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The Predatory Nature of State Lotteries

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THE PREDATORY NATURE OF STATE LOTTERIES

*Andrew Clott**

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I. INTRODUCTION

American society's perception of state lotteries has shifted dramatically over the last 50 years. Once considered an unacceptable vice, every American state prohibited lotteries from 1894 through 1964.¹ Today, lotteries are extremely prevalent, operating in 44 states as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.² This dramatic turnaround can be attributed mainly to the desire of states to increase revenue without making the politically

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¹ CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 51 (Harvard University Press 1989).

² Chris Isidore, *Seven States that don't Have Lotteries*, CNN MONEY (Dec. 17, 2013), <http://money.cnn.com/2013/12/17/news/economy/states-without-lotteries/>.

(Explaining that currently only Mississippi, Alabama, Utah, Alaska, Hawaii, and, ironically, Nevada do not have legally sanctioned lotteries. Wyoming was the latest state to legalize lotteries, in July 2013)

unpopular choice to raise taxes. To gain public support, lotteries are often presented as a valuable public service, with portions of revenue earmarked for services which provide a public benefit, most commonly education and infrastructure. By presenting themselves as both a beneficial service and a palatable alternative to tax increases for cash-strapped states looking to shore up their bottom line, lotteries have become increasingly popular among the American public. Despite their rapid ascent, lotteries are still beset by criticism. Criticisms of lotteries have come from economic, behavioral, and public policy perspectives, among others, yet lottery revenues continue to increase as public demand for these games remains high.³

Since their reintroduction, lotteries have become an increasingly integral part of state budget calculations.⁴ Once established, the lottery industry in many states uses its formidable economic clout to form powerful lobbies tasked with opposing any potential regulation while promoting further growth.⁵ At the federal level, Congress has exercised little oversight, allowing lotteries to operate largely outside of federal gambling legislation.⁶ As cash-strapped states seek more and more revenue, lottery states have become more than mere providers of lottery games; they have become advocates for them, actively trying to persuade players to spend more money more often.⁷ This has led to massive increases in lottery advertisements in these states, as well as expansion into more varied lottery games in order to attract new players and keep things fresh for existing players.⁸ In their relentless quest to improve their bottom line, State government officials have ignored the predacious effects of lotteries on consumers.

Consumers in lottery states spent over \$70 billion on lottery tickets in 2014, more than consumers in all States spent on sporting

³ Linda S. Ghent & Alan P. Grant, *The Demand for Lottery Products and Their Distributional Consequences*, NAT'L TAX J., June 2010, 63 (2), 254.

⁴ *Lotteries*, NAT'L GAMBLING IMPACT STUDY COMM'N, [http:// govinfo.library.unt.edu/ngisc/research/lotteries.html](http://govinfo.library.unt.edu/ngisc/research/lotteries.html) (last visited Oct. 14, 2015).

⁵ John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 221, 222 (2003).

⁶ *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 187 (1999).

⁷ See CLOTFELTER & COOK, *supra* note 1, at 10.

⁸ *Lotteries*, NAT'L GAMBLING IMPACT STUDY COMM'N, <http:// govinfo.library.unt.edu/ngisc/research/lotteries.html> (last visited Oct. 14, 2015).

event tickets, movie tickets, books, video games and music purchases combined.⁹ Lottery tickets are purchased disproportionately by low-income consumers.¹⁰ Numerous studies have shown that those in the lowest sectors in terms of socioeconomic status show the highest rates of lottery play and are far more likely to play compulsively.¹¹ Lottery advertising, much of which is designed to prey on the hopes of the poverty-stricken who dream of one day becoming wealthy, further exacerbates this problem. Lotteries are classified as a state entity, which exempts them from federal truth-in-advertising laws.¹² This allows states to aggressively market these games to consumers by tapping directly into the fantasy of winning a large jackpot or highlighting the public benefit of lottery revenue, while simultaneously ignoring the enormous odds stacked against players as well as the addictive nature of lottery gambling.¹³

Compulsive lottery playing, much like any other form of gambling, has deleterious effects on those who are struggling to make ends meet. Many economists have argued that lotteries are, in effect, a regressive tax on the lower class, raking in a large proportion of revenue from people of low socioeconomic status while having little impact on the rich.¹⁴ By disproportionately collecting income from the poor over the rich, wealth concentration and inequality in these states increases, further widening the gulf between the haves and have-nots.¹⁵ Lotteries may be helpful to government officials looking to bolster their State's revenue, but an increasing dependence on lottery revenue has blinded many states from accounting for the negative effects on consumers that flow from lotteries.

This paper proceeds as follows. Section II will attempt to provide

⁹ Derek Thompson, *Lotteries: America's \$70 Billion Shame*, THE ATLANTIC (May 11, 2015), available at <http://www.theatlantic.com/business/archive/2015/05/lotteries-americas-70-billion-shame/392870/>.

¹⁰ John W. Welte, et al., *Gambling participation in the U.S. – Results from a National Survey*, 18 J. GAMBLING STUD. 326-29

¹¹ *Id.*

¹² See *Lotteries*, *supra* note 8.

¹³ Erika Gosker, *The Marketing of Gambling to the Elderly*, 7 ELDER L.J. 185, 200 (1999)

¹⁴ Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. Rev. 11, 12 (1992)

¹⁵ Elizabeth Freund & Irwin Morris, *The Lottery and Income Inequality in the States*, 86 SOC. SCI. Q. 996, 996-1012.

a framework for understanding the modern landscape of state lotteries, first by providing a brief overview of the development of American state lotteries over the past 50 years and highlighting some of the events which have led to the current prevalence of lotteries. It will then examine the current landscape of the lottery industry, as well as the increasing role that lottery revenue plays in state budgets. Section III will provide an in-depth analysis of the profoundly negative effects that lottery playing has on lower-income consumers. This section will also include a look at the evolving relationship between lottery states and consumers that is most prominently seen in the context of lottery advertising. It will then examine some of the public policy questions associated with state lotteries, including their effects as regressive tax and on the rise of income inequality. Finally, Section IV will provide a look at some proposed solutions for states to lessen the negative consumer effects of lotteries, including stricter enforcement of regulations on lottery advertising, and also offer a brief conclusion.

II. ESTABLISHING A FRAMEWORK FOR MODERN STATE LOTTERIES

A. *The Resurgence of the State Lottery in America*

The prevalence of state lotteries in America is a relatively recent phenomenon. After a period of popularity in the eighteenth and early nineteenth century, lotteries were increasingly seen as institutions beset by fraud and corruption.¹⁶ Newspapers in the 1800s published exposés explaining how lotteries could be rigged, and accusing lottery operators of orchestrating various schemes to defraud players.¹⁷ Massachusetts chose to outlaw lotteries after an investigation uncovered massive misappropriations of lottery funds by the lottery's organizers.¹⁸ Anti-lottery sentiment reached its peak during the Gilded Age of the late nineteenth century, a period characterized by extremely high levels of income inequality

¹⁶ See CLOTFELTER & COOK, *supra* note 1, at 34.

¹⁷ See RYCHLACK, *supra* note 14, at 35.

¹⁸ *Id.* (Massachusetts investigatory committee discovered that \$886,439 worth of tickets had been sold in a lottery chartered for the purpose of raising \$16,000 to repair Plymouth Beach, but that after nine years only \$9,876 had been turned over to the project.)

between the working class and the wealthy.¹⁹ The burgeoning Populist movement of this era viewed lotteries as a tool for the wealthy to profit off of the poor.²⁰ By 1890, growing negative sentiment led most States to outlaw lotteries entirely.²¹ At the Federal level, Congress passed legislation in 1895 which used the Commerce Clause to forbid shipments of lottery tickets or advertisements across state lines, which effectively shut down the popular Louisiana lottery, the only remaining state lottery in operation at the time.²² For nearly 70 years thereafter, no state-sponsored lotteries were held in the United States.²³ Public demand for these types of games remained, however.²⁴ During the Great Depression, many illegal and semi-legal lotteries operated under the guise of “bank nights”, “numbers games”, and “policy games”.²⁵ In the post-WWII era, American attitudes towards gambling in general became more permissive, and public support for lotteries began to resurface.²⁶

In 1964, New Hampshire became the first state to operate a lottery in the twentieth century.²⁷ New Hampshire passed legislation overturning the statewide ban on lotteries and vested the power to operate the lottery solely with the state, creating a state monopoly framework that every other lottery state would follow.²⁸ New Hampshire also set a precedent for other states by pledging a large portion of its lottery revenue to the state’s public school system, garnering broad public support for the lottery.²⁹ Once New Hampshire established its lottery, other states were quick to follow suit. By 1974, eleven other states started their own

¹⁹ See generally MARK TWAIN & CHARLES DUDLEY WARNER, *THE GILDED AGE: A TALE OF TODAY* (American Publishing Company 1873).

²⁰ See RYCHLACK, *supra* note 14, at 28.

²¹ ACT OF SEPT. 19, 1890, CH. 908, 26 STAT. 465 (CURRENT VERSION AT 18 U.S.C. § 1302 (1982))

²² ACT OF MAR. 2, 1895, CH. 191, 28 STAT. 963 (CURRENT VERSION AT 18 U.S.C. § 1301 (1982))

²³ See CLOTFELTER & COOK, *supra* note 1, at 19.

²⁴ *Id.* at 41.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 4.

²⁸ See generally N.H. REV. STAT. ANN. §§ 287-F:1 to 287-F:19 (1987) (New Hampshire’s lottery legislation).

²⁹ *History*, N.H. LOTTERY, <http://www.nhlottery.com/About-Us/History.aspx> (last visited October 26, 2015).

lotteries.³⁰ New Jersey's lottery in the 1970s was the first to gain substantial popularity by lowering ticket prices, increasing jackpots, and offering a wider array of games and prizes to entice new players.³¹ Many states began to follow the New Jersey model throughout the 1970s, and innovations such as daily "instant win" games using scratch-off tickets quickly became more popular than the traditional "sweepstakes" style games.³² These early innovations set a course that lottery promoters still follow today, as new and different products are constantly introduced to entice consumers to play more.³³

The late twentieth century saw further growth of state lotteries, spurred on by a different form of innovation in the lottery industry. The introduction of "lotto" games in the early 1980s, which offered enormous jackpots sometimes reaching into the tens of millions of dollars, captured the public's imagination and brought a great deal of publicity to lotteries through news stories about lottery winners who had become instant millionaires.³⁴ In 1987, several states came together to form the Multi-State Lottery Association (MUSL) and began offering multi-state lotto games.³⁵ These games offered even larger jackpots while generating national press coverage.³⁶ In April 1992, fifteen member states held the first Powerball drawings.³⁷ Powerball has grown into one of the biggest and most recognizable lottery games in the world, and is offered by every lottery state.³⁸ Today, the MUSL has grown to include 36 member states and offers a vast array of lotto games in

³⁰ See RYCHLACK, *supra* note 14, at 45.

³¹ *Id.*

³² See *Lotteries*, *supra* note 8. (Traditional "sweepstakes" lottery games are basically raffles, where customers buy a ticket for a drawing which occurs at a later date. With scratch-off tickets, on the other hand, the purchaser could immediately determine if he had won or lost, thus increasing the "excitement value")

³³ *Id.*

³⁴ *Id.*

³⁵ *Powerball History*, MULTI-STATE LOTTERY ASS'N, http://www.powerball.com/pb_history.asp (last visited October 26, 2015) (Iowa, Kansas, Oregon, Rhode Island, West Virginia, Missouri, along with the District of Columbia, were the founding members of the MUSL.)

³⁶ *Id.*

³⁷ "Powerball changing to offer more winners, bigger jackpots", KTVZ, <http://www.ktvz.com/news/powerball-changing-to-offer-more-winners-bigger-jackpots/35531356> [hereinafter KTVZ].

³⁸ *Id.*

addition to Powerball.³⁹

The 1980s also saw the rise of the two companies that would become major players in the lottery industry, Gtech and Scientific Games. These companies set about aggressively pursuing state contracts to operate lotteries in the mid-1980s.⁴⁰ Recognizing the promise of untapped markets, Gtech and Scientific Games began pouring millions of dollars into lobbying efforts in states that still lacked lotteries.⁴¹ Scientific Games even helped draft legislation leading to the creation of lotteries in California, Arizona, North Carolina, South Carolina, Colorado and Oregon.⁴² Today, Gtech and Scientific Games operate the vast majority of state lotteries.⁴³ According to the director of the Illinois lottery, these two companies wield a tremendous influence not just on the lottery industry, but on the gaming industry as a whole.⁴⁴ With the broad support of state governments backed by the increasing private influence of Gtech and Scientific Games, more and more states have jumped on the lottery bandwagon over the past two decades. Currently only six states still do not operate lotteries in any form.⁴⁵ In just five decades, state lotteries went from being essentially non-existent and viewed as a harmful vice to being an entrenched and popular institution throughout the country.

B. Lotteries and State Revenue

As lotteries gain widespread acceptance, states have begun to heavily rely on the revenue they provide. The appeal of lottery revenue is readily apparent. On average, lottery states take in about forty-four cents for every dollar spent on lottery tickets, with the remaining percentage paid out to winners.⁴⁶ In 2013, states

³⁹ See *Powerball History*, supra note 35.

⁴⁰ Ron Stodghill and Ron Nixon, *Divide and Conquer: Meet the Lottery Titans*, N.Y. TIMES (Oct. 21, 2007), <http://www.nytimes.com/2007/10/21/business/21machine.html?pagewanted=all>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Isidore, supra note 2. (Mississippi, Alabama, Utah, Alaska, Hawaii, and Nevada currently do not have legally sanctioned lotteries)

⁴⁶ David Cay Johnston, *U.S. lotteries and the state taxman*, REUTERS (July 15, 2011), <http://blogs.reuters.com/david-cay-johnston/2011/07/15/u-s-lotteries-and-the-state-taxman/>.

collected a \$19.4 billion in profit from lotteries.⁴⁷ In addition, lottery winnings above \$600 are generally subject to income tax, generating even more revenue for states.⁴⁸ Thus, as lottery revenue increased, some states felt they could rely less on revenue from traditional taxes.⁴⁹ Economists have noted a correlation between increased lottery revenues and decreasing corporate income tax rates.⁵⁰ In 2009, eleven states took in more revenue from lotteries than from corporate income taxes.⁵¹ Well-organized opposition to any form of tax increases has led politicians in lottery states to view lotteries as a way to shore up budgets without risking their political capital.⁵² Summing up the political appeal of lotteries, former New York Lottery director Jeff Perlee stated that “voters want states to spend more, and politicians look at lotteries as a way to get tax money for free.”⁵³

Reliance on lottery revenue, however, has often proved to be less beneficial than states would like.⁵⁴ Lottery revenue is often inconsistent and can be highly susceptible to the general economic climate.⁵⁵ Even when the economy is stable, a common pattern observed in lottery states is a leveling off or slight drop in revenue after an initial surge.⁵⁶ Economists have attributed this to both an oversaturation of the market as well as a general “boredom” factor among lottery players.⁵⁷ However, once lottery states have seen the economic possibilities this new industry can provide, there is often relentless pressure to continually increase revenue.⁵⁸ This has led many states to dramatically increase spending on advertising and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Peter Keating, *Lotto Fever: We All Lose*, MONEY MAGAZINE (May 1996), at 142.

⁵⁴ *Legislative report finds gambling at a slowdown in Illinois*, CHI. SUN-TIMES (Sep. 27, 2015), <http://chicago.suntimes.com/news/7/71/992582/gambling-illinois-slowdown>.

⁵⁵ Kristian Foden-Vencil, *New Machines Help Boost Oregon Lottery Sales, But At What Cost?*, OR. PUB. BROADCASTING (June 14, 2015), <http://www.opb.org/news/article/new-machines-boost-oregon-lottery-sales-but-at-what-cost/>.

⁵⁶ See RYCHLACK, *supra* note 14, at 49.

⁵⁷ See *Lotteries*, *supra* note 8.

⁵⁸ *Id.*

advanced market research, sparing no expense to influence lottery players and potential players in an attempt to persuade them to spend more.⁵⁹ Another common practice in lottery states is the constant introduction of new games with different prizes to try and attract new players while simultaneously enticing existing players to spend more.⁶⁰ Constant innovations are made to develop fresh new games which will excite players.⁶¹ The Powerball game alone has undergone eight significant revisions in its brief history.⁶² These new products are designed with the sole purpose of bringing in more revenue from players.⁶³ As state governments grow accustomed to the revenue brought in by lotteries, they have an increased incentive to bring in more, even when new revenue comes at the cost of potentially serious consequences for players.

One innovation championed by many state lotteries and subject to intense scrutiny from opponents is the expansion of video lottery terminals (VLTs).⁶⁴ These machines, which are essentially identical to video slot machines found in casinos, are a major profit driver.⁶⁵ Oregon, one of the early adopters of VLTs, made a major effort in 2014 to replace older VLTs with newer, more advanced models that offer more chances for players to bet on low-stakes games with better odds of winning.⁶⁶ The behavioral sciences community and addiction specialists have harshly criticized these games, claiming they promote compulsive gambling at much higher rates than traditional lotteries.⁶⁷ The high speed of play, as well as the higher frequency of play in VLTs are potential triggers for addictive gamblers.⁶⁸ Despite the criticism, the new VLTs have proven very popular, and have been seen as a major success by the Oregon government.⁶⁹ The new VLTs have

⁵⁹ See Gosker, *supra* note 13, at 201.

⁶⁰ See *Lotteries*, *supra* note 8.

⁶¹ *Id.*

⁶² See KTVZ, *supra* note 30.

⁶³ See *Lotteries*, *supra* note 8.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Foden-Vencil, *supra* note 55.

⁶⁷ *Id.*

⁶⁸ Pamela Prah, "Wyoming Catches Lottery Fever; Online Gaming Eyed Elsewhere", STATELINE: RESEARCH & ANALYSIS, The Pew Charitable Trusts, April 26, 2013, available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/04/26/wyoming-catches-lottery-fever-online-gaming-eyed-elsewhere>

⁶⁹ See Foden-Vencil, *supra* note 55.

been largely credited with a ten percent rise in lottery revenue statewide.⁷⁰ VLTs are legal in less than a dozen lottery states, yet those states have among the most profitable lotteries.⁷¹

C. Lottery Advertising

Advertising is a hallmark of modern commerce, and the lottery industry is no exception. Lottery advertising plays a pivotal role in expanding the base of players needed to satisfy a relentless demand for more revenue.⁷² The federal government, which banned lottery advertising until 1975,⁷³ no longer exercises any authority over the substance of state lottery advertising.⁷⁴ As with all state entities, state lotteries are exempt from the regulatory power of the Federal Trade Commission (the "FTC").⁷⁵ Truth-in-advertising rules were set forth by the FTC to protect the public from deceiving, misleading ads.⁷⁶ Researchers have roundly criticized this exemption when it comes to lotteries.⁷⁷ If the lottery were run purely by private industry instead of by state governments, it is likely the FTC guidelines would prohibit much of the current lottery advertising.⁷⁸ Without this baseline of protection, consumers fall prey to sophisticated, deceptive marketing strategies which are backed by massive financial resources.⁷⁹ Once the federal ban was lifted and lotteries began to spread, states began pouring money into advertising their lotteries. By the early 1990s, an estimated seventy-four percent of all state-funded advertisements were for lotteries.⁸⁰ Over half of a billion

⁷⁰ *Id.*

⁷¹ See Prah, *supra* note 68.

⁷² See Lotteries, *supra* note 8.

⁷³ See generally PL 93-583 (S 544), PL 93-583, Act of January 2, 1975, 88 Stat 1916. (Amended Title 18 of the United States Code to permit the transportation, mailing, and broadcasting of advertising, information, and materials concerning lotteries authorized by law and conducted by a State).

⁷⁴ See Lotteries, *supra* note 8.

⁷⁵ See generally U.S. Const. amend. X (The tenth amendment prohibits federal agencies from exerting regulatory authority over state entities).

⁷⁶ FED. TRADE COMM'N, Truth-in-Advertising Rules: Protecting Consumers, <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited Oct. 26, 2015). (Explaining that the Federal Trade Commission has a broad mandate to protect consumers from fraud and deception in the marketplace).

⁷⁷ See RYCHLACK, *supra* note 14, at 63.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See RYCHLACK, *supra* note 14, at 61.

dollars is spent by the States each year advertising lotteries, and that figure is likely to continue to rise as long as the demand for revenue remains strong.⁸¹ Although most states have some form of regulation on lottery advertising, they are not consistently enforced out of fear of decreasing profits.⁸² Lottery promotion has become so omnipresent that researchers have found it difficult to separate the adverse effects that the lottery itself has on society from the adverse effects caused by lottery promotion itself.⁸³

Modern advertising campaigns often use advanced psychology in order to sell their products.⁸⁴ Using the strategy of “subconscious seduction”, advertisers are able to influence consumers without them becoming consciously aware of it.⁸⁵ Even those who actively resist the siren song of advertising may well be susceptible at a subconscious level to the thousands of advertisements that an average person experiences every day.⁸⁶ As with most ad campaigns, lottery advertisers compile data identifying likely players, building socioeconomic profiles of consumers, conducting focus group research, and test-marketing new products.⁸⁷ Advertisers also spend significant amounts of money on scientific research, including brain studies to better understand how to effectively manipulate player behavior.⁸⁸ With a massive budget and virtually no regulation, advertisers have free reign to use any tools at their disposal in order to entice consumers to play.

The most common form of lottery advertisement encourages “magical thinking” by highlighting potentially life-changing effects of winning the lottery.⁸⁹ Typical advertisements focus on hard-working, blue-collar individuals who took a chance on buying a ticket and won big. A recent Iowa Lottery advertisement asks viewers what they would do if they won the

⁸¹ See *Lotteries*, *supra* note 8.

⁸² See RYCHLACK, *supra* note 14, at 78.

⁸³ See RYCHLACK, *supra* note 14, at 61.

⁸⁴ ROBERT HEATH, *SEDUCING THE SUBCONSCIOUS: THE PSYCHOLOGY OF EMOTIONAL INFLUENCE IN ADVERTISING* 12 (2012).

⁸⁵ *Id.*

⁸⁶ M. Neil Browne, et. al., *Casinos and Problem Gamblers: The Complexity of Legal Responsibility*, 5 CHARLOTTE L. REV. 339 (2014).

⁸⁷ See *Lotteries*, *supra* note 8.

⁸⁸ *Id.*

⁸⁹ Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37, 84 (2012).

lottery, using the tagline “It’s your dream. . .Anything can happen”.⁹⁰ The commercial makes no mention of the odds against winning. Advertisements such as these are deceptively simple: while promoting the harmless fun of fantasizing about sudden instant wealth, they also exert a powerful subconscious effect. Advertisements such as these increase consumer reliance on the availability heuristic—the way in which the brain makes a mental shortcut by relying on knowledge that is readily available—rather than forcing the consumer to examine other alternatives or possibilities when making decisions.⁹¹ Lotteries, especially those that offer massive jackpots, are uniquely positioned to take advantage of this trait.⁹² The ads attempt to get people to make the “easier choice” of fantasizing about what they would do with their potential winnings rather than think about the overwhelming odds against winning.⁹³

Another type of lottery advertisement that has recently become more popular is one that focuses solely on the public good that comes from purchasing lottery tickets. These ads typically highlight popular issues amongst a broad swatch of the American public, and explain that a portion of the revenue from lottery tickets sales goes towards these fixing these issues. States such as Oregon, New York, and Iowa use these ads to great effect: a recent Oregon advertisement focuses on environmental and sustainable economic development projects that lottery revenue has stimulated, all while barely mentioning the actual lottery itself.⁹⁴ The commercial uses swelling, cinematic music overlaid with pristine beaches and shots of families and blue-collar workers.⁹⁵ A recent New York advertisement depicts school children breaking into song inside a convenience store to thank people buying lottery tickets for supporting the public education system.⁹⁶ Similarly, the

⁹⁰ Iowa Lottery, *Dreams Really Do Come True!* YOUTUBE (Aug. 25, 2014), <https://www.youtube.com/watch?v=XgoSh1g9Bmo>.

⁹¹ V. Ariyabuddhiphongs, *Lottery Gambling: A Review*, 27 J. GAMBLING STUD. 15, 18 (2011).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Or. Lottery, *Oregon Lottery - It Does Good Things - Economic Development - Long Form*, YOUTUBE (Mar. 12, 2015), <https://www.youtube.com/watch?v=wqTOPkDSxj0>.

⁹⁵ *Id.*

⁹⁶ New York Lottery, *Thank you - New York Lottery TV Commercial Ad*, YOUTUBE (Jan. 31, 2015),

Iowa Lottery has run ads which highlight its contribution to a trust for military veterans.⁹⁷

This advertising strategy is seemingly counterintuitive, as the most common factors that influence lottery ticket purchasing are a desire to win, impulse, feelings of luck, and feelings of enjoyment.⁹⁸ None of these ads makes any mention of jackpot winnings, but they still exert a profound subconscious effect. By forging a connection between the lottery and popular issues such as sustainable development, education, and veterans' affairs, these ads increase the social acceptability of the lottery in the mind of the general public.⁹⁹ This kind of relationship has been used to present lotteries as more socially acceptable since their reemergence in New Hampshire in 1964.¹⁰⁰ Tying lotteries to the public good in such a way aims to reassure players that they are, at the very least, putting their money towards a good cause when they play.¹⁰¹ The end result sought by advertisers is for lottery players to believe they are engaging in socially acceptable activities which carry real public benefit, while tricking them into ignoring the inherent risks in playing.

III. LOTTERIES AND CONSUMERS

A. *Who Plays the Lottery?*

The consumers who drive the majority of state lottery revenues are generally among the poorest.¹⁰² Researchers have found that socioeconomic status (SES) of consumers is by far the strongest predictor in determining whether they play the lottery.¹⁰³ Studies have shown that the highest concentration of lottery players come from the lowest strata of SES.¹⁰⁴ Lower income

<https://www.youtube.com/watch?v=aIvxRT7Zto0>.

⁹⁷ Iowa Lottery, *Iowa Veterans Trust Fund – Ray*, YOUTUBE (Sep. 8, 2015), <https://www.youtube.com/watch?v=vevwNNuwC5E>.

⁹⁸ See Ariyabuddhipongs, *supra* note 91, at 20.

⁹⁹ *Last Week Tonight with John Oliver: The Lottery* (HBO television broadcast Nov. 9, 2014), available at <https://www.youtube.com/watch?v=9PK-netuhHA#>. [hereinafter *Last Week Tonight*]

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Thompson, *supra* note 9.

¹⁰³ See Ariyabuddhipongs, *supra* note 91, at 23.

¹⁰⁴ Grace M. Barnes, et. al., *Gambling on the Lottery: Sociodemographic*

consumers are not only more likely to play, but also more likely to play regularly.¹⁰⁵ Simply living in an economically disadvantaged neighborhood is also a significant factor tied to increased rates of lottery play.¹⁰⁶ Those playing daily numbers games, including scratch tickets, are far more likely to come from lower-income neighborhoods.¹⁰⁷ Even those who perceive themselves as poor, regardless of their SES, show higher rates of lottery play.¹⁰⁸ Rates of lottery play are generally found to be consistent across racial and ethnic demographics, although some evidence suggests that African-Americans, on average, lose a higher proportion of their income purchasing lottery tickets than other ethnicities.¹⁰⁹ There is also some evidence pointing to higher rates of play among less-educated consumers.¹¹⁰

Many factors can explain the increased rate of play among low-income consumers. Low-income consumers are more likely to believe that the lottery can provide them with the opportunity to escape their current situation.¹¹¹ These consumers see lotteries as a financial “Hail-Mary strategy.”¹¹² Low-income players may also consider lotteries to be a “social equalizer,” where everyone has an equal chance to win.¹¹³ Lottery advertisement often plays into the fantasy of winning, which is more pronounced in lower-income consumers.¹¹⁴ In some cases, states have expressly targeted their advertising at low-income individuals. In a particularly egregious example, the Illinois lottery prominently displayed a billboard in one of Chicago’s poorest neighborhoods which read “How to go from Washington Boulevard to Easy Street - Play the Illinois State

Correlates Across the Lifespan, 27 J. GAMBLING STUD. 575–86 (Dec. 2011).

¹⁰⁵ *Id.* (explaining that of those surveyed, those in the lowest quintile of SES averaged the highest rates of play and the most days played).

¹⁰⁶ *Id.*

¹⁰⁷ See *Lotteries*, *supra* note 8.

¹⁰⁸ Emily Haisley, et. al., *Subjective relative income and lottery ticket purchases*, 21 J. BEHAV. DECISION MAKING 283, 290 (2008).

¹⁰⁹ K. Brandon Lang & Megumi Omori, *Can demographic variables predict lottery and pari-mutuel losses? An empirical investigation*, 25 J. GAMBLING STUD., 171, 180 (2009).

¹¹⁰ Ariyabuddhiphongs, *supra* note 91, at 21.

¹¹¹ Garrick Blalock, David R. Just, & Daniel H. Simon, *Hitting the Jackpot or Hitting the Skids: Entertainment, Poverty, and the Demand for State Lotteries*, 66 AM. J. ECON & SOCIOLOGY 545, 548 (2007).

¹¹² *Id.*

¹¹³ See Welte, *supra* note 10, at 326.

¹¹⁴ See *Lotteries*, *supra* note 8.

Lottery.”¹¹⁵ Similarly, advertisements for Ohio’s “SuperLotto” game were timed perfectly with monthly distribution of government benefits, payroll and Social Security payments.¹¹⁶

B. The Negative Effects of the Lottery on Consumers

Historically, gambling in America has been heavily regulated or banned because it tends to impose unacceptably high risks of serious financial injury on certain classes of the community.¹¹⁷ Receiving monetary rewards through gambling in any form can be highly addictive, producing brain activity similar to that observed in a cocaine addict receiving an infusion of cocaine.¹¹⁸ The thinking for much of American history has been that gambling exacerbates the common tendency of people to risk their money even in the face of a significantly high probability that they will lose it.¹¹⁹ This risk, especially when not counterbalanced by the prospect of a sufficiently substantial or obtainable benefit, was thought to run counter to American public policy.¹²⁰ In the modern age, however, gambling has become far more accepted in our society, with lotteries at the forefront of acceptance. Not surprisingly, the increase in gambling over the past few decades has led to a sharp increase in the number of compulsive gamblers.¹²¹

Lotteries are far and away the most popular form of gambling in America.¹²² They have become so ubiquitous that many do not view lotteries as a form of gambling.¹²³ However, the odds of winning the lottery are far worse than that of any other form of gambling. Lotteries, much like other casino games, rely on the player’s misperception of probability in order to get them to play.¹²⁴ Much like any other type of gambling, the subconscious

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Leacock, *supra* note 89, at 80.

¹¹⁸ Jonathan Gruyan and Melissa S. Kearney, *Is Lottery Gambling Addictive?* 2 AM. ECON. J.: ECON. POLICY 90, 96.

¹¹⁹ See Leacock, *supra* note 89, at 84.

¹²⁰ *Id.*

¹²¹ Derrick Depledge, *Compulsive Gamblers Up 1.6 Million*, SEATTLE TIMES (Dec. 5, 1997), <http://community.seattletimes.nwsourc.com/archive/?date=19971205&slug=2576320>.

¹²² See Ariyabuddhiphongs, *supra* note 91, at 19.

¹²³ *Id.* at 20.

¹²⁴ *Id.* at 18.

effects on lottery playing can be addictive.¹²⁵ As lotteries become increasingly prevalent, behavioral researchers are looking more closely at lotteries as a species of gambling.¹²⁶ Several theories, most of which apply to compulsive gamblers in general, explain why some are drawn to frequent lottery play. In their 1974 study, Daniel Kahneman and Amos Tversky put forth common heuristics for judgment under uncertainty which have been used subsequently to help explain the draw of the lottery for a player.¹²⁷ The availability heuristic explains that people will buy lottery tickets because it is easier to imagine what they would do if they won the lottery, rather than think about the small probability of actually winning.¹²⁸ The representativeness heuristic, on the other hand, explains the fascination players often have with “lucky numbers” and other strategies for winning.¹²⁹ The lottery, more than any other form of gambling, is entirely a game of chance, yet players often attempt to apply pseudo-scientific order to these games in an attempt to win.¹³⁰

Entrapment theory, another common trait for explaining compulsive gambling behavior, applies readily to lottery players.¹³¹ Entrapment theory operates similar to the “sunk cost fallacy” in economic theory, in which an actor will feel that because they have invested a considerable amount of resources to an activity, they should not stop until they receive a reward.¹³² In lottery gambling, entrapment theory can explain how a player’s belief that they have invested so much money buying lottery tickets will prevent them from giving up, since if they do they will never win their money back.¹³³ Studies have shown that entrapment theory influences the frequency of lottery play.¹³⁴

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Amos Tversky & Daniel Kahneman, *Judgment under uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1125 (1974).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.* at 1126.

¹³¹ *See* Ariyabuddhiphongs, *supra* note 91, at 22.

¹³² Michael Davidson, *How the Sunk Cost Fallacy Makes You Act Stupid*, LIFE HACK, <http://www.lifehack.org/articles/communication/how-the-sunk-cost-fallacy-makes-you-act-stupid.html> (last visited October 26, 2015).

¹³³ *See* Ariyabuddhiphongs, *supra* note 91, at 22.

¹³⁴ *Id.*

Habitual lottery players can be classified into two categories: investors and plungers.¹³⁵ Investors view the lottery itself as an investment instrument.¹³⁶ These players are more likely to play games with higher odds, even if they payouts are lower.¹³⁷ Conversely, plungers may realize that their chances of winning are quite small, but still play in order to improve their standard of living, no matter how slim the chance.¹³⁸ Plungers are more likely to play games with high jackpots, which can make their dreams of sudden wealth a reality.¹³⁹ Neither of these players are completely ignorant of the odds against them, but both types of player is susceptible to overestimating the likelihood of statistically rare events.¹⁴⁰ In both cases, these players are drawn at a subconscious level to continue playing the lottery, even in the face of long odds against winning.

C. Public Policy Concerns

There has always been a complex relationship between the state and its consumers regarding common vices.¹⁴¹ In their pioneering look at the lottery industry, Charles Clotfelter and Philip Cook examined how State reliance on lottery revenues has transformed this relationship, as States seek more profit out of lottery players without considering social costs or public policy concerns.¹⁴² Lottery proponents argue that consumer demand for these games is and will remain high, and that states would be wrong to oppress citizens through paternalistic regulations.¹⁴³ This argument, however, leaves out a key factor. As Clotfelter and Cook explain, States are not simply making a product available to accommodate consumer preference;¹⁴⁴ they are also actively fostering that demand.¹⁴⁵ Clotfelter and Cook highlight a “Jekyll and Hyde” quality to state-run lotteries, as States suggest they are merely accommodating consumers, all while they ignore clear

¹³⁵ See CLOTFELTER & COOK, *supra* note 1, at 74.

¹³⁶ *Id.*

¹³⁷ See *id.* at 75.

¹³⁸ See Freund & Morris, *supra* note 15, at 1001.

¹³⁹ See CLOTFELTER & COOK, *supra* note 1, at 74.

¹⁴⁰ See Freund & Morris, *supra* note 15, at 1001.

¹⁴¹ See CLOTFELTER & COOK, *supra* note 1, at 10.

¹⁴² *Id.*

¹⁴³ See *Lotteries*, *supra* note 8.

¹⁴⁴ See CLOTFELTER & COOK, *supra* note 1, at 10.

¹⁴⁵ *Id.*

downsides.¹⁴⁶

In a recent piece on the show *Last Week Tonight*, host John Oliver explored the lottery's "Jekyll and Hyde" nature by comparing the State's role in the lottery with State regulation of alcohol, another widely-accepted vice which creates revenue through heavy taxation.¹⁴⁷ The distinguishing factor between alcohol regulation and state-sponsored lotteries is that the State is not an active participant in the liquor business, and certainly does not concoct marketing strategies designed to attract new drinkers or encourage existing drinkers to consume more.¹⁴⁸ The State chooses to allow the sale of alcohol—and profits from that sale—but does not craft advertisements to highlight a perceived public benefit that drinkers bring to the State by purchasing liquor.¹⁴⁹ This is in stark contrast to the State's role in the lottery, where they aggressively sell to their citizen-consumers, leading to a host of public policy concerns.¹⁵⁰

One of the most common criticisms of lotteries is that they operate as a regressive tax on the poor.¹⁵¹ Economists define a regressive tax as one that takes an increasing percentage of income as income falls.¹⁵² Although lottery play is voluntary, there are distinct reasons for viewing lotteries as a regressive tax.¹⁵³ The State lotteries take a far greater percentage of income from those who are already economically disadvantaged, a hallmark of a regressive tax.¹⁵⁴ This is especially true of daily numbers games, including scratch tickets, which are bought much more heavily in low-income neighborhoods.¹⁵⁵ Lottery players consistently overinvest in the lottery relative to their income.¹⁵⁶ As the lottery is most often played by those with lower incomes, this overinvestment has the most deleterious effects on those people.¹⁵⁷

¹⁴⁶ See *id.* at 12.

¹⁴⁷ See *Last Week Tonight*, *supra* note 99.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Leacock, *supra* note 89, at 39.

¹⁵¹ See Blalock et. al, *supra* note 111, at 548.

¹⁵² See *Lotteries*, *supra* note 8.

¹⁵³ See Johnston, *supra* note 46.

¹⁵⁴ See *Lotteries*, *supra* note 8.

¹⁵⁵ *Id.*

¹⁵⁶ See Freund & Morris, *supra* note 15, at 1005.

¹⁵⁷ *Id.*

Thus, as the lottery takes a larger portion of income from those who have the least income to spare, the regressive nature of the lottery becomes clear.

Another significant impact of lotteries is that they increase overall levels of income inequality. Over the last forty years, rising incomes have coincided with dramatic increases in income inequality in the United States.¹⁵⁸ Elizabeth Freund and Irwin Morris, two University of Maryland researchers, conducted a wide-ranging study which evaluated the connection between the rise of lotteries and increased levels of income inequality between 1975 and 2005, concluding that the “lottery effect” had a sizable impact in magnifying inequality.¹⁵⁹ Freund and Morris’ study found that lottery states had, on average, a much higher level of income concentration among the wealthy than non-lottery states, caused by both direct and indirect factors.¹⁶⁰ The direct factor, seen most notably in games with high jackpots and extremely low odds such as Powerball, is that the jackpot winners are the beneficiaries of a sudden redistribution of wealth, mainly from the poor.¹⁶¹ These games directly transfer a portion of personal income from a very large group of people to a single individual or a very small group of people.¹⁶² The indirect factor leading to wealth concentration comes into play as habitual lottery players pour money into the lottery, leaving them with fewer resources to invest, and thus losing out on potential future income.¹⁶³ Both the direct and indirect factors of the “lottery effect” lead to increased levels of wealth concentration and income inequality in lottery states.¹⁶⁴

IV. RECOMMENDATIONS & CONCLUSION

It is highly unlikely that state lotteries will become any less prevalent in the years to come. States will continue to see lotteries as a way to increase their budgets, and consumer demand is likely to remain high for lottery games. The question that must be asked, then, is not how to ban lotteries, but how to manage them in a way that mitigates the negative impact felt by consumers.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 1005.

¹⁶⁰ *See id.* at 1000.

¹⁶¹ *Id.*

¹⁶² *See* Freund & Morris, *supra* note 15, at 1000.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

States must find a way to lessen their reliance on lottery revenue rather than doubling down on expanding these programs. This is especially true with respect to games that are highly addictive, such as VLTs.¹⁶⁵ Through their aggressive expansion of lotteries, states are in danger of leading vulnerable citizens to fall into gambling addiction. With any proposed expansion of lotteries, states must make the hard choice of valuing their citizen-consumers over increased revenue. By adopting the recommendations of experts in the behavioral sciences community and refusing to allow the expansion of VLTs, state governments can take a positive step towards protecting their citizens.

Many of the public policy concerns surrounding lotteries could be lessened if states effectively reined in advertising abuses. Lottery advertising should not be able to make blatantly deceptive claims, and advertisements should come with more than just a cursory warning that lottery games should only be played for fun. Most lottery states have some statutory or administrative limitations on advertising, but are unwilling to enforce them.¹⁶⁶ In Minnesota, for instance, lottery advertising is prohibited from targeting specific economic classes or implying that the lottery is a financial investment.¹⁶⁷ However, states are unwilling to effectively enforce these regulations when they are seen as cutting into profits.¹⁶⁸

The massive lobbying power of the lottery industry, coupled with the state's financial interest in increased revenue, has stifled any chance at effective regulation.¹⁶⁹ Since states have such a large incentive in maximizing lottery profits, they cannot also operate as a neutral party when enforcing advertising regulations.¹⁷⁰ One way to prevent this conflict of interest is to create a cause of action for individual citizen suits in cases of lottery advertising abuses.¹⁷¹ This way, rather than having a state-appointed agency review the advertising material, the case would

¹⁶⁵ See Foden-Vencil, *supra* note 55.

¹⁶⁶ See Rylchack, *supra* note 14, at 77.

¹⁶⁷ See MINN. STAT. ANN. § 349A.09 Subd. 2. (West)

¹⁶⁸ See Rylchack, *supra* note 14, at 77.

¹⁶⁹ See Stodghill and Nixon, *supra* note 40.

¹⁷⁰ See Rylchack, *supra* note 14, at 78.

¹⁷¹ *Id.*

go before an impartial judge.¹⁷² Likewise, liability in cases of advertising abuses could be structured to fall on the advertisers themselves, which would give them more of an incentive to play by the rules.¹⁷³ By effectively restricting advertising, states could lessen the negative impact that lotteries have on consumers and show their commitment to sound public policy.

The explosive growth of lotteries over the last 50 years, and the massive revenue they provide, have increasingly blinded state governments to the predatory nature of these seemingly harmless games. State lotteries have led to a host of social, economic, and ethical problems which disproportionately affect lower-income consumers and those prone to compulsive behavior. In continually seeking greater lottery revenue, states have exacerbated the problems associated with lotteries, doubling down on misleading advertising and promoting innovations designed to entice consumers to compulsively spend more money more often. States have largely failed to consider what is in the best interest of their own vulnerable citizens, and been led astray by the ease of increased revenue without the political backlash of increased taxation. States going forward must make a greater effort to combat the problems that flow from lotteries and promote responsible, well-informed lottery playing, rather than resorting to dishonesty and manipulation to increase profits. States must consider the problems that flow from the growth of lotteries, rather than worrying only about their own bottom line.¹⁷⁴

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 51. (Harvard University Press 1989).