GAMBLING
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Introduction

We are delighted to have Becky Harris as our Guest Editor for this issue. The first woman to head the Nevada Gaming Commission and a former Nevada state senator, she is the Distinguished Fellow of Gaming & Leadership at the International Gaming Institute (IGI) at the University of Las Vegas Boyd School of Law. She has attracted a group of talented writers to help capture the span of the gambling industry and its regulation in the West.

Javiera Sothers captures the difficult beginnings of tribal gaming describing the 1992 intervention of armed federal agents, who swarmed the bingo hall of the Fort McDowell Yavapai community on the outskirts of Phoenix. The Tribe had earlier installed video poker and slot machines to supplement their bingo operation. At the instigation of state officials, federal agents arrived at the former bingo parlor, seized slot machines, and began to load them onto rented moving vans. Tribal President Clinton Pattea noticed the name blazoned on the side of the vans the government had chosen to hire: Mayflower. This would turn out to be something of a public relations nightmare. Even the Governor of Arizona, a fierce opponent of casino gambling, noted the irony of using vans named after ships that brought invading pilgrims to native lands. A standoff ensued, with tribal members blockading the vans. The event was a step on the path leading to the Supreme Court’s Cabazon decision determining that states had no role in the regulation of gaming on tribal lands and Congress’s 1988 enactment of the Indian Gaming Regulatory Act (IGRA), which allowed tribal and state governments to enter into compacts allowing tribal gaming consistent with that otherwise permitted in the state. The standoff itself was eventually peacefully resolved with the Tribe and the state of Arizona entering into an IGRA-compliant compact. As John Maloney notes in his piece, this opened the floodgates to tribal gaming. Flash forward to 2022, when the Seminole Tribe completed the purchase of the Mirage casino on the Las Vegas strip.  

3. Tribal-State compacts are agreements that establish the rules to govern the conduct of Class III gaming activities on Indian land under the IGRA.
Western Legal History, Vol. 34, No. 1-2

years, tribal involvement in the gaming industry moved from the backwaters of bingo parlors to the major leagues of gambling.

A similar revolution has taken place in gambling writ large. For the better part of the 20th century, gambling was treated as a public nuisance, to be regulated (i.e., stopped) by enforcing criminal laws. Former state and federal prosecutor Andrea Ordin’s piece on the August 1939 raid led by then California Attorney General Earl Warren studies the future Supreme Court Chief Justice’s attempts to seize and dismantle the S.S. Rex, an offshore gambling ship operated by Tony Canero, a shadowy organized crime figure.

Travis Studdard brings gambling into the life and times of Wyatt Earp who, long after the shootout at the O.K. Corral, brought his sidearm as the somewhat less-than-impartial referee in a notorious San Francisco boxing match.

Michael Stephen Gilmore’s piece on the history of gaming regulation in Idaho notes an early trend that in many respects is with us today: the regulation or allowance of gaming reflects the norms of the time. Gambling and other vices, with little or no legal restriction, was prevalent in the mining camps of the 1800s, consistent with the “strike it rich” mentality of early miners and mine owners eager to keep their workforce entertained and needing to work. Evolving community standards underline Riana Durrett’s description of Nevada’s embrace of marijuana deregulation and its relationship (or not) to gaming.

Gaming or gambling, no longer involving the work of community volunteers, means that the workforce issues of other industries live here too. Norman Brand, a nationally known expert in labor arbitration, describes the emergence of gaming industry workplace issues. The modernization of gambling now extends to online gambling, as described by Jordan Hollander. Technology, which copies so much of modern life, has found its way into gambling as Sara Partida tells us, requiring regulators to keep pace. Jason Pope takes us from the California gold fields to betting on the modern-day football team, the San Francisco 49ers.

Our Book Review Section bristles with thought provoking and timely titles from the Japanese war crimes trials to an imagined trial if a Presidential assassin had not himself been taken from us now sixty years ago, to a western massacre, to the Supreme Court in time of war.
Oh, there’s black jack, and poker, and the roulette wheel  
A fortune won and lost on every deal  
All you need’s a strong heart and a nerve of steel  
Viva Las Vegas, Viva Las Vegas

Introduction

When I contemplated where I might spend most of my life, Las Vegas never came to mind. After living in Las Vegas for twenty-six years I have come to love it, and the rest of Nevada, with my whole heart. Never did I think I would ever lead the world’s most highly regarded gambling regulatory body. Responsible for comprehensively regulating the multi-billion dollar gambling industry in the State of Nevada, tough issues were never in short supply during my tenure, from the repeal of the Professional and Amateur Sports Protection Act (PASPA) and the emergence of sports betting across the United States, various Wire Act issues, sexual harassment matters and the #MeToo Movement, to the gaming implications from the legalization of recreational cannabis, the more than 400 people comprising the Nevada Gaming Control Board, to name but a few.

* Becky Harris is the Distinguished Fellow in Gaming and Leadership at the International Gaming Institute at University Nevada, Las Vegas (UNLV), is on the faculty at the International Center of Gaming Regulation, UNLV, and teaches teaching Gaming Law and Policy and AML for Gaming Lawyers at the William S. Boyd School of Law. AML for Gaming Lawyers and. An internationally recognized expert on gambling policy, regulation, and legislative affairs, Harris works with regulators, operators, academics, and other stakeholders ensuring they have the information, knowledge, and tools necessary to assess and improve gambling policy and regulation in their respective jurisdictions. Harris served as the Chair of the Nevada Gaming Control Board from 2018-2019 and was the first woman to hold the position. Co-editor and contributing author of The Business of Sports Betting.

1. “Viva Las Vegas” written by Doc Pomus and Mort Shuman, 1964, recorded by Elvis Presley at RCA.
Gaming Control Board and the Nevada Gaming Commission were always up to the task leading the way for Nevada and the rest of the world.

**Gambling, Gaming or Gam(bl)ing?**

“You like potayto, I like potahto; you like tomatyto, I like tomahto; poto yto, potahto, tomatyto, tomahto, let’s call the whole thing off!”

And so it is with gambling or gaming both often used to refer to games of chance. Gambling or gaming involves the risking of consideration, usually money, on an uncertain outcome for the chance to win something. More succinctly when the three elements of chance, prize, and consideration are combined the result is a game of chance. Those that defend the term gambling argue that gaming is simply a euphemism, a chance to disassociate an activity from gambling, thereby making it more socially acceptable, even a strategic plan by the gaming industry to call gambling something other than what it is.

If you are looking to end the debate and come away with a better understanding of how the terms came into use, you will not find it here. Of the available source material, evidence abounds for both points of view but there is no definitive answer. According to the Oxford English Dictionary, gaming has a longer history in the English lexicon than the word gambling. A derivative or variant of game or gaming, the term gambling was born.

The American Gaming Association supports this origin. According to James Philip Quinn and Thomas L. Clark, “While some people assume the word gaming was created as a way to “re-invent” the casino industry, history tells a different story. The word “gaming”—defined as the action or habit of playing at games of chance for stakes—actually dates back to 1510, predating use of the word “gambling” by 265 years. The words “gambler,” “gambling” and “gamble” all were considered slang when they came into use in the 18th century, implying that the activity involved unduly high stakes. The word “gamble” was essentially considered a term of reproach, according to The Oxford English Dictionary, and would only be used by those who “condemn playing for money altogether.”

One could argue that based on this analysis, the term gamble was a judgmental term used against those whose behavior appeared to be unseemly or played games for stakes.

Both the Associated Press Stylebook and the New York Times Manual of Style and Usage prefer gambling to gaming for clarity’s sake. Colloquially,

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2. “Let’s Call the Whole Thing Off,” George and Ira Gershwin, 1937.
3. Cite to English Oxford Dictionary and Alexandra Franz-Harder
4. As quoted by the Columbia Journalism Review, quoting the OED, the book Fools of Fortune by James Philip Quinn, and Dictionary of Gambling and Gaming by Thomas L. Clark, Place your bets - Columbia Journalism Review [cjr.org]
there is no doubt that the term gambling refers to activities that take place when engaging in casino games. The term gaming is much less clear when one must differentiate between skill-based games, social games, and esports, each of which, in addition to games of chance, bears the moniker of gaming.

With so many stakeholders using the term gaming in a variety of contexts to mean vastly different activities across various industries, confusion and misunderstanding around the terms will continue. Clarity will not come anytime soon. It seems that be best we can do is accept that games of chance can be referred to as gambling or gaming depending on the perspective of the stakeholder. In an effort to be clear, the title of this edition of the Ninth Judicial Circuit Historical Society's Western Legal History Journal is titled Gam(bl)ing. That way there can be no confusion, right? Maybe not, as for me, unless otherwise a term is specified by a stakeholder, I refer to games of chance, gambling, and gaming as gam(bl)ing in my introduction. The contributing authors do not use this term in their writings. It will be for you to ascertain which activities they refer to when engaging the terms gambling or gaming.

The Economic Impact of Gam(bl)ing

Often misunderstood by those who don’t live here, Las Vegas has been called “the brightest spot on earth,” not because fortunes can be won, destinies changed, and the never-ending siren song of possibility, but rather because of the “millions of lights” found along the strip. There is simply no other place like Nevada with its bright lights, promises of million dollar payouts, and billion dollar integrated resorts. Though Las Vegas and Nevada can be considered synonymous, one cannot forget Reno the “Biggest Little City in the World,” or Wendover, Elko, Lake Tahoe, Pahrump and the multitude of tiny cities dotting the Nevada desert where locals and visitors alike come to spend their time and their money. The gaming and resort industry in Nevada accounts for more than 386,000 jobs, about one third of Nevada’s workforce. With an economic impact of over US$90 billion or “43% of the state’s gross domestic product,” gaming and hospitality are critical industries for Nevada.

Tribal gam(bl)ing has grown from bingo halls in the 1970s to commanding almost half of all gam(bl)ing revenue in the United States. With

5. Place your bets - Columbia Journalism Review (cjr.org)
6. 39 Interesting Facts About Las Vegas that May Surprise You | Golden Gate Hotel & Casino Las Vegas (goldengatecasino.com)
7. The Impact of Gaming in Nevada (nevadaresorts.org)
8. History | National Indian Gaming Commission (nigc.gov)
more than 250 tribes involved in gambling it is no surprise that tribal gaming supports over 1 million jobs nationwide. Collectively Indian tribes own the majority of United States casinos, more than 500, with commercial casinos accounting for 468 as of 2022.

Nationwide, gambling has an economic impact of US$329 billion annually. The gambling industry is also a significant employer responsible for supporting 1.8 million jobs across the United States. Forty-six states offer legal regulated gambling in casinos. The repeal of PASPA spurred the largest expansion of legal regulated gambling the United States has seen in decades as several states rushed to cash in on the sports betting bonanza. Sports betting is currently legal and operational in 38 states, the District of Columbia and Puerto Rico with 6 more considering legalization either through legislative efforts or at the ballot box. When asked why sports betting legalization is happening so quickly, I respond, I am surprised it is taking so long.

The Destigmatization of Gambling

Legalized regulated gambling is no longer banished to a sparsely populated section in the Western United States desert, is not a fad, and is not in decline. Indeed, as lawmakers look for solutions to backfill budgets and pay for social programs, legalizing and expanding gambling offerings become more attractive and more mainstream. According to an annual Gallup poll on morally acceptable behaviors, 71% of Americans find gambling morally acceptable. With such a high acceptance by the American people, the barriers for politicians to overcome regarding gambling expansion are almost inconsequential.

Regulating with Integrity

What remains to be done? Regulate with integrity. Tony Dungy, an NFL head coach with a Superbowl Championship under his belt defined it this way: "Integrity is what you do when no one is watching, it's doing the right thing..."
all the time, even when it may work to your disadvantage.” Integrity means having strong principles and values. Integrity also means having a firm unwavering commitment to ethical behavior. It is critical that gambling operators have a robust regulatory framework with appropriate oversight to ensure integrity in gambling operators.

Consider another type of integrity – regulatory integrity. In my view, this type of integrity has a specific meaning of its own. I define regulatory integrity as having the right types of guidelines, regulations, and policies in place coupled with a transparent accountability mechanism. The ideal is to have the right mechanisms in place to allow regulators to judge and address the behavior of those they regulate. A gaming license is a privileged license and those possessing a license must be held accountable to a standard. That standard should contain integrity such that there is no tolerance for variation within it.

Wanting to reinforce its already robust regulatory structure, the Nevada Legislature declared the state’s gambling public policy to be:

NRS 463.0129 – Public policy of state concerning gaming, license or approval revocable privilege.

1. The Legislature hereby finds, and declares to be the public policy of this state, that:

   (a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.

   (b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming . . . [is] conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gambling is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, . . . and that gaming is free from criminal and corruptive elements.

   (c) Public confidence and trust can only be maintained by strict regulation . . .

With the passage of the legislation, the concept of “strict” regulation in gambling was born. Adopted and adhered to by jurisdictions around the globe, “strict” is the standard with which the United States regulated gaming.

17. TOP 25 QUOTES BY TONY DUNGY (of 153) | A-Z Quotes (azquotes.com)
industry complies. Sometimes despite being the articulated standard, strict regulation can be unwieldy and create unintended barriers.

While subsection (c) suggests that states that “public confidence and trust can only be maintained by strict regulation . . . there is nothing to suggest that smart regulation cannot also be “strict.” Smart regulation is visionary, adaptive to new situations, and includes a healthy dose of common sense. There is absolutely no reason smart regulation can’t be strict too. Integrity is a key component of smart regulation; in actuality there is probably even a higher degree of integrity in smart regulation! Some of the articles contained in this journal illustrate some of the absurdities of strict regulation and some show the application of smart regulation. It is left to reader to determine if strict and smart regulation are mutually exclusive or can be used collaboratively to guide a rapidly transforming industry.

Western Legal History Gam(bl)ing Edition

I am particularly excited by the tremendous contributions from this edition’s authors. The topics are diverse as are the jurisdictions highlighted in the articles. Topic selection ranges from robust treatment of today’s pressing issues in gam(bl)ing, to historical reviews that provide insight into the formation of gambling policy, to witty anecdotes. Even the authors are incredibly diverse, from law students to seasoned gaming attorneys and former regulators. In short, there is something for everyone.

Michael S. Gilmore brings over 40 years of experience from the Idaho Attorney General’s office where he worked on a host of exciting issues and argued cases at both the state and federal level, including the United States Supreme Court. Mr. Gilmore continues to share his expertise as an adjunct law professor at the University of Idaho and through the Leavitt Institute. Mr. Gilmore’s article provides a comprehensive history of gambling law in Idaho from its territorial days to the present.

Riana Durrett served as the Executive Director of Nevada Dispensary Association (Association) where she transformed the Association into the primary regulatory and government affairs voice for Nevada’s cannabis industry. The Association has become the primary resource for best practices in the cannabis industry. Appointed to Nevada’s Cannabis Compliance Board, she serves as Vice-Chair. She is the newly appointed Director of the University Nevada Las Vegas (UNLV) Cannabis Compliance Board. Ms. Durrett describes the policy decisions that shaped the creation of Nevada’s Cannabis Control Board as Nevada established a robust regulatory structure based on its success in regulating gaming.

Javiera Sothers is a Juris Doctor candidate (2025) at the William S. Boyd School of Law at UNLV. Ms. Sothers tackles the fight for self-regulation and the survival of Indian gaming. She provides a fascinating overview of the origins of tribal gaming and how the Yavapai Indian community stood its
ground against the federal government to the collective benefit of the Arizona tribes and arguably all gaming tribes.

Jordan Hollander serves as a Deputy Attorney General for the New Jersey Division of Gaming Enforcement and is responsible for casino and employee licensing. He coordinates licensing application investigations in the casino and sports wagering industries and prosecutes violations of the New Jersey Casino Control Act. Mr. Hollander explains federal gaming law in the context of online gambling and legal regulated sports betting. This is an article one will want to refer to again and again.

Norm Brand has over 35 years of experience as an arbitrator and mediator in labor, employment, and pension cases. He has been named a “Super Lawyer” in Alternative Dispute Resolution for over a decade. Mr. Brand brings his wealth of experience as he traces the history of legalizing tribal casino gambling in California. He then assesses the different rules governing tribal labor relations contained in the California Compacts. Finally, he examines how the organization, negotiation of collective bargaining agreements, and the outcome of arbitrations under Union or Tribe agreements are affected by Compact labor relations provisions.

Sara Partida is an expert in data privacy law, government affairs, and public policy. She is an experienced corporate counsel currently working in the gaming industry where her work centers on data privacy issues. Ms. Partida discusses technological innovation from 1891 to the present. She explores the necessity of regulatory innovation to address new technologies and concludes her insightful article with a some thoughts on what the future holds.

Travis Studdard obtained his Juris Doctor from the William S. Boyd School of Law at University Nevada Las Vegas. He clerks full-time in the Eighth Judicial District Court for the Honorable Joe Hardy, Jr. in Las Vegas, Nevada. Mr. Studdard’s article is a pure delight. Revealing little-known details about Wyatt Earp’s stint as a boxing referee, readers will come away knowing a bit more about this larger-than-life legend and his impact on gambling in California.

Jason Pope serves as the California Gambling Control Commission’s (Commission) Chief Counsel. Prior to his Chief Counsel role, Jason was a presiding officer and attorney for the Commission for over a decade. Mr. Pope has extensive experience regulating and licensing cardrooms, third party providers of proposition player services, and their employees under the California Gambling Control Act. Mr. Pope also has significant experience working with Tribal nations’ gaming agencies on Tribal regulations, Compact findings of suitability, and compliance issues. Mr. Pope delves into the historical development of gambling in the State of California shining a light on the interplay between California Tribes, cardrooms, and horse racing tracks. A discussion of the tension between a desire for legal regulated sports betting and the illegal market provides the perfect conclusion.
Jennifer Roberts is a Vice President and General Counsel for WynnBET. She has the distinction of being a former gaming regulator in the first all mobile sports wagering jurisdiction in the United States – Tennessee. She has extensive experience representing gaming law clients from her time as a gaming attorney as is an adjunct law professor at William S. Boyd School of Law and the S. J. Quinney School of Law at the University of Utah. Ms. Roberts’ article provides context for the necessity of regulatory compliance in gaming and why compliance programs are required by Nevada gaming regulators. She highlights the common elements that are central to all compliance plans and explains, “compliance programs help gaming companies stay out of trouble and help regulators from having to dedicate resources from limited budgets to monitor company activities.”

John Maloney spent time as a former gaming regulator on two continents, having spent 8 years with the Nevada Gaming Control Board in the Investigations Division and 4 years with the Queensland Casino Control Commission in Australia. As a gaming attorney Mr. Maloney represents gaming operators, key employees, gaming manufacturers, gaming equipment distributors, and various investors domestically and internationally. Mr. Maloney is also co-chair of the international gaming law subcommittee at the American Bar Association. Drawing on his vast experience as a former gaming regulator, Mr. Maloney shares his thoughts about gaming regulation generally, what jurisdictions can do to streamline redundant processes, and how to maintain regulatory integrity. He leaves the reader with thoughtful questions that should be pondered in every gaming jurisdiction.

Andrea Ordin has spent a large portion of her career in public service: starting at the California Attorney General’s office in 1966 (as part of the first “big” class of women in the class of 1965, when most private sector legal jobs were still closed for women, but government offices had opened their doors more widely), then as the Assistant District Attorney of Los Angeles County; as the United States Attorney of the Central District of California; and then back to the California Attorney General’s office. She brings this lens and expertise to her article on the 1939 raid led by then California Attorney General Earl Warren to seize and dismantle the S.S. Rex, an offshore gambling ship operated by Tony Canero, a shadowy organized crime figure.

Dan Hartman is the former Director of the Colorado Division of Gaming where he served as chief regulator for 4 years. PASPA was repealed under Mr. Hartman’s tenure and Colorado quickly became a leader in the legalized regulated sports betting market. Mr. Hartman reviews The Business of Sports Betting, a first of its kind textbook focusing on the various elements of conducting sports betting in a legal regulated environment.

Conclusion

Whether you refer to this activity as gambling, gaming or gam(bl)ing, this edition of the Ninth Judicial Circuit Historical Society’s Western Legal
History Journal will provide you with interesting insights and practical tips on how to navigate an innovative industry that continually reinvents itself and is sensitive to changing technologies. For the simply curious, I hope you enjoy the diverse array of articles provided here. Perhaps you find some inspiration, a little entertainment; but most of all, I hope you will come away with a better appreciation of the regulatory oversight requires to operate a casino, cardroom, sports book, or horse track.

In Spanish, *viva* can mean live, alive, hurray and cheer.18 In English, *viva* is used to express goodwill or approval.19 With almost 75% of Americans expressing approval for gambling, I can almost hear a quiet hum rising from the desert floor echoing Elvis’ exultant shout, “Viva Las Vegas!” “Viva Las Vegas!”

18. [What does viva mean in Spanish?](https://wordhippo.com)
19. [Viva Definition & Meaning - Merriam-Webster](https://www.merriam-webster.com)
REFLECTIONS ON THE HISTORY OF GAMING REGULATION

Introduction

Gambling is as old as time itself. Cavemen, at the dawn of the human species, bet on who would be more successful in killing animals for meat. Dice have been found in Egyptian tombs. The Chinese, Japanese, Greeks, and Romans played games of skill and chance for amusement as early as 2300 B.C. Lotteries date back to 100-40 B.C. Keno was created by the Han Dynasty around 100 B.C. to finance the construction of the Great Wall of China. In 1465, lotteries in Belgium built “chapels, almshouses, canals, and port facilities.” In 1539, King Francis I of France held a lottery to replenish the

*John Maloney started his career in gaming in 1983 as a regulator with the Nevada Gaming Control Board and thereafter with the Queensland Treasury Department in Queensland, Australia. Mr. Maloney started practicing law in 1994 and since that time has worked with domestic and international clients with a focus on corporate and gaming regulatory matters. Mr. Maloney is licensed to practice law in California and Nevada.

1. A special thank you to James Lau, William S. Boyd School of Law, University Nevada, Las Vegas for footnoting the article.


4. Schwartz, supra note 1, at 3-6.


6. Id.

7. Id.
royal treasury. In 1567, Queen Elizabeth established the first English state lottery.

In the 1700s, lotteries were routinely used to finance war and public works. Between 1790 and America’s Civil War, “300 schools” (including Harvard, Yale, Princeton, and Columbia), “200 churches” and “twenty-four of the 33 states financed civic improvements” (“courthouses, jails, hospitals, orphanages, and libraries”) through lotteries. Between 1820 and 1878, private lotteries became rampant, which triggered prohibitions. As a result, all states except Louisiana prohibited lotteries either by statute or via state constitution. Thereafter, the United States Congress banned lottery materials from the mail (1890) and all lotteries from interstate commerce (1898).

Meanwhile, in 1861, Nevada became a recognized Territory (the territorial legislature outlawed gambling, but local prosecutors never enforced the ban). Thereafter, in 1864, Nevada became a state before the more populous territories of Utah, New Mexico, Nebraska, and Colorado because it was anti-slavery and supported President Lincoln. In 1869, gambling, in the form of Fargo and 3 Card Monte, was legalized and around 1900, the Liberty Bell slot machine invented by Charles Fey in 1895 in San Francisco appeared in Nevada. This was followed by the licensing of slot machines in 1905. This began the cycle of legalized gambling and gambling prohibition (1909, never fully implemented) in Nevada. Between 1915 and 1931, the Nevada legislature tinkered with gambling laws.

8. Id. at 25.
11. Id. at 26.
12. Id.
13. Id.
14. Id. at 18.
15. Id.
16. Id.
17. Schwartz, supra note 1, at 197.
18. Id.
19. Id. at 198.
20. Id. at 199.
21. Schwartz, supra note 1, at 199.
22. Id.
23. Id. at 199-201.
Casino gambling was legalized in 1931 with a minimal regulatory structure, with the authority to grant gaming licenses given to local sheriffs.24 This was followed in 1945 by the creation of a state casino license and a tax structure enforced by the Nevada State Tax Commission.25 In 1947, Nevada Attorney General Alan Bible issued an opinion declaring that the Nevada State Tax Commission had the authority to adopt regulations regarding state licenses and deny applications for casino licenses,26 which was formalized by the legislature in 1949 when the state legislature moved casino licensing authority from local sheriffs to the Nevada State Tax Commission.27 Thereafter, in 1955, the Nevada Legislature created the Nevada State Gaming Control Board.28 The legislature then moved casino licensing authority from the Nevada State Tax Commission to the newly created Nevada Gaming Commission.29 By 1959, Nevada’s casino industry generated 21.9% of the state’s tax revenues.30

While New York crime families financed the construction of the Flamingo Casino,31 which opened in 1947, it was not until the late 1950s that the Teamsters Midstate Pension Fund began providing loans to finance Las Vegas casino construction by organized crime families using frontmen for licensing purposes.32 The impact of this financing became a focal point when in 1961, United States Attorney General Robert F. Kennedy commenced criminal proceedings against Teamsters President James “Jimmy” Hoffa, and joined efforts with Nevada authorities to eliminate casino ownership by organized crime families,33 an effort which was completed by the 1980s.34 These joint efforts were bolstered by the Nevada legislature’s enactment of the Corporate Gaming Act in 1967.35 Nevada Gaming Commission Regulation 15 followed as did 1969 legislation permitting publicly traded corporations to own gaming subsidiaries without mandatory background investigations and licensing of all their shareholders.36 Meanwhile, between 1967 and 1970, Howard Hughes sold Trans World Airlines, moved to the Desert Inn in Las Vegas, and engaged in a casino and land buying spree.

25. Id. at 127.
26. Id.
27. Id. at 129.
28. Id.
29. Id. at 130.
30. Id.
32. Id. at 285.
34. Id. at 131.
35. Faiss & Gemignani, supra note 23, at 131-32.
36. Id.
resulting in the purchase of six Las Vegas casinos.37 These developments, in combination, created the first wave of Nevada casino ownership expansion.38 This was followed by Steve Wynn’s construction of the Mirage Hotel and Casino Resort in 1989, whose success spurred a massive new casino development boom on and near the Las Vegas Strip, followed by mega-acquisitions by major casino publicly traded companies.39

While Nevada was reshaping its casino industry, Congress enacted the Wire Act in 1961.40 Then, the New Hampshire legislature created a state lottery in 1964, followed by the creation of the New York and the New Jersey state lotteries.41 Congress’ amendment of federal law allowing state lotteries to advertise on radio and television ultimately resulted in 45 of the 50 states plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands following suit and the resulting formation of the Powerball and Mega Millions multi-state lotteries.42

Meanwhile, New Jersey amended its state constitution to allow the construction of casinos in Atlantic City.43 Thereafter, several states legalized casino riverboats on waterways.44 This activity in turn created a boom in the development of land-based casinos in many states, a trend that continues to this day.45

The development of commercial casinos beyond Nevada was followed by the expansion of gambling activity on Tribal land, commencing with poker rooms.46 Litigation over the legality of tribal gaming led to the Supreme Court’s Cabazon decision47 opening the door to the development of tribal-
owned casinos on tribal land and Congress’ enactment of the Indian Gaming Regulatory Act (IGRA). A rapid expansion of casinos on tribal land followed. 48

At the end of 2023, over 1,400 casinos are operating in 45 U.S. states in multiple economic, social, and political environments. 49 The gambling industry continues to evolve at a record pace. 50 Gambling is a multi-billion-dollar industry in the United States, and there are multiple forms of gambling in many jurisdictions, including regulated markets and unregulated gray and black markets. 51

Over time, the casino industry has grown from private companies with little transparency to multinational corporations, many traded on public stock exchanges worldwide. Publicly traded companies bring much-needed transparency to an industry with a checkered past. Historically, this cash-rich industry has attracted organized crime. 52 Still, the opportunities to launder or wash money from criminal proceeds and/or evade taxes are abundant, although much more difficult in well-regulated gaming jurisdictions. 53


51. See id. at 8, 13-14 (showing that thirty-five jurisdictions with legal gaming operations generated more than $60 billion in revenue in 2022, and showing the variety of legal gaming offerings on a state-by-state basis); see also American Gaming Association, Sizing the Illegal and Unregulated Gaming Markets in the United States, at 1 (2022) https://www.americangaming.org/wp-content/uploads/2022/11/Sizing-the-Illlegal-and-Unregulated-Gaming-Markets-in-the-US.pdf (stating that research estimates Americans wager over $500 billion annually with illegal or unregulated gaming entities).

52. See Schwartz, supra note 1, at 159 (explaining that the illegal gaming syndicates formed in the 1850’s were the predicate for organized crime’s influence in gaming for the next century).

The massive expansion of the gaming industry has resulted from multiple factors including (1) federal and state legislation; (2) federal and state court decisions; (3) voter referendums; (4) legislative pursuit for additional sources of revenue; (5) aggressive assertion of rights by federally recognized Indian tribes; (6) the entry of publicly traded companies into the casino industry; (7) the entry of foreign gambling companies into the United States market; and (8) aggressive creative internet and land-based activity by gray and black market gambling operators.54

The regulatory review process varies widely with very little consistency. There are many reasons for the inconsistencies, including tax revenues earmarked for special purposes such as education and commercial reasons such as employment and capital investment. In many cases, strict regulatory oversight is an afterthought, and the appearance of some feel-good legislation is sufficient. In other words, commerce over compliance.

The proliferation of gambling today has forced many state law enforcement agencies to wear multiple hats. A "gaming regulator" may at one moment be acting in the capacity of a police officer investigating a burglary

54. See generally David D. Schwartz, Roll the Bones: The History of Gambling (Svetvlana Miller et al. eds., 2nd ed. 2013) (discussing the various factors which have contributed to the expansion of gaming in the United States, including state and federal legislation, numerous court decisions and their impacts on the gaming market, ballot and legislative initiatives, the rise of Indian gaming, regulatory expansion to allow publicly-traded companies engage in gaming activity, and investments from foreign companies in United States gaming); see also American Gaming Association, Sizing the Illegal and Unregulated Gaming Markets in the United States, at 3 (2022) https://www.americangaming.org/wp-content/uploads/2022/11/Sizing-the-Illlegal-and-Unregulated-Gaming-Markets-in-the-US.pdf (discussing the differences between the illegal gaming market and the "gray" market, the prevalence of land-based illegal gambling, and the prevalence of online illegal gambling from unlicensed operators and operators licensed in their home country but not in the United States).
and the next moment sitting down with an applicant who is asking to be investigated and who is willingly providing information. The question that should then be asked is whether the regulated gaming jurisdiction should have a separate independent gaming body to focus on gaming regulatory issues, including applicant gaming license investigation. If the underlying public policy objectives are understood, it might be easier to understand the respective regulatory environments.

The Early Days of Casino-Style Gaming Regulation in the United States

The early days of gambling in Nevada were an evolving process with starts and stops depending upon the social and political environment existing at any particular time. In the 1940s, organized crime became entrenched in the gambling industry in Nevada. There was very little regulatory oversight as politicians struggled to get a grip on the growing gambling industry and the organized crime that controlled it. In the late 1940s, Nevada moved towards stricter gaming regulation and allowed the Tax Commission to further regulate gaming. For example, fingerprints and other information were required. In 1955, the Nevada Gaming Control Board was formed and became the enforcement and investigative body within the Nevada Tax Commission. In 1959, the Nevada Gaming Commission was formed and the Nevada Gaming Control Board became a separate agency, no longer associated with the Nevada Tax Commission. This then created the start of a legitimate gaming regulatory structure in Nevada. The Nevada Gaming Control Board today is the investigative body tasked with maintaining the integrity of gaming in Nevada.

55. See Anthony N. Cabot & Keith C. Miller, The Law of Gambling and Regulated Gaming 61, 80 (Carolina Academic Press, 3rd ed. 2021) (explaining that most United States jurisdictions grant police powers and other investigative authority to gaming regulators); see also Nev. Rev. Stat. § 289.360 (delegating certain authority of a peace officer to members of the Nevada Gaming Control Board and the Nevada Gaming Commission, as well as the Board and Commission’s agents).

56. See Schwartz, supra note 1, at 214-15 (explaining the influx of organized crime into Nevada in the 1940’s).

57. Id. at 251.


59. Id. at 7; see also Schwartz, supra note 1, at 233 (explaining the separation of the Gaming Control Board from the Nevada Tax Commission).

60. Nevada Gaming Commission et al., supra note 58, at 6-7.

61. Id.
New Jersey approved casino-style gambling in the late 1970s and became the second state to legalize casino-style gambling. The Casino Control Commission and the Division of Gaming Enforcement were established in 1977 under the Casino Control Act. The Division of Gaming Enforcement is the investigative body responsible for investigating applicants for gaming licenses and ensuring the transparency of gaming in New Jersey.

Mississippi approved casino-style gambling in June 1990 with the enactment of the Mississippi Gaming Control Act. The Mississippi Gaming Commission was then established to regulate dockside casinos. The first dockside casino opened in August 1993 in Biloxi and Mississippi became the third state to approve casino-style gaming. Louisiana legalized casino gambling in 1991 but the licenses were limited to riverboats.

Colorado followed Mississippi in 1990 with a Limited Gaming Initiative. Unlike Nevada, New Jersey, and Mississippi, the bets were limited to $5.00, and locations could not operate 24 hours a day. Similar to New Jersey, casino-style gaming could only operate in certain locations in Colorado. Expansion of the gaming industry continues to the present day.

66. Id.
67. Schwartz, supra note 1, at 313.
69. See Richard Sweetman, A Brief Timeline of Colorado Gaming Law, Colorado LegiSource (Feb. 8, 2024), https://legisource.net/2024/02/08/a-brief-timeline-of-colorado-gaming-law/ (explaining the passage of the Amendment 4 on the 1990 general election ballot of Colorado, which amended the state constitution to authorize “limited gaming”).
70. See id. (explaining the amendment allowed a maximum bet limit of $5 and limited the hours of operation for gaming).
71. See id. (stating that gaming could only occur in the towns of Black Hawk, Central City, and Cripple Creek).
Modern Regulation of Casino Gaming

Some form of regulated casino-style gambling has now spread to 45 states, and this includes both tribal and commercial casinos. It can be argued that after Nevada, both New Jersey and Mississippi took a very methodical approach through the establishment of gaming regulatory agencies to oversee regulated gaming. Separate agencies were set up which focus specifically on regulating the gaming industry to ensure transparency, accountability, and integrity. The review process ensures that applicants for gaming approvals have to go through rigorous background and suitability investigation, including both background and financial reviews. Nevada, New Jersey, and Mississippi set a high bar for other states and tribal regulatory bodies yet to enter the regulated casino market.

From 1959 when the Nevada Gaming Commission was formed until the 1980s organized crime still had a foothold in Nevada casinos. Despite taking decades to completely rid the casino industry of organized crime, the experience obtained, and the efforts undertaken by the Nevada gaming authorities ultimately resulted in the creation of a model for the effective oversight and regulation of the gambling industry. Today, the Nevada Gaming Control Board is one of the best gaming regulatory agencies in the world. New Jersey also had challenges with organized crime after the casino industry became legal in Atlantic City. As was the case with Nevada, New Jersey also developed an effective oversight and regulatory system for its gambling industry.

Over the decades, many of the regulatory agencies in gaming have perfected their trade. With 45 states involved in some sort of regulatory review, there is a lot of cross-reference of information among gaming regulatory agencies. When information was not as accessible and only three primary state regulatory agencies were conducting regulatory investigations, it was much easier to hide information. The licensing investigations today are less focused on the smoking gun “rap sheets” that were such a big part of the early-day investigations. The days of having to physically visit the courthouse to review records are over because most everything is online. Further to that point, accessing information from separate state and federal law enforcement


73. See Schwartz, supra note 1, at 257 (explaining that casino ties to organized crime in Nevada were declining by the early 1980’s).

74. See Erica Adler, Nevada Regulators’ Vital Role Through the Growth of Gaming, 26 Gaming L. Rev. 165, 166, 175-76 (Apr. 2022) (calling Nevada’s gaming regulatory structure the “gold standard” and stating that it has been used as a model for other jurisdictions).

75. See Schwartz, supra note 1, at 269-71 (discussing connections to organized crime related to the opening of the Ceasars World resort in Atlantic City, New Jersey shortly after the state legalized commercial gaming).
agencies on regulatory investigations was restricted. If it was not a criminal investigation, many law enforcement agencies were reluctant or even forbidden from sharing information that pertained to a gaming regulatory investigation. Access to the National Crime Information Center (“NCIC”) was also difficult when matters pertained to a regulatory investigation.

Gaming regulators in Nevada and New Jersey are widely respected for the regulatory infrastructures each has developed. Many state gambling regulatory bodies, as well as foreign regulatory bodies, have actively sought the advice and expertise of these two regulatory bodies in developing their own gambling regulatory and oversight structures. Decades of hard lessons have created much institutional knowledge within the two respective agencies. This knowledge is not something that can be imparted in crash course seminars lasting only a couple of days. Gaming investigations cannot effectively be taught in a course. Instead, this process also must include being taught and mentored by gaming regulators who have spent years conducting every type of investigation who can then impart that knowledge to new gaming agents. Yes, it is imperative that if a gaming agent is conducting a financial review a basic skill set is in place, for example, an accounting or finance degree. However, it also takes a unique skill set to be able to ask the right questions. The gaming regulatory investigations today can be very expensive and time-consuming because a lot of the investigative time is spent reviewing complex organizational charts and understanding how money moves. The applicants with nefarious intentions have become very sophisticated and this has forced regulatory agencies to update the legal and regulatory review process and maintain staff with the expertise to conduct complex domestic and international investigations.

Many other states, such as Illinois, Indiana, Michigan, Iowa, and Pennsylvania entered the casino market after Nevada, Mississippi, and New Jersey. These regulated gaming jurisdictions had the benefit of learning from the early pioneers in the regulation of casino-style gaming. There is a rich history of hard lessons, how to avoid mistakes, the ability to understand which regulatory structure works best, and which mix of new hires should have law enforcement or accounting/finance degrees or both. Many of the later entry gaming regulatory agencies have become very respectable, similar to Nevada and New Jersey. Still, other gaming regulatory jurisdictions, due to structural, personnel, funding issues, and/or political issues, continue to struggle with the concept of a well-established gaming regulatory framework.

76. Id. at 313 (Illinois legalized riverboat gaming in January 1990).
77. Id. at 315 (Indiana legalized riverboat casinos in 1993).
79. See Schwartz, supra note 1, at 311 (Iowa legalized riverboat gaming in 1989).
80. Id. at 319 (explaining Pennsylvania’s legalization of casinos).
Deficiencies and Shortcomings in the Gaming Regulatory Review Process

There are hundreds of gaming regulatory agencies in the United States. Many of them, following the lead of Nevada and New Jersey, have established excellent regulatory structures staffed with highly competent investigators and regulators. However, not all regulatory agencies are alike. There are agencies that, for a variety of reasons, do not have the skill sets, depth, access to resources, funding, or focus to conduct well-structured regulatory investigations. The reasons and excuses for the lack of a robust regulatory review process are many.

In Nevada, the opportunity to hire gaming agents with specific talents and abilities such as extensive law enforcement backgrounds or financial investigative backgrounds is done whenever more agents need to be hired. The Nevada Gaming Control Board is not bound by hiring from a state pool of individuals who may not meet the specific qualifications of the job. This allows for a national and industry-wide applicant pool possessing unique talents and abilities. Essential skill sets include the ability to speak foreign languages, a background in law enforcement, law degrees, established international associations, and advanced finance degrees. This is critical because as was noted earlier, regulatory investigations are sometimes difficult to conduct, especially if certain law enforcement agencies do not understand or respect that process.

Gaming investigations have become increasingly intricate and who and what to review and how to do that is complicated and, as a result, very difficult. The focus of the gaming regulator today should move away from the form over substance and “gotcha” issues and move into a more streamlined, substantive review.

Unfortunately, many of the gaming agencies rely on renewal fees to finance staff so the suggestion that one agency can rely on another, more experienced and sophisticated gaming agency has not worked very well. Compliance departments for many gaming operators and vendors have grown exponentially over time. It is a full-time operation to churn out the same or similar applications, the only difference being the name of the jurisdiction on the application. For many gaming agencies, there is a focused effort in collecting applications that will probably never be reviewed but that box must be checked. Many gaming agencies do not interview applicants, do not travel to foreign jurisdictions, do not have law enforcement contacts in the respective jurisdictions, and do not have the language capabilities or other skills required to conduct an investigation but pretend the job is being accomplished.

There are also inherent conflicts in the regulatory review process. The more profitable the casinos, the more taxes that are collected. It is very difficult to self-regulate and therefore there should always be a clear separation between those regulating and those being regulated. There are of course commercial considerations, and it can be tempting to place the due diligence process in a secondary position to the monetary considerations. This should never be the case. One sour apple can ruin the whole barrel and expose a casino operation and a regulatory body to very unfortunate and unfavorable situations. There are too many opportunities for casino gaming vendors today to enter a gaming market without a full gaming regulatory review and depart
that gaming market before any comprehensive investigative review by the respective gaming agency. Why would certain gaming vendors or operators want to enter the Nevada or New Jersey gaming markets if there is low-hanging fruit elsewhere, where the return on investment is greater?

Every gaming jurisdiction must attract capital investment to be successful. The Las Vegas strip was not built on the premise that casino gambling is going to disappear tomorrow, but instead, it is understood that casino gambling is embedded in the fabric of the economy of Nevada. A successful gaming industry in Nevada provides much-needed tax revenues and brings real-wage employment to thousands. The casino industry in Nevada attracts tens of millions of visitors to the Las Vegas Strip each year. There is zero political risk that the Las Vegas strip will suddenly be outlawed in Nevada. The notion of zero political risk attracts much-needed capital to build multi-billion-dollar casinos.

It is perhaps understandable that something of a love-hate relationship exists between the casino gaming industry and their regulators. The industry sees regulation taking regulatory fees going to pet projects for officials who may see gaming as a cash cow to be “milked” without consideration for the consequences, taxing the gaming industry into submission when there is little left for capital investment. Going back to the Las Vegas Strip, would it have been possible if a tax structure was in place that bled off the profits of the casino operators, making capital investment difficult? The multi-billion-dollar casinos on the Las Vegas strip are there because of a well thought out political structure, gaming regulatory infrastructure, and 6.75% tax rate.81

Interagency Cooperation

The good news about the gaming industry is the ability to access so much information that might not otherwise be readily available. For example, if a casino operator, casino vendor, and/or casino executive has gone through a very detailed background and financial investigation in Nevada (better known in Nevada as a non-restricted licensing investigation) there is 100% assurance it was an expensive, detailed, and time-consuming investigative process. The result, if the applicants are successful, is a recommendation for approval for a gaming license from the Nevada Gaming Control Board and approval from the Nevada Gaming Commission. The meetings before the Nevada Gaming Control Board and Nevada Gaming Commission delve into questions and issues that arise during the investigative review. These meetings can go on for hours, are public, and a court reporter is present creating a written record. This information is available for review by any jurisdiction that might be reviewing the same entities and/or individuals for

81. See Nev. Rev. Stat. § 463.370 (Nevada’s gross revenue fee on gaming licensees is applied as a percentage, based on the amount of licensee’s gross monthly revenues in three tiers); see also Nev. Rev. Stat. § 463.370(1)(a) (applying a 3.5% fee to licensees with less than $50,000 of gross revenue in a calendar month), Nev. Rev. Stat. § 463.370(1)(b) (applying a 4.5% fee to licensees with at least $50,000, but less than $134,000 of gross revenue in a calendar month), Nev. Rev. Stat. § 463.370(1)(c) (applying a 7.5% fee to licensees whose gross revenue in a calendar month is $134,000 or greater).
licensure or a finding of suitability. The public records created at the meetings in Nevada are very detailed and are the result, in some cases, of an investigative review process that can go on for over a year. Gaming agents do not sit at their desks and solely rely on open-source documents and information supplied with the applications. The gaming agents meet with officials in foreign jurisdictions, from regulatory to law enforcement. The gaming agents meet with bankers, lawyers, CPAs, and other professionals working with or on behalf of the applicants. The point is any record created at the Board and Commission meetings in Nevada is a direct result of the very intrusive but necessary investigation that was conducted.

Nevada is just an example of what so many other sophisticated, experienced gaming jurisdictions are doing. Gaming regulatory personnel should review issues with personnel in other gaming regulatory agencies, cross checking their respective data. There is a wealth of public information (transcripts, minutes) that would not otherwise be available, for those jurisdictions that do not have a regulatory infrastructure to carry out such investigations. For example, the State of New Jersey Casino Control Commission’s transcripts of Commission meetings are available from 2017 through the present day.

Optimally, gaming regulators across jurisdictions would have the same skill sets and experience and thus the ability to conduct a thorough investigation of each gaming applicant. However, this is not the case. The danger then is what happens to those applicants applying for a gaming license who are not successful due to the inability of the respective gaming jurisdiction to separate fact from fiction, to separate old, debunked intelligence information. A denial in any gaming jurisdiction will have wide ranging impact especially if the operator or vendor is operating in multiple jurisdictions. The livelihoods of people are put in jeopardy if gaming regulators are not able to do their job. There are simply no excuses if there is available information based on credible investigations carried out by reputable gaming agencies to dispel falsehoods. On the other hand, the same goes for those applicants who slip through the process by taking advantage of less sophisticated jurisdictions without the ability, expertise, or motivation to conduct a thorough regulatory review.

If the motive is to collect a licensing fee to support staff, this might be referred to as the cost of doing business in that gaming jurisdiction. Can the application process be streamlined for those applicants already approved in reputable gaming jurisdictions, where transcripts and minutes are available for review, the direct result of a final investigative review? If an individual applicant for a gaming license has already been licensed in multiple jurisdictions like Nevada or New Jersey, can the investigative review be based on updating relevant information since the last review? This reliance on another jurisdiction’s investigation would depend on the type of investigative review that occurred, but that is easy to determine. This would mean a more streamlined application process and quicker access to the gaming market.

There are certain public policy concerns unique to particular jurisdictions, even if qualified jurisdictions have approved an applicant. For example, an applicant’s involvement with marijuana businesses or felony convictions may preclude licensure and so a supplemental application may be required.

There is also information available from casino vendors and operators who have compliance programs. The compliance program in some cases require
regular reporting to regulatory agencies which go into specific details on employees, business associates, vendors, financing, etc. Many of the large, regulated companies conduct very in-depth background checks and spend millions of dollars on such programs. These companies must do it right or existing licensing approvals are put in jeopardy. It might be inferred that if a reputable gaming company is conducting business with a certain vendor or individual, there is a high likelihood that a background review has been conducted. A review is not the same as an approval from Nevada or New Jersey but a tool that can be used in the vendor licensing review process.

The presence of so many gaming agencies requiring vendors and casino operators to repeat the same or similar duplicative licensing processes is an indictment of a bureaucratic process that diverts staff and resources from the oversight of daily compliance by licensees with regulatory requirements and, as such, constitutes a substantive waste of regulatory agency staff time and public resources. Moreover, the many millions of dollars spent by gaming companies in the repetitive multi-jurisdictional regulatory application process can be better spent on programs like problem gambling, strengthening compliance programs, AML, and KYC infrastructure instead of pushing paper to check the boxes to satisfy a bureaucratic process that is blind to a process filled with repetition.

Suggestions Going Forward

Jurisdictions that conduct regulatory reviews or are looking to modernize their regulatory structures could benefit from contemplating and addressing the following questions:

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<tr>
<th>Suggested Questions</th>
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<tr>
<td>Why do some jurisdictions regulate better than others? Is it a result of hard lessons learned or an internal review suggesting there are more efficient regulatory processes that can bypass mistakes made in the past?</td>
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<td>Do regulators understand the purpose of the gaming regulatory review process? Have they lost focus on the purpose of the gaming regulatory review process?</td>
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<td>Is it possible to conduct a serious regulatory review in a limited time frame on a multinational corporation where there might be language barriers, different accounting standards, cultural issues, limited access to law enforcement resources, and limited access to the judicial system?</td>
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<td>How many times do regulators across gaming jurisdictions have to ask the same questions on the same applications?</td>
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<td>How many times do gaming employees/executives have to be fingerprinted?</td>
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<td>What is the sophistication level of the personnel of each gaming agency and their ability to review complicated multinational corporations relying on, for the most part, an application submitted by the applicant and open-source documents?</td>
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<td>Is it possible to conduct a gaming regulatory review in a few short weeks sitting at a desk and relying on open-source documents and long-winded applications that ask for so much peripheral information that it may never be reviewed or verified?</td>
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<td>Can such a regulatory review be conducted without an in-depth interview of the applicant which allows that applicant to correct minor errors on applications and verify information on the applications?</td>
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<td>Is there procedural due process if an applicant is not allowed to provide context or clarify information obtained during an interview that appears to contradict an applicant’s own statements?</td>
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<td>Does the gaming regulatory agency wear multiple hats? If so, what are the agency’s priorities?</td>
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<td>How do gaming regulators remain impartial to gaming applicants when at the same time agents are involved with prosecuting criminal cases?</td>
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<td>Could regulators and its law enforcement agency have differing points of view?</td>
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<td>Can a gaming regulator conduct an impartial review of an applicant when the regulator’s primary expertise is in conducting a police investigation?</td>
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<tr>
<td>Should decades-old intelligence information from unreliable sources that has never been acted upon impede the licensing review of an applicant with an otherwise clean criminal history?</td>
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Is time better spent reviewing substantive issues by contacting reputable, respected gaming agencies, relying on irreplaceable institutional knowledge and in many cases, public documents produced based on such knowledge?

Is it better to keep going through the checklist that requires applications to be collected from vendors that in many cases are already licensed in numerous jurisdictions like Nevada or New Jersey?

Is it possible for some jurisdictions to rethink or redo the regulatory review process, skip the mundane steps, stop pretending there is some sort of regulatory review taking place, and instead consolidate the review process to include review and reliance on those jurisdictions that simply do it better?

Conclusion

The technology available to the regulated and the unregulated elements in the gaming industry and to criminals seeking to access the massive amounts of money handled within the gaming industry has grown quickly and dramatically in the past forty years. As a result, the practical challenges faced by both the regulators and the regulated, and the costs incurred in addressing the challenges they all face, have grown exponentially. Accordingly, it is imperative that staff and resources be focused on the substantive issues and challenges of preserving and protecting the integrity of the gaming industry.

Through their respective national and international associations, the regulators, and the regulated need to continue to expand the interconnectivity of their associations to maximize efficiency and minimize the cost of regulatory oversight and compliance. Many individual gaming agencies have done a stellar job of regulating their respective jurisdictions. Their experience is a source that should be utilized on an ongoing basis. There is much room for improvement within the industry, and this can be achieved through focused efforts and well thought out processes. Maintaining and enhancing the integrity of the gaming industry is an ongoing challenge that is best met by constant substantive dialogue and transparency between the regulators and the regulated. For the gaming industry to continue to thrive and provide meaningful economic benefits on a widespread basis, the incorruptibility of the industry must be maintained, and the public must be confident in that fact. To continue to achieve this result, the regulators and the regulated must all be focused on streamlining the regulatory process without compromising the same. A good start is to minimize regulatory duplication which may free up capital for gaming operators and gaming-related suppliers to reinvest in infrastructure, employees, and technology. This will also allow the regulators to be more efficient, encourage interaction and communication among gaming agencies, and increase their focus on relevant issues.
GAMBLING LAW IN IDAHO: FROM TERRITORIAL DAYS TO THE PRESENT

I. Idaho Gambling Law in Territorial Days and Through Drafting of the Idaho Constitution

It would take the discovery of gold in Pierce, Idaho, in the Clearwater River drainage in 1860,1 and of more gold near Idaho City in the Boise River drainage in 1862, for the ensuing gold rushes to draw a non-Native population that was large enough for Congress to organize the Idaho Territory in 1863.2 Idaho’s first territorial laws reflected the vices that were traditional in the mining camps — liquor, prostitution, and gambling. The 1864 Legislature’s enactment of a criminal code3 did not address any of them. Unrestricted gambling fit well with prospectors’ hopes that the next claim might be the one that struck it rich and the wage-earning miners’ wont to blow off steam after a long shift.

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2. The Idaho Territory was created by 12 Stat.L. 808, ch. 117 (1863). Section 9 of the Act governing Territorial courts had a glaring omission — it did not adopt a criminal code. Thus, there would be no criminal law in the Territory until the Territorial Legislature first met in 1863–1864.

In 1871 as a revenue measure the Territorial Legislature decided to license gambling houses offering certain games — “Faro,” Monte, E-O, or Roulette, Shuffle-board, or any other banking game at cards, dice or other devices.” That Act also provided that “no person shall have a license for Three Card or French Monte, or the game commonly called the Thimble Game, and those games are hereby made unlawful.” The latter games were the first ones made unlawful in Idaho, presumably because they were scams, not “honest” gambling.

4. Faro was a card game. The banker and each player picked a card to place bets on. They then bet on whether the next two cards drawn would match the value of banker’s card (ace, deuce, etc.), in which case the bank won all bets players had wagered on that value, or the value of a player’s card, in which case all players who had bet on that value would win. Bets on the other cards carried over. See https://en.wikipedia.org/wiki/Faro_(banking_game) for a complete explanation.

5. Monte is somewhat analogous to Faro, but players bet on matching suits rather than values of the cards. See https://en.wikipedia.org/wiki/Monte_Bank for a complete explanation.

6. “E.O.” (meaning even odd) was a forerunner to roulette that used a wheel with even and odd numbers upon which players placed their bets. See https://en.wikipedia.org/wiki/Roulette and https://www.tradgames.org.uk/games/roulette.htm.

7. Roulette (French for “little wheel”) is still played today. Players bet on which numbered slot along a spinning wheel a small ball will come to rest in. See https://en.wikipedia.org/wiki/Roulette.

8. Table top shuffle board was played by sliding pucks along a smooth table with just enough force that they would stop in a scoring area at the opposite end of the table or would displace the opposing player’s puck from the scoring area. See https://bargames101.com/history-of-table-shuffleboard/.

9. 1871 ISL, p. 61, An Act Relating to All Games of Chance, § 1. Once this statute was enacted, the common law principle that common gaming houses were nuisances that could be abated did not apply to licensed gaming houses. People v. Goldman, 1 Idaho 17 (Terr. S.Ct. 1878).

10. “French monte” and “three-card monte” are shell games in which a player attempts to pick a target card from three cards placed facedown. See https://en.wikipedia.org/wiki/Three-card_monte.

11. The thimble game is a shell game in which a small ball is hidden under several (usually three) identical containers and the player attempts to choose the container with the concealed ball. See https://en.wikipedia.org/wiki/Shell_game.
Times changed. In the 1870s and 1880s farmers began to develop irrigated land in southern Idaho’s rich volcanic soil; in the North they cultivated the green lands of the Palouse near Moscow and the Rathdrum Prairie near Coeur d’Alene. A change in mores came with the growing farm population.

In 1885 the Territorial Legislature criminalized more forms of gambling, some of which had previously been authorized, by providing that every person playing or conducting “any game of French monte, three card monte, E.O. or roulette, or … the thimble game, or percentage stud-poker, or any other percentage game12 played with cards or dice, or any other device, for money, checks, credit, or any other representative of value” committed a misdemeanor.13 Lotteries, bingo, and raffles were not explicitly addressed, although they would be percentage games.

When Idaho’s Constitutional Convention met in 1889, it proposed Article III, ¶ 20, which as originally written would have prohibited both lotteries and games of chance. However, in further debate the prohibition against “games of chance” was stricken and only lotteries were constitutionally prohibited. As adopted by the Convention and later ratified by the voters, Article III, § 20, provided: “The Legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatsoever.”14 Delegate George Ainslie explained that the purpose of the amendment was to preserve the Legislature’s authority to authorize non-lottery games of chance that were “licensed under territorial law” and that in “my county alone probably $2,000 is derived from that fund alone that goes to the school fund of the county.” Id. Thus, Idaho’s proposed Constitution left the regulation of most gambling to statutory law, but explicitly prohibited lotteries.

II. Gambling Law in Idaho’s First Century of Statehood

A. The First 35 Years of Statehood, 1890–1925 — More of the Same, Lotteries Defined, and Bookmaking

In early statehood the Legislature played a game of whack-a-mole, repeatedly tweaking the definition of illegal games to include what were likely the most recent fads and scams. In 1893 it added the strap game,15 thimblerig

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12. A “percentage game” is “a type of gambling where the house takes a percentage of the bets or winnings. It is a game of chance, meaning that luck plays a big role in determining the outcome.” Slot machines, bingo, blackjack, roulette, and craps are all percentage games. See https://www.lsd.law/define/percentage-game

13. 1887 Revised Statutes, § 6850, citing a Territorial Act of February 5, 1885


15. The strap game is “a swindling game in which a strap or belt is folded in the middle and then rolled up tightly with the victim betting that he can
game, patent safe game, black and red game commonly known as the ten dice game, and two card box at faro to the list of prohibited games. Keeping up with new scams was difficult. In 1897 lansquenet, rouge et noir, and rondo were added to the list. The 1899 amendment simplified the list of prohibited games to “faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards or dice, or any other device” for value. At the end of the century, things settled down and this section would stay

place a pencil in the loop so as to hold the strap when both ends are pulled.” See https://www.merriam-webster.com/dictionary/strap%20game.

16. The thimblerig game is “a swindling trick in which a small ball or pea is quickly shifted from under one to another of three small cups to fool the spectator guessing its location.” See https://www.merriam-webster.com/dictionary/thimblerig.

17. The patent safe game would take a page to explain. It involves betting on whether hollowed-out balls will contain a piece of paper or be empty. See https://en.wikipedia.org/wiki/Patent_safe.

18. I could not determine what the black and red game commonly known as the ten dice game was.

19. The two-card box at faro is a scam using a shoe that holds and marks the cards for an otherwise honest card game of faro. See https://en.wikipedia.org/wiki/Faro_(banking_game); http://sharpsandflats.com/faro_07.html.

20. 1893 ISL, p. 163, amending § 6850 of the Revised Statutes (internal quotation marks omitted).

21. Lansquenet is a banked game in which players turn up cards until the card matches the dealer’s card or the table card. See https://en.wikipedia.org/wiki/Lansquenet.

22. In rouge et noir (meaning red and black), also called Trente et Quarante (meaning thirty and forty), cards that are turned up are placed in a row for red cards or a row for black cards; players bet on whether the face values of the red row of cards or the black row will be closest to a certain sum. See https://en.wikipedia.org/wiki/Trente_et_Quarante.

23. Rondo was played on a billiard table; players bet on how many balls that were rolled on the table would go into a pocket and how many would not. See https://gambling-history.com/games/rondo/.

24. 1897 ISL, pp. 53–54. This act that made many forms of gambling illegal superseded and displaced the authority of the City of Boise, granted in its Territorial municipal charter, to license gambling houses. In re Ridenbaugh, 5 Idaho 371, 273, 38 Pac. 12, 13–14 (1897).

as it was until 1921, when “Indian stick games” were added to the list. The newly formed State Legislature spent the next decade doubling down on the Territorial Legislature’s criminalization of gambling, imposing criminal penalties for engaging in gambling on both the operators of the games and the persons who played them.

In the meantime the 1911 Legislature defined lotteries for the first time and did so in a way that explicitly prohibited raffles:

A lottery is any scheme:
[1] for the disposal or distribution of property by chance
[2] among persons who have paid or promised to pay any valuable consideration
[3] for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

In 1913 the Legislature added book making and pool selling of “bets and wagers” to the definitions of illegal gambling.

B. The Next Forty Years, 1925–1965 — Slot Machines and Horse Racing

Laws against gambling do not stop people from gambling. In 1941 the Idaho Supreme Court held that there was no property interest in slot machines seized by a sheriff or in the money in them; the machines were contraband, and both the machines and the money were forfeit. State v. McNichols, 63 Idaho 100, 103–105, 117 P.2d 468, 470 (1941). Pinball machines that paid winners in coins were held to be illegal gambling devices. Pepple v. Headrick, 64 Idaho 132, 141–143, 128 P.2d 757, 761–762 (1942). So were pinball machines that gave a player more games. Thamart v. Moline, 66 Idaho 110, 112–117, 156 P.2d 187, 187–190 (1945).

Seized slot machines were gambling devices, so the court affirmed the sheriff’s authority to seize and destroy them under another section of the gambling code.

26. Indian stick games involve throwing sticks (similar to throwing dice) to advance a player’s position around a circle or a square. E.g., https://boardgamegeek.com/boardgame/35459/pima-indian-stick-game, https://navajopeople.org/blog/tsidil-navajo-stick-game/.

27. 1921 ISL, ch. 116, p. 292.

28. 1911 ISL, ch. 147, p. 451, section formatted and bracketed numbers added.

29. 1913 ISL, ch. 76, p. 327.

30. Headrick’s footnote 1 contains a thorough review of the statutory changes in Idaho’s gambling laws. 64 Idaho at 137–140.
Perhaps cases like these prompted the 1945 Legislature to enact the Idaho Coin Operated Amusement Device Control Act, which made the first changes to Idaho's definitions of gambling since Indian stick games were added in 1921. Among other things this Act defined:

(a) a "Coin-operated Amusement Device" as a machine into which coins or tokens may be inserted and which "by physical or mechanical force may issue wholly upon any chance or uncertain or contingent event" money or tokens that can be exchanged for money, and

(b) a "Club" as a corporation or unincorporated association "operated solely for fraternal, benevolent, educational, ex-servicemen's, labor organizations, athletic or social purposes, and not for pecuniary gain or profit ...."

The Act amended the general definition of gambling to provide: "[I]t shall be lawful for any Club ... to own, conduct and operate, and the members of the Club to play, coin operated amusement devices upon compliance by such Club with all the conditions in the Act." In other words, the American Legion and the Elks Club, among others, could legally operate slot machines for their members.

That Act lasted one legislative cycle. The next session of the Idaho Legislature renamed the regulatory scheme for slot machines the Local License Act. Club-based operations were gone. The new Act allowed municipalities to license coin-operated amusement devices to businesses that paid the fees provided by statute. Gambling was redefined again: "[I]t shall be lawful to own and operate, and play such coin operated amusement devices as may be licensed under the provisions of [this] Act. Such devices so licensed are hereby declared to be a game of chance but not a lottery." A regulatory scheme in which clubs could decide whether to offer slot machine gambling was replaced by one in which each city or village would decide whether to allow slot machine gambling.

32. This general definition of gambling, which had been codified in many different sections before, was then codified in Idaho Code § 17-2301 of the Idaho Code Annotated.
33. 1947 ISL, ch. 151, pp. 359–366. The Legislature met biennially in those days.
34. Section 7 of the Local License Act, amending Idaho Code Annotated Section § 17-2301.
In a separate act the 1947 Legislature also authorized gambling with punchboards,35 chance spindles,36 and chance prize games.37 That Act allowed cities or villages to allow or prohibit these games and further amended the definition of gambling to authorize “punchboards, chance spindles and/or chance prize games” complying with licensing requirements and also declared that they were not lotteries.38 Legal challenges to the 1947 Act would follow.

In *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953),39 the court made short shrift of the argument that slot machines, punchboards, chance spindles, and chance prize games were not illegal lotteries:

>The definitions … by which the Legislature attempted to legalize slot machines, … punchboards, chance spindles and chance prize games … simply define lotteries by other names, and the parts of the acts which define the various devices as gaming and not lotteries, are of no importance. While the acts … are adroitly and cleverly drawn, … the instrumentalities and devices so defined and permitted are no more nor less than lotteries.

74 Idaho at 521–522, 265 P.2d at 331.

That was the end of legal slot machines in Idaho.40

35. “Punchboards” are gambling devices in which the player pays for the chance to obtain money or merchandise that may be awarded if the player “punches” the hole or receptacle indicating that a prize would be awarded. 1947 ISL, ch. 239, § 1(b), p. 593.

36. “Chance spindles” are similar to punch boards, but use wheels, sticks, pins, or other devices to hold or attach to pieces of paper showing prizes. 1974 ISL, ch. 239, § 1(b), p. 593.

37. “Chance prize games” are “any game in which the obtaining of a prize is based solely upon the chance of the player, upon payment of consideration, to draw or otherwise secure a token number, figure, insignia character, symbol, letter or word, or combination thereof, which is designated to pay a prize, in cash or merchandise.” 1947 ISL, ch. 239, § 1(c), p. 593. One would be hard pressed to take at face value the legislative declaration that chance prize games were not lotteries.

38. ISL, ch. 239, § 9, p. 595, amending Idaho Code Annotated § 17-2301.

39. The case is captioned *State v. Garden City*, but the State was not represented by State officers. Instead, private citizens (called relators) brought the case and pursued it on appeal pursuant to their right to sue to abate nuisances. 74 Idaho at 524, 265 P.2d at 333. Garden City was a defendant along with several businesses that operated slot machines because the relators alleged that Garden City was in cahoots with them: “Garden City is a partner in such business of maintaining and carrying on such gambling places, in that Garden City has licensed the same under an agreement with the other defendants … to share in the profits.” Id. at 519, 265 P.2d at 329.

40. What activity is illegal on paper and what laws are actually enforced can be two different things. *Hyta v. Finley*, 137 Idaho 755, 53 P.3d 338 (2002),
The certainty of the Court’s ruling in *Garden City* was matched by the shallowness of its reasoning. The Court concluded that slot machines were lotteries because both statute and the common law “defined a lottery as a species of gaming, wherein prizes are distributed by chance among persons paying a consideration for the chance to win, a game of hazard in which sums are paid for the chance to obtain a larger value in money or articles.” 74 Idaho at 520, 265 P.2d at 330. This analysis — that (1) all games of chance (2) in which money is paid (3) for the opportunity (4) to win a larger value (5) are lotteries — would apply to casino gambling where players bet against the house, to pari-mutuel horse-racing, and to poker, as well as to traditional lotteries or raffles, where one purchases a ticket with the hopes of winning a pre-determined prize. Are all of these games lotteries? The Court did not say. The Court would be faced with the sloppiness of the *Garden City* opinion when it later considered the constitutionality of pari-mutuel gambling on horse racing.41


Businesses would continue to try to run slot machines under new disguises. E.g., *MDS Investments, LLC v. State*, 138 Idaho 456, 462–464, 65 P.3d 197, 203–205 (2003) (video terminals that cost money to play and allowed credits to be cashed out were illegal gambling devices that were video representations of slot machines).

41. *Garden City* did not have the benefit of the California Supreme Court’s opinion in *Western Telcon, Inc. v. California State Lottery*, 13 Cal. 4th 475, 53 Cal Rptr. 2d 812, 917 P.2d 651 (1996) (CSL), which came out 43 years later. CSL divided gambling into three mutually exclusive categories:

The three key forms of gambling are [1] gaming, [2] lotteries and [3] betting. [1] Gaming may be defined as the playing of any game for stakes hazarded by the players. [2] A lottery may be defined as a distribution of prizes by lot or chance. [3] Betting may be defined as promises to give money or money’s worth upon the determination of an uncertain or unascertained event in a particular way, and (unlike a lottery) may involve skill or judgment.

13 Cal. 4th at 484–485, 53 Cal Rptr. 2d at 816, 917 P.2d at 655 (internal punctuation omitted; bracketed numbers added). CSL elaborated (1) Gaming is bilateral, each side risks its own stake, and each side has the possibility of winning the other’s stake. 13 Cal Rptr. 4th at 484, 485, 53 Cal Rptr. at 816–187, 917 P.3d at 655, 655–656. Blackjack, roulette, craps, etc., are gaming because bettors make individual wagers on the result of a hand of cards, a spin of the wheel, or a roll of the dice. The amount of the wager determines what is at stake for both sides. Slot machines are gaming under this definition.
The 1963 Legislature enacted the Idaho Horse Racing Act, which permitted pari-mutuel betting on horse races. The Governor vetoed the Act, the Legislature overrode his veto, he then refused to appoint members of the Idaho Horse Racing Committee, contending that the Act violated the Idaho Constitution’s prohibition against lotteries. County Fair Boards that wished to offer pari-mutuel horse racing and a horse breeder who wished to race petitioned the Idaho Supreme Court to order the Governor to appoint the members of the Horse Racing Committee to implement the Act. The Governor defended by saying that the Act was unconstitutional.

The Court stated the issue was “not whether … pari-mutuel … wagering … constitutes gambling, but whether … wagering on horse races is a lottery.” The Court noted that the Idaho Constitution’s framers rewrote a draft of Article III, § 20, that prohibited all games of chance and lotteries to replace it with one that prohibited lotteries; thus, the Court concluded that “the framers … distinguished a ‘lottery’ from a ‘game of

because in each play the bettor wagers against the slot machine’s owner and the amount of the wager determines what can be gained or lost. (2) Lotteries do not pit individual bettors against each other. In gaming it would be possible for every bettor to win and for the house to pay all of them or for every bettor to lose and the house to win all their bets. Lotteries do not have that possibility, the prize is predetermined (or there is a predetermined formula for calculating the prize), and a payout must eventually be made; the payout is not doubled when an individual bettor’s wager is doubled. 13 Cal Rptr 4th at 484–484, 53 Cal Rptr. at 816–819, 917 P.3d at 655–658. Slot machines would not be lotteries under this definition. (3) Betting does not involve bilateral wagering. Examples would be poker or pari-mutuel horse racing, in which the bettors are not playing against a single opponent (often called the house), but are wagering for a share of or all of a pool of money provided (at least in part) by the participants. Betting may also involve an element of skill in knowing the odds of success of one’s own cards or knowing the horses and track conditions at a horse race. In betting the outcome is not determined solely by chance. 13 Cal Rptr 4th at 485, Cal Rptr. at 816, 917 P.3d at 655.

CSL’s analytical framework provides a rationale for which games of chance are or are not lotteries that is missing from Garden City and later decisions.

42. 1963 ISL, ch. 64, pp. 246–257, codified at Idaho Code §§ 54–2401 et seq. In the remaining years of Idaho’s first century, i.e., through 1990, this act was amended to allow mule racing, 1984 ISL, ch. 83, p. 158, to clarify which bets could be placed (win, place, show, etc.) and how the betting pool would be distributed, 1985 ISL, ch. 94, pp. 497–497, and to allow dog racing, 1988 ISL, ch. 316, pp. 660–665.

43. The Governor was defended by the Idaho Attorney General, i.e., the Attorney General argued that the Act was unconstitutional rather than defending its constitutionality.
chance”’. Id. at 347, 386 P.2d at 377. The Court reviewed cases from fifteen other States and England to help it determine whether pari-mutuel horse racing was a game of chance but not a lottery and held that the weight of authority “leads to the conclusion that a horse racing meet where the pari-mutuel system of wagering is used does not contravene the constitutional prohibition against lotteries.” Id. at 348–367, 368, 386 P.2d at 377–390, 391. The opinion lacked definitive statements such as those in CSL, see n.41, supra, which explained how a lottery differed from pari-mutuel betting. Regardless, pari-mutuel betting on horse racing was recognized as a legally permissible form of gambling under the Idaho Constitution.

C. The Last 25 Years of the First Century of Statehood, 1965–1990 — Lotteries, Dog Racing, and Tribal Gaming

The Idaho Legislature44 and the Idaho courts45 broke little new ground on gambling in the last twenty-five years of Idaho’s first century of Statehood. However, two developments beyond the State government’s control shaped gambling in Idaho’s second century of statehood.

I. The State Lottery

The first development was a 1986 initiative to create a state lottery, which followed a failed attempt to amend the Idaho Constitution to permit a state lottery.46 The initiative’s opponents petitioned the Idaho Supreme Court to keep the measure off the ballot on the grounds that it was unconstitutional. By a 3–2 vote the Court declined to remove the initiative from the ballot. Taxpayers of Idaho, Inc. v. Cenarrusa, 111 Idaho 502, 725 P.2d 526 (1986). Chief Justice Donaldson’s concurrence stated that a vote on the initiative would inform legislators what the people wanted and that the court should not interfere with the people’s right to exercise their franchise. Id. at 503, 725 P.2d at 527 (1986). Justice Shepard’s concurrence, which the Chief Justice joined, stated that the people’s right to propose initiatives was not limited to “good” or “constitutional” legislation; if an unconstitutional initiative were to pass, it could be addressed by the legislature or the courts. Id. at 505, 725 P.2d at 529. Justice Bistline’s concurrence included his reasoning that, “The people are possessed of just as much right as is the legislature to enact a law

44. See footnote 46, supra.
45. The Idaho Supreme Court continued to hold that illegal gambling devices could be seized, but the owner must be given notice and an opportunity for hearing concerning whether they were in fact gambling devices. Prendergast v. Dwyer, 88 Idaho 278, 398 P.2d 637 (1965). As for “free game” pinball machines, they were not gambling devices. State v. Fitzpatrick, 89 Idaho 568, 407 P.2d 309 (1965). The State continued to suspend liquor licenses for allowing gambling on the premises. State, Dept. of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (App. 1985).
46. See 1986 House Journal, p. 221 (March 12, 1986), defeating House Joint Resolution No. 8, which would have amended the Idaho Constitution to allow the Legislature to authorize lotteries.
notwithstanding that its constitutionality has been brought under question ….” Id. at 505, 725 P.23d at 529.

The initiative was on the 1986 general election ballot. It passed and was challenged as unconstitutional. The Court held that Article III, § 20’s prohibition against the Legislature authorizing a lottery applied as well to the people authorizing a lottery by initiative. “Initiative legislation is on an equal footing with legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho legislature.” Westerberg v. Andrus, 114 Idaho 401, 405, 757 P.2d 664, 668 (1988).

However, the combination of passage of the initiative and Westerberg’s holding that the initiative was unconstitutional led the 1988 Legislature to propose and the citizens to ratify the following revision of Idaho Constitution Article III, § 20, to allow for creation of a state lottery:

§ 20. Gambling not to be authorized. No game of chance, lottery, gift enterprise or gambling shall be authorized under any pretense or for any purposes whatsoever, except for the following:

a. A state lottery which is authorized by the state if conducted in conformity with law; and
b. Pari-mutuel betting if conducted in conformity with law; and

c. Charitable games of chance which are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with law.

Thus, in a century, Idaho had come full circle from prohibiting lotteries to authorizing the State to run a lottery. Idaho also formalized the constitutionality of pari-mutuel horse racing and charitable raffles and bingo (although not by name).

2. Indian Gaming

In the meantime two events far from Idaho would shape Idaho’s gambling law in its second century of statehood. The first began in California. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), held that neither California nor its local governments, which allowed both bingo and poker games to be conducted elsewhere in the State, had authority under federal law to regulate or criminalize bingo or poker games that were open to the public and conducted by Indian Tribes on their own tribal lands under ordinances approved by the United States Secretary of the Interior.


(1) Class I Gaming includes traditional forms of Indian gaming in connection with Tribal ceremonies or celebrations. IGRA § 4(6), 25 U.S.C. § 2703(6).
(2) Class II Gaming includes bingo and card games not explicitly prohibited by State law or explicitly authorized by State law if the card games are played in conformity with State law regarding times of operation and limitations on wagers or pot sizes. Class II Gaming does not include banking card games or slot machines. IGRA § 4(7), 25 U.S.C. § 2703(7).

(3) Class III Gaming is all other forms of gaming. IGRA § 4(8), 25 U.S.C. § 2703(8).

IGRA allowed Tribes to offer gaming tied to the State law in which Tribal lands were located. Under IGRA, because Idaho authorized bingo, Idaho Tribes could offer bingo. IGRA § 11(b), 25 U.S.C. § 2710(b). Furthermore, IGRA authorized Tribes to adopt ordinances to offer Class III gaming if the gaming is “located in a State that permits such gaming for any purpose by any person, organization, or entity” and the gaming is “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.” IGRA § 11(d)(1), 25 U.S.C. § 2710(d)(1). Because Idaho allowed lotteries and pari-mutuel gambling on horse races, IGRA gave Idaho Tribes a right to compact with the State to offer their versions of such gaming. The stage was now set for the gambling law issues of Idaho’s second century of statehood.

III. Gambling Law in Idaho’s Second Century of Statehood

A. Indian Gaming

Four Indian Tribes’ reservations are wholly in Idaho: the Kootenai, 47 Coeur d’Alene, 48 Nez Perce, 49 and Shoshone-Bannock (Sho-Bans). 50 Each eventually compacted with Idaho for tribal gaming. This article calls them the Idaho Compacting Tribes. The fifth Tribe — the Shoshone-Paiutes 51 — has a

47. The Kootenai Tribe’s homepage is at https://www.kootenai.org/.
49. The Nez Perce Tribe’s home page is at https://nezperce.org/.
50. The Shoshone-Bannock Tribes’ home page is at https://www.sbtribes.com/.
51. The Shoshone-Paiute Tribes’ home page is at https://shopaitribes.org/spt/.
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reservation that straddles the Idaho-Nevada border; it eventually compacted with Nevada.52

Alarmed that Idaho Tribes might try to use IGRA to offer casino gambling in Idaho, the Governor called a special session of the 1992 Legislature. 1993 I.S.L. p.1. The special session proposed, and the people approved in the 1992 general election, a revised Article III, ¶ 20, that explicitly stated that casino-style gambling was forbidden in Idaho.53

§ 20. Gambling prohibited.

(1) Gambling is contrary to public policy and is strictly prohibited except for the following:

a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and

b. Pari-mutuel betting if conducted in conformity with enabling legislation; and

c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

(2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, bacarrat [sic], keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

By a 3–2 vote the Idaho Supreme Court held that this constitutional amendment had met the procedural requirements to be submitted to the voters. Nez Perce Tribe v. Cenarrusa, 125 Idaho 37, 38, 867 P.2d 911, 912 (1993).

52. See https://www.bia.gov/as-ia/oig/gaming-compacts, which is a list of all Tribal Gaming Compacts. This website provides links to all the approved Tribal Gaming Compacts, including the Shoshone-Paiute Compact with Nevada.

53. That same special session adopted Idaho’s first bingo and raffle statutes, which were codified at Idaho Code §§ 67–7701 et seq. 1993 I.S.L. pp. 4–5.
In 1993 the Kootenai and Coeur d’Alene Tribes both compacted with Idaho; the Nez Perce did so in 1995. These Tribes (the Northern Tribes) were frustrated that the State would not agree to allow them to offer casino-style Class III Gaming. They sued for declaratory relief because they “intended to engage in extensive Class III gaming activities, including casino-style gambling.” Coeur D’Alene Tribe v. Idaho, 842 F. Supp. 1268, 1271 (D. Idaho 1994). The Federal District Court defined the declaratory relief issue before it thusly:

The Tribes contend that because Idaho permits and/or does not prohibit certain forms of Class III gaming, the Tribes are free to conduct any and all forms of Class III gaming, including casino gambling, on their reservations. Idaho contends that the Tribes may conduct only those specific forms of Class III gaming which are permitted and/or are not prohibited under the law and public policy of the State.

Id. at 1272, i.e., the Northern Tribes argued that if Idaho permitted one Class III Game (e.g., a lottery or pari-mutuel racing), it must allow all Class III Games (including casino gambling).

After rejecting the argument that Idaho could not amend its constitution after the Tribes requested negotiations for a compact, id. at 1275–1276, the Court held that Idaho was required to negotiate a compact with the Tribes only for the Class III Games that Idaho allowed to be offered, id. at 1276–1280, namely “a lottery and pari-mutuel betting on horse … races. The State is not required to negotiate as to any other forms of Class III gaming,” id. at 1280. The Court summarized: “[T]he State is only obligated to negotiate a compact … regarding Class III games which are permitted and/or are not prohibited by the laws and public policy of the State.” Id. at 1283. The Court sided with the Tribes on another issue, however, holding that if the State Lottery wanted to operate on Tribal lands, as a Class III Game the State Lottery can be conducted on Tribal lands only if it is “authorized by an ordinance or resolution of the tribe … conducted in conformance with a tribal-state compact entered into by the tribe and the state.” 25 U.S.C. § 2710(d). Thus, the State had to compact with the Tribe to operate its Lottery on Tribal lands. Id. at 1282. The District Court did not resolve whether the State could demand that the Tribes compact regarding the scale of their gaming operations, the

54. IGRA did not give a Tribe the right to operate a lottery that takes bets from persons located off-reservation and out of state even if the winning numbers are drawn on-reservation and the lottery software is housed on-reservation. “The Tribe’s effort to obtain 800 Service so that a player can order chances while outside the limits of the Reservation would have the effect of maintaining a gaming activity off Indian lands and, consequently, take the Lottery outside the protective preemption provided by IGRA.” AT&T Corp. v. Coeur D’Alene Tribe, 45 F Supp 2d 995, 1001 (D. Idaho 1998). Later decisions also confirmed what would seem obvious: A Tribe does not have the right to operate poker tournaments when Idaho does not allow poker tournaments. Idaho v. Coeur D’Alene Tribe, 49 F.Supp.3d 751 (D. Idaho 2014); Idaho v. Coeur D’Alene Tribe, 49 F Supp 3d 751 (D. Idaho 2014).
number of gaming machines, or limits on bets and payouts. Id. at 1281. The District Court was affirmed on appeal. Coeur D'Alene Tribe v. Idaho, 51 F.3d 876 (9th Cir. 1995).

The three Northern Tribes who were parties to this case agreed to similar compacts. For example, the Coeur d'Alene Compact allowed the Tribe to operate a lottery, pari-mutuel betting on horse races, and simulcasts of horse races on Indian lands without restriction. The Compact required the Tribe to establish a Gaming Code and a governing structure to implement the Gaming Code, including terms for management contractors, licensing, security, operational requirements, accounting and cash controls, audits, and State enforcement of Compact provisions. The 1992 Nez Perce and 1993 Kootenai Compacts were similar. None of the Compacts limited the number of gaming machines that the Tribes could operate.

What is a lottery? The Idaho Supreme Court has never satisfactorily answered that question. When the 1988 Lottery Amendment was approved there were “classic” lotteries in existence; they sold tickets for a prize, and the winners were chosen on a daily or weekly basis, often by the selection of numbered balls from a drum. Players with the winning numbers shared the prize, or the prize rolled over to another drawing if there were no winners. 55 There were also scratch-off tickets (sometimes called instant lotteries) where, for example, a lottery might order 10,000 tickets with a predetermined number of $1, $2, $5, and $10 winners among them. 56

One can create these same patterns of ticket purchases and prize winnings through a centralized computer system connected to various video terminals in a Tribal Gaming venue. The video terminals might be configured to resemble slot machines or to mimic other casino gambling even though the payouts are lottery payouts, i.e., there are a maximum number or a fixed number of payouts over the course of the lottery. And a centralized computer can start new lotteries every few seconds. Centralized computer-generated lotteries using video terminals were not theoretical; they were in existence in the 1990s and were being used in Tribal Gaming throughout the United States, including Idaho.

In 2001 the Governor’s Office negotiated Compact Amendments with the Northern Tribes that limited the number of Tribal Video Gaming Machines to the number that the Tribe operated on January 1, 2001, plus a 15% increase. 2001 Idaho Senate Bill 1211. The State Senate rejected the Compact Amendments. 2001 Idaho Senate Journal, p. 300 (March 29, 2001).

The Northern Tribes then did what the people did in 1986: They qualified an Initiative for the ballot, which was written to give them a better deal than they had earlier negotiated. The Idaho Supreme Court rejected an effort to keep the initiative off the ballot. Noli v. Cenarrusa, 137 Idaho 798, 53 P.3d 1217 (2002). The so-called Tribal Gaming Initiative passed, and pursuant to its terms, each Northern Tribe amended its Compact to lock in the number of Tribal Video Gaming Machines 57 allowed by the Initiative: the number

55. https://en.wikipedia.org/wiki/Lotteries_in_the_United_States#
57. Section 3 of the Initiative, which was codified as Idaho Code § 67-429B, defined Tribal Video Gaming Machines as follows.
operated on January 1, 2002, plus up to 25% more, with no annual increase in machines beyond 5% in one year, until the cap on the number of machines was removed ten years later.\textsuperscript{58} The Northern Tribes also agreed to amend their

\textbf{67-429B. Authorized tribal video gaming machines.} — (1) Indian tribes are authorized to conduct gaming using tribal video gaming machines pursuant to state-tribal gaming compacts which specifically permit their use. A tribal video gaming machine may be used to conduct gaming only by an Indian tribe, is not activated by a handle or lever, does not dispense coins, currency, tokens, or chips, and performs only the following functions:

(a) Accepts currency or other representative of value to qualify a player to participate in one or more games;

(b) Dispenses, at the player’s request, a cash out ticket that has printed upon it the game identifier and the player’s credit balance;

(c) Shows on a video screen or other electronic display, rather than on a paper ticket, the results of each game played;

(d) Shows on a video screen or other electronic display, in an area separate from the game results, the player’s credit balance;

(e) Selects randomly, by computer, numbers or symbols to determine game results, and

(f) Maintains the integrity of the operations of the terminal.

(2) Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) above is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling.

The Idaho Supreme Court has never addressed the issue of whether Tribal Video Gaming Machines meet the constitutional definition of a lottery. In \textit{Knox v. State ex rel. Otter}, 148 Idaho 324, 336–338, 223 P.3d 266, 278–280 (2009), the Court instead held that \textit{Idaho v. Shoshone-Bannock Tribes}, 465 F.3d 1095 (9th Cir.2006), was conclusive on the matter because the State could have challenged the constitutionality of the Tribal Gaming Initiative, but did not.

\textsuperscript{58} Initiative section 4(1)(b), later codified as Idaho Code § 67-429C(1)(b), provided:

(b) In the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number, provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.
Compacts, as provided by the Initiative, to make certain donations to local schools and educational institutions.\footnote{59. Initiative section 4(1)(c), later codified as Idaho Code § 67–429C(1)(c), provided: "To the extent such contributions are not already required under the tribe’s existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation."} The Sho-Bans did not compact in lockstep with the Northern Tribes. Their 2000 Compact provided that they could “operate … any gaming activity that the State … ‘permits for any purpose by any person, organization, or entity,’ as the phrase is interpreted in [IGRA]. The Tribes may not operate any other form of Class III gaming activity.” The Compact did not list what the allowable games were. The Compact also had a most favored nation provision: If “any other Indian tribe is permitted … to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games.” If the two sides could not agree on what Class III games the Sho-Bans could conduct, the Compact provided that the Federal District Court or arbitration could resolve their disputes.

The scope of the “any gaming activity” and the most favored nation provisions was litigated after the Northern Tribes amended their Compacts pursuant to the Tribal Gaming Initiative, but the Sho-Bans did not. The Sho-Bans contended that they had the right to operate Tribal Video Gaming Machines without limit and without contributing to schools or educational institutions. The Ninth Circuit agreed, affirming an unreported decision of the District Court and holding, because the Sho-Bans’ compact allowed them to operate any gaming activity that Idaho permitted others to offer and to operate any game that other Tribes offered, the Sho-Bans “are entitled to a mandatory amendment of the Compact stating that they are authorized to conduct tribal video gaming, as the other tribes have been permitted to do.” \cite{Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1102 (9th Cir. 2006)}. The Sho-Bans did not amend their Compact pursuant to the Tribal Gaming Initiative, they were under no obligation to accept the Initiative’s limit on the number of machines that could be operated or the Initiative’s requirement to contribute to schools or educational institutions. \textit{Id}. There have not been any significant new decisions in Tribal Gaming law in Idaho since then.\footnote{60. That a Tribe cannot conduct poker tournaments when Idaho does not allow poker tournaments, see n.58, \textit{supra}, does not break new ground, but only confirms current understanding of the law.}

\textbf{B. Horse Racing, Simulcasting, and Historical Horse Racing}

Interest in betting on live horse races has been waning. The horseracing laws had several post-1990 changes designed to increase the numbers and kinds of events that could be wagered on in addition to the live races at a race meet in Idaho. Licensees conducting Idaho race meets were allowed to participate in combined interstate wagering pools for races located in or out
of Idaho. 61 Qualifying licensees were allowed to supplement their live racing with simulcasts of races from elsewhere. 62 “Pari-mutuel” betting and “Simulcast” were defined for the first time. 63 Lastly, “Historical horse race” was defined and a new Idaho Code § 54–2512A that allowed pari-mutuel betting on the outcome of historical horse races was enacted. 64

Historical horse racing was a step too far. Concerned that it was similar to gambling like slot machines, the 2015 Legislature repealed the authorization to bet on historical horse races and sent the repealer bill to the Governor. In a comedy of errors (or perhaps a tragedy of errors) described in Coeur D’Alene Tribe v. Denney, 161 Idaho 508, 387 P.3d 761 (2015), the Governor’s veto of the repealer was not timely returned to the Senate (the originating body), so his veto was ineffective, and the repealer became law. After the repeal of betting on historical horse races, the number of horse racing meets in Idaho has fallen to historic lows; the Idaho Racing Commission website listed only 22 racing days in the entire State for 2023.

IV. Conclusion

Idaho appears to have entered a period of stability in the law governing gambling. The State Lottery is well established, having returned $1.189 billion to the State in 34 years of operation. 65 Charitable bingo and raffles are, with very few exceptions, very well regulated. 66 Pari-mutuel racing is hanging on.

63. 2006 I.S.L., ch. 147, section 1, pp. 461–462, amending Idaho Code § 54-2502 to provide these definitions: “Pari-mutuel” means any system whereby wagers with respect to the outcome of a race are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under state law, and in which the participants are wagering with each other and not against the operator. “Simulcast” means the telecast or other transmission of live audio and visual signals of a race, transmitted from a sending track to a receiving location, for the purpose of wagering conducted on the race at the receiving location.
64. 2013 I.S.L., ch. 139, pp. 333–335, including the following definition: “Historical horse race” means a race involving live horses that was conducted in the past and that is rebroadcast by electronic means and shown on a delayed or replayed basis for the purposes of wagering conducted at a facility that is authorized to show simulcast and/or televised races.
66. There have been exceptions. E.g., Sons & Daughters of Idaho v. Lottery Com’n, 144 Idaho 23, 28–33, 156 P.3d 524, 529–533 (2007) (bingo operators can lose their license for improperly indirectly compensating themselves from the bingo operation through rental payments).
Tribal gaming and Tribal Video Gaming Machines have over two decades of operations behind them.
GAMBLING IN CALIFORNIA: FROM 49ERS GAMBLING TO GAMBLING ON THE 49ERS

Gambling has a colorful history and evolving future in the State of California. From rowdy saloon card tables in the 1800s to modern tribal casinos, understanding how legal gaming developed in the nation’s largest state may help us understand where it might be headed in the future.

Gambling in California dates back to when California was a part of Mexico. However, everything changed in 1848 when James Marshall discovered gold at Sutter’s Mill in Coloma, California, which started the California “Gold Rush” in 1849, a seminal event in history, where people traveled from across the nation and globe to seek out their fortune.


3. These miners became known as “49ers” and are the namesake of the popular San Francisco National Football League team burnishing its red and especially gold colors and its mascot Sourdough Sam, a gold rush prospector.

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wealth at the tables.\textsuperscript{5} J. Linville Hall, one of the foremost documenters of the era, explained that for the miners “[t]he principal amusement is gambling, which is carried on to an unlimited extent, and the perfect indifference with which thousands are lost.”\textsuperscript{6} This gambling environment was widespread, largely unregulated, and led to cheating and crime.\textsuperscript{7} Additionally, while this rush of 49ers helped spur growth in California and the country, it had severe consequences for Native Americans in California; tribal gaming was more than a century and a half away.\textsuperscript{8}

After California gained independence from Mexico and was incorporated into the United States gaining statehood in 1850, this freewheeling Wild West gradually started to succumb to more conservative laws.\textsuperscript{9} In 1872, California reigned in gambling when it adopted its first Penal Code which enacted a ban on lotteries under section 319 and prohibited specific games under section 330, such as faro, monte, roulette, lansquenet, rouge et noire, rondo, and any banking game played with cards, dice, or any device for money.\textsuperscript{10} The former section remains to this day unchanged.\textsuperscript{11}

Penal Code section 330 was expanded several times to add specific games and “percentage games” generally to the list of prohibited activities.\textsuperscript{12} However, despite these growing statutory limitations, gambling saloons or “cardrooms,” as they are called today, continued to operate and play games


\textsuperscript{6} Noy, Hellacious California! at p. 28.

\textsuperscript{7} See Noy, Hellacious California! at p. 52; See also Scott, J., Sacramento’s Gold Rush Saloons, pp. 54-55.


\textsuperscript{9} See Noy, Hellacious California! at p. 34; See also Brands, The Age of Gold, p. 592.

\textsuperscript{10} Cal. Penal Code §§319 & 330 (1872); See also Cal. Const. Art. IV, section 26 (1879), renumbered to section 19, subsection (a) by the California Constitution Revision Commission – banning lotteries.

\textsuperscript{11} Cal. Penal Code §319 (2024)

\textsuperscript{12} Cal. Penal Code §330 (1885) – modified to add tan, fan-tan, stud-horse poker, seven and a half, and perhaps most importantly twenty-one and “percentage” games; Cal. Penal Code §330 (1891) – modified to add “hokey-pokey” a type of four card stud poker and not the wedding dance favorite.
for money like poker, which was, in the words of the California Supreme Court in 1895, as "innocent as chess.\textsuperscript{13}

While card and banking games were drawing statewide regulation, Californians continued to innovate in other forms of gambling. In 1893, Gustav Friedrich Wilhelm Schultze, a German immigrant in San Francisco, received the first United States patent issued for a gambling machine similar to a slot machine.\textsuperscript{14} However, it was his former colleague and contemporary Charles Augustus Fey who is widely credited as the "Thomas Edison of Slots" with his "Liberty Bell" slot machine which had three spinning wheels, dispensed coins on payout, and had a pull lever, often referred to as a "one armed bandit."\textsuperscript{15}

The irony of their slot machine innovations was that local California jurisdictions widely banned them and, in 1911, the Legislature passed Penal Code section 330a which banned slot machines statewide.\textsuperscript{16} The Legislature also prohibited bookmaking and essentially all sports wagering when in 1909 it passed Penal Code section 337a.\textsuperscript{17} Later in 1933, and perhaps reconsidering blanket prohibitions, the California electorate voted to ratify the repeal of the 18th Amendment of the United States Constitution as well as amend the state Constitution to allow horse racing and pari-mutuel wagering.\textsuperscript{18}

In the intervening years gaming largely maintained the status quo in California while large casinos prospered in Nevada, and later in New Jersey when in the mid-1970s it authorized casinos in Atlantic City.\textsuperscript{19} Perhaps looking to the east, attitudes in California towards gaming thawed further when in 1976, the electorate again amended the state Constitution to allow the use of pari-mutuel wagering.

\textsuperscript{13} Ex parte Meyer, 40 P. 953, 954 (Cal. 1895); See also Monterey Club v. Superior Ct. of Los Angeles, 48 Cal. App. 2d 131, 148 (1941) - Neither playing draw poker nor maintaining a place where it is played being an offense under our law, and therefore being lawful.

\textsuperscript{14} See Noy, Hellacious California! at pp. 42-43.


\textsuperscript{16} Cal. Penal Code §330a (1911); See also Penal Code section(s) 330b & 330.1 (1950) - which have similar language to section 330a and expand upon it in several ways.

\textsuperscript{17} Cal. Penal Code §337a (1909)—banning bookmaking, pool selling, wagering, and offering wagering on events or contests of animals or persons.

\textsuperscript{18} Press Democrat, Volume 77, Number 151, 28 June 1933; Cal. Const. Art. IV, section 26 (1933) renumbered to §19, subsection (b) by the California Constitution Revision Commission.

\textsuperscript{19} The Daily Register, Volume 99, Number 99, 3 November 1976; N.J. Stat. Ann. § 5.12-1 (West)
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charitable bingo which was subsequently enacted by the Legislature.\textsuperscript{20} This change arguably facilitated the greatest expansion of gambling in California by emboldening the tribes to offer gambling on tribal land.

Towards the end of the 1970s and the early 1980s, various tribes including the Cabazon Band of Cahuilla Indians, a federally recognized tribe in Riverside County, California, started to offer poker and bingo games on their reservation land.\textsuperscript{21} This ultimately led to conflict when in 1983, the Riverside Sheriff’s Department raided Cabazon attempting to shut the gaming operation down.\textsuperscript{22} The resulting litigation went to the United States Supreme Court in \textit{California v. Cabazon Band of Mission Indians}.\textsuperscript{23} There, the Court held that while Congress had granted California broad authority over criminal jurisdiction on tribal land with Public Law 280,\textsuperscript{24} it had not granted general civil regulatory authority.\textsuperscript{25} The Court stated that games like lottery, bingo, and poker were allowed under State law and therefore the laws were regulatory in nature and could not be enforced against Cabazon.\textsuperscript{26} This decision sent shockwaves throughout the country and ultimately led to the passage of the Federal Indian Gaming Regulatory Act (IGRA) in 1988 which was instrumental in creating tribal gaming as we know it today.\textsuperscript{27}

California continued to warm towards gaming in 1984 when it again modified the state Constitution, this time to authorize a statewide lottery via the California State Lottery Act, but at the same time banned “casinos of the type currently operating in Nevada or New Jersey.”\textsuperscript{28} This led to California offering a plethora of lottery-based games such as Scratchers, Mega Millions, Powerball, Superlotto Plus, Fantasy 5, Daily 4, Daily 3, Hot Spot and Daily Derby.\textsuperscript{29}

The Legislature that same year also passed the “Gambling Registration Act” which required the California Attorney General’s Office to provide uniform, minimum regulation of cardrooms for the first time.\textsuperscript{30} The statutes,

\begin{itemize}
  \item \textsuperscript{20} Cal. Const. Art. IV, §19, subdivision (c) (1976); Penal Code §325.6.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{25} California, 480 U.S. at 207.
  \item \textsuperscript{26} Id. at 211
  \item \textsuperscript{27} 25 U.S.C.A. § 2701 et seq.
  \item \textsuperscript{28} Cal. Const., art. IV, §19, subdivision (d)
  \item \textsuperscript{29} Home: California State Lottery (no date) Home | California State Lottery. Available at: https://www.calottery.com/ (Accessed: 21 January 2024).
  \item \textsuperscript{30} Bureau of Gambling Control (2023) State of California - Department of Justice - Office of the Attorney General. Available at:
\end{itemize}
though, were quite limited and the program was never properly funded. As a result, much remained subject to local regulation and control as the state had effectively not preempted the field. This gap eventually led to the adoption of the Gambling Control Act in 1997 which enacted statewide regulation of cardrooms via the California Gambling Control Commission and the Bureau of Gambling Control.

During this period, cardrooms frequently sought court protection regarding the meaning of Penal Code section 330. In 1990, the owner of the Oaks Card Room brought a suit to confirm whether “stud-horse poker” included all forms of poker including the popular poker variation Texas hold ‘em. The court held that while they were both poker, Texas hold ‘em differed substantially from stud-horse poker and was not proscribed by Penal Code section 330. The legislature subsequently deleted stud-horse poker from the section the next year.

Similarly, while Penal Code section 330 prohibits “any banking or percentage game” it does not define those terms. Courts have interpreted banking to mean that “the ‘house’ or ‘bank’ is a participant in the game, taking on all comers, paying all winners, and collecting from all losers.” The court in Sullivan v. Fox was forced to take up the question of what constituted “percentage game[s]” when a cardroom sought declaratory relief regarding whether Pai Gow was a banking or a percentage game. The court focused on


31. Id.
34. The Oaks Card room or Oaks Card Club is one of the oldest cardrooms in the state, dating back to the 1890s. https://emeryvillehistorical.org/locations/oaks-card-club/.
36. Id.
38. Sullivan v. Fox, 189 Cal. App. 3d 673, 678 (Cal. Ct. App. 1987); People v. Carroll, 80 Cal. 153, 157-158 (1889) —[a banking game] is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost. The fund which is provided for that purpose is generally called the bank, and the person who conducts it the banker, Ex parte Lowrie, 43 Cal. App. 564, 567 (Cal. Ct. App. 1919); But see People v. Ambrose, 122 Cal. App. 2d Supp. 966, 968 (Cal. App. Dep't Super. Ct. 1953) - Where the players bet against each other and settle with each other, the game is not a banking game.
the use of the disjunctive "or" in section 330 to hold that banking and percentage had separate meanings and prohibitions. The court stated that a percentage game encompassed "any game of chance from which the house collects money calculated as a portion of wagers made or sums won in play, exclusive of charges or fees for use of space and facilities." It also referenced the Nevada taxation statutes for this same purpose as "games where patrons wager against each other and the house takes a percentage of each wager as a 'rake-off.'"

The court then turned to the Pai Gow rules which featured a dealer position which was continually and systematically rotated amongst each of the participants at the table with the "player-dealer" being required to provide a minimum wager and play against all the other participants. Under the rules, the cardroom had no interest in the outcome of play, did not participate in the play of the game, and did not wager against the participants. However, the court concluded that the cardroom "charge[d] a rental fee which may be based upon . . . the amount of each participant’s winnings, the amount of each participant’s bet[s], or the time that each participant plays" and the first two would make the game an illegal percentage game under Penal code section 330, whereas only the latter would have been permissible.

The court expanded upon Sullivan in Huntington Park Club Corp. v. County of Los Angeles and stated that Pai Gow played with a rotating player-dealer position and where the house did not have an interest or participation in the game, was not a banked game under Penal Code section 330 as the cardroom and no other entity maintains or operates a bank.

The court looked at banked games again in 1992 when the California State Lottery expanded into Keno. This "Nevada-style keno" was challenged as an impermissible banked game in violation of Penal Code section 330. There the court held that the keno game as operated by the California State Lottery was not in fact a lottery under state law but was instead a house banked game, in which the participants bet individually against the game’s operator, the California State Lottery who won when the players lost.

Questions about banked games arose again when in 1998, California passed Proposition 5 which enacted "The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998" which purported to authorize tribal

40. Id.
41. Id. at 679
42. Id.
43. Id.
44. Id.
49. Id.
gaming via statute. This bill sought negotiated compacts and a “player’s pool” from which participants would be awarded prizes. The tribal operators would in turn collect fees “on a per play, per amount wagered, or time-period basis.” It was hoped through the player’s pool that certain card games, such as blackjack would not be considered “banking games” but instead be lotteries. The court however viewed the previous 1984 constitutional amendment as constitutionalizing the statutes in place at the time and specifically the Penal Code section 330 prohibition against banked games. The court concluded that “the tribe must pay all winners, and collect from all losers” and that the “player’s pool” was a bank in nature if not in name because everybody has a right to bet against that fund and it collects the winnings and pays out the losses.

The immediate effect was short lived, for Proposition 1A was approved less than seven months later, which again amended the California Constitution to expand gaming. This amendment enabled the Governor to enter into compacts with California tribes so that they may operate “slot machines, lottery games … banking and percentage card games,” essentially authorizing casino style games. This resolution in favor of tribes led to the rapid expansion and development of tribal gaming operations throughout the state that collectively make over $8 billion a year in revenues and arguably has been the best development for California tribes since the 49ers and the Gold Rush decimated their populations.

The *Hotel Empls. & Rest. Empls. Int’l Union v. Davis* (HERE) case also laid the groundwork for another banked game question when it referenced the holding in *Oliver v. County of Los Angeles* regarding the players pool stating that a banked game “may be banked by someone other than the owner of the gambling facility.” In *Oliver*, the court was concerned with a game called “Newjack” which, similar to Pai Gow above, let the players play the game without the house serving as a bank. The court, though, believed the rules of the game

51. Id. at 601.
52. Id.
53. Id. at 606.
54. Id.
55. Id. at 607.
allowed a player-dealer to accept the deal for repeated hands and did not require others at the table to accept it.\textsuperscript{61} The court believed it therefore had the potential to be a banked game because it was “possible that the house, another entity, a player, or an observer can maintain a bank or operate as a bank during the play of the game.”\textsuperscript{62}

The Legislature responded to Oliver by adopting Penal Code section 330.11.\textsuperscript{63} This section initially defined “banking game” or “banked game” consistent with the courts above, as well as excluding from the definition games featuring rules similar to Pai Gow and Newjack also discussed above.\textsuperscript{64} Section 330.11 importantly states the rules must “preclude the house, another entity, a player, or an observer from maintaining or operating as a bank…” but the language also makes clear it does not “mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means.”\textsuperscript{65} This bill also added Business and Professions Code section 19984 to the Gambling Control Act which authorized the regulation and licensure of third party individuals or businesses who contracted with cardrooms to occupy the player-dealer position in these games.\textsuperscript{66} These services have come to be known as Third-Party Proposition Player Services, or TPPPS.\textsuperscript{67} While it may be asserted that games with a rotating player-dealer position occurred prior to 1983, that is the year that

\begin{itemize}
\item \textsuperscript{61} Id. at 1408.
\item \textsuperscript{62} Id. at 1409.
\item \textsuperscript{63} Penal Code §330.11. BUSINESS AND PROFESSIONS—GAMBLING—LICENSING AND REGULATION, 2000 Cal. Legis. Serv. Ch. 1023 (A.B. 1416) (WEST).
\item \textsuperscript{64} Pen. Code §330.11 (2024).
\item \textsuperscript{65} This section was modified the next year to eliminate the definition of banked game and to modify Penal Code 337j to prohibit fee collection based on a percentage. GAMBLING—CLUBS—FEES, 2001 Cal. Legis. Serv. Ch. 941 (A.B. 54) (WEST).
\item \textsuperscript{66} Cal. Bus. & Prof. Code §19984 (West).
\item \textsuperscript{67} Cal. Code Regs. tit. 4, §12002, subdivision (ap).
\end{itemize}
various cardrooms and cardroom associations assert games such as Pai Gow Poker and “Blackjack” with this rule element began to appear in cardrooms.68 

Despite these court cases and statutes, this question remains unsettled to this day with the impact of the HERE and Oliver cases as well as Penal Code section 330.11 and Business and Professions Code section 19984 still unresolved. In fact, this issue is currently a point of contention between the tribes, cardrooms, and the state. For instance, one tribe sued the state asserting the operation of these player-dealer games violated what they believed was the exclusive right to offer banked games in their compact while another tribe attempted to sue the cardrooms and TPPPS providers asserting it violated the Penal Code.69 This has even led to proposed legislation that would directly enable tribes to sue cardrooms and TPPPS providers to prohibit these games from being offered.70 

There have been additional points of friction between California Tribes, cardrooms, and even horse racing tracks. For instance, in the 2010s there were many bills seeking to authorize internet poker that all ultimately failed to leave the legislature with the sticking points being who should be able to participate and benefit as well as what it might lead to down the road for internet gambling in general.71 The last internet poker bill died in 2018 and the issue likely has not been taken up again because that same year the

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United States Supreme Court in *Murphy v. National Collegiate Athletic Ass’n*, struck down the Professional and Amateur Sports Protection Act (PASPA) which up to that point had prohibited sports wagering by states such as California. 72

Prior to *Murphy* the legislature had shown some interest in regulating fantasy sports, 73 but there had been little movement to amend or modify Penal Code section 337a which bans sports wagering. 74 While the reasoning and holding behind *Murphy* is beyond the scope of this article, the result was effectively a new Gold Rush with a massive wave of laws throughout the country authorizing sports wagering. 75 This has encouraged the growth of online sports wagering companies such as DraftKings, FanDuel, BetMGM, and Caesars who collectively control over 82% of the market. 76

The California Legislature attempted to step into this territory with a constitutional amendment in 2019 but that bill did not progress.77 The lure of California participating in this new Gold Rush was apparently too great though for in 2022, two Propositions were put on the ballot for consideration by California which would have again amended the constitution.78 Proposition 26 was initially put forward by certain Californian tribes and would have authorized in-person sports wagering in tribal casinos and at horse racing tracks. 79 Proposition 27 in contrast would have authorized in-person and mobile sports wagering and was supported by BetMGM, LLC, FanDuel, and DraftKings. 80 The fighting for and against these propositions

76. Id. at 1420-1421.
79. Id.
80. Id.
was intense, and despite a half-billion dollars being spent, neither was approved. 81

While the failed bill and Propositions 26 and 27 sought to amend the constitution, it is unclear whether this was necessary. Presumably, this is due to a belief perhaps that tribes have the exclusive right to this sort of “casino” activity under the compacts or perhaps that the HERE case constitutionalized Penal Code section 337a in addition to Penal Code section 330. However, it is not clear that exclusivity and the constitutional provision are actionable by the Tribes. 82 Additionally, for some, the argument that the HERE case constitutionalized the statutes about “casinos of the type currently operating in Nevada and New Jersey” including Penal Code section 337a is not as strong because New Jersey in 1984 when Article IV, section 19 was amended did not have sports wagering as Murphy was still 30 years away. 83

Regardless of how sports wagering ultimately comes about it is clear there is still strong interest. In 2023 two initiatives, Initiative 23-0031 “Allows for Legalization of Online and In-Person Sports Wagering” and Initiative 23-0030A1 “Legalizes Online and In-Person Sports Wagering and Other New Types of Gambling” were filed with the California Attorney General’s Office. 84 These two initiatives were even approved for gathering signatures, 85 but after withering opposition from the Sports Betting Alliance consisting of FanDuel, DraftKings, Fanatics, and BetMGM as well as the California Nations Indian Gaming Association the author threw in his cards and indicated he was pulling them. 86 Despite this, it seems likely, if not inevitable, that a sports


wagering bill or proposition is going to happen in California at some point in time as there could be upwards of $20 to $30 billion in wagers a year.\footnote{Kiszla, C. (2024) California Sports Gambling Push Fails Again, KTLA. Available at: https://ktla.com/news/local-news/california-sports-gambling-push-fails-again/ (Accessed: 24 January 2024).}

Despite the repeated failures to authorize internet poker or sports wagering, the reality is that online gambling including sports wagering, internet poker, and even other online banked games are currently occurring in California.\footnote{Gonzalez, S. (2021) Is Sports Gambling in California’s Future?, KQED. Available at: https://www.kqed.org/news/11899623/is-sports-gambling-in-californias-future (Accessed: 22 January 2024).} Some estimates suggest the illegal market captures $10 billion or more annually on sports betting alone.\footnote{Healey, J. (2022) Don’t bet on it. Wagering on the Super Bowl is illegal in California, Los Angeles Times. Available at: https://www.latimes.com/sports/story/2022-01-30/super-bowl-2022-betting-illegal-in-california (Accessed: 22 January 2024).} This is all without regulation, safeguards, or benefit to the state or tribes. As was the case in the past for horse racing in 1933, the lottery in 1984, and for tribal gaming in 1999 and 2000, the prohibition against most types of gambling passed following the 49er Gold Rush era has been continuously eroded in favor of more regulated, controlled, and safer gambling. Gambling has provided tax revenue for local jurisdictions as well as aiding tribes in protecting their sovereignty and cultural heritage.\footnote{Jones, M. (2020) California May Legalize Online Gambling: Pros and Cons. Available at: https://www.legalreader.com/california-may-legalize-online-gambling-pros-and-cons/ (Accessed: 22 January 2024).} \footnote{Association, C.G. (2019) New report finds California cardroom industry generates over 32,000 jobs and Nearly $5.6 Billion in Annual Impact on State’s Economy, PR Newswire: press release distribution, targeting, monitoring and marketing. Available at: https://www.prnewswire.com/news-releases/new-report-finds-california-cardroom-industry-generates-over-32-000-jobs-and-nearly-5-6-billion-in-annual-impact-on-states-economy-300954843.html (Accessed: 22 January 2024).} Eventually, the last remaining barriers against sports wagering and other online wagering will fall and the next California Gold Rush
will occur with legal and safe gambling, this time on the 49ers\textsuperscript{92} rather than gambling by the 49ers.

\textsuperscript{92} ...or the Rams, Chargers, or dozens upon dozens of other professional and amateur sports teams throughout the state.
Compliance has a broad meaning within the business world. Simply, compliance means those systems, processes, policies, and procedures that ensure the laws and regulations governing the business are being followed.

In the corporate world, compliance programs were enhanced or developed as a result of the Enron scandal. In the late 1980s, Enron was a rising business in the oil and gas industry, including the creation of energy derivatives. However, after several years of risky investments, related party transactions, and serious accounting failures, the company was left to declare bankruptcy, in the wake of allegedly spending $5 billion in cash over 50 days. This downward spiral was also fueled by poor accounting practices by the company’s outside auditors. After these events left a black eye on corporate governance, compliance programs were enhanced or developed as a result of the Enron scandal.

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3. Id.

4. Id.
governance and practices, the accounting industry committed to increased
measures and controls to facilitate corporate compliance.

Over a decade before the Enron scandal, casino companies in Nevada
were developing compliance programs to help ensure compliance with
Nevada’s stringent gaming laws and regulations. In 1984, the Nevada Gaming
Commission granted approval for Carma Limited, “a publicly-traded
corporation headquartered in Calgary, Alberta, Canada” to seek a gaming
license to own the Shenandoah Hotel-Casino in Las Vegas, Nevada.5 Prior to
this time, casino ownership was limited to U.S. companies and residents.

As part of the approval for the Canadian company to proceed, there was
a condition to any prospective gaming license that a compliance committee
be formed to submit quarterly reports to the Nevada Gaming Control Board
“on any business association with a person found to be unsuitable, material
civil litigation filed against Carma, any allegation or charge made against any
key executive of Carma or an affiliate company based on alleged criminal
conduct, any significant change in the financial condition of Carma, and any
activity that would be reported to the SEC by a United States Company.”6

This condition then allowed the Board to proceed with licensing Ginji
Yasuda, a Japanese citizen, who purchased the Aladdin Hotel and Casino
(now Planet Hollywood) in Las Vegas out of bankruptcy.7 During the
investigative process of Mr. Yasuda, the Nevada Gaming Control Board staff
were challenged with cultural differences and access to information.8 After the
investigation was performed, the Board recommended an additional layer of
oversight by requiring a gaming compliance committee “to monitor activities
of the [owner] to provide gaming authorities a level of comfort that the
[owner] is not engaging in any unsuitable situations or associating with
unsuitable persons.”9

As international ownership and publicly-traded corporations continued
to enter the Nevada gaming market, in 1991, the Nevada Gaming Commission
adopted a regulation that empowered it to impose a condition for a gaming
compliance program.10 Nevada Gaming Commission Regulation 5.045
provides that the Nevada Gaming Commission “may impose a condition upon
a license . . . to require implementation of a compliance review and reporting
system.” A compliance program benefits both the regulators and the
regulated because some core features of gaming compliance are to (1) ensure
there are no violations of gaming laws and regulations; (2) prevent

6. Id. at 221-222.
7. Id. at 224.
8. Id. at 225.
9. Id. at 226.
10. See NGC Regulation 5.045.
discipline action, such as fines or even license revocation, taken by the regulators against a gaming business; (3) ensure that management and regulators are informed of activities that could affect the suitability of the company, and (4) assist in the expansion of gaming activities of different types or to new markets.

Since Nevada does not have a renewal process for gaming licensing, the compliance committee and reporting system serves as a way for companies to comply with the Nevada legal requirement that those approved by the Nevada Gaming Commission to be part of the gaming industry “continue to meet the applicable standards and qualifications … and any other qualifications established by the Commission by regulation.”

In other words, compliance programs help gaming companies stay out of trouble and help regulators from having to dedicate resources from limited budgets to monitor company activities. The overall goal of gaming compliance programs in Nevada is for licensed gaming businesses and individuals to remain as suitable in their operations as they were at the time they were initially licensed by the Nevada Gaming Commission.

When imposing the condition, the Nevada Gaming Commission requires that the compliance program consist of “monitoring activities” pursuant to an approved written compliance plan. A gaming compliance plan generally consists of the following common elements – (1) designation of a compliance officer; (2) creation of a compliance committee and meeting requirements; (3) areas that require monitoring and reports; (4) an internal reporting system; and (5) cooperation and communication with the regulators. The plan must be submitted to and approved by the Nevada Gaming Control Board.

A gaming compliance program includes the designation of an employee to serve as a compliance officer for the gaming operation, who then must be administratively approved by the Nevada Gaming Control Board to serve in that role. This individual will be responsible for implementing the compliance plan, providing training to employees about the requirements of the plan, overseeing the internal reporting system, and serving as a contact between the company, regulators, and the compliance committee.

The compliance plan will also confirm creation of a gaming compliance committee. The plan will include size, frequency of meetings, and other governance requirements. In Nevada, compliance committees are expected to have at least one member independent of the gaming company and one member who is familiar with Nevada gaming laws and regulations. The independent member and the member with Nevada gaming knowledge can be the same individual. There are some companies whose compliance committee consists entirely of independent members. It is not uncommon for

11. NRS 463.170(8)
12. NGC Regulation 5.045.
former Nevada Gaming Commission and Nevada Gaming Control Board members or Nevada gaming lawyers to serve on compliance committees. The compliance committee will generally meet on a quarterly basis and review the reports prepared by the compliance officer that derive from the gaming company’s internal reporting system.

The compliance plan will designate the information that is required to be gathered by the compliance officer pursuant to the internal reporting system and reviewed by the gaming compliance committee. The following are common areas for reporting and the reasons why they are important to maintaining ongoing suitability –

**Purchases and Leases of Gaming Devices**

There are federal and state laws and obligations for the transport, sale, leasing, and operating of gaming devices, such as slot machines. The compliance program helps ensure that gaming devices are being purchased from licensed suppliers.

**Material Litigation**

A compliance committee will want to review litigation that may have substantial financial or reputational impact on the company, rather than litigation that occurs in the normal course, such as personal injuries. The compliance committee will want to know if there are patterns to litigation claims, such as discrimination or repeated contract breaches.

**Material Financings or Loans**

Investments or funding for a gaming operation should be reviewed to guarantee that it comes from suitable sources. Further, the purpose and use of financing should for legitimate business activities.

**Transactions with Suppliers (Vendors)**

The compliance committee must review business relationships with certain vendors to make sure the supplier is suitable.

Other common reports for compliance committee review include appointment or changes in officers, directors, and key executives of the company; compliance policies and conditions; lobbyists and consultants; and regulatory notices and violations. Another important area of reporting is allegations of wrongdoing involving the company, key personnel, or employees, as well as arrests, criminal charges, or prosecutions. These reports will help the company track any vulnerabilities for unsuitable associations or situations.
The failure to maintain the standards and qualifications for a gaming license or approval constitutes grounds for disciplinary action. 13 Thus, if there is a failure in the compliance program, the gaming license could be in jeopardy or a penalty could be imposed against the business. An example of this occurred back in January 2004 when the Nevada Gaming Control Board issued a complaint for disciplinary action against the Hard Rock Hotel & Casino (“Hard Rock”). 14 Although the newsworthy part of the complaint was that the advertising content of the Hard Rock potentially violated Nevada Gaming Commission regulations, the complaint also alleged that the Hard Rock failed to use its compliance officer and committee to review advertising in accordance with commitments previously made by the gaming operator to the Nevada Gaming Control Board. 15 Although there were hearings before the Nevada Gaming Commission on the matter, the complaint finally settled whereby the counts concerning the “questionable” advertising content were dismissed, but the Hard Rock agreed to pay a fine of $100,000 for the compliance failures. 16

Nevada has had decades of experience with gaming compliance programs. As a mature privileged industry, compliance programs have helped uphold the integrity and trustworthiness of gambling in the state.

13. NRS 463.170(8).
15. Id.
Pressing field glasses to his eyes, California Attorney General Earl Warren stood at the bay windows of a rented room at the Beach Club of Santa Monica, peering towards boats anchored off Santa Monica Bay. One might ask what the future California Governor and Chief Justice of the United States Supreme Court was doing on that afternoon of August 1, 1939. Thoughts of groundbreaking constitutional theories likely were far from his mind.

Warren, previously District Attorney of Alameda County, was known for his relentless prosecution of gambling establishments and public corruption. He had been elected California’s Attorney General after handily capturing both the Republican and Progressive nominations and winning the Democratic primary. On this day in August, the Attorney General was supervising, through a walkie talkie, 250 state and local law enforcement officers whom he had commandeered through personal persuasion from the United States Coast Guard and the California State Department of Fish and Game, as well as officers and skiffs from the Los Angeles Sheriff, Eugene Biscailuz, and from Burton Fitts, the Los Angeles District Attorney. Warren had additionally obtained the support of the new, reform-minded mayor of Los Angeles, Fletcher Bowren and was flanked at the Beach Club by Los

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1. Earl Warren, The Memoirs of Chief Justice Earl Warren (Doubleday & Company, Inc. 1977), 104. Chief Justice Warren did not consider himself “a crusading District Attorney” as he had been called, but did not bristle when his Office was called “a boy scout” organization, acknowledging that his Office was “effective” and “We did have the fervency of the Scout movement.”

2. Ed Cray, Chief Justice (Simon & Schuster 1997), 94.
Angeles Sheriff Biscailuz and Los Angeles District Attorney Fitts. Altogether, more than 25 boats and motor launches approached the four gambling ships, Tango, Showboat, Texas, and the most famed luxury yacht the Rex, each anchored more than three miles off the Southern California piers.  

The Attorney General's time as District Attorney had convinced him of the necessity of halting the open and notorious gambling which had fostered widespread corruption in his community. Warren's attention to the prosecution of gambling was driven not so much by any personal or religious belief in its eradication, but rather by his experience as District Attorney, where he saw illegal gambling leading to widespread corruption among law enforcement and government leaders. His record of prosecutions included both major and minor criminal offenses, but his years as District Attorney were unique in the large number of successful indictments and prosecutions of police officers, public officials, and lawyers for bribery, fraud, and grand larceny.

As District Attorney, Warren often complained that his office had no investigators or bureaus of investigation upon which he could thoroughly rely. He recognized that the schemes of corruption, often financed by illegal gambling, were not limited to his county of Alameda. From his office, he was aware of numerous patterns of police protection of gambling operations across county lines. That experience convinced him that law enforcement in California urgently needed not only additional resources but also coordination of local law enforcement.

Warren was able to convince the Board of Supervisors to hire 10 new investigators to be able to adequately prepare and present successful cases. Warren's many prosecutions of smaller gambling operations in Alameda County led to the indictment and successful prosecution of Burton F. Becker, Chief of Police of the City of Piedmont. Becker was convicted of not only ignoring the bootlegging, slot machine and lottery interests, but of actually telling the bootlegger and owners of slot machines what the "cost" of their operation would be. District Attorney Warren was able to successfully prosecute the sheriff and eventually commissioners in the county who also were secretly receiving percentages on all paving contracts.

Now, as Attorney General, Warren was confronted with gambling ships in California’s Santa Monica Bay. The floating casinos had been wildly successful, but, unlike his experience in Alameda County, the Attorney...
General was able to win the support of local law enforcement. In Santa Monica, the owner of the largest and most successful ship, the Rex, invited as many as 3,000 guests a day, who daily wagered as much as $400,000. The owner of the Rex, Anthony (Tony) Corrono Stralla, a longtime gambler and petty defendant, openly advertised the joys of his business: “All the thrills of Biarritz, Riviera, Monte Carlo, and Cannes – surpassed.”7 Prior attempts by the Los Angeles District Attorney to stop the gambling ships had failed when courts found he had no jurisdiction over ships anchored three miles offshore. Relying upon the early geographical accounts of the Bay and federal and state legislative history, the court mapped the locations of the ships from the landing piers and held that the ships were moored beyond the three-mile limit.8 Convinced by the decision, Corrono and the owners of the other ships were persuaded that they were beyond the reach of local law enforcement.

Warren and his Chief Assistant Warren Olney III, were not persuaded. Warren not only continued to challenge the jurisdictional argument in the California Supreme Court, he also presented a novel theory to halt the gambling: filing a civil complaint, branding the gambling ships “public nuisances,” and serving notices of abatement against the ship owners. His theory was that the vessels induce people of limited means “[t]o spend upon wagers the money necessary for the support and maintenance of their minor children and aged parents.”9 For Warren the ships had caused the loss of jobs by reason of the “idle and dissolute habits encouraged and developed by gambling.”10

In July of 1939, armed with two theories of enforcement, Olney went first to Coast Guard Vice Admiral Stanley Parker to ensure that the Attorney General’s planned efforts would not be in conflict with federal law. Once having achieved the enthusiastic assistance of that agency and the United States Attorney in Los Angeles, Attorney General Warren proceeded to collect and organize a fleet including U.S. Fish & Game Commission patrol boats and 16 water taxis. Warren next went to the Mayor and the Los Angeles District Attorney for their assistance. Overcoming the Sheriff’s concern that the pending court decision would bar their enforcement actions, Warren

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10. Ibid., 133
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convinced him to provide 150 officers. The District Attorney provided 50 more, some of whom infiltrated the gambling ships posing as customers.

Armed with this armada of support, Warren’s office served an injunction on each of the ships requiring them to abate the public nuisance. The owners of the ships, represented by Jerry Geisler, one of the celebrated criminal defense lawyers of the thirties, confidently ignored the Attorney General’s orders to stop.

When the abatement order was disregarded, at 3 p.m. on August 1, 1939, all four ships were raided by the assembled fleet. Three of the ships offered no resistance to the armed officers and boats. The Rex, however, under the leadership and control of Tony Correro - who liked to be called “Admiral” - determined to resist and turned fire hoses on the boats and the officers. 11

Concerned with potential harm to the more than 600 people aboard the Rex (including undercover agents), one of the officers returned to the Santa Monica Beach Club to inform the Attorney General and get further instructions. Warren’s initial instructions had been that if the officers were not permitted to enter the ship, then the gangway should be blocked, so none of the customers could leave. He believed the customers would put pressure on Cordero to relent and surrender. Concerned with the customers’ safety, Warren then decided the customers should be allowed to leave that same evening.12

Nevertheless, “Admiral” Correro and his crew continued to hold out. Fortified by provisions of food and liquor intended for hundreds of patrons, they refused to leave the boat, protecting themselves with large water hoses, which they turned on the small boats attempting to board. As a gesture greatly enjoyed by those writing the news stories, the crew threw bottles of whiskey down to the waiting newsmen in small boats. The Los Angeles Times and Santa Monica newspapers followed the stand-off with breathless commentary and pictures of the boats. After approximately six or seven days, Correro surrendered, smiling at the cameras and explaining that he needed a haircut and “the boat didn’t have a barber.”

11. Ibid., 133-135

12. There are significant disputes between the Memoirs of Earl Warren, Cray’s biography, Chief Justice, and subsequent articles listed as resources as to when and at whose direction the customers were allowed to leave in the early morning of August 2. In most cases, when there has been a difference of recollections, I have chosen Warren’s as the most credible, but in this case, it appears that “Admiral” Correro did not capitulate until days later. See, e.g., Victoria Bernal, Revisiting the 1939 Battle of Santa Monica Bay, (2021); Daniel Miller, Column One: The secret history of L.A.’s glitzy gambling boat kingpin – and the raid that sank him, (Los Angeles Times, 2021).
Rather than continuing criminal prosecutions, the Attorney General and District Attorney settled the nuisance suits with all four boats. The gambling money aboard was sacked and deposited in the State Treasury. All ships were then towed into port by order of the court. All gambling paraphernalia was destroyed. All money was confiscated and additional fines were paid. And, as it turned out, part of the value of the Rex went to the United States government, to pay back taxes.\(^\text{13}\)

Importantly, the California Supreme Court adopted the Attorney General’s jurisdictional argument. Under the California Constitution, the state’s boundaries included “[a]ll the … bays along and adjacent to the coast” and extended 3 miles from those boundaries into the Pacific Ocean. It was clear that the Rex and the three ships were more than 3 miles from the landing piers and some of the land surrounding the Santa Monica Bay, however the Supreme Court held that California’s waters included all of Santa Monica Bay, defined by a line running from Point Dume in Malibu to Point Vicente in Palos Verdes, which was more than 12 miles off the Santa Monica coast. Thus, the 3-mile limit began after that line — not from the landing piers.\(^\text{14}\)

As Warren’s memoir recounts, “[i]t was our thinking that the State’s jurisdiction ran 3 miles seaward from a straight line drawn from headland to headland. In effect, this meant that the ships, in order to be beyond our jurisdiction, had to be at least 10 miles out to sea. That would be impractical for them for two reasons. First, it would be too long and rough a trip for the little taxis, and second, the anchored ship in the open Pacific swells would cause so much sea sickness that most people would lose all desire to gamble.”\(^\text{15}\)

Warren also recalls that “[o]ur ultimate objective of closing all the gambling ships was achieved, and I must say that, of all the raids on law violators I have known, these, as organized and executed by (his assistant)
Warren Olney with the help of my investigators . . . were by far the most intelligently planned and successfully carried out.\textsuperscript{16}

Warren’s experience, first as a District Attorney, and then as Attorney General, to coordinate multiple levels of law enforcement in the Battle of Santa Monica Bay, convinced him that substantial changes were necessary to establish order from what was essentially a nonexistent chain of command in California.

Warren filled that void. As Secretary of the District Attorneys’ Association of California, he drafted an initiative for the voters of California that proposed a constitutional amendment. Warren argued in favor of Initiative, Proposition No. 4: “[e]ven when we know who the criminals are it is not only difficult but often impossible to arrest them, and the manner in which numerous other criminal gangs have been playing hide-and-seek with the public authorities has truly become a national disgrace.” The fault, he argued, “lies largely in the lack of organization of our law enforcement agencies.” For him, law enforcement in California was big business, costing the people of the state $30 million a year, and it was being run “in a most un-business-like manner.”\textsuperscript{17}

Warren’s solution to the lack of coordination and resources was to make the Attorney General the supervisor and coordinator for our county law enforcement agencies:

“Subject to the powers and duties of the Governor . . ., the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices . . . Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.”\textsuperscript{18}

While District Attorney, Warren foresaw that the Attorney General could be an instrumental and important arm of the State government. The Attorney General prior to 1934 had approximately 50 deputies who were paid very little

\textsuperscript{16} Ibid., 136-137

\textsuperscript{17} Voter Information Guide 1934: California Ballot Proposition and Ballot Initiatives @ UC Hastings Scholarship Repository.

and were permitted to develop their own private practice of law. The office had no central filing system and no calendar control — each deputy handled his own phase of the work with little supervision.19 The Attorney General had no independent criminal law enforcement power, except to handle criminal appeals in the State and Federal appellate courts. Warren also proposed in 1934 that the Attorney General be constituted as a full-time job with a salary equal to that of a justice of the California Supreme Court.20 These reforms, too, were written into the 1934 constitutional amendment:

“The Attorney General shall receive the same salary as that now or hereafter prescribed by law for an associate justice of the Supreme Court, and he shall not engage in the private practice of law, nor shall he be associated directly or indirectly with any attorney in private practice; and he shall devote his entire time to the service of the State.”21

The constitutional amendment was enacted by the voters by a “very substantial vote” in 1934.22 At the time of passage of the constitutional amendment Ulysses S. Webb was the State Attorney General. Due to the high visibility of Warren in passing the constitutional amendment, many Californians expected that he intended to run for the office. Because of Warren’s great respect for Webb, Warren told him that he had no intention of running against him, but should Webb decide to retire, he asked to be informed. Three years later, Webb called Warren into his office and said he believed it was time to retire at the end of this term in 1938, opening the way for Warren’s election.23

Upon Warren’s entry into the office as Attorney General, he followed the mandate of the Constitution and increased the criminal jurisdiction of the office and developed the beginnings of an office of investigation with adequate resources. The salaries of the deputies were increased and deputies were no longer permitted to represent private clients before state agencies. Although they initially were permitted to keep some private cases, they were not permitted to work on them with State resources.24 The office continued and expanded its responsibility to serve as the civil lawyer for all State

20. Ibid., 109.
23. Ibid., 110.
24. Ibid., 130.
agencies and provided written legal advice which was collected after distribution in bound volumes. In addition, Warren was active in developing police education utilizing the resources of local colleges to emphasize "[D]eveloping police work into a thorough-going profession." He maintained that "[t]he best way to achieve this is to employ enlightened and fair procedures which the public would respect."26

Warren believed that in his years as Attorney General that commercial gambling had been "pretty well subdued" except for a booking racket on horse races. In some places, almost every cigar store placed bets and runners solicited bets in office buildings, stores, shops, and on street corners. The racket was successful through the use of the telephone. The Attorney General prepared a civil injunction to prohibit Pacific Telephone & Telegraph from leasing its wires for that purpose. But in this case, the Attorney General was not successful. The California Supreme Court said that based upon a prior case against a Chinese lottery, it was not a public nuisance.27

Today, Earl Warren — and the “Warren Court” — are remembered principally for the desegregation of education, democratizing elections, and curbing police abuses.28 These reforms were long overdue. But Warren’s recognition of constitutional limits on states’ action is entirely consistent with his lifelong commitment to effective law enforcement, which he advanced across the Golden State and on its territorial waters.

28. In the words of Justice Stevens, at least three of Chief Justice Warren’s opinions ‘…represented giant strides forward on the road to formation of a more perfect union: Brown v. Board of Education (1954), invalidating racial segregation in public schools; Reynolds v. Sims (1964), applying the “one person, one vote” rule to the election of state legislatures; and Miranda v. Arizona (1966), requiring state and local law enforcement officers to safeguard the voluntariness of confessions by prefacing their custodial interrogations of suspects with warnings comparable to those that the FBI and the British police used. Each of those opinions was a principled application of constitutional law that correctly rejected earlier precedent. See, e.g., Stevens, J. (2011:98) Five Chiefs. New York. Little, Brown and Company.
Book Resources:


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2. A Town in the News: The Battle of Santa Monica Bay, Santa Monica History Museum (Aug. 7, 2020), [https://www.youtube.com/watch?v=rqTrcKLlI-0](https://www.youtube.com/watch?v=rqTrcKLlI-0)
3. The Era of the Gambling Ships & the Battle of Santa Monica Bay, The Los Angeles Almanac (last visited Sept. 26, 2023) [http://www.laalmanac.com/history/hi06ee.htm](http://www.laalmanac.com/history/hi06ee.htm)
4. Victoria Bernal, Revisiting the 1939 Battle of Santa Monica Bay, (Jun. 7, 2021)

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2. *People v. Stralla*, 14 Cal. 2d 617 (1939) (Stralla II)

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Javiera Sothers*

INDIAN GAMING AND SOVEREIGNTY: LOOKING BEYOND THE FORT McDOWELL STANDOFF

Introduction

On the morning of May 12, 1992, FBI agents stormed the Fort McDowell casino in Arizona. Their one mission: to confiscate more than 300 gaming machines inside the Yavapai tribe’s booming casino operation. They did not expect resistance as they had already finished raiding several other tribal casinos with ease. But much to their surprise, a multitude of tribal members gathered around the casino and formed a blockade, trapping dozens of FBI agents and trucks from leaving. The stand-off lasted five hours until Arizona Governor Fife Symington flew down and negotiated a cooling off period with Fort McDowell President Clinton Pattea in hopes of reconciliation. The eventual resolution marked a turning point for the Yavapai and other tribes all over the U.S. who sought sovereignty over their gambling endeavors.

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However, although this was a historic success, it was one of many steps that were needed to enable tribal gaming to flourish.

**Tribal Gaming Origins**

The cornerstone of the standoff at Fort McDowell, and by extension tribal gaming, was sovereignty. Tribes have sought sovereignty and control for their own independent affairs for decades. Sovereignty encompasses one of the greatest controversies in tribal gaming and has brought about a number of complex legal issues. In the 1800s, local treaties were used to control tribes and take land from them. With the creation of the Bureau of Indian Affairs in 1824 and the Dawes Act in 1887, which limited the amount of land each head of an Indian family could own, tribal land was quickly sold off, partitioned, and removed from family units, forcing tribes to become “wards” of the state and stripping them of their sovereignty. Congressional support of tribal sovereignty only came about in the Indian Reorganization Act of 1934, which allowed for tribal constitutional governments to be established.

However, as tribal sovereignty grew, economic dependence continued to plague the tribes. Many suffered from “historically rooted socioeconomic adversity.” Resources from the federal government were minimal and only for the most basic of needs. Unemployment ran over 30% and as high as 70% on some reservations before bingo was introduced. Before opening its first casino in New Mexico in 2008, the Navajo Nation faced an unemployment rate of more than 50% and poverty levels exceeding 40%. The tribes were in dire need of a source of income in order to become self-sufficient. This desire for self-determination and the ability to freely pursue their social, cultural, and economic development was a major drive for tribes to pursue gaming.

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4. INDIAN GAMING 6 (Stuart A. Kallen, ed., 2006).
6. Id. at 19.
7. Id. at 19–20.
8. Id. at 20.
12. Meister, supra note 9, at 386.
ventures in the 1970s. Gaming was not foreign to them either. Rooted in their culture, Native Americans used gaming to settle disputes, to entertain, to make profit, and in certain ceremonies before the arrival of the Europeans.

In the late 1970s and early 80s, games of chance began to proliferate. Non-profit groups were utilizing bingo to raise funds and state governments were dabbling in lotteries. Tribes quickly took to this growing trend. The Seminole Indians in Florida ran the first Indian bingo hall in 1979 from a cigarette shop. Early attempts in Washington by the Puyallup tribe to operate casino-type gambling were strongly opposed by the mayor of Tacoma and other officials. What’s more, these Indian gaming operations began to take. At the dawn of 1985, Indian gaming revenues were already in the hundreds of millions, and states were looking at a slice of the pie.

Since tribes were forced to “govern within the limits of federal and state criminal laws,” but were left largely to their own devices when it came to civil law, tribal governments claimed their right to operate gaming since it fell under the latter and not the former. However, as tribal gaming became more successful, states began to dislike the unregulated manner in which it was conducted, along with potential tax revenue being diverted from them and utilized for tribal needs instead. This reflected a common sentiment in tribal history where government intervention occurred only when tribes had resources worth seeking, but were otherwise left alone. Since many of the bingo halls operated by tribes did not comply with state laws, state officials sought to shut them down. Legal battles arose as tribes responded in kind by suing in federal court, claiming that states had no right to enforce their

14. Id.
16. Id.
18. Id. at 177.
21. Id.
laws in Indian country. Following these battles, a number of landmark court cases were decided that would solidify tribal gaming rights.

**Tribal Gaming Rights in the Courts**

One of the first important steps towards Indian gaming sovereignty was *Seminole Tribe of Florida v. Butterworth* in 1981. The Seminole tribe’s bingo operation had become highly profitable and the state of Florida mandated that the operation be regulated by a Florida statute that would force all proceeds to go to charity. The 5th Circuit Court of Appeals ruled in favor of the tribe and asserted that the state had no authority to regulate the tribe’s bingo operation and that such an operation was not contrary to the state’s public policy. The court reasoned that since Florida did not prohibit but merely regulated bingo, the Seminole Tribe was not prohibited from operating a bingo hall by Florida’s civil regulatory laws. The decision was appealed and ultimately upheld by the U.S. Supreme Court. In essence, “the Court ruled that if bingo was legal elsewhere in the state, states could not prohibit bingo on Indian reservations, and states could not regulate it due to sovereignty.” The 9th Circuit Court of Appeals took a similar stance a year later in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, where the court held that California could not regulate the tribe’s bingo hall near San Diego. It is no surprise that as a result of these decisions, Indian bingo and gambling halls proliferated.

Then in 1987 came the landmark case that would cause a frenzy among regulators: *California v. Cabazon*. The Cabazon case has been dubbed “the most important Indian gaming court case to date.” The circumstances in Cabazon were comparable to the earlier Seminole and Barona cases. The small Cabazon Band of Mission Indians had opened a successful bingo operation in Riverside County, California. The Cabazon tribe’s operation offered poker and other card games to the public, which the Riverside county sheriff claimed...
fell under the state's jurisdiction to regulate.\(^3^4\) A raid by the Indio City Police Department, a subdivision of Riverside County, on a Cabazon card club and the subsequent arrest of over a hundred band members quickly ignited the situation, and the band filed suit.\(^3^5\) The Ninth Circuit ultimately agreed with the tribe and held that the city of Indio's attempted annexation was void.\(^3^6\) Thereafter, the Cabazon and Morongo bands, another tribe that had been operating bingo halls in the state, sought declaratory judgment enjoining the sheriff of Riverside from enforcing state and county laws against their gaming operations, and the district court agreed, with the Ninth Circuit affirming the decision in 1982.\(^3^7\)

California appealed, and the Supreme Court granted certiorari in 1987.\(^3^8\) California argued that it had substantial state interests in regulating gambling activities on Indian land.\(^3^9\) It also asserted that unregulated tribal bingo games created a high risk of involvement in organized crime,\(^4^0\) although no substantial evidence was ever found of organized crime existing.\(^4^1\) In particular, California depended on what at the time was known as Public Law 280 (or PL 280). Enacted in 1953, PL 280 gave certain states, including California, Nebraska, Minnesota, Oregon, and Wisconsin, a broad grant of criminal and a more limited grant of civil jurisdiction over most tribes within their borders.\(^4^2\) The Supreme Court had previously ruled in *Bryan v. Itasca County* that PL 280's authority was limited to adjudicatory rather than regulatory civil jurisdiction.\(^4^3\) Since California permitted a substantial amount of gambling at the time, the Court concluded in *Cabazon* that California regulated rather than prohibited gambling, and thus PL 280 did not allow the state to interfere in the tribe's gaming operations.\(^4^4\)

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36. *Id.* at 49.
37. Sohn, *supra* note 22, at 141; *id.* at 49.
39. *Id.* at 49–50.
40. *Id.* at 50.
41. Fixico, *supra* note 17, at 184.
42. Mason, *supra* note 25, at 33; Meister, *supra* note 9, at 376–77. The tribes excluded by PL 280 included Minnesota’s Red Lake Chippewa Reservation, Oregon’s Warm Springs Reservation, and Wisconsin’s Menominee Reservation.
43. Sohn, *supra* note 22, at 141; Meister, *supra* note 9, at 377.
44. Meister, *supra* note 9, at 377.
The Court ultimately issued its momentous, and divided, 6–3 decision on February 25, 1987 in favor of the Cabazon and Morongo tribes.45 The Court claimed that the county had no legal authority to shut down the tribes’ gaming operations.46 The Court also claimed that as long as gambling did not violate state public policy, tribes were allowed to operate their gaming businesses without state intervention.47 This effectively cemented tribal sovereignty from the prying hands of state and local governments. The court’s decision was momentous; after its publishing, state and commercial interests lobbied Congress for state regulation, while tribes argued for exclusive regulation or, at worst, federal regulation.48 For a moment, it seemed like no solution was possible.49 Until, that is, a year later, when a compromise was spun into the most important piece of legislation for Indian gaming: the Indian Gaming Regulatory Act.

The Indian Gaming Regulatory Act

After the landmark decision by the United States Supreme Court in Cabazon, concerns for the Pandora’s box of unregulated Indian gaming festered. Since the Court in Cabazon removed the power of regulation from the states, the federal government, or more specifically, Congress, was the only non-Indian actor left that could limit the Indian gaming industry.50 Although Congress had considered various bills to regulate Indian gaming before Cabazon, it felt pressured to come to an agreement, and quickly, after the Court’s unprecedented ruling.51 The most difficult obstacle in passing legislation to address Indian gaming regulation was sovereignty. Congress did not want to unilaterally impose complete federal or state control over the tribes, but they were not willing to allow the tribes to continue running unregulated games.52

The resolution came in the form of Senate Bill 555, or what is commonly known as the Indian Gaming Regulatory Act (or IGRA).53 On October 17, 1988, President Ronald Reagan signed the IGRA into law.54 The Indian Gaming

45. Fixico, supra note 17, at 180.
46. Id.
47. Meister, supra note 9, at 377.
48. Id. at 378.
49. Rose, supra note 11, at 6.
50. Sohn, supra note 22, at 142.
51. Id.
52. Rose, supra note 11, at 6.
54. Fixico, supra note 17, at 182.
Regulatory Act primarily did two things: divide Indian gaming into three categories, and provide different regulatory guidelines for each one. In the words of Representative Morris Udall, an influential congressman with a specialty in Indian affairs in the Southwest, the bill was a “delicately balanced compromise” between the tribal governments, the states, and the federal government. The IGRA split gaming into three classes: Class I, Class II, and Class III gaming. Class I encompassed nominal social games played for ceremonial purposes, Class II detailed bingo-like games and poker, and Class III gaming included more of the “casino-style” games, such as blackjack, roulette, craps, and slot machines, to name a few. While the IGRA allowed for Class I gaming to be regulated by the tribes only, it mandated that Class II and Class III gaming were to be jointly regulated by the tribes and the National Indian Gaming Commission, with Class III requiring that the tribes “negotiate a gaming compact with the state and draft its tribal gaming ordinances in conformity with that tribal-state compact.” The IGRA also required that a state deal with a tribe in good faith to enter into a gaming compact when a tribe requested one. It also required that the tribal-state compacts serve the interests of both parties, and that gaming revenues fund tribal government operations and similar interests.

The IGRA signaled a new wave of sovereignty for tribes all over the U.S., but in particular, it gave a small tribe in Arizona the fuel to fight for its economic independence. Merely three years after the IGRA was passed, tribal members held their own against Arizona Governor Fife Symington and the FBI agents that had come knocking on their door.

**The Fort McDowell Standoff**

The Yavapai Indian community in Fort McDowell, Arizona, is tight-knit and tenacious, especially in the face of adversity. The community historically faced limited resources and somber economic prospects. Their sand and gravel business, farming, and service stations were not sufficient to generate enough funds to improve the wellbeing of the Yavapai people. In an effort
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to combat these hardships, the tribe opened and operated a small bingo parlor in 1984.63 The parlor became a success, and the Yavapai people, among other tribes in Arizona, quickly introduced slot machines and video poker.64 At the time of the raid by FBI agents, the tribe’s revenues from the machines reached $3.4 million a month and were being used for new homes, healthcare, jobs, and other services tribal members desperately needed.65 However, the Yavapai had not yet signed a tribal-state gaming compact with Arizona.66

Governor Fife Symington refused to sign a gaming compact with the tribes, afraid that the state would become a “gambling mecca.”67 In fact, he never intended for Indian casino style gaming to be permissible in the state.68 Since Arizona already regulated dog and horse betting, the tribes, including the Yavapai, felt the state was compelled to create gaming compacts with them under federal law.69 Symington, refusing to budge, asked U.S. Attorney Linda Akers, and by extension, federal marshals and the FBI, to resolve the

Tribal members protesting against the Arizona governor’s attempt to raid the gaming machines at the Fort McDowell casino in 1992. Image courtesy of Independent Newsmedia, Inc. USA.

63. Id. at 27; Alflen, supra note 1, at 27; Krol, supra note 3.
64. Alflen, supra note 1, at 27; Krol, supra note 3.
65. Krol, supra note 3.
66. Alflen, supra note 1, at 27.
67. Krol, supra note 3.
68. Alflen, supra note 1, at 27.
69. Krol, supra note 3.
situation. 70 FBI agents quickly raided four tribal casinos in the state, which caught the tribes completely by surprise. 71 Meeting no resistance, the FBI quickly turned their attention to Fort McDowell. 72

They arrived unannounced on the morning of May 12, 1992, and began to haul and confiscate hundreds of gaming machines into trucks from the Yavapai tribe’s casino. 73 Since the Attorney General had promised to give at least a day’s notice before the state instituted a raid, the Yavapai people felt betrayed. 74 Watching the raid unfold, the tribal members nearby quickly spurred into action. Once the FBI drivers and agents were ready to drive away with their haul, they found all of the parking lot’s exits completely blocked. 75 Word of mouth quickly spread amongst the tribe, and more Yavapai rounded up whatever they could find, including old cars, pickups, and construction equipment, to blockade the agents in. 76 The standoff prevented the FBI agents from removing casino property and caused a media frenzy, with news helicopters, cameras, and reporters hailing the scene. 77

Governor Symington heard about the standoff through a reporter who called his deputy chief of staff. 78 Concerned about the situation and afraid of the possibility of violence, Symington flew out to Fort McDowell. 79 There, he and Fort McDowell President Clinton Pattea negotiated a 10-day cooling off period in order to come to an agreement. 80 During the 10 days, powwows were held, and several members of other tribes in Arizona, New York, Oregon, Washington, and New Mexico came to support the Yavapai. 81 After the cooldown period ended, Fort McDowell members held a march in Phoenix to raise awareness of their struggles for sovereignty. 82 Eventually, Symington agreed to negotiate a gaming compact on May 22, the first of its kind in

70. Krol, supra note 3; Alflen, supra note 1, at 27.
71. Alflen, supra note 1, at 28, 72.
72. Alflen, supra note 1, at 72; Alflen, supra note 1, at 72.
73. Id.
74. Id.
75. Id.
76. Id.
77. Krol, supra note 3.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
Arizona. The Governor went on to sign compacts with 15 more tribes between 1992 and 1994, and by 1994, ten tribal casinos were in operation. The compacts allowed the tribes “exclusive rights” to operate their casino-style gaming and established comprehensive gaming regulations in Arizona.

The standoff by the small Yavapai tribe allowed for the first Indian gaming compact to be signed in Arizona and for Indian gaming to flourish in the state. As of 2023, all 22 tribes in Arizona have signed tribal-state compacts governed by the IGRA. The IGRA has allowed for Indian gaming to become a multi-billion dollar industry. Indian gaming revenues have grown significantly since 1988 when IGRA was enacted, with revenues increasing from $125 million in 1985 to $4.547 billion in 1995. In 2022, tribal gaming brought in $2.7 billion in revenues. It is clear that Indian gaming has become a runaway success and an important source of revenue for the tribes who operate gaming establishments.

Conclusion

When the hundred or so members of the small Yavapai tribe decided to form a stand-off, they did so not only out of concern for their gaming establishment, but for their jobs and livelihoods. The momentous day on May 12, 1992, represented a stand for tribal rights for not only the Yavapai but all other tribes looking to secure sovereignty in their affairs. May 12 is now a source of pride and a tribal holiday for the Yavapai. The stand-off was, in many ways, a reflection of how tribal gaming rights came into being, with a
series of blockades and negotiations coupled with the long and arduous process of court decisions like *Cabazon* and legislation like the IGRA allowing for tribes to attain their self-sufficiency. As Victor Rocha, nationally known tribal gaming expert, aptly put it, “[Fort McDowell’s] fight for its sovereign rights is a lesson that resonates… [the standoff] was just an incredible event and a touchstone for tribal sovereignty.” 92 Tribal gaming will be sure to continue to be an influential and important part of the gaming industry. But the Fort McDowell stand-off symbolizes the true core of tribal gaming and its ruling principle: tribal sovereignty.

Travis C. Studdard*

**WYATT EARP’S QUESTIONABLE OFFICIATING: DUBIOUS CALL OR MATCH-FIXING?**

“There will never be another first-class meeting in San Francisco. The men who pay to see square contests will never again assemble on the Pacific Coast.”¹

Wyatt Earp may be known best for his gunslinging career enforcing law and order across the West. But Earp’s influence, with respect to gambling and wagering, reached the North American coast, from San Diego, California to Nome, Alaska. Earp’s ventures included gambling, running saloons and gambling halls, and refereeing boxing matches.² The most famous match that Earp officiated, however, was also his last – the *Heavyweight Championship of the World* between Bob Fitzsimmons and Tom Sharkey.

The attention of the San Francisco press was already focused on the Fitzsimmons-Sharkey match because of its importance in the boxing world.³ Fitzsimmons was considered the top in his weight class, while Sharkey could withstand a twenty-five-round pounding.⁴ Because of its popularity, both men and women were allowed to attend the December 2, 1896 match at the Mechanics Pavilion.⁵ That interest continued to grow up to moments before the match when Earp climbed into the ring to officiate, sporting his famous revolver.

The fight’s notoriety persisted even after it finished. In the eighth round, Fitzsimmons appeared to have knocked out Sharkey with an uppercut. Earp, however, saw it differently. He called a foul on Fitzsimmons and awarded the

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⁵ Women May See the Big Fight, SAN FRANCISCO CHRONICLE, (Dec. 2, 1896).
$10,000 purse to Sharkey who was laid out on the canvas. Uproar rolled through the crowd and into the next day's newspapers. Earp's call fed Fitzsimmons's suspicions that the fight was fixed; he filed suit in a San Francisco court seeking a declaratory judgment that he was the winner of the match and should be awarded the purse.

This article highlights some events surrounding the Fitzsimmons-Sharkey match and ensuing litigation as reported by three San Francisco newspapers: the San Francisco Call (Call), the San Francisco Examiner (Examiner), and the San Francisco Chronicle (Chronicle).

The press speculated that the match, whether fixed or not, would be one of San Francisco's last sanctioned fights. The allegations of a corrupt referee appeared to be a "serious setback to square pugilistic sport" on the West Coast, especially given the accusations and legal proceedings.

The National Boxing Association, represented by J.J. Groom and J.D. Gibbs, placed placards around San Francisco promoting the match. But with the fight just hours away, the boxers still had not agreed on a referee. Fitzsimmons suspected that the fight had been fixed and would not accept any proposed referee offered by Sharkey. Sharkey similarly distrusted his opponent's suggestions and refused to agree. Groom and Gibbs had a fallback plan, but they kept the identity of the "soul of honor" a secret. The pair effectuated their plan once they realized the fighters were at an impasse. Although Earp agreed to officiate the match, questions surround exactly how Groom and Gibbs chose him.

7. Supra note 2.
8. Both Fighters Ready and Eager for Battle, SAN FRANCISCO CHRONICLE, (Dec. 2, 1896); see also, Adams, supra note 5.
10. Id.
11. Long Green Andy Lawrence and His Armed Body Guard, SAN FRANCISCO CALL, (Dec. 6, 1896); see also Sharkey, Though Knocked Out, Gets the Decision, SAN FRANCISCO CHRONICLE, (Dec. 3, 1896), (highlighting that "by the articles of agreement the managers of the National Athletic Club were to select the referee in the event of the managers of the principals failing to agree on a man.").
12. A tempest of Opinions on the Fight, SAN FRANCISCO EXAMINER, (Dec. 4, 1896) (according to Groom and Gibbs, Earp had to be verbally persuaded before he agreed to referee,) see also supra note 4 (noting that Earp at first refused but said that if they could not find a referee by the time of the fight, they could find him at the restaurant across the street from Mechanics Pavilion,) see also supra note 2 (according to another version, Groom and Gibbs approached Earp and told him that he had been chosen to referee the Fitzsimmons-Sharkey match. Earp immediately agreed, and stated "Well, I consider it an honor and consent to serve.").
The press closely examined the referee selection and Earp's background as the call roused suspicion in both the attendees and betting public. Gibbs told a Chronicle reporter that Earp had refereed about thirty boxing matches, but omitted the fact that those bouts were fought under the older London Prize Ring Rules, not the more technical Marquess of Queensberry rules. Why would Groom and Gibbs pick someone who had no experience with the rules that would govern the Heavyweight Championship of the World? The Marquess of Queensberry Rules required the fighters to wear gloves and rounds were set at three minutes rather than one of the fighters getting knocked down to mark the end of the round. Under the Marquess of Queensberry rules, fighters had to get up within ten seconds of being knocked down or would be declared knocked out and the fight would be over. Earp's inexperience with the Queensberry Rules lent an air of suspicion to Groom and Gibbs' selection of Earp.

The Call claimed that executives at the Examiner were in on the fix and used their influence to ensure that Earp would be the referee. The Call brought attention to Earp's day job. Beginning in August 1896, Earp was a personal bodyguard to Andy “Long Green” Lawrence, Managing Editor of the Examiner. At the same time, Lawrence's newspaper published first-person, ghostwritten accounts of some of Earp's adventures on the American frontier which portrayed him as a larger-than-life hero. Although the stories were exaggerated, they drew substantial attention to Earp. The Examiner wanted the readers and competition to know that Earp was not only good with a gun, but also on their side.

The Call alleged that Lawrence wanted Earp to be the referee to guarantee that Sharkey would be the winner. The Call claimed that Lawrence

13. Supra note 4; see also A Tempest of Opinions on the Fight, SAN FRANCISCO EXAMINER, (Dec. 4, 1896).
16. Long Green Andy Lawrence and His Armed Body Guard, SAN FRANCISCO CALL, (Dec. 6, 1896).
18. Wyatt Earp Tells Tales of the Shotgun-Messenger Service, SAN FRANCISCO EXAMINER, (Aug. 9, 1896); see also supra note 4.
21. Supra note 18.
and his colleagues had placed large bets on Sharkey and supplemented those
wagers as the fight drew closer. Lawrence bet $70 three hours before the
match, allegedly relying upon information that his bodyguard was chosen as
the referee. Years later, Stuart N. Lake’s semi-biographical book Frontier
Marshall dismisses the Call’s accusations. Yet in doing so, Lake overstates the
claim that “the proprietor of one [newspaper] bet $20,000 on Fitzsimmons.”

Even if Groom and Gibbs chose Earp based on his reputation alone, however,
their choice would curry favor with Lawrence and the Examiner.

Although sports wagering in California became illegal with the passage
of Penal Code 337(a) in 1909, it is unclear whether sports wagering was
unlawful in 1896 San Francisco. Legal or not, the increasingly large bets
placed on the match drove the public to wager more and more on Sharkey.
Once Groom and Gibbs settled on Earp as the referee, the sharps wagered so
much on Sharkey that the betting lines shifted significantly. At one popular
bookmaker, the combined wagered amount on both fighters was $28,000,
almost $1 million in today’s dollars.

As boxing fans crammed into the Mechanics Pavilion, it is likely that no
one expected Earp to reveal his revolver as he entered the ring. Earp’s gun
drew the immediate attention of both the crowd and the police captain who
was stationed ringside. The police captain saw the potential for disaster and
asked Earp for his gun. Earp turned the gun over without protest, although he
might have felt a pang of humiliation at the public sight of a frontier lawman
handing over his weapon.

22. Id.
23. Id.
24. Adams supra note 5 (although Lake does not explicitly state which
newspaper he is referring to, it is not a stretch to assume that he is referring
to the San Francisco Call as Lake’s book has been referred to as “the most
assiduously concocted blood-and-thunder piece of fiction ever written about
the West, and a disgraceful indictment of the thousands of true Arizona
pioneers whose lives and written protests refute every discolored incident in
it.” To that end, a single $20,000 bet is likely an embellishment.)
25. Supra note 4.
27. Supra note 18.
28. Id.
29. Sharkey, Though Knocked Out, Gets the Decision, SAN FRANCISCO
31. Id.; see also A Tempest of Opinions on the Fight, SAN FRANCISCO EXAMINER,
(Dec. 4, 1896).
32. Id.
The Call seized on the opportunity to speculate about Earp’s intentions for calling a clean fight by showing up to the match armed. Why would Earp need to bring a gun to a boxing match sanctioned by the City Supervisors, in a “civilized community?” Even the potential for angry bettors did not justify carrying, unless Earp was in on the fix.

But after it was assured that padded stone fists were the only weapons in the ring, the match was underway. Fitzsimmons dominated from the start, exploiting Sharkey’s height and reach disadvantage. Sharkey, overwhelmed, turned to wrestling, shoulder-butting, and leg-grasping in desperation against Fitzsimmons’s relentless assault. The fight lasted into the eighth round when Fitzsimmons rammed an uppercut into Sharkey’s solar plexus. The wind was knocked out of Sharkey and he was momentarily unable to breathe as he hit the mat. Fitzsimmons smiled, believing that he had won, but that smile quickly turned to pained confusion once he realized that Earp had called the uppercut a foul.

Earp declared that the punch landed below Sharkey’s belt and not directly beneath his rib cage. Earp raised Sharkey’s right hand above his limp body as he lay on the canvas. After a brief silence, the crowd erupted yelling “Fraud! Job! Robbery!”

Eyewitnesses interviewed after the match claimed that Earp had blown the call. One attendee described the final sequence of Sharkey’s relentless onslaught. “Fitzsimmons crossed Sharkey with his right. He then changed his position, bringing his left foot to the rear and his left shoulder well back, and uppercut with the left hand, at the same time guarding his face with the right. This blow, as far as I could see, landed in the stomach, and the blow brought
Sharkey’s head forward. Fitzsimmons used the same uppercut again and landed on the chin.” 43 This sequence left Sharkey bloodied, bruised, and beaten “while Fitzsimmons showed not a mark of the conflict.” 44

Another witness, a doctor, not only saw Sharkey foul Fitzsimmons “in a low brutal way more than a dozen times,” but also speculated that if Fitzsimmons had fouled Sharkey where he claimed to have been struck, he would have a deep, black and blue bruise on his groin for weeks. 45

Fitzsimmons, when interviewed after the fight in his dressing room, was indignant. He claimed that he had played with Sharkey through most of the fight and “knew that he had his opponent at his mercy.” 46 As for the solar plexus punch, Fitzsimmons declared that it “was one of the cleanest punches I ever made in my life.” 47

Fitzsimmons’s final punch left Sharkey in a complete state of collapse and he could not walk on his own. He was taken to a nearby room, but only one physician was allowed to attend to him, Dr. B.B. Lee. 48 Dr. Lee determined that there was “no doubt” Sharkey had been fouled, but his diagnosis could not be officially confirmed as the National Athletic Association’s physicians were refused admission to Sharkey’s private room until the next day. 49 Due to the delay, the official medical examiner of the National Athletic Club could not conclude that Sharkey was hit in the groin. 50 He did, however, observe swelling and discoloration where Sharkey claimed he was struck. 51 Eventually, multiple doctors from the National Athletic Association’s doctors signed a letter suggesting that Sharkey was hit where he claimed, which justified awarding the purse to Sharkey. 52 But two days after the fight, Sharkey’s groin injury was barely visible. 53

The night after the fight, Earp sent his written decision to the pool rooms declaring Sharkey the winner. 54 Despite the public outcry, a popular bookmaker clarified that “[t]he report that I will not pay off the money in my hands according to the decision of the referee is incorrect. It was the understanding that in this house, at least, all bets went with the referee’s
decision.”55 This bookmaker tacitly supported legitimate sports wagering by affirming that all bets would be paid according to the official decision.

Before the purse was paid out, however, Fitzsimmons filed an injunction, to freeze the prize money’s disbursement.56 The suit took the question of whether Sharkey or Fitzsimmons was the winner from the ring to the courtroom.

Fitzsimmons alleged a conspiracy between Sharkey, the National Athletic Club, its executives, and Earp to defraud Fitzsimmons of the prize and split it among themselves.57 Fitzsimmons contended that selecting Earp as the referee was the conspirators’ backstop so that, no matter how the fight shook out, Sharkey would be declared the winner. Fitzsimmons maintained that he knocked out Sharkey with an uppercut to the stomach and that he should be awarded the prize money under the rules because he “showed greater skill and training.”58 In support of his position, Fitzsimmons intended to show that once Earp was appointed referee, the payout odds shifted sufficiently to suggest that the fight had a fixed outcome.59 That is, when the National Boxing Association confirmed Earp, those with superior knowledge sought to profit. Fitzsimmons – perhaps in anticipation of a defense – maintained that the match was lawful per a city ordinance and that the National Athletic Commission had been granted a permit by the City Supervisors. The injunction was granted the same day it was filed.60

Court proceedings were underway almost immediately to determine which fighter should be awarded the purse. The parties sought testimony from Sharkey, Earp, Fitzsimmons, and others. Getting Earp to appear in court was not difficult as he already had a charge pending at the time – carrying a concealed weapon.

After Earp’s gun was confiscated, it was given to the San Francisco Chief of Police. The chief expected Earp to claim his gun the day after the fight, but Earp laid low. Police eventually arrested Earp and took him to the station house where he was charged.61 He was fined fifty dollars.62

Earp did not allow his conviction to undermine his credibility or interrupt his Western lawman confidence. When Earp was called to testify in the injunction action, Fitzsimmons’s lawyer accused Earp of having a gun while he was on the witness stand and demanded he give it to the clerk.63

55. Supra note 30.
56. Id.
57. Supra note 31.
58. Supra note 51.
59. Supra note 2.
60. Supra note 31.
61. Supra note 51.
62. Arne K. Lang, Prizefighting: An American History 237 (2014); see also Long Green’s Bodyguard Swears He Is a Poor Man, SAN FRANCISCO CALL, (Dec. 9, 1896).
63. Wyatt Earp Exposes the Examiner’s Fake Methods, SAN FRANCISCO CALL, (Dec. 16, 1896).
Earp, staying true to his American frontier persona, replied, “If there is a gun on me you can have the Deputy Sheriff search me.”

Under oath, Earp stated that Fitzsimmons punched Sharkey in the groin causing him to double up in pain and fall to the canvas. Earp claimed that the foul appeared to be deliberate: “Fitzsimmons fouled Sharkey with his left. He uppercut him when Sharkey ducked and caught him just below the abdomen. It was a foul, pure and simple, and it was not the first that Fitzsimmons made during the evening.” Earp denied any interest, wagering or otherwise, in the outcome of the match and only learned the afternoon of the fight that he was chosen by Groom and Gibbs.

When called to testify, Sharkey similarly denied the match-fixing allegations. He described the final moments of the match as follows: 

“[Fitzsimmons] gave me a left-hand jab in the mouth. Then he feinted with his left and sent his right across my head. I jumped back and he sent his left hand and hit me in the groin. As I was falling, he hit me in the jaw.”

Those who were in attendance, however, saw it differently. Although their statements were not given under oath, the consensus was that Earp made a bad call. One man who sat a mere twelve feet from the ring saw “every blow struck in the eighth round” and stated that Sharkey was hit with “a clean uppercut that fetched up right on the pit of his stomach.” Another patron seated close to the ring stated that Fitzsimmons never struck a foul blow and should have been awarded the decision. The Call quoted at least fourteen eyewitnesses, all of whom contradicted Earp’s and Sharkey’s testimony.

After hearing multiple witnesses testify, the court remarked that it expected the parties to address the nature of the match – that is, whether it was a prize fight or an amateur fight. The court went so far as to suggest that if Sharkey focused his argument “upon the showing as to what kind of contest it was you will have a better chance.” The court could not dissolve the injunction on the face of the complaint itself, because Fitzsimmons claimed that the match was legal as it was City-sanctioned. Sharkey’s attorney took the hint and moved to dissolve the injunction the next day.

Sharkey’s attorney directly addressed the court’s inquiry by arguing lack of jurisdiction due to the event being an illegal match and against good

64. Id.
65. Id.
66. Supra note 30.
67. Supra note 64.
68. Id.
69. Supra note 31.
70. Id.
71. Id.
72. Id.
73. Id.
74. The Swag Ready for Long Green, SAN FRANCISCO CALL, (Dec. 18, 1896).
morals (i.e., a prize fight). He argued that the court did not have jurisdiction to decide who should be awarded the prize money because the match itself was a breach of the peace. Despite the approval of the City Supervisors, the court was barred from refereeing a prize fight that was illegal from the start. Sharkey cited multiple cases in support of the notion that fights, whether sanctioned or not, are illegal. Sharkey further contended that the police presence at the fight was also insufficient to create jurisdiction.

In opposition, Fitzsimmons’s attorney argued that the boxing match did not fall under §412’s prohibitive clause – the statute governing prize fights – because it was not a match “in which the contestants tried to injure each other.” Thus, it was not a breach of the peace. Fitzsimmons’s attorney maintained that the court could not declare a contest illegal when it was sanctioned by the City Supervisors and supervised by the police. Fitzsimmons argued that the awarding of a prize did not make the contest illegal.

The court, as expected given its earlier comments, agreed with Sharkey. The court explained that the injunction had been granted, in part, because it appeared that the match was lawfully sanctioned as stated in the complaint. Because the court did not want to dirty its hands by declaring the winner of an illegal prize fight, however, it granted the motion to dismiss. But the court did not end its reasoning there; it believed that everyone involved in the fight broke the law including the fighters, managers, promoters, referee, and “all those who witnessed the contest.” In the court’s view, every attendee was subject to criminal liability, even the one hundred or so police officers present had violated § 412. If the court were to decide which boxer deserved the prize, the court itself would be a co-conspirator.

75. Id.
76. Thrown Out by Judge Sanderson, SAN FRANCISCO CHRONICLE, (Dec. 18, 1896).
77. See supra note 75.
78. Section 1 of the applicable statutes read: “It shall be unlawful for any person or persons within this State to engage in what is generally known as prize fighting, with or without gloves, whereby bruising or maiming, or other serious bodily injury, may result to the participants.”
79. See supra note 75.
80. Supra note 77.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. The Swag Ready for Long Green, SAN FRANCISCO CALL, (Dec. 18, 1896), see also Both Fighters Ready and Eager for Battle, SAN FRANCISCO CHRONICLE, (Dec. 2, 1896).
Because the City Supervisors could not legally sanction a fight under §412, they could not grant a permit for a boxing match. The court granted the motion to dissolve the injunction and dismissed Fitzsimmons's complaint. The court refused to decide the winner of the match, which it declared unlawful, despite the public outcry and allegations of possible fixing.

Although the factual question of whether the match was fixed remained undecided, the confession of Dr. B.B. Lee, Sharkey’s sole attending physician immediately after the fight, provided the strongest evidence that Sharkey was the predetermined winner. When questioned seven years later he stated: “I fixed Sharkey up to look as if he had been fouled. How? Well, that is something I do not care to reveal, but I will assert that it was done – that is enough. There is no doubt Fitzsimmons was entitled to the decision and did not foul Sharkey. I got $1,000 for the part I played in the affair.”

Earp’s reputation may have been tainted by the alleged conspiracy, but that did not stop him from achieving success in gaming. At the turn of the century, Earp was running one of the most prosperous saloons in the West. Known as “the only second-class saloon in Alaska,” Earp’s Dexter Saloon became a gathering place for locals and miners to gamble and socialize.

Earp pressed his luck by opening a gambling house in Seattle, WA – a city where gaming was expressly forbidden. Earp’s business gamble did not pay off in the Emerald City and he was forced to close after six months.

87. Id.


90. Id.
LABOR RELATIONS IN CALIFORNIA TRIBAL GAMING

In 2022 there were approximately 236 tribal gaming operations in the Ninth Circuit, with revenues of approximately $16.5 billion. The California region (which includes a small portion of Northern Nevada) produced $11.8 billion of this revenue. According to the California Gambling Control Commission, the State of California has signed and ratified Tribal-State Gaming Compacts with 76 Tribes and there are Secretarial Procedures in effect with four more Tribes. There are currently 66 casinos operated by 63 Tribes. Because there are no commercial casinos in California, this article uses the term “casino” to mean “tribal gaming casinos with Class III gaming.”

California casinos vary in size from the 300 slot machine tribal gaming casino of the Cher-Ae Heights Indians of Trinidad

* Norman Brand, a former Professor at UC Davis and Albany Law School, has been a full time arbitrator and mediator of labor, employment, and pension disputes since 1983. He has been a member of the Tribal Labor Panel, which arbitrates all Tribal/Union disputes in California casinos, since 1999.


2. Under the Indian Gaming Regulatory Act the State and Tribe are required to negotiate a compact covering specific areas, for Class III gaming to be authorized. When the State and Tribe cannot agree to a Compact the Secretary of the Interior may authorize Class III tribal gaming as set out at 25 USC 291.1.


These are casinos with Las Vegas style gaming (technically Class III gaming), which requires a compact with the State. Another part of the site shows legislation ratifying seven Compacts with tribes in 2023. The State web site does not indicate the currency of its data.

Rancheria, on the North Coast, to the Yaamava' (formerly San Manuel) Resort & Casino, the largest casino in California, with 7,000 slot machines, 150 table games, a 17-story hotel, a 2,800-seat entertainment venue and 17 restaurants and bars east of Los Angeles. California tribal gaming is a significant revenue source for the tribes and a significant source of employment for both tribal and non-tribal workers.

Some casino workers are Unionized; most are not. The focus of this article is labor relations in California casinos. Part 1 traces the history of legalizing exclusively tribal casino gambling in California. Part 2 looks at the different rules governing tribal labor relations contained in the California State/Tribe Compacts. Part 3 examines, from the author’s perspective, how these labor relations provisions affect organizing, negotiating collective bargaining agreements, and the outcomes of arbitrations under Union/Tribe agreements.

1. Legalizing Tribal Casinos in California

In 1988 Congress passed the Indian Gaming Regulatory Act ("IGRA"), which requires a compact between State and Tribal governments as a condition for conducting Class III gaming on "Indian lands." The statute defines Class III gaming as "all forms of gaming that are not Class I gaming or Class II gaming (25 U.S.C.S. § 2703). Class I gaming is social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations. Class II gaming includes bingo and card games played at other locations in the state, but excludes "any banking card games,

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5. https://www.funattheheights.com/casino-gaming-slot-machines/ accessed 11/15/2023 The number of slot machines is an indicator of size. The casino also has other Las Vegas style games.


7. The State/Tribe compacts contain a section ("Indian Preference Explicitly Permitted") that allows Indian preference in employment, promotion, seniority, and lay-offs. The author could find no reliable public information on the number of tribal and non-tribal employees in California casinos.

8. Some Tribal/Union relationships are governed by a Memorandum of Agreement ("MOA") with UNITE HERE, the Union that generally represents organized casino employees in California. These MOAs govern Union organizing campaigns at a Tribe’s casino for a discrete period of time.

9. This account is taken primarily from the decision in Coyote Valley Band of Pomo Indians v. Cal. (In re Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094 (9th Cir. 2003) ("Coyote") and does not include specific citations.

10. The statute defines Class III gaming as "all forms of gaming that are not Class I gaming or Class II gaming (25 U.S.C.S. § 2703). Class I gaming is social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations. Class II gaming includes bingo and card games played at other locations in the state, but excludes "any banking card games,
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requires the State to negotiate in good faith with tribes and limits the subjects that can be negotiated in the Compact.\textsuperscript{11} The issue in Coyote Valley Band of Pomo Indians v. Cal. (In re Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094 (9th Cir. 2003) was whether the State of California was negotiating in good faith, in part, because it insisted on a labor relations provision covering employees of the casino.

Initially, under Governor Pete Wilson, California refused to negotiate Class III gaming Compacts because the state did not generally permit Las Vegas style gaming, although it generally permitted some types of Class III games.\textsuperscript{12} Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994), held the IGRA did not oblige California to negotiate Compacts for all of the most lucrative forms of Class III gaming because it allowed some types of Class III gaming. Governor Wilson refused to negotiate Compacts covering the forms of Class III gaming the State permitted until tribes that engaged in illegal Class III gaming\textsuperscript{13} ceased those activities. In response, California tribes sought a political solution. They put a ballot initiative – Proposition 5 (Prop 5) – before the voters, amending State law to allow Class III gaming on Indian lands. Prop 5 specified the terms of the Compact that the State would be required to sign when requested by a tribe – which included allowing slot machines and banked card games on Indian lands, but did not address the rights of casino employees or tribal labor relations.\textsuperscript{14} Prop 5 passed easily, but before it could be implemented the Hotel Employees and Restaurant Employees International Union (a predecessor of UNITE HERE) applied for a writ of mandate to prevent the governor from implementing proposed legislation that authorized gaming in tribal casinos, asserting the proposition was invalid under the laws of California and the United States.\textsuperscript{15}

While the case was in the courts, newly elected Governor Gray Davis began to negotiate a model Compact with the tribes. The State wanted the model Compact to address casino workers’ rights and labor relations. It asked the tribes to work directly with Union representatives to understand their concerns. Some Tribes, however, asserted labor relations was not an item that could be negotiated in Compacts. On August 23, 1999, the California Supreme Court concluded that Prop 5’s provision authorizing gaming in tribal casinos was invalid because it permitted gaming that was specifically prohibited by

including baccarat, chemin de fer, or blackjack, or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind” (25 U.S.C.S. § 2703). These excluded games comprise what is often referred to as “Las Vegas style” gaming.

\textsuperscript{11} Any Tribal-State Compact negotiated under subparagraph (A) may include provisions relating to 25 U.S.C.S. § 2710.

\textsuperscript{12} It did not permit the most lucrative games, such as banked card games and slot machines.

\textsuperscript{13} That is, gaming that was not permitted by a State/Tribal Compact and was not permitted by State law.

\textsuperscript{14} At this time, the National Labor Relations Act (“NLRA”) was not applied to tribal governments. (See Fort Apache Timber Co. 226 NLRB 503).

\textsuperscript{15} See Hotel Emps. & Rest. Emps. Int’l Union v. Davis, 21 Cal. 4\textsuperscript{th} 585 (1999).
the California Constitution. The Governor then proposed an amendment to the California Constitution to allow Las Vegas style gaming exclusively on Indian lands, which appeared on the ballot as Proposition 1A (Prop 1A). Before Prop 1A passed, the State and Tribes negotiated a model Compact, which included all the terms the State would require in the Compact per the IGRA to permit Las Vegas style gaming in tribal casinos. Eventually, 57 tribes signed letters of intent to enter this 1999 model Compact. Prop 1A passed in March 2000.

2. Labor Relations Provisions in State/Tribe Compacts

The 1999 Tribal/State Compact, which 57 tribes agreed to enter, contains a model Tribal Labor Relations Ordinance (“TLRO”). Similar to the National Labor Relations Act in many ways, it defines eligible employees and Unfair Labor Practices (“ULPs”) for the Tribe and the Union. It requires the tribe to grant access to a Union for organizing; it requires a 30% showing of interest to qualify for an election; and it sets out rules for a secret ballot election to certify a Union as the employees’ collective bargaining representative, and requires a 50%+1 majority for certification. It also provides rules for decertifying a Union. The model Compact has a two-level dispute resolution system. All pre-certification matters relating to organizing, the election, and ULPs (including discharges of employees that allegedly constitute a tribal ULP[s]) go first to a Tribal forum. A party that is dissatisfied with the decision of the Tribal forum can proceed to arbitration before an arbitrator from the Tribal Labor Panel (“TLP”). TLP arbitrators are required to generally follow
American Arbitration Association rules for labor disputes. Any matter relating to an impasse in negotiations goes only to a Tribal forum. If the Union is not satisfied with the resolution, it can strike, but it cannot picket on “Indian lands as defined in 25 U.S.C. Sec. 2703(4).” Under the model Compact TLRO, a motion to compel or confirm arbitration goes first to a tribal court and is appealable to a federal court. The Compact contains a limited waiver of sovereignty that allows a motion to compel or confirm an arbitration to be made in state court if the federal court declines jurisdiction. Approximately 37 State/Tribal Compacts currently have this provision.

Two major variations on the model 1999 Compact are significant for both unionization and collective bargaining. These are found in 2004 Compacts, but not the 2006 Compacts. The first relates to Section 7 of the model Compact, which provides:

> The tribe’s and Union’s expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint or coercion if such expression contains no threat of reprisal or force or promise of benefit.

Subsequent Compacts add a subsection (b) to Section 7, making it possible for a Union attempting to organize casino employees to create a

Ordinarily, such motions are made to the U.S. District Court. 9 U.S.C. §§ 4, 9, 10, and 11.

The State online database is not complete. In some instances, it does not have the current TLRO. For example, the online database has a 2017 TLRO for the Wilton Rancheria, not the TLRO approved in 2019, which contains an additional preliminary section entitled “Scope.” That section provides: “This Ordinance shall be narrowly construed to apply to Eligible Employees to the extent the Ordinance provisions are lawfully required by an effective tribal-state gaming Compact between the Tribe and the State of California.”

In addition to varying the TLRO in a later or amended Compact, as previously noted, tribes and Unions may enter into memoranda of agreement that vary the terms of organizing and have their own arbitral enforcement mechanism. See, e.g. Unite Here Int’l Union v. Shingle Springs Band of Miwok Indians, No. 2:16-cv-00384-TLN-EFB, 2017 U.S. Dist. LEXIS 108179 (E.D. Cal. July 12, 2017) aff’d Unite Here Int’l Union v. Shingle Springs Band of Miwok Indians, 738 F. App’x 560 (9th Cir. 2018)

The changes to the 1999 model Compact occurred in the 2004 Compacts, but not the 2006 Compacts. California Legislative Analyst’s report “Questions and Answers: California Tribal Casinos” February 2007. The cited example is from the 2015 Compact with the Santa Ynez Band of Mission Indians. It is also found in the 2004 Compact with the Coyote Valley Band of
contract between itself and the Tribe. A Union that delivers a written Notice of Intent to Organize (NOIO) to the Tribe and agrees for the next 365 days to:

(a) not engage in strikes, picketing, boycotts, attack websites, or other economic activity at or in relation to the tribal casino or related facility, and refrain from engaging in strike-related picketing on Indian lands as defined in 25 U.S.C. § 2703(4);
(b) not disparage the Tribe for purposes of organizing Eligible Employees;
(c) not attempt to influence the outcome of a tribal government election; and
(2) Resolve all issues, including collective bargaining impasses, through the binding dispute resolution mechanisms set forth in Section 13…

is entitled to the following:

the Tribe must supply a list of eligible employees within two days, and the Tribe agrees, for the same 365-day period, to:

not do any action nor make any statement that directly or indirectly states or implies any opposition by the Tribe to the selection by such employees of a collective bargaining agent, or preference for or opposition to any particular Union as a bargaining agent. This includes refraining from making derisive comments about Unions, publishing or posting pamphlets, fliers, letters, posters, or any other communication which could reasonably be interpreted as criticizing the Union or advising Eligible Employees to vote “no” against the Union. However, the Tribe shall be free at all times to fully inform Eligible Employees about the terms and conditions of employment it provides to employees and the advantages of working for the Tribe; and

resolve all issues, including collective bargaining impasses, through the binding dispute resolution mechanisms set forth in Section 13…

Significantly:

The Union’s offer in subsection (b) of this Section 7 shall be deemed an offer to accept the entirety of this Ordinance as a bilateral contract between the Tribe and the Union, and the Tribe agrees to accept such offer. By entering into such bilateral contract, the Union and Tribe mutually waive any right to file any form of action or proceeding with the National Labor Relations Board for the three hundred sixty-five (365)-day period following the NOIO.

Pomo Indians of California. Notably the 3004 Compacts have a provision for Tribal neutrality in the organizational campaign.
This modification does four things: first, it creates an enforceable contract between the Tribe and the Union that makes the written offer described in Section 7(b). Second, by giving up the right to strike, picket, disparage, or take other economic actions against the Tribe, the Union gains tribal neutrality in the one year organizing period. Third, in Section 13, “Binding Dispute Resolution Mechanism,” the parties agree to resolve all issues, except impasses, through arbitration before the TLP, eliminating intermediate Tribal forums. Fourth, impasses in negotiations are themselves subject to the Binding Dispute Resolution Mechanism.

Whether these new Compact TLRO provisions are valid was tested in part in Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation, 35 F.4th 695, 704 (9th Cir. 2022), when the Ninth Circuit decided that a contract was formed when UNITE HERE Local 30 sent a NOIO to the Sycuan tribe. The Court found that the terms of the contract were definite, that any challenge to the contract as a whole, or on the grounds the NLRA preempted the contract, was for an arbitrator to decide. The Court noted:

there was an express waiver of tribal sovereign immunity as Sycuan agreed in Section 13(e) of the Compact’s TLRO to waive its immunity from suit for the purpose of compelling arbitration. Further, when a tribe agrees to judicial enforcement of an arbitration agreement it waives its immunity concerning that agreement. [Internal citation omitted]. Id. at 704.

Thus, the binding arbitration provision of Section 13(b) requires a tribe to arbitrate any disputes under the TLRO.

An equally important provision of the Binding Dispute Resolution Mechanism applies to impasses. Section 13(c) requires the tribe and Union to negotiate for a period of 90 days after the Union is certified as the collective bargaining representative of casino employees. If at the end of that period either party believes they are at an impasse, it can submit the matter “to mediation with the Federal Mediation and Conciliation Service.” After 30 days of mediation, if the issues are not resolved, the mediator certifies “the mediation process has been exhausted.” Once that occurs, within 21 days:

the mediator shall file a report that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any

24. To become certified as the collective bargaining representative, the Union must show 30% interest among eligible employees, which triggers a secret ballot election, in which 50% + 1 of the eligible employees must choose the Union. All disputes, including alleged ULPs are decided by the election officer, who is an arbitrator from the Tribal Labor Panel.

25. This requirement does not preclude choosing a mediator who is not employed by the FMCS.

26. The parties can mutually agree to extend the period.
issues in dispute between the parties, the report shall include the basis for the mediator’s determination. The mediator’s determination shall be supported by the record.

This provision shifts the mediator’s role to that of an arbitrator in a binding “interest” arbitration. The only directions for the mediator are:

In resolving the issues in dispute, the mediator may consider those factors commonly considered in similar proceedings.

A second significant change to the model Compact modifies section 7(b) of the TLRO. It incorporates the previously described changes, modifies the NLRA language, and provides a different impasse procedure. These changes are found in the 2012 Compact with the Coyote Valley Band of Pomo Indians of California, which provides:

If a United States Court of Appeals issues a final order upholding National Labor Relations Board jurisdiction over tribal casinos that is not later superseded by a decision of the United States Supreme Court, then the labor organization’s offer in subdivision (a) shall be deemed to be an offer to accept the entirety of this Ordinance as a bilateral contract between the Tribe and the labor organization and a waiver by the labor organization of any right to file any form of action or proceeding with the National Labor Relations Board, and the Tribe agrees to accept such offer.

The Ninth Circuit upheld NLRA jurisdiction over tribal casinos in Pauma v. NLRB, 888 F.3d 1066 (9th Cir. 2018), cert. denied, 139 S. Ct. 2614 (2019). See also NLRB v. Little River Band of Ottawa Indians Tribal Gov’t, 788 F.3d 537, 539-40 (6th Cir. 2015) (Because the NLRA applies to the Band’s operation of the casino, the Board had jurisdiction to issue a cease and desist order.) Since 2015, legislation has regularly been introduced in either the House or the Senate to exclude “any Indian tribe” from the coverage of the NLRA. None has moved towards a vote.

The impasse procedure in the 2012 Compact with the Coyote Valley Band of Pomo Indians contains the impasse procedure change. It provides:

...if collective bargaining negotiations result in impasse, the matter shall be resolved by the procedures set forth in section 13. The arbitrator shall consider, but not be limited to, the following factors:
(1) Wages, hours and other terms and conditions of employment of other Indian gaming operations in Mendocino County.

27. The author has not researched every Compact to see if others contain criteria for the contract an arbitrator can impose to resolve an impasse. The 2004 amendment to the Compact between the State and the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation contains a substantially similar set of criteria to these, substituting “Southern California” for “Mendocino County.”
California:
(2) Size and type of the Tribe’s operations at the Tribal Casino and Related Facility
(3) Change in the cost of living as it affects the Eligible Employees and measured by the index mutually agreed to by the parties;
(4) Regional and local market conditions;
(5) The Tribe’s financial capacity (if the Employer places this in issue); and
(6) The competitive nature of the business environment in which the Tribal Casino and Related Facility operate.

The factors that the arbitrator must specifically consider are analogous to, but significantly different from those found in California public sector interest arbitration ordinances.

3. Tribal Labor Relations in Arbitration

TLROs contain two distinct types of arbitration: “rights” arbitration and “interest” arbitration. In “rights” arbitration the arbitrator decides a dispute over an alleged violation of the terms of an agreement. The agreement can be the TLRO, a Memorandum of Agreement (“MOA”) between a tribe and a Union governing an organizing campaign, or a collective bargaining agreement between the Tribe and the Union. MOAs generally contain a provision for a card check, rather than an election and a promise by the Tribe to remain neutral during the organizing campaign. “Interest” arbitration is a

28. As discussed below, certain parts of the TLRO, such as the ULPs, are interpreted using the NLRB model, while others are interpreted using a contract or collective bargaining agreement model.

29. As previously noted, MOAs are typically negotiated between a tribe and UNITE HERE because the Tribe wants the Union’s political support in its efforts to lobby state or local authorities. For instance, the Tribe may want to build a hotel for its casino that requires an exception to a local zoning ordinance from a City Council or County Board of Commissioners.

30. A “card check” provides for the Tribe to recognize the Union as their employee’s bargaining representative upon a showing that a majority of eligible employees have signed cards authorizing the Union to represent them. The “check” is generally done by a member of the TLP, who certifies the Union if 50%+1 of the eligible employees have authorized the Union to represent them. The arbitrator’s task is to match authorization cards against signatures of eligible employees provided by the Tribe and to total valid cards.

31. A typical neutrality provision reads:

a. The Tribe shall advise Bargaining Unit Employees that it is neutral to their selection of the Union as their exclusive representative, if any, and shall not directly or indirectly state or imply opposition to the selection by Bargaining Unit Employees of the Union as their exclusive representative, if any, and shall so instruct all appropriate Managers.
system in which a neutral determines the terms of the parties’ first collective bargaining agreement. After the Union has been certified as the bargaining representative of the employees, the parties’ attempt to negotiate their first collective bargaining agreement. If the negotiations reach an impasse, either party can declare an impasse, which invokes interest arbitration.

Rights Arbitration

The number of rights arbitrations, overall, is quite small. The early rights arbitrations are notable for how they deal with the interplay between the decision made by the first level Tribal forum and arbitration, as well as the role of the Tribal Gaming Commission (“TGC”). A 2004 decision determined that the Arbitrator does not review the decision of the first step Tribal forum. Rather, the Arbitrator conducts a **de novo** hearing to determine facts and decide the issues in dispute. All arbitrations under the TLRO have since recognized the Arbitrator conducts **de novo** hearings.

The role played by the TGC is more nuanced. All TLROs provide:

> Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe’s National Indian Gaming Commission- Approved gaming ordinance.

b. For the purposes of this Agreement “Neutrality” means that Manager or management shall not express any opinion for or against Union representation of any existing or proposed bargaining unit composed of Bargaining Unit Employees, or for or against the Union or any officer, member or representative thereof in their capacity as such. Furthermore, Manager or management shall not make any statements or representations as to the potential effects or results of Union representation on the Tribe or any Bargaining Unit Employee or group of Bargaining Unit Employees. The Union also agrees that, neither the Union nor any of its officers, representatives, agents, or employees will express publicly any negative comments concerning the motives, integrity or character of the Tribe, the Tribe’s management contractor, in its capacity as the Tribe’s management contractor, or any of their officers, agents, directors or employees.

c. The Union and its representatives will not directly or indirectly coerce or threaten any employee in an effort to obtain authorization cards.

32. Each tribe establishes a TGC. The TGC is responsible for fulfilling the tribe’s regulatory responsibilities under the IGRA. The statute establishes a National Indian Gaming Commission that approves tribal ordinances establishing tribal gaming agencies, or Tribal Gaming Commissions (25 U.S.C. §2704). The TGC licenses employees who work in the casino and conducts background checks to ensure their suitability for working in gaming.
The TGCs may require employees to be licensed in order to work in the casino. In the arbitration previously mentioned, the Arbitrator decided that the TLRO specifically did not require unlicensed employees to become licensed solely because they wanted to exercise their TLRO right to post Union information in non-public areas.

The TLROs may permit the Tribe to require Union organizers who want access to employees to get licensed by the TGC. They generally provide: "that such licensing shall not be unreasonable, discriminatory, or designed to impede access."

**Specific Arbitration Awards**

Here are some examples of arbitration awards in the tribal gaming context. 33

A 2003 Award describes the following facts. The Union sent the Tribe notice of its interest in obtaining access to employees at the Tribe’s casino for organizing. Three days later, the Tribe sent the Union a letter saying it was required to obtain a license from the TGC before it could have access to the casino. Over the next three years the Union submitted everything the TGC required, to allegedly complete the application—including applicants’ social security cards. But nothing happened. The Union finally filed a grievance, alleging the Tribe was using the TGC to deny access to the Union. The Tribe formed a Tribal Council Committee to hear the grievance. It found the delays were not “unreasonable, discriminatory, or designed to impede access.” The TGC then asked for two more pieces of information, which the Union promptly provided. Three months later, the Union asked for the status of its application and was told it was coming. Eventually the Tribe sent the Union a letter saying the license had been granted and the license—dated three months earlier. The Arbitrator had no difficulty finding the Tribe engaged in “unfounded harassment” “designed to delay the access required by the TLRO.

In a 2008 Award, the same Arbitrator found – despite the Tribe’s contention to the contrary – that the TGC is not independent of the Tribe and cannot be used as a subterfuge for the Tribe to avoid its Collective Bargaining Agreement (“CBA”) obligations to the Union. The CBA contained a just cause

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33. There is no public repository for TLP Awards. As with other arbitration awards, they are the property of the parties. The AAA was unable to provide the author with the number of cases in which parties chose an arbitrator from the TLP. The administrator of the TLP advised the author that his recent selection for a case was the first TLP case in 4 or 5 years. The arbitration Awards discussed in this section are either ones in which the author was the arbitrator, or Awards supplied by Counsel to UNITE HERE, with the permission of the client. These redacted Awards do not reflect the names of tribes, nor locations, nor individual’s names. The author has avoided including any such identifying information from the discussion of his own Awards. In this article the arbitration Awards are identified by the year they were issued.
The Tribe asserted that it terminated the Grievant solely because Grievant lost their TGC license. The Tribe argued that the Arbitrator could not consider the actions of the TGC because the TGC was not a party to the CBA. The Arbitrator ruled that the Tribe must show that the “reasons for [Grievant] losing the license were not arbitrary, nor for unspecified reasons.” The Grievant originally received a TGC license based on a work permit that allowed Grievant to work in the US. Grievant failed to renew the work permit and was not a citizen, nor a resident of the US. Grievant applied for resident status and was given additional time by the TGC. However, the Grievant remained out of status. The TGC ultimately refused the license because the Grievant was no longer authorized to work in the US. The Arbitrator found there was just cause for the termination. In the 2007 and 2011 Awards, arbitrators upheld terminations when the TGC refused a license because the applicant lied on the application.

A 2014 case involved two Tribal members who were also casino employees. While off duty, both participated in activities with a tribal faction opposed to the newly elected members of the Tribal Council. “Employee A” engaged in a silent protest at the installation of new members to the Tribal Council. When Employee A returned to work the following day, the casino suspended Employee A indefinitely. The casino gave Employee A no reason for the suspension. Subsequently, the Tribal Council acted against Employee A as a tribal member. The Tribe denied Employee A Tribal benefits. Two days after the suspension, the Union filed a grievance on Employee A’s behalf. Two days after that, the TGC suspended Employee A’s license making Employee A ineligible to work at the casino. Employee B, who was also part of the disfavored faction, went on FMLA leave as a result of experiencing the violence that was roiling the Tribe. While Employee B was on that leave, the TGC suspended Employee B’s license. Six weeks later the Tribal Council directed the General Manager to suspend Employee B, who was still on FMLA leave. Again, the Union grieved. Subsequently, the TGC revoked both licenses and the Union moved the grievances to arbitration.

Between the first and second day of hearing, the Tribe notified the Arbitrator that the TGC had directed it to cancel the arbitration. The arbitration continued and the Arbitrator found the Tribe’s attempt to distance itself from the actions of the TGC unconvincing. He decided the Tribe effectively controlled the TGC and that the “Tribe uses the TGC in efforts to evade its contractual obligations under the CBA.” The Arbitrator found Grievants were suspended and discharged without just cause. He ordered

34. The just cause standard is common in Union contracts. The employer promises not to terminate any covered employee unless there is “just cause.” Over the last 75 years, this standard has been given procedural and substantive meaning through arbitration Awards and treatises.

35. The ungrammatical third person pronoun is used to avoid providing potentially identifying information.

36. In 2007, in finding the Tribe had just cause for discharge, a different Arbitrator noted, “… had Petitioner presented a case where the [TGC] had arbitrarily denied a license for unspecified reasons, the [Tribe’s] burden of proof would not have been met.”
them reinstated with back pay and made whole in all other ways. Anticipating that the TGC might refuse to license these Tribal members, the Arbitrator ordered front pay if they were not reinstated.

Rights arbitrations under MOAs sometimes follow a different arbitral jurisprudence. The MOAs generally provide for a card check to certify the Union’s majority status and require the Tribe to remain neutral during the Union’s organizing effort. The card check procedure, like the election procedure in many compacts, mirrors procedures under the NLRA. Consequently, rather than the "just cause" and contract interpretation standards that arbitrators generally apply under CBAs, the standards arbitrators apply to alleged MOA violations mirror standards required by the National Labor Relations Board ("NLRB").

In a 2018 case, the MOA provided for a card check and required the Tribe to tell employees “it is neutral to their selection of the Union" and not directly or indirectly state or imply opposition to …” selecting the Union to represent them.” The clause goes on to describe, in detail, what neutrality means. The MOA has a dispute resolution clause that requires mediation followed by an expedited arbitration before a TLP arbitrator. The Arbitrator agreed the MOA mostly relied on the TLRO, which was modeled on the NLRA. Consequently, the Arbitrator could generally look to cases decided under the NLRA for guidance – except when it came to neutrality. He noted that while the TLRO contained Employer “free speech” rights like the NLRA, the MOA contained a requirement of strict neutrality not found in the NLRA. Consequently, even if the NLRB would have considered the tribal action “free speech,” it could still violate contractual neutrality under the MOA definition.

This Tribe employed certain employees in positions where their responsibilities were sometimes the same as their co-workers (for instance, making change on the casino floor) and sometimes involved supervising those same workers. The employees with supervisory responsibilities as well as bargaining unit responsibilities are referred to in this article as Leads. When the Tribe provided the Union a list of eligible employees, in response to the Union’s first request in 2014, it excluded Leads on the grounds that they had supervisory responsibilities. The Leads attended the Tribe’s management training given by a firm that counsels employers on how to resist Union organizing campaigns. Three years and six months later, when the Union was most actively involved in organizing, the Tribe added the Leads’ names to the list of eligible employees who would participate in the card check. One Lead distributed anti-Union flyers with the Casino’s logo, which the Lead claimed was added to the flyers by the printer without the Lead’s knowledge. Other Leads wore anti-Union buttons. Another Lead told an employee that the casino thought someone who signed an authorization card was stabbing the casino in the back. Leads counseled employees on how to rescind an authorization card. The Leads reported their anti-Union efforts and successes at dissuading employees directly to Human Resources (HR) –

37. There is a reciprocal promise by the Union not to “express publicly any negative comments concerning the motives, integrity or character of the Tribe…”

38. For convenience, employees with part-time supervisory responsibilities are called “leads.”
which kept a tally. While the duties of the Leads never changed, their late change of status from supervisors to eligible employees provided the Tribe plausible deniability for anti-Union management activists within the proposed bargaining unit.

When an employee wore a Union button, the employee’s supervisor said to take it off. When the employee’s Manager reiterated the direction, the employee said employees were entitled to wear the button under the neutrality agreement. The Manager asked the employee to take it off, and the employee complied. Later, the Manager told the employee that HR said employees could not wear Union buttons. HR testified that after being questioned by the Manager, HR contacted counsel, who told HR that employees must be permitted to wear Union buttons under the neutrality agreement. There was no evidence HR ever communicated this requirement to the Manager or anyone else. The Union successfully argued that the operative NLRB standard requires “an unequivocal admission of unlawful conduct” to remedy a ULP. The Arbitrator found HR’s failure to disseminate the correct information – that employees were allowed to wear Union buttons – was a violation of the neutrality agreement.

The behaviors that most clearly violated NLRB standards involved benefits. The Union distributed flyers showing that unionized casino employees generally had better health care and personal time off benefits, as well as more generous 401(k) matches. The Tribe put up posters comparing the same benefits selectively, using only Tribes that had inferior benefits. The Tribe knowingly made assertions and used numbers it knew were false. The Tribe also promised to raise its 401(k) match the following year. The Arbitrator quoted a Supreme Court case:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964)

The Arbitrator used this NLRB principle to determine if the Tribe violated its neutrality agreement in this and other instances.

When the Union used dissatisfaction with how attendance points were being assigned, comparing the Tribe’s process with organized casinos, the Tribe responded with a poster announcing a new attendance policy that matched organized casinos. Although the Tribe had previously given $50 gift cards as a Christmas bonus, it promised $130 payments in the last year of the MOA. At previous “appreciation” events, where the Tribe provided food and

39. Attendance points are part of a “no-fault” system in which points are assigned for being late or missing work. An employee’s accumulation of points leads to discipline and ultimately may be grounds for termination. Whether being late is treated the same as being absent, how long points stay on an employee’s record, what accumulation of points over which period leads to discipline – all are factors that can make an attendance system seem more or less equitable to employees.
prizes for employees, it raffled off a $1500 trip to Hawaii one year and two Microsoft Surface Pro laptops another year. In the final year of the MOA it raffled off two trips to Hawaii worth $5,000 each. Using the cited NLRB principle, the Arbitrator determined the Tribe violated its neutrality agreement.

The most significant MOA violation that occurred during this organizing campaign— the one most commonly seen in non-tribal settings – occurred when the Tribe fired a key rank and file leader early in the organizing campaign, using spurious allegations of misconduct. This was an effort to frighten employees who might be inclined to support the Union. Despite the agreement to submit disputes to "expedited and binding arbitration" the Tribe refused to arbitrate the termination of the rank and file leader. It opposed the Union’s federal court Petition to Compel, with a Motion to Dismiss, which the Court noted did not cite a single case supporting its theory. When the Court granted the Motion to Compel, the Tribe filed a Motion to Stay the arbitration. The Court found the Motion to Stay did “not attempt to articulate a colorable basis for disagreeing with the Court’s conclusion.” While the Stay motion was pending, the Tribe filed a Motion for Declaratory Relief that the Court found was solely to gain a procedural advantage in the related (Motion to Compel) case. The Tribe then filed another Motion to Stay the decision on the Motion for Declaratory Relief. The Court found the Tribe duplicated its brief from the Motion to Stay the arbitration and, in the Court’s view, more egregiously so because the underlying motion was for Declaratory Relief, and failed to address the likelihood of success on the appeal. The multiple duplicative filings, and the Court’s detailed description of the legal inadequacy of those filings, strongly suggest the Tribe’s purpose was to delay an arbitration it knew it would lose until after the card check.

**Interest Arbitration**

Later Compacts (e.g. Barona Band of Mission Indians, 2016) provide impasse procedures for a Union that offers in writing to comply with Section 7(b) of the TLRO. There are two general types. One version of Section 7(b) provides for mediation at impasse. If the mediation is unsuccessful, within 21 days after the mediation concludes, the mediator issues a report that resolves the outstanding issues and “establishes the final terms of a collective bargaining agreement.” The “mediator may consider those factors commonly considered in similar proceedings.” In the second version of Section 7(b) (e.g. Coyote Band of Pomo Indians), the impasse procedure does not call for mediation and provides specific factors for the Arbitrator to consider when determining the terms of the first collective bargaining agreement.

40. In organizing campaigns, the Union identifies influential employees who strongly desire Union representation. It recruits these “influencers” to encourage other employees to sign authorization cards. In labor relations parlance they are known as “rank and file leaders.”

41. The TLP arbitrator who ultimately heard the case determined the allegations were spurious.

42. The citation for the case is omitted to avoid identifying the Tribe.
Interest arbitration is common only in the public sector, where it is typically used in police and firefighter contracts. The arbitrator is required to either pick the entire last offer of one side or pick one side’s last offer on each issue in dispute. Typically, the issues left for arbitration involve wages and benefits. The criteria the arbitrator is required to use in choosing one side’s position include the wages and benefits of those performing comparable work in similar (sometimes defined) geographic areas, cost of living changes, and the financial condition of the employer. The Coyote Band TLRO uses similar criteria. There is a significant difference, however, between the public sector and the tribal gaming sector. Cities and counties have publicly available budgets and financial statements that are generally compliant with accounting standards established by the Governmental Accounting Standards Board. These are available to any Union that negotiates with a public entity. Tribes’ budgets and financial statements are not generally available to the Union negotiating a first collective bargaining agreement. Under a Barona type compact, the Tribe is not expressly obliged to provide the mediator – or the Union – with its financial statements. Under the Coyote type Compact, the Tribe’s financial statements remain unavailable so long as the Tribe does not specifically put its ability to pay at issue.

In the only impasse that has gone to mediation under a Barona type compact, the mediator recognized that the parties had differing interests preventing each side accepting the other’s proposals. The Tribe was interested in enticing residents of a nearby city to gamble at its casino. Consequently, it provided free lunches to customers who gambled regularly. The employees serving those free lunches, however, relied on tips for a significant portion of their income. The customers eating these lunches frequently failed to leave tips because they had given a free lunch card to the server and did not expect a check. The employees wanted the casino to provide a “paid” check that showed the customers the retail value of the free meal along with tip amount suggestions such as 18% and 22%, typical of what is shown on most restaurant checks. The casino feared this would make patrons feel they were being pressured into providing a tip when the lunch was supposed to be free.

When arguing wages and benefits, the Union provided comparisons with similar sized casinos for which the Union had negotiated collective bargaining agreements and therefore knew the employees’ terms and conditions of employment. The Tribe used only the lowest paid Union comparators and asserted other information it had about casino wages that was not publicly available to support its case. More significantly, the casino claimed to be in financial straits, but did not put that forth in the joint mediation sessions. Instead, it made unconvincing wage and benefit comparisons and claimed its offers were fair based on those comparisons. As the employee negotiating committee began insisting it was time to move to arbitration, the Tribal Chair made an important gesture. Several years had been consumed in negotiations and mediation without agreement on a first contract. The Tribal Chair unilaterally provided an unconditional retroactive increase to raise the employees’ wages. It was not an amount that brought employees to parity with other unionized tribal casinos, even at the retroactive date. However, it demonstrated a willingness to negotiate that helped keep the mediation going.
Because the casino had presented no financial data to demonstrate its actual ability to pay, there was no reliable data to use in deciding a wage that was in keeping with both the market and the Tribe’s financial capacity. The mediator suggested a “mediator’s proposal.” This is a proposal that is attributable to neither side and which both sides can only accept or reject. Neither can negotiate different terms. If the Tribe would open its books to the mediator to evaluate its ability to pay, he would consider the comparators and what he believed represented the maximum the Tribe could afford, then propose a wage term for the agreement. The specifics of the Tribe’s financial situation would not be disclosed. If the Union accepted the proposal, the Tribe could either accept it and have a contract, or have the mediation converted into binding arbitration. The Tribe gave the mediator the necessary financial documents and the mediator was able to propose a wage term to which both parties agreed.

Conclusion

Neither the number of California casinos with Collective Bargaining Agreements, nor the percentage of unionized employees in Tribal casinos is readily available. UNITE HERE asserts it represents 6,000 employees in Tribal casinos. As discussed earlier, courts have held that the NLRA applies to tribal casinos and certiorari was denied, creating binding interest arbitration for first contracts in casinos with Coyote type compacts. There is currently increased interest in, and public approval of, Unions. Unions have had recent successes in both organized workplaces – such as Detroit automobile manufacturers – and in organizing new employers like Starbucks. Whether this portends increased organizing and unionization in California casinos remains to be seen. It will be interesting to watch.

43. This claim is made in a February 2023 comment by UNITE HERE on a proposed rule change. Before The Department Of The Interior, Bureau Of Indian Affairs Re: Class III Tribal State Gaming Compacts RIN: 1076-AF68 25 C.F.R. Part 293
FROM THE WIRE ACT TO WIRELESS: A BRIEF OVERVIEW OF THE HISTORY OF ONLINE GAMBLING IN THE UNITED STATES

Introduction

When Resorts International opened a casino on the Atlantic City boardwalk on May 26, 1978, it was a momentous occasion that would forever change the course of gambling history in the United States. At the time, it marked the first legal casino operation in the United States outside of Nevada. The decades following the adoption of the Federal Indian Gaming Regulatory Act in 1988 saw many states and tribal jurisdictions jumping on the bandwagon and legalizing retail casino operations. As of December 31, 2022, the American Gaming Association estimates that there are approximately 1,000 commercial and tribal casinos in the United States operating in 45 states.

Of course, today, gambling no longer is limited to just brick-and-mortar buildings and physical slot machines and table games. Virtually any computer and smart device is a full-fledged casino, possibly a sports book

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2. See generally State of Play 2023, American Gaming Association, available at https://www.americangaming.org/state-of-play-2023/. The only states with no retail commercial or Indian gaming casino operations are Georgia, Hawaii, South Carolina, Utah, and Vermont, along with the District of Columbia.
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and race book as well, depending on the jurisdiction. While the federal government has passed some laws impacting gambling, the regulation of gambling has traditionally been left to the states pursuant to the Tenth Amendment of the United States Constitution. This has resulted in a patchwork of state laws and regulations that vary widely. Moreover, states are free to completely prohibit all forms of gambling, as Hawaii and Utah have done. At the time of the writing of this article, online casino gambling, including poker, is legal in six states. Sports wagering, both online and retail, is legal in 38 states plus the District of Columbia.

This article will provide a brief overview of the history and evolution of online gambling in the United States. It will highlight certain important milestones and events that brought the gambling industry in the United States to where it is today. Finally, this article will provide an overview of the current status of legal online wagering in the United States.

The Wire Act

Historical Background

The origins of modern online gambling regulation and operations in the United States traces back to the pre-internet era and the anti-organized crime efforts of President John F. Kennedy and United States Attorney General Robert F. Kennedy. As part of that effort, the Wire Act was enacted in 1961 as part of a package of related federal laws that sought to assist states in combating organized crime by cutting off the financial resources obtained


4. See Matthew Kredell, State-By-State 2024 Online Gambling Legislation Projections, PlayUSA (January 8, 2024, updated January 9, 2024), available at https://www.playusa.com/2024-gambling-expansion-preview/. In addition, Nevada has online poker and Rhode Island is expected to launch online casino in 2024.


through illegal wagering activity. The Wire Act reads, in its entirety, as follows:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by

8. Some of these other federal laws include the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955 (2014), the Travel Act, 18 U.S.C. § 1952 (2014), and the Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2014). IGBA is designed to assist states enforce their own anti-gambling laws and requires a state law violation as a predicate to prosecution. The Travel Act generally prohibits travel or the use of any facility in interstate or foreign commerce to promote, manage, further, or carry on any business enterprise involving illegal gambling or other illegal activity. Like IGBA, the Travel Act generally requires as a predicate a violation of state anti-gambling laws or other federal law. The Wagering Paraphernalia Act prohibits the transportation in interstate commerce of anything used for illegal gambling and requires a violation of state law. The Wire Act, by contrast, does not require a state law violation as a predicate.
law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.9

The Wire Act is a supply-side law, meaning that in order to violate its terms one must be engaged in the “business of betting or wagering.” This has been held to require the sale of a product or service for a fee involving third parties or the performance of a function which is an integral part of such business.10 Furthermore, the conduct need not be exclusively engaged in by the business, but must be an integral part.11 The court in Baborian held that “mere bettors” are not covered by the Wire Act.12 The actor must knowingly use a wire communication facility, which has been commonly interpreted broadly to apply to the internet. The actor need not know the wire communication facility crosses state or international boundaries, but simply must knowingly use the facility. Lastly, the actor must transmit, in interstate or foreign commerce, (i) a bet or wager, (ii) information assisting in the placement of a bet or wager, and/or (iii) a communication that entitles the recipient to receive money or credit as a result of a bet or wager. There are two exemptions in the Wire Act. The first exempts the transmission of information related to sports for news reporting. The second exempts the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal. It should be noted, however, that this second exemption only applies to information assisting in the placement of a bet or wager (such as line information) and not to the bet itself or information entitling the recipient to money or credit as a result of a bet or wager.

The Cohen Case

In the late 1990’s, there was a significant Wire Act prosecution against Jay Cohen, an American bookmaker who resided in Antigua and operated an offshore sports book known as World Sports Exchange, which targeted customers in the United States, and in particular, New York.13 Customers were required to first establish an account and wire money into that account in Antigua.14 Bets were then placed either by telephone or online. While such betting activity was legal in Antigua, it was not legal in the United States, and

11. Ibid.
12. Id. at 331.
14. Id. at 70.
importantly for this case, in New York. Cohen was arrested in 1998, charged with violating the Wire Act, and was convicted at trial.\textsuperscript{15}

On appeal, Cohen advanced several arguments to overturn his conviction, including that this offshore bookmaking activity was protected under the safe-harbor provision of the Wire Act. Cohen argued that the betting activity was legal, or not expressly prohibited, in both Antigua and New York and that the transmission of information over the telephone or internet was limited to mere information that assisted in the placing of bets in a jurisdiction where such wagering was legal, and not the bets themselves.\textsuperscript{16} The court rejected both arguments. Even though the betting was legal in Antigua, it was illegal in New York, thus rendering the safe-harbor provision of the Wire Act inapplicable.\textsuperscript{17} Since World Sports Exchange used an account wagering system, Cohen maintained that the information conveyed by the phone or online was merely information assisting in the placement of a bet or wager, and not the bet itself since the information was used to place a bet using the patron’s established account in Antigua. The court held that by World Sports Exchange taking requests and accepting them as bets, the customers were placing bets.\textsuperscript{18}

The Cohen case had an enormous impact on the local economy in Antigua, which had developed into a center for offshore gaming. The remote gaming industry at the time was worth over $3.4 billion to the Antiguan economy and had employed over 4,000 people, which was reduced to only a few hundred people by the early 2010’s.\textsuperscript{19} Motivated by the Cohen case, Antigua in 2003 filed a complaint against the United States before the World Trade Organization (WTO), arguing that certain American laws restricting cross-border gambling and betting services conflicted with the United States’ commitments under Article 1 of the General Agreement on Trade in Services (GATS).\textsuperscript{20} A panel tribunal found that the Wire Act, the Travel Act, IGBA, and laws of the states of Louisiana, Massachusetts, South Dakota, and Utah all violated the United States’ commitments under the GATS. On appeal, the Appellate Body of the WTO reversed the findings of the panel tribunal related to the state laws, not because the Appellate Body did not believe that it had the authority to review and invalidate state laws, but because it found Antigua did not make a \textit{prima facie} case. However, the Appellate Body did find that the federal Interstate Horse Racing Act discriminates against foreign and

\begin{itemize}
  \item 15. Id. at 71.
  \item 16. Id. at 73.
  \item 17. Id. at 74.
  \item 18. Id. at 75.
\end{itemize}
domestic supplies and could not be justified under any exemption. The WTO essentially gave the United States the option to prohibit all online horse race wagering or permit foreign operators. The United States has essentially ignored the WTO’s decision, and the WTO has permitted Antigua to levy trade sanctions against the United States.

The DOJ Memo

Prior to December 2011, the Criminal Division of the United States Department of Justice (DOJ) had taken the position that the prohibitions of the Wire Act applied to all forms of betting or wagering, and not just to sports wagering. Federal courts that had considered the issue were split. In response to an inquiry from the Criminal Division of the DOJ to proposals by New York and Illinois to sell lottery tickets online, the DOJ Office of Legal Counsel released a memo (2011 DOJ Memo) in December 2011 clarifying the federal government’s position on this issue. The Office of Legal Counsel was asked to decide whether the Wire Act prohibits states from offering in-state sales of lottery tickets online if the transmission of electronic data during the sale crossed state lines. The Office of Legal Counsel concluded that the Wire Act’s prohibitions “relate solely to sports-related gambling activities in interstate and foreign commerce.” Importantly, Office of Legal Counsel memoranda are merely guidance and do not carry the force of law.

Even though the request that preceded the 2011 DOJ Memo was ostensibly about offering lottery ticket sales online, several states seized the opportunity to legalize online casino gambling within their respective jurisdictions. Prior to the issuance of the 2011 DOJ Memo, Nevada had

21. 15 U.S.C. § 3001 et seq. (2000). The Interstate Horse Racing Act (IHA) was passed in 1978 to encourage cooperation between states that permit off-track wagering on horse racing. It is an opt-in statute, meaning that states are free to choose to participate, again demonstrating Congress’ intent not to displace state authority over gambling regulation. In 2000, Congress amended the IHA to permit remote wagers across state lines by phone or on the computer so long as the bet is legal in the states where the bettor is located, where the bet is accepted, and where the race takes place. See also I. Nelson Rose, Gambling and the Law: An Introduction to the Law of Internet Gambling, UNLV Gaming Research & Review Journal, Vol. 10, Issue 1 (2006), available at https://digitalscholarship.unlv.edu/grrj/vol10/iss1/1/.

22. For a further discussion of the WTO dispute, see Hollander, supra note 7.


enacted a statute permitting the issuance of licenses for online casinos, but after the DOJ threatened to prosecute any online casino operator, none were issued. Following the 2011 DOJ Memo however, Nevada re-enacted that authorization. Delaware enacted legislation authorizing online casino gambling, poker, and video lottery games in 2012, which launched in 2013. New Jersey adopted its online gambling law on February 26, 2013, including poker, and launched operations in November 2013.

In 2014, Delaware and Nevada entered into a multi-state internet gaming agreement, which permits online poker players in each state to play against each other even though they are not located in the same state. By entering into such an agreement, the pool of possible players and liquidity, particularly with these two smaller states, increases and makes the available games more attractive to potential gamblers. Since that time, New Jersey, Michigan, and West Virginia have joined this interstate poker compact, further increasing the liquidity of the poker market.

The regulated online casino markets in those jurisdictions that legalized such activity continued to prosper following the 2011 DOJ Memo. The federal government under a new presidential administration in 2018, however, requested the Office of Legal Counsel to reconsider the 2011 DOJ Memo. This resulted in a new memorandum that concluded that the Wire Act did apply to non-sports wagering, thus reversing the 2011 DOJ Memo. This memorandum called into question not only the intrastate online sales of lottery tickets but also other types of intrastate online gambling that states had authorized in reliance on the Office of Legal Counsel's earlier opinion. Following this reversal of position, the New Hampshire Lottery Commission and a lottery supplier brought a lawsuit challenging the Office of Legal Counsel's opinion.

27. 29 Del. C. § 4801 et seq. (2012).
30. Id. at 514.
31. Robert Simmons, West Virginia Joins Online Poker Shared Liquidity Agreement, EGR (November 15, 2023), available at https://www.egr.global/northamerica/news/west-virginia-joins-online-poker-shared-liquidity-agreement/. As of the date of this writing, only Pennsylvania and Connecticut have legalized online poker but are not members of the interstate compact and thus do not share in the pooled liquidity.
Counsel’s new interpretation seeking a declaratory judgment that the Wire Act only applied to sports wagering. A federal district court agreed with the plaintiffs, holding that the 2011 DOJ Memo’s interpretation that the Wire Act applied only to sports wagering was the correct one and set aside the 2018 re-interpretation. In 2021, the United States Court of Appeals for the First Circuit affirmed that decision.

**UIGEA and Black Friday**

**UIGEA**

Against the backdrop of the debate over the Wire Act and the rising popularity of poker, including unregulated online poker, the Federal government in 2006 enacted the Unlawful Internet Gambling Enforcement Act (UIGEA) in an effort to crack down on illegal online gambling. Passed as part of an unrelated national security bill regarding port safety, UIGEA has been widely misunderstood and criticized. Unlike prior federal legislation related to gambling, UIGEA was not geared towards fighting organized crime. Instead, UIGEA is a payment processing law which prohibits the processing of financial transactions related to “unlawful internet gambling” as defined in the law. Essentially, UIGEA makes it a crime for payment processors to accept money related to online gambling that violates any other state or federal law. Importantly, UIGEA has a significant, and seemingly often overlooked or misunderstood limiting construction. UIGEA does not make any gambling activity illegal that was previously legal and does not make any gambling activity legal that was previously illegal. The determination of legality under UIGEA is left to other applicable federal and state laws regarding gambling.

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35. 31 U.S.C. § 5361 et seq. (2006). Wagers placed pursuant to the IHA are expressly excepted under UIGEA.
37. UIGEA contains a carve out for fantasy sports contests that both meet the definition set forth in the statute and that are also legal under other federal or state laws. There has been much controversy over the fantasy sports “exception” in UIGEA, with some daily fantasy sports operators, which differ significantly from traditional season-long fantasy sports contests, arguing that UIGEA affirmatively legalizes or authorizes such activity. This article will not cover this ongoing debate, which also involves the application of many different state law tests for what constitutes gambling. What should be emphasized, however, is that UIGEA is clear on its face that it does not make legal or prohibit any gambling activity. That is left to other applicable state and federal laws. UIGEA is a payment processing law and does not directly regulate gambling. For a more complete discussion on this topic, see
This is a recognition of the fact that the regulation of gambling is traditionally a police power reserved to the states pursuant to the Tenth Amendment of the United States Constitution.

One unique aspect of UIGEA is a provision that addresses intermediate routing of data over the internet. Due to the nature of how data is transmitted over the internet, an otherwise wholly intrastate transmission of data over the internet from a computer located in one state to a server located in that same state may cross a number of state and international boundaries. UIGEA, however, essentially overlooks any intermediate routing of electronic data, deeming that it "shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made." This poses a conflict with the Wire Act, however, where even an incidental crossing of state or international boundaries could result in criminal penalties. This issue was sidestepped in the 2011 DOJ Memo as it relates to online casino gambling since it was determined that the Wire Act only reached sports wagering, but could still pose a conflict as it relates to sports wagering, which at the time was still mostly prohibited in the United States outside of Nevada.

**Black Friday**

On April 15, 2011, federal prosecutors from the United States Attorney’s Office for the Southern District of New York (SDNY) unsealed indictments against 11 defendants, including the founders of the three largest internet poker companies then doing business in the United States: PokerStars, Full Tilt Poker, and Absolute Poker. The indictments alleged counts of bank fraud, money laundering, and gambling offenses, including violations of UIGEA. It was alleged that these poker companies used fraudulent methods

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39. United States v. Yaquinta, 204 F. Supp. 276 (N.D. W. Va. 1962). In *Yaquinta*, a telephone wire originated in one part of West Virginia and terminated in another part of West Virginia, but physically crossed over the border with Ohio. A federal district court held that this was enough “to hang a hat” on federal jurisdiction to prosecute a Wire Act violation.

to trick payment processors to continue processing transactions on their behalf by disguising the true nature of the transactions by labeling them as merchandise purchases of jewelry and golf balls. These indictments rocked the online gambling industry and “effectively halted the growth of the lucrative online poker industry in the United States.”

The Black Friday indictments notably did not involve the Wire Act. Eventually, all three operators charged on Black Friday settled their cases with the SDNY. Full Tilt Poker agreed to forfeit virtually all of its assets, including internet domain names, to the United States. PokerStars agreed to forfeit $547 million to the federal government and reimburse $184 million owed by Full Tilt Poker to foreign players. PokerStars also acquired all the forfeited Full Tilt Poker assets from the federal government. Many of the company principals, who were also charged in related cases, were prohibited from serving in any management or director roles in any internet poker companies and PokerStars was prohibited from offering online poker in the United States for real money unless and until such activity was legal under United States law. Absolute Poker was required to forfeit all of its assets to the federal government. While none of the companies admitted to any criminal wrongdoing or guilt in these settlement agreements, the impact and messaging of the Black Friday indictments were clear and the online poker industry in the United States essentially ceased until states such as Nevada, New Jersey, and Delaware later affirmatively legalized such wagering activity.

41. See Holden, supra note 38, at 108, n. 73.


44. See note 43, supra.

The Rise and Fall of PASPA

The Professional and Amateur Sports Protection Act

While much of the focus of this article so far has been on online casino and poker, the recent growth and expansion of sports wagering, including online sports wagering, cannot be ignored. As noted, most gaming law regulation and oversight is left to the various states pursuant to the Tenth Amendment of the United States Constitution. Where the federal government has acted in the gambling space, its efforts have largely been to assist the states in enforcing their own criminal laws and have concentrated on combating organized crime. One major exception to this general rule was the Professional and Amateur Sports Protection Act, more commonly known as PASPA. Enacted in 1992 and signed into law by President George H.W. Bush, PASPA was meant to address concerns over the influence of gambling on minors and the protection of the integrity and fairness of athletic competitions.

PASPA was a unique federal law in the way it operated, which would eventually be the cause of its demise. PASPA did not directly prohibit or regulate sports wagering in the United States. Rather, PASPA made it unlawful for any “governmental entity…or person to sponsor, operate, advertise, or promote…a lottery, sweepstakes, or other betting, gambling, or wagering scheme based…on one or more competitive games” in which amateur or professional athletes compete or intend to participate. Strangely, PASPA delegated enforcement of the law to the various private sports leagues whose competitions were the subject of the wagering schemes, along with the Attorney General of the United States, to commence an action in federal court to enjoin any potential violation of the law.

PASPA contained a number of exemptions, which permitted already existing sports wagering schemes legal under state law to continue. This permitted full sports wagering operations in Nevada, and more limited sports wagering operations as they then-existed in Oregon, Montana, and Delaware, to continue to operate. PASPA also had another provision that permitted any other jurisdiction that had permitted casinos to operate in a municipality.

for the previous 10 years to opt-in and permit sports wagering within a year of PASPA’s enactment. In effect, this provision could only apply to the State of New Jersey which, at that time was the only state that had offered commercial casino gaming for at least 10 years outside of Nevada. For various reasons, New Jersey did not opt-in during this one-year period. A later legal effort by the various Atlantic City casinos to attempt to recognize sports wagering under then-existing law was unsuccessful.

From before the time it was enacted, there were federalism and constitutional concerns over PASPA. In a letter written by then United States Assistant Attorney General W. Lee Rawls in 1991, the DOJ asserted that the manner in which states determine to raise revenues had typically been left to the states and PASPA’s indirect prohibitions on states raised federalism concerns. Over the years, there were a handful of challenges to the restrictions contained in PASPA. Delaware, restricted to offering only three-leg parlay bets on National Football League (NFL) games, sought to expand the types of wagers offered, including single game betting, on various sports leagues, not just the NFL. In July 2009, various professional and amateur sports leagues sued Delaware because the new forms of betting to be offered would differ from the exemption granted to Delaware under PASPA. The federal district court in Delaware declined to issue an injunction, but on appeal, the United States Circuit Court of Appeals for the Third Circuit vacated the district court opinion and held that the exemption in PASPA limited Delaware to only the sport wagering operations that existed at the time PASPA was enacted. Notably, this challenge to PASPA did not involve its constitutionality, merely the extent of the bounds of the exemptions in the law.

The Fall of PASPA

The challenge to PASPA that would ultimately lead to its downfall started in November 2011, when the voters of New Jersey approved a constitutional amendment to the state constitution to permit state lawmakers to authorize sports wagering in the state. Of course, such an
action would be in direct violation of PASPA, which prohibited states from taking action to authorize by law sports wagering schemes. In August 2012, the NFL, National Basketball Association, National Hockey League, Major League Baseball, and the National Collegiate Athletic Association filed a complaint in federal court in New Jersey seeking to enjoin New Jersey from implementing the state constitutional amendment as it violated PASPA. In what may be a surprise to readers unfamiliar with the history of sports wagering in the United States, the various sports leagues vehemently opposed any expansion of sports wagering and argued that permitting sports wagering in New Jersey would undermine the integrity of their sporting contests, even though legal sports wagering existed at the time in Nevada, which they did not oppose, and in the unregulated and illegal black market.

The federal district court concluded that the various sports leagues would suffer a legally cognizant injury sufficient to establish standing to sue and declined to dismiss the lawsuit. Eventually, the DOJ intervened in the litigation to defend PASPA and represent the interests of the federal government. In its opposition to the complaint, the state defendants mounted a complete constitutional attack on PASPA, notably that the law violated the anti-commandeering provisions of the Tenth Amendment to the United States Constitution.

In February 2013, the district court issued an opinion siding with the sports leagues and the DOJ, holding that PASPA did not exceed Congress' Commerce Clause power, did not discriminate between the states, and did not violate the Tenth Amendment, as it did not force New Jersey to take any legislative, executive, or regulatory action. This decision was upheld on appeal by the Third Circuit by a 2-1 vote in an opinion written by Judge Julio Fuentes. The Third Circuit denied rehearing en banc and the United States Supreme Court declined to hear the matter.

Following the loss in the courts, New Jersey passed a new law partially repealing the state’s prohibitions on sports wagering to the extent they constitutionality of PASPA was filed in New Jersey. This lawsuit was dismissed for lack of standing because sports wagering had not yet been approved and authorized in New Jersey. See iMEGA v. Holder, 2011 WL 802106 (D.N.J. Mar. 7, 2011).

61. Ibid. New Jersey also raised arguments under the commerce clause and equal sovereignty doctrine.
62. Ibid. See also Hollander, supra, note 52, and Boswell, supra, note 56.
63. NCAA v. Christie, 730 F.3d 208 (2013). Judge Thomas Vanaskie dissented on Tenth Amendment grounds, and would have held that PASPA unconstitutionally commandeers states by prohibiting states from licensing or authorizing sports gambling.
applied to state-licensed racetracks and casinos. This action was taken due to language in the Third Circuit’s opinion that nothing in PASPA required states to maintain laws prohibiting sports wagering. However, the sports leagues again sued and obtained an injunction, returning the matter to the Third Circuit. In another 2-1 split decision, the Third Circuit again held that New Jersey was in violation of PASPA and that New Jersey’s partial repeal of its sports betting prohibitions must be read as affirmatively “authorizing a scheme that clearly violates PASPA.” Interestingly, Judge Fuentes, who wrote the initial panel opinion upholding the constitutionality of PASPA, dissented and asserted that the majority opinion amounted to nothing more than a false equivalency and recognized that New Jersey simply took actions consistent with his own prior opinion. To the surprise of some, the Third Circuit took the case en banc, which resulted in a 9-3 decision in an opinion by Judge Marjorie Rendell, upholding the constitutionality of PASPA and finding that New Jersey’s partial repeal of its sports wagering prohibitions was tantamount to an affirmative authorization in violation of PASPA. Judge Fuentes, now joined by Judge Felipe Restrepo, again dissented, adhering to his view that a repeal of a law cannot be construed as an affirmative authorization and that New Jersey, as a result, did not violate PASPA. Judge Vanaskie also dissented, and maintained his view that PASPA was unconstitutional under the Tenth Amendment.

Judge Vanaskie’s opinion would eventually carry the day in May 2018, when the United States Supreme Court issued its opinion in the re-captioned Murphy v. NCAA. In a 6-3 opinion authored by Justice Samuel Alito, the Court held that PASPA’s indirect prohibition on sports wagering violated the Tenth Amendment’s anti-commandeering principles and found that no

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69. NCAA v. Christie, 832 F.3d 389 (3d Cir. en banc 2016).
70. Id. at 402 (Fuentes, J., dissenting).
71. Id. at 406 (Vanaskie, J., dissenting).
provision of PASPA was severable. 73 While Congress could have, if it so
determined, directly prohibited sports wagering, it could not, as PASPA did,
commandeer states by prohibiting state legislatures from enacting certain
laws in order to carry out federal policy. As Justice Alito explained, “[a] more
direct affront to state sovereignty is not easy to imagine.” 74

Immediately following the decision in NCAA v. Murphy, states across the
country began to authorize retail and online sports wagering. Delaware was
the first state to enact a post-PASPA sports wagering law, expanding the types
of sports wagering offered in the state similar to what it had previously
attempted to do. 75 New Jersey was the first major new jurisdiction to
authorize sports wagering and launched retail sports wagering at the state’s
racetracks and casinos in June 2018, followed by online sports wagering in
August 2018. 76

Where Do We Stand and Where Do We Go From Here?

With that historical overview and understanding, that brings us to the
current state of online gambling in the United States. Following the 2011 DOI
Memo, it was thought that many states, looking for ways to boost state
revenues, 77 would legalize online casino gambling. While there was an initial
push, currently there are only six states with online casinos: 78

1. Connecticut
2. Delaware
3. Michigan
4. New Jersey
5. Pennsylvania
6. West Virginia

As noted earlier, Nevada permits online poker and Rhode Island has
legalized online casinos, including poker, and is expected to launch sometime
in 2024. 79

73. Ibid. Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia
Sotomayor dissented, mostly on severability grounds).
74. Id. at 1478.
75. James Bisson, Delaware Expands Sports Betting to Include Mobile Sports
Betting Apps, Sportsbook Review (January 2, 2024), available at
https://www.sportsbookreview.com/news/delaware-expands-sports-betting-
to-include-mobile-apps-jan-2-2024/.
77. Steve Petrella, Where Are Online Casinos Legal? Tracking All 50 States,
Action Network (June 2, 2023), available at
78. See Kredell, supra, note 5.
79. Derek Helling, Rhode Island Ensures that 2023 Isn’t a Wash for Online
Casino Expansion, PlayUSA (June 23, 2023, updated October 10, 2023), available
at https://www.playusa.com/ballys-legal-rhode-island-online-casino/.
Since PASPA was held to be unconstitutional, the following states offer sports wagering:80

1. Arizona*
2. Arkansas*
3. Colorado*
4. Connecticut*
5. Delaware*
6. Florida*81
7. Illinois*
8. Indiana*
9. Iowa*
10. Kansas*
11. Kentucky*
12. Louisiana*
13. Maine*
14. Maryland*
15. Massachusetts*
16. Michigan*
17. Mississippi
18. Montana
19. Nebraska
20. Nevada*
21. New Hampshire*
22. New Jersey*
23. New Mexico
24. New York
25. North Carolina82
26. North Dakota
27. Ohio*
28. Oregon*
29. Pennsylvania*

80. Jurisdictions denoted with an * also offer online sports wagering in addition to retail. Jurisdictions denoted with ** offer only online sports wagering operations.


30. Rhode Island*
31. South Dakota
32. Tennessee**
33. Vermont**
34. Virginia*
35. Washington
36. District of Columbia*
37. West Virginia*
38. Wisconsin
39. Wyoming**

While not the focus of this article, it should be noted that online advance deposit wagering on pari-mutuel horse racing is permitted in 40 states.83

It was initially anticipated that many jurisdictions would have authorized online casinos, but only a relative few have actually done so. As can be seen from the lists above, there has been much less opposition to the expansion of sports betting, even though many of the same concerns or issues exist for online casinos. There are a number of reasons why online casinos have not expanded as rapidly and include concerns over cannibalizing the retail market, concerns related to problem gaming, opposition from anti-gambling groups, and logistical issues relating to competition from existing stakeholders, such as racetracks.84 Some states merely require new legislation to authorize new forms of gaming, but other states would require constitutional amendments, which can make the process more cumbersome and expensive.85 Tribal gaming interests must also be taken into account in many jurisdictions.86


85. For example, the State Constitution of Georgia prohibits all forms of gambling other than lottery and nonprofit bingo. See Ga. Const. Art. I, § II, Para. VIII.


For instance and largely due to tribal opposition, two referendums to legalize sports wagering in California failed in 2022. See Guy Marzorati, California Voters Reject Measures to Legalize Sports Betting, NPR (November 9, 2022), available at https://www.npr.org/2022/11/09/1133986282/california-gambling-prop-26-27-midterm-results. Due to concerns related to the Wire Act, IGRA, and UIGEA, there is an open question of whether Tribal gaming operations can offer online casino beyond the borders of tribal reservations. For a discussion on this topic, see Koichi R. Aton, Tribal Casinos and Online Gaming: Hurles in Modifying
So where do we go from here? 2024 could be a busy year for legislators and lobbyists, with many states actively considering the legalization of online casino or sports wagering, though some commentators are less than optimistic.87 For instance, and as of the writing of this article, legislators in both Maine and New York have recently introduced legislation to authorize online casinos.88 Moreover, legislators in both Missouri and Minnesota have introduced sports wagering bills, and there is a renewed push for another constitutional ballot referendum in California.89 While it is unlikely that each of these legislative pushes will ultimately be successful in 2024, it seems a good bet that more jurisdictions across the United States will legalize online casinos in the near future and, to the extent they have not already, sports wagering and online sports wagering. We have come a long way from the days of bookies, organized crime, and telephone wires. We now have full-fledged mobile casinos and sports books in our pockets.90 With this colorful history in mind, what state will be the next one to roll the dice and authorize online gambling?

State Charters to Meet the Digital Era, 13 UNLV Gaming L.J. 109 (2022), available at https://scholars.law.unlv.edu/glj/vol13/iss1/6/. For instance, the Ninth Circuit Court of Appeals has held that IGRA and UIGA do not permit a tribe to offer online gambling to patrons located in California. See State of California v. Iipay Nation of Santa Ysabel, 898 F.3d 960 (9th Cir. 2018).

87. See Kredell, supra, note 5.


90. It should be noted that illegal and unregulated gambling, including online gambling, offshore gambling, and skill gaming, still exists and combating such operations remains a priority for the regulated industry. See Illegal Gambling, American Gaming Association (2024), available at https://www.americangaming.org/policies/illegal-gambling/.
Sara Partida

TECHNOLOGY IN GAMING

Introduction

When the modern era of gaming began in Nevada in 1931 (after roughly two decades of being prohibited), the notion that every person would someday have a casino in their back pocket was inconceivable. Yet, less than 100 years after Nevada set itself on the path to be the gambling mecca of the U.S., that is a reality. As the technology sector innovates, the gaming industry has always seized on those opportunities and found new ways to entertain gamblers. New technology also comes with new risks that were not contemplated when gaming was first legalized in the various jurisdictions. This article explores some of the technological developments and regulatory responses in commercial gambling. It is not meant to be exhaustive but rather highlight some of the technology that shaped an industry that continues to reinvent itself.

Evolution of Technology in Slot Machines

Early Mechanical Machines

The earliest devices used in gaming operations were a far cry from the high-tech machines in casinos today. If necessity is the mother of invention, the first slot machines certainly embody that mantra. In the 1880’s, poker was extremely popular across the United States, particularly in “poker-infatuated San Francisco.” The first slot machine, produced in 1891 by Sittman and Pitt, was a mechanical device consisting of springs, reels and a lever designed to allow individuals to play a mechanized version of the much loved game. Known as the “one-armed bandit” because of its pull down lever that started

1. Roll the Bones: The History of Gambling, Pr. 187.
the game, the device brought poker into establishments that hadn't previously offered the game. From 1894 through 1908, several advancements were made which allowed the early slot machine to accept coins and pay out winnings automatically. While those may seem like minor changes, it meant more time spent playing the slot machine for guests, and less time spent by the proprietor or employees of the establishment in maintaining the operation of the machines. Through these early years of slot machines, most laws were ambiguous as to the legality of mechanical gaming devices. Given that gambling and slot machines were not legal in all jurisdictions, often times the payout was not money; it was typically some type of good otherwise sold by the shop, such as gum, candy, cigars, or similar items. The justification being that because it was not offering money or a significant prize for winning, the machine was not a gaming device, and not in violation of anti-gambling laws.

In 1909, California and Nevada both passed laws making gambling illegal. For Nevada, this law went into effect October 1, 1910. It was briefly repealed in 1911 and reimposed in 1913. It was not until 1931 that Nevada passed laws once again allowing gambling. From approximately 1910 through 1931, legal gambling was almost nonexistent in the U.S. Not surprisingly, there were not as many technological advancements in gaming during this time, and those that did come during this period were mechanical improvements geared toward reducing slot cheating scams and staying "one step ahead of ingenious tricksters."

4. Roll the Bones: The History of Gambling, Pg 188.
6. Roll the Bones: The History of Gambling, Pg 189.
Electromechanical Machines

The next major advancement in the slot machine industry came in 1963, when Bally Manufacturing Company introduced the first entirely electromechanical slot machine, Money Honey. Money Honey introduced two important advancements in the slot machine industry, a “reliable electronically controlled construction and the incorporation of a ‘bottomless’ motor-driven payout hopper capable of automatic payouts of up to 500 coins without the use of an attendant.” Making the slot machine fully electromechanical also meant that the iconic lever was no longer necessary to operate the slot machine. Although Money Honey still provided the lever, over time the handle of the one-armed bandit was phased out and was replaced with buttons as the means for starting a game.

Video Slot Machines

In 1976, the first video slot machine was manufactured in Kearny Mesa, California. This machine used a modified Sony television for the display and replaced the old mechanical reels with graphic reels using a computerized display. This new video slot machine was first installed for field trial in the Las Vegas Hilton and was ultimately approved for statewide use by the Nevada Gaming Commission. The new video display screen resulted in a vast expansion of the number and types of symbols that could be displayed. As computer processing and display technology has advanced, the possibilities have proven endless, and include multimedia and interactive features. Moving away from mechanical devices to electromechanical also introduced the need for a computerized means of randomizing the results.

While some limited gaming, such as card games, bingo and sports pools, has been legalized in Montana since 1973, in 1983 the voters defeated an initiative which would have established a Gaming Commission and expanded authorized gambling in the state to include “blackjack, punchboards and certain electronic or mechanical gambling devices.”

11. https://www.delasport.com/history-of-slot-
12. https://www.delasport.com/history-of-slot-
13. https://www.delasport.com/history-of-slot-
1984 Montana Supreme Court ruling gave another blow to legalized gaming when it held that electronic poker machines were illegal slot machines as defined by Montana law. The decision relied in part on a finding that the computerized version of poker, which relies on a random generating pattern to display cards, was not the same as playing the game of poker as defined by the Montana Card Games Act. This decision ultimately led the legislature to pass the Video Poker Machine Act in 1985, allowing for poker machines and keno machines in certain licensed establishments. Montana is in the company of Nevada and Oregon as one of the only Western states to allow any form of slot machine in an establishment other than on tribal lands, in Oregon these are called video lotteries, which are overseen by the Oregon Lottery. Alaska, by contrast, does not permit slot or video poker machines even in tribal gambling establishments.

In 1996, WMS Industries Inc. released “Reel ‘Em,” which was the first video slot machine with bonus rounds on a second screen. The invention of the second screen bonus round, which later became known as a “bonus game” or an “extended feature” would auto initiate when a certain outcome was achieved. These games reinvigorated the popularity of slot machines and soon this new type of machine dominated the Las Vegas casino floors. With the popularity of the new games came a new challenge for regulators in the form of patron disputes. In 2001, the significant increase of patron disputes led the states of Arizona, Colorado, Michigan, Mississippi, Nevada, New Jersey, and New Mexico, and the province of Ontario, to each issue a similar policy governing auto-initiation of bonus games and extended features by a gaming device. While cooperation amongst gaming regulators is not unusual, this cooperative effort which led to the issuance of coordinated policies by so many jurisdictions was unique and underscores the substantial number of patron disputes concerning these types of games.

Progressive Slot Machines

The lottery has long been viewed as competition to casino gaming, and one only has to observe the gaming industry’s opposition to a legal lottery in
Nevada to understand the depth of that rivalry. In 1985 the first interstate lottery was approved, allowing anyone in Maine, New Hampshire and Vermont to play a combined lottery, thereby increasing the prize pool. Seeing this expansion of single-state lotteries into multi-state lotteries, the gaming industry soon responded with its own opportunity to win a multi-location prize pool. International Game Technology released Megabucks, an industry-changing progressive jackpot slot machine in 1986. The idea behind the progressive jackpot was to accumulate the prize pot over multiple linked slot machines, with the eventual winner taking the pot from all slot machines, not just the single machine at which the patron was gaming. There are three types of progressive slot machines used across the various jurisdictions, the stand-alone progressive machine, which accumulates the jackpot at a single device and is not linked to any other device, the multiple gaming device progressive, where multiple devices are linked to offer a common jackpot, and multi-site progressive slot machines where gaming devices are linked across more than one casino and offer a common progressive jackpot across all linked sites. It was not until 1995 that Nevada gaming laws were revised to account specifically for this type of game, which was defined and regulated as “inter-casino linked system.” Slot machines now account for $8.98 billion for the U.S. gaming industry.

Table Game Advancements

In addition to the advancements in slot machines and related systems, new technology in table games also developed over the years. The invention of the card shuffler, a device which is capable of randomly rearranging a deck or multiple decks of playing cards prior to use in a game, and the card shoe, which holds the playing cards for distribution by a dealer, made dealing cards less prone to human error and ensured a more even randomization of cards within the deck(s). Even casino chips have now gone high-tech, using radio frequency identification (RFID) technology to tag and track chips used in the casino. One of the newest advancements in table game technology is the use of RFID chips in playing cards and corresponding RFID technology in poker tables, allowing for the tracking of the exact location of all playing cards in a poker game. This technology is on display during live poker tournaments.

22. Minutes of the Meeting of the Assembly Committee on Legislative Operations and Elections, April 4, 2023, Pgs. 35-39 (https://safe.menlosecurity.com/doc/docview/viewer/docNDB7C8E92DB49a56137e92860902417a28113045b0be10563c5f691b923d5b06a179b8971ca9)
25. GLI-12 version 2.1: Progressive Gaming Devices in Casinos, Release date September 6, 2011, Pg. 11.
26. NRS 463.01643.
27. https://www.americangaming.org/resources/aga-commercial-gaming-revenue-tracker/
such as the World Series of Poker and the World Poker Tour, allowing the
audience and announcers to see which cards are held by which players.

Data Systems and Monitoring

In 1976, Bally exemplified the technological advancements of the
gaming industry by creating a new division, Slot Data Systems (SDS). As the
first fully computerized data-collection system, SDS ushered in a new era of
electronic slot management, slot accounting, and slot security previously
unheard of in the casino industry. Similar systems are now offered by
numerous gaming equipment manufacturers and have grown to include data
collection and monitoring for all aspects of the casino, not just the slot
machines. In addition to systems which monitor casino activity, the machines
and devices themselves are also now frequently connected to internet or
intranet connections to allow updates as well as ongoing monitoring to
ensure the proper function of the devices.

From the 1990s through the 2000s, regulatory agencies also began to
embrace what new technology could offer and started requiring certain
automated slot accounting and administrative tools be installed in gaming
equipment and systems. These tools allowed for real time tracking of events
and data, from machine performance to floor performance. Individual player
activities could be electronically tracked for the first time if a player card was
used and allowed in the jurisdiction (see discussion below concerning loyalty
programs). During these years, many regulatory agencies also began to
update internal controls to account for technological advancements. In 1999,
Montana passed House Bill 109 to authorize use of automated accounting
and reporting systems to simplify the reporting of video gambling machine
data, including revenue reporting, to increase efficient recordkeeping and
reduce regulatory costs. Nevada Gaming Regulation 6.045 requires certain
gaming licensees to maintain an online slot metering system, which required
installation starting in 2005.

Another development that has been a natural outcome of the
technological advancements already mentioned is server-based gaming.
Historically, each gaming device was a standalone computing terminal and
all computing, from game logic to the random number generator and gaming
configurations, were performed on the machine. This is no longer the case
and some or all of the computing functionalities may take place on a remote
server, not within the gaming device on the casino floor. This type of remote
processing is generally broken down into two classifications, the server based
game system, or a server supported game system. In a server based game
system, “the entire or integral portion of game content resides on the [remote]

information.

With a server supported game system, the entire control program and game content are capable of being transferred to the gaming terminal, allowing the gaming terminal to operate "independently from the system once the downloading process has been completed." The game outcome is still determined by the gaming device itself and not by the system. Regulators started taking a closer look at how these systems were operating, including Nevada which has established basic system architecture and other technical requirements for system based and system supported gaming devices.

The collection of data had another significant advantage for the casino operators and players - customer loyalty and rewards programs. The programs gave casinos a way of more closely monitoring the gaming activities of its players, and players who participated were rewarded for their play with free play credits, dining rewards, free hotel rooms, and more. Most states have remained somewhat permissive on the collection and use of player data, but Montana did not take a hands-off approach to regulating customer rewards programs. Use of a player tracking and/or player rewards system had been prohibited in Montana until quite recently. A prior attempt to authorize this type of player tracking system was vetoed by the Montana governor in 2019, citing problem gambling, a competitive advantage for large operators over small operators, and a concern that the bill had not been reviewed by the state’s Gaming Advisory Council. The following legislative session, in 2021, Montana’s legislature approved player reward systems.

Cashless Wagering Systems

While slot machines continued to get smarter and more advanced, the underlying casino systems and corresponding regulations had to advance to keep pace. While the bottomless hopper, first introduced with Money Honey, was seen as revolutionary at the time, even more groundbreaking was the idea of the cashless wagering systems. Introduced in the early 1990’s the “ticket-in, ticket-out” system, came to be known as TITO. Cashless wagering systems allow a patron to use a paper voucher, printed with a barcode or other electronically readable indicator of value and move credits from one machine to another without having to handle large amounts of coins. When the patron is done playing at a machine, they print a paper ticket to remove the remaining credits from a machine. The patron moves to the next machine, inserts the paper voucher, and the machine is then credited with the value remaining on the voucher. While being more convenient for the patron, it also


eliminates significant overhead for the casino by reducing labor costs and wear and tear on machines because they no longer have to handle large volumes of coin.34

**Regulation and Testing**

Oversight of the gaming industry requires regulatory evolution in conjunction with technological developments. Public policy dictates that state gaming regulators safeguard the fairness and integrity of the gaming industry. Regulatory responsibility requires expertise in technology be developed or outsourced to ensure proper oversight. For each type of gaming device, associated equipment, and system, regulators have set technical standards for the proper operation and security of the device or system. These technical standards set forth the minimum criteria required to obtain approval or certification for the device or system being proposed for gaming activity within the jurisdiction. With some limited differences in jurisdictions which offer tribal gaming only, the testing and approval of devices and systems is typically handled in three ways: (1) the gaming regulator handles the testing itself; (2) the testing is outsourced to an independent testing laboratory (lab); or (3) a combination of the two.

By way of example, in Arizona, the Arizona Department of Gaming uses an independent testing lab to test and certify devices before the device or technology can be submitted to the Arizona Department of Gaming for testing and verification.35 In 1998, the Washington State Gambling Commission established the Electronic Gambling Lab, where equipment is tested and approved before it can be used in “house banked card rooms, authorized electronic raffle locations, and tribal casinos.”36 Conversely, in California, “[g]aming devices must be approved by an independent testing laboratory licensed by a tribal gaming office and certified by the state gaming agency.”37

The use of independent testing labs was not a new concept for other states, but Nevada’s Electronic Services Division (later renamed the Technology Division) has its own state run laboratory capable of testing and validating most gaming devices, systems and equipment in-house. In 2001, following the increased use of cashless wagering systems, the Nevada Gaming Control Board announced its intent to use qualified testing labs to test slot machine-to-system interfacing for cashless wagering systems.38 Other than limited

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37. https://us-west-1-02900067-view.menlosecurity.com/safeview-fileservtc_download/cd10e7753deabeff2cc5b8ff88a19e62c572b7020953c0edf0113b4d3065ad7/?cid=NB55D130B88B6E_&rid=489341815ee67de185f274aafda5fa&cl=4CTCXAXIFGa.
testing conducted by the independent labs, it was not until 2011 that the Nevada legislature authorized the Gaming Control Board to “utilize independent testing laboratories for the inspection and certification of any gaming device, associated equipment, cashless wagering system, mobile gaming system or interactive gaming system, or any components thereof.” 39

Server-based gaming, cloud hosting, and other technological advancements have resulted in casinos increasing reliance on third party technology vendors that have not historically been part of the gaming industry. Regulators have grappled with issues like determining whether gaming data, including patron data, gaming hardware, and similar data, can be stored at sites not licensed for gaming operations, whether such data can leave the jurisdiction in which it is operating, and what level of service can be provided by an un-licensed third party. Nevada adopted laws specifically addressing hosting centers and service providers in 2011, and many other states have followed with varying outcomes on how those critical questions are to be answered. 40

**Interactive, Online and Mobile Gaming**

Interactive gaming is defined as exposing gambling games for play through communications technology which allows a person to use a computer to assist in the placing of a bet or wager and corresponding information for the purpose of gaming. 41 In short, interactive gaming allows casino games to be offered using computer and internet technology. Nevada first authorized interactive gaming in 2001, 42 at the time giving the Nevada Gaming Commission authority to adopt regulations for interactive gaming after it determined whether such activity can be done in compliance with Nevada’s laws governing gaming and that systems used for interactive gaming would be reliable. These regulations were not adopted until 2011, when the Legislature removed the requirement that the Commission make those findings public. 43 Assembly Bill 258 of the 2011 Legislative Session opened the door for interstate interactive gaming if a federal law authorizing interactive gaming was enacted or the United States Department of Justice notified Nevada in writing that such interactive gaming would be permissible under federal law. 44 On December 22, 2011, the Commission adopted a new Regulation - 5A, governing the operation of interactive gaming, by setting the regulatory framework for internet poker to be offered by licensed gaming operators. 45

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39. NRS 463.670(7).
40. NRS 463.673 and 463.677.
41. NRS 463.016425
42. NRS 463.750
43. 2011 Statutes of Nevada, Pgs. 1669 and 1670 (CHAPTER 302, AB 258).
44. 2011 Statutes of Nevada, Page 1670 (CHAPTER 302, AB 258).
In 2013, Nevada’s Legislature took interactive gaming one step further by removing the dependency on federal action to operate interstate interactive gaming and affirmatively requiring the Gaming Commission to adopt regulations authorizing the Governor to enter interstate compacts for interactive gaming. This legislation was effective immediately and permitted Nevada’s governor to pursue interstate compacts, thereby allowing Nevada residents to play online poker with residents of other states which had entered such compacts. The Multi-State Internet Gaming Agreement (MSIGA) was first signed by Nevada and Delaware. Taking effect on February 25, 2014, the MSIGA allowed Nevada residents to begin playing poker on Delaware’s interactive gaming websites. To date there are five states in the MSIGA, Delaware, Michigan, Nevada, New Jersey, and West Virginia. Pennsylvania is the only other state which currently offers interactive gaming but is not a member of the MSIGA. Rhode Island, in 2023, passed legislation that will allow operators to offer online table games; however, the legislative changes are recent and interactive gaming is not yet available in the state.

Online and interactive gaming introduced new challenges by way of payment processing, identity and age verification, and geolocation. The federal Unlawful Internet Gambling Enforcement Act prohibits the processing of certain payment methods for unlawful internet gambling sites or the banks which represent such sites. In the early days of legalized interactive and online gaming, many banks, card brands, and payment processors were reluctant to assist with payment processing for these new lawful websites. Although more providers are willing to facilitate payment today, there are still several hurdles that a legal gaming website or app must jump over before processing certain payment types. For example, most payment processors and card brands will require the gaming site to obtain an independent legal opinion of the legality of operating in the jurisdiction and manner intended for the gaming site. Even after the gaming site is successful in establishing payment processing methods, many credit and debit card transactions are still being declined due to the nature of the transaction. In testimony before the Nevada Committee to Conduct an Interim Study on the Impact of Technology Upon Gaming, it was reported in 2013 that only 44 percent of credit card transactions for online gaming sites were approved by the

46. 2013 Statutes of Nevada, Page 5 (CHAPTER 2, AB 114).
49. https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=04&div=0&chpt=13B
consumers’ banks.\textsuperscript{52} This problem has been largely resolved since the early days of legal online gambling, due in part because there are more options available for making deposits into and processing withdrawals from online wagering accounts, but also due to the fact that online gaming has become legal in more jurisdictions since Nevada first allowed it.

The technical requirements for interactive gaming systems require that an interactive system be capable of geolocating the player’s physical location within a specified confidence radius to ensure that the player is physically present in the jurisdiction in which the system is approved to operate. Prospective players must have their identify successfully confirmed before they are allowed to play a game on an interactive system. This includes minimum authentication of the legal name, address, and date of birth. Both of these functions are frequently outsourced to third party service providers who specialize in that field of regulatory compliance.

In its 2018 decision in \textit{Murphy v. National Collegiate Athletic Association},\textsuperscript{53} the U.S. Supreme Court turned the online and mobile gambling law on its head when it struck down as unconstitutional the Professional and Amateur Sports Protections Act of 1992 (PASPA),\textsuperscript{54} which generally prohibited sports betting in the U.S. With the overturn of PASPA, online gambling in the form of sports wagering became widely accepted in the United States. Thirty-eight states and District of Columbia, as of November 7, 2023, have live sports betting, with most states having some form of online/mobile app sportsbook(s). Nevada’s exclusion from the PASPA prohibitions meant that it had mobile sports wagering even before the 2018 overturn of the law.

\textbf{Cybersecurity}

Cybersecurity and the risks of technology infrastructure failures has been a topic of regulatory concern in all industries. U.S. states have long had data breach notification rules requiring all businesses to disclose certain breaches of personally identifiable information, and some states also have minimum technology requirements for businesses which hold personally identifiable information about consumers. Gaming regulators have long incorporated system and equipment requirements in their technical standards and apply minimum internal controls and standards to gaming operations and certain gaming equipment, including some limited specifications for cybersecurity requirements. As the online, mobile, and interactive gaming options continue to grow, many jurisdictions are now realizing that technology standards directed at only a single device or system are missing the bigger picture of how all systems and devices connect to each other. For example, if several systems, each of which was independently

\begin{itemize}
  \item \textsuperscript{52} Minutes of the Nevada Committee to Conduct an Interim Study on the Impact of Technology Upon Gaming, pg.5 (https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2013/Meeting/4639).
  \item \textsuperscript{53} 138 S. Ct. 1461 (2018)
\end{itemize}
tested and approved, are used in a manner in which the systems are all connected, there may be vulnerabilities that were not evident when testing isolated systems. Similarly, the overall technology infrastructure on which these systems and devices are being operated along with the security implemented on those networks may not be subject to gaming regulatory approval or may have vulnerabilities that are not identified by gaming technical standards. In December 2022, the Nevada Gaming Commission adopted comprehensive cybersecurity requirements and breach reporting.55 The new Nevada cybersecurity regulation does not limit its applicability to gaming systems; it covers all gaming operator information systems. Pursuant to Regulation 5.260, a gaming operator is required to establish cybersecurity best practices, perform ongoing risk assessments, and report cyber-attacks. In addition, certain licensees are also required to designate a qualified individual to be responsible for its cybersecurity program and perform certain annual audits.56

Future Technologies

It seems technology news is inundated with stories discussing cryptocurrency, and not always painting the technology in a flattering light. Several Nevada casino operators offer cryptocurrency ATMs on or near the casino floors, allowing customers with crypto wallets access to those funds while at the casino. It was recently announced that Bitline will roll out a new technology to utilize blockchain technology to provide casino patrons worldwide with casino chip access on the gaming floor, directly from their cryptocurrency or digital assets.57 One of the controversies surrounding the use of cryptocurrency in gaming is the problem with ascertaining source of funds and conducting customer due diligence, as required by the Bank Secrecy Act58 and gaming regulation. To combat this criticism, Bitline said it has formed a strategic partnership with Everi Holdings, a well-known gaming manufacturer, along with other partners to “implement transaction monitoring.”59 The prevalence of cryptocurrency will only continue to increase now that the SEC has approved the listing and trading of a number of spot bitcoin exchange-traded product shares60 and it will be more important than

56. Reg 5.260.
ever that the gaming industry be prepared to respond to the increased use and availability of this new type of currency. The rise of artificial intelligence in all aspects of computing and analytics is also gaining traction within the technology world, and this is also being seen in the gaming industry. One of the earliest examples of artificial intelligence is the use of facial recognition software by casino surveillance systems. The use of artificial intelligence in these systems has allowed casino operators to more easily identify persons who are prohibited from being on the casino premises. Moving beyond security uses, several technology companies recently exhibited new, improved artificial intelligence products which are capable of carrying out hospitality services, including baristas, bartenders, and chefs.\(^{61}\) While these technologies are not gaming focused, it would not be a stretch to someday see technology equipped with artificial intelligence capable of dealing a live table game, or carrying out any number of other responsibilities on the gaming floor. The regulatory response to these new technologies may influence whether and how quickly they are incorporated into business operations.

**Conclusion**

If early legislators and regulators in 1931 could not conceive of mobile gaming and the current technologies incorporated into gaming, it would be naive of us to believe that we can conceive of what the next 100 years will bring. Knowing now the benefits of rapidly changing technology, it is incumbent upon the gaming industry to set up structures to ensure it is ready to advance at the same pace as new technology is being introduced. Setting frameworks for overseeing these advancements in a way that continues to monitor the security and integrity of the games but allows more nimble changes will ensure the industry’s long-term viability in an increasingly digital world.

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GAMING HISTORY

Nevada's modern gambling framework was legalized in 1931. At that time, the Nevada legislature granted local authorities the power to regulate or prohibit gaming. In 1945, the legislature created the first state tax of 1% of gross gaming revenue and required casinos to obtain a state license. The Nevada Tax Commission (NTC) collected taxes from the industry but did not have any other authority or regulatory oversight over gaming until 1947, when the Attorney General opined that it could limit licensing based on suitability.
In 1949, the legislature shifted regulatory authority from local governments to the state.\footnote{Id. at 28.}

Organized crime took root in Nevada’s gaming establishments in the industry’s earliest years.\footnote{Id. at 26.} Organized crime’s rise and other issues involving criminal conduct in gaming drew attention from the federal government. For example, Senator Estes Kefauver (Tennessee) threatened greater federal intervention, and, in the 1950s, chaired congressional hearings that discussed and produced a report critical of Nevada gaming and the presence of organized crime.\footnote{https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/NV-Gaming-History.pdf, slides 30-32.} Around that time, Congress entertained legislation that adopted an industry-decimating excise tax of 10%.\footnote{Id.} However, Senator Pat McCarran (Nevada) was able to maneuver around proposed legislation that attempted to impose such a crippling excise tax on Nevada’s gaming industry.\footnote{Id. at 31.}

Nevada recognized that the threat of federal intervention was likely without significant efforts to rid the industry of the influence of organized crime. In 1955, the Nevada legislature created the Gaming Control Board (GCB) to assume responsibility for the regulation of the gaming industry and, in 1959, replaced the NTC’s role with the Nevada Gaming Commission (NGC).\footnote{Id. at 32, 36.} Governor Grant Sawyer shaped the industry’s policy goals within the Gaming Control Act. The Act continues to be the authority on policy goals in Nevada’s gaming regulatory framework.\footnote{Id. at 35.} The Gaming Control Act also made the GCB an independent agency.\footnote{Id. at 36.}

There are two relevant bodies: the GCB consists of three board members and an agency divided into six divisions, each led by a chief: Administration, Technology, Enforcement, Audit, Investigations, and Tax and Licensing.\footnote{Id. at 37.} The GCB’s Enforcement Division is empowered to conduct criminal and regulatory investigations as well as perform other activities commonly assigned to policing agencies.\footnote{https://gaming.nv.gov/index.aspx?page=46.}
There is also the Nevada Gaming Commission. The five-member Commission may accept licensing recommendations from the GCB, take disciplinary action, and adopt binding regulations.\textsuperscript{15}

**CANNABIS LEGALIZATION**

In 2000, Nevada voters legalized medical marijuana by supporting the Nevada Medical Marijuana Act (NMMA), an amendment to the Nevada Constitution.\textsuperscript{16} As a constitutional amendment, the change was required to pass by a vote of the people in two consecutive elections, which occurred in 1998 and 2000. The NMMA authorizes medical patients to use cannabis upon the advice of a physician for the alleviation or treatment of certain medical conditions.\textsuperscript{17}

While NMMA allows patients to use medical marijuana upon the advice of a physician, it did not create a method for legal sales of marijuana in Nevada. The Nevada legislature passed Senate Bill 374 in 2017, which allowed for state licensing of medical marijuana dispensaries, cultivation facilities, and production facilities. The Bill also devised a system of registering medical marijuana patients, commercial licenses, and medical cannabis industry employees with the state.

In early 2014, the Marijuana Policy Project (MPP) filed an initiative petition to regulate and tax marijuana in Nevada.\textsuperscript{18} The first medical marijuana licenses were awarded in late 2014.\textsuperscript{19} Starting in 2015, licensees were allowed to transfer their registrations to another entity (originally prohibited) via the passage of Senate Bill 276.\textsuperscript{20} Nevada’s first marijuana

\textsuperscript{15} Id. at 55.


\textsuperscript{17} Nevada Const., art. IV, sec. 38, https://www.leg.state.nv.us/const/nvconst.html#Art4Sec38.

\textsuperscript{18} Initiative to Regulate and Tax Marijuana, April 23, 2014, https://www.webcitation.org/6T06efF7c.


“The following are nontransferable:...2. A medical marijuana establishment registration certificate.”
businesses also opened in the state in 2015, with Silver State Relief in Reno being the first establishment to open in northern Nevada \(^{21}\) and Euphoria Wellness the first medical marijuana business to open in southern Nevada. \(^{22}\)

The Nevada Marijuana Legalization Initiative (Question 2) appeared on the 2016 ballot as an initiative petition and was approved by voters. \(^{23}\) Question 2 authorized anyone 21 years of age or older to possess and consume retail marijuana. Marijuana consumers can possess up to one ounce of marijuana or one-eighth of an ounce of concentrated marijuana. The law also clarified that marijuana can only be purchased legally from a state-licensed retail marijuana store. \(^{24}\)

With the approval of Question 2, voters mandated the sale of adult-use cannabis in Nevada beginning on January 1, 2018. However, the NTC approved temporary regulations \(^{25}\) on May 8, 2017, to allow recreational cannabis to be sold as of July 1, 2017, under an “early start” program. \(^{26}\)

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**Changed language from 2015 Statutes of Nevada, page 2978:**

“Except as otherwise provided in subsection 2, the following are nontransferable:

A medical marijuana establishment agent registration card.

A medical marijuana establishment registration certificate.

A medical marijuana establishment may transfer all or any portion of its ownership to another party...”

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\(^{25}\) https://tax.nv.gov/uploadedFiles/taxnvgov/Content/Meetings/Marijuana-Overview-2-14-19.pdf

Modeled after the GCB, the Cannabis Compliance Board (CCB) was created by the passage of Assembly Bill 533 (AB 533) at the end of Nevada’s Eightieth Legislative Session in 2019. Nevada had undergone considerable shifts prior to that with regulation initially under the Department of Agriculture, then the Division of Health and Human Services, and eventually, the Department of Taxation.

Cannabis manufacturing and distribution continue to be prohibited under the Controlled Substance Act (CSA) at the federal level. Marijuana is classified as a Schedule I substance by the CSA. Schedule I drugs are defined as “drugs with no currently accepted medical use and a high potential for abuse.”

29. The Division of Public and Behavioral Health, under Nevada’s Department of Health and Human Services, initially regulated legalized medical marijuana businesses and sales. To efficiently govern and wisely utilize resources, the Nevada Legislature combined the medical marijuana and adult use regulatory programs by moving the medical marijuana regulatory responsibilities to the Nevada DTC in 2017. In 2019, in collaboration with the Governor’s Office, the Nevada legislature relieved the Department of Taxation of most of its oversight over the cannabis industry by creating the Cannabis Compliance Board (CCB) with the passage of AB 533. AB 533 bestowed the CCB with governing authority over medical and adult-use cannabis licenses and sales beginning July 1, 2020. The CCB has the authority to adopt, amend, and repeal regulations. In addition, the CCB has the authority to issue, deny, and revoke cannabis business licenses, subject to certain state laws. AB 533 also created a Cannabis Advisory Commission (CAC), but that body is strictly advisory.
30. 21 U.S.C § 841.
32. Id.
CREATION OF THE CANNABIS COMPLIANCE BOARD

In 2019, Governor Steve Sisolak issued Executive Order 2019-03, establishing the Advisory Panel for the Creation of a Nevada Cannabis Compliance Board (Governor’s Advisory Panel). The Executive Order notes that “Nevada’s [world-class] gaming industry and the renowned regulatory structure which protects the gaming industry, its patrons, and the State’s reputation evolved in a manner instructive to Nevada’s medical and retail cannabis economies.” The Executive Order goes on to note:

Whereas, the historical parallels between the development of Nevada’s legal gaming industry—the result of the genius and initiative of the industry’s most important figures and the active management of the industry by Nevada’s world class regulatory structure, often responding to considerable pressure from federal law enforcement agencies— and the early history of Nevada’s nascent medical and retail cannabis industry, subject to similar law enforcement scrutiny and pressure, suggests that the latter, if properly managed could follow a similar trajectory as Nevada’s successful gaming industry.

Four of the five members of the Governor’s Advisory Panel included the Governor’s then-General Counsel, former Chief of the Gaming Division within the Attorney General’s Office, former GCB Chairman Dennis Neilander, and gaming law attorney and professor Jennifer Roberts. There is no mistaking that the Governor’s Advisory Panel planned to model their proposed compliance board after the regulatory structure of gaming in Nevada.

AB 533 adapted elements of Nevada’s gaming model but was not an exact replica. The bill, which created an entirely new state agency and regulatory model for cannabis, was discussed and passed by Nevada’s legislative body in less than two weeks.

Pursuant to AB 533, the CCB consists of a five-member Board with regulatory authority and the Cannabis Advisory Commission (CAC) with 12 members who provide recommendations to the CCB. The Board has the

33. https://tax.nv.gov/FAQs/Cannabis-Compliance/
34. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.
35. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.
36. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.
37. https://tax.nv.gov/FAQs/Cannabis-Compliance/
38. AB 533, 2019.
authority to adopt and repeal regulations, license businesses, and impose disciplinary sanctions. 39 The CAC does not have binding authority, but may make recommendations to take various actions and inform CCB policies. 40

In 2023, Senate Bill 328 placed the CCB under the Administrative Procedures Act.41 This was a major change for the CCB as it afforded more due process protections to licensees and added more oversight from the Nevada Legislature when adopting or changing regulations.42 In addition, the Bill added a vice chair position, created a mechanism for rotating the chair position, and imposed additional standards to board positions, among other governance reforms.43

**COMPARISON OF CODIFIED PUBLIC POLICY**

The Governor’s Advisory Panel aimed to emulate the gaming industry’s successful history of regulation. Among other things, the gaming industry has been declared to be vitally important to Nevada’s economy.

**NRS 463.0129 Public policy of state concerning gaming; license or approval revocable privilege.**

1. The Legislature hereby finds, and declares to be the public policy of this state, that:
   a. The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.
   b. The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the

40. AB 533, 2019.
42. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10235/Overview.
43. https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10235/Overview.
surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.

c. Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture, sale or distribution of gaming devices and associated equipment.

d. All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.44

It is interesting to note that the stated public policy for cannabis regulation was adapted from gaming regulation, using similar or exact language from the Nevada Gaming Control Act:

... c. Cannabis establishments do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods;

d. Cannabis licenses and registration cards are issued in a fair and equitable manner;

e. The holders of cannabis licenses and registration cards are representative of their communities; and

f. The cannabis industry is free from criminal and corruptive elements.

44. In 2023, the Nevada legislature made changes to this section. The most relevant changes state that the cannabis industry is “significant” to the economy, giving the cannabis industry’s perceived contribution a boost from “beneficial.” The legislature also added language referencing the illegal market in this initial preamble. As of the writing of this Article, the changes have not been incorporated into the legislature’s online version of the Nevada Revised Statutes. How these changes will impact the regulatory approach and how they will be implemented remain to be seen.
3. All public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of cannabis establishments.
4. All cannabis establishments and cannabis establishment agents must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of the cannabis industry and to preserve the competitive economy and policies of free competition of the State of Nevada.

SIMILARITIES IN LEGISLATION AND FUNCTIONS

From the inception of cannabis business licensing and regulation, there has been discussion of regulating cannabis like gaming and developing a “gold standard of regulation.” Despite the title of the campaign, called “Regulate Marijuana Like Alcohol,” the ballot initiative’s name and a slight nod to “distributors” are the only links to alcohol regulation.

The basic, high-level similarity between gaming and cannabis regulation is that each is controlled by a state agency that licenses businesses, conducts enforcement, and adopts regulations to carry out state statutes. The legislature also bestowed the CCB with authority similar to the gaming regulatory framework, although they operate differently in practice. The following functions of cannabis regulation are similar to, or adopted from, gaming regulation:

- Suitability requirements for licensing, including good moral character
- Licensing of all persons that exercise control over a licensed business, including officers, directors, etc.
- Specific licensing rules for publicly traded companies
- Extensive recordkeeping, including financial documents, that must be made available to the regulatory body
- Registration of employees
- Natural and imposed barriers to entry
- Requisite approval to transfer interest
- Product approval and quality controls

45. NRS 463.1625, NRS 678B.200.
46. NRS 463.160, NRS 678B.200.
47. NRS 463.490, NCCR 5.
48. NGCR 5.107, NRS 678B.510.
49. NGCR 5, NCCR 5.
50. NGCR 8, NCCR 5.
51. NGCR 14, NCCR 11.
• Regulation of third parties on company premises 52
• A division of the Attorney General’s Office dedicated to assisting the state agency and pursuing disciplinary charges against licensees 53
• Exemption from Nevada Administrative Code (with the caveat that the Nevada State Legislature may object to regulations adopted by the CCB). 54

DIFFERENCES IN LEGISLATION AND FUNCTIONS

There is often confusion about the roles of the CAC and the CCB because the Governor’s Advisory Panel was clearly tasked with creating a structure similar to gaming, but the CCB and CAC do not perform the same functions as the NGC and GCB.

In gaming, the NGC is meant to be the policy body, with the authority to adopt regulations and certain GCB recommendations. 55 In cannabis, the CCB is the body with the authority to adopt regulations and is the body that is meant to set policy. In cannabis, the CAC is more analogous to the Gaming Policy Committee (GPC) than the NGC. Like the CAC, the main purpose of the GPC is to receive input on industry policy from various groups, discuss these matters, and advise. Its recommendations are not binding. The CCB also assumes a similar role to both the NGC and the GCB.

Another striking difference between the two regulatory bodies is that the GCB’s “Tax and License Division collects, deposits, distributes and dedicates all gaming taxes, fees, penalties, interest and fines.” 56 Whereas the Department of Taxation imposes and administers excise tax collection on the cannabis industry pursuant to NRS 372A. Additional high-level differences between the statutorily created frameworks include:

• Cannabis dispensary licenses are numerically limited, whereas gaming licenses are not 57
• The size and budget of the GCB is much larger than the CCB

52. NRS 463.0129, NRS 678B.040.
53. NRS 463.0199.
54. NRS 22B.039.
55. Gaming Regulation and Gaming Law in Nevada: As Remembered by Robert D. Faiis, by R.T. King.
57. NRS 678B.220.
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- Cannabis tax revenue is mostly dedicated to the State Education Fund, whereas the Gross Revenue Gaming tax is dedicated to Nevada’s General Fund58

AND THE TWO SHALL NEVER MEET

This often quoted, and almost poetic refrain comes from the Chair of the NGC’s admonishment that gaming operations were prohibited from engaging in legal cannabis business operations.59 The GCB first weighed in on whether licensed gaming operators could “invest in or otherwise participate in medical marijuana establishments” on May 6, 2014.60 At that time, GCB Member Terry Johnson issued a letter to licensees concluding that:

[U]nless the federal law is changed, the Board does not believe investment or any other involvement in a medical marijuana facility or establishment by a person who has received a gaming approval or has applied for a gaming approval is consistent with the effective regulation of gaming. Further, the Board believes that any such investment or involvement by gaming licensees or applicants would tend to reflect discredit upon gaming in the State of Nevada.

The NGC later took up the discussion on their licensees’ potential involvement with the legal cannabis industry after voters legalized recreational cannabis establishments in November 2016.61 The NGC discussed such involvement at a hearing on August 24, 2017.62 Chair Tony Alamo led a policy discussion, at which time the Commissioners opined as to whether cannabis sales discredited the gaming industry and discussed the propriety of:

- Events on the premises of a licensed gaming establishment that cater to or promote the use, sale, cultivation, or distribution of marijuana.
- Contracting with or maintaining a business relationship with an individual or entity engaged in the sale, cultivation, or

58. NRS 372A.290.
62. Id.
distribution of marijuana, including vendors and landlord/tenant relationships.

- Licensees receiving financing from or providing financing to an individual, entity, or establishment that sells, cultivates, or distributes marijuana.63

The NGC did not engage in any formal rulemaking at its 2017 hearing, but the GPC met to further discuss and pass a resolution providing further guidance to those approved to conduct gaming activity.64 The GPC’s determinations do not carry the weight of state law or regulation. However, the resolution does provide guidance as to how gaming regulators would view gaming licensees’ involvement with the legal cannabis industry. The GPC resolved that those approved to conduct gaming activities:

- Shall not “participate in the marijuana industry”
- Shall not “contract with or maintain business relationships with or enter into landlord/tenant agreements with individuals or entities for the purpose of engaging in the sale, cultivation or distribution of marijuana”
- Shall not “receive financing from or provide financing to individuals, entities or establishments that sell, cultivate or distribute marijuana”
- Shall “continue to follow all federal direction regarding AML obligations and SAR reporting, in line with FINCEN guidance”
- Shall be allowed to “host conventions, trade shows, or similar conferences that may be related to marijuana but whose focus is primarily networking between participants…and other trade or educational activities that do not facilitate the actual possession or consumption of marijuana on a licensed property”
- Shall “take care to ensure that any events on the premises of a licensed gaming establishment do not promote illegal activities or foster incidents which might negatively impact the reputation of Nevada’s gaming industry”
- Shall “conduct necessary due diligence and exercise discretion and sound judgment to prevent violations of Nevada or federal law in all business and financial activities”65

As a result of the above guidance, persons approved to conduct gaming activities are expected to avoid cannabis-related business activities. In addition, the consumption of cannabis is prohibited in gaming establishments, as is the legal delivery of cannabis or cannabis products.

**SIMILARITIES IN POLICY AND PRACTICE**

While both industries are susceptible to organized crime and criminal activity has been present in both gaming and cannabis, both are now strictly regulated. The participation of organized crime in Nevada’s legal gaming industry has been well documented and widely depicted in entertainment media. The gaming industry has been on the brink of federal shutdown on at least two occasions, the first being when Senator Kefauver proposed a crushing 10% excise tax and the second time when Governor Grant Sawyer worked to avoid a federal raid led by Robert Kennedy and FBI Director J. Edgar Hoover.66

Legal gaming in Nevada involved the mafia attempting to operate within the legal, newly regulated system, whereas illegal activity has not permeated the legal cannabis regulatory structure. From the outset, cannabis business licensing has required background checks, suitability requirements, and financial resources.67 Illegal cannabis sales have been conducted by perpetrators of criminal conduct prior to and after legalization. However, when legalizing cannabis businesses in Nevada, policymakers actively rejected and avoided negative images of cannabis sales.68 One of the primary proponents of legal cannabis, Senator Mark Hutchison (Nevada), noted that Nevada “[ . . . will never be Venice Beach, California . . . [with p]eople . . . walking down the boardwalk, being sucked into facilities where doctors write prescriptions for medical marijuana. California . . . is a nightmare in terms of what [Nevada] want[s] to do.”69 Not only did Nevada create a system that

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68. [https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf](https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf), pg. 31.

69. [https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf](https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf), pg. 31.

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would be unfriendly to crime, the cannabis industry would also have to rise above negative stereotypes created by California head shops.

The illegal cannabis market, in general, sells a similar product at a lower price. If a legal cannabis business is struggling, it may be tempted to sell its product where there is a well-worn demand through illegal distribution channels. This has happened in states where the legal market has struggled. In Oregon, “[i]t is an open secret some licensed growers have funneled product to the out-of-state black market just to stay afloat.”70 However, in the illegal gambling market, products may be the same, and pricing may not be much different either. The real difference is that the operator is typically from out of the country, and the bettor may have options to participate in gambling activities anonymously and on credit.

**Consumer Protection**

The state’s gaming mandate in Nevada is that it must maintain public confidence and trust through strict regulation of all persons, locations, practices, associations, and activities related to the operation of gaming establishments.71 The same language is found in the state policy for cannabis.72 In gaming, the mandate refers to maintaining trust that the gaming industry does not cheat patrons and is free from crime or criminal elements. In cannabis, the same language refers to the quality and safety of cannabis products. While the language is similar, the purpose and responsibilities of the policies is far different.

**Barriers to Entry and Suitability**

Both industries impose licensing requirements that cull would-be participants by examining their backgrounds and financial means. Cannabis establishment applicants must show evidence that they control at least $250,000 in liquid assets.73 In addition, Nevada expressly caps the number of retail stores permitted in the state.74 Gaming licenses do not require a specific amount of assets but include the requirement that “[n]o license will be issued for use in any establishment until satisfactory evidence is presented that there is adequate financing available to pay all current obligations and, in

70. https://apnews.com/article/cannabis-marijuana-420-legal-california-oregon-washington-ae7880387eee7dbfcfecaaff563d0b211
71. NRS 463.0129.
72. NRS 678A.005.
74. NRS 678B.220
addition, to provide adequate working capital to finance the opening of the establishment.”

Nevada legislation requires that the initial medical dispensaries have “an appearance, both as to the interior and exterior, that is professional, orderly, dignified and consistent with the traditional style of pharmacies and medical offices.”

In addition to financial means, both industries require “good moral character,” although gaming has developed its process for determining good moral character more systematically and in-depth. Gaming, of course, has had many decades to develop and implement its approach to conducting suitability investigations, whereas cannabis had less than one decade. In cannabis, according to NRS 678B.200, “[w]hen determining whether to approve an application to receive a license or registration card, the Board may consider whether the applicant is: (a) A person of good character, honesty and integrity.” In practice, cannabis registration cards are issued by staff and do not require CCB approval. When the CCB approves new cannabis licensees through the sale or transfer of existing establishments, there is a limited review of criminal and personal background, but this is not nearly as extensive as the reviews conducted by the GCB.

**Disciplinary Action**

AB 533 reflected the Governor’s Advisory Panel members’ concerns about the lack of disciplinary action against licensees. The Bill created a new structure for disciplinary action involving referral of investigations to the Attorney General’s Office and pursuit of complaints against licensees by the Attorney General’s Office. This process and other aspects of the new disciplinary regime were an attempt to incorporate some aspects of the gaming model. There has been pushback from the cannabis industry, which has been expressed at CCB hearings and culminated in Senate Bill 195, known as a disciplinary action “reform” bill, which passed in the 2023 legislative session.

75. NGCR 3.050.
76. https://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB374_EN.pdf
77. NRS 678B.200.
78. AB 533, 2019, page 17.
session. The Bill caps civil penalties and requires the CCB to apply certain mitigating factors when making decisions about disciplinary action.

**DIFFERENCES IN POLICY AND PRACTICE**

**IRS Code § 280E and State Tax Rates**

Gaming taxes in Nevada are quite low, with a tax rate of just 6.75% of gross gaming revenues over $1 million, compared to other U.S. jurisdictions that have enacted up to a 51% tax rate for certain types of gambling. Nevada gaming companies are also not subject to Internal Revenue Service Code § 280E.

Cannabis industry representatives, however, have stressed that taxes imposed on cannabis are extremely high. State taxes imposed are often high, but another factor that makes the business uniquely costly and less likely to be profitable is IRS Code § 280E, which prohibits cannabis businesses from claiming standard business deductions, except on the cost of goods sold. The code states the following:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Section 280E effectively increases the amount of taxes paid or tax impact compared to businesses not subject to the provision because it imposes federal taxes on gross income rather than net income (as many other businesses would pay) and prohibits standard business deductions. According to a Bloomberg Tax article published in April of 2022, the impact of Section 280E is such that:

79. *Generally*

> https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/9955/Text#

80. **pag. 3,7.**


82. 26 U.S.C. § 280E.
Seemingly simple business decisions like choice of entity, accounting methods, and ownership structure have crucial implications for purposes of risk management. If a cannabis business is not structured carefully and thoughtfully from a tax perspective, the effect of Section 280E’s disallowance of deductions can easily result in effective tax rates and tax bills equaling or exceeding the economic profits of the business, often leaving the business operating in the red. 83

Illegal Market and Profitability

The AGA estimates “that Americans bet more than $ 510.9 billion a year with illegal and unregulated operators. This costs the legal industry $ 44.2 billion in gaming revenue and state governments $ 13.3 billion in lost tax revenue.”84 In Nevada, for example, gaming establishments are not typically competing with unlicensed brick-and-mortar operations, although illegal online gaming operations are accessible. While both industries lose revenue to the illegal market, it is possible that the ratio of unlicensed cannabis sales to licensed sales is far greater than the corresponding ratio of illegal gaming to legal. The profitability of the cannabis business is starkly different from gaming and should be taken seriously when considering regulatory approaches.

Collection of Tax Revenue

Nevada enumerates the economic impact of gaming and cannabis as the first policy goals in the Nevada Revised Statutes (NRS) that govern each industry. When participating in the Governor’s Advisory Panel, former GCB Chair Dennis Neilander stated that the primary policy goal of both areas of regulation is to collect tax revenue. 85 He expressed that revenue collection is almost 99.9% in gaming due to the speedy and severe consequence of license revocation if taxes are unpaid. 86


84. Sizing the Illegal and Unregulated Gaming Markets in the U.S. - American Gaming Association


86. Id.
Although tax revenue collection is listed as the first codified priority for cannabis regulation under NRS, the speedy and severe consequences for nonpayment of taxes have not been replicated in cannabis governance. There have been many CCB meetings in which the CCB admonishes and, in some cases, disciplines licensees for unpaid and/or late taxes.\footnote{Generally https://ccb.nv.gov/public-meetings/} No cannabis license has been revoked for late and/or unpaid taxes.

One of the main reasons for the divergence in the strictness relating to tax collection is that the GCB is in charge of tax revenue collection while the CCB is not. The Department of Taxation continues to govern revenue collection from cannabis establishments.

**GOING FORWARD**

Successful regulation is difficult, and attempting to measure the success of a regulation or regulatory model is challenging. From the outset of legalization, Nevada public officials and community leaders have focused on achieving the “gold standard” in cannabis regulation in the country by looking to the success of gaming regulation. However, Nevada and other states with legalized cannabis programs may need to focus more on the viability of the industry and the loss in tax revenue as a result of the myriad factors discussed above.

With regards to modeling cannabis after gaming regulation, the two industries may be too divergent—especially in size and when considering major obstacles, such as Section § 280E and the illegal cannabis market—to successfully model cannabis regulation after gaming regulation. Further, there are too many public policies and policy goals converging onto the cannabis legalization experiment in Nevada. If the state prioritizes the economy—as it purports to in the first sentence of the cannabis chapters under the NRS—then it must avoid policies and goals that conflict with this goal, such as imposing costs and taxes that are so high that the legal industry is at a significant competitive disadvantage to the illegal market. Perhaps Nevada could benefit from a reexamination of the public policy related to cannabis regulation and a determination on whether the cannabis laws that have developed since 2013 are likely to meet the policy goals.
APPENDIX

NEVADA REVISED STATUTES: CANNABIS AND GAMING COMPARISON

NRS 678A.005 Legislative findings and declarations. The Legislature hereby finds, and declares to be the public policy of this State, that:

1. The cannabis industry is beneficial to the economy of the State and the general welfare of its residents.
2. The continued growth and success of the cannabis industry is dependent upon public confidence and trust that:
   a. Residents who suffer from chronic or debilitating medical conditions will be able to obtain medical cannabis safely and conveniently;
   b. Residents who choose to engage in the adult use of cannabis may also obtain adult-use cannabis in a safe and efficient manner;
   c. Cannabis establishments do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods;
   d. Cannabis licenses and registration cards are issued in a fair and equitable manner;
   e. The holders of cannabis licenses and registration cards are representative of their communities; and
   f. The cannabis industry is free from criminal and corruptive elements.
3. Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of cannabis establishments.
4. All cannabis establishments and cannabis establishment agents must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of the cannabis industry and to preserve the competitive economy and policies of free competition of the State of Nevada.

NRS 463.0129 Public policy of state concerning gaming; license or approval revocable privilege.

1. The Legislature hereby finds, and declares to be the public policy of this state, that:
a. The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.

b. The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.

c. Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture, sale or distribution of gaming devices and associated equipment.

d. All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.

e. To ensure that gaming is conducted honestly, competitively and free of criminal and corruptive elements, all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature.

2. No applicant for a license or other affirmative Commission or Board approval has any right to a license or the granting of the approval sought. Any license issued or other Commission or Board approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

3. This section does not:
a. Abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or

b. Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine.
President Franklin Delano Roosevelt had no reason to “pack” the Supreme Court as part of his controversial initiative to expand the size the of the Court. In fact, he was able to literally “stack” the Court with Roosevelt-appointed justices. By 1941, seven of the nine justices had been appointed by FDR, and he had elevated Harlan Stone to Chief Justice (initially appointed by Calvin Coolidge). This constellation of talent lead to a court that was loyal to FDR to a fault, both personally—and in hindsight—jurisprudentially.

Unlike today, these justices had not joined the Court from positions on the federal courts of appeals. Rather, they came mostly from the political world. Some came from elected politics: Justices Black and Byrnes were United States Senators, and Justice Murphy was Governor of Michigan before becoming Attorney General. Others had agency experience: Justice Douglas had been Chair of the Securities and Exchange Commission and Justice Reed came to Washington to work on agricultural issues and ended up as General Counsel of the Reconstruction Finance Corporation. Justices Stone and Jackson served as Attorney General; Justice Roberts had been special counsel investigating the Teapot Dome scandal. Although Justice Frankfurter, a Harvard academic, lacked political gravitas, he met FDR when they worked together in the Wilson administration and Frankfurter was enmeshed in political issues behind the scenes on behalf of Justice Brandeis. Rutledge alone came from a judicial background from his seat on the U.S. Court of Appeals for the District of Columbia Circuit. He joined the Court in 1943, after Justice Byrnes—in yet another example of the close ties between the Court and the political branches at the time—stepped down to become the Director of Economic Stabilization.

Given their backgrounds, it is not surprising that the Justices dabbled in politics, to put it mildly. And while Justices Frankfurter and Douglas compared the Court to a monastery, as had Chief Justice Taft during his tenure, the Justices were hardly cloistered. Douglas had his eye on the presidency and was considered by FDR as a potential vice president in 1944, and Frankfurter offered advice on everything from foreign policy and weapons production to War Department appointments.

In his thoroughly researched, eminently readable, and sharply insightful book, The Court at War: FDR, His Justices, and the World they Made, Georgetown law professor Cliff Sloan explores the unseemly close relationship between FDR and the justices at a time when the nation was gripped with war.

Sloan brings a storied pedigree to his work that gives him keen insight into the intersection of politics and the law. Aside from working in Congress, at the White House, and the U.S. Solicitor General’s office, he served as Special Envoy for Guantanamo Closure. It was that experience that led to this book. His research about military commissions prompted a close look at the
secret military commission ordered by FDR for the prosecution of eight Nazi saboteurs who arrived in the United States on German submarines.

December 7, 1941, a day President Roosevelt declared would “live in infamy” after Japan’s attack on Pearl Harbor, resulted in the United States’ declaration of war. Following Pearl Harbor, many of the justices jumped in to shore up the President’s call to arms. Frankfurter immediately called the White House to offer advice, and, as the only Jewish justice, he later undertook efforts on behalf of European Jews. Justices Douglas, Frankfurter, Reed, Murphy, Jackson, and Black gave speeches and supported the President’s war mobilization effort. And, in some cases, the White House coordinated the comments. Douglas considered leaving the Court for a position in the administration. Byrnes, a skilled political tactician, was drafting war powers legislation. It appeared that the long-standing principle of separation of powers began a rapid erosion.

Recognizing the need to respond to public outrage, FDR announced a presidential commission to investigate the Pearl Harbor disaster. He sought someone who would be viewed as independent, fair-minded and nonpartisan. Who better than a federal judge? After behind the scenes lobbying by Justice Frankfurter and others, FDR chose Justice Roberts. The appointment was generally met with praise, and Roberts took a leave of absence from the Court. Chief Justice Stone, however, was not among the supporters. He wrote, “With one hundred and thirty million people in the United States to draw from to do these jobs, it seems as though the Court might have been left alone.” Just a few years later, President Truman appointed Justice Jackson as chief United States prosecutor for the war crimes tribunal in Nuremberg. Jackson was absent from the Court for a year. This appointment was the culmination of Jackson’s earlier entreaties to FDR that “Nazi leaders should be held responsible for war crimes in fair and orderly legal tribunals as an example to the world.

It was not the first time a judge was chosen for a non-judicial role, as I recount in Citizen Justice. In the 1920s, Major League Baseball chose a federal district judge, Kenesaw Mountain Landis, as baseball Commissioner in the wake of the game-fixing scandal that enveloped the Chicago White Sox. The same logic of independence and fair-mindedness spurred the appointment. But public outcry about Landis serving as both a judge and the Commissioner led to the appointment of then-Chief Justice Taft (who had been President from 1909 to 1913) to head the American Bar Association Committee on Judicial Ethics. Landis stepped down from the federal bench and the Taft committee produced the first model judicial code of ethics. Although adopted by the states and much later for the lower federal courts, the Supreme Court had no formal ethics code until 2023, when it adopted a Code of Conduct.

Sloan explores ethics, independence, and loyalty to the President throughout the book, with the Nazi saboteurs case as a starting point. The special session in Ex Parte Quirin, called “the event of the season” by one commentator, resembled a sporting event, with spectators standing throughout the marbled hall of the Supreme Court courtroom. Invoking the law of war, the Court held that the espionage offenses were ones “which the president is authorized to order tried before a military commission,” and that the commission was duly constituted. At the time of the initial emergency decision, the Court had not yet figured out the rationale for its decision, which was issued three months later. In the interim, six of the saboteurs were executed. FDR commuted two of the death sentences to prison sentences.
As troubling as the rush to judgment may have been, even more troubling were ex parte communications swirling around between counsel for the saboteurs and Justice Roberts. And, remarkably, Attorney General Biddle informed Roberts that whatever the Court decided, FDR would order the execution of the petitioners. Ex Parte Quirin was aptly titled.

Sloan’s initial review of this case sparked a broader interest in the Court during this era. Sloan chronicles the “tale of two courts,” representing “both the best of courts and the worst of courts.” On the positive side, in Skinner v. Oklahoma, Justice Douglas wrote that sentencing a chicken thief who was a habitual offender to sterilization “touches a sensitive and important area of human rights . . . .” Douglas juxtaposed American liberty with Nazi zeal for sterilization, and a unanimous Court declared compulsory sterilization laws unconstitutional. The Court also issued “pathbreaking decisions on issues from reproductive choice and voting rights to civil liberties and government structure.”

In contrast, Sloan labels the Korematsu v. United States decision, in which a divided Court upheld the banishment and incarceration of Japanese citizens and noncitizens, as “an indelible stain on American history and on the Supreme Court, a decision that sadly ranks with Dred Scott and Plessy v. Ferguson as among the worst ever issued.”

The year before Korematsu, the Court considered another case arising from FDR’s executive order on exclusion, Hirabayashi v. United States. Gordon Hirabayashi, a college student at the University of Washington, was convicted of violating an exclusion order and the curfew for persons of Japanese ancestry. Under pressure from colleagues, the Court was unanimous in upholding the conviction, albeit with two concurrences. That decision came just a week after the decision in Virginia State Board of Education v. Barnette, which held that schoolchildren could not be forced to salute the flag. As Sloan trenchantly writes, “In the course of one week in the midst of the war, the Roosevelt Court issued one of the Court’s staunchest defenses of civil liberties—and one of its greatest betrayals of civil liberties.”

War time hysteria fueled the Court’s economic decisions as well. The President championed price controls “as indispensable to the nation’s ability to wage war.” In upholding sweeping authority, the Court harkened back to Hirabayashi, writing that “[e]ven the personal liberty of the citizen may be temporarily restrained as a measure of public safety.” Whether dealing with civil liberties or price controls, there was a through line in the Court’s thinking—the Constitution was on the front lines of the war and national security justified Draconian measures.

Roosevelt’s fourth inauguration in January 1945 was a somber affair. It was held at the White House rather than in Congress. There was no parade and no inaugural ball. Less than three months later FDR was dead. The Justices were devastated, though at least one felt a sense of liberation mixed with grief. Justice Reed told Frankfurter, “[N]aturally I wanted to help him and not hinder him in matters that came before the Court, and I have found it very difficult not to decide things in the way in which I think he would be helped, and I, myself, as a result of his death, feel very much more free and expect to be much more free in the future.”

Although relations were fractious among the Justices, to the end, they fell in line behind FDR when his war policies were in play. Sloan’s careful
scholarship and story-telling ability bring to life the intersection of “deep allegiances” to FDR, coupled with FDR’s view of many of the justices as “his personal bullpen rather than as an independent and impartial branch.”

Sloan concludes that “the War Court’s legacy was profound.” Yet, he makes a compelling case that the justices crossed the ethical line in service to their allegiances to FDR. And he offers a cautionary contemporary note: “Particularly in our current era, when party affiliations correlate to justices’ positions and divisions more than at any time in our history, the War Court’s failings send an important message. Justices must not be afraid to challenge the President who appointed them, even at the risk of alienating or infuriating that President or the President’s supporters.”

Hon. Margaret McKeown, Ninth Circuit Court of Appeals

The Limits of Vengeance

Toward the beginning of Gary J. Bass’s magisterial new book, *Judgment at Tokyo: World War II on Trial and the Making of Modern Asia*, he recounts a scene in June 1945 that, in his view, foreshadowed the conflicted character of American power. He calls it the “clash of ideals” – how the quest for post-war justice under law collided with the utility of vengeance.

Outdoing Hitler in Atrocities

Aghast at reports that American firebombing of Japanese cities was killing tens of thousands of civilians, U.S. Secretary of War Henry Stimson, the Republican patrician who had already served three presidents before taking over the direction of the country’s herculean effort to defeat both Germany and Japan in World War II, hurried over to the White House to meet alone with President Harry Truman. He bluntly told the president that, “I did not want to have the United States get the reputation of outdoing Hitler in atrocities.” But Stimson was quick to add another concern – a far more coldblooded one at that. Japan, the Secretary of War pointed out, could not be “so thoroughly bombed out that the new weapon would not have a fair background to show its strength.” Truman knew, of course, what he was obliquely referring to—the atomic bomb. Laughing now, the president said he understood.

In his splendidly-readable narrative, Bass, formerly a writer for the *Economist* and now a professor at Princeton University, explores what historians and legal scholars have long dismissed as a failed sideshow representing the worst kind of victor’s justice – the Tokyo war crimes trial. Even those who played key roles in the proceeding thought the whole thing was hypocrisy. One such was U.S. Army Brigadier General Elliott Thorpe who administered the arrests leading to the trial. “We wanted blood,” Thorpe concluded. “And, by God we had blood.”

But Bass, like a highly skilled forensicist piecing together passed-over evidence from the archive of a cold case, uses the two and one-half year-long trial to offer us a penetrating reinterpretation of American power: how the U.S. came to terms with the use of vengeance against the Japanese. Somehow, in the course of seven frenetic years, the American occupiers—scheming, moralizing incessantly, fighting among themselves and often misapprehending in the extreme the art of the possible in conquered Japan—were able to reimagine and rebuild a country they had planned to eviscerate and a people they had been well on their way to annihilating. That story is more than important. It is illuminating, even instructive. And Bass tells it with lucid and piquant zest.
End-run around Annihilation

Well before the surprise attack on Pearl Harbor, Americans were well-acquainted with the extraordinary viciousness of the Japanese armed forces. In the first months of 1938, American newspapers ran lengthy, lurid accounts about the mass rape and slaughter of tens of thousands of unarmed Chinese by the Imperial Japanese Army (IJA) that had occurred in the city of Nanjing. In April 1943, a dozen escaped American POWs detailed the IJA’s sadistic “Bataan death march” in which some 3,000 American and Filipino prisoners had been shot, beheaded, bayoneted or beaten to death on their forced trek to a POW camp. By war’s end, public hatred had metastasized into calls for summary executions of the entire Japanese ruling class and even the extermination of the whole race. With Congress baying for blood as well, President Truman coldly vowed to show the Japanese no quarter and to accept nothing less than unconditional surrender.

But then U.S. firebombing of Tokyo and 56 other Japanese cities, while killing more than 200,000 largely innocent people, failed to get the enemy to quit. When Secretary of War Stimson hurried to the White House in June 1945 to encourage the President Truman to stop those airborne “atrocities” – the better to showcase, he said, the power of “the new weapon” – he was actually setting the stage for an end-run around unconditional surrender. Bass details how the artful Stimson, while apparently backing the bomb, tried to push the president toward initiating a negotiated end to the war.

At the Secretary of War’s suggestion, Truman first met with Stimson’s old boss, former President Herbert Hoover, long out of power but a still formidable interlocutor. Hoover told Truman that leaving the emperor on the throne would not only end the war and save the lives of a million GIs, but would enable the U.S. to accomplish the “impossible task” of governing Japan while turning the country into a counterweight against the real enemy – the Soviet Union. Then Stimson dispatched Acting Secretary of State Joseph C. Grew, a former U.S. ambassador to Japan, who reiterated Hoover’s arguments but prophetically added: “If the emperor were spared, he could eventually become “a constitutional monarch in the new (Japanese) democracy.”

But almost everyone else in Truman’s military and diplomatic high command remained fiercely opposed to any conditional surrender. Whether via summary execution or military drumhead, they argued, the Japanese militarists and their emperor had to be eliminated to subdue and then to reconstruct postwar Japan. Stimson then began promoting another démarche, one that New Deal intellectuals like Under Secretary of State Dean Acheson and Associate U.S. Supreme Court Justice Robert Jackson found appealing: vengeance by tribunal. To get final justice against the Nazi and Japanese leadership, American jurists should enunciate (and thereby enshrine) a radically new legal doctrine – the commission of “aggressive war” as a crime against peace extending to individual responsibility.

But what about the bomb? As the final tests went forward in late July 1945, President Truman traveled to Berlin for his summit meeting with Soviet Marshal Joseph Stalin and British Prime Minister Winston Churchill. While preparing for the talks in his spacious rented mansion in the toney Berlin suburb of Potsdam, Truman took time out one day to have lunch with General Dwight D. Eisenhower, the former Supreme Allied commander of European forces. Ike was polite but direct. The U.S. should not use the atomic bomb...
against Japan, he told Truman. Japan was “already defeated.” Among his peers, Bass writes, Eisenhower’s stance was regarded as pure apostasy.

Days later, of course, President Truman issued the order to drop an atomic bomb on Hiroshima. But Stimson’s attempted end-run (namely, his proposal to inform the Japanese that we would spare the emperor), even though it was never included in the Potsdam ultimatum that preceded Hiroshima, would fundamentally shape the Occupation’s later attempts to pacify the conquered Japanese.

American Caesar

Like many others in the Truman administration, Stimson strongly opposed the appointment of General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP) in Tokyo, a man he regarded as a vainglorious reactionary. (FDR had once described the general as “the most dangerous man in America”). General MacArthur had already ramrodded death sentences for two Japanese generals via a drumhead proceeding in Manila. Their conviction had, in turn, occasioned an appeal to the U.S. Supreme Court in which one of the defendants, General Tomoyuki Yamashita, had requested leave to seek a writ of habeas corpus.

Writing for the majority in In re Yamashita, 327 U.S. (1946), U.S. Supreme Court Chief Justice Harlan Fiske Stone declared that it was “unnecessary” for the Court to consider what the Fifth Amendment might have required since the Japanese general had been tried in a military tribunal. Accordingly, the requested leave was denied. Associate Justice Frank Murphy, the former governor of Michigan, emphatically disagreed, however. Reading his dissent from the bench in a low and indignant tone, Murphy said that the Bill of Rights followed the American flag. Any person charged by the U.S. government with a crime was entitled to due process under the Fifth Amendment. That meant a fair trial free of the “ugly stigma of revenge and vindictiveness.” Murphy said that the prosecution had failed to investigate any aspect of General Yamashita’s knowledge or actions with regard to the depredations of his troops. Denying Fifth Amendment rights to an enemy belligerent, he concluded, was “contrary to the whole philosophy of human rights which makes the Constitution the greatest living document that it is.”

As a result of the Yamashita decision, General MacArthur’s judge advocate general (JAG) team felt confident about wielding broad prosecutorial powers in the upcoming trial in Tokyo to establish what it called “the judgment of history.” But the U.S. Navy, which had already started its own war crimes investigation in Guam, stated in an internal document that it wanted no part of “victor’s justice with retroactive laws and prosecutorial excesses.” When SCAP airlifted its trial instructions to the Navy JAG, USN Captain George Murphy (Justice Murphy’s younger brother) tossed them in the garbage. The younger Murphy, then serving as the executive officer organizing the Navy’s military commissions, was a former trial judge in Detroit with ten years of experience on the bench. Rejecting SCAP’s instructions, the Navy command then issued its decision to confine war crimes prosecution to Japanese officers and men accused of the murder, torture and assault of American prisoners of war. Further, the Navy’s tribunal set forth trial procedures and rules of evidence consistent with those practiced in a criminal court in the U.S. The overall commander of Navy war crimes, Captain (and
later Admiral) John D. Murphy, pledged that the Navy would “uphold the highest traditions of judicial dignity and impartiality.” The battle of the tribunals was on.¹

But then something unexpected happened: the imperious MacArthur interceded to save the emperor, an action that may have saved the Occupation but also served to sabotage the war crimes trial in Tokyo. Vengeance was about to turn on itself.

Conquerors’ Court

Calling the International Military Tribunal for the Far East in Tokyo to order on May 3, 1946, the chief judge, Australian jurist Sir William Webb, after declaring proceeding “the most important criminal trial in all history,” ordered the prosecutors to read out the counts against the 25 defendants. Two days later, the defense answered back, audaciously telling the eleven judges that theirs was no court at all.² It was inherently biased and lacked jurisdiction, a charge the court did not dispute, merely promising to resolve the question later but, incredibly enough, never doing so.

Defense attorney U.S. Army Major Ben Bruce Blakeney lost no time in putting the tribunal itself on trial: “We speak for the proposition that observing legal forms, while ignoring the essence of legal principles, is the supreme atrocity against the law.” The trumped-up charges against the defendants, he said, about planning “aggressive war” violated the ancient prohibition of nullum crimen sine lege, nulla poena sine lege by framing a crime after the fact. If the indictment charged that killing U.S. servicemen at Pearl Harbor was murder, Blakeney continued, then Harry Truman could equally well stand accused. “We know the name of the man whose hands loosed the atomic bomb,” he declared, labeling the president “a criminal” who should be brought to justice. Thereafter, with General MacArthur privately issuing dire warnings to the court, Judge Webb summarily cut off any and all “defense propaganda,” as he termed it, that dared bring disrespect to the all-virtuous, all-powerful United States.

If judgment of the Nazi principals at Nuremberg was “a grand moment of moral clarity,” as Professor Bass tells us, Tokyo proved to be no more than “a dive into murk” in his view. But why?

At Nuremberg (November 1945-October 1946), chief prosecutor Robert Jackson (having taken a leave from the U.S. Supreme Court) masterfully laid out the Nazis’ “common plan” of aggression before the nine-judge panel. Even doubters like Massachusetts federal judge Charles E. Wyzanski, who worried midway through the trial that the indictments barely skirted the proscription against ex post facto prosecution (“high politics masquerading as law,” as he put

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¹. Admiral Murphy was no relation to either his executive officer Captain George Murphy or Supreme Court Associate Justice Frank Murphy. The author’s father, Lieutenant (j.g.) William P. Mahoney, Jr., served as the Navy’s chief prosecutor.

². One judge from each of the following countries: U.S., Canada, Australia, Great Britain, China, the Philippines, the Netherlands, France, New Zealand, India and the Soviet Union.
But the Japanese case was very different. Unlike the Nazis’ systematic execution of plans from the Anschluss to the curated lists of the Einsatzgruppen (the mobile killing squads that went about “cleansing” conquered territories), Japanese aggression, though often murderous, was hardly monolithic in terms of command and control. The Japanese war cabinet had been fractious, with governments coming and going. During the hostilities, the Japanese army and navy were in constant (and even violent) dispute. Bass further points out that much of Japanese aggression was against colonies, not countries. “This looked less like a clear-cut case of foreign conquest and more like a clash of empire against empire...What did aggression mean when the territories being seized were not self-governing countries but exploited imperial possessions?” Was there, in fact, any “common plan” by which U.S. prosecutors could frame, try, and convict Tojo and the rest?

Even if there was, the Japanese got the jump on their eventual inquisitors by burning millions of incriminating documents in the weeks before the war ended. But thanks to MacArthur, it was the Americans, ironically enough, who conclusively gutted the war crimes trial by adopting the very expedient – the same “end-run,” as it were—that Stimson had once believed could end war with the Japanese. Only this time, the cause was to save the Occupation itself.

Although the Truman administration knew that Emperor Hirohito was guilty in the authorization and prosecution of the war, MacArthur persuaded his nominal superiors in Washington that trying and convicting the emperor could trigger bloody revolt, deadly attacks on American servicemen and the collapse of the Japanese government. What followed was a bizarre trial drama that Bass sets forth with acidic delight.

American Kabuki

Though news of the grant of immunity to Hirohito initially came as a shock to everyone involved in the trial, the eleven judges, the 170-odd attorneys, and scores of Japanese and foreign press covering the event were all soon engaged in a conspiracy of silence about the now-excused crimes of the Mikado. Former Prime Minister Tojo Hideki, who testified for some 17 hours “with the cold assurance of a conquering samurai,” Time said, exonerated the emperor at every turn before accidentally slipping up. Hirohito’s power was such, Tojo unguardedly explained, that “no Japanese subject would go against the will of his Majesty.” At this, a stunned hush fell over the assembly before Judge Webb came to the rescue, cautioning the defendant, “Well, you know the implications from that reply.”

An even more brutish (if juridically less consequential) expedient imposed by the U.S. concerned the “macabre decision,” as Bass describes it, to shield General Ishii Shiro, the chief of Unit 731, Japan’s secret biological weapons operation in northern China. In the course of Unit 731’s “experiments,” some 250,000 Chinese had been infected or poisoned to death. Yet Washington was sufficiently intrigued by the grotesque knowledge that might be recouped from Japanese biowarfare to exempt the mass murderer and his record of slaughter from the trial.
There were other glaring lapses as well. As far-reaching as the indictments at the Tokyo trial were purported to be, none included Japan’s heinous record of sexual violence all over Asia or its extraordinary brutality in Korea and Taiwan. The trial’s rules of evidence, as SCAP intended, were notably loose and often openly biased. While the prosecution was permitted to enter hearsay and unsworn statements into the record, the court consistently curtailed cross-examination as well as the introduction of exhibits by the defense. Still, the accumulated evidentiary record was massive: 419 witnesses, 779 affidavits and depositions, some 30,000 pages of exhibits, and no less than 49,358 pages of court transcript.

And what of the “eleven angry men,” as Professor Bass characterizes the motley group of judges who presided over the strange trial? Two of them – Mei Ruao of China and Delfin Jaranilla of the Philippines – were victims of the Japanese armed attacks (thereby violating the ancient proscription of being a judge in one’s own cause) while nearly all of the judges were improperly in touch with their respective governments. The Russian justice, Major General Ivan Zaryanov, was an alcoholic hack whose judicial experience derived from having served as a judge in one of Stalin’s show trials. It was said that his first words in English were “bottoms up.” Eight of the eleven justices were white non-Asians even though it was Asian peoples who had borne the brunt of Japan’s rapacious criminality. As noted historian John Dower later concluded, “The trial was fundamentally a white man’s tribunal.”

**Dissensus**

By majority decision, of the 25 men indicted, the court sent seven of those former Japanese leaders (led by Tojo Hideki) to the gallows. Sixteen were sentenced to life imprisonment with two of the convicted getting multi-year prison terms. Although Washington would claim that justice had been served, the three dissents filed at the tribunal’s end by France, the Netherlands, and India thoroughly belied that conclusion. Judge Radhabinod Pal, a Bengali intellectual who had distinguished himself at the Indian bar during the British Raj, issued a 1,000-page jeremiad that called for acquitting all the defendants. Pal decried American hypocrisy for standing in judgment after having unleashed its own “inhuman blasts” at Hiroshima and Nagasaki. As for the Soviet Union, how could it deliberate on the fate of the Japanese leadership when its armed forces had invaded and murdered their way through Manchuria after Japan surrendered? Pal’s dissent was especially unsparing about Western imperialism in Asia. If colonialism were deemed a crime, he wrote, then the “entire international community would be a community of criminal races.”

No sooner did SCAP rubber-stamp the war crimes convictions than the defendants mounted an appeal to the U.S. Supreme Court. When Supreme Court Chief Justice Fred Vinson announced that the court would hear arguments about the defense lawyers’ motions for leave to file petitions for writs of habeas corpus, SCAP was galled and the Truman administration was practically apoplectic about what it regarded as judicial intrusion into the executive’s conduct of foreign affairs.

After two days of “fierce” oral exchanges, the chief justice read aloud the per curiam ruling in *Hirota v. MacArthur, General of the Army, et al.*, 338 U.S. (1948). Vinson concluded that the court had “no power or authority to review, to
affirm, set aside, or annul" the convictions. Six justices voted to let the executions proceed with Justices William O. Douglas concurring post hoc and Wiley Rutledge not voting. Only Justice Murphy indicated his dissent. But the “scorching opinion he had in mind” would never see the light of day. Already in ill-health, he would die of a coronary occlusion seven months later at the age of 59.

Despite the high court’s decision in Hirota, the U.S. Navy completed its war crimes work in Guam and Kwajalein under the fair-trial strictures of the Fifth Amendment. Unlike the Tokyo tribunal, which had summarily imputed guilt on the “demonstrable consequences of aggressive war,” the Navy had set out to prove its murder and torture counts via months of arduous and painstaking investigation (using no fewer than 20 different “intelligence sources”) in nearly two dozen formerly-conquered Japanese islands in the central and south Pacific.

That rigor paid off. Of the 51 cases the Navy tried, 41 of the accused Japanese officers and men were sentenced to death for the crime of murder. Two of the cases made international news – the trial of Admiral Shigematsu Sakaibara for having ordered the machine-gunning of 98 American civilians on Wake Island in October 1943 and that of Vice Admiral Koso Abe for having ordered the beheading of nine U.S. Marine Raiders on Kwajalein in October 1942. Both admirals were convicted and subsequently hanged.

Around 50 other military tribunals were convened by Allied countries (not counting China or the Soviet Union) in various Asian locales in the years after the war. A total of 5,700 Japanese were indicted of which 984 were initially condemned to death with some 500 of those later executed. An estimated 475 Japanese officers and soldiers were given life sentences. Some 2,944 got lesser terms.

The Blessed Vengeance of Liberty

If, in the end, the Tokyo war crimes tribunal “misfired and fizzled,” as Professor Bass concludes in his definitive book, the trial did succeed in doing something of historic consequence. Thanks to General MacArthur’s October 1947 civil liberties directive, which established freedom of the press and assembly while emptying the country’s jails of all political prisoners (including the communist ones), Japanese newspapers were able to publish thousands of articles about the Tokyo trial. These detailed the welter of lies and wanton cruelty of the militarists. Along with that explosion of free expression came a frenzy of electoral organizing and the advent of new political parties, mostly on the left.

MacArthur’s other “lightning bolt,” as the Japanese press characterized it, sealed Japan’s transformation as a modern democratic and pacifist state. It was as if the supposedly reactionary general had, for some reason, set out to complete the unfinished work of the New Deal – but in defeated feudal Japan! With an imperial push from the American Caesar late in 1947, the Japanese Diet passed into law a new constitution, codifying broad labor rights, gender equality, academic freedom, due process under law, and pacifism as a sovereign duty of the new state. The emperor became a constitutional monarch and Japan’s aristocratic and corporatist legacy was effaced, at least under the new organic law. Historian John Dower caught the potent oddity of it all: “No modern nation ever has rested on a more alien constitution – or a
more unique wedding of monarchism, democratic idealism, and pacifism; and few, if any, alien documents have ever been as thoroughly internalized and vigorously defended as this national charter would come to be."

How America’s unique dialectic of power politics and lofty ideals about democracy and the rule of law achieved the impossible—a just and lasting peace in Japan— is among the most important stories of the 20th century. Yet Professor Bass reminds us that American foreign policy since World War II has largely been a monument to imperial impunity from Vietnam to Afghanistan. Today, the three great powers which oppose the International Criminal Court (the permanent war crimes tribunal in The Hague) are Russia, China and the United States.

For all that, the redeeming truth of America is democracy—and today we would do well to save our own.

Professor Richard Mahoney, School of Public and International Affairs, North Carolina State University
In the last year I have had the privilege of reading two excellent biographies of federal judges who left a lasting mark on the judiciary: Justice William O. Douglas in Judge Margaret McKeown’s *Citizen Justice* and Judge Irving R. Kaufman in his former law clerk Martin Siegel’s *Judgment and Mercy*.

Even though these two men grew up thousands of miles from each other in vastly different physical and cultural environments, they had certain things in common. Each was a terrible husband, an awful father and treated their law clerks with disdain and contempt. Each had a blind spot about judicial ethics that led them toward very questionable behavior on the bench. And each was haunted by what they felt was their inability to reach what they thought was their rightful position. For Justice Douglas, that was President of the United States; for Judge Kaufman it was Justice of the Supreme Court.

Irving R. Kaufman was born Isidore Kaufman (no middle name) in 1910 on the Lower East Side of Manhattan. That’s where many Jewish families who escaped pogroms in Eastern Europe settled. He attended public schools in Manhattan and went to college and law school at Fordham University. Upon graduating from law school Kaufman decided his first name was too Jewish and too ordinary so he changed “Isidore” to “Irving” and added a middle name to give him the more traditional American name “Robert.”

After a few years in private practice—where his major accomplishment seems to have been meeting his future wife, the daughter of a named partner in the firm, Kaufman was hired by the U.S. Attorney’s Office in the Southern District of New York (Manhattan). There he handled a number of high-profile criminal cases and became known in the local legal community as an up-and-coming potential federal judge. President Harry Truman appointed Kaufman in 1949. Less than two years later this very young, very inexperienced trial presided over the Trial of the Century: the espionage trial of Julius and Ethel Rosenberg for giving scientific secrets about the atomic bomb to the Soviet Union.

The vast majority of American Jews who fled European countries to come to the United States in the 1900s were patriotic Americans who admired everything about this great country that took them in. A small portion still had an affiliation and affection for the Soviet Union, which had taken the lead
in fighting Nazi aggression in World War II long before the United States joined the battle in December of 1941 after Pearl Harbor was attacked. The Soviet Union inflicted the first military defeat on Hitler’s Army in 1943 in the Battle of Stalingrad. The Soviet leader Joseph Stalin was an American ally in defeating fascism and joined Roosevelt and Churchill in their combined efforts to build a post-war world.

However, by the time Judge Kaufman was assigned the trial of the Rosenbergs, the new clear enemy was World Communism in general and the Soviet Union in particular. Several scientists who were found to have given away secrets to the Soviet Union about the development of the atomic bomb at Los Alamos were under FBI suspicion. The award-winning movie Oppenheimer covers this post-war period and how in the 1950s the spotlight was directed at people such as Robert Oppenheimer—American Jews suspected of being communists or communist sympathizers.

It was in this climate of anti-communism and fear of the Red Menace (“Better Dead Than Red” was a slogan of the 1950s) that Judge Kaufman walked the tightrope of both the trial of the Rosenbergs and the decision about whether they should be executed upon conviction. Siegel does a first-rate job of describing what occurs inside the courtroom and what happens outside. The great stain on Judge Kaufman is the revelation that he had multiple ex parte contacts with the government prosecutor (the notorious Roy Cohn) about the evidence, the presentation of witnesses and the punishment to be imposed upon conviction. This is the same Roy Cohn who later became chief counsel to the McCarthy Committee investigating communists in the United States government and in Hollywood.

There is no doubt that Julius Rosenberg was guilty of espionage but there is significant evidence that the government only charged his wife Ethel to pressure Julius to admit his involvement and name additional conspirators. When that didn’t work, the government hoped that upon conviction of both and with Ethel facing the electric chair, Julius would cave and name names. That didn’t happen either. There’s no denying that Kaufman’s status as a Jewish Judge affected his approach to the Rosenbergs trial and sentencing. As Siegel writes, “No less an icon than Louis Brandeis shared this kind of thinking, writing years earlier that ‘large as this country is, no Jew can behave badly without injuring each of us in the end...Since the act of each becomes thus the concern of all, we must exact even from the lowliest the avoidance of things dishonorable, and we may properly brand the guilty as a traitor to the race.’”

After the jury returned guilty verdicts against both Rosenbergs, Kaufman was the one who would decide on the sentence. The death penalty was not the only punishment for the crimes of conviction. In fact, there was a legal

argument that the death penalty was not a proper sentence for violations of the Espionage Act, at least at a time when the enemy nation receiving the documents was not at war with the United States. That was set forth in a government response to a clemency petition from the Rosenbergs written by none other than our own former Chief Judge of the 9th Circuit Court of Appeals James R. Browning, who in 1953 was an assistant to the Attorney General. That legal argument was never made in the trial, the appeal or in any of the habeas petitions filed.

Judge Kaufman orchestrated the sentencing with the government lawyers urging them not to make a specific recommendation in open court. There were indications that the Department of Justice in general and the FBI’s Director J. Edgar Hoover might urge leniency for Ethel Rosenberg so she would not become a symbol for communists about the unfairness of the American justice system. Kaufman’s speech at the sentencing blamed the Rosenbergs for the American casualties in the Korean War. He said, “I consider your crime worse than murder. I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused...the communist aggression in Korea, with resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason.” Judge Kaufman also spent some time talking about how he had gone to Temple to pray for guidance from God on this matter. That led Supreme Court Justice Felix Frankfurter to write to Judge Learned Hand years later, “I despise a judge who feels God told him to impose the death sentence.”

Two years of appeals and habeas petitions followed before Julius and Ethel Rosenberg were executed in June 1953. Over that period the sentiment toward sending the mother of two small children to the electric chair started to change and both internationally and within the United States there were more and more people calling for leniency. Still Judge Kaufman would not be moved and continued to affirm the death penalty for both. The appellate courts refused to intervene despite Justice Douglas’s attempt to stay the execution.

While the initial reaction to the sentence handed down by Judge Kaufman was generally positive in the media and the country, over time it became apparent that this case would become an albatross around his reputation and Kaufman looked for ways to change the future so that it wouldn’t be the “headline in his obituary.” Siegel then details the next chapter of Kaufman’s judicial career where first on the District Court and then on the 2nd Circuit Court of Appeals he became known as a progressive jurist who moved the law forward in many important ways in both civil and criminal cases.

As a trial judge he ordered the desegregation of New Rochelle public schools. On the appellate court—where he finally was appointed by President Kennedy in 1961 after years of disappointments in the prior administration—
he broke new ground on the Insanity Defense, on Juvenile Justice Reform and on Felony Sentencing. He stopped the deportation of John Lennon, defended the rights of Vietnam War protesters, was a constant defender of the First Amendment and the media and made important rulings on the Pentagon Papers litigation. But even here he displayed some of his lifelong blind spots: the need to get glowing media acclaim, the desire to become a U.S. Supreme Court Justice no matter how he got there and the inability to respect boundaries that judges must follow in remaining impartial.

Kaufman developed a close personal relationship with the Sulzberger Family which owned the New York Times—by far the most influential newspaper in the country. He received unprecedented favorable coverage from the Times to the point that reporters became uncomfortable with why his every speech deserved an article and every decision a positive editorial. When Linda Greenhouse was given the assignment of writing a profile on Judge Kaufman after President Reagan appointed him the head of a commission on organized crime, she agreed to do so only on the condition that her byline not be on the story. When the New York Times editors asked her why, she explained “that the paper wouldn’t print the truth about Judge Kaufman, and I didn’t want my byline on a story that wasn’t true.”

Every chief judge in the district and circuit courts knows his term as chief judge ends after seven years. Judge Kaufman served as chief judge of his circuit court from 1973-1980. He loved the title and the responsibilities that went with being chief judge. And as his seven-year term approached his end point, instead of graciously paving the way for his successor, Kaufman started lobbying his friends in Congress to extend the terms of chief judges so he could remain in that role longer. Those attempts failed, but they reveal the flaws that marred Judge Kaufman’s judicial career.

I highly recommend Martin Siegel’s superb book. He was one of the two last law clerks Judge Kaufman had before his death in 1992. He describes his contact with some of the former law clerks, one of whom said to him “That was the worst year of my life and I don’t want to talk about it.” Siegel also describes an incident where the judge received a phone call in chambers and after hanging up, put on his coat and hat and left the office. A few minutes later a U.S. Marshal called chambers and was astonished when a law clerk answered the phone. “Didn’t the judge tell you about the bomb threat?” The judge had not. He wanted his clerks to keep working. They were expendable; he was not.

Hon. Robert S. Lasnik, U.S. District Court for the Western District of Washington
Fresh off the press, *The Business of Sports Betting* is much more than just a textbook. It is a manual that takes the reader through the detailed history and practices of sports wagering. It takes an immersive look at sports gambling. Written by gaming and sports betting professionals with decades of experience who impart practical knowledge that allows one to navigate this highly regulated industry, this is the right text at the right time.

In 2018, the U.S. Supreme Court overturned the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal law restricting single game sports betting to Nevada. Since that decision in *Murphy v. National Collegiate Athletics Association*, sports betting has become a very big business. In a relatively short time, a little over five and a half years, sports betting in some form is now allowed legally in 38 states, the District of Columbia, and Puerto Rico with more to come.

Those of us involved in observing the sports betting surge following the overturning of PASPA have experienced the need for up-to-date educational course literature as well as an everyday reference for industry professionals and regulators. This book accomplishes both. The layout and organization of this book is in fifteen easy to follow and comprehensive chapters. Each chapter starts by laying out the objectives and content for reaching the learning goals of the chapter. There are *industry highlights* in each chapter. These *industry highlights* focus on gaming and sports betting pioneers, leaders, companies, and the contributions of law enforcement, and what they and the lessons learned have meant to the industry’s success. There are also *real-world applications* that give examples of the impact they may have had on the industry. Additionally, there are *case studies* and review questions to assess the individual’s knowledge of the subject matter studied.

Included in the book is a comprehensive glossary of the terms used in all aspects of sports gambling. Along with the recognizable sports betting terms used, it is notable that sports betting has its own unique vocabulary or jargon that is used every day. Understanding the common terms used in sports gambling is important. A glossary of this type is invaluable to the layman just starting to learn and understand the sports gambling landscape. The glossary includes all the terms a sports betting insider needs to know.

This textbook could have easily been written in total by its three editors and chapter authors, Becky Harris, JD, LLM, the first woman to Chair the Nevada Gaming Control Board, is the Distinguished Fellow in Gaming and Leadership at the International Gaming Institute and faculty member of the International Center for Gaming Regulation at University Nevada, Las Vegas (UNLV); John Holden, PhD, JD, a William S. Spears Fellow and associate professor in the department of management in the Spears School of Business at Oklahoma State University. Holden’s academic scholarship is focused on...
legal and regulatory issues in the sports gambling industry. He is the author of more than 50 academic articles on gaming policy and related issues of corruption, Gil Fried JD, is a professor at the University of West Florida (UWF) and chair of its Administration & Law department, which encompasses legal studies, construction management, sport management, and public administration. He has taught courses and written numerous books and articles on sport risk management, sport facility management, sport analytics, esports, and sports finance. The collective knowledge of these three authors would have produced a deep, collaborative educational experience. However, choosing to bring in an additional seven industry experts and veterans to contribute makes The Business of Sports Betting an in-depth resource from experts who, collectively, have over a century’s worth of real-world gaming and sports betting experience.

A quick overview of each chapter is necessary to provide a good sense of this book. The first chapter, A History of Sports Gambling, provides a thorough history of sports gambling. Gambling on sport has been around since ancient times, ever since there have been organized competitions. The chapter details sports gambling throughout history and offers a chronology of sports betting in the United States. Attempts by the United States Federal Government to regulate and a look at the current sports betting landscape in the U.S. complete the chapter.

Chapter two, Sports Betting Stakeholders, introduces us to the many stakeholders that make up the legal sports betting ecosystem. It explores the business entities that operate casinos and sports books. Additionally, it discusses Tribal and state jurisdictions that are now legal and regulated, how each state has chosen to enact sports betting, which agency will regulate it, and the statutory parameters put in place for that regulation are explored.

Chapter three delves into Federal, State, and Tribal Legal Authorization and Governance. This is the first of seven chapters where the content was contributed by a gaming industry expert. In this case, contributor Tamera S. Malvin is an attorney who represents businesses in the U.S. gaming and hospitality sectors. This chapter details the U.S. federal system, how it operates, and a state’s responsibilities and rights to govern and determine which forms of gambling can take place within its borders. The chapter takes a detailed look at gaming on Tribal land, including an understanding of the Indian Gaming Regulatory Act (IGRA). The interplay between state, Tribal, and federal authorities in regulating gambling is also considered. The legislative and regulatory authority of those entities is also examined. All these topics carry significant public policy and legal implications in setting up regulatory frameworks that work in each jurisdiction.

Chapter four is Why Regulate, written by contributing author Greg Gemignani, an attorney whose practice focuses primarily on intellectual property, gaming, technology, internet, and online gaming law. This chapter explores gaming and why there is a need for robust regulation. Additionally, it explores the evolution of gambling, the lack of meaningful regulation and how it led to the robust regulatory model we see today. It also looks in depth at the regulatory models in three U.S. states and shows how each state is unique and why different models work in different states.

The topic for chapter five is Sports Gambling Regulatory Models. The chapter discusses the many regulatory models in the U.S. and others around the world. It points out considerations for choosing how to set up a regulatory model that is right for the individual jurisdiction considering sports betting.
Ultimately, there may be no right or wrong way to set up sports betting, but there are matters governing bodies should consider before establishing a regulatory framework that is right for their jurisdiction.

Chapter six, *Race and Sportsbooks*, goes into the details of wagering at sports books on horse races and other sports and events. It goes into the history of the horse racing industry and how some states are incorporating non-traditional fixed odds bets on horses into sports betting legislation or regulation. There is also mention of the inclusion of other sports esports and other events.

In chapter seven, *Mitigating Harm from Sports Betting*, contributing author Dr. Jennifer Shatley, responsible gambling consultant and President and CEO of Logan Avenue Consulting, explores all aspects of problem gambling, the harms that are seen, and the additional resources needed to reach the additional people affected when sports betting is introduced into a state. Advertising and overall lack of funding for disordered gambling are also discussed in depth. The author breaks down a very complex issue and explains the need for communication and collaboration by policy makers, industry, regulators, public health officials, and advocates to raise awareness and ensure funding.

The topic for chapter eight is *Integrity in Sports Betting*. Contributing author Jennifer Roberts is vice president and general counsel of Wynn Interactive and WynnBET. She has practiced gaming law for over 20 years. The chapter explores the importance of integrity in sports and sports betting. The author details the safeguards that are in place and talks about the independent sports betting integrity providers. Also, there are details on scandals that have happened in the past. There is also discussion about integrity risks in sports betting and how the systems in place in the legal sports betting markets are there to identify anomalies and provide an immediate response by operators and regulators. She points out that only with robust integrity monitoring and positive action taken will the sports betting patrons have confidence in the games being played and wagered on.

The topic for chapter nine is *Illegal Sports Wagering*. In this case contributor Matt Rybaltowski, a reporter and senior analyst at SportHandle, one of the leading websites on sports betting news, details the fixing of the 1919 World Series and the proliferation of the offshore and illegal sports betting market. How these offshore operators targeting U.S. citizens is not just illegal, but also serves as a haven for money laundering and other illicit criminal activities. Also discussed are the illegal and gray market gambling sites in Canada and how some of them have transitioned from the gray market to the new legal market.

Chapter ten, *Sports Betting Scandals and Match-Fixing*, takes a detailed look at match-fixing and sports betting scandals. There is an in-depth exploration of a number of incidents that have happened in sport and a discussion as to why they occur. It also looks at enforcement and prevention efforts. Finally, it offers some insight into protecting sports from corruption through technology and education.

The topic for chapter eleven is *Doing Business as a Sportsbook*. In this case contributing author Daurean G. Sloan, is the chief compliance officer, in-house counsel, and bank secrecy officer for Circa Hospitality Group and Circa Sports in Las Vegas. This chapter provides a very detailed discussion of the sports betting environment. The author is very thorough in detailing the numerous business considerations and decisions that must be made before
entering a sports betting market. Once convinced pursuing a sports betting market is the correct decision, the author discusses all the business operations, technology, personnel, and regulatory approvals needed to proceed.

In chapter twelve, contributor Jennifer Gaynor, an experienced administrative law and government relations attorney whose practice focuses on helping clients in highly regulated industries, including gaming and liquor, with a focus on licensing and regulatory compliance, discusses Sports Wagering and Compliance. The author discusses the many aspects of maintaining regulatory compliance for a sports betting operation with federal, state and in some cases Tribal laws and regulations. Much of this chapter focused on and around anti-money laundering (AML) regulations. There is so much that revolves around AML and knowing your customer that this in-depth look gives a great compliance prospective. Also detailed is the need to know who can bet, what they can bet on, advertising requirements, and how to ensure patrons are gambling responsibly.

Chapter thirteen, Sports Wagering Venues, discusses various sportsbook venues, from physical retail locations, kiosks, and mobile offerings.

The topic for chapter fourteen is Sports Betting Advertising and Marketing. This chapter examines advertising and marketing in sports betting, how it is used to acquire and retain customers, the use of affiliate marketing and commercial partnerships, and the ethics of advertising and responsible gambling. Also included is a discussion of the state and federal regulations on advertising and the responsible marketing code for sports wagering published American Gaming Association (AGA).

The topic for chapter fifteen is Intellectual Property, Data, Technology, and the Future of Sports Betting. This chapter focuses on technology, including proprietary or white labeled technology stacks and the importance of data to this industry. Also discussed are the different types of intellectual property, and finally, what the future holds for the sports betting industry.

This book is not only a great educational tool but should become a recommended read and day-to-day resource for industry professionals and regulators, both for those new to the industry and those who have years of experience.

Dan Hartman, Director, Colorado Division of Gaming
About fifty-five years ago, my mother took me and my siblings to the Mountain Meadows in Utah. Back then it was hard to get to. A small, unmaintained wooden sign designated a rutted cow path to the west of the road. In those seasons of the year when it was passable, it led to a trail that took you through brambles to an old gate hanging on its hinges above a small ditch at the bottom of a draw. After passing over the ditch and mounting the other side you arrived at a rectangular stone wall about four feet high with a stair and a pipe railing built-in. The purpose of the stair was unclear. But, my mother said, it was a memorial marker for the many people buried below. She said that more than a hundred years earlier a train of innocent pioneers had been attacked on this spot by some from my church—the Church of Jesus Christ of Latter-day Saints, historically called Mormons—who lived in the small settlements nearby. The attackers even recruited Indians to initiate the attack and shield their responsibility. When that went badly wrong, after a four-day stand-off, under a flag of truce, the attackers had gone into the encircled encampment and promised those trapped safe conduct back to Cedar City. Once they had lured them from their make-shift fort, however, the locals, together with the Indians they had recruited, slaughtered about 100 men, women and children, leaving alive only 17 children under the age of six.

I felt an enormous sense of rage and shame at hearing the story. I was used to stories in which the members of my church were either the heroes or the victims, but not the bad guys. This was altogether new for me, and I struggled with how to process it. That first and subsequent visits led to a life-long interest in the Meadows and a desire to understand the facts to, in some way, do justice. It has been an elusive quest.

The account by my mother was a summary of Juanita Brooks’ classic study *The Mountain Meadows Massacre* published in 1950. Brooks had gifted signed editions of this book to my father’s family as she did with her subsequent biography *John Doyle Lee Zealot, Pioneer Builder, Scapegoat*. I read and reread these books. Brooks concluded that the local Mormons had done what they’d done because of a combination of hysteria and panic occasioned from the approach of U.S. General Albert Sidney Johnston’s Army to Utah and the intensity of the Mormon reformation. Although Brigham Young did not direct the massacre, Brooks concluded, his leadership produced the social conditions which brought it about.

Although some studies, hobbyist efforts, and total junk were published over the next decades, nothing of real quality on the topic after Brooks was published until 2002 when Will Bagley published *Blood of the Prophets: Brigham
Young and the Mountain Meadows Massacre. Giving due credit to Brooks’s account, Bagley nevertheless disagreed with one of her principal conclusions—that Young did not direct the massacre. Bagley asserted that Young had targeted the Arkansas pioneers for death from the moment of their arrival into Utah because Mormon Church apostle Parley P. Pratt had been killed in Arkansas months earlier.

After publication of Blood of the Prophets, the Church agreed to open its archives to three scholars: Richard Turley Jr., Ronald W. Walker and Glen M. Leonard. Those archives contained 1890s interviews by the assistant Church historian with Massacre participants and other accounts turned into the Church over time. With these new materials and their own research, these authors wrote a two-volume study: The first volume, Massacre at Mountain Meadows by all three scholars, reconstructed the massacre and its causes; the second volume, Vengeance is Mine: The Mountain Meadows Massacre and Its Aftermath, by Turley and Barbara Jones Brown, discusses the Massacre’s repercussions.

There is much to recommend the second volume, which took fifteen years after the first volume to complete. It updates the story of the Massacre with new sources or those that have become more germane since the publication of the first volume. It also uses an easier narrative style. To the extent that earlier authors charged Young with the responsibility for the delay in the arrest and/or prosecution of the perpetrators, Turley and Brown present a strong case that the delay is attributable to the disfunction of the Utah territorial justice system set up by the U.S. Congress—especially as it was administered by multiple groups which distrusted each other.

For example, in the middle of Judge John Cradlebaugh’s initial investigation into the Massacre in Cedar City in 1859, Johnston received orders from the U.S. Attorney General, Jeremiah Black, stating that it was improper for Johnston to use military troops in aid of the operations of civil courts as he was doing. The exception would be in those cases in which “the services of a civil posse are insufficient.” But, Black specified that it was up to the Territorial Governor, Alfred Cumming, and neither Johnston nor Cradlebaugh, to make that determination. Johnston thus recalled his 300 troops from Cedar City. Upon their withdrawal Cradlebaugh refused to continue his investigation, and he too returned to Salt Lake City. He did not ask Cumming to authorize military assistance to his court, presumably because Black’s letter to Johnston was the result of Cumming’s earlier complaint about Cradlebaugh’s improper use of military troops in conducting court operations in Provo. Similarly, the U.S. territorial Marshall, Peter Dotson, refused to attempt to serve arrest warrants or subpoenas. Cumming and the U.S. District Attorney then suggested that Dotson deputize John Kay, the locally-elected Territorial Marshal, to serve the warrants because Kay knew the people and the territory and had expressed a determination to execute warrants if asked. But Dotson refused to accept Kay’s help because Kay was a Mormon.

Brigham Young then assured Cumming that if the Governor were to go to Cedar City and convene court there using civil authority, Young would go with him to guarantee the safety of the Court and assist in obtaining witnesses for its investigation and in arresting all charged. Although Young repeated the same guarantee to various government officials several times over the next fifteen years, the offer was never accepted until after the first trial of Lee.
There were other complications too. The federally appointed judges viewed it as their duty to eliminate polygamy, which was then practiced by the Church, and break-up the Church, or at least its prevalent influence in civil society, which they deemed inconsistent with republican principles. Thus, despite U.S. President Buchanan’s blanket pardon in 1858, the judges tried to renew the treason prosecutions against Young upon their arrival in Salt Lake. In fact, in the absence of federal or territorial law against polygamy, the judges even attempted to apply Mexican law to bar its practice, and further convened court elsewhere to minimize the service of Mormons on both grand and petit juries.

In response, the Territorial legislature required that jurors for each Territorial district court be selected from lists prepared by the locally elected probate courts. It further required that, to be eligible for jury service, a man had to be a resident of the state for a year. This prevented the federally-appointed district judges from excluding Mormon jurors. When some judges refused to follow this mandate the U.S. Supreme Court in *Clinton v. Englebrecht*, 80 U.S. 434 (1871) affirmed that judges that were federally-appointed to Utah territorial district courts were judges of territorial and not federal courts. They were thus subject to the mandates of the Territorial legislature and did not have recourse to federal court procedures. To obtain convictions in any prosecution, then, including one relating to Mountain Meadows, federal prosecutors knew they would have to obtain the votes of Mormon jurors.

Because of these perceived obstacles, the Civil War, and the lack of government funding, no further terms of a territorial district court were held in southern Utah until 1865. When court terms did resume, however, there were no inquiries into the Mountain Meadows Massacre.

Matters gradually changed, however. In 1873 Fort Cameron, a new military base in Beaver, was completed. And, in 1874, Congress passed the Poland Act that functionally allowed Utah Territorial district courts to pick half of their own jurors. Lee was arrested later that year and he was tried in Beaver and held at Fort Cameron.

It may be, as Cumming insisted, that while he might be the governor of the Territory, Young was the governor of its people. Even so, Turley and Brown set forth evidence strongly suggesting that the delays in the prosecution of the Massacre perpetrators did not have to do with Young but with the inadequacies of Territorial justice. Indeed, this examination of the territorial justice system, governmental actors, and the political environment is a great contribution to Massacre scholarship.

Lee eventually was tried twice for first-degree murder, and the book demonstrates that the stark differences in Lee’s trials do not demonstrate that the Church entered an agreement with the government to sacrifice Lee in exchange for a cessation of Massacre investigations.

In Lee’s first trial, the principal prosecutor was Phillip Baskin—a skilled non-Mormon jurist from Salt Lake, who was also a leader of Utah’s Liberal Party. The Liberal Party was defined by its opposition to the church and sought the disenfranchisement of its members. At the time, Baskin was also the Liberal Party’s candidate for Utah’s delegate to Congress. Believing that they could not obtain a conviction against Lee in any event—the Poland Act did not permit them to exclude all Mormons from the jury—the prosecutors decided to use the trial to enflame national sentiment against the Church, to showcase the inadequacy of the Poland Act, and to facilitate legislation resulting in Mormon disenfranchisement. This may seem to be an
irresponsible accusation for an historian to make, but it was the Salt Lake Tribune – the Liberal Party’s own press organ at the time—that identified this as the purpose of the prosecution. In fact, at trial, Baskin did not fight the seating of Mormon jurors. Rather, in his trial presentation he accused the Church and its doctrine with complicity, attempting to tar Church leaders with the crime as much as, or more than, he did Lee. By the entry of a mistrial, in which the jurors were divided based upon their church affiliation, the prosecution had achieved an outpouring of negative press against the Church. Baskin then went to lobby Congress.

The next U.S. Attorney for Utah, Sumner Howard, did not have these ulterior motives. He decided the most effective strategy was to prosecute Massacre perpetrators one at a time. At Lee’s trial, he thus focused on Lee’s guilt. Realizing that he would have to obtain a verdict with Mormons on the jury, he openly accepted Brigham Young’s longstanding offer to assist with any legitimate prosecution of the massacre. Thereafter the Church provided requested witnesses that had avoided subpoena for the previous trial, including Massacre participants; it even provided a member of the Church’s First Presidency. It is likely that those witnesses who themselves took part in the Massacre offered false testimony to shield the extent of their own participation. But, given Lee’s apparent subsequent confessions, and what we otherwise know with some certainty, there is little reason to believe that these witnesses lied about their observations of Lee’s conduct during the Massacre. Jacob Hamblin, who was not a witness to the Massacre, testified to a damning story about Lee’s conduct that seems exaggerated. But, even if it was, such great animosity already existed between Lee and Hamblin that it would be the likely reason Hamblin offered the inflammatory testimony. In his closing, Howard noted to the jurors that he had intentionally selected an all-Mormon jury so that they could demonstrate their willingness to convict one of their own if deserved. He had demonstrated to them, he argued, that Lee had not only committed the crimes, but had done so against the express doctrines of his church and the actual direction of its leaders.

This approach succeeded. The Salt Lake Tribune reported that, at the beginning of their deliberations, the jurors split three different ways on the various possible charges. But after prayer and several hours of deliberation, they resolved their differences, and all voted unanimously in favor of murder in the first degree.

Lee and his lawyer William Bishop later accused the Church and Howard of pre-selecting twelve jurors committed to convict. But at the time, Bishop made no such allegations, but conceded that Howard had beaten him fairly. And Bishop further failed to raise such allegations in Lee’s appeal. The Tribune’s report of the jury’s deliberations also cuts against Bishop’s charge of a jury pre-committed to a finding of guilt. So does the report of Lee’s granddaughter that many years later one of the jurors described to her how other jurors brought him around to a guilty verdict that he then regretted.

In any event, as the authors note, if the Church made a bargain with Howard, it’s difficult to know what was the quid for its quo. Howard continued to vigorously pursue the arrests of Massacre suspects, he continued to recommend strategies for their capture, gather evidence, and plan their prosecutions. Neither the Church nor its leaders ever expressed surprise, disappointment, or betrayal by that vigorous pursuit. Nevertheless, the government never appropriated the funds requested by Howard, the Edmunds-Tucker Act disenfranchised the Mormons anyway, and Brigham
Young died. These developments, apparently, sufficiently diminished the government interest in vigorously pursuing the perpetrators so that nothing of any substance was ever after accomplished, even if the perpetrators never could safely settle.

Yet, even while Young made no attempt to control the state, as Prophet he controlled the Church. Expulsion from it had spiritual ramifications for the life in this world and after. Only two Church members, Lee and Isaac Haight, were ever excommunicated for participation in the Massacre. Those excommunications did not occur until thirteen years after the fact and the authors struggle some to explain the reasons for this.

Through the use of independent and contemporaneous sources, the authors convincingly demonstrate that, when Lee described the Massacre to Young in late September 1857, he lied in implicating only Indians. But, even assuming that Young believed and continued to want to believe Lee, the book describes multiple occasions thereafter in which Young received information from reliable sources that would have at least called Lee’s report into serious question. And, it further reviews Young’s inconsistent treatment of Lee. In 1863, for example, Young told Lee with reference to the massacre “In heaven you shall never be.” Yet in 1865, Lee was authorized to be sealed to an additional plural wife—a privilege at the time only afforded to Church members in good standing.

In 1867 Erastus Snow, the Church’s Apostle assigned to Utah’s southern settlements, forwarded to Young a confession of a Massacre participant who was seeking guidance from Snow about what earthly or eternal hope he had. Snow told Young there were a number of similar Mormons under his charge and that he would benefit from any advice. In a mixed response, Young seemed to indicate that participants would not escape judgment in any event, adding that while they should not be allowed further Church privileges, they should not lose their membership. Young told Snow: “Men will act independent and they must endure the consequences of their actions. I can give no encouragement to any man who was engaged in that transaction, and can only say let them remain where they are.”

Yet in 1870, Young was presented with apparently overwhelming evidence by trusted colleagues of Lee’s direction at the Mountain Meadows as well as Haight’s apparent initiation of the enterprise. Young seemed to reach a breaking point, and Lee and Haight were both excommunicated.

While not directly, the authors seem to suggest another cause for Young’s wavering reticence. As part of his direction for preparing for the Utah War in 1857, Young told all settlements to cease trading their grain to emigrant companies so that it could be preserved in preparation for the oncoming war. In Blood of the Prophets, Bagley convincingly demonstrates that an additional part of that strategy was to encourage Indian tribes along the overland trails to raid the emigrant trains and steal their cattle, whereas previously the Mormons had helped prevent such raids. As did the authors of volume one before them, Turley and Brown convincingly demonstrate that this policy would not have produced the Massacre, because the Indian Chiefs responded ambivalently to Young’s encouragement to steal the cattle of emigrants, and at least some of them remained in Salt Lake City after the meeting with Young until after the Massacre had taken place. To the extent that others may have returned home earlier, it would have been unlikely that they would have had time to return before the Massacre.
In any event, it was not the Indians who planned the initial attack on the emigrants. Rather, it was Haight, Cedar City’s stake president, militia major and mayor. He may have been made aware of Young’s anticipated policy before it was presented to the Indians. He may have used it as cover for, or at least viewed it as being consistent with, Young’s plans. Even if this was not the case, Haight’s plan for the attack on the emigrants by Indians sufficiently mimicked Young’s policy such that several years after the fact Young “must have wondered whether his strategy to encourage Indian cattle raiding was to blame.” To assist in evaluating that potential, Turley and Brown have placed on the inside back cover of the book a map that shows the dates and locations of such incidents surrounding the Massacre.

Regardless, Young’s spiritual punishment for Lee’s participation in the massacre turned out to be unique. There is evidence that Young may have authorized the rebaptism of Haight in 1874 after a visit to Tocquerville, Utah where Haight was hiding. Whether then or later, at some point Haight’s rebaptism seems to be fact. Being a question pertaining to the Church’s spiritual discipline, any judgment about rebaptism would have been particularly Young’s. Maybe Young was moved, perhaps impulsively, by a personal encounter. Yet, Lee and Young met for the last time later that same year, and Young did nothing to readmit Lee to the church. Perhaps this distinction involved possible personal differences between Haight and Lee. Yet, as horrible as Lee’s actions at the Meadows were, of the two, Haight appears to be the more culpable. While, as the authors relate, rebaptism did not spare Haight from being shunned from Mormon society, Lee’s continuing excommunication would have made it easier for Mormon jurors to convict him. Further, it left Lee, and only Lee, for almost a century, in a disciplinary status that marked him to succeeding generations as the man most culpable for the Massacre in the eyes of the church. It is doubtful that Young contemplated this result of his different treatment of Haight and Lee if in fact he authorized Haight’s re-baptism. But it has nevertheless resulted in the anomaly that Lee has borne the reproach which many others are also due. Lee was sentenced to death and executed by a firing squad at the site of the Massacre in 1877. Haight died in 1886 in Thatcher, Arizona.

In a footnote in The Mountain Meadows Massacre, Brooks tells of when she went to Salt Lake City hoping to retrieve the “Morris Collection”—affidavits on the massacre she had learned were in the custody of the Church. When she met with the Church official in charge, the materials lay in a large envelope between them, and yet they were not made available to her. Fortunately, the Morris Collection was among the documents made available when the Church later opened its archives. It is an irony that Brooks, as much as anybody, achieved that openness through her persistence in publishing without them, but never had the benefit of them in her work.

Turley and Brown have been the beneficiary of those sources and the work of their predecessors. Of course, just having sources about the Meadows, does not ensure accuracy. Almost every witness to the Massacre had powerful motives to conceal, rewrite or fabricate events and did so. Oral history not infrequently is indistinguishable from salacious legend. The facts of the Massacre, even then, were often decided on predisposition and supposition rather than on facts.

By virtue of writing the latest book on the topic, Turley and Brown have had the luxury of addressing the conclusions of their predecessors. They do so subtly. Sometimes they effectively impeach a source, provide additional
context, or opt for a previously disputed conclusion. They clearly provide the authority on which they base their determinations. For those who are aware of the previous works, it is a gracious, satisfying and thorough enterprise.

It is certain that the complete truth about the Mountain Meadows will continue to evade us. But, Joseph Smith, the Prophet revered by both John D. Lee and Brigham Young, made a practical observation about how to discern truth in murky environments. “By proving contraries truth is made manifest.” This book is a worthy contributor to that decades long enterprise which improves with age. That is all that the boy that I was when I first went to the Meadows could hope for.

Hon. G. Murray Snow, Chief Judge, U.S. District Court for the District of Arizona
The Trial of Lee Harvey Oswald, by William Alsup. NEWSOUTH BOOKS: UNIVERSITY OF GEORGIA PRESS, 2022. 320 pp.; $27.95, hardcover.

On the morning of Sunday, November 24, 1963, Dallas police were preparing to transfer the accused assassin of President Kennedy from police custody to the custody of the county sheriff at the local courthouse a few blocks away. A certain Dallas police officer was stationed at the ramp leading down to the basement garage of the police building. Suppose, just suppose, that that officer had stopped a local nightclub owner named Jack Ruby from using that ramp to enter the police garage. Ruby never would have been able to shoot Lee Harvey Oswald, and Oswald would have survived to be prosecuted for the murder of Kennedy, the wounding of Texas Governor Connally, and the murder of Dallas police officer J. D. Tippit later in the afternoon of November 22. That is the counterfactual premise for William Alsup’s fascinating new novel, “The Trial of Lee Harvey Oswald.”

Since 1999, Alsup has served as a U.S. District Judge for the Northern District of California in San Francisco. Before that time, he was for many years a senior litigation partner at the Morrison & Foerster firm, also in San Francisco. As an experienced trial judge and trial lawyer, Alsup was ideally situated to try to envision what might have happened at a trial of Lee Harvey Oswald, if one had been held.

The end product of Alsup’s labors is a remarkable interweaving of detailed facts, painstakingly culled from close study of the Warren Commission report, with the novelist’s educated construct of how capable lawyers on both sides would have arranged and presented those facts to a Dallas jury. As defense counsel, Alsup recruits the renowned Texas criminal defense attorney Percy Foreman (who apparently had actually expressed an interest in representing Oswald). As the prosecutorial team, Alsup uses a combination of senior lawyers from the Dallas District Attorney’s office and two fictional attorneys from the federal government, Abe Sommer from the Criminal Division of the U.S. Department of Justice in Washington, D.C. and Elaine Navarro from the U.S. Attorney’s Office in Dallas. The author plainly views with favor these two characters of his creation. They are consummate professionals, and they bring to the prosecution team not only legal competence but also a federal presence that seems only fitting in a case involving the killing of the President. Oddly, as Alsup has one of the participants observe, it was not at the time a federal crime to kill the
President, so an assumption from the very beginning of the novel is that any trial would have taken place in state court.

The novel proceeds at a fast pace through an initial phase of fact-gathering and witness interviews, and then on to the trial itself. As Alsup envisions the proceedings, not a moment is wasted. Jury selection begins in late February 1964, barely more than three months after the assassination, and the trial proper starts in early March. The underlying facts set forth regarding Oswald himself, his background and family, the events of November 22, and the investigation that follows, are all true. Pretty much everything else is a figment of Alsup’s imagination, although, at least with respect to the trial, it is a highly plausible figment. (Alsup acknowledges that he employs a bit of poetic license in connection with an unsigned handwritten note that Oswald left for an FBI agent only ten days before the assassination.)

To move his narrative forward, and to further develop his characters, Alsup uses a series of entertaining vignettes in a variety of locales outside the courtroom. Abe and Elaine make two visits to the chambers of U.S. District Judge Sarah Hughes, who famously administered the oath of office to President Johnson after President Kennedy was killed. Judge Hughes offers good advice, good stories, and good Scotch. There also are a couple of evening occasions at Jack Ruby’s nightclub, both involving the third of Alsup’s principal fictional characters, Barbara “Bebe” Boudreaux, a reporter for the New Orleans Times-Picayune. On one of these occasions, Bebe is at the club with Abe, and on the other she’s there with Percy Foreman. When Abe heads to New Orleans to investigate Oswald’s time in that city, Bebe meets him there. The two visit a park and have dinner together while Bebe interviews Abe for one of her profiles of counsel in the case. During the interview, we learn about Abe’s military service in Europe during WWII. Similarly, toward the end of a Sunday morning breakfast that Elaine prepares for Abe, we learn of Elaine’s participation in the 1963 March on Washington, and her father’s interment at Arlington Cemetery.

Not surprisingly, the encounters among counsel and the presiding state court trial judge, Joe Brown, play a pivotal role in the novel. The judge may run a messy chambers, and he may not be up to date on the most recent decisions from the Supreme Court, but he is determined to be fair. Percy Foreman quickly demonstrates his formidable capabilities as defense counsel, extracting useful information from the prosecution at what otherwise might have been a perfunctory bail hearing, and educating the court about the Supreme Court’s then-recent decision in *Brady v. Maryland*, which held that the defense was entitled to any exculpatory information in the prosecution’s possession. Eventually, under pressure from Foreman, and to avoid future issues of unfairness, the prosecution agrees to disclose all of its witness interview statements to the defense. This decision sharpens the dramatic tension that continues to build as the novel proceeds, leaving the reader ever more curious as to the nature of the defense that Foreman will present.
Alsup’s intensive study of the Warren Commission Report, and his familiarity with the trial process, enabled him to piece together a possible defense for Oswald that could be reconciled with all of the witness statements and evidence offered by the prosecution. The novel, especially the trial that is its climax, is appealing for lawyers and non-lawyers alike. A real page-turner, it can be read quickly as pure entertainment. But it also will greatly reward a more careful and attentive study, through which the reader can gain an appreciation of both the complexity of the investigation and the possibility of presenting a defense to the prosecution’s very strong case. In sum, the novel is highly recommended.

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Talk about Trail Blazers! Here we learn that Dorothy was the Vice President of the UCLA Student Body, that she actually signed John Wooden’s contract as basketball coach, that she graduated at the top of her 1953 UCLA law school class where she was one of two women, and that she became the first woman dean of the University of Southern California Law School at a time when there were only a couple of other women law school deans in the country. When I was a struggling lawyer in Phoenix in the early 70s, she was the only woman dean I had ever heard of. She was among the few women world leaders of the Bahá’í faith, and must have been the only woman in the room many times when important subjects dear to her heart were discussed, including judicial administration and human rights. She did all this alongside her lifelong partner Jim, in a marriage accurately described here as egalitarian: two judges, two community and religious leaders as well as two parents raising two children. A feminist? Not that it would show. A humanitarian? Absolutely and to her core!

That is the story that comes through this highly readable biography of Dorothy Nelson, who has been my beloved colleague on the Ninth Circuit for more than forty years. It is written by her former law clerk and good friend, Lisa Kloppenberg, who followed in her mentor’s footsteps as an academic and clearly picked up super communication skills along the way. The book follows Professor, Dean and eventually Judge Nelson from her athletic youth (her mother trained for the Olympics as a swimmer and her father was a rider and trainer of horses) through her marriage to Jim during their first year of law school, and traces the trials and tribulations of her distinguished academic and judicial careers. The values running through almost all phases of her life come through clearly: her family, her faith and her belief in the essential value of every human being.

The book has virtually nothing negative to say about its subject, which might sound like a criticism of a biography, but then I have never heard anyone say anything negative about Dorothy. The closest I could find in the book was that, in addition to being affectionately called Dean Dottie, she was also occasionally dubbed Doughnut Dottie, an apparent reference to her legendary qualities as a hostess. Dorothy was always making sure people had something good to eat, especially when they were discussing something important.
All successful careers in the law owe debts to mentors. I was aware that while at UCLA Dorothy had been influenced by former Harvard Dean and social justice pioneer Roscoe Pound, but I had not known how influential he was. It was Pound who steered her away from law practice and to her first legal job doing research for a project at USC (known to her then as the “other law school”), studying the Los Angeles court system. Bingo! A life in the administration of justice was born. She taught, wrote about and maybe even dreamed about judicial administration and how courts should work.

Her devotion to the cause of justice was matched by her devotion to her Bahá’í faith. She and Jim hosted Bahá’í Fireside events every Wednesday evening in their lovely Pasadena home. The events went on whether the Nelsons were home or not. They gave folks the keys and told them to carry on. And of course, Dorothy always made sure there was good food.

Indeed, Dorothy’s talents as a hostess made her famous in many circles. She was proud of the roses in her garden, made sure there were flowers in her beautifully decorated chambers and enjoyed serving tea and coffee from the polished silver service that was always displayed prominently near her desk. Dorothy has always had class.

Her professional accomplishments were many, and this book makes a major contribution to our understanding of the 20th Century development of the study of both judicial administration and human rights. The description of her meeting in Egypt with Jehan Sadat, wife of the Egyptian President, is memorable. When the two found agreement on the importance of family, Mrs. Sadat sent her male secretary out of the room and she and Dorothy discussed the education of women to achieve world peace. Dorothy always tried to find common ground.

Dorothy traveled extensively to international destinations, both as an expert in judicial administration and a leader of the Bahá’í faith. I was happy to see my favorite Dorothy Nelson story captured in the book when describing Dorothy and Jim’s travel in support of the Bahá’í belief in human rights. This humanitarian work made a difference, though not nearly enough in Dorothy’s estimation: After returning from one of her many trips to Egypt, where persecution has historically been rife, I asked her how many lives she had been able to save. She sighed and replied, “only six.”

Dorothy’s devotion to the pursuit of justice and her devotion to her faith merge in the book’s title, *The Best Beloved Thing is Justice*. It is a quotation from one of Bahá’u’lláh’s writings that Professor Kloppenberg describes as having impacted the Nelsons deeply through their long careers in the judicial system.

The chapters covering Dorothy’s years sitting as a judge on the Ninth Circuit bring out the rich variety of ways Dorothy used her skills as a mentor, mediator and hostess to try to bring about harmony and peace. She did this in all the forums she was involved with: her chambers—with her personal staff, the court—working with judges and court staff, and with the leadership in her faith, all while maintaining her international contacts. I once introduced her as knowing everyone in the world. I was impressed, but not
surprised to learn that she handled all of her court duties, that included substantial travel assignments, while maintaining the weekly programs at her home and monthly travel with Jim to the Bahá’í headquarters near Chicago.

The descriptions of Dorothy’s activities within the court are heartwarming, and accurate. She was a champion of Alternative Dispute Resolution (ADR), and she worked to expand the court’s mediation office and assist it becoming a national leader in promoting effective alternatives to litigation. She was appalled by the size of the court’s backlog when she came on board and helped devise tools to reduce it, including shorter dispositions that were unpublished and hence took less time to produce, shortening the time for oral argument, and, of course, diverting cases from the court to mediation.

Because she was a social person, Dorothy’s chambers in Pasadena became a social center for the court. Her outer office was more like a living room, as the book describes it, with flowers and comfortable chairs. Her office featured a round table where visitors were offered tea and coffee. During court week each month Dorothy hosted a brown bag lunch where, after a learned introduction by one of Dorothy’s clerks, a visiting judge or dignitary would hold forth on any topic, usually autobiographical, and answer questions. These sessions were a must for judges and law clerks to attend, and the book quotes one judge describing the scene as featuring people hanging out the door. Guests provided their own lunch and Dorothy provided cookies and punch.

During Dorothy’s most active years as a Judge, the Ninth Circuit Court of Appeals came under attack from time to time. As Chief Judge during one of the most hostile periods, I am more than familiar with the attacks and with the reasons the court was able to withstand them. There is no question that Dorothy’s role, described here as “Dean of the Ninth Circuit” was important. She provided the glue that helped keep the institution together. She did this by demonstrating concern for the welfare of everyone in the court family and by making everyone feel at home at the events she hosted, all while exuding warmth and her love of humanity. She was, in short, way ahead of her time in understanding the importance of including everyone and rejecting no one.

We are told about some of Dorothy’s opinions that emphasized due process, but some of her more passionate efforts were reversed by the Supreme Court. Professor Kloppenberg concludes, correctly I think, that Dorothy’s leadership in promoting ADR had greater impact on the justice system than her opinions.

The book is meticulously researched and all sources are revealed in the extensive footnotes. In addition to primary documents and secondary sources, Professor Kloppenberg must have interviewed almost everyone Dorothy ever knew who is still alive. Their insights are revealing, and so too is the rueful comment of someone who chose to clerk for a different judge, and now regards not clerking for Dorothy to have been the greatest mistake of her
life. The quotes shed light on how Dorothy was perceived and how those that interacted with her felt they had always been treated respectfully.

Nevertheless, it was perhaps her background as an academic that made her suspicious of lawyers who mischaracterized the record or withheld information. She thought oral argument important, and wanted straight answers. As Professor Kloppenberg writes, at oral argument, she appreciated lawyers who answered the questions. She quotes Dorothy as saying, “It always amuses me when a lawyer responds, ‘Well that is a really good question Judge,’ as if the lawyer would dare say, ‘That’s a bad question.’” One colleague is quoted as describing her trying to convince someone by using a gentle, persuasive approach. A lawyer distinguished Dorothy from judges who get carried away with ego or ideology. Dorothy, the lawyer continued, is a conciliator, not seeking the limelight, but treating everyone with respect and dignity. We should not be surprised.

The quotations from so many interviews had me whirring the pages to find the footnote identifying the source. One quote seemed to be perhaps a little excessive. It described her as “deeply cherished by all of the judges.” When I checked the footnotes, I discovered that I was the source. Upon reflection, I stand by my statement.

Hon. Mary M. Schroeder, Ninth Circuit Court of Appeals
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