

**A SHORT TREATISE ON SPORTS GAMBLING AND THE LAW:  
HOW AMERICA REGULATES ITS MOST LUCRATIVE VICE<sup>1</sup>**

---

John T. Holden<sup>2</sup> & Marc Edelman<sup>3</sup>

**Abstract**

On May 14, 2018, the U.S. Supreme Court issued its seminal ruling in *Murphy v. NCAA*, which held that the Professional and Amateur Sports Protection Act (PASPA) violated the Tenth Amendment of the United States Constitution. This ruling, in conjunction with other societal changes, has opened the floodgates for states to liberalize laws on sports betting. In less than two years since the Supreme Court's *Murphy* decision, nineteen U.S. states, in addition to Washington D.C., have legalized sports betting in some form. Meanwhile, eleven states have specifically legalized online sports betting. This article (or, perhaps more accurately stated, short treatise) is the first of its kind to provide a detailed analysis of how the United States regulates sports gambling in the aftermath of *Murphy v. NCAA*. The article examines closely the history of sports gambling, seminal legal decisions involving the sports betting industry, new state regulatory systems that have emerged since the Supreme Court's *Murphy* decision, newfound legal risks for companies that operate in sports gaming markets, and important matters of public policy related to regulating America's most lucrative vice.

**Table of Contents**

<b>INTRODUCTION</b> .....	2
<b>I. AN ABBREVIATED HISTORY OF SPORTS GAMBLING AROUND THE WORLD AND IN THE U.S.</b> .....	4
A. <i>Early Betting Activities: From Ancient Greece to the United States</i> .....	4
B. <i>U.S. Betting in the 1800s: An Era of Scandals</i> .....	6
C. <i>The End of World War II, Nevada Turf Clubs, and the Kefauver Commission</i> .....	10
D. <i>The First Legislative Era</i> .....	12
E. <i>The Second Legislative Era</i> .....	14
F. <i>Daily Fantasy Sports</i> .....	18
<b>II. SPORTS GAMBLING IN THE COURTS</b> .....	22

---

<sup>1</sup> The named authors contributed equally to the creation of this article. In the true gambling spirit, they flipped a coin to determine whose names would appear first. Marc flipped the coin. John called tails. The coin landed tails. And both are now wondering if the element of "consideration" was met by their actions. Perhaps, that's a topic for a future law review article.

<sup>2</sup> John T. Holden, J.D., Ph.D., Assistant Professor, Spears School of Business, Oklahoma State University. He can be contacted at john.holden@okstate.edu.

<sup>3</sup> Marc Edelman, J.D., Professor, Zicklin School of Business, Baruch College, City University of New York. He can be contacted at marc@marcedelman.com.

A.	<i>NFL v. Delaware</i> .....	22
B.	<i>United States v. Cohen</i> .....	24
C.	<i>The Three Early PASPA Decisions (Flagler, IMEGA and Markell)</i> .....	26
D.	<i>The New Jersey PASPA Lawsuits</i> .....	28
<b>III.</b>	<b>SPORTS GAMBLING TODAY</b> .....	34
A.	<i>The Size of the Market</i> .....	35
B.	<i>Mobile versus Brick and Mortar</i> .....	37
C.	<i>Illegal Market Remains Significant</i> .....	39
D.	<i>New State Laws</i> .....	41
<b>IV.</b>	<b>THE FEDERAL – STATE – TRIBAL INTERPLAY</b> .....	44
A.	<i>Overview of Federal, State, and Tribal Responsibilities</i> .....	45
B.	<i>Challenges Facing States with Large Tribal Gaming Infrastructure</i> .....	49
<b>V.</b>	<b>LEGAL RISKS FOR GAMBLING COMPANIES</b> .....	51
A.	<i>State Gaming Laws</i> .....	52
B.	<i>Federal Gaming Laws</i> .....	55
C.	<i>Intellectual Property Law</i> .....	60
<b>VI.</b>	<b>LEGAL RISKS FOR BETTORS AND ANCILLARY SPORTS GAMBLING SERVICE PROVIDERS</b> .....	65
A.	<i>Legal Risks for Sports Bettors</i> .....	65
B.	<i>Legal Risks for Related Gambling Businesses</i> .....	69
<b>VII.</b>	<b>BROADER SOCIETAL AND GOVERNMENT CONCERNS</b> .....	75
A.	<i>Costs Associated with Gambling Addiction</i> .....	76
B.	<i>Economic/Taxation Issues</i> .....	78
C.	<i>Legal and Social Obligations to Native American Community</i> .....	79
D.	<i>Data Collection and Protection of Personal Information</i> .....	80
E.	<i>Monopolization, Market Consolidation and Freezing Out of Small Entrepreneurs</i> .....	81
	<b>CONCLUSION</b> .....	82

## INTRODUCTION

On May 14, 2018, the U.S. Supreme Court issued its seminal ruling in *Murphy v. National Collegiate Athletic Association*, which held that the Professional and Amateur Sports Protection

Act violated the Tenth Amendment of the United States Constitution.<sup>4</sup> This ruling, in conjunction with other societal changes, opened the floodgates for states to liberalize their laws on sports betting.<sup>5</sup> In less than two years since the Supreme Court's *Murphy* decision, nineteen U.S. states, in addition to Washington D.C., have legalized sports betting in some form.<sup>6</sup> Meanwhile, eleven states have specifically legalized online sports betting.<sup>7</sup>

The rapid emergence of legalized, regulated sports betting has created an excellent opportunity for states to regulate and tax America's "most lucrative vice."<sup>8</sup> Much like with the federal legalization of the sale of alcohol in 1933 and some states' decriminalization of marijuana in more recent years,<sup>9</sup> the emergence of legalized, regulated sports gambling has transformed a lucrative black market into an open market.<sup>10</sup> It further has replaced unrecorded business transactions with documented, taxable ones,<sup>11</sup> and it has initiated a series of meaningful discussions

---

<sup>4</sup> *Murphy v. National Collegiate Athletic Association*, 1138 S. Ct. 1461, 1484-85 (2018). See also Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313 (2019).

<sup>5</sup> See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020) (discussing the scope of the *Murphy* decision).

<sup>6</sup> SPORTS HANDLE, *U.S. Sports Betting—Where It's Legal And Where It's Coming Soon*, <https://sportshandle.com/sportsbetting/> (last accessed Dec. 31, 2019).

<sup>7</sup> SPORTS HANDLE, *U.S. Sports Betting—Where It's Legal And Where It's Coming Soon*, <https://sportshandle.com/sportsbetting/> (last accessed Dec. 31, 2019).

<sup>8</sup> Stephen Fehr, Adam Levin & Alexandria Zhang, *States Jump at Chance to Boost Revenue With Sports Betting*, PEW TRUSTS (Oct. 30, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/10/30/states-jump-at-chance-to-boost-revenue-with-sports-betting>.

<sup>9</sup> See John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 331-333 (2019).

<sup>10</sup> See David Purdum, *One year into legal U.S. sports betting: What have we learned?*, ESPN (May 13, 2019), [https://www.espn.com/chalk/story/\\_/id/26740441/one-year-legal-us-sports-betting-learned](https://www.espn.com/chalk/story/_/id/26740441/one-year-legal-us-sports-betting-learned).

<sup>11</sup> See generally, Richard C. Auxier, *Three Tax Lessons from the First Year of Widespread Legal Sports Betting*, TAX POL'Y CTR (May 22, 2019), <https://www.taxpolicycenter.org/taxvox/three-tax-lessons-first-year-widespread-legal-sports-betting>.

about how American society should balance the conflicting interests of preserving individual autonomy and protecting societal welfare.<sup>12</sup>

This article (or, perhaps more accurately stated, short treatise) is the first of its kind to provide a detailed analysis of how the United States regulates sports gambling in the aftermath of *Murphy v. NCAA*.<sup>13</sup> Part I of this article provides an abbreviated history of sports gambling around the world, and it explains the earliest forms of gambling activity in the United States. Part II discusses the historic treatment of sports gambling in U.S. courts up through the *Murphy* decision. Part III analyzes the sports gambling market today from both a business and legal perspective. Part IV looks at the unique relationship between the federal government, state governments, and tribal law in governing sports betting on Native American land. Part V addresses forward-looking legal risks for sports gambling operators. Part VI explores legal risks for bettors and ancillary sports gambling service providers. Finally, Part VII addresses broader social and governmental concerns that arise from the new sports betting regulatory scheme that is emerging in the United States.

## **I. AN ABBREVIATED HISTORY OF SPORTS GAMBLING AROUND THE WORLD AND IN THE U.S.**

### *A. Early Betting Activities: From Ancient Greece to the United States*

The history of sports gambling outside of the United States dates back many thousands of years.<sup>14</sup> Some historians trace betting on sports back to the earliest Olympic Games in ancient

---

<sup>12</sup> See e.g., Chuck Canterbury, *Law Enforcement's Case Against Restoring the Federal Ban on Sports Gambling*, WASH. EXAMINER (Sep. 27, 2018), <https://www.washingtonexaminer.com/opinion/op-eds/law-enforcements-case-against-restoring-the-federal-ban-on-sports-gambling>.

<sup>13</sup> S. Ct. 1461 (2018)

<sup>14</sup> John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020).

Greece that were hosted around 3000 B.C.<sup>15</sup> Other historians, meanwhile, trace the practice of sports gambling back to ancient Rome.<sup>16</sup> While, still others trace it to ancient Egypt.<sup>12</sup>

In England, there was little recorded history of gambling – sports or otherwise – until 1612.<sup>17</sup> That year, King James announced his hosting of the first British lottery to generate much-needed funds for the American colony at Jamestown—a colony that had been ravaged by illness and a shortage of supplies.<sup>18</sup> Thereafter, wealthy citizens in the thirteen colonies began to host their own lotteries to help fund public buildings, roads, and canals, as well as to build religious buildings and more than forty of the nation’s preeminent universities.<sup>19</sup>

As tensions rose amongst colonists in America, the British outlawed lotteries, fearing that they would help to finance an organized rebellion.<sup>20</sup> However, even as commercial gambling has fallen in and out of favor, gambling as a form of recreation has persisted.<sup>21</sup> During the United States’ westward expansion, cities such as San Francisco licensed casinos and gaming houses to

---

<sup>15</sup> Joseph B. Verrengia, *Ancient Olympics Were A Mix of Sacred, Profane*, A.P. (July 25, 2004), <http://corinth.sas.upenn.edu/dgr/sitecache/clips/sacredprofane.htm>.

<sup>16</sup> See Rodolfo Lanciani, *Gambling and Cheating in Ancient Rome*, 155 THE N. AM. REV. 96 (1892). See also Katarina Vojvodic, *The History of Gambling in Ancient Egypt*, ASK GAMBLERS (July 18, 2017), <https://www.askgamblers.com/gambling-news/blog/gambling-in-egyptian-culture/>.

<sup>17</sup> Ken Zurski, *The Jamestown Lottery*, UNREMEMBERED (Jan. 13, 2016), <https://unrememberedhistory.com/2016/01/13/the-jamestown-lottery/>.

<sup>18</sup> Ken Zurski, *The Jamestown Lottery*, UNREMEMBERED (Jan. 13, 2016), <https://unrememberedhistory.com/2016/01/13/the-jamestown-lottery/>.

<sup>19</sup> See Becky Little, *Lottery Tickets Helped Fund America’s 13 Colonies*, HISTORY (Oct. 11, 2019), <https://www.history.com/news/13-colonies-funding-lottery>; Robert J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 25-26 (1992); Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 314 (2019) (discussing the use of lotteries for public works projects). See also JONATHAN D. SARNA, AMERICAN JUDAISM: A HISTORY 40 (2d. ed. 2019) (discussing the Philadelphia synagogue Mikveh Israel’s receiving of state permission “to set up a lottery to retire its debt”).

<sup>20</sup> Robert J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 28-29 (1992).

<sup>21</sup> See generally I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361 (2010).

raise revenue to avoid having to use other resources to enforce a prohibition.<sup>22</sup> Even illegal forms of wagering were largely ignored in the new Western territories, as gambling activities were often viewed there as a lesser diversion to some other vices.<sup>23</sup>

The exception to the cyclical treatment of gambling appears to be horseracing, a gambling activity that has seemingly managed to evade widespread bans throughout U.S. history.<sup>24</sup> The first American horseracing track was established in New York in 1665, and it was one of the more popular recreational activities in all thirteen colonies by the time of the Revolutionary War.<sup>25</sup> Horseracing also built the foundation for interstate sports wagering, in conjunction with the telephone and totalizer machines, in the 1800s.<sup>26</sup>

#### *B. U.S. Betting in the 1800s: An Era of Scandals*

Although horseracing seemed to be immune to the cyclical illegalization of other forms of gambling,<sup>27</sup> the latter 1800s saw a number of states ban lotteries and most other forms of gambling in their newly authored constitutions.<sup>28</sup> The nation's largest lottery, the Louisiana state lottery, was one the most profitable lotteries during this period, albeit it was also one of the most corrupt.<sup>29</sup> After the State of Louisiana moved to crack down on its public lottery, the lottery's operators

---

<sup>22</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 370(2010).

<sup>23</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 370-372 (2010).

<sup>24</sup> Mehmet Samuk, *Early Horse Racing in America*, ST. MARY'S UNIV. HISTORY MEDIA (Dec. 6, 2016), <https://stmuhistorymedia.org/early-horse-racing-in-america/>.

<sup>25</sup> Mehmet Samuk, *Early Horse Racing in America*, ST. MARY'S UNIV. HISTORY MEDIA (Dec. 6, 2016), <https://stmuhistorymedia.org/early-horse-racing-in-america/>.

<sup>26</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 371 (2010) (noting that even when gambling in every form was virtually prohibited across the country at the turn of the 20<sup>th</sup> century, horse racing persisted in several states).

<sup>27</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 371 (2010) (Kentucky and Maryland maintained horse racing even as other states moved to ban all forms of gambling).

<sup>28</sup> Keith C. Miller, *State Lotteries and Their Customers*, 9 UNLV GAMING L.J. 177, 178 (2019).

<sup>29</sup> Keith C. Miller, *State Lotteries and Their Customers*, 9 UNLV GAMING L.J. 177, 178 (2019).

moved their operations to Honduras and used private companies to transact business with customers in the United States.<sup>30</sup> Their purpose in doing so was to avoid an 1890 federal law banning the distribution of lottery materials using the Postal Service.<sup>31</sup> The avoidance of the 1890 law led Congress thereafter to ban the distribution of lottery materials through interstate commerce in 1895.<sup>32</sup>

In 1903, the Supreme Court would affirm Congress's power to ban the interstate distribution of lottery tickets.<sup>33</sup> In particular, the court held itself of the opinion that "lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States."<sup>34</sup> The federal laws, as well as the state-level bans, would lead to nearly 70 years of silence for lotteries in the United States that ended when New Hampshire relaunched its lottery in 1964.<sup>35</sup>

While the corruption in lotteries had a chilling effect, perhaps no U.S. gambling scandal led to as great of a negative backlash against betting overall as the alleged fix of the 1919 World Series between the Chicago White Sox and Cincinnati Red Stockings.<sup>36</sup> Specifically, it was alleged during this period that organized crime leader Arnold Rothstein bribed eight members of the

---

<sup>30</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 373-374 (2010).

<sup>31</sup> G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 935 (1978).

<sup>32</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFERY S. MOORAD SPORTS L.J. 361, 374 (2010) (criminalizing the interstate carrying or sending of lottery tickets or lottery information in interstate and foreign commerce).

<sup>33</sup> See *The Lottery Case*, 188 U.S. 321, 354 (1903).

<sup>34</sup> *The Lottery Case*, 188 U.S. 321, 354 (1903).

<sup>35</sup> John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020).

<sup>36</sup> John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455 (2015).

heavily-favored White Sox team to lose the 1919 World Series on purpose.<sup>37</sup> Although this was the one of the first times the fixing of a sporting event became public knowledge, this was not likely the first time this behavior transpired.<sup>38</sup> During grand-jury testimony, one member of the eight accused fixers testified that White Sox players were jealous of the purported \$10,000 per head that members of the Chicago Cubs had received for throwing the 1918 World Series to the Boston Red Sox.<sup>39</sup>

Following a trial that resulted in acquittal of the eight White Sox players,<sup>40</sup> Major League Baseball (MLB) established the Office of the Commissioner for purposes of overseeing the integrity of the game, and MLB owners tasked judge Kennesaw Mountain Landis with ending all betting on the sport.<sup>41</sup> Landis promptly banned for life all eight Chicago White Sox players accused of throwing the World Series, including Shoeless Joe Jackson, who batted .375 during the 1919 World Series – the highest batting average of any player on either team.<sup>42</sup> Landis's actions would mark the beginning of nearly a century of opposition to sports betting from MLB, among

---

<sup>37</sup> John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455 (2015).

<sup>38</sup> William F. Lamb, *The Black Sox Scandal*, SOC'Y FOR AM. BASEBALL RESEARCH (2015), <https://sabr.org/research/black-sox-scandal-bill-lamb>.

<sup>39</sup> William F. Lamb, *The Black Sox Scandal*, SOC'Y FOR AM. BASEBALL RESEARCH (2015), <https://sabr.org/research/black-sox-scandal-bill-lamb>.

<sup>40</sup> The players were indicted on five counts, the majority of which centered on various fraud theories, and two which centered on conspiracy to injure the business interests of the American League, and team owner Charles Comiskey, respectively. Douglas Lindor, *The Black Sox Trial: An Account* (2007). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1024290&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024290&download=yes).

<sup>41</sup> William F. Lamb, *The Black Sox Scandal*, SOCIETY FOR AMERICAN BASEBALL RESEARCH (2015), <https://sabr.org/research/black-sox-scandal-bill-lamb>. After the acquittal, the players reportedly shook hands with the jury and signed autographs, some players allegedly even attended a party with members of the jury after the verdict. *Id.*

<sup>42</sup> See Sarah Pruitt, *Did Shoeless Joe Jackson Conspire to Throw the 1919 World Series*, HISTORY, Oct. 22, 2018, <https://www.history.com/news/did-shoeless-joe-jackson-conspire-to-throw-the-1919-world-series>.



other U.S. professional sports leagues.<sup>43</sup> MLB's ban also scared most players away from gambling connections.<sup>44</sup>

The connection between the alleged 1919 World Series fix and organized crime, however, was what interested many politicians most about Baseball's corruption and led to its continued investigation.<sup>45</sup> U.S. politicians were concerned not so much with the result of the 1919 World Series, but more with how organized crime was using gambling as a means to finance their operations, particularly after the fall of prohibition.<sup>46</sup> These fears increased following World War II, when millions of soldiers returned home from war with a little extra money and looking for recreational activities.<sup>47</sup> By 1950, 57 percent of Americans who responded to a Gallop survey stated that they had wagered in the past year.<sup>48</sup>

Given that gambling activities other than horseracing were largely illegal at the time, one could reasonably assume that there had emerged a nationwide infrastructure of bookmakers servicing the gambling habits of American citizens.<sup>49</sup> The most fundamental aspect of the interstate bookmaking infrastructure was the racing wire service, which transmitted sports scores and horse racing results with rapid speed across the country.<sup>50</sup> The convenience of the wire service

---

<sup>43</sup> See generally, John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329 (2019).

<sup>44</sup> MLB would take numerous actions against players, and former players who associated with various forms of gambling. See e.g., Michael Martinez, *Mays, Mantle Reinstated By Baseball Commissioner*, 7, N.Y. TIMES (Mar. 19, 1985); see also David Hill, *Cincinnati Reds History: Pete Rose Banned from Hall of Fame Ballot*, FOX SPORTS (June 30, 2017), <https://www.foxsports.com/mlb/story/cincinnati-reds-history-pete-rose-banned-from-hall-of-fame-ballot020417>.

<sup>45</sup> See Daniel A. Nathan, *Arnold Rothstein Rigged The 1919 World Series. Or Did He?*, LEGAL AFFAIRS (Mar. 2004), [http://www.legalaffairs.org/issues/March-April-2004/review\\_nathan\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/review_nathan_marapr04.msp).

<sup>46</sup> See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 46-47 (U. Nev. Press 2005).

<sup>47</sup> DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 46 (U. Nev. Press 2005).

<sup>48</sup> DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 47 (U. Nev. Press 2005).

<sup>49</sup> DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 46 (U. Nev. Press 2005).

<sup>50</sup> Charles B. Hagan, *Wire Communications Utilities and Bookmaking*, 35 MINN. L. REV. 262-263 (1951).

meant that bookmakers (and other subscribers) did not need to wait for the morning papers to find out the results of sporting events.<sup>51</sup> It also enabled a source of virtually real-time information in an era decades before commercial access to the Internet.<sup>52</sup>

*C. The End of World War II, Nevada Turf Clubs, and the Kefauver Commission*

The end of World War II and the emergence of the race wire enabled bookies across the country to begin taking wagers. While gambling remained illegal throughout most of the country, Nevada, which first legalized state-sponsored casino gambling with its Open Gambling Bill of 1931, emerged as the American mecca of legal, gambling activities.<sup>53</sup> Yet, even though Nevada legalized sports gambling, the state's decision to tolerate quasi-legal "turf clubs," a predecessor to today's sportsbooks, angered the federal government to such an extent that, in 1951, the federal government implemented a ten percent excise tax on sports gambling winnings for legal and illegal sportsbooks alike.<sup>54</sup> The tax was purportedly not passed in the interest of generating revenue for the federal government, but instead as a means of allowing the federal government to sanction intrastate gambling activity.<sup>55</sup>

---

<sup>51</sup> Charles B. Hagan, *Wire Communications Utilities and Bookmaking*, 35 MINN. L. REV. 262-263 (1951).

<sup>52</sup> See Note, *Racing Wire Service*, 5 STAN. L. REV. 493 (1953); see also Charles B. Hagan, *Wire Communications Utilities and Bookmaking*, 35 MINN. L. REV. 262 (1951).

<sup>53</sup> Anthony Curtis, *Question of the Day – 17 November 2017*, LAS VEGAS ADVISOR (Nov. 17, 2017), <https://www.lasvegasadvisor.com/question/sports-betting-history/>. See also Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 317 (2019) (noting that Nevada affirmatively legalized the betting on sports in 1949, which was not long after the end of World War II).

<sup>54</sup> Anthony Curtis, *Question of the Day – 17 November 2017*, LAS VEGAS ADVISOR (Nov. 17, 2017), <https://www.lasvegasadvisor.com/question/sports-betting-history/>. The challenge for bookmakers was that the ten percent excise tax cut significantly into bookmaker profits, unlike many other casino games, historically a bookmakers profit margin was five percent. See Tim Johnson, *Calculating Margins in Sports Betting*, THE SPORTS GEEK (Mar. 18, 2019), <https://www.thesportsgeek.com/blog/calculating-margins-in-sports-betting/>.

<sup>55</sup> Kevin P. Braig, *Reform the Federal Sports Betting Excise Tax "Dilemma,"* LEXOLOGY (Nov. 3, 2017), <https://www.lexology.com/library/detail.aspx?g=2b160213-645e-48bf-b484-f7bcb6941831>. The tax and related stamp requirements were successfully challenged on Fifth Amendment grounds in 1968. *Id.*; see also *Grosso v. United States*, 390 U.S. 62 (1968); see also *Marchetti v. United States*, 390 U.S. 39 (1968).

In 1950, Congress authorized the Kefauver Committee, which was a five-member group led by Tennessee Senator Estes Kefauver, to investigate and crack down on “organized crime in interstate commerce.”<sup>56</sup> The Kefauver Committee travelled to 14 cities, over 15 months, hosting televised hearings and interviewing dozens of witnesses before producing its final report.<sup>57</sup> During that time, the Kefauver Committee observed first hand another sports gambling-related corruption matter.<sup>58</sup> This time, dozens of college basketball players from around the country were accused of working with members of organized crime to shave points in collegiate basketball games.<sup>59</sup> Some of these allegations were so salacious that it led to college basketball powerhouse schools such as University of Kentucky facing NCAA sanctions, and the City College of New York, which had won the 1949-50 NCAA men’s basketball championship, abandoning its big-time college basketball program altogether.<sup>60</sup> For Columbia University star Jack Molinas, his involvement with organized crime cost him his NBA career, his freedom, and ultimately his life.<sup>61</sup>

Under this unique context, the Kefauver Committee’s final report found strong support for the contention that organized crime was an interstate operation with a significant grasp on many areas of the country.<sup>62</sup> One of the principal funding mechanisms for this organized criminal

---

<sup>56</sup> John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part One*, LEGAL SPORTS REPORT (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/>.

<sup>57</sup> John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part One*, LEGAL SPORTS REPORT (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/>.

<sup>58</sup> See AL FIGONE, *THE DIRTY COLLEGE GAME: CORRUPTION, GAMBLING AND THE PURSUIT OF MONEY IN NCAA FOOTBALL AND BASKETBALL*, 19 (McFarland 2019) (noting that the while the Kefauver Committee did not contain discussion of match fixing, scandals were occurring simultaneously to the hearings).

<sup>59</sup> Joe Goldstein, *1951 Scandals Threaten College Hoops*, ESPN (Nov. 19, 2003), [https://www.espn.com/classic/s/basketball\\_scandals\\_explosion.html](https://www.espn.com/classic/s/basketball_scandals_explosion.html). There were also allegations that a referee implicated in the scandal manipulated six National Basketball Association games. *Id.*

<sup>60</sup> Marty Burns, *First the Double, Then the Trouble, CCNY Won the NIT and NCAA Crowns in 1950, a Year Before Falling to Scandal*, SPORTS ILLUSTRATED, Apr. 3, 2000, at <http://www.si.com/vault/2000/04/03/277609/first-the-double-then-the-trouble-ccny-won-the-nit-and-ncaa-crowns-in-1950-a-year-before-falling-to-scandal>.

<sup>61</sup> See *Molinas’s Past Sifted for Clues*, N.Y. TIMES, Aug. 6, 1975, at B57, <https://www.nytimes.com/1975/08/06/archives/molinass-past-sifted-for-clues.html>

<sup>62</sup> John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part One*, LEGAL SPORTS REPORT (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/>.

syndicate was bookmaking via the utilization of various wire services.<sup>63</sup> The report stated that “[t]he ‘bookie’ empire ha[d] two vulnerable points within reach of Congress’s power over interstate commerce: [t]he essential flow of specialized gambling information to the bookmaker, and this dependence on interstate facilities in placing lay-off and come-back bets.”<sup>64</sup> To combat illegal sports betting activity, the Kefauver Committee recommended that Congress pass several new anti-gambling laws as well as implement several modifications to the tax code.<sup>65</sup> Congress then proceeded to legislate in that direction.<sup>66</sup>

#### *D. The First Legislative Era*

Beginning in 1950, even before the Kefauver Committee had concluded its investigations, Congress began to introduce legislation to target organized crime’s gambling operations.<sup>67</sup> One such method of doing so was to criminalize the use of wire communication facilities for the transmission of gambling information.<sup>68</sup> This bill, which ultimately was signed into law eleven years later, became known as the Interstate Wire Act (Wire Act).<sup>69</sup> Along with the so-called Wire Act,<sup>70</sup> Congress also passed the Travel Act, which criminalized interstate travel with the intent to engage in unlawful activity including gambling business activity.<sup>71</sup> In addition, Congress passed

---

<sup>63</sup> John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part One*, LEGAL SPORTS REPORT (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/>.

<sup>64</sup> *Kefauver Committee Final Report, U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce*, 82<sup>nd</sup> Cong. S. Rep. 725 at 113-114, available at <http://stoppredatorygambling.org/wp-content/uploads/2012/12/Kefauver-Committee-Final-report.pdf>.

<sup>65</sup> *Kefauver Committee Final Report, U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce*, 82<sup>nd</sup> Cong. S. Rep. 725 at 113-114, available at <http://stoppredatorygambling.org/wp-content/uploads/2012/12/Kefauver-Committee-Final-report.pdf>.

<sup>66</sup> See John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. (2020).

<sup>67</sup> *Transmission of Gambling Information: Hearing on S.3358 Before the Senate Subcommittee of the Committee on Interstate and Foreign Commerce*, 81<sup>st</sup> Cong. (1950).

<sup>68</sup> John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. (2020).

<sup>69</sup> John Holden, *Legislative Sausage Making: How We Got The Wire Act, Part Two*, LEGAL SPORTS REPORT (Sep. 11, 2018), <https://www.legalsportsreport.com/22329/making-the-wire-act-sports-betting-part-two/>.

<sup>70</sup> 18 U.S.C. § 1084 (1994).

<sup>71</sup> 18 U.S.C. § 1952 (2014).

the Wagering Paraphernalia Act, which made the interstate transport of wagering materials, including bookmaking materials, into a federal crime.<sup>72</sup>

In 1964, Congress then moved to attack the stream of revenue for organized crime that took the chance out of sports gambling, notably match fixing via bribery.<sup>73</sup> The Sports Bribery Act was passed in 1964, as a holdover from the Kennedy-era anti-organized crime legislation of 1961.<sup>74</sup> The statute was intended to give the federal government a means to interrupt interstate match fixing.<sup>75</sup> Thereafter, Congress would pass a number of additional laws to be used in conjunction with these anti-gambling statutes to further pursue leaders of organized crime.<sup>76</sup> The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) granted the United States power to bring criminal charges for racketeering conduct, even where the underlying illegal acts occurred under state, rather than federal, law.<sup>77</sup> Meanwhile, the Illegal Gambling Business Act (IGBA) provided a vast expansion of federal power as the federal government effectively made operating a gambling business of even medium proportions into a national matter.<sup>78</sup> Congress deemed the IGBA necessary, in part, because Congress believed some states were failing to rein in organized crime by not enforcing their own gambling laws.<sup>79</sup>

---

<sup>72</sup> 18 U.S.C. § 1953 (2014).

<sup>73</sup> Match-fixing is the practice where athletes intentionally reduce effort in order to ensure a specified outcome that they can control results. See John T. Holden & Ryan M. Rodenberg, *Lone-Wolf Match-Fixing: Global Policy Considerations*, 9 INT'L J. SPORT POL'Y & POLITICS 97, 98 (2017).

<sup>74</sup> John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455 (2015).

<sup>75</sup> H. Rep. 88-1053 (Dec. 17, 1963). The House Report articulated: "During the past few years, we have witnessed a number of scandals in the sporting world in which attempts were made to influence sporting events by bribery. With the development of highly organized athletics, both professional and collegiate, gambling interests have become increasingly involved." The statute was narrowly tailored to supplement state laws and was yet another means of providing the federal government a tool to prosecute organized crime. H. Rep. 88-1053 (Dec. 17, 1963); see also 18 U.S.C. § 224 (1994).

<sup>76</sup> See e.g., 18 U.S.C. §§ 1961–1968 (2016).

<sup>77</sup> See 18 U.S.C. §§ 1961–1968 (2016).

<sup>78</sup> 18 U.S.C. § 1955 (b) (1) (i-iii) (1970).

<sup>79</sup> Kaitlyn Dunphy, *Following Suit With the Second Circuit: Defining the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1321-1322 (2014).

*E. The Second Legislative Era*

While many states were struggling to deal with illegal gambling, Nevada saw a significant increase in the prominence of sports betting in the 1970s.<sup>80</sup> The introduction of a ten percent federal excise tax on sports wagers made sports betting difficult to operate at a profit, and numerous turf club operators were evading the bulk of their taxes by reporting one percent of the wagers they were collecting.<sup>81</sup> As Nevada's gaming industry grew, there were efforts to get Congress to lower the excise tax, and in 1974, Congress reduced the rate to two percent.<sup>82</sup> As a result of the reduction and because of how the tax was calculated, it amounted to a tax of nearly fifty percent of gross gaming revenue.<sup>83</sup> Yet, despite the continued presence of a high federal tax rate, several turf clubs expanded into large-scale operations, with some eventually moving inside casinos and transforming into the sportsbook-style wagering that is present today.<sup>84</sup>

In 1976, the U.S. Commission on the Review of the National Policy toward Gambling presented an important report on gambling to President Gerald Ford.<sup>85</sup> The report noted that illegal sports bookmaking was "the number one form of illegal gambling in the United States,"<sup>86</sup> and the

---

<sup>80</sup> I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE LAW (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/>.

<sup>81</sup> I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE LAW (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/>. (For instance, "a \$1,100 bet to win \$1,000 was recorded as merely \$11 to win \$10.").

<sup>82</sup> I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE LAW (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/>.

<sup>83</sup> The federal excise tax is applied to handle (total amount wagered) as opposed to revenue; as such, the effective tax rate is much higher than the stated two percent. I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE LAW (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/>.

<sup>84</sup> I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE LAW (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/>.

<sup>85</sup> GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 1-212 (1976). Available at: [https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit\\_bw.pdf](https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit_bw.pdf).

<sup>86</sup> GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 174 (1976). Available at: [https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit\\_bw.pdf](https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit_bw.pdf).

typical sports bettor was a White male between 18 and 44 with a college degree and an annual income of more than \$10,000 (in 1976 dollars).<sup>87</sup> Amongst the biggest concerns noted in the report were the perceptions of gamblers fixing sporting events.<sup>88</sup> Respondents ranked high school sports as least likely to be fixed and professional sports as much more likely.<sup>89</sup>

A few years later, one of the most famous contemporary match-fixing scandals involving college sports would make the news.<sup>90</sup> In 1981, a Brooklyn jury convicted former Boston College basketball star Rick Kuhn of conspiracy in association with efforts to fix Boston College basketball games during the 1978-79 season.<sup>91</sup> The scheme originated when organized crime figures made contact with Kuhn and offered him and some other members of the team several thousand dollars to manipulate the outcome of six games.<sup>92</sup> The fallout from the match-fixing scandal showed that sports betting was still a powerful force in the country and drove an idea that betting of any kind would contribute to an increase in sports-related corruption—a belief that continued to persist for

---

<sup>87</sup> GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 175 (1976). Available at: [https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit\\_bw.pdf](https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit_bw.pdf).

<sup>88</sup> GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 175 (1976). Available at: [https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit\\_bw.pdf](https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit_bw.pdf).

<sup>89</sup> GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 176 (1976). Available at: [https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit\\_bw.pdf](https://ia902205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit_bw.pdf).

<sup>90</sup> David Purdum, *The Worst Fix Ever*, ESPN (Oct. 3, 2014), [https://www.espn.com/espn/chalk/story/\\_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal](https://www.espn.com/espn/chalk/story/_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal).

<sup>91</sup> Bart Barnes, *5 Convicted in Boston College Betting Case*, WASH. POST (Nov. 24, 1981), <https://www.washingtonpost.com/archive/sports/1981/11/24/5-convicted-in-boston-college-betting-case/9b63d19a-d0b3-43f0-9004-c5a5a3c9c137/>.

<sup>92</sup> Bart Barnes, *5 Convicted in Boston College Betting Case*, WASH. POST (Nov. 24, 1981), <https://www.washingtonpost.com/archive/sports/1981/11/24/5-convicted-in-boston-college-betting-case/9b63d19a-d0b3-43f0-9004-c5a5a3c9c137/>. Amongst those convicted was James Burke, who was portrayed by Robert DeNiro as Jimmy Conway in the Martin Scorsese film *Goodfellas*. The fix was allegedly initiated by Burke, the inspiration for the film, Henry Hill. See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 458 (2015).

decades.<sup>93</sup> This belief would culminate in a push from various sports organizations to ban any future expansion of sports betting.<sup>94</sup>

Beginning in 1990, the four major American professional sports leagues and the National Collegiate Athletic Association (NCAA) began to exert pressure on Congress to pass a law banning sports wagering throughout the country.<sup>95</sup> The first effort to pass legislation banning sports betting came as multiple states considered expanding their lottery offerings to include sports betting products.<sup>96</sup> Pushed by testimony from sports league representatives, bill sponsors concluded that sports betting would reflect negatively on the images that the sports leagues had carefully cultivated.<sup>97</sup> The first legislative attempt would fail, but a year later new legislation would surface.<sup>98</sup> Backed by many of the same driving forces, Congress would debate, and subsequently pass, the Professional and Amateur Sports Protection Act (PASPA), in 1992.<sup>99</sup>

---

<sup>93</sup> See Jon Wertheim, *Will Legalized Sports Betting Curtail Corruption or Encourage It?*, 60 MINUTES (Mar. 24, 2019), <https://www.cbsnews.com/news/ncaa-march-madness-betting-will-legalized-sports-betting-curtail-corruption-or-encourage-it-60-minutes/>. There is little evidence that legalized sports betting increases corruption, as match-fixing expert Declan Hill stated at a conference in Holland “... only stupid people fix in regulated markets. Only dummies fix on a regulated market. Why would you fix on a regulated market if you can go to Asia, which as everyone knows, they don’t care. It’s volume, volume, volume ....” See John Holden, *What Gaming in Holland Can Teach the US Sports Betting Market*, LEGAL SPORTS REPORT (July 18, 2019), <https://www.legalsportsreport.com/34412/holland-gaming-us-sports-betting/>.

<sup>94</sup> See Ryan M. Rodenberg, Anastasios Kaburakis, & John T. Holden, “*Whose*” Game Is It? Sports-Wagering and Intellectual Property, 60 VILL. L. REV. 1, 2-3 (2014).

<sup>95</sup> See John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 338 (2019).

<sup>96</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 338 (2019).

<sup>97</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 338 (2019). Then-commissioner of the NFL, Paul Tagliabue testified that “[t]he most precious possessions that we as a football league have are our reputations for integrity and the integrity of our games.” Goodell would further testify “this type of State-sponsored lottery misappropriates the good will, the public interest in our sport, and the entertainment value of products that we have chosen to market in a certain fashion.” See *Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 38-39 (1990).

<sup>98</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 342-343 (2019).

<sup>99</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 352 (2019).



PASPA did not ban sports wagering entirely.<sup>100</sup> Instead, it froze in place sports betting as it existed in 1992.<sup>101</sup> The PASPA freeze, created by section 3704 of the statute,<sup>102</sup> meant that only a handful of states were able to have any kind of sports wagering.<sup>103</sup> The statute also created a one-year window for New Jersey to authorize sports gambling in Atlantic City, but the state failed to capitalize on the opening.<sup>104</sup> The passage of PASPA led to a 25-year monopoly on sportsbook style wagering for the state of Nevada, even despite the freeze on legalized sports betting.<sup>105</sup> This was a very lucrative result for Nevada, but not necessarily one that benefited the United States or its citizens overall.<sup>106</sup> Congress remained concerned with the expansion of gambling, and specifically sports gambling.<sup>107</sup> Meanwhile, sports gambling operations continued to flourish underground, operating illegally in black markets such as on the emerging Internet.<sup>108</sup>

Then, beginning in 1997, Congress took aim at online gambling with a bill introduced by Senator Jon Kyl of Arizona.<sup>109</sup> The first hearing was followed by nearly a decade of attempts to

---

<sup>100</sup> See John T. Holden, Anastasios Kaburakis, & Ryan M. Rodenberg, *Sports Gambling Regulations and Your Grandfather (Clause)*, 26 STAN. L. & POL'Y REV. ONLINE 1, 2-3 (2014).

<sup>101</sup> John T. Holden, Anastasios Kaburakis, & Ryan M. Rodenberg, *Sports Gambling Regulations and Your Grandfather (Clause)*, 26 STAN. L. & POL'Y REV. ONLINE 1, 2-3 (2014).

<sup>102</sup> 28 U.S.C. § 3704 (2012).

<sup>103</sup> Anastasios Kaburakis, Ryan M. Rodenberg, & John T. Holden, *Inevitable: Sports Gambling, State Regulation, and the Pursuit of Revenue*, 5 HARV. BUS. L. REV. ONLINE 27, 28 (2015). There is actually a possibility that several jurisdictions had limited exemptions as well as Nevada, Oregon, Montana, and Delaware, which are the states most commonly cited as exempt. See Ryan M. Rodenberg & John T. Holden, *Sports Betting Has An Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 15 (2017).

<sup>104</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 353 (2019).

<sup>105</sup> See generally, Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313 (2019).

<sup>106</sup> For an overview of Nevada sports wagering win totals see UNLV CTR. FOR GAMING RESEARCH, *Nevada Sports Betting Totals*, (Jan. 2019), available at: [https://gaming.unlv.edu/reports/NV\\_sportsbetting.pdf](https://gaming.unlv.edu/reports/NV_sportsbetting.pdf).

<sup>107</sup> See John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 103 (2018).

<sup>108</sup> See ROBERT J. WILLIAMS ET AL., ROUTLEDGE INTERNATIONAL HANDBOOK OF INTERNET GAMBLING, 3-26 (Routledge 2012) (discussing growth of online gambling).

<sup>109</sup> John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 103 (2018).

ban Internet gambling in various forms.<sup>110</sup> Driving this push was a 1999 report, commissioned by Congress, which concluded that the illegal sports gambling market was worth between \$80 and \$380 billion annually.<sup>111</sup> Following this report, there were a number of additional attempts to ban online wagering, with some bills even linking online gambling to terrorism financing following the attacks of September 11, 2001.<sup>112</sup>

After nearly a decade of trying, Congress was able to pass the Unlawful Internet Gambling Enforcement Act (UIGEA)<sup>113</sup>—a largely neutered bill that targeted the payment processors who allowed online gambling operators to transact business with American customers.<sup>114</sup> One of the reasons that the UIGEA lacked the power of some of the other proposed bills was based on the variety of exemptions contained in the bill, including one for “fantasy sports.”<sup>115</sup> It is this “fantasy sports” exemption that ultimately paved the way to the emergence of the “daily fantasy sports” industry—an industry that, in earnest, is far more akin to sports gambling than to traditional fantasy sports.<sup>116</sup>

#### *F. Daily Fantasy Sports*

---

<sup>110</sup> See John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 103-113 (2018).

<sup>111</sup> See NAT’L GAMBLING IMPACT STUDY COMM’N, GAMBLING IN THE UNITED STATES, 2-14 (1999), available at: <https://govinfo.library.unt.edu/ngisc/reports/2.pdf>.

<sup>112</sup> John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 113 (2018). Evidence of the widespread use of online gambling websites as a money laundering instrument is limited. *Id.*; see also Steve Ruddock, *Unsurprisingly, Terrorists Aren’t Using Online Gambling Sites To Launder Money And Fund Plots*, ONLINE POKER REPORT (Jan. 6, 2017), <https://www.onlinepokerreport.com/23377/congressional-investigation-terrorists-online-gambling/>.

<sup>113</sup> John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 102 (2018).

<sup>114</sup> 31 U.S.C. §§ 5361-5367 (2006).

<sup>115</sup> 31 U.S.C. § 5362 (1)(E)(ix) (2006).

<sup>116</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1, 2 (2016).

The term “fantasy sports” traditionally described a game with academic origins dating back to Professor William Gamson of Harvard University in the 1960s.<sup>117</sup> Participants in traditional fantasy sports drafted or otherwise selected real-world athletes who they thought would produce the best real-world statistics over the course of multiple real-world events – typically, a full, professional sports season.<sup>118</sup> Throughout the season, participants in traditional fantasy sports contests would tabulate their players’ real world, day-to-day statistics.<sup>119</sup> At the end of the season, the participant who possessed the players with the best real-game statistics would win a prize.<sup>120</sup>

Although traditional fantasy sports began as a niche hobby, this activity gained popularity in the late 1990s when the Internet, for the first time, allowed fans to play traditional fantasy sports without needing to calculate their own statistics.<sup>121</sup> Thereafter, Internet content providers such as ESPN, CBS and Yahoo began to offer a wide range of traditional fantasy sports games to fans as a way to drive them to their website and advertising.<sup>122</sup> Some of the U.S. professional sports leagues also began to host traditional fantasy sports contests.<sup>123</sup>

The UIGEA exemption for the funding of traditional fantasy sports allowed payment processors to continue doing business with traditional fantasy sports providers, even though payment processors could no longer safely accept funds from online sportsbooks or poker sites.<sup>124</sup>

---

<sup>117</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 124 (2016).

<sup>118</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law*, 3 HARV. J. SPORTS & ENT. L. 1, 7-10 (2012).

<sup>119</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law*, 3 HARV. J. SPORTS & ENT. L. 1, 7-10 (2012).

<sup>120</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1,32 (2016).

<sup>121</sup> Michael Militello, *The History of Fantasy Sports*, MEDIUM (Dec. 1, 2016), [https://medium.com/@michael\\_mvm/the-history-of-fantasy-sports-39b150d3451a](https://medium.com/@michael_mvm/the-history-of-fantasy-sports-39b150d3451a).

<sup>122</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 19-21 (2012).

<sup>123</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 20 (2012).

<sup>124</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1, 5-6 (2016).

This exemption allowed the burgeoning fantasy sports industry to continue to thrive.<sup>125</sup> At around the same time, Kevin Bonnet, a disgruntled poker blogger, responded to the UIGEA's crackdown on poker funding and favoritism toward fantasy sports by creating a new website that looked very much like an illegal sportsbook, but instead of allowing bettors to pick the winners of individual sporting events, allowed them to select groups of athletes.<sup>126</sup> To give his new contest an aura of legality under the UIGEA carve-out, Bonnet named his business "Fantasy Sports Live" and called his new type of games "daily fantasy sports." A new source of legal confusion was born.<sup>127</sup>

Although Bonnet's website never gained much traction, two other groups of entrepreneurs thereafter became much more successful with a venture into so-called "daily fantasy sports."<sup>128</sup> One company, FanDuel, which was an outgrowth of a Scottish prognostication business, very quickly raised upwards of \$6 million in financing from Comcast Ventures and sold an equity stake in their business to the National Basketball Association.<sup>129</sup> Meanwhile, an entirely American company, DraftKings, followed FanDuel's lead in entering the daily fantasy sports marketplace and granted an ownership stake to Major League Baseball.<sup>130</sup> By 2016, FanDuel and DraftKings each had raised upwards of \$1 billion in equity financing – transitioning themselves from startups

---

<sup>125</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 37-38 (2012).

<sup>126</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1, 6-7 (2016).

<sup>127</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 124 (2016).

<sup>128</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>129</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1, 7 (2016).

<sup>130</sup> Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELLECTUAL, SPORTS & ENT. L. FORUM 1, 7-8 (2016).

into companies that were highly leveraged by private equity firms.<sup>131</sup> This was despite the undeniable legal risks that both FanDuel and DraftKings faced at the time by operating their business models in the U.S. market.<sup>132</sup>

FanDuel and DraftKings initially thrived by offering “daily fantasy sports” – contests that, in their form, looked like illegal sports betting, but technically involved the selection of multiple real-world players, often across multiple real-world events.<sup>133</sup> Then, for a time in late 2015 and early 2016, these companies faced serious legal threats under state gambling laws, most notably New York law.<sup>134</sup> However, the federal government never filed any criminal charges against either company.<sup>135</sup> Soon thereafter, FanDuel and DraftKings, backed by their new sources of capital financing, were able to hire lobbyists and get certain state laws changed.<sup>136</sup>

Then, on May 14, 2018, U.S. Supreme Court rendered its decision in *Murphy v. NCAA* that overturned PASPA and changed everything for these two large “daily fantasy sports”

---

<sup>131</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>132</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>133</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>134</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>135</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020) Despite rumors of at least three federal grand jury investigation being convened no federal charges ever materialized. See Admin, *Here's Where The Federal Investigations Into Daily Fantasy Sports Might Be Focused*, LEGAL SPORTS REPORT (Mar. 18, 2016), <https://www.legalsportsreport.com/9053/dfs-federal-issues/>.

<sup>136</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

companies.<sup>137</sup> Upon the Supreme Court rendering its decision, FanDuel and DraftKings almost instantaneously transformed from being self-purported “daily fantasy sports” operators to embracing their identities as U.S. sportsbooks.<sup>138</sup> At present, not only do FanDuel and DraftKings continue to offer *cy pres* sports gambling under the moniker of “daily fantasy sports,” but they also now serve as the two of the largest sports gambling companies to openly operate subject to state licenses in the United States.<sup>139</sup>

## **II. SPORTS GAMBLING IN THE COURTS**

While a growing number of states have legalized and embraced sports betting, it took a long and winding road to arrive at this modern era.<sup>140</sup> This Part of the article highlights some of the important legal decisions that have shaped the current treatment of sports gambling in the United States.

### *A. NFL v. Delaware*

The first important legal decision to shape the modern status of sports betting in the United States was *NFL v. Delaware*.<sup>141</sup> This case pitted the legal interests of a state that sought to expand sports gambling (Delaware), against a U.S. professional sports league that opposed such expansion (the National Football League).<sup>142</sup> The dispute in *NFL v. Delaware* began when the Delaware Lottery, in 1977, publicly announced a plan to begin offering a lottery contest based on the results

---

<sup>137</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>138</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>139</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>140</sup> 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).

<sup>141</sup> 435 F. Supp. 1372 (D. Del. 1977).

<sup>142</sup> Nat'l Football League v. Delaware, 435 F. Supp. 1372, 1376- (D. Del. 1977).

of real-world NFL games.<sup>143</sup> The betting contest, called Scoreboard, was a pool type game that required participants to select correctly which team they believed would win several different NFL games.<sup>144</sup>

The NFL, which at the time opposed organized betting on its games, sued the State of Delaware, alleging that the Scoreboard contest created a forced association between the league and gambling, and thus that the contest constituted an unlawful interference with the league's property rights.<sup>145</sup> The NFL further alleged that the Delaware Lottery infringed on the NFL's trademarks by using team's city names in the context of their contest.<sup>146</sup>

The U.S. District Court for the District of Delaware, however, ruled almost entirely in the State of Delaware's favor.<sup>147</sup> The court held that the Delaware Lottery's use of NFL team names did not constitute general interference with any NFL property rights.<sup>148</sup> In addition, with respect to the NFL's trademark infringement claim, the court did not find any substantial wrongdoing because the Delaware Lottery used neither NFL logos, nor NFL team names, but rather simply city names.<sup>149</sup> The district court acknowledged that "[u]ndoubtedly when defendants print 'Philadelphia v. Los Angeles', the public reads 'Philadelphia Eagles v. Los Angeles Rams', and, in this sense, the words utilized by defendants have a secondary meaning."<sup>150</sup> Yet, still, the court concluded that this fact alone was insufficient to constitute infringement of plaintiffs' registered marks or any other form of unfair competition.<sup>151</sup> Moreover, the court opined that any *bona fide*

---

<sup>143</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1375 (D. Del. 1977).

<sup>144</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1376 (D. Del. 1977).

<sup>145</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1376 (D. Del. 1977).

<sup>146</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>147</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>148</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1378 (D. Del. 1977).

<sup>149</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>150</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>151</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

concern of confusion about the source of the lottery contest could be easily resolved by requiring the Delaware Lottery to post a clear and conspicuous disclaimer on its contest materials that disaffirmed any association or endorsement of the NFL.<sup>152</sup> Thus, the court concluded that it did not need to implement any broader injunction against the Delaware Lottery's NFL betting contest.<sup>153</sup>

Overall, the court's decision in *NFL v. Delaware* was a big win for the First Amendment and the doctrine of "nominative fair use," which allows a third party to use the name of a trademarked entity in a descriptive, rather than competitive, sense.<sup>154</sup> For the gaming industry, this decision was even more important as it called into doubt the ability of U.S. professional sports leagues to use their intellectual property rights as a sword to forestall states from legalizing new forms of sports gambling.<sup>155</sup> The *NFL v. Delaware* decision thus clarified that, absent the passing of new law, sports leagues would not have an easy time preventing states from expanding their available forms of sports gambling.<sup>156</sup> Of course, however, the sports leagues gained their new law in 1992 when Congress passed PASPA.<sup>157</sup>

#### *B. United States v. Cohen*

While the *NFL v. Delaware* decision pitted a state's economic interest in expanding sports gambling against a sports league's effort to forestall it, another important legal challenge to the attempted expansion of sports gambling came more than a decade later when the U.S. Court of

---

<sup>152</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>153</sup> Nat'l Football League v. Delaware, 435 F.Supp.1372, 1391 (D. Del. 1977).

<sup>154</sup> See Nat'l Football League v. Delaware, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>155</sup> John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 51 (2019).

<sup>156</sup> John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 51 (2019).

<sup>157</sup> See 28 U.S.C. §§ 3701-3704 (1992).



Appeals for the Second Circuit decided the criminal case, *United States v. Cohen*.<sup>158</sup> The *Cohen* litigation emerged out of the conduct of the President and CEO of World Sports Exchange, Jay Cohen, in accepting wagers from New York gamblers from his Antigua-based operation.<sup>159</sup> In March 1998, the United States arrested Cohen and charged him with eight counts of wrongdoing, many of which related to alleged violations of Wire Act.<sup>160</sup> While admitting to the underlying conduct, Cohen, however, alleged that his behavior fell under a safe harbor in the Wire Act because he believed he did not violate any laws within Antigua.<sup>161</sup>

The thrust of Cohen's legal defense relied specifically on two arguments: first, that he only took sports bets that were legal in both the place of origin and the destination of the transmission; and second, that he merely provided information that assisted in the placing of bets, as opposed to making the bets himself.<sup>162</sup> The U.S. Court of Appeals for the Second Circuit, nevertheless, fully rejected both of Cohen's legal arguments.<sup>163</sup> Noting that Cohen's assertion about where he took bets was incorrect and that Cohen's conduct separately violated New York law (a predicate offense to a Wire Act violation), the court found Cohen guilty of violating the Wire Act for operating a foreign sports betting operation that did business by phone and the Internet in the United States.<sup>164</sup>

The *Cohen* decision was a major blow to offshore sports gambling operators that had believed they would be able to get around federal laws that criminalized certain forms of sports gambling simply by setting up their operations overseas in jurisdiction in which sports gambling

---

<sup>158</sup> *United States v. Cohen*, 260 F.3d 68 (2<sup>d</sup> Cir. 2001).

<sup>159</sup> *United States v. Cohen*, 260 F.3d 68, 70-71 (2<sup>d</sup> Cir. 2001).

<sup>160</sup> *United States v. Cohen*, 260 F.3d 68, 71 (2<sup>d</sup> Cir. 2001).

<sup>161</sup> *United States v. Cohen*, 260 F.3d 68, 71 (2<sup>d</sup> Cir. 2001).

<sup>162</sup> *United States v. Cohen*, 260 F.3d 68, 73 (2<sup>d</sup> Cir. 2001).

<sup>163</sup> *United States v. Cohen*, 260 F.3d 68, 73-74 (2<sup>d</sup> Cir. 2001).

<sup>164</sup> *United States v. Cohen*, 260 F.3d 68, 74-75 (2<sup>d</sup> Cir. 2001).

was legal.<sup>165</sup> The more reputable offshore sportsbooks responded to *Cohen*, as well as a number of subsequent federal court decisions, by implementing geo-tracking technology to block individuals based in the United States from using their betting services.<sup>166</sup>

*C. The Three Early PASPA Decisions (Flagler, IMEGA and Markell)*

The next three court decisions pertinent to the modern legal status of sports gambling each addressed the outer contours of PASPA – the new anti-gambling statute that went into effect in 1992 to prevent states from expanding intrastate sports betting operations.<sup>167</sup> The first two of these challenges pitted the interests of private citizens against those of the United States Department of Justice.<sup>168</sup> Meanwhile, the third case, once again, pitted the State of Delaware against the interests of the NFL, as well as the other U.S. commercial sports leagues.<sup>169</sup>

In *Flagler v. U.S. Attorney for the District of New Jersey*, a private citizen, James Flagler, filed a *pro se* complaint against the United States and the U.S. Attorney for the District of New Jersey, Chris Christie, alleging that the Professional and Amateur Sports Protection Act violated the Tenth Amendment of the U.S. Constitution.<sup>170</sup> Flagler, among other things, alleged that because the U.S. Constitution is silent as to gambling (or gaming), the issue of gambling's legality

---

<sup>165</sup> There remains a great deal of confusion as to what conduct is legal online, and numerous websites provide questionable advice to bettors and operators. See e.g., GAMBLINGSITES.COM, *Sports Betting Laws From Around The World*, <https://www.gamblingsites.com/sports-betting/laws/> (last visited Nov. 23, 2019).

<sup>166</sup> For an overview of how geo-location tracking works. See Jodie Fleischer, et al., *DC's Sports Betting App Will Let You Bet District-Wide, Except for the Hundreds of Places It Won't Work*, NBC WASH. (Sep. 5, 2019), <https://www.nbcwashington.com/news/local/washington-dc-sports-betting-app-geofencing/1959020/>.

<sup>167</sup> See *Flagler v. United States Attorney for the District of N.J.*, 2:06-cv-03699-JAG-MCA (D. N.J. 2007); see *Interactive Media Ent. & Gaming Ass'n v. Holder*, 09-1301 (GEB) (D. N.J. 2011); see also *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

<sup>168</sup> See *Flagler v. United States Attorney for the District of N.J.*, 2:06-cv-03699-JAG-MCA (D. N.J. 2007); see *Interactive Media Ent. & Gaming Ass'n v. Holder*, 09-1301 (GEB) (D. N.J. 2011);

<sup>169</sup> *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

<sup>170</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322 (2019); see also *Flagler v. United States Attorney for the District of N.J.*, 2:06-cv-03699-JAG-MCA at 2 (D. N.J. 2007).

is reserved to the states.<sup>171</sup> Nevertheless, the U.S. District Court for the District of New Jersey dismissed Flagler's complaint without addressing any of his substantive arguments.<sup>172</sup> The court, in particular, held that Flagler lacked standing to challenge PASPA because he was merely a private citizen and not someone with a direct interest in the matter.<sup>173</sup> Further, Flagler failed to allege that his interest in betting on sporting events constituted a legally protectable right.<sup>174</sup>

Thereafter, a similar legal dispute emerged in *Interactive Media & Gaming Association v. Holder*, where the Interactive Media & Gaming Association ("iMEGA") along with three New Jersey horseracing associations sued then-Attorney General Eric Holder, attempting to challenge the Constitutionality of PASPA under the Tenth Amendment.<sup>175</sup> The iMEGA plaintiffs alleged that they, unlike Flagler, had standing to file a lawsuit because the association's membership sought to imminently provide gambling services if PASPA were overturned – thus, making their interests in the matter more direct than in *Flagler*.<sup>176</sup> Nevertheless, as in *Flagler*, the court in *iMEGA* once again held that the plaintiffs lacked standing—stating that only a U.S. state, and not a private plaintiff, is capable of asserting a commandeering claim under the Tenth Amendment.<sup>177</sup>

---

<sup>171</sup> *Flagler v. United States Attorney for the District of N.J.*, 2:06-cv-03699-JAG-MCA at 2-3 (D. N.J. 2007).

<sup>172</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322 (2019).

<sup>173</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322 (2019).

<sup>174</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322 (2019).

<sup>175</sup> *Interactive Media Ent. & Gaming Ass'n v. Holder*, 09-1301 (GEB) (D. N.J. 2011); *see also* Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322 (2019).

<sup>176</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 322 (2019); *see also* *Interactive Media Ent. & Gaming Ass'n v. Holder*, 09-1301 (GEB) (D. N.J. 2011).

<sup>177</sup> *Interactive Media Ent. & Gaming Ass'n v. Holder*, 09-1301 (GEB) (D. N.J. 2011).

Meanwhile, the third legal dispute, *Office of the Commissioner of Baseball v. Markell*, presented a very different legal posture.<sup>178</sup> Harkening back to the 1977 dispute in *NFL v. Delaware*, the U.S. professional sports leagues, here led by Major League Baseball, sought to stop the State of Delaware and its then governor, Jack Markell, from expanding Delaware's sports gambling offerings.<sup>179</sup> This time, however, instead of alleging trademark infringement, the leagues argued that the State of Delaware's attempt to expand its sports gambling violated PASPA – the new anti-gambling law that went into effect in 1992.<sup>180</sup> At the district court level, the judge in *Office of the Commissioner of Baseball v. Markell* denied the sports leagues an injunction to stop Delaware from legalizing a broader form of sports gambling.<sup>181</sup> This was because Delaware was one of the four states to enjoy a grandfather clause exemption from PASPA's anti-gambling requirements.<sup>182</sup> On appeal, however, the U.S. Court of Appeals for the Third Circuit reversed, finding that PASPA's grandfather clause only allowed the State of Delaware to offer sports gambling “to the extent that the scheme was conducted by that state” prior to PASPA's passing.<sup>183</sup> Since Delaware sought to expand, rather than maintain, its sports gambling offerings, the court found that the state's conduct indeed violated PASPA.<sup>184</sup>

#### *D. The New Jersey PASPA Lawsuits*

---

<sup>178</sup> See *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

<sup>179</sup> *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009).

<sup>180</sup> *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293, 296-297 (3d Cir. 2009). PASPA provided sports organizations a right to enforce the statute if games that they operated were the subject of wagering. See 28 U.S.C. § 3703 (1992).

<sup>181</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322-23 (2019).

<sup>182</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 322-23 (2019).

<sup>183</sup> *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293, 300-01 (3d Cir. 2009).

<sup>184</sup> *Ofc. Of Comm. Of Baseball v. Markell*, 579 F.3d 293, 300-01 (3d Cir. 2009).

Since the U.S. Court of Appeals for the Third Circuit's decision in *Office of the Commissioner of Baseball v. Markell*, the most significant, recent legal disputes related to sports gambling have involved the State of New Jersey seeking to implement state-sponsored sports gambling, while the U.S. commercial sports leagues have sought to prevent them from doing so under PASPA.<sup>185</sup> Initially, New Jersey failed in its efforts to gain legalized, intrastate sports betting.<sup>186</sup> However, ultimately the State of New Jersey succeeded at convincing the United States Supreme Court that PASPA indeed violated the U.S. Constitution.<sup>187</sup>

### 1. *Christie I*

The first legal action involving the U.S. commercial sports leagues and the State of New Jersey began in 2012 when the sports leagues sued New Jersey governor Chris Christie under PASPA, seeking to prevent his state from implementing a new law to legalize and regulate sports betting.<sup>188</sup> The State of New Jersey, in turn, sought to defend its right to implement sports betting legislation by arguing that PASPA violated the U.S. Constitution on a number of different grounds.<sup>189</sup> Upon hearing the parties' argument, the U.S. District Court for the District of New Jersey found PASPA constitutional based on Congress's constitutional right to govern interstate commerce, and thus glossed over some of New Jersey's other legal arguments.<sup>190</sup>

---

<sup>185</sup> See *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F.Supp. 2d 551 (D. N.J. 2013); see also *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F.Supp. 488, 491-492 (D. N.J. 2014).

<sup>186</sup> See *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (2014).

<sup>187</sup> *Murphy v. National Collegiate Athletic Association*, 1138 S. Ct. 1461, 1484-85 (2018).

<sup>188</sup> See *N.J.S.A. 5:12A-1, et seq*; see also Ryan M. Rodenberg & John T. Holden, *Sports Betting Has An Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 17 (2017).

<sup>189</sup> *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F.Supp. 2d 551, 558 (D. N.J. 2013). The equal footing doctrine is an unwritten constitutional doctrine that all states admitted after the original 13 states are admitted on "equal footing" to those already admitted. See generally Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761 (1997).

<sup>190</sup> *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F.Supp. 2d 551, 559 (D. N.J. 2013) *citing* *United States v. Riehl*, 460 F.2d at 458 (3d Cir. 1972).

The State of New Jersey then appealed the district court's ruling to the U.S. Court of Appeals for the Third Circuit, which upheld the lower court's decision.<sup>191</sup> A three-judge panel sitting for the U.S. Court of Appeals, found both that PASPA did not offend the anti-commandeering principal of the Tenth Amendment as the State of New Jersey had alleged, and that PASPA was a valid exercise of the federal supremacy power.<sup>192</sup> In addition, the majority opinion stated, "[n]othing in [PASPA's text] requires that the states keep any law in place." All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] by law" of gambling schemes."<sup>193</sup> The U.S. Court of Appeals for the Third Circuit, in addition, rejected the state appellants' equal sovereignty arguments.<sup>194</sup> Although the State of New Jersey petitioned the U.S. Supreme Court to hear the case, the high court ultimately declined certiorari.<sup>195</sup>

## 2. *Christie II*

After the Supreme Court's denial of certiorari in *Christie I*, New Jersey politicians returned to the drawing board in their effort to offer sports wagering to New Jersey.<sup>196</sup> Seizing upon language in *Christie I*, New Jersey politicians then drafted a law that, rather than create a new scheme to legalize and regulate sports betting, simply repealed "all state laws and regulations prohibiting sports wagering."<sup>197</sup> The key caveat to the New Jersey partial repeal, however, was that it only repealed the existing laws "to the extent they applied to sports wagering at a casino or

---

<sup>191</sup> Nat'l Collegiate Athletic Ass'n v. Gov. of N.J., 730 F.3d 208, 224-225 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (2014).

<sup>192</sup> Nat'l Collegiate Athletic Ass'n v. Gov. of N.J., 730 F.3d 208, 229-230 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (2014).

<sup>193</sup> Nat'l Collegiate Athletic Ass'n v. Gov. of N.J., 730 F.3d 208, 232 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (2014).

<sup>194</sup> Nat'l Collegiate Athletic Ass'n v. Gov. of N.J., 730 F.3d 208, 239-240 (3d Cir. 2013) *cert. denied* 134 S. Ct. 2866 (2014).

<sup>195</sup> 134 S. Ct. 2866 (2014).

<sup>196</sup> See Nat'l Collegiate Athletic Ass'n v. Christie, 61 F.Supp. 488, 491-492 (D. N.J. 2014).

<sup>197</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 61 F.Supp. 488, 494 (D. N.J. 2014).

gambling house operating in ... in Atlantic City or a running or harness horse racetrack ... by persons 21 years of age or older.”<sup>198</sup> Thus, one could reasonably define the new statute as a partial, rather than total, repeal.<sup>199</sup>

New Jersey legislators had believed that their repeal of the existing state gambling laws served as a creative end-around to PASPA because it did not amount to passing new law to legalize sports gambling, but rather entailed the mere repeal of existing law.<sup>200</sup> Yet, despite the state’s best efforts to couch their actions as a repeal of existing sports betting laws, the U.S. commercial sports leagues once again sued New Jersey under PASPA, seeking a permanent injunction to prevent New Jersey from opening its door to sports betting.<sup>201</sup> And, once again, the lower courts found in favor of the sports leagues—finding that PASPA preempted New Jersey’s law and granted a permanent injunction.<sup>202</sup>

After the merits panel ruling, however, the U.S. Court of Appeals for the Third Circuit vacated its decision in favor of the NCAA and granted an en banc hearing.<sup>203</sup> The en banc panel of Third Circuit, once again, held that New Jersey’s intended legal action violated PASPA because even though the language of the law was one of repeal, the effect was one of authorization, in that racetracks and casinos were permitted to begin accepting sports wagers.<sup>204</sup> The decision further held that PASPA does not impermissibly commandeer the state.<sup>205</sup>

---

<sup>198</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 61 F.Supp. 488, 494-495 (D. N.J. 2014).

<sup>199</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 61 F.Supp. 488, 494-495 (D. N.J. 2014).

<sup>200</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 61 F.Supp. 488, 495 (D. N.J. 2014).

<sup>201</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 61 F.Supp. 488, 495 (D. N.J. 2014).

<sup>202</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 61 F.Supp. 488, 503-504 (D. N.J. 2014).

<sup>203</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 832 F. 3d 389, 390 (3d Cir. 2016).

<sup>204</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 832 F. 3d 389, 396-397 (3d Cir. 2016).

<sup>205</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 832 F. 3d 389, 398-399 (3d Cir. 2016).

Nevertheless, the decision of the en banc panel upholding the permanent injunction lacked unanimity.<sup>206</sup> One dissenting opinion concluding that New Jersey did exactly what the Third Circuit said they were entitled to do by repealing their existing law.<sup>207</sup> Meanwhile, the second dissent stressed that what PASPA does offends the anti-commandeering doctrine within the Tenth Amendment, and while the federal government is capable of preempting state law, PASPA does not do that.<sup>208</sup>

### *3. Murphy v. National Collegiate Athletic Association*

Emboldened by the dissenting opinions by certain Third Circuit judges during the en banc appeal, the State of New Jersey, once again in *Christie II*, petitioned the U.S. Supreme Court for a writ of certiorari.<sup>209</sup> This time, however, the U.S. Supreme Court agreed to hear the case.<sup>210</sup> Around the same time, Chris Christie, who was the lead, named defendant in the case was replaced as New Jersey's Governor by Phil Murphy—leading to the updated caption.<sup>211</sup>

On May 14, 2018, the U.S. Supreme Court then delivered its opinion in *Murphy* that would fundamentally change the sports betting landscape in the United States.<sup>212</sup> Authored by Justice Samuel A. Alito, the U.S. Supreme Court held that PASPA impermissibly commandeers the states into maintaining their sports gambling laws.<sup>213</sup> Thus, PASPA was void.<sup>214</sup>

---

<sup>206</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 832 F. 3d 389, 402 (3d Cir. 2016) (Judge Fuentes joined Judge Vanaskie in finding that PASPA impermissibly commandeered the state legislature into maintaining laws that the state no longer desired).

<sup>207</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 832 F. 3d 389, 404 (3d Cir. 2016).

<sup>208</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 832 F. 3d 389, 408-411 (3d Cir. 2016).

<sup>209</sup> See Petition for Writ of Certiorari, Christie v. Nat'l Collegiate Athletic Association, Nos. 16-476 & 16-477 (U.S. Oct. 7, 2016).

<sup>210</sup> SCOTUSBLOG, *Murphy v. National Collegiate Athletic Association*, <https://www.scotusblog.com/case-files/cases/murphy-v-national-collegiate-athletic-association-2/> (last visited Nov. 24, 2019).

<sup>211</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).

<sup>212</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).

<sup>213</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).

<sup>214</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).



Justice Alito began the U.S. Supreme Court's majority opinion by highlighting the history of evolving and competing views on gambling in the United States, and in New Jersey, in particular.<sup>215</sup> He wrote specifically that "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States."<sup>216</sup> Indeed, while Congress has the authority to regulate sports gambling directly, it does not have the power to dictate how states legislate sports gambling.<sup>217</sup>

The Court was further tasked with determining if the offensive portions of PASPA could be severed from the statute in a manner that would allow PASPA to survive.<sup>218</sup> However, the Court determined that severing the unconstitutional aspects of PASPA would deflate the statute in a manner that Congress had never intended.<sup>219</sup> Potentially foreseeing future litigation, Justice Thomas, in his concurrence, stated "I do 'doubt' that Congress can prohibit sports gambling that does not cross state lines."<sup>220</sup> Indeed, even the dissents in *Murphy*, which centered on the severability of the provision at issue, agreed that at least certain aspects of PASPA were unconstitutional.<sup>221</sup>

---

<sup>215</sup> 138 S.Ct. 1461, 1468-1469 (2018).

<sup>216</sup> 138 S.Ct. 1461, 1475 (2018).

<sup>217</sup> 138 S.Ct. 1461, 1479-1481 (2018).

<sup>218</sup> 138 S.Ct. 1461, 1481-1482 (2018).

<sup>219</sup> 138 S.Ct. 1461, 1484-1485 (2018).

<sup>220</sup> 138 S.Ct. 1461, 1485 (2018) (Thomas, J. concurring).

<sup>221</sup> 138 S.Ct. 1461, 1489 (2018). Justice Ginsburg's dissent emphasized the heavy hand that the majority purportedly used in order to strike PASPA as wholly unconstitutional. Ginsburg wrote "Assuming, arguendo, a 'yes' answer to that question, there would be no cause to deploy a wrecking ball destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does today. Leaving out the alleged infirmity, i.e., 'commandeering' state regulatory action by prohibiting the States from 'authoriz[ing]' and 'licens[ing]' sports-gambling schemes, two federal edicts should remain intact." 138 S.Ct. 1461, 1489 (2018) (internal citations omitted).

The landmark Supreme Court decision in *Murphy* immediately opened the doors for legalized sports wagering beyond the borders of Nevada, Delaware, Montana, and Oregon.<sup>222</sup> Even before the Supreme Court's decision, U.S. states were preparing for the end of PASPA, whether it came as a result of the New Jersey litigation or via congressional repeal.<sup>223</sup> Before the end of 2018, more than 20 states had introduced legislation that would legalize sports betting in some form.<sup>224</sup> The enthusiasm for sports betting would sustain into 2019 and 2020, as states continued to look for an opportunity to raise revenue in a manner that does not require implementing a new tax.<sup>225</sup> The push for sports betting remains important; however, states are learning that in order for sports betting to be a significant boon for state coffers, regulation and implementation must be done carefully.<sup>226</sup> Excessive burdens on operators or customers risk leaving money in consumers' pockets, or sending the money to the still thriving black market.<sup>227</sup>

### **III. SPORTS GAMBLING TODAY**

The enthusiasm for legalized sports wagering since the *Murphy* decision has been palpable.<sup>228</sup> Sports betting legalization has attracted interest from more than 35 states.<sup>229</sup> Even states that have almost no legalized gambling such as South Carolina have explored legalizing

---

<sup>222</sup> See generally John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020).

<sup>223</sup> For example, Pennsylvania passed a sports betting law in October of 2017 that was designed to take effect when PASPA was no longer in place. See Phil Helsel, *Sports Betting is Now Legal in Several States Many Others are Watching from the Sidelines*, NBC NEWS (Aug. 13, 2018), <https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211>.

<sup>224</sup> Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT (updated Sep. 4, 2019), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/>.

<sup>225</sup> See Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. (2020).

<sup>226</sup> John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020) (describing the factors impacting the success of legalized sports betting).

<sup>227</sup> See e.g., Associated Press, *Why Rhode Island Casinos Are Getting Crushed on Sports Betting*, MARKETWATCH (Mar. 29, 2019), <https://www.marketwatch.com/story/why-rhode-island-casinos-are-getting-crushed-on-sports-betting-2019-03-29>.

<sup>228</sup> See Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Gambling*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html>.

<sup>229</sup> See Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT (updated Jan 11, 2020), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/>.

sports betting.<sup>230</sup> The rise of legal and regulated sports betting, however, has not been without its obstacles to a thriving sports gambling marketplace.<sup>231</sup> The most notable obstacle has been misguided efforts by the professional sports leagues to extract a portion of sports betting proceeds from sportsbook operators.<sup>232</sup> There has also been a looming threat of the federal government moving to implement a comprehensive regulatory scheme in a way that PASPA failed to do.<sup>233</sup> Yet, despite these threats, the legal sports betting market continues to expand.<sup>234</sup>

#### *A. The Size of the Market*

As of the end of 2019, 19 states and the District of Columbia had passed laws legalizing sports wagering.<sup>235</sup> Of those 19 states, 14 were accepting bets of some kind at the end of the first full year, without a federal ban in place.<sup>236</sup> While the national market remains immature, there

---

<sup>230</sup> Ryan Butler, *South Carolina Sports Betting Bill Introduced Despite Odds*, GAMBLING.COM (Dec. 17, 2018), <https://www.gambling.com/news/south-carolina-sports-betting-bill-introduced-despite-odds-1720800>.

<sup>231</sup> See generally, Geoff Mulvihill, *Why Sports Betting Hasn't Gone Nationwide Yet After Supreme Court Ruling*, USA TODAY (June 23, 2019), <https://www.usatoday.com/story/money/2019/06/23/sports-betting-gambling-states-legal-supreme-court-ruling/1542110001/>.

<sup>232</sup> See generally, Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have An Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J. L. & BUS. 1 (2018); see also John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31 (2019). Even before the Supreme Court issued a decision in the *Murphy* case, sports leagues had begun positioning to receive a percentage of the total amount wagered in a number of states. The ask, for what was initially termed an “integrity fee,” would undergo several rebranding efforts including being referred to as a royalty, and then an ask that state legislators mandate the use of official league data, which would necessitate a payment to sports league partners who pay for the privilege to distribute sports betting data direct from the sports leagues. See SPORTS HANDLE, *Integrity Fees-What Are They And Why Are They So Controversial?*, <https://sportshandle.com/integrity-fees/> (last visited Nov. 24, 2019).

<sup>233</sup> While legislation was introduced in 2018, it appears to have been largely symbolic, as it was introduced by Senator Orrin Hatch and Charles Schumer days before Hatch was scheduled to retire. See John Brennan, *Federal Sports Betting Bill Has ‘Integrity’ In The Title And Data In The Details*, SPORTS HANDLE (Dec. 19, 2018), <https://sportshandle.com/federal-sports-betting-bill-introduced/>. A bill was similarly rumored to be coming in 2019, with Orrin Hatch’s Utah senate seat successor Mitt Romney joining Charles Schumer, but the bill never materialized. See John Holden, *Remember The Federal Sports Betting Bill? Apparently It’s Still A Thing*, LEGAL SPORTS REPORT (Sep. 6, 2019), <https://www.legalsportsreport.com/35368/federal-sports-betting-bill-official-league-data/>.

<sup>234</sup> See Bob Woods, *Making a Wager? Half of Americans Live in States Soon To Offer Sports Gambling*, CNBC (July 10, 2019), <https://www.cnn.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html>.

<sup>235</sup> David Fucillo, *The State of Sports Betting*, SB NATION (last visited Nov. 24, 2019), <https://www.sbnation.com/a/sports-betting-gambling-state-legislation-tracker>.

<sup>236</sup> David Fucillo, *The State of Sports Betting*, SB NATION (last visited Nov. 24, 2019), <https://www.sbnation.com/a/sports-betting-gambling-state-legislation-tracker>. Two states are outliers within these 14, as New York passed a law in 2013 allowing sports betting, if legalized, at a small number of upstate casinos, several

have been some observable trends regarding which regulatory models best equate to greater sportsbook revenues.<sup>237</sup> Nevada, which set the benchmark for sports betting revenue, has, to date, not seen a siphoning off of sports betting revenue, as Las Vegas remains a destination city for gamblers of all varieties.<sup>238</sup> While Nevada remains a destination for sports bettors, New Jersey is quickly catching up, even surpassing the amount wagered in Nevada in some months.<sup>239</sup> As of the beginning of November 2019, New Jersey sportsbooks had seen revenue of more than \$330 million, which equated to a share for the state (via taxes) of more than \$43 million.<sup>240</sup>

Thus far, New Jersey is a true success story in the wake of their sports betting launch; however, in a strict gross revenue sense, other states demonstrate that sports betting is far from a sure thing to significantly boost state coffers.<sup>241</sup> The example for overestimating revenue from sports betting at the time of writing has been Rhode Island.<sup>242</sup> The sparsely populated state had

---

hours from major population centers. See Jon Campbell & Joseph Spector, *Supreme Court Ruling Clears The Way For Sports Gambling at NY Casinos*, DEMOCRAT & CHRONICLE (May 14, 2018), <https://www.democratandchronicle.com/story/news/politics/albany/2018/05/14/sports-betting-new-york/607152002/>. Similarly, a provision in New Mexico gaming compacts allowed certain tribal casinos to offer sports wagering without the state passing any new legislation, as such, a small number of tribal casinos in the state have opened sportsbooks. See John Holden, *So How Exactly Is New Mexico Sports Betting Legal, And What Does It Mean In Other States*, LEGAL SPORTS REPORT (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/>.

<sup>237</sup> For an overview of different regulatory models see John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020).

<sup>238</sup> In 2018, Nevada sportsbooks saw their most profitably year on record (dating to 1984). UNLV CENTER FOR GAMING RESEARCH, NEVADA SPORTS BETTING TOTALS 1-7 (Jan. 2019), available at: [https://gaming.unlv.edu/reports/NV\\_sportsbetting.pdf](https://gaming.unlv.edu/reports/NV_sportsbetting.pdf).

<sup>239</sup> See Nick Corasaniti, *Move Over, Nevada: New Jersey Is the Sports Betting Capital of the Country*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/nyregion/nj-sports-betting.html>.

<sup>240</sup> LEGAL SPORTS REPORT, *US Sports Betting Revenue and Handle*, <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited Nov. 24, 2019).

<sup>241</sup> See LEGAL SPORTS REPORT, *US Sports Betting Revenue and Handle*, <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited Nov. 24, 2019).

<sup>242</sup> See LEGAL SPORTS REPORT, *US Sports Betting Revenue and Handle*, <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited Nov. 24, 2019).

anticipated \$11.5 million in revenue in the state's first fiscal year of offering sports betting.<sup>243</sup> Instead, with several months remaining before the end of the year, the state had generated only \$150,000.<sup>244</sup> Other early adopter states, including West Virginia, Pennsylvania and Mississippi, also saw revenues below estimates.<sup>245</sup> A number of factors play a role in the revenue generated by sportsbooks and, in turn, the money returned to the states, including tax rates, the variety of offerings and the product's accessibility.<sup>246</sup>

### *B. Mobile versus Brick and Mortar*

The growth of e-commerce is reshaping nearly every industry as 53 percent of all purchases are reported to have been digitally influenced.<sup>247</sup> Sports betting appears to follow the trend with some experts predicting that 90 percent of sports betting will be done on mobile phones by the end of the next decade.<sup>248</sup> New Jersey already has seen upwards of 80 percent of its sports wagers placed online or via mobile phones.<sup>249</sup> Part of New Jersey's success emerges from that the state

---

<sup>243</sup> Jennifer McDermott, *Rhode Island's Sports Betting Revenue Projection was \$11.5 million. So Far? \$150k*, HARTFORD COURANT (Mar. 29, 2019), <https://www.courant.com/sports/hc-sp-rhode-island-sports-betting-revenue-20190329-20190329-kann4s3oyrbpbirolfjpspzfha-story.html>.

<sup>244</sup> Jennifer McDermott, *Rhode Island's Sports Betting Revenue Projection was \$11.5 million. So Far? \$150k*, HARTFORD COURANT (Mar. 29, 2019), <https://www.courant.com/sports/hc-sp-rhode-island-sports-betting-revenue-20190329-20190329-kann4s3oyrbpbirolfjpspzfha-story.html>.

<sup>245</sup> Kendall Baker, *States See Disappointing Tax Revenue from Legal Sports Betting*, AXIOS (Apr. 22, 2019), <https://www.axios.com/legal-sayports-betting-tax-revenue-new-jersey-e40237af-b442-484d-a4d9-49fbbb154a81.html>.

<sup>246</sup> See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. (2020).

<sup>247</sup> See Jason Goldberg, *The Future of Brick-And-Mortar Retail Is Mobile*, FORBES (Nov. 26, 2018), <https://www.forbes.com/sites/jasongoldberg/2018/11/26/the-future-of-brick-and-mortar-retail-is-mobile/#6fb1181446ba>.

<sup>248</sup> Todd Shriber, *US Sports Betting Market Will Be 90 Percent Online and Mobile Within a Decade, Industry Experts Assert*, CASINO.ORG (June 14, 2019), <https://www.casino.org/news/us-sports-betting-market-will-be-90-percent-online-or-mobile-within-a-decade/>.

<sup>249</sup> Todd Shriber, *US Sports Betting Market Will Be 90 Percent Online and Mobile Within a Decade, Industry Experts Assert*, CASINO.ORG (June 14, 2019), <https://www.casino.org/news/us-sports-betting-market-will-be-90-percent-online-or-mobile-within-a-decade/>.

quickly opened up mobile sports betting.<sup>250</sup> Other states, like Pennsylvania, who were slower to authorize a mobile component, have struggled to generate volumes similar to those of New Jersey.<sup>251</sup>

While there are a number of factors that states must consider in deciding what type of sports betting to allow, there has been a belief that not having mobile wagering will increase foot traffic at casinos, and while this may be true, states that have licensed sports betting have also seen a similar increase at brick and mortar facilities.<sup>252</sup> Indeed, many concerns regarding mobile wagering can be controlled via complex identity verification and geolocation tracking applications.<sup>253</sup> For example, one of the considerations with adding a mobile component to sports betting legislation is that if the legal sports betting market is to recapture money from the illegal market, the legal market must offer competitive and desirable alternatives to the illegal market.<sup>254</sup>

Another concern about mobile sports betting is that experts in the study of problem gambling believe “online gambling makes it easier for someone who engages in pathological forms of gambling to engage in these behaviors.”<sup>255</sup> There also are outstanding questions about whether the mechanisms to identify problem gamblers, underage gamblers, and inebriated gamblers are

---

<sup>250</sup> See Steve Silverman, *Betting-Friendly New Jersey Leads The Way For Sports Wagering*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/stevesilverman/2019/11/15/betting-friendly-new-jersey-leads-the-way-for-sports-wagering/#648298cd1398>.

<sup>251</sup> Jill R. Dorson, *Pros, Cons Of Legalizing Sports Betting Fast Versus Taking It Slow*, SPORTS HANDLE (May 15, 2019), <https://sportshandle.com/sports-betting-rush-slow/>. Some of Pennsylvania’s delay was due to concerns regarding the state’s related launch of mobile casino gaming, and reinterpretation of the Wire Act. *Id.* West Virginia similarly saw low sports betting numbers, after mobile wagering was abruptly halted in the state following a contract dispute between suppliers. See Jill R. Dorson, *Delaware North Sue Miami Over West Virginia Sportsbook Contract*, SPORTS HANDLE (Apr. 19, 2019), <https://sportshandle.com/west-virginia-sports-betting-dispute/>.

<sup>252</sup> See Kevin Shelly, *When It Comes To Retail Sports Betting, Valley Forge Is All About Foot Traffic*, PLAY PENNSYLVANIA (Aug. 1, 2019), <https://www.playpennsylvania.com/valley-forge-fanduel-retail-traffic/>.

<sup>253</sup> See Martin Derbyshire, *What Is Geolocation And How It Works On Gambling Websites In NJ*, NJ GAMBLING WEBSITES (Apr. 5, 2018), <https://www.njgamblingwebsites.com/geolocation-technology-works-new-jersey/>.

<sup>254</sup> See Brett Smiley, *How The U.S. Legal Sports Betting Business Is Fundamentally Disadvantaged*, SPORTS HANDLE (Nov. 21, 2019), <https://sportshandle.com/legal-sports-betting-disadvantages/>.

<sup>255</sup> Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 333 (2019).

sophisticated enough to identify and block these particular individuals when participating in online, rather than brick-and-mortar, gambling.<sup>256</sup> Thus, some argue that U.S. states should move gingerly toward allowing mobile sports betting, even where they have already legalized sports betting and brick-and-mortar locations.<sup>257</sup>

### *C. Illegal Market Remains Significant*

Meanwhile, eradicating the illegal gambling market, or at least reducing its size, has long been viewed as one of the principal benefits of legalizing sports betting.<sup>258</sup> One survey conducted prior to the *Murphy* decision reported that 70 percent of respondents would move some or all of their sports betting from the illegal market into the legal market.<sup>259</sup> Findings for the period between the *Murphy* decision and the end of 2019 show that, at least in New Jersey, the availability of sports betting translated into a lot of people betting, with a sample reporting 19 percent of respondents having bet on sports in the previous year.<sup>260</sup> The study of New Jersey bettors further revealed that nearly a year after the introduction of legal sports betting, almost half of bettors were still wagering with illegal offshore sportsbooks and 15 percent of bettors still wagered with a local

---

<sup>256</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 333 (2019).

<sup>257</sup> See e.g., Editorial Board, *The Headwinds Against Legalized Sports Betting*, CHRISTIAN SCI. MONITOR (Sep. 30, 2019), <https://www.csmonitor.com/Commentary/the-monitors-view/2019/0930/The-headwinds-against-legalized-sports-betting>.

<sup>258</sup> See e.g., Martin Derbyshire, *Legal Sportsbooks Have To Dominate Illegal Ones And Lawmakers Are Key*, PLAYUSA (June 18, 2019), <https://www.playusa.com/lawmakers-sports-betting-market/>; see also Matt Volz & Geoff Mulvihill, *Handful of US States are Poised to Legal Sports Betting*, Associated Press (Apr. 23, 2019), <https://apnews.com/3ab98743f50a4a49a2fe64655234d495>; see also Ronald J. Lampard & Jonathan Williams, *It's A Sure Bet: States Will Keep Legalizing Sports Gambling*, WASH. EXAMINER (July 17, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/its-a-sure-bet-states-will-keep-legalizing-sports-gambling>.

<sup>259</sup> Michelle Minton, *Legalizing Sports Betting in the United States*, COMPETITIVE ENTER. INST. (Mar. 15, 2018), <https://cei.org/content/legalizing-sports-betting-united-states>.

<sup>260</sup> John Holden, *A Look inside the Latest Research on Sports Betting and Fantasy Sports*, PLAYUSA (Aug. 22, 2019), <https://www.playusa.com/fantasy-sports-and-sports-betting-research-2019/>.

bookie.<sup>261</sup> There are a number of reasons that stakeholders want to eliminate the illegal sports betting market, and chief amongst them is corruption of sporting events.<sup>262</sup>

The threat of match-fixing also remains a very real threat to sport globally, and while many believe that American professional athletes are paid too well to be bribed to fix a game, a modern reality is that match-fixers will resort to other means if bribery does not accomplish the fixer's objective.<sup>263</sup> Most match fixing happens in illegal markets, where fixers are less likely to be caught and sportsbooks may not even care that a game is being fixed.<sup>264</sup> Indeed, one of the most effective means for stamping out corruption in sport has been to provide a market that offers competitive legal alternatives, as a market with robust competition can act as a check, and increase the costs of corruption.<sup>265</sup>

While the legal market can hope to recapture some of the money going to the illegal market, there are certain features present in the illegal market, which the legal market likely deems too undesirable to consider, even at the cost of losing money and bettors to the illegal market.<sup>266</sup> One of the advantages widely cited as a benefit that illegal bookmakers enjoy is that they are often

---

<sup>261</sup> John Holden, *A Look inside the Latest Research on Sports Betting and Fantasy Sports*, PLAYUSA (Aug. 22, 2019), <https://www.playusa.com/fantasy-sports-and-sports-betting-research-2019/>.

<sup>262</sup> See generally, Declan Hill, *A Critical Mass of Corruption: Why Some Football Leagues Have More Match-Fixing Than Others*, 11 INT'L J. SPORTS MARKETING & SPONSORSHIP 38 (2010) (noting that one of the conditions necessary for match-fixing to thrive is the existence of illegal gambling markets).

<sup>263</sup> See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*: 42 N. KY. L. REV. 453-455 (2015); see also John Holden, *Match Fixing and Other Manipulations In Sports Betting: A Primer*, LEGAL SPORTS REP. (June 6, 2018), <https://www.legalsportsreport.com/20922/match-fixing-primer-sports-betting/>; see also John Holden, *Match Fixers Have More Tools To Manipulate Sports Betting Outcomes Than Just Bribery*, LEGAL SPORTS REP. (June 6, 2018), <https://www.legalsportsreport.com/20984/match-fixing-primer-part-ii/>.

<sup>264</sup> When asked about where match-fixing happens, sport corruption expert Declan Hill stated: "... only stupid people fix in regulated markets. Only dummies fix on a regulated market. Why would you fix on a regulated market if you can go to Asia, which as everyone knows, they don't care. It's volume, volume, volume ...." See John Holden, *What Gaming in Holland Can Teach the US Sports Betting Market*, LEGAL SPORTS REPORT (July 18, 2019), <https://www.legalsportsreport.com/34412/holland-gaming-us-sports-betting/>.

<sup>265</sup> John T. Holden, *Ghosts in the Machine: How Corrupters Manipulate Games that Never Happen*, 22 GAMING L. REV. 630, 633-634 (2018).

<sup>266</sup> See Brett Smiley, *How The U.S. Legal Sports Betting Business Is Fundamentally Disadvantaged*, SPORTS HANDLE (Nov. 21, 2019), <https://sportshandle.com/legal-sports-betting-disadvantages/>.



willing to extend customers credit to make wagers.<sup>267</sup> While some states have authorized the use of credit cards at sportsbooks, a significant number of those transactions are being blocked by issuing banks,<sup>268</sup> likely out of concerns regarding federal law.<sup>269</sup> Another advantage of the illegal market is that illegal bookies are not restricted by state gambling commissions or lottery rules that forbid them from taking bets on certain events, such as New Jersey's ban on wagering on in-state college teams.<sup>270</sup> The decision to not allow lawful betting on certain in-state games will not eliminate the demand for such wagers; instead, it will simply force those wishing to place wagers into the unregulated market.<sup>271</sup>

#### *D. New State Laws*

Finally, the new state laws that some legislators have approved in the aftermath of *Murphy* have not created a true free market for legalized sports gambling, but rather they have produced a highly regulated, oligopoly market, in which state legislators have granted a few large and powerful companies control over the legal sports gambling industry.<sup>272</sup> U.S. states currently fall into three general categories in terms of their legal treatment of sports gambling.<sup>273</sup> At present,

---

<sup>267</sup> Brett Smiley, *How The U.S. Legal Sports Betting Business Is Fundamentally Disadvantaged*, SPORTS HANDLE (Nov. 21, 2019), <https://sportshandle.com/legal-sports-betting-disadvantages/>.

<sup>268</sup> Brett Smiley, *How The U.S. Legal Sports Betting Business Is Fundamentally Disadvantaged*, SPORTS HANDLE (Nov. 21, 2019), <https://sportshandle.com/legal-sports-betting-disadvantages/>.

<sup>269</sup> See e.g., 18 U.S.C. § 1084 (1994); see also 31 U.S.C. §§ 5361-5367 (2006).

<sup>270</sup> See John Holden, *How NJ Sports Betting Set Up A Potential Constitutional Problem For Everyone*, LEGAL SPORTS REPORT (June 7, 2019), <https://www.legalsportsreport.com/32820/in-state-nj-sports-betting/>.

<sup>271</sup> John Holden, *How NJ Sports Betting Set Up A Potential Constitutional Problem For Everyone*, LEGAL SPORTS REPORT (June 7, 2019), <https://www.legalsportsreport.com/32820/in-state-nj-sports-betting/>. Indeed, one sports integrity executive suggested that most regulators do not have an understanding of the betting market and where corruption happens. Jack Kennedy, of Sportradar, stated: "It's all about if they [regulators] understand the state of the market, and in all of our experiences, I am sure we will say most people who are tasked with engaging on this problem don't understand the market at all. They don't understand where the true risk actually comes from." John Holden, *What Gaming In Holland Can Teach The US Sports Betting Market*, LEGAL SPORTS REPORT (July 18, 2019), <https://www.legalsportsreport.com/34412/holland-gaming-us-sports-betting/>.

<sup>272</sup> See Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTS HANDLE (June 4, 2019), <https://sportshandle.com/sports-betting-data-antitrust/>.

<sup>273</sup> See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

eleven states (plus the District of Columbia) allow for a limited number of companies, subject to a license, to offer sports gambling at brick and mortar facilities (e.g. casinos, racetracks) and on the Internet.<sup>274</sup> Eight states allow for a limited number of companies, subject to a license, to offer sports gambling at brick and mortar facilities, but continue to disallow all Internet betting.<sup>275</sup> Meanwhile, 31 states continue to disallow all forms of sports gambling whatsoever.<sup>276</sup>

While sports gambling regulations vary by state, there are certain common themes that exist across most, if not all, states' gambling regulations.<sup>277</sup> First, every state that allows for sports gambling, in any form, requires any entity that seeks to offer sports gambling first to obtain a license from the relevant agency in the state.<sup>278</sup> This means that no state, in any capacity, allows for entrepreneurs to offer sports gambling without a license.<sup>279</sup> While a few low-population states such as Delaware and Rhode Island limit access to sports gambling licenses to already-licensed casinos,<sup>280</sup> most states require potential licensees to pay a substantial fee to offer sports gambling. In many cases, the licensing fee chills free market competition.<sup>281</sup>

---

<sup>274</sup> See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>275</sup> See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>276</sup> See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>277</sup> See generally, See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>278</sup> KEITH MILLER, *THE LAW OF REGULATED GAMBLING: A PRACTICAL GUIDE FOR BUSINESS LAWYERS*, 249-250 (Am. Bar Ass'n 2020).

<sup>279</sup> KEITH MILLER, *THE LAW OF REGULATED GAMBLING: A PRACTICAL GUIDE FOR BUSINESS LAWYERS*, 249-250 (Am. Bar Ass'n 2020).

<sup>280</sup> See Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 325-26, 330 (2019) (discussing the much higher tax rates for sports betting in these states, or, perhaps explained more eloquently, the partnership arrangement between the state and its few state-operated casinos).

<sup>281</sup> For example, the state of Pennsylvania charges a licensing fee of \$10 million (on top of a tax rate above 30 percent), this has translated into fewer operators entering the market. See Eric Raskin, *5 Differences Between Pa and NJ Sports Betting Law*, PENN BETS (May 1, 2019), <https://www.pennbets.com/5-differences-pa-nj-sports-betting-law/>.

In addition, most states that allow for online sports gambling require a prospective applicant for an online gambling license to have a casino partner with a brick-and-mortar location.<sup>282</sup> For example, the State of New Jersey allows each of its brick-and-mortar casinos to choose up to three online providers “to provide internet sports-betting services in conjunction with their wagering lounge.”<sup>283</sup> The dual requirements that potential online operators work with a brick and mortar partner and that the brick and mortar operators may only choose a limited number of online companies has a further chilling effect on the ability for smaller, or less well-known, companies to enter the online sports gambling marketplace.<sup>284</sup>

There is also a financial component to the new, state gambling laws. Beyond the paying of licensing fees, licensed sports gambling operators further must pay an annual tax to each state in which they operate.<sup>285</sup> The amount of this tax varies by state, with most states settling on a tax rate between eight and sixteen percent of “Gross Gaming Revenue.”<sup>286</sup> Gross Gaming Revenue “represents the difference between a sportsbook’s amount wagered and amount won.”<sup>287</sup> Many observers astutely describe Gross Gaming Revenue as the gambling equivalent of Net Sales or Gross Profit because it does not allow gambling operators to subtract any business costs other than

---

<sup>282</sup> See Matt Rybaltowski, *The Skins Game: Following Landmark Deal, Penn National Gains Flexibility To Leverage Primary Skins*, SPORTS HANDLE (Aug. 14, 2019), <https://sportshandle.com/penn-national-gains-skin-flexibility/>.

<sup>283</sup> Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 327 (2019).

<sup>284</sup> Indeed, many of the deals for access to “skins” in jurisdictions with mobile betting tethered to brick and mortar casinos have gone to major companies. See Matt Rybaltowski, *The Skins Game: Following Landmark Deal, Penn National Gains Flexibility To Leverage Primary Skins*, SPORTS HANDLE (Aug. 14, 2019), <https://sportshandle.com/penn-national-gains-skin-flexibility/>.

<sup>285</sup> For a list of each states’ tax rate. See THE LINES, *US Sports Betting Revenue 2020*, <https://www.thelines.com/betting/revenue/>, (last visited Jan. 30, 2020).

<sup>286</sup> See THE LINES, *US Sports Betting Revenue 2020*, <https://www.thelines.com/betting/revenue/>, (last visited Jan 30, 2020).

<sup>287</sup> See Definition of Gross Gaming Revenue, CORPORATE FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/gross-gaming-revenue-ggr/> (last visited Jan. 23, 2020).

the amount paid in prizes to contest winners.<sup>288</sup> Much like licensing fees, this tax keeps smaller and more entrepreneurial companies excluded from the market by making startup costs arguably prohibitive.<sup>289</sup>

Finally, while the first states to license sports gambling in the aftermath of *Murphy* scoffed at the U.S. commercial sports leagues' demands for a share of sports gambling revenues, some of the more recent states to legalize sports gambling have guaranteed the leagues a direct or indirect cut.<sup>290</sup> The states of Illinois, Michigan and Tennessee, for example, each require gaming operators to purchase their sports gambling data from the leagues in each sport, as long as such data is available on "commercially reasonable terms."<sup>291</sup> These "official data mandates" again increase the costs of operating legal sports betting and further exclude potential small competitors from the marketplace.<sup>292</sup>

#### **IV. THE FEDERAL – STATE – TRIBAL INTERPLAY**

The United States governance of sports gambling, nonetheless, entails more than just the complex, intertwined relationship between state and federal law.<sup>293</sup> In this area, there is actually

---

<sup>288</sup> See Definition of Gross Gaming Revenue, CORPORATE FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/gross-gaming-revenue-ggr/> (last visited Jan. 23, 2020).

<sup>289</sup> See Liza Donnelly, *Sports Betting Companies Still Caught Up in the Entry Barriers*, ME NEWS INDUS. (Sep. 27, 2019), <https://menewsindustry.com/2019/09/27/sports-betting-companies-still-caught-up-in-the-entry-barriers/>.

<sup>290</sup> See *Official League Data*, LEGAL SPORTS REPORT (updated Jan. 11, 2020), <https://www.legalsportsreport.com/official-league-data/> (noting that Michigan, Tennessee, and Illinois have mandated that operators purchase official league data for Tier 2 (bets taking place during the game) wagers).

<sup>291</sup> See John Holden, *What Exactly Is 'Commercially Reasonable' Pricing For Official League Data?*, LEGAL SPORTS REPORT (Jan. 14, 2020), <https://www.legalsportsreport.com/36742/commercially-reasonable-official-league-data-sports-betting/> (describing the difficulty in assessing what commercially reasonable means in the context of official league data).

<sup>292</sup> John Holden, *What Exactly Is 'Commercially Reasonable' Pricing For Official League Data?*, LEGAL SPORTS REPORT (Jan. 14, 2020), <https://www.legalsportsreport.com/36742/commercially-reasonable-official-league-data-sports-betting/>.

<sup>293</sup> John Holden, *Tribal Compacts: A Primer for Legal US Sports Betting*, LEGAL SPORTS REPORT (Nov. 14, 2019), <https://www.legalsportsreport.com/32819/tribal-compacts-us-sports-betting/>.

a tripartite relationship with the federal government, state governments, and the tribal governments that maintain dominion over Native American land.<sup>294</sup> While state governments have historically had the primary responsibility for determining which activities to allow within their jurisdiction,<sup>295</sup> sports betting is one area where the federal government has tried to meddle in state matters via PASPA—complicating both matters of federalism and tribal compacts.<sup>296</sup>

*A. Overview of Federal, State, and Tribal Responsibilities*

For more than a century, states have been able to determine their preferences for what activities take place within their borders.<sup>297</sup> For example, while many around the globe view Nevada as a gambling haven, the state's next-door neighbor, Utah, allows virtually no gambling at all – not even widely permissible types of social gambling.<sup>298</sup> Since the 1990s, there has been a steady growth of gambling offerings at the state-level, with most states now having lotteries and many states even authorizing casino gambling.<sup>299</sup> States have viewed gambling as a means to generate revenue for a number of years, and only two states presently lack any form of legalized gambling, Utah and Hawaii.<sup>300</sup> The federal government has long played a supporting role in

---

<sup>294</sup> John Holden, *Tribal Compacts: A Primer for Legal US Sports Betting*, LEGAL SPORTS REPORT (Nov. 14, 2019), <https://www.legalsportsreport.com/32819/tribal-compacts-us-sports-betting/>.

<sup>295</sup> See Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999) (“Gambling legislation is largely a matter of state law and, as a result, varies considerably, running from prohibition to regulation to taxation to the even more remunerative scheme of outright cooption, most notably in the form of state-run lotteries.”).

<sup>296</sup> See generally, Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 139-141 (2016).

<sup>297</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).

<sup>298</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).

<sup>299</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).

<sup>300</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1577 (1999). Despite Hawaii's long opposition, and absence of gambling, state legislators did introduce a sports betting bill in January 2019. See Eric Ramsey, *Sports Betting Bill Roundup: New Legislation Pops Up In Arizona, Hawaii*, LEGAL SPORTS REPORT (Jan. 24, 2019), <https://www.legalsportsreport.com/27957/arizona-hawaii-sports-betting-bills/>.

regulating gambling activities, as documented in the Interstate Horseracing Act.<sup>301</sup> While Congress historically attempted to control state gambling offerings via the mail and later the Commerce Clause, until 1992, the trend had been to assist states in enforcing their own gambling laws.<sup>302</sup>

During the 1960s, Congress saw federal gambling law as a means to aid states where organized crime might otherwise escape prosecution due to jurisdictional entanglements.<sup>303</sup> The legislative history supporting the passage of the Wire Act indicated that the statute served to help states to enforce their own laws, as opposed to providing a federal tool to usurp state policy preferences.<sup>304</sup> The Illegal Gambling Business Act similarly relies on the predicate violation of state gambling law.<sup>305</sup> This federal policy of allowing states to choose which forms of gambling existed in their jurisdiction was in place until the passage of PASPA in 1992.<sup>306</sup> PASPA, by contrast to previous federal gambling statutes, specifically stated:

It shall be unlawful for... a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>307</sup>

---

<sup>301</sup> See 15 U.S.C. § 3001(a)(1) (1978) (“the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders”).

<sup>302</sup> G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 958 (1978).

<sup>303</sup> G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 959-965 (1978).

<sup>304</sup> G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 965 (1978).

<sup>305</sup> 18 U.S.C. § 1955 (b) (1)(i) (2014).

<sup>306</sup> See generally John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329 (2019).

<sup>307</sup> 28 U.S.C. § 3702 (1992).

PASPA was a direct attack on states' choices for the type of permissible gambling within their borders, which was largely what rendered the statute constitutionally problematic.<sup>308</sup> In PASPA's wake, it appears that the gambling landscape has returned to a policy of state-level regulation being the primary factor in determining which activities take place.<sup>309</sup> This position, however, is complicated in states with a tribal gaming presence.<sup>310</sup>

The Indian Gaming Regulatory Act (IGRA) is a federal law passed in 1988 that governs how states and tribal governments negotiate the specific permissible types of gaming.<sup>311</sup> The IGRA came about following a Supreme Court decision in *California v. Cabazon Band of Mission Indians*.<sup>312</sup> The *Cabazon* case centered on two tribes in California that operated a bingo parlor, and the Cabazon tribe, which operated a card room where poker games and other games were played.<sup>313</sup> The State of California moved to shut down the games on tribal land arguing that they were in violation of state gaming laws.<sup>314</sup> The tribes then sued for declaratory relief, arguing that the games were taking place on sovereign land and the State of California lacked authority to enforce state gaming laws with the reservations.<sup>315</sup>

The *Cabazon* case made it all the way to the U.S. Supreme Court, which held that not only did the State of California not prohibit gambling criminally, but the state encouraged its "citizens

---

<sup>308</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018); 138 S.Ct. 1461 (2018).

<sup>309</sup> See John Brennan, *New Federal Sports Betting Bill Surfaces, Empowering Attorney General and Mandating Purchase of Data*, SPORTS HANDLE (Dec. 4, 2018), <https://sportshandle.com/federal-sports-betting-bill-draft-emerges/> (describing a federal sports betting bill that would have allowed for states to continue determining which sports betting activities they allow but subjecting them to federal review).

<sup>310</sup> John Holden, *Tribal Compacts: A Primer for Legal US Sports Betting*, LEGAL SPORTS REPORT (Nov. 14, 2019), <https://www.legalsportsreport.com/32819/tribal-compacts-us-sports-betting/>.

<sup>311</sup> John Holden, *Mailbag Mythbusting: The Indian Gaming Regulatory Act (IGRA) and Sports Betting*, SPORTS HANDLE (June 13, 2018), <https://sportshandle.com/mailbag-mythbusting-the-indian-gaming-regulatory-act-igra-and-sports-betting/>.

<sup>312</sup> 480 U.S. 202 (1987).

<sup>313</sup> 480 U.S. 204-206 (1987).

<sup>314</sup> 480 U.S. 205-206 (1987).

<sup>315</sup> 480 U.S. 206-210 (1987).

to participate in state-run gambling,” via the lottery.<sup>316</sup> The decision had a sweeping impact, as even states that had the ability to regulate criminal activity on tribal land were seemingly facing the possibility that tribes could run gaming operations without any say from the state where tribal lands were located, and the prospect of this led Congress to act quickly.<sup>317</sup>

In 1988, Congress then passed the IGRA, as a means of compromise between tribal sovereignty and state interests.<sup>318</sup> The IGRA enables Indian tribes to regulate gaming activity on tribal lands as long as that the activity is not prohibited by the federal government and the type of activity occurring is lawful in the state in which the tribal lands are located.<sup>319</sup> The IGRA divides gaming activities into three classes.<sup>320</sup> Class I activities are social games or traditional forms of gaming within tribal culture that are always permissible.<sup>321</sup> Class II includes bingo, and tribes are permitted to conduct Class II gaming in any state where the activity is lawful under state law.<sup>322</sup> Class III gaming, by contrast, includes all games not included within Class I or Class II, including sports betting.<sup>323</sup> The IGRA requires that in order to offer Class III games they must be permitted within the state and the tribe must enter into a gaming compact with the state.<sup>324</sup> The compact essentially provides an arrangement between the tribal government and the states, where in

---

<sup>316</sup> 480 U.S. 210 (1987).

<sup>317</sup> See Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453 (2003).

<sup>318</sup> Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453 (2003).

<sup>319</sup> 25 U.S.C. § 2701(5) (1988).

<sup>320</sup> 25 U.S.C. § 2710 (1988).

<sup>321</sup> Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 454 (2003).

<sup>322</sup> Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 454 (2003).

<sup>323</sup> John Holden, *Mailbag Mythbusting: The Indian Gaming Regulatory Act (IGRA) and Sports Betting*, SPORTS HANDLE (June 13, 2018), <https://sportshandle.com/mailbag-mythbusting-the-indian-gaming-regulatory-act-igra-and-sports-betting/>.

<sup>324</sup> Eric Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 454 (2003).



exchange for some form of exclusivity, the tribal government agrees to certain regulations and often payments to the state.<sup>325</sup> While more than 700 tribal compacts have been signed since the passage of the IGRA,<sup>326</sup> many states have engaged in protracted and often hostile negotiations with tribes in more recent years as revenues have far surpassed most experts' bullish expectations from 1988.<sup>327</sup>

### *B. Challenges Facing States with Large Tribal Gaming Infrastructure*

While the IGRA has been a success, in some ways the success of tribal gaming in a number of states with a significant tribal gaming presence may be an impediment to launching sports betting.<sup>328</sup> New Mexico-based tribes were able to offer sports betting very quickly as a result of permissive language in their compacts; however, other states with tribal gaming have been much

---

<sup>325</sup> Barbara Hoberock, *Tribal Gaming 101: What You Need To Know As Tribal Gaming Becomes A Topic Of Significant Debate In The Coming Months*, TULSA WORLD (July 20, 2019), [https://www.tulsaworld.com/news/tribal-gaming-what-you-need-to-know-as-tribal-gaming/article\\_1d42d1c0-40ef-5fb6-b6b7-01afb867a2f9.html](https://www.tulsaworld.com/news/tribal-gaming-what-you-need-to-know-as-tribal-gaming/article_1d42d1c0-40ef-5fb6-b6b7-01afb867a2f9.html).

<sup>326</sup> See BUREAU OF INDIAN AFFAIRS, INDIAN GAMING COMPACTS, <https://www.bia.gov/as-ia/oig/gaming-compacts> (last visited Nov. 26, 2019).

<sup>327</sup> See e.g., Richard Luscombe, *Florida Seminole tribe goes to 'war' again with state over gambling income*, THE GUARDIAN (June 13, 2019), <https://www.theguardian.com/us-news/2019/jun/13/florida-seminole-tribe-fight-state-gambling-income>; see also Randy Ellis, *Governor voices frustrations, suggests tribal gaming fees as high as 25%*, THE OKLAHOMAN (Nov. 15, 2019), <https://oklahoman.com/article/5647067/chickasaw-attorney-says-tribes-prepared-to-renegotiate-gaming-fees>.

<sup>328</sup> John Holden, *Mailbag Mythbusting: The Indian Gaming Regulatory Act (IGRA) and Sports Betting*, SPORTS HANDLE (June 13, 2018), <https://sportshandle.com/mailbag-mythbusting-the-indian-gaming-regulatory-act-igra-and-sports-betting/>.

slower in adopting sports betting.<sup>329</sup> Indeed, each state's tribal interests, and the interest of each tribe, are going to vary as to the desirability of sports betting.<sup>330</sup>

Moreover, sports betting is a relatively low-margin gambling product because of how most bookmakers try to balance wagers, attracting an even amount of money on both sides of a wager.<sup>331</sup> The bookmaker then relies on the vigorish or commission.<sup>332</sup> This usually leaves a bookmaker with approximately a five percent profit margin.<sup>333</sup> That small profit risk may change the calculus

---

<sup>329</sup> Steve Ruddock, *How New Mexico Sports Betting Started In A State Without A Sports Betting Law*, LEGAL SPORTS REPORT (Nov. 19, 2018), <https://www.legalsportsreport.com/26007/pueblo-tribe-new-mexico-sports-betting/> (noting that the New Mexico compact states: "The Tribe may conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all forms of casino-style gaming, including but not limited to slot machines and other forms of electronic gaming devices; all forms of poker, blackjack and other casino-style card games, both banked and unbanked; roulette; craps; keno; wheel of fortune; pai gow; and other games played in casino settings; and any form of a lottery."). Several Mississippi tribes have also launched sports betting at tribal casinos in state, competing alongside commercial operators. *See* Regina Garcia Cano, *Mississippi Choctaws One of Only 2 Indian Casinos Offering Sports Betting in the US*, CLARION LEDGER (Dec. 26, 2018), <https://www.clarionledger.com/story/news/2018/12/26/ms-choctaws-one-2-indian-tribes-offering-sports-betting-nationwide/2414516002/>.

<sup>330</sup> *See* Regina Garcia Cano, *Mississippi Choctaws One of Only 2 Indian Casinos Offering Sports Betting in the US*, CLARION LEDGER (Dec. 26, 2018), <https://www.clarionledger.com/story/news/2018/12/26/ms-choctaws-one-2-indian-tribes-offering-sports-betting-nationwide/2414516002/>.

<sup>331</sup> James Chen, *Bookie*, INVESTOPEDIA (May 14, 2019), <https://www.investopedia.com/terms/b/bookie.asp>.

<sup>332</sup> James Chen, *Bookie*, INVESTOPEDIA (May 14, 2019), <https://www.investopedia.com/terms/b/bookie.asp>.

<sup>333</sup> James Chen, *Bookie*, INVESTOPEDIA (May 14, 2019), <https://www.investopedia.com/terms/b/bookie.asp>. There is some evidence that bookmakers may seek to maximize profits as opposed to creating a balanced book, but for the purposes of this illustration, we assume a conventional model of bookmaking strategy. *See* Steven D. Levitt, *Why Are Gambling Markets Organized So Differently From Financial Markets*, 114 THE ECON. J. 223 (2004).

for states and tribes that would need to renegotiate their gaming compacts in order to offer sports betting.<sup>334</sup> The calculus for some tribes means that sports betting does not make financial sense.<sup>335</sup>

## **V. LEGAL RISKS FOR GAMBLING COMPANIES**

Since the U.S. Supreme Court's decision in *Murphy*, many sports betting companies have become attracted to the U.S. marketplace where these activities have become permissible.<sup>336</sup> In addition to FanDuel and DraftKings,<sup>337</sup> a number of large international sportsbooks, some smaller American startups, and even a few offshore companies that previously operated in violation of U.S. law have sought to capitalize on the changing legal environment.<sup>338</sup> Nevertheless, the *Murphy*

---

<sup>334</sup> John Holden, *Tribal Compacts: A Primer For Legal US Sports Betting*, LEGAL SPORTS REPORT (Nov. 14, 2019), <https://www.legalsportsreport.com/32819/tribal-compacts-us-sports-betting/>. In particular, in a state like Florida, where the Seminole tribe had been making annual payments of up to \$350 million dollars, any effort to allow sports betting beyond the Seminole tribe could disrupt what is already a contentious relationship and would potentially put the relationship in further jeopardy. In May 2019, the Seminole tribe stopped payments to the state of Florida over a breach of the Tribe's exclusivity agreement. Earlier in the year the state had contemplated allowing the tribe to offer sports betting, but that talk disappeared in the wake of the payment stoppage. See Samantha J. Gross & Emily L. Mahoney, *Seminole Tribe Halts \$350 Million Annual Casino Payment to Florida*, TAMPA BAY TIMES (May 14, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/05/14/seminole-tribe-halts-350-million-annual-casino-payment-to-florida/>. More recently, there has been an effort in Florida to bypass the Seminole tribe and offer sports betting via the state lottery, a move that would almost certainly add further tensions to the strained relationship and cutting out the Seminole tribe all together may violate the IGRA requirements that the state and tribe meet and negotiate over class III gaming in good faith. See Jill R. Dorson, *Florida Bill Would Allow Mobile Sports Betting With Lottery In Charge*, SPORTS HANDLE (Nov. 18, 2019), <https://sportshandle.com/sports-betting-florida-mobile/>.

<sup>335</sup> Indeed, a number of Arizona-based tribes announced that they opposed state efforts to legalize sports betting. Unlike commercial gaming operators, who see adding sports betting as being a very low risk proposition, even if the margins are smaller than other games, tribal entities risk opening up compacts and having to renegotiate exclusivity payments to states, which could result in a net loss for the tribe(s). See Jill R. Dorson, *Tribes Want Monopolies, But Not Mobile. How Come?*, SPORTS HANDLE (Feb. 19, 2019), <https://sportshandle.com/tribal-sports-betting-exclusivity-mobile/>. This three-party relationship is responsible for establishing the rules that gaming stakeholders must abide by. The gambling industry is one that is highly regulated and thus there are risks for many different parties, perhaps most prominent are the risks facing the gambling companies. Ben Giles, *Tribes, Ducey Oppose Bill to Legalize Sports Betting*, AZ. CAPITOL TIMES (Feb. 26, 2019), <https://azcapitoltimes.com/news/2019/02/26/tribes-oppose-sports-betting-bill/>.

<sup>336</sup> See Robert Mann, *Legal Sports Betting In The U.S.: The British are Coming! The British are Coming!*, SPORTS HANDLE (Aug. 7, 2018), <https://sportshandle.com/legal-sports-betting-in-the-u-s-the-british-are-coming-the-british-are-coming/> (describing the influx of British gaming companies entering the U.S. market after the *Murphy* decision).

<sup>337</sup> See John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>338</sup> See Mason Jones, *Big Players Making Moves for Regulated Online Gambling in the U.S.*, INT'L POL'Y DIGEST (Aug. 22, 2019), <https://intpolicydigest.org/2019/08/22/big-players-making-moves-for-regulated-online-gambling-in-the-u-s/>.

decision has not created a true free market for companies to offer sports betting.<sup>339</sup> Instead, the emergence of state-sponsored sports betting has produced a complex bureaucracy that continues to exclude all but the largest potential sports gambling operators.<sup>340</sup>

#### *A. State Gaming Laws*

In the nineteen states, in addition to Washington, D.C., that currently allow for state-sponsored sports gambling, the primary legal obligations for sports gaming operators today relate to obtaining a license and following the rules mandated by each state's regulators.<sup>341</sup> Any company that receives a license to operate a brick-and-mortar sportsbook may then service any customer of the legal age that is physically present at the sportsbook (other than self-excluded or prohibited customers).<sup>342</sup> Similarly, any company that is licensed to operate an online sportsbook must limit access to individuals physically located within the state where they have received their license.<sup>343</sup> To illustrate this point, if a company has a license to operate an online sportsbook in New Jersey, that company may accept bets from any individual of legal age (other than self-excluded or prohibited individuals) that is physically located in New Jersey at the time of placing their bet.<sup>344</sup> By contrast, even a licensed New Jersey online sportsbook may not accept bets from people,

---

<sup>339</sup> See John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>340</sup> See John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>341</sup> See generally, *What's The Current State of Sports Betting In The US?*, PLAYUSA, <https://www.playusa.com/sports-betting/> (last visited Jan. 31, 2020).

<sup>342</sup> For a discussion of some of the challenges in identifying whether an individual is prohibited from wagering. See John Holden, *NFL Suspension of Josh Shaw Shows Where Communication Can Improve In Legal Sports Betting Era*, LEGAL SPORTS REPORT (Dec. 3, 2019), <https://www.legalsportsreport.com/36203/holden-josh-shaw-nfl/>.

<sup>343</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>344</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

including New Jersey residents, whom are physically located outside of State of New Jersey at the time of their attempt to make a bet.<sup>345</sup> Based on the forgoing, it is critical that any licensed online sportsbook implement proper geo-tracking technology to ensure that all bettors are based in permissible locations.<sup>346</sup>

In addition to monitoring the location of prospective bettors, most state gambling regulations also require licensed operators to ensure that all bettors have attained the minimal legal age (usually 21) before placing any bet.<sup>347</sup> The best way to ensure that all bettors have first reached the age of majority is by requiring all individuals seeking to place a bet to provide a copy of their driver's license or some equivalent form of government issued identification.<sup>348</sup> For online sportsbooks, it may be prudent to require potential customers to produce multiple forms of identification to reduce the risk of bettor fraud.<sup>349</sup>

Gambling laws in many states also require licensed operators to exclude bets on certain sporting events.<sup>350</sup> For example, the states of Delaware and New Jersey each do not allow for

---

<sup>345</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>346</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>347</sup> Some states such as Rhode Island allow bettors to be 18 years old. *See Frequently Asked Questions*, Sportsbook Rhode Island, <http://www.sportsbetri.com/faq/> (last visited Jan. 31, 2020). However, New Jersey has set the standard for minimum age at 21. *See* Nick Corasaniti, *Game On! Legislature Approves Sports Betting in New Jersey*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/nyregion/sports-betting-new-jersey.html>.

<sup>348</sup> New Jersey's process for identity verification includes require a form of government issued identification (e.g. a driver's license, passport, or military identification), and address verification with can be accomplished by presenting certain documents containing a matching name and address to the individual's government identification. *See* James Warmington, *What Documents Do I Need for Online Sportsbook in NJ?*, GAMBLING.COM (Sep. 19, 2019), <https://www.gambling.com/us/online-betting/knowledge/what-documents-do-i-need-for-online-sportsbook-in-nj-2087000>.

<sup>349</sup> A number of states accomplish this verification by requiring that mobile accounts be registered in person. *See* Steve Ruddock, *States Exploring Legal Sports Betting Should Scrap In-Person Registration*, LEGAL SPORTS REPORT (Mar. 28, 2018), <https://www.legalsportsreport.com/19438/in-person-registration-for-sports-betting/>.

<sup>350</sup> Jill Dorson, *Mississippi Rolls Out Regs: No 'Integrity Fee,' OK to Bet on Mississippi College Teams*, SPORTS HANDLE (June 21, 2018), <https://sportshandle.com/mississippi-rolls-out-regs-no-integrity-fee-ok-to-bet-on-mississippi-college-teams/>.

betting on the sporting events of collegiate teams that reside within the state.<sup>351</sup> Both brick-and-mortar and online sportsbooks need to carefully review state gambling laws to understand specifically what types of bets are prohibited.<sup>352</sup> Most state gambling laws also require both brick-and-mortar and online sportsbooks to provide a means for problem gamblers to engage in self-exclusion.<sup>353</sup> Much like with the rules for prohibited contests, the rules for protecting those with gambling addiction vary slightly based state, and gaming operators need to understand the subtle distinctions in these requirements.<sup>354</sup>

Finally, companies that operate in the sports gaming marketplace need to be careful to understand the complex, and sometimes opaque, distinctions between what constitutes “sports gambling” and what constitutes “daily fantasy sports.”<sup>355</sup> In many states, these distinctions turn on whether the underlying contest is based on the performance of multiple real-world athletes across multiple real-world events.<sup>356</sup> While this distinction may seem like one of semantics, for

---

<sup>351</sup> See Jill Dorson, *Mississippi Rolls Out Regs: No ‘Integrity Fee,’ OK to Bet on Mississippi College Teams*, SPORTS HANDLE (June 21, 2018), <https://sportshandle.com/mississippi-rolls-out-regs-no-integrity-fee-ok-to-bet-on-mississippi-college-teams/>.

<sup>352</sup> See Bill Gelman, *Regulators Fine Sportsbooks For Bets On NJ College Teams*, NJ GAMBLING SITES (Apr. 29, 2019), <https://www.njgamblingsites.com/21342/nj-college-sports-betting-fine/>.

<sup>353</sup> See NAT’L COUNCIL ON PROBLEM GAMBLING, *Responsible Gaming Principles for Sports Gambling Legislation* (Mar. 2018), <http://www.ncpgambling.org/wp-content/uploads/2018/03/Responsible-Gaming-Principles-for-Sports-Gambling-Legislation.pdf>.

<sup>354</sup> See Brian Pempus, *Each State Different On Combating Problem Sports Gambling Under New Laws*, US BETS (Sep. 24, 2019), <https://www.usbets.com/state-sports-betting-problem-responsible-gaming-funding/>.

<sup>355</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 331 (2019) (providing an example of the online gaming operator DraftKings offering a contest under the moniker of “daily fantasy sports” that allows participants to predict the winners of a single NASCAR race, whereas “a reasonable expert in the field of sports gaming is more likely to describe this contest as ‘sports gambling’ than ‘fantasy sports.’”).

<sup>356</sup> See generally Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 331 (2019) (explaining how the Unlawful Internet Gambling Enforcement Act defined “fantasy sports” within its carve-out from payment processor’s potential liability under federal gambling laws).

many operators, it is all that distinguishes their business activities from activities that constitute the commission of a crime.<sup>357</sup>

### *B. Federal Gaming Laws*

While state law plays the primary role in shaping modern gambling policy,<sup>358</sup> the interconnected nature of modern commerce also triggers a number of specific concerns for gambling operators under federal law.<sup>359</sup> The dragnet of federal anti-gambling laws can pose a confusing and cumbersome compliance checklist for operators, especially given that U.S. federal laws all pre-date the right of states to legalize sports betting.<sup>360</sup> Because most federal gambling statutes were proposed to fight organized crime, these laws create particular challenges for those large, licensed companies that simultaneously operate in multiple states.<sup>361</sup>

#### *1. Wire Act*

One federal law that may cause legal concern for certain sports betting operators is the Wire Act, which is one of the federal government's most powerful tools for stopping illegal interstate gambling activity.<sup>362</sup> The Wire Act prohibits those "engaged in the business of betting or wagering" from using a "wire communication facility," for the interstate transmission of "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event or

---

<sup>357</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO MASON L. REV. 313, 331 (2019) (explaining that it is important for states to adopt the proper legal definition for "sports gambling" given the differences between how many states regulate sports gambling and fantasy sports).

<sup>358</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).

<sup>359</sup> See generally, Ronald J. Rychlak, *The Legal Answer To Cyber-Gambling*, 80 MISS. L.J. 1229 (2011).

<sup>360</sup> The most recent piece of gambling specific legislation with the UIGEA passed in late-2006. See 31 U.S.C. §§ 5361-5367 (2006).

<sup>361</sup> It does not appear that wide-spread legal gambling was a consideration in 1961 or 1970 when the Wire Act and the Illegal Gambling Business Act were passed. As a result, the elements of these statutes raise the risk-level for those operating in states where gambling is legal. See 18 U.S.C. § 1084 (1994); see also 18 U.S.C. § 1955 (2014).

<sup>362</sup> See generally John T. Holden, *Through The Wire Act*, 95 WASH. L. REV. (2020).

contest.”<sup>363</sup> Section 1084 of the Wire Act also prohibits any wire transmission that “entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.”<sup>364</sup> The Wire Act, nevertheless, contains a safe harbor provision that not only exempts the transmission of information for news reporting, but also protects the “transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.”<sup>365</sup>

In 2011, U.S. Assistant Attorney General Virginia Seitz authored an Office of Legal Counsel opinion on the scope of the Wire Act, in response to a request from both New York and Illinois.<sup>366</sup> The Seitz opinion confirmed an earlier appellate decision from the Fifth Circuit, which concluded the Wire Act was applicable only to sports betting, and it did not encompass all online gambling activities—arguably not even fantasy sports.<sup>367</sup>

In 2018, however, the Department of Justice released a new memorandum authored by Acting Assistant Attorney General Steven Engel, which advanced the argument that the majority of the Wire Act applies to all gambling and not just sports gambling.<sup>368</sup> This memo also seemed to deny any safe harbor under the Wire Act even where the UIGEA excluded particular conduct from its scope.<sup>369</sup> Shortly, after Engel’s memo threatened to disrupt commerce in a number of

---

<sup>363</sup> 18 U.S.C. § 1084 (a) (1994).

<sup>364</sup> 18 U.S.C. § 1084 (a) (1994).

<sup>365</sup> 18 U.S.C. § 1084 (b) (1994).

<sup>366</sup> Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1, 1 (Sept. 20, 2011), *available at* <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

<sup>367</sup> *In re Mastercard*, 313 F.3d 257, 262 (5<sup>th</sup> Cir. 2001).

<sup>368</sup> *See* Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, Op. O.L.C. (Nov. 2, 2018), *available at* <https://www.justice.gov/olc/file/1121531/download>.

<sup>369</sup> *See* Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, Op. O.L.C., 1 (Nov. 2, 2018), *available at* <https://www.justice.gov/olc/file/1121531/download>.



states that had authorized everything from online gambling to online lottery sales, the Deputy Attorney General issued a reprieve, giving companies time to comply.<sup>370</sup> Prior to the expiration of the Deputy Attorney General's grace period, however, the New Hampshire Lottery Commission filed suit in district court, seeking declaratory relief that the Wire Act applies only to betting and wagering on sporting events or contests.<sup>371</sup> The court ruled against the Deputy Attorney General, but still predicted the case was destined for a hearing at the Supreme Court.<sup>372</sup> This matter still has not reached final adjudication—leaving sports gambling operators' legal risks under the Wire Act very much unsettled.<sup>373</sup>

## *2. Illegal Gambling Business Act*

A second federal statute that sports betting operators need to consider is the Illegal Gambling Business Act, which, like the Wire Act, was passed to provide the federal government a means to target organized crime's money-making businesses.<sup>374</sup> The Illegal Gambling Business Act requires that a predicate violation of state law be applied against an accused.<sup>375</sup> Additionally, the statute targets gambling businesses that remain in frequent operation or receive amounts in excess of \$2,000 in a single day.<sup>376</sup> The reliance on a predicate state law offense has the effect of creating differing standards for which activities are to be considered illegal gambling, depending upon the location of both the company and its bettors.<sup>377</sup> The broad nature of the act further

---

<sup>370</sup> Letter from The Deputy Attorney General to United States Attorneys et al., Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling (Jan. 15, 2019), available at <https://www.justice.gov/file/1124286/download>.

<sup>371</sup> New Hampshire Lottery Comm'n v. Barr, 19-CV-00163-PB, at 60 (D.N.H. June 3, 2019).

<sup>372</sup> Michael Casey, *Judge gives Justice Department a deadline in N.H. lottery case*, CONCORD MONITOR (Apr. 12, 2019, 5:40 PM), <https://www.concordmonitor.com/Judge-gives-Justice-Department-a-deadline-in-lottery-case-24816229>.

<sup>373</sup> John T. Holden, *Through The Wire Act*, 95 WASH. L. REV. (2020).

<sup>374</sup> Kaitlyn Dunphy, *Following Suit With the Second Circuit: Defining the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1321-1322 (2014).

<sup>375</sup> See 18 U.S.C. § 1955(b) (1) (i) (1970).

<sup>376</sup> See 18 U.S.C. § 1955(b) (1) (iii) (1970).

<sup>377</sup> See *United States v. DiCristina*, 726 F.3d 92 (2013).

effectively enables the government to federalize state level gambling crimes.<sup>378</sup> While some uncertainty exists as to whether the IGBA incorporates all state gambling crimes within the first element, the scope of the statute does appear intentionally broad.<sup>379</sup>

The danger for sports gambling operators under the Illegal Gambling Business Act is that they immediately appear to satisfy the second and third elements of the statute (being in continuous operation and having more than five people),<sup>380</sup> meaning, that a violation of the state gambling law is the only element separating them from a potential federal indictment.<sup>381</sup> Although it may appear unlikely that a gambling company would run afoul of state gambling laws intentionally, there is evidence that two of the major U.S. sports gambling companies, FanDuel and DraftKings, operated in contravention of state law for years.<sup>382</sup> Indeed, depending on the nature of the violation, there have been repeated instances of violations by gambling companies in nascent markets that, depending on whether the violations were criminal in nature, could trigger liability.<sup>383</sup>

### *3. Unlawful Internet Gambling Enforcement Act*

The third federal statute that could affect sports gambling operators is the Unlawful Internet Gambling Enforcement Act: the federal law that criminalizes knowingly accepting credit, electronic fund transfer, or commercial paper “in connection with the participation of another

---

<sup>378</sup> See 18 U.S.C. § 1955(b) (1) (i)-(iii) (1970).

<sup>379</sup> Linda J. Shorey & Anthony R. Holtzman, *When is Gambling Not Gambling? An Examination of United States v. DiCristina*, K&L GATES (Sep. 2012), available at [http://www.klgates.com/files/Publication/afd527df-b093-482d-b392-9190a860ccde/Presentation/PublicationAttachment/19451d71-9e30-4f60-8c4e-2143d42487fa/White\\_Paper\\_Betting\\_Gaming\\_September\\_2012.pdf](http://www.klgates.com/files/Publication/afd527df-b093-482d-b392-9190a860ccde/Presentation/PublicationAttachment/19451d71-9e30-4f60-8c4e-2143d42487fa/White_Paper_Betting_Gaming_September_2012.pdf).

<sup>380</sup> 18 U.S.C. § 1955(b) (1) (ii) - (iii) (1970).

<sup>381</sup> See 18 U.S.C. § 1955(b) (1) (i) (1970).

<sup>382</sup> John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020).

<sup>383</sup> For instance, a number of states ban wagering on in-state college teams, a sportsbook accepting a bet on such a team could potentially be seen to trigger the first element of the Illegal Gambling Business Act. See e.g., Bill Gelman, *Regulators Fine Sportsbook for Bets on NJ College Teams*, NJ GAMBLING SITES (Apr. 29, 2019), <https://www.njgamblingsites.com/21342/nj-college-sports-betting-fine/>; see also 18 U.S.C. § 1955(b) (1) (i) (1970).

person in unlawful Internet gambling.”<sup>384</sup> The UIGEA articulates that an unlawful Internet gambling transaction includes any wager that is unlawful in a particular jurisdiction where the bettor is located.<sup>385</sup> The statute does not apply to sports betting specifically, but rather includes many different types of online gambling activities.<sup>386</sup>

The UIGEA has received a great deal of attention for its exemption for certain types of fantasy sports,<sup>387</sup> and it may be particularly important to gambling operators with respect to so-called intermediate routing.<sup>388</sup> The UIGEA allows for transactions that are sent across state lines to be lawful if they are not prohibited in the initiating or receiving jurisdiction, even if illegal in a third-party state where the data is intermittently transmitted.<sup>389</sup> The legality of this route of a transaction is an open question with regards to whether the Wire Act’s safe harbor provision permits this type of activity.<sup>390</sup>

The UIGEA was primarily designed to target off-shore operators of illegal gambling sites, but the recent widespread legalization of sports betting has brought a new focus on shore.<sup>391</sup> While the focus of the statute is on financial institutions and blocking the funding for illegal gambling operators, the UIGEA can create some challenges for gambling operators as they rely of financial institutions and payment processors to operate particularly their mobile sports betting offerings.<sup>392</sup>

---

<sup>384</sup> 31 U.S.C. § 5363 (2006).

<sup>385</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 37 (2012).

<sup>386</sup> John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97, 101-103 (2018).

<sup>387</sup> See generally John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS OF SPORT 97 (2018).

<sup>388</sup> 31 U.S.C. § 5362 (10)(E) (2006).

<sup>389</sup> 31 U.S.C. § 5362 (10)(E) (2006).

<sup>390</sup> John T. Holden, *Through The Wire Act*, 95 WASH. L. REV. (2020).

<sup>391</sup> See FEDERAL DEPOSIT INSURANCE CORPORATION, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 1-11 (2010), available at <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>.

<sup>392</sup> See FEDERAL DEPOSIT INSURANCE CORPORATION, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 1-11 (2010), available at <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>.

While the UIGEA should not pose a significant burden on legal sportsbook operators, it is possible that a violation of state gambling laws could result in violation of the statute.<sup>393</sup>

### *C. Intellectual Property Law*

Beyond state and federal gambling laws, sports gambling operators also need to be wary of infringing the intellectual property rights of others, including those rights of commercial sports teams, athletes, and business competitors.<sup>394</sup> Important intellectual property rights in the area of sports gambling may include not only federal intellectual property rights such as patent, copyright and trademark, but also state rights such as the right of publicity.<sup>395</sup>

#### *1. Patent Law*

Patent law serves to provide inventors with limited, exclusive rights to their technological innovations.<sup>396</sup> Claims of patent infringement emerge under Article 1, Section 8 of the U.S. Constitution, which grants the federal government power “to promote Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>397</sup> More specifically, Section 101 of the Federal Patent Act allows parties to obtain protection on “new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof.”<sup>398</sup>

---

<sup>393</sup> It is also worth noting that UIGEA may not be implicated by certain transactions involving virtual currencies as a result of the way the definitions of the statute are structured. Bitcoin and many other virtual currencies do not require an intermediary to pass the money from bettor to gambling operator, the transaction that the UIGEA targets. *See* John T. Holden, *Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41, 79 (2018).

<sup>394</sup> *See, infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>395</sup> *See, infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>396</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 38 (2012).

<sup>397</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>398</sup> 35 U.S.C. § 101.

Based upon Section 101 of the Federal Patent Act's definition of patentable material, it is possible that certain aspects of a sports gambling business may be indeed patentable.<sup>399</sup> For example, if a sports gambling operator were to create a betting contest that involves a unique and innovative scoring method, the underlying scoring formula might be patentable.<sup>400</sup> In addition, if a sports gambling operator were to develop a new and specific technology, such technology also may be patentable.<sup>401</sup>

Nevertheless, the U.S. Supreme Court has recognized that "laws of nature, natural phenomena, and abstract ideas" are never patentable.<sup>402</sup> Based on this holding, many of the nation's leading patent law scholars have concluded that all patent claims must "be limited to a specific set of practical applications of an idea."<sup>403</sup> In this vein, it is very doubtful that a sports gambling company could enforce patent rights over the technology for identifying and paying contest winners, even though one sports gambling company has recently and aggressively attempted to do so.<sup>404</sup>

## *2. Copyright Law*

---

<sup>399</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>400</sup> See *Fantasy Sports Properties, Inc. v. ESPN/Starwave Partners*, 287 F.3d 1108, 1114 (Fed. Cir. 2002) (finding a genuine issue of relevant fact regarding if CBS Sports infringed on a patent relating to "a method of and apparatus for playing a 'fantasy' football game on a computer," whereby players earned "additional points awarded beyond those given in an actual football game for unusual scoring plays, such as when a player scores in a manner not typically associated with his position.").

<sup>401</sup> See John Holden, *Making Sense of Pro Sports Leagues' Search For Sports Betting Data Fees*, LEGAL SPORTS REPORT (June 18, 2018), <https://www.legalsportsreport.com/21245/search-for-sports-betting-fees/>.

<sup>402</sup> *CG Technology Development, LLC v. William Hill U.S. Holdco, Inc.* 2019 WL305500, 404 F.3d 842, 846 (D. Del., Aug. 28, 2019) (quoting *Alice Corp. Pty. v. CLS Bank Int'l.* 573 U.S. 208 (2014) (internal citations and quotations omitted)).

<sup>403</sup> See Mark Lemley et. al., *Life after Bilski*, 63 STAN. L. REV. 1315, 1317 (2011).

<sup>404</sup> See *CG Technology Sued DraftKings, FanDuel for Patent Infringement*, I Gaming Business, Apr. 13, 2016, <https://www.igamingbusiness.com/news/cg-technology-sues-draftkings-fanduel-patent-infringement> (describing briefly two of the many purported patent infringement lawsuits that CG Technology, the sports betting technology provider formerly known as Cantor Gaming and Wagering, has filed).

Copyright law, meanwhile, protects “original works of authorship fixed in a tangible medium of expression.”<sup>405</sup> While a copyright law covers both published and unpublished works, copyright law “extends only to the expression of an idea—not to the underlying idea itself.”<sup>406</sup> Thus, copyright law does not protect “facts, ideas, systems, or methods of operation.”<sup>407</sup>

Sports gambling operators do not risk violating copyright law when they list player names, team names, sports game scores, or player statistics because this information is typically considered to be mere facts.<sup>408</sup> However, sports gambling operators may violate copyright law if they make unlicensed use of game recaps or other written prose from other sources.<sup>409</sup> Online gaming operators also need to ensure that if they want to provide athlete pictures or biographies in the context of their contests that they use their own authors and photographers or, alternatively, secure a license to the underlying rights before placing such content in their commercial materials.<sup>410</sup>

### *3. Trademark Law*

Trademark law, meanwhile, protects “brand names and other forms of marketing information.”<sup>411</sup> Typically, the federal Lanham Act prevents the use of a protectable mark, without permission, in a manner that causes consumer confusion.”<sup>412</sup> Some courts have interpreted this requirement to similarly protect against individuals and businesses from capitalizing on the

---

<sup>405</sup> Copyright Act, 17 USCA § 102(a) (1976).

<sup>406</sup> Oracle America Inc. v. Google, Inc., 750 F.3d 1339, 1354 (Fed. Cir. 2014).

<sup>407</sup> See *Copyright in General (FAQ)*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-general.html#protect1> (last visited Jan. 19, 2019).

<sup>408</sup> See, *supra*, note \_\_ and accompanying text.

<sup>409</sup> See, *supra*, note \_\_ and accompanying text.

<sup>410</sup> See generally, BAYLOR UNIV., *Using Copyrighted Material*, <https://www.baylor.edu/copyright/index.php?id=56543> (last visited Jan 31, 2020).

<sup>411</sup> DAVID LANGE ET. AL., *INTELLECTUAL PROPERTY CASES AND MATERIALS* 84 (2d. ed. 2003).

<sup>412</sup> See *KP Permanent Make-Up Inc. v. Lasting Impression I.*, 543 U.S. 111, 117 (2004) (stating that “the holder of a registered mark (incontestable or not) has a civil action against anyone employing an imitation of it in commerce when such use is likely to cause confusion, or to cause mistake, or to deceive”) (internal citations and quotations omitted).

goodwill of another's trademark."<sup>413</sup> For instance, in *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing*, the U.S. Court of Appeals for the Fifth Circuit held that the unauthorized use of professional sports team logos on sportswear violates the Lanham Act, even if consumers are not confused about the apparel's source or origin."<sup>414</sup> The Fifth Circuit's *Dallas Cap* decision, its progeny, and the Congress's more recent passing of the Trademark Dilution Revision Act of 2006, have all provided U.S. professional sports teams with reasonable ammunition to challenge the commercial use of team trademarks by sports gambling operators in their gambling contests.<sup>415</sup>

Nevertheless, the doctrine of "nominative fair use" allows sports gambling operators to use the minimum amount of an otherwise protectable mark, with proper disclaimer, for reasonable, descriptive purposes.<sup>416</sup> In this vein, the U.S. District Court for the District of Delaware properly held that a sports gambling operator may use NFL city names, without any license from the league, for purpose of describing game bets.<sup>417</sup> Similarly, it is reasonably likely that a court would allow sports gambling operators that include proper disclaimers to use actual sports team names, absent their logos, to describe specific betting opportunities.<sup>418</sup>

---

<sup>413</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 40 (2012).

<sup>414</sup> See *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004, 1012 (5th Cir. 1975).

<sup>415</sup> See *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004 (5th Cir. 1975); *NBA Properties, Inc. v. WYG, Inc.*, No 93-C-1533, 1993 WL 462836, (N.D. Ill. 1993), at \*3-\*4 (citing favorably to the broader *Dallas Cap* test for showing trademark infringement in the context of the unlicensed use of sports team logos) ; Trademark Dilution Revision Act, 120 Stat. 1730, §2 (2006) (allowing for the owner of a "famous mark that is distinctive, inherently or through acquired distinctiveness", subject to principles of equity to obtain legal relief "against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury") (emphasis added).

<sup>416</sup> See Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have An Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J. L. & BUS. 1, 9 (2018).

<sup>417</sup> *Nat'l Football League v. Delaware*, 435 F.Supp.1372, 1380 (D. Del. 1977).

<sup>418</sup> The doctrine of "nominative fair use" generally applies where one company uses another's trademark to describe that other party's product, rather than its own. See *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d

#### *4. Right of Publicity Law*

Finally, right of publicity laws generally protect famous individuals against the use of their name, image of likeness, without permission, for commercial gain.<sup>419</sup> If a sports gaming operator were to use an athlete's name, image or likeness, without a license, to promote its own company or its products, use of this nature would likely infringe upon the athlete's publicity rights.<sup>420</sup> However, if a gaming operator instead uses an athlete's name and statistics simply to describe a bet, most, but not all, courts would likely find such use fully defensible under the First Amendment doctrine of "fair use."<sup>421</sup>

#### *5. A Quick Point about Sports Data (The False Intellectual Property Right)*

Before concluding this section, it is worth noting one more important point. In recent months, several of the U.S. commercial sports leagues have intermittently claimed to possess an

---

302, 308 (9th Cir.1992). As one seminal case on this doctrine explained, "a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: [f]irst, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder").

<sup>419</sup> See Marc Edelman, *Closing the Free Speech Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 560 (2013) (explaining that "n almost all states, a prima facie claim for violating one's right of publicity requires the showing of four elements: (1) the use of one's identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm").

<sup>420</sup> Marc Edelman, *Closing the Free Speech Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 559–60 (2013).

<sup>421</sup> See *CBC Distribution & Marketing Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007) (holding that, in the context of the use of the unlicensed use of Major League Baseball players' names and likenesses in fantasy sports contests, the First Amendment trumps the right of publicity for three reasons including that this information already lies in the public domain); *CBS Interactive Inc. v. National Football League Players Association*, 259 F.R.D. 398, 419 (D. Minn. 2009) (holding that the First Amendment similarly trumps the right of publicity in the context of unlicensed use of National Football League players' names and likenesses in a full-season fantasy football context); *Daniels v. FanDuel Inc.*, 109 N.E.3d 390, 398 (Sup. Ct. Ind. 2018) (holding that "Indiana's right of publicity statute contains an exception for material with newsworthy value that includes online fantasy sports operators' use of college players' names, pictures, and statistics for online fantasy contests). But see *Gridiron.com v. National Football League Players Association*, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (rejecting the argument that a website operator may use NFL players' names and images for purposes of both selling football memorabilia and operating a fantasy sports game).



intellectual property right over the statistical data derived from their sports games.<sup>422</sup> Frankly, these claims are dubious, as they contravene well-established legal precedent.<sup>423</sup> While copyright law or other legal principles based in equity might disallow a gaming operator from copying a third party's statistical compilation, there is absolutely nothing in traditional intellectual property law to prevent a sports gaming business from independently collecting and using the data from professional sports contests.<sup>424</sup>

## **VI. LEGAL RISKS FOR BETTORS AND ANCILLARY SPORTS GAMBLING SERVICE PROVIDERS**

While the legal risks facing gambling operators receive a great deal of attention, the emergence of a society with legalized, state-sponsored sports-gambling also yields a society with some legal risk for bettors and ancillary gambling service providers, albeit these risks are likely substantially lower.<sup>425</sup>

### *A. Legal Risks for Sports Bettors*

The legal risks for sports bettors depend largely on the bettor's level of activity. For instance, the legal risks facing a casual gambler are likely much smaller, at least on a criminal

---

<sup>422</sup> See John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 36-37 (2019).

<sup>423</sup> See John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 50-55 (2019); See also Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have An Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J. L. & BUS. 1 (2018); see also Ryan M. Rodenberg, John T. Holden, & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J. L. TECH. & ARTS 63 (2015).

<sup>424</sup> See Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have An Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J. L. & BUS. 1, 7 (2018).

<sup>425</sup> See generally Daniel Roberts, *Was My Sports Bet Legal?*, FORTUNE (Feb. 15, 2011), <https://fortune.com/2011/02/15/was-my-sports-bet-legal/>; see also Marc Edelman & John Holden, *Commentary: Why Create New Gambling Laws When We Don't Enforce Our Existing Ones?*, CHI. TRIBUNE (July 29, 2019), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-gambling-casinos-sports-betting-laws-20190729-347fzxzfpdztkwhqxh347lypm-story.html> (describing the lack of enforcement of gaming laws).

level, than the risks facing a professional bettor.<sup>426</sup> The state law risks that casual gamblers face vary from state to state.<sup>427</sup> Many states appear to allow forms of small stakes social games, the type played between close friends or family members.<sup>428</sup> However, state law risks for the greatest number of people arise around the NCAA March Madness tournament or the Super Bowl, where squares games are popular,<sup>429</sup> although the risks associated with these events fall primarily on the operator, as opposed to the participant.<sup>430</sup> The risk to a casual bettor will vary depending on the state, as well as prosecutorial priorities.<sup>431</sup> Most states that do not allow social gambling treat first offenses of casual gambling as a misdemeanor, but depending on the scope of the wager, or type of contest and the involvement of the bettor, gambling in some states may be a felony.<sup>432</sup> While

---

<sup>426</sup> Ben J. Hayes & Matthew J. Conigliaro, *The Business of Betting or Wagering: A Unifying View of Federal Gaming Law*, 57 DRAKE L. REV. 445, 450 (2008) (noting that the Wire Act has been used to prosecute bookmakers and professional gamblers).

<sup>427</sup> See FORD HARRISON, 50 STATE SURVEY ON SOCIAL GAMBLING LAWS (Mar. 2014), available at: [http://www.fordharrison.com/files/28045\\_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf](http://www.fordharrison.com/files/28045_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf).

<sup>428</sup> See FORD HARRISON, 50 STATE SURVEY ON SOCIAL GAMBLING LAWS (Mar. 2014), available at: [http://www.fordharrison.com/files/28045\\_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf](http://www.fordharrison.com/files/28045_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf).

<sup>429</sup> Super Bowl squares pools allow fans to purchase boxes in a matrix with players paying money to select a box on the x axis labeled 0-9 and a y axis labeled similarly. The player whose square corresponds to last digits of each team in the game is considered the winner and typically receives all the money in the pool. Marc Edelman, *Super Bowl Squares Pools Are Legally Risky Even after the Fall of PASPA*, FORBES (Jan. 31, 2019), <https://www.forbes.com/sites/marcedelman/2019/01/31/super-bowl-squares-pools-are-legally-risky-even-after-the-fall-of-paspa/#3c65b92635f6>.

<sup>430</sup> Marc Edelman, *Operating an Unlicensed March Madness Pool May Be Riskier than Ever, Despite The Fall of PASPA*, FORBES (Mar. 18, 2019), <https://www.forbes.com/sites/marcedelman/2019/03/18/operating-an-unlicensed-march-madness-pool-may-be-riskier-than-ever-despite-the-fall-of-paspa/#40c44d9e14d9>.

<sup>431</sup> FORD HARRISON, 50 STATE SURVEY ON SOCIAL GAMBLING LAWS (Mar. 2014), available at: [http://www.fordharrison.com/files/28045\\_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf](http://www.fordharrison.com/files/28045_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf).

<sup>432</sup> For instance, in Oklahoma “Gambling is a misdemeanor; while opening, conducting or carrying on a gambling game is a felony.” Opening, or conducting a gambling game could encapsulate a greater scope of behavior than the typical language found in many state statutes, which require the operation of a gambling business. See FORD HARRISON, 50 STATE SURVEY ON SOCIAL GAMBLING LAWS (Mar. 2014), available at: [http://www.fordharrison.com/files/28045\\_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf](http://www.fordharrison.com/files/28045_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf).

the state law risks for bettors are the primary criminal law risks for bettors, they should remain cognizant of the federal gambling laws, and obligations they have under federal law.<sup>433</sup>

Meanwhile, federal law appears to pose few, if any, risks for casual bettors.<sup>434</sup> Former-Attorney General Robert F. Kennedy testified in support of the Wire Act stating as follows:

The word “organized” is italicized because it should be clear that the Federal Government is not undertaking the almost impossible task of dealing with-all of the many forms of casual or social wagering which so often may be effected over communication facilities. It is not intended that the act should prevent a social wager between friends by telephone.<sup>435</sup>

Indeed, it appears that the trend of excluding the casual gambler from the scope of federal gambling law continued with legislation subsequent to the Wire Act.<sup>436</sup> The Illegal Gambling Business Act, for instance, excludes bettors from the total number of individuals counted to reach the statute’s numerosity requirement.<sup>437</sup> Of course, while gambling specific laws may not capture the casual bettor within their reach, federal income tax laws most certainly do.<sup>438</sup> The obligation to pay taxes on gambling winnings applies to both legal and illegal wagers.<sup>439</sup>

---

<sup>433</sup> For instance, the Internal Revenue Service requires that wagers made in states with authorized sports wagering are subject to a .25 percent excise tax, and wagers made in states without lawful sports wagering are subject to a two percent excise tax. *See* 26 U.S.C. §§ 4401 (a)(1)-(2) (1982).

<sup>434</sup> *See* 18 U.S.C. § 1084 (2012) (noting that the statute applies to those in the *business* of betting or wagering (emphasis added)). *See also* 18 U.S.C. § 1955 (2012) (requiring a minimum of five individuals and substantially continuous operation of a gambling *business* (emphasis added)). *See also* 31 U.S.C. §§5361-5367 (2006).

<sup>435</sup> *See The Attorney General’s Program to Curb Organized Crime Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the Committee on the Judiciary*, 87<sup>th</sup> Cong. (1961) (Statement of Attorney General Robert F. Kennedy) at 6.

<sup>436</sup> *See* 18 U.S.C. § 1955 (2012); *see also* 31 U.S.C. §§5361-5367 (2006).

<sup>437</sup> *United States v. Schullo*, 363 F.Supp. 246, 251 (D. Minn. 1973).

<sup>438</sup> *See* Marcia Geffner, *Sports Betting: Get Ready To Pay Tax On Your Winnings*, CREDIT KARMA (Sep. 25, 2018), <https://www.creditkarma.com/tax/i/tax-on-sports-betting/>.

<sup>439</sup> There is a complex litany of cases addressing the Fifth Amendment implications of the Internal Revenue Service’s requirement to declare both legal and illegal gambling winnings, but such discussion is largely beyond the scope of this short treatise. *See generally* Richard B. Stanley, *Comments: Conflict between the Internal Revenue Code and the Fifth Amendment Privilege against Self-Incrimination*, 15 U. BALT. L. REV. 527 (1986).

There are also undeniable financial risks for sports bettors.<sup>440</sup> Concerns over a rise in problem gambling, because of expanded legal sports gambling, has been one of the primary issues confronting state lawmakers considering legalizing sports wagering.<sup>441</sup> While the gambling industry purportedly spends upwards of \$300 million annually on harm reduction initiatives, some states are severely lagging in their funding for problem gambling programs.<sup>442</sup> Indeed, there is a great disparity in the commitment that states have made to combating problem gambling.<sup>443</sup>

There has been an observed correlation between the personal bankruptcy rate and increased access to gambling facilities.<sup>444</sup> While a bettor can discharge legal gambling debts, courts may view such debts differently, particularly if a bankruptcy trustee, or gambling creditor, argues that the debts were incurred without the intent of repaying them.<sup>445</sup> These allegations, however, may be rebutted if a bettor has a gambling problem and seeks treatment for problem gambling.<sup>446</sup> The risks for bettors are significant, even though they are quite different from those faced by gambling operators.<sup>447</sup> Likewise, there are a number of risks facing governments who seek to legalize sports wagering.<sup>448</sup>

---

<sup>440</sup> See R.J. Bell, *Vegas Weekend Recap: Why Do So Many Sports Bettors Lose?*, GRANTLAND (Nov. 20, 2013), <https://grantland.com/the-triangle/vegas-weekend-recap-why-do-so-many-sports-bettors-lose/>.

<sup>441</sup> Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Gambling*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html>.

<sup>442</sup> Mississippi for instance earmarked only \$110,000 for problem gambling services. Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Gambling*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html>.

<sup>443</sup> See Brian Pempus, *Each State Different on Combating Problem Sports Gambling under New Laws*, US BETS (Sep. 24, 2019), <https://www.usbets.com/state-sports-betting-problem-responsible-gaming-funding/>.

<sup>444</sup> See generally Lynda De La Vina & David Bernstein, *The Impact of Gambling on Personal Bankruptcy Rates*, 31 J. SOCIO-ECONOMICS 503 (2002).

<sup>445</sup> Jeff Jenkins, *Gambling Debts and Bankruptcy: Are They Dischargeable?*, JENKINS & CLAYMAN (Nov. 15, 2013), <https://www.jenkinsclayman.com/gambling-debts-bankruptcy-dischargeable/>.

<sup>446</sup> Domma Pizarro, *Gambling: A Big Problem That Results In Bankruptcy*, THRIVE GLOBAL (Sep. 12, 2018), <https://thriveglobal.com/stories/gambling-a-big-problem-that-results-in-bankruptcy/>.

<sup>447</sup> See *supra*, note \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>448</sup> In addition to potential social costs associated with increased access to gambling activities that a state or local government may face, they also face a threat that the federal government, should it choose, preempt state laws and

*B. Legal Risks for Related Gambling Businesses*

In addition to the risks facing the groups outlined above, a number of different stakeholders face legal risks associated with legalized sports wagering.<sup>449</sup> Amongst those facing legal risks are banks and financial institutions, geolocation companies, integrity monitoring companies, advertisers of gambling, and gambling advisors.<sup>450</sup>

*1. Risks for Banks*

Banks appear to face a tremendous amount of risk in the legal sports gambling market, in large part because the banking industry is so heavily regulated.<sup>451</sup> Banks have historically been cautious about processing gambling related transactions,<sup>452</sup> and it appears that the legal sports gambling market is no different from previous online gambling markets.<sup>453</sup> Certain banks have also blocked transactions to daily fantasy sports companies, DraftKings and FanDuel, in the past.<sup>454</sup>

---

regulate sports gambling directly. *See* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1484-85 (2018) (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

<sup>449</sup> *See e.g.*, Kevin Wack, *Bankshot Sports gaming is next hot-button issue for banks*, AM. BANKER (May 15, 2018) (noting there are concerns with accepting internet-based gambling transactions).

<sup>450</sup> Kevin Wack, *Bankshot Sports gaming is next hot-button issue for banks*, AM. BANKER (May 15, 2018); *see also* John Holden, *Could Legal Sports Betting Bring Back Annoying TV Advertising*, LEGAL SPORTS REPORT (June 13, 2018), <https://www.legalsportsreport.com/21148/legal-sports-betting-tv-advertising/>. *See also* Matt Schmitto, *Buyer Beware: Sports Betting Touts In Era Of Widespread Legalization*, SPORTS HANDLE (July 10, 2019), <https://sportshandle.com/buyer-beware-sports-betting-touts/>.

<sup>451</sup> *See generally*, Matthew Johnston, *A Brief History of U.S. Banking Regulation*, INVESTOPEDIA (updated June 25, 2019), <https://www.investopedia.com/articles/investing/011916/brief-history-us-banking-regulation.asp>.

<sup>452</sup> Samantha Beckett, *Big Banks Refuse to Process Legal Online Gambling Transactions*, CASINO.ORG (Jan. 13, 2014), <https://www.casino.org/news/big-banks-refuse-to-process-legal-online-gambling-transactions/>.

<sup>453</sup> John Isaac, *Banks are Rejecting 50% of Transactions at Legal American Casinos*, ONLINE GAMBLING (Sep. 17, 2019), <https://www.online-gambling.com/news/banks-are-rejecting-50-of-transactions-at-legal-american-casinos.html>. *See also* *Payments, Credit Card Issuers Not Ready To Bet on Sports Gambling*, PYMENTS.COM (May 21, 2018), <https://www.pymnts.com/bank-regulation/2018/credit-card-issuers-sports-gambling-regulations/>.

<sup>454</sup> Chris Morran, *Citi Now Blocking DraftKings, FanDuel Transactions in New York State*, CONSUMERIST (Feb. 5, 2016), <https://consumerist.com/2016/02/05/citi-now-blocking-draftkings-fanduel-transactions-in-new-york-state/>.

Caution on the part of banks is likely justified. The banking industry's concerns stem from not only concern that the interstate nature of banking could render certain debts unenforceable,<sup>455</sup> but also that the activities themselves could implicate various gambling and non-gambling laws.<sup>456</sup> Banks should be particularly concerned with the Wire Act's language, which states "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers" because "a wire communication from a gambling provider to a bank, that is processed out of state, may implicate the bank as a direct violator or as an aider or abettor."<sup>457</sup>

The UIGEA is another statute that raises potential risks for banks. While the statute does not raise intermediate routing concerns as does the Wire Act,<sup>458</sup> it is possible that banks could face liability for processing transactions to operators knowingly accepting illegal wagers.<sup>459</sup> In addition to the gambling specific laws that may pose a concern for banks, there are additional obligations such as the anti-money laundering obligations that require banks (and gambling operators, as well) to report certain transactions above a threshold amount under the Bank Secrecy Act.<sup>460</sup>

## *2. Legal Risks for Geolocation Companies*

---

<sup>455</sup> The argument that gambling debts incurred wagering on illegal sites are unenforceable has been raised on a number of occasions over the last two decades. *See generally* Jon Patterson, *Internet Gambling and the Banking Industry: An Unsure Bet*, 6 N.C. BANKING INST. 665 (2002).

<sup>456</sup> *See* Kevin Wack, *Bankshot Sports Gambling Is Next Hot-Button Issue For Banks*, AM. BANKER (May 15, 2018), <https://www.americanbanker.com/opinion/just-what-banks-need-another-hot-button-issue-in-sports-gambling>.

<sup>457</sup> 18 U.S.C. § 1084 (a) (1994).

<sup>458</sup> 31 U.S.C. § 5362 (10) (E) (2006).

<sup>459</sup> 31 U.S.C. § 5363 (2006). While the possibility that a bank would knowingly process transactions for a company illegally accepting certain types of wagers may seem remote, consider for a moment that several daily fantasy sports companies operated in contravention of various state attorneys general's opinions and continued to have transactions processed despite the apparent brazenness of the violations. *See* John T. Holden, Christopher M. McLeod, & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. (2020); *see also* Marc Edelman & John T. Holden, *Commentary: Why Create New Gambling Laws When We Don't Enforce Our Existing Ones?*, CHI. TRIBUNE (July 29, 2019), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-gambling-casinos-sports-betting-laws-20190729-347fzxzfpdztwhqhx347lypm-story.html>.

<sup>460</sup> 31 U.S.C. §§5311-5330 (2011).

Another prominent segment of the modern gambling industry are companies that provide geo-fencing or restrict the locations where a consumer can bet.<sup>461</sup> These companies provide a range of services, from restricting bets to a particular property within a state, to restricting bets to those individuals not physically present within a state.<sup>462</sup> The technology is purportedly sufficiently advanced that it can combat work-arounds like virtual private networks, and similar location spoofing tools, but there will always be efforts by some to evade the systems.<sup>463</sup> Failure of the software could subject the companies to hefty fines from gaming regulators, as well as reputational harm.<sup>464</sup> Geolocation companies will be required by many gaming regulators to take certain affirmative steps to avoid liability.<sup>465</sup> While the industry standard for the systems employed by the geo-fencing industry is still a moving target, as the industry continues to grow and standards are established, it is likely that there will be more concrete qualifications these companies must satisfy to demonstrate compliance.<sup>466</sup>

### *3. Legal Risks for Integrity Monitoring Companies*

---

<sup>461</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>462</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>463</sup> Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

<sup>464</sup> Wayne Parry, *N.J. Levies \$25K Fine Against Casino for Allowing Online Gaming To Out-of-State Gambler*, PHILA. INQUIRER (May 9, 2019), <https://www.inquirer.com/news/new-jersey/new-jersey-out-of-state-gambling-fine-20190509.html>.

<sup>465</sup> Wayne Parry, *N.J. Levies \$25K Fine Against Casino for Allowing Online Gaming To Out-of-State Gambler*, PHILA. INQUIRER (May 9, 2019), <https://www.inquirer.com/news/new-jersey/new-jersey-out-of-state-gambling-fine-20190509.html> (failing to ensure that a computer server made a final determination as to the location of a bettor subjected Gaming Innovation Group to a \$25,000 fine from New Jersey gaming regulators.).

<sup>466</sup> As has been seen when unauthorized users are permitted to wager companies face steep fines, as geolocation technology becomes more commonly understood it is likely that states will adopt standards that failure to comply with will result in penalties. Wayne Parry, *N.J. Levies \$25K Fine Against Casino for Allowing Online Gaming To Out-of-State Gambler*, PHILA. INQUIRER (May 9, 2019), <https://www.inquirer.com/news/new-jersey/new-jersey-out-of-state-gambling-fine-20190509.html>. See also Jill R. Dorson, *The Total Dummy's Guide to Sports Betting Geolocation Technology*, SPORTS HANDLE (Apr. 1, 2019), <https://sportshandle.com/geolocation-mobile-sports-betting/>.

Meanwhile, amongst the fastest growing industry segments in the gambling market are integrity monitoring companies.<sup>467</sup> These companies serve to monitor both legal and illegal betting markets for irregular betting line movements, which may indicate nefarious activity such as match-fixing.<sup>468</sup> While evidence from these companies has been accepted at the Court of Arbitration for Sport,<sup>469</sup> no U.S. court has yet accepted algorithmic evidence of sport corruption.<sup>470</sup> These companies are undoubtedly well intentioned, although they lack the investigative authority of a law enforcement agency and are thus effectively limited to being an early warning system.<sup>471</sup> The companies could have potential liability in the event of either a false positive or false negative identification of match fixing.<sup>472</sup> It is likely that a negligence theory would be the most viable means for a plaintiff to recover against a false identification, which could be costly for an integrity monitoring company and have a chilling effect on the industry as a whole.<sup>473</sup>

#### *4. Legal Risks for Gambling Advertisers*

The First Amendment looms large over many aspects of the legal sports gambling industry.<sup>474</sup> Despite the power of the First Amendment, commercial speech is not unfettered, and

---

<sup>467</sup> See John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 46-48 (2019).

<sup>468</sup> John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 46-48 (2019).

<sup>469</sup> Court of Arbitration for Sport CAS 2017/A/5173 Lamprey v. FIFA. See also Dustin Gouker, *A Banned FIFA Referee And How Sports Betting Data Monitoring Played A Key Role In Stopping Him*, LEGAL SPORTS REPORT (Jan. 15, 2018), <https://www.legalsportsreport.com/17773/fifa-sportradar-banned-referee/>.

<sup>470</sup> Reliance on technology to detect corruption does raise due process concerns for those involved. See Ivan Martin, *Technology that Detects Football Match-Fixing Could Catch Guilty Players*, TIMES MALTA (Aug. 17, 2017), <https://timesofmalta.com/articles/view/technology-that-detects-football-match-fixing-could-catch-guilty.655823>.

<sup>471</sup> John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 NYU J. L. & BUS. 32, 47-48 (2019).

<sup>472</sup> In most cases involving team sports it would be unlikely that the algorithm could identify an actual individual perpetrator. In individual sports such as tennis such an implication could be drawn by default.

<sup>473</sup> A theory that a sport organization negligently conducted an investigation that led to some loss by the accuser has been recognized as a viable claim in other contexts by some state courts. See e.g., *M.W. v. Dept. of Soc. & Health Serv.*, 70 P.3d 954, 956 (Wash. 2003) (noting the tort of negligent investigation).

<sup>474</sup> See Ryan M. Rodenberg, John T. Holden, & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J. L. TECH. & ARTS 63 (2015).



regulators including the Federal Trade Commission have taken notice of deceptive advertising in the gambling industry.<sup>475</sup> While the federal government has the authority to target false and deceptive advertising without running afoul of the First Amendment, the government cannot issue a blanket ban on gambling advertising.<sup>476</sup> Indeed, gambling advertisements have become increasingly common, from gambling companies sponsoring soccer teams across Europe,<sup>477</sup> to daily fantasy sports companies running advertisements so pervasively that they appeared at virtually every television commercial break during the 2015 NFL season.<sup>478</sup> In 2003, the Department of Justice issued a letter to the National Association of Broadcasters that vaguely threatened accomplice liability for violation of various gambling laws if advertisers carried advertisements for offshore sportsbooks or Internet gambling sites.<sup>479</sup> A little over a year after the Department of Justice letter was sent, Casino City Inc. filed a suit for declaratory relief against the Department of Justice seeking a declaration that online casino and sportsbook advertising was constitutionally protected speech.<sup>480</sup> The key dispute between the two parties was whether Internet gambling was illegal under various federal statutes.<sup>481</sup> Even if the federal government could

---

<sup>475</sup> See FED. TRADE COMM’N, *CSGO Lotto Owners Settle FTC’s First-Ever Complaint against Individual Social Media Influencers*, (Sep. 7, 2017), available at: <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>. See also John T. Holden & Sam C. Ehrlich, *Esports, Skins Betting and Wire Fraud Vulnerability*, 21 GAMING L. REV. 566, 570 (2018).

<sup>476</sup> See *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173 (1999) (rendering the Communications Act unconstitutional as applied to legal gambling advertising).

<sup>477</sup> David Sheldon A *Recent History of Gambling Advertising*, CASINO.ORG (updated Sep. 11, 2017), <https://www.casino.org/blog/a-recent-history-of-gambling-advertising/>.

<sup>478</sup> John T. Holden & Simon Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORTS L.J. 1, 1 (2017).

<sup>479</sup> Letter from Deputy Assistant Attorney General John G. Malcolm to National Association of Broadcasters, Re: Advertising for Internet Gambling and Offshore Sportsbooks Operations (June 11, 2003), available at: [http://www.igamingnews.com/articles/files/NAB\\_letter-030611.pdf](http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf).

<sup>480</sup> Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers “Aiding and Abetting” Criminal Activity or Exercising First Amendment-Protected Commercial Speech*, 15 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENT. L.J. 547, 550 (2005).

<sup>481</sup> Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers “Aiding and Abetting” Criminal Activity or Exercising First Amendment-Protected Commercial Speech*, 15 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENT. L.J. 547, 604-609 (2005).

restrict illegal online casino advertising under the *Central Hudson* commercial speech test, the narrative has changed in a new market with widespread legal gambling.<sup>482</sup> Indeed, many advertisers are likely protected by the First Amendment, provided the entities they are advertising are lawful,<sup>483</sup> and that they are in compliance with state regulations governing gambling advertising.<sup>484</sup>

### 5. *Legal Risks for Gambling Advisers*

A final group of ancillary service providers that deserves mention are companies that provide advice to gamblers about who they expect to win certain sporting events.<sup>485</sup> While individuals and companies for many years have provided gambling advice in exchange for a fee, the legalization of state-sponsored sports gambling by many U.S. states gives increasing legitimacy to these types of service providers, arguably placing them on a close to social par with those columnists who provide stock and other financial advice.<sup>486</sup>

While providing sports betting advice is a relatively safe business that is generally protected from liability under state and federal gaming laws based on the First Amendment, those who provide sports betting advice could face liability under both tort and contract law if they fail

---

<sup>482</sup> The *Central Hudson* test provides First Amendment protection assuming: “The communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal.” See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

<sup>483</sup> John Holden, *Could Legal Sports Betting Bring Back Annoying TV Advertising?*, LEGAL SPORTS REPORT (June 13, 2018), <https://www.legalsportsreport.com/21148/legal-sports-betting-tv-advertising/>.

<sup>484</sup> See AM. GAMING ASS’N, RESPONSIBLE GAMING REGULATIONS & STATUTES 1-167 (Aug. 2016), available at: <https://www.americangaming.org/wp-content/uploads/2019/01/Responsible-Gambling-Regulations-WEB.pdf>.

<sup>485</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 49 (2012).

<sup>486</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 49 (2012).

to deliver a certain, proper level of service.<sup>487</sup> Under tort law, gambling advisors risk liability if they negligently supply misinformation that another uses when placing a bet, potentially even if the gambling advisor does not sell that information to the party that suffers the financial loss.<sup>488</sup> Specifically, Section 552 of the Restatement of Torts states that the tort of “information negligently supplied for the guidance of others” occurs where “[o]ne who in the course of his business or profession supplies information for the guidance of others in their business transaction [and] fails to exercise that care and competence ... which its recipient is justified in expecting.”<sup>489</sup> Similarly, under contract law, if a gambler purchases advisory services that fail to meet the standard of their warranty, the gambler may reasonably attempt to sue the advisory company that breached its express warranty.<sup>490</sup> Given these risks, an individual or company in the business of providing gambling advice should seek legal counsel and make sure to adopt a Terms of Service that includes a proper disclaimer of any express and implied warranties, including, in particular, any warranties about expected performance.<sup>491</sup>

## **VII. BROADER SOCIETAL AND GOVERNMENT CONCERNS**

Finally, while many would describe sports gambling as a contractual activity simply between bettors and gambling operators (or bettors and each other), the government and society

---

<sup>487</sup> For instance, guaranteeing a level of success and failing to deliver, or advertising in a misleading manner may subject a sports betting tout to civil ramifications. The sports tout industry is reportedly filled with exaggerated claims of success, but it does not appear that many have resulted in actual lawsuits. *See generally*, Rick Reilly, *1-900-RIPOFFS*, SPORTS ILLUSTRATED (Nov. 18, 1991), <https://www.si.com/vault/1991/11/18/125398/1-900-ripoffs-the-ads-for-call-in-services-that-offer-sure-thing-betting-advice-on-the-big-games-couldnt-be-more-tempting-our-own-hot-tip-dont-touch-that-phone>.

<sup>488</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 49 (2012).

<sup>489</sup> Restatement (First) of Torts § 552 (2011).

<sup>490</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 49-50 (2012).

<sup>491</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 50 (2012).

overall are implicitly effected by every gambling contract.<sup>492</sup> Beyond the legal risks that gambling operators, bettors and ancillary businesses face under federal and state law, there are additional undeniable risks that affect society overall.<sup>493</sup>

#### *A. Costs Associated with Gambling Addiction*

One of the common objections that some state legislatures have to gambling markets involves “the significant public health problem known as compulsive or pathological gambling.”<sup>494</sup> This is a mental health disorder that affects approximately 0.4% to 3.4% of the adult population and an even greater share of the adolescents and college student population.<sup>495</sup> Pathological gambling, which is fundamentally different from social gambling or professional gambling,<sup>496</sup> is recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) as form of mental disorder.<sup>497</sup> Its features may include a preoccupation with gambling, the need to gamble with increasing amounts to maintain the same level of excitement, repeated unsuccessful attempts to control gambling behaviors, and the belief that “money is both the cause and solution to all [of] their problems.”<sup>498</sup>

While there are numerous private associations that attempt to help pathological gamblers such as Gamblers Anonymous the National Council on Problem Gambling, many citizens who are

---

<sup>492</sup> C.f. John Holden, Chris McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling* 57 AMERICAN BUS. L. J. (2020) (describing how the government is implicitly involved in every contractual matter).

<sup>493</sup> See generally, Staff, *Legalized Gambling Isn't Worth The Risks*, WASH. EXAMINER (July 10, 2018), <https://www.washingtonexaminer.com/policy/economy/legalized-gambling-isnt-worth-the-risks>.

<sup>494</sup> KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 64 (2011).

<sup>495</sup> KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 68 (2011) (describing the rate of pathological gambling in adolescents and college students as ranging between 2.8% and 8% of the overall population).

<sup>496</sup> See KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 68 (2011).

<sup>497</sup> See DSM-V Diagnostic Criteria: Gambling Disorder, <https://www.ncpgambling.org/wp-content/uploads/2014/08/DSM-5-Diagnostic-Criteria-Gambling-Disorder.pdf>.

<sup>498</sup> KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 67 (2011). See also DSM-V Diagnostic Criteria: Gambling Disorder, <https://www.ncpgambling.org/wp-content/uploads/2014/08/DSM-5-Diagnostic-Criteria-Gambling-Disorder.pdf>.

addicted to gambling fail to seek help, or do not receive the help they need.<sup>499</sup> Sadly, pathological gamblers have relatively high rates of suicidal ideation and suicide attempts.<sup>500</sup> In addition, some pathological gamblers find themselves with large sums of debt—leaving not only themselves, but also their families, destitute.<sup>501</sup> This results in not only social harm for individuals, but also economic loss for communities overall.<sup>502</sup>

There are a number of ways either a state or federal government could theoretically mitigate the risks of legalized gambling leading to pathological behaviors.<sup>503</sup> One way to mitigate these risks would be by imposing a cap that any individual sports betting operator (or perhaps all sports betting operators in aggregate) can collect from any individual over a finite period of time.<sup>504</sup> Another way for legislators to attempt to strike this balance would be to require any sports-gambling operator to include a Surgeon General’s warning that reminds would-be gamblers about the risk of gambling addiction.<sup>505</sup> Meanwhile, a third way for states to reasonably approach these concerns would be to set the minimum legal age to participate in sports gambling at twenty-one,

---

<sup>499</sup> KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 67 (2011).

<sup>500</sup> See Gambler’s Anonymous Webpage, <http://www.gamblersanonymous.org/ga/>; see also Nat’l Council for Problem Gambler’s Webpage, <https://www.ncpgambling.org/about-us/mission-values>.

<sup>501</sup> See generally, Timothy W. Fong, *The Biopsychosocial Consequences of Pathological Gambling*, 2 PSYCHIATRY 22 (Mar. 2005).

<sup>502</sup> Some have argued that problem gambling may cost society as much as \$54 billion annually. See Mark Reutter, *Social Costs of Gambling Nearly Half That of Drug Abuse, New Book Concludes*, NEWS BUREAU U. ILL. (Mar. 8, 2004), <https://news.illinois.edu/news/04/0308grinols.html>.

<sup>503</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>504</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 337-38 (2019) (explaining that even though no federal or state sports gambling law currently imposes caps on how much individual bettors may wager in a given time period, state laws governing interactive fantasy sports in states including Massachusetts and Tennessee currently impose such caps on fantasy games).

<sup>505</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 338 (2019).

recognizing that adolescents and college-age students are disproportionately likely to exhibit behaviors of pathological gambling.<sup>506</sup>

*B. Economic/Taxation Issues*

Certain gambling activities additionally may harm the greater wellbeing of society.<sup>507</sup> First, as referenced immediately above, individuals who suffer from pathological gambling disorders are more likely to become destitute and wards of the state—draining collective resources with their need for public assistance.<sup>508</sup> In addition, some studies claim that sustained online gambling activity could reduce worker productivity, further reducing economic output.<sup>509</sup> Perhaps these economic harms of gambling (if not the social ones) may be offset through taxation.<sup>510</sup> At present, most states that have legalized state-sponsored sports gambling have implemented an additional tax rate of between eight and sixteen percent of Gross Gaming Revenue of companies that operate in this sector.<sup>511</sup> While some within the industry criticize these tax rates as unreasonably high, one goal of the high tax rates on sports gambling may be to fund the additional public assistance and social welfare programs that would be needed to cover any expected tax

---

<sup>506</sup> See Marc Edelman *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 338 (2019).

<sup>507</sup> See Mark Reutter, *Social Costs of Gambling Nearly Half That of Drug Abuse, New Book Concludes*, NEWS BUREAU U ILL. (Mar. 8, 2004), <https://news.illinois.edu/news/04/0308grinols.html>.

<sup>508</sup> Mark Reutter, *Social Costs of Gambling Nearly Half That of Drug Abuse, New Book Concludes*, NEWS BUREAU U ILL. (Mar. 8, 2004), <https://news.illinois.edu/news/04/0308grinols.html>.

<sup>509</sup> See Mark Fox, Larry Phillips, Ganesh Vaidyanathan, *Managing Internet Gambling in the Workplace*, 8 FIRST MONDAY (Apr. 2003); available at: <https://firstmonday.org/ojs/index.php/fm/article/view/1044/965>.

<sup>510</sup> Colorado, who passed a sports betting bill in a referendum in 2019 has directed money from the state tax on sports gambling revenue for treatment of gambling addiction. See Tripp Baltz, *Sports Betting Tax to Go Before Voters in Colorado*, BLOOMBERG TAX (Oct. 7, 2019), <https://news.bloombergtax.com/daily-tax-report-state/sports-betting-tax-to-go-before-voters-in-colorado>.

<sup>511</sup> See *supra*, notes \_\_\_\_-\_\_\_\_ and accompanying text.

losses due to the need for additional social welfare programs and the arguable decreases in worker productivity.<sup>512</sup>

*C. Legal and Social Obligations to Native American Community*

The Indian Gaming Regulatory Act (IGRA) presents another risk for state governments because the statute requires that states negotiate in good faith with tribes seeking to offer a lawful type of Class III gaming, such as sports betting.<sup>513</sup> Failure of a state to enter into good faith negotiations with a tribe allows the tribe to seek relief under the IGRA in district court.<sup>514</sup> Failure to negotiate in good faith may result in a District Court ordering the tribe and state to conclude a compact within 60 days.<sup>515</sup> If a compact cannot be reached in the 60 day window, the court will appoint a mediator, who will select one of two proposals.<sup>516</sup> Should the state not agree with the proposal selected by the mediator, the mediator shall notify the Secretary of the Interior who will provide for how the tribe may implement the class III gaming prescribed in the mediator's chosen compact.<sup>517</sup>

The failure to negotiate a new compact is not the only potential risk facing state governments that seek to legalize sports betting under the IGRA. Indeed, if a state sought to legalize sports betting and such an act was found to violate existing exclusivity agreements between tribes and the state, there is a potential that tribes could terminate payments to the state.<sup>518</sup>

---

<sup>512</sup> Similar proposals have been made to allocate funds for other projects that lack funding. See Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. (2020) (noting that sports betting funds could be earmarked to increase funding to institutions of higher education).

<sup>513</sup> 25 U.S.C. § 2710 (3)(A) (1988).

<sup>514</sup> The state bears the burden of proof in District Court for showing that they have entered into negotiations with the tribe to work towards concluding a gaming compact. 25 U.S.C. § 2710 (7)(B) (1988).

<sup>515</sup> 25 U.S.C. § 2710 (7)(B)(iii) (1988).

<sup>516</sup> 25 U.S.C. § 2710 (7)(B)(iv) (1988).

<sup>517</sup> 25 U.S.C. § 2710 (7)(B)(vii) (1988).

<sup>518</sup> For example, the Seminole Tribe of Florida suspended payments to the state of Florida after a District Court Judge found the state's authorization of certain types of card games violated the tribe and state's exclusivity arrangement under their compact. Jeff Schweers, *Seminole Tribe Suspends Gambling Payments to State of Florida*, TALLAHASSEE

Unfortunately, many of the tribal-state relationships, in some of the most populated states, have been tense of late, which makes the prospect of states like California and Florida being able to offer sports betting difficult, because the relationships have been soured.<sup>519</sup> Indeed, the risks faced by governments are significant, as sports betting has potential to generate revenue for the state without the need to increase taxes, but litigation could threaten to derail those profits.<sup>520</sup>

*D. Data Collection and Protection of Personal Information*

Another risk for society is the potential for a data breach by one of the online sportsbooks.<sup>521</sup> Currently, online sportsbooks (as well as daily fantasy sports operators) collect a wide range of highly sensitive information from customers, including not only names, telephone numbers, and email addresses, but also credit card or bank account information, social security numbers, and often driver's license data.<sup>522</sup> If this information were to enter the wrong hands through either sale or data breach, bettors would face heightened risk of problems including identity fraud.<sup>523</sup> While the new California Compliance Privacy Act provides consumers with important additional protections such as the right to demand the deletion of their data, most U.S.

---

DEMOCRAT (May 14, 2019), <https://www.tallahassee.com/story/news/local/state/2019/05/14/seminole-tribe-suspends-gambling-payments-state-florida/3668949002/>.

<sup>519</sup> See Robert Mann, *Tribal Gaming Interests Will Have Major Influence on U.S. Sports Betting*, SPORTS HANDLE (Feb. 12, 2019), <https://sportshandle.com/examining-tribal-gaming-and-sports-betting/>.

<sup>520</sup> See Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. (2020).

<sup>521</sup> Indeed, the gaming industry has seen a number of high-profile breaches. See e.g., Catalin Cimpanu, *Online Casino Group Leaks Information on 108 Million Bets, Including User Details*, ZD NET (Jan. 21, 2019), <https://www.zdnet.com/article/online-casino-group-leaks-information-on-108-million-bets-including-user-details/>.

<sup>522</sup> See e.g., Danny Lawhon, *Iowa Sports Betting: What to Do Now That It's Legal to Wager*, DES MOINES REGISTER (July 30, 2019), <https://www.desmoinesregister.com/story/sports/2019/07/30/iowa-sport-betting-start-date-legal-sports-gambling-app-ncaa-college-football-spread-rule-how-to-bet/1857134001/> (noting what is necessary to register for a mobile wagering account in Iowa).

<sup>523</sup> IRON MOUNTAIN, *The Legal Ramifications of a Data Breach*, <https://www.ironmountain.com/resources/general-articles/t/the-legal-ramifications-of-a-data-breach> (last visited Jan. 31, 2020).



states and the federal government have not come up with a sufficient mechanism to truly protect personal data or fully hold companies liable for placing user personal data at risk.<sup>524</sup>

*E. Monopolization, Market Consolidation and Freezing Out of Small Entrepreneurs*

Finally, a fifth major risk pertaining to state-sponsored sports gambling is the creation of new monopoly and oligopoly markets to the detriment of both consumers and small entrepreneurs.<sup>525</sup> While perhaps well-intended, state laws that require online sportsbooks to partner with brick-and-mortar casinos have led to the emergence of oligopolistic markets to offer online sports betting in many states.<sup>526</sup> In addition, high licensing fees for online sportsbooks further limit market competition to those companies that are already highly leveraged.<sup>527</sup>

A similar, if not greater, problem also seems to be emerging in states that have imprudently implemented league data mandates.<sup>528</sup> By destroying the free market to collect, organize and sell game data to third parties, state legislators have not only arguably raised the price for sportsbooks to acquire game data, but they have also potentially reduced the quality of this data and chilled innovation in data collection markets—both well-established harms of market monopolies.<sup>529</sup> While states' data mandates are likely beyond the scope of federal antitrust laws, such mandates

---

<sup>524</sup> See John Stephens, *California Consumer Privacy Act*, AM. BAR ASS'N (July 2, 2019), [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/bcl/2019/201902/fa\\_9/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_9/).

<sup>525</sup> See e.g., John Holden, *Integrity Fee Issues For NBA and MLB Run Deeper Than They Appear*, LEGAL SPORTS REPORT (May 10, 2019), <https://www.legalsportsreport.com/32378/holden-nba-mlb-integrity-fee/>.

<sup>526</sup> For instance, in New Jersey in 2019 FanDuel and DraftKings' owned sportsbooks accounted for eighty-two percent of the revenue generated from sports betting. See PLAY NJ, *New Jersey Sports Betting Revenue* (updated Jan. 14, 2020), <https://www.playnj.com/sports-betting/revenue/>.

<sup>527</sup> See *supra*, notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>528</sup> See Joe Vardon, *How MLB, the NBA and the PGA Used 'Negotiation By Bayonet' to Get A Slice of State Gambling Revenue*, THE ATHLETIC (Jan. 16, 2020), <https://theathletic.com/1530989/2020/01/16/how-mlb-the-nba-and-the-pga-used-negotiation-by-bayonet-to-get-a-slice-of-state-gambling-revenue/>.

<sup>529</sup> See John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & BUS. 31, 56-58 (2020) (discussing the problems caused by limiting the data marketplace).

nevertheless run counter to the broader economic principles that underlie general U.S. competition policy.<sup>530</sup>

## **CONCLUSION**

The U.S. Supreme Court's decision in *Murphy v. National Collegiate Athletic Association* has undoubtedly opened a brave new world for sports gambling in the United States, as state-sponsored sports gambling is on the path toward becoming incredibly lucrative for gaming operators, commercial sports leagues, U.S. states, and even potentially some Native American tribes. Nevertheless, the emerging world of state-sponsored sports gambling has not proven to be the libertarian paradise that some commentators had predicted. Rather, the emerging sports gambling industry in the United States is highly regulated, limited in scope to a few deep-pocketed companies, and arguably overly protective of the interests of the U.S. commercial sports industry.

For sports gaming operators, the biggest challenge in this new era of legalized, state-sponsored sports gambling involves obtaining gaming licenses from individual states and complying with the administrative rules required to maintain their license, often including complex taxation schemes. In addition, sports gaming operators must ensure that they operate exclusively on an intrastate basis in light of the U.S. Department of Justice's sustained, broad interpretation of the Wire Act. Sports bettors and ancillary gambling service providers, meanwhile, have comparatively lower legal risks, but they too need to remain cognizant of a wide array of laws, including federal gaming laws.

---

<sup>530</sup> Indeed, there has been a long-held belief that American-style capitalism thrives because of free market capitalism. See e.g., J. H. Callum Clark, *Why America's Free Market Economy Works Better in Some Places than Others*, THE CATALYST (Fall 2019), available at: <https://www.bushcenter.org/catalyst/capitalism/clark-why-americas-free-market-economy-works-better-in-some-places-than-others.html> (describing free market capitalism ideals, and that the system appears to work better in some geographic regions than others).

The emerging, legalized world of U.S. sports gambling also poses a wide range of new public policy concerns for society, especially as many U.S. states move toward legalizing not only brick-and-mortar sports wagering in casinos but also online forms of sports betting. Among these concerns include not only important issues about taxation policy, but also issues about how to protect a limited segment of our population that is predisposed to pathological gambling from engaging in addictive and life-destroying behaviors.

Finally, the federal government, state governments and Native American tribal leadership each need to understand who are the true beneficiaries of the new, sports gambling laws. One area of *bona fide* concern for society is that the U.S. commercial sports leagues are leveraging their shared monopolies over hosting American sporting events into a second monopoly they will ultimately control over sports gambling (or, at least sports gambling data). Policymakers need to maintain a keen eye to make sure that the professional sports team-owners that once lobbied so hard to keep sports betting illegal in the U.S. do not use the *Murphy* decision as an opportunity to become the parties controlling, and most profiting from, legalized sports betting. Furthermore, policymakers need to ensure that the new gambling laws benefit not only large U.S. business interests, but also small businesses, consumers, and a broad range of other important social and economic policy objectives.