

TIP-POOLING AT NEVADA CASINOS—  
THE CASE AT THE WYNN AND WHY THE  
NEVADA STATE GAMING CONTROL  
BOARD AND GAMING COMMISSION  
SHOULD SET STRICT REGULATIONS ON  
TIP-POOLING TO PROTECT THE RIGHTS  
OF DEALERS, CASINOS, AND THE REPUTATION  
OF THE NEVADA GAMING INDUSTRY

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I. INTRODUCTION

In the United States, the social practice commonly known as “tipping” is a method of showing appreciation to those in a particular line of service. Tipping started as early as the 1600’s in Europe and, originally, was a way of saying ‘thank you’ by paying for a drink for the server.<sup>1</sup> It has been said that tipping did not catch on in the United States until after the Civil War because the thought of showing gratitude in the form of money to ‘lower’ classes was viewed as unacceptable and was seen as going against the grain of the democracy.<sup>2</sup> Following the war, however, tipping took hold in the United States and is now a very lucrative part of many professions, including the profession of dealing cards and working other table games in major casinos.<sup>3</sup>

Many industries in the United States allow employees to collect tips for services rendered on top of their regular salary or hourly pay. The employees claim these tips as income, and the tips often make up a substantial part of their total income.<sup>4</sup> Waiters, stylists, and valets are tipped on a regular basis. Casino table dealers are no different. When hired, they expect that tips, often referred to as ‘tokens,’ will supplement the hourly pay they receive.<sup>5</sup> In fact, in Las

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<sup>1</sup> *Service 101: A Brief History of Tipping*, FOOD WOOLF (August 2, 2010), <http://www.foodwoolf.com/2010/08/history-of-tipping.html>.

<sup>2</sup> *Id.*

<sup>3</sup> See generally Liz Benston, *Caesars Palace Mulling Change on Dealer Tips*, LAS VEGAS SUN (June 14, 2010), <http://www.lasvegassun.com/news/2010/jun/14/daily-memo-gaming-caesars-looking-change-tips-wynn/>.

<sup>4</sup> See generally Steve Green, *Judge Rejects Wynn Tip-Pooling Policy; Company to Appeal*, VEGAS INC. (Nov. 10, 2011, 1:02 PM), <http://www.vegasinc.com/news/2011/nov/10/judge-overturns-ruling-favoring-wynn-tip-pooling-p/>.

<sup>5</sup> *Id.*

Vegas, table game dealers at high-end casinos can make tens of thousands of dollars in tips each year, making it a substantial part of their earnings and a major factor in deciding which casino to work for.<sup>6</sup>

Per Nevada Revised Statute (“NRS”) § 608.160, it is illegal for employers to “take” tips from employees.<sup>7</sup> A controversial new tip-sharing, or tip-pooling, policy at Wynn Las Vegas has attracted much attention, and much debate, to tipping policies and the legal system’s role in enforcing them.<sup>8</sup> Because of the large amounts of money and the controversy surrounding tipping in casinos, the Nevada State Gaming Control Board and Nevada Gaming Commission should set regulations to govern tip-pooling,<sup>9</sup> particularly between table dealers and other positions that might be introduced into tip-pools. Not having these regulations in place could create bad policy by opening up the gaming industry to possible bribery and favoritism amongst casino employees, as well as allowing the possibility of illegitimate and illegal “takings” from casino employees by their employers, which is banned under NRS § 608.160.

This article will give an overview of tip-pooling using Nevada case law regarding this practice. It will also provide background information on the Nevada State Gaming Control Board (“GCB”) and Nevada Gaming Commission (“NGC”), offer policy arguments for creating stricter regulations on tip-pooling in casinos, and illustrate the need for the GCB and NGC to create and enforce these regulations. Although the Nevada Legislature and the Courts could create more specific laws and regulations, the casino industry differs from other industries in a multitude of ways, and the creation of laws surrounding the industry reflect its unique nature. This article will argue that for the sake of clarity and the public image of Nevada, the NGC and the GCB should set their own regulations regarding tip-pooling in casinos that can be strictly enforced.

## II. HOW DOES TIPPING WORK AT TABLE GAMES & WHAT IS TIP-POOLING?

Tipping at table games is a form of art, and tipping can make the gambler’s experience more or less favorable depending on their knowledge of the practice.<sup>10</sup> Tipping the valets and the housekeeping staff is a fairly standard practice, but it is important to understand how tipping at table games works in order to understand what a tip-pool is and why it’s done in most casinos. Players tip dealers at table games, and sometimes the other casino floor staff, for one reason – to receive better treatment while gambling.<sup>11</sup>

Because the dealers have no direct effect on the outcome of any game, tipping a dealer will not increase a player’s chances of winning or give any advantage in the game. Instead, it rewards friendly dealers and helps ensure the

<sup>6</sup> *Id.*

<sup>7</sup> NEV. REV. STAT. § 608.160(1)(a) (2011).

<sup>8</sup> See Chris Sieroty, *Wynn Tip Policy Said to Violate Law*, LAS VEGAS REV. J. (Nov. 11, 2011, 2:01 AM), <http://www.reviewjournal.com/news/crime-courts/wynn-tip-policy-said-violate-state-law>.

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

<sup>10</sup> KEVIN BLACKWOOD, CASINO GAMBLING FOR DUMMIES 76 (2006).

<sup>11</sup> *Id.*

experience for all is fun.<sup>12</sup> According to the popular series *Casino Gambling for Dummies*, there are two common ways to tip the dealer.<sup>13</sup> The first is by placing an extra bet in front of or on top of your bet during the game; this extra bet is for the dealer.<sup>14</sup> This allows the dealer to have some fun with the game as well.<sup>15</sup> The other is to give chips directly to the dealer as a gift while sitting at the table or upon leaving the table.<sup>16</sup> There is a process at the end of a game where the player might ask the dealer to “color up,” or to change out many chips with smaller dollar values for fewer chips with larger dollar values, which is also a common time to tip the dealer.<sup>17</sup> The book lists a standard tip for a dealer as \$2-\$10 or \$25-\$100 for high-rollers.<sup>18</sup> These are explicitly suggested amounts and players commonly tip as they see fit. The book also warns new gamblers not to over-tip because without realizing it, gamblers sometimes tip more than they win.<sup>19</sup>

In most casinos, tips given to dealers are pooled in the interest of fairness and integrity.<sup>20</sup> To make sure that no customer is given an advantage, or even perceived by other patrons of the casino as having an advantage, the tips are pooled so that all dealers take home equal shares and there is no perception of a bias favoring any one player over another.<sup>21</sup> Tip-pooling occurs when employees who are regularly tipped put all of the tips received within a certain time frame together to be divided up evenly by the employer.<sup>22</sup> This compilation of tips, or tip-pool, must then be distributed by the employer according to the mutually agreed upon terms of the pooling arrangement.<sup>23</sup> Tip-pooling is so common in the service industry, that laws regulating the practice can be found in the Code of Federal Regulations.<sup>24</sup> Tip-pooling is a legal practice; however, a tip-pooling strategy must be in line with the Fair Labor Standards Act (“FLSA”) which states that valid, mandatory tip-pools:

. . . can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees’ tips for any other purpose.<sup>25</sup>

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

<sup>13</sup> *Id.* at 76-77.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 77.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 78.

<sup>19</sup> *Id.* at 77.

<sup>20</sup> See generally Rob Wiser, *How Gratuities Work in the Casino, and Why a Little Generosity Can Go a Long Way*, CASINO CENTER, <http://www.casinocenter.com/tips-on-tipping/> (last visited Jan. 27, 2014) (“In most casinos, dealers pool their tips and split them.”).

<sup>21</sup> *Id.*

<sup>22</sup> WILLIAM NORMAN THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 45 (2001).

<sup>23</sup> 29 C.F.R. § 531.54 (2011).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Multiple cases in Nevada have been decided by courts regarding the legality of tip-pooling practices in casinos as recently as 2013.<sup>26</sup> While the practice itself might not raise many issues, the manner in which some casinos have decided to split the tips has been the cause for much concern.<sup>27</sup> It is a particular problem when tips are not split among regularly tipped employees in similar positions, but instead, when tips are split among employees with different jobs and pay grades—some of which might not fall into the category of employees who customarily receive tips.<sup>28</sup>

### III. TIP-POOLING REACHES THE COURTS: CASE LAW IN NEVADA

#### Moen v. Las Vegas International Hotel, Inc.

Although *Wynn Las Vegas, LLC v. Baldonado* is the most recent tip-pooling case to make its way to a Nevada court, it is not the only case to ever do so. Before *Wynn*, there was *Moen v. Las Vegas International Hotel, Inc.*, a 1975 case in which table dealers challenged a tip-pooling policy that required dealers to share tips amongst themselves, as well as with the floormen, boxmen, and cashiers.<sup>29</sup> The employees that brought the suit felt that a situation in which they had to share tips, or create a tip-pool, was effectively an unfair taking under Nevada law.<sup>30</sup> The court recounted the legislative history behind NRS § 608.160, which made it illegal for employers to take tips from employees to then apply the tips towards the minimum wage requirements.<sup>31</sup> Although the statute made *takings* illegal, it did not explicitly bar employers from requiring employees to create and participate in tip-pools.<sup>32</sup>

Prior to the passage of this statute, employers had, on occasion, confiscated tips employees received from customers and counted them toward their minimum hourly wage.<sup>33</sup> To avoid accusations of fraud, employers would sometimes post a sign to let patrons know that tips were property of the management, but in 1971, Nevada's legislature passed NRS § 608.160 and put an end to this practice.<sup>34</sup>

The language of NRS § 608.160 reads as follows:

1. It is unlawful for any person to:
  - (a) Take all or part of any tips or gratuities bestowed upon the employees of that person.

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<sup>26</sup> See *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179 (Nev. 2013); *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96 (Nev. 2008) (this issue was heard by the court twice; the first time only contract and employment law issues were decided); *Alford v. Harolds Club*, 669 P.2d 721 (Nev. 1983); *Moen v. Las Vegas Int'l Hotel, Inc.*, 402 F. Supp. 157 (D. Nev. 1975).

<sup>27</sup> See Benston, *supra* note 3; Sieroty, *supra* note 8.

<sup>28</sup> Sieroty, *supra* note 8.

<sup>29</sup> *Moen*, 402 F. Supp. at 158.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 159-60.

<sup>32</sup> *Id.* at 160.

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

<sup>34</sup> *Id.* at 159.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon the employees of that person.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.<sup>35</sup>

In *Moen*, the casino was not taking the tips to apply to the minimum hourly wage, but was simply creating a pool that was going to be split between regularly tipped employees.<sup>36</sup> The court in *Moen* decided that the purpose of NRS § 608.160 was not to make tip-pooling illegal, but was to make the public and employers aware that tips belonged to the employees who were given the tip and not the management of the casino.<sup>37</sup> The court concluded that the Nevada Legislature passed NRS § 608.160 to put an end to employers taking the tips of employees and found that posting a sign or otherwise was not “adequate protection” of the public against fraud.<sup>38</sup> Moreover, the court held that the legislature had passed NRS § 608.160 to ensure that no tips would be confiscated and applied to meet the employees’ minimum wage.<sup>39</sup>

Although the court in *Moen* held that the tip-pooling and splitting between regularly tipped employees was acceptable, it suggested that splitting tips between these kinds of employees was only acceptable because they were part of providing for the “good service and well-being” of the customers—an issue that came up again in the *Wynn* case.<sup>40</sup> The court likened this kind of splitting to the kind that occurs in restaurants when waitresses split tips with busboys, reasoning that there are many workers who contribute to the customer experience, and, as such, tips should not only be for the benefit of the last person in the service line who actually receives the tip.<sup>41</sup>

#### Alford v. Harolds Club

In 1983, the Supreme Court of Nevada was again confronted with a tip-pooling issue, this time challenging a casino’s mandatory tip-pooling program. Like in *Moen*, the legality of tip-pooling was not being challenged, rather the proposition that an employer could make a tip-pool mandatory was.<sup>42</sup> The workers at Harolds Club in Northern Nevada had originally been allowed to keep the tips they earned without splitting between other workers.<sup>43</sup> But, when Harolds Club became aware that other casinos in the state were making tip-pools mandatory, it also decided to have its employees pool their tips to make the average tip take-home fair for all employees.<sup>44</sup>

Some employees did not agree with the new policy, refused to take part in the new tip-pooling strategy, and were fired.<sup>45</sup> Within two weeks of being

<sup>35</sup> NEV. REV. STAT. § 608.160 (2011).

<sup>36</sup> *Moen*, 402 F. Supp. at 161.

<sup>37</sup> *Id.* at 160.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Alford v. Harolds Club*, 669 P.2d 721, 722 (Nev. 1983).

<sup>43</sup> *Id.* at 722-23.

<sup>44</sup> *Id.* at 723.

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

fired, they decided to sue.<sup>46</sup> After an involuntary dismissal at the district court level, the case went on appeal to the Supreme Court of Nevada.<sup>47</sup> The court ruled that the tip-pooling strategy was not in violation of NRS § 608.160 because the employer was not *taking* any of the tips from the employees.<sup>48</sup> The court again stressed that the intention of NRS § 608.160 was not to make tip-pools illegal nor to stop employers from making them company policy but, instead, to make sure that employers were not cutting themselves into the tip-pool or taking any of the tips from the employees “for the benefit of the employer.”<sup>49</sup>

#### Baldonado v. Wynn Las Vegas, LLC

The Wynn opened its doors in 2005<sup>50</sup> at 3131 Las Vegas Boulevard South where the famous Las Vegas Boulevard meets Sands Ave.<sup>51</sup> The hotel and casino takes its name from its owner, casino mogul Steve Wynn. The building has over 2,700 rooms<sup>52</sup> and employs approximately 16,000 people, including full and part-time staff.<sup>53</sup> It prides itself on being a luxury hotel and has been recognized as such by many well-known and well-respected sources.<sup>54</sup> The Wynn’s list of outstanding recognitions includes: a AAA five diamond rating, a Mobil five-star rating, a Forbes five-star rating, and a Michelin Five Pavilions Award, among others.<sup>55</sup> A press release in 2013 announced that the Wynn, and its companion hotel, Encore, hold a collective “40 stars among their Forbes Travel Guide Five-Star Award winning properties, more than any other independent hotel company in the world.”<sup>56</sup>

To say the least, the Wynn is not your average hotel and casino, and because of its elite status, the Wynn’s tipping policy has been attracting national attention. When discussing the tip-sharing issues being decided in this case, a sense of perspective is required. The tip-pool at the Wynn is not about the splitting of a few thousand dollars, the Wynn’s tip-pool approximated value is \$5,000,000 per year.<sup>57</sup> Given the reputation of the hotel and casino, and

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 722.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 723 (quoting *Moen v. Las Vegas Int’l Hotel, Inc.*, 402 F. Supp. 157, 160 (D. Nev. 1975)).

<sup>50</sup> *Wynn Resorts Company Profile*, UNLV CENTER FOR GAMING RESEARCH, [http://gaming.unlv.edu/abstract/fin\\_wynn.html](http://gaming.unlv.edu/abstract/fin_wynn.html) (last visited Jan. 8, 2014).

<sup>51</sup> *Contact Information*, WYNN LAS VEGAS, <http://www.wynnlasvegas.com/AboutUs/ContactInformation> (last visited Jan. 27, 2014).

<sup>52</sup> *Wynn Resorts Company Profile*, *supra* note 50.

<sup>53</sup> *Wynn Number of Employees*, MACROAXIS, [http://www.macroaxis.com/invest/ratio/WYNN—Number\\_of\\_Employees](http://www.macroaxis.com/invest/ratio/WYNN—Number_of_Employees) (last visited Jan. 8, 2014).

<sup>54</sup> *Wynn Resorts Named as 2013 Forbes Five-Star Award Winners*, PR NEWSWIRE.COM, (Feb. 26, 2013), <http://www.prnewswire.com/news-releases/wynn-resorts-named-as-2013-forbes-five-star-award-winners-193291951.html>.

<sup>55</sup> *Id.*; *see also* Norm Clark, *Michelin Makes Steve Wynn’s Year*, LAS VEGAS REV. J. (Nov. 14, 2007, 10:00 PM), <http://www.reviewjournal.com/norm-clark/michelin-makes-steve-wynns-year>.

<sup>56</sup> *Wynn Resorts Named as 2013 Forbes Five-Star Award Winners*, *supra* note 54.

<sup>57</sup> Sieroty, *supra* note 8.

magnitude of money at stake, it should not be surprising that a controversial tip policy would again go to the courts, attracting plenty of media attention.

In 2006, the Wynn decided to modify its tip-pooling policy, a decision that would eventually land in front of the Supreme Court of Nevada—more than once.<sup>58</sup> When the Wynn hired its employees in 2005, their employment handbook included the tipping policy.<sup>59</sup> This policy split tips evenly between dealers based on hours worked and other factors.<sup>60</sup> The entire tip-pooling process was articulated in the handbook.<sup>61</sup> This policy also stated that a voting process was necessary to make any changes to the token policy and that any changes had to be approved by the “Table Games Management.”<sup>62</sup> Table Games Management had the authority, as was stated in the handbook, to veto any change that it did not think was in the Wynn’s best interest.<sup>63</sup>

To better understand the issues that dealers had with the 2006 change in their tip-pooling policy, it is important to understand the background of the policy at the Wynn: what did their employee manual say, who were the casino service team leads, and why were they necessary? If one were to read through the employee handbook given to Wynn employees in 2005, one would find nearly ten pages of small font dedicated to tipping, how the process works, who counts the tips, and who is included in the tip-pool.<sup>64</sup> In fact, the handbook was so specific, it included a flow chart that summarized the process.<sup>65</sup> It described the process as follows: the token would be received by the employee and placed in a “token box” at each table, which was eventually emptied by the dealers at the end of their shift into a larger box. The large boxes were then taken to the dealer’s lounge by Token Committee members, where the boxes were emptied onto a table for sorting and counting. The Token Committee members then delivered the counted tokens to the satellite cage for verification and deposit. Finally, a member of the committee calculated the dealers’ tokens and gave the information to payroll so that the tokens could be paid out with the bi-weekly paychecks.<sup>66</sup> If an employee was left wanting to know more, they could continue reading to find out how the Token Committee is elected and how often the members are changed, how tokens are calculated on holidays, and even what can be worn while counting tokens—no civilian clothes or clothes with pockets allowed.<sup>67</sup>

But perhaps most interesting of all the information can be found in Section 1.11.2 of the employee handbook titled ‘General Policies.’ “The token process applies only to Dealers. Box supervisors, floor supervisors, pit managers, assistant shift managers and shift managers are prohibited from accepting tips.”<sup>68</sup>

<sup>58</sup> *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179 (Nev. 2013); *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96 (Nev. 2008).

<sup>59</sup> *Tokes and the Token Committee*, WYNN CASINO EMPLOYEE HANDBOOK 156 (2005).

<sup>60</sup> *Id.* at 157.

<sup>61</sup> *Id.* at 156-65.

<sup>62</sup> *Id.* at 163.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 156-65.

<sup>65</sup> *Id.* at 156.

<sup>66</sup> *Id.* at 160.

<sup>67</sup> *Id.* at 170.

<sup>68</sup> *Id.* at 157.

The Wynn is not run by people unfamiliar with the job positions on a casino floor; therefore, in being so explicit, one would imagine that the authors of the General Policies were deliberate in their choice of words and job titles. A problem with the policy arose when the Wynn decided to eliminate the positions of floor supervisor and pit manager, while creating the position casino service team lead (“CSTL”), which would, subsequently, be cut into the dealers’ tip-pool.<sup>69</sup>

The traditional job of a floor supervisor is to watch over the dealers, to make sure they are doing their job, to watch for cheating or any sign of problems, to handle altercations or disputes with customers, and to generally keep the floor running smoothly.<sup>70</sup> If the floor supervisor’s job is to watch the dealers, then the pit manager’s job is to watch the floor supervisors.<sup>71</sup> Pit managers, more commonly called “pit bosses,” are the heads of the casino floors and are called into action when major disputes or allegations arise.<sup>72</sup> These have been institutional, quintessential casino positions and are an integral part of the operation—they are not to be tipped.<sup>73</sup> It is easy to see why tipping the supervisors of the casino floor could become an illegitimate practice because of the possible perception that the tip was a bribe or a payment for turning a blind eye to some less-than-favorable behavior on the floor. These issues can explain why in the Wynn’s handbook, these are two of the positions barred from receiving tips.

Once these positions were eliminated, the Wynn introduced the new CSTL and fashioned it as more of a customer service agent, having a relationship with the dealers more akin to the waitress/busboy scenario than the pit boss/table dealer scenario.<sup>74</sup> It can be logically argued that this is a legitimate description of a new floor position. After all, surveillance in casinos is becoming more and more high-tech, making the need for the traditional pit boss and other casino security personnel less necessary.<sup>75</sup> But others would say that this was just a sleight-of-hand way of renaming the supervisory positions to cut them into the tip-pool—an argument for why the change in tip-pooling was more akin to a *taking* than a restructuring.<sup>76</sup> This is exactly what the dealers in *Wynn* argued.<sup>77</sup>

The modification in 2006 changed the tip-pool from just dealers to cutting in CSTL’s.<sup>78</sup> Though these CSTL’s were on the casino floor, they were in a

<sup>69</sup> *In re Meghan Smith*, Nev. State Labor Comm’r, 4 (July 2012), available at [http://wynn-lawsuit.com/uploads/FINAL\\_7-12.pdf](http://wynn-lawsuit.com/uploads/FINAL_7-12.pdf).

<sup>70</sup> See *What Does a Floorman Do?*, WISE GEEK, <http://www.wisegeek.com/what-does-a-floorman-do.htm> (last visited Jan. 8, 2014).

<sup>71</sup> *Id.*; see also *What Does a Pit Boss Do?*, WISE GEEK, <http://www.wisegeek.com/what-does-a-pit-boss-do.htm> (last visited FEB. 4, 2014).

<sup>72</sup> *Id.*

<sup>73</sup> WYNN CASINO EMPLOYEE HANDBOOK, *supra* note 59, at 157.

<sup>74</sup> *In re Meghan Smith*, *supra* note 69 at 5.

<sup>75</sup> Mike Pritchard, *New Rules Eliminate Atlantic City Pit Bosses*, ATLANTIC CITY WEEKLY (Apr. 11, 2011), <http://www.atlanticcityweekly.com/casinos/features/New-Rules-Eliminate-Atlantic-City-Pit-Bosses-119625034.html>.

<sup>76</sup> Green, *supra* note 4.

<sup>77</sup> *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 99 (Nev. 2008).

<sup>78</sup> *In re Meghan Smith*, *supra* note 69 at 4.



different position at the Wynn and had different responsibilities than dealers.<sup>79</sup> In *Wynn*, the district court described the managers who were being cut into the tip sharing policy as pit manager/floor supervisor positions that were combined into a position called casino service team lead.<sup>80</sup> The Wynn did not originally include the CSTL in the tip-pool because, at the time of the handbook's creation, the CSTL position did not exist.

The decision to modify the plan allegedly came into being when the Wynn realized that it was having a problem promoting table dealers to management positions because they were effectively being paid less once they were promoted.<sup>81</sup> Apparently, because of the amount of tips that the dealers received, their take-home income actually could end up being higher than the income of the lower-level management, even though the manager technically received a higher base salary.<sup>82</sup> Perhaps for this reason, the Wynn decided to combine two of the management positions into one lead, give the position a new name, and cut it into the tip-pool. Though some speculate that the Wynn only created this position to avoid having to pay higher wages to its low-level managers<sup>83</sup> or to avoid scrutiny under NRS § 608.160, the true reasoning behind the creation of the position and the legality of including this new position in the tip-pool was ultimately of little consequence.<sup>84</sup>

Regardless of how the Wynn arrived at the creation of the CSTL, the dealers felt that the new tip-pooling policy was in violation of state law and that it should not be allowed to remain in place.<sup>85</sup> The case was decided in favor of the Wynn in the Eighth Judicial District Court and later appealed.<sup>86</sup> The Supreme Court of Nevada<sup>87</sup> heard the case in 2008, holding that the dealers had no private cause of action, their issues were inappropriate for declaratory relief, and that they did not establish a breach of contract claim.<sup>88</sup> Unfortunately for those concerned with the tip-pooling outcome, the court only ruled on employment and contract issues in the case. It did not provide a black and white opinion as to what the outcome for the tip-pooling strategy would have been had the dealers had a private cause of action. The case then had to go before the Nevada Labor Commissioner.<sup>89</sup>

In 2010, the Labor Commissioner found in favor of the Wynn, highlighting in its report that prior to the new tip-pooling policy, the positions that were combined to create CSTLs were actually tipped at times.<sup>90</sup> The report stated, "boxpersons, floor supervisors and pit managers, assistant shift managers, and

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<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Baldonado*, 194 P.3d at 99.

<sup>81</sup> Sieroty, *supra* note 8.

<sup>82</sup> Green, *supra* note 4.

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

<sup>84</sup> Employment law surrounding this issue is beyond the scope of this article and will not be addressed further.

<sup>85</sup> *Baldonado*, 194 P.3d at 98.

<sup>86</sup> *Id.* at 99.

<sup>87</sup> There is no intermediate appellate court in Nevada; all district court decisions appealed are taken to the state's Supreme Court.

<sup>88</sup> *Id.* at 969.

<sup>89</sup> *In re Meghan Smith*, *supra* note 69, at 1.

<sup>90</sup> *Id.* at 3-4.

shift managers were prohibited from receiving a share of the tips and required to put any tips bestowed upon them into the tip-pool for the *sole* benefit of the dealers”<sup>91</sup> (emphasis added).

That aside, the dealers still felt that the new tip-pooling policy and the way it was created was in violation of Nevada law and the case returned to court.<sup>92</sup> In 2007, Wynn dealers had voted overwhelmingly in favor of representation by the Transportation Workers Union, a group that represents dealers in other casinos.<sup>93</sup> This case was in front of District Court Judge Kenneth Cory in 2011.<sup>94</sup> He issued a decision in favor of the dealers based on the statute section discussed above.<sup>95</sup> The Wynn appealed, and the case was decided by the Supreme Court of Nevada on October 31, 2013.<sup>96</sup>

Not surprisingly, the Nevada Supreme Court reversed the lower court and found in favor of the Wynn.<sup>97</sup> In its decision, the Supreme Court reasoned that some level of benefit to the employer did not necessarily constitute a *taking*.<sup>98</sup> Because the Wynn paid out all of the tips to employees in the tip-pool and did not keep any of the tips, the Court found that a *taking* had not occurred.<sup>99</sup> Though the decision allows the Wynn’s policy to stand, it does not clarify the ongoing confusion and unrest about tip-pooling in casinos in terms of which positions should be allowed to share in a certain tip-pool.

#### IV. THE NEVADA STATE GAMING CONTROL BOARD AND THE NEVADA GAMING COMMISSION: WHY THEY SHOULD GET INVOLVED

While the outcome of the *Wynn* case validates the Wynn’s current tip-pooling policy, it has not solved the problem completely. Because the issue does not concern all service industries in Nevada, it would be appropriate for the Nevada Gaming Control Board and the Nevada Gaming Commission to be the regulatory bodies to set standards for tip-sharing policies in Nevada casinos.

##### *Who are the Gaming Control Board and Gaming Commission?*

The Nevada Gaming Control Board<sup>100</sup> was created by the Nevada legislature in 1955, with an original purpose of regulating gaming.<sup>101</sup> The Control Board has three members appointed by the governor who serve in full-time

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *See* *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179 (Nev. 2013).

<sup>93</sup> *See* Benston, *supra* note 3.

<sup>94</sup> Green, *supra* note 4.

<sup>95</sup> *Id.*

<sup>96</sup> *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179 (Nev. 2013).

<sup>97</sup> *Id.* at 1182-83.

<sup>98</sup> *Id.* at 1182.

<sup>99</sup> *Id.*

<sup>100</sup> The Nevada State Gaming Control Board and Gaming Commission became particularly famous when depicted in the movie *Casino* (Universal Pictures, 1995), where the Board denied a gaming license to Sam Rothstein, a character with the likeness of notorious gambler and casino executive Frank Rosenthal.

<sup>101</sup> JIM KILBY ET AL., *CASINO OPERATIONS MANAGEMENT* 14 (2nd ed. 2005).

positions.<sup>102</sup> In 1959, the Nevada Gaming Commission was established to handle licensing and disciplinary issues and to govern the ever-expanding gaming industry that still thrives in Nevada.<sup>103</sup> The Commission has five members who serve part-time and are also appointed by the governor.<sup>104</sup> Prior to the creation of the Nevada Gaming Commission, the gaming industry was under the control of the Nevada State Tax Commission.<sup>105</sup>

Gaming came under the Tax Commission's control in 1945, and remained there for over a decade.<sup>106</sup> In 1959, then Governor Grant Sawyer recognized the many problems plaguing the gaming industry and pressed for a complete revitalization of gaming oversight.<sup>107</sup> The result was the Nevada Gaming Control Act, which took the gaming industry out from under the control of the Tax Commission and created the new Nevada Gaming Commission, which had the highest power and control over the industry; power it still holds today.<sup>108</sup>

The two agencies are not the same, but they co-exist in that the Board is responsible for administering the regulations promulgated by the Commission, which grants licenses.<sup>109</sup> Along with the Gaming Control Board, the Nevada Gaming Commission has the power to regulate the gaming industry in Nevada.<sup>110</sup> The Commission's work is aimed at holding the industry to high standards and at ensuring enforcement of the gaming laws.<sup>111</sup>

A quick review of the Commission's Statutes & Regulations provides an excellent overview of the types of activities the GCB and NGC are already involved in managing.<sup>112</sup> The GCB and NGC describe their role in the creation of gaming law as "further clarification" of the laws in the Nevada Gaming Control Act and ancillary statutes;<sup>113</sup> clarification that can be achieved through regulation. On the Commission's website, the GCB and NGC have an extensive list of regulations that range from the way casinos are run, to the operation of electronic gaming devices, to horse racing.<sup>114</sup> The website also has a link to regulation activity that allows the public to view regulations that have been created and amendments passed and proposed.<sup>115</sup>

But why the need for a separate Commission to do the work involved in regulating the gaming industry; why not just let the legislature create gaming laws and the courts handle any challenges to the laws and decide on their legal-

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<sup>102</sup> JEFF BURBANK, LICENSE TO STEAL: NEVADA'S GAMING CONTROL SYSTEM IN THE MEGARESORT AGE 223 (2000).

<sup>103</sup> KILBY, *supra* note 101, at 14.

<sup>104</sup> BURBANK, *supra* note 102, at 223.

<sup>105</sup> RUSSELL R. ELLIOTT, HISTORY OF NEVADA 332 (2nd ed. 1987).

<sup>106</sup> KILBY, *supra* note 101, at 13.

<sup>107</sup> ELLIOTT, *supra* note 105.

<sup>108</sup> KILBY, *supra* note 101, at 14.

<sup>109</sup> *Id.* at 223.

<sup>110</sup> *See generally* BURBANK, *supra* note 102.

<sup>111</sup> *Id.*

<sup>112</sup> *Gaming Statutes and Regulations*, NEVADA STATE GAMING CONTROL BOARD AND GAMING COMMISSION, <http://gaming.nv.gov/index.aspx?page=51> (last visited Jan. 13, 2014).

<sup>113</sup> *About Regulation*, NEVADA STATE GAMING CONTROL BOARD AND GAMING COMMISSION, <http://gaming.nv.gov/index.aspx?page=53> (last visited Jan. 13, 2014).

<sup>114</sup> *Gaming Statutes and Regulations*, *supra* note 112.

<sup>115</sup> *Pending Regulation Activity*, NEVADA STATE GAMING CONTROL BOARD AND GAMING COMMISSION, <http://gaming.nv.gov/index.aspx?page=52> (last visited Jan. 13, 2014).

ity? The answer to this can be given in two parts: 1) The gaming industry in Nevada is unlike any other industry in the state, and therefore should have a specialized group of people with expertise in the area of gaming creating the regulations, and 2) for the benefit of the casinos, casino employees, and patrons in Nevada, there needs to be clear regulations in the industry and an appropriate place to address concerns. The Board and Commission have the power to manage both of these crucial tasks.<sup>116</sup>

#### *The Nevadan's View of the Gaming Industry*

Providing commercial gaming is a privilege in Nevada, not a right. This has been made explicitly clear by the Nevada Legislature in NRS § 463.0129(2), which calls a gaming license a “revocable privilege.”<sup>117</sup> Gaming is designated as such for the obvious purpose of being able to rid the industry of those who fail to meet the industry’s high standards or fail to respect public confidence and trust.<sup>118</sup> Insufficient regulations and highly publicized cases need to be considered by the NGC and kept in mind when deciding whether or not to get involved in clarifying and enforcing tip-pooling laws.

#### *How is the Gaming Industry Different from Other Industries?*

Nevada is unique because few states have embraced the gaming industry in a similar fashion.<sup>119</sup> Las Vegas is, without a doubt, the shining example of Nevada’s gaming industry.<sup>120</sup> But, one characteristic of the gaming industry that might go unnoticed by an outsider is the fact that, because of the unique nature of Nevada’s gaming industry, the laws that govern it are also unique.<sup>121</sup> For example, employment laws and service industry regulations are treated a bit differently in Sin City.<sup>122</sup>

Employers in Las Vegas and other gaming-based cities have to pay very close attention to laws regarding age discrimination, mandatory costumes, sexual harassment, and alcohol and drug use.<sup>123</sup> Casinos are sometimes held liable for the actions of their employees and, conversely, for not protecting employees from the heightened risk and exposure to the exploits of the industry.<sup>124</sup> Because the adult atmosphere is part of the appeal of the gaming industry, the casinos walk a fine line in protecting that status and protecting their employees. This is no different in the arena of tip-pooling. At times laws can have disparate effects on certain groups of employees, for example, employees at risk for age

<sup>116</sup> See BURBANK, *supra* note 102.

<sup>117</sup> NEV. REV. STAT. § 463.0129(2) (2013).

<sup>118</sup> NEV. REV. STAT. § 463.0129(1)(b) (2013).

<sup>119</sup> See generally *United States Casino Gambling Review*, WORLD CASINO DIRECTORY, <http://www.worldcasinodirectory.com/american-casinos.asp> (last visited Feb. 20, 2014).

<sup>120</sup> *Id.*

<sup>121</sup> See Diana P. Scott, *Employment Law and Gaming Industry: An Overview of Special Problems and Cutting Edge Issues*, in A.L.I.-A.B.A. COURSE OF STUDY, THE GAMING INDUSTRY: CURRENT LEGAL, REGULATORY, AND SOCIAL ISSUES, 415, 417 (March 29, 2001) available at Westlaw SF89 ALI-ABA 415 (discussing employment law issues in the gaming context).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 417, 426, 428, 430.

<sup>124</sup> *Id.* at 417 (referring to 29 C.F.R. §1604.11(e)).

discrimination; in the casinos, the dealers are an at-risk population when it comes to law surrounding the splitting of tips.<sup>125</sup> This is an excellent reason for the Gaming Control Board and Commission to take a closer look at the different tip-pooling strategies in Nevada's casinos and promulgate regulations to help protect workers' rights to earned tips while protecting the casinos from litigating tip-pooling schemes that are frivolous or well within the letter of the law.

As stated, the gaming industry is so unique that the laws and subsequent regulations that govern it should be advised by a group of experts who understand how the industry works and can advocate for the best interests of the workers and casinos in a balanced manner. Issues like these are the reason the Nevada Legislature created the Gaming Control Board and Gaming Commission.<sup>126</sup>

*Is There a Tip-Pooling Precedent in Another State for Nevada to Emulate?*

Like in Nevada, tips in California belong to the tipped employees, not the employer.<sup>127</sup> However, California's legal interpretation of the tip laws are clear. For employees in a restaurant, California has reasoned that only those who provide *direct* table service are allowed in the sharing or pooling of the tips.<sup>128</sup> Of course, good lawyers could argue over the meaning of *direct*, but a plain reading would preclude managers and others whom do not provide service at the table from sharing in the tips.

In the past few years, many states have handled lawsuits relating to tips. For example, Massachusetts' tipping laws came under scrutiny when baristas at Starbucks sued over their tip-pools in the highly publicized case against the coffee giant.<sup>129</sup> The United States Court of Appeals for the First Circuit found in favor of the baristas in November 2012 (Starbucks was sued in California for similar reasons in 2009).<sup>130</sup> Starbucks is not alone in this type of publicized dispute: a restaurant chain owned by Mario Batali was sued in New York in 2012,<sup>131</sup> Dunkin' Donuts was sued in Massachusetts in 2010,<sup>132</sup> and Outback Steak House was sued in Minnesota in 2010.<sup>133</sup> These cases highlight the

<sup>125</sup> See Green, *supra* note 4.

<sup>126</sup> See ELLIOTT, *supra* note 105.

<sup>127</sup> *Id.*

<sup>128</sup> See Leighton v. Old Heidelberg, Ltd., 268 Cal. Rptr. 647 (1990).

<sup>129</sup> Matamoros v. Starbucks Corp., 699 F.3d. 129 (1st Cir. 2012).

<sup>130</sup> *Id.*; Andrea Chang & Jerry Hirsch, *Starbucks Wins Reversal of \$100-million Tips Verdict*, L.A. TIMES (June 3, 2009), <http://articles.latimes.com/print/2009/jun/03/business/fo-starbucks-tips3>.

<sup>131</sup> Franczek Radelet, *Mario Batali Restaurants Settle Tip Pool Lawsuit for \$5.25 Million*, JDSUPRA BUS. ADVISOR (Mar. 12, 2012), <http://www.jdsupra.com/legalnews/mario-batali-restaurants-settle-tip-pool-64537/>.

<sup>132</sup> Jenn Abelson, *Court: Starbucks Owes More than \$14 M to Mass. Baristas*, THE BOSTON GLOBE (Nov. 9, 2012), <http://www.bostonglobe.com/business/2012/11/09/starbucks/kHSjM omW83ToqN7RIHwh2N/story.html>.

<sup>133</sup> Ed Stych, *Outback Steakhouse Settles With MN Servers Over Tip Sharing*, MINNEAPOLIS/ST. PAUL BUS. J. (Sep. 7, 2011), <http://www.bizjournals.com/twincities/news/2011/09/07/outback-steakhouse-mandated-tips.html>.

highly contentious area of tip-pooling law and its desperate need for regulation and clarity.

While other states' laws might serve as a guidepost, perhaps the most persuasive authority the GCB and NGC should look to is the set of casino regulations the Missouri Gaming Commission has created. In 2005, the Missouri Gaming Commission dealt specifically with the tipping processes for Class B licensees in the state.<sup>134</sup> Class A licenses are granted to parent companies that oversee the Class B licensees; Class B licenses are granted to the establishments themselves.<sup>135</sup> The tipping regulations are entitled "Minimum Internal Control Standards: Chapter T – Tips." This section is then broken into the following four sections: 1) Tips, Gifts and Gratuities, 2) Transportation of Tips, 3) Table Game Tips, and 4) Individual Poker Dealer Tips.<sup>136</sup> The regulations guide Missouri gaming establishments on how they are to conduct their tip-pooling process—including how the tip-boxes are stored and how tips are counted.<sup>137</sup> The regulations do leave some of the decisions up to the establishments themselves; "If the Class B Licensee chooses to allow Poker Dealers to receive individual tips."<sup>138</sup> This type of regulation would be particularly useful in Nevada because it gives establishments some control over how tips are shared while also providing enough structure to keep the process fairly similar across all establishments in the state.

Other gaming control boards often look to the Nevada Gaming Control Board for guidance.<sup>139</sup> Right now, Nevada has the opportunity to intervene in the regulation of tip-pooling in the gaming industry and should take on the task to prevent further high-profile litigation on tipping in the state.

*If the Gaming Control Board and Gaming Commission Cannot Write Laws,  
What Can They Do To Clarify Tip-Pooling Issues?*

It is important to recognize that although the GCB and NGC have no authorship in the state's statutes, they hold an advisory role in the area of gaming policy and are enabled to create regulations to further the enforcement of the state's statutes.<sup>140</sup> It is also important to note the difference between laws and regulations in order to understand how regulations could have a real impact on the current tip-pooling issues in Nevada. While laws are written by the legislature, regulations are often written by regulatory bodies to clarify aspects of

<sup>134</sup> MISSOURI GAMING COMMISSION, MINIMUM INTERNAL CONTROL STANDARDS: CHAPTER T- TIPS T-2 (Aug. 30, 2012), available at <http://www.mgc.dps.mo.gov/MICS/MICS%20Chapter%20T%208-30-2012%20clean.pdf>; MO. CODE REGS. ANN. tit. 11 CSR § 45-8.130 (2013) (codification in the Missouri Code of Regulations).

<sup>135</sup> MO. CODE REGS. tit. 11, § 45-4.020(1) (2013).

<sup>136</sup> MISSOURI GAMING COMMISSION, *supra* note 134 at T-1

<sup>137</sup> *Id.* at T-2.

<sup>138</sup> *Id.* at T-3.

<sup>139</sup> Richard N. Velotta, *Is Nevada Still the National Leader in Gaming Regulation?*, VEGAS INC. (Dec. 19, 2011, 2:00 AM), <http://www.vegasinc.com/news/2011/dec/19/nevada-still-national-leader-gaming-regulation/>.

<sup>140</sup> See ELLIOTT, *supra* note 105.

the law for daily operations and administrative simplification.<sup>141</sup> For example, while laws about taxes are written by the legislature, the Department of Treasury has the power to write regulations in the tax code that help clarify how the laws are applied and enforced.<sup>142</sup> They are granted this power by the legislature, and these regulations effectively fill in the blanks when it comes to tax law.<sup>143</sup> Similarly, when the Nevada Legislature created the Gaming Commission, it intended for the Gaming Commission to function as a regulatory body with power to use its expertise to handle problems such as the tip-pooling issues in the gaming industry.<sup>144</sup>

In the area of tip-pooling regulations, perhaps the most important component of the Nevada Gaming Control Board to focus on is the “Gaming Policy Committee,” which was created for the purpose of recommending good policy measures to be taken in the gaming industry.<sup>145</sup> The Gaming Policy Committee is made up of the following eleven members: the Governor, one member of the State Senate, one member of the State Assembly, one member of the Nevada Gaming Commission, one member of the State Gaming Control Board, one member of a Nevada Indian Tribe, and five members appointed by the Governor including two representatives of the general public, two representatives of non-restricted gaming licensees, and one representative of restricted gaming licensees.<sup>146</sup> This group meets to discuss and recommend policies it feels will benefit the gaming industry and works to uphold the public policy codified in NRS § 463.0129, which deals with public confidence and trust.<sup>147</sup>

As stated, even though the recommendations made to the GCB and NGC by the Gaming Policy Committee are not binding, the recommendations are influential and could create the spark that leads to promulgation of tip-pooling regulations. Decisions regarding the manner in which tip-pools in casinos are run should not be left only to the legislature and the courts. Although the courts are certainly competent to make decisions regarding tip-pooling, it is not the court’s responsibility to decide the best policy for the industry. Casinos should have the ability to manage their tip-pools in the way they feel most efficient, but the Control Board and Gaming Commission should use their power to create regulations that clear up the grey areas. For instance, regulations could create clearly defined tiers of employees that would share in a given pool. The courts have already decided that tip-pools can be made up of more than one type of employee,<sup>148</sup> so it would be helpful for those with familiarity of casino

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<sup>141</sup> See *How to Understand the Differences Between Statutes, Regulations, Ordinances and Common Law*, ANIMAL PROTECTION OF NEW MEXICO, [http://www.apnm.org/publications/animal\\_law/how\\_to/understand.php](http://www.apnm.org/publications/animal_law/how_to/understand.php) (last visited Jan. 13, 2014).

<sup>142</sup> *Writing and Enacting Tax Legislation*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/resource-center/faqs/Taxes/Pages/writing.aspx> (last visited Jan. 13, 2014).

<sup>143</sup> See *id.*

<sup>144</sup> See generally ELLIOTT, *supra* note 105.

<sup>145</sup> See BURBANK, *supra* note 102, at 225; see also *About the Gaming Policy Committee*, NEVADA STATE GAMING CONTROL BOARD AND GAMING COMMISSION, <http://gaming.nv.gov/index.aspx?page=173> (last visited Jan. 15, 2014).

<sup>146</sup> *Id.*; NEV. REV. STAT. § 463.0129.

<sup>147</sup> NEV. REV. STAT. § 463.0129(1)(c) (2013).

<sup>148</sup> See *Moen v. Las Vegas Int’l Hotel, Inc.*, 402 F. Supp. 157, 160 (1975).

operations to decide which employees should be allowed into a certain tip-pool on the casino floor.

*The Effect of this Ongoing Debate on the Public Image of Nevada and Its Gaming Industry*

Without these regulations, the tip-pooling policies in Nevada will continue to be questioned by employees and the media, and potential court cases will continue to tarnish the image of the Nevada gaming industry that the State of Nevada and the Las Vegas Convention and Visitors Authority (“LVCVA”) have worked so hard to improve.<sup>149</sup> NRS § 463.0129 states, “Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments.”<sup>150</sup> This must also be true of the policies that directly affect the workers in the casinos to which Nevada is trying to attract tourists and international vacationers.

The State of Nevada, and in particular Las Vegas, depend heavily on the gaming and tourism industry.<sup>151</sup> Because of the importance of this revenue, the state has worked very hard to clean up the industry in an attempt to improve its image.<sup>152</sup> Nevada has put plenty of money and effort into destroying the idea that Las Vegas is a mob-run city<sup>153</sup> full of illegal activity, and promoting it as a place to have a great time for both gamblers and people looking for a fun family vacation.<sup>154</sup> Not only has Nevada worked to clean up its image by tightening gaming regulations and catering to more than just gamblers, it has also undertaken public projects to literally “clean” up the cities.<sup>155</sup> For example, in Las Vegas there was a major push to get adult pamphlets and images off the sidewalks of the famed Las Vegas Boulevard.<sup>156</sup> The legislature passed laws that ban prostitution in counties with large populations<sup>157</sup>—Washoe and Clark, which happen to contain the cities of Reno and Las Vegas. These are examples of the calculated steps in recreating the way Nevada is perceived by the rest of the country.<sup>158</sup>

Prior to the economic crisis, and even still to a lesser extent, Las Vegas has become a haven for corporate meetings and international travelers and

<sup>149</sup> See generally *About the LVCVA*, LAS VEGAS CONVENTION AND VISITORS AUTHORITY, <http://www.lvcva.com/who-we-are/> (last visited Jan 21, 2014).

<sup>150</sup> NEV. REV. STAT. § 463.0129(1)(c).

<sup>151</sup> *Las Vegas Stats & Facts*, LAS VEGAS CONVENTION AND VISITORS AUTHORITY, <http://www.lvcva.com/stats-and-facts/> (last visited Jan 15, 2014).

<sup>152</sup> The years of the regulations indicate the tightening of the laws to push unfavorable groups, such as the mob, out of Nevada’s mainstream business.

<sup>153</sup> See ELLIOTT, *supra* note 105, at 336.

<sup>154</sup> *About the LVCVA*, *supra* note 149.

<sup>155</sup> Mead Gruver, *Las Vegas Tries to Clean Up X-Rated Litter*, ASSOCIATED PRESS (Sep. 8, 2012, 5:03 PM), <http://bigstory.ap.org/article/litter-law-new-attempt-target-vegas-smut-cards>.

<sup>156</sup> *Id.*

<sup>157</sup> See NEV. REV. STAT. § 244.345(8) (2011), (prostitution made illegal in counties with a population of 700,000 or more).

<sup>158</sup> See generally ELLIOTT, *supra* note 105, at 335.



investors.<sup>159</sup> According to the LVCVA, Las Vegas was visited by thirty-nine million tourists in 2011.<sup>160</sup> It was also home to over 19,000 conventions totaling more than four million attendees.<sup>161</sup> Clark County had gaming revenue of over \$9 billion in 2011.<sup>162</sup> All of these excellent figures are a product of the bigger plan—the reinvention and revitalization of the gaming industry’s image in Nevada and the rest of the world. This image-renovation has permeated the landscape of the Nevada gaming industry. Even the Gaming Commission focuses on good policies on its website, including, but not limited to, the following objectives:

We act with a high degree of integrity, honesty and respect in carrying out our duties and in our interactions with our stakeholders. . . We are committed to protecting the confidentiality of all information entrusted to us by applicants, licensees and other stakeholders. . . Our objectivity, independence and impartiality are beyond reproach. . . We avoid all personal or professional circumstances or conflicts that would call these into question. . . Our processes ensure that actions, decisions and policies are consistently applied and do not result in advantages or disadvantages to any party to the detriment of another. . . Our investigations, audits and tests, while comprehensive, are objective and fair-minded. Written reports of such actions are made with a high degree of care with special attention to accuracy. . .<sup>163</sup>

Readers should note the emphasis on impartiality and integrity in the regulation of businesses. These characteristics should be reflected in the policy of tip-pooling, and in order to uphold these values, the Gaming Commission should be committed to setting standards for tip-pooling policies sooner than later.

The Gaming Control Board and Gaming Commission should continue to focus their attention on putting a stop to any illegal policies and, just as importantly, on creating regulations that give guidance to casinos on how to establish and manage their tip-pooling policies, should they choose to have tip-pools. This is not just an issue the Wynn is facing, for other casino groups in Las Vegas are familiar with the method the Wynn currently has in place.<sup>164</sup> With the recent *Wynn* decision, there are no regulations in place to stop other casinos from implementing a similar policy.

Because *Wynn* attracted so much media attention, other groups have joined in the public criticism of the tip-pooling policy and are claiming that it is a bad policy that adversely, illegally, and unfairly impacts low-powered casino workers.<sup>165</sup> Workers’ groups and religious groups in southern Nevada filed

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<sup>159</sup> See generally *Historical Las Vegas Visitor Statistics*, LAS VEGAS CONVENTION AND VISITORS AUTHORITY, <http://www.lvcva.com/includes/content/images/media/docs/Historical-1970-to-2011.pdf> (last visited Feb. 10, 2014).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *About Us*, NEVADA STATE GAMING CONTROL BOARD AND GAMING COMMISSION, <http://gaming.nv.gov/index.aspx?page=2> (last visited Jan. 21, 2014).

<sup>164</sup> Benston, *supra* note 3.

<sup>165</sup> Steve Green, *Religious, Progressive Groups Join Fight Against Wynn Tip-Sharing Mandate*, VEGAS INC. (Oct. 2, 2012, 2:00AM), <http://www.vegasinc.com/news/2012/oct/02/religious-progressive-groups-join-fight-against-wyl/>.

briefs with the court in opposition to the Wynn's policy.<sup>166</sup> One group was quoted in the press saying:

Wynn's use of the dealers' tips to compensate the dealers' non-tipped or nominally tipped supervisors, whom the Wynn is neglecting to adequately compensate itself, is immoral, improper, and not in compliance with (state law), particularly in light of the great wealth possessed by the Wynn and its clear ability to adequately compensate those supervisors itself," the religious group says. "Such actions by the Wynn are not in compliance with Judeo-Christian values or any faith-based value system that respects the dignity of those who must labor to provide for the needs of themselves and their families."<sup>167</sup>

While many groups have come out in support of the dealers, there are other industries in Las Vegas supporting the Wynn's right to choose how it will handle employee tips.<sup>168</sup> They believe the policy is legitimate and not in violation of Nevada law; it is simply a business decision. According to a brief filed in support of the Wynn policy:

Whether by implementing an incentive-based compensation structure like tip pools, stock options, or profit sharing; offering alternative work schedules; setting a company-wide policy limiting email correspondence on off hours; or any number of unique solutions, companies need to be creative in attracting and retaining high-performing employees, reducing turnover and in motivating their workers to deliver better service.<sup>169</sup>

Regardless of the reasons behind the Wynn's changed policy, there has been nothing but bad press for both the Wynn and the gaming industry as a whole. Although there is, and should be, freedom for casinos to make business decisions that benefit the casino's bottom line, such decisions should not be allowed if they are truly illegal or, in the opinion of many, undermine the stated purposes of the GCB and NGC. Unclear regulations in the gaming industry allow for unnecessary challenges to the integrity of the gaming industry as a whole.

## V. CONCLUSION

Tipping is now so ingrained in the culture of the United States and the gaming industry that it will not cease to be a part of service industries anytime in the foreseeable future. Because the industry is trending towards Nevada's table dealers being required to pool their tips, it is critical that the Nevada Gaming Control Board and Nevada Gaming Commission create regulations to better manage this process. Dealers should have the security of knowing the basic regulations of their tip-pools and the public should feel confident that, when tipping in Nevada casinos, the tips they give the dealers will be, at the very least, distributed fairly.

This article outlined the fundamental laws currently in effect in Nevada and also provided some of the most prominent case law on tipping in the state. With NRS § 608.160, the Nevada Legislature made it illegal for employers in

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Spring 2014]

*TIP-POOLING AT NEVADA CASINOS*

99

Nevada to take tips from employees in order to benefit the employer or contribute to the minimum hourly wage. In *Moen* and *Alford*, the courts decided that tip-pools were legal as long as they were split between regularly tipped employees in the same line of service and that employers could make tip-pools mandatory so long as those tip-pools did not violate NRS § 608.160. The Court only ruled on employment and contract issues in the *Baldonado v. Wynn Las Vegas, LLC* case in 2008; in the 2013 *Wynn* case, the court ruled in favor of the Wynn and held that the tip-pooling did not constitute a *taking* as all of the tips were given to employees.

The distinction between court decisions, state statutes, and agency regulations is clear; now it is time for the Nevada Gaming Control Board and Nevada Gaming Commission to meet with the Gaming Policy Committee to start deciding how to constructively regulate the tip-pooling policies in Nevada's casinos. The casino industry is unlike any other, and it deserves to have a specialized commission to regulate its activities. Casinos need to have flexibility in organizing and structuring tip-pools in the most effective and beneficial manner that is within the law. At the same time, basic regulations are needed to make sure that no minute changes can be made to positions or operations that are purely semantic in order to maneuver around the laws. Creating regulations that will help define or group job descriptions in a given tip-pool would alleviate the necessary emphasis on the court's interpretation of a *taking* and give more security to dealers, casinos, and the general public.

Though gaming industries exist in multiple states, none of them has the reputation or repute of Nevada. Given that reputation, and the economic dependence Nevada has on the gaming industry, it is extremely important that Nevada lead the way in ensuring the fair treatment of casino employees and protecting the business motives of casino owners. The Nevada Gaming Control Board and Gaming Commission have the power to create the needed regulations and should do so as soon as possible.

