JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

You Can Bet On It: The Legal Evolution of Sports Betting

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Introduction

Justice Alito delivered the long-awaited opinion of the Court: the Professional and Amateur Sports Protection Act ("PASPA") was an unconstitutional violation of the Tenth Amendment's Anti-Commandeering clause.[1] Referred to colloquially as the "Bradley Act," PASPA restricted persons, companies or governmental entities from sponsoring or operating any sports-gambling scheme.[2] As Senator Bill Bradley, one of PASPA's most prominent champions, noted, "As a former professional basketball player, I have witnessed first-hand some of the negative effects of sports gambling . . . [PASPA] attempt[s] to . . . protect the integrity of sports by proscribing the development of sports gambling."[3] Today, legislators who may have once shared Senator Bradley's concerns are now looking to capitalize on an increasingly popular industry. Since Justice Alito's ruling, states across the nation have passed laws sanctioning sports betting, with major sports leagues and media networks eagerly embracing the nascent enterprise. But, as this Article will discuss, various considerations remain that both sports leagues and state legislators should be aware of as they each work to capitalize on the continually evolving sports betting world.

Section I of this Article will explore the gambling policies of Major League Baseball, the National Football League, and the National Basketball Association, and use past gambling scandals affecting each sport to highlight the application of such policies. Section II of this Article will discuss

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1 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

2 28 U.S.C. § 3702 (1992).

3 Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 5 (1992) (highlighting the policy justifications for PASPA).

PASPA at length, providing perspective on the policy justifications leading to its passage. Section III will analyze the Supreme Court's decision in *Murphy v. National Collegiate Athletic Association*, including the procedural history of the case as well as an assessment of its central arguments. Finally, this Article will conclude in Section IV with a discussion of the structure of the sports betting industry, the various regulatory structures implemented across the nation, and recommendations on how to improve sports betting regulation both at the state and federal level. As the sports-gambling industry continues to evolve, it is increasingly clear that implementing an effective regulatory framework requires a careful consideration of the unique features of the industry. Further, given disparate regulatory requirements across states, it is increasingly important for the federal government to establish minimum standards to facilitate stability and predictability within the sports-gambling industry.

I. An Exploration of Gambling Within the Big Three Sports Leagues

As the sports-gambling industry rapidly evolves, it is important to maintain perspective on the history of sports gambling and the impact it has had on the perceived integrity of sports themselves. While sports betting has, in some fashion, been a ubiquitous complement to American sports consumption, it has oftentimes been an informal or otherwise illegal activity. And given that underground criminals typically ran illegal sports gambling, the intersection of athletes and sports gambling has rightfully raised significant match-fixing concerns. American sports have existed and, in many cases, thrived throughout various societal controversies—such as racially integrating leagues (and the resistance thereof) and the military drafting of star athletes into wars. However, none of these controversies can cripple a sports league like sports-gambling scandals. One thing American consumers will not tolerate is the notion that the results of games are rigged. Thus, to understand the evolution of sports gambling laws—and their underlying policy concerns—this Article first explores sports-gambling controversies within the three major sports leagues,[4] which illustrate the complex issues that sports leagues, regulators, and legislators face as they continue to grow the sports-gambling industry and develop regulatory frameworks.

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[4] The three major sports leagues in the United States are the National Football League, National Basketball Association, and Major League Baseball.

A. Major League Baseball and Sports Gambling: Pete Rose

Perhaps the most notable figure in the sports-gambling debate is Pete Rose. In August 1989, facing allegations of betting on Major League Baseball ("MLB") games, Rose accepted a lifetime ban from baseball.[5] Because he was the manager of the Cincinnati Reds at the time of the alleged infractions, Rose's betting violated Major League Rule 21, a provision that prohibits sports betting by all MLB players, umpires, and club or league officials.[6] There were reports that Rose's gambling started while he was a player for the same club, which, along with his conduct as a manager, led MLB to use Rose as a cautionary tale for its players, managers and employees.

1. Current MLB Gambling Policy

Rule 21 of the Major League Rules prohibits, among other things, betting on baseball games, receiving gifts for performance, and giving gifts for performance.[7] Rule 21(d) specifically mandates both a one-year suspension of any MLB employee found betting on baseball games in which they are not a participant and an indefinite suspension of any MLB employee found betting on baseball games in which they *are* a participant.[8] The Major League Rules also require each team to post a copy of Rule 21 in their clubhouse.[9] That said, Rule 15(d) of the Major League Rules gives the MLB Commissioner the right to reinstate any player who has been indefinitely suspended for violating Rule 21.[10] As further detailed below, the Pete Rose saga provides an informative, yet unfortunate, example of MLB's enforcement of these rules.

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5 *See* Peter Edward Rose & A. Bartlett Giamatti, Agreement and Resolution (1989); https://www.baseball-almanac.com/players/p_rosea.shtml [https://perma.cc/F3Z9-MWFU]; *see also* John M. Dowd, Report to the Commissioner 1 (1989), https://www.baseball-almanac.com/players/p_rose0.shtml [https://perma.cc/QWY9-XL6E].

6 *See* The Official Professional Baseball Rules Book, Major League Baseball, Rule 21(d) (2019) [hereinafter MLB Rules Book], https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf [https://perma.cc/L2VH-MDQU].

7 *See id.*

8 *See id.*

9 *See id.* at Rule 21(h).

10 *See id.* at Rule 15(d).

2. Pete Rose's History

A local product of Cincinnati, Ohio, Pete Rose was beloved across the league for his grit, determination, and hustle. One writer even stated that Rose, nicknamed "Charlie Hustle," gave his team twelve dimes on the dollar—his iconic hustle plays and blue-collar approach to the game were the hallmarks of his career.[11] As Sports Illustrated's William Leggett wrote in 1968, "Pete Rose is the type of person who would run to a funeral and, if he didn't like it, would boo the deceased."[12] Always a larger-than-life character, perhaps the most recognizable image of Rose is the one in which he is barreling head-first into third base.

But despite the fondness baseball fans have for Rose—both as an on-field legend and for his hall-of-fame-level statistics[13]—Rose now finds himself on the margins of baseball as he continues to serve his lifetime ban from the game. In February 1989, Rose met with Commissioner Peter Ueberroth and other MLB officials to discuss allegations of his gambling on baseball.[14] Three days later, MLB hired John Dowd to extensively investigate the accusations against Rose.[15]

A month later, news broke that Rose had ties to baseball betting and that he accumulated nearly $500,000 of gambling debt when he left the Reds as a player in 1978 to sign with the Philadelphia Phillies.[16] Then, in May 1989, Dowd submitted his 225-page investigative report (the "Dowd Report") on Rose's gambling to MLB.[17] Focusing particularly on Rose's betting between 1985 and 1987, the Dowd Report presented overwhelming evidence that Rose's gambling was not a momentary lapse in judgment,[18]

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[11] *See* William Leggett, *Charlie Hustle Gives Twelve Dimes on the Dollar*, SPORTS ILLUSTRATED (May 27, 1968), https://www.si.com/vault/1968/05/27/610256/charlie-hustle-gives-twelve-dimes-on-the-dollar [https://perma.cc/N7X7-P6WD].

[12] *Id.*

[13] Pete Rose is one of, if not *the*, most prolific hitters to play the game of baseball. Over the course of his twenty-three-year career, he amassed 4,256 career hits, seventeen all-star selections, and three World Series championships. *See* Pete Rose Stats, ESPN, http://www.espn.com/mlb/player/stats/_/id/397/pete-rose [https://perma.cc/Y3A9-TZLV]; *see also* Pete Rose Bio, ESPN, http://www.espn.com/mlb/player/stats/_/id/397/pete-rose [https://perma.cc/6YW9-X5HU].

[14] *Pete Rose Investigation Chronology*, UNITED PRESS INT'L (Aug. 24, 1989), https://www.upi.com/Archives/1989/08/24/Pete-Rose-Investigation-Chronology/5253619934400/ [https://perma.cc/N9YG-L75P].

[15] DOWD, *supra* note 5, at 1.

[16] *Pete Rose Investigation Chronology*, *supra* note 14.

[17] DOWD, *supra* note 5, at 1 (1989).

[18] *See id.* at 5–6.

but an extensive, secretive sports-betting scheme.[19] According to the Dowd Report, "Rose [often times] did not deal directly with bookmakers but rather placed his bets through others."[20] During the 1985 and 1986 seasons, Rose placed bets with Franklin, Ohio bookmaker, Ron Peters.[21] Generally, Rose funneled his wagers to Peters through Tommy Gioiosa, but at times went to Peters directly.[22] While at the time of the report Rose admitted to placing bets with Gioiosa on football and basketball games, he continued to deny placing bets on baseball games—even though witness testimony corroborated the allegations.[23]

The Dowd Report found that, during the 1987 MLB season, Rose had placed bets with a New York–based bookie named "Val" through Paul Janszen.[24] As it turns out, Janszen was reportedly one of the first people to give MLB information about Rose's sports betting.[25] Despite never positively identifying Val, the Dowd Report unearthed considerable evidence suggesting that Rose placed many bets with the bookie, including betting slips recovered from Rose's home.[26] Even when Val started to refuse to take bets from Rose due to unpaid debts, Rose continued to place wagers throughout 1987, returning to his former bookie Ron Peters.[27]

Throughout the investigation, Rose maintained his innocence. But eyewitness testimony and incriminating evidence recovered from Rose's possession ultimately convinced MLB otherwise.

3. MLB's Disciplinary Action

Under Article I, Section 2 of the MLB Collective Bargaining Agreement ("CBA") in force at the time, Commissioner Ueberroth investigated the allegations against Rose.[28] Rose allegedly violated Major League Rule 21(d) directly, which states that:

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[19] *See id.*
[20] *Id.* at 3–4.
[21] *See id.* at 4.
[22] *See id.*
[23] *See id.*
[24] *Id.* at 5.
[25] *See* John Erardi, *Janszen tells his side of the Pete Rose betting case*, CINCINNATI ENQUIRER, (Mar. 29, 2014, 9:15 PM), https://www.cincinnati.com/story/sports/columnists/john-erardi/2014/03/29/paul-janszen-pete-rose/7067975/ [https://perma.cc/JZ9R-AXEH].
[26] *Id.*
[27] *See* DOWD, *supra* note 5, at 5.
[28] Article I, Section 2 of the Major League Agreement empowered the Commissioner to, "Investigate . . . any act transaction or practice charged, alleged or sus-

> Any player, umpire, or Club or League official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform, shall be declared ineligible for one year. Any player, umpire, or Club or League official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform, shall be declared permanently ineligible.[29]

Rose maintained his innocence throughout the investigation and sued Commissioner Giamatti, who succeeded Ueberroth as Commissioner in April 1989,[30] in June 1989, seeking an injunction to prevent the Commissioner from holding a disciplinary hearing.[31] Later that summer, before the United States Court of Appeals for the Sixth Circuit ruled on the merits, Pete Rose agreed to accept a lifetime ban from the game of baseball, a mere six months after the allegations surfaced.[32] This agreement, however, provided that, "[n]othing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any Major League Baseball game."[33] The agreement also let Rose apply for reinstatement at a later date.[34] While the agreement ended the legal saga, it also enabled Rose to keep denying the allegations.

These denials ultimately worked against Rose's reinstatement in the future. In 1997, eight years after accepting his ban, Rose applied to MLB for reinstatement—eventually meeting with Commissioner Selig in 2002—but the Commissioner did not issue a ruling.[35] In 2004—perhaps in a concerted effort to rehabilitate his image, express contrition, and ultimately secure his place in baseball history—Rose admitted in his autobiography that he indeed placed bets on baseball games as the manager of the Cincinnati Reds, but always *for* his team, never against them.[36]

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pected to be not in the best interests of . . . Baseball." *See* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 533 n.11 (7th Cir. 1978).

[29] *See* MLB Rules Book, *supra* note 6, at Rule 21(d).

[30] *See* Major League Baseball Commissioners, *Baseball Almanac*, https://www.baseball-almanac.com/articles/major_league_baseball_commissioners.shtml [https://perma.cc/T9HH-GFM9].

[31] *See generally* Rose v. Giamatti, 721 F. Supp. 924 (S.D. Ohio 1989).

[32] *See* Rose & Giamatti, *supra* note 5.

[33] *Id.*

[34] *See id.* The right to apply for reinstatement was granted by Major League Rule 15(d).

[35] *See* Joe Kay, *Pete Rose's application for reinstatement rejected by Rob Manfred, citing continued gambling*, StarTribune (Dec. 15, 2015, 7:05 AM), http://www.startribune.com/commissioner-rejects-pete-rose-s-plea-for-reinstatement/361828531/ [https://perma.cc/E4TY-CGFM].

[36] *See Rose Admits Gambling in New Autobiography - 2004-01-06*, Voa News (Oct. 30, 2009, 3:10 PM), https://www.voanews.com/a/a-13-a-2004-01-06-3-rose/2995

This newfound penchant for truth-telling may have led to Rose's ultimate undoing, all but solidifying his relegation to the margins of baseball. In 2004, the New York Times reported that Commissioner Bud Selig was reluctant to reinstate Rose because it was unclear whether he could trust someone who, for the last fifteen years, had brazenly lied to the American public.[37] Still determined, Rose again applied for reinstatement in 2015, submitting his request to Selig's successor, Commissioner Rob Manfred.[38] But under reasoning similar to Selig's, Commissioner Manfred rejected Rose's application for reinstatement.[39]

According to Major League Rule 15(d), Commissioner Manfred had the right to approve or reject Rose's reinstatement application in his sole discretion.[40] Rule 15(d) allows the Commissioner to reinstate a player, under "such terms and conditions as he or she may deem proper . . . ."[41] In Commissioner Manfred's view, the Commissioner:

> Must exercise that discretion with great care, bearing in mind the intended deterrent effect of the mandatory penalty for a violation of Rule 21 . . . there must be objective evidence which demonstrates that the applicant has fundamentally changed his life and that, based on such changes, the applicant does not pose a risk for violating Rule 21 in the future.[42]

With this standard in mind, Manfred argued that Rose's inability to tell the truth consistently, along with his admission that he continued to gamble (albeit legally), suggested Rose might violate Rule 21 in the future if reinstated.[43] In his written decision, Manfred specifically stated that:

09.html [https://perma.cc/HQG9-7WY2]; *see also* Jack Curry, *BASEBALL; Rose, in New Book, Admits Betting on His Team*, N.Y. TIMES (Jan. 6, 2004), http://www.nytimes.com/2004/01/06/sports/baseball-rose-in-new-book-admits-betting-on-his-team.html [https://perma.cc/KA3U-NFVZ].

[37] *See* Curry, *supra* note 36.

[38] *Rose Applies Again for Reinstatement*, TIMES UNION (Mar. 16, 2015, 8:41 PM), https://www.timesunion.com/news/article/Rose-applies-again-for-reinstatement-6137859.php [https://perma.cc/L3ZU-ZMZC].

[39] *See id.*

[40] *See* MLB Rules Book, *supra* note 6, at Rule 15(d).

[41] *Id.*

[42] ROBERT D. MANFRED, JR., DECISION OF COMMISSIONER ROBERT D. MANFRED, JR. CONCERNING THE APPLICATION OF ROSE FOR REMOVAL FROM THE PERMANENT INELIGIBLE LIST, OFFICE OF THE COMMISSIONER, MAJOR LEAGUE BASEBALL 2 (Dec. 14, 2015), http://mlb.mlb.com/documents/8/4/6/159619846/Commissioner_s_Decision_on_Pete_Rose_Reinstatement_u35dqem0.pdf [https://perma.cc/8S9B-FG4C].

[43] *See id.*

> Most important, whatever else a 'reconfigured life' may include, in this case, it must begin with a complete rejection of the practices and habits that comprised his violations of Rule 21 . . . . In short, Mr. Rose has not presented credible evidence of a reconfigured life either by an honest acceptance by him of his wrongdoing, so clearly established by the Dowd Report, or by a rigorous, self-aware and sustained program of avoidance by him of all the circumstances that led to his permanent ineligibility in 1989.[44]

Commissioner Manfred also refused to debate the merits of Rose's eligibility for the National Baseball Hall of Fame.[45]

Today, Rose remains ineligible for the Hall of Fame because of his lifetime ban. And there is no sign, absent a major development in his behavior, that his status will change anytime soon.

B. *The National Football League and Sports Gambling: Paul Hornung, Alex Karras, and Art Schlichter*

Since its inception, the National Football League ("NFL") has experienced two major gambling scandals involving its players betting on games. While some argue that gambling influenced the NFL in the mid-20th century,[46] only nine NFL players have been suspended to date for violating the league's gambling policy.[47] The penalties levied against those nine NFL players fall short of Rose's current lifetime ban because, while both the NFL and MLB work hard to protect the integrity of their respective games, the

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[44] *Id.* at 3.

[45] Indeed, Manfred stated, "It is not a part of my authority or responsibility here to make any determination concerning Mr. Rose's eligibility as a candidate for election to the National Baseball Hall of Fame . . . . In fact, in my view, the considerations that should drive a decision on whether an individual should be allowed to work in Baseball are not the same as those that should drive a decision on Hall of Fame eligibility." *Id.* at 2.

[46] *See* An Unauthorized History of the NFL 17:38, (PBS television broadcast, Jan. 17, 1983), https://www.youtube.com/watch?v=LtAcYaubQXg.

[47] On November 29, 2019, Arizona Cardinals cornerback Josh Shaw was suspended indefinitely for betting on NFL games, including betting on his team. Shaw reportedly went to a Las Vegas casino while on the injured reserve list, and placed bets using his own player card and identification. Shaw claimed that his violation of NFL policy was an innocent mistake because he believed that sports gambling for current athletes was legal due to the overturning of PASPA in the summer of 2018. Shaw has appealed his suspension. *See* Jesse Reed, *Report: Josh Shaw Considers Betting Suspension an 'Innocent Mistake'*, SPORTSNAUT (Nov. 29, 2019), https://sportsnaut.com/2019/11/report-josh-shaw-considers-betting-suspension-an-innocent-mistake/ [https://perma.cc/5YQ7-C8CZ].

NFL's gambling policy allows the Commissioner more flexibility in determining a penalty's severity.

1. Current NFL Policy

Compared to the MLB's Rule 21, the NFL's gambling policy mandates a broader ban on gambling and related activities. Indeed, at its outset, the NFL's policy states, "[t]he NFL opposes all forms of illegal gambling, as well as legal betting on NFL games or other professional, college or Olympic sports."[48] NFL players are also subject to Section 15 of the NFL Player Contract, which specifically restricts players from wagering on NFL games.[49] Additionally, league policy prohibits NFL personnel from affiliating with or endorsing any gambling or related activities. This includes participating in "casino nights," promotional appearances to promote gambling, and accepting complementary benefits from casinos.[50]

The NFL Commissioner ultimately decides the penalty for violating the league gambling policy. Section 8 of the NFL Gambling Policy provides that:

> Violations of this policy constitute conduct detrimental to the League and will subject the involved Club and/or person(s) to appropriate disciplinary action by the Commissioner. Such disciplinary action may include, without limitation, severe penalties, up to and including a fine, termination of employment and/or banishment from the NFL for life.[51]

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[48] *Gambling Policy for NFL Personnel 2018*, Nat'l Football League (2018) [hereinafter NFL Gambling Policy], https://nflcommunications.com/Documents/2018%20Policies/2018%20Gambling%20Policy%20-%20FINAL.pdf [https://perma.cc/CUW3-C4L5].

[49] NFL Player Contract § 15, SEC (2012), https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm [https://perma.cc/5U6T-LPHH].

[50] These restrictions have led to a considerable amount of public controversy for the NFL. Given the league's expansion into Las Vegas and the Arizona Cardinals' exploration of a naming rights partnership with a casino, many have argued that the league's gambling policy is inconsistently enforced between owners and players. Brent Schoretenboer, *NFL's Gambling Policy Appears Consistently Inconsistent*, USA Today (June 11, 2017), https://www.usatoday.com/story/sports/nfl/2017/06/11/gambling-las-vegas-casino-naming-rights-advertising/102634272/ [https://perma.cc/6HPE-45XY].

[51] NFL Gambling Policy, *supra* note 48, § 7.

Recently, in *Fan Expo v. National Football League*, the Court of Appeals of Texas held that the NFL was justified in enforcing its gambling policy.[52] That said, although the NFL Commissioner has broad enforcement powers (as discussed below), the NFL has historically imposed more lenient punishments for those found to have violated its gambling policy.

2. Paul Hornung & Alex Karras—The 1963 Betting Scandal

In April 1963, Commissioner Pete Rozelle suspended Paul Hornung and Alex Karras and fined five Detroit Lions players for betting on sports, including NFL games.[53] This was the first major betting scandal in the NFL since 1946 when Commissioner Bert Bell suspended New York Giants running back, Merle Hapes, for failing to report outside parties attempting to fix the 1946 NFL Championship.[54]

Commissioner Rozelle's disciplinary actions sent shockwaves throughout the sports world. Paul Hornung—the NFL's Most Valuable Player in 1961 and a member of the 1962 NFL Champion Green Bay Packers—was one of the most popular players in the league.[55] Hornung, born and raised in Louisville, Kentucky, was a standout running back at Notre Dame.[56] In 1956, Hornung won the Heisman Trophy, and many believe he remains the greatest all-around football player in Notre Dame history.[57]

Along with Hornung's popularity, however, came a few relationships that ultimately led to his suspension. Following his 1956 Heisman season, Hornung developed a friendship with a California businessman who used

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[52] *See* Fan Expo, LLC v. Nat'l Football League, No. 05-16-00763-cv, 2018 WL 1890144, at *3 (Tex. Ct. App. Apr. 20, 2018). According to the NFL Gambling Policy, players are prohibited from "using or allowing others to use [their] name and/or image directly to promote, advertise, or publicize gambling-related enterprises . . . or making personal, promotional appearances on behalf of any entity in a casino gaming area or Sportsbook." NFL Gambling Policy, *supra* note 48, § 2(8).

[53] *See* James Weighart, *Hornung Suspended!*, MILWAUKEE SENTINEL (Apr.18, 1963), https://news.google.com/newspapers?id=SnRQAAAAIBAJ&sjid=ahEEAAAAIBAJ&pg=5474%2C520872 [https://perma.cc/RS5J-6NYH].

[54] Kevin Dupont, *As NFL Boss, Bert Bell Dealt with Controversy Swiftly*, BOSTON GLOBE (Sept. 21, 2014), https://www.bostonglobe.com/sports/2014/09/20/nfl-commissioner-bert-bell-dealt-with-controversy-swiftly/BxdJ8z39rrZKX5sGpEDJ9J/story.html [https://perma.cc/5JY3-MFLV].

[55] *See Paul Hornung Biography*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/paul-hornung/biography/ [https://perma.cc/3Y22-XE3Q].

[56] *See id.*

[57] *Paul Hornung Biography*, ALL AMERICAN SPEAKERS BUREAU, https://www.allamericanspeakers.com/speakers/16/Paul-Hornung [https://perma.cc/S4Q2-JJE6].

Hornung as a source of information for sports betting.[58] What started out as a seemingly innocuous relationship based on mutual admiration eventually turned into one in which gambling on college sports and the NFL was a centerpiece. In 1959, Hornung began placing wagers on college and professional football games, ranging between $100 to $200 per bet.[59] This pattern continued through the 1962 NFL preseason, at which time Hornung ceased gambling.[60] Despite Hornung's continuous gambling on NFL games from 1959 to 1962, the report summarizing the investigation into Hornung's actions clarified that "[t]here is no evidence that Hornung ever bet against his team, sold information for betting purposes or performed less than his best in any game."[61]

While Alex Karras and his five Detroit Lions teammates engaged in a less extensive pattern of gambling than Hornung, Commissioner Rozelle still suspended the defensive lineman for his "continued association with persons described by Detroit police as 'known hoodlums' even after 'learning of their backgrounds and habits.'"[62] Karras reportedly made six significant bets, starting in 1958, through a business associate. Compared to Hornung, Karras's bets were small—the bets were each for $50 until 1962, when Karras bet $100 on his team, the Detroit Lions.[63] As with Hornung, Commissioner Rozelle found no evidence that Karras ever bet against his team, sold information for betting, or played less than to the best of his abilities.[64]

Though Commissioner Rozelle merely fined five of Karras's teammates for betting $50 on the 1962 NFL Championship game, Karras faced suspension—likely because the five other players made their bets at the Miami home of Karras's friend.[65] Commissioner Rozelle also fined the Detroit Lions $4,000 for "loose supervision" because the team failed to intervene despite reports from the Detroit Police that its players were cavorting with "hoodlums."[66]

The revelation that seven players engaged in a pattern of betting shaped NFL gambling policy and the level of responsibility teams would

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[58] *See* Weighart, *supra* note 53.
[59] *See id.*
[60] *See id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See id.*
[65] *See id.*
[66] *Id.*

assume over player conduct. Indeed, Sports Illustrated's Tex Maule wrote shortly after the scandal:

> One of Rozelle's most pressing tasks now is to make certain that any betting player will be detected immediately and punished. He already has looked ahead to this. At the spring meeting of the National Football League the owners will be clearly informed of their responsibilities in surveillance over their players. Rozelle will insist on close contact between clubs and local law-enforcement agencies.[67]

Commissioner Rozelle asked the owners for both more money to bolster the league's investigative forces, and the power to assess fines exceeding $2,000 against players and teams who he, as Commissioner, unilaterally found guilty of sports betting.[68]

3. Art Schlichter

Art Schlichter's story is one of the most unfortunate, yet illustrative, examples of the dangerous and destructive nature of sports betting. An All-American drafted fourth overall in the 1982 NFL Draft, Schlichter's inclination toward gambling existed beneath a polished veneer.[69] In the introduction of a biography about Schlichter, released when he was just twenty-two years old, the author stated, "He's a 22-year-old nationally recognized sports celebrity who doesn't smoke, drink or use drugs, who respects and obeys his parents. He is an Ohio State All-American athlete with an All-American personality and you'll love his story."[70] The biography did not mention Schlichter's persistent sports betting, a habit he developed long before being drafted.

That Schlichter bet on sports as a professional did not necessarily surprise those close to him. In high school, Schlichter started going to the

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[67] Tex Maule, *Players are not just people: The NFL suspends its 'Golden Boy'*, SPORTS ILLUSTRATED (Apr. 29, 1963), https://www.si.com/nfl/2015/05/12/si-vault-paul-hornung-alex-karras-pete-rozelle [https://perma.cc/X9KD-CWYN].

[68] *See id.*

[69] *See* Wayne Coffey, *Art of the Steal - The Life & Crimes of Art Schlichter*, N.Y. DAILY NEWS (Dec. 5, 2004), http://www.nydailynews.com/archives/sports/art-steal-life-crimes-art-schlichter-playing-part-football-idol-husband-father-addict-crook-art-schlichter-spend-20-years-conning-including-article-1.561953 [https://perma.cc/M7NN-GTWS].

[70] *See* Paul Zimmerman, *Has it All Been Thrown Away*, SPORTS ILLUSTRATED (Apr. 18, 1983), https://www.si.com/vault/1983/04/18/619591/has-it-all-been-thrown-away [https://perma.cc/3GE6-3YPL].

Scioto Downs racetrack to bet on races with his best friend, Bill Hanners.[71] Because the legal betting age in Ohio was eighteen years old, Hanners' mother reportedly placed bets for the underage pair.[72] Later, while attending Ohio State University, he often went to the Scioto Downs with his coach Earle Bruce.[73] In fact, a few law-enforcement agencies in central Ohio reportedly knew of Schlichter's gambling. A former Ohio State University police officer stated that Schlichter's presence at the track "was common knowledge around the campus."[74] Dave Dailey, the former head of the Columbus, Ohio organized crime bureau, told the New York Times that officers in his department saw Schlichter at the race track with one of the biggest bookmakers in Ohio.[75] Even though suspicions of Schlichter's gambling were high, a lack of evidence stymied the repeated efforts of law enforcement officials to implicate Schlichter.[76] And because there was no evidence, the Ohio State athletic department largely ignored law enforcement's warnings and refused to report Schlichter to the National Collegiate Athletic Association (the "NCAA").[77]

Given the largely complicit environment and presence of enablers in college, Schlichter's gambling habits were further engrained, and he continued his sports betting in his professional career. Selected with the fourth pick in the 1982 NFL Draft by the Baltimore Colts, Schlichter signed a three-year contract and received a $350,000 signing bonus.[78] Despite a promising career ahead of him, not only was Schlichter's play on the field underwhelming, so too was his performance with Baltimore bookies, leading Schlichter to amass significant gambling debts. By the end of his rookie season, Schlichter had been relegated to the position of third-string quarterback, and although he had reportedly paid off around $220,000 in gambling debts,[79] he still owed nearly $159,000 and risked exposure by his bookmakers over this unpaid debt.[80]

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[71] *See* Michael Janofsky, *Schlichter: A Pattern of Gambling That Began In His Youth*, N.Y. TIMES (July 10, 1983), https://www.nytimes.com/1983/07/10/sports/schlichter-a-pattern-of-gambling-that-began-in-his-youth.html [https://perma.cc/4F4K-T93K].

[72] *See id.*

[73] *See id.*

[74] *Id.*

[75] *Id.*

[76] *See id.*

[77] *See id.*

[78] *Id.*

[79] See Zimmerman, *supra* note 70.

[80] *See id.*

Rather than paying his remaining debt, Schlichter instead elicited the help of the Federal Bureau of Investigation ("FBI") to put his debtors in prison. On April 1, 1983, the FBI arrested three individuals linked to Schlichter's betting at the Port Columbus International Airport on charges of interstate gambling.[81] Although Schlichter's debts were ostensibly absolved, he was not yet in the clear. Colts General Manager Ernie Accorsi stated that nobody had informed him of Schlichter's gambling until April 6, and Head Coach Frank Kush did not find out until a day later.[82] The news of Schlichter's gambling finally broke publicly on April 8, 1983.[83]

Upon receiving the news that Schlichter violated the league's anti-gambling policy, Commissioner Pete Rozelle, acting under Paragraph 15 of the Standard NFL Player Contract, suspended Schlichter indefinitely.[84] While Commissioner Rozelle accepted Schlichter's denials of ever placing a wager on or against his team, the investigation revealed Schlichter bet on at least ten NFL games during the 1982 season.[85] Following his suspension, Schlichter underwent hospitalization and "intensive therapy" to address his compulsive gambling.[86] Despite his treatment, Commissioner Rozelle stated,

> [A]n N.F.L. player with his record of gambling, whether prompted by uncontrollable impulses or not, cannot be permitted to be active in the N.F.L. until the league can be solidly assured that the serious violations of cardinal N.F.L. rules he has committed will not be repeated. Public confidence in the game of football requires this.[87]

Although the NFL reinstated Schlichter, making him eligible for the 1984 NFL season, the Colts released Schlichter after just five games amid reports that he had continued gambling.[88] But rather than link Schlichter's release to gambling, Colts owner Robert Irsay insisted the team released

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81 *See id.*

82 *See id.*

83 *See id.*

84 *See Rozelle Suspends Schlichter for Bets*, N.Y. TIMES (May 21, 1983), https://www.nytimes.com/1983/05/21/sports/rozelle-suspends-schlichter-for-bets.html [https://perma.cc/T2V2-4X86].

85 *See id.*

86 *See id.*

87 *Id.*

88 *See Art Schlichter Signs with Bills*, THE BEND BULLETIN (June 17, 1986), https://news.google.com/newspapers?nid=1243&dat=19860617&id=62gPAAAvAIBAJ&sjid=uIYDAAAAIBAJ&pg=3289,6545159&hl=en [https://perma.cc/5BPN-9A9S].

Schlichter because of his "physical stature."[89] Subsequently, Schlichter continued to struggle with a gambling addiction, and he is currently serving a ten-year prison sentence resulting from a fraudulent ticketing scheme.[90]

C. National Basketball Association and Sports Gambling: Jack Molinas and Tim Donaghy

The two major gambling scandals implicating National Basketball Association ("NBA") players and referees have received less notoriety than the incidents discussed above. Jack Molinas, the first and only player expelled from the NBA for gambling, is relatively unknown among NBA fans. Likewise, while basketball fans may be familiar with Tim Donaghy, many are unaware he was convicted of betting on games he refereed. Both incidents, while not widely discussed, provide excellent examples of how the NBA enforces its gambling policy, particularly when NBA personnel bet on the game of basketball.

1. Current NBA Policy

The NBA Constitution—a broad set of regulations that apply to NBA players, coaches and employees—details the NBA's gambling policy. Article 35(f) of the current NBA Constitution provides that:

> Any player who, directly or indirectly, wagers money or anything of value on the outcome of any game played by a Team in the league operated by the Association shall . . . be given an opportunity to answer such charges after due notice, and the decision of the Commissioner shall be final, binding and conclusive and unappealable. The penalty for such offense shall be within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members.[91]

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89 *See Schlichter Arrested in Betting Inquiry*, N.Y. Times (Jan. 17, 1987), https://www.nytimes.com/1987/01/17/sports/schlichter-arrested-in-betting-inquiry.html [https://perma.cc/UJ9Y-NA3R].

90 *See Schlichter Gets 10-Plus Years in Prison*, FOX Sports (May 4, 2012), https://www.foxsports.com/nfl/story/federal-judge-sentences-former-ohio-state-and-nfl-quarterback-art-schlichter-to-nearly-11-years-in-prison-050412 [https://perma.cc/2PA3-TH8R].

91 National Basketball Association Constitution and By-Laws art. 35(f) (Oct. 2018) [hereinafter NBA Constitution], https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2018/10/NBA-Constitution-By-Laws-October-2018.pdf [https://perma.cc/9WZD-2KQ6].

Although Article 35's general language leaves open whether the policy applies to referees, NBA referees are prohibited from gambling through another source, the NBA-National Basketball Referee Association ("NBRA") CBA.[92] The NBA-NBRA CBA states that:

> No Referee shall participate in any gambling or place bets of any kind; nor shall any Referee visit or attend any race track, off track betting establishment, casino, or gambling establishment of any kind; provided, however, that a Referee may, during any Off-season (i) visit and place bets at race tracks; and (ii) attend a show at a hotel/casino, provided that the Referee may, at no time, be present in the "gaming" area of such hotel/casino.[93]

According to a 2007 ESPN report, NBA Commissioner David Stern found that all fifty-six NBA referees had violated their contracts by engaging in some form of gambling.[94] Because the NBA-NBRA CB policy was considered too broad, Stern proposed narrowing the referee gambling policy to deter future, potentially detrimental gambling, while also maintaining a realistic perspective on permissible innocuous gambling activities outside the context of professional basketball.[95]

2. Jack Molinas

Many consider Jack Molinas to be one of the most corrupt individuals to ever play basketball. Not only was Molinas suspended as a player from the Fort Wayne Pistons in 1954 for betting on games in which he participated[96] but, later, he was also a central figure in the 1961 NCAA college basketball gambling scandal, an incident widely considered to have nearly destroyed college basketball.[97]

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[92] *See* National Basketball Association and National Basketball Referees Association Collective Bargaining Agreement, art. IX, § 2 (2010), *in* James Nafziger & Stephen Ross, Handbook on International Sports Law 197 (2011).

[93] *Id.*

[94] *See* Chris Sheridan, *NBA to* Revamp Ref Gambling Rules; Jackson, Nunn See Roles Reduced, ESPN (Oct. 26, 2007), http://www.espn.com/nba/news/story?id=3079309 [https://perma.cc/M929-HFSN].

[95] Howard Beck, *Stern Alters Gambling Restrictions on Referees*, N.Y. Times (Oct. 26, 2007), https://www.nytimes.com/2007/10/26/sports/basketball/26nba.html [https://perma.cc/ACP9-4U3W].

[96] *See* Michael Fatale, *Inside the Jack Molinas Story: He Threw It All Away*, Columbia Spectator (Sept. 20, 1982), http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19820920-01.2.20 [https://perma.cc/B4FQ-Y3TW].

[97] In 1961, the NCAA was embroiled in a gambling scandal, which produced "37 arrests of players from 22 colleges including Columbia, St. John's, New York

Prior to any wrongdoings, Bronx-born Jacob "Jack" Molinas was considered one of the top amateur athletes in New York. Indeed, before attending Columbia University, Molinas had a "record-breaking career at Stuyvesant High School in Manhattan," where his team won the 1949 New York City championship game.[98] At Columbia University, Molinas started for three years on the varsity basketball team, and upon graduating, held every major Columbia basketball record.[99]

Selected in the first round of the 1953 NBA Draft, Molinas' career got off to an exceptional start. Over the course of his first thirty-two games, Molinas averaged 11.6 points and 7.1 rebounds per game, earning a selection to the 1954 Western Conference All-Star team.[100] But Molinas never played in that All-Star game; in fact, he never played another professional game of basketball after January 7, 1954, when the NBA suspended him for betting on games in which he played for the Fort Wayne Pistons.[101]

But Molinas' involvement with betting on basketball didn't start when he entered the NBA. On the contrary, Molinas admitted that he was involved in point shaving even as a member of the Columbia University basketball team.[102] According to Molinas, Joe Hacken, a high school acquaintance, approached him about shaving points and fixing games, an idea Molinas first rejected.[103] It wasn't until his junior year at Columbia, while serving a suspension for breaking a professor's windshield, that Molinas finally relented to Hacken's overtures.[104]

For some, suspicions about Molinas' play emerged following his performance on the Fort Wayne Pistons in a December 1953 game against the Boston Celtics. Even though the Pistons had a better regular-season record than the Celtics, early betting pushed the point spread to six points in favor

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University, North Carolina State and Connecticut . . . ." Joe Goldstein, *Explosion II: The Molinas Period*, ESPN (Nov. 19, 2003), http://www.espn.com/classic/s/basketball_scandals_molinas.html [https://perma.cc/E28C-YZZN]. Jack Molinas was considered the lead conspirator in the scheme, which reportedly resulted in the fixing of outcomes of sixty-seven NCAA games, and involved forty-nine players from twenty-five colleges. Molinas was ultimately sentenced to ten to fifteen years in prison for his role in the scheme. *See* Fatale, *supra* note 96.

98 *Id.*

99 *See id.*

100 *See Jack Molinas 1953-54 Game Log*, BASKETBALL-REFERENCE, https://www.basketball-reference.com/players/m/molinja01/gamelog/1954 [https://perma.cc/W5YA-D5G3].

101 *See* Fatale, *supra* note 96.

102 *See id.*

103 *See id.*

104 *See id.*

of the Celtics.[105] The Pistons shot out the gate and went into halftime with an eleven-point lead over the Celtics, with Molinas scoring eighteen points.[106] While in the locker room before the start of the second half, a stranger tried to make his way into the Pistons locker room, and ultimately left a note for Molinas that simply stated, "Joe sent me."[107] The Pistons ended up losing the game 82-75.[108] Following the game, New York bookmakers refused to take bets on Fort Wayne Pistons games, leading many to believe that the contests involving the Pistons were fixed.[109]

Acting on tips and news stories, NBA President Maurice Podoloff launched an investigation of Molinas and his teammates.[110] New York and Fort Wayne law enforcement officials, using wiretaps, gathered evidence that Molinas and at least six of his teammates were involved with gamblers in game-fixing and point shaving.[111] In January 1954, Molinas signed a written statement at the Fort Wayne police station, admitting:

> After being on the team for approximately a month I called a man in New York by the name of Stanley Ratensky, knowing this man for a long period of time I called him on the telephone and asked him if he could place a bet for me. He said that he could and he would tell me the odds on the game either for or against the Pistons. After hearing the odds or points on the game I either placed a bet on the Pistons or else told him that the odds were to [sic] great and I did not want to place the bet.[112]

Immediately following his admission, President Podoloff arrived at the police station and indefinitely suspended Molinas from the league.[113] In response, Molinas sued the league, seeking a permanent injunction to set aside his suspension.[114] In reviewing Molinas' claims, the court focused on Section 15 of the NBA Player Contract which stated:

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[105] J. Gordon Hylton, *How the Morals Clause In Jack Molinas' Contract Saved the National Basketball Association in 1954*, FORDHAM SPORTS L.F., http://fordhamsportslawforum.com/wp-content/uploads/2013/05/How-the-Morals-Clause-in-Jack-Molinas-Contract-Saved-the-National-Basketball-Association-in-1954.pdf [https://perma.cc/B8KN-V438].

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] CHARLEY ROSEN, THE WIZARD OF ODDS: HOW JACK MOLINAS ALMOST DESTROYED THE GAME OF BASKETBALL 126 (2002).

[111] *See id.* at 283.

[112] *Id.* at 17.

[113] *Id.*

[114] *See* Molinas v. Podoloff, 133 N.Y.S.2d 743, 744–46 (N.Y. Sup. Ct. 1954).

> It is severally and mutually agreed that any player of a Club, who directly or indirectly bets money or anything of value on the outcome of any game played for any National Basketball Association Club, shall be expelled from the National Basketball Association by the President after due notice and hearing and the President's decision shall be final, binding, conclusive and unappealable; and the Player hereby releases the President and waives every claim he may have against the President and/or the National Basketball Association, and against every Club in the National Basketball Association, and against every director, officer and stockholder of every Club in the National Basketball Association, for damages and for all claims and demands whatsoever arising out of or in connection with the decision of the President of the National Basketball Association.[115]

The court then noted that Section 43 of the NBA Constitution afforded the NBA Commissioner the power to:

> suspend for a definite or indefinite period or to impose a fine not exceeding $1,000 or inflict both upon any manager, coach, player or officer who in his opinion shall be guilty of conduct prejudicial or detrimental to the association regardless whether the same occurred in or outside of the playing building.[116]

Finally, the court also highlighted Section 79 of the NBA Constitution which stated:

> Any officer, director, coach or employee of a club, team, corporation or organization operating a franchise in the N.B.A. who or which directly or indirectly wagers money or anything of value on the outcome of any game played by a team of the N.B.A. shall on being charged with such wagering be given a hearing by the President of the Association after due notice, and the decision given by the President shall be final, binding and conclusive and unappealable, and anyone so charged and found guilty shall have no claim against the President and/or N.B.A. or its members or against any club or organization operating a franchise of the N.B.A.[117]

Unsurprisingly, the court summarily dismissed Molinas' claims because he breached his contract and violated the clear prescriptions of the NBA Constitution.[118] As a matter of policy, the Court asserted, "[w]hen the breath of scandal hits one sport, it casts suspicion on all other sports. It does irreparable injury to the great majority of the players, destroys the confidence of the public in athletic competition, and lets down the morale of our

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[115] Rosen, *supra* note 110, at 96.
[116] *Podoloff*, 133 N.Y.S.2d at 745.
[117] *Id.* at 745–746.
[118] *See id.* at 747.

youth."[119] For Molinas, what began as a promising career quickly devolved into one of the most devastating stories of self-destruction in professional basketball history. Molinas, once a rising star, never played professionally again, and in 1975, nearly a decade after serving five years in federal prison for his role in an NCAA gambling scheme, Molinas was shot to death in his Los Angeles home.[120]

3. Tim Donaghy

The 2007 NBA betting scandal involving Tim Donaghy marked the first time a "referee, umpire, linesmen or other in-game official ha[d] ever been arrested or indicted for game- or match-fixing in the history of the four major sports."[121] At the time, the revelation that the FBI had arrested an NBA referee for match-fixing shook the sports world, with some even describing the incident as "a nightmare scenario for the NBA, a league that has had to fight off conspiracy charges . . . ."[122]

Before his arrest, Donaghy worked as an NBA referee for thirteen years.[123] His ties to refereeing, however, were even more extensive than, and pre-date, his career.[124] Philadelphia, sometimes described as the "cradle of basketball refereeing," produced fourteen current or former basketball referees.[125] Deeply connected to the profession, Donaghy began his career in 1994 at age twenty-seven. While involved in a few on-court incidents during his career,[126] there were no indications Donaghy illegally bet on basketball games.

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119 *Id.* at 746.

120 Goldstein, *supra* note 97.

121 *Donaghy under investigation for betting on NBA games*, ESPN (July 20, 2007), http://www.espn.com/nba/news/story?id=2943095 [https://perma.cc/4F37-6ESE].

122 David Aldridge & Marc Narducci, *FBI Investigating Area NBA Referee*, PHILA. INQUIRER (July 20, 2007), https://web.archive.org/web/20070929133029/http://www.philly.com/philly/hp/news_top/20070720_FBI_investigating_area_NBA_referee.html [https://perma.cc/67Z5-42PQ].

123 *See id.*

124 *See* Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Feb. 19, 2019), https://www.espn.com/nba/story/_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games [https://perma.cc/VY6Q-7Y29]. Among the Philadelphia-bred referees were both Billy Oakes (Donaghy's uncle) and Gerry Donaghy (Donaghy's father).

125 *See id.*

126 For example, Donaghy was involved in a 2003 incident when he called a technical foul forward on Rasheed Wallace for allegedly throwing a ball at another official. Following the game, Wallace confronted Donaghy on the loading dock of the Rose Garden, leading to a seven-game suspension for Wallace. "In April 2005,

It came as a shock, then, when it was revealed that Donaghy started wagering on NBA games, particularly games in which he was officiating, during the 2003–2004 NBA season.[127] In 2003, Donaghy began providing betting recommendations to his friend, Jack Concannon, who would then place bets with various betting services, always concealing the fact that the bets were being placed, in part, on behalf of Donaghy.[128] Concannon hid Donaghy's participation in the betting scheme until December 2006 when James Battista and Thomas Martino, high school friends of Donaghy, told Donaghy that they knew he was placing bets on NBA games, including games he officiated.[129] Battista proposed, and Donaghy accepted, an agreement in which Donaghy would provide "the identity of officiating crews for upcoming games, the interactions between certain referees and team personnel, and the physical condition of certain players" in exchange for a percentage of Battista and Martino's winnings.[130]

Donaghy's betting scheme with Battista and Martino lasted just over six months. By July 2007, reports began emerging suggesting Donaghy was under FBI investigation for influencing the outcomes of NBA games.[131] In August 2007, NBA Commissioner David Stern enlisted the help of law firm Wachtell, Lipton, Rosen & Katz to conduct a broad examination of the league's anti-gambling laws policies and look into all referees, not just Donaghy.[132] In his announcement of the internal investigation, Commissioner Stern stated, "[t]here is nothing as important as the integrity of our game and the covenant we have with our fans."[133] By October 2007, Commissioner Stern had found that "all of the league's 56 referees violated the contractual prohibition against engaging in gambling, with more than half

Boston Celtics Coach Doc Rivers, after Donaghy ejected him from a game, accused Donaghy of being biased against him. The Boston Globe reported that Rivers lodged a complaint with the league, but it appears the matter did not go much further." Alan Schwarz & William K. Rashbaum, *N.B.A. Referee Is the Focus of a Federal Inquiry*, N.Y. Times (July 21, 2007), https://www.nytimes.com/2007/07/21/sports/basketball/21referee.html?_r=1&ref=sports&oref=slogin {https://perma.cc/2DFV-KLHG}.

127 *See* United States v. Donaghy, 570 F. Supp. 2d 411, 415 (E.D.N.Y. 2008).

128 *See id.*

129 *See id.* at 415–16.

130 *Id.* at 416.

131 *See, e.g.*, Schwarz & Rashbaum, *supra* note 126; Aldridge & Narducci, *supra* note 122.

132 *See* Murray Weiss, *NBA's Hire Gun*, N.Y. Post (Aug. 22, 2007), https://nypost.com/2007/08/22/nbas-hired-gun/ {https://perma.cc/UL6V-8P4Q}.

133 *Id.*

of them admitting to placing wagers in casinos."[134] But the internal review also discovered that, while the referees had placed wagers in some form or fashion, no referees admitted to placing bets with a sportsbook or bookie.[135] To his credit, Commissioner Stern refused to overreact, instead determining that the NBA's betting rules were far too strict. According to Stern, "Our ban on gambling is absolute, and in my view it is too absolute, too harsh and was not particularly well-enforced over the years . . . . We're going to come up with a new set of rules that make sense."[136]

Tim Donaghy's actions, however, were distinguishable from those of the other fifty-five league referees who engaged in non-basketball betting. While the NBA's gambling policies may have been too broad in many respects,[137] Tim Donaghy violated the core rule proscribing wagering on NBA games. Before Donaghy's scandal, all league employees—including players, coaches and referees—were prohibited from betting, indirectly or directly, on NBA games:

> Any player who, directly or indirectly, wagers money or anything of value on the outcome of any game played by a Team in the league operated by the Association shall, on being charged with such wagering, be given an opportunity to answer such charges after due notice, and the decision of the Commissioner shall be final, binding, conclusive, and unappealable. The penalty for such offense shall be within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members.[138]

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[134] Chris Sheridan, *NBA to revamp ref gambling rules; Jackson, Nunn see roles reduced*, ESPN (Oct. 26, 2007), http://www.espn.com/nba/news/story?id=3079309 [https://perma.cc/Q68Y-CTA2].

[135] *See id.*

[136] *Id.*

[137] Not only were NBA referees subject to the NBA Constitution and the collective bargaining agreement between the NBA and NBA Referee's Association, the NBA Work Rules subjected referees to general restrictions of good behavior. The Work Rules specifically stated, "Because it is impossible to cover with a specific rule or regulation every situation that may arise, you are reminded that you are expected always to conduct yourself on and off the court according to the highest standards of honesty, integrity, and professionalism; to conform your personal conduct to the highest moral standards; and to refrain from any conduct that might impair the faithful and thorough discharge of your duties or be detrimental or prejudicial to the best interests of the NBA." *See* LAWRENCE PEDOWITZ, REPORT TO THE BOARD OF GOVERNORS OF THE NATIONAL BASKETBALL ASSOCIATION 23 (Oct. 1, 2008), http://d.yimg.com/a/p/sp/tools/med/2008/10/ipt/1222996132.pdf [https://perma.cc/4E37-3KV6].

[138] NBA Constitution, *supra* note 91, art. 35(f).

Moreover, the NBA's Legal Compliance Policy and Code of Conduct prohibited all NBA employees from discussing with anyone outside the NBA any non-public information, which includes "the health of a player or the identity of the referees at a particular game."[139] Donaghy's betting scheme with Concannon, Battista, and Martino no doubt violated NBA policy, but Commissioner Stern neglected to terminate Donaghy immediately in an effort to preserve the ongoing investigation of his actions.[140] But before the league could enforce any penalty against him for violating the NBA's anti-gambling policies, Donaghy resigned as an NBA referee on July 9, 2007.[141]

In August 2007, Donaghy pled guilty to charges of conspiracy to commit wire fraud and conspiracy to transmit wagering information, leading to a 15-month sentence in federal prison.[142] Commissioner Stern saw Donaghy's sentencing as a chance to move the league forward:

> We anticipate that the judge's sentencing decision, together with the changes we have made to our referee operations staff, will enable us to continue with the improvements we are making to our anti-gambling rules, policies and procedures. . . . There is little comfort to be gained from the mandatory prison sentence, especially as it affects Mr. Donaghy's children and their mother, but hopefully the healing process can begin in earnest for all.[143]

II. The Professional and Amateur Sports Protection Act

The incidents described above underscore how sports gambling, particularly by those participating in sporting contests, can undermine the integrity of sports. Nonetheless, thirteen states began considering legislation in the 1980s that would have sanctioned gambling "in the hope that legalizing and taxing the activity would fill increasingly large budget deficits."[144] In response, Congress passed the Professional and Amateur Sports Protection Act ("PASPA") in 1992, ostensibly to address many concerns about the

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139 *See* Pedowitz, *supra* note 137, at 22.

140 *See id.*

141 *David Stern's Donaghy News Conference Transcript*, ESPN (July 24, 2007), https://www.espn.com/nba/news/story?id=2947534 [https://perma.cc/V62B-S67S].

142 *Donaghy Sentenced to 15 Months in Prison in Gambling Scandal*, ESPN (July 29, 2008), http://www.espn.com/nba/news/story?id=3509440 [https://perma.cc/X9ZB-N5EU].

143 *Id.*

144 Michelle Minton & Steven Titch, *Time to End the Madness around March Madness*, Competitive Enterprise Inst., (Mar. 2, 2017), https://cei.org/content/time-end-madness-around-march-madness [https://perma.cc/PNS7-H4KA].

pervasiveness of gambling in sports. Also known as the Bradley Act, PASPA was codified at 28 U.S.C. § 3701–04. Under PASPA:

> It shall be unlawful for —
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[145]

Notably, Section 3704 carved out exceptions to PASPA's prohibitions for states with: (i) existing wagering schemes enacted between January 1, 1976 and August 31, 1990; (ii) a wagering scheme in effect as of October 2, 1991 that was conducted between September 1, 1989 and October 2, 1991; and (iii) a wagering scheme conducted exclusively in casinos in a municipality, provided the scheme was authorized no later than January 1, 1994 for states which operated casino gaming during the previous ten-year period.[146] These exceptions were considered to have been grandfathered in for four states—Delaware, Montana, Nevada, and Oregon—which, at the time, allowed sports gambling.[147] Moreover, the language in the third condition provided New Jersey the opportunity to create a wagering scheme within one year after PASPA was enacted; the state, however, declined to do so.[148]

When passed, PASPA was largely uncontroversial constitutionally, justified in large part as a valid exercise of Congress's Commerce Clause power. Article I, § 8 of the United States Constitution specifically grants Congress the power to regulate interstate commerce,[149] an authority that has enabled a broad array of federal legislation, ranging from securities laws to civil-rights laws. Under the Commerce Clause, the Supreme Court had long considered Congress's ability to regulate gambling, particularly lottery tickets, consti-

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[145] 28 U.S.C. § 3702 (2018), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[146] 28 U.S.C. § 3704 (2018), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[147] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018)
[148] *Id.* at 1471 & n.27.
[149] U.S. CONST. art. I, § 8.

tutional.[150] Given this historical precedent, few thought anyone would successfully challenge PASPA in court.

A. *The Policy Justifications Leading to PASPA*

There were several policies justifying PASPA's codification that were persuasive when Congress passed the Act but likely would not resonate with most American sports fans today. Before the Act's passage, Bill Bradley, a former NBA basketball player and, at the time, a senator from New Jersey, penned an article that explained the primary policy justifications for PASPA.[151] Senator Bradley's article noted that the Act's central policy concern was that state-sanctioned betting "would convey[ ] the message that *sports are more about money than personal achievement and sportsmanship* . . . . Athletes are not roulette chips, but sports gambling treats them as such. If the dangers of state sponsored sports betting are not confronted, the character of sports and youngsters' view of them could be seriously threatened."[152]

Today, this argument has lost its persuasive power, as few seem bothered by the increasing commercialization of sports. The popularity of—and revenue generated by—the big three sports leagues and their athletes are at an all-time high. Indeed, the broadcast deals of the big three sports leagues alone are in the billions of dollars:

League	Partners	Length	Contract
MLB	Fox, TBS, ESPN	To 2021	$12.4 billion[153]
NFL	Fox, CBS, ESPN, NBC	To 2022	$27 billion[154]
NBA	ABC, ESPN, TNT	To 2024-25	$24 billion[155]

[150] *See* Champion v. Ames, 188 U.S. 321 (1903).

[151] *See generally* Bradley, *supra* note 3.

[152] *See id.* at 5 (emphasis added).

[153] Christina Settimi, *Baseball Scores $12 Billion In Television Deals*, FORBES (Oct. 2, 2012), https://www.forbes.com/sites/christinasettimi/2012/10/02/baseball-scores-12-billion-in-television-deals/#501b25c71d35 [https://perma.cc/S3DY-284T].

[154] Kurt Badenhausen, *The NFL Signs TV Deals Worth $27 Billion*, FORBES (Dec. 14, 2011), https://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/#2ba4f23322b4 [https://perma.cc/FEQ5-FJE6].

[155] *NBA TV deal: How the new $24B contract stacks up against other leagues*, CBC (Oct. 7, 2014), http://www.cbc.ca/sports/basketball/nba/nba-tv-deal-how-the-new-24b-contract-stacks-up-against-other-leagues-1.2790143 [https://perma.cc/X97C-5S6P].

Likewise, the value of sports franchises in each league has soared. For example, the Indiana Pacers, purchased in 1983 for $11 million, are now valued at close to $1.4 billion.[156] The LA Clippers, bought by Donald Sterling in 1981 for $12.5 million, were bought by Steve Ballmer for $2.5 billion in 2014, representing an astounding 15,900% return.[157] Further, player salaries continue to increase each year. For example, Michael Jordan was the highest paid athlete in the world in 1992, earning $35.9 million through a combination of his salary and endorsement deals.[158] During the 2019–2020 NBA season, there will be tweny players earning over $30 million from their salary alone.[159] LeBron James, the highest paid American athlete in 2019, earns close to $90 million per year in salary and endorsement deals.[160] This figure does not include James' purported $1 billion endorsement deal with Nike.[161] While athletes certainly play the game out of a sense of passion and duty to sportsmanship, the notion that sports aren't primarily revenue-generating ventures for athletes, franchises, and leagues is misguided.[162]

Senator Bradley also argued PASPA was necessary to quell the ever-spreading epidemic of teen gambling.[163] In his article, Senator Bradley cited

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[156] Kurt Badenhausen, *NBA Team Values 2019: Knicks on Top at $4 Billion*, FORBES (Feb. 2, 2019, 9:00 AM), https://www.forbes.com/sites/kurtbadenhausen/2019/02/06/nba-team-values-2019-knicks-on-top-at-4-billion/#45abcb57e667 [https://perma.cc/Z4AE-Q5VR].

[157] *See Donald Sterling's Payday: 15,900% return on Clippers investment*, L.A. TIMES (May 29, 2014), https://www.latimes.com/la-fi-g-how-clippers-sale-compares-to-other-investments-20140529-htmlstory.html [https://perma.cc/73XJ-ME5J].

[158] *The World's Highest Paid Athletes in 1992*, TOP END SPORTS, https://www.topendsports.com/world/lists/earnings/athletes-paid-1992.htm [https://perma.cc/KL2R-KS5E].

[159] *See* NBA Salary Rankings, SPORTTRAC, https://www.spotrac.com/nba/rankings/2019/cash/ [https://perma.cc/5MVB-DXU7].

[160] Kurt Badenhausen, *The NBA's Highest-Paid Players 2019: LeBron James Leads With $89 Million*, FORBES (Feb. 12, 2019), https://www.forbes.com/sites/kurtbadenhausen/2019/02/12/the-nbas-highest-paid-players-2019-lebron-james-leads-with-89-million/#33319ea25d1b [https://perma.cc/V8XS-T2EZ].

[161] *LeBron James's Nike Deal May Be Worth More Than $1 Billion*, SPORTS ILLUSTRATED (May 17, 2016), https://www.si.com/nba/2016/05/17/lebron-james-nike-deal-contract-one-billion [https://perma.cc/AHN4-SV7H]

[162] The monetization of college sports, even absent legalized gambling, has led to fraud schemes surrounding player recruitment in college sports, which are currently being investigated by the FBI. Pat Forde & Pete Thamel, *Exclusive: Federal documents detail sweeping potential NCAA violations involving high-profile players, schools*, YAHOO! SPORTS (Feb. 23, 2018), https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html [https://perma.cc/57HG-AKRM]

[163] *See* Bradley, *supra* note 3, at 6.

the congressional testimony of Valerie Lorenz, a purported expert on compulsive gambling, who argued that the issue of gambling addiction affects all people, regardless of color, age or socioeconomic status.[164] He also highlighted a New York Times article which reported that students were two and a half times more likely than adults to become gambling addicts.[165]

These concerns surrounding teen gambling persist today.[166] Nearly 10% of young people are at risk of developing gambling problems.[167] As discussed above, early exposure to gambling likely influenced the behavior of Pete Rose, Jack Molinas, and Art Schlichter. Yet this argument in support of the Act has largely been undermined. Even when sports gambling was illegal, the emergence of off-shore online betting opportunities crippled the efficacy of PASPA's protections against youth gambling. People, of all ages, could easily bet on sports through offshore bookmakers with little to no legal scrutiny. Moreover, the emergence and public acceptance of daily-fantasy-sports outlets such as DraftKings, FanDuel, and Fantasy Draft—websites and applications easily accessed by children of any age—illustrate state legislators' waning concerns over youth gambling.

Finally, Senator Bradley argued that legalizing sports gambling would undermine the public's trust in sports because "[s]ports gambling raises people's suspicions about point-shaving and game-fixing . . . . Where sports-gambling occurs, fans cannot help but wonder if a missed free throw, dropped fly ball, or a missed extra point was part of a player's scheme to fix the game."[168] At the time, Senator Bradley's concerns were echoed by representatives of each of the three major sports leagues. Indeed, Red Auerbach testified before Congress in 1991, stating "[T]he strategies of the coaches and players as they relate to the point spread will be called into question. Coaches and players have enough to worry about without their motives and integrity being questioned by gamblers and bookies."[169]

Today, however, these concerns appear to have dissipated, at least for MLB and the NBA, both of whom have transformed their views and now support legalizing sports gambling. For example, representatives from the two leagues lobbied state legislatures across the nation, while the constitu-

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[164] *See id.*

[165] *See id.* at 7.

[166] *See id.*

[167] Gianna Le, et al., Youth Gambling in the 21st Century: Prevalence, Impact, and Interventions, Problem Gambling Prevention 3, https://docplayer.net/14959863-Youth-gambling-in-the-21-st-century-prevalence-impact-and-interventions.html [https://perma.cc/NZ84-T9XW].

[168] Bradley, *supra* note 3, at 7–8.

[169] *Id.* at 8.

tionality of PASPA was being deliberated by the Supreme Court, to help shape sports-gambling laws and ensure the development of reliable revenue streams from state-betting schemes.[170] The NBA also recently entered into multiple partnerships with sportsbooks.[171]

While the MLB and NBA both supported the legalization of sports betting, the NFL was more reluctant, at least initially.[172] Echoing concerns similar to Senator Bradley's, Commissioner Roger Goodell stated,

> To me it it's very clear, which is about the integrity of the game, you don't want to do anything that's going to impact negatively on the integrity of our game. You want to be certain that there are no outside influences on our game and *that fans don't even have any issue with that*, they understand, whether there's a perception or not, that there's no influence in our game. And that's something that we stand firmly behind on the integrity of our game.[173]

But Commissioner Goodell's concerns, while understandable, lack evidence. According to the Competitive Enterprise Institute,

> Despite the prohibition [PASPA], Americans spent an estimated $9 billion on the 2016 NCAA Men's Basketball Tournament. And it is not just March Madness. Americans wagered almost $5 billion on Super Bowl LI, according to some estimates. . . . Some 95 to 99 percent of this economic activity takes place through illegal channels or on websites based offshore, which deprives American consumers of the protections found in a legal market.[174]

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170 Eric Ramsey, *Records Show MLB, NBA Now Lobbying On Sports Betting In Nearly A Dozen States*, LEGAL SPORTS REP. (Mar. 27, 2018, 6:47 AM), https://www.legalsportsreport.com/19395/sports-betting-lobby-funded-by-mlb-nba/ [https://perma.cc/3X5H-VPME].

171 Press Release, National Basketball Association, *NBA and FanDuel expand partnership to include sports betting and new fan experiences* (Dec. 18, 2018, 12:17 PM), http://www.nba.com/article/2018/12/18/nba-fan-duel-expand-partnership-official-release [https://perma.cc/5M4U-PDFT].

172 The NFL now seems to be more accepting of sports betting. In 2019, the NFL "not only embraced its former nemesis — sports betting — but joined in promoting the fact its games are more fun to watch when there's a point spread involved." Associated Press, *Column: NFL Riding Wave of Sports Betting*, USA TODAY (Nov. 7, 2019, 2:54 PM), https://www.usatoday.com/story/sports/nfl/2019/11/07/column-nfl-riding-wave-of-sports-betting/40565457/ [https://perma.cc/RY9K-X7U8].

173 Dustin Gouker, *NFL Commish Goodell On Sports Betting: 'We Are Going To Protect The Integrity Of The Game'*, LEGAL SPORTS REP. (Jan. 30, 2018, 10:37 AM) (emphasis added), https://www.legalsportsreport.com/18085/nfl-goodell-on-sports-betting-integrity/ [https://perma.cc/5T5N-XGDD].

174 Minton & Titch, *supra* note 144.

And despite the prevalence of illegal sports gambling, the big three leagues earned revenues at unprecedented rates. Even in the midst of daily fantasy sports and a growing sports-gambling industry, sports fans' trust in the league appears higher than ever. This will likely remain true as state legislatures continue to expand the legality of sports gambling across the United States.

III. Emerging Legal Challenges

A. *New Jersey's First Attempt to Legalize Sports Gambling:* Christie I

In 2012, nearly two decades after declining to legalize sports gambling, the New Jersey legislature amended the state's constitution to give the state legislature the authority to legalize sports betting.[175] The constitutional amendment also would have effectively allowed in-person and account betting in Atlantic City casinos and racetracks.[176] Soon after, however, the NCAA, NBA, NFL, MLB, and National Hockey League ("NHL") challenged the amendment and requested injunctive relief, arguing it violated

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[175] Will Hobson, *Everything you need to know about New Jersey's pending high-stakes sports gambling ruling*, WASH. POST (July 1, 2015, 11:00 AM), https://www.washingtonpost.com/news/sports/wp/2015/07/01/everything-you-need-to-know-about-new-jerseys-pending-high-stakes-sports-gambling-ruling/?utm_term=.e02f00ba0d48 [https://perma.cc/2GCF-QF6H].

[176] S. Res. 49, 214th Leg. (N.J. 2010). The law stated:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City by persons who are present at a casino or gambling house, or who are at any other location within or outside of Atlantic City and place wagers at a casino or gambling house through an account wagering system using telephone, Internet or other means, on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . .
>
> It shall also be lawful for the Legislature to authorize by law wagering at running and harness horse racetracks in this State by persons who are present at a racetrack, or who are at any other location and place wagers at a racetrack through an account wagering system using telephone, Internet or other means, on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

PASPA. As expected, the New Jersey district court agreed, holding that the New Jersey law violated PASPA, which prohibited the state from legalizing gambling.[177]

In its defense, New Jersey argued that the Act violated the Tenth Amendment's Anti-Commandeering doctrine, the Commerce Clause, and Equal Protection Principles, rather than challenging PASPA simply as an overreach of Congress's Commerce Clause powers. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[178] Under this principle, New Jersey argued that Congress could not commandeer or compel a state into enforcing federal law.[179] The District Court of New Jersey rejected this contention, stating that PASPA "neither compels nor commandeers New Jersey to take any action."[180] The court also distinguished PASPA from laws containing affirmative commands, reasoning that the central prescriptions of the statute are simply prohibitions on sports betting.[181]

The court also rejected New Jersey's Commerce Clause arguments. When analyzing whether the nexus between the regulated activity and interstate commerce sufficiently implicates the Commerce Clause, a court must determine whether there is a rational basis for Congress to regulate a specific activity.[182] Using the reasoning laid out above, the court held that when faced with Commerce Clause challenges, Congress is afforded a broad presumption of constitutionality.[183] The district court found that illegal gambling fell within a class of activities that affected interstate commerce because the Congressional record sufficiently detailed Congress' rational basis for enacting PASPA, thus rendering PASPA constitutional.[184]

New Jersey's final challenge of PASPA relied on the Fifth Amendment, including both the Equal Protection Clause and Due Process Clause. According to the court, "The Due Process and Equal Protection concerns lodged here are subject to rational basis review," which requires some con-

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177 *See* Nat'l Collegiate Athletic Ass'n v. Christie (*Christie I*), 926 F. Supp. 2d 551, 559 (D.N.J. 2013).

178 U.S. Const. amend. XIV.

179 *Id.* at 554.

180 *Id.* at 561.

181 *See id.* at 570.

182 *Id.* at 559.

183 *See id.*

184 *See id.* at 561.

nection between the alleged disparity in treatment and a legitimate legislative purpose.[185] In the case of the 2012 law, the court held that,

> Since PASPA's classification neither involves fundamental rights, nor proceeds along suspect lines, it is accorded a presumption of validity. PASPA advances the legitimate purpose of stopping the spread of legalized sports gambling and of protecting the integrity of athletic competition . . . PASPA's provisions are rationally related to Congress' aims.[186]

Accordingly, the court rejected New Jersey's claims and denied the state's attempt to legalize sports gambling. In 2013, the Third Circuit affirmed the New Jersey district court's decision, yet gave hope to supporters of legalized gambling by stating, "[W]e do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering."[187]

B. *New Jersey's Second Attempt to Legalize Sports Gambling:* Christie II

Seizing upon the Third Circuit's dicta, New Jersey passed a new law in 2014 that didn't affirmatively legalize sports betting, but repealed all existing prohibitions of sports betting at racetracks and in casinos.[188] Once again, the NCAA, NBA, NFL, MLB, and NHL challenged the law in court, arguing it violated PASPA,[189] However, the district court's inquiry differed from that in the first case. Both New Jersey and the leagues agreed that the Third Circuit's previous opinion gave New Jersey the choice to either maintain or repeal its prohibitions on sports betting. However, New Jersey argued that PASPA allowed a *partial* repeal of gambling laws, while the leagues argued that PASPA required a complete deregulation of sports gambling.[190] The court ultimately held that PASPA preempted partially repeal-

[185] *Id.* at 574.

[186] *Id.* at 575.

[187] Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 241 (3d Cir. 2013).

[188] S. Res. 2460, 16th Leg. (N.J. 2014). stated, "[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City. . ."

[189] *See generally*, Nat'l Collegiate Athletic Ass'n v. Christie (*Christie II*), 61 F. Supp. 3d 488 (D.N.J. 2014).

[190] *See id.* at 498.

ing state gambling laws, asserting that "federal courts have been unwilling to allow states to do indirectly what they may not do directly."[191]

The district court, analyzing the Third Circuit's opinion in *Christie I*, presented New Jersey with two options:

> [O]n the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.[192]

The district court found that New Jersey's 2014 gambling law was simply an attempt to circumvent the Third Circuit's ruling, leaving the law "in direct conflict with the purpose and goal of PASPA and [ ] therefore preempted."[193]

While the Third Circuit affirmed the district court's ruling on appeal, the circuit court's reasoning varied significantly from that of the district court. In its review of *Christie I* and the district court's decision in *Christie II*, the Third Circuit held that any discussion of whether a state could repeal its gambling laws, and whether a partial repeal was preempted by PASPA, was unnecessary.[194] Instead, the court held that, by repealing its prohibitions of betting in casinos, New Jersey was affirmatively sponsoring sports betting in those locations.[195] And because sports betting at that point would be "state sponsored," the 2014 law was preempted by PASPA under longstanding Supremacy Clause principles.[196]

C. The Supreme Court Weighs In

When the Supreme Court chose to review the constitutionality of PASPA, many saw the choice as a sign that the national sports betting landscape was on the precipice of change. In October 2016, New Jersey submitted a petition for a writ of certiorari to the Supreme Court. The question presented was simple: "Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly comman-

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191 *Id.* at 504.

192 *Id.* at 500 (quoting Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 231 (3d Cir. 2013)).

193 *Id.* at 506.

194 *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 397 (3d Cir. 2016) (en banc).

195 *Id.* at 401.

196 *Id.* at 398.

deer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?"[197] The Court granted the petition in June 2017 and held oral arguments five months later in December. Reportedly, the Court appeared to side with New Jersey during oral arguments:

> Justice Stephen Breyer pressed Clement to explain Congress' goal in enacting PASPA. When Clement responded that Congress wanted to eliminate "state-sponsored or -operated gambling taking place by either individuals or the state," Breyer pounced. That means, he observed, "there is no interstate policy other than the interstate policy of telling the states what to do."[198]

Early analysis of the oral arguments proved prescient.

D. *The Court Rules PASPA Unconstitutional*

In May 2018, Justice Alito delivered the long-awaited opinion of the Court: PASPA was an unconstitutional violation of the Tenth Amendment's Anti-Commandeering clause.[199] Acknowledging that Congress may directly regulate sports gambling if it chooses to do so[200]—ostensibly under the Commerce Clause—the Court rejected arguments that tried to distinguish between compelling and prohibiting state action. PASPA, according to the Court, "unequivocally dictates what a state legislature may and may not do . . . . 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."[201] The Court was clear: PASPA, as constructed, represented an impermissible exercise of Congress's enumerated powers and was thus unconstitutional under principles of state sovereignty.

IV. An Analysis of Current Sports Betting Regulation

Among the states that have legalized sports betting, the preferred regulatory structure remains varied, producing mixed financial results and a

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[197] Petition for Writ of Certiorari, Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (No. 16-476).

[198] Amy Howe, *Argument analysis: Justices seem to side with state on sports betting*, ScotusBlog, (Dec. 4, 2017, 2:51PM), http://www.scotusblog.com/2017/12/argument-analysis-justices-seem-side-state-sports-betting/ [https://perma.cc/D8EQ-8G7W].

[199] Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

[200] *Id.* at 1484.

[201] *Id.* at 1478.

need for legislation that aligns with how sports betting operators actually function. Anticipating the Court's decision, many states have quickly moved to legalize sports gambling. To date, twenty-one states have passed laws legalizing sports gambling in some capacity, with fourteen states regulating operational industries and seven others developing their regulatory structure.[202] Through this process, lawmakers, who, while well-intentioned, have no understanding of how the sports-betting industry functions, have enacted legislation that discourages industry growth and limits consumer options.

The growing acceptance of sports betting is in large part motivated by the potential financial boon to states' economies.[203] While the precise value of the gambling market remains unknown, estimates range between $150 to $400 billion per year.[204] "Some 95 to 99 percent of this economic activity takes place through illegal channels or on websites based offshore, which deprives American consumers of the protections found in a legal market."[205] By legalizing sports gambling, states have naturally elected to tax sports-betting revenue.[206] To accomplish their financial goals, however, it is imperative that states incentivize migration from black markets to legal markets. Without a robust legal-betting market consisting of both consumers and sports-betting operators, there will be no income base on which to levy taxes. Thus, given that the design and structure of sports-gambling laws will impact their efficacy, states should remain aware of the following considerations.

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[202] Ryan Rodenberg, *Sports betting bill tracker*, ESPN (Apr. 1, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [https://perma.cc/2HWK-X34E].

[203] *See, e.g.*, Michelle Minton, *Legalizing Sports Betting in the United States*, COMPETITIVE ENTERPRISE INST. (Mar. 15, 2018), https://cei.org/content/legalizing-sports-betting-united-states [https://perma.cc/ZF3G-M9M6] ("According to Eilers & Krejcik's analysis, if states legalized sports betting they would collectively generate up to $16 billion in new tax revenue from the activity each year.").

[204] Minton & Titch, *supra* note 144.

[205] *See id.*

[206] Between September and November 2017, Nevada reported a handle of over $500 million. Nevada imposes a 6.75% tax rate on the sportsbooks' rakes (Typically between 3-5% of the handle). PAUL CONNELY & JUSTIN STEMPECK, WHITE PAPER ON SPORTS BETTING, MASS. GAMING COMM'N 5 (Feb. 28, 2018). https://massgaming.com/wp-content/uploads/2C-Final-Draft-Sports-Betting-WP-2-28-18.pdf [https://perma.cc/HV9N-5SEL].

A. *How Sportsbooks Work*

To understand how to regulate sportsbooks effectively, states must first understand how sportsbooks function. Many people assume sports betting operators print money because of the oft-repeated mantra, "the house always wins." In reality, though, sportsbooks often operate with thin profit margins and high risk.

First, sportsbook revenue is, unsurprisingly, generated by sports betting. Sports bettors generally place wagers on three types of bets: the winner of the game ("moneyline"), the total number of points scored by both teams ("total"), and the number of points by which each team will either win or lose ("spread"). Each outcome is tied to a set of odds the sportsbook commits to pay out, and thus the odds effectively represent the "price" of each bet.

An example may help to understand how this works. Imagine that the New England Patriots and Philadelphia Eagles will meet in a Super Bowl rematch and a person wants to bet on the moneyline. Typically, sportsbooks will price the bet at odds of "-110." This means that a bettor who wagers $110 will win $100. If two fans bet on the game—one for the Eagles and the other for the Patriots—$220 will be paid to the sportsbook. But after the game, no matter which team wins, the sportsbook will pay out $210 ($110 original bet + $100 winnings) with the sportsbook keeping $10 as revenue or, as sportsbook operators say, a 4.5% "hold" ($10/$220). Put another way, though gamblers bet billions of dollars each year, sportsbooks only collect a fraction of the money wagered. A critical assumption in the preceding example is that bettors will generally split evenly on each side of the bet. In reality, this only happens if bets are established at lines and prices that encourage such behavior. When that happens, sportsbooks and state regulators can reliably predict the revenue for each bet offered. However, if the sportsbook misprices a bet, all of the action will be on one side, putting the sportsbook at a greater risk of big losses. For example, if both bettors in the preceding example bet on the Patriots, and the Eagles once again win, the sportsbook earns $220—but if the Patriots win instead, the sportsbook loses $200. Thus, sportsbooks face an intriguing paradox: price your products correctly, and you're running a high-risk business with thin margins—price your products poorly, and you may not have a business to run at all.[207]

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[207] *See generally* Ed Miller & Matthew Davidow, The Logic of Sports Betting (2019).

Given how sportsbooks derive revenue, setting lines and prices are among the most critical decisions sportsbooks make. One bad outcome can destroy an entire business. Accordingly, as explained below, most sportsbooks don't independently determine their lines and pricing.

In reality, there are two types of sportsbooks: market makers and those that source their lines from market makers.[208] Market-maker sportsbooks operate with the biggest risk within the sports betting industry.[209] To develop a line and price for any given bet, the market maker engages in a series of dynamic exchanges with consumer markets to determine the optimal willingness to pay, so that the sportsbook can maximize revenue and minimize risk. The Eagles vs. Patriots example again can illustrate how this process plays out. When people go to bet on the Eagles vs. Patriots game, besides picking the outright winner, they might also wager on the point spread[210]—that is, wagering on how many points by which they think either team will win or lose. The favorite in any contest is priced as "minus" a given number of points, and the underdog at "plus" the same amount of points. For example, for Super Bowl LII, the Patriots were -4.5-point "favorites" and the Eagles were +4.5-point underdogs. In plain English, this means that for someone to have won a bet on the Patriots, New England had to beat the Eagles by 4.5 points or more. And to have won a bet on the Eagles, Philadelphia had to win outright or lose by fewer than 4.5 points.

As confusing as this may be, arriving at the spread is an even more complex process. By the time most of the public bets on the Eagles vs. Patriots game, the point spread has been set for days. Early in the week, market-maker sportsbooks will conduct extensive data analysis and release a point spread to the public—say, at plus or minus 3.5—at a price of -110. Upon receiving bets, the market-maker sportsbook categorizes every wager received based on how good the particular bettor is. And as the market maker receives these bets, it will dynamically move the point spread in one direction until roughly half of the money is bet on both outcomes. Notably, market makers are more sensitive to wagers placed by "sharp" bettors—customers who have a reputation of winning most of their bets—and will adjust the point spread and price until these sophisticated bettors no longer find the bet worth paying for. To mitigate the tremendous amount of risk

[208] *See id.*

[209] *See id.*

[210] The point spread is a common bet that is designed to level the playing field. Going into a game, many outcomes are highly predictable because one team is so much better than the other. To encourage betting on the game, bookmakers will establish a point spread that makes it harder for the clearly better team to win, and more ways in which the underdog can upset the favorite.

with this dynamic-pricing model, market makers typically place wager limits on early betting while they are still setting the optimal price. But once they set the price, market makers provide the point spread to retail sportsbooks who simply relay these lines to their customers. Given the clear risks in market making, many sportsbooks limit their market-making operations to certain sports, bets, and products, creating a web of information sharing and systemic risk borne by all sportsbooks.[211]

B. Regulating Complex Sports-Betting Markets

Considering how sportsbooks operate, and the risks they face, lawmakers should design regulatory structures that not only encourage consumer migration from black market sportsbooks to legal sportsbooks, but also provide sportsbook operators the financial incentives necessary to develop well-priced, attractive betting products. Accordingly, regulators should pay special attention to rules related to (1) the location of sportsbooks, (2) the management of stakeholder expectations, and (3) product offerings.

1. Location: Brick and Mortar or Online?

One of the first decisions lawmakers must make is whether to confine sports betting to brick-and-mortar establishments or allow online book makers to accept bets as well. This consideration is essential because, given the availability of illegal online gambling, states must incentivize sports bettors to transition from illegal platforms to state-sanctioned forums. To be clear, states are not necessarily faced with an either-or decision. Rather, states can and should incorporate some combination of both brick-and-mortar locations and online formats, not only to expand revenue growth, but also to maintain consumer protection.

States with state-sponsored casinos and racetracks conveniently have an existing framework for setting up sportsbooks. Legal sports betting will likely only increase visitation to these forums, leading to an increase in gambling revenues on the whole. As noted by the Chief Executive Officer of Penn National Gaming, "[W]e think the big advantage for us is the increased visitation that we'll see by having sportsbook operations at our regional properties where we can take advantage of that visitation with higher room rates, higher volumes of food and beverage revenues."[212] These loca-

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[211] *See id.*

[212] Dustin Gouker, *Penn National CEO: Big Opportunity In Sports Betting Is 'Increased Visitation,' Not Direct Revenue*, LEGAL SPORTS REP. (Feb. 8, 2018), https://

tions are already working with state regulatory bodies and have established systems to manage new revenue streams effectively, creating quick, reliable tax revenue.

But while casinos and racetracks are positioned to convert their existing consumer base into sports bettors, there remains a subset of consumers who may be resistant to visiting brick-and-mortar locations. Thus, in order to incentivize a full transition to legal betting markets, states should incorporate online betting forums that co-exist with the aforementioned brick-and-mortar locations. Nevada and New Jersey exemplify how this can be implemented.

In Nevada, bettors must first create their accounts with land-based providers, with each customer required to provide an ID for age verification.[213] Approved bettors may then place bets online through web browsers or mobile apps if they are in the state of Nevada. The main drawback is that there is still a subset of consumers who might elect to continue illegally gambling online through off-shore providers because of the in-person registration at a casino that is required to legally bet online.

New Jersey, by contrast, provides a more customer-friendly option for such online bettors by offering digital age-verification and safety checks—in lieu of in-person registration—as its prerequisite for online betting. With this system in place, New Jersey has generated the highest sports-betting revenue in the United States, despite Nevada's more-mature sports betting market. The recent emergence of online casinos, outside the sports-betting context, along with the astounding success of New Jersey's regulatory system, suggests that a combination of online and physical betting options increases gambling revenues across all platforms.[214] State lawmakers designing future sports-betting regulations should strongly consider implementing online betting forums along with land-based locations.

2. Managing the Interests of Key Stakeholders: Taxes

In addition to sportsbooks, three distinct stakeholders have emerged within the betting sphere as lawmakers continue to develop their regulatory structures: sports leagues, players unions, and the states themselves. Each

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www.legalsportsreport.com/18322/penn-national-ceo-sports-betting-future/ [https://perma.cc/MG6A-JKLN].

[213] *See* Connely & Stempeck, *supra* note 206, at 23.

[214] Dustin Gouker, *NJ Online Casinos Surpass $20 Million In Revenue For Sixth Straight Month As Caesars Surges*, Online Poker Rep. (Sept. 13, 2017), https://www.onlinepokerreport.com/26657/nj-online-casinos-august-2017-revenue/ [https://perma.cc/BRG6-VRHV].

party views sports gambling as a potential source of revenue. But a careful balancing of each stakeholder's desired means and methods of generating this revenue is necessary to incentivize an effective transition to legal sports-betting markets. With sportsbooks already operating with thin margins and a high risk of failure, giving stakeholders a residual claim in sportsbook profits will undermine the success of the industry.

Before the invalidation of PASPA, MLB and NBA aggressively lobbied states to shape legislation, with both leagues advocating for a 1% integrity fee on all wagers made.[215] According to the leagues, the integrity fees would be used to fund the leagues' efforts to ensure the purity of the game.[216] But while these fees may be justifiable as a matter of policy, taxing sportsbooks 1% on all wagers would discourage the formation of legal bookmakers and undermine the legalization of sports gambling. As discussed above, a sportsbook's revenue represents just a fraction of total money wagered. In fact, from June 2018 to September 2019, the average hold (revenue percentage of bets wagered) across the United States was 6.4%.[217] A 1% integrity fee would require a sportsbook to pay a value of 1% of all bets wagered at its facility even though the sportsbook only retains 6.4% of money wagered. Put another way, if, for example, $100 million is wagered in a state and the sportsbooks in that state collected $6.4 million in revenue, those same sportsbooks would have to pay $1 million in integrity fees to various sports leagues out of the revenue earned. States would effectively allow the leagues to impose a 15.6% tax ($1 million divided by $6.4 million) on bookmakers on top of whatever local, state and federal taxes to which the entities would be subject.[218]

Moreover, the leagues' players unions recently issued a joint statement advocating for a seat at the table and the opportunity to profit from sports

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[215] Darren Heitner, *NBA Asks For 1% Integrity Fee From Sports Betting Operators,* FORBES (Jan. 25, 2018), https://www.forbes.com/sites/darrenheitner/2018/01/25/nba-asks-for-1-integrity-fee-from-sports-betting-operators/#7919c21a643a [https://perma.cc/XG9M-YFXA]; *see also* Chris Crouse, *NFL, MLB, NBA and NHL players unions join legal sports gambling debate*, CNBC (Apr. 12, 2018), https://www.cnbc.com/2018/04/12/nfl-mlb-nba-nhl-players-unions-join-legal-sports-gambling.html [https://perma.cc/ZF3Q-PPNL].

[216] *See id.*

[217] *See US Sports Betting Revenue and Handle*, LEGAL SPORTS REP. (Sept. 9, 2019), https://www.legalsportsreport.com/sports-betting/revenue/ [https://perma.cc/7DX8-DTDG].

[218] Heitner, *supra* note 215; *see also* C.W. Crouse, *NFL, MLB, NBA and NHL players unions join legal sports gambling debate*, CNBC (Apr. 12, 2018), https://www.cnbc.com/2018/04/12/nfl-mlb-nba-nhl-players-unions-join-legal-sports-gambling.html [https://perma.cc/9SDH-9EW7].

gambling as well.[219] If the leagues, players unions, and states all imposed some tax on legal sportsbooks, then incentives to transition to legal markets would wane because illegal bookmakers operate with little to no tax structure, and can transfer their cost savings to bettors in the form of lower rates and higher limits. Thus, to maximize bettors' transition from illegal black markets to legal markets, states must balance the interests of all stakeholders to ensure that all parties profit—but not at the cost of the consumer.

3. Product Offerings: Betting Types

When deciding how to structure new economic markets, legislators must consider which products may be legally offered. This is especially true when suppliers face black-market competition. The products available on the legal market must be valuable enough to consumers and suppliers so that revenue can be effectively generated while maintaining the market's integrity.

In sports gambling, the "products" sportsbooks offer are the different bets they make available, with each possessing "potential unique issues regarding the integrity of the underlying contests."[220] Sportsbooks have a shared interest in preserving the integrity of the games on which wagers are cast because any indication that results are not fair will drive consumers away from the legal market. Even though the integrity of the game is in the interest of all stakeholders, many states are reluctant to extend sports betting to certain products, such as college sports,[221] because of their perception that games played by unpaid college athletes are more likely to be corrupted. Regardless, college sports are a popular sports-betting product, and affirmatively limiting wagers on college sports would affect both sportsbooks' and states' bottoms lines. Before banning specific product offerings, such as college sports, lawmakers should consider the revenue impacts that such a decision could have on sportsbooks and states.

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[219] Christian D'Andrea, *Sports Betting Could Be Widely Legalized Soon, and America's Top Athletes Have Concerns*, SB NATION (Apr. 12, 2018), https://www.sbnation.com/2018/4/12/17229126/nba-mlb-nfl-nhl-players-associations-joint-statement-regulation-sports-betting [https://perma.cc/7YDZ-3YM9].

[220] CONNELY & STEMPECK, *supra* note 206, at 25.

[221] *See, e.g.*, Morgan Moriarty, *You Can't Bet on Rutgers, which is funny, but a lot of states will have gambling laws like that*, SB NATION (June 14, 2018), https://www.sbnation.com/college-football/2018/6/14/17464124/rutgers-bets-new-jersey-sports-gambling [https://perma.cc/4LUX-RQXE].

V. Conclusion—Next Steps and Considerations

In August 2018, the NBA fully embraced sports gambling and entered into a partnership agreement with MGM Resorts International ("MGM"), an international hospitality and entertainment company that owns and manages casinos and sportsbooks nationwide. While the agreement's details remain private, the partnership publicly cemented the NBA's embrace of sports gambling. According to reports, the NBA-MGM partnership is a non-exclusive deal through which MGM pays the NBA for official data and the use of NBA intellectual property while also providing the NBA with integrity services.[222] The NBA-MGM partnership is just the beginning—as the regulatory landscape surrounding sports gambling evolves, so too will related sponsorships, partnerships, and agreements. For example, the MLB inked its third partnership with a sportsbook operator in August 2019,[223] and the NFL provides official league data for a sports betting data provider.[224]

But while enthusiasm for legalized sports gambling continues to grow, unanswered legal questions remain that will have a considerable effect on the growth of the industry. For example, although the Supreme Court overturned PASPA, the Interstate Wire Act of 1961 remains an obstacle to future nationwide sports betting operations. Also called the Federal Wire Act, the law prohibits any person or entity engaged in sports betting from transmitting bets, wagers, or information relating to bets or wagers through interstate commerce using wire communication facilities.[225] This has widely been interpreted to mean that transmitting information related to betting through the internet is illegal.[226] Thus, there's an open question about how

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[222] *NBA strikes deal with MGM Resorts to provide data to bettors*, L.A. Times (July 31, 2018), http://www.latimes.com/sports/nba/la-sp-nba-mgm-resorts-deal-20180731-story.html [https://perma.cc/YLP5-KU5P].

[223] *See* Sam Carp, *MLB adds FanDuel as Third Sports Betting Partner*, Sports Pro Live (Aug. 16, 2019), http://www.sportspromedia.com/news/mlb-fanduel-sports-betting-sponsorship [https://perma.cc/59DB-PCG3].

[224] *See National Football League and Sportradar Broaden Partnership*, Sportradar (Aug. 12, 2019), https://sportradar.us/2019/08/national-football-league-and-sportradar-broaden-partnership/ [https://perma.cc/QC5Q-VK6D].

[225] 18 U.S.C. § 1084 (2018).

[226] *Accord* Daniel Wallach, *Did The Supreme Court Reinterpret The Wire Act To Allow Cross-Border Internet Sports Betting?*, Forbes (July 8, 2018), https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#20b86ca346c5 [https://perma.cc/3LPP-XGNQ].

the Federal Wire Act serves to limit the interactions between market makers and retail sportsbooks.

Notably, there is growing discussion on whether the Supreme Court's interpretation of the Federal Wire Act in *Murphy* grants people and entities the ability to transfer information through the internet as long as the company to whom the information is being transmitted is located in a state that has legalized sports gambling. Justice Alito stated, "[The Wire Act applies] . . . only if the underlying gambling is illegal under state law."[227] While dicta, this statement could have considerable legal ramifications for the sports-betting industry, as it would upend long-standing interpretations of the Federal Wire Act.

Finally, it must be noted that *Murphy* explicitly left the door open for Congress to ban sports betting across the nation. If Congress were to do so, however, the federal government would have to expend a considerable amount of resources to regulate and enforce anti-gambling laws in a country that has largely accepted the practice—costs our current legislators seem unwilling to incur.

Whether, and to what extent, federal enforcement of the Federal Wire Act or the *Murphy* Court's invitation to Congress to regulate will impact current sports gambling models remains to be seen, but what appears clear now more than ever is that sports gambling in the United States is here to stay. You can bet on it.

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[227] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1483 (2018).