

IS POKER LEGAL OR ILLEGAL IN CALIFORNIA?

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ABSTRACT

A number of online poker sites state that poker is not illegal in California because California law no longer criminalizes the playing of poker. Some of that information is accurate, and the conclusion reached may be accurate, but not for the reasons stated. California has a complicated history with poker. Recent changes in how the state treats poker may have created the impression that playing poker is not illegal in California, but that is, at best, a qualified legal position. This article examines this question by looking at past and present approaches that California has used to control the game of poker. The article concludes that current California law does not apply to online internet poker sites when the game is hosted from a site outside California. However, playing poker in California, except for social games in private residences, is illegal unless the operator of the game is properly licensed by the California Gambling Control Commission.

I. POKER IN CALIFORNIA

Poker in American originated in Louisiana and on Mississippi river boats.¹ Poker was popular in early California, as were other forms of gambling,² getting their start in the state's mining camps during the Gold Rush and then moving to California cities that expanded as the Gold Rush subsided.³ California's embrace of gambling was, however, short-lived. By the 1860s, the state had largely outlawed commercial gambling by enacting legislation that

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¹ It is commonly believed that the American card game now known as "poker" derived from the French game "poque," which was played in New Orleans, a French possession before the Louisiana Purchase in 1803. *Poque*, Britannica.com, Britannica.com/topic/Poque (last visited Oct. 11, 2021).

² Roger Dunstan, *Gambling in California*, Part II-5 (California Research Bureau, II 1997).

³ *Id.*

barred “house-banked” games,⁴ which took the profit out of commercial gambling. Specific legislation followed that made it a crime to engage in certain gambling games.⁵

One major exception that California allowed (perhaps “tolerated” is a better word) was Cardrooms (or “Card Clubs”). Cardrooms have had a presence in California since the 1850s. Until the 1980s, the only forms of legal gambling in California were pari-mutuel wagering at racetracks and Cardrooms. That has

⁴ CHARLENE WEAR SIMMONS, *GAMBLING IN THE GOLDEN STATE 1998 FORWARD* 107 CAL. RESEARCH BUREAU (2006) (hereinafter “Simmons”). A “house-banked game” is a game where the casino (the “house”) participates in the game, taking on all customers, paying all winners, and—most importantly—collecting from all losers. House-banked games are profitable because the house has a statistical edge in the gambling games offered. For example, the house edge for roulette with two zeros on the wheel is 5.26%, which we can round to 5%. This means that for every \$100 wagered, the house will retain \$5, and for every \$1 million wagered, the house retains \$50,000. For other house-banked games, the house edge can be higher—for example, the house edge for slot machines may be as high as 20%—or lower, such as the house edge in blackjack, which is usually pegged as between 0.5 to 1%. The house edge is a statistical percentage that is true only for long periods of time based on the Law of large numbers. The law of large numbers holds that as a sample size grows, its mean gets closer to the average of the whole population. For example, the odds of a quarter being heads or tails is 50%. If you flip a quarter ten times, it is possible that the same side could show up eight, nine, or ten times, which is outside the statistical percentage. This is known as variance. The law of large numbers holds that as the number of coin flips increases over time, the number of heads and tails will become equal. In other words, variance will dissipate. If you flip a coin one million times, the number of heads and tails will be nearly equal. For the casino, this means that over time, the statistical edge built into gambling games will prevail.

⁵ CAL. PEN. CODE § 330 currently provides:

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

Section 330 is substantially in the same form now as it was when it was enacted in 1872.

changed as California authorized a state-run lottery in 1984,⁶ tribal casinos pursuant to the Indian Gaming Regulatory Act of 1988,⁷ and several minor exceptions generally reserved for charitable and religious organizations.⁸

The dominant gambling game in Cardrooms is poker, although other card games are also played.⁹ Cardrooms persisted after gambling games were generally declared unlawful in 1872 by Penal Code section 330 by exploiting a loophole in the statute. Penal Code section 330 bans a list of enumerated gambling games, which did not include poker until 1885.¹⁰ Section 330 also banned “house-banked” and percentage games. Cardrooms, however, financed their operations by charging players a fee to play in the form of a rake or a set fee.¹¹

⁶ California authorized a state-run lottery by ballot initiative. *See* Proposition 37, 1984, https://lao.ca.gov/reports/1984/proposition_37_the_california_state_lottery_initiative.pdf. The California legislature passed legislation instituting the lottery. *See* California State Lottery Act of 1984.

⁷ 25 U.S.C. § 2701 (1988).

⁸ CAL. CONST. art. 4, § 19(c) (authorizing the legislature to permit cities and counties to allow “bingo games for charitable purposes”); *id.* § 19(f) (authorizing the legislature to allow private nonprofit organizations to conduct raffles).

⁹ For example, Cardrooms often offer the gambling card games pai gow and three card poker. Simmons, *supra* note 4, at 108. Cardrooms also offer “banked” games, such as blackjack and baccarat, but the game must be banked by a player, not the Cardroom. Players who bank games are regulated by the California Gambling Commission.

¹⁰ In 1885, § 330 was amended to include the game of “studhorse poker.” *See infra* notes 27–35. Section 330 was also amended in 1892 to ban the card game “hokey-pokey.” The identity of hokey-pokey is obscure. It was identified as a variant of stud poker, in which four cards, rather than the traditional five cards, are played. “*Stud-Horse Poker*” and “*Hokey-Pokey*” Are Illegal Card Games, HEALDSBURG TRIB., Mar. 28, 1947 (hereinafter “Healdsburg Tribune”):

Hokey-pokey cannot be defined by consulting any standard reference work. Exhaustive research has failed to disclose any reference to it as a game in any legal decisions, any dictionary, any encyclopedia or any standard book on card games. As we understand this usage, hokey-pokey is identical with four card hokey and in substance stud poker played with four instead of five cards.

¹¹ There is a difference between a rake and a drop. A rake is a sum of money removed from each pot created by the players’ wagers. The rake theoretically can be a set fee or percentage of the pot, but in California the percentage method cannot be used. A drop is a set fee per hand; for example, the dealer may remove \$4 from each hand played. Cardrooms can also charge a fee to sit at the table (“chair fee”). *What’s Rake*

Prior to the 1980s, California Cardrooms were regulated by local ordinances. In the 1980s, the legislature created a joint state-local regulatory regime, with state oversight from the California Attorney General's office.¹² In 1997, California enacted the Gambling Control Act¹³ to create uniform, statewide regulation of certain gambling activities.¹⁴ The Gambling Control Act does not regulate the following: pari-mutuel wagering, which is regulated by the California Horseracing Board;¹⁵ tribal casinos, which are primarily regulated by the tribal casino operator;¹⁶ and the state lottery, which is operated by the Lottery Commission.¹⁷ This essentially means that the only thing left for the Gambling Commission to regulate is Cardrooms.¹⁸ According to the California Gambling Commission website, there are currently eighty-six active cardroom licenses operating 1703 tables.¹⁹ Cardrooms range from large establishments, such as the

Got to do With it?, RED CHIP, <https://redchippoker.com/beat-rake-poker-podcast/> (last visited Nov. 6, 2021) (hereinafter "Red Chip").

¹² Gaming Registration Act, CAL. BUS. & PROF. CODE § 19800 (repealed 1998). See 1997 Cal. Legis. Serv. Ch. 867 (S.B. 8) (WEST).

¹³ Gambling Control Act, CAL. BUS. & PROF. CODE §§ 19800–19987. With the enactment of this Act, the Gaming Registration Act was repealed.

¹⁴ CAL. BUS. & PROF. CODE § 19803(a).

¹⁵ CAL. BUS. & PROF. CODE §§ 19400–19668. The California Horse Racing Board is an independent regulatory body.

¹⁶ The Indian Gaming Regulatory Act (IGRA) permits Native American tribes to enter compacts with states to offer casino-style gambling. As sovereign entities, the tribes retain power to regulate their gaming businesses, except to the extent they have agreed to share authority with the state under the tribe-state compact authorized by IGRA. 25 U.S.C. §§ 2701–2721.

¹⁷ Simmons, *supra* note 4, at 88:

The California State Lottery is operated and administered by the Lottery Commission, which is composed of five members appointed by the governor, and meets quarterly and as needed. The Lottery's Security Division and independent auditors maintain the integrity of the games. The Security Division conducts background checks on employees and vendors and monitors complaints against vendors. Retailers' contracts may be terminated for just cause, such as fraudulent activity. In general, however, the Lottery's primary motivation is to expand its vendor base and market, not decrease it through enforcement actions.

¹⁸ Gambling Control Act, *supra* note 13, vests jurisdiction in the Commission over "gambling establishments." A "gambling establishment" is defined in § 19805(o) and generally consists of "controlled gambling," which is defined in CAL. PEN. CODE § 337j.

¹⁹ *Active Gambling Establishments in California*, CAL. GAMBLING CONTROL COMM'N, <http://www.cgcc.ca.gov/?pageID=ActiveGEGE> (last visited Nov. 6, 2021). Not all the active licenses are currently operating.

Commerce Casino with 270 authorized tables, to the Old Cayucos Tavern with 2 authorized tables.²⁰

Cardrooms provide a legal way to play poker in California. But are they the only means by which poker may be played? More importantly, Cardrooms are brick-and-mortar establishments. To what extent, if at all, may persons offer or play online poker in California? California, unlike some other jurisdictions,²¹ does not directly address online gambling in any state statute. Do current California gambling laws, generally enacted well before the existence of the internet, nonetheless capture internet gambling transactions with the same force and effect as applied to brick-and-mortar gambling sites?

II. HISTORY OF THE LEGALITY OF POKER IN CALIFORNIA

In 1872, California enacted legislation criminalizing certain forms of gambling.²² The statute enumerated a list of gambling games then popular, such as faro and roulette. The statute also included a catch-all section that encompassed games in which the casino (or house) “banked” the game or took a percentage of the amount wagered.²³ This catch-all provision built on the earlier prohibition of “house-banked” games.²⁴ The 1872 statute did not include the game of poker. The omission was, however, addressed in 1885 when the legislature amended the statute and added the game of “stud-horse poker”²⁵ and several years later when it added “hokey-pokey” to the list of banned gambling games.²⁶ Unfortunately, the legislature did not define those terms. In *Tibbetts v. Van de Kamp*, the court noted that news accounts, contemporaneous with the 1885 enactment, described stud-horse poker as a form of five-card stud, a widely recognized poker game, but played as a percentage game.²⁷ The court noted that the California Attorney General also provided an opinion that stud-horse poker was a form of five-card stud poker.²⁸ This suggested that section 330 reached

²⁰ *Id.*

²¹ *Legal US Online Gambling Guide*, PLAYUSA, <https://www.playusa.com/us/> (last visited June 2, 2021) (identifying seventeen states, not including Washington, DC, that permit one or more forms of online gambling).

²² *See* CAL. PEN. CODE § 330.

²³ *See* Simmons, *supra* note 4.

²⁴ *Id.*

²⁵ Stats. 1885, ch. 145. § 1, p. 135.

²⁶ CAL. PEN. CODE § 330.

²⁷ *Tibbetts v. Van de Kamp*, 271 Cal. Rptr. 792, 794–95 (Ct. App. 1990). As a “percentage game,” the promoter of the game took a percentage of the bets made.

²⁸ *Id.* The court also noted that no one really knows what stud-horse poker is. There are a number of fanciful stories about the origins of the term, most of which involve traditional stud poker and that the wager involved a horse. *See* James Lewis, *Why the Card Game is Called Stud Horse Poker*, LA TIMES (Sept. 7, 1985), <https://www.latimes.com/archives/la-xpm-1985-09-07-me-6704-story.html>; Martin

only specifically identified games of poker, not games of poker in general. While hokey-pokey was not before the court, the game was clouded by uncertainly similar to that of stud-horse poker.²⁹

All poker games are variants of three fundamental ways of playing the game of poker: draw poker, community card poker, and stud poker. In draw poker, all the player's cards are concealed. In stud poker, some of the player's cards are exposed for all the players to see. In community card poker, players combine the card or cards dealt individually to them with one or more community cards, which may be played by all the players. Cards dealt to each individual player are concealed; community cards are dealt face up. Stud-horse poker is clearly, by its terms, a form of stud poker rather than draw poker or community card poker.³⁰ Unlike draw poker, stud-horse poker clearly envisions that one or more of the cards will be face up, rather than concealed. Similarly, nothing in the term stud-horse poker suggests that community cards will be played, but it is entirely unclear whether the legislature's use of that specific term was meant to refer to all games of stud poker or only a specific variant of stud poker known as stud-horse poker.³¹ That question, however, no longer needs to be answered because the legislature removed the reference to stud-horse poker from section 330 in 1991.³²

The failure to include poker games other than the specific games of stud-horse poker and perhaps hokey-pokey in the list of banned games in Penal Code section 330 created the opening that Cardrooms exploit to offer poker as a gambling game in California. Cardrooms could escape the ban of Penal Code section 330 by simply offering poker in a format other than stud-horse poker or hokey-pokey, and not offering the games as house-banked or percentage games.

Harris, *Poker & Pop Culture: Following Draw, "Stud-Horse Poker" Gallops In*, POKERNEWS (June 14, 2016), pokernews.com/news/2016/06/poker-pop-culture-007-25030.htm.

²⁹ See Healdsburg Tribune, *supra* note 10.

³⁰ This distinction is important because an opinion by the California Attorney General concluded that draw poker was not included in the statutory ban of stud-horse poker, so California Cardrooms could lawfully offer draw poker games if they were not house-banked or percentage games. 2 Opn. Cal. Atty. Gen. 378 (Nov. 6, 1943); 9 Opn. Cal. Atty. Gen. 108 (1947). In *Tibbetts*, *supra* note 27, the court concluded that the community card poker game Texas Hold'em was not a form of stud poker, barred by the then-inclusion in § 330 of the ban on stud-horse poker.

³¹ The fact that the legislature shortly added another game, hokey-pokey, which is understood to be a variant of stud poker, suggests that the legislature was dealing with specific gambling games rather than the generic game of stud poker when it added stud-horse poker to the list of banned games. The California General Attorney, however, concluded that the reference to stud-horse poker encompassed all forms of stud poker. *See* 2 Opn. Cal. Atty. Gen. 378 (1943).

³² 1991 Cal. Legis. Serv. Ch. 71 (A.B. 97). Ironically, the legislature did not remove the reference to the other stud-poker game in § 330, hokey-pokey, probably because the removal was in response to the *Tibbetts* decision, which only discussed stud-horse poker. *See supra* note 27.

As the California Supreme Court recognized in 1895, “[p]oker played for money, however objectionable in fact, is, in the eyes of the law, as innocent as chess or any game played for simple recreation.”³³ This position was confirmed by an Attorney General Opinion indicating that non-stud poker games were not prohibited by Penal Code section 330³⁴ despite the fact that poker has been consistently recognized as a “gambling game.”³⁵ Thus, for over a hundred years, Cardrooms could operate in the twilight zone of not criminal, but not expressly legal under state law. In this sense, poker, as a statewide matter, was legal because it was not expressly criminal. That view can, however, be misleading.

The deletion of stud-horse poker from section 330 in 1991 does not mean that poker can be played anywhere in California today. That was not the case before the prohibition of stud-horse poker was removed, nor after. Even when the California Attorney General opined that section 330 did not apply to games of draw poker, draw poker could not be freely offered in California. Poker as a gambling game was always subject to local regulation.

Nonetheless, even after the Attorney General opined that draw poker was not prohibited by section 330, many California courts treated playing poker—whether draw or stud—for money as unlawful. Under section 330, the local government could permit or ban the playing of poker.³⁶ However, when these matters were pursued as criminal cases, it was under a local ordinance, not section 330.³⁷ When the local government permitted poker, it did so by licensing Cardrooms. Other cases involved civil disputes where a person sought to avoid obligations imposed under a gambling contract or claimed that gambling debt

³³ Ex Parte Meyer, 40 P. 953, 954 (Cal. 1885).

³⁴ 2 Op. Cal. Att’y Gen. 379 (1943):

With respect to draw poker it has been held that this game is not within the prohibition of Section 330 of the Penal Code when not played as a banking or percentage game, nor is it regarded as illegal under other provisions of law.

³⁵ See Tokar v. Redman, 291 P.2d 987, 989 (Cal. Ct. App. 1956) (stating that poker, (low) ball poker, and draw poker are gambling games).

³⁶ 2 Op. Cal. Att’y. Gen., *supra* note 34:

However, both the City and the County Ordinances prohibit draw poker when played for money as they are broader in their application than the State statutes and there is no doubt that they apply to this game.

Local governments could legalize or ban gambling games not banned by § 330, but they could not legalize gambling games banned by § 330.

³⁷ See, e.g., Remmer v. Municipal Court, 204 P.2d 92 (Cal. Ct. App. 1949) (defendant criminally prosecuted for maintaining an establishment where draw poker was played for money in violation of the Police Code of the City of San Francisco).

was unenforceable under California law.³⁸ This last point warrants some amplification: even when gambling was legal and accepted in California, California courts have traditionally refused to permit enforcement of gambling debt or gambling contracts.

In *Bryant v. Mead*,³⁹ decided in 1851 shortly after California became a state, the California Supreme Court addressed a claim for recovery of gambling debt. The defendant lost \$4,000 playing the card game faro and the plaintiff sought to recover the debt. The California Supreme Court refused to enforce the debt, relying extensively on English precedents that treated such obligations as unenforceable in courts of law or equity.⁴⁰ At the time, California permitted the operation of licensed gambling houses. The plaintiff was apparently unlicensed, yet the court commented that even if the plaintiff held a license, “such license should not be construed as conferring a *right to sue* for a gaming debt but as a *protection* solely against a criminal action.”⁴¹

Two years later, in *Carrier v. Brannan*, the California Supreme Court reaffirmed the rule against judicial enforcement of gambling debts.⁴² The proscription on the recovery of gambling debt in courts of law or equity has been carried forward to modern times and, aside from one contrary decision,⁴³ had been the settled law in California since statehood.⁴⁴ The English precedents relied on in *Bryant v. Mead* and *Carrier v. Brannan* were based on the Statute of Anne.⁴⁵ This statute was enacted to take the profit out of gambling by allowing gamblers to recover their losses from winners, and barring winners from obtaining judicial assistance in recovering their gambling winnings. The California Supreme Court applied these precedents in refusing to enforce gambling debt, even though California permitted gambling.

Traditionally, California courts have refused to enforce gambling contracts, not on the ground that they are criminal, but more generally on the ground that such contracts, even if not criminal, violate public policy.⁴⁶ While one recent California decision has been willing to enforce contracts involving

³⁸ *Lavick v. Nitzberg*, 188 P.2d 758, 759 (Cal. Ct. App. 1948) (stating that a contract founded upon gambling consideration was an illegal contract under Cal. Civ. Code § 1667).

³⁹ *Bryant v. Mead*, 1 Cal. 441, 441 (Cal. 1851).

⁴⁰ *Id.* at 444.

⁴¹ *Id.*

⁴² *Carrier v. Brannan*, 3 Cal. 328, 329 (1853).

⁴³ *Crockford’s Club Ltd. v. Si-Ahmed*, 250 Cal. Rptr. 728 (Cal. Ct. App. 1988) (holding that acceptance of gambling in several forms in California made it no longer tenable to refuse to recognize an English judgement on the ground that enforcement of gambling debts violated California public policy).

⁴⁴ This issue is discussed in greater detail in James M. Fischer, *Is Online Sports Betting Legal in California?*, HASTINGS BUS. L. J. (2021) (forthcoming).

⁴⁵ 9 Anne. Ch. 14, § 1.

⁴⁶ *Kelly v. First Astri Corp.*, 84 Cal. Rptr. 2d 810 (Ct. App. 1999).

legal gambling,⁴⁷ that decision remains in the minority when assessed against a century of contrary decisional law.⁴⁸

Despite legalization, gambling generally does not enjoy the same level of legal protection as other businesses. Courts note that gambling is a “non-essential, dangerous and sensitive industr[y]”⁴⁹ and that gambling exists “at the sufferance of the Legislature.”⁵⁰ It is said that gambling as a business may be compared to activities like liquor and tobacco production, distribution, and sale, which are characterized as “inherently harmful and dangerous to society and the public welfare.”⁵¹ In this context, fine distinctions that would be generally recognized as protecting a business activity may be eluded in the case of a gambling contract or matter involving the gambling industry.

Finally, some people believe that poker (or gambling in general) is illegal in California because it is illegal under federal law. This view is, however, incorrect. No federal statute makes poker illegal. Moreover, with some exceptions, when federal law criminalizes gambling activity, it does so in coordination with state law. For example, the Wire Act makes it a federal offense to transmit bets over instrumentalities of interstate or international commerce.⁵² The Wire Act does not, however, apply when the bets are legal in the state or states where the bets are made.⁵³ Thus, federal law would only criminalize poker if (1) an instrumentality of interstate or international commerce is used in playing poker, and (2) poker is illegal in the state or states where the game is offered. Offering or playing online poker satisfies the first element, but is the second element satisfied when the game touches the state of California? It is to the second part that we now turn.

⁴⁷ *Kyablue v. Watkins*, 149 Cal. Rptr. 3d 156 (Ct. App. 2012).

⁴⁸ *Cf. Wallace v. Opingham*, 165 P.2d 709 (Cal. Ct. App. 1946) (refusing relief to a person who had been cheated in a gambling game). When refusing to enforce gambling contracts, courts often rely on the early precedents discussed *supra* notes 35, 37–41 and CAL. CIV. CODE § 1667, which defines an “unlawful” contract as one that is: “(1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals.”

⁴⁹ *Application of Martin*, 447 A.2d 1290, 1302 (N.J. 1982). *See also Fendrich v. Van de Kamp*, 227 Cal. Rptr. 262, 268 (Cal. Ct. App. 1986) (noting the disfavored status of gambling in California).

⁵⁰ *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439 (8th Cir. 2007); CAL. BUS. & PROF. CODE § 19801(d) (1998) (noting that no person has the right to engage in the business of gambling); CAL. BUS. & PROF. CODE § 19801(f) (1998) (noting that it is not the purpose of the state to expand opportunities for gambling or to create any right to operate a gambling enterprise in California).

⁵¹ ANTHONY N. CABOT & KEITH C. MILLER, *THE LAW OF GAMBLING AND REGULATED GAMING* 159 (Carolina Acad. Press, 2d ed. 2016) (hereinafter “Cabot & Miller”).

⁵² 18 U.S.C. § 1084(a).

⁵³ 18 U.S.C. § 1084(b). This exception for lawfulness under state law is common in federal statutes addressing gambling.

III. CURRENT STATUS OF POKER IN CALIFORNIA

In 1984, the legislature made the initial effort to subject Cardrooms to state regulation. The Gaming Registration Act authorized the Attorney General to adopt uniform minimum regulation of Cardrooms.⁵⁴ Prior to this Act, Cardrooms were regulated solely by local ordinance. However, regulation by the Attorney General under the Act was widely seen as inadequate and unable to address the problems presented by the rapid growth of Cardrooms.⁵⁵

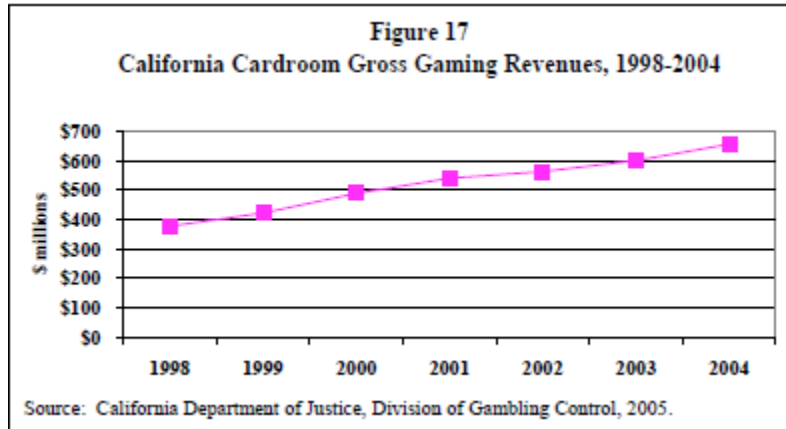
⁵⁴ Gaming Registration Act, *see supra* note 12.

⁵⁵ These concerns were addressed in bill analyses that accompanied the consideration and eventual enactment of the Gambling Control Act. *See, e.g.*, S.B. 8, Senate Third Reading, as amended at 4 (Cal. 1997):

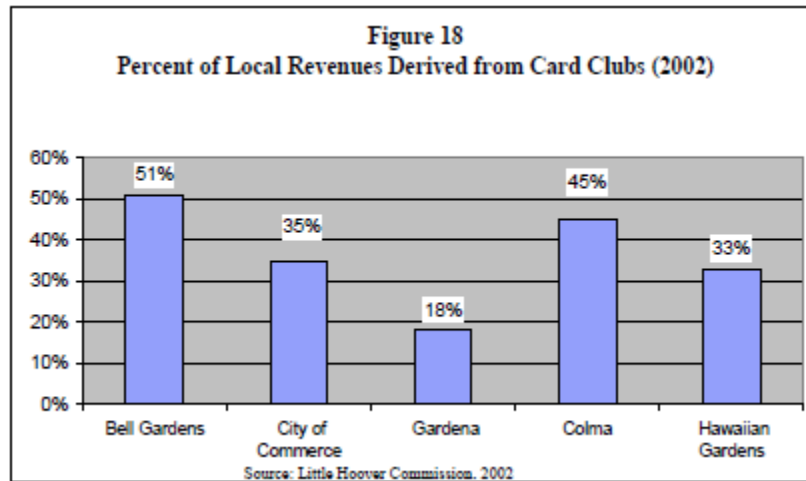
Comments: Under the Gaming Registration Act, the state and local governments have concurrent jurisdiction over gaming establishments. However, the state plays a fairly limited role in regulating card clubs. Specifically, card clubs are authorized by local jurisdictions with a majority vote of the electorate and, on a day-to-day basis, are regulated by local governments' code of regulations. At the same time, local governments rely on the tax revenues generated from the card clubs to bolster their finances. Because of such relationships, critics are suspicious of local governments' willingness to regulate the very entities that provide them with much needed revenues. Moreover, critics contend that the lack of statewide regulatory structure has made card clubs an attractive target for organized crime and other criminal influences. This bill would address those concerns by establishing a two-phased statewide regulatory scheme.

Cardrooms had at the time of the enactment of the Gambling Control Act, and continue to have, a significant financial impact in California. *See Simmons supra* note 4, at 111 (May 2006) (noting that revenue from California Cardrooms increased significantly between 1998 and 2004):

In 1997, the legislature completed the task started in 1984. With the enactment of the Gambling Control Act, California established statewide control



Simmons also noted that a number of municipal jurisdictions were substantially dependent on Cardroom revenues to fund local government operations:



ROGER DUNSTAN, GAMBLING IN CALIFORNIA note 1, at Part V (Jan. 1997) (footnotes omitted):

Cardclubs Have a Large and Growing Presence Within the State. It is estimated that the state's 233 cardclubs generated \$711 million in gross revenue in 1995. Bettors wagered approximately \$8.5 billion. Bettors wagered four times more than in Californian's spent buying lottery tickets.

over Cardrooms where licensing standards and terms of play were concerned.⁵⁶ Local government jurisdiction was not entirely preempted, however. Local government retained the power to authorize Cardrooms in the jurisdiction, to tax Cardroom operations, and to create more stringent regulatory standards than required by the state.

State authority over Cardrooms is bifurcated. The Bureau of Gambling Control,⁵⁷ which is part of the Attorney General's office, has enforcement and investigative responsibilities.⁵⁸ Jurisdiction over the conduct and operation of Cardrooms is vested in the Gambling Control Commission.⁵⁹ The Commission, with the assistance of the Bureau of Gambling Control, thus determines whether a person will be allowed to operate a Cardroom by the issuance of the necessary license. Without the license granted by the Commission, the Cardroom cannot operate.⁶⁰

⁵⁶ CAL. BUS. & PROF. CODE §§ 19800–19987.

⁵⁷ CAL. BUS. & PROF. CODE § 19826. The reference to “Department” in § 19826 is to the Department of Justice. *Id.* § 19805(h).

⁵⁸ BUREAU OF GAMBLING CONTROL, oag.ca.gov/gambling (last visited Oct. 18, 2021).

⁵⁹ CAL. BUS. & PROF. § 19811(b). The Commission defines its duties regarding Cardrooms as:

- Making determinations of suitability for the issuance of licenses/registrations to owners, supervisors, players, related parties, and key employees;
- Issuing work permits to cardroom employees in specific jurisdictions;
- Taking reasonable actions to ensure that no ineligible, unqualified, disqualified, or unsuitable persons are associated with controlled gaming activities;
- Assessing and acting upon certain restricted transactions including ownership changes and lending arrangements;
- Taking reasonable actions to ensure that gambling activities take place only in suitable locations;
- Granting temporary/interim licenses, permits or approvals on appropriate terms and conditions;
- Developing and implementing regulations pursuant to the Gambling Control Act; and,
- Adjudicating recommendations concerning license denials or revocations, or disciplinary actions.

About the Commission, CAL. GAMBLING CONTROL COMM'N, www.cgcc.ca.gov/?pageID=aboutus&pageName=AboutUs (last visited Nov. 7, 2021).

⁶⁰ *Active Gambling Establishments in California*, *supra* note 19. The Commission's website lists all current active Cardrooms and indicates whether the Cardrooms may operate and whether their operation is subject to any conditions.

How does all this apply to the legality of poker in California? A duly licensed Cardroom can offer poker as long as the game is not house-banked or a percentage game. Poker played within these licensed facilities is legal. What about poker played outside these licensed facilities? Recall that poker is no longer included in the list of prohibited games contained in Penal Code section 330. The Gambling Control Act attempted to address this issue. The Act added section 337j to the Penal Code.⁶¹ This provision provides, in pertinent part, that

⁶¹ CAL. PEN. CODE § 337j provides:

(a) It is unlawful for any person, as owner, lessee, or employee, whether for hire or not, either solely or in conjunction with others, to do any of the following without having first procured and thereafter maintained in effect all federal, state, and local licenses required by law:

(1) To deal, operate, carry on, conduct, maintain, or expose for play in this state any controlled game.

(2) To receive, directly or indirectly, any compensation or reward or any percentage or share of the revenue, for keeping, running, or carrying on any controlled game.

(3) To manufacture, distribute, or repair any gambling equipment within the boundaries of this state, or to receive, directly or indirectly, any compensation or reward for the manufacture, distribution, or repair of any gambling equipment within the boundaries of this state.

(b) It is unlawful for any person to knowingly permit any controlled game to be conducted, operated, dealt, or carried on in any house or building or other premises that he or she owns or leases, in whole or in part, if that activity is undertaken by a person who is not licensed as required by state law, or by an employee of that person.

(c) It is unlawful for any person to knowingly permit any gambling equipment to be manufactured, stored, or repaired in any house or building or other premises that the person owns or leases, in whole or in part, if that activity is undertaken by a person who is not licensed as required by state law, or by an employee of that person.

(d) Any person who violates, attempts to violate, or conspires to violate this section shall be punished by imprisonment in a county jail for not more than one year or by a fine of not more than ten thousand dollars (\$10,000), or by both imprisonment and fine. A second offense of this section is punishable by imprisonment in a county jail for a period of not more than one year or in the state prison or by a fine of not more than ten thousand dollars (\$10,000), or by both imprisonment and fine.

(e) (1) As used in this section, “controlled game” means any poker or Pai Gow game, and any other game played with cards or tiles,

it is unlawful to conduct or allow a “controlled” game to be operated without a license from the Gambling Control Commission.⁶² A “controlled game” is defined in section 337j(e)(1) and specifically references “any game of poker.”⁶³

What is important here is that section 337j specifically references the game of poker as a “controlled game.” Thus, under the statute, it is a criminal offense to conduct a game of poker or derive revenue from conducting the game of poker *without a license*. The only applicable exception is Section 337j(e)(2)(D), which references poker played in a “private home or residence in which no person makes money from operating the game, except as a player.”⁶⁴ However, a quick tour of the internet will reveal a number of online sites where

or both, and approved by the Department of Justice, and any game of chance, including any gambling device, played for currency, check, credit, or any other thing of value that is not prohibited and made unlawful by statute or local ordinance.

(2) As used in this section, “controlled game” does not include any of the following:

(A) The game of bingo conducted pursuant to Section 326.3 or 326.5.

(B) Parimutuel racing on horse races regulated by the California Horse Racing Board.

(C) Any lottery game conducted by the California State Lottery.

(D) Games played with cards in private homes or residences, in which no person makes money for operating the game, except as a player.

(f) This subdivision is intended to be dispositive of the law relating to the collection of player fees in gambling establishments. A fee may not be calculated as a fraction or percentage of wagers made or winnings earned. The amount of fees charged for all wagers shall be determined prior to the start of play of any hand or round. However, the gambling establishment may waive collection of the fee or portion of the fee in any hand or round of play after the hand or round has begun pursuant to the published rules of the game and the notice provided to the public. The actual collection of the fee may occur before or after the start of play. Ample notice shall be provided to the patrons of gambling establishments relating to the assessment of fees. Flat fees on each wager may be assessed at different collection rates, but no more than five collection rates may be established per table. However, if the gambling establishment waives its collection fee, this fee does not constitute one of the five collection rates.

⁶² CAL. PEN. CODE §§ 337j(a)(1)–(2).

⁶³ CAL. PEN. CODE § 337j(e)(1).

⁶⁴ CAL. PEN. CODE § 337j(e)(2)(D).

one can play poker, such as ClubWPT.⁶⁵ There is no indication that any of these sites have secured a license from the Gambling Control Commission.⁶⁶

These online sites appear to be organized to avoid Penal Code section 330, but it is unclear whether they escape the reach of section 337j. Recall that section 330 no longer lists poker as a specifically prohibited game. However, section 330 still prohibits house-banked and percentage games.⁶⁷ Ironically, violating section 337j carries a higher maximum fine and longer prison sentence than violating section 330.⁶⁸ Focusing on section 330 while ignoring section 337j is a great mistake that may give rise to significant punitive consequences.

Poker is traditionally seen as a gambling game,⁶⁹ but why is it? Traditionally, a gambling game requires three elements: (1) consideration,⁷⁰ (2) chance,⁷¹ and (3) a prize.⁷² The online poker sites have structured their business model to avoid being characterized as a house-banked or percentage game,⁷³ but they have also sought to avoid characterization as a gambling game.

Online poker sites usually present themselves as operating on a “sweepstakes” model. Generally, sweepstakes-style games avoid characterization as gambling games by allowing free play to avoid the “consideration” element that is necessary for the game to be characterized as gambling. The online poker sites supply each player with a limited number of coins (or chips) that the player may use to play poker on the online site. While the coins are available for free, winners may redeem their winnings for cash.⁷⁴ Where does the money come from that is used to redeem the coins? These online

⁶⁵ For example, several online poker sites can be accessed through the Card Player website, cardplayer.com. Another website offering poker is ClubWPT, which is offered by the World Poker Tour, worldpokertour.com.

⁶⁶ Currently, there is no California statute or regulation that expressly addresses the legality of online gambling.

⁶⁷ See Simmons, *supra* note 4, at 23–30.

⁶⁸ The penalty for violating Penal Code § 330 is imprisonment for up to six months or a fine of up to \$1,000, or both. CAL. PEN. CODE § 330. The penalty for violating Penal Code § 333j is imprisonment for up to one year or a fine up to \$10,000, or both. CAL. PEN. CODE § 337j(d).

⁶⁹ *People v. Philbin*, 50 Cal. App. 2d 859, 861 (Ct. App. 1942) (draw poker game was gambling, but not a form of poker made unlawful by the state); see *supra* notes 37–41. See also *Ex. Parte Meyer*, 40 P. 953, 954 (Cal. 1985). 2 Opn. Cal. Atty. Gen. 378 (Nov. 6, 1943); *Tokar v. Redman*, 291 P.2d 987 (Cal. Ct. App. 1956); *Lavick v. Nitzberg*, 188 P.2d 758 (Cal. Ct. App. 1948).

⁷⁰ Modernly, this requires that the player give up “something of real economic value” to participate in the game. Cabot & Miller, *supra* note 51, at 12.

⁷¹ Chance is the opposite of skill. Winning something of economic value as a result of skill is not gambling. For example, professional athletes win prizes as a result of skill.

⁷² A prize is something of economic value that is awarded to the game winner or winners.

⁷³ See, e.g., *Healdsburg Tribune supra* note 10; *Red Chip supra* note 11.

⁷⁴ “Winnings” include coins purchased or won, but not free coins.

poker sites allow players to purchase additional coins for cash, which provide the sites with resources necessary to pay out the winners.

The obvious weak link in this business model is the players' ability to purchase additional coins. Functionally, there appears to be little difference between coins and chips. The online poker site operator might argue that these additional purchases are incidental to the primary function of the site, which is to allow free play. That argument, however, is not credible. Coins purchased on an online poker site are no different from chips purchased at a casino cashier. Many casinos use free-play coupons to generate attendance and play. The fact that a player is enticed to enter a casino and allowed to play a game for free does not mean that all subsequent transactions avoid characterization as a gambling game. For example, if a casino gives a customer \$100 in casino chips, that act does not control the characterization of the player's subsequent purchase of \$1,000 in casino chips. Free play ceases to be free play once a player pays cash to play.

ClubWPT uses a different business model. This website, operated by the World Poker Tour, charges a monthly membership fee that allows the "member" to play poker for prizes. Under this model, the player's membership fee is consideration. The question is whether it is consideration to join a club (not a gambling transaction) or consideration to play poker for prizes (a gambling transaction). ClubWPT also offers its members other benefits, such as poker lessons and meetings with poker celebrities, which could be used to bolster the argument that membership in ClubWPT involves more than just playing poker for prizes.

In the end, however, whether the business model used by the online poker sites or ClubWPT constitutes consideration for gambling purposes is irrelevant to whether the poker game violates section 330. The presence of consideration supports treating the transaction as gambling, but section 330 does not prohibit "gambling." Section 330 prohibits certain enumerated games and any game that is a house-banked or percentage game. Even if an online site sold coins or chips for cash to enable gambling by playing poker, the game would not violate section 330 as long as the site's business model was not based on house-banked or percentage games. Thus, if the poker site takes a fixed rake or charges a set fee to play—which is essentially what ClubWPT does by charging a membership fee—or allows players to purchase chips, section 330 is not violated.

The fact that poker, which is traditionally not a house-banked or percentage game, does not violate section 330 does not, however, mean that poker may be played with impunity in California. As noted previously, section 337j specifically mentions poker and requires that providers of the game of poker secure licenses from the Gambling Control Commission. Moreover, unlike the old reference to stud-horse poker in section 330, the reference to poker in section 337j contains no qualifiers. On its face, section 337j applies to all forms

of poker.⁷⁵ There is no question that the online sites are offering the game of poker, regardless of whether it is being offered in a sweepstakes or membership format.

Does section 337j apply to online sweepstakes poker sites or membership sites, such as ClubWPT? The key provision in section 337j is subsection (a)(1), which provides that it is “unlawful” for any person “to deal, operate, carry on, conduct, maintain, or expose for play in this state any controlled game.” Because poker is a controlled game, the two critical issues raised by this subsection are:

1. What is meant by the term “in this state”?
2. Does the term “in this state” modify all the elements of subsection (a)(1) or only the last element “exposed for play”?

If one simply looks at the term “in this state,” it is difficult to see how that language could be understood to mean anything other than a gambling game played physically in California. This understanding is bolstered by the realization that the central focus of the Gambling Control Act, which includes what is now section 337j, was to provide statewide, uniform regulation of California Cardrooms. For over a century Cardrooms had been subject to local regulation, which was generally seen as problematic.⁷⁶ The Gambling Registration Act of 1984 had vested power in the California Attorney General to exercise some oversight over the operation of Cardrooms, but that oversight was generally considered to be inadequate.⁷⁷ The Gambling Control Act was the legislature’s response to a century of haphazard, and oftentimes nonexistent, regulation of Cardrooms. There can be little doubt that the focus of the Gambling Control Act

⁷⁵ The legislature is presumed to be aware of relevant legal authorities when it enacts legislation. *People v. Ledesma*, 939 P.2d 1310, 1316 (Cal. 1997) (“When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of and acquiesced in the courts’ construction of that statute.”).

As noted earlier, the issue of what types of poker games were encompassed within section 330’s reference to stud-horse poker and hokey-pokey extended over 100 years. That history supports the natural reading of the term “poker” as meaning all forms of the game: draw, community card, and stud. Had the legislature intended for a more limited scope, it was aware, from past practices, how to narrow it. To avoid confusion, all poker games were simply brought within the statute.

⁷⁶ See S.B. 8, Senate Third Reading, *supra* note 55.

⁷⁷ *Id.*

was on brick-and-mortar Cardrooms that had been a fixture in the California landscape since the 1850s.⁷⁸

⁷⁸ The legislative history of the Gambling Control Act clearly evidenced concern over the then-bifurcated regulation of Cardrooms by local jurisdictions and the Gambling Control Board. *See* S.B. 8, Senate Floor Analysis (Cal. 1997):

ARGUMENTS IN SUPPORT: According to the author's office, this bill is an attempt to once again resolve previous unsuccessful efforts over the past four years to achieve a workable plan to correct problems and inequities of current law. This bill establishes an entirely new gaming law, with a comprehensive statutory framework to regulate gambling in California.

The author believes that provisions of this bill articulate a strong public policy that legal gambling should be conducted only when properly regulated.

Id. at 7. Similar concerns were voiced in the California Assembly's Committee on Government Organization's consideration of the measure:

COMMENTS:

1. Background on card club regulation. The majority of gaming money in California is wagered in card clubs. In 1995 alone, almost \$9 billion was wagered in card clubs. In fact, California's card clubs generate so much business that the state ranks as the biggest (in terms of dollars wagered) card club state in the nation. Under the Gaming Registration Act, the state and local governments have concurrent jurisdiction over gaming establishments. However, the state plays a fairly limited role in regulating card clubs. Specifically, card clubs are authorized by local jurisdictions with a majority vote of the electorate and, on a day-to-day basis, are regulated by local governments' code of regulations. At the same time, local governments rely on the tax revenues generated from the card clubs to bolster their finances. Because of such relationships, critics are suspicious of local governments' willingness to regulate the very entities that provide them with much needed revenues. Moreover, critics contend that the lack of a statewide regulatory structure has made card clubs an attractive target for organized crime and other criminal influences.

Assembly Committee on Government Organization Analysis (July 7, 1997), at 8. It is a well-accepted rule of statutory interpretation that statutes should be interpreted in light of the concerns and problems that the statute was designed to address. Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 967 (2021). The fundamental rule is that a court should construe a statute "so as to effectuate the purpose of the law." *Tripp v. Swoap*, 552 P.2d 749, 755 (Cal. 1976). Here, the drafter's concerns were clearly on regulation of brick-and-mortar Cardrooms operating "in the state."

These facts strongly suggest that the term “in this state” should be understood to mean that the gambling site offering a “controlled game” has a fixed geographic physical presence in California. A license is necessary when the poker game is conducted or maintained within California’s geographic boundaries. A brick-and-mortar establishment has a fixed geographic presence. Since this type of establishment was the focus of legislative concern, that concern should be used to interpret the scope of section 337j’s coverage.

The problem here, however, is that shortly after the Gambling Control Act was enacted, internet websites began to evolve into virtual equivalents of brick-and-mortar establishments. There is nothing in the Gambling Control Act that addresses internet gambling. And while there have been recurrent legislative efforts to address internet gambling, and specifically internet poker,⁷⁹ no California statute expressly addresses the present issue.

Numerous commentators have addressed the issue of regulating internet gambling. Some commentators see little difference between the internet and traditional forms of wire communications, such as the telephone.⁸⁰ Other commentators see the internet as entirely distinct from traditional forms of wire communications insofar as attempting to pinpoint where business activity occurs for the purposes of determining jurisdiction.⁸¹ Here, however, it is not necessary to address or resolve theoretical disputes. The phrase “in this state” is very specific, and the question is whether an online gambling business operates “in

⁷⁹ For example, Senator Dodd and Assembly Member Gray introduced numerous proposals to adopt a coherent, sensible approach to the regulation of gambling, including online gambling. See, e.g., SCA6, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SCA6 (last visited Oct. 12, 2021).

Their efforts failed due to (1) political opposition from established gambling interests that saw SCA6 as a threat to their existing business interests and (2) the dislocations caused by the COVID-19 pandemic, which began in early 2020 just when SCA6 was being considered. See Jill R. Dorson, *Not This Time: California Sports Betting Dead in Legislature*, SPORTSHANDLE (June 22, 2020), <https://sportshandle.com/no-sports-betting-california/> (bill sponsor blames COVID-19, deadlines for pulling bill, but tribal opposition likely played a role).

⁸⁰ Bruce P. Keller, *The Game’s the Same: Why Gambling in Cyberspace Violate Federal Law*, 108 Yale L. J. 1569, 1572 (1999):

[T]he Internet is an earthbound network of interconnected computers, each with a specific physical location, connected by a physical telecommunications backbone. One no more makes a “virtual visit” when using the Internet than when telephone long distance.

⁸¹ Jean-Baptiste Maillart, *The Limits of Subjective Territorial Jurisdiction in the Context of Cybercrime*, 19 ERA FORUM 375 (2019) (questioning the utility of territorial concepts when addressing jurisdiction questions in the digital era).

this state” such that it must acquire a license if it satisfies the requirements of sections 337j(a)(1) to 337j(a)(3).

What does “in this state” mean? If one looks at the concern that led to the enactment of the Gambling Control Act, “in this state” means entirely and completely within the state. A brick-and-mortar Cardroom has a definitive physical presence. It exists in a particular place. Each of the currently licensed Cardrooms in California that are identified on the Gambling Commission’s website can be physically seen and appreciated.⁸² The buildings are real, the employees are physically present on the premises during business operations, and the chips and cards are tangible. If brick-and-mortar Cardrooms are the appropriate reference for interpreting “in the state,” virtual poker sites that exist only as pixels on a computer screen and have an ethereal, electronic existence do not have the same physicality as a Cardroom and do not exist “in the state” in the same sense a Cardroom exists “in the state.”

It is, of course, possible to contend that “in the state” should have a more relaxed interpretation and apply to activities that touch upon the state, have a significant connection to the state, or substantially occur in the state. Under that approach, a person in California playing poker on an internet site where the site was located outside California could be seen as playing poker in California. The physical presence of the player in the state might be a sufficiently substantial contact to satisfy the “in the state” requirement.

While one can certainly make the argument, it is a strained interpretation of the phrase “in this state.” Section 337j does not refer to persons in the state, and instead refers to allowing a “controlled game” to be played “in the state.”⁸³ It is the actual conducting of the controlled game that must occur “in the state.” It is also difficult to stretch the phrase so that it is satisfied if some, but not all, players and the host are outside the state. If, while in Las Vegas, Nevada, I make a telephone call to a friend in San Francisco, my friend is in California, but in what sense of the phrase am I “in California”? “In the state” necessarily has a physical, geographic, and fixed sense of actual presence; when these requirements are met the activity is “in the state.” An online poker game conducted by an out-of-state operator is far removed from the brick-and-mortar

⁸² See *Active Gambling Establishments in California*, *supra* note 19.

⁸³ Compare, for example, Washington’s ban on internet gambling. WASH. REV. CODE § 9.46.240 provides, in pertinent part: “Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, the internet, a telecommunications transmission system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony.”

The statute was upheld against contentions that it violated the Commerce Clause in *Rouso v. State*, 239 P.3d 1084 (Wash. 2010). Importantly, this statute is directed to the transmission or receipt of gambling information rather than on the place where gambling is conducted, which is the focus of California Penal Code § 337j(a).

Cardrooms that are the focus of section 337j and the California Gambling Control Act.

It also must be determined what aspects of a controlled game are subject to the “in the state” requirement. Penal Code section 337j states:

(a) It is unlawful for any person, as owner, lessee, or employee, whether for hire or not, either solely or in conjunction with others, to do any of the following without having first procured and thereafter maintained in effect all federal, state, and local licenses required by law:

(1) To deal, operate, carry on, conduct, maintain, or expose for play *in this state* any controlled game.

Does the italicized phrase “in this state” modify every term in subsection (a) or only the last term “expose for play”?

Although the grammatical argument can be made that due to the comma, the phrase “in this state” modifies only the term to which it is affixed (“exposed for play”), but that argument is strained in this context for several reasons. First, acceptance of the argument requires that the entire phrase “in this state any controlled game” modifies only the last term. This interpretation would render subsection (a) irrational because it would cause the other terms in subsection (a) to apply without limit, not just to controlled games. Regulation of “controlled games” is, however, the reason for the creation of the Gambling Control Commission. In effect, limiting the whole phrase “in this state any controlled game” only to the phrase “expose for play” would negate the introductory sentence of section 337j that requires the possession and maintenances of a license to conduct a “controlled game.”

Second, even if the focus is only on the phrase “in this state,” there is no reason why the legislature would impose that limit only on the last term of subsection (a) and exempt the other terms (e.g., deal, operate, etc.) from the restriction. All the terms of subsection (a) apply to the operating of aspects (general or specific) of gambling games. It would simply make no sense to apply the phrase “in this state” to the last term (“expose for play”) but not apply it to the other aspects of operating a gambling game (e.g., dealing).⁸⁴ Moreover, given that the manifest purpose of the Gambling Control Act was to provide statewide regulation of Cardrooms in California, applying the phrase “in this state” to all terms in subsection (a) is consistent with the Act’s purpose.⁸⁵

⁸⁴ Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 128 (1994) (finding that statutes should be construed to avoid unreasonable or absurd meanings. The principle that statutes should be interpreted to avoid absurd results “enjoys almost universal endorsement, even by those who are most critical of judicial discretion, and most insistent that the words of the statute are the only legitimate basis of interpretation”) (footnote omitted).

⁸⁵ Simmons, *supra* note 4, at 108 (discussing shared state and local control).

It may, of course, be contended that the grammatical argument should be preferred because it is consistent with a long-standing canon of statutory interpretation: the rule of the last antecedent. This rule holds that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”⁸⁶ Applying this rule would lead to the conclusion that the phrase “in this state” only applies to the term “expose for play.”

There are a number of reasons, however, why this rule is inapt in this context. First, the rule of the last antecedent is not applied in every context. As noted in *Sutherland on Statutes*, “where the sense of an entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent.”⁸⁷ Limiting the qualifying phrase “in this state” to the term “expose for play” would be unreasonable and lead to a nonsensical reading of section 337j(a), for the reasons noted earlier.

Moreover, as is often the case, there is a contrary rule of statutory interpretation that leads to the opposite result: the series-qualifier rule.⁸⁸ This rule holds that when a specific term is followed by a qualifier or qualifying words that is as applicable to other terms in the statutory list, the qualifying language applies to all the terms in the statutory list.⁸⁹ Again, as noted previously, all the terms listed in section 337j(a) involve operating a gambling game. The most natural reading of section 337j(a) is that “in this state” modifies each of the terms listed. It simply makes no sense that “in this state” would modify “expose for play” but not “deals” or “conducts” when all the terms are interrelated and are aspects of a common concern—the operation of a controlled game. If the rule of the last antecedent was applied, a bet made, or a poker game conducted anywhere in the world would be subject to California licensing requirements. It is unreasonable to think the legislature sought such a result, particularly given that the driving concern behind the Gambling Control Act and section 337j was to regulate Cardrooms operating in California. Applying the series-qualifier rule avoids that unreasonable result.

⁸⁶ *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see White v. County of Sacramento*, 646 P.2d 191, 193 (1982).

⁸⁷ 2A NORMAN J. SINGER & SHAMBIE SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 47:33 (7th ed. 2020).

⁸⁸ Karl N. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rule of Canon About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) (providing an example of what Llewelyn referred to as the “thrust and parry” of contradictory canons).

⁸⁹ *P.R. Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 345 (1920) (“When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all”).

IV. IS INTERNET POKER PLAYED IN CALIFORNIA?

Let us assume that a California poker player (“Player”) accesses an online poker site (“Site”).⁹⁰ The Site is licensed in Costa Rica and uses a white-label⁹¹ online software program that has been customized to the Site’s particular business aesthetics and needs. The Site has not sought nor received a license to conduct a “controlled game” in California. The Site attracts players with online advertising of its poker site.⁹² Player previously wired \$2,500 to the Site, which

⁹⁰ Carter Maddox, *The Current Online Gambling Situation in Costa Rica in 2020*, COSTA RICA (Apr. 27, 2020) <https://qcostarica.com/the-current-online-gambling-situation-in-costa-rica-in-2020/> (stating Costa Rica permits online gambling establishments to operate out of Costa Rica as long as they provide gambling to players outside Costa Rica).

⁹¹ *White Label Online Casino Software*, SOFTGAMINGS, <https://www.softgamings.com/igaming-solutions-and-platforms/white-label-casino-software/> (last visited Nov. 7, 2021) (defining “white label” as products manufactured by one company to be sold under another company’s brand name. In the online gambling industry, one such white-label company is SoftGamings, which offers services that allow a person to start an online gambling business); *see also* SOFTSWISS, <https://www.softswiss.com/white-label-solution/> (last visited Nov. 7, 2021).

⁹² *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 173 (1999) (holding that the government could not ban advertising about private commercial gambling establishments in jurisdictions where such gambling was legal. On the other hand, the government may prohibit advertising of commercial gambling activity when gambling is illegal in the state); *United States v. Edge Broad. Co.*, 509 U.S. 418, 418 (1993) (upholding the federal ban on broadcast advertising (18 U.S.C. § 1304) as applied to broadcast advertising of Virginia’s lottery by a radio station located in North Carolina, where no such lottery was authorized). *See also* 1 *Cybercrime & Security* § 4A:19 (2021) (describing federal enforcement actions against broadcasters that had advertisements involving illegal commercial gambling); Lawrence G. Walters, *Internet Gambling Advertising Best Practices*, REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES 2 (Anthony Cabot & Ngai Pindell eds., 2013):

While the legality of various forms of online gaming is an unsettled question in the United States, the legal issues relating to advertising Internet gambling services are even more difficult to ascertain. The main reason for this distinction is that the power of the United States government to regulate a particular activity (like gambling) is not co-extensive with its ability to regulate or ban advertising for that same activity. In other words, while the government may regulate (or completely prohibit) the conduct of gambling itself, it is less free to regulate commercial speech about that conduct, under the First Amendment. Therefore, affiliates,

the Site maintains as Player's account.⁹³ The Site has five employees and operates out of an office in San Juan, Costa Rica. When Player accesses the Site via Player's computer in Player's residence in Los Angeles, California, Player purchases \$500 in chips, which are debited against Player's account and which Player uses to play a \$2 to \$4-limit stud poker game. There are eight players in the game, including Player, all of whom are identified only by their online names. Is this game, hosted by the Site, being played "in this state" of California?

The internet is often thought of as being nowhere and everywhere, virtual space, or a cloud; the internet is neither a place nor a thing—it is wholly unique.⁹⁴ That thinking does not, however, completely reflect the reality of the internet. When a person accesses an online website through the internet via the person's computer, the website and the computer exchange data packets.⁹⁵ These data packets are transmitted through network routers that rely on an interconnected set of computers.⁹⁶ The internet is essentially a decentralized information transfer mechanism that allows users to communicate with one another.⁹⁷ Where on this information-transfer mechanism is this \$2 to \$4 poker game being played?

One might initially focus on the data packets and ask are they in California within the meaning of section 337j(a)? Courts have looked at the transmission of data packets to assess whether a state may, consistent with due

promoters and marketing agencies associated with the marketing of online gaming are less constrained, from a legal perspective, than those individuals or companies operating the gambling venture itself.

See generally BARRIE GUNTER, *GAMBLING ADVERTISING: NATURE, EFFECTS, AND REGULATION* (Emerald Publishing Limited, 1st ed. 2019).

⁹³ Unlawful Internet Gambling Enforcement Act, 31 U.S.C.A. §§ 5361–5366 (2006) (explaining that this Act was designed to bar large financial institutions from financing large-scale gambling operations, but it has done little to interfere with small-scale operations).

⁹⁴ Michael Winters, "The Internet Will Be Everywhere and Nowhere" *Dr. Michio Kaku's ISTE 2016 Keynote*, EDSURGE (June 27, 2016), <https://www.edsurge.com/news/2016-06-27-the-internet-will-be-everywhere-and-nowhere-dr-michio-kaku-s-iste-2016-keynote> ("Dr. Kaku envisions a world where the Internet—and therefore information—is both everywhere and nowhere."). *See* *Reno v. Am. C.L. Union*, 217 F.3d 162 (3d Cir. 2000), vacated sub nom. *Ashcroft v. Am. C.L. Union*, 535 U.S. 564 (2002) ("The [internet] is ambient—nowhere in particular and everywhere at once.") (citation omitted).

⁹⁵ ANDREW BLUM, *TUBES: A JOURNEY TO THE CENTER OF THE INTERNET* 9–10 (2012) ("[T]he internet is made of pulses of light . . . They are produced by powerful lasers contained in steel boxes housed . . . in unmarked buildings. The lasers exist. The boxes exist. The buildings exist. The internet exists") (hereinafter "Blum").

⁹⁶ *Id.* at 87, 102.

⁹⁷ *Id.* at 53–54 (stating that the internet is a decentralized collection of networks that uses a common language to move information from point to point).

process, exercise personal jurisdiction over a person who is outside the state. Most courts have concluded that intentionally transmitting information through the internet into the state demonstrates sufficient “purposeful availment” of the state as to permit the exercise of personal jurisdiction consistent with due process.⁹⁸ However, the issue here is not whether California can regulate online gambling sites that wish to do business with persons within California. Rather, the issue here is whether California has done so through the language of section 337j(a). As noted previously, section 337j(a) requires that the controlled game be conducted “in the state.”

The transmission of data packages does not appear to satisfy the critical, physical elements set out in section 337j(a): “deal, operate, carry on, conduct, maintain, or expose for play.” These words attach to the actual playing of the game, not communications or information about the playing of the game, which is what is in the data packets. The result might be different if section 337j(a) used different language that could be aligned with the function of data packets. For example, if section 337j(a) used the term “bet” or “wager,” those actions could be seen as encapsulated in the information contained in the data packages,⁹⁹ but that is not the case here because those terms are not in section 337j(a). Rather, section 337j(a) uses terms applicable to the conducting of gambling games within

⁹⁸ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (adopting a sliding-scale test to determine whether internet advertising subjects a defendant to the state’s personal jurisdiction. At one end of the scale are websites that transact business over the internet, which may be sufficient to establish due process minimum contacts. At the other end of the scale are passive websites that are accessed by internet users and do not establish minimum contacts with the state. In between are interactive websites that allow the exchange of information being between the two extremes and may support the exercise of personal jurisdiction depending on the nature and continuity of the contacts; see *Wright & Miller*, 4A Fed. Prac. & Proc. Civ. § 1073 (4th ed. 2021) (treating *Zippo* as perhaps the most influential decision regarding internet personal jurisdiction).

⁹⁹ See *U.S. v. Cohen*, 260 F.3d. 68, 76 (2d Cir. 2001):

We need not guess whether the provisions of [18 U.S.C.] § 1084 apply to Cohen’s conduct because it is clear that they do. First, account-wagering is wagering nonetheless; a customer requests a particular bet with WSE by telephone or internet and WSE accepts that bet. WSE’s requirement that its customers maintain fully-funded accounts does not obscure that fact. Second, Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information. Cohen subsequently received such transmissions from customers, and, in turn, sent such transmissions back to those customers in various forms, including in the form of acceptances and confirmations. No matter what spin he puts on “transmission,” his conduct violated the statute.

brick-and-mortar establishments, which is consistent with the purpose of the Gambling Control Act.¹⁰⁰

Beyond the data packets, there remains no meaningful argument that the hypothetical online poker game is being played “in the state” unless one focuses only on the actions of Player, which as noted earlier, seems inadequate.¹⁰¹ The Site’s physical facility is in Costa Rica and the means by which the data packets are transmitted (routers) are decentralized and have no single fixed position.¹⁰² This is the antithesis of being somewhere; yet, being somewhere is a necessary predicate to being “in the state.”

V. CONCLUSION: INTERNET POKER PROBABLY IS LEGAL IN CALIFORNIA, BUT DO NOT BET ON IT!

At the present time, there is no California state statute that addresses the playing of poker other than Penal Code section 337j.¹⁰³ No California state statute criminalizes or declares unlawful the playing of poker in California.¹⁰⁴ Penal Code section 337j requires those who offer the game of poker “in this state” to obtain and maintain a license from the California Gambling Commission. However, it is difficult to fit online poker within the actual requirements of section 337j such that operators of a “controlled game” played online would be required to obtain a license from the California Gambling Commission.¹⁰⁵ This is important because section 337j does not criminalize the playing of poker; it criminalizes the playing of a “controlled game” without a license when a license is required. However, it does not appear that a license is needed to play online poker in California when the operator of the online poker platform is not “in this state,” as would be the case with an out-of-state online operation.

¹⁰⁰ CAL. PEN. CODE § 337(j).

¹⁰¹ See *supra* notes 80–81 and accompanying text.

¹⁰² Blum, *supra* note 95, at 229–30 (defining a “data exchange” as a place where information on the internet is routed and scattered across the United States); *id.* at 109 (noting that data storage sites are likewise scattered and decentralized. A transmission of data packets between internet users may or may not follow the same path over the course of time and separate transmissions).

¹⁰³ 1991 Cal. Legis. Serv. Ch. 71; Ex. Parte Meyer, 40 P. 953, 954 (Cal. 1985).

¹⁰⁴ Ex. Parte Meyer, 40 P. 953, 954 (Cal. 1985) (noting that poker may be made illegal by local ordinance); 2 Opn. Atty. Gen., *supra* note 34.

¹⁰⁵ CAL. PEN. CODE § 337j(e)(1), *supra* note 64 (stating that commercial poker is a “controlled game”).