinez lived a long, law-abiding life.”⁵ As a juvenile, she had had “no encounters with the criminal justice system.”⁶ She learned from her mother “religious observance and respect for others.”⁷ She had a “lengthy, diligent work life[, and for] six decades she exhibited abiding respect for the law.”⁸ What changed Mrs. Martinez?

Gambling changed her.

She had become a depressed and desperate woman who felt that gambling had made her a failure in life, a shame, and a disgrace.⁹ In the years preceding her criminal act, Mrs. Martinez “had gambled away in the casinos an enormous sum of money—her and her husband’s savings, plus more that she had borrowed”—and yet she could not stop the very behavior that caused her tormenting remorse.¹⁰ Mrs. Martinez spent the night before the robbery as she had so many other nights before—at the Camel Rock Casino, methodically sinking coins into the twenty-five-cent progressive jackpot machines, the popular gambling devices that use video technology to replicate now-archaic mechanical slot machines and standard table games like draw poker.¹¹

¹ United States v. Martinez, 978 F. Supp. 1442, 1444–45 (D.N.M. 1997).

² *Id.* at 1445.

³ *Id.*

⁴ *Id.* at 1444.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1446.

¹⁰ *Id.* at 1445.

¹¹ *Id.*

Following another night of losses, Mrs. Martinez awoke on the day that she would rob the casino in a deteriorated, hangover-like state.¹² As she described it, she suffered “a severe headache, feeling extremely depressed, guilty, worthless and hating myself for all of my actions and feeling unable to cope with all the unhappiness that my gambling habits had created for me and my family throughout the last few years.”¹³

When Mrs. Martinez left her house that day, she had not planned to commit a robbery; instead, overcome with remorse and self-loathing, she planned to “kill herself on her mother’s grave.”¹⁴ She drove to the cemetery where her mother was buried, parked her car, took “the purse [that held] the gun and shell from the trunk,” sobbed, and “prayed that God would forgive [her]” for what she was about to do.¹⁵ Then, remembering her family, including her young grandson, she “suddenly realized none of them deserved the misery” her suicide would bring upon them, and she decided to go home.¹⁶

On her way home, however, Mrs. Martinez stopped in the parking lot of the Camel Rock Casino.¹⁷ Sitting in her car, finding herself once again at the casino despite her determined plan to go directly home, she suddenly “felt [a] horrible hatred toward all . . . [c]asinos.”¹⁸ She then scribbled a note demanding bundles of fifty- and one-hundred-dollar bills and “decided to go in and take their money as they had been taking it from [her] for all these years.”¹⁹ By robbing the casino, Mrs. Martinez sought to take back a small fraction of what she had lost to the casino’s electronic gambling machines (“EGMs”).

No sensible person would condone Mrs. Martinez’s gun-toting, vengeful brand of corrective justice. Neither would the district court that presided over Mrs. Martinez’s case: the court found Mrs. Martinez guilty of robbery and sentenced her to five years’ probation and six months’ home detention.²⁰ Despite the court’s ruling, it did show sympathy for Mrs. Martinez, noting that she suffered from a debilitating “gambling compulsion, which developed after the advent of casinos in New Mexico.”²¹ This compulsion, which made her increasingly depressed, alienated from her family, and suicidal, ultimately proved so powerful that it led a faithfully law-abiding

¹² *Id.* at 1445–46.

¹³ *Id.*

¹⁴ *Id.* at 1447–48.

¹⁵ *Id.* at 1447.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1445, 1447.

²⁰ The court invoked in its opinion the quote adorning a mural at the entrance to the courtroom that read “Justice Tempered by Mercy,” but ultimately determined that “[n]o court should condone a person robbing another.” *Id.* at 1454.

²¹ *Id.* at 1444, 1447.

woman to abandon her scruples and commit a serious crime of desperation.²²

Mrs. Martinez's tale, while dramatic, is but one that shows how pathological gambling wreaks havoc in the lives of otherwise healthy individuals, their families, and their communities.²³ Many gamblers will never develop Mrs. Martinez's severe problems, but many like her will. Her story reveals the problems associated with the legal availability of EGMs: pathological compulsion, consuming depression, overwhelming debt, shattered families, crimes of desperation, and suicidal ideation.²⁴ Given the recent and ongoing proliferation of legal gambling in the United States and the pathology that inevitably follows when some people gamble, it makes sense to search for ways to prevent pathological gambling and, at the same time, allow those who engage in legalized gambling without detriment to enjoy what for them amounts to comparatively harmless fun.

I. INTRODUCTION

Many states, when they first legalized casino gambling within their borders, implemented certain regulatory limits intended to contain pathological gambling and prevent its development in those vulnerable to the affliction.²⁵ For example, some states set "loss limits" that capped by statute the amount of money an individual gambler could lose each day.²⁶ As more states have legalized gambling, however, a competition to attract gamblers across state lines has developed among the states.²⁷ A state-by-state erosion of enacted protections typically accompanies this competition, and a classic "race to the bottom" ensues.²⁸

Many states initially legalized only very limited forms of gambling, but they later found themselves compelled to abandon their protective measures as neighboring states began to offer gambling with less restrictive regulations that were more attractive to gamblers, especially pathological gam-

²² *Id.* at 1447.

²³ Courts have recognized the legitimacy of pathological gambling as a mental disorder, often applying the diagnostic criteria in the American Psychiatric Association's *Diagnosics and Statistical Manual of Mental Disorders* when dealing with gambling-related crimes. *See, e.g.,* United States v. Liu, 267 F. Supp. 2d 371, 372 (E.D.N.Y. 2003) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 674 (4th ed. text rev. 2000) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-IV]) (noting that Liu, a gambler who had passed multiple bad checks, met ten out of ten of the DSM-IV's diagnostic criteria); *see also infra* note 92.

²⁴ *See Liu*, 267 F. Supp. 2d at 376.

²⁵ *See* discussion *infra* Part II.

²⁶ *See Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 105 (2003) for a discussion of Iowa's loss limits.

²⁷ NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 2-7 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter NGISC, FINAL REPORT].

²⁸ *Id.*

blers.²⁹ In this race to win the greatest possible revenues, the states have been abandoning their concern for, and perhaps their duty to, pathological gamblers. The states, therefore, are no longer in a position to regulate gambling effectively, while paying due regard to pathological gamblers, since the states, much like the gamblers they work to attract, are engaged in a fantastic scramble for cash.

As gambling spreads across the nation, those who advocate on behalf of pathological gamblers have paid particular attention to the problems associated with EGMs, which are essentially computers housed in contraptions that look like video arcade games and are designed to visually replicate traditional casino games, such as poker and slot machines.³⁰ These EGMs, detractors say, are the “crack cocaine” of pathological gambling.³¹ Like crack cocaine, the analogy goes, EGMs provide the ideal delivery system for the rapid onset of pathological gambling.³² Though EGMs closely resemble familiar wagering games like traditional mechanical slot machines or card games like poker, critics point out that the computerized games of today are different in one important respect: they are highly programmable and, thus, manipulable.³³ Some contend that programmers design the games to lure, deceive, and hook pathological gamblers in such a way that manufacturers of the devices and the casinos that offer them should be held accountable for gamblers’ losses.³⁴ United States courts, however, typically insulate casinos and EGM manufacturers from suits brought by gamblers.³⁵

As state legislatures expand legalized gambling to include more states and communities, EGMs reach greater numbers of potential users closer to their homes than ever before.³⁶ In fact, EGMs now account for a majority

²⁹ See discussion *infra* Part II.

³⁰ Note that some EGMs are wholly computerized in that they employ both a random number generator to determine bet results in the “background” and use video display technology to represent that determination to the user via, for example, virtual slot machine reels. Other EGMs employ a hybrid system of computer and mechanical parts, such as actual reels that spin according to the dictates of the random number generator in the background. For the purposes of this Comment, it is insignificant whether a particular EGM is wholly computerized or a hybrid that even more closely resembles to the gambler familiar games. Even if a hybrid machine has mechanical reels, the computer in the background makes any resemblance to a purely mechanical slot machine of yore a mere chimera.

³¹ NGISC, FINAL REPORT, *supra* note 27, at 2-6.

³² See generally R.B. Breen, *Rapid Onset of Pathological Gambling in Machine Gamblers: A Replication*, INT’L J. MENTAL HEALTH & ADDICTION, Apr. 12, 2004, at 44, available at http://www.ecommunity-journal.com/article.php?volume=2&issue=1&article_id=7.

³³ Poulos v. Caesars World, Inc., 379 F.3d 654, 661 (9th Cir. 2004).

³⁴ See, e.g., *id.* at 661, 665.

³⁵ See, e.g., *id.* at 665-67 (affirming denial of class certification because individual reliance issues related to causation predominated over the class action and plaintiffs were not entitled to a presumption of reliance); Merrill v. Trump Ind., Inc., 320 F.3d 729 (7th Cir. 2003) (affirming summary judgment for defendants on numerous claims related to plaintiff’s gambling addiction because the court found that the casino owed no duty of care to compulsive gamblers).

³⁶ See Am. Gaming Ass’n, States with Slots, http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=32 (last visited Jan. 20, 2006).

of dollars wagered in casinos.³⁷ Accordingly, the problems associated with this form of gambling should be a source of great concern in communities throughout the nation.

Because legalized state gambling has developed into a cross-border competition between the states and the individual states have been largely unable to address the problems facing individual pathological gamblers and the communities they affect, this Comment calls for a national solution. It uses the backdrop of EGMs to show how a national solution might work in a particular context, leaving aside questions about regulating other forms of legal gambling, though one can easily conceive how some of the proposed solutions could be tailored to fit other gambling contexts. Briefly, Congress should create a Federal Gambling Regulatory Commission pursuant to its Commerce Clause authority to tackle the problems that inevitably accompany the proliferation of legalized gambling. The commission should be tasked with the responsibility of creating unobtrusive gambling regulations applicable to all states with an eye toward protecting individuals and communities from the ills associated with pathological gambling, while at the same time respecting the liberty interests of those for whom gambling is not a problem. Leaving to the proposed commission's expertise the bulk of the task of formulating specific solutions, this Comment suggests a few model regulations that can achieve both objectives.

Part II describes the rapid proliferation of legalized gambling across the United States in the recent past, while Part III discusses regulatory limits states have enacted to protect problem gamblers and the erosion of those limits over time as states compete with each other in a "race to the bottom." Part IV describes pathological gambling, and Part V discusses how EGMs are uniquely able to capitalize on the disorder. Part VI discusses largely unsuccessful efforts by gamblers to sue casinos and EGM manufacturers. Part VII supports the argument that preventative legislation is preferred over reactive litigation in combating the effects of pathological gambling; it describes how gambling regulations should be designed carefully to both protect the pathological gambler and accommodate the recreational gambler, and pits another author's proposals for gambling regulation against the advocated model. Part VIII advocates the creation of a federal agency tasked with regulating the gambling industry nationwide in a manner that conforms to the regulatory principles set forth in this Comment. Part IX concludes.

II. VEGAS, VEGAS EVERYWHERE: THE SWIFT PROLIFERATION OF LEGALIZED CASINO GAMBLING ACROSS THE UNITED STATES

To believe that gambling pathology could ever be eliminated root and branch is naïve. Even a complete prohibition of all forms of gambling

³⁷ Breen, *supra* note 32.

throughout the United States would lead the most determined gamblers to gamble abroad or go underground to gamble illegally in secret.³⁸ To root out even those gambling activities would require a wholesale intrusion into private behavior of the most unappealingly drastic and totalitarian kind. Nevertheless, though a certain degree of gambling will in all likelihood always be part of human societies, the recent spread of *legal* gambling throughout much of this country should be cause for concern: by making state-sanctioned gambling venues available to more gamblers, some of whom will develop pathologies, state legislatures have contributed to the escalating incidence of pathological gambling.³⁹

Not long ago, most Americans lived far from legal casinos and had to travel abroad or great distances within the country to reach one of the few locales offering casino gambling. Before 1989, casino gambling was lawful domestically in only Nevada and New Jersey.⁴⁰ Beginning in the late 1980s, however, the nation bore witness to a rapid expansion of legalized casino gambling as states sought new means to increase revenues. In the six years after 1988, a period marked by astonishingly rapid deregulation, “casinos were either authorized or operating in twenty-three states.”⁴¹ Today, gamblers have legal access to EGMs in over thirty-five states,⁴² and there seems no end in sight as more states continue the trend toward legalizing casino-style gambling.⁴³ Accordingly, as states provide greater access to casino gambling, greater numbers of Americans gamble at legal casinos situated just a short drive from their homes.⁴⁴

This widespread expansion of legal gambling has brought about a dramatic rise in the number of gamblers and the total amount wagered in the United States. Between 1990 and 1993, the number of American households visiting casinos doubled.⁴⁵ In 2003, 53.4 million gamblers visited U.S. casinos annually, with an average of 5.8 trips per person.⁴⁶ In 2005, an estimated 73 million Americans visited one of 1200 legal U.S. gambling

³⁸ Frank L. Quinn, *First Do No Harm: What Could Be Done by Casinos to Limit Pathological Gambling*, 22 *MANAGERIAL & DECISION ECON.* 133, 134 (2001) (noting that “[p]athological gambling does not develop without the opportunity to gamble and the enabling of others” (citation omitted)).

³⁹ *Id.* at 133.

⁴⁰ ROBERT GOODMAN, *THE LUCK BUSINESS: THE DEVASTATING CONSEQUENCES AND BROKEN PROMISES OF AMERICA’S GAMBLING EXPLOSION 2* (1995).

⁴¹ *Id.*

⁴² Am. Gaming Ass’n, *supra* note 36.

⁴³ See, e.g., James Dao, *Bill to Allow Slot Machines Is Passed in Pennsylvania*, N.Y. TIMES, July 5, 2004, at A10.

⁴⁴ GOODMAN, *supra* note 40, at 3.

⁴⁵ *Id.*

⁴⁶ AM. GAMING ASS’N, 2004 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 14 (2004), available at http://www.americangaming.org/assets/files/2004_Survey_for_Web.pdf.

venues.⁴⁷ With the increase in gambling has come an increase in casino revenues: annual casino revenues nearly doubled in the United States from \$8 billion in 1988 to about \$15 billion in 1994.⁴⁸ In 2001, U.S. casino revenues passed the \$40 billion mark.⁴⁹ Today the figure is significantly higher: gambling now rakes in over \$48 billion in annual revenues.⁵⁰ The stunning growth in gambling revenues thus shows that increasing numbers of states have succumbed or are succumbing to the high-stakes political and social gamble inherent in legalized gambling, wagering that the alluring promise of a new tax base will beat the odds of gambling's known side effects.

III. RACING TO THE REGULATORY BOTTOM: AS CASINO STATES GROW IN NUMBER, STATUTORY PROTECTIONS DESIGNED TO ADDRESS PATHOLOGICAL GAMBLING ERODE

When introducing legalized casino gambling within their borders, states do not intend for their casinos to entice merely their own residents; rather, states also look across their borders to attract out-of-state gamblers who will go home after gambling, by and large, leaving money behind.⁵¹ Not surprisingly then, neighboring states with legalized gambling compete with each other to attract the most gamblers.⁵² When states compete against each other to attract industry, or in this case gambling revenues, they may find themselves in a “race to the bottom”⁵³ wherein each state has a perverse incentive to lower its regulatory standards in an effort to lure business to the state. This race to the bottom, with each state enacting increasingly lax laws to attract increased revenue, comes “typically at the expense of the consumer” and “may cause dramatic reductions in consumer welfare both inside and outside the state.”⁵⁴ Just such a race is being run by the states in the gambling context, to the predicted detriment of consumers: “The record of state decisionmaking regarding [casino gambling] is not comforting. . . . The various states’ decisions have been driven to a surprising extent not by a steadfast concern for the public welfare but by a fierce interstate competition for tax dollars”⁵⁵

⁴⁷ Marc Cooper, *Sit and Spin: How Slot Machines Give Gamblers the Business*, ATLANTIC MONTHLY, Dec. 2005, at 121, 121.

⁴⁸ GOODMAN, *supra* note 40, at 2.

⁴⁹ THOMAS A. GARRETT, CASINO GAMBLING IN AMERICA AND ITS ECONOMIC IMPACTS 4 (2003), available at <http://www.stls.frb.org/community/assets/pdf/CasinoGambling.pdf>.

⁵⁰ Cooper, *supra* note 47, at 121.

⁵¹ NGISC, FINAL REPORT, *supra* note 27, at 2-7.

⁵² *Id.*

⁵³ The term “race to the bottom” appears to have been coined in William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974).

⁵⁴ Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 479 (2001).

⁵⁵ NGISC, FINAL REPORT, *supra* note 27, at 2-7.

As states have liberalized their gambling laws in an effort to raise revenues, they have especially looked to capture the revenues of out-of-state visitors, with “the twin desires of securing tax revenues from the citizenry of neighboring states while also blocking those same states from undertaking a similar raid of their own.”⁵⁶ With cross-border revenue generation as a goal, states consistently locate casinos “on the borders of other states, often conveniently near major population centers across the [boundary, so] they could be assured of drawing at least some of their revenues (and thus tax receipts) from the populations of their benighted neighbors.”⁵⁷ Predictably, public officials in a targeted state where legal gambling is unavailable quickly realize that their citizens are traveling out of state to gamble, leaving millions of dollars behind before they return.⁵⁸ In an effort to recapture “the revenues of their wayward citizens,” state lawmakers “quickly retaliate[] with [casinos] of their own.”⁵⁹

States responding to neighboring states’ gambling behavior, having themselves experienced cross-border pressure to legalize casino gambling, are “not above attempting their own raids [on other neighboring states] by locating a portion of their new [casinos] near the casino-deprived populations in states far afield from the original aggressor.”⁶⁰ Thus, “the pattern [of casino proliferation] tend[s] to be self-propagating.”⁶¹ Like dominoes stood on their edges, long-standing state gambling prohibitions fall one by one.

When few states offered legal casino gambling, cross-border revenue-grabbing was an alluring possibility, but as more states open casinos within their borders, out-of-state revenue capture tends to decrease: with a legal casino open in one’s home state, why go to the trouble of traveling farther than necessary? When states race against each other to open casinos in a feverish attempt to secure gambling revenues within their borders, “the resulting counteractions have meant that the net revenue gains from, and losses to, non-resident populations tend[] to cancel each other out.”⁶² The end result is that “[i]n setting out to tap into their neighbors’ pocketbooks, state governments have ended up tapping into that of their own citizens.”⁶³ Compelled by their neighbors to open casinos within their borders, the states have “ensured that every state’s population is now within an easy commute of the casinos.”⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

The pressure to engage in the race to the bottom goes beyond each state's initial decision to legalize casino gambling; states also face pressure over time to eliminate harm-reduction regulations initially designed to limit gambling and protect the pathological gambler. Many state legislatures, when first introducing legalized gambling within their borders, attempted to balance the revenue-producing goals of legalized casinos with the social-welfare needs of the population by implementing regulatory measures meant to address the problem of pathological gambling.⁶⁵ These measures have taken a variety of forms, such as funding for pathological gambling treatment programs; gambling hotlines for people who think they may need help; and wager and daily loss limits, which attempt to restrain gamblers from betting too much too fast.⁶⁶ States imposing such preventative measures run into a problem, however, when neighboring states open casinos along shared borders but do not implement similarly restrictive limits.⁶⁷

For example, when Iowa legalized riverboat casino gambling in 1989, "it limited bets to \$5 and losses to \$200 per excursion"⁶⁸ in an effort to prevent high-stakes betting and losses. The purpose of these restrictions was to welcome gamblers to Iowa, while recognizing the addictive potential of gambling. However, after Illinois legalized riverboat casino gambling in 1991, Iowa experienced an immediate drop in its gambling revenues because the Illinois casinos (many of which were situated on Iowa's border to eliminate Iowa's regional monopoly) imposed no loss limits on gamblers.⁶⁹ Gamblers, when faced with the choice to gamble in Iowa with loss limits or in Illinois without such limits, overwhelmingly chose to gamble in the new Illinois casinos.⁷⁰

Finally, in 1994, Iowa's legislature yielded and eliminated the loss limits amid much controversy,⁷¹ deregulating its casinos to eliminate their competitive disadvantage.⁷² Thus, although the original intent of Iowa's legislature was to provide limited, highly-regulated forms of gambling that accounted for the problems of pathological gambling, competition from

⁶⁵ See *infra* notes 66–82 and accompanying text.

⁶⁶ See HOWARD J. SHAFFER, REGULATING GAMBLING & ITS CONSEQUENCES: TOWARD SCIENCE-BASED REGULATION 5 (2005), http://www.divisiononaddictions.org/html/handouts/regulating_gamblingg2e.pdf.

⁶⁷ See Associated Press, *Gaming Commission Says Loss Limits Hurting Casinos*, NEWS TRIB. (Jefferson City, Mo.), Oct. 3, 2003, at 3, available at http://64.146.17.242/stories/100303/sta_1003030007.asp.

⁶⁸ *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 105 (2003).

⁶⁹ See Mark W. Nichols, *Deregulation and Cross-Border Substitution in Iowa's Riverboat Gambling Industry*, 14 J. GAMBLING STUD. 151, 153–55 (1998).

⁷⁰ *Id.*

⁷¹ *Fitzgerald*, 539 U.S. at 105.

⁷² Nichols, *supra* note 69, at 153–55.

outside Iowa's borders pressured the legislature to abandon its original intent and scrap the preventative measures.⁷³

Iowa has not been alone in facing cross-border pressure. Missouri restricts gamblers from purchasing "more than \$500 in slot-machine tokens or table-game chips during each two-hour gambling session."⁷⁴ Plainly, this loss limit is considerably more lax than Iowa's former regulation in that it permits each individual gambler to wager up to \$6000 in a twenty-four-hour period; nonetheless, lobbyists for Missouri's casinos have sought to repeal the limit. Though their efforts have been unsuccessful thus far, the Missouri Gaming Commission,⁷⁵ a state-funded agency, has exerted additional pressure by reporting that Missouri's loss limit puts its casinos at a competitive disadvantage to neighboring states without such limits, and that "Missouri casino [gamblers] find the loss limit a patronizing intrusion by government into a private business transaction."⁷⁶ In light of such pressures, it may only be a matter of time before Missouri follows in Iowa's deregulatory footsteps.

Even in a state like New Jersey, where gambling has been legal since long before the recent wave of proliferation, regulations have weakened in response to the race to the bottom.⁷⁷ When gambling was first legalized in Atlantic City, "the original rules . . . included regulations that sought to reduce problem gambling."⁷⁸ These regulations limited the hours casinos could operate; restricted the floor space used for slot machines, which were considered "one of the most addictive forms of gambling"; prohibited games like video poker and sports betting; and established prize limits "to ensure that players wouldn't be taken advantage of too outrageously."⁷⁹ New Jersey's casinos, however, lobbied for repeal of the restrictions "as competition from casinos in other states increased during the early 1990s."⁸⁰ By 1994, all the original protective regulations had been dropped with the exception of the sports betting prohibition.⁸¹ "Since federal law restricts sports betting, New Jersey's Casino Control Commission ruled that it simply had no legal power to change the rules."⁸²

The examples above illustrate that even when restrictive measures accompany gambling decriminalization, in due course outside economic pres-

⁷³ *Id.* at 169–70.

⁷⁴ See Associated Press, *supra* note 67.

⁷⁵ I have elected not to use the gambling industry's user-friendly term "gaming" to euphemize gambling except where it is necessary, as here. Gambling should be distinguished from mere gaming, as gambling involves money wagers.

⁷⁶ See Associated Press, *supra* note 67.

⁷⁷ GOODMAN, *supra* note 40, at 11.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

sure from neighboring gambling states precipitates an erosion of existing regulations. Despite initial efforts by state legislatures to place limits on gambling, state-to-state competition compels a free-market race to capture the most gamblers via a relaxation of existing regulations, which ultimately leaves problem gambling largely unaddressed.

Leaving the job of regulating gambling to the states presents obvious problems. Though some argue that “the control of gambling has always been a matter left up to the states under their police powers” and advocate leaving regulation to the states out of concerns for federalism,⁸³ the states have proven ill equipped to maintain protective regulations designed to prevent the deleterious effects of pathological gambling. As such, the federal government ought to step in to protect individual pathological gamblers—and those who consequently suffer from the attendant social dysfunction created by pathological gambling—from the states’ downwardly spiraling deregulation race.

IV. PATHOLOGICAL GAMBLING: A GRAVE PERSONAL DISORDER WITH FAR-REACHING COMMUNITY EFFECTS

To understand how the national government might regulate gambling to prevent pathological gambling, it is important first to understand pathological gambling in some detail. Plaintiffs’ attorneys arguing on behalf of gamblers suing casinos and EGM manufacturers liken pathological gambling to diseases, such as alcoholism or drug addiction.⁸⁴ Defense attorneys, conversely, have exploited to their advantage reluctance by some to recognize pathological gambling as a disease.⁸⁵ It is certainly true that gambling pathology differs from drug and alcohol addiction in that gambling involves the ingestion of no mood-altering *substance*. Despite this seeming difference, however, pathological gambling is a “pure addiction, untainted by psychoactive substances,” with meaningful similarities to substance abuse and dependence in terms of their psychological, biological, and social effects.⁸⁶ Though for the pathological gambler no drug is ingested to produce

⁸³ Nelson Rose, *Gambling and the Law: Understanding the Law of Internet Gambling*, in ALI-ABA COURSE OF STUDY MATERIALS: THE GAMING INDUSTRY: CURRENT LEGAL, REGULATORY, AND SOCIAL ISSUES 175, 178 (2001).

⁸⁴ Wendy N. Davis, *Gambling on Casino Cases: Compulsive Rollers Are Suing the House, Betting That Courts Will Find Casinos Liable*, A.B.A. J., Apr. 2004, at 18.

⁸⁵ *Id.* (“One factor complicating matters for plaintiffs is that compulsive gambling is not as well-studied or as well-publicized as other addictions.”).

⁸⁶ Howard J. Shaffer, *Gambling and Disordered Gambling*, RESPONSIBLE GAMING Q., Winter 2002, http://www.americangaming.org/rgq/rgq_detail.cfv?id=97; see also Mass. Council on Compulsive Gambling & Harvard Med. Sch. Div. on Addictions, *Comparing DSM-IV Criteria for Pathological Gambling and Substance Dependence*, THE WAGER, Jan. 30, 1996, <http://www.thedram.org/backissues/1996/vol1pdf/w105.pdf> (noting “the psychological, biological and social factors that contribute to these two disorders”).

a high, “[e]xcitement has often been referred to as the gambler’s drug.”⁸⁷ Numerous studies suggest that gambling causes neurochemical changes, that these changes are more pronounced in pathological gamblers, and that these changes often parallel certain neurochemical changes observed in substance addicts.⁸⁸ Clinicians note, too, that upon cessation of gambling, gamblers experience withdrawal effects akin to those that accompany interrupted substance abuse in alcoholism and other drug addiction.⁸⁹ Accordingly, some have theorized that the primary goal of the gambler is not to win a fortune, but rather “to maintain a phenomenological state of excitement and/or escape (i.e., an optimum level of arousal).”⁹⁰ Like the drug abuser who must repeatedly ingest substances to maintain arousal, “it is also assumed that the excitement or euphoria [experienced by pathological gamblers] is addictive and that because it is short-lived, it needs to be repeated.”⁹¹

The American Psychiatric Association (“APA”) recognizes pathological gambling as an “Impulse Control Disorder Not Elsewhere Classified.”⁹²

⁸⁷ Mark Griffiths, *Psychobiology of the Near-Miss in Fruit Machine Gambling*, 125 J. PSYCHOL. 347, 349 (1991).

⁸⁸ For a bibliographic review of some of this research, see ROBERT W. WILDMAN, GAMBLING: AN ATTEMPT AT INTEGRATION 88 (1997), available at <http://www.gamblingresearch.org/contentdetail.sz?cid=2096>.

⁸⁹ Shaffer, *supra* note 86 (“For example, among pathological gamblers who stop, [thirty to fifty] percent report experiencing withdrawal symptoms. These symptoms are similar to those experienced by people in withdrawal from narcotic or stimulant drugs. Starting to gamble again can make these symptoms of withdrawal go away. Gambling is more similar to drug addiction than you might imagine.”).

⁹⁰ Griffiths, *supra* note 87, at 349.

⁹¹ *Id.*

⁹² The diagnostic criteria for pathological gambling, according to the DSM-IV, are as follows:

A. Persistent and recurrent maladaptive gambling behavior as indicated by five (or more) of the following:

- (1) needs to gamble with increasing amounts of money in order to achieve the desired excitement
- (2) after losing money gambling, often returns another day to get even (“chasing” one’s losses)
- (3) is restless or irritable when attempting to cut down or stop gambling
- (4) has repeated unsuccessful efforts to control, cut back, or stop gambling
- (5) gambles as a way of escaping from problems or of relieving a dysphoric mood
- (6) is preoccupied with gambling
- (7) lies to family members, therapist, or others to conceal the extent of involvement with gambling
- (8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling
- (9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling
- (10) relies on others to provide money to relieve a desperate financial situation caused by gambling

B. The gambling behavior is not better accounted for by a Manic Episode.

AM. PSYCHIATRIC ASS’N, DSM-IV, *supra* note 23, at 674.

Although the APA categorizes pathological gambling as an impulse control disorder and not a substance-related disorder, the similarities between the APA's diagnostic criteria for pathological gambling and substance dependence are considerable and noteworthy, supporting the conclusion that gambling pathology is a real and serious problem facing gamblers and, consequentially, society at large.⁹³

While pathological gamblers constitute a slim minority of the population,⁹⁴ the impact of pathological gambling ripples through society as many of these gamblers neglect their families, rack up bad debt, lose jobs, and commit crimes. Most Americans gamble at least occasionally,⁹⁵ and of those who choose to gamble, few suffer any notable side effects beyond modest, absorbable losses.⁹⁶ For most gamblers, wagering is an innocuous and entertaining pastime that results in little to no detriment to their own lives or the lives of others.⁹⁷ For the minority that suffers, however, pathological gambling is a "hidden disease" that "cannot be detected by breath or blood tests . . . or needle marks."⁹⁸ For those gamblers who become problem or pathological gamblers, the consequences can be monumental.

Stories abound of gamblers who find escape in EGMs and ultimately develop a compulsion to gamble that propels them to wager their life savings, to accumulate crippling debt in order to gamble more when their access to ready cash is eliminated, and finally to declare bankruptcy.⁹⁹ The effects of pathological gambling, though, are not merely monetary in nature. Pathological gamblers experience high rates of depression and incidences of marital problems and divorce.¹⁰⁰ Suicidal ideation and attempts

⁹³ Mark Griffiths, *Gambling Technologies: Prospects for Problem Gambling*, 15 J. GAMBLING STUD. 265, 273 (1999) ("There is no doubt that slot machines are potentially addictive and there is now a large body of research world-wide supporting this." (citation omitted)).

⁹⁴ The prevalence of pathological gambling is somewhat contentious. NGISC, FINAL REPORT, *supra* note 27, at 4-4. Different studies have provided estimates that vary widely. *See id.* (describing possible reasons for data variance). The National Gambling Impact Study Commission gathered previous study data indicating prevalence rates of combined pathological and "problem" gambling that ranged from 1.7% to 7.3%, and contracted two new studies that showed combined pathological and problem gambling rates within that range. *Id.* at 4-5. The most conservative estimate of pathological gambling (apart from problem gambling) was 1.2%. *Id.* Whatever the true prevalence, pathological gamblers constitute a proportionally small, but numerically large, minority of the general population.

⁹⁵ NGISC, FINAL REPORT, *supra* note 27, at 1-1 & n.1 (citing NAT'L OPINION RESEARCH CTR., REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 6 (1999) (reporting that sixty-eight percent of Americans reported "having gambled at least once in the past year")).

⁹⁶ *Id.* ("[T]he vast majority of Americans either gamble recreationally and experience no measurable side effects related to their gambling, or they choose not to gamble at all.")

⁹⁷ *Id.*

⁹⁸ Robert L. Stenander, *You Bet Your Life: Lawyers and Compulsive Gambling*, NEVADA LAW., July 2004, at 34, available at <http://www.nvbar.org/Publications/Nevada%20Lawyer%20Magazine/2004/July/CareerKillers.htm>.

⁹⁹ NGISC, FINAL REPORT, *supra* note 27, at 4-9; *see, e.g.*, *United States v. Liu*, 267 F. Supp. 2d 371 (E.D.N.Y. 2003); *United States v. Martinez*, 978 F. Supp. 1442 (D. N.M. 1997).

¹⁰⁰ *Liu*, 267 F. Supp. 2d at 376.

on one's life are not uncommon for the pathological gambler.¹⁰¹ Additionally, problem gamblers who accumulate substantial losses often cause detrimental third-party effects in their communities because gambling debts spur some pathological gamblers to engage in criminal activity or default on their debts.¹⁰² Pathological gambling also often leads to child neglect, sometimes with frightening consequences: one pathological gambler drove her sleeping ten-day-old infant to a casino and left the infant in her car for nine hours while she gambled (and casino employees "supplied [the gambler] with food and drinks"), until the baby—dehydrated by the August sun—died alone in the casino parking lot.¹⁰³ Pathological gambling and its consequences have begun to garner greater national attention as more people gamble more frequently in a brave new American landscape peppered with legal casinos, but too little has been done at the federal level to regulate the industry with a mind toward prevention.

V. ELECTRONIC GAMBLING MACHINES AND THE NATION'S FLIRTATION WITH THE "CRACK COCAINE OF GAMBLING"

EGMs are due special attention in any attempt to address pathological gambling.¹⁰⁴ While pathological gambling can arise from any form of gambling, EGMs now represent the most popular form of casino gambling, and of all forms of gambling, empirical data indicate that EGMs are associated with the more rapid onset of pathological gambling than are traditional forms of gambling.¹⁰⁵ So rapid is the onset of pathology and so powerful is the compulsion's grasp once established that EGMs are widely regarded by gambling opponents as "the crack cocaine of gambling."¹⁰⁶

The rapid onset associated with EGMs may be the direct result of deliberate machine design by EGM manufacturers: because EGMs are programmable computers, manufacturers are able to employ sophisticated psychological research about gambling behavior to design machines with particularity to entice those who are most vulnerable to pathological gambling to gamble in the very ways that their pathologies are manifested. As

¹⁰¹ John Warren Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 *MANAGERIAL & DECISION ECON.* 17, 23 (2001) ("[B]etween 12 and 18% of those in [Gamblers Anonymous] have attempted suicide, 45–49% have planned to commit suicide, 48–70% have contemplated suicide; and 80% have evidenced a death wish and stated that they 'wanted to die.'").

¹⁰² John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 *S. ILL. U. L.J.* 221, 224–27 (2003); see also *Martinez*, 978 F. Supp. 1442.

¹⁰³ Quinn, *supra* note 38, at 134.

¹⁰⁴ NGISC, FINAL REPORT, *supra* note 27, at 2-6.

¹⁰⁵ See generally Breen, *supra* note 32, at 45 (finding, for example, that the onset of pathological gambling for EGM gamblers begins after a mean of 1.08 years versus 3.58 years for traditional table and racetrack gamblers).

¹⁰⁶ NGISC, FINAL REPORT, *supra* note 27, at 2-6.

such, EGMs are a prime candidate for regulations designed to address pathological gambling.

A. EGMs Represent the Most Popular Form of Casino Gambling

Dollars spent on EGMs now represent a majority of casino gambling: “Whereas . . . table games [once] produced 60% of the average casino’s revenues, compared to 40% for machines, recently 70% of revenues have come from [EGMs].”¹⁰⁷ Seventy-five percent of casino gamblers play EGMs,¹⁰⁸ so it comes as little surprise that the machines occupy eighty percent of casinos’ floor space.¹⁰⁹ Video slot machines alone collect wagers of over \$1 billion *per day* in the United States.¹¹⁰ A good deal of this money spent is trickled back to gamblers in the form of winnings, but despite the returns to consumers in payouts large and small (which are often gambled right back),¹¹¹ North American EGMs reportedly earned casinos \$30 billion in 2003.¹¹²

B. Designing Addiction into the Machines

EGMs programmers design machines to capitalize on pathological gambling.¹¹³ Though they appear to simulate the mechanical “one-armed bandits” of days past or traditional card games, today’s EGMs employ sophisticated computer technology designed to increase the games’ psychological and subconscious lure for current and potential pathological gamblers.¹¹⁴ By manipulating gamblers’ basic inner drives, EGM manufacturers and casinos that make the machines available to the public seriously undermine the degree to which even well-informed gamblers exercise free choice.

A widely read article in the *New York Times Magazine* detailed how EGM programmers use elaborate technology to design games that trigger players’ subconscious psychological reactions, luring gamblers to wager more than they otherwise might.¹¹⁵ Inside the EGM manufacturing companies, “a cadre of people . . . study addiction” to attract customers and keep

¹⁰⁷ Breen, *supra* note 32, at 44.

¹⁰⁸ Garrett, *supra* note 49, at 6.

¹⁰⁹ *Id.* at 7.

¹¹⁰ Gary Rivlin, *The Chrome-Shiny, Lights-Flashing, Wheel-Spinning, Touch-Screened, Drew-Carey-Wisecracking, Video Playing, “Sound Events”-Packed, Pulse-Quickening Bandit*, N.Y. TIMES, May 9, 2004, § 6 (Magazine), at 42.

¹¹¹ For a good description of how even seemingly generous paybacks to gamblers still result in odds that generate revenues for casinos, see Cooper, *supra* note 47, at 123–25, 129.

¹¹² Rivlin, *supra* note 110.

¹¹³ See also Poulos v. Caesars World Inc., No. CV-94-1126-RLH-RJJ, 2002 WL 1991180 (D. Nev. June 25, 2002), *aff’d*, 379 F.3d 654 (9th Cir. 2004). See generally Rivlin, *supra* note 110.

¹¹⁴ See generally Rivlin, *supra* note 110.

¹¹⁵ *Id.*

them playing and spending.¹¹⁶ By way of example,¹¹⁷ EGM designers “[u]se sight and sound and everything at [their] disposal to get people’s juices going.”¹¹⁸ As players gamble more, the music gets “quicker and usually louder.”¹¹⁹ A top sound designer admitted that his team “want[s] to get your heart rate going a little.”¹²⁰ An *I Love Lucy*-themed EGM that displayed video clips during bonus rounds “even sprayed a rich chocolate scent in front of the player’s nose when the classic . . . chocolate factory [scene] was shown.”¹²¹ EGM manufacturers engage as many of the human senses as feasible if profit will attach; however, the most invasive and economically effective design manipulations have to do not with the sensory bells and whistles surrounding the games, but with the game play itself.

1. *The Lure and Allure of the “Near Miss”*.—An article in the *Wall Street Journal* noted that casinos use “psychographic data, behavior modification reports, Pavlovian marketing and the use of gambler profiles in prescribing inducements to promote *more frequent and longer gambling sessions* among ‘avid’ . . . gamblers.”¹²² An especially invidious method by which manufacturers have coaxed Pavlovian responses from gamblers is by programming “near miss” sequences into EGMs.

A “near miss” in gambling parlance is a result that appears to come close to a jackpot, causing excitement and hope in the gambler, but is not in fact a jackpot or even a winning bet at all. For example, suppose that on a slot machine the result Bar-Lemon-Bar does not offer the gambler any payout for his wager. Bar-Bar-Bar would be a jackpot, but Bar-Lemon-Bar counts for nothing. In this scenario, Bar-Lemon-Bar is a near miss because two of the reels approach a jackpot award. Though Bar-Lemon-Bar results in a loss of the wager as much as any other nonpaying combination would (e.g., Lemon-Plum-Cherry), the gambler frequently experiences a jolt when the near miss shows up as the reels stop spinning.¹²³

¹¹⁶ *Id.*; see also Cooper, *supra* note 47, at 121–26, 128–29 (describing additional means by which EGM manufacturers and casinos design and situate EGMs to maximize profits).

¹¹⁷ The design techniques described in the Rivlin article are, unfortunately, too numerous for an exhaustive appraisal in this Comment.

¹¹⁸ Rivlin, *supra* note 110.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Cooper, *supra* note 47, at 122.

¹²² Quinn, *supra* note 38, at 134–35 (summarizing Christina Binkley, *Lucky Numbers: Casino Chain Mines Data on Its Gamblers, and Strikes Pay Dirt*, WALL ST. J., May 4, 2000, at A1). As Quinn noted, the article never “suggested that such intentional manipulations of gambling behavior were wrong, or could contribute to the destruction of individuals and families[;] rather, the article lauded the profits these manipulations produced.” *Id.* at 135. These manipulations demonstrate that casinos and the manufacturers of EGMs “understand how to encourage the development of pathology in the name of profit.” *Id.*

¹²³ See generally Griffiths, *supra* note 87.

Furthermore, because the gambler can often see above and below the payout line in a slot machine, she may be able to see whether, in the Bar-Lemon-Bar result described above, a third Bar was positioned just above the Lemon in the payout line. Programming a Bar to appear above the Lemon, rather than another nonjackpot symbol, would compound the gambler's reaction to the near miss, because it gives the appearance that the gambler was "soooo close" to winning the jackpot—if only the middle reel had spun one space further than it did—though, in truth, the position of the Bar above the payout line had been programmed to elicit that exact reaction and had nothing at all to do with chance.¹²⁴

In the days of mechanical slot machines, when real reels spun freely inside chambers unaffected by computers, clicking to a random result after a gambler placed a bet and pulled the machine's arm, near-miss events had at least some truth to them. Though the gambler did not win, two of the three reels on a three-reel machine, for example, *did* line up toward a jackpot, indicating to some degree the true likelihood that a jackpot might by chance spin to a stop on the payout line. With the advent of EGMs, casino game designers can now program machines so that near miss events appear before gamblers' eyes more often than they otherwise would by pure chance, causing gamblers to perceive greater odds of winning than the games truly offer.¹²⁵ Whereas a genuine near miss may have meant something real regarding the odds of winning in the days of mechanical slots, a manufactured near miss is meaningless in this regard, as it is programmed to occur more often than chance would allow. The psychological power of a near miss, however, remains constant.

Programmers can design EGMs so that near-miss scenarios appear with artificial frequency in a variety of ways. One of the simplest ones to understand involves the popular "Wheel of Fortune" EGM, where designers have incorporated a "bonus-round" spinning wheel akin to the one that appears on the television game show after which the machine's visual presentation is modeled.¹²⁶ By clicking a button, a gambler "spins" the wheel which appears to have twenty-two equally sized, pie-shaped wedges marked by varying dollar amounts up to \$1000. Given the appearance of the wheel,

¹²⁴ Rivlin, *supra* note 110.

¹²⁵ See Griffiths, *supra* note 87, at 351. This is possible because

[electronic] slot machine payouts are dictated by a computerized random number generator. Basically, every combination of possible reel outcomes on the slot machine has certain numbers associated with it. After a wager is made, the slot machine internally picks a combination of random numbers. The [virtual] reels then [only appear to] spin and land on a particular combination of symbols that have been preassigned to the combination of random numbers. . . . [H]igher-paying symbols are mapped to fewer random numbers than lower-paying symbols. . . . The machine then pays out if the . . . random numbers [generated] corresponds to those preassigned for the jackpot or smaller prizes. *The symbols on each reel are irrelevant—they are simply for show*; the outcome is determined at the time each bet is made, not after the reels stop spinning.

Garrett, *supra* note 49, at 7 (emphasis added).

¹²⁶ Rivlin, *supra* note 110.

it would be reasonable for a gambler to believe that his chance of winning \$1000 on any spin is one in twenty-two.¹²⁷ Not so. When a gambler spins the wheel, he disproportionately lands on one of the spots adjacent or nearly adjacent to the jackpot.¹²⁸ This is no accident. “The slot machine version of ‘Wheel [of Fortune]’ . . . is designed to produce . . . [lots of] near misses. . . . [T]he odds are weighted so that a player is likely to land on some wedges far more often than on others.”¹²⁹ In effect, the spinning wheel is simply for show. The wheel’s creators designed it shrewdly to stop with disproportionate frequency on those wedges that will induce a player to gamble more—the near-miss wedges. The odds involved in the bonus round have nothing to do with friction overcoming the inertia of the spinning wheel at random—and everything to do with merging psychological research on human behavior with shrewd computer programming.

Video poker machine designers can program machines to show near-miss events with odds-defying frequency as well.¹³⁰ Compare the traditional playing-card poker game with a computer-programmed poker game. When a five-card-draw poker player holds Three, Four, Five, and Six cards and discards his fifth card hoping to draw a Seven or Two to complete a winning “straight,” the dealer in a traditional poker game selects a random card from the deck (or decks). Assume that the fifth card dealt at random would not be a Two or Seven, but another card, say a Queen. In a computer-programmed poker game, once the random number generator generates an outcome that translates to a loss, the Queen, which would have appeared at random as the fifth card, can be replaced with another card that, though it still results in the player’s loss, may induce him to think that he was oh-so-close to winning the hand. For example, the computer can be programmed to substitute a randomly chosen fifth card with an Ace or Eight—cards close to the hoped-for Two or Seven—to reinforce the gambler’s feeling that a win is just around the corner.

Even though this sort of reasoning is illogical—a loss, after all, is a loss, regardless of the losing card drawn—the effects of these near misses on pathological gamblers are important because “[r]esearch indicates that many gamblers, veterans and novices alike, do not understand the basic math of gambling.”¹³¹ Manufactured near misses are “believed to encourage future play” by gamblers¹³² because a gambler experiencing a near miss interprets it as the harbinger of an upcoming win, in defiance of sound

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Liz Bentson, *Weighing the Legal Odds: Several Experts Debate Gaming’s Vulnerability to Lawsuits*, LAS VEGAS SUN, Apr. 18, 2004, at 1D, available at <http://www.lasvegassun.com/sunbin/stories/sun/2004/apr/16/516702785.html?Weighing%20the%20Legal%20Odds>.

¹³¹ Quinn, *supra* note 38, at 139.

¹³² Griffiths, *supra* note 87, at 351.

logic. In addition, because EGMs offer games that are familiar to gamblers like poker and slots, it is easy for gamblers to believe that the games work just as the old familiar betting games did without suspecting that game designers have programmed near misses to appear more frequently than chance would allow. “If . . . excessive gamblers become physiologically aroused when they win *or nearly win*, then in their minds they [may] not [be] constantly losing but constantly nearly winning, reinforcing further play through self-arousal.”¹³³ EGM manufacturers and casinos have considerable incentive, then, to induce just such arousal since it reinforces additional wagers.

Because this practice reeks of deception, Nevada has outlawed symbol replacement as a means to generate near-miss events and the gambling industry claims that electronic slot machine manufacturers no longer program machines to generate near misses in this way.¹³⁴ Thus, if by virtue of the random number generator, the symbols Bar-Lemon-Cherry should appear on the payout line, the machine cannot replace the visual image with one that appears closer to a win, such as Bar-Cherry-Bar, to give the gambler a false sense of nearly winning.

Predictably, the EGM manufacturing industry did not take this lying down, but there was in fact no need to challenge directly laws prohibiting manufactured near-miss events. One way the gambling industry has adhered to the law’s letter while still reaping the psychological benefits of near-miss events is by increasing use of five-reel video slots rather than the traditional three.¹³⁵ Because five reels create a complex web of crisscrossing payout lines, winning symbols can appear more frequently than they would on a three-reel machine without increasing the odds of winning since the odds are simply that much smaller than five, rather than three, winning symbols will appear in succession.¹³⁶ By increasing the number of jackpot symbols that appear, while maintaining a low probability of winning, five-reel machines “greatly enhance[] . . . apparent near misses” without resorting to deceptive programming.¹³⁷

2. *Virtual Reel Mapping: Evading Law by Staying One Step Ahead.*—Although five-reel slots present a means for programmers to work around the laws against nonrandom, programmed near-miss events, programmers have not abandoned the pursuit of finding other still-legal ways to misrepresent the odds of winning. Through a process called “vir-

¹³³ *Id.* at 356.

¹³⁴ See Benston, *supra* note 130 (noting that Nevada outlawed near-miss events on pay lines in 1989); see also Nigel Turner & Roger Horbay, *How Do Slot Machines and Other Electronic Gambling Machines Actually Work?*, J. GAMBLING ISSUES, July 2004, at 1, 28, <http://www.camh.net/egambling/archive/pdf/JGI-issue11/JGI-Issue11-turner-horbay.pdf>.

¹³⁵ Turner & Horbay, *supra* note 134, at 28.

¹³⁶ *Id.*

¹³⁷ *Id.*

tual reel mapping,” programmers can design machines that increase the likelihood that jackpot symbols will appear more frequently above or below the pay line than chance would permit¹³⁸—in effect displaying the very sort of near-miss events that were otherwise banned, but by new and legal means. Near misses give gamblers a false sense of hope, compelling them to gamble more,¹³⁹ whether programming causes them to appear by simply replacing nonjackpot symbols near the payout line with jackpot symbols or by more complicated virtual reel mapping. Thus, while EGM manufacturers have abandoned the most obviously manipulative techniques such as symbol substitution programming due to regulations outlawing the practice and unfavorable publicity, EGM manufacturers continue to thwart users’ abilities to calculate the odds of winning by programming their machines in ways that distort gamblers’ reasoning.

EGM manufacturers now design machines that mimic, on their face, the traditional, mechanical one-armed bandits of yore, which typically had reels of twenty-two symbols that were equally likely to land on the payout line.¹⁴⁰ However, if three-reel electronic slot machines were limited in this manner, multimillion-dollar mega-jackpot prizes would not be feasible as a means of luring gamblers because the odds of winning would be too high given the limited number $((22)(22)(22) = 10,648)$ of combinations possible.¹⁴¹ Virtual reel mapping allows EGM manufacturers to make machines that appear to have the odds of purely mechanical slot machines conform to laws forbidding programmed symbol replacement and create miniscule odds of winning jackpots that belie what gamblers see in the turning reels.

Through virtual reel mapping, manufacturers of electronic slot machines have increased the number of possible stops on each reel from the traditional twenty-two, thus reducing the odds of winning jackpots while maintaining the illusion that each reel still contains about twenty-two stops.¹⁴² Because multiple occurrences of a single nonjackpot symbol (e.g., a Lemon or Blank) can be mapped to a single spot on the wheel, to the gambler’s eye, it appears that nonjackpot symbols occur at a much lower frequency than they actually do.¹⁴³ For example, a virtual reel with hundreds of stops might contain dozens, or even hundreds, of Lemon symbols, but the machine might only display a single video lemon scrolling by on the reel because each virtual lemon is mapped to a single video representation. At the same time, a jackpot Bar symbol that in fact appears only once on a

¹³⁸ See generally Citizen Voice for Gaming Integrity Soc’y, *Real World vs. Virtual World*, <http://www.citizenvoice.ca/CVRealVsVirtual.asp> (last visited Feb. 17, 2006).

¹³⁹ Griffiths, *supra* note 87, at 351.

¹⁴⁰ Turner & Horbay, *supra* note 134, at 28.

¹⁴¹ *Cf. id.* at 11–12. Such a machine, paying out in the millions, could be profitable, but only if gamblers were willing to place very high minimum bets.

¹⁴² See generally Citizen Voice for Gaming Integrity Soc’y, *supra* note 138.

¹⁴³ *Id.*

virtual reel would also be mapped to a single representation on the visual reel. To the gambler's eye, the symbols Bar and Lemon occur with equal frequency, despite the much higher likelihood that nonwinning Lemons will appear on the pay line.¹⁴⁴ In addition, because jackpot symbols on virtually mapped reels appear to the gambler with greater comparative frequency than they would if each possible stop were mapped to its own unique symbol, near-miss events will appear more often than chance would dictate.¹⁴⁵ That is, because jackpot symbols occur with more frequency to the gambler than they would if each possible stop on the reel were mapped to a unique symbol, jackpot symbols are more likely to appear above or below the pay line as well, giving the illusion of near-miss events that have nothing to do with the true odds of winning. Thus, although negative attention brought to deliberately programmed near-miss events has spurred some state legislatures to outlaw at least the most flagrant abuses of the near-miss technique, EGM manufacturers are likely to continue to find ways to make their machines more seductive to gamblers by masking the true odds—and costs—of playing.

EGM manufacturers' use of computer-programming techniques to disrupt gamblers' subconscious calculations of the real odds of winning presents a serious challenge to those who would oppose gambling regulations as an invasion of individuals' liberties. Opponents of gambling regulations who argue that gambling is a matter of free will, choice, and personal liberty must confront the reality that manufacturers of EGMs employ techniques that are a direct attempt to disrupt the reasoning and rationality of gamblers. The ability of EGMs "to hook so deeply into a player's cerebral cortex derives from . . . powerful human feedback mechanisms."¹⁴⁶ The "hard-wiring that nature gave us didn't anticipate electronic gaming devices."¹⁴⁷ That EGMs deliberately tap into players' brain circuitry to hook them on the games undermines any objection that regulations aimed at protecting gamblers interfere with their "free choice," given that manufacturers design their EGMs to interfere precisely with informed decisionmaking. Only vigilant regulation, keeping current with the latest designs, will succeed in combating efforts by the gambling industry to deceive players. Regulation, in fact, can *enhance* gamblers' capacity to exercise their free choice.

VI. GAMBLERS' LAWSUITS: MOSTLY LEMONS

Some casino patrons, arguing that EGM manufacturers and casinos should be held liable for providing access to machines designed with the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Griffiths, *supra* note 87, at 351.

¹⁴⁷ *Id.* (quoting Howard Shaffer, Director of the Division on Addictions at Harvard Medical School).

deliberate intent to deceive gamblers, have filed lawsuits to recover their gambling losses, most notably in the widely anticipated class action lawsuit, *Poulos v. Caesars World Inc.*¹⁴⁸

In *Poulos*, plaintiff representatives filed a class action suit against “manufacturers, distributors, operators, and owners of electronic slot machines and video poker machines, [and] owners and operators of casinos and cruise ships where such machines are played.”¹⁴⁹ The proposed class included “hundreds of thousands, if not millions, of individuals who have played video poker or electronic slot machines.”¹⁵⁰ The plaintiffs sought to argue in court that the defendants defrauded them by leading them to believe that EGMs “operate[d] in the same manner as . . . table poker and mechanical reel slots.”¹⁵¹ With regard to virtual reels, the plaintiffs claimed that the “winning symbols that spin by on machines’ ‘virtual wheels’ appear more frequently than they show up on the pay line when the wheels stop, making the odds appear better than they are.”¹⁵² The plaintiffs contended that use of this “programming tactic to manipulate the psychology of the game . . . encourag[ed] players to believe that they are just missing jackpots and . . . that the odds of a jackpot are greater than they are.”¹⁵³ With regard to video poker, the plaintiffs alleged that “video poker machines do not replicate a random deal from a conventional deck of cards.”¹⁵⁴ Instead, “the results of individual plays are predetermined” by a computer, which “gives the manufacturers and casinos the ability to orchestrate and know in advance when and with what frequency a machine will ‘deal’ a winning ‘hand.’”¹⁵⁵

The plaintiffs were ultimately unable to argue the merits of their claims in court because both the district court and the court of appeals denied the plaintiffs’ motion for class certification.¹⁵⁶ In rejecting the proposed class, the Ninth Circuit noted that a plaintiff “claiming that the Casinos’ misrepresentations caused her to play the . . . machines and suffer losses must do more than merely allege causation. . . . It is not enough to say, ‘I played the games and I lost money’”¹⁵⁷ Instead, the court noted that for each individual, the harm associated with gambling machines is individualized.¹⁵⁸ “Gambling” the court said, “is not a context in which . . . potential class

¹⁴⁸ No. CV-94-1126-RLH-RJJ, 2002 WL 1991180 (D. Nev. June 25, 2002), *aff’d*, 379 F.3d 654 (9th Cir. 2004).

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Poulos*, 379 F.3d at 662.

¹⁵¹ *Poulos*, 2002 WL 1991180 at *1.

¹⁵² Benston, *supra* note 130.

¹⁵³ *Poulos*, 379 F.3d at 661.

¹⁵⁴ *Id.* at 660.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 658.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

members are always similarly situated.”¹⁵⁹ Some gamblers in the class may play the games without any concern for the odds of winning, while others may play despite being “fully aware of how the machines operate.”¹⁶⁰ Because the potential class members’ experiences were too disparate, the court determined that individual reliance must be shown and thus that class certification was improper.¹⁶¹

The court did not eliminate the possibility that each *individual* plaintiff could go forward with a claim, provided individual reliance were established. In fact, the court provided examples of how individuals might show such reliance.¹⁶² An individual plaintiff might show that “the Casinos’ failure to inform players that the electronic slot machines operate differently than their mechanical counterparts affected her decision to play.”¹⁶³ Alternatively, a plaintiff might argue that because “electronic slot machines look like traditional slot machines” the manufacturers of these machines and the casinos that make them available led him to believe they operated similarly.¹⁶⁴ But each plaintiff would still need to “establish that she was aware of how the mechanical slot machines operated, was unaware that the electronic slot machines operated differently than those machines, and was motivated to play the electronic slot machines based on her knowledge of these factors.”¹⁶⁵

The *Poulos* decision places an inordinate burden on the individual plaintiff. The appeal of a class action suit lies in enabling multiple parties to pool costs and information against a more powerful opponent, thus enabling plaintiffs who have suffered crippling financial losses from EGMs to bring a lawsuit that they might not be able to afford individually.¹⁶⁶ Even if individual plaintiffs manage to find lawyers willing to represent them on contingency bases, proving reliance may be an insurmountable obstacle for many casino patrons despite the *Poulos* court’s suggestions.¹⁶⁷ The court’s proposed paths for individual plaintiffs assume the rationality of an ill-informed consumer.¹⁶⁸ However, as we have seen, EGM manufacturers merge sophisticated technology with psychological manipulation, programming the machines to thwart consumers’ rational choices by taking aim at reasoning functions that are most vulnerable to influence and pathol-

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 666.

¹⁶¹ *Id.*

¹⁶² *Id.* at 665.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Paula Batt Wilson, Note, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 301–05 (1994) (describing generally the benefits of class action suits for plaintiffs).

¹⁶⁷ *Poulos*, 379 F.3d at 665.

¹⁶⁸ See *supra* notes 157–159 and accompanying text.

ogy. Thus, even a patron who “knows” how EGMs operate might be induced to gamble more than she otherwise would due to subtle manipulation by the machines’ manufacturers. By employing cunning psychological mechanisms that enhance the likelihood that a gambler will continue to gamble against her better judgment and in spite of any rational understanding, EGM manufacturers effectively destroy many gamblers’ legal claims.

Individual pathological gamblers who might have cause to challenge casinos in court may face a further, extralegal obstacle that prevents the filing of claims: shame. Many pathological gamblers are reluctant to pursue legal action against casinos for fear that they will be tagged “disgruntled losers.”¹⁶⁹ Others may want to avoid the embarrassment of appearing before a jury and admitting their enormous debt and mental illness.¹⁷⁰ It is the extraordinary gambler who has the psychological wherewithal to mount a case, but even the extraordinary gambler is likely to find no relief because claims plaintiffs do file against casinos typically end unfavorably for pathological gamblers.¹⁷¹ If pathological gambling is to be addressed in a legal setting, looking to the courts for relief is unlikely to lead to a satisfactory solution anytime soon. Legislatures, then, present the best venue in which to address problems associated with pathological gambling.

VII. REGULATING GAMBLING TO ADDRESS PROBLEMS ASSOCIATED WITH PATHOLOGICAL GAMBLING MUST BE A NATIONAL PRIORITY

Regulating gambling sensibly *ex ante* to prevent and avoid its inherent problems is preferable to litigating haphazardly *ex post*. The problems associated with pathological gambling, including depression, debt, familial neglect, crime, and suicide, are a sort of “social pollution” that naturally accompanies unchecked gambling, just as environmental damage naturally accompanies certain unregulated polluting industries.¹⁷² Evidence from the courts demonstrates that they are not terribly effective at cleaning up gambling’s pollution. At times courts may show lenience to gamblers who are

¹⁶⁹ John Warren Kindt, *Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?*, 82 OR. L. REV. 221, 240 (2003).

¹⁷⁰ *Id.*

¹⁷¹ Bentson, *supra* note 130 (noting that cases brought by gamblers are most often dismissed or settled quietly, “making no waves industrywide”); *see, e.g.*, *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003) (holding that Indiana law imposes no duty of care on casinos to protect pathological gamblers from their own injurious behavior). *Compare* *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003) (vacating and remanding with instruction to the lower court to dismiss the case for lack of subject matter jurisdiction after finding RICO claim to be frivolous), *with* *Harrah’s Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517 (8th Cir. 2002) (holding that gamblers’ casino “markers” were a debt that need not be paid by bankruptcy trustee).

¹⁷² Professor Koppelman makes the point that in an environmental pollution scenario, it is preferable that Congress regulate industry to prevent known environmental harms, rather than leave industry free to pollute and require individuals to prove, only after the fact, that they suffered injury. Interview with Andrew Koppelman, Professor, Northwestern Univ. Sch. of Law, in Chicago, Ill. (Oct. 12, 2004).

in bankruptcy¹⁷³ or may grant downward departures for crimes committed to fund gambling debt,¹⁷⁴ but class actions¹⁷⁵ and individual claims¹⁷⁶ against casinos and EGM manufacturers have largely been dismissed in favor of defendants. As the *Poulos* case suggests, courts may even exacerbate the difficulties facing plaintiffs by requiring them to show individual reliance, despite considerable obstacles in providing proof.¹⁷⁷ Furthermore, courts are utterly unequipped to deal with other personal aspects of gambling's pollution, such as depression, familial neglect, and suicide.

A better approach is to leave gambling regulation to the legislative branch, rather than leave courts to clean up the mess left by a deregulated industry. Even critics of lawsuits brought against casinos by pathological gamblers would likely agree that limited regulation by legislatures designed to account for the interests of both problem and nonproblem gamblers is preferable to "litigation . . . [as] a substitute for failed legislation" and, as here, the absence of federal regulation.¹⁷⁸ Accommodating those interests is the subject of the sections below.

A. *Prohibition, Deregulation, and the Pursuit of a Feasible Middle Path*

Seeking to eliminate the social-welfare problems associated with casino gambling, some welcome its total prohibition.¹⁷⁹ Other commentators, reflecting on the temperance movement of the early twentieth century and its ill-fated campaign to prohibit the manufacture, sale, and transportation of alcohol nationwide,¹⁸⁰ suggest that a total prohibition on gambling would be "no more likely to eliminate pathological gambling than . . . prohibition . . . eliminated alcoholism."¹⁸¹ Alcohol prohibition has been labeled a failure in part because it was linked to increased corruption and crime and a counterintuitive rise in alcohol consumption and the number of drinking es-

¹⁷³ See, e.g., *In re Crutcher*, 215 B.R. 696 (Bankr. W.D. Tenn. 1997) (discharging pathological gambler's \$11,885.75 debt); Benston, *supra* note 130.

¹⁷⁴ See, e.g., *United States v. Liu*, 267 F. Supp. 2d 371, 376–77 (E.D.N.Y. 2003) (granting defendant four-point downward departure for using unauthorized credit card checks issued to others "to reflect his significantly reduced mental capacity caused by his pathological gambling addiction"); *United States v. Checoura*, 176 F. Supp. 2d 310, 311 (D.N.J. 2001) (granting defendant two-point downward departure in conviction for interstate transportation of stolen property where "compulsive gambling disorder significantly impaired [defendant's] ability to control her wrongful behavior").

¹⁷⁵ See, e.g., *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004).

¹⁷⁶ See, e.g., *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003).

¹⁷⁷ See *supra* notes 157–159 and accompanying text.

¹⁷⁸ Robert A. Levy, *Wagering War*, 25 *MANAGERIAL & DECISION ECON.* 185, 189 (2004).

¹⁷⁹ Kindt, *supra* note 102, at 259 ("The best policy approach from a social welfare perspective is to simply re-criminalize or substantially limit all types of legalized gambling activity at the state and national levels.")

¹⁸⁰ U.S. CONST. amend. XVIII.

¹⁸¹ Quinn, *supra* note 38, at 133 (citation omitted). Indeed, Alcoholics Anonymous was founded in the years just following Prohibition, the period when many of the early members did their heaviest drinking. See, e.g., 3 *ALCOHOLICS ANONYMOUS* 5, 213 (3rd ed. 1976).

tablishments.¹⁸² The lessons of Prohibition, therefore, should be acknowledged and considered in the gambling debate say the opponents of gambling's recriminalization.¹⁸³

Gambling prohibition, even if it could reduce pathological gambling, may not even be feasible: "One of the most problematic long-term consequences of legalizing gambling is the difficulty, if not impossibility, of undoing it."¹⁸⁴ States cannot deregulate casino gambling as a "'try it and see' experiment Once the casino opens and the dice begin to roll, gambling creates an instant constituency. People depend on it for jobs. Governments depend on it for revenues."¹⁸⁵ Moreover, for the vast majority of gamblers that play for fun without deleterious consequences, prohibition would interfere with their free choice to engage in what is, for them, innocuous escape and adult entertainment.

Nevertheless, a number of studies show that a link exists "between increases in gambling activity and increases in pathological gambling."¹⁸⁶ Thus, for pathological gamblers, "choice" gives way to compulsion. Though the trend in recent years has been toward increased deregulation of the gambling industry, gambling ought to remain a heavily regulated industry given its potential for serious harm to the pathological gambler and her community. A wise approach, "[g]iven the recent expansion and generally accepted inevitability of gambling," is to seek "a rational middle road . . . between prohibition and deregulation" that aims to prevent pathological gambling.¹⁸⁷ The expertise of those who study and treat pathological gamblers should be put to use to devise effective strategies aimed not at prohibiting gambling but at protecting the pathological gambler.¹⁸⁸ Whatever regulatory scheme is established, it should be one that accommodates the liberty interests of millions of gamblers who experience no grave side effects while recognizing that, for some gamblers, choice is seriously impaired not only by their pathologies but also by efforts of the gambling industry to exploit those pathologies.¹⁸⁹

¹⁸² Mark Thornton, *Alcohol Prohibition Was a Failure* (Cato Institute, Policy Analysis Paper No. 157, 1997), available at <http://www.cato.org/pubs/pas/pa-157.html>.

¹⁸³ *Id.*

¹⁸⁴ GOODMAN, *supra* note 40, at 9.

¹⁸⁵ *Id.* at 9–10 (quoting Stephen P. Perskie, "the politician who led the battle to legalize gambling in Atlantic City and a former chairman of New Jersey's Casino Control Commission").

¹⁸⁶ Quinn, *supra* note 38, at 133.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

B. Casinos and EGM Manufacturers Need Not View Regulations as Wholly Contrary to Their Interests

Advocates of gambling regulations that would seek to prevent gambling pathology in a decriminalized setting argue that enforcement of gambling regulations “would have to be the responsibility of an external regulatory agency.”¹⁹⁰ The presumption is that casinos would “lack sufficient motivation to implement” regulations on their own.¹⁹¹ Indeed, if casinos were left to self-regulate, they would no doubt be tempted to skirt regulations that cut into their revenues. Regulations protecting pathological gamblers would undoubtedly be the very regulations casinos would reflexively resist: “[P]athological gamblers provide a disproportionate share of casino revenue, so it would seem that limiting pathology would be in conflict with [casinos’] business goals.”¹⁹² Thus, trusting the gambling industry to self-regulate in a way that protects pathological gamblers may be as futile as putting mice in charge of protecting cheese.¹⁹³ If regulation of casinos and EGMs is to have any effect, it must be carried out by an external agency that is more likely to provide effective monitoring and enforcement.

Though casinos would no doubt oppose an outside enforcement agency, they could welcome—even if begrudgingly—certain regulations that enhanced their image with a skeptical public, especially regulations that would instill consumer confidence in the integrity of the games.¹⁹⁴ Casinos battle the image “[i]n the popular imagination [of] the ‘con’ man forever hover[ing] in the shadows of gambling.”¹⁹⁵ Government oversight would help to reverse this negative image and aid casinos in their public-relations campaigns for greater consumer legitimacy because outside regulation would promote the public belief that casino games are controlled, monitored, and, above all, fair.¹⁹⁶ “By doing what reasonably can be done to limit the development of pathological gambling, even if forced [by government regulation], casinos would take a huge step towards becoming [accepted as] legitimate business and legitimizing gambling as a form of

¹⁹⁰ *Id.* at 134.

¹⁹¹ *Id.*

¹⁹² *Id.* at 135 (citation omitted).

¹⁹³ *See id.* at 141 (“Casinos . . . will not voluntarily take the needed steps to limit their contribution to the development of pathological gambling. Casinos will view these changes as impediments to their goal of making money. If significant changes are to be made in casinos to limit pathological gambling, the impetus and enforcement will have to come from an external source, such as local or federal government.”).

¹⁹⁴ NGISC, FINAL REPORT, *supra* note 27, at 3-1 (stating that regulations that focus on “ensuring the integrity of the games offered [serve] a function often valued most by . . . gambling establishments themselves”).

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

[innocuous] entertainment.”¹⁹⁷ Admittedly, consumer-protection regulations may decrease casinos’ profitability, explaining why casinos and EGM manufacturers are not rushing to self-regulate in search of good will. Even so, outside regulation would bring to casinos some benefit by raising the stature of casinos in the public eye.¹⁹⁸ It is possible that a lessening of the public stigma that would accompany increased consumer good will could in fact be profitable in the long run were casinos to become regarded as a more consumer-friendly and wholesome industry that took adequate account of the problems associated with pathological gambling.

Additionally, efforts by the gambling industry to cooperate with government agencies entrusted with enforcing gambling regulations would likely quell some of the voices that now call for gambling’s total prohibition. If regulations allowed casinos to operate, but only under terms that genuinely accounted for, and addressed the problem of, pathological gambling, “communities [might be] more willing to pay the social costs associated with gambling.”¹⁹⁹ Under the current regulatory scheme, casinos are hotly debated, with some arguing that casinos are such a drain on communities that they should be banned and held liable in courts for their detrimental impact.²⁰⁰ Good will, then, though perhaps not as profitable as the exploitation of human weakness, might still be good for business.

C. *Avoiding Paternalistic Regulations as Unduly Invasive Intrusions on Individual Liberties*

Critics of regulation may reflexively fear that a regulatory plan will necessarily smack of paternalism at its worst, arguing that rational adults making rational choices need no protection from themselves. Regulations should, wherever possible, avoid paternalism because “[n]o . . . adult likes to believe he stands in relation to the states as a child to an adult. Every person likes to believe he knows what is best for himself and that it is not

¹⁹⁷ Quinn, *supra* note 38, at 140. Indeed, the Interactive Gaming Council, “a not-for-profit organization . . . established to . . . establish fair and responsible trade guidelines and practices that enhance consumer confidence in [internet] gaming products and services,” promotes the implementation of “systems and controls to identify and curtail compulsive gambling.” Interactive Gaming Council, IGC Regulation Position Statement—Considerations for Industry, http://www.igcouncil.org/press.php?id=217§ion_name=News (last visited Feb. 17, 2006) (noting further that “the procedures instituted should include the ability for a player to set bet/loss limits, [and] possibly win limits”). Of course, those who desire deregulation of Internet gambling in the United States have every incentive to support accompanying measures that would promote responsible gambling in order to build public support for the deregulation of this controversial form of gambling. In fact, the proponents of legalized *casino* gambling employ similar tactics to garner public support when lobbying for the introduction of physical casinos, as in Iowa where loss and bet limits were introduced alongside the advent of riverboat casinos in that state. See discussion *supra* note 68.

¹⁹⁸ Quinn, *supra* note 38, at 140.

¹⁹⁹ *Id.*

²⁰⁰ Kindt, *supra* note 101, at 17 (concluding that states may have triable claims against the gambling industry for recovery of the negative costs casinos bring).

the state's business to overrule his choice[s]"²⁰¹ Yet, the law is replete with examples of paternalism in a variety of contexts, including laws requiring seatbelt use in automobiles and helmet use on motorcycles; laws forbidding recreational drug use, suicide, and swimming in the absence of a lifeguard; compulsory education laws; and the Social Security system's laws, which compel retirement investment.²⁰² In the EGM context, libertarian arguments that rely on a premise of free choice confront substantial evidence that the manufacturers of such machines design them purposefully to interfere as much as possible with an individual's free choice in an effort to engineer compulsion.²⁰³

While paternalistic laws are hotly contested because they are perceived as infringements of individual liberties, some scholars argue that certain laws enacted to promote citizens' best interests are consistent with the antipaternalism principle if designed narrowly to respect individual liberties.²⁰⁴ For example, Dale Carpenter writes that "[t]he antipaternalism principle does not prevent the state from adopting an information-providing strategy to achieve what it thinks are citizens' best interests."²⁰⁵ "[T]his information-providing strategy may even take an information-forcing form, permitting the state to require [the disclosure of] certain additional information relevant to citizens' rational decision-making"²⁰⁶ Where the government believes that citizens are making ill-formed, ill-informed choices based on insufficient knowledge of relevant information, the state is entitled to force information disclosure, which respects the antipaternalism principle in that disclosure allows consumers to make fully informed choices without restricting the scope of those choices.²⁰⁷ The alternate idea, that an individual might make better choices if she were provided with less information relevant to her options, seems patently absurd.

Neither is the antipaternalism principle offended when "the state, in the limited context of commercial speech . . . aid[s] citizens' informed self-determination by prohibiting falsity, deception, or overreaching."²⁰⁸ "[I]f the constitutional problem with paternalism is that it fails to respect the capacity for rationality in individuals, then regulating to maximize the exercise of that rational deliberation may not be problematic."²⁰⁹ Thus, where consumers are known to make ill-informed choices based on lack of information or reliance on false information, the government should step in with

²⁰¹ Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 650 (2004).

²⁰² *Id.* at 580, 650.

²⁰³ Rivlin, *supra* note 110.

²⁰⁴ Carpenter, *supra* note 201, at 622.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 622–23.

²⁰⁷ *Id.* at 622.

²⁰⁸ *Id.* at 623.

²⁰⁹ *Id.* at 624.

regulatory measures to provide true and full information to the consumer so that she can make a maximally informed, rational choice. Such regulatory measures, because they leave choice in the hands of the consumer, do not violate the antipaternalism principle.

Gambling presents a special challenge for regulators in that the population of gamblers is not a homogenous one.²¹⁰ The occasional, recreational gambler may have very little in common with the pathological gambler. As such, careful regulators mindful of arguments against intrusively paternalistic legislation must pursue a middle course that respects both the liberty interests of the unharmed majority and the real harms faced by the minority that is pathologically addicted to gambling. This can be achieved by limiting regulatory measures to those that are designed to restore pathological gamblers' rationality. Such an approach would protect pathological gamblers while adhering to the antipaternalism principle, because it would help pathological gamblers make rational choices without restricting the ability of nonproblem gamblers to make such choices.

Currently, the problem does not appear to be that governments are overprotecting the small minority to the detriment of the majority's liberty interests. Rather, as state governments today liberalize their gambling laws, they are failing to disaggregate the gambling population in order to recognize the problems facing the pathological minority. Though some state governments may have tried to chart a middle course when first decriminalizing gambling by, for example, installing ceilings on wagers and losses, these limits have eroded over time as states in competition for gambling revenues have raced to the regulatory bottom.²¹¹ Because protective measures are in freefall, the occasion is ripe for the federal government to step in with regulatory control.

*D. "Libertarian Paternalism" as the Philosophical Foundation
for Regulations That Protect Gamblers by Putting Information and Control
in Their Hands*²¹²

Clearing an appropriate regulatory path between legislation that would impose undue, paternalistic liberty restrictions on nonpathological gamblers and deregulation that would ignore the pathological gambler should be the goal of any governmental body addressing legalized gambling. Cass Sunstein and Richard Thaler, in their article *Libertarian Paternalism Is Not an Oxymoron*, state that "it is both possible and desirable for private and public institutions to influence behavior while also respecting freedom of choice."²¹³ They promote the idea that although "[t]he idea of libertarian

²¹⁰ See *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004).

²¹¹ See *supra* Part II.

²¹² See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

²¹³ *Id.*

paternalism seems to be a contradiction in terms,” the seemingly paradoxical principles are reconcilable.²¹⁴

The authors acknowledge that some dogmatic libertarians are likely to object to any suggestion that paternalistic laws are acceptable.²¹⁵ However, Sunstein and Thaler respond to this anticipated criticism by exposing what they believe is the fallacious assumption undergirding the dogmatists’ reasoning: “that almost all people, almost all of the time, make choices that are in their best interest.”²¹⁶ On the contrary, “people’s preferences are [often] unclear and ill-formed, and their choices will inevitably be influenced by default rules, framing effects, and starting points.”²¹⁷ This is especially true when people are “inexperienced and poorly informed.”²¹⁸ Indeed, when preferences are unclear and ill formed, “paternalism cannot be avoided.”²¹⁹ Under these circumstances, “libertarian paternalists should attempt to steer people’s choices in welfare-promoting directions without eliminating freedom of choice.”²²⁰

However, while it is one thing to “attempt to steer” individuals in their decisionmaking, it is quite another thing to block individual choices altogether. Sunstein and Thaler avoid paternalistic restrictions that impose too greatly on individual choice, asserting that “in general, people should be free to opt out of specified arrangements if they choose to do so.”²²¹ Thus, Sunstein and Thaler advocate a system that integrates the best aspects from both paternalism and libertarianism without causing either to subsume the other.

Sunstein and Thaler do not discuss gambling in their article,²²² but their theory is directly applicable to the gambling milieu. Pathological gamblers are marked by the ill-formed choices they make when wagering, and ill-formed choices are precisely the sort of menace Sunstein and Thaler address.²²³ Casinos and the manufacturers of EGMs further reduce the clarity of gamblers’ choices through purposeful game design.²²⁴ Libertarian pater-

²¹⁴ *Id.* at 1160.

²¹⁵ *Id.* at 1162.

²¹⁶ *Id.* at 1163.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 1161.

²²² The authors do, however, note, “[M]any smokers, drinkers, and overeaters are willing to pay for third parties to help them choose better consumption sets.” *Id.* at 1168. The assumption behind this statement seems to be that addictive behaviors negatively influence individuals’ abilities to engage in free choice.

²²³ Quinn, *supra* note 38, at 138 (“Gamblers seem to be either ill-informed or rather poor mathematicians as a group, relying on faulty logic and fantasies about how things ‘should be’ when wagering.” (citation omitted)).

²²⁴ See generally Rivlin, *supra* note 110.

nalism applies, then, in the gambling context inasmuch as manufacturers program EGMs to manipulate users' rational thought processes, taking aim directly at the brain to manufacture the very ill-formed choices by which they attain their greatest profits.

Sunstein and Thaler present a number of scenarios where a regulatory approach that conforms to their libertarian-paternalism model is recommended,²²⁵ and while no example deals specifically with gambling, some of the authors' illustrations provide ideas worthy of adaptation. While it is not necessary for the purposes of this Comment to flesh out each example in elaborate detail, it will help to outline briefly the sorts of regulatory decisions the authors laud as effective means to improve consumer choice in decisionmaking.

First, Sunstein and Thaler recommend opt-out provisions as a means of assuring free choice where some default choice is necessarily imposed on a consumer.²²⁶ For example, an employer has to make a choice to either automatically enroll all new employees in a 401(k) plan, giving them the option to opt out, or to require employees to opt in when hired. If the employer chooses the former, an employee who does not want to participate must make the active choice to withdraw, just as she would have to make the choice to enter the program if the automatic participation policy were not in place. Either way, employee choice is maintained since no employee *must* enroll. Given that the employer must, by necessity, decide whether to create an opt-out or opt-in policy, Sunstein and Thaler argue that it makes the most sense to choose as the default the policy that is more likely to promote employees' long-term economic interests: providing default coverage so long as an opt-out provision allows employees to determine whether their interests are truly being promoted by the employer.²²⁷ Regulations implemented in the gambling context should be fashioned to permit and even promote consumer free choice. Opt-out provisions are one way to promote that choice.

Loss limits, as the states have imposed them, are a poor example of liberty-promoting gambling regulation. While well intended as a measure to limit the amount gambled by each individual, uniform loss-limit regulations are both overinclusive and underinclusive in that they impose dollar limits that are meaningless for the wealthiest gambler and ineffective as a means to protect the poorest. Alternatively, if regulations required each *individual* to establish his own loss limit for the day, consumer choice would be maintained and, in fact, mandated. Allowing gamblers to set personalized loss limits before gambling—before the machines take hold of their brains—promotes decisionmaking that is uncorrupted by psychological manipulation. Because EGMs are so highly programmable, it would be simple

²²⁵ Sunstein & Thaler, *supra* note 212, at 1184–90.

²²⁶ *Id.* at 1184.

²²⁷ *Id.* at 1184–85.

to design a machine which would allow gamblers to set a loss limit of their own. Just as an ATM machine allows a patron to request his own withdrawal amount, an EGM could be programmed to permit gamblers an opportunity to enter a self-selected loss limit. Even if EGMs were required by regulation to display a suggested default loss limit (much like ATM machines suggest typical withdrawal amounts when patrons begin a withdrawal transaction), the inclusion of an opt-out provision would at once present the gambler with an example of a potentially reasonable choice, at the same time allowing him to exercise his free choice by overriding the machine's suggestion. While such a policy would admittedly not protect every gambler from pathology since the amount of the loss limit would be left entirely to each individual gambler, it at least presents a method to get the gambler to make a choice before gambling, rather than during play when the potential for ill-formed decisionmaking is greatest.

Sunstein and Thaler also promote the use of waiting, grace, and cooling-off periods as means to maximize consumer choice in situations where impulse may be overriding reason.²²⁸ They point to the example of the Age Discrimination in Employment Act ("ADEA"), which permits employees to waive certain rights upon retirement, but requires both a waiting period of at least twenty-one days, during which the employee can consider the agreement before execution, and a seven-day grace period after any agreement is signed, during which the employee can unilaterally revoke.²²⁹ Thus, the waiting and grace periods maximize choice in that they never force an employee to make any particular decision, but they also provide extra protections that emphasize the magnitude of the choice being made and allow for correction of poorly formed choices.

Applied to the gambling context, a gambler who reaches a self-imposed loss limit could be given an opportunity to override his own previously chosen limit, but not immediately after the limit is reached. At that point, the gambler may still be intoxicated from a stimulating gambling episode and thus likely to make an ill-formed choice. Before increasing his limit, the gambler might wait for a cooling-off period to pass, giving his brain time to come down from the gambling "high" so that he might make his choice from a more sober state of mind. While some might object that waiting periods constitute an interruption of the gambler's free choice, note that the waiting period would go into effect only after the loss limit, which the gambler chose for himself, was reached. Thus, cooling-off periods, triggered by each gambler's chosen threshold, could be effective means by which to promote sober decisionmaking and prevent pathological gambling.

A similar mechanism with an opt-out-plus-cooling-off-period provision could be implemented such that gamblers would choose not just a personal loss limit, but also a personal "walk-away" threshold. Successful

²²⁸ *Id.* at 1184–88.

²²⁹ *Id.* at 1186–87.

gamblers, as told in song, “know when to walk away,”²³⁰ but pathological gamblers typically fail to harvest their winnings on those occasions when they are beating “the house.” If EGM players were required to set their own walk-away figure before beginning to gamble, they could make well-formed choices before the machines hooked them into their circuitry. Opt-out provisions coupled with cooling-off periods would ensure, as in the loss-limit discussion above, that informed personal choice is always maintained.²³¹

In summary, Sunstein and Thaler generally suggest that in situations where consumers make ill-formed choices, libertarian objections to regulations that promote the formation of informed choice as paternalistic are unnecessarily inflexible and actually run counter to the objectors’ support of individual liberties because liberties are promoted wherever choice is maximized.²³² If maximizing rational choice is the ultimate goal, then knowledgeable, rational decisionmaking can hardly be objectionable.

E. Other Proposals and Their Adherence to Antipaternalism Principles

Concerned about the problems associated with pathological gambling, commentators have proposed regulatory reforms seeking to limit the gambling industry’s contribution to pathology. This section describes some of those proposals and briefly evaluates their feasibility and value according to the principles established above. It does not address every proposal encountered in the literature, but instead pays special attention to proposals that either directly or tangentially address the problems associated with EGMs.

In his article *First Do No Harm: What Could Be Done by Casinos to Limit Pathological Gambling*, Frank L. Quinn, Director of the South Carolina Center for Gambling Studies, outlines a number of proposals to curb

²³⁰ KENNY ROGERS, *The Gambler*, on THE GAMBLER (United Artists 1978).

²³¹ Note that any concern that a gambler might easily evade his self-imposed limits merely by switching EGMs or traveling to another casino or state might be answered by using a simple mechanism already employed by casinos: “players’ cards.” If gamblers were required to bet using personal-identification cards that recorded their gambling activity rather than cash, their self-imposed loss limits, walk-away limits, or both could be programmed into the cards’ memories to be read by any EGM. If a national standard for the cards were set, a gambler would be unable to avoid regulation by simply switching machines, hopping between casinos, or crossing state lines. While it is possible that a black market for these cards could emerge if gamblers developed a sufficiently urgent compulsion to gamble after reaching the limits on their personally assigned cards, criminal penalties could be assessed for selling unauthorized cards not assigned to the end user, or gamblers attempting to retrieve winnings on cards not assigned to them could have those cards confiscated. It is possible, though, that any concerns raised about a black market would be overstated given that gamblers always have the option under the proposals in this Comment to set their own limits and to override them after a cooling-off period. The windows of opportunity available to black market sellers of unauthorized cards during gamblers’ cooling-off periods may be simply too small to make such a market worth entering at all.

²³² See generally Sunstein & Thaler, *supra* note 212.

pathological gambling through governmental regulation of casinos.²³³ Several of his proposals specifically address EGMs. While Quinn seems to have a solid understanding of EGMs and their potential for harm to the pathological gambler, many of his proposals are excessively paternalistic and fail to take into account the fact that most gamblers are not at risk for pathological gambling.

For example, Quinn argues that limiting jackpot amounts would discourage the development of pathological gambling, since large jackpots are particularly alluring to pathological gamblers.²³⁴ While that may be true, the proposal fails to consider that large jackpots may provide many non-pathological gamblers with a valued form of fantasy and escapism.²³⁵ The idea of winning a jackpot is an essential part of the fun. The gambling industry frequently envelops its games with fantastic prizes and opulent atmospheres to attract customers. But so, too, do the hotel, fashion, theater, film, and other industries involved in potentially escapist entertainment forms drape their products with illusions and fantasy, offering to improve consumers' perhaps-underwhelming individual realities. "The elegance and opulence of the [\$2 billion] Bellagio [hotel and casino in Las Vegas] is designed to make a used car salesman from the Midwest feel [like,] and spend as lavishly as[,] a Medici merchant prince."²³⁶ But so what? In the open market, fantasy can be sold at a premium if the market will bear it. Taking the fantasy of a mega-jackpot away from the average person infringes too greatly on recreational gamblers' escapist fun.

Another proposal by Quinn, to forbid patrons from sitting while on the gambling floor in an effort to limit the amount of time people gamble, is similarly paternalistic.²³⁷ While this proposal would certainly reduce the ability of pathological gamblers to gamble for great lengths of time, it would too negatively impinge on the liberty of nonpathological gamblers, who ought to have the opportunity to choose to sit or stand while gambling.²³⁸

Quinn's proposal to mandate the posting of odds-of-winning charts on

²³³ Quinn, *supra* note 38, at 135–40.

²³⁴ *Id.* at 135.

²³⁵ Countless numbers of legally available products and services in the American economy similarly promote escapist leisure, magical thinking, fantasy, and sloth in the absence of regulation. Outlawing gambling outright or capping jackpots merely because they foster escapism is inappropriate as a justification for infringing on an individual's decision to fantasize. Instead, regulators should craft provisions such that they disaggregate pathological and nonpathological gamblers, protecting one without harming the other in recognition that one person's temporary escape into fantasy may be another's chronic and debilitating pathology.

²³⁶ Quinn, *supra* note 38, at 136.

²³⁷ *Id.* at 137.

²³⁸ Of course, some people are physically unable to stand or remain standing for a prolonged period, but harping on this flaw in Quinn's proposal is beyond the scope of this Comment.

all EGMs seems more reasonable.²³⁹ Because pathological gamblers (if not all gamblers) have a difficult time calculating the odds of winning,²⁴⁰ informing gamblers at the outset of the expected odds of winning does nothing more than allow gamblers to make a better-informed decision to gamble at a particular machine. This sort of information-providing regulation, which does nothing to infringe upon a person's decision to gamble, is in clear accordance with antipaternalism principles.

However, the proposal may fall short of being truly effective, given that EGMs designed with virtual reels may cause gamblers to calculate their odds of winning as better than they actually are.²⁴¹ If over 500 possible stops exist on a virtual reel—very few of which are jackpot symbols—but only twenty-two possible stops are displayed to the gambler, the gambler may be subconsciously led to believe during game play that the chance of winning a jackpot is higher than it actually is, even though the gambler consciously knows the posted odds tell a different story.²⁴² Merely posting odds, then, while seemingly helpful, may not go far enough to provide gamblers with the *best* possible information they need to make an informed choice.

A better regulation might involve eliminating virtual reel mapping altogether, prohibiting the mapping of multiple stops on a reel to a single symbol in order to create the illusion that jackpots are more likely. Instead, a slot machine would be required to display reels as if they were truly mechanical reels. That is, if a slot machine reel is designed to stop on 22 (or 64, or 512) stops in equal likelihood, then the gambler should see reels displayed that reflect 22 (or 64, or 512) stops. The gambler would then see a display that accurately reflects, rather than masks, the true odds of winning. This proposal in particular shows how important it is that any regulations promulgated to effectuate gambler choice be created by people who are expertly familiar with contemporary gambling since certain simple solutions, such as posting odds, may be mere window dressing to a problem that can only be addressed properly by taking into account the elaborate design techniques EGM manufacturers use to mask the real odds of winning.

The proposals above are examples illustrating general principles rather than an exhaustive list of recommended regulations. Legal gambling assumes a variety of forms, and while this Comment specifically addresses EGMs, the principles advanced here can be transferred easily to other gambling media. Furthermore, the proposals suggested above are but a few that might be implemented in the EGM context. With a solid set of principles in hand, regulators could change the face of gambling throughout the industry.

²³⁹ Quinn, *supra* note 38, at 139.

²⁴⁰ *Id.*

²⁴¹ See *infra* notes 140–145 and accompanying text.

²⁴² See *infra* notes 140–145 and accompanying text.

Note that any specific proposal made in this Comment may be further limited because it necessarily addresses only the current state of technology now used by the gambling industry. Because EGM manufacturers use the latest available research and technology in their efforts to attract more gamblers and make their machines more profitable, any current proposal is limited in that it will likely fail to anticipate the imaginative ways in which game designers will develop their technologies to stay a step ahead of regulation. Nevertheless, the principles set forth in this Comment provide a framework for regulation that regulators tasked to address the issues on an ongoing basis can employ today and in the future.

VIII. TO ENSURE THE MEANINGFUL IMPLEMENTATION OF EFFECTIVE GAMBLING REFORMS, CONGRESS MUST CREATE AN INDEPENDENT FEDERAL GAMBLING REGULATORY COMMISSION

This Comment calls for the creation of a Federal Gambling Regulatory Commission as the wisest course to address effectively the proliferation of legalized casino gambling. Only a national regulating agency will have the requisite expertise, authority, and focus to sufficiently regulate and monitor the casino industry.²⁴³

Legal casino gambling in the United States has until recently been limited in scope, but it has now spread across the nation with an increasing number of states opting to open casinos within their borders.²⁴⁴ Problems associated with pathological gambling have followed wherever gambling has been introduced.²⁴⁵ Recognizing this, states legalizing casino gambling typically implemented it with accompanying regulations designed to account for pathological gambling.²⁴⁶ However, as states competed for gam-

²⁴³ Note that although the gambling industry has contributed to research on “responsible gaming” and has done some initial investigations into “harm-minimization” EGMs and their potential ability to minimize excessive gambling, see Richard N. Velotta, ‘Harm-minimization’ Slots Studied by Industry, LAS VEGAS SUN, Dec. 10, 2003, at 3C, available at <http://www.lasvegassun.com/sunbin/stories/gaming/2003/dec/10/515999130.html>, the industry generally has not adopted harm-minimization measures independently. Thus, the gambling industry might be lauded to some extent for at least investigating the effectiveness of machine-based interventions, including

on-screen cash counters calculating a total of how much money is in play, on-screen clocks that remind players how much time they have spent gambling, pop-up time reminders with alarm settings, problem gambling banner ads that give anti-addiction messages, access to virtual problem gambling rooms where issues about addictive play are discussed[.]

id., and more aggressive interventions, such as “automatic time-outs for players after a big win or a big loss, [and] smart cards that slow down the speed of play, disabling lights and sound effects and turning off the machine after a specific time period or when a money limit is reached.” *Id.* However, extending a prior analogy, while the mouse here may have demonstrated its willingness to investigate cheese-avoidance strategies, left to its own devices it has in fact implemented none. The cheese stands, most conveniently, alone.

²⁴⁴ See *supra* Part II (discussing proliferation of gambling since 1988).

²⁴⁵ See *supra* Part IV (discussing pathological gambling and its effects).

²⁴⁶ See *supra* Part IV.

bling dollars, the limiting regulations have eroded, leaving behind a more unfettered industry than state legislators originally envisioned.²⁴⁷ Abandoned by the states, pathological gamblers have turned to the courts for relief, but there, too, gamblers have come away largely empty handed as courts have shown a general willingness to dismiss gamblers' claims against casinos and EGM manufacturers, or at least to make it difficult for them to state a justiciable claim.²⁴⁸ Thus, because those concerned with the pathological gambling problem face terrific obstacles in the courts and in the individual states, a national regulatory approach must address the problem.

A Federal Gambling Regulatory Commission that regulates and monitors the gambling industry offers the best approach. Only an agency endowed with the resources and expertise necessary to study gambling, identify its problems, and provide solutions will be able to keep abreast of an industry that undergoes constant technological evolution. While Congress might be fit to address the most salient problems that arise, only a commission of experts will handle adequately the problems that arise in gambling, which often involve a complicated intersection of technology, psychology, and statistics that defy simple solutions.²⁴⁹ Accordingly, Congress should recognize its limited expertise to deal with a matter as broad and technical as gambling and address the problem of widespread legal gambling by delegating responsibility to a federal agency.

It is far beyond the scope of this Comment to provide a detailed agenda for the proposed agency; my main purpose here is to propose a regulatory system that recognizes and accounts for pathological gambling without treading on the legitimate liberty interests of those for whom gambling presents few, if any, problems. Accordingly, any agency creating a regulatory system for the gambling industry should operate from a philosophy that adheres closely to the antipaternalism principles presented above.²⁵⁰

Technologies now used by the casino industry to increase profitability (and, perhaps, to swindle gamblers), can be adapted conceivably by a regulatory body to provide gamblers with truer information and better choices. Computerized EGMs present opportunities for regulators to go head to head with manufacturers, employing the technology to promote gamblers' interests, and not just the casinos'.²⁵¹ Thus, regulations need not come at an ex-

²⁴⁷ See *supra* Part III (discussing the race to the bottom among states legalizing gambling).

²⁴⁸ See *supra* Part VI (discussing the difficulty gamblers face recouping losses in court).

²⁴⁹ See *supra* Part VII.E (discussing well-intended regulations that may unwittingly fail to provide real change where technology, such as virtual reel mapping, defies simple solutions).

²⁵⁰ See *supra* Part VII.C (discussing the antipaternalism principle).

²⁵¹ Casinos are already issuing gamblers debit-type cards in lieu of cash or chips to place bets, which the casinos then use to mine data on gamblers' habits for use in designing games that earn profits most efficiently. See generally Binkley, *supra* note 122. These cards could easily serve as a means by which regulators offer gamblers the opportunity to establish a daily loss limit, as discussed *supra* Part VII.D.

ceptional cost if they exploit the availability of existing technology as a means of implementing regulatory control.

Though it would be unrealistic to imagine that an administrative agency, even one keeping constantly abreast of the gambling industry, could ever regulate pathological gambling to extinction, it is likely to do a better job than the states have and bring about an end to the race to the bottom. Additionally, administrative action has an advantage over judicial solutions in that addressing problems *ex ante* is preferable in the gambling context, as it is better where possible to prevent a known potential problem before it arises than to clean up foreseeable effects *ex post*.²⁵² With states and courts unable or unwilling to address the problem, and Congress unprepared for the task, a federal agency presents the best opportunity to regulate the rapidly expanding casino industry in a manner that takes appropriate account of the known problem of pathological gambling.²⁵³

IX. CONCLUSION

The gambling industry works unceasingly to encourage people to gamble. Using extensive psychological research on gambling behavior to design sophisticated gambling machinery that maximizes gamblers' sense of excitement and the perceived possibility of winning big, the gambling industry is able to tap deep inside gamblers' brains—so they will dig deep into their wallets. Particularly susceptible to the gambling industry's techniques are those predisposed to pathological gambling, but little is being done in the current legal environment to prevent the psychological fleecing of pathological gamblers. With the states competing against each other to attract casino gamblers, pathological gambling regulations fall by the wayside. Meanwhile, the courts have largely proven unreceptive to gamblers' claims of psychological manipulation at the hands of EGMs. Thus, in an environment where pathological gamblers are without significant local protections or judicial intervention, a national regulatory solution makes the most sense.

As this Comment has shown, a national effort to address problems associated with widespread legal gambling is necessary to achieve genuine progress. Given the complexity of the problem and the rapidity with which the casino industry updates its research and technology, the best national solution will be one implemented by experts in the field that can create competent, comprehensive, sophisticated, effective, and timely solutions.

²⁵² See Koppelman, *supra* note 172.

²⁵³ Congress, pursuant to its Commerce Clause authority, may regulate not only interstate commerce but also intrastate commerce that is "part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 125 S. Ct. 2195, 2197 (2005). While it is, perhaps, conceivable that some EGM manufacturers and casinos may engage in operations that are wholly intrastate, Congress may regulate even those aspects of commerce if a rational basis exists for concluding that the "activities, taken in the aggregate, substantially affect interstate commerce." *Id.*

Recognizing that we do not live in a political vacuum, this Comment has sought to find a position that even the most partisan Congress could support. Regulations that protect the pathological gambler from manipulative game design will attract the broadest support when those regulations also protect the nonpathological gambler from unwarranted intrusions upon her personal liberty.²⁵⁴ Any proposal failing to do this would, in all likelihood, fail to achieve majority backing. Thus, it makes sense to advocate a centrist approach likely to garner support over a drastic one destined to fail.

A new, independent federal administrative agency, composed of experts and tasked with regulating gambling nationally, can ensure that the problems presented by pathological gambling in an environment of widely available legal gambling are no longer ignored. A comprehensive and effective administrative solution provides the best means by which we can address pathological gambling and seek to minimize its societal effects. Any lesser effort, history has shown us, is doomed to leave the most vulnerable gamblers and their communities at the hands of heartless machines—and profiteers who supply them.

²⁵⁴ This Comment used the example of EGMs throughout both to reveal the toll pathological gambling can take and to illustrate how casinos and manufacturers can design games that prey upon pathological gamblers' weaknesses. As such, EGMs have provided a particularly useful context in which to envision regulatory efforts; however, the general principles espoused in this Comment should not be limited to EGMs, but should instead be extended where possible to encompass other forms of gambling as well.

