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THE SHAM OF INTEGRITY FEES
IN SPORTS BETTING

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Following the Supreme Court's decision in Murphy v. National Collegiate Athletic Association, states can legalize sports gambling for the first time in more than 25 years. The advent of legalized gambling has sports leagues clamoring for compensation from states that authorize wagers on the particular leagues' games. Legal sports gambling promises to be one of the largest growth industries in the United States for years to come. Americans spent upwards of \$150 billion gambling illegally in 2017. The opportunity to convert some of that money to legal markets has state legislators salivating, gambling operators lining up, and sports leagues abandoning policy positions they have maintained for the better part of the last century. Derivative industries are also popping up, including companies that traffic in public information (e.g., scores) through partnerships with major sports organizations. There has been a collective push of the false narrative that sports leagues own the information generated by sporting events and that the leagues should be compensated when sportsbooks use this information. On this basis, the sports leagues seek compensation from state legislatures voting to legalize sports betting. Acceptance of the position pushed by the sports leagues could generate a windfall of upwards of \$2 billion for the leagues, while preventing that same \$2 billion from funding state programs. This Article examines the legal foundations of the sports leagues' quest for mandated fees and the monetization of information in the public domain by the integrity monitoring industry. It concludes that the quest for compensation by the sports leagues is baseless rent-seeking.

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INTRODUCTION

A gambling scandal marred the 1919 World Series. Eight members of the Chicago White Sox were accused of intentionally losing for the benefit of organized crime boss Arnold Rothstein.¹ After a criminal trial for the accused players, Major League Baseball's (MLB's) first Commissioner pronounced:

Regardless of the verdict of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are discussed, and does not promptly tell his

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

club about it, will ever again play professional baseball.²

Almost a century later, MLB owned part of a sportsbook that took bets on the 2018 World Series.³

On May 14, 2018, the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA) impermissibly forced states to maintain laws banning sports wagering.⁴ The *Murphy v. National Collegiate Athletic Association* decision acted as an accelerant for states looking to pad depleted budgets with a source of revenue that is not a new tax.⁵ Before the Supreme Court struck down PASPA, ending a 25-plus year prohibition on sportsbook style sports betting outside of Nevada,⁶ daily fantasy sports (DFS) companies began softening America's moral opposition to sports wagering.⁷ The rise of

2. *Kenesaw Landis*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/landis-kenesaw> (last visited Feb. 7, 2019).

3. Robert Mann, *Source: DraftKings, MLB Partnering on Groundbreaking Sports Betting App*, SPORTSHANDLE (Oct. 5, 2018), <https://sportshandle.com/source-draftkings-mlb-partnering-on-groundbreaking-sports-betting-app>. MLB subsequently divested their stake in DraftKings via a private sale in 2019. Eben Novy-Williams, *Gambling Outfit DraftKings in Pact to Use Official Baseball Data*, BLOOMBERG (July 25, 2019), <https://www.bloomberg.com/news/articles/2019-07-25/gambling-outfit-draftkings-in-pact-to-use-official-baseball-data>.

4. *Murphy v. Nat'l Coll. 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. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA ‘regulate[s] state governments’ regulation’ of their citizens. The Constitution gives Congress no such power.”) (quoting *New York v. United States*, 505 U.S. 149, 166 (1992)); see also Kathryn Kisska-Schulze, *This Is Our House! - The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 352 (2019) (discussing the decision).

5. In the first five weeks of 2019, 29 states introduced bills to legalize sports betting, following four states who were historically exempted under PASPA, and Mississippi, West Virginia, Pennsylvania, New Jersey, and Delaware, who launched sports betting before the end of 2018. See Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last updated Sept. 4, 2019).

6. See Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 33 (2017). A handful of other jurisdictions including Montana, Oregon, and Delaware were permitted to offer limited forms of sports wagering. *Id.* at 16.

7. See Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling and the Speculation Paradox*, 86 B.U. L. REV.

DFS showed that millions of Americans wanted to bet on sports⁸ and allowed professional sports leagues⁹ to experiment with gambling products they had long detested.¹⁰

A turning point in the interaction between North American sports and gambling was when the National Basketball Association (NBA) became an equity partner of DFS company FanDuel.¹¹ A day later, NBA Commissioner Adam Silver authored an op-ed in the *New York Times* stating that “the laws on sports betting should be changed. Congress should adopt a federal framework that allows states to authorize betting on professional sports.”¹² MLB continued this trend by securing

371, 396, 402 (2006) (summarizing the historical moral opposition to gambling); *see also* 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. 1, 8 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442178 (describing how DFS companies sought to brand themselves as more akin to fantasy sports than gambling in order to avoid legal challenges).

8. In 2014, DFS company FanDuel had more than one million paid accounts while the company and its primary competitor DraftKings were still in a growth stage. *See The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited Feb. 7, 2019). While both major DFS companies argued that their games were games of skill and not gambling, this is a mischaracterization of the way gambling laws are generally interpreted. *See* John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORTS L.J. 1, 6–7 (2017); *see also* Eric Ramsey, *Judge: New York Daily Fantasy Sports Are Illegal Gambling; What’s Next for DraftKings, FanDuel?*, LEGAL SPORTS REP. (Oct. 29, 2018, 4:47 PM), <https://www.legalsportsreport.com/25363/judge-new-york-daily-fantasy-sports-illegal-gambling-whats-next-draftkings-fanduel>; Brent Schrottenboer, *Fantasy Sports Debate: Gambling or Not Gambling?*, USA TODAY (Jan. 11, 2015, 9:29 PM), <https://www.usatoday.com/story/sports/fantasy/2015/01/11/fantasy-sports-gambling-debate-fan-duel/21612771>.

9. *See generally* Scott Stinson, *Pro Sports Leagues Happy to Embrace Daily Fantasy — and Pretend It Is Somehow Not Gambling*, NAT’L POST (Sept. 16, 2015, 10:21 PM), <https://nationalpost.com/sports/pro-sports-leagues-happy-to-embrace-daily-fantasy-and-pretend-it-is-somehow-not-gambling>.

10. *Id.*

11. *See* Darren Rovell, *NBA Partners with FanDuel*, ESPN (Nov. 12, 2014), http://www.espn.com/nba/story?id=11864920&_slug_=nba-fan.

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

an equity position in DFS site DraftKings, marking a drastic change for the league that banned one of its greatest players, Pete Rose, for wagering on the game.¹³ The shift ended nearly 100 years of equating gambling with the demise of the game.

Beyond investments in DFS, major U.S. leagues added to their bottom lines by contracting with companies who provide data to gambling firms.¹⁴ The deals commonly arose through partnerships with data brokers like Sportradar and Sports Integrity Monitor (now Genius Sports), who have two parts to their business.¹⁵ One side involves “integrity monitoring,” which uses algorithms to monitor betting line movements for irregular line variations that can potentially indicate nefarious activity. The other side sells data to bookmakers.¹⁶ The relationships forged between the American sports leagues and integrity monitoring companies has translated into a valuable partnership in the newly legalized U.S. market, as the leagues have an ability to disseminate official data to sportsbooks.¹⁷

Perhaps fearing the invisible hand of the market¹⁸ would not lead consumers to pay for official data, sports leagues launched a two-pronged lobbying effort in the states seeking to legalize sports wagering. The first means of attack seeks an “integrity fee,” which is a private tax on all wagers placed on a

13. Chris Grove, *Three of the Four Major American Sports Leagues Now Have Official Daily Fantasy Sports Partners*, LEGAL SPORTS REP. (Apr. 2, 2015, 12:05 PM), <https://www.legalsportsreport.com/840/mlb-daily-fantasy-partnership-draftkings/>.

14. Steve Fainaru, Paula Lavigne & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling-Related Firms*, ESPN (Jan. 27, 2016), http://www.espn.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms.

15. *See id.*

16. *See id.* *See generally* Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 107 IOWA L. REV. (forthcoming) (explaining the modern value of data in commerce).

17. Eric Ramsey, *'Data Monopoly' Key to Leagues' Desired Control over US Sports Betting*, LEGAL SPORTS REP. (Mar. 22, 2018, 1:15 PM), <https://www.legalsportsreport.com/19047/data-monopoly-key-to-leagues-controlling-sports-betting/>.

18. *See* ADAM SMITH, THE WEALTH OF NATIONS (1776). For an overview of the invisible hand theory, see Aidan Hunt, *Adam Smith and the Invisible Hand Theory*, MEDIUM (Nov. 15, 2017), <https://medium.com/@awhunt1002/adam-smith-and-the-invisible-hand-theory-8f992b73b71a>.

particular league's games.¹⁹ One estimate proffers that, if betting were enacted in every jurisdiction currently considering the matter, integrity fees would divert \$2 billion annually to the leagues from the states and their bookmakers.²⁰ The second approach seeks a requirement that legal sports betting operators purchase official league data.²¹ In this paper, we establish that these proposals are unlikely to further sports integrity and explain why they may violate both state law and the First Amendment.

This Article is organized into six parts. Part I provides an overview of the sports leagues' quest for gambling fees and mandates. Part II explores the rise of the integrity monitoring industry and describes how these firms may fall short of actually promoting an ideal playing ground. Part III examines relevant cases showing continued attempts by sports leagues to control information arising from their events. Part IV analyzes potential First Amendment considerations associated with awarding sports leagues a property right in data. Part V looks at various state constitutions limiting gifts to private enterprises and associated issues arising from competitive bidding statutes. Finally, Part VI discusses the fact that sports data cannot be protected under copyright. Taken as a whole, the article establishes that integrity fee and official data clauses do not stand up to rigorous legal evaluation.

I.

BACKGROUND ON THE SEARCH FOR FEES

To frame our analysis, we introduce the origins of integrity fees and official data proposals. From this anecdotal evidence, the influence of sports league lobbying is apparent. The second half of this section discusses public choice and collective action theories to establish why enactment of integrity fee or official data mandates is possible or even likely. In support of this theory, an analysis of all relevant 2019 bills is pro-

19. See *Sports Betting Integrity Fee*, LEGAL SPORTS REP., <https://www.legal-sportsreport.com/integrity-fee/> (last visited Feb. 7, 2019).

20. Dustin Gouker, *Leagues Could Make Billions If States Implement Sports Betting 'Integrity Fees'*, LEGAL SPORTS REP. (Jan. 9, 2018), <https://www.legal-sportsreport.com/17430/leagues-sports-betting-integrity-fee-revenue>.

21. See James Glanz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html>.

vided. This Article finds that substantial portions of recent legislation are taken *directly* from proposals circulated by the leagues.

A. *Introduction of Integrity Fees*

An Indiana bill introduced on January 9, 2018 marks the first appearance of integrity fees, more than five months before the Supreme Court would strike down PASPA.²² House Bill 1325 mandated: “A sports wagering operator shall remit to a sports governing body . . . an integrity fee of one percent (1%) of the amount wagered on the sports governing body’s sporting events . . . at least once per calendar quarter.”²³ This fee embodies a concept from France and Australia that mandates bookmakers pay sport organizations a small fee for the ability to offer wagering on particular events.²⁴ Under the Indiana plan, the sports leagues receive an integrity fee of 1% of the handle (total amount wagered) on their games.²⁵

Bookmakers see this as a problem because—unlike casino games such as roulette or craps where the casinos retain a high percentage of the total amount wagered—the typical bookmaker keeps only about 5% of wagers to cover expenses.²⁶ The 1% fee in Indiana threatened to usurp as much as 20% of bookmakers’ revenue.²⁷ As will be established herein, neither the bookmaker nor the state would receive any value in exchange for this payment; these proposals are naked rent-seeking by the leagues. The Indiana bill marked the first time that league advocates secured the inclusion of this kind of fee.²⁸

Prior to the passage of PASPA, the sports leagues testified in front of the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks and argued that state lotteries

22. *Integrity Fees – What Are They And Why Are They So Controversial*, SPORTSHANDLE, <https://sportshandle.com/integrity-fees> (last visited Oct. 10, 2019).

23. H.B. 1325, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

24. LEGAL SPORTS REP., *supra* note 19.

25. *Id.*

26. *See id.*

27. *Id.* The potential windfall from the integrity fees could be as large as several billion dollars spread across the major sports leagues. *Id.*

28. SPORTSHANDLE, *supra* note 22.

were misappropriating professional sports service marks.²⁹ In 1990, then-NFL Commissioner Paul Tagliabue testified that state-sponsored sports betting was a form of misappropriation of sports league property.³⁰ Tagliabue sought to limit the argument that gambling was a states' rights issue by asserting some intellectual property right in the results of sporting events.³¹ He stated:

A State does not have the right to misappropriate someone else's property, which is what is going on here. A State does not have the right to go out and have State employee's [sic] misappropriate Disney's product to manufacture Donald Duck dolls or Mickey Mouse dolls and sell them as a State product. Those are protected property interests in those products. We have a similar protected property interest in our service marks. So States rights do not give you the right to steal someone else's property interest, and that is what is suggested here.³²

This manufactured narrative connecting sports gambling to both real and imagined property interests³³ was furthered by then-Harvard law professor Arthur Miller, who testified on the NFL's behalf that the "The National Football League, baseball, basketball, and hockey have created values."³⁴ Miller argued that current law failed to protect the sports leagues' goodwill and the Lanham (trademark) Act should therefore

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

30. *Id.* (statement of Paul Tagliabue, Commissioner, NFL) ("[T]his type of State-sponsored lottery misappropriates the good will, the public interest in our sport, and the entertainment value of products that we have chosen to market in a certain fashion. We have rights to control the way that our product is presented to the public and not to sell it in a salacious way and not to associate it with gambling.").

31. *See id.*

32. *Id.* (statement of Paul Tagliabue, Commissioner, NFL).

33. *See generally* Marc Edelman, *Lack of Integrity? Rebutting the Myth That U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J.L. & Bus. 1, 7–10 (2018) (explaining why, under current law, leagues maintain no trademark rights associated with this type of behavior).

34. *Legislation Prohibiting State Lotteries*, *supra* note 29 (statement of Arthur Miller, Professor, Harvard Law School).

be amended.³⁵ Congress did not make the requested changes, but they passed PASPA two years after the hearing.

Between 1992 and 2018, the professional sports leagues and the National Collegiate Athletic Association (NCAA) chose not to seek compensation from Nevada sportsbooks or other entities offering more-limited forms of sports betting.³⁶ Indeed, until recently, integrity fees and official data mandates were literally foreign concepts.³⁷ Addressing the newfound need for integrity fees, NBA Executive Vice President Dan Spillane stated: “To compensate leagues for the risk and expense created by betting and the commercial value our product creates for betting operators, we believe it is reasonable for operators to pay each league 1% of the total amount bet on its games.”³⁸ Industry observers questioned why regulated bookmakers should now have to compensate the leagues.³⁹ After all, sports leagues failed to seek compensation from Nevada when it enjoyed a 25-year near-monopoly on legal sports betting; Nevada further served as a Maginot Line for sports betting integrity.⁴⁰ Its gaming commission discovered numerous match-fixing incidents, alerting authorities prior to sports leagues becoming aware.⁴¹

35. *See id.*

36. SPORTSHANDLE, *supra* note 22.

37. *See id.* Professor Stephen F. Ross argued in 2015 that the model employed in the Australian state of Victoria could serve as a model that American states could adopt if PASPA were struck down. *See* Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under*, 5 ARIZ. ST. SPORTS & ENT. L.J. 6, 9–10 (2015).

38. *Statement of the National Basketball Association to the New York Senate Standing Committee on Racing, Gaming & Wagering*, SPORTSHANDLE (Jan. 24, 2018), https://sportshandle.com/wp-content/uploads/2018/01/1.24.18_testimony_of_national_basketball_association.pdf.

39. *See* Matt Bonesteel, *Sports Gambling ‘Integrity Fee’ Supporters are not Doing Themselves any Favors*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors>.

40. *See id.*

41. *Hearing on Post-PASPA: An Examination of Sports Betting in America Before the Judiciary Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations*, 116th Cong. 4–7 (2018) (statement of Becky Harris, Chair, Nev. Gaming Control Bd.) (noting that the Nevada Gaming Control Board identified the 1985 point-shaving scandal at Tulane University and the 1994 Arizona State point-shaving scandal, and that Las Vegas-based odds-makers were also first to alert the NCAA of suspicions of point shaving at the University of Toledo).

In February of 2018, the NBA gained a confederate in its search for a piece of sports wagering: MLB. Beginning in West Virginia, MLB pushed for the same 1% fee that the NBA requested in Indiana.⁴² During the NBA's All-Star weekend, the NBA continued to exert similar pressures but pivoted from the "integrity fee" moniker and instead referred to it as a "royalty."⁴³ Near this time, advocates for the NBA circulated model legislation containing language mandating that sportsbook operators remit the 1% fee on a quarterly basis to the "relevant sports governing body."⁴⁴

In early March 2018, West Virginia passed a bill legalizing sports wagering.⁴⁵ It did not contain an integrity fee provision, which prompted MLB Commissioner Rob Manfred to personally petition Governor Jim Justice to veto the bill due to this omission.⁴⁶ The Manfred interjection began a series of events in West Virginia as the state launched legal sports betting. After failing to secure a statutory integrity fee, Governor Jim Justice announced a deal between the sports leagues, government officials, and casino executives requiring integrity payment external to legislation.⁴⁷ Recognizing the governor's financial interest in these fees,⁴⁸ state officials responded with disdain. Lawmaker Shawn Fluharty tweeted: "A 'tentative agreement'

42. See Brett Smiley, *A Timeline of the Leagues' Fight for a Sports Betting 'Integrity Fee,'* OFF SHORE GAMING ASS'N (June 14, 2018), https://osga.com/online_gaming_articles.php?A=Timeline-of-the-Leagues-Fight-For-A-Sports-Betting-Integrity-Fee-21543.

43. *Id.* The connection between the term royalty and intellectual property may or may not have been an intentional shift by the NBA to imply that they were somehow owners of information being relied on by bookmakers. See John Holden, *When They Say Integrity Fee, Are Pro Sports Leagues Really Asking for a Private Tax?*, LEGAL SPORTS REP. (Nov. 30, 2018), <https://www.legal-sportsreport.com/26361/pro-sports-leagues-integrity-fee-private-tax>.

44. Smiley, *supra* note 42.

45. *Id.*

46. *See id.*

47. Adam Candee, *Chaos Erupts in West Virginia Over Sports Betting After Governor Issues Statement on Integrity Fee*, LEGAL SPORTS REP. (May 10, 2018), <https://www.legalsportsreport.com/20293/wv-integrity-fee-sports-betting/>.

48. An apparent conflict of interest (and thus the controversy) stems from the Governor's ownership of the Greenbrier Resort, which has an ongoing relationship with the PGA Tour. Brad McElhinny, *Governor Walks Fine Line on W.Va. Sports Betting Talks*, W. VA. METRONews (May 15, 2018, 12:58 PM), <http://wvmetronews.com/2018/05/15/justice-walks-a-fine-line-on-wv-sports-betting-talks>.

behind closed doors in the dark. This is complete BS from @WVGovernor and Bray the Intern. If the casinos are willing to pay more money then it shouldn't be going to billionaire leagues it should be going to West Virginians."⁴⁹ The pushback from legislators resulted in the plan falling apart.⁵⁰ Undeterred, Governor Justice tried to execute a second deal by pushing back the rollout of sports betting, but was rebuffed again by state lottery officials.⁵¹ Sports betting ultimately launched without the contested provisions under emergency rules from the state's lottery.⁵²

After the passage of West Virginia's bill, New York Senator John Bonacic introduced a bill with a smaller integrity fee (.25% of the handle capped at 2% of gross revenue).⁵³ This reduced rate was branded a "compromise."⁵⁴ While continuing to push for integrity fees, the leagues appeared to double their efforts to further proposals for official data use. Indeed, they secured an official data requirement in the U.S. Senate bill introduced by Senator Hatch and Senator Schumer immediately before Congress's term ended in 2018.⁵⁵

49. Candee, *supra* note 47.

50. Eric Ramsey, *Justice Denied Means Justice Served: West Virginia Sports Betting Still on Track*, LEGAL SPORTS REP. (Aug. 7, 2018), <https://www.legalsportsreport.com/22638/west-virginia-governor-sports-betting/>.

51. Phil Kabler, *As More Sports Betting Nears, Legislators Concerned over Lottery Changes*, CHARLESTON GAZETTE-MAIL (Sept. 17, 2018), https://www.wv-gazette.com/news/politics/as-more-sports-betting-nears-legislators-concerned-over-lottery-changes/article_d47b8acb-3631-56bc-98da-749206ff2526.html. It was revealed in a Freedom of Information request that NBA and MLB lobbyists had requested that they receive a mandate for the use of official league data, a means of compensation that would effectively see the leagues compensated by the state awarding leagues a monopoly on data distribution. Brad McElhinny, *WV Lawmakers Say No to 'Integrity Fees,' but Pro Leagues Push Again Through Regs*, W. VA. METRO NEWS (Sept. 17, 2018, 12:08 AM), <http://wvmetronews.com/2018/09/17/wv-lawmakers-say-no-to-integrity-fees-but-pro-leagues-push-again-through-regs>.

52. Ramsey, *supra* note 50.

53. Smiley, *supra* note 42.

54. *Id.*

55. Sports Wagering Market Integrity Act, S. 3793, 115th Cong. (2018). The bill contained a sunset clause on the use of official data, which may have been a means to avoid running afoul of the Constitution's Intellectual Property Clause, which requires monopolistic grants be for "limited times." See Ryan M. Rodenberg et al., *Whose Game Is It: Sports-Wagering and Intellectual Property*, 60 VILL. L. REV. TOLLE LEGE 1, 5 (2014).

The bill failed to pass in the waning days of the 115th Congress.⁵⁶

B. *Theoretical Concerns and Evidence of Effective League Lobbying*

Beyond early anecdotal evidence, relevant theory and a review of all recent sports betting bills in 2019 indicate a strong possibility of successful implementation of integrity fee or official data clauses. This Article evaluates the likelihood of implementation of these provisions through the lens of Public Choice Theory. This idea posits that legislators' self-interest in reelection shapes policy choices, with the odds of reelection being a function of campaign funds and popularity among the electorate.⁵⁷ New policies are thus most likely to be enacted when lobbyists persuade legislators regarding issues that are inoffensive to voters and unlikely to affect counter-lobbying.

Rent-seeking on behalf of the leagues is unlikely to garner backlash among the electorate at large. As most proposals stand, bookmakers pay fees directly to the leagues;⁵⁸ this money is thus unlikely to be perceived as a loss of public funds. If the public becomes aware of these proposals and view the payments as a loss to the state (i.e., assuming the government would have kept these funds), the policy could prove unpopular. And though substantial payments will occur (estimated at over \$60 million annually in each state⁵⁹), public outcry is unlikely. Each U.S. citizen would lose an estimated \$10 per year⁶⁰—a sum unlikely to encourage contacting a congressper-

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

57. W. Michael Schuster, *Public Choice Theory, the Constitution, and Public Understanding of the Copyright System*, 51 U.C. DAVIS L. REV. 2247, 2251 (2018).

58. See, e.g., SB3432, 100th Gen. Assemb. § 35(c) (Ill. 2018).

59. One estimate proffers that, if sports betting were enacted in the 32 feasible states with a 1% integrity fee, the total payout to the leagues could be approximately \$2 billion. Gouker, *supra* note 20. Divided by 32, this sum is approximately \$62.5 million per state, though this sum would obviously vary from state to state.

60. As a gross estimate, there were 308,745,538 people in the United States as per the 2010 Census. *Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/decade.2010.html>. Divided by 50, this number is approximately 6.17 million individuals per state, and assuming \$62.5 million in revenue per state, this comes to an estimated \$10 per individual per year.

son to complain.⁶¹ While anecdotes show some backlash (e.g., pushback to the West Virginia governor's unilateral attempts to secure payments), similar future acts remain far from guaranteed.

A second source of public outcry could come from would-be betting establishments. Collective action scholars predict that, where the size of a group of interested parties is small enough that peers would notice free riders but no individual firm would undertake the common interest alone, it is uncertain if the parties will act in concert to achieve a policy goal.⁶² Where a company sees others free riding on their lobbying efforts, they may reasonably stop lobbying themselves.⁶³ However, each of these parties may foresee this cessation and—still wanting to obtain the public good—choose not to free ride.⁶⁴ In the current situation, counter-lobbying against integrity fees cannot be predicted with certainty. The number of would-be betting establishments in any given state would not be huge (i.e., sufficiently small for free riding to be detected) and no potential bookmaker maintains enough interest to individually fund a lobbying campaign.

On the contrary, where a small group finds an issue important, collective action theory predicts that the group may successfully organize lobbying efforts and attract donations, thereby influencing legislators.⁶⁵ This density of interests avoids the problems associated with organizing larger factions susceptible to free-rider issues.⁶⁶ When parties stand to benefit substantially from a new policy, lobbying costs may prove a net positive and thus are more likely to be undertaken.⁶⁷ Our anal-

61. See generally Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION* 21 (1965) (describing the preference individuals have for others to pay the cost of a public good).

62. *Id.* at 21, 44; Schuster, *supra* note 57, at 2291.

63. See Olson, *supra* note 61, at 43.

64. See *id.*

65. See *id.* at 21, 44 (explaining that action towards a collective benefit is guaranteed where the gain to a single firm exceeds the cost of lobbying to secure that benefit).

66. *Id.*

67. See Frank B. Cross, *The Judiciary and Public Choice*, 50 *HASTINGS L.J.* 355, 356 (1999); see also Olson, *supra* note 61, at 33–34, 43–44; W. Michael Schuster, *Invalidity Assertion Entities and Inter Partes Review: Rent Seeking as a Tool to Discourage Patent Trolls*, 51 *WAKE FOREST L. REV.* 1163, 1181–84 (2016)

ysis of recent proposals establishes this is the case for integrity fees.

We searched all bills introduced in 2019 related to sports betting⁶⁸ and found the phrase “integrity fee” in the following bills: Illinois SB 176, Kansas HB 2068/SB 23, and Missouri SB 44. Using anti-plagiarism software, we found that Illinois SB 176 contains over 60% of the language in the Model Sports Wagering Act (MSWA)—a proposal drafted by the sport leagues and their lobbyists.⁶⁹ Analysis established similar results for Missouri SB 44, which included 64% of the language in the MSWA. The Kansas acts comprised 34% of the MSWA.

Lobbying efforts likely caused the overlap between the MSWA and sports betting proposals. The NBA and MLB did not employ a single lobbyist in Illinois in 2017. In 2018, they both hired 10 firms to pursue their interests, and, in 2019, the NBA hired 11 firms, while the MLB hired 12.⁷⁰ The leagues maintain a similar number of lobbyists in Missouri, all of whom registered with the state in 2018.⁷¹

We find similar trends for bills requiring payment of a “royalty fee” to sports leagues. In 2019, the following bills mandated royalty payments that end up in the leagues’ bank accounts: New York S17, Missouri S327 and HB119, Mass. S1110, and Iowa Senate Study Bill 1081 (House Study Bill 102). Each of these proposals included substantial portions of the MSWA: 19%, 19%, 75%, and 39%, respectively. The subject states exhibited the same lobbying trends as described above—no lob-

(demonstrating the ways patent lobbying helps IAE’s target patent trolls in litigation involving small groups of defendants).

68. This is the “as introduced” version of all bills from *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker> (last visited Feb. 7, 2019).

69. 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/> (noting that leagues and lobbyists have “drafted an eight-page ‘Model Sports Wagering Act’ for ‘gaming states’”).

70. *Lobbyist Information Search*, ILL. SEC’Y OF STATE, <https://www.ilsos.gov/lobbyistsearch/lobbyistsearch>. The NFL employed a single lobbyist in 2018 and 2019; it did not employ a lobbyist in the state in 2017. *Id.*

71. *Principal*, MO. ETHICS COMM’N, <https://mec.mo.gov/mec/Lobbying/PrincipalSearch.aspx>. The NFL hired its first lobbyist in the state on January 17, 2019. *Id.*

bying in 2017, with significant upticks in 2018 and 2019.⁷² And while lobbying efforts do not ensure implementation of integrity fees, these facts—taken in concert with public choice and collective action theories—raise a significant possibility of success.

This lobbying and associated proposals focus on the idea that monitoring sports betting costs money and these expenditures are related to the legalization of sports betting.⁷³ All of the above league propositions focus on increased “integrity” in sports; the following section analyzes integrity-centric business models and discusses how these firms commonly fall short of this goal.

II.

OVERVIEW OF THE FALSE NARRATIVE UNDERLYING THE INTEGRITY INDUSTRY

League demands for fees or use of official data commonly focus on the theme of “integrity.” Indeed, the phrase has created a global cottage industry of integrity monitoring organizations. As discussed below, however, many such companies operate sport integrity monitoring as a secondary business to their profit-generating data sales. Recent sports league interest in the integrity industry should, accordingly, be viewed with some skepticism.

A. *Monitoring Integrity of the Game*

One of the most prominent organizations advocating for increased integrity and protection of sport is the Qatar-based International Centre for Sport Security (“ICSS”).⁷⁴ The ICSS

72. *Lobbying Data on Demand*, N.Y. STATE JOINT COMM’N ON PUB. ETHICS, <https://jcope.ny.gov/public-data> (noting that there are seven NBA lobbying firms in New York in 2019 and 2018, and zero in 2017; and seven MLB lobbying firms in 2019, eight in 2018, and zero in 2017); *Lobbyist Public Search*, SEC’Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/LobbyistPublicSearch/Default.aspx> (noting that there are three NBA lobbying firms in 2019 and 2018, and zero in 2017; same for MLB); *Search Lobbyist Database*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/lobbyist/reports/searchLobby?type=client> (noting that there are ten NBA lobbying firms in 2019, one in 2018, and zero in 2017; same for MLB).

73. See LEGAL SPORTS REP., *supra* note 19.

74. See *Governance*, INT’L CTR. FOR SPORT SEC., <http://theicss.org/governance/> (last visited Feb. 9, 2019).

launched in October 2010 with funding from the Qatari government⁷⁵ and recently expanded its scope to “include sport integrity, policy, good governance and anti-corruption issues.”⁷⁶ These ambitious objectives purportedly stand independent of outside influence, despite funding from the Qatari government.⁷⁷

The argument about ICSS’s independence raised eyebrows of many sport security observers. Dr. Declan Hill, a world-renowned expert on sport corruption, accused the organization of “dead catting” for the Qatari government—essentially hosting integrity-themed conferences to distract from the laborers dying en masse while constructing stadiums for the Qatar-hosted 2022 World Cup.⁷⁸ ICSS’s critics likewise questioned its independence after the ICSS found Qatari official Mohammed Bin Hammam not responsible for the vote-rigging and bribery that brought the World Cup to the tiny emirate.⁷⁹ The finding conflicted with conclusions from a variety of other organizations, including FIFA.⁸⁰

B. *Monitoring Sports Betting*

Integrity monitoring of sports betting may present a second variation on this theme. Two companies led the booming field (Sportradar⁸¹ and Genius Sports⁸²) at the inception of

75. *Id.*

76. *Id.*

77. *Id.*

78. Declan Hill, *Dead Catting, Image Laundering and Why You Should Have Nothing to Do with the ICSS*, DECLAN HILL BLOG, <http://declanhill.com/dead-catting-image-laundering-and-why-you-should-have-nothing-to-do-with-the-icss/> (last visited Feb. 9, 2019). Hill quotes Boris Johnson, explaining that dead catting is a term meaning: “When a debate is going badly you put a dead cat on the table. Then the media all goes ‘What is that dead cat doing on the table?’ In other words, they are not talking about the issue you are doing badly on.” *Id.*

79. *See id.*

80. *See* Ben Rumsby, *Qatari Did Manipulate World Cup 2022 Vote, Says FIFA Report*, THE TELEGRAPH (Nov. 13, 2014, 12:57 PM), <https://www.telegraph.co.uk/sport/football/world-cup/11228507/Qatari-did-manipulate-World-Cup-2022-vote-says-Fifa-report.html>.

81. *See A Global Leader in Understanding and Leveraging the Power of Sports Data*, SPORTRADAR, <https://sportradar.us/about-us/> (last visited Feb. 9, 2019).

82. *See Our Story*, GENIUS SPORTS GRP., <https://www.geniussports.com/about> (last visited Feb. 9, 2019). Genius Sports previously operated one por-

legal sports wagering in the United States.⁸³ These businesses recognize potentially corrupt behavior⁸⁴ via algorithmic identification of irregular line movements in betting markets.⁸⁵

Professors David Forrest and Ian McHale conducted an evaluation of Sportradar’s “Fraud Detection System” which, while generally positive, did raise a few concerns regarding the integrity monitoring industry.⁸⁶ They note that while Sportradar notifies customers about suspicious activities, these re-

tion of its business as SportIM and another portion as BetGenius. MARK LOCKE, TRUTH IN TESTIMONY, HOUSE COMMITTEE ON ENERGY AND COMMERCE (May 9, 2016), <https://docs.house.gov/meetings/IF/IF17/20160511/104902/HHRG-114-IF17-TTF-LockeM-20160511.pdf>. Other firms, such as the Perform Group and Nasdaq, are also competing for business monitoring the integrity of sports wagering markets and the underlying sporting events. Darren Heitner, *NBA And MLB Face Challenge in Persuading States to Award a Sports Betting Integrity or Rights Fee*, FORBES (May 18, 2018, 7:00 AM), <https://www.forbes.com/sites/darrenheitner/2018/05/18/the-nbas-and-mlbs-challenge-in-convincing-states-to-award-a-sports-betting-integrity-or-rights-fee>.

83. See generally Brett Smiley, *MLB, Sportradar Ink Sports Betting Data Deal As Controversy Brews*, SPORTSHANDLE (Feb. 27, 2019), <https://sportshandle.com/mlb-sportradar-announce-betting-data-deal/>.

84. See, e.g., *Integrity*, SPORTRADAR, <https://sportradar.us/integrity-services/> (last visited Feb. 9, 2019).

85. See, e.g., *id.* This detection method is replicable with access to the right information—much of it available from subscription services who provide updated sports betting prices. See *Real-Time Odds & Betting Trends*, SPORTS INSIGHTS, <https://www.sportsinsights.com/sportsbook-insider/> (last visited Feb. 9, 2019). Indeed, numerous academics have identified similar concepts from which these firms base a portion of their business model. See generally Adam Hosmer-Henner, *Preventing Game Fixing: Sports Books as Information Markets*, 14 GAMING L. REV. & ECON. 31 (2010); Elihu D. Feustel & Ryan M. Rodenberg, *Sports (Betting) Integrity: Detecting Match-fixing in Soccer*, 19 GAMING L. REV. & ECON. 689 (2015); Ryan M. Rodenberg & Elihu D. Feustel, *Forensic Sports Analytics: Detecting and Predicting Match-fixing in Tennis*, 8 J. PREDICTION MKTS. 77 (2014); Wen-Bin Lin & Mei-Yen Chen, *A Study of Efficiency Monitoring Systems for Match-fixing Players in the Chinese Professional Baseball League*, 15 EUR. SPORT MGMT. Q. 301 (2015); Christian Deutscher et al., *Match Fixing and Sports Betting in Football: Empirical Evidence from the German Bundesliga* (2017), https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=2910662; Justin Wolfers, *Point Shaving: Corruption in NCAA Basketball*, 96 AM. ECON. REV. 279 (2006); Mark Duggan & Steven D. Levitt, *Winning Isn’t Everything: Corruption in Sumo Wrestling*, 92 AM. ECON. REV. 1594 (2002).

86. David Forrest & Ian G. McHale, *AN EVALUATION OF SPORTRADAR’S FRAUD DETECTION SYSTEM* (2015), https://fds.integrity.sportradar.com/wp-content/uploads/sites/18/2016/03/Sportradar-Security-Services_University-of-Liverpool_An-Evaluation-of-the-FDS.pdf.

ports do not always result in law enforcement investigations.⁸⁷ Indeed, the report recognizes one of the failures of the industry is that private firms (e.g., Sportradar) lack authority to investigate irregularities and identify those behind the corruption with the vigor of state-sanctioned law enforcement agencies.⁸⁸ Forrest and Hale compared these firms to governmental regulatory bodies:

[I]n some sense analysts at Sportradar face a tougher problem than those [before] the US Securities and Exchange Commission (SEC). Typically, national agencies such as the SEC are empowered to obtain information on the identity of traders in cases when anomalies such as heavy buying before a favourable announcement are observed (whereas this is not possible in the betting market, where transactions often take place in regions with no effective regulation). Further, the SEC is permitted . . . to seek further evidence using law enforcement techniques such as wire-tapping.⁸⁹

This failure raises concerns, given the sports leagues' desire to engage with integrity monitoring companies. If increased integrity stands as the goal of monitoring, sports would benefit from public disclosure of irregularities and investigation by public bodies with investigatory power. Private companies, including the leagues, cannot satisfy this standard.⁹⁰

87. *Id.* at 8. While the integrity monitoring industry is in a contractual relationship with their sports league partners, law enforcement remains the most important piece in stopping match-fixing threats. See e.g., John Holden, *The Cautionary Tale For US Sports Betting In Esports Match-Fixing Struggles*, LEGAL SPORTS REP. (Sep. 23, 2019), <https://www.legalsportsreport.com/35511/esports-match-fixing-us-sports-betting/>.

88. See Forrest & McHale, *supra* note 86, at 5.

89. *Id.*

90. See Holden & Rodenberg, *supra* note 1. Additionally, the integrity monitoring business itself may be built around questionable sourcing of data. The first means of data collection is through a direct feed, which presumably is obtained through sites who partner with Sportradar. The second means of data collection to feed the Fraud Detection System is scraping odds, which presumably does not occur with the consent of the sites the data originates from. Forrest & McHale, *supra* note 86, at 15. Scraping exists within a legal void. While common, for instance, Google scrapes websites to generate search results, and while a court in 2014 held that scraping did not

C. Betting Data Sales

The second half of these integrity monitoring firms' business is the sale of betting data to bookmakers.⁹¹ Firms such as Sportradar and BetGenius contract with sports leagues to disseminate official data to sportsbooks.⁹² They collect this data via a direct feed from the league or through networks of hundreds of "data scouts,"⁹³ or "data journalists,"⁹⁴ who watch sporting events live or from an office. The firms then disseminate the data to sportsbook clients.⁹⁵

A mandate that state-licensed sportsbooks exclusively use official data could provide integrity monitoring companies a significant windfall. This requirement may, however, perversely threaten the integrity of betting markets. In that situation, there would be a single data source creating a single point of failure that a corruptor could attack in order to cripple the entire market.⁹⁶ Absent this mandate, sportsbooks may purchase data from a variety of places, creating a marketplace.

Research recognizes that more sources of data increases the ability to identify corruption⁹⁷ and, conversely, games with

violate the Computer Fraud and Abuse Act, there remain questions about the scope of permissible scraping. Eric Goldman, *QVC Can't Stop Web Scraping*, FORBES (Mar. 24, 2015), <https://www.forbes.com/sites/ericgoldman/2015/03/24/qvc-cant-stop-web-scraping/#78d657523ca3>; see also *QVC, Inc. v. Resultly, LLC*, 159 F. Supp. 3d 576 (E.D. Pa. 2016) (holding that Resultly's scraping which resulted in an overloading of QVC's servers did not satisfy the required elements of the Computer Fraud and Abuse Act). The scraping of data is not in and of itself a problem, however, the repackaging of scraped data as part of an integrity monitoring program does appear somewhat oxymoronic. *Id.*

91. See Fainaru, Lavigne & Purdum, *supra* note 14.

92. See, e.g., Press Release, Nat'l Basketball Ass'n., NBA Announces First Betting-data Partnerships in U.S. with Sportradar, Genius Sports (Nov. 28, 2018), <http://www.nba.com/article/2018/11/28/nba-sportradar-genius-sports-partnership-official-release>.

93. See *Live Scout – NBA & NHL (Multiple US Locations)*, SPORTRADAR, <https://sportradar.us/2016/10/live-scout-nba-nhl> (last visited Feb. 9, 2019).

94. See *Data Journalist (for Sports Events)*, SPORTRADAR, <https://sportradar.jacando.com/uk/en/job/eATotkMN> (last visited Feb. 9, 2019).

95. See *FAQ*, SPORTRADAR, <https://www.sportradar.com/about-us/group-set-up/faq> (last visited Feb. 9, 2019).

96. See John T. Holden, *Ghosts in the Machine: How Corrupters Manipulate Games that Never Happened*, 22 GAMING L. REV. 630 (2018).

97. See Marius Ötting, Roland Langrock & Christian Deutscher, *Integrating Multiple Data Sources in Match-fixing Warning Systems*, 18 STAT. MODELLING 483 (2018).

a single source of data are at an increased risk of corruption.⁹⁸ In fact, having a single feed of data was a contributing factor to one of the greatest match-fixing hoaxes ever accomplished, involving the national soccer teams of Togo and Bahrain.⁹⁹ The Togo team consisted entirely of imposters, but by virtue of match-fixers corrupting the data scouts sending information to bookmakers, the fixers profited while the bookmakers located thousands of miles away were none the wiser.¹⁰⁰ While NBA and MLB games are highly unlikely to ever be manipulated by “ghost-fixers,” the reliance on a single feed of data may increase the threat to more obscure sports leagues.

Simply put, integrity firms present only a partial solution. With this in mind, league attempts to secure fees to maintain integrity or provide official data should be viewed with skepticism. For years the sports leagues managed to protect the integrity of games without third-party contractors, private monitoring companies watching betting markets, or the firms devoted to protecting the underlying sporting events. With that in mind, the following section addresses prior attempts by the leagues to profit from sports betting and associated information, showing that the current iteration thereof (i.e., integrity fees and official data) are simply an extension of this trend.

III.

A HISTORY OF FAILED ATTEMPTS TO CONTROL SPORTS INFORMATION

American professional sports leagues continuously attempt to maximize control over, and profit from, all aspects of their brands.¹⁰¹ These vigorous efforts produced an extensive progeny of case law. Beginning as far back as 1976, the leagues litigated efforts to secure property rights for public informa-

98. Holden, *supra* note 96.

99. *Id.* at 633.

100. Paul Kelso, *Fifa Haunted by New Gambling Phenomenon: ‘Ghost Games,’* TELEGRAPH (Oct. 19, 2011, 7:30 AM), <https://www.telegraph.co.uk/sport/football/international/8835176/Fifa-haunted-by-new-gambling-phenomenon-ghost-games.html>.

101. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 645 (1989).

tion surrounding the games they facilitate.¹⁰² The following section outlines relevant cases to present the legal landscape upon which integrity fee and official data proposals should be evaluated. This part likewise establishes that—far from being a unique event—the leagues’ current lobbying efforts exhibit but another chapter in their efforts to internalize all value (including data belonging to the public) associated with their respective sports.

A. *NFL v. Delaware*

In 1976, the NFL sued the Governor of Delaware, alleging the state’s NFL lottery game’s “use of National Football League’s schedules, scores and public popularity,” constituted misappropriation of the league’s property and that the lottery games infringed on NFL trademarks.¹⁰³ The misappropriation claim stood upon the idea that the lottery created a “forced association with gambling” for the league, which misappropriated common law property rights.¹⁰⁴ The Delaware District Court rejected the argument, noting that the lottery used only the NFL’s schedule and game scores, which it “obtained from public sources and are utilized only after plaintiffs have disseminated them at large and no longer have any expectation of generating revenue from further dissemination.”¹⁰⁵

Judge Stapleton chastised the NFL regarding its overzealous attempt to internalize *all* value associated public data arising from its games:

What the Delaware Lottery has done is to offer a service to that portion of plaintiffs’ following who wish to bet on NFL games. It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs’ fans who want to go to the stadium or, indeed, the

102. See Ryan Rodenberg, *That Time Pete Rozelle Bet on College Football*, ESPN (July 24, 2015), http://www.espn.com/chalk/story/_/id/13308895/behind-nfl-anti-gambling-stance-espn-chalk.

103. *NFL v. Governor of Delaware*, 435 F. Supp. 1372, 1377 (D. Del. 1977).

104. *Id.* at 1376.

105. *Id.* at 1377.

sidewalk popcorn salesman who services the crowd as it surges towards the gate.

While courts have recognized that one has a right to one's own harvest, this proposition has not been construed to preclude others from profiting from demands for collateral services generated by the success of one's business venture.¹⁰⁶

In regards to the Trademark infringement claim, the court observed that "[t]he Delaware Lottery does not utilize the NFL name or any of the plaintiffs' registered service marks for the purpose of *identifying*, as opposed to *describing*, the service which it offers."¹⁰⁷ The fact that when the Delaware lottery identifies a game as "'Philadelphia v. Los Angeles', the public reads 'Philadelphia Eagles v. Los Angeles Rams,'"¹⁰⁸ does not constitute Trademark infringement.¹⁰⁹ This early lawsuit presents a particularly piercing rebuke of the NFL's attempt to create an interest in publicly available data. The theme that leagues do not own facts resonates throughout the following cases and is particularly germane to the present study.

B. *Cardtoons v. Major League Baseball Players Association*

Cardtoons sold parody baseball cards with caricatures based on MLB players.¹¹⁰ Fearing an imminent lawsuit by the Major League Baseball Players' Association ("MLBPA"), the company sought declaratory judgment that the First Amendment protected its cards.¹¹¹ Analyzing the MLBPA's right of publicity counterclaims and freedom of speech concerns, the 10th Circuit stated:

Cardtoons' parody trading cards receive full protection under the First Amendment. The cards provide social commentary on public figures, major league

106. *Id.* at 1378.

107. *Id.* at 1380.

108. *Id.*

109. *Id.* Despite the fact that Judge Stapleton noted that he was unable to observe any indication of an explicit endorsement of the lottery by the NFL, he did order that the lottery notify customers that there was no association, as the NFL produced research showing consumers were drawing an association. *Id.* at 1381.

110. *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996).

111. *Id.* at 966.

baseball players, who are involved in a significant commercial enterprise, major league baseball . . . Speech that entertains, like speech that informs, is protected by the First Amendment because “the line between the informing and the entertaining is too elusive for the protection of that basic right.”¹¹²

The court thus rejected the MLBPA’s arguments that the right of publicity could be balanced with Cardtoon’s freedom of speech interests. First Amendment interests accordingly loom large for any attempt to control information in the public domain.

C. *NBA v. Motorola*

In the mid-1990s, Motorola developed a pager system called SportsTrax, that delivered NBA game information to consumers.¹¹³ The NBA sued, alleging that Motorola engaged in copyright infringement and unfair competition by misappropriation (under the Hot News doctrine).¹¹⁴ The hallmark of the latter cause of action is free riding by a competitor through the use of time-sensitive information created by the plaintiff.¹¹⁵ The Second Circuit found the pager service to not satisfy this standard because Motorola gathered the information at its own costs and was not in competition with the NBA.¹¹⁶

The court likewise rebuffed the NBA’s copyright cause of action. On this point, the Second Circuit found no copyrightable interest in the underlying sporting event, as a game is not even analogous to any of the statutory examples of protectable subject matter.¹¹⁷ Beyond the event itself, the NBA claimed Motorola infringed on the broadcast of NBA games by reproducing the statistics therefrom.¹¹⁸ Again, the court rejected

112. *Id.* at 969 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). The Tenth Circuit further rejected the MLBPA’s suggestion that the trading cards are entitled to less First Amendment protection because they are packaged in an untraditional medium, not a newspaper or book. *Id.* at 969–70.

113. *NBA v. Motorola, Inc.*, 105 F.3d 841, 843–44 (2d Cir. 1997).

114. *Id.* at 844. The league also alleged four other causes of action not relevant to the current discussion. *Id.*

115. *Id.* at 845.

116. *Id.* at 854.

117. *Id.* at 846.

118. *Id.* at 847.

these claims, recognizing that, per Supreme Court precedent, no copyright is possible in a fact (e.g., a game's score).¹¹⁹

D. *CBC Distribution & Marketing v. Major League Baseball Advanced Media*

CBC operated a fantasy sports website that provided a variety of fantasy baseball products to consumers over the internet and by mail.¹²⁰ For nearly ten years, CBC purchased a license from MLBPA that gave the company the right to use various types of player information useful in the business of fantasy baseball.¹²¹ In 2005, the MLBPA granted an exclusive license to Major League Baseball Advanced Media ("MLBAM")¹²² to operate fantasy baseball on the MLB website.¹²³ CBC brought an action for declaratory judgment that CBC did not require a license to use player names and associated information in its fantasy baseball products.¹²⁴ The District Court held that CBC violated none of the league's rights of publicity.¹²⁵ The Eighth Circuit struggled to analyze the publicity claims, but held that it was immaterial because the First Amendment trumps any such cause of action.¹²⁶ The Eighth Circuit stated:

[T]he information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone. It is true that CBC's use of the information is meant to provide entertainment, but "[s]peech that entertains, like speech that in-

119. *Id.*

120. *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

121. *Id.* at 821.

122. MLBAM was founded in 2000, as a wholly owned subsidiary of MLB, responsible for the distribution and management of MLB's digital content. See *MLB Advanced Media LP*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=7009235> (last visited Feb. 18, 2019); Shalini Ramachandran, *MLB's Streaming-Tech Unit Goes Pro*, WALL ST. J. (Feb. 23, 2015) <https://www.wsj.com/articles/mlbs-streaming-tech-unit-goes-pro-1424718022>.

123. *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 821.

124. *Id.* at 820.

125. *Id.*

126. *Id.* at 823.

forms, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’”¹²⁷

The court further recognized the “public value of information about the game of baseball and its players.”¹²⁸ It accordingly affirmed the lower court’s grant of summary judgment to CBC.

The above four cases evidence continuing attempts by sports leagues to internalize all value created by their events, including public data. Lobbying to secure payment of integrity fees (also called “royalties”) or mandated use of official data present an extension of this trend. The following subsections analyze why, consistent with the above cases, these rent-seeking attempts by the leagues cannot survive legal analysis.

IV.

THE FIRST AMENDMENT AND OWNERSHIP OF DATA

While numerous legal obstacles stand in the way of integrity fees and mandated use of official data,¹²⁹ no problem may be quite as fierce as the First Amendment. While the *NBA v. Motorola* decision did not address looming First Amendment issues, the *New York Times* as amicus argued that attempts to use a lawsuit to stifle the use of facts “unprotected by copyright law and freely available to those who would disseminate them” presents an assault on the First Amendment.¹³⁰ The leagues’ current attempts to create statutory preferences for their “official” version of public data are likewise odious to free speech protections.¹³¹ The state cannot show preference to league use of public data (e.g., as the only provider of “official” data) versus others’ use of the information (e.g., by excluding others from providing data to betting establishments).

127. *Id.* (citing *Cardtoons, L.C. v. MLB Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996)).

128. *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 823.

129. Official data mandates have appeared in a variety of bills. *See, e.g.*, S.B. 552, 121st Gen. Assemb., Reg. Sess. (Ind. 2019).

130. Brief for N.Y. Times Co. as Amicus Curiae Supporting Appellants Motorola, Inc., & STATS, Inc. at 4, *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997).

131. *Id.*

The threshold question asks whether a sports data feed constitutes constitutionally protected speech. Free speech extends to speakers whether they are members of the press or a layperson communicating information (e.g., via internet communication).¹³² These freedoms are not limited to the reporting of late-breaking political scandals, but also equally apply to even menial conveyances of information.¹³³ There is nothing about gambling data that would separate it from protected speech.¹³⁴

The fact that the sports data is provided for commercial gain presents little concern for First Amendment purposes; efforts to ban commercial speech have largely been rebuked by the Supreme Court.¹³⁵ Absent advertising something illegal or misleading, restrictions on commercial speech must meet a three-pronged test: (1) the restriction must support a substantial government interest, (2) the restriction must advance the government interest materially and directly, and (3) the restriction must be narrowly drawn.¹³⁶ Proposed limitations on the use of “unofficial” public domain sports scores satisfy none of these elements.

It is unclear what government interest benefits from preferring the data (speech) of a single provider (i.e., the leagues) over the data provided by others. Preferred use of a monopolized data system threatens the integrity of the entire gambling market. A single glitch in one data stream would cripple the entirety of a state’s sports gambling system. Likewise, there is little argument to be advanced that mandating

132. *Reno v. ACLU*, 521 U.S. 844, 877 (1997).

133. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 295–97 (1964) (Black, J., concurring) (holding the First Amendment speech clauses applicable to federal, state, and local governments).

134. Professor Bambauer states, “[w]hen data already exists and is transmitted from one person or entity to another, the case law strongly supports the conclusion that raw facts are protected by the First Amendment.” Jane Bambauer, *Is Data Speech?*, 66 *STAN. L. REV.* 57, 70 (2014).

135. It is possible that gambling data disseminators are engaged in commercial speech, which, though it receives a lesser degree of protection, is still heavily protected. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). It is largely beyond the scope of this paper to examine the nuances between commercial and non-commercial speech; however, it should be noted that merely charging for something does not render speech commercial by default. *See Burstyn v. Wilson*, 343 U.S. 495, 501–02 (1952).

136. *Cent. Hudson Gas*, 447 U.S. at 564–65.

use of official data is drawn narrowly. A seemingly less restrictive alternative involves a requirement that data providers show their data to have the same reliability as official information, as opposed to a total ban. And while there may be a substantial government interest in protecting against the harms of gambling, the Supreme Court has held that the public must assess and evaluate the information, not the government.¹³⁷

It is equally unlikely that a court would find preferences against non-official data to be a content-neutral exercise of reasonable time, place, and manner restrictions.¹³⁸ Contrary to the permissible exercise of content-neutral regulation—such as mandating that performers in city parks use city owned equipment—official data mandates prefer a very specific type of content: official data provided by sports leagues.¹³⁹ There is no alternative means for unofficial data providers to engage in speech (i.e., providing public domain data to public betting establishments). They are simply put out of business, such that official data mandates effectively censor unofficial (non-league) sources. The broad brush with which recent proposals paint the mandate for official data is hardly the narrow tailoring that the Supreme Court finds permissible.¹⁴⁰

The slippery slope of legislating preferences for a single source of facts is disturbing. State action recognizing one true source of public information as superior to others for no objective reason offends free speech principles. The proposition that a source of data is superior by virtue of the seller runs counter to the First Amendment. As Judge Dalzell of the East-

137. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195–96 (1999).

138. *See Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1022 (9th Cir. 2008) (explaining that reasonable time, place, and manner restrictions on speech are permissible so long as they are, among other things, content-neutral).

139. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (holding that New York City regulation providing that city-owned sound systems and city-provided technicians be used for concerts in Central Park was content-neutral and therefore constitutional).

140. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (Marshall, J., dissenting) (“Restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).

ern District of Pennsylvania stated, “the implicit premise [in limiting speech] is that too much speech occurs . . . and that speech is too available . . . is profoundly repugnant to First Amendment principles.”¹⁴¹

The efforts to award monopolies to official data suppliers may also represent an improper prior restraint.¹⁴² The Supreme Court has stated, “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”¹⁴³ Justice White characterized the barrier against prior restraints in *New York Times v. United States* regarding the disclosure of the Pentagon Papers as follows:

I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.¹⁴⁴

There has long been a recognized public interest in the dissemination of sports information.¹⁴⁵ Sports information—

141. Brief for N.Y. Times Co. as Amicus Curiae, *supra* note 130, at 6 (citing *ACLU v. Reno*, 929 F. Supp. 824, 991 (E.D. Pa. 1996) (Dalzell, J.)).

142. Prior restraints are a government act that ban a type of speech preemptively, akin to censorship. See Daniel Baracskey, *Prior Restraint*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1009/prior-restraint> (last visited Feb. 13, 2019).

143. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

144. *N.Y. Times Co. v. United States*, 403 U.S. 713, 731 (1971) (White, J., concurring).

145. *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 823 (“Courts have also recognized the public value of information about the game of baseball and its players, referring to baseball as ‘the national pastime.’”); see also *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 315 (Cal Ct. App. 2001).

Major league baseball is followed by millions of people across this country on a daily basis. Likewise, baseball fans have an abiding

like other types of information—can be kept proprietary if not publicly disseminated. The NBA and MLB could create proprietary algorithms or statistics and keep them under lock and key to the exclusion of those who do not purchase a subscription.¹⁴⁶ But the ability to control dissemination of independently gathered public statistics is something incompatible with both the First Amendment¹⁴⁷ and, as discussed later, the Copyright Act.¹⁴⁸

V.

STATE LAW ISSUES

Proposals associated with integrity fees or official data requirements will find significant legal hurdles under state law. Most states prohibit handouts to private parties from public funds without the state receiving some sufficient return value.¹⁴⁹ In the following section, we describe why the recent league proposals are likely to fail under these requirements. Even if this threshold is satisfied, this Part concludes by discussing the substantial competitive bidding issues that are likely to arise in the unlikely event the leagues are determined to have provided something of value to the state.

interest in the history of the game. The public has an enduring fascination in the records set by former players and in memorable moments from previous games. Statistics are kept on every aspect of the game imaginable. Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances. Thus, the history of professional baseball is integral to the full understanding and enjoyment of the current game and its players.

146. *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905); see also John Holden, *Making Sense of Pro Sports Leagues' Search for Sports Betting Data Fees: Case Study No. 2*, LEGAL SPORTS REP. (July 6, 2018), <https://www.legalsportsreport.com/21252/pro-sports-leagues-data-fees-case-study-2/>.

147. *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 823.

148. See *supra* Section III.C and Section IV.

149. Such state prohibitions are also called “public purpose clauses and aid limitation clauses.” C. Tyler Mulligan, *Economic Development Incentives Must Be “Necessary”: A Framework for Evaluating the Constitutionality of Public Aid for Private Development Projects*, 11 HARV. L. & POL'Y REV. S13, S15 (2017) (citations omitted).

A. *Gift Clause Limitations*

A problem with integrity fees arises from so-called “gift clauses” found in state constitutions. While each of these provisions stands alone,¹⁵⁰ they generally prohibit “using, giving, or lending taxpayer money to aid private enterprises.”¹⁵¹ For example, the Illinois Constitution provides that, “[p]ublic funds, property or credit shall be used only for public purposes.”¹⁵² Kentucky similarly precludes private taxes, stating, “[t]axes shall be levied and collected for public purposes only.”¹⁵³ Provisions of this nature are germane to the instant issue, as the government is directing funds (integrity fees) to the leagues without securing any public benefit in exchange. These fee clauses are thus likely unconstitutional in many states.

Initially, some integrity fee proposals require payment of a fee to a public betting commission, which then sends funds to the leagues.¹⁵⁴ Public payments of this nature will draw gift clause scrutiny, as they mandate a direct payment from the government to the leagues. However, not all integrity fee clauses facially require expenditure of public funds (e.g., directly from the public coffers) to private parties.¹⁵⁵ Despite this, those clauses can trigger gift clause scrutiny.

An Illinois proposal mandates that, “sports wagering operator[s] shall remit integrity fees to [relevant] sports governing

150. Nicholas J. Houpt, Note, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 407 (2011) (providing an appendix of gift clauses throughout the country); Ellen Callahan, Note, *Will an Increase in Profits Increase Affordable Housing? Examining the Limited Dividend Requirement of Chapter 40B of the Massachusetts General Laws*, 50 SUFFOLK U. L. REV. 649, 658 (2017) (“Forty-six states have constitutional provisions barring the use of state funding solely for private gain.”).

151. Timothy Sandefur, *State Powers and the Right to Pursue Happiness*, 21 TEX. REV. L. & POL. 323, 328 (2017); see also *Common Cause v. State*, 455 A.2d 1, 16 (Me. 1983).

152. ILL. CONST. art. VIII, § 1(a).

153. KY. CONST. § 171.

154. See S.B. 327, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); H.B. 119, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); S.2273, 190th Gen. Court (Mass. 2018); S.S.B. 1081, 88th Gen. Assemb. (Iowa 2019); S.B. 17D, 2019-2020 Legis. Sess. (N.Y. 2019); see also N.Y. CONST. art. VII, § 8(1) (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . .”).

155. See, e.g., S.B. 3432, 100th Gen. Assemb. (Ill. 2018).

bod[ies] at least once per calendar quarter.”¹⁵⁶ Direct payment of this sort avoids deposit of the integrity fee in the state account, such that the payment to the sports league is not “from the government.” In this manner, these proposals attempt to circumvent gift clause limitations. The substance, not the form, of the statute must, however, control.¹⁵⁷

Clever drafting of legislation is insufficient to avoid the clear will of a constitution.¹⁵⁸ For example, the First Circuit struck down Massachusetts’s attempts to circumvent the Dormant Commerce Clause through the drafting of facially neutral laws favoring in-state interests (by presenting limitations on “large wineries” where no such wineries existed inside the state).¹⁵⁹ If courts did not rule against this sort of artifice, gift clauses would be a nullity because any legislator could recast a transfer of public funds to a private individual by requiring payment of a “fee” from one private party to another.¹⁶⁰ Such an approach avoids the issue of expenditures of public funds for private gains (e.g., under the Illinois Constitution) and

156. *Id.*

157. *United States v. Eurodif S.A.*, 555 U.S. 305, 317 (2009) (“[I]n reading regulatory and taxation statutes, form should be disregarded for substance and the emphasis should be on economic reality.”) (internal quotation marks omitted); *United States v. Eagle*, 539 F.2d 1166, 1173 n.9 (8th Cir. 1976) (“In ascertaining congressional intent, however, we look to the substance, rather than the form, of the statutes.”).

158. *Colo. Ass’n of Pub. Emps. v. Bd. of Regents of Univ. of Colo.*, 804 P.2d 138, 146 (Colo. 1990) (“[W]e find that the changes in University Hospital were changes of form, not substance, that did not affect the nature of the jobs held by the civil service employees.”); *Rappaport v. Dep’t of Pub. Health & Hosps.*, 87 N.E.2d 77, 81 (Ind. 1949) (“Such change in [statutory] form ought not to avoid the impact of . . . the Constitution merely because the territory is dubbed a district in addition to being a city.”); *In re State Treasury Note Indebtedness*, 90 P.2d 19, 29 (Okla. 1939) (Welch, V.C.J., concurring specially). In perhaps a twist of irony, the Third Circuit writing en banc in favor of the sports leagues prior to the *Murphy* decision stated: “States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law.” *NCAA v. Governor of N.J.*, 832 F.3d 389, 398 (3d Cir. 2016).

159. *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 8 (1st Cir. 2010).

160. *See Buse v. Smith*, 247 N.W.2d 141, 159 (Wis. 1976) (citing FREDERICK N. JUDSON, A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES 413–14 (1917)) (“The requirement of a public purpose obviously applies to *all forms of taxation* . . . Whatever the form of the tax, it is inherent in its nature that it must be levied for a public, as distinct from a private, purpose”) (emphasis added).

problems with creating “private taxes” (e.g., under the Kentucky Constitution).

Many commenters recognize the true nature of this tax-and-donate (but without the government middleman) regulation. The CEO of a significant sportsbook refers to integrity fees as a “tax.”¹⁶¹ A recent whitepaper characterized it as, “a tax on legal sports betting that goes to professional leagues.”¹⁶² No uncertainty exists that such a forced allocation of funds deviates from the express language of most gift clauses (e.g., the Illinois Constitution states that public funds can only be “used only for public purposes.”).¹⁶³ There endures, however, some legal leeway for deviation from such strict mandates.

Creation of public purpose exceptions eroded the applicability of gift clauses over the past century.¹⁶⁴ These doctrines allow public funds to go to private firms where sufficient public benefit will accrue.¹⁶⁵ Examples include payments for urban redevelopment, to benefit low-income citizens, and to en-

161. Chris Crouse, *Supreme Court’s Legal Sports Betting Decision: Three Key Unanswered Questions*, CNBC, <https://www.cnbc.com/2018/05/14/3-key-questions-after-supreme-courts-legal-sports-betting-decision.html> (last updated May 15, 2018). A Major League Baseball executive vice president has likewise stated that, “We don’t call it an integrity fee. I’ll call it essentially what it is, which is a royalty.” Brett Smiley, *Michigan Could Become First State to Pay Leagues Sports Betting ‘Integrity Fee’*, SPORTSHANDLE (Nov. 16, 2018), <https://sportshandle.com/michigan-could-become-first-state-to-pay-leagues-sports-betting-integrity-fee/>.

162. Robin Bernhard, *Sports Betting and The 1% ‘Integrity Fee’ Explained*, BMM TESTLABS (Dec. 5, 2018), <http://bmm.com/wp-content/uploads/2018/12/Sports-Betting-Integrity-Fee-Digital.pdf>; see also Edelman, *supra* note 33, at 2.

163. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910–12 (2003). ILL. CONST. art. VIII, § 1(a).

164. C. Tyler Mulligan, *Economic Development Incentives Must be “Necessary”: A Framework for Evaluating the Constitutionality of Public Aid for Private Development Projects*, 11 HARV. L. POL’Y REV. ONLINE S13, S16 (2017) (“However, over the past century, courts have chipped away at these gift clauses by allowing exceptions when public aid to private enterprise promotes certain public purposes.”); Briffault, *supra* note 163.

165. Houpt, *supra* note 150, at 408 (providing an appendix of state limitation on gift clauses).

courage firms to do business in a particular region.¹⁶⁶ There exists, accordingly, room for private benefits within the bounds of gift clause scrutiny, so long as some requisite quantum of public benefit arises.

Arizona courts require a private recipient of public funds to create a public benefit of similar value to the public expenditure.¹⁶⁷ Restated, “[w]hen government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.”¹⁶⁸ Nevada likewise mandates the state receive some “valuable benefit,”¹⁶⁹ and California courts will strike a public act down where it “see[s] no benefit to the public.”¹⁷⁰ As discussed below, integrity fee legislation does not satisfy these standards.

The recent Illinois Sports Wagering Act imposes zero affirmative obligations on sports leagues in exchange for payment of a one-percent-of-gross-wagers integrity fee.¹⁷¹ The proposed bill grants the league permissive rights, such as the ability to “notify the [state] that it desires to restrict or limit wagering on its sporting events to ensure the integrity of its contests,” or to require the state to share “real-time information . . . for wagers placed on its sporting events.”¹⁷² There are,

166. C. Tyler Mulligan, *Economic Development Incentives and North Carolina Local Governments: A Framework For Analysis*, 91 N.C. L. REV. 2021, 2104–05 (2013).

167. Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 ARIZ. ST. L.J. 461, 478 (2012) (citing *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (The public benefit to be obtained from the private entity as consideration for the payment or conveyance from a public body may constitute a “valuable consideration” but the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public)); *Turken v. Gordon*, 224 P.3d 158, 161, 163 (Ariz. 2010) (The court also held, however, that merely finding a valid public purpose for an expenditure is not enough to satisfy the Gift Clause. Courts must also look to the adequacy of the “public benefit to be obtained from the private entity as consideration for the payment or conveyance from a public body.”).

168. *Turken*, 224 P.3d at 164.

169. *Lawrence v. Clark Cty.*, 254 P.3d 606, 612 (Nev. 2011).

170. *Jordan v. DMV*, 123 Cal. Rptr. 2d 122, 136–37 (Cal. Ct. App. 2002).

171. S.B. 3432, 100th Gen. Assemb. § 35(c) (Ill. 2018).

172. *Id.* §§ 30(c), 35(b). Sports leagues also may (but have no affirmative duty to) share “lists of employees and affiliates” for purposes of maintaining integrity. *Id.* § 30(b)(2).

however, no obligations placed on the leagues that could benefit the public.

Other proposals impose insignificant obligations on sports leagues in exchange for an integrity fee. The Model Sports Wagering Act implicitly requires leagues to provide information to states by requiring operators to only use “statistics, results, outcomes, and other data relating to a sporting event that have been obtained from the relevant sports governing body.”¹⁷³ As shown below, this type of obligation provides nominal public benefit for purposes of gift clause analysis.

Nevada sports betting establishments successfully entertain billions of dollars in wagers annually¹⁷⁴ without receiving “official” data directly from the sports leagues.¹⁷⁵ Even without official data and associated payments,¹⁷⁶ the fixing of matches is an “anomaly in U.S. sports—and will remain so even with legalized sports betting.”¹⁷⁷ The “infrequency of betting scandals”¹⁷⁸ within the United States makes clear that betting regimes, such as Nevada’s, function satisfactorily without payments to ensure integrity. The provision of official data thus presents zero value to states for purposes of gift clause scrutiny.

173. MODEL SPORTS WAGERING ACT (GAMING STATES), § 5(8).

174. 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.

175. Symposium, *Sports, Politics & Social Movements*, 25 JEFFREY S. MOORAD SPORTS L.J. 147 (“Vegas books operate on a slim margin and that’s out with it . . . that’s without any imposition of the integrity fee.”); Crouse, *supra* note 161.

176. Edelman, *supra* note 33, at 2 n.4 (noting that Las Vegas has allowed sports betting since 1949 without paying integrity fees).

177. Michelle Minton, *Let Chris Christie Legalize Sports Gambling. It Won’t Ruin the Game*, NEW REPUBLIC (Oct. 22, 2014), <https://newrepublic.com/article/119940/new-jerseys-legalizing-sports-gambling-wouldnt-cause-match-fixing>.

178. Zach Schreiber, Note, *The Time Is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 353, 379 (2016).

Sports leagues have asserted that betting presents a threat to the integrity of their games.¹⁷⁹ Apropos integrity fees, statements of this kind imply the public will benefit from increased game integrity associated from these fees. This is a dubious contention.¹⁸⁰ As pointed out by the Colorado Department of Revenue, “[t]hese sports should already have integrity built into their games and regulations.”¹⁸¹ It has moreover been asserted that, by creating a direct financial interest in sports betting, the leagues are encouraged to engage in nefarious activity to ensure the most popular teams win and thereby drive up aggregate bets.¹⁸² Lastly, commenters note that, if a public benefit from “integrity” is to be assumed, leagues should be required to provide “proof of a verifiable integrity program” including independent testing for banned substances¹⁸³—a common sense requirement not mandated in current proposals.¹⁸⁴

Lastly, sports leagues also assert moral or business justifications for payments of integrity fees. For example, the NBA argues that fee payment is proper “because its business would suffer from a betting scandal.”¹⁸⁵ While such assertions may be true, they present no public benefit, and accordingly, matter

179. Nat’l Collegiate Athletic Ass’n v. Christie, No. 12-4947 MAS, 2012 WL 6698684, at *2 (D.N.J. Dec. 21, 2012), *aff’d sub nom*, Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

180. *See Sports, Politics & Social Movements*, *supra* note 175 (a symposium participant commenting on whether integrity fees enhance security or are a money grab stated that, “I definitely think the NFL is just, it’s taking a moral position. I think that’s how they’ve evolved. And if you think I’m being disgustingly sarcastic, I am. Of course it’s about money.”).

181. COLO. DEP’T OF REVENUE, PUBLIC POLICY INFORMATION SHEET: SPORTS BETTING, at 5, <https://drive.google.com/file/d/1Gm0NfwV8jRo38IkSaAmpMCTYD99d3HhI/view>.

182. Derek Major, *NJ Sen. Denounces Possible Sports Betting ‘Integrity Fees’*, 2018 LAW360 145-84 (2018) (New Jersey Senate President Steve Sweeney stated that, “giving [the league] a ‘piece of the action’ would make suspicions grow whenever turning-point calls in close games go in favor of the more popular team — whose presence in the ‘big game’ would drive ratings and betting.”)

183. COLO. DEP’T OF REVENUE, *supra* note 181.

184. MODEL SPORTS WAGERING ACT (GAMING STATES), § 5(8).

185. *The Latest: NBA Says It Is Entitled to Cut of Sports Bets*, THE ASSOCIATED PRESS (Jan. 4, 2019), <https://www.apnews.com/9c9ee311c0394b9cb5c10d94c62bd808>; James Nani, *NY Senator Pitches 8.5% Tax on Casinos’ Sports Revenue*, 2018 LAW360 67–131 (2018).

not to gift clause analysis. In the unlikely event that, despite the above discussion why integrity fees create no public benefit, a court determined that the leagues were in fact providing sufficient value to the public, legal analysis would continue. The proposal must then navigate the requirement that public contracts be awarded through a competitive selection process.

B. *Competitive Bidding Requirements*

Should the leagues assert that they are delivering significant value to the state for purposes of gift clause analysis (e.g., providing the scores of sporting events), this may subject integrity fee payments to competitive selection requirements. Most state procurement contracts are subject to an open competitive bidding process required by statute or regulation.¹⁸⁶ Mandates of this type preclude favoritism and corruption when selecting amongst firms that are equally qualified to fill a public contract.¹⁸⁷

These rules exist for many state lottery systems.¹⁸⁸ In fact, disputes associated with competitive bidding for sports wagering run by Washington D.C.'s lottery system have already arisen.¹⁸⁹ In that instance, the D.C. Council passed legislation to decline competitive bidding for technological infrastructure associated with sports betting.¹⁹⁰ While the D.C. example ultimately did not require competitive bidding, it establishes that—absent exempting legislation—bidding is the norm in the area.

186. Kenneth M. Roberts & Nancy C. Smith, *Design-Build Contracts Under State and Local Procurement Laws*, 25 PUB. CONT. L.J. 645, 647 (1996); *James Cape & Sons Co. v. Mulcahy*, 700 N.W.2d 243, 247–48 (Wisc. 2005).

187. *Brasi Dev. Corp. v. AG*, 925 N.E.2d 826, 832 (Mass. 2010) (regarding construction contracts).

188. IOWA CODE § 99G.23 (2003) (lottery bill requirement mandating that, “[a]ll major procurement contracts must be competitively bid”); Oklahoma Education Lottery Act, 2003 OK HB 1278 (enacted Nov. 2, 2004); Alabama Veterans Share-Lottery Act, 1996 Bill Text AL H.B. 757.

189. Fenit Nirappil, *D.C. Council Approves Sole-Source Sports Betting Contract, Aid to Federal Workers*, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/local/dc-politics/dc-council-approves-sole-source-sports-betting-contract-aid-to-federal-workers/2019/02/05/8d672494-295c-11e9-b011-d8500644dc98_story.html.

190. *Id.*; D.C. CODE MUN. REGS. tit. 30, § 2200.1 (LexisNexis 2018) (“The contracting officer shall solicit goods and services using the competitive sealed bidding process.”).

For gift clause purposes, the leagues will likely assert that they provide value in the form of official scores and associated information. Assuming this represents some public benefit (thus ignoring the fact that scores and data are not subject to copyright),¹⁹¹ the following establishes that other sources are capable of providing equivalent sports data. Accordingly, relevant competitive bidding provisions should be triggered because similar consideration can be secured from multiple sources.¹⁹²

As discussed herein, Nevada successfully operates large-scale sports betting using unofficial scores.¹⁹³ Given the lack of integrity concerns associated with Nevada betting (and the general ubiquity of sports information),¹⁹⁴ the provision of correct sports information from “un-official sources” satisfies the need of legal bookmakers. For example, these scores could come from independent scoring services, including attendees at the event itself.¹⁹⁵ Firms of this nature should be afforded the opportunity to competitively bid for the right to provide the public with the information necessary for sports betting.¹⁹⁶

191. See *supra* Section III.C; *supra* Section IV.

192. In a related area, the Code of Federal Regulation provides that to be considered a potential bidder, a firm must, among other things, “[b]e able to comply with the required or proposed delivery or performance schedule” and “[h]ave a satisfactory performance record.” 48 C.F.R. § 9.104-1 (2019).

193. Will Hobson, *supra* note 174; *Sports, Politics & Social Movements*, *supra* note 175 (“Vegas books operate on a slim margin and that’s out with it . . . that’s without any imposition of the integrity fee.”); Crouse, *supra* note 161 (Noting “[There’s] never been an integrity tax in Nevada, no requirement to use league source data. That doesn’t exist in Nevada.”); see also Brett Smiley, *How ‘Unofficial’ Sports Betting Data May Be Better Than ‘Official League Data’*, SPORTSHANDLE (June 5, 2019), <https://sportshandle.com/unofficial-league-data/>; see also Bill King, *Sportsbooks Weigh Benefits of Official Data*, SPORTS BUS. J. (Apr. 15, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/04/15/In-Depth/Data>.

194. Schreiber, *supra* note 178, at 379.

195. Edelman, *supra* note 33, at 14 (“[S]ports-gambling operators can avoid free-riding on sports leagues’ gathering efforts by independently gathering their statistical information or purchasing data feeds from third parties that engaged in independent gathering.”).

196. Laws, of course, vary from jurisdiction to jurisdiction regarding competitive bidding. This discussion is intended as a broad overview of arguments that could be made depending on the specifics of the individual jurisdiction. See, e.g., Jean Boylan, *After Katrina: Is the Emergency Exception to Public Bidding All Washed Up?*, 53 LOY. L. REV. 31, 38 (2007) (discussing state specific exemptions to competitive bidding requirements).

Sports leagues should not get to provide data without public bidding simply because they oversee the games.

It will be difficult for integrity fee proposals to navigate the gamut of state laws. Initially, leagues must establish that some sufficient value is going to the state to avoid gift clause issues. Satisfaction of this threshold will, however, potentially subject the proposal to competitive bidding requirements for state requisitions. Were this not sufficient to diminish the chances of integrity fee legislation being enacted, the leagues would be unable to assert that the scores they provide constitute value for gift clause analysis because, as discussed below, sports information is not subject to copyright. Therefore, the leagues maintain no legal control over this data.

VI.

COPYRIGHT AND HOT NEWS

NBA Commissioner Adam Silver asserts that his organization “should be compensated for [its] intellectual property” such as player statistics and game scores.¹⁹⁷ If sports leagues maintained copyright or similar protections (e.g., under the Hot News doctrine) over their scores, the delivery of this material to state gambling bodies could be a public benefit sufficient to avoid gift clause scrutiny. This contention, however, finds no legal support, as the leagues do not hold copyright or Hot News protections over scores and statistics.

Facts are not subject to copyright.¹⁹⁸ The Supreme Court made clear that, as facts do not arise from human creativity, but rather from discovery, they cannot satisfy the originality threshold necessary for copyright protection.¹⁹⁹ This issue has been addressed with regard to sports statistics, with courts find-

197. Tim Reynolds, *Take That for Data: NBA Preps for Expanded Betting on Games*, CHI. TRIB. (July 17, 2018, 9:30 AM), <https://www.chicagotribune.com/sports/basketball/ct-spt-nba-advanced-stats-betting-20180717-story.html> (Commissioner Silver stated further that, “[m]y view is we should be compensated for our intellectual property, but we can do that directly, again, with commercial relationships with gaming establishments.”); *see also NBA Defends Quest for ‘Integrity Fee’ Payment in Sports Bets*, FOXSPORTS (May 24, 2018, 10:21 AM), <https://www.foxsports.com/nba/story/nba-defends-quest-for-integrity-fee-payment-in-sports-bets-052418>.

198. *Harney v. Sony Pictures TV, Inc.*, 704 F.3d 173, 181 (1st Cir. 2013).

199. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

ing game and player information to be outside the scope of copyright.²⁰⁰

In *CBC Distribution and Marketing v. Major League Baseball Advanced Media* (discussed *supra* for different purposes in Section III(D)), the court had to analyze whether the players' names and statistics used by CBC on its fantasy baseball site were subject to copyright protection.²⁰¹ In addressing a copyright preemption issue, the case was analogized to the seminal holding in *Feist Publications v. Rural Telephone Service*, which found contact information to be facts not subject to copyright.²⁰² Based on that case, the *CBC* district court ruled that, "the names and playing records of Major League Baseball players as used by CBC in its fantasy baseball games are akin to the names, towns and telephone numbers," and likewise do not fall under copyright's protections.²⁰³ Sports scores and associated factual statistics used for betting cannot, therefore, fall under copyright's protections. Analysis of intellectual property and related issues, however, does not stop there.

The Hot News doctrine was created in *International News Service v. Associated Press*²⁰⁴ and was extended in *NBA v. Motorola* (discussed *supra* Section III(D)). In *International News*, the Supreme Court recognized a common law unfair competition tort for misappropriation of a quasi-intellectual property right associated with time-sensitive facts gathered at an expense.²⁰⁵ *NBA v. Motorola* acknowledged five elements to a New York state version of the tort: (i) the plaintiff obtains information at some cost, (ii) the data is time-sensitive, (iii) defendant free rides on these efforts, (iv) the parties are in direct competition, and (v) the ability to free ride discourages the plaintiff from producing a quality product.²⁰⁶

200. *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1103 (E.D. Mo. 2006).

201. *Id.* at 1102–03.

202. 499 U.S. at 347.

203. *C.B.C. Distrib. & Mktg., Inc.*, 443 F. Supp. 2d at 1102–03. The court recognized that a compilation of such facts might be copyrightable, but not the facts themselves. *Id.*

204. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

205. *Id.*

206. *NBA v. Motorola*, 105 F.3d 841, 845 (2d Cir. 1997). One court rejected the *NBA* test for an even stricter standard. See Edelman, *supra* note 33, at 13 n.56 (citing *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 499–500

As recognized by Professor Edelman, Hot News “comes the closest of any recognizable intellectual property right to justifying the payment to sports leagues of ‘integrity fees.’”²⁰⁷ Assuming that a sports league brought suit in one of the few states that expressly adopted the Hot News doctrine,²⁰⁸ it might argue that betting establishments free ride by using time-sensitive data that the league invested funds in to create and organize. There exists, however, a significant problem in this position because the information can be independently gathered (e.g., from news or sport broadcasts), which defeats the element of free riding.²⁰⁹ In fact, the Second Circuit has directly addressed this point.

The aforementioned *NBA v. Motorola* case addressed whether the transmission of NBA scores via mobile device created liability under the Hot News doctrine.²¹⁰ The court found the defendant to “expend their own resources to [independently] collect purely factual information generated in NBA games,” which was subsequently transmitted to consumers.²¹¹ This did not represent free riding, nor did it discourage the NBA from producing a competing product.²¹² Accordingly, no Hot News violation was present.²¹³ Building from this precedent, so long as betting establishments do not derive their information from, and compete with, sport league-sanctioned score services, no Hot News issue is raised. With the above in mind, it is highly unlikely that sports leagues can justify the

(D. Md. 2010)) (“Although the NBA test has been cited with approval and adopted outside the Second Circuit, [it has not been universally adopted].”).

207. Edelman, *supra* note 33, at 14.

208. Phelan Holdings, Inc. v. Wendy’s Int’l, Inc., No. 2:11-CV-392-FtM-99DNF, 2012 U.S. Dist. LEXIS 101643, at *15 (M.D. Fla. July 3, 2012).

209. Edelman, *supra* note 33, at 14.

210. 105 F.3d at 843.

211. *Id.* at 854.

212. *Id.*; *see also* World Chess US, Inc. v. Chessgames Servs. LLC, 16 Civ. 8629 (VM), 2016 U.S. Dist. LEXIS 165318, at *9 (S.D.N.Y. Nov. 22, 2016). *But see* Morris Commc’ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1279 (M.D. Fla. 2002) (recognizing, outside of the Hot News doctrine, that redistribution of golf scores could constitute free riding due to idiosyncrasies of the presentation, broadcast, and nature of the game of golf).

213. *NBA*, 105 F.3d at 843.

payment of integrity fees on copyright or Hot News-related arguments.²¹⁴

CONCLUSION

The obstacles facing sports leagues in their quest to receive compensation from gambling operators—through integrity fees or mandatory use of official data—are numerous. The challenge facing the leagues is that existing precedent supports the position that the information the leagues would like to be compensated for is not subject to copyright protection.²¹⁵ Additionally, states seeking to legislate the use of official data face a substantial obstacle in the form of the First Amendment, which rebukes such efforts to censor the distribution of information for a lawful purpose.²¹⁶ The obstacles facing sports leagues are compounded by state constitutional

214. For a discussion of integrity fees and intellectual property rights, see Edelman, *supra* note 33, at 14.

215. According to the *NBA* court:

Sports events are not “authored” in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run. What “authorship” there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship — figure skating, gymnastics, and, some would uncharitably say, professional wrestling — a performer who conceives and executes a particularly graceful and difficult — or, in the case of wrestling, seemingly painful — acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.

105 F.3d at 846; *cf.* Barclays Capital Inc. v. TheFlyOnTheWall.com, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

216. *See* N.Y. Times v. United States, 403 U.S. 713 (1971). *See generally* C.B.C. Distrib. & Mktg., Inc., 443 F. Supp. 2d 1077.

prohibitions on the awarding of gifts and bans on awarding contracts without competitive bidding. Despite these obstacles, sports leagues are still poised to benefit from legal sports betting.

A competitive and robust data market will provide greater integrity to the games promoted by sports leagues, as well as to sportsbooks themselves. Indeed, it is ironic that sports leagues continue to push for single-source data providers when their integrity monitoring partners employ algorithms, which rely on multiple sources of data to be accurate. This irony has apparently been lost on several integrity monitoring companies who are indeed endorsing the use of official data.²¹⁷ A fixed game at the highest level of American sport could be very costly; entire foreign leagues have collapsed at the hands of match fixing.²¹⁸ By contrast, sports leagues are capable of reaching private agreements to provide official data to gambling operators, which may provide a benefit to both sides while maintaining the underlying market for protecting the integrity of the games and the betting market. The NBA, National Hockey League, and MLB have found official gaming partners.²¹⁹ These private relationships are likely the most lucrative for sports leagues moving forward, since legislative mandates are likely to result in years of litigation. The choice to endorse official gambling partners, like MGM, is a step that does not undermine the integrity of the market. If official data does provide value, those official partners should see advan-

217. See, e.g., James Glanz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> (“Without agreement on a fast, common source of data among the leagues, betting houses and legislators, Mr. Burton said, the legal product risks being less than compelling and ‘won’t make much of a dent.’”).

218. See Declan Hill, *Inside the Fixing: How a Gang Battered Soccer’s Frail Integrity*, N.Y. TIMES (June 1, 2014), <https://www.nytimes.com/2014/06/02/sports/soccer/match-fixing-gang-strikes-at-soccers-fragile-legitimacy.html>.

219. All three leagues have a partnership with MGM Resorts. See Eric Ramsey, *MLB Makes MGM Resorts ‘Official Gaming Partner’ As Sports Betting Deals Proliferate*, LEGAL SPORTS REP. (Nov. 27, 2018), <https://www.legalsportsreport.com/26238/mlb-sports-betting-announcement-mgm/>. MLB also remains part-owner of DraftKings. See Dustin Gouker, *So Do NBA, MLB And NHL Now Own Parts of Gambling Companies?*, LEGAL SPORTS REP. (May 24, 2018), <https://www.legalsportsreport.com/20715/nba-mlb-nhl-relationship-with-fanduel-draftkings/>.

tages not available to non-users of the data, while still allowing competition, which benefits the integrity of sportsbooks and sporting events by creating sufficient alternatives that irregularities in line-movements can be identified.

There is money to be made from legalized sports betting for all stakeholders involved. Sports leagues are likely to see a boom in television ratings, which should translate into more lucrative future contracts, as gamblers have been shown to consume sports in greater volume than non-gamblers.²²⁰ This, coupled with private partnerships, should ensure that sports leagues are not left out of the pool of gambling revenue. Likewise, states will see benefits from sports wagering, provided they do not unreasonably tax revenues or send money unnecessarily to private parties.²²¹ The best solution for all parties is to allow the market to dictate which parties receive contracts to supply data. Absent allowing market forces to control, there is a prisoner's dilemma-type risk that if any one party receives more than their share they risk crippling the industry as a whole, likely resulting in money remaining in the black market where it sits untaxed, driving down the value of partnerships and future broadcast deals.²²² The legal sports betting market is nascent and still fragile. A scandal such as a fixed game, or an insider trading-like event, could topple the entire industry. If all stakeholders work together cooperatively, protection of both sportsbook and sporting event integrity can be maximized, which would minimize the risk of a catastrophic event.

220. See Greg Couch, *The NFL Has a Gambling Problem*, VICE SPORTS (July 25, 2015), https://sports.vice.com/en_us/article/aemmx8/the-nfl-has-a-gambling-problem; see also Jon Lafayette, *Legal Gambling Could Spur Bettors to Watch More TV*, BROAD. CABLE (June 8, 2018), <https://www.broadcasting-cable.com/news/legal-gambling-could-spur-bettors-to-watch-more-sports>.

221. John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U.L. REV. 329, 371 (2019).

222. For an overview of game theory and the Prisoner's Dilemma, see generally ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION (1965).