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PROHIBITIVE FAILURE: THE DEMISE OF THE BAN ON SPORTS BETTING

John T. Holden *

ABSTRACT

On May 14, 2018, the Supreme Court of the United States struck down the federal prohibition on sports gambling. The sweeping opinion, authored by Justice Alito, ended more than a twenty-five-year-old policy that kept states from offering sports gambling, which confined sports betting almost entirely to illegal underground markets. Indeed, the sports betting prohibition is largely responsible for the growth of the illegal sports gambling market, which is now one of America's twenty largest industries. The challenge to the federal Professional and Amateur Sports Protection Act was initially launched in 2012 when former U.S. Attorney and New Jersey Governor, Chris Christie, signed a bill licensing sports betting at New Jersey casinos and racetracks. Almost six years later, Governor Philip Murphy would see New Jersey prevail at the Supreme Court.

The Supreme Court decision, holding that the Professional and Amateur Sports Protection Act was unconstitutional because of its commandeering of state legislative bodies, was an impactful decision bound to have implications across a variety of topics, ranging from state legalization of marijuana to so-called sanctuary cities. This article explores the origins of the Professional and Amateur Sports Protection Act by detailing the political conditions that gave rise to the statute and then examines the practicalities of the sports betting prohibition. In the second section, this article discusses the demise of the prohibition and its defeat at the Supreme Court. In section three, this article elucidates the remaining obstacles to an expansion of sports betting at the state and federal level. In section four, this article recommends several provisions that would serve the interests of all in

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new legal markets and concludes with a brief discussion of the broader implications of the fall of the prohibition.

INTRODUCTION

On May 14, 2018, the Supreme Court struck a fatal blow to the federal government's sports betting prohibition.¹ The decision, authored by Justice Alito, ended the existence of the Professional and Amateur Sports Protection Act (PASPA), which had, up to that point in time, frozen sports betting laws in place for a little more than twenty-five years.² Some commentators had suggested that the Supreme Court would avoid the constitutional questions raised by the case and attempt to dispose of the matter on statutory grounds to avoid the complex quagmire of addressing the anti-commandeering doctrine and attempting to define the precise scope and bounds of federal power.³ Alas, what happened was not the surgical approach some had anticipated; rather, the Supreme Court performed surgery with all the precision of a chainsaw, ruling that PASPA was unconstitutional and could not be saved by simply severing the

1. See generally *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

2. See generally Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 U. NEV. L.V. GAMING L.J. 281 (2011) (explaining that PASPA limited states' abilities to legalize, regulate, and tax sports gambling).

3. Daniel Wallach, *How the Supreme Court Could Hand a Win to New Jersey and Sports Betting*, FORBES (Dec. 11, 2017, 7:00 AM), <http://www.forbes.com/sites/danielwallach/2017/12/11/supreme-court-ncaa-christie-nj-betting> [<https://perma.cc/XUB4-JSJK>] (“One way for the Supreme Court to resolve this conundrum—in keeping with the [C]ourt’s longstanding preference for interpreting statutes in a manner that would avoid ‘constitutional difficulties’—would be to decide the case on the purely statutory grounds suggested by Justices Gorsuch and Sotomayor. Under this approach, the [C]ourt could sidestep the severability quagmire and conclude simply that New Jersey’s partial repeal law does not rise to the level of an authorization under PASPA.”). Others have suggested that the anti-commandeering doctrine “has no basis in the text or history of the [Constitution].” Steven Schwinn, *Symposium: It’s Time to Abandon Anti-Commandeering (but Don’t Count on This Supreme Court to Do It)*, SCOTUSBLOG (Aug. 17, 2017, 10:44 AM), <http://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court> [<https://perma.cc/9SB3-QYBD>] (arguing that the Constitution does not support the anti-commandeering doctrine and actually advocates the opposite, and pointing out that “[f]or example, the supremacy clause makes the Constitution and federal laws supreme over state constitutions and state laws; it also binds state judges to the Constitution and federal law. The oath clause requires state legislators and state executive officers to swear an oath to support the federal Constitution, but doesn’t reciprocally require federal officers to swear an oath to support the states.”).

constitutionally offensive language.⁴ Although the majority's decision was sweeping, Justice Thomas argued in a concurring opinion that not only does PASPA exceed congressional authority, it also raises doubts as to a broader question of federalism, namely Congress's ability to regulate sports gambling that does not cross state lines.⁵ Like many other prohibitions that came before it, the prohibition on sports betting was an abject failure.⁶

The prohibition on alcohol, which Congress passed just before the end of 1917 and ratified on January 16, 1919, was likely America's most committed and prominent prohibition.⁷ The push for prohibition began decades earlier, led by Hillsboro, Ohio housewife Eliza Thompson, who began a nationwide crusade against alcohol.⁸ The calls for prohibition began to mount, and by the early twentieth century the Anti-Saloon League had gained sufficient power to become a force to be reckoned with.⁹ By 1916, the Anti-Saloon League had used its influence to "effectively seize[] control of both the House and Senate," becoming the driving force behind what would motivate Congress to pass what would become the Eighteenth Amendment to the United States Constitution, banning the sale of intoxicating beverages in the United States.¹⁰ The economic drivers of prohibition were based on the idea that there would be a substitution effect if alcohol was banned.¹¹ The idea put forth by legislators and advocates was that prohibition would shift spending from alcohol to items such as life insurance, food, shelter, and

4. *Murphy*, 138 S. Ct. at 1482. The Supreme Court held that to find the whole statute unconstitutional, as opposed to individual sections, it was necessary to show "[Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Id.* (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

5. *Id.* at 1485 (Thomas, J., concurring).

6. See John T. Holden, *Sports Betting and Booze: A Tale of Two Prohibitions*, SPORTS HANDLE (May 22, 2018, 10:00 AM), <https://sportshandle.com/sports-betting-and-booze-a-tale-of-two-prohibitions> [<https://perma.cc/34J4-3CC5>].

7. *Id.* (describing the histories and impacts of the United States's experiment with alcohol prohibition and the sports gambling prohibition of PASPA and drawing parallels between the two prohibitions).

8. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 13–14 (2010).

9. *Id.* at 129.

10. *Id.* at 131.

11. MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 58 (1991).

savings.¹² The alcohol prohibition was a substantial failure.¹³ Not only did the practice not result in additional spending on food and shelter, but also beer consumption increased during prohibition, and the consumption levels of pure alcohol remained relatively stable throughout the era.¹⁴ The Amendment's prohibition failed miserably in achieving its purpose because it simply forced bootleggers to improvise, often creating concoctions with far more alcohol than typical alcoholic beverages, rendering them much more dangerous.¹⁵ The prohibition against alcohol ended on December 5, 1933, with the ratification of the Twenty First Amendment.¹⁶ Prohibition lasted little more than a decade cost an estimated \$11 billion in lost tax revenues as a result of prohibited liquor being sold outside the realm of taxation.¹⁷ The lost tax revenue was compounded by the \$300 million spent on enforcement of Prohibition.¹⁸ The failure of the prohibition of alcohol would manifest yet again in the federal government's "War on Drugs."

The War on Drugs' most controversial target has been marijuana,¹⁹ especially since the rise of the medical marijuana industry, which began with California passing Proposition 215 in 1996.²⁰ Marijuana in the United States has been illegal at the federal level since the passage of the Marijuana Tax Act in 1937.²¹ Although illegal since before World War II, large expenditures on policing the drug did not escalate until the late 1960s.²² As enforcement expenditures rose, so

12. *Id.* at 72.

13. *Id.* at 127.

14. *Id.* at 102.

15. *Id.* at 103–05.

16. U.S. CONST. amend. XXI.

17. Holden, *supra* note 6.

18. *Id.*

19. Ashley C. Bradford & W. David Bradford, *Why Jeff Sessions Is Going to Lose His War Against Cannabis*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/01/why-jeff-sessions-is-going-to-lose-his-war-against-cannabis/?noredirect=on&utm_term=.0262c9e7894a [https://perma.cc/QYN3-F9UK].

20. *State Medical Marijuana Laws*, NAT'L CONFERENCE STATE LEGISLATURES (Oct. 17, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/9GMS-CBDQ].

21. THORNTON, *supra* note 11, at 105.

22. *Id.* at 108.

did the potency of the drug; like during the alcohol prohibition era, providers sought to increase the potency so that there was less drug needed to achieve the same result, effectively maintaining a similar level of risk.²³ The marijuana prohibition, however, is slowly being dismantled on a state-by-state basis.²⁴ Indeed, there has been an ongoing litigious debate between the federal government and state lawmakers over who should bear the cost of federal marijuana enforcement in states that have repealed their prohibitions.²⁵ The debate over state power to legalize marijuana for both medicinal and recreational purposes continues, but the federal government does not yet appear ready to totally abandon the enforcement of its own criminal laws against cannabis growers and sellers, despite a stated policy shift in enforcement priorities.²⁶ Unlike the prohibition against alcohol, the federal marijuana prohibition appears to be eroding by slow decay, as opposed to the democratic death of its predecessor.²⁷ Sports betting, however, is the most recent prohibition to meet its end, and, unlike marijuana and alcohol, the courts ended this prohibition.²⁸

23. *Id.* at 89, 99.

24. See Kevin Litman-Navarro, *Marijuana Legalization 2018: A State-by-State Guide to Legal Weed*, INVERSE (Apr. 18, 2018), <http://www.inverse.com/article/43850-marijuana-legal-weed-states-in-2018> [https://perma.cc/PM3Y-8YPD]. By 2018, thirty states had legalized medical marijuana. German Lopez, *Marijuana Is Legal for Medical Purposes in 30 States*, VOX, <http://www.vox.com/cards/marijuana-legalization/what-is-medical-marijuana> [https://perma.cc/D3XE-TK8R] (last updated Aug. 20, 2018, 12:07 PM). In addition to the thirty states that have legalized medical marijuana, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington, and the District of Columbia have all legalized marijuana for recreational use. Litman-Navarro, *supra*.

25. *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (“That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state.”).

26. See Evan Halper, *Trump Administration Abandons Crackdown on Legal Marijuana*, L.A. TIMES (Apr. 13, 2018, 3:25 PM), <http://www.latimes.com/politics/la-na-pol-marijuana-trump-20180413-story.html> [https://perma.cc/Z4DZ-RTX9]. The April 2018 announcement from the Trump Administration reversed a January 2018 Justice Department memorandum that rescinded guidance documents issued by the Obama Administration regarding lax prosecutorial policies towards enforcing criminal laws insofar as they related to marijuana in states that had legalized the drug. Memorandum from Jefferson B. Sessions, III, Att’y Gen., on Marijuana Enforcement to All U.S. Att’y’s (Jan. 4, 2018), <http://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/7NAS-KJ96].

27. Halper, *supra* note 26.

28. *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018).

The modern prohibition against sports betting dates to the early 1950s²⁹ and the emergence of the Special Committee on Organized Crime in Interstate Commerce's (Kefauver Committee) final report, which noted that organized crime figures used wire transmissions to convey bookmaking information across the country.³⁰ The primary fixation of early modern sports gambling laws was less on sports gambling itself as a vice, but on sports gambling as a means of revenue generation for organized crime.³¹ Attorney General Robert F. Kennedy had estimated that organized crime's illegal gambling business surpassed a value of \$7 billion in 1961.³² Kennedy made clear that it was not the intent of the federal government to target all

29. S. REP. NO. 82-725, at 13 (1951). There were federal and state prohibitions on sports wagering prior to the 1950s and 1960s, but many of these statutes were never modernized to address contemporary criminal organizations. *Id.*

30. *Special Committee on Organized Crime in Interstate Commerce*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Kefauver.htm> [<https://perma.cc/EX7E-5XBK>]. Senate Resolution 202 established the Special Committee on Organized Crime in Interstate Commerce. *Id.* The Committee, led by Representative Estes Kefauver of Tennessee, launched a fourteen-city tour of the country over fifteen months. *Id.* The Committee held televised hearings, which included testimony from organized crime figures such as Frank Costello. *Id.* This marked the first time that many Americans had ever seen the faces or heard mafia members speak. *Id.* The Kefauver Committee, in its final report, produced a recommendation for passage of what would become the Federal Wire Act, stating:

S. 1564 reflects the committee's recognition that the ultimate effects of S. 1563 may be delayed by hearings, appeals and court tests, the initial weakness of any administrative device, and it therefore strikes straight at the source of the bookmakers' information with a narrow criminal prohibition. The proprietors of almost all legitimate race tracks and sports events have long been fighting the wire-service operators, by denying them the right to send out their bulletins on betting odds, scratches, times, results, etc. Consequently the operators have been driven to elaborate subterfuge, sometimes stealing the information from blinds outside the track or enclosure, sometimes using wig-wag signals, semaphores, special codes, and even walkie-talkie radio equipment from inside. S. 1564 would make it a Federal crime for any person to transmit in interstate commerce gambling information "obtained surreptitiously or through stealth and without the permission of" the proprietor of the event, when such information is intended to be used for illegal gambling purposes. It is believed that this measure would be effective at once to stop the flow of such information, and thus to cripple the wire services before they are brought completely in hand by regulation under the FCC.

S. REP. NO. 82-725, *supra* note 29, at 89.

31. H.R. REP. NO. 87-967, at 2631 (1961).

32. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearing on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, and S. 1665 Before the S. Comm. on the Judiciary, 87th Cong. 5* (1961) ("Gambling in the United States, we estimate, involves about 70,000 persons and a gross volume of \$7 billion annually.").

sports bettors; to the contrary, the bill was only intended to target professional bettors. The Attorney General sought to avoid a situation where a bettor could escape the scope of the statute by claiming “I just like to bet. I just make social wagers.”³³ The Wire Act, which would become law on September 13, 1961, would serve as the lone federal statute to explicitly address bets and wagers on sporting events until the passage of PASPA in 1992.³⁴

Among the pushes for the enactment of PASPA, scholars cite continued pressure to reinforce existing laws protecting against organized crime and the potential for an increase in match-fixing in a world where sports betting was not prohibited.³⁵ By 1989, it was estimated that more than \$29.5 billion was being wagered illegally, and federal lawmakers and sports leagues began to express concerns that states would seek to recapture some of the illegal market share by legalizing sports gambling themselves.³⁶ Senator Bill Bradley wrote a law review article in which he detailed that “one million of the eight million compulsive gamblers in this country are teenagers,” and their activity of choice is sports betting.³⁷ The argument that state-sanctioned sports betting would exacerbate gambling addictions was prominent in the early 1990s.³⁸ These fears, along with fears of

33. JOHN L. MCCLELLAN, PROHIBITING TRANSMISSION OF BETS BY WIRE COMMUNICATIONS, S. REP. NO. 588, at 3 (1st Sess. 1961). Attorney General Robert F. Kennedy stated that the bill “is not interested in the casual dissemination of information with respect to football, baseball or other sporting events between acquaintances.” *Id.*

34. Interstate Wire Act of 1961, 18 U.S.C. § 1084(a) (2018) (“Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.”). During the years after the Act’s passage, Congress passed other pieces of antigambling legislation, which certainly impacted sports wagering involving human participants, but no bill specifically addressed the activity. *See, e.g.*, Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001–07; Organized Crime Control Act of 1970, 18 U.S.C. § 1955; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–09, 2711–21 (2018); 25 U.S.C. § 2710 (1994) (*invalidated by Seminole Tribe of Fla. v. Florida*, 517 U.S. § 44 (1996)).

35. James H. Frey, *Gambling on Sport: Policy Issues*, 8 J. GAMBLING STUD. 351, 351–52 (1992).

36. *Id.* at 353.

37. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 7 (1992).

38. *Id.*

rising societal costs, were the locomotives driving the crusade of Congress against state-sanctioned sports betting.³⁹

PASPA was a disaster for more than twenty-five years.⁴⁰ The statute did not prohibit sports wagering; instead, it prohibited the state sanctioning of sports wagering in states that did not already offer sports betting prior to its passage.⁴¹ This policy decision effectively conveyed a monopoly to Nevada and ensured that illegal bookmakers did not have to fear losing their clients to the legal market.⁴² PASPA served as an incubator for illegal sports gambling with the internet acting as fertilizer.⁴³ By 2017, estimates placed the size of the illegal sports betting market at \$150 billion annually.⁴⁴ PASPA was unsuccessful and, as the Supreme Court declared,

39. *Id.* at 6.

40. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

41. 28 U.S.C. §§ 3701–04 (2012), *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

42. *See* Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 4 (2017). Although PASPA is frequently discussed as exempting Nevada, Delaware, Oregon, and Montana, all of which offered some forms of sports wagering products, only Nevada offered full-scale sports wagering. *Id.* at 34. Additionally, there are at least a handful of other states that had laws permitting limited forms of sports betting. *See* Nebraska County and City Lottery Act, NEB. REV. STAT. §§ 9-601, -602 (2018) (“The purpose of the [act] is to allow any county, city, or village to conduct a lottery for community betterment purposes. Any lottery conducted by a county, city, or village shall be conducted only by those methods and under those circumstances prescribed in the act. No other form or method shall be authorized or allowed.”); *see also* WASH. REV. CODE § 9.46.0335 (2018) (“The legislature hereby authorizes any person, association, or organization to conduct sports pools without a license to do so from the commission but only when the outcome of which is dependent upon the score, or scores, of a certain athletic contest and which is conducted only in the following manner: (1) A board or piece of paper is divided into one hundred equal squares, each of which constitutes a chance to win in the sports pool and each of which is offered directly to prospective contestants at one dollar or less; (2) The purchaser of each chance or square signs his or her name on the face of each square or chance he or she purchases; and (3) At some time not later than prior to the start of the subject athletic contest the pool is closed and no further chances in the pool are sold; (4) After the pool is closed a prospective score is assigned by random drawing to each square; (5) All money paid by entrants to enter the pool less taxes is paid out as the prize or prizes to those persons holding squares assigned the winning score or scores from the subject athletic contest; (6) The sports pool board is available for inspection by any person purchasing a chance thereon, the commission, or by any law enforcement agency upon demand at all times prior to the payment of the prize; (7) The person or organization conducting the pool is conducting no other sports pool on the same athletic event; and (8) The sports pool conforms to any rules and regulations of the commission applicable thereto.”).

43. Rodenberg & Holden, *supra* note 42, at 34.

44. AM. SPORTS BETTING COAL., *The Sports Betting Opportunity: New Research Shows Legalized Sports Betting Will Generate Economic Growth, American Jobs and Tax Revenues*, AM. GAMING ASS’N (Aug. 31, 2017), https://www.americangaming.org/sites/default/files/sidebar_file/8.31.17.Oxford.pdf [<https://perma.cc/L6GZ-UHKN>].

unconstitutional.⁴⁵ Although PASPA no longer exists, widespread legal sports betting continues to face a number of obstacles.

This article contains four parts. Part I examines the emergence of PASPA and the evolution of the statute in the early 1990s. Part II discusses the roughly twenty-five-year history of the statute and the Supreme Court's recent decision in *Murphy v. NCAA*, which brought an abrupt end to the statute's existence. In Part III, this article discusses what obstacles remain in the way of widespread wagering, including challenges at the federal, state, and private operator levels. Finally, in Part IV, this article provides some recommendations for best practices in the new legal market.

I. The Rise of PASPA

The conception of PASPA was not as a criminal law or civil prohibition, but instead a proposal to amend the Lanham Act.⁴⁶ Professional sports leagues drove the campaign to stop the spread of state-sanctioned sports gambling and argued that federal legislation was necessary to protect the integrity of professional and amateur sporting events.⁴⁷ The sports leagues professed an interest in preserving the innocence of American youth and the integrity of the game.⁴⁸ The concerns about the integrity of the game were overshadowed by concerns about purported intellectual property

45. *Murphy*, 138 S. Ct. at 1479.

46. *Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 37 (1990) [hereinafter *Initial PASPA Hearing*] (statement of Sen. Harry Reid) (recording the title of S. 1772 as “[a] bill to amend the Lanham Trademark Act of 1946 to protect the service marks of professional sports organizations from misappropriation by State lotteries”).

47. Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball's Continued Crusade Against Sports Gambling*, 2 SETON HALL J. SPORT L. 19, 21 (1992) (“In addition to aggressively and jointly lobbying Congress, in conjunction with the other professional and amateur sports organizations, Major League Baseball (MLB) has lodged a concerted grass-roots campaign against the legalization of state-sanctioned and state-authorized sports gambling enterprises. This campaign is aimed at preserving the integrity of our sports contests, preserving the image of its athletes as role models for our nation's youth, and preventing the deleterious effects that sports gambling would have upon the youth of America.”) (citing *Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law*, 102d Cong. 165 (1991)).

48. *Id.* at 24.

rights in sporting events raised during the initial hearings on the legislation that would become PASPA.⁴⁹

A. 1990: Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks

The first hearing on the legislation that would become PASPA took place on June 26, 1991, before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks.⁵⁰ Senator Dennis DeConcini of Arizona, who called for the gathering, opened the hearing by stating: “The Sports Service Protection Act is a very important piece of legislation”⁵¹ At the time, numerous states were considering offering sports lotteries.⁵² The perception in Congress was that the professional sports leagues had worked hard to portray a wholesome image to fans and that sports betting would be deleterious to this goodwill.⁵³ Further driving home the perceived need for the legislation in his opening statement, Senator DeConcini stated that legalized sports betting would result in an overall increase in wagering activity.⁵⁴

49. Ryan M. Rodenberg, Anastasios Kaburakis & John T. Holden, “Whose” Game Is It? *Sports-Wagering and Intellectual Property*, 60 VILL. L. REV. TOLLE LEGE 1, 2–6 (2014). Unlike sports broadcasts, which can be copyrighted, sporting events themselves enjoy no such protection. *Id.* at 4; see also Nat’l Basketball Ass’n v. Motorola, 105 F.3d 841, 847 (2d Cir. 1997) (“We believe that the lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed, as described in the next subsection of this opinion, Congress found it necessary to extend such protection to recorded broadcasts of live events. The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.”); Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079, at *26 (“[W]hen a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.”).

50. *Initial PASPA Hearing*, *supra* note 46.

51. *Id.* at 1 (statement of Sen. Dennis DeConcini).

52. *Id.* Sports lotteries are effectively pools where players bet on the outcomes of sporting events, and, although often done via pari-mutuel wagering, this is not always the case. *Sports Lottery*, CASINOPEdia, <http://www.casinopedia.org/terms/s/sports-lottery> [<https://perma.cc/C9GY-7QLS>] (last visited Oct. 11, 2018).

53. See *Initial PASPA Hearing*, *supra* note 46, at 2 (statement of Sen. Dennis DeConcini).

54. *Id.* This position is one that persists, though others have argued that there may instead be a substitution effect, as opposed to a net increase, whereby bettors either move to legal markets from

Senator Richard Bryan of Nevada followed the testimony of Senator DeConcini and testified that he supported the proposed legislation, provided that the proposed regulations did not affect Nevada's sports betting regulatory structure.⁵⁵ This concern for Nevada's sports betting monopoly would become realized when Representative John Bryant from the House of Representatives would testify, immediately following Senator Bryan, that a companion House bill would inadvertently criminalize gambling in Nevada.⁵⁶ The Representative from Texas stated that "wherever gambling becomes a principal concern, sports have a tendency to become corrupt."⁵⁷ This theme was echoed when Reggie Williams, a former National Football League (NFL) linebacker and Cincinnati city councilman, testified that "[s]tate-sponsored gambling really would make a mockery of an athlete's sacrifices and commitments."⁵⁸ Williams stated that if legalized betting existed, he would be suspicious of a teammate who smiled after losing a game on the field.⁵⁹ Legalized sports betting would mean that athletes could no longer be role models and children would collect lottery tickets instead of baseball cards.⁶⁰ Although not articulated during his testimony that he was appearing on behalf of the NFL, Williams later responded to additional questions on NFL letterhead, stating that it was his belief that legalized betting might increase the likelihood of games being fixed.⁶¹

illegal markets or bettors choose to wager on sports versus other gambling activities such as horse racing. See Michael Baumann, *The Downsides of Legalized Sports Gambling*, RINGER (May 15, 2018, 10:56 AM), <http://www.theringer.com/sports/2018/5/15/17355544/downsides-sports-gambling-legalization-ncaa-marijuana> [https://perma.cc/F93E-VVSK].

55. *Initial PASPA Hearing*, *supra* note 46, at 13 (statement of Sen. Richard H. Bryan). Later, Senator Bryan played an instrumental role in the exemption of fantasy sports from the Unlawful Internet Gambling Enforcement Act, which led to the rise of the daily fantasy sports industry, one of the indicators of a societal shift in terms of attitudes towards sports gambling. John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97, 103, 109 (2018).

56. *Initial PASPA Hearing*, *supra* note 46, at 14 (statement of Sen. John Bryant).

57. *Id.* at 16.

58. *Id.* at 23 (statement of Reggie Williams, Former Linebacker, Cincinnati Bengals).

59. *Id.* at 24.

60. *Id.*

61. *Id.* at 29.

Following Williams's testimony, Jeff Ballard, a pitcher for the Baltimore Orioles, spoke.⁶² Ballard testified that state-sponsored gambling might lead to "shaving runs or even fixing the outcome of the games."⁶³ Both Ballard and Williams informed the Subcommittee that legalized sports betting may cause threats to the integrity of the games they played, but Ballard specifically noted that in all his years of being a professional athlete he had not heard any talk of the Las Vegas point spreads in the locker room.⁶⁴

NFL Commissioner Paul Tagliabue testified that state-sanctioned sports gambling sends a negative message to the youth of the country.⁶⁵ Tagliabue asserted that state-sponsored betting games "misappropriated" sports league property, likening it to a state manufacturing Donald Duck or Mickey Mouse dolls.⁶⁶ In response to additional questions submitted by Senator Grassley, Tagliabue asserted that the NFL had never taken legal action against casinos in Nevada that use NFL logos and team names.⁶⁷ The lack of any such

62. *Initial PASPA Hearing*, *supra* note 46, at 32 (statement of Jeff Ballard, Pitcher, Baltimore Orioles).

63. *Id.*

64. *Id.* at 24, 33 (statements of Reggie Williams, Former Linebacker, Cincinnati Bengals, and Jeff Ballard, Pitcher, Baltimore Orioles).

65. *Id.* at 39 (statement of Paul Tagliabue, Comm'r, National Football League).

66. *Id.* The suggestion that sports betting misappropriates sports leagues' property is a theme that has recently reemerged. See Adam Candee, *NBA's Adam Silver on Sports Betting: 'The Integrity Fee Is Something We Are Entitled to,'* LEGAL SPORTS REPORT (June 1, 2018, 2:40 PM), <http://www.legalsportsreport.com/20904/nba-commissioner-adam-silver-talks-sports-betting> [<https://perma.cc/6D77-Y8SH>] (statement of Adam Silver, Comm'r, National Basketball Association) ("We think the integrity fee is something that we are entitled to, one, because we have the additional costs and also—something that as I've said before, we're not hiding from—that we also think we are due a royalty. And that if the intellectual property that is created by this league—and I know all the leagues support this position, but in the case of the NBA, we will spend roughly \$7.5 billion creating NBA basketball this season."); David Waldstein, *Rob Manfred Addresses the Shift, Gambling and That Viral Terry Collins Video*, N.Y. TIMES (June 14, 2018), <http://www.nytimes.com/2018/06/14/sports/baseball/rob-manfred-shift-gambling-expansion.html> [<https://perma.cc/V84D-QTL2>] (quoting Rob Manfred, Comm'r, Major League Baseball) ("From our perspective, we see revenue opportunities, but most important, we see it as an opportunity for fan engagement," [Manfred] said, adding that baseball wants it done in a way that, "first and foremost protects the integrity of the game—but, equally important, protects [Major League Baseball's] intellectual property.").

67. *Initial PASPA Hearing*, *supra* note 46, at 55 (statement of Paul Tagliabue, Comm'r, National Football League).

legal action likely suggests that the NFL was fishing for an intellectual property grant from Congress.⁶⁸

Major League Baseball (MLB) Deputy Commissioner Stephen Greenberg reiterated the other sports league representatives' objections, suggesting that increases in state-sponsored sports gambling would increase the likelihood that games will be subjected to attempted manipulation.⁶⁹ Richard Hilliard, the Director of Enforcement for the National Collegiate Athletic Association (NCAA), testified that the NCAA would support any legislative initiative to limit opportunities for individuals to gamble on the outcome of NCAA games.⁷⁰ Despite Hilliard's endorsement, he noted that the NCAA possesses no "hard" evidence that organized crime has attempted to infiltrate college basketball through the sale of drugs, which could leave athletes vulnerable to extortion.⁷¹ Gary Bettman, who appeared on behalf of the National Basketball Association (NBA), testified that "[b]etting creates point spread fans," who are fans that no longer care about their team, but instead are cheering to win a bet.⁷² Bettman also suggested that "[t]he Federal antilottery statute, in section 1307, seems to expressly prohibit sports betting."⁷³ However, Bettman conceded that the courts had failed to agree with his interpretation.⁷⁴ Senator Ted Kennedy asked Bettman whether it was true that NBA teams have accepted millions of dollars in advertising fees from state-sanctioned lotteries. In response, Bettman maintained that the NBA's position was that

68. See Lorenzo Reyes, *Roger Goodell, NFL Ask Congress for 'Uniform Standards' on Sports Betting*, USA TODAY (May 21, 2018, 12:04 PM), <https://www.usatoday.com/story/sports/nfl/2018/05/21/nfl-betting-gambling-congress-roger-goodell/628697002/> [<https://perma.cc/X6QS-7JS6>]; see also Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L., TECH. & ARTS 63, 86 (2015).

69. See *Initial PASPA Hearing*, *supra* note 46, at 62–63 (statement of Stephen Greenberg, Deputy Director, Major League Baseball).

70. *Id.* at 70 (statement of Richard Hilliard, Director of Enforcement, National Collegiate Athletic Association).

71. *Id.* at 73.

72. *Id.* at 76 (statement of Gary Bettman, Senior Vice President & General Counsel, National Basketball Association).

73. *Id.* at 77.

74. *Id.*

there is a clear distinction between accepting money from lotteries with traditional lottery games and approving of sports wagering.⁷⁵

Harvard law professor Arthur Miller appeared on behalf of the NFL to testify before the Senate Subcommittee.⁷⁶ Miller specifically focused his testimony on what he described as the misappropriation of “good will and values.”⁷⁷ Professor Miller informed the committee that state-sponsored lotteries would take the values that were crafted by the sports leagues and would alter them.⁷⁸ Miller further asserted that the current state of the law was inadequate to protect the leagues under the existing Lanham Act.⁷⁹ According to Miller, there would be an insufficient remedy to the sports leagues with the legislation that was the subject of the hearing despite the existing protections of the Lanham Act.⁸⁰

Professor Miller advocated for changes to intellectual property laws in favor of the uniqueness of the sports leagues’ products, but Garo Partoyan of the United States Trademark Association testified that the organization opposed the new proposed regulations because they would tarnish the uniformity, balance, and “essential fairness” of the Lanham Act.⁸¹ Partoyan detailed numerous alternatives that would not result in an alteration and special privileges being afforded under the proposed legislation.⁸² Partoyan’s message may have resonated with Congress, as the 1990 hearing was the last time legislators proposed amendments to the Lanham Act in regard to sports betting.

By September 1990, the efforts to stop the expansion of state-sponsored sports lotteries had transitioned from an intellectual

75. *Initial PASPA Hearing*, *supra* note 46, at 92.

76. *Id.* at 251 (statement of Arthur R. Miller, Bruce Bromley Professor of Law, Harvard Law School).

77. *Id.* at 252.

78. *Id.*

79. *Id.*

80. *Id.* at 253. Indeed, Miller’s argument that under existing interpretations of the Lanham Act the statute was insufficient to provide protections to the sports leagues is perhaps ironic, given sports leagues’ current assertions that they already possess an enforceable intellectual property right. *See Initial PASPA Hearing*, *supra* note 46, at 253.

81. *Id.* at 263 (statement of Garo Partoyan, President, United States Trademark Association).

82. *Id.* at 264.

property issue to a criminal law issue with a proposed amendment as part of the Comprehensive Crime Control Act of 1990.⁸³ The first of three hearings had several key themes emerge, including sports league executives seeking to have Congress bestow a right in the league's games to them.⁸⁴ The testimony of sports league executives was also one of the first occasions that where organization leaders began to push for a right to control how facts associated with how their games were used by third-parties.⁸⁵ This theme remains pervasive more than two decades later.

B. 1991: Prohibiting State-Sanctioned Sports Gambling

The second hearing on legislation that became PASPA took place before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on June 26, 1991.⁸⁶ The hearing included testimony on two separate bills, the first was titled: "A Bill to Amend the Lanham Trademark Act of 1946 to Protect the Service Marks of Professional and Amateur Sports Organizations from Misappropriation by State Lotteries"; and the second was titled: "A Bill to Prohibit Sports Gambling Under State Law."⁸⁷ The two bills were a transition from the hearing in the previous year because, for the first time, Congress recognized the challenge in addressing sports gambling proliferation and managing the allocation of resources to enforce a new gambling statute.⁸⁸

83. H.R. REP. NO. 101-681, pt. 1, at 192 (1990) ("[A] [s]tate-sponsored lottery based on sporting events will undermine public confidence in the integrity of the sports involved, place undue pressure on players and coaches, and communicate negative values about sports to the youth of America. The stamp of approval that government would put upon such a lottery by sponsoring it could encourage a broad section of the population to participate in an activity that is much more than a mere game of chance.")

84. *See id.*

85. *See Sports Betting Integrity Fee*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/integrity-fee> [https://perma.cc/6YZP-YRZC] (last visited Oct. 11, 2018); Brett Smiley, *U.S. Sports Betting in 2018: Timeline of State and Sportsbook Developments*, SPORTS HANDLE (July 2, 2018, 4:30 PM), <https://sportshandle.com/us-sports-betting-in-2018-timeline-of-state-and-sportsbook-developments> [https://perma.cc/KBG6-F75U].

86. *Prohibiting State-Sanctioned Sports Gambling: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 102d Cong. 1 (1991) [hereinafter *Second PASPA Hearing*].

87. *Id.*

88. John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, Commentary, *Occam's Razor and Sports Wagering Law*, HARV. J. SPORTS & ENT. L. ONLINE DIG. 1, 3 (Jan. 25, 2015),

Once again, Senator DeConcini delivered the opening statement in the second PASPA hearing as he had during the first hearing.⁸⁹ DeConcini noted that S. 473, the service mark bill, was the same as was debated in the previous Congress, but S. 474 was described as “a broader approach to the problem of sports gambling and is the byproduct of information provided during last year’s hearing.”⁹⁰ The Arizona senator argued that there were limits to the strategies states utilized to raise money, stating: “I do not believe the answers to budgetary problems should be to increase the number of lottery players or sports bettors.”⁹¹

The first witness to testify in the June 1991 hearing was Senator Bill Bradley of New Jersey.⁹² Bradley, a former NBA player, noted that the \$100 billion sports gambling industry appears attractive to states that are cash-strapped.⁹³ Senator Bradley testified that there were eight million gambling addicts in the United States and one million were teenagers.⁹⁴ Bradley stressed that it was his opinion that legal gambling would likely increase illegal gambling, creating “an atmosphere that invites corruption.”⁹⁵ The hypothesized idea was that legalized gambling was likely to shift the focus of the game from being about the skill of the athletes to being about beating point spreads.⁹⁶ Senator Orrin Hatch of Utah, who testified immediately

<http://www.harvardjlsel.com/2015/01/occams-razor-and-sports-wagering-law> [<https://perma.cc/C47G-YG6V>]. One of PASPA’s unique features was that it enabled professional and amateur sports leagues to enforce the statute on their own. *Id.* Under previous conceptions of property rights, this would appear to be problematic because the leagues have only an indirect connection with the information used by sportsbooks. *Id.*; Anastasios Kaburakis, Ryan M. Rodenberg & John T. Holden, *Inevitable: Sports Gambling, State Regulation, and the Pursuit of Revenue*, 5 HARV. BUS. L. REV. ONLINE 27 at 1, 3 (Jan. 10, 2015).

89. *Second PASPA Hearing*, *supra* note 86, at 1 (statement of Sen. Dennis DeConcini).

90. *Id.*

91. *Id.* at 3.

92. *Id.* at 10. Bradley would later publish a book titled *Values of the Game*, though the book makes no reference to gambling or his crusade for the passage of PASPA. *See* BILL BRADLEY, *VALUES OF THE GAME* (1998).

93. *Second PASPA Hearing*, *supra* note 86, at 10 (statement of Sen. Bill Bradley).

94. *Id.*

95. *Id.*

96. *Id.* at 12.

after Bradley, echoed Bradley's view that legalized gambling would increase the size of the illegal gambling market.⁹⁷

Senator Chuck Grassley of Iowa challenged Senator Bradley, arguing that the professional sports leagues have seemingly acquiesced to gambling on sports using team logos in Nevada's casinos.⁹⁸ Grassley stated that he was "curious" as to why the focus was placed on state-sponsored lotteries when the vast majority of gambling takes place outside of regulated markets.⁹⁹ Grassley's comments were among the few voices questioning the efficacy of the proposed legislation.¹⁰⁰ Grassley's skepticism, however, did not deter the onslaught of war stories from sports league representatives.

Commissioner Tagliabue testified that the NFL strongly endorsed the restrictions proposed in S. 474.¹⁰¹ Tagliabue then informed the Senate Subcommittee that as a seventeen-year-old at summer camp, he recalled players being offered money, and he opined that the money being offered to the youth at summer camp led down a road to point shaving and corruption.¹⁰² Following Tagliabue's testimony, the Commissioner of Baseball, Francis Vincent, testified.¹⁰³ Vincent stated that the office of the Commissioner of Baseball was created as a direct result of the 1919 World Series scandal.¹⁰⁴ Vincent noted that state-sponsored sports gambling runs the risk of undermining the integrity of the sport.¹⁰⁵ Legalized betting would be unlikely to slow illegal gambling because illegal bookmakers allow gamblers to bet on credit.¹⁰⁶ The third in the trifecta of sports league chief executives was NBA Commissioner David Stern, who stressed that state-sanctioned sports gambling would create "point spread fans," or fans who do not care about winning but only whether a team covered the

97. *Id.* at 16 (statement of Sen. Orin Hatch).

98. *Id.* at 17–18 (statement of Sen. Charles Grassley).

99. *Second PASPA Hearing, supra* note 86, at 19 (statement of Sen. Charles Grassley).

100. *Id.*

101. *Id.* at 21 (statement of Paul Tagliabue, Comm'r, National Football League).

102. *Id.* at 22.

103. *Id.* at 37 (statement of Francis T. Vincent, Comm'r of Baseball).

104. *Id.*

105. *Second PASPA Hearing, supra* note 86, at 37.

106. *Id.* (statement of Francis T. Vincent, Comm'r of Baseball).

point spread.¹⁰⁷ The statement submitted by National Hockey League (NHL) General Counsel Gil Stein echoed the sentiment of the three commissioners. Stein noted that the NHL believed legalized gambling would harm the integrity of the game, without providing specifics.¹⁰⁸

Chicago Bears linebacker Mike Singletary made a statement following the testimony of the commissioners.¹⁰⁹ Singletary argued that state-sponsored gambling would create an added stressor on America's youth.¹¹⁰ Singletary also suggested that he might have concerns about teammates playing to win if sports gambling were to be legal across the United States—the implication being that some professional athletes may seek to supplement their income by wagering against their own teams.¹¹¹ Valerie Lorenz of the National Center for Pathological Gaming argued that the creation of new forms of gambling would likely attract new gamblers.¹¹² Lorenz's concern was shared by James A. Smith, the Director of Government Relations for the Christian Life Commission of the Southern Baptist Convention.¹¹³

The second hearing in the evolution of PASPA revealed many themes similar to those in the previous hearing. The proposed legislation was widely supported, with few speaking out in opposition.¹¹⁴ The sports leagues advocated for the bill becoming law, arguing that it was necessary to protect the integrity of the products they sell and that there was an increased risk of corruption of young members of society without it.¹¹⁵ The lone sports-league-affiliated dissenter was former Oakland Raiders defensive end Ben Davidson who testified alongside a representative for the

107. *Id.* at 45 (statement of David J. Stern, Comm'r, National Basketball Association).

108. *Id.* at 59 (statement of Gil Stein, General Counsel, National Hockey League).

109. *Id.* at 66 (statement of Mike Singletary, Middle Linebacker, Chicago Bears).

110. *Id.*

111. *Second PASPA Hearing*, *supra* note 86, at 67.

112. *Id.* at 75 (statement of Valerie C. Lorenz, Ph.D., Director, National Center for Pathological Gambling, Inc.).

113. *Id.* at 91 (statement of James A. Smith, Director of Government Relations, Christian Life Commission of the Southern Baptist Convention).

114. *See id.*

115. *Id.* at 199 (statement of Ben Davidson, Former Defensive End, Oakland Raiders).

Massachusetts State Lottery and stated that state-regulated gambling is the lesser evil in comparison to illegal gambling.¹¹⁶ The *New York Times* covered this second hearing and noted that the legislation was unlikely to pass.¹¹⁷ Before the fourth quarter of 1991, Congress would hold their ultimate hearing on the PASPA legislation.

C. 1991: Professional and Amateur Sports Protection Act

The final congressional hearing on legislation that would become PASPA occurred on September 12, 1991, before the House of Representatives Subcommittee on Economic and Commercial Law.¹¹⁸ Representative Jack Brooks of Texas opened the meeting and expressed that he had observed a growth in the public's fascination with sports wagering.¹¹⁹ Brooks stated that the purpose of the hearing was to consider whether sporting events were too sacred to the American way of life to exclude them as a means of generating revenue for the states.¹²⁰

The House Subcommittee heard from a series of panels. The first panel consisted of Commissioner Tagliabue, Boston Celtics President Arnold "Red" Auerbach, Baltimore Orioles Assistant General Manager Frank Robinson, and Richard Schultz of the NCAA.¹²¹ Tagliabue stated that he objected to the term "lottery" being used in the proposed legislation; instead he wished for it to be replaced with the term "gambling."¹²² Tagliabue testified that when he was in college at Georgetown University, he played in a fixed basketball game at Madison Square Garden.¹²³ He believed that gambling on sports needed to be clearly marked as illegal.¹²⁴ Tagliabue concluded

116. *Id.* at 196.

117. Steven A. Holmes, *League Heads Speak out Against Sports Lotteries*, N.Y. TIMES, June 27, 1991, at B15.

118. See *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law of the Comm. on the Judiciary*, 102d Cong. 1 (1991) [hereinafter *Final PASPA Hearing*].

119. *Id.* (statement of Rep. Jack Brooks).

120. *Id.* at 2.

121. *Id.* at 9.

122. *Id.* at 10 (statement of Paul Tagliabue, Comm'r, National Football League).

123. *Id.*

124. *Final PASPA Hearing*, *supra* note 118, at 10 (statement of Paul Tagliabue, Comm'r, National

that former United States Attorney General Nicholas Katzenbach believed that the proposed statute was directly related to the anticorruption statutes of the 1960s.¹²⁵ Auerbach testified that the NBA was so concerned with the potential manipulation of games that at one point in time players warming up for a game were banned from speaking with anyone not in a team uniform.¹²⁶ Auerbach stated that fans would suspect a fix is in place anytime a player misses a shot.¹²⁷ The NBA's position was that the proposed legislation would preserve "our image throughout the world."¹²⁸

Frank Robinson testified that professional baseball players are humans subject to the same faults as others, and state-sanctioned sports betting may present too much temptation for some players to resist.¹²⁹ Robinson testified that he believed that legalized sports betting would multiply the amount of money already being illegally wagered, and for that reason it required intervention.¹³⁰ Richard Schultz of the NCAA argued that NCAA players are susceptible to match fixers because players can be convinced to win and simply not cover the point spread.¹³¹ Schultz noted that the grandfathering clause in PASPA was supported by the NCAA because sports betting

Football League). It is worth noting that neither PASPA nor any other federal statute makes all forms of sports gambling illegal. Some states even specify that *de minimis* bets are lawful. *See, e.g.*, ALA. CODE § 13A-12-21(b) (2017) ("It is a defense to a prosecution under this section that a person charged with being a player was engaged in a social game in a private place. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof."); KY. REV. STAT. ANN. § 528.010(1) (West 2017) ("A person who gambles at a social game of chance on equal terms with other participants does not otherwise advance gambling activity by performing acts, without remuneration or fee, directed toward the arrangement or facilitation of the game as inviting persons to play, permitting the use of premises therefor and supplying equipment used therein . . .").

125. *Final PASPA Hearing, supra* note 118, at 11 (statement of Paul Tagliabue, Comm'r, National Football League).

126. *Id.* at 32 (statement of Arnold "Red" Auerbach, President, Boston Celtics).

127. *Id.* at 32-33.

128. *Id.* at 33. Auerbach's comments neglect the fact that UK-based sportsbooks have offered wagers on U.S.-based sports since at least the 1940s. *History and the Start of Ladbrokes*, GAMBLING SITES, <https://www.gamblingsites.org/history/ladbrokes> [<https://perma.cc/VZG5-R94K>] (last visited Oct. 11, 2018).

129. *Final PASPA Hearing, supra* note 118, at 38 (statement of Frank Robinson, Assistant General Manager, Baltimore Orioles).

130. *Id.* at 39.

131. *Id.* at 43 (statement of Richard Schultz, Executive Director, National Collegiate Athletic Association).

revenue was already included in the budgets for some states.¹³² Schultz concluded by noting that illegal gambling and legal gambling pose identical problems from the NCAA's perspective.¹³³

Richard May of the National Conference of State Legislatures appeared before the Subcommittee and noted that although his organization does not take a position on sports gambling, the proposed bill preempts states' rights in "conducting their own fiscal affairs."¹³⁴ Thomas O'Heir testified that the positions taken by the sports leagues were hypocritical because they had accepted advertising money from lotteries for years and were untroubled by sports wagering in Nevada for more than fifty years.¹³⁵ C. William Byrne, athletic director at the University of Oregon, also expressed opposition to the proposed House bill, noting that he was aware of football pools that take place among staffers on Capitol Hill.¹³⁶ He further observed that those games are more expensive than the games offered by the Oregon lottery.¹³⁷ Byrne further noted that the money generated by the Oregon lottery has gone back into funding the university.¹³⁸ Byrne's testimony represented one of the few dissenting voices among those who perceivably had interests associated with the sports leagues.¹³⁹

The final hearing regarding PASPA contained similar themes to the previous two hearings. The sports leagues' opposition focused on hypothesized threats to integrity, and opposition to the bill centered on the impingement of states' rights and possibilities of lost revenue.¹⁴⁰ Additionally, those who opposed the bill focused on the apparent hypocrisy of the sports leagues not having previously

132. *Id.* at 44.

133. *Id.*

134. *Id.* at 59 (statement of Richard May, Executive Director, National Conference of State Legislatures).

135. *Final PASPA Hearing*, *supra* note 118, at 68 (statement of Thomas O'Heir).

136. *Id.* at 73 (statement of C. William Byrne, Athletic Director, University of Oregon).

137. *Id.*

138. *Id.* at 74.

139. *Id.* at 73.

140. *Id.* at 158–59 (statement of James J. Davey, Director, Oregon State Lottery, Member, North American Association of State and Provincial Lotteries).

challenged Nevada over the use of league marks.¹⁴¹ In the aftermath of the third hearing on PASPA, the Justice Department weighed in on the proposed statute.

In a letter to Judiciary Chairman Joseph Biden, Assistant Attorney General W. Lee Rawls expressed several concerns with the proposed legislation.¹⁴² Notably, Rawls flagged that the proposed legislation would shift primary responsibility for determination of the legality of gambling activities from the states to the federal government.¹⁴³ The Justice Department also expressed concerns that the proposed legislation contained a number of exemptions that seemingly cannibalized the intentions of lawmakers.¹⁴⁴ However, the most stark realization of the Justice Department's letter was the assertion that "[i]t is particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues."¹⁴⁵ Despite the Justice Department's opposition to the bill, a Senate Report in November 1991 endorsed the proposed bill.¹⁴⁶

The Senate Report noted that, despite opposition to the proposed legislation, the Senate Judiciary Committee favorably recommended the bill.¹⁴⁷ The Senate Report, authored by Senator Biden, stated that federal intervention was necessary because:

Sports gambling is a national problem. The harms it inflicts are felt beyond the borders of those [s]tates that sanction it. The moral erosion it produces cannot be limited

141. *Final PASPA Hearing*, *supra* note 118, at 159 (statement of James J. Davey, Director, Oregon State Lottery, Member, North American Association of State and Provincial Lotteries).

142. See Letter from W. Lee Rawls, Assistant Att'y Gen., Dep't of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Comm. on the Judiciary 1 (Sept. 24, 1991) [hereinafter Rawls Letter].

143. *Id.* ("Generally speaking, it is left to the states to decide whether to permit gambling activities based upon sporting events, although [f]ederal law generally prohibits any use of an interstate facility in connection with such sports-based gambling activities.").

144. *Id.* at 2 ("Also unclear is the purpose of the exception for pari-mutuel racing in S. 474. Pari-mutuel racing is not an amateur sport. Therefore, the bill's prohibition on sports-based lotteries would only apply to pari-mutuel racing—absent the express exception—if pari-mutuel racing were a team sport. Further, the pari-mutuel racing exception raises questions about the application of the proposed legislation to other sports, such as jai alai.").

145. *Id.*

146. S. REP. NO. 102-248, at 1 (1991).

147. *Id.* at 3.

geographically. Once a [s]tate legalizes sports gambling, it will be extremely difficult for other [s]tates to resist the lure. The current pressures in such places as New Jersey and Florida to institute casino-style sports gambling illustrate the point. Without [f]ederal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum.¹⁴⁸

Senator Grassley was the lone dissenting voice in the Senate Report, expressing his concerns that PASPA was a substantial intrusion into states' rights.¹⁴⁹ Grassley's remarks, which fell on deaf ears, concluded by articulating that "[s]ports pool lotteries pose no threat to the integrity of professional sports. Rather, they are a potential new source of substantial nontax revenue for the many important programs funded by [s]tate lotteries."¹⁵⁰ PASPA successfully passed nearly unanimously in the Senate and by voice vote in the House. President George H.W. Bush signed it into law on October 28, 1992.¹⁵¹ The legislation, however, underwent tremendous changes prior to passage.

D. Evolution of the Professional and Amateur Sports Protection Act

The hearings held about PASPA and its predecessors featured a debate on four statutes. The first hearing's subject was S. 1772.¹⁵² S. 1772 was referred to as the "Sports Service Mark Protection Act of 1989."¹⁵³ The bill was to modify the Lanham Act by including a provision banning any state or other jurisdiction in the United States from sponsoring, operating, advertising, or promoting any lottery or gambling scheme that directly or indirectly "uses or exploits . . . a

148. *Id.* at 5.

149. *Id.* at 12.

150. *Id.* at 17.

151. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–04 (2012), *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

152. *See Initial PASPA Hearing*, *supra* note 46, at 6.

153. S. 1772, 101st Cong. § 2 (1990).

service mark owned by a professional sports organization.”¹⁵⁴ Any state-run lottery or gambling scheme that was based on games of a professional sports organization would be deemed to be exploiting said mark.¹⁵⁵ The original version of legislation that would become PASPA contained no exemptions.¹⁵⁶

The second hearing regarding legislation that would become PASPA heard testimony on two separate bills—S. 473 and S. 474. S. 473 was a modified version of S. 1172, containing expanded definitions noting that a state may not use geographical references in place of team names as a means of defeating the intent of the statute. The bill also added applicability to amateur sports organizations.¹⁵⁷ S. 473 also exempted from application gambling or wagering activities that were conducted prior to August 31, 1990, and parimutuel racing.¹⁵⁸ S. 474 was a new bill that prohibited any state from sponsoring, operating, advertising, authorizing, licensing, or promoting any lottery or gambling activity based on a professional or amateur sports organization.¹⁵⁹ The statute also acknowledged that sports gambling threatens the integrity of sports and granted a right of enforcement jointly to the Attorney General of the United States or a professional or amateur sports league “whose games or performances are the subject of a prohibited lottery, sweepstakes, or other betting, gambling, or wagering scheme.”¹⁶⁰ S. 474 also exempted schemes in existence between September 1, 1989, and August 31, 1991, and parimutuel racing.¹⁶¹ The House debated an identical bill to S. 474 in the form of H.R. 74.¹⁶²

PASPA was a non-criminal statute limiting sports betting to several states that had already offered sports gambling prior to the

154. *Id.*

155. *Id.*

156. *Id.*

157. S. 473, 102d Cong. § 2 (1991).

158. *Id.*

159. S. 474, 102d Cong. § 4 (1991).

160. H.R. 74, 102d Cong. § 5 (1991).

161. S. 474 § 6.

162. Compare S. 474 § 1 (“This Act may be referred to as the ‘Professional and Amateur Sports Protection Act’”), with H.R. 74 § 1 (“This Act may be referred to as the ‘Professional and Amateur Sports Protection Act’”).

start of the congressional hearings on the statute.¹⁶³ The final version of PASPA contained an even more extensive exemption period and included a one-year window for New Jersey to add sports gambling in Atlantic City.¹⁶⁴ In addition to the numerous exemptions contained within the final version of PASPA, the statute also contained a unique provision granting professional and amateur sports leagues the authority to enforce the statute—equal to the enforcement authority of the Attorney General.¹⁶⁵

The passage of PASPA was a major milestone for both Congress and the professional sports leagues as it marked the first wager-sports-specific piece of gaming legislation to be passed since the 1961 Wire Act.¹⁶⁶ Although the statute went more than a decade without a significant challenge or even a single reported decision, the Justice Department articulated the statute's downfall from the very beginning.¹⁶⁷ In Section II, this article examines the judicial challenges to PASPA and provides an analysis of the Supreme Court's ruling ending the federal government's prohibition.

II. *The Demise of PASPA*

After PASPA's passage in 1992, the statute was commonly referred to as the Bradley Act, after Senator Bill Bradley's

163. 28 U.S.C. § 3704 (2012), *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

164. *Id.* §§ 3701–04 (2012). Representative Brooks explained that the exemption for New Jersey was justified due to:

New Jersey's unique role in the gaming industry. As most of you know, New Jersey has had a highly regulated, legalized gaming industry in place in Atlantic City since 1978. There is no other State in the country except Nevada which has a comparable, state-regulated gaming industry. New Jersey and Nevada are in direct competition when it come to the gaming industry. Nevada already had legalized sports betting in place in its casinos. New Jersey has been considering this issue, but has not put it on the ballot as yet. It just would not be fair for Congress to give Nevada a virtual monopoly on sports betting, without first giving New Jersey residents the opportunity to vote on this proposal and decide it for themselves.

138 CONG. REC. 32,438 (1992) (statement of Rep. Brooks).

165. 28 U.S.C. § 3703 (2012) (“A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.”).

166. 18 U.S.C. § 1084 (2012).

167. *See* Rawls Letter, *supra* note 142, at 3.

impassioned efforts to see the passage of the statute.¹⁶⁸ This version of PASPA created a prohibition on government entities to “sponsor, operate, advertise, promote, license, or authorize by law or compact” a sports gambling scheme that was not in place in between the time frame of January 1, 1976, and August 31, 1990.¹⁶⁹ This prohibition effectively confined whole scale sports gambling to Nevada, granting the state a de facto monopoly.¹⁷⁰ The legislation granted an exemption to at least three additional states—Oregon, Montana, and Delaware—and enabled them to provide limited forms of sports gambling.¹⁷¹ Despite testimony from the few skeptics, such as Romano Mazzoli of Kentucky, who questioned whether the statute would have any level of effectiveness, and given the observation that sports gambling already existed, primarily in black markets, passage was supported overwhelmingly by members of both parties in Congress.¹⁷² The need for PASPA was also questionable and some speculated it might be redundant, adding little to existing anti-gambling laws including the Wire Act, Illegal Gambling Business Act (IGBA), and the Sports Bribery Act of 1964.¹⁷³

The legislative history of PASPA reveals a great deal of confusion over the scope and even the objectives of the legislation, as PASPA does not ban sports gambling; rather, the law only attempts to contain legal iterations of the practice to exempted states.¹⁷⁴ The exemption for New Jersey was pushed for by New Jersey Senator Frank Lautenberg, who feared that a sports-betting monopoly granted to Nevada would have devastating consequences for New Jersey’s

168. *What Is PASPA*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/what-is-paspa/> [<https://perma.cc/8VPK-XZ4F>] (last visited Oct. 11, 2018).

169. 28 U.S.C. § 3702 (2012) (invalidated by *Murphy v. NCAA*, 138 S. Ct. 1461 (2018)).

170. Sean Gregory, *The Risks and Rewards of the Supreme Court’s Sports Gambling Decision*, TIME (May 17, 2018), <http://time.com/5280442/supreme-court-sports-betting-repeal> [<https://perma.cc/YH86-D9ZJ>].

171. Jason Goldstein, Note, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 362 (2012).

172. *Final PASPA Hearing*, *supra* note 118, at 92 (statement of Rep. Romano Mazzoli).

173. Matthew D. Mills, *The Failure of the Professional and Amateur Sports Protection Act*, 16 U. DENV. SPORTS & ENT. L.J. 215, 224–27 (2014).

174. *See Second PASPA Hearing*, *supra* note 86, at 2; *Final PASPA Hearing*, *supra* note 118, at 74.

Atlantic City casino industry; Lautenberg's plea would appear prophetic two decades later.¹⁷⁵

In addition to the substantive challenges to PASPA brought by New Jersey and Delaware, the only other attempts to challenge the authority of the federal government under the statute were dismissed on procedural grounds before addressing the constitutionality of the statute.¹⁷⁶ In *Flagler v. U.S. Attorney for the District of New Jersey*, the pro se plaintiff filed a complaint arguing that PASPA violates the Tenth Amendment.¹⁷⁷ The district court concluded that the plaintiff lacked constitutional standing to challenge the statute and dismissed the suit.¹⁷⁸ Similarly, several years later, a court dismissed a lawsuit brought by the Interactive Media Entertainment & Gaming Association would also be dismissed on standing grounds.¹⁷⁹ In the more than twenty-five years that PASPA existed as federal law, there were only three reported decisions that addressed the substance of the statute itself, all originating from within the Third Circuit.¹⁸⁰

175. Matthew T. Mierswa, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HALL LEGIS. J. 447, 451 (2014).

176. *Flagler v. U.S. Att'y Dist. of N.J.*, No. 06-3699, 2007 WL 2814657, at *3 (D.N.J. Sept. 25, 2007).

177. *Id.* at *1.

178. *Id.* at *3. Flagler argued that:

[because] “[g]aming/gambling is not mentioned in the U.S. Constitution one way or another,” the decision on whether to allow gambling in general, and gambling on sports specifically, should be reserved for the states. The complaint further states that the PASPA does not fall under the powers of Congress derived from the Commerce Clause of the Constitution because the activity it prohibits stays within borders of a single state.

Id. at *2 (citations omitted). The district court, however, found that the plaintiff failed to satisfy two of the three required prongs for standing to challenge the constitutionality of the statute. *Id.* at *2–3. The district court relied on *Lujan v. Defenders of Wildlife* to find that the defendant lacked standing. *Flagler*, 2007 WL 2814657, at *3 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (“First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”).

179. *Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder*, No. 09-1301, 2011 WL 802106, at *10 (D.N.J. Mar. 7, 2011).

180. *See NCAA v. Governor of N.J.*, 730 F.3d 208, 209 (3d Cir. 2013), *abrogated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009); *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2012).

A. *Office of Commissioner of Baseball v. Markell*

PASPA's statutory language has led to several challenges regarding the constitutionality of the bill.¹⁸¹ In 2009, Governor Jack Markell of Delaware signed into law the Sports Lottery Act. The bill authorized the expansion of Delaware's existing sports-betting scheme, an exclusive NFL lottery scheme that required players to select a minimum of three teams in a parlay format.¹⁸² Governor Markell argued that the new lottery scheme would help alleviate the state's \$700 million budget deficit by an estimated \$50–\$100 million per year.¹⁸³ Markell's new law was quickly met with a challenge from the major professional sports leagues and the NCAA, under a provision granting dual enforcement authority to professional and amateur sports leagues, concurrent with the Department of Justice.¹⁸⁴ The challenge to PASPA advanced by Delaware did not directly challenge the statute as a per se violation of an enumerated constitutional provision but instead challenged the law under the doctrine of vagueness.¹⁸⁵ The Third Circuit Court of Appeals ruled in favor of the sports-league plaintiffs, finding that PASPA was unambiguous as to its exemption regarding existing schemes.¹⁸⁶

B. *Christie I*

The second substantive challenge to PASPA arose in 2012 when Governor Chris Christie of New Jersey signed into law the Sports Gambling Law, which authorized casinos and racetracks to offer Las Vegas-style sports betting at their facilities.¹⁸⁷ The sports leagues

181. See *NCAA*, 730 F.3d at 209; *Markell*, 579 F.3d at 293.

182. Dylan Oliver Malagrino, *Off the Board: NCAA v. Christie Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act*, 118 PENN ST. L. REV. 375, 391–92 (2013).

183. *Id.* at 391.

184. 28 U.S.C. § 3703 (2012) (providing the authority for civil enforcement of PASPA "by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game . . ."); Malagrino, *supra* note 182, at 391–92.

185. *Markell*, 579 F.3d at 301.

186. *Id.* at 302–03.

187. Complaint for Declaratory and Injunctive Relief ¶¶ 22–26, *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2012) (No. 2:12-CV-04947), 2012 WL 3191255.

quickly challenged the provisions of the law, arguing that New Jersey's law was a direct affront to PASPA.¹⁸⁸ The challenge by New Jersey asserted that PASPA ran afoul of a number of constitutional provisions—the anti-commandeering provision of the Tenth Amendment, the Due Process and Equal Protection Clauses and their principles, and the doctrine of equal sovereignty or “Equal Footing Doctrine.”¹⁸⁹ In the district court, New Jersey was unsuccessful in mounting its multifaceted constitutional attack on the law, and the court ruled that PASPA was indeed a constitutional exercise of legislative authority.¹⁹⁰ In New Jersey's appeal to the Third Circuit, the court reached a 2–1 decision in favor of the sports leagues, finding that PASPA was constitutional.¹⁹¹ Judge Vanaskie, concurring in part and dissenting in part, argued that although PASPA did not violate principles of equal sovereignty, the statute did violate the anti-commandeering principles of the Tenth Amendment and should thus be invalidated.¹⁹²

In what appeared to be a final challenge to the constitutionality of PASPA by New Jersey, the state filed a petition to the Supreme Court; however, the Court denied the petition.¹⁹³ The petition to the Supreme Court raised an additional constitutional challenge regarding the legality of the conferral of an indefinite intellectual property right to the sports leagues, an issue expressly forbidden by Article I, Section 8, Clause 8 of the Constitution.¹⁹⁴ Despite the finality of the Supreme Court's denial of certiorari, Governor Christie signed into law a partial repeal of New Jersey's sports gambling laws in 2014, something that the United States stated would not be in violation to PASPA in a brief filed with the Supreme Court.¹⁹⁵

188. *Id.* ¶¶ 18–20.

189. *Christie*, 926 F. Supp. 2d at 554.

190. *Id.*

191. *NCAA v. Governor of N.J.*, 730 F.3d 208, 240 (3d Cir. 2013), *abrogated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

192. *Id.* at 241, 251 (Vanaskie, J., concurring and dissenting in part).

193. *NCAA*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

194. Brief for Amici Curiae Ryan M. Rodenberg, Anastasios Kaburakis & John T. Holden in Support of Petitions for Writ of Certiorari at 2, 7, *Christie*, 134 S. Ct. 2866 (No. 13-967), 2014 WL 1246719 at *2, *7.

195. Brief of the United States at 11, *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013).

C. Daily Fantasy Sports

Although litigation was the eventual cause for the downfall of PASPA and the inevitable increase in legalized sports betting across the country, daily fantasy sports also played an important role in signaling a change in societal attitudes to gambling products associated with and based on a sport.¹⁹⁶ The explosion of daily fantasy sports came in the wake of a Justice Department crackdown on online poker websites and sports-gambling sites.¹⁹⁷ Though initially conceived in the mid-2000s, daily fantasy sports took several years and the entrance of two venture-capital-backed companies to really push the market forward.¹⁹⁸ The emergence of daily fantasy sports led many to speculate that the companies entering this space would be prosecuted for violating federal and state gambling laws.¹⁹⁹ While many outside observers saw contests that looked like illegal sports betting products, the industry pushed back, citing an exemption for certain fantasy sports in the Unlawful Internet Gambling Enforcement Act as evidence of widespread legality.²⁰⁰ Although this was a strained argument, because a rule of construction in the statute proscribed the Unlawful Internet Gambling Enforcement Act from modifying any other federal or state law,²⁰¹ the public relations company successfully parlayed this issue into a

196. See John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classifications and Consumer Implications*, 15 ENT. & SPORTS L.J. at 1, 1 (Oct. 4, 2017), <https://www.entsportslawjournal.com/articles/10.16997/eslj.207/> [<https://perma.cc/3XTN-9PUL>] (surveying the impact of daily fantasy sports on lessening society's formerly hard stance against sports gambling).

197. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gaming Law*, 2016 U. ILL. L. REV. 117, 121–23 (2016) (noting the federal crackdown on sportsbooks and online poker). The raids on online poker sites is referred to as “Black Friday” in the industry and saw some of the largest Texas Hold ‘Em website domains seized by the Department of Justice. *Lawson v. Full Tilt Poker Ltd.*, 930 F. Supp. 2d 476, 481 (S.D.N.Y. 2013). Similarly, the crackdown on online sportsbooks is referred to as Blue Monday and resulted in a number of arrests and prominent internet domains being seized by federal authorities. See Ryan M. Rodenberg & Anastasios Kaburakis, *Legal and Corruption Issues in Sports Gambling*, 23 J. LEGAL ASPECTS SPORT 8, 9 (2013).

198. Edelman, *supra* note 197, at 124, 126, 145 (deeming Kevin Bonnet, who launched a website called FantasySportsLive.com in 2007, “the creator of ‘daily fantasy sports’”).

199. *Id.* at 126.

200. See Holden, *supra* note 55, at 104.

201. 31 U.S.C. § 5361(b) (2012).

meaningful diversionary tactic as the companies continued to grow, attracting hundreds of millions in investment money.²⁰²

Daily fantasy sports came to be known by the name “fantasy sports.”²⁰³ This name established an association with traditional season-long fantasy games, which were often played among small groups of friends for nominal amounts of money.²⁰⁴ The daily version shortened the temporal commitment, anonymized the competition, and increased the frequency with which users could participate.²⁰⁵ The anonymity and frequency of the contests drew skepticism that the contests were indeed fundamentally distinct from widely-prohibited sports gambling, but by the time these contests had gained widespread notoriety, they had hundreds of thousands of active users in the United States.²⁰⁶ The two principal companies had gained mainstream attention by devoting tens of millions of dollars to advertising budgets, which saw television advertisements airing multiple times an hour on major networks during their peak.²⁰⁷ The incessant television advertising, in conjunction with several high-profile scandals regarding daily fantasy company employees playing on competitors’ websites, resulted in a series of state-level investigations—most prominently in New York.²⁰⁸

As the industry continued to gain attention from state lawmakers who examined whether their gambling laws were applicable to daily fantasy sports, a number of states began to express an interest in sports betting.²⁰⁹ As *Christie II* progressed, the momentum for

202. *Daily Fantasy Sports Investment and Acquisition Tracker*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/dfs-investment-and-acquisition-tracker> [https://perma.cc/6VCB-3L28] (last updated Feb. 23, 2018).

203. *Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/daily-fantasy-sports/> [https://perma.cc/CDW4-WDST] (last updated Aug. 1, 2018).

204. *Id.*

205. Edelman, *supra* note 197, at 127 n.55.

206. Holden & Brandon-Lai, *supra* note 196, at 1, 5.

207. *Id.* at 5.

208. John T. Holden, Will F. Green & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECON. 8 (2017).

209. *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker> [https://perma.cc/A94B-6EL4] (last visited Aug. 1, 2018). Beginning in 2016, four states in addition to New Jersey introduced various bills that would legalize sports betting. *Id.* In 2017, fifteen states introduced legislation to legalize sports betting. *Id.*

legalized sports betting continued to build, with many seeing daily fantasy sports as a placeholder for legal sports betting.²¹⁰ By the time *Christie II* reached the Supreme Court, two of the plaintiffs in the case had begun to express a desire for legalized sports betting, with NBA commissioner Adam Silver authoring an op-ed in the *New York Times*.²¹¹

D. *Christie II*

In New Jersey's second attempt to allow its residents to lawfully bet on sports, the governor signed into law a piece of legislation that effectively repealed most regulations associated with sports gambling being conducted at the state's horse racing tracks and casinos.²¹² Shortly thereafter, the quintet of sports leagues who brought suit in *Christie I* reunified to once again sue then-Governor of New Jersey, Chris Christie.²¹³ The New Jersey legislators had taken the advice of the United States Solicitor General's office, which argued in *Christie I* that New Jersey was free to repeal "in whole or in part" their sports gambling prohibitions without running afoul of PASPA.²¹⁴ Although the government had stipulated that a repeal would not offend PASPA in *Christie I*, the sports league plaintiffs argued that, indeed, a repeal was tantamount to an authorization, one of PASPA's forbidden acts.²¹⁵ However, the federal district court disagreed with the state's

210. Dustin Gouker, *If States Want to Pay for Their Budgets with Fantasy Sports, They Need to Get Creative*, LEGAL SPORTS REPORT (Aug. 31, 2017, 10:10 AM), <https://www.legalsportsreport.com/15333/state-revenue-fantasy-sports> [<https://perma.cc/94SU-HE2N>].

211. Adam Silver, Opinion, *Legalize and Regulate Sports Gambling*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html> [<https://perma.cc/PDW9-PC7P>] ("B[etting] on professional sports is currently illegal in most of the United States outside of Nevada. I believe we need a different approach."). Similarly, Major League Baseball Commissioner Rob Manfred endorsed a change to federal laws as well. See Brandon Schlager, *Rob Manfred: MLB rethinking stance on sports betting*, SPORTING NEWS (Feb. 8, 2017), <http://www.sportingnews.com/us/mlb/news/mlb-gambling-rules-rob-manfred-reconsider-pete-rose-hall-of-fame/1dctoqm3i8mv111tn6toaigmj> [<https://perma.cc/CHP5-454A>].

212. S.B. 2460, 216th Leg., Reg. Sess. (N.J. 2014); Act of Jan. 17, 2012, ch. 231, §§ 1–6, 2011 N.J. ch. 12A, 7–9 (repealed 2014).

213. Complaint for Declaratory and Injunctive Relief at 1, *NCAA v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014).

214. Brief for the United States in Opposition at 11, *Christie v. NCAA*, 730 F.3d 208 (3d Cir. 2013).

215. Complaint for Declaratory and Injunctive Relief, *supra* note 213, at 3, 18. PASPA forbids states and individuals from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]"

lawmakers, holding that PASPA was a valid preemption of even the state's efforts to repeal the existing gambling laws.²¹⁶

Following a second 2-1 loss at the Third Circuit, the *Christie II* defendants petitioned for a rehearing en banc, which the Circuit court granted.²¹⁷ Despite the extraordinary measure of granting a rehearing en banc, the Third Circuit bench voted in favor of the plaintiffs by a vote of 9–3.²¹⁸ The majority opinion, authored by Circuit Judge Rendell, held that New Jersey's 2014 law violated PASPA and determined that the partial repeals were tantamount to an authorization because they effectively determined where sports betting can take place, how it may take place, and who can place wagers.²¹⁹ In addition to finding that the 2014 repeal was the equivalent to an authorization, the majority found that PASPA does not commandeer the state legislature by requiring that the state maintain its laws because the majority maintained that although a partial repeal would not comply with the statute, a full repeal would not offend PASPA.²²⁰

The twelve judges were split 9–3 with two separate dissents filed.²²¹ Judge Fuentes, in his dissent with Judge Restrepo, pointed out the absurdity of the linguistic gymnastics of equating a repeal with an authorization.²²² Judge Fuentes highlighted the fact that the

sports gambling schemes pursuant to a law or compact.” 28 U.S.C. § 3702 (2012) *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

216. *NCAA v. Christie*, 61 F. Supp. 3d 488, 506 (D.N.J. 2014), *overruled by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). Though largely beyond the scope of this paper, District Judge Shipp determined that PASPA expressly preempted New Jersey's actions. *Id.* at 503–06. PASPA, however, contains no express preemption language, and instead Shipp examined the legislative history, determining that PASPA's intent was to “keep sports betting from spreading.” *Id.* at 505–06. The Supreme Court has articulated that Congress can expressly preempt state law by doing so within its “statute's express language or through its structure and purpose.” *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). This position is problematic, however, because the desire to stop the spread of sports betting is not something PASPA does particularly well. In fact, it only stops legal and state-regulated sports betting from spreading and does nothing to stop illegal gambling, which is undoubtedly far more pervasive.

217. *NCAA v. Governor of N.J.*, 832 F.3d 389, 389 (3d Cir. 2016), *overruled by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

218. *Id.*

219. *Id.* at 396–97.

220. *Id.* at 400–02.

221. *Id.*

222. *Id.* at 402–06 (Fuentes, J., dissenting).

majority's opinion would allow for the state to repeal all its gambling laws (which does not offend PASPA) and then immediately begin passing restrictions, such as requiring a minimum age to wager.²²³ Both dissents also highlighted the absurdity of states facing what is in effect an ultimatum, where they are forced to choose between a "Wild West" with no laws governing sports betting or maintaining laws that they do not desire.²²⁴

The grant of certiorari by the Supreme Court marked the first time the Court had the opportunity to interpret the statute.²²⁵ The Court framed the issue to be whether PASPA unconstitutionally commandeered the states in contravention of *New York v. United States* and *Printz v. United States* by requiring New Jersey to maintain its laws prohibiting sports gambling.²²⁶ In ruling that

223. *NCAA*, 832 F.3d at 402–06.

224. *Id.* at 405 ("Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirement and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from restricting sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.").

225. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179–80 (1999). PASPA was, however, mentioned on two previous occasions by the Supreme Court. *Id.* (citations omitted) ("A separate statute, the 1992 Professional and Amateur Sports Protection Act, proscribes most sports betting and advertising thereof. Section 3702 makes it unlawful for a State or tribe 'to sponsor, operate, advertise, promote, license, or authorize by law or compact'—or for a person 'to sponsor, operate, advertise, or promote, pursuant to the law or compact' of a State or tribe—any lottery or gambling scheme based directly or indirectly on competitive games in which amateur or professional athletes participate. However, the Act also includes a variety of exemptions, some with obscured congressional purposes: (i) gambling schemes conducted by States or other governmental entities at any time between January 1, 1976, and August 31, 1990; (ii) gambling schemes authorized by statutes in effect on October 2, 1991; (iii) gambling 'conducted exclusively in casinos' located in certain municipalities if the schemes were authorized within 1 year of the effective date of the Act and, for 'commercial casino gaming scheme[s],' that had been in operation for the preceding 10 years pursuant to a state constitutional provision and comprehensive state regulation applicable to that municipality; and (iv) gambling on pari-mutuel animal racing or jai-alai games. These exemptions make the scope of § 3702's advertising prohibition somewhat unclear, but the prohibition is not limited to broadcast media and does not depend on the location of a broadcast station or other disseminator of promotional materials."); *see also* *Shelby City v. Holder*, 570 U.S. 529, 588 (2013) (citations omitted) ("Today's unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties.").

226. *See* *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). In *New York v. United States*, the Court held, "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). In *Printz v. United States*, the Court held that the Federal government cannot require a state to

PASPA violates the anti-commandeering principle, Justice Alito stated that the anti-commandeering principle is fundamental to creating accountability in the political system, and if there are intrusions into state areas of authority, it can impermissibly muddy the waters as to who is responsible for consequences of legislation.²²⁷ In a damning condemnation of PASPA, Justice Alito wrote:

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.²²⁸

In addition to finding that PASPA impermissibly commandeered the New Jersey legislature, the majority found that the offending provisions of PASPA were not severable, thereby dooming the entire statute.²²⁹ The Court held that the provision of PASPA prohibiting state action could not be severed from the provision prohibiting private action, ruling that Congress intended the public and private prohibitions to be deployed in tandem and, without one, the other must similarly fail.²³⁰ In his concurring opinion, Justice Thomas added that the question to ask regarding severability is whether Congress would have desired the statute to be passed absent the

enforce its own laws; rather the powers of the states and federal governments are separate and unequal, with the federal government confined to enforce its own laws, without conscripting either state legislatures or state officers. *Printz v. United States*, 521 U.S. 898, 935 (1997).

227. *Murphy*, 138 S. Ct. at 1475.

228. *Id.*

229. *Id.* at 1484.

230. *Id.*

severed portion, which in this case the answer was no; as such PASPA was unsalvageable.²³¹

The death of PASPA has ushered in a new era. For the first time in the new millennium, states are able to authorize sports wagering for their citizens. However, the rise of opportunity for the padding of state coffers is not without challenges. Indeed, there remains a number of challenges for states at both the federal and state levels, as well as obstacles from private enterprise.²³² Overcoming these challenges will be easier for some areas than it will be for others. Despite this, there is an initial level of enthusiasm surrounding the opportunity for a new source of revenue.²³³

III. The Rise of Legal Sports Betting

Contrary to the perceptions that sports betting was widely desired and PASPA was the sole obstacle in its way, there are numerous remaining obstacles to widespread gambling legalization. In fact, nearly every state has maintained laws prohibiting sports wagering.²³⁴ The challenges regarding legalizing sports betting in many states are complex and have both regulatory and political obstacles. For example, the political climate in a variety of states remains quite conservative on issues like gambling.²³⁵ This moral opposition and its political consequences may be a more substantial obstacle to legalization in a state like Utah than the task of repealing

231. *Id.* at 1485 (Thomas, J., concurring). Justice Thomas also stated his opinion that sports gambling should not be considered interstate commerce by default in contrast to the dissent. *Id.* at 1. This position was also advanced by the author in an Amicus Brief filed in the case. Brief for Researcher John T. Holden as Amicus Curiae Supporting Petitioners at 35, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

232. John Holden, *Sports Betting Legalization: Biggest Issues Preventing Widespread Wagering*, ACTION NETWORK (July 29, 2018, 5:00 PM), <http://www.actionnetwork.com/news/sports-betting-legalization-biggest-issues-challenges-hurdles> [https://perma.cc/PP4P-95VT].

233. See Steve Mendelson, *Sports Gambling and Tax Money: Coming Soon to a State Near You*, INC. (May 16, 2018), <http://www.inc.com/steve-mendelsohn/sports-gambling-tax-money-coming-soon-to-a-state-near-you.html> [https://perma.cc/K5GT-F2FQ].

234. Chuck Humphrey, *State Gambling Law Summary*, GAMBLING LAW U.S. (Mar. 22, 2017), <http://www.gambling-law-us.com/State-Law-Summary> [https://perma.cc/M5BN-YTX3] (providing an overview of state gambling laws).

235. Phil Hensel, *Sports Betting is Now Legal in Several States*, NBC NEWS (Aug. 13, 2018, 5:13 AM), <https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211> [https://perma.cc/P6YX-UPPQ].

state laws governing sports betting.²³⁶ Likewise, at the federal level, there are a number of federal laws that may continue to act as an obstacle to the spread of sports wagering.

A. Federal Obstacles

Federal law is replete with a variety of statutes that continue to pose some obstacles for the expansion of sports betting into some states. Although larger states may be of sufficient size for companies to invest in the technology necessary to confine sports betting geographically within the state, other more sparsely populated states may lag behind in attracting such companies, particularly in the realm of mobile betting if there is a requirement that infrastructure be physically located within a particular state.²³⁷ This is a primary concern under the Wire Act.²³⁸

1. The Wire Act

The Wire Act was one of the crowning achievements of then-Attorney General Robert F. Kennedy's Department of Justice in its war against organized crime during the early 1960s.²³⁹ The statute emerged out of the Kefauver Committee hearings nearly a decade earlier,²⁴⁰ and after a series of deliberative hearings, which debated

236. Dennis Romboy, *Utah GOP Lawmakers Hail Decision on Sports Betting as Win for States' Rights*, DESERET NEWS (May 14, 2018, 2:56 PM), <http://www.deseretnews.com/article/900018566/utah-gop-lawmakers-hail-decision-on-sports-betting-as-win-for-states-rights.html> [https://perma.cc/J8SQ-ZYEA]. Utah is widely regarded as one of the most restrictive states on gambling, as the state is one of only two states that do not even allow for the sale of lottery tickets. *Id.* Though Utah did file an amicus brief in support of New Jersey, lawmakers argued that the brief was focused on supporting the rights of states to self-govern and was not an endorsement of sports gambling. *Id.*; see also Brief for West Virginia et al. as Amici Curiae Supporting Petitioners, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

237. Paul J. Fishman, Marcus A. Asner & Ian Jay, *Supreme Court Overturns Federal Prohibition on State Authorization of Sports Wagering Under the Professional and Amateur Sports Protection Act*, ARNOLD & PORTER (May 31, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/05/supreme-court-overturns-federal-prohibition> [https://perma.cc/8CST-RS2H].

238. 18 U.S.C. § 1084 (2012).

239. DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET*, 80–81 (2005).

240. S. REP. 82-725, *supra* note 29.

the intended scope of the statute, the bill was finally passed.²⁴¹ Liability under the Wire Act requires several elements: (1) being in the business of betting or wagering; (2) knowing use of a wire communication facility; (3) transmitting bets or wagers, or information to assist in placing bets or wagers, in interstate or foreign commerce; (4) the subject of the bets or wagers must be a sporting event or contest.²⁴² The statute further contains a safe harbor provision that exempts the transmission of information (not bets themselves) in placing bets or wagers on a sporting event or contest, so long as the transmission is lawful in both the sending and receiving jurisdictions.²⁴³

One of the most important inquiries for a Wire Act claims centers on who is in the business of betting or wagering.²⁴⁴ The exact meaning of being in the “business of betting or wagering” is well established in jurisprudence, and there is evidence that Congress intended the statute to target “layoff men” or big team bookies who use networks to limit their risk across the country.²⁴⁵ The Wire Act was intended to serve as means of attacking criminal organizations that otherwise were able to avoid prosecution (in an era before the Racketeer Influenced and Corrupt Organizations Act), and as a result, it has been argued that the language “business of betting or wagering” was intended to apply broadly to include many individuals associated with organized crime while excepting the casual bettor.²⁴⁶

Although the Wire Act was drafted to target organized crime in an era in which criminal organizations drove fear into politicians and citizens alike, the statute remains a real obstacle to legalized

241. Ben J. Hayes & Matthew J. Conigliaro, “*The Business of Betting or Wagering*”: *A Unifying View of Federal Gaming Law*, 57 *DRAKE L. REV.* 445, 453 (2009).

242. 18 U.S.C. § 1084(a) (2012).

243. *Id.* § 1084(b); Ryan Rodenberg, *The Wire Act of 1961: That Time RFK Sent JFK a Letter About Sports Betting*, *SPORTS HANDLE* (Mar. 5, 2018, 9:30 AM), <https://sportshandle.com/the-wire-act-of-1961-rfk-jfk-sports-betting> [<https://perma.cc/X3ZB-TWMV>].

244. See Hayes & Conigliaro, *supra* note 241, at 447; John T. Holden, *Mailbag Mythbusting: The Wire Act and Sports Betting, Explained*, *SPORTS HANDLE* (May 30, 2018, 1:30 PM), <https://sportshandle.com/mailbag-mythbusting-the-wire-act-and-sports-betting-explained> [<https://perma.cc/A9NX-USR4>].

245. Hayes & Conigliaro, *supra* note 241, at 454.

246. *Id.*

gambling because of unresolved questions about cross-border transmissions and the scope of the safe harbor exemption.²⁴⁷ New Jersey has recently tried to note that intermediate routing should not determine the location of the information, seemingly anticipating questions about the Wire Act's implication in such an interest.²⁴⁸ However, as nearly six years of litigation with New Jersey and the private sports leagues over the scope of federal law show, New Jersey's opinions on the scope of federal law do not necessarily reflect the view of the federal government.²⁴⁹ Some have speculated that the federal government may be unlikely to interfere in states' efforts to generate revenue and respect gaming operators desire to provide a cost-effective service by locating servers in a central location and transmitting information, creating a spoke network. However, risk managers for gaming companies may see the risk as too great in the absence of further clarification.²⁵⁰

2. *Indian Gaming Regulatory Act*

In addition to the Wire Act, federal law has several other gaming-specific statutes that may complicate the spread of legalized sports

247. Tony Batt, *The Wire Act: Is Its Bark Worse Than Its Bite?*, GAMBLINGCOMPLIANCE (June 29, 2018), https://gamblingcompliance.com/premium-content/insights_analysis/wire-act-its-bark-worse-its-bite [https://perma.cc/9D2Y-V6RX].

248. Ifrah Law, *Why We Won't See a Federal Sports Betting Bill Soon*, IFRAH ON IGAMING (July 30, 2018), <http://www.ifrahlaw.com/ifrah-on-igaming/wont-see-federal-sports-betting-bill-soon> [https://perma.cc/6VDX-3YYR].

249. See N.J. REV. STAT. ANN. § 5:12A-11(l) (West 2018) ("All wagers on sports events authorized under this provision shall be initiated, received and otherwise made within this State unless otherwise determined by the division in accordance with applicable federal and state laws. Consistent with the intent of the United States Congress as articulated in the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. § 5361 et seq.), the intermediate routing of electronic data relating to a lawful intrastate wager authorized under this provision shall not determine the location or locations in which such wager is initiated, received or otherwise made."); see also Law, *supra* note 248.

250. See *United States v. Yaquinta*, 204 F. Supp. 276, 279 (N.D. W. Va. 1962) ("Defendants' counsel argue that [because], in the transmission of the messages from New York to Nevada, the transmission lines traverse many States where off-track betting is illegal, and must pass through telephone exchanges in those States, the framers of the Act did not intend to make the incident of the locations of the telephone exchanges of legal significance. The argument loses sight of the fact that the objective of the Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received. To mix a metaphor, the telephone wire may seem a slender thread on which to hang the federal crime, but it is a substantial part of the web in which these defendants seem to be caught.").

betting. One that impacts both federal and state actions is the Indian Gaming Regulatory Act (IGRA).²⁵¹ The IGRA was passed by Congress as a means of implementing a level of federal regulation on the growing Indian gaming industry, which had begun to gain a significant foothold in many states by the time of its passage.²⁵² The IGRA established the National Indian Gaming Commission, which was granted authority to oversee gaming conducted on Indian lands.²⁵³ The Act further divides gaming activities into three regulatory classes.²⁵⁴ The first class of gaming is to be regulated exclusively by the tribes; the second class by the tribes and the National Indian Gaming Commission; and the third class is to be regulated by the states and tribes, and includes “all lotteries, card games, and games of chance other than bingo—these games must be conducted pursuant to a tribal-state gaming compact.”²⁵⁵

The location of sports betting in the three-class system has been the subject of debate, with some believing sports betting would fall into Class II and others believing that sports betting is a Class III activity.²⁵⁶ Although likely desirable for sports betting to fall into Class II, this position is historically undermined by a variety of different sources including the Code of Federal Regulations, which states that Class III gaming includes: “Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai.”²⁵⁷ Florida Attorney General Bill McCollum echoed this opinion in an Advisory Opinion, issued at the request of then-Florida Speaker of the House Marco Rubio, where

251. 25 U.S.C. §§ 2701–09, 2711–21 (2018); 25 U.S.C. § 2710 (1994) (*invalidated by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)).

252. *Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the S. Comm. on Indian Affairs*, 100th Cong. 1 (1987) (statement of Sen. Daniel K. Inouye, Chairman, Special Committee on Indian Affairs).

253. Indian Gaming Regulatory Act § 5, Pub. L. No. 100-497, 102 Stat. 2467, 2369 (codified at 25 U.S.C. § 2704(a)).

254. M. MAUREEN MURPHY, CONG. RESEARCH Serv., CRS REP. NO. 93-793A, INDIAN GAMING REGULATORY ACT: JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS (1993).

255. *Id.*

256. Dave Palermo, *Tribal Position on Sports Betting Will Come into Focus at Phoenix Conference*, LEGAL SPORTS REPORT (Sept. 14, 2017, 1:31 PM), <http://www.legalsportsreport.com/15573/tribal-gaming-and-sports-betting-niga-2017> [https://perma.cc/3UC8-BVXD].

257. 25 C.F.R. § 502.4(c) (2018).

the Florida attorney general quoted the language of the Code of Federal Regulations articulating that sports betting is a Class III activity.²⁵⁸

The probable classification of sports betting as a type of Class III gaming activity potentially complicates matters for both states and tribes, as gaming compacts are often the result of months and even years of negotiations.²⁵⁹ Because of this, states that have tribal compacts may face substantial challenges to renegotiating what share of revenue each party to the compact will receive.²⁶⁰ The IGRA is likely to remain one of the biggest obstacles to the spread of legalized sports betting. Without sports betting, Indian gaming generated more than \$31 billion in 2016, nearly three times what the private casinos in Nevada generated in the same period.²⁶¹

3. *The Unlawful Internet Gambling Enforcement Act*

The third federal statute that may inhibit the spread of legalized sports gambling is the Unlawful Internet Gambling Enforcement Act (UIGEA), the statute whose exemption for fantasy sports was largely responsible for the emergence of daily fantasy sports.²⁶² Although the statute is of questionable application to the daily fantasy industry, largely as a matter of semantics, lobbying, and contest structures, there is no question that UIGEA implicates sports betting.²⁶³ UIGEA is a 2006 law that targets payment processors like Visa, MasterCard, and PayPal.²⁶⁴ The statute also implements requirements on banks

258. Fla. AGO 2007-36 (Sep. 6, 2007), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/23FBEBF8B371FFCD68525734F004F8F6F> [<https://perma.cc/PFK9-7MZ9>].

259. *Id.*

260. Kevin Draper, Tim Arango & Alan Blinder, *Indian Tribes Dig in to Gain Their Share of Sports Betting*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/sports/sports-betting-indian-casinos.html> [<https://perma.cc/E8C9-UZYE>].

261. *Id.*

262. See Dustin Gouker, *UIGEA Author: "No One Ever Conceived" That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REPORT (May 8, 2015, 8:15 AM), <https://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout> [<https://perma.cc/ZV6J-K54E>].

263. Holden & Brandon-Lai, *supra* note 196.

264. *Id.*

regarding the facilitation of payments to gambling websites.²⁶⁵ Although the statute does not modify any existing state or federal laws, it contains a cornucopia of exemptions and is targeted at illegal websites.²⁶⁶ There are likely questions among payment processors and banks leery of processing transactions due to federal regulatory uncertainty, even though the statute specifically exempts intermediate routing, unlike the Wire Act.²⁶⁷

The marijuana industry may also serve as a model for caution by the banking industry.²⁶⁸ Banks have generally shied away from accepting business relationships with organizations in the marijuana industry because of concerns about exposure to federal banking laws.²⁶⁹ Although UIGEA certainly has some provisions built in, such as predetermination about intermediate routing, the traditionally conservative banking industry may be cautious about facilitating some relationships in the industry, particularly because some companies seek to test the boundaries of regulators with innovative products.²⁷⁰ Whether the federal obstacle is UIGEA, or some other banking, finance, or securities statute, the path forward likely contains a number of challenges for operators to overcome before sports betting takes off in every state. Existing federal statutes are but one part of a trident hindering the widespread expansion of legalized sports betting. In the next subsection, this article examines state-level obstacles to expanded sports gaming.

265. 31 U.S.C. § 5361 (2012).

266. *Id.*

267. *Id.* § 5362(10)(E).

268. See Aaron Klein, *Banking Regulations Create Mess for Marijuana Industry, Banks, and Law Enforcement*, BROOKINGS INST. (Apr. 23, 2018), <http://www.brookings.edu/research/banking-regulations-create-mess-for-marijuana-industry-banks-and-law-enforcement> [<https://perma.cc/4Z2H-KKPM>].

269. *Id.*

270. Eric Ramsey, *DraftKings Sportsbook App Now in Stock for N.J. Sports Betting*, LEGAL SPORTS REPORT (Aug. 1, 2018, 12:30 PM), <http://www.legalsportsreport.com/22417/draftkings-sportsbook-release> [<https://perma.cc/XNT3-BPEQ>]. For instance, DraftKings—the daily fantasy company that has entered the realm of sports betting—launched a product that includes a “Cash Out Button,” which will enable users to effectively create a futures (securities) product out of their sports betting interest. *Id.* This type of product blurs the lines between gambling regulators and securities regulators and may cause some payment processors, banks, and other financiers to be cautious about jumping into the industry. *Id.*

B. *State Obstacles*

State-level obstacles to expanded sports wagering are the largest impediment to widespread brick and mortar casino-style wagering like the type of sports wagering most commonly associated with Nevada.²⁷¹ Although brick-and-mortar wagering is a huge step forward from a near total prohibition, its revenue potential is dwarfed in comparison to the potential revenue associated with mobile wagering.²⁷² Early projections estimate that by 2025 there may be as many thirty-seven states offering sports betting but perhaps only a dozen offering mobile or online wagering by that time.²⁷³ One of the most pressing issues for many states is whether offering sports betting would require a constitutional amendment for casinos and regulators to oversee the practice.²⁷⁴

1. *State Constitutions*

Many state constitutions restrict the expansion of gambling within the state and require amendments for there to be offerings of new types of wagering.²⁷⁵ Amending state constitutions is often an arduous process for lawmakers and citizens alike. For example, the procedure for amending the California constitution has several methods which can be undertaken.²⁷⁶ First, two-thirds of each chamber of the legislature must propose an amendment for

271. *An Examination of Sports Betting in America & Forecast of Revenues by State*, GLOBAL MKT. ADVISORS (Nov. 2017), http://globalmarketadvisors.com/wp-content/uploads/2017/11/GMA_An-Examination-of-Sports-Betting-in-America-Forecast-of-Revenues-by-State_FINAL.pdf [<https://perma.cc/H4DS-Q8DN>].

272. *Id.*

273. Brian Barrett, *The Sports Betting Revolution Will Be a Slow Play Online*, WIRED (May, 15, 2018, 1:59 PM), <http://www.wired.com/story/the-sports-betting-revolution-will-be-muted-online> [<https://perma.cc/GNP3-UTBC>].

274. *See, e.g.*, Max Brantley, *Arkansas Casino Amendment Includes Sports Betting*, CDC GAMING REPORTS INC. (May 24, 2018, 10:19 PM), <http://www.cd gamingreports.com/arkansas-casino-amendment-includes-sports-betting> [<https://perma.cc/9DKN-EP9W>].

275. N.Y. CONST. art. I, § 9.1. For example, New York bans casino gambling at more than seven facilities in the state. *Id.*; *see also* CAL. CONST. art. IV, § 19; DEL. CONST. art. II, § 17; IDAHO CONST. art. III, § 20; KAN. CONST. art. XV, § 3; MONT. CONST. art. III, § 9; N.D. CONST. art. XI, § 25; UTAH CONST. art. VI, § 27.

276. *Amending State Constitutions*, BALLOTEDIA, https://ballotpedia.org/Amending_state_constitutions [<https://perma.cc/NX4A-PTDR>].

ratification by the registered voters in the state.²⁷⁷ Second, petitioners in the state can collect signatures, totaling at least 8% of the votes cast in the most recent gubernatorial election, to qualify to have the proposed amendment placed on the ballot.²⁷⁸ The third means is through a state constitutional convention, whereby two-thirds of the legislature agrees to call a constitutional convention, which places the proposed measure on the ballot in the next general election.²⁷⁹ The procedure for amending state constitutions is intentionally arduous, and for states that require amendments to offer sports betting, there may be an added delay while legislators attempt to ensure sufficient voter interest before legislators invest time, money, and political capital into such an initiative.

Some states have begun to consult with their attorney generals regarding the feasibility of offering sports betting.²⁸⁰ Colorado legislators asked the state attorney general about two questions regarding the possibility of bringing sports betting to the state.²⁸¹ First, lawmakers wanted to know whether a constitutional restriction on lotteries would restrict sports betting, to which the attorney general responded that sports betting would not require a constitutional amendment in the state.²⁸² Second, lawmakers asked what would be necessary to offer sports gambling under Colorado law, to which Colorado Attorney General Cynthia Coffman responded that it could be accomplished through an amendment to the state's criminal code.²⁸³ Relatedly, other state regulators have also anticipated the rise of sports betting and have started studying the issue and making recommendations.²⁸⁴ Although many states are

277. Cal. CONST. art. XVIII, § 1.

278. *Id.* art. XVIII, § 3; *id.* art. II, § 8(B).

279. *Id.* art. XVIII, § 2.

280. See, e.g., Anna Staver, *Colorado Can Legalize Sports Betting Without Amending Constitution, Attorney General Says*, DENV. POST (Aug. 2, 2018, 4:11 PM), <http://www.denverpost.com/2018/08/02/attorney-general-colorado-sports-betting-legislation> [<https://perma.cc/H393-BFSY>].

281. Legality of Commercial Sports Betting in Colorado, Op. Att'y Gen. No. 18-02 (2018), <https://coag.gov/sites/default/files/contentuploads/ago/agopinions/cynthia-h-coffman/2018/no-18-02.pdf> [<https://perma.cc/55F7-RTE3>].

282. *Id.*

283. *Id.*

284. MASS. GAMING COMM'N, WHITE PAPER ON SPORTS BETTING (2018),

beginning to move to seek opinions and studies on the feasibility of issues regarding the legalization of sports betting, the hurdle that continues to surface in many states is the impact of existing relationships with tribal gaming partners within the states.

2. *Tribal Gaming Compacts*

With its passage in 1988, the IGRA became a landmark piece of legislation.²⁸⁵ In the decades following its passage, Indian gaming in the United States has seen gaming revenues increased from \$100 million in 1988 to more than \$28 billion in 2013.²⁸⁶ The tribal-state gaming compacts, in sheer economic terms, are remarkable successes; however, compromises in the negotiations have meant underserved demand.²⁸⁷ There have also been significant disagreements over the scope of permitted games in some states.²⁸⁸ Unfortunately for state legislators looking to jump at the opportunity to quickly supplement state budgets, there is another challenge. To avoid frequent tinkering or ongoing struggles over issues within the compacts, some states, such as Oklahoma, have structured the agreements such that every amendment means reopening negotiations.²⁸⁹

The National Indian Gaming Association itself has been quite cautious about wading into the sports betting waters.²⁹⁰ The National Indian Gaming Association has voiced support for expanded sports betting provided sports betting, satisfies nine enumerated conditions:

<https://massgaming.com/wp-content/uploads/Commissioners-Packet-3-1-18.pdf>

[<https://perma.cc/G7N5-F5F9>].

285. Randall K. Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Development*, 29 J. ECON. PERSP. 185, 185 (2015).

286. *Id.* at 186.

287. *Id.* at 195.

288. *Id.*

289. Jacob McClelland & Molly Fleming, *Oklahoma Tribes Look to the Future of Gaming Compacts*, KGOU (July 27, 2017), <http://www.kgou.org/post/oklahoma-tribes-look-future-gaming-compacts> [<https://perma.cc/H4VU-57LQ>].

290. See Adam Candee, *National Tribal Group Passes Resolution to Support Sports Betting Repeal, with Caveats*, LEGAL SPORTS REPORT (Apr. 24, 2018), <http://www.legalsportsreport.com/19967/tribes-resolution-sports-betting-repeal> [<https://perma.cc/W26Y-5ERZ>].

1. Tribes must be acknowledged as governments with authority to regulate gaming;
2. Tribal Government Sports Betting revenues will not be subject to taxation;
3. Customers may access Tribal Government Sports Betting sites as long as Sports Betting is legal where the customer is located;
4. Tribal rights under the IGRA and existing Tribal-State gaming compacts must be protected;
5. IGRA should not be opened up for amendments;
6. Tribal Governments must receive a positive economic benefit in any federal Sports Betting legalization proposals;
7. Indian Tribes possess the inherent right to opt into a federal regulatory scheme to ensure broad-based access to markets;
8. Tribal Governments acknowledge the integrity and protection of the game and patron protections for responsible gaming are of the utmost importance; and
9. Any consideration of the use of mobile, online or internet gaming must adhere to these principles.²⁹¹

The provisions laid out in the National Indian Gaming Association resolution are likely to be quite contentious in some jurisdictions, especially in some states where legislators seek to maximize the take for their interests.²⁹² One additional challenge for tribal interests is that although many states seek to maintain good relationships with tribal governments, most states are immune from suit in the event of bad faith negotiations by virtue of the Eleventh Amendment.²⁹³

291. NAT'L INDIAN GAMING ASS'N, RES. NO. 01-LAS-BOD-4-16-18 (Apr. 16, 2018), <http://www.legalsportsreport.com/wp-content/uploads/2018/04/SB-Resolution-Clean-Final.pdf> [<https://perma.cc/M98V-N6CA>].

292. Buck Wargo, *Tribes Fear They Will Be Left out of Sports Betting Growth, Pass Internal Resolution on PASPA and Tribal Integrity*, CDC GAMING REP. INC. (Apr. 23, 2018), <http://www.cdcgamingreports.com/wargo-tribes-fear-they-will-be-left-out-of-sports-betting-growth> [<https://perma.cc/SC9W-RHAF>].

293. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75–76 (1996) (“[W]e have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability that is

3. *Tax Rates*

In addition to challenges in passing legislation via obstacles with state constitutions and previously existing tribal gaming compacts, another problem states will have to grapple with is implementing reasonable tax rates. In its legislation, Pennsylvania set the sports betting tax rate at 36% of revenue, a figure arrived at by doubling the applicable tax rate for revenue coming from casino table games.²⁹⁴ In comparison to Nevada, which has been offering sports betting for decades and taxes the activities at 6.75%, the Pennsylvania rate is astronomical.²⁹⁵ Pennsylvania also charges a one-time \$10 million fee for a sports gambling license, limiting the size of a company that may be able to enter the market; and with sportsbook profits often operating on tight margins, high tax rates may mean a small number of companies will want to compete in the market.²⁹⁶ Although markets like Pennsylvania's may still be able to attract sportsbooks, even with astronomical tax rates, smaller states with more limited populations may not have such luck. The final potential obstacle to widespread legalized wagering explored in this article is the potential for lawsuits initiated by private party sports leagues.

significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3). Nor are we free to rewrite the statutory scheme to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts. We hold that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction."'). A small number of states, including California, have waived their immunity, which may result in a more receptive environment. Dave Palermo, *Implementation of Sports Betting Would be 'Tricky' in Indian Country, If Federal Ban Lifted*, LEGAL SPORTS REPORT (Aug. 14, 2017), <http://www.legalsportsreport.com/15006/sports-betting-tricky-in-indian-country> [<https://perma.cc/U629-XEFB>].

294. Adam Candee, *Interesting Math: PA Sports Betting Tax Rate Came from Doubling Table Games Rate*, LEGAL SPORTS REPORT (July 17, 2018), <http://www.legalsportsreport.com/22089/pennsylvania-sports-betting-tax-rate> [<https://perma.cc/PMV3-VFEG>].

295. Eric Ramsey, *Let's Talk About PA's Insanely High Sports Betting Tax*, PLAY PENN. (May 25, 2018), <http://www.playpennsylvania.com/pa-sports-betting-tax-high> [<https://perma.cc/B948-VBRU>].

296. *Id.*

C. *Private Sports League Challenges*

Perhaps an inevitability will be a legal challenge from one or several of the same five plaintiffs who have initiated the three substantive PASPA lawsuits: the four major professional sports leagues and the NCAA. The sports leagues have been quite vocal in requesting what have been termed “integrity fees” from states that offer legalized sports betting.²⁹⁷ Integrity fees have been referred to as a tax on sports betting revenues.²⁹⁸ First appearing in draft legislation in Indiana, a variety of bills across the country have included these fees.²⁹⁹ The idea originates from regulations in France, where professional leagues receive a percentage of money from the gambling operators’ revenues from league games.³⁰⁰ Sports league executives, in particular NBA Commissioner Adam Silver and Major League Baseball Commissioner Rob Manfred, have led the push for leagues to receive a royalty; however, their reliance on the model implemented in France, and to a related extent in Australia, neglects to account for U.S. law, in particular, the First Amendment.³⁰¹

The two most vocal commissioners have framed their desire around an integrity fee as being associated with the “league’s intellectual property.”³⁰² The commissioners’ framing of the issue is, however, not entirely accurate, as much of the information necessary

297. *Sports Betting Integrity Fee*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/integrity-fee> [<https://perma.cc/N4PD-G66T>] (last visited Aug. 3, 2018).

298. *Id.*

299. *Id.*

300. *Id.*

301. John Holden, *Can Leagues Own Data Rights When It Comes to US Sports Betting?*, LEGAL SPORTS REPORT (May 29, 2018), <http://www.legalsportsreport.com/20745/leagues-and-fees-in-sports-betting> [<https://perma.cc/W9R9-YRXD>].

302. Joe Lemire, *MLB’s Manfred Discusses Betting for First Time Since SCOTUS Decision*, SPORT TECHIE (May 22, 2018), <http://www.sporttechie.com/sports-betting-supreme-court-mlb-rob-manfred> [<https://perma.cc/Q8GP-7S34>] (quoting Rob Manfred, Commissioner, Major League Baseball) (“We spend the money to produce the product. Gambling, sports betting operations are free-riding on that product. It’s our intellectual property at the end of the day.”); Jeff Zillgitt, *NBA, MGM Resorts International Announce New Multi-Year Partnership*, USA TODAY (July 31, 2018), <http://www.usatoday.com/story/sports/nba/2018/07/31/nba-mgm-resorts-announce-new-multi-year-partnership/872528002> [<https://perma.cc/P4DV-T585>] (quoting Adam Silver, Commissioner, National Basketball League) (“And to the extent that product is then used for casinos, betting parlors to make money on, we feel, just in the same way a musician that receives a royalty for the music that’s being played, that we should receive some sort of royalty.”).

to operate a sports gambling operation exists in the public domain, and the leagues have previously litigated and lost the right to be compensated for the information that they now seek compensation.³⁰³ Although all of the major sports leagues would likely desire to overturn the existing precedent that seems to exclude their ability to obtain intellectual property rights in the games and scores, this has long been flagged as not within the scope of existing copyright law and a potentially problematic exception to fundamental understandings of intellectual property rights.³⁰⁴ Despite what is a pretty formidable challenge in overcoming precedent, dating back to the turn of the twentieth century, both Commissioners Silver and Manfred, as well as NHL Commissioner Gary Bettman, have all attempted to lobby state lawmakers to pass legislation imposing integrity fees.³⁰⁵

Although the push for integrity fees has not been successful in states that have passed bills legalizing sports wagering, there exists another route for the sports leagues. As the sports leagues have not had success lobbying on a state-by-state basis, they may seek to initiate a lawsuit or lawsuits against gaming operators over perceived intellectual property infringements.³⁰⁶ The NBA has already sought to subvert the lack of a legislative royalty fee, by announcing a partnership with MGM International, which will see the casino giant

303. *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (holding that the First Amendment trumps state law rights of publicity regarding the use of names and player statistics in fantasy baseball); *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 854 (2d Cir. 1997) (holding that the distribution of sports scores recorded by Motorola did not free ride on the NBA's intellectual property rights); *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) (holding that freedom of expression trumps the right of publicity for a company who made baseball cards using parodies of real major league players).

304. See *Initial PASPA Hearing*, *supra* note 46. For instance, Garo Partoyan of the United States Trademark Association argued, when Congress debated PASPA's predecessor, that an amendment to the Lanham Act allowing the sports leagues special interests would be fundamentally unfair. *Id.*

305. Kirstie Chiappelli, *NHL Commissioner Gary Bettman Talks Gambling Negotiations*, SPORTINGNEWS (Aug. 1, 2018), <http://www.sportingnews.com/us/nhl/news/nhl-gary-bettman-gambling-sports-betting-legal-partner-nba-mgm-news/wwi2hp9vfp6s1lemqqf8149qz> [<https://perma.cc/7MXJ-YYSB>]. NHL Commissioner Gary Bettman was quoted as stating, "From our standpoint, we believe that, whether it's our intellectual property, our data, whether its video of our game, we have important assets and if somebody is going to avail themselves or want to avail themselves of those assets in order to conduct their business, then we're going to need to have a negotiation." *Id.*

306. Holden, *supra* note 232.

as the NBA's official gaming partner.³⁰⁷ Though this partnership enables MGM casinos to utilize NBA logos and the NBA's real-time data feed, questions remain as to what value the partnership will add for MGM beyond being able to use team logos.³⁰⁸ Although the deal seems questionable, given the lack of proprietary content within the NBA's official data, at some point the NBA and other leagues may seek to initiate lawsuits against companies not using official data feeds despite what appears to be a likely negative outcome given existing case law.³⁰⁹

The death of PASPA is but the removal of a single obstacle in the challenge of widespread sports wagering. Though a formidable hurdle has been cleared, there remain additional complications at the federal, state, and organizational levels. Much remains uncertain regarding the future of sports betting in the United States, and valuable lessons have and will continue to be learned. In the following section, this article examines some of the areas that have been pushed to the background in the wake of the excitement over the fall of PASPA.³¹⁰

IV. Averting Disaster

The excitement over the freedom to legalize sports wagering has gripped state lawmakers across the country like a vice, but the legalization of sports wagering brings with it tremendous risks to sports, bookmakers, and the public.³¹¹ One of the biggest costs associated with the risks is the necessity for lawmakers to take steps

307. Kevin Draper, *N.B.A. Makes MGM Resorts International Its First Gambling Partner*, N.Y. TIMES (July 31, 2018), <http://www.nytimes.com/2018/07/31/sports/nba-betting-mgm.html> [<https://perma.cc/NE4R-VS6B>].

308. Brett Smiley, *NBA Announces Historic Sports Betting Deal with MGM Resorts International*, SPORTS HANDLE (July 31, 2018), <https://sportshandle.com/nba-announces-historic-sports-betting-deal-with-mgm-resorts-international> [<https://perma.cc/AGU4-GSUR>].

309. See, e.g., *Nat'l Basketball Ass'n v. Motorola*, 103 F.3d 841 (2d Cir. 1997); see also *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007).

310. See Michael McCann, *Winners and Losers from the Supreme Court's Ruling on Sports Gambling*, SPORTS ILLUSTRATED (May 14, 2018), <http://www.si.com/more-sports/2018/05/14/winners-losers-supreme-court-ruling-sports-betting-chris-christie-las-vegas> [<https://perma.cc/B8JQ-X2E2>]. One of the most pressing areas of concern is in ensuring adequate resources for those exhibiting problem gambling tendencies. *Id.*

311. Gregory, *supra* note 170.

to manage their states' exposure. Among the early failures are Pennsylvania's 36% tax rate, which threatens the viability of sports betting in the state.³¹² Noncompetitive tax rates are a very real threat keeping legal bookmakers out of the marketplace or making it so expensive that they cannot offer competitive betting lines in comparison to bookmakers in the illegal market.³¹³ If states do not offer competitive pricing to illegal bookmakers, legalized sports wagering will fail to recapture bettors from the illegal market, and PASPA's death will appear as little more than a few pages in a textbook in the annals of history. The sports leagues' entitlement to an integrity fee is not based on strong legal ground; however, protecting the integrity of both sports and sportsbooks must be a top priority of lawmakers.

A. Integrity Issues

There are two layers of integrity issues. The first is ensuring the integrity of the sportsbooks themselves, and the second is ensuring that the integrity of the underlying sports events is protected with a robust system of checks and balances. Ensuring the integrity of sportsbooks is necessary to ensure that consumers are engaging in a fair transaction and that the imprimatur of state endorsement through regulation is not undermined. The integrity of sports betting operators requires several components; like financial operators, it is necessary to ensure that employees are not misusing proprietary or consumer information for personal gain.³¹⁴ The alleged misuse of insider information also arose in the daily fantasy sports industry.³¹⁵ For

312. Andrew Maykuth, *PA's Sports Betting Taxes So High Legal Bookmakers May Shun State*, PHILA. INQUIRER (July 16, 2018), <http://www.philly.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html> [https://perma.cc/V4US-C6QR].

313. Adam Candee, *Is It 'Revenue Sharing' or High Taxes for Sports Betting? Ask Rhode Island, Delaware How They Slice the Pie*, LEGAL SPORTS REPORT (July 3, 2018), <http://www.legalsportsreport.com/21663/sports-betting-revenue-sharing> [https://perma.cc/5U6B-4KBC] (quoting Sara Slane, Senior Vice President of Public Affairs, American Gaming Association) ("States should focus on the consumer experience and empower licensed, regulated operators the ability to offer a competitive product that fosters betting in a safe way and shuts down the illegal market.").

314. See Harold Demsetz, *Corporate Control, Insider Trading, and Rates of Return*, 76 AM. ECON. REV. 313, 313 (1986) (an overview of potential uses of insider information in financial trading).

315. Holden, Green & Rodenberg, *supra* note 208, at 3.

example, an employee at DraftKings who had access to information that provided him with a competitive advantage, and he won more than \$350,000 in a contest on rival FanDuel, DraftKings's rival.³¹⁶ Another story of alleged misconduct by the major players in the daily fantasy industry describes a DraftKings's executive pulling up a consumer's line-up on his phone and mocking his player selections at a party.³¹⁷ To prevent these types of abuses, states looking to license and regulate sports betting will need to implement consumer protections. Massachusetts gaming regulators have suggested that advertising consumer protections may actually encourage bettors to migrate from the black market to the legal market.³¹⁸

Protecting the integrity of legal sports betting markets through transparent regulations that ensure solvency and protection against abuses is one way that state-licensed sportsbooks can entice consumers to use their products.³¹⁹ Although states and casinos continue to push back against paying an integrity fee to the sports leagues, both leagues and sportsbooks have an interest in protecting the integrity of the underlying sporting events from corruptors.³²⁰ Protecting the integrity of sports has been a primary concern for American sports leagues since at least 1919, when the Chicago White

316. *Id.* at 4.

317. *Id.* at 5. It should be noted that both FanDuel and DraftKings have entered the sports betting marketplace despite multiple reports of misconduct in the daily fantasy industry, including reports of federal investigations into at least one company's conduct. *Id.*; see Staff, *Here's Where the Federal Investigations into Daily Fantasy Sports Might Be Focused*, LEGAL SPORTS REPORT (Mar. 18, 2016, 4:47 PM), <http://www.legalsportsreport.com/9053/dfs-federal-issues> [<https://perma.cc/HW88-JDH3>]. Relatedly, DraftKings CEO Jason Robins acknowledged non-compliance with the Unlawful Internet Gambling Enforcement Act in a conference call with the Fantasy Sports Trade Association. David Purdum, *DraftKings CEO Acknowledged Some UIGEA Noncompliance in May Conference Call*, ABC NEWS (Nov. 19, 2015, 4:55 PM), <https://abcnews.go.com/Sports/draftkings-ceo-acknowledged-uigea-noncompliance-conference-call/story?id=35313282> [<https://perma.cc/4279-C4VD>].

318. MASS. GAMING COMM'N, *supra* note 284, at 18.

319. See David Purdum, *Dodgers-Phillies Marathon Causes New Jersey Sportsbook Issue*, ESPN (July 25, 2018), http://www.espn.com/chalk/story/_id/24191856/mlb-story-bettors-not-being-able-cash-winning-tickets-fanduel-meadowlands-sportsbook-tuesday-night [<https://perma.cc/SHC4-BYFZ>]. On one of the first nights following the legalization of sports betting in New Jersey, there was an incident involving miscommunication regarding a FanDuel-branded sportsbook and their policy for paying bettors after a certain time. *Id.* This resulted in some bettors speculating that the sportsbook did not have sufficient money to pay out bettors. *Id.*

320. John Holden, *The Sports Bribery Act: A Look Back at Attempts to Aid Integrity*, LEGAL SPORTS REPORT (May 30, 2018, 12:41 PM), <http://www.legalsportsreport.com/20813/sports-integrity-in-the-us-history> [<https://perma.cc/Z6V2-VRGF>].

Sox allegedly fixed the World Series at the urging of reputed organized crime figure Arnold Rothstein.³²¹ The methods of detection have improved greatly, but many of the sources of sports corruption are the same today as they were in 1919.³²²

The increased sophistication in sports integrity is being publicly driven by several for-profit companies that monitor online gambling line movements looking for anomalous, suspicious, or unexplained changes in pricing, which might indicate some form of corruption taking place.³²³ Though these companies operate for profit, the models they use to detect corruption are not overly sophisticated. Similar studies have been run in academia with little cost, essentially raising questions about the proprietary nature of the integrity models.³²⁴ Relatedly, there are also substantial questions about the proprietary nature of the data these companies collect and analyze, and internal reports indicate that much of the information appears to be scraped from various sports betting websites.³²⁵ There are meaningful questions surrounding the efficacy of entrusting for-profit entities with protecting the integrity of sport when the companies may have conflicting incentives to report or not report information depending on who is employing the companies.³²⁶ Although private parties may appear equipped to protect sports organizations, they lack the law enforcement capabilities of local, state, and federal

321. John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455 (2015).

322. See *id.* at 462–63; John T. Holden & Ryan M. Rodenberg, *Lone-Wolf Match-Fixing: Global Policy Considerations*, 9 INT'L J. SPORT POL'Y & POL. 137, 137 (2016).

323. David Cook, *Fixers Beware*, GAMBLING INSIDER (Jan. 12, 2016), <https://www.gamblinginsider.com/in-depth/1667/fixers-beware> [<https://perma.cc/UE7X-LFXV>]; *About Us*, SPORT RADAR, <https://sportradar.us/about-us> [<https://perma.cc/4SJY-FWUY>] (last visited Aug. 4, 2018).

324. Elihu D. Feustel & Ryan M. Rodenberg, *Sports (Betting) Integrity: Detecting Match-Fixing in Soccer*, 19 GAMING L. REV. & ECON. 689, 689 (2015); Ryan M. Rodenberg & Elihu D. Feustel, *Forensic Sports Analytics: Detecting and Predicting Match-Fixing in Tennis*, 8 J. PREDICTION MKTS. 77, 81, 88 (2014).

325. DAVID FORREST & IAN G. MCHALE, AN EVALUATION OF SPORTRADAR'S FRAUD DETECTION SYSTEM 1–3 (2015), https://fds.integrity.sportradar.com/wp-content/uploads/sites/18/2016/03/Sportradar-Security-Services_University-of-Liverpool_An-Evaluation-of-the-FDS.pdf [<https://perma.cc/5Y2P-H2AX>].

326. *Id.* at 42–43. There is also a questionable relationship with law enforcement and the obligation to report suspicious activity. *Id.* at 7–8.

government agencies, such as the power to obtain search warrants and conduct investigations where witnesses are under an obligation to cooperate. The concept of trusting private organizations that lack any authority to take action when they identify a potential indicator of corruption is problematic for regulators who want to ensure that there is an efficient system for deterring corruption.

Currently, federal laws such as the Sports Bribery Act,³²⁷ as well as the patchwork of state laws addressing sport corruption, are outdated and require updating to address modern criminal structures and create a system that encourages individuals to come forward with information through mechanisms such as whistleblower protections.³²⁸ Despite relative silence from early state adopters and delegation to operators on how to protect the integrity of sports, there have been emergent calls from some congressional members to begin reexamining federal laws on the issue and to implement some new regulations that would bring uniformity into the system.³²⁹ Protecting the integrity of both sports events and sportsbooks is critical to ensure a properly functioning wagering market, as well as ensuring resources are available for individuals experiencing problematic gambling behaviors.

B. Public Health

Public health concerns associated with gambling are among the most commonly cited reasons for prohibiting and limiting access to gambling facilities and websites.³³⁰ Indeed, “problem gamblers” can be a massive cost to society, especially when safeguards and systematic protections fail to protect individuals.³³¹ One study found

327. Sports Bribery Act, § 1(a), Pub. L. No. 88-316, 78 Stat. 203 (codified as amended at 18 U.S.C. § 224 (2012)).

328. See Holden & Rodenberg, *supra* note 321, at 471–73.

329. See Orrin G. Hatch, *Sports Betting Is Inevitable—Let’s Make Sure It’s Done Right*, SPORTS ILLUSTRATED (May 23, 2018), <http://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation> [<https://perma.cc/E583-G7AW>].

330. Resource Center, STOP PREDATORY GAMBLING, http://www.stoppredatorygambling.org/resource-center/?fwp_form=sports-betting [<https://perma.cc/D868-9KXY>] (last visited Aug. 4, 2018).

331. *Average Debt of Problem Gamblers in Wisconsin Exceeds \$34,000*, STOP PREDATORY GAMBLING, <http://www.stoppredatorygambling.org/average-debt-of-problem-gamblers-in-wisconsin->

that by the time the average problem gambler seek help, he has already amassed nearly \$47,000 in gambling debt on average.³³² Many gambling sites now include self-exclusion options where bettors and, in some instances bettors' loved ones, can get themselves (or their loved ones) blocked from accessing brick and mortar casinos or online sports betting sites; this is often viewed as a minimal level protection.³³³ Self-exclusion protocols are not flawless and are likely most effective for bettors who are at an advanced stage of being ready to quit. Online websites can block internet protocol addresses, but casinos face an added challenge of having to police self-excluders and those who the casino wishes to exclude.³³⁴

The research on the efficacy of self-exclusion programs is mixed. One of the major long-term studies, conducted in 2010, found that while many self-excluders had a positive experience with the program, more than half who tried to trespass at casinos were able to do so.³³⁵ There is promise in self-exclusion programs; however, there remains much to be learned about what makes programs successful.³³⁶ There are a wide variety of disparities within self-exclusion programs, some which may make programs more or less successful than others. States need to begin educating themselves on the costs and benefits of government-based self-exclusion, which effectively creates criminal or civil penalties for self-excluders who trespass at casinos.³³⁷ Additionally, consideration needs to be given

exceeds-34000 [https://perma.cc/SH9F-WFRL] (last visited Aug. 4, 2018).

332. Andy Thompson, *Average Debt for Compulsive Gamblers: \$47,000*, POST CRESCENT (Jan. 10, 2015, 3:49 PM), <http://www.postcrescent.com/story/news/local/2015/01/10/average-debt-compulsive-gamblers/21561693> [https://perma.cc/T24H-24R4].

333. Sean P. Murphy, *Foxwoods Didn't Stop Gambling Addict Who Asked to Be Banned—Until He Won*, BOS. GLOBE (Jan. 30, 2017), <http://www.bostonglobe.com/metro/2017/01/29/banned-from-casino-returns-lose-more-money-without-detection/pDuGgMVtU6xGICjavXcfjL/story.html> [https://perma.cc/SFC4-97YF].

334. Alice Ross, *Why Self-Exclusion Is Not an Answer to Problem Gambling*, BUREAU INVESTIGATIVE JOURNALISM (July 24, 2012), <http://www.thebureauinvestigates.com/stories/2012-07-24/why-self-exclusion-is-not-an-answer-to-problem-gambling> [https://perma.cc/6Z39-ZS7L].

335. Sarah E. Nelson et al., *One Decade of Self-Exclusion: Missouri Casino Self-Excluders Four to Ten Years After Enrollment*, 26 J. GAMBLING STUDIES 129, 129 (2010).

336. *Research on Self-Exclusion Programs*, NAT'L CTR. RESPONSIBLE GAMING (Aug. 2010), <http://www.ncrg.org/resources/publications/issues-insights/research-self-exclusion-programs> [https://perma.cc/5G5P-7FYB].

337. *Id.*

to who should be held responsible if self-excluders gain access and cause personal financial harm.³³⁸ Although self-exclusion has many variables, it is a baseline protection that is necessary industry-wide. There are, however, more advanced options that progressive state legislatures could implement in the realm of online wagering that may be more promising in identifying problem gamblers at an early stage.

Many gambling sites collect large amounts of data regarding patterns of play by users, which can be compared against other users to determine which users might be exhibiting problem gambling tendencies.³³⁹ Several of the *Diagnostic and Statistical Manual of Mental Disorders V*'s criteria for problem-gambling signs could be identified using data from online playing patterns, including “[r]epeated unsuccessful efforts to control, cut back on or stop gambling” and “[a]fter losing money gambling, often returning [another day] to get even.”³⁴⁰ Using data to identify problem-gamblers at an earlier stage and implement interventions to provide assistance before the gambler incurs significant consequences would be a meaningful advancement over what is currently being done in brick-and-mortar casinos and in overseas markets with legal sports betting.

In addition to age and identity verifications, which are fairly commonplace in most gambling industries, the implementation of impactful integrity provisions such as governmental oversight of integrity monitoring and the use of data-based solutions to identify problem gambling tendencies can make meaningful advances in the United States sports betting market. Unfortunately, there has been an early rush to beat competitors to the market in some regions of the

338. Peter Czegledy, *The Legal Risk of Problem Gambling*, 13 GAMING L. REV. & ECON. 233, 233 (2009); Neda Faregh & Craig Leth-Steensen, *Reflections on the Voluntary Self-Exclusion of Gamblers and the Law-Suits Against Ontario Lottery and Gaming Corporation*, 25 J. GAMBLING STUD. 131, 131 (2009); NAT'L CTR. RESPONSIBLE GAMING, *supra* note 336.

339. Mark Griffiths, *Internet Gambling: Issues, Concerns, and Recommendations*, 6 CYBERPSYCHOLOGY & BEHAV. 557, 563, 566 (2003).

340. Philip Wang, *What is Gambling Disorder?*, AM. PSYCHIATRIC ASS'N (Aug. 2018), <https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder> [<https://perma.cc/7V7K-M54E>].

country, and consumer protection issues have been pushed to the back burner.³⁴¹ Although sports betting promises to bring new revenue to the states, there is a risk that a system without checks and balances could end up costing states more money in social costs than they could ever generate in tax revenue.

CONCLUSION

In a report commissioned for the American Gaming Association, Oxford Economics Group prepared an estimate of what the economic impact of legalized sports betting might look like in the United States.³⁴² The report concluded that the total economic impact could range from a little more than \$10 billion annually to nearly \$44 billion annually if sports betting was widely available across the country.³⁴³ It is also hypothesized that in certain environments there could be more than \$300 billion wagered annually and legally in the United States, which would rank sports betting as the fifteenth-largest industry in the country. Three hundred billion dollars is roughly equivalent to two percent of the country's gross domestic product.³⁴⁴ Although the high-end estimates are likely overly rosy, many lawmakers have seen the fall of PASPA as an opportunity to cure state budget problems. But, legal sports betting is unlikely to be a panacea in terms of the ills of state tax revenue shortfalls.³⁴⁵

The small margins within which betting operators have to generate a profit make it difficult to implement taxes that would alleviate

341. Brian Hess, Letter to the Editor, *As Legal Sports Betting Spreads, We Need Consumer Protection*, WASH. POST, https://www.washingtonpost.com/opinions/as-legal-sports-betting-spreads-we-need-consumer-protection/2018/10/10/70ba2742-cb42-11e8-ad0a-0e01efba3cc1_story.html [https://perma.cc/NE5T-BSSN] (last visited Oct. 19, 2018).

342. OXFORD ECONS., ECONOMIC IMPACTS OF LEGALIZED SPORTS BETTING 3 (2017), <http://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf> [https://perma.cc/4UV9-CNSA].

343. *Id.* at 5.

344. *The Biggest Industries in the United States*, WORLD ATLAS <http://www.worldatlas.com/articles/which-are-the-biggest-industries-in-the-united-states.html> [https://perma.cc/8WC6-A943] (last visited Aug. 15, 2018).

345. See, e.g., Editorial Board, *A Good Bet: Kansas and Missouri Should Get Ready to Offer Sports Gambling*, KAN. CITY STAR (July 5, 2018), <http://www.kansascity.com/opinion/editorials/article214374624.html> [https://perma.cc/L6KV-LVUG].

deficits and allow operators to remain competitive with the illegal market.³⁴⁶ The opportunity for states to legalize sports betting should be viewed as an opportunity to give millions of Americans the ability to do something legally that they were doing already. There certainly are risks associated with sports betting, both legal and illegal, but the legal market offers great advantages because lawmakers can mandate standards to protect consumers, operators, and sports leagues. The opportunity to make a risky behavior safer is what lawmakers should embrace, and in many ways, legalization with proper implementation designed around consumer protection may be able to achieve what the federal government never could—a means of curbing the illegal market.

The ability to legalize sports betting presents a tremendous opportunity, but also a tremendous risk for states. Much can be learned from the deliberate and careful approach to the legalization of recreational marijuana in states like Oregon and Washington, which have seen the growth of a now-booming industry.³⁴⁷ This type of deliberate practice and attention to detail is what is necessary to ensure that sports betting is a success as opposed to a mere fad that will only temporarily serve as a substitute to the illegal market. Legalized sports betting has great potential, but its success will be measured in years, not in months.

346. SPORTS INSIGHTS, *Sportsbook Profit Margins*, <http://www.sportsinsights.com/betting-tools/sportsbook-profit-margins> [https://perma.cc/U8F3-CNDP] (last visited Aug. 4, 2018).

347. *Beaver State or Reefer State? A Short History of Cannabis in Oregon*, OR. STATE UNIV. PRESS (Nov. 14, 2017), <http://www.osupress.oregonstate.edu/blog/beaver-state-or-reefer-state-short-history-of-cannabis-in-oregon> [https://perma.cc/H4EN-YYVY]. The state of Oregon publishes a working document of best practices for the marijuana industry. See Cannabis Envtl. Best Practices Task Force, *Working Document*, OR. LIQUOR CONTROL COMM'N (Aug. 16, 2016), http://www.oregon.gov/olcc/marijuana/Documents/CEBP/WorkingDocument_CEBP_08162016.pdf [https://perma.cc/T3ZS-6XD3].