

# I'D WAGER IT'S TIME FOR A CHANGE: RECONSIDERING NEW YORK STATE'S CONSTITUTIONAL PROHIBITION AGAINST GAMBLING

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## I. INTRODUCTION

### *A. Constitutional Prohibitions Against Gambling Generally*

The Bill of Rights of the New York State Constitution prohibits gambling except in limited circumstances.<sup>1</sup> Article I, section 9, states:

[N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, *and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature* shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.<sup>2</sup>

This section was added in 1894 and was subsequently amended

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<sup>1</sup> See N.Y. CONST. art I, § 9.

<sup>2</sup> *Id.* (emphasis added).

multiple times—most recently in 2013.<sup>3</sup> The Constitution does not define the term “gambling,” however.<sup>4</sup> The New York State Penal Law describes criminal gambling as follows:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.<sup>5</sup>

In addition, the New York General Obligations Law voids losses or authorizes the recovery of losses due to unlawful gambling activities.<sup>6</sup> For example, section 5-401 states: “All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.”<sup>7</sup> However, there is no body of law or regulation that specifically defines gambling.

The Constitution authorizes the legislature to pass appropriate laws to prevent offenses against prohibited types of gambling.<sup>8</sup> The New York State Penal Law and General Obligations Law provisions above are examples of the legislature exercising its constitutional authority to prevent unlawful gambling activities. The legislature

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<sup>3</sup> *Id.* In 2013, there was a constitutional amendment authorizing extended gaming in New York, and Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law was enacted to provide a legislative framework for up to seven commercial gaming casinos. See SPONSOR'S MEMORANDUM IN SUPPORT OF LEGISLATION, Governor's Program Bill #33 (2013), [http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/governor\\_files/documents/GPB-33-UPSTATE-MEMO.pdf](http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/governor_files/documents/GPB-33-UPSTATE-MEMO.pdf); see also STATE BD. OF ELECTIONS, STATE OF N.Y., FORM OF SUBMISSION OF PROPOSAL NUMBER ONE, AN AMENDMENT 1 (2013), <https://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalOneFinal.pdf> (discussing the purpose of the proposed amendment); Thomas Kaplan, *Expansion of Gambling in New York is Approved*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/referendum-to-expand-casino-gambling-in-new-york-is-approved.html> (discussing the expansion of casino gambling); see generally Gerald Benjamin, *If the New York State Constitution Bans Gambling, Why is There so Much Opportunity to Gamble in New York?*, NYCONSTITUTION.ORG, <http://nyconstitution.org/professors-corner/casino-gambling/if-new-york-state-constitution-bans-gambling-why-there-so-much-opp> (last visited Nov. 16, 2016) (providing an even more in-depth historical overview of New York State's prohibition on gambling).

<sup>4</sup> See N.Y. CONST. art I, § 9.

<sup>5</sup> N.Y. PENAL LAW § 225.00(2) (McKinney 2017).

<sup>6</sup> See N.Y. GEN. OBLIG. LAW § 5-401 (McKinney 2017); see also *id.* § 5-411 (voiding contracts on account of money or property wagered); *id.* § 5-413 (voiding securities for money lost at gaming); *id.* § 5-415 (voiding certain transfers of property in pursuance of lottery); *id.* § 5-417 (voiding contracts, agreements, and securities on account of raffling); *id.* § 5-419 (authorizing recovery of property staked in any prohibited wager or bet); *id.* § 5-421 (authorizing recovery of certain losses); *id.* § 5-423 (authorizing recovery for money paid for lottery tickets).

<sup>7</sup> *Id.* § 5-401.

<sup>8</sup> See N.Y. CONST. art I, § 9, cl. 2.

has also passed gambling laws that clarify what is *not* prohibited gambling.<sup>9</sup> State courts have repeatedly held that the legislature has latitude in determining what activities do and do not constitute prohibited gaming within the meaning of the Constitution.<sup>10</sup>

History suggests that the general prohibition against gambling is rooted in morality. The New York State Court of Appeals has held that Article I, section 9, was “adopted with a view toward protecting the family man of meager resources from his own imprudence at the gaming tables.”<sup>11</sup> While the state legislature can enact laws in furtherance of the constitutional prohibition against gambling, it may not expand gambling without a full amendment to New York’s Constitution.<sup>12</sup>

### *B. Constitutional Amendments*

This article argues that changes to the Article I, section 9, prohibitions on gambling are necessary in light of today’s gambling environment. Amendments to New York’s Constitution are achieved in two different ways.<sup>13</sup> The first method is via amendment by the legislature, subject to voter approval.<sup>14</sup> The second method is through a convention, called either by proposal of the legislature or through an automatic referendum every twenty years, subject to voter approval.<sup>15</sup> The main difference between constitutional revision through legislative amendment and amendment via convention is that a constitutional convention “allows for much wider modifications of the Constitution.”<sup>16</sup>

<sup>9</sup> See, e.g., N.Y. TAX LAW § 1617-a (McKinney 2017) (authorizing video lottery terminals at selective racetracks); see also *id.* §§ 1604, 1617 (authorizing New York State to participate in a multi-jurisdictional lottery).

<sup>10</sup> See, e.g., *People v. Wilkerson*, 342 N.Y.S.2d 936, 942 (Cty. Ct. 1973) (citing *People v. Stedeker*, 67 N.E. 132, 133 (N.Y. 1903)) (“[S]ince the Constitution commits to the legislature the duty of preventing gambling, the measures to be adopted in furtherance of that end also rest in the legislative discretion.”).

<sup>11</sup> *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 213 (N.Y. 1964) (citing NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 567 (1821)).

<sup>12</sup> Daniel Wallach, *N.Y. Fantasy Sports Law May Face Constitutional Roadblock*, LAW360 (June 21, 2016), <http://www.law360.com/articles/809124/ny-fantasy-sports-law-may-face-constitutional-roadblock>.

<sup>13</sup> See N.Y. CONST. art. XIX, §§ 1, 2; GERALD BENJAMIN & RICHARD BRIFFAULT, THE PHILIP WEINBERG FORUM: AMENDING THE NEW YORK STATE CONSTITUTION—CURRENT REFORM ISSUES 12, 13 (2005), [http://www.rockinst.org/pdf/public\\_policy\\_forums/2005-03-14-the\\_philip\\_weinberg\\_forum\\_amending\\_the\\_nys\\_constitution\\_current\\_reform\\_issues.pdf](http://www.rockinst.org/pdf/public_policy_forums/2005-03-14-the_philip_weinberg_forum_amending_the_nys_constitution_current_reform_issues.pdf).

<sup>14</sup> See BENJAMIN & BRIFFAULT, *supra* note 13, at 12.

<sup>15</sup> See *id.* at 13, 18.

<sup>16</sup> *Pandora’s Box—Get the Facts about a Constitutional Convention*, LAWRENCE TEACHERS’

Conventions have generally been unpopular, though recent Albany scandals involving state legislators have prompted renewed interest in political reform through a constitutional convention.<sup>17</sup> Legislators are unlikely to call for a convention, though, in fear that changes to New York's Constitution may take away their powers.<sup>18</sup>

An automatic vote on whether New York State residents want to hold an optional twenty-year constitutional convention is scheduled for November 7, 2017.<sup>19</sup> If the people vote "yes," an Election Day 2018 vote would be scheduled to decide the delegates for the convention.<sup>20</sup> The actual convention would not happen until 2019.<sup>21</sup> Triggering the process is difficult, as many organizations are opposed to re-writing the Constitution.<sup>22</sup> Additionally, all amendments to the Constitution related to gambling face an additional hurdle, as special interest groups in the casino and gaming industry do not "want to see additional expansion to compete with [the gambling that already] exists."<sup>23</sup>

Despite these hurdles, the authors seek to explain why New York must endeavor to alter Article I, section 9, in the near future. Part II of this article makes note of the wide array of forms of gambling currently authorized by the Constitution in New York State. Part III explores special instances of gambling, which currently exist in a

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ASS'N, [http://www.lawrenceta.org/images/ConstConvnt\\_1\\_4.pdf](http://www.lawrenceta.org/images/ConstConvnt_1_4.pdf) (last visited Aug. 6, 2017).

<sup>17</sup> See Nicholas Confessore, *As Voter Disgust with Albany Rises, So Do Calls for a New Constitution*, N.Y. TIMES (Aug. 23, 2009), <http://www.nytimes.com/2009/08/24/nyregion/24convention.html>.

Including a convention held in 1777, when delegates gathered in White Plains to write the first draft of the New York Constitution, New York has had nine conventions. . . . But voters have been less open to change in recent decades. The last convention, held in 1967, ended with a whimper: When several proposed changes to the Constitution were later submitted for voter approval, as required by law, each was defeated. . . . In 1997, voters rejected having a convention at all, urged on by a strange bedfellows coalition of environmentalists, labor unions, and conservative activists.

*Id.*

<sup>18</sup> See *id.* ("[Opponents of the constitutional convention are] joined by the leaders of the Senate and Assembly, who wield enormous clout in Albany under the existing rules.").

<sup>19</sup> See Joe Mahoney, *Constitutional Convention Could Change N.Y. Government*, DAILYSTAR (Sept. 19, 2016), [http://www.thedailystar.com/news/local\\_news/constitutional-convention-could-change-ny-government/article\\_2098d9da-dbd5-57c9-8bc2-b99fed62dbed.html](http://www.thedailystar.com/news/local_news/constitutional-convention-could-change-ny-government/article_2098d9da-dbd5-57c9-8bc2-b99fed62dbed.html); *Reasons We Don't Want a NYS Constitutional Convention in 2017*, RETIRED UNITED TCHRS. NORTHPORT (Feb. 18, 2016), [http://www.retiredteachersofnorthport.org/wp-content/uploads/2016/02/Constitutional\\_Convention.pdf](http://www.retiredteachersofnorthport.org/wp-content/uploads/2016/02/Constitutional_Convention.pdf).

<sup>20</sup> See Matthew Hamilton, *16 Months Out, Voters Like Idea of a Con-Con*, TIMES UNION (June 30, 2016), <http://blog.timesunion.com/capitol/archives/264861/16-months-out-voters-like-the-idea-of-a-con-con/>.

<sup>21</sup> See *id.*

<sup>22</sup> See generally Mahoney, *supra* note 19 (arguing that conventions have been opposed by public employee unions and labor groups).

<sup>23</sup> See *Reasons We Don't Want a NYS Constitutional Convention in 2017*, *supra* note 19.

gray area of legality, but continue to operate unimpeded in New York. Part IV identifies and discusses new developments in gambling in recent years, and identifies inadequacies in the Article I, section 9, prohibition in accounting for these changes. Part V concludes by urging lawmakers to abandon the Article I, section 9, failed prohibition—either at the constitutional convention or via standard amendment—to bring New York’s gambling laws in line with the reality of modern society. The authors opine that the ideal path for gambling regulation in New York is a full repeal of the gambling prohibition contained in Article I, section 9, as well as the promulgation of rational regulations that will serve to ensure the integrity of widely expanded gambling operations in New York State.

## II. PERMISSIBLE TYPES OF GAMBLING IN NEW YORK

Presently, the New York State Gaming Commission only identifies lottery, horse racing, gaming (including Native American, commercial, and video lottery), and religious, charitable, and other non-profit organization-run gaming, as authorized forms of gambling.<sup>24</sup>

### A. Native American Casinos

Native American gaming exists in New York, and indeed, in all jurisdictions, by virtue of the federal Indian Gaming Regulatory Act (“IGRA”).<sup>25</sup> The statute plainly states that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”<sup>26</sup> New York currently features six Native American casinos—Akwesasne Mohawk Casino, Seneca Niagara Casino, Seneca Allegany Casino, Seneca Buffalo Casino, Turning Stone Casino, and Yellow Brick Road Casino—operated by the St. Regis Mohawks, Seneca Nation of Indians, and the Oneida Indian Nation of New York, respectively.<sup>27</sup>

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<sup>24</sup> See *About the New York State Gaming Commission*, N.Y. ST. GAMING COMMISSION, <https://www.gaming.ny.gov/about/> (last visited Aug. 6, 2017).

<sup>25</sup> See Indian Gaming Regulatory Act, 25 U.S.C. § 2701(5) (2012).

<sup>26</sup> *Id.*

<sup>27</sup> *Gaming: Frequently Asked Questions*, N.Y. ST. GAMING COMMISSION, <http://www.gaming.ny.gov/gaming/indianFAQ.php#FAQ6> (last visited Apr. 4, 2016). Yellow Brick Road, not reflected on the Commission’s website, opened during the summer of 2015. See Elizabeth

Each Native American nation has its own compact with New York State, which dictates the regulation of the gaming on tribal lands.<sup>28</sup>

All other forms of gambling currently legal in New York State owe their existence to amendments to the New York State Constitution.<sup>29</sup> Unlike Native American casinos, these types of permissible gambling fall within the sole jurisdiction of the New York State Gaming Commission.<sup>30</sup>

### *B. Horse Racing*

Horse racing has the longest tenure of any form of legal gambling in New York State, having been part of the state Constitution since its amendment in 1939.<sup>31</sup> The Constitution allows “pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government.”<sup>32</sup> Currently, “[t]here are four Thoroughbred tracks and seven Standardbred . . . tracks” where New Yorkers can watch and wager on live racing.<sup>33</sup>

### *C. Charitable Gaming*

Non-profit, charitable, and religious organizations first received their golden ticket into the gambling world in 1957, when an amendment was passed that allowed these entities to run bingo games.<sup>34</sup> In 1975, the Constitution was further amended to allow these organizations to run a wider range of games of chance.<sup>35</sup> The Constitution now states:

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Doran, *Oneida Nation's Yellow Brick Road Casino Opens Today*, SYRACUSE.COM (June 2, 2015), [http://www.syracuse.com/news/index.ssf/2015/06/oneida\\_nations\\_yellow\\_brick\\_road\\_casino\\_opens\\_today.html](http://www.syracuse.com/news/index.ssf/2015/06/oneida_nations_yellow_brick_road_casino_opens_today.html).

<sup>28</sup> See *Indian Gaming Regulatory Act of 1988*, N.Y. ST. GAMING COMMISSION, [https://www.gaming.ny.gov/gaming/indian\\_digl.php#1988](https://www.gaming.ny.gov/gaming/indian_digl.php#1988) (last visited Aug. 9, 2017); *Native Americans and Gambling in New York State: New York Compacts and Provisions*, N.Y. ST. GAMING COMMISSION, [https://www.gaming.ny.gov/gaming/indian\\_digl.php#compacts](https://www.gaming.ny.gov/gaming/indian_digl.php#compacts) (last visited Aug. 9, 2017).

<sup>29</sup> See, e.g., N.Y. DEPT OF STATE, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS, [https://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_Votes-Cast-Conventions-Amendments.pdf](https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf) (last visited Oct. 28, 2017) [hereinafter VOTES CAST FOR AND AGAINST].

<sup>30</sup> *About the New York State Gaming Commission*, *supra* note 24.

<sup>31</sup> See VOTES CAST FOR AND AGAINST, *supra* note 29.

<sup>32</sup> N.Y. CONST. art. I, § 9, cl. 1.

<sup>33</sup> *Horse Racing & Pari-Mutuel Wagering*, N.Y. ST. GAMING COMMISSION, <https://www.gaming.ny.gov/horseracing/index.php?ID=0> (last visited Aug. 9, 2017).

<sup>34</sup> See VOTES CAST FOR AND AGAINST, *supra* note 29.

<sup>35</sup> See *id.*

[A]ny city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars.<sup>36</sup>

#### *D. Lottery and Traditional Lottery*

Traditional lottery was born of a 1966 amendment of the state Constitution, which allowed “lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe.”<sup>37</sup> The essentials of a lottery are: (1) staking something of value (or consideration) (2) to purchase a

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<sup>36</sup> N.Y. CONST. art. I, § 9, cl. 2.

<sup>37</sup> N.Y. CONST. art. I, § 9, cl. 1; see VOTES CAST FOR AND AGAINST, *supra* note 29.

ticket (3) in a game of chance (4) requiring multiple participation by players, (5) where the set number of predetermined winners are randomly distributed from a finite pool, (6) for the chance to win a prize or the opportunity to play another round.<sup>38</sup>

The road to expand traditional lottery to video lottery gaming<sup>39</sup> was not without challenges. In *Dalton v. Pataki*, the legislature had passed Tax Law section 1617-a, authorizing video lottery terminals at selective racetracks, and Tax Law sections 1604 and 1617, authorizing New York State to participate in a multi-jurisdictional lottery.<sup>40</sup> The legislature had passed these laws immediately after the 9/11 terrorist attacks in 2001, in an attempt to overcome the negative economic effects felt throughout the state as a result of the attacks.<sup>41</sup> Opponents cited this legislative action as an attempt at spreading gambling without specific constitutional authority.<sup>42</sup>

The Court of Appeals distinguished video lottery terminals and slot machines in determining that the enactment of video lottery gaming was in fact constitutional.<sup>43</sup> The court determined that a video lottery terminal is a slot machine lookalike that is “connected to a central system through . . . ‘site controllers.’”<sup>44</sup> The central system generates a finite pool of electronic tickets identical to a spool of scratch-off tickets at a traditional lottery retailer.<sup>45</sup> Players may make a wager at a video lottery terminal by placing cash or a voucher into the bill acceptor and performing an action such as hitting the “play” button or pulling a lever on the terminal.<sup>46</sup> If the player wins, credits will be added to the player’s balance and, if the player loses, the wager is forfeited.<sup>47</sup> Essentially, each play is the equivalent of buying an electronic lottery ticket.<sup>48</sup>

Opponents of video lottery gaming argued that video lottery games were not in fact a “lottery” because they physically resembled slot machines.<sup>49</sup> However, the Court of Appeals determined that

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<sup>38</sup> See *Dalton v. Pataki*, 835 N.E.2d 1180, 1191–93 (N.Y. 2005) (citations omitted).

<sup>39</sup> The more common name for a video lottery gaming facility is “racino.” See Terry Golway, *Racino. Get to Know the Word*, N.Y. TIMES (Aug. 15, 2004), [http://www.nytimes.com/2004/08/15/nyregion/racino-get-to-know-the-word.html?\\_r=0](http://www.nytimes.com/2004/08/15/nyregion/racino-get-to-know-the-word.html?_r=0).

<sup>40</sup> *Dalton*, 835 N.E.2d at 1184–85 (citations omitted).

<sup>41</sup> See *id.* at 1184.

<sup>42</sup> See *id.* at 1191 (citations omitted).

<sup>43</sup> See *id.* at 1193 (citation omitted).

<sup>44</sup> *Id.* at 1192.

<sup>45</sup> See *id.* at 1192, 1193.

<sup>46</sup> See *id.* at 1192.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

video lottery was constitutional as long as it satisfied the requirements of a lottery, even if it physically resembled slot machines or met the Penal Law definition of a slot machine.<sup>50</sup>

### *E. Commercial Casino Gaming*

Most recently, in 2013, the People voted to amend the New York State Constitution to specifically allow casino gaming at “no more than seven facilities as authorized and prescribed by the legislature.”<sup>51</sup> This amendment has paved the way for casino gaming to leave the confines of Native American reservations and permeate throughout New York State.

On July 30, 2013, Governor Andrew M. Cuomo signed the Upstate New York Gaming Economic Development Act, which authorized commercial gaming in the Hudson Valley/Catskill, Capital District-Saratoga, and Central-Southern Tier regions of the state.<sup>52</sup> The legislative intent was to “boost economic development, create thousands of well-paying jobs[,] and provide added revenue to the state;”<sup>53</sup> and the gaming revenues were to be used to “increase support for education beyond that of the state’s education formulae and to provide real property tax relief to localities.”<sup>54</sup> The four

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<sup>50</sup> *See id.*

<sup>51</sup> N.Y. CONST. art. I, § 9, cl. 1.

<sup>52</sup> *See* N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1300 (McKinney 2017); Press Release, Office of the Governor of N.Y. State, Governor Cuomo Signs Upstate N.Y. Gaming Economic Development Act (July 30, 2013), <https://www.governor.ny.gov/news/governor-cuomo-signs-upstate-ny-gaming-economic-development-act>. Section 1310 created two development zones. *See* RAC. PARI-MUT. WAG. & BREED. § 1310(1). Zone one includes New York City and Nassau, Putnam, Rockland, Suffolk and Westchester counties. *Id.* Zone two includes the rest of the state’s counties. *Id.* Both zones were further broken down into development regions. *Id.* § 1310(2). For a seven-year period, zone two is protected by exclusivity so that no destination gaming resorts will be licensed by the state downstate. *See id.* § 1311(1). Section 1311 authorized up to four gaming facility licenses in development regions one (Columbia, Delaware, Dutchess, Greene, Orange, Sullivan, and Ulster counties), two (Albany, Fulton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, and Washington counties), and five (Broome, part of Chemung, part of Schuyler, Seneca, Tioga, Tompkins, and part of Wayne counties). *Id.* §§ 1310(2)(b), 1311(1).

<sup>53</sup> RAC. PARI-MUT. WAG. & BREED. § 1300(5); *see also* Jesse McKinley & Charles V. Bagli, *Board Backs Casinos in the Catskills, Near Albany and in Central New York*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/nyregion/new-york-casino-resort-proposals.html?mcubz=0> (“Under state law, the new operators will have to pay a one-time licensing fee of \$20 million to \$70 million, depending on the location. Location will also determine the tax rate on gambling revenues, from 37 percent to 45 percent for slot machines and 10 percent for table games.”).

<sup>54</sup> RAC. PARI-MUT. WAG. & BREED. § 1300(9); *see also* McKinley & Bagli, *supra* note 53 (“The bulk of the revenue, 80 percent, is earmarked for elementary and secondary education or property tax relief, with the remaining money split between municipal and county governments.”).

commercial casino gaming facilities are, in the order of opening dates: Tioga Downs Casino, Racing, and Entertainment, in Nichols; del Lago Resort and Casino, in Tyre; Rivers Casino and Resort at Schenectady, in Schenectady; and Montreign Resort Casino, in Thompson.<sup>55</sup>

There are two main differences between commercial casino gaming and video lottery gaming from a customer's perspective. First, there are table games at commercial casino gaming, such as Blackjack or Baccarat, played around a table and conducted by a live dealer instead of on a machine.<sup>56</sup> Second, most slot machines are not wired like video lottery terminals.<sup>57</sup> Specifically, the outcome of each slot game (meaning a loss or a win to the player) is usually determined by a random number generator.<sup>58</sup> This means that the outcome is not pre-determined, as is the case in video lottery terminals.<sup>59</sup>

### III. PERMISSIBLE CONTESTS THAT DO NOT CONSTITUTE GAMBLING

#### A. *Daily Fantasy Sports*

On November 17, 2015, New York State Attorney General Eric Schneiderman made national news with the commencement of the People's actions against DraftKings and FanDuel, the two top operators of daily fantasy sports.<sup>60</sup>

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<sup>55</sup> See Charley Hannagan, *Del Lago Resort First Look: Upstate's Newest Casino Opens Wednesday*, SYRACUSE.COM (Jan. 30, 2017), [http://www.syracuse.com/news/index.ssf/2017/01/a\\_first\\_look\\_at\\_del\\_lago\\_upstates\\_newest\\_casino.html](http://www.syracuse.com/news/index.ssf/2017/01/a_first_look_at_del_lago_upstates_newest_casino.html); see also Teri Weaver, *Montreign Casino & Raceway: A Look at Construction Progress in Catskills*, NYUP.COM (Feb. 24, 2017), [http://www.newyorkupstate.com/catskills/2016/05/montreign\\_casino\\_raceway\\_a\\_look\\_at\\_construction\\_progress\\_in\\_the\\_catskills.html](http://www.newyorkupstate.com/catskills/2016/05/montreign_casino_raceway_a_look_at_construction_progress_in_the_catskills.html) (stating that Montreign is scheduled to open in early spring 2018).

<sup>56</sup> See *New York Casino Commission Approves Table Game Regulations for Upstate Casinos*, CASINO NEWS DAILY (Nov. 2, 2016), <http://www.casinonewsdaily.com/2016/11/02/new-york-casino-commission-approves-table-game-regulations-upstate-casinos/>.

<sup>57</sup> See *Slot Machine Q&A/FAQ: What Is the Difference Between a Class 2 and Class 3 Slot?*, VEGASSLOTSONLINE, <http://www.vegasslotsonline.com/faq/> (last visited Aug. 19, 2017); *What Is the Difference Between Video Lottery Terminals and Slot Machines?*, "WHAT IS GAMBLING?" BLOG (Nov. 14, 2013), <http://blog.what-is-gambling.com/2013/11/14/what-is-the-difference-between-video-lottery-terminals-and-slot-machines/> [hereinafter *What Is the Difference?*].

<sup>58</sup> See *Slots Random Number Generator*, CASINO NEWS DAILY (Mar. 21, 2017), <http://www.casinonewsdaily.com/slots-guide/random-number-generator-hit-frequency-vs-pay-out-ratio/>; see also GAMING LABS CERTIFIED, GLI-11: GAMING DEVICES (2016), <http://www.gaminglabs.com/pdfs/GLI-11%20Gaming%20Devices%20V3.0.pdf> (providing more information on the technical aspect of slot machines).

<sup>59</sup> See *What Is the Difference?*, *supra* note 57.

<sup>60</sup> See generally *Complaint, People v. DraftKings, Inc.*, 2016 WL 1134794, No. 453054/2015

In the complaints, the People alleged that daily fantasy contests constituted gambling under New York law.<sup>61</sup> While the People's actions against the daily fantasy operators were pending, the legislature passed Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law.<sup>62</sup> The statute declared that interactive fantasy sports contests are "*game[s] of skill* wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events."<sup>63</sup> This legislative enactment seemingly put to rest the debate over whether fantasy sports constituted gambling within the meaning of the Constitution; however, a recent suit has been brought concerning the status of fantasy sports.<sup>64</sup>

As far as the legislature is presently concerned, the current law sets forth the legislature's finding and declaration that:

(1)(a) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization; (b) Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any

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(N.Y. Sup. Ct. Mar. 21, 2016); Complaint, *People v. FanDuel, Inc.*, 2015 WL 8490461, No. 453056/15 (N.Y. Sup. Ct. Dec. 11, 2015). Daily fantasy sports are the progeny of rotisserie or traditional fantasy sports where players draft real-world athletes to their fantasy teams and compete with other players based on a scoring system. The outcome is determined by the accumulated points for each real-world athlete's performance and not the outcome of the games in which the athletes play. Daily fantasy sports simply shortens the contest duration time from season-long—as in traditional fantasy sports—to weekly or daily formats. See *Daily Fantasy Sports, What is Daily Fantasy Sports (DFS)?*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/daily-fantasy-sports/> (last visited Aug. 19, 2017).

<sup>61</sup> See Complaint, *People v. DraftKings, Inc.*, *supra* note 60, ¶ 13; Complaint, *People v. FanDuel, Inc.*, *supra* note 60, ¶ 12.

<sup>62</sup> See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW §§ 1400–1412 (McKinney 2017).

<sup>63</sup> *Id.* § 1401(8) (emphasis added).

<sup>64</sup> See *id.* § 1400(1); *but see* Complaint, *White v. Cuomo*, No. 0005861/2016 (N.Y. Sup. Ct. 2016).

fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices[; and] . . . (2) Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as defined in article two hundred twenty-five of the penal law.<sup>65</sup>

The People discontinued its action against FanDuel and DraftKings when, in August 2016, Governor Andrew Cuomo signed legislation declaring such fantasy sport enterprises legal.<sup>66</sup>

The New York State legislature is not alone in making this determination. Daily fantasy sports have been determined to be games of skill, and not gambling, by the legislatures of: Colorado, Indiana, Kansas, Maryland, Mississippi, Montana, Virginia, and Tennessee.<sup>67</sup> The one jurisdiction that declared daily fantasy sports to be gambling is the gambling mecca of the United States: Nevada.<sup>68</sup> It is important to note that Nevada does not distinguish between games of skills and games of chance, so the threshold to qualify an activity as a gambling activity is lower.<sup>69</sup>

### *B. Other Contests*

On a lesser-known scale, the legislature has authorized other contest activities as non-gambling activities. For example, in *Lawrence v. Fallon*,<sup>70</sup> an officer of the Westchester Racing Association was arrested for violating provisions of the Penal Code prohibiting unauthorized lotteries and wagering.<sup>71</sup> The officer and others in the association held races where owners of horses were permitted to pay an entrance fee and the top three finishers won a

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<sup>65</sup> RAC. PARI-MUT. WAG. & BREED. §1400(1), (2).

<sup>66</sup> See Zachary Zaggar, *DraftKings, FanDuel Pay \$12M to Settle N.Y. False Ad Claims*, LAW360 (Oct. 25, 2016), <https://www.law360.com/articles/854771/draftkings-fanduel-pay-12m-to-settle-ny-false-ad-claims>.

<sup>67</sup> COLO. REV. STAT. § 12-15.5-102 (2017); IND. CODE § 4-33-24-1 (2017); KAN. STAT. ANN. § 21-6403(a)(9), (d) (2017); MD. CODE ANN., CRIM. LAW § 12-114 (2017); MISS. CODE ANN. § 97-33-303(c) (2017); MO. REV. STAT. § 313.920(1) (2017); MONT. CODE ANN. § 23-5-802 (2017); TENN. CODE ANN. §§ 39-17-501, 47-18-1602(6) (2017); VA. CODE ANN. § 59.1-569 (2017).

<sup>68</sup> Memorandum from J. Brin Gibson, Bureau Chief, Gaming & Gov't Affairs, & Ketan D. Bhirud, Head, Complex Litig., to A.G. Burnett, Chairman, Nev. Gaming Control Bd. et al., at 1 (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>.

<sup>69</sup> See *id.* at 4.

<sup>70</sup> *People ex rel. Lawrence v. Fallon*, 46 N.E. 296 (N.Y. 1897).

<sup>71</sup> See *id.* at 296.

pre-set prize.<sup>72</sup> This type of racing contest was initially authorized by chapter 570 of the laws of 1895.<sup>73</sup> The continued validity of this law was challenged in the suit.<sup>74</sup>

The Court of Appeals found that not all races or other contests were “a lottery . . . [merely] because [their] result[s were] uncertain, or because [they] may be affected by things unforeseen and accidental.”<sup>75</sup> The court determined that the legislature’s passing of separate laws governing lotteries and horseracing demonstrated its intention not to include the racing of horses in “the offenses [that] should be punishable under the statute against lotteries.”<sup>76</sup> As to the validity of chapter 570 of the laws of 1895, the court established that paying for the privilege of entering a contest that uses one’s competitive edge to win a pre-set prize is different than making a gambling wager “within the spirit and intent” of Article I, section 9.<sup>77</sup> Therefore, in this case, the court upheld the law and determined that the legislature properly excluded such racing activities from the scope of gambling.<sup>78</sup>

#### IV. THE NEW FACES OF MODERN GAMBLING

##### *A. Sportsbetting*

“Sportsbetting” is the activity of wagering something of value on the outcome of a specific sporting event.<sup>79</sup> It is federally regulated by the Professional and Amateur Sports Protection Act (“PASPA”).<sup>80</sup> Passed in 1992, PASPA states:

It shall be unlawful for—

- (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of

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<sup>72</sup> See *id.* at 296, 297.

<sup>73</sup> See *id.* at 297.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 296.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* at 297.

<sup>78</sup> See *id.*

<sup>79</sup> GAMBLING INFO. RES. OFFICE, VICTORIAN RESPONSIBLE GAMBLING FOUND., INFORMATION SHEET: WHAT IS SPORTS BETTING? 1 (2013), [https://www.responsiblegambling.vic.gov.au/\\_\\_data/assets/pdf\\_file/0005/3938/What-is-Sports-Betting.pdf](https://www.responsiblegambling.vic.gov.au/__data/assets/pdf_file/0005/3938/What-is-Sports-Betting.pdf).

<sup>80</sup> See Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2012).

geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>81</sup>

PASPA also excluded or partially excluded four states from the prohibition on sportsbetting: Nevada, Oregon, Delaware, and Montana.<sup>82</sup>

New Jersey has repeatedly tried to introduce sportsbetting. Effective January 17, 2012, New Jersey Governor Chris Christie signed a state law, known as the Sports Wagering Act, that legalized sportsbetting at both Atlantic City casinos and the state's horseracing tracks.<sup>83</sup> Under the law, the bets had to be placed in person and bettors were free to gamble on any games not involving New Jersey college teams or college games played within the state.<sup>84</sup> The basis for this legal move was rooted in economics.<sup>85</sup> It was estimated that sports books could bring in \$1.3 billion in annual revenue to New Jersey, amounting to \$120 million in annual taxes at a proposed rate of 9.25%.<sup>86</sup> At a time when states were facing significant financial hardship, it seemed that this new source of revenue was welcomed and much needed.<sup>87</sup>

However, not everyone was a proponent of this law. Almost

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<sup>81</sup> *Id.* § 3702.

<sup>82</sup> See Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 288–89 (2011).

Nevada is the only state that offers the full-range of legal sports wagering for all of the major professional and collegiate sports. The Nevada Gaming Commission and the State Gaming Control Board regulate sports gambling within the state. . . . From 1989 . . . Oregon operated a sportsbetting lottery called "Sports Action" which allowed Oregonians to make parlay bets on NFL games. [This was later repealed in 2007 so the state could attract college basketball tournaments to the state.] . . . In 1976, Delaware operated a sportsbetting scheme that allowed bettors to place parlay bets on NFL games. The lottery was discontinued after the 1976 NFL season because it was not an economically viable program for the State to maintain. . . . Montana voters have chosen to allow state-licensed sports pools, fantasy sports leagues, and sports tab games. The referendum limits sports gambling to only those types of schemes, and thus does not allow a Montana bettor to place a bet on a single game or bundle of games.

*Id.*

<sup>83</sup> See N.J. STAT. ANN. § 5:12A-2 (West 2012) (repealed 2014); Donald Wittkowski, *New Jersey Governor Signs Law to Legalize Sports Betting*, BREAKING NEWS (Jan. 17, 2012), [http://www.pressofatlanticcity.com/news/breaking/new-jersey-governor-signs-law-to-legalize-sports-betting/article\\_38365360-4146-11e1-84c9-0019bb2963f4.html](http://www.pressofatlanticcity.com/news/breaking/new-jersey-governor-signs-law-to-legalize-sports-betting/article_38365360-4146-11e1-84c9-0019bb2963f4.html).

<sup>84</sup> See Wittkowski, *supra* note 83.

<sup>85</sup> See Kyle Smith, *Legalize Sports Betting, and Let Gov. Chris Christie Spike the Football*, FORBES (Aug. 23, 2012), <http://www.forbes.com/sites/kylesmith/2012/08/23/legalize-sports-betting-and-let-gov-chris-christie-spike-the-football/>.

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*

immediately, five sports leagues filed suit to stop this law from coming into effect.<sup>88</sup> The five leagues were the: National Collegiate Athletic Association (“NCAA”); Major League Baseball (“MLB”); National Football League (“NFL”); National Basketball Association (“NBA”); and National Hockey League (“NHL”).<sup>89</sup> They argued that legalizing sports gambling would corrupt the industry.<sup>90</sup> As their main legal support, the leagues cited PAPSA.<sup>91</sup> In turn, New Jersey challenged the validity of PASPA.<sup>92</sup>

The two strongest bases to challenge the constitutionality of PASPA are the Commerce Clause and the Tenth Amendment. The U.S. Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>93</sup> In *Ward v. Maryland*,<sup>94</sup> U.S. Supreme Court Justice Clifford noted that the Constitution:

[F]orbids discrimination in State taxation . . . [because] the want of uniformity in commercial regulations[] was one of the grievances of the citizens under the Confederation[] and the new Constitution was adopted, among other things, to remedy [that] defect[] in the prior system [and] . . . Congress . . . is forbidden to make any discrimination in enacting commercial or revenue regulations.<sup>95</sup>

The Tenth Amendment succinctly states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>96</sup> The main argument for relegating sportsbetting to state control is as follows:

[S]tates view sportsbetting with differing degrees of acceptance—from completely embracing all forms of sportsbetting, to limiting the practice to lotteries, to outright

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<sup>88</sup> See Wayne Perry, *Leagues Say N.J Sports Betting Law is Hypocritical*, NBC N.Y. (Oct. 2, 2012), <https://www.nbcnewyork.com/news/local/Leagues-Say-New-Jersey-Sports-Betting-Law-is-Hypocritical--172328451.html>.

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

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> See Alex Zietlow, *Supreme Court Says It Will Hear New Jersey Challenge to Sports Gambling Ban*, WASH. TIMES (June 27, 2017), <http://www.washingtontimes.com/news/2017/jun/27/scotus-hear-nj-challenge-sports-gambling-ban/>; see also Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2012) (providing the statute that New Jersey is challenging).

<sup>93</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>94</sup> *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

<sup>95</sup> *Id.* at 431.

<sup>96</sup> U.S. CONST. amend. X.

rejection of sportsbetting and gambling in all forms. Why not, then, preserve to states the autonomy to regulate and control the extent and nature of gambling within their borders? Just as the proponents of the Wilson Act explained 120 years ago with regard to the internal state policies for regulating intoxicating liquor, each state should be permitted today to be “free to determine for itself what its policy shall be” with regard to the internal regulations of sportsbetting. This is an area in which the federal government should not interfere.<sup>97</sup>

In 2013, the U.S. District Court found that the Sports Wagering Act reflected the state’s “intention to sponsor, operate, advertise, promote, license[,] and/or authorize sports gambling.”<sup>98</sup> The U.S. Court of Appeals for the Third Circuit affirmed in the same year, stating that the law “authorizes [private parties] to engage in conduct that the federal [PASPA] forbids . . . and accordingly conflicts with PASPA and is preempted.”<sup>99</sup>

Governor Christie was not dissuaded by this decision, however, and signed a new sportsbetting law in 2014 that resembled the 2012 Sports Wagering Act but removed any regulatory scheme for sportsbetting.<sup>100</sup> The courts were, once again, unconvinced that New Jersey could skirt PASPA.<sup>101</sup> However, New Jersey scored a minor win on January 17, 2017, when the U.S. Supreme Court invited the acting Solicitor General to file a brief regarding the case.<sup>102</sup> Sportsbetting players are now hopeful that this gambling activity may finally have its day in front of the country’s high Court.<sup>103</sup>

New Jersey’s sportsbetting drive is important for New York to monitor because New York’s 2013 constitutional referendum

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<sup>97</sup> Thomas L. Skinner III, *The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PAFSA*, 2 UNLV GAMING L.J. 311, 338 (2011).

<sup>98</sup> NCAA v. Christie, 926 F. Supp. 2d 551, 556 (D.N.J. 2013).

<sup>99</sup> NCAA v. Governor of N.J., 730 F.3d 208, 236 (3d Cir. 2013) (citation omitted).

<sup>100</sup> See N.J. STAT. ANN. § 5:12A-8 (West 2012) (repealed 2014); Brent Johnson, *Christie Signs Law Allowing Sports Betting in N.J.*, NJ.COM (Oct. 17, 2014), [http://www.nj.com/politics/index.ssf/2014/10/chris\\_christie\\_signs\\_law\\_allowing\\_for\\_sports\\_betting\\_in\\_nj.html](http://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html).

<sup>101</sup> NCAA v. Governor of N.J., 832 F.3d 389, 397 (3d Cir. 2016) (“While artfully couched in terms of a repealer, the 2014 law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.”).

<sup>102</sup> See Joyce Hanson, *Justices Want Solicitor General’s Take on NJ Sports Betting*, LAW360 (Jan. 17, 2017), <https://www.law360.com/articles/881340/justices-want-solicitor-general-s-take-on-nj-sports-betting>.

<sup>103</sup> See *id.*

authorizing commercial gaming in up to seven casinos contained a special provision for sportsbetting.<sup>104</sup> Specifically, section 1367 authorizes sports wagering provided that “there has been a change in federal law authorizing such [activity] or upon a ruling of a court of competent jurisdiction that such activity is lawful.”<sup>105</sup> Indeed, the Chairperson of the New York State Assembly’s Racing and Wagering Committee plans on introducing a bill legalizing sportsbetting because of his belief that it is already constitutional, and another senator has sponsored legislation calling for a constitutional amendment for sportsbetting.<sup>106</sup>

### *B. Online Casino Games*

Many attribute the federal regulation of online gambling to the Unlawful Internet Gambling Enforcement Act, passed in 2006.<sup>107</sup> This law did not outright prohibit online wagering but it did make the act of processing wagers involving real money illegal in the United States.<sup>108</sup> On April 15, 2011, “the U.S. Department of Justice unsealed a 52-page indictment against top executives of PokerStars, Full Tilt Poker, and Absolute Poker, [and filed] a civil complaint against those companies.”<sup>109</sup> All of the player accounts registered to those companies were frozen and that day became known as “Black Friday” in the poker world.<sup>110</sup>

Today, a few states, such as New Jersey, Nevada, and Delaware, offer intra-state online gambling or online poker.<sup>111</sup> In enacting the Internal Gambling Law, New Jersey’s legislature found that:

Pursuant to the 1976 amendment to the New Jersey State Constitution and the express authorization to the legislature to determine the type of gambling games that may be conducted in casinos under regulation and control by the

<sup>104</sup> N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1367 (McKinney 2017).

<sup>105</sup> *Id.*

<sup>106</sup> See Rick Archer, *NY, SC Lawmakers Lob Measures to Legalize Sports Betting*, LAW360 (Jan. 11, 2017), <https://www.law360.com/articles/879772/ny-sc-lawmakers-lob-measures-to-legalize-sports-betting>; Zachary Zaggar, *NY Looking to Test Sports Betting Ban, Wagering Chair Says*, LAW360 (Jan. 17, 2017), <https://www.law360.com/articles/880814/ny-looking-to-test-sports-betting-ban-wagering-chair-says>.

<sup>107</sup> Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367 (2012).

<sup>108</sup> See *id.* § 5363.

<sup>109</sup> Martin Harris, *Black Friday: Reliving Poker’s Darkest Day Five Years Later*, POKERNEWS (Apr. 12, 2016), <https://www.pokernews.com/news/2016/04/black-friday-five-years-later-24506.htm>.

<sup>110</sup> See *id.*

<sup>111</sup> See DEL. CODE ANN. tit. 29, § 4801 (2017); N.J. STAT. ANN. § 5:12-95.22 (West 2017); NEV. REV. STAT. § 463.745 (2017).

State, the legislature hereby declares that in furtherance of the goals of the Casino Control Act and in recognition that the technologies necessary to support Internet gaming can be prescribed and implemented in a manner that ensures all such gambling activity occurs within casinos located in Atlantic City or in other facilities in Atlantic City owned or leased by a casino licensee and thereby considered to be part of a casino hotel facility that are secure, inaccessible to the public, and specifically designed to house Internet gaming equipment, and where that equipment will be under the complete control of a casino licensee or its Internet gaming affiliate, it is appropriate that the Casino Control Act be amended and supplemented to authorize licensed casino operators to conduct such games within the casino premises with all wagering to be conducted solely within the casinos.<sup>112</sup>

The logic is to use authorized, physical brick-and-mortar casinos as hosts for online poker companies, so that the states are not impermissibly expanding gambling. Nevada and Delaware have further bolstered the success of these online gambling operations by entering into a multi-state pact.<sup>113</sup>

New York State constantly flirts with the prospect of online poker.<sup>114</sup> With the opening of three authorized commercial gaming casinos and another in the pipeline,<sup>115</sup> New York has an opportunity to copy this land-based casino model and offer online gambling. New York State has a population of twenty million, more than New Jersey or Delaware,<sup>116</sup> so should New York enter into a multi-state

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<sup>112</sup> N.J. STAT. ANN. § 5:12-95.17(l).

<sup>113</sup> See Christopher Palmeri, *Nevada Joins with Delaware for Multistate Online Poker Pact*, BLOOMBERG (Feb. 25, 2014), <https://www.bloomberg.com/news/articles/2014-02-25/nevada-joins-with-delaware-for-multistate-online-poker-pact-1->. Statutes in both states permit such cooperation; specifically, the Nevada statute states:

1. Upon recommendation of the Commission, the Governor, on behalf of the State of Nevada, is authorized to: (a) Enter into agreements, in accordance with the requirements of this section, with other governments whereby persons who are physically located in a signatory jurisdiction may participate in interactive gaming conducted by one or more operators licensed by one or more of the signatory governments; and (b) Take all necessary actions to ensure that any agreement entered into pursuant to this section becomes effective.

NEV. REV. STAT. § 463.747(1). Like the law in Nevada, the Delaware statute also grants broad authority to the Governor. See DEL. CODE ANN. tit. 29, § 4801.

<sup>114</sup> See Ivan Potocki, *Bill to Regulate Online Poker in New York: The Game of Skill*, BEAT FISH (Feb. 17, 2017), <https://www.beatthefish.com/bill-to-regulate-online-poker-in-new-york/>.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*; see generally *QuickFacts: Delaware*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/10> (last visited Mar. 26, 2017) (providing more information

online poker pact, it would make online poker more attractive to the players in smaller states because the increase in pooled prize money would mean more action and higher payouts in tournaments.

### *C. Bitcoin Gambling*

Once relegated to the fringes of the Internet, Bitcoin has risen to prominence in recent years, becoming a well-recognized and widely used virtual currency.<sup>117</sup> Bitcoin differentiates itself from other forms of online payment, such as PayPal, by being completely unregulated by any governing entity,<sup>118</sup> and deriving its worth “solely by public perception, trust, and adoption.”<sup>119</sup> A transaction conducted via Bitcoin is done directly between the transacting parties, outside the purview of the traditional third-party gatekeepers of financial activities (e.g., banks).<sup>120</sup> In addition, Bitcoin transactions can be made “without personal information tied to the transaction,”<sup>121</sup> offering users unprecedented privacy.<sup>122</sup>

The existence of Bitcoin alone is not a simple gateway to legal online gambling for residents of New York.<sup>123</sup> After all, Article I, section 9, pays no heed to the form of currency used in a gambling transaction.<sup>124</sup> While Bitcoin gambling is not specifically prohibited, reasonable interpretation of the law suggests that the prohibitions of Article I, section 9, would extend beyond transactions conducted solely with traditional currencies.<sup>125</sup> However, Bitcoin does add a crucial piece of the puzzle for those seeking to find a way to disregard New York’s ban on gambling: pseudonymous and

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regarding the populations of New Jersey and Delaware); *QuickFacts: New Jersey*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/34> (last visited Mar. 26, 2017) (providing the same).

<sup>117</sup> See Elena Eyber, *The Rise and Regulation of Virtual Currency*, WOLTERS KLUWER (Jan. 23, 2017), <http://news.cchgroup.com/2017/01/23/rise-regulation-virtual-currency/>.

<sup>118</sup> See *Frequently Asked Questions*, BITCOIN, <https://bitcoin.org/en/faq> (last visited Mar. 26, 2017).

<sup>119</sup> Matthew Kien-Meng Ly, Note, *Coining Bitcoin’s “Legal-Bits”: Examining the Regulatory Framework for Bitcoin and Virtual Currencies*, 27 HARV. J.L. & TECH. 587, 590 (2014).

<sup>120</sup> See *Frequently Asked Questions*, *supra* note 118.

<sup>121</sup> *Id.*

<sup>122</sup> See generally Anton Badev & Matthew Chen, *Bitcoin: Technical Background and Data Analysis* 1–2 (Fin. & Econ. Discussion Series, Fed. Reserve Bd., Working Paper No. 104, 2014) (providing a more detailed technical explanation of Bitcoin).

<sup>123</sup> See Hartley Henderson, *Bitcoin Purchases Still Difficult for New York Residents*, OFF SHORE GAMING ASS’N (Dec. 20, 2016), [http://www.osga.com/online\\_gaming\\_articles.php?Bitcoin-purchases-still-difficult-for-New-York-residents-18300#.WNHnxTsrI2x](http://www.osga.com/online_gaming_articles.php?Bitcoin-purchases-still-difficult-for-New-York-residents-18300#.WNHnxTsrI2x).

<sup>124</sup> See N.Y. CONST. art. I, § 9.

<sup>125</sup> See *id.*

virtually untraceable payment.<sup>126</sup>

Many existing online gambling sites refuse to do business with users who have an IP address originating in New York.<sup>127</sup> However, region-based restrictions are easily circumvented by the use of a Virtual Private Network (“VPN”).<sup>128</sup> Once a user activates the protection of a VPN, he or she can mask location identifiers, such as IP addresses, thus gaining access to an otherwise prohibited site.<sup>129</sup>

In addition, much of the federal legislation that seeks to target online gambling is notoriously “toothless,” relying on a hodge-podge of outdated laws that pre-date the widespread adoption and use of the Internet.<sup>130</sup> For these reasons, the current best way to enforce the prohibition on gambling is not by restricting access to gambling sites, but by monitoring transactions with payment processors (e.g., banks and credit cards) that suggest interaction with gambling providers. With Bitcoin, the need for transactions with payment processors is eliminated, and users can deposit and withdraw money from gambling sites without fear of alerting authorities.<sup>131</sup>

The potential for circumvention of gambling prohibitions has not gone unnoticed by Bitcoin-based entrepreneurs, and Bitcoin casinos are now multitudinous.<sup>132</sup> Beyond Bitcoin-exclusive casinos, long-established online casinos are taking note of the currency and are adding Bitcoin to their roster of payment options.<sup>133</sup> Studies estimate that gambling accounts for between fifty to sixty percent of all Bitcoin usage.<sup>134</sup>

Not only does the nature of Bitcoin render enforcement of prohibitions nearly impossible, the widespread adoption of the currency in the gambling market suggests that the general

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<sup>126</sup> See Simone Pathe, *Gamblers Wager Billions on Unregulated Bitcoin Betting Sites*, PBS NEWSHOUR (Mar. 2, 2014), <http://www.pbs.org/newshour/updates/bitcoin-gambling-sites-fly-regulatory-radar/>.

<sup>127</sup> See, e.g., Patrick Howell O'Neill, *How New Jersey Keeps Online Gamblers from Crossing Digital State Lines*, DAILY DOT (Nov. 26, 2013), <https://www.dailydot.com/business/new-jersey-online-gambling-fence-new-york-manhattan/>.

<sup>128</sup> See Max Eddy, *How to Hide Your IP Address*, PCMAG (Apr. 13, 2016), <http://www.pcmag.com/article/343394/how-to-hide-your-ip-address>.

<sup>129</sup> See *id.*

<sup>130</sup> See Pathe, *supra* note 126.

<sup>131</sup> See *id.*

<sup>132</sup> See Patrick Howell O'Neill, *Inside the Bustling, Dicey World of Bitcoin Gambling*, DAILY DOT (Mar. 8, 2014), <https://www.dailydot.com/business/bitcoin-gambling-just-dice-video-casino/>.

<sup>133</sup> Cinerama, *Why Online Casinos should Consider Adding Bitcoin Payment Option*, BITCOIN ISLE (July 28, 2016), <http://www.bitcoinisle.com/2016/07/28/why-online-casinos-should-consider-adding-bitcoin-payment-option/>.

<sup>134</sup> Pathe, *supra* note 126.

constituency is no longer desirous of a wholesale prohibition on gambling.<sup>135</sup>

#### *D. Counter Strike Gambling and eSports Wagering*

Produced by the undisputed kings of PC gaming, Valve Corporation's Counter Strike: Global Offensive ("CS:Go") is one of the most widely-played PC games in the world.<sup>136</sup> Released in 2012, CS:Go players assume the role of either a terrorist or counter-terrorist, and work with teammates to either eliminate the other team or accomplish a pre-defined goal, such as rescuing a hostage or detonating a bomb at a prescribed location.<sup>137</sup> The game has hundreds of thousands of players, millions of viewers, and is one of the most popular eSports in the world, with professional organizations fielding teams that compete in international tournaments for millions of dollars.<sup>138</sup>

However, the popularity of CS:Go is not based solely on the quality of the game itself. In an August 2013 update to the game, developers added the ability for players to acquire solely cosmetic upgrades to their weapons and characters, known collectively as "skins."<sup>139</sup> These skins were awarded randomly at the end of matches as well as given out to viewers of large CS:Go tournaments, with different skins having varying levels of rarity.<sup>140</sup> In addition, developers implemented the ability to purchase a random skin from the in-game store for \$2.49.<sup>141</sup> Skins were also transferable between players.<sup>142</sup>

The implementation of skins paved the way for CS:Go to develop its own black market economy.<sup>143</sup> The rarest skins sold for

<sup>135</sup> See *id.*

<sup>136</sup> As of January 2017, CS:Go was the second most popular game on the largest PC gaming service, Steam, after Dota 2. See *An Ongoing Analysis of Steam's Concurrent Players*, STEAM CHARTS, <http://steamcharts.com/> (last visited Jan. 26, 2017).

<sup>137</sup> See *History of CSGO*, CSGO EVOLUTION, <http://csgo-evolution.weebly.com/history-of-csgo.html> (last visited Aug. 19, 2017).

<sup>138</sup> See Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), [http://www.espn.com/espn/feature/story/\\_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler](http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler).

<sup>139</sup> See T.J. Hafer, *CS:GO Arms Deal Update Adds More Than 100 Weapon Skins, Supports eSports*, PC GAMER (Aug. 14, 2013), <http://www.pcgamer.com/cs-go-arms-deal-update-adds-more-than-100-weapon-skins-supports-esports/>.

<sup>140</sup> See *id.*

<sup>141</sup> See Assael, *supra* note 138.

<sup>142</sup> See *id.*

<sup>143</sup> See Joshua Brustein & Eben Novy-Williams, *Virtual Weapons are Turning Teen Gamers into Serious Gamblers: The Boom in Pro Video Gaming is Fueled by \$2.3 Billion in Online Bets*, BLOOMBERG BUSINESSWEEK (Apr. 20, 2016), <https://www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling/>.

thousands of dollars, and with the skins having gained a clearly ascertainable market value, third-party websites began offering the ability to place bets via skin.<sup>144</sup> While some sites took bets based on the outcome of professional CS:Go matches, others offered more traditional casino foils such as slot machines and coin flips.<sup>145</sup> Winners could easily convert their skins into currency, or even Bitcoins.<sup>146</sup>

The unregulated nature of the CS:Go skin gambling scene led to a host of issues and controversies within the community. Valve Corporation was the target of multiple lawsuits alleging that it knowingly and deliberately allowed the creation of a black market gambling economy.<sup>147</sup> It also came to light that individuals publicizing certain CS:Go gambling websites via their YouTube channels were secret investors in those sites—seemingly in violation of the Federal Trade Commission’s guidelines on disclosure in online advertising.<sup>148</sup>

Finally, after much controversy, on October 5, 2016, the Washington State Gambling Commission “directed Valve . . . to stop facilitating the use of ‘skins’ for gambling activities.”<sup>149</sup> The Commission further stated:

In Washington, and everywhere else in the United States, skins betting on eSports remains a large, unregulated black market for gambling. And that carries great risk for the players who remain wholly unprotected in an unregulated environment. We are also required to pay attention to and investigate the risk of underage gambling[,] which is especially heightened in the eSports world. It is our sincere hope that Valve will not only comply but also take proactive steps to work with the Commission on future measures that

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<sup>144</sup> See Assael, *supra* note 138.

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., Brustein & Novy-Williams, *supra* note 143; Maddy Myers, *Inside the Unregulated and Scam-Filled World of Video Game Betting*, KOTAKU (Mar. 16, 2017), <https://compete.kotaku.com/inside-the-unregulated-and-scam-filled-world-of-video-g-1793306> 259.

<sup>147</sup> See Brian Crecente, *Lawyer: Valve’s Silence While Helping Gambling Sites is “Unconscionable,”* POLYGON (July 6, 2016), <http://www.polygon.com/2016/7/6/12109022/valve-csgo-lawsuit-interview>.

<sup>148</sup> See FED. TRADE COMM’N, *THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING* 11 (2015), [https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs\\_0.pdf](https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf); Allegra Frank, *Counter-Strike YouTubers Revealed as Owners of Gambling Site they Promoted (Update)*, POLYGON (July 4, 2016), <http://www.polygon.com/2016/7/4/12093546/csgo-lotto-tmartn-syndicate-youtube-disclosure>.

<sup>149</sup> Press Release, State of Wash. Gambling Comm’n, Valve Corporation Told to Stop Facilitating Gambling (Oct. 5, 2016), <http://www.esportsbettingreport.com/wp-content/uploads/2016/10/10-2016-Valve-Press-Release.pdf>.

will benefit the public and protect consumers.<sup>150</sup>

While Valve has sent cease and desist letters to many operators of skin gambling sites, it refuses to change the Application Program Interface (“API”) of CS:Go, citing concerns that doing so would negatively impact the legitimate services that Valve offers.<sup>151</sup> As such, third parties continue to offer skin gambling even in the wake of the Washington State Gambling Commission’s proclamation.<sup>152</sup>

The CS:Go skin gambling explosion is not unique in the video gaming world. Many games now offer cosmetic skins that serve as hotly traded commodities.<sup>153</sup> CS:Go’s economy just happened to offer one of the most efficient interfaces for enabling gambling.<sup>154</sup> As digital economies based around video games become more commonplace, it is unquestionable that individuals looking to make a quick dollar will look to offer the gambling services of which users are unquestionably desirous.<sup>155</sup> However, the lack of regulation around this form of gambling<sup>156</sup> will consistently lead to the same problems present in the CS:Go community.

Existing prohibitions on gambling did little to stop United States citizens from participating in the CS:Go skin gambling scene.<sup>157</sup> New York needs to move forward with a new regime, designed to monitor services such as these to ensure that they are operating in a manner that does not expose residents of the state to unscrupulous individuals. Further, with wider access to legitimate gambling avenues, economies of desperation, such as the CS:Go scene, may struggle to find a foothold in the future. If there is a carefully regulated and safe alternative method to place wagers, users are unlikely to be drawn in to these black market

<sup>150</sup> *Id.*

<sup>151</sup> Assael, *supra* note 138.

<sup>152</sup> See Press Release, *supra* note 149; Assael, *supra* note 138.

<sup>153</sup> See, e.g., Charlie Hall, *Meet the Gambling Kingpin Funding Eve Online’s Biggest War*, POLYGON (Apr. 20, 2016), <http://www.polygon.com/2016/4/20/11467726/meet-the-gambling-kingpin-funding-eve-onlines-biggest-war>; Luke Plunkett, *Valve Cracking Down on Team Fortress 2 Gambling*, KOTAKU (Jan. 29, 2017), <http://kotaku.com/valve-cracking-down-on-team-fortress-2-gambling-1791756442>.

<sup>154</sup> See, e.g., Evan Lahti, *CS:GO’s Controversial Skin Gambling, Explained*, PC GAMER (July 6, 2016), <http://www.pcgamer.com/csgo-skin-gambling/>.

<sup>155</sup> See, e.g., Arjun Kharpal, *YouTube Star Fined \$114,000 for Running FIFA Video Game Gambling Site Used by Kids as Young as 12*, CNBC TECH (Feb. 8, 2017), <http://www.cnbc.com/2017/02/08/fifa-gambling-site-used-by-kids-youtube-star-fined.html>.

<sup>156</sup> See Kamali Melbourne & Matthew Campbell, *Professional Video Gaming May Have an Underage Gambling Problem*, BLOOMBERG (Sept. 7, 2015), <https://www.bloomberg.com/news/articles/2015-09-07/professional-video-gaming-has-an-underage-gambling-problem>.

<sup>157</sup> See Brustein & Novy-Williams, *supra* note 143.

economies.<sup>158</sup>

## V. CONCLUSION: A NEW PATH FOR NEW YORK'S GAMBLING LAWS

New York continuing the patchwork prohibition on gambling created in Article I, section 9, makes little sense, given the current realities of the gambling world. The state Constitution now specifically allows horse racing, charitable gaming, lotteries, and commercial casino gaming, and the state has long agreed to allow Native American casinos.<sup>159</sup> Few forms of gambling can truly be said to be wholesale banned, and the hypocrisy of allowing some forms of gambling while prohibiting others is clear. In addition, the distinguishing lines between games of skill and games of chance grow increasingly blurry, as fantasy sports bear many of the hallmarks of traditional sportsbetting.<sup>160</sup> And changes continue in the modern world of gambling that suggest changing attitudes toward, and increasing difficulties in the enforcement of, gambling prohibitions.

New York needs to amend its Constitution to eliminate Article I, section 9. A robust gaming regulation system should take its place, ensuring that New Yorkers have access to safe and well-supervised wagering of all kinds. Distinguishing between forms of gambling and legalizing select forms only leads to risks for New Yorkers, who will go outside the safety of well-regulated entities to wager how they please. The possibility of successful wholesale legalization of gambling is patently visible in the state of Nevada. Since 1931, Nevada has successfully regulated its gambling industry.<sup>161</sup> New York State's Gaming Commission is already well established and imminently capable of similarly supervising unrestricted gambling in New York. The gambling genie is out of the bottle, and it is time for lawmakers to stop attempting to shove it back into the lamp of Article I, section 9.

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<sup>158</sup> See DAVID FORREST & RICK PARRY, THE KEY TO SPORTS INTEGRITY IN THE UNITED STATES: LEGALIZED, REGULATED SPORTS BETTING 12 (2016), <https://www.american-gaming.org/sites/default/files/FINAL%20SPORTS%20INTEGRITY%20REPORT.pdf>.

<sup>159</sup> See N.Y. CONST. art I, § 9; Indian Gaming Regulatory Act, 25 U.S.C. § 2702 (2012).

<sup>160</sup> See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 130 (2016).

<sup>161</sup> See 1931 Nev. Stat. 165, § 1.