

# Legalized Sports Wagering in America

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## ABSTRACT

For 25 years, state legislative efforts to legalize, tax, and regulate sports wagering were forestalled by a federal law that disallowed new states from legalizing sports wagering. This freeze on new state-sponsored sports wagering ended abruptly on May 14, 2018, when the U.S. Supreme Court ruled in *Murphy v. NCAA* that the Professional and Amateur Sports Protection Act violated the U.S. Constitution by impermissibly commandeering the states.

Since the U.S. Supreme Court’s ruling in *Murphy*, there has been a rapid proliferation of legalized and regulated sports wagering throughout much of the United States. At present, 35 states allow for some form of legalized and regulated sports wagering, with most of these states allowing for sports wagering not only in the brick-and-mortar format but also online and on mobile applications.

This rapid proliferation of sports wagering, however, has not always gone perfectly. At present, some states enforce strict limits on the number of companies that are eligible to obtain sports wagering licenses. Other states have implemented hefty taxation schemes that have made it difficult for any licensed operator to turn a profit. Meanwhile, still other states have focused primarily on maximizing tax revenues while doing little, if anything, to protect the interests of consumers including problem gamblers.

This Article provides an expert-level analysis of the emergent market for regulated sports wagering— examining the evolution of sports wagering before legalization, the *Murphy* decision, and the market for sports wagering since *Murphy*. The Article then proceeds to elucidate some of the high-profile failures of the present market for sports wagering and examines ways of ameliorating many of these failures.

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## Introduction

For 25 years, legal sports wagering in the United States was confined to a small handful of states, with only Nevada having privately-operated sportsbooks, and only Delaware, Montana, Nevada, and Oregon having any form of wagering on sports.<sup>1</sup> This broad prohibition on the expansion of legal sports wagering—existing in the United States from 1992 until 2018—did not prevent most people from actually wagering on sports.<sup>2</sup> But it did force individuals who wanted to bet on sports to do so through illegal means such as by using unlicensed offshore sportsbooks or private, unlicensed betting pools.<sup>3</sup>

By the early 2010s, larger businesses began to make their way into the sports gaming world, albeit not at first through traditional sportsbooks.<sup>4</sup> During this period, contests operating under the moniker of “daily fantasy sports” took root on the internet, garnered millions of users, and became big business—all under the

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<sup>1</sup> See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 577 n.12 (2020) (noting that Nevada, Delaware, Montana, and Oregon all had forms of legal sports betting, as well as a few other states that had more limited exemptions); see also Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 3–6 (2017) (describing the legislative hearing that clarified there were various exemptions created around the country by virtue of the passage of the Professional and Amateur Sports Protection Act).

<sup>2</sup> In 1999, the National Gambling Impact Study Commission estimated that Americans wagered between \$80 and \$380 billion annually on sports. See NAT’L GAMBLING IMPACT STUDY COMM’N, GAMBLING IN THE UNITED STATES, 2–14 (1999).

<sup>3</sup> See generally Marc Edelman, *The Legal Risk of Operating NCAA Tournament Pools*, FORBES (Mar. 13, 2017), <https://www.forbes.com/sites/marcedelman/2017/03/13/the-legal-risk-of-operating-ncaa-tournament-pools/?sh=68ab793bf75b> (noting that “[f]or most college basketball fans, playing in NCAA Tournament pools is a fun pastime that generally does not lead to much legal scrutiny.”).

<sup>4</sup> See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html> (observing the similarities between daily fantasy sports websites and gambling websites).

guise of being something similar to, but other than, sports wagering.<sup>5</sup> By launching a *cy pres* activity to sports wagering, daily fantasy sports companies served the important function of testing the political waters for legalizing traditional sports wagering.<sup>6</sup> Their business success helped to highlight the demand for legal sports betting by the American consumer.<sup>7</sup>

In 2014, responding to growing consumer demand for legal sports wagering, National Basketball Association (“NBA”) commissioner Adam Silver wrote an op-ed in the *New York Times* calling for Congress to legalize and regulate sports betting at the federal level—a request that was never granted.<sup>8</sup> Silver’s calls were supported a few months later by Major League Baseball commissioner Rob Manfred who, despite his league’s historic opposition to sports wagering that dates back to the 1919 Black Sox scandal,<sup>9</sup> suggested that legalized sports gambling receive “fresh consideration.”<sup>10</sup>

The comments from these two league commissioners, however, are not without a big asterisk. As both league heads called for the legalization and regulation of sports wagering, their respective leagues were engaged in protracted litigation against New Jersey’s then-Governor Chris Christie over the state’s efforts to legalize much the same activity.<sup>11</sup> Many believe that while these two sports leagues were warming to the prospect of fans betting on their games, they opposed the prospect of New Jersey legalizing sports gambling without sharing gambling-related revenues with the leagues.<sup>12</sup> To this extent, their continued opposition to New Jersey legalizing sports gambling may have been, in part, political posturing.<sup>13</sup>

Nevertheless, on May 14, 2018, the Supreme Court declared the Professional and Amateur Sports Protection Act (“PASPA”)—the law that for twenty-five years had prevented the expansion of sports wagering<sup>14</sup>—was unconstitutional.<sup>15</sup> In the first four years since the Supreme Court’s *Murphy* decision, states

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<sup>5</sup> See Maureen A. Weston, *Daily Fantasy Sports and the Law in the USA*, 21 INT’L SPORTS L.J. 121, 123 (2021) (noting that daily fantasy sports “has reportedly over 60 million users in the USA and Canada and is a billion-dollar industry worldwide.”).

<sup>6</sup> John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 922–24 (2020).

<sup>7</sup> *Id.*

<sup>8</sup> See Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html> (stating: “Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”).

<sup>9</sup> See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 43 N. KY L. REV. 453, 454–455 (2015) (describing the accusations against eight members of the Chicago White Sox, that they had intentionally lost the 1919 World Series to the Cincinnati Reds).

<sup>10</sup> David Purdum, *MLB to Talk Betting with Owners*, ESPN (Feb. 5, 2015), [https://www.espn.com/chalk/story/\\_/id/12286521/mlb-commissioner-rob-manfred-says-legalized-sports-betting-needs-fresh-consideration](https://www.espn.com/chalk/story/_/id/12286521/mlb-commissioner-rob-manfred-says-legalized-sports-betting-needs-fresh-consideration).

<sup>11</sup> See *NCAA v. Christie*, 61 F. Supp. 3d 488, 490–91 (D.N.J. 2014) (noting that the National Collegiate Athletic Association, the NBA, the National Football League, the National Hockey League, and the Office of the Commissioner of Major League Baseball sued the Governor of New Jersey over a regulatory scheme that would allow sports wagers in the Garden State).

<sup>12</sup> Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WILLIAM & MARY L. REV. 63, 112–13 (2021).

<sup>13</sup> Jon Wertheim, *The Big Picture*, SPORTS ILLUSTRATED (Aug. 9, 2021), <https://www.si.com/betting/2021/08/09/gambling-issue-daily-cover>.

<sup>14</sup> 28 U.S.C. §§ 3701–04 (1992).

<sup>15</sup> See *Murphy v. NCAA*, 584 U.S. \_\_\_\_; 138 S.Ct. 1461, 1478 (2018) (holding “[t]he PASPA provision at issue here — prohibiting state authorization of sports gambling — violates the anticommandeering rule.”).

across the country have reexamined their sports betting bans.<sup>16</sup> At present, more than thirty-five states have chosen to legalize or expand their sports betting options following the 2018 ruling.<sup>17</sup>

In the four years since *Murphy*, just under \$135 billion has been wagered by Americans legally on sports.<sup>18</sup> This has translated into just under \$1.5 billion in tax dollars for the states that legalized sports betting—with New Jersey, New York, and Pennsylvania accounting for more than half of all tax revenue generated by sports betting since *Murphy*.<sup>19</sup> While sports betting so far has failed to emerge as the panacea for state budget woes that many had hoped,<sup>20</sup> the market remains desirable to a large number of state legislatures and sports betting companies.<sup>21</sup> In many cases, there have been more potential market entrants into the sports wagering market than state gaming licenses made available.<sup>22</sup>

With many states granting professional sports leagues exclusive rights to sell game-related data,<sup>23</sup> the launch of legal sports wagering has been accompanied by broad support from the four major U.S. professional sports leagues, which once opposed legalized sports gambling.<sup>24</sup> Sports wagering has also become tremendously popular among sports fans.<sup>25</sup> Meanwhile, state politicians have latched onto sports wagering as a means to raise revenue without undertaking unpopular actions like raising income or property taxes.<sup>26</sup>

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<sup>16</sup> Pete Blackburn, Chris Bengel & Shanna McCarriston, *Wanna Bet? Explaining Where All 50 States Stand on Legalizing Sports Gambling*, CBS SPORTS (Jan. 7, 2022), <https://www.cbssports.com/general/news/wanna-bet-explaining-where-all-50-states-stand-on-legalizing-sports-gambling/>.

<sup>17</sup> See Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022), <https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling> (observing that sports betting is legal in 35 states, as well as in the District of Columbia).

<sup>18</sup> *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited June 24, 2022).

<sup>19</sup> *Id.*

<sup>20</sup> See e.g., Kati Weis, *Despite Millions on the Line, Sports Betting in Colorado is Collecting Less State Revenue Than You'd Think*, 4 CBS DENVER (Oct. 26, 2020), <https://denver.cbslocal.com/2020/10/26/sports-betting-colorado-revenue/> (noting that Colorado rules that allow operators to deduct promotions from taxes saw the state receive under \$70,000 in tax revenue in a month when bettors wagered more than \$200 million). See also Jennifer McDermott, *In Rhode Island, Sports Betting has Fallen Far Short*, CONCORD MONITOR (Mar. 29, 2019), [https://www.concordmonitor.com/Sports-betting-revenue-projection-was-\\$11-5M-So-far-\\$150K-24490887](https://www.concordmonitor.com/Sports-betting-revenue-projection-was-$11-5M-So-far-$150K-24490887).

<sup>21</sup> See, e.g., Spencer Buell, *Sports Betting Would Change Massachusetts Forever. Here's How*, BOSTON MAGAZINE (May 23, 2022), <https://www.bostonmagazine.com/news/2022/05/23/sports-betting-massachusetts/> (describing efforts to bring sports betting to Massachusetts).

<sup>22</sup> See, e.g., Robert Linnehan, *Additional New York Online Sports Betting Operators Not Included in Budget*, Elite Sports NY (Apr. 8, 2022), <https://elitesportsny.com/2022/04/08/additional-new-york-online-sports-betting-operators-not-included-in-budget/> (describing interest amongst some stakeholders in expanding the number of mobile sports wagering licenses available in New York).

<sup>23</sup> Edelman & Holden, *Monopolizing*, *supra* note 12 at 99–100.

<sup>24</sup> Jon Wertheim, *The Big Picture*, SPORTS ILLUSTRATED (Aug. 9, 2021), <https://www.si.com/betting/2021/08/09/gambling-issue-daily-cover>. The NCAA, the fifth member of the sports organization quintet that sued New Jersey to stop sports betting expansion, remains opposed to gambling, legal or illegal. See Matt Bonesteel, *NCAA Athletes Aren't Allowed to Play Fantasy Sports for Money, Even Though It's Legal*, WASH. POST (Sep. 22, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/09/22/ncaa-athletes-arent-allowed-to-play-fantasy-sports-for-money-even-though-its-legal>. However, even the NCAA has begun to change its stance, recently, allowing schools and conferences to sell data to sports betting companies. See Eben Novy-Williams, *NCAA To Allow Sports Betting Data Deals for Schools, Conferences*, SPORTICO (Apr. 28, 2022), <https://www.sportico.com/business/sports-betting/2022/ncaa-sports-betting-policy-1234673989/>.

<sup>25</sup> *Sports Gambling Tendencies of Fans*, NIELSON SPORTS, <https://nielsen.com/sports-gambling-tendencies-fans/> (last visited June 24, 2022).

<sup>26</sup> Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 480–81 (2020).

Nevertheless, legalized sports wagering has also led to certain unresolved problems. These problems include optimizing taxation rates on sports wagering,<sup>27</sup> addressing consumer protection needs, especially for problem gambling,<sup>28</sup> and ensuring the integrity of the underlying sporting events.<sup>29</sup> These problems, of course, are not unsurmountable, and, once reasonably addressed, gambling marketplace experts predict that state legislatures will expand sports wagering into nearly all states.<sup>30</sup>

This Article provides an expert discussion of the emergence and early regulation of widespread legal sports wagering in the United States. Part I of this Article provides an overview of gambling regulation prior to the *Murphy* decision. Part II illustrates the process of legalization of sports wagering across the country and discusses the emergent models for regulating sports wagering. Part III provides an overview and evaluation of regulation in the U.S. sports wagering market. Part IV delves into the potential for unifying sports wagering law across the country. Finally, Part V considers best practices for future sports wagering regulation given the extreme unlikelihood of passing federal or state uniform law.

## I. Historical Legal Treatment of Sports Wagering

The historical legal treatment of sports wagering emerges from complex political and social dynamics that largely involve powerful lobbying groups including professional sports leagues and the Catholic Church.<sup>31</sup> As with other forms of gambling, the cultural and moral ambivalence toward sports wagering has produced a legal environment that is potholed and bumpy.<sup>32</sup> This part of the Article begins by examining sports wagering in the United States prior to the passage of the PASPA. Section B discusses the momentum that led to the passage of the PASPA. Section C describes the rise of gambling on the internet. Section D analyzes the role of daily fantasy sports in testing the market for sports gambling. Section E explores the lead-up to the *Murphy* decision. Finally, Section F delves into the *Murphy* decision.

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<sup>27</sup> See e.g., Julie Zauzmer Weil, *D.C.'s Sports Betting App Keeps Underperforming, with Lots of Finger Pointing About What's to Blame*, WASH. POST (Aug. 30, 2021), <https://www.washingtonpost.com/dc-md-va/2021/08/30/dc-sports-betting-revenue-disappointment/> (noting that while D.C. officials once projected tens of millions of dollars being added in revenue, those hopes quickly faded). Many sportsbooks themselves have struggled to make money. See, e.g., Josh Kosman, *New York Mobile Sports Betting Operators Have Lost \$200 Million, Analyst Claims*, N.Y. POST (Feb. 23, 2022). Others have chosen to leave the U.S. market altogether. See Jeff Lagerquist, *TheScore to Shut Down U.S. Sports Book on Canada Day*, YAHOO (June 1, 2022), <https://www.yahoo.com/entertainment/the-score-to-shut-down-us-sports-book-on-canada-day-155254487.html#:~:text=Score%20Media%20and%20Gaming%20will,visibility%20south%20of%20the%20border.>

<sup>28</sup> Rich Shapiro, *Sports Betting Skyrocketed in Pandemic. Experts Warn of a 'Ticking Time Bomb'*, NBC NEWS (May 15, 2021), <https://www.nbcnews.com/news/us-news/sports-betting-skyrocketed-pandemic-experts-warn-ticking-time-bomb-n1266518>.

<sup>29</sup> See generally John Holden, *Analysis: Sportradar Report Chronicles Match-Fixing In 2021*, LEGAL SPORTS REP. (May 3, 2022) (noting that there was an uptick in suspicious betting behavior, which could indicate integrity concerns in 2021).

<sup>30</sup> See Rick Maese, *Sports Betting Will Keep Booming in 2022, But Some See Risks in Growth*, WASH. POST (Jan. 14, 2022), <https://www.washingtonpost.com/sports/2022/01/14/legal-sports-betting-states-2022/> (expecting continued expansion of sports betting legalization). See also Ryan Butler, *Research Firm: 37 States Projected to Have Legal Sports Betting by 2023*, ACTION NETWORK (Sep. 23, 2021), <https://www.actionnetwork.com/legal-online-sports-betting/us-states-projected-approve-legal-sports-betting-2023> (noting “every state except Utah, Alaska and Hawaii could, at some point, legalize sports wagering. If this “full” list approves full mobile wagering, the sports betting market could eclipse \$19 billion in annual revenues.”).

<sup>31</sup> See e.g., John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 337–51 (2019) (describing sports league efforts to have a ban on sports wagering enacted). See also *Legalizing Sports Wagers: Entertainment of Enslavement?*, CATHOLIC SPIRIT (Nov. 23, 2021), <https://thecatholicspirit.com/commentary/inside-the-capitol/legalizing-sports-wagers-entertainment-or-enslavement/> (describing that while the Catholic Church does not prohibit Catholics from gambling, modern sports gambling “is like an addictive drug.”).

<sup>32</sup> Ben Strauss & Emily Guskin, *Support for Legal Sports Betting Grows, Post-UMD Poll Finds*, WASH. POST (July 8, 2022), <https://www.washingtonpost.com/sports/2022/07/08/legal-sports-betting-support-americans/>.

A. *Sports Betting Prior to the Professional and Amateur Sports Protection Act*

Until the Supreme Court's invalidated the Professional and Amateur Sports Protection Act (PASPA) in 2018,<sup>33</sup> nearly all sports wagering in the U.S. was in the form of illegal betting.<sup>34</sup> Illegal sports betting became popular in the U.S. in the years between World War I and World War II<sup>35</sup> when many former bootleggers moved into the market as their new form of organized crime.<sup>36</sup>

For most of the twentieth century, the availability of legal sports betting, other than horseracing, was limited.<sup>37</sup> In large part, this was because, until 1978, Nevada was the only state that allowed casino gambling.<sup>38</sup> And, even in Nevada, sports betting was effectively thwarted by a 1951 federal law that imposed a 10% excise tax on sports wagers accepted by legal sportsbooks.<sup>39</sup> This tax on the amount bet, known as the "handle,"<sup>40</sup> made it impossible for legally-operating sportsbooks to make money.<sup>41</sup>

The imposition of the 10% excise tax was among the first, but certainly not the last, federal actions that sought to eliminate sports betting.<sup>42</sup> As it related to lawful sports betting, the tax was a success. However, in the broader context, the federal excise tax simply drove sports betting further underground into an unregulated and criminally influenced environment. Congressional investigations in the 1950s gave visibility to the role of organized crime in sports and horse racing wagering,<sup>43</sup> and these investigations produced calls for legislation.

A leading voice in the call for imposing federal criminal law against sports wagering as a means to target organized crime was Robert F. Kennedy. When his brother John was elected President in 1960, John appointed Robert to be Attorney General. In this role, Robert Kennedy championed the enactment of the Wire Act,<sup>44</sup> as the first of several federal laws targeted at curtailing sports wagering.<sup>45</sup>

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<sup>33</sup> *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>34</sup> For a discussion of the role of sports betting throughout the history of the United States, see RICHARD O. DAVIES & RICHARD G. ABRAM, *BETTING THE LINE: SPORTS WAGERING IN AMERICAN LIFE* (Columbus: Ohio State University Press 2001).

<sup>35</sup> Wagering on sports goes back a long way in history, in the U.S. and globally. For a detailed discussion of this historical background, see Holden & Edelman, *A Short Treatise*, *supra* note 6, at 910–22.

<sup>36</sup> *Id.* at 41.

<sup>37</sup> Vinny Magliulo, *History of Sports Betting in Las Vegas*, VSIN (Aug. 21, 2017), <https://www.vsin.com/history-of-sports-betting-in-las-vegas/>.

<sup>38</sup> See George C. Fenich, *A Chronology of (Legal) Gambling in the U.S.*, 3 GAMING RES. & REV. J. 65 (1996).

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

<sup>40</sup> See *Ultimate Gambling Terms and Glossary Guide*, CASINO, <https://www.casino.org/glossary/> (last visited Aug. 8, 2022).

<sup>41</sup> See DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 169 (2005). The tax was lowered to 2% in 1974 and to 0.25% in 1982.

<sup>42</sup> G. Robert Blakely, *Legal Regulation of Gambling Since 1950*, 474 ANNALS AM. ACAD. POLITICAL & SOCIAL SCI. 12, 14 (1984).

<sup>43</sup> See Holden, *Regulating Sports Wagering*, *supra* note 1, at 581.

<sup>44</sup> 18 U.S.C. § 1084 (2018).

<sup>45</sup> John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 707 (2020).

Few federal laws have created more misunderstanding, or have been criticized more harshly, than the Federal Wire Act (Wire Act).<sup>46</sup> The legislative history of the Wire Act reflects the desire to criminalize organized crime's use of the Racing Wire Service<sup>47</sup>— a ticker-like mechanism that allowed horseracing and sports information, including wagers, to be quickly transmitted to bookmakers.<sup>48</sup> With the passing of the Wire Act, Congress was intimating that the interstate transmissions of sports wagers were not *per se* undesirable, but rather that “they were undesirable chiefly because they were used by hoodlums.”<sup>49</sup>

Even though the Wire Act did not prevent new states from legalizing sports gambling, only three states joined Nevada in legalizing sports betting in the 1970s and 1980s—these states being Delaware, Montana, and Oregon.<sup>50</sup> And, even these states limited legal sports gambling to a small number of state-sponsored, lottery-like contests.<sup>51</sup> New Jersey, meanwhile, 1976 became the second state after Nevada to allow for casinos.<sup>52</sup> However, unlike Nevada's regulations, New Jersey's regulations did not allow casinos to offer sports wagering.<sup>53</sup>

By the beginning of the 1990s, several other states began to seriously consider legalizing sports wagering.<sup>54</sup> As the U.S. economy hit a downturn, three states, in particular, began to explore bills that would legalize and regulate this once prohibited activity—California, Florida, and Illinois.<sup>55</sup> The Illinois proposal was particularly intriguing because it planned to use a proposed tax on sports wagering to fund the building of a new Chicago Bears stadium.<sup>56</sup> Because the sports wagering proceeds would indirectly go into the pockets of NFL owners, some legislatures believed the sports leagues would not voice much opposition.<sup>57</sup> But, at least for the time being, the U.S. sports leagues remained opposed to expanding legal sports wagering. And, in response to these state efforts to legalize sports betting, the U.S. sports leagues doubled down on their lobbying efforts to federally prevent sports betting's expansion.<sup>58</sup>

B. *Opposition to Sports Betting Mobilizes, and the Professional and Amateur Sports Protection Act*

As states such as California, Florida, and Illinois discussed legalizing sports wagering in the early 1990s, major professional sports leagues and the NCAA began to organize a coalition to renew their attack on sports

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<sup>46</sup> See, e.g., Anthony Cabot, *The Absence of a Comprehensive Federal Policy Toward Internet and Sports Wagering and a Proposal for Change*, 17 JEFFREY S. MOORAD SPORTS L.J. 271, 282 (2010) (“The Wire Act, in its entirety, reads poorly and in parts, the Act is nearly incomprehensible.”).

<sup>47</sup> See Journal Article, *Racing Wire Service*, 5 STAN. L. REV. 493 (1953) for a contemporary account of this issue.

<sup>48</sup> *Id.*

<sup>49</sup> Schwartz, *supra* note 41, at 96

<sup>50</sup> See Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy*, 26 GEORGE MASON L. REV. 313, 318 (2018). The legislative history of PASPA refers to a handful of other states that may have been qualified for PASPA's exemptions by virtue of some prior offering of limited forms of sports gambling, but Nevada, Delaware, Montana, and Oregon are the states most commonly cited. See S. REP. No. 102-248, at 8 (1992), as reprinted in 1992 U.S.C.C.A.N. 3553, 3559.

<sup>51</sup> See *Nat'l Football League v. Governor of Delaware*, 435 F.Supp. 1372, 1376 (D. Del. 1977) (describing Delaware's sports betting contests)

<sup>52</sup> Martin Derbyshire, *The Complete History of Gambling in Atlantic City*, NJ ONLINE GAMBLING (June 9, 2022), <https://www.njonlinegambling.com/atlantic-city-history/>.

<sup>53</sup> See Edelman, *Regulating Sports Gambling*, *supra* note 50, at 318.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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

<sup>58</sup> See Rodenberg & Holden, *supra* note 1 (describing lobbying efforts surrounding PASPA).

betting as an activity that they purported would corrupt the integrity of sports.<sup>59</sup> The public face of the opposition emerged in Senator Bill Bradley of New Jersey.<sup>60</sup>

Bradley was a formidable adversary. He had been an All-American basketball player at Princeton University, and then a Rhodes Scholar.<sup>61</sup> Before entering politics, Bradley was a two-time NBA champion with the New York Knicks.<sup>62</sup> He sought to gather broad-based support for a federal law that would prohibit sports betting, perhaps even applying the ban to Nevada where sports betting had been legal and regulated for decades.<sup>63</sup> But his efforts to pass a direct, federal ban on state-sponsored sports wagering languished. Despite the efforts of Bradley and others to pass a “clean” law making all sports betting illegal in the U.S., Bradley had to instead settle for a law that prohibited sports betting’s *expansion*.<sup>64</sup> Thus, sports betting would essentially be frozen at the state level as it was in 1992.<sup>65</sup>

The new law that Senator Bradley was ultimately able to pass, known as the Professional and Amateur Sports Protection Act (PASPA), was enacted on October 28, 1992.<sup>66</sup> PASPA is notable both for what it did, and what it did not, do. There is wide support for the view that Congress has the power to prohibit sports betting in the United States.<sup>67</sup> However, rather than doing that, PASPA merely told the states that *they* could not authorize or license sports betting operations beyond those forms of sports gambling the states already had in place.<sup>68</sup>

The law had two specific prohibitions to that effect. One provision made it “unlawful” for a state “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on” competitive sporting events.<sup>69</sup> The other prohibition made it “unlawful” for “a person to sponsor, operate, advertise, or promote” such gambling activities on competitive sporting events if this were done “pursuant to the law or compact of a governmental entity.”<sup>70</sup>

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<sup>59</sup> Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball's Continued Crusade Against Sports Gambling*, 2 SETON HALL J. SPORT L. 19, 21 (1992) (description of how Major League Baseball and other sports leagues campaigned for legislation and asserted that it was “aimed at preserving the integrity of our sports contests, preserving the image of its athletes as role models for our nation's youth, and preventing the deleterious effects that sports gambling would have upon the youth of America”).

<sup>60</sup> Stephen Barr, *Gambling: How Much is Too Much?*, N.Y. TIMES (Nov. 24, 1991), <https://www.nytimes.com/1991/11/24/nyregion/gambling-how-much-is-too-much.html>.

<sup>61</sup> *Bill Bradley*, in ENCYCLOPEDIA BRITANNICA, (2021 ed.), <https://www.britannica.com/biography/Bill-Bradley..>

<sup>62</sup> *Id.*

<sup>63</sup> See John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U.L. REV. 329, 338–46 (2019) (describing 1991 subcommittee hearings with testimony from active and former athletes).

<sup>64</sup> See Ryan M. Rodenberg & John T. Holden, *Sports Betting has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 11-17 (2017) (describing PASPA’s exemptions and some of the legislative horse trading that took place).

<sup>65</sup> 28 U.S.C. §§3701–04 (1992).

<sup>66</sup> *Id.*

<sup>67</sup> The opinion of the Court in *Murphy* stated, “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. \_\_\_, 138 S. Ct. 1461, 1484–85 (2018).

<sup>68</sup> 28 U.S.C. §§3701–04 (1992).

<sup>69</sup> *Id.* §3702(1). The law used the term “governmental entities,” defined as “a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States.” *Id.* §3701(2).

<sup>70</sup> *Id.* § 3702(2).



Though PASPA did not make sports betting a federal crime, the U.S. Attorney General was authorized by PASPA to bring civil actions to enjoin violations.<sup>71</sup> In addition, this same power to seek injunctive relief was extended to “a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.”<sup>72</sup>

Because the State of New Jersey already had licensed casinos in Atlantic City, PASPA allowed New Jersey one year from PASPA’s effective date to authorize sports betting and thus be grandfathered in along with Delaware, Montana, Nevada, and Oregon.<sup>73</sup> However, New Jersey never took steps to do so—perhaps, recognizing the irony of legalizing sports betting within its borders when one of the state’s two senators, Bill Bradley, was the primary initiator of efforts to keep sports betting from becoming legal elsewhere.<sup>74</sup>

### C. *Online Gambling: The Purported New Menace*

The passing of PASPA essentially put a halt to the expansion of legalized, state-licensed sports gambling for the time being, and, by the mid-1990s, Congressional concerns about gambling had pivoted away from brick-and-mortar sports betting, and toward a new betting concern: online gambling.<sup>75</sup> The emerging world of online gambling included not only online casinos and online poker sites, but also online sportsbooks—many of which were housed on foreign servers but targeted local customers.<sup>76</sup>

In a landmark case, *United States v. Cohen*,<sup>77</sup> the U.S. Court of Appeals for the Second Circuit upheld the conviction of Jay Cohen, a business entrepreneur with a prestigious academic pedigree, for violating the Wire Act by accepting sports wagers in Antigua, placed by telephone or the internet from bettors located in the U.S. The court held that it made no difference that Cohen placed all of his company’s servers outside of the U.S. given that he accepted money from bettors in the U.S.<sup>78</sup>

Antigua took exception to the Cohen prosecution, and it challenged the U.S. before the World Trade Organization for violating the General Agreement on Trade in Services (“GATS”), claiming that the U.S. was giving an unfair advantage to U.S. gambling operators at the expense of non-U.S. operators.<sup>79</sup> The United States’ defense to these claims was that the type of trade involved—internet gambling—violated the “public morals” of the United States, and thus fit within an exception to GATS.<sup>80</sup> However, the WTO rejected this assertion, pointing to that the U.S. legalized and regulated other forms of gambling, including interstate horseracing.<sup>81</sup>

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<sup>71</sup> *Id.* § 3703.

<sup>72</sup> *Id.*

<sup>73</sup> Michael Walsh, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV. 1009, 1010, n.8 (2014).

<sup>74</sup> Holden & Edelman, *A Short Treatise*, *supra* note 6, at 920.

<sup>75</sup> *See generally*, Joseph M. Kelly, *Internet Gambling Law*, 26 WILLIAM MITCHELL L. REV. 117, 134–70 (2000) (describing early U.S. efforts to target online gambling).

<sup>76</sup> *See id.* at 167–70 (describing the challenges of targeting operations existing outside of the territorial United States).

<sup>77</sup> *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

<sup>78</sup> *Id.* at 75–76.

<sup>79</sup> *See* Katie Berry, *Know When to Fold ‘Em: The International Effects of Murphy v. NCAA and Why Antigua Holds the Cards*, 8 ARIZ. ST. SPORTS & ENT. L. J. 93, 115–16 (2019).

<sup>80</sup> *Id.* at 118.

<sup>81</sup> *Id.* at 122–23.

Nevertheless, the Bush Administration's Department of Justice continued to use the Wire Act and other federal laws to selectively pursue and prosecute internet gambling businesses that accepted bets from those in the U.S.<sup>82</sup> Doubling down on the efforts to eradicate online gambling within U.S. borders, a number of largely Republican congresspersons proceeded to launch an effort pass federal law prohibiting the internet gambling in the near entirety.<sup>83</sup> This culminated rather anti-climatically in 2006 with the passage of the Unlawful Internet Gambling Enforcement Act—otherwise known by its clumsy acronym UIGEA.<sup>84</sup> UIGEA, which was unceremoniously attached to a port security bill related to defending against terrorist attacks, was passed, or, as some have said, “rammed through,” in the final minutes before the Congressional fall recess.<sup>85</sup> Few, if any, members of Congress were aware of its provisions, which may have been an intentional tactic of the UIGEA sponsors.<sup>86</sup>

In practice, UIGEA attacked internet gambling more subtly than in previous efforts.<sup>87</sup> Rather than using a “kill shot,” UIGEA sought to suffocate internet gambling by removing its oxygen source, specifically, the funding of online gambling accounts.<sup>88</sup> To accomplish this, the law targeted two of the three parties to the transfer of money—the gambling site, and the financial institutions that facilitated the transfer of funds from the bettor to the gambling site. The portion of UIGEA directed at the gambling site makes it unlawful for “[any] person engaged in the business of betting or wagering” to “knowingly accept” credit, an electronic funds transfer, check, or similar instrument in connection with unlawful Internet gaming.<sup>89</sup> Meanwhile, the portion of UGEA targeted at financial institutions empowers the Federal Reserve Board and the Department of the Treasury to develop regulations requiring financial transaction providers—credit card companies, banks, or stored value providers—to identify, code, and block restricted transactions.<sup>90</sup> Restricted transactions were those where a gambling business accepts funds directly or indirectly from a player connected with unlawful internet gambling, that is gambling illegal under state or federal law.<sup>91</sup>

The financial industry voiced sharp opposition to the notion that credit card processors had to be the filter for illegal internet gambling transactions. It would require an overinclusive process which would lead to

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<sup>82</sup> See, e.g., *United States v. Corrar*, 512 F. Supp. 2d 1280 (N.D. Ga. 2007) (defendant traveled to Georgia from Florida to collect on debts from online gambling and was indicted for violations of the Travel Act and the Wire Act. The defendant did not violate the Travel Act because he did not use means of interstate commerce to facilitate the carrying out of an unlawful activity, because gambling business was no longer operating, thus it did not satisfy statutory requirement of the activity being “ongoing.” Wire Act was violated, however, because defendant gave gambler in another state account numbers that enabled him to place wagers with the defendant.)

<sup>83</sup> See, e.g., Internet Gambling Prohibition Act, H.R. 4777, 109<sup>th</sup> Cong. (proposing to amend the Federal Wire Act to include fixed and mobile communication facilities, as well as expanding the definition of bets and wagers).

<sup>84</sup> 31 U.S.C. §§ 5361–367.

<sup>85</sup> I. Nelson Rose, *Vienpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006)

<sup>86</sup> While UIGEA was attached as a last-minute legislative rider, internet gambling regulation had been debated for approximately a decade. John Holden, *Legislative Sausage Making: How We Got UIGEA*, LEGAL SPORTS REP. (Sep. 21, 2018), <https://www.legalsportsreport.com/22325/legislative-sausage-making-uigea/>.

<sup>87</sup> See Brant M. Leonard, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 526 (2009).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Leonard, *supra*, note 89, at 527.

<sup>91</sup> *Id.*

the blocking of many transactions that were not about gambling at all.<sup>92</sup> Although UIGEA specified that the regulations for this blocking process would be prescribed within 270 days following the law's enactment, in fact, years passed before final regulations were in place.<sup>93</sup> Those regulations discarded the identify/code/block requirements, which would have placed a burden on financial institutions to police individual client transactions by coding and ultimately blocking all payments in violation of UIGEA.<sup>94</sup> Instead, entities that had the closest relationship to the internet business had to exercise due diligence to determine whether that business was engaged in unlawful internet gambling.<sup>95</sup>

#### D. *The Stalking Horse for Sports Betting: Daily Fantasy Sports*

Flawed as it may have been, UIGEA did put another enforcement arrow in the quivers of prosecutors who wanted to prosecute offshore internet gambling companies taking bets from U.S. bettors.<sup>96</sup> Still, UIGEA's most controversial provision was a "carve-out" for "any fantasy or simulation sports game or educational game or contest" where the outcomes are determined by "accumulated statistical results" and not the "score" or "point-spread" of a competition by a "single real-world team," nor the single performance of an individual athlete.<sup>97</sup>

How this provision became part of a law stately hostile to online gambling is a fascinating study in the legislative process.<sup>98</sup> At the time of UIGEA's enactment, fantasy sports were regarded by many as a "bragging rights," or small money, activity which did not resemble gambling.<sup>99</sup> Moreover, the major sports leagues had not opposed a carveout, in part because they had "recognized the synergy between their games and the fantasy sports hobby."<sup>100</sup>

Nevertheless, almost as soon as Congress passed the UIGEA and its special carveout for "fantasy or simulation sports game[s]," risk-seeking and perhaps legally unadvised entrepreneurs launched a new brand of online contests that they called "daily fantasy sports" (DFS), in which participants would have the task to "pick a roster of players from draft lists based on a salary cap, with participants competing against one another for prizes"—sometimes large sums of money.<sup>101</sup> With the emergence of DFS as a purported form of fantasy sports, new questions of legality arose.<sup>102</sup> DFS companies purported that federal law explicitly legalized their games as

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<sup>92</sup> See Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 BERK. TECH. L. J. 529, 544 (2010) (noting concerns that "the 'natural' reaction for a financial intermediary would be to deem every transaction from an internet gaming operator to be an unlawful one").

<sup>93</sup> The Treasury Department and the Federal Reserve, along with the Justice Department adopted final rules implementing UIGEA in 2009, with an effective date of June 1, 2010. See *Unlawful Internet Gambling Enforcement Act (UIGEA) and Its Implementing Regulations*, CONG. RSCH. SERV. REP. (Apr. 10, 2012).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Josh Dean, *The Personality Behind Online Gaming Site Bodog*, FAST COMPANY (July 1, 2008), <https://www.fastcompany.com/898669/personality-behind-online-gaming-site-bodog>.

<sup>97</sup> See 31 U.S.C. § 5362(1)(E)(ix) (2018).

<sup>98</sup> See John T. Holden, *The Unlawful Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. OF LEGAL ASPECTS OF SPORT 97 (2018).

<sup>99</sup> Marc Edelman, John T. Holden, & Adam Scott Wandt, *U.S. Fantasy Sports Law: Fifteen Years After UIGEA*, 83 OHIO ST. L.J. 117, 117–18 (2022).

<sup>100</sup> BILL ORDINE, FANTASY SPORTS, REAL MONEY: THE UNLIKELY RISE OF DAILY FANTASY, HOW TO PLAY, HOW TO WIN 36 (2016).

<sup>101</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports*, 2016 U. ILLINOIS L. REV. 117, 127 (2016).

<sup>102</sup> Edelman, Holden, & Wandt, *supra* note 99, at 124.

these activities involved predicting the performance of multiple players in multiple real-world events and did not entail betting money against the house.<sup>103</sup> However, others, including the sponsors of UIGEA, were less certain.<sup>104</sup>

The outsized attention given to DFS from 2007 until the *Murphy* decision in 2018 was a critical antecedent to legalized sports betting.<sup>105</sup> Despite the hostility to DFS and some difficult times in 2015, DFS “softened up” the U.S. to the idea that wagering on sports, or “wagering type” activity on sports, was not so bad.<sup>106</sup> Moreover, with so much attention focused on the legal status of DFS, particularly in the period from 2013-18, less attention was paid to New Jersey’s attack on PASPA taking place in the courts of the Third Circuit.<sup>107</sup>

#### E. *The Lead Up to Murphy*

There is some irony to New Jersey being the state that attacked PASPA. New Jersey indeed was the only state upon PASPA’s passing that was offered a window within which to legalize sports gambling.<sup>108</sup> And yet, the state decided, at the time, not to exercise its special option.<sup>109</sup>

But times change. And the option that New Jersey failed to act upon in 1993 had, in the years since the emergence of DFS, become very important to state senator Ray Lesniak as a means to potentially revitalize the struggling casino district of Atlantic City through the raising of tax dollars.<sup>110</sup> At the time, Lesniak also claimed that legalizing sports wagering would be a boon to small-business entrepreneurs—claiming that, with legalized sports wagering, New Jersey could become the center of a new and thriving home for online businesses—a gambling Silicon Valley of sorts.<sup>111</sup>

In 2011, Lesniak, along with several New Jersey thoroughbred associations and a media company, brought suit in federal court claiming that Congress did not have the authority under the Commerce Clause of the U.S. Constitution to pass PASPA.<sup>112</sup> In addition, Lesniak and his co-plaintiffs alleged that the law infringed on the Tenth Amendment by interfering with the “reserved powers” of states, as well as the Equal Protection Clause of the Fourteenth Amendment due to the privileges selectively granted to a few states.<sup>113</sup> Nonetheless,

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<sup>103</sup> See Marc Edelman, *Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELL. PROP, SPORTS & ENT. L. FORUM 1, 12 (2016) (stating that “it was poor legal logic that was briefly accepted by fantasy sports operators and the media that led many to believe the UIGEA provided a blanket exemption to all companies that called their businesses fantasy sports”).

<sup>104</sup> “Former congressman says daily fantasy sports are a ‘cauldron of daily betting,’” PBS NEWS HOUR (Oct. 12, 2015) (Congressional sponsor of UIGEA says the law was supposed to stop internet gambling, not promote it).

<sup>105</sup> Holden & Edelman, *A Short Treatise*, *supra* note 6, at 922–24.

<sup>106</sup> *Id.*

<sup>107</sup> See *id.* (noting the various attacks on the legality of DFS).

<sup>108</sup> See Joseph F. Sullivan, *How Politics Nipped a Sports Betting Bill*, N.Y. TIMES (Jan. 2, 1994), <https://www.nytimes.com/1994/01/02/nyregion/how-politics-nipped-a-sports-betting-bill.html>.

<sup>109</sup> *Id.*

<sup>110</sup> A.P., *N.J. Senators Pushing Sports Betting Bill*, COURIER POST (Sep. 30, 2014), <https://www.courierpostonline.com/story/news/local/south-jersey/2014/09/30/nj-senators-pushing-sports-betting-bill/16498669/>.

<sup>111</sup> Politicker, *Lesniak to Introduce New Sports Betting Bill on Monday*, OBSERVER (Sep. 10, 2014), <https://observer.com/2014/09/lesniak-to-introduce-new-sports-betting-bill-on-monday/>.

<sup>112</sup> Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder, No. 09-1301, 2011 WL 802106 (D.N.J. Mar. 7, 2011).

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

none of these assertions were considered by the court, as it ruled the plaintiffs lacked standing to bring the constitutional claims.<sup>114</sup>

Meanwhile, New Jersey's supporters of sports gambling were just beginning their efforts.<sup>115</sup> In November 2011, they prepared a referendum item for their general election, amending their state Constitution to permit sports betting.<sup>116</sup> Voters overwhelmingly supported the amendment. Soon after that, the state legislature passed laws allowing sports wagering at Atlantic City casinos and horse racetracks.<sup>117</sup> The new laws gave the New Jersey Division of Gaming Enforcement authority to approve applications for sports wagering operations.<sup>118</sup>

In doing so, New Jersey was openly challenging the sports leagues' authority under PASPA.<sup>119</sup> As Governor Chris Christie announced, "We intend to go forward and allow sports betting to happen. If someone wants to stop us, then let them try to stop us."<sup>120</sup> With regulations in place and an intent to be operational by football season in the fall of 2012, the expected legal challenge from the leagues came on August 7, 2012, when they sought and received injunctive relief from a federal court.<sup>121</sup>

The litigation that followed—originally captioned as *Christie v. NCAA* and later recaptioned as *Murphy v. NCAA* after Phil Murphy succeeded Chris Christie in the New Jersey Governor's office—began an almost six-year slog through the courts of the Third Circuit.<sup>122</sup> Among other arguments, New Jersey claimed that PASPA violated the Tenth Amendment of the U.S. Constitution because it "commandeered" the New Jersey legislative process, and "conscripted" the state legislature to do the work of federal officials by mandating the state take specific legislative action.<sup>123</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> Wayne Parry, *New Jersey Bills Push Sports Betting*, N.Y. POST (Jan. 23, 2012), <https://nypost.com/2012/01/23/new-jersey-bills-push-sports-betting/>.

<sup>116</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018).

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

<sup>118</sup> 2012 Sports Wagering Act (2012 Act), 2011 N.J. Sess. Law Serv. 1723–30 (West).

<sup>119</sup> *4 Major Pro Sports Leagues, NCAA Sue to Stop N.J. From Allowing Betting*, NJ (Aug. 7, 2012), [https://www.nj.com/politics/2012/08/4\\_major\\_pro\\_sports\\_leagues\\_sue.html](https://www.nj.com/politics/2012/08/4_major_pro_sports_leagues_sue.html).

<sup>120</sup> See Kyle Smith, *Legalize Sports Betting and Let Gov. Chris Christie Spike the Football*, FORBES, (Aug 23, 2012), <https://www.forbes.com/sites/kylesmith/2012/08/23/legalize-sports-betting-and-let-gov-chris-christie-spike-the-football/?sh=6f6e49881f75>.

<sup>121</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013) (*aff'd* 730 F.3d 208 (2013)).

<sup>122</sup> *Sports Betting Now Made Possible in Every State in the United States*, FINTECH CRIMES (Feb. 3, 2020), <https://fintechcrimes.com/sports-betting-allowed-in-every-state/>.

<sup>123</sup> Holden, *Regulating Sports Wagering*, *supra* note 1, at 569–73.

New Jersey's path to the Supreme Court was turbulent and has been detailed elsewhere.<sup>124</sup> From the initial challenges to PASPA by the state in 2012 to the Murphy decision in 2018, the state endured a pounding.<sup>125</sup> It lost five times in the courts of the Third Circuit, and the Supreme Court denied its petition for certiorari in 2014 after the litigation's first time through the courts.<sup>126</sup> After another rejection by the Third Circuit in August of 2016, this time by the court *en banc*, there was little reason for optimism. Another petition for certiorari seemed like a long shot.

An inkling that something might be different this time, however, came in January 2017 when the Court issued a "call for the views of the Solicitor General" (CVSG),<sup>127</sup> which seeks the counsel of the United States Solicitor General about a case in which the United States does not have a direct interest.<sup>128</sup> Historically, if the Solicitor General recommends the Court grant certiorari, the Court usually does.<sup>129</sup>

The Solicitor General found little merit to the petition, opining that the case did not warrant the scrutiny of the Court.<sup>130</sup> Still, however, on June 27, 2017, the Supreme Court surprised many people when it granted New Jersey's petition for certiorari on the question of whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct "impermissibly commandeere[s] the regulatory power of States in contravention of *New York v. United States*."<sup>131</sup> The stage was set for the transformation of American law on the issue of sports wagering.

#### F. *The Murphy Decision*

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<sup>124</sup> See, e.g., Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATO SUP. CT. REV. 247, 267 ("Murphy reaffirms a principle at the foundation of our constitutional structure--that Congress may not issue direct orders to states or otherwise operate the machinery of state government. . . . More broadly, *Murphy* will likely introduce new questions about the balance of power between Congress and the states. All of this is good for federalism--and a healthy federalism is a win for all Americans."); Matthew A. Melone, *New Jersey Beat the Spread: Murphy v. National Collegiate Athletic Association and the Demise of PASPA Allows for States to Experiment in Regulating the Rapidly Evolving Sports Gambling Industry*, 80 U. PITT. L. REV. 315 (2018); Tucker Davison, *Merging Sports Gambling and Technology: What's Really Going to Happen?*, 22 SMU SCI. & TECH. L. REV. 165 (2019) (discussing the decision in *Murphy* and the future implications on sports betting technology); Ilya Somin, *Federalism Comes Out as the Winner in Murphy v. NCAA*, REGUL. REV. (July 10, 2018), <https://www.theregview.org/2018/07/10/somin-federalism-comes-out-winner-murphy-v-ncaa/>; Daniel Boswell, Comment, *The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting*, 28 U. MIAMI BUS. L. REV. 115 (2019).

<sup>125</sup> New Jersey ultimately lost twice at the District Court, three times at the Third Circuit Court of Appeals, and once at the Supreme Court when certiorari was denied in 2014. The state only prevailed in its final effort. Holden & Edelman, *A Short Treatise*, *supra* note 6, at 929–33.

<sup>126</sup> 573 U.S. 931 (2014).

<sup>127</sup> See Ryan Rodenbergh, *Noel Francisco could play role in future of nationwide sports betting*, ESPN (Mar. 7, 2017), [https://www.espn.com/chalk/story/\\_/id/18850678/noel-francisco-confirmed-solicitor-general-weigh-new-jersey-sports-betting-case](https://www.espn.com/chalk/story/_/id/18850678/noel-francisco-confirmed-solicitor-general-weigh-new-jersey-sports-betting-case).

<sup>128</sup> Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support from The Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROC. 209, 212 (2009) (describing process of issuance of CVSG).

<sup>129</sup> *Id.*

<sup>130</sup> See Dustin Gouker, *No Go for NJ Sports Betting Case? Solicitor General Tells SCOTUS To Deny Appeal*, LEGAL SPORTS REP. (May 24, 2017), <https://www.legalsportsreport.com/14125/scotus-new-jersey-sports-betting-case/>

<sup>131</sup> *Christie v. NCAA*, 584 U.S. \_\_\_, 137 S. Ct. 2327 (2017) (citing 505 U.S. 144 (1992)).

Predicting the outcome of a Supreme Court case based on the oral argument before the Court is a bold undertaking. Justices whose comments suggest a particular viewpoint may surprise when the case is decided.<sup>132</sup> Thus, lawyers should be wary of reading too much into the colloquy between the Bench and the attorney.<sup>133</sup>

The oral argument in *Murphy* belies that caution. Questions from the Bench were heavily weighted against the constitutionality of PASPA, and commentators noted that fact.<sup>134</sup> When the decision was released on May 14, 2018, the antipathy toward PASPA expressed by the Justices during the case's oral argument was reflected in the outcome and the Court's opinion.<sup>135</sup>

Justice Alito's opinion for the Court was an emphatic takedown of PASPA.<sup>136</sup> Seven Justices voted in favor of invalidating section 3702 of PASPA on the basis that it in fact commandeered states.<sup>137</sup> Six Justices also found section 3703 invalid, with Justice Breyer parting ways with the majority on that point. Justices Sotomayor and Ginsburg dissented.<sup>138</sup>

The Court described anticommandeering as a “fundamental structural decision incorporated into the Constitution”<sup>139</sup>— one that withholds “from Congress the power to issue orders directly to the states.”<sup>140</sup> Though the term itself might “sound arcane,”<sup>141</sup> it simply expressed the limits on Congress's power and the power reserved to the states in the Tenth Amendment.<sup>142</sup> Moreover, it was a “structural protection of liberty” for individuals.<sup>143</sup> The opinion also stressed the role the anti-commandeering doctrine played in promoting political accountability,<sup>144</sup> and preventing the federal government from shifting regulatory costs to the states.<sup>145</sup>

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<sup>132</sup> See *Recent Rulings Show How Hard It Is to Predict High-Profile Court Decisions*, NPR (June 29, 2012) <https://www.npr.org/sections/itsallpolitics/2012/06/28/155925331/recent-rulings-show-how-hard-it-is-to-predict-high-profile-court-decisions>.

<sup>133</sup> See Colter Paulson, *Predicting Outcomes Based On Questioning at Oral Argument*, SIXTH CIRCUIT APPELLATE BLOG (August 28, 2012), <https://www.sixthcircuitappellateblog.com/news-and-analysis/predicting-outcomes-based-on-questioning-at-oral-argument/>; Amanda Frost, *Academic highlight: Jacobi & Rozema on predicting outcomes based on interruptions at oral argument*, SCOTUSBLOG (Dec 18, 2017), <https://www.scotusblog.com/2017/12/academic-highlight-jacobi-rozema-predicting-outcomes-based-interruptions-oral-argument/>.

<sup>134</sup> See Ilya Somin, *Place your bets on federalism — thoughts on today's oral argument in Christie v. NCAA*, WASH. POST (Dec. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/12/04/place-your-bets-on-federalism-thoughts-on-todays-oral-argument-in-christie-v-ncaa/> (opining that “oral argument reveals that most of the justices don't buy this attempt to circumvent the constitutional rule against commandeering”).

<sup>135</sup> *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>136</sup> See *id.* at 1481 (noting “there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”).

<sup>137</sup> *Id.* at 1468.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1475.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1476.

<sup>143</sup> *Id.* at 1477.

<sup>144</sup> “When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.” *Id.*

<sup>145</sup> “If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.” *Id.*

The core of the Court’s opinion is its analysis of *New York v. United States*,<sup>146</sup> and *Printz v. United States*,<sup>147</sup> the only two cases where the Court had struck down a federal statute using the anticommandeering principle.<sup>148</sup> In both cases, Congress gave states a direct order to take action that promoted a federal policy.<sup>149</sup> PASPA, the leagues, and the government had argued, gave no such instruction. Rather, it simply *prohibited* states from licensing or authorizing sports betting.<sup>150</sup> However, Justice Alito’s opinion swept away any distinction between a “command” and a “prohibition,” calling that distinction “empty.”<sup>151</sup>

## II. Regulating Sports Wagering in the Aftermath of *Murphy*

Since the Supreme Court’s ruling in *Murphy*, the growth of sports wagering in the U.S. has been nothing short of meteoric—with the Supreme Court ruling in favor of states’ rights ushering in the single greatest expansion of legalized gambling in our nation’s history.<sup>152</sup> Almost immediately upon the Supreme Court’s ruling in *Murphy*, the states of West Virginia and Delaware—based on their pre-*Murphy* actions—launched legalized and regulated sports wagering.<sup>153</sup> Very shortly thereafter, Rhode Island, Mississippi, Pennsylvania, and New Mexico joined them, as well as New Jersey, which ironically was not the first to act despite funding the Supreme Court lawsuit.<sup>154</sup>

At present, thirty-five states plus the District of Columbia have legalized some form of sports wagering, with sports wagering currently legal in most of the states along the northeastern corridor.<sup>155</sup> Many, but not all, of the states that have introduced legal and regulated sports betting allow for online sports betting through a website or mobile application—a form of sports betting that today represents eighty-five percent of all legal

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<sup>146</sup> 505 U.S. 144 (1992).

<sup>147</sup> 521 U.S. 898 (1997).

<sup>148</sup> See Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 364 (2020) (noting that *Murphy* differed from the two previous instances where the court observed impermissible commandeering, in that *Murphy* involved a prohibition, whereas *New York* and *Printz* commanded behavior”).

<sup>149</sup> In *New York*, the Court invalidated a federal law that required a State, under certain circumstances, either to “take title” to low-level radioactive waste or to “regulat[e] according to the instructions of Congress.” The “Constitution does not empower Congress to subject state governments to this type of instruction.” 505 U.S. at 176.

In *Printz*, the Court struck down a federal law that required state and local law enforcement officers to perform background checks on those who applied for handgun licenses. Congress may not “command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” 521 U.S. at 935.

<sup>150</sup> *Id.* at 1478. Respondents argued that commandeering occurred only when Congress “affirmatively commands” action by the state.

<sup>151</sup> *Murphy v. NCAA*, 138 S. Ct. 1481 (2018).

<sup>152</sup> See, e.g., *USA State Casinos*, ONLINE U.S. CASINOS, <https://www.onlineunitedstatescasinos.com/states/> (last visited June 10, 2022) (explaining the history of casino gambling began in 1822, but that by 1989, only three states had legalized it).

<sup>153</sup> See Eric Raskin, *One Casino Will Get the Jump on The Rest When Sports Betting Launches in West Virginia*, US BETS (Aug. 30, 2018), <https://www.usbets.com/west-virginia-hollywood-casino-sports-betting-launch/>.

<sup>154</sup> See Keith C. Miller, *Sports Betting Integrity at Risk: The Role of the Wire Act*, 61 SANTA CLARA L. REV. 247, 252 (2020). New Mexico did not legalize sports betting. The Pueblo of Santa Ana began operating a sportsbook, limited to on site betting, pursuant to a compact with the state of New Mexico which allowed “any or all forms of Class III Gaming.” John Holden, *So How Exactly Is New Mexico Sports Betting Legal, And What Does It Mean in Other States?* LEGAL SPORTS REP. (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/> (beginning operation on October 11, 2018).

<sup>155</sup> Sam McQuillan, *Where is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (July 6, 2022), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.



U.S. sports wagers.<sup>156</sup> Clearly, the concerns about the “public morals” of betting over the Internet that the Bush administration had raised with the WTO are now all but dead.<sup>157</sup>

Nevertheless, with the Wire Act continuing to disallow interstate sports gambling,<sup>158</sup> individual states have been forced to implement their own, independent regulatory schemes—leading to differences in the manner in which the sports wagering industry operates across states.<sup>159</sup> Under these individual state regulatory schemes, sports wagering has not proven profitable for the gaming operators in all states, nor has it even served as a meaningful source of tax revenue to the state itself.<sup>160</sup> In addition, the legalization of sports wagering has been complicated by the Indian Gaming Regulatory Act (IGRA), which sets forth the gaming relationship between federally recognized Indian tribes and states.<sup>161</sup> Under this act, if a state does not presently allow for casino gaming by commercial entities but allows for tribes to operate such gambling by compact, then the tribes within the state can make a reasonable argument that they should be entitled to a monopoly over sports wagering.<sup>162</sup> This has created challenges for the legalization of sports wagering in states such as California and Florida.<sup>163</sup>

#### A. *Models for Legalized Sports Wagering*

While thirty-five states plus the District of Columbia currently maintain some system of legalizing, taxing, and regulating sports wagering, there is great variance in the regulatory models that have been adopted and the underlying features of these models.<sup>164</sup> This part proceeds in three sections. Section A of this part provides an overview of the three primary models for regulating sports wagering that presently exists in the United States and their comparative successes and challenges. Section B includes a discussion of the various methods for licensing and taxing sports gambling operators today. Section C briefly examines the aspects of existing state gambling regulations that pertain to gambling integrity and consumer protection.

The primary distinction in the regulatory models that have been adopted for sports wagering relate to who serves as the principal regulatory agent. At present, most states fall into one of three broad models. The Nevada regulatory model—featuring a Gaming Control Board and a Gaming Commission overseeing all sports

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<sup>156</sup> See *Online wagering, engaged fans key to sports betting growth* S&P GLOBAL (Oct. 20, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/online-wagering-engaged-fans-key-to-sports-betting-growth-66575074>.

<sup>157</sup> This is not to say that there do not still remain moral concerns surrounding sports gambling. See, e.g., Matthew Walther, *The Sports-Betting Boom Is a Moral Disaster*, ATLANTIC (May 9, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/online-gambling-sports-betting/629790/> (questioning whether the cultural shift towards sports betting is positive).

<sup>158</sup> Interstate Wire Crime Act, 18 U.S.C. §§ 1801–04 (also known as the Fed. Wire Act, prohibiting certain types of gambling in the U.S.).

<sup>159</sup> See Holden, *Through the Wire Act*, *supra* note 45, at 723–25 (describing the questions lingering surrounding that Wire Act that have resulted in replication of procedures in each individual state).

<sup>160</sup> Andrew Bary, *Why Online Sports Gambling Companies May Never Earn Much Money*, BARRON'S (Sep. 9, 2021), <https://www.barrons.com/articles/why-online-sports-gambling-companies-may-never-earn-much-money-51631199769>.

<sup>161</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding the state has immunity under the 11<sup>th</sup> Amendment from suit in federal court; IGRA provision allowing tribe to sue state and obtain injunctive relief when state has not negotiated compact in good faith was unconstitutional).

<sup>162</sup> Dan Walters, *Will California's Indian Tribes Get a Monopoly on Sports Betting*, DESERT SUN (Aug. 29, 2021), <https://www.desertsun.com/story/opinion/columnists/2021/08/29/sports-betting-californias-indian-tribes-get-monopoly/5609662001/>.

<sup>163</sup> Grace Gedye, *California Sports Betting Initiative Backed by FanDuel, DraftKings Would Block Small Companies*, CAL MATTERS (Apr. 27, 2022), <https://calmatters.org/economy/2022/04/california-sports-betting-initiative-backed-by-fanduel-draft-kings-would-block-small-competitors/>.

<sup>164</sup> See McQuillan, *supra* note 155.

gambling activity—has long been described as the “Gold Standard” for regulating sports gambling activities.<sup>165</sup> Nevada first created its gambling control board in 1955.<sup>166</sup> In 1977, the state legislature declared that there was no implicit right for an entity to receive a gambling license, but only a revocable privilege to offer gambling.<sup>167</sup> With the reduction of the federal excise tax to a manageable .25 percent in 1982, sports betting flourished and emerged into an industry that saw more than \$5 billion wagered in 2018.<sup>168</sup>

The Nevada model has since been adopted by a number of other states including New Jersey, Pennsylvania, and Mississippi.<sup>169</sup> From a revenue perspective, New Jersey and Pennsylvania have done well with the Nevada model; however, Mississippi, which only allows for mobile sports betting on a casino site, has seen far less tax revenue generated.<sup>170</sup>

A second regulatory model, meanwhile, uses a state lottery as the primary regulatory agency.<sup>171</sup> The three states other than Nevada that operated sports betting products prior to the *Murphy* decision—Delaware, Montana, and Oregon—were all operated by state lotteries.<sup>172</sup> While states like Delaware had existing expertise and legislative delegation within their lottery corporations to oversee limited sports wagering products and thus were able to seemingly expand their sports betting offerings in the immediate aftermath of *Murphy*, other jurisdictions that adopted the state lottery model did not have quite as smooth a transition.<sup>173</sup> For example, the District of Columbia has seen returns significantly below expectations from its sports betting app, GambetDC.<sup>174</sup> In addition, the GambetDC product was mired in controversy, not only for the bid process that resulted in Intralot receiving the contract, but in the low payouts to consumers that likely resulted in many choosing alternatives, or not to bet, rather than use the lottery’s products.<sup>175</sup>

Tennessee also has seen problems with its rollout of sports wagering under the state lottery regulatory model.<sup>176</sup> In particular, it was revealed that one of the local companies approved for a license in Tennessee also happened to operate a payday lending business, and that company reportedly withheld winnings from pay-day lending clients who won wagers through the app.<sup>177</sup> The controversial approval of this particular licensee was followed by reported instances of rampant proxy betting on the same company’s app.<sup>178</sup> Compounding the situation, when the lottery moved to suspend this company’s license, a court overturned the suspension when it was revealed that the Tennessee lottery had failed to follow its procedures.<sup>179</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 U.N.L.V. GAMING L.J. 75, 76–77 (2020).

<sup>167</sup> *Id.* at 78.

<sup>168</sup> *Id.* at 79.

<sup>169</sup> Holden, *Regulating Sports Wagering*, *supra* note 1, at 598.

<sup>170</sup> Chris Altruda, *Legal US Sports Betting Revenue, Handle and Tax Totals Since PASPA Repeal*, SPORTSHANDLE (July 9, 2022), <https://sportshandle.com/sports-betting-revenue/>.

<sup>171</sup> Holden, *Regulating Sports Wagering*, *supra* note 1, at 600.

<sup>172</sup> *See id.* (noting that Montana, Oregon, and Delaware all used the lottery to regulate sports gambling.).

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

<sup>174</sup> Dominique Maria Bonessi, *D.C. Sports Betting Revenues Suffer from Pandemic, Lack of Mobile Wagering Options*, DCIST (Sep. 10, 2021), <https://dcist.com/story/21/09/10/d-c-sports-betting-revenues-suffer-from-pandemic-lack-of-mobile-wagering-options/>.

<sup>175</sup> Zauzmer Weil, *supra* note 27.

<sup>176</sup> Calvin McAlee, *Tennessee Sports Betting: Ranking the Top Sportsbook Apps 2022*, LINEUPS (June 28, 2022), <https://www.lineups.com/betting/tennessee-sports-betting/>.

<sup>177</sup> Matthew Waters, *Bill to Shake Up TN Sports Betting Regulation Passes Senate*, LEGAL SPORTS REP. (Apr. 26, 2021), <https://www.legalsportsreport.com/50895/bill-tn-sports-betting-regulation-senate/>.

<sup>178</sup> *Id.* Proxy betting involves a third-party placing wagers for someone, often the person having the third-party place wagers is outside the jurisdiction and therefore not able to bet. The practice is widely prohibited.

<sup>179</sup> *Id.*

The third dominant regulatory model for sports wagering, meanwhile, involves tribal governance, or shared governance with tribal authorities having oversight of sports wagering within their sphere of jurisdiction.<sup>180</sup> Several Native American tribes in New Mexico were amongst the first to launch sports betting, shortly after the *Murphy* decision.<sup>181</sup> Wagering on tribal land is governed by the 1998 Indian Gaming Regulatory Act (IGRA).<sup>182</sup> IGRA was the federal government's rapid response to the 1987 decision in *California v. Cabazon Band of Mission Indians*, which declared that state authorities lack the necessary authority to regulate gaming on tribal lands.<sup>183</sup> Following the passage of IGRA, states were obligated to negotiate in good faith with federally recognized tribes, if the tribes sought to offer certain types of gaming and enter into compacts, which were subject to approval by the Department of the Interior.<sup>184</sup> New Mexico tribes had entered into permissive compacts that allowed them to offer any legal Class III game, so when the *Murphy* decision allowed sports betting to expand beyond Nevada, New Mexico tribes were only a sportsbook partner away from being able to begin taking wagers.<sup>185</sup> While New Mexico tribes quickly launched in-person wagering, tribes in other jurisdictions aspired to compete on a broader scale by allowing mobile wagering.<sup>186</sup> As a result of uncertainty regarding whether IGRA permitted tribes to offer mobile wagering via compact, tribes in Michigan, Arizona, and Connecticut have agreed to terms with state regulators outside of the IGRA compacting process, which respects tribal sovereignty, and instead, the tribes have agreed to be taxed as commercial operators.<sup>187</sup> Federal efforts to expand mobile wagering under the IGRA compacting process failed in 2019 and 2021.<sup>188</sup>

In 2021, Governor Ron DeSantis and the Seminole Tribe of Florida entered into a compact that would have allowed the Seminole Tribe the exclusive ability to operate mobile sports wagering throughout Florida.<sup>189</sup> The first of its kind agreement was promised on a theory that IGRA allowed a tribe and states wide latitude to negotiate and come to terms on gaming.<sup>190</sup> The Florida compact, however, was challenged by several groups including West Flagler Associates, a group that operates pari-mutuel facilities in South Florida, and were required under the compact to negotiate with the Seminole Tribe if they desired to offer sports wagering.<sup>191</sup> After approval was deemed to occur following a 45-day lapse without rejection at the Department of the Interior, the Department issued a deemed approval letter, which included the finding that the Department of the Interior believes "evolving technology should not be an impediment to tribes participating in the gaming

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<sup>180</sup> *Id.* at 604–05.

<sup>181</sup> *Id.* at 605.

<sup>182</sup> 25 U.S.C. §§ 2701–21 (1988).

<sup>183</sup> 480 U.S. 202, 221–22 (1987); *see also* Holden, *Regulating Sports Wagering*, *supra* note 1, at 605.

<sup>184</sup> Randall K. Q. Akee, Katherine A. Spilde, & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECONOMIC PERSPECTIVES 185, 195 (2015).

<sup>185</sup> John Holden, *So How Exactly Is New Mexico Sports Betting Legal, And What Does It Mean in Other States?*, LEGAL SPORTS REP. (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/>.

<sup>186</sup> Matthew Kredell, *How Michigan Tribes Learned to Stop Worrying and Love Mobile Wagering*, PLAY MICHIGAN (July 30, 2020), <https://www.playmichigan.com/tribal-casinos-michigan-online-gambling-bay-mills/>.

<sup>187</sup> *Id.*

<sup>188</sup> The 2019 legislation was far more permissive than the 2021 legislation. The 2019 legislation would have allowed for tribes to be able to compact with states to offer mobile wagering, the 2021 extended mobile wagering only to tribal land, something that may or may not already be permitted by IGRA. *See* John Holden, *Analysis: New Federal Legislation Would Allow Mobile Sports Betting on Tribal Land*, LEGAL SPORTS REP. (July 26, 2021), <https://www.legalsportsreport.com/53956/analysis-federal-legislation-mobile-sports-betting-tribal-lands/>.

<sup>189</sup> Rebecca Turco & Troy Kinsey, *Florida Legislature Sends Seminole Tribe Gaming Compact to DeSantis*, SPECTRUM NEWS 13 (May 19, 2021), <https://www.mynews13.com/fl/orlando/news/2021/05/19/florida-senate-considers-gambling-compact-with-seminole-tribe>.

<sup>190</sup> *See* Gary Rotstein, *New Compact Grants Seminoles Clout in Florida, and That's Nothing New for Influential Tribe*, US BETS (Apr. 30, 2021), <https://www.usbets.com/new-compact-seminoles-clout-florida-influential-tribe/> (quoting law Professor Richard Jarvis who stated: "the federal court found that on Indian property the Indians could pretty much do whatever they wanted to...").

<sup>191</sup> *W. Flagler Assocs v. Haaland*, No. 21-CV-2192, 2021 U.S. Dist. LEXIS 225057 (D.D.C. Nov. 22, 2021).

industry.”<sup>192</sup> West Flagler Associates challenged the Department of Interior’s deemed approval arguing that the Department had an obligation under IGRA to reject the compact as incompatible with federal law.<sup>193</sup> The D.C. District Court ultimately agreed with West Flagler Associates holding that the compact violates IGRA’s provision that gaming must take place on “Indian lands,” and because mobile wagering does not take place exclusively on tribal land the Secretary had an “affirmative duty to reject” the compact.<sup>194</sup> Tribal gaming regulation has played a growing role as many states that have been later adopters of legalized sports wagering have done so as a result of the need to re-negotiate tribal compacts.<sup>195</sup> Indeed, California’s future regulation of sports betting is very likely to depend on tribal governments to play a role in regulation.<sup>196</sup>

Ultimately, the model a state uses for regulating sports betting, to a large degree, will be dictated by its historic structure for regulating gambling generally. In states where Indian tribes operate casinos, sports betting could be another form of Class III gaming offered by the tribal casino, subject to the terms of the compact the tribe negotiates with the state.<sup>197</sup> For example, in Connecticut commercial casinos are not permitted and all Class III gaming is offered by two Indian tribes with which the state has entered compacts.<sup>198</sup> Those compacts were amended in 2021 to allow the tribes to offer sports betting regulated by the state Department of Consumer Protection Gaming Division.<sup>199</sup> This is the path Florida and California will need to follow to open those massive sports betting markets. Consequently, regulation of sports betting in this fashion is not as much of a path chosen as one required by history.

State lotteries may have considerable power, especially in states without commercial casinos. However, a model placing oversight and regulatory authority over sports betting in a state lottery has no apparent benefits. On balance, allocating authority over sports betting to an existing gaming regulator is likely to be the most efficient. Concerns about agency capture in the regulation of sports betting, nevertheless, are legitimate. Although often referred to as being the “gold standard” of regulation, Nevada regulators have been criticized for their lack of transparency in handling allegations of sexual misconduct of a licensee,<sup>200</sup> and in not disclosing potential

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<sup>192</sup> Letter from Principal Deputy Assistant Secretary Department of the Interior, Bryan Newland to Chairman of the Seminole Tribe of Florida Marcellus Osceola Jr. (Aug. 6, 2021), *available at*: [https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/gaming\\_compacts/508%20Compliant%202021.08.06%20Seminole%20Tribe%20Compact%20Letter%20to%20Tribe.pdf](https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/gaming_compacts/508%20Compliant%202021.08.06%20Seminole%20Tribe%20Compact%20Letter%20to%20Tribe.pdf).

<sup>193</sup> *W. Flagler Assocs v. Haaland*, No. 21-CV-2192, 2021 U.S. Dist. LEXIS 225057 (D.D.C. Nov. 22, 2021).

<sup>194</sup> *Id.*

<sup>195</sup> Heidi McNeil Staudenmaier & Paloma Diaz, *What’s in The Cards for Tribal Sports Betting in 2021 and Beyond?*, 7 GAMING L. REV. 287, 288–92 (2021).

<sup>196</sup> The 2022 November election has two competing ballot initiatives that would bring sports wagering to California, one is supported by many of the state’s tribes, the other is backed by out of state gaming operators. Dan Walters, *Will California Voters Approve Betting on Sports*, CAL MATTERS (May 18, 2022), <https://calmatters.org/commentary/2022/05/will-california-voters-approve-betting-on-sports/>. One thing that remains to be seen is even if the tribal-backed initiative fails and the commercial operator-backed initiatives are the winners, the tribes may argue that IGRA requires the state to enter into negotiations with them. *See* 25 USC § 2710(7)(A) (1988) (noting a state’s obligation to enter into good faith negotiations upon request by federal recognized tribes).

<sup>197</sup> Any form of gambling offered by tribes other than bingo and similar games can only be offered pursuant to a tribal-state compact. 25 U.S.C. §§ 2701–21 (2009).

<sup>198</sup> *See* 12 CONN. GEN. STAT. § 12-851 (2022) (describing the process for Governor entering contracts with the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut).

<sup>199</sup> *Governor Lamont, Mashantucket Pequot Tribe, and Mohegan Tribe Announce Federal Approval of Revisions to Gaming Compacts*, GOV. NED LAMONT (Sep. 9, 2021), *available at*: <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/09-2021/Governor-Lamont-Announce-Federal-Approval-of-Revisions-To-Gaming-Compacts>.

<sup>200</sup> *See* Richard Schuetz, *Captured or Broken?*, GGB NEWS (Mar. 15, 2022), <https://ggbnews.com/article/captured-or-broken/>.

conflicts of interest.<sup>201</sup> Under any model of regulation, administrators must always be sensitive to perceptions of excessive outside influence.

### B. *Tax Rates and Licensing Mechanisms*

In addition to the disparate systems for determining who oversees sports wagering, there is large diversity on the state level between tax rates and how third-party operators are licensed.<sup>202</sup> While the federal government charges a quarter of a percent of the total amount of money wagered,<sup>203</sup> there is a significant variation in state tax rates ranging from 6.75 percent in Nevada and Iowa to fifty-one percent in New Hampshire, Delaware, and New York.<sup>204</sup> Licensing fees also vary across the country ranging from \$500 in Nevada to \$20 million for an online-only license in Illinois.<sup>205</sup> The disparate tax and licensing regimes around the country come with different privileges. Because operators in Iowa have a tax rate of 6.75 percent and licensing fees of only \$45,000, the state's companies have significant competition when Iowa has issued over eighteen licenses.<sup>206</sup> By contrast, in Rhode Island, the state awarded a monopoly over online sports betting to William Hill in exchange for a fifty-one percent share of the revenue.<sup>207</sup> States with higher tax rates have generally seen more tax revenue, though some states have seen their potential revenue depleted via deductions for customer promotions including free bets.<sup>208</sup>

No state has generated as much attention for its licensing and tax regime as New York.<sup>209</sup> New York held a blind bidding process where sports betting operators submitted bids where they offered the highest tax rate that they would be willing to pay.<sup>210</sup> After the top bid won—sixty-four percent of gross gaming revenue—the state issued a matrix with a declining tax rate based on the number of operators in the market.<sup>211</sup> The tax rate would be set at sixty-four percent with no deductions for promotions<sup>212</sup> allowed if there were only four or

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<sup>201</sup> See Richard Schuetz, *Message from a Small Town*, GGB NEWS (Feb. 9, 2022), <https://ggbnews.com/article/message-from-a-small-town/>.

<sup>202</sup> See generally, Steve Ruddock, *Sports Betting Tax Rates and Licensing Fees*, BETTINGUSA, <https://www.bettingusa.com/sports/taxes-and-licenses/> (last visited July 1, 2022) (listing the various state tax rates and licensing fees).

<sup>203</sup> The federal government first imposed a ten percent tax on the handle in 1951, this was lowered to two percent in 1974, before reaching the current rate in the 1982. See Schwartz, *supra* note 41; Harris, *supra* note 166, at 79.

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

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

<sup>206</sup> *Sports Wagering Operators*, IOWA RACING & GAMING COMM'N, <https://irgc.iowa.gov/licensing-information/sports-wagering-operators> (last visited July 1, 2022).

<sup>207</sup> *Rhode Island Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/ri/> (last visited July 1, 2022). See also Ruddock, *supra* note 202.

<sup>208</sup> See Holden & Kisska-Schulze, *supra* note 26, at 899 (citing Colorado as a state that allows uncapped deductions for promotions including free bets).

<sup>209</sup> See, e.g., Sara Dorn, *New Bill Would Cut New York's Mobile Sports Betting Tax Rate in Half*, CITY & STATE (Mar. 10, 2022), <https://www.cityandstateny.com/policy/2022/03/new-bill-would-cut-new-yorks-mobile-sports-betting-tax-rate-half/363040/> (noting that within the first year of legal mobile sports betting efforts have been made to lower the tax rate for sports betting operators).

<sup>210</sup> Matthew Waters, *Who Bid Top Tax Rate for A Mobile NY Sports Betting License?*, LEGAL SPORTS REP. (Oct. 20, 2021), <https://www.legalsportsreport.com/58212/mobile-ny-sports-betting-license-top-tax-rate/>.

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

<sup>212</sup> Deductions for promotions has been one of the most controversial aspects of the legalized market, as companies spend to acquire customers, states with unlimited deductions have seen tax revenue cut by significant amounts. For instance, in June 2022, one online sportsbook operator in Michigan had a handle of more than \$81 million, which resulted in revenue of more than \$6 million, whereas the state of Michigan received only \$142,555 in tax revenue. Still another company had a handle of more than \$70 million and revenue of more than \$1.7 million and they paid zero dollars to the state in taxes. See *Michigan Sports Betting Revenue*, PLAY MICHIGAN, <https://www.playmichigan.com/sports->

five operators allowed into the market, declining to thirty-five percent if thirteen or more operators were selected.<sup>213</sup> The state received bids that would have provided for a total of fourteen operators;<sup>214</sup> however, after scoring, the bids settled on nine operators.<sup>215</sup> In six months, New York had surpassed the tax revenue generated by every other state, regardless of when those states had launched sports betting post-*Murphy*.<sup>216</sup>

Yet, despite New York's success, not all subsequent states have attempted to implement a high tax rate. Kansas, for instance, imposed a modest ten percent tax and noted that it hoped to generate only between \$1 and \$5 million in tax revenue.<sup>217</sup> Uniquely, Kansas announced its goal to use sports betting revenue to attract a professional sports franchise to the state.<sup>218</sup>

### C. *Gambling Integrity and Consumer Protection Mechanisms*

Not only do individual states differ from one another in terms of their models for regulatory oversight and raising revenue through licenses and taxation, but they also differ in terms of their procedures for maintaining gambling integrity and ensuring consumer protection. The approaches taken to both market integrity and consumer protection differ from state to state on a continuum from restrictive to permissive.<sup>219</sup> While the most basic level of maintaining market integrity and consumer protection is licensing, there are variations in states regarding which suppliers need to be licensed.<sup>220</sup> For instance, in Illinois, even a person who repairs certain technology products must be licensed.<sup>221</sup> Tiered licensing is another common feature, with different states choosing which stakeholders require which level of licensure.<sup>222</sup> Colorado, for instance, has major licenses for the betting operators, and then requires only minor licenses for those supporting the operation as outside contractors.<sup>223</sup>

States also differ with regard to how they regulate market integrity. A great number of states have chosen to prohibit wagering on in-state college teams, or collegiate sports altogether, in the name of integrity.<sup>224</sup> Many states also have mandated the use of so-called official league data—adopting a false narrative promoted by sports-league lobbyists who, in the absence of traditional property rights over gathering game statistics, are

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betting/revenue/ (last visited July 25, 2022). Virginia is one of a several states that have amended or have considered amending the amount that companies can deduct in promotional credits. Devin O'Connor, *Virginia Sports Betting Tax Regulations Reworked to Include Promo Play*, CASINO (July 25, 2022), <https://www.casino.org/news/virginia-sports-betting-regulations-reworked-promotional-credits-subject-tax/>.

<sup>213</sup> Waters, *supra* note 210.

<sup>214</sup> *Id.*

<sup>215</sup> Chris Bengel, *New York Gaming Commission Awards Licenses for Nine Sportsbooks*, CBS SPORTS (Nov. 8, 2021), <https://www.cbssports.com/general/news/new-york-gaming-commission-awards-licenses-for-nine-sportsbooks/>.

<sup>216</sup> James O'Donnell, *New York Tops Nation in Sports Betting Tax Revenue as Promotions Taper*, CRAIN'S N.Y. BUS. (June 2, 2022), <https://www.crainsnewyork.com/politics/new-york-tops-nation-sports-betting-tax-revenue-promotions-taper#:~:text=Kathy%20Hochul%20has%20announced.,legalized%20sports%20betting%20for%20years>.

<sup>217</sup> John Holden, *Opinion: Welcome to Kansas, the New Las Vegas of Sports Betting*, LEGAL SPORTS REP. (May 20, 2022), <https://www.legalsportsreport.com/70176/welcome-to-kansas-new-las-vegas-of-sports-betting/>.

<sup>218</sup> *Id.*

<sup>219</sup> See, e.g., Scott Sherer & Melissa Thevenot, *The Common Denominators of U.S. Sports Betting Regulation and Those States Swimming Against the Tide*, NV BAR (Sept. 2020), <https://nvbar.org/wp-content/uploads/12-Common-Denominators.pdf>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., Becky Harris & John T. Holden, *Reshaping College Athlete Sports Betting Education*, 47 BYU L. REV. 389, 420–25 (2022). In fact, by not allowing wagering on in-state teams, legislators are creating an opportunity for the unregulated market to take those bets, while the regulated market wants to detect match-fixing, the unregulated has different incentives. Jill Dorson, *What's the Point of Banning Betting on In-State Teams*, SPORTSHANDLE (Apr. 6, 2020), <https://sportshandle.com/why-ban-college-sports-betting/>.

looking for a means to profit directly from the legalization of sports gambling.<sup>225</sup> Official league data is simply data that is provided by an official sports league authorized provider, of which there are a small number.<sup>226</sup>

While states have taken some misguided steps with respect to limiting the market to sell collected and aggregated game data, all states work to protect market integrity by restricting certain types of wagers that might be easily manipulated.<sup>227</sup> For instance, a number of states disallow certain proposition wagers such as wagering on whether an injury will occur.<sup>228</sup> States also restrict which individuals are allowed to participate in the market. For instance, New Jersey disallows anyone owning more than a ten percent stake in a sports team from placing a wager on a game from the associated league.<sup>229</sup> Other individuals commonly excluded by state regulations include those likely to have insider information or the ability to impact the outcome of a contest.<sup>230</sup>

From a consumer protection standpoint, there seems to be widespread agreement that the emerging market has not done enough to protect those with problem gambling tendencies.<sup>231</sup> Many states have opted to set the age limit for wagering at 21; however, several states including Rhode Island, New Hampshire, and Washington D.C. allow players to wager at 18.<sup>232</sup>

States also have taken varied approaches to what is necessary to create a sports betting account. While some states allow bettors the ability to simply pull out their phone, take a photo of their driver's license or passport, provide a social security number or tax id, and connect a bank account or credit card from the comfort of their own homes, other states, like Nevada, require individuals to present themselves in person and have their information verified by a sportsbook employee.<sup>233</sup> While some states like Illinois began with in-person verification required, pandemic necessity resulted in a change, which was later permanently adopted allowing consumers to verify their identity without presenting themselves physically at a casino.<sup>234</sup>

Another common area where there is a dichotomy in regulation is with regards to the allowance for use of credit cards.<sup>235</sup> Many states have chosen to allow customers the convenience of funding accounts with credit cards, however, others like Iowa and Tennessee require customers to use other means of funding their accounts.<sup>236</sup> The concern about allowing gamblers to fund their accounts using credit cards is the prospect of some problem gamblers betting on margin.

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<sup>225</sup> John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31, 35 (2019).

<sup>226</sup> *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> (last visited July 19, 2022).

<sup>227</sup> Sherer & Thevenot, *supra* note 219.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Marie Fazio, *It's Easy (and Legal) to Bet on Sports. Do Young Adults Know the Risks?*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/sports/sports-betting-addiction.html>.

<sup>232</sup> Sherer & Thevenot, *supra* note 219.

<sup>233</sup> *Id.*

<sup>234</sup> Robert Channick, *Illinois Ends In-Person Registration Requirements for Sports Betting, Opening Floodgates for Online Sportsbooks Ahead of March Madness*, CHI. TRIBUNE (Mar. 5, 2022), <https://www.chicagotribune.com/business/ct-biz-sports-betting-online-registration-illinois-20220305-jwp53ipj5be5thw6i3b7ahpefi-story.html>.

<sup>235</sup> Sherer & Thevenot, *supra* note 219.

<sup>236</sup> *Id.*

While the success of each sports wagering market is at least partially dictated by its regulatory structure, it remains to be seen if the successful structures that individual states have adopted will continue to be successful over time.<sup>237</sup> The following Part of this Article details and evaluates the current sports wagering market.

### III. Overview and Evaluation of the U.S. Sports Wagering Market Today

The current hodge-podge of state laws that have regulated sports wagering in the aftermath of *Murphy* leads to great differentiation on a state-by-state basis; yet, at the same time, there is undoubtedly something that can reasonably be described as a singular sports betting business market in the United States, with various characteristics that arise from the interaction of this amalgamation of ununified state laws. Today, more than four years after the Supreme Court's decision in *Murphy*, this emergent market for sports wagering can be evaluated in several different ways. Section A of this part looks at the current sports wagering market in terms of its structure and size. Section B explores the market's actors. Section C looks at the state of competition within the U.S. wagering market. Section D looks at the market's failures.

#### A. Sports Wagering Market Structure and Size

In the time since the Supreme Court's decision in *Murphy*, sports betting has transformed from an activity that was primarily enjoyed either in the state of Nevada or illegally into an activity that is legal and regulated in a majority of U.S. states.<sup>238</sup> The marketplace also has seen a rapid consolidation, where companies have engaged in an advertising arms race, effectively outspending less well-resourced competitors to the point that they concede that they cannot compete with bigger brands.<sup>239</sup>

The discussion surrounding sports betting financials has long caused confusion due to the common conflation of the total amount wagered, or the "handle," and gross gaming revenue, also known as the amount of money kept by sportsbooks.<sup>240</sup> While the handle of sports wagering in the United States in the four years post-*Murphy* has been significant (roughly \$135 billion at the time of writing), the gross gaming revenue has been far lower.<sup>241</sup> The 7.1 percent nationwide hold rate may even be slightly inflated, as historically sportsbooks have managed to hold onto only about five percent of the total amount of money that is wagered, this suggests that the industry could see the hold rate regress to the mean.<sup>242</sup> Even with legal wagering, it is widely believed that the amount of money being wagered in unregulated markets far exceeds the regulated market.<sup>243</sup> Towards

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<sup>237</sup> For instance, while New York has been incredibly successful in generating revenue from high tax rates, there are questions if the approach is sustainable. Brad Allen, *Can NY Sports Betting Ops Solve Profit Problem They Helped Create*, LEGAL SPORTS REP. (June 1, 2022), <https://www.legalsportsreport.com/70547/will-ny-sports-betting-ever-make-any-money/>.

<sup>238</sup> While there is some variability on just what gambling activities are illegal depending on the state, it can be safely assumed that the vast majority of gambling activity prior to the *Murphy* decision took place illegally. See Chuck Humphrey, *State Gambling Law Summary*, GAMBLING LAW US (Sep. 30, 2007), <http://www.gambling-law-us.com/State-Law-Summary/>.

<sup>239</sup> See Colton Lochhead, *Consolidation in Sports Betting Operations Unlikely to Slow Down*, LAS VEGAS REV. J. (Oct. 4, 2021), <https://www.reviewjournal.com/business/casinos-gaming/consolidation-in-sports-betting-operations-unlikely-to-slow-down-2452755/> (noting that companies are looking for ways to increase market share and consolidations allow access to customer databases of former competitors).

<sup>240</sup> *Sports Betting Handle vs. Revenue*, LINES, <https://www.thelines.com/sports-betting-handle-revenue/> (last visited June 24, 2022).

<sup>241</sup> *US Sports Betting Revenue and Handle*, *supra* note 18.

<sup>242</sup> *Id.* Nevada, which may be the best proxy, had a 5.6 percent rate between 1984 and 2021. See NEVADA SPORTS BETTING TOTALS, UNLV CTR. FOR GAMING RESEARCH (Feb. 2022), [https://gaming.library.unlv.edu/reports/NV\\_sportsbetting.pdf](https://gaming.library.unlv.edu/reports/NV_sportsbetting.pdf).

<sup>243</sup> Ryan Butler, *Despite Growth, Legal Sports Betting Still Just Fraction of Illegal Market*, ACTION NETWORK (Dec. 11, 2021), <https://www.actionnetwork.com/general/despite-growth-legal-sports-betting-still-just-fraction-of-illegal-market>.



the end of 2021, it was estimated that the regulated U.S. market was merely eight percent of the size of the unregulated market serving U.S.-based consumers.<sup>244</sup>

As the states' sports wagering markets mature, it is expected that hold percentages will regress towards the mean.<sup>245</sup> This may be explained by bettors' initial attraction to lottery-esque types of wagers that rarely pay off, before becoming more conservative with their bets over time.<sup>246</sup> The regression in the amount of money that sportsbooks keep will result in less state-imposed tax income based on revenue, as opposed to the handle.<sup>247</sup> The taxation of sports betting operators has been one of the most prominent features of the legalization of sports betting.<sup>248</sup> While some states have followed the lead of Nevada and New Jersey by passing laws with tax rates below ten percent in hopes of creating a robust and competitive market, other states like Rhode Island and Delaware sold monopolies for a fifty-one percent share of gross gaming revenue,<sup>249</sup> and the District of Columbia sold a monopoly for fifty-seven and a half percent minus direct operating costs incurred by the operator.<sup>250</sup> Meanwhile, New York has attempted to garner the best of both worlds by instituting a fifty-one percent tax rate while also granting licenses to nine companies—a far cry from monopoly or oligopoly.<sup>251</sup>

In addition to taxes, states have taken varying approaches to both the rate of licensing fees and the frequency with which operators must renew them.<sup>252</sup> While some states have sought to maximize revenue through the legalizing of sports betting, other states have touted the objective of recapturing at least some of the money being wagered in unregulated markets.<sup>253</sup>

Reducing the size of the unregulated, often illegal, market has been an ambition of U.S. authorities since at least the 1950s when the federal government began to examine ways to disrupt organized crime's gambling operations.<sup>254</sup> It was during this era—prior to the passage of the Wire Act—<sup>255</sup> that the government began attaching estimates to the size of the illegal gambling market and initially pegged an annual value between

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<sup>244</sup> *Id.*

<sup>245</sup> See *US Sports Betting Revenue and Handle*, *supra* note 18.

<sup>246</sup> Wagers like parlays, which involve selecting multiple events and needing to be correct on all selected events, as well as teasers, which offer better odds, but again involve multiple events, are often popular with novice sports bettors, however, the increased number of events that the bettor needs to correctly predict weights the odds much more in the sportsbook's favor than a traditional wager on a single event. See Josh Applebaum, *Sports Betting 101: Should You Bet Parlays and Teasers (Spoiler: No)*, VSIN (Apr. 5, 2020), <https://www.vsin.com/sports-betting-101-should-you-bet-parlays-and-teasers-spoiler-no/>.

<sup>247</sup> John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 AM. U. L. REV. 845, 896 (2022).

<sup>248</sup> See *id.*, at 896–97 (discussing various approaches to taxation).

<sup>249</sup> For the various taxation rates see Ulrik Boesen, *Large Spread in Tax Treatment of Sports Betting Operators*, TAX FOUNDATION (Feb. 9, 2022), <https://taxfoundation.org/sports-betting-tax-treatment/>.

<sup>250</sup> Gregory Woods & Toya Harris, *D.C. Sports Gambling Fails to Meet Expectations*, OFFICE OF THE D.C. AUDITOR (Sep. 9, 2021), <https://zd4l62ki6k620lqb52h9ldm1-wpengine.netdna-ssl.com/wp-content/uploads/2021/09/GambetDC.Report.9.9.21.pdf>.

<sup>251</sup> Mike Mazzeo, *Cuomo Spokesman Blasts Critics As New York Claims Online Sports Betting Tax Revenue Record*, PLAYNY (May 24, 2022), <https://www.playny.com/cuomo-spokesman-blasts-critics-of-sports-betting-tax-rate/>.

<sup>252</sup> See Jackson Brainerd, *The Early Bets Are In: Is Sports Betting Paying Off?*, NAT'L COUNCIL OF STATE LEGISLATURES (Mar. 1, 2021), <https://www.ncsl.org/research/fiscal-policy/the-early-bets-are-in-is-sports-betting-paying-off.aspx>. (noting a range of licensing fees from \$1,000 to \$20 million). New York, however, tops the list with a one-time license fee of \$25 million. See Dan Holmes, *New York Sports Betting Bill Would Increase Number of Mobile Operators to 16*, NY SPORTSDAY (Mar. 5, 2022), <https://www.nysportsday.com/2022/03/05/new-york-sports-betting-bill-would-expand-number-of-mobile-operators/#:~:text=The%20tax%20rate%20is%20currently,sports%20betting%20in%20New%20York>.

<sup>253</sup> See *id.* (observing “Higher rates may better maximize state revenues; however, some states have pursued low rates to help ensure that legal sports betting products will be priced competitively with illegal market products and thus encourage more gamblers to leave the black market.”).

<sup>254</sup> See generally, Holden, *Through the Wire Act*, *supra* note 45, at 692–712 (2020) (describing the legislative history and evolution of the Wire Act).

<sup>255</sup> 18 U.S.C. §§ 1081–1084 (commonly known as the Wire Act, prohibiting certain types of gambling in the U.S.).

\$1 billion and \$8 billion.<sup>256</sup> That number remained relatively consistent for at least a decade.<sup>257</sup> Yet, by 1999, the estimated size of the illegal market had grown to between \$80 and \$380 billion.<sup>258</sup> With the rise of the regulated market in the United States, the government expended effort to temper the estimated size of the unregulated market, perhaps to manage expectations for the regulated market.<sup>259</sup> The most commonly cited figure for the size of illegal sports betting in the era of widespread legal betting is \$150 billion, though that remains largely a best guess.<sup>260</sup> Regardless of actual size, government regulation has long aimed to bring at least a portion of the money being wagered back to a market where it can be taxed.<sup>261</sup>

Targeting the offshore market is a popular political position. Not only does it stop untaxed activity, but it also suggests that new revenue can be generated.<sup>262</sup> The unregulated market, nevertheless, has some built-in advantages over the regulated market, perhaps the most prominent of which is the longevity of existing relationships, the first online gambling sites that emerged in 1996, and relationships.<sup>263</sup> In addition, there is the convenience factor of many unregulated gambling systems operating on a credit-based system—something generally disapproved of by regulators in regulated markets.<sup>264</sup> Meanwhile, yet another factor that may contribute to the continued success of the unregulated market is pricing. Unregulated sportsbooks that do not have to worry about taxation can, in theory, offer bettors more attractive pricing because they maintain a greater share of the revenue.<sup>265</sup> Perhaps more than anything, despite efforts to vilify unregulated operators, many of the unregulated companies have well-established brand names and high brand equity with long-time gamblers.<sup>266</sup> While it may be an aspiration to recapture money from the unregulated market, the costs of totally eradicating the illegal competition are simply too high.<sup>267</sup>

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<sup>256</sup> *Id.* at 679. See also SCHWARTZ, *supra* note 41, at 47–48 (describing the estimated size of the market and that illegal gambling was expected to increase following return home of troops from World War II).

<sup>257</sup> *Congress Urged to Act on Crime*, N.Y. TIMES, at 8 (May 18, 1961); see also Holden, *Through the Wire Act*, *supra* note 45, at 707.

<sup>258</sup> See NAT'L GAMBLING IMPACT STUDY COMM'N *supra* note 2.

<sup>259</sup> The size of the illegal market is an inherently difficult thing to measure, however, the large estimate undoubtedly played an important role in capturing the attention of politicians considering legalization of sports betting. See Jay L. Zagorsky, *Market for Illegal Sports Betting in US is Not Really a \$150 Billion Business*, CONVERSATION (May 14, 2018), <https://theconversation.com/market-for-illegal-sports-betting-in-us-is-not-really-a-150-billion-business-96618>.

<sup>260</sup> Alex Sherman, *Legal Gambling from Your Phone Could Be A \$150 Billion Market, Making It Happen Will Be Tough*, CNBC (Apr. 27, 2019), <https://www.cnbc.com/2019/04/27/fanduel-draftkings-race-to-win-150-billion-sports-betting-market.html>.

<sup>261</sup> See generally, Steven G. Koven & Thomas S. Lyons, *Is Gambling a Good Economic Development Bet?*, INT'L CITY MANAGERS ASS'N (Aug. 4, 2010) (describing the economic consequences of legal and illegal gambling).

<sup>262</sup> Holden, *Regulating Sports Wagering*, *supra* note 1, at 598.

<sup>263</sup> Intertops is often cited as the first online sportsbook, launching in 1996. The first online sports bet was reportedly placed on the Tottenham Hotspur to defeat Hereford United on January 17, 1996. See *How Intertops Got Things Started*, GAMBLINGSITES.ORG, <https://www.gamblingsites.org/history/intertops/> (last visited June 29, 2022).

<sup>264</sup> See Andrew J. Silver, *Legal Sports Betting Still Faces Competition from Illegal Market; Low State Taxes Could Turn the Tide*, FORBES (Apr. 7, 2020), <https://www.forbes.com/sites/andrewsilver/2020/04/07/legal-sports-betting-still-faces-competition-from-illegal-market-low-state-taxes-could-turn-the-tide/?sh=59b8b0d823e3> (quoting ESPN sports betting writer David Purdum “the biggest advantage of the underground bookmaking market has in my opinion is credit.”). See also Brett Smiley, *Q&A: Here's How a Local Bookie Really Operates: Myths and Reality*, SPORTSHANDLE (Feb. 28, 2019), <https://sportshandle.com/how-local-bookie-works-operates-myths-reality-interview/> (describing how a local bookie chooses to extend credit to customers).

<sup>265</sup> *Id.*

<sup>266</sup> Allen, *supra* note 21.

<sup>267</sup> Large-scale gambling investigations can be incredibly costly, and in recent years have rarely resulted in significant jail time. In an era where there are limited law enforcement resources, gambling offenses, unconnected from organized crime, typically rank as lower-level priorities. See John Holden, *Breaking Down The Rise and Fall of Legendz Sportsbook, Part II*, Legal Sports Rep. (Aug. 1, 2019), <https://www.legalsportsreport.com/32871/legendz-sportsbook-sports-betting-2/> (citing the trial of a group that operated a sports betting ring with an alleged handle of approximately \$1 billion resulting in a jury

## B. *The Market Actors*

While the regulators create the shape of the market, the operators are the ones who ultimately serve the gambling consumers. The regulated U.S. sports betting market's first four years have been highlighted by a rapid consolidation around a handful of well-known major brands.<sup>268</sup> The most dominant brands in the market are two companies, FanDuel and DraftKings, that gained a head start by building customer lists around DFS products—sometimes even in markets where DFS was arguably illegal—while biding time for sports betting to become legal.<sup>269</sup> The existing customer lists, and hundreds of millions of dollars on advertising, undoubtedly created a brand awareness that other companies could not replicate when they sought to enter the U.S. market beyond Nevada following May 14, 2018.<sup>270</sup>

Immediately behind FanDuel and DraftKings in the emergent sports wagering market are a series of legacy brands that operated legally in Nevada long before either FanDuel or DraftKings came into existence but did not launch DFS products as a means to develop national customer lists. These companies include Caesar's Sportsbook which acquired bookmaker William Hill in 2021<sup>271</sup> and BetMGM.<sup>272</sup> Additionally, Barstool Sportsbook (owned by Penn National Gaming), Fox Bet (a subsidiary of the Fox Corporation), Bet365, PointsBet, Bally Bet, Bet Rivers, and SugarHouse represent the other, most prominent sports betting brands.<sup>273</sup>

## C. *Market Competition, Advertising, and Fear of Consolidation*

At present, FanDuel, DraftKings, BetMGM, and Caesars have remained the dominant brands in the sports wagering market, with a combined control of over 82 percent of the market in 2021.<sup>274</sup> Meanwhile, the inability to gain market share has already caused some well-resourced brands, including Canadian media company-backed the ScoreBet, to exit the U.S. market altogether.<sup>275</sup> For some of the smaller and more niche gambling brands, the inability to secure a sports wagering license in certain states has made it more difficult for them to garner a national footprint and thus to build the economies of scale to compete effectively in even the

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note stating “With all the ‘legal’ sports gambling that goes on in the U.S., coupled with the fact that no one was physically harmed and nobody was forced to place bets, I see no threat to society by allowing both ... to avoid prison time.” The defendants ultimately avoided being sentenced to any jail time not already served).

<sup>268</sup> Alex Silverman, *For U.S. Sports Bettors, It's FanDuel and DraftKings—and Then Everyone Else*, MORNING CONSULT (Jan. 20, 2022), <https://morningconsult.com/2022/01/20/sports-betting-brands-usage-fanduel-draftkings/#:~:text=Regular%20sports%20bettors%20were%20most,picking%20a%20sports%20betting%20service.>

<sup>269</sup> See John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 154–55 (2020) (describing how FanDuel and DraftKings lobbied and used marketing strategies to position their products as games of skill, ultimately, creating doubt amongst many state legislators and state law enforcement authorities about whether daily fantasy sports were permitted under state law. Even in states where state attorneys general deemed the activities a violation of state law some companies continued to operate).

<sup>270</sup> See John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classifications and Consumer Implications*, 15 ENT. & SPORTS L.J. 1, 1 (2017) (noting that DraftKings spent \$82 million on television advertising in 2015, and both companies combined to air a television commercial every ninety seconds at one point during 2015).

<sup>271</sup> Andre Dubronski, *MGM Entertain Full BetMGM Buy-Out*, IGAMING FUTURE (Oct. 8, 2021), <https://igamingfuture.com/mgm-entertain-full-betmgm-buy-out/>.

<sup>272</sup> Silverman, *supra* note 268.

<sup>273</sup> *Id.*

<sup>274</sup> Matt Rybaltowski, *Bloomberg Summit: Sports Betting Market In ‘Early Innings’ After Super Bowl Frenzy*, SPORTSHANDLE (Feb. 18, 2022), <https://sportshandle.com/bloomberg-summit-2022/>.

<sup>275</sup> Geoff Zochodne, *TheScore Bet Exiting U.S. Sports Betting Market as Penn Streamlines Operations*, COVERS (June 1, 2022), <https://www.covers.com/industry/thescore-bet-discontinue-us-operations-may-2022#:~:text=%E2%80%9CtheScore%20Bet%20mobile%20sportsbook%20is,also%20operates%20the%20Barstool%20Sportsbook.>

states where they have gained licensure.<sup>276</sup> Meanwhile, even the biggest market players have been unable to turn revenue into profits,<sup>277</sup> with gaming operators contending their situation is made worse by high tax rates in states like New York.<sup>278</sup>

The rapid consolidation of the market around a few top brands led to those top companies spending tens of millions of dollars to attract customers.<sup>279</sup> Many in the industry have acknowledged that advertising spending is simply unsustainable over an extended period.<sup>280</sup> Not only are the advertisements bringing these companies unwanted regulatory attention, but they are incredibly costly.<sup>281</sup> The hope is, undoubtedly, to be the last company standing when the dust settles and the competition has spent their last dollar, but until then, companies have been spending an average of hundreds of dollars to acquire a single new customer.<sup>282</sup> Even if smaller companies can afford the tax rates and licensing fees around the country, the customer acquisition costs are yet another challenge to try and compete against the best-resourced companies.<sup>283</sup>

The race to acquire customers and survive until profitability has resulted in billions being spent on advertising. Both FanDuel and DraftKings are projected to spend more than \$750 million in 2022.<sup>284</sup> The sports betting demographic is incredibly desirable for marketers and advertisers, and sports leagues have seen the average age of their viewers continue to age out their prime earning years.<sup>285</sup> Online sports bettors tend to be overwhelmingly male, making up eighty percent of bettors, but they have an average age of 37.7, with fifty

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<sup>276</sup> Some smaller brands are hoping to fill a void with product differentiation; however, marketing and licensing costs may be limiting factors even with enticing product offerings. See Christopher Gerlacher, *What the Impending Market Bubble Means for Sports Betting*, GAMING TODAY (Oct. 6, 2021), <https://www.gamingtoday.com/news/what-impending-market-bubble-means-sports-betting/>.

<sup>277</sup> See e.g., Stephen Gandel, *DraftKings, Recruits Fewer Bettors Than Expected, Despite Freebies*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/business/draftkings-earnings-4q-2021.html#:~:text=DraftKings%20lost%20%24326%20million%20in,47%20percent%20to%20%24473%20million.&text=the%20main%20story->

[The%20Super%20Bowl%20ad%20blitz%20is,further%20bolster%20legalized%20sports%20betting](https://www.nytimes.com/2022/02/18/business/draftkings-earnings-4q-2021.html#:~:text=DraftKings%20lost%20%24326%20million%20in,47%20percent%20to%20%24473%20million.&text=the%20main%20story-) (noting that DraftKings lost \$326 million in the fourth quarter of 2021).

<sup>278</sup> See John Holden, *Opinion: Sportsbooks Might Hate It, But NY Winning Sports Betting Game*, LEGAL SPORTS REP. (May 26, 2022), <https://www.legalsportsreport.com/70313/opinion-sportsbooks-might-hate-it-ny-winning-sports-betting-game/> (noting various executives were going to adjust their advertising spending in order to counteract New York's 51 percent tax on revenue).

<sup>279</sup> Ed Olson, *The Sports Betting Arms Race*, LINE DRIVE SPORTS MARKETING (Sep. 27, 2021), <https://linedrivesportsmarketing.com/the-sports-betting-arms-race/>

<sup>280</sup> See, e.g., Jack O'Donnell, *Opinion: The Ugly Truth Behind All Those Fun Gambling Ads*, POLITICO (Feb. 13, 2022), <https://www.politico.com/news/magazine/2022/02/13/ugly-truth-behind-fun-gambling-ads-00008380> (noting companies have spent hundreds of millions on advertising).

<sup>281</sup> Ayumi Davis, *Sports Betting Industry Ponders if Relentless Advertising Is Overkill for Viewers, Fans*, NEWSWEEK (Dec. 3, 2021), <https://www.newsweek.com/sports-betting-industry-ponders-if-relentless-advertising-overkill-viewers-fans-1656043>.

<sup>282</sup> See *Sports Betting Primer*, FRONT OFFICE SPORTS (Sep. 2020), <https://frontofficesports.com/newsletter/sports-betting-primer/> (noting that DraftKings was reportedly spending an average of \$371 per customer acquired).

<sup>283</sup> See John Holden, *Opinion: Two Big Questions for US Sports Betting Industry in 2022*, LEGAL SPORTS REP. (Feb. 1, 2022), <https://www.legalsportsreport.com/62931/opinion-two-questions-us-sports-betting-2022/> (noting the rapid consolidation of the market around the daily fantasy companies and well-resourced brands).

<sup>284</sup> Roundhill Investments (@Roundhill), TWITTER (Aug. 3, 2021, 10:53 AM), <https://twitter.com/roundhill/status/1422586354064625667>.

<sup>285</sup> See Jason Notte, *The Sports with the Oldest—and Youngest—TV Audiences*, MARKETWATCH (June 30, 2017), <https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30> (noting that the average baseball viewer is 57 years old, the average NFL viewer is 50, the average NHL viewer is 49, and the average NBA viewer is 42).

percent being between the ages of 18–34.<sup>286</sup> A significant portion of bettors, forty-five percent, earn more than \$75,000 per year, while the national average earning that amount is only thirty-four percent.<sup>287</sup>

The race to secure the largest market share in the U.S. is further aided by a plethora of affiliate marketing sites, which integrate sports betting links into industry, gambling, and sports coverage.<sup>288</sup> Affiliate programs, which are used across a variety of industries and by companies such as Amazon, work by directing website visitors to a sportsbooks website, where if that visitor signs up as a customer, the affiliate site receives a commission.<sup>289</sup> Different sportsbooks use different compensation schemes for affiliate links, ranging from one-time commissions to the receipt of a percentage of the customer's lifetime revenue generated for the sportsbook.<sup>290</sup> Even with millions being spent on direct market and affiliate deals, the sportsbook landscape has remained largely consistent, with the two daily fantasy sports juggernauts at the top and everyone else looking up and trying to reach them.<sup>291</sup>

Despite having access to multiple brands in all but a small handful of states, and generous promotions that can sometimes offer risk-free wagers of up to several thousand dollars, American consumers have not shown themselves to be particularly interested in shopping around via a multitude of different apps.<sup>292</sup> Not only do different sportsbooks offer different promotions for both new and existing customers, but they also offer different betting lines.<sup>293</sup> This brand loyalty means consumers also show themselves to be non-price discriminate.<sup>294</sup> While a portion of this may be simple laziness, another factor may be related to cumbersome sign-up processes that some states impose.<sup>295</sup> In addition, a big portion of this is likely related to the familiarity that Americans have with FanDuel and DraftKings.<sup>296</sup> While many Americans undoubtedly bet illegally online during the 25-year PASPA prohibition, to date, none of the offshore brands that served American consumers have obtained a license to operate in the United States, leaving the two daily fantasy sports companies as the next best alternative for customers looking for a familiar name.<sup>297</sup> The familiarity that consumers had, not only with the FanDuel and DraftKings brands but also with the interface and user experience of their products has

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<sup>286</sup> David Wyld, *What the Surprisingly Youthful Demographics of Sports Betting Portends for the Future*, MEDIUM (Dec. 27, 2021), <https://medium.com/modern-business/the-young-demo-of-online-sports-betting-c595f7dcefaa>.

<sup>287</sup> *Id.*

<sup>288</sup> See generally *The Ultimate Guide to Affiliate Marketing for Sports Betting Businesses*, GAMMASTACK (Jan. 18, 2022), <https://www.gammastack.com/the-ultimate-guide-to-affiliate-marketing-for-sports-betting-businesses/>.

<sup>289</sup> *Id.*

<sup>290</sup> Niall Roche, *The Best Sports Betting Affiliate Programs of 2022-For Home Run Affiliate Earnings*, AUTHORITY HACKER (Jan. 5, 2022), <https://www.authorityhacker.com/sports-betting-affiliate-programs/>.

<sup>291</sup> Alun Bowden, *The Global Sports Betting Myth*, STATE OF ONLINE GAMBLING (June 1, 2022), <https://stateofonlinegambling.substack.com/p/the-global-sports-betting-myth>.

<sup>292</sup> Jeff Edelstein, *America's Sports Bettors Are Selling Themselves Short in The Odds Game*, SPORTSHANDLE (Nov. 11, 2021), <https://sportshandle.com/american-sports-bettors-single-sportsbook-gamblers/>. Numerous sportsbooks offer risk-free bets where if a bettor wagers \$1,000 and loses, for example, the sportsbook will grant that bettor \$1,000 in site credits. Often that money can only be wagered and cannot be withdrawn. See Martin Green, *Top Sports Betting Promo Codes: Best Betting Promo Codes 2022*, SACRAMENTO BEE (July 1, 2022), <https://www.sacbee.com/betting/article259053683.html>.

<sup>293</sup> Edelstein, *supra* note 292.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See John T. Holden, Will F. Green, & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECONOMICS 8, 10–12 (2017) (describing the popularity of daily fantasy sports).

<sup>297</sup> Other markets, such as Ontario in Canada, have created a pathway for former unregulated operators to enter the regulated market by agreeing to no longer accept customers from unregulated markets, but this has not occurred in the United States. See e.g., John Holden, *Opinion: Ontario Sports Betting Needs Revenue Transparency to Succeed*, LEGAL SPORTS REP. (May 7, 2022), <https://www.legalsportsreport.com/70435/opinion-ontario-sports-betting-revenue-transparency/>.

undoubtedly played a significant role in their market position but may also explain why both brands have struggled outside of the U.S. market.<sup>298</sup>

#### D. *Sports Wagering Market Failures*

When looking at the current U.S. sports betting marketplace, it is easy to observe a number of marketplace failures. First and foremost, the sports betting regulation is grossly inefficient, with market participants needing to comply with differing and sometimes conflicting regulatory schemes. The legal inability for sportsbooks to operate in interstate commerce due to the Wire Act may create additional jobs for individuals in the industry, but at the same time, it leads to cost inefficiencies in terms of maintaining separate brick and mortar locations, as well as servers.<sup>299</sup> The same, no doubt, can be said with respect to the need for sports wagering companies to regularly file paperwork with the oversight body in each of the jurisdictions in which they operate.<sup>300</sup> If some of these regulatory costs could be reduced, perhaps there would be more money left for the sportsbooks after paying taxes, and there would be fewer suggestions to reduce the tax rate on these existing operators.<sup>301</sup>

Sports wagering market failures also include the inability of many of the smaller sportsbooks to remain in business given the high licensing costs and tax rates charged by states.<sup>302</sup> The speed with which the sports betting market has consolidated has created a two-tiered system; at the top are companies with sufficient resources to enter multiple markets, and at the bottom are all the other companies, with many hoping for a merger offer as the best case scenario.<sup>303</sup> Even for the companies that can participate in the market, few, if any, are profitable as advertising and customer acquisition costs have decimated balance sheets.<sup>304</sup> Unless this approach ultimately changes, the reality is that many of the comparatively smaller sportsbooks, as well as those who lack licensure in multiple states, will either go bankrupt or attempt to merge with larger competitors.<sup>305</sup> As such, it will be incumbent on the U.S. antitrust agencies to ensure that any prospective mergers in the sports gambling marketplace do not make the largest operators even larger or aid in creating a nationwide oligopoly.

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<sup>298</sup> Bowden, *supra* note 291. While the FanDuel and DraftKings brands have been less popular in other markets it is worth noting that since 2020 FanDuel has been wholly owned by European gaming company, Flutter, who operates a variety of brands across the world. Brad Allen, *Flutter Acquires Remaining 37% of FanDuel For \$4.2 billion*, LEGAL SPORTS REP. (Dec. 4, 2020), <https://www.legalsportsreport.com/46229/flutter-acquire-remainder-fanduel/>. See also *Our Brands*, FLUTTER, <https://www.flutter.com/our-brands/> (last visited July 1, 2022) (listing that Flutter owns FanDuel, Sportsbet, SkyBetting & Gaming, PaddyPower, PokerStars, Betfair, Tombola, Adjarabet.com, TVG, FoxBet, Jungle Games, Airtion Risk Management, and Sporting Life).

<sup>299</sup> Holden, *Through the Wire Act supra* note 45, at 732–34.

<sup>300</sup> Sherer & Thevenot, *supra* note 219.

<sup>301</sup> See, e.g., Robert Linnehan, *Assemblyman Pretlow Files Bill to Increase NY Sports Betting Operators, Decrease Tax Rate*, ELITE SPORTS NY (Mar. 4, 2022), <https://elitesportsny.com/2022/03/04/assemblyman-pretlow-files-bill-to-increase-ny-sports-betting-operators-decrease-tax-rate/> (describing legislation introduced in New York to lower the tax rate to thirty-five percent).

<sup>302</sup> See, e.g., Jeff Lagerquist, *The Score to Shut Down U.S. Sports Book on Canada Day*, YAHOO (June 1, 2022), <https://www.yahoo.com/lifestyle/the-score-to-shut-down-us-sports-book-on-canada-day-155254487.html> (noting that even the Score, a company that was acquired for \$2 billion was unable to compete in the American market and decided to cease operations).

<sup>303</sup> See Kirk O’Neil, *Can Sports Betting Upstarts Challenge Caesars, MGM, DraftKings?*, STREET (Mar. 5, 2022), <https://www.thestreet.com/investing/who-will-launch-the-next-big-sports-betting-companies> (describing the competitive environment and noting the possibility of even larger companies looking to enter the market than just large gambling brands, including Disney).

<sup>304</sup> Kate Marino, *Competition in Online Sports Betting is Fierce—and Not Profitable*, AXIOS (Oct. 13, 2021), <https://www.axios.com/2021/10/13/competition-in-online-sports-betting-is-fierce-and-not-profitable>.

<sup>305</sup> Numerous sports betting companies have been eyed as potential targets for competitors, or outsiders seeking to enter the market. See Chris Katje, *3 Sports Betting Stocks That Could Get Bought Out Next*, INSIDER (Aug. 5, 2021), <https://markets.businessinsider.com/news/stocks/3-sports-betting-stocks-that-could-get-bought-out-next-1030697667>.

Similar consolidation was seen in the daily fantasy sports marketplace nearly ten years ago.<sup>306</sup> While the Federal Trade Commission ultimately issued a Second Request for Information and took steps to enjoin the proposed merger of FanDuel and DraftKings, one reasonably could argue the agencies should have acted even sooner and disallowed the 2014 merger of DraftKings and DraftStreet, which in essence had reduced the DFS marketplace from three to two major players.<sup>307</sup>

Another market failure entails the number of states, including even those that had language disallowing bad actors from the marketplace, that have allowed companies with questionable past behavior to enter the sports gambling market.<sup>308</sup> As an interesting side note, the sports wagering companies DraftKings and FanDuel had both operated their daily fantasy sports businesses for a number of years in certain markets where their underlying contests were at least questionably illegal based on either reasonable statutory interpretation or an attorneys general letter.<sup>309</sup> Nevertheless, outside of Nevada, no state regulatory body has precluded either of these companies from receiving sports wagering licenses on these grounds. By contrast, to date, no offshore sportsbook has yet been granted a license from a U.S. jurisdiction.<sup>310</sup>

Similarly, lobbyists seem to have an outsized role in getting more effective sports wagering legislation changed to preserve their personal interests. Two vivid examples of this particularly come to mind. First, whereas New York has arguably been the most successful state to date in raising tax revenue for licensing sports wagering, multiple New York State assemblymen who serve on the state's Racing, Gaming, and Wagering Committee are now encouraging the reduction of the state's gambling tax rate to appease gaming operators.<sup>311</sup> Second, after a number of states followed Nevada's lead in not granting the U.S. professional sports leagues a share of the proceeds derived from legalized and regulated sports wagering, the professional sports lobby has been more successful in encouraging recent states to legalize sports wagering to impose mandates sports wagering operators to purchase their data exclusively from the leagues.<sup>312</sup>

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<sup>306</sup> Steve Gardner, *Daily Fantasy Sports Site DraftKings Acquires DraftStreet*, USA TODAY (July 14, 2014),

<https://www.usatoday.com/story/sports/fantasy/2014/07/14/draft-kings-draft-street-acquisition/12640959/>.

<sup>307</sup> Diane Bartz & Liana B. Baker, *U.S. to Seek to Block DraftKings, FanDuel Fantasy Sports Merger*, REUTERS (June 23, 2017), <https://www.reuters.com/article/fanduel-ma-draftkings/u-s-to-seek-to-block-draftkings-fanduel-fantasy-sports-merger-idUSL1N1JL00L>. See also Marc Edelman, *LAC Rumored to Be Selling Draftsteet Assets to DraftKings; Will Antitrust Scrutiny Follow?* FORBES, Jul. 14, 2014, <https://www.forbes.com/sites/marcedelman/2014/07/14/iac-rumored-to-be-selling-draftstreet-assets-to-draftkings-antitrust-scrutiny-may-follow/?sh=472536fa1d59> (expressing some degree of antitrust concern with the merger of the second and third largest DFS companies).

<sup>308</sup> See, e.g., Julie Moraine, *DraftKings Enters Illinois, Bad Actor Clause Worked Around*, GAMBLING NEWS (July 1, 2020), <https://www.gamblingnews.com/news/draftkings-enters-illinois-bad-actor-clause-worked-around/> (observing that DraftKings was able to enter the Illinois market, even after the legislation had a so-called "penalty box" provision that would have caused the company to sit out of the market for several years before entering).

<sup>309</sup> See Marc Edelman, *Regulating Fantasy Sports*, 92 IND. L. J. 653, 669–71, n. 82–97 and accompanying text (providing citations to numerous state attorneys general opinions finding daily fantasy sports illegal).

<sup>310</sup> There are complications with allowing offshore operators into the regulated market with respect to potential federal law violations; however, outside of the United States, the province of Ontario has recently undertaken an experiment to allow grey market operators to enter the regulated market without penalty if they cease their unregulated activities. See John T. Holden, *The Emergence of Single-Game Sports Betting in Canada*, 32 J. of Legal Aspects of Sport \_\_\_\_ (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4166219](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4166219).

<sup>311</sup> See, e.g., Fiona Simmons, *New York State Bills Suggest Reduction of Mobile Betting Tax Rate*, GAMBLING NEWS, Mar. 7, 2022, <https://www.gamblingnews.com/news/new-york-state-bills-suggest-reduction-of-mobile-betting-tax-rate> (explaining proposals by Senate Racing, Gaming, and Wagering Committee chairmen Joseph Addabbo and J. Gary Pretlow to lower the tax rate on sports wagering operators).

<sup>312</sup> See Jeff Edelman, *Sports Leagues Continue to Lobby to Force Sportsbooks to Use their Data*, SPORTSHANDLE, May 5, 2021, <https://sportshandle.com/official-league-data-paper>; see also Edelman & Holden, *Monopolizing Sports Data*, *supra* note 12, at 99, 109.

Other inefficiencies in the sports gambling market entail failure to properly educate athletes in organized sports about the impermissibility of their gambling on game results and the failure of certain players to comply with these regulations.<sup>313</sup> In recent years, there have been a few standout examples of professional athletes being found to have bet on their own sport--the most recent involving Atlanta Falcons star receiver, Calvin Ridley.<sup>314</sup> All leagues have rules that prohibit wagering on league games, and some leagues, like the NCAA, prohibit all sports wagering.<sup>315</sup> There has clearly been a breakdown in communication as Calvin Ridley will lose at least \$11 million because of his suspension for the 2022 season.<sup>316</sup>

Also, many states prohibit sports wagering on games involving their state's college teams, but allow for wagering on all other collegiate sporting events.<sup>317</sup> Given the ease in which a potential bettor in a small, Northeastern state such as New Jersey could travel to either New York or Pennsylvania to legally bet on a Rutgers University football game, such regulations seem to serve little to no meaningful integrity-preserving purpose.<sup>318</sup>

Finally, for what is supposed to serve as a regulatory scheme intended to legalize, tax and regulate sports wagering, there seems to be far more being done in terms of legalizing and taxing the marketplace than in terms of implementing consumer protections. Indeed, for consumers, the launch of regulated sports betting has been accompanied by an inundation of advertising from seemingly every medium.<sup>319</sup> Consumers with proclivities toward problem gambling have almost certainly been negatively affected by the expansion of legalized sports betting, which has not been accompanied by significant increases in resources for the treatment of addictions.<sup>320</sup>

#### IV. Potential Unification of Sports Wagering Law

To a casual observer, the movement by states to legalize, tax and regulate sports wagering has been a tremendous success. Yet, given the market failures expressed in the previous section, the question of whether the current U.S. system of sports wagering is working likely depends on the perspective of the particular stakeholder, as well as the underlying regulatory jurisdiction.

As such, some commentators have suggested that it makes little sense for each state to independently implement their regulations for sports wagering, especially as certain regulatory regimes are performing better than others. In addition, it has been widely noted that there may be inefficiencies that emerge from state-by-state regulation of sports wagering given that the Wire Act continues to disallow for states to agree to interstate sports betting much as has been seen with interstate betting compacts in online poker. This Part looks at the potential to unify sports wagering law in one of two different ways. Section A looks at the potential for Congress to step in and pass a federal law to regulate sports wagering. Section B then looks, in the alternative to federal legislation, at the potential for proposing and implementing uniform state law.

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<sup>313</sup> John Holden, *Opinion: So An NFL Player Walks into A Sportsbook...*, LEGAL SPORTS REP. (Apr. 12, 2022). *See also* Harris & Holden, *supra* note 224, at 439–48 (describing ways of improving the athlete education system).

<sup>314</sup> *Id.*

<sup>315</sup> *Sports Wagering*, NCAA, <https://www.ncaa.org/sports/2016/4/29/sports-wagering.aspx> (last visited July 7, 2022).

<sup>316</sup> *Id.*

<sup>317</sup> Sherer & Thevenot, *supra* note 219.

<sup>318</sup> Andrew Maykuth, *At Two Philadelphia Universities, You Can Bet on Sports, But Not on The Home Team*, PHILA. INQUIRER (Oct. 12, 2019), <https://www.inquirer.com/business/philadelphia-universities-villanova-saint-josephs-ban-some-sports-betting-20191012.html>.

<sup>319</sup> Sam McQuillan, *Sports Betting Ads Under Fire by Lawmakers*, ACTION NETWORK (May 18, 2022), <https://www.actionnetwork.com/legal-online-sports-betting/sports-betting-ads-lawmakers>.

<sup>320</sup> Marie Fazio, *It's Easy (and Legal) to Bet on Sports. Do Young Adults Know the Risks?*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/sports/sports-betting-addiction.html>.



### A. *Unifying Sports Wagering Law through Federal Regulation*

As New Jersey's battle against PASPA worked its way through the courts between 2012 and 2018, the leagues remained united in their opposition to legalized sports betting.<sup>321</sup> However, an op-ed piece by the NBA Commissioner, Adam Silver, published in the *New York Times* on November 13, 2014, suggested that there might be a path forward the leagues might approve. It was time, he wrote, "that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated."<sup>322</sup>

Silver's opinion piece did not suggest the leagues were reconsidering their opposition to New Jersey's effort to overturn PASPA. What was needed, Silver wrote, was for Congress to "adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards."<sup>323</sup> In the absence of such a "comprehensive federal solution" that states would be required to follow, it would be "bad public policy" to allow sports betting to be offered by states.<sup>324</sup>

At a time when New Jersey was being rebuffed in the courts, it seemed evident that any change in the law of sports betting would be a product of Congressional action and not through judicial invalidation of that law. Even the leagues and members of Congress expressed this view.<sup>325</sup> However, at some point, there was a pivot in this thinking.

If Congress had passed a law that involved the federal government in sports betting, it would not be its first effort. The Wire Act addressed sports betting,<sup>326</sup> as did the Sports Bribery Act.<sup>327</sup> PASPA's fatal flaw, however, was that Congress did not directly proscribe sports betting; instead, it unconstitutionally commandeered the states to achieve that objective.<sup>328</sup> The Unlawful Internet Gambling Enforcement Act impacted sports betting but its primary target was any form of internet gambling.<sup>329</sup> If the federal government's record in helpfully addressing issues involving sports betting were measured by these laws, its grade would be passing, but not above average.

One federal law that has produced positive results is the Interstate Horseracing Act. (IHA)<sup>330</sup> Enacted in 1978 and amended in 2000,<sup>331</sup> the law established the legality of off-track interstate pari-mutuel wagering

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<sup>321</sup> See, e.g., David W. Chen, *The N.F.L.'s About-Face on Sports Gambling*, N.Y. TIMES (Feb. 10, 2022), <https://www.nytimes.com/2022/02/10/sports/nfl-bets-gambling.html>.

<sup>322</sup> Adam Silver, Opinion: *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> See, e.g., David Purdum, *John McCain welcomes discussion*, ESPN (Jan. 30, 2015), [https://www.espn.com/chalk/story/\\_/id/12255167/sen-john-mccain-says-congress-needs-hold-hearings-discuss-legalizing-sports-betting](https://www.espn.com/chalk/story/_/id/12255167/sen-john-mccain-says-congress-needs-hold-hearings-discuss-legalizing-sports-betting) (refers to comments by Senator McCain that a debate in Congress was needed to build consensus on legalizing sports betting); David Purdum, *Leagues discussing sports betting*, ESPN (Feb. 3, 2015), <https://abc11.com/sports/leagues-discussing-sports-betting/502380/> (conversations among commissioners and private meetings between league counsel being conducted; quotes Adam Silver, that the sports betting issue will "ultimately require a legislative remedy").

<sup>326</sup> 18 U.S.C. § 1084 (2018).

<sup>327</sup> 18 U.S.C. § 224(a) (2018). For discussion of the Sports Bribery Act and its enactment following high-profile betting scandals, 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).

<sup>328</sup> *Murphy v. NCAA*, 138 S.Ct. 1461, 1484–85 (2018).

<sup>329</sup> 31 U.S.C. §§ 5361–67 (2018). See Holden, *Regulating Sports Wagering*, *supra* note 1, at 584–85 (2020) (describing UIGEA as "primarily a banking statute" that sought to limit funding of internet gambling." Statute was riddled with exceptions and did not provide "a meaningful deterrence to internet gambling.").

<sup>330</sup> 15 U.S.C. §§ 3001–3007 (2012).

<sup>331</sup> The legislative history of the 2000 amendments stated specifically that it intended to "codify [the] legality of placing wagers over the telephone or other electronic media like the Internet." 146 Cong. Rec. H.11230, 11232 (2000).

under certain conditions.<sup>332</sup> Although it is a federal law, the IHA does not create a regulatory nor grant authority to an existing federal body to regulate this gambling. States determine how much, if any, interstate horse wagering they will permit.<sup>333</sup>

The IHA is quite detailed in specifying when interstate horse wagers are legal.<sup>334</sup> The purpose of the law, however, is clear. As a practical matter, off-track racebooks are required to negotiate a contract with a track in another state if they seek to offer betting on the races at that track.<sup>335</sup> In turn, the track is required to reach an agreement with the horse owners and trainers racing at that track.<sup>336</sup> Ultimately, the agreements provide that the racebook will share a portion of the wagers they accept with the host track and the owners and trainers racing horses there.<sup>337</sup> This revenue sharing plan was designed to “further the horseracing and legal off-track betting industries in the United States.”<sup>338</sup>

The IHA, though not without its critics, has been at least partially successful in achieving its purpose of stabilizing the horse racing industry.<sup>339</sup> As a model for sports betting, however, the law may be of limited utility. It is hard to imagine sportsbook operators being willing to pay a portion of each sports bet to the leagues upon whose game the bet was made. Unlike the floundering horseracing industry, sports leagues would have a difficult case to make in seeking similar assistance.<sup>340</sup>

Soon after the *Murphy* decision, a bill was offered in Congress that would create a significant federal presence in sports betting regulation.<sup>341</sup> The Sports Wagering Market Integrity Act would have established a framework of regulation whereby states could authorize and conduct sports wagering. The bill also included minimum standards and consumer protections.<sup>342</sup>

One notable provision is the establishment of a National Sports Wagering Clearinghouse.<sup>343</sup> The Clearinghouse would collect and distribute data on sports wagering, maintain a “national repository of anonymized sports wagering data and suspicious transaction reports,”<sup>344</sup> and provide assistance and consultation with state and federal authorities when suspicious sports wagering activity is identified.<sup>345</sup> The entity would be funded by several sources, including proceeds collected as part of the federal excise tax on sports wagers.<sup>346</sup>

Opponents of the federal government having any role in regulating sports betting will view the Clearinghouse as a pernicious first step toward a federal takeover of sports betting. However, having a central

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<sup>332</sup> The requirements are set out in 15 U.S.C. § 3004.

<sup>333</sup> The Congressional findings in § 3001 begin by stating, “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. *Id.* § 3001(a)(1)(2018).

<sup>334</sup> *Id.* §§ 3004(a)(1–3).

<sup>335</sup> *Id.* § 3004(a)(1)(B).

<sup>336</sup> *Id.*

<sup>337</sup> See ANTHONY CABOT & KEITH MILLER, *supra* note 42, at 77.

<sup>338</sup> 15 U.S.C. § 3001(b).

<sup>339</sup> See Anthony N. Cabot & Eugene Christiansen, *Why the Future of Horseracing is at Risk: The WTO Decision and Senator Kyl*, 9 GAMING L. REV. 201, 202 (2005).

<sup>340</sup> See Dusan Randjelovic, *11 Most Profitable Sports Leagues-Their Value Will Surprise You*, ATHLETIC PANDA (June 3, 2020), <https://apsportseditors.org/others/most-profitable-sports-leagues/> (listing various sports league valuations).

<sup>341</sup> See *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>].

<sup>342</sup> Sports Wagering Market Integrity Act of 2018, S.3792, 115th Cong. Reg. Sess. (2018) (§ 103).

<sup>343</sup> *Id.* § 106.

<sup>344</sup> *Id.* § 106(c)(4).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* § 106(f)(g).

data collection process would promote both sports wagering and sports contest integrity. The resources of state governments to monitor integrity are strained by the fact sports wagering is a global market, and the federal government could play an important role in coordinating with foreign sports wagering regulators.<sup>347</sup>

One provision of the proposal likely to find support amends the Wire Act to allow states to enter compacts that would pool their customers and create added liquidity.<sup>348</sup> In addition, the law lays to rest concerns about the “intermediate routing” of online sports wagers. Even when a sports bettor and a sportsbook’s computer server are in the same state, the internet seeks the most efficient means of delivering the “data packet,” the wager, so there is no assurance the electronic communication stays within the state’s borders at all times.<sup>349</sup> The federal proposal makes it clear that a wager made under those conditions is an intrastate wager.<sup>350</sup>

The policy reasons for involving the federal government in regulating sports wagering are numerous and have been addressed in detail elsewhere.<sup>351</sup> The federal government’s involvement in day-to-day regulation of sports wagering is, however, unnecessary. States have a long history of dealing with licensing, audit and accounting rules, internal control standards, and similar issues when regulating casino gambling and much of this would translate to regulating sports betting.<sup>352</sup>

However, one feature of sports betting that distinguishes sports betting from casino gambling provides the strongest argument for some federal presence in regulating sports betting. In casino wagering contracts, the future contingent event that determines who wins and who loses is under the tight control of casinos and regulators. Card and dice games have detailed rules, and the games are played under the keen eyes of employees and video surveillance.<sup>353</sup> Everything that goes into playing the game is right in front of the casino operator.

With sports betting, however, assuring the honesty of the underlying event that determines the outcome of a sports wager is a very different proposition. The uncertain contingent events that determine wins and losses no longer occur within the rigidly controlled environment of the casino. The sports contests take place outside the casino, often outside the jurisdiction where the casino is located, and sometimes on the other side of the globe. As a result, the integrity of the sporting event is largely outside the control of the casino regulators. Consequently, ensuring the integrity of the sports contests and the wagering process is fundamentally different from the integrity of casino gambling.<sup>354</sup> The federal government’s resources, including law

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<sup>347</sup> See Anthony Cabot, & Keith Miller, *Moving Faster Than the Speed of Regulation: Can State-Authorized Sports Wagering Dodge A Game-Fixing Bullet Without The Help Of The Feds?*, 30 J. LEGAL ASPECTS SPORT 85, 102 (2020).

<sup>348</sup> *Sports Wagering Market Integrity Act*, *supra* note 342 § 105(a).

<sup>349</sup> See Pamela Fox, *Internet routing protocol*, KHAN ACADEMY, <https://www.khanacademy.org/computing/computers-and-internet/xcae6f4a7ff015e7d:the-internet/xcae6f4a7ff015e7d:routing-with-redundancy/a/internet-routing> (last visited Apr. 21, 2022).

<sup>350</sup> *Sports Wagering Market Integrity Act*, *supra* note 342 § 301 (1)(B). The Wire Act itself makes no reference to this situation, but another federal law, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) does. In defining “unlawful Internet gambling” that law provides, “The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362(10)(E). Despite this reference, in 2018, the Office of Legal Counsel of the Justice Department had declined to adopt that position for the Wire Act, raising questions whether an intrastate sports wager could be made under any circumstances.

See U.S. Dep’t of Justice, Office of Legal Counsel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, Opinion Memorandum, at 18 (Nov. 2, 2018), <https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf>. The Opinion was not released until January of 2019, but it is dated November 2, 2018.

<sup>351</sup> See *Moving Faster Than the Speed of Regulation* *supra*, note 347, at 98.

<sup>352</sup> *Id.* at 96.

<sup>353</sup> *Id.* at 89.

<sup>354</sup> *Id.*

enforcement, and its greater ability to work with regulators and law enforcement in other countries, can be important tools in helping promote integrity in sports wagering.<sup>355</sup>

The Sports Wagering Market Integrity Act proposal from 2018 has made no progress in Congress.<sup>356</sup> States have not waited for the federal government to step into the field of regulating sports betting,<sup>357</sup> and now thirty-five states plus the District of Columbia have operating sportsbooks.<sup>358</sup> The critical mass of state legislation has certainly been achieved. That is, any federal proposal of consequence will require considerable input from the states, and dramatic changes in the federal-state balance seem unlikely. Perhaps there is a place for a law that recognized the state's historic role in regulating gambling, and which created a streamlined system of regulation with a clearly defined role for the federal government. But the assumption pre-*Murphy* that sports betting would inevitably be a product of federal legislation seems long, long ago.

#### B. *Unifying Sports Wagering Law through Model State Law*

Short of Congress passing a federal law to regulate sports wagering, there are, of course, other ways to potentially standardize sports wagering law. Most notably, one could craft a model law that state legislatures could then vote to adopt. Since 1892, the Uniform Law Commission (“ULC”)—a non-profit unincorporated association composed of individuals admitted to the bar—has played an important role in drafting proposed uniform laws.<sup>359</sup> Having recently drafted proposed legislation governing topics such as sports agency and college athlete name, image, and likeness rights, it would not be surprising to see the ULC take on the topic of sports wagering.<sup>360</sup>

While uniform state wagering law could not override the Wire Act and thus would not open the door to legal, interstate wagering on sports, it could facilitate the creation of a multistate wagering database to facilitate the registration of sports betting companies over multiple states, allow for the sharing of information in the context of the investigation of sports betting companies for misconduct, and facilitate maintenance of an interstate excluded players list to reduce the likelihood of problem gamblers or other prohibited players from accessing sports wagering sites in any states.

Yet, at the same time, it may be too late for the ULC to make reasonable inroads with model state wagering law. As discussed earlier in this article, at present 35 states already have some form of legalized, tax, and regulated sports wagering,<sup>361</sup> and the states have knowingly adopted differing perspectives on a number of

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<sup>355</sup> *Id.* at 100.

<sup>356</sup> One commentator stated that the bill was a “conversation starter and was likely never expected to pass.” Holden, *Regulating Sports Wagering*, *supra* note 1, at 594 (2020).

<sup>357</sup> In Delaware, sportsbook operators began taking single-game sports wagers on June 5, 2018, less than a month after the *Murphy* decision.

<sup>358</sup> See LEGAL SPORTS REPORT which provides an up-to-date listing of states authorizing and/or conducting sports betting

<sup>359</sup> See *About Us*, UNIFORM LAW COMM’N, <http://uniformlaws.org/aboutulc/overview> (last visited Jul. 18, 2022). See also R. Wilson Freyermuth, *Teaching and Scholarship Enrichment Through Involvement in Law Reform*, 53 WAKE FOREST L. REV. 935, 935–36 (2018) (explaining that “[t]he ULC is a nonprofit association comprised of state commissions from each state, as well as the District of Columbia, Puerto Rico, and the Virgin Islands” and that “[i]ts primary objective is to provide states with nonpartisan, well-drafted legislation that can help bring clarity and stability to critical areas of state law, yet also reflect the diverse experience of the states”).

<sup>360</sup> See *Law Commission Approves Changes to Strengthen Sports Agent Act*, USA TODAY, Jul. 15, 2015 (discussing the Uniform Law Commission’s approval of changes to the Uniform Athlete Agents Act); *College Athlete Name, Image, and Likeness Act*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=540d3a4a-82de-4b1a-bb1f-3abd6a23b67b> (last visited Jul. 18, 2022) (providing the text for the proposed ULC name, image and likeness bill and the two jurisdictions that, to date, have introduced the bill).

<sup>361</sup> See Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022), <https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling> (observing that sports betting is legal in 35 states, as well as in the District of Columbia).

critical matters, as referenced above. It is unlikely that many states would discard their recently implemented sports wagering regulations to adopt a “model” statute that no individual state legislator even played a role in drafting. Moreover, many states that have already implemented sports wagering laws have done so in a manner to maximize their expected tax revenue generated from sports gambling. To the extent any model uniform law would be likely to reduce the expected wagering tax revenue accumulated by a given state, it would seem highly unlikely that the state would adopt the bill.

Somewhat ironically, the optimal time for an organization such as the ULC to have proposed uniform sports wagering law would have been prior to the Supreme Court’s issuance of the *Murphy* decision—at a time when few states had yet considered how they would desire to regulate sports betting. At this point, more than four years after the Court’s *Murphy* decision, the ULC may be able to achieve a somewhat more plebian task such as organizing information exchange between states when determining whether to regulate a sports betting operator or exclude a potential sports bettor. However, it would be very difficult to get states to implement true uniform law that set constant elements such as a licensing tax rate across states.

## V. Best Practices for Sports Wagering Regulation

While the proverbial train may have already left the yard in terms of federal sports wagering law or even meaningful, uniform state sports law, there are nonetheless important lessons that can be learned from observing the results of legalized sports wagering across a broad range of states and regulatory schemes, and best practices that certainly could and should be adopted and emulated by the individual states.<sup>362</sup> Sometimes these lessons turn primarily on the underlying goal of a given state. For example, if a state is looking to maximize revenue, the numbers suggest that the ideal regulatory model would involve a high licensing fee and a blind bid system for a monopoly on the market.<sup>363</sup> However, if a state were to view a competitive market as a desirable regulatory system or is seeking more market competitors for purposes of trying to create new jobs, a different approach may operate better.<sup>364</sup> Similarly, if a state wishes to maximize the well-being of college athletes it may seek to prevent betting on all college sporting events; meanwhile, if a state wishes to maximize consumer freedom, it may wish to allow betting on all college sports events.

States cannot easily control the marketing spending of companies without getting into murky First Amendment issues and potentially creating a less desirable product for consumers. Keeping barriers to entry low, if a competitive market is a state’s model choice, is essential for allowing startups the ability to have a

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<sup>362</sup> For instance, one of the easiest solutions to cutting into the unregulated market, which even if that is not a primary goal of a state regulatory scheme should be a secondary or tertiary goal, is to ensure that betting on in-state teams is permitted. State like Illinois, New Jersey, and Virginia who do not allow wagering on in-state teams will likely send most of their bettors across state lines or to unregulated options. Brant James, *March Madness Is Here, But Only Some States Allow Betting On In-State College Teams*, PLAY USA (June 13, 2022), <https://www.playusa.com/which-states-dont-allow-sports-betting-on-in-state-college-teams/>.

<sup>363</sup> This process is similar to New York’s bidding process where blind bids were submitted, however, New York’s bid guidelines detailed that there would be a minimum of two platform providers, which had to have a minimum of four total operators. Each bid in New York was tied to a matrix that determined the tax rate-based on the number of operator licenses and platform providers, but a monopoly in a populated state could conceivably attract an even higher bid. Matt Rybaltowski, *A Tangled Web: New York Shifts Attention to Competitive Bidding Process After Historic Sports Betting Deal*, SPORTSHANDLE (Apr. 7, 2021), <https://sportshandle.com/ny-competitive-bidding-4721/>. See also Matt Rybaltowski, *Books Face Deadline to Conform with N.Y. Tax Rate Matrix Amid Collusion Warnings*, SPORTSHANDLE (Oct. 21, 2021), <https://sportshandle.com/ny-tax-matrix-deadline/> (describing how New York’s tax rate on sports wagering was determined via a matrix).

<sup>364</sup> See Steve Ruddock, *The Impact of Sports Betting Goes Way Beyond Betting Revenue*, BETTING USA (Feb. 5, 2021), <https://www.bettingusa.com/sports-betting-hidden-benefits/> (describing the indirect benefits of sports betting for communities).

chance.<sup>365</sup> Regulators should also work to ensure that startups are not hurt by competitors who breach rules and suffer only small slaps on the wrist or no punishment at all for bad conduct.<sup>366</sup>

There is also a need to do far more to ensure the independence of state gaming commissions. One of the challenges of establishing the staff of state gaming commissions is there is often an interest in choosing staff with experience in sports and/or wagering. This has thus meant, in some cases, individuals who have served in meaningful capacities in sports gaming commissions previously worked closely with one of the stakeholders in the legalization and regulation of sports gambling.<sup>367</sup> Thus, it is not surprising that in many cases the state gaming commissions have adopted regulations that have favored professional sports leagues or large, international sportsbooks to the detriment of small, startup companies.

Moreover, even where sports gaming commissions are truly independent of both sports leagues and large, sports gambling companies, the U.S. sports wagering lobby is an increasingly powerful lobby that has been highly successful at petitioning state legislators and members of the state gaming authority.<sup>368</sup> In some cases, it seems as if lobbyists have even played a substantial role in drafting and redrafting state bills. While the problem of a cozy relationship between lobbyists and regulators is far from limited to sports gaming markets, any broader efforts to limit who may serve in the role of lobbyist and what lobbyists may do to attempt to influence legislation would benefit the emergence of fair markets for sports wagering, as well as beyond.

The outsized role of the U.S. professional sports leagues in lobbying for special treatment under sports wagering laws is a matter too of especially serious concern. While the sports league lobby was once a major force in keeping legalized gambling out of most U.S. states, today the sports league lobby has become a critical force in demanding “integrity fees,” “data mandates” and other unnatural means of expanding their rights over sports game data as a means to ensure for themselves a direct share of the revenues from legalized, licensed sports wagering.<sup>369</sup> Notably, while most of the early states to legalize sports wagering rejected the idea of granting such additional rights to the U.S. professional sports leagues, many of the larger, more recent states to legalize sports wagering, including New York and Illinois, have granted the U.S. professional sports leagues an essential monopoly over the collection and sale of sports statistics to gaming operators—thus, ensuring these

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<sup>365</sup> There is not yet very much case law on restricting sports betting advertising, however, the Supreme Court has reached differing results on efforts to restrict advertising of gambling activity, where the conduct is legal. *See* *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 436 (1993) (holding that restricting lottery ads that crossed state lines was a substantial government interest). Six years later, however, the Court ruled a ban which stopped lawful casino advertising in Louisiana violated the First Amendment. *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 195–96 (1999).

<sup>366</sup> For example, DraftKings negotiated a mere \$150,000 penalty with the New Jersey Attorney General for allowing proxy betting to occur involving a high-value customer based in Jacksonville, Florida. Matt Rybaltowski, *Did DraftKings Receive a Slap on the Wrist in New Jersey Messenger Betting Case?*, SPORTSHANDLE (Mar. 11, 2022), <https://sportshandle.com/draftkings-messenger-proxy-betting-case-punishment-questions/>. This followed a meager \$10,000 fine to DraftKings for sending promotional materials to bettors who had placed themselves on a self-exclusion list. *See* Brad Allen, *Why Did the NJ Sports Betting Regulator Just Fine DraftKings?*, LEGAL SPORTS REP. (Apr. 8, 2021), <https://www.legalsportsreport.com/50298/dge-fine-draftkings-nj-sports-betting/>. The \$10,000 fine, followed what amounted to a \$7,000 fine for a similar violation of rules to protect people with gambling addictions, taking wagers from individuals who were in a “cool off period.” *DraftKings Penalised for NJ Self-Exclusion Failures*, IGAMING BUS. (June 20, 2019), <https://igamingbusiness.com/draftkings-penalised-for-nj-self-exclusion-failures/>.

<sup>367</sup> *See, e.g., Biography of Ed Burns, General Counsel of New York State Gaming Commission*, <https://www.linkedin.com/in/edmundburns> (last visited Jul. 21, 2022) (indicating that Mr. Burns had worked from 1994–2011 as “VP Operations and Administration” for Major League Baseball before becoming General Counsel of the New York State Gaming Commission in 2013).

<sup>368</sup> *See, e.g.,* Jeff Edelstein, *Sports Leagues Continue to Lobby to Force Sportsbooks to Use their Data*, SPORTSHANDLE, May 5, 2021, <https://sportshandle.com/official-league-data-paper> (discussing the role of sports leagues lobbying legislatures and gaming authorities).

<sup>369</sup> *Id.*

sports leagues a share of overall gambling profits.<sup>370</sup> The failed federal bill to regulate sports wagering also included a similar provision for the benefit of sports leagues.<sup>371</sup>

The protection of individuals who suffer from problem gambling is yet another area where most, if not all, states that have legalized sports wagering have substantial room to improve. While at present state laws seem to uniformly require the provision of information for problem gamblers on their websites and advertisements, state gaming law to date has failed to extend the requirement of including this information on third-party affiliates or other sites promoting sports gambling operators such as on tout websites and tout Twitter handles.<sup>372</sup> In addition, state gaming commissions have fallen short in imposing limits to when sports wagering companies may advertise on television and the role which sports gaming companies may play in placing signage in sports facilities and in promoting televised game broadcasts.<sup>373</sup> As professional sports represent an important part of American culture and a reasonable segment of the U.S. population including children and problem gamblers may benefit from being insulated from sports wagering content, a reasonable step for sports gaming commissions to take would be to require any professional sports team that allows for game broadcasts that include wagering-related content to also make available, either for free or at a reasonable cost, alternative live game broadcasts that are scrubbed of all wagering content.<sup>374</sup>

Furthermore, sports leagues need to improve their education programs for players and safely provide the necessary resources, so that athletes with problems related to gambling can receive the necessary treatment.<sup>375</sup> The NFL has had two players violate league rules related to gambling since the advent of widespread legal wagering.<sup>376</sup> The most recent involving Atlanta Falcons star receiver, Calvin Ridley, has raised significant concerns about league control of players betting activities.<sup>377</sup> All leagues have rules that prohibit wagering on league games, and some leagues, like the NCAA, prohibit all sports wagering.<sup>378</sup> There has clearly been a breakdown in communication as Calvin Ridley will lose at least \$11 million because of his suspension for the 2022 season.<sup>379</sup> Something is missing from the current programs since there continue to lapse where players violate the gambling rules.<sup>380</sup> Improving education will be amongst the most promising solutions to

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<sup>370</sup> *Id.*; see also Edelman & Holden, *Monopolizing Sports Data*, *supra* note 12, at 99, 109.

<sup>371</sup> See John Holden, *Remember the Federal Sports Betting Bill? Apparently it's Still a Thing*, LEGAL SPORTS REP. (Sept. 6, 2019), <https://www.legalsportsreport.com/35368/federal-sports-betting-bill-official-league-data/> (explaining that the proposed federal sports betting bill, which never passed, included a mandate that operators need to purchase their sports data from the leagues).

<sup>372</sup> See generally Marc Edelman, *New York Online Sports Betting Needs Stronger Advertising Regulations*, FORBES (Feb. 11, 2022) (describing New York's failure to require gambling helpline information to be posted on tout websites and tout Twitter handles).

<sup>373</sup> See Daryl Austin, *The Legalization of Sports Wagering and the Increase in Problem Gambling*, DESERET NEWS (Jul. 19, 2022), <https://www.deseret.com/sports/2022/7/19/23195839/the-legalization-of-sports-wagering-and-the-increase-in-problem-gambling>.

<sup>374</sup> *Id.*

<sup>375</sup> While all leagues appear to provide some level of gambling education some programs, like the NCAA's appear dated. See Harris & Holden, *supra* note 224, at 437–38 (2022).

<sup>376</sup> John Holden, *Opinion: So An NFL Player Walks into A Sportsbook...*, LEGAL SPORTS REP. (Apr. 12, 2022), <https://www.legalsportsreport.com/65926/opinion-calvin-ridley-an-nfl-player-walks-into-sportsbook/>. It is worth noting, perhaps, that the first player, Josh Shaw, placed his wagers at a sportsbook in Nevada, not a state that was part of the post-PASPA expansion. *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Sports Wagering*, NCAA, <https://www.ncaa.org/sports/2016/4/29/sports-wagering.aspx> (last visited July 7, 2022).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

preventing a disaster scenario involving gambling-related match-fixing.<sup>381</sup> Maintaining the integrity of both the underlying sporting events and the betting market itself is essential.<sup>382</sup>

While match-fixing of a major American sports league is a nightmare scenario for the sports betting market,<sup>383</sup> latency issues also are one of the key components holding the market back from reaching its current potential.<sup>384</sup> Latency refers to the speed at which information travels.<sup>385</sup> From a sports betting perspective, faster is generally regarded as better.<sup>386</sup> A person attending a sporting event is watching that event in real-time, over-the-air broadcasts were at one time nearly simultaneous to the viewer attending in person, but now broadcasts are delayed several seconds by a digitization process, and occasionally by producers.<sup>387</sup> Online streaming is often even more delayed, sometimes by as much as a minute.<sup>388</sup> Slow sports betting feed can be exploited by so-called “courtsiders” who transmit information live from within a stadium often faster than a television feed, which allows bettors to gain information faster than a sportsbook if they do not have superior information.<sup>389</sup> Naturally, receiving information before a sportsbook can adjust a betting line places a bettor in a superior position and exposes a sportsbook to significant financial risk.<sup>390</sup> Instead, of promoting competition in the data distribution market to foster innovation, several states have been mandating the use of official data, a practice that limits the allowed number of data providers who all receive access from the same feed.<sup>391</sup> This is a mistake. Rather than restricting the source of data, states should be encouraging competition in the data market, so companies have an incentive to reduce the latency associated with data transmission and bring the industry one step closer to truly real-time information.

## CONCLUSION

In hindsight, Congress and the Uniform Law Commission should have been prepared to implement a new and reasonable system for regulating sports wagering in 2018 based on the possibility the U.S. Supreme Court in *Murphy* would overturn the Professional and Amateur Sports Protection Act. However, neither Congress nor the ULC sufficiently acted—thus leaving state legislators scrambling to pass new laws to legalize, tax, and regulate sports gambling in their respective jurisdictions. In many cases, these new laws seem to have been largely a product of lobbyist intervention. And, in many cases, these laws have proven to be suboptimal to meet the needs of all constituent groups.

Now, more than four years since the Supreme Court’s *Murphy* decision, it seems unlikely that most states will go gentle into the night and voluntarily give up their regulatory oversight over sports wagering,

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<sup>381</sup> *Id.*

<sup>382</sup> Gregory Day, John T. Holden, & Brian M. Mills, *Fraud on Any Market*, 97 IND. L.J. 659, 666 (2022).

<sup>383</sup> See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455-456 (2015) (discussing high-profile American match-fixing incidents).

<sup>384</sup> Brian Ring, *Streaming’s High Latency-No One Cares, But You Still Should: Ring*, FIERCE VIDEO (May 13, 2021), <https://www.fiercevideo.com/video/streaming-s-high-latency-no-one-cares-but-you-still-should-ring>.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> Eric Grundhauser, *How ‘Live’ is Live TV*, ATLAS OBSCURA (Feb. 5, 2016), <https://www.atlasobscura.com/articles/how-live-is-live-tv>.

<sup>388</sup> Tom Butts, *Super Bowl LVI Streaming Averaged 50-60 Seconds Behind Cable When Compared to In-Stadium Experience*, TV TECH (Feb. 14, 2022), <https://www.tvtechnology.com/news/super-bowl-lvi-streaming-averaged-50-60-seconds-behind-cable>.

<sup>389</sup> Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J. L. TECH. & ARTS 63, 65–67 (2015).

<sup>390</sup> Matt Rybaltowski, *As State Consider Anti-Courtsiding Measures, Debate on Transmission of Live Data Intensifies*, SPORTSHANDLE (July 10, 2019), <https://sportshandle.com/state-anti-courtsiding-measures/>.

<sup>391</sup> *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> (last visited July 7, 2022).



especially as independent regulation has yielded meaningful tax revenues. By the same count, the idea of states fully replacing their current regulatory systems with uniform model legislation seems unlikely.

Nevertheless, there are *bona fide* lessons to be learned from the experiment of individual states implementing their regulations for sports wagering, and best practices that states reasonably could and should adopt into their legislation expediently, even if states do not gut their legislation in the entirety. Among other things, states should take reasonable steps to increase the number of sports wagering licenses awarded to avoid creating monopoly or oligopoly markets, and states should improve consumer protections to better insulate pathological gamblers and minors from sports gambling advertisements. In addition, states desiring a competitive market should consider transitioning to the model of overseeing sports wagering that makes use of an experienced, professional Gaming Control Board as has been in place in Nevada for over half a century. These best practices serve not only to promote a fair and transparent market for sports wagering, but also reasonably allow for states to continue to collect reasonable tax dollars from their regulatory schemes.