

REGULATING SPORTS GAMBLING IN THE  
AFTERMATH OF *MURPHY V. NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION*

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INTRODUCTION

On May 14, 2018, the U.S. Supreme Court issued its seminal ruling in *Murphy v. National Collegiate Athletic Association*,<sup>1</sup> which held that the Professional and Amateur Sports Protection Act (“PASPA”) violated the Tenth Amendment of the United States Constitution and that the U.S. states are now free to legalize commercial sports gambling.<sup>2</sup> At present, six states have initiated plans to allow for state-sponsored sports gambling in response to the Supreme Court’s *Murphy* decision.<sup>3</sup> Meanwhile, numerous other states, including New York, will potentially legalize sports gambling in 2019.<sup>4</sup>

This Essay explores newfound legal questions that arise from the expansion of state-sponsored sports gambling in the aftermath of *Murphy*. Part I of this Essay explores the history of sports gambling in the United States prior to the Supreme Court’s decision in *Murphy*. Part II explains the legal rise and fall of PASPA, culminating with the Supreme Court’s decision in *Murphy*. Part III describes six new state laws to legalize and regulate sports gambling in the aftermath of PASPA’s demise. Finally, Part IV addresses

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<sup>1</sup> 138 S. Ct. 1461 (2018).

<sup>2</sup> *Id.* at 1484–85; see also Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J.L. & BUS. (forthcoming 2018) (manuscript at 2). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3203879](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3203879).

<sup>3</sup> See *Legal Sports Betting Legislation Tracker – Betting Bills and Information Tracker for USA*, SPORTS HANDLE, <https://sportshandle.com/legal-betting-legislation-tracker> (last visited May 16, 2018) (listing these states as New Jersey, Delaware, Mississippi, Pennsylvania, West Virginia, and Rhode Island). A seventh state, Nevada, has offered state-sponsored sports betting since 1949, and the overturn of PASPA will not lead to any changes in its current legal practices. See *infra*, notes 29–32 and accompanying text (discussing the history of sports betting in Nevada).

<sup>4</sup> See *Sports Betting Could Spread to 32 U.S. States*, CBS SPORTS (Oct. 2, 2017, 8:33 AM), <https://www.cbsnews.com/news/sports-betting-could-spread-to-32-u-s-states>; Matthew Krendell, *Lawmaker Says NY Sports Betting Bill ‘Not Dead but in a Coma;’ Expects Wagering at Commercial Casinos in 2018*, LEGAL SPORTS REP. (June 26, 2018, 3:48 PM), <https://www.legalsportsreport.com/21588/new-york-sports-betting-integrity-fee> (discussing the expectation that New York will pass a sports-betting bill in 2019).

seven important public policy issues that state legislators should consider when proposing new sports-gambling laws in the wake of *Murphy*.

## I. HISTORY OF SPORTS GAMBLING IN THE UNITED STATES

The United States has endured a long and complicated history with gambling in general, and more specifically with sports gambling.<sup>5</sup> Section A of this Part discusses the emergence of gambling laws during the United States' early history. Section B explores the rise of U.S. commercial sports leagues and their historic opposition to gambling. Section C discusses state efforts to legalize sports gambling during the twentieth century. Section D explains attempts by sports leagues to quash state-sponsored sports gambling. Finally, Section E describes the 1992 passing of PASPA and its implications on the expansion of sports gambling.

### A. *Gambling Laws in Early U.S. History*

Scholars trace the history of organized gambling in the United States to the pre-Revolutionary War period, when many colonies conducted lotteries to raise money to build roads and hospitals.<sup>6</sup> During this period, a few wealthy citizens conducted their own lotteries to raise money for large public works projects such as the building of Harvard University, Yale University, and the University of Pennsylvania.<sup>7</sup> Other citizens, meanwhile, created lotteries strictly for their own personal gain.<sup>8</sup>

By the end of the nineteenth century, most states had enacted laws to prevent private citizens from conducting their own lotteries.<sup>9</sup> However, public lotteries continued to survive until the mid-1800s, when state legislators

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<sup>5</sup> See Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 154 (2018) (explaining that prior to the passage of PASPA, “[r]ather than preempting state laws, federal gambling laws were to aid states in enforcing their laws that prohibit gambling”). While some people are surprised to learn that organized gambling existed at the time the United States was founded, the history of organized gambling dates back much further than that, with the discussion of gambling activities on ancient Egyptian burial walls, as well as appearing in numerous biblical texts. See, e.g., Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 15 (1992) (discussing gambling-related drawings in ancient Egyptian society that are estimated to date back to 2500 B.C.E.); Zach Schreiber, *The Time Is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 353, 357 (2017) (“Religious texts such as the Jewish Talmud and the Bible provide evidence of gambling in ancient civilizations.”).

<sup>6</sup> Rychlak, *supra* note 5, at 25–26.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 26 (noting, however, the longstanding complaints about truly private lotteries).

<sup>9</sup> *Id.*; cf. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1468–69 (2018) (“By the end of the 19th century, gambling was largely banned throughout the country . . .”).

reached the uniform conclusion that public lotteries were an undesirable form of regressive taxation.<sup>10</sup>

Although most states had abandoned their lotteries by the 1840s, a few southern states reinstated lotteries at the conclusion of the Civil War.<sup>11</sup> In 1890, Congress responded by passing a law making it illegal for any state or citizen to use the mail to send or receive lottery tickets.<sup>12</sup> Then, in 1895, Congress passed another law to disallow the “[i]mporting or transporting of lottery tickets.”<sup>13</sup> The goal of these two federal statutes was to limit state-sanctioned gambling activities as much as Congress believed was possible.<sup>14</sup>

### B. *Emergence of U.S. Commercial Sports Leagues*

It was under this political climate that commercial sports leagues emerged in the United States.<sup>15</sup> Major League Baseball, as an entity, emerged in 1903 out of a cooperative venture between the National League (originally founded in 1876) and the American League (originally founded as the Western League in 1893).<sup>16</sup> The National Hockey League expanded into U.S. markets in 1924.<sup>17</sup> The National Football League began play in 1920.<sup>18</sup> Meanwhile, big-time college football traces its roots to two important dates: 1869 (the year of the first college football game) and 1895 (the year when the Big Ten Conference was founded as the first modern collegiate athletic conference).<sup>19</sup>

<sup>10</sup> Rychlak, *supra* note 5, at 33.

<sup>11</sup> *Id.* at 37–39.

<sup>12</sup> *See id.* at 43; 18 U.S.C. § 1302 (2012) (stating that anyone who “knowingly deposits in the mail, or sends or delivers by mail: . . . [a]ny letter, package, postal card, or circular containing any lottery . . . or similar scheme offering prizes . . . ; [a]ny lottery ticket . . . ; [any payment] for the purchase of any [lottery] ticket . . . [s]hall be fined under this title or imprisoned not more than two years, or both”).

<sup>13</sup> 18 U.S.C. § 1301.

<sup>14</sup> *See* Rychlak, *supra* note 5, at 42. (“Because the Louisiana legislature would not shut the lottery down, and other states were ineffective in their efforts to confine the effects within the Louisiana border, reformers, churches and newspapers all lobbied for federal intervention.”).

<sup>15</sup> *See infra* notes 16–19 and accompanying text.

<sup>16</sup> *See* Marc Edelman, *Why the “Single Entity Defense” Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 899 (2008) (describing 1903 as the year of the unofficial merger of the National League and the American League); *National League of Baseball Is Founded*, HISTORY, <https://www.history.com/this-day-in-history/national-league-of-baseball-is-founded> (last visited Sept. 16, 2018) (discussing the National League’s founding in 1876); *American League*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/American-League> (last visited Aug. 31, 2018) (discussing the American League’s founding in 1893).

<sup>17</sup> *See NHL Hockey Came to the U.S. on Dec. 1, 1924*, NHL (Dec. 1, 2008), <https://www.nhl.com/news/nhl-hockey-came-to-the-u-s-on-dec-1-1924/c-395417>.

<sup>18</sup> *See* Marc Edelman, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions*, 115 PENN ST. L. REV. 341, 343 (2010).

<sup>19</sup> *See* Marc Edelman, *The NCAA’s “Death Penalty” Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 389 (2014) (providing the dates of

The mass appeal of commercial sports in the United States was based on the principle of outcome uncertainty. This means that fans believed game results were the product of bona fide competition and not a predetermined script. Based on this presumption, fans rooted enthusiastically for their home teams. They also may have engaged in activities to predict who they thought would win particular games.

Nevertheless, from the very beginning, there were occasional rumors that gamblers were interfering with outcome uncertainty by “greasing the palms of disgruntled ballplayers” in exchange for inside information about the games’ anticipated results.<sup>20</sup> Then, in the fall of 1919, eight members of the Chicago White Sox baseball team were accused of losing the World Series on purpose in exchange for a payment from organized gamblers.<sup>21</sup> A grand jury indicted the eight White Sox ballplayers for engaging in an illegal gambling conspiracy.<sup>22</sup> Nevertheless, none of these players were convicted at trial of any wrongdoing.<sup>23</sup>

In response to Major League Baseball’s first notable gambling scandal, league owners convened a special meeting in January 1921 to establish the position of “commissioner” to provide an appearance of oversight and accountability for the sport.<sup>24</sup> From the owners’ perspective, the commissioner’s position was essential to remove any lingering doubt among fans that players engaged in good faith competition. Thus, in essence, the commissioner’s position became one of safeguarding outcome uncertainty.

The ideal commissioner was a person the public perceived as earnest. When choosing candidates to serve as Major League Baseball’s first commissioner, some of the owners’ first choice was William Howard Taft—former President and future Chief Justice of the United States.<sup>25</sup> However, after Taft learned that he was likely to soon receive a nomination to serve on the U.S. Supreme Court, league owners instead offered the position to a sitting federal judge—Kenesaw Mountain Landis.<sup>26</sup> During Landis’s twenty-four

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the first U.S. college football game and the founding of the Big Ten athletic conference). The broader entity that ultimately gained oversight over college sports, the National Collegiate Athletic Association, did not come into existence until at least 1905. *See id.* (discussing President Theodore Roosevelt’s efforts in 1905 to help establish the NCAA).

<sup>20</sup> Evan Andrews, *The Black Sox Baseball Scandal, 95 Years Ago*, HISTORY (Oct. 9, 2014), <https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (noting that no player on the Chicago White Sox was ultimately convicted, but important grand jury records, including purported confessions, “vanished” shortly before trial).

<sup>24</sup> *See The Commissionship: A Historical Perspective*, MLB, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com) (last visited Aug 31, 2018).

<sup>25</sup> *See* Mike Lynch, *Harry Frazee, William Howard Taft, and the Lasker Plan*, SEAMHEADS (July 13, 2009), <http://seamheads.com/blog/2009/07/13/harry-frazee-william-howard-taft-and-the-lasker-plan/>.

<sup>26</sup> *See* Chelsea Janes, *Throwback Thursday: The First Commissioner of Baseball*, WASH. POST (Nov. 13, 2014), [https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/11/13/throwback-thursday-the-first-commissioner-of-baseball/?utm\\_term=.88db0798e9c7](https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/11/13/throwback-thursday-the-first-commissioner-of-baseball/?utm_term=.88db0798e9c7) (discussing Kenesaw Mountain

year tenure as Major League Baseball Commissioner, he actively insulated the game from gambling scandals. Other U.S. commercial sports leagues took note of Landis's role, and they eventually hired commissioners to similarly police their sports.<sup>27</sup>

### C. *State Legalization of Sports Gambling*

Although Major League Baseball's 1919 gambling scandal led to strong public sentiment against sports gambling, the scandal did not affect public sentiment toward gambling more generally. In the years that followed, a few states reintroduced their public lotteries.<sup>28</sup> Then, in 1931, Nevada became the first state to allow for state-sponsored casino gambling by passing the Wide Open Gambling Bill of 1931, which became "the cornerstone on which Las Vegas' modern economy was built."<sup>29</sup>

While the Wide Open Gambling Bill did not immediately lead to state-sponsored sports gambling, Nevada expanded its list of approved casino games in 1949 to include betting on sports.<sup>30</sup> The leading political voice in favor of legalizing sports gambling in Nevada was Phil Tobin—a former cowboy who ran for political office on a platform that state-sponsored gambling would help to revitalize the Nevada's economy.<sup>31</sup>

Montana soon followed in 1973 when it launched a publicly operated sports lottery.<sup>32</sup> A few years later in 1976, Delaware instituted a state lottery

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Landis's selection as the first commissioner of Major League Baseball); *Presidents in Retirement: William Howard Taft*, PRESIDENTIAL HISTORY GEEKS (July 26, 2017, 1:03 AM), <https://potus-geeks.livejournal.com/870166.html> (explaining that in January 1921, the same month that the Major League Baseball owners met to choose their first commissioner, "Taft heard through intermediaries that [President Warren] Harding planned to appoint him to the [Supreme Court]").

<sup>27</sup> See Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 71 (1995) (noting that other sports leagues created their Commissioner positions for many of the same reasons that Major League Baseball did).

<sup>28</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1469 (2018) (explaining that "beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened").

<sup>29</sup> Ed Koch, *Bill that Transformed a City*, LAS VEGAS SUN (May 15, 2008, 3:00 AM), <http://www.lasvegassun.com/news/2008/may/15/bill-transformed-city>; see also *Nevada Legalizes Gambling*, HISTORY, <https://www.history.com/this-day-in-history/nevada-legalizes-gambling> (last visited Sept. 16, 2018).

<sup>30</sup> See *Nat'l Football League v. Governor of Delaware*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (explaining that sports betting had been legal in Nevada since 1949).

<sup>31</sup> See Koch, *supra* note 29.

<sup>32</sup> Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 42 (2013).

that allowed participants to bet a parlay on NFL games.<sup>33</sup> Delaware abandoned its NFL lottery in 1977 but reintroduced a similar version in 2009.<sup>34</sup>

Oregon became the fourth state to legalize state-sponsored sports gambling in the 1980s when it unveiled a contest that—similarly to Montana and Delaware’s contests—allowed participants to bet on the winners of NFL games.<sup>35</sup> Oregon’s sports lottery survived until 2007 when state legislators sought to win the “good graces” of the National Collegiate Athletic Association (“NCAA”), with hopes of hosting NCAA Men’s Division I Basketball Championship games.<sup>36</sup>

By the early 1990s, at least three other states explored launching sports-gambling activities:

(1) In 1990, Illinois proposed to expand the powers of the Illinois Gaming Board to allow for traditional sports betting, with 20 percent of the gross profits from sports betting going to the state for building a new Chicago Bears stadium;<sup>37</sup>

(2) Around the same time, California proposed to legalize sports betting to raise general tax revenue, allowing “racetracks, card clubs or anyone with a clean record who was willing to post a \$100,000 license fee to set up sports bookmaking operations in any California city that permits the wagering”;<sup>38</sup> and

(3) In 1992, Florida proposed a bill allowing individuals located within the state to place bets on professional football games,<sup>39</sup> which was ultimately undermined by the work of antigambling lobbyists, including perhaps, individuals who worked on behalf of the interests of U.S. commercial sports leagues.

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<sup>33</sup> See Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 289 (2011). At the time, the National Football League sought, and failed to obtain, a preliminary injunction to stop Delaware from introducing gambling on pro football. See Nat’l Football League v. Governor of Delaware, 435 F. Supp. 1372, 1375, 1378 (D. Del. 1977).

<sup>34</sup> See Meer, *supra* note 33; Chad Millman, *Delaware Allows Sports Betting*, ESPN (May 13, 2009), <http://www.espn.com/espn/news/story?id=4162225>.

<sup>35</sup> See Winneker et al., *supra* note 32, at 42.

<sup>36</sup> *Id.* at 43.

<sup>37</sup> Daniel Egler, *Betting to Fund Bear Dome Faces Long Odds*, CHICAGO TRIB., May 14, 1990. Around the same time, another Illinois legislative proposal sought to introduce to Illinois a parlay-style football betting lottery similar to the one legalized the prior year in Oregon, with the proposal aimed at raising money for public education. *Id.*

<sup>38</sup> Kenneth Reich, *State Would Lose Under Legal Sports Betting, Critics Say*, L.A. TIMES, Aug. 6, 1991, at A3.

<sup>39</sup> See *State to Consider Pro Sports Gambling*, S. FLA. SUN-SENTINEL, Jan. 15, 1992, at 2C.

#### D. *Sports League Attempts to Quash State-Sponsored Gambling*

At the same time as several states began to explore legalizing sports gambling, Major League Baseball and the other U.S. commercial leagues became even more averse to gambling expansion. From the standpoint of Major League Baseball, the league's longstanding opposition to sports gambling, which emerged as a result of the 1919 World Series scandal, was exacerbated by a second sports-gambling scandal in the late 1980s, which involved Pete Rose—the game's all-time hits leader.<sup>40</sup>

The Pete Rose gambling scandal first gained public attention in February 1989.<sup>41</sup> At the time, Major League Baseball Commissioner A. Bartlett Giamatti called Rose into his office to discuss rumors that Rose had been betting on baseball games in which he managed and played.<sup>42</sup> When Giamatti was not comforted by Rose's response to these rumors, he hired a former Justice Department lawyer to conduct an investigation into Rose's conduct.<sup>43</sup> The private investigator found that Rose had indeed bet on baseball.<sup>44</sup> As a consequence, Giamatti banned Rose from the game indefinitely.<sup>45</sup>

Less than one week later, Giamatti died of a heart attack, and was succeeded by Fay Vincent, who became increasingly zealous in his efforts to eradicate sports gambling.<sup>46</sup> In June 1990, Vincent spoke at the Associated Press Sports Writers Convention, where he stated that “sports betting is regressive, not a very good form of taxation and I think it hurts . . . the sport involved.”<sup>47</sup> In this same speech, Vincent also declared that Major League

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<sup>40</sup> See Ronald J. Rychlak, *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 MISS. L.J. 889, 892 (1999).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* at 893 (describing Major League Baseball's hiring of lawyer John Dowd to investigate Pete Rose's alleged gambling conduct). As an interesting aside, the lawyer hired by Major League Baseball to investigate the Pete Rose scandal, John Dowd, became the lawyer to President Donald Trump more than twenty-five years later when a special investigator was hired to help determine whether the President obstructed justice and engaged in other crimes related to the 2016 U.S. presidential election. See Craig Calcaterra, *John Dowd: Pete Rose's Mortal Enemy, Donald Trump's Lawyer*, NBC SPORTS (Dec. 5, 2017, 12:11 PM), <https://mlb.nbcsports.com/2017/12/05/john-dowd-pete-roses-mortal-enemy-donald-trumps-lawyer>.

<sup>44</sup> See JOHN M. DOWD ET AL., REPORT TO THE COMMISSIONER IN THE MATTER OF: PETER EDWARD ROSE, MANAGER, CINCINNATI REDS BASEBALL CLUB 3–5 (1989) (concluding that Pete Rose did, in fact, bet on baseball).

<sup>45</sup> See Kyle Wyant, *Do Not Pass Go, Do Not Collect \$231 Million Dollars: How NCAA v. Governor of New Jersey Could Negatively Affect Nevada's Monopoly on Sports Betting*, 7 UNLV GAMING L.J. 223, 226 (2017) (discussing Major League Baseball's ban of Pete Rose for allegedly gambling on his team's games); Rychlak, *supra* note 40, at 895 (noting that Rose's suspension was called “permanent,” but he was technically eligible to apply for reinstatement after one year).

<sup>46</sup> See *Giamatti Died from Heart Attack and Autopsy Shows Prior Attack*, N.Y. TIMES (Sept. 3, 1989), <https://www.nytimes.com/1989/09/03/nyregion/giamatti-died-from-heart-attack-and-autopsy-shows-prior-attack.html>.

<sup>47</sup> *Vincent Noncommittal on Rose Reinstatement*, PITTSBURGH PRESS, June 29, 1990, at D2.

Baseball would “not consider a state for expansion which has any [sports-betting] arrangements.”<sup>48</sup>

In the months that followed, Vincent convinced front office executives of the National Basketball Association and the National Football League to join him in efforts to seek a federal ban on sports gambling.<sup>49</sup> As a result of these efforts, Senator Dennis DeConcini introduced the Professional and Amateur Sports Protection Act in 1991, a federal bill designed to “stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.”<sup>50</sup> Although the Department of Justice opposed this bill, DeConcini’s bill drew strong support from many members of Congress, including Senator Bill Bradley—a former college and professional basketball player, who stressed that “the law was needed to safeguard the integrity of sports.”<sup>51</sup> It would not take long for PASPA to become federal law.

### E. *The Professional and Amateur Sports Protection Act*

After several months of negotiating the finer points of the Professional and Amateur Sports Protection Act, Congress voted on a final version of the Act in mid-1992, which President George H. W. Bush thereafter signed into law on October 28, 1992.<sup>52</sup> The final version of PASPA stated that “it shall be unlawful for . . . a governmental entity . . . or a person to sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate.”<sup>53</sup>

To ensure maximum legislative support, federal legislators included in PASPA a “grandfather” clause that allowed states that already offered sports gambling—namely, Nevada, Montana, Delaware, and Oregon—to maintain their already existing forms of gambling.<sup>54</sup> PASPA also included a provision granting New Jersey one year to legalize sports betting and similarly enjoy “grandfather” status.<sup>55</sup> New Jersey never exercised this special option, however.

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g.*, Reich, *supra* note 38 (discussing efforts by executives of these sports leagues to stop California from moving forward with a proposal to legalize sports gambling); *State to Consider Pro Sports Gambling*, *supra* note 39 (“The NFL, Major League Baseball and the NBA have hired some heavyweight lobbyists, including Jack Peeples, a former top advisor to Gov. Lawton Chiles, to fight any attempt by the state to legalize sports betting.”).

<sup>50</sup> S. REP. NO. 102-248, at 3554–55 (1991); *see also* Matthew T. Mierswa, Note, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HELL LEGIS. J. 447, 450–51 (2014).

<sup>51</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1470 (2018).

<sup>52</sup> *See* Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 23, 31–32 (2016).

<sup>53</sup> 28 U.S.C. § 3702 (2012).

<sup>54</sup> *Murphy*, 138 S. Ct. at 1471 (citing 28 U.S.C. § 3704(a)(1)–(2)).

<sup>55</sup> *Id.* (citing 28 U.S.C. § 3704(a)(3)).



PASPA, meanwhile, featured certain peculiarities in terms of its legal enforcement. While PASPA did not criminalize sports gambling, it empowered the Attorney General, as well as professional and amateur sports organizations, “to bring civil actions to enjoin violations.”<sup>56</sup> As a result, PASPA created a bizarre power dynamic where the U.S. commercial sports leagues directly governed the behavior of the states, rather than vice versa. PASPA’s topsy-turvy arrangement set the stage for intense legal disputes between state governors and sports league executives about both the Act’s meaning and its constitutionality.<sup>57</sup>

## II. THE LEGAL RISE AND FALL OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Some legal experts, from the very beginning, expressed concerns about whether PASPA was constitutional.<sup>58</sup> These concerns became the source of five litigations—four of which failed to find PASPA illegal, and a fifth which ultimately overturned the act.<sup>59</sup> Section A of this Part introduces four lawsuits in which courts failed to rule that PASPA violated the U.S. Constitution. Section B then explores *Murphy v. National Collegiate Athletic Association*—the case in which the Supreme Court ultimately overturned PASPA.

### A. Four Lawsuits that Failed to Overturn PASPA

Before *Murphy*, PASPA gave rise to four separate litigations.<sup>60</sup> In the first litigation—*Flagler v. U.S. Attorney for the District of New Jersey*<sup>61</sup>—a private citizen, James Flagler, filed a pro se complaint against the United States, alleging that PASPA violated the Tenth Amendment of the Constitution.<sup>62</sup> This was because, according to Flagler, “gaming/gambling is not mentioned in the U.S. Constitution,” so “the decision on whether to allow gambling in general, and gambling on sports specifically, should be reserved for the states.”<sup>63</sup> The U.S. District Court for the District of New Jersey, however, dismissed Flagler’s complaint without addressing any of his substantive

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<sup>56</sup> *Id.* at 1470–71.

<sup>57</sup> *See, e.g., Nat’l Collegiate Athletic Ass’n. v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

<sup>58</sup> *Cf. Murphy* 138 S. Ct. at 1470 (noting that the Department of Justice had opposed Congress’s passing of PASPA in 1992).

<sup>59</sup> *See infra* notes 65, 69, 73, 77, 180.

<sup>60</sup> *See infra* notes 62, 67, 71, 75.

<sup>61</sup> No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007).

<sup>62</sup> *Id.* at \*1 (quoting Complaint).

<sup>63</sup> *Id.* (quoting Complaint).

arguments.<sup>64</sup> The court, in particular, held that Flagler lacked standing to challenge PASPA because, as a private citizen, Flagler failed to sufficiently allege that the right to gamble on commercial sporting events constituted a legally protectable right.<sup>65</sup>

Thereafter, in *Interactive Media & Gaming Association v. Holder*,<sup>66</sup> the Interactive Media & Gaming Association (“iMEGA”) and three New Jersey horse-racing associations similarly attempted to challenge PASPA under the Tenth Amendment.<sup>67</sup> The iMEGA plaintiffs alleged that they, unlike Flagler, had standing to file suit because their members sought to imminently provide gambling services if PASPA were overturned.<sup>68</sup> Nevertheless, the District of New Jersey once again found that the plaintiffs lacked standing because, even if a court were to overturn PASPA, a separate New Jersey statute still prevented them from operating a sports-betting enterprise.<sup>69</sup>

In a third case—*Office of the Commissioner of Baseball v. Markell*<sup>70</sup>—five commercial sports leagues sued Delaware Governor Jack Markell to prevent Delaware from expanding its legalized forms of sports gambling beyond those falling explicitly within the state’s “grandfather clause” exception provided in PASPA.<sup>71</sup> A district court judge denied the sports leagues an injunction to stop Delaware from legalizing sports gambling.<sup>72</sup> But the U.S. Court of Appeals for the Third Circuit vacated this ruling, holding that PASPA’s grandfather clause limited Delaware’s right to offer sports gambling “to the extent that the scheme was conducted by that state” prior to PASPA’s enactment.<sup>73</sup>

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<sup>64</sup> *Id.* at \*2–3 (explaining that for a litigant to be entitled to have a court decide the merits of a particular case, he needs to have both Article III standing and prudential standing and that Article III standings requires a plaintiff to allege that he has suffered an injury in fact that is “concrete and particularized” and “actual and imminent,” as well as that there is a causal connection between the complaint about conduct and the injury and that it is reasonably likely that the injury would be addressed by a favorable decision).

<sup>65</sup> *Id.* In addition, even if Flagler had sufficiently alleged a legally protectable right, Flagler still failed to allege that it was the result of PASPA, and not a separate New Jersey antigambling law, that prohibited his gambling activities. *Id.* at \*3.

<sup>66</sup> No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011).

<sup>67</sup> *Id.* at \*1–2.

<sup>68</sup> *See id.* at \*4 (“iMEGA and the N.J. Horsemen’s Associations assert that they have standing because PASPA prohibits the promotion of sports betting, and because PASPA prevents their respective members ‘from pursuing the Internet sports wagering industry in New Jersey.’”).

<sup>69</sup> *Id.* at \*5 (also finding a lack of standing because neither association showed an “actual injury” as association members who sought to offer sports gambling theoretically could have brought their own legal claims). Senator Raymond Lesniak was similarly found to lack standing because he was not acting in the capacity of the state overall and was personally unable to show injury in fact. *Id.* at \*8.

<sup>70</sup> 579 F.3d 293 (3d Cir. 2009).

<sup>71</sup> *Id.* at 296 (“On July 24, [2009], the Leagues filed a complaint . . . claiming that elements of Delaware’s proposed sports betting scheme violate the Professional and Amateur Sports Protection Act.”)

<sup>72</sup> *See Office of the Comm’r of Baseball v. Markell*, No. 09-538 (GMS) 2009 WL 2450284 (D. Del. Aug. 10, 2009), at \*1.

<sup>73</sup> *Markell*, 579 F.3d at 300–01 (quoting 28 U.S.C. § 3704(a)(3) (2012)).

Meanwhile, in the fourth case—*National Collegiate Athletic Association v. Governor of New Jersey*<sup>74</sup> (hereinafter referred to as *Christie*)—the U.S. commercial sports leagues sued New Jersey to enjoin the state from partially repealing its antigambling laws and allowing for state-sponsored sports betting.<sup>75</sup> New Jersey argued, among other things, that applying PASPA to prevent a state from repealing its antigambling laws would “unconstitutionally infringe[] the State’s sovereign authority to end its sports gambling ban.”<sup>76</sup> However, both the District of New Jersey and the Third Circuit disagreed, holding that PASPA did not commandeer the states, especially in light of what amounted to New Jersey’s attempt to only partially lift its sports-betting ban.<sup>77</sup> New Jersey thereafter petitioned the Supreme Court for certiorari, but the Court denied this request.<sup>78</sup>

### B. *Murphy v. National Collegiate Athletic Association*

Despite these earlier court failures to overturn PASPA, New Jersey was nevertheless prepared to continue its efforts to attempt to legalize sports gambling, even if it meant engaging in a time-consuming and expensive legal battle. In October 2014, the New Jersey legislature passed a second bill that attempted to allow for sports gambling—this time fully repealing provisions of state law that prohibited individuals over twenty-one years of age from engaging in sports gambling at racetracks or casinos.<sup>79</sup> This bill was signed into law in November 2014, which initiated a second round of litigation between the U.S. commercial sports leagues and New Jersey, in the matter that became known as *Murphy v. National Collegiate Athletic Association*.<sup>80</sup>

In this second round of litigation between New Jersey and the U.S. commercial sports leagues, the lower courts, much the same as in *Christie*, disallowed New Jersey from implementing its new sports-gambling scheme.<sup>81</sup> However, unlike in *Christie*, the Supreme Court thereafter granted New Jersey a writ of certiorari to resolve the issue of whether the provision in PASPA

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<sup>74</sup> 730 F.3d 208 (3d Cir. 2013).

<sup>75</sup> *Id.* at 214.

<sup>76</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1471 (2018).

<sup>77</sup> *Id.*

<sup>78</sup> *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (mem.).

<sup>79</sup> *Murphy*, 138 S. Ct. at 1472.

<sup>80</sup> This second litigation began with the identical caption as the first lawsuit, *National Collegiate Athletic Association v. Christie*, so it is frequently referenced as *Christie II*. See *Nat’l Collegiate Athletic Ass’n v. Christie*, 61 F. Supp. 3d 488, 488, 494 (D.N.J. 2014). However, when Phil Murphy succeeded Chris Christie as governor of New Jersey, his name was inserted as a party to the case, in place of Christie. See *Murphy*, 138 S. Ct. at 1461. For the sake of reader’s ease, the entirety of this lawsuit is simply referenced in this Essay as *Murphy v. National Collegiate Athletic Association* as the named governor of New Jersey is rather irrelevant to the case’s substantive merits.

<sup>81</sup> See *Murphy*, 138 S. Ct. at 1473.

that makes it unlawful for a state to authorize sports gambling is compatible with the system of “dual sovereignty” in the U.S. Constitution.<sup>82</sup>

On December 4, 2017, the Supreme Court heard oral arguments in *Murphy*.<sup>83</sup> Arguing on behalf of New Jersey, attorney Theodore B. Olson contended that, while Congress may regulate interstate commerce directly, “it may not regulate states’ regulation of interstate commerce.”<sup>84</sup> In particular, Mr. Olson objected to the component of PASPA that prevented New Jersey from addressing the problem of illegal gambling within the state by legalizing and regulating the activity directly.<sup>85</sup> Meanwhile, attorney Paul D. Clement, arguing on behalf of the commercial sports leagues, pointed out that nothing, as a matter of Constitutional law, would have prohibited Congress from directly regulating sports gambling.<sup>86</sup> According to Mr. Clement, PASPA “actually furthers federalism values” by leaving it to the states to determine how to punish those who engage in sports gambling, rather than imposing a “one-size-fits-all policy.”<sup>87</sup>

On May 14, 2018, after consideration of these arguments, the Supreme Court concluded that PASPA indeed violated the anticommandeering provision of the Constitution because it “unequivocally dictate[d] what a state legislature may and may not do” and thus placed state legislatures “under the direct control of Congress.”<sup>88</sup> The Court compared PASPA to “federal officers [being] installed in state legislative chambers and [being] armed with the authority to stop legislators from voting on any offending proposals.”<sup>89</sup> Despite Mr. Clement’s arguments to the contrary, the Court concluded that “[a] more direct affront to state sovereignty is not easy to imagine.”<sup>90</sup>

Nevertheless, the Supreme Court’s decision in *Murphy* did not serve as a public policy endorsement of state-sponsored sports gambling.<sup>91</sup> To the contrary, the Court explained that “[t]he legalization of sports gambling is a controversial subject” that requires Congress or the states to make “an important policy choice.”<sup>92</sup> The Court recognized that the Constitution permits Congress to pass a statute directly forbidding sports gambling.<sup>93</sup> The legal

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<sup>82</sup> *Id.* at 1468. Perhaps the Court’s interest in this issue increased after, months earlier, President Trump suggested that the federal government could mandate that states use their police forces to target and arrest undocumented immigrants—another potential attack on state sovereignty.

<sup>83</sup> Transcript of Oral Argument at 1, *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018) (No. 16-477), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-476\\_4fb4.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-476_4fb4.pdf).

<sup>84</sup> *Id.* at 4.

<sup>85</sup> *Id.* at 20.

<sup>86</sup> *Id.* at 49.

<sup>87</sup> *Id.*

<sup>88</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 1484.

<sup>92</sup> *Id.*

<sup>93</sup> *Murphy*, 138 S. Ct. at 1484–85 (2018) (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

problem with PASPA, according to the Court, was merely that the statute sought to compel state action rather than disallow sports gambling directly.<sup>94</sup>

### III. THE SIX NEW, STATE-SPONSORED SPORTS-GAMBLING LAWS

Since *Murphy*, many states have scrambled to legalize sports gambling in the absence of any absolute, federal prohibition.<sup>95</sup> Meanwhile, many other states have introduced or plan to introduce sports-betting bills during their upcoming legislative sessions.<sup>96</sup> This Part looks at the new laws and regulations implemented to legalize casino-style sports betting by each of the following states: Delaware, New Jersey, Mississippi, Pennsylvania, West Virginia, and Rhode Island.

#### A. Delaware

On June 5, 2018, Delaware became the first state since the Supreme Court's *Murphy* decision to launch casino-style sports gambling in the state's three operational casinos.<sup>97</sup> According to Delaware law, individuals over the age of twenty-one may place bets on most "professional and college sports."<sup>98</sup> Delaware, however, does not allow for betting on the sporting events of collegiate teams that reside within the state.<sup>99</sup> Delaware also does not allow for any online sports betting.<sup>100</sup>

Delaware transitioned seamlessly into offering full-scale sports betting based on a law that its legislature had passed in 2009 but was held to violate

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<sup>94</sup> See *id.* (explaining that the Supreme Court's job is simply to "interpret the law Congress has enacted and decide whether it is consistent with the Constitution")

<sup>95</sup> See Jonathan D. Cohen, *Delaware Just Became the First State to Legalize Sports Gambling. Why That's Likely to Be a Bad Bet.*, WASH. POST (June 5, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/06/05/delaware-just-became-the-first-state-to-legalize-sports-gambling-why-thats-likely-to-be-a-bad-bet/?noredirect=on&utm\\_term=.ea5bc9c99e7a](https://www.washingtonpost.com/news/made-by-history/wp/2018/06/05/delaware-just-became-the-first-state-to-legalize-sports-gambling-why-thats-likely-to-be-a-bad-bet/?noredirect=on&utm_term=.ea5bc9c99e7a) (noting that the Supreme Court's repeal of PASPA has "sent states scrambling to take advantage").

<sup>96</sup> See Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (Aug. 30, 2018), [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states).

<sup>97</sup> See Maya Salam, *Delaware Kicks Off Full-Scale Sports Betting, a First Outside of Nevada*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/sports/sports-betting-delaware.html>.

<sup>98</sup> See Brad Tuttle, *Another State Just Made Sports Gambling Legal. Here's Where and How to Place a Bet.*, TIME (June 11, 2018), <http://time.com/money/5306373/legal-sports-betting-new-jersey-delaware/>.

<sup>99</sup> See Jill R. Dorson, *Mississippi Rolls Out Regs: No 'Integrity Fee,' OK to Bet on Mississippi College Teams*, SPORTS HANDLE (June 21, 2018, 2:07 PM), <https://sportshandle.com/mississippi-rolls-out-regs-no-integrity-fee-ok-to-bet-on-mississippi-college-teams>.

<sup>100</sup> See *Delaware Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/delaware> (last visited Aug. 31, 2018).

federal law by the Third Circuit.<sup>101</sup> Another factor that has simplified Delaware’s introduction of sports gambling is that “[t]he state’s three casinos function as a combined licensee, and they share the cost of licensure based on their slot contribution to the state.”<sup>102</sup> Thus, the Delaware Lottery, which technically oversees sports gambling in the state, does not have to deal with an ongoing process of reviewing and licensing prospective licensees.<sup>103</sup>

One potential reason for the legalization of sports gambling in Delaware is to raise revenues for a state that is just one of five in the country to not generate revenue through a sales tax.<sup>104</sup> Rather than introducing a special tax on sports gambling, the casinos operate subject to what the state describes as a revenue-sharing arrangement.<sup>105</sup> Under this arrangement, after winners are paid and the host provider receives a 12.5 percent share of revenues, the remainder of the sports-gambling revenues are allocated between the state and casino operators.<sup>106</sup> Under this arrangement, “the State share is 50 percent.”<sup>107</sup>

## B. *New Jersey*

New Jersey then became the second state since *Murphy* to legalize state-sponsored, casino-style sports gambling.<sup>108</sup> Although New Jersey’s sports-gambling law allows for betting on most types of sporting events, it forbids betting on any “collegiate sport or athletic event that takes place in New Jersey or . . . in which any New Jersey college team participates.”<sup>109</sup> The New Jersey law also disallows betting on “high school sports events, electronic sports, and competitive video games.”<sup>110</sup> Meanwhile, the minimum age to

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<sup>101</sup> Office of the Comm’r of Baseball v. Markell, 579 F.3d 293, 304 (3d Cir. 2009); see also *Delaware Sports Betting*, supra note 100.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> See Jeremy Bowman, *The 5 States with No Sales Tax*, MOTLEY FOOL (Aug. 16, 2014, 2:14 PM), <https://www.fool.com/taxes/2014/08/16/the-5-states-with-no-sales-tax.aspx> (discussing the lack of sales tax in Delaware).

<sup>105</sup> See Adam Candee, *Is It ‘Revenue Sharing’ or High Taxes for Sports Betting? Ask Rhode Island, Delaware How They Slice the Pie*, LEGAL SPORTS REP. (July 3, 2018, 5:46 AM), <https://www.legalsportsreport.com/21663/sports-betting-revenue-sharing/>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Act of June 11, 2018, ch. 33, 2018 N.J. Laws 4111, [https://legiscan.com/NJ/text/A4111/id/1809536/New\\_Jersey-2018-A4111-Chaptered.html](https://legiscan.com/NJ/text/A4111/id/1809536/New_Jersey-2018-A4111-Chaptered.html); see also *Gov. Phil Murphy Signs New Jersey Sports Betting Bill*, NBC PHILA. (June 11, 2018, 3:22 PM), <https://www.nbcphiladelphia.com/news/local/New-Jersey-Phil-Murphy-Sports-Betting-Legislation--485164151.html>.

<sup>109</sup> Act of June 11, 2018, ch. 33, § 1, 2018 N.J. Laws 4111, [https://legiscan.com/NJ/text/A4111/id/1809536/New\\_Jersey-2018-A4111-Chaptered.html](https://legiscan.com/NJ/text/A4111/id/1809536/New_Jersey-2018-A4111-Chaptered.html).

<sup>110</sup> *Id.*

place a wager on a sporting event in New Jersey is “at least 21 years of age.”<sup>111</sup>

Under New Jersey’s licensing requirements, entities that seek to offer sports gambling must obtain a “sports wagering license.” and establish a “sports wagering lounge” on their premises.<sup>112</sup> Casinos that obtain a license may then choose up to three online operators to provide internet sports-betting services in conjunction with their wagering lounge.<sup>113</sup> For example, in July 2018, “FanDuel’s first sportsbook at the Meadowlands opened its doors.”<sup>114</sup>

The system for taxing sports-gambling revenues in New Jersey is rather straightforward. In exchange for the right to offer casino sports gambling, any entity licensed to offer sports gambling must pay a special 8.5 percent tax on its in-person sports-gambling income (defined as “sums received by the casino” minus sums “paid out as winnings to patrons”).<sup>115</sup> In addition, New Jersey implemented a 13 percent tax on sums received from online sports wagering.<sup>116</sup> Any entity that receives a gambling license as a horse racing permit holder must additionally pay a 1.25 percent tax on amounts received to their local municipality.<sup>117</sup>

### C. *Mississippi*

Mississippi became the third state since *Murphy* to announce the launch of state-sponsored sports gambling.<sup>118</sup> Mississippi’s legislature did not need to pass any new laws after the Supreme Court’s *Murphy* ruling because a provision in the state’s 2017 fantasy sports law allowed for the state gaming

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<sup>111</sup> *Id.* § 2(e).

<sup>112</sup> *Id.* § 2(a) (“[A] casino which holds a sports wagering license issued by the division may operate a sports pool in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. . . . No casino or racetrack shall be permitted to operate a sports pool or accept wagers via an online sports pool unless a sports wagering lounge is established and has commenced operation in its facility.”).

<sup>113</sup> *Id.* As an interesting aside, the New Jersey statute states that “[n]o license to operate a sports pool shall be issued to . . . any person that operated a sports pool in New Jersey within one year prior to the enactment of the act.” *Id.* This presents an interesting question as to whether certain companies that operated under the moniker of “daily fantasy sports” but allowed participants to enter contests in which they predicted the winners of single golf competitions or NASCAR races should be eligible to obtain a license under New Jersey state law. See David Purdum, *DraftKings CEO Acknowledged Some UIGEA Noncompliance in May Conference Call*, ESPN, (Nov. 19, 2015, 4:55 PM), <https://abcnews.go.com/Sports/draftkings-ceo-acknowledged-uigea-noncompliance-conference-call/story?id=35313282>.

<sup>114</sup> See Rodenberg, *supra* note 96.

<sup>115</sup> Act of June 11, 2018, ch. 33, § 7, 2018 N.J. Laws 4111, [https://legiscan.com/NJ/text/A4111/id/1809536/New\\_Jersey-2018-A4111-Chaptered.html](https://legiscan.com/NJ/text/A4111/id/1809536/New_Jersey-2018-A4111-Chaptered.html).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Dorson, *supra* note 99.

commission to implement regulations allowing for traditional sports gambling as soon as the Supreme Court overturned PASPA.<sup>119</sup>

At the time of this Essay's publication, Mississippi's new sports-gambling regulations allowed individuals over the age of twenty-one to bet on all commercial sporting events—including games that involve college sports teams based in Mississippi.<sup>120</sup> Mississippi, however, disallows betting on high school sports, as well as the taking of bets from participants and coaches involved in the underlying game itself.<sup>121</sup> Mississippi intends to tax sports betting revenues at a 12 percent rate, with an 8 percent tax going to the state and a 4 percent tax going to the local municipality.<sup>122</sup> The state does not currently allow for online sports betting, unless one is in a casino and using certain devices.<sup>123</sup>

#### D. *Pennsylvania*

Pennsylvania also passed a new law to allow for casino-style sports betting, with the goal of beginning to license sports-betting entities sometime in 2018.<sup>124</sup> However, the actual launch of sports gambling in Pennsylvania might be delayed because none of Pennsylvania's licensed casinos have yet applied for a sports-gambling license—likely the result of the extremely high fees associated with filing an application.<sup>125</sup> At present, Pennsylvania's sports-gambling regulations would require any entity that seeks to obtain a gambling license to pay a one-time, nonrefundable fee of \$10 million and, thereafter, to pay a tax of 34 percent on all daily gross sports wagering revenue.<sup>126</sup>

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<sup>119</sup> See Rodenberg, *supra* note 96 (“Mississippi enacted a new law in 2017 that allowed for sports betting pending a favorable decision by the Supreme Court.”).

<sup>120</sup> See Dorson, *supra* note 99; see also 13 Miss. Admin. Code pt. 9, R. 4.8, <http://www.sos.ms.gov/adminsearch/ACCode/00000682c.pdf>.

<sup>121</sup> See 13 Miss. Admin. Code pt. 9, R. 3.11, <http://www.sos.ms.gov/adminsearch/ACCode/00000682c.pdf>.

<sup>122</sup> See Dorson, *supra* note 99.

<sup>123</sup> *Id.*; see also 13 MISS. ADMIN. CODE pt. 9, R. 3.15(a), <http://www.sos.ms.gov/adminsearch/ACCode/00000682c.pdf>.

<sup>124</sup> Rodenberg, *supra* note 96.

<sup>125</sup> See Andrew Maykuth, *Pa.'s Sports Betting Taxes So High Legal Bookmakers May Shun State*, PHILA. INQUIRER (July 16, 2018, 5:00 AM), <http://www.philly.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html> (describing Pennsylvania's tax rate as “four times higher than New Jersey's”).

<sup>126</sup> See Brett Smiley, *Pennsylvania Passes Bill that Would Legalize Sports Betting – But with a Huge Tax*, LEGAL SPORTS REP. (Oct. 26, 2017, 1:19 PM), <https://sportshandle.com/pennsylvania-sports-betting-bill-online-gaming-hb271-passes>. In addition to concerns pertaining to high start-up costs, the National Football League on June 15, 2018, penned a letter to state officials expressing “concerns about consumer protections, data, enforcement and other hot-button issues.” Rodenberg, *supra* note 96.



E. *West Virginia*

West Virginia's new sports-betting law grants the state's lottery commission the right to license certain forms of sports gambling.<sup>127</sup> The West Virginia statute references as its impetus for legalizing sports gambling the desire to both eradicate black markets and reap economic benefits.<sup>128</sup> It imposes a minimum age requirement of twenty-one to wager on sports, and it allows licensed operators to accept bets from mobile devices or other digital platforms located within the state.<sup>129</sup>

Casinos that seek to provide sports wagering in West Virginia must pay a \$100,000 application fee.<sup>130</sup> Meanwhile, operators that seek to provide sports wagering in West Virginia must pay an annual, nonrefundable \$1,000 licensing fee.<sup>131</sup> Also, both casinos and operators must pay a 10 percent tax on "adjusted gross sports wagering receipts."<sup>132</sup> West Virginia state law makes it a misdemeanor to operate a sports-gambling operation without a proper license and a felony to engage in a wide range of conduct that can be construed as attempting to fix the results of sporting events or to profit based on such a fix.<sup>133</sup>

F. *Rhode Island*

Finally, on June 22, 2018, the Rhode Island governor announced that Rhode Island would allow for sports gambling at the state's two casinos, with betting expected to launch around October 2018.<sup>134</sup> Sports gambling in Rhode Island will operate in a similar manner to Delaware, in that the state and the casinos/operators will each keep a revenue share.<sup>135</sup> Under the Rhode Island bill, the state will keep 51 percent of the revenues, with 32 percent going to the gaming operator and 17 percent going to the casinos.<sup>136</sup>

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<sup>127</sup> West Virginia Lottery Sports Wagering Act, S.B. 415, Reg. Sess. (W. Va. 2018), [http://www.wvlegislature.gov/Bill\\_Text\\_HTML/2018\\_SESSIONS/RS/bills/SB415%20INTR.pdf](http://www.wvlegislature.gov/Bill_Text_HTML/2018_SESSIONS/RS/bills/SB415%20INTR.pdf).

<sup>128</sup> *Id.* § 29-22D-2(b)(4)–(5).

<sup>129</sup> *Id.* § 29-22D-15(a)–(c).

<sup>130</sup> *Id.* § 29-22D-6(d) (noting that the license must be renewed at the conclusion of a five-year term for an additional \$100,000 fee).

<sup>131</sup> *Id.* § 29-22D-7(b)–(c).

<sup>132</sup> *Id.* § 29-22D-16(a).

<sup>133</sup> West Virginia Lottery Sports Wagering Act § 29-22D-21(a)–(b), S.B. 415, Reg. Sess. (2018), [http://www.wvlegislature.gov/Bill\\_Text\\_HTML/2018\\_SESSIONS/RS/bills/SB415%20INTR.pdf](http://www.wvlegislature.gov/Bill_Text_HTML/2018_SESSIONS/RS/bills/SB415%20INTR.pdf).

<sup>134</sup> See *Rhode Island Sports Betting*, LEGAL SPORTS REP. (2018), <https://www.legalsportsreport.com/ri/> (last visited July 20, 2018) (explaining that Rhode Island state lawmakers had previously approved sports betting at two casinos).

<sup>135</sup> See Candee, *supra* note 105.

<sup>136</sup> See *Rhode Island Sports Betting*, *supra* note 134.

#### IV. DEVISING NEW LAWS TO REGULATE STATE-LICENSED SPORTS GAMBLING

Although the aforementioned six states have taken substantial steps toward introducing new forms of sports gambling in the aftermath of *Murphy*, these new sports-gambling laws emerged in a short time frame, perhaps at the expense of state legislators conducting a detailed policy analysis.<sup>137</sup> As a consequence of such hasty drafting, legislators may have ignored public policy considerations that could “have ramifications for generations of American gamblers.”<sup>138</sup>

While no single list could address all issues related to sports gambling that legislators should consider, some of the more important questions for reasonable legislative debate include the following: (a) how to legally define the term “sports gambling;” (b) how to determine whether to allow gambling on amateur sports; (c) whether to allow for online sports betting; (d) whether to allow for multi-jurisdictional gambling compacts; (e) how to share sports-gambling revenues between states and operators; (f) whether to share sports-gambling revenues with U.S. commercial sports leagues; and (g) how to minimize the risk of participant gambling addiction and loss of financial independence.

##### A. *How to Legally Define the Term “Sports Gambling”*

When drafting new laws to regulate state-sponsored “sports gambling,” the first issue state legislators need to consider is how to define the term “sports gambling.” Adopting an appropriate definition of “sports gambling” is important because, in some states, the legal requirements to operate “sports gambling” are different from the legal requirements to operate “fantasy sports” contests.<sup>139</sup> Without clearly differentiating “sports gambling” from “fantasy sports,” it becomes difficult for states to instruct gaming operators as to which specific laws govern their activities.

Furthermore, if legal terms such as “sports gambling” are inadequately defined, some companies may adopt questionable labels to describe their activities in hopes of achieving more favorable legal treatment. For example, the online gaming operator DraftKings, which currently offers both an online sportsbook and a daily fantasy sports business, currently markets a contest under the moniker “daily fantasy sports” that allows participants to predict

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<sup>137</sup> See generally Cohen, *supra* note 95 (“[W]hen it comes to gambling, legislators should proceed cautiously, with full awareness that the legalization of sports betting in 2018 will have ramifications for generations of American gamblers.”).

<sup>138</sup> *Id.*

<sup>139</sup> For an understanding of the way in which states currently regulate contests that are defined as “fantasy sports,” see Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 662–65 (2017).

the results of NASCAR racers in a single race.<sup>140</sup> While a reasonable expert in the field of sports gaming is more likely to describe this contest as “sports gambling” than “fantasy sports,” it is understandable why, lacking legal clarity, DraftKings executives would attempt to attach the more favorable legal label to their contest.<sup>141</sup>

Although there is nothing that limits states from adopting their own unique definitions of “sports gambling” and “fantasy sports,” one reasonable way for states to distinguish between these two activities is by applying the legal definition of “fantasy sports” adopted by the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).<sup>142</sup> This definition specifically classifies a contest as “fantasy sports,” and not sports gambling, if “no fantasy or simulation sports team is based on the current membership of an actual team” and the following three criteria are met:

- (1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
- (2) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
- (3) No winning outcome is based—(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.<sup>143</sup>

#### B. *How to Determine Whether to Allow Gambling on Amateur Sports*

In addition to carefully defining the term “sports gambling,” state legislators also need to decide whether to extend state-sponsored sports gambling into the realm of “amateur” sports, including high school and collegiate sports. The primary justifications for allowing individuals to bet on high school and college sports include libertarianism, as well as maximizing gambling-related tax revenues for states.<sup>144</sup> By contrast, the main reasons for not allowing individuals to bet on amateur sporting events are to protect the

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<sup>140</sup> See Purdum, *supra* note 113.

<sup>141</sup> *Id.* (quoting the author of this Article as explaining to ESPN’s David Purdam that “[t]he reason why it is most logical to construe these DraftKings contests as based on singular events is because a single golf tournament or a single NASCAR race is advertised to the public as a single event”).

<sup>142</sup> 31 U.S.C. § 5362(1)(E)(i)–(ix) (2012).

<sup>143</sup> *Id.* For a further analysis of the UIGEA carve-out for fantasy sports and its impact on the fantasy sports industry, see generally Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 142–44 (2016).

<sup>144</sup> *Cf.* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484 (2018) (“Supporters [of sports gambling] argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime.”).

privacy of amateur athletes and to insulate these athletes from gamblers, based on the athletes' greater financial incentive to accept bribes.<sup>145</sup>

Considering these arguments in the aggregate, a reasonable compromise for states is to allow gamblers to bet on some sports, while maintaining prohibitions on others. Specifically, states should allow betting on National Collegiate Athletic Association Football Bowl Series ("FBS") games and Division I men's basketball games, while prohibiting gambling on sporting events involving high school athletes and all other collegiate athletes. This distinction makes logical sense because individuals who compete in FBS football and Division I men's basketball, unlike high school and other collegiate athletes, are already exposed to the public spotlight by regularly playing games in front of large crowds and broadcast on national television networks.<sup>146</sup> Of course there is always a bona fide risk that these athletes might accept gamblers' money to fix game results. To mitigate this risk, the NCAA can allow FBS football and Division I men's basketball players to profit in the free market by selling services related to their fame and athletic skills, much like many other famous and commercialized athletes already do.<sup>147</sup>

### C. *Whether to Allow for Online Sports Gambling*

A third issue for state legislators to consider is whether to allow online sports betting in addition to live casino gambling.<sup>148</sup> The main argument in favor of allowing online sports betting is that betting on sports is likely to attract additional consumers to gambling, thus increasing the tax revenues derived from state-sponsored sports gambling.<sup>149</sup> In addition, many sports

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<sup>145</sup> See generally Adam Kilgore, *For Sports Leagues, Legalized Sports Betting Offers New Risks, and Massive Rewards*, WASH. POST (May 14, 2018), [https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4-5790-11e8-858f-12becb4d6067\\_story.html?utm\\_term=.62ad1a703bbd](https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4-5790-11e8-858f-12becb4d6067_story.html?utm_term=.62ad1a703bbd) (quoting Florida State University sports law professor Ryan Rodenberg for the proposition that "[c]ollege sports is the one realm where corrupters can influence athletes, because they're not paid market rate").

<sup>146</sup> See generally Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm\\_term=.f888187e220a](https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.f888187e220a).

<sup>147</sup> See Joe Nocera, *It's a Business, NCAA. Pay the Players*, BLOOMBERG (Oct. 13, 2017, 7:30 AM), <https://www.bloomberg.com/view/articles/2017-10-13/it-s-business-ncaa-pay-the-players> (arguing that the big-time college sports industry, which generates an estimated \$13 billion per year in revenue, could easily provide compensation for its athletes). For the argument that it further violates antitrust laws for the NCAA to fail to allow its member colleges (or at least member conferences) to compete in the free market for college athletes' services, see Marc Edelman, *A Short Treatise on Amateuism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 63-64 (2013).

<sup>148</sup> Compare Act of June 11, 2018, ch. 33, § 2(a), 2018 N.J. Laws 4111, (allowing online sports betting), with *Delaware Sports Betting*, *supra* note 100 (not allowing online sports betting).

<sup>149</sup> Cf. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484 (2018) (stating revenue generation as an important reason why supporters advocate legalized sports gambling).

fans simply prefer to bet in the privacy of their own homes, or, alternatively, they do not have time to travel to casinos or racetracks.<sup>150</sup>

Nevertheless, the added risks of allowing online sports gambling pose three concerns. First, sports gambling is “particularly addictive and especially attractive to young people with a strong interest in sports.”<sup>151</sup> Second, online gambling makes it easier for someone who engages in pathological forms of gambling to engage in these behaviors when the person has easy access to a “casino” in the form of his computer or smartphone.<sup>152</sup> Third, mechanisms to identify addictive gamblers, underage gambling, and participation in sports gambling while inebriated are not necessarily sophisticated enough to detect these activities when they take place online.<sup>153</sup>

Unlike some of the other public policy issues related to state-sponsored sports gambling, it is difficult to take a strong view about whether states should allow for online sports gambling. On the one hand, modern society is moving in the direction of consummating an ever-increasing share of financial transactions online, perhaps justifying the movement of legal, state-sponsored sports gambling onto the internet. On the other hand, until the technological safeguards for online gaming catch up to the technology of online gaming itself, there remains a reasonable argument to curb the expansion of online gaming even where brick and mortar casino gambling is already legal.

#### D. *Whether to Allow for Multi-Jurisdictional Gambling Compacts*

A related question pertaining to states that legalize online sports gambling is whether to allow for multi-jurisdictional compacts that would allow online gamblers to compete in a single competitive pool against gamblers from other states. In recent years, Delaware, Nevada, and New Jersey have signed compacts to allow online poker players in these states to compete against one another for a single prize pool.<sup>154</sup> From a business standpoint,

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<sup>150</sup> See Adrian Ma, *Mobile Phones Could Make Sports Betting More Accessible—and Addictive*, MARKETPLACE (July 10, 2018, 10:13 AM), <https://www.marketplace.org/2018/07/10/business/mobile-phones-could-make-sports-betting-more-accessible-and-addictive> (referencing Nevada sports bettor Kelly Stewart as someone who prefers the convenience of sports betting from the privacy of her own home).

<sup>151</sup> *Murphy*, 138 S. Ct. at 1469.

<sup>152</sup> See Ma, *supra* note 150 (“[A]dvocates for problem gamblers, and experts who study gambling disorders, warn that putting sports betting at more people’s fingertips increases the likelihood that some of them will develop a gambling addiction.”).

<sup>153</sup> See *id.* (quoting Derek Longmeier, executive director of the Problem Gambling Network of Ohio, about the additional challenges associated with detecting underage gambling when the betting takes place online, rather than at a brick-and-mortar casino).

<sup>154</sup> See Steve Ruddock, *New Jersey, Nevada and Delaware Will Share Online Poker Player Pools After Gov. Christie Signs Deal*, ONLINE POKER REP. (Oct. 13, 2017, 11:05 AM), <https://www.onlinepokerreport.com/26921/new-jersey-interstate-nevada-delaware>.

these multistate compacts desirably increase the prize pool for participants and help generate economies of scale.<sup>155</sup>

Nevertheless, there remain lingering legal questions as to whether federal law permits states to sign multi-jurisdictional sports-gambling compacts, even though similar compacts already exist in the world of poker.<sup>156</sup> This is because, even though the Supreme Court has struck down PASPA, there are still other federal laws that regulate certain forms of interstate gambling, including, most notably, the Interstate Wire Act of 1961.<sup>157</sup> Whether the Interstate Wire Act disallows sports gambling activities that cross state lines where there is no underlying violation of state law constitutes a complex question that perhaps warrants a separate, detailed, law review article. Moreover, it is somewhat doubtful that the attorney general would prosecute companies that operate interstate but comply with the local laws in all states of operation.

E. *How to Share Sports-Gambling Revenues Between States and Operators*

Meanwhile, a fifth policy issue for states to explore is how, if at all, they should share the revenues derived from sports betting. Currently, there is great variation among state approaches to taxing revenues on gambling transactions. New Jersey and Pennsylvania are good representations of opposing ends of the taxation spectrum. New Jersey takes a minimal taxation approach, collecting a rate as low as 8.5 percent of revenues, while Pennsylvania charges a \$10 million licensing fee plus 34 percent on all daily gross sports wagering revenues.<sup>158</sup>

On the one hand, someone could make a reasonable argument that simply legalizing sports betting and taxing it at the same rate as any standard business enterprise would raise substantial tax revenues. This is because the mere legalization of sports gambling is likely to shift untaxed betting on

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<sup>155</sup> See *id.* (explaining that the interstate poker compact “should be good news for all three states in terms of the size and quality of their poker offerings, and will make online poker more attractive for users in those states”).

<sup>156</sup> For seemingly conflicting views on this topic, compare Daniel Wallach, *Did the Supreme Court Reinterpret the Wire Act to Allow Cross-Border Internet Sports Betting?*, FORBES (July 8, 2018, 10:05 PM), <https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#10d687cc46c5> (arguing that “The Wire Act Does Not Require a Predicate State Law Offense” to find conduct in violation of federal law, so conduct that complies with state laws in all states of operation might still violate the Wire Act), with Keith C. Miller & Anthony N. Cabot, *supra* note 5 (explaining that prior to the passage of PASPA, “[r]ather than preempting state laws, federal gambling laws were to aid states in enforcing their laws that prohibit gambling”).

<sup>157</sup> 18 U.S.C. § 1084 (2012).

<sup>158</sup> See Act of June 11, 2018, ch. 33, § 7, 2018 N.J. Laws; Smiley, *supra* note 126.

sports into the open, thus inducing tax payments.<sup>159</sup> However, on the other hand, there is also a strong state history of taxing vices at a higher rate to discourage such behaviors.<sup>160</sup> Indeed, one negative externality of legalizing sports gambling is that a limited number of pathological gamblers may lose all of their money betting on sports and thus become wards of the state.<sup>161</sup> By implementing a high tax rate on sports gambling, a state might implicitly account for the potential need to provide additional welfare services to those pathological gamblers who lose all of their income betting on sports.

F. *Whether to Share Sports-Gambling Revenues with U.S. Commercial Sports Leagues*

A sixth legal issue pertaining to the legalization of sports gambling is whether states that legalize sports gambling should mandate the payment of a “tax” or “royalty” that transfers a share of gambling revenues from the operators to the commercial sports leagues.<sup>162</sup> Although none of the states that currently allow sports gambling have mandated the sharing of revenues with sports leagues, a proposed Indiana bill would include the mandatory payment of 1 percent of all gambling wagers directly to the owners of sports teams.<sup>163</sup> Similarly, New York legislators are planning to introduce a bill during their 2019 legislative session that would grant the U.S. sports leagues the right to 0.25 percent of all gambling wagers.<sup>164</sup>

Representatives of the sports leagues have advanced three separate arguments in favor of sharing the revenues derived from state-sponsored sports gambling.<sup>165</sup> First, the leagues purport that they possess legally protectable intellectual property rights in gambling-related statistical information.<sup>166</sup> This

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<sup>159</sup> See Esther M. Bauer, *High Stakes for the IRS: Tax Officials Say North Texas Bookmaking, Betting Are on a Roll*, DALLAS MORNING NEWS, Aug. 10, 1986, at 33A (citing Internal Revenue Service statistics in 1982 as estimating unreported tax revenue on sports betting at \$3.5 billion).

<sup>160</sup> See, e.g., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 187–90 (Barbara S. Lynch & Richard J. Bonnie eds., 1994).

<sup>161</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1473, 1484 (2018) (noting that opponents of legalized sports gambling contend that these activities will “encourage people of modest means to squander their savings and earnings”).

<sup>162</sup> Edelman, *supra* note 2, at \*3.

<sup>163</sup> See Brett Smiley, *Should Indiana’s Proposed 1% Sports Betting ‘Integrity Fee’ Worry Nevada?*, SPORTS HANDLE (Jan. 10, 2018, 3:47 PM), <https://sportshandle.com/indiana-legal-sports-betting-nevada-integrity-fee-hb1325>.

<sup>164</sup> See Dustin Gouker, *This Might Be the NY Sports Betting Bill to Watch: Legislation Surfaces with Compromise on ‘Integrity Fee,’* LEGAL SPORTS REP. (Feb. 21, 2018, 1:55 PM), <https://www.legalsportsreport.com/18574/new-ny-sports-betting-2018-bill>.

<sup>165</sup> See *infra* notes 166, 169, 171.

<sup>166</sup> See Ted Menmuir, *Adam Silver Backs ‘1% Integrity Fee’ as NBA’s Intellectual Property Protection*, SBC NEWS (Feb. 20, 2018), <https://www.sbcnews.co.uk/sportsbook/2018/02/20/adam-silver-backs-1-integrity-fee-as-nbas-intellectual-property-protection> (quoting NBA Commissioner Adam Silver as

argument, however, ignores the U.S. Court of Appeals for the Second Circuit's decision in *National Basketball Association v. Motorola*,<sup>167</sup> which held that sports statistics lie outside the range of copyright protection and that the independent gathering of sports statistics does not give rise to any equitable concerns under the hot news doctrine.<sup>168</sup>

A second argument advanced by the sports leagues attempts to tie the leagues' costs of policing game fixing to the payment of an "integrity fee."<sup>169</sup> This argument is also highly controversial because, irrespective of whether states legalize sports gambling, commercial sports leagues have a strong and independent incentive to prevent players and owners from gambling on their sports to safeguard outcome uncertainty.<sup>170</sup>

A third league argument in favor of sharing sports-gambling revenues attempts to tie a gambling-related tax to the creation of a fund for building and maintaining new sports stadiums.<sup>171</sup> This third argument is perhaps more reasonable than the other two arguments because some municipalities have paid the costs related to sports stadium construction since 1953, when the City of Milwaukee built a new, publicly funded baseball stadium to lure the Braves franchise from Boston to Milwaukee.<sup>172</sup> While using public funding to build quasi-private sports stadiums is undoubtedly controversial, the idea is neither novel (an Illinois legislator proposed doing this to fund a new Bears

stating that "[t]his notion that as the intellectual property creators that we should receive a one percent fee seems very fair to me").

<sup>167</sup> 105 F.3d 841 (2d Cir. 1997).

<sup>168</sup> *Id.* at 846–47. For a far more detailed analysis of why the U.S. commercial sports leagues do not enjoy an intellectual property right in any of the elements related to state-sponsored sports gambling, see Edelman, *supra* note 2, at \*1–4. (rebutting intellectual property arguments in favor of granting the sports leagues a revenue share in gambling proceeds based on patent, copyright, trademark, right of publicity, and hot news doctrines).

<sup>169</sup> See Darren Heitner, *Leading Sports Data Company Defends MLB and NBA 'Integrity Fee' Demand*, FORBES (Apr. 2, 2018, 7:07 PM), <https://www.forbes.com/sites/darrenheitner/2018/04/02/leading-sports-data-company-defends-mlb-and-nba-integrity-fee-demand/#69563bee4a5d> (discussing Major League Baseball and the National Basketball Association's argument that they need added money to police the integrity of their competitions in a legal world that allows for mass sports gambling).

<sup>170</sup> See Ryan Glasspiegel, *Sports Leagues Will Plead with the Federal Government for "Integrity Fees" from Gambling*, THE BIG LEAD (May 14, 2018, 2:30 PM), <https://thebiglead.com/2018/05/14/sports-leagues-will-plead-with-the-federal-government-for-integrity-fees-from-gambling/> ("The leagues already have every incentive to make sure their sports are on the level.").

<sup>171</sup> See Marc Edelman, *Don't Blame Pittsburgh Pirates for Idea Linking Gambling Revenues to Stadium Construction*, FORBES (July 27, 2018, 9:33 AM), <https://www.forbes.com/sites/marcedelman/2018/07/27/dont-blame-pittsburgh-pirates-for-idea-linking-gambling-revenues-to-stadium-construction/#12c0c39308e6> (referencing a letter recently penned by Pittsburgh Pirates president Frank Coonelly to the Pennsylvania Gaming Control Board that seeks a share of any state gambling revenues for new stadium construction projects at PNC Park).

<sup>172</sup> See Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL'Y 35, 38–39 (2008). There were three publicly funded sports stadiums dating back prior to 1953; however, those stadiums were not initially built for the purported financial benefit of sports team owners). *Id.*



stadium in 1990) nor any more troubling than paying for stadium construction and maintenance using any other form of vice tax.<sup>173</sup>

G. *How to Minimize the Risks of Participant Gambling Addiction and Loss of Financial Independence*

Finally, states that seek to legalize sports gambling need to carefully consider how to protect individual citizens from the risk of gambling addiction and thus the potential loss of financial independence. One way to minimize the likelihood of sports gamblers becoming wards of the state is to cap the amount of money that any gambling operator (or perhaps all sports-gambling operators in the aggregate) may collect from any sports gambler over a monthly period.<sup>174</sup> Even though no state's sports-gambling law currently includes gambling caps of this nature, the laws governing interactive fantasy sports in both Tennessee and Massachusetts already include such caps and thus serve as a perfect analog for legislators to consider when devising individual caps on state-sponsored sports-gambling activities.<sup>175</sup>

Another way for legislators to strike a balance between individual freedom to gamble and the risk of facilitating gambling addiction is to require any sports-gambling operator to include a "Surgeon General's-type warning" that reminds would-be gamblers about the risk of gambling addiction.<sup>176</sup> Legislators should further mandate that both online and brick-and-mortar sports books maintain self-exclusion forms for individuals who wish to block their own future ability to engage in sports-gambling activities.<sup>177</sup>

A third way for states to reduce the risk of pathological sports gambling is to set the minimum age to engage in sports gambling at twenty-one, even though eighteen is the age of majority for most other activities in most other states. Maintaining this minimum age to engage in sports gambling aligns the minimum age for sports gambling with the minimum age for drinking.<sup>178</sup> It also recognizes studies that show college-age males are the demographic group most likely to suffer from pathological gambling behaviors.<sup>179</sup>

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<sup>173</sup> See Egler, *supra* note 37; Edelman, *supra* note 172, at 50–56.

<sup>174</sup> See Edelman, *supra* note 139, at 688 (making the same recommendation with respect to model laws for regulating interactive fantasy sports contests).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (making this recommendation with respect to model laws for regulating interactive fantasy sports contests).

<sup>177</sup> *Id.* (making this recommendation with respect to model laws for regulating interactive fantasy sports contests).

<sup>178</sup> *Id.* at 689.

<sup>179</sup> See National Center for Responsible Gaming, *Fact Sheet: Gambling Disorders Among College Students*, COLLEGE GAMBLING.ORG, <http://www.collegegambling.org/just-facts/gambling-disorders-among-college-students> (last visited Sept. 25, 2018).

#### H. *Guiding Principles for a Model Sports-Gambling Statute*

The undeniable differences in public policy interests among the states make it infeasible to propose a single model statute to ubiquitously govern sports gambling. Nevertheless, there are still some important guiding principles that any state seeking to legalize sports gambling should adopt. First, all states seeking to legalize “sports gambling” should define the term “sports gambling” to include “the betting on the performance of one or more commercial athletes or teams in one or more sporting events” and exclude from this definition the participation in “bona-fide fantasy sports contests.”

States also should uniformly disallow betting on “non-commercial amateur sports,” which would include all high school sporting events, as well as any collegiate sporting events other than those involving FBS football and Division I men’s basketball teams. States should not allocate any sports-gambling revenues to the U.S. commercial sports leagues, even though some states reasonably may choose to earmark a certain share of sports-gambling revenues for constructing and renovating commercial sports facilities. Finally, states that legalize sports gambling should include monthly caps on the amount of money that any gambling operator may collect from any one individual, set at twenty-one the minimum age for an individual to gamble on sports, and conspicuously provide gamblers with a Surgeon General’s-type warning about the risks of engaging in sports gambling, including its addictive nature.

#### V. CONCLUSION

The Supreme Court’s recent decision in *Murphy* marks an important victory for state sovereignty by voiding PASPA, which had previously compelled states to affirmatively disallow sports gambling.<sup>180</sup> Nevertheless, the Court’s decision in *Murphy* did not simply legalize sports gambling.<sup>181</sup> Rather, it granted states the opportunity to introduce their own sports-gambling laws based on their own independent policy objectives.<sup>182</sup>

As a result of the Supreme Court’s recent decision, some states have already passed new laws to allow for certain forms of state-sponsored sports gambling. However, many of these new state laws fail to define the scope of the activities they seek to govern, as well as fail to adequately safeguard citizens against gambling addiction and the potential loss of financial independence.

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<sup>180</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018).

<sup>181</sup> *See id.* at 1484 (“The legalization of sports gambling requires an important policy choice, but the choice is not ours to make.”).

<sup>182</sup> *Id.* at 1484–85 (“The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

Moving forward, the challenge for states seeking to legalize sports gambling entails understanding how to implement gambling laws that benefit communities overall, without leading to a heightened risk of addictive behaviors or a regressive taxation scheme. In addition, states seeking to legalize sports gambling need to ensure their laws primarily serve their citizens overall and do not serve as a guise for shifting revenue into the hands of already wealthy gaming operators and sports league owners.

If legislators are mindful of these concerns when proposing new sports-gambling laws, the Supreme Court's decision in *Murphy* could produce important benefits to those states that choose to legalize sports gambling. At the same time, the decision could open the doors for individuals seeking to engage in legal sports-gambling activities to do so in a substantial number of states.