

A SHORT TREATISE ON SPORTS GAMBLING AND THE LAW: HOW AMERICA REGULATES ITS MOST LUCRATIVE VICE*

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On May 14, 2018, the U.S. Supreme Court decisively held in *Murphy v. National Collegiate Athletic Association* 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 *Murphy*, eighteen U.S. states, in addition to the District of Columbia, 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 closely examines 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.

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INTRODUCTION

On May 14, 2018, the U.S. Supreme Court decisively held in *Murphy v. NCAA*¹ that the Professional and Amateur Sports Protection Act violated the Tenth Amendment of the U.S. Constitution.² This ruling, in conjunction with other societal changes, opened the floodgates for states to liberalize their sports betting laws.³ In two years since *Murphy*, eighteen U.S. states, in addition to the District of Columbia, have legalized sports betting in some form.⁴ Meanwhile, eleven states have specifically legalized online sports betting.⁵

This rapid emergence of legalized, regulated sports betting has created an excellent opportunity for states to regulate and tax America's most lucrative vice.⁶ Much like the federal legalization of the sale of alcohol in 1933 and some states' decriminalization of marijuana in more recent years,⁷ the emergence of legalized, regulated sports gambling has transformed a lucrative black market into an open market.⁸ Further, it has replaced unrecorded business transactions with documented, taxable ones,⁹ and it has also initiated a series of meaningful discussions about

1. 1138 S. Ct. 1461 (2018).

2. *Id.* at 1468, 1476, 1484–85; see also Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 313 (2019).

3. See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 583–91 (2020) (discussing the scope of the *Murphy* decision).

4. *U.S. Sports Betting—Where You Can Make Legal Sports Bets and Full State-by-State Information*, SPORTS HANDLE, <https://sportshandle.com/sports-betting/> [<https://perma.cc/SF92-FHCB>] (last visited Sept. 20, 2020).

5. *Id.*

6. Stephen Fehr, Adam Levin & Alexandria Zhang, *States Jump at Chance to Boost Revenue with Sports Betting*, PEW CHARITABLE TRS. (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> [<https://perma.cc/UFX4-DZUK>].

7. See John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 331–33 (2019).

8. 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://perma.cc/5A6W-8NRB>].

9. See generally Richard C. Auxier, *Three Tax Lessons from the First Year of Widespread Legal Sports Betting*, TAX POL'Y CTR.: TAXVOX (May 22, 2019), <https://www.taxpolicycenter.org/taxvox/three-tax-lessons-first-year-widespread-legal-sports-betting> [<https://perma.cc/NY2R-FUGQ>] (describing the tax revenues raised from sports betting in several states).

how American society should balance the conflicting interests of preserving individual autonomy and protecting societal welfare.¹⁰

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*. Part I of this Article provides an abbreviated history of sports gambling around the world and 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, state, and tribal law that governs 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 the 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 UNITED STATES

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.¹¹ Some historians trace betting on sports back to the earliest Olympic Games in ancient Greece, hosted around 3000 B.C.E.¹² Other commentators, meanwhile, trace the practice of sports gambling back to ancient Rome or to ancient Egypt.¹³ In England, there was little recorded history of gambling—sports or otherwise—until 1612.¹⁴ That year, King James announced his hosting of

10. See, e.g., Chuck Canterbury, Opinion, *Law Enforcement's Case Against Restoring the Federal Ban on Sports Gambling*, WASH. EXAM'R (Sept. 27, 2018, 12:00 AM), <https://www.washingtonexaminer.com/opinion/op-eds/law-enforcements-case-against-restoring-the-federal-ban-on-sports-gambling> [<https://perma.cc/P934-6E2C>].

11. Holden, *supra* note 3, at 576.

12. Joseph B. Verrengia, *Ancient Olympics Were a Mix of Sacred, Profane*, MERCURY NEWS (San Jose, Cal.), July 25, 2004, at 3A.

13. See Rodolfo Lanciani, *Gambling and Cheating in Ancient Rome*, 155 N. AM. REV. 97, 100–01 (1892); see also Katarina Vojvodic, *Rough Guide to History of Gambling: From Ancient Origins to Online Casinos*, ASK GAMBLERS (Sept. 17, 2020), <https://www.askgamblers.com/gambling-news/blog/history-of-gambling/> [<https://perma.cc/58C8-USSP>] (discussing the gambling practices and artifacts of Ancient Egypt).

14. See Ken Zurski, *The Jamestown Lottery*, UNREMEMBERED (Jan. 13, 2016), <https://unrememberedhistory.com/2016/01/13/the-jamestown-lottery/> [<https://perma.cc/H665-8J9H>].

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.¹⁵ 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.¹⁶ As tensions rose among colonists in America, the British outlawed lotteries, fearing that they would help to finance an organized rebellion.¹⁷

While commercial gambling has fallen in and out of favor, gambling as a form of recreation has persisted.¹⁸ During the United States’ westward expansion, cities like San Francisco licensed casinos and gaming houses to raise revenue and avoid having to use other resources to enforce a prohibition.¹⁹ Even illegal forms of wagering were largely ignored in the new western territories.²⁰

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.²¹ The first American horseracing track was established in New York in 1665, and it was one of the more popular recreational activities in the thirteen colonies by the time of the Revolutionary War.²² Horseracing also built the foundation for interstate sports wagering, in conjunction with the rise of telephone and totalizer machines, in the 1800s.²³

15. *Id.*

16. See Becky Little, *Lottery Tickets Helped Fund America’s 13 Colonies*, HIST. (Oct. 11, 2019), <https://www.history.com/news/13-colonies-funding-lottery> [<https://perma.cc/N2A4-53XH>]; Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 25–26 (1992); Edelman, *supra* note 2 (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”).

17. Robert J. Rychlak, *supra* note 16, at 28–29.

18. See I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361 (2010).

19. *Id.* at 370.

20. See *id.* at 370–72.

21. See Mehmet Samuk, *Early Horse Racing in America*, STMU HIST. MEDIA (Dec. 6, 2016), <https://stmuhistorymedia.org/early-horse-racing-in-america/> [<https://perma.cc/LMV4-GBZK>].

22. *Id.*

23. Rose, *supra* note 18, at 371 (noting that even when gambling in every form was virtually prohibited across the country at the turn of the twentieth century, horseracing persisted in several states).

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,²⁴ the latter 1800s saw a number of states ban lotteries and most other forms of gambling in their newly authored constitutions.²⁵ The nation's largest lottery, the Louisiana Lottery, was one the most profitable lotteries during this period, albeit one of the most corrupt.²⁶ After Louisiana cracked down on its public lottery, the lottery's operators moved their operations to Honduras and used private companies to transact business with U.S. customers.²⁷ They did so to avoid an 1890 federal law banning the distribution of lottery materials using the Postal Service.²⁸ This avoidance led Congress to ban the distribution of lottery materials through interstate commerce in 1895.²⁹

In 1903, the Supreme Court affirmed Congress's power to ban the interstate distribution of lottery tickets.³⁰ In particular, the Court held 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."³¹ Federal laws, as well as state-level bans, led to a nearly seventy-year silence for lotteries in the United States that ended only when New Hampshire relaunched its lottery in 1964.³²

While the corruption in lotteries had a chilling effect, perhaps no U.S. gambling scandal led to as much negative backlash against betting

24. *See id.* at 373 (noting that Kentucky and Maryland maintained horseracing even as other states moved to ban all forms of gambling).

25. Keith C. Miller, *State Lotteries and Their Customers*, 9 UNLV GAMING L.J. 177, 178 (2019). *See, e.g.*, Bennett Liebman, *Gambling and the New York State Constitution*, 12 GOV. L. & POL'Y J. 46, 46 (2010) (noting that at the New York Constitutional Convention in 1894, the delegates elected to ban all gambling in the state via the state's bill of rights).

26. *Id.*

27. Rose, *supra* note 18, at 373–74.

28. G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 938 (1978).

29. Rose, *supra* note 18, at 374 (describing enactment of the federal law criminalizing the interstate carrying or sending of lottery tickets or lottery information in interstate and foreign commerce).

30. *The Lottery Case*, 188 U.S. 321, 363–64 (1903).

31. *Id.* at 354.

32. Holden, *supra* note 3, at 580. *See also* Kevin Flynn, *How NH Defied the Feds, Mob and Church to Create the First State Lottery*, NH MAG. (Dec. 14, 2015), <https://www.nhmagazine.com/how-nh-defied-the-feds-mob-and-church-to-create-the-first-state-lottery/> [<https://perma.cc/T4JP-SB5N>] (noting that New Hampshire hosted the first [modern] state-run lottery on September 14, 1964).

overall as the alleged fix of the 1919 World Series.³³ Specifically, it was alleged that organized-crime leader Arnold Rothstein bribed eight members of the heavily favored White Sox team to lose the 1919 World Series on purpose.³⁴ Although this was one of the first times the fixing of a sporting event became public knowledge, it was not likely the first time this behavior transpired.³⁵ 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.³⁶

Following the acquittal of the eight White Sox players,³⁷ 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.³⁸ Landis promptly banned for life all eight Chicago White Sox players accused of throwing the World Series.³⁹ Landis's actions would mark the beginning of nearly a century of opposition to sports betting from MLB, among other U.S. professional sports leagues.⁴⁰ MLB's ban also scared most players away from any gambling connections.⁴¹

The connection between the alleged 1919 World Series fix and organized crime would change how sports leagues thought about

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

34. *Id.*

35. See William F. Lamb, *The Black Sox Scandal*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/the-black-sox-scandal/> [<https://perma.cc/3WVP-YSA7>] (last visited Sept. 25, 2020).

36. *Id.*

37. A grand jury indicted the players on nine counts, which centered on conspiracy to injure the business interests of institutions and individuals, including the American League, and team owner Charles Comiskey, respectively. Douglas Linder, *The Black Sox Trial: An Account* (2007) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024290 [<https://perma.cc/YHM8-K4QY>].

38. Holden & Rodenberg, *supra* note 33, at 455. After the acquittal, the players reportedly shook hands with the jury; some players allegedly even attended a party with members of the jury after the verdict. Lamb, *supra* note 35.

39. Sarah Pruitt, *Did Shoeless Joe Jackson Conspire to Throw the 1919 World Series?*, HIST. (Oct. 22, 2018), <https://www.history.com/news/did-shoeless-joe-jackson-conspire-to-throw-the-1919-world-series> [<https://perma.cc/8842-TN2R>].

40. See Holden, *supra* note 7, at 337–49, 356–64.

41. 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*, N.Y. TIMES, Mar. 19, 1985, at B7, <https://www.nytimes.com/1985/03/19/sports/mays-mantle-reinstated-by-baseball-commissioner.html> [<https://perma.cc/F7Y7-8ZAR>]; see also FanSided & David Hill, *Cincinnati Reds History: Pete Rose Banned from Hall of Fame Ballot*, FOX SPORTS (June 30, 2017), <https://www.foxsports.com/stories/mlb/cincinnati-reds-history-pete-rose-banned-from-hall-of-fame-ballot> [<https://perma.cc/5G2X-K8NL>].

gambling for much of the twentieth century.⁴² 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 its operations, particularly after the fall of Prohibition.⁴³ These fears increased following World War II, when millions of soldiers returned home from war with a little extra money, looking for recreational activities.⁴⁴ In 1950, fifty-seven percent of Americans who responded to a Gallup survey stated that they had wagered in the past year.⁴⁵

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.⁴⁶ The most fundamental aspect of the interstate bookmaking infrastructure was the racing wire service, which transmitted sports scores and horseracing results with rapid speed across the country.⁴⁷ The convenience of the wire service meant that bookmakers (and other subscribers) did not need to wait for the morning papers to find out the results of sporting events.⁴⁸ It also enabled a source of virtually real-time information in an era decades before commercial access to the internet.⁴⁹

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 legalized state-sponsored casino gambling with its Open Gambling Bill of 1931,

42. See Daniel A. Nathan, *The Big Fix: Arnold Rothstein Rigged the 1919 World Series. Or Did He?*, LEGAL AFFS., Mar.–Apr. 2004, at 52, 52–53, http://www.legalaffairs.org/issues/March-April-2004/review_nathan_marapr04.msp [<https://perma.cc/A46N-6MCW>]; see also Les Carpenter, *Say It Ain't So, Joe! How 1919 Informs America's Entire Worldview on Gambling*, THE GUARDIAN (May 16, 2018), <https://www.theguardian.com/sport/blog/2018/may/16/say-it-aint-so-joe-how-1919-informs-americas-entire-worldview-on-gambling> [<https://perma.cc/MJY3-VGN7>].

43. See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 45–50 (2005).

44. See *id.* at 46–47.

45. *Id.* at 47.

46. *Id.* at 45–46, 48–51.

47. Charles B. Hagan, *Wire Communications Utilities and Bookmaking*, 35 MINN. L. REV. 262, 262–63 (1951).

48. *Id.*

49. See Note, *Racing Wire Service*, 5 STAN. L. REV. 493, 493–94 (1953); see also Hagan, *supra* note 47, at 262–63.

quickly emerged as the American mecca of legal gambling activities.⁵⁰ 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.⁵¹ 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.⁵²

In 1950, Congress authorized the Kefauver Committee to investigate and crack down on "organized crime in interstate commerce."⁵³ Over a span of fifteen months, the Committee travelled to fourteen cities, hosting televised hearings and interviewing dozens of witnesses before producing its final report.⁵⁴ During that time, the Committee also observed another sports gambling-related corruption matter firsthand.⁵⁵ 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

50. *Nevada Legalizes Gambling*, HIST. (Mar. 18, 2020), <https://www.history.com/this-day-in-history/nevada-legalizes-gambling> [https://perma.cc/4RNE-USUX]; see also Edelman, *supra* note 2, at 317 (noting that Nevada affirmatively legalized sports betting in 1949, not long after the end of World War II).

51. *Question of the Day – 17 November 2017*, LAS VEGAS ADVISOR (Nov. 17, 2017), <https://www.lasvegasadvisor.com/question/sports-betting-history/> [https://perma.cc/VX5W-8ZXZ]. The challenge for bookmakers was that the ten percent excise tax cut significantly into bookmaker profits, unlike many other casino games, a bookmaker's profit margin was historically less than five percent. Tim Johnson, *Calculating Margins in Sports Betting*, THE SPORTS GEEK: SPORTS BETTING BLOG (Mar. 18, 2019, 2:58 PM), <https://www.thesportsgeek.com/blog/calculating-margins-in-sports-betting/> [https://perma.cc/9WYL-NCR4].

52. 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> [https://perma.cc/C5DN-XU49]. 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) (holding that the excise tax provisions violated the petitioner's constitutional privilege against self-incrimination); *Marchetti v. United States*, 390 U.S. 39 (1968) (concluding that a wager tax stamp may provide decisive, yet impermissible, evidence of incrimination).

53. John Holden, *Legislative Sausage Making: How We Got the Wire Act, Part One*, LEGAL SPORTS REP. (Sep. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/> [https://perma.cc/435W-SJHT].

54. *Id.*

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

basketball games.⁵⁶ Some of these allegations were so salacious that they resulted in college basketball powerhouse schools facing NCAA sanctions; the City College of New York, which had won the 1949–50 NCAA men’s basketball championship, abandoned its big-time college basketball program altogether.⁵⁷ For Columbia University star Jack Molinas, his involvement with organized crime cost him his NBA career, his freedom, and ultimately his life.⁵⁸

Under this unique context, the Committee’s final report found strong support for the contention that organized crime was an interstate operation with a significant grip on many areas of the country.⁵⁹ One of the principal funding mechanisms for this organized criminal syndicate was bookmaking via the utilization of various wire services.⁶⁰ The report stated that “[t]he ‘bookie’ empire ha[d] two vulnerable points within reach of Congress’ 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.”⁶¹ To combat illegal sports betting activity, the Committee recommended that Congress pass several new anti-gambling laws as well as implement several modifications to the tax code.⁶² Congress then legislated in that direction.⁶³

D. The First Legislative Era

Even before the Kefauver Committee concluded its investigations, Congress already began to introduce legislation targeting organized crime’s gambling operations.⁶⁴ One method was criminalizing the use of

56. Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN: ESPN CLASSIC (Nov. 19, 2003), https://www.espn.com/classic/s/basketball_scandals_explosion.html [https://perma.cc/5F9F-AE4U]. There were also allegations that a referee implicated in the scandal manipulated six National Basketball Association games. *Id.*

57. 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 VAULT, Apr. 3, 2000, <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> [https://perma.cc/W2V6-KWSA].

58. See *Molinas’s Past Sifted for Clues*, N.Y. TIMES, Aug. 6, 1975, at 57, <https://nyti.ms/1kdPIRS>.

59. See Holden, *supra* note 53.

60. *Id.*

61. S. REP. NO. 82-725 (1951), <http://stoppredatorygambling.org/wp-content/uploads/2012/12/Kefauver-Committee-Final-report.pdf> [https://perma.cc/9CYG-73TC].

62. *Id.*

63. See John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677 (2020).

64. *Transmission of Gambling Information: Hearing on S. 3358 Before the S. Subcomm. of the Comm. on Interstate and Foreign Com.*, 81st Cong. (1950).

wire communication facilities for the transmission of gambling information.⁶⁵ This bill became known as the Interstate Wire Act (Wire Act).⁶⁶ Along with the so-called Wire Act,⁶⁷ Congress also passed the Travel Act, which criminalized interstate travel with the intent to engage in unlawful activity, including gambling business activity.⁶⁸ Congress also passed the Wagering Paraphernalia Act, which made the interstate transport of wagering materials, including bookmaking materials, a federal crime.⁶⁹

In 1964, Congress attacked the stream of revenue for organized crime that took the chance out of sports gambling, notably match fixing via bribery.⁷⁰ The Sports Bribery Act was passed in 1964 as a holdover from the Kennedy-era anti-organized crime legislation of 1961.⁷¹ The statute was intended to give the federal government a means to interrupt interstate match fixing.⁷² Thereafter, Congress passed a number of additional laws to be used in conjunction with these anti-gambling statutes to further pursue leaders of organized crime.⁷³ The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) granted the United States the power to bring criminal charges for racketeering conduct, even where the underlying illegal acts occurred under state, rather than federal, law.⁷⁴ 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.⁷⁵ Congress deemed the IGBA necessary in part because it

65. Holden, *supra* note 63, at 682.

66. See Holden, *supra* note 53.

67. 18 U.S.C. § 1084.

68. 18 U.S.C. § 1952(a)–(b).

69. 18 U.S.C. § 1953(a).

70. 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 & POLS. 97, 98 (2017).

71. Holden & Rodenberg, *supra* note 33, at 455.

72. H.R. REP. NO. 88-1053, at 2 (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.” *Id.* 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. *Id.* See also 18 U.S.C. § 224.

73. See, e.g., 18 U.S.C. §§ 1961–1968.

74. *Id.*

75. 18 U.S.C. § 1955(b)(1)(i)–(iii) (1970).

believed that some states were failing to rein in organized crime by not enforcing their own gambling laws.⁷⁶

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.⁷⁷ The introduction of a 10% 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 1% of the wagers they were collecting.⁷⁸ 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 2%.⁷⁹ Because of how the tax was calculated, it amounted to a tax of nearly 50% of gross gaming revenue.⁸⁰ 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 modern sportsbook-style wagering.⁸¹

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.⁸² The report noted that illegal sports bookmaking was "the number one form of illegal gambling in the United States,"⁸³ and that the typical sports bettor was a white male between eighteen and forty-four with a college degree and an annual income of more than \$10,000 (in 1976 dollars).⁸⁴ Among the biggest concerns noted in the report were the perceptions of gamblers fixing sporting events.⁸⁵ Respondents ranked high school sports as least likely to be fixed and professional sports as much more likely.⁸⁶

76. Kaitlyn Dunphy, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1321–22 (2014).

77. See I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING & THE L. (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/> [https://perma.cc/6SG9-WZ43].

78. *Id.* ("For example, \$1,100 bet to win \$1,000 was recorded as merely \$11 to win \$10.").

79. *See id.*

80. 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. *See id.*

81. *Id.*

82. COMM'N ON THE REV. OF THE NAT'L POL'Y TOWARD GAMBLING, GAMBLING IN AMERICA (1976).

83. *Id.* at 174.

84. *Id.* at 175.

85. *Id.* at 69–70.

86. *Id.* at 70.

A few years later, one of the most famous contemporary college sports match-fixing scandals would make the news.⁸⁷ 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.⁸⁸ 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.⁸⁹ The fallout from the match-fixing scandal showed that sports betting was still a powerful force in the country and drove the idea that betting of any kind would contribute to an increase in sports-related corruption—a belief that continued to persist for decades⁹⁰ and eventually culminated in various sports organizations pushing to ban any future expansion of sports betting.⁹¹

Beginning in 1990, major American professional sports leagues began pressuring Congress to pass a law banning sports wagering throughout the country.⁹² The first effort to pass this legislation came as multiple states were considering expanding their lottery offerings to

87. 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://perma.cc/B2EC-9TV8].

88. 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/> [https://perma.cc/M78Y-CDJR].

89. *Id.* 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 and, the inspiration for the film, Henry Hill. Holden & Rodenberg, *supra* note 33, at 458–59.

90. 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/> [https://perma.cc/9Y7T-WXYE]. There is little evidence that legalized sports betting increases corruption, as match-fixing expert Declan Hill stated at a conference in Holland, “[O]nly 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.” John Holden, *What Gaming in Holland Can Teach the US Sports Betting Market*, LEGAL SPORTS REP. (July 18, 2019), <https://www.legalsportsreport.com/34412/holland-gaming-us-sports-betting/> [https://perma.cc/8B63-ELZA].

91. See Ryan M. Rodenberg, Anastasios Kaburakis & John T. Holden, “*Whose*” *Game Is It? Sports-Wagering and Intellectual Property*, 60 VILL. L. REV.: TOLLE LEGE 1, 1–3 (2014).

92. See Holden, *supra* note 7, at 337–38; see also *Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Pats., Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 38–39 (1990) (featuring testimony from representatives from Major League Baseball, the National Football League, as well as the National Collegiate Athletic Association).

include sports betting products.⁹³ 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.⁹⁴ The first legislative attempt failed, but new legislation surfaced a year later.⁹⁵ Backed by many of the same driving forces, Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992.⁹⁶

PASPA did not ban sports wagering entirely.⁹⁷ Instead, it froze it.⁹⁸ The PASPA freeze, created by Section 3704 of the statute,⁹⁹ meant that only a handful of states were able to have any kind of sports wagering.¹⁰⁰ 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.¹⁰¹ So, PASPA led to a monopoly on sportsbook style wagering for the state of Nevada, even despite the freeze on legalized sports betting elsewhere.¹⁰² This was a very lucrative result for Nevada, but not necessarily one that benefited the United States or its citizens overall.¹⁰³ Congress remained concerned with the expansion of gambling, and

93. *Id.* at 338.

94. *See id.* at 338–42. 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.” Tagliabue would further testify that “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 Pats., Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 38–39 (1990) (statement of Paul J. Tagliabue, Comm’r, National Football League).

95. *See* Holden, *supra* note 7, at 342–43.

96. *See* Holden, *supra* note 7, at 351.

97. *See* John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling Regulations and Your Grandfather (Clause)*, 26 STAN. L. & POL’Y REV. ONLINE 1, 1–3 (2014).

98. *See id.* at 2–3.

99. 28 U.S.C. § 3704.

100. *See* 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, 15–16 (2017).

101. *See* Holden, *supra* note 7, at 353.

102. *See* Kyle Wyant, Note, *Do Not Pass Go, Do Not Collect \$231 Million Dollars: How NCAA v. Governor of New Jersey Could Negatively Affect Nevada’s Monopoly on Sports Betting*, 7 UNLV GAMING L.J. 223, 223–24 (2017).

103. For an overview of Nevada sports wagering win totals, see UNLV CTR. FOR GAMING RSCH., *Nevada Sports Betting Totals: 1984-2019* (2020), https://gaming.unlv.edu/reports/NV_sportsbetting.pdf [https://perma.cc/2WGH-MERF].

specifically, sports gambling.¹⁰⁴ Meanwhile, sports gambling operations continued to flourish underground, operating illegally in black markets on the emerging internet.¹⁰⁵

Beginning in 1997, Congress took aim at online gambling.¹⁰⁶ The first hearing was followed by nearly a decade of attempts to ban internet gambling in its various forms.¹⁰⁷ Driving this push was a 1999 report that concluded the illegal online sports gambling market was worth between \$80 and \$380 billion annually.¹⁰⁸ 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, 2001.¹⁰⁹

After nearly a decade of trying, Congress finally passed the Unlawful Internet Gambling Enforcement Act (UIGEA)¹¹⁰—a largely neutered bill that targeted the payment processors who allowed online gambling operators to transact business with American customers.¹¹¹ One of the reasons that the UIGEA lacked the power of some of the other proposed bills was because of the variety of exemptions contained in the bill, including one for fantasy sports.¹¹² This fantasy sports exemption 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.¹¹³

104. See John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97, 101–03 (2018).

105. See ROUTLEDGE INTERNATIONAL HANDBOOK OF INTERNET GAMBLING, 3–4 (Robert J. Williams, Robert T. Wood & Jonathan Parke eds., 2012) (discussing growth of online gambling).

106. See Holden, *supra* note 104, at 103.

107. See *id.* at 103, 107–13, 116.

108. See NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT, at 2–14 (1999).

109. See Charles P. Ciaccio, Jr., Note, *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529, 542 (2010). Evidence of the widespread use of online gambling websites as a money laundering instrument is limited. See MALCOLM K. SPARROW, COLEMAN BAZELON & CHARLES JACKSON, CAN INTERNET GAMBLING BE EFFECTIVELY REGULATED? MANAGING THE RISKS 38 (2009); see also Steve Ruddock, *Unsurprisingly, Terrorists Aren’t Using Online Gambling Sites to Launder Money and Fund Plots*, ONLINE POKER REP. (Jan. 6, 2017), <https://www.onlinepokerreport.com/23377/congressional-investigation-terrorists-online-gambling/> [<https://perma.cc/PRK5-WCRV>].

110. Holden, *supra* note 104, at 101.

111. Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1952–62 (2006) (codified at 31 U.S.C. §§ 5361–5367).

112. 31 U.S.C. § 5362(1)(E)(ix).

113. Marc Edelman, Keynote Address, *A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELL. PROP., SPORTS & ENT. L.F. 1, 9–13 (2016).

F. Daily Fantasy Sports

The term “fantasy sports” traditionally described a game with academic origins dating back to the 1960s.¹¹⁴ Participants in traditional fantasy sports contests 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.¹¹⁵ Throughout the season, participants in traditional fantasy sports contests would tabulate their draftees’ real-world, day-to-day statistics.¹¹⁶ At the end of the season, the participant who had drafted the players with the best real-game statistics would win a prize.¹¹⁷

Although traditional fantasy sports began as a niche hobby, this activity gained popularity in the late 1990s when the internet allowed fans to play traditional fantasy sports without needing to calculate their own statistics.¹¹⁸ Thereafter, internet content providers such as ESPN, CBS, and Yahoo began to offer a wide range of traditional fantasy sports games as a way to drive fans to their website and advertising.¹¹⁹ Some of the U.S. professional sports leagues also began to host traditional fantasy sports contests.¹²⁰

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.¹²¹ This exemption allowed the fantasy sports industry to continue to thrive.¹²² 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.¹²³ To give his new contest an aura of legality under the UIGEA carve-out, Bonnet named his business “Fantasy Sports Live” and called

114. 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, 120.

115. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law*, 3 HARV. J. SPORTS & ENT. L. 1, 5–9 (2012).

116. See *id.* at 5–10.

117. See *id.* at 7–9.

118. See Michael Militello, *The History of Fantasy Sports*, MEDIUM (Dec. 1, 2016), https://medium.com/@michael_mvmm/the-history-of-fantasy-sports-39b150d3451a [<https://perma.cc/CC7D-WR9Q>].

119. See Edelman, *supra* note 115, at 19–20.

120. See *id.* at 20–21.

121. See Edelman, *supra* note 113, at 19–20.

122. See Edelman, *supra* note 115, at 37–38.

123. See Edelman, *supra* note 113, at 6–7.

his new type of games “daily fantasy sports.”¹²⁴ And so, a new source of legal confusion was born.

Although Bonnet’s website never gained much traction,¹²⁵ two other groups of entrepreneurs soon became much more successful with their ventures into daily fantasy sports.¹²⁶ One company, FanDuel, an outgrowth of a Scottish prognostication business, very quickly raised over \$6 million in financing from Comcast Ventures and sold an equity stake in their business to the National Basketball Association.¹²⁷ 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.¹²⁸ By 2016, FanDuel and DraftKings had each raised upwards of \$1 billion in equity financing—transitioning themselves from startups into companies that were highly leveraged by private equity firms.¹²⁹ 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.¹³⁰

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.¹³¹ 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.¹³² However, the federal government never filed any criminal charges against either company.¹³³ Soon thereafter, FanDuel and DraftKings, backed by their significant capital financing, were able to hire lobbyists and get certain state laws changed.¹³⁴

124. Edelman, *supra* note 114, at 124.

125. *See* Edelman, *supra* note 113, at 7.

126. *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. 113, 114–15 (2020).

127. *See* Edelman, *supra* note 113, at 7, 15.

128. *See id.* at 7–8.

129. *See id.* at 8.

130. *See* Holden, McLeod & Edelman, *supra* note 126, at 114–16.

131. *See* Edelman, *supra* note 113, at 6–7.

132. *See* Holden, McLeod & Edelman, *supra* note 126, at 132–33, 143.

133. *See id.* at 132–35, 158. Despite rumors of at least three federal grand jury investigations being convened, no federal charges ever materialized. *See Here’s Where the Federal Investigations into Daily Fantasy Sports Might Be Focused*, LEGAL SPORTS REP. (Mar. 18, 2016), <https://www.legalsportsreport.com/9053/dfs-federal-issues/> [<https://perma.cc/7UGZ-FX9D>].

134. *See* Holden, McLeod & Edelman, *supra* note 126, at 155.

Then, on May 14, 2018, the U.S. Supreme Court rendered its decision in *Murphy v. NCAA*¹³⁵ that overturned PASPA and changed everything for these two large daily fantasy sports companies.¹³⁶ 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.¹³⁷ At present, not only do FanDuel and DraftKings continue to offer cy-près sports gambling under the moniker of daily fantasy sports, but they also now serve as two of the largest sports gambling companies to openly operate subject to state licenses in the United States.¹³⁸

II. SPORTS GAMBLING IN THE COURTS

While a growing number of states have legalized and embraced sports betting, it was a long and winding road to arrive at this modern era.¹³⁹ 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. Governor of Delaware

The first important legal decision to shape the modern status of sports betting in the United States was *NFL v. Governor of Delaware*.¹⁴⁰ This case pitted the legal interests of a state that sought to expand sports gambling against a U.S. professional sports league that opposed such expansion.¹⁴¹ The dispute began when the Delaware Lottery publicly announced a plan to begin offering a lottery contest based on the results of real-world NFL games.¹⁴² 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.¹⁴³

The NFL, which at the time opposed organized betting on its games, sued the State of Delaware, alleging that Scoreboard created a forced association between the league and gambling, and thus the contest

135. 138 S. Ct. 1461 (2018).

136. *See id.* at 1484–85; *see also* Holden, McLeod & Edelman, *supra* note 126, at 114–15.

137. *See* Holden, McLeod & Edelman, *supra* note 126, at 152–53.

138. *See id.* at 166.

139. *See Murphy*, 138 S. Ct. at 1469–70.

140. 435 F. Supp. 1372 (D. Del. 1977).

141. *See id.* at 1375–76.

142. *Id.* at 1375.

143. *Id.* at 1376.

constituted an unlawful interference with the league's property rights.¹⁴⁴ The NFL further alleged that the Delaware Lottery infringed on the NFL's trademarks by using teams' city names in the context of their contest.¹⁴⁵

The U.S. District Court for the District of Delaware ruled almost entirely in the State's favor.¹⁴⁶ The court held that the Delaware Lottery's use of NFL team names did not constitute general interference with any property rights.¹⁴⁷ 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.¹⁴⁸ 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."¹⁴⁹ Yet, the court still concluded that this fact alone was insufficient to constitute infringement of the NFL's registered marks or any other form of unfair competition.¹⁵⁰ Moreover, the court opined that any bona fide 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.¹⁵¹ Thus, the court concluded that it did not need to implement any broader injunction against the Delaware Lottery's NFL betting contest.¹⁵²

Overall, the court's decision in *NFL v. Governor of Delaware* 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.¹⁵³ The 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.¹⁵⁴ Of course, however, the sports leagues gained their new law in 1992 when Congress passed PASPA.¹⁵⁵

144. *Id.*

145. *Id.* at 1380.

146. *Id.*

147. *Id.* at 1378.

148. *Id.* at 1380.

149. *Id.*

150. *Id.*

151. *Id.* at 1380, 1391.

152. *See id.* at 1391.

153. *See* John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J. L. & Bus. 31, 51 (2019).

154. *Id.*

155. *See* 28 U.S.C. §§ 3701–3704 (1992).

B. United States v. Cohen

While the *NFL v. Governor of Delaware* decision pitted a state's economic interest in expanding sports gambling against a sports league's effort to forestall it,¹⁵⁶ another important legal challenge to the attempted expansion of sports gambling came more than a decade later when the U.S. Court of Appeals for the Second Circuit decided the criminal case, *United States v. Cohen*.¹⁵⁷ 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.¹⁵⁸ In March 1998, the United States arrested Cohen and charged him with eight counts of wrongdoing, many of which related to alleged violations of the Wire Act.¹⁵⁹ While admitting to the underlying conduct, Cohen alleged that his behavior fell under a safe harbor in the Wire Act because he believed he did not violate any laws within Antigua.¹⁶⁰

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.¹⁶¹ The court fully rejected both arguments.¹⁶² Noting that Cohen's assertion about where he took bets was incorrect and that Cohen's conduct separately violated New York law, the court found Cohen guilty of violating the Wire Act.¹⁶³

The *Cohen* decision was a major blow to offshore sports gambling operators that had believed they would be able to get around federal laws by setting up their operations overseas where sports gambling was legal.¹⁶⁴ 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.¹⁶⁵

156. *NFL*, 435 F. Supp. 1372.

157. *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

158. *Id.* at 70–71.

159. *Id.* at 71; 18 U.S.C. § 1084.

160. *Cohen*, 260 F.3d at 71.

161. *Id.* at 73.

162. *Id.* at 73–74.

163. *Id.* at 73–75.

164. *See id.*

165. For an overview of how geo-location tracking works, *See* Jodie Fleischer, Rick Yarborough, Jeff Piper & Steve Jones, *DC's Sports Betting App Will Let You Bet District-Wide, Except for the Hundreds of Places It Won't Work*, NBC WASH. (Sept. 5, 2019), <https://www.nbcwashington.com/news/local/washington-dc-sports-betting-app-gEOFENCING/1959020/> [<https://perma.cc/5VT2-GWHY>].

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

The next three court decisions 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.¹⁶⁶ The first two of these challenges pitted the interests of private citizens against those of the U.S. Department of Justice.¹⁶⁷ Meanwhile, the third case pitted Delaware against the interests of the NFL and the other U.S. commercial sports leagues.¹⁶⁸

In *Flagler v. United States 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 PASPA violated the Tenth Amendment of the U.S. Constitution.¹⁶⁹ Flagler, among other things, alleged that because the U.S. Constitution is silent as to gambling (or gaming), the issue of gambling's legality is reserved to the states.¹⁷⁰ Nevertheless, the court dismissed Flagler's complaint without addressing any of his substantive arguments.¹⁷¹ In particular, the court decided that Flagler lacked standing to challenge PASPA because he was merely a private citizen and not someone with a direct interest in the matter.¹⁷² Similarly, Flagler failed to allege that his interest in betting on sporting events constituted a legally protectable right.¹⁷³

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.¹⁷⁴ The iMEGA plaintiffs alleged that they, unlike Flagler, had standing to file a lawsuit because the association's membership sought to imminently

166. See *Flagler v. United States Atty. for Dist. of N.J.*, No. 06-3699, 2007 WL 2814657 (D.N.J. Sept. 25, 2007); *Interactive Media Ent. & Gaming Ass'n v. Holder*, No. 09-1301, 2007 WL 802106 (D.N.J. 2011); *Off. of Comm'r. of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

167. See *Flagler*, 2007 WL 2814657, at *1; *Interactive Media Ent. & Gaming Ass'n*, 2007 WL 802106, at *1.

168. *Markell*, 579 F.3d at 295.

169. *Flagler*, 2007 WL 2814657, at *1; Edelman, *supra* note 2, at 321–322.

170. *Flagler*, 2007 WL 2814657, at *1.

171. See *id.* at *3 (dismissing for lack of subject matter jurisdiction); see also Edelman, *supra* note 2, at 322.

172. See *Flagler*, 2007 WL 2814657, at *2; see also Edelman, *supra* note 2, at 322.

173. See *Flagler*, 2007 WL 2814657, at *2; see also Edelman, *supra* note 2, at 322.

174. *Interactive Media Ent. & Gaming Ass'n*, 2007 WL 802106, at *1; see also Edelman, *supra* note 2, at 322.

provide gambling services if PASPA were overturned, making Flagler's interests in the matter more direct than in *Flagler*.¹⁷⁵ 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.¹⁷⁶

Meanwhile, the third legal dispute, *Office of the Commissioner of Baseball v. Markell*, presented a very different legal posture.¹⁷⁷ Harkening back to the 1977 dispute in *NFL v. Governor of Delaware*, the U.S. professional sports leagues, led by Major League Baseball, sought to stop the State of Delaware and its governor from expanding Delaware's sports gambling offerings.¹⁷⁸ This time, however, instead of alleging trademark infringement, the leagues argued that Delaware's attempt to expand its sports gambling violated PASPA.¹⁷⁹ The district court denied the sports leagues an injunction to stop Delaware from legalizing a broader form of sports gambling.¹⁸⁰ This was because Delaware was one of the four states to enjoy a grandfather clause exemption from PASPA's anti-gambling requirements.¹⁸¹ On appeal, however, the U.S. Court of Appeals for the Third Circuit reversed, finding that PASPA's grandfather clause only allowed Delaware to offer sports gambling "to the extent that the scheme was conducted by that state" prior to PASPA's passing.¹⁸² Since Delaware sought to expand, rather than maintain, its sports gambling offerings, the court found that the state's conduct indeed violated PASPA.¹⁸³

175. *Interactive Media Ent. & Gaming Ass'n*, 2007 WL 802106, at *4; see also Edelman, *supra* note 2, at 322.

176. *Interactive Media Ent. & Gaming Ass'n*, 2007 WL 802106, at *6; *Flagler*, 2007 WL 2814657, at *2-*3.

177. See *Off. of Comm'r. of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

178. *Markell*, 579 F.3d at 295; *NFL v. Governor of Del.*, 435 F. Supp. 1372 (D. Del. 1977).

179. *Markell*, 579 F.3d at 296–97. PASPA provided sports organizations a right to enforce the statute if games that they operated were the subject of wagering.

180. See Edelman, *supra* note 2, at 323.

181. See *id.* at 322–23; see also Chris Sieroty, *PASPA's Grandfathered States of Delaware, Oregon and Montana Consider Sports Betting*, GAMBLING COMPLIANCE (May 29, 2018), https://gamblingcompliance.com/premium-content/insights_analysis/paspas-grandfathered-states-delaware-oregon-and-montana-consider [https://perma.cc/QG4Y-52FV] (listing Delaware, Oregon, Montana, and Nevada as states grandfathered under PASPA).

182. *Markell*, 579 F.3d at 300–01.

183. *Id.*

D. The New Jersey PASPA Lawsuits

Since the U.S. Court of Appeals for the Third Circuit's decision in *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 seek to prevent them from doing so under PASPA.¹⁸⁴ Initially, New Jersey failed in its efforts to gain legalized, intrastate sports betting.¹⁸⁵ However, it ultimately succeeded at convincing the United States Supreme Court that PASPA indeed violated the U.S. Constitution.¹⁸⁶

1. *CHRISTIE I*

The first legal action involving the U.S. commercial sports leagues and 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.¹⁸⁷ New Jersey, in turn, sought to defend its right to implement sports betting legislation by arguing that PASPA violated the Constitution on a number of different grounds.¹⁸⁸ The U.S. District Court for the District of New Jersey found PASPA constitutional based on Congress's constitutional right to govern interstate commerce, glossing over some of New Jersey's other legal arguments.¹⁸⁹

New Jersey appealed to the U.S. Court of Appeals for the Third Circuit, which upheld the lower court's decision.¹⁹⁰ The three-judge panel 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.¹⁹¹ In

184. See *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013); see also *NCAA v. Christie*, 61 F. Supp. 488 (D.N.J. 2014).

185. See *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013).

186. *Murphy v. NCAA*, 1138 S. Ct. 1461, 1484–85 (2018).

187. See N.J. Stat. Ann. §§ 5:12A-1 to 5:12A-4 (repealed 2014); N.J. Stat. Ann. §§ 5:12A-5 to 5:12A-6 (repealed 2014); N.J. Stat. Ann. §§ 5:12A-7 to 5:12A-9 (repealed 2018); N.J. Stat. Ann. §§ 5:12A-10 to 5:12A-19 (2018); see also Rodenberg & Holden, *supra* note 100, at 17.

188. *NCAA 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 thirteen 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).

189. *NCAA v. Christie*, 926 F. Supp. 2d at 559 (citing *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972)).

190. *NCAA v. Governor of N.J.*, 730 F.3d 208, 224–25 (3d Cir. 2013).

191. *Id.* at 229–31.

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.”¹⁹² The court also rejected the state appellants’ equal sovereignty arguments.¹⁹³

2. CHRISTIE II

After the Supreme Court’s denial of certiorari in *Christie I*,¹⁹⁴ New Jersey politicians returned to the drawing board in their effort to offer sports wagering to New Jersey.¹⁹⁵ Seizing upon language in *Christie I*, New Jersey politicians then drafted a law that simply repealed “all state laws and regulations prohibiting sports wagering,” instead of creating a new scheme to legalize and regulate sports betting.¹⁹⁶ 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 gambling house operating . . . in Atlantic City or a running or harness horse racetrack . . . by persons 21 years of age or older.”¹⁹⁷ Thus, one could reasonably define the new statute as a partial, rather than total, repeal.¹⁹⁸

New Jersey legislators 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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

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.²⁰² The en banc panel of the 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

192. *Id.* at 232.

193. *Id.* at 239–40.

194. *Id.*

195. *NCAA v. Christie*, 61 F. Supp. 3d 488, 491–92 (D.N.J. 2014).

196. *Id.* at 494.

197. *Id.* at 494–95 (citing N.J. Stat. Ann. § 5:12A-7 (repealed 2018)).

198. *Id.*

199. *Id.* at 495.

200. *Id.*

201. *Id.* at 503–04.

202. *NCAA v. Governor of N.J.*, 832 F.3d 389, 391–92 (3d Cir. 2016).

effect was one of authorization in that racetracks and casinos were permitted to begin accepting sports wagers.²⁰³ The decision further held that PASPA does not impermissibly commandeer the state.²⁰⁴

Nevertheless, one dissenting opinion concluded that New Jersey did exactly what the Third Circuit said they were entitled to do by repealing their existing law.²⁰⁵ Meanwhile, a second dissent stressed that PASPA 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.²⁰⁶

3. *MURPHY V. NCAA*

Emboldened by those dissenting opinions, the State of New Jersey, once again petitioned the U.S. Supreme Court for a writ of certiorari.²⁰⁷ This time, the U.S. Supreme Court agreed to hear the case.²⁰⁸ Around the same time, Chris Christie was replaced as New Jersey's Governor by Phil Murphy—leading to the updated caption.²⁰⁹

On May 14, 2018, the U.S. Supreme Court delivered its opinion in *Murphy* that would fundamentally change the sports betting landscape in the United States.²¹⁰ Authored by Justice Alito, the Court held that PASPA impermissibly commandeers the states into maintaining their sports gambling laws.²¹¹ Thus, PASPA was rendered void.²¹²

The majority opinion began by highlighting the history of the evolving and competing views on gambling in the United States and in New Jersey in particular.²¹³ Alito 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.”²¹⁴ So, while Congress does indeed

203. *Id.* at 396–97.

204. *Id.* at 398–99.

205. *Id.* at 403–04 (Fuentes, J., dissenting).

206. *Id.* at 408–11 (Vanaskie, J., dissenting).

207. *See* Petition for Writ of Certiorari, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (No. 16-476).

208. *Murphy v. National Collegiate Athletic Association*, SCOTUSBlog <https://www.scotusblog.com/case-files/cases/murphy-v-national-collegiate-athletic-association-2/> [<https://perma.cc/4JP5-PTZE>] (last visited Oct. 10, 2020).

209. *See Murphy*, 138 S. Ct. 1461.

210. *Id.*

211. *Id.* at 1481.

212. *Id.* at 1484–85.

213. *Id.* at 1468–69.

214. *Id.* at 1475.

have the authority to regulate sports gambling directly, it does not have the power to dictate how states legislate sports gambling.²¹⁵

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 it to survive.²¹⁶ But, the Court determined that severing the unconstitutional aspects of PASPA would deflate the statute in a manner that Congress had never intended.²¹⁷ 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.”²¹⁸ 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.²¹⁹

Murphy immediately opened the doors for legalized sports wagering beyond the borders of Nevada, Delaware, Montana, and Oregon.²²⁰ Even before the Supreme Court’s decision, other 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.²²¹ Before the end of 2018, more than twenty states had introduced legislation that would legalize sports betting in some form.²²² That enthusiasm continued in 2019 and 2020, as states looked for opportunities to raise revenue in a manner that does not

215. *Id.* at 1479–81.

216. *Id.* at 1481–82.

217. *Id.* at 1484–85.

218. *Id.* at 1485 (Thomas, J., concurring).

219. *Id.* at 1489 (Ginsburg, J., dissenting). Justice Ginsburg’s dissent emphasized the heavy hand that the majority purportedly used in order to strike PASPA as wholly unconstitutional. Justice 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, 28 U.S.C. § 3702(1), two federal edicts should remain intact.

Id.

220. *See* Holden, *supra* note 3, at 588.

221. 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. 21, 2018, 8:52 PM), <https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211> [<https://perma.cc/5KL6-GGRN>].

222. *See* *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> [<https://perma.cc/K3RL-EG4T>] (last visited Oct. 10, 2020).

require implementing a new tax.²²³ 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.²²⁴ Excessive burdens on operators or customers risk leaving money in consumers' pockets or sending money to the still-thriving black market.²²⁵

III. SPORTS GAMBLING TODAY

The enthusiasm for legalized sports wagering since the *Murphy* decision has been palpable.²²⁶ Sports betting legalization has attracted interest from more than thirty-five states.²²⁷ Even states that have almost no legalized gambling have explored legalizing sports betting.²²⁸ But, that rise has not been without its obstacles.²²⁹ The most notable obstacle being misguided efforts by the professional sports leagues to extract a portion of sports betting proceeds from sportsbook operators.²³⁰ There is also the

223. See Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 518 (2020).

224. Holden, *supra* note 3, at 611–14 (describing the factors impacting the success of legalized sports betting).

225. See, e.g., Associated Press, *Why Rhode Island Casinos Are Getting Crushed on Sports Betting*, MARKETWATCH (Mar. 29, 2019, 6:52 PM), <https://www.marketwatch.com/story/why-rhode-island-casinos-are-getting-crushed-on-sports-betting-2019-03-29> [<https://perma.cc/DW7C-NZ6C>] (providing examples of states whose gambling revenue in early 2019 was far below the numbers these states had anticipated).

226. See Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Gambling*, CNBC (July 10, 2019, 3:19 PM), <https://www.cnbc.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html> [<https://perma.cc/U5JP-55BC>].

227. See *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Oct. 10, 2020).

228. 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> [<https://perma.cc/L89V-JRDF>].

229. See generally Geoff Mulvihill, *Why Sports Betting Hasn't Gone Nationwide Yet After Supreme Court Ruling*, USA TODAY (June 23, 2019, 3:22 PM), <https://www.usatoday.com/story/money/2019/06/23/sports-betting-gambling-states-legal-supreme-court-ruling/1542110001/> [<https://perma.cc/HU43-5G4H>] (describing state lawmakers' efforts to balance revenue boosts with consumer protections and analyzing business interests and opposition from stakeholders).

230. 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) (discussing sports league efforts to obtain a percentage of proceeds from gambling operators). See also Holden & Schuster, *supra* note 153. 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

looming threat of the federal government moving to implement a comprehensive regulatory scheme in a way that PASPA failed to do.²³¹ Yet, despite these threats, the legal sports betting market continues to expand.²³²

A. *The Size of the Market*

As of the end of 2019, nineteen states and the District of Columbia had passed laws legalizing sports wagering.²³³ Of those nineteen states, fourteen were accepting bets of some kind at the end of the first full year without a federal ban in place.²³⁴ While the national market remains immature, there have been some observable trends regarding which regulatory models best equate to greater sportsbook revenues.²³⁵ Nevada, which set the benchmark for sports betting revenue, has not seen a siphoning off of sports betting revenue to date, as Las Vegas remains a

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. *Integrity Fees-What Are They And Why Are They So Controversial?*, SPORTS HANDLE, <https://sportshandle.com/integrity-fees/> [https://perma.cc/4U44-M7A9] (last visited Oct. 10, 2020).

231. 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/> [https://perma.cc/EPW8-NMLX]. 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 REP. (Sep. 6, 2019), <https://www.legalsportsreport.com/35368/federal-sports-betting-bill-official-league-data/> [https://perma.cc/62AD-2PN6].

232. See Woods, *supra* note 226.

233. David Fucillo, *The State of Sports Betting*, SB NATION, <https://www.sbnation.com/a/sports-betting-gambling-state-legislation-tracker> [https://perma.cc/7FM7-X7XN] (last visited Oct. 10, 2020).

234. *Id.* Two states are outliers within these fourteen, as New York passed a law in 2013 allowing sports betting, if legalized, at a small number of upstate casinos, several hours from major population centers. See Joseph Spector, *Supreme Court Ruling Clears the Way for Sports Gambling at NY Casinos*, DEMOCRAT & CHRON. (May 15, 2018), <https://www.democratandchronicle.com/story/news/politics/albany/2018/05/14/sports-betting-new-york/607152002/> [https://perma.cc/6H9F-TU34]. 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 REP. (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/> [https://perma.cc/7VV9-87SV].

235. For an overview of different regulatory models, see Holden, *supra* note 3.

destination city for gamblers of all varieties.²³⁶ But New Jersey is quickly catching up, even surpassing the amount wagered in Nevada in some months.²³⁷ As 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.²³⁸

Thus far, New Jersey is a true success story; however, in a strict gross revenue sense, other states have demonstrated that sports betting is far from a sure thing to significantly boost state coffers.²³⁹ The example for overestimating revenue from sports betting at the time of writing has been Rhode Island.²⁴⁰ The sparsely populated state had anticipated \$11.5 million in revenue in the state's first fiscal year of offering sports betting.²⁴¹ Instead, with several months remaining before the end of the year, the state had generated only \$150,000.²⁴² Other early adopter states, including West Virginia, Pennsylvania, and Mississippi, also saw revenues below estimates.²⁴³ A number of factors play a role in the revenue generated by sportsbooks²⁴⁴ and, in turn, the money returned to the states, including tax rates, the variety of offerings, and the product's accessibility.²⁴⁵

236. In 2018, Nevada sportsbooks saw their most profitable year on record (dating to 1984). U.N.L.V. CTR. FOR GAMING RSCH., NEVADA SPORTS BETTING TOTALS: 1984–2019 (2020), https://gaming.unlv.edu/reports/NV_sportsbetting.pdf [https://perma.cc/AZT5-BQV8].

237. 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> [https://perma.cc/A44L-KXEU].

238. *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting/revenue/> [https://perma.cc/3VDR-4A53] (last visited Oct. 10, 2020).

239. See *id.*

240. See *id.*

241. 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> [https://perma.cc/MS7J-6TKC].

242. *Id.*

243. 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> [https://perma.cc/22HJ-VR2B].

244. *What Is a Sportsbook? (And How Does Such a Business Make Money?)*, GAMBLING SITES (June 9, 2018), <https://www.gamblingsites.org/blog/what-is-a-sports-book-and-how-does-such-a-business-make-money/> [https://perma.cc/VS83-SJ5J].

245. See Holden, *supra* note 3.

B. Mobile Versus Brick-and-Mortar

The growth of e-commerce is reshaping nearly every industry: nearly 53% of all purchases are reported to have been digitally influenced.²⁴⁶ Sports betting appears to follow that trend with some experts predicting that 90% of sports betting will be done on mobile phones by the end of the next decade.²⁴⁷ New Jersey already has seen upwards of 80% of its sports wagers placed online or via mobile phones.²⁴⁸ Part of New Jersey's success emerges from the fact that the state so quickly opened up mobile sports betting.²⁴⁹ Other states that were slower to authorize a mobile component, like Pennsylvania, have struggled to generate volumes similar to those of New Jersey.²⁵⁰

While there are a number of factors that states must consider in deciding what type of sports betting to allow,²⁵¹ 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 mobile sports betting have also seen a similar increase at brick-and-mortar facilities.²⁵² Indeed, many concerns regarding mobile wagering can be controlled via complex identity verification and geolocation tracking applications.²⁵³ For

246. 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> [https://perma.cc/J5W6-GHES].

247. 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/> [https://perma.cc/94GD-BGFW].

248. *Id.*

249. 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> [https://perma.cc/7C4G-KBUa5].

250. 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/> [https://perma.cc/4NJ7-JAC9]. 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/> [https://perma.cc/A3C4-J452].

251. See Holden, *supra* note 3, at 611–19.

252. See Kevin Shelly, *When It Comes to Retail Sports Betting, Valley Forge Is All About Foot Traffic*, PLAY PA. (Aug. 1, 2019), <https://www.playpennsylvania.com/valley-forge-fanduel-retail-traffic/> [https://perma.cc/L8MS-TLFZ].

253. See Martin Derbyshire, *What Is Geolocation and How It Works on Gambling Websites in NJ*, NJ GAMBLING WEBSITES (Apr. 5, 2018),

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.²⁵⁴

Another concern about mobile sports betting is that experts in problem gambling believe “online gambling makes it easier for someone who engages in pathological forms of gambling to engage in these behaviors.”²⁵⁵ There also are outstanding questions about whether the mechanisms to identify problem gamblers, underage gamblers, and inebriated gamblers are sophisticated enough to identify and block these particular individuals when participating in online gambling.²⁵⁶ Thus, some argue that states should move gingerly toward allowing mobile sports betting, even where they have already legalized sports betting and brick-and-mortar locations.²⁵⁷

C. Illegal Market Remains Significant

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.²⁵⁸ One survey conducted prior to the *Murphy* decision reported that 70% of respondents would move some or all of their sports betting from the illegal market into the legal market.²⁵⁹ Findings for the period between the *Murphy* decision and the end of 2019 show that, at least in

<https://www.njgamblingwebsites.com/geolocation-technology-works-new-jersey/>
[<https://perma.cc/K9SF-EWN9>].

254. 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/> [<https://perma.cc/9PW2-YQCU>].

255. Edelman, *supra* note 2, at 333.

256. *Id.*

257. See, e.g., The Monitor’s 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> [<https://perma.cc/ZEK7-VAM8>].

258. 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/> [<https://perma.cc/7DQL-Z74M>]; 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> [<https://perma.cc/J5BQ-7MSZ>]; 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> [<https://perma.cc/7MJK-BZDY>].

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

New Jersey, the availability of sports betting translated into a lot of people betting, with a sample reporting 19% of respondents having bet on sports in the previous year.²⁶⁰ That same study further revealed that nearly a year after the introduction of legal sports betting, almost half of New Jersey's bettors were still wagering with illegal offshore sportsbooks while 15% of bettors still wagered with a local bookie.²⁶¹ There are a number of reasons why stakeholders want to eliminate the illegal sports betting market, the corruption of sporting events being chief among them.²⁶²

The threat of match fixing 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.²⁶³ 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.²⁶⁴ 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.²⁶⁵

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.²⁶⁶ One of the advantages

260. 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/> [https://perma.cc/A356-8XUX].

261. *Id.*

262. See generally Declan Hill, *A Critical Mass of Corruption: Why Some Football Leagues Have More Match-Fixing than Others*, 11 INT'L J. SPORTS MKTG. & SPONSORSHIP 221 (2010) (noting that one of the conditions necessary for match-fixing to thrive is the existence of illegal gambling markets).

263. Holden & Rodenberg, *supra* note 33, at 453–55; 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/> [https://perma.cc/JR3S-NPR3]; 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/> [https://perma.cc/ZH98-JS4V].

264. 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 Holden, *supra* note 90.

265. John T. Holden, *Ghosts in the Machine: How Corrupters Manipulate Games that Never Happen*, 10 GAMING L. REV. 630, 634 (2018).

266. 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/> [https://perma.cc/Z9WX-NETC].

widely cited as a benefit that illegal bookmakers enjoy is that they are often willing to extend customers credit to make wagers.²⁶⁷ While some states have authorized the use of credit cards at sportsbooks, a significant number of those transactions are blocked by issuing banks,²⁶⁸ likely out of concerns regarding federal law.²⁶⁹ 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.²⁷⁰ 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 these wagers into the unregulated market.²⁷¹

D. New State Laws

Finally, some of the new state laws approved in the aftermath of *Murphy* have not created a true free market for legalized sports gambling. 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.²⁷² U.S. states currently fall into three general categories in terms of their legal treatment of sports gambling.²⁷³ At present, twelve 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.²⁷⁴ Seven states allow for a limited number of

267. *Id.*

268. *Id.*

269. *See e.g.*, 18 U.S.C. § 1084; *see also* 31 U.S.C. §§ 5361–5367.

270. *See* John Holden, *How NJ Sports Betting Set Up a Potential Constitutional Problem for Everyone*, LEGAL SPORTS REP. (June 7, 2019), <https://www.legalsportsreport.com/32820/in-state-nj-sports-betting/> [<https://perma.cc/7KZ3-L75Y>].

271. *Id.* Indeed, one sports integrity executive suggested that most regulators do not have an understanding of the betting market and where corruption happens. Holden, *supra* note 90. 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.” *Id.*

272. *See* Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTS HANDLE (June 4, 2019), <https://sportshandle.com/sports-betting-data-antitrust/> [<https://perma.cc/F35W-RHJB>].

273. *See* Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (May 29, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> [<https://perma.cc/8PHE-9UFM>] The three categories that states fall into are: brick-and-mortar and mobile betting, brick-and-mortar online, and a remaining prohibition. *Id.*

274. *See id.*

companies, subject to a license, to offer sports gambling at brick-and-mortar facilities, but continue to disallow all internet betting.²⁷⁵ Meanwhile, thirty-one states continue to disallow all forms of sports gambling whatsoever.²⁷⁶

While sports gambling regulations vary by state, there are certain common themes.²⁷⁷ First, every state that allows for sports gambling in any form requires any entity seeking to offer sports gambling to first obtain a license from the relevant state agency.²⁷⁸ This means that no state, in any capacity, allows for entrepreneurs to offer sports gambling without a license.²⁷⁹ While a few low-population states such as Delaware and Rhode Island limit access to sports gambling licenses to already-licensed casinos,²⁸⁰ most states require potential licensees to pay a substantial fee to offer sports gambling.²⁸¹ In many cases, these licensing fees chill free market competition.²⁸²

In addition, many states that allow for online sports gambling allow a prospective applicant for an online gambling license to have a casino partner with a brick-and-mortar location.²⁸³ For example, 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.”²⁸⁴ These dual requirements have a further

275. Arkansas, Delaware, Michigan, Montana, New Mexico, New York allow brick-and-mortar sports betting and Mississippi allows mobile betting for patrons on casino property. *See id.*

276. *See id.*

277. These common themes include requirements such as operators needing to obtain a license. *See generally id.*

278. AMERICAN BAR ASS’N, *THE LAW OF REGULATED GAMBLING: A PRACTICAL GUIDE FOR BUSINESS LAWYERS* 249–50 (Keith Miller ed., 2020).

279. *Id.*

280. *See Edelman, supra* note 2, at 325–26, 330 (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).

281. *See AMERICAN BAR ASS’N, supra* note 278, at 250.

282. For example, the state of Pennsylvania charges a licensing fee of \$10 million (on top of a tax rate above 30 percent). *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/> [https://perma.cc/XE7G-BVNV]; *see also* Andrew Maykuth, *Pa.’s Sports Betting Taxes So High Legal Bookmakers May Shun State*, PHILA. INQUIRER (July 16, 2018) <https://www.inquirer.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html> [https://perma.cc/G64E-6H7J] (describing the taxes and fees in Pennsylvania and how they may act to discourage entrants to the market).

283. *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/> [https://perma.cc/HED9-632B].

284. Edelman, *supra* note 2, at 327.

chilling effect on the ability for smaller, or lesser known, companies to enter the online sports gambling marketplace.²⁸⁵

There is also a financial component to the new state gambling laws. Beyond paying licensing fees, licensed sports gambling operators must also pay an annual tax to each state in which they operate.²⁸⁶ The amount of this tax varies by state, with most states settling on a tax rate between eight percent and sixteen percent of gross gaming revenue.²⁸⁷ Gross gaming revenue “represents the difference between [a sportsbook’s] amount wagered [and] amount won.”²⁸⁸ Many observers astutely describe gross gaming revenue as the gambling equivalent of net sale or gross profit because it does not subtract any business costs other than the amount paid in prizes to contest winners.²⁸⁹ Much like licensing fees, this tax keeps smaller and more entrepreneurial companies excluded from the market by making startup costs prohibitive.²⁹⁰

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,²⁹¹ some of the more recent states to legalize sports gambling have guaranteed the leagues a cut.²⁹² Illinois, Michigan, and Tennessee, for example, each require gaming operators to purchase their sports gambling data, for certain types of wagers, from providers approved by each sports league as long as such data is available on “commercially reasonable terms.”²⁹³ These

285. 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, *supra* note 283.

286. For a list of each state’s tax rate, see *US Sports Betting Revenue 2020*, THE LINES, <https://www.thelines.com/betting/revenue/> [<https://perma.cc/2JP3-EZBW>] (last visited Jan. 30, 2020).

287. *Id.*

288. See Definition of Gross Gaming Revenue, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/gross-gaming-revenue-ggr/> [<https://perma.cc/584Z-JXT9>] (last visited Oct. 10, 2020).

289. *Id.*

290. See Raskin, *supra* note 282; Maykuth *supra* note 282.

291. See Rui Kaneya, *The NBA and MLB Quietly Hustle For a Cut of the Sports Betting Jackpot*, SALON (June 7, 2018), https://www.salon.com/2018/06/07/the-nba-and-mlb-quietly-hustle-for-a-cut-of-the-sports-betting-jackpot_partner/ [<https://perma.cc/D5SW-BRSQ>] (describing efforts by several sports leagues to receive a cut of sports betting revenue but noting a lack of traction in getting states to commit).

292. See *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> [<https://perma.cc/4E64-368X>] (last visited Oct. 3, 2020) (noting that Tennessee and Illinois have mandated that operators purchase official league data for Tier 2 (bets taking place during the game) wagers).

293. See John Holden, *What Exactly Is ‘Commercially Reasonable’ Pricing for Official League Data?*, LEGAL SPORTS REP. (Jan. 14, 2020), <https://www.legalsportsreport.com/36742/commercially-reasonable-official-league-datasports-betting/> [<https://perma.cc/T7CX-6LPV>] (describing the difficulty in assessing what commercially reasonable means in the context of official league data).

“official data mandates” again increase the costs of operating legal sports betting and further exclude potential small competitors from the marketplace.²⁹⁴

IV. THE FEDERAL/STATE/TRIBAL INTERPLAY

Governance of sports gambling in the United States entails more than just the complex, intertwined relationship between state and federal law.²⁹⁵ In this area, there is actually a tripartite relationship with the federal government, state governments, and the tribal governments that maintain dominion over Native American land.²⁹⁶ While state governments have historically had the primary responsibility for determining which activities to allow within their jurisdictions,²⁹⁷ 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.²⁹⁸

A. Overview of Federal, State, and Tribal Responsibilities

For well over a century, states have been able to determine what activities take place within their borders.²⁹⁹ For example, while many 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.³⁰⁰ 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.³⁰¹ In fact, only two states presently lack any form of legalized gambling, Utah and Hawaii.³⁰² The federal government has long played a supporting role in

294. *See id.*

295. John Holden, *Tribal Compacts: A Primer for Legal US Sports Betting*, LEGAL SPORTS REP. (Nov. 14, 2019), <https://www.legalsportsreport.com/32819/tribalcompacts-us-sports-betting/> [<https://perma.cc/4MLG-H4QN>].

296. *Id.*

297. *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.”).

298. *See* Edelman, *supra* note 114, at 139–41.

299. Keller, *supra* note 297, at 1577.

300. *Id.* at 1576.

301. *Id.* at 1576–77.

302. *Id.* at 1577. 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

regulating gambling activities, as documented in the Interstate Horseracing Act.³⁰³ The modern trend of Congress has been to assist states in enforcing their own gambling laws.³⁰⁴

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.³⁰⁵ The Wire Act's legislative history 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.³⁰⁶ The Illegal Gambling Business Act similarly relies on the predicate violation of state gambling law.³⁰⁷ 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 1992.³⁰⁸ 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.³⁰⁹

PASPA was a direct attack on states' ability to choose the type of permissible gambling that went on within their borders, which was largely why the statute was constitutionally problematic.³¹⁰ 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

SPORTS REP. (Jan. 24, 2019), <https://www.legalsportsreport.com/27957/arizona-hawaii-sports-betting-bills/> [https://perma.cc/QME6-DNW8].

303. See 15 U.S.C. § 3001(a)(1) (“[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders”).

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

305. *Id.* at 959–65.

306. *Id.* at 965.

307. 18 U.S.C. § 1955 (b)(1)(i).

308. See Holden, *supra* note 7, at 335.

309. 28 U.S.C. § 3702.

310. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018).

activities take place.³¹¹ This position, however, is complicated in states with a tribal gaming presence.³¹²

The Indian Gaming Regulatory Act (IGRA) is a 1988 federal law that governs how states and tribal governments negotiate the specific permissible types of gaming.³¹³ The IGRA came about following a Supreme Court decision in *California v. Cabazon Band of Mission Indians*.³¹⁴ *Cabazon* centered on two California tribes that operated a bingo parlor and the Cabazon tribe, which operated a card room where poker games and other games were played.³¹⁵ California moved to shut down the games on tribal land, arguing that they were in violation of state gaming laws.³¹⁶ The tribes then sued for declaratory relief, arguing that the games were taking place on sovereign land and that California lacked the authority to enforce state gaming laws within the reservations.³¹⁷

The *Cabazon* case made it all the way to the U.S. Supreme Court, which held that not only did California not prohibit gambling criminally, but the state encouraged its “citizens to participate in state-run gambling,” via the lottery.³¹⁸ The decision had a sweeping reach, 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.³¹⁹ This led Congress to act quickly.³²⁰

So, in 1988, Congress passed the IGRA as a means of compromise between tribal sovereignty and state interests.³²¹ 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 that the type of activity occurring is lawful in the state in which the tribal lands are

311. 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/> [<https://perma.cc/HQ9U-HUJH>] (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).

312. See Holden, *supra* note 295.

313. John Holden, *Mailbag Mythbusting: The Indian Gaming Regulatory Act (IGRA) and Sports Betting*, SPORTS HANDLE (June 13, 2019), <https://sportshandle.com/mailbag-mythbusting-the-indian-gaming-regulatory-act-igra-and-sports-betting/> [<https://perma.cc/MRS9-A62Y>].

314. 480 U.S. 202 (1987).

315. *Id.* at 204–06.

316. *Id.* at 205–06.

317. *Id.* at 206.

318. *Id.* at 210.

319. See *id.* at 221–22.

320. See Eric S. 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).

321. *Id.*

located.³²² The IGRA divides gaming activities into three classes.³²³ Class I activities are social games or traditional forms of gaming within tribal culture that are always permissible.³²⁴ Class II includes bingo, and tribes are permitted to conduct Class II gaming in any state where the activity is lawful under state law.³²⁵ Class III gaming, by contrast, includes all games not included within Class I or Class II, including sports betting.³²⁶ The IGRA requires that, in order to offer Class III games, those games must be permitted within the state and the tribe must enter into a gaming compact with the state.³²⁷ The compact essentially provides an arrangement between the tribal government and the states, where in exchange for some form of exclusivity, the tribal government agrees to certain regulations and often payments to the state.³²⁸ While more than 700 tribal compacts have been signed since the passage of the IGRA,³²⁹ 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 1988.³³⁰

B. Challenges Facing States with Large Tribal Gaming Infrastructure

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.³³¹ For example, some New Mexico-based tribes were able to offer sports betting very quickly as a result of permissive

322. 25 U.S.C. § 2701(5).

323. § 2710.

324. Lent, *supra* note 320, at 454.

325. *Id.*

326. Holden, *supra* note 313.

327. Lent, *supra* note 320, at 454.

328. 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://perma.cc/4UGV-ZEBA].

329. See OFFICE OF INDIAN GAMING, *Indian Gaming Compacts*, BUREAU OF INDIAN AFF., <https://www.bia.gov/as-ia/oig/gaming-compacts> [https://perma.cc/9JSM-MBKK] (last visited Nov. 26, 2019).

330. 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> [https://perma.cc/E7AF-7FR5]; 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> [https://perma.cc/LV32-KEHF].

331. See Holden, *supra* note 313.

language in their compacts;³³² however, other states with tribal gaming have been much slower in adopting sports betting.³³³ Indeed, each state's tribal interests and the interest of each tribe are going to vary as to the desirability of sports betting.³³⁴

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.³³⁵ The bookmaker then relies on the vigorish or commission.³³⁶ This usually leaves a bookmaker with approximately a five percent profit margin.³³⁷ That small profit risk may change the calculus for states and tribes that would need to renegotiate their gaming compacts in order to offer sports

332. Steve Ruddock, *How New Mexico Sports Betting Started in a State Without a Sports Betting Law*, LEGAL SPORTS REP. (Nov. 19, 2018), <https://www.legalsportsreport.com/26007/pueblo-tribe-new-mexico-sports-betting/> [<https://perma.cc/56BH-U7K9>] (noting that the New Mexico compact stated: “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.”).

333. A Mississippi tribe has also launched sports betting at its casino, 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/> [<https://perma.cc/S27Q-DG5K>].

334. Garcia, *supra* note 332.

335. James Chen, *Bookie*, INVESTOPEDIA (Sept. 9, 2020), <https://www.investopedia.com/terms/b/bookie.asp> [<https://perma.cc/F57N-5ALH>].

336. *Id.*

337. See *Sportsbook Profit Margins*, SPORTS INSIGHTS, <https://www.sportsinsights.com/betting-tools/sportsbook-profit-margins/> [<https://perma.cc/PSY2-SQ9P>] (last visited Oct. 4, 2020). There is some evidence that bookmakers may seek to maximize profits as opposed to creating a balanced book. See Steven D. Levitt, *Why Are Gambling Markets Organised So Differently from Financial Markets*, 114 ECON. J. 223, 232 (2004). For the purposes of this illustration, we assume a conventional model of bookmaking strategy.

betting.³³⁸ And for some tribes, this means sports betting does not make financial sense.³³⁹

V. LEGAL RISKS FOR GAMBLING COMPANIES

Since *Murphy*, many sports betting companies have become attracted to the U.S. marketplace.³⁴⁰ In addition to FanDuel and DraftKings,³⁴¹ 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.³⁴² Nevertheless, the *Murphy* decision has

338. Holden, *supra* note 295. In particular, in a state like Florida, where the Seminole tribe had been making annual payments of up to \$350 million, 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. 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/> [<https://perma.cc/2V3A-LM98>]. 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. *Id.* 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. 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/> [<https://perma.cc/H36R-ALYZ>]. Cutting out the Seminole tribe altogether may violate the IGRA requirements that the state and tribe meet and negotiate over Class III gaming in good faith.

339. 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). Ben Giles, *Tribes, Ducey Oppose Bill to Legalize Sports Betting*, ARIZ. CAPITOL TIMES (Feb. 26, 2019), <https://azcapitoltimes.com/news/2019/02/26/tribes-oppose-sports-betting-bill/> [<https://perma.cc/VJ2L-EMBC>]. 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. 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/> [<https://perma.cc/74DJ-DHV5>].

340. 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/> [<https://perma.cc/T64Z-TLJ4>] (describing the influx of British gaming companies entering the U.S. market after the *Murphy* decision).

341. See Holden, McLeod & Edelman, *supra* note 126, at 113.

342. See Mason Jones, *Big Players Making Moves for Regulated Online Gambling in the U.S.*, INT'L POL'Y DIG. (Aug. 22, 2019),

not created a true free market for companies to offer sports betting.³⁴³ 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.³⁴⁴

A. State Gaming Laws

In Washington, D.C. and the eighteen states that currently allow for state-sponsored sports gambling, the primary legal obligations for sports gaming operators relate to obtaining a license and following the rules mandated by the state's regulators.³⁴⁵ Any company that receives a license to operate a brick-and-mortar sportsbook may then service any customer of legal age that is physically present at the sportsbook (other than self-excluded or prohibited customers).³⁴⁶ 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.³⁴⁷ 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 the bet.³⁴⁸ By contrast, even a licensed New Jersey online sportsbook may not accept bets from people, including New Jersey residents, who are physically located outside of New Jersey at the time of the attempted bet.³⁴⁹ Therefore, it is critical that any licensed online sportsbook implement proper geo-tracking technology to ensure that all bettors are based in permissible locations.³⁵⁰

In addition, most state gambling regulations also require licensed operators to ensure that all bettors have attained the minimal legal age

<https://intpolicydigest.org/2019/08/22/big-players-making-moves-for-regulated-online-gambling-in-the-u-s/> [<https://perma.cc/K6QU-R9SV>].

343. See Holden, McLeod, & Edelman, *supra* note 126, at 116, 132.

344. *Id.* at 130–35.

345. *What's the Current State of Sports Betting In the US?*, PLAYUSA, <https://www.playusa.com/sports-betting/> [<https://perma.cc/2YJJ-RAYF>] (last visited Oct. 10, 2020).

346. 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 REP. (Dec. 5, 2019), <https://www.legalsportsreport.com/36203/holden-josh-shaw-nfl/> [<https://perma.cc/7VMB-QKRW>].

347. 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/> [<https://perma.cc/G5PB-YU73>].

348. *Id.*

349. *Id.*

350. *Id.*

(usually 21) before placing any bet.³⁵¹ 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.³⁵² For online sportsbooks, it may be prudent to require potential customers to produce multiple forms of identification to reduce the risk of bettor fraud.³⁵³

Gambling laws in many states also require licensed operators to exclude bets on certain sporting events.³⁵⁴ For example, Delaware and New Jersey do not allow for betting on the sporting events of collegiate teams that reside within the state.³⁵⁵ Both brick-and-mortar and online sportsbooks need to carefully review state gambling laws to understand what types of bets are specifically prohibited.³⁵⁶ 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.³⁵⁷ Much like with the rules for prohibited contests, the rules for protecting those with

351. Some states, such as Rhode Island, allow bettors to be eighteen years old. *Frequently Asked Questions*, SPORTSBOOK R.I., <http://www.sportsbetri.com/faq/> (last visited Jan. 31, 2020). However, New Jersey has set the standard for minimum age at 21. 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> [<https://perma.cc/AY4R-AN42>].

352. New Jersey's process for identity verification requires a form of government issued identification (e.g. a driver's license, passport, or military identification), and address verification which 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 (Sept. 19, 2019), <https://www.gambling.com/us/online-betting/knowledge/what-documents-do-i-need-for-online-sportsbook-in-nj-2087000> [<https://perma.cc/47J3-UA3W>].

353. 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 REP. (Mar. 28, 2018), <https://www.legalsportsreport.com/19438/in-person-registration-for-sports-betting/> [<https://perma.cc/GH77-PKCC>].

354. 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/> [<https://perma.cc/9QQQ-YKH5>].

355. *Id.*

356. 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/> [<https://perma.cc/4QAZ-T482>].

357. *Self-Exclusion Requirements in the US*, VIXIO GAMBLING COMPLIANCE, <https://gamblingcompliance.com/infographic/self-exclusion-requirements-usa> [<https://perma.cc/P533-Z58R>] (last visited Oct. 4, 2020).

gambling addiction vary slightly by state, and gaming operators need to understand the subtle distinctions in these requirements.³⁵⁸

Finally, companies that operate in the sports gaming marketplace need to be careful to understand the complex, and sometimes opaque, distinctions between “sports gambling” and “daily fantasy sports.”³⁵⁹ In many states, this distinction turns on whether the underlying contest is based on the performance of multiple real-world athletes across multiple real-world events, as well as whether the underlying contest is played against the house rather than against other participant.³⁶⁰ While these distinctions may seem semantic, for many operators, it is all that distinguishes their business activities from the commission of a crime.³⁶¹

B. Federal Gaming Laws

While state law plays the primary role in shaping modern gambling policy,³⁶² the interconnected nature of modern commerce also triggers a number of specific concerns for gambling operators under federal law.³⁶³ 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 predate the right of states to legalize sports betting.³⁶⁴ 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.³⁶⁵

358. 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/> [https://perma.cc/SAD8-YW8M].

359. See Edelman, *supra* note 2, at 331 (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.’”).

360. See *id.* (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).

361. See *id.* (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).

362. See Keller, *supra* note 297, at 1576.

363. See generally Ronald J. Rychlak, *The Legal Answer to Cyber-Gambling*, 80 MISS. L.J. 1229, 1237 (2011) (“The U.S. Department of Justice (DOJ) has taken the position that Internet gambling is illegal under at least four older federal statutes: the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (otherwise known as the Travel Act); the Professional and Amateur Sports Protection Act; the Interstate Transportation of Wagering Paraphernalia Act; and the Wire Act.”).

364. The most recent piece of gambling-specific legislation was the UIGEA passed in late 2006. See 31 U.S.C. §§ 5361–5367.

365. It does not appear that widespread legal gambling was a consideration in 1961 or 1970 when the Wire Act and the Illegal Gambling Business Act were passed. As

1. WIRE ACT

One such federal law is the Wire Act, one of the federal government's most powerful tools for stopping illegal interstate gambling activity.³⁶⁶ 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 contest.”³⁶⁷ 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.”³⁶⁸ 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.”³⁶⁹

In 2011, Assistant U.S. Attorney General Virginia Seitz authored an Office of Legal Counsel opinion on the scope of the Wire Act.³⁷⁰ The Seitz opinion confirmed an earlier appellate decision from the Fifth Circuit³⁷¹ that concluded the Wire Act was applicable only to sports betting, and it did not encompass all online gambling activities—arguably not even fantasy sports.³⁷²

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.³⁷³ This memo also seemed to deny any safe harbor under the Wire Act even where the

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; 18 U.S.C. § 1955.

366. *See generally* Holden, *supra* note 63 (noting that the Wire Act has a broad application).

367. 18 U.S.C. § 1084(a).

368. *Id.*

369. *Id.* at 1084(b).

370. 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. Off. Legal Couns. (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> [<https://perma.cc/ECB5-JWEZ>].

371. *Id.* at 3.

372. *See In re Mastercard Int'l Inc. Internet Gambling Litig.*, 313 F.3d 257, 262 (5th Cir. 2002).

373. Office of Legal Counsel, Opinion Letter on Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (Nov. 2, 2018), 42 Op. Off. Legal Couns. <https://www.justice.gov/olc/file/1121531/download> [<https://perma.cc/R5FQ-FC8V>].

UIGEA excluded particular conduct from its scope.³⁷⁴ Because Engel's memo threatened to disrupt commerce in states that had authorized everything from online gambling to online lottery sales, the Deputy Attorney General issued a reprieve, giving companies time to comply.³⁷⁵ Prior to that, however, the New Hampshire Lottery Commission had filed suit in district court, seeking declaratory relief that the Wire Act applies only to betting and wagering on sporting events or contests.³⁷⁶ The court ruled against the Deputy Attorney General, but still predicted the case was destined for a hearing at the Supreme Court.³⁷⁷ This matter still has not reached final adjudication—leaving sports gambling operators' legal risks under the Wire Act very much unsettled.³⁷⁸

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.³⁷⁹ The Illegal Gambling Business Act requires that a predicate violation of state law be applied against an accused.³⁸⁰ Additionally, the statute targets gambling businesses that remain in frequent operation or receive amounts in excess of \$20,000 in a single day.³⁸¹ The reliance on a predicate state law offense has the effect of creating differing standards for which activities are considered illegal gambling, depending upon the location of both the company and its bettors.³⁸² The broad nature of the Act effectively enables the government to federalize state level gambling crimes.³⁸³ 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.³⁸⁴

374. *Id.* at 18.

375. U.S. Dep't of Just., Opinion Letter on Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling (Jan. 15, 2019), <https://www.justice.gov/file/1124286/download> [<https://perma.cc/8RFE-EZCD>].

376. *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 136 (D.N.H. 2019).

377. *See id.* at 156 n.16.

378. Holden, *supra* note 63, at 692.

379. Dunphy, *supra* note 76, at 1321–22.

380. *See* 18 U.S.C. § 1955(b)(1)(i).

381. § 1955(b)(1)(iii).

382. *See United States v. DiCristina*, 726 F.3d 92, 97–98 (2013).

383. *See* § 1955(b)(1)(i)–(iii).

384. *See* LINDA J. SHOREY & ANTHONY R. HOLTZMAN, K&L GATES, WHEN IS GAMBLING NOT GAMBLING? AN EXAMINATION OF *UNITED STATES V. DICRISTINA* 4–5 (2012), <https://www.jdsupra.com/legalnews/when-is-gambling-not-gambling-an-examin-90466/> [<https://perma.cc/ZCJ6-BAYG>].

The danger for many 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),³⁸⁵ meaning that a violation of the state gambling law is the only element separating the operators from a potential federal indictment.³⁸⁶ 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, have operated in contravention of state law for years.³⁸⁷ 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.³⁸⁸

3. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

The third federal statute that could affect sports gambling operators is the Unlawful Internet Gambling Enforcement Act (UIGEA), which criminalizes knowingly accepting credit, electronic fund transfer, or commercial paper “in connection with the participation of another person in unlawful internet gambling.”³⁸⁹ The UIGEA articulates that an unlawful internet gambling transaction includes any wager that is unlawful in a particular jurisdiction where the bettor is located.³⁹⁰ The statute does not apply to sports betting specifically but instead includes many different types of online gambling activities.³⁹¹

The UIGEA has received a great deal of attention for its exemption for certain types of fantasy sports,³⁹² and it may be particularly important to gambling operators with respect to so-called “intermediate routing.”³⁹³ 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 they are illegal in a third-party state where the data is intermittently transmitted.³⁹⁴ The legality of the third-party transactional

385. See § 1955(b)(1)(i)–(iii).

386. See § 1955(b)(1)(i).

387. See Holden, McLeod & Edelman, *supra* note 126, at 113–15.

388. For instance, a number of states ban wagering on in-state college teams, and 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., Gelman, *supra* note 356; 230 ILL. COMP. STAT. 45/25-25(d) (2019); see also § 1955(b)(1)(i).

389. 31 U.S.C. § 5363.

390. Edelman, *supra* note 115, at 37.

391. See Holden, *supra* note 104, at 102–03.

392. See *id.* at 103–06.

393. 31 U.S.C. § 5362(10)(E).

394. § 5362(10)(A), (E); Holden, *supra* note 63, at 724.

route is an open question with regards to whether the Wire Act's safe harbor provision permits this type of activity.³⁹⁵

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 to shore.³⁹⁶ 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 on financial institutions and payment processors to operate particularly their mobile sports betting offerings.³⁹⁷ 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.³⁹⁸

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.³⁹⁹ These intellectual property rights may include not only federal intellectual property rights such as patent, copyright and trademark, but also state rights such as the right of publicity.⁴⁰⁰

1. PATENT LAW

Patent law serves to provide inventors with limited, exclusive rights to their technological innovations.⁴⁰¹ Claims of patent infringement emerge under Article 1, Section 8 of the U.S. Constitution, which grants the federal government power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴⁰² More

395. Holden, *supra* note 63, at 723–24.

396. See 31 U.S.C. § 5361; Holden, *supra* note 3, at 579.

397. See FED. DEPOSIT INS. CORP., UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 (2010), <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [<https://perma.cc/HV98-EZ8P>].

398. 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, 78–79 (2018).

399. See *infra*, notes 404–21 and accompanying text.

400. See *infra*, notes 401–27 and accompanying text.

401. Edelman, *supra* note 115, at 38.

402. U.S. CONST. art. I, § 8, cl. 8.

specifically, Section 101 of the Patent Act allows parties to obtain protection on “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”⁴⁰³

Based upon Section 101’s definition of patentable material, it is possible that certain aspects of a sports gambling business may indeed be patentable.⁴⁰⁴ 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.⁴⁰⁵ In addition, if a sports gambling operator were to develop a new and specific technology, such technology may also be patentable.⁴⁰⁶

Nevertheless, the U.S. Supreme Court has recognized that “[l]aws of nature, natural phenomena, and abstract ideas” are never patentable.⁴⁰⁷ 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.”⁴⁰⁸ 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.⁴⁰⁹

403. 35 U.S.C. § 101; *Alice Corp. Pty. v. CLS Bank Int’l.*, 573 U.S. 208, 216 (2014).

404. See *infra* notes 405–06 and accompanying text.

405. See *Fantasy Sports Props., Inc. v. Sportsline.com*, 287 F.3d 1108, 1111–14 (Fed. Cir. 2002) (finding a genuine issue of material 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.”).

406. See John Holden, *Making Sense of Pro Sports Leagues’ Search for Sports Betting Data Fees*, LEGAL SPORTS REP. (June 18, 2018), <https://www.legalsportsreport.com/21245/search-for-sports-betting-fees/> [<https://perma.cc/Q3TM-KCRN>].

407. *Alice Corp.*, 573 U.S. at 216 (quoting *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

408. See Mark A. Lemley, Michael Risch, Ted Sichelman & R. Polk Wagner, *Life After Bilski*, 63 STAN. L. REV. 1315, 1317 (2011).

409. See Peter Amsel, *CG Technology Sues DraftKings, FanDuel for Patent Infringement*, CALVIN AYRE (Apr. 12, 2016), <https://calvinayre.com/2016/04/12/business/cg-technology-patent-infringement-suits-draftkings-fanduel/> [<https://perma.cc/ESL3-BBT6>] (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).

2. COPYRIGHT LAW

Copyright law, meanwhile, protects “original works of authorship fixed in a tangible medium of expression.”⁴¹⁰ 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.”⁴¹¹ Thus, copyright law does not protect “facts, ideas, systems, or methods of operation.”⁴¹²

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.⁴¹³ However, sports gambling operators may violate copyright law if they make unlicensed use of game recaps or other written prose.⁴¹⁴ Online gaming operators also need to ensure that, if they want to provide athlete pictures or biographies, they use their own authors and photographers or, alternatively, secure a license to the underlying rights before placing such content in their commercial materials.⁴¹⁵

3. TRADEMARK LAW

Trademark law protects “brand names and other forms of marketing information.”⁴¹⁶ Typically, the Lanham Act prevents the use of a protectable mark, without permission, in a manner that causes consumer confusion.⁴¹⁷ Some courts have interpreted this requirement to similarly protect against “individuals and businesses capitalizing on the goodwill of another’s trademark.”⁴¹⁸ For instance, in *Boston Professional Hockey*

410. Copyright Act, 17 U.S.C. § 102(a).

411. § 104; *Oracle Am. Inc. v. Google, Inc.*, 750 F.3d 1339, 1354 (Fed. Cir. 2014).

412. See *Copyright in General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html#protect1> [https://perma.cc/3X6T-J8TB] (last visited Oct. 10, 2020).

413. See *supra* note 412 and accompanying text.

414. See *supra* notes 410–11 and accompanying text.

415. See generally *Using Copyrighted Material*, BAYLOR U., <https://www.baylor.edu/copyright/index.php?id=56543> [https://perma.cc/3X6T-J8TB] (last visited Sept. 25, 2020) (providing an overview of when copyright issues commonly arise).

416. DAVID LANGE, MARY LAFRANCE & GARY MYERS, *INTELLECTUAL PROPERTY CASES AND MATERIALS* 84 (2d. ed. 2003).

417. See *KP Permanent Make-Up Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004) (stating that “[t]he 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).

418. Edelman, *supra* note 115, at 40.

Association v. Dallas Cap & Emblem Manufacturing,⁴¹⁹ 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 of origin.⁴²⁰ The *Dallas Cap* decision, its progeny, and 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.⁴²¹

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.⁴²² 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 the purpose of describing game bets.⁴²³ 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.⁴²⁴

4. RIGHT OF PUBLICITY LAW

Finally, right of publicity laws generally protect famous individuals against the use of their name, image, or likeness without permission for

419. 510 F.2d 1004 (5th Cir. 1975).

420. *Id.* at 1011–12.

421. *See id.* at 1008; *NBA Props., Inc. v. WYG, Inc.*, No 93-C-1533, 1993 WL 462836, at *2–3 (N.D. Ill. Nov. 5, 1993) (citing favorably to the broader *Dallas Cap* test for showing trademark infringement in the context of the unlicensed use of sports team logos); 15 U.S.C. § 1125(c)(1) (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).

422. *See* Edelman, *supra* note 230, at 9–10.

423. *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1380 (D. Del. 1977).

424. The doctrine of "nominative fair use" generally applies when 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 Publ'g, Inc.*, 971 F.2d 302, 307–08 (9th Cir. 1992) ("[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.").

commercial gain.⁴²⁵ If a sports gaming operator were to use an athlete's name, image, or likeness to promote its own company or its products without a license, that would likely infringe upon the athlete's publicity rights.⁴²⁶ 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."⁴²⁷

5. A QUICK POINT ABOUT SPORTS DATA (THE FALSE INTELLECTUAL PROPERTY RIGHT)

Before concluding this section, it is worth noting that in recent years, several of the U.S. commercial sports leagues have intermittently claimed to possess an intellectual property right over the statistical data derived from their sports games.⁴²⁸ These claims are dubious as they contravene well-established legal precedent.⁴²⁹ While copyright law or other legal principles might disallow a gaming operator from copying a third party's statistical compilation,⁴³⁰ there is absolutely nothing in traditional intellectual property law to prevent a sports gaming business

425. 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, 559–60 (2013) ("In 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.").

426. *Id.* at 559–61.

427. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 820–23 (8th Cir. 2007) (holding that in the context 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. Nat'l Football League Players Ass'n*, 259 F.R.D. 398, 417–19 (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 (Ind. 2018) ("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, Inc. v. Nat'l Football League Players Ass'n*, 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).

428. See Holden & Schuster, *supra* note 153, at 36, 40–41.

429. See *id.* at 50–55; see also Edelman, *supra* note 230, at 9–10; Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 82–85 (2015).

430. See Edelman, *supra* note 230, at 5–6.

from independently collecting and using the data from professional sports contests.⁴³¹

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 some legal risk for bettors and ancillary gambling service providers, although these risks are likely substantially lower.⁴³²

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 level, than the risks facing a professional bettor.⁴³³ The state law risks that casual gamblers face vary from state to state.⁴³⁴ Many states appear to allow forms of small stakes social games, played between close friends or family members.⁴³⁵ Most states that do not allow social gambling treat first offenses of casual gambling as a misdemeanor,⁴³⁶ but depending on the scope of the wager, the type of contest, and the involvement of the bettor, gambling in some states may be a felony.⁴³⁷ While the state law risks for bettors lie

431. *See id.* at 7.

432. *See generally* Daniel Roberts, *Was My Sports Bet Legal?*, FORTUNE (Feb. 15, 2011, 9:00 AM), <https://fortune.com/2011/02/15/was-my-sports-bet-legal/> [<https://perma.cc/F7YK-9BP5>] (highlighting the lack of willingness to enforce betting laws in instances of casual or social gambling). *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-20190729-347fzxzfpdztkwhqhx347lypm-story.html> [<https://perma.cc/K8VB-V42R>] (describing the lack of enforcement of gaming laws).

433. Ben J. Hayes & Matthew J. Conigliaro, *"The Business of Betting or Wagering": A Unifying View of Federal Gaming Law*, 57 DRAKE L. REV. 445, 450–52 (2008) (noting that the Wire Act has been used to prosecute bookmakers and professional gamblers).

434. *See* FORD HARRISON, 50 STATE SURVEY ON SOCIAL GAMBLING LAWS 3 (2014), http://www.fordharrison.com/files/28045_50%20State%20Survey%20on%20Gambling%20Laws%20March%202014.pdf [<https://perma.cc/5RR8-7CNF>].

435. *See id.* at 3, 10, 15.

436. *Id.*

437. For instance, in Oklahoma, "[g]ambling is a misdemeanor, while opening, conducting or carrying on a gambling game is a felony." *See id.* at 13. Opening or conducting a gambling game could encapsulate a greater scope of behavior than the

primarily in criminal law,⁴³⁸ bettors should also remain cognizant of the federal gambling laws.⁴³⁹

Meanwhile, federal law appears to pose few, if any, risks for casual bettors.⁴⁴⁰ Former Attorney General Robert F. Kennedy testified in support of the Wire Act 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 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.⁴⁴¹

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.⁴⁴² The Illegal Gambling Business Act, for instance, excludes bettors from the total number of individuals counted to reach the statute’s numerosity requirement.⁴⁴³ Of course, while gambling specific laws may not capture the casual bettor within their reach, federal income tax laws most certainly do.⁴⁴⁴ The obligation to pay taxes on gambling winnings applies to both legal and illegal wagers.⁴⁴⁵

typical language found in many state statutes, which require the operation of a gambling business.

438. *Id.* at 6, 10, 12–14.

439. For instance, the Internal Revenue Service requires that wagers made in states with authorized sports wagering are subject to a 0.25 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).

440. *See* 18 U.S.C. § 1084(a) (noting that the statute applies to those in the *business* of betting or wagering); *see also* 18 U.S.C. §§ 1955(a)–(b) (requiring a minimum of five individuals and substantially continuous operation of a gambling *business*); 31 U.S.C. §§ 5361–5367.

441. *See The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearing on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 6 (1961) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

442. *See* 18 U.S.C. § 1955 (2012); 31 U.S.C. §§ 5361–5367 (2006).

443. *United States v. Schullo*, 363 F.Supp. 246, 247–50 (D. Minn. 1973).

444. *See* Marcia Geffner, *Sports Betting: Get Ready to Pay Tax On Your Winnings*, CREDIT KARMA (Sept. 25, 2018), <https://www.creditkarma.com/tax/i/tax-on-sports-betting/> [<https://perma.cc/6AHZ-QGRM>].

445. 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) (discussing general disclosures in relation to wagers).

There are also undeniable financial risks for sports bettors.⁴⁴⁶ 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.⁴⁴⁷ 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.⁴⁴⁸ Indeed, there is a great disparity in the commitment that states have made to combating problem gambling.⁴⁴⁹

There has been an observed correlation between the personal bankruptcy rate and increased access to gambling facilities.⁴⁵⁰ While a bettor can discharge legal gambling debts,⁴⁵¹ 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.⁴⁵² These allegations, however, may be rebutted if a bettor has a gambling problem and seeks treatment.⁴⁵³ The risks for bettors are significant, even though they are quite different from those faced by gambling operators.⁴⁵⁴ Likewise, there are a number of risks facing governments who seek to legalize sports wagering.⁴⁵⁵

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

446. 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/> [<https://perma.cc/CZ32-EY6R>].

447. Woods, *supra* note 226.

448. Mississippi, for instance, earmarked only \$110,000 for problem gambling services. *Id.*

449. See Pempus, *supra* note 358.

450. See generally Lynda de la Viña & David Bernstein, *The Impact of Gambling on Personal Bankruptcy Rates*, 31 J. SOCIO-ECONOMICS 503 (2002).

451. *Gambling Debts and Bankruptcy: Are They Dischargeable?*, JENKINS & CLAYMAN (Nov. 15, 2013), <https://www.jenkinsclayman.com/gambling-debts-bankruptcy-dischargeable/> [<https://perma.cc/YRL3-9PR6>].

452. *Id.*

453. Domma Pizarro, *Gambling: A Big Problem That Results in Bankruptcy*, THRIVE GLOB. (Sep. 12, 2018), <https://thriveglobal.com/stories/gambling-a-big-problem-that-results-in-bankruptcy/> [<https://perma.cc/X57X-96VM>].

454. See Bell, *supra* note 446 and accompanying text; 18 U.S.C. § 1084(a) (noting that the statute applies to those in the *business* of betting or wagering).

455. 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, could preempt state laws and regulate sports gambling directly. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1473, 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.”).

wagering.⁴⁵⁶ Amongst those facing legal risks are financial institutions, geolocation companies, integrity monitoring companies, advertisers of gambling, and gambling advisors.⁴⁵⁷

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.⁴⁵⁸ Banks have historically been cautious about processing gambling related transactions⁴⁵⁹ and it appears that the legal sports gambling market is no different from previous online gambling markets.⁴⁶⁰ Certain banks have also blocked transactions to daily fantasy sports companies in the past.⁴⁶¹

Caution on the part of banks is likely justified. The banking industry's concerns stem not only from the concern that the interstate nature of banking could render certain debts unenforceable,⁴⁶² but also

456. See, e.g., Kevin Wack, *Bankshot Sports Gaming is Next Hot-Button Issue for Banks*, AM. BANKER (May 15, 2018, 2:10 PM) (noting there are concerns with accepting internet-based gambling transactions), <https://www.americanbanker.com/opinion/just-what-banks-need-another-hot-button-issue-in-sports-gambling> [<https://perma.cc/MU3W-NJBY>].

457. *Id.*; see also John Holden, *Could Legal Sports Betting Bring Back Annoying TV Advertising?*, LEGAL SPORTS REP. (June 13, 2018), <https://www.legalsportsreport.com/21148/legal-sports-betting-tv-advertising> [<https://perma.cc/G45F-BREG>]; 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/> [<https://perma.cc/UZC7-L9KS>].

458. See generally Matthew Johnston, *A Brief History of U.S. Banking Regulation*, INVESTOPEdia (last updated May 7, 2020), <https://www.investopedia.com/articles/investing/011916/brief-history-us-banking-regulation.asp> [<https://perma.cc/F8SA-5RPW>].

459. Samantha Beckett, *Big Banks Refuse to Process Legal Online Gambling Transactions*, CASINO.ORG (Jan. 13, 2014, 6:56 AM), <https://www.casino.org/news/big-banks-refuse-to-process-legal-online-gambling-transactions/> [<https://perma.cc/QCM9-BUAG>].

460. 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 *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/> [<https://perma.cc/7WUV-DPQS>].

461. Chris Morran, *Citi Now Blocking DraftKings, FanDuel Transactions in New York State*, CONSUMERIST (Feb. 5, 2016, 5:34 PM), <https://consumerist.com/2016/02/05/citi-now-blocking-draftkings-fanduel-transactions-in-new-york-state/> [<https://perma.cc/RL56-HLH2>].

462. The argument that gambling debts incurred while 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*,

that the activities themselves could implicate various gambling and non-gambling laws.⁴⁶³ The Wire Act penalizes those:

engaged in the business of betting or wagering [who knowingly use] a wire communication facility . . . for 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.⁴⁶⁴

Banks should be particularly concerned with this language 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.

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,⁴⁶⁵ it is possible that banks could face liability for processing transactions to operators who are knowingly accepting illegal wagers.⁴⁶⁶ 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.⁴⁶⁷

2. LEGAL RISKS FOR GEOLOCATION COMPANIES

Another prominent segment of the modern gambling industry involves companies that provide geofencing or restrict the locations where a consumer can bet.⁴⁶⁸ These companies provide a range of services, from restricting bets to a particular property within a state to restricting bets to those individuals physically present within a state.⁴⁶⁹

6 N.C. BANKING INST. 665, 683–85 (2002) (discussing the legal success, in some states, of debtors' arguments that gambling transactions create unenforceable contracts).

463. See Wack, *supra* note 456.

464. See 18 U.S.C. § 1084(a).

465. 31 U.S.C. § 5362(10)(E).

466. See 31 U.S.C. § 5363. 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 opinions and continued to have transactions processed, despite the apparent brazenness of the violations. See also Holden, McLeod & Edelman, *supra* note 126, at 133–35; Edelman & Holden, *supra* note 432 (explaining how DFS companies have operated in conflict with the law and the opinions of many attorneys general).

467. 31 U.S.C. §§ 5311–5330.

468. Dorson, *supra* note 347.

469. *Id.*

The technology is purportedly sufficiently advanced that it can combat work-arounds like virtual private networks and similar location spoofing tools,⁴⁷⁰ but there will always be efforts by some to evade the systems.⁴⁷¹ Failure of the software could subject the companies to hefty fines from gaming regulators as well as to reputational harm.⁴⁷² Geolocation companies will be required by many gaming regulators to take certain affirmative steps to avoid liability.⁴⁷³ While the industry standard for the systems employed by the geo-fencing industry is still a moving target, it is likely that there will be more concrete qualifications these companies must satisfy to demonstrate compliance.⁴⁷⁴

3. LEGAL RISKS FOR INTEGRITY MONITORING COMPANIES

Meanwhile, amongst the fastest growing industry segments in the gambling market are integrity monitoring companies.⁴⁷⁵ These companies serve to monitor both legal and illegal betting markets for irregular betting line movements that may indicate nefarious activities like match fixing.⁴⁷⁶ While evidence from these companies has been accepted at the Court of Arbitration for Sport,⁴⁷⁷ no U.S. court has followed suit.⁴⁷⁸ So, for now, these companies lack the investigative authority of a law

470. *Id.*

471. *Id.*

472. Wayne Parry, *N.J. Levies \$25K Fine Against Casino for Allowing Online Gaming to Out-of-State Gambler*, PHILA. INQUIRER (May 9, 2019, 12:21 PM), <https://www.inquirer.com/news/new-jersey/new-jersey-out-of-state-gambling-fine-20190509.html> [<https://perma.cc/RYJ6-474G>].

473. *See id.* (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 a New Jersey gaming regulator).

474. As has been seen when unauthorized users are permitted to wager, geolocation companies face steep fines. *Id.* As geolocation technology becomes more commonly understood, it is likely that states will adopt standards that will result in penalties for noncompliance. *See id.*; *see also* Dorson, *supra* note 347 (explaining that geolocation services are becoming increasingly implemented in different localities).

475. *See* Holden & Schuster, *supra* note 153, at 34–35, 46–47.

476. *Id.* at 47–48.

477. *Lamptey v. Fédération Internationale de Football Ass'n*, CAS 2017/A/5173 (Court of Arbitration for Sport, Dec. 4, 2017), <http://jurisprudence.tas-cas.org/Shared%20Documents/5173.pdf>; *see also* Dustin Gouker, *A Banned FIFA Referee and How Sports Betting Data Monitoring Played a Key Role in Stopping Him*, LEGAL SPORTS REP. (Jan. 15, 2018), <https://www.legalsportsreport.com/17773/fifa-sportradar-banned-referee/> [<https://perma.cc/5BLM-WWU6>] (describing CAS's reliance and faith in data provided by integrity monitoring companies).

478. 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> [<https://perma.cc/62A6-59NR>].

enforcement agency and are thus effectively limited to being an early warning system.⁴⁷⁹ These companies could have potential liability in the event of either a false positive or false negative identification of match fixing.⁴⁸⁰ 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.⁴⁸¹

4. LEGAL RISKS FOR GAMBLING ADVERTISERS

The First Amendment looms large over many aspects of the legal sports gambling industry.⁴⁸² Despite the power of the First Amendment, commercial speech is not unfettered,⁴⁸³ and regulators have taken notice of deceptive advertising in the gambling industry.⁴⁸⁴ While the federal government has the authority to target false and deceptive advertising without running afoul of the First Amendment,⁴⁸⁵ the government cannot issue a blanket ban on gambling advertising.⁴⁸⁶ Indeed, gambling advertisements have become increasingly common, from gambling companies sponsoring soccer teams across Europe⁴⁸⁷ to daily fantasy sports companies running advertisements during virtually every

479. See Holden & Schuster, *supra* note 153, at 47–48.

480. In most cases involving team sports, it would be unlikely that the algorithm could identify an actual individual perpetrator. In individual sports like as tennis such an implication could be drawn by default.

481. In other contexts, the theory that a negligently conducted investigation led to loss by the accuser has been recognized as a viable claim in some state courts. See, e.g., *M. W. v. Dep't of Soc. & Health Servs.*, 70 P.3d 954, 956 (Wash. 2003) (noting the tort of negligent investigation).

482. See generally Rodenberg, Holden & Brown, *supra* note 429 (examining the First Amendment implications of attempts by sports organizations to monetize the distribution of real-time sports data).

483. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

484. See Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sep. 7, 2017) <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/2WKV-MKYQ>]; see also John T. Holden & Sam C. Ehrlich, *Esports, Skins Betting, and Wire Fraud Vulnerability*, 21 GAMING L. REV. 566, 570 (2017), <https://doi.org/10.1089/plr2.2017.2183> [<https://perma.cc/7EE3-R8J6>].

485. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 421 U.S. 748, 771–72 (1976).

486. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (rendering a portion of the Communications Act unconstitutional as applied to legal gambling advertising).

487. David Sheldon, *A Recent History of Gambling Advertising*, CASINO.ORG (Sep. 12, 2016), <https://www.casino.org/blog/a-recent-history-of-gambling-advertising/> [<https://perma.cc/V8NJ-9CZ4>].

television commercial break during the 2015 NFL season.⁴⁸⁸ In 2003, the Department of Justice issued a letter to the National Association of Broadcasters that vaguely threatened accomplice liability for the violation of various gambling laws if advertisers carried advertisements for offshore sportsbooks or internet gambling sites.⁴⁸⁹ Just over a year later, 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.⁴⁹⁰ The key dispute between the two parties was whether internet gambling was illegal under various federal statutes.⁴⁹¹ Even if the federal government could restrict illegal online casino advertising under the *Central Hudson* commercial speech test,⁴⁹² the narrative has changed in a new market with widespread legal gambling.⁴⁹³ Indeed, many advertisers are likely protected by the First Amendment, provided the entities they are advertising are lawful⁴⁹⁴ and that they are in compliance with state regulations governing gambling advertising.⁴⁹⁵

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.⁴⁹⁶ The legalization of state-sponsored sports

488. 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), <https://doi.org/10.16997/eslj.207> [<https://perma.cc/JJ5L-YPEJ>].

489. Letter from John G. Malcolm, Deputy Assistant Att’y Gen., Dep’t of Just., to Nat’l Ass’n of Broads. (June 11, 2003), http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf [<https://perma.cc/X3RP-WARM>].

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

491. *Id.* at 582.

492. The *Central Hudson* test provides First Amendment protection to commercial advertising 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.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

493. Frese, *supra* note 490, at 594.

494. Holden, *supra* note 457.

495. See generally AM. GAMING ASS’N, RESPONSIBLE GAMING REGULATIONS & STATUTES 1-167 (2016), <https://www.americangaming.org/wp-content/uploads/2019/01/Responsible-Gambling-Regulations-WEB.pdf> [<https://perma.cc/ZN93-9DYW>].

496. Edelman, *supra* note 115, at 49.

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 columnists who provide stock and other financial advice.⁴⁹⁷

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,⁴⁹⁸ those who provide sports betting advice could face liability under both tort and contract law if they fail to deliver a certain level of service.⁴⁹⁹ 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.⁵⁰⁰ 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.”⁵⁰¹ 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.⁵⁰² 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.⁵⁰³

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 overall are implicitly effected

497. *Id.* at 24–25.

498. *See id.* at 49.

499. *Id.* 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> [<https://perma.cc/29JS-UUJT>] (providing an inside look into the sports betting advising business).

500. Edelman, *supra* note 115, at 49–50.

501. RESTATEMENT (FIRST) OF TORTS § 552 (AM. LAW INST. 1938).

502. Edelman, *supra* note 115, at 49–50.

503. Edelman, *supra* note 115, at 50.

by every gambling contract.⁵⁰⁴ 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.⁵⁰⁵

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.”⁵⁰⁶ 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 adolescent and college student population.⁵⁰⁷ Pathological gambling is recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) as form of mental disorder.⁵⁰⁸ 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.”⁵⁰⁹

While there are numerous private associations that attempt to help pathological gamblers, many citizens who are addicted to gambling fail to seek help or do not receive the help they need.⁵¹⁰ Sadly, pathological gamblers have relatively high rates of suicidal ideation and suicide attempts.⁵¹¹ In addition, some pathological gamblers find themselves with large sums of debt—leaving themselves and their families destitute.⁵¹²

504. *C.f.* Holden, McLeod & Edelman, *supra* note 126 (describing how the government is implicitly involved in every contractual matter).

505. *See generally* Washington Examiner 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> [<https://perma.cc/2ZBK-LMZX>].

506. KEVIN WASHBURN, *GAMING AND GAMBLING LAW: CASES AND MATERIALS* 64 (2011).

507. *Id.* (describing the rate of pathological gambling in adolescents and college students as ranging between 2.8% and 8% of the overall population).

508. *See* AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 § 312.31* (5th ed. 2013); *see also* *What Is Gambling Disorder?*, AM. PSYCHIATRIC ASS'N <https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder> [<https://perma.cc/VFG5-V79X>] (last visited Oct. 10, 2020).

509. *See* WASHBURN, *supra* note 506, at 67.

510. *See id.*

511. *See* Gambler's Anonymous, *20 Questions*, <http://www.gamblersanonymous.org/ga/> (last visited Sept. 27, 2020); *see also* *Mission & Values*, NAT'L COUNCIL ON PROBLEM GAMBLING <https://www.ncpgambling.org/about-us/mission-values/> [<https://perma.cc/N7JJ-UBQB>] (last visited Sept. 23, 2020).

512. *See generally* Timothy W. Fong, *The Biopsychosocial Consequences of Pathological Gambling*, 2 *PSYCHIATRY* 22, 25 (2005).

This results in not only social harm for individuals but also in overall economic loss for communities.⁵¹³

There are a number of ways that either a state or federal government could theoretically mitigate the risks of legalized gambling leading to pathological behaviors.⁵¹⁴ One way 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.⁵¹⁵ Another way 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.⁵¹⁶ Meanwhile, a third way would be to set the minimum legal age to participate in sports gambling at twenty-one, recognizing that adolescents and college-age students are disproportionately likely to exhibit behaviors of pathological gambling.⁵¹⁷

B. Economic/Taxation Issues

Certain gambling activities additionally may harm the greater well-being of society.⁵¹⁸ First, as referenced 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.⁵¹⁹ In addition, some studies claim that sustained online gambling activity could reduce worker productivity, further reducing economic output.⁵²⁰ Perhaps these economic harms of gambling may be offset through taxation.⁵²¹ Again, at present, most states that have

513. 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 ILL. (Mar. 8, 2004), <https://news.illinois.edu/news/04/0308grinols.html> [<https://perma.cc/EQ56-4BAM>].

514. See *infra* notes 518, 524, 539 and accompanying text.

515. See Edelman, *supra* note 2, at 337–38 (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).

516. See *id.* at 338.

517. See *id.*

518. See Reutter, *supra* note 513.

519. *Id.*

520. See Mark Fox, Larry Phillips & Ganesh Vaidyanathan, *Managing Internet Gambling in the Workplace*, FIRST MONDAY (Apr. 7, 2003), <https://firstmonday.org/ojs/index.php/fm/article/view/1044/965> [<https://perma.cc/AB23-2Z9E>].

521. Colorado, which 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> [<https://perma.cc/JH5C-D8ST>].

legalized state-sponsored sports gambling have implemented an additional tax rate of between eight percent and sixteen percent of gross gaming revenue.⁵²² While some within the industry criticize these tax rates as unreasonably high,⁵²³ 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 losses due to the need for additional social welfare programs and the arguable decreases in worker productivity.⁵²⁴

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.⁵²⁵ 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.⁵²⁶ Failure to negotiate in good faith may result in a district court ordering the tribe and state to conclude a compact within sixty days.⁵²⁷ If a compact cannot be reached in the sixty-day window, the court will appoint a mediator, who will select one of two proposals.⁵²⁸ 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.⁵²⁹

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.⁵³⁰ Unfortunately, many of the tribal-state relationships in some of

522. See *supra* note 286–87 and accompanying text.

523. See Auxier, *supra* note 9.

524. Similar proposals have been made to allocate funds for other projects that lack funding. See Kisska-Schulze & Holden, *supra* note 223 (noting that sports betting funds could be earmarked to increase funding to institutions of higher education).

525. 25 U.S.C. § 2710(3)(A).

526. The state bears the burden of proof in district court for showing that it has entered into negotiations with the tribe to work toward concluding a gaming compact. § 2710(7)(B)(i).

527. § 2710(7)(B)(iii).

528. § 2710(7)(B)(iv).

529. § 2710(7)(B)(vii).

530. 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*,

the most populated states have been tense of late,⁵³¹ which makes the prospect of states like California and Florida being able to offer sports betting difficult.⁵³² Indeed, the risks faced by governments are significant, as litigation could threaten to derail any profits.⁵³³

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.⁵³⁴ 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.⁵³⁵ If this information were to enter the wrong hands, bettors would face a heightened risk of problems including identity fraud.⁵³⁶ While the new California Consumer Privacy Act provides consumers with important additional protections such as the right to demand the deletion of their data, most U.S. 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.⁵³⁷

TALLAHASSEE DEMOCRAT (May 14, 2019), <https://www.tallahassee.com/story/news/local/state/2019/05/14/seminole-tribe-suspends-gambling-payments-state-florida/3668949002/> [https://perma.cc/GA7T-57DR/].

531. 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/> [https://perma.cc/5RBY-CZ3H].

532. See *id.*

533. See Kisska-Schulze & Holden, *supra* note 223, at 475.

534. 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/> [https://perma.cc/4Q5E-4997].

535. See, e.g., Danny Lawhon, *Iowa Sports Betting: What to Do Now that It's Legal to Wager*, DES MOINES REG. (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/> [https://perma.cc/R828-ZUMN] (noting what is necessary to register for a mobile wagering account in Iowa).

536. *The Legal Ramifications of a Data Breach*, IRON MOUNTAIN, <https://www.ironmountain.com/resources/general-articles/t/the-legal-ramifications-of-a-data-breach> [https://perma.cc/LVD3-4TWM] (last visited Oct. 10, 2020).

537. See John Stephens, *California Consumer Privacy Act*, AM. BAR ASS'N (Feb. 14, 2019), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_9/ [https://perma.cc/UEY2-CVCT]; see also Chris Wysopal,

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.⁵³⁸ 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.⁵³⁹ In addition, high licensing fees for online sportsbooks further limit market competition to those companies that are already highly leveraged.⁵⁴⁰

A similar, if not greater, problem also seems to be emerging in states that have imprudently implemented league data mandates.⁵⁴¹ 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.⁵⁴² While states' data mandates are likely beyond the scope of federal antitrust laws, such mandates nevertheless run counter to the broader economic principles that underlie general U.S. competition policy.⁵⁴³

Determining Liability for Security Breaches Isn't Black and White, FORBES (May 26, 2020), <https://www.forbes.com/sites/forbestechcouncil/2020/05/26/determining-liability-for-security-breaches-isnt-black-and-white/#6af96dafaf75> [https://perma.cc/465T-VTGV] (highlighting challenges legislating data breach liability as well as the lack of uniform standards).

538. See, e.g., John Holden, *Integrity Fee Issues for NBA and MLB Run Deeper than They Appear*, LEGAL SPORTS REP. (May 10, 2019), <https://www.legalsportsreport.com/32378/holden-nba-mlb-integrity-fee/> [https://perma.cc/X67E-3MLX].

539. 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*, <https://www.playnj.com/sports-betting/revenue/> [https://perma.cc/92BV-NT2A] (last updated Sept. 2020).

540. See *supra* notes 286–90 and accompanying text.

541. 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/> [https://perma.cc/8BZQ-N4FU].

542. See Holden & Schuster, *supra* note 153, at 56–58 (discussing the problems caused by limiting the data marketplace).

543. 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), <https://www.bushcenter.org/catalyst/capitalism/clark-why-americas-free-market-economy-works-better-in-some-places-than-others.html> [https://perma.cc/DJZ4-N54J]

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 some Native American tribes. Nevertheless, the emerging world of state-sponsored sports gambling has not proven to be the libertarian paradise that some commentators predicted. Rather, the emerging sports gambling industry in the United States is highly regulated, limited 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 licenses, 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.

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. 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 the true beneficiaries of the new sports gambling laws are. 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 that they will ultimately control in 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.

(describing free market capitalism ideals, and that the system appears to work better in some geographic regions than others).

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.