

8-1-2005

PUBLIC FINANCE AND THE FORTUNES OF THE EARLY AMERICAN LOTTERY

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PUBLIC FINANCE AND THE FORTUNES OF THE EARLY AMERICAN LOTTERY

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ABSTRACT

This Article connects the rise and fall of the early American lottery with changes in the laws governing incorporation and public borrowing. Part II of the Article describes the legal obstacles that hindered private and public actors from carrying out internal improvements in order to illustrate why lotteries were an appealing funding device. Part III uses case study analysis of six eighteenth century lotteries to explore why lotteries were initiated and why they failed to achieve their promise as a funding device. Part IV makes the link between the uses of the lottery as an instrument of government and the fortunes of the lottery in American public life. As I will argue, public finance imperatives did much to cause the historical rise and fall of the lottery, as well as its resurgence in the modern day.

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* B.A. Yale, M.Phil and Ph.D. University of Cambridge. I am grateful to Chris Beauchamp, Professor Morris Cohen, Professor Robert Ellickson, Professor Robert Gordon, and Professor Fred Robinson for taking the time to read and comment on earlier versions of this work.

I. INTRODUCTION

Public lotteries have a long but mixed history in America. The first lottery drawing for the benefit of an American community was held in 1612, to support the settlement of Jamestown.¹ Thereafter, colonial and early state legislatures looked to lotteries for supplementary revenue and as a means to pay for the construction of internal improvements such as roads, canals, bridges, hospitals, lighthouses, and jails. From 1740 to 1865, state legislatures authorized at least 686 lotteries to raise funds for internal improvements and governmental functions.² Income from state-sponsored lotteries was also used to establish or improve over 47 universities and 300 secondary schools.³ Yet, as games of chance that threatened to undermine the connection between wealth and work, lotteries were always subject to some degree of moral suspicion. During the eighteenth century, these concerns were addressed through the requirement that lotteries be licensed by the state. In the mid-nineteenth century, opprobrium finally overtook support and states began to ban lotteries altogether. By 1860, thirty out of the thirty-three states had enacted constitutional or statutory provisions prohibiting lotteries.⁴ Lotteries did not reappear again until New Hampshire introduced a state lottery in 1964. At present, forty states and the District of Columbia use lotteries to generate public revenue.⁵

Existing studies of early American lotteries treat lotteries largely as social, cultural, and historical phenomena. Indeed, few efforts have been made to explore the role of early American lotteries as a tool of public finance. This is in a sense understandable, since the last major work on historical lotteries was written before the resurrection of lotteries in the modern era.⁶ Yet it is also surprising given the present-day significance of

¹ From 1614 until about 1621, the colony of Virginia derived roughly half of its operating budget from the yields of the Virginia Company's lottery franchise. JOHN EZELL, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 4-8 (1960).

² *Id.* at 54-59, 64-65, 71-72, 101-131.

³ *See id.* at 136-60; Ronald J. Rylchak, *Lotteries, Revenues and Social Costs*, 34 B.C.L. REV. 11, 25 n.83.

⁴ EZELL, *supra* note 1, at 274.

⁵ *See* Nat'l Conference of State Legislatures, *Lotteries in the United States*, at <http://www.ncsl.org/programs/econ/lotto.htm> (last visited Nov. 19, 2004).

⁶ The definitive work on historical lotteries, written before the re-introduction of modern lotteries, is EZELL, *supra* note 1. Shorter overviews of specific lotteries, or lotteries in particular regions include HARRY B. WEISS & GRACE M. WEISS, *THE EARLY LOTTERIES OF NEW JERSEY* (1966); John Steele Gordon, *Born in Iniquity*, 45 AM. HERITAGE 14 (describing

lotteries as a fundraising device for cash-strapped state governments.

Inquiry into why the state and local governments of early America escalated and then discontinued their reliance on public lotteries thus represents a worthwhile endeavor for two reasons. First, and most generally, this story has important implications for our understanding of the advantages and limitations of lotteries as a fiscal device. Having identified the problems that led to the decline of historical lotteries, we can then consider the extent to which modern lotteries have successfully overcome these. Is the modern state lottery truly here to stay? Or, like the historical lottery, will it disappear once policymakers and the public realize that lotteries are not necessarily a painless form of taxation?

The second reason to re-evaluate the early lottery relates to the prevailing historical view of its fortunes. Studies of the early public lottery take its appeal to policymakers as a given. However, as this Article will demonstrate, lotteries always existed among a number of fiscal alternatives, and policymakers were continually choosing between different funding approaches on the basis of perceived suitability for the task at hand. Considering how effectively lotteries served the objectives of public finance at any given moment, as well as over time, is thus crucial to understanding why support for lottery waxed and waned when it did. By underemphasizing the economic role of early American lotteries, traditional accounts of the lottery's decline place disproportionate weight on the role played by its moral critics. I hope to refine that narrative by demonstrating that the success of mid-nineteenth century attacks on the lottery owed much to the backdrop against which these took place: namely, the development of new and better means for funding internal improvements and consequent weakening of the link between lotteries and the public purpose.

Law plays an important part in this story. As I will argue, the state and local governments of early America looked to the lottery as a fiscal device largely because they lacked the ability to enable large-scale public improvements through other means. Modern state and local governments tend to finance infrastructure development through long-term borrowing. However many local governments did not receive legislative permission to issue bonds

the Louisiana lottery) (1994); Alan D. Watson, *The Lottery in Early North Carolina*, 69 N.C. HIST. REV. 365 (1992); Philip G. Nordell, *The Yale Lottery*, 29 YALE ALUMNI MAG. 13 (May 1965) [hereinafter Nordell, *Yale Lottery*]; Philip G. Nordell, *Lotteries in Princeton's History*, 15 PRINCETON U. LIBR. CHRON. 16 (1953-54) [hereinafter Nordell, *Princeton Lotteries*]; Philip G. Nordell, *The Academy Lotteries: A Chapter in the Early History of the University of Pennsylvania*, 14 LIBR. CHRON. FRIENDS U. PENN. LIBR. 51 (1953) [hereinafter Nordell, *Pennsylvania Lotteries*]; Philip G. Nordell, *The Rutgers Lotteries*, 16 J. RUTGERS U. LIBR. 1 (1952) [hereinafter Nordell, *Rutgers Lotteries*].

until the mid-nineteenth century. Even in situations where legal authorization was not an obstacle, the absence of networks for large-scale public borrowing proved a critical impediment. At the turn of the nineteenth century, there were still very few institutions capable of collecting and aggregating capital contributions from multiple would-be investors. Early nineteenth century relaxation of state policies towards incorporation—in particular, the advent of general incorporation statutes—altered this state of affairs by greatly increasing the number of business entities willing to provide capital or undertake local improvements in exchange for franchise rights. With the removal of de facto and de jure limitations on the ability of public and private actors to mobilize capital for internal improvements, the importance of less efficient devices such as the lottery declined.

Part II of the Article describes the legal obstacles that hindered private and public actors from carrying out internal improvements in order to illustrate the appeal of the lottery as a funding device. Part III uses case study analysis of six eighteenth century lotteries to explore why lotteries were initiated and why they failed to achieve their promise as a funding device. Part IV makes the link between the uses of the lottery as an instrument of government and the fortunes of the lottery in American public life. As I will argue, dynamics of adoption and disappointment in the public finance context have played a critical role in determining the lottery's fate.

II. INTERNAL IMPROVEMENTS IN EARLY AMERICA: DEMAND AND SUPPLY

The eighteenth and early nineteenth centuries were times of great demand for all types of “internal improvement.” In early America this term had an expansive meaning, including within its scope any endeavor that contributed to the “security, prosperity, and enlightenment” of the American people.⁷ Thus, when early Americans set themselves to identifying prospects for internal improvement, their designs ranged beyond roads, canals and bridges to include the construction of schools, meetinghouses, and commercial facilities. Part A describes limitations on private provision of internal improvements. Part B describes limitations on government abilities to undertake such projects.

A. Limitations on Private Provision

Then, as now, internal improvements could be enabled through private as well as public means. Private actors might assist with provision out of altruism or in the hopes of turning a profit. Alternatively, public

⁷ See, e.g., JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* 3 (2001).

actors might assume primary responsibility where political commitments or market failure demanded. Market failure was a particularly significant motivator of government action. Many proposed internal improvements had a strong public goods component, making it difficult for private actors to realize a return on their investments.⁸ Even when there was money to be made—as in the case of mills, bridges, and other facilities that could be operated on a pay-per-use basis—few entrepreneurs had sufficient capital to undertake large-scale building projects on an individual basis. Moreover legal obstacles to organization as a business entity made it hard for groups of investors to come together for purpose of pooling capital and managing an enterprise. Until the mid-nineteenth century, almost all states required specific legislative approval of corporate charters.⁹ Individuals who lacked the influence to obtain special legislation could, of course, conduct business as an unincorporated partnership. However their partnerships would not reap the benefits of the corporate form, which included the ability to act as a single entity in law, to persist in the same identity despite turnover of shareholders, and to shield personal assets from third party claims against the enterprise.¹⁰

Because national governments were not particularly involved in local improvements during this era,¹¹ the task of encouraging private investment fell primarily to state and local governments.¹² The selective awarding of corporate charters by colony/state legislatures was itself a major way to stimulate action by private investors. Legislatures gave out 317 special enterprise charters between 1780 and 1801, only four percent of which went

⁸ See, e.g., RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 4-7 (1973) (describing the characteristics of public goods and difficulty of motivating private actors to provide these); HARVEY S. ROSEN, PUBLIC FINANCE 44-45, 55-65, 80-81, 100-1 (6th ed. 2002) (same).

⁹ See JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 14-16 (Lawbook Exchange, Ltd., 2004) (1970); Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 81-84 (1999).

¹⁰ HURST, *supra* note 9, at 19-20.

¹¹ LARSON, *supra* note 7, at 5, 39-40, 69 (describing limits on federal government involvement with internal improvements).

¹² In particular, local governments, which collected and spent over three-quarters of public funds during peacetime and about half of all public funds during the Revolutionary war. See William Marcuse, *Local Public Finance in Colonial Connecticut* 112 (1966) (unpublished Ph.D. dissertation, Columbia University) (on file with Lehman Library, Columbia University). By way of comparison, local governments accounted for 50-60.9% of all government expenditure from 1900-1930, but under 30% from 1980 onwards. See ROSEN, *supra* note 8, at 473.

to individuals seeking to form general business enterprises. Fully two-thirds of all state charters went to firms providing transportation services such as inland navigation, turnpikes, and toll bridges. Twenty percent went to banks and insurance companies, and the remaining ten percent to businesses that undertook local public service functions such as water supply.¹³ Franchise arrangements, which entailed government grant of a special privilege such as the right to collect user fees or operate the enterprise tax free, represented a second form of subsidy.¹⁴ Finally, governments could stimulate private activity through the offer of in-kind benefits such as free land, timber, and labor.¹⁵

B. Limitations on Public Provision

When private capital could not be mobilized, governments had no option other than to step into the breach and provide the desired facility themselves. In early America, funding for internal improvements came largely from taxation and voluntary contributions. Monetary grants from higher levels of government were rare and facilities for large-scale public borrowing virtually non-existent.

Funding by a subscription system, in which individual donors signed on to contribute a certain amount towards a project, represented a way to coordinate individual private interests in a particular public good while leaving the actual business of contribution to occur on a voluntary basis. Potential contributors included end-users of the good in question and altruistic individuals. Individuals motivated by a combination of altruism and other social and psychological objectives¹⁶ could also be drawn in through the

¹³ See HURST, *supra* note 9, at 17.

¹⁴ Franchises could be granted to corporations, individuals, or unincorporated groups. See, e.g., *id.* at 20.

¹⁵ See, e.g., *Webster v. Town of Harwinton*, 32 Conn. 131, 138 (1864) (recognizing the historical right of Connecticut towns “to dispose of their own lands undisposed of”); An Act for the Preservation of Timber, ACTS AND LAWS OF CONNECTICUT 1716, at 111 (criminalizing the unauthorized harvesting of timber from town lands). Statutory enactments allowed town governments to exercise the sovereign’s common law power of conscription. See, e.g., An Act for High-Ways, ACTS AND LAWS OF CONNECTICUT 1715, at 50 (empowering towns to assess a labor tax on local men aged sixteen to sixty); Marcuse, *supra* note 12, at 64, 66, 69-71, 108 (discussing labor assessments in early America more generally).

¹⁶ For example, a desire to avoid the scorn of others or to receive social acclaim. See the studies of Gary Becker and Mancur Olson as cited in James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm Glow Giving*, 100 *Ec. J.* 464, 464 (1990). Historical studies have come to similar conclusions. See, e.g., SANDRA CAVALLO, *CHARITY AND POWER IN EARLY MODERN ITALY: BENEFACTORS AND THEIR MOTIVES IN TURIN, 1541-*

application of peer pressure and/or appeal to the desire for increased social standing. From the standpoint of public finance, the main disadvantage of subscriptions was the lack of any formal means to enforce commitments to contribute or dictate the form in which contributions should be made.

Taxation had the advantage of being a legally enforceable obligation and thus a more predictable source of revenue than voluntary contributions. Nevertheless, approval of local taxes was inevitably complicated by considerations of self-interest, with individuals occasionally refusing to authorize necessary increases in taxation even when they stood to benefit from the goods and services to be provided through tax revenues. Revenue raising for internal improvements was further complicated by the type of taxation that local governments used for this purpose. While regular government expenses were defrayed through an annual tax, the cost of internal improvement projects tended to be funded through special assessments. Funding through an annual tax allowed for substantial discretion in spending. The governing body would set a tax rate, levy the tax, and only later vote on how to apportion the proceeds. If more revenue was needed, the governing body could impose a supplementary tax. A special assessment, in contrast, functioned like a referendum on the project to be funded. The governing body would identify a specific need and set a tax rate according to the projected cost of meeting that need. Agreement about the merit of the project was thus a prerequisite to imposition of a special assessment.

In addition to the above problems, such year-to-year sources of compulsory and voluntary funding did not permit cost-spreading over time. Large-scale public improvements are extremely costly but return benefits over a substantial period of time. Hence contemporary local governments generally finance infrastructure development through long-term borrowing.¹⁷ By spreading the costs of a capital project over a longer time-span than just the period of construction, borrowing allows tax-payers of the present moment to share the burden of payment with individuals who will benefit from the project in the future.¹⁸ From the standpoint of public goods provision, borrowing may also help to correct for market imperfections that arise when the entire burden of payment is placed on first generation users.¹⁹

1789, at 2-5, 100, 104 (1996).

¹⁷ MARGARET G. MYERS, *A FINANCIAL HISTORY OF THE UNITED STATES* 143-47 (1970). Indeed, Eric Monkkonen describes long-term debt as “the foundation of modern urban life.” ERIC H. MONKONNEN, *THE LOCAL STATE: PUBLIC MONEY AND AMERICAN CITIES* 1 (1995).

¹⁸ ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, *MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE* xviii, 10-11 (1992).

¹⁹ In the absence of cost-spreading through borrowing, first-generation users will be

Colony/state governments possessed the power to borrow money by virtue of their sovereign status.²⁰ Local governments, on the other hand, could only obtain the power to borrow money through an express grant by statute, charter, or state constitutional provision.²¹ The colonial legislature of Connecticut declined to give local governments the power to issue bills of credit and, during the pre-Revolutionary War era, moved swiftly to punish the one town that dared to engage in unauthorized borrowing.²² Indeed, Connecticut town and city governments did not acquire the ability to enter into anything more than annual debt until the nineteenth century. In 1862, the Connecticut state legislature authorized local governments to clear Civil War-related debts by issuing bonds.²³ In 1870, the legislature extended the power to issue bonds more broadly, giving local governments the right to issue bonds whenever they had “made appropriations or incurred debts, or shall hereafter make appropriations or incur debts exceeding ten thousand dollars.”²⁴

Absence of legal authorization was not the only limitation on local government borrowing. A second barrier was the absence of networks for large-scale public borrowing. It was not until the late eighteenth century that American localities gained access to the institutions necessary to facilitate credit-based public finance: a commercial banking system capable of aggregating small sums of investment capital in the manner of the subscription list; corporations with stocks, bonds, specialized investment bankers; and exchanges to expedite the collection of capital funds.²⁵

Where taxing powers are distributed among different levels of government, subsidies from higher government represent one potential source of funding for public improvements. However higher government grants for early American internal improvements were rare for several reasons. First,

tempted to undersupply capital resources given that they bear the entire cost of these projects but only derive a fraction of the associated benefits. Future users, who receive the benefits of the project without bearing any of the associated financial burden, will have an incentive to overconsume. *See* AMDURSKY & GILLETE, *supra* note 18, at 10.

²⁰ *See* WILLIAM L. RAYMOND, *STATE AND MUNICIPAL BONDS* 199 (1932).

²¹ *See, e.g.*, 15 EUGENE MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 39.07 (3d. ed. 1995).

²² In 1732, the Connecticut legislature dissolved the New London town government as punishment for issuing bills of credit “without the Authority of this Government.” An Act for Repealing the Act, Constituting a Society, by the Name of the New-London Society (1732), *ACTS AND LAWS OF CONNECTICUT 1749*, at 403.

²³ *CONN. GEN. STAT.* tit. 3, § 2 (1866).

²⁴ *CONN. GEN. STAT.* tit. 8, § 17 (1875).

²⁵ MYERS, *supra* note 17, at 41-45, 102-6, 119-26.

higher governments were more likely to give such subsidies when the benefits from a project would be diffuse, as opposed to experienced locally.²⁶ In the largely self-contained communities of seventeenth and eighteenth-century America, few undertakings fit this profile. Second, even when local improvements did seem likely to generate broadly experienced positive externalities, higher governments tended to avoid local fiscal entanglements as a matter of political principle.²⁷

As the foregoing discussion illustrates, early American local governments were relatively limited in their ability to enable desired internal improvement projects. The likelihood of outside assistance depended largely on what private citizens were willing and able to put towards the effort. Meanwhile, prospects for public provision rested largely on the resources that could be mustered through taxation. Public lotteries, like subscriptions and investment devices, offered a way to aggregate monies voluntarily given by numerous contributors. Furthermore, lotteries combined the characteristic advantages of these two alternatives. Like subscriptions, lotteries could be initiated on an adhoc basis. Like investment devices, lotteries could stimulate willingness to contribute through the promise of financial reward.

III. THE PUBLIC FINANCE FUNCTION OF THE PUBLIC LOTTERY

Viewed from a public finance standpoint, lotteries have a number of attractive features. Lotteries represent a way for governments to attract voluntary contributions to public funds and so constitute a superficially appealing alternative to taxation.²⁸ Lotteries are also designed to be self-funding,²⁹ making them more attractive than public borrowing, which is associated with the payment of interest. At the same time, lotteries do have certain limitations as a fiscal instrument. High administrative costs and unpredictable ticket sales render lotteries an unreliable and inefficient generator of income.³⁰ From a distributional standpoint, lotteries are more regressive than conventional alternatives such as income, sales, and excise taxes.³¹ Finally, public lotteries also implicate moral concerns about

²⁶ See DAVID N. HYMAN, *PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY* 663-66 (2002).

²⁷ See LARSON, *supra* note 7, at 42, 51-52, 59-67 (discussing examples).

²⁸ James Alm, Michael McKee, & Mark Skidmore, *Fiscal Pressure, Tax Competition, and the Introduction of State Lotteries*, 46 NAT'L TAX J. 463 (1993).

²⁹ Advertising and operations costs are usually paid for out of lottery revenues.

³⁰ See, e.g., MARY O. BORG ET AL., *THE ECONOMIC CONSEQUENCES OF STATE LOTTERIES* 3 (1991); John L. Mikesell & C. Kurt Zorn, *State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence*, 46 PUB. ADMIN. REV. 311 (1989).

³¹ CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN*

compulsive gambling and the appropriateness of state involvement with a gambling enterprise. The discussion that follows reconstructs the circumstances of six New Haven, Connecticut lotteries undertaken between 1747 and 1792. Focus on New Haven allows this study to draw on the unusually extensive body of contemporary records documenting the law, economy, and public administration of colonial/early republican Connecticut. It also permits engagement with the rich secondary literature on the government of New Haven, which is one of the of the oldest communities in America and the home of Yale University. Taken as a whole, these sources greatly facilitate investigation of why lotteries were selected over other approaches to fundraising, and to what extent these lotteries succeeded in the purposes for which they were instituted.

Lotteries came over to America with the earliest British settlers and, by the first days of the eighteenth century, had become a popular source of public entertainment.³² Nonetheless, support for lotteries was not unanimous. Quakers and Puritans, who disapproved of gambling and public amusements more generally, consistently opposed lotteries on moral grounds.³³ Secular minded critics focused on the detrimental effects that lottery participation had on the lower classes, arguing that public lotteries encouraged the poor to slothfully neglect their work, improvidently spend their scarce income, and loiter in a disorderly way around places where lotteries were held.³⁴ In 1760, concerns about corrupt lottery administration and potential abuses in the colonial licensing process led the British Parliament to require that all public lotteries be approved first by the Crown.³⁵ Because the charter of Connecticut colony did not require it to accept Crown supervision over its internal affairs, the colonial legislature of Connecticut continued to license lotteries at its discretion until the Revolutionary War.³⁶

Like most other early American governments, the government of Connecticut colony initially took a laissez-faire attitude towards private and public lotteries.³⁷ That position changed in 1727 when—moved by the “very

AMERICA, at 100-01, 226-27 (1989) (finding that, of all state excise taxes, only the tax on tobacco “approaches the degree of regressivity of implicit lottery taxation”); *see also* BORG ET AL., *supra* note 30, at 10 (reviewing the findings of several empirical studies); Mikesell & Zorn, *supra* note 30, at 316 & 319 n.8 (same).

³² EZELL, *supra* note 1, at 4-8, 13-17.

³³ *Id.* at 17-18.

³⁴ *Id.* at 20.

³⁵ *Id.*

³⁶ *Id.*

³⁷ The exception was the Quaker-dominated legislature of Pennsylvania, which passed anti-lottery legislation in 1682, 1693, 1700, and 1705 only to have each act nullified by the English Crown. *Id.* at 12-13, 17-19.

great abuse . . . very great disorders, tumults, and mispence of precious time” associated with certain private lotteries—the Governor of Connecticut decided to “strictly forbid all persons within . . . Connecticut” from holding lotteries.³⁸ Violators would forfeit the goods or money to be disposed of through the lottery, with half the value going to whoever informed on them.³⁹ The 1727 statute remained active in the same form until 1773,⁴⁰ when the Connecticut colony legislature amended the regulation to order that no person within Connecticut should buy or sell tickets for any lottery “except such as are, or may be authorized and approved of by the General Assembly of this Colony.”⁴¹ From 1790 onwards, the Connecticut state legislature usually required lottery managers to post a bond as a guarantee of honesty.⁴²

Four projects were funded through lottery in eighteenth century New Haven: construction of a new hall of residence for Yale College (Connecticut Hall), the creation of wharves at Ferry Point and Fleet Street (Long Wharf), and the building of a bridge at Dragon, on the East River (now known as the Quinnipiac). Two of these structures are landmarks of particular note. Connecticut Hall, now the only surviving building from the original Yale campus, at one time housed Nathan Hale (1773), Noah Webster (1778), and Eli Whitney (1792). In 1965, it was designated a National Historic Landmark.⁴³ Long Wharf—the enabler of New Haven’s early commercial success and a symbol of the area’s maritime prosperity—was, during the mid-nineteenth century, the longest wharf in United States.⁴⁴ The Yale and Ferry Point projects sought and received one lottery license each, while the other projects sought and received two lottery licenses each. The discussion that follows reconstructs the progression of these six lotteries.

³⁸ See 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 147 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1873).

³⁹ An Act for Preventing and Suppressing of Lotteries (1728), ACTS AND LAWS OF CONNECTICUT 1749, at 351.

⁴⁰ See, e.g., An Act for Preventing and Suppressing of Lotteries, ACTS AND LAWS OF CONNECTICUT 1750, at 351 (1750).

⁴¹ An Act, in Addition to an Act, Entitled, “An Act for preventing and suppressing of Lotteries” (1773), ACTS AND LAWS OF CONNECTICUT 1773-1783, at 391.

⁴² See, e.g., 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 304, 346, 422 (Leonard Woods Labaree ed., 1948) (requiring bonds of £1000-3000 to ensure proper management of lotteries and payment of all prizes).

⁴³ Judith Ann Schiff, *Nathan Hale Slept Here*, YALE ALUMNI MAG., Dec. 2001, at 104.

⁴⁴ See FLOYD M. SHUMWAY & RICHARD HEGEL, NEW HAVEN: A TOPOGRAPHICAL HISTORY 25 (1988); Thomas Trowbridge, *History of the Long Wharf in New Haven*, 1 PAPERS OF THE NEW HAVEN COLONY HIST. SOC’Y 83, 83-84 (1865).

A. Lottery for Connecticut Hall, Yale College (1747)

Yale had its beginnings in the desire of several prominent New Haven residents for “a Collegiate School wherein youth may be instructed in the arts and sciences” to better fit them “for public employment both in Church and Civil State.”⁴⁵ The seed resources for the college came from individual donations of money and land. However reliance on charity patrons represented an uncertain strategy at best.⁴⁶ Thus, when chartering the college in 1701, the Connecticut colony legislature voted it an annual subvention of £120 in “country pay”: essentially, grain and other foodstuffs.⁴⁷ The legislature refused the College’s request for funds to build a student residence and library in 1714 but did offer some assistance the following year, when there was an opportunity to do so through a means other than taxation.⁴⁸ The legislature also assumed responsibility for repairs to college buildings from 1722 to 1741, authorized grants out of its own resources of £2193 in cash, 1500 acres land, and three years’ income from the colony rum impost.⁴⁹

The outbreak of King George’s War in 1744 severely undercut the ability of town and colony to offer any help to Yale. War brought pressing new expenses associated with protecting the seacoast and New England frontier against the French.⁵⁰ Moreover, the hostilities led to a halting of business and trade at a time when local residents were already being taxed for men and money to the utmost of their ability.⁵¹ By 1760, the colony would be almost bankrupt, having spent close to £400,000 on war-related undertakings.⁵² It was against this backdrop that Yale President Thomas Clap

⁴⁵ Franklin B. Dexter, *Removal of Yale College to New Haven*, 9 PAPERS OF THE NEW HAVEN COLONY HIST. SOC’Y 70, 72 (1918).

⁴⁶ *Id.* at 80, 88.

⁴⁷ BROOKS MATHER KELLEY, *YALE: A HISTORY* 11 (1974).

⁴⁸ The legislature voted to grant the college £500 out of the proceeds from a sale of lands received in settlement of a dispute with Massachusetts. *Id.* at 18.

⁴⁹ See 6 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1872); 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 38, at 279; 8 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1874); 9 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1876).

⁵⁰ EZELL, *supra* note 1, at 32.

⁵¹ Edward E. Atwater, *Annals of the City of New Haven*, in HISTORY OF THE CITY OF NEW HAVEN TO THE PRESENT TIME, in HISTORY OF THE CITY OF NEW HAVEN TO THE PRESENT TIME 81 (Edward E. Atwater ed., New York, W.W. Munsell & Co. 1887); William L. Kingsley, *Yale College*, in HISTORY OF THE CITY OF NEW HAVEN TO THE PRESENT TIME, *supra*, at 168.

⁵² LAWRENCE HENRY GIPSON, *CONNECTICUT TAXATION 1750-1775*, at 20 (CT.

resolved to seek a lottery license from the General Assembly. As Clap stated in a 1747 letter to a College trustee, “we want a new College [building] very much, and the matter now lies before the Assembly, but considering the vast sums of Bills already emitted, it seems not likely that they will emit any more for Such a purpose.”⁵³

Also informing Clap’s decision was the New York legislature’s recent authorization of a lottery for the support of King’s College (later Columbia University). Given that Connecticut residents had just as great a desire for games of chance as did the residents of New York, Clap considered it “probable, considering the Humour of Mankind, that Considerable Sums of Money will go out of this Government to build a college there.”⁵⁴ Hence the opinion of Clap and others that it was “best to take mankind in their own Humour and set up a lottery for building a College here.”⁵⁵

Yale received the first Connecticut lottery license in May of 1747, having petitioned the legislature for permission to raise funds for a new student residence “in such a manner as under the present circumstances of the government may be thought most convenient.”⁵⁶ The legislature set the face value of the Yale lottery drawing at £50,000 Old Tenor.⁵⁷ Eighty-five percent of the yield was to be paid out in prize money. Fifteen percent (£7500) would be set aside.⁵⁸ Out of this sum, £200 would be paid to the directors and managers of the lottery “as a reward for their service in the said affair.”⁵⁹ Whatever was left would “remain in the hands of the aforesaid directors and managers . . . to be disposed of in erecting a college . . . according to such orders as shall be given by [the legislature] from time to time.”⁶⁰ To direct the lottery, the legislature selected three prominent local residents: John Hubbard, Samuel Mix, and Chauncey Whittlesey. Hubbard

Tercentenary Comm’n Comm. on Hist. Publ’ns, No. 9, 1933); Kingsley, *supra* note 51, at 170.

⁵³ Nordell, *Yale Lottery*, *supra* note 6, at 15.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 9 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 49, at 279.

⁵⁷ The term “Old Tenor” describes all paper money issued by Connecticut until 1740, and used until about 1744. The Connecticut colony paper money issued after 1744 was known as “New Tenor.” In 1748, the conversion rate of Old Tenor was about six to one for silver, and eight to one for sterling. See Franklin B. Dexter, *A Selection from the Correspondence and Miscellaneous Papers of Jared Ingersoll*, 9 PAPERS OF THE NEW HAVEN COLONY HIST. SOC’Y 201, 223n (1918)

⁵⁸ 9 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 56, at 279.

⁵⁹ *Id.* at 280.

⁶⁰ *Id.*

and Mix had prior experience with public service and the management of public money, while Whittlesey was closely affiliated with Yale.

By May 1748, the net proceeds of the Yale lottery amounted to £5200 instead of the anticipated £7300. Furthermore, due to inflation of the colony currency, this £5200 O.T. was worth only £775 sterling.⁶¹ Because the amount raised was “not sufficient” to cover the costs of the new building, the President and Fellows of Yale petitioned the Connecticut legislature in 1749 for “a grant . . . to enable them to carry on and finish the said building.”⁶² The legislature responded by giving the college £4000 O.T.⁶³ In the end, the lottery funded between quarter and a third of the total cost of the building.⁶⁴ This shortfall in takings does not appear to have been caused by malpractice or corruption. Certainly, the managers of the Yale lottery continued to occupy positions of civic prominence and public trust within town and colony government. Rather, it seems that despite newspaper advertisements in the *New York Post-Boy* and *The Boston Evening Post*, tickets for the Yale lottery just did not sell as well as expected.⁶⁵

Yale’s experience did not deter other fledgling universities from seeking lottery licenses. Between 1746 and 1856, about forty-seven colleges benefited to some extent from authorized lotteries.⁶⁶ Yale itself never again had recourse to lottery funding, most likely because of the college’s increased access to other types of funding from the late eighteenth century onwards. In 1792, the trustees of the college met with a legislative committee of the

⁶¹ This amounts to 72% of the anticipated Old Tenor amount. According to one scholar of early American lotteries, the collection of 69.2-72% of the anticipated amount represents an outcome that “may fairly be classified as successful, if not spectacularly so.” See Nordell, *Yale Lottery*, *supra* note 6, at 6.

⁶² 9 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 56, at 492-93.

⁶³ *Id.* at 493.

⁶⁴ This includes the £212 18s O.T. that the college earned by loaning out the lottery proceeds while it waited to obtain sufficient funds for the project. Nordell, *Yale Lottery*, *supra* note 6, at 16.

⁶⁵ Nordell, *Yale Lottery*, *supra* note 6, at 16. The Yale lottery was not unusual in this regard. See, e.g., Nordell, *Rutgers lotteries*, *supra* note 6, at 1 (relating the disappointments of the Rutgers lottery to “prevailing economic and social conditions” rather than to “any element peculiar to” Rutgers or its setting); Nordell, *Princeton Lotteries*, *supra* note 6, at 23 (observing that “it was a rare lottery, even among the successful ones, in which all the tickets were sold”).

⁶⁶ Almost all pre-Revolutionary war colleges and many of the colleges founded in the early nineteenth century benefited from lotteries. Among these were William and Mary, Rutgers, Dickinson, St. John’s, the University of North Carolina, the University of Delaware, the University of Maryland, the University of Michigan, and all the Ivy League colleges except Cornell. See Rylchak, *supra* note 3, at 25 n.83.

legislature to discuss the affairs of the college. Pursuant to this discussion, the legislature allowed Yale \$20,000 to build a new hall of residence and establish “a Fund for raising an annual Revenue forever hereafter to be applied to and for the support of necessary Professors . . . for the Benefit of said College.”⁶⁷

B. Ferry Point Wharf Lottery (1754)

The request for a lottery to benefit Ferry Point wharf came from the wharf’s proprietors, who had begun building on the understanding that such a facility “would much advantage the navigation and trade of [the] Colony . . . but thro’ the present unhappy circumstances of trade were unable further to carry on and finish said wharf.”⁶⁸ Their proposed design is of particular interest insofar as it amounted to a substantial interest-free loan rather than an outright grant. Essentially, the proprietors requested a license to raise £600 by lottery but promised to repay the sum to the Colony government in annual installments of £30.⁶⁹

The legislature approved the proprietors’ petition, issuing a license for a public lottery to be “drawn in the usual and proper form of public lotteries” and managed by three local residents.⁷⁰ Of the £660 to be raised by the license, £60 would go to the managers “as a reward for their service in said affair.”⁷¹ The remainder would go to the proprietors of the wharf. In return, the proprietors would be bound to pay back the amount received in installments of £30 per year.⁷²

More so than the lottery for Connecticut Hall, the Ferry Point Wharf lottery proved a disappointment to all involved. By May of 1757, the Ferry Point Wharf lottery had raised only £150, instead of the expected £660; and the proprietors were refusing to accept even this money on the conditions originally laid out. In the end, the legislature cleared the matter by ordering the proceeds of the lottery to be deposited in the colony treasury.⁷³ However no malpractice was alleged and the reputations of the lottery managers did not suffer any long term damage.

⁶⁷ 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 38, at 392-93; 8 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 49, at 403 n.38.

⁶⁸ *Id.* at 295.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 296.

⁷² *Id.*

⁷³ 11 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 50 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1880).

C. Long Wharf Lotteries (1772, 1790)

Long Wharf formally originated in the New Haven town government's successive grants, in 1663 and 1682, of the right to build a docking facility into the flats of the New Haven harbor.⁷⁴ However the actual work of building the wharf did not begin until the 1730s.⁷⁵ From about 1738 to 1753, income from wharfage fees and letting out the wharf provided sufficient funds for Long Wharf's operators to cover the cost of improvements and repairs. But after 1753, dispersion of the original owners and the persistent lack of dividends caused the project to falter.⁷⁶ In 1760, the proprietors of the wharf petitioned the Connecticut colony legislature for relief on the grounds that the wharf was "much gone to decay and wants repairing . . . [but] that the owners being numerous and living remote from one another . . . it is impracticable equitably to rectify and keep in repair said wharf under present circumstances."⁷⁷ The legislature responded by issuing them a charter, under the name of "Union Wharf Company of New Haven."⁷⁸

In 1770, a subscription was held to fund the construction of an eighty-square-foot platform-like pier where ships could unload at high tide.⁷⁹ The recentness of this subscription and general shortage of public and private funds meant that, when the proprietors sought to connect this pier with the wharf just two years later, they found it advisable to consider alternative means of funding the venture.⁸⁰ Thus, in 1772, the proprietors of the wharf—recounting how "inhabitants and others trading to [New Haven] suffer great inconvenience for want of the further extension of the Long Wharf . . . to a certain pier in the harbour"—asked the legislature "for liberty to set up a lottery to effectuate the same."⁸¹ Significantly, they did not specify the amount to be raised or the terms of the proposed arrangement.

The scheme that the legislature established in response to the 1772

⁷⁴ SHUMWAY & HEGEL *supra* note 44, at 16-17; Trowbridge, *supra* note 44, at 87.

⁷⁵ By 1738, Long Wharf extended about four hundred feet into the harbor. See SHUMWAY & HEGEL, *supra* note 44, at 18.

⁷⁶ *Id.* at 91.

⁷⁷ 11 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 73, at 400-01

⁷⁸ *Id.* at 400-01; Simeon Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 450, 456 (1903); Trowbridge, *supra* note 44, at 90-91.

⁷⁹ SHUMWAY & HEGEL, *supra* note 44, at 18; Trowbridge, *supra* note 44, at 91-92.

⁸⁰ 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 240; Trowbridge, *supra* note 44, at 93.

⁸¹ 13 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 622 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1885).

petition had four notable aspects. First, it gave the proprietors of the wharf authorization to hold more than one lottery: that is, “to set up and carry on a lottery or lotteries amounting to such sums as by drawing at least ten per cent. out of each prize or out of the whole may raise a sum of one thousand pounds and no more.”⁸² Second, it amounted neither to a grant nor a loan. The proprietors did not have to pay back the thousand pounds raised. However the legislature did stipulate that “the wharfage [fees] of such part of said wharf as shall be built with said monies so to be raised . . . [would be] appropriated to the use of Yale College,” once the proprietors had covered the costs of necessary maintenance and repairs.⁸³ The third notable aspect of the lottery was its attempt to impose procedural safeguards for the protection of consumers. As the scheme directed, “if the said sum is not raised and the tickets cannot be sold, the managers shall return to the [purchasers] the money paid for the tickets and the charges arisen shall be born by the [wharf proprietors].”⁸⁴ The legislature also required the managers to “give publick notice as soon as may be of the prizes” and to “pay off such prizes on demand.”⁸⁵ Fourth and finally, the legislature named a group of eight men from among whom four lottery directors could be drawn. All but one of the men nominated by the legislature had some record of participation in town and/or colony government, while three were also shareholders of the Union Wharf Company.⁸⁶

The exact yield of the first Long Wharf lottery is not recorded in private or public records.⁸⁷ Rather, the only indication of its outcome comes from the proprietors’ next petition to the legislature, which characterized the proceeds as “small and inadequate to Effect very beneficial Purposes” before proceeding to request a second lottery license.⁸⁸ Given the failure of their first lottery, the proprietors’ request for a second lottery is somewhat surprising. However, as the petition makes clear, the proprietors attributed their earlier disappointment to the contingent factor of the Revolutionary War

⁸² *See id.* at 622 (emphasis added).

⁸³ *Id.* at 623.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Trowbridge, *supra* note 44, at 91-92.

⁸⁷ The editors of the PUBLIC RECORDS OF THE STATE OF CONNECTICUT, citing Trowbridge’s history of Long Wharf, put the yield of the first lottery at £98 2s. However that figure actually represents Trowbridge’s estimate of the yield from the second lottery. *See* 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 240 n.; Trowbridge, *supra* note 44, at 95.

⁸⁸ 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 240.

rather than any structural factors.⁸⁹ The proprietors placed no blame on the lottery managers and none attached.

At the same time, the petition does reveal a telling change in the proprietors' attitude towards lottery funding. Whereas in 1772 the proprietors had requested a lottery license outright, in December 1790 they asked the legislature for "some Assistance . . . Praying for such Assistance by Lottery or otherwise as per Petition on file."⁹⁰ The legislature responded to the proprietors' 1790 petition by authorizing them to raise £3000 by lottery. As under the earlier scheme, some flexibility was allowed in the selection of lottery managers.⁹¹

Despite the best efforts of the managers, which included an unsuccessful petition to sell lottery tickets in the city of New York, the outcome of the 1790 lottery came nowhere near to satisfying initial expectations.⁹² By 1799, only £98 2s had been raised, of which £39 11s went immediately to Drake for "what he had expended on the wharf in repairs."⁹³ Following these disappointments, the proprietors of the wharf moved back to a subscription model, supplementing the donations they received with money raised through a lien on company property.⁹⁴ In 1810, the newer generation of shareholders incorporated themselves as a company under the name of "Contractors to rebuild and support Union Wharf and Pier in New Haven." Thereafter, this company worked together with the original "Union Wharf Company" to maintain and improve Long Wharf, which by 1865 was the longest wharf in the United States.⁹⁵ According to local records, all but one of the 1790 lottery managers continued to hold positions of authority in town government.⁹⁶

D. Dragon Bridge Lotteries (1780, 1792)

In 1762, "Stephen Morris and Sundry other persons" obtained a grant to build a bridge at Dragon Point "at their own Cost and Charge, Provided also they do build the bridge . . . So that the passage of the River be not

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 241.

⁹² Trowbridge, *supra* note 44, at 95.

⁹³ *Id.*

⁹⁴ Between 1802 and 1810, the proprietors raised about \$36,000 through subscription alone. *Id.* at 96-97.

⁹⁵ *Id.* at 97-98.

⁹⁶ Austin ceases to be mentioned in any capacity, suggesting that he may have moved away or died.

obstructed.”⁹⁷ In 1767, the New Haven town government agreed to assume responsibility for the bridge on the condition that Morris and his associates continue to maintain the road that passed over it.⁹⁸ When a flood subsequently destroyed the bridge, the town government resolved to ask the Connecticut colony legislature “for a grant of Such a sum of money (to be raised by lottery or otherwise . . .) as will enable said Town to build a bridge across the East River in said New Haven where the bridge called morrises bridge Lately stood.”⁹⁹ The resulting petition, presented to the legislature in May of 1780, stated that the town of New Haven had maintained a bridge across the East River “for many years at great expense;” that the “bridge is now carried away;” and, finally, that “late misfortunes” had “rendered [the town] unable to build and repair the [bridge] without some assistance from this Assembly.”¹⁰⁰ In response to the town’s petition, the legislature authorized “a lottery or lotteries . . . to raise a sum not exceeding £1000.”¹⁰¹ The legislature left the decision about who should manage the lottery to the discretion of the town.¹⁰²

The town government’s appointed managers began to advertise the lottery in June of 1780 and, by early 1781, had already drawn the first set of tickets. Nevertheless, the lottery ultimately raised only £465, an amount that fell far short of needs as well as expectations.¹⁰³ In addition, since these funds were paid partly in the form of depreciated state currency, the real value of the money obtained was actually closer to £300.¹⁰⁴

Nothing further was done about the bridge until December of 1788, when the town government petitioned the legislature for the right to build or commission a toll bridge on the site.¹⁰⁵ The legislature granted this request in

⁹⁷ 3 NEW HAVEN COLONY HISTORICAL SOCIETY ANCIENT TOWN RECORDS 764 (Zara Jones Powers ed., 1962).

⁹⁸ *Id.* at 796.

⁹⁹ New Haven Town Records 1769-1807, at 117 (unpublished typescript, on file with the New Haven Colony Hist. Soc’y).

¹⁰⁰ 3 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 80-81 (Leonard Woods Labaree ed., 1922).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ New Haven Town Records 1769-1807, *supra* note 99, at 120, 124-25, 228-29.

¹⁰⁴ Edward E. Atwater, *Streets, Avenues, and Bridges*, in HISTORY OF THE CITY OF NEW HAVEN TO THE PRESENT TIME, *supra* note 51, at 340, 350 [hereinafter Atwater, *Streets, Avenues, and Bridges*]; New Haven Town Records 1769-1807, *supra* note 99, at 229-30 (listing payment in “state note,” “Rhode Island bill,” “Massachusetts Do[llar],” and “Continental New Hampshire bill.”).

¹⁰⁵ New Haven Town Records 1769-1807, *supra* note 99, at 192.

January of 1789, pending an assessment of the costs involved.¹⁰⁶ In October of 1789, after a committee appointed by the legislature estimated the cost of the bridge at £1500, the legislature issued a directive authorizing the town of New Haven to operate Dragon Bridge as a toll bridge for ten years, by which time the town would have made back its initial investment “with the interest thereof.”¹⁰⁷ With this grant in hand, the town began its search for a private citizen who would be willing to build and maintain the bridge in exchange for the right to collect tolls.¹⁰⁸ By the end of 1790, it had still not found anyone to do so. Thus, in December of 1790, representatives from the New Haven town government petitioned the legislature to extend the term of the toll grant from ten to twenty years.¹⁰⁹ The legislature approved this petition on the condition “that said Bridge be Built and made passable within two Years.”¹¹⁰

By February of 1791, the town was still debating whether the town should build “the whole or a part of said bridge” at its own expense, or authorize someone to build it in exchange for the right to collect tolls.¹¹¹ One month later, the town entered into a franchise agreement with Henry Daggett, James Prescott, and Thomas Punderson. Under the terms of the contract, the grantees and their heirs received the “[l]iberty, powers, and privileges . . . inabling [New Haven] to Erect and build a bridge across the East River at a place called Dragon,” as well as the right “to enjoy all the Benefits which said Town of New Haven might have enjoyed thereby.”¹¹² In exchange, the grantees promised to complete the bridge in accordance with the town’s specifications by no later than January 1, 1793.¹¹³ Notably, they also had to agree to pay £50 “to be laid out procuring and repairing highways leading to and from said Bridge . . . and also a further sum of fifty pounds at the expiration of ten years from this Date for a like purpose and to be Disposed of in the Same manner.”¹¹⁴

The franchisees had thought that theirs would be the only bridge across the East River. However they soon discovered that the Connecticut legislature had given bridge-building rights to other individuals, rendering the right to levy a toll “useless.”¹¹⁵ In response, they asked the legislature to

¹⁰⁶ 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 26.

¹⁰⁷ *Id.* at 96.

¹⁰⁸ New Haven Town Records 1769-1807, *supra* note 99, at 203.

¹⁰⁹ 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 241.

¹¹⁰ *Id.* at 242.

¹¹¹ New Haven Town Records 1769-1807, *supra* note 99, at 221.

¹¹² *Id.* at 208.

¹¹³ *Id.* at 209-211.

¹¹⁴ *Id.* at 211.

¹¹⁵ 7 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, *supra* note 42, at 420.

compensate them for the expense of building and maintaining the bridge in order that they could maintain it as a free bridge thereafter.¹¹⁶

In May 1792, the Connecticut legislature authorized the Dragon Bridge proprietors to raise £1400 by lottery on condition that they cease charging tolls.¹¹⁷ The proprietors then approached the town government in an attempt to broker a settlement that would absolve them of responsibility for the lottery and the bridge.¹¹⁸ The town declined their invitation, considering it “not . . . advisable” for the town to undertake management of a lottery.¹¹⁹ Instead, the town proposed to discharge the proprietors from their original contract if they would maintain the bridge for three years and then deliver it to the town in good condition, or else deliver the bridge immediately upon completion and pay the town \$150 in lottery tickets.¹²⁰

Town records document that ownership of the bridge was eventually transferred back to the town but do not reveal on what terms and, in particular, what became of the second lottery.¹²¹ Nevertheless, it does appear that subsequent bridge-builders did not consider the lottery an appealing device for funding their projects. When residents of nearby East Haven resolved to build a bridge in 1796, they rejected the lottery option in favor of funding through higher government subsidies and tolls.¹²² Likewise, when Dragon Bridge was washed away in 1806, it was ultimately rebuilt by a group of local inhabitants who had organized themselves as a company and obtained permission to collect tolls until their capital was returned with an interest of 12% per year.¹²³

E. Overview of the New Haven Lotteries

Taken as a whole, the four case studies offer an illuminating view into the types of internal improvement projects that were amenable to private provision through franchise, the role that corporate identity played in the success of franchising arrangements, and the public finance function served by lotteries. The first case study, of Yale’s Connecticut Hall, represents an instance where the improvement concerned promised a non-economic return

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 421.

¹¹⁸ New Haven Town Records 1769-1807, *supra* note 99, at 237.

¹¹⁹ *Id.* at 239.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Atwater, *Streets, Avenues, and Bridges*, *supra* note 104, at 350.

¹²³ 12 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 353 n.23 (Dorothy Ann Lipson ed., 1986); 13 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 383-84 (Dorothy Ann Lipson ed., 1988).

and funding for the overall venture had previously come in the form of direct subsidy from the state government. Here the role of the lottery was to substitute for government grants at a time when background circumstances deprived Yale of outside assistance and the college had not yet fully developed an independent fundraising apparatus.

Ferry Point, Long Wharf, and Dragon Bridge present cases where private franchisees might hope to earn a return on initial investments but faced prospective competition that threatened the value of their franchises. Competitive pressure obliged the proprietors of Ferry Point and Long Wharf to keep their facilities in good condition and deprived the Dragon Bridge proprietors of the chance to recoup their expenses through the imposition of tolls. Franchising appears to have been more successful in the case of the two wharves than in the case of the bridge, a result that may plausibly be explained by the relative risks involved. The repeated destruction of the bridge structure at Dragon Point by floods not only created a serious disincentive to private investment, but occasioned repeated shifts in management from private to public hands. In all three cases, however, lotteries represented a means of maintaining the facility in question when the franchise ran into trouble.

Incorporation provided an alternative means of support for private action. The case study of Long Wharf, in particular, reveals both the advantages and the limitations of the corporate form in this context. The proprietors' first petition for aid was motivated by difficulties in coordinating the different owners of the venture. State legislators initially responded by granting a charter, allowing the partners to aggregate the capital of numerous investors while still continuing to enjoy strong central control over their enterprise.¹²⁴ The proprietors ultimately requested a lottery license because, in the underdeveloped economy of early New Haven, they were unable to raise the capital that they had been legally authorized to solicit. Conversely, the failure of the proprietors of Ferry Point and Dragon Bridge to gain access to the corporate form meant that they could not bring in additional investors without sacrificing control over management of the enterprise. Without this ability, these private actors had no real alternative other than the lottery.

While proceeds fell far short of initial expectations in the four New Haven lotteries with documented outcomes,¹²⁵ the background conditions of the New Haven lotteries do not fit with standard explanations for why public lotteries failed to meet their fundraising aims. The prevailing historical image of lottery administration is one of salesmanship and hucksterism. Lottery managers are portrayed as being at worst corrupt and at best

¹²⁴ HURST, *supra* note 9, at 24.

¹²⁵ Neither state nor local records document the outcome of the first Long Wharf lottery or second Dragon Bridge lottery. See *infra* notes 91, 125, and accompanying text.

primarily motivated by the prospect of personal gain.¹²⁶

Implicit within that characterization is the assumption that managers ultimately did not care about the community or organization for whose benefit the lottery was taking place. In that sense, lotteries are understood to have failed in large part because lottery managers were acting in their own interests rather than in the interests of the lottery's intended beneficiaries. However this model deals only with professional lottery managers and professionally managed lotteries since, to date, no scholar of early American lotteries has investigated the backgrounds of non-professional lottery managers.

All six non-professionally managed New Haven lotteries were run by local residents who were well-embedded within the community. Nineteen out of twenty-seven New Haven lottery managers had previous experience managing public money. Twenty-four had held public office. After the New Haven lotteries had run their course, nineteen out of twenty-seven directors continued to have personal responsibility for public money and twenty-four continued to participate in town and colony government.

In the end, the New Haven lotteries appear to have failed due to lack of demand for the product they were selling, rather than fraud and malpractice in the sale of it. The 1747 lottery for Yale, 1772 lottery for Long Wharf, and 1780 lottery for Dragon Bridge took place at times of general financial hardship, when private individuals would have been purchasing fewer discretionary items like lottery tickets. Oversupply and competition probably also played some role.

In general, the competitive pressures on early American lotteries came less from alternative outlets for gambling than from the rapid proliferation of other public lotteries. During the colonial period, there were few formal gaming establishments outside the French settlements of Mobile and New Orleans. Rather, gambling occurred mainly in coffee-houses, taverns, and private homes.¹²⁷ Colony/state governments responded to the problem of gambling by explicitly proscribing its most common manifestations. The Connecticut legislature had banned gaming activity since before 1702, ordering that "no Taverner, Inn-keeper, Ale-housekeeper, or Victualler shall have or keep in or about their Houses, Out-houses, Yards, Back-sides, Gardens or places to them belonging; any Dice, Cards, Tables, Bowles, Shuffle-board, Billiards, Coytes, Keiles, Loggets, or any other

¹²⁶ See, e.g., CLOTFELTER & COOK, *supra* note 31, at 33-39; EZELL, *supra* note 1, at 205; Rylchak, *supra* note 3, at 37.

¹²⁷ HERBERT ASBURY, *SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA FROM THE COLONIES TO CANFIELD* 126, 155 (1969).

Implements used in Gaming.”¹²⁸ The same statute imposed penalties on individuals who played at any of these games, and heads of household who allowed gaming to be carried out in their homes.¹²⁹ In 1778, the legislature added horseracing to the list of prohibited gaming activities.¹³⁰ Prohibitions on gambling were certainly motivated to some degree by beliefs that gambling posed a threat to public order.¹³¹ However the concern that unauthorized gambling might lessen public demand for lottery tickets was also a significant factor. The revenue-raising capacity of public lotteries could not be maximized unless competition was restricted. Hence authorized lotteries were vigorously promoted while unauthorized lotteries and other games of chance were strictly prohibited.¹³²

Colony/state attempts to prohibit unauthorized gaming were largely successful. Public lotteries became the major outlet for the natural gambling instincts of early America, crowding out gaming houses until the mid-nineteenth century.¹³³ Indeed, the only major competitor to the lottery was a scheme known as “lottery insurance” that, by the late eighteenth century, had become a standard appendage to the public lottery.¹³⁴ What authorities ignored in their calculations, though, were the competitive effects of other public lotteries. The three decades from 1740 to the Revolutionary War saw 19 Connecticut lotteries and 158 overall.¹³⁵ In the fourteen years between 1775 and 1789, there were 12 Connecticut lotteries and 111 overall; and four of these lotteries were behemoths aiming to raise \$200,000 or more.¹³⁶ From

¹²⁸ See An Act Against Gaming, ACTS AND LAWS OF CONNECTICUT 1715, at 45; An Act Against Gaming, ACTS AND LAWS OF CONNECTICUT 1750, at 81; An Act Against Gaming, CONNECTICUT SESSION LAWS 1784-1791, at 348 (altering penalties); An Act Against Gaming, ACTS AND LAWS 1796, at 219.

¹²⁹ See e.g., An Act Against Gaming, ACTS AND LAWS OF CONNECTICUT 1715, at 45.

¹³⁰ Individuals who raced horses would have these horses confiscated. Those who bet on horses would be liable for a stiff fine. See An Act for the preventing of Horse-Racing (1778), CONNECTICUT SESSION LAWS 1773-1783, at 505.

¹³¹ REUVEN BRENNER & GABRIELLE A. BRENNER, GAMBLING AND SPECULATION: A THEORY, A HISTORY, AND A FUTURE OF SOME HUMAN DECISIONS 77 (1990)

¹³² *Id.* at 79.

¹³³ ASBURY, *supra* note 127, 155.

¹³⁴ Lottery insurance was essentially a numbers game whereby players wishing to “insure a number” bet on whether numbers of their selection would appear in the drawing of a designated lottery. See *id.* at 89.

¹³⁵ All but thirty-three of these lotteries were held in New England. Rhode Island alone initiated seventy-five. EZELL, *supra* note 1, at 54-59.

¹³⁶ One was a lottery initiated by Congress to raise \$1,005,000 for troops. The other three were initiated by Massachusetts and aimed to raise a total of \$1,000,000 for military

1790, new lotteries sprung up at an even more rapid rate. Between 1790 and 1860, state legislatures authorized at least 417 lotteries to raise funds for governmental functions and internal improvements.¹³⁷ As a commentator in the *Christian Spectator* declared in 1826, “[t]here is no one passion which is so universally addressed in the United States at present, as is the love of this species of enterprise. It would seem as if our legislators assembled for the set purpose of creating lotteries.”¹³⁸

IV. THE FALL AND RISE OF PUBLIC LOTTERIES

A. *The Fall*

The early nineteenth century saw several complementary developments in the means for funding internal improvements. State legislatures passed the first general incorporation statutes during the 1830s and, by 1859, twenty-five out of the thirty-eight states and territories had passed similar legislation.¹³⁹ These provisions led to a rise in the number of business enterprises capable of investing in and carrying out infrastructure development.¹⁴⁰ Likewise, while few banks had existed before 1780, over 700 new banks—public and private—came into being between 1782 and 1837.¹⁴¹ Over 58 new state banks were chartered between 1801 and 1811, and over 120 state banks between 1811 and 1813 alone.¹⁴² The early nineteenth century also saw the creation of major stock exchanges in New York and Philadelphia, and the rise of savings banks and trust companies that aggregated contributions from individual depositors for investment in instruments such as government and corporate bonds.¹⁴³ Contemporaneous with these developments was the emergence of investment banking firms that specialized in selling securities of canals, railroads, and

needs and infrastructure improvements. *Id.* at 64, 65, 71-2.

¹³⁷ The 287 lotteries for internal improvements aimed to raise £32,486,000. *Id.* at 120, 136.

¹³⁸ Literary and Philosophical Intelligence, *CHRISTIAN SPECTATOR*, June 1826, at 323-24.

¹³⁹ See HURST, *supra* note 9, at 18; See Hamill *supra* note 9, at 101-03.

¹⁴⁰ Richard Sylla, *Experimental Federalism 1789-1914*, in 2 *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 483, 510-11 (Stanley L. Engerman & Robert R. Gallman eds., 2000).

¹⁴¹ See 1 JERRY W. MARKHAM, *A FINANCIAL HISTORY OF THE UNITED STATES* 85-87, 91 (2002).

¹⁴² *Id.* at 127-28. *But see* Hugh Rockoff, *Banking and Finance 1789-1914*, in *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES*, *supra* note 140, at 643, 647 (estimating that the number of state banks grew from 117 in 1811 to 232 in 1816).

¹⁴³ Rockoff, *supra* note 142, at 679. Canals, dock companies, and railroads made up an increasing fraction of listed securities during the 1850s. *Id.* at 676-77, 679.

state governments to European investors.¹⁴⁴ Roughly three-quarters of the eleven million dollars that went into building the Erie Canal was raised from the capital market, much of it through state-backed bonds that were eventually sold to overseas investors.¹⁴⁵ The success of the Erie and Champlain canals, which during their first decade of operation (1826-1835) yielded an annual net gain equivalent to about eight percent of cost, demonstrated to state governments that the tolls paid by canal users could be sufficient to service debts incurred in canal construction.¹⁴⁶ Thus states subsequently undertaking to supply excludible public goods elected to tax little or not at all for such improvements, financing these projects by borrowing from the capital market. Between 1820 and 1841, twenty of the thirty-one states borrowed approximately \$200 million for infrastructure development, much of it from European investors.¹⁴⁷ States acquired an additional non-tax boon in 1837 when the federal government distributed \$28 million in surplus revenue to the states, which used the money to fund education and internal improvements.¹⁴⁸

In the 1840s, as states curtailed their involvement with internal improvements, local governments resumed a position of leadership; albeit now with state authorization to incur large-scale and long-term debt.¹⁴⁹ Capital markets provided much-needed funds to local governments in exchange for municipal bonds backed by local taxes. Cities were particularly active clients of the capital market, using it to finance urban infrastructure development. Local governments borrowed to the tune of \$25 million in 1840, with local debt increasing to \$200 million by 1860 and \$821 million in 1880.¹⁵⁰

It was against this backdrop that the opponents of lotteries gathered their forces for what would prove a successful onslaught. Disquiet about the distributional consequences of lotteries played a significant role in the anti-lottery movement of the mid-nineteenth century. As their familiarity with the lottery business increased, the managers of public and private lotteries learned how to stimulate demand for lottery tickets: in particular, which consumers to target most heavily. Commenting on the effectiveness of a

¹⁴⁴ *Id.* at 681.

¹⁴⁵ Sylla, *supra* note 140, at 520.

¹⁴⁶ Albert Fishlow, *Transportation in the Nineteenth and Early Twentieth Centuries*, in THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, *supra* note 140, at 543, 554.

¹⁴⁷ Sylla, *supra* note 140, at 521.

¹⁴⁸ *Id.* at 522.

¹⁴⁹ *See, e.g.*, CONN. GEN. STAT. tit. 8, § 17 (1875) (giving local governments the right to issue bonds whenever they had “made appropriations or incurred debts, or shall hereafter make appropriations or incur debts exceeding ten thousand dollars.”).

¹⁵⁰ Sylla, *supra* note 140, at 524-526.

special circular advertising the outcome of a lottery in Marblehead Massachusetts, one local resident stated “[t]he effects are already visable, the poorest people are spending their time & interest to purchase Tickets, and already the number of Lotteries are sufficient with their schemes to fill a Gazette.”¹⁵¹ Contemporary writings about lotteries were rife with observations that the burden of lotteries fell most heavily on the “poorer classes . . . because they are least informed of the slender chances of succeeding, and because success has to them its greatest relative importance.”¹⁵² One commentator described lotteries as a “poverty-breeding business,” and characterized lottery patrons as “mostly from the poorer classes.”¹⁵³ Another declared that “[m]any of the adventurers in this sort of enterprise were already fit subjects for the alms-house, and would probably, in spite of their golden expectations, soon to be actual tenants there.”¹⁵⁴

Coupled with these objections were traditional concerns that the lottery might be an evil practice in and of itself. A submission to the March 1828 issue of the *Christian Spectator* named as the consequences of gambling and lotteries “total loss of character, gross licentiousness, poverty, ruin, and even suicide.”¹⁵⁵ Similarly, an 1833 essay on the “history, extent, and pernicious consequences” of lotteries cited many instances where crimes had been committed to obtain money for lottery tickets.¹⁵⁶ Other criticisms focused on “the extravagant hopes and desires for sudden wealth which they [lotteries] create, to the check of industry and ruin of morals;” and the way in which lottery speculation had “withdrawn from useful employment a vast amount of capital and labor.”¹⁵⁷ The issue of how newfound wealth would impact lottery winners was of particular concern. *The Lottery Ticket: An American Tale* (1822) described the fictional decline of “a young, enterprising, and respected farmer” who was seized with lottery fever after winning \$1000 and eventually landed himself in debtors’ prison.¹⁵⁸ Contemporary commentators found great insight in this depiction. One

¹⁵¹ EZELL, *supra* note 1, at 178.

¹⁵² *On the Morality and Public Tendency of Lotteries*, Miscellaneous Communications, CHRISTIAN SPECTATOR, Feb. 1827, at 71, 76.

¹⁵³ Newman Smyth, *Suppression of the Lottery and Other Gambling*, FORUM, Apr. 1895, at 238, 239, 241.

¹⁵⁴ Franklin [sic], *Lotteries*, CHRISTIAN SPECTATOR, Apr. 1826, at 196, 197 [hereinafter, Franklin, *Lotteries*].

¹⁵⁵ *Lotteries*, Back Cover, CHRISTIAN SPECTATOR, Mar. 1828, at 168 [hereinafter, *Lotteries*, Back Cover].

¹⁵⁶ EZELL, *supra* note 1, at 209.

¹⁵⁷ *On the Morality and Public Tendency of Lotteries*, *supra* note 152, at 74.

¹⁵⁸ EZELL, *supra* note 1, at 193.

observer noted that “[I]n a vast majority of cases, from the very nature of the lottery system, the adventurers must be losers. . . [However] in almost every instance the successful purchaser of tickets is ruined by his success.¹⁵⁹ Another lamented that most lottery winners knew nothing about “the proper use of wealth” and were “wholly unprepared” to face “the temptations which abundance brings.”¹⁶⁰

Finally, the lottery abolition movement drew additional support from critics of the corruption and excesses that characterized many nineteenth century lotteries. In 1818, the managers of a New York lottery initiated a libel suit against Charles N. Baldwin, the editor of the *Republican Chronicle*. Baldwin, who had alleged the existence of “swindling in the management” of their lottery, secured a swift acquittal by introducing evidence that fraudulent practices were “not only possible but probable” and in the instant case “a proven fact.”¹⁶¹ The case and its outcome “shook the lottery system to its roots in New York, and by undermining public confidence in the effectiveness of close government regulation and supervision, caused reverberations through the country.”¹⁶² In Massachusetts, the state legislature outlawed lotteries after an 1821 finding that the managers of a lottery for repairing Plymouth beach had sold \$886,439 worth of tickets on a license to raise \$16,000 yet, nine years later, had turned over only \$9876 for the use of the state.¹⁶³ Likewise, the Pennsylvania anti-lottery movement gained in strength following the discovery that brokers and managers of Union Canal Lottery had kept \$41,870 of the lottery proceeds for themselves, paying over only \$18,530 for use of the state.¹⁶⁴ The District of Columbia hosted its last lottery after an 1827 Supreme Court decision making the city liable for \$150,000 in defaulted prizes.¹⁶⁵ In Maine, the governor and legislature ended the state licensing of lotteries after an 1833 affair in which the directors of a lottery attempted to claim \$10,794.34 for expenses, having raised only \$16,126.55 overall.¹⁶⁶ The element of state sponsorship only sharpened these objections. As one critic declared:

When a government derives a profit from the licensing of

¹⁵⁹ *To the Trustees and Directors of those Institutions Which Hold Grants or Charters for Lotteries*, Miscellaneous Communications, CHRISTIAN SPECTATOR, Aug. 1828, at 402, 402.

¹⁶⁰ *On the Morality and Public Tendency of Lotteries*, *supra* note 152, at 77.

¹⁶¹ The court deliberated only fifteen minutes before acquitting Baldwin of all charges. See EZELL, *supra* note 1, at 189.

¹⁶² *Id.* at 187.

¹⁶³ *Id.* at 123; Rylchak, *supra* note 3, at 35.

¹⁶⁴ *Lotteries*, Back Cover, *supra* note 155, at 168.

¹⁶⁵ *Clarke v. City of Washington*, 25 U.S. 40 (1827); EZELL, *supra* note 1, at 194.

¹⁶⁶ EZELL, *supra* note 1, at 212.

lotteries or gambling houses, what does it else but offer a premium to a vice most fatal to domestic happiness and destructive to national prosperity? How disgraceful is it, to see a government, thus acting as the pander of irregular desires, and irritating the fraudulent conduct it punishes in others, by holding out to want and avarice the bait of hollow and deceitful chance.¹⁶⁷

Advertising helped public lotteries of the nineteenth century overcome the type of demand-side problems that dogged the early New Haven lotteries. Yet, by more adeptly exercising their powers of promotion, the state lotteries of the nineteenth century drew renewed attention to the question of whether it was proper for states to raise money through this means. Indeed, early labor groups, recognizing that lottery advertising disproportionately targeted the poor, criticized state-sponsored lottery schemes as a destructive form of taxation.¹⁶⁸

Thus glaring instances of corrupt administration and traditional concerns about the morality of state-sponsored gambling certainly had a role in the eventual abolition of the lottery. However lack of a concerted opposition to the anti-lottery movement also played a part. Earlier opponents of lotteries had faced off against lottery supporters who defended the practice on public finance grounds. The supporters of an 1833 Pennsylvania school-fund lottery successfully countered the objections of lottery abolitionists by pointing out that the proposed legislation did not create a new evil, but rather transformed an existing evil into a vehicle for doing good; and, furthermore, that if the bill failed, the legislature would have to resort to the less popular alternative of taxation.¹⁶⁹ The pro-lottery arguments offered by an unidentified contributor to the March 1811 issue of the *Connecticut Evangelical Magazine and Religious Intelligencer* were in a similar vein. Writing under the pseudonym Priscus, the author concedes the “evil concomitants and consequences” of lotteries but argues that the practice is nevertheless worth preserving. According to Priscus, “[lotteries] have, in one respect, the advantage of all other modes of taxation, in that the tax assumed by individuals is voluntary, and of course, all cause of complaint from them is prevented.”¹⁷⁰ Hence lotteries should be permitted, but only when the following conditions could be met. First, the “object in view of the

¹⁶⁷ Franklin, *Lotteries*, *supra* note 154, at 197.

¹⁶⁸ EZELL, *supra* note 1, at 273.

¹⁶⁹ *Id.* at 218.

¹⁷⁰ Priscus, *On the lawfulness and expediency of lotteries*, in 4 CONN. EVANGELICAL MAG. & RELIGIOUS INTELLIGENCER 99, 101 (1811).

legislature in granting [the lottery], in a given case, must be of pressing importance . . . [that is] of a nature to uphold or advance its permanent interests: such as maintenance of public religion, and of such institutions as are essential in the education of youth; and other similar objects.”¹⁷¹ Second, the object “must not be of frequent occurrence;”¹⁷² otherwise, allowing even one license could establish a precedent that would necessitate the granting of many other requests. Finally, the object should be “permanent and abiding” because only then would the evils of the lottery be “overbalanced by a good, which might prove lasting and general.”¹⁷³ Priscus finds that lotteries are not ideal even under these circumstances. Yet, as he argues, lotteries may be necessary when public sentiment prevents the legislature from funding worthy projects through direct taxation.¹⁷⁴

The mid-nineteenth century emergence of better means for enabling internal improvements struck at the heart of the public finance-based arguments for extending the life of the lottery.¹⁷⁵ And the withdrawal from the debate of reluctant lottery supporters such as Priscus and the Pennsylvania delegation left lottery opponents without any significant opposition. By the beginning of 1894, most states had enacted statutory or constitutional prohibitions against lotteries.¹⁷⁶ Congress followed their lead, in March of 1895 prohibiting transmission of lottery tickets through the mail.¹⁷⁷

B. *The Rise*

In 1964, approximately seventy years after Congress brought an end to American lotteries by prohibiting transmission of lottery tickets through the mail, the New Hampshire legislature approved the first state lottery of the modern era. Following the New Hampshire lottery, lotteries spread across the northeast, midwest, and west. By 1992, thirty-nine states and the District

¹⁷¹ *Id.* at 102.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 104 (“[T]he legislature is justified in granting lotteries for the attainment of objects important to the welfare of church or state, not constantly occurring, and permanent in their effects, when the state of things will not suffer them to have recourse to better means.”).

¹⁷⁵ See *infra* notes 139-150 and accompanying text.

¹⁷⁶ EZELL, *supra* note 1, at 271.

¹⁷⁷ See An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States, 28 Stat. 963 (1895); *Champion v. Ames*, 188 U.S. 321 (1903) (finding the Act constitutional).

of Columbia were using lotteries to benefit the public purse.¹⁷⁸ These modern lotteries were initiated by state governments that could not or would not raise needed revenue through other means, and proliferated as other states rushed to stop the outflow of local money to neighboring states that had lotteries.¹⁷⁹ New Hampshire introduced its lottery as a way to fund local education without recourse to a sales tax, income tax, or rise in the rate of property taxation.¹⁸⁰ New York, the second state to re-introduce the lottery, did so largely in response to the New Hampshire lottery, which depended heavily on players from New York.¹⁸¹ Colorado and California elected to authorize a state lottery when tax limitations restricted their ability to respond to the fiscal pressures of the 1970s and 1980s.¹⁸²

State lotteries of the modern era raise the same basic dilemma that bedeviled the managers of early public lotteries. While modern lotteries tend to be marketed as entertainment, states introduce lotteries not to entertain their residents but to raise funds for public spending. As a consequence, state legislatures inevitably face a number of pressures to maximize revenue from that source.¹⁸³ Advertising offers states a way to increase the participation of existing lottery consumers and attract new players. In the absence of extensive advertising neither the New Hampshire nor the New York lotteries raised as much as initially anticipated: in New Hampshire, lottery proceeds actually declined steadily after 1964.¹⁸⁴ Indeed, the first state lottery to meet fiscal expectations was the 1971 New Jersey lottery, which initiated the practice of marketing the lottery as entertainment and catering to consumer preferences through the offer of lower-priced tickets and more frequent drawings.¹⁸⁵ Yet advertising also implicates concerns about state sponsorship of gambling, particularly from a distributional perspective. First, lotteries tend to be regressive, absorbing a greater share

¹⁷⁸ BORG ET. AL., *supra* note 30, at 2-3.

¹⁷⁹ For a detailed model that outlines the factors determining whether a state will introduce a lottery, see Alm, McKee, & Skidmore, *supra* note 28.

¹⁸⁰ Mikesell & Zorn, *supra* note 30, at 311.

¹⁸¹ BORG ET. AL., *supra* note 30, at 3-4; Alm, McKee, & Skidmore, *supra* note 28, at 467.

¹⁸² Alm, McKee, & Skidmore, *supra* note 28, at 464.

¹⁸³ See, e.g., Massachusetts State Representative Daniel E. Bosley's declaration that "[t]he decision was made 27 years ago to have a lottery in Massachusetts . . . [t]he question now is how best to maximize that decision." Raphael Lewis, *As Lottery Marks Holiday with Ads, Some Critics Object*, BOSTON GLOBE, Dec. 17, 2003, at B.10.

¹⁸⁴ BORG ET. AL., *supra* note 30, at 3.

¹⁸⁵ *Id.*

of income from low-income relative to high income households.¹⁸⁶ Second, lottery marketing tends to target poor communities. Illinois, for example, placed billboards bearing slogans such as “This could be your ticket out” and “How to go from Washington Blvd. to Easy Street—Play the Illinois State Lottery” in the poor and largely black West Side neighborhoods of Chicago.¹⁸⁷ In addition, states have not always held the content of lottery advertising to the highest standards. Few lottery advertisements either note the odds of winning or disclose that large prizes are paid out over time.¹⁸⁸ Furthermore, at least one state has resorted to blatantly false advertising.¹⁸⁹

In that sense, like the first-phase of American public lotteries, the administration of modern state lotteries has described a path from revenue dependence to exploitative behavior to critical backlash. As one critic of the modern lottery has commented, states undoubtedly have a responsibility to undertake a “careful and thoughtful balancing of all [the] economic, political, social, and moral implications” involved with state sponsorship of lotteries; however, given their dependence on lottery revenues, states “cannot be counted on to do this balancing well, or even to do it at all.”¹⁹⁰ Recognition of tendencies to overreach has resulted in some attempts to impose regulation on lottery marketing. Successful examples of informal measures have included a church-organized boycott that secured the removal of offensive billboards put up by the Illinois lottery commission, and a citizen opposition movement that forced the state of Florida to withdraw misleading television

¹⁸⁶ See *infra* note 31.

¹⁸⁷ See CLOTFELTER & COOK, *supra* note 31, at 8; see also Mitchell Zuckoff, *State-run Games Flout Ad Standards*, BOSTON GLOBE, Sept. 27, 1993, at 9 (describing how Massachusetts advertised its lottery through direct mail campaigns to low-income households) [hereinafter Zuckoff, *State-run Games*]; Mitchell Zuckoff & Doug Bailey, *United States Turns to Betting as Budget Fix*, BOSTON GLOBE, Sept. 26, 1993, at 1 (describing how New York plastered the subway with Spanish-language posters declaring “The New York Lottery helped me realize the American dream.”).

¹⁸⁸ Rylchak, *supra* note 3, at 75 (describing how, even when lottery promoters disclose odds, “the print on most tickets is so small as to be almost indecipherable; billboards and signs in stores rarely post odds in legible script; and the disclaimers that follow television advertisements are only briefly listed and then only in fine print.”); Zuckoff, *State-run Games*, *supra* note 187, at 9 (identifying a general pattern of non-disclosure and citing the specific example of two Maryland lottery television ads that were criticized for misleading viewers about odds of winning and staggered payouts).

¹⁸⁹ BORG ET. AL., *supra* note 30, at 6; Letters, *Should Chiles get rid of Rebecca Paul?*, ST. PETERSBURG TIMES, Nov. 30, 1990, at 27A (describing how state lottery manager Rebecca Paul “starred in a misleading lottery ad that falsely implied that the lottery produced a large share of the state’s education budget”).

¹⁹⁰ Mikesell & Zorn, *supra* note 30, at 316.

advertisements.¹⁹¹ Furthermore, at least one state government has imposed controls on the content of lottery advertising. The Connecticut state legislature has called for “[lottery] advertisements in newspapers, magazines, brochures and on posters” or “television and radio advertisements” that devote “thirty seconds or longer for one game” to “include a prominent and clear statement of the average chances of winning per lottery ticket.”¹⁹² It has also ordered the state lottery corporation to “implement a code of standards for all advertisements and other activities intended to promote the purchase of lottery tickets” and stated that “[t]he code of standards shall include the requirement that no advertisement or promotion shall denigrate the character or conduct of non-lottery players or praise the character or conduct of lottery players.”¹⁹³ At the same time, several other states have resisted the call for regulation.¹⁹⁴ In 1987, fears about impact on future lottery sales caused the Maryland legislature to reject a bill that would have required lottery tickets to carry the warning: “Playing the lottery is a form of gambling and can be compulsive.”¹⁹⁵ Similarly, in 1993, Massachusetts Governor William Weld vetoed a legislature-approved initiative to ban the lottery from targeting low-income communities with direct-mail campaigns, and require all advertisements to disclose the actual odds of winning each prize.¹⁹⁶

V. CONCLUSION

The existing historiography of early American public lotteries takes as a given that lotteries were a painless method of revenue-raising, and therefore a preferable alternative to taxation. Moreover, it attributes the fall of the lottery to the strength of a reformist movement that united traditional opponents of state-sponsored gambling with critics of dysfunctional lottery administration. Central to this account is a narrative about the corrupt

¹⁹¹ CLOTFELTER & COOK, *supra* note 31, at 222.

¹⁹² CONN.GEN. STAT. ANN. § 12-814 (2000).

¹⁹³ *Id.*

¹⁹⁴ State lottery advertising agencies are not subject to the National Advertising Division of the Council of Better Business Bureaus (the self-regulatory agency of the advertising industry) or the Federal Trade Commission, which monitors the advertisements put out by privately run games and contests. Furthermore, Congress has exempted state lotteries from most laws that regulate marketing. *See* Zuckoff, *State-run Games*, *supra* note 187, at 9.

¹⁹⁵ Robert Sullivan, *Wager Warning*, SPORTS ILLUSTRATED, May 4, 1987, at 18 (pointing out that lotteries had raised \$718.3 million in 1986 and that it was “doubtful that the legislature [would] do anything to jeopardize this money-making machine.”); *see also* BORG ET. AL., *supra* note 30, at 6.

¹⁹⁶ Zuckoff, *State-run Games*, *supra* note 187, at 9.

practices of professional lottery managers who, in their attempts to maximize the revenue potential of the lottery—and line their own pockets in the process—provoked a backlash from a public outraged at the excesses and corruption of nineteenth century lotteries.

This Article set out to refine existing historical understandings. Through close study of six New Haven lotteries, it has established that lotteries were not always preferred to other approaches to fundraising. In New Haven, local governments looked to lotteries not as an easy first-choice option but as a fall-back to be deployed when alternative means of public finance were unavailable. The Article has also shown that the inability of lotteries to meet public finance objectives was not invariably a function of corrupt management. The individuals overseeing the New Haven lotteries were deeply embedded in community governance and the management of public finances. Moreover, in every case with a documented outcome, shortfalls in takings seem to have arisen through lack of demand for lottery tickets rather than fraudulent administration.

Ultimately, the Article has sought to demonstrate that the rise and fall of early American public lotteries cannot be understood without attention to the evolving capacities of local government: in particular, local government capacities to enable internal improvements. In New Haven, the turn away from lotteries was motivated not by distaste for corruption and state-sponsored gambling but by the failure of lotteries to adequately serve the objectives of public finance. Study of the public finance backdrop to the anti-lottery movement of the nineteenth century likewise reveals the critical role of fiscal considerations. By the later nineteenth century, the development of networks for large-scale public borrowing, along with changes in local government powers to enter into debt, meant that local governments no longer needed lotteries to finance public works. As a result, the public lottery lacked an underlying justification to sustain it against opposition.

Overview of the issues implicated in the administration of modern state lotteries suggests that modern lotteries have fallen into a similar pattern of revenue maximization leading to overreaching and a critical backlash. However, in this case, critics have failed to impose any onerous conditions on lottery administration, let alone to challenge the basic legitimacy of state lotteries themselves. On that basis, a second era of lottery prohibition does not seem likely to occur in the foreseeable future. For a start, the three main conditions leading to abolition of lotteries during the nineteenth century do not apply today. The opponents of gambling are not as strong. Instances of outright corruption, as opposed to overreaching, are rarer. Finally, and perhaps most importantly, modern state lotteries have proved themselves

capable of generating enough income to relieve pressure on the fiscal system.¹⁹⁷ In the words of Massachusetts state legislator Timothy Cahill, “[f]or better or worse, we've got the lottery, but the better part is it pays for firemen, and fills potholes.”¹⁹⁸

¹⁹⁷ In 1984, net revenue from state lotteries averaged 1.95% of state general revenue; and over 3% of state general revenue in Illinois, Maryland, New Jersey, and Pennsylvania. See Mikesell & Zorn, *supra* note 30, at 313 & tbl.2; see also BORG ET. AL., *supra* note 30, at 9-10 and 126n.13 (describing how, during the fiscal crises of the 1980s, lotteries allowed states to take “a temporary breather before . . . mak[ing] the touch decisions of either raising taxes or cutting services”).

¹⁹⁸ Raphael Lewis, *As Lottery Marks Holiday with Ads, Some Critics Object*, BOSTON GLOBE, Dec. 17, 2003, at B.10; see also Lucy Morgan, *Chiles takes aim at lottery*, ST. PETERSBURG TIMES, Apr. 27, 1990, at 1B (quoting Florida Governor Bob Martinez’s campaign manager as saying that “lottery revenues have saved the state's education budget from facing cuts in recent years.”).