

# Regulating Sports Wagering

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*ABSTRACT: The Supreme Court decision in Murphy v. National Collegiate Athletic Association has opened a door that has remained closed for more than a quarter century, allowing states to begin legalizing sports gaming. State lawmakers' excitement in seeking a new way to generate revenue is palpable through the more than 25 different bills that have been introduced to legalize sports betting since the May 2018 Supreme Court decision. In addition to the interest shown by state lawmakers, Senators Orrin Hatch and Charles Schumer introduced a federal sports gambling bill. The desire to generate revenue for states via a source other than new taxes is understandable; however, there has been a rush in many states to implement sports wagering schemes that either provide maximum benefit to the state, while trying to be first in the region offering sports betting, and seemingly neglecting wholesale objectives such as recapturing money from sports betting's vast \$150 billion black market. The regulation of sports betting is a complicated topic often involving state, tribal, and federal governments. This Article discusses the challenges of regulating sports betting at the state, tribal, and federal levels, before identifying and suggesting best practices for regulation in the space and reviewing possible alternative schemes for regulation.*

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## I. INTRODUCTION

The relationship between sports and gambling has been linked for millennia.<sup>1</sup> Ball games have been traced back to around 2000 B.C., with high stakes gambling tightly intertwined with these games.<sup>2</sup> Gambling on gladiatorial events was a staple of the games held at the Circus Maximus in Ancient Rome, and this relationship between sports and gambling continued through the eighteenth and nineteenth centuries in many places within the British Empire as a game within the game for sporting events spectators.<sup>3</sup> While the twentieth century saw growing concerns over gambling expenditures, largely by the working class, sports betting persisted during the Second World War in both Europe and the United States.<sup>4</sup> The post-war years in the United States, however, brought forth major concerns from the federal government that returning soldiers would transcend into delinquency fueled by gambling.<sup>5</sup> United States officials' concerns included a fear of organized

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1. Warren D. Hill & John E. Clark, *Sports, Gambling, and Government: America's First Social Compact?*, 103 AM. ANTHROPOLOGIST 331, 331 (2001).

2. *Id.* at 336 ("In one example, an Aztec noble, Xihuitlemoc, was taunted into competing in a ballgame by his rival, Axayacatl. Both players staked the rulership of their respective communities on the outcome of the match.").

3. David Forrest, *Sport and Gambling*, in WLADIMIR ANDREFF & STEFAN SZYMANSKI, HANDBOOK ON THE ECONOMICS OF SPORT 40-49 (2006).

4. See generally Mike Huggins, *Sports Gambling during the Second World War: A British Entertainment for Critical Times or a National Evil?*, 32 INT'L J. HIST. SPORT 667 (2015) (describing sports gambling in England during the Second World War).

5. DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 124 (2005).

crime, and many officials viewed sports betting as a malignancy attached to the power of criminals.<sup>6</sup>

The federal government's fear that sports betting would send the country down a dangerous path of crime persisted for the better part of 75 years.<sup>7</sup> Beginning with hearings in the 1950s on legislation that would ultimately become the Wire Act, the federal government linked sports betting with revenue generation for organized crime.<sup>8</sup> This perceived link would remain enshrined in federal law through the 1960s and 1970s as the government continued to struggle to corral organized crime which was perceived to have a widening grasp as it spread across the country.<sup>9</sup> In the 1960s and 1970s the federal government also became concerned that state law enforcement officials were not prioritizing the policing of organized crime's money making businesses, and therefore frequently invoked the commerce clause in order to police matters that otherwise might not trigger federal jurisdiction.<sup>10</sup> By the early 1990s, however, the government's sports betting focus had been redirected, in no small part due to testimony from professional sports leagues like the National Football League ("NFL"), National Basketball Association ("NBA"), and Major League Baseball ("MLB"), along with the National Collegiate Athletic Association ("NCAA"), which argued that sports betting posed a dire threat to the integrity of sport.<sup>11</sup>

The passage of the Professional and Amateur Sports Protection Act ("PASPA") in 1992 was a watershed moment for federal sports gambling policy, while not an outright ban, PASPA marked the first time that the federal government had prohibited states from offering sports betting if they were not already doing so at the time of the law's passage.<sup>12</sup> This near-total prohibition on sports wagering in the United States continued even as attitudes towards sports gambling evolved, and more than half of Americans

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6. John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 334-35 (2019).

7. *Id.*

8. 18 U.S.C. § 1084 (2012). The Wire Act does not specifically mention organized crime in the statute, but instead refers to those in "the business of betting or wagering," a phrase that would incorporate organized criminal bookmaking operations. *Id.* § 1084(a).

9. In 1970, Congress passed the Illegal Gambling Businesses Act, which created a federal prohibition on some gambling operations that violated state law. *See id.* § 1955.

10. Brett Smiley, *Mailbag Mythbusting: The Illegal Gambling Businesses Act and Sports Betting*, SPORTS HANDLE (June 18, 2018), <https://sportshandle.com/mailbag-mythbusting-the-illegal-gambling-businesses-act-and-sports-betting> [<https://perma.cc/Fg96-LYCF>].

11. *See generally* Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1 (2017) (describing the arguments many major sports leagues put forth to encourage the governments continued ban on sports betting) [hereinafter Rodenberg & Holden, *Sports Betting Has an Equal Sovereignty Problem*].

12. 28 U.S.C. §§ 3701-3704 (1992). PASPA's exemption was commonly thought to exempt only Nevada, Delaware, Montana, and Oregon from the ban on sports wagering, but in reality, a variety of other jurisdictions were exempted in limited capacities as well. *See* Rodenberg & Holden, *Sports Betting Has an Equal Sovereignty Problem*, *supra* note 11, at 3-6.

surveyed in 2017 supported its legalization.<sup>13</sup> Much like the prohibition on marijuana, which also saw public support for legalization grow over recent decades,<sup>14</sup> the ban on sports betting was nearly a complete failure, and sports betting continued to grow into an industry accounting for over \$150 billion in illegal wagers annually.<sup>15</sup> The sports betting ban was, in fact, largely a bar on states generating tax revenue, as both traditional corner bookies and internet gambling appeared undeterred by PASPA's purported ban.<sup>16</sup>

The ban on sports betting persisted as many states were in near constant search for new ways to fill their coffers.<sup>17</sup> 2018 saw a record number of states have their teachers go on strike, with low wages frequently cited as a reason for the strikes.<sup>18</sup> Teachers strikes and infrastructure repair needs<sup>19</sup> have sent states looking for new sources of revenue. The tolerance for sports betting at the state level may have been primarily softened by the rapid rise of daily fantasy sports.<sup>20</sup> Even as daily fantasy sports were viewed unfavorably by lawmakers in a number of jurisdictions, most notably in New York where the contests were temporarily stopped by the state's Attorney General as a form of illegal gambling, but a settlement was eventually reached between the state and the two largest daily fantasy operators allowing those two operators to continue operating.<sup>21</sup> Texas Attorney General Ken Paxton had a similar

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13. Rick Maese & Emily Guskin, *Poll: For First Time, Majority of Americans Approve of Legalizing Sports Betting*, WASH. POST (Sept. 26, 2017), [https://www.washingtonpost.com/sports/poll-for-first-time-majority-of-americans-approve-of-legalizing-sports-betting/2017/09/26/a18b97ca-a226-11e7-b14f-f41773cd5a14\\_story.html](https://www.washingtonpost.com/sports/poll-for-first-time-majority-of-americans-approve-of-legalizing-sports-betting/2017/09/26/a18b97ca-a226-11e7-b14f-f41773cd5a14_story.html) [<https://perma.cc/YCB3-CQFA>].

14. Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> [<https://perma.cc/FY7W-FX57>].

15. Brian Barrett, *The Sports Betting Revolution Will Be a Slow Play Online*, WIRED (May 15, 2018, 1:59 PM), <https://www.wired.com/story/the-sports-betting-revolution-will-be-muted-online> [<https://perma.cc/D7V3-92G4>].

16. See James Glanz et al., *Finding 'Who' and 'Where' Within the Sports Cyber-Betting Universe*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/2015/10/16/us/finding-who-and-where-within-the-sports-cyber-betting-universe.html> [<https://perma.cc/72W8-Z25S>].

17. See Howard Gleckman, *From Head Taxes to Parcel Taxes, Cities and States Are Looking for New Ways to Raise Revenue*, TAX POLY CTR. (June 14, 2018), <https://www.taxpolicycenter.org/taxvox/head-taxes-parcel-taxes-cities-and-states-are-looking-new-ways-raise-revenue> [<https://perma.cc/YY44-7PFF>].

18. Madeline Will, *Teacher Strikes Are Heating Up in More States*, EDUC. WK. (Sept. 7, 2018), <https://www.edweek.org/ew/articles/2018/09/12/teacher-strikes-are-heating-up-in-more.html> [<https://perma.cc/DHC9-483Y>].

19. See Samuel Stebbins, *Infrastructure Spending: Which State Is Falling Apart the Worst?*, USA TODAY (Oct. 9, 2018, 12:54 PM), <https://www.usatoday.com/story/money/economy/2018/08/13/infrastructure-spending-states-that-are-falling-apart/37270513> [<https://perma.cc/V6RL-LW3T>].

20. See 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, 120-26.

21. See Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets->

reaction, calling daily fantasy sports illegal gambling under state law.<sup>22</sup> Despite these prominent declarations from heavily populated states, daily fantasy sports did not disappear. Indeed, approximately ten million people played daily fantasy sports at the time.<sup>23</sup> Eventually, New York would reach a settlement with the two major daily fantasy operators, DraftKings and FanDuel, allowing them to continue operating in the state.<sup>24</sup> The emergence of daily fantasy sports showed lawmakers that at least one form of sports wagering did not immediately send professional and amateur sports down a spiral of disrepute.<sup>25</sup>

The new world of legal sports betting began on May 14, 2018, when the Supreme Court struck down PASPA as an overreach of federal authority.<sup>26</sup> With the federal freeze on sports betting lifted, states were free to begin authorizing sports gambling.<sup>27</sup> The exuberance for sports betting resulted in eight states launching sports betting before the end of 2018, little more than six months after the Supreme Court's decision.<sup>28</sup> The interest in sports betting across the country has been palpable with even states like South Carolina, which has virtually no commercial or tribal gaming legal structure,

in-new-york.html [https://perma.cc/PM2V-9VG7]. Daily fantasy sports, like their traditional season-long counter-parts, involve selecting players and competing against others; however, unlike season-long fantasy sports, daily fantasy sports are played over a much shorter period. The shortened period over which a contest is held has led some to believe the contest is more similar to sports wagering, where bettors bet on a single game. Daily fantasy sports operators have often cited skill being the predominant factor in determining daily fantasy winners as to why daily fantasy sports is distinct from sports betting, but this is only one consideration for whether an activity constitutes gambling. See Edelman, *supra* note 20, at 130–35; see also *infra* Section II.B.

22. Chuck Lindell, *Ken Paxton: Daily Fantasy Is Illegal Gambling*, STATESMAN (Sept. 25, 2018, 2:00 PM), <https://www.statesman.com/news/20160915/ken-paxton-daily-fantasy-is-illegal-gambling> [https://perma.cc/P454-KXV4].

23. Daniel Roberts, *The Daily Fantasy Sports Market Has a Demographic Problem*, YAHOO FINANCE (Jan. 10, 2017), <https://finance.yahoo.com/news/the-daily-fantasy-sports-market-has-a-demographic-problem-133011359.html> [https://perma.cc/D26E-7YHV].

24. Lucinda Shen, *DraftKings and FanDuel Settle New York Lawsuit for \$12 Million*, FORTUNE (Oct. 26, 2016), <http://fortune.com/2016/10/26/draftkings-fanduel-settlement> [https://perma.cc/S7CC-5SBQ].

25. While some may contend that daily fantasy sports are distinct from gambling, this is likely based on the incorrect assertion that the predominance of skill in activity renders it not a form of gambling. See generally John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORT L.J. 1 (2017) (examining the content of daily fantasy sports advertisements for associations with gambling messaging).

26. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018).

27. Some states, such as Pennsylvania, passed laws in anticipation of either a favorable judicial decision or in the case of congressional repeal of PASPA. See Dustin Gouker, *PA Governor Signs Sports Gambling Law, but What's Next?*, LEGAL SPORTS REP. (Jan. 29, 2018, 9:17 AM), <https://www.legalsportsreport.com/16339/pa-sports-betting-law> [https://perma.cc/HQS8-WGHS].

28. *What's The Current State of Sports Betting in the US?*, PLAY USA (Aug. 19, 2019), <https://www.playusa.com/sports-betting> [https://perma.cc/6XGU-D3CK].

introducing a bill to legalize sports betting.<sup>29</sup> This Article examines the various approaches available to regulate sports betting, and discusses alternatives and best practices for states choosing to do so moving forward.

This Article is divided into five substantive parts. Part II details the framework that existed prior to the *Murphy* decision in 2018. Part III discusses the potential means of federal regulation, drawing from a bill introduced by Senator Orrin Hatch in late 2018, as well as other federal proposals that have been floated in other circles. Part IV provides an overview of the various means of state regulation including the two most prominent models to emerge, the lottery model, and the gaming control board model. Part V analyzes the role that tribal governments will have in some states discussing how the Indian Gaming Regulatory Act means that sports gambling in many states will be a multi-party negotiation. Part VI discusses how best to move forward with legal sports gambling, including potential alternatives to the currently proposed models of regulation.

## II. WAITING FOR *MURPHY*

Concerns over the spread of gambling have existed for some time. While politicians often link the ills of gambling with organized crime,<sup>30</sup> others express concerns over the social costs associated with gambling, such as debt accumulated by problem gamblers.<sup>31</sup> Despite the negative externalities that have been linked to gambling, there has been a rise in states seeking to add new sources of revenue to budgets. Beginning in 1964, when the first state reauthorized the lottery, states began lining up to take a share of lottery sales to fund a variety of state needs, by 2006, 42 of the 50 states had lotteries.<sup>32</sup> States have more recently begun to look beyond the lottery to add revenue with 30 states offering either tribal or commercial gambling at casino-type facilities.<sup>33</sup> The saliency of sports betting following the Supreme Court's decision in *Murphy* has prompted even states who have been reluctant to offer gambling products to explore legalizing sports betting; but this has not always

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29. Jeff Wilkinson, *Want to Bet on USC-Clemson Game? Here Are Chances that Legal Betting Will Come to SC*, STATE (Nov. 16, 2018, 12:45 PM), <https://www.thestate.com/news/local/article221662015.html>; see also 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/RC9C-LCSA>].

30. See Peter Ferentzy & Nigel Turner, *Gambling and Organized Crime—A Review of the Literature*, 23 J. GAMBLING ISSUES 111, 130–33 (2009).

31. See, e.g., Richard T.A. Wood & Mark D. Griffiths, *A Qualitative Investigation of Problem Gambling as an Escape-Based Coping Strategy*, 80 PSYCHOL. & PSYCHOTHERAPY: THEORY RES. & PRAC. 107, 113–17 (2007).

32. Debi A. LaPlante et al., *Thirty Years of Lottery Public Health Research: Methodological Strategies and Trends*, 26 J. GAMBLING STUD. 301, 302 (2010).

33. Matt Villano, *All In: Gambling Options Proliferate Across USA*, USA TODAY (Jan. 26, 2013, 5:00 PM), <https://www.usatoday.com/story/travel/destinations/2013/01/24/gambling-options-casinos-proliferate-across-usa/1861835> [<https://perma.cc/6ZLB-KSWY>].

been the case.<sup>34</sup> Indeed, it is only within very recent memory that sports betting has been viewed as a panacea and not as a pariah. Beginning in the 1950s, Congress regarded sports gambling as a menace that fueled organized crime and deemed it a threat to national prosperity and morality.<sup>35</sup>

#### A. PRIOR TO PASPA

In May of 1950, the Senate created a five-member special committee to investigate organized crime. The committee would come to be known by the name of its Chairman, Senator Estes Kefauver of Tennessee.<sup>36</sup> The Kefauver Committee would barnstorm across the United States, visiting 14 cities over the course of two years.<sup>37</sup> The committee returned with ten recommendations for legislation, but Congress would not act until 1961 when the Wire Act was passed.<sup>38</sup> The Wire Act was designed to target the Racing Wire Service, which was a ticker-like service allowing for horseracing and sports information to be transmitted to bookmakers around the country at speeds faster than any alternatives.<sup>39</sup> The shepherd of the Wire Act was Attorney General Robert F. Kennedy, who stressed that the bill was intended to address a very specific problem, the complex multistate structure of organized crime, which made it impractical for state police powers to corral.<sup>40</sup> The Wire Act was the first of many pieces of federal legislation that the Kefauver Committee recommended. In 1964, Congress addressed another gambling related concern independent of the Kefauver Committee, through the Sports Bribery Act.<sup>41</sup>

The Sports Bribery Act, like the Wire Act, was passed to address a specific problem.<sup>42</sup> The law criminalizes influencing the outcome of a sporting event

34. Prior to the end of January 2019, 13 states had active bills proposing the legalization of sports wagering pending in their legislatures. See Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. (Aug. 27, 2019, 8:50 AM), <https://www.legalsportsreport.com/sportsbetting-bill-tracker> [<https://perma.cc/N62P-VEX3>].

35. John Holden, *Legislative Sausage Making: How We Got the Wire Act, Part One*, LEGAL SPORTS REP. (Sept. 7, 2018, 8:41 AM), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one> [<https://perma.cc/SWJ8-JNNR>].

36. See *Kefauver Crime Committee Launched*, U.S. SENATE (May 3, 1950), [https://www.senate.gov/artandhistory/history/minute/Kefauver\\_Crime\\_Committee\\_Launched.htm](https://www.senate.gov/artandhistory/history/minute/Kefauver_Crime_Committee_Launched.htm) [<https://perma.cc/7KBH-J378>].

37. SCHWARTZ, *supra* note 5, at 70–71.

38. *Id.* at 78–79.

39. See generally Note, *Racing Wire Service*, 5 STAN. L. REV. 493 (1953) (discussing the history and development of wire services).

40. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1955, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 1–5 (1961) (statement of Robert F. Kennedy, Attorney General of the United States).

41. See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455–56 (2015) [hereinafter Holden & Rodenberg, *The Sports Bribery Act*].

42. *Id.* at 460–61.

by way of bribery.<sup>43</sup> The Sports Bribery Act enabled the federal government to address another problem that had been primarily linked to organized crime, match-fixing. The law arose following high profile match-fixing incidents involving the City College of New York's men's basketball team in 1950.<sup>44</sup> Match-fixing is often described as the practice whereby gamblers induce players to compete to a predetermined end.<sup>45</sup> The advantage for the fixer can be significant, as knowing the result of a wagering proposition prior to the start of an event is akin to knowing a company's quarterly earnings before they are publicly released. A fixer in possession of knowledge of a fixed game is not only engaged in fraud against the honest players in the game and the fans, but also to the bookmakers who have accepted bets believing the contest to be legitimate.<sup>46</sup> Concerns regarding organized crime's grip on the public through the operation of gambling schemes would persist as a federal priority into the 1970s.

In 1970, Congress passed the Illegal Gambling Businesses Act ("IGBA").<sup>47</sup> The IGBA federalizes state gambling laws where the operation involves five or more people and is in operation for more than 30 days or takes in more than \$2,000 in gross revenue in a single day.<sup>48</sup> The IGBA was passed on what Dante Fascell called, "the 50th anniversary of the most successful growth industry in the United States—organized crime."<sup>49</sup> The IGBA enabled the federal government to target criminal organizations that were either outside the jurisdiction of state law enforcement officials or were too low on state police priorities lists to be targeted.<sup>50</sup> The reliance on state law, however, leads to the somewhat odd occurrence where federal law is applied differently across states, as state gambling definitions differ from jurisdiction to jurisdiction.<sup>51</sup> While Congress initially used gambling

43. 18 U.S.C. § 224(a) (2012).

44. See Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN (Nov. 19, 2003), [http://www.espn.com/classic/s/basketball\\_scandals\\_explosion.html](http://www.espn.com/classic/s/basketball_scandals_explosion.html) [https://perma.cc/68VK-QHKS].

45. See John T. Holden & Ryan M. Rodenberg, *Lone-Wolf Match-Fixing: Global Policy Considerations*, 9 INT'L J. SPORT POL'Y & POL. 137, 138–39 (2017) [hereinafter Holden & Rodenberg, *Lone-Wolf Match-Fixing*].

46. Holden & Rodenberg, *The Sports Bribery Act*, *supra* note 41, at 455.

47. 18 U.S.C. § 1955.

48. *Id.*

49. *Federal Effort Against Organized Crime: Role of the Private Sector Hearings Before a Subcomm. of the Comm. on Gov't Operations*, 90th Cong. 1 (1970) (statement of Rep. Dante Fascell, Chairman, Subcomm. on Legal and Monetary Affairs).

50. See Kaitlyn Dunphy, Note, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1310 (2014).

51. *Id.* at 1311. States classifying gambling fall into one of four groups. The first group of states are those that rely on the predominate factor test, where if skill is the predominant factor determining the outcome the activity is not gambling. The second test is the material element test, which is applied in New York and other states and determines an activity to be prohibited if chance is a material element in the outcome of an event. The third test is the any chance test,



legislation as a means of targeting organized crime, by the 1990s, the emphasis of Congress would shift from targeting criminal operators to targeting the state government regulation of sports gambling.

### B. THE 1990S TO MURPHY

Before PASPA passed, the Senate debated a bill titled, “Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks.”<sup>52</sup> While the bill was labeled intellectual property legislation, much of the testimony coming from former professional athletes focused on how expanded sports wagering would cause fans to question the legitimacy of professional sports.<sup>53</sup> The 1990 hearing was also the first time professional sports leagues articulated the position that state-sponsored gambling misappropriated sports league property.<sup>54</sup> The concerns regarding threats to sporting event integrity, and athletes themselves, continued a year later as Congress tried once again to pass a ban on state-sponsored sports wagering.<sup>55</sup> However, as Senator Chuck Grassley pointed out, the sports leagues’ concerns seemed somewhat hollow as they had not voiced objection to Nevada’s offering of sports wagering and failed to register complaints related to Nevada casinos using sports team logos.<sup>56</sup> Sports gambling legislation, which initially sought to propose a ban on sport wagering, would eventually succumb to a maintenance of the status quo with the passage of PASPA.<sup>57</sup>

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which determines that activities with any degree of chance are considered prohibited forms of gambling. The fourth test is applied in very few jurisdictions, the gambling instinct test, which asks whether an activity appeals to a participant’s gambling instinct. *See generally* Anthony N. Cabot et al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383 (2008) (analyzing how states regulate legal and non-legal gambling).

52. *Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Patents, Copyrights and Trademarks of the S Comm. on the Judiciary*, 101st Cong. 1 (1990).

53. *See, e.g., id.* at 23–24 (testimony of Reggie Williams, former linebacker for the Cincinnati Bengals). Williams testified that athletes would no longer be looked at as role models and that young fans would collect lottery tickets, as opposed to baseball cards. *See id.* Williams also expressed his belief that legal sports betting would increase the likelihood of a professional game being fixed. *See id.*

54. *See id.* at 55.

55. *See generally Prohibiting State-Sponsored Sports Gambling: Hearing on S. 473 & S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Hearing on S. 473 & S. 474*] (amending legislation to comport with the ban on sports wagering).

56. *See id.* at 17–18.

57. *See* John T. Holden et al., *Sports Gambling Regulation and Your Grandfather (Clause)*, 26 *STAN. L. & POL’Y REV. ONLINE* 1, 1–2 (2014). While PASPA largely froze sports gambling schemes in place as they were in 1992, the statute did contain an exemption that would have allowed certain jurisdictions to implement a sports gambling scheme within a one-year window after passage of the statute. 28 U.S.C. § 3704 (1992).

Following the passage of PASPA, the federal government maintained its staunch opposition to sports betting and online gambling more generally, going so far as to argue before the World Trade Organization (“WTO”) that internet gambling offends the public morals of the country.<sup>58</sup> The dispute centered on Antigua and Barbuda being excluded from accessing the United States gambling and betting services market.<sup>59</sup> Under the General Agreement on Trade in Services (“GATS”), countries can generally not restrict others from accessing their markets.<sup>60</sup> The United States argued that an exception to GATS, the public morals clause, would mean that operators from Antigua and Barbuda need not be afforded access to the American marketplace if the trade they sought to engage in violated the country’s morals.<sup>61</sup> The WTO Appellate Body rejected the American representatives’ arguments. The panel found the United States’ claim that online gambling offended the public morals was not supported as the government actively regulated interstate horse racing, among other activities.<sup>62</sup> As trade representatives were battling to keep foreign online gambling operators outside of the United States, Congress was attempting to reign in online gambling domestically.

In 1997, Congress began to take an interest in regulating online gambling.<sup>63</sup> Concerns had grown regarding what was available on the internet.<sup>64</sup> Various bills would eventually be condensed and modified to the point where what actually passed was not a ban on internet gambling at all.<sup>65</sup> In fact, the Unlawful Internet Gambling Enforcement Act (“UIGEA”) is primarily a banking statute, which regulates payment processors and prohibits the processing of payments to illegal gambling providers.<sup>66</sup> In addition to failing to provide a meaningful deterrence to internet gambling, UIGEA is also riddled with exceptions from the definition of bet or wager, which is the targeted offending conduct spelled out in the bill.<sup>67</sup> One such exception

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58. Albenia P. Petrova, *The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions Under GATS Article XIV(a) and How to Set the Trend for Implementation and Compliance in WTO Cases Involving “Public Morals” and “Public Order” Concerns?*, 6 RICH. J. GLOBAL L. & BUS. 45, 46–47 (2006).

59. *Id.* at 49.

60. See Heather A. Bloom, *Upping the Ante: The Unlawful Internet Gambling Enforcement Act’s Noncompliance with World Trade Organization Law*, 5 S.C.J. INT’L L. & BUS. 75, 85 (2008).

61. See *id.* at 85–86.

62. *Id.* at 80.

63. *Internet Crimes Affecting Consumers: Hearing on S. 474 Before the Subcomm. on Technology, Terrorism and Government Information of the S. Comm. on the Judiciary*, 105th Cong. 24, 58–61 (1997).

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

65. See generally *id.* (explaining the origin of the Internet Gambling Enforcement Act).

66. 31 U.S.C. §§ 5361–5367 (2012).

67. *Id.* § 5362 (“[P]articipation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of

applies to certain fantasy sports games.<sup>68</sup> This fantasy sports exemption would spark the innovation demonstrating the American public's tolerance for one type of sports gambling, daily fantasy sports.<sup>69</sup>

Daily fantasy sports have similarities to their season-long predecessors, but like their name implies, daily fantasy contests occur over a much shorter period of time, often a day or less.<sup>70</sup> Daily fantasy contests also differ from season-long games, in that most contests do not allow a fantasy player to alter their roster after they have selected their team.<sup>71</sup> Daily fantasy sports exist because of the exemption in UIGEA,<sup>72</sup> but the UIGEA's authors did not intend to create this loophole that would enable the daily fantasy industry to flourish.<sup>73</sup> The debate over whether daily fantasy sports was a form of sports betting quickly became a topic of national conversation, especially as the two major companies, FanDuel and DraftKings, launched incessant advertising campaigns in 2015.<sup>74</sup> Despite rulings in a variety of states deeming their products illegal gambling,<sup>75</sup> DraftKings, FanDuel, and a handful of other daily fantasy companies tested the public's and politicians' tolerance for a new type of gambling and, contrary to the hyperbolic assertions during PASPA-related

title 28) and that meets the following conditions: . . . All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. . . . All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events. . . . No winning outcome is based . . . on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or . . . solely on any single performance of an individual athlete in any single real-world sporting or other event.”).

68. *Id.*

69. *See generally* Edelman, *supra* note 20 (mentioning the different risks associated with daily fantasy sports).

70. Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 659 (2017).

71. *Id.* at 660.

72. *Id.*

73. Tim Dahlberg, *Former Congressman Says Daily Fantasy Sports Sites Are a 'Cauldron of Daily Betting'*, PBS (Oct. 12, 2015, 6:50 PM), <https://www.pbs.org/newshour/politics/former-congressman-says-daily-fantasy-football-sites-cauldron-daily-betting> [<https://perma.cc/4A8H-ZC47>] (quoting the bill's sponsor Congressman Jim Leach as stating: “There is no credible way fantasy sports betting can be described as not gambling”).

74. Justin Wm. Moyer, *Sorry, Daily Fantasy Sports Is Gambling, Not a Game of Skill, Nevada Says*, WASH. POST (Oct. 16, 2015, 1:39 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/16/nevada-sorry-fantasy-sports-is-gambling-not-a-game-of-skill> [<https://perma.cc/EQY8-UMAY>].

75. *See, e.g.*, Dustin Gouker, *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REP. (July. 3, 2019, 12:40 AM), <https://www.legalsportsreport.com/state-legality-of-dfs> [<https://perma.cc/B8UK-Ng4W>].

hearings, professional sports did not succumb to the poison that allegedly follows sports gambling.<sup>76</sup>

Daily fantasy sports companies served an important role for the legalization of sports betting because they were able to mimic some aspects of sports betting, like the ability to confine wagers to a single day, while appearing like traditional fantasy sports in that users selected players, as opposed to teams.<sup>77</sup> The idea for daily fantasy sports came from a poker writer named Kevin Bonnet, who noted that the UIGEA exemption for fantasy sports created an opportunity to create an activity that was narrowly tailored to comply with the exemption, while providing a contest that was much more rapid than traditional fantasy sports.<sup>78</sup> While Bonnet's daily fantasy sports efforts were not a commercial success, within a few years daily fantasy sports had become a viable segment within the fantasy sports industry pushed by other entrepreneurs.<sup>79</sup> The daily fantasy industry relied heavily on the carve out in UIGEA to advance the argument that the games were not a prohibited activity like sports betting,<sup>80</sup> while largely turning a blind eye to the fact that state laws have typically determined whether an activity is gambling.<sup>81</sup> The emphasis on daily fantasy sports being a game where skill is the dominant factor in determining the outcome of games was an additional strategy daily fantasy companies used to advance their argument that the games were distinct from sports wagering. This, however, oversimplified the tests used to determine whether an activity is gambling in more than 20 states, which impose more stringent tests than the dominant factor test.<sup>82</sup> The efforts by major companies FanDuel and DraftKings to assert their products were legal appeared to catch many state lawmakers off guard as it was not until 2015 that various state Attorneys General began to issue opinions finding daily fantasy sports violated state gambling laws.<sup>83</sup> FanDuel and DraftKings continued to

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76. See, e.g., *Hearing on S. 473 & S. 474*, *supra* note 55, at 17–18 (testimony of Paul Tagliabue, Commissioner, National Football League).

77. Marc Edelman, *Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELL. PROP. SPORTS & ENT. L.F. 1, 6–7 (2016).

78. *Id.*

79. *Id.*

80. *Why Fantasy Sports is Not Gambling: Understanding A Game of Skill*, FANTASY SPORTS TRADE ASSOC., <https://web.archive.org/web/20190323044408/https://fsta.org/research/why-fantasy-sports-is-not-gambling> [<https://perma.cc/CGM7-TU5>].

81. See Kiran S. Raj, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 782–83 (2006).

82. See Holden & Brandon-Lai, *supra* note 25, at 3.

83. See e.g., Memorandum from Lisa Madigan, Attorney General of Illinois, to Elgie R. Sims, Representative and Scott R. Drury, Representative (Dec. 23, 2015), *available at* <https://www.legalsportsreport.com/wp-content/uploads/2015/12/Illinois-DFS.pdf> [<https://perma.cc/JQC5-WNZG>]; see also Memorandum from Ken Paxton, Attorney General of Texas, to Myra Crownover, Representative (Jan. 19, 2016), *available at* <https://www.legalsportsreport.com/wp-content/uploads/2016/01/Texas-ag-dfs-decision.pdf> [<https://perma.cc/6FN5-T4P7>].

successfully operate in large-population states like Illinois despite opinions finding the games constituted illegal gambling.<sup>84</sup>

The daily fantasy sports experiment served an important role in testing the country's appetite for sports betting, as despite the companies' claims that the contests were not like sports betting there were similarities for many consumers, and lawmakers.<sup>85</sup> Adding to the uncertainty about the place of daily fantasy sports on the gambling non-gambling continuum of activities was the embrace and investments by major American sports leagues who had historically opposed sports betting in any form.<sup>86</sup> While the emergence of daily fantasy sports appears to have tested the public's appetite and lawmaker's tolerance for sports betting, the Supreme Court would open the flood gates for sports betting across the country with a decision in *Murphy v. National Collegiate Athletic Association*.<sup>87</sup>

### C. THE POST-MURPHY WORLD

The Supreme Court's *Murphy* decision on May 14, 2018 ruled that PASPA impermissibly commandeered state legislatures by dictating that states were not free to pass or repeal their own laws affecting sports wagering.<sup>88</sup> The *Murphy* decision ended a near six-year-long saga that saw the state of New Jersey lose at every level of court, except at the Supreme Court.<sup>89</sup> The *Murphy* decision did not legalize sports betting, but instead allowed states the opportunity to legalize sports wagering within their own jurisdictions. As the Supreme Court removed PASPA's prohibition on states authorizing sports gambling, states began to mobilize their legislatures for sports betting.<sup>90</sup>

84. Matthew Kredell, *Bad-Actor Amendment Proposed in Illinois Sports Betting to Target DraftKings, FanDuel*, LEGAL SPORTS REP. (Mar. 29, 2019, 10:55 AM), <https://www.legal-sportsreport.com/30767/illinois-sports-betting-bad-actor> [<https://perma.cc/97FR-23NV>]; see Roberts, *supra* note 23 (estimating that daily fantasy sites had approximately ten million registered users in 2017).

85. See Brent Schrottenboer, *Fantasy Sports Debate: Gambling or Not Gambling?*, USA TODAY, <https://www.usatoday.com/story/sports/fantasy/2015/01/11/fantasy-sports-gambling-debate-fan-duel/21612771> [<https://perma.cc/3PQS-6DMJ>] (last updated Jan. 12, 2015, 7:26 AM).

86. Scott Stinson, *Pro Sports Leagues Happy to Embrace Daily Fantasy—and Pretend It Is Somehow Not Gambling*, NAT'L POST (Sep. 16, 2015, 10:21 PM), <https://nationalpost.com/sports/pro-sports-leagues-happy-to-embrace-daily-fantasy-and-pretend-it-is-somehow-not-gambling> [<https://perma.cc/HND5-KD4A>].

87. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

88. *Id.* at 1478.

89. See generally Rodenberg & Holden, *Sports Betting Has an Equal Sovereignty Problem*, *supra* note 11 (detailing the extensive litigation related to PASPA); see also Anastasios Kaburakis et al., *Inevitable: Sports Gambling, State Regulation, and the Pursuit of Revenue*, 5 HARV. BUS. L. REV. ONLINE 27, 29–33 (2015).

90. Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3285361](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285361) [<https://perma.cc/8759-6ZEX>].

Beginning in Delaware on June 5, 2018, less than three weeks after the Supreme Court's decision, betting on a single-game sporting event took place legally for the first time outside of Nevada since at least 1992.<sup>91</sup> New Jersey, Mississippi, Pennsylvania, West Virginia, and Rhode Island quickly joined Delaware as the first wave of states to authorize sports wagering in the absence of PASPA.<sup>92</sup> In addition to the states that authorized sports wagering, the Pueblo of Santa Ana launched a sportsbook with the assistance of bookmaker, US Bookmaking.<sup>93</sup> The tribal community took advantage of language in their gaming compact with New Mexico that authorized the tribe to offer any type of game classified as Class III gaming.<sup>94</sup> Despite the exuberance of more than a handful of states to legalize sports wagering, nearly immediately in the wake of the *Murphy* decision, there have been a number of incidents that have occurred since May 2018 that suggest a need for caution.

In the world post-*Murphy*, the rush to legalize sports wagering in jurisdictions across the country has not been without challenges. Even before the Supreme Court struck down PASPA, Pennsylvania made headlines when the Governor signed a sports betting bill that taxed sports wagering revenue at 36 percent.<sup>95</sup> The 36 percent tax rate was arrived at not by a calculation of costs and benefits for both the state and operators, but by doubling the tax rate Pennsylvania charges for table games. The reason for this was, at least purportedly, that some members of the Republican leadership thought sports betting resembled slot machines, which are taxed at a higher rate.<sup>96</sup> The Pennsylvania tax rate is also joined by a \$10 million licensing fee, which operators must pay in order to be licensed to offer sports betting.<sup>97</sup> While the Keystone state eventually found some takers for their high licensing fee and

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91. *Id.* at 13.

92. *Id.* at 13-17.

93. 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, 9:33 AM), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico> [<https://perma.cc/X5AK-3Y3T>].

94. *Id.* Class III gaming activities are described as "Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to: (a) Any house banking game, including but not limited to - (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); (2) Casino games such as roulette, craps, and keno; (b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance; (c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or (d) Lotteries." 25 C.F.R. § 502.4 (2016).

95. Gouker, *supra* note 27.

96. Adam Candee, *Interesting Math: PA Sports Betting Tax Rate Came from Doubling Table Games Rate*, LEGAL SPORTS REP. (Jul. 17, 2018, 5:00 AM), <https://www.legalsportsreport.com/22089/pennsylvania-sports-betting-tax-rate> [<https://perma.cc/YGE4-DSSY>].

97. *Id.*

tax rates,<sup>98</sup> the rates have likely been responsible for keeping smaller companies out of the state, especially when a state like Nevada charges only 6.75 percent tax on gross gaming revenue.<sup>99</sup> Pennsylvania's tax rates threatened to derail the state's nascent sports betting industry, but state lawmakers in other states also faced challenges with getting sports betting off the ground.

West Virginia was the first state to pass a sports betting law in 2018, but before the state rolled out newly legalized sports betting at the state's Hollywood Casino, the director of the lottery commission and the commission's general counsel were no longer in their positions.<sup>100</sup> The challenges in West Virginia centered, in part, on a conflict between the state's law and the governor, Jim Justice, who owned a PGA Tour host golf course. The governor advocated for the mandated use of official data, but the legislature rejected these calls.<sup>101</sup> When the legislature and the Gaming Commission would not capitulate on mandated fees or required data sources, one of the governor's staffers gathered a meeting of sports leagues and casinos and attempted to broker a private data agreement.<sup>102</sup> Despite the initial challenges, West Virginia's sports betting industry has since launched and is an early success.<sup>103</sup>

The state that experienced the highest number of challenges in the first few months of legal sports betting was New Jersey. After six years of fighting to make sports betting legal, New Jersey was unable to be the first state with a new sports gambling scheme.<sup>104</sup> New Jersey's sports betting industry was initially rocked by an incident involving a bettor who wagered \$110 on a betting line of +75,000 during the late stages of a Denver Broncos versus

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98. See Joss Wood, *The Ultimate Guide to Pennsylvania Sports Betting & Online Gambling*, PLAYUSA (July 14, 2019), <https://www.playusa.com/pennsylvania-sports-betting-online-gambling-guide> [https://perma.cc/R3GG-585S].

99. Howard Gleckman, *6 Reasons Why States Shouldn't Be Counting Their Sports Betting Tax Revenue Yet*, FORBES (May 16, 2018, 11:35 AM), <https://www.forbes.com/sites/howard-gleckman/2018/05/16/six-reasons-why-states-shouldnt-be-counting-their-sports-betting-tax-revenue-yet> [https://perma.cc/4HUN-DMTD].

100. Eric Ramsey, *West Virginia Sports Betting Shakeup Is 'Disturbing The Hell Out Of Lawmakers*, LEGAL SPORTS REP. (Sept. 17, 2018, 11:59 AM), <https://www.legalsportsreport.com/24178/west-virginia-sports-betting-disturbing-lawmakers> [https://perma.cc/ZUE3-NQJD].

101. *Id.*

102. *Id.*

103. See Dustin Gouker, *WV Online Sports Betting Goes Live, and Two More Sportsbooks Open*, LEGAL SPORTS REP. (Dec. 27, 2018, 1:49 PM), <https://www.legalsportsreport.com/27178/wv-online-sports-betting-goes-live> [https://perma.cc/M7GV-AMRQ].

104. Delaware was the first state to expand gambling offerings following the *Murphy* decision. See Rick Maese, *Delaware Is the First New State to Bet On Sports Gambling, but It Might Not Pay Off*, WASH. POST (June 5, 2018, 3:21 PM), <https://www.washingtonpost.com/news/sports/wp/2018/06/05/delaware-first-to-bet-on-sports-gambling-but-it-might-not-pay-off> [https://perma.cc/7SD9-H542].

Oakland Raiders football game.<sup>105</sup> The line was a reportedly a glitch in FanDuel's system, and the site initially chose not to pay the bettor, instead offering him \$500 and tickets to luxury seats at an upcoming football game.<sup>106</sup> The bettor declined, and FanDuel eventually elected to pay the bettor the full value of his ticket, despite the company's insistence that the computer glitch did not obligate them to pay.<sup>107</sup> Caesar's and the Golden Nugget Atlantic City also made news when it was revealed that New Jersey's Division of Gaming Enforcement had fined the companies for accepting illegal wagers during the 2018 college football season.<sup>108</sup> The two companies had accepted wagers on New Jersey collegiate teams, which is an illegal wager under the state's law.<sup>109</sup> New Jersey was also the site of a third incident. At the DraftKings Sports Betting National Championship in January of 2019, there were allegations that some players were delayed from having access to their bankroll to place wagers before the event expired, whereas other players were not so restricted, allowing them to make additional bets.<sup>110</sup> These early setbacks, among other factors, have prompted some to question the states' ability to effectively regulate sports betting.<sup>111</sup> In Part III, this Article explores some of the proposed modes for federal regulation of sports wagering.

### III. THE FEDERAL SCENARIOS

PASPA's fatal flaw, according to Justice Alito, was that it required states to maintain laws they no longer desired, leaving room for Congress to regulate instead using federal resources, but the federal government cannot require New Jersey (or any other state) to advance federal policy via state

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105. Alex Myers, *FanDuel, New Jersey Gambler in Dispute Over Potential \$82,000 NFL Bet*, GOLF DIGEST (Sept. 18, 2018), <https://www.golfdigest.com/story/fanduel-new-jersey-gambler-in-dispute-over-potential-dollar82000-nfl-bet> [<https://perma.cc/QDK7-4S6F>].

106. *Id.*

107. *Id.*

108. David Danzis, *Caesars, Golden Nugget Accepted Illegal Sports Bets*, PRESS ATLANTIC CITY (Dec. 24, 2018), [https://www.pressofatlanticcity.com/news/press/casinos\\_tourism/caesars-golden-nugget-accepted-illegal-sports-bets/article\\_6ba8e11f-6735-5999-9749-0d076cc74789.html](https://www.pressofatlanticcity.com/news/press/casinos_tourism/caesars-golden-nugget-accepted-illegal-sports-bets/article_6ba8e11f-6735-5999-9749-0d076cc74789.html) [<https://perma.cc/KgMS-2V2W>].

109. *Id.*

110. Dustin Gouker, *\$2.5 Million DraftKings Sports Betting Championship Ends with Controversy*, LEGAL SPORTS REP. (Jan. 14, 2019, 2:39 PM), <https://www.legalsportsreport.com/27560/draftkings-sports-betting-championship-controversy> [<https://perma.cc/Y4VM-HFET>]. The DraftKings Sports Betting National Championship saw each competitor pay an entry fee and then begin the event with \$5,000, which they had limited time to turn into as much money as possible betting on real sporting events. In addition to being able to keep the amount that the winner won, the top prize winner also received \$1 million. See John Britt, *DraftKings Announces 2019 Sports Betting National Championship*, ROTOGRINDERS, <https://rotogrinders.com/articles/draftkings-2019-sports-betting-national-championship-2691843> [<https://perma.cc/FD5Q-S488>].

111. Todd Prince & Richard N. Velotta, *Schumer-Hatch Bill Would Regulate Sports Betting Nationwide*, LAS VEGAS REV. J. (Dec. 19, 2018, 10:25 AM), <https://www.reviewjournal.com/sports/betting/schumer-hatch-bill-would-regulate-sports-betting-nationwide-1554796> [<https://perma.cc/HA3Y-RFHR>].



legislatures.<sup>112</sup> Alito concluded the Court's opinion by stating "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own."<sup>113</sup> The *Murphy* decision prompted one of PASPA's original sponsors, Senator Orrin Hatch of Utah, to author an op-ed in *Sports Illustrated*, in which the senator expressed his view that federal legislation is needed for the successful existence of sports wagering in the United States.<sup>114</sup> Shortly before Congress went home and Senator Hatch retired, he and Senator Chuck Schumer of New York introduced a bipartisan bill that would regulate sports gambling at the federal level.<sup>115</sup>

A. *THE SPORTS WAGERING MARKET INTEGRITY ACT OF 2018*

Almost immediately after the *Murphy* decision the federal government began to discuss federal legislation that could supplant the now unconstitutional PASPA.<sup>116</sup> The federal government would quickly propose a model framework, backed by Senate stalwarts Chuck Schumer of New York and Orrin Hatch of Utah, the draft bill would have implemented federally mandated minimums serving as checks and balances on state-authorized sports wagering.<sup>117</sup> The sports wagering bill introduced on December 19, 2018, one of Senator Hatch's last acts in office, was 101 pages long and presented a comprehensive plan to regulate sports wagering in the United States.<sup>118</sup> The bill was divided into five separate titles, with the first labelled "Sports Wagering."<sup>119</sup> The bill begins by doing something no federal law had ever done previously: proposing to make it "unlawful for any person to knowingly accept a sports wager."<sup>120</sup> This prohibition was subject to two exceptions: the first for licensed operators in a state that subscribes to the sports gambling framework unveiled in the bill, and the second for sports wagers that are legal under states' social gambling laws.<sup>121</sup> While the bill made

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112. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

113. *Id.*

114. Orrin G. Hatch, *Sports Betting is Inevitable—Let's Make Sure It's Done Right*, SPORTS ILLUSTRATED (May 23, 2018), <https://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation> [<https://perma.cc/EN34-HHDF>].

115. Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

116. See Associated Press, *Will Sports Betting See Federal Regulation?*, PENN LIVE (Dec. 19, 2018), <https://www.pennlive.com/news/2018/12/will-sports-betting-see-federal-regulation.html> [<https://perma.cc/RU64-47UD>].

117. See generally S. 3793 (introducing a bill to regulate sports wagering and betting within the states).

118. *Id.*

119. *Id.* § 101.

120. *Id.* § 101(a).

121. *Id.* § 101(b). A number of states allow social wagers between friends or family to be outside the scope of state gambling law, often these limits are de minimis. See Chuck Humphrey, *State Gambling Law Summary*, GAMBLING-LAW-US.COM (Mar. 22, 2017), <http://www.gambling-law-us.com/State-Law-Summary> [<https://perma.cc/68MZ-LBXF>].

accepting a wager unlawful, the only associated penalties in the bill were civil fines.<sup>122</sup> Under the bill, state sponsored sports wagering programs would be required to file an application with the Attorney General providing a description of the wagering scheme and providing an assurance that the scheme was lawful under state law.<sup>123</sup> The Attorney General would then have the ability to deny or authorize the state scheme for a period of three years, subject to three year renewals.<sup>124</sup> The federal bill further mandated that states meet minimum standards in several areas: location verification for mobile wagering; prohibitions on accepting wagers on certain amateur events; procedures for preventing unauthorized users from wagering; users' use of official league data for determination of the results of all wagers; and a variety of other consumer protections, which are largely standard across the industry.<sup>125</sup> Title I of the bill also requires sports wagering operators to comply with various federal anti-money laundering provisions and allow for interstate wagering compacts.<sup>126</sup> The allowance for interstate wagering compacts would likely facilitate access to the sports gambling market for smaller states, whereas it might otherwise be cost prohibitive for operators to set up standalone businesses in jurisdictions with small populations.

Title I introduced the idea of a National Sports Wagering Clearinghouse, a nonprofit organization, that would be composed of sports wagering operators, sports organizations, state regulatory entities, federal and state law enforcement, and an individual representing the interests of the public.<sup>127</sup> The National Sports Wagering Clearinghouse would be responsible for operating a resource center; coordinating programs related to sports betting integrity, responsible betting, and problem gambling; contributing and disseminating information regarding best practices affecting the industry; maintaining a "national repository of anonymized sports wagering data and suspicious transaction reports," as well as serve as an agency that would alert federal and state law enforcement agencies of suspicious trends and irregularities in the betting data.<sup>128</sup> Title I of the bill contained a provision requiring procedures to enhance cooperation between state and federal authorities and the National Sports Wagering Clearinghouse to better respond to suspicious and illegal behavior.<sup>129</sup>

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122. S. 3793 § 101(d).

123. *Id.* § 102(a).

124. *Id.* § 102(d)-(e).

125. *Id.* § 103.

126. *Id.* §§ 104-105.

127. *Id.* § 106.

128. *Id.* § 106(c).

129. *Id.* § 107.

Title II of S. 3793 establishes a sports wagering trust fund from Federal excise tax revenues collected pursuant to the Internal Revenue Code.<sup>130</sup> The Wagering Trust Fund would distribute up to \$5 million over ten years to study gambling addiction nationwide, as well as \$3 million for the creation of the National Sports Wagering Clearinghouse.<sup>131</sup> Money would also be made available to the Department of Justice for the investigation and prosecution of various gambling and sport corruption related crimes, including violations of the Wire Act, the Sports Bribery Act, and the Illegal Gambling Businesses Act.<sup>132</sup> Title III of the bill would serve to modernize the Wire Act and the Sports Bribery Act.<sup>133</sup> The bill would eliminate questions about whether the Wire Act prohibits transmission of data between two jurisdictions that allow sports wagering if that information passes through a third-party state where sports wagering is illegal.<sup>134</sup> The so-called intermediate routing question is one that has made operators cautious of transmitting wagering information between even two legal jurisdictions.<sup>135</sup> The Sports Bribery Act would also be modernized to include other means used by match-fixers, including incorporation of extortion and blackmail, as well as punishments for wagering with non-public information.<sup>136</sup> The revisions to the Sports Bribery Act also call for the addition of whistleblower protections, which may serve as means to encourage individuals in low-level positions to come forward with information.<sup>137</sup>

Title IV of bill S. 3793 would provide for additional resources for the study of gambling addiction and treatment.<sup>138</sup> Title IV would authorize the Secretary of Health and Human Services to establish a Gambling Research Committee under the coordination of the National Institutes of Health and Health and Human Services.<sup>139</sup> The bill would also authorize a comprehensive nationwide surveillance program of gambling addiction as well as create a massive research database for both government and private researchers to examine gambling addiction.<sup>140</sup> The bill concludes with General Provisions regarding the impact on the Indian Gaming Regulatory Act, noting that the

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130. *Id.* §§ 201–202. The Internal Revenue Service has collected a 0.25 percent tax on all legal sports wagers in the United States since 1982.

131. *Id.* § 9511.

132. *Id.*

133. *Id.* § 301.

134. *Id.*

135. See Mark Hichar, *Even if the PASPA Is Struck Down, the Wire Act Will Still Prohibit Sports Bets from Crossing State Lines*, PUB. GAMING INT'L., Apr. 2018, at 40.

136. S. 3793 § 302.

137. *Id.* The suggestion to add whistleblower protections and expand the scope of the Sports Bribery Act were originally presented in a 2015 law review article. See Holden & Rodenberg, *The Sports Bribery Act*, *supra* note 41, at 471.

138. S. 3793 § 401.

139. *Id.* § 402.

140. *Id.* § 317U.

bill does not preempt existing state and tribal gaming compacts.<sup>141</sup> The bill concludes by remarking that in the event any aspect of the bill is found unconstitutional it should be severed and the rest of the bill should survive.<sup>142</sup>

While the Hatch and Schumer bill was introduced as a conversation starter and was likely never expected to pass as it was introduced with Senator Hatch's retirement mere days away.<sup>143</sup> Most state legislators' opposition to any federal bill remains sharp,<sup>144</sup> but S. 3793 presented some advances that are generally regarded by scholars as positives, including additional funding for addiction and research, as well as modernization of antiquated statutes to better encapsulate modern iterations of match-fixing. There are, however, alternative models that have been floated around for regulating sports betting at the federal level.<sup>145</sup>

### B. THE INTERSTATE HORSE RACING ACT MODEL

Horse racing has long been treated differently from other types of wagering because it has existed outside of the traditional prohibition on sports wagering.<sup>146</sup> Horse racing is also a gambling activity, which has a component the federal government directly regulates.<sup>147</sup> The Interstate Horse Racing Act ("IHRA"), passed in 1978, notes that states have the primary responsibility for determining what types of gambling to authorize and that the federal government should aim to prevent states from interfering with each other's gambling policies, but "in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers."<sup>148</sup> Off-track betting allows an individual to place a wager on

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141. *Id.* § 501.

142. *Id.* § 502. The severability provision is likely an ode to the *Murphy* decision whereby the court wrestled with whether the constitutionally offensive aspects of PASPA could be severed allowing the statute to survive. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018) (determining "that no provision of PASPA is severable from the provision directly at issue").

143. Chris Mills Rodrigo, *Schumer, Hatch to Introduce Bill Regulating Sports Betting*, HILL (Dec. 19, 2018, 1:53 PM), <https://thehill.com/regulation/finance/422103-schumer-hatch-to-introduce-bill-regulating-sports-betting> [<https://perma.cc/GCN9-DVNX>].

144. See, e.g., Howard Stutz, *Response to Proposed Federal Sports Betting Oversight: 'Legislation Not Necessary'*, CDC GAMING REP. INC. (Dec. 5, 2018, 12:02 AM), <https://www.cdcgamingreports.com/response-to-proposed-federal-sports-betting-oversight-legislation-not-necessary> [<https://perma.cc/6KGE-5THF>].

145. Paulick Report Staff, *Opinion: Interstate Horseracing Act Could Provide Blueprint for Sports Betting Legislation*, PAULICK REP. (Jan. 18, 2018, 1:57 PM), <https://www.paulickreport.com/news/the-biz/opinion-interstate-horseracing-act-provide-blueprint-sports-betting-legislation> [<https://perma.cc/T3WC-YDC6>].

146. Charles P. Ciaccio, Jr., Note, *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529, 539 (2010).

147. *Id.*

148. 15 U.S.C. § 3001(a)(3) (2012).

a horse race from a location in a different city and then watch the race on a television (or computer).<sup>149</sup> The IHRA is unique in another facet as well, in that the statute requires off-track betting companies to obtain consent from state racing associations and state racing commissions in order to accept wagers on races from those jurisdictions.<sup>150</sup>

Scholars have suggested that IHRA may serve as a model for the federal government to dip its toes into the sports betting regulatory pool, while still deferring to states to make primary decisions regarding the scope of sports betting policy.<sup>151</sup> Indeed, ideas from the IHRA appear to have made their way into some draft bills, including a provision that would have allowed sports leagues to restrict certain types of wagers.<sup>152</sup> The IHRA only applies to interstate wagers and has no impact on intrastate wagers, which would seemingly preserve much of the historical deference to state regulation of gaming.<sup>153</sup> Some of the concepts from the IHRA may have also made their way into the Schumer and Hatch bill, including creating a process for removing wagers, effectively giving sports organizations a right to challenge types of bets.<sup>154</sup>

The federal options for regulating sports wagering would represent a massive shift from the ancillary role that the federal government has played in the regulation of wagering more broadly.<sup>155</sup> While a broad intervention from the federal government would likely be met with staunch resistance from the states and some in the gaming community, the federal government could attempt to implement a limited regulatory regime based on the IHRA model, which would effectively restrict the federal purview to wagering matters of a strictly interstate nature, excluding for the states all matter of regulating intrastate wagering. The desirability of federal legislation remains a matter of debate, on several levels, including whether there is a need at all, and if there is a need, how best to undertake such regulation. In addition to the various potential ways that the federal government may seek to regulate sports wagering, states have implemented disparate forms of wagering themselves. Part IV examines the state-level scenarios for sports wagering regulation.

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149. Ciaccio, *supra* note 146, at 539.

150. *Id.*

151. Ryan Rodenberg, *How a 40-Year-Old Horse Racing Law Can Nudge Sports Betting Forward*, LEGAL SPORTS REP. (Jan. 17, 2018, 11:13 AM), <https://www.legalsportsreport.com/17825/horse-racing-law-and-sports-betting> [<https://perma.cc/6HEZ-QAZM>].

152. *Id.*

153. *See* 15 U.S.C. § 3001(a)(3).

154. *See* Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

155. G. Robert Blakey, *Legal Regulation of Gambling Since 1950*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 19–21 (1984).

## IV. THE STATE SCENARIOS

The regulation of sports gambling at the state-level has been the traditional venue for the regulation of gaming activities.<sup>156</sup> Dating back to pre-revolutionary times, local jurisdictions often decided for themselves which activities to allow and which to forbid.<sup>157</sup> Historically, each jurisdiction was allowed to choose what was best for its citizens and consistent with their religious beliefs.<sup>158</sup> More recently, some states have taken the initiative to regulate vices such as marijuana, despite running counter to federal policy, arguing that states are better positioned than the federal government to choose which conduct of their citizens to regulate.<sup>159</sup> While the *Murphy* decision opened the doors to lawfully regulate sports wagering within the borders of a state, the exuberance and desire to be first to market prompted some, including representatives from the National Football League (“NFL”), to argue that states are rushing sports gambling legislation and that they are in “a regulatory race to the bottom.”<sup>160</sup> The states rushing to get sports gambling schemes to market are following in the Nevada’s footsteps, which has been operating the most extensive legal sports wagering scheme in the United States for decades.

## A. THE NEVADA MODEL

Gambling in Nevada was first legalized in 1931, but sports wagering was largely confined to illegal and quasi-legal Turf Clubs until the 1950s.<sup>161</sup> In the 1950s, the federal government imposed a ten percent tax on legal wagers placed in Nevada, a move that threatened to stamp out the state’s legal market

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156. See Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 154 (2018) (noting that historically “federal gambling laws were to aid states in enforcing their laws that prohibit gambling”).

157. For example, the Jamestown colony was funded by a lottery. See Jerome H. Skolnick, *The Social Transformation of Vice*, 51 LAW & CONTEMP. PROBS. 9, 16 (1988).

158. For example, in Pennsylvania where the Quakers settled, gaming activities were much more strictly controlled than in other jurisdictions where there was less religious overlap with governance. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 27 (1992).

159. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419, 1422 (2009) (“[S]tate laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land.”).

160. Eric Ramsey, *Say What? The Five Worst Takes from the Sports Betting Hearing in Congress*, LEGAL SPORTS REP. (Sept. 28, 2018, 10:58 AM), <https://www.legalsportsreport.com/24540/five-worst-takes-sports-betting-hearing> [<https://perma.cc/URQ9-MZNV>] (“Since the Supreme Court’s decision, states are rushing to promote sports betting. And we are witnessing a regulatory race to the bottom.” (quoting Jocelyn Moore, NFL Executive Vice President, during her testimony to a Congressional subcommittee)).

161. *Question of the Day—17 November 2017*, LAS VEGAS ADVISOR, <https://www.lasvegasadvisor.com/question/sports-betting-history> [<https://perma.cc/7TFP-NNNG>].

for wagering.<sup>162</sup> In 1974, however, the federal government dropped the federal excise tax to two percent, giving legal bookmakers in the state more room to operate.<sup>163</sup> By 1983, the federal government would once again drop the tax rate to 0.25 percent on legal wagers.<sup>164</sup> This ushered in an opportunity for sportsbooks to become a viable business across the state, as opposed to an ancillary casino product.<sup>165</sup> In 1955, the state of Nevada created the Gaming Control Board, whose task was “to create a policy to eliminate the undesirable elements in Nevada gaming, provide regulations for the licensing and the operation of gaming and make sure gaming taxes were correctly reported to the state.”<sup>166</sup>

Nevada’s success in the fight against illegal sports betting in the state and establishing legitimacy for legal operations came about as a result of the federal government establishing reasonable tax rates.<sup>167</sup> In 1977, the Nevada legislature codified the public policy that would guide gaming in the state.<sup>168</sup> The regulation of gaming in the state would be guided by four findings: First, the gaming industry is important to the economy and welfare of the people of Nevada; second, growth of the gaming industry is conditioned on the perception of legitimacy of the industry, including the absence of criminal influence; third, strict regulation is necessary to maintain public confidence; and, finally, all establishments offering gaming are to assist in protecting the “public health, safety, morals, good order, and general welfare of the inhabitants of the state and to preserve the competitive economy and policies of free competition of the state of Nevada.”<sup>169</sup> Accompanying these four factors is a statement that a gaming license in Nevada is a privilege, which is revocable, and there is no right attached to a license.<sup>170</sup> These principles have guided the regulation of Nevada’s gaming industry for more than 40 years.<sup>171</sup>

The regulation of sports gambling in Nevada has been a success, according to Chairwoman of the Gaming Control Board Becky Harris, because of reasonable tax rates, state oversight, and the dedication of state resources to the regulation of gaming within the state.<sup>172</sup> Nevada gaming officials have also been responsible for identifying various threats to sports

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Subcomm. on Crime Terrorism, Homeland Sec. & Investigations of the H. Comm. on the Judiciary*, 115th Cong. 1–2 (2018) (statement of Becky Harris, Chair, Nevada Gaming Control Board) [hereinafter *Post-PASPA*].

167. *Id.* at 2.

168. *Id.*

169. *Id.* at 2–3.

170. *Id.* at 3.

171. *Id.*

172. *Id.* at 3–4.

integrity, including identifying a point-shaving scheme involving Tulane University basketball players in 1985, and Arizona State basketball's point shaving scandal in 1994.<sup>173</sup> Nevada's sports betting regulatory model has worked, in part because the state has managed to keep fees low, and Harris noted that a failure to do so would likely result in the illegal gambling market recapturing part of the market share, and thereby sustaining an environment where corrupting activity can fester.<sup>174</sup>

### B. THE GAMING CONTROL BOARD MODEL

A second regulatory option, while not adopted in whole in any state, is the so-called gaming control board model. A variety of states, including New Jersey,<sup>175</sup> Pennsylvania,<sup>176</sup> and Mississippi,<sup>177</sup> have adopted the gaming control board model of regulation. On July 11, 2018, less than two months after the Supreme Court struck down PASPA, New Jersey Governor Phil Murphy signed the state's sports betting bill into law.<sup>178</sup> New Jersey's law allowed for the offering of in-person sports betting at the state's casinos and racetracks, as well as mobile betting after a 30-day waiting period.<sup>179</sup> The New Jersey law gives enforcement authority to the Division of Gaming Enforcement.<sup>180</sup> Casinos are taxed at a state rate of 8.5 percent for in-person wagers and 13 percent for mobile wagers, whereas racetracks pay 14.25 percent on mobile wagers, in addition to the federal 0.25 percent tax.<sup>181</sup> Amongst the oddities of New Jersey's sports-wagering regulations was the prohibition of New Jersey-based sportsbooks from accepting wagers on New Jersey-based collegiate

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173. *Id.* at 4–6. For instance, Nevada sportsbooks were responsible for discovering that Stevin 'Hedake' Smith, an Arizona State University player, was shaving points for the Sun Devils in 1994. Las Vegas officials noticed that a March 5, 1994 game between Arizona State and the University of Washington had the largest one-day betting line shift in the history of Las Vegas sportsbooks. Officials reported that money continued to be bet on the Sun Devils regardless of how much the line moved, which was an indication that a fix was likely. See Zachary Pekale, *A Bookie, a Bet, a Basketball Player: 25 Years Ago, Point-Shaving Scandal Rocked Arizona State*, CRONKITE NEWS (Dec. 11, 2018), <https://cronkitenews.azpbs.org/2018/12/11/point-shaving-scandal-rocked-arizona-state> [https://perma.cc/BF7V-LHPW].

174. *Post-PASPA*, *supra* note 166, at 8.

175. N.J. STAT. ANN. § 5:12A-10-19 (West 2018).

176. Gouker, *supra* note 27.

177. Dustin Gouker, *Mississippi Is Already Poised to Offer Legal Sports Betting, Thanks to Language in a Fantasy Sports Law*, LEGAL SPORTS REPORT (June 29, 2017, 10:14 AM), <https://www.legalsportsreport.com/14536/mississippi-sports-betting-law> [https://perma.cc/96L4-QZT7].

178. Eric Ramsey, *New Jersey Sports Betting Is Finally Here, As Governor Signs Bill*, LEGAL SPORTS REP. (June 11, 2018, 12:34 PM), <https://www.legalsportsreport.com/21121/new-jersey-governor-signs-sports-betting-into-law> [https://perma.cc/Q2VR-C2NY].

179. *Id.*

180. *Id.*

181. *Id.*



teams.<sup>182</sup> While New Jersey has been an early leader in capturing the sports gambling market share, there have been several high profile incidents, including sportsbooks violating the ban on accepting wagers on New Jersey-based collegiate teams, which resulted in a fine of a mere \$2,000.<sup>183</sup> Some of the state's leaders have maintained that the state is capable of establishing and supervising its sports wagering industry without the help of the federal government.<sup>184</sup>

In Mississippi, one of the other states to adopt the opportunity to offer sports betting at an early juncture, the state legislature tasked the Mississippi Gaming Commission (“MGC”) with establishing a regulatory framework for the state’s 28 casinos.<sup>185</sup> Under the MGC’s regulations, only existing gaming license holders were authorized to obtain sports wagering licenses.<sup>186</sup> The MGC also proposed allowing wagering on professional, college, and Olympic sports—without the exclusion of in state collegiate teams.<sup>187</sup> While the state authorized mobile wagering, consumers need to be on the property of a licensed casino in order to wager using their mobile devices.<sup>188</sup> Mississippi imposed a 12 percent tax rate across all types of sports wagers, which is in the middle range of tax rates with other states that have licensed sports wagering.<sup>189</sup> Mississippi’s sports wagering revenue numbers have lagged behind other states with more robust mobile offerings, likely raising questions about how much of the illegal market is being recaptured.<sup>190</sup> Mississippi’s decision to limit mobile offerings to casino properties has likely caused the state to miss opportunities to recapture money from the illegal market and generate additional tax dollars.

182. *Id.* This type of protectionism may raise questions as to whether New Jersey’s sports betting bill violates the Dormant Commerce Clause, but such an examination is beyond the scope of this Article.

183. Michael Sol Warren, *2 A.C. Casinos Busted for Taking Illegal Bets on College Games*, NJ.COM (Dec. 26, 2018), <https://www.nj.com/news/2018/12/2-ac-casinos-busted-for-taking-illegal-bets-on-college-games.html> [<https://perma.cc/7QAS-3BFD>].

184. See Brian Pempus, *New Jersey Has ‘Great Concerns’ As Feds Prepare New Legal Opinion on iGaming*, USBETS (Dec. 19, 2018), <https://www.usbets.com/feds-revisit-wire-act-possible-ipoker-crackdown> [<https://perma.cc/YE84-SKRJ>].

185. Adam Candee, *Proposed Regulations for Mississippi Sports Betting Already on the Table; Mobile Rules Included*, LEGAL SPORTS REP. (May 17, 2018, 12:01 PM), <https://www.legalsportsreport.com/20541/mississippi-sports-betting-regulations> [<https://perma.cc/WLT3-3B4A>].

186. *Id.*

187. *Id.*

188. *Id.*

189. See Adam Candee, *Is It ‘Revenue Sharing’ or High Taxes for Sports Betting? Ask Rhode Island, Delaware How They Slice the Pie*, LEGAL SPORTS REP. (July 3, 2018, 5:46 AM), <https://www.legal-sportsreport.com/21663/sports-betting-revenue-sharing> [<https://perma.cc/K9GJ-GJAH>].

190. See Courtney Ann Jackson, *Three Months of Numbers in for Mississippi Sports Betting*, WMC 5 (Nov. 30, 2018, 9:18 PM), <http://www.wmctionnews5.com/2018/12/01/three-months-numbers-mississippi-sports-betting> [<https://perma.cc/JR79-4XJY>].

Pennsylvania has imposed a tax rate and licensing fee that initially appeared to threaten their ability to attract any companies to the market.<sup>191</sup> The Pennsylvania Gaming Control Board's ("PGCB") \$10 million licensing fee and 36 percent effective tax rate initially led to speculation that the PGCB might not be able to sell any of the 13 available licenses.<sup>192</sup> Months after the PGCB began taking applications, the first Pennsylvania casino, Hollywood Casino at Penn National Race Course, began accepting sports wagers.<sup>193</sup> Pennsylvania's launch of sports betting has been slow but steady after casinos were initially scared off by the tremendous upfront costs.<sup>194</sup> Pennsylvania's regulations allow for mobile betting, but the launch has lagged, similar to the slow launch of in-person wagering at brick and mortar casinos.<sup>195</sup> The gaming control board model of control is a relatively new model of regulation employed in the new market for sports betting regulation, inspired perhaps by Nevada. A second model of regulation, the lottery-model, has existed for more than 40 years and continues to be followed by several other states.<sup>196</sup>

### C. THE LOTTERY MODEL

The lottery model of regulating sports gambling was the model employed prior to PASPA's demise in Oregon, Montana, and Delaware.<sup>197</sup> Delaware's efforts to launch a sports lottery in 1976 were challenged by the NFL and its 28 teams.<sup>198</sup> The NFL sought a temporary restraining order against the Delaware state lottery, alleging that the Delaware football lottery's "Scoreboard" games would create immediate irreparable harm to the NFL.<sup>199</sup> Despite the NFL's claims that the lottery would misappropriate the league's "popularity and reputation," the Delaware District Court largely rejected the

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191. See John Brennan, *Will High Tax Rates Drive Away Pennsylvania's Sports Betting Business?*, PENN BETS (Oct. 12, 2018), <https://www.pennbets.com/pennsylvania-sports-betting-tax-rate-impact> [<https://perma.cc/8KQG-5FE2>].

192. *Id.*

193. Nicholas Garcia, *PA Sports Betting Is Finally Here: Hollywood Casino Is Taking First Wagers Today*, LEGAL SPORTS REP. (Nov. 16, 2018, 11:42 AM), <https://www.legalsportsreport.com/25946/first-pennsylvania-casino-ready-for-sports-betting> [<https://perma.cc/N23Z-C6SQ>].

194. See *Pennsylvania Online Sports Betting*, LEGAL SPORTS REP. (Aug. 2, 2019, 2:40 AM), <https://www.legalsportsreport.com/pa> [<https://perma.cc/E8ZZ-6BC9>].

195. JD McNamara, *PA Online Sports Betting—Pennsylvania Sportsbook Promo Codes, News and Info*, ROTOGRINDERS, <https://rotogrinders.com/sports-betting/pennsylvania-online-sports-betting> [<https://perma.cc/B7XH-NUX5>].

196. See Brian Pempus, *\$80 Billion U.S. Lottery Industry Wants Involvement in Regulated Sports Betting Market*, CARD PLAYER (May 22, 2018), <https://www.cardplayer.com/poker-news/22814-80-billion-u-s-lottery-industry-wants-involvement-in-sport-betting> [<https://perma.cc/7U3P-VGQT>].

197. Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), <https://sportshandle.com/gambling-laws-legislation-united-states-history>, [<https://perma.cc/RCM7-JQGM>].

198. See *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1375–78 (D. Del. 1977).

199. *Id.* at 1375.

NFL's arguments that gambling would cause reputational harm, though the lottery was required to print "clear and conspicuous" statements noting that the Scoreboard games were not associated with or endorsed by the NFL.<sup>200</sup> Delaware would continue to be a leader in the offering of lottery-based games despite PASPA's prohibition, even unsuccessfully trying to expand the types of games offered in 2009.<sup>201</sup>

Following PASPA's demise, Delaware lottery officials quickly moved to begin accepting single game wagers on a variety of sports at the state's three casinos.<sup>202</sup> As Delaware had attempted to offer full-scale sports wagering when it was blocked by Major League Baseball, the state had already developed regulations which allowed the state to quickly launch when the opportunity arose.<sup>203</sup> Unlike other jurisdictions' commercial casino model, the lottery model enables states some additional flexibility in the locations where consumers access sports betting products. While Delaware has elected to confine single-game wagering to the state's casinos, they make their Scoreboard product available at hundreds of locations, virtually any location that offers lottery products could sell sports wagering products under a lottery model.<sup>204</sup> The lottery has established duties that retailers must comply with to be able to sell sports wagering products. These include maintaining the integrity of self-service wagering machines, age verification of purchasers, and refusing sales to intoxicated persons.<sup>205</sup> Delaware, unlike a commercial casino operation, only requires operators to have small amounts of money on hand, with winners having to claim larger winnings from the lottery's offices.<sup>206</sup> Delaware lottery officials have contended that mobile wagering is authorized in the state, though no one is currently servicing that market segment.<sup>207</sup> While Delaware's launch into sports wagering has appeared to be smooth, moves to bring a lottery-based product to the District of Columbia were not as smooth.<sup>208</sup>

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200. *Id.* at 1377, 1381.

201. *OFC Comm'r Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (holding that PASPA restricts states from offering new wagering schemes that they had not offered prior to the passage of the statute in 1992).

202. Jill R. Dorson, *Delaware Lottery Director on Sports Betting: 'We've Been Ready Since 2009'*, SPORTS HANDLE (June 1, 2018), <https://sportshandle.com/delaware-sports-betting-june-paspa-governor-carney> [<https://perma.cc/6X57-AEPU>] (noting that Delaware offered parlay style wagering on NFL games only between 1976 and 2018).

203. *Id.*

204. *Id.*

205. *Sports Lottery Rules and Regulations*, DELAWARE LOTTERY (June 2018), <https://www.delottery.com/Sports-Lottery/Rules-And-Regulations#6> [<https://perma.cc/D8UR-QBN3>].

206. *Id.*

207. *Delaware Sports Betting*, LEGAL SPORTS REP. (Aug. 9, 2019, 9:20 AM), <https://www.legalsportsreport.com/delaware> [<https://perma.cc/622L-QXYH>].

208. See Nicholas Garcia, *Single-Operator Plan Wins First Round with Council in DC Sports Betting Discussion*, LEGAL SPORTS REP. (Dec. 5, 2018, 12:22 PM), <https://www.legalsportsreport.com/26567/dc-sports-betting-bill-advances-2> [<https://perma.cc/SMR2-H388>].

In early 2019, the District of Columbia's Council sought to avoid a bidding process for sports betting and instead elected to proceed with Greek lottery company, and current District lottery provider, Intralot.<sup>209</sup> The DC Council moved forward with the single-operator lottery model, in part because of a commissioned report that showed waiting to launch sports betting after 2019 would cause the District of Columbia to miss out on millions of revenue dollars.<sup>210</sup> The report, prepared by Spectrum gaming consultants, proposed that the DC council adopt a ten percent tax rate, which according to the report would allow an operator (predictably Intralot) to earn \$15 for every \$1,000 wagered, compared to the Pennsylvania tax rates, which would have an operator earn \$2 for the same \$1,000.<sup>211</sup> The DC model would see the District become the first locale in the country to have retail and mobile operated by a lottery without casino partners.<sup>212</sup> Amongst the questions faced by the District of Columbia is the question regarding how to modernize necessary lottery provisions to deal with sports wagering products, which have different concerns than traditional lottery games, including how to comply with anti-money laundering requirements.<sup>213</sup> The lottery model can allow for a state monopoly on sports wagering, which may present opportunities for the state to maintain a greater level of control over the industry; however, there are a drawbacks to the lottery model of regulation.

The licensing choice, in many situations, depends on the state's political environment. For instance, in states without a significant casino or horse racing industry, lotteries may be the most attractive option. In a state with an established casino industry, there will likely be powerful interests pushing for sports wagering licenses to be made more widely available than under a state licensing model.<sup>214</sup> Among the potential drawbacks of a lottery-model is a lack of competition for bettors, leaving bettors susceptible to the state's bookmakers, who do not need to compete with external competition.<sup>215</sup> Allowing for outside entities to run sports betting may further result in states losing control that they cannot recapture. For instance, if the federal government seeks to intervene, potentially reworking taxation schemes, a state with a commercial licensing scheme may have less room to adjust and protect programs that rely on lottery revenue.<sup>216</sup>

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209. Adam Candee, *DC Council Eyes Unorthodox Sports Betting Bid Process to Favor Current Lottery Provider*, LEGAL SPORTS REPORT. (Jan. 4, 2019, 1:56 PM), <https://www.legalsportsreport.com/27384/dc-sports-betting-bid-process> [<https://perma.cc/R4R5-B7EY>].

210. *Id.*

211. SPECTRUM GAMING GROUP, *SPORTS BETTING IN DISTRICT OF COLUMBIA: ANALYSIS AND BUSINESS CASE OF THE ECONOMIC IMPACT OF REGULATING AND OPERATING SPORTS BETTING THROUGH THE DC LOTTERY 22-23* (2018).

212. *Id.* at 23.

213. *Id.* at 28-29.

214. Miller & Cabot, *supra* note 156, at 163.

215. *Id.* at 166-67.

216. *See id.* at 163.

*D. OTHER STATE REGULATORY CONSIDERATIONS*

The Nevada Gaming Control Board has been the model for sports wagering regulation, for better or worse, by default for the last half century.<sup>217</sup> Nevada's model has succeeded because it has managed to protect trust in the gaming industry and provide consumer protections necessary to avoid the deleterious effects that can accompany unmanaged gaming operations.<sup>218</sup> States face a number of considerations as they move forward and attempt to regulate the sports gambling industry. In addition to deciding who will run the sports wagering operation, questions abound over a variety of regulatory matters. Miller and Cabot identify a series of important considerations for states, beginning with states needing to decide whether sports leagues should be compensated for wagering that takes place on games they produce.<sup>219</sup> Sports leagues have been seeking compensation for the use of sports scores and player names and information for more than two decades, although to date, such requests have been unsuccessful.<sup>220</sup> Related to direct compensation is the question of whether it is necessary to use official data, provided and monetized by a sports league and their data providing partners. The use of official data was mandated in the Hatch and Schumer bill, but at the time of writing has not surfaced in any state bills that have passed.<sup>221</sup> In addition to considerations related to sources of data and potential compensation for sports leagues, states must consider whether to authorize mobile wagering. Decisions to authorize mobile wagering, beyond the boundaries of casinos, may be impacted by a state's sports wagering desires. For instance, New Jersey demonstrates that mobile wagering generates significantly more interest than brick and mortar wagering;<sup>222</sup> however, it may be less easy to control underaged access to mobile wagering. The various models of state regulation may bring differing benefits to states, but many states have an additional consideration as a result of tribal gaming interests within their state and existing state-tribal gaming compacts. In Part V, this Article provides an overview of the interests in regulating sports wagering under tribal gaming compacts.

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217. A.G. Burnett, *Nevada's Sports Betting Model Protects Consumers*, CDC GAMING REP. INC. (Sept. 26, 2018, 7:39 PM), <https://www.cdcgamingreports.com/commentaries/nevadas-sports-betting-model-protects-consumers> [<https://perma.cc/JF24-FCG2>].

218. *Id.*

219. Miller & Cabot, *supra* note 156, at 176–83.

220. *See, e.g.*, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 820 (8th Cir. 2007).

221. John Holden, *Instant Expert Legal Analysis of the Federal Sports Betting Bill—Part 1*, LEGAL SPORTS REP. (Dec. 20, 2018, 8:45 AM), <https://www.legalsportsreport.com/26953/federal-sports-betting-bill-analysis> [<https://perma.cc/4EE3-3YLH>].

222. Eric Ramsey, *Here's Everything We Know About NJ Online Sports Betting Right Now*, LEGAL SPORTS REP. (Feb. 5, 2019, 1:03 PM), <https://www.legalsportsreport.com/21853/new-jersey-online-sports-betting> [<https://perma.cc/NLT7-2ZCX>].

## V. THE TRIBAL GAMING SITUATION

Tribal gaming has been a partner in the regulatory regime of gaming activities in more than 25 states since 1988.<sup>223</sup> In 2006, tribal gaming activities accounted for more than \$25 billion in revenue across the country.<sup>224</sup> Following the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, which held that neither state nor local governments have authority to regulate gambling on tribal lands,<sup>225</sup> Congress passed the Indian Gaming Regulatory Act (“IGRA”).<sup>226</sup> The IGRA, passed in 1988, was responsive to the Court’s *Cabazon* decision. Despite hearings prior to the Supreme Court case, the IGRA mandated a partnership of sorts between states, tribes, and the federal government to come to mutual agreement over the types of state gambling offerings.<sup>227</sup> In some states the relationship between the state and tribal governments has been contentious, with disputes often arising over exclusivity arrangements providing for the exclusion of commercial gambling operators in favor of tribes, or calculation of the amount of revenue tribes must share with the state.<sup>228</sup> The IGRA mandated that tribes offering gambling enter into compacts with states in order to establish an agreement over the games that would be offered.<sup>229</sup> These compacts all predate the decision in *Murphy*, and as a result tend to not specifically address sports wagering.<sup>230</sup> This has created some questions as to whether tribes or states have a right to control sports betting in some states,<sup>231</sup> but has opened doors for at least one tribe in New Mexico to offer sports betting exclusively, while the rest of the state remains under a prohibition.<sup>232</sup>

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223. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW: CASES AND MATERIALS* 5 (2008).

224. *Id.*

225. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987).

226. Smiley, *supra* note 10.

227. *Id.*

228. *See, e.g.*, Robert Johnson, *Seminole Tribe and Florida Governor Settle Blackjack Exclusivity Dispute*, CASINO NEWS DAILY (July 6, 2017, 7:48 AM), <https://www.casinonewsdaily.com/2017/07/06/seminole-tribe-and-florida-governor-settle-blackjack-exclusivity-dispute> [<https://perma.cc/PE4C-GMP4>]; Cheyna Roth, *Tribe and State Government Reach a Partial Agreement on Casino Revenue*, MICH. RADIO (July 26, 2016), <http://www.michiganradio.org/post/tribe-and-state-government-reach-partial-agreement-casino-revenue> [<https://perma.cc/5ELR-YBEU>].

229. 25 U.S.C. §§ 2701–2721 (1988).

230. The Bureau of Indian Affairs maintains records of 797 gaming compacts. *See Indian Gaming Compacts*, U.S. DEP’T OF THE INTERIOR: BUREAU OF INDIAN AFF., <https://www.bia.gov/asia/oig/gaming-compacts> [<https://perma.cc/FJ59-PYPC>].

231. *See, e.g.*, Adam Candee, *Connecticut Sports Betting Law Already Exists, Yet Another Bill Just Dropped*, LEGAL SPORTS REP. (Jan. 28, 2019, 11:38 AM), <https://www.legalsportsreport.com/28007/new-connecticut-sports-betting-bill> [<https://perma.cc/5VPK-XZfZ>].

232. Steve Ruddock, *How New Mexico Sports Betting Started in a State Without a Sports Betting Law*, LEGAL SPORTS REP. (Nov. 19, 2018, 5:13 PM), <https://www.legalsportsreport.com/26007/pueblo-tribe-new-mexico-sports-betting> [<https://perma.cc/W368-8SCE>].

## A. THE NEW MEXICO SCENARIO

Without a new bill being passed by the state authorizing sports wagering, New-Mexico-based tribe Pueblo of Santa Ana announced a partnership with Nevada-based USBookmaking to offer sports betting.<sup>233</sup> The compact's language afforded the tribe the opportunity to offer sports betting: "Authorized Class III Gaming. 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.*"<sup>234</sup> The agreement between the state government and Tribal governments seemingly grants the tribes, subject to the compact, extensive authority to authorize Class III gaming at their facilities.

The determination of sports betting as a Class III gaming activity is a near certainty, and the Federal Register endorses that conclusion, listing "sports betting and parimutuel wagering" as examples of Class III games.<sup>235</sup> Despite the fact that sports betting appears to be illegal under New Mexico law,<sup>236</sup> state officials have endorsed the Pueblo of Santa Ana's interpretation that the gaming compact allows the tribe to offer in-person sports wagering.<sup>237</sup> The Pueblo of Santa Ana launch has raised questions about which other tribes may have entered into compacts with permissive language that would enable them to bypass renegotiation of existing compacts or launch a sports wagering product without further action from the state. Tribes' ability to launch sports betting is confined by the aforementioned IGRA, which has served to shape the gaming regulatory environment since 1988.<sup>238</sup>

## B. THE INDIAN GAMING REGULATORY ACT

Prior to passage of the IGRA, the Supreme Court was tasked with addressing the scope of tribal sovereignty in the realm of gaming in *California v. Cabazon Band of Mission Indians*.<sup>239</sup> The *Cabazon* case centered on two California tribes with Indian reservations located in Riverside County, California. Pursuant to authorization by the Secretary of the Interior, the two tribes began offering bingo on the reservations and the Cabazon band

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233. Dustin Gouker, *The Newest State with Sports Betting: New Mexico Casino to Launch Next Week*, LEGAL SPORTS REP. (Oct. 9, 2018, 8:40 AM), <https://www.legalsportsreport.com/24769/new-mexico-sports-betting-launch> [<https://perma.cc/J8MQ-6DWW>].

234. Letter from Bruce Babbitt, Sec'y of the Interior, to the Leonard Armijo, Governor of Pueblo of Santa Ana (Oct. 30, 1997), *available at* <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038370.pdf> [<https://perma.cc/W4LX-NRVW>] (emphasis added).

235. 25 C.F.R. § 502.4(c) (2016).

236. N.M. STAT. ANN. § 30-19-15 (2011).

237. See Geoff Grammer, *Sports Wagering to Hit New Mexico Next Week at Santa Ana*, ALBUQUERQUE J. (Oct. 9, 2018, 9:26 PM), <https://www.abqjournal.com/1231258/sports-wagering-in-new-mexico-to-start-next-week-at-santa-ana.html> [<https://perma.cc/3A7H-4XCM>].

238. Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 452 (2003).

239. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1987).

opened a card club, which offered poker.<sup>240</sup> The state of California sought to enforce a state law, which restricted bingo operations to designated charitable operations and limited prizes to \$250.<sup>241</sup> Before the state could enforce the relevant statute and Riverside County could separately enforce an ordinance banning poker games, the tribes moved for declaratory judgment that the reservations were sovereign territory.<sup>242</sup>

The Supreme Court held that tribes' sovereignty has historically only been subordinate to the federal government, not the states.<sup>243</sup> The majority cited the fact that federal loan initiatives, such as the Indian Financing Act of 1974 for the construction of bingo facilities, and approval by the Secretary of the Interior supported the conclusion that the federal government had approved of these gaming activities.<sup>244</sup> Thus, allowing the state of California and Riverside County to subrogate these authorizations would undermine the tribal-federal relationship.<sup>245</sup> The Court ruled that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them."<sup>246</sup> The ruling that "state regulation would impermissibly infringe on tribal government,"<sup>247</sup> elucidated a conflict between the traditional role that states have played in regulating gambling and tribal sovereignty. The result was the passage of the IGRA, which Congress had been debating for several years.<sup>248</sup>

President Ronald Reagan signed the IGRA into law on October 17, 1988.<sup>249</sup> The emergence of the legislation came about following a 1984 House hearing that heard testimony regarding more than 80 Indian tribes engaging in some form of gaming activity across the country.<sup>250</sup> The Reagan-era saw communities look for alternative means for revenue generation following budget cuts that eliminated numerous programs which previously divvied out federal funds for social programs, such as the Comprehensive Employment Training Act.<sup>251</sup> American Indian tribes were among those segments of the population that suffered the most under the Reagan-era cuts, as their local

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240. *Id.* at 204-05.

241. *Id.* at 205.

242. *Id.* at 206.

243. *Id.* at 207 (noting that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980))).

244. *Id.* at 217-18.

245. *Id.* at 217-22.

246. *Id.* at 221-22.

247. *Id.* at 222.

248. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 99 (2010).

249. *Id.*

250. *Id.*

251. *Id.* at 110-11.



economies relied heavily on funding from the Bureau of Indian Affairs.<sup>252</sup> The funding cuts prompted numerous tribes across the country to begin exploring gaming operations to supplement growingly barren local coffers.<sup>253</sup> Some of these gaming activities ran contrary to state law, leaving the federal government in a challenging place, facing state lawmakers angry over tribes operating games that violate state law, while recognizing that tribes are looking to supplant the diminished federal funding.<sup>254</sup>

Beginning in 1984, and concluding in late 1988, Congress tackled the complex balance of state and tribal interests shaped by the federally controlled Bureau of Indian Affairs.<sup>255</sup> The bill was passed following a Senate Report remarking that different types of gaming would be treated differently. Bingo and “card parlor operations” were within the tribes’ primary jurisdiction, whereas Class III games were subject to agreements between tribal and state governments in order for a tribe to offer casino-style or other Class III games.<sup>256</sup> The IGRA specifically notes that the bill’s intent is “to promote economic development, tribal self-sufficiency, and strong tribal government.”<sup>257</sup> The IGRA also established the National Indian Gaming Commission,<sup>258</sup> an organization that would be assigned responsibility for monitoring and regulating parts of the tribal gaming industry as well as enforcing IGRA violations.<sup>259</sup>

The IGRA recognizes three classes of gaming activities and grants the tribes and states various levels of permission to allow the games.<sup>260</sup> Class I games are “social or traditional gaming” and are within the exclusive jurisdiction of tribal governments.<sup>261</sup> Class II games refer to “bingo and similar games” and are governed under the joint authority of tribal governance and the National Indian Gaming Commission.<sup>262</sup> Class III gaming “includes all other gaming, including casino gaming or Las Vegas-style gaming” and is

252. *Id.* at 111.

253. *Id.*

254. *Id.* at 111–12.

255. *Id.* at 112–69.

256. *Id.* at 166 (“S. 555 recognizes the primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.” (quoting S. REP. NO. 100-446, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071)).

257. *Id.* at 170 (citing 25 U.S.C. § 2702(1) (2006)).

258. 25 U.S.C. § 2704 (2012).

259. *See About Us*, NAT’L INDIAN GAMING COMM’N, <https://www.nigc.gov/commission/about-us> [<https://perma.cc/39CS-A5X7>].

260. CONG. RESEARCH. SERV., INDIAN GAMING: LEGAL BACKGROUNDS AND THE INDIAN GAMING REGULATORY ACT (IGRA) 12 (2012).

261. *Id.* at 2.

262. *Id.*

subject to agreements between tribal and state authorities through compacts, which must be approved by the Secretary of the Interior.<sup>263</sup> Class III gaming has been presumed to incorporate sports betting by virtue of the Code of Federal Regulations noting that sports betting and pari-mutuel wagering were Class III activities,<sup>264</sup> though prior to the Pueblo of Santa Ana offering sports betting, no tribe during the PASPA-era offered sports wagering. While sports betting is not classified by the IGRA, many scholars and government officials appear willing to accept the Class III classification that was promulgated by the National Indian Gaming Commission.<sup>265</sup> The Class III classification requires states and tribes to negotiate over the offering of sports betting, in the absence of the permissive language contained within the Pueblo of Santa Ana and State of New Mexico compact.<sup>266</sup>

The tribal-state relationship in many states may actually be an impediment to offering sports betting, as oftentimes gaming compacts are the result of years of negotiation and any potential disruption by a renegotiation, as may be necessary in some states, could prompt both tribes and states to view offering sports betting as not worth the effort.<sup>267</sup> Florida serves as an apt example of the challenges of offering sports betting where there is an existing tribal gaming compact.<sup>268</sup> Florida and the Seminole tribe have a Class III gaming compact that was initially signed in 2010, and then amended in 2015.<sup>269</sup> The compact provides for the tribe to receive substantial exclusivity over the offering of Class III gaming. Any new approval of a gaming activity, such as sports betting, would prompt a renegotiation of the compact or a potential reduction in the amount of revenue the tribe grants to the state.<sup>270</sup>

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263. *Id.* at Summary.

264. 25 C.F.R. § 502.4(c) (2016). The classification of sports betting as a Class III activity has been referenced by former Florida Attorney General Bill McCollum. See Letter from Bill McCollum, Attorney General, to Marco Rubio, Rep. of Fla. (Sept. 6, 2007), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/23FBEF8B371FFCD68525734F004F8F6F> [<https://perma.cc/B6MB-X7UT>].

265. George Skibine & Alan Fedman, *Taking a Gamble*, BEST LAWYERS (Nov. 28, 2018, 12:26 PM), <https://www.bestlawyers.com/article/tribal-sports-betting-ruling/2216> [<https://perma.cc/ESW3-HFV7>].

266. Howard Stutz, *New Mexico AG 'Will Closely Monitor' Launch of Sports Betting at Santa Ana Star Casino*, CDC GAMING REP. (Oct. 10, 2018, 12:37 AM), <https://www.cdcgamingreports.com/new-mexico-ag-will-closely-monitor-launch-of-sports-betting-at-santa-ana-star-casino> [<https://perma.cc/V3B3-V4ZR>].

267. See John Holden, *If Sports Betting Is Going to Happen in Florida, It's Going to Have to Come Via Seminole Hard Rock*, LEGAL SPORTS REP. (Nov. 14, 2018, 7:41 AM), <https://www.legal-sportsreport.com/25835/will-florida-be-getting-sports-betting-soon> [<https://perma.cc/L9XL-3YHT>] [hereinafter Holden, *If Sports Betting Is Going to Happen*].

268. *Id.*

269. GAMING COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA (June 24, 2010), available at <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026001.pdf> [<https://perma.cc/4AW9-L95K>]; see also Holden, *If Sports Betting Is Going to Happen*, *supra* note 267.

270. Holden, *If Sports Betting Is Going to Happen*, *supra* note 267.

As a low margin gaming product,<sup>271</sup> sports betting may not be an attractive offering for some tribes if it means having to renegotiate a gaming compact. Likewise, a state like Florida that receives approximately \$300 million a year from existing compacts will likely avoid passing any laws that may jeopardize the continued flow of that revenue to state budgets.<sup>272</sup>

The federal, state, and tribal landscape is very much in a state of flux, and is likely to remain so for some time, as all consider how best to move forward. The early lessons that are being learned suggest there is a need to proceed cautiously so as to maximize revenues and minimize negative externalities associated with lax consumer protections, and impose some sort of know-your-customer regulations.<sup>273</sup> Part VI of this Article discusses how best to move forward with legalized sports betting by examining industry best practices and a potential alternative based on the regulation of financial markets.

## VI. HOW BEST TO MOVE FORWARD?

Even before the Supreme Court's decision in *Murphy* striking down PASPA's ban on sports wagering, states lined up legislation in preparation for an eventual thaw of the 25-year sports betting ice age.<sup>274</sup> Despite having a quarter of a century to theoretically prepare for sports betting, many states appear to be relying on a variety of different sources to promulgate their regulations. Some have speculated that there is "a regulatory race to the bottom."<sup>275</sup> While the suggestion that there is a real race to the regulatory bottom is likely hyperbolic, several early incidents in New Jersey have raised questions about both the effectiveness of the state's regulations and the

271. There is often confusion between the amount of money wagered and the amount of profit a sportsbook generates. Typically, sportsbooks hold about 4.5 percent to 5.5 percent of the total amount wagered. Meaning for every \$100 wagered the typical sportsbook will have between \$4.50 and \$5.50 in revenue. From the \$5.00 hold there are also taxes, operating costs, and other expenses often leaving sportsbooks with a small profit in comparison to other casino games. See GLOBAL MARKET ADVISORS, RESEARCH BRIEF: THE ECONOMICS OF SPORTS BETTING 4 (2018).

272. Holden, *If Sports Betting Is Going to Happen*, *supra* note 267.

273. Know-Your-Customer regulations are the required steps that gaming entities need to take to not only verify that their customers are of lawful age, but also that they have processes in place to mitigate against customers trying to launder money or engage in other unlawful activities. See John Callahan, *Know Your Customer (KYC) Will Be a Great Thing When It Works*, FORBES (July 10, 2018, 7:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2018/07/10/know-your-customer-kyc-will-be-a-great-thing-when-it-works> [<https://perma.cc/4M9A-EVN7>].

274. Pennsylvania passed a bill legalizing sports betting in October 2017. See Brett Smiley, *Pennsylvania Passes Bill that Would Legalize Sports Betting—But with a Huge Tax*, SPORTS HANDLE (Oct. 26, 2017), <https://sportshandle.com/pennsylvania-sports-betting-bill-online-gaming-hb271-passes> [<https://perma.cc/J9ER-Q3XA>]. Similarly, New York passed a bill that would allow sports betting at some of the state's casinos in 2013. See Lisa M. Marrello et al., *The Wait Is Over for Legalized Sports Gambling in New York*, JACKSON LEWIS P.C. (June 5, 2018), <https://www.jacksonlewis.com/publication/wait-over-legalized-sports-gambling-new-york> [<https://perma.cc/4TXM-RHUK>].

275. *Post-PASPA*, *supra* note 166, at 7 (statement of Jocelyn Moore, Executive Vice President, Communications & Public Affairs, National Football League).

transparency of the Division of Gaming Enforcement's actions. The high-profile incidents, including two sportsbooks accepting bets on prohibited games, are a black mark on an industry that is just emerging from hibernation in a den of illegality.<sup>276</sup>

The early fines from the Division of Gaming Enforcement have raised questions about the potential deterrence value as Caesars entertainment was fined a mere \$2,000 for accepting illegal wagers on a football game between Rutgers and Kansas on September 10, 2018.<sup>277</sup> Similarly, the Golden Nugget Hotel Casino was ordered to forfeit \$390.00 in wagers it had accepted on various football games involving New Jersey teams during the month of September.<sup>278</sup> The online website Playsugarhouse.com was fined \$30,000 following allegations that the site's age verification software had malfunctioned and allowed underage patrons to illegally wager on the site between November 2016 and January 2018.<sup>279</sup> In the case of the illegal wagers on prohibited contests and that of the acceptance of underage wagers, there was no information indicating that the operators conducted themselves with nefarious intent; however, with the New Jersey Division of Gaming Enforcement watched carefully since taking its first sports bet, it has not made the best first impression. Regardless, the state of New Jersey appears to be on track to overtake Nevada in terms of sports betting revenue.<sup>280</sup> Nevada and New Jersey appear intent on each taking their own steps to regulate their respective markets and the members of their congressional delegations have written to the House Judiciary Committee opposing the federal government playing any role in regulating sports betting.<sup>281</sup> Despite states' desire to have

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276. Bill Gelman, *NJ Regulators Fine Caesars, Golden Nugget AC for Taking Illegal Sports Bets*, NJ GAMBLING SITES (Dec. 19, 2018), <https://www.njgambblingsites.com/17729/caesars-golden-nugget-illegal-bets-nj-sports-betting> [<https://perma.cc/YBQ6-VNAM>].

277. See Notice of Violation at 1–2, Caesars Entertainment Boardwalk Regency Corporation, Docket No. 18-0841-NV (Div. of Gaming Enforcement, Office of the Att'y Gen. Dec. 13, 2018), available at [https://nj.gov/oag/ge/docs/Rulings/2018/dec1\\_15/b3-caesarsnovsports.pdf](https://nj.gov/oag/ge/docs/Rulings/2018/dec1_15/b3-caesarsnovsports.pdf) [<https://perma.cc/48ZD-C3L7>].

278. Order at 2, *New Jersey v. Amount of \$390.00 in Illegal Wagers Theoretically Owed to 10 Unknown Individuals*, Docket No. 18-0781-FC (Div. of Gaming Enforcement, Office of the Att'y Gen. Dec. 13, 2018), available at [https://nj.gov/oag/ge/docs/Rulings/2018/dec1\\_15/bg\\_nuggetsportsforfeit.pdf](https://nj.gov/oag/ge/docs/Rulings/2018/dec1_15/bg_nuggetsportsforfeit.pdf) [<https://perma.cc/Q8C6-MCLG>].

279. Rebecca Campbell, *Rush Street Interactive Fined \$30k for Underage Bettors*, VEGAS SLOTS ONLINE (Jan. 24, 2019), <https://www.vegasslotsonline.com/news/2019/01/24/rush-street-interactive-fined-30k-for-underage-bettors> [<https://perma.cc/C5WK-3J5J>].

280. Richard N. Velotta, *New Jersey Could Become Top Sports-betting Market in US, Expert Says*, LAS VEGAS REV. J. (Sept. 15, 2018, 9:42 AM), <https://www.reviewjournal.com/business/business-columns/inside-gaming/new-jersey-could-become-top-sports-betting-market-in-us-expert-says> [<https://perma.cc/P5MN-BSJQ>].

281. Letter from Dina Titus, Member of Congress, Nev. & Tom MacArthur, Member of Congress, N.J. to Jim Sensenbrenner, Chairman, House Judiciary Comm., & Sheila Jackson Lee, Ranking Member, House Judiciary Comm. (Sept. 25, 2018), available at <https://sportshandle.com/wp-content/uploads/2018/09/Titus-MacArthur-Sports-Betting-Letter-Judiciary.pdf> [<https://perma.cc/64EA-DHU4>].

federal regulations in the space, there are numerous accepted best practices that should be implemented in order to demonstrate a capability of self-regulation without federal intervention.

A. *BEST PRACTICES CONSIDERATIONS*

Scholars and regulators have long sought to find a manageable and cohesive set of guidelines for implementation of sports betting that minimize potential harms, while creating an attractive industry capable of generating revenue for operators and the state.<sup>282</sup> One of the preliminary concerns for states is how to define “sports gambling.”<sup>283</sup> The rise of daily fantasy sports companies claiming to be distinct from sports gambling has exacerbated the need for a definition,<sup>284</sup> but regulators may see benefits from treating both daily fantasy and sports wagering as “sports gambling” for regulatory efficiency and consistency. There is also the necessity to consider whether to include esports as a sport, as that industry’s gambling market is comparable in size to markets for some major sports leagues.<sup>285</sup> Another consideration that states have grappled with is whether to allow wagering on amateur sports, and if gambling on amateur sports is allowed, which amateur sports should operators be allowed to accept wagers on.<sup>286</sup> Fears over the wagering on youth sports are likely exaggerated at the scaled out level of commercial sports betting; however, betting on youth sports, including peewee football,<sup>287</sup> and the Little League World Series is not unheard of.<sup>288</sup> Limiting amateur sports betting to collegiate and Olympic sports is likely the most efficient means to protect the integrity of amateur sports. Although these athletes are not immune from match-fixers,<sup>289</sup> athletes at the Division I level of National Collegiate Athletic Association sports have more exposure to the limelight and public notoriety than high school and younger athletes typically have.<sup>290</sup>

One of the biggest challenges for balancing the interests in protecting consumers via monitoring and maximizing revenue is the decision regarding

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282. See, e.g., Edelman, *supra* note 90.

283. *Id.*

284. See Holden & Brandon-Lai, *supra* note 25, at 2.

285. See John T. Holden et al., *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD. J. INT’L L. 236, 238–39 (2017); see also John T. Holden et al., *The Future is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 67 (2017).

286. Edelman, *supra* note 90, at 18–20.

287. Paula Lavigne, *Adults Bet Thousands on Youths*, ESPN (Apr. 29, 2011), <http://www.espn.com/espn/otl/news/story?id=6451796> [<https://perma.cc/U85S-C7YC>].

288. Matt Mitchell, *Why I Love to Bet on the Little League World Series*, ACTION NETWORK (Aug. 14, 2018, 12:21 PM), <https://www.actionnetwork.com/llws/little-league-world-series-2018-odds-betting-baseball> [<https://perma.cc/WM3N-8WZ7>].

289. See Holden & Rodenberg, *The Sports Bribery Act*, *supra* note 41; see also Holden & Rodenberg, *Lone-Wolf Match-Fixing*, *supra* note 45, at 137.

290. Edelman, *supra* note 90, at 19–20.

whether to offer online wagering.<sup>291</sup> In New Jersey, early numbers report that as much as two-thirds of total wagers are being made via mobile sports betting applications.<sup>292</sup> While the opportunity for greater revenues is likely attractive to many states, the potential for negative externalities such as underage access and unrecognized addiction to remain hidden without proper protections is likely higher with online wagering.<sup>293</sup> Some of these concerns can be mitigated by requiring mobile operators to implement multistep age verification protections<sup>294</sup> and monitor for betting patterns that may indicate signs of addiction.<sup>295</sup> Other challenges that states face in deciding to implement a sports gambling program relate to how best to create a balance of revenue for the state via taxation, and room for operators to be competitive and recapture some of the spending in the black market.<sup>296</sup> While some sports leagues have sought to mandate the use of official data, or a fee to the leagues for offering wagering on the games produced by the leagues, these mandates may actually harm the integrity of the market.<sup>297</sup> The reliance of an entire market on a single feed of data is likely at greater risk of being corrupted than a robust marketplace for data feeds, with the market serving to correct any errors or manipulations.<sup>298</sup> Despite this fact, various professional sports leagues have continued to seek a mandate for the use of official data.<sup>299</sup>

States must also consider how to mandate that operators limit the risk of addiction and potential for financial ruin of consumers.<sup>300</sup> States mandate that operators provide literature or warnings for sports bettors regarding the financial and mental health risks associated with the practice, as well as requiring training for operators to recognize customers demonstrating signs of addiction.<sup>301</sup> Many jurisdictions require self-exclusion options, which allow

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291. *Id.* at 20–21.

292. See Eric Ramsey, *NJ Sports Betting Reaches a Quarter Billion Dollars in October Handle*, LEGAL SPORTS REP. (Nov. 15, 2018, 11:20 AM), <https://www.legalsportsreport.com/25906/nj-sports-betting-revenue-october-2018> [<https://perma.cc/C5AK-5EZ8>].

293. Edelman, *supra* note 90, at 20–21.

294. One of the biggest obstacles in preventing underage access to gaming websites is stopping parents from allowing underage users to access sites via their login credentials. See Malgorzata Carran, *Minors and Gambling Regulation*, 4 EUR. J. RISK REG. 509, 517 (2013).

295. It has been hypothesized that online wagering sites could potentially serve as a useful mechanism for recognizing addictive tendencies. Mark Griffiths, *Internet Gambling: Issues, Concerns, and Recommendations*, 6 CYBERPSYCHOL. & BEHAV. 557, 566 (2003).

296. Edelman, *supra* note 90, at 22–23.

297. *See id.*

298. See generally John T. Holden, *Ghosts in the Machine: How Corrupters Manipulate Games That Never Happened*, 22 GAMING L. REV. 630 (2018) (discussing the match-fixing phenomenon where non-existent sporting events, or sporting events involving fake players are created by match-fixers).

299. Tom Haberstroh, *In the Courts: The State of NBA Betting*, NBC SPORTS (Dec. 13, 2018, 1:30 PM), <https://www.nbcsports.com/philadelphia/nba-insider-tom-haberstroh/courts-state-nba-betting> [<https://perma.cc/MWV5-NH9M>].

300. Edelman, *supra* note 90, at 25–26.

301. *Id.* at 25.

for a customer to request that they not be able to wager any more, and operators are required to not accept future wagers from the customer.<sup>302</sup> States may also consider requiring sportsbooks to establish certain levels of liquidity to ensure that they are able to pay out a certain percentage of wagers at any given time, guaranteeing the solvency of the operators so as to avoid a scenario where operators accept wagers that they cannot cover, and consumers are left with little recourse as unsecured creditors in the sportsbooks bankruptcy proceedings.

The Hatch and Schumer bill highlighted another consumer protection consideration that states must grapple with, bad actors:<sup>303</sup>

While each State may decide whether to permit sports wagering and how to regulate sports wagering, there is an important role for Congress in setting minimum standards for sports wagering that affects interstate commerce and providing law enforcement with additional authority to target the illegal sports wagering market and bad actors in the growing legal sports wagering market.<sup>304</sup>

The federal bill would render companies who previously violated certain state or federal law ineligible for licensure under the federal regime.<sup>305</sup> The significance of this is that both FanDuel and DraftKings, the two largest sports betting operators in New Jersey, have offered daily fantasy sports contests that arguably violate federal law.<sup>306</sup> While both companies have emerged as leaders in the New Jersey sports gambling space, other states may be less keen to take a chance on licensing companies that have boldly flouted federal law in the past.<sup>307</sup> The questions surrounding bad actors also permeate other good governance considerations, such as to how many licenses states should issue; and while there may be a desire to have an unlimited number of licenses, policing such a large market may prove difficult. Similarly, awarding a license to a single operator may raise questions about the competitiveness of the market or the legitimacy of the bidding process.<sup>308</sup> While the current market has followed Nevada's example of sports betting offerings, the financial

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302. *Id.*

303. See John Holden, *Breaking Down the Federal Sports Betting Bill Discussion Draft: Part 1*, LEGAL SPORTS REP. (Dec. 6, 2018, 9:00 AM), <https://www.legalsportsreport.com/26581/federal-sports-betting-bill-draft-1> [<https://perma.cc/9SV2-LJZH>].

304. *Id.* (quoting a draft federal sports betting bill).

305. *Id.*

306. *Id.*

307. See Dustin Gouker, *How the Fantasy Sports Trade Association Guttled Its Own Self-Regulatory Charter*, LEGAL SPORTS REP. (May. 19, 2017, 3:08 PM), <https://www.legalsportsreport.com/8734/fsta-charter-and-dfs-regulation> [<https://perma.cc/25DM-DZJQ>].

308. See, e.g., Adam Candee, *DC Sports Betting Bill Signed by Mayor But It's Not a Law Just Yet*, LEGAL SPORTS REP. (Jan. 23, 2019, 2:48 PM), <https://www.legalsportsreport.com/27928/dc-sports-betting-bill-signed> [<https://perma.cc/HXN6-QFRT>] (providing an example via the awarding of a sports betting contract in Washington DC).

market regulation and Australian models are alternative regulatory models that states may be more comfortable with allowing the federal government to oversee.

## B. ALTERNATIVE MODELS

### 1. The Financial Market Regulation Model

One potential option for regulating sports betting would be to regulate the activity similarly to other financial products. A regulatory model for sports betting modeled after other market regulators like the Commodities and Futures Trading Commission (“CFTC”) may be attractive to certain sports leagues that may view the market with interest. Given the leagues’ stated concerns regarding protecting game integrity, any exchange-based market would likely be opposed by sports betting operators without an exchange-based platform such as the one offered by company Betfair.<sup>309</sup>

Regulating sports betting is a complicated task. There are issues and questions related to overlapping jurisdiction between federal, state, and tribal regulators. A regulatory body like the CFTC may present some distinct benefits to stakeholders, including sports leagues, customers, politicians, and even some operators. The similarities between sports betting and financial markets have been recognized by various academics.<sup>310</sup> Exchange-based markets present integrity monitoring opportunities that might not be present in the one-sided bookmaker-to-customer relationship.<sup>311</sup>

While match-fixers undoubtedly pose a threat to the integrity of sporting events, some gambling markets also present easily translatable indicators when an event is attracting unusual volumes. In arguably the biggest tennis match-fixing incident to date, on August 2, 2007, after 87th ranked player Martin Vassallo Arguello lost the first set to the fourth ranked player Nikolay Davydenko before winning the second set, the Betfair exchange company cancelled all wagers when the match attracted ten times the normal amount wagered on a match involving equivalent competitors.<sup>312</sup> Davydenko would eventually withdraw from the match in the third set trailing two games to

309. COLIN CAMERON, YOU BET: THE BETFAIR STORY AND HOW TWO MEN CHANGED THE WORLD OF GAMBLING 7 (2008).

310. Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 373–74 (2006); see also Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 CREIGHTON L. REV. 29, 31–32 (2008); Michael C. Macchiarola, *Rethinking Sports Wagering*, 85 IND. L.J. SUPP. 1, 5–6 (2010).

311. For an overview of how bookmakers are structured differently than financial markets, see generally Steven D. Levitt, *Why are Gambling Markets Organised So Differently from Financial Markets?*, 114 ECON. J. 223 (2004) (comparing and contrasting gambling and financial markets by focusing on the role of bookmakers in in sports betting).

312. Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 17 (2008).



one.<sup>313</sup> In the years preceding the Davydenko incident, there were multiple occasions in which sportsbooks cancelled wagers after irregular volumes of money were wagered on the player.<sup>314</sup> The demand for sport organizations to monitor the integrity of events has created a cottage industry of for-profit private companies that provide integrity monitoring services.<sup>315</sup> These companies also offer the sale of sports data to gambling enterprises at the same time through related companies.<sup>316</sup>

The use of line-monitoring companies by sports leagues has been a practice embraced in Europe. It is thought that the North American leagues have relied on the legal Las Vegas market to provide information regarding any abnormalities, until recently.<sup>317</sup> In promotional materials, Sport Integrity Monitor (now Genius Sports) CEO Mark Locke noted that successful regulation of sports gambling would create “an environment where integrity is maintained” and “the illegal market is eradicated.”<sup>318</sup> While integrity monitoring companies are able to compare various price movements across a variety of sportsbooks and exchanges, it is also possible that they are behind the sportsbooks or exchanges in knowing when irregular activity is taking place. There have been several academic examinations into the usefulness of gambling markets as indicators of match-fixing, but given that it may not always be beneficial for a bookmaker or exchange to identify a fixed match, if it serves to benefit the offeror financially, lines may not be moved, thereby withholding information from the integrity monitoring companies.<sup>319</sup> In a

313. *Id.* at 17.

314. *Id.* at 22.

315. Integrity monitoring has also been the subject academic research. *See also* Elihu D. Feustal & Ryan M. Rodenberg, *Sports (Betting) Integrity: Detecting Match-Fixing in Soccer*, 19 GAMING L. REV. & ECON. 689, 689 (2015); J. James Reade & Sachiko Akie, *Using Forecasting to Detect Corruption in International Football* (Geo. Wash. U. Dep’t of Econ. Working Paper No. 2013-005), available at <https://www.gwu.edu/~forcpgm/Reade.pdf> [<https://perma.cc/C2MN-8FN5>] (asserting that there is evidence of mild, potential corrupt outcomes in soccer). *See generally* Mark Duggan & Steven D. Levitt, *Winning Isn’t Everything: Corruption in Sumo Wrestling*, 92 AM. ECON. REV. 1594 (2002) (exploring the widespread corruption in sumo wrestling through an empirical study).

316. *See* Steve Fainaru et al., *Betting on the Come: Leagues Strike Deals with Gambling-related Firms*, ESPN (Jan. 27, 2016), [http://espn.go.com/espn/od/story/\\_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms](http://espn.go.com/espn/od/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms) [<https://perma.cc/N8SX-WZTZ>].

317. *See, e.g.*, Michael McCarthy, *Point-shaving Remains a Concern in College Athletics*, USA TODAY (May 9, 2007, 4:06 PM), [http://usatoday30.usatoday.com/sports/college/2007-05-08-point-shaving-cover\\_N.htm](http://usatoday30.usatoday.com/sports/college/2007-05-08-point-shaving-cover_N.htm) [<https://perma.cc/633H-9GLH>].

318. *See* Mark Locke, *Regulation of Sports Wagering in the United States: A Solution that Enables US Sports to Control and Benefit from a Regulated Market*, SPORT INTEGRITY MONITOR 1 (May 2015) (on file with Author).

319. For a discussion of sportsbooks’ ability to detect match-fixing, *see generally* Adam Hosmer-Henner, *Preventing Game Fixing: Sports Books as Information Markets*, 14 GAMING L. REV. & ECON. 31 (2010) (discussing inherent difficulty of sportsbooks’ capacity to detect game-fixing, which is determined in part by the individual sport and other factors). Relationships between private entities and private monitoring companies may potentially be exposed to situations where there is an incentive not to inform law enforcement of detected corruption.

regulated exchange-based market, the profit incentive of the traditional private profit-maximizing enterprise structure can be shifted to a transaction-based model or removed, thereby reducing the costs associated with maintaining the integrity of the sporting events that form the basis for the underlying sports products.

Another potential benefit of financial-market type regulation is the clearly identifiable registration requirements associated with federal anti-money laundering obligations, which offer a robust system of identity verification requirements. Controlling access to permit only authorized users was identified as an early challenge to e-commerce. Imperfect age and identity verification software and tools are continuously being improved.<sup>320</sup> These verification systems will not stop the situation in which a parent either authorizes a child to access a website or when a child represents himself or herself as an adult to an online service provider with an adult's credentials, as this type of activity is a separate issue that requires a different approach to curbing the activity. While some anti-money laundering regulations apply to gaming entities, the robustness of financial market regulations appears to be the gold standard for know-your-customer-type regulations.

An additional feature of a regulated gambling market-exchange is that it is theoretically conducive to detecting several behaviors associated with problem gambling. Gambling addiction is a serious concern at all levels of government, and one of the reasons numerous groups oppose expanded legal wagering of any kind.<sup>321</sup> The Diagnostic and Statistical Manual of Mental Disorders V ("DSM-V") classifies gambling disorder as the following:

- A. Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:
  1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement.
  2. Is restless or irritable when attempting to cut down or stop gambling.
  3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
  4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences,

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320. See *Anti-Money Laundering (AML) Source Tool for Broker-Dealers*, SEC (Oct. 4, 2018), <https://www.sec.gov/about/offices/ocie/amlsourcetool.htm> [<https://perma.cc/J4T2-4U9U>].

321. See, e.g., John W. Kindt, *SCOTUS Decision Creates a 'Wild West' for Sports Gambling*, HILL (May 14, 2018, 4:45 PM), <https://thehill.com/opinion/finance/387632-scotus-decision-creates-a-wild-west-for-sports-gambling> [<https://perma.cc/78K8-SDLS>].

handicapping or planning the next venture, thinking of ways to get money with which to gamble).

5. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
6. After losing money gambling, often returns another day to get even (“chasing” one’s losses).
7. Lies to conceal the extent of involvement with gambling.
8. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
9. Relies on others to provide money to relieve desperate financial situations caused by gambling.

B. The gambling behavior is not better explained by a manic episode.<sup>322</sup>

Several of these factors may be observable via the tracking of an individual’s online wagering activity. An addiction to gambling, like other addictions, may have negative consequences for individuals on both a professional and personal level. Online gambling providers may actually possess the information necessary to identify attributes associated with problem gambling at an early stage, something not as easily available by observing traditional gambling. While the future study of identifying potential problem gamblers via online betting activity appears promising, such an examination can likely only occur in a regulated market that allows for tracking wagering activity like other financial markets.

## 2. The Australian Model

Professor Stephen Ross and others have suggested that Australia uses a model of sports gambling regulation that would be adaptable to the American market.<sup>323</sup> The similarities between the United States and Australia begin with both countries being confederations of states, with power shared between federal and state authorities.<sup>324</sup> Federal Australian regulations govern internet gambling, restricting the types of sports wagers that can be placed online, including in game wagering.<sup>325</sup> The Victorian state authorities can then approve wagering on a single event or a class of events looking at a variety of factors, including the potential integrity risks associated with offering betting

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322. See generally *Gambling Disorder*, in *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5* (5th ed. 2015) (explaining the causes of symptoms of gambling disorders).

323. See Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under*, 5 *ARIZ. ST. U. SPORTS & ENT. L.J.* 6, 7–10 (2015).

324. *Id.* at 21.

325. *Id.* at 22.

on a particular event.<sup>326</sup> The model also allows organizations to apply to the overseeing Commission to be a sports controlling body, which would grant the organization privileges such as the ability to investigate suspicious betting.<sup>327</sup> The recognition of an organization as a controlling body also requires bookmakers to seek the entity's permission before offering bets, unless the event occurs outside of the state of Victoria; and it can require bookmakers to pay a fee for the right to offer bets on an event.<sup>328</sup>

The Australian right-to-bet type legislation raises several issues in the United States as U.S. courts have not recognized a private right to commodify sporting event data, instead suggesting that it is in the public domain and incapable of copyright protection.<sup>329</sup> There are also constitutional arguments that could be advanced against the possibility of granting sports organizations the right to demand payment for offering wagers on particular events.<sup>330</sup> Despite the challenges of adapting the Australian model in the United States, there does appear to be value in having the regulators, sports leagues, and sportsbooks all represented as having a voice at the table. In the early-era of legal sports betting in the United States, there has been a rush to regulate, often leaving one or more stakeholders on the outside looking in.

The states may not like federal intervention into sports wagering policy, but there will likely be calls for some unity over sports gambling policy as more and more states seek to legalize the practice. Arrangements for interstate compacts,<sup>331</sup> and the need for interstate liquidity pooling may be necessary to attract operators to smaller states where they otherwise would not realize a profit. These activities will almost certainly necessitate, at minimum, clarification of the scope of federal laws, such as the Wire Act, in order for these arrangements to be made.<sup>332</sup> While states continue to pass sports betting laws, there is a continued need to be aware of best practices so as to ensure the viability of a robust market that is not susceptible to corruption.

326. *Id.* at 23.

327. *Id.* at 24.

328. *Id.* at 24–25.

329. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997); *see also* *CBC Distrib. Mktg. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824–25 (8th Cir. 2007); Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 115 N.Y.U. J.L. & BUS. 1, 10–12 (2018).

330. *See, e.g.*, Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 96–101 (2015).

331. *See* Edelman, *supra* note 90, at 25–26.

332. The Wire Act prohibits the interstate transmission of information related to and assisting in the placing of bets and wagers. This likely incorporates financial transactions including transfers of money between operators' various accounts in different states, it also likely prohibits bookmakers from making layoff wagers which would allow them to limit their risk exposure. While the Wire Act contains a safe harbor provision that protects transactions between states where the activity is legal in each, it is unclear whether states that the information is routed through (so-called intermediate routing) also need the activity to be legal in order for the safe harbor provision to be a viable defense against a Wire Act prosecution. *See* 18 U.S.C. § 1084 (2012).

## VII. CONCLUSION

The opportunity to legalize sports wagering has created excitement in dozens of states.<sup>333</sup> Lawmakers' excitement has centered on sports betting's ability to generate a supplemental revenue stream. While the likely benefit of legalized sports betting is that states will generate modest revenue from the activity, revenue should not be legislators' only focus.<sup>334</sup> The costs associated with sports betting gone wrong could be meaningful for states that fail to properly implement safeguards and a system to police the operators to ensure that patrons are wagering with reputable entities. The current rush to legalize sports betting before neighboring states has also seemed to omit from consideration the need to recapture bettors from the illegal market in some jurisdictions. While some states have set tax rates at reasonable levels,<sup>335</sup> others, such as Pennsylvania's 36 percent tax rate, threaten to cause bookmakers to set prices to maximize profit,<sup>336</sup> making them uncompetitive with betting lines that bettors might find in illegal markets.<sup>337</sup>

There is a need for the three levels of government—state, tribal, and federal—to recognize that each has a role in the regulation of gambling in most states. The nature of gaming compacts is such that in many states, if a state wants to offer sports betting there is going to be no choice but to seek to partner with tribal governments to offer the product. In many ways, sports betting may provide an opportunity for tribal governments to continue generating revenue, particularly in states like Oklahoma and Arizona which have extensive tribal gaming operations. Sports betting may create opportunities for tribes in these states to generate added revenue as vacation destinations, much like Las Vegas has been for major events such as the Super Bowl or the National Collegiate Athletic Association's March Madness tournament.<sup>338</sup>

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333. Gouker, *supra* note 34.

334. For an overview of potential revenue from state legalization of sports betting, see OXFORD ECONOMICS, ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING (May 2017), available at <https://www.americangaming.org/wp-content/uploads/2018/12/AGA-Oxford-Sports-Betting-Economic-Impact-Report1-1.pdf> [<https://perma.cc/R6PQ-ZJZ2>].

335. See *US Sports Betting Revenue 2019: Sports Betting Handle, Revenue and Hold*, LINES, <https://www.thelines.com/betting/revenue> [<https://perma.cc/7JXU-5GPG>].

336. While there is some evidence that bookmakers seek to maximize profits, the conventional bookmaking model results in a bookmaker attempting to balance the number of bets on each side of a wager, while collecting a profit on the vigorish, usually a ten percent fee for placing the bet. This contrasts with a bookmaker effectively trying to make smarter wagers than the bettors. See Levitt, *supra* note 311, at 224.

337. See *id.* at 243.

338. See, e.g., *Las Vegas Super Bowl*, SIN CITY VIP, <https://sincityvip.com/vip-packages/super-bowl> [<https://perma.cc/Z5G3-YZLC>].

States that have legalized sports betting show a desire to keep the federal government out of the industry.<sup>339</sup> The federal government does have the authority to regulate sports betting directly, according to the Supreme Court decision that has led to the sports betting land rush.<sup>340</sup> The likelihood of the federal government taking a continued interest in sports betting may have a direct relationship with how many scandals surface with the state-level management of sports betting. Nevada has managed to be a role-model example of state-level regulation, serving as the nation's premier guardian of sports integrity for nearly 50 years before other states began to enter the fray. Overemphasis on revenue generation and neglect for integrity and consumer protections, however, would likely threaten autonomous state-level governance of sports wagering. The sports betting cookie jar is not as large as some may hope, and significantly more fragile than it may appear. For that reason, states are best to proceed cautiously with regulating the practice to create a viable and robust market and capitalize on the limited economic benefits that are offered.

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339. Philip Conneller, *States Assert Right to Regulate US Sports Betting as Leagues Call for Federal Intervention*, CASINO.ORG (May 27, 2018), <https://www.casino.org/news/states-assert-right-to-regulate-us-sports-betting-as-leagues-call-for-federal-intervention>.

340. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 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.”).