

# BET ON LUCK: WHY CALIFORNIA SHOULD ELIMINATE SKILL V. CHANCE GAMBLING LAWS

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## I. INTRODUCTION

Imagine a world where David spends countless hours honing his sports betting skills but is not allowed to place bets legally. Alternatively, consider a world where David could go, without any knowledge, preparation, or strategy, to a better percentage gamble and bet his life savings legally. This is the distinction California places on its citizens with current gambling laws.<sup>1</sup> David could follow a game of chance to the most expert level and master the system but cannot legally place the bet. For example, suppose David follows his favorite athlete, LeBron James of the Lakers, and develops a strategy based on James' statistics during home games against a certain team. In that case, he might notice that James averages thirty-three points against the Warriors. If David then sees that the over-under line for James' points against the Warriors is set at twenty—a wager he has been preparing and scouting for months—he still cannot legally place that bet. The law should not favor one wager over another, and it should allow David to gamble on the games he feels most confident about.

In 2018, the U.S. Supreme Court ruled in *Murphy v. NCAA*<sup>2</sup> that the Professional and Amateur Sports Protection Act was unconstitutional.<sup>3</sup> The act was enacted in 1992 and prohibited sports gambling in every state, except for Nevada.<sup>4</sup> The reasoning at the time for this act was to prevent money

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1. See CAL. PENAL CODE §§ 330b, 337a (West 2011); see also David M. Fried, *What Determines if a Game is One of Skill or Chance*, CALGAMINGLAW (Apr. 14, 2020), <https://www.calgaminglaw.com/what-determines-if-a-game-is-one-of-skill-or-chance/>; c.f. Frank A. DiGiacomo & Joseph F. Caputi, *Esports: The Billion Dollar Industry Worth Gambling on*, 45 SETON HALL LEGIS. J. 605, 614 (2021).

2. 584 U.S. 453, 486 (2018).

3. *Id.*

4. Brian Pempus, *States Where Sports Betting Is Legal*, FORBES (Oct. 16, 2024), <https://www.forbes.com/betting/guide/states-where-sports-betting-is-legal/>.

laundering and schemes regarding betting.<sup>5</sup> The Court held in *Murphy* that the U.S. Constitution does not authorize Congress to issue direct commands to states by preventing sports wagering.<sup>6</sup> The Court reasoned that the Constitution grants Congress specific enumerated powers, while all unenumerated powers are left to the states under the Tenth Amendment.<sup>7</sup> Gambling is a legal issue governed by state powers.<sup>8</sup> This structure of separating powers is to protect liberty, prevent Congress from shifting the cost of regulation onto the states, and promote accountability by allowing voters and citizens to understand who to blame or credit for governing laws.<sup>9</sup> The statute was therefore unconstitutional as it prohibited state gambling by federal law.<sup>10</sup> After the 2018 decision, the Supreme Court ruling shifted the power to each state to regulate gambling laws.<sup>11</sup> Since then, thirty-eight states, including the District of Columbia, have legalized sports gambling.<sup>12</sup>

In the years since the states gained control, most have legalized sports gambling, and there have been major benefits to the economy as a whole.<sup>13</sup> There have been millions of dollars in state and local revenue from taxes on legalized bets.<sup>14</sup> The money generated from gambling taxes goes to improve the public in areas like “education, health care, infrastructure, and more.”<sup>15</sup> Further, the shift to legal sports gambling has increased legal wagers, providing a more regulated route for the same actions that were previously

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5. *Id.*

6. *Murphy*, 584 U.S. at 480.

7. *Id.* at 471.

8. See Nelson Rose, *The Future Legal Landscape for Internet Gambling*, 4 GAMBLING L. REV. 399, 409 (2000).

9. *Murphy*, 584 U.S. at 474.

10. *Id.* at 486.

11. See Pempus, *supra* note 4; Cole Eisenshtadt, *Betting on Oversight: Repurposing Regulations for Cigarette and Tobacco Advertising to Address Sports Gambling, America’s Fastest Growing Vice Industry*, 74 ADMIN. L. REV. 387, 398 (2022).

12. Eisenshtadt, *supra* note 11, at 398; Robert Strezo, *A New Debt Epidemic: The Risky Wager Of Online Sports Betting*, CTR. FOR PUB. JUST., (Mar. 7, 2024), <https://cpjustice.org/a-new-debt-epidemic-the-risky-wager-of-online-sports-betting/>.

13. See Victoria Noam, *Moneyball 2.0: Charting a Course for Sports League Data Monetization During the Legalized U.S. Sports Betting Boom*, 12 U. L.V. GAMING L.J. 117, 119-120 (2021).

14. *Id.* at 120.

15. Guy Reschenthaler, *American Support for Legalized Sports Betting Continues To Grow*, THEHILL (June 2, 2023, 1:30 PM), <https://thehill.com/opinion/congress-blog/4032038-american-support-for-legalized-sports-betting-continues-to-grow>; see *Michigan Gaming Control Board Announces Significant Impact, Revenue Contributions to State Funds in 2024*, MICH. GAMING CONTROL BD., (Dec. 19, 2024), <https://www.michigan.gov/mgcb/news/2024/12/19/2024-impact-and-revenue-contributions-to-state> (finding that in Michigan, the Gaming Control Board “generated more than \$501.4 million for the state’s School Aid Fund” from gambling taxes).

done illegally.<sup>16</sup> Legalizing sports gambling has taken these actions “out of the shadows” and into a more regulated and monitored system.<sup>17</sup> College and professional sports leagues have put an emphasis on informing and educating bettors on the risks of placing wagers on sports.<sup>18</sup> The industry, (legalized sports books, legal operators, and sports leagues collaborate to provide) also provides a monitoring system for legal wagers and investigates any concerns.<sup>19</sup> In contrast, states like California that have not legalized gambling deprive the state of the tax benefits and deprive the gambler of a safe, well-regulated wager. This leaves gamblers to deal with bookies on online websites who seek to benefit from others’ losses, providing no warnings of risk or monitoring any wagers.<sup>20</sup>

California law prohibits bets that are based on chance, like sports wagers.<sup>21</sup> However, California allows for skill gambling. California law distinguishes between gambling games that are based on skill and games based on chance.<sup>22</sup> Skill-based games are games where the factor of skill predominates, and chance games are where the factor of chance predominates.<sup>23</sup> Further, the ability of the player and skill of play do not factor into the equation when determining whether the game is one of chance or skill.<sup>24</sup> For example, if David is a highly skilled and professional poker player, the game is still considered chance because of the cards he is dealt on a per-hand basis.

This distinction between skill and chance gambling is what limits the legalization of sports gambling across the state. As more and more people voice support for new laws and regulations, lawmakers need to determine if

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16. See John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 937 (2020).

17. Reschenthaler, *supra* note 15.

18. *Id.* The NCAA partnered with EPIC Risk Management to provide a comprehensive sports wagering gambling harm prevention program. The NCAA provides member schools with on-demand virtual training, training workshops and in-person campus educational sessions. The in-person campus sessions focus on sports wagering awareness, protecting the integrity of competitions, gambling addiction/harm and student-athlete well-being. See Corbin McGuire, *Addressing Sports Wagering*, NCAA, (May 16, 2023), <https://www.ncaa.org/news/2023/5/16/media-center-as-sports-wagering-grows-ncaa-continues-providing-education-integrity-services-and-research.aspx>.

19. Reschenthaler, *supra* note 15; McGuire, *supra* note 18.

20. Reschenthaler, *supra* note 15; McGuire, *supra* note 18.

21. CAL. PENAL CODE §§ 330b, 337a (West 2011); see also Fried, *supra* note 1.

22. See *In re Allen*, 337 P.2d 280, 281 (Cal. 1962); see also Fried, *supra* note 1.

23. See Michael Orkin, *Games of Chance and Games of Skill*, CHANCE, <https://chance.amstat.org/2021/11/games/> (last visited Mar. 21, 2025) (explaining how the odds of winning in chance games falls to only 25% in repeated play, while skill games will have a win percentage significantly higher than 25%).

24. See *Allen*, 337 P.2d at 281.

the legal definition between skill and chance gambling is logical or if it is an obstacle on the route of protecting public policy issues with a stigma against gambling.

This note will further explore California's legislative history with gambling, examine the rules and rationale for having a skill and chance law distinction, and explain why California should eliminate its current law and allow a fully legalized system of gambling state-wide.

## II. BACKGROUND

### A. History of Gambling Laws

Throughout American history, gambling has been seen as immoral and against public policy.<sup>25</sup> In *Champion v. Ames*, the Supreme Court held that Congress, acting under the Commerce Clause, could prohibit the interstate distribution of lottery tickets because such tickets constituted articles of commerce subject to federal regulation.<sup>26</sup> The dissent argued that “[t]he scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest.”<sup>27</sup> This was not a commercial issue but a moral one, which was used to limit gambling nationwide.

When lawmakers and interpreters view gambling law, there is a general emphasis on public policy issues. The laws are mainly meant to ensure morality amongst individuals and reduce splurges on games. Gambling laws tend to focus more on the “right thing to do” for members of the public.

Gambling is much more than what is depicted in commercials and movies.<sup>28</sup> It has been a layer in our history since the nation's founding, and there are countless stories of “a big win” or “fixed loss.”

For instance, in California, gambling is prohibited with certain exceptions, like “Indian gaming.”<sup>29</sup> In 1988, the United States passed the Indian Gaming Regulatory Act (IGRA),<sup>30</sup> which permits “Indian Tribes” to gamble legally in certain locations.<sup>31</sup>

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25. See Sarah H. Hinchliffe, *Defining the “Defined” – Problem Gambling, Pathological Gambling, and Gambling Disorder: Impact on Policy and Legislation*, 20 BARRY L. REV. 221, 224 (2014).

26. 188 U.S. 321, 363-64 (1903).

27. *Id.* at 372 (Fuller, C.J., dissenting).

28. *History of Gambling in California*, EASY READER & PENINSULA MAGAZINE, <https://easyreadernews.com/history-of-gambling-in-california/> (last visited Mar. 21, 2025).

29. Nicholas Kump, *Chapter 51: Approval of Tribal-State Gaming Agreement Governing California's First Off-Reservation Casino*, 45 MCGEORGE L. REV. 507, 508 (2013).

30. 25 U.S.C. §2701.

31. Kump, *supra* note 29.

Another layer into avoiding gambling prohibition is the use of international waters.<sup>32</sup> Here, in California, the first use of a casino on a ship was just three miles off the coast of Santa Monica.<sup>33</sup> It started with two ships in the early 1900s, where two to three thousand passengers were taken into international waters to gamble legally, avoiding governance and regulations of the state.<sup>34</sup> In general, California now recognizes the following as legalized gambling: Native American casinos, card clubs, and the state lottery.<sup>35</sup> California does not allow gambling on sports and casino games like traditional roulette because of the factor of chance.<sup>36</sup>

### B. *Distinguishing Between Skill and Chance Gambling*

Gambling regulations differ between games of skill and games of chance. A game of chance is considered gambling, while a game of skill is not gambling.<sup>37</sup> States use one of three tests to determine whether a game is one of chance or skill.<sup>38</sup> First, the *predominance test* asks whether chance predominates over skill for the outcome of a given game.<sup>39</sup> Second, the *material element test* asks whether chance is a “material” element in determining the outcome of a game.<sup>40</sup> Third, the *any element of chance test* asks if a game involves any percent of chance.<sup>41</sup> If the game has any chance involved, then that game would be classified as a game of chance.<sup>42</sup> California uses the predominance test to determine whether a game is considered a game of skill or chance.<sup>43</sup> In California, whether the game is one of skill or chance is dependent on the game itself, not the abilities of the participant.<sup>44</sup> Thus, a court will look at the elements of the game and see if chance predominates the outcome.<sup>45</sup>

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32. *Id.*

33. *Id.*; *The Era of the Gambling Ships & Battle of Santa Monica Bay*, L. A. ALMANAC, <https://www.laalmanac.com/history/hi06ee.php> (last visited Aug. 27, 2025).

34. *History of Gambling in California*, *supra* note 28.

35. *Id.*

36. *Id.*

37. DiGiacomo & Caputi, *supra* note 1, at 606.

38. *Id.* at 614.

39. *Id.* at 614-15.

40. *Id.* at 615.

41. *Id.*

42. *Id.*

43. Fried, *supra* note 1.

44. *Id.*

45. *Id.*

Skill games require a mental and physical capacity to bring out a desired result.<sup>46</sup> Common characteristics of these games revolve around either strategy, tactic, knowledge, or expertise about the game.<sup>47</sup> Games that give the players control of the outcome tilt in favor of skill and not chance. That is why most states use the predominance test to determine skill or chance in gambling laws.<sup>48</sup> In contrast, games of chance are strongly decided upon random chance or uncertainty.<sup>49</sup> For example, gambling on dice, playing cards, or random numbers drawn, like bingo, are all games of chance. Although games of chance also have an element of skill, and skill games also have an element of chance, the question the courts use to decide legality in California is which element predominates the game.<sup>50</sup>

### III. CALIFORNIA AND ITS CITIZENS WILL ALL BENEFIT BY ELIMINATING THE PROHIBITIONS AGAINST GAMBLING

#### A. *Legalizing Gambling Will Align with Our History*

In the early 1900s, the government would find ways to limit gambling laws based on moral and ethical issues to justify their rulings. In *Champion*, the Supreme Court used the Commerce Clause to prevent lottery tickets from being sold through different states only to dignify the wrongfulness of gambling.<sup>51</sup> As others have famously said, the law was made to suppress the evil of gambling.<sup>52</sup> Even though buying lottery tickets was legal in each state, the law intended to disallow out-of-staters from buying lottery tickets and then taking them to their state.<sup>53</sup> On its face, this law is not rational; the only objective is reducing gambling. When one could participate in such a gamble in their state, but they are not allowed to in a state nearby, the only inference here is the stigma and unethical view lawmakers have on gambling. In stark contrast, a law that would allow for robbery in the state you live in but

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46. *The Legality of Skill Gaming*, SKILLZ (July 14, 2023), <https://support.skillz.com/hc/en-us/articles/200620348-The-Legality-of-Skill-Gaming>; see also *In re Allen*, 337 P.2d 280, 281 (Cal. 1962) (“It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.”).

47. *The Legality of Skill Gaming*, *supra* note 46.

48. *Id.*

49. *Id.*

50. DiGiacomo & Caputi, *supra* note 1, at 614-15.

51. *Champion v. Ames*, 188 U.S. 321 (1903).

52. See John W. Compton, *Easing the Shoe Where it Pinches: The Lottery Case and the Demise of Duel Federalism*, 40 J. SUP. CT. HIST. 133, 143 (July 2015).

53. *Champion*, 188 U.S. at 357, 363-64.

prohibits robbery from out-of-staters to commit in nearby states and take the items robbed to their state, would not justify any means of logical lawmaking. Like gambling, if it is legal to buy lottery tickets or gamble in one state, then it should be legal to buy lottery tickets and gamble in the states one travels to for any reason. Our history only shows a deterrence and moralistic justification to illegalize gambling,<sup>54</sup> and until lawmakers change their view of gambling as an evil, then much will not change. The public has power, and it will continue to find ways to gamble. Thus, lawmakers should adopt new laws to serve the economy and nation with the benefits and allow for the views of gamblers to change, which will also improve people's thoughts on gambling.

As California's history demonstrates, gambling has been part of our culture for many decades.<sup>55</sup> Many citizens have gone to great lengths to gamble, regardless of what the law says. In California, we have seen Native Americans find a workaround to gambling laws and establish a plethora of locations for all individuals to bet legally.<sup>56</sup> Further, international waters are another escape from the laws currently in place.<sup>57</sup> From the early 1900s, many individuals would take a small trip off the coast of the Pacific for one purpose – to gamble.<sup>58</sup>

Not only do citizens gamble in our state illegally, but there is also a clear and easy workaround that many individuals take to bypass laws governing California.<sup>59</sup> For most, these methods are available year-round, but for California, it keeps a law on the books that has no teeth to sway individuals to obey. Rather than allowing individuals to bypass laws, California should incorporate and pass a new bill to legalize sports gambling to align with individuals' actions.

The benefits of legalizing gambling laws in the state will mostly benefit the state. California will receive a vast amount of money in taxes, which can then be spent on more important and critical issues like health care and education. Further, legalizing gambling statewide will benefit the individual as well because the state will provide information avenues and monitoring systems for each wager. In turn, this will take away the risks of illegal wagers online through illegal websites that can lead to fraudulent activity and other unsafe outcomes for which the individual cannot seek relief as they engaged in illegal activity.

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54. *Id.* at 356-57.

55. *See History of Gambling in California, supra* note 28.

56. *See supra* Part II.A.

57. *See supra* Part II.A.

58. *See supra* Part II.A.

59. *See supra* Part II.A.

*B. The Flawed Skill versus Chance Tests Should Be Avoided*

Although games are distinguished between games of skill and games of chance, all games have some chance to them. Each state uses one of three tests to determine if a game is of skill or chance—predominance test, element of chance as a material element test, or any chance test.<sup>60</sup> The predominance test requires that skill be equaled to greater than chance, or said differently, fifty-one percent of chance makes the wager illegal.<sup>61</sup> Another test is to determine whether chance is a material element of the game, which is not a clear standard.<sup>62</sup> The third alternative some states use is whether a game has any chance in it, the game is subject to gambling laws.<sup>63</sup>

The predominance test, used by California and a majority of other states, still allows for a significant amount of chance in a given game.<sup>64</sup> Although skill is greater, the amount of chance can still affect the outcome, making the rule flawed. Further, courts look at the game as a whole, not the individual playing these games.<sup>65</sup> If the focus was on the individual rather than the game, then the balance of chance and skill could shift in either direction.<sup>66</sup> For example, a game like poker has both elements of skill and chance, but is considered a game of chance,<sup>67</sup> due to the card element and randomness of cards drawn.<sup>68</sup> Chance predominates in this game on a single hand-by-hand basis. However, if the court viewed the game differently, skill could become predominant.<sup>69</sup> The more a player plays a certain game, like poker, the more that individual can strategize, learn, and reduce the factors of chance.<sup>70</sup> For instance, a highly skilled poker player who has knowledge about the game, a strategic and tactical approach, and expertise in the game has a higher “chance” of winning through their skill.<sup>71</sup> The skill aspect of a given player

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60. See DiGiacomo & Caputi, *supra* note 1.

61. DiGiacomo & Caputi, *supra* note 1, at 614-15; see also Elissa B. Harwood, *Better Good Than Lucky: A Legal Analysis of Poker As A Skill Game in A Changing Gambling Climate*, 101 WASH. U. L. REV. 1705, 1714 (2024).

62. Harwood, *supra* note 61, at 1716.

63. *Id.* at 1716-17.

64. See DiGiacomo & Caputi, *supra* note 1, at 614-15; see also Fried, *supra* note 1.

65. Fried, *supra* note 1.

66. Anthony N. Cabot et al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 407 (2009).

67. See, e.g., *United States v. Dicristina*, 886 F. Supp. 2d. 164, 169 (E.D.N.Y. 2012).

68. *Id.* at 231; see also *The Legality of Skill Gaming*, *supra* note 46.

69. See Cabot et al., *supra* note 66, at 407.

70. Fried, *supra* note 1.

71. See *id.*

will shift the balance of a game to one of skill and not chance through a case-by-case assessment.

Further, a game should be determined as a game of skill or a game of chance with repeated attempts of play, not on one attempt. With the efforts Californians have made to gamble throughout history,<sup>72</sup> it is unlikely a person would play only one game a single time.<sup>73</sup> Players will play a game for hours or even days on end to gain an advantage and win.<sup>74</sup> When an individual plays any game more than once, they learn skills and knowledge about the game. In doing so, that player reduces the odds of chance over an extended period of time by developing the skills necessary to win. The balance of incorporating a more complete gambling view demonstrates that the predominance test is flawed because, with time and repetition, a game will become more skill-based for any player.

The material test asks whether the element of chance is material.<sup>75</sup> In this test, chance can be lower than fifty percent and still be material.<sup>76</sup> Determining what is material is not clear in this context.<sup>77</sup> Material means “important information, generally significant enough to determine an issue.”<sup>78</sup> What is not clear for betting games is what outcome is significant enough to alter the chances of winning.<sup>79</sup> For every game, a material element will change, and like the predominance test, a material element can vary from player to player and from hand to hand.<sup>80</sup> Whether chance is a significant factor in determining an outcome also changes over time. For example, a hand of poker has a material element of chance depending on which cards are passed around the table. But a choice of how to continue the hand and play the game will depend upon the players on the table, the dealer, and time.<sup>81</sup> The more these factors change, the less “material” the card factor

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72. Wayne Parry, *What Is Gambling Addiction and How Widespread Is It in the US?*, AP NEWS (Mar. 21, 2024), <https://apnews.com/article/gambling-addiction-betting-oh-tani-dodgers-mizuhara-456460e191e0d5676bbb80ee8c9eb9f7/>.

73. *Compulsive Gambling: Symptoms & Causes*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/compulsive-gambling/symptoms-causes/syc-20355178> (last visited Mar. 26, 2025).

74. See Anthony Cobot and Robert Hannum, *Advantage Play and Commercial Casinos*, 74 MISS. L.J. 681, 690-704 (2005).

75. See Cabot et al., *supra* note 66, at 391.

76. Fried, *supra* note 1.

77. *Id.*

78. *Material*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/material#> (last reviewed Dec. 12, 2023).

79. See Cabot et al., *supra* note 66, at 407.

80. See OLE BJERG, *POKER: THE PARODY OF CAPITALISM* 40-45 (Univ. of Michigan Press 2011) (explaining how turns of Poker are played).

81. Fried, *supra* note 1.

becomes. Thus, decreasing or eliminating the material element in the game, which would then make the game legal. Given that this test is not a clear standard for distinguishing skill from chance, this test should be eliminated altogether.

Alternatively, the any chance test used only by a few states, allows for no chance in the games.<sup>82</sup> The inquiry here is whether there is “any chance” at all, that the game is subject to gambling laws.<sup>83</sup> This test creates the strictest of approaches among the states because even a small percent of chance will make the game illegal to gamble on.<sup>84</sup> Although this test provides clear and easy guidance and leaves no room for mistakes or misrepresentation in interpreting the law, it also creates a stricter policy that citizens will not abide by. As discussed, individuals throughout our history have found unique and special workarounds to gambling laws, whether strict or lenient.<sup>85</sup> If every state adopted the no-chance test, gambling would ultimately be illegal throughout the nation—meaning, we would only take a step back in releasing the stigma, barring the benefits, and impacting the safety of legal betting.

Each variation of the skill and chance tests that lawmakers use to determine what kind of games are legalized around the country has weaknesses and flaws to them in their own unique way. The best solution, at the individual level, the public level, and the country level, is to fully eliminate the distinction between skill and chance gambling laws. By so doing, lawmakers will and should fully legalize gambling in every game, forum, and state nationwide to reap the benefits of a world with no gambling restrictions.

In recent years, the massive growth in Daily Fantasy Sports resulted in debate as to whether they are games of skill or chance.<sup>86</sup> Daily Fantasy Sports apps, like DraftKings, allow users to draft a daily roster of players for their team and wager money in contests against other users nationwide.<sup>87</sup> The statistical points the athletes earn in real life are then converted to fantasy points on the app.<sup>88</sup> The team with the most points at the end of the day wins

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82. Cabot et al., *supra* note 66, at 393.

83. Fried, *supra* note 1.

84. See Cabot et al., *supra* note 66, at 393 (“[M]ost skill games will not survive scrutiny in these states.”).

85. *History of Gambling in California*, *supra* note 28.

86. Barry M. Klein, *Removing Chance from the Litigation of Daily Fantasy Sports: The Need to Broaden the Scope of What Constitutes a Game of Skill*, 55 TEX. TECH L. REV. 779, 785 (2023).

87. *How to Play Daily Fantasy Sports*, DRAFTKINGS, <https://www.draftkings.com/how-to-play> (last visited Mar. 23, 2025).

88. *Id.*

that wager.<sup>89</sup> So far, Daily Fantasy Sports wagers have been interpreted as a game of chance.<sup>90</sup> The reason this was determined to be a game of chance is because betting on a specific players' statistical line is also chance due to the nature and significant factor of luck.<sup>91</sup> For example, games like basketball have prop bets as to whether a player will score over or under a certain number based on chance, and chance predominates.<sup>92</sup> DraftKings has argued that these games are different from betting on a single sports game, because the users' demonstrate their knowledge to outperform others and use skill to reduce chance from the outcome.<sup>93</sup> Lawmakers need to determine whether the user's abilities would change the definition of these wagers to ones of skill, making them legal.<sup>94</sup>

In California, an individual engaging in online sports gambling is considered to be a wager of chance.<sup>95</sup> For example, an online gambler who does not follow sports at all would be taking a high risk on placing a bet if a certain player will score more than twenty-seven points that night. It comes off as a random probability for one to just engage in such a wager of a player's stats for that evening.<sup>96</sup> A wager like this mostly depends on luck and chance. However, in contrast, an individual who follows sports events knows all players' averages, which vary at home games versus road games, depending on what team they are facing, and other factors like players' health, schedule, recent slumps or hot streaks, all weigh in a follower's decision-making process in a bet.<sup>97</sup> This individual has immense knowledge, strong strategy skills, and tactics regarding their wagers, which leads to a

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89. *Id.*

90. See Jason M. Breslow et al., *Is it Gambling? How States View Daily Fantasy Sports*, PBS (Feb. 8, 2016), <https://www.pbs.org/wgbh/frontline/article/is-it-gambling-how-states-view-daily-fantasy-sports/>.

91. Eric Chemi, *Skill, Chance, Gambling, Legality: They're All Separate*, CNBC (Nov. 12, 2015), <https://www.cnbc.com/2015/11/12/skill-chance-gambling-legality-theyre-all-separate.html>.

92. *Id.*

93. Klein, *supra* note 86, at 789.

94. It is important to note that the legality of Daily Fantasy Sports is currently being disputed in California. California Attorney General Rob Bonta wrote an opinion declaring that DFS's are illegal. However, it is unclear if the AG will move forward with enforcement of this opinion. Sam McQuillan, *California Daily Fantasy Sports Crackdown Coming AG Says*, LEGAL SPORTS REP., (July 24, 2025), <https://www.legalsportsreport.com/238227/california-daily-fantasy-sports-crackdown-coming-ag-says/>.

95. See Fried, *supra* note 1.

96. Ellie Gellrich, *Professional Bettors, Recreational Bettors or Fan Bettors: Which One Are You?*, JT.ORG (May 31, 2023), <https://jt.org/professional-bettors-recreational-bettors-or-fan-bettors-which-one-are-you/>.

97. *Id.*

skill definition of gambling.<sup>98</sup> Yet, as the current law stands, the focus is not on the particular individual but rather the game itself.<sup>99</sup>

In order to promote a safer gambling environment, which will lead to benefits for the economy and the public as a whole, the law needs to eradicate the skill and chance distinction. As the law stands, it does not consider that people are finding alternate dangerous ways to gamble, depriving economic growth and safety. Further, the law does not consider the individuals' ability to reduce chance and use skill instead in their wager by learning and developing over time knowledge of the game at hand.<sup>100</sup> It thus signifies that these laws are in place only to continue the moral and disgraceful views of lawmakers towards gambling. As time has progressed, we should allow individuals to decide for themselves if they want to gamble on games as the harm can be reduced with the individual's skill, while the benefit is to the masses.

#### IV. CONCLUSION: IT IS TIME TO LEGALIZE GAMBLING IN CALIFORNIA

California should eliminate the distinction between skill and chance gambling. California needs to eliminate the predominance test for determining if a game is one of chance or skill because, as is, it does not allow for an individual to strategize and engage in bets that they know will result in a favored outcome for them. The test only focuses on the game itself, not the abilities of those wagering on them. Further, the law does not incorporate an individual's ability to perform better with repetition and knowledge and only looks at the game in the abstract. Focusing on an individual could affect whether or not chance will predominate in determining the outcome of the game as skill could be used to reduce luck. The law only adds to the animosity towards gambling, which has been an unwanted fabric in our society's history. Only with change and time will our society eliminate these feelings toward gamblers. A change is needed to protect the citizens of the state. This change will allow for sports gambling in the state and provide citizens with a safer and more monitored venue for betting on any games. As the law stands, many people will find workarounds, as the law is not strictly enforced, which causes risk to the individual and deprives the state of benefits for allowing gambling. If gambling is made legal, California will (1) provide resources to help gamblers with risk and (2) provide the state with a vast revenue of taxes on the legal wagers taken by citizens.

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98. Fried, *supra* note 1.

99. *Id.*

100. *Id.*