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# NOTE

## Million to One: Criticizing the Framework for State-Sponsored Lottery Schemes

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## INTRODUCTION

The odds of winning the lottery are astronomically unlikely. In California, depending on the ticket purchased, the odds of winning may be between 1 in 41,416,353, and 1 in 302,575,350.<sup>1</sup> It is now common practice to assemble lists of implausible events that are nonetheless “more likely” than winning the lottery.<sup>2</sup> However, state-sponsored lottery schemes persist despite the odds against their players. State-sponsored lotteries are sets of gambling games operated entirely by a state’s government, and not by a private party such as a casino.<sup>3</sup> State lotteries occupy a unique space in gaming law, and modern state lottery frameworks seem to contrast sharply with historic prohibitions on gambling schemes.

This Note critiques the legal framework of the California State Lottery<sup>4</sup> and inquires whether the Lottery’s exemption from the state’s broader prohibition on other lotteries generates harmful consequences for the public. Additionally, legal frameworks that may have disproportionate economic impacts on individuals of lower income ranges deserve focused criticism to ensure that less inequitable means of achieving the same economic, social, or legal goals are not available. The California State Lottery, despite its long history of supposed legitimacy, should not be exempt from this criticism.

In Part I, this Note examines the legal definitions of a “lottery” under the common law, criminal law, and within the California legal lottery framework.<sup>5</sup> Additionally, a brief chronology of the history of the prohibition of lotteries in California and the unique statutory origins of the modern Lottery will provide context for later arguments.

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<sup>1</sup> See, e.g., *Mega Millions*, CALOTTERY, <https://www.calottery.com/draw-games/mega-millions#section-content-4-3> (last visited Oct. 6, 2021) [<https://perma.cc/5EWW-RZKS>] (describing the mathematical odds of winning the grand prize in one of the most popular California Lottery “Draw Games”).

<sup>2</sup> See, e.g., Ben Kageyama, *40 Things that Are More Likely to Happen than Winning the Lottery*, MEDIUM (Jan. 22, 2021), <https://medium.com/illumination/40-things-that-are-more-likely-to-happen-than-winning-the-lottery-da3a43de066e> [<https://perma.cc/5MP3-GGW9>] (listing getting struck by lightning, winning an Olympic gold medal, getting killed by a shark, and catching the Coronavirus, among others).

<sup>3</sup> See NAT’L GAMBLING IMPACT STUDY COMM’N, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 2-3 (1999).

<sup>4</sup> Unless specifically stated otherwise, mentions in this Note of “the Lottery” refer to the California State Lottery, its associated games, and its underlying legal framework.

<sup>5</sup> See *infra* Part I.

Part II outlines three arguments for why the Lottery's current legal framework creates questionable public outcomes.<sup>6</sup> Primarily, the ability of California to self-exempt its lottery from prohibition creates an unfair and dangerous pseudo-monopoly over all lottery gaming decisions and associated revenues in the state. Additionally, immunity from liability as a public entity may shield the lottery from accountability for the impact of potentially predatory actions demonstrated to be outside their legal authorization. Finally, the lottery has a disproportionate impact on Californians with the least socioeconomic means, with questionable outcomes for educational funding. Part III advocates for several possible solutions to the problems posed, including abolishing the lottery, changing marketing strategies to correct inequitable wealth redistribution, imposing income-dependent costs to safeguard players, or allowing free-market intervention.<sup>7</sup>

## I. BACKGROUND

### A. Common Law

The definition of a lottery at common law is “a system of deciding who will get something by choosing people's names by chance.”<sup>8</sup> California courts have refined this definition to establish three key elements: (1) a prize, (2) distribution by chance, and (3) consideration.<sup>9</sup> Absent from these elements is any aspect of player skill. This distinguishes lotteries from other common forms of gambling such as poker, blackjack, or sports betting.<sup>10</sup> There is nothing a lottery player can do strategically to increase their odds of winning a prize (other than purchasing more tickets).<sup>11</sup>

### B. Criminal Law

The California Penal Code defines a lottery as “any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of

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<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> *Lottery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>9</sup> *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 996 (Cal. 1999).

<sup>10</sup> See *Different Types of Gambling*, GAMBLING SITES, <https://www.gamblingsites.org/gambling/types/> (last visited Oct. 8, 2021) [<https://perma.cc/3YGX-NKEN>].

<sup>11</sup> See *id.*

obtaining such property or a portion of it...<sup>12</sup> This definition mirrors the elements of common law.<sup>13</sup>

### C. *State Lottery Definitions*

For the California State Lottery, a “lottery game” is, “any procedure authorized by the commission whereby prizes are distributed among persons who have paid, or who have unconditionally agreed to pay, for tickets or shares which provide the opportunity to win those prizes.”<sup>14</sup> As a limitation, lottery games are not permitted to “use the theme of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing.”<sup>15</sup> The Lottery’s own definition does appear to contain the traditional elements. However, the language allowing for “any procedure authorized by the commission . . .” suggests a broad authority to develop various lottery games, discussed more in detail in Part II.A.<sup>16</sup>

### D. *California Lottery Origins*

When California became a state in 1850, its Constitution mentioned lotteries explicitly.<sup>17</sup> Under Article IV, section 27, “No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.”<sup>18</sup> This negative historical sentiment has persisted for 173 years, as the current California constitution retains this same fundamental prohibition on lotteries.<sup>19</sup> Article IV, section 19(a) of the current California Constitution states, “The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.”<sup>20</sup> Operationalizing this prohibition is the California Penal Code, which punishes as a misdemeanor “every person who contrives, prepares, sets up, proposes, or draws any lottery.”<sup>21</sup> This criminal statute has remained unchanged since its passage in 1872.<sup>22</sup>

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<sup>12</sup> CAL. PENAL CODE § 319 (2022).

<sup>13</sup> *Hotel*, 981 P.2d at 996.

<sup>14</sup> CAL. GOV’T CODE § 8880.12 (2022).

<sup>15</sup> GOV’T § 8880.28(a)(1).

<sup>16</sup> *See infra* Part II.A.

<sup>17</sup> CAL. CONST. art. IV, § 27 (1849).

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

<sup>19</sup> *See id.* art. IV, § 19(a).

<sup>20</sup> *Id.*

<sup>21</sup> CAL. PENAL CODE § 320 (2022).

<sup>22</sup> *Id.*

However, despite the unambiguously negative historical treatment of lotteries, public sentiment had shifted by the 1980s. In 1984, a proposal regarding a legal “state lottery” appeared on the 1984 ballot.<sup>23</sup> 57.9% voters approved “Proposition 37,” which established the modern state lottery framework.<sup>24</sup> Proposition 37 both amended the Constitution and enacted statutes to “authorize establishment of a state lottery.”<sup>25</sup> The constitutional amendment added the following exemption language into section 19(d) of the California Constitution, “Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.”<sup>26</sup> The accompanying statutory provisions were known as the “California State Lottery Act of 1984,”<sup>27</sup> which established the five-member California State Lottery Commission and gave it “broad powers to oversee the operations of the statewide lottery.”<sup>28</sup> Thus, the California State Lottery was both established and simultaneously exempted from the broader prohibition on lotteries, which remained intact.<sup>29</sup>

The intention behind the 1984 California State Lottery Act was to supplement public education funding without increasing taxes.<sup>30</sup> However, arguments for and against the initiative were impassioned. Authors claimed, “The California State Lottery will provide hundreds of millions of ADDITIONAL DOLLARS FOR PUBLIC EDUCATION without raising taxes a penny!”<sup>31</sup> The rebuttal was, “Proposition 37 isn’t a game; it’s a new, hidden and expensive tax which will take an estimated \$1.5 billion a year out of the pockets of Californians.”<sup>32</sup> Nonetheless, the public agreed to institute the legal framework, and the California State Lottery has now been in operation for more than 35 years.

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<sup>23</sup> *State Lottery*, U.C. HASTINGS SCHOLARSHIP REPOSITORY, [https://repository.uchastings.edu/ca\\_ballot\\_props/927](https://repository.uchastings.edu/ca_ballot_props/927) (last visited Feb. 21, 2023) [<https://perma.cc/UA44-H4MS>].

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

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

<sup>26</sup> *Id.* Subdivision (a) refers to the general prohibition on the authorization of lotteries by the Legislature. *See supra* note 20.

<sup>27</sup> Codified at CAL. GOV’T CODE §§ 8880-8880.72 (2022).

<sup>28</sup> *State Lottery*, *supra* note 23.

<sup>29</sup> *See* CAL. CONST. art. IV, § 19(a).

<sup>30</sup> GOV’T § 8880.1.

<sup>31</sup> *State Lottery*, *supra* note 23.

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

*E. The Modern California Lottery*

The California State Lottery posted total revenues of over \$8.4 billion in the fiscal year 2020-2021.<sup>33</sup> The Lottery framework rests on its inherent connection to public education funding.<sup>34</sup> Per statute, not less than 87% of revenues from the sale of lottery tickets is “returned to the public in the form of prizes and net revenues to benefit public education.”<sup>35</sup> This allocation or redistribution has resulted in approximately \$39.5 billion in contributions to public education since the Lottery’s inception.<sup>36</sup>

To fund this multibillion-dollar enterprise, the Lottery has sold several different lottery games to the public,<sup>37</sup> but primarily it sells tickets to its “Draw Games.”<sup>38</sup> This includes California-specific games like “Super Lotto Plus,” “Fantasy 5,” and “Daily 4.”<sup>39</sup> The Lottery also participates in multi-jurisdictional games with household names such as “Powerball” and “Mega Millions.”<sup>40</sup>

California was not the first state in the U.S. to develop a legal state lottery framework. The New Hampshire Lottery was the first, passing the state’s legislature in 1963.<sup>41</sup> Today, the only states without legal lottery schemes are Alabama, Alaska, Hawaii, Nevada, and Utah.<sup>42</sup> When comparing California’s lottery odds and average player payout per dollar to other jurisdictions, California is middle of the road, coming in at approximately twenty-seventh, and below the national average.<sup>43</sup>

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<sup>33</sup> CAL. STATE LOTTERY, ANNUAL COMPREHENSIVE FINANCIAL REPORT: FOR THE FISCAL YEAR ENDED JUNE 30, 2021, at 23 (2022).

<sup>34</sup> See GOV’T § 8880.1.

<sup>35</sup> GOV’T § 8880.4(a).

<sup>36</sup> CAL. STATE LOTTERY, *supra* note 33, at 6.

<sup>37</sup> See *infra* Part II.A.

<sup>38</sup> See *Draw Games*, CALOTTERY, <https://www.calottery.com/draw-games> (last visited Nov. 23, 2022) [<https://perma.cc/4NVF-43GK>].

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> *History*, NHLOTTERY, <https://www.nhlottery.com/about-us> (last visited Nov. 23, 2022) [<https://perma.cc/53L7-SJXN>].

<sup>42</sup> Brad Tuttle, *Why You Can’t Buy Powerball Tickets in Some Seriously Gambling-Friendly States*, MONEY (Jan. 12, 2016), <https://money.com/states-no-powerball-lottery-sales> [<https://perma.cc/DYW8-WENU>]. Mississippi is the most recent adopter, instituting its state lottery in 2018. See *About the Mississippi Lottery*, MSLOTTERY, <https://www.mslotteryhome.com/about-the-mississippi-lottery> (last visited Nov. 23, 2022) [<https://perma.cc/6D5G-U8SV>].

<sup>43</sup> See John W. Schoen, *These States Offer the Best and Worst Odds for Lottery Players*, NBC NEWS, <https://www.nbcnews.com/better/money/these-states-offer-best->

As an example of how the Lottery is played, Super Lotto Plus involves choosing five numbers between one and forty-seven, and one number between one and twenty-seven, wherein up to twenty consecutive “draws” may be played, each costing \$1.<sup>44</sup> Winning numbers are drawn twice a week.<sup>45</sup> During one such drawing in November 2022, only four players beat the 1 in 197,221 odds to win \$3,811 each.<sup>46</sup> Nobody won the grand prize of \$8,000,000.<sup>47</sup> Ultimately, the Lottery framework has created several legal and social issues that may undermine its original intent and purpose.

## II. THE LOTTERY’S SUNKEN COSTS

### A. *Self-Exemption and Monopoly*

The nature of the Lottery’s statutory framework means the Lottery is the only entity selling legal lottery games in California. As such, the Lottery has very little competition in the gambling market, and it can sell to the public any gambling game or “procedure” if it qualifies as a “lottery game” under the framework.<sup>48</sup> Thus, the Lottery has the freedom to experiment with creating attractive, lucrative lottery games that push the boundaries of their statutory definition. Ultimately, what constitutes a “lottery game” is a matter of law, requiring input from the court system on each potentially illegitimate lottery game sold.<sup>49</sup> Additionally, the legal Lottery

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worst-odds-lottery-players-n495976 (last updated Jan. 13, 2016, 2:50 PM PST) [https://perma.cc/NXN6-BTMW].

<sup>44</sup> See *How to Play SuperLotto Plus*, CALOTTERY, <https://www.calottery.com/draw-games/superlotto-plus#section-content-3-3> (last visited Nov. 23, 2022) [https://perma.cc/RR3G-QD52].

<sup>45</sup> See *id.*

<sup>46</sup> See *Detailed Draw Results*, CALOTTERY, <https://www.calottery.com/draw-games/superlotto-plus#section-content-1-3> (last visited Nov. 23, 2022) [https://perma.cc/YW69-978U].

<sup>47</sup> See *id.*

<sup>48</sup> See CAL. GOV’T CODE § 8880.12 (2022); NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 3, at 2-3 (noting “the lottery industry is the only form of gambling in the United States that is a virtual government monopoly” (citing CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* (1989))); Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L. REV. 11, 21 (1992) (finding “[l]otteries are well suited to government control because their profitability is enhanced by monopoly power and wide coverage”).

<sup>49</sup> *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 658 (Cal. 1996).



framework that creates this monopoly is distinct from other legal frameworks that legitimize monopolies for the public welfare.<sup>50</sup>

### 1. Pushing the Legal Boundaries

Historically, the California State Lottery has attempted to use its monopoly over lottery gaming to expand operations into gambling schemes that are not properly “lotteries,” and which may unfairly advantage the Lottery over its players.<sup>51</sup> In 1996, in *Western Telcon, Inc. v. California State Lottery*, the California Supreme Court resolved a challenge to the legality of a state gambling game called “Keno.”<sup>52</sup> The court described the rules of this particular game as follows:

In [California State Lottery (“CSL”)] Keno, participants try to match between 1 and 10 numbers to a set of 20 numbers randomly selected, out of the integers 1 through 80, by a CSL computer. The game is played approximately every five minutes at locations throughout California, known in the regulations as “retailers,” which are equipped with CSL computer terminals and video display screens.<sup>53</sup>

Players wagered a desired amount between \$1 and \$20 that their selected numbers will match the winning numbers, drawn every five minutes, and they would win more depending on how many numbers matched.<sup>54</sup> Superficially, this game appears very similar to a conventional draw-game “lottery,” especially from the perspective of an ordinary player.<sup>55</sup>

The court ruled that this was not a “lottery game” as defined by statute, but rather an illegal “house percentage banking game.”<sup>56</sup> The difference between the two requires distinguishing one of the elements of a lottery, a “prize,” from a “wager,” an element of another type of gambling, “betting.”<sup>57</sup> Betting is a promise to give money upon the outcome of an uncertain event, and unlike a lottery, it may involve judgment or skill.<sup>58</sup> A bilateral “wager” between two parties may be won by either party, but

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<sup>50</sup> See *infra* Section II.A.2.

<sup>51</sup> See *W. Telcon, Inc.*, 917 P.2d at 662.

<sup>52</sup> *Id.* at 652.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *supra* notes 44–45 and accompanying text.

<sup>56</sup> *W. Telcon, Inc.*, 917 P.2d at 658.

<sup>57</sup> *Id.* at 655.

<sup>58</sup> *Id.*

neither is hazarding any property to be shared by *other players* of the game.<sup>59</sup> The court stated the only issue in a lottery is “*to whom*” a prize is distributed, not “[*w*]hether” a wager is won or lost.<sup>60</sup> Additionally, lottery operators are not to be “contender[s] for the prize,” and they must “ha[ve] no interest in the outcome of the chance event that determines the winner or winners.”<sup>61</sup>

The court concluded that the Lottery’s Keno game was not a lottery, it was a banking game.<sup>62</sup> In banking games, the operator “has a direct interest in the outcome of the game, because the amount of money the operator will have to pay out depends upon whether each of the individual bets is won or lost.”<sup>63</sup> In the Keno game, the Lottery “pays off on all winning bets and collects all losing bets; [the Lottery] offers no prize for distribution to others, but simply bets individually against each of the other participants.”<sup>64</sup> In short, the Lottery’s monopoly over lottery gaming resulted in a scheme wherein the state bet against its residents to lose.

In addition to ruling this one specific game illegal, *Western Telcon* reiterated that the California State Lottery can sell “only lotteries,” and not any other form of gambling.<sup>65</sup> Thus, California courts have a history of policing the boundaries of the Lottery’s products to ensure conformity with the authorizing legal framework. Of note, the *Western Telcon* case only questioned the legality of the CSL Keno game, not legal issues with the Lottery framework in general.<sup>66</sup> However, there are ways to distinguish the Lottery framework from other, more widely accepted, state monopolies.

## 2. Other Monopolies and Paternalism

The Lottery is unlike any other state-sanctioned monopoly that operates for the public welfare. For example, the government has a monopoly on the legitimate use of force, particularly in the context of the military.<sup>67</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 656.

<sup>61</sup> *Id.* at 657.

<sup>62</sup> *Id.* at 658.

<sup>63</sup> *Id.* at 657.

<sup>64</sup> *Id.* at 658.

<sup>65</sup> *Id.* at 662.

<sup>66</sup> *See id.* at 652 (noting the Lottery has “constitutional and statutory authority”).

<sup>67</sup> *See* Kristoffel Grechenig & Martin Kolmar, *The State’s Enforcement Monopoly and the Private Protection of Property*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 5, 5 (2014).

Private armies and mercenary forces are not permitted to compete with the government for an equal share of the enforcement market.<sup>68</sup> Another common state monopoly is public education.<sup>69</sup> While these industries generally fit the definition of a “state monopoly,”<sup>70</sup> arguments for increased competition or total prohibition are generally undermined by the overwhelming benefit to the public welfare. Lotteries are different from such state monopolies in several important ways: (1) the benefit to public education is questionable,<sup>71</sup> (2) the Lottery provides no individual benefit to public welfare besides marginal recreation,<sup>72</sup> and (3) the Lottery’s underlying gaming conduct is otherwise illegal and unconstitutional.<sup>73</sup>

The most tangible benefit the Lottery provides is recreation to the individual player. However, this must be balanced against the broader social costs, while elements of paternalism towards players must be carefully considered. The average lottery player will not win a life-altering amount of money playing the lottery because the probabilities are so small.<sup>74</sup> However, the pull to the lottery is still strong and is usually driven by the “irrational hope” that the player will win.<sup>75</sup> The reasons an individual chooses to play will likely be entirely subjective. However, some studies indicate that there is a marginal increase in player happiness purely from the recreation of playing the lottery.<sup>76</sup> This marginal increase cannot be discounted but should be viewed skeptically, as lottery games

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<sup>68</sup> *See id.* at 7.

<sup>69</sup> *See, e.g.,* David Wees, *The Public Education Monopoly*, THE REFLECTIVE EDUCATOR (Sept. 13, 2010, 1:26 AM), <https://davidwees.com/content/public-education-monopoly> [<https://perma.cc/BZH5-6B3P>] (discussing the pitfalls of a monopolistic education regime, and how having a larger choice of schools does little to alleviate the monopoly). Private education also exists; however, the nuance of the school finance market is outside the scope of this Note.

<sup>70</sup> *State Monopoly*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/state-monopoly> (last visited Feb. 17, 2023) [<https://perma.cc/XA5D-HM6B>].

<sup>71</sup> *See infra* Part II.C.

<sup>72</sup> *See infra* notes 74–81 and accompanying text.

<sup>73</sup> *See infra* notes 82–85 and accompanying text.

<sup>74</sup> *See supra* notes 1–2 and accompanying text.

<sup>75</sup> Jonah Lehrer, *The Psychology of Lotteries*, WIRED (Feb. 3, 2011, 11:22 AM), <https://www.wired.com/2011/02/the-psychology-of-lotteries> [<https://perma.cc/P79C-NADV>].

<sup>76</sup> M. J. Burger, M. Hendriks, E. Pleeging & P.W. van der Zwan, *The Silver Linings of Lottery Play: Motivation and Subjective Well-Being of British Lottery Participants*, 23 APPLIED ECON. LETTERS 1312, 1315 (2016).

are carefully structured to press upon mere “anticipatory” enjoyment, despite lottery outcomes being entirely pre-determined.<sup>77</sup>

The *Western Telcon* case discussed this issue regarding “scratchers” lottery games.<sup>78</sup> The court stated they were legal lotteries, but with respect to interactivity, “all tickets are, when sold, either winning or losing tickets; nothing in the manner of ‘play,’ that is, determines whether the ticket buyer wins or loses.”<sup>79</sup> As such, marginal recreational value is undermined by pre-determination, and the anticipation is grounded on information that requires no skill or strategy to reveal.<sup>80</sup> Thus, while recreational value is still subjective, the overall public benefit is minimal and outweighed by the exposure to addiction and poverty.<sup>81</sup> Therefore, lotteries are distinct from other state monopolies that provide services for an overwhelming public benefit.

The Lottery is more akin to legal frameworks where no actors are permitted to legally operate in the space.<sup>82</sup> The clearest example of this notion is the “War on Drugs,”<sup>83</sup> wherein no actor, not even the government, is permitted to operate in the business of distributing controlled substances under federal law. In these situations, the harms are deemed too immense for even the government to control alone, the benefits are marginal, and thus, full prohibition is imposed. The same should apply to a commodity such as lottery games, which have a similar marginal recreational benefit and detrimental impact on the public.<sup>84</sup> This is consistent with historic prohibitions. The prohibition on lotteries applied to *all actors* in California for about 134 years prior to Proposition 37’s passage.<sup>85</sup>

Furthermore, the Lottery can be distinguished from other common vice prohibition frameworks such as State regulations on the sale and

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<sup>77</sup> *Id.* at 1312.

<sup>78</sup> *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 662 (Cal. 1996).

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

<sup>80</sup> *See id.* (“[A] bettor purchases a lottery ticket and can immediately determine if he or she has won a prize by scratching off a coating on the ticket.”).

<sup>81</sup> *See infra* Part II.C.

<sup>82</sup> *See infra* Part I.B.

<sup>83</sup> The author would note that while this prohibition analogy is an effective juxtaposition to the Lottery, the “War on Drugs” has been a highly destructive endeavor with a disproportionate impact on marginalized communities. *See A History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Nov. 23, 2022) [<https://perma.cc/KH2R-A4UB>].

<sup>84</sup> *See infra* Part II.C.

<sup>85</sup> *See supra* Part I.D.

consumption of alcohol. The distinction here is the lack of a state actor as a competitor in the market.<sup>86</sup> Nor does the state actively encourage the purchase of alcohol through advertisement or highlight its benefits.<sup>87</sup> There is no California brand beer or liquor being advertised for the public to purchase for the benefit of education.<sup>88</sup> Nonetheless, the statutory framework incentivizes the Lottery to market the consumption of a product that would otherwise be prohibited if it were produced by a private entity.<sup>89</sup>

A common criticism leveled against broad legal prohibitions is that they are overly paternalistic.<sup>90</sup> Paternalism is the interference of the state with individual choice, against the will of the individual, justified because the individual will be “protected from harm” through the interference.<sup>91</sup> This sentiment is rife in debates over government prohibitions and is often used as a pejorative when describing the actions of those campaigning against various perceived vices.<sup>92</sup>

The concern of paternalism also applies to the prohibition or proliferation of state lotteries. Too much paternalism dilutes the power of the individual to choose how they use their money for recreation,<sup>93</sup> while too little paternalism allows for individuals to harm their own interests under predatory gambling schemes.<sup>94</sup> Currently, there is very little paternalism in place to guide conduct away from dangerous self-harm,<sup>95</sup> so additional policy safeguards should be implemented.<sup>96</sup>

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<sup>86</sup> See Andrew Clott, Note, *The Predatory Nature of State Lotteries*, 28 LOY. CONSUMER L. REV. 137, 154 (2015).

<sup>87</sup> *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> See CAL. CONST. art. IV § 19(a); CAL. PENAL CODE § 319 (2022).

<sup>90</sup> See, e.g., Douglas N. Husak, *Recreational Drugs and Paternalism*, 8 LAW & PHIL. 353, 381 (1989) (arguing, and ultimately concluding, in the context of drug policy that “the prospects for constructing a paternalistic rationale . . . appear[s] to be bleak”).

<sup>91</sup> Gerald Dworkin, *Paternalism*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE, <https://plato.stanford.edu/archives/fall2020/entries/paternalism> (last updated Sept. 9, 2020) [<https://perma.cc/EU3P-5KRT>].

<sup>92</sup> See Robert Higgs, *Puritanism, Paternalism, and Power*, 2 INDEP. REV. 469, 470 (1998).

<sup>93</sup> See Husak, *supra* note 90, at 369 (arguing that an autonomy principle that justifies self-harm may be outweighed by “competing considerations,” though nonetheless, autonomy must “occasionally prevail” in some instances of self-harm”).

<sup>94</sup> See *id.*

<sup>95</sup> See *infra* Part II.C.

<sup>96</sup> See *infra* Part III.

*B. Immunity as a Public Entity*

When litigants have attempted to recover funds unfairly generated from illegal lottery games, California courts have held that because the Lottery is a public entity it may be generally immune from liability.<sup>97</sup> In *Trinkle v. California State Lottery*, the California Court of Appeal ruled that Trinkle, the owner of a business that operated vending and amusement machines,<sup>98</sup> could not recover under the California Unfair Competition Act (“UCA”) because the statutes were meant to protect the public, not the profits of gaming operators.<sup>99</sup> However, the court also noted that the State Lottery was not a “person” for the purpose of the UCA, therefore not directly subject to suit, and as such, enjoyed “blanket immunity from liability based on misrepresentation.”<sup>100</sup>

In *Janis v. California State Lottery Commission*, the California Court of Appeal held, in a similar case regarding the recovery of funds for an illegal lottery game, that the Lottery was immune from liability as a public entity.<sup>101</sup> Thus, the California State Lottery Commission may sell any lottery game with very little accountability to the public if the game is ruled illegal. One may argue that limited accountability is beneficial for two reasons: (1) there have been very few instances of illegal games in California,<sup>102</sup> so there is little need for more accountability;<sup>103</sup> and (2) “lottery games” are statutorily defined, so there is already implicit judicial oversight if the Lottery deviates from that definition.<sup>104</sup>

Arguing that there is little need for accountability because there are few historical instances of illegal games does not contemplate future Lottery developments. If in the future the Lottery creates new games on the borderline of their statutory authorization, the courts would again need to account for whether they are gathering revenue illegally. *Western Telcon*

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<sup>97</sup> See *Trinkle v. Cal. State Lottery*, 84 Cal. Rptr. 2d 496, 497 (Ct. App. 1999); *Janis v. Cal. State Lottery Comm’n.*, 80 Cal. Rptr. 2d 549, 552-53 (Ct. App. 1998).

<sup>98</sup> *Trinkle*, 84 Cal. Rptr. 2d at 497.

<sup>99</sup> *Id.* at 499.

<sup>100</sup> *Id.* at 500.

<sup>101</sup> See *Janis v. Cal. State Lottery Comm’n.*, 80 Cal. Rptr. 2d 549, 553-54 (Ct. App. 1998).

<sup>102</sup> See, e.g., *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651 (Cal. 1996) (describing an illegal “Keno” banking game).

<sup>103</sup> But see *Freedom’s Not Always Good: State Lottery Agency Is Too Unrestricted, and That Should Change*, L.A. TIMES (Feb. 15, 1996, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1996-02-15-me-36144-story.html> [https://perma.cc/EDM4-THMN]; discussion *infra* notes 130–39.

<sup>104</sup> See CAL. GOV’T CODE § 8880.12 (2022).

does not imply that CSL Keno is the *only* illegal game the Lottery could attempt to sell to the public, or that it would not try to sell it again the future.<sup>105</sup> This would again call into question the billions of dollars of revenue generated from such a game, and immunity from liability would likely shield all claims for damages.

Regarding the statutory boundaries, there is no guarantee that the Lottery cannot lobby to expand its statutory authorizations, which would potentially broaden the scope of its immunity to new gambling endeavors.<sup>106</sup> Additionally, a narrow definition of what products may be sold is still monopolistic if one entity produces them. Even if the boundaries are policed by the courts, lack of competition still creates power, and generalized immunity shields that power.

### C. *Disproportionate Impacts and Policy Concerns*

The primary criticism leveled against state lotteries is that they are mostly played by individuals with relatively lower socioeconomic status.<sup>107</sup> Players are often more likely to purchase tickets when they perceive their income as lower than standard.<sup>108</sup> Lower income groups usually spend the most money on lotteries and spend the most average days of the year gambling on the lottery.<sup>109</sup> The lottery is an economic transaction, and its broad function is wealth redistribution.<sup>110</sup> However, while lower-income individuals tend to play all lotteries, wealthy individuals involve themselves to an equal degree only when the jackpots are relatively large.<sup>111</sup> Thus, because wealthy individuals rarely play, lotteries operate as a wealth redistribution scheme only *within* the lower-income band. This is incongruent with public policy; redistribution is

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<sup>105</sup> See generally *W. Telcon, Inc.*, 917 P.2d at 662 (the Court expressed, “no opinion as to whether a restructured Keno game could be run as a lottery”).

<sup>106</sup> See Clott, *supra* note 86, at 156 (stating “[t]he massive lobbying power of the lottery industry . . . has stifled any chance at effective regulation”).

<sup>107</sup> See V. Ariyabuddhiphongs, *Lottery Gambling: A Review*, 27 J. GAMBLING STUD. 15, 22 (2011).

<sup>108</sup> Lehrer, *supra* note 75.

<sup>109</sup> Grace M. Barnes, John W. Welte, Marie-Cecile O. Tidwell & Joseph H. Hoffman, *Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan*, 27 J. GAMBLING STUD. 575, 584 (2011).

<sup>110</sup> CAL. GOV’T CODE § 8880.4 (2022) (not less than 50% of total annual revenues shall be returned to the public in the form of prizes).

<sup>111</sup> See EMILY OSTER, DREAMING BIG: WHY DO PEOPLE PLAY THE POWERBALL 41 (2002); see also Emily Oster, *Are All Lotteries Regressive? Evidence from the Powerball*, 57 NAT’L TAX J. 179, 185 (2004).

usually preferred *across* incomes, from those *with* means to those *without*.<sup>112</sup> Additionally, the increasing prevalence and popularity of state lotteries has contributed to an increase in income inequality.<sup>113</sup>

This redistribution within an income band without procedural safeguards has resulted in some criticizing state lotteries as a “regressive tax.”<sup>114</sup> A “progressive tax” is one where the average tax burden increases with income, thus, high-income individuals pay a disproportionate share of the burden because they possess the relative means.<sup>115</sup> With state lotteries, most players are of lower socioeconomic status,<sup>116</sup> so they pay a disproportionate share of the lottery revenue, and thus, the lottery scheme is “regressive.”

One might argue that because the Lottery is voluntary, it cannot properly be characterized as a tax.<sup>117</sup> However, for those who gamble compulsively, it may not be truly voluntary.<sup>118</sup> Lottery games, like all gambling schemes, can be dangerously addictive.<sup>119</sup> Lower socioeconomic status is also closely related to a higher risk of pathological gambling.<sup>120</sup> These issues can be life and death, as problem gambling has the highest rates of suicide of any addictive disorder; 1 in 5 problem gamblers will attempt to end their lives.<sup>121</sup> Additionally, whether it is characterized as a tax or not, the regressive effect on wealth redistribution is the same, and a progressive

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<sup>112</sup> See François Bourguignon, *Spreading the Wealth*, 55 FIN. & DEV. 22, 22 (2018) (“Taxation and income transfers to the poorest segment of society are the most direct way to keep inequality in check and reduce poverty in the short term.”); Todd A. Wyett, Note, *State Lotteries: Regressive Taxes in Disguise*, 44 TAX LAW. 867, 876 (1991).

<sup>113</sup> Elizabeth A. Freund & Irwin L. Morris, *The Lottery and Income Inequality in the States*, 86 SOC. SCI. Q. 996, 996 (2005).

<sup>114</sup> E.g., Elizabeth Winslow McAuliffe, *The State-Sponsored Lottery: A Failure of Policy and Ethics*, 8 PUB. INTEGRITY 367, 370 (2006).

<sup>115</sup> *Progressive Tax*, TAX FOUND., <https://taxfoundation.org/tax-basics/progressive-tax> (last visited Oct. 29, 2021) [<https://perma.cc/7LG6-WVCM>].

<sup>116</sup> See *supra* notes 107–11 and accompanying text.

<sup>117</sup> But see Wyett, *supra* note 112, at 873.

<sup>118</sup> See generally Alvin C. Burns, Peter L. Gillett, Marc Rubinstein & James W. Gentry, *An Exploratory Study of Lottery Playing, Gambling Addiction and Links to Compulsive Consumption*, 17 ADVANCES CONSUMER RSCH. 298 (1990) (finding that within very heavy players is a small group that exhibits characteristics of compulsive consumption).

<sup>119</sup> See, e.g., Ariyabuddhiphongs, *supra* note 107, at 23 (describing assessment of pathological lottery gambling).

<sup>120</sup> Barnes et al., *supra* note 109, at 584.

<sup>121</sup> Christine Gordon-Davis, *A Public Health Approach to Problem Gambling*, HEALTH RES. IN ACTION (Mar. 31, 2022), <https://hria.org/2022/03/31/problemgambling> [<https://perma.cc/MD23-DA3M>].



society should prefer to have wealth redistribution occur with procedural safeguards to distribute from the wealthiest to the poorest.<sup>122</sup>

Disillusionment with other sources of income can also cause players to turn to the Lottery, despite its low odds. Two surveys from 2006 indicated that 1 in 5 Americans believed that the most practical way for them to accumulate wealth was to win the lottery.<sup>123</sup> This is despite the requirement that the estimated odds of winning be posted on “all television and print advertising,” so the odds are readily available.<sup>124</sup> Winning the lottery is also sold as an instant curative for all economic woes, despite the numerous accounts of the extremely negative effect a large windfall can have on an individual.<sup>125</sup> Murder, bankruptcy, divorce, lawsuits, and other challenges face winners.<sup>126</sup>

Lottery spending and poverty go hand in hand. For low income players, the Lottery is less tied to entertainment than it is to economic desperation.<sup>127</sup> Between the theories that low income consumers view the Lottery merely as low cost entertainment or as a rare opportunity to improve their standard of living researchers find “strong” support for the economic “desperation hypothesis,” and none for the entertainment hypothesis.<sup>128</sup> Poverty rates and Lottery ticket plays have a strong correlation, especially around the poverty line, and comparisons with other cheap entertainment (like movie tickets) do not have the same relation.<sup>129</sup>

Outcomes for public education are also questionable and therefore cut against the Lottery framework’s explicit legal justifications. The Lottery framework does contain internal protections regarding the percentage of income that must be earmarked for public education spending.<sup>130</sup>

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<sup>122</sup> See Wyett, *supra* note 112, at 876.

<sup>123</sup> CONSUMER FED’N OF AMERICA, HOW AMERICANS VIEW PERSONAL WEALTH VS. HOW FINANCIAL PLANNERS VIEW THIS WEALTH (2006), [https://consumerfed.org/press\\_release/how-americans-view-personal-wealth-v-how-financial-planners-view-this-wealth](https://consumerfed.org/press_release/how-americans-view-personal-wealth-v-how-financial-planners-view-this-wealth) [<https://perma.cc/4HLH-2Y5F>].

<sup>124</sup> CAL. GOV’T CODE § 8880.24 (2022).

<sup>125</sup> See Gabriela Miranda, *Dreaming of Winning the Lottery? These Horror Stories May Change Your Mind.*, USA TODAY, <https://www.usatoday.com/story/news/nation/2021/10/07/most-lottery-winners-go-into-debt-horror-stories/6019987001> (last updated Oct. 7, 2021, 11:42 AM ET) [<https://perma.cc/27GM-NY5D>].

<sup>126</sup> See *id.*

<sup>127</sup> See 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. & SOCIO. 545, 545 (2007).

<sup>128</sup> *Id.* at 567.

<sup>129</sup> See *id.* at 547.

<sup>130</sup> See CAL. GOV’T CODE § 8880.4(a) (2022).

However, there is no *external* guarantee in the Lottery's framework to prevent the legislature from reducing funding for education from other sources by the same, or any, amount.<sup>131</sup> Additionally, lottery funding is unstable and dependent on the whims of players. Revenues fluctuated by as much as \$150 million between the fourth quarter of 2019-2020 and 2021-2022.<sup>132</sup> In 2020, the Lottery was audited by the California State Auditor for under-funding its educational allotments by approximately \$36 million.<sup>133</sup>

Underfunding was not the only issue raised by the California State Auditor in its report.<sup>134</sup> The report also alleges the Lottery cannot prove that its current prize payout is the optimal scheme for maximizing funding for public education.<sup>135</sup> The Lottery relied on a 10-year-old study in upholding the payout rate but did not adhere to that study when planning recent budgets.<sup>136</sup> The report also claimed that the Lottery as a business did not engage in best practices when bidding on procurements, and the report also accused the State Controller's Office of neglectful oversight of the Lottery as a business entity.<sup>137</sup> The Lottery "strongly disagrees" with the findings of the report, and argues that the Auditor is misinterpreting its statutory responsibilities.<sup>138</sup> Overall, the State Auditor's report highlights

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<sup>131</sup> See NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 3, at 2-4 (noting there is "no practical way of preventing a legislature from allocating general revenues away from earmarked uses").

<sup>132</sup> See CAL. STATE LOTTERY, CONTRIBUTIONS TO PUBLIC EDUCATION FOURTH QUARTER FISCAL YEAR 2021-2022 AND CUMULATIVE TOTALS 1 (2022), <https://static.www.calottery.com/-/media/Project/calottery/PWS/PDFs/Contributions-to-Education/Ca-Lottery-Educ-Alloc--2021-2022-4th-Qtr-V1.pdf?rev=8f17a3954def4798a4be5d78bd503e6c&hash=D63A31D9B2CC0FFF77295983CF44A1EB> [<https://perma.cc/9EDF-6VYY>] [hereinafter CAL. STATE LOTTERY 2021-2022]; CAL. STATE LOTTERY, CONTRIBUTIONS TO PUBLIC EDUCATION FOURTH QUARTER FISCAL YEAR 2019-2020 AND CUMULATIVE TOTALS 1 (2021), <https://static.www.calottery.com/-/media/Project/calottery/PWS/PDFs/Contributions-to-Education/Ca-Lottery-Educ-Alloc--2019-2020-4th-Qtr-v1.pdf?rev=2e575b2acfd04c62a13043ad6a0e64c&hash=0E4DEFBD58DFC9CB580DB492BA91BF57> [<https://perma.cc/WK9B-E86S>] [hereinafter CAL. STATE LOTTERY 2019-2020].

<sup>133</sup> CAL. STATE AUDITOR, REPORT NO. 2019-112, CALIFORNIA STATE LOTTERY: THE LOTTERY HAS NOT ENSURED THAT IT MAXIMIZES FUNDING FOR EDUCATION 1 (2020), <https://www.auditor.ca.gov/pdfs/reports/2019-112.pdf> [<https://perma.cc/CK3A-L2DZ>].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See id.* at 1-2.

<sup>138</sup> *See California State Lottery*, CAL. STATE AUDITOR (Feb. 6, 2020), <http://auditor.ca.gov/reports/2019-112/responses.html> [<https://perma.cc/A859-84AK>].

underlying bureaucratic concerns about the Lottery as a stable source of funding for education.<sup>139</sup>

Concerns regarding changing the lottery scheme may center on loss of funding for schools. However, California State Lottery funds amount to *less than 1.5%* of all public education funding in California.<sup>140</sup> Therefore, any concerns about general reliance on lottery funds are unwarranted. Additionally, per the original Lottery proposition, revenue from the scheme “shall not be used as substitute funds but rather shall supplement the total amount of money allocated.”<sup>141</sup> Because Lottery revenues amount to a minor, supplemental percentage of overall funding for public education, the system may be abolished or reasonably altered without any tangible impact on education funding.<sup>142</sup>

### III. SOLUTIONS

The Lottery framework is, at minimum, a questionable exception to a broader prohibition on gambling, and at maximum, a dangerous and self-perpetuating scheme of unfettered wealth redistribution. There are several solutions to these concerns. First, eliminate the Lottery’s constitutional exemption, overturn the statutory framework, and return to a complete prohibition on lotteries. Alternatively, maintain the Lottery scheme, but shift marketing, payoffs, and costs to protect vulnerable players.

Calls to repeal State Lottery schemes are not difficult to come across.<sup>143</sup> Accusations that the Lottery “gamifies the American Dream,” while being another “rigged capitalist competition,” that provides only a “narrative of false potential” add colorful language to the discussion.<sup>144</sup> Direct democracy is an option to repeal the Lottery, though it is not without its

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<sup>139</sup> See CAL. STATE AUDITOR, *supra* note 133, at iii, 1-3.

<sup>140</sup> CAL. STATE LOTTERY 2021-2022, *supra* note 132, Cover Page; CAL. STATE LOTTERY 2019-2020, *supra* note 132, Cover Page.

<sup>141</sup> CAL. GOV’T CODE § 8880.1 (2022).

<sup>142</sup> See Kana A. Ellis, Note, *Finding the Winning Numbers: State Lotteries for Education and Their Impacts on the Poor*, 14 GEO. J. ON POVERTY L. & POL’Y 317, 326 (2007) (“[L]otteries have not been shown to play a significant role in generating revenue for public education.”); Keith C. Miller, *State Lotteries and Their Customers*, 9 UNLV GAMING L.J. 177, 185 (2019) (“[I]n five states that earmarked lottery proceeds for education, lottery dollars made up a small portion of total education financing.”).

<sup>143</sup> See, e.g., Leah Muncy, *It’s Time to Get Rid of the Lottery*, THE OUTLINE (July 31, 2019, 1:00 PM EST), <https://theoutline.com/post/7737/abolish-state-lotteries> [<https://perma.cc/S4LT-PN2E>] (stating “[increased taxation would] thus provide the state an opportunity to sever its reliance on the poor to purchase lottery tickets”).

<sup>144</sup> *Id.*

own challenges.<sup>145</sup> A statutory or constitutional amendment from the California Legislature is the other source of possible repeal.<sup>146</sup>

Ultimately, the largest obstacle to repeal is public sentiment.<sup>147</sup> The Lottery has been normalized, and Lottery tickets are sold at approximately 23,000 “retail partners” in California.<sup>148</sup> If the primary concern is a loss of funding for public education, the solution is simple: replace the *regressive* tax with a *progressive* tax. Again, the Lottery amounts to only approximately 1.5% of annual public education funding,<sup>149</sup> so an equivalent progressive tax increase by that amount through less regressive taxes such as sales taxes, or by more progressive taxes like income taxes, would distribute the burden across all Californians more equitably.<sup>150</sup> All the benefit is retained without the costs to players.

If the Lottery scheme is so entrenched into the public psyche that it is inextricable, the framework could be maintained, but protections must be in place to mitigate costs. The Lottery could take affirmative action to market more aggressively to high-income players, which would alleviate some concerns regarding the disproportionate player-base. However, one might question why it is that higher-income players feel less need to play the lottery in the first place. This does not necessarily mean the individual costs associated with playing are reduced, as the issues with addiction, low-probability outcomes, and more are still present. To go one step further, the Lottery should simultaneously reduce marketing in lower-income areas, so those with lower socioeconomic means are not drawn to the Lottery to begin with.<sup>151</sup>

One response to concerns is to also increase individual payoffs to players. If players win larger amounts and do so more often, it reduces the implicit futility associated with the unattainable odds. This solution could

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<sup>145</sup> See generally David A. Carrillo, Stephen M. Duvernay, Benjamin Gevercer & Meghan Fenzel, *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557 (2019) (describing the pros and cons of the California direct democracy system).

<sup>146</sup> See Wyett, *supra* note 112, at 882.

<sup>147</sup> See Clott, *supra* note 86, at 155 (noting “[i]t is highly unlikely that state lotteries will become any less prevalent in the years to come . . . consumer demand is likely to remain high for lottery games”).

<sup>148</sup> CAL. STATE LOTTERY, POPULAR ANNUAL FINANCIAL REPORT 9 (2020), <https://static.www.calottery.com/-/media/Project/calottery/PWS/PDFs/Financial-Reports-etc/PAFR-2020-final-v2.pdf?rev=e501a097ac6d4661857c515e64510bdc&hash=6EE8F8A80AB722FF8B70940469ED8CD1> [https://perma.cc/TP75-T6UY].

<sup>149</sup> See *supra* note 140 and accompanying text.

<sup>150</sup> See Wyett, *supra* note 112, at 882.

<sup>151</sup> See Ellis, *supra* note 142, at 336 (“[S]tates can . . . enforce restrictions on lottery advertisements so that the advertisements and games are not targeted at the poor.”).

be achieved by increasing the statutory amount required to be redistributed to players.<sup>152</sup> This does mean fewer allotments to public education, but the State is already underfunding allotments,<sup>153</sup> and progressive taxation should be considered in tandem.

A final option is to drastically reduce the direct costs of the Lottery to players. If tickets cost pennies instead of dollars, the economic concerns dissipate slightly. The theme would then be “pay less, win more.” This solution does not address the Lottery’s remaining underlying monopoly on games, and it would likely merely result in the Lottery diluting the odds of winning proportionately to retain revenue streams. One alternative option in response would be to make ticket costs proportionate to player income, so lower-income players pay less for the same odds of winning as higher-income players, who pay more. This solution addresses some issues with disproportionate costs; however, it would be highly unappealing to higher-income players, who would likely see games like this as unfair and discriminatory.

One last option is to remove lottery prohibitions altogether and allow for private lottery schemes. Jurists such as Supreme Court Justice Oliver Wendell Holmes have raised this idea, and questioned statutory restrictions on lotteries:

“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. *A more modern one is the prohibition of lotteries.*”<sup>154</sup>

This would ameliorate the monopoly concerns and introduce competition; however, this simply adds more actors into the market without changing the underlying structural issues, and it proliferates the social costs of lotteries with each new entity selling games to the public. Thus, this solution is not recommended. The first two solutions better address the issues of monopoly, self-exemption, immunity, and social costs. There can be no immune, monopolistic entity if the Lottery is abolished. If the

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<sup>152</sup> Theoretically, 100% of lottery proceeds could be returned to players, thus the scheme would be a pure wealth redistribution mechanism. See Wyett, *supra* note 112, at 882.

<sup>153</sup> See *supra* notes 130–39 and accompanying text.

<sup>154</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (emphasis added).

Lottery remains, additional adjustments to the existing framework would ameliorate some of the social costs.

Ultimately, repealing the Lottery framework is preferred, as it addresses all noted concerns. The costs of such a change could be mitigated by a hybrid of the above proposed solutions. Recall, repealing the Lottery is not a *new* solution, it is a *return* to the legal landscape in California as it was before 1984.

#### CONCLUSION

The California State Lottery exists in a unique legal space. The operation of a state-sponsored gambling scheme despite historic and modern prohibitions on the underlying conduct is legally curious. Lotteries experienced constitutional and penal prohibitions for the entirety of California statehood until an exemption was created for the State Lottery by direct democracy in 1984.<sup>155</sup> The Lottery is now ubiquitous, as tickets are sold in approximately 23,000 retail locations, and revenues are measured in the billions of dollars.<sup>156</sup> However, there are glaring concerns with the existing legal framework.

The self-exemption implicit in the Lottery's framework creates unfair and questionable incentives for the Lottery when it sells its games to the public. There have been incidents in the past when the Lottery has pushed past its legal authorizations and taken advantage of Californians.<sup>157</sup> Additionally, the Lottery's legally manufactured monopoly should not be permitted to persist, as it is easily distinguished from other state-sanctioned monopolies due to its overwhelming public policy costs and marginal benefits.<sup>158</sup>

When the Lottery acts outside of its statutory authorization, possible immunity as a public entity creates difficulties for private individuals and other businesses that desire accountability.<sup>159</sup> If the Lottery were to expand its reach again, it could reap billions of dollars unfairly from a gaming scheme outside legal authorization with very little recourse for the public to seek damages.

Public policy concerns such as the socioeconomic status of players, gambling addiction, and questionable funding outcomes for public

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<sup>155</sup> *See supra* Part I.D.

<sup>156</sup> *See supra* notes 33, 148.

<sup>157</sup> *See supra* Section II.A.1.

<sup>158</sup> *See supra* Section II.A.2.

<sup>159</sup> *See supra* Part II.B.

education likely outweigh any recreational benefit the Lottery provides.<sup>160</sup> The Lottery should be abolished, or its legal framework should be modified to introduce more safeguards for Californians.

#### APPENDIX A

In the November 2022 general election, California voters again faced a ballot initiative that tested their sentiments on gambling. Proposition 27 was titled “Allows Online and Mobile Sports Wagering Outside Tribal Lands.”<sup>161</sup> Proposition 27 would have amended the Constitution and state law to allow online sports betting companies to offer gambling over internet and mobile devices.<sup>162</sup> Proposition 27 contained a public policy justification for this proliferation of gambling in the State. While the Lottery used public education as a counterweight, Proposition 27 used homelessness.<sup>163</sup> The proposition would have given 85% of revenue to local entities to address homelessness and mental health.<sup>164</sup> This proposition bears a striking resemblance to the 1984 proposition that instituted the Lottery framework.

Proposition 27 was defeated by an overwhelming margin. 82.3% of voters voted against it, while only 17.7% supported it.<sup>165</sup> This result indicates Californians may still retain an underlying negative disposition toward gambling schemes, which further supports a reduction in the legal and rhetorical power of the California State Lottery.

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<sup>160</sup> *See supra* Part II.C.

<sup>161</sup> LEGIS. ANALYST’S OFF., ANALYSIS OF MEASURE 1 (2022), <https://lao.ca.gov/BallotAnalysis/Proposition?number=27&year=2022> [<https://perma.cc/3PJJ-WEW7>].

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* at 1.

<sup>164</sup> *Id.* at 2.

<sup>165</sup> *State Ballot Measures – Statewide Results*, SEC’Y OF STATE, <https://electionresults.sos.ca.gov/returns/ballot-measures> (last visited Jan. 11, 2023) [<https://perma.cc/TK2A-REYG>].