

Regulating Vice: From Marijuana to Sports Gambling
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The United States has long been a country of prohibitions. No prohibition was more famous in American history than the banning of alcohol sales in 1920, which lasted until December 5, 1933 with the ratification of the 21st Amendment to the Constitution. However, the 13 years of prohibition did not eradicate alcohol sales in the United States during this period, instead it created a monopoly for organized crime, who were more than willing to fill the void left by the ban. Like the ban on alcohol, the bans on marijuana and sports betting failed to stop consumption of those activities as well. The decades-long bans fostered illegal markets valued in the 100s of billions of dollars, run almost exclusively by organized criminal syndicates. Unlike the preemptive prohibition of alcohol that was repealed, the “legal” markets for marijuana and sports gambling remain intrastate, restricted by federal laws that continue to limit interstate operations.

There are numerous similarities between sports gambling and marijuana regulation. The Supreme Court’s decision in *Murphy v. National Collegiate Athletic Association*, which declared the Professional and Amateur Sports Protection Act (PASPA) unconstitutional, thereby allowing states to legalize and regulate sports betting catapulted the regulation of sports betting into the national spotlight, alongside states seeking legalization of another vice, marijuana. There are however distinctions between the regulation of marijuana and sports betting. Chief among the differences between the rise of state-regulation of marijuana and state-sanctioned sports wagering are the fact that federal law via the Controlled Substances Act (CSA) classifies marijuana as a prohibited substance under federal law, sports betting is classified differently. Indeed, the simple act of sports betting between friends is likely not illegal at the federal level, nor was it while PASPA remained in place. But, the federal prohibitions on operating sports betting as a business in interstate commerce render these prohibitions largely a distinction without a difference, as both the CSA, and a conglomeration of federal anti-gambling statutes including the Wire Act, Travel Act, and Illegal Gambling Business Act create a de facto federal ban akin to that within the CSA.

The *Murphy* case elucidated the contours of the federal government’s power to commandeer state police powers to execute federal policy objectives. The Supreme Court’s decision made clear that the federal government could not create an illusory ban on an activity without expending its own resources to enforce the ban. The decision directly implicated the federal ban on commercial sports wagering but has significant ancillary implications for the state regulation of both medical and recreational marijuana. Since the May 2018 decision, more than 30 states have introduced legislation to legalize sports betting, with about 15 having successfully passed laws in the first 16 months since the Supreme Court’s decision. Likewise, medical marijuana is legal in 33 states and recreational marijuana is authorized in 11 states. In spite of the growing state-level legality of both marijuana and sports gambling, the exuberance for sports gambling by entities like banks and institutional investors has surpassed the marijuana industry despite the marijuana industry having a significant head start. This Article explores why sports gambling has been widely accepted and led banks and financial institutions to take risks that they have not been willing to take for the marijuana industry, despite the apparent similar treatment under federal law.

In part I of the Article, we provide an overview of the illegal markets and failed prohibitions that fueled calls for regulation of these two industries and examine their current legal markets. Part II

discusses the rise of the legal marijuana industry. Part III analyzes the impact of the *Murphy* decision on federal preemption of state law. Part IV evaluates the threats facing the marijuana industry and why the sports gambling industry has seen an embrace from investors that the marijuana industry has not. Finally, in part V we examine the best practices that have been employed in the sports betting industry and how their implementation in the marijuana industry could open doors for legitimization of the industry by institutional investors in the face of threats and calls for federal action.