

STATE LOTTERIES AND THEIR CUSTOMERS

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INTRODUCTION

On Tuesday, October 23, 2018, a lucky person in South Carolina who purchased a Mega Millions lottery ticket learned she or he was the winner of the second largest lottery prize ever awarded in the United States—\$1.536 billion.¹ The ticket was sold by a convenience store in rural South Carolina.² The build-up to the drawing was dramatic; people stood in lines waiting to buy a ticket, hoping they would become the winner of a prize that would make them fabulously wealthy.³ The United States had another case of lottery fever.

Lotteries have a history in our country that predates the U.S. Constitution.⁴ Not surprisingly, our affection for lotteries can be traced to their popularity, and

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¹ The Associated Press, *\$1.537B jackpot won in South Carolina is 2nd largest in U.S.*, AP NEWS (Oct. 24, 2018), <https://www.apnews.com/91503645c0e5488c91e48bb60718966b>. Actually, the ticket would only pay a total of \$1.536 billion if the winner chose to take the prize over a 29-year period. If the winner elected the immediate cash payout, she or he received \$878 million. *The SC Education Lottery has a message for the Mega Millions jackpot winner, who has not yet come forward*, FOX CAROLINA (Oct. 25, 2018), https://www.foxcarolina.com/the-sc-education-lottery-has-a-message-for-the-mega/article_25e99aa0-d744-11e8-9bfa-23931c0220c1.html.

² See Jeffrey Collins, *South Carolina adds 2nd billionaire with huge jackpot ticket*, AP NEWS (Oct. 24, 2018), <https://www.apnews.com/d34842cb5108486db4afdf965eac55ef>.

³ Bopha Phorn, *If you win the Mega Millions \$1.6 Billion jackpot in some states, you can remain anonymous*, ABC NEWS (Oct. 22, 2018, 3:30 PM), <https://abcnews.go.com/US/win-mega-millions-16-billion-jackpot-states-remain/story?id=58623192>. The identity of the winner of the drawing may never be known. South Carolina is one of eight states (the others being Delaware, Georgia, Kansas, Maryland, North Dakota, Ohio, and Texas) where the winners of a lottery drawing can remain anonymous. *Id.*

⁴ See generally JOHN SAMUEL EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 49–54 (Harvard Univ. Press 1960) (providing a thorough treatment of colonial America's receipt of lotteries from Britain).

prevalence, in Britain.⁵ Lotteries in the Colonial Era helped to finance universities,⁶ public works,⁷ and a Continental army of independence.⁸ In the period leading up to the Declaration of Independence, 157 lotteries were created by colonial legislatures.⁹

By the mid-nineteenth century, however, lotteries had lost much of their appeal. States acted to outlaw them, and a common provision in the constitutions of newly admitted states was a provision banning lotteries.¹⁰ Only the notorious “Serpent,” the Louisiana State Lottery, survived the anti-lottery sentiment of the nineteenth century.¹¹ It did more than survive, it flourished. Between 1867 and 1907, the Louisiana Lottery generated millions of dollars in profits on a yearly basis from sales across the United States.¹² But, the Serpent also produced widespread corruption and the joint efforts of numerous states and the U.S. government shut the Louisiana Lottery down for good in 1907.¹³

What followed was a lengthy period of time when lotteries vanished from the U.S. landscape. Lotteries were so unpopular that over half a century passed before New Hampshire adopted a modest lottery and began its operation in

⁵ See generally DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 140–50 (2006).

⁶ *Id.* at 144. Some of the schools that benefited from lotteries included Yale, Princeton, and Columbia. *Id.*

⁷ See *id.* at 148. The construction of the city of Washington, D.C. came in part from lottery proceeds. *Id.* George Washington purchased the first ticket. *Id.*

⁸ *Id.* at 146. See also A.R. Spofford, *Lotteries in American History*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL SOCIETY, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 175 (1893) (“It is curious to find the early defense of the colonies against foreign invasion helped on by the aid of the lottery.”).

⁹ SCHWARTZ, *supra* note 5, at 144.

¹⁰ For example, language from the original 1861 Kansas Constitution provided, “Lotteries and the sale of lottery tickets are forever prohibited.” KAN. CONST. art. XV, § 3 (1861). The Kansas Constitution was amended in 1986 to allow for a state lottery. KAN. CONST. art. XV, § 3c (1986). See also ALA. CONST. art. IV, § 65; MISS. CONST. art. IV, § 98 (repealed 1992) (stating ban has been repealed, but the state lottery is still in development); NEV. CONST. art. IV, § 24; UTAH CONST. art. VI, § 27.

¹¹ See DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 24 (William R. Eadington ed., 2005).

¹² See generally G.W. McGinty, *The Louisiana Lottery Company*, 20 SW. SOC. SCI. Q. 329, 331, 340–41 (Mar. 1940), https://www.jstor.org/stable/42879653?seq=13#metadata_info_tab_contents (providing a history of the Louisiana Lottery); *History of Lotteries*, LA. LOTTERY CORP., <https://louisianalottery.com/history-of-lotteries> (last visited Jan. 6, 2019).

¹³ See generally *Champion v. Ames*, 188 U.S. 321, 330 (1903); *Douglas v. Kentucky*, 168 U.S. 488, 496, 505 (1897); *Stone v. Mississippi*, 101 U.S. 814, 815, 818–19 (1879); *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 169 (1850); JOHN SMITH KENDALL, *HISTORY OF NEW ORLEANS VOL. II* 501 (1922), available at http://www2.latech.edu/~bmagee/louisiana_anthology/303_download/texts/aldrich_pere_antoinies_palm/211-003—10—kendall—history_of_new_orleans/kendall—historyofneworle02kend.pdf.

1964.¹⁴ But there is nothing modest about what has happened with lotteries since then. As of 2018, forty-four states and the District of Columbia have lotteries of some form.¹⁵ According to *La Fleur's*, a magazine that follows the lottery industry, lottery sales in the United States for fiscal year 2018 were \$77.7 billion.¹⁶ *La Fleur's* referred to 2018 as a “comeback year” from 2017, when sales were \$72.5 billion.¹⁷ The United States is not the only place with a huge lottery market. Lotteries are a \$273 billion industry worldwide.¹⁸ As lotteries seek to attract the next generation of customers, a continuation of the expansion into online lottery products will likely be essential.¹⁹

From a revenue perspective, the appeal of lotteries is hardly subtle. Lottery proponents maintain that when people purchase lottery tickets, they are paying a “voluntary tax” to the state.²⁰ This spares lawmakers from imposing the types of taxes that are neither voluntary nor popular.²¹ As a “no new taxes” mantra coalesces with daunting revenue challenges for states, the appeal of state lotteries is undeniable. This is especially the case when lottery proceeds are directed toward worthy causes such as education or the environment.²²

¹⁴ See Kevin Flynn, *How NH Defied the Feds, Mob and Church to Create the First State Lottery*, NHMAGAZINE.COM (Dec. 14, 2015), <http://www.nhmagazine.com/January-2016/How-NH-Defied-the-Feds-Mob-and-Church-to-Create-the-State-Lottery/>; N.H. Lottery Comm'n, *History of New Hampshire Lottery Commission*, NASPL, http://www.naspl.org/nasplmembers/New_Hampshire (last visited Mar. 10, 2019).

¹⁵ INST. ON TAXATION AND ECON. POLICY, LOTTERY, CASINO AND OTHER GAMBLING REVENUE: A FISCAL GAME OF CHANCE (June 2018), <https://itep.org/wp-content/uploads/Gambling-Final.pdf>.

¹⁶ *Fiscal 2018 Report*, LA FLEUR'S, <https://lafleurs.com/magazine-feature/magazine-secondary-feature/2018/09/19/fiscal-2018-report/> (last visited Mar. 10, 2019).

¹⁷ *Id.*

¹⁸ GC INTERNATIONAL, GC WORLD LOTTERY WHITEPAPER 5 (Jul. 31, 2018), available at https://ico.gg.international/pdf/whitepaper_v1.00.pdf (“The global lottery industry generated over \$273 billion in ticket sales in 2017.”). Another source estimated the revenues from state-regulated lotteries to be nearly \$300 billion in 2014. See WORLD LOTTERY ASS'N, *The WLA Global Lottery Data Compendium 2015: An annual review of the lottery industry based on data from WLA members 12* (2015), file:///C:/Users/law%20review/Downloads/ecitydoc.com_now-available-online-world-lottery-association.pdf.

¹⁹ Nathan Smith, *With an Eye to the Future, Some States are Betting on Internet Lottery Sales*, COUNCIL OF ST. GOV'TS (Aug. 31, 2016, 9:18 AM), <http://knowledgecenter.csg.org/kc/content/eye-future-some-states-are-betting-internet-lottery-sales>.

²⁰ The “voluntary tax” conceit was apparently extant as far back as colonial times. See SPOFFORD, *supra* note 8, at 174–75.

²¹ See 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/>. As an example of how lawmakers look to lotteries to substitute for taxes, in 2009, eleven states obtained more revenue from their lotteries than from the state's corporate income tax. *Id.*

²² *E.g.*, CAL. GOV'T CODE § 8880.1 (West 2018) (directing funds to education); FLA. STAT. § 24.102 (2018) (directing funds to education); GA. CODE ANN. § 50-27-2 (2018) (directing funds to education); NEB. REV. STAT. § 9-812(2)–(4) (2019)

Like any commercial venture, a lottery has to maintain and expand its customer base in order to be successful. However, a state-sponsored lottery is no ordinary commercial venture. It involves the state *directly* being involved in the generation of revenues from losses of those who buy lottery products, typically residents of that state. This primary relationship between bettor and state makes lottery revenues quite different from those garnered by state taxes on the revenues of commercial,²³ or tribal,²⁴ gaming operations within the state. This direct governmental involvement in a gambling enterprise implicates a number of social policy issues. Many of these issues are functionally related to knowledge of who the customers of lotteries are.

A common criticism of lotteries is that they target advertising to poor people and minority groups.²⁵ They do this, critics maintain, because lotteries derive a substantial portion of their revenue from these groups, and are aware of that fact.²⁶ Lotteries often respond to this criticism by describing the “typical” lottery

(directing funds to education and other purposes); N.J. STAT. ANN. § 5:9-2 (West 2018) (directing funds to “State institutions and State aid for education”); OHIO REV. CODE ANN. § 3770.06(B) (West 2014) (directing funds to education); OKLA. STAT. tit. 3A § 702 (2018) (directing funds to education); OR. CONST. art. XV, § 4(d) (defining the purpose of the lottery revenue is for state education stability fund); S.C. CODE ANN. § 59-150-20(4) (2018) (defining “Educational purposes and programs”); TENN. CODE ANN. § 4-51-102(5) (2018) (defining “Educational programs and purposes”); W. VA. CODE § 29-22-18(f)(c) (2018) (directing funds to education). See discussion of how lottery proceeds are used, *supra* at 7–11.

²³ The tax rates on net casino revenues vary considerably from state to state. For example, in 2017 Florida maintained a 35 percent tax, Iowa used a graduated rate for land and riverboat casinos ranging between 5 percent and 22 percent while racetracks could be taxed up to 24 percent, and Nevada taxed at a graduated rate with a maximum of 6.75 percent. AM. GAMING ASS’N, STATE OF THE STATES 2018: THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY (2018), https://www.americangaming.org/sites/default/files/AGA%202018%20State%20of%20the%20State%20Report_FINAL.pdf, 8–11 [hereinafter STATE OF THE STATES 2018].

²⁴ According to the Indian Gaming Regulatory Act, states are not permitted to tax tribal casino revenues. 25 U.S.C. § 2710(d)(4) (2012). However, pursuant to compacts entered into between states and tribes, there are often forms of “revenue-sharing” whereby tribes are required to give the state a certain share of their revenues. This is not without controversy. See, e.g., Eric S. Lent, *Are States Beating the House: The Validity of Tribal-State Revenue Sharing under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453, 463 (2003) (arguing that revenue-sharing agreements violate IGRA and suggesting remedies that would protect Indian gaming rights).

²⁵ See Steve Tripoli, *Lotteries Take In Billions, Often Attract The Poor*, NPR (July 16, 2014, 5:39 PM), <https://www.npr.org/2014/07/16/332015825/lotteries-take-in-billions-often-attract-the-poor>; Alvin Chang, *4 ways the lottery preys on the poor*, VOX (Jan. 13, 2016, 4:00 PM), <https://www.vox.com/identities/2016/1/13/10763268/lottery-poor-prey>; Dan Sweeney et al., *Lottery expansion entices poor families the most*, SUN SENTINEL (Aug. 5, 2016, 5:48 PM), <http://www.sun-sentinel.com/news/fl-florida-lottery-scratch-off-20160723-story.html>.

²⁶ Tripoli, *supra* note 25 (discussing an Ohio marketing suggestion that “lottery ads be timed to coincide with the receipt of government benefits.”); Chang, *supra* note 25 (stating that more tickets are sold in areas with larger minority populations than those with smaller nonwhite populations); Sweeney et al., *supra* note 25 (describing

player as being a middle-class person.²⁷ The truth of these competing claims is subject to significant disagreement. Consequently, regular, specific, and focused research and demographic studies on lottery customers conducted by neutral, outside entities would inform this dispute. While some research on this issue has been conducted,²⁸ further systematic study is called for. Without this demographic information, policymakers cannot make informed judgments about the types of lottery products that should be available, how they should be marketed, and the uses to which lottery revenues should be put.

This article will analyze the issues associated with lotteries and their customers. As state agents, lotteries should be held to high standards of disclosure and forthrightness regarding their customers and operations. This includes the need for disclosure of the lottery's customer base. A survey of state law, however, reveals that only a few states mandate objective studies of lottery customer demographics. Moreover, when the studies are provided for, they are often sporadic, general, and conducted by those primarily interested in marketing the lottery.²⁹

Given the unique relationship between state lotteries and their customers, detailed and accurate information regarding lottery players is essential to many aspects of lottery, and thereby state policy. This article proposes that lotteries be required to underwrite the cost of this research conducted by objective third parties. The blind eye taken by most state lotteries regarding who their players are is unfortunate and demonstrates a willingness to ignore important characteristics of this "voluntary tax."³⁰

I. THE PECULIAR CHARACTERISTICS OF STATE LOTTERIES

All forms of gambling in the United States have supporters and detractors. Lotteries are no different. Lotteries provide revenues for states in lieu of taxes,

advertising growth to outlets serving minority populations).

²⁷ See, e.g., Zac Auter, *About Half of Americans Play State Lotteries*, GALLUP (July 22, 2016), <https://news.gallup.com/poll/193874/half-americans-play-state-lotteries.aspx> (discussing Gallup poll findings that people of lower income are actually less likely to say they purchase tickets); *Miscellaneous FAQs*, IALOTTERY, <https://www.ialottery.com/Pages/FAQs/FAQ-Miscellaneous.aspx> (last visited Mar. 12, 2019).

²⁸ See, e.g., Mythily Subramaniam et al., *Sociodemographic Correlates and Morbidity in Lottery Gamblers: Results from a Population Survey*, 32 *J. GAMBLING STUDS.* 291, 295–96 (2016) (suggesting that people whose sole form of gambling is the lottery are likely to be older, from an ethnic minority, less educated, and with a lower income).

²⁹ See discussion on studies conducted by states, *infra* notes 108–22.

³⁰ Norm Champ, *Opinion: Powerball and other lotteries don't replace taxes — they add to them*, MARKETWATCH (Aug. 22, 2017, 1:02 PM), <https://www.marketwatch.com/story/powerball-and-other-lotteries-dont-replace-taxes-they-add-to-them-2017-06-07>.

and lottery supporters claim no one is forced to purchase a lottery ticket.³¹ To the contrary, opponents assert lotteries are a regressive tax and should not be a replacement for traditional progressive tax structures.³² In fact, many of these same accolades and criticisms of lotteries have been heard for more than 200 years in the United States and Colonial Era.³³ Several specific issues are implicated by this debate on the role of lotteries.

II. HOW ARE LOTTERIES DIFFERENT FROM OTHER FORMS OF GAMBLING?

Lottery revenues differ from revenues derived from taxes on casino revenues.³⁴ The latter is a tax on the adjusted gross revenues of a business entity

³¹ See Suman Bhattacharyya, *Jackpot! These 10 States Make the Most Money from Lotteries*, FISCAL TIMES (June 14, 2016), <http://www.thefiscaltimes.com/2016/06/14/Jackpot-These-10-States-Make-Most-Money-Running-Lotteries> (listing the states in order of most proceeds retained by each state and including information on how money is spent); Tripoli, *supra* note 25 (lottery officials describe playing as voluntary); ELLE HULL, COUNCIL OF STATE GOV'TS, LOTTERIES PROVIDED STABLE FUNDING THROUGH RECESSION, https://www.csg.org/pubs/capitolideas/enews/issue117_4.aspx.

³² See Richard C. Auxier, *Nearly All States Play the Lottery, But None Are Big Winners*, TAX POLICY CENTER (Sept. 9, 2014), <https://www.taxpolicycenter.org/taxvox/nearly-all-states-play-lottery-none-are-big-winners> (stating income is very small fraction of a state's own-source revenue); David Goldman, *Does Powerball really fund education?*, CNN MONEY (Jan. 14, 2016, 5:34 AM), <https://money.cnn.com/2016/01/13/news/powerball-education/index.html> (providing example of North Carolina, where state allocation of funds to education dropped after lottery was created and statutory language insisting that lottery funds be additional rather than substitute has been stripped).

³³ See John Ezell, *The Lottery in Colonial America*, 5 WM. & MARY Q. 185, 194 (1948) (describing how early Americans were willing to participate in state-controlled or illegally held lotteries if the public stood to benefit); Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12–13 (1992) (quoting SPOFFORD, *supra* note 8, at 194-95) (noting an 1893 comment from the Librarian of Congress stating that lotteries were “among the most dangerous and prolific sources of human misery”); Jonathan D. Cohen, *The U.S. has a lottery problem. But it's not the people buying tickets.*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/09/13/the-u-s-has-a-lottery-problem-but-its-not-the-people-buying-tickets/?utm_term=.3443913c6e5c (discussing hopes in the late 1960s that funds from a state lottery could allow the state to abandon taxes).

³⁴ This can also include pari-mutuel activity and, as of recently, sports wagering. See generally LUCY DADAYAN, STATE REVENUES FROM GAMBLING: SHORT-TERM RELIEF, LONG-TERM DISAPPOINTMENT, NELSON A. ROCKEFELLER INST. OF GOV'T 5, 9–16, 22–23 (Apr. 2016), http://rockinst.org/wp-content/uploads/2017/11/2016-04-12-Blinken_Report_Three-min.pdf (discussing state regulation and statutory designation of lottery revenue and the competition posed by private casinos and racinos); *The Lottery Meets Casino Gaming—What do They Have in Common?*, LOTTOEXPOSED (last updated Oct. 3, 2018), <http://www.lottoexposed.com/the-lottery-meets-casino-gaming/> (discussing differences in tempo, returns, and costs).

that is typically subject to competition from similar businesses.³⁵ In effect, lottery revenues are produced from a tax on the lottery players themselves. Additionally, state lotteries jealously guard their exclusivity,³⁶ and brook no competition from other lotteries within the state. Their competitors are the commercial, and often tribal, gaming opportunities within the state. To put it colloquially, lotteries are “the man.” States not only regulate lotteries, they sponsor them.

Some people question whether the state should even be in the business of encouraging their citizens to risk money in this way.³⁷ By operating lotteries, governments are taking advantage of the people they exist to serve. Casinos do not share this characteristic, as their function is not to serve citizens. Similarly, for many services supplied by the government, the belief is that the government can do a better job of providing such services than the private sector.³⁸ This certainly is not the case with gambling, as there is no reason to think the government can offer gambling opportunities more efficiently than private interests can.³⁹ Lotteries exercise their monopoly power to keep private businesses from offering gambling services that they would likely otherwise offer.⁴⁰

Nevertheless, as the October 2018 Mega Millions drawing indicates, the popularity of lotteries is undeniable. With forty-four states operating lotteries and deriving significant revenue from them, abolitionist proponents have a steep hill to climb. Nevertheless, when the government derives direct financial benefits from lotteries, it seems reasonable to expect the government to be able to report accurately who its best customers are.

Another reason that lotteries warrant special scrutiny is because lotteries are stingy in returning winnings to gamblers. The returns vary according to the lottery product involved, but no lottery game offers a return matching the theoretical return of casino games.⁴¹ Even slot machines, colloquially known as

³⁵ In many states, in addition to competition from other commercial casinos, a casino may be in a struggle for market share against tribal casinos. STATE OF THE STATES 2018, *supra* note 23, at 12–13, 15, 35 (illustrating that fourteen states have both tribal and land-based riverboat or racinos, showing commercial casino revenue reached \$40 billion in fiscal year 2017 while tribal casinos reached \$32.4 billion).

³⁶ See, e.g., FLA. CONST. art. X, § 7; MONT. CONST. art. III, § 9; S.C. CONST. art. XVII, § 7; TENN. CONST. art. XI, § 5; TEX. CONST. art. III, § 47(e).

³⁷ Stephen L. Carter, *Why is the Government in the Gambling Business?*, DAILY BEAST (Apr. 23, 2011, 7:59 PM), <https://www.thedailybeast.com/why-is-the-government-in-the-gambling-business>.

³⁸ See *id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Theoretical return is an expression of “what proportion of total bets will the house take and what proportion will be returned to the player. . . .” *Theoretical Returns*, LIVEDEALER.ORG, <https://www.livedealer.org/live-casino-games/theoretical-returns/> (last visited Mar. 12, 2019). According to one author, a slot machine’s payback is about eighty-eight percent, while major lottery payback is around fifty percent. Randy Ray, *The Lottery or Slot Machines? Which is the Better Bet?*,

“one-arm bandits,” are typically required by states to return at least eighty percent of the money bet back to the gambler.⁴²

The National Conference of State Legislatures lists payout rates for state lotteries based on the 2010 census.⁴³ The payout rates range from fifty to nearly eighty percent.⁴⁴ Using data from the 2013 fiscal year, another study reports returns of between \$0.10 and \$0.80 on the dollar, noting that West Virginia, Delaware, South Dakota, Oregon, and Rhode Island have particularly low return rates.⁴⁵ In examining the expected value of a lottery ticket for a large 2016 Powerball jackpot drawing, one author concluded that a ticket matching no numbers has a value of $-\$0.26$ when the net return is multiplied by the probability of winning and the cost of the ticket is subtracted.⁴⁶ Scratch-off tickets fare no better than lottery drawings, with estimates suggesting a \$0.50 return on each dollar spent.⁴⁷

In light of these unfavorable odds, one may question how lotteries can be so successful. People gamble for many reasons, even when the odds disfavor them.⁴⁸ The point is not to prohibit gambling because people cannot be trusted to spend their money wisely. Rather, it is that, as an extension of the state, lotteries have obligations that private actors such as casinos do not. When

GAMBLINGSITES.COM (Mar. 15, 2018), <https://www.gamblingsites.com/blog/lottery-slot-which-is-better-bet-67027-67027/>.

⁴² See, e.g., *Gaming Compacts*, ARIZ. DEP'T OF GAMING, <https://gaming.az.gov/gaming-compacts> (last visited Mar. 12, 2019) (requiring theoretical payout of 80 percent over the life of a machine); *Playing in a Casino - Gaming*, COLO. DEP'T OF REVENUE, <https://www.colorado.gov/pacific/enforcement/playing-casino-gaming> (last visited Mar. 5, 2019) (stating slot machine payout cannot exceed 100 percent); IOWA ADMIN. CODE r. 491-11.9(1)(a) (2018) (stating for the life of a machine the payout must be at least 80 percent but not more than 100 percent); Upstate New York Gaming Economic Development Act of 2013, 2013 N.Y. LAWS 36, available at <https://www.gaming.ny.gov/pdf/Chapter%20174,%20Laws%20of%202013.pdf> (stating payout must be at least 85 percent).

⁴³ *Lottery Payouts and State Revenue, 2010*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/lottery-payouts-and-state-revenue-2010.aspx> (last visited Mar. 12, 2019).

⁴⁴ *Id.*

⁴⁵ John W. Schoen, *These States Offer the Best and Worst Odds for Lottery Players*, NBC NEWS (Jan. 13, 2016, 2:50 PM), <https://www.nbcnews.com/better/money/these-states-offer-best-worst-odds-lottery-players-n495976>.

⁴⁶ See Andy Kiersz, *We did the math to see if it's worth it to buy a ticket for the \$415 million Powerball jackpot*, BUS. INSIDER (May 6, 2016, 7:44 PM), <https://www.businessinsider.com/powerball-lottery-expected-value-2016-5>.

⁴⁷ Peg Legg, *How to Win with Scratch Off Tickets*, LINKY BLOGGER, <https://www.linkylogger.com/how-to-win-with-scratch-off-tickets/> (last visited Mar. 5, 2019).

⁴⁸ See generally Kevin Bennett, *6 Reasons We Keep Playing the Lottery*, PSYCHOL. TODAY (Apr. 12, 2016), <https://www.psychologytoday.com/us/blog/modern-minds/201604/6-reasons-we-keep-playing-the-lottery>; Jonah Lehrer, *The Psychology of Lotteries*, WIRED (Feb. 3, 2011, 11:22 AM), <https://www.wired.com/2011/02/the-psychology-of-lotteries/>.

government is involved in promoting an activity that has such a low probability of producing a positive return, we need to know what those return rates are. And, just as important, we need to know who the government's customers are. That should be a beginning point for how lotteries are operated and marketed.

III. WHAT ARE LOTTERY PROCEEDS SPENT ON?

Lottery proceeds are directed to a variety of different uses in states. Having accurate data regarding a lottery's customer base should be of interest to policy makers when they make decisions on the uses to which the proceeds are put.

A number of states provide that lottery revenues go to the general fund of the state.⁴⁹ But it is also common for lottery proceeds to be targeted for particular uses, in whole or in part.⁵⁰ Indeed, such targeting is a valuable tool in promoting the lottery as an appropriate way for the state to generate funds.

One of the most popular uses for lottery funds is to direct them to education.⁵¹ Opposing the funding of public education is a stance few politicians would take.⁵² Studies have found, however, that in five states that earmarked lottery proceeds for education, lottery dollars made up a small portion of total education financing.⁵³ Overall, in a 2006 study, for the states that directed lottery moneys to schools, such funding "accounted for less than 1 percent to 5 percent of the total revenue for K-12 education."⁵⁴ Additionally, often the money for education that comes from the lottery is not additional money, but money that is

⁴⁹ See, e.g., DEL. CODE ANN. tit. 29 § 4802 (2018); D.C. CODE § 3-1312(c) (2018); IOWA CODE § 99G.2(1) (2016); KAN. STAT. ANN. § 74-8711(c)(4) (2018); KY. REV. STAT. ANN. § 154A.130(1) (2018); ME. REV. STAT. tit. 8, § 387(1)(c) (2017); MD. CODE ANN., STATE GOV'T § 9-120(b)(1)(vi) (West 2018); S.D. CODIFIED LAWS § 42-7A-24 (2018).

⁵⁰ Eight states and the District of Columbia distribute proceeds to the general fund, twenty states dedicate proceeds to education programs, and sixteen states dedicate proceeds to other state purposes including but not limited to state parks and property tax relief. See Niraj Chokshi, *The States that Rely on Powerball and Lotteries the Most*, WASH. POST (Jan. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/13/the-states-that-rely-on-powerball-and-lotteries-the-most/?utm_term=.c8f7a704d892.

⁵¹ See, e.g., Ron Stodghill & Ron Nixon, *For Schools, Lottery Payoffs Fall Short of Promises*, N.Y. TIMES (Oct. 7, 2007), <https://www.nytimes.com/2007/10/07/business/07lotto.html> (noting that twenty-three states earmark all or some lottery funds for education and discussing the issues that arise under the earmarks for education).

⁵² See *id.* Marketing campaigns for lotteries often emphasize their "educational benefits, like a South Carolina lottery slogan, 'Big Fun, Bright Futures,' or an ad campaign in North Carolina featuring a thank-you note passed through schools and signed 'The Students.' The New York Lottery's Web site includes the tagline, 'Raising billions to educate millions.'" *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

replacing tax money previously spent on education.⁵⁵

One particular use of lottery money for education is especially relevant to the need for more developed information about the lottery's biggest customers. Several states direct lottery money primarily to funding scholarships for college.⁵⁶ In Georgia, for example, the Helping Outstanding Pupils Educationally (HOPE) program provides financial assistance to students for education after high school.⁵⁷ Since its creation in 1992 legislation, assistance provided to students by HOPE exceeds \$10 billion.⁵⁸

The connection between who plays the lottery that funds the program and those who receive aid shows that "students from low-income families and minority students are less likely to receive HOPE assistance."⁵⁹ A study conducted by the Georgia Budget and Policy Institute in 2012 surveyed information from Georgia's 159 counties and reached the following conclusions:

- Georgians living in counties with the lowest median household incomes spend a significant share of their income on lottery games.
- Counties with moderate median household incomes contribute significantly more in lottery sales than they receive in HOPE dollars.
- Counties with the highest median household incomes receive

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ HOPE, GA. STUDENT FIN. COMM'N, <https://gsfc.georgia.gov/hope#top> (last visited Mar. 24, 2019) (there are six HOPE programs: HOPE Scholarships and Grants, Zell Miller Scholarships and Grants, HOPE GED Grant, and HOPE Career Grant. The HOPE Scholarship may be awarded to help with tuition costs to students attending a HOPE-approved undergraduate institution who complete high school with a 3.0 GPA and maintain that GPA through college for no more than seven years. A HOPE Grant may be awarded to a Georgia resident at an approved Georgia college or university who maintains a GPA of at least 2.0 to help with tuition costs, expiring upon the ninety-five-quarter hour or sixty-three semester limits. The Zell Miller Scholarship operates like the HOPE scholarship but requires that students have graduated with a 3.7 high school GPA and maintain a 3.3 collegiate GPA, along with certain SAT or ACT minimum score requirements. The Zell Miller Grant is a full-tuition award to a student at an eligible institution who maintains a 3.5 GPA in post-secondary work, expiring upon the ninety-five-quarter hour or sixty-three semester limits. The HOPE GED Grant is a one-time \$500 award, with broader use options, that may be awarded to a student completing a GED through the Technical College System of Georgia (TCSG), to be used within twenty-four months of the date of the GED diploma. The HOPE Career Grant is a supplement available to students already receiving either a HOPE or Zell Miller Grant awarded to students in career paths deemed "strategically important to the state's economic growth.").

⁵⁸ *Id.*

⁵⁹ Rick Seltzer, *HOPE for Whom?*, INSIDE HIGHER ED (Sept. 16, 2016), <https://www.insidehighered.com/news/2016/09/16/report-finds-georgias-hope-programs-miss-many-students>.

the largest share of HOPE dollars.

•Counties where lottery spending is highest are more economically distressed.⁶⁰

A 2016 study by the same Institute reached similar conclusions.⁶¹ Although there were programs for technical college students that reached minorities, that aid fell short of meeting the students' financial needs.⁶² The result was that lottery players in counties with low household incomes contributed a disproportionate amount of money to the HOPE program, and the largest share of program benefits went to students from higher median households.⁶³ In other words, lower income people in the state are helping to subsidize the education of those with greater economic means.

Florida also provides college scholarships funded by Florida Lottery revenues.⁶⁴ In 2011, the Florida Legislature raised the standardized test scores necessary to qualify for the scholarships.⁶⁵ The result was, "Miami-Dade schools with large populations of low-income and African-American and Hispanic students have seen a drastic decrease in the number of students who qualify" for the awards.⁶⁶ If demographic research shows minority and low-income groups are indeed major funders of the lottery, poorer people are again subsidizing the educational expenses of those with greater economic means. Such an economic reality, which can only be established by neutral, objective research, should be acknowledged by policymakers.

As noted above, in order to gain support, lottery proposals may emphasize the potential benefits to education. But the experience in North Carolina illustrates that once a lottery is established, the commitment to education is subject to change. North Carolina created a lottery in 2005 with a stipulation that 35 percent of lottery proceeds be directed to education in the state.⁶⁷ In

⁶⁰ CEDRIC D. JOHNSON, HOPE FOR WHOM? FOR SOME IT DOESN'T PAY TO PLAY THE GEORGIA LOTTERY, GA. BUDGET & POL'Y INST. 1 (Apr. 2012), <https://cdn.gbpi.org/wp-content/uploads/2012/04/HOPE-for-Whom-Lottery-Report04162012.pdf>.

⁶¹ See CLAIRE SUGGS, TROUBLING GAPS IN HOPE POINT TO NEED-BASED AID SOLUTIONS, GA. BUDGET & POL'Y INST. 1-2 (Sept. 2016), <https://cdn.gbpi.org/wp-content/uploads/2016/09/Troubling-Gaps-in-HOPE-Point-to-Need-based-Aid-Solutions.pdf>.

⁶² *Id.*

⁶³ JOHNSON, *supra* note 60.

⁶⁴ FLA. STAT. ANN. § 24.102(1) (West 2018). See *Education*, FLORIDA LOTTERY, <http://www.flalottery.com/education> (last visited Apr. 13, 2019).

⁶⁵ See Kyra Gurney, *Lottery rakes in cash but fewer students, particularly poor ones, make cut for scholarships*, MIAMI HERALD (Mar. 18, 2017, 5:09 PM), <https://www.miamiherald.com/news/local/education/article139149008.html>.

⁶⁶ *Id.*

⁶⁷ Current Operations and Capital Improvements Appropriations Act of 2005, S. Res. 622, 2005-276 Sess., at 398 (N.C. 2005) [hereinafter Current Operations 2005].

2009, however, the 35 percent requirement became a “guideline,”⁶⁸ and in the 2016 fiscal year, only 26.5 percent of lottery money went to education.⁶⁹

Similarly, there was an allocation requirement in the 2005 law specifying 50 percent of the education lottery money would be for class-size reduction, 40 percent for school construction, and 10 percent for college scholarships.⁷⁰ A 2017 law changed that formula so legislators could allocate lottery proceeds to any education purpose they chose.⁷¹ In the 2017 fiscal year, 63 percent of the education money was directed to “non-instructional support personnel.”⁷²

The first versions of the lottery proposal in North Carolina specified that revenues were not to “supplant revenues already expended or projected to be expended for [education.]”⁷³ However, this restriction was removed from the final language of the proposal before voting.⁷⁴ As to whether lottery money was supplemental or substitutional, one study concluded:

Whether the lottery has actually increased education funding is a tricky question because we do not know what would have happened with education funding if the lottery did not exist. Critics argue [] lottery funding has supplanted state funding rather than supplemented it. However, per pupil spending [] has increased from \$7,596.15 in 2006 when the lottery first started, to \$9,172.18 in 2017, and supporters point to the fact that lottery revenue was used to pay for teacher salaries during the recession. Unfortunately, the effect of the recession on education funding makes it hard to evaluate the impact of the lottery.⁷⁵

The important point here is not whether some lottery proceeds have gone to

⁶⁸ N.C. GEN. STAT. ANN. § 18C-162 (West 2009).

⁶⁹ PROGRAM EVALUATION DIV., N.C. GEN. ASSEMBLY, OPTIONS EXIST FOR INCREASING LOTTERY PROCEEDS FOR EDUCATION: FINAL REPORT TO THE JOINT LEGISLATIVE PROGRAM EVALUATION OVERSIGHT COMMITTEE, REPORT NUMBER 2017-03, at 3 (May 1, 2017), available at <https://www.ncleg.gov/DocumentSites/committees/JLPEOC/Minutes%20and%20Handouts/2018/01-22-18/Lottery%20Report.pdf>.

⁷⁰ Current Operations 2005, *supra* note 67.

⁷¹ The law specifying how the education money should be spent was repealed by the Current Operations Appropriations Act of 2017. N.C. GEN. STAT. ANN. § 18C-164 (effective July 1, 2017) (amended 2018).

⁷² NC EDUC. LOTTERY, HISTORY OF LOTTERY FUND ASSIGNMENT, available at <https://www.nc lottery.com/Content/Docs/History%20of%20Lottery%20Fund%20Assignment%20FY17.pdf> (last visited Apr. 29, 2019).

⁷³ Current Operations 2005, *supra* note 67, at 307.

⁷⁴ Molly Osborne, *AskNC: What percentage of lottery money goes to education?*, N.C. CTR. FOR PUB. POL’Y RES. (Apr. 20, 2018), <https://nccppr.org/asknc-percentage-lottery-money-goes-education/>.

⁷⁵ *Id.*

support education, because they clearly have. Rather, it is that when lotteries promote the beneficent uses to which the proceeds are put, changes in a legislature's composition or a perceived state fiscal crisis may dilute that commitment.⁷⁶ Lotteries can be a political football and this underscores the need for lotteries to be forthcoming about who their customers are.

Another use of lottery revenues is to reduce taxes – sometimes a specific tax. In Indiana, a substantial portion of lottery revenues goes to the “Build Indiana Fund.”⁷⁷ Most of that money, over \$182 million in 2015, is given to local governments based on the assessed value of the motor vehicles in the county.⁷⁸ This arrangement allows local governments to recapture excise taxes that were cut by the Indiana Legislature in 1996.⁷⁹ The more expensive the cars, boats, and RVs in a county are, the more the county is compensated. Thus, lottery players from poorer counties, where the value of the vehicles would likely be lower, are paying money into a fund that gives tax relief to people in counties where luxury vehicles are more common. Through this subsidy, the people in the richer counties are lottery winners without even purchasing a ticket.

Another example of lottery revenue being put toward benefits enjoyed primarily by the middle class arises in Wisconsin. In 1999, voters there approved an amendment to the state's constitution that allowed a portion of lottery funds to be used to reduce property taxes owed on primary residences in the state.⁸⁰ In 2017-18, approximately 1,425,300 homeowners benefitted from this lottery credit.⁸¹ Similar to the excise tax relief vehicle owners receive in Indiana from lottery proceeds, the Wisconsin use of lottery dollars benefits people based on the value of the property they own, in this case, real property. Are the beneficiaries of these tax breaks the lottery's best customers? Or, are they again winning money from the lottery without buying a ticket? Only through objective research focused on who the lottery's customers are can the source of this

⁷⁶ In order to help balance the 2008-09 budget, North Carolina's then-Governor, Bev Perdue, redirected \$50 million from lottery reserves to the general fund. Amanda Vuke, *Lottery Funds Continue To Be Diverted For Unauthorized Purposes*, CAROLINA J. (Aug. 25, 2010, 12:00 AM), <https://www.carolinajournal.com/news-article/lottery-funds-continue-to-be-diverted-for-unauthorized-purposes/>. The 2009-10 budget diverted to the General Fund \$69 million in lottery money slated initially for school construction. *Id.*

⁷⁷ James Briggs, *Here's where all that Powerball Money you're spending in Indiana is going*, INDYSTAR (Jan. 11, 2016, 7:45 PM), <https://www.indystar.com/story/money/2016/01/11/heres-where-all-powerball-money-youre-spending-indiana-going/78641902/>.

⁷⁸ *See id.*

⁷⁹ IND. ST. BUDGET AGENCY, DISTRIBUTION OF LOTTERY AND GAMING SURPLUS ACCOUNT FUNDS AND RIVERBOAT ADMISSIONS AND WAGERING TAXES: FISCAL YEAR ENDING JUNE 30, 2000 4 (2000), available at https://www.in.gov/sba/files/lott_gam_rep_00.pdf.

⁸⁰ *See* WIS. DEP'T OF REVENUE, LOTTERY AND GAMING TAX CREDIT (Nov. 30, 2018), available at <https://www.revenue.wi.gov/DORReports/ltrycr.pdf>.

⁸¹ *Id.*

revenue be determined.

The education, excise, and property tax illustrations are especially notable examples of lottery proceeds benefitting those who have substantial economic means at the expense of those who, perhaps, do not. However, even when the lottery money goes to a state's general fund or is put to some other use that does not have overtly discriminatory effects based on economic class, policymakers need to determine who is supplying the bulk of lottery money. If it comes from those in poorer classes, legislators and lottery officials should be aware of this as they make policies involving the lottery.

IV. DO WE ALREADY KNOW WHO PLAYS THE LOTTERY?

Among the most enduring of criticisms of lotteries is that they exploit poor people and operate as a regressive tax.⁸² One of the assumptions behind this attack is that people of lesser economic means play the lottery at a proportionately higher level than those of more substantial means. Who *does* play the lottery then?

Studies that describe the "typical" lottery player offer a variety of profiles. For example, a study of lottery players in Vermont noted "almost 20 percent of the Vermonters who buy lottery tickets have post-graduate or professional degrees" and "22 percent of the ticket buyers came from households with annual incomes of more than \$95,000[.]"⁸³ This prompted Vermont Lottery Commission Chair, Martha O'Connor, to say that the survey results should prove the Lottery is not "preying on the poor and uneducated."⁸⁴

In a similar spirit, the Oregon Lottery declares:

Earning maximum profits for the people of Oregon requires conducting research with Oregon's population base to identify players and consumer markets for Lottery games. By investing time and money into surveys and tracking studies, the Lottery is able to define its players and develop games and marketing strategies to reach them.⁸⁵

⁸² See Todd A. Wyatt, *State Lotteries: Regressive Taxes in Disguise*, 44 TAX LAW. 867, 867 (1991); Jeff Desjardins, *Why the Lottery is a Regressive Tax on the Nation's Poorest*, VISUAL CAPITALIST (May 18, 2016, 12:26 PM), <http://www.visualcapitalist.com/lottery-regressive-tax-nations-poorest/>.

⁸³ Jon Margolis, *Margolis: Lottery survey lacks telling numbers*, VTDIGGER (Aug. 16, 2012), <https://vtdigger.org/2012/08/17/margolis-lottery-survey-lacks-telling-numbers/> [hereinafter Margolis].

⁸⁴ *Id.*

⁸⁵ See *Player Profile: Who Plays the Lottery?*, OR. LOTTERY, <https://digital.osl.state.or.us/islandora/object/osl%3A19549/datastream/OBJ/view> (last visited Mar. 24, 2019).

The Lottery then debunks the myth that only poor people play the lottery.⁸⁶ To the contrary:

Research consistently shows that the “typical Oregon Lottery player” is the “typical Oregonian,” in terms of age, income and education. Lottery players comprise 63 percent of the total adult population of Oregon; are equally likely to be male or female; have an average age of about 47 years old; have some college education; and have a household income of \$50,000 per year.⁸⁷

According to the Lottery’s November 2014 Tracking Study, current players of the lottery range across the income scale somewhat evenly, with 18.7 percent of players having income of \$75,000 or more.⁸⁸ Additionally, 51 percent of men and 49 percent of women surveyed had played the lottery at some time.⁸⁹

A lottery industry trade group, The North American Association of State and Provincial Lotteries (NASPL), cites a number of state surveys that seemingly belie the claim that the predominate purchasers of lottery products are poor people.⁹⁰ The results noted by the NASPL are undated, however.⁹¹ Still, several other state lotteries and reports make the same point: lottery products are consumed by a demographic that mirrors the population of the state, and people across the socioeconomic spectrum are represented.⁹²

These assessments, however, illustrate the selective nature of much of the research on who comprises the lottery playing population. For example, the

⁸⁶ See *About Us: Player Profile*, OR. LOTTERY, <https://www.oregonlottery.org/about/player-profile> (last visited Mar. 24, 2019).

⁸⁷ See *About Us: Frequently Asked Questions*, OR. LOTTERY, <https://www.oregonlottery.org/about/public-interaction/commission-director/frequently-asked-questions> (last visited Apr. 29, 2019).

⁸⁸ *About Us: Player Profile*, *supra* note 86.

⁸⁹ See *id.*

⁹⁰ *Debunking Lottery Myths*, N. AM. ASS’N OF STATE AND PROVINCIAL LOTTERIES, <http://www.naspl.org/mythsandfaq/> (last visited Mar. 12, 2019).

⁹¹ See *id.*

⁹² See GINA BALLARD ET AL., COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR FISCAL YEARS ENDED JUNE 30, 2017, AND 2016, FLA. LOTTERY 1, 76–77 (Dec. 21, 2017), <http://www.flalottery.com/expkt/financialreport17.pdf> (demonstrating in the table that lottery participation comes from all socioeconomic, racial, educational, and sex groups); NICHOLAS BUCHEN, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2017, CAL. ST. LOTTERY 1, 66–70 (Dec. 31, 2017) https://static.www.calottery.com/~media/Publications/Financial_Reports/2016-17%20CSL%20Comprehensive%20Annual%20Financial%20Report%20Final.pdf [hereinafter ANNUAL CALIFORNIA REPORT 2017]; MONIQUE FAWVER & MARTHA WILDFANG, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2017, OR. ST. LOTTERY 1, 60–61 (Dec. 19, 2017), https://www.oregonlottery.org/docs/default-source/default-document-library/fy-2017-oregon-lottery-cafr-final.pdf?sfvrsn=fc5033a7_4 (demonstrating in the table that lottery participation comes from all socioeconomic, racial, educational, and sex groups).

Vermont study measured who bought a lottery product of any kind, at any frequency.⁹³ It does not reflect the amount of money people spend on lottery products. In other words, “the \$100,000-a-year professional who buys one ticket a week is indistinguishable from the \$35,000-a-year waitress who buys 10.”⁹⁴ There is an important difference between these two types of players: The professional may buy a lottery ticket as a lark without any sense that it was an “investment.” The waitress who buys a lottery ticket, however, may view the purchase as a way of building wealth. Indeed, some research supports the view that people of low economic means perceive the lottery as a way of escaping that poverty.⁹⁵

Similar infirmities have been identified with the representations made by the Oregon Lottery. Despite claims that the “typical Oregonian lottery player” is a middle-class person, research in 2014 by The Oregonian showed that “more than half of the state’s nearly 12,000 video lottery terminals [in 2014] were in census tracts where the median income [was] \$45,000 or less.”⁹⁶ In other words, the “typical” player whose money makes up the majority of lottery proceeds may not be as well-off as is represented in lottery marketing. This research spurred a 2015 effort in the Oregon legislature to pass a data collection law that would require the state lottery to map retailers according to neighborhood income on a bi-annual basis.⁹⁷ That measure, however, “died in a [state] Senate committee.”⁹⁸

Some social science research supports the view that lotteries’ best customers are the poor. For example, a 2011 review of the research on lotteries concluded, “[t]he poor are still the leading patron of the lottery[.]”⁹⁹ A 2011 research paper found that “[t]he bottom three quintiles in socioeconomic status spent the most on the lottery and the highest socioeconomic group spent the least on the lottery.”¹⁰⁰ Research from a 2012 study determined the “highest rate of lottery gambling” was found in those people “in the lowest fifth [socioeconomic] group.”¹⁰¹

⁹³ See Margolis, *supra* note 83.

⁹⁴ *Id.*

⁹⁵ See Jens Beckert & Mark Lutter, *Why the Poor Play the Lottery: Sociological Approaches to Explaining Class-based Lottery Play*, 47 SOC. 1152, 1155–1156 (2012); Ki C. Han et al., *Lottery as a Retail Product*, 6 J. GAMBLING BUS. & ECON 82, 85 (2012).

⁹⁶ Denis C. Theriault, *Video lottery machines easier to find in poor neighborhoods, analysis finds*, THE OREGONIAN (June 3, 2015), https://www.oregonlive.com/politics/2015/06/oregon_lottery_poor_neighborhood.html.

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ Vanchai Ariyabuddhiphongs, *Lottery Gambling: A Review*, 27 J. GAMBLING STUDS. 15, 25 (2011).

¹⁰⁰ Grace M. Barnes et al., *Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan*, 27 J. GAMBLING STUD. 575, 576 (2011). *See also* John W. Welte et al., *Gambling Participation in the U.S.—Results from a National Survey*, 18 J. GAMBLING STUD. 313, 325 (2002).

¹⁰¹ Barnes et al., *supra* note 100, at 579.

The methodologies used to determine who plays the lottery take several forms. Many studies use telephone samples where every landline number in the United States has an equal probability of being included in a sample; likewise, all cell phone numbers have the same probability as other cell numbers.¹⁰²

Another approach to determining a lottery's biggest customers is mapping lottery retailers according to neighborhood income. This was the proposal recently considered in Oregon.¹⁰³ However, knowing the location of lottery machines, the sales from the machines, and the sales numbers for lottery products in those locations, does not tell us who is actually *buying* the lottery products.¹⁰⁴ It may be that a person living in a poor neighborhood where there are many lottery retailers is the lottery customer. On the other hand, the customers at such locations might be wealthy persons travelling through that neighborhood and purchasing a ticket at a convenience store or gas station. One lottery researcher stated:

Lottery products are marketed in qualifying retail outlets. These sites are predominantly convenience stores, gas stations and supermarkets. If zoning regulations in high-income neighborhoods prohibit convenience stores, gas stations and supermarkets, you [will not] see many lottery retail sites in those areas. If there is a concentration of qualifying retail outlets in less affluent areas of a community, you will see many more lottery retail sites in those areas. This makes it appear that lottery sales sites are chosen by income level when in fact this is just not true. Also keep in mind that players buy tickets in areas where they work and shop, not necessarily where they live. A Minnesota survey found that more than half the players bought tickets in zip codes outside their own home zip code.¹⁰⁵

That different conclusions can be reached according to different research methodologies is not a phenomenon unique to lottery research. All researchers must be able to validate their work. As to the composition of the market for lottery products, the differing conclusions suggest that more, not less, research is needed.

¹⁰² See John W. Welte et al., *The Relationship Between the Number of Types of Legal Gambling and the Rates of Gambling Behaviors and Problems Across U.S. States*, 32 J. GAMBLING STUD. 379, 381–82 (2016) (providing a useful description of the methodology used in a single study).

¹⁰³ See Theriault, *supra* note 96.

¹⁰⁴ See *Frequently Asked Questions*, N. AM. ASS'N OF STATE AND PROVINCIAL LOTTERIES, <http://www.naspl.org/faq> (last visited Mar. 7, 2019) (“[T]he reality is people [do not] always buy their lottery tickets in the neighborhoods where they live.”).

¹⁰⁵ Duane V. Burke, *Top Ten Myths About Lottery (And Why They are Not True)*, PUB. GAMING RESEARCH INST. (1999), <http://www.publicgaming.org/toptenmyths.html>.

While the location of a retailer with a high volume of sales is not dispositive of who its customers are, that evidence is certainly worth considering along with information gained from other research methodologies. Critically, however, this research cannot be part of marketing initiatives by lotteries. Policymakers, and the public, need data from outside researchers whose objective is to inform, and not to promote sales.

V. ADDITIONAL BENEFITS OF LOTTERY CONSUMER RESEARCH

The value of data collection on lottery customers goes beyond determining whether poorer populations are the primary contributors to lotteries. Other important information impacting public policy considerations for lotteries can be gathered.

For example, the issue of disordered gambling raises distinct problems for lottery players: Lottery products are widely available without the need to go to a casino. In an effort to increase revenues, some lotteries have made lottery products available at gasoline pumps, ATMs, and similar places.¹⁰⁶ As with other forms of gambling, lotteries are also looking to the internet to increase sales.¹⁰⁷ The impact of these enhanced opportunities for purchasing lottery products on those with gambling disorders warrants careful study.¹⁰⁸ As the direct recipients of lottery moneys, states should not be in the position of promoting gambling that enhances the risks of gambling disorders. Research on who is playing the lottery can be combined with studies of whether certain lottery products aggravate these problems.¹⁰⁹

¹⁰⁶ See Brad Tuttle, *Buying Lottery Tickets Just Keeps Getting Easier*, TIME (June 4, 2013), <http://business.time.com/2013/06/04/buying-lottery-tickets-just-keeps-getting-easier/> (discussing Missouri's use of gas pump and ATM sales methods); *Request an Evaluation*, CALOTTERY, <https://www.calottery.com/retailer/request-evaluation> (last visited Mar. 18, 2019) (retailers may be "grocery stores, gas stations, convenience stores, card rooms, bowling alleys, bars and other social venues"); *New Mexico Lottery Announces New Test Program, "Play at the Pump,"* N.M. LOTTERY (July 25, 2016), <https://www.nmlottery.com/news.aspx?e31bc7892b684824b2fd6156e3f4f0c0blogPostId=e3302160ccce4cd5a6de6b94a0575191> (describing how Play at the Pump works, allowing players to both buy lottery tickets and get gas).

¹⁰⁷ See *Online Lotteries in the USA*, BETTINGUSA, <https://www.bettingusa.com/lottery/> (last visited Mar. 18, 2019) (noting that a few states allow players to purchase and manage subscriptions online).

¹⁰⁸ See Jonathan Guryan & Melissa Schettini Kearney, *Is Lottery Gambling Addictive?* 30–31 (Nat'l Bureau of Econ. Research, Working Paper No. 14742, 2009), <http://www.nber.org/papers/w14742.pdf> (One study examining whether playing the lottery could be addictive found evidence of addictiveness, and that a number of factors including winning the lottery, an advertising campaign, or a new game could influence the level of gambling). See also Ferris Jabr, *How the Brain Gets Addicted to Gambling*, SCI. AM. (Nov. 2013), <https://www.scientificamerican.com/article/how-the-brain-gets-addicted-to-gambling/> (originally published with the title "Gambling on the Brain." Highlighting the similarities between drug and gambling addictions, noting that like any other addiction, the longer one partakes, the harder it is to stop).

¹⁰⁹ See Per Binde, *What Are the Most Harmful Forms of Gambling? Analyzing*

Research on lottery customers also can shed light on good practices in advertising. The argument that lottery purchases are a voluntary tax suggests that these actions are spontaneously occurring ones. Yet, advertising expenditures by lotteries are neither insubstantial nor declining. For example, Maine's advertising budget has tripled since 2003.¹¹⁰ A North Carolina bill was proposed in 2017 to double the lottery advertising budget.¹¹¹ Advertising costs make up a significant portion of the \$6 billion spent on administrative costs by lotteries in 2016.¹¹² Indeed, some critics of lottery advertising come from within lottery institutions themselves.¹¹³ A New York Lottery Director stated:

[L]ottery officials[] “must confront the fact that the product they market is a vice that is not universally accepted. . . [Some state lottery advertisements] are so far-fetched and so fanciful that they would not stand up to the same ‘truth-in-advertising’ standards to which advertising conducted by private industry is held. Add to that the fact that our advertising is often relentless in its frequency, and lottery critics and even supporters are left wondering what public purpose is served when a state’s primary message to its constituents is a frequent and enticing appeal to the gambling instinct. The answer is none. No legitimate public purpose justifies the excesses to which some lottery advertising has resorted.”¹¹⁴

Advertising is not, of course, the sole engine of lottery sales; factors such as jackpot amounts may drive sales more than advertising campaigns. However, advertising is viewed as a powerful driver of the market for scratch tickets.¹¹⁵ In

Problem Gambling Prevalence Surveys 16, 18 (Ctr. for Pub. Sector Research, Working Paper No. 12, 2011), https://gupea.ub.gu.se/bitstream/2077/26165/1/gupea_2077_26165_1.pdf (Research suggests that among various forms of gambling, lotteries have the weakest association with problem gambling. Nevertheless, problem gambling that causes significant harm exists with lotteries).

¹¹⁰ Amelia Josephson, *The Economics of the Lottery*, SMARTASSET (June 18, 2018), <https://smartasset.com/taxes/the-economics-of-the-lottery>.

¹¹¹ *ALERT: Senate Budget Proposes to Double Lottery Advertising*, N.C. FAM. POL’Y COUNCIL (May 10, 2017), <https://www.ncfamily.org/alert-senate-budget-proposes-double-lottery-advertising/> (In its call to action, the North Carolina Family Policy Council highlights the negative impact targeted advertising has on gambling addicts, particularly those under the age of 19).

¹¹² Chris Isidore, *We spend billions on lottery tickets. Here’s where all that money goes*, CNN MONEY (Aug. 24, 2017, 4:44 PM), <https://money.cnn.com/2017/08/24/news/economy/lottery-spending/index.html>.

¹¹³ *See Lotteries*, NAT’L GAMBLING IMPACT STUDY COMM’N (last visited Mar. 8, 2019), <https://govinfo.library.unt.edu/ngisc/research/lotteries.html>.

¹¹⁴ *Id.*

¹¹⁵ Stuart Elliot, *It Only Takes an Instant, Lottery Ads Declare*, N.Y. TIMES (May 09, 2011), <https://www.nytimes.com/2011/05/09/business/media/09adnewsletter1>

any event, how lotteries are advertised is a function of the audience the lottery is trying to reach. If a lottery markets its products in neighborhoods with a large black population, this is not a coincidence.¹¹⁶ Ultimately, scholarly research on the composition of the lottery's markets would inform the discussion of how lottery products should be advertised.

Finally, lotteries have been rocked by scandals in the recent past.¹¹⁷ Some have involved lottery employees who were able to rig drawings because of access they had to lottery computers and programs that determined the winning numbers.¹¹⁸ Suspicions of cheating have also been raised when the employees of lottery retailers have won substantial jackpots "more than a dozen times."¹¹⁹ Such scandals undermine public confidence in the legitimacy of state lotteries. That confidence would be enhanced by disclosure of who is actually playing the lottery.

Whether the issue is fraud, problem gambling, or a disproportion of players who are of fewer economic means, lotteries need transparency because of their direct connection to the state and because of the role they play as surrogates for taxation. The need for transparency is heightened still when lottery profits are used in ways that benefit those on the higher rungs of the socioeconomic ladder. Mandating publicly available research generated by neutral and objective studies is an important step toward holding legislators and lottery officials accountable for their choices.

.html?auth=login-smartlock. Cf. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, LOTTERY JACKPOTS, RETAILER DENSITY, AND ADVERTISING DRIVE TRANSFERS TO EDUCATION, REP. NO. 10-17, at 2 (Jan. 2010), <http://www.opp.aga.state.fl.us/MonitorDocs/Reports/pdf/1017rpt.pdf> (finding a primary factor is the jackpot amount) (suggesting that advertising is important for all lottery products but scratch players are also affected by jackpot size). *But see* WASH. JOINT LEGIS. AUDIT & REV. COMM., LOTTERY MARKETING & INCENTIVE PAY: JACKPOT AND ECONOMY, NOT ADVERTISING OR BENEFICIARY CHANGE, APPEARED TO IMPACT TICKET SALES, REP. NO. 12-4, at 6 (May 17, 2012), <http://leg.wa.gov/jlarc/AuditAndStudyReports/Documents/12-4.pdf> (Advertising was not found to be a powerful driver in Washington).

¹¹⁶ See Rosa Ramirez, *Minorities Seek to Power to American Dream With Lottery*, THE ATLANTIC (Nov. 28, 2012), <https://www.theatlantic.com/politics/archive/2012/11/minorities-seek-to-power-to-american-dream-with-lottery/429576/>. See also *Blacks contribute heavily to lottery sales*, CHI. DEFENDER (Dec. 23, 2008), <http://chicagodefender.com/blacks-contribute-heavily-to-lottery-sales/> (noting the zip codes with highest sales are in predominantly poor black neighborhoods).

¹¹⁷ See *State v. Tipton*, 897 N.W.2d 653, 661 (Iowa 2017).

¹¹⁸ "Winning numbers are selected by one of two random number generator (RNG) computers." *Id.*

¹¹⁹ Jason Clayworth, *Some Iowa Lottery retail employees win big, raising suspicions*, DES MOINES REG. (June 4, 2017), <https://www.desmoinesregister.com/story/news/investigations/2017/06/04/some-iowa-lottery-retail-employees-win-big-raising-suspicions/305964001/>.

VI. DO STATES REQUIRE RESEARCH ON LOTTERY MARKETS?

The discussion above suggests a number of reasons why regular and thorough research on the demographics of a lottery's customer base is necessary. However, a majority of lotteries in United States jurisdictions make no provision for any such research.¹²⁰ Even when jurisdictions authorize or require lottery officials to conduct research on the lottery, the research rarely focuses on the demographics of lottery customers.

For example, lottery officials are sometimes directed to study the "operation and administration" of lotteries in other states "with a view toward implementing improvements" in the lottery.¹²¹ Other states direct the study simply to the lottery's "operation," and its marketing and advertising.¹²² These requirements are separate from the annual reports typically required that relate to the financials for the lottery.¹²³ These annual reports may contain some demographic data but their purpose clearly is not to study these issues in detail.¹²⁴

Much more common are provisions that authorize, but don't require, lottery officials to conduct research. Sometimes these permissive laws specify that the research may be on what other states are doing with their lotteries.¹²⁵ In other instances, the focus of the permitted research is on how to better market the lottery, with demographic characteristics of the players being part of the research.¹²⁶ These statutes are the best illustration of why demographic research

¹²⁰ Lottery jurisdictions with no reference to demographic studies: Ariz., Del., D.C., Idaho, Kan., Ky., Me., Md., Mich., Mo., Mont., Neb., N.H., N.J., N.M., N.Y., N.D., Ohio, Pa., R.I., Va., Wash., W. Va., and Wis.

¹²¹ IOWA CODE § 99G.7(2) (2010). *See also* NEB. REV. STAT. § 9-840 (2018) (using boilerplate language about keeping abreast of other states' lotteries and laws).

¹²² *See* Illinois Lottery Law, 20 ILL. COMP. STAT. § 1605 (7.8)(a) (2013) ("to ensure that advertising content and practices do not target with the intent to exploit specific groups or economic classes of people.").

¹²³ *Id.* *See also* IOWA CODE § 99G.40(1) (2010); NEB. REV. STAT. § 9-809(2) (2012).

¹²⁴ *See* DEL. STATE LOTTERY, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEARS ENDED JUNE 30, 2014 AND 2013, 53–57 (2014), <https://auditor.delaware.gov/wp-content/uploads/sites/40/2017/01/Lottery-CAFR-2014.pdf>. *See also* MO. STATE LOTTERY COMM'N, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 54–55 (2015), http://www.molottery.com/where_the_money_goes/documents/fy15_cafr.pdf.

¹²⁵ *See* MD. CODE ANN., ST. GOV'T. § 9-109(b)(1)(iv) (West 2012) (The Commission may conduct studies to "analyze the gaming industry within and outside the State to determine whether Maryland's gaming program is competitive and maximizing revenues for the State."). *See also* MASS. GEN. LAWS ANN. ch. 10, § 24 (West 2013); 42 R.I. GEN. LAWS ANN. § 42-61-4(8) (West 2018); VA. CODE ANN. § 58.1-4007(C) (2008).

¹²⁶ *See* GA. CODE ANN. § 50-27-9(a)(8) (2013) (giving the Georgia Lottery Corporation the power to "conduct such market research as is necessary or appropriate, which may include an analysis of the demographic characteristics of the players of each lottery game."). *See also* FLA. STAT. § 24.105(8) (2012); IND. CODE

of lottery players conducted by the lottery is less reliable than that performed by an outside research entity. When the function of demographic research is to figure out how the lottery can increase its sales, the research will likely emphasize demographic characteristics that best achieve this goal. Even when statutes provide that, without reference to marketing, demographic research is permitted,¹²⁷ such research can be tainted by the reality that lottery officials are focused more on growing their product than how lottery sales might in some way need to be curbed.

A few states do have some requirement for the lottery to conduct demographic research, although the duty might be rather mild.¹²⁸ A more direct mandate exists in California. State law requires a demographic study “of the players of each Lottery Game, including but not limited to their income, age, sex, education, and frequency of participation.”¹²⁹ In the past, California has contracted with Burke, Inc. to undertake these studies through ongoing phone and internet surveys.¹³⁰ The lottery included the data it received from Burke in its yearly Communications Effectiveness Tracking Study statements.¹³¹ The most recent available annual financial statement covers the fiscal year ending June 30, 2017, and includes demographic information.¹³² However, California’s mandate illustrates why simply reporting demographic information is not

ANN. § 4-30-3-6 (West 2018); KAN. STAT. ANN. § 74-8706(b), (d) (West 2018); S.C. CODE ANN. § 59-150-60(A)(8) (2015) (In South Carolina a demographic analysis was required for each of the first five years the lottery was in existence since it was launched in January 2002. Additionally, the Commission now has the power but is no longer statutorily required to “conduct necessary or appropriate market research, which may include an analysis of the demographic characteristics of the players. . . .”); TENN. CODE ANN. § 4-51-105(a)(8) (West 2011).

¹²⁷ See ARK. CODE ANN. § 23-115-205(a)(8) (West 2015) (Demographic studies are at the discretion of the Office of the Arkansas Lottery.); *see also* N.C. GEN. STAT. § 18C-120(b)(8) (West 2013) (The lottery director has the power to collect demographic information.); OR. REV. STAT. ANN. § 461.180(4) (West 1997) (A demographic study is required six months after the lottery law is enacted. Subsequent demographic studies are to be done “from time to time as determined by the director.”); S.D. CODIFIED LAWS § 42-7A-4(5) (2019) (Lottery executive director may “make demographic studies”).

¹²⁸ See COLO. REV. STAT. ANN. § 44-40-109(1)(e) (West 2018). *See also* COLO. REV. STAT. ANN. § 44-40-120(b)(I)-(II), (c)(V) (West 2018) (State auditor must submit a report evaluating the lottery’s performance “at least every 5 years,” including “a report on . . . the socioeconomic profile of persons who play the lottery.”); CONN. GEN. STAT. ANN. § 12-564(b) (West 2013) (The Lottery Commissioner must “conduct studies concerning the effect of legalized gambling on the citizens of this state.”).

¹²⁹ CAL. GOV’T CODE § 8880.44 (West 1984).

¹³⁰ Memorandum from Hugo Lopez, Dir., Cal. State Lottery, on Item 8(a)-Contract for Communications Effectiveness Tracking Study Services, to the Cal. St. Lottery Comm’n., at 2 (Jan. 27, 2016), *available at* <https://static.www.calottery.com/~media/822324F5693B48CBB1238DA5337A4B04.pdf>.

¹³¹ *Id.* at 1-2.

¹³² See ANNUAL CALIFORNIA REPORT 2017, *supra* note 92 at 66–70.

sufficient.

One drawback of having a lottery simply include demographic information in its yearly reports is that the information may be presented in summary fashion. For example, the 2017 report in California states the “Household Income of Lottery Players,” with 39 percent earning below \$50,000.¹³³ But it is misleading to describe lottery players as a single group. A person who purchases a Powerball ticket once a year when the jackpot reaches a high number may have a different demographic profile than a person who purchases scratch tickets on a regular or daily, basis. Demographic information in the aggregate fails to indicate precisely who that regular lottery customer is, and how much they are putting into the games.

The state with the most robust mandate to the lottery regarding demographic research is Texas. According to Texas law, the Lottery’s “executive director shall, every two years, employ an independent firm experienced in demographic analysis to conduct a demographic study of lottery players. The study must include the income, age, sex, race, education, and frequency of participation of players.”¹³⁴ The studies have been conducted since 2001 and have been the product of research by various colleges and universities in the state.¹³⁵

Among the many findings of the Reports is that there is an increase in the sale of scratch tickets.¹³⁶ More money was spent on these lottery products by unemployed persons than those who were retired or employed.¹³⁷ This finding has certainly not led to a retreat in the sales of scratch tickets. In 2007, Texas began selling \$50 scratch tickets, which at the time were the most expensive lottery scratch ticket in the country.¹³⁸

The three most recent reports in Texas, 2018, 2016, and 2015, show a fluctuation in the income of players. The 2018 Report indicated that those playing any lottery game whose income was below \$30,000 constituted 24.3% of the overall market.¹³⁹ On the other hand, 38.2% of players had incomes of \$75,000 and higher.¹⁴⁰ The 2016 Report found that the below \$30,000 group comprised 20.3% of the overall market.¹⁴¹ On the other hand, 42.2% of players

¹³³ See *id.* at 70.

¹³⁴ TEX. GOV’T CODE ANN. § 466.021(a) (West 1995).

¹³⁵ See *generally Reports*, TEX. LOTTERY, https://www.txlottery.org/export/sites/lottery/About_Us/Publications/Reports.html (last visited Mar. 10, 2019).

¹³⁶ TEX. LOTTERY COMM’N, DEMOGRAPHIC SURVEY OF TEXAS LOTTERY PLAYERS 2018, 16–19, 29 (2018), https://www.txlottery.org/export/sites/lottery/Documents/Texas_Lottery_Study_2018.pdf [hereinafter TEXAS LOTTERY STUDY 2018].

¹³⁷ *Id.* at 17.

¹³⁸ Eric Dexheimer, *One man’s itch puts Gonzalez on lottery map with \$50 scratch-offs*, STATESMAN (last updated Sept. 27, 2018), <https://www.statesman.com/news/20120901/one-mans-itch-puts-gonzales-on-lottery-map-with-50-scratch-offs>.

¹³⁹ TEXAS LOTTERY STUDY 2018, *supra* note 136, at 10.

¹⁴⁰ *Id.*

¹⁴¹ TEX. LOTTERY COMM’N, DEMOGRAPHIC SURVEY OF TEXAS LOTTERY PLAYERS 2016, (2016),

had incomes of \$75,000 and higher.¹⁴² Both of these findings support a conclusion that lottery products were not consumed disproportionately by those at the lower end of the income scale. In contrast, however, the 2015 Report found that the below \$30,000 group made up 28.9% of the overall lottery product market,¹⁴³ while the \$75,000 and greater demographic was 32.9%.¹⁴⁴ These variations demonstrate the value of regular studies showing patterns of play for lottery products.

The Texas research model supplies a helpful template for other states to consider and to adapt. For any state, however, the orientation of demographic research should be to determine if particular lottery products or marketing initiatives target and appeal to vulnerable populations, like the poor. If, however, the orientation of the research is one of promoting more effective marketing to boost sales, the research may be of limited value.

VII. CONCLUSION

State lotteries play a prominent role in American gaming culture and have become a core component of state budgets. There is no indication the wave of lottery abolitionism that occurred in nineteenth century United States will be repeated anytime in the near future. This does not alter, however, the nature of the connection between the state and its residents that the lottery represents. When the state is directly involved in offering gambling, transparency regarding who is playing these games is a matter of public interest and is essential for lottery officials and regulators to consider. There is a wealth of social science data to draw from in this regard, and more attention needs to be given to the findings of these studies. Ultimately, however, it is in the interest of the lottery itself to underwrite neutral, objective demographic research. By doing so, it demonstrates a confidence that having the state directly involved in this form of gambling advances the interests of all citizens in the state.

https://www.txlottery.org/export/sites/lottery/Documents/Texas_Lottery_Study_2016.pdf.

¹⁴² *Id.*

¹⁴³ TEX. LOTTERY COMM'N, DEMOGRAPHIC SURVEY OF TEXAS LOTTERY PLAYERS 2015, 10 (2015), https://www.txlottery.org/export/sites/lottery/Documents/Texas_Lottery_Study_2015.pdf.

¹⁴⁴ *Id.*