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TREASURE STATE: GAMBLING LAW, LOBBYING, AND THE CASE FOR THE EXPANSION OF LEGAL GAMBLING IN MONTANA

Trevor Funseth*

I. INTRODUCTION

Drive down a main road in one of Montana's cities and you will count more casinos than gas stations. What's more, even the gas station has a casino inside. Pass through a small town and you will likely find at least one Lucky Lil's or Magic Diamond Casino. Montana is currently home to just under 1,400 state-licensed gambling operators¹ and ranks fifth in the nation in casinos per capita with 1.7 casinos per thousand residents.² One study used 21 different metrics including casinos per capita, lottery sales per capita, casino revenues, and gambling-related arrests per capita.³ Based on these metrics, the study assigned each state a "gambling problem" ranking and a "gambling law friendliness" ranking; Montana ranked third in the country when averaging the two categories.⁴

Every Montanan knows the prevalence of gambling in the state, but fewer are familiar with Montana's gambling laws. Gamblers can wager livelihoods on the three-year-old thoroughbred at the horse track or sit at a keno machine for 12 hours straight, but will not find a live blackjack table or a slot machine—neither are legal.⁵ Despite the constraints, gambling is a massive source of revenue for the state. In 2022, the Montana Department of Justice reported that the state received over \$82 million in revenue from gambling taxes, permitting, and fines.⁶ Notably, around 93% of that reve-

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1. *Biennial Report Fiscal Years 2021–22*, MONT. DEP'T OF JUSTICE GAMBLING CONTROL DIV. 22 (Dec. 2022), <https://perma.cc/63XR-7L2M>.

2. Abby Messick, *Top 10 US States by Number of Casinos Per Capita*, CASINO CITY TIMES (Mar. 20, 2017), <https://perma.cc/DN6Z-YFZU>.

3. Adam McCann, *Most Gambling-Addicted States*, WALLET HUB (Apr. 25, 2023), <https://perma.cc/MFP6-Y98Q>.

4. *Id.*

5. See MONT. CODE ANN. § 23-5-111 (1991); *Haman v. State*, 865 P.2d 274, 275 (Mont. 1993). Blackjack and slots have not been specifically authorized by the Legislature or the people through initiative and thus remain illegal.

6. *Biennial Report Fiscal Years 2021–22*, *supra* note 1, at 13.

nue came from the Video Gaming Machine Income Tax, which is deposited directly into the state General Fund.⁷

Montana is home to seven Indian reservations.⁸ Compacts between the state and the tribes govern gambling on the reservations.⁹ Although compact terms and internal control systems differ for each tribe, generally, casinos on reservations offer more games, including “Class III” slot machines, which are Vegas-style slot machines that support higher maximum bets and payouts than off-reservation slot machines.¹⁰ By contrast, the “Class II” slot machines found in the rest of Montana are restricted to “bingo” style games featuring comparatively lower maximum bets and payouts.¹¹

This comment explores the contrast between the pro-gambling nature of Montana’s citizens and the absence of that mentality in state law. Section II of this comment summarizes the history of gambling and gambling law in Montana. Section III examines political influence on gambling law through the legislative and the executive branches. Section IV proposes the expansion of legal gambling in Montana and explores its benefits. Section V concludes this comment.

II. HISTORY OF GAMBLING LAW IN MONTANA

The ratification of the 1972 Montana Constitution cleanly divides the history of Montana’s gambling law into two eras. Before 1972, gambling was unconstitutional,¹² though illegal games and loophole gambling systems persisted.¹³ Since 1972, Montana has experienced an era of gradual relaxation of gambling law by the Legislature, the Montana Supreme Court, and voter referendums. Montana’s gambling framework is a constant work

7. *Id.*; *Budget Reports: General Fund*, MONT. LEGIS. FISCAL DIV. (July 29, 2020), <https://perma.cc/WN68-KJVU>. The General Fund is established in MONT. CODE ANN. § 17-2-102 (2021) and is the main “checking account” of the state government, accounting for all financial resources that are not appropriated in another fund. The fund pays for an array of state expenditures including public education, health and human services, government operating budgets, state law enforcement, and more.

8. *Tribal Territories in Montana*, MONT. STATE UNIV. (Jan. 14, 2019), <https://perma.cc/V7EV-63AC>.

9. *State-Tribal Gaming Compacts*, MONT. DEP’T OF JUSTICE GAMBLING CONTROL DIV., <https://perma.cc/C3XH-LS9Y> (last visited Feb. 12, 2023). As of 2022, Montana has gaming law compacts with every tribal reservation except for Flathead and Blackfeet.

10. *See, e.g., CLASS III TRIBAL-STATE GAMING COMPACT BETWEEN THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY’S INDIAN RESERVATION AND THE STATE OF MONTANA*, (Dec. 19, 2012), *available at* <https://perma.cc/CZ7N-3NG9>. Currently, the maximum bet on video gambling machines in Montana is \$2 and the maximum payout is \$800. *See also* MONT. CODE ANN. § 23-5-608(1) (2021).

11. 25 U.S.C. § 2703(7)–(8).

12. MONT. CONST. of 1889, art. XIX, § 2.

13. Jaix Chaix, *The History of Gambling in Montana*, DISTINCTLY MONTANA (Sept. 3, 2013), <https://perma.cc/TA9U-HZCV>.

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in progress and has undergone major changes as recently as the 2019 legislative session.¹⁴

A. *Statehood to the Constitutional Convention (1889–1972)*

Before the ratification of the 1972 Montana Constitution, gambling had been illegal in the Treasure State for 83 years.¹⁵ Upon achieving statehood, the Montana Constitution of 1889 explicitly made gambling illegal: “The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose.”¹⁶ This move coincided with a nationwide crusade against gambling and other “improprieties” like alcohol consumption.¹⁷ In 1910, nine years before the Eighteenth Amendment to the United States Constitution marked the start of Prohibition, Nevada became the last western state to outlaw casino gambling and, in doing so, solidified an American era in which nearly all gambling was illegal, with a few horseracing exceptions.¹⁸

In Montana and around the country, illegal gambling survived alongside illegal alcohol operations.¹⁹ Speakeasies and social halls popped up all over the state and often hosted illegal card games.²⁰ Enforcement was lax and sometimes nonexistent.²¹ In Butte, some of the city’s Prohibition enforcement officers turned out to also be running some of Montana’s top bootlegging operations.²² It is not possible to accurately quantify the prevalence of illegal gambling operations in early 1900s Montana, but it would be a mistake to assume gambling ceased when the 1889 Montana Constitution outlawed it.

In 1933, the Twenty-First Amendment repealed the prohibition on alcohol and bars opened publicly and rapidly.²³ Gambling remained illegal in

14. MONT. CODE ANN. § 23-7-104.

15. MONT. CONST. of 1889, art. XIX, § 2.

16. *Id.*

17. PAUL AARON & DAVID MUSTO, TEMPERANCE AND PROHIBITION IN AMERICA: A HISTORICAL OVERVIEW; *see also* NAT’L RESEARCH COUNCIL, ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 140–152 (1981).

18. Nelson Rose, *Gambling and the Law: Endless Fields of Dreams*, J. GAMBLING STUD. 11, 19 (1995), available at <https://perma.cc/3LQC-W9SR>.

19. Maroa Lincoln, *Prohibition in Helena: When the Nation was ‘Dry,’ Liquor Still Flowed*, HELENA INDEP. REC. (Oct. 28, 2013), <https://perma.cc/492X-JQFV>.

20. Tracy Thornton, *A Look Back: Prohibition Came a Year Early for Montanans*, MONT. STANDARD (Sept. 19, 2022), <https://perma.cc/R8ZZ-E5KB>; Jim Harmon, *Harmon’s Histories: Missoula Was One of the Wickedest Cities in Montana Territory*, MISSOULA CURRENT (Nov. 4, 2017), <https://perma.cc/7554-H2SL>; Chaix, *supra* note 13; *History of Gambling in Montana*, MONT. DEP’T OF JUSTICE, <https://perma.cc/K6ZR-SY2P> [hereinafter *DOJ Mont. History of Gambling*].

21. Chaix, *supra* note 13.

22. Thornton, *supra* note 20.

23. *See* U.S. CONST. amend. XXI; Kim Briggeman, *Montana History Almanac: Montana Quietly Celebrates the End of Prohibition*, MISSOULIAN (Dec. 5, 2010), <https://perma.cc/DSL6-BDSU>.

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Montana, but many bars searched for loopholes.²⁴ Bar owners skirted around the law by setting up nonprofit, charitable, and fraternal organizations, which were legally allowed to operate limited gambling activities like pull tabs²⁵ and dominoes.²⁶ Many proprietors got away with these loophole gambling operations, mostly due to a lack of enforcement by a state government hesitant to appropriate the funding necessary for such enforcement.²⁷

The first turn toward legal gambling since Montana statehood came with the Hickey Act, passed by the Legislature in 1937.²⁸ The law allowed individual counties to license specific table games, including dominoes, bridge, and blackjack, so long as the proprietor paid a \$10 annual fee.²⁹ Even with the addition of a legal—albeit limited—ability to gamble, illegal and loophole operations continued to survive in Montana until the Legislature declared a law enforcement emergency in 1949 and appropriated \$40,000 to the Secretary of State for the sake of enforcing gambling laws.³⁰

Though many Montanans outright ignored the gambling laws, and illegal operations could be found in broad daylight, there was still a strong anti-gambling sentiment within the state government and among a large segment of the citizenry.³¹ The year after the Legislature declared an emergency to crack down on gambling, the Montana Supreme Court ruled in *State v. Marck*³² that slot machines, a new technology at the time, were illegal lotteries.³³ The defendant, the owner of Ed's Tavern in Conrad, Montana, had been licensed by Pondera County to operate eight slot machines.³⁴ The defendant argued, and the dissent agreed, that slot machines were not illegal lotteries because a lottery is a game of chance involving a prize pool and multiple simultaneous players, while slot machines involve a single player.³⁵ The Court upheld the defendant's criminal conviction and held that counties could only issue permits for table games—putting the public on notice that loopholes were closing.³⁶ That same year, perhaps surprisingly due to the prevalence of illegal gambling, the voters of Mon-

24. Chaix, *supra* note 13.

25. Pull tabs are similar to scratch-off lottery tickets, but rather than scratching to reveal numbers, the gambler pulls off pieces of paper to reveal sequences of numbers or symbols.

26. Chaix, *supra* note 13.

27. *Id.*; DOJ Mont. *History of Gambling*, *supra* note 20.

28. DOJ Mont. *History of Gambling*, *supra* note 20.

29. Chaix, *supra* note 13; DOJ Mont. *History of Gambling*, *supra* note 20.

30. *Id.*

31. DOJ Mont. *History of Gambling*, *supra* note 20.

32. 220 P.2d 1017 (Mont. 1950).

33. *Id.* at 1019.

34. *Id.* at 1018.

35. *Id.* at 1019–20.

36. *Id.* at 1018–20.

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tana defeated a constitutional initiative to legalize gambling by a four-to-one margin.³⁷

Over the next two decades, gambling law in Montana remained stagnant. During this time, public opinion on gambling flipped; in 1972, the constituents once again voted on gambling—this time in favor.³⁸

B. *The 1972 Montana Constitutional Convention*

The second era of gambling law in Montana began with the 1972 Constitutional Convention and has been marked by the slow relaxation of regulations. Delegate Lyman Choate presented voluntarily submitted petitions with “about 4,900” signatures, evidencing the people of Montana were in favor of legalizing gambling in their constitution.³⁹ He further noted: “On our statewide radio-telephone program, we had 48 phone calls, 40 of which were in support of the basic proposal.”⁴⁰ The Convention delegates argued vigorously for and against gambling legalization; for example, after one delegate highlighted the massive potential for state revenue, another responded, “Any time an agency gets so hungry for money that it has to finance itself out of the weaknesses of its own people, it sows the seeds of its own destruction.”⁴¹ Delegate Harper took all his speaking time to argue against legalizing gambling in the constitution by drawing on moral and religious themes, further claiming that legal gambling destroys legitimate businesses.⁴² Harper concluded by stating that legalizing gambling without a popular vote would be the equivalent of a “burial of [this] constitution.”⁴³

The delegates debated gambling for days.⁴⁴ In total, five different proposals were voted on and defeated, including a proposal that would have given voters the choice between a constitutional prohibition on gambling and leaving it out of the constitution completely; a proposal to reserve gambling legalization exclusively to the citizens through the initiative power; and a proposal to legalize bingo, but no other forms of gambling.⁴⁵

Finally, as a compromise, the Convention voted 83 to 8 in favor of Delegate Thomas Ask’s motion to leave the issue to the voters and include an alternative measure on the ballot, effectively providing voters with a

37. DOJ Mont. *History of Gambling*, *supra* note 20.

38. 1972 *Primary Election Results*, MONT. SEC’Y OF STATE, <https://perma.cc/7A73-BUMV> (last visited Mar. 17, 2023).

39. VII MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2729 (1981), *available at* <https://perma.cc/V4LS-7AMM> [hereinafter CONVENTION TRANSCRIPT VOL. 7].

40. *Id.* at 2729–30.

41. *Id.* at 2731.

42. *Id.*

43. *Id.*

44. *Id.* at 2728–59.

45. CONVENTION TRANSCRIPT VOL. 7, *supra* note 39, at 2747–59.

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choice between (1) prohibiting gambling or (2) prohibiting gambling absent prior authorization from the Legislature or the citizenry.⁴⁶ The voters spoke, and while the new constitution narrowly passed by a margin of 2,532 votes, the measure giving the Legislature and citizenry power to authorize gambling passed by 50,639 votes.⁴⁷ Since then, both the Legislature and the Montana Supreme Court have asserted that any form of gambling must be specifically legalized rather than assumed to be legal if it has not been expressly outlawed.⁴⁸ What follows, and persists today, is an era of gradual legalization of gambling's various forms.

C. *Post Constitutional Convention (1972–Present)*

Following the ratification of Montana's new Constitution in 1972, the Legislature immediately created the Senate Special Committee on Gambling and subsequently passed the Card Game, Bingo, Raffles, and Sports Pool Act, a statutory scheme relating to all types of gambling.⁴⁹ Horserace betting is the only form of gambling outlined under a different chapter of the Code.⁵⁰

The Montana Supreme Court, in the 1976 decision of *Treasure State Games Inc. v. State*,⁵¹ held that video keno is a legal bingo game. This decision effectively legalized the video gaming machines that are found in Montana casinos today.⁵²

There have been several pushbacks throughout this period of gambling expansion. In 1982, 62% of voters defeated Initiative 92, which would have legalized blackjack and almost all forms of gambling.⁵³ The Montana Supreme Court subsequently held in *Gallatin County v. D&R Music and Vending, Inc.*⁵⁴ that video poker machines like Draw 80 were, in fact, slot machines, and therefore illegal.⁵⁵ Finally, in 2003, the Legislature defeated a unique proposal called "Destination Montana," which sought to establish

46. *Id.* at 2759–60.

47. *1972 Primary Election Results*, *supra* note 38.

48. *See* MONT. CODE ANN. § 23-5-111 (2021); *Haman v. State*, 865 P.2d 274, 275 (Mont. 1993).

49. *DOJ Mont. History of Gambling*, *supra* note 20.

50. MONT. CODE ANN. § 23-4-301.

51. 551 P.2d 1008 (Mont. 1976).

52. *Id.* at 1010. Keno is a lottery-style game in which a board displays numbers, usually from one to 80, and the player selects as many of these numbers as they wish up to the permitted maximum. When the game is "played," the machine randomly draws a batch of numbers, often 20 of them, and prizes are paid out based on how many of the player's selected numbers were drawn.

53. *1982 General Election Results*, MONT. SEC'Y OF STATE (Dec. 13, 1982), <https://perma.cc/5JY9-B93G>.

54. 676 P.2d 779 (Mont. 1984).

55. *Id.* at 782. Slots is a game in which the machine generates a random combination of symbols on a dial, with certain combinations winning money for the player. Slots have not been legalized by the Legislature or voter initiative, and thus remain illegal under the Montana Constitution.

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a Las Vegas-style entertainment district in Butte, Montana.⁵⁶ Despite these periodic obstacles, the legalization of gambling thrived.

The Video Poker Machines Act of 1985 created licensing fees and established baseline rules on the ownership and operation of video gambling machines.⁵⁷ Under the Act, liquor license holders were originally allowed five poker machines and unlimited keno machines.⁵⁸ Then, in the late 1980s, the Legislature implemented a new regulatory framework, adding a 15% income tax to video gaming machines on top of the licensing fees,⁵⁹ centralizing all gambling regulation at the state level, and assigning the Department of Justice all regulatory and taxation duties previously held by the Department of Commerce.⁶⁰

In 1986, the voters overwhelmingly approved by referendum the creation of the Montana Lottery.⁶¹ Three decades later, in 2019, the Montana Lottery reported over \$60 million in revenue deposited into the General Fund.⁶² Perhaps inspired by the influx of revenue, the Legislature lifted the cap on video poker machines, establishing the modern maximum of 20 machines allowed per liquor license.⁶³

Over the past 30 years, gambling restrictions relating to maximum bets and payout sizes have gradually risen. In 1995, the maximum video poker payout was increased to \$800, and in 2011 and 2013, bingo, sports pool, and table game payouts and wagers were similarly raised to the current levels.⁶⁴

Throughout this same period, the state government worked to ensure its exclusive control over all intrastate gambling activities. Before this time period, gambling permits were subject to county regulation.⁶⁵ In 1989, the Legislature passed a law asserting gambling statutes must be strictly construed, which meant gambling activities had to be specifically enumerated in the law to be considered legal.⁶⁶ Six years later, the Legislature approved funding to create a digital accounting and reporting system for gambling

56. Music and Entertainment District Act, H.B. 757, 58th Leg. Sess. (Mont. 2003); Vince Devlin, *Resurrecting Butte*, THE MISSOULIAN (Mar. 16, 2003), <https://perma.cc/P2JQ-DD3E>.

57. MONT. CODE ANN. § 23-5-603 (2021); see also *DOJ Mont. History of Gambling*, *supra* note 20.

58. *DOJ Mont. History of Gambling*, *supra* note 20.

59. *Id.*

60. An Act Generally Revising the Public Gambling Laws of Montana, S. 431, 51st Leg. Sess. (Mont. 1989); *DOJ Mont. History of Gambling*, *supra* note 20.

61. 1986 *General Election Results*, MONT. SEC'Y OF STATE (Dec. 4, 1986), <https://perma.cc/A6SX-YGG5>.

62. 2019 *Annual Report*, MONT. LOTTERY 3 (Mar. 17, 2020), <https://perma.cc/JF93-YLXB>.

63. MONT. CODE ANN. § 23-5-611(3) (2021).

64. MONT. CODE ANN. § 23-5-608 (1995); MONT. CODE ANN. § 23-5-412 (2011); MONT. CODE ANN. § 23-5-503 (2011); MONT. CODE ANN. § 23-5-312 (2013).

65. *DOJ Mont. History of Gambling*, *supra* note 20.

66. MONT. CODE ANN. § 23-5-111 (1989); *DOJ Mont. History of Gambling*, *supra* note 20.

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revenues.⁶⁷ In 2002, the Montana Department of Justice's Gambling Control Division began offering combined applications for gambling and liquor licenses.⁶⁸ In 2005, the Legislature passed another law requiring that gambling operations take place on physical "premises," categorically prohibiting internet gambling.⁶⁹ A final example of the state government's control is the failure to legalize blackjack—bills attempting to legalize it have been proposed but repeatedly fail to pass.⁷⁰ Today, gambling regulation in Montana is largely an administrative affair supervised by the Gambling Control Division.⁷¹

The most recent major change to Montana's gambling law followed the federal legalization of sports betting in 2019.⁷² Montana became the ninth state in the nation to legalize sports betting, just one year after the United States Supreme Court held that the Professional and Amateur Sports Protection Act was unconstitutional under the Tenth Amendment's anticommandeering doctrine.⁷³ Thereafter, the Montana Legislature required all sports gambling in Montana to be run through the Montana Lottery, effectively disallowing private gambling companies from offering online or in-person sports betting activities.⁷⁴

Since gambling is legal on the federal level, it is largely a states' rights issue under the Tenth Amendment.⁷⁵ Most states, Montana included, have trended toward gradually relaxing gambling restrictions. Some form of gambling is now legal in every state except for Utah and Hawaii.⁷⁶ At the time of this writing, online casino gambling is legal in seven states, with several others in the process of legalization.⁷⁷ Thirty-six states have legalized sports betting since it was federally legalized in 2019.⁷⁸ Forty states

67. Allow Dept. of Justice Automated Video Gambling, Accounting and Reporting System, H.B. 109, 56th Leg. Sess. (Mont. 1999).

68. *Alcoholic Beverage – Gambling Operator Combined License Application Guide*, MONT. DEP'T OF JUSTICE GAMBLING CONTROL DIV. (May 2022), <https://perma.cc/BRM9-V3MG>.

69. MONT. CODE ANN. § 23-5-177 (2005).

70. *DOJ Mont. History of Gambling*, *supra* note 20. Blackjack legalization bills failed in 1991, 2003, 2017, and 2019.

71. MONT. ADMIN. R. 23.16.3501 (2019).

72. Bart Shirley, *Montana Sports Betting*, LEGAL SPORTS REPORT (Mar. 14, 2023), <https://perma.cc/DA93-4DVR>.

73. MONT. CODE ANN. § 23-7-104 (2021); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481–85 (2018); Scott Miller, *Montana Becomes Ninth State to Legalize Sports Betting*, ACTION NETWORK (Sept. 23, 2021), <https://perma.cc/6KNS-JD45>.

74. MONT. CODE ANN. § 23-7-102.

75. U.S. CONST. amend. X; *Murphy*, 138 S. Ct. at 1484.

76. *US State-By-State Gambling Laws*, LETS GAMBLE USA, <https://perma.cc/WRN3-AHKF> (last visited Feb. 26, 2023).

77. *Id.*; *Online Gambling Legal States 2023*, WORLD POPULATION REVIEW, <https://perma.cc/E3N5-WP8J> (last visited May 9, 2023).

78. *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N, <https://perma.cc/X86J-VJVF> (last visited Feb. 26, 2023).

have at least one horseracing track with a legal gambling system and forty-five states have a state lottery.⁷⁹

Nevada remains the only state in which Vegas-style casino gambling—which includes “games against the house”⁸⁰ like blackjack and roulette—is legal statewide.⁸¹ There are additional carve-outs for Vegas-style gambling in districts like Atlantic City, New Jersey.⁸² Another interesting carve-out comes from Louisiana, wherein riverboat casinos are statutorily exempted from state gambling restrictions.⁸³

The majority of state constitutions categorically bar gambling activities and expressly list the exceptions.⁸⁴ Montana’s 1972 Constitution is among the few state constitutions that explicitly provide for the right of the people to authorize gambling.⁸⁵

III. POLITICAL INFLUENCE

Public opinion on gambling has gradually become more liberal in recent decades. A 2018 Gallup poll showed an all-time high of 69% of Americans believed gambling was “morally acceptable.”⁸⁶ While there are no such polls tracking public opinion on gambling in Montana, a state-commissioned study found 78% of adult Montanans had engaged in some type of gambling in the last year.⁸⁷

Despite this seemingly pro-gambling sentiment, Montanans remain restricted in what types of gambling activities are allowed and limited in the wager and payout amounts. Any game not yet made expressly legal remains illegal under the Montana Constitution, including popular Vegas-style games like blackjack and roulette.⁸⁸ As outlined in Section II, while the general trend of the Legislature has been the relaxation of restrictions, legislative control is still dominant.⁸⁹

A turning point in licensing and regulation came in 2002 when the Montana Gambling Control Division began offering combined liquor and

79. *US State-By-State Gambling Laws*, *supra* note 76.

80. A “game against the house” is a gambling game in which players win money from the “house”—the casino itself—and lose money to the house, rather than to other players.

81. NEV. REV. STAT. § 463.0152 (2013).

82. N.J. CONST. art. IV, § VII(2)(D).

83. LA. STAT. ANN. § 27:43 (2021).

84. *See, e.g.*, IDAHO CONST. art. III, § 20.

85. MONT. CONST. art. III, § 9. *See, e.g.*, IDAHO CONST. art. III, § 20; CAL. CONST. art. IV, § 19.

86. Jim Norman, *Acceptance of Gambling Reaches New Heights*, GALLUP (June 7, 2018), <https://perma.cc/EX8E-CTAN>.

87. Dillon Tabish, *Risk vs. Reward: Montana’s Gambling Habit*, FLATHEAD BEACON (Apr. 22, 2015), <https://perma.cc/62BN-6T5C>.

88. MONT. CONST. art. III, § 9.

89. *2019 Annual Report*, *supra* note 62, at 6.

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gambling licenses through Department of Revenue auctions.⁹⁰ Subsequent gambling laws have been connected to the alcohol industry, giving the alcohol and tavern lobbies greater leverage while also providing Montana with extraordinary revenues.⁹¹ The attachment of liquor licenses to gambling licenses has contributed to the steady rise in auction sale prices of liquor licenses.⁹² Previously, businesses wanting a liquor license had to enter a statewide lottery with hopes of being selected to purchase a license for between \$400 and \$800.⁹³ Now, liquor licenses are sold through a bidding system.⁹⁴ Liquor licenses are tied to the municipality in which they authorize activities; a proprietor cannot purchase a license in Miles City for use in Kalispell without going through a strenuous transfer process, which includes a public hearing.⁹⁵ In 2018, a new license in Bozeman had a minimum starting bid of \$371,250, and licenses in Montana's biggest cities have sold for over \$1 million.⁹⁶

As discussed above, the Legislature explicitly outlawed online gambling in 2005.⁹⁷ The initial bill was recommended by the Gambling Control Division, which presented testimony favoring the prohibition and argued online gambling was dangerous to Montanans because it was unregulated, required payment by credit card that could result in fraud, and funneled money outside of the United States.⁹⁸ The Legislature, holding the power of the purse, has an interest in ensuring all gambling activities in Montana are taxable and regulated by the state; this interest seems to outweigh their constituency's pro-gambling nature.⁹⁹ Naturally, the alcohol, casino, and tavern lobbies possess an interest in keeping gamblers off the internet and in front of their machines.

90. *Alcoholic Beverage – Gambling Operator Combined License Application Guide*, *supra* note 68; *DOJ Mont. History of Gambling*, *supra* note 20.

91. *Liquor Enterprise Fund Report of Operations Fiscal Year 2022*, MONT. DEP'T OF REVENUE ALCOHOLIC BEVERAGE CONTROL DIV. 21–30 (2022), <https://perma.cc/NS54-MD98>.

92. *Alcoholic Beverage Retail Competitive Bidding Process*, MONT. DEP'T OF REVENUE ALCOHOLIC BEVERAGE CONTROL DIV., <https://perma.cc/GFG5-YHXD> (last visited Feb. 21, 2023) [hereinafter *Beverage Bidding Process*]; *Alcoholic Beverage Purchase Price Report*, MONT. DEP'T OF REVENUE ALCOHOLIC BEVERAGE CONTROL DIV., <https://perma.cc/QUP3-V8GY>.

93. David Erickson, *Montana's Liquor License System Changed From Lottery to Highest-Price Bidding*, MONTANA STANDARD (Dec. 14, 2017), <https://perma.cc/QK2Y-BRUY>; *The All-Beverages License*, MONT. DEP'T OF REVENUE ALCOHOLIC BEVERAGE CONTROL DIV., <https://perma.cc/C97X-53SL> (last visited Apr. 7, 2023).

94. MONT. CODE ANN. § 16-4-430(1)(a) (2021).

95. MONT. CODE ANN. § 16-4-204.

96. *Beverage Bidding Process*, *supra* note 92.

97. MONT. CODE ANN. § 23-5-112(22) (2005); H. Business and Labor Comm., Review of H.B. 89, 59th Leg. Sess. (Mont. 2005).

98. Define Prohibited Internet Gambling, S. Judiciary Comm., Hearing on S. 103, 59th Leg. Sess. (Mont. 2005); MONT. CODE ANN. § 23-5-112 (2021).

99. Tabish, *supra* note 87.

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In 2019, the Legislature opened the door to a new source of state revenue by legalizing sports gambling while at the same time mandating that all bets be placed through the Montana Lottery.¹⁰⁰ The state purchased hundreds of “Sports Bet Montana” betting machines to be placed only in establishments with a liquor and gambling license.¹⁰¹ To obtain a machine, establishments must possess both a gambling operator’s license and a liquor license, apply through an online portal, and pay a \$1,000 annual fee.¹⁰²

The Montana Lottery funded the creation of its own betting app, Sports Bet Montana, but the location services on a phone using the app must show the bet is placed while standing in a licensed gambling location.¹⁰³ In other states where sports betting is legal, gamblers can use convenient and massively popular online applications like FanDuel, Caesar’s Sportsbook, and Draft Kings from anywhere in the state.¹⁰⁴ Although the Montana Legislature passed a second sports betting bill in 2019, which would have allowed private companies to offer sports betting services, it was vetoed by Governor Steve Bullock.¹⁰⁵

Upon examining Montana’s gambling laws and recognizing the possible incentives for Montana legislators and special interest groups, Montanans would be justified in questioning how much influence these lobbying groups have had on state gambling law. Unfortunately, Montana lacks what many other states have: a centralized and sortable lobbying database.¹⁰⁶ In Montana, lobbyists are required by law to report all lobbying activity and expenditures, but those reports need not be digitized, which contributes to the lobbying information’s inaccessibility.¹⁰⁷ Illustrating the difference this may make, one nonprofit organization tracking money in politics rated all 50 states on their lobbying disclosure practices.¹⁰⁸ The organization gave Montana an overall score of “11.75 out of 20,” and rated

100. MONT. CODE ANN. § 23-7-104 (2019).

101. *SportsBet Montana Locations*, MONT. LOTTERY, <https://perma.cc/E8HE-G9MX> (last visited Feb. 21, 2023); John Riley, *Sports Betting is Now Available in Montana*, KTVH (Mar. 11, 2020), <https://perma.cc/A63H-KPUG>; Mike Dennison, *Montana Lottery Sports-Betting Contract Under Fire – But Betting Could Be in Place This Year*, KTVQ (July 11, 2019), <https://perma.cc/6JHS-BJFX>.

102. MONT. CODE ANN. § 23-5-128 (2021); *eStop Business Licenses Online Service*, MONT. LOTTERY, <https://perma.cc/XD6S-KRZD> (last visited Feb. 21, 2023).

103. MONT. ADMIN. R. 2.63.1301 (2019); MONT. CODE ANN. § 23-7-103(11).

104. *Where, How and When Sports Betting is Legal*, FAN DUEL, <https://perma.cc/D3MQ-BRQM> (last visited Mar. 20, 2023).

105. Authorize Sports Gambling Act, S. 330, 66th Leg. Sess. (Mont. 2019).

106. See generally, *Political Disclosure Reporting Data*, WASH. PUB. DISCLOSURE COMM’N, <https://perma.cc/74TW-G3VQ> (last visited May 11, 2023); *Search Lobby Registrations and Activity Reports*, TEX. ETHICS COMM’N, <https://perma.cc/JC7J-M6UF> (last visited May 11, 2023).

107. MONT. CODE ANN. § 5-7-208(1) (2021).

108. Dan Auble & Brendan Glavin, *State Lobbying Disclosure: A Scorecard*, OPEN SECRETS (June 28, 2022), <https://perma.cc/H4JG-EZ96>.

Montana's lobbying website's "user friendliness and transparency" as a "1 out of 5."¹⁰⁹

In the past, the Montana Commissioner of Political Practices digitized the physical documents, which were then made available online, accompanied by a tool that could sort data by total expenditures per sector.¹¹⁰ Although it was difficult to sort through the data using a dated digital system created in the early 2000s, it was possible. Beginning in 2019, Commissioner Jeff Mangan decided to discontinue this service, stating that "it's not [his staff's] jobs to input, or data input, information for the lobbyists."¹¹¹ Mangan went on to say that the Legislature needs to take responsibility for this issue by providing funding to bring the system into the 21st century and requiring lobbyists to digitally file reports.¹¹² Two legislative sessions have taken place since that interview and no progress has been made.

Stuck in the middle of a standoff between the Commissioner of Political Practices and the Montana Legislature, the public is left with an impractical system to determine lobbying influence on gambling law—that is, no real system at all. There is one online database containing filings and data for reports that are voluntarily filed electronically.¹¹³ These digital reports can be conveniently sorted and searched. Still, lobbyists are not required to file electronically, and a large majority chose not to file during the 2019 legislative session.¹¹⁴ For lobbying reports that were not filed online, a viewer can only see raw scans of each paper report in a second database with no data compilation or sorting capability.¹¹⁵

Private reporters and organizations have attempted to sort through the hundreds of lobbyist reports split between these two messy databases.¹¹⁶ Notably, there were no major substantive gambling bills on the table during the 2021 legislative session—only two minor proposals. Senate Bill 49 changed simple definitions and wording in the gambling section of the Montana Code Annotated and passed 44 to 6.¹¹⁷ Failed Senate Bill 189 moved to legalize historical horse racing machines and incorporate them

109. *Id.*

110. Corin Cates-Carney, *Montana Lobbyist Spending Reports Now Harder to Access*, MONT. PUB. RADIO (June 18, 2019), <https://perma.cc/UL6N-N6DN>.

111. *Id.*

112. *Id.*

113. *Principal and Lobbyist Online Reporting System*, MONT. COMM'R OF POLITICAL PRACTICES, <https://perma.cc/WK8T-7DV4> (last visited Feb. 22, 2023) [hereinafter *Lobbyist App*].

114. *Id.*; *Montana Lobbyist and Principal Search*, MONT. COMM'R OF POLITICAL PRACTICES, <https://perma.cc/6XKR-HW8E> (last visited Apr. 8, 2023) [hereinafter *Campaign Search*].

115. *Lobbyist App.*, *supra* note 113; *Campaign Search*, *supra* note 114.

116. Sam Wilson, *Two Years Later, Little Progress on Tracking Lobbyist Spending in Montana*, HELENA INDEP. REC. (Sept. 19, 2021), <https://perma.cc/28VT-MS8Q>.

117. Generally Revise Gambling Laws, S. 49, 67th Leg. Sess. (Mont. 2021); MONT. CODE ANN. §§ 23-5-112, 23-5-118, 23-5-176 (2021).

into the Video Gaming Machine law.¹¹⁸ The Helena Independent Record manually sorted through all 1,051 lobbyist reports in the two databases to tally totals for each sector.¹¹⁹ Reporters found that over \$126,000 was spent on lobbying by the gambling sector.¹²⁰ Another \$85,000 was spent on lobbying by the alcohol industry.¹²¹

The Independent Record also created a database of the same 2021 filings for public use that can be sorted by sector, total spending, and state of origin.¹²² During the 2021 legislative session, nearly 70% of gambling sector lobbying money came from outside the state.¹²³ Much of the in-state gambling lobbying money came from the Montana Racehorse Owners & Breeders Coalition advocating for Senate Bill 189 and historical horseracing machines.¹²⁴ The largest lobbyist in the gambling sector, spending almost \$70,000, was Exacta Systems, an out-of-state manufacturer of historical horse racing machines and software.¹²⁵ Intralot—another out-of-state gambling machine manufacturer—was the third largest lobbying group of the 2021 session, spending more than \$13,000.¹²⁶ Following the 2019 authorization of sports betting in Montana, Intralot was awarded the state’s multi-million dollar contract to supply all the new sports bet machines and the software that would run the new system—without having to go through a bidding process.¹²⁷

Private news organizations have made 2021 Montana lobbying data more accessible than the state government ever has, but previous legislative sessions have not received the same treatment. Unless the lobbying group targeted in a search is one of the twenty-five that filed digitally, 2019 legislative session lobbying data is discoverable only by sorting through the hard copy database one document at a time.¹²⁸

IV. THE EXPANSION OF LEGAL GAMBLING

Nevada ranks first in the country in gambling law “friendliness.”¹²⁹ In 1931, in an effort to boost its economy during the Great Depression, the

118. Authorize Historical Horseracing Gambling, S. 189, 67th Leg. Sess. (Mont. 2021).

119. Wilson, *supra* note 116.

120. *Id.*

121. *Id.*

122. *Montana Lobbying Data*, HELENA INDEP. REC. (Sept. 8, 2021), <https://perma.cc/B26N-J75N>.

123. *Id.*

124. *Id.*

125. *Id.*; see also *Montana Based Fleetwood Gaming Announces Historic Horse Racing Partnership with Exacta Systems*, EXACTA SYSTEMS (Sept. 3, 2020), <https://perma.cc/FDV9-Y7UC>.

126. *Montana Lobbying Data*, *supra* note 122.

127. Dennison, *supra* note 101.

128. *Lobbyist App.*, *supra* note 113; *Campaign Search*, *supra* note 114.

129. McCann, *supra* note 3.

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Nevada Legislature legalized all forms of gambling.¹³⁰ The long-term financial payoffs have been massive. In 2018, the gambling and hospitality industry accounted for 38.9% of the state's total tax revenue and supported over 450,000 jobs.¹³¹ In addition to the gambling taxes, the casinos of Nevada are also the state's largest property taxpayers.¹³² The taxation of the gaming industry has allowed the state to forgo a personal or corporate income tax on its citizens and charge one of the lowest property tax rates in the country on its residents.¹³³ The Nevada Gaming Fact Book, a biennial report, estimated a total gaming industry economic impact of over \$67 billion.¹³⁴ The industry also donates millions of dollars each year to local nonprofits.¹³⁵ The city of Las Vegas, located in the middle of a desert, has become the fourth most visited city in North America, flooding billions of dollars in tourist spending each year into the state of Nevada.¹³⁶ Montana may not be the next Las Vegas, but there are certainly more gambling benefits to go around.

The state of Montana has the opportunity to expand gambling. Tourism is already a large and growing sector in the Treasure State and could be bolstered by a larger gambling offering.¹³⁷ With Nevada as a model, gambling and property taxes levied on larger casinos could ease the state's financial strains and provide funding for public works projects, education, and land preservation. The industry has a proven ability to provide well-paying jobs with advancement opportunities in Nevada, and could do the same for Montana, which currently has a below-average median family income.¹³⁸

There is no strong anti-gambling moral or political argument to be made in Montana. The state's current gambling restrictions do not stop

130. Sonia Church-Vermeys & Erin Elliott, *The Gambling Law Review: USA – Nevada*, LAW REVIEWS (May 9, 2022), <https://perma.cc/4S9K-69B9>.

131. Kay Foley, *Betting on Nevada: Gaming Industry Outlook*, NEV. BUS. (Feb. 1, 2020), <https://perma.cc/5PMK-2ULT>.

132. *How Gaming Benefits Nevada*, NEV. RESORT ASS'N, <https://perma.cc/PKY8-Z9KD> (last visited May 12, 2023).

133. *Id.*

134. Howard Stutz, *Report: Gaming's Economic Impact in Nevada Totals \$67.6 Billion in 2018*, CDC GAMING REPORTS (Mar. 5, 2019), <https://perma.cc/63TG-MB3C>.

135. *Id.*

136. Euromonitor International, *The 10 Most Visited Cities in North America*, ENJOY TRAVEL, <https://perma.cc/9RM6-GEEJ> (last visited May 12, 2023); Bryan Horwath, *Tourist spending in Las Vegas breaks another record in 2022, LVCVA report show*, KTNV LAS VEGAS (Apr. 11, 2023), <https://perma.cc/8UDS-G6KC>.

137. See Micah Drew, *Tourism Grows as Economic Driver in Montana*, FLATHEAD BEACON (Apr. 10, 2023), <https://perma.cc/46W8-CW69>.

138. See Emily Shrider et al., *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU (Sept. 14, 2021), <https://perma.cc/RMY5-UUH9>; *Median Family Income by Family Size*, U.S. CENSUS BUREAU (2022), <https://perma.cc/EBT7-7XHX>.

Montanans from gambling.¹³⁹ As discussed in this comment, Montana is a strongly pro-gambling state that is already home to hundreds of casinos.¹⁴⁰ Low-cost direct flights to Las Vegas depart every week from Kalispell, Missoula, Bozeman, Great Falls, and Billings.¹⁴¹ The state of Montana should expand gambling opportunities to attempt to keep some of that revenue in the state, rather than letting it fly to Nevada.

An expansion to casino-style gambling would not even be a particularly large step from the gambling Montana currently allows. Blackjack is a variant of poker, many types of which, most prominently Texas Hold'em, are already legal in Montana.¹⁴² Slot machines are not too different from the “bingo” machines that Montana already has, which manufacturers meticulously design to resemble a slot machine as closely as possible while still meeting the regulatory definitions of a “bingo” game by putting a small bingo card in the corner.¹⁴³ As Chief Justice Roberts put it when analyzing the same “bingo” machines being played in Texas, “the electronic bingo being played at the Speaking Rock Entertainment Center is about as close to real bingo as Bingo the famous dog.”¹⁴⁴ Expanded gambling in Montana is not a radical change, but a practical one.

The right to authorize gambling was separately and overwhelmingly voted for by the people of Montana in 1972.¹⁴⁵ If the Legislature will not act on basic gambling expansion to reflect the culture of the state of Montana, the citizens can and should use their initiative power to do it themselves.

V. CONCLUSION

After nearly a century of strict gambling laws and Prohibition-style underground operations, Montana is decidedly a pro-gambling state. The delegates to the 1972 Montana Constitutional Convention were so divided on the issue of gambling that the only agreement was to leave the issue to the voters.¹⁴⁶ The people were not similarly divided and overwhelmingly asserted that they—through citizen initiatives or referenda—and the Legislature should have the power and discretion to legalize gambling.¹⁴⁷ Despite

139. Tabish, *supra* note 87.

140. McCann, *supra* note 3.

141. *Trip Planner*, ALLEGIANTE AIRLINES, <https://perma.cc/4H8T-MKHJ> (last visited May 12, 2023).

142. See MONT. CODE ANN. § 23-5-311 (2021).

143. See Jeremiah Booker, *Class II vs. Class III Slot Machines – What are the Main Differences?*, Best US Casinos (Dec. 5, 2021), <https://perma.cc/59XD-4SNY>.

144. *Ysleta Del Sur Pueblo v. Texas*, No. 20–493, slip op. at 7 n.1 (June 15, 2022) (Roberts, C.J., with Thomas, Alito & Kavanaugh, JJ., dissenting).

145. *1972 Primary Election Results*, *supra* note 38.

146. CONVENTION TRANSCRIPT VOL. 7, *supra* note 39, at 2752.

147. *1972 Primary Election Results*, *supra* note 38.

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this, the people's initiative power has not been used a single time to expand gambling rights. Many Montanans may not even know this is a power they hold, and those who do may not possess the resources to initiate political change.

The Montana Legislature, on the other hand, has been active. State law has gone through several eras of gambling expansion and restriction, overall trending towards legalizing more games and allowing larger payouts and wagers.¹⁴⁸ As gamblers' options have expanded, so has the Legislature's control. Gambling taxes, permitting fees, and fines have become such an essential revenue source for the state that every effort has been made to ensure all gambling activities are authorized and regulated by the state government.¹⁴⁹ As addressed in this comment, if you want to bet in Montana, you will have to get yourself to a licensed casino—even gambling online will result in an error message indicating users in the state are not authorized to participate.¹⁵⁰

The influence of the gambling, alcohol, and tavern lobbies within the Montana Legislature, and on the state's gambling law is undeniable. While lobbying influences are no novelty in the political arena, the lack of an accessible filing database further compounds their effects. The citizens of Montana have the opportunity, and the authority, to take action. The people can use their initiative power to expand gambling opportunities without the influence of lobbyists and partisan politics. While the harms are nonexistent, the financial opportunities from gambling in the Treasure State are practically endless.

148. *DOJ Mont. History of Gambling*, *supra* note 20.

149. *2019 Annual Report*, *supra* note 62, at 6.

150. *Where, How and When Sports Betting is Legal*, *supra* note 104.