

LEGALIZED SPORTS WAGERING IN AMERICA

John T. Holden,[†] Marc Edelman[†] & Keith Miller[†]

*For twenty-five 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. National Collegiate Athletic Ass'n* 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, thirty-five 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.*

[†] Associate Professor, Spears School of Business, Oklahoma State University. All authors contributed equally to this Article.

[†] Professor of Law, Baruch College, Zicklin School of Business, City University of New York; Director of Sports Ethics, Robert Zicklin Center for Corporate Integrity.

[†] Ellis and Nelle Levitt Distinguished Professor of Law, Drake Law School.

TABLE OF CONTENTS

INTRODUCTION.....	1384
I. HISTORICAL LEGAL TREATMENT OF SPORTS WAGERING.....	1389
A. <i>Sports Betting Prior to the Professional and Amateur Sports Protection Act</i>	1390
B. <i>Opposition to Sports Betting Mobilizes, and the Professional and Amateur Sports Protection Act</i>	1392
C. <i>Online Gambling: The Purported New Menace</i>	1394
D. <i>The Stalking Horse for Sports Betting: Daily Fantasy Sports</i>	1397
E. <i>The Lead Up to Murphy</i>	1399
F. <i>The Murphy Decision</i>	1402
II. REGULATING SPORTS WAGERING IN THE AFTERMATH OF <i>MURPHY</i>	1404
A. <i>Models for Legalized Sports Wagering</i>	1406
B. <i>Tax Rates and Licensing Mechanisms</i>	1411
C. <i>Gambling Integrity and Consumer Protection Mechanisms</i>	1413
III. OVERVIEW AND EVALUATION OF THE U.S. SPORTS WAGERING MARKET TODAY.....	1415
A. <i>Sports Wagering Market Structure and Size</i>	1416
B. <i>The Market Actors</i>	1420
C. <i>Market Competition, Advertising, and Fear of Consolidation</i>	1421
D. <i>Sports Wagering Market Failures</i>	1424
IV. POTENTIAL UNIFICATION OF SPORTS WAGERING LAW	1428
A. <i>Unifying Sports Wagering Law Through Federal Regulation</i>	1429
B. <i>Unifying Sports Wagering Law Through Model State Law</i>	1433
V. BEST PRACTICES FOR SPORTS WAGERING REGULATION	1436
CONCLUSION	1441

INTRODUCTION

For twenty-five 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.¹ 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.² 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.³

By the early 2010s, larger businesses began to make their way into the sports gaming world, albeit not at first through traditional sportsbooks.⁴ During this period, contests operating under the moniker of “daily fantasy sports” (DFS) took root on the internet, garnered millions of users, and became big business—all under the guise of being something similar to, but other than, sports wagering.⁵ By launching a *cy pres* activity to sports wagering, DFS companies served the important function of testing the political waters for legalizing traditional sports wagering.⁶ Their success helped to highlight the demand for legal sports betting by the American consumer.⁷

¹ 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).

² In 1999, the National Gambling Impact Study Commission estimated that Americans wagered between \$80–\$380 billion annually on sports. See NAT’L GAMBLING IMPACT STUDY COMM’N, *Gambling in the United States*, in NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 2–14 (1999).

³ See generally Marc Edelman, *The Legal Risk of Operating NCAA Tournament Pools*, FORBES (Mar. 13, 2017, 8:39 AM), <https://www.forbes.com/sites/marcedelman/2017/03/13/the-legal-risk-of-operating-ncaa-tournament-pools/?sh=68ab793bf75b> [https://perma.cc/UPK9-XGKC] (“For most college basketball fans, playing in NCAA Tournament pools is a fun pastime that generally does not lead to much legal scrutiny.”); Will Hobson, *Sports Gambling in U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html [https://perma.cc/252K-ZS2D]; *Big Business of Illegal Gambling*, CNBC (Sept. 13, 2013, 4:33 PM), <https://www.cnn.com/2009/12/14/Big-Business-of-Illegal-Gambling.html> [https://perma.cc/268H-GBHP].

⁴ See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES MAG. (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html> (last visited Nov. 17, 2022) (observing the similarities between DFS websites and gambling websites).

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

⁶ 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).

⁷ *Id.*

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.⁸ Silver’s calls were supported a few months later by Major League Baseball (MLB) commissioner Rob Manfred who, despite his league’s historic opposition to sports wagering that dates back to the 1919 Black Sox scandal,⁹ suggested that legalized sports gambling receive “fresh consideration.”¹⁰

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 similar activity.¹¹ 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.¹² To this extent, their continued opposition to New Jersey legalizing sports gambling may have been, in part, political posturing.¹³

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 wagering¹⁴—

⁸ See 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> (last visited Nov. 17, 2022) (“Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”).

⁹ See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 454–55 (2015) (describing how eight members of the Chicago White Sox were accused of intentionally losing the 1919 World Series to the Cincinnati Reds).

¹⁰ 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://perma.cc/5WC2-MKQ8>].

¹¹ See Nat’l Collegiate Athletic Ass’n v. Christie, 61 F. Supp. 3d 488, 490–91 (D.N.J. 2014) (noting that the National Collegiate Athletic Association (NCAA), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), and Office of the Commissioner of MLB sued the Governor of New Jersey over a regulatory scheme that would allow sports wagers in the Garden State).

¹² Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV. 63, 112–13 (2021).

¹³ Jon Wertheim, *The Big Picture*, SPORTS ILLUSTRATED (Aug. 9, 2021), <https://www.si.com/betting/2021/08/09/gambling-issue-daily-cover> [<https://perma.cc/368S-3EN2>].

¹⁴ 28 U.S.C. §§ 3701–3704.

unconstitutional.¹⁵ In the first four years since the Supreme Court's *Murphy* decision, states across the country have reexamined their sports betting bans.¹⁶ At present, more than thirty-five states have chosen to legalize or expand their sports betting options following the 2018 ruling.¹⁷

In the four years since *Murphy*, just under \$160 billion has been legally wagered by Americans on sports.¹⁸ This has translated into just under \$1.9 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*.¹⁹ While sports betting so far has failed to emerge as the panacea for state budget woes that many had hoped,²⁰ the market remains desirable to a large number of state legislatures and sports betting companies.²¹ In many cases, there have been more potential market entrants into the sports wagering market than state gaming licenses made available.²²

¹⁵ See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) (“The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule.”).

¹⁶ Chris Bengel & Shanna McCarriston, *U.S. Sports Betting: Here's Where All 50 States Stand on Legalizing Sports Gambling, Newer Mobile Bets*, CBS SPORTS (Nov. 3, 2022, 2:35 PM), <https://www.cbssports.com/general/news/wanna-bet-explaining-where-all-50-states-stand-on-legalizing-sports-gambling> [<https://perma.cc/NY4K-GXWC>].

¹⁷ See Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022, 5:00 AM), <https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling> [<https://perma.cc/5NQR-WL3Y>] (observing that sports betting is legal in thirty-five states and the District of Columbia).

¹⁸ Matthew Waters, *US Sports Betting Revenue & Handle*, LEGAL SPORTS REP. (Feb. 15, 2023), <https://www.legalsportsreport.com/sports-betting/revenue> [<https://perma.cc/F64A-2PNC>].

¹⁹ *Id.*

²⁰ See, e.g., *Despite Millions on the Line, Sports Betting in Colorado Is Collecting Less State Revenue Than You'd Think*, CBS COLO. (Oct. 26, 2020, 11:56 PM), <https://www.cbsnews.com/colorado/news/sports-betting-colorado-revenue> [<https://perma.cc/ZHA7-VC4D>] (noting Colorado rules that allow operators to deduct promotions from taxes caused the state to 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, 3:57 PM), [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) [<https://perma.cc/H2M7-WTN6?type=image>].

²¹ See, e.g., Spencer Buell, *Sports Betting Would Change Massachusetts Forever. Here's How*, BOS. MAG. (May 23, 2022, 12:21 PM), <https://www.bostonmagazine.com/news/2022/05/23/sports-betting-massachusetts> [<https://perma.cc/5GAQ-78FU>] (describing efforts to bring sports betting to Massachusetts).

²² 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> [<https://perma.cc/SYL8-E3DS>] (describing interest among some stakeholders in expanding the number of mobile sports wagering licenses available in New York).

With many states granting professional sports leagues exclusive rights to sell game-related data,²³ 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.²⁴ Sports wagering has also become tremendously popular among sports fans.²⁵ Meanwhile, state politicians have latched onto sports wagering as a means to raise revenue without undertaking unpopular actions like raising income or property taxes.²⁶

Nevertheless, legalized sports wagering has also led to certain unresolved problems. These problems include optimizing taxation rates on sports wagering;²⁷ addressing consumer protection needs, especially for problem gambling;²⁸ and ensuring the integrity of the underlying sporting events.²⁹ These problems, of course, are not insurmountable,

²³ Edelman & Holden, *supra* note 12, at 99–100.

²⁴ Wertheim, *supra* note 13. 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 (Sept. 22, 2015, 11:58 AM), <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> [<https://perma.cc/K7T5-LK5M>]. 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*, YAHOO! SPORTS (Apr. 28, 2022), <https://sports.yahoo.com/ncaa-allow-sports-betting-data-193130883.html> [<https://perma.cc/8ULJ-Q6JS>].

²⁵ *Sports Gambling: Tendencies of Fans*, NIELSON SPORTS, <https://nielsen.com/sports-gambling-tendencies-fans> [<https://perma.cc/KYP6-U5W3>].

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

²⁷ 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, 12:25 PM), <https://www.washingtonpost.com/dc-md-va/2021/08/30/dc-sports-betting-revenue-disappointment> [<https://perma.cc/L2J7-R4NF>] (noting that while D.C. officials once hoped to add tens of millions of dollars in projected 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 \$200M, Analyst Claims*, N.Y. POST (Feb. 23, 2022, 6:22 PM), <https://nypost.com/2022/02/23/new-york-mobile-sports-betting-operators-have-lost-200m-analyst> [<https://perma.cc/MYT5-FKWP>]. 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! FINANCE (June 1, 2022), https://finance.yahoo.com/news/the-score-to-shut-down-us-sports-book-on-canada-day-155254487.html?fr=sycsrp_catchall [<https://perma.cc/QR6P-LPJL>].

²⁸ Rich Schapiro, *Sports Betting Skyrocketed in Pandemic. Experts Warn of a 'Ticking Time Bomb'*, NBC NEWS (May 15, 2021, 6:00 AM), <https://www.nbcnews.com/news/us-news/sports-betting-skyrocketed-pandemic-experts-warn-ticking-time-bomb-n1266518> [<https://perma.cc/SUV3-TLUU>].

²⁹ See generally John Holden, *Analysis: New Sportradar Report Chronicles Match-Fixing in 2021*, LEGAL SPORTS REP. (May 3, 2022), <https://www.legalsportsreport.com/66188/analysis-new-sportradar-report-match-fixing-2021> [<https://perma.cc/5BNK-FUE3>] (noting there was an uptick in suspicious betting behavior, which could indicate integrity concerns, in 2021).

and, once reasonably addressed, gambling marketplace experts predict that state legislatures will expand sports wagering into nearly all states.³⁰

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 the 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 ranging from professional sports leagues to the Catholic Church.³¹ As with other forms of gambling, the cultural and moral ambivalence towards sports wagering has produced a legal environment that is potholed and bumpy.³² Section I.A begins by examining sports wagering in the United States prior to the passage of PASPA. Section I.B discusses the momentum that led to the passage of PASPA. Section I.C describes the rise of gambling on the internet. Section I.D analyzes the role of DFS in testing the market for sports gambling. Section I.E explores

³⁰ See Rick Maese, *Sports Betting Will Keep Booming in 2022, but Some See Risks in Growth*, WASH. POST (Jan. 14, 2022, 9:00 AM), <https://www.washingtonpost.com/sports/2022/01/14/legal-sports-betting-states-2022> [<https://perma.cc/CW9X-LSF8>] (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 (Sept. 23, 2021, 2:09 PM), <https://www.actionnetwork.com/legal-online-sports-betting/us-states-projected-approve-legal-sports-betting-2023> [<https://perma.cc/R9HK-63V4>] (“[E]very 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.”).

³¹ 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 Minn. Cath. Conf., *Legalizing Sports Wagers: Entertainment or Enslavement?*, CATH. SPIRIT (Nov. 23, 2021), <https://thecatholicspirit.com/commentary/inside-the-capitol/legalizing-sports-wagers-entertainment-or-enslavement> [<https://perma.cc/U9LC-9AHT>] (describing that while “[t]he Catholic Church does not strictly prohibit Catholics from [gambling.] . . . modern sports gambling . . . is like an addictive drug”).

³² Ben Strauss & Emily Guskin, *Support for Legal Sports Betting Grows, Post-UMD Poll Finds*, WASH. POST (July 8, 2022, 10:00 AM), <https://www.washingtonpost.com/sports/2022/07/08/legal-sports-betting-support-americans> [<https://perma.cc/AH89-LR8E>].

the lead-up to the *Murphy* decision. Finally, Section I.F delves into the *Murphy* decision.

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

Until the Supreme Court invalidated PASPA in 2018,³³ nearly all sports wagering in the United States was in the form of illegal betting.³⁴ Illegal sports betting became popular in the United States in the years between World War I and World War II³⁵ when many former bootleggers moved into the market as their new form of organized crime.³⁶

For most of the twentieth century, the availability of legal sports betting, other than horseracing, was limited.³⁷ In large part, this was because, until 1978, Nevada was the only state that allowed casino gambling.³⁸ 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.³⁹ This tax on the amount bet, known as the “handle,”⁴⁰ made it impossible for legally-operating sportsbooks to make money.⁴¹

The imposition of the 10% excise tax was among the first, but certainly not the last, federal actions that sought to eliminate sports betting.⁴² As it related to lawful sports betting, the tax was a success.⁴³ However, in the broader context, the federal excise tax simply drove sports betting further underground into an unregulated and criminally

³³ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

³⁴ 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* (2001).

³⁵ Wagering on sports goes back a long way in history, in the United States and globally. For a detailed discussion of this historical background, see Holden & Edelman, *supra* note 6, at 910–22.

³⁶ DAVIES & ABRAM, *supra* note 34, at 41.

³⁷ Vinny Magliulo, *History of Sports Betting in Las Vegas*, VSIN (Aug. 21, 2017, 2:52 PM), <https://www.vsin.com/history-of-sports-betting-in-las-vegas> [<https://perma.cc/V28D-VWQJ>].

³⁸ See George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RSCH. & REV. J. 65 (1996).

³⁹ Becky Harris & John T. Holden, *Reshaping College Athlete Sports Betting Education*, 47 BYU L. REV. 389, 398–99 (2022).

⁴⁰ See *Ultimate Gambling Terms & Glossary Guide*, CASINO, <https://www.casino.org/glossary> [<https://perma.cc/5YVR-7EAP>].

⁴¹ 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. Harris & Holden, *supra* note 39, at 402.

⁴² G. Robert Blakely, *Legal Regulation of Gambling Since 1950*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 14 (1984).

⁴³ Holden, *supra* note 1.

influenced environment.⁴⁴ Congressional investigations in the 1950s gave visibility to the role of organized crime in sports and horse racing wagering, and these investigations produced calls for legislation.⁴⁵

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.⁴⁶ When his brother, John F. Kennedy, was elected President in 1960, John appointed Robert to be Attorney General.⁴⁷ In this role, Robert Kennedy championed the enactment of the Federal Wire Act,⁴⁸ as the first of several federal laws targeted at curtailing sports wagering.⁴⁹

Many critics agree that few federal laws have created more misunderstanding, or have been criticized more harshly, than the Wire Act.⁵⁰ The legislative history of the Wire Act reflects the desire to criminalize organized crime's use of the Racing Wire Service⁵¹—a ticker-like mechanism that allowed horseracing and sports information, including wagers, to be quickly transmitted to bookmakers.⁵² 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.”⁵³

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.⁵⁴ And, even these states limited legal sports gambling to a

⁴⁴ SCHWARTZ, *supra* note 41, at 169.

⁴⁵ See Holden, *supra* note 1, at 581.

⁴⁶ Blakely, *supra* note 42, at 14–15.

⁴⁷ *Robert Kennedy's Attorney General Office*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/visit-museum/exhibits/permanent-exhibits/robert-kennedys-attorney-general-office> [<https://perma.cc/H92B-CCRN>].

⁴⁸ 18 U.S.C. § 1084.

⁴⁹ John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 707 (2020).

⁵⁰ 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.”).

⁵¹ See Note, *Racing Wire Service*, 5 STAN. L. REV. 493 (1953), for a contemporary account of this issue.

⁵² *Id.*

⁵³ SCHWARTZ, *supra* note 41, at 96.

⁵⁴ See Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. 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.

small number of state-sponsored, lottery-like contests.⁵⁵ Meanwhile, in 1976, New Jersey became the second state after Nevada to allow for casinos.⁵⁶ However, unlike Nevada's regulations, New Jersey's regulations did not allow casinos to offer sports wagering.⁵⁷

By the beginning of the 1990s, several other states began to seriously consider legalizing sports wagering.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶²

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 National Collegiate Athletic Association (NCAA) began to organize a coalition to renew their attack on sports betting as an activity that they

⁵⁵ See *Nat'l Football League v. Governor of Delaware*, 435 F. Supp. 1372, 1376 (D. Del. 1977) (describing Delaware's sports betting contests).

⁵⁶ Martin Derbyshire, *The Complete History of Gambling in Atlantic City*, NJ ONLINE GAMBLING (Jan. 3, 2023), <https://www.njonlinegambling.com/atlantic-city-history> [https://perma.cc/CU8B-7MWF].

⁵⁷ See Edelman, *supra* note 54, at 318.

⁵⁸ *Id.* at 318–19.

⁵⁹ *Id.* at 318.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Rodenberg & Holden, *supra* note 1, at 5 (describing lobbying efforts surrounding PASPA).

purported would corrupt the integrity of sports.⁶³ The public face of the opposition emerged in Senator Bill Bradley of New Jersey.⁶⁴

Bradley was a formidable adversary. He had been an All-American basketball player at Princeton University, and then a Rhodes Scholar.⁶⁵ Before entering politics, Bradley was a two-time NBA champion with the New York Knicks.⁶⁶ 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.⁶⁷ 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 United States, Bradley had to instead settle for a law that prohibited sports betting’s expansion.⁶⁸ Thus, sports betting would essentially be frozen at the state level as it was in 1992.⁶⁹

The new law that Senator Bradley was ultimately able to pass—PASPA—was enacted on October 28, 1992.⁷⁰ PASPA is notable both for what it did—and did not—do. There is wide support for the view that Congress has the power to prohibit sports betting in the United States.⁷¹ 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.⁷²

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

⁶³ Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball’s Continuing Crusade Against Sports Gambling*, 2 SETON HALL J. SPORT L. 19, 21 (1992) (describing how MLB and other sports leagues campaigned for legislation and asserting 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”).

⁶⁴ 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> (last visited Feb. 10, 2023).

⁶⁵ *Bill Bradley: United States Senator and Athlete*, BRITANNICA (July 24, 2022), <https://www.britannica.com/biography/Bill-Bradley> [<https://perma.cc/WX7N-UVV5>].

⁶⁶ *Id.*

⁶⁷ See Holden, *supra* note 31, at 338–46 (describing 1991 subcommittee hearings with testimony from active and former athletes).

⁶⁸ See Rodenberg & Holden, *supra* note 1, at 11–17 (describing PASPA’s exemptions and some of the legislative horse trading that took place).

⁶⁹ 28 U.S.C. §§ 3701–3704.

⁷⁰ *Id.*

⁷¹ See, e.g., *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018) (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

⁷² 28 U.S.C. §§ 3701–3704.

betting, gambling, or wagering scheme based” on competitive sporting events.⁷³ 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.”⁷⁴

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.⁷⁵ 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.”⁷⁶

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.⁷⁷ 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, Bradley, was the primary initiator of efforts to keep sports betting from becoming legal elsewhere.⁷⁸

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,⁷⁹ and, by the mid-1990s, Congressional concerns about gambling had pivoted away from brick-and-mortar sports betting toward a new betting concern: online gambling.⁸⁰ The emerging world of online gambling included not only online casinos and online poker sites, but also online sportsbooks—

⁷³ *Id.* § 3702. The statute defined the term “governmental entity” 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).

⁷⁴ *Id.* § 3702(2).

⁷⁵ *Id.* § 3703.

⁷⁶ *Id.*

⁷⁷ Michael Welsh, *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).

⁷⁸ Chris Chavez, *What Is PASPA? The Professional and Amateur Sports Protection Act Explained*, SPORTS ILLUSTRATED (May 14, 2018), <https://www.si.com/more-sports/2018/05/14/professional-amateur-sports-protection-act-explained-supreme-court-decision> [https://perma.cc/UT5Z-DTUD].

⁷⁹ Holden & Edelman, *supra* note 6, at 920–21.

⁸⁰ See generally Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 134–70 (2000) (describing the United States’ early efforts to target online gambling).

many of which were housed on foreign servers but targeted local customers.⁸¹

In a landmark case, *United States v. Cohen*, 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 United States.⁸² The court held that it made no difference that Cohen placed all of his company's servers outside of the United States given that he accepted money from bettors in the United States.⁸³

Antigua took exception to the Cohen prosecution, and it challenged the United States before the World Trade Organization (WTO) for violating the General Agreement on Trade in Services (GATS), claiming that the United States was giving an unfair advantage to U.S. gambling operators at the expense of non-U.S. operators.⁸⁴ 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.⁸⁵ However, the WTO rejected this assertion, pointing out that the United States legalized and regulated other forms of gambling, including interstate horseracing.⁸⁶

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 United States.⁸⁷ Doubling down on the efforts to eradicate online gambling within U.S. borders, a number of largely Republican congresspersons proceeded to launch an effort to pass a federal law nearly

⁸¹ See *id.* at 167–70 (describing the challenges of targeting operations existing outside of the territorial United States).

⁸² 260 F.3d 68 (2d Cir. 2001); Guest, *Bookies Behaving Badly: Five Years Now Since WSEX Went Bust, Jay Cohen Fleeced Hundreds* (Mar. 15, 2018), <https://www.gambling911.com/gambling/bookies-behaving-badly-five-years-now-wsex-went-bust-jay-cohen-fleeced-hundreds-.html> [<https://perma.cc/X2CH-UW55>].

⁸³ *Cohen*, 260 F.3d 68, at 74–75.

⁸⁴ 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).

⁸⁵ *Id.* at 118.

⁸⁶ *Id.* at 122–23.

⁸⁷ See, e.g., *United States v. Corrar*, 512 F. Supp. 2d 1280 (N.D. Ga. 2007). In *Corrar*, the 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, as the gambling business was no longer operating, and thus it did not satisfy the statutory requirement of the activity being “ongoing.” The Wire Act was violated, however, because the defendant gave a gambler in another state account numbers that enabled him to place wagers with the defendant. *Id.*

prohibiting internet gambling in its entirety.⁸⁸ This culminated rather anticlimactically in 2006 with the passage of the Unlawful Internet Gambling Enforcement Act—otherwise known by its clumsy acronym, UIGEA.⁸⁹ 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.⁹⁰ Few, if any, members of Congress were aware of its provisions, which may have been an intentional tactic of the UIGEA sponsors.⁹¹

In practice, UIGEA attacked internet gambling more subtly than in previous efforts.⁹² Rather than using a “kill shot,” UIGEA sought to suffocate internet gambling by removing its oxygen source, specifically, the funding of online gambling accounts.⁹³ 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.⁹⁴ 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.⁹⁵ Meanwhile, the portion of UIGEA 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.⁹⁶

⁸⁸ See, e.g., Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. (2006) (proposing to amend the Federal Wire Act to include fixed and mobile communication facilities, as well as expanding the definition of bets and wagers).

⁸⁹ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367. See generally I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537 (2006).

⁹⁰ Rose, *supra* note 89, at 537.

⁹¹ See *id.* While UIGEA was attached as a last-minute legislative rider, internet gambling regulation had been debated for approximately a decade. See John Holden, *Legislative Sausage Making: How We Got UIGEA*, LEGAL SPORTS REP. (Sept. 21, 2018), <https://www.legalsportsreport.com/22325/legislative-sausage-making-uigea> [https://perma.cc/4X5X-YRL7].

⁹² See Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 526 (2009).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (alteration in original) (quoting 31 U.S.C. § 5363).

⁹⁶ See *id.* at 527; BD. OF GOVERNORS OF THE FED. RESRV. SYS., FED. DEPOSIT INS. CORP., NAT’L CREDIT UNION ADMIN., OFF. OF THE COMPTROLLER OF THE CURRENCY & OFF. OF THRIFT SUPERVISION, FIL-35-2010, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OVERVIEW AND EXAMINATION PROCEDURES (2010), <https://www.fdic.gov/news/financial-institution-letters/2010/fil10035a.pdf> [https://perma.cc/FG6A-8MMR].

Restricted transactions were those where a gambling business accepted funds directly or indirectly from a player connected with unlawful internet gambling, that is, gambling illegal under state or federal law.⁹⁷

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 that would lead to the blocking of many transactions that were not about gambling at all.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

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 United States bettors.¹⁰² 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.¹⁰³

⁹⁷ Leonard, *supra* note 92, at 526.

⁹⁸ See Charles P. Ciaccio, Jr., Note, *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY 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").

⁹⁹ The Treasury Department and the Federal Reserve, along with the Justice Department, adopted final rules implementing UIGEA in 2008, with an effective date of January 19, 2009. CONG. RSCH. SERV., RS22749, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT (UIGEA) AND ITS IMPLEMENTING REGULATIONS 3 (2012).

¹⁰⁰ See *id.* at 4–6.

¹⁰¹ *Id.* at 5.

¹⁰² Josh Dean, *The Personality Behind Online Gaming Site Bodog*, FAST CO. (July 1, 2008), <https://www.fastcompany.com/898669/personality-behind-online-gaming-site-bodog> [<https://perma.cc/9J38-SX4J>].

¹⁰³ See 31 U.S.C. § 5362(1)(E)(ix).

How this provision became part of a law stately hostile to online gambling is a fascinating study in the legislative process.¹⁰⁴ At the time of UIGEA's enactment, fantasy sports were regarded by many as a "bragging rights," or small money, activity that did not resemble gambling.¹⁰⁵ 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.'"¹⁰⁶

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," in which participants would have the task of "picking 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.¹⁰⁷ With the emergence of DFS as a purported form of fantasy sports, new questions of legality arose.¹⁰⁸ DFS companies purported that federal law explicitly legalized their games, as these activities involved predicting the performance of multiple players in multiple real-world events and did not entail betting money against the house.¹⁰⁹ However, others, including the sponsors of UIGEA, were less certain.¹¹⁰

The outsized attention given to DFS from 2007 until the *Murphy* decision in 2018 was a critical antecedent to legalized sports betting.¹¹¹ Despite the hostility to DFS and some difficult times in 2015, DFS softened up the United States to the idea that wagering on sports, or

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

¹⁰⁵ Marc Edelman, John T. Holden & Adam Scott Wandt, *U.S. Fantasy Sports Law: Fifteen Years After UIGEA*, 83 OHIO ST. L.J. 117, 118–19 (2022).

¹⁰⁶ BILL ORDINE, *FANTASY SPORTS REAL MONEY: THE UNLIKELY RISE OF DAILY FANTASY: HOW TO PLAY—HOW TO WIN* 36 (2015).

¹⁰⁷ Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 127, 143 (2016) (quoting 31 U.S.C. § 5362(1)(E)(ix)).

¹⁰⁸ Edelman, Holden & Wandt, *supra* note 105, at 124.

¹⁰⁹ See Marc Edelman, *Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports*, 5 PACE INTELL. PROP. SPORTS & ENT. L.F. 1, 12 (2016) ("[I]t 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.").

¹¹⁰ Tim Dahlberg, *Former Congressman Says Daily Fantasy Sports Sites Are a 'Cauldron of Daily Betting'*, PBS NEWSHOUR (Oct. 12, 2015, 6:50 PM), <https://www.pbs.org/newshour/politics/former-congressman-says-daily-fantasy-football-sites-cauldron-daily-betting> [https://perma.cc/299E-PLCM] (noting that a congressional sponsor of UIGEA says the law was supposed to stop internet gambling, not promote it).

¹¹¹ Holden & Edelman, *supra* note 6, at 922–24.

“wagering type” activity on sports, was not so bad.¹¹² Moreover, with so much attention focused on the legal status of DFS, particularly in the period from 2013–2018, less attention was paid to New Jersey’s attack on PASPA taking place in the courts of the Third Circuit.¹¹³

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.¹¹⁴ And yet, the state decided, at the time, not to exercise its special option.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ 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

¹¹² *See id.*

¹¹³ *See id.* (noting the various attacks on the legality of DFS).

¹¹⁴ *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> (last visited Feb. 10, 2023).

¹¹⁵ *Id.*

¹¹⁶ *N.J. Senators Pushing Sports Betting Bill*, COURIER POST (Sept. 30, 2014, 5:19 PM), <https://www.courierpostonline.com/story/news/local/south-jersey/2014/09/30/nj-senators-pushing-sports-betting-bill/16498669> [<https://perma.cc/7PSP-M82V>].

¹¹⁷ *Lesniak to Introduce New Sports Betting Bill on Monday*, OBSERVER (Sept. 10, 2014, 12:39 PM), <https://observer.com/2014/09/lesniak-to-introduce-new-sports-betting-bill-on-monday> [<https://perma.cc/F8ZG-7ECT>]; Eric Markowitz, *All In! Start-Ups Bet on Online Gambling Boom*, INC, <https://www.inc.com/eric-markowitz/start-ups-and-states-bet-on-gambling-boom.html> (last visited Feb. 10, 2023).

¹¹⁸ *Interactive Media Ent. & Gaming Ass’n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106, at *1–2 (D.N.J. Mar. 7, 2011).

selectively granted to a few states.¹¹⁹ Nonetheless, none of these assertions were considered by the court, as it ruled the plaintiffs lacked standing to bring the constitutional claims.¹²⁰

Meanwhile, New Jersey's supporters of sports gambling were just beginning their efforts.¹²¹ In November 2011, they prepared a referendum item for their general election, amending their state constitution to permit sports betting.¹²² Voters overwhelmingly supported the amendment. Soon after that, the state legislature passed laws allowing sports wagering at Atlantic City casinos and horse racetracks.¹²³ The new laws gave the New Jersey Division of Gaming Enforcement authority to approve applications for sports wagering operations.¹²⁴

In doing so, New Jersey was openly challenging the sports leagues' authority under PASPA.¹²⁵ 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."¹²⁶ 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.¹²⁷

The litigation that followed—originally captioned as *Christie v. National Collegiate Athletic Ass'n* and later recaptioned as *Murphy v. National Collegiate Athletic Ass'n* 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.¹²⁸ Among other arguments, New Jersey claimed that PASPA violated the Tenth Amendment of the U.S. Constitution because it commandeered the New Jersey legislative

¹¹⁹ *Id.* at *2.

¹²⁰ *Id.* at *1.

¹²¹ Wayne Parry, *New Jersey Bills Push Sports Betting*, N.Y. POST (Jan. 23, 2012, 8:34 PM), <https://nypost.com/2012/01/23/new-jersey-bills-push-sports-betting> [<https://perma.cc/4H42-XPBS>].

¹²² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018).

¹²³ *Id.*

¹²⁴ 2012 Sports Wagering Act (2012 Act), 2011 N.J. Sess. Law Serv. 1723–30 (West).

¹²⁵ *4 Major Pro Sports Leagues, NCAA Sue to Stop N.J. From Allowing Betting*, NJ.COM (Aug. 7, 2012, 3:44 PM), https://www.nj.com/politics/2012/08/4_major_pro_sports_leagues_sue.html [<https://perma.cc/JY7Z-D945>].

¹²⁶ *See Gov. Christie Says Sports Gambling Coming To New Jersey, Expects Legal Challenge*, SPORTS BUS. J. (May 25, 2012), <https://www.sportsbusinessjournal.com/Daily/Issues/2012/05/25/Sports-in-Society/NJ-Betting> [<https://perma.cc/9QUX-A9PP>].

¹²⁷ *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J.) *aff'd*, 730 F.3d 208 (3d Cir. 2013).

¹²⁸ Fintech Crimes Team, *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> [<https://perma.cc/R6MV-H99R>].

process and conscripted the state legislature to do the work of federal officials by mandating the state take specific legislative action.¹²⁹

New Jersey's path to the Supreme Court was turbulent and has been detailed elsewhere.¹³⁰ From the initial challenges to PASPA by the state in 2012, to the *Murphy* decision in 2018, the state endured a pounding.¹³¹ 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.¹³² After another rejection by the Third Circuit in August 2016, this time by the court en banc, there was little reason for optimism. Another petition for certiorari seemed like a long shot.¹³³

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),¹³⁴ a mechanism for seeking the counsel of the U.S. Solicitor General about a case in which the United States does not have a direct interest.¹³⁵ Historically, if the Solicitor General recommends the Court grant certiorari, the Court usually does.¹³⁶

¹²⁹ Holden, *supra* note 31, at 353–64.

¹³⁰ 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); 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).

¹³¹ 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, *supra* note 6, at 929–33.

¹³² *Christie v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014).

¹³³ *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016), *rev'd sub nom. Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018).

¹³⁴ See Ryan Rodenberg, *Noel Francisco Could Play Role in Future of Nationwide Sports Betting*, ESPN (Mar. 8, 2017), https://www.espn.com/chalk/story/_/id/18850678/noel-francisco-confirmed-solicitor-general-weigh-new-jersey-sports-betting-case [https://perma.cc/9UMW-FMX6].

¹³⁵ 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. & PROCESS 209, 212–13 (2009) (describing the process of issuing a CVSG).

¹³⁶ *Id.* at 216.

The Solicitor General found little merit to the petition, opining that the case did not warrant the scrutiny of the Court.¹³⁷ 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 commandeers the regulatory power of States in contravention of *New York v. United States*."¹³⁸ The stage was set for the transformation of American law on the issue of sports wagering.

F. *The Murphy Decision*

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.¹³⁹ Thus, lawyers should be wary of reading too much into the colloquy between the bench and the attorney.¹⁴⁰

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.¹⁴¹ 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.¹⁴²

¹³⁷ 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> [<https://perma.cc/U3VX-KZ9U>].

¹³⁸ Petition for a Writ of Certiorari at i, *Murphy*, 138 S. Ct. 1461 (No. 16-476) (citing *New York v. United States*, 505 U.S. 144 (1992)).

¹³⁹ See Elise Hu, *Recent Rulings Show How Hard It Is to Predict High-Profile Court Decisions*, NPR (June 29, 2012, 7:58 AM), <https://www.npr.org/sections/itsallpolitics/2012/06/28/155925331/recent-rulings-show-how-hard-it-is-to-predict-high-profile-court-decisions> [<https://perma.cc/V3FH-H3SF>].

¹⁴⁰ See Colter Paulson, *Predicting Outcomes Based on Questioning at Oral Argument*, SIXTH CIR. APP. BLOG (Aug. 28, 2012), <https://www.sixthcircuitappellateblog.com/news-and-analysis/predicting-outcomes-based-on-questioning-at-oral-argument> [<https://perma.cc/C6KC-N22V>]; Amanda Frost, *Academic Highlight: Jacobi & Rozema on Predicting Outcomes Based on Interruptions at Oral Argument*, SCOTUSBLOG (Dec 18, 2017, 10:38 AM), <https://www.scotusblog.com/2017/12/academic-highlight-jacobi-rozema-predicting-outcomes-based-interruptions-oral-argument> [<https://perma.cc/VX5T-5H72>].

¹⁴¹ See Ilya Somin, *Place Your Bets on Federalism—Thoughts on Today's Oral Argument in Christie v. NCAA*, WASH. POST (Dec. 4, 2017, 3:11 PM), <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> (last visited Feb. 10, 2023) (“[O]ral argument reveals that most of the justices don’t buy this attempt to circumvent the constitutional rule against commandeering.”).

¹⁴² See generally *Murphy*, 138 S. Ct. 1461.

Justice Alito's opinion for the Court was an emphatic takedown of PASPA.¹⁴³ Seven Justices voted in favor of invalidating section 3702 of PASPA on the basis that it in fact commandeered states.¹⁴⁴ Six Justices also found section 3703 invalid, with Justice Breyer parting ways with the majority on that point. Justices Sotomayor and Ginsburg dissented.¹⁴⁵

The Court described anticommandeering as a “fundamental structural decision incorporated into the Constitution”¹⁴⁶—one that “withhold[s] from Congress the power to issue orders directly to the States.”¹⁴⁷ Though the term itself might “sound arcane,”¹⁴⁸ it simply expressed the limits on Congress's power and the power reserved to the states in the Tenth Amendment.¹⁴⁹ Moreover, it was a “structural protection[] of liberty” for individuals.¹⁵⁰ The opinion also stressed the role the anticommandeering doctrine played in promoting political accountability¹⁵¹ and preventing the federal government from shifting regulatory costs to the states.¹⁵²

The core of the Court's opinion is its analysis of *New York v. United States*¹⁵³ and *Printz v. United States*¹⁵⁴—the only two cases where the Court had struck down a federal statute using the anticommandeering principle.¹⁵⁵ In both cases, Congress gave states a direct order to take

¹⁴³ See *id.* at 1481 (“[T]here 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.”).

¹⁴⁴ *Id.* at 1468.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1475.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1476.

¹⁵⁰ *Id.* at 1477 (citing *Printz v. United States*, 521 U.S. 898, 921 (1997)).

¹⁵¹ *Id.* (“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.”).

¹⁵² *Id.* (“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.”).

¹⁵³ 505 U.S. 144 (1992).

¹⁵⁴ 521 U.S. 898 (1997).

¹⁵⁵ See Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 364–65 (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).

action that promoted a federal policy.¹⁵⁶ PASPA—the leagues and the government argued—gave no such instruction. Rather, it simply prohibited states from licensing or authorizing sports betting.¹⁵⁷ However, Justice Alito’s opinion swept away any distinction between a “command” and a “prohibition,” calling that distinction “empty.”¹⁵⁸

II. REGULATING SPORTS WAGERING IN THE AFTERMATH OF *MURPHY*

Since the Supreme Court’s ruling in *Murphy*, the growth of sports wagering in the United States 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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

At present, thirty-six states plus the District of Columbia have legalized some form of sports wagering, with sports wagering currently

¹⁵⁶ 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.” *New York*, 505 U.S. at 175. The “Constitution does not empower Congress to subject state governments to this type of instruction.” *Id.* 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.” *Printz*, 521 U.S. at 935.

¹⁵⁷ *Murphy*, 138 S. Ct. at 1478. Respondents argued that commandeering occurs only when Congress “affirmatively commands” action by the state.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., *U.S. Gambling Laws*, ONLINE U.S. CASINOS, <https://www.onlineunitedstatescasinos.com/states> [<https://perma.cc/U46G-CCSG>] (explaining that the history of casino gambling began in 1822, but that by 1989, only three states had legalized it).

¹⁶⁰ See Eric Raskin, *One Casino Will Get the Jump on the Rest When Sports Betting Launches in West Virginia*, US BETS, <https://www.usbets.com/west-virginia-hollywood-casino-sports-betting-launch/amp> [<https://perma.cc/NY4Y-5LXX>].

¹⁶¹ 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 that 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> [<https://perma.cc/VK8K-8RMF>].

legal in most of the states along the northeastern corridor.¹⁶² 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 more than eighty-five percent of all legal U.S. sports wagers.¹⁶³ 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.¹⁶⁴

Nevertheless, with the Wire Act continuing to disallow interstate sports gambling,¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ This

¹⁶² *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS’N (Jan. 17, 2023), <https://www.americangaming.org/research/state-gaming-map> [https://perma.cc/2ZJ3-WZS6].

¹⁶³ See Mike Reynolds, *Online Wagering, Engaged Fans Key to Sports Betting Growth*, S&P GLOB. (Oct. 20, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/online-wagering-engaged-fans-key-to-sports-betting-growth-66575074> (last visited Feb. 10, 2023).

¹⁶⁴ See generally text accompanying note 85. This is not to say that moral concerns surrounding sports gambling do not remain. 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> [https://perma.cc/MW9N-TL54] (questioning whether the cultural shift towards sports betting is positive).

¹⁶⁵ Interstate Wire Crime Act, 18 U.S.C. §§ 1081–84 (prohibiting certain types of gambling in the United States). This statute is also known as the Federal Wire Act.

¹⁶⁶ See Holden, *supra* note 49, at 723–26 (describing the lingering questions surrounding the Wire Act that have resulted in replication of procedures in each individual state).

¹⁶⁷ Andrew Bary, *Why Online Sports Gambling Companies May Never Earn Much Money*, BARRON’S (Sept. 9, 2021, 11:02 AM), <https://www.barrons.com/articles/why-online-sports-gambling-companies-may-never-earn-much-money-51631199769> (last visited Feb. 10, 2023).

¹⁶⁸ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44 (1996) (holding that the state has immunity under the Eleventh Amendment from suit in federal court, and that the IGRA provision allowing the tribe to sue Florida and obtain injunctive relief when the state has not negotiated in good faith was unconstitutional).

¹⁶⁹ Dan Walters, *Will California’s Indian Tribes Get a Monopoly on Sports Betting?*, DESERT SUN (Aug. 29, 2021, 5:00 AM), <https://www.desertsun.com/story/opinion/columnists/2021/08/29/>

has created challenges for the legalization of sports wagering in states such as California and Florida.¹⁷⁰

This Part proceeds in three Sections. Section II.A 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 II.B includes a discussion of the various methods for licensing and taxing sports gambling operators today. Section II.C briefly examines the aspects of existing state gambling regulations that pertain to gambling integrity and consumer protection.

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.¹⁷¹ 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 gambling activity—has long been described as the “gold standard” for regulating sports gambling activities.¹⁷² Nevada first created its gambling control board in 1955.¹⁷³ 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.¹⁷⁴ With the reduction of the federal excise tax to a manageable .25% in 1982, sports betting flourished and emerged into an industry that saw more than \$5 billion wagered in 2018.¹⁷⁵

sports-betting-californias-indian-tribes-get-monopoly/5609662001 [https://perma.cc/ZS4Q-RCLN].

¹⁷⁰ Grace Gedye, *California Sports Betting Initiative Backed by FanDuel, DraftKings Would Block Small Competitors*, CAL MATTERS (Apr. 27, 2022), <https://calmatters.org/economy/2022/04/california-sports-betting-initiative-backed-by-fanduel-draft-kings-would-block-small-competitors> [https://perma.cc/6LFY-PJRA].

¹⁷¹ See *Interactive U.S. Map: Sports Betting*, *supra* note 162.

¹⁷² Sam McQuillan, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Feb 12, 2023, 9:12 AM), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> [https://perma.cc/3PL2-4QCP].

¹⁷³ Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 UNLV GAMING L.J. 75, 76–77 (2020).

¹⁷⁴ *Id.* at 77–78.

¹⁷⁵ *Id.* at 78–79.

The Nevada model has since been adopted by a number of other states, including New Jersey, Pennsylvania, and Mississippi.¹⁷⁶ 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.¹⁷⁷

A second regulatory model, meanwhile, uses a state lottery as the primary regulatory agency.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ For example, the District of Columbia has seen returns significantly below expectations from its sports betting app, GambetDC.¹⁸¹ In addition, the GambetDC product was mired in controversy, not only for the bid process that resulted in Intralot receiving the contract, but also in the low payouts to consumers that likely resulted in many choosing alternatives—or not to bet at all—rather than use the lottery’s products.¹⁸²

Tennessee also has seen problems with its rollout of sports wagering under the state lottery regulatory model.¹⁸³ 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 reportedly withheld winnings from pay-day lending clients who won wagers through the

¹⁷⁶ Holden, *supra* note 1, at 598.

¹⁷⁷ Chris Altruda, *Legal US Sports Betting Revenue, Handle and Tax Totals Since PASPA Repeal*, SPORTSHANDLE (Nov. 14, 2022), <https://sportshandle.com/sports-betting-revenue> [<https://perma.cc/S7AH-5KKV>].

¹⁷⁸ Holden, *supra* note 1, at 600.

¹⁷⁹ *See id.* (noting that Montana, Oregon, and Delaware all used the lottery to regulate sports gambling).

¹⁸⁰ *Id.* at 601.

¹⁸¹ Dominique Maria Bonessi, *D.C. Sports Betting Revenues Suffer from Pandemic, Lack of Mobile Wagering Options*, DCIST (Sept. 10, 2021, 10:53 AM), <https://dcist.com/story/21/09/10/d-c-sports-betting-revenues-suffer-from-pandemic-lack-of-mobile-wagering-options> [<https://perma.cc/ZM4V-45WQ>].

¹⁸² Weil, *supra* note 27.

¹⁸³ Anthony Elio, *Tennessee Sports Betting: Top Sportsbook Apps 2022 & TN Sports Betting Guide*, LINEUPS (Nov. 1, 2022, 4:51 PM), <https://www.lineups.com/betting/tennessee-sports-betting> [<https://perma.cc/U3HW-UGQ7>].

app.¹⁸⁴ The controversial approval of this particular licensee was followed by reported instances of rampant proxy betting on the same company's app.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ Several Native American tribes in New Mexico were among the first to launch sports betting, shortly after the *Murphy* decision.¹⁸⁸ Wagering on tribal land is governed by IGRA.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ 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.¹⁹² While New Mexico tribes quickly launched in-person wagering, tribes in other jurisdictions aspired to compete on a broader scale by allowing mobile wagering.¹⁹³ 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

¹⁸⁴ 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> [https://perma.cc/HP82-TECU].

¹⁸⁵ *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.

¹⁸⁶ *Id.*

¹⁸⁷ Holden, *supra* note 1, at 604–05.

¹⁸⁸ *Id.* at 605.

¹⁸⁹ 25 U.S.C. §§ 2701–2721.

¹⁹⁰ 480 U.S. 202, 221–22 (1987); *see also* Holden, *supra* note 1, at 605–06.

¹⁹¹ 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. ECON. PERSPECTIVES 185, 193 (2015).

¹⁹² Holden, *supra* note 161.

¹⁹³ Matthew Kredell, *How Michigan Tribes Learned to Stop Worrying and Love Online Gambling*, PLAY MICH. (Sept. 13, 2022), <https://www.playmichigan.com/tribal-casinos-michigan-online-gambling-bay-mills> [https://perma.cc/JKJ3-829R].

process, which respects tribal sovereignty. Instead, the tribes have agreed to be taxed as commercial operators.¹⁹⁴ Federal efforts to expand mobile wagering under the IGRA compacting process failed in 2019 and 2021.¹⁹⁵

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.¹⁹⁶ The first-of-its-kind agreement was premised on the theory that IGRA allowed tribes and states wide latitude to negotiate and come to terms on gaming.¹⁹⁷ The Florida compact, however, was challenged by several groups including West Flagler Associates, a group that operates pari-mutuel facilities in South Florida, who were required under the compact to negotiate with the Seminole Tribe if they desired to offer sports wagering.¹⁹⁸ After approval was deemed to occur following a forty-five-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 industry.”¹⁹⁹ 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.²⁰⁰ 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

¹⁹⁴ *Id.*; Rob Capriccioso, *Arizona Tribes Celebrate Advent of Sports Betting*, TRIBAL BUS. NEWS (Sept. 27, 2021), <https://tribalbusinessnews.com/sections/gaming/13638-arizona-tribes-celebrate-advent-of-sports-betting> [<https://perma.cc/9Q2S-V5N9Q>].

¹⁹⁵ The 2019 legislation was far more permissive than the 2021 legislation. The 2019 legislation would have allowed for tribes to compact with states to offer mobile wagering. The 2021 legislation 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> [<https://perma.cc/7E4Y-S4FL>].

¹⁹⁶ *Gov. DeSantis Signs New Gambling Compact with Seminole Tribe of Florida*, FLA. POL. (Apr. 23, 2021), <https://floridapolitics.com/archives/423375-seminole-compact-desantis> [<https://perma.cc/C6YL-TWBX>].

¹⁹⁷ 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> [<https://perma.cc/KTH4-UFXJ>] (quoting law professor Richard Jarvis who stated that “the federal court found that on Indian property the Indians could pretty much do whatever they wanted to”).

¹⁹⁸ *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 263–65 (D.D.C. 2021).

¹⁹⁹ Letter from Bryan Newland, Principal Deputy Assistant Sec’y—Indian Affs., to Hon. Marcellus W. Osceola Jr., Chairman, Seminole Tribe of Fla. 6 (Aug. 6, 2021), 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://perma.cc/56GM-AEZZ>].

²⁰⁰ *W. Flagler Assocs.*, 573 F. Supp. at 265.

“Indian lands,” and because mobile wagering does not take place exclusively on tribal land, the Secretary had an “affirmative duty to reject” the compact.²⁰¹ 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 renegotiate tribal compacts.²⁰² Indeed, California’s future regulation of sports betting is very likely to depend on tribal governments playing a role in regulation.²⁰³

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.²⁰⁴ 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.²⁰⁵ Those compacts were amended in 2021 to allow the tribes to offer sports betting regulated by the Connecticut Department of Consumer Protection Gaming Division.²⁰⁶ 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

²⁰¹ *Id.* at 275.

²⁰² 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).

²⁰³ The 2022 November election had two competing ballot initiatives that would bring sports wagering to California; one was supported by many of the state’s tribes, while the other was backed by out of state gaming operators. Dan Walters, *Will California Voters Approve Betting on Sports?*, CALMATTERS (May 18, 2022), <https://calmatters.org/commentary/2022/05/will-california-voters-approve-betting-on-sports> [<https://perma.cc/3YB7-S79T>]. One thing that remains to be seen is, even if the tribal-backed initiative failed and the commercial operator-backed initiatives won, whether the tribes could argue that IGRA required the state to enter into negotiations with them. *See* 25 U.S.C. § 2710(d)(7)(A) (1988) (noting a state’s obligation to enter into good faith negotiations upon request by federally recognized tribes).

²⁰⁴ 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.

²⁰⁵ *See* 12 CONN. GEN. STAT. § 12-851 (2022) (describing the process for a governor entering into contracts with the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut).

²⁰⁶ Press Release, Ned Lamont, Governor, State of Connecticut, Governor Lamont, Mashantucket Pequot Tribe, and Mohegan Tribe Announce Federal Approval of Revisions to Gaming Compacts (Sept. 9, 2021), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/09-2021/Governor-Lamont-Announce-Federal-Approval-of-Revisions-To-Gaming-Compacts> [<https://perma.cc/3ECZ-FAD3>].

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,²⁰⁷ and in not disclosing potential conflicts of interest.²⁰⁸ 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 diversity on the state level between tax rates and how third-party operators are licensed.²⁰⁹ While the federal government charges a quarter of a percent of the total amount of money wagered,²¹⁰ there is a significant variation in state tax rates, ranging from 6.75% in Nevada and Iowa to 51% in New Hampshire, New York, and Rhode Island.²¹¹ Licensing fees also vary across the country, ranging from \$500 in Nevada to \$20 million for an online-only license in Illinois.²¹² The disparate tax and licensing regimes around the country come with different privileges. Because operators in Iowa have a tax rate of 6.75% and licensing fees of only \$45,000, the state’s companies have significant competition, as Iowa has issued over eighteen licenses.²¹³ By contrast, in Rhode Island, the state awarded a monopoly over online sports betting to

²⁰⁷ See Richard Schuetz, *Captured or Broken?*, GGB NEWS (Mar. 15, 2022), <https://ggbnews.com/article/captured-or-broken> [https://perma.cc/P4A6-MUUP].

²⁰⁸ See Richard Schuetz, *Message from a Small Town*, GGB NEWS (Feb. 9, 2022), <https://ggbnews.com/article/message-from-a-small-town> [https://perma.cc/U6VL-XPBV].

²⁰⁹ See generally Steve Ruddock, *Sports Betting Tax Rates and Licensing Fees*, BETTINGUSA.COM, <https://www.bettingusa.com/sports/taxes-and-licenses> [https://perma.cc/97SH-Q6GP] (listing the various state tax rates and licensing fees).

²¹⁰ 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 1982. See SCHWARTZ, *supra* note 41, at 169; Harris, *supra* note 173, at 78.

²¹¹ Harris, *supra* note 173; Ulrik Boesen, *Large Spread in Tax Treatment of Sports Betting Operators*, TAX FOUND. (Feb. 9, 2022), <https://taxfoundation.org/sports-betting-tax-treatment> [https://perma.cc/4CXG-BE76].

²¹² Ruddock, *supra* note 209.

²¹³ *Id.*; see also *Sports Wagering Operators*, IOWA RACING & GAMING COMM’N, <https://irgc.iowa.gov/licensing-information/sports-wagering-operators> [https://perma.cc/L79B-MD2Z].

William Hill in exchange for a 51% share of the revenue.²¹⁴ 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.²¹⁵

No state has generated as much attention for its licensing and tax regime as New York.²¹⁶ 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.²¹⁷ After the top bid won—64% of gross gaming revenue—the state issued a matrix with a declining tax rate based on the number of operators in the market.²¹⁸ The tax rate would be set at 64% with no deductions for promotions²¹⁹ allowed if there were only four or five operators allowed into the market, declining to 35% if thirteen or more operators were selected.²²⁰ The state received bids that would have provided for a total of fourteen operators;²²¹ however, after scoring the bids, it settled on nine operators.²²² In six months, New York

²¹⁴ *Rhode Island Sports Betting*, LEGAL SPORTS REP. (Feb. 1, 2023), <https://www.legalsportsreport.com/ri> [<https://perma.cc/9EF8-868E>]; see also Ruddock, *supra* note 209.

²¹⁵ See John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 AM. U. L. REV. 845, 899 (2022) (citing Colorado as a state that allows uncapped deductions for promotions, including free bets).

²¹⁶ See, e.g., Sara Dorn, *New Bill Would Cut New York's Mobile Sports Betting Tax Rate in Half*, CITY & STATE N.Y. (Mar. 10, 2022), <https://www.cityandstateny.com/policy/2022/03/new-bill-would-cut-new-yorks-mobile-sports-betting-tax-rate-half/363040> [<https://perma.cc/Z6ST-AM73>] (noting that within the first year of legal mobile sports betting, efforts have been made to lower the tax rate for sports betting operators).

²¹⁷ Matthew Waters, *Who Bid Top Tax Rate for a Mobile NY Sports Betting License?*, LEGAL SPORTS REP. (Apr. 29, 2022), <https://www.legalsportsreport.com/58212/mobile-ny-sports-betting-license-top-tax-rate> [<https://perma.cc/9J88-95X3>].

²¹⁸ *Id.*

²¹⁹ 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 nothing to the state in taxes. See *Michigan Sports Betting Revenue*, PLAY MICH., <https://www.playmichigan.com/sports-betting/revenue> [<https://perma.cc/5UF9-8LD6>]. Virginia is one of several states that have amended or 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, 2:47 AM), <https://www.casino.org/news/virginia-sports-betting-regulations-reworked-promotional-credits-subject-tax> [<https://perma.cc/9NYY-D7UF>].

²²⁰ Waters, *supra* note 217.

²²¹ *Id.*

²²² Chris Bengel, *New York Gaming Commission Awards Licenses for Nine Sportsbooks*, CBS SPORTS (Nov. 8, 2021, 4:18 PM), <https://www.cbssports.com/general/news/new-york-gaming-commission-awards-licenses-for-nine-sportsbooks> [<https://perma.cc/WRL4-SXYL>].

had surpassed the tax revenue generated by every other state, regardless of when those states had launched sports betting post-*Murphy*.²²³

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.²²⁴ Uniquely, Kansas announced its goal to use sports betting revenue to attract a professional sports franchise to the state.²²⁵

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.²²⁶ 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.²²⁷ For instance, in Illinois, even a person who repairs certain technology products must be licensed.²²⁸ Tiered licensing is another common feature, with different states choosing which stakeholders require which level of licensure.²²⁹ Colorado, for instance, has major licenses for the betting operators, and then requires only minor licenses for those supporting the operation as outside contractors.²³⁰

States also differ with regard to how they regulate market integrity. A great number of states have chosen to prohibit wagering on in-state

²²³ Will Yakowicz, *New York Tops \$1.6 Billion in Mobile Sports Betting in January*, FORBES (Feb. 4, 2022, 5:33 PM), <https://www.forbes.com/sites/willyakowicz/2022/02/04/new-york-tops-16-billion-in-mobile-sports-betting-in-january/?sh=217fe0ad6b4f> (last visited Feb. 10, 2023); see Waters, *supra* note 18.

²²⁴ 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> [<https://perma.cc/SM72-V3QH>].

²²⁵ *Id.*

²²⁶ See Scott Sherer & Melissa Thevenot, *The Common Denominators of U.S. Sports Betting Regulation and Those States Swimming Against the Tide*, NEV. GAMING LAW., Sept. 2020, at 42, 42–46 (giving examples of approaches to regulation taken by various states).

²²⁷ *Id.* at 42–44.

²²⁸ *Id.* at 42.

²²⁹ *See id.*

²³⁰ *Id.*

college teams, or collegiate sports altogether, in the name of integrity.²³¹ 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 looking for a means to profit directly from the legalization of sports gambling.²³² Official league data is simply data that is provided by an official sports league-authorized provider, of which there are a small number.²³³

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.²³⁴ For instance, a number of states disallow certain proposition wagers such as wagering on whether an injury will occur.²³⁵ 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.²³⁶ Other individuals commonly excluded by state regulations include those likely to have insider information or the ability to impact the outcome of a contest.²³⁷

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.²³⁸ Many states have opted to set the age limit for wagering at 21 years old; however, several states, including Rhode Island, New Hampshire, and Washington D.C., allow players to wager at 18 years old.²³⁹

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

²³¹ See Harris & Holden, *supra* note 39, at 418–25. 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 market has different incentives. Jill R. Dorson, *What’s the Point of Banning Betting on In-State Teams?*, SPORTSHANDLE (Apr. 6, 2020), <https://sportshandle.com/why-ban-college-sports-betting> [<https://perma.cc/59K3-VCGF>].

²³² John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31, 35–36 (2019).

²³³ *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data> [<https://perma.cc/5DVX-P3TK>].

²³⁴ See Sherer & Thevenot, *supra* note 226, at 44–45.

²³⁵ *Id.* at 45.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See, e.g., Marie Fazio, *It’s Easy (and Legal) to Bet on Sports. Do Young Adults Know the Risks?*, N.Y. TIMES (Apr. 1, 2021, 12:04 PM), <https://www.nytimes.com/2021/04/01/sports/sports-betting-addiction.html> (last visited Feb. 10, 2023).

²³⁹ Sherer & Thevenot, *supra* note 226, at 43.

passport, provide a social security number or tax identification number, and connect a bank account or credit card from the comfort of their own home, other states, like Nevada, require individuals to present themselves in person and have their information verified by a sportsbook employee.²⁴⁰ While some states, like Illinois, began with an in-person verification requirement, pandemic necessity resulted in a change, which was later permanently adopted, allowing consumers to verify their identity without presenting themselves physically at a casino.²⁴¹

Another common area where there is a dichotomy in regulation is with regard to the allowance for use of credit cards.²⁴² 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.²⁴³ The concern about allowing gamblers to fund their accounts using credit cards is the prospect of some problem gamblers betting on margin.

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.²⁴⁴ Part III 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 regulate 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

²⁴⁰ *Id.* at 46; Matthew Waters, *Nevada Sports Betting*, LEGAL SPORTS REP. (Jan. 5, 2023), <https://www.legalsportsreport.com/nevada> [<https://perma.cc/SKY6-H2H6>].

²⁴¹ Robert Channick, *Illinois Ends In-Person Registration Requirements for Sports Betting, Opening Floodgates for Online Sportsbooks Ahead of March Madness*, CHI. TRIB. (Mar. 5, 2022, 5:00 AM), <https://www.chicagotribune.com/business/ct-biz-sports-betting-online-registration-illinois-20220305-jwp53ipj5be5thw6i3b7ahpefi-story.html> [<https://perma.cc/A3G7-YEDT>].

²⁴² Scherer & Thevenot, *supra* note 226, at 46.

²⁴³ *Id.*

²⁴⁴ 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> [<https://perma.cc/ZQ4G-AY8F>].

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 III.A looks at the current sports wagering market in terms of its structure and size. Section III.B explores the market's actors. Section III.C looks at the state of competition within the U.S. wagering market. Section III.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.²⁴⁵ 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.²⁴⁶

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.²⁴⁷ 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.²⁴⁸ The 7.6% nationwide hold rate may even be slightly inflated, as historically sportsbooks have managed to hold onto only about 5% of the total amount of money that is wagered, which suggests that the industry could see the hold rate regress to the mean.²⁴⁹ Even with legal wagering, it is widely believed that the amount of money being wagered in unregulated markets far exceeds the regulated

²⁴⁵ 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.COM (Sept. 30, 2007), <http://www.gambling-law-us.com/State-Law-Summary> (last visited Nov. 11, 2022).

²⁴⁶ See Colton Lochhead, *Consolidation in Sports Betting Operations Unlikely to Slow Down*, LAS VEGAS REV. J. (Oct. 4, 2021, 8:29 AM), <https://www.reviewjournal.com/business/casinos-gaming/consolidation-in-sports-betting-operations-unlikely-to-slow-down-2452755> [<https://perma.cc/U5Z8-A3XF>] (noting that companies are looking for ways to increase market share and that consolidations allow access to customer databases of former competitors).

²⁴⁷ *Sports Betting Handle vs. Revenue*, LINES, <https://www.thelines.com/sports-betting-handle-revenue> [<https://perma.cc/RDS5-964M>].

²⁴⁸ Waters, *supra* note 18.

²⁴⁹ *Id.* Nevada, which may be the best proxy, had a 5.66% rate between 1984 and 2021. See UNLV CTR. FOR GAMING RSCH., NEVADA SPORTS BETTING TOTALS: 1984–2021 (Feb. 2022), https://gaming.library.unlv.edu/reports/NV_sportsbetting.pdf [<https://perma.cc/R7KS-XRS5>].

market.²⁵⁰ Towards the end of 2021, it was estimated that the regulated U.S. market was merely 8% of the size of the unregulated market serving U.S.-based consumers.²⁵¹

As the states' sports wagering markets mature, it is expected that hold percentages will regress towards the mean. 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.²⁵² 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.²⁵³ The taxation of sports betting operators has been one of the most prominent features of the legalization of sports betting.²⁵⁴ While some states have followed the lead of Nevada and New Jersey by passing laws in hopes of creating a robust and competitive market, other states like Rhode Island and New Hampshire sold monopolies for a 51% share of gross gaming revenue,²⁵⁵ and the District of Columbia sold a monopoly for 57.5% minus direct operating costs incurred by the operator.²⁵⁶ Meanwhile, New York has attempted to garner the best of both worlds by instituting a 51% tax rate while also granting licenses to nine companies—a far cry from a monopoly or oligopoly.²⁵⁷

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.²⁵⁸ While some states have sought to maximize revenue

²⁵⁰ Ryan Butler, *Despite Growth, Legal Sports Betting Still Just Fraction of Illegal Market*, ACTION NETWORK (Dec. 11, 2021, 11:38 AM), <https://www.actionnetwork.com/general/despite-growth-legal-sports-betting-still-just-fraction-of-illegal-market> [<https://perma.cc/LJK3-JQMT>].

²⁵¹ *Id.*

²⁵² 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 weighs the odds much more in the sportsbook's favor than a traditional wager on a single event. See Josh Appelbaum, *Sports Betting 101: Should You Bet Parlays and Teasers (Spoiler: No)*, VSIN (Apr. 5, 2020, 11:56 PM), <https://www.vsin.com/sports-betting-101-should-you-bet-parlays-and-teasers-spoiler-no> (last visited Feb. 10, 2023).

²⁵³ Holden & Kisska-Schulze, *supra* note 215, at 896.

²⁵⁴ See *id.* at 896–97 (discussing various approaches to taxation).

²⁵⁵ For the various taxation rates, see Boesen, *supra* note 211.

²⁵⁶ GREGORY WOODS, TOYA HARRIS & KATHLEEN PATTERSON, OFF. OF THE D.C. AUDITOR, D.C. SPORTS GAMBLING FAILS TO MEET EXPECTATIONS (2021), <https://dcauditor.wpenginepowered.com/wp-content/uploads/2021/09/GambetDC.Report.9.9.21.pdf> [<https://perma.cc/R6X3-ANTX>].

²⁵⁷ 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> [<https://perma.cc/X63V-PVKA>].

²⁵⁸ See Jackson Brainerd, *The Early Bets Are in: Is Sports Betting Paying Off?*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 1, 2021), <https://www.ncsl.org/research/fiscal-policy/the-early->

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.²⁵⁹

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.²⁶⁰ It was during this era—prior to the passage of the Wire Act²⁶¹—that the government began attaching estimates to the size of the illegal gambling market and initially pegged an annual value between \$1 billion and \$8 billion.²⁶² That number remained relatively consistent for at least a decade.²⁶³ Yet, by 1999, the estimated size of the illegal market had grown to between \$80 and \$380 billion.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ Regardless of actual size, government regulation has long aimed to bring

bets-are-in-is-sports-betting-paying-off.aspx [https://perma.cc/J9K5-2VMK] (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*, NYSPOrTSDAY (Mar. 10, 2022), <https://www.nysportsday.com/2022/03/05/new-york-sports-betting-bill-would-expand-number-of-mobile-operators> [https://perma.cc/9LY4-HT5S].

²⁵⁹ See Brainerd, *supra* note 258 (“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.”).

²⁶⁰ See generally Holden, *supra* note 49, at 692–716 (describing the legislative history and evolution of the Wire Act).

²⁶¹ See Interstate Wire Crime Act, 18 U.S.C. §§ 1081–84.

²⁶² Holden, *supra* note 49, 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 the return home of troops from World War II).

²⁶³ *Congress Urged to Act on Crime*, N.Y. TIMES, May 18, 1961, at 8; see also Holden, *supra* note 49, at 707.

²⁶⁴ See NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 2.

²⁶⁵ 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, 6:18 PM), <https://theconversation.com/market-for-illegal-sports-betting-in-us-is-not-really-a-150-billion-business-96618> [https://perma.cc/24H2-WRPD].

²⁶⁶ Alex Sherman, *Legal Gambling from Your Phone Could Be a \$150 Billion Market, but Making It Happen Will Be Tough*, CNBC (Apr. 29, 2019, 4:07 PM), <https://www.cnbc.com/2019/04/27/fanduel-draftkings-race-to-win-150-billion-sports-betting-market.html> [https://perma.cc/6YKM-E26K].

at least a portion of the money being wagered back to a market where it can be taxed.²⁶⁷

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.²⁶⁸ 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 as the first online gambling sites emerged in 1996.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ 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.²⁷² 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.²⁷³

²⁶⁷ See generally Steven G. Koven & Thomas S. Lyons, *Is Gambling a Good Economic Development Bet?*, ICMA (Aug. 4, 2010), <https://icma.org/articles/article/gambling-good-economic-development-bet> [<https://perma.cc/CE29-LD5B>] (describing the economic consequences of legal and illegal gambling).

²⁶⁸ See *New AGA Report Shows Americans Gamble More Than Half a Trillion Dollars Illegally Each Year*, PUB. GAMING (Dec. 3, 2022), <https://publicgaming.com/news-categories/71-latest-news/illegal-gambling/10539-new-aga-report-shows-americans-gamble-more-than-half-a-trillion-dollars-illegally-each-year> [<https://perma.cc/G983-RX4E>].

²⁶⁹ 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, <https://www.gamblingsites.org/history/intertops> [<https://perma.cc/3EPF-TY9R>].

²⁷⁰ See Andrew J. Silver, *Legal Sports Betting Still Faces Competition from Illegal Market; Low State Taxes Could Turn the Tide*, FORBES (Apr. 7, 2020, 9:22 AM), <https://www.forbes.com/sites/andrewjsilver/2020/04/07/legal-sports-betting-still-faces-competition-from-illegal-market-low-state-taxes-could-turn-the-tide/?sh=59b8b0d823e3> (last visited Feb. 10, 2023) (quoting ESPN sports betting writer David Purdum, who stated that “[t]he biggest advantage of the underground bookmaking market has [sic] 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, 2018), <https://sportshandle.com/how-local-bookie-works-operates-myths-reality-interview> [<https://perma.cc/R2Z5-X59B>] (describing how a local bookie chooses to extend credit to customers).

²⁷¹ Silver, *supra* note 270.

²⁷² Buell, *supra* note 21.

²⁷³ 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,

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.²⁷⁴ 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.²⁷⁵ 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, 2018.²⁷⁶

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 they 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 2021,²⁷⁷ and BetMGM.²⁷⁸

gambling offenses, unconnected from organized crime, typically rank as lower-level priorities. See, for example, 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> [<https://perma.cc/39HM-KFPE>] (citing a jury note that stated “[w]ith 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”), which discusses the trial of a group that operated a sports betting ring with an alleged handle of approximately \$1 billion. The defendants ultimately avoided being sentenced to any jail time not already served. *Id.*

²⁷⁴ Alex Silverman, *For U.S. Sports Bettors, It's FanDuel and DraftKings—and Then Everyone Else*, MORNING CONSULT (Jan. 20, 2022, 12:01 AM), <https://morningconsult.com/2022/01/20/sports-betting-brands-usage-fanduel-draftkings> [<https://perma.cc/TS2G-FW46>].

²⁷⁵ 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 among many state legislators and state law enforcement authorities about whether DFS 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).

²⁷⁶ 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 that both DraftKings and FanDuel combined to air a television commercial every ninety seconds at one point during 2015).

²⁷⁷ Andre Dubronski, *MGM Entertain Full BetMGM Buy-Out*, IGAMING FUTURE (Oct. 8, 2021), <https://igamingfuture.com/mgm-entertain-full-betmgm-buy-out> [<https://perma.cc/ZU5X-ECE8>].

²⁷⁸ Silverman, *supra* note 274.

Additionally, Barstool Sportsbook (owned by Penn National Gaming), Fox Bet (a subsidiary of the Fox Corporation), Bet365, PointsBet, Bally Bet, BetRivers, and SugarHouse represent the other, most prominent sports betting brands.²⁷⁹

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% of the market in 2021.²⁸⁰ Meanwhile, the inability to gain market share has already caused some well-resourced brands, including Canadian media company-backed theScore Bet, to exit the U.S. market altogether.²⁸¹ 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 necessary to compete effectively in even the states where they have gained licensure.²⁸² Meanwhile, even the biggest market players have been unable to turn revenue into profits,²⁸³ with gaming operators contending that their situation is made worse by high tax rates in states like New York.²⁸⁴

The rapid consolidation of the market around a few top brands led those top companies to spend tens of millions of dollars to attract

²⁷⁹ *Id.*

²⁸⁰ Matt Rybaltowski, *Bloomberg Summit: Sports Betting Market in 'Early Innings' After Super Bowl Frenzy*, SPORTSHANDLE (Feb. 18, 2022), <https://sportshandle.com/bloomberg-summit-2022> [<https://perma.cc/494G-JBFR>].

²⁸¹ Geoff Zochodne, *TheScore Bet Exiting U.S. Sports Betting Market as Penn Streamlines Operations*, COVERS (June 1, 2022, 10:45 AM), <https://www.covers.com/industry/thescore-bet-discontinue-us-operations-may-2022> [<https://perma.cc/9CX4-P6UG>].

²⁸² 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> [<https://perma.cc/99TL-45TG>].

²⁸³ 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> (last visited Feb. 10, 2023) (noting that DraftKings lost \$326 million in the fourth quarter of 2021).

²⁸⁴ 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> [<https://perma.cc/9L3Q-H4DG>] (noting various executives were going to adjust their advertising spending in order to counteract New York's 51% tax on revenue).

customers.²⁸⁵ Many in the industry have acknowledged that advertising spending is simply unsustainable over an extended period.²⁸⁶ Not only are the advertisements bringing these companies unwanted regulatory attention, but they are incredibly costly.²⁸⁷ The hope is, undoubtedly, to be the last company standing when the dust settles and the competition has spent its last dollar, but until then, companies have been spending on average hundreds of dollars to acquire each new customer.²⁸⁸ Even if smaller companies can afford the tax rates and licensing fees around the country, customer acquisition costs are yet another challenge in competing against the best-resourced companies.²⁸⁹

The race to acquire customers and survive until profitability has resulted in billions being spent on advertising. Both FanDuel and DraftKings were projected to spend more than \$750 million each in 2022.²⁹⁰ 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.²⁹¹ Online sports bettors tend to be overwhelmingly male, making up 80% of bettors, but they have an average age of 37.7, with 50% being between the ages of

²⁸⁵ See Ed Olson, *The Sports Betting Arms Race*, LINE DRIVE SPORTS MKTG. (Sept. 27, 2021), <https://linedrivesportsmarketing.com/the-sports-betting-arms-race> [https://perma.cc/T68M-V8QA]; Holden, *supra* note 284.

²⁸⁶ See, e.g., Jack O'Donnell, *The Ugly Truth Behind All Those Fun Gambling Ads*, POLITICO (Feb. 13, 2022, 7:00 AM), <https://www.politico.com/news/magazine/2022/02/13/ugly-truth-behind-fun-gambling-ads-00008380> [https://perma.cc/LE3C-YAS2] (noting companies have spent hundreds of millions on advertising).

²⁸⁷ Ayumi Davis, *Sports Betting Industry Ponders if Relentless Advertising Is Overkill for Viewers, Fans*, NEWSWEEK (Dec. 3, 2021, 8:12 PM), <https://www.newsweek.com/sports-betting-industry-ponders-if-relentless-advertising-overkill-viewers-fans-1656043> [https://perma.cc/569B-QYZT].

²⁸⁸ Pat Evans, *State of Play: Sports Betting Industry Trends*, FRONT OFF. SPORTS (Sept. 2020), <https://frontofficesports.com/newsletter/sports-betting-primer> [https://perma.cc/E5XY-ZCAN] (noting that DraftKings reportedly spent an average of \$371 per customer acquired).

²⁸⁹ 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> [https://perma.cc/AKA5-WFW5] (noting the rapid consolidation of the market around the daily fantasy companies and well-resourced brands); Olson, *supra* note 285.

²⁹⁰ Roundhill Investments (@roundhill), TWITTER (Aug. 3, 2021, 11:53 AM), <https://twitter.com/roundhill/status/1422586354064625667> [https://perma.cc/FUS4-7TMV].

²⁹¹ See Jason Notte, *The Sports with the Oldest—and Youngest—TV Audiences*, MARKETWATCH (June 30, 2017, 1:34 PM), <https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30> [https://perma.cc/P8P6-FE2E] (noting that the average MLB viewer is 57 years old, the average NFL viewer is 50, the average NHL viewer is 49, and the average NBA viewer is 42).

18 to 34.²⁹² A significant portion of bettors, 45%, earn more than \$75,000 per year, while the national average earning that amount is only 34%.²⁹³

The race to secure the largest market share in the United States is further aided by a plethora of affiliate marketing sites, which integrate sports betting links into industry, gambling, and sports coverage.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ Even with millions being spent on direct market and affiliate deals, the sportsbook landscape has remained largely consistent, with the two DFS juggernauts at the top and everyone else looking up and trying to reach them.²⁹⁷

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.²⁹⁸ Not only do different sportsbooks offer different promotions for both new and existing customers, but they also

²⁹² 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> [<https://perma.cc/U5QP-JZ8V>].

²⁹³ *Id.*

²⁹⁴ See generally *The Ultimate Guide to Affiliate Marketing for Sports Betting Businesses*, GAMMASTACK (Jan. 18, 2022, 12:44 PM), <https://www.gammastack.com/the-ultimate-guide-to-affiliate-marketing-for-sports-betting-businesses> [<https://perma.cc/998S-ZTUN>].

²⁹⁵ *Id.*

²⁹⁶ Niall Roche, *The Best Sports Betting Affiliate Programs of 2022—for Home Run Affiliate Earnings*, AUTHORITYHACKER (Jan. 5, 2022), <https://www.authorityhacker.com/sports-betting-affiliate-programs> [<https://perma.cc/63MM-F2SR>].

²⁹⁷ Alun Bowden, *The Global Sports Betting Myth: Is Online Sports Betting Really an International Business After All?*, STATE OF ONLINE GAMBLING (June 1, 2022), <https://stateofonlinegambling.substack.com/p/the-global-sports-betting-myth> [<https://perma.cc/9CHT-P3TP>].

²⁹⁸ Jeff Edelman, *America's Sports Bettors Are Selling Themselves Short in the Odds Game: Why Don't Bettors Download More Sportsbook Apps? And Why Isn't There a Discount Sportsbook Yet?*, SPORTSHANDLE (Nov. 11, 2021), <https://sportshandle.com/american-sports-bettors-single-sportsbook-gamblers> [<https://perma.cc/34LF-E6J5>]. Numerous sportsbooks offer risk-free bets where, for example, if a bettor wagers \$1,000 and loses, 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 (Sept. 20, 2022, 7:48 AM), <https://www.sacbee.com/betting/article259053683.html> [<https://perma.cc/8FFQ-JMLU>].

offer different betting lines.²⁹⁹ This brand loyalty means consumers also show themselves to be non-price discriminate.³⁰⁰ While a portion of this may be simple laziness, another factor may be related to cumbersome sign-up processes that some states impose.³⁰¹ In addition, a big portion of this is likely related to the familiarity that Americans have with FanDuel and DraftKings.³⁰² While many Americans undoubtedly bet illegally online during the twenty-five-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 DFS companies as the next best alternative for customers looking for a familiar name.³⁰³ 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 undoubtedly played a significant role in their market position and may also explain why both brands have struggled outside of the U.S. market.³⁰⁴

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 leads to cost inefficiencies in

²⁹⁹ Edelstein, *supra* note 298.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See John T. Holden, Will F. Green & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECON. 8, 10–12 (2017) (describing the popularity of DFS).

³⁰³ Other markets, such as in Ontario, 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> [<https://perma.cc/MY5E-VG7F>].

³⁰⁴ Bowden, *supra* note 297. 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> [<https://perma.cc/N3BC-U6MN>]; see also *Our Brands*, FLUTTER, <https://www.flutter.com/our-brands> [<https://perma.cc/3WXU-E3JG>] (listing that Flutter owns FanDuel, Sportsbet, Sky Betting & Gaming, Sisal, Paddy Power, PokerStars, Betfair, Adjarabet.com, TVG, and Jungle Games).

maintaining separate brick-and-mortar locations, as well as servers.³⁰⁵ 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.³⁰⁶ 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.³⁰⁷

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.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ Unless this approach ultimately changes, the reality is that many of the comparatively smaller sportsbooks, as well as those that lack licensure in multiple states, will either go bankrupt or attempt to merge with larger competitors.³¹¹ 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. Similar consolidation was seen in the DFS marketplace nearly ten years

³⁰⁵ Holden, *supra* note 49, at 732–34.

³⁰⁶ Sherer & Thevenot, *supra* note 226.

³⁰⁷ 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> [<https://perma.cc/K6TR-WKVD>] (describing legislation introduced in New York to lower the tax rate to 35% contingent on there being thirteen to fourteen operators).

³⁰⁸ See, e.g., Lagerquist, *supra* note 27 (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).

³⁰⁹ See Kirk O'Neil, *Can Sports Betting Upstarts Challenge Caesars, MGM, DraftKings?*, THE STREET (Mar. 5, 2022, 8:28 PM), <https://www.thestreet.com/investing/who-will-launch-the-next-big-sports-betting-companies> [<https://perma.cc/WGD7-A46L>] (describing the competitive environment and noting the possibility of even larger companies looking to enter the market than just large gambling brands, including Disney).

³¹⁰ 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> [<https://perma.cc/MJE9-3DG8>].

³¹¹ 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 Stockers That Could Get Bought Out Next*, MKTS. INSIDER (Aug. 5, 2021, 3:32 PM), <https://markets.businessinsider.com/news/stocks/3-sports-betting-stocks-that-could-get-bought-out-next-1030697667> [<https://perma.cc/CJ6B-HDUV>].

ago.³¹² 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 could reasonably argue that the agency 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.³¹³

Another market failure entails the number of states, including even those with language disallowing bad actors from the marketplace, that have allowed companies with questionable past behavior to enter the sports gambling market.³¹⁴ As an interesting side note, the sports wagering companies DraftKings and FanDuel had both operated their DFS 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.³¹⁵ Nevertheless, outside of Nevada, no state regulatory body has precluded either of these companies from receiving sports wagering licenses on these grounds. Indeed, DraftKings operates in at least twenty states and FanDuel operates in at least eighteen; by contrast, to date, no offshore sportsbook has yet been granted a license from a U.S. jurisdiction.³¹⁶

³¹² Steve Gardner, *Daily Fantasy Sports Site DraftKings Acquires DraftStreet*, USA TODAY (July 14, 2014, 6:53 PM), <https://www.usatoday.com/story/sports/fantasy/2014/07/14/draft-kings-draft-street-acquisition/12640959> [<https://perma.cc/CC7A-RY95>].

³¹³ Diane Bartz & Liana B. Baker, *U.S. to Seek to Block DraftKings, FanDuel Fantasy Sports Merger*, REUTERS (June 23, 2017, 8:28 PM), <https://www.reuters.com/article/fanduel-ma-draftkings/u-s-to-seek-to-block-draftkings-fanduel-fantasy-sports-merger-idUSL1N1JL00L> [<https://perma.cc/L5EL-TVW9>]; see also Marc Edelman, *IAC Rumored to Be Selling DraftStreet Assets to DraftKings; Will Antitrust Scrutiny Follow?*, FORBES (July 14, 2014, 6:12 PM), <https://www.forbes.com/sites/marcedelman/2014/07/14/iac-rumored-to-be-selling-draftstreet-assets-to-draftkings-antitrust-scrutiny-may-follow/?sh=472536fa1d59> (last visited Feb. 10, 2023) (expressing some degree of antitrust concern with the merger of the second and third largest DFS companies).

³¹⁴ 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> [<https://perma.cc/D9HM-M6LK>] (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).

³¹⁵ See Marc Edelman, *Regulating Fantasy Sports*, 92 IND. L.J. 653, 669–71 nn.82–97 (2017) (providing citations to numerous state attorneys general opinions finding DFS illegal).

³¹⁶ *Where Is Draftkings Legal?*, ROTOWIRE (2023), <https://www.rotowire.com/betting/faq/where-is-draftkings-legal-ee7c9c5c> [<https://perma.cc/AGH2-Z7YS>]; *Where, How and When Sports Betting Is Legal*, FANDUEL, <https://www.fanduel.com/legal-sports-betting-us-map> [<https://perma.cc/Y6WJ-TNFC>]. 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. LEGAL ASPECTS SPORT 198 (2022).

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 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.³¹⁷ 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 on sports wagering operators to purchase their data exclusively from the leagues.³¹⁸

Other inefficiencies in the sports gambling market entail the 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.³¹⁹ In recent years, there have been a few standout examples of professional athletes found to have bet on their own sport—the most recent involving former Atlanta Falcons star receiver, Calvin Ridley.³²⁰ All leagues have rules that prohibit wagering on league games, and some leagues, like the NCAA, prohibit all sports wagering.³²¹ 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.³²²

Also, many states prohibit sports wagering on games involving their state's college teams but allow for wagering on all other collegiate sporting

³¹⁷ 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> [https://perma.cc/46R9-2GRM] (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).

³¹⁸ See 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> [https://perma.cc/9HPN-RGH5]; see also Edelman & Holden, *supra* note 12, at 99, 109.

³¹⁹ 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> [https://perma.cc/9K7J-GHNX]; see also Harris & Holden, *supra* note 231, at 439–48 (describing ways of improving the athlete education system).

³²⁰ Holden, *supra* note 319.

³²¹ *Sports Wagering*, NCAA, <https://www.ncaa.org/sports/2016/4/29/sports-wagering.aspx> [https://perma.cc/G832-TYZ4].

³²² Matthew Wadleigh, *Calvin Ridley's \$1,500 Bet Just Cost Him \$11 Million and Perhaps His NFL Career*, SPORTSCASTING (Mar. 8, 2022), <https://www.sportscasting.com/calvin-ridley-1500-bet-just-cost-11-million-perhaps-nfl-career> [https://perma.cc/DU4L-5VAW].

events.³²³ 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.³²⁴

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.³²⁵ 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.³²⁶

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 Section III.D, 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.³²⁷ This Part looks at the potential to unify sports wagering law in one of two different ways. Section IV.A looks at

³²³ Scherer & Thevenot, *supra* note 226, at 44–45.

³²⁴ Andrew Maykuth, *At Two Philadelphia Universities, You Can Bet on Sports, but Not on the Home Team*, PHILA. INQUIRER (Oct. 12, 2019, 7:00 AM), <https://www.inquirer.com/business/philadelphia-universities-villanova-saint-josephs-ban-some-sports-betting-20191012.html> (last visited Nov. 6, 2022).

³²⁵ Sam McQuillan, *Sports Betting Ads Under Fire by Lawmakers*, ACTION NETWORK (May 18, 2022, 7:52 PM), <https://www.actionnetwork.com/legal-online-sports-betting/sports-betting-ads-lawmakers> [<https://perma.cc/GN22-9P22>].

³²⁶ Fazio, *supra* note 238.

³²⁷ *See infra* Sections IV.A–IV.B.

the potential for Congress to step in and pass a federal law to regulate sports wagering. Section IV.B then looks, in the alternative to federal legislation, at the potential for proposing and implementing uniform state law.

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.³²⁸ However, Adam Silver's op-ed piece suggested that there might be a path forward that 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."³²⁹

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."³³⁰ 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.³³¹

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.³³² 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

³²⁸ See, e.g., David W. Chen, *The N.F.L.'s About-Face on Sports Gambling*, N.Y. TIMES (Feb. 10, 2022, 10:11 PM), <https://www.nytimes.com/2022/02/10/sports/nfl-bets-gambling.html> (last visited Nov. 6, 2022).

³²⁹ Silver, *supra* note 8.

³³⁰ *Id.*

³³¹ *Id.*

³³² 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://perma.cc/YTC9-CQWW>] (referring to comments by Senator McCain stating that a debate in Congress is needed to build consensus on legalizing sports betting); David Purdum, *Leagues Discussing Sports Betting*, ABC 11 (Feb. 3, 2015), <https://abc11.com/sports/leagues-discussing-sports-betting/502380> [<https://perma.cc/D85Q-9JNZ>] (discussing conversations among commissioners and private meetings between league counsel being conducted and quoting Adam Silver, who said that the sports betting issue will "ultimately require a legislative remedy").

sports betting,³³³ as did the Sports Bribery Act.³³⁴ PASPA's fatal flaw, however, was that Congress did not directly proscribe sports betting; instead, it unconstitutionally commandeered the states to achieve that objective.³³⁵ The UIGEA impacted sports betting, but its primary target was any form of internet gambling.³³⁶ 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).³³⁷ Enacted in 1978 and amended in 2000,³³⁸ the law established the legality of off-track interstate pari-mutuel wagering under certain conditions.³³⁹ Although it is a federal law, the IHA does not create a regulatory authority, nor grant authority, to an existing federal body to regulate this gambling. States determine how much, if any, interstate horse wagering they will permit.³⁴⁰

The IHA is quite detailed in specifying when interstate horse wagers are legal.³⁴¹ The purpose of the law, however, is clear. As a practical matter, off-track sportsbooks are required to negotiate a contract with a track in another state if they seek to offer betting on the races at that track.³⁴² In turn, the track is required to reach an agreement with the horse owners and trainers racing at that track.³⁴³ Ultimately, the agreements provide that the sportsbook will share a portion of the wagers they accept with the host track and the owners and trainers racing horses

³³³ 18 U.S.C. § 1084.

³³⁴ *Id.* § 224(a). For a discussion of the Sports Bribery Act and its enactment following high-profile betting scandals, see Holden & Rodenberg, *supra* note 9, at 455–56.

³³⁵ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

³³⁶ 31 U.S.C. §§ 5361–67; see Holden, *supra* note 1, at 584–85 (describing UIGEA as “primarily a banking statute” that sought to limit funding of internet gambling, was “riddled with exceptions,” and did not provide “a meaningful deterrence to internet gambling”).

³³⁷ 15 U.S.C. §§ 3001–3007.

³³⁸ 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. 11230, 11232 (2000).

³³⁹ The requirements are set out in 15 U.S.C. § 3004.

³⁴⁰ 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).

³⁴¹ *Id.* § 3004(a)(1)–(3).

³⁴² *Id.* § 3004(a)(1)(B).

³⁴³ *Id.*

there.³⁴⁴ This revenue sharing plan was designed to “further the horseracing and legal off-track betting industries in the United States.”³⁴⁵

The IHA, though not without its critics, has been at least partially successful in achieving its purpose of stabilizing the horse racing industry.³⁴⁶ 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 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.³⁴⁷

Soon after the *Murphy* decision, a bill was offered in Congress that would create a significant federal presence in sports betting regulation.³⁴⁸ 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.³⁴⁹

One notable provision is the establishment of a National Sports Wagering Clearinghouse.³⁵⁰ The Clearinghouse would collect and distribute data on sports wagering, maintain a “national repository of anonymized sports wagering data and suspicious transaction reports,”³⁵¹ and provide assistance and consultation with state and federal authorities when suspicious sports wagering activity is identified.³⁵² The entity would be funded by several sources, including proceeds collected as part of the federal excise tax on sports wagers.³⁵³

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 data collection process would promote both sports wagering and sports contest integrity. The resources of state governments to monitor integrity

³⁴⁴ 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, 87 (2020).

³⁴⁵ 15 U.S.C. § 3001(b).

³⁴⁶ 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).

³⁴⁷ 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> [<https://perma.cc/F24D-7ETU>] (listing various sports league valuations).

³⁴⁸ See Associated Press, *Will Sports Betting See Federal Regulation?*, PENN LIVE (Dec. 19, 2018, 2:37 PM), <https://www.pennlive.com/news/2018/12/will-sports-betting-see-federal-regulation.html> [<https://perma.cc/RU64-47UD>].

³⁴⁹ Sports Wagering Market Integrity Act of 2018, § 3793, 115th Cong. § 103 (2018).

³⁵⁰ *Id.* § 106.

³⁵¹ *Id.* § 106(c)(4).

³⁵² *Id.* § 106(c)(11).

³⁵³ *Id.* § 106(f)(g).

are strained by the fact that sports wagering is a global market, and the federal government could play an important role in coordinating with foreign sports wagering regulators.³⁵⁴

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.³⁵⁵ 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.³⁵⁶ The federal proposal makes it clear that a wager made under those conditions is an intrastate wager.³⁵⁷

The policy reasons for involving the federal government in regulating sports wagering are numerous and have been addressed in detail elsewhere.³⁵⁸ 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, auditing and accounting rules, internal control standards, and similar issues when regulating casino gambling, and much of this would translate to regulating sports betting.³⁵⁹

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.³⁶⁰ Everything that goes into playing the game is right in front of the casino operator.

³⁵⁴ See Cabot & Miller, *supra* note 344, at 102.

³⁵⁵ Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 105(a) (2018).

³⁵⁶ See Pamela Fox, *Internet Routing Protocol*, KHAN ACAD., <https://www.khanacademy.org/computing/computers-and-internet/xcae6f4a7ff015e7d:the-internet/xcae6f4a7ff015e7d:routing-with-redundancy/a/internet-routing> [<https://perma.cc/8DY8-J356>].

³⁵⁷ Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 301(1)(B). The Wire Act itself makes no reference to this situation but the UIGEA does. In defining “unlawful Internet gambling,” the UIGEA provides that “[t]he 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 declined to adopt that position for the Wire Act, raising questions whether an intrastate sports wager could be made under any circumstances. See *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1, 18 (2018).

³⁵⁸ See Cabot & Miller, *supra* note 344, at 98.

³⁵⁹ *Id.* at 96.

³⁶⁰ *Id.* at 89.

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.³⁶¹ The federal government's resources, including law 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.³⁶²

The Sports Wagering Market Integrity Act proposal from 2018 has made no progress in Congress.³⁶³ States have not waited for the federal government to step into the field of regulating sports betting,³⁶⁴ and now thirty-five states, plus the District of Columbia, have legalized sportsbooks.³⁶⁵ 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 seems unlikely. Perhaps there is a place for a law that recognizes the state's historic role in regulating gambling, and which creates 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

³⁶¹ *Id.*

³⁶² *Id.* at 101–02.

³⁶³ One commentator stated that the bill was a “conversation starter and was likely never expected to pass.” Holden, *supra* note 1, at 594.

³⁶⁴ In Delaware, sportsbook operators began taking single-game sports wagers on June 5, 2018, less than a month after the *Murphy* decision.

³⁶⁵ For an up-to-date listing of states authorizing and/or conducting sports betting, see *Interactive U.S. Map: Sports Betting*, *supra* note 162.

to the bar—has played an important role in drafting proposed uniform laws.³⁶⁶ In doing so, the ULC has been able to help garner a system of legal conformity without Congress needing to act to pass laws at the federal level.

While the ULC has drafted model law on a wide range of topics, the ULC's arguably most noteworthy initiative to date has entailed unifying much of commercial law across the fifty states with its drafting and subsequent state adoption of the Uniform Commercial Code—a code that was first adopted by Pennsylvania in 1953 and has been adopted, at least in part, by every other state.³⁶⁷

Meanwhile, some other areas where the ULC is currently exploring the potential to draft model legislation include: the treatment of debt collection default judgments, mortgage modifications, and the treatment of restrictive covenants in deeds.³⁶⁸ The ULC also has some experience proposing model law related to the commercial sports industry. 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.³⁶⁹

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

³⁶⁶ See *About Us*, UNIF. L. COMM'N, <http://uniformlaws.org/aboutulc/overview> [<https://perma.cc/VFJ2-6BGG>]; see also R. Wilson Freyermuth, *Teaching and Scholarship Enrichment Through Involvement in Law Reform*, 53 WAKE FOREST L. REV. 935, 935–36 (2018) (“The 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. Its 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.” (footnote omitted)).

³⁶⁷ See *History*, UNIF. L. COMM'N, <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/K4VN-J4LE>].

³⁶⁸ See *Drafting Committees*, UNIF. L. COMM'N, <https://www.uniformlaws.org/projects/committees/drafting> [<https://perma.cc/PBM7-H4CF>].

³⁶⁹ See *Law Commission OKs Changes to Strengthen Sports Agent Act*, USA TODAY (July 15, 2015, 6:24 PM), <https://www.usatoday.com/story/sports/ncaaf/2015/07/15/law-commission-oks-changes-to-strengthen-sports-agent-act/30208833> [<https://perma.cc/7W2K-D76R>] (discussing the ULC's approval of changes to the Uniform Athlete Agents Act); *College Athlete Name, Image, and Likeness Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=540d3a4a-82de-4b1a-bb1f-3abd6a23b67b> [<https://perma.cc/M3WE-W22R>] (providing the text for the proposed ULC name, image, and likeness bill, and the two jurisdictions that, to date, have introduced the bill).

2023]

LEGALIZED SPORTS WAGERING

1435

in any states. One of the virtues of states replacing their own systems for registering sports wagering companies with a method for multistate registration is that it would reduce the costs for individual states to investigate potential new sports betting operators because the costs of reviewing and registering applicants could be shared among all states that opt into multistate registration. In addition, multistate registration would save sports wagering companies substantial sums of money, even if actual state-specific licensing fees did not change, because operators would no longer need to reproduce similar paperwork many times over, nor would they need to pay lawyers to submit filings and supportive filings separately to each individual state. If the sports wagering marketplace were to remain a competitive marketplace with a large number of competitors fighting for market share, perhaps some of these cost savings might even be passed along to consumers in the form of more bettor promotions and/or lower vigs or rakes.

Another potential virtue of the multistate licensing approach comes in terms of enforcement. While to date it seems as if states are doing far more to legalize and tax sports wagering than to regulate operator behavior, there is a possibility that a single, large multistate body investigating gaming operator misconduct and seeking to enforce regulations might be more effective than many small and perhaps underfunded state investigative bodies doing the same. Furthermore, the potential sanction for misconduct—loss of the ability to operate a sports wagering business in many different states—may serve as a greater deterrent against sports wagering operator wrongdoing than simply losing the ability to operate in a single state.

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 thirty-five states already have some form of legalized, taxed, and regulated sports wagering,³⁷⁰ and the states have knowingly adopted differing perspectives on a number of 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 seems highly unlikely that the state would adopt the bill.

³⁷⁰ See Hernandez, *supra* note 17 (observing that sports betting is legal in thirty-five states, as well as in the District of Columbia).

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, or perhaps even creating a registration system that leaves the taxation choices up to the individual states. However, it would be very difficult to get states to implement true uniform law that sets 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 there are best practices that certainly could and should be adopted and emulated by the individual states.³⁷¹ 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.³⁷² However, if a state were to view a competitive market as a desirable regulatory system

³⁷¹ 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. States like Illinois, New Jersey, and Virginia, which 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> [<https://perma.cc/CW4G-QZA6>].

³⁷² 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> [<https://perma.cc/7QEF-9K4N>]; 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> [<https://perma.cc/6RT4-WXXK>] (describing how New York's tax rate on sports wagering was determined via a matrix).

or is seeking more market competitors for purposes of trying to create new jobs, a different approach may operate better.³⁷³ 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 is essential for allowing startups the ability to have a chance if a competitive market is a state's model of choice.³⁷⁴ 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.³⁷⁵

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

³⁷³ See Steve Ruddock, *The Impact of Sports Betting Goes Way Beyond Betting Revenue*, BETTINGUSA.COM (Feb. 5, 2021), <https://www.bettingusa.com/sports-betting-hidden-benefits> [<https://perma.cc/WRD6-7VZX>] (describing the indirect benefits of sports betting for communities).

³⁷⁴ 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 Broad. Co.*, 509 U.S. 418, 435–36 (1993) (holding that restricting lottery ads that crossed state lines was a substantial government interest). Six years later, however, the Court ruled that a ban that stopped lawful casino advertising in Louisiana violated the First Amendment. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194–96 (1999).

³⁷⁵ 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> [<https://perma.cc/P4C9-4BTH>]. 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> [<https://perma.cc/7Y2Y-VNUJ>]. 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 “cooling off period.” *DraftKings Penalised for NJ Self-Exclusion Failures*, IGAMING BUS. (June 20, 2019), <https://igamingbusiness.com/draftkings-penalised-for-nj-self-exclusion-failures> [<https://perma.cc/G7KC-RDY9>].

stakeholders in the legalization and regulation of sports gambling.³⁷⁶ 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.³⁷⁷

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.³⁷⁸ In some cases, it seems as if lobbyists have even played a substantial role in drafting and redrafting state bills.³⁷⁹ 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 also a matter 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

³⁷⁶ See, e.g., Edmund Burns, *Experience*, LINKEDIN, <https://www.linkedin.com/in/edmundburns> (last visited July 21, 2022) (indicating that Mr. Burns had worked from 1994–2011 as “VP, Baseball Operations and Administration” for MLB before becoming General Counsel of the New York State Gaming Commission in 2013).

³⁷⁷ Matt Rybaltowski, *2022 in Review: Consolidation of Sports Betting Industry Tops Year’s Business Stories*, SPORTSHANDLE (Dec. 27, 2022), <https://sportshandle.com/2022-top-sports-betting-business-stories> [<https://perma.cc/9QTU-LED7>].

³⁷⁸ See, e.g., Edelstein, *supra* note 318 (discussing the role of sports leagues lobbying legislatures and gaming authorities).

³⁷⁹ Peter Robison & Gerry Smith, *How an Arizona Lobbying Firm Helped Sports App Bookies Write Their Own Rules*, BLOOMBERG (Dec. 2, 2022, 6:51 PM), <https://www.bloomberg.com/news/articles/2022-12-02/how-a-lobbying-frenzy-helped-sports-betting-apps-write-their-own-rules> [<https://perma.cc/TG2V-VNP5>]; Brett Smiley, *Exclusive: Here’s the ‘Model’ Sports Betting Playbook from NBA, MLB*, SPORTSHANDLE (Feb. 20, 2018), <https://sportshandle.com/sports-betting-nba-mlb-model-act-integrity-fee> [<https://perma.cc/XE6D-REH6>]; Joe Vardon, *How MLB, the NBA and the PGA Used ‘Negotiation by Bayonet’ to Get a Slice of State Gambling Revenue*, ATHLETIC (Jan. 16, 2020), <https://theathletic.com/1530989/2020/01/16/how-mlb-the-nba-and-the-pga-used-negotiation-by-bayonet-to-get-a-slice-of-state-gambling-revenue> (last visited Feb. 10, 2023); Eric Lipton & Kenneth P. Vogel, *Cigars, Booze, Money: How a Lobbying Blitz Made Sports Betting Ubiquitous*, N.Y. TIMES (Nov. 20, 2022, 10:27 AM), <https://www.nytimes.com/2022/11/20/business/sports-betting-lobbying-kansas.html> (last visited Feb. 10, 2023).

wagering.³⁸⁰ 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 sports leagues a share of overall gambling profits.³⁸¹ The failed federal bill to regulate sports wagering also included a similar provision for the benefit of sports leagues.³⁸²

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 laws to date have 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 Twitter handles.³⁸³ In addition, state gaming commissions have fallen short in imposing limits to when sports wagering companies may advertise on television and the role that sports gaming companies may play in placing signage in sports facilities and promoting televised game broadcasts.³⁸⁴ 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 alternative live game

³⁸⁰ Edelstein, *supra* note 378; Holden & Schuster, *supra* note 232.

³⁸¹ Edelstein, *supra* note 378; *see also* Edelman & Holden, *supra* note 12, at 99, 109.

³⁸² *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> [<https://perma.cc/LEL8-APL6>] (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).

³⁸³ *See generally* Marc Edelman, *New York Online Sports Betting Needs Stronger Advertising Regulations*, FORBES (Feb. 11, 2022, 10:24 AM), <https://www.forbes.com/sites/marcedelman/2022/02/11/new-york-online-sports-betting-needs-stronger-advertising-regulations/?sh=38192a1665bf> (last visited Feb. 10, 2023) (describing New York's failure to require gambling helpline information to be posted on tout websites and Twitter handles).

³⁸⁴ *See* Daryl Austin, *The Legalization of Sports Wagering and the Increase in Problem Gambling*, DESERET NEWS (July 19, 2022, 11:00 PM), <https://www.deseret.com/sports/2022/7/19/23195839/the-legalization-of-sports-wagering-and-the-increase-in-problem-gambling> [<https://perma.cc/WKM6-WN88>].

broadcasts that are scrubbed of all wagering content, either for free or at a reasonable cost.³⁸⁵

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.³⁸⁶ The NFL has had two players violate league rules related to gambling since the advent of widespread legal wagering.³⁸⁷ The most recent incident involving former Atlanta Falcons star receiver, Calvin Ridley, has raised significant concerns about league control of players' betting activities.³⁸⁸ All leagues have rules that prohibit wagering on league games, and some leagues, like the NCAA, prohibit all sports wagering.³⁸⁹ The Ridley incident illustrates that the NFL still has work to do educating players.³⁹⁰ Something is missing from the current programs since they continue to lapse where players violate the gambling rules.³⁹¹ Improving education will be among the most promising solutions to preventing a disaster scenario involving gambling-related match-fixing.³⁹² Maintaining the integrity of both the underlying sporting events and the betting market itself is essential.³⁹³

While match-fixing of a major American sports league is a nightmare scenario for the sports betting market,³⁹⁴ latency issues also are one of the key components holding the market back from reaching its current potential.³⁹⁵ Latency refers to the speed at which information travels.³⁹⁶ From a sports betting perspective, faster is generally regarded as better.³⁹⁷ A person attending a sporting event is watching that event in

³⁸⁵ *Id.*

³⁸⁶ While all leagues appear to provide some level of gambling education, some programs, like the NCAA's, appear dated. *See* Harris & Holden, *supra* note 231, at 437–38.

³⁸⁷ Holden, *supra* note 319. 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.*

³⁸⁸ *Id.*

³⁸⁹ *Sports Wagering*, *supra* note 321; Jeff Edelstein, *Evander Kane Case Shows Urgent Need to Change Sports Betting Rules for Athletes*, SPORTSHANDLE (Aug. 5, 2021), <https://sportshandle.com/evander-kane-sports-gambling-policy> [<https://perma.cc/7PDD-9YLF>].

³⁹⁰ Holden, *supra* note 319.

³⁹¹ *Id.*

³⁹² *See id.*

³⁹³ Gregory Day, John T. Holden & Brian M. Mills, *Fraud on Any Market*, 97 IND. L.J. 659, 666 (2022).

³⁹⁴ *See* Holden & Rodenberg, *supra* note 9, 454–56 (discussing high-profile American match-fixing incidents).

³⁹⁵ Brian Ring, *Streaming's High Latency—No One Cares, but You Still Should: Ring*, FIERCE VIDEO (May 13, 2021, 3:28 PM), <https://www.fiercevideo.com/video/streaming-s-high-latency-no-one-cares-but-you-still-should-ring> (last visited Feb. 10, 2023).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

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.³⁹⁸ Online streaming is often even more delayed, sometimes by as much as a minute.³⁹⁹ Slow sports betting feeds 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.⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰² This is a mistake. Rather than restricting the source of data, states should encourage 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 ULC should have been prepared to implement a new and reasonable system for regulating sports wagering in 2018 based on the possibility that the U.S. Supreme Court in *Murphy* would overturn PASPA. 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.

³⁹⁸ Eric Grundhauser, *How ‘Live’ Is Live TV*, ATLAS OBSCURA (Feb. 5, 2016), <https://www.atlasobscura.com/articles/how-live-is-live-tv> [https://perma.cc/FPV6-UFXS].

³⁹⁹ 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> [https://perma.cc/3E64-F5HD].

⁴⁰⁰ 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).

⁴⁰¹ Matt Rybaltowski, *As States Consider Anti-Courtsiding Measures, Debate on Transmission of Live Data Intensifies*, SPORTSHANDLE (July 10, 2019), <https://sportshandle.com/state-anti-courtsiding-measures> [https://perma.cc/VAH3-VRMR].

⁴⁰² *Official League Data*, *supra* note 233.

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, 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 entirely. 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 to allow for states to continue to collect reasonable tax dollars from their regulatory schemes.