



ALBANY LAW SCHOOL

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# Gambling and Good Government:

A Program Celebrating the 30<sup>th</sup>  
Anniversary of the Warren M.  
Anderson Series

October 20, 2022

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**Gambling and Good Government**  
**A Program Celebrating the 30<sup>th</sup> Anniversary of the**  
**Warren M. Anderson Series**

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**Agenda**

4:00pm – 4:30pm	Registration
4:30pm – 5:30pm	Introduction History of New York Gambling Gambling and Corruption in New York Overall Political Corruption in NY Possible Remedies Conclusion
5:30pm	Reception – East Foyer, 1 <sup>st</sup> Floor

# **Gambling and Good Government: A Program Celebrating the 30th Anniversary of the Warren M. Anderson Series**

**October 20, 2022**

## **Speaker Biography**

**BENNETT LIEBMAN** is a Government Lawyer in Residence with the Government Law Center at Albany Law School and an adjunct professor of law.

He worked for Mario Cuomo while Cuomo was Secretary of State and served as his Counsel when he was Lieutenant Governor. When Cuomo was elected Governor in 1982, Bennett became his Special Deputy Counsel handling ethics matters, Freedom of Information Law questions, and many other issues. Bennett served as a member of the New York State Racing and Wagering Board for more than a decade beginning in 1988, including a term as its Acting Co-Chair. He concluded his government service in 2014 after three years as Deputy Secretary to the Governor for Gaming and Racing.

## **About the Warren M. Anderson Series**

The Warren M. Anderson Series, held annually since 1992, features experts who address major legal and policy issues pending before New York State government. The series is named in honor of **WARREN M. ANDERSON '40**, a distinguished alumnus of Albany Law School. He served in the New York State Senate for 36 years working with six governors. He was the longest-serving majority leader of the Senate, holding that position from 1973 to 1988. He was best known for working to bail out New York City from its fiscal crisis in the mid-1970s. He also was responsible for establishing the state's Tuition Assistance Program which helped fund the education of thousands of New York college students.



# ALBANY LAW SCHOOL

## GOVERNMENT LAW CENTER

### EXPLAINER

## ***White v. Cuomo*: What Comes Next After Daily Fantasy Sports Gambling in New York?**

by Bennett Liebman\*

September 15, 2022

### **Introduction**

On March 12, 2022, the New York Court of Appeals, in the case of *White v. Cuomo*,<sup>1</sup> upheld the validity of a 2016 law authorizing daily fantasy sports (DFS) gambling in New York State by a four-to-three vote.<sup>2</sup> (DFS is formally known in New York as “interactive fantasy sports.”[IFS])<sup>3</sup> Daily fantasy sports are contests in which the players “assemble a roster of athletes in a given sport and use the actual aggregated performance statistics of those athletes to determine the contest’s winner.”<sup>4</sup>

The DFS market has largely been captured by two companies: DraftKings and FanDuel. DraftKings has explained the workings of DFS in its filings submitted to the U.S. Securities and Exchange Commission (SEC). It has stated, “Since our launch, we have monetized our DFS offering by facilitating peer-to-peer play, whereby users compete against each other for prize money. We provide users with technology that establishes DFS contests, scores the contests, distributes the prizes and performs other administrative activities to enable the ‘skin-in-the-game’ sports fan experience. Our revenue is the difference between the entry fees collected and the amounts paid out to users as prizes and customer incentives in a period.”<sup>5</sup>

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\* Bennett Liebman is a Government Lawyer in Residence with the Government Law Center at Albany Law School and an adjunct professor of law. This explainer has been issued with the permission of the Gaming Law Review. [An edited version of this explainer has been published online by the Gaming Law Review.](#)

<sup>1</sup> *White v. Cuomo*, 2022 NY Slip Op 01954 (N.Y. Mar. 22, 2022).

<sup>2</sup> 2016 N.Y. Laws 237.

<sup>3</sup> See Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter PML), art. 14, §§ 1400 and 1401.8.

<sup>4</sup> *White v. Cuomo*, *supra* note 1. Fantasy sports have similarly been termed “contests where persons compete for cash or prizes based on a scoring system that takes into account the accumulated statistics of professional athletes chosen as part of a fantasy team.” Anthony N. Cabot and Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195 (2007).

<sup>5</sup> DraftKings Inc., *Annual Report for the Fiscal Year Ended Dec. 31, 2021*, U.S. Securities and Exchange Commission (SEC) Form 10-K (Feb. 18, 2022).

## The Rationale of the Majority Decision

In the majority opinion, authored by Chief Judge Janet DiFiore, the Court attempted to navigate the morass of gambling laws and the New York State Constitution. The Court concluded that, to escape the reach of New York's traditional 1894 constitutional ban on gambling,<sup>6</sup> the skill elements in a contest must predominate over the elements of chance. In other words, contests must rely more on participants' skills than chance. Based significantly on the findings of the State legislature in the 2016 legislation authorizing DFS as a skill game,<sup>7</sup> the majority determined that the skill elements predominated over the chance elements. The Court further opined that "the historic prohibition on 'gambling' in Article I, section 9 does not encompass skill-based competitions in which participants who exercise substantial influence over the outcome of the contest are awarded predetermined fixed prizes by a neutral operator."<sup>8</sup> It similarly stated that "Article 14 [of the State Constitution] permits only IFS contests that have prizes that are predetermined, announced prior to the start of the contest, awarded by a neutral operator, and which do not change based upon the number of participants or the amount of entry fees collected."<sup>9</sup>

Courts' decisions on what constitutes gambling in various states have had seemingly endless unintended consequences. Any decision attempting to establish a bright line rule on what constitutes permissible quasi-gambling is likely to be subject to numerous legal, logical, and ironical questions.<sup>10</sup> That is evident in New York State, whose constitutional provision has been debated with little resolution for over 125 years.<sup>11</sup> The New York gambling legal world has more slippery slopes than there are ski resorts in the Rocky Mountains.

The gist of this explainer is not to critique the *White* decision. That critique has been made in Judge Rowan Wilson's dissenting opinion. Any criticism of a decision finding that a specific competition does not constitute gambling is analogous to shooting fish in a barrel—an idiom that, in itself, could give rise to a legitimate game of skill.<sup>12</sup>

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<sup>6</sup> See N.Y. Const., art. 1, § 9.

<sup>7</sup> 2016 N.Y. Laws 237; *supra* note 2. "Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants..." PML, art. 14, § 1400.1(a).

<sup>8</sup> *White v. Cuomo*, *supra* note 1.

<sup>9</sup> *Id.* A neutral operator requirement should mean that the game is not played between the player and the bank/operator. Generally, house-banked games such as blackjack, craps, roulette, and baccarat would not meet the neutral operator requirement, unless the prize is predetermined.

<sup>10</sup> For example, it is surprising to see the Court of Appeals citing with approval the decision of that Court in *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1 (1897), which was regularly criticized by then New York Governor Charles Evans Hughes, who became the Chief Justice of the United States Supreme Court. See *Breed Honest Men, Says the Governor*, N.Y. TRIB. (Feb. 3, 1908).

<sup>11</sup> N.Y. Const., art. 1, § 9, *supra* note 6.

<sup>12</sup> "Fishing contests" and "fishing derbies" have been defined by state legislatures in such a way as not to be considered gambling. See Mo. Rev. Stat. § 311.211 (2009). For example, Wash. Rev. Code § 9.46.010 (1994) states, "The legislature further declares that fishing derbies shall not constitute any form of gambling and shall not be considered as a lottery, a raffle, or an amusement game and shall not be subject to the provisions of this chapter or any rules and regulations adopted hereunder."

## Low-Stakes Financial Consequences of *White v. Cuomo*

From a financial viewpoint, the *White* decision is arguably of limited significance. Legally, even if daily fantasy sports gambling had been considered illegal sports gambling, it still would have qualified as a game fitting clearly within the state's definition of mobile sports gambling, and DFS wagers would have been permissible proposition wagers. Thus, had there been an unfavorable judicial outcome in *White*, daily fantasy sports contests would have become legal sports gambling contests and would have continued under Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law (PML).<sup>13</sup>

An end to daily fantasy sports contests would have also had minimal effect on the state's fiscal condition. The 15% gross revenue tax<sup>14</sup> imposed on DFS earnings attributed to New York raised \$5 million in 2018 and \$5.6 million in 2019.<sup>15</sup> In the first 14 full weeks of mobile sports wagering, average weekly revenue to the state was \$13.2 million. In no week was the state's revenue share less than \$6.6 million.<sup>16</sup> Thus, daily fantasy sports gambling has not been a significant source of revenue for New York State.

Similarly, the lack of daily fantasy sports in New York would not significantly impact the revenue of the two major DFS companies—DraftKings and FanDuel—which control the DFS market.<sup>17</sup> Gross revenue from DFS in New York totaled \$33 million in 2018 and \$37.5 million in 2019. By comparison, based on the early 2022 results, gross annual revenue from New York mobile sports gambling may exceed \$1.25 billion this year.

While New York State's revenue from daily fantasy sports gambling may appear insignificant, DFS serves as an entry level gateway into the sports wagering market. In 2019, the New York State Gaming Commission reported 1,572,534 authorized player accounts in the state.<sup>18</sup> As DraftKings has stated, “We established a following among ‘skin-in-the-game’ sports fans through our robust daily fantasy sports technology that now powers millions of contest entries in peer-to-

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<sup>13</sup> See PML §§ 1367 and 1376-a.

<sup>14</sup> PML § 1407.

<sup>15</sup> See New York State Gaming Commission, *Interactive Fantasy Sports Report for Calendar Year 2018*, <https://www.gaming.ny.gov/about/2018ap.php> (last viewed May 9, 2022); New York State Gaming Commission, *Interactive Fantasy Sports Report for Calendar Year 2019*, <https://www.gaming.ny.gov/about/2019ap.php> (last viewed May 9, 2022).

<sup>16</sup> See generally New York State Gaming Commission, *Mobile Sports Wagering Reports*, <https://www.gaming.ny.gov/gaming> (last viewed May 9, 2022).

<sup>17</sup> In 2017, the “two accounted for about 90 percent of the \$320 million in revenue generated by fantasy sports, according to research firm Eilers & Krejcik Gaming.” Eben Novy-Williams and Ira Boudway, *Gambling Laws Created Daily Fantasy Sports. Now It Could Cripple Them*, BLOOMBERG (Jan. 17, 2018), <https://www.bloomberg.com/news/articles/2018-01-17/spread-of-legal-sports-betting-could-upend-daily-fantasy-sports#xj4y7vzkg>. See also Scott Soshnick and Mason Levinson, *MSG Signs Marketing Partnership with Fantasy Site DraftKings*, BLOOMBERG (June 4, 2015), <https://www.bloomberg.com/news/articles/2015-06-04/madison-square-garden-inks-marketing-partnership-with-draftkings#xj4y7vzkg>. “FanDuel controls 63 percent of the market and DraftKings 33 percent, Eilers estimated last October, using reported revenues.”

<sup>18</sup> New York State Gaming Commission, *Interactive Fantasy Sports Report for Calendar Year 2019*, *supra* note 15.

peer competitions every week.”<sup>19</sup> The company has tried to parlay its brand as a well-known daily fantasy sports platform into being the go-to online sports betting venue.<sup>20</sup> FanDuel has followed a similar approach. Both companies apparently have been successful in reaching New York sports bettors. By the end of April 2022, the two firms accounted for two-thirds of the sports wagering handle in New York.<sup>21</sup> Their competition, consisting of six major gambling companies, combined to handle only one-third of the sports wagers.

## Low-Stakes Legal Consequences of *White v. Cuomo*

In a legal sense, the *White* decision will cause little change in the current operation of quasi-gambling contests in New York. The New York Penal Law establishes a lower limit than the State Constitution does for what constitutes gambling.<sup>22</sup> Under the Penal Law, an activity is defined as an illegal game of chance when “the outcome depends in a material degree upon an element of chance.”<sup>23</sup> Thus, the Constitutional definition of gambling does not govern the Penal Law definition of gambling. An activity in which skill dominates over chance (the Constitutional definition) can still be an activity that depends in a material degree on luck, and, therefore, would constitute a crime in New York.<sup>24</sup> In short, even if a contest passes the Constitutional test, it still may be considered gambling under the Penal Law test.

An individual or entity seeking to have a quasi-gambling contest legalized in New York would generally need a statutory enactment specifically proclaiming that the Penal Law definition of gambling does not apply to that particular activity.<sup>25</sup> Thus, without the enactment of a statute that assures that a quasi-gambling activity will be exempt from the Penal Law, it is unlikely that new commercial activities lacking such specific protection from the legislature will enter New York to take advantage of the decision in *White v. Cuomo*.

<sup>19</sup> DraftKings Inc., *Annual Report for the Fiscal Year Ended Dec. 31, 2021*, *supra* note 5.

<sup>20</sup> Jake Lerch, *Is DraftKings Stock a Buy Now?* THE MOTLEY FOOL (Mar. 30, 2022), <https://www.fool.com/investing/2022/03/30/is-draftkings-stock-a-buy-now>.

<sup>21</sup> New York State Gaming Commission, *Mobile Sports Wagering Reports*, *supra* note 16. *See also* Mike Mazzeo, *The Fourth Is with Them: NY Online Sportsbooks Exceed \$1 Billion Handle for Fourth Straight Month*, PLAYNY (Apr. 29, 2022), <https://www.playny.com/fourth-billion-dollar-month-ny-online-sports-betting> (last viewed May 1, 2022).

<sup>22</sup> N.Y. Penal Law § 225.00(1).

<sup>23</sup> *Id.*

<sup>24</sup> Consider games like bridge, blackjack and backgammon. *See Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*, 188 N.J. Super 372 (N.J. Super. Ct. 1982), finding backgammon to be a game of chance.

<sup>25</sup> *See* Daniel Wallach, *NY High Court Ruling That DFS Players Are “Actual Contestants” Boosts Hopes for Other Skill Games*, CONDUCT DETRIMENTAL (Apr. 15, 2022), <https://www.conductdetrimental.com/post/ny-high-court-ruling-that-dfs-players-are-the-actual-contestants-boosts-hopes-for-other-skill-games> (last viewed May 3, 2022). Consideration should also probably be given to Article 5, title 4 of the General Obligations Law, finding gambling contracts to be illegal and void. *See* N.Y. Gen. Oblig. Law, §§ 5-401 and 5-411.

## What Types of Contests Will Arguably Be Constitutional Under *White v. Cuomo*?

### Actual Skill Contests

Rather than handicapping tournaments—contests in which individuals make a subjective assessment of the merits of the actual contestants in an event—actual skill contests are contests in which participants who pay entry fees/wagers directly compete against each other in an activity where skill clearly predominates over chance. These would include chess, checkers, marbles, turkey shoots,<sup>26</sup> the aforementioned fishing derbies and contests, trivia contests, darts, crossword puzzle contests, and a variety of golf contests, including lowest score, who hit the longest drive, and who hit the approach shot closet to the pin.<sup>27</sup>

The difficulty in assessing the constitutionality of such contests stems from the majority's use of the language regarding a predetermined prize irrespective of the number of contestants, and the need for a neutral operator of the contest. In the late 19th century, heavyweight boxing champion John L. Sullivan barnstormed across the nation challenging individuals to see if they could last several rounds in the ring with him. The challenger might pay an entry fee and would receive a prize if they weren't knocked out by Sullivan. The prize might depend on the number of people who challenged Sullivan, and Sullivan's people would control the pools. This is clearly a contest where skill predominated over luck, but it is not clear whether the fact that there was no preestablished prize and the pools were controlled by Sullivan would affect the validity of the contest under the *White* majority's view of the Constitution.

Similarly, there are contests where a chess grandmaster will play a series of challengers simultaneously.<sup>28</sup> The game is obviously one of skill. There are often entry fees. Yet, the prize may depend on the number of entrants and how many challengers are successful. The grandmaster controls the entry fees. Again, the issue of constitutionality depends on whether the majority's language regarding preestablished prizes and a neutral operator is an adornment or a requirement.<sup>29</sup>

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<sup>26</sup> Shooting games could conceivably include arcade games where the contestant plays against the house. See *The Best Arcade Shooter Games Ever, Ranked*, RANKER (Dec. 28, 2021), <https://www.ranker.com/list/best-arcade-shooting-games-of-all-time/video-games-lists> (last viewed May 5, 2022).

<sup>27</sup> In *Las Vegas Hacienda v. Gibson*, 359 P.2d 85 (Nev. 1961), the Nevada Supreme Court even determined that hole-in-one contests are contests of skill.

<sup>28</sup> See NPR, *A Chess Grandmaster Takes on 30 Opponents in a Simultaneous Exhibition*, ALL THINGS CONSIDERED (Apr. 16, 2022), <https://www.npr.org/2022/04/16/1093212516/a-chess-grandmaster-takes-on-30-opponents-in-a-simultaneous-exhibition>; Leonard Barden, *Chess Grandmaster Plays 48 Games at Once, Blindfolded While Riding Exercise Bike*, THE GUARDIAN (Feb. 10, 2017), <https://www.theguardian.com/sport/2017/feb/10/timor-gareyev-48-chess-games-blindfolded-riding-exercise-bike-leonard-barden>.

<sup>29</sup> Stated differently, would DFS still be legal under the rationale of the *White* majority if the NFL ran DFS or if executives of FanDuel regularly entered the contests? What if the predetermined prize was a percentage of the entry fees, rather than a fixed dollar amount? What if there was a minimum, guaranteed prize? Would these features turn a skill-dominated game into a game of chance?



## Poker Tournaments

This clearly would be the case in tournaments of Texas Hold 'Em and Omaha Poker, where community cards are used in the game. In his dissent in the *White* case, Judge Wilson wrote: "The Attorney General, now defending DraftKings' and FanDuel's operations as constitutional, admits that because poker involves a substantial amount of skill and highly skilled poker players—just like highly skilled IFS players—reap the lion's share of winnings, poker would not constitute 'gambling' under the Constitution, except for the fact that it was thought of as gambling at the time and now we are stuck with that anomaly." This misconstrues the facts. Poker is a genre. It is not one particular game. There are numerous variations of poker. There are even newer versions of poker, such as Pai Gow Poker, Let It Ride, and Caribbean Stud Poker, where—unlike stud and draw variations—the players play against the house.<sup>30</sup> The community card poker games did not exist in 1894. Texas Hold 'Em also did not become commonly known until well into the 20th century.<sup>31</sup> Further, a Hold 'Em poker tournament—in which success would be based on skill,<sup>32</sup> and a player/competitor would pay an entrance fee to a neutral operator, who in turn would have predetermined fixed prizes—would not involve unconstitutional gambling. Instead, as described in the majority's exposition, the gambling ban would not "encompass skill-based competitions in which participants who exercise substantial influence over the outcome of the contest are awarded predetermined fixed prizes by a neutral operator."

## Non-Poker Tournaments

If a tournament involving poker is a game of skill, there are similar tournaments that can be created for other games in which skill arguably predominates over chance. These could include

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<sup>30</sup> See William Norman Thompson, *Gambling in America: An Encyclopedia of History, Issues, and Society*, 295–296 (2001).

<sup>31</sup> See generally Martin Harris, *Poker and Pop Culture: Telling the Story of America's Favorite Card Game* (2019); Christopher Lehmann-Haupt, *Glimpses of the Gambler's Abyss*, N.Y. TIMES (July 16, 1998), <https://timesmachine.nytimes.com/timesmachine/1998/07/16/issue.html>. The *Oxford English Dictionary* lists the first usage of Hold 'Em as 1964. *Hold 'Em*, *Oxford English Dictionary* (3rd ed., Mar. 2006). It lists the first usage of the community poker game known as Omaha poker as 1985. *Omaha*, *OXFORD ENGLISH DICTIONARY* (3rd ed., Mar. 2004).

<sup>32</sup> In a poker tournament involving multiple deals, the presence of chance might be far less likely to predominate over skill.

tournaments for blackjack<sup>33</sup> scrabble, canasta,<sup>34</sup> bridge, video poker,<sup>35</sup> and even mahjong tournaments.<sup>36</sup>

Skill-based tournaments could also include horse-racing handicapping tournaments. The New York State legislature has already provided an authorized manner to run handicapping tournaments for horse racing,<sup>37</sup> and has specifically stated that “a handicapping tournament operated in accordance with the provisions of this section shall be considered a contest of skill and shall not be considered gambling.”<sup>38</sup>

Over the course of many decades, literature has described horse-racing handicapping as a game of skill. There are objective publications from more than a third of a century ago that describe computer-based successful strategies for wagering on horse racing.<sup>39</sup> Much like DFS, there are numerous computer-aided players.<sup>40</sup> At the very least, there is as much skill in a horse-racing handicapping contest as there is in a DFS contest. If a horse-racing handicapping contest is conducted by a neutral player and involves a predetermined prize, it should reasonably be considered an authorized competition under Article 1, section 9 of the New York State Constitution.

Arguably, a tournament on elections also would be permissible. Such a tournament could be established in much the same manner as assembling a lineup in a DFS contest. Theoretically, a competitor would select a lineup of candidates that would compete with a team of candidates assembled by other competitors. As evidenced by the multitude of consultants and political analysts who have built lucrative careers from handicapping elections, picking winners in electoral races is certainly an activity in which skill could dominate over chance.<sup>41</sup> Once it is posited that election handicapping is a skilled activity, it would be possible to structure a contest that mirrors the way that DFS is structured.<sup>42</sup>

<sup>33</sup> See e.g., *Teeing Off for a Cause: Charity Golf, Blackjack Tournament Friday*, OKLAHOMA GROVE SUN (Aug. 22, 2017). Edward Thorp’s 1962 book, *Beat the Dealer*, was an acclaimed best seller that showed people that blackjack could be a game of skill. See Jerry Hicks, *How to Beat the House: Blackjack Guru Wrote the Book*, L.A. TIMES (Aug. 1, 1982).

<sup>34</sup> See Gilbert Millstein, *Mr. Canasta Melds Himself a Fortune*, N.Y. TIMES (April 30, 1950), quoting card expert Oswald Jacoby stating, “The maximum degree of skill that can be displayed in playing canasta is far beyond that offered by contract bridge.”

<sup>35</sup> *US Patent Issued on July 4 for Tournament Video Poker (Nevada Inventor)*, US FED NEWS (July 5, 2017).

<sup>36</sup> Sharon Weatherhead, *Mah Jong Tournament a Solid Success*, SEBRING HIGHLANDS JOURNAL (August 3, 2017).

<sup>37</sup> PML § 906.

<sup>38</sup> PML § 906.3.

<sup>39</sup> See William L. Quirin, *Winning at the Races: Computer Discoveries in Thoroughbred Handicapping* (1979); William T. Ziemba and Donald B. Hausch, *Betting at the Racetrack* (1985).

<sup>40</sup> See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES MAGAZINE (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html>.

<sup>41</sup> See, for example, commentator Steve Kornacki, who makes both horse racing and election selections at NBC.

<sup>42</sup> For the numerous types of DFS contests, see DraftKings, *How to Play Daily Fantasy Sports*, DRAFTKINGS, <https://www.draftkings.com/how-to-play> (last viewed May 7, 2022).

## Football Parlay Cards

Forty to fifty years ago, almost every large American office was overrun in the fall by the presence of football parlay cards.<sup>43</sup> A participant paid an entry fee and selected a number of National Football League (NFL) teams to win against the point spread. There were fixed payouts depending on the number of games the participant selected. The pools were run by illegal gambling crews, but they were agnostic about the outcome of the individual games. The ability of the participants to select winners can be analogized to the level of skill involved in selecting successful DFS teams, as knowledgeable bettors should hold an advantage over players with limited knowledge. Under *White*, football parlay cards could potentially pass constitutional muster in New York.

## Exchange Wagering

Pioneered by the U.K. firm Betfair,<sup>44</sup> exchange wagering is a form of betting in which a betting exchange marketplace “electronically pits one bettor against another who expects the opposite result at the agreed-upon odds — usually on whether a particular horse will win a race.”<sup>45</sup> The players compete against each other on the outcome of a particular contest. In New Jersey, exchange wagering has been defined in the context of horse racing as a form of wagering “in which two or more persons place identically opposing wagers in a given market.”<sup>46</sup> In short, in exchange wagering, one person can place an offer to bet on Secretariat in the Kentucky Derby at odds of two-to-one, and one person can agree to match the bet and pay the first player two-to-one odds if Secretariat should win the Derby.<sup>47</sup>

As conducted in this manner, exchange wagering is little different from the head-to-heads bet featured in DFS.<sup>48</sup> The competitors play directly against each other. The winner takes it all. The operator running the contest is neutral and takes a small share out of every entry fee/wager. The prize is predetermined before the race or before the sporting contest commences. If the handicapping ability and wagering tactics of the player dominate the chance outcome of the contest, then this activity bears significant similarity to DFS.

## E-sports

The emerging field of e-sports is certainly ripe for a determination of what may constitute quasi-gambling. E-sports has been defined as “competition involving video games, including first-person shooters, real-time strategy games, and multiplayer online battle arenas in which: (1)

<sup>43</sup> In 2021, the casinos in Nevada still won \$12.28 million from parlay cards. Nevada Gaming Control Board, *Monthly Revenue Report: December 2021*, 4. (Jan. 2022), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=18396>.

<sup>44</sup> Betfair is now owned by Flutter, which also owns FanDuel.

<sup>45</sup> John Brennan, *If It's Legal, Tracks May Be Safe*, BERGEN RECORD (Oct. 29, 2010). *See also* In USA, *Exchange Wagering Seen as Savior for Racetracks*, Sporting Post (Oct. 29, 2010), <https://www.sportingpost.co.za/horse-racing/sports-betting/usa-exchange-wagering>.

<sup>46</sup> N.J. Rev. Stat. § 5:5-170 (2021).

<sup>47</sup> Many of the terms involving Betfair and betting exchanges are explained at *Easy Explainers: Your Guide to the Betfair Exchange*, BETFAIR EXCHANGE, <https://betting.betfair.com/how-to-use-betfair-exchange/beginner-guides/exchange-explainers-310120-6.html> (last viewed May 6, 2022). It should also be noted that Betfair takes wagers on all other sports, not merely on horse racing.

<sup>48</sup> *How It Works*, FANDUEL, <https://www.fanduel.com/how-it-works> (last viewed May 6, 2022).

players compete against each other; and (2) the dominant element determining the results is the relative skill of the players.”<sup>49</sup> In Connecticut, they are considered “electronic sports and competitive video games played as a game of skill.”<sup>50</sup> In the past decade, e-sports have amassed an enormous audience. In 2019, Arizton Advisory & Intelligence reported that the total e-sports occasional viewership had reached over 450 million, and the number of e-sports enthusiasts worldwide had exceeded 20 million.<sup>51</sup> That audience, whether through a fantasy format, exchange wagering,<sup>52</sup> or direct wagers,<sup>53</sup> would place bets/entry fees on the participants or their teams. Again, the handicapping abilities of the audience might lead to a conclusion that the game is dominated by skill, and it would be relatively easy to structure the competition in such a way that the prizes are predetermined and the entity running the competition is a neutral player.

## Conclusion

The decision in *White v. Cuomo* may not have significant fiscal consequences for the State or for the companies that run DFS contests. Given the need for the legislature to find a way to work around the lower definitional threshold for the term “gambling” in the Penal Law, there may be no immediate quasi-gambling operations that will be approved in New York. Nonetheless, in years to come, as more quasi-gambling contests seek legislative authorization in New York, the decision in *White v. Cuomo* will be of great significance. We will learn in future years whether that decision, with its slippery slopes, establishes a clear bright line or a murky fine line.

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<sup>49</sup> Md. Crim. Law. § 12-114

<sup>50</sup> Conn. Gen. Stat. § 12-850 (8). See also Ind. Code 4-38-2-7; Tenn. Code Ann. § 4-49-102; Wash. Rev. Code § 9.46.038 (2020).

<sup>51</sup> Press Release, *Online Betting Helps Support eSport's Burgeoning Reputation*, BLOOMBERG (June 5, 2020), <https://www.bloomberg.com/press-releases/2020-06-25/online-betting-helps-support-esport-s-burgeoning-reputation>. See generally EBET INC., <https://ebet.gg> (last viewed May 7, 2022).

<sup>52</sup> As stated previously, exchange wagering can be analogized to fantasy wagering. See *supra* note 47.

<sup>53</sup> Direct e-sports wagers on players and teams potentially could be constructed in New York as part of mobile sports wagering.

# **“What Are You Going to Do About It?”**

## **Ethics and Corruption Issues in the New York State Constitution**

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*Cover image: “The Prevailing Candidate, or the Election carried by Bribery and the Devil,” attributed to William Hogarth, circa 1722. It depicts a candidate for office (with a devil hovering above him) slipping a purse into a voter’s pocket, while the voter’s wife, standing in the doorway, listens to a clergyman who assures her that bribery is no sin. Two boys point to the transaction, condemning it. Image courtesy of the [N.Y. Public Library](#). Explanation of the image is drawn from the Yale Library; see <http://images.library.yale.edu/walpoleweb/oneitem.asp?imageId=wlpr22449>.*

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## I. INTRODUCTION

Ethics and corruption have been perpetually perplexing issues in the governance of New York State.<sup>1</sup> The words of one of the most infamous political scoundrels, William Magear “Boss” Tweed, still echo today. Tweed said before his death, “The fact is New York politics were always dishonest – long before my time.”<sup>2</sup> The saying often attributed to Tweed, “Well, what are you going to do about it?”<sup>3</sup> is the question that has perpetually faced policymakers in New York.

Currently, many prominent reformers believe that the answer to “What are you going to do about it?” lies in amending the New York State Constitution to help resolve New York’s ethical crisis. These reform initiatives come in 2017, a year where the voters in New York will vote on whether there should be a constitutional convention.<sup>4</sup> They come after years which have seen the convictions of numerous former leaders of the State legislature, including Assembly Speaker Sheldon Silver, and Senate leaders Dean Skelos, Malcolm Smith, Pedro Espada Jr.,

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<sup>1</sup> This paper focuses on non-judicial public officers and employees. While ethics can be defined broadly to include most every aspect of government action, the scope of this paper will be on the topics considered by the American Law Institute in its tentative draft on the “Principles of the Law, Government Ethics.” The core topics would be gifts and private benefits provided to public servants, conflicts of interest and outside activities of public servants, election-related activities of public servants, past-government employment restrictions on public servants, lobbying, and the administration and enforcement of government ethics laws. It was uncertain as to whether the lobbying would also be included as a core topic. American Law Institute, “Principles of the Law, Government Ethics, Tentative Draft No. 1” at xv (Apr. 24, 2015). See also Am. Law Institute Annual Proceedings, 2015 A.L.I. PROCEEDINGS 112 (May 19, 2015).

<sup>2</sup> Pete Hamill, “Boss Tweed: The Fellowship of the Ring,” N.Y Times, Mar. 27, 2005. Tweed, per the Encyclopaedia Britannica, was an “American politician who, with his ‘Tweed ring’ cronies, systematically plundered New York City of sums estimated at between \$30,000,000 and \$200,000,000.” <https://www.britannica.com/biography/William-Magear-Tweed> (last viewed March 3, 2017).

<sup>3</sup> *Id.* It is questionable as to whether Tweed actually said these exact words.

<sup>4</sup> Article XIX, § 2 of the New York State Constitution mandates a vote by the public every twenty years on whether to hold a convention to amend and revise the Constitution.

and John Sampson. Since 2003, “at least 29 state legislators, or former legislators, and other elected state officials have been convicted of felonies, misdemeanors or violations.”<sup>5</sup> Several close confidants of Governor Andrew Cuomo were indicted on federal felony charges in 2016.”<sup>6</sup>

Political scientist Gerald Benjamin has stated, “A convention is the only vehicle New York has for achieving a more ethical and responsive government.”<sup>7</sup> *Newsday* has editorialized, “New Yorkers can take matters into their own hands by voting yes in November on the ballot question of whether to hold a constitutional convention and get ethics reform done that way.”<sup>8</sup> Assembly Minority Leader Brian Kolb declared, “If Albany won’t police itself, the public needs to do it. A Constitutional Convention is a mechanism by which meaningful change can take place.”<sup>9</sup>

Perhaps the most outspoken person on the need for a constitutional convention to address State ethics issues has been Evan Davis, the former counsel to Governor Mario Cuomo. Davis has written, “Without a constitutional convention, corruption in Albany will just continue to be a fact of life.”<sup>10</sup> Instead, a constitutional convention with a focus on ethics represents “an opportunity to bring ethics and other reforms to Albany.”<sup>11</sup> “With the Legislature unwilling to put in place a meaningful

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<sup>5</sup> Mike McAndrew, “29 New York State Officials Convicted, 0 Ethics Reform Laws Passed in 2016,” *Syracuse.com.*, May 13, 2016, [http://www.syracuse.com/state/index.ssf/2016/05/ethics\\_reform\\_in\\_albany.html](http://www.syracuse.com/state/index.ssf/2016/05/ethics_reform_in_albany.html) (Last viewed February 25, 2017).

<sup>6</sup> Joseph Spector and Jon Campbell, “Prominent Developers, Top NY Power Brokers Charged,” *Rochester Democrat and Chronicle*, September 23, 2016. Those indicted included lobbyist Todd Howe, SUNY Polytechnic Institute President Alain Kaloyeros, and the Governor’s former deputy executive secretary, Joe Percoco.

<sup>7</sup> “Q&A: Gerald Benjamin,” *New York Law Journal* (Online) May 13, 2016.

<sup>8</sup> “Editorial; Get Down to Work for New York; Too Many Crucial Issues Demand Action,” *Newsday*, January 8, 2017.

<sup>9</sup> “Kolb: Albany Ethics Reform,” *Auburn Citizen*, December 27, 2016. See also Kenneth Lovett, “Cuomo Expresses Reservations about State Constitutional Convention,” *New York Daily News*, February 6, 2017.

<sup>10</sup> Evan A. Davis, “A Path to Ethics Reforms,” *Albany Times Union*, February 5, 2017.

<sup>11</sup> *Id.*



deterrent, it is time for the people to take charge at a constitutional convention. Ethics is as fundamental as other matters addressed in the constitution.”<sup>12</sup>

The purpose of this paper is to examine the issues involving ethics in the New York State Constitution. The paper reviews and assesses the history of New York State’s efforts to deal directly with corruption issues through the State Constitution, reviews other ethics-related sections of the New York Constitution, reviews how New York State has considered ethics in the Constitution in the last half century and how other states have treated the issues of corruption and ethics in their constitutions, and concludes with potential strategies on how best to handle future ethics issues in a State constitution.

## **II. ETHICS PROVISIONS IN THE STATE CONSTITUTION**

### **A. Extant Ethics Provisions in the Constitution**

While it has been said that “the state constitution currently says nothing about ethics in government,”<sup>13</sup> that remark is not technically accurate. Throughout much of the 19th century, the State in constitutional conventions and through the amendment process spent considerable effort in placing specific ethics language in the State Constitution. A few of these ethics provisions remain in the State Constitution.

The constitutional article on State canals<sup>14</sup> contains the admonition that canal contracts should be awarded to the lowest responsible bidder. “All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest responsible price, with adequate security for their performance as provided by law.”<sup>15</sup>

A number of the anti-bribery amendments added in the 19th century remain in the Constitution. Under article II, which

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> N.Y. CONST. art. XV.

<sup>15</sup> N.Y. CONST. art. XV, §3.

deals with suffrage, the legislature is required to “enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.”<sup>16</sup> That same provision also bans voting by people who have offered or accepted compensation or rewards to vote in an election.<sup>17</sup> It similarly bans voting by individuals who have wagered on the result of an election.<sup>18</sup>

The Public Officers article in the State Constitution<sup>19</sup> also contains a provision on ethics. When a county district attorney investigates or prosecutes a person for giving or attempting to give bribes to a public official or prosecutes or investigates a public official for bribe receiving, the county’s expenses are charges against the State.<sup>20</sup> Payment of these expenses “by the state shall be provided for by law.”<sup>21</sup>

These ethical constraints are the vestiges of what were regular efforts in the 19th century to incorporate ethics into the State Constitution.

## **B. Banking and Ethics**

Under early New York State laws, corporate charters for business institutions had to be approved by the legislature. There was a considerable demand for bank charters, especially beginning with the early 19th century, and “bank chartering in New York became embroiled in partisan politics from the beginning.”<sup>22</sup>

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<sup>16</sup> N.Y. CONST. art. II, § 3.

<sup>17</sup> *Id.*

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

<sup>19</sup> N.Y. CONST. art. XIII.

<sup>20</sup> N.Y. CONST. art. XIII, §13 (c).

<sup>21</sup> *Id.*

<sup>22</sup> Howard Bodenhorn, “Bank Chartering and Political Corruption in Antebellum New York, Free Banking as a Reform,” in CORRUPTION AND REFORM 234 (ed. Glaeser and Goldin 2006). *See also* “Problems Relating to Legislative Organization and Powers New York State,” 7 CONSTITUTIONAL CONVENTION COMMITTEE 531 (1938). Before 1838, bank charters were issued only by special acts of the Legislature, and in many instances these charters were issued for political reasons or for the personal profit of the legislators.

The earliest banks created in New York during the last decade of the 18th century were under the control of the Federalist Party. Democratic Party leader Aaron Burr believed that his party needed a bank to counter the power of the Federalist banks. He helped to form a water company to combat yellow fever in New York City—a water company that also had banking powers.

In order to obtain banking privileges for the Democrats, in the face of a Federalist majority in the legislature, Burr asked the Legislature for a charter for the Manhattan Company, “a business ostensibly formed to supply desperately needed clean drinking water in New York.”<sup>23</sup> The charter proposal included authorization for the company to raise \$2 million, and “a provision allowing any surplus capital to be used ‘in any way not inconsistent with the laws and Constitution of the United States or of the State of New York.’”<sup>24</sup> “The charter, in this form, was granted, and Aaron Burr went on to use capital to cause the Manhattan Company to function primarily as a bank.”<sup>25</sup>

While Burr’s de facto establishment of a bank may have been disingenuous, it was not manifestly illegal. In subsequent years, however, bank chartering moved on from the merely guileful to the overwhelmingly corrupt. Legislators were regularly given shares in the organizations attempting to receive bank charters. “During the early years of the last century, efforts to incorporate banks in New York were characterized by such an utter disregard of moral methods, that the period was long remembered as a black spot in the history of

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<sup>23</sup> *In re New York*, 57 A.D. 166, 169 (2d Dep’t 1901).

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

<sup>25</sup> *NYC C.L.A.S.H. v. City of New York*, 147 A.D.3d 97 (1st Dep’t 2017). See L. 1799, Ch. 84. The banking component of the Manhattan Company chartering statute stated, “And be it further enacted That it shall and may be lawful for the said company to employ all such surplus capital as may belong or accrue to the said company in the purchase of public or other stock, or the surplus capital might be employed in any other moneyed transactions or operations not inconsistent not with the constitution and laws of this State or of the United States for the sole benefit of the said company.” The recounting of the history of the creation of the Manhattan Company can be found in *Matter of City of New York (Clinton Avenue)*, 57 App. Div. 166 (2d Dep’t 1901).

the State.”<sup>26</sup> “Scarcely a member of the Legislature escaped downright Self corruption—and human nature never was exhibited in more disgusting features.”<sup>27</sup>

There was corruption of the legislature in the awarding of the charter of New York State Bank of Albany in 1803.<sup>28</sup> “It is quite certain that members of the 1803 legislature received N.Y.S. B. stock.”<sup>29</sup> Similar accusations were made against the chartering in 1805 of the Merchants’ Bank. It was virtually conceded that the vote of the senator who created the majority in support of the bank’s chartering was bribed by the incorporators. The senator resigned to avoid an investigation, but the bank was still able to obtain its charter.<sup>30</sup>

It grew worse in 1812 with the chartering of the Bank of America. “Federalist petitioners seeking a charter for the Bank of America of New York City hired two prominent Republican lobbyists who spread influence and cash liberally on both sides of the aisle.”<sup>31</sup> The result was that “seldom has a more unblushingly offensive proposal been made to a governing body . . . This one sought to secure its charter by collective bribery of the State of New York.”<sup>32</sup> Members of the Assembly were openly bribed. The leaders of the charter effort were charged with bribery.<sup>33</sup> Yet support for the bank incorporation only increased. “After these accusations of bribery, the truth of which was

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<sup>26</sup> De Alva Stanwood Alexander, 1 A POLITICAL HISTORY OF THE STATE OF NEW YORK 186 (1906).

<sup>27</sup> “Elkanah Watson, Journal E,” PAPERS OF ELKANAH WATSON, quoted in Robert E. Wright, BANKING IN POLITICS IN NEW YORK 1784-1829 at 290 (PhD Dissertation, SUNY Buffalo, 1997).

<sup>28</sup> Howard Bodenhorn, “Free Banking and Bank Entry in Nineteenth-Century New York,” NBER Working Paper No. 10654 at 9 (July 2004).

<sup>29</sup> Wright, *supra* note 27.

<sup>30</sup> See Ray B. Smith, 1 HISTORY OF THE STATE OF NEW YORK, POLITICAL AND GOVERNMENTAL 259 (1922). The bribery charge “was based upon the affidavits of Messrs. German and Thorn, Democratic members of the Assembly, to the effect that Purdy had offered them large compensation for their votes if they would cast them in favor of the bill, and had told them that he had been persuaded to favor the charter at a confidential conference with the directors of the Merchants’ Bank.”

<sup>31</sup> Bodenhorn, *supra* note 28, at 10.

<sup>32</sup> Wright, *supra* note 27, at 331.

<sup>33</sup> *Id.* at 332.

widely believed, support for the bill increased, and the remaining clauses were passed by the Assembly by a vote of 58 to 39.”<sup>34</sup> Faced with the likely passage of the charter effort before the State Senate, Governor Tompkins took the unique step of proroguing, or dismissing, the legislature for a 60-day period.<sup>35</sup> It hardly stopped the bank. When the Senate returned, it passed the charter by a vote of 17-13.<sup>36</sup> The Council of Revision did not take any action to disapprove the charter.<sup>37</sup>

Finally, the State’s second Constitutional Convention amended the Constitution in a way that significantly changed the manner of creating corporations, especially bank corporations. Two thirds of the members of each branch of the Legislature would be needed for “every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate.”<sup>38</sup>

The ostensible purpose of the change in the Constitution was to prevent bank bribery and corruption.<sup>39</sup> “Banks could no longer gain charter by a simple majority. They could not even carry with two thirds of the members present. Two thirds of the entire number of legislators had to vote in the affirmative.”<sup>40</sup>

Despite the good intentions of the Convention in strengthening the bank-incorporation provisions, there is a

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<sup>34</sup> *Id.* at 333. “A regular system of bribery, almost without parallel in the history of civilized governments, was established and carried on, until the final passage of the bill in the Assembly, by a vote of fifty-eight to thirty-nine.” John S. Jenkins, *HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK* 147 (1846).

<sup>35</sup> Wright, *supra* note 27, at 334. *See also* 1 J. Hampden Dougherty, *CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK* 120 (1915).

<sup>36</sup> Wright, *supra* note 27, at 337. *See* L. 1812, Ch. 78.

<sup>37</sup> Dougherty, *supra* note 35, at 102. This was at a time when the governor did not have veto power over legislature. Veto power was vested in the Council of Revision which was repealed by the 1821 State Constitution.

<sup>38</sup> Article VII § 9 of the New York Constitution of 1821; *see* *REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821* at 687 (Albany, E and E. Hosford, 1821). The discussion of corporations and banks were not the subjects of significant debate at the Convention. *See id.* at 446.

<sup>39</sup> Wright, *supra* note 27, at 940.

<sup>40</sup> *Id.*

consensus that the changes were not at all effective. “The unintended effect of the clause was probably to increase bank corruption, however, as it was virtually impossible to charter a new bank without resorting to bribery or strict party allegiance.”<sup>41</sup>

Witness the proceedings in passing the law to incorporate the Chemical Bank, and other institutions, in 1825. “The intention of the convention was good, but the clause failed to accomplish the object intended. The only effect of the restrictive clause in the constitution has been to increase the evil, by rendering necessary a more extended system of corruption, in some form, than was before indispensable.”<sup>42</sup> “Between about 1820 and 1838, Martin Van Buren’s political regime manipulated the charter-granting process to serve its allies and advance its political agenda.”<sup>43</sup> “Party insiders received lucrative bank charters, and partisan administrators then allocated shares among themselves and other party regulars. In 1836 the distribution of shares in 12 newly chartered banks was so overtly partisan that even the partisan bank commissioners criticized them and recommended changes in allocation practices.”<sup>44</sup>

The excesses of the bank charter incorporation system eventually led the legislature to adopt a system of free banking in 1838, under which the legislature played no role in approving bank charters,<sup>45</sup> and banks would be authorized under general

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<sup>41</sup> *Id.*

<sup>42</sup> Jabez D. Hammond, *THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK, FROM THE RATIFICATION OF THE FEDERAL CONSTITUTION TO DECEMBER, 1840* at 337 (1844). *See also* Dougherty, *supra* note 35, at 120-121.

<sup>43</sup> Bodenhorn, *supra* note 22, at 233.

<sup>44</sup> Bodenhorn, *supra* note 22, at 11.

<sup>45</sup> 2 Franklin Benjamin Hough, *NEW YORK CONVENTION MANUAL, PREPARED IN PURSUANCE OF CHAPTERS 194 AND 458, OF THE LAWS OF 1867*, at 158-60 (1867). “The granting of charters was soon regarded as part of the spoils belonging to the victorious party, and were dealt out as rewards for partisan services. This practice became so shameless and corrupt that it could be endured no longer, and in 1838, the Legislature sought a remedy in the general banking law.” Comptroller Millard Fillmore, *ANNUAL REPORT* (1848).

law.<sup>46</sup> “New York’s free banking act stripped the legislature of its chartering prerogative, depoliticized incorporation, and made it a purely administrative function.”<sup>47</sup> In the ensuing Constitutional Convention of 1846, the essentials of the 1838 system were placed in the constitution.

As Charles Lincoln has stated:

“The Convention, without changing the banking system, put enough of it into the constitution to place it beyond the effect of legislative fluctuation, and to insure its continuance. The committee on banking and currency presented a report... including the following propositions:— Prohibiting the legislature from granting any special bank charters, and requiring banks to be incorporated under general laws.”<sup>48</sup>

The constitutional efforts to remove corruption from the bank-chartering process in 1821 were not successful. The constitutional amendment only served to exacerbate the ethical problems.

### C. The Canal System and Ethics

By the 1840’s, the state’s canal system—including the Erie Canal—faced significant competition from the development of railroads throughout the state. The media and the legislature paid considerable attention to the expenditures and the management of the canal system.<sup>49</sup> Reviews of the canal system

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<sup>46</sup> L. 1838, Ch. 260. The law was held constitutional in *Warner & Ray v. Beers*, 23 Wend 103 (Court for the Correction of Errors of N.Y. 1840).

<sup>47</sup> Bodenhorn, *supra* note 22, at 12.

<sup>48</sup> Charles Z. Lincoln, 2 *THE CONSTITUTIONAL HISTORY OF NEW YORK* 195 (1906). See article VIII of the Constitution of the State of New York adopted in 1846, in particular article VIII, §4, “The Legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.”

<sup>49</sup> The 1846 Constitutional Convention provided for the election of canal commissioners and a prohibition on the State’s sale of canal property. See

showed extensive corruption in the system's operation. An Assembly committee reviewing the management of the canal system found "a system of frauds and abuse of confidence such as seldom comes to life."<sup>50</sup>

In 1851, there were accusations that the State Attorney General had been offered a bribe not to test the constitutionality of an upcoming canal bill. Attorney General Levi S. Chatfield claimed that people in regular contact with prominent members of the legislature "have organized a company consisting of some twenty persons for the avowed purpose of taking the entire contract for all the work to be put under contract on the Erie Canal enlargement under the new canal bill."<sup>51</sup> An 1852 legislative investigation "revealed that the superintendents of the three divisions of the Erie Canal had divided equally among supporters of the Democratic and Whig parties the contracts authorized under the \$9 Million Act of 1851."<sup>52</sup> Canal Board Commissioner John C. Mather was impeached in 1853 by the Assembly for his conduct at the Canal Board, but he was found innocent by the State Senate.<sup>53</sup>

In order to authorize the canal board to borrow funds to provide for expansion of the canal<sup>54</sup> and to avoid corruption in the awards of these contracts, the State Constitution was

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Ernest Henry Breuer, CONSTITUTIONAL DEVELOPMENTS IN NEW YORK 1777-1958 30 (1958).

<sup>50</sup> "Outrageous Corruption—The Canal Frauds—Astounding Disclosure," *N.Y. Herald* (Feb. 21, 1847).

<sup>51</sup> "The Difficulty between the Attorney General and the Assembly," *N.Y. Herald* (July 12, 1851). See also "The Charge or Attempt to Bribe the Attorney General: From the Evening Journal," *N.Y. Tribune* (July 12, 1851).

<sup>52</sup> Archdeacon, *supra* note **Error! Bookmark not defined.**, at 411. "In the Assembly, it was openly charged that several members of the canal board had met secretly at the house of Peter Cagger in Albany prior to the letting and agreed upon an allotment of canal contracts on the basis of political considerations and favoritism, and not to the lowest bidder." Noble E. Whitford, HISTORY OF THE CANAL SYSTEM OF THE STATE OF NEW YORK TOGETHER WITH BRIEF HISTORIES OF THE CANALS OF THE UNITED STATES AND CANADA 200-201 (1905).

<sup>53</sup> "The Hon. John C. Mather, of New York, State Senator," *The United States Democratic Review*, New York, 47 (Jan. 1858).

<sup>54</sup> See *Newell v. People ex rel. Phelps*, 7 N.Y. 9 (1852).



amended in 1854.<sup>55</sup> The language in the amendment stated “All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price with adequate security for their performance. No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the Canal Board may, upon the application of the contractor, cancel such contract.”<sup>56</sup>

This ethics reform did not have its intended results. “Unfortunately this measure resulted only in new schemes. By offering to do major parts of a project at a very low rate while demanding exorbitant prices for minor ones, a contractor could present an ‘unbalanced’ but winning bid.”<sup>57</sup> Charles Z. Lincoln later commented on this reform, “Under this provision numerous frauds had been perpetrated on the state by means of combination bids, under which the lowest bids would be rejected for informality, and the contract finally awarded to the highest bidder, who was in collusion with the other bidders.”<sup>58</sup>

In 1868, a legislative investigative committee found “gross and monstrous frauds” in the canal system.<sup>59</sup> The testimony according to the committee shows the grossest neglect of public duty by which the State has suffered to an incalculable

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<sup>55</sup> See 1853 Report on the Canals of New York State by the State Engineer and Surveyor, Senate Doc. 1854 No. 60, p. 61. “In departing from the wholesome rule of awarding the work to the lowest bidder, the public officers are plunged into a wide sea of discretion, and are liable to charges of erroneous judgment, and to suspicion of favoritism.” J. Hampden Dougherty noted, “There was wisely added to the section a provision that all contracts for work or materials on any canal should be made with the person offering to ‘do or provide the same at the lowest price with adequate security for their performance.’” Dougherty, *supra* note 35, at 175.

<sup>56</sup> Article VII, §3. See Robert Alan Carter, 1 NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 170-71 (2d ed. 2001); *People ex rel. Frost v. Fay*, 3 Lans. 398 (1871).

<sup>57</sup> Archdeacon, *supra* note **Error! Bookmark not defined.**, at 411.

<sup>58</sup> 2 Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 357 (1906). See also Peter J. Galie, ORDERED LIBERTY 15 (1996).

<sup>59</sup> Archdeacon, *supra* note **Error! Bookmark not defined.**, at 410-411.

extent.”<sup>60</sup> A canal commissioner named Robert Dorn was impeached.<sup>61</sup>

In March of 1875, Governor Tilden issued “a special message to the Legislature, showing that for the five years ending September 30, 1874, millions had been wasted because of unnecessary repairs and corrupt contracts. Upon ten of these fraudulent contracts the State, it appeared, had paid more than a million and a half, while the proposals at contract prices called for less than half a million.”<sup>62</sup>

Governor Tilden followed the message with an investigating commission which issued 12 reports on the canals substantiating the Governor’s charges. Indictments included former Assemblyman George D. Lord for bribery, one of the “Board of Canal Appraisers for a conspiracy to cheat the State . . . an ex-canal commissioner . . . two ex-superintendents of canals and of one division engineer; also in the suspension and final removal of the auditor of the Canal Department for unlawfully trafficking in canal certificates.”<sup>63</sup>

In short, the effort to stem corruption in contracting in the canals system through placing an ethics provision in the State constitution failed. The bidding requirements were constantly violated and evaded by the canal overseers for more than two decades. Only massive investigative action undertaken against the canal commissioners by the executive put a halt to corruption.

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<sup>60</sup> “Albany: The Report of the Assembly Special Committee on Canal Frauds,” *N.Y. Tribune* (Feb. 28, 1868). Dorn was acquitted of the charges.

<sup>61</sup> Archdeacon, *supra* note **Error! Bookmark not defined.**, at 412. JOURNAL OF THE COURT FOR THE TRIAL OF IMPEACHMENTS IN THE CASE OF THE HON. ROBERT C. DORN, A CANAL COMMISSIONER OF THE STATE OF NEW YORK (1868).

<sup>62</sup> Dealva Stanwood Alexander, 3 POLITICAL HISTORY OF THE STATE OF NEW YORK 1861-1882 at 321-22 (1906). See 6 State of New York, MESSAGES FROM THE GOVERNORS COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 at 788 (Charles Z. Lincoln ed. 1909).

<sup>63</sup> John Bigelow, 1 THE LIFE OF SAMUEL J. TILDEN at 261-62 (1895).

## D. Bribery and Ethics

It is hard to envision the massive degree of corruption that took place in the legislature in the late 1860's. The New York Times could write, "We venture to say that as a general rule for the last ten years one-fifth of the members of each House have been in the habit of taking bribes for their votes:— the fact is open and notorious to everyone who has had any personal connection with Albany legislation."<sup>64</sup>

There were the railroad wars in 1868 between Commodore Cornelius Vanderbilt, representing the New York Central, and James Fiske and Jay Gould, representing the Erie Railroad. Collectively, these two companies bribed and counter-bribed members of the legislature, turning the legislature into the "Sanhedrin of rascality."<sup>65</sup> Initially, the Vanderbilt forces through their bribes were successful in blocking legislation that was favorable to the Erie Canal. Jay Gould himself then went personally to Albany with a trunk "literally stuffed with thousand dollar bills which are to be used for some mysterious purpose in connection with legislation on the subject of the bill now before the Legislature."<sup>66</sup>

Accounts of the funds provided by Gould to the legislature vary from between \$500,000<sup>67</sup> to \$800,000.<sup>68</sup> There was a report of one individual who took \$100,000 from one side and then

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<sup>64</sup> "Legislative Corruption—Albany Matters Which Deserve Attention," *N.Y. Times* (Apr. 8, 1867).

<sup>65</sup> John Steele Gordon, *THE SCARLET WOMAN OF WALL STREET* at 184 (1986), quoting George Templeton Strong.

<sup>66</sup> *Id.* at 186, quoting the *N.Y. Herald* of April 15, 1868.

<sup>67</sup> Robert Fuller, *JUBILEE JIM: THE LIFE OF COLONEL JAMES FISK, JR.* at 174 (1928); Gustavus Myers, *2 HISTORY OF THE GREAT AMERICAN FORTUNES* at 308 (1911).

<sup>68</sup> Gordon, *supra* note 65, at 187. Even in years prior to 1868, there was considerable legislative spending by railroads corporations in Albany. The Committee on Official Corruption at the 1867 Constitutional Convention had noted before 1868 that "one railroad company had expended in a single year in efforts to procure favorable legislation \$20,000; another upward of \$200,000, besides \$60,000 or more during the two preceding years, and that another had distributed \$300,000 of its own stock, valued at about par, a large portion of which was believed to have been paid, ultimately, to members of the Legislature. The inference is unavoidable, that much of these and other large sums, similarly expended, must have been employed, directly or indirectly, in corrupting members of the Legislature." *PROCEEDINGS OF THE 1867 CONSTITUTIONAL CONVENTION* at 2279.

\$70,000 from the other.<sup>69</sup> In the end, Gould, with the deeper pockets, succeeded in passing the Erie legislation.

Peaking soon after the railroad wars came the Tweed Ring. William Magear Tweed, and his cohorts, were able for several years to take over not only New York City government but much of Albany as well. Tweed allegedly profited by \$650,000 from the Erie-Grand Central wars.<sup>70</sup> Through voter registration frauds involving the naturalization of immigrants, Tweed was able to get his candidate John Hoffman elected governor in 1868. "In twenty districts of the city Hoffman's vote exceeded the total number of voters registered."<sup>71</sup>

From 1869 to 1871, Tweed was immersed in controlling much of New York state government, and most everything touched by the Tweed Ring involved bribery and corruption.<sup>72</sup> "The Tweed ring at its height was an engineering marvel, strong and solid, strategically deployed to control key power points: the courts, the legislature, the treasury and the ballot box. Its frauds had a grandeur of scale and an elegance of structure: money-laundering, profit sharing and organization."<sup>73</sup> "Plunder of the city treasury, especially in the form of jobbing contracts, was no new thing in New York, but it had never before reached such colossal dimensions."<sup>74</sup>

While Tweed eventually went to prison (some of his associates did not), he did succeed in turning both New York City and the state legislature into a "den of thieves."<sup>75</sup>

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<sup>69</sup> *Id.* See also Myers, *supra* note 67, at 311.

<sup>70</sup> Edwin G. Burrows & Mike Wallace, *GOTHAM* 913 (1999).

<sup>71</sup> Gordon, *supra* note 65, at 323. "It was estimated that the vote cast in New York City was 8 per cent in excess of its entire population and that illegal votes exceeded 50,000." Alexander B. Callow, *THE TWEED RING* at 213 (1966).

<sup>72</sup> See generally Kenneth D. Ackerman, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* (2005). "In 1870, came the exposure of the Tweed frauds in New York city. Public sentiment then awoke, investigated the disease and demanded a remedy." J. Hampden Dougherty, "The Constitutions of the State of New York," 230 *Political Science Quarterly* IV, 2 (June 1889).

<sup>73</sup> Pete Hamill, *supra* note 2.

<sup>74</sup> James Bryce, 2 *THE AMERICAN COMMONWEALTH* at 387 (1895).

<sup>75</sup> REPORT OF THE SPECIAL COMMITTEE OF THE BOARD OF ALDERMEN APPOINTED TO INVESTIGATE THE "RING" FRAUDS 13 (1878). The committee

In this era, it was not surprising that there were efforts made to amend the Constitution to improve the laws against bribery and corruption. This was especially true since the governmental efforts to enforce and prosecute bribery offenses had been almost non-existent. The crime was “also *the one crime* most prevalent and the *one crime* most rarely prosecuted or punished.”<sup>76</sup> Nobody at the New York Constitutional Convention could even recollect a single conviction for bribery except for a single conviction in Ontario County in 1867 where the bribe receiver was given a \$1,000 fine.<sup>77</sup> Nor was there a reported decision until 1886 where a person was convicted of bribery.<sup>78</sup>

Given the dormant status of the enforcement efforts, it was not surprising that the 1867 Constitutional Convention added a new Article 13 on bribery. “Various practices and abuses of public life existing at the time of the convention of 1867 led the delegates to consider seriously various measures intended to correct these conditions.”<sup>79</sup> The Committee on Official Corruption at the 1867 convention stated that “official corruption is a crime of deep turpitude, of growing prevalence and of dangerous tendency.”<sup>80</sup> The bribe-receiving public office holder was guilty of a felony. If the bribe was rejected, the bribe-giver would be guilty of a felony; if the bribe offer was accepted, the bribe-giver, however, would not be guilty of the crime if the bribe-giver testified about the bribe. The governor was empowered to remove district attorneys who did not faithfully

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also brought the Erie and the Grand Central Railroads into this era of corruption stating “Not only the “Tweed Ring” entered the market as a buyer and seller of Legislators, but powerful corporations (notably two great railroad companies), also engaged warmly in this degrading traffic.” *Id.* at 13.

<sup>76</sup> De Lancey Nicoll, “An Unpunished Constitutional Crime,” *NORTH AMERICAN LAW REVIEW* 21-22 (Jan 1, 1888).

<sup>77</sup> *Id.* at 28.

<sup>78</sup> *Id.* “Prosecutions under the existing bribery legislation, enacted in 1853, were few and the law appeared to be ineffective.” State of New York, *THE TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION* at 164 (1957-1961).

<sup>79</sup> New York State Constitutional Convention Committee, Volume VIII, “Problems Relating to Executive Administration of Powers,” at 238 (1938).

<sup>80</sup> 1867 Constitutional Convention, *supra* note 68, at 2277.

prosecute a bribery case, and counties would be reimbursed by the State for the costs of bribery prosecutions and investigations involving State officials.<sup>81</sup> The constitutional proposal was part of one overall package of proposals that was decisively rejected by the people in 1869.<sup>82</sup>

With the failure of the Convention's proposal on bribery, the legislature in 1869 added its own proposal on bribery.<sup>83</sup> The penalties were basically the same as that provided in the 1867 Constitutional Convention proposals. Nonetheless, in a year that was dominated by the Tweed forces, the new bribery law gave immunity to all people who in the past and in the future offered bribes that had been accepted in whole or in part.<sup>84</sup> Also, there could be no conviction of the crime of bribery simply based on the testimony of one of the parties to the transaction.<sup>85</sup> Only with additional corroborating evidence could a person be convicted of bribery. The effect of this provision was virtually to authorize bribery in the state. "It was the golden age of bribery. The crime flourished. The paying of bribes was absolutely innocent, and the taking of bribes absolutely safe."<sup>86</sup>

This situation began to change by 1872. Governor John Hoffman<sup>87</sup> recommended legislation suggesting a 32-member constitutional commission which would recommend amendments to the State Constitution.<sup>88</sup> The legislature created

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<sup>81</sup> George A. Glynn, Compiler. *Convention Manual for the Sixth New York State Constitutional Convention*, (1894) at 413-414. See also Dougherty, *supra* note 35, at 242.

<sup>82</sup> The overall proposal lost by a vote of 290,456 to 223,935. An amended judiciary article was narrowly approved by the voters. Glynn, *supra* note 81, at 417.

<sup>83</sup> L. 1869, Ch. 742.

<sup>84</sup> *Id.* § 2.

<sup>85</sup> *Id.* § 9.

<sup>86</sup> De Lancey Nicol, *supra* note 76, at 26.

<sup>87</sup> Hoffman, a former mayor of New York City, had basically been elected as an ally of the Tweed Ring.

<sup>88</sup> STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 392-403 (Charles Z. Lincoln ed. 1909). Hoffman wrote, "Such a commission could have all the benefit of the debate incident to a larger body through intelligent discussions in the press, and the voluntary suggestions of thoughtful

this 32-member commission which featured eight individuals from the four judicial districts.<sup>89</sup> All the members were appointed by the governor subject to confirmation by the senate.<sup>90</sup>

On the issue of bribery, the commission recommended to the legislature that the bribery provisions of the 1867 Constitutional Convention be submitted to the public for vote.<sup>91</sup> These amendments were necessitated, according to the commission, by “the simple purpose of ... purity in office.” The commission also recommended an addition, that had also been recommended in the 1867 Convention,<sup>92</sup> in the oath of office for elected officials. Besides the standard oath, elected officials would swear that they had not engaged in bribery of votes in the election at which they had attained office.<sup>93</sup> The legislature in 1873 and 1874 passed this proposal, and it was overwhelmingly approved by popular vote in 1874.”<sup>94</sup>

At the 1874 election, the people voted on twelve separate proposals that had been recommended by the 1872 Constitutional Commission. All twelve proposals were

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citizens; and would be almost certain to agree upon amendments which would secure the popular approval.” *Id.* at 393.

<sup>89</sup> L. 1872, ch. 884.

<sup>90</sup> J. Hampden Dougherty wrote, “The commission of 1872 was an innovation in constitutional evolution in this state. The experiment of an intermediate body summoned into being to advise and to report to the legislature upon constitutional reform had never before been tried in its history.” Dougherty, *supra* note 35, at 245. Similarly, Peter J. Galie has written that the commission was “unique in New York history.” Peter J. Galie, *THE NEW YORK STATE CONSTITUTION* 39 (2011). *See also* Peter J. Galie, *ORDERED LIBERTY* 154 (1996).

<sup>91</sup> *JOURNAL OF THE CONSTITUTIONAL COMMISSION OF THE STATE OF NEW YORK* 409 (Mar. 13, 1873).

<sup>92</sup> Peter J. Galie, *Ordered Liberty*, *supra* note 90, at 130.

<sup>93</sup> 1873 Journal, *supra* note 91, at 472.

<sup>94</sup> *See generally* “The Vote on the Constitutional Amendments,” *N.Y. Times* (Dec. 2, 1874). The full vote on the amendment was 341,697 in favor and 178,065 opposed. All the twelve amendments recommended by the Constitutional Commission passed. The bribery amendment passed despite opposition from the Tammany Hall interests in New York City. The amendment lost in New York County as well as in the counties of Cortland, Oneida, Putnam and Schoharie. On the other hand, it carried all the other counties. In Erie County, it passed with a remarkable 96.3% of the vote.

approved. Besides the bribery article, there was a vote on amendments to article II, the Constitution's suffrage article. One of the amendments to the suffrage article contained language banning "all persons convicted of bribery or of any infamous crime" from voting.<sup>95</sup>

Despite the Constitution's efforts to suppress bribery and corruption, it can hardly be said that these efforts had much impact. Initially, the carrot and the stick approach to bribery—under which local district attorneys could be removed by the governor for failing to pursue bribery cases, but the cost of prosecutions involving State officers would be picked up the state—seemed to work.

The Albany County district attorney prosecuted State senator Loren B. Sessions, who was accused of bribing a State assemblyman in the course of the legislative voting for the United State senators in 1881.<sup>96</sup> The constitutional provision on removals of district attorneys for failure to pursue bribery investigations arguably placed added pressure on the district attorney to prosecute the senator.<sup>97</sup> The senator was quickly found innocent in the bribery trial.<sup>98</sup> In 1883, Governor Grover Cleveland removed Queens County district attorney Benjamin Downing for bribery.<sup>99</sup>

Nonetheless, in subsequent years, the practice of having the governor remove a district attorney for failure to prosecute

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<sup>95</sup> 1873 Journal, *supra* note 91, at 458. As it exists today as Article II, § 3, "in addition to barring from voting those convicted of bribery, the section prohibits any person who engages in bribery or election wagering in connection with an election from voting in that election. Every conceivable form of bribery is detailed. Such elaborate detail is testimony to the gross and open electoral fraud characteristic of New York politics after the Civil War...Putting into the constitution a provision that reads like an election code likely reflected the frustration created by a failure of other attempts to correct the problem." Peter J. Galie, *THE NEW YORK STATE CONSTITUTION*, *supra* note 90, at 86.

<sup>96</sup> "The Situation at Albany," *N.Y. Tribune*, June 29, 1881.

<sup>97</sup> "Sessions Indicted," *N.Y. Herald* (June 29, 1881); *see also* "Senator Sessions Indicted," *Buffalo Morning Express* (June 29, 1881).

<sup>98</sup> "The Acquittal of Sessions," *New York Tribune* (Oct. 20, 1883); *see also* "Other Bribery Cases in State Legislature," *N.Y. Herald* (May 25, 1915).

<sup>99</sup> Public Papers of Governor Cleveland, *Order of Removal of Benjamin W. Downing, District Attorney of Queens County* 140 (1883). *See also* "Mr. Downing Removed," *N.Y. Times* (Oct. 27, 1883).



bribery<sup>100</sup> largely stopped. The last major time that this occurred seemed to be in 1936, when Governor Herbert Lehman refused to remove Kings County district attorney William F. X. Geoghan, who had been accused by a grand jury of failing to sufficiently investigate and prosecute a bribery attempt.<sup>101</sup> Moreover, district attorneys who did prosecute bribery offenses used the penal laws rather than rely on the constitutional crime of bribery.

Thus, given their lack of practical utility, the 1874 provisions were slowly removed from the Constitution. “Little interest has been stirred by this portion of the Constitution since its adoption in 1874.”<sup>102</sup> The 1938 Constitutional Convention removed the bribery provisions of the oath of office from the Constitution. Speaking in support of repeal was Supreme Court justice Phillip McCook. Justice McCook found that the bribery section was legally useless and that the “oath is stronger without it.” He stated, “I can only say that the false swearing of oaths will not bother dishonest men. Men who bribe will not hesitate to falsify.”<sup>103</sup> McCook invoked the comments of Governor Alfred Smith who had taken the oath 22 times and believed that the bribery oath was “just foolishness.”<sup>104</sup>

The other bribery provisions in Article XIII simply became obsolete. The Legislature “has so extensively exercised its power to deal with the handling of bribery problems that the constitutional treatment of the matter has been completely overshadowed.”<sup>105</sup> In 1958, the Inter-Law School Committee on Constitutional Simplification studied the bribery provisions in the constitution and recommended that the bribery provisions

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<sup>100</sup> “Problems Relating to Executive Administration and Powers,” VIII NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 231 (1938).

<sup>101</sup> “The Decision on Geoghan: Governor Lehman's Decision ‘Dismissing’ Geoghan Charges,” *N.Y. Times*, (Sept. 18, 1936); “Lehman Clears Geoghan,” *N.Y. Herald Tribune* (Sept. 18, 1936).

<sup>102</sup> *Inter-Law School Committee Report on the Problem of Simplification of the Constitution*, N.Y. Legis. Doc. No. 57 at 166 (1958).

<sup>103</sup> 1938 CONSTITUTIONAL CONVENTION PROCEEDINGS at 2430.

<sup>104</sup> *Id.* at 2429. See also “Convention Acts to End Bribery Clause in Oath,” *N.Y. Times* (Aug. 10, 1938).

<sup>105</sup> *Temporary Commission on the Revision and Simplification of the Constitution*, *supra* note 78, at 168.

not be retained.<sup>106</sup> “Generally, the Committee recommended either that the provisions be dropped in toto or that they be replaced by a simple declaration of policy.”<sup>107</sup> The provisions were obsolete and/or superfluous.<sup>108</sup>

The Inter-Law School Committee’s recommendations on bribery were endorsed by the Temporary Commission on the Revision and Simplification of the Constitution and subsequently by the legislature in two separate sessions. The proposal was placed on the ballot in 1962,<sup>109</sup> and passed by a nearly 2-1 margin.<sup>110</sup>

The anti-bribery constitutional provisions were part of the State Constitution for nearly ninety years.<sup>111</sup> Yet, while they were considered of utmost significance when they were passed, the fact is that they had no significant effect on public policies in the state. Prosecutors did not rely on the constitutional provision in their prosecution of bribery, and governors largely did not take much action against district attorneys who failed to pursue bribery allegations. In large measure, the constitutional

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<sup>106</sup> *Inter-Law School Committee Report*, *supra* note 102, at 168. The report said of the crime of bribery, “The section has no practical significance today in the prosecution of public officials for accepting bribes.” As to the totality of the bribery provisions in Article XIII, the Committee reported, “No court has relied on the constitutional provisions in recent years, although there has been considerable litigation involving the bribery statutes.” *Id.* at 174. For a summary of the report, see Charles N. Quinn, “State Constitution Held Verbose, Trim Is Urged,” *N.Y. Herald Tribune* (June 2, 1958).

<sup>107</sup> Roger B. Jellinik in 1 Jack B. Weinstein et al., *ESSAYS ON THE NEW YORK CONSTITUTION*, from the Seminar in Problems in Revising the New York Constitution, VI-1, VI-5 (1966).

<sup>108</sup> *Id.* at VI-4. The *New York Times* later described these repeals as pruning “out of the Constitution sections that had become meaningless with the passing years or that had been taken care of by specific laws.” Charles Grutzner, “State Voters Reject Subsidy Plan on Low-Income Family Housing,” *N.Y. Times* (Nov. 7, 1962).

<sup>109</sup> Richard P. Hunt, “6 Proposals Face Voters Tuesday,” *N.Y. Times*, (Nov. 4, 1962); “State to Vote on Articles to Trim Constitution,” *N.Y. Times* (Apr. 8, 1962).

<sup>110</sup> [https://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_Votes-Cast-Conventions-Amendments.pdf](https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf) (last viewed February 25, 2017).

<sup>111</sup> They were in effect from 1875-1963.

bribery reforms—despite the best of intentions—had no real effect on ethics or corruption in the state.

### **E. Free Passes, Rebates, and Ethics**

Much of the corruption in the state legislature in the post-Tweed era of the 19th century focused on what was known colloquially as the Black Horse Cavalry. Theodore Roosevelt in his autobiography suggested that during his years in the legislature a third of the members were corrupt.<sup>112</sup> The Black Horse Cavalry would demand payment from corporations and, after payment, vote as they wished.<sup>113</sup> They would introduce “strike” legislation the purpose of which was to harm a corporation. Subsequently, the corporation affected adversely by the legislation would buy off the introducers of the bill, sometimes in the case of a railroad company by the issuance of free passes.<sup>114</sup> These so-called “strike” bills were “introduced for the purpose of holding up the corporations, holding them up and calling them down...Good men, good citizens, honest, law-abiding men justified themselves in the directorates of these railroads and other public service corporations in spending the money of the corporation to elect senators and assemblymen who would protect them against strike bills. The whole system became a scandal and a disgrace.”<sup>115</sup>

To counter the use of “strike” legislation, the 1894 Constitutional Convention added language making it a misdemeanor for a public official to demand, accept or receive a free pass, free transportation, rebate, or reduced telephone or telegraph rates from a person or corporation. The attorney general was authorized to remove from office any public officer

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<sup>112</sup> Theodore Roosevelt, THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 69 (1921).

<sup>113</sup> *Id.*

<sup>114</sup> 1914 CYCLOPEDIA OF AMERICAN GOVERNMENT, v.1 at 478 (Abattoirs/Finality), McLaughlin and Hart.

<sup>115</sup> Elihu Root, “The Regulation of the Public Service Commissions and the Decline of the ‘Black Horse Cavalry,’” address given on Aug. 25, 1915, in ADDRESSES ON GOVERNMENT AND CITIZENSHIP 188 (1916).

who violated the provision, and the person or corporation offering the benefit would also be guilty of a misdemeanor.<sup>116</sup>

The issue of free passes was subject to considerable debate at the Convention. Some opponents thought that it should be sufficient to have the railroad companies list the public officers who received free passes. Others thought that this was a statutory provision that did not merit a mention in the Constitution.<sup>117</sup> Delegate E.R. Brown argued against “the evils of the practice of giving railroad passes to public officers, especially to members of the legislature and judges,” pointing out that in some sections of the state passes were also given to assessors, and the rate of assessment was controlled by this means. Municipal officers were also frequently, if not usually, the recipients of such passes. He cited several states whose constitutions contained provisions against passes.<sup>118</sup> Delegate Nicoll added, “We all know that this is a great evil, petty and disgraceful as it is. What right has any man, the moment he get into a public office to accept a pass.”<sup>119</sup> He added that while it might not stop free passes, “this provision will do some good; it will have some effect, and it is our duty to incorporate it in the organic law of this State, in the hope that, while we know as practical men that it will not eradicate the evil, it will at least lessen the evil to the advantage of the body politic.”<sup>120</sup> The provision was agreed to by a vote of 96-44,<sup>121</sup> and became a part of the Constitution when the people voted in support of the work of the 1894 Convention.

Again, it can hardly be said that the anti-free pass provision had any significant effect on corruption in the State. Those legislators who introduced strike bills continued to do so

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<sup>116</sup> CONSTITUTION OF THE STATE OF NEW YORK AS PROPOSED BY THE CONSTITUTIONAL CONVENTION SEPTEMBER 20, 1894, AT ALBANY, N.Y., AND ADOPTED BY THE PEOPLE OF THE STATE art. 13, §5 (Nov. 6, 1894).

<sup>117</sup> 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 480-512 (1894).

<sup>118</sup> 2 Charles Z. Lincoln, CONSTITUTIONAL HISTORY OF NEW YORK 655-656 (1906).

<sup>119</sup> *Revised Record*, *supra* note 117, at 487.

<sup>120</sup> *Id.* at 488.

<sup>121</sup> 2 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 at 708-709 (1894).

into the second decade of the 20th century. Major corporations, such as the life insurance company and public utilities, were involved in major scandals in the early 20th century that were not prevented by the anti-free pass provisions. There was almost no enforcement of the free-pass provisions.

Moreover, the United States Supreme Court, in the 1923 case of *Kansas City Southern Railway Co. v. Van Zant*,<sup>122</sup> found that interstate rail passes were subject to federal and not to state controls. The Court stated, “The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies.”<sup>123</sup> As such, the free pass ban—as it pertained to railroads—was “highly questionable to begin with.”<sup>124</sup> Even more significantly, the section had not been cited by a court since 1915.<sup>125</sup>

Given the dubious constitutionality of the free-pass provision, its obscurity, and its ineffectiveness, the repeal of the provision was suggested by both the Inter-Law School Committee and the Temporary Commission on the Revision and Simplification of the Constitution. The repeal of the free-pass provision was included by the legislature as part of its repeal of the bribery provisions, and was passed by the people in the 1962 referendum.<sup>126</sup>

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These efforts in the 19th century to place ethics provisions in the State Constitution were largely unsuccessful. The unintended result of the bank-chartering provision was only to increase corruption. The plunderers were able to outmaneuver the bidding protections in the canal provision. Most significantly, the anti-bribery and anti-free pass provisions soon became obsolete due to legislative and historical developments and court decisions.

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<sup>122</sup> 260 U.S. 459 (1923).

<sup>123</sup> *Id.* at 468.

<sup>124</sup> Jellinik, *supra* note 107, at vi-i.

<sup>125</sup> *Id.*

<sup>126</sup> See *supra* note 110.

While placing substantive ethics provisions in the State Constitution has the advantage of bypassing a legislature that might be reluctant to undertake significant ethics reform, the fact is that placing ethics reform in the Constitution poses its own series of challenges. These challenges arise from the difficulty of changing constitutional provisions.

Constitutional ethics provisions are static, and they cannot be easily repaired once scheming individuals can find a way to maneuver around them. Thus, if corrupt bidders and canal administrators can evade the language of the low-bid requirements, it is very difficult to change the constitutional bidding requirements. If the circumstances of bribery and anti-free-pass provisions change due to court decisions, legislative actions, or even current events, the constitutional ethics provisions cannot change with the times. As a result, despite the best of intentions, the 19th century constitutional ethics provisions largely did not achieve the results that the reformers might have expected or desired.<sup>127</sup>

### **III. RESTRICTIONS ON THE AUTHORITY OF THE STATE LEGISLATURE**

While the provisions of the Constitution that were specifically enacted to limit corruption might not have succeeded in achieving their goals, there are a series of sections in Article III, the legislative article, which affect ethics and corruption issues. They limit the authority of the legislature, and they have in some cases limited the potential for legislative corruption.

These provisions include Article III(a) § 6, which prohibits changes in the compensation of legislators during their term; III(b) § 7, which bans certain civil appointments for legislators; III(c) § 15, which requires private and local bills to encompass one subject; III(d) § 17, which bans certain private or local bills; III(e) § 19, which bans the legislature from auditing or allowing

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<sup>127</sup> “Constitutional reformers added numerous substantive and procedural limitations on state legislatures. Added when less was demanded of government than is the case today, these restrictions now function in ways not intended by the reformers and, in some cases, have not eliminated the evils they were intended to remedy.” Peter J. Galie and Christopher Bobst, *Constitutional “Stuff”: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1393-1394 (2013-2014).

private claims against the state; and III(f) § 22, which requires tax laws to “distinctly state the tax and the object to which it is to be applied.”

While some of these restrictions have been more successful in restraining graft and corruption and in promoting transparency in legislative operations than the ethics provisions of the 19th century, the effect of many of these provisions has been muted. With the possible exception of Article III § 19, which banning the payment of private claims by the legislature, these provisions have not been of particularly great significance in promoting ethics.

### **A. The Rule Against Raising Legislators’ Salaries**

Article III § 6 provides that “neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected.” Much of this provision dates from a 1947 amendment which allowed the legislature to fix members’ salaries.<sup>128</sup> (Previously, they had been set by the Constitution.) This provision has prevented the legislature from immediately raising its collective salary during the current legislative term,<sup>129</sup> but it has not had an overall broader effect on ethics. It also has not been able to keep the issue of legislative salaries out of political and judicial scrutiny.<sup>130</sup>

### **B. Legislators’ Other Jobs**

Article III § 7 prevents legislators from receiving certain additional civil appointments. The prohibition stems in large part from the work of the 1872 Constitutional Commission<sup>131</sup> and was in large part aimed at preventing future Boss Tweeds. Tweed served simultaneously as a state senator and as the commissioner of public works in New York City.<sup>132</sup> While the

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<sup>128</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 56, at 25. *See also New York Public Interest Research Group, Inc. (NYPIRG) v. Steingut*, 40 N.Y.2d 250, 255-256 (1976); *Dunlea v. Anderson*, 66 N.Y.2d 265 (1985).

<sup>129</sup> *NYPIRG v. Steingut*, 40 N.Y. 2d at 259.

<sup>130</sup> *Cohen v. State*, 94 N.Y. 1 (1999); *Maron v. Silver*, 14 N.Y.3d 230 (2010).

<sup>131</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 56, at 26.

<sup>132</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 90, at 103.

definition of a “civil appointment” has been defined very broadly by the Court of Appeals,<sup>133</sup> the fact is that this provision is limited on its face to banning civil positions which have been created during the term of the current legislator or to civil positions where the emoluments have increased during the current term of the legislator.<sup>134</sup> Thus, in practice, this section bans relatively few civil appointments of legislators.

### C. The One-Subject Rule

Article III § 15 requires that local or private bills shall include no more than one subject, and that subject must be expressed in the title of the bill. This section was added by the Constitutional Convention of 1846 partially as a result of Aaron Burr’s establishment of a bank in a bill purported to supply potable water for the city of New York.<sup>135</sup> The Court of Appeals in *Burke v. Kern* stated, “This is perhaps best illustrated by the occasion for the creation of this constitutional provision, which was added as a result of the success of Aaron Burr in persuading the Legislature to grant him a charter for a water company which had hidden among its provisions a clause enabling him to found a bank.”<sup>136</sup> At the Constitutional Convention in 1846, supporters of the proposal noted a number of instances where the actual contents of legislation did not match up with the title of the legislation.<sup>137</sup> The courts have opined that the section was designed to prevent logrolling<sup>138</sup> and “to prevent the fraudulent

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<sup>133</sup> *People v. Tremaine*, 252 NY 27 40 (1929). “The importance of the office is immaterial if the appointment is administrative or judicial in character. The prohibition is absolute and unqualified, and in analogous cases has been ruthlessly enforced.” *Id.* at 41.

<sup>134</sup> Peter Galie notes, “Only those [positions] created or the salaries of which have been increased during the term of office are off-limits.” Galie, *THE NEW YORK STATE CONSTITUTION*, *supra* note 90, at 103.

<sup>135</sup> See *supra*.

<sup>136</sup> 287 N.Y. 203, 213 (1941).

<sup>137</sup> REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 176-77 (1846).

<sup>138</sup> *People v. Chautauqua County*, 43 N.Y. 10, 22 (1870). “That purpose is, that every bill on a private or local subject, shall stand alone, and ask for legislative favor on its own merits.”



insertion of provisions upon subjects foreign to that indicated in the title.”<sup>139</sup>

The section, while it may have been intended to have a broad effect, has little present effect. “The courts have not given a strong interpretation of any of the crucial terms employed in this section.”<sup>140</sup> So long as the bill’s contents are incidental to the purpose of the bill as shown by the bill’s title, the section is not violated.<sup>141</sup> Accordingly, the single-subject section, as currently interpreted, has not placed significant limitations on legislative overreach.<sup>142</sup>

#### **D. Private and Local Bills**

Article III § 17 prevents the legislature from passing an assortment of private and local bills. Private bills constitute bills designed specifically to apply to an individual, a class of individuals or to specific corporations. Local bills apply to specific governmental units. Collectively, they tend to be described euphemistically as special bills, as contrasted to general bills which have statewide application. These bills prohibited by Article III § 17, include a host of categories from changing county seats and personal name changes to regulating the rate of interest, and granting tax exemptions, immunity, or a franchise. The section was largely added by the Constitutional Commission of 1872 and has been amended only slightly since

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<sup>139</sup> *Economic Power & Construction Co. v. City of Buffalo*, 195 NY 286, 296 (1909). See also Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 90, at 107.

<sup>140</sup> Galie, *supra* note 90. Galie also notes that the traditional presumption of constitutionality also works to protect legislation from challenges under Article III, Section 15.

<sup>141</sup> *People ex rel. Olin v. Hennessy*, 206 N.Y. 33, 39 (1912); *Bogart v. Westchester County*, 270 A.D. 274, 277 (2d Dep’t 1945). See also *NYC C.L.A.S.H. v. City of New York*, *supra* note 25 (finding that the single subject rule was not violated by a city ordinance dealing with both electronic and traditional cigarettes).

<sup>142</sup> While the section may have been added to prevent Aaron Burr from adding banking powers to the chartering of a company designed to improve the safety of New York City’s water supplies, a court might now find that the banking authority was incidental and related to the purpose of “an act for supplying the city of New York with pure and wholesome water.” See L. 1799, Ch. 84.

that time.<sup>143</sup> It was part of the general effort of the Commission to prevent corruption by limiting the private legislative power to help specific individuals and corporations. It was also designed to limit the number of bills passed by the legislature.

Again, this provision has had very limited practical effect. “This section has not limited the legislature as much as its framers intended because the courts have allowed the term *general law* to apply to less than all places or person in the state.”<sup>144</sup> The insignificance of Article III § 17 was recognized soon after its passage. The Association of the Bar of the City of New York in 1885 recognized, “The constitutional restrictions of 1875 in restraining the Legislature from passing special laws in a large number of enumerated cases, have not brought about the beneficial results which were anticipated from them, as even the number of laws which are annually enacted has not been materially reduced by such restrictions.”<sup>145</sup>

To get around the prohibition on special laws, the legislature crafted laws, technically general in application, which accomplished the purposes of the private laws or local laws. Soon after the constitutional amendment, “the practice of concealing under the guise of general laws legislation designed to affect private interests and to meet individual cases became general. This practice tends to destroy and has already very considerably destroyed the symmetry of the laws, and has substituted fickleness and changeableness for certainty and stability.”<sup>146</sup> The eminent lawyer Simon Sterne in an 1884 address noted that “the constitutional restriction of the legislature to pass special and local acts has not only failed to accomplish the purposes of the projectors of the reform, and produced a condition of affairs more dangerous than that which it was intended to cure, but it has also placed the general body of the law in great jeopardy by creating a strong incentive to destroy the general law to serve special interests.”<sup>147</sup>

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<sup>143</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 56, at 30.

<sup>144</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 90, at 109.

<sup>145</sup> Association of the Bar of the City of New York, REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE 3 (1885).

<sup>146</sup> John Foord, THE LIFE & PUBLIC SERVICES OF SIMON STERNE 167 (1903).

<sup>147</sup> Simon Sterne, “The Prevention of Defective and Slipshod Legislation,” paper read before the American Bar Ass’n, at 19 (1884).

The courts have similarly expanded the notion of what constitutes a general law by expanding the concept to include legislation that applies to less than all the locations or people in the state.<sup>148</sup> Thus, bills applying to cities with a population over one million (which simply means New York City) are not local bills.<sup>149</sup> Whatever the intent of the 1872 commissioners may have been, current section 17 has not served as a meaningful limitation on legislative prerogatives.

### **E. Claims Against the State**

Article III § 19 was another product of the Constitutional Commission of 1872, and it has largely remained intact since that time.<sup>150</sup> It basically prevents the legislature from settling and resolving private claims against the State. Prior to its passage, this was “a procedure open to abuse and soon depleted the public treasury.”<sup>151</sup>

This provision has largely been successful in reducing corruption; the Court of Claims has replaced the legislature as a non-political, legally regulated, and standardized forum to hear private claims on their merits.

That is not to say that the legislature has refrained from acting on individual claims that affect the state that are not directly barred by this section. Thus, the legislature is frequently involved in authorizing exemption applications from real property taxes<sup>152</sup> and in assisting individuals with pension

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<sup>148</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 89 at 109.

<sup>149</sup> *McAneny v. Board of Estimate & Apportionment of City of New York*, 232 N.Y. 377 (1922).

<sup>150</sup> Carter, NEW YORK STATE CONSTITUTION, *supra* note 56, at 31.

<sup>151</sup> Galie, THE NEW YORK STATE CONSTITUTION, *supra* note 90, at 100. The original State case against the Tweed ring involved the allegation that the ring members, who jointly held the power to audit claims against New York City, conspired to approve fraudulent claims which benefited them personally. *See People v. Ingersoll*, 58 NY 1 (1874).

<sup>152</sup> See for instance L. 2015, §§ 253, 261, 283, 284, 294, 310, 316, 318, 319, 322, 327, 328, 346, 352, 355, 356, 357, 359, and 360.

and civil-service issues.<sup>153</sup> Nonetheless, this section has actually advanced the cause of ethics in New York State.

### **F. Explicitness of Tax Laws**

Article III, Section 22 requires tax laws “state the tax and the object to which it is to be applied.” This was largely the product of the 1846 Convention. The provision has not been a significant check on arbitrary action by the legislature. It has been held that the section only applies to actual state taxes and not to license fees, regulatory assessments, or local taxes.<sup>154</sup> Moreover, simply by stating that the tax moneys are to go to the State’s general fund would suffice to satisfy this section.<sup>155</sup> In short, this section has not at all affected State ethics.

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While the constitutional limitations on legislative procedures and authority have likely had a more beneficial effect on State ethics than the provisions that had been designed directly to improve ethics, their overall effect has not been especially significant. The State Constitution over the centuries has had very little effect on the overall ethical operation of the State and its elected officials.

## **IV. WHAT CAN NEW YORK DO ABOUT IT?**

Given the limited effect of New York’s constitutional attempts to improve ethics, the question becomes—returning to the alleged words of William Tweed—what New York can do about it.

The Inter-Law School Committee in 1958 did not think there was much that could be done about it. It saw little reason for any constitutional provision on corruption. The Committee

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<sup>153</sup> See for instance L. 2015, §§ 202, 203, 305, 306, 330, 337, 338, 339, 342, 353, and 354.

<sup>154</sup> See *Exempt Firemen’s Benev. Fund v. Roome*, 93 N.Y. 313 (1883); *Berkshire Fine Spinning Associates, Inc. v. City of New York*, 5 N.Y.2d 347 (1959); *New York Ins. Ass’n, Inc. v. State*, 145 A.D. 3d 80 (3d Dep’t 2016).

<sup>155</sup> *Matter of McPherson*, 104 N.Y. 306, 318–320 (1887); *Steuben Restaurants, Inc. v. City of New York*, 202 Misc. 22 (Sup. Ct. N.Y. County, Special Term, 1952); *Matosin v. City of New York*, 203 Misc. 973 (Sup. Ct. NY County, Special Term, 1952).

wrote, “If any constitutional reference to bribery is to be retained as a solemn expression of the State’s condemnation of official corruption, a general directive that there shall be laws against bribery would adequately serve the purpose.”<sup>156</sup>

In 1966, future federal district judge Jack Weinstein—then a professor at Columbia Law School—as part of a seminar on revising the New York Constitution, edited and published a series of student essays on the Constitution.<sup>157</sup> Included among these essays was an essay on “Political Ethics as a Constitutional Issue” by Roger Jellinik.<sup>158</sup> The essay stated, “The exact degree of coverage of the subject matter [in the constitution] should depend upon the circumstances within the jurisdiction considering inclusion of such a provision. If the problem is not serious, a simple declaration of policy will probably suffice.”<sup>159</sup> The essay specifically suggested a limited role for ethics in the Constitution. It recommended that the Constitution contain language that “public officers are constructive trustees for the benefit of the people and they shall be held to the standards commonly demanded of (corporate) fiduciaries.”<sup>160</sup> The attorney general was empowered to initiate proceedings in equity to prevent such violations, and the legislature was charged with enacting laws to further the policy of this provision.<sup>161</sup>

Ethics emerged as a very minor issue at the 1967 Constitutional Convention.<sup>162</sup> Delegate Martin Walsh offered a proposition stating that public offices are public trusts and that “it shall be the duty of the legislature to adopt appropriate

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<sup>156</sup> Inter-Law School Committee, *supra* note 102, at 175.

<sup>157</sup> Roger B. Jellinik in 1 Jack B. Weinstein et al., *ESSAYS ON THE NEW YORK CONSTITUTION*, *supra* note 107. A number of individuals who became prominent in political life in New York City and the nation participated in the seminar. These included Carter Burden, Harold Ickes, and Frank Macchiarola.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at VI-22.

<sup>160</sup> *Id.* at VI-23.

<sup>161</sup> *Id.*

<sup>162</sup> Henrik N. Dullea’s 1997 book on the 1967 Convention barely contains a mention of the word “ethics.” See Henrik N. Dullea, *CHARTER REVISION IN THE EMPIRE STATE* (1997).

legislation to effectuate such right.”<sup>163</sup> That proposition was not acted upon.

Former New York City mayor Robert Wagner offered a somewhat more comprehensive measure on ethics. He proposed a ban on legislators and State officers and employees appearing pay in relation to: (a) any case or matter against the interest of the State or (b) before most State agencies. The bill also created an independent ethics commission which would issue advisory opinions on ethical standards.<sup>164</sup> Delegate Earl Brydges, who was also the temporary president of the Senate, took exception to the proposal. He found it unnecessary since “this State has the greatest, tightest code of ethics in the nation and has had for many years.”<sup>165</sup> The Wagner proposition was defeated by voice vote at the convention.<sup>166</sup>

In the lead-up to the 1997 vote on whether to convene a constitutional convention, there was limited mention of ethics-related issues.<sup>167</sup> The report of the Association of the Bar on the 1997 Convention vote only mentioned ethics in regard to the selection of delegates and to term limits for New York City elected officials.<sup>168</sup> The volume of the *Hofstra Law and Policy Symposium* devoted to the 1997 Convention vote had no mention

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<sup>163</sup> PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Volume VI, Proposition No. 7 (1967).

<sup>164</sup> *Id.* at volume VIII, Proposition No. 393 (1967). *See also id.* volume I at 93-94.

<sup>165</sup> *Id.* at volume IV at 753. Former Assemblyman Charles Cusick went even further than Senator Brydges and said the “Wagner proposal, on its face, brands ... any member of the Assembly, any member of the Senate, as second-class citizens who must be subjected to some sort of ethical code which does not apply to any other person in the state.” He further stated, “I am sick and tired of sanctimonious psalm singers.” *Id.* at 756.

<sup>166</sup> *Id.* at 758.

<sup>167</sup> Earlier in the decade, the State Commission on Government Integrity in its reports recommended no constitutional changes. It did recommend a pension forfeiture provision for public officials but only in the future for people who joined or rejoined the state retirement system. THE COLLECTED REPORTS OF THE STATE COMMISSION ON GOVERNMENT INTEGRITY, GOVERNMENT ETHICS REFORM FOR THE 1990’S at 712-13 (Bruce A. Greene ed. 1991).

<sup>168</sup> The Task Force on the New York State Constitutional Convention, “Report of the Task Force on the New York State Constitutional Convention,” 52 THE RECORD 523 (1997).

of the term “ethics.”<sup>169</sup> The term “corruption” was only mentioned in one article in reference to an 1884 constitutional amendment on debt limits.<sup>170</sup> There were few newspaper articles on the topic of ethics and the Constitutional Convention.<sup>171</sup> The most significant mention of ethics as a possible topic was in Jeffrey Stonecash’s “Elections and the Political Process,” which was an essay in the briefing book put out by the Temporary Commission on Constitutional Revision in 1994.<sup>172</sup> Stonecash wrote that three states (Texas, Hawaii, and Rhode Island) had established independent statewide ethics commissions<sup>173</sup> and that this would be “one solution”<sup>174</sup> to improve “the scrutiny of the ethics of public officials.”<sup>175</sup>

In its final report in 1995, the Temporary State Commission on Constitutional Revision did not mention ethics as part of its four-part action agenda for Albany.<sup>176</sup> The four areas the Commission suggested for necessary action were education, public safety, fiscal integrity, and state and local

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<sup>169</sup> 1 HOFSTRA L. & POL’Y SYMP. [i], [ii] (1996).

<sup>170</sup> Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL’Y SYMP. 79, 110 (1996).

<sup>171</sup> The few articles included William J. Stern, “C’mon Governor Pataki, Lead,” *City Journal* (Oct. 1995), suggesting that Governor Pataki “should urge a yes vote and press the convention to bypass the Legislature and write his ethics and process reforms into the Constitution”; and John Caher, “Questions Often Asked on State Constitution” (Sept. 21, 1997), suggesting state ethics as a possible topic at a convention.

<sup>172</sup> Jeffrey M. Stonecash, “The New York Constitution: Elections and the Political Process,” in the Temporary Commission on Constitutional Revision, *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* at 147-148 (1994). The same essay appeared in “Elections and the Political Process” in *DECISION 1997 CONSTITUTIONAL CHANGE IN NEW YORK* 193 (eds. Gerald Benjamin and Henrik N. Dullea 1997).

<sup>173</sup> *Id.* at 205.

<sup>174</sup> *Id.* at 204.

<sup>175</sup> *Id.*

<sup>176</sup> *Effective Government Now for the New Century: A Report to the People, the Governor, and the Legislators of New York: The Final Report of the Temporary State Commission On Constitutional Revision*, (1995). The Commission did mention as part of its selective ideas in its final report that a constitutional change could improve legislative districting and end the political party equality requirement for elections boards.

government relations.<sup>177</sup> If action could be taken in these four crucial areas, the Commission believed that the need for a convention might be obviated.

In sum, there was little focus on ethics in the campaign leading to the vote for a 1997 Constitutional Convention, and much of what was written on ethics centered simply on the general issue of whether ethics should be part of the Convention's consideration.

In the years since the Convention vote, there has been minimal activity in the legislature on the issue of using the Constitution as a way to improve government ethics. While there have been fairly frequent legislative Constitutional amendments introduced to change the Constitution by adding initiative and referendum, recall, term limits, pension forfeitures, and redistricting requirements, the overall topic of ethics in the Constitution has been given short shrift.

The only proposal to include ethics in the constitution is one that has been introduced annually in the Assembly since 2004, initially by former Assemblyman Richard Brodsky.<sup>178</sup> Since Assemblyman Brodsky left the Assembly after 2010, it has been introduced continuously by Assemblyman Gary Pretlow. The resolution "raises the importance of ethics to a constitutional level,"<sup>179</sup> and states that "a public office is a public trust." It requires each of the three branches of government to establish an ethics code which will be administered by its own independent ethics commission. Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure, conflicts of interest, and lobbyist registration and restriction." The proposal

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<sup>177</sup> See Kevin Collison, "Reform Urged in Bid to Avoid State Constitutional Convention," *Buffalo News* (Feb. 26, 1995).

<sup>178</sup> A. 11857 (2004) introduced by the Committee on Rules at the request of Member Brodsky.

<sup>179</sup> New York State Assembly Memorandum in Support of Legislation, A. 737 (2017).



has not changed since it was first introduced in 2004,<sup>180</sup> and it has not advanced at all in the legislature over the years.

Nonetheless, in the period leading up to the 2017 Constitution vote, the need for ethics reform has taken central stage as an argument for the Convention. Ethics issues seen as potential topics for the Constitution include stripping pensions from State officials found guilty of significant crimes, a full-time legislature, term limits for the legislature, outside income restrictions for legislators, and an independent ethics agency. Issues related to ethical concerns cited as possible Convention topics have included campaign-finance reform, redistricting procedures, various election and voter registration reforms, and the permissible use and sources of campaign funds.<sup>181</sup>

Ethics has gone from being a lounge act in 1997 to the center stage in 2017. Yet most of the 2017 suggested reforms seem to be aimed at structural and procedural concerns. They are unlike the constitutional amendments of the late 19th century on bribery and free passes which sought to establish specific penal sanctions and regulated conduct norms for government officials. Instead, the 2017 proposed changes largely focus on establishing procedures for improved governance<sup>182</sup> and in adding electoral-process reforms.<sup>183</sup> Additionally, thus far, there has been an absence of specifics in the ethics-related proposals. One needs to look to other jurisdictions to see what ethics proposals have been placed into state constitutions.

## V. WHAT DO OTHER STATES DO ABOUT IT?

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<sup>180</sup> A. 598 in the 2005-2006 term, A. 1198 in the 2007-2008 term, A.4252 in the 2009-2010 term, A.2545 in the 2011-2012 term, A. 4144 in the 2013-2014 term and A.2619 in the 2015-2016 term.

<sup>181</sup> See generally the website of the Committee for a Constitutional Convention and its suggested issues for constitutional purview. [http://www.concon19.org/take\\_action](http://www.concon19.org/take_action) (viewed Feb. 25, 2017).

<sup>182</sup> For example, there is a focus on an independent ethics commission, and independent redistricting body, independent election boards.

<sup>183</sup> These include campaign finance reforms, broader participation in choosing officeholders, automatic registration, early voting and voting by mail. It is somewhat ironic that the constitutional provisions from the 19<sup>th</sup> century designed to prevent elections fraud now serve as an impediment to increasing voter turnout.

In reviewing how states treated ethics issues in their constitutions in 1966, Roger Jellinik noted that “all states have constitutional provisions that, in theory or in practice, serve to check the actions of government officials.”<sup>184</sup> He did not seem to believe they had a “single rubric that can adequately cover the multiplicity of situations involved.”<sup>185</sup>

Yet, broadly speaking, there appear to be three types of ethics provisions in state constitutions. These include hortatory declarations on ethics, structural and procedural changes affecting ethics, and, finally, substantive provisions governing actual ethical conduct by public officers and employees.

### **A. Hortatory Provisions in State Constitutions**

First is the hortatory provision, which tends to simply declare the state’s public policy on the importance of ethics in state government or the notion that public office is a public trust.<sup>186</sup> Somewhat typical of this is the Massachusetts constitutional section that states, “All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”<sup>187</sup>

Similarly, the Florida Constitution states, “A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.”<sup>188</sup> While cynics might view these adages as substance-free window dressing, they do act

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<sup>184</sup> Jellinik, *supra* note 107, at VI-7.

<sup>185</sup> *Id.* at VI-6.

<sup>186</sup> *Id.* at VI-7.

<sup>187</sup> MASS. CONST. Pt. 1, Art. V; similarly, see N.H. CONST. Pt. First, Art. 8.

<sup>188</sup> FLA. CONST. art. II, § 8. *See also* “That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct.” Md. Dec. of R. Art. 6; “Legislative office is a public trust, and every effort to realize personal gain through official conduct is a violation of that trust.” LA. CONST. Art. III § 9; Public officers and employees “shall carry out their duties for the benefit of the people of the state.” C.R.S.A. CONST. Art. 29, § 1(1)(b); “Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.” 5 C.F.R., § 2635.101.

symbolically to provide clear policy direction on the importance of ethics in state government. They could provide value in inspiring people to work towards higher levels of integrity in government. In fact, while reviewing the overall state of ethics in state constitutions in the late 1950's, the Inter-Law School Committee seemed to take the position that the only benefit of a reference of bribery in the Constitution would be as a "solemn expression of the State's condemnation of official corruption."<sup>189</sup>

## **B. Constitutionally Created Ethics Commissions**

While state constitutions since the 1960's have witnessed a de-emphasis in handling bribery issues, in the years since Watergate a number of states have used their constitutions to create ethics commissions and to help establish codes of ethics.<sup>190</sup>

The Florida constitutional provision on ethics appears to be the earliest constitutional ethics provision of this kind. It was enacted in 1976 as a result of a citizen initiative. It requires the creation of an "independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees."<sup>191</sup> Also, the legislature is required to prescribe a code of ethics for employees.<sup>192</sup>

Hawaii was the first state to have an ethics commission, in 1968,<sup>193</sup> and was also early in placing state ethics

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<sup>189</sup> The Inter-Law School Committee, *supra* note 102, at 175.

<sup>190</sup> This includes states that have established ethics commissions that cover the executive branch of government. It does not include the states that have established separate judicial ethics commissions through their constitutions. *See, e.g.*, N.Y. CONST. art VI, § 22; TEX. CONST. art. V, § 1-a; UTAH CONST. art. VIII, § 13; WASH. CONST. art. IV, § 31; WYO. CONST. art. 5, § 6. For interesting perspectives on what an ethics code can actually achieve, *see* Richard Rifkin, "Commentary: What Can Ethics Codes Accomplish?" 74 PUBLIC ADMINISTRATION REVIEW 39 (January/February 2014); Mark Davies, "Governmental Ethics Laws: Myths and Mythos," 40 N.Y.L. SCH. L. REV. 177 (1995).

<sup>191</sup> FLA. CONST. art. II, § 8(f). The commission is the Florida Commission on Ethics. *Id.* art II, § 8(i)(3).

<sup>192</sup> *Id.* at (g).

<sup>193</sup> [http://ethics.hawaii.gov/about\\_hsec/](http://ethics.hawaii.gov/about_hsec/) (last viewed Feb. 28, 2017). *See also* Wendy J. Johnson, Samuel E. Sears and Daniel J. Rice, *Oregon*

commissions in its constitution, which it did in 1978.<sup>194</sup> Its provision requires each branch of State government to establish its own code of ethics which will be administered by its own ethics commission.<sup>195</sup> The ethics commissions were to be independent. “The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.”<sup>196</sup>

Hawaii’s constitution does not dictate the actual contents of the codes of ethics.<sup>197</sup> It does, however, require the codes to include “provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction.”<sup>198</sup>

The Constitution of Texas in 1991<sup>199</sup> was amended to establish an eight-member bipartisan ethics commission.<sup>200</sup> Four members are appointed by the governor from bipartisan lists supplied by the members of the house of representatives and senate “from each political party.”<sup>201</sup> Two are appointed by the speaker of the house from lists made by the members of the house from each political party, and two are appointed by the lieutenant governor from lists made by the members of the senate from each political party. The ethics commission can recommend the salaries of the legislature, subject to a public

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*Government Ethics Law Reform*, 44 WILLAMETTE L. REV. 399, 402 (2007); Department of the Attorney General, State of Hawaii, Op. No. 15-2 (2015).

<sup>194</sup> Rebecca L. Anderson, *The Rules in the Owners’ Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375, 379 (2008).

<sup>195</sup> HAWAII CONST. art. 14.

<sup>196</sup> *Id.*

<sup>197</sup> Opinion No. 15-2, *supra* note 193.

<sup>198</sup> HAW. CONST. art. 14. The New York constitutional amendment introduced by Assemblymen Brodsky and Pretlow is clearly modeled on the Hawaiian Constitution.

<sup>199</sup> Mark S. DesNoyer, “In Through the Out-Door: Conflicts of Interest in Private-To-Public Service, Revolving Door Statutes, And Ethical Considerations,” 5 TEX. TECH J. TEX. ADMIN. L. 113, 119 (2004).

<sup>200</sup> TEX. CONST. art. III, § 24a.

<sup>201</sup> *Id.* at §24a.(a).

referendum, but otherwise has the powers established by the legislature.<sup>202</sup>

Rhode Island was also early in creating a constitutionally based ethics commission. The constitutional provision passed in 1986<sup>203</sup> requires the legislature to “establish an independent non-partisan ethics commission.”<sup>204</sup> The commission is to adopt a code of ethics which is to include, but is not limited to, “conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure.”<sup>205</sup>

Rhode Island’s constitution applies not to just state executive-department officials but to “all elected and appointed officials and employees of state and local government, of boards, commissions and agencies.” There has always been some tension over how the provision applied to the legislature. The commission could not remove members of the legislature, since it lacked the “power to remove from office officials who are not subject to impeachment.”<sup>206</sup> Also, under a 2009 Rhode Island Supreme Court decision, the ethics commission was unable to enforce the ethics code against members of the legislature engaged in the legislative process.<sup>207</sup> The court found that the Rhode Island Constitution’s speech-in-debate clause gives legislators absolute immunity from the actions of the ethics commission when the legislators were engaged in “core legislative acts.”<sup>208</sup> At the general election of 2016, the legislative immunity was ended when a constitutional amendment was passed to provide the ethics commission with full jurisdiction over members of the legislature.<sup>209</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> See *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999); *In re Advisory Opinion to Governor*, 612 A.2d 1 (R.I. 1992).

<sup>204</sup> R.I. CONST. art. III, § 8.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Irons v. R.I. Ethics Comm’n*, 973 A.2d 1124 (R.I. 2009).

<sup>208</sup> *Id.* at 1132.

<sup>209</sup> See “Rhode Island Gives Ethics Commission Oversight of Legislators,” *States News Service* (Nov. 15, 2016); Alex Kuffner, “Jurisdiction Over Assembly Restored; Question 2 Wins in A Landslide,” *Providence Journal* (Nov. 9, 2016).

Louisiana requires the legislature to “enact a code of ethics for all officials and employees of the state and its political subdivisions.”<sup>210</sup> It further provides that the code be administered by one or more boards to be established by the legislature.<sup>211</sup>

Oklahoma has a constitutionally created ethics commission which was established by an initiative petition in 1990.<sup>212</sup> The constitution requires “an annual appropriation by the Legislature sufficient to enable it to perform its duties.”<sup>213</sup> The Ethics Commission is charged with promulgating rules of conduct for State elections and “rules of ethical conduct for state officers and employees.”<sup>214</sup> These rules can be disapproved by the legislature subject to a gubernatorial veto, and the legislature is also given power to repeal or modify the ethics rules, subject again to a gubernatorial veto.<sup>215</sup>

Arkansas, strictly speaking, does not have a constitutionally created ethics body. Instead, it has an ethics commission which was established by an initiative in 1990.<sup>216</sup> Under that law, the Arkansas Ethics Commission is composed of five members with one appointment each from the governor, the lieutenant governor, the attorney general, the speaker of the House of Representatives, and the president pro tem of the Senate.<sup>217</sup> Nonetheless, the Arkansas Constitution recognizes the existence of the Arkansas Ethics Commission in three separate sections. The registration of a former member of the legislature as a lobbyist,<sup>218</sup> the regulation of gifts to public

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<sup>210</sup> LA. CONST. art. 10, § 21.

<sup>211</sup> *Id.*

<sup>212</sup> OKLA. CONST. art. 29, § 1.

<sup>213</sup> *Id.* § 2.

<sup>214</sup> *Id.* § 3.

<sup>215</sup> *Id.*

<sup>216</sup> A.C.A. § 7-6-217.

<sup>217</sup> *Id.* Initially the chief justice of the Supreme Court selected one of the members. That was found unconstitutional as a violation of separation of the powers in *Spradlin v. Arkansas Ethics Commission*, 314 Ark. 108 (1993). The statute was amended to allow the lieutenant governor rather than the chief justice to make the appointment to the commission.

<sup>218</sup> ARK. CONST. art. 19, § 29.

officials,<sup>219</sup> and the regulation of political contributions<sup>220</sup> are all constitutionally under the jurisdiction of the Ethics Commission. Thus, in essence, the Arkansas Constitution has incorporated the Arkansas Ethics Commission by reference.

Colorado may have the most extensive of the state constitutional structures governing ethics.<sup>221</sup> Enacted pursuant to an initiative in 2006, Colorado amended its Constitution to establish an independent ethics commission.<sup>222</sup> “In many ways, the language of the Amendment creates a super-agency, a commission set apart from the legislative and executive branches of government so as to supervise the ethical conduct of both branches, and given the authority to administer, implement, and enforce the Amendment's provisions.”<sup>223</sup> The constitution further provides a guarantee of independence by adding that in no way can “legislation limit or restrict the provisions of this article or the powers herein granted.”<sup>224</sup> There are five members of the commission. One member each is appointed by the governor, the Senate, the House of Representatives, and the chief justice of the Supreme Court. The fifth member is a local government official or employee appointed by three of the other members of the commission. No more than two members can belong to the same political party. The legislature is required to “appropriate reasonable and necessary funds to cover staff and administrative expenses”<sup>225</sup> for the independent ethics commission. Unless a complaint is determined to be frivolous, the commission is required to “conduct an investigation, hold a public hearing, and render findings.”<sup>226</sup>

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<sup>219</sup> *Id.* § 30.

<sup>220</sup> *Id.* § 28.

<sup>221</sup> COLO. CONST. art. 29. Besides establishing an ethics commission, the Colorado Constitution contains detailed language creating limitations on gifts to public officials and lobbying by former public officers.

<sup>222</sup> *Id.* § 5.

<sup>223</sup> *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Co. 2008).

<sup>224</sup> COLO. CONST. art. 29, § 9.

<sup>225</sup> *Id.* § 5(1).

<sup>226</sup> *Id.* § 5(3)(C). See generally *Colorado Ethics Watch v. Independent Ethics Commission*, 369 P. 3d (Colo. 2016), finding that a decision of the commission finding a complaint to be frivolous is not subject to judicial review.

Elements of these state constitutions could serve as models for constitutional reform of ethics in New York. The current ethics enforcement, training, and oversight agency, the Joint Commission on Public Ethics,<sup>227</sup> is regularly criticized for not being independent, having too many members, lacking a sufficient budget to perform its duties, and having insufficient power over the legislature.<sup>228</sup> A constitutionally created ethics commission could resolve these issues by reducing the size of the commission, guaranteeing commission independence, resolving the issues of coverage of the legislature, and guaranteeing a satisfactory budget.

### C. Substantive Constitutional Ethics Codes

Several of the states that have added ethics provisions in their constitutions have gone further than simply creating an independent organization to enforce and oversee ethics rules. These states have established enactments which are in many ways “collections of essentially statutory material.”<sup>229</sup> As such, they raise significant theoretical and practical issues over what properly belongs in state constitutions. Should it simply be fundamental principles that belong in the state constitution, or in a vital field where the legislature refuses to take significant action, do you need to place a quasi-legislative scheme into the constitution? If you place the legislative scheme in the constitution, what do you do when the enactment receives

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<sup>227</sup> N.Y. Exec. Law §94.

<sup>228</sup> See N.Y. Ethics Rev. Comm’n, *Review of the Joint Commission on Public Ethics and the Legislative Ethics Commission* (Nov. 1, 2015), <http://www.nyethicsreview.org/wp-content/uploads/2015/11/Ethics-Review-Commission-Final-Report.pdf> (reviewed Mar. 1, 2017) and its attached materials; Mark Davies, “New York State Whiffs on Ethics Reform,” 5 ALB. GOV’T L. REV. 710 (2012); see also “For Review, Cuomo Chooses Outside Agent Over Existing State Investigators,” *Gotham Gazette* (June 6, 2016); Bill Mahoney, “A Guide to What the JCOPE Review Commission Will Be Looking At,” *Politico* (Oct. 13, 2015).

<sup>229</sup> J. Harvie Wilkinson III, “Gay Rights and American Constitutionalism: What’s A Constitution For?,” 56 DUKE L.J. 545, 574 (2006); cf. Gerald Benjamin, “When Does a Gambling Prohibition Not Prohibit Gambling? Or an Alternative Mad Hatter’s Riddle and How It Helps Us to Understand Constitutional Change in New York,” 75 ALB. L. REV. 739, 742 (2012).



unfavorable or controversial administrative treatment,<sup>230</sup> controversial or unfavorable judicial treatment, goes out of public favor, or becomes obsolete? What do you do if the persons and entities affected by the constitutional code devise a permissible way of circumventing the code?<sup>231</sup> How hard and how long will it take to amend the constitution if the constitutional code is given a construction that defeats its intended purposes?<sup>232</sup>

Arkansas bans gifts from lobbyists to its major public officeholders.<sup>233</sup> The section on gifts is extremely detailed. It was added in 2014 and was amended extensively in 2015<sup>234</sup> and even in 2017 by a new provision allowing gifts of facilities “for the purpose of conducting a meeting of a specific governmental body.”<sup>235</sup> The Arkansas Constitution has a revolving-door section preventing former legislators from becoming lobbyists until two years after their term has expired.<sup>236</sup> It also has a detailed section governing who can make political contributions to candidates for public office. Arkansas even retains a bribery ban in its Constitution.<sup>237</sup>

Florida in its Constitution requires financial disclosure statements for elected constitutional officers and for their campaigns, prevents legislators from appearing for compensation before a state agency, has a two-year ban on individuals appearing before their former agency, and adds that public officer or employees who breach the “public trust for

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<sup>230</sup> See, e.g., “Colo. Ethics Board Misreads the Rules,” *Denver Post* (Jan. 17, 2017).

<sup>231</sup> Since constitutional codes are stationary and hardly elusive targets, it did not take long in the 19th century for New York legislators to find a way to work around the limitations on “single subject” private and local bills as well as the ban on private and local bills containing certain subjects.

<sup>232</sup> For example, it took Rhode Island seven years to amend the Constitution to respond to the *Irons* decision. See *supra* notes 207 to 209 and accompanying text.

<sup>233</sup> ARK. CONST. art. 19, § 30. But see Max Brantley, “It’s Official: Amendment 94, the ‘Ethics Amendment,’ is Meaningless,” *Arkansas Times* (Mar. 19, 2015).

<sup>234</sup> 2015 Arkansas Laws Act 1280 (S.B. 967).

<sup>235</sup> 2017 Arkansas Laws Act 207 (S.B. 169).

<sup>236</sup> ARK. CONST. art. 19 § 29.

<sup>237</sup> *Id.* at art. 5, § 35.

private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions.”<sup>238</sup>

Colorado’s detailed substantive ethics enactments in its constitution ban most gifts of slightly more than \$50 to public officials<sup>239</sup> and has a two-year bar on former statewide elected officials and legislators representing clients before other statewide elected officials or the legislature.<sup>240</sup> The gift ban is extremely detailed and complicated,<sup>241</sup> and “ripe for future interpretation.”<sup>242</sup> Colorado’s ethics commission, however, does not have much power to actually investigate complaints,<sup>243</sup> and its budget has been extremely limited.<sup>244</sup>

Perhaps it might be worthwhile to determine whether the inclusion of ethics in a state’s constitution improves the overall integrity of government conduct. While certainly subjective and a very gross measure, no state received higher than a C grade from the Center for Public Integrity.<sup>245</sup> The states with ethics provisions in their constitution had rankings all across the board. Hawaii and Rhode Island ranked fourth and fifth respectively with a grade of D+. They were followed by Colorado (13th), Florida (30th), Arkansas (32nd), Texas (39th), Oklahoma

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<sup>238</sup> FLA. CONST. art. 2 § 8.

<sup>239</sup> COLO. CONST. art. 29, § 3. The original \$50 limit has been indexed for inflation. For questions about the reach of the gift ban, see Tim Hoover, “Gift-Ban Tweak Roils Opinions Amendment 41 Foes Say It ‘Implodes’ the Law,” *Denver Post* (Aug. 22, 2010).

<sup>240</sup> COLO. CONST. art. 29 § 4.

<sup>241</sup> Gerald E. Dahl, B. Brittany Scantland, “Amendment 41: Ethics in Government,” 39 COLO. LAWYER 29 (Dec. 2010).

<sup>242</sup> *Id.* at 38. See Hoover, *supra* note 239.

<sup>243</sup> “Audit: Colorado’s Ethics Commission Has Questionable Ethic,” *Colorado Independent* (Mar. 8, 2016).

<sup>244</sup> Joey Bunch, “Bill Would Give Ethics Panel More Powers,” *Denver Post*, March 9, 2016. See Colorado Office of the State Auditor, *Independent Ethics Commission, Performance Audit* (February 2016), <https://perma.cc/E4UM-6LWN>.

<sup>245</sup> Nicholas Kusnetz, “Only Three States Score Higher Than D+ in State Integrity Investigation; 11 Flunk,” (Center for Public Integrity report, Nov. 9, 2015); <https://www.publicintegrity.org/2015/11/09/18693/only-three-states-score-higher-d-state-integrity-investigation-11-flunk> (viewed Mar. 3, 2017).

(40th), and Louisiana (41st). Both Oklahoma and Louisiana received failing marks under the grading system used by the Center for Public Integrity. New York ranked 31st.<sup>246</sup>

To be sure, correlation is not causation, and it is possible that states with ethics problems are those more likely to need—and therefore enact—constitutional ethics provisions. But we can at least say that adding ethics to the state constitution is hardly a guarantee of government integrity.

## VI. CONCLUSION

Many thoughtful reformers reasonably believe that the State legislature in New York will not take meaningful steps to improve ethics training, administration, and enforcement. They believe, in the absence of legislative action, that amending the Constitution is the only way to significantly improve ethics and reduce corruption in New York. While this may be a necessary step to limit integrity problems, it is not a panacea. The history of ethics reform in New York's constitution has demonstrated that the benefits may be marginal. The 19th-century constitutional amendments aimed at ending bribery and corruption in New York were largely unproductive. Efforts across the country to introduce ethics reforms into state constitutions have also produced unremarkable effects.

The 19th-century New York examples show that adding detailed quasi-legislative codes of conduct into the Constitution was a questionable way of deterring corruption. The bribery and anti-free pass amendments to the State Constitution quickly became obsolete and lay dormant for decades before they were ultimately repealed. More general structural reforms aimed at guaranteeing an independent ethics enforcement and oversight body with a reasonable number of members,<sup>247</sup> providing that body with adequate funding, and giving it clear authority over

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<sup>246</sup> *USNews.com* has its own rankings for state integrity. It is not much different from the 2015 Center for Public Integrity rankings. Hawaii was 4th, Rhode Island tied for 5th, Colorado tied with seven other states for 7th, New York and Arkansas tied for 30th, Texas tied for 36th, and Oklahoma and Louisiana tied with four other states for 39th. See <https://perma.cc/273N-APZA>.

<sup>247</sup> The current Joint Commission on Public Ethics has 14 members, which has been considered an unwieldy number. See N.Y. Ethics Review Commission, *supra* note 228.

all non-judicial State officers and employees, might be a more successful formula. Even then, these structural reforms will hardly be enough to end corruption in New York State. No one doubts that an improvement in ethics would be beneficial to New York State, but not even the most Panglossian of optimists should expect that adding a spoonful of ethics into New York's Constitution will bring about a renaissance of honest and principled government in the Empire State. High ideals, by themselves, will not suffice.<sup>248</sup> We will need an overall continued focus on ethics at all levels of government if we ever are to respond successfully to Boss Tweed's question, "What are you going to do about it?"

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<sup>248</sup> Quoting the detestable banker Mr. Potter on George Bailey's father, Peter, in the film *It's a Wonderful Life*, "He was a man of high ideals, so called, but ideals without common sense can ruin this town." See [https://en.wikiquote.org/wiki/It%27s\\_a\\_Wonderful\\_Life](https://en.wikiquote.org/wiki/It%27s_a_Wonderful_Life) (viewed Mar. 4, 2017).

## **Confessions of a Recovering Racing Regulator**

Prepared Remarks for the Association of Racing Commissioners International  
Annual Convention, April 18, 2017

By Bennett Liebman  
Government Lawyer in Residence  
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When Ed Martin asked me to speak about confessions of a recovering racing regulator, I was perplexed. What life lessons do I have? I was a member of the State Racing and Wagering Board in New York for nearly 12 years from 1988 to 2000. What wisdom can I possibly impart to a new generation of regulators? Did I have any lessons?

One of the most perplexing changes to me was in the agenda of the Association of Racing Commissioners International meeting. When I went to ARCI meetings in the 1990s, they were largely excuses to play golf or to go to the local track. I was the substantive part of the agenda, talking about rules and fouls and ethics. Because I'm old, I have a limited recollection of those conventions, but I do remember being on a dinner cruise to the Statue of Liberty one year and talking to Tom Lomangino who ran the Maryland Racing Commission laboratory. I think we concluded that the saying on the Statue of Liberty "Give me your tired, your poor, your huddled masses yearning to breathe free" was actually the poet Emma Lazarus's subtle reference to Lasix.

Yet now Ed has a convention tackling truly important issues. The only filler in the convention is me. It's like the traditional poker story often attributed to Warren Buffet. "If you've been in the game 30 minutes and you don't know who the patsy is, you're the patsy." I'm the patsy. I've gone from the content guy to the comic relief of the ARCI meeting.

In fact, looking at my credentials, I'm probably the founding partner of the firm of former, former and former. Former member of the Racing and Wagering Board, former Acting Co-Chair of the Racing Board, former Deputy Secretary to the Governor for Gaming and Racing, former NYRA Board member, former Columnist, Daily Racing Form, Former Columnist, Hoof Beats.

Also, here is the record of New York racing since I joined on. In 1987, total handle was nearly \$3.5 billion. For 2015, the last year for which we have stats, the handle was less than \$1.5 billion. When you apply the cost-of-living changes, since I joined the Board, handle is down by nearly 80 percent. Since I joined the board, live harness racing handle – that's the amount bet at harness tracks on their live product – is down by 97.5 percent. I haven't even helped the state. Revenue to the state from horse

racing is down nearly 90 percent. If you're looking for whom to blame for the state of New York racing, I could be the primary suspect. I'm approaching the guy who used to run a harness track in New York who said: "I should be in charge of the state's problem gambling program because I've proven conclusively that nobody will bet in any facility that I run." So you need to question my authority before you accept what I'm saying.

So before I can impart my racing life lessons, let me talk about where I came from.

I was a lawyer who had met Mario Cuomo when I was in law school. When he became Secretary of State in New York, I became an assistant. When he became lieutenant governor, I became his associate counsel and then counsel. I was a special deputy counsel when he became governor. I did much of the state's ethics work. I helped research speeches. I can say with some certainty that I am the only person to have drafted speeches for both Mario Cuomo and Joe Neglia. I worked on all kinds of major projects. I thought I was a serious, thoughtful, respected attorney.

Of course, the minute I got appointed to the Racing and Wagering Board, I instantly became a hack.

I always get asked about Mario Cuomo's relationship with racing. Cuomo seemed to have a rocky relationship with racing. It wasn't that he hated it. He was puzzled by the fascination people had with it. He was baffled by people's interest in it. And he had a decent amount of experience in it. He grew up in Jamaica, Queens, which had New York's most successful track, Jamaica. He went to junior high school at a location less than two miles from both Aqueduct and Jamaica. His law partner and close friend Peter Dwyer was a diehard racing fan. Dwyer and his pal Freddy Flynn would even in the old days drive to Harrington Racetrack in Delaware, because Harrington was the only track in the Mid-Atlantic that was open between Christmas and New Year's. Dwyer would come into the office and say "My ex-partner is the Secretary of State, and I'm the only lawyer in Brooklyn who doesn't have a pass to the track." Cuomo's political career was largely launched by Jimmy Breslin who spent considerable time at the track. At the Department of State, we had a number of racetrack enthusiasts, besides myself. Our administrative director swore that he had a computer program that would beat the harness tracks, Cuomo's top assistant ended up doing some horse owning and breeding, and our top government lawyer was in a fraternity with an assortment of future thoroughbred trainers. One of his early jobs was to run from Aqueduct to the street outside the track to convey race results to his frat brother's father who was a local bookie. Oddly enough, our overall boss in the governor's office – a non-racing type – Mike Del Giudice, became the chair of NYRA. Maybe because Cuomo came from Queens, Governor Carey put him on a racing study panel, and he came away from it saying that the white-haired guy, future Hall of

Famer Phil Johnson, was the one who knew anything, but Cuomo largely saw us as non-serious, biased supporters of racing, whose opinions we should downgrade.

The one moment I do remember is him coming into the office one day and saying that his wife, who ended up being a close friend of Mary Lou Whitney, was going to Belmont Park that day, and he was studying the entries. There was a horse named State running, who was actually a regally bred horse trained by Woody Stephens. Cuomo was the Secretary of State. State had five letters in it. It was in the fifth race running out of post five. Destiny. Kismet. He bet. And of course, the horse finished fifth.

Initially, I felt that I seemed well placed in 1988 to be on the Racing Board. My parents just before my birth lived three blocks from Aqueduct. They actually entered a contract to buy a house about 100 yards from Aqueduct. You could see Roosevelt Raceway from my high school. Much of my college career was spent at Saratoga Raceway. My suitemates actually sent a letter to Stan Bergstein asking for job advice. One of my suitemates became a harness driver and groom. I helped work on a harness tip sheet in law school. I had season tickets to Saratoga, before the era of Chris Kay, so they were affordable. My wife grew up on Meadowlands Street in the hamlet of Delmar, New York. Many of you may remember the late Clyde Hirt from Sports Eye. My next-door neighbor dated Clyde Hirt's daughter. What else was I going to do with my life? I had the right breeding to be a racing commissioner.

I was the first of the Slingerlands members of the Racing and Wagering Board. From my appointment until the termination of the Racing and Wagering Board, there was always one member from the hamlet of Slingerlands, which has a population of approximately 7,500. After being replaced, I was followed by Cheryl Buley in 2000, and Cheryl was replaced by my neighbor Dan Hogan, who served until the board was legislated out of existence and replaced by the Gaming Commission in 2013. Thus, for nearly two and a half decades, there was a Racing and Wagering Board member from Slingerlands, New York. We had a Slingerlands seat.

I can remember buying a train ticket from Penn Station to Belmont Park in 1989. I asked for a receipt, and the clerk said, "What a life. Getting paid to go to the racetrack."

But glorious it was not. It was not the part of Garrison Keillor's Lake Wobegon where "all the women are strong, all the men are good looking, and all the children are above average." We were the part of Lake Wobegon "that time forgot, and the decades cannot improve."

And time had truly forgotten the Racing and Wagering Board. Our main office was in Manhattan near Little Italy and Chinatown. Today it's an NYU dorm in the heart of what is now trendy NoLo. Back then, it was the dive of dives. It was the building

where the heroin in *The French Connection* had been lost, and it must have permeated the building and its inhabitants. Everything in the building not tied down would be stolen. The subway rumbled right under the building, so you had to stop hearings every 10 minutes because the noise was deafening when the trains went by. We shared the building with the state's Public Service Commission, which, unlike ours, was a substantive agency. Their Albany-based personnel were so scared of going to the building that they travelled in convoys on subways from Grand Central Station to get there. They would not send material to New York City except by UPS, since they assumed that any other mode of transport would get lost. We had no computers. We had, basically, IBM selectric typewriters and a few word processors that used floppy disks. We had no faxes

I worked mainly in the Albany office, which was far nicer but is only remembered because a third of the small floor we occupied held a large craps table. We were the office with the craps table. In order to use a fax, I had to walk about 500 yards over to my friends at the governor's office and ask them to fax any info.

I recall our big hearing at the Board in the second month was there. We had an all-day hearing to consider what to do about NYRA's termination of its gap attendants. I got up the next morning and went to my local newspaper store, and I saw this huge, huge write up of the story by Clyde Hirt in *Sports Eye*. I had never met Clyde Hirt, but I knew he wasn't at the meeting. Instead, our chair, Richie Corbisiero, had one of the lawyers in the office take long notes on the meeting and then gave them to Clyde who reran them as his entire story. I thought I had followed Alice down the rabbit hole.

I got the impression that they threw anyone who had a restaurant background into the agency. Our chairman's family ran a large restaurant and catering facility. Our director of bingo had run a catering hall and bowling alley in Staten Island. The family of one of our assistant counsels ran a large kosher deli and catering facility on Long Island. We had an investigator who ran a restaurant in New York's northern suburbs. When the director of bingo retired, he was replaced by a guy who did not run a restaurant, but he had the same name as the people who ran Nathan's hotdogs; so, obviously, they sent him to the Racing and Wagering Board.

Our meetings when I started at the Board could have been held in secret. I only recall one person showing up for a Board meeting in my first six years there. We had open meetings that nobody attended. We would hold the meeting, and Richie Corbisiero would call up Clyde Hirt and tell him the decisions. We could have met in the backroom on a takeout Chinese restaurant and nobody would have known. We had a press officer who wasn't allowed to talk to the press. It got better when Mike Hoblock became chairman and we tried to take the Board show on the road, but, even then,



we would hold meetings at racetracks, and the track leadership wouldn't show up for the meeting.

A year before I got to the Board, there was an infamous incident where Mario Cuomo had called up the office wondering about the agency's recommendation on a bill to reduce the taxes paid by harness tracks. The Board really didn't have a position, but other agencies had suggested that the bill would be signed and the Board should recommend approval.

Cuomo phoned asking for an explanation of the approval recommendation. He went through the whole agency as either people weren't in the office or nobody in the office could give him any explanation of the agency's position. Just a typical day at the Racing and Wagering Board.

And we got worse. During the early- and mid-1990s recession, we started to shed staff. By 1996, we had nobody around. We shed all our OTB people. We shed our branch offices. We had one racing investigator on central staff. We had one racing administrator on staff in Jim Gallagher, and we had 2.5 attorneys. We had no hearing officers; so I held all the hearings. We could hardly do drug cases because we had no personnel. We had the Flanders case pending for years.

We were saved from being laughingstocks by the arrival of Ed Martin and our chairman, Mike Hoblock, at our agency in 1997, and we began to have resources to actually do our work. We were better. Much better. We had an OTB staff. We did investigations. We did hearings. We had faxes and the Internet.

Yet, it seems that we never grew up to be a real agency. We never climbed out of the rabbit hole. I remember Mike Hoblock saying something that went like this. If the State Health Department tells a facility to jump, the facility says "How high?" When we say jump, everyone ignores us.

I once shared a meal with a former OTB official who simply said, you might put out a policy directive. We would ignore it. You did it again, and we would continue to ignore it. We figured you would lose interest and not come back a third time. The industry will always see racing commissioners the way Tom Meeker at Churchill Downs once characterized them as "gnomes" or those "little cloisters that meet in their own little states and make these grand and wise decisions." I think I said in a speech fifteen years ago, that tracks thought racing commissions were two-thirds of the old Perry Mason objection. Commissioners were not necessarily incompetent but certainly immaterial and irrelevant.

So with that look back at my career as a racing bureaucrat, what actually have I learned? If you're a racing commissioner, you will always be considered part of the problem and not the solution. You will not stop decades of narrative. Racing commissions are always going to be viewed as clueless or out of touch.

It doesn't matter that racing administrators here today, like Ed Martin, Mike Hopkins, Larry Eliason, Charley Gardiner, John Wayne, and Rob Williams from New York and other states, have had decades of experience in racing and probably more relevant experience than many people running tracks. It doesn't matter that when racing was popular, nobody thought racing commissions were responsible for the sport's popularity. But now in harder times, it's the racing commissions who are to blame. That is the way it has almost been since the advent of the racing commission. For eighty years, the narrative has been set that racing commissioners are clueless. You are not going to change that. I used to think when I started as a racing commissioner, please don't make us look like the NCAA. But the NCAA has clout. I don't think we ever reached the NCAA level. Instead, racing commissioners are seen as a combination of W.C. Fields and Captain Hook's assistant, Mr. Smee. Windbags and toadies. We're like political versions of stewards. It is so ingrained in racing that you are not going to change the narrative.

If Abe Lincoln, George Washington, and Eleanor Roosevelt returned to earth as a racing commission, they would be considered political hacks serving as the three blind mice of racing.

Iron rule of politics: When an elected official says that they are a friend of racing, and this might not be true in Kentucky, the odds are 3-5 that they are not a friend of racing. Politicians hear "horse racing," and they see dollar signs. In some states, they see Jockey Club-types ponying up real dollars. In other states, they see it simply that if someone can afford to lose money to race a horse, they certainly have enough money to invest in political candidates. Election season brings out the friends of racing.

Sometimes, I think the wisest words on politics and racing were said by President Rutherford B. Hayes in 1879. Before the start of a race in Kentucky, Hayes said, "Ladies and Fellow Citizens, I am told that the race is ready to be run and by speaking I should only delay the enjoyment. With so good an excuse for saying nothing, I am sure you will be glad to know that I propose to let the race go on."

Where is Rutherford B. Hayes when racing needs him?

Again, this statement might not be applicable in Kentucky, but budget people in other states do not like horse racing. They see it – pardon my Yiddish – but as schnorrers, beggars, or posers looking for larger pieces of a diminishing pie. They all see less and less money coming in to the states from racing and yet, at the same time, they see more and more people looking for the crumbs. In the six gubernatorial administrations I've seen in New York, most every counsel or program person assigned to racing quickly wanted out. Referring to the movie, horse racing is the Chinatown of the state budget and governmental world. It's so fouled up that nobody can deal with it.

Because it's so unimportant fiscally, it takes on another serious repercussion. It becomes the opposite of The Godfather. Racing politics isn't business. It's personal. Track representatives get drunk and badmouth politicians. It happens all the time, regardless of parties, and the pols don't forget. In New York, Governor Eliot Spitzer saw Senate Republican leader Joe Bruno as an enemy of NYRA and supported NYRA as the enemy of his enemy. The Assembly Democrats in New York always saw that racing was important to some Republican leaders, so they would simply hold racing hostage until their other deals would be done.

Nobody takes the racing industry's financial numbers seriously. The numbers are nice, but, seriously, nobody in government remotely believes them. They are far too used to racing CEO's complaining annually that the legislature is killing them. You can put your financial impact statements into as many press releases as you want, but nobody believes that a sport where attendance, handle, and breeding are constantly decreasing can continue to be the support of so many thousands of jobs. You ain't going to change the face of racing. There's a reason there is no racing commissioners wing of any racing hall of fame. Nobody's walking around the racetrack thinking how good racing was when Ashley Trimble Cole or Herbert Bayard Swope chaired the racing commission. Nobody even remembers them. Nobody remembers a racing commissioner or a boxing commissioner. We, you and I, are yesterday's news.

What should you be doing about it?

I did not think this way when I first joined the Racing Board but after simulcasting and international racing and nearly universal account wagering, there simply is no reason to oppose uniform rules. The thought process that now goes into uniform rules is exceedingly better than it was twenty years ago. It wasn't always the case, but there now is one world of racing. What happens in New York does affect Kentucky, Florida, California, and even England. Our differences are minor and often pointless. Unless you have an incredibly damn good justifiable public policy reason, uniformity is best. It's always been true about the rules of the race, but now it's true of most every rule that racing commissioners promulgate. Racing commissioners do look like the three blind mice when they ignore the need for uniformity.

Respect the sport. Horse racing is really about the oldest sport that exists. It brings out so much to everyone. What sport do we have that has a lineage out of Winston Churchill? Winston Churchill legalized the tote in the UK when he was Chancellor of the Exchequer in the 1920s, and his maternal grandfather Leonard Jerome first brought pari-mutuels to America in the 1870s. Supreme Court justice Louis Brandeis, one of the people least likely to ever wager, wrote about thoroughbred horses, "I supposed them to be lank, thin and to the uneducated mind unbeautiful. Quite the

contrary. They are the most beautiful living creatures I have ever seen.” Benjamin Disraeli coined the phrase “dark horse” to mean an outsider.

Horse racing has even given the English language a richer vocabulary. Words and phrases like “workout,” “dead heat,” “hands down,” “all ages,” “turf war,” “morning line,” “pari-mutuel,” “parlay,” “trifecta,” “tipster,” “hot tip,” “daily double,” “quinella,” “across the board,” “exacta,” and “out of the money” all come from racing. Even the nickname “The Big Apple” for New York City is probably a racing term.

When I was on the NYRA Board, I used to get passionate about our history of New York racing. How could the Futurity, which was the most important race in America for decades, be downgraded in status? How could the Ladies Handicap, the oldest stakes race in the country for fillies and mares, become ungraded? Part of what’s great about racing are its traditions. It’s why people weep when they hear “My Old Kentucky Home.”

My parents and my family got drawn into racing when I became a fan in my early 20s. It brought out the absolute best in my family. They never had a bad day at the track. Our trips were planned around going to the track. My father – who probably would not have run after Joe DiMaggio – would run after Andy Beyer, Harvey Pack, or Steve Crist. No sport brought us together as much as racing. No sport ever could.

We need to respect the sport. It’s why racing should be the king of sports. Racing commissioners need to take the lead on safety. I was nominally, with Gordon Hare of the Oklahoma Racing Commission, the chair of the rules committee in the mid-1990s. We didn’t do much. Nobody except the Jockeys’ Guild even bothered to lobby us. Yet the Jockeys’ Guild asked us to take a position on safety vests. We supported them fairly early, and it actually made a difference. And you can make a difference. You can improve the lives of the people who work in the sport and the animals who are our principal athletes. It should be easy for commissioners to do the right thing here.

The other obvious right thing is charity. There are so many worthwhile charities associated with horse racing, horses, riders, and the backstretch communities. You need to set a good example here for everyone.

Ethics. This ought to be so easy. Obviously, act ethically. There’s a moral imperative here, but there’s a pragmatic one here as well. This is racing.

Everyone sees you at the track or at an OTB. They’re suspicious. Are they making a bet? What are they telling the stewards? What kind of inside info do they have? Will the stewards give the commissioner’s horses more slack because they want to keep their jobs? Are they getting free meals in the trustee’s room? Stay out of it. You are immediately suspect. You don’t need to have everyone looking at you like you’re taking money away from the bettors.

More pragmatically, it's racing. People understand racing scams. They almost expect them. You're far more likely to get caught than in most any other activity. I think I could go through the history of the Racing Commission in New York and point out the scandals. The odds are you're going to get caught. So for your own self-interest, do the right thing.

Finally, and I have been saying this for as long as I became a commissioner, you work for the public, and the public are the fans of racing. Without fans – and most of them are gambling on the sport – you have nothing. They don't have lobbyists. They don't have clout. They pay for the sport through their betting dollars. No sport has a closer relationship to its fans. They are the true investors in racing. Never forget it. You need to stand up for their rights. They are what racing needs.

You may not be able to change the course of horse racing. You are certainly not going to change the narrative of the clueless racing commissioner, but you do have the power, if only in a humble and modest manner, to make things better for the people in racing. Stand up for these people, please, because racing is our greatest sport. Please make it better by respecting the sport and standing up for its fans and participants. You've been granted a great privilege here in serving as racing. Please pay it forward.

# Union College, Schenectady and the New York State Lottery in the 19<sup>th</sup> Century

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## I Introduction

The New York State Lottery (now a component of the State Gaming Commission) in 1991 moved its offices fifteen miles west from downtown Albany in the Empire State Plaza to its present location in downtown Schenectady. The State Lottery currently bills itself as the largest and most profitable in the nation. It is only fitting that the Lottery would be relocated to Schenectady because in the first half of the nineteenth century, the State's largest lottery was based in Schenectady and operated for the benefit of Union College. Not only was the lottery conducted for the benefit of Union College, it was governed by Union College president Dr. Eliphalet Nott who became known as the "superintendent of lotteries"<sup>1</sup> and the "lottery king of America."<sup>2</sup> "The planning, execution and management of these lotteries were for the most part in Dr. Nott's hands."<sup>3</sup> The lottery-related controversies involving Union College and Dr. Nott lasted for nearly half a century.

Union College was for the first half of the nineteenth century the almost complete domain of its president, Eliphalet Nott. Nott served as the college's president for sixty-two years from 1804–1866. During his lifetime, Dr. Nott was widely considered to be one of the most important educators and citizens in the nation.<sup>4</sup> Union was the second college established in the State (Only Columbia which opened in 1754 preceded Union in New York State) and in 1795 became the first school to be chartered by the State Board of Regents.<sup>5</sup> Nott was the fourth president of

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<sup>1</sup> Robert A. Davison, Book Review "Eliphalet Nott by Codman Hislop," 24 *American Quarterly* 289, 290 (1972). See also Codman Hislop, *Eliphalet Nott* 151 (1971).

<sup>2</sup> Richard Spillan, "Eliphalet Nott," *Cincinnati Enquirer*, Aug. 14, 1910. The lottery under Nott was "skillfully managed by and at the behest of the state." Thomas N. Bonner, "The Beginnings of Engineering Education in the United States: The Curious Role of Eliphalet Nott," *New York History*, 35, 45 (Jan. 1, 1988).

<sup>3</sup> Joseph Rotundo, "Eliphalet Nott," 13 *New York History*, 166–167 (Apr. 1, 1932).

<sup>4</sup> In its obituary of Nott, the *Christian Advocate* wrote, "He has scarcely less than any contemporary impressed his own character upon that of his age and country, and his influence will live on indefinitely," "Rev. Eliphalet Nott," *Christian Advocate*, Feb. 8, 1866. The *New York Tribune* noted, "But in his kind, he was a master, the like of whom we shall not see again. His life was his best logic, adding grace to his own persuasions and fortifying his neighbor's creed by its purity and benevolence." "Death of the Rev. President Nott," *New York Tribune*, Jan. 30, 1866; "His services in the cause of education have been equaled by few. His influence upon the young men of this country is beyond estimation." Eliphalet Nott, D. D., LL. D., *American Educational Monthly*, March 1866; "For more than half a century, he was preeminent as a clergyman, as an educator of young men, and as temperance advocate." Spillan *supra* note 2. See also "Obituary Eliphalet Nott, D. D., LL. D., *New York Times*, Jan. 30, 1866.

<sup>5</sup> See Ch. 55, L. 1795.

Union, and when he arrived at Union, he found the school's financial condition to be in precarious shape. "Nine years had elapsed without any perceptible improvement in the condition or prospects of the college; on the contrary, its pecuniary resources had been expended; it possessed no means, except an edifice partly completed, and a few books."<sup>6</sup> There certainly was no way to build a modern college or campus. In 1804, the whole expenses were a little short of \$4,000 a year, and the income from all sources failed to reach even this moderate sum.<sup>7</sup> Nott's plan was to build a modern campus and attract numerous students. In 1804, when Nott assumed the presidency of the college, only fifteen students graduated from Union College.<sup>8</sup> That required massive moneys that the school certainly lacked.

## II The First Union College State Lottery

Nott's solution was to go to the legislature for assistance. "He had come to see the state government as his financial partner in education."<sup>9</sup> Rather than directed appropriations from the legislature, Nott negotiated for a lottery to benefit Union College. In 1805, the State legislature responded with a bill to authorize Union College to be the beneficiary of the four separate lotteries which would grant Union \$80,000.<sup>10</sup> The law was entitled, "An act for the endowment of Union College."<sup>11</sup> Out of this amount, \$35,000 was to be used to erect new buildings for the students and a similar amount for faculty salary endowments.<sup>12</sup> The remaining \$10,000 was to be split equally between the establishment and maintenance of a classical library at the school and the defrayment of the expenses of indigent students.<sup>13</sup>

The quid pro quo for the lottery grant, however, was that the school technically became under State control. The number of trustees was reduced to twenty-one from twenty-four, and eleven State officials became ex officio members of the Union College board.<sup>14</sup> Further, the board of regents was given the power to fill the vacancies on the Union College board.

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<sup>6</sup> John C. Spencer, *Argument in Defence Of The Rev. Eliphalet Nott, D. D., President Of Union College* 23 (Albany: C. Van Benthuysen, printer, 1853).

<sup>7</sup> Cornelius Van Santvoord, *Memoirs of Eliphalet Nott, For Sixty-Two Years President of Union College* 137 (1876).

<sup>8</sup> Franklin Benjamin Hough, *Historical and Statistical Record of the University of the State of New York: During the Century from 1784 to 1884* at 168 (1885).

<sup>9</sup> Hislop, *supra* note 1 at 144. Union College had received gifts and loans from the State after its creation in 1795. In 1795 Union College was granted \$1,500 "as a free and voluntary gift on the part of the people of this state to be by them applied to the purchase of an apparatus of the instruments and machines for illustrating lectures in astronomy, geography, and natural philosophy and the residue, if any, to be applied to the purchase of such books for the use of the said college as the trustees may think proper." Elsie Garland Hobson, *Educational Legislation and Administration in the State of New York, 1777-1850* at 146 (1918), quoting Ch. 76, L. 1795. Union College received other small donations from the State in the years before 1805. Paul Joseph Scudiere, *A Historical Survey of State Financial Support of Private Higher Education in New York* 35-36 (1975).

<sup>10</sup> Ch. 62, L. 1805 passed Mar. 30, 1805.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* and Wayne Somers, *The Encyclopedia of Union College History* 462 (2003).

<sup>13</sup> *Id.* Scudiere believes that "the action was more political and philosophical than personal. In effect the Democratic-Republicans were attempting to balance the Federalist dominated Columbia College with its own institution." Scudiere, *supra* note 9 at 39.

<sup>14</sup> See Scudiere, *supra* note 9 at 38.

It took years for the lottery managers to actually operate the Union College lottery.<sup>15</sup> In the interim, to help out the school, the State would loan Union College the potential lottery proceeds. While various estimates have been given for what Union College eventually received from the lottery, it is likely that Union ended up receiving \$76,000 of the \$80,000 that had been earmarked from the lottery.<sup>16</sup> Nott used the proceeds of the lottery to complete the existing Union College building and to build adjacent dormitories.<sup>17</sup>

Given Nott's ambitious nature and lofty goals, Union College grew larger and stronger. The enrollment at the school grew considerably. By 1813, forty-five students graduated, tripling the number of graduates from Nott's first year on campus.<sup>18</sup> Nott saw that he needed a new and bigger campus for his growing student body. He sold Union's existing campus (which was located in what is now known as the Stockade Historic District in Schenectady) to the city of Schenectady.<sup>19</sup> The cost of the new campus and the buildings would certainly exceed the proceeds from the 1805 lottery which had largely been used to improve the existing campus.<sup>20</sup> Union would need more funding from the State.

### III The Second Union College Lottery

Nott went back to work lobbying State government for more aid. Nott requested this assistance in 1814, in the midst of the War of 1812. State government was in no position that year to provide significant donations to any colleges. So Nott again proposed a lottery. This requested lottery would provide Union College with \$200,000 of lottery proceeds, up from the \$80,000 approved in 1805. The request was broken down to include \$100,000 for buildings, \$50,000 for talented but indigent students, \$20,000 for apparatus and the library, and \$30,000 to cancel debts already contracted.<sup>21</sup> The College petitioned the legislature in early 1814 in the midst of the War of 1812 noting that the trustees had no means of their own to pay for the campus.<sup>22</sup> The college trustees asked to "spread their wants before your honorable body, praying that you will grant such relief as may appear expedient. And the Trustees do this with a grateful remembrance [sic] of past favor, and confident that a liberal and enlightened legislature will not hesitate to cooperate with those who are struggling to improve the condition of a seminary in which so many of the youth of their own state are to be educated and with whose glory of the republic is so intimately connected."<sup>23</sup>

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<sup>15</sup> In *People v. Gilbert*, 18 Johns. 227 (Supreme Court 1827), the State sued one of the managers of the Union College lottery for selling tickets in an unauthorized manner.

<sup>16</sup> See "Union College," *The Schenectady Cabinet*, Jan. 17, 1854. See also Spencer *supra* note 6 at 25. Under Ch. 72, L. 1806, the State lent the college \$15,000. See also Ch. 53, L. 1810 authorizing a payment of \$10,000 to the Bank of Albany to pay for funds borrowed by the Union College trustees.

<sup>17</sup> Somers, *supra* note 12 at 462.

<sup>18</sup> Hough, *supra* note 8.

<sup>19</sup> Somers, *supra* note 12 at 790.

<sup>20</sup> Van Santvoord, *supra* note 7 at 141.

<sup>21</sup> Scudiere, *supra* note 9 at 40.

<sup>22</sup> Hislop, *supra* note 1 at 155.

<sup>23</sup> *Id.*



The task to obtain the lottery relief for Union College seem daunting, but Nott's lobbying abilities were especially effective. He basically logrolled his bill from the legislature. He brought on newly formed Hamilton College which would receive \$40,000 from the lottery. Lottery funds in the amount of \$30,000 would be provided to the endowment of the college of physicians and surgeons. The Asbury African Church was to receive \$4,000. The New York Historical Society was to receive \$12,000.<sup>24</sup>

That left Columbia, New York State's most significant college. "To shut out Columbia from the lottery bounty would have been to lose the gamble at once."<sup>25</sup> So Nott, worried about another potential lottery grantee, arranged for some minor lands in New York City to be transferred from the State to Columbia. The lands constituted the Hosack botanical garden in Manhattan. This was a 20-acre property in the middle of Manhattan Island, far away from what was in 1814 the center of the city of New York. The Columbia representatives were not thrilled with the arrangement.<sup>26</sup> Yet in the long run, Columbia was the runaway winner of the lottery legislation. The property received from the lottery act by Columbia eventually became the land on which Rockefeller Center was constructed.

At the beginning of the twentieth century, long before the construction of Rockefeller Center could have been contemplated, it was said, "Thus, solely through the influence of the president of Union, Columbia received that magnificent property which to-day forms its principal endowment. The botanical garden granted to Columbia comprised 20 acres located between Fifth and Sixth avenues, Forty-seventh and Fifty-first streets, in New York City, then 3 miles out of town, but now the center of the wealth and population of the metropolis."<sup>27</sup> In 1985, Columbia sold the property to the Rockefeller Group for \$400 million.<sup>28</sup> At the time of the sale, Columbia University president Michael Sovern commented, "My own feeling is that it was fobbed off on us in 1814" and "was a white elephant until after the Civil War."<sup>29</sup>

The "Literature Lottery," as it was called in the bill, ended up being passed easily by the legislature.<sup>30</sup> The session laws for the legislation contain the unique note, "No bill before the legislature excited greater interest and attention than this act. Much credit is due to the unwearied exertions of the able and eloquent president of Union College in procuring its passage."

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<sup>24</sup> The lottery revenues for the Historical Society were provided for in a different statute than the provision for the other beneficiaries. The lottery authorization for the historical society was contained in Ch. 200, L. 1814.

<sup>25</sup> Hislop, *supra* note 1 at 159.

<sup>26</sup> *Id.* at 159–160. The property received by Columbia may have been worth \$6,000 to \$7,000. Somers, *supra* note 12 at 462. The Columbia Daily Spectator noted that the gift of the botanical gardens to Columbia "didn't please the trustees and there was talk of rejecting the gift." "Lottery Share Gave CU Financial Start," *Columbia Daily Spectator*, January 11, 1954. See also Robert R. Siroty, "Radio City Lease Up for Extension," *Columbia Daily Spectator* March 13, 1953.

<sup>27</sup> Sidney Sherwood, *The University of the State of New York; History of Higher Education in the State of New York* 207 (1901).

<sup>28</sup> Maureen Dowd, "Columbia Is to Get \$400 Million In Rockefeller Center Land Sale," *New York Times*, Feb. 6, 1985.

<sup>29</sup> *Id.*

<sup>30</sup> Ch. 120, L. 1814.

A quarter century later, the historian Jabez Hammond wrote, “The Rev. Dr. Nott the president of Union College, was, I have no doubt, the individual who devised this grand scheme for the liberal and permanent endowment of the institution over which he presided. Certainly it is owing to his indefatigable exertions, and matchless skill and address that a majority in favor of the bill was obtained in both houses. His ingenuity in explaining away and warding off objections; his skill in combining different and apparently conflicting interests; and, above all, his profound knowledge of the human heart, and that discernment which enabled him, as it were, intuitively to discover the peculiar propensity and character of the mind of each individual whom he addressed, together with his tact in adopting that mode of address best suited to each, rendered him almost irresistible, and, I believe, ultimately secured the success of the great measure which he advocated.”<sup>31</sup>

#### IV Lotteries Fall from Grace

One might have thought that given Union College’s prior experience with the 1805 lottery, it would have been a relatively simple matter for Union to obtain the \$200,000 in promised revenues. After all, nobody knew how to play the Albany lobbying game as well as Eliphalet Nott. That did not happen. Instead, Union College and Dr. Nott ended up in a melodrama that played out over the next four decades.

The Literature Lottery could not be undertaken until all the previously authorized State lotteries had been drawn.<sup>32</sup> “The managers of these lotteries, appointed under the act, were remiss in their duties, and heavy losses were sustained in the sale of tickets.”<sup>33</sup> This process took years, and the Literature Lottery could not be undertaken until the 1820s.

Most importantly, the State and the nation’s appetite for lotteries had changed considerably. Lotteries were commonly used in the eighteenth and early nineteenth century to finance numerous government-related projects such as assisting schools, building roads, building fortifications, improving navigation, building courthouses, building lighthouses, building jails and even assisting the hemp industry.<sup>34</sup> Indeed, “a public lottery system had become thoroughly entrenched as a part of our social and financial policy, and had been the subject of frequent legislative regulation.”<sup>35</sup>

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<sup>31</sup> Jabez D. Hammond, *The History Of Political Parties in the State Of New York: From the Ratification of the Federal Constitution to December, 1840* at 373–374 (1845). Even in 1885, it was said to be of “immense value.” Hough, *supra* note 8 at 125. In an address given to the Union College alumni, New York Governor Benjamin Odell in 1901 stated, “Dr. Nott seems to have been able to secure whatever he asked.” *Public Papers of Governor Odell* 290 (1901). Governor Odell also acknowledged that the Columbia botanical garden was “probably its most valuable asset and greatest source of income.” *Id.* at 289.

<sup>32</sup> Ch. 120, L. 1814, § XVI.

<sup>33</sup> Spencer, *supra* note 6 at 26–27.

<sup>34</sup> A list of the lotteries authorized by New York State government can be found in Charles Z. Lincoln, *Constitutional History of New York: 1895–1905: Volume 3*, 35–37 (1906). See also *New York State Constitutional Convention Committee. [Reports]* (1938). *Problems Relating to Legislative Organization and Powers*, Volume 7, Chapter 15 and Alden Chester, Editor, Lyman Horace Weeks and J. Hampden Dougherty., *Legal and Judicial History of New York* 290–291 (1911).

<sup>35</sup> *Id.* at 43. The United States Supreme Court in *Stone v. Mississippi*, 101 US 814, 818 (1879) noted, “We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States,

Nonetheless, by the second decade of the eighteenth century, the tide had turned against lotteries. Many of the lottery operations had been tarnished by fraud and corruption. The moral climate of the entire nation changed, and the operation of lotteries became regarded as sinful. Lotteries largely vanished from America. By 1850, the United States Supreme Court in an opinion by Justice Grier could say, "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."<sup>36</sup>

In 1819, an Assembly committee investigating corruption in the operation of lotteries concluded, "The foundation of the lottery system is so radically vicious, that your committee feels convinced, that under no system of regulation that can be devised, will it be possible for this Legislature to adopt it as an efficacious source of revenue, and at the same time divest it of all the evils of which it has hitherto proved so baneful a cause."<sup>37</sup> New York State, in response, passed strict laws limiting all future lotteries.<sup>38</sup> All lotteries not authorized by the legislature were deemed to be a "common and public nuisance."<sup>39</sup> The law placed limitations on the managers of the lotteries and gave the state comptroller authority to oversee the operations of the authorized lotteries.<sup>40</sup>

The 1821 State Constitutional Convention went even further than the 1819 law and permanently barred the State from enacting future lotteries. "Those in favor of the abolition of all lotteries by constitutional provision could justly point to the State's inconsistency in condemning as "pernicious," "evil" and "detrimental" private lotteries and at the same time authorizing public ones."<sup>41</sup> They argued "moreover, that it should be prohibited in the Constitution itself rather than left to the discretion of the Legislature in order to prevent the possible yielding by the Legislature to a future seductive influence and to prohibit by a paramount law the creation or continuance of a species of speculation which was considered demoralizing in its influence and ruinous in its tendencies."<sup>42</sup>

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and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes."

<sup>36</sup> *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850). Nearly three decades later, in *Stone v. Mississippi*, *supra* at note 35, the court would add, "Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested. If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt." See also *Champion v. Ames*, 188 U.S. 321, 328 (1903) finding that the lottery "has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right."

<sup>37</sup> See A. Franklin Ross, *The History of Lotteries in New York* 33 (1906).

<sup>38</sup> Ch. 206, L. 1819.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> New York State Constitutional Convention Committee, *supra* note 34 at 418.

<sup>42</sup> *Id.*

The argument at the Convention was that the lotteries were uniquely harmful, and there were no legitimate reasons for the legislature to ever authorize a lottery. Delegate John Duerr argued that “in the present state of that science, almost regarded as elementary, that the plan of raising a revenue from lotteries ought [sic] not to be adopted by a wise and moral government, since of all taxes, it was the most unjust and unequal in its mode of imposition and collection, and the most pernicious in its operation. He believed that the evils of lotteries were inseparable from the system, and not to be remedied by any regulations or restrictions that could be devised.”<sup>43</sup>

Those opposed to banning lotteries in the Constitution argued that lotteries were a form of voluntary taxation, had helped worthy causes, were not inherently immoral or criminal, and should properly be a subject of legislative regulation.<sup>44</sup> The opponents also argued that a ban on lotteries in New York State would be ineffective because New Yorkers could continue to buy lottery tickets brought into New York from other states. While there was considerable opposition to placing the ban on lotteries in the Constitution, the ban passed by a vote of 67 to 45.

The new Article VII, Section 2 of the Constitution, as passed by the convention and approved by the voters, read, “No lottery shall hereafter be authorized in this State; and the Legislature shall pass laws to prevent the sale of all lottery tickets within this State except in lotteries already provided for by law.” Thus under the terms of the Constitution, no more lotteries could be approved by the State of New York, but lotteries that had been previously authorized (such as the Literature Lottery) could move ahead.<sup>45</sup>

The anti-lottery provision in the new Constitution was not a hindrance to Dr. Nott. The provision required further legislative action to put the provision into full effect, and it gave Nott an opportunity to place himself in charge of the Literature Lottery.

At the 1822 legislative session, Nott was able to persuade the legislature to let him—rather than the state—be responsible for the operation of the Literature Lottery.<sup>46</sup> “Nott’s plan for breaking the deadlock in the lottery system met with little resistance.”<sup>47</sup> As part of the act to limit the continuation of lotteries, the State was removed from its responsibility for operating the lottery, thereby freeing the State from the hazards of future lottery losses. Instead, the legislature found that the educational institutions had been materially harmed by the delay in implementing the Literature Lottery. To help the institutions, the legislature believed that the “lottery might be managed with greater economy and less hazard, by the institutions interested in its success, than it has hitherto been, or can hereafter be, by the state: And whereas all that could be thus saved, by greater economy in the management of said lottery, would go to diminish the loss of said institutions: And, Whereas all that could be just saved by greater economy in the management of said lottery, would go to diminish the loss of said institutions.”<sup>48</sup>

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<sup>43</sup> Nathaniel H. Carter & William L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821* at 569 (1821).

<sup>44</sup> *Id.* See most especially the views of Chancellor Kent and Chief Justice Spencer at 568.

<sup>45</sup> See Hammond, *supra* note 31 at 929.

<sup>46</sup> Ch. 163, L. 1822.

<sup>47</sup> Hugh G. J. Aitken, “Yates and McIntyre: Lottery Managers,” 13 *The J. of Econ. Hist.* 36, 41 (Winter, 1953).

<sup>48</sup> Ch. 163, *supra* note 46.

Accordingly, the legislature authorized the institutions benefitted by the 1814 legislation to “assume the supervision and direction of said lottery, and for the conducting the same.”<sup>49</sup> Once the benefitted institutions accepted the plan or took a payment in lieu of receiving lottery receipts, they would assume the operation of the Lottery.

Nott wasted little time. Before the bill was passed, he entered into verbal agreements to pay off the other grantees of the lottery, Hamilton College, the college of physicians and surgeons, the Asbury African Church, and the New York Historical Society. These organizations all agreed to sell their shares of the proceeds to Union College at a discount.<sup>50</sup> Nott and Union College’s treasurer, Henry Yates, pledged their personal credit in buying out the other grantees, and Union College was able to buy out the other beneficiaries.<sup>51</sup>

At the annual Union College annual meeting of 1822, the trustees gave Nott unlimited authority to operate the lottery.<sup>52</sup> The board gave Nott “unlimited authority to supervise the management of the lottery, now the college’s chief asset.”<sup>53</sup> He became the superintendent of the Literature Lottery.

At nearly the same time, Nott used the changes made in the State’s judicial system as a result of the 1821 Constitutional Convention to remove the State of New York from having de jure control over the Union College board. “When the state reduced the size of the New York State Supreme Court from five judges to three..., Nott saw an opportunity to regain the College’s independence.”<sup>54</sup> Nott argued that this reduction in the number of judges improperly reduced the number of members of the Union board of trustees. This arguably impaired the state’s contract with Union College and violated the contract clause of the federal constitution.<sup>55</sup> Rather than litigating the issue with Union, the legislature passed a law changing the membership of the Union College board of trustees in accordance with Nott’s desires. In legislation named as “an act relative to the City of Schenectady,”<sup>56</sup> the lieutenant governor and the governor replaced the two erstwhile Supreme Court judges as ex officio members of the Union College board, and the board was given the right to fill vacancies, a right which had previously been bestowed on the board of regents. Nott was able to keep the Union College board from being controlled by the State and more significantly away from the board of regents.<sup>57</sup>

## V Running the Literature Lottery

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<sup>49</sup> *Id.*

<sup>50</sup> Hislop, *supra* note 1 at 194.

<sup>51</sup> Andrew Van Vranken Raymond, 1 *Union University, Its History, Influence, Characteristics and Equipment* 235 (1907).

<sup>52</sup> Somers, *supra* note 12 at 462. *See also* Ross, *supra* note 37 at 35.

<sup>53</sup> Hislop, *supra* note 1 at 195.

<sup>54</sup> Somers, *supra* note 12 at 745. For a general overview of this situation, see the materials contained in “The Whole of the Documentary Evidence,” *Annals of Beneficence*, Oct. 31, 1823.

<sup>55</sup> The college’s argument can be seen at *Documents of the Assembly of the State of New York*, No. 213 (1849).

<sup>56</sup> Ch. 36, L.1823.

<sup>57</sup> “The revised state constitution of 1846 removed five ex officio members from Union’s board (the chancellor, the supreme court justices, and the surveyor-general) and authorized the board to replace them with appointed members, thus ending the state majority and changing the balance to fifteen appointed members and six ex officio members.” Somers, *supra* note 12 at 745.

Once having been giving the go-ahead by the Union College board, Nott moved quickly on his lottery plan. He quickly entered into an agreement with the firm of Yates and McIntyre to manage the lottery. The agreement was reached within five days after the Union College trustees had authorized Nott to run the lottery.

Yates and McIntyre could hardly have been a more politically connected business firm. The firm had started in the lottery business in 1821.<sup>58</sup> John B. Yates was a former United States Congressman who was active in New York State politics.<sup>59</sup> One of his brothers, Henry Yates, was a State Senator, and also the treasurer of Union College. Another brother, Joseph Yates, would subsequently serve as governor of New York State from 1823–1824.<sup>60</sup> Archibald McIntyre was not only a former State Assemblyman, but he had served as the New York State Comptroller for fifteen years.<sup>61</sup> One of the duties of the Comptroller was to supervise the State's lotteries.<sup>62</sup>

Under the operation of the lottery, the managers and the institutions benefitted by the lottery were to share 15% of the gross sales. The rest was returned to the individuals who had purchased winning tickets. Lottery managers commonly received 5% of the sales with the institution to receive 10%.<sup>63</sup> The Literature Lottery had a different distribution formula. Union College was to receive 8.75% of sales. Yates and McIntyre would receive 4% of sales. Dr. Nott would receive 2.25% of sales to be placed in a "President's Fund." Dr. Nott did not advise the Union College trustees of the existence of the President's Fund and the potential monetary benefits he stood to gain from the operation of the President's Fund.<sup>64</sup>

"On February 4, 1823, the comptroller certified that the time limit for the lottery was eleven years and that the total amount of tickets to be drawn was \$4,492,800."<sup>65</sup> The amount due to the grantee institutions would be \$322,256.<sup>66</sup> Under the contract, Yates and McIntyre were to pay Union College approximately \$276,000 which was the present value of the \$322,256.<sup>67</sup>

Drawings of the Literature Lottery began in May of 1823. Initially, the drawings were quite successful.<sup>68</sup> Yates and McIntyre had inaugurated the Vannini system of lotteries which allowed lottery drawings to be completed within fifteen minutes instead of the old system of lotteries

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<sup>58</sup> Aitken, *supra* note 47 at 36.

<sup>59</sup> He had been helpful in 1814 in persuading the legislature to authorize the Literature Lottery. Hislop, *supra* note 1 at 275.

<sup>60</sup> Aitken, *supra* note 47 at 38.

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

<sup>62</sup> "Archibald McIntyre probably knew as much about the lottery business as any man in New York State at this time." *Id.* at 40.

<sup>63</sup> *Id.* at 37.

<sup>64</sup> Somers, *supra* note 1 at 463.

<sup>65</sup> Aitken, *supra* note 47 at 42.

<sup>66</sup> Spencer, *supra* note 6 at 29.

<sup>67</sup> *Id.* at 31.

<sup>68</sup> Hislop *supra* note 1 at 276.

which could take weeks or months to complete.<sup>69</sup> The good times for the Literature Lottery, however, did not last.

The initial problems came from the speculations of Messrs. Yates and McIntyre. They invested heavily in the Welland Canal Company which would connect Lake Erie to Lake Ontario. They invested hundreds of thousands of dollars into the company only to see the stock of the company drop significantly in value. “Handicapped by unexpected engineering difficulties, by chronic lack of funds, and by inexperienced management, the Welland Canal Company, for all its fair prospects, proved very different from the profitable venture that Yates had anticipated. The shares rapidly depreciated to a nominal value.”<sup>70</sup> Financial times also were bad starting in 1825 resulting in less public interest in lottery sales. Yates and McIntyre had lost their working capital. They called on Eliphalet Nott to help them out.

In January of 1826, Yates and McIntire advised Nott that “they had no reasonable prospect of being able to make their contractual payments nor to pay the prizes in the lottery.”<sup>71</sup> Nott then pledged the college’s lands and building in return for a loan of \$100,000 from William James.<sup>72</sup> James was a highly successful Albany land speculator, investor, and developer.<sup>73</sup> He was one of the wealthiest men in New York State.

In addition to this loan, Henry Yates, the treasurer of Union College, moved to New York to help supervise the lottery in person. Yates continued as the college treasurer but unbeknownst to Nott, became a partner in the firm of Yates and McIntosh.

In order to improve their financial positions, Yates and McIntosh sought legislative permission to take control over the two remaining State lotteries, the Fever Hospital Lottery<sup>74</sup> and the Albany Land Lottery.<sup>75</sup>

The legislature passed a bill that would allow private interests to take over the Albany Land Lottery and the Fever Hospital Lottery and to mix the prizes and tickets for these lotteries with the ongoing lottery, Union’s Literature Lottery.<sup>76</sup> Thus, there was no requirement that the Literature Lottery would need to be completed before sales for the other two lotteries could start. The consent of the literary institutions that were interested in the Literature Lottery had to be obtained by the managers of the newly merged lotteries.<sup>77</sup> In short, Yates and McIntyre would need Nott’s approval to conduct the additional lotteries.

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<sup>69</sup> *Id.* at 196–197. See Joseph Vannini, Palmer Canfield & William Grattan, *An Explanation of a Lottery, on Mathematical Principles: Being an Improvement on the European Plan* (1822).

<sup>70</sup> Aitken, *supra* note 47 at 45.

<sup>71</sup> *Id.* at 47.

<sup>72</sup> Aitken claims that Nott acted within his rights in pledging the school’s assets, but Nott did not advise the trustees of his decision. *Id.* at 48.

<sup>73</sup> James had also provided backing to Dr. Nott to buy out the other institutional lottery awardees. Hislop, *supra* note 1, at 291 and Somers, *supra* note 12 at 415. James was the grandfather of the novelist Henry James and the philosopher and psychologist William James.

<sup>74</sup> It was intended to help construct a hospital in New York City to treat yellow fever victims. See Ch. 82, L. 1823.

<sup>75</sup> See Ch. 232, L. 1820.

<sup>76</sup> Ch. 186, L. 1826.

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

Nott did agree to the conduct of the additional lotteries, but in return, his President's Fund would receive 6.31% rather than 2.31% of the sales of the combined lotteries.<sup>78</sup> The Union College share of the consolidated lotteries ended on November 10, 1827,<sup>79</sup> and a settlement with the college was reached in 1828 with the college receiving promissory notes for the amount still due of \$137,383.<sup>80</sup>

Nott's involvement with Yates and McIntyre continued. "Nott, in fact, could hardly afford to wash his hands of the business. He had become responsible for large sums of money which he had borrowed to aid Yates and McIntyre, and these debts had to be paid. Further, if Yates and McIntyre were to go bankrupt, he might as well tear up the notes which the college had received."<sup>81</sup> Unfortunately for all parties involved, lottery sales continued to decrease, and Nott was called on to provide financial help to Yates and McIntosh.

## VI The Lottery Partners Battle Each Other

Finally in 1832, the rocky relationship between Nott and Yates and McIntosh came to an end. Henry Yates on April 27, 1832, wrote Dr. Nott advising him that "it will be necessary for you to make up your mind, not to draw any money from here."<sup>82</sup> This was followed by a letter from the firm to Nott (again with Henry Yates as one of the signees) that Nott's calculations for the lottery had failed, and all payments from the firm to Nott would cease.<sup>83</sup> His putative payments would be handed over instead to the original partners, John B. Yates and Archibald McIntyre, to compensate them for losses which, it was alleged, they had suffered in the first years of the lotteries."<sup>84</sup>

Dr. Nott, besides first learning that his college treasurer was now a partner of the firm that was refusing to pay him, demanded his continued compensation. He went to the State Comptroller, Silas Wright,<sup>85</sup> to help enforce his rights. Wright advised Yates and McIntosh to adhere to the contract with Nott.<sup>86</sup>

They did not, and the stage was struck for a legal battle. Dr. Nott sued first. He sued Yates and McIntosh in chancery court for his proceeds. Unfortunately, Nott named the Union College board as a co-plaintiff without informing the board members. Yates and McIntosh countered that

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<sup>78</sup> Aitken, *supra* note 47, at 50-51. See generally *Reply of the Trustees of Union College, to Charges Brought Before the Assembly of New York, March 19, 1850; and before the Senate, on the 12th of April, 1851*, by the Hon. J. W. Beckman, Appendix K (1853).

<sup>79</sup> *Id.* at 50.

<sup>80</sup> *Id.* at 50 and 56.

<sup>81</sup> *Id.* at 51. Somers, *supra* note 12 at 464. Hislop remarks that Yates and McIntosh "had secured in the Doctor, so they then thought a continuing source of short term capital without which the firm would have collapsed and an unofficial partner whose influence with legislators, growing numbers of them his former pupils, was beyond price." Hislop, *supra* note 1 at 311.

<sup>82</sup> Hislop, *supra* note 1 at 311.

<sup>83</sup> *Id.* at 311-312.

<sup>84</sup> Aitken, *supra* note 47 at 54.

<sup>85</sup> As Comptroller, Wright was an ex officio member of the Union College board.

<sup>86</sup> Hislop, *supra* note 1 at 314.



the contract did not involve the board as it was simply a contract between them and with Nott for personal services. The court dismissed Dr. Nott's suit.

Yates and McIntosh then sued the Union College trustees and Nott in chancery court claiming that the school had been overpaid and that Nott had enriched himself at the expense of the college.<sup>87</sup> The issues of college treasurer Henry Yates acting against the interest of his college was raised by the supporters of the college.<sup>88</sup>

Finally, with prospects of unending litigation, the personal involvement of the State officials who served as Union College trustees, and the death of John B. Yates in 1836, the parties in 1837 reached a tri-partite agreement. Union College would pay back \$94,477 to Yates and McIntyre.<sup>89</sup> Yates and McIntyre would pay Nott \$150,000 over a ten-year period rather than the \$300,000 that Nott had demanded.<sup>90</sup> It seems likely according to New York Secretary of State (and future Governor) John Dix that Dr. Nott "surrendered his own judgment to the earnest wish expressed by Mr. Flagg,<sup>91</sup> Governor Marcy,<sup>92</sup> Mr. Wright<sup>93</sup> and myself to put an end to what we believed would prove an unpleasant and protracted controversy."<sup>94</sup>

In total, Union College received \$512,867 from the Literature Lottery.<sup>95</sup> This actually was nearly \$50,000 more than "the original grant with compound interest."<sup>96</sup> One economics professor gives high grades to Yates and McIntyre. "That Yates and McIntyre, in a period of declining demand, were able to conduct their lotteries, raise the capital that they contracted to raise, and finance a well-nigh bankrupt corporation in another country, reflects considerable credit both on their managerial ability and on the skill with which they exploited academic ambitions."<sup>97</sup> It is unlikely that Eliphalet Nott would have agreed with the professor's opinion.

The President's Fund likely accumulated \$451,000 from Yates and McIntosh.<sup>98</sup> Most of this came from Dr. Nott's share of lottery sales, but he also received funds for helping to arrange loans to keep Yates and McIntosh afloat.<sup>99</sup>

## VII The Legislature Battles Union College

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<sup>87</sup> See *McIntyre v. Trustees*, 6 Paige Ch. 239 (1837). See also Hislop, *supra* note 1 at 320–346.

<sup>88</sup> Somers, *supra* note 12 at 802. Henry Yates resigned as the college treasurer in 1833 but continued to serve as a member of the college board.

<sup>89</sup> Hislop, *supra* note 1 at 344. Aitken claims a figure of \$126,000 was returned to the firm. Aitken, *supra* note 47 at 55. Hislop, who spent much of his lifetime researching Eliphalet Nott-related issues is more likely to be closer to the truth here. A copy of the agreement can be found in *Documents of the Senate of the State of New York*, No. 41 (1853).

<sup>90</sup> *Id.*

<sup>91</sup> Azariah Flagg was the State comptroller.

<sup>92</sup> William L. Marcy was the State's governor.

<sup>93</sup> Silas Wright was a United States senator from New York. He was a future New York State governor and the State comptroller before Azariah Flagg.

<sup>94</sup> *Id.* All were in 1837 present or prior trustees of Union College.

<sup>95</sup> Somers, *supra* note 12 at 464. Aitken, *supra* note 47 at 56.

<sup>96</sup> Aitken, *supra* note 47 at 56.

<sup>97</sup> *Id.* at 57.

<sup>98</sup> Hislop, *supra* note 1 at 345.

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

Union College and Eliphalet Nott might reasonably have believed that the 1837 settlement with Yates and McIntosh would have brought an end to the lottery issues. Yet, twelve years later all the issues returned, this time in a protracted battle between Union College, Dr. Nott, and certain members of the State legislature.

Not surprisingly, it was the Yates family that was the cause of the school's woes. Erstwhile Union College treasurer Henry Yates was probably the lead instigator in the fight against Union College.<sup>100</sup> Henry Yates from his lottery endeavors may have been one of the wealthiest people in New York State outside of New York City.<sup>101</sup>

The Yates family antagonism was fueled by the issues involving Professor John Austin Yates, a professor of Oriental Literature at Union. John Austin Yates was the nephew of both Henry Yates and John B. Yates. He became a professor at Union in 1827, but in the 1848–1849 term, Professor Yates' position was abolished.<sup>102</sup> While Dr. Nott may not have been behind the firing of Professor Yates, he did nothing to prevent it. Yates, however, held Dr. Nott responsible for his termination and went to the State Assembly's committee on colleges, academies and common schools to complain about Union's finances in 1849.<sup>103</sup>

The forces opposing Union College and Dr. Nott found a champion in Assemblyman James W. Beekman.<sup>104</sup> Beekman, who descended from a wealthy and prestigious old Dutch family,<sup>105</sup> began a four-year campaign against Union and Dr. Nott.<sup>106</sup> In this campaign, he was aided by the *Albany Daily Knickerbocker* which would write of Union College, "In our opinion the whole management has been for years as rotten as oranges three for a cent."<sup>107</sup>

In this fight, Union College was eventually aided significantly by the work in 1853 of its attorney John Canfield Spencer.<sup>108</sup> At various times in his career, Spencer, a graduate of Union College, had been the State Assembly Speaker, a member of the State Senate, Secretary to the Governor and New York Secretary of State. At the federal level, he served as the Secretary of War and the Secretary of the Treasury. He was nominated on two occasions to the United States Supreme Court, but he was not confirmed by the Senate.

On March 12, 1849, Robert Pruyn, the chairman of the committee on colleges, academies and common schools, introduced a resolution to force Union College to produce a report on its property and fiscal condition over the past ten years. That resolution was approved by the full Assembly.<sup>109</sup>

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<sup>100</sup> Hislop, *supra* note 1 at 446. Somers, *supra* note 12 at 803.

<sup>101</sup> *Id.* at 498.

<sup>102</sup> Somers, *supra* note 12 at 804.

<sup>103</sup> Hislop, *supra* note 1 at 445. Professor Yates died of cholera later in 1849.

<sup>104</sup> *Id.* at 447 and 482.

<sup>105</sup> See Philip L. White, *The Beekmans of New York in Politics and Commerce, 1647-1877* (1956).

<sup>106</sup> *Id.* at 607. Hislop, *supra* note 1 at 447.

<sup>107</sup> *Albany Daily Knickerbocker*, May 29, 1849.

<sup>108</sup> In the 1830s, Spencer served as one of the attorneys for Yates and McIntire in its litigation with Union College and Dr. Nott.

<sup>109</sup> *Journal of the Assembly of the State of New York* 810 (1849).

On March 25, 1849, Assemblyman Beekman proposed an amendment to the resolution calling on Union College to report its fiscal condition over the past twenty-five years.<sup>110</sup> This amendment was approved by the Assembly, and it would give the Assembly the full picture of how the Literature Lottery impacted Union College.

The college submitted its report on April 5.<sup>111</sup> It did not resolve any issues, and the Assembly on April 14, on the motion of Assemblyman Pruyn, established a select committee to examine the financial condition of Union College. The committee had the power to send for persons and papers and was to report to the next session of the legislature.<sup>112</sup> The members of the committee interviewed Union College personnel and held hearings in 1849 on the financial transactions and condition of the college,<sup>113</sup> but did not issue its report until March of 1850.

The majority report, issued by four of the five members of the committee (including Assemblyman Beekman), was sharply critical of Union College and Dr. Nott finding “that the financial condition of Union College is unsound and improper.”<sup>114</sup> The committee found “many cases of wrong management”<sup>115</sup> and felt its “duty to call attention to the injudicious and unsafe investment of the funds of the college.”<sup>116</sup> President Nott “did use the funds of said college as his own, interchangeably as occasions did arise.”<sup>117</sup>

Assemblyman Pruyn issued his own dissenting report. He disagreed with the conclusion of the majority about the soundness of the college’s finance and stated, “No one can examine the history of these complicated and immense operations without being satisfied that Union College owes all it has derived from them to its president.”<sup>118</sup> No further action was taken in the 1850 session of the Assembly regarding Union College. The college would eventually claim that the failure of the Assembly to take further action was due to its refutation of the majority report’s charges. “To the charges in the report of Mr. Beekman, the treasurer of Union College replied, and in so satisfactory a manner, that the Assembly refused to take any further notice of the charges contained therein.”<sup>119</sup>

In the meantime, James Beekman was elected in 1850 as a member of the Senate. He became the chairman of the committee on literature and continued his campaign against Union College management. He initially requested that the Attorney General and the State Comptroller report

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<sup>110</sup> *Id.* at 957. See also “Legislature of New York,” *Albany Evening Journal*, Mar. 21, 1849.

<sup>111</sup> *Id.* at 1300. See *Documents of the Assembly of the State of New York*, No. 213 (1849).

<sup>112</sup> *Id.* at 1496.

<sup>113</sup> Hislop, *supra* note 1 at 450–453.

<sup>114</sup> *Documents of the Assembly of the State of New York*, No. 146 (1850). See also “Affairs of Union College,” *New York Enquirer*, Mar. 26, 1850.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*, Document No. 147. Union College’s annual report, which includes its own defense to the majority report of the select committee, is contained in Assembly Document No. 190 of 1850.

<sup>119</sup> “Union College,” *Schenectady Cabinet*, Mar. 29, 1853. See also Document No. 41, *supra* note 55.

on the financial condition of Union College.<sup>120</sup> The State Comptroller initially reported he was unable to perform the task.<sup>121</sup>

Instead Senator Beekman's committee issued a report that was highly critical of Union College and echoed much of the criticism that had been issued by the majority report of the Assembly's select committee in 1850.<sup>122</sup> The committee reported that the Assembly report was "fully sustained by the facts of the case,"<sup>123</sup> and it adopted the finding of the assembly report "that the financial condition of Union College is unsound and improper."<sup>124</sup> The report called for "legislative investigation in a thorough manner, as a warning to future financial presidents of learned institutions, and for the purpose of preserving, so far as possible, what may remain of the intended benefactions of former Legislatures."<sup>125</sup>

Based on the report, the Senate established a committee composed of the Comptroller, the Attorney General, and a member of the board of regents to "employ a skillful accountant" and "examine into the pecuniary affairs of Union College."<sup>126</sup>

Later in the session, the advocates for Union College were able to amend the terms of the committee to investigate Union College. Two additional members of the board of regents were added to the committee. The committee was ordered to reexamine previous proceedings involving the college and to personally visit the college and to investigate five specific claims, two of which involved Dr. Nott's dealings with any college or lottery funds.<sup>127</sup> Accountant Levinus Vanderheyden was hired to review Union's finances.

The investigation by Vanderheyden continued through 1852 with Senator Beekman certain that it would prove his contention that Union College's finances has been badly managed under the Nott regime.<sup>128</sup>

Even before the report was released, there were major arguments within the Senate about the propriety of the publication of the report. One senator claimed that the printing of the report would "work an outrageous injustice."<sup>129</sup> Senator Beekman argued to the contrary that "the trustees were guilty of misapplication of funds as far back as when the literature lottery was in existence."<sup>130</sup>

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<sup>120</sup> *Journal of the Senate of the State of New York* 123 (1851).

<sup>121</sup> *Id.* at 162. See also *Documents of the Senate of the State of New York*, No. 26 (1851).

<sup>122</sup> *Id.* at 526.

<sup>123</sup> *Documents of the Senate of the State of New York*, No. 71 (1851).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Journal of the Senate*, *supra* note 120 at 526. See also "New York Legislature: Senate Report Relative to Union College," *New York Herald*, Apr. 13, 1851, "New-York Legislature," *New York Tribune*, Apr. 14, 1851, and "New York Legislature," *Albany Argus*, Apr. 14, 1851.

<sup>127</sup> *Id.* at 807–808.

<sup>128</sup> Hislop, *supra* note 1 at 466–469. See also "New York Legislature," *New York Times*, Feb. 24, 1852.

<sup>129</sup> "New York Legislature: Senate The Union College—Dr. Nott And Senator Beekman—Spirited Controversy," *New York Herald*, Mar. 3, 1853.

<sup>130</sup> "Interesting Doings in Albany," *New York Herald*, Mar. 3, 1853.

The report was released on March 4, 1853.<sup>131</sup> With two dissents, a majority of the committee simply presented a short statistical summary of the school's finances.<sup>132</sup> The basic gist of the numbers was that "Eliphalet Nott had taken \$885,789.62 of Union College funds for his own use."<sup>133</sup> The dissent largely argued the good faith of Dr. Nott, the fact that the moneys earned by Dr. Nott were due to his private efforts, and that the process utilized by Vanderheyden did not give the college any realistic opportunity to rebut any of the claims made against the school. It was an ex parte report.<sup>134</sup>

Debates continued on the Union College issue in the Senate throughout much of March of 1853. Beekman continued to rail against the college management. He believed that \$800,000 raised by the college through the lottery should have been used on students.<sup>135</sup> Beekman contended that "the end and aim of the trustees of Union College was concealment and delay – concealment and delay always the first and last resource of the guilty."<sup>136</sup> He gave "one of the most astonishing expositions ever made."<sup>137</sup> The *Albany Daily Star Register* claimed that Beekman's assertion that Union College "'was a rotten institution' was now proved by the testimony of its own books."<sup>138</sup>

Union College fought back, now securing the services of John Canfield Spencer.<sup>139</sup> Advocates for the college in the Senate fired back at Beekman with Senator William Henry Van Schoonhoven calling Beekman's charges "vile slanders."<sup>140</sup> The Senate determined to establish another committee which would this time allow the Union College representatives an opportunity to contest and question the evidence against them. Senator Beekman attempted to require Union College to post a bond of \$500,000 before the committee would be authorized to meet, but that resolution was defeated overwhelmingly by the Senate.<sup>141</sup> In place of that resolution, Beekman moved to make it the duty of the attorney general to take legal action against the trustees and/or president of Union College who may be guilty of improper conduct.<sup>142</sup> That motion was agreed to by the Senate, and the Senate appointed a three-member committee chaired by Senator John Vanderbilt to review the evidence against Union College and Dr. Nott.<sup>143</sup>

The committee began hearings in August of 1853. The hearings were dominated by Spencer who was able to establish the "'malignity' of the Doctor's accusers, and then to prove that the

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<sup>131</sup> *Journal of the Senate of the State of New York* 261 (1853).

<sup>132</sup> *Documents of the Senate* No. 41, *supra* note 55.

<sup>133</sup> Hislop, *supra* note 1 at 480. See also Eliphalet Nott, "Miscellany," *New York Observer and Chronicle*, Apr. 21, 1853. The same article by Dr. Nott is in the *Albany Argus* of Mar. 22, 1853.

<sup>134</sup> Document No. 41, *supra* note 55.

<sup>135</sup> "New York Legislature," *New York Herald*, Mar. 23, 1853.

<sup>136</sup> *Id.*

<sup>137</sup> "Affairs at the State Capitol," *New York Herald*, Mar. 23, 1853.

<sup>138</sup> Hislop, *supra* note 1 at 471.

<sup>139</sup> Much of the Union College argument can be found in the report of the dissenting members of the committee in Document No. 41, *supra* note 55.

<sup>140</sup> Hislop, *supra* note 1 at 473.

<sup>141</sup> Senate Journal, *supra* note 131 at 406–407.

<sup>142</sup> *Id.* at 407.

<sup>143</sup> *Id.* at 408.

evidence they brought against him was deliberately perverted to serve the malignity.”<sup>144</sup> He claimed that Vanderheyden’s bookkeeping methods were unintelligible and that the accountant lacked credibility.<sup>145</sup> Finally, he announced that Dr. Nott would give to Union College \$600,000 plus the land owned by Nott adjacent to the East River in parts of Queens, Brooklyn and Manhattan.<sup>146</sup> The point of this was to show that Dr. Nott had always planned to grant Union College all of his earnings from the lottery. On top of that, Dr. Nott still enjoyed considerable respect for his fifty years of service to Union College, and Senator Beekman declined to run for reelection. “At the end of his senatorial term, he withdrew from politics, and never could be induced to re-enter the field.”<sup>147</sup>

The committee issued its report on December 30, 1853. It was a unanimous victory for Union College and Dr. Nott.<sup>148</sup> It found that the six hundred thousand dollar donation to the college by Dr. Nott “explains the design and object of Dr. Nott in all the somewhat complicated transactions that have occasioned the investigation in which we have been engaged.”<sup>149</sup> The committee praised nearly all the work and deeds of Dr. Nott. The committee concluded its report by stating, “In our judgment not only the great prosperity of Union College but its very existence during periods of great calamity, are owing almost exclusively to his life-long efforts, sacrifices and hazards in its behalf. He has been and is a public benefactor in promoting the great cause of education, on which our institution, our property, our security and our liberty depend.”<sup>150</sup>

The \$600,000 was transferred by Dr. Nott to the college later in January of 1854 as part of the Nott Trust Fund.<sup>151</sup>

The committee report was seen as complete vindication for Dr. Nott.<sup>152</sup> The *Albany Evening Journal* wrote, “The report unravels minutely and carefully, the long series of accounts, which, while naturally of a complicated character, have been rendered still more intricate either by misapprehensions, or by a persevering desire to destroy the reputation of Dr. Nott. All the moneys derived from the State during the last half century are accounted for.”<sup>153</sup>

The *New York Times* took note of the \$600,000 to be given from Dr. Nott to Union College and stated the only motive of his persecutors was to “blacken his character, torture the last years of his long, useful and honored life, and throw a cloud of suspicion upon his integrity in after ages.

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<sup>144</sup> Hislop, *supra* note 1 at 483. See also Spencer *supra* note 6 at 13–18.

<sup>145</sup> *Id.* at 484–485.

<sup>146</sup> *Id.* at 491.

<sup>147</sup> Edward F. DeLancey, *Memoir of James William Beekman* 14 (1877).

<sup>148</sup> *Documents of the Senate of the State of New York* No. 5 (1854).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> “Munificent Donations to Union College—Dr. Nott Vindicated,” *New York Times*, Jan. 4, 1854.

<sup>152</sup> “The Affairs of Union College,” *Albany Evening Journal*, Jan. 14, 1854. Even eighty years later, the term “complete vindication” would be used to describe the result of the Vanderbilt committee’s report. See “James Symposium Casts Light on Early College Era,” *Schenectady Gazette*, Jan. 23, 1933.

<sup>153</sup> *Id.*

His own conscious purity of purpose will foil the most malignant part of their object, and the noble friendship of John C. Spencer has defeated the rest.”<sup>154</sup>

One criticism of Dr. Nott after his exoneration was found in the *New York Tribune*, which stated “In the case of the Union College Lottery, there was not merely an acceptance of the fruits of the unhallowed gain, but the evils necessarily incident to the lottery were immeasurably increased by the unprecedented activity with which the lottery was managed”<sup>155</sup>

Yet, viewed in later years, Dr. Nott does not appear as the innocent party. The basic finding is that John Canfield Spencer believed that Dr. Nott was largely guilty of the charges. Jonathan Pearson, who served for decades in the Union College administration and was the acting treasurer of the college in the early 1850s, wrote that Spencer had taken Dr. Nott aside and told him, “Sir, you have not a shadow of right to that property. Your title to it is not worth a straw.”<sup>156</sup> Spencer had decided that Vanderheyden’s basic charges were “essentially correct,”<sup>157</sup> and that Dr. Nott’s chance for prevailing depended on his transferring his properties to the college.

It is no surprise that Dr. Nott’s legacy comes with a large asterisk. Despite his long service to Union College and his many innovations and leadership in collegiate education, his work—especially his work with the lottery—“led him sometimes to accomplish his purposes by indirect means that laid him open to the accusation of double-dealing.”<sup>158</sup>

#### VIII Conclusion: The Lottery’s Effect on Union College

The income from the lottery has to be regarded as a savior for Union College. Without the lottery money, the school’s survival would have been questionable. The school received \$76,000 from the first lottery authorized in 1805. From the Literature Lottery, it received \$512,000.<sup>159</sup> The school also received what was supposed to be \$600,000 from Dr. Nott’s properties in January of 1854 based on his gift/repayment of debt to Union from his President’s Fund. The property in what came to be known as the Nott Trust Fund was land by the East River in Queens County in areas known as Hunter’s Point and Greenpoint.<sup>160</sup> Much of the property was in the Queens County municipality of Long Island City. That property was sold for \$1.1 million in 1898.<sup>161</sup> The *Brooklyn Daily Star* claimed that the college lacked the funds to develop the property and needed to sell the property for its own financial needs.<sup>162</sup> In explaining the sale of the property, Union

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<sup>154</sup> “Union College and Dr. Nott,” *New York Times*, Jan. 7, 1854.

<sup>155</sup> “Fiat Justitia,” *New York Tribune*, Feb. 2, 1854.

<sup>156</sup> Jonathan Pearson and Harold C. Martin, *The Diary of Jonathan Pearson* (2004). It is recounted in Hislop, *supra* note 1 at 494 and by Somers, *supra* note 12, at 524.

<sup>157</sup> Hislop, *supra* note 1 at 49.

<sup>158</sup> VII *Dictionary of American Biography* 581 (1934).

<sup>159</sup> Somers, *supra* note 12 at 464.

<sup>160</sup> *Id.* at 524. Ch. 385, L. 1860 established a Union College trust for these lands.

<sup>161</sup> *Id.* at 403. Contemporary newspaper accounts place the price of the sale at above \$1 million. See “Sold by Union College,” *New York Sun*, February 19, 1898; “Union College Land Sold,” *New York Times*, February 19, 1898; “Union College Sells Land,” *Buffalo Evening News*, March 8, 1898.

<sup>162</sup> “Mr. Harroun’s Views,” *Brooklyn Daily Star*, July 14, 1898. The value of the property likely rose due to consolidation of the five boroughs into the city of New York in 1898. Nearly all the Union College lands were in the city of Long Island City in Queens County. Long Island City had taxed the Union College properties extremely

College president Andrew Van Vranken Raymond wrote that the sale “saved the College from imminent peril and disaster.... That income is quite inadequate to meet the current outlay, and it is no longer possible to permit encroachments upon capital under the guise of drafts upon unearned increment.”<sup>163</sup> Besides the sale for \$1.1 million, the college did earn significant income from the property before the 1898 sale.<sup>164</sup> One likely extremely optimistic estimate was that the income could have been perhaps as much as \$100,000 in some years.<sup>165</sup>

So Union College’s revenue from the two lotteries directly was \$588,000. Adding in \$600,000 from the Nott Trust Fund transfer in 1854 would increase Union College’s lottery revenue to a total of \$1.188 million.

If you substitute the 1898 sales date of the Nott Trust Fund property for the 1854 transfer date, the gross revenue would increase to \$1.688 million. On top of that, if you estimated income of approximately \$250,000 from the trust properties from 1854–1898, you would have Union College receiving \$1.938 million in gross revenue from the lottery.

Utilizing the calculator for determining the consumer price index for the nineteenth century as developed by the Federal Reserve Bank of Minneapolis,<sup>166</sup> one can determine what Union College lottery revenue would mean in 2017 dollars. Crediting the \$76,000 from the first lottery in 1814 would yield \$887 thousand. Crediting the \$512,000 from the Literature Lottery to the year 1830 would yield \$11.766 million.<sup>167</sup> The \$600,000 from the Nott Trust in 1854 would yield \$16.342 million. In 2017 dollars, Union College would have received \$29 million from the lottery.

If, however, you value the Nott Trust Fund at its \$1.1 million sale in 1898 (rather than the \$600,000 figure from 1854), and if you add in revenue from the Fund properties based on \$10,000 per year for the 44 years of Union College ownership from 1854–1898,<sup>168</sup> the total

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heavily, and Union College was able to obtain considerable relief from this taxation by legislation in Ch. 973, L. 1895. After the consolidation, the municipality of Long Island City ceased to exist.

<sup>163</sup> Somers, *supra* note 12 at 403.

<sup>164</sup> *Id.* at 524. The Union College newspaper could write in 1893, “The popular idea that Union College is located at Schenectady, is not entirely true. The brains of the college are there, no doubt, but the hands are in New York city and the feet are firmly planted on the soil of Long Island City whence like Antaeus of old, Union College receives its real strength and chief support.” “The New College Treasurer,” *The Concoriensis*, March 1, 1893. In fact, the office of the treasurer of Union College was moved from Schenectady to Long Island City in 1886. See Benjamin A. McDonald, “Reminiscences of a Veteran Long Island City Reporter,” *Queens Daily Star*, July 30, 1921.

<sup>165</sup> *Id.* at 402. Nonetheless, the government of Long Island City was especially antagonistic to the development of the Union College properties and likely severely limited Union’s potential revenue from its holdings. See “Union College Land Sold,” *supra* note 161. See also “Reminiscences of a Veteran Long Island City Reporter,” *supra* note 164. The president of Union College in 1887 noted of the Hunter’s Point land, “It is burdened by a debt and taxation that exceeds \$300,000. The improved property suffers from that encumbrance and yet is worth a great deal more than that sum. Our unencumbered property there consists of 1,400 vacant lots. We have to pay taxes on that, the interest on our debts and support our establishment here.” “Alumni Day, *The Concoriensis*, June 20, 1887.

<sup>166</sup> <https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800> [last viewed December 7, 2017].

<sup>167</sup> There was significant deflation between 1814 and 1830.

<sup>168</sup> This number was determined by using the year 1876, the midway point from the college acquiring the trust property in 1854 and selling it in 1898 as the basis for determining the 2017 equivalents.



receipts by the college from the lottery in 2017 dollars would be \$55.12 million.<sup>169</sup> No matter how you evaluate the revenues, Union College received somewhere from \$29 million to over \$55 million in 2017 dollars from the two lotteries.

Union, however, was not in Columbia's league. Columbia clearly benefitted to the tune of well in excess of \$2 billion in 2017 dollars from the 1814 legislation,<sup>170</sup> but Union was hardly the unlucky loser of the 1814 lottery. Union received considerable benefits (albeit some extremely adverse publicity) from the lottery. Receiving \$1.18 million from a lottery in the first half of the nineteenth century was not chump change, in an era when the college was receiving less than \$10,000 per year from tuition<sup>171</sup> and when the total expenses of the college were less than \$22,000.<sup>172</sup> Union was not the Wile E. Coyote of 1814.

Thanks in no small part to the lottery, the successes for Union College were remarkable. From 1820 to 1850, it was considered among the Big Three of American colleges, with Yale and Harvard.<sup>173</sup> By 1823, there were 234 students enrolled in the school,<sup>174</sup> reaching a high point of 325 in 1859.<sup>175</sup> Union may never have been the largest school in the nation in terms of total student body, but it was generally second to Yale in size.<sup>176</sup> From 1820 to 1851, Union graduated more students than Harvard in all but two years. For eleven of those years, starting in 1820 and ending in 1849, Union graduated more students than any other school in the nation.<sup>177</sup> In 1830, Union graduated 96 students compared to 71 for Yale, 48 at Harvard and 20 at Princeton.<sup>178</sup> By 1839, Union was "potentially the wealthiest college in America."<sup>179</sup> Not until the Civil War was

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<sup>169</sup> The \$1.1 million sale in 1898, would be valued at \$32.357 million, and the revenue stream would be valued at \$10.11 million. They would replace the \$600,000 transfer in 1854.

<sup>170</sup> The 2017 CPI inflation calculator values the \$400 million sale of the Columbia property in 1985 at \$932 million. To that amount would be added Columbia's revenue during the 170 years that it owned the property. Starting in 1929, Columbia received \$3 million in rentals from the Rockefeller Center properties. That amount was increased to \$3.9 million by 1952 and went up to \$9 million annually in 1973. At the time the property was sold in 1985, Columbia was receiving \$11 million per year. See Richard Briffault, "Fiscal Deficit to Continue Despite Rockefeller Incomes," *Columbia Daily Spectator*, October 29, 1973; Richard Briffault, "Agreement Near on Lease for Rockefeller Center," *Columbia Daily Spectator*, August 31, 1973; Richard Briffault, "Secrecy Surrounds Center Talks," *Columbia Daily Spectator*, March 23 1973; Jennifer Lynch, John Sullivan and Anne Kornhauser, "Rockefeller Center Sold," *Columbia Daily Spectator*, February 6, 1985; Julie Zuckerman, "Admins: CU got top Dollar for Rock," *Columbia Daily Spectator*, November 1, 1989; "Rockefeller Center Holds Key to Budget," *Columbia Daily Spectator*, December 16, 1970; "Students Tread on Home Soil in New Rockefeller Centre," *Columbia Daily Spectator*, January 4, 1933. In 1952, the revenue from Rockefeller Center provided 18.75% of the school's revenue. "Gentzler Sees Slight Income Loss for CU," *Columbia Daily Spectator*, October 28, 1952. In the 1947-48 budget year, 25% of the university's income was derived from Rockefeller Center. "1½ Million Spent by CU Over Income '47-'48," *Columbia Daily Spectator*, December 3, 1948. The total value received by Columbia in 2017 dollars should be well over \$2 billion. The easiest calculation for post-1913 changes in the CPI can be found at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). [last viewed December 7, 2017].

<sup>171</sup> *Annual Report of the Regents of The University of the State of New-York* 31 (1836-1837).

<sup>172</sup> *Id.*

<sup>173</sup> Hislop, *supra* note 1, at 399.

<sup>174</sup> The Whole of the Documentary Evidence, *supra* note 54.

<sup>175</sup> Somers, *supra* note 12, at 263.

<sup>176</sup> In the 1818-1819 school year, Union had only about 15-20 students less than Yale. *Id.* at 265

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 514.

<sup>179</sup> Hislop, *supra* note 1 at 398.

Union's position as one of the Big Three challenged.<sup>180</sup> Up to the Civil War, Union was certainly the largest college in New York State.<sup>181</sup>

After Dr. Nott's death in 1866, Union College fell on hard times in the last third of the nineteenth century. Enrollment decreased significantly at times, and there were several efforts made to relocate Union College from Schenectady to Albany. It is likely that the revenues attributable to the lottery –which included revenues from Union's property in Long Island City - provided a cushion that kept Union College alive and in Schenectady throughout the nineteenth century.

For fifty years, lottery politics dominated Union College and Schenectady. The city was the site of the major longest running lottery melodrama in New York State, if not the entire nation. It is more than appropriate that the State Lottery should be headquartered in Schenectady. Schenectady is where much of the lottery politics originated and where it is today.

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<sup>180</sup> *Id.* at 230.

<sup>181</sup> Hough, *supra* note 8 at 107 [viewing 1863 statistics].

# A Quotable History of New York Corruption

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There are some people who could conceivably believe that corruption in New York government is a recent twenty-first-century or late twentieth-century phenomenon. Little could be further from the truth. Corruption has always been a factor in New York government. Whether it has been corruption in the awarding of bank charters, governmental franchises, railroad rights, bridge rights, or insurance preferences, New York State has it all. This is an attempt to look back at corruption in quotes from the early founding of New York State up to a century ago.

The quotes are divided into three eras. Era I is from the late eighteenth century until 1850. This is an era dominated by corruption in bank legislation. Era II is from 1850 to 1875, where there was massive corruption in railroad rights legislation and in the schemes of the Tweed Ring in New York City. Era III, from 1875 to 1916, was the era of the “Black Horse Cavalry,” where corrupt legislators often worked to compel corporate interests to pay them bribes in order to protect themselves from damaging legislation.

## Era I (1788–1850)

1. **“Charges of corruption swirled around nearly every bank charter introduced between 1813 and 1821.**

Allegations of bribery surfaced as early as 1804 with the chartering of the Merchants’ Bank of New York City, when it was disclosed that one state senator had promised shares to two other state senators, along with a guarantee that they could sell the shares at a substantial profit after the charter was passed.

Between about 1820 and 1838, Martin Van Buren’s political regime manipulated the charter-granting process to serve its allies and advance its political agenda.”

Howard Bodenhorn, “Bank Chartering and Political Corruption in Antebellum New York.”

2. “Man and boy I have known New York politics for sixty years, and to me they have always been **the devil’s own incomprehensible.**”

President John Adams quoted in “The Erie Railroad Row,” *The American Law Review*, 1868.

3. “The **odium attached to all those implicated in the corrupt means used to promote the incorporation of the Bank of America, was so great and so lasting** that no attempts of the kind were made for a long while afterwards; and the iniquitous proceedings of former legislatures in relation to granting charters to moneyed institutions, had been so disgraceful to the state, and were so fresh in the recollection of the members of the convention of 1821, as, beyond all question, induced them, with a view to the prevention of these practices, to insert the clause in the present constitution which renders necessary the assent of two-thirds of both houses of the legislature in order to incorporate a moneyed institution. The intention of the convention was good, but the clause failed to accomplish the object intended. Witness the proceedings in passing the law to incorporate the Chemical Bank, and other institutions, in 1825. The only effect of the restrictive clause in the constitution has been to increase the evil, by rendering necessary a more extended system of corruption, in some form, than was before indispensable.”

Jabez D. Hammond, *The History of Political Parties in the State of New-York, From the Ratification of the Federal Constitution to December, 1840.*

4. “During the early years of the last century, efforts to incorporate banks in New York were characterized by such an utter disregard of moral methods, that the period was long remembered as a **black spot in the history** of the State.”

De Alva Stanwood Alexander, *A Political History of the State of New York.*

5. “The Republicans of Albany, realising the importance of a bank and the necessity of avoiding the opposition of their own party, obtained a charter for the State Bank, by selling stock to Republican members of the Legislature, with an assurance that it could be resold at a premium as soon as the institution had an existence. There was a ring of money in this proposition. **Such an investment meant a gift of ten or twenty dollars on each share, and immediately members clamoured, intrigued, and battled for stock. The very boldness of the proposition seemed to save it from criticism.** Nothing was covered up.”

*Id.* on State Bank of Albany Charter of 1803.

6. “**It seems incredible in our day that such corruption could go on in broad daylight without a challenge.** At the present time a legislator could not carry a district in New York if it were known that his vote had been secured by such ill-gotten gains. Yet the methods of the Republican promoters of the State Bank seem not to have brought a blush to the cheek of the youngest legislator. No one of prominence took exception to it save Abraham Van Vechten, and he was less

concerned about the immorality of the thing than the competition to be arrayed against the Federalist bank in Albany.”

*Id.*

7. “‘To sanction a bill thus marked in its progress through one branch of the Legislature with bribery and corruption,’ concluded the Judge, ‘would be subversive of all pure legislation, and become a reproach to a government hitherto renowned for the wisdom of its councils and the integrity of its legislatures.’”

Judge Ambrose Spencer in 1805 on chartering of State Bank of Albany.

8. “Even Erastus Root, then just entering his first term in Congress, saw nothing in the transaction to shock society’s sense of propriety or to break the loftiest code of morality. ‘There was nothing of mystery in the passage of the bank,’ he wrote. ‘The projectors sought to push it forward by spreading the stock among the influential Republicans of the State, including members of the Legislature, and carry it through as a party measure. It was argued by the managers of the scheme that the stock would be above par in order to induce the members of the Legislature to go into the measure, but nothing in the transaction had the least semblance of a corrupt influence. No one would hesitate from motives of delicacy, to offer a member, nor for him to take, shares in a bank sooner than in a turnpike or in an old canal.’”

De Alva Stanwood Alexander, *supra* on chartering of the State Bank of Albany.

9. “Turnpike companies and other types of corporations regularly made their stock available for legislators.”

Robert E. Wright, *Banking and Politics in New York, 1784-1829*.

10. “Federalists would grant no charters to Republicans and Re-publicans none to Federalists. After a few banks had been established they united, regardless of politics, to create a monopoly by preventing other persons from getting charters. When charters were applied for and refused, the applicants began business on the common law plan. Then, at the instigation of the favored ones, the politicians passed a law to suppress all unchartered banks. The latter went to Albany and bribed the Legislature. **In short, politics, monopoly, and bribery constitute the key to banking in the early history of the State.**”

Horace White, *Money and Banking*.

11. “In an attempt to prevent banks from buying up members of the State Legislature in order to secure charters, the Constitution of New York State was amended in 1821 to the effect that thereafter a two-thirds vote of both branches of the

Legislature was necessary to pass a bank charter, but the only **effect of this was to increase the evil by rendering necessary a more extended system of corruption.**"

R. L. Garis, *Principles of Money, Credit and Banking*.

12. "The granting of charters was soon regarded as part of the spoils belonging to the victorious party, and were dealt out as rewards for partisan services. **This practice became so shameless and corrupt that it could be endured no longer**, and in 1838, the Legislature sought a remedy in the general banking law."

Comptroller Millard Fillmore 1848, Annual Report.

13. "The whole business of legislation was retarded, and a **regular system of bribery, almost without parallel in the history of civilized governments, was established and carried on**, until the final passage of the bill in the Assembly, by a vote of fifty-eight to thirty-nine. The attempts of the agents of the company to obtain votes for the charter, by means of the most shameless bribery and corruption, were made known before the bill went to the Senate, and a motion was made in that body, when in committee of the whole, to reject it, which was lost; thirteen Senators voting in the affirmative, and fifteen in the negative."

John S. Jenkins, *The History of Political Parties in the State of New-York*, re Bank of America charter vote in 1812.

14. "Scarcely a member of the Legislature escaped downright Self corruption – and **human nature never was exhibited in its naked deformity** in more disgusting features."

Elkanah Watson, describing the chartering of the State Bank of Albany in 1803.

## **Era II (1850–1875)**

1. "Again, legislative bribery and corruption were, within recent memory, looked upon as antiquated misdemeanors, almost peculiar to the unenlightened period of Walpole and Fox, and their revival in the face of modern public opinion was thought to be impossible. In this regard at least a sad delusion was certainly entertained. Governments and ministries no longer buy the raw material of legislation; —at least not openly or with cash in hand. **The same cannot be said of individuals and corporations; for they have of late not infrequently found the supply of legislators in the market even in excess of the demand.**"

Charles F. Adams, Jr., *Chapters of Erie, and Other Essays*.

2. "Legislation bought and sold — bills passed or defeated to suit the highest bidder — bribery the order of the day — **such is the hideous picture presented to the people of our noble State.**"

George Washington Hunt, 1860, quoted in Brummer, *Political History of New York State During the Period of the Civil War*.

3. "The year 1868 proved a particularly busy one for Vanderbilt. He was engaged in a desperately devious struggle with Gould. In vain did his agents and lobbyists pour out stacks of money to buy legislative votes enough to defeat the bill legalizing Gould's fraudulent issue of stock. **Members of the Legislature impassively took money from both parties. Gould personally appeared at Albany with a satchel containing \$500,000 in greenbacks which were rapidly distributed.** One Senator, as was disclosed by an investigating committee, accepted \$75,000 from Vanderbilt and then \$100,000 from Gould, kept both sums, — and voted with the dominant Gould forces. It was only by means of the numerous civil and criminal writs issued by Vanderbilt judges that the old man contrived to force Gould and his accomplices into paying for the stock fraudulently unloaded upon him. The best terms that he could get was an unsatisfactory settlement which still left him to bear a loss of about two million. The veteran trickster had never before been overreached; all his life, except on one occasion, he had been the successful sharper; but he was no match for the more agile and equally sly, corrupt and resourceful Gould."

Gustavus Myers, *History of the Great American Fortunes*.

4. "The legislature, as a whole, was as crooked as a ram's horn...After all was said and done, perhaps the two chief factors in our favor were first, the hatred that existed in the public mind of Vanderbilt monopoly and of Vanderbilt's bulldozing methods, and, second, **the five hundred thousand dollars that Gould had in his pocket.**"

Robert H. Fuller, *Jubilee Jim: The Life of Colonel James Fisk, Jr.*

5. "The most important bills are rushed through at the last moment without any consideration or even knowledge of them upon the part of members; that the most outrageous jobs are constantly presented in the form of bills, and that they are passed or defeated only by the most enormous expenditure of money. These are undeniable facts."

"Legislative Corruption," *Harpers Weekly*, May 4, 1867.

6. "**The canal administration and the evident waste and corruption in the letting of contracts for repairs,** called for investigation. The convention

faced a popular conviction **that bribery was rampant in the Legislature, and under existing law could not be punished.**"

Ray B. Smith, *History of the State of New York Political and Governmental*.

7. "The need for action to repress the practice of bribery originated with the Committee on Official Corruption appointed by the convention of 1867. Its report was prefaced by the remark that official corruption was 'a crime of deep turpitude, growing prevalence, and dangerous tendency.' The corroboration of this statement can be found in the testimony taken before it which revealed over a half million dollars distributed by railroads as bribes. One newspaper, referring to current conditions, said, **'We speak what hundreds of men know from personal experience, that no bill whose passage will confer pecuniary advantage upon any man or any corporation can be passed in Albany except by bribery'**-except by paying members to pass upon it. No man can get his rights, or prevent serious damage to his private interests, or to avert ruin from himself and his family, except by bribery."

New York State Constitutional Convention Committee (1938) (Reports) referring to *New York Times*, April 8, 1867.

8. "During all the many years that I have been accustomed to observe the character of legislators and the proceedings of the body, I have never seen anything to compare with the present assemblage of representatives in point of shamelessness, rapacity and recklessness of consequences. Their predecessors have often been noted for venality and greediness, **but these people sell their votes openly haggle about the price without pretense of concealment and then boast of what they have been paid.** And all with the knowledge that they are within reach of the criminal statute, and that a felon's cell would be their fate if the law should be enforced against them."

Letter to the New York Tribune, quoted in the *New York Times*, April 8, 1867.

9. "We venture to say that as a general rule for the last ten years one-fifth of the members of each House have been in the habit of taking bribes for their votes:- the fact is open and notorious to everyone who has had any personal connection with Albany legislation."

"Legislative Corruption--Albany Matters Which Deserve Attention," *New York Times*, April 8, 1867.

10. "Either this state of affairs must be remedied or the **State Capitol ought to be removed to Auburn or Sing Sing.** Our legislators and convicts should change places."

*Id.*



11. "Gould traveled to Albany, reportedly with a trunk full of thousand dollar bills and set up shop in the Delavan House and began buying up votes. The Commodore swiftly dispatched counterbribery agents, among them William Tweed, who installed themselves on another floor of the same hostelry. **Legislators shuttled back and forth in search of the highest bidder.** With the Erie's treasury close at hand, Gould's was the more bottomless wallet, and Vanderbilt's troops deserted him, even Tweed who was rewarded for his treachery with lavish supplies of Erie stock netting him \$650,000 in all."

Burrows and Wallace, *Gotham*.

12. "**There never was a time when you couldn't buy the Board of Alderman.**" Tweed once remarked – but it was the arrival of the street railroads, with their attendant scramble for franchises, that brought civil chicanery to new heights or depth."

*Id.*

13. "Working amid the cloud of lobbyists that swarmed each day about City Hall, the Common Council set about earning its nickname of the **'Forty Thieves.'**"

*Id.*

14. "Not only the 'Tweed Ring' entered the market as a buyer and seller of Legislators, but powerful corporations (notably two great railroad companies), also engaged warmly in this degrading traffic. The Legislature no less than the city government seems to have been a **den of thieves**; and even the ermine of the judges was polluted by this wild craze for ill-gotten wealth."

Report of the Special Committee of the Board of Aldermen Appointed to Investigate the "Ring" Fraud: 1878.

15. "With the bestowal of the first trolley franchise in 1851 the Board of Aldermen embarked on a career of spoliation. The body in which 'Boss' Tweed served his apprenticeship was known as the 'Forty Thieves.' **It was said that an enterprising alderman could make his fortune in a single term; few were backward in this pursuit of pelf.**"

Frederick Shaw, *History of the N.Y.C. Legislature*, 1954.

16. "1. Large sums of money were expended for corrupt purposes by parties interested in legislation concerning railways during the session of 1848. 2. Lobbyists were thus enriched, and in some cases received money on the false pretense that the votes of senators were to be thereby influenced. 3. There is no proof of actual bribery of any Senator. 4. The newspaper charges made in

the instances that were brought to the attention of your committee were founded upon rumor alone and have been in no case sustained by the evidence of the writers or other proof.”

Matthew Hale, Report of State Senate Committee of 1869.

### **Era III (1875–1916)**

1. “But the corrupt work was usually done through the members directly. Of course I never had anything in the nature of legal proof of corruption, and the figures I am about to give are merely approximate. **But three years’ experience convinced me, in the first place, that there were a great many thoroughly corrupt men in the Legislature, perhaps a third of the whole number.**”

Theodore Roosevelt, *An Autobiography*.

2. “The corrupt legislators, the ‘black horse cavalry,’ as they were termed, would demand payment to vote as the corporations wished, no matter whether the bill was proper or improper.”

*Id.*

3. “The duty of holding these corporations accountable was a burden upon the Legislature which it ought not to have been called upon to perform. But, worse than that, this multitude of bills, founded upon just complaint, brought after them a multitude of strike bills introduced for the purpose of holding up the corporations, holding them up and calling them down. Many of us can now remember the dreadful days of the Black Horse Cavalry which came as an incident mainly, to the performance of this duty by the Legislature, and, further still, the fact that the great transportation companies were being attacked, the great public service corporations were being attacked in the Legislature, justified them in their own minds in going into politics and electing, or furnishing the money to elect, members of the Senate and Assembly.”

Elihu Root at the 1915 New York State Constitutional Convention.

4. **STRIKE BILLS.** “With the opening of every legislative session, among the first contents of the ‘bill-box’ there is always a number of what are called ‘strike bills.’ Some of these have ‘been introduced year after year, until the reading of their titles by the clerk excites familiar smiles from the old members. Nothing stops the introduction of these bills except their passage. **A ‘strike’ bill is a bill which is introduced in the hope that somebody will pay the**

**introducer not to press its passage. Its introduction is variously known as ‘ringing the bell’ or ‘striking the gong.’ Its intent is an invitation to bribery. It is called a ‘strike’ because it is always aimed at some corporate interest which could spare the money to pay for its suppression.”**

American Lawyer, Vol. 14, Issue 2 (February 1906), 82.

5. **“His domination of the Legislature for personal or factional interests arrayed many of the more serious men of the party against Platt’s methods, especially his practice of secretly obtaining large contributions from big business, under the promise of immunity from ‘strike’ bills, and of using such funds secretly for the nomination and election of legislators and other officials who would do his bidding.** Wheeler H. Peckham, a lawyer of State-wide reputation, in an address before the Good Government Club in 1894, declared that this custom had practically ended the day of the lobby. ‘When the Democrats are in power,’ he said, ‘the leader of Tammany takes its place. He handles yearly a large amount of money and is accountable to no one. He says whether a bill shall pass, and corporations pay large amounts for ‘peace,’ as they call it. The Metropolitan Telephone Company pays \$50,000 a year. I know of one corporation which pays a similar amount. As counsel I went twice to Albany to defeat the passage of a bill and could not get a hearing. But the measure failed, and several months after a subscription list was quietly passed around. As Mr. Tilden so fitly said: ‘It was a case of sending up the stuff to Albany.’”

De Alva Stanwood Alexander, *supra*.

6. **“I have seen something of the world, and affirm that in no civilized country, and hardly in any uncivilized, is there a government which, in foulness of corruption, in insatiable capacity, in criminal practices, in cruel oppression of the lowly, equals Tammany rule.”**

Carl Schurz, 1894.

7. **“There’s bribery everywhere.”**

Wheeler Peckham, *New York Sun*, 3/30/94.

8. **“I tell you that every day of their lives these Tammany men are bribed and bribe others.”**

Wheeler Peckham, *New York Post*, 3/30/1894.

9. On bribery: **“It was also the *one crime* most prevalent and the *one crime* most rarely prosecuted or punished.”**

De Lancey Nicoll, "An Unpublished Constitutional Crime," *The North American Review*, 1888.

10. "The utilities became Tammany's greatest source of income. Whitney and Ryan of the Manhattan Elevated Railroad provided **top politicians with hefty lawyer's fees, stock market tips, contracts for their construction companies, and pieces of the action in Metropolitan's financial deals.** They were amply repaid with valuable franchises, maintenance of high fares and the blockage of utilities reform."

*Gotham, supra.*

11. "It was a well-considered fact that to be **a senator at Albany was worth anywhere from \$50,000 to \$100,000 a year and that it came largely from the insurance companies.** This is no secret. Every New York man knows it. I know it. I know it well."

Congressman Joseph Goulden, quoted in the *LA Times*, 5/22/1906.

12. "Insurance companies in New York City have always been regarded as good things."

*Id.* Goulden, quoted in the *Washington Post*, 5/22/1906.

13. "**The payment of bribe money to prevent the passage of hostile measures** which as a class are known as 'strikes' is an ancient practice."

*New York Times*, 10/6/1905.

14. "It is probably true as Mr. McCall said to the Armstrong committee that three-fourths of the bills relating to insurance are instruments of blackmail."

*New York Tribune*, 10/6/1905. McCall was the New York Life Insurance Company president.

15. "The existence of a huge pool to prevent hostile legislation in every state in the union was revealed today... This revelation explains much of the mystery in the payment of \$235,000 to 'Judge' Andrew Hamilton in 1903 by the New York Life as testified to by President McCall."

"Life Companies in Bribery Pool?," *Chicago Daily Tribune*, 9/30/1905.

16. "Black Horse Cavalry. A derogatory appellation given to a coterie of **Republican members in the New York legislature charged with selling legislative privileges and extorting money from corporations by the introduction of blackmailing legislation.** Much light was thrown on its methods by the investigation connected with the conviction of Senator Allds."

1910 Cyclopedia of American government, v.1 (Abattoirs/Finality), McLaughlin and Hart.

17. "Strike Legislation and Other Methods. — 'Strike' bills, or 'regulators' which are introduced by legislators attack some interest for the purpose of being bought off. **Behind them is frequently to be found a 'combine' of members, usually bipartisan, organized for purposes of plunder.** A combine of this nature in New York earned for itself the expressive title of the 'Black Horse Cavalry.'...This body was particularly active in state legislation at the time when Boss Tweed was a state senator and practically in control of the legislature. A number of the members of legislatures are 'owned,' that is, controlled by some outside interest. Usually this is a political leader or boss, to whom the member is indebted for his seat. In other cases, a member is serving some particular interest to which he is bound by the fact that his campaign expenses have been paid or other substantial favors given him."

*Id.*

18. "Thus, the Board of Aldermen in New York City, which, in name is the legislature of the city, has gradually been deprived of its initiative in financial matters and all other powers of real magnitude, except the power to enact the building code. In 1905 because of alleged 'hold up' tactics, its power over franchises was taken from it and lodged in the Board of Estimate and Apportionment. It is not necessary to go back to the 'Forty Thieves Council' of the early fifties in New York or to the notable instances of legislative corruption in the city council in the period of the Tweed Ring (see) for instances of direct bribery."

*Id.*

19. "The insurance investigation in New York disclosed the payment of large sums to the legislative agents of the insurance companies and the recent investigation in the Senate of the United States of the method by which certain Senators secured their election have brought out facts showing a lavish use of money. In 1910 and 1911, the examination of legislative conditions in Illinois indicated the existence of a corruption fund, named, with ill-timed levity, the 'jack-pot.' Convictions in the courts of members of state legislatures for bribery are not infrequent. In New York, In 1910, a senator, after a prolonged trial before the Senate which attracted wide-spread attention, was held to have received a bribe in connection with legislation affecting certain bridge interests and resigned."

*Id.*

# EVERYDAY RACING ETHICS

HORSE RACING AND PROFESSIONAL ETHICS

Bennett Liebman

Government Law Center

# Advisory on Audience Participation

- **“I don't like audience participation. It falls somewhere between incest and folk dancing.”**
- Nathan Lane



# Areas of Concern

- State Racing Commissions and Elected Officials
- The Racetracks Themselves Your text here
- The Actual Racing and Betting
- The Media



# Racing Commissions

## Conflicts Include:

- General Abuse of Power
- Betting
- Side Employments
- Gifts
- Loans
- Friendships with Gangsters

# Herbert Bayard Swope



World famous journalist and chair of the NY racing commission from 1934 -1944. Arranged timing of races to fit his schedule. Huge bettor. Friend of numerous bookies as well as the best man at Arnold Rothstein's wedding. Chairman of board of Florida's, Tropical Park.

# George Patrick Monaghan



Numerous free meals, drinks and favors from racetracks while serving as the full harness racing commission. Also free repairs to home from racetrack concessionaire. Previously famous prosecutor, fire and police commissioner

# Frank Wiswall



Wiswall served as the first executive secretary to the Harness Racing Commission starting in 1940. While at the Commission, Wiswall received a gift of 3,200 shares of Saratoga Harness stock. He also helped plan Saratoga Harness, and he drove in pari-mutuel races at the track. He left in 1945 to become the president of Saratoga. By 1954, his stock was worth \$337,000 and dividends had included \$156,140. Wiswall also had been paid a salary at Saratoga, plus his law firm had been paid \$75,000 in fees. Was on the ALS board of trustees for 45 years.

# Marvin Mandel – Governor of Maryland

- Bribes of property in return for friends getting more race dates at Marlboro track that they controlled in Md. Withdrew opposition to bills that he vetoed, which caused legislature to override his vetoes.



# Otto Kerner – Governor of Illinois

- Low price racetrack stock in return for favorable date treatment for donors.



# New York State Harness Racing



Irwin Steingut, Assembly  
Minority Leader, Controls  
Batavia Downs.



Jimmy Dunnigan,  
Senate Minority  
Leader, Owns Buffalo  
Raceway.



J. Russell Sprague, Nassau County  
Executive and Republican Party leader,  
Owns large block of Roosevelt Raceway  
shares,

# Illinois Racing and Politics

- Makes New York look good by comparison.
- Chicago Downs gets the right to have harness racing at Hawthorne Park.
- Legislators get stock at ten cents a share pays 1650% profit in first two years.
- House speaker holds 16,900 shares Ended up valued at \$600,000 at death. Also a \$20,000 consultant at Chicago Downs. Died with an estate of \$3 million.
- Stock to governor's executive secretary.
- Legislators working at the track as patrol judges and investigators.
- Even now, Maywood Park and Balmoral are out of business having lost a civil RICO case where they were involved in a bribery/extortion scheme with Governor Rod Blagojevich.



# Track Management

- Bribery- Direct or Indirect. Clearly, the tracks were paying legislators in the late 19<sup>th</sup> and 20<sup>th</sup> centuries. Certainly the New York tracks in the 1890's and 1900's in order to enable pro-racing legislation.

- Rockingham Park – entire board of selectmen on the payroll.

Legislators on payroll.

- Breaks to legislators and executives. Seating perks, Freebies. Who gets the seats on Belmont day? John Pricci in Newsday in 1987 suggested that Ivan Lafayette asked for 10 Travers Day box seats and 500 passes and had been accommodated by NYRA on Belmont Day and at the Belmont Ball as a guest of NYRA.
- Traditional contracting issues. Kickbacks to management for contracts. Contracts to friends. Late 1990's at NYRA Belmont glass contract and closed-circuit television equipment. Video Projects the closed-circuit vendor for 28 years, alleged her company eventually made a "blind bid" under "intense time pressure" for a \$2 million job, based on terms "N.Y.R.A. deliberately altered" to favor Teleview. She also said that Kenny Noe demanded she make a political contribution.
- Self-dealing on contracts. See Yonkers Raceway in the 1970's. Self-dealing by management. "tracks were being financially drained by their parent corporations." Roosevelt Raceway in the 1970's.
- Track Owners with Out-of-State Interests Might take action to benefit their own tracks rather than in-state racing.
- NYRA early 1960's buys president's house for double what had been paid.
- Perks to management. Free meals. Get your free gas.

# Track Management and Running the Races

- Running Races to Provide Best Racing Opportunities for Management's Horses.
- Indirect Pressure on Employees Not to Take Action Against Management.
- Avoid Scratches since Scratches can Lower Fields and Handle. Pressure on Vets and Stewards to Avoid Scratches and not Take Action against Management Horses.
- Task Force on Racehorse Health in 2012 pressure from racing office on veterinarians not to scratch called a "critical conflict of interest."
- Hialeah – 1999 stewards learn of claim of president's horse and let the horse scratch out of the race to avoid the scratch.
- Will other racing participants race their hardest against the track horse?
- Saratoga Harness – At its inception, many of the track owners raced their horses at the track. Due to abuses, stopped in 1957 by Harness Commission.

# Allocation of Stalls and Selection of Races

- Traditional claim in the 1970's at NYRA that the socially influential owners received the best and most stall space.
- Denial of stall allocation to prevent activist/troublemaking trainers from obtaining stalls.(Buddy Jacobson 1970's).
- Provide worst stall space to trainers and owners most likely to complain about management policies.
- Write conditions of the races to help put trainers and owners aligned with management.
- Traditional Claims of Kickbacks in Order to Obtain Stall Space.

# Racing Office Conflicts

- Gifts from Licensees (Owners, Trainers, Jockey Agents) to Racing Office Personnel and to Clerk of Scales. Woodbine clerk of scales fired in 2014.
- Help from Racing Office in Writing Races.
- Attitude of quid pro quo from Racing Office. If you fill this race, we'll write a race for you.
- Alerting horsemen and agents about races that might fit their conditions and which horses have entered. (Ongoing Penn National scandals)
- Holding races open to allow agents to help get mounts for their riders.
- Letting horsemen and agents use the track's computer system and program to help with mounts. Recent Queens County Prosecution: Sold jockey agent access to the racing office's computer system.

# The Actual Betting and Racing

- All the Ills Associated with an Unregulated Free Market
- Besides race fixing:
  - 1. Generally Corrupt Participants
  - 2. Collusion
  - 3. Insider Training
  - 4. Inside Information
  - 5. Betting Manipulations

# Corrupt Participants



Numerous Gangsters in Racing. Not Just Tony Soprano.

Al Capone owned Sportsman's Park as a dog track – Used to Fix the Races to Win Bets.

Arnold Rothstein – owned major horses

John Gotti - His restaurateur and companion Carlo Vaccarezza said he went to the track 10,000 times with John Gotti.

Big Bill Dwyer “The King of the Rum Runners” ran Tropical Park

Meyer Lansky had the lease on the Havana Racetrack  
False Ownership – Jim French case in 1971 owned by discredited Ralph Libutti who had been banned from racing.

Hidden Owner Mark Gerrard Cinzano

# Betting Plays

- Past Posting
- Fake Signers for IRS Payments: Ten Percenters
- Non Closed Windows
- Pre-OTB Tie up the Track Pari-Mutuel Windows and make huge bets off –track with Bookies who Paid Track odds. Don't play the favorites at the track.
- Late Cancellation = Allow major players to Cancel Wagers 10 or 15 seconds into race
- Pick 6 Scandal Manipulate the Bets after They've Been Made
- Other Ploy – Cash the outs moneys
- Now – Timing of Bets. Which syndicate or group gets the last shot at the odds??



Union College, Schenectady and the New York State Lottery in the 19<sup>th</sup> Century

By Bennett Liebman

Government Lawyer in Residence

Government Law Center

Albany Law School

<b>S</b> PLENDID LOTTERY—To be drawn in the city of New York, on the 29th November next.						
HIGHEST PRIZE 50,000 DOLLARS.						
New York State Literature Lottery, (consolidated by authority of the Legislature,)—Class No. 6, for 1826.						
SPLENDID SCHEME.						
1	50,000	15	50,000	10	500	5,000
1	20,000		20,000	26	200	5,000
1	10,000		10,000	104	100	10,000
1	7,000		7,000	104	50	5,200
1	6,000		6,000	1,248	20	24,960
1	4,000		4,000	10,608	10	10,000
1	3,000		3,000			
1	2,920		2,920	12,120 Prizes }		
2	2,000		4,000	22,100 Blanks }		273,700 dolls
10	1,000		10,000			
34,240 Tickets.						
Whole Ticket, 10; Half, 5; Quarter, 2.50; Eighth, 1.25.						
Tickets and Shares for sale at WAITE'S Old Established and Truly Fortunate						
Offices, corner of Maiden Lane and Broadway, and Corner of Fulton						
street and Broadway, where the Capital Prize of 100,000						
dollars was sold and paid in Shares						

*The Albion, A Journal of News, Politics and Literature*, October 21, 1826



## I Introduction

The New York State Lottery (now a component of the State Gaming Commission) in 1991 moved its offices fifteen miles west from downtown Albany in the Empire State Plaza to its present location in downtown Schenectady. The State Lottery currently bills itself as the largest and most profitable in the nation. It is only fitting that the Lottery would be relocated to Schenectady because in the first half of the nineteenth century, the State's largest lottery was based in Schenectady and operated for the benefit of Union College. Not only was the lottery conducted for the benefit of Union College, it was governed by Union College president Dr. Eliphalet Nott who became known as the "superintendent of lotteries"<sup>1</sup> and the "lottery king of America."<sup>2</sup> "The planning, execution and management of these lotteries were for the most part in Dr. Nott's hands."<sup>3</sup> The lottery-related controversies involving Union College and Dr. Nott lasted for nearly half a century.

Union College was for the first half of the nineteenth century the almost complete domain of its president, Eliphalet Nott. Nott served as the college's president for sixty-two years from 1804–1866. During his lifetime, Dr. Nott was widely considered to be one of the most important educators and citizens in the nation.<sup>4</sup> Union was the second college established in the State (Only Columbia which opened in 1754 preceded Union in New York State) and in 1795 became the first school to

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<sup>1</sup> Robert A. Davison, Book Review "Eliphalet Nott by Codman Hislop," 24 *American Quarterly* 289, 290 (1972). See also Codman Hislop, *Eliphalet Nott* 151 (1971).

<sup>2</sup> Richard Spillan, "Eliphalet Nott," *Cincinnati Enquirer*, Aug. 14, 1910. The lottery under Nott was "skillfully managed by and at the behest of the state." Thomas N. Bonner, "The Beginnings of Engineering Education in the United States: The Curious Role of Eliphalet Nott," *New York History*, 35, 45 (Jan. 1, 1988).

<sup>3</sup> Joseph Rotundo, "Eliphalet Nott," 13 *New York History*, 166–167 (Apr. 1, 1932).

<sup>4</sup> In its obituary of Nott, the *Christian Advocate* wrote, "He has scarcely less than any contemporary impressed his own character upon that of his age and country, and his influence will live on indefinitely," "Rev. Eliphalet Nott," *Christian Advocate*, Feb. 8, 1866. The *New York Tribune* noted, "But in his kind, he was a master, the like of whom we shall not see again. His life was his best logic, adding grace to his own persuasions and fortifying his neighbor's creed by its purity and benevolence." "Death of the Rev. President Nott," *New York Tribune*, Jan. 30, 1866; "His services in the cause of education have been equaled by few. His influence upon the young men of this country is beyond estimation." Eliphalet Nott, D. D., LL. D., *American Educational Monthly*, March 1866; "For more than half a century, he was preeminent as a clergyman, as an educator of young men, and as temperance advocate." Spillan *supra* note 2. See also "Obituary Eliphalet Nott, D. D., LL. D., *New York Times*, Jan. 30, 1866. "Among the master minds of that generation, there was not a more skillful, adroit or more effective political manager than the Rev. Dr. Eliphalet Nott... He never sought legislation in vain." R.C. Alexander, "Popular Observations: Columbia's Debt to Union," *New York Tribune*, May 11, 1891.

be chartered by the State Board of Regents.<sup>5</sup> Nott was the fourth president of Union, and when he arrived at Union, he found the school's financial condition to be in precarious shape. "Nine years had elapsed without any perceptible improvement in the condition or prospects of the college; on the contrary, its pecuniary resources had been expended; it possessed no means, except an edifice partly completed, and a few books."<sup>6</sup> There certainly was no way to build a modern college or campus. In 1804, the whole expenses were a little short of \$4,000 a year, and the income from all sources failed to reach even this moderate sum.<sup>7</sup> Nott's plan was to build a modern campus and attract numerous students. In 1804, when Nott assumed the presidency of the college, only fifteen students graduated from Union College.<sup>8</sup> That required massive moneys that the school certainly lacked.

## II The First Union College State Lottery

Nott's solution was to go to the legislature for assistance. "He had come to see the state government as his financial partner in education."<sup>9</sup> Rather than directed appropriations from the legislature, Nott negotiated for a lottery to benefit Union College. In 1805, the State legislature responded with a bill to authorize Union College to be the beneficiary of the four separate lotteries which would grant Union \$80,000.<sup>10</sup> The law was entitled, "An act for the endowment of Union College."<sup>11</sup> Out of this amount, \$35,000 was to be used to erect new buildings for the students and a similar amount for faculty salary endowments.<sup>12</sup> The remaining \$10,000 was to be

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<sup>5</sup> See Ch. 55, L. 1795.

<sup>6</sup> John C. Spencer, *Argument in Defence Of The Rev. Eliphalet Nott, D. D., President Of Union College* 23 (Albany: C. Van Benthuysen, printer, 1853).

<sup>7</sup> Cornelius Van Santvoord, *Memoirs of Eliphalet Nott, For Sixty-Two Years President of Union College* 137 (1876).

<sup>8</sup> Franklin Benjamin Hough, *Historical and Statistical Record of the University of the State of New York: During the Century from 1784 to 1884* at 168 (1885).

<sup>9</sup> Hislop, *supra* note 1 at 144. Union College had received gifts and loans from the State after its creation in 1795. In 1795 Union College was granted \$1,500 "as a free and voluntary gift on the part of the people of this state to be by them applied to the purchase of an apparatus of the instruments and machines for illustrating lectures in astronomy, geography, and natural philosophy and the residue, if any, to be applied to the purchase of such books for the use of the said college as the trustees may think proper." Elsie Garland Hobson, *Educational Legislation and Administration in the State of New York, 1777-1850* at 146 (1918), quoting Ch. 76, L. 1795. Union College received other small donations from the State in the years before 1805. Paul Joseph Scudiere, *A Historical Survey of State Financial Support of Private Higher Education in New York* 35-36 (1975).

<sup>10</sup> Ch. 62, L. 1805 passed Mar. 30, 1805.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* and Wayne Somers, *The Encyclopedia of Union College History* 462 (2003).

split equally between the establishment and maintenance of a classical library at the school and the defrayment of the expenses of indigent students.<sup>13</sup>

The quid pro quo for the lottery grant, however, was that the school technically became under State control. The number of trustees was reduced to twenty-one from twenty-four, and eleven State officials became ex officio members of the Union College board.<sup>14</sup> Further, the board of regents was given the power to fill the vacancies on the Union College board.

It took years for the lottery managers to actually operate the Union College lottery.<sup>15</sup> In the interim, to help out the school, the State would loan Union College the potential lottery proceeds. While various estimates have been given for what Union College eventually received from the lottery, it is likely that Union ended up receiving \$76,000 of the \$80,000 that had been earmarked from the lottery.<sup>16</sup> Nott used the proceeds of the lottery to complete the existing Union College building and to build adjacent dormitories.<sup>17</sup>

Given Nott's ambitious nature and lofty goals, Union College grew larger and stronger. The enrollment at the school grew considerably. By 1813, forty-five students graduated, tripling the number of graduates from Nott's first year on campus.<sup>18</sup> Nott saw that he needed a new and bigger campus for his growing student body. He sold Union's existing campus (which was located in what is now known as the Stockade Historic District in Schenectady) to the city of Schenectady.<sup>19</sup> The cost of the new campus and the buildings would certainly exceed the proceeds from the 1805 lottery which had largely been used to improve the existing campus.<sup>20</sup> Union would need more funding from the State.

### III The Second Union College Lottery

Nott went back to work lobbying State government for more aid. Nott requested this assistance in 1814, in the midst of the War of 1812. State government was in no

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<sup>13</sup> *Id.* Scudiere believes that "the action was more political and philosophical than personal. In effect the Democratic-Republicans were attempting to balance the Federalist dominated Columbia College with its own institution." Scudiere, *supra* note 9 at 39.

<sup>14</sup> See Scudiere, *supra* note 9 at 38.

<sup>15</sup> In *People v. Gilbert*, 18 Johns. 227 (Supreme Court 1827), the State sued one of the managers of the Union College lottery for selling tickets in an unauthorized manner.

<sup>16</sup> See "Union College," *The Schenectady Cabinet*, Jan. 17, 1854. See also Spencer *supra* note 6 at 25. Under Ch. 72, L. 1806, the State lent the college \$15,000. See also Ch. 53, L. 1810 authorizing a payment of \$10,000 to the Bank of Albany to pay for funds borrowed by the Union College trustees.

<sup>17</sup> Somers, *supra* note 12 at 462.

<sup>18</sup> Hough, *supra* note 8.

<sup>19</sup> Somers, *supra* note 12 at 790.

<sup>20</sup> Van Santvoord, *supra* note 7 at 141.

position that year to provide significant donations to any colleges. So Nott again proposed a lottery. This requested lottery would provide Union College with \$200,000 of lottery proceeds, up from the \$80,000 approved in 1805. The request was broken down to include \$100,000 for buildings, \$50,000 for talented but indigent students, \$20,000 for apparatus and the library, and \$30,000 to cancel debts already contracted.<sup>21</sup> The College petitioned the legislature in early 1814 in the midst of the War of 1812 noting that the trustees had no means of their own to pay for the campus.<sup>22</sup> The college trustees asked to “spread their wants before your honorable body, praying that you will grant such relief as may appear expedient. And the Trustees do this with a grateful remembrance [sic] of past favor, and confident that a liberal and enlightened legislature will not hesitate to cooperate with those who are struggling to improve the condition of a seminary in which so many of the youth of their own state are to be educated and with whose glory of the republic is so intimately connected.”<sup>23</sup>

The task to obtain the lottery relief for Union College seem daunting, but Nott’s lobbying abilities were especially effective. He basically logrolled his bill from the legislature. He brought on newly formed Hamilton College which would receive \$40,000 from the lottery. Lottery funds in the amount of \$30,000 would be provided to the endowment of the college of physicians and surgeons. The Asbury African Church was to receive \$4,000. The New York Historical Society was to receive \$12,000.<sup>24</sup>

That left Columbia, New York State’s most significant college. “To shut out Columbia from the lottery bounty would have been to lose the gamble at once.”<sup>25</sup> So Nott, worried about another potential lottery grantee, arranged for some minor lands in New York City to be transferred from the State to Columbia. The lands constituted the Hosack botanical garden in Manhattan. This was a 20-acre property in the middle of Manhattan Island, far away from what was in 1814 the center of the city of New York. The Columbia representatives were not thrilled with the arrangement.<sup>26</sup> Yet in the long run, Columbia was the runaway winner of the

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<sup>21</sup> Scudiere, *supra* note 9 at 40.

<sup>22</sup> Hislop, *supra* note 1 at 155.

<sup>23</sup> *Id.*

<sup>24</sup> The lottery revenues for the Historical Society were provided for in a different statute than the provision for the other beneficiaries. The lottery authorization for the historical society was contained in Ch. 200, L. 1814.

<sup>25</sup> Hislop, *supra* note 1 at 159.

<sup>26</sup> *Id.* at 159–160. The property received by Columbia may have been worth \$6,000 to \$7,000. Somers, *supra* note 12 at 462. The Columbia Daily Spectator noted that the gift of the botanical gardens to Columbia “didn’t please the trustees and there was talk of rejecting the gift.” “Lottery Share Gave CU Financial Start,” *Columbia Daily Spectator*, January 11, 1954. See also Robert R. Siroty, “Radio City Lease Up for Extension,” *Columbia Daily Spectator* March 13, 1953. There does an alternate interpretation that Columbia clearly desired the botanical garden, and Nott — by consolidating the

lottery legislation. The property received from the lottery act by Columbia eventually became the land on which Rockefeller Center was constructed.

At the beginning of the twentieth century, long before the construction of Rockefeller Center could have been contemplated, it was said, “Thus, solely through the influence of the president of Union, Columbia received that magnificent property which to-day forms its principal endowment. The botanical garden granted to Columbia comprised 20 acres located between Fifth and Sixth avenues, Forty-seventh and Fifty-first streets, in New York City, then 3 miles out of town, but now the center of the wealth and population of the metropolis.”<sup>27</sup> In 1985, Columbia sold the property to the Rockefeller Group for \$400 million.<sup>28</sup> At the time of the sale, Columbia University president Michael Sovern commented, “My own feeling is that it was fobbed off on us in 1814” and “was a white elephant until after the Civil War.”<sup>29</sup>

The “Literature Lottery,” as it was called in the bill, ended up being passed easily by the legislature.<sup>30</sup> The session laws for the legislation contain the unique note, “No bill before the legislature excited greater interest and attention than this act. Much credit is due to the unwearied exertions of the able and eloquent president of Union College in procuring its passage.”

A quarter century later, the historian Jabez Hammond wrote, “The Rev. Dr. Nott the president of Union College, was, I have no doubt, the individual who devised this grand scheme for the liberal and permanent endowment of the institution over which he presided. Certainly it is owing to his indefatigable exertions, and matchless skill and address that a majority in favor of the bill was obtained in both houses. His ingenuity in explaining away and warding off objections; his skill in combining different and apparently conflicting interests; and, above all, his profound knowledge of the human heart, and that discernment which enabled him, as it were, intuitively to discover the peculiar propensity and character of the mind of each individual whom he addressed, together with his tact in adopting that mode of address best suited to each, rendered him almost

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collegiate assistance programs into one bill — was able to secure the botanical garden for Columbia. See R. C. Alexander *supra* note 4.

<sup>27</sup> Sidney Sherwood, *The University of the State of New York; History of Higher Education in the State of New York* 207 (1901).

<sup>28</sup> Maureen Dowd, “Columbia Is to Get \$400 Million In Rockefeller Center Land Sale,” *New York Times*, Feb. 6, 1985.

<sup>29</sup> *Id.*

<sup>30</sup> Ch. 120, L. 1814.

irresistible, and, I believe, ultimately secured the success of the great measure which he advocated.”<sup>31</sup>

#### IV Lotteries Fall from Grace

One might have thought that given Union College’s prior experience with the 1805 lottery, it would have been a relatively simple matter for Union to obtain the \$200,000 in promised revenues. After all, nobody knew how to play the Albany lobbying game as well as Eliphalet Nott. That did not happen. Instead, Union College and Dr. Nott ended up in a melodrama that played out over the next four decades.

The Literature Lottery could not be undertaken until all the previously authorized State lotteries had been drawn.<sup>32</sup> “The managers of these lotteries, appointed under the act, were remiss in their duties, and heavy losses were sustained in the sale of tickets.”<sup>33</sup> This process took years, and the Literature Lottery could not be undertaken until the 1820s.

Most importantly, the State and the nation’s appetite for lotteries had changed considerably. Lotteries were commonly used in the eighteenth and early nineteenth century to finance numerous government-related projects such as assisting schools, building roads, building fortifications, improving navigation, building courthouses, building lighthouses, building jails and even assisting the hemp industry.<sup>34</sup> Indeed, “a public lottery system had become thoroughly entrenched as a part of our social and financial policy, and had been the subject of frequent legislative regulation.”<sup>35</sup>

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<sup>31</sup> Jabez D. Hammond, *The History Of Political Parties in the State Of New York: From the Ratification of the Federal Constitution to December, 1840* at 373–374 (1845). Even by 1885, the Columbia property was said to be of “immense value.” Hough, *supra* note 8 at 125. In 1891, it was stated that “Columbia’s grant is to-day worth millions of dollars and is its principal source of revenue.” See R. C. Alexander *supra* note 4. In an address given to the Union College alumni, New York Governor Benjamin Odell in 1901 stated, “Dr. Nott seems to have been able to secure whatever he asked.” *Public Papers of Governor Odell* 290 (1901). Governor Odell also acknowledged that the Columbia botanical garden was “probably its most valuable asset and greatest source of income.” *Id.* at 289.

<sup>32</sup> Ch. 120, L. 1814, § XVI.

<sup>33</sup> Spencer, *supra* note 6 at 26-27.

<sup>34</sup> A list of the numerous lotteries authorized by New York State government can be found in Charles Z. Lincoln, *Constitutional History of New York: 1895–1905: Volume 3*, 35–37 (1906). See also New York State Constitutional Convention Committee. [Reports] (1938). *Problems Relating to Legislative Organization and Powers*, Volume 7, Chapter 15 and Alden Chester, Editor, Lyman Horace Weeks and J. Hampden Dougherty., *Legal and Judicial History of New York* 290–291 (1911).

<sup>35</sup> *Id.* at 43. The United States Supreme Court in *Stone v. Mississippi*, 101 US 814, 818 (1879) noted, “We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes.”

Nonetheless, by the second decade of the eighteenth century, the tide had turned against lotteries. Many of the lottery operations had been tarnished by fraud and corruption. The moral climate of the entire nation changed, and the operation of lotteries became regarded as sinful. Lotteries largely vanished from America. By 1850, the United States Supreme Court in an opinion by Justice Grier could say, “Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.”<sup>36</sup>

In 1819, an Assembly committee investigating corruption in the operation of lotteries concluded, “The foundation of the lottery system is so radically vicious, that your committee feels convinced, that under no system of regulation that can be devised, will it be possible for this Legislature to adopt it as an efficacious source of revenue, and at the same time divest it of all the evils of which it has hitherto proved so baneful a cause.”<sup>37</sup> New York State, in response, passed strict laws limiting all future lotteries.<sup>38</sup> All lotteries not authorized by the legislature were deemed to be a “common and public nuisance.”<sup>39</sup> The law placed limitations on the managers of the lotteries and gave the state comptroller authority to oversee the operations of the authorized lotteries.<sup>40</sup>

The 1821 State Constitutional Convention went even further than the 1819 law and permanently barred the State from enacting future lotteries. “Those in favor of the abolition of all lotteries by constitutional provision could justly point to the State’s inconsistency in condemning as “pernicious,” “evil” and “detrimental” private lotteries and at the same time authorizing public ones.”<sup>41</sup> They argued “moreover, that it should be prohibited in the Constitution itself rather than left to the discretion of the Legislature in order to prevent the possible yielding by the

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<sup>36</sup> *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850). Nearly three decades later, in *Stone v. Mississippi*, *supra* at note 35, the court would add, “Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested. If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt.” See also *Champion v. Ames*, 188 U.S. 321, 328 (1903) finding that the lottery “has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.”

<sup>37</sup> See A. Franklin Ross, *The History of Lotteries in New York* 33 (1906).

<sup>38</sup> Ch. 206, L. 1819.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> New York State Constitutional Convention Committee, *supra* note 34 at 418.

Legislature to a future seductive influence and to prohibit by a paramount law the creation or continuance of a species of speculation which was considered demoralizing in its influence and ruinous in its tendencies.”<sup>42</sup>

The argument at the Convention was that the lotteries were uniquely harmful, and there were no legitimate reasons for the legislature to ever authorize a lottery. Delegate John Duerr argued that “in the present state of that science, almost regarded as elementary, that the plan of raising a revenue from lotteries ought [sic] not to be adopted by a wise and moral government, since of all taxes, it was the most unjust and unequal in its mode of imposition and collection, and the most pernicious in its operation. He believed that the evils of lotteries were inseparable from the system, and not to be remedied by any regulations or restrictions that could be devised.”<sup>43</sup>

Those opposed to banning lotteries in the Constitution argued that lotteries were a form of voluntary taxation, had helped worthy causes, were not inherently immoral or criminal, and should properly be a subject of legislative regulation.<sup>44</sup> The opponents also argued that a ban on lotteries in New York State would be ineffective because New Yorkers could continue to buy lottery tickets brought into New York from other states. While there was considerable opposition to placing the ban on lotteries in the Constitution, the ban passed by a vote of 67 to 45.

The new Article VII, Section 2 of the Constitution, as passed by the convention and approved by the voters, read, “No lottery shall hereafter be authorized in this State; and the Legislature shall pass laws to prevent the sale of all lottery tickets within this State except in lotteries already provided for by law.” Thus under the terms of the Constitution, no more lotteries could be approved by the State of New York, but lotteries that had been previously authorized (such as the Literature Lottery) could move ahead.<sup>45</sup>

The anti-lottery provision in the new Constitution was not a hindrance to Dr. Nott. The provision required further legislative action to put the provision into full effect, and it gave Nott an opportunity to place himself in charge of the Literature Lottery.

At the 1822 legislative session, Nott was able to persuade the legislature to let him—rather than the state—be responsible for the operation of the Literature Lottery.<sup>46</sup> “Nott’s plan for breaking the deadlock in the lottery system met with

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<sup>42</sup> *Id.*

<sup>43</sup> Nathaniel H. Carter & William L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821* at 569 (1821).

<sup>44</sup> *Id.* See most especially the views of Chancellor Kent and Chief Justice Spencer at 568.

<sup>45</sup> See Hammond, *supra* note 31 at 929.

<sup>46</sup> Ch. 163, L. 1822.



little resistance.”<sup>47</sup> As part of the act to limit the continuation of lotteries, the State was removed from its responsibility for operating the lottery, thereby freeing the State from the hazards of future lottery losses. Instead, the legislature found that the educational institutions had been materially harmed by the delay in implementing the Literature Lottery. To help the institutions, the legislature believed that the “lottery might be managed with greater economy and less hazard, by the institutions interested in its success, than it has hitherto been, or can hereafter be, by the state: And whereas all that could be thus saved, by greater economy in the management of said lottery, would go to diminish the loss of said institutions: And, Whereas all that could be just saved by greater economy in the management of said lottery, would go to diminish the loss of said institutions.”<sup>48</sup>

Accordingly, the legislature authorized the institutions benefitted by the 1814 legislation to “assume the supervision and direction of said lottery, and for the conducting the same.”<sup>49</sup> Once the benefitted institutions accepted the plan or took a payment in lieu of receiving lottery receipts, they would assume the operation of the Lottery.

Nott wasted little time. Before the bill was passed, he entered into verbal agreements to pay off the other grantees of the lottery, Hamilton College, the college of physicians and surgeons, the Asbury African Church, and the New York Historical Society. These organizations all agreed to sell their shares of the proceeds to Union College at a discount.<sup>50</sup> Nott and Union College’s treasurer, Henry Yates, pledged their personal credit in buying out the other grantees, and Union College was able to buy out the other beneficiaries.<sup>51</sup>

At the annual Union College annual meeting of 1822, the trustees gave Nott unlimited authority to operate the lottery.<sup>52</sup> The board gave Nott “unlimited authority to supervise the management of the lottery, now the college’s chief asset.”<sup>53</sup> He became the superintendent of the Literature Lottery.

At nearly the same time, Nott used the changes made in the State’s judicial system as a result of the 1821 Constitutional Convention to remove the State of New York from having de jure control over the Union College board. “When the state reduced the size of the New York State Supreme Court from five judges to three..., Nott saw

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<sup>47</sup> Hugh G. J. Aitken, “Yates and McIntyre: Lottery Managers,” 13 *The J. of Econ. Hist.* 36, 41 (Winter, 1953).

<sup>48</sup> Ch. 163, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> Hislop, *supra* note 1 at 194.

<sup>51</sup> Andrew Van Vranken Raymond, 1 *Union University, Its History, Influence, Characteristics and Equipment* 235 (1907).

<sup>52</sup> Somers, *supra* note 12 at 462. *See also* Ross, *supra* note 37 at 35.

<sup>53</sup> Hislop, *supra* note 1 at 195.

an opportunity to regain the College's independence."<sup>54</sup> Nott argued that this reduction in the number of judges improperly reduced the number of members of the Union board of trustees. This arguably impaired the state's contract with Union College and violated the contract clause of the federal constitution.<sup>55</sup> Rather than litigating the issue with Union, the legislature passed a law changing the membership of the Union College board of trustees in accordance with Nott's desires. In legislation named as "an act relative to the City of Schenectady,"<sup>56</sup> the lieutenant governor and the governor replaced the two erstwhile Supreme Court judges as ex officio members of the Union College board, and the board was given the right to fill vacancies, a right which had previously been bestowed on the board of regents. Nott was able to keep the Union College board from being controlled by the State and more significantly away from the board of regents.<sup>57</sup>

## V Running the Literature Lottery

Once having been giving the go-ahead by the Union College board, Nott moved quickly on his lottery plan. He quickly entered into an agreement with the firm of Yates and McIntyre to manage the lottery. The agreement was reached within five days after the Union College trustees had authorized Nott to run the lottery.

Yates and McIntyre could hardly have been a more politically connected business firm. The firm had started in the lottery business in 1821.<sup>58</sup> John B. Yates was a former United States Congressman who was active in New York State politics.<sup>59</sup> One of his brothers, Henry Yates, was a State Senator, and also the treasurer of Union College. Another brother, Joseph Yates, would subsequently serve as governor of New York State from 1823–1824.<sup>60</sup> Archibald McIntyre was not only a former State Assemblyman, but he had served as the New York State Comptroller

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<sup>54</sup> Somers, *supra* note 12 at 745. For a general overview of this situation, see the materials contained in "Relative to the Controversies between the Regents of University and the Trustees of union College," *Annals of Beneficence*, Oct. 31, 1823.

<sup>55</sup> The college's argument can be seen at *Documents of the Assembly of the State of New York*, No. 213 (1849).

<sup>56</sup> Ch. 36, L.1823.

<sup>57</sup> "The revised state constitution of 1846 removed five ex officio members from Union's board (the chancellor, the supreme court justices, and the surveyor-general) and authorized the board to replace them with appointed members, thus ending the state majority and changing the balance to fifteen appointed members and six ex officio members." Somers, *supra* note 12 at 745.

<sup>58</sup> Aitken, *supra* note 47 at 36. Yates and McIntyre even held the management rights to assist Thomas Jefferson by disposing of his property through a lottery. See "Jefferson Lottery," *Niles' Weekly Register*, July 29, 1826; Jeff Nilsson, "The Debt and Death of Thomas Jefferson," *Saturday Evening Post*, July 2, 2015.

<sup>59</sup> He had been helpful in 1814 in persuading the legislature to authorize the Literature Lottery. Hislop, *supra* note 1 at 275.

<sup>60</sup> Aitken, *supra* note 47 at 38.

for fifteen years.<sup>61</sup> One of the duties of the Comptroller was to supervise the State's lotteries.<sup>62</sup>

Under the operation of the lottery, the managers and the institutions benefitted by the lottery were to share 15% of the gross sales. The rest was returned to the individuals who had purchased winning tickets. Lottery managers commonly received 5% of the sales with the institution to receive 10%.<sup>63</sup> The Literature Lottery had a different distribution formula. Union College was to receive 8.75% of sales. Yates and McIntyre would receive 4% of sales. Dr. Nott would receive 2.25% of sales to be placed in a "President's Fund." Dr. Nott did not advise the Union College trustees of the existence of the President's Fund and the potential monetary benefits he stood to gain from the operation of the President's Fund.<sup>64</sup>

"On February 4, 1823, the comptroller certified that the time limit for the lottery was eleven years and that the total amount of tickets to be drawn was \$4,492,800."<sup>65</sup> The amount due to the grantee institutions would be \$322,256.<sup>66</sup> Under the contract, Yates and McIntyre were to pay Union College approximately \$276,000 which was the present value of the \$322,256.<sup>67</sup>

Drawings of the Literature Lottery began in May of 1823. Initially, the drawings were quite successful.<sup>68</sup> Yates and McIntyre had inaugurated the Vannini system of lotteries which allowed lottery drawings to be completed within fifteen minutes instead of the old system of lotteries where the drawings often took weeks or months to complete.<sup>69</sup> The good times for the Literature Lottery, however, did not last.

The initial problems came from the speculations of Messrs. Yates and McIntyre. They invested heavily in the Welland Canal Company which would connect Lake Erie to Lake Ontario. They invested hundreds of thousands of dollars into the company only to see the stock of the company drop significantly in value.

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

<sup>62</sup> "Archibald McIntyre probably knew as much about the lottery business as any man in New York State at this time." *Id.* at 40.

<sup>63</sup> *Id.* at 37.

<sup>64</sup> Somers, *supra* note 1 at 463.

<sup>65</sup> Aitken, *supra* note 47 at 42.

<sup>66</sup> Spencer, *supra* note 6 at 29.

<sup>67</sup> *Id.* at 31.

<sup>68</sup> Hislop *supra* note 1 at 276. "The number of lottery offices in New York City increased from 60 to 190 between 1819 and 1827." David G. Schwartz, *Roll the Bones: The History of Gambling*, 149 (2006). See also Herbert Asbury, *Sucker's Progress*, 77 (1938).

<sup>69</sup> *Id.* at 196–197. See Joseph Vannini, Palmer Canfield & William Grattan, *An Explanation of a Lottery, on Mathematical Principles: Being an Improvement on the European Plan* (1822). See also *Vannini, M'Intyre & Yates v. Paine*, 1 Del. 65, 67-68 (1833), "The Bill states that Vannini is the original inventor of a plan for constructing and drawing lotteries, and that he had obtained a patent therefor."

“Handicapped by unexpected engineering difficulties, by chronic lack of funds, and by inexperienced management, the Welland Canal Company, for all its fair prospects, proved very different from the profitable venture that Yates had anticipated. The shares rapidly depreciated to a nominal value.”<sup>70</sup> Financial times also were bad starting in 1825 resulting in less public interest in lottery sales. Yates and McIntyre had lost their working capital. They called on Eliphalet Nott to help them out.

In January of 1826, Yates and McIntire advised Nott that “they had no reasonable prospect of being able to make their contractual payments nor to pay the prizes in the lottery.”<sup>71</sup> Nott then pledged the college’s lands and building in return for a loan of \$100,000 from William James.<sup>72</sup> James was a highly successful Albany land speculator, investor, and developer.<sup>73</sup> He was one of the wealthiest men in New York State.

In addition to this loan, Henry Yates, the treasurer of Union College, moved to New York to help supervise the lottery in person. Yates continued as the college treasurer but unbeknownst to Nott, became a partner in the firm of Yates and McIntosh.

In order to improve their financial positions, Yates and McIntosh sought legislative permission to take control over the two remaining State lotteries, the Fever Hospital Lottery<sup>74</sup> and the Albany Land Lottery.<sup>75</sup>

The legislature passed a bill that would allow private interests to take over the Albany Land Lottery and the Fever Hospital Lottery and to mix the prizes and tickets for these lotteries with the ongoing lottery, Union’s Literature Lottery.<sup>76</sup> Thus, there was no requirement that the Literature Lottery would need to be completed before sales for the other two lotteries could start. The consent of the literary institutions that were interested in the Literature Lottery had to be obtained by the managers of the newly merged lotteries.<sup>77</sup> In short, Yates and McIntyre would need Nott’s approval to conduct the additional lotteries.

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<sup>70</sup> Aitken, *supra* note 47 at 45.

<sup>71</sup> *Id.* at 47.

<sup>72</sup> Aitken claims that Nott acted within his rights in pledging the school’s assets, but Nott did not advise the trustees of his decision. *Id.* at 48.

<sup>73</sup> James had also provided backing to Dr. Nott to buy out the other institutional lottery awardees. Hislop, *supra* note 1, at 291 and Somers, *supra* note 12 at 415. James was the grandfather of the novelist Henry James and the philosopher and psychologist William James.

<sup>74</sup> It was intended to help construct a hospital in New York City to treat yellow fever victims. See Ch. 82, L. 1823.

<sup>75</sup> See Ch. 232, L. 1820.

<sup>76</sup> Ch. 186, L. 1826.

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

Nott did agree to the conduct of the additional lotteries, but in return, his President's Fund would receive 6.31% rather than 2.31% of the sales of the combined lotteries.<sup>78</sup> The Union College share of the consolidated lotteries ended on November 10, 1827,<sup>79</sup> and a settlement with the college was reached in 1828 with the college receiving promissory notes for the amount still due of \$137,383.<sup>80</sup>

Nott's involvement with Yates and McIntyre continued. "Nott, in fact, could hardly afford to wash his hands of the business. He had become responsible for large sums of money which he had borrowed to aid Yates and McIntyre, and these debts had to be paid. Further, if Yates and McIntyre were to go bankrupt, he might as well tear up the notes which the college had received."<sup>81</sup> Unfortunately for all parties involved, lottery sales continued to decrease, and Nott was called on to provide financial help to Yates and McIntosh.

## VI The Lottery Partners Battle Each Other

Finally in 1832, the rocky relationship between Nott and the firm of Yates and McIntosh came to an end. Henry Yates on April 27, 1832, wrote Dr. Nott advising him that "it will be necessary for you to make up your mind, not to draw any money from here."<sup>82</sup> This was followed by a letter from the firm to Nott (again with Henry Yates as one of the signees) that Nott's calculations for the lottery had failed, and all payments from the firm to Nott would cease.<sup>83</sup> His putative payments would be handed over instead to the original partners, John B. Yates and Archibald McIntyre, to compensate them for losses which, it was alleged, they had suffered in the first years of the lotteries."<sup>84</sup>

Dr. Nott, upon first learning that his college treasurer was now a partner of the firm that was refusing to pay him, demanded his continued compensation. He went to the State Comptroller, Silas Wright,<sup>85</sup> to help enforce his rights. Wright advised Yates and McIntosh to adhere to the contract with Nott.<sup>86</sup>

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<sup>78</sup> Aitken, *supra* note 47, at 50-51. *See generally* *Reply of the Trustees of Union College, to Charges Brought Before the Assembly of New York, March 19, 1850; and before the Senate, on the 12th of April, 1851*, by the Hon. J. W. Beekman, Appendix K (1853).

<sup>79</sup> *Id.* at 50.

<sup>80</sup> *Id.* at 50 and 56.

<sup>81</sup> *Id.* at 51. Somers, *supra* note 12 at 464. Hislop remarks that Yates and McIntosh "had secured in the Doctor, so they then thought a continuing source of short term capital without which the firm would have collapsed and an unofficial partner whose influence with legislators, growing numbers of them his former pupils, was beyond price." Hislop, *supra* note 1 at 311.

<sup>82</sup> Hislop, *supra* note 1 at 311.

<sup>83</sup> *Id.* at 311-312.

<sup>84</sup> Aitken, *supra* note 47 at 54.

<sup>85</sup> As Comptroller, Wright was an ex officio member of the Union College board.

<sup>86</sup> Hislop, *supra* note 1 at 314.

They did not, and the stage was struck for a legal battle. Dr. Nott sued first. He sued Yates and McIntosh in chancery court for his proceeds. Unfortunately, Nott named the Union College board as a co-plaintiff without informing the board members. Yates and McIntosh countered that the contract did not involve the board as it was simply a contract between them and with Nott for personal services. The court dismissed Dr. Nott's suit.

Yates and McIntosh then sued the Union College trustees and Nott in chancery court claiming that the school had been overpaid and that Nott had enriched himself at the expense of the college.<sup>87</sup> The issues of college treasurer Henry Yates acting against the interest of his college was raised by the supporters of the college.<sup>88</sup>

Finally, with prospects of unending litigation, the personal involvement of the State officials who served as Union College trustees, and the death of John B. Yates in 1836, the parties in 1837 reached a tri-partite agreement. Union College would pay back \$94,477 to Yates and McIntyre.<sup>89</sup> Yates and McIntyre would pay Nott \$150,000 over a ten-year period rather than the \$300,000 that Nott had demanded.<sup>90</sup> It seems likely according to New York Secretary of State (and future Governor) John Dix that Dr. Nott "surrendered his own judgment to the earnest wish expressed by Mr. Flagg,<sup>91</sup> Governor Marcy,<sup>92</sup> Mr. Wright<sup>93</sup> and myself to put an end to what we believed would prove an unpleasant and protracted controversy."<sup>94</sup>

In total, Union College received \$512,867 from the Literature Lottery.<sup>95</sup> This actually was nearly \$50,000 more than "the original grant with compound interest."<sup>96</sup> One economics professor gives high grades to Yates and McIntyre. "That Yates and McIntyre, in a period of declining demand, were able to conduct their lotteries, raise the capital that they contracted to raise, and finance a well-nigh bankrupt corporation in another country, reflects considerable credit both on their

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<sup>87</sup> See *McIntyre v. Trustees*, 6 Paige Ch. 239 (1837). See also Hislop, *supra* note 1 at 320–346.

<sup>88</sup> Somers, *supra* note 12 at 802. Henry Yates resigned as the college treasurer in 1833 but continued to serve as a member of the college board.

<sup>89</sup> Hislop, *supra* note 1 at 344. Aitken claims a figure of \$126,000 was returned to the firm. Aitken, *supra* note 47 at 55. Hislop, who spent much of his lifetime researching Eliphalet Nott-related issues is more likely to be closer to the truth here. A copy of the agreement can be found in *Documents of the Senate of the State of New York*, No. 41 (1853).

<sup>90</sup> *Id.*

<sup>91</sup> Azariah Flagg was the State comptroller.

<sup>92</sup> William L. Marcy was the State's governor.

<sup>93</sup> Silas Wright was a United States senator from New York. He was a future New York State governor and the State comptroller before Azariah Flagg.

<sup>94</sup> *Id.* All were in 1837 present or prior trustees of Union College.

<sup>95</sup> Somers, *supra* note 12 at 464. Aitken, *supra* note 47 at 56.

<sup>96</sup> Aitken, *supra* note 47 at 56.

managerial ability and on the skill with which they exploited academic ambitions.”<sup>97</sup> It is unlikely that Eliphalet Nott would have agreed with the professor’s opinion.

The President’s Fund likely accumulated \$451,000 from Yates and McIntosh.<sup>98</sup> Most of this came from Dr. Nott’s share of lottery sales, but he also received funds for helping to arrange loans to keep Yates and McIntosh afloat.<sup>99</sup>

## VII The Legislature Battles Union College

Union College and Eliphalet Nott might reasonably have believed that the 1837 settlement with Yates and McIntosh would have brought an end to the lottery issues. Yet, twelve years later all the issues returned, this time in a protracted battle between Union College, Dr. Nott, and certain members of the State legislature.

Not surprisingly, it was the Yates family that was the cause of the school’s woes. Erstwhile Union College treasurer Henry Yates was probably the lead instigator in the fight against Union College,<sup>100</sup> and Yates, from his lottery endeavors, may have been one of the wealthiest people in New York State outside of New York City.<sup>101</sup>

The Yates family antagonism was fueled by the issues involving Professor John Austin Yates, a professor of Oriental Literature at Union. John Austin Yates was the nephew of both Henry Yates and John B. Yates. He became a professor at Union in 1827, but in the 1848–1849 term, Professor Yates’ position was abolished.<sup>102</sup> While Dr. Nott may not have been behind the firing of Professor Yates, he did nothing to prevent it. Yates, however, held Dr. Nott responsible for his termination and went to the State Assembly’s committee on colleges, academies and common schools to complain about Union’s finances in 1849.<sup>103</sup>

The forces opposing Union College and Dr. Nott found a champion in Assemblyman James W. Beekman.<sup>104</sup> Beekman, who descended from a wealthy and prestigious old Dutch family,<sup>105</sup> began a lengthy and intense campaign against Union and Dr. Nott.<sup>106</sup> In this campaign, he was aided by the *Albany Daily Knickerbocker* which

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<sup>97</sup> *Id.* at 57.

<sup>98</sup> Hislop, *supra* note 1 at 345.

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

<sup>100</sup> Hislop, *supra* note 1 at 446. Somers, *supra* note 12 at 803.

<sup>101</sup> *Id.* at 498.

<sup>102</sup> Somers, *supra* note 12 at 804.

<sup>103</sup> Hislop, *supra* note 1 at 445. Professor Yates died of cholera later in 1849.

<sup>104</sup> *Id.* at 447 and 482.

<sup>105</sup> See Philip L. White, *The Beekmans of New York in Politics and Commerce, 1647-1877* (1956).

<sup>106</sup> *Id.* at 607. Hislop, *supra* note 1 at 447.

would write of Union College, “In our opinion the whole management has been for years as rotten as oranges three for a cent.”<sup>107</sup>

In this fight, Union College was eventually aided significantly by the work in 1853 of its attorney John Canfield Spencer.<sup>108</sup> At various times in his career, Spencer, a graduate of Union College, had been the State Assembly Speaker, a member of the State Senate, Secretary to the Governor and New York Secretary of State. At the federal level, he served as the Secretary of War and the Secretary of the Treasury. He was nominated on two occasions to the United States Supreme Court, but he was not confirmed by the Senate.

On March 12, 1849, Robert Pruyn, the chairman of the committee on colleges, academies and common schools, introduced a resolution to force Union College to produce a report on its property and fiscal condition over the past ten years. That resolution was approved by the full Assembly.<sup>109</sup>

On March 25, 1849, Assemblyman Beekman proposed an amendment to the resolution calling on Union College to report its fiscal condition over the past twenty-five years.<sup>110</sup> This amendment was approved by the Assembly, and it would give the Assembly the full picture of how the Literature Lottery impacted Union College.

The college submitted its report on April 5.<sup>111</sup> It did not resolve any issues, and the Assembly on April 14, on the motion of Assemblyman Pruyn, established a select committee to examine the financial condition of Union College. The committee had the power to send for persons and papers and was to report to the next session of the legislature.<sup>112</sup> The members of the committee interviewed Union College personnel and held hearings in 1849 on the financial transactions and condition of the college,<sup>113</sup> but did not issue its report until March of 1850.

The majority report, issued by four of the five members of the committee (including Assemblyman Beekman), was sharply critical of Union College and Dr. Nott finding “that the financial condition of Union College is unsound and improper.”<sup>114</sup> The committee found “many cases of wrong management”<sup>115</sup> and felt its “duty to call

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<sup>107</sup> *Albany Daily Knickerbocker*, May 29, 1849.

<sup>108</sup> In the 1830s, Spencer served as one of the attorneys for Yates and McIntire in its litigation with Union College and Dr. Nott.

<sup>109</sup> *Journal of the Assembly of the State of New York* 810 (1849).

<sup>110</sup> *Id.* at 957. See also “Legislature of New York,” *Albany Evening Journal*, Mar. 21, 1849.

<sup>111</sup> *Id.* at 1300. See *Documents of the Assembly of the State of New York*, No. 213 (1849).

<sup>112</sup> *Id.* at 1496.

<sup>113</sup> Hislop, *supra* note 1 at 450–453.

<sup>114</sup> *Documents of the Assembly of the State of New York*, No. 146 (1850). See also “Affairs of Union College,” *New York Enquirer*, Mar. 26, 1850.

<sup>115</sup> *Id.*



attention to the injudicious and unsafe investment of the funds of the college.”<sup>116</sup> President Nott “did use the funds of said college as his own, interchangeably as occasions did arise.”<sup>117</sup>

Assemblyman Pruyn issued his own dissenting report. He disagreed with the conclusion of the majority about the soundness of the college’s finance and stated, “No one can examine the history of these complicated and immense operations without being satisfied that Union College owes all it has derived from them to its president.”<sup>118</sup> No further action was taken in the 1850 session of the Assembly regarding Union College. The college would eventually claim that the failure of the Assembly to take further action was due to its refutation of the majority report’s charges. “To the charges in the report of Mr. Beekman, the treasurer of Union College replied, and in so satisfactory a manner, that the Assembly refused to take any further notice of the charges contained therein.”<sup>119</sup>

In the meantime, James Beekman was elected in 1850 as a member of the Senate. He became the chairman of the committee on literature and continued his campaign against Union College management. He initially requested that the Attorney General and the State Comptroller report on the financial condition of Union College.<sup>120</sup> The State Comptroller initially reported he was unable to perform the task.<sup>121</sup>

Instead Senator Beekman’s committee issued a report that was highly critical of Union College and echoed much of the criticism that had been issued by the majority report of the Assembly’s select committee in 1850.<sup>122</sup> The committee reported that the Assembly report was “fully sustained by the facts of the case,”<sup>123</sup> and it adopted the finding of the Assembly report “that the financial condition of Union College is unsound and improper.”<sup>124</sup> The report called for “legislative investigation in a thorough manner, as a warning to future financial presidents of learned institutions, and for the purpose of preserving, so far as possible, what may remain of the intended benefactions of former Legislatures.”<sup>125</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*, Document No. 147. Union College’s annual report, which includes its own defense to the majority report of the select committee, is contained in Assembly Document No. 190 of 1850.

<sup>119</sup> “Union College,” *Schenectady Cabinet*, Mar. 29, 1853. *See also* Document No. 41, *supra* note 55.

<sup>120</sup> *Journal of the Senate of the State of New York* 123 (1851).

<sup>121</sup> *Id.* at 162. *See also Documents of the Senate of the State of New York*, No. 26 (1851).

<sup>122</sup> *Id.* at 526.

<sup>123</sup> *Documents of the Senate of the State of New York*, No. 71 (1851).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Based on the report, the Senate established a committee composed of the Comptroller, the Attorney General, and a member of the board of regents to “employ a skillful accountant” and “examine into the pecuniary affairs of Union College.”<sup>126</sup>

Later in the session, the advocates for Union College were able to amend the terms of the committee to investigate Union College. Two additional members of the board of regents were added to the committee. The committee was ordered to reexamine previous proceedings involving the college and to personally visit the college and to investigate five specific claims, two of which involved Dr. Nott’s dealings with any college or lottery funds.<sup>127</sup> Accountant Levinus Vanderheyden was hired to review Union’s finances.

The investigation by Vanderheyden continued through 1852 with Senator Beekman certain that it would prove his contention that Union College’s finances has been badly managed under the Nott regime.<sup>128</sup>

Even before the report was released, there were major arguments within the Senate about the propriety of the publication of the report. One senator claimed that the printing of the report would “work an outrageous injustice.”<sup>129</sup> Senator Beekman argued to the contrary that “the trustees were guilty of misapplication of funds as far back as when the literature lottery was in existence.”<sup>130</sup>

The report was released on March 4, 1853.<sup>131</sup> With two dissents, a majority of the committee simply presented a short statistical summary of the school’s finances.<sup>132</sup> The basic gist of the numbers was that “Eliphalet Nott had taken \$885.789.62 of Union College funds for his own use.”<sup>133</sup> The dissent largely argued the good faith of Dr. Nott, the fact that the moneys earned by Dr. Nott were due to his private efforts, and that the process utilized by Vanderheyden did not give the college any realistic opportunity to rebut any of the claims made against the school. It was an *ex parte* report.<sup>134</sup>

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<sup>126</sup> *Journal of the Senate*, *supra* note 120 at 526. See also “New York Legislature: Senate Report Relative to Union College,” *New York Herald*, Apr. 13, 1851, “New-York Legislature,” *New York Tribune*, Apr. 14, 1851, and “New York Legislature,” *Albany Argus*, Apr. 14, 1851.

<sup>127</sup> *Id.* at 807–808.

<sup>128</sup> Hislop, *supra* note 1 at 466–469. See also “New York Legislature,” *New York Times*, Feb. 24, 1852.

<sup>129</sup> “New York Legislature: Senate The Union College—Dr. Nott And Senator Beekman—Spirited Controversy,” *New York Herald*, Mar. 3, 1853.

<sup>130</sup> “Interesting Doings in Albany,” *New York Herald*, Mar. 3, 1853.

<sup>131</sup> *Journal of the Senate of the State of New York* 261 (1853).

<sup>132</sup> *Documents of the Senate* No. 41, *supra* note 55.

<sup>133</sup> Hislop, *supra* note 1 at 480. See also Eliphalet Nott, “Miscellany,” *New York Observer and Chronicle*, Apr. 21, 1853. The same article by Dr. Nott is in the *Albany Argus* of Mar. 22, 1853.

<sup>134</sup> Document No. 41, *supra* note 55.

Debates continued on the Union College issue in the Senate throughout much of March of 1853. Beekman continued to rail against the college management. He believed that \$800,000 raised by the college through the lottery should have been used on students.<sup>135</sup> Beekman contended that ‘the end and aim of the trustees of Union College was concealment and delay – concealment and delay always the first and last resource of the guilty.’<sup>136</sup> He gave “one of the most astonishing expositions ever made.”<sup>137</sup> The *Albany Daily Star Register* claimed that Beekman’s assertion that Union College “‘was a rotten institution’ was now proved by the testimony of its own books.”<sup>138</sup>

Union College fought back, now securing the services of John Canfield Spencer.<sup>139</sup> Advocates for the college in the Senate fired back at Beekman with Senator William Henry Van Schoonhoven calling Beekman’s charges “vile slanders.”<sup>140</sup> The Senate determined to establish another committee which would this time allow the Union College representatives an opportunity to contest and question the evidence against them. Senator Beekman attempted to require Union College to post a bond of \$500,000 before the committee would be authorized to meet, but that resolution was defeated overwhelmingly by the Senate.<sup>141</sup> In place of that resolution, Beekman moved to make it the duty of the attorney general to take legal action against the trustees and/or president of Union College who may be guilty of improper conduct.<sup>142</sup> That motion was agreed to by the Senate, and the Senate appointed a three-member committee chaired by Senator John Vanderbilt to review the evidence against Union College and Dr. Nott.<sup>143</sup>

The committee began hearings in August of 1853. The hearings were dominated by Spencer who was able to establish the “‘malignity’ of the Doctor’s accusers, and then to prove that the evidence they brought against him was deliberately perverted to serve the malignity.”<sup>144</sup> He claimed that Vanderheyden’s bookkeeping methods were unintelligible and that the accountant lacked credibility.<sup>145</sup> Finally, he announced that Dr. Nott would give to Union College \$600,000 plus the land owned by Nott adjacent to the East River in parts of Queens, Brooklyn and Manhattan.<sup>146</sup> The

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<sup>135</sup> “New York Legislature,” *New York Herald*, Mar. 23, 1853.

<sup>136</sup> *Id.*

<sup>137</sup> “Affairs at the State Capitol,” *New York Herald*, Mar. 23, 1853.

<sup>138</sup> Hislop, *supra* note 1 at 471.

<sup>139</sup> Much of the Union College argument can be found in the report of the dissenting members of the committee in Document No. 41, *supra* note 55.

<sup>140</sup> Hislop, *supra* note 1 at 473.

<sup>141</sup> Senate Journal, *supra* note 131 at 406–407.

<sup>142</sup> *Id.* at 407.

<sup>143</sup> *Id.* at 408.

<sup>144</sup> Hislop, *supra* note 1 at 483. See also Spencer *supra* note 6 at 13–18.

<sup>145</sup> *Id.* at 484–485.

<sup>146</sup> *Id.* at 491.

point of this was to show that Dr. Nott had always planned to grant Union College all of his earnings from the lottery. On top of that, Dr. Nott still enjoyed considerable respect for his fifty years of service to Union College, and Senator Beekman declined to run for reelection. “At the end of his senatorial term, he withdrew from politics, and never could be induced to re-enter the field.”<sup>147</sup>

The committee issued its report on December 30, 1853. It was a unanimous victory for Union College and Dr. Nott.<sup>148</sup> It found that the six hundred thousand dollar donation to the college by Dr. Nott “explains the design and object of Dr. Nott in all the somewhat complicated transactions that have occasioned the investigation in which we have been engaged.”<sup>149</sup> The committee praised nearly all the work and deeds of Dr. Nott. The committee concluded its report by stating, “In our judgment not only the great prosperity of Union College but its very existence during periods of great calamity, are owing almost exclusively to his life-long efforts, sacrifices and hazards in its behalf. He has been and is a public benefactor in promoting the great cause of education, on which our institution, our property, our security and our liberty depend.”<sup>150</sup>

The \$600,000 was transferred by Dr. Nott to the college later in January of 1854 as part of the Nott Trust Fund.<sup>151</sup>

The committee report was seen as complete vindication for Dr. Nott.<sup>152</sup> The *Albany Evening Journal* wrote, “The report unravels minutely and carefully, the long series of accounts, which, while naturally of a complicated character, have been rendered still more intricate either by misapprehensions, or by a persevering desire to destroy the reputation of Dr. Nott. All the moneys derived from the State during the last half century are accounted for.”<sup>153</sup>

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<sup>147</sup> Edward F. DeLancey, *Memoir of James William Beekman* 14 (1877).

<sup>148</sup> *Documents of the Senate of the State of New York* No. 5 (1854).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> “Munificent Donations to Union College—Dr. Nott Vindicated,” *New York Times*, Jan. 4, 1854. See *Trust Deed: from Eliphalet Nott and Wife, to the Trustees of Union College* (1853). “The ‘Nott Trust’ may briefly be summarized as follows: On December 28, 1853, Eliphalet Nott and wife duly assigned in trust to Union College, the property for the establishment and maintenance of nine professorships, six assistant professorships, tutors, fellow and scholarships, the purchase of scientific apparatus, a special library and specimens for a geological museum. In this conveyance Nott reserved to himself certain powers in trust for the purpose of fulfilling his obligations.” J. S. Kelsey, *History of Long Island City*, 27 (1896)

<sup>152</sup> “The Affairs of Union College,” *Albany Evening Journal*, Jan. 14, 1854. Even eighty years later, the term “complete vindication” would be used to describe the result of the Vanderbilt committee’s report. See “James Symposium Casts Light on Early College Era,” *Schenectady Gazette*, Jan. 23, 1933.

<sup>153</sup> *Id.*

The *New York Times* took note of the \$600,000 to be given from Dr. Nott to Union College and stated the only motive of his persecutors was to “blacken his character, torture the last years of his long, useful and honored life, and throw a cloud of suspicion upon his integrity in after ages. His own conscious purity of purpose will foil the most malignant part of their object, and the noble friendship of John C. Spencer has defeated the rest.”<sup>154</sup>

One criticism of Dr. Nott after his exoneration was found in the *New York Tribune*, which stated “In the case of the Union College Lottery, there was not merely an acceptance of the fruits of the unhallowed gain, but the evils necessarily incident to the lottery were immeasurably increased by the unprecedented activity with which the lottery was managed”<sup>155</sup>

Yet, viewed in later years, Dr. Nott does not appear as the innocent party. The basic finding is that John Canfield Spencer believed that Dr. Nott was largely guilty of the charges. Jonathan Pearson, who served for decades in the Union College administration and was the acting treasurer of the college in the early 1850s, wrote that Spencer had taken Dr. Nott aside and told him, “Sir, you have not a shadow of right to that property. Your title to it is not worth a straw.”<sup>156</sup> Spencer had decided that Vanderheyden’s basic charges were “essentially correct,”<sup>157</sup> and that Dr. Nott’s chance for prevailing depended on his transferring his properties to the college.

It is no surprise that Dr. Nott’s legacy comes with a large asterisk. Despite his long service to Union College and his many innovations and leadership in collegiate education, his work—especially his work with the lottery—“led him sometimes to accomplish his purposes by indirect means that laid him open to the accusation of double-dealing.”<sup>158</sup>

## VIII The Lottery’s Effect on Union College

The income from the lottery has to be regarded as a savior for Union College. Without the lottery money, the school’s survival would have been questionable. The school received \$76,000 from the first lottery authorized in 1805. From the Literature Lottery, it received \$512,000.<sup>159</sup> The school also received what was supposed to be \$600,000 from Dr. Nott’s properties in January of 1854 based on his gift/repayment of debt to Union from his President’s Fund. The property in what came to be known as the Nott Trust Fund was land by the East River in Queens

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<sup>154</sup> “Union College and Dr. Nott,” *New York Times*, Jan, 7, 1854.

<sup>155</sup> “Fiat Justitia,” *New York Tribune*, Feb. 2, 1854.

<sup>156</sup> Jonathan Pearson and Harold C. Martin, *The Diary of Jonathan Pearson* (2004). It is recounted in Hislop, *supra* note 1 at 494 and by Somers, *supra* note 12, at 524.

<sup>157</sup> Hislop, *supra* note 1 at 49.

<sup>158</sup> VII *Dictionary of American Biography* 581 (1934).

<sup>159</sup> Somers, *supra* note 12 at 464.

County in areas known as Hunter's Point and Greenpoint.<sup>160</sup> Much of the property was in the Queens County municipality of Long Island City.<sup>161</sup> That property was sold for \$1.1 million in 1898.<sup>162</sup> The *Brooklyn Daily Star* claimed that the college lacked the funds to develop the property and needed to sell the property for its own financial needs.<sup>163</sup> In explaining the sale of the property, Union College president Andrew Van Vranken Raymond wrote that the sale "saved the College from imminent peril and disaster.... That income is quite inadequate to meet the current outlay, and it is no longer possible to permit encroachments upon capital under the guise of drafts upon unearned increment."<sup>164</sup> Besides the sale for \$1.1 million, the college had earned decent income — although never as much as the college had wished or expected — from the property before the 1898 sale.<sup>165</sup> One likely wildly optimistic estimate was that the income might have been perhaps as much as \$100,000 in some years.<sup>166</sup> Much of the revenue from the Long Island City

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<sup>160</sup> *Id.* at 524. Ch. 385, L. 1860 established a Union College trust for these lands.

<sup>161</sup> Before the 1898 consolidation of the counties that currently make up New York City (Bronx, Kings, New York, Queens and Richmond), the independent city of Long Island City determined the taxes on the Union College properties. There were longstanding legislative and court battles between Long Island City and Union College over taxation. A flavor of these fights can be seen in *Trustees of Union College v. New York*, 173 N.Y. 38 (1903); and *In re Union College*, 129 N.Y. 308 (1891).

<sup>162</sup> *Id.* at 403. Contemporary newspaper accounts placed the price of the sale at above \$1 million. See "Sold by Union College," *New York Sun*, February 19, 1898; "Union College Land Sold," *New York Times*, February 19, 1898; "Big Property Sale" *Brooklyn Eagle*, February 19, 1898; "To Develop Water Front," *Brooklyn Eagle*, February 20, 1898; "Union College Sells Land," *Buffalo Evening News*, March 8, 1898.

<sup>163</sup> "Mr. Harroun's Views," *Brooklyn Daily Star*, July 14, 1898. The value of the property likely rose due to consolidation of the five boroughs into the city of New York in 1898. Nearly all the Union College lands were in the city of Long Island City in Queens County. Long Island City had taxed the Union College properties extremely heavily, (See "Groans Under Taxes," *Albany Morning Star*, October 5, 1891) and Union College was able to obtain considerable relief from this taxation by legislation in Ch. 973, L. 1895. After the consolidation, the city of Long Island City ceased to exist.

<sup>164</sup> Somers, *supra* note 12 at 403. The New York Tribune saw the sale of the property as a belated tribute to the financial acumen of Eliphalet Nott. It wrote, "The sale of the Union College property at Hunter's Point for a sum which brings a handsome profit to the institution makes timely an appreciative thought of the far-seeing wisdom of Dr. Nott, who acquired the land which long seemed unremunerative, but which now brings Union wealth." "Editorial," *New York Tribune*, February 20, 1898.

<sup>165</sup> *Id.* at 524. The Union College student newspaper could write in 1893, "The popular idea that Union College is located at Schenectady, is not entirely true. The brains of the college are there, no doubt, but the hands are in New York city and the feet are firmly planted on the soil of Long Island City whence like Antaeus of old, Union College receives its real strength and chief support." "The New College Treasurer," *The Concordiensis*, March 1, 1893. In fact, the office of the treasurer of Union College was moved from Schenectady to Long Island City in 1886. See Benjamin A. McDonald, "Reminiscences of a Veteran Long Island City Reporter," *Queens Daily Star*, July 30, 1921.

<sup>166</sup> *Id.* at 402. Nonetheless, the government of Long Island City was especially antagonistic to the development of the Union College properties and likely severely limited Union's potential revenue from its holdings. See "Union College Land Sold," *supra* note 162. See also "Long Island City Valuation," *Brooklyn Eagle*, October 3, 1891 and "Reminiscences of a Veteran Long Island City

properties, however, was used not for academic purposes in Schenectady but to finance improvements on these properties and to pay an assortment of taxes to Long Island City.

The Union College properties in Long island City came into further focus in 2018 when Amazon announced plans to build its gigantic co-headquarters in Long Island City centered around Anable Basin, an area by the East River traditionally the home of many industrial warehouses and docks.<sup>167</sup> Anable Basin was named for Henry Sheldon Anable who was for decades Union College's representative in Long Island City.<sup>168</sup> Starting in 1855, Anable was "best known as the successful manager and agent, for nearly thirty years, of the great real estate interests at Hunter's Point and at Greenpoint, then owned by the late Dr. Eliphalet Nott, president of Union College, of Schenectady, N.Y., and Messrs. Crane & Ely, and afterwards owned by the trustees of Union College."<sup>169</sup> Anable was a friend of Eliphalet Nott, and Nott eventually married Anable's aunt.<sup>170</sup> Anable was succeeded for a time as Union College's representative by his son Eliphalet Nott Anable.<sup>171</sup>

#### IX Conclusion: The Financial Effects of the Lotteries

Union College's revenue from the two lotteries directly was \$588,000. Adding in \$600,000 from the Nott Trust Fund transfer in 1854 would increase Union College's lottery revenue to a total of \$1.188 million.

If you substitute the 1898 sales date of the Nott Trust Fund property for the 1854 transfer date, the gross revenue would increase to \$1.688 million. On top of that, if you estimated income of approximately \$250,000 from the trust properties from

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Reporter," *supra* note 165. The president of Union College in 1887 noted of the Hunter's Point land: "It is burdened by a debt and taxation that exceeds \$300,000. The improved property suffers from that encumbrance and yet is worth a great deal more than that sum. Our unencumbered property there consists of 1,400 vacant lots. We have to pay taxes on that, the interest on our debts and support our establishment here." "Alumni Day, *The Concoriensis*, June 20, 1887. See also "A Big Claim Against Union College," *New York Times*, August 11, 1885 and Ch. 856, L. 1886.

<sup>167</sup> C.J. Hughes, "Long Island City's Next Act," *New York Times*, November 25, 2018.

<sup>168</sup> Zachary Matson, "Amazon Site Has Ties to Union," *Daily Gazette*, November 25, 2018.

<sup>169</sup> J. S. Kelsey, *supra* note 151 at 155.

<sup>170</sup> *Id.*

<sup>171</sup> Eliphalet Nott Anable also served as Union College's attorney in the case of *In re Union College*, *supra* note 161. Many current and former street names in Long Island City were named after Union College representatives. Pearson Street was named after a professor at Union, and Crane Street was named for a Union College trustee. Ely Avenue which is now 23rd Street was named for Eliphalet Nott's partner in his Long Island City investments. 44<sup>th</sup> Drive was Nott Avenue, named after Eliphalet Nott. Court Square was once Anable Avenue, named after the Anable family. See "Forgotten New York," <https://forgotten-ny.com/2012/12/jackson-avenue-side-streets/> [last viewed January 18, 2018].

1854–1898, you would have Union College receiving \$1.938 million in gross revenue from the lottery.

Utilizing the calculator for determining the consumer price index for the nineteenth century as developed by the Federal Reserve Bank of Minneapolis,<sup>172</sup> one can determine what Union College lottery revenue would mean in 2017 dollars. Crediting the \$76,000 from the first lottery in 1814 would yield \$887 thousand. Crediting the \$512,000 from the Literature Lottery to the year 1830 would yield \$11.766 million.<sup>173</sup> The \$600,000 from the Nott Trust in 1854 would yield \$16.342 million. In 2017 dollars, Union College would have received \$29 million from the lottery.

If, however, you value the Nott Trust Fund at its \$1.1 million sale in 1898 (rather than the \$600,000 figure from 1854), and if you add in revenue from the Fund properties based on \$10,000 per year for the 44 years of Union College ownership from 1854-1898,<sup>174</sup> the total receipts by the college from the lottery in 2017 dollars would be \$55.12 million.<sup>175</sup> No matter how you evaluate the revenues, Union College received somewhere from \$29 million to over \$55 million in 2017 dollars from the two lotteries.

Union, however, was not in Columbia's league. Columbia clearly benefitted to the tune of well in excess of \$2 billion in 2017 dollars from the 1814 legislation,<sup>176</sup> but

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<sup>172</sup> <https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800> [last viewed December 7, 2017].

<sup>173</sup> There was significant deflation between 1814 and 1830.

<sup>174</sup> This number was determined by using the year 1876, the midway point from the college acquiring the trust property in 1854 and selling it in 1898 as the basis for determining the 2017 equivalents.

<sup>175</sup> The \$1.1 million sale in 1898, would be valued at \$32.357 million, and the revenue stream would be valued at \$10.11 million. They would replace the \$600,000 transfer in 1854.

<sup>176</sup> The 2017 CPI inflation calculator values the \$400 million sale of the Columbia property in 1985 at \$932 million. To that amount would be added Columbia's revenue during the 170 years that it owned the property. Starting in 1929, Columbia received \$3 million in rentals from the Rockefeller Center properties. That amount was increased to \$3.9 million by 1952 and went up to \$9 million annually in 1973. At the time the property was sold in 1985, Columbia was receiving \$11 million per year. See Richard Briffault, "Fiscal Deficit to Continue Despite Rockefeller Incomes," *Columbia Daily Spectator*, October 29, 1973; Richard Briffault, "Agreement Near on Lease for Rockefeller Center," *Columbia Daily Spectator*, August 31, 1973; Richard Briffault, "Secrecy Surrounds Center Talks," *Columbia Daily Spectator*, March 23 1973; Jennifer Lynch, John Sullivan and Anne Kornhauser, "Rockefeller Center Sold," *Columbia Daily Spectator*, February 6, 1985; Julie Zuckerman, "Admins: CU got top Dollar for Rock," *Columbia Daily Spectator*, November 1, 1989; "Rockefeller Center Holds Key to Budget," *Columbia Daily Spectator*, December 16, 1970; "Students Tread on Home Soil in New Rockefeller Centre," *Columbia Daily Spectator*, January 4, 1933. In 1952, the revenue from Rockefeller Center provided 18.75% of the school's revenue. "Gentzler Sees Slight Income Loss for CU," *Columbia Daily Spectator*, October 28, 1952. In the 1947-48 budget year, 25% of the university's income was derived from Rockefeller Center. "1½ Million Spent by CU Over Income '47-'48," *Columbia Daily Spectator*, December 3, 1948. The total value received by Columbia in 2017 dollars should be well over \$2 billion. The easiest calculation for post-1913 changes in the CPI can be found at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). [last viewed December 7, 2017].



Union was hardly the unlucky loser of the 1814 lottery. Union received considerable benefits (albeit some extremely adverse publicity) from the lottery. Receiving \$1.18 million from a lottery in the first half of the nineteenth century was not chump change, in an era when the college was receiving less than \$10,000 per year from tuition<sup>177</sup> and when the total expenses of the college were less than \$22,000.<sup>178</sup> Union was not the Wile E. Coyote of 1814.

Thanks in no small part to the lottery, the successes for Union College were remarkable. From 1820 to 1850, it was considered among the Big Three of American colleges, with Yale and Harvard.<sup>179</sup> By 1823, there were 234 students enrolled in the school,<sup>180</sup> reaching a high point of 325 in 1859.<sup>181</sup> Union may never have been the largest school in the nation in terms of total student body, but it was generally second to Yale in size.<sup>182</sup> From 1820 to 1851, Union graduated more students than Harvard in all but two years. For eleven of those years, starting in 1820 and ending in 1849, Union graduated more students than any other school in the nation.<sup>183</sup> In 1830, Union graduated 96 students compared to 71 for Yale, 48 at Harvard and 20 at Princeton.<sup>184</sup> By 1839, Union was “potentially the wealthiest college in America.”<sup>185</sup> Not until the Civil War was Union’s position as one of the Big Three challenged.<sup>186</sup> Up to the Civil War, Union was certainly the largest college in New York State.<sup>187</sup>

After Dr. Nott’s death in 1866, Union College fell on hard times in the last third of the nineteenth century. Enrollment decreased significantly at times, and there were several efforts made to relocate Union College from Schenectady to Albany.<sup>188</sup> It is likely that the revenues attributable to the lottery—which included revenues from Union’s property holdings in Long Island City—provided some measure of a

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<sup>177</sup> University of the State of New York *Annual Report of the Regents of The University of the State of New-York* 31 (1836-1837).

<sup>178</sup> *Id.*

<sup>179</sup> Hislop, *supra* note 1, at 399.

<sup>180</sup> The Whole of the Documentary Evidence, *supra* note 54.

<sup>181</sup> Somers, *supra* note 12, at 263.

<sup>182</sup> In the 1818-1819 school year, Union had only about 15-20 students less than Yale. *Id.* at 265

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 514.

<sup>185</sup> Hislop, *supra* note 1 at 398.

<sup>186</sup> *Id.* at 230.

<sup>187</sup> Hough, *supra* note 8 at 107 [viewing 1863 statistics]. Hough’s statistics demonstrate that Union College in 1860 had more than double the number of students than Columbia, which was the second largest college in New York State.

<sup>188</sup> “In 1872, it was not more than a fifth part as great as it had been twelve years before.” *Id.* at 159. See also “Union College, Shall It Be Removed to Albany,?” *Schenectady Daily Evening Star*, November 30, 1868.

cushion that kept Union College alive and in Schenectady throughout the nineteenth century.<sup>189</sup>

For fifty years, lottery politics dominated Union College and Schenectady. The city was the site of the major longest running lottery melodrama in New York State, if not the entire nation. It is more than appropriate that the State Lottery should be headquartered in Schenectady. Schenectady is where much of the lottery politics originated and where it is today.

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<sup>189</sup> In 1884, Union College's expenditures were \$48,296, per the State Regents. University of the State of New York, *Ninety-Eighth Annual Report of the Regents of The University of the State of New-York* 544 (1885). At the same time, the New York Time reported that 1884 revenues from Union College's Long Island City holdings were \$16,000. "Union College Finances," *New York Times*, August 11, 1885. The Times wrote, "The position of the college may be viewed through two glasses. One, very rose-colored, lights ups the institution as it may be in a few years, rich and flourishing. The other shows the college tenaciously holding on to its unproductive property, borrowing money to pay assessments and running expenses and then again borrowing to pay the interest on the borrowed money, and all the time in receipt of only small income."

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## **Additional Reading**

"What Are You Going to Do About It? Ethics and Corruption Issues in the New York State Constitution – April 2017

By Bennett Liebman – Government Lawyer in Residence, Government Law Center,  
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