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The Sports Betting Advertising Boom: Possible Regulations to Avoid the Bust

BY DAVID ZACK / ON NOVEMBER 14, 2023



Photo by Adam Cai on Unsplash

Whether you watch sports or not, you've likely experienced a bombardment of sports gambling advertisements. Since the federal ban on sports betting was lifted, there has been a marketing blitz by the gambling industry in an attempt to capture new consumers in their emerging and rapidly growing industry. It has been estimated that the total ad spend for sports wagering in the United States will reach \$2 billion in 2023, which is an 8% increase from the previous year.¹

While states have been quick to establish legalized betting in their jurisdictions for many reasons, most notably tax revenue, there has been a growing concern about the negative externalities associated with the industry. In particular, the influence of legal sports betting on problem gamblers, those with addictive tendencies, and minors. Advocates have been looking for creative solutions to curb the side effects created by the newly legalized vice, with many

focusing on regulating advertisements. Much of their inspiration has come from how the United States regulates tobacco advertisements, as well as examples from abroad.

How We Got Here

In 1992, Congress passed the Professional Sports and Advertising Amateur Sports Protection Act (PASPA), which, with a few exceptions, banned gambling on professional and amateur sports in the United States.² The purpose of the act was to stop the: 1) changing of sporting events from wholesome entertainment to devices for gambling, 2) undermining of public confidence in the character of sports, and 3) promotion of gambling among young people.³ The bill was supported by the NBA, NFL, MLB, as well as various others leagues and organizations.⁴

The intention of the act was clear: to effectively stop Americans from wagering on sports. In practice though, it created a huge black market for illegal betting. In 2015, \$148-\$500 billion dollars in wagers were placed illegally.⁵

In 2018, PASPA was declared unconstitutional by the Supreme Court in *Murphy v. National Collegiate Athletic Assn.* The Court held that PASPA breached the anticommandeering doctrine by instructing state legislatures not to enact laws allowing sports gambling, representing a clear encroachment on states' sovereignty.⁶

Since the *Murphy* decision, the sports gambling market has had explosive growth. Thirty-eight states and Washington DC have legalized some form of sports betting, with more expected to follow.⁷ In 2022, sportsbook revenue reached \$7.5 billion, up 75% from 2021.⁸ That record is projected to be shattered again this year, which will likely be the trend for years to come.

The public lauded the result in *Murphy*. Just after its repeal, the American Gaming Association (AGA) polled Americans and found that 85% supported the decision⁹ and states have been quick to come up with legal schemes for betting in their jurisdictions. So, what's the problem?

The Issue

There are concerns from addiction experts that a national epidemic is coming that could rival the opioid epidemic.¹⁰ Some see similarities between now and the middle of the 20th century when society cheerily embraced smoking and drinking. "We are where cigarettes were in the 1940s and alcohol was in the 1950s," said Lia Nower, a professor and director of the Center for Gambling Studies at Rutgers University.¹¹ According to the National Problem Gambling Hotline, monthly calls rose 124 percent to over 30,000 between March 2020 and March 2023.¹²

"Gambling is a very different addiction from drugs or alcohol," said Nower. "If I'm drunk or high, at some point my family is going to figure it out. With gambling, I can be sitting with my

kids, watching cartoons, and gambling away my house, my car, everything I own, on my mobile phone. How would you know?"¹³

Experts are also concerned about what subset of the population is gambling. Rutgers study found that half of sports gamblers earn less than \$50,000 a year.¹⁴ In the UK, which legalized online betting before the United States, 60% of the industry profits come from 5% of its customers, a natural assumption being that much of their earnings are coming from addicts.¹⁵ According to the National Council on Problem Gambling, approximately 60 to 80 percent of high school students have engaged in gambling activities within the last year. Between 14 to 19 percent of these students either meet the criteria for a gambling problem or display indicators of losing control over their gambling behavior.¹⁶

There is a fear that advertising drives participation in online betting for both new users and recovering addicts. "We expect that there is a higher rate now of people who were in recovery that have been lured back or tempted back into betting again due to the massive volume of ads," said Keith Whyte, executive director of the National Council on Problem Gambling. The UK's Department of Culture, Media & Sport found that "[t]here is good evidence that [sports betting ads] can have a disproportionate impact on those who are already experiencing problems with their gambling. We also know some forms of online advertising have a strong appeal to children (under 18) and young adults (aged 18 to 24), and some aggressive marketing practices are particularly associated with harm." A survey this year found that 69 percent of 16 to 25-year olds in New Jersey saw at least four gambling ads a week from social media alone.¹⁷

While some advocates have called on states to decline the legalization of sports betting in their jurisdictions, others have looked to a middle ground that allows consenting adults to participate in gambling while to minimizing the side effects.

Possible Solutions

The United States might look abroad for solutions to curtailing gambling addiction by limiting how the industry advertises. Last year, France banned gambling companies from using anyone with "strong appeal" to young people from appearing in advertisements.¹⁸ The new rules were "part of its commitment to safeguarding young people and vulnerable audiences."¹⁹ The UK²⁰ and Canada have similar restrictions.²¹

Some have criticized promotions such as sign up-bonuses and "free" credits promotions which entice new and existing users, some who may be trying to avoid their addiction. These promotions are not permitted in other industries that pose public health risks, like the sale of alcohol or marijuana.²² In Ontario, these promotions "will be limited to offering bonuses and other inducements on its own digital properties and through direct advertising and marketing "after receiving active player consent."²³

Other countries have gone further in response to concerns that those at risk, or who already have gambling problems, can't watch sports without being triggered. Germany has banned advertising before, during, and after sporting events on broadcast TV.²⁴ Norway, which has a state monopoly system for gambling, banned unlicensed operators from advertising on broadcast media. This action seems to have been successful in Norway, which saw the number of problem gamblers in the country halved.²⁵

In the United States, there has been growing pressure to adopt regulations. Paul Tonko, a Congressman from New York, recently introduced the "Betting on our Future Act," which would "prohibit the advertising of sportsbooks on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."²⁶ "These ads pose a particularly dangerous threat to adolescents and young adults unaware of the risks involved in gambling, and to individuals prone to addiction," said Congressman Tonko.²⁷ The act was modeled after the Federal Cigarette Labeling and Advertising Act.²⁸

The Feasibility of New Regulations

It seems clear that the industry would challenge almost any regulation that restricted their ability to advertise.²⁹ On its surface, one might assume the government would be able to ban advertising in the gambling industry as they did for tobacco,³⁰ however, the Courts interpretation of commercial speech under the First Amendment has changed drastically since the 1970's.

In 1980, the Supreme Court laid out the standard for when the government can restrict commercial speech under the First Amendment. In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, the Court held that for advertisements that are protected under the First Amendment (meaning they are not misleading), the government has the burden to show, 1) a substantial government interest in the restriction, 2) the restriction directly advances state's interest; and 3) the restriction is not "more restrictive than necessary" to advance that state interest.³¹

This test is often fact intensive and depends on a variety of factors. The state would need to show that a restriction on sports betting advertisements both advances the state's interest and is not more restrictive than necessary to further such interest. Although demonstrating that a specific restriction furthers the state's interest might appear straightforward, especially when the interest is public health, that is not always the case.

In *Greater New Orleans Broadcasting Association, Inc. v. United States*, the Supreme Court held that a restriction on casino gambling advertisements on radio or television was unconstitutional. The government argued that advertising contributes to the social costs of gambling by boosting overall gambling demand, with compulsive gamblers being particularly susceptible to the influence of broadcast advertising. The Court disagreed; they found that

while the advertising may increase demand, it was also reasonable to assume that advertising primarily redirects existing gamblers from one casino to another.³² It is worth noting that this case was decided in 1999, and if it could be proven that there was a public health crisis then the calculus might change.

It is in the best interest of consumer advocates and politicians who wish to restrict sports betting advertising to meticulously craft their proposals so that it can survive judicial review on First Amendment grounds.

Conclusion

Sports betting is here, and there is no indication that it is going away anytime soon. While the impact of sports betting advertisements continues to be a matter of debate and legal scrutiny, it is evident that the industry faces challenges in balancing its growth with the potential social costs, particularly related to addiction and vulnerable populations. Finding the right balance between allowing consenting adults to engage in gambling while minimizing the adverse effects is a complex endeavor, and it remains to be seen how regulations will evolve to address this multifaceted issue.

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