

ALL BETS ARE OFF: AN EXAMINATION OF ALABAMA'S PROPOSED LOTTERY AND THE EDUCATIONAL INADEQUACIES IT WAS INTENDED TO REMEDY

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹

I. INTRODUCTION

In Alabama, educational reform has been a central issue since the gubernatorial elections of November 1998 when Governor Don Siegelman and then incumbent Fob James vigorously debated possible solutions for Alabama's underachieving public schools.² Siegelman's key campaign issue was education and, more specifically, Alabama's implementation of a state-sponsored lottery as a mechanism to raise money for education.³ After Siegelman was elected Governor of Alabama in November, he argued that Alabamians had spoken and that the solution Alabama chose was a state-sponsored "Education Lottery."⁴

After much debate and campaigning on both sides of the issue, Alabamians ultimately had the opportunity to pass judgment on a lottery as a mechanism to raise revenues for education. On October 12, 1999, a public referendum was held in

1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), *supplemented by*, 349 U.S. 294 (1955).

2. See Cynthia Martin, *As Election Fades, Lottery Controversy at the Front* (NBC Nightly News broadcast, Jan. 3, 1999) (visited Feb. 3, 1999) <<http://www.msnbc.com/local/WVTM/72994.asp>> (on file with author).

3. Sznajderman, Michael, *Siegelman Can Recover, Observers Say*, BIRMINGHAM NEWS, Oct. 13, 1999, at 1A.

4. *Id.*

which one issue was the adoption of Alabama's Education Lottery.⁵ By a fifty-four percent margin, voters vetoed the lottery and sent a message to lawmakers that the proposed lottery was not the solution for Alabama's educational inadequacies.⁶

Since Alabama's voters decided the propriety of a lottery in October 1999, this Article does not aim to criticize or exalt that decision. Rather, the intent of this Article is to examine state-sponsored lotteries as revenue-raising mechanisms and, in particular, to explore Alabama's proposed Education Lottery as a solution to Alabama's educational inadequacies. In so doing, this Article first examines Alabama's grossly underachieving public school systems in order to understand the magnitude of the problem that the lottery was intended to address. Second, this Article explores the nature of a lottery through examining the historical and modern uses of state-sponsored lotteries as revenue-raising mechanisms. Third, it examines the legal hurdles that prevent a lottery in Alabama, absent a favorable referendum and extensive legislation. This Article then compares the legislation governing lotteries in existing lottery states and the legislation that was proposed, and defeated, in Alabama in an attempt to understand the nature of this game. Finally, this Article outlines the social costs of a lottery and whether appropriate legislation can mitigate these problems. Although there were many conflicting and emotional perspectives tied to Alabama's lottery decision, everyone involved in this debate had the same goal—to provide additional educational opportunities and resources for Alabama's children.

II. ALABAMA'S EDUCATION PROBLEM

Before examining Alabama's proposed lottery, it is important to understand the scope and breadth of the educational inadequacies in Alabama. The lottery was merely a mechanism proposed to solve these inadequacies. Thus, in order to make an informed decision regarding the necessity of a lottery or any other proposed reform, the magnitude of Alabama's deficient educational resources must be explored.

5. *Id.*

6. *Id.*

The duty to provide a public education for Alabamians falls on the state and not the federal government because the United States Constitution does not "explicitly or implicitly" confer a fundamental right to be provided with an education.⁷ Instead, "existing in the sovereignty of each state in the Union, [are] somewhat vaguely termed police powers" under which each state has the power, and arguably a duty, to regulate and provide public schooling.⁸ Through these police powers, every state constitution, except that of Mississippi, contains a provision that at the very least requires that a system of public education be provided.⁹

Alabama has enacted six different constitutions since 1819, each containing express provisions relating to education.¹⁰ "[W]ith each new constitution[,] Alabama's stated commitment to education has become stronger."¹¹ The modern foundation of these provisions is Article XIV, section 256 of the Alabama Con-

7. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (holding that education is not a fundamental right under the Due Process Clause of the Fourteenth Amendment).

8. *Lochner v. New York*, 198 U.S. 45, 53 (1905). The police powers of the states, "broadly stated, . . . relate to the safety, health, morals and general welfare of the public." *Lochner*, 198 U.S. at 53 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

9. William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 ED. LAW REP. 19, 19 (1993) (citing ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, para. 1; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. 8, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MO. CONST. art. 9, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VII, § 3; PA. CONST. art. III, § 14, R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1).

10. See ALA. CONST. of 1819 art. VI (1819); ALA. CONST. of 1861, art. VI (1861); ALA. CONST. of 1868, art. XI, § 6 (1868); ALA. CONST. of 1875, art. XIII, § 1 (1875); ALA. CONST. of 1886, art. XI, § 6 (1886); ALA. CONST. of 1901, art. XIV, § 256.

11. Opinion of the Justices No. 338, 624 So. 2d 107, 151 (1993).

stitution of 1901. This provision establishes the state's duty to provide "a liberal system of public schools throughout the state."¹² This section is a "mandate" on the state rather than local government to provide educational opportunities for all school-age children.¹³ The mandate is construed liberally to require "a system of public schools that is generous and broad-based in its provision of educational opportunity."¹⁴

The state's duty under section 256 is two-fold.¹⁵ First, Alabama must establish public schools.¹⁶ Second, the state must "maintain" the schools for the children of Alabama who are the "specific beneficiar[ies]" of this constitutional right.¹⁷ The duty to "maintain" public schools includes a "continuing obligation to ensure compliance with evolving educational standards" and a duty to provide "education that will *in fact* . . . prepar[e] . . . [children] for the responsible duties of life."¹⁸ This interpretation of section 256 gives Alabama's children a fundamental, enforceable constitutional right to an education.¹⁹

In an advisory opinion, the Alabama Supreme Court held that the state's 1993 public school system was unconstitutional because it did not provide equal opportunities for education to all children.²⁰ The court found that poorer school districts were so under-funded that many could not provide adequate or even basic facilities, programs, classes and extracurricular activities.²¹ Although the state cited insufficient resources as the

12. ALA. CONST. of 1901, art. XIV, § 256 (stating that "[t]he legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years").

13. *State v. Tuscaloosa County*, 172 So. 892, 893 (Ala. 1937); *see also* *Mobile, Ala.-Pensacola, Fla. Bldg. & Constr. Trade Council v. Williams*, 331 So. 2d 647, 649 (Ala. 1975) (holding that Article XIV, § 256 "plac[es] the primary responsibility for providing education upon the state government").

14. *Opinion of the Justices*, 624 So. 2d at 153.

15. *Id.* at 147.

16. *Id.*

17. *Id.*

18. *Id.* at 154.

19. *Opinion of the Justices*, 624 So. 2d at 147, 159.

20. *Id.* at 144.

21. *Id.* at 114-44. The court found that poorer school districts did not provide opportunities for extracurricular activities, college preparatory courses, special needs accommodations, basic facilities (such as classroom space, computers, laboratories, auditoriums, gymnasiums and playgrounds) or maintenance staff (such as janitors,

cause and justification for the disparate treatment, the court noted that "[i]nadequate resources can never be an adequate justification of the state's depriving any person of his constitutional rights."²² The court held that the right to a liberal system of public schools throughout the state was a fundamental right and therefore enjoined the public school system to provide "equitable and adequate educational opportunities to all school-age children."²³

Even after the remedial action imposed by the Justices' 1993 advisory opinion, educational funding is, arguably, still not equal and certainly not sufficient.²⁴ Lack of funding for public schooling is a major problem in Alabama. Resource inadequacies perpetuate inequalities between the school systems and create a deficit in the total resources needed to educate Alabama's children.

In upholding the state's duty to "maintain a liberal system of public schools," the Alabama Legislature appropriates the largest share of Alabama's annual budget to the maintenance of public schools.²⁵ In 1995, the Legislature attempted to reform education by passing extensive legislation.²⁶ These laws are intended to improve Alabama's "chronically low-achieving schools" and promote accountability for the grossly inadequate school systems.²⁷ In order to effectuate these goals, Alabama's educational reform package imposes new graduation requirements, changes core curriculums and requires exit exams in all of Alabama's public schools.²⁸ The legislation also requires an eight and one-half percent pay raise for teachers and a \$550 million bond for capital improvements to public schools.²⁹ Un-

guidance counselors and nurses) equal to those provided by school systems in wealthier districts.

22. *Id.* at 146 (citing *Hamilton v. Love*, 328 F. Supp 1182, 1194 (E.D. Ark. 1972)).

23. *Id.* at 166.

24. See Act of Apr. 27, 1998, No. 98-382, 1998 Ala. Acts 717 (recording the Alabama Legislature declaring "an emergency in funding . . . for fiscal year ending September 30, 1998").

25. *Opinion of the Justices*, 624 So. 2d at 157.

26. Act of July 7, 1995, No. 95-314, 1995 Ala. Acts 634.

27. Mark Walsh, *Alabama: Sending a Message*, 18 EDUC. WEEK 17 (1999) (visited Apr. 1, 1999) <<http://www.edweek.org/sreports/qc99/states/policy/al-up.htm>>.

28. See Act of July 7, 1995, No. 95-313, 1995 Ala. Acts 620.

29. See Act of July 7, 1995, No. 98-314, 1995 Ala. Acts 634; Act of Apr. 22,

fortunately, the provisions of these laws are slow to be implemented.³⁰ The lack of expedience in establishing these requirements means that more students will graduate from Alabama's substandard public schools before the educational inadequacies are remedied.

Of Alabama's 128 school districts, 111 districts were put on academic alert in 1998 for low performance on standardized tests.³¹ This low performance illustrates the pervasive educational problems, even after extensive legislative *and* judicial efforts to reform education in Alabama. In addition to providing a low standard of education, Alabama also lacks the resources necessary to provide sufficient learning environments in many public educational institutions. With the pervasive educational problems in Alabama as a backdrop, the question that logically follows is: what is the solution?

III. WHAT IS A LOTTERY?

An education lottery was one of the first solutions posited to solve the state's educational inadequacies. In determining the consequences and possible utility of implementing this game, the nature of a lottery must first be examined.

A. Lottery Defined

The Alabama Supreme Court defines a lottery as a game of chance in which skill or choice exerts no effect; rather, a small amount of consideration is exchanged for the chance to win a large amount.³² The elements of a lottery are: (1) a prize, (2)

1998, No. 98-373, 1998 Ala. Acts 682.

30. Walsh, *supra* note 27.

31. *Id.* (noting that Alabama has 128 school districts composed of 1340 public schools educating over 738,000 kindergarten through twelfth grade students); *Alabama's Report Card*, 18 EDUC. WEEK 17 (1999) (visited Apr. 1, 1999) <<http://www.edweek.org/sreports/qc99/states/grades/al-rc.htm>> [hereinafter *Alabama's Report Card*].

32. See Opinion of the Justices No. 277, 397 So. 2d 546 (Ala. 1981); *Loiseau v. State*, 22 So. 138 (Ala. 1897); *Reeves v. State*, 17 So. 104 (Ala. 1895); *Buckalew v. State*, 62 Ala. 334 (1878); *Chavannah v. State*, 49 Ala. 396 (1873); *State v. Crayton*, 344 So. 2d 771 (Ala. Civ. App. 1977), *cert. denied*, 344 So. 2d 775 (Ala. 1977).

awarded by chance, and (3) consideration paid for the chance to win the prize.³³ Under this definition, the Alabama Supreme Court has held that dog racing is not a lottery because a degree of skill is necessary, and thus the winner is not determined by chance.³⁴ Pepsi Cola's instant cash game is also not a lottery because players are not required to purchase the company's product to play; therefore, no consideration exists.³⁵ Conversely, a state-sponsored lottery would constitute a "lottery" under Alabama case law because prize winners are determined by chance and are eligible because of their consideration in the form of a bet.³⁶

B. History of Lotteries: Their Rise and Fall and Rise Again

State-sponsored lotteries are not modern, novel, or even new ideas. In fact, "[c]hoosing by lots has been a method for making determinations at least as far back as biblical times."³⁷ Examining the historical evolution of the lottery exemplifies the social and political issues spurred by state-sponsored gambling. Moreover, the history of lotteries exemplifies social perceptions of this game and some of the reasons that it did not pass in Alabama.

The first real lottery occurred in Italy during the Middle Ages when merchants, trying to stimulate sales, awarded prizes.³⁸ In 1530, the first state-sponsored lottery was created in Florence.³⁹ By 1566, France and England had adopted state-sponsored lotteries as well.⁴⁰ English lotteries were brought to colonial America and "were popular and [a] common means of

33. *FCC v. ABC*, 347 U.S. 284, 290 (1954); Opinion of the Justices No. 205, 251 So. 2d 751, 753 (Ala. 1971); *Grimes v. State*, 178 So. 73, 74 (Ala. Crim. App. 1938), cert. denied, 178 So. 73 (Ala. 1937).

34. *Opinion of the Justices*, 251 So. 2d at 751.

35. *Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co.*, 534 So. 2d 295 (Ala. 1988).

36. See *Grimes*, 178 So. at 71.

37. CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 33 (1989); see also *Proverbs* 18:18 ("the lot puts an end to disputes and decides between powerful contenders").

38. CLOTFELTER & COOK, *supra* note 37, at 34.

39. *Id.*

40. *Id.*

financing public projects."⁴¹ Profits from these lotteries funded public projects such as "paving roads, constructing bridges and wharves, and erecting buildings . . . [such as] Harvard, Yale, Princeton and King's College (later Columbia)."⁴² Thus, it is clear that the lottery has historically been an effective mechanism to fund public projects such as education.

In the nineteenth century, American lotteries remained popular mechanisms to raise funds for public projects.⁴³ All of the state lotteries of the 1800s were administered and regulated by state legislatures, except for a series of federal lotteries that funded the Continental Army and projects in the District of Columbia.⁴⁴ The need to fund public projects prompted the implementation of most state-sponsored lotteries of this time.⁴⁵ Lotteries were also offered because they formed an accepted and permissible form of entertainment for Americans, as many religious organizations endorsed lotteries and benefited from their proceeds as well.⁴⁶

Nineteenth century Alabama was no different from the rest of the country in its need to raise revenues. Therefore, in 1868, the Alabama Legislature approved a statutorily prescribed, state-sponsored lottery.⁴⁷ Alabama's 1868 lottery legislation required the Governor to "appoint a commissioner of lotteries" with "power . . . concurren[t] of the Governor" to "assess and collect a tax . . . on the gross amount of sales or the gross income of the business of all lotteries . . . [to] be paid over to the public school fund."⁴⁸ Pursuant to this legislation, the lottery commissioner was also directed to collect and distribute the lottery profits as "required in the charters or grants."⁴⁹ The lottery was enacted to raise revenues for public schools and other

41. *Id.*

42. *Id.*

43. CLOTFELTER & COOK, *supra* note 37, at 35.

44. *Id.* at 36.

45. *Id.* at 35.

46. *Id.* at 36. From 1790 to 1833, the Pennsylvania lottery, which was at that time the largest in the nation, contributed lottery proceeds to Lutheran, Presbyterian, Episcopal, Reformed, Baptist, Catholic, Universalist and Jewish congregations. The Quakers, however, "consistently opposed lotteries." *Id.*

47. Act to Regulate Lotteries, No. 185, 1868 Ala. Acts 529.

48. *Id.*

49. *Id.*

public projects that the Legislature authorized.

Alabama's state lottery of the 1800s was the only legal lottery in the state at that time.⁵⁰ Prior to the adoption of this lottery, the Legislature had made it "[un]lawful for any person to sell tickets or shares in any lottery not chartered under the authority of this State."⁵¹

There is no account of how much money was raised by the 1868 lottery or of the social implications that it had on Alabamians.⁵² It is true, though, that Alabama was economically devastated at this time due to a long and expensive civil war. The lottery was probably an attempt to raise revenues for the massive reconstruction required after the war. In 1871, Alabama repealed the act which regulated lotteries and thereafter constitutionally and statutorily moved to criminalize such activity.⁵³

Public sentiment regarding lotteries also changed during the late 1800s, another impetus for the Alabama Legislature to repeal the state lottery.⁵⁴ The public's opinion changed during the nineteenth century primarily because the method of administering lotteries was transformed in Alabama and throughout the nation.⁵⁵ Entrepreneurs entered this burgeoning industry as marketing providers, and with their insurgence, the margin of fraud and dishonesty grew.⁵⁶ As illegality surrounding lotteries grew, so did public opposition.⁵⁷ By 1833, most of the northern states had repealed their state-sponsored lotteries, and by the end of the nineteenth century, all of the southern states had followed suit.⁵⁸

From 1894 to 1964, there were "no legal government-spon-

50. See Act of Dec. 9, 1890, No. 47, 1890 Ala. Acts 67.

51. Act of Feb. 21, 1860, No. 47, 1859-60 Ala. Acts 42.

52. It is interesting to note that Alabama's nineteenth century lottery was not adopted through a referendum of the people. Rather, the lottery was a statutorily prescribed game. Thus, it is hard to know the public's sentiment regarding the lottery of that time. Moreover, it is difficult to understand the moral and social implications raised in any nineteenth century lottery debate in Alabama.

53. See ALA. CONST. of 1901, art. IV, § 65; ALA. CODE § 13A-12-20 (1975) (declaring lotteries and other forms of gambling crimes against public health and morals).

54. CLOTFELTER & COOK, *supra* note 37, at 36.

55. *Id.*

56. *Id.* at 37.

57. *Id.*

58. *Id.*

sored lotteries operat[ing] in the United States."⁵⁹ During this time, America experienced a complete lottery prohibition. The federal government fostered this prohibition by passing strong anti-lottery legislation.⁶⁰ In addition, thirty-six of the forty-five states existing in 1900 prohibited lotteries through constitutional amendments.⁶¹ The vehement federal and state opposition to lotteries during this period was based on the fraud associated with the game's administration and the belief that lotteries contributed to social decay.⁶²

Despite the introduction of lottery bills in five different northeastern states by 1934, none were passed.⁶³ It was not until 1963 that New Hampshire approved a state-sponsored lottery.⁶⁴ With the passage of the New Hampshire lottery, many other states followed.⁶⁵ By 1988, "two-thirds of the nation's population lived in states that were actively promoting the sale of a commodity that had been illegal twenty-five years earlier."⁶⁶ With the rise of state-sponsored lotteries in the twentieth century, many criticisms of the nineteenth century lotteries are echoed as states take on new roles as entrepreneurs.⁶⁷

59. CLOTFELTER & COOK, *supra* note 37, at 38. During this period, the only forms of lotteries that existed were church bingo, charity raffles, foreign lotteries and illegal gambling. *Id.*

60. *See, e.g.*, 18 U.S.C. §§ 1301-1307 (1994) (providing comprehensive federal legislation making it a crime to use the mail to promote or administer a lottery); 19 U.S.C. § 1305 (1994) (making a federal lottery illegal); 15 U.S.C. §§ 1171-1178 (1994) (establishing that it is a federal crime to carry an illegal gambling device across state lines).

61. Kathleen M. Joyce, *Public Opinion and the Politics of Gambling*, 35 J. SOC. ISSUES 144, 148 (1979).

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

63. *See* CLOTFELTER & COOK, *supra* note 37, at 142.

64. *Id.*

65. *Id.* at 139.

66. *Id.*

67. *See supra* text accompanying notes 50-57.

IV. THE MODERN STATE-SPONSORED LOTTERY

A. *Modern Lottery States*

Currently, thirty-seven states and the District of Columbia have state-sponsored lotteries.⁶⁸ Each of these state-run businesses is a mechanism to raise revenues that is much more popular than taxes because participation is wholly voluntary.⁶⁹ In most states, the increase in revenues only equals around a one-cent increase in the sales tax.⁷⁰ This penny, however, adds up. "Since the New Hampshire lottery was founded in 1964, lotteries have raised over \$140 billion for government programs in North America."⁷¹ It is probably not incidental that the states ranking highest in resource adequacy for education are those states that have lotteries earmarked for education, given the obvious economic benefits of the increased revenues.⁷² Thus, a lottery might be able to provide the much needed revenues to raise the bar for education in Alabama. This conclusion is not that simplistic, however, as there are many factors which define the successes and failures of modern state-sponsored lotteries.

68. Anthony N. Cabot, *Gaming Regulatory Enforcement*, in GAMING ENFORCEMENT (1997). In 1999, state-sponsored lotteries exist in Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. NORTH AMERICAN ASSOCIATION OF STATE & PROVINCIAL LOTTERIES, STATE LOTTERIES (1999) (visited Nov. 8, 1999) <<http://www.naspl.org>>.

69. See Rychlack, *supra* note 62, at 48-49.

70. See CLOTFELTER & COOK, *supra* note 37, at 216.

71. NORTH AMERICAN ASSOCIATION OF STATE & PROVINCIAL LOTTERIES, LOTTERY SALES (1999) (visited Sept. 12, 1999) <<http://www.naspl.org/faq.html#lotrev>>.

72. See *Quality Counts: State of the States*, 18 EDUC. WEEK 17 (1999) (Resources Table) (visited Apr. 1, 1999) <<http://www.edweek.org/sreports/qc99/states/indicators/in-t5.htm>>.

B. *The Game Itself*

Virtually all games used in modern lotteries are the same and compose "four basic types: so-called passive drawings, instant scratch-off games, numbers and lotto."⁷³ Each of these basic games has distinct attributes designed to appeal to different players.⁷⁴ For example, instant scratch-off games provide an immediate chance to play, as opposed to lotto games where a player must wait until a drawing to determine if he or she wins.⁷⁵ Variations of these games, such as multi-state lotteries, exist in many states and, in keeping with the goal, are introduced to provide a new appeal to attract different players.

Modern marketing insures that lotteries will not become boring for players by constantly creating and promoting new games. Private advertising firms are hired by most lottery states to develop and propose new lottery games.⁷⁶ The problems associated with aggressive marketing by lottery states and these private firms are plenary. As the lottery industry grows, serious issues can arise about the legality of some of the games under a state's no-gambling but pro-lottery attitude.⁷⁷ For instance, on-line wagering and video lotteries traverse the definition of lottery and push the envelope toward casino-like games.⁷⁸ A state must be cautious not to promote new games that in actuality amount to prohibited gambling.⁷⁹ Thus, all lottery states must have clear, delineated rules regarding the permissible scope of the games in order to establish what constitutes a legitimate "lottery" game in the state. For the same reasons, non-lottery states should also have laws explicitly disallowing lotteries and casino gambling.

73. CLOTFELTER & COOK, *supra* note 37, at 51.

74. *See id.*

75. *Id.* at 53 (discussing the difference in "play value" between passive drawings and instant scratch-off games).

76. *See* Robin DeMonia, *Lottery Ads, Rapped, Defended*, BIRMINGHAM NEWS, Sept. 6, 1999, at 1A.

77. *See* Robin DeMonia, *Lottery Launch Would Require Complex Setup*, BIRMINGHAM NEWS, Feb. 15, 1999, at 9A.

78. *Id.*

79. *Id.*

V. LEGAL HURDLES ALABAMA MUST SURMOUNT TO ADOPT A LOTTERY

A. *Amending the Constitution of Alabama*

If Alabama legalizes a state-sponsored lottery, constitutional revision would be necessary⁸⁰ because Alabama's constitution contains an express prohibition on the Legislature's power to authorize "lotteries or gift enterprises for any purposes."⁸¹ Therefore, before Alabama can administer a lottery in the future, the constitution of Alabama must first be amended.⁸² The constitutional amendment most recently proposed to legalize a lottery in Alabama was introduced by Representative Black (the "Black amendment").⁸³ Through a brief examination of Alabama's constitutional revision process, it is clear how many hurdles must be surmounted before a lottery can ever be legal in this state.

Amending Alabama's constitution is not as drastic a measure as it sounds, given the nature of the state's constitution. In fact, the Constitution of 1901 has over 600 amendments.⁸⁴ Broad restrictions on local governments and the Legislature were included in the Constitution of 1875 and incorporated into the Constitution of 1901.⁸⁵ Any time a prohibited government

80. Jeffrey Ball, *For Legislators, a New Session but Old Issues: A Southeast Journal Roundup*, WALL ST. J., Jan. 6 1999, at 1, available in 1999 WL, WSJ 5435559.

81. ALA. CONST. of 1901, art. IV, § 65 provides:

The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.

82. See H.B. 73, 1999 Leg., 1st Reg. Sess. (Ala.) (proposing an amendment to the state constitution to establish a lottery).

83. *Id.*

84. There are presently 615 amendments to the constitution of Alabama and many proposed amendments are awaiting the citizens' vote. For current proposed amendments to the constitution of Alabama, see ALA. CODE vol. 2 (Supp. 1999).

85. See ALA. CONST. art. IV, §§ 93-94 (formerly ALA. CONST. of 1875, art. IV, §§ 54-55); ALA. CONST. art. XI, § 213 (formerly ALA. CONST. of 1875, art. XI, § 3); ALA. CONST. art. XI, §§ 214-216 (formerly ALA. CONST. of 1875, art. XI, §§ 4, 5 &

function must be authorized, an amendment to the constitution is necessary.⁸⁶ Due to this feature of Alabama's constitution, amending it to authorize a lottery did not present a major hurdle, as the Legislature is accustomed to taking part in the amendment process.

The power to amend the constitution, however, does not belong to the Legislature. This power belongs exclusively to the voters of Alabama because although the Legislature "can . . . propose a constitutional amendment; it cannot enact one."⁸⁷ This power of the people is unlimited to the extent that it complies with the federal Constitution and does not impair the obligations of a contract.⁸⁸ In *Opinion of the Justices No. 148*, the Supreme Court of Alabama stated:

It is self evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they "shall forever remain inviolate."⁸⁹

It is therefore clear that if the people of Alabama had approved the lottery on October 12, 1999, that vote would have removed Alabama's constitutional lottery prohibition.

The procedure for proposing an amendment to Alabama's constitution is set out in article XVIII, section 284.⁹⁰ The first step is the introduction of a bill or resolution in either the house or senate for a vote.⁹¹ A resolution proposing a constitutional amendment requires a super-majority vote of three-fifths of all members elected to both the house and senate.⁹² The Black amendment earned this three-fifths vote on April 14, 1999 and

7).

86. Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 583, 583 (1997).

87. *Gafford v. Pemberton*, 409 So. 2d 1367, 1373 (Ala. 1982) (noting that the procedure for proposing constitutional amendments is specifically provided for in Article XVIII of the Alabama constitution and not Article IV, relating to the Legislature).

88. *Downs v. City of Birmingham*, 198 So. 231, 234-35 (Ala. 1940).

89. *Opinion of the Justices No. 148*, 81 So. 2d 881, 883 (Ala. 1955).

90. ALA. CONST. art XVIII, § 284 (amended by ALA. CONST. amend. XXIV).

91. See *Jones v. McDade*, 75 So. 988, 991 (Ala. 1917).

92. ALA. CONST. art. XVIII, § 284 (as amended).

thereafter became a proposed amendment to Alabama's constitution.⁹³

Upon the passage of a proposed amendment in both the house and senate, the Legislature is required to set the date for a popular election and to give notice of the election.⁹⁴ This procedure was followed when the Black amendment was adopted by requiring the "Secretary of State to assign the proposed constitutional amendment as ballot position Number One."⁹⁵ Alabama's Secretary of State set the date of election on the lottery amendment for October 12, 1999.⁹⁶ If a majority of voters had voted "yes" for the lottery in October's referendum, the Black amendment would have then become a part of Alabama's constitution.⁹⁷

B. Statutory Revision Necessary to Adopt a Lottery

In addition to constitutional revision, most lottery states must also create extensive statutory schemes. In Alabama, a comprehensive lottery plan was proposed through Black's constitutional amendment and defined by supplementary statutory enactments.⁹⁸ Thus, in Alabama, the proposed lottery was defined by the Black amendment and by the proposed lottery's enabling legislation.⁹⁹ Much of this enabling legislation was enacted prior to the popular election on the lottery.¹⁰⁰ In fact, some lottery statutes were enacted as far back as May of 1999 and expressly made "operative upon the adoption by the people

93. See H.B. 73, 1999 Leg., 1st Reg. Sess. (Ala.).

94. See ALA. CONST. art XVIII, § 284 ("[T]he legislature shall order an election by the qualified electors of the state upon such proposed amendments, to be held either at the general election . . . or upon another day appointed by the legislature."); Opinion of the Justices No. 251, 361 So. 2d 522, 532 (Ala. 1978).

95. See H.B. 73, § 3, 1999 Leg., 1st Reg. Sess. (Ala.).

96. OFFICE OF THE SECRETARY OF ALABAMA, 1999 ELECTION INFORMATION, ELECTION DIVISION (1999) (visited Nov. 9, 1999) <<http://www.sos.state.al.us/election/1999/1999.htm>>.

97. See ALA. CONST. art. XVIII, § 284 (as amended).

98. See *id.*; see also S.B. 73, 1999 Leg., 1st Reg. Sess. (Ala.); S.B. 385, 1999 Leg., 1st Reg. Sess. (Ala.); S.B. 376, 1999 Leg., 1st Reg. Sess. (Ala.); S.B. 374, 1999 Leg., 1st Reg. Sess. (Ala.).

99. See Ala. S.B. 73; Ala. S.B. 385; Ala. S.B. 376; Ala. S.B. 374.

100. See Ala. S.B. 73; Ala. S.B. 385; Ala. S.B. 376; Ala. S.B. 374.

of a constitutional amendment authorizing an education lottery."¹⁰¹

C. Viability of Passing a Lottery in a Public Referendum

As Alabama's constitution dictates, a majority of voters must authorize the lottery in order to legalize it.¹⁰² Thus, public support was crucial to the viability of Governor Siegleman's plan, and Alabama residents seemed to be in favor of the lottery prior to October 12, 1999.¹⁰³

Like Alabama, Georgia's constitution contained an express prohibition of lotteries.¹⁰⁴ Therefore, to authorize a state-sponsored lottery, an amendment to Georgia's constitution was necessary. In November of 1992, the citizens of Georgia voted to adopt the lottery by a narrow fifty-two percent margin.¹⁰⁵ Given the narrow majority that passed the Georgia lottery, supporters and opponents of the lottery in Alabama were on notice that outspoken campaigning would be necessary to persuade constituents to vote "yes" for Alabama's lottery.

Protestant religious groups are the most vocal and pervasive organizations in Alabama that consistently oppose the lottery. The premise of these religious groups' opposition is based on a belief that a lottery relies on chance, which undermines the divine predestination of human life, and that lotteries condone gambling, which in many religions is tantamount to a sin.¹⁰⁶ Opposition to lotteries and gambling in general is most common in Protestant religions such as the Methodist, Presbyterian, Mormon, Baptist and Lutheran sects.¹⁰⁷ Catholic and Jewish religions do not condone gambling per se, but they do not "consider it sinful" in all cases.¹⁰⁸ According to a poll conducted by

101. See Ala. S.B. 376; Ala. S.B. 385.

102. See *supra* text accompanying notes 89-97.

103. 1999 ELECTION INFORMATION, *supra* note 96.

104. See GA. CONST. art. 1, § 2, para. 8.

105. Karen Lundegaard & Brad Reagan, *For States Seeking HOPE, Georgia May Ease the Way*, WALL ST. J., Jan. 20, 1999, at S1, available in 1999 WL, WSJ 5437463.

106. CLOTFELTER & COOK, *supra* note 37, at 47.

107. See *id.*

108. *Id.*; see also Greg Garrison, *Denominations Divided on Lottery*, BIRMINGHAM

the Christian Coalition in the fall of 1998, forty-seven percent of Alabamians consider themselves Baptist while thirty-eight percent think of themselves as believers in other Protestant, Christian religions.¹⁰⁹ Given this strong, conservative electorate in Alabama and the moral and religious implications associated with a lottery, it is clear that religion was a large factor and a strong voice in Alabama's October referendum.

Religious opposition groups were not the only organizations actively involved in the recent lottery referendum. Because lotteries have become a profitable business, private-interest lobbyists had an important role in October's vote as well.¹¹⁰ Lottery firms that supply management, computer equipment and other lottery supplies have grown into multi-billion-dollar businesses, and "the suppliers' ability to act effectively in the political arena [has grown] . . . correspondingly."¹¹¹ These companies hire lobbyists to campaign for the passage of lottery referendums in legislatures and in popular elections.¹¹² GTECH Corp., a lottery manager in twenty-eight existing lottery states, hired various individuals with political ties in Alabama to lobby for the proposed lottery.¹¹³ The gambling lobby is "the most powerful force in government today," says James C. Dobson, member of the National Gambling Impact Study, a panel appointed by President Clinton to investigate the impact of legalized gambling.¹¹⁴

In addition to pressures from the gambling lobby, other private-interest groups such as convenience store chains also actively endorsed the lottery.¹¹⁵ Convenience store operators

NEWS, Mar. 15, 1999, at 1A.

109. SHANDWICK RESEARCH INTERNATIONAL FOR THE CHRISTIAN COALITION, VOTE 98, POLL (1999) (on file with the author and the Christian Coalition) (finding that only four percent of those questioned answered they were Catholic, and six percent answered they were non-Christian, non-Christian presumably including Jews and atheists, certainly an odd grouping).

110. See CLOTFELTER & COOK, *supra* note 37, at 141 (explaining that businesses involved in the sale of lottery products have become active in the political arena); see also Robin DeMonia, *National Lottery Firm Hires State Lobbyist*, BIRMINGHAM NEWS, Feb. 20, 1999, at 1A.

111. CLOTFELTER & COOK, *supra* note 37, at 141.

112. *Id.*

113. DeMonia, *supra* note 110, at 2A.

114. Joyce Howard Price, *Gambling Industry a Big Winner in U.S.*, WASHINGTON TIMES, Feb. 8, 1999, at A1, available in 1999 WL 3077544.

115. Robin DeMonia, *Leading Edge of Lottery is Gas Stations, Quick Marts*, BIR-

stood to profit immensely from the passage of a lottery, as they would have been the primary retailers of the lottery game pieces.¹¹⁶ In fact, retailers would have earned as much as a five percent commission on all lottery ticket sales in Alabama.¹¹⁷ Therefore, these businesses had a vested interest in bringing a lottery to Alabama as well.

On October 12, 1999, the citizens of Alabama rejected the Alabama Education Lottery. Given the extensive constitutional amendment process required to authorize a lottery, it is doubtful that the debate will arise again for some time. The best way to understand why Alabama rejected the lottery is by looking at examples of existing lottery states.

VI. STRUCTURE AND REGULATION OF VARIOUS LOTTERY STATES

Most modern lottery states define the game and mechanisms for its administration through statutes and regulations unique to those states. Thus, it is important to look at the lottery legislation in various lottery states to determine what failures and successes can be gleaned from their experiences.

During the lottery debate in Alabama, Governor Siegelman campaigned on the premise that Alabama's proposed lottery would emulate Georgia's lottery structure.¹¹⁸ Other critics, such as economist Donald Ratajczak, commented that "[i]f Alabama adopts a lottery, it should follow Georgia's example and not Florida's."¹¹⁹ In examining the legislation of existing lottery states, it is important to understand why Georgia's structure is praised, while Florida's lottery merits vehement criticism.

MINGHAM NEWS, Sept. 7, 1999, at 1A.

116. *See id.*

117. *See* S.B. 374, § 17(c), 1999 Leg., 1st Reg. Sess. (Ala.).

118. Governor Don Siegelman, Inauguration Speech at the Capitol Building in Montgomery, Ala. (Jan. 18, 1999).

119. Mike Sherman, *Renowned Economist Prefers Georgia's Lottery to Florida's*, MONTGOMERY ADVERTISER, Jan. 8, 1999, at 9B, available in 1999 WL 10343495.

A. Assurance That Lottery Profits Do Not Replace the Pre-Lottery Education Budget

1. *Georgia's Solution and Florida's Problem.*—In Georgia, the first initiative to pass the lottery was the Lottery for Education Act ("GLEA"), a statutory plan governing the lottery which was enacted by the Georgia Legislature in 1992.¹²⁰ The GLEA is comprehensive in that it addresses virtually every aspect of the lottery's structure.¹²¹ There are some very important and distinguishing features about Georgia's statutory plan which ensure the success of Georgia's lottery to benefit education.

First, in the general statutes regarding the lottery, Georgia mandated that the lottery proceeds are to "supplement, not supplant, existing resources for educational purposes and programs."¹²² This means that the Georgia Legislature is prohibited from taking away the educational appropriations that existed before the lottery and replacing the funds with lottery profits. Instead, Georgia requires that lottery funds supplement the pre-lottery education budget. This provision statutorily guarantees that lottery profits advance *additional* educational opportunities in Georgia and do not replace the pre-lottery education budget.

In contrast, while Florida's lottery also earmarked lottery funds for education, its Legislature took away the pre-lottery educational budget when lottery profits materialized.¹²³ In yanking pre-lottery education funds from the post-lottery education budget, Florida's education system was in precisely the same position as it was before the lottery—under-funded.¹²⁴ Eliminating the pre-lottery education budget thwarted the lottery's goal of advancing the state's educational opportunities because no revenues were added to education. Instead, the Florida Legislature took funds away from education and replaced them with roughly the same amount of money from a different

120. GA. CODE ANN. §§ 50-27-1 to -33 (1998).

121. *See id.*

122. *Id.* § 50-27-2(1).

123. Sherman, *supra* note 119.

124. *Id.* Because pre-lottery appropriations were funneled back into the general fund, it is not clear where the money went. It is obvious, however, that the children of Florida did not receive the benefits of the infusion of lottery profits into the state budget. *Id.*

source, the lottery.¹²⁵ This is the predominate cause for criticism of the Florida lottery and arguably one reason why lack of resources is a major problem for public education in Florida today.¹²⁶

2. *Alabama Declined to Adopt Georgia's Solution.*—In Alabama, the Black amendment specifically addressed the problem of replacing the existing educational budget with lottery profits. It provided, in pertinent part, "funds . . . derived from the Alabama Education Lottery shall not replace or supplant existing or any other funds dedicated or intended for the purposes of [education]."¹²⁷ Thus, Alabama's proposed lottery would have *constitutionally* ensured that lottery profits only "supplemented" existing educational revenues.¹²⁸ Legislators would have been divested of the power to replace the state's pre-lottery education budget with lottery profits. In this respect, Alabama's proposed lottery emulated an important feature of Georgia's lottery plan, not Florida's.

In addition, Alabama's lottery enabling legislation included the comprehensive Alabama Education Lottery Act ("AELA"), which was enacted on June 1, 1999.¹²⁹ As promised by Governor Siegelman, much of the language contained in the AELA is identical to that of Georgia's GLEA.¹³⁰ Like the GLEA, the AELA *statutorily* promised that "net proceeds [from the lottery] shall be used to supplement, not supplant, existing resources for educational purposes and programs."¹³¹ Thus, Alabama's com-

mitment not to replace the pre-lottery education budget with lottery profits would have been both *constitutionally* and *statutorily* ensured by the Black amendment and the AELA, respectively.

125. See Jeffrey Ball & Carrick Mollenkamp, *Nov. 3 Was a Lucky Day for Advocates of Lottery*, WALL ST. J., Nov. 11, 1998, at S1, available in 1998 WL, WSJ 18991625.

126. See Jon Mills & Timothy McLendon, *Strengthening the Duty to Provide Public Education*, 71 FLA. B.J. 28, 29 (1998) (examining Florida's education funding problems today).

127. H.B. 73, pt. II, § (b), 1999 Leg., 1st Reg. Sess. (Ala.).

128. *Id.*

129. S.B. 374, 1999 Leg., 1st Reg. Sess. (Ala.).

130. Compare Ala. S.B. 374, with GA. CODE ANN. §§ 50-27-1 to -33.

131. Ala. S.B. 374.

B. The Lottery Corporation and the State: A Dynamic Relationship

1. *The Georgia Lottery Corporation.*—A second noteworthy aspect of the GLEA is the Georgia Legislature's declaration that the lottery is "an entrepreneurial enterprise" for which the "state shall create a public body, . . . known as the Georgia Lottery Corporation ["GLC"]."¹³² The statute vests the GLC "with comprehensive and extensive powers as generally exercised by corporations engaged in entrepreneurial pursuits."¹³³ However, the corporation is not a completely separate entity because it must "be accountable to the General Assembly and to the public through a system of audits and reports."¹³⁴ To this end, the Governor appoints an independent board to oversee the operations of the lottery and to report to the Legislature and the public on the GLC's status.¹³⁵

In *Jackson v. Georgia Lottery Corp.*,¹³⁶ the Georgia Court of Appeals examined the effect of creating a corporation to manage and promote the state lottery. The issue in this case was whether the GLC constituted a state agency for the purpose of sovereign immunity.¹³⁷ The court noted that the Legislature's intent was clear: the GLC "shall be deemed to be an instrumentality of the state, and not a state agency, . . . [but] a public corporation."¹³⁸ The effect of this designation is that the GLC is a "separate, self-sufficient entity, and the General Assembly is not required to appropriate any funds either to satisfy debts of the [GLC] or to pay any of the [GLC's] costs of operation."¹³⁹ Based on this characterization, the court held that the GLC was not a government agency entitled to the defense of sovereign

132. GA. CODE ANN. § 50-27-2(2).

133. *Id.*

134. *Id.* § 50-27-2.

135. *See id.* § 50-27-6; GEORGIA LOTTERY, GEORGIA LOTTERY TIMELINE (1999) visited Apr. 1, 1999 <<http://www.galottery.com/lottery/timeline.htm>>.

136. 491 S.E.2d 408 (Ga. Ct. App. 1997).

137. *Jackson*, 491 S.E.2d at 410.

138. *Id.* at 410 (citing GA. CODE ANN. § 50-27-4).

139. *Id.* at 411.

immunity.¹⁴⁰ The court concluded that this characterization ensures "autonomy in decision-making, without repeated Legislative . . . oversight."¹⁴¹

Applying the *Jackson* court's reasoning, the benefits of creating a distinct corporation to manage the lottery become obvious. First, and most importantly, this ensures that the state's "entrepreneurial enterprise" is separate from the operations of the government so that the lottery is "free of political influence."¹⁴² Divorcing the GLC from the state for the purposes of its daily operations and management means that lawmakers are effectively shut out of the lottery business. Legislators are left to the job they were elected to perform—the state's non-entrepreneurial functions.

A second benefit Georgia experiences through creation of the GLC is that the state is shielded from liability arising from the GLC's conduct. No state funds, including the lottery's education profits, may be siphoned to satisfy any debts of the GLC.¹⁴³ The operational expenses of the lottery are wholly derived from the net profits allocated to the GLC from the lottery, and this allocation is the cap on any recovery or gain that the corporation can incur.¹⁴⁴ Therefore, the debts of the GLC can never have an adverse economic effect on the general fund or operations of the state of Georgia.

2. *The Alabama Lottery Corporation.*—Like the Georgia lottery, Alabama's proposed lottery would have been managed by an entity distinct from the state.¹⁴⁵ If the Black amendment had been adopted on October 12, 1999, the Alabama Education Lottery Corporation ("AELC") would have been created,¹⁴⁶ and its powers would have been "provided by general law."¹⁴⁷ Alabama's "general law" defining the AELC is contained in the AELA.¹⁴⁸ The AELA makes it clear that the body governing

140. *Id.*

141. *Id.* at 412 n.4.

142. GA. CODE ANN. § 50-27-2.

143. *See Jackson*, 491 S.E.2d at 412.

144. *See* GA. CODE ANN. §§ 50-27-13(a)(2) to -13(3)(b)(1).

145. S.B. 374, § 4, 1999 Leg., 1st Reg. Sess. (Ala.).

146. H.B. 73, pt. II, § (d), 1999 Leg., 1st Reg. Sess. (Ala.)

147. *Id.*

148. Ala. S.B. 374.

Alabama's lottery would have been the same type of entity that oversees the Georgia lottery.¹⁴⁹

Like Georgia, Alabama's enabling statutes clearly state that the "Education Lottery Corporation shall be deemed to be an instrumentality of the state and a public corporation, and not a state agency."¹⁵⁰ Therefore, like Georgia, Alabama's lottery corporation would have been divorced from the state for purposes of liability. In addition, the AELA expressly states that the "Alabama Education Lottery shall be operated and managed in a manner which provides continuing entertainment to the public, maximizes revenues for education, and ensures that the Alabama Education Lottery is operated with integrity and dignity and free of political influence."¹⁵¹ This language is virtually identical to the GLEA's provisions. By emulating Georgia's lottery in these respects, Alabama's proposed lottery would have ensured that the business of the lottery was divorced from the Legislature's purview, and the state would have been shielded from liability relating to the lottery corporation's business.

C. *Assuring That Lottery Profits are for Educational Programs Only*

1. *Georgia's Statutory Promise.*—Another remarkable aspect of the GLEA is that it statutorily ensures that lottery profits are appropriated to the earmarked educational programs only.¹⁵² The Georgia Legislature promised this structure to Georgians by enacting a statute that designated three specific educational programs as the recipients of the lottery profits.¹⁵³ Each of these programs is secondary to the state's traditional duty to provide public education. This enables the Georgia lottery to effectuate its goal of providing *supplementary* educational programs to the students of Georgia through the lottery's prof-

149. *Id.*

150. *Id.*

151. *Id.* § 2(3).

152. See GA. CODE ANN. § 50-27-2(1) (declaring that the net profits of the lottery were to be used for "educational purposes and programs"); see generally *id.* § 50-27-3(8) (defining educational programs under the lottery to encompass only specific areas).

153. See *id.* § 50-27-3(8).

its.¹⁵⁴

The GLEA, in conjunction with the constitutional authorization of the lottery, appropriates funds for "capital outlay projects for educational facilities."¹⁵⁵ This money is used for instructional technology in secondary schools such as computers, media centers and internet access.¹⁵⁶ The statute also creates a voluntary pre-kindergarten program for the state's children.¹⁵⁷ In addition, the Georgia lottery created a program to provide grants, scholarships and loans to undergraduate college students and eligible Georgia teachers.¹⁵⁸ Through this provision, Georgia's Hope Scholarship Program ("Georgia's Hope") was created, which entitles qualified students to a grant that pays for tuition, mandatory fees and books to attend Georgia's public colleges and universities or a \$3000 scholarship to attend a private Georgia college or university.¹⁵⁹ Additionally, the Hope Promise Teacher Scholarship Program was formed to assist undergraduate students who aspire to be teachers in Georgia's public schools with paying college tuition.¹⁶⁰

The pinnacle achievement of the Georgia lottery is Georgia's Hope Scholarship. As of January 1999, it has awarded 393,488 students with scholarships that are valued at a total of \$663.5 million.¹⁶¹ Since its inception, the profits of the Georgia lottery have far exceeded the projections, so the number of students eligible for the scholarships has grown significantly.¹⁶²

2. *Alabama's Offer.*—In Alabama, the profits from the lottery were intended exclusively to fund three Georgia-like educational programs.¹⁶³ First, the Black amendment and the AELA allocated lottery profits "to fully fund the Alabama Hope Schol-

154. *Id.* § 50-27-2.

155. *See id.* § 50-27-3(8).

156. GEORGIA LOTTERY, MORE THAN \$2.83 BILLION TO THE STUDENTS OF GEORGIA (1999) (visited Oct. 21, 1999) <<http://galottery.com/lottery/usesofp.htm>>.

157. *See* GA. CODE ANN. § 50-27-3(8).

158. *Id.*

159. *Id.*; GA. CODE ANN. § 20-3-519.1 to -519.11 (Supp. 1999) (setting out the statutes pertaining to the Hope Scholarship).

160. *Id.* § 20-3-519.8.

161. Lundegaard & Reagan, *supra* note 105.

162. *Id.*

163. H.B. 73, pt. II, § (e)(1), 1999 Leg., 1st Reg. Sess. (Ala.).

arship Program [(“Alabama’s Hope”).”¹⁶⁴ The Black amendment defined Alabama’s Hope program as providing “tuition grants, scholarships, or loans to citizens of Alabama . . . to enable such citizens to attend universities, colleges, and junior, technical or community colleges located in Alabama.”¹⁶⁵ In so doing, the lottery plan would have created an Alabama scholarship fund to give exceptional students the opportunity to attend college. Alabama’s Hope program could have advanced the public and private colleges and universities of the state, and more importantly, it could have given more Alabamians the option of pursuing a college-level education. In this respect, the Alabama lottery provided a solution to the deficient educational opportunities in the state.¹⁶⁶

Second, the Black amendment and the AELA would have appropriated lottery revenues to “fully fund a voluntary pre-kindergarten program for Alabama children.”¹⁶⁷ An additional bill created the Office of School Readiness on May 26, 1999, a governmental branch that would have had the duty to “administer such programs and services as may be necessary for the operation and management of a voluntary pre-kindergarten program.”¹⁶⁸ The Office was authorized to receive money from the AELA to fund “public schools, private schools, churches” and other existing public and private pre-kindergarten programs that could “voluntarily participate in the [state] program[.]”¹⁶⁹ Thus, through the passage of Alabama’s Education Lottery, a voluntary pre-kindergarten would have been created and implemented throughout the state. This would have given Alabama’s children the opportunity for a pre-school education and, therefore, could have been an important element in crafting a comprehensive solution to Alabama’s educational inadequacies.

The third and final program that the AELA and the Black

164. *Id.*; see S.B. 374, § 34, 1999 Leg., 1st Reg. Sess. (Ala.).

165. Ala. H.B. 73, pt. II, § (e)(1).

166. There are many issues that anti-lottery advocates raise regarding Pell grants and other collateral problems students may encounter in the administration of Alabama’s Hope program. It is, however, not within the scope of this Article to address all of these potential problems. It does seem that some of the perceived inequities of the program could have been worked out by appropriate legislation.

167. Ala. H.B. 73, pt. II, § (e)(1); Ala. S.B. 374, § 34.

168. S.B. 376, § 4(1), 1999 Leg., 1st Reg. Sess. (Ala.).

169. *Id.* § 5(a).

amendment would have created was a fund for the "provision of technology in the public schools with funding divided on the basis of average daily membership in each public school system."¹⁷⁰ Dividing the funds on the basis of enrollment would ensure that resources would be distributed equally throughout the state and would fulfill the state's duty to provide equal opportunities for education.¹⁷¹ To ensure that technology funds would be dispersed equally, the Office of Information Technology was created in the lottery's enabling legislation.¹⁷² The duties of the Office would have included a responsibility to "administer lottery technology funds to be used for the purchase of computers, satellites, hardware, software, and teacher and staff training in the use of technology development programs."¹⁷³ By creating a mechanism to improve the technological resources in Alabama's public schools, Alabama's proposed lottery provided a solution to the state's currently inadequate resources and educational opportunities.

Alabama's lottery was proposed so that its profits would fund a college scholarship program, a voluntary pre-kindergarten program, and additional technological resources in Alabama's public schools. The three programs could have provided additional educational opportunities for pre-school and college-age Alabamians as well as additional technological resources in all of the state's schools. It is therefore clear that these three programs represent a possible solution to Alabama's educational inadequacies.

Georgia's example proves that a Hope program, voluntary pre-kindergarten, and provisions for technological resources in schools can increase educational opportunities throughout the state. Georgia funds these educational programs through its lottery, which is governed by a comprehensive statutory plan. Alabama's proposed lottery emulated Georgia's statutory lottery plan by ensuring that lottery profits would not supplant existing educational resources, by creating a distinct lottery corporation to manage and promote the lottery, and by creating three sup-

170. Ala. H.B. 73, pt. II, § (e)(1); see S.B. 385, 1999 Leg., 1st Reg. Sess. (Ala.).

171. See Opinion of the Justices No. 338, 624 So. 2d 107, 116 (Ala. 1993); see also text accompanying *supra* notes 12-19.

172. Ala. S.B. 385.

173. *Id.* § 4(2).

plementary, Georgia-style educational programs to which lottery profits would be solely devoted. These three aspects of the Georgia lottery ensure that the economic benefits of the game are maximized for Georgia's students and that the customary duties of the state government are not disrupted. By constitutionally and statutorily ensuring these three features of the Georgia lottery, Alabama's proposed lottery plan could have created a mechanism equipped to achieve the same goals that Georgia's lottery is presently serving.

VII. THE SOCIAL COSTS OF A LOTTERY

A. *Social Costs: Arguments Against a Lottery*¹⁷⁴

Despite the possible economic successes of state-sponsored lotteries, there are still many arguments against them. Although there are many different premises, the essence of the anti-lottery argument amounts to a simple proposition: the lottery's social costs outweigh the economic benefits of the game.

The first social cost cited by lottery opponents is that a lottery is a regressive tax on the poor.¹⁷⁵ Essentially, because a wealthy person and a poor person pay the same amount for a lottery ticket—or rather, the same tax on the purchase of a lottery ticket—the “tax will take a bigger percentage of the poor person's income than it will take of the rich person's.”¹⁷⁶ Because lottery profits are targeted to help lower-income school districts and students, proponents argue that regressivity of a lottery should not be a major concern.¹⁷⁷ Nonetheless, it is a valid problem with the modern lottery that should be addressed, as the goal of this game is to help those with lower incomes, not to burden them further.

Concern for the poor should prompt legislators in lottery states to determine what protections to include in a comprehen-

174. CLOTFELTER & COOK, *supra* note 37, at 43 (describing public attitudes toward lotteries as a “fundamental paradox”).

175. Rychlack, *supra* note 62, at 50.

176. *Id.*

177. *Id.*

sive lottery for these individuals. As of October 12, 1999, the date of Alabama's popular election on the lottery, there were no provisions in the lottery legislation that addressed the regressivity problem of a lottery in Alabama.¹⁷⁸

A second social cost of a lottery is its adverse effect on individuals, which has been documented in many states with legalized gambling.¹⁷⁹ For instance, there is a rise in personal bankruptcies in states that legalize gambling.¹⁸⁰ Additionally, and more pervasively, gambling poses a threat of addiction to susceptible individuals. "Pathological gambling" is an official mental illness according to the American Psychiatric Association.¹⁸¹ How the law and the gambling industry treat gambling compulsions is largely unsettled. The pervasive economic and emotional effects of gaming are more commonly associated with casino gambling and therefore typically do not arise in lottery states immediately. It is, however, "reasonable to conclude that lotteries have contributed to the spread of the gambling habit" and that because "lotteries have a broader participation rate than any other form of commercial gambling," lotteries have "spread . . . [compulsive] gambling to [a] new demographic group."¹⁸²

Another cost of lotteries on individuals pertains to children. "Although lottery states typically impose criminal sanctions on those who sell lottery tickets to children, a recent study found that 43 percent of the high school students in New Jersey played that state's lottery."¹⁸³ One lottery opponent worries that "lotteries may be teaching our children that success can be had without hard work or education."¹⁸⁴ If this is the message sent to children by state-sponsored lotteries, then it is a fallacy to

178. See H.B. 73, 1999 Leg., 1st Reg. Sess. (Ala.); S.B. 374, 1999 Leg., 1st Reg. Sess. (Ala.).

179. See NATIONAL OPINION RESEARCH CENTER, REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION, OVERVIEW OF NATIONAL SURVEY & COMMUNITY DATABASE RESEARCH ON GAMBLING BEHAVIOR (1999).

180. *Id.* at 38; see also Tim O'Brien, *Lottery Series: The Big Gamble* (WBHM Ala. Public Radio Broadcast, Jan. 13, 1999).

181. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (1980).

182. Rychlack, *supra* note 62, at 67, 69.

183. *Id.* at 69.

184. *Id.* at 70.

think that a lottery can ever be a solution to educational inadequacies.

*B. Mitigating the Social Costs Through
Legislation*

It is axiomatic that if the social costs of the lottery ultimately outweigh its economic benefits, not only may a state's educational opportunities be corrupted, but harm is likely to befall individuals in the state as well. This is true because all of the arguments advanced by anti-lottery advocates implicate the impact a lottery has on individuals, such as the poor, children and compulsive gamblers, and the pressure it places on lawmakers.¹⁸⁵

In order to mitigate these costs, proper legislation can be passed to delineate and precisely identify the state's role after implementing the game. If anticipatory legislation is not passed, the examples of other states prove that the social costs of a lottery will probably exceed the economic benefits. Specifically, three different social costs affecting individuals can be mitigated and possibly eliminated if appropriate legislation is passed.

1. *Casino Gambling and the Gaming Industry.*—First, the issue of casino gambling as a whole must be addressed prior to the adoption of a state-sponsored lottery. It is a slippery slope for a state to sanction and endorse the lottery and yet consistently oppose all other forms of gambling. Serious questions arise regarding the viability of expanding lotteries into other forms of gambling through the authority of a lottery state's existing lottery laws.

For example, in Oregon¹⁸⁶ and South Dakota,¹⁸⁷ state-sponsored lotteries set the stage for each respective legislature to statutorily authorize video poker machines. In West Virginia, the Legislature was not even afforded the right to adopt a statute to authorize video poker.¹⁸⁸ Instead, the Attorney General

185. CLOTFELTER & COOK, *supra* note 37, at 43.

186. See OR. REV. STAT. § 461.217 (1992).

187. See S.D. CODIFIED LAWS §§ 42-7A-1 to -50, 10-58-11 (Michie 1991).

188. See I. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS

of that state issued a non-precedential ruling that the machines were legal because they constituted authorized lotteries under the present law.¹⁸⁹ Similarly, in Rhode Island, the Attorney General ruled that the state lottery may legally offer keno machines under the state's lottery laws.¹⁹⁰ Additionally, in Kansas, an opinion issued by the Attorney General concluded that by virtue of their scheme of legalized state-sponsored lottery, the state's Native American tribes may operate "any game involving the three elements of consideration, chance and prize" which includes casino gambling.¹⁹¹

These examples foreshadow the problem of the expansion of a lottery into the gaming industry as a whole. The Black amendment and the AELA, however, provided the sort of restrictions necessary to prohibit this expansion by stating that the "Alabama Education Lottery is prohibited from operating, using, or employing . . . directly or indirectly, a casino or casinos and . . . any form of casino gambling."¹⁹² Additionally, both the Black amendment and the AELA expressly prohibited "the operation of casinos."¹⁹³ By placing these limits in the proposed constitutional amendment, Alabama's lottery would have ensured that the lottery corporation, the State of Alabama and any other group would have been *constitutionally* prohibited from administering games that amount to casino gambling.¹⁹⁴

The law surrounding horse tracks in Alabama is a helpful example of how easily casino gambling can be authorized in Alabama absent a constitutional prohibition. Casino gambling is not prohibited by Alabama's constitution, but it has been criminalized through statutes.¹⁹⁵ Absent a constitutional prohibition of casino gambling, the Legislature has the power to statutorily authorize this activity.¹⁹⁶ Under this power, the Legisla-

COMM. & ENT. L.J. 93, 101 (1993).

189. *Id.* at 101-02

190. *Id.* at 102 (citing Opinion of R.I. Attorney General (Nov. 19, 1991)).

191. *Id.* at 103 (quoting Opinion of Kan. Attorney General (Sept. 30, 1991)).

192. See H.B. 73, pt. II, § (h), 1999 Leg., 1st Reg. Sess. (Ala.); see also S.B. 374, § 6, 1999 Leg., 1st Reg. Sess. (Ala.).

193. Ala. H.B. 73, pt. II, § (h); Ala. S.B. 374.

194. See Ala. H.B. 73, pt. II, § (h); Ala. S.B. 374, § 6.

195. ALA. CODE § 13A-12-20 to -31 (1975).

196. See ALA. CONST. art. IV, § 65; see also Opinion of the Justices No. 205, 251 So. 2d 751 (Ala. 1971).

ture added the "Horse Racing and Greyhound Racing" Chapter to the Alabama Code in 1984.¹⁹⁷ This chapter authorizes municipalities to "determine through referendum whether horse racing and pari-mutuel wagering thereon will be permitted in such municipality."¹⁹⁸ Additionally, section 11-47-111 of the Alabama Code states that the "cities and towns of this state shall have the power to restrain and prohibit gaming."¹⁹⁹ Under these provisions, Jefferson County authorized greyhound and horse racing and *presently* allows legalized gambling in the area.²⁰⁰

During the 1999 Spring Legislative Session, Representative Knight proposed an amendment to Alabama's present criminal and civil gambling statutes.²⁰¹ This bill further defines what activities constitute illegal gambling and seeks to statutorily prohibit casino gambling and the operation of slot machines.²⁰² The legislation also seeks to authorize pari-mutuel operators, who are exempt from the anti-casino prohibitions, to conduct games "requiring some degree of skill," such as video poker.²⁰³

Essentially, the bill, if passed, will legalize video poker and other casino-style games requiring a degree of skill, if they are conducted at dog and horse tracks. Bill Pryor, Attorney General of Alabama, interprets the Knight bill to authorize many forms of casino gambling at horse and dog tracks throughout the state, such as poker and blackjack with live dealers.²⁰⁴ Pryor also thinks that if the Knight bill is passed, federal law will permit Alabama's Native Americans to conduct exactly the same sort of gambling that would be authorized in dog and horse tracks.²⁰⁵ The Knight Bill is presently in a committee of the

197. ALA. CODE §§ 11-65-1 to -47.

198. *Id.* § 11-65-1(1).

199. *Id.* § 11-47-111 (arguably allowing cities and towns to authorize casino gambling).

200. *See id.* § 11-65-1.

201. H.B. 71, 1999 Leg., 1st Reg. Sess. (Ala.).

202. *Id.*

203. *Id.*

204. David White, *Pryor Says Poker Plan Opens Door*, BIRMINGHAM NEWS, Mar. 23, 1999, at 1A.

205. *Id.* The Poarch Band of Creek Indians stated that if the Knight bill was adopted, they would offer video poker at their Atmore and Wetumpka reservations. Robin DeMonia, *Tribe Eyes Video Poker*, BIRMINGHAM NEWS, Mar. 26, 1999, at 1C.

Alabama Legislature, which exemplifies the existing threat of casino gambling in Alabama, even absent the adoption of the lottery.

Georgia is presently debating whether its lottery and gambling statutes permit Georgia's Native Americans to administer casinos under federal law.²⁰⁶ Under the Indian Gaming Regulatory Act²⁰⁷ ("IGRA"), Native American tribes are authorized to "conduct various forms of gambling—including casino gambling—pursuant to tribal-State compacts if the State permits such gambling 'for any purpose by any person, organization, or entity.'"²⁰⁸ In Georgia, gambling has been decriminalized.²⁰⁹ Therefore, under the IGRA, Georgia's Native Americans may be legally entitled to operate casinos.

With or without a lottery, the threat of casino gambling in Alabama is not as immediate as in Georgia. Unlike Georgia, Alabama criminalized casino gambling through statutes.²¹⁰ In addition, if Alabama had adopted a lottery, the Black amendment would have ensured that casino gambling remained unconstitutional as administered by the state or any other entity. Thus, even if Alabama's lottery had passed, Alabama's Native Americans would have no basis under the IGRA to argue that Alabama permits casino gambling "for any purpose by any person, organization or entity" and, thus, that they should be permitted to operate these enterprises themselves. However, since the Black amendment was rejected by voters, there is no constitutional prohibition against casinos in Alabama's constitution. Nonetheless, the state's criminal gambling statutes should be sufficient under the IGRA to ensure that Native Americans are prohibited from operating casinos under state and federal law.²¹¹

206. Jim Wooten, *Lottery Leaves Door Ajar for Casinos*, ATLANTA J. & CONST., Sept. 12, 1999, at G5.

207. See 25 U.S.C. § 2701 (1994).

208. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1927-28 (1999).

209. See Wooten, *supra* note 206, at G5.

210. ALA. CODE § 13A-12-20.

211. The law surrounding the IGRA is murky. "As of 1997, half of the States in the Union hosted Class III Indian gaming (which may encompass casino gambling), including Louisiana, Mississippi and four other states that had private casinos." *Greater New Orleans Broadcasting Ass'n*, 119 S. Ct. at 1932 n.5. "By the mid 1990's,

Alabama's Native Americans may have an argument that since section 11-47-111 of the Alabama Code gives "cities and towns of this state . . . the power to restrain and prohibit gaming," and thus arguably the power to authorize casino gambling, the Indian sovereignty should have this power as well. Absent a constitutional prohibition of casino gambling like that contained in the Black amendment, this argument has some validity.

The results of October's lottery referendum prove that Alabama does not want gambling of any form in this state. However, in rejecting the Black amendment, the constitutional prohibition of casinos was also rejected. While October's election foreclosed the possibility of a lottery, it left the issue of casino gambling largely undecided. The law of gaming in Alabama proves that if Alabamians want to foreclose the possibility of casino gambling, more strict prohibitions are necessary.

2. *Lottery Funding.*—In addition to the casino gambling issue, lottery states must also address a second issue regarding the disbursement of lottery funds. In making appropriations from the lottery, lawmakers must realize that, as is the case with private business, revenues will not be consistent from year to year. Additionally, it must be anticipated that lottery revenues will initially be very high but will drop off as people become bored or frustrated with the game.²¹² Massachusetts, for instance, experienced a drop in lottery revenues by fifty percent in one year.²¹³ In Georgia, a poll conducted by Georgia State University found that the number of individuals buying lottery tickets decreased by twenty-one percent since the first year of the lottery.²¹⁴

tribal casino-style gambling generated over \$3 billion in gaming revenue—increasing its share to 18% of all casino gaming revenue." *Id.* The resurgence of this large industry would not further Alabama's state goal of providing supplemental educational opportunities. Moreover, innumerable social costs would befall Alabama if casino gambling were authorized to be administered by Native Americans in Alabama. See *supra* text accompanying notes 175-85.

212. I. NELSON ROSE, *GAMBLING AND THE LAW* 14-15 (1986).

213. See Rychlack, *supra* note 62, at 54; see also John L. Mikesell & C. Kurt Zorn, *State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence*, 46 *PUB. ADMIN. REV.* 311, 314-15 (1986).

214. Peter Mantius, *The Georgia Lottery Poll: Most Revenues Come from Repeat Payers*, *ATLANTA J. & CONST.*, June 28, 1998, at E5.

The decline in sales of lottery tickets may create adverse effects on a state and the agencies that depend on the lottery's revenues. If the legislature does not anticipate this decline in making the lottery appropriations, there will be adverse consequences for those who depend on the lottery's programs. A state may be forced to advertise or otherwise promote the lottery to raise revenues for programs whose sustenance requires this money. This will put a state government in a unique position because lottery tickets will then be the "only consumer product[] that . . . [is] backed by the prestige and integrity of the state government."²¹⁵

Scholars argue that without aggressive advertising and the introduction of new games, the lottery will not yield revenues consistent with or equal to those raised in the first few months of the game.²¹⁶ This puts lawmakers in a very precarious situation because they may feel compelled to promote the lottery by endorsing and selling gambling. These collateral problems raised by funding shortfalls can be addressed by looking at further lottery advertising.

3. *Advertising.*—Active promotion of a lottery is necessary to keep interest and revenues high.²¹⁷ "Although it varies from state to state, approximately 74 percent of all [lottery] state advertisements are lottery promotions."²¹⁸ In 1998, \$500 million was spent on lottery advertising.²¹⁹ Most states employ advertising agencies to launch comprehensive lottery campaigns in which advertisements are placed throughout the state, from "the corner store to baseball telecasts."²²⁰

Advertisements represent the most pervasive mechanism by which a state can limit the social costs of the lottery on its population. A state is supposed to be the citizens' protector from misleading or deceptive advertising. However, with respect to lotteries, a state must play two opposing roles: that of a protectionist from misleading advertising and that of a promotor of

215. ROSE, *supra* note 212, at 16.

216. *Id.*

217. See Rychlack, *supra* note 62, at 61.

218. *Id.* at 62.

219. DeMonia, *supra* note 76, at 5A.

220. Rychlack, *supra* note 62, at 62.

lottery businesses. To successfully achieve both goals, advertisements should be elementary so that less educated people can understand the odds, payouts and procedures.²²¹ Moreover, the state should ensure that advertisements are cautious of susceptible individuals likely to be harmed by a lottery. To this end, the state can guarantee that advertisements exclude susceptible individuals from their target groups. If a state does not responsibly attend to its duty of protectionism, the economic benefits of the lottery will be exceeded by its social costs on vulnerable individuals.²²²

Some states ensure compliance with both of these duties by enacting statutory and administrative limitations on lottery advertising.²²³ Some examples include: prohibitions of misstating odds, comparisons of lotteries to investments and celebrity or political endorsements and restrictions on target groups in advertising.²²⁴ Additionally, the National Association of State Lotteries promulgated an Advertising Code of Ethics in the 1970s which requires state lotteries to clearly state the odds of winning.²²⁵ However, these regulations do not have any mechanism for enforcement.²²⁶ Therefore, while a state is required to comply with the rules, it is not penalized for breaking them.²²⁷

Simultaneous with implementing a lottery, a lottery state should pass restrictive advertising statutes *and* create a cause of action for citizen suits, similar to those found in many federal environmental statutes.²²⁸ These restrictive regulations are necessary to prohibit deceptive techniques and lessen the negative influence of advertisements on children, compulsive gamblers and the poor. Moreover, lottery states should regularly

221. *Id.* at 75-76.

222. *Id.* at 63.

223. *Id.* at 75.

224. *See id.* at 74-75 (citing MINN. STAT. ANN. § 349.09(2)(a) (West 1990); VA. CODE ANN. §§ 58.1-4022(E) (Michie 1991); WIS. STAT. ANN. § 565.32(1)-(2) (1991)).

225. ALAN J. KARCHER, LOTTERIES 81-82 (1989).

226. *See id.*

227. *Id.*

228. *Id.* The author suggests that, at the minimum, legislation should require that advertisements: 1) are not misleading, 2) should not compare the lottery to secure financial investments, 3) should not target low-income markets, and 4) television advertising should be restricted to time slots when children are less likely to be watching. *See generally id.* at 72-81.

disseminate information through public service announcements or a similar mechanism, using simple terms and explaining the unlikely odds of winning to make sure that all people see the lottery as a game.²²⁹ By implementing this sort of legislation, lottery states can mitigate the possible social costs of a lottery on individuals who are likely to be harmed by state-sponsored gambling. As of the date of Alabama's popular election on the lottery, Alabama had not proposed any statutes within the proposed lottery legislation that restricted lottery advertisements to protect susceptible individuals.

VIII. ALTERNATIVE SOLUTIONS TO ALABAMA'S EDUCATION PROBLEM

Other than the lottery, there have not been many alternative solutions posited for Alabama's educational inadequacies. Of course, taxes could be raised to fund education, but this is not the only way to raise money for education.

One solution is reforming the existing Education Trust Fund ("ETF"). In Alabama, public kindergarten through twelfth grade is funded by the ETF. The Legislature's definition of "education" under the ETF is very liberal. In fact, the Alabama Association of School Boards argues that there is a "long-standing tradition in Alabama of sending some K-12 dollars to entities other than schools."²³⁰

In 1997, approximately \$211 million was appropriated from the ETF to fund private schools, charities and non-education programs, such as the Alabama Sports Hall of Fame and the Children's Hospital.²³¹ In 1997 and 1998, the Legislature also appropriated money from the ETF to fund programs in the Department of Public Health, the Children's and Women's Hospital of Mobile and the AIDS Task Force of Alabama.²³² These con-

229. See Rychlack, *supra* note 62, at 75-76.

230. Jessica L. Sandham, *Alabama School Boards Challenge Nonschool Appropriations*, 17 EDUC. WEEK 26 (1999) (visited October 25, 1999) <<http://www.edweek.org/ew/vol-17/40ala.h17>>.

231. *Id.*

232. See *id.*; Act of May 29, 1997, No. 97-686, 1997 Ala. Acts 1376 (appropriating from the ETF \$120,000 to the Children's Hands on Museum); Act of May 29, 1997, No. 97-687, 1997 Ala. Acts 1377 (appropriating \$52,500 from the ETF to the AIDS

stituencies clearly do not provide education for students in kindergarten through twelfth grade. Thus, the ETF is not strictly limited to funding "educational projects."

The problems with Alabama's present education system can be resolved without resorting to a lottery. Governor Siegelman could simply propose a bill defining "education" under the ETF more narrowly in order to encompass only what the ETF was intended to fund—K-12 public education. This is a simple and inexpensive way to change education in Alabama, or at the very least to provide more money for Alabama's grossly underachieving schools.

IX. CONCLUSION

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."²³³ Unfortunately, in Alabama, educational opportunities are not adequate. A primary cause exacerbating these inadequacies is a lack of funding for educational programs. Alabamians are aware of the need for educational reform in Alabama. Indeed, the lottery, and more importantly, its goal of funding educational opportunities, have been crucial issues in the state since the gubernatorial elections of November 1998. In addition, the lottery debate has forced many Alabamians to consider how the state will succeed in the twenty-first century when inadequate educational funding is presently denying Alabama's children adequate educational opportunities.

Through Georgia's example, it is clear that Alabama's proposed lottery legislation could have provided a mechanism to raise the much-needed education revenues.²³⁴ In Georgia, the

Task Force of Alabama); Act of May 29, 1997, No. 97-688, 1997 Ala. Acts 1378 (appropriating \$682,793 from the ETF to the Children's and Women's Hospital of Mobile); Act of May 29, 1997, No. 97-694, 1997 Ala. Acts 1412 (appropriating \$381,534 from the ETF to the Space Science Exhibit Commission); Act of May 29, 1997, No. 97-696, 1997 Ala. Acts 1413 (appropriating \$4,714,831 from the ETF to the Department of Public Health); Act of May 29, 1997, No. 97-699, 1997 Ala. Acts 1417 (appropriating \$307,615 from the ETF to the Helen Keller Eye Research Foundation).

233. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), *supplemented by*, 349 U.S. 294 (1955).

234. Of course, this proposition assumes that the appropriate funding could be generated from a lottery.

lottery achieves the goal of providing supplemental educational programs by infusing large amounts of lottery profits into the state's public education system. More importantly, Georgia ensures the integrity of its lottery by a complex statutory scheme intended to effectuate the sole goal of funding additional educational opportunities.

Alabama's proposed lottery plan fulfilled its promise to emulate Georgia's lottery legislation in three significant respects. Each of these aspects of Alabama's proposed lottery incorporated important and unique details of Georgia's lottery legislation. By mirroring important aspects of Georgia's lottery, Alabama could have created a mechanism to provide supplementary educational opportunities in the state and thus solve Alabama's educational problems.

In addition to the need for a comprehensive administrative and statutory scheme for the lottery business, there are many social, political and legal ramifications that must be addressed when developing a state-sponsored lottery. Alabama's lottery legislation did not include any provisions to mitigate the social costs of a lottery. For instance, Alabama's lottery legislation did not provide any protection for susceptible individuals likely to be harmed by the game. Moreover, Alabama's lottery legislation did not address the need for restrictive advertising, nor did it attempt to answer the problem of regressivity inherent in a lottery. This lack of appropriate legislation may be one of the reasons that Alabamians were not willing to gamble on the "Education Lottery."

The treatment of casino gambling is another issue which might have motivated Alabamians to reject a state-sponsored lottery. The irony here is that the rejection of the lottery made the state of the law regarding casino gambling in Alabama even more tenuous. This is true because casino gambling currently is not unconstitutional, as it would have been had the Black amendment been adopted. Therefore, casino gambling may be authorized by the Legislature and, arguably, under a special statute, may even be authorized by cities and towns. There are many problems relating to the law of gambling in Alabama which the lottery issue has brought to the forefront. Furthermore, the social costs of a lottery are minimal compared to those of casino gambling, thus this threat also must be addressed.

Alabama's lottery was merely *one* mechanism proposed to raise revenues for Alabama's inadequate educational opportunities. Since this option has been rejected by Alabamians, alternative solutions must be considered. As these alternative solutions are posited and debated, it is important to remember that the goal of all these debates is the same.

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