

Volume 11, Number 1
Winter 2020

Contents

ARTICLES

The NCAA's Transfer Rules: An Antitrust Analysis <i>Roger D. Blair and Wenche Wang</i>	1
The Northwestern University Football Case: A Dissent <i>Roberto L. Corrada</i>	15
Transfixed in the Camera's Gaze: <i>Foster v. Svenson</i> and the Battle of Privacy and Modern Art <i>Michael Goodyear</i>	41
You Can Bet On It: The Legal Evolution of Sports Betting <i>Kendall Howell</i>	73

Harvard Journal of Sports & Entertainment Law
Student Journals Office, Harvard Law School
1585 Massachusetts Avenue, Suite 3039
Cambridge, MA 02138
(617) 495-3146; jsel@law.harvard.edu
www.harvardjsel.com
U.S. ISSN 2153-1323

The *Harvard Journal of Sports & Entertainment Law* is published semiannually by Harvard Law School students.

Submissions: The *Harvard Journal of Sports and Entertainment Law* welcomes articles from professors, practitioners, and students of the sports and entertainment industries, as well as other related disciplines. Submissions should not exceed 25,000 words, including footnotes. All manuscripts should be submitted in English with both text and footnotes typed and double-spaced. Footnotes must conform with *The Bluebook: A Uniform System of Citation* (20th ed.), and authors should be prepared to supply any cited sources upon request. All manuscripts submitted become the property of the JSEL and will not be returned to the author. The JSEL strongly prefers electronic submissions through the ExpressO online submission system at <http://www.law.bepress.com/expresso> or the Scholastica online submission system at <https://harvard-journal-sports-ent-law.scholasticahq.com>. Submissions may also be sent via email to jselsubmissions@gmail.com or in hard copy to the address above. In addition to the manuscript, authors must include an abstract of not more than 250 words, as well as a cover letter and resume or CV. Authors also must ensure that their submissions include a direct e-mail address and phone number at which they can be reached throughout the review period.

Permission to Copy: The articles in this issue may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational purposes including distribution to students, provided that the copies are distributed at or below cost and identify the author, the *Harvard Journal of Sports & Entertainment Law*, the volume, the number of the first page, and the year of the article's publication.

Volume 11 of the *Harvard Journal of Sports and Entertainment Law* is generously sponsored by:

Premium Partners

O'Melveny PAUL HASTINGS Proskauer»

General Partners

LATHAM & WATKINS^{LLP} SULLIVAN & CROMWELL LLP

Weil

Limited Partners

ROPES & GRAY



Volume 11, Number 1
Winter 2020

EDITORIAL BOARD

Editors in Chief

Sarah Edwards
Ross Evans

Managing Editors

Ashley Park
Nicholas Urban

*Executive Editor,
Submissions*
Lolita de Palma

*Executive Editor,
Production*
Sameer Aggarwal

*Executive Editor,
Operations*
Will Lindsey

*Head of Online Strategy &
Operations*
Adele Zhang

*Executive Editor, Online
Entertainment Content*
Jenna El-Fakih

*Executive Editor, Online Sports
Content*
Daniel Alford

Senior Article Editors

Ryan Gribbin-Burket
Chinelo Okonkwo

Jonathan Reback
Tianyi Tan

Alex Van Dyke

Submissions Chair
Dixie Morrison

*Online Content Chair,
Entertainment*
Katherine Khazal

*Online Content Chair,
Sports*
Madison Martin

Events Chair
LJ Sanchez

Submissions Committee

Sarah Alawi
Travis Arbon
Jack Becker
Camille Edwards
John Ellis
Kimberly Everett
Jason Fitzgerald
Aaron Fogelson

Maggie Goff
Jack Goldbrenner
Ryan Gribbin-Burket
Allanah Irwin
Jack Jacobson
Mina Kim
Jonathan Kuang
Joseph Marcus
Will Walker

Rachel McKenzie
Maria Mortenson
Eli Nachmany
Ali Nayfeh
John Riggs
Jackie Salwa
Erin Savoie
Matt Shields

Editors

Travis Arbon
Jacob Arkatov
Jack Becker
Alex Blutman
Logan Duffy
John Ellis
Kimberly Everett
Jason Fitzgerald
Will Walker

Aaron Fogelson
Becky Hval
Larson Ishii
Jack Jacobson
Ellen Kim
Mina Kim
Jonathan Kuang
Martin Lazzaro

Kendall Maxwell
Maria Mortenson
Eli Nachmany
Ali Nayfeh
Anil Partridge
Griffin Romney
Erin Savoie
Jackie Salwa
Chris Zheng

Online Content Contributors

Alex Butman
Jason Fitzgerald

Aaron Fogelson
Larson Ishii
Matt Shields

Eli Nachmany
Ali Nayfeh

The NCAA's Transfer Rules: An Antitrust Analysis

Roger D. Blair* and Wenche Wang**

ABSTRACT

In *Deppe v. National Collegiate Athletic Association*,¹ the Seventh Circuit accepted the NCAA's argument that its transfer rules are presumptively procompetitive. It also approved the NCAA's no-poaching agreement. This Article analyzes these NCAA-imposed restraints and finds them inconsistent with current antitrust policy.

INTRODUCTION

For decades, the NCAA has imposed strict transfer rules, restricting student-athletes' ability to transfer from one university to another. Past legal complaints about the NCAA's transfer rules have largely failed.² Most recently, in *Deppe v. National Collegiate Athletic Association*, Peter Deppe, a student athlete, challenged the NCAA's transfer rules as a horizontal agreement in violation of § 1 of the Sherman Act.³ The Seventh Circuit rejected Deppe's claim and found the transfer rules to be presumptively procompeti-

* Department of Economics, University of Florida and Affiliate Faculty of Law, University of Florida

** Sport Management, School of Kinesiology, University of Michigan, respectively. We appreciate the useful comments provided by Ryan Rodenberg. Disclaimer: Neither of the authors participated in the litigation examined in this paper.

¹ 893 F.3d 498 (7th Cir. 2018)

² See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 328 (7th Cir. 2012); *Pugh v. Nat'l Collegiate Athletic Ass'n*, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *3 (S.D. Ind. Sept. 27, 2016).

³ 893 F.3d 498 (7th Cir. 2018); see also 15 U.S.C. § 1 (2018)

tive.⁴ Its foundation for this sweeping conclusion can be traced to dicta in the Supreme Court's opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.⁵

In this Article, we examine the inferences drawn by the Seventh Circuit and, in short, we find them wanting. First, in Part I, we review the background surrounding Deppe's suit. Second, in Part II, we present the Seventh Circuit's decision and the foundation for that decision. Third, in Part III, we discuss the Seventh Circuit's views on the competitive significance of the NCAA's no-poaching rules. Here, we observe that the Seventh Circuit is out-of-step with current antitrust enforcement. We introduce the Department of Justice and Federal Trade Commission's *Antitrust Guidance for Human Resources Professionals* and compare that guidance to the NCAA's conduct. Fourth, in Part IV, we argue that the NCAA would not prevail if its transfer rules and no-poaching rules were subject to a rule of reason analysis. Fifth—and finally—in Part V, we close with some concluding remarks.

I. PETER DEPPE'S COMPLAINT

Peter Deppe, a star punter from Almont High School in Michigan, received athletic-scholarship offers from several college football teams.⁶ In the end, he elected to attend Northern Illinois University without a scholarship as a "walk-on."⁷ For his first year at Northern Illinois, Deppe decided to "red-shirt," which meant that he could practice and train with the team but he could not participate in games.⁸ During that first year, his position coach told him that he would receive an athletic scholarship for his second year.⁹ When his position coach left Northern Illinois, however, the head coach informed Deppe that the team would not award him a scholarship because they were recruiting another punter.¹⁰

Without a scholarship or the prospect of playing time, Deppe decided to transfer to another school.¹¹ Even though Deppe had been a red-shirt walk-on at Northern Illinois—that is, a non-playing and non-scholarship member of the football team—the NCAA's transfer rule, Bylaw 14.5.5, still

⁴ *Deppe*, 893 F.3d at 503–04.

⁵ 468 U.S. 85 (1984).

⁶ *See Deppe*, 893 F.3d at 499.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

applied.¹² Thus, he had to obtain permission from Northern Illinois to transfer to another Division I school.¹³ Additionally, he would have to sit out for the entire academic year following his transfer.¹⁴ This rule hurt Deppe since the University of Iowa wanted him to join their team, but only if he could play immediately.¹⁵ Deppe requested an exception to the transfer rule so that he could play immediately at Iowa,¹⁶ but NCAA rules prohibited Deppe—the student-athlete—from requesting an exception.¹⁷ Only the University of Iowa, the transferee school, could request such a waiver.¹⁸ Iowa, however, decided to move on to another punter and was no longer interested in Deppe.¹⁹ When the NCAA refused to consider his request, Deppe filed an antitrust suit alleging that the transfer rule was an unreasonable restraint of trade in violation of § 1 of the Sherman Act.²⁰ As we will discuss, Deppe's suit failed because of the Seventh Circuit's interpretation of *Board of Regents*.

II. THE SEVENTH CIRCUIT'S PRESUMPTION OF PRO-COMPETITIVENESS

Deppe's antitrust challenge can be traced to the Supreme Court's largely deferential attitude toward the NCAA. In *Board of Regents*, the issue involved the legality of the NCAA's plainly anticompetitive television plan, which limited the quantity and quality of televised college football games.²¹ Ordinarily, such an agreement would have been condemned as a per se violation of § 1 of the Sherman Act.²² But in *Board of Regents*, the Court recognized the historical importance of the NCAA:

¹² *Id.*; see also NAT'L COLLEGIATE ATHLETIC ASS'N, 2017–18 NCAA DIVISION I MANUAL ¶ 14.5.5 (2017) [hereinafter NCAA Manual], <http://www.ncaapublications.com/productdownloads/D118.pdf> [https://perma.cc/3FUK-KGRX].

¹³ See *Deppe*, 893 F.3d at 500.

¹⁴ *Id.* Transfers attend school and train with the team but cannot compete in intercollegiate athletic events.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 500; see also 15 U.S.C. § 1 (2018) (providing that “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is hereby declared to be illegal”). Currently, a violation of § 1 is a felony. Firms face maximum fines of \$100 million, while individuals face maximum fines of \$1 million and/or maximum prison sentences of ten years. *Id.*

²¹ See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984).

²² 15 U.S.C. § 1 (2018).

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.²³

The Court did not explain its apparent approval of recruiting restraints as well as limits on the number of players and coaches per team.²⁴ Because these limits are binding, they inhibit competition on these dimensions. Though these restraints tend to reduce costs and thereby improve profitability, they likely decrease quality. These restraints can only be maintained through collaboration among NCAA members, because otherwise, competitive pressure would incentivize the members to gain a competitive advantage by not abiding by the rules. Since the Court thought these restraints necessary, it refused to treat the NCAA's agreements as a *per se* violation:

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.²⁵

The Supreme Court failed to cite empirical evidence for its assertion that the NCAA's restraints, which protect amateurism, enhance public interest in intercollegiate athletics. Thus, the Supreme Court's conclusion was based entirely on conjecture. Without sound and relevant evidence, there is no theoretical or empirical foundation to justify the NCAA's restraints as a general proposition.²⁶ The Supreme Court laid the foundation for future misadventures with the following broad conclusory statement:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But

²³ See *Bd. of Regents*, 468 U.S. at 88.

²⁴ *Id.*

²⁵ *Id.* at 117.

²⁶ It comes as no surprise that the NCAA would restrict student-athletes to be amateurs and change the definition of amateurism over time to suit its needs. It is also no surprise that the NCAA would revere a tradition that limits payment to student-athletes.

consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die.²⁷

In *Board of Regents*, the Supreme Court distinguished the anticompetitive restrictions in the NCAA's television plan from "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture."²⁸ From this statement, the Seventh Circuit inferred that *all* eligibility rules are procompetitive.²⁹ And since the Seventh Circuit considered the NCAA's transfer rules to be eligibility rules, the Seventh Circuit deemed the NCAA's transfer rules presumptively procompetitive without requiring further inquiry.

The NCAA's transfer rule—Bylaw 14.5.5.1—frustrated Deppe's efforts to transfer from Northern Illinois University to the University of Iowa. Bylaw 14.5.5.1 specifically provides that "[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution."³⁰ Deppe alleged that this rule violates § 1 of the Sherman Act because it unreasonably restrains trade or commerce.³¹

As an economic matter, there is a clear employment relationship between the student-athlete and the school. Indeed, a student-athlete on an athletic scholarship receives both payment in kind and an educational opportunity, while the school receives a commitment from the student-athlete to train, practice, and participate in competition. But the NCAA's transfer rule adds friction to this market. For a school receiving a transferring student-athlete, this rule is an obvious cost, as the school may have to pay the student-athlete in kind while the student cannot compete. For the student-athlete, sitting out a year at a new school inhibits her incentive to switch

²⁷ See *Bd. of Regents*, 468 U.S. at 120.

²⁸ *Id.* at 117.

²⁹ *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 501 (7th Cir. 2018).

³⁰ *Id.* at 500 (quoting NCAA Manual, *supra* note 12, ¶ 14.5.5.1). There are some exceptions to this rule which can be found in the NCAA Manual. Notably, students in Division I sports outside of basketball, baseball, bowl subdivision football, and ice hockey have a one-time transfer exception to this rule. That is, if a student in a sport other than those listed has not previously transferred, she may qualify to immediately begin playing at another institution without the year in residence requirement. See NCAA Manual, *supra* note 12, ¶ 14.5.5.2.10. Additionally, if the student was dismissed or non-sponsored, the transfer rule may not apply. See *id.* ¶ 14.2.1.5.

³¹ *Deppe*, 893 F.3d at 500.

schools, even when an opportunity arises that could help her career. Altogether, the NCAA's transfer rule impairs competition.³²

In *Deppe*, the district court recognized that the NCAA is ordinarily subject to the antitrust laws and that its restraints are evaluated under the rule of reason.³³ The district court also observed that “most—if not all—eligibility rules . . . fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations.”³⁴ The district court determined that the eligibility rules “do not violate the antitrust laws,” noting that “[t]he eligibility rules create the product [of college football] and allow its survival in the face of commercializing pressures.”³⁵ Accordingly, because the challenged bylaw was directly related to eligibility, the court deemed it presumptively procompetitive, thus requiring no further analysis under the Sherman Act.

The district court began by addressing the issue of whether the challenged restraint was procompetitive. If the bylaw was presumptively procompetitive, then there is no need for a rule of reason analysis because the bylaw is per se lawful. The district court also pointed out that the transfer regulation falls under Article 14 in the NCAA Division I Manual, which addresses the eligibility of student athletes. Pointing to an earlier Seventh Circuit decision in *Agnew v. National Collegiate Athletic Association*,³⁶ where it held that “most [of the Association's] regulations will be a ‘justifiable means of fostering competition among amateur athletic teams,’”³⁷ and a prior district court decision in *Pugh v. National Collegiate Athletic Associa-*

³² See JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION*, ch. 26. (1933). The labor economics literature has found that frictions in the labor market result in monopsonistic exploitation, which Joan Robinson defined as the gap between labor's marginal revenue product and the wage paid; see also Alan Manning, *Imperfect Competition in the Labor Market*, in *HANDBOOK OF LABOR ECONOMICS* 973–1041 (Vol. 4b 2011) (identifying employer collusion as one source of monopsony power in the labor market). The report also explained the adverse consequences of monopsony.

³³ See *Deppe v. Nat'l Collegiate Athletic Ass'n*, Case No. 1-16-cv-00528-TWP-DKL, 2017 WL 897303, at *4 (S.D. Ind. Mar. 6, 2017).

³⁴ *Id.* at *4 (citing *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 328 (7th Cir. 2012)).

³⁵ See *id.* (quoting *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988)).

³⁶ 683 F.3d 328 (7th Cir. 2012).

³⁷ *Id.* at 341 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

tion,³⁸ the court determined that eligibility rules are presumptively procompetitive.³⁹

This concluded the matter in the district court, but Deppe appealed to the Seventh Circuit. In its decision, the Seventh Circuit began by observing that “[t]he year-in-residence requirement is an eligibility rule clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive under *Board of Regents*.”⁴⁰ The court’s reasoning is strained here. To be an “amateur,” a student-athlete must not receive compensation greater than the NCAA-approved maximum.⁴¹ It is far from clear how the residency requirement for transferring students relates to amateurism.⁴² Having determined that the transfer rule was presumptively procompetitive, the Seventh Circuit affirmed the district court’s dismissal of Deppe’s case.⁴³

The central problem with this inference is the lack of analysis of the NCAA’s transfer rules by the Supreme Court. In *Board of Regents*, the issue did not involve transfer rules or eligibility rules.⁴⁴ And the Supreme Court has never made a finding on the competitive significance of these restraints. But in *Deppe*, the Seventh Circuit continued to rely on its strained interpretation of *Board of Regents*:

Importantly here, we also explained that most—if not all—eligibility rules fall within the presumption of pro-competitiveness established in *Board of Regents*. After all, the Supreme Court explicitly mentioned eligibility rules as a type that fits into the same mold as other procompetitive rules. And because eligibility rules define what it means to be an amateur or a student-athlete, they are essential to the very existence of the product of college football.⁴⁵

³⁸ No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *3 (S.D. Ind. Sept. 27, 2016).

³⁹ *Deppe*, 2017 WL 897307, at *3.

⁴⁰ *Deppe v. Nat’l Collegiate Athletic Ass’n*, 893 F.3d 498, 501 (7th Cir. 2018).

⁴¹ See NCAA Manual, *supra* note 12, ¶ 12.1.2.

⁴² *Id.* ¶ 13.11.2.4.2.

⁴³ See *Deppe*, 893 F.3d at 501. Yet the court later provided some fanciful arguments. For example, referring to athletes in the high-revenue sports of football, men’s basketball, and ice hockey, the Seventh Circuit speculated that “[w]ithout transfer restrictions, the players in these high-revenue sports could be traded like professional athletes.” *Id.* This inference is absurd. Student-athletes are not owned by member institutions and there has never been a suggestion that transfers to another school could be compelled. Moreover, the existing rule would only make such “trades” more expensive; it would not preclude them.

⁴⁴ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 136 (1984).

⁴⁵ See *Deppe*, 893 F.3d at 502 (alterations and citations omitted).

The NCAA's transfer rules are unnecessary to preserve amateurism. These rules do, however, inhibit some forms of competition and thereby improve the profits earned by the NCAA's members. Thus, the rules tend to be anticompetitive rather than procompetitive.

The economic effect of the NCAA's transfer rules are clear. For the student-athlete, the cost of transferring is higher than it would be in the absence of the restraint. Requesting permission to transfer may be a daunting prospect for some eighteen- to twenty-one-year-old student-athletes. More importantly, however, the transferring student-athlete cannot compete until she has been in residence at the new school for a full academic year. Because demand functions are negatively-sloped, these costs reduce the equilibrium number of transfers.

Schools losing a transferring student-athlete sometimes welcome such transfers. For example, if an athlete is disgruntled or not performing well, the school may wish to reallocate the scholarship to someone else. In other cases, however, the school may wish to retain a player, perhaps to fill an important backup position. In that event, the school may make it difficult for a student-athlete to transfer. Thus, the Transfer Regulation Bylaw 14.5.5 has costs and benefits: costs for the students and benefits for the school.

III. THE NCAA'S NO-POACHING AGREEMENTS

In addition to endorsing the NCAA's transfer rules, the Seventh Circuit observed that the NCAA rules also prohibit schools from soliciting a student-athlete enrolled at another school.⁴⁶ Referenced in Bylaw 14.5.5, but detailed in Bylaw 13.1.1.3, the rule states that:

An athletics staff member or other representative of the institution's athletics interests shall not make contact with the student-athlete of another NCAA or NAIA four-year collegiate institution, directly or indirectly, without first obtaining the written permission of the first institution's athletics director (or an athletics administrator designated by the athletics director) to do so, regardless of who makes the initial contact. If permission is not granted, the second institution shall not encourage the transfer and the institution shall not provide athletically related financial assistance to the student-athlete until the student-athlete has attended the second institution for one academic year. If permission is granted to contact the student-athlete, all applicable NCAA recruiting rules apply.⁴⁷

⁴⁶ See *id.* at 503.

⁴⁷ NCAA Manual, *supra* note 12, ¶ 13.1.1.3.

Thus, the NCAA Bylaws, which govern the conduct of its members, forbid solicitation. For example, if the University of Tennessee were to invite the University of Alabama's backup linebacker to transfer to Tennessee, such an action would constitute illegal poaching by Tennessee under Bylaw 13.1.1.3. Violations of NCAA Bylaws can result in severe sanctions, such as a ban on bowl-game participation, loss of championships, forfeiture of games, and loss of scholarships.

A no-poaching agreement is an agreement among employers to refrain from hiring one another's employees. The purpose of such agreements is to eliminate a form of competition in the labor market. Because these agreements suppress wages and other forms of compensation,⁴⁸ the NCAA's ban on solicitation is clearly anticompetitive.

In *Deppe*, however, the Seventh Circuit appears to disapprove of "poaching."⁴⁹ Indeed, the court seems to suggest that because poaching happens in professional sports, allowing it in the NCAA would be inconsistent with the preservation of amateurism.⁵⁰ But this presumption is misinformed because the four major sports leagues—Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League—all have anti-tampering provisions, or no-poaching rules that forbid such competition.⁵¹ For example, Major League Baseball's anti-tampering rule is similar to the NCAA's no-poaching bylaw: absent current employer permission, "negotiations [and] dealings respecting employment, either present or prospective, between any player, coach or manager and any Major or Minor League Club other than the Club with which the player is under contract" are prohibited.⁵² In the case of the four major professional sports leagues—all of which are unionized—the no-poaching agreements avoid antitrust prosecution because they are the product of collective bargaining.⁵³ In contrast, student-athletes are not unionized, but

⁴⁸ See Oz Shy & Rune Stenbacka, *Anti-Poaching Agreements in Labor Markets*, 57 *ECON. INQUIRY* 243, 243 (2018) (analyzing the economic effects of no-poaching agreements in a duopoly model of wage competition and finding that employers enjoy higher profits while the employees are worse off).

⁴⁹ See *Deppe*, 893 F.3d at 503.

⁵⁰ See *id.*

⁵¹ For an examination of the anti-tampering rules in the major sports leagues, see Roger D. Blair & John E. Lopatka, *The Economic Effects of Anti-Tampering Rules in Professional Sports Leagues*, 38 *MANAGERIAL & DECISION ECON.* 704 (2017).

⁵² See THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, MAJOR LEAGUE BASEBALL, Rule 3(k) (2019), <https://registration.mlbp.org/pdf/MajorLeagueRules.pdf> [<https://perma.cc/L2VH-MDQU>].

⁵³ For a compact discussion of the labor exemptions, see AMERICAN BAR ASSOCIATION, *ANTITRUST LAW DEVELOPMENTS* 1491–99 (8th ed. 2017).

should be considered employees. Thus, the NCAA's no-poaching rules—unlike those in unionized professional sports leagues—should be subject to antitrust scrutiny.

Notably, the Seventh Circuit refers to poaching in a way that suggests poaching is undesirable.⁵⁴ But poaching is simply another word for a specific form of competition. If a good player receives expressions of interest from other teams, the pursuit of this player would increase competition among the teams. Because a fundamental premise of the Sherman Act is that competition is socially desirable, one cannot defend a restraint of trade on the grounds that competition is undesirable.⁵⁵

Moreover, the Seventh Circuit's view of no-poaching agreements is out-of-step with current antitrust enforcement. In *United States v. Adobe Systems, Inc.*, the Department of Justice ("DOJ") challenged the legality of no-poaching agreements among Adobe Systems, Apple, Google, Intel, Intuit, and Pixar.⁵⁶ Similarly, in *United States v. Lucasfilm, Inc.*, the DOJ alleged that a no-poaching agreement among digital animators violated § 1 of the Sherman Act.⁵⁷ Likewise, in *United States v. eBay, Inc.*, the DOJ challenged a no-solicitation and no-hiring agreement between eBay and Intuit, Inc.⁵⁸ In each suit, the DOJ reached consent decrees with the defendants. Subsequent private suits have resulted in payments of hundreds of millions of dollars to those injured by the agreements not to compete.⁵⁹

⁵⁴ See *Deppe*, 893 F.3d at 503.

⁵⁵ See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 773 (1975); *United States v. Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 696 (1978) ("In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

⁵⁶ See *United States v. Adobe Sys., Inc.*, Case No. 1:10-cv-01629, 2011 WL 10883994, at *6 (D.D.C. Mar. 18, 2011).

⁵⁷ See *United States v. Lucasfilm, Inc.*, Case No. 1:10-cv-02220, 2011 WL 2636850, at *1 (D.D.C. June 3, 2011).

⁵⁸ See *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1034 (N.D. Cal. 2013).

⁵⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). No-poaching agreements suppress wages and salaries as well as other forms of compensation. Those employees who are denied the benefits of competition will have suffered antitrust injury and would appear to have standing to sue for treble damages. The damage suffered by an employee is the difference between the compensation that she would have received but for the unlawful agreement and the actual compensation. For student-athletes, the estimation of damages poses a daunting empirical challenge. Nonetheless, student-athletes who have been denied the benefits of competition should be able to prove their magnitude. In *Adobe*, the eventual settlement amounted to roughly \$415 million. See David Streitfeld, *Bigger Settlement Said to Be Reached in Silicon Valley Antitrust Case*, N.Y. TIMES (Jan. 14, 2015), <https://nyti.ms/1DYcPO4> [<https://perma.cc/64G7-X77B>].

In the Department of Justice and Federal Trade Commission's ("FTC") *Antitrust Guidance for Human Resource Professionals*, the antitrust agencies explain their view that no-poaching agreements are per se violations of § 1 of the Sherman Act.⁶⁰ They have warned that the DOJ will begin pursuing no-poaching agreements as criminal violations. This antitrust enforcement policy is clearly inconsistent with the Seventh Circuit's holdings in *Deppe*.

"Naked . . . no-poaching agreements among employers . . . are per se illegal under the antitrust laws."⁶¹ To escape the "naked" label, the NCAA would have to show that the no-poaching agreements were reasonably necessary to maintain the system of intercollegiate athletics. This, it cannot do. In its *Antitrust Guidance*, the antitrust agencies advised the community of human resource professionals that "[a]greements among employers not to recruit certain employees or not to compete on terms of compensation are illegal."⁶² In the *Antitrust Guidance*, the DOJ warned that it "intends to proceed criminally against naked . . . no poaching agreements."⁶³ The agencies make it clear that the antitrust laws pertain to nonprofit organizations, which would also include colleges and universities.⁶⁴

IV. RULE OF REASON ANALYSIS

No one disputes that the NCAA is subject to the antitrust laws. As a result of the Supreme Court's *Board of Regents* decision, however, the NCAA's restraints must be analyzed under the "rule of reason" unless they are presumptively procompetitive. A rule of reason inquiry is aimed at determining whether a restraint is competitively reasonable. If it is, the re-

⁶⁰ DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016), <https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice> [<https://perma.cc/6X7B-YP4L>]. The *Antitrust Guidance* is not legally binding, but the agencies make it clear that they will challenge no-poaching agreements. *See id.* at 2.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 4.

⁶⁴ *See Seaman v. Duke Univ.*, No. 1:15-CV462, 2016 WL 1043473 (M.D.N.C. Feb. 12, 2016). The nonprofit status of the NCAA's members will not protect them from antitrust exposure. Duke University and the University of North Carolina—Chapel Hill allegedly agreed not to poach one another's medical staff. They both recently reached settlements. *See Jake Satisky, Duke agrees to pay \$54.5 million to settle class action lawsuit*, DUKE CHRONICLE (May 25, 2019), <https://www.dukechronicle.com/article/2019/05/duke-university-settles-class-action-lawsuit-for-54-5-million> [<https://perma.cc/L3S2-3SM7>].

straint will be lawful. If it is not, it will violate § 1 of the Sherman Act. In addition to fines, the NCAA would be vulnerable to private damage actions.⁶⁵ In that event, the damages caused by the antitrust violation would be tripled automatically. The sums involved could be staggering. In 2018, there were about 179,200 student-athletes in Division I schools. Even if the damage to each athlete was only \$1,000, the actual damages would amount to about \$180,000,000. This sum would be tripled automatically to \$540,000,000. The NCAA and its members will have a difficult time defending some of their restraints under a rule of reason analysis.

In broad strokes, there are three stages in a rule of reason analysis.⁶⁶ First, the plaintiff must make a prima facie case that the challenged restraint was anticompetitive. In response, the defendant may disprove the allegation as a factual matter. Alternatively, the defendant may offer a procompetitive justification for the challenged conduct. The plaintiff can rebut this response by disproving the facts alleged or by showing that a less restrictive alternative is available. The trier of fact must then decide whether, on balance, the restraint is beneficial or detrimental.

A. Application of the Rule of Reason to the NCAA's Transfer Regulations

In Deppe's case, the complaint involved the NCAA's requirement that a student-athlete sit out a year at the new school. The prima facie argument is straightforward: the NCAA rule imposes additional costs for transferees and thereby hinders the allocation of scarce resources. Some would-be transferees will be deterred from transferring. Some student-athletes will transfer and be forced to sit out. If the new school would have given these student-athletes playing time but for the NCAA rule, that school's team would not be as good as it could have been absent the restraint. Thus, there is a misallocation of resources that decreases the quality of the output.

Faced with this argument, the NCAA would have to disprove the allegation or offer a procompetitive justification for the challenged conduct. This, the NCAA cannot do. First, the restraint is stated clearly in Bylaw 13.1.1.3, which is the product of agreement among the NCAA members.⁶⁷ There is no way to disprove the fact of the agreement. The economic impact of the rule cannot be denied. It is basic economics—if the cost of an activity

⁶⁵ See generally ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* ¶¶ 71–93 (Oxford Univ. Press, 2d ed. 2008); PHILIP AREEDA ET AL., *ANTITRUST LAW* ¶¶ 390–99 (Wolters Kluwer, 4th ed. 2014).

⁶⁶ See generally PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶¶ 1500–12 (Wolters Kluwer, 4th ed. 2017).

⁶⁷ NCAA Manual, *supra* note 12, ¶ 13.1.1.3.

increases, demand for that activity will decrease. The NCAA, therefore, must offer a procompetitive justification.

The NCAA may turn to the argument of amateurism, but the transfer rule has nothing to do with “preserving amateurism.” The compensation paid to a student-athlete may rise following a transfer, but the total amount cannot exceed the collusively-agreed-to maximum. For example, suppose a full athletic scholarship, known as a grant-in-aid, is worth \$40,000 at both schools. A student-athlete playing ice hockey may receive a 50% scholarship worth \$20,000 at the first school. If the school receiving the transferee offers a 75% scholarship, which is worth \$30,000, the total compensation for the student would rise by \$10,000. This amount, however, does not exceed the maximum of \$40,000. The bottom line is that transferring does not endanger amateurism.

Paternalistic arguments about transferring are also not procompetitive. According to the NCAA, sitting out a year is good for the student because it provides the student-athlete with time to settle in and become accustomed to the new surroundings.⁶⁸ But this is disingenuous. When a student-athlete transfers to a new school, she must adapt to a new environment. Although the transferring student-athlete is not competing, she still practices and trains with her new team. If it is necessary to provide time and opportunity for transfer students to settle into a new environment, the training should also be prohibited, or at least reduced. Second, the same logic would apply *a fortiori* to freshmen. Freshmen often go from high schools with student bodies of 1,500–2,000 to universities with 25,000–50,000 students. Some manage while some do not. Transfer student-athletes are no different, but no one is advocating a return to ineligibility for freshman athletes.

B. *Non-Solicitation Agreements*

Much the same can be said about the non-solicitation agreements in Bylaw 13.1.1.3. In spite of the Seventh Circuit’s approval of this anticompetitive bylaw in *Depp*, it is hard to see how it could pass muster under a rule of reason analysis. Neither the DOJ nor the FTC ultimately determines whether a practice is unlawful, but these enforcement agencies believe that non-solicitation agreements are unlawful per se. They have warned that the DOJ will file criminal charges in non-solicitation cases.⁶⁹

⁶⁸ Alex Kirshner, *NCAA transfer rules, explained quickly and honestly*, SBINATION (May 9, 2018), <https://www.sbnation.com/college-football/2018/5/9/17311748/ncaa-transfer-rules-change-guide-list-sit-out>, [<https://perma.cc/2SAD-GB3C>].

⁶⁹ See DEP’T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM’N, *supra* note 61, at 2.

It should be relatively easy to establish a prima facie case that non-solicitation agreements are anticompetitive. By definition, such agreements restrain competition. There are also several cases involving no-poaching agreements. None of these cases found agreements not to compete in the labor market to be procompetitive.⁷⁰

The NCAA cannot deny the existence of the agreement since it is in black and white—Bylaw 13.1.1.3. Nor can the NCAA offer a legitimate procompetitive justification for this restraint. In their *Antitrust Guidance*, the DOJ and the FTC reject a defense involving cost reductions, so the NCAA members cannot cry poverty. Resorting to claims that the restraint is necessary to preserve amateurism should be unavailing.

V. CONCLUDING REMARKS

In *Deppe*, as in *Agnew* and again in *Pugh*, the Seventh Circuit found that eligibility rules are presumptively procompetitive. This presumption, however, is flawed for two reasons. First, the requirement was obviously the product of a collusive agreement that hinders competition among member institutions for the services of student-athletes. The existence of the agreement itself can hardly be denied since it is in Bylaw 14.5.5. Second, sitting out means not participating (i.e., not competing), which is not obviously procompetitive. Following a transfer, if the student-athlete would have played but for the Transfer Regulation, the result is a lower-quality product. Collusive reductions in product quality are not procompetitive.

In its *Deppe* opinion, the Seventh Circuit has blessed anticompetitive conduct by the NCAA and its members. Neither the transfer rules nor the non-solicitation rules should be considered *presumptively procompetitive*. Both are plainly anticompetitive, and neither would pass muster under a rule of reason analysis.

⁷⁰ See, e.g., *AMN Healthcare, Inc. v. Aya Healthcare Serv., Inc.*, 28 Cal. App. 5th 923, 930 (Cal. Ct. App. 2018). Non-solicitation agreements have come under fire as unfair methods of competition under California state law.

The Northwestern University Football Case: A Dissent

Roberto L. Corrada*

I. INTRODUCTION

In 2014, to much fanfare, members of the Northwestern University football team petitioned the National Labor Relations Board (“NLRB”), asking for a union election to determine whether the College Athletics Player Association (“CAPA”) could exclusively represent them in collective bargaining with Northwestern.¹ Later that year, the NLRB’s Regional Director in Chicago determined both that the players were “employees” and that Northwestern was an “employer” under the National Labor Relations Act (“NLRA” or the “Act”), and then directed a union-representation election for a bargaining unit of Northwestern football players who were recipients of “grant-in-aid” scholarships.² Northwestern then appealed to the NLRB in Washington, D.C., and the matter ended in 2015 when a unani-

* Professor of Law and Mulligan Burleson Chair in Modern Learning, University of Denver Sturm College of Law. I thank all of my colleagues at the University of Denver who participated in the summer work-in-progress session about this article, and I also thank all the participants in the 13th Annual Colloquium on Scholarship in Employment and Labor Law session on New Approaches to Collective Bargaining. For their helpful comments, I would like to thank in particular: Ken Dau-Schmidt, Marty Malin, Michael Oswald, Cesar Rosado Marzan, Joe Slater, Rick Bales, Rachel Arnow Richman, Scott Moss, Miriam Cherry, Rebecca Aviel, Justin Marceau, Alan Chen, and Michael Siebecker. And special thanks to Jeff Hirsch for his suggestions regarding NLRB discretionary jurisdiction. Thanks to Russell Kalvelage and Rebekah Nickel for research assistance. Any errors are mine.

¹ See, e.g., Daniel Uthman, *College Athletes Take Steps to Form Labor Union*, USA TODAY (Jan. 29, 2014, 7:37 AM), <https://www.usatoday.com/story/sports/ncaaf/2014/01/28/college-athletes-players-association-northwestern-football/4958861/> [<https://perma.cc/NX72-FZC8>].

² *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at *2 (2014) (“RD Decision”).

mous Board decided—in its discretion and to foment labor stability—that the NLRA’s jurisdiction should not extend to collegiate football players, even if they are “employees” under the NLRA.³

Although several legal scholars weighed in, analyzing and discussing collective bargaining after the NLRB Chicago Regional Director’s decision,⁴ few scholars have written about the NLRB’s final decision, and those that have have discussed only the implications of the decision.⁵ The Board offered no dissenting opinion in the case, and no scholars have critiqued the Board’s

³ *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. 1350 (2015).

⁴ See generally Cesar F. Rosado Marzan & Alex Tillett-Saks, *Work! Study! Organize!: Why the Northwestern University Football Players are Employees under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301 (2015); William B. Gould IV, Glenn Wong, Eric Weitz, *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014); Michael H. LeRoy, *How a “Labor Dispute” Would Help the NCAA*, 81 U. CHI. L. REV. DIALOGUE 44 (2014); David I. Rosen & Damon W. Silver, *Labor and Employment Law Implications of Finding Student Scholarship Athletes to be University Employees*, N.J. L. 59 (Dec. 2014); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65 (2014).

⁵ Four commentators have discussed broad future implications of the NLRB’s decision. See Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627 (2017); Sam C. Ehrich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77, 107–11 (2019); Richard T. Karcher, *Big-Time College Athletes’ Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 44–47 (2017); Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlr-ruling-analysis> [https://perma.cc/XD2S-T4P5]. While others have analyzed individual specific implications of the decision. See generally Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015) (joint employer issues); Omar A. Barentto, *NCAA, It’s Time to Pay the Piper: The Aftermath of O’Bannon v. NCAA and Northwestern v. College Athletes Players Association*, 12 RUTGERS BUS. L. REV. 1 (2015) (tax implications of college athlete collective bargaining). Only one article, a sports editorial in the Nation magazine, could be called a critique of the NLRB decision. See Dave Zirin, *The Absurd, Cowardly, and Morally Bankrupt NLRB Decision Against the Northwestern Football Union*, THE NATION (Aug. 17, 2015), <https://www.thenation.com/article/the-absurd-cowardly-and-morally-bankrupt-nlr-b-decision-against-the-northwestern-football-union/> [https://perma.cc/EA67-WETM]. While I agree with the points made in the editorial, it does not constitute a real analysis of the NLRB decision itself.

determination. This Article intends to fill this void by discussing and analyzing the NLRB's final decision in *Northwestern University*.

More specifically, this Article argues that the NLRB issued a non-decision in *Northwestern University*. A close look at the opinion shows that the Board refused to make findings it is statutorily required to make when ruling on an election petition. Though the decision buries much of this evidence in its footnotes, this Article unearths this evidence and reveals how the footnotes consistently disclaim statements made by the Board in the decision's text. Moreover, close scrutiny of the precedent cited by the NLRB reveals that the Board may not, in fact, have the authority to exercise the discretion it claims for itself in declining jurisdiction over the matter. Finally, the Article maintains that elite athletes in moneymaking collegiate sports like football and basketball, primarily in Football Bowl Subdivision ("FBS") Division I Power 5 Conferences, are indeed employees that should be able to unionize if they wish.⁶

II. THE NLRB REGIONAL DIRECTOR'S DECISION IN THE *NORTHWESTERN UNIVERSITY* CASE: THE NORTHWESTERN FOOTBALL TEAM IS A COMMERCIAL ENTERPRISE

The Regional Director's decision in the *Northwestern University* football case shows that the Northwestern University football team is a substantial commercial enterprise in its own right. There are three separate revenue streams for Northwestern related to the football team: (1) football ticket sales, (2) TV broadcast contracts, and (3) sale of football team merchandise. From 2003 to 2012, the Northwestern football team generated \$235 million in total revenues.⁷ With expenses totaling around \$159 million, the

⁶ The analysis in this essay focuses on football players, like Northwestern's, in the FBS Division I Power 5 Conferences, but the conclusions would apply to any collegiate sport that independently makes substantial money for the college or university. At that point, as I argue in this Article, the sport is invariably treated by the college or university as a commercial enterprise, and the athletes involved are effectively treated as employees. That essentially means that college basketball athletes in the Power 5 Conferences should also be considered employees under the NLRA. The FBS Power 5 Conferences include the ACC, the Big 10, the Big 12, the PAC 12, and the SEC. These comprise approximately sixty-five football teams including Notre Dame, an independent, counted as an ACC school for Power 5 Conference designation purposes. See generally *Full List of Division 1 Football Teams*, NEXT COLLEGE STUDENT ATHLETE, <https://www.ncsasports.org/football/division-1-colleges> [https://perma.cc/87ZU-A3RF].

⁷ RD Decision at *11 (2014).

team generated a profit over ten years of \$76 million for the University.⁸ In the 2012–2013 academic year alone, the University earned profits of approximately \$8 million from the football team.⁹

The team looks like a business, too. It maintains a sizable athletic and administrative support staff.¹⁰ In addition, at the time of the Regional Director’s 2014 decision, the football team itself, an FBS Division I squad, was 112 players strong, eighty-five of whom were “grant-in-aid” scholarship recipients.¹¹ Annual “grant-in-aid” scholarships at the time paid \$61,000 per player to cover tuition, fees, room, board, and books.¹²

The football team also has a rule that players must reside on campus their first two years, so underclassmen both reside in an on-campus dorm room and use a Northwestern-provided meal card for their meals.¹³ Upperclassmen who live off campus receive another \$1,200 to \$1,600 monthly stipend to cover living expenses.¹⁴ Since the 2012–13 academic year, Northwestern has offered non-guaranteed four-year scholarships for incoming freshmen.¹⁵ These “grant in aid” scholarship numbers have increased since the federal court decision in *O’Bannon v. National Collegiate Athletic Ass’n*,¹⁶ in which the United States Court of Appeals for the Ninth Circuit upheld a ruling that colleges and universities could compensate elite college athletes with a stipend up to the full amount of the cost of attending the school.¹⁷ Many schools now pay annual “cost-of-attendance” stipends, valued up to

⁸ *See id.*

⁹ *Id.*; *see also* Marzan & Tillett-Saks, *supra* note 4, at 318 (“[I]t is transparent from the facts determined by Region 13, prior studies, and from general knowledge of contemporary college football that commercial relationships have usurped traditional roles in universities, principally in college football, even as college athletes attempt to obtain an education from their university.”).

¹⁰ These include: Head Coach, Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, four graduate assistant coaches, five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns.

¹¹ RD Decision at *2.

¹² Some argue this is “payment,” and by itself should make players eligible to organize unions and collectively bargain. *See* Zirin, *supra* note 5.

¹³ RD Decision at *2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 802 F.3d 1049 (9th Cir. 2015).

¹⁷ *Id.* at 1053. The Ninth Circuit upheld the cost-of-attendance ruling by the district court but reversed the district court’s determination that schools must pay deferred compensation to student-athletes for use of their likeness. *Id.*

nearly \$6,000.¹⁸ In sum, the Northwestern football team—as a commercial entity—earns extensive revenue for the University, and the University allots some percentage of this revenue to players to cover various educational and living expenses, including tuition.

Clearly, Northwestern University, like any employer controlling its employees, exercises vast control over its players. Indeed, Northwestern football players are subject to special rules not imposed on other students, and their daily schedules are micromanaged in a way that deprives them of the freedom enjoyed by most other college students.¹⁹ Unsurprisingly, they must also dedicate much time to football. During the first week of August—before classes begin—football players must participate in an intense month-long training camp. From 6:30 A.M. to 8 P.M., Northwestern expects football players to engage in various football team activities.²⁰ After this first week on campus, the team travels to Kenosha, Wisconsin for the rest of training camp, during which time the school expects players to spend fifty to sixty hours per week on football activities.²¹ After training camp, the school starts its regular season football schedule, which runs from the beginning of September to the end of November.²² During the regular season, players spend forty to fifty hours per week on football-related activities, including travel to and from games.²³ During the week, the players not only spend mornings in mandatory practices with helmets and pads on, but also attend various team and position meetings.²⁴ Since National Collegiate Athletic Association (“NCAA”) rules limit “countable athletic related activi-

¹⁸ See Jon Solomon, *Alabama's Cost of Attendance Stipend Will Rank Among Highest in Nation*, CBS SPORTS (July 24, 2015, 9:01 AM), <https://www.cbssports.com/college-football/news/alabamas-cost-of-attendance-stipend-will-rank-among-highest-in-nation/> [https://perma.cc/X6JW-XU2S] (“For years, athletic scholarships have not covered what university financial aid offices list as the full cost of attending college. That changes this August when athletic scholarships can include not only the traditional tuition, room, board, books and fees, but also incidental costs of attending college. . . . Alabama’s cost of attendance stipends will rank among the leaders nationally at \$5,386 for out-of-state players and \$4,172 for in-state players, according to information the university provided to CBSSports.com.”); see also Hank Kurz, Jr., *ACC Players: Cost of Attendance Stipend is Helpful in Many Ways*, ASSOCIATED PRESS (Oct. 31, 2018), <https://apnews.com/d5bc51a726754b3489151613f6ba3fac> [https://perma.cc/M45F-U4MG].

¹⁹ See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at *3–*8 (“RD Decision”).

²⁰ *Id.* at *4–*5.

²¹ *Id.* at *4.

²² *Id.* at *5.

²³ *Id.*

²⁴ *Id.*

ties” per week to twenty hours, the players independently conduct non-countable evening practices without their coaches.²⁵ After these sessions, players go to their coaches’ offices to watch film on their own for a couple of hours.²⁶ In short, Northwestern has substantial control over many aspects of their players’ lives, ranging from their source of food, to their living arrangements, to their drug and alcohol use, to their social media presence, among other aspects.²⁷

Northwestern, of course, pays some attention to the athlete as a student, but much of that attention focuses on the recruiting process. For example, coaches can visit and watch recruits play high school football in the fall but are limited to six home visits.²⁸ A special admissions liaison also makes a determination about whether each individual recruit can meet the school’s academic standards.²⁹ If not, all recruiting must cease. Once in college, to remain eligible to play on the football team, the player must: (1)

²⁵ *Id.* at *5 n.11.

²⁶ *Id.* at *5.

²⁷ Courts analyzing the scope of college athletes’ duties in moneymaking college sports have echoed the Regional Director’s findings and conclusions. For example, a federal district court judge found that FBS Division I football players participate in a competitive labor market that is commercial in nature. *See O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 988–89, 991–94 (N.D. Cal. 2014), *aff’d in relevant part*, 802 F.3d 1049 (9th Cir. 2015). The Ninth Circuit agreed in upholding the district court’s finding of liability. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1066 (9th Cir. 2015) (“[The NCAA’s compensation rules] regulate . . . labor for in-kind compensation[, which is] a quintessentially commercial transaction.”); *see also Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 341 (7th Cir. 2012) (“[T]ransactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.”); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 837–38 (M.D. Tenn. 2015), *aff’d sub nom. Marshall v. ESPN*, 668 F. App’x 155 (6th Cir. 2016) (“College basketball and football, particularly at the Division I and FBS levels, is big business. Of that there can be little doubt.”); *Bd. of Regents of Univ. of Okla. v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1288–89 (W.D. Okla. 1982), *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984) (“[I]t is cavil to suggest that college football, or indeed higher education itself, is not a business. . . . It is a business, and it must behave in a businesslike manner to insure [sic] its future viability. The objectives and the past achievements of our institutions of higher learning have earned them great praise and an exalted position in our social fabric. Nonetheless, it is a business and a business operated by professionals. Like any business, the schools which play intercollegiate football seek to maximize revenue and minimize expense while at the same time maintaining the level of quality which makes their product attractive to the buying public.”).

²⁸ RD Decision at *8.

²⁹ *Id.*

maintain enrollment as a student, (2) progress toward obtaining a degree, and (3) achieve minimum academic standards (requiring both completion of 40% to 80% of degree requirements for the year and a minimum grade point average range of 1.8–2.0).³⁰ Players generally take three to four courses per quarter.³¹

Overall, a fair reading of the facts in the Chicago Regional Director’s decision in the *Northwestern University* case can yield only one conclusion: Northwestern does not treat its scholarship football players as students; instead, Northwestern treats them all—even those with little hope of becoming professional athletes—more as football-playing employees. It’s obvious that Northwestern recruits and pays their scholarship players in kind to help the football team win games and produce money for the University.

At some point, it is just common sense that a university will view an athletic team that produces millions of dollars of profits annually as an independent, profitable business enterprise—and thus will treat the revenue-generating students involved as employees. Therefore, not only the Northwestern University football team, but also, as this Article argues, all FBS Power 5 Conference Division I teams that earn significant revenue, are separate, wholly owned commercial entities. In addition, elite Division I Power 5 Conference basketball teams, including perhaps some of the top women’s teams, fall into the same earnings category. But virtually no other college athletics teams do.

III. GIVEN THAT THE NORTHWESTERN FOOTBALL TEAM IS A COMMERCIAL ENTERPRISE, A UNANIMOUS NLRB GOT IT WRONG IN THE *NORTHWESTERN UNIVERSITY* CASE

A. *Introduction And Summary Of Decision*

The full NLRB (Chairman Mark Pearce and Members Philip Miscimarra, Kent Hirozawa, Harry Johnson III, and Lauren McFerran) reversed the decision of the Chicago Regional Director, refusing to assert jurisdiction over college football players.³² In its opinion, the NLRB first explained that

³⁰ *Id.* at *9.

³¹ *Id.*

³² It is remarkable that members of an Obama Board unanimously penned the NLRB decision declining jurisdiction over the Northwestern football team. Many expected Democrats Pearce, Hirozawa, and McFerran to uphold the RD’s decision and find the election petition valid. Or, at the very least, one would have expected Pearce, Hirozawa, or McFerran to write a substantial dissent. That there was no dissenting opinion at all suggests that the decision was the product of a political

it would not decide whether Northwestern's football players were employees under the NLRA.³³ Indeed, even if they were employees, the NLRB refused to assert jurisdiction.³⁴ The Board premised its decision on two structural factors uniquely related to college athletics: First, the NCAA and the conference to which Northwestern belongs exercise control over individual teams, and, second, almost all of Northwestern's competitors are public universities and colleges over which the Board cannot assert jurisdiction.³⁵ According to the Board, "it would not promote stability in labor relations to assert jurisdiction in this case."³⁶

The Board justified its decision by stating that this case was unique in that the Board had never been asked to assert jurisdiction over college athletes of any kind.³⁷ The Board further explained that—for three reasons—the Northwestern football players resemble neither the students nor the professional athletes that have previously petitioned for union representation, and thus, no analytical framework existed for assessing their petition.³⁸ First,

compromise. Perhaps the Democrats, not willing to spend political capital on a single petition that may have proven relatively insignificant, contented themselves with receiving some concessions in the draft of the decision itself. Thus, political considerations might explain the substantial disclaimers and caveats toward the end of the decision.

³³ *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1350 (2015).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1352. According to one commentator on the labor-stability point, "[w]hat the hell does that mean? . . . The argument is that since it would be imposing a different set of rules for the 17 private institutions [in NCAA Division I football], this would send the entire system out of whack, injecting 'instability' into a climate that is currently stable. This is absolute hogwash. Northwestern is its own entity where football players generate huge amounts of revenue and have their own grievances with coaches and administrators. . . . As people who generate income, and, as was ruled earlier by the NLRB, are 'paid' with a scholarship, room, and board, they should have every right to organize themselves to achieve whatever else they feel they are denied, like decent medical care or better concussion protocols." See Zirin, *supra* note 5.

³⁷ *Northwestern Univ.*, 362 N.L.R.B. at 1352. The NLRB has asserted jurisdiction over an NCAA Division I athletic conference in the context of a unionized group of basketball referees contracted by the conference itself "which the Board found was an independent private entity created by the member schools." *Id.* at 3 n.9 (emphasis added). See *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* *Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987) (asserting jurisdiction but dismissing the case because referees are independent contractors, not employees).

³⁸ *Northwestern Univ.*, 362 N.L.R.B. at 1352–53.

unlike graduate teaching assistants who have petitioned the Board for representation in the past, college football players: (1) are not graduate students (most football players are undergraduates), and (2) engage in football activities unrelated to their course of study. Indeed, according to the Board, college football scholarships are for extracurricular, not academic, activity.³⁹ Second, the Northwestern football players are also unlike professional athletes, both because they are enrolled as students who must meet academic requirements and because they are subject to NCAA limitations on profiting from the use of their names or likenesses.⁴⁰ And third, even if college foot-

³⁹ *Id.* at 1353 n.10.

⁴⁰ *Id.* at 1353. The NCAA’s “names and likenesses” restrictions may not survive for long. In *O’ Bannon v. National Collegiate Athletic Ass’n*, for example, the court found, applying the Rule of Reason, that the NCAA’s rules on “names and likenesses” are more restrictive than necessary, and violate the antitrust laws. *See* 802 F.3d 1049, 1079 (9th Cir. 2015). Although the *O’ Bannon* court limited the remedy to amounts equaling the full cost of attending college, elite college football players are looking more like their NFL counterparts every day. *See also supra* notes 16–18 and accompanying text. Indeed, after this Article had been written and submitted for publication, on September 10, 2019, the California Assembly passed a bill allowing student-athletes at California colleges to hire agents and be paid for the use of their name, image, or likeness. The Fair Pay to Play Act, S.B. 206 (Cal. 2019); *see also* Steve Berkowitz, *California Assembly Passes Bill that Brings State to Verge of Rules Showdown with NCAA*, USA TODAY (Sept. 10, 2019), <https://www.usatoday.com/story/sports/2019/09/09/california-assembly-bill-allows-college-athletes-use-likeness/2269869001/> [https://perma.cc/2TVJ-LYPC]. Jeremy Bauer Wolf, *One Step Closer to Pay for College Athletes*, INSIDE HIGHER ED (Sept. 11, 2019), <https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness> [https://perma.cc/GP4G-VPEZ]. The California law goes into effect in 2023. *See* Berkowitz, *supra*. Florida proposed legislation that is modeled after California’s. *See* Bobby Caina Calvan, *Florida following California’s example*, U.S. NEWS (Oct. 25, 2019), <https://www.usnews.com/news/us/articles/2019-10-24/florida-considers-allowing-college-athletes-to-earn-money> [https://perma.cc/29BV-AX86]. The biggest football states are likely to follow since none of them wants to cede a recruiting advantage. Indeed, bills modeled on California’s have been passed or proposed in Illinois, New Jersey, Georgia, and Wisconsin. Not surprisingly, the NCAA was quick to change course after the possibility of Florida legislation was announced. *See* Ralph D. Russo, *NCAA Allows profit for athletes, but lots of questions remain*, ASSOCIATED PRESS (Oct. 30, 2019), <https://apnews.com/70081cee181a447ebe97727441b5e509> [https://perma.cc/LJQ6-PY3C]. The NCAA Board of Governors will allow student-athletes to receive pay for use of their name, image, or likeness. However, the NCAA Board “is emphasizing that change must be consistent with the values of college sports and higher education and not turn student-athletes into employees of institutions. *Id.*”

ball and professional players were alike, the NLRB has never authorized a bargaining unit consisting of an individual team's players.⁴¹

Despite these differences, the Board went on to discuss how FBS Division I football "does resemble a professional sport in a number of ways."⁴² For example, the Board noted that college and pro football resemble each other in that both have a group of teams in an association or conference that stage athletic contests from which they derive substantial revenue.⁴³ Like the National Football League ("NFL"), according to the Board, the NCAA resulted from colleges and universities banding together to set common rules and govern competition.⁴⁴ And again, like the NFL, the NCAA wields considerable influence and control over its members. Indeed, NCAA member schools have affirmatively given the NCAA the authority to police and enforce rules governing eligibility, practice, and competition, arguing that there is a symbiotic relationship among the various teams, conferences, and the NCAA.⁴⁵ As a result, according to the Board, "terms applied to one team would likely have ramifications for other teams."⁴⁶ The Board concluded, based on its analysis of the control of FBS teams by the NCAA, that if it were to assert jurisdiction in a single-team case, then labor-relations stability would be undermined.⁴⁷ Surprisingly, though, in a footnote, the Board emphasized that NCAA control over many terms and conditions of a college football player's activity was *not* an independent reason that the Board declined to assert jurisdiction in the case.⁴⁸ But even so, the Board gave no example of how recognizing a single-team bargaining unit would destabilize labor relations. Instead, the Board merely noted that all previous Board cases regarding professional sports involved leaguwide bargaining units.⁴⁹

The Board did acknowledge that the NCAA had recently reformed rules involving scholarship players, in particular allowing FBS Division I teams to award four-year—as opposed to renewable one-year—contracts, reducing athletes' risk of losing educational funding and being unable to graduate college.⁵⁰ The Board then suggested that it might be open to col-

⁴¹ *Northwestern Univ.*, 362 N.L.R.B. at 1354 n.16.

⁴² *Id.* at 1353.

⁴³ *Id.* According to the NLRB, "there is no 'product' without direct interaction among the players and cooperation among the various teams." *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1353.

⁴⁶ *Id.* at 1354. (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1354 n.15.

⁴⁹ *Id.* at 1354.

⁵⁰ *Id.* at 1355.

lege football unionization in the future, even for Northwestern's team, because further such changes in the NCAA's treatment of scholarship players could outweigh the motivations behind the Board's decision to decline to assert jurisdiction in the *Northwestern University* case before it.⁵¹

In the last several paragraphs of its opinion, the Board reiterated the limited nature of its decision. Indeed, the Board stated that its "decision today does not concern other individuals associated with FBS football, but is limited to Northwestern's scholarship football players."⁵² Next, the Board again emphasized that the case was limited to Northwestern, noting that it does "not address what the Board's approach might be to a petition for *all* FBS scholarship football players (or at least those at private colleges and universities)."⁵³ Finally, the Board stated that its decision, "does not preclude a reconsideration of this issue in the future."⁵⁴

In a footnote, the Board also rejected an argument made by Northwestern that the Board should use its discretion under the Act to decline jurisdiction over college football in general.⁵⁵ Indeed, the Board emphasized that it already asserts jurisdiction over private colleges and universities, that no party disputes that Northwestern is an "employer" under the Act, and that it was unwilling to find that FBS Division I football does not have a "sufficiently substantial" effect on commerce.⁵⁶ The Board did finally state, however, that its statutory jurisdictional mandate allows it to decline asserting jurisdiction in individual cases, like Northwestern's, where doing so would not advance the policy goals of the Act.⁵⁷

B. *The NLRB's Decision: an Analysis*

The NLRB's decision to decline jurisdiction over FBS Division I college athletes in *Northwestern University* rests on two of its findings. First, that the Northwestern football team's petition is unique and unprecedented.⁵⁸ Thus, there is no precedent to apply in assessing the petition, and likewise

⁵¹ *Id.*

⁵² *Id.* The Board acknowledged that it has asserted jurisdiction in other cases involving college athletics, including coaches, referees, and even college physical plant employees working on athletic events.

⁵³ *Id.* (emphasis added).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1355 n.28.

⁵⁶ *Id.*

⁵⁷ *Id.* (citing *NLRB v. Denver Building Trades*, 341 U.S. 675 (1951); *NLRB v. Teamsters Local 274* F.2d 19 (7th Cir. 1960); *Council 19, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968)).

⁵⁸ *Id.* at 1352.

no precedent compelling the Board to assert jurisdiction in the case. Second, that asserting jurisdiction over the Northwestern University football team, in particular, would undermine labor stability. While Northwestern University's football team is a single team and would constitute a single bargaining unit, college football operates on a league-wide, or even a national, level regulated by the various leagues and the NCAA. Thus, the exercise of jurisdiction over an individual team would threaten labor stability.⁵⁹

In making these arguments, however, the Board also stated that: (1) Northwestern University is an "employer" under the Act, (2) Northwestern's football players may well be "employees" under the Act, and (3) individual FBS Division I college football teams and college football in general may well substantially affect commerce.⁶⁰ These three legal findings—employer status, employee status, and substantially affecting commerce—typically lead to, and indeed require, the NLRB to assert jurisdiction. This Article, in turn, will analyze both of the Board's stated reasons for refusing to assert jurisdiction.

1. The Uniqueness of the Northwestern Football Team's Petition, the Undermining of Labor Stability, and the NLRB's Jurisdictional Mandate

The Board stressed not only that it had never reviewed a petition by college athletes or individual teams but also that college football players are both athletes and students, making their case unique.⁶¹ Admittedly, the Northwestern petition was a case of first impression for the NLRB. But that is all irrelevant in determining jurisdiction. Rather, it is relevant to the question of precedent.

For example, consider the Board's position that, because football players in the *Northwestern University* case seem less like students and more like athletes, the NLRB's decisions involving graduate assistants are rendered inapplicable. Had the Board not adopted this position, the uniqueness of the players' petition would have been unimportant to the Board's ultimate determination. But on closer examination, the Board's position in *Northwestern University*—that the players seem less student and more athlete—actually makes the case much easier! Indeed, while the NLRB may have needed to take great pains to determine whether graduate assistants impact interstate commerce, making the same determination vis-à-vis FBS Division I college

⁵⁹ *Id.* at 1354.

⁶⁰ *Id.* at 1351 n.5.

⁶¹ *See id.* at 1352–53.

football players is quite straightforward: the answer is resoundingly yes. In other words, if assertion of jurisdiction over college graduate assistants is a close call, as evidenced by a series of Board decisions flip-flopping on the issue,⁶² the jurisdictional case in *Northwestern University* is much easier for all of the reasons the NLRB gives related to college football players' uniqueness and their strong comparison to professional athletes.⁶³ Remarkably, the NLRB dodged the issue of whether the Northwestern football team is a "commercial endeavor" by simply stating that it need not decide the issue since it is enough that Northwestern University itself is a commercial enterprise and an "employer" under the Act.⁶⁴ But the Board is arguably required to make a determination about whether the football team itself is a commercial endeavor. Such a finding would seem central to whether the Board should assert jurisdiction in the case—since the team's commercial impact goes both to the Board's jurisdictional touchstone ("substantially affects commerce") and to whether football players are "employees" under the Act. And while it is true that Northwestern University's impact on

⁶² See *Trustees of Columbia Univ. in the City of New York & Graduate Workers of Columbia GWC, UAW*, 364 N.L.R.B. 90 (2016), *overruling Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO, Petitioner*, 342 N.L.R.B. 483 (2004).

⁶³ See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at *15 (2014) ("[P]layers' football related duties are unrelated to their academic studies, unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements."); Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 43-44 (2018). Of course, the fact that college football players have athletic duties, not academic ones, is beside the point. Graduate research assistants do not bring in grants that fund their employment; the faculty and the college do that. College football players in FBS Division I schools are the very reason the money comes in. Indeed, in 2016 and 2017, after the *Northwestern University* decision, the NLRB issued an advice memorandum and then later a report detailing why Northwestern football players were in fact employees under the Act. See Memorandum from Barry J. Kearney, Associate General Counsel, NLRB Division of Advice, to Peter Sung Ohr, Regional Director, Region 13 (Sept. 22, 2016), <http://apps.nlr.gov/link/document.aspx/09031d4582210c1b>; Memorandum from Richard F. Griffin, Jr., General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, GC 17-01 (Jan. 31, 2017), http://hr.cch.com/ELD/GCMemo17_01.pdf [<https://perma.cc/54FA-GMTM>], *rescinded by* Memorandum from Peter B. Robb, General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, GC 18-02 (Dec. 1, 2017), http://hr.cch.com/ELD/GC18_02MandatorySubmissionstoAdvice.pdf [<https://perma.cc/CC9R-UC66>].

⁶⁴ *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1351 n.5 (2015).

interstate commerce alone suffices for its qualification as an employer under the Act—and thus for the Board to assert jurisdiction here—the fact that the football team *independently* meets the Act's jurisdictional requirement underscores why the NLRB should have asserted jurisdiction.

Notably, in prior similar circumstances—ironically involving the NLRB's jurisdiction over colleges and universities themselves—the Board affirmatively asserted jurisdiction. In 1970, the NLRB confronted another similar “unique” set of petitions when it asserted jurisdiction over a pair of nonprofit educational institutions for the first time in *Cornell University*.⁶⁵ In *Cornell University*—which involved not only Cornell but also Syracuse University—the Board found that despite their nonprofit status, the universities substantially affected interstate commerce as commercial enterprises.⁶⁶ And though the NLRB had steadfastly refused to assert jurisdiction over universities before 1970 due to the noncommercial nature of higher education, the Board stated in *Cornell University* that “an analysis of cases reveal[ed] that the dividing line separating purely commercial from noncommercial activity has not been easily defined.”⁶⁷ The Board recognized that to ensure uniformity and stability in labor policy it should assert jurisdiction over these institutions even though “a portion of the industry is relegated to the State or other control.”⁶⁸ The Board asserted jurisdiction over Cornell and Syracuse while refusing to set a minimum dollar-volume standard for asserting jurisdiction over universities in general,⁶⁹ reasoning that “[w]hatever dollar-volume standard we ultimately adopt for asserting jurisdiction over educational institutions can best be left to determination in future situations involving institutions which are far nearer the appropriate dividing line.”⁷⁰ Clearly, asserting jurisdiction over two universities—yet leaving for future determination the standard by which it would regulate other similar institutions—did not bother the Board in *Cornell University*. Indeed, the Board's sole concern about first exercising jurisdiction over private universities was whether the universities were commercial—that is, whether they affected commerce. That private universities both belong to national associations (e.g., the NCAA or athletic conferences)—and have to follow rules imposed by accrediting bodies and state and federal governments—apparently did not deserve even a mention in *Cornell University*.

⁶⁵ *Cornell Univ. & Ass'n of Cornell Emp'rs-Libraries*, 183 N.L.R.B. 329 (1970).

⁶⁶ *Id.* at 332.

⁶⁷ *Id.* at 331.

⁶⁸ *Id.* at 333.

⁶⁹ *Id.* at 334.

⁷⁰ *Id.*

Moreover, that the Board declined jurisdiction in a case involving FBS Power 5 Conferences Division I college football players despite college football's (and the university's) substantial commercial impact is not just unusual—it also conflicts with the Board's statutory jurisdictional mandate. Indeed, an examination—both of the NLRB's history of exercising jurisdiction and of the controlling law from the NLRA (the Board's "jurisdictional mandate")—proves this to be the case. After the Board refused to assert jurisdiction in a series of cases in the 1950s, and out of concern that the preemptive effect of the NLRA would therefore leave a void in the labor regulation of important industries, Congress added § 14(c)(1) to the Act in the Landrum Griffin amendments of 1959.⁷¹ Section 14(c)(1) provides:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, *the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction*; Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.⁷²

At the very least, § 14(c)(1) reveals a clear legislative intent to ensure that the NLRB asserts jurisdiction over businesses and industries that substantially affect interstate commerce.⁷³ In other words, Congress added § 14(c)(1) to ensure that the Board did not decrease its jurisdiction over industries or businesses impacting interstate commerce.⁷⁴ Congress did so

⁷¹ Labor Management Reporting & Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 164 (2018).

⁷² *Id.* (emphasis added).

⁷³ The Board's jurisdiction broadly extends to all enterprises with operations that directly or indirectly affect interstate or foreign commerce. 29 U.S.C. §§ 159(c), 160(a) (2018); *see also* BRENT Garren, John E. Higgins, Jr., & David A. Kadela, *How To Take a Case Before the NLRB* 3-1, 3-2 (9th ed. 2016). Courts have construed this to mean that the Board's jurisdiction encompasses "the fullest jurisdictional breadth constitutionally permissible under the commerce clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *San Manuel Indian Casino v. NLRB*, 475 F.3d 1306, 1316 (D.C. Cir. 2007) (citing *Reliance Fuel*, 371 U.S. at 226); *see also* GARREN, HIGGINS, & KADELA, *supra*, at 3-2 n.2.

⁷⁴ The Board's discretion to decline jurisdiction has been limited by the Supreme Court and by Congress. After the Board refused to assert jurisdiction over employees of labor unions and over the hotel industry as a class, the Supreme Court rebuffed the Board. *See Office Emps.' Local 11 v. NLRB*, 353 U.S. 313, 320 (1957); *Hotel & Rest. Emps. Local 255 v. Leedom*, 358 U.S. 99 (1958). And Congress in the Landrum Griffin Act, Pub. L. No. 86-257, § 14(c)(1), ensured that the Board would

because these entities are most likely to be the cause of significant labor disruption.⁷⁵ Indeed, virtually all NLRB decisions declining jurisdiction concern the Board's discretion to stay away from businesses or industries that *do not* substantially affect commerce, even though they may fall within the reach of the Commerce Clause.⁷⁶

And while it is true that the NLRB, at times, declines jurisdiction because, in its judgment, asserting jurisdiction would not serve the overall policies of the Act, these instances rarely, if ever, involve industries that substantially affect interstate commerce.⁷⁷ In fact, of the three cases cited by the Board to show that it may decline jurisdiction in individual cases, all three concern whether the employer substantially affected commerce.⁷⁸

First, in *NLRB v. Denver Building Trades Council*,⁷⁹ a U.S. Supreme Court case, the employer contended that the Board lacked jurisdiction because the subcontractor involved in the case did not substantially affect interstate commerce. The Court, however, found that the Board's assertion of jurisdiction was appropriate.⁸⁰ In dicta, the Court said, "[e]ven when the effect of activities on interstate commerce is sufficient to enable the Board to

not neglect its mandate to regulate industries and businesses that have a substantial effect on interstate commerce. *See supra*, notes 67–69; *see also* JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 27-16 to 27-18 (7th ed. 2017).

⁷⁵ *See* Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944); *see also* GARREN, HIGGINS & KADELA, *supra* note 73, at 3–6 ("In approving this practice [of allowing the Board not to exercise its full jurisdictional authority], the U.S. Supreme Court has noted that Congress left it to the Board to ascertain whether proscribed practices would, in particular situations, adversely affect commerce.").

⁷⁶ *See* GARREN, HIGGINS & KADELA, *supra* note 73, at 3-6 ("Despite its extensive statutory grant of jurisdiction, the Board has never exercised its full authority. *Instead, it considers only those cases that, in its opinion, have a substantial effect on commerce.*" (emphasis added)).

⁷⁷ The most notable example, perhaps, of the Board's refusal to assert jurisdiction over an industry, because doing so would not effectuate the policies of the Act despite the industry's effect on commerce, is horse and dog racing. *See* N.Y. Racing Ass'n v. NLRB, 708 F.2d 46, 54 (2d Cir. 1983). The primary reason for the Board's declination of jurisdiction was state government's extensive involvement in regulating the industry already. *Id.* at 48; HIGGINS, JR., *supra* note 74, at 27-116 n.626. Unlike in *Northwestern University*, the Board's reasoning is deep, comprehensive, and extensive. State government regulation of an industry really cannot be analogized to a private entity like the NCAA. And, of course, the NLRB in the *Northwestern* case does not even try.

⁷⁸ *See Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355 n.28 (2015); *Council 19, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968).

⁷⁹ 341 U.S. 675, 682–83 (1951).

⁸⁰ *Id.* at 683.

take jurisdiction of a complaint, the Board sometimes properly declines to do so”⁸¹ But the statement’s context makes it clear that the Court meant that some industries have a *sufficient* effect on interstate commerce to allow the Board to assert jurisdiction even if the effect is not *substantial*. Critically, nothing in the case even hints at the idea that the Board may decline jurisdiction over an entity that “substantially affects” interstate commerce.

Second, in *NLRB v. Teamsters Local 364*,⁸² the United States Court of Appeals for the Seventh Circuit simply cited *Denver Building Trades*, repeating the Supreme Court’s language to uphold the Board’s determination in a secondary boycott case that it was appropriate for the Board to combine the dollar amount of primary and secondary employer business in determining impact on commerce.⁸³ Again, in that case, the employer barely met the jurisdictional standard for affecting interstate commerce and certainly did not “substantially” affect interstate commerce.

Third, the NLRB cited *AFSCME v. NLRB*,⁸⁴ a 1968 federal district court opinion where the NLRB declined jurisdiction over a nonprofit nursing home because it, unlike for-profit enterprises, had no net earnings to “benefit any private shareholder or individual.”⁸⁵ The district court found that the Board’s failure to assert jurisdiction in the case violated constitutional due process because distinguishing for-profit and nonprofit nursing homes was arbitrary.⁸⁶ According to the court, “[s]uch a distinction, on its face at least, bears no reasonable relationship to the homes’ impact on commerce or to the Act’s goal of assuring employees the right to organize and bargain collectively.”⁸⁷ The decision fails to support the Board’s allegation that it may decline jurisdiction when interstate commerce is substantially affected. In fact, the district court miscited *Denver Building Trades*, implying that the decision meant that the Board may decline jurisdiction broadly in an individual case if doing so would not effectuate the policies of the Act.⁸⁸

⁸¹ *Id.* at 684.

⁸² 274 F.2d 19, 23 (7th Cir. 1960).

⁸³ *Id.* at 24.

⁸⁴ See *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. 1350, 1355 n.28 (2015) (citing Council 19, Am. Fed’n of State, Cty. & Mun. Emps., *AFL-CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968)).

⁸⁵ 296 F. Supp. 1100, 1104 (N.D. Ill. 1968).

⁸⁶ *Id.* at 1105.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1104. Why does the Board cite a 1951 U.S. Supreme Court decision followed by a 1968 federal district court opinion? Is it possibly because the Supreme Court’s 1951 opinion does not clearly support the Board’s statement about declining jurisdiction (the district court has better language but miscites the U.S. Su-

On the contrary, the Board properly exercises its discretion to decline jurisdiction only when the entity involved does *not* substantially affect commerce.⁸⁹ Thus, the very decisions the Board relied on to decline jurisdiction in the Northwestern University football case actually show that the Act *requires* the NLRB to assert jurisdiction. The NLRB might respond that § 14(c)(1)'s language explicitly mentions only "*classes or categories*" of employers, thus giving them the right to pass on *individual* cases. But neither the law nor the legislative history of § 14(c)(1) implies that there is a discretionary "individual case exception" within the NLRA's mandate that allows the NLRB to look beyond whether an employer substantially affects commerce.⁹⁰

In any case, the decisions cited in *Northwestern University* do not support the Board's contention that it has independent jurisdictional discretion in individual cases beyond analyzing the employer's impact on commerce. A fair reading of the NLRA, and the caselaw interpreting it, reveals that if the parties involved in the dispute are statutory "employers" and "employees," and the employer has a "substantial" effect on interstate commerce, the NLRB is compelled to assert jurisdiction.

2. League-Wide Versus Single-Team Bargaining Units

Another basis for the *Northwestern University* Board's decision to decline jurisdiction was that the election petition was only for a single unit—the Northwestern football team—even though the team is a member of the Big Ten conference and the NCAA. Though the NLRB noted the potential difficulties involved in asserting jurisdiction over only one team in a multi-team conference or association, the Board has recognized units at the individual team, plant, or store level despite these entities' membership in, or subsidiary relationship with, a larger organization. Indeed, the Board has twice confronted situations involving sports leagues in which it asserted jurisdic-

preme Court decision) and, perhaps also, because the 1951 Supreme Court opinion precedes § 14(c)(1), the 1959 amendment to the Act explicitly limiting the Board's ability to decline jurisdiction.

⁸⁹ *Id.*

⁹⁰ This is not to say that the Board cannot deny jurisdiction in an individual case if the parties are not "employers" or "employees" as defined by the Act, or certainly if the Board finds the collective bargaining unit inappropriate. But the Board refused to deny the Northwestern football team's election petition on any of these grounds.

tion over fewer than *all* the teams in the league.⁹¹ In these cases, the Board explicitly mentioned the propriety of single-team units.

First, in *North American Soccer League*,⁹² the NLRB received a petition from the North American Soccer League Players' Association ("NASLPA") seeking to represent soccer players employed by nineteen soccer clubs in the North American Soccer League ("NASL"). The NLRB upheld the petition but refused to assert jurisdiction over the only two NASL soccer clubs outside the United States, the Toronto Metros and the Vancouver Whitecaps.⁹³ The Board felt that, since those teams were subject to Canadian law and had strong connections to Canada (but not to the United States), the NLRB should exclude them from jurisdiction.⁹⁴ In a lengthy partial dissent, Member Murphy argued for Board jurisdiction over the Canadian teams, reasoning that the teams substantially affected United States commerce and had significant ties to the United States despite being foreign employers.⁹⁵ Neither the majority nor the dissent discussed the propriety or difficulty of asserting jurisdiction over some, but not all, members of a league. Indeed, the employers' primary argument against Board jurisdiction over NASL was that each team was autonomous and therefore single-team units were, in fact, more appropriate.⁹⁶ The employers argued that union representation should be on a team-by-team basis. The Board agreed that single-team units were appropriate but felt that a league-wide unit was appropriate as well.⁹⁷ In fact, the Board mentioned that individual team bargaining might be problematic as a matter of labor policy only because the NASL had such extensive control over labor relations that "it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single club units."⁹⁸ The Board may have been concerned that seventeen teams

⁹¹ *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* *Collegiate Basketball Officials Ass'n. v. NLRB*, 836 F.2d 143 (3d Cir. 1987); *N. Am. Soccer League & its Constituent Member Clubs & the N. Am. Soccer League Players' Ass'n*, 236 N.L.R.B. 1317 (1978).

⁹² *N. Am. Soccer League & its Constituent Member Clubs & the N. Am. Soccer League Players' Ass'n*, 236 N.L.R.B. 1317 (1978).

⁹³ *Id.* at 1319.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1323–25 (Member Murphy, dissenting in part).

⁹⁶ *Id.* at 1320 (decision of the Board).

⁹⁷ *Id.* at 1321 ("While these facts might support a finding that single-club units may be appropriate, they do not establish that such units are alone appropriate or that the petitioned-for overall unit is inappropriate. The only unit sought is leaguewise, with the exceptions of the Canadian clubs, and it is presumptively appropriate as an employerwide [sic] unit.").

⁹⁸ *Id.* at 1321–22.

would have their own representatives and collective bargaining agreements, creating a fragmented bargaining landscape. The Board would not have the same concerns about labor stability, however, if only one team in a league or conference could seek representation. Because Northwestern University is the only private university in the Big Ten conference, it is the only Big Ten team under the NLRB's jurisdiction. One unionized team is hardly enough to paralyze the Big Ten. Moreover, Northwestern University seems to be the ideal school and team to first collectively bargain under the NLRA: the single-team bargaining unit would allow the Board to observe college-football collective bargaining in a relatively closed environment that is unlikely to yield a strike due to lack of player leverage.⁹⁹

Second, in *Big East Conference*,¹⁰⁰ the Board asserted jurisdiction over a collegiate conference as an employer even though conference members included two public, state-run colleges.¹⁰¹ According to the Board, jurisdiction was appropriate since the Big East Conference was a private entity and the two public colleges, despite having seats on the board of directors, did not have enough control to dictate the decisions of the league.¹⁰² At no point did the Board discuss the impropriety or difficulty of asserting jurisdiction over an entity that included organizations over which the NLRB had no jurisdiction. Northwestern University, as the only private school in the Big Ten, likewise would not have enough control to dictate the decisions of the Big Ten Conference. Further, the *Northwestern University* decision itself, according to the Board, does not foreclose a later union petition by a larger group of FBS Division I football players, including *all* FBS Division I football players in private colleges or universities.¹⁰³ The Board seems unaware that this statement undermines the Board's argument that it could not regulate football teams when so many are public and beyond the Board's jurisdiction. A bargaining unit with *all* eligible (i.e., private) FBS Division I Power 5 universities would comprise some seventeen members. Why would

⁹⁹ In fact, the only college football FBS Power 5 Conference scenario that would raise the same concerns for the NLRB that it had in *NASL* would perhaps be an election petition from a private school in the ACC. That conference has five private college team members. So as not to unduly fragment the conference and create labor instability there, perhaps the NLRB could find a single unit to be inappropriate. A five-team unit might be the only appropriate bargaining unit in the ACC.

¹⁰⁰ *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* *Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987).

¹⁰¹ *Id.* at 341.

¹⁰² *Id.*

¹⁰³ See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355 (2015).

this scenario not threaten labor stability if the single Northwestern football union would?

Continuing the speculation over why the NLRB declared that recognizing a petition by Northwestern's football team might undermine labor stability, perhaps the NLRB was worried about what might happen if only one team, Northwestern, could go on strike, but others could not. If that was the concern, the NLRB need not worry. A strike's power is severely limited if the collective leverage to influence collective bargaining negotiations resides with a single football team. Northwestern would likely maintain leverage in any negotiations since there is only the single unit of its football players. The collective power of football players in a leaguewide unit would be much greater. Moreover, the Northwestern players would be unlikely to strike.¹⁰⁴ Not only would they have little leverage, but unlike most employees, they are in school for a short time. They would likely be even more loathe than longer-term employees to jeopardize one of their precious years of college football play, unless, of course, the need to do so is substantial. Further, the Northwestern football players are likely to be satisfied that their union is pursuing their desired ends through collective bargaining. That is essentially the entire idea behind the NLRA and the policy reasons for the Act's passage. Even if the players decided to strike, the other teams in the conference would have advance notice under the NLRA and could either rest their players for a week or arrange to play a team from another conference. In that case, only the employer—Northwestern University—would suffer a negative impact, in the form of lost revenue. After all, Congress did not intend for the NLRB to shield employers from strikes.

And why wouldn't labor stability instead improve? The demands of one team's players can be a litmus test for the rest of the league. Northwestern University could be a model for the rest of the college football. For example, players could request provisions or benefits that schools simply may not have thought of, but are not necessarily against. If Northwestern and its players could figure out a more flexible training schedule that would

¹⁰⁴ That they are unlikely to strike does not mean they are unlikely to walk out if the student-athletes do not perceive their needs are being met, or if they perceive they are not being heard. The issues that caused the Northwestern team to file an election petition may be replicated. A severe injury to a poor student on scholarship who is denied critical healthcare, or a student with strong academic aspirations prevented from taking important classes, may be just the right kind of complications to trigger a walkout. In the walkout situation, as opposed to an economic strike, the students even at an individual school might have some leverage over the school. For this reason, the NLRB has a duty to assert jurisdiction if the statutory prerequisites are met.

allow students to take classes they need without affecting team preparation, other schools could simply institute the Northwestern plan without engaging in collective bargaining. Indeed, if Northwestern were to recruit while citing its flexible academic schedule to gain top talent, other teams in the league might adopt the plan just to negate Northwestern's competitive advantage.

Moreover, Northwestern would gain another recruitment advantage over other FBS schools. Northwestern could promise recruits that playing for Northwestern is better preparation for the NFL since a collective bargaining agreement governs Northwestern players, just like unionized NFL players. And, for those without NFL dreams, Northwestern could tout the rock-solid protection the collective bargaining agreement affords players as students.

Ironically, recognizing college football players as employees might lead to better education-related benefits for them as well. For example, the NCAA rule that limits "countable athletic related activities" to twenty hours per week is currently honored more in the breach than the observance. If student-athletes thought that failure to police the rule was abusive, they might seek to address this in collective bargaining. In addition, if student-athletes later played professionally, they would already have experience in an environment involving unions and collective bargaining. That would mean less of an adjustment between college and professional football. And, if collective bargaining turns out to be a recruitment advantage for private schools, the public schools in the conference might well pressure their state legislatures to allow at least some limited form of collective bargaining for their schools as well.¹⁰⁵

Despite dicta to the contrary in the *North American Soccer League* and *Big East*, the NLRB in *Northwestern University* suggests that, if it cannot assert jurisdiction over most of the teams in a league, then labor stability will be undermined. Yet, in footnote 16 in *Northwestern University*—and consistent with its position in the *NASL* and *Big East* cases—the NLRB emphasized that it "do[es] not reach and do[es] not decide that team-by-team organizing and bargaining is foreclosed or that [it] would never assert jurisdiction over an individual team."¹⁰⁶ Moreover, in the same footnote, the Board, citing *North American Soccer League*, stated that "evidence of each team's day-to-

¹⁰⁵ See Zirin, *supra* note 5 ("As for players at state universities, they have the freedom to do exactly what the Northwestern players did and organize themselves in an effort to then approach their own state boards and ask for union recognition. That is how national campaigns work. Different states have different laws, different union freedoms, and unions still make efforts to organize across state lines.")

¹⁰⁶ *Northwestern Univ.*, 362 N.L.R.B. at 1354 n.16.

day autonomy ‘might support a finding that single-club units may be appropriate.’”¹⁰⁷

C. *The NLRB’s Non-Decision in the Northwestern University Case*

A close reading of the Board’s *Northwestern University* decision leaves one wondering what exactly the NLRB did decide in the case. Indeed, both the NLRB’s disclaimers tacked on to the end of the opinion, as well as its substantial hedging on major points (found buried in the footnotes) undermines the certainty of the Board’s unanimous decision. Arguably, *Northwestern University* barely constitutes a decision at all, and can hardly be called precedent-setting. And the Board, throughout the opinion, repeatedly failed to make findings it is arguably required to make by law: whether Northwestern football substantially affects commerce and whether Northwestern football players are employees.¹⁰⁸ The number of times the NLRB stated what it was *not* deciding is so substantial that the ultimate decision might even meet the threshold for an abdication of administrative responsibility. Indeed, the NLRB even declined to make findings and conclusions about the necessary prerequisites for NLRB jurisdiction, such as whether the Northwestern football players are “employees”.¹⁰⁹ Interestingly, the NLRB’s express refusal to decide presumably leaves the Regional Director’s reasoning that they are employees intact. The NLRB also declined to address whether the Northwestern football team substantially affects commerce—paradoxically, the Board suggested that the Northwestern team actually *does* affect commerce by indicating that it had asserted jurisdiction over entities that have less of an impact on commerce.¹¹⁰ The NLRB also hints, without explicitly finding, that Northwestern University is an employer.¹¹¹ The NLRB refused to hold that a single-team unit, like Northwestern’s, is inappropriate, instead suggesting that in some cases (where the Board has made certain factual determinations) it might well be appropriate.¹¹² Finally, the Board refused to find that the NCAA’s regulation of, and control over, col-

¹⁰⁷ *Id.*

¹⁰⁸ In fact, the only NLRB position on the point of whether Northwestern football players are employees, is the Chicago Regional Director’s decision that they are. The NLRB punted on the issue and did not reverse the Regional Director’s findings, reasoning, or conclusions on that score.

¹⁰⁹ *Northwestern Univ.*, 362 N.L.R.B. at 1350, 1355.

¹¹⁰ *Id.* at 1355 n.28 (“[W]e are unwilling to find that a labor dispute involving an FBS football team would not have a ‘sufficiently substantial’ effect on commerce to warrant declining to assert jurisdiction.”).

¹¹¹ *Id.* (“[N]o party disputes that Northwestern is an employer under the Act.”).

¹¹² *Id.* at 1354 n.16.

lege football constitutes a reason to decline jurisdiction.¹¹³ The NLRB has an affirmative duty to make these determinations when confronted with a representation petition under the Act, yet the Board time and again refused to do so.

The Board not only failed to make these basic statutory determinations, but it also withheld other important guidance, while suggesting that Northwestern's petition may well be valid. For example, the Board reserved the right to reconsider this very same case in the future, allowing for the possibility that someday it will find a single-team unit involving an FBS Power 5 Division I private school appropriate, even at Northwestern.¹¹⁴ The Board also stated that its decision does not concern other individuals associated with FBS football.¹¹⁵ In the end, the NLRB, an administrative agency of the federal government, decided only that it will not accept the Northwestern University football team's election petition *at this time*.¹¹⁶ A close reading of the opinion shows that the Board effectively decided without offering a cogent reason. The NLRB's *Northwestern University* decision, then, arguably failed to abide by the NLRA's procedural requirements, and offends even the most basic notions of administrative due process.

IV. CONCLUSION

Arguably, the NLRB's *Northwestern University* decision represents the same abdication of responsibility that spurred both the United States Supreme Court and Congress to act from 1957–1959. Under § 14(c)(1), the Board can discretionarily decline jurisdiction only where it finds employers do not have a substantial effect on interstate commerce. Indeed, the same type of arbitrary declination of jurisdiction present in *Northwestern University* prompted Congress to add the amendment in 1959.

Even more importantly, the NLRB's decision bypasses critical findings of fact and conclusions of law in the name of labor stability and the policies of the Act, while leaving us to guess why a Northwestern football union would undermine these objectives.

The Board's declination of jurisdiction in the *Northwestern University* football case also goes against fundamental labor policy at the core of the NLRA. The labor policy of the United States is set out in § 1 of the National Labor Relations Act:

¹¹³ *Id.* at 1354 n.15.

¹¹⁴ *Id.* at 1355.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹¹⁷

Declination of jurisdiction by the NLRB over an activity, FBS Division I college football, that clearly has a substantial effect on interstate commerce, both denies labor rights to college football players and presents a potential threat to commerce from future disruption due to labor strife.

¹¹⁷ National Labor Relations Act, 29 U.S.C. § 151 (2018); *see also* Frederick Sherman & Dennis Black, *The Labor Board and the Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 1323, 1350 (1970) (In the context of NLRB declination of jurisdiction over charitable employers despite their impact on interstate commerce, “[t]he Board’s practice of declination, then, rejects the [National Labor Relations] Act’s explicit finding that the best way to minimize destructive labor disputes is to place employees and employers within a statutorily defined framework for bargaining”).

Transfixed in the Camera's Gaze: *Foster v. Svenson* and the Battle of Privacy and Modern Art

Michael Goodyear*

ABSTRACT

The battle between First Amendment expression and privacy interests in twenty-first century America is in full force. In *Foster v. Svenson*, a photographer used a high-powered camera to take snapshots of his neighbors. The New York court ruled that it was art and therefore immune from New York's privacy statute. Constrained by New York's ineffective privacy statute, the court's ruling included a cry for the New York legislature to act.

Privacy has become an increasingly powerful right in American law, especially with the growth of technology. Yet the problem with *Foster* and the New York statute is that the sole focus is on whether the First Amendment or privacy interests should prevail. While other American courts have provided more equitable solutions to this battle, New York's have fallen short. To ensure that the First Amendment's protections for art do not run roughshod over privacy rights, New York should move toward a more equitable solution: its legislature should revise the state's privacy statute and its courts should permit unjust enrichment claims to create a balance between these two rights. Doing so would help protect privacy rights against modern technological capabilities.

* J.D. Candidate, University of Michigan Law School (2020); A.B., University of Chicago (2016). I would like to thank Professor Carl Schneider for his comments and guidance. I would also like to thank Professor Lori Andrews for her invaluable mentorship, friendship, and wisdom regarding the world of privacy, as this Article and my budding legal career would not be possible without her.

INTRODUCTION

When we are walking down Fifth Avenue or through Central Park, we have only the slightest expectation of privacy. We are entering a public space where others can see us going about our lives. The same is true with the Internet: every post or photo on social media is a step into the public space. At the opposite end of the privacy spectrum is our home, the place where we eat, sleep, and live with our families behind walls and windows. There is a longstanding principle in Western societies of the home being sacred.¹ Yet in the world of twenty-first century technology, even privacy in our homes is being whittled away by drones,² apps,³ Alexa,⁴ and even Roombas.⁵

It is this final frontier of personal privacy—the home—that was the focus of *Foster v. Svenson*.⁶ When the Fosters sued Svenson for photographing them inside their home, the Appellate Division of the New York Supreme Court rejected the claim, upholding the photographs as protected art.⁷ Effectively, this precedent permits New York photographers to snap pictures of their neighbors with little fear of repercussion. But while Americans have acquiesced their privacy interests in other contexts, they have generally expected some benefit in return.⁸ Here, however, the Fosters' innermost privacy was violated without benefitting them. The modern technology of high-powered cameras stripped aside their privacy for all to see. While First Amendment rights of expression are all-important in the United States, the facts of *Foster v. Svenson* highlight the imbalance between expression and privacy under current New York law.

¹ See, e.g., ABIGAIL BRUNDIN, DEBORAH HOWARD & MARY LAVEN, *THE SACRED HOME IN RENAISSANCE ITALY* 38–81 (2018); *Weimer v. Bunbury*, 30 Mich. 201, 208 (1874) (stating that the state constitution prohibits unreasonable searches and seizures “to make sacred the privacy of the citizen’s dwelling . . .”).

² María de Miguel Molina et al., *Ethics for Civil Indoor Drones: A Qualitative Analysis*, 10 INT’L J. MICRO AIR VEHICLES 340 (2018).

³ Lori Andrews, *A New Privacy Paradigm in the Age of Apps*, 53 WAKE FOREST L. REV. 421, 457–60 (2018).

⁴ Ethan Sacks, *Alexa Privacy Fail Highlights Risks of Smart Speakers*, NBC NEWS (May 26, 2018, 9:56 AM), <https://www.nbcnews.com/tech/innovation/alexa-privacy-fail-highlights-risks-smart-speakers-n877671> [<https://perma.cc/UW4K-PF7Y>].

⁵ Maggie Astor, *Your Roomba May Be Mapping Your Home, Collecting Data That Could Be Shared*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/technology/roomba-irobot-data-privacy.html> [<https://perma.cc/NL6S-XGMZ>].

⁶ 128 A.D.3d 150 (N.Y. App. Div. 2015).

⁷ *Id.* at 154.

⁸ See *infra* Part I.

This Article advances the solutions of statutory reform and unjust enrichment to correct this inequitable situation caused by too great of a focus on whether privacy or expression should win. First, this Article traces the historical development of privacy, as it has been consolidated as a central right under American law that is only abridged through an overriding interest or personal benefit, even in the face of privacy-infringing new technologies. Second, it shows how using privacy as a medium of artistic expression is popular but does not require actual infringement. Third, it discusses how Svenson violated the Fosters' privacy, but the New York courts failed to provide an equitable solution for the Fosters. Fourth, it details how, despite the tension between freedom of expression and privacy, equitable options for protecting privacy still exist. Fifth, it investigates how other courts have developed far more equitable solutions to conflicts between art and privacy than New York's have. Finally, it offers suggestions for how New York can create a more equitable compromise between expression and privacy by both reforming its privacy statute and utilizing the unjust enrichment doctrine.

I. HISTORY OF PRIVACY

Privacy is an important right with contours that have been expanded and defined over the past 125 years, overlapping and conflicting with artistic expression since the start. Samuel D. Warren and Louis D. Brandeis first articulated the importance of a right to privacy in their seminal 1890 law review article.⁹ From the beginning, they were worried about the risks technology posed to privacy.¹⁰ Warren and Brandeis were concerned that "the press is overstepping in every direction the obvious bounds of propriety and of decency."¹¹ They warned, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops."¹²

Warren and Brandeis were not alone in fearing that portable cameras would destroy privacy. An article published in the *Hawaiian Gazette* the same year warned,

Have you seen the Kodak fiend? Well, he has seen you. He caught your expression yesterday while you were in recently talking at the Post Office.

⁹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁰ *Id.* at 195.

¹¹ *Id.* at 196.

¹² *Id.* at 195 (citation omitted).

He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the veriest hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men.¹³

The problem was that common law remedies did not protect the right to privacy. Suits for slander, libel, breach of contract, and violation of property rights all fell short. Warren and Brandeis concluded that there should be a tort for damages and perhaps an injunction as remedies for infringements of the “general right of the individual to be let alone.”¹⁴

Soon, states began to recognize Warren and Brandeis’ privacy torts, ingrain the notion of a right to privacy into the law. In 1903, New York enacted a statute providing a cause of action for the invasion of privacy.¹⁵ In 1905, the Georgia Supreme Court recognized a tort for invasion of privacy.¹⁶ Over the next fifty years, several other legislatures and courts followed suit.¹⁷ Despite this slow stream of recognition, however, privacy remained a tort of last resort, often attached to claims of intentional infliction of emotional distress.¹⁸ By 1940, only fourteen states recognized privacy torts.¹⁹

Change soon came from another legal scholar, William L. Prosser, whose seminal 1960 law review article articulated his division of torts on privacy into four distinct categories,²⁰ which were later codified in the Second Restatement of Torts.²¹ This led the remaining thirty-six states to adopt privacy torts.²² Around the same time, the Supreme Court of the United States revolutionized the scope for protecting privacy. Cases such as *Mapp v.*

¹³ *The Kodak Fiend*, HAWAIIAN GAZETTE, Dec. 9, 1890, at 5 (quoted in LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* (2012)).

¹⁴ Warren & Brandeis, *supra* note 9, at 205, 219.

¹⁵ N.Y. CIV. RIGHTS LAW §§ 50–51.

¹⁶ *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

¹⁷ *See, e.g.*, *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927); *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

¹⁸ Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1894 (2010).

¹⁹ *Id.* at 1895. Twelve states recognized a common law right to privacy and the other two (Utah and New York) had enacted a statutory right to privacy.

²⁰ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388–89 (1960).

²¹ Richards & Solove, *supra* note 18, at 1890, 1901.

²² *Id.* at 1890, 1901. *See, e.g.*, *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

*Ohio*²³ and *Katz v. United States*²⁴ expanded privacy protections for Americans. The *Katz* Court opined “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”²⁵ The currently used *Katz* standard—the reasonable-expectation-of-privacy test—asks (1) whether a person exhibits an “actual (subjective) expectation of privacy” and (2) whether “the expectation [is] one that society is prepared to recognize as ‘reasonable.’”²⁶

Congress and the Supreme Court have continued to expand federal protection of privacy over the past 50 years, specifically in the realms of decisional privacy²⁷ and informational privacy,²⁸ which even a narrowing of the scope of privacy protection by the Supreme Court in the 1970s and 1980s could not entirely curb.²⁹ The Supreme Court has emphasized the importance of privacy in the face of new technologies in recent cases, such as in *Jones v. United States*, where the Court held that a tracking device attached to the defendant’s car violated his Fourth Amendment rights,³⁰ and in *Carpenter v. United States*, where the Court held that the government’s warrantless seizure of the defendant’s cell-site location information violated his Fourth Amendment rights.³¹ These cases illustrate both the climate of sensitivity to individual privacy and the strong standalone legal protections for privacy that exist today at the state and federal level.³²

When Americans have permitted their privacy to be infringed, there is usually an overriding public concern or some personal benefit in return.³³

²³ 367 U.S. 643 (1961).

²⁴ 389 U.S. 347 (1967).

²⁵ *Id.* at 351–52.

²⁶ *Id.* at 361 (Harlan, J., concurring).

²⁷ *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁸ *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); Privacy Act of 1974, 5 U.S.C. § 552a (2014).

²⁹ *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that numbers recorded by a pen register were not protected since there was no reasonable expectation of privacy); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (holding that state authorities can search the premises of third parties if there is probable cause).

³⁰ 565 U.S. 400 (2012).

³¹ 138 S. Ct. 2206 (2018).

³² *See, e.g.*, LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* (2012).

³³ *See generally* Shiva Maniam, *Americans Feel the Tensions Between Privacy and Security Concerns*, FACT TANK (Feb. 19, 2016), <https://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns> [<https://perma.cc/4VX4-9H68>]; Alessandro Acquisti, Leslie K. John & George Loewenstein, *What Is Privacy Worth?*, 42 J. LEGAL STUD. 249 (2013); Chris Taylor

For example, police have search-and-seizure rights for the overriding purpose of protecting the population at large from crime, and even these rights are subject to privacy-preserving restrictions.³⁴ Online, consumers give up their data privacy for ease of access and curated advertisements.³⁵ Although these twenty-first century examples may suggest that Americans no longer care about privacy, research on this “privacy paradox” shows otherwise.³⁶ Many modern innovations have failed to provide a benefit in exchange for privacy, with software like mobile apps often gleaning private information from unknowing users.³⁷

II. ART AS A PRIVACY HACK

Art is one such area of modern innovation that actively engages with privacy yet does not provide any personal benefit in return. If the instant flash of the Kodak portable camera alarmed Americans in 1890,³⁸ those folks would be shocked to see the privacy-infringing capabilities of technology today. Even with a cellphone camera, photographers can take incredibly high-definition shots in a mere second.³⁹ With a full-size professional camera, the clarity of photographs, even at a great distance, is remarkable.⁴⁰ Modern privacy dangers from technology hardly end at the camera either;

& Ron Webb, *A Penny for Your Privacy?*, HARV. BUS. R. (Oct. 11, 2012), <https://hbr.org/2012/10/a-penny-for-your-privacy> [<https://perma.cc/7QZF-HVP2>].

³⁴ See U.S. CONST. amend. IV.

³⁵ See, e.g., Kari Paul, *Americans Are Worried About Their Facebook Data — But College Students Would Give Up Their Privacy for Free Pizza*, MARKETWATCH (Mar. 23, 2018, 8:06 AM), <https://www.marketwatch.com/story/college-students-would-give-up-their-friends-privacy-for-free-pizza-2017-06-13> [<https://perma.cc/XYG5-YER7>].

³⁶ See generally Susan Athey, Christian Catalini & Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk* (Nat'l Bureau of Econ. Research, Working Paper No. 23488, 2017).

³⁷ See, e.g., Narseo Vallina-Rodriguez & Srikanth Sundaresan, *7 in 10 Smartphone Apps Share Your Data With Third-Party Services*, THE CONVERSATION (May 29, 2017, 9:48 PM), <https://theconversation.com/7-in-10-smartphone-apps-share-your-data-with-third-party-services-72404> [<https://perma.cc/3RVT-333R>].

³⁸ *Kodak Fiend*, *supra* note 13.

³⁹ See Fionna Agomuoh, *10 Smartphone Camera Features that Make You Feel Like a Professional Photographer*, BUSINESS INSIDER (Feb. 21, 2018, 8:45 AM), <https://www.businessinsider.com/smartphone-camera-features-that-make-you-feel-like-a-professional-photographer-2018-2> [<https://perma.cc/W43D-A77W>].

⁴⁰ James Abbott, *Smartphones vs Cameras: Do You Still Need a DSLR?*, TECHRADAR (Mar. 9, 2018), <https://www.techradar.com/news/smartphones-vs-cameras-do-you-still-need-a-dslr> [<https://perma.cc/3KM2-TAJP>].

the rise of the Internet⁴¹ and improvements in biotechnology⁴² have proved especially risky.

Some artists have embraced the hazards of twenty-first-century technology and used their art to highlight the dangers technology poses to privacy.⁴³ However, these artists, importantly, were conscious about not violating privacy while raising privacy concerns in their works. No benefit was received, but also no direct infringement of privacy took place. There was also no overriding public interest. Expressing art through privacy does not have to infringe one's privacy, as shown by the following works.

One example of this approach is bioartist Heather Dewey-Hagborg, who uses DNA to demonstrate the possibilities and limitations of scientific progress. One of her best-known pieces, *Stranger Visions*, involved Dewey-Hagborg collecting chewed gum and cigarette butts from across New York City, extracting and analyzing leftover DNA from them, and printing life-sized 3D portraits of the former owners.⁴⁴ While it may seem that analyzing DNA would produce a singular face, it actually produces a range of potential faces.⁴⁵ So while there is a chance that Dewey-Hagborg's next installation could feature your face, reproduced from a bit of discarded gum on the New York subway, this is unlikely. In fact, *Stranger Visions* intended to raise awareness of forensic DNA phenotyping and the limited potential for biological surveillance by law enforcement.⁴⁶ Other works by Dewey-Hagborg highlight ways in which we can spoof our DNA, further destabilizing the idea that DNA provides a full picture of someone.⁴⁷ While Dewey-Hagborg stressed the inaccuracy in genetic profiles, the materials she used in *Stranger Visions* were discarded scraps—and were therefore legally abandoned—so the previous owners no longer had attached property rights.⁴⁸

⁴¹ See generally ANDREWS, *supra* note 32.

⁴² See generally SIGNS OF LIFE: BIO ART AND BEYOND (Eduardo Kac ed., 2007).

⁴³ See Lori Andrews, *Controlling Our 'Nature': Gene Editing in Law and in the Arts*, in GENE EDITING, LAW, AND THE ENVIRONMENT: LIFE BEYOND THE HUMAN 113 (Irus Braverman ed., 2017).

⁴⁴ Heather Dewey-Hagborg, *Stranger Visions*, HEATHER DEWEY-HAGBORG, <http://deweyhagborg.com/projects/stranger-visions> [<https://perma.cc/JP8F-JYHV>].

⁴⁵ Heather Dewey-Hagborg, *Sci-Fi Crime Drama with a Strong Black Lead*, THE NEW INQUIRY, <https://thenewinquiry.com/sci-fi-crime-drama-with-a-strong-black-lead> [<https://perma.cc/9HUT-4Y86>].

⁴⁶ Dewey-Hagborg, *supra* note 44.

⁴⁷ See, e.g., Heather Dewey-Hagborg, *Invisible*, HEATHER DEWEY-HAGBORG, <http://deweyhagborg.com/projects/invisible> [<https://perma.cc/EH7C-B6EH>].

⁴⁸ See generally Lior Jacob Strahilevitz, *The Right to Abandon*, 158 PENN. L. REV. 355 (2010).

Critical Art Ensemble's *Flesh Machine* took a volunteer-based approach to scrutinizing privacy. *Flesh Machine* is a performative piece that solicited volunteers to donate their cell and DNA samples, which were then analyzed to see how valuable the volunteers would be in the genetic-donor market for babies.⁴⁹ If the volunteers "passed" the test, they received certificates of genetic merit.⁵⁰ Those who passed could then have their cell samples and pictures in the piece.⁵¹ The piece criticized modern eugenics in sperm and egg donors, but it only used voluntary participants.

Artist Chrissy Conant eschewed using others' DNA in her piece *Chrissy Caviar*.⁵² The piece features a glass jar with a label on top that is reminiscent of fine caviar. But instead of the image of a sturgeon fish in the center, there is Conant lounging in a ball gown. The small jars do not contain fish roe either. Instead, suspended in a small vial inside a viscous liquid is one of Conant's own eggs. It is an expensive commodity, priced for sale at \$250,000. Along with the jars of *Chrissy Caviar*, Conant included biographical and genetic information about herself.⁵³ The piece is a statement on the commodification of egg donors, but Conant used herself rather than soliciting volunteers like Critical Art Ensemble did for *Flesh Machine*.

Finally, artist Larry Miller decided not to reveal personal information about anyone in his work but to instead use it to protect all his buyers from outside invasions of privacy. Dismayed by the outcome of *Moore v. Regents of the University of California*,⁵⁴ which held that the plaintiff, John Moore, had no right to his own cell line, Miller decided to act.⁵⁵ He drafted a new work of art, the Genetic Code Copyright, a document stating that the holder has a copyright over his genetic code.⁵⁶ While the document is probably not legally binding,⁵⁷ it does raise awareness of the risks around genetic privacy without infringing on any individual's personal information.

⁴⁹ *Flesh Machine*, 1997-98, CRITICAL ART ENSEMBLE, <http://critical-art.net/flesh-machine-1997-98> [https://perma.cc/T2H9-B2S3].

⁵⁰ Rebecca Schneider, *Nomadmedia: On Critical Art Ensemble*, 44 DRAMA REV. 120, 122 (2000).

⁵¹ *Id.*

⁵² Chrissy Caviar, *General Information*, CHRISSY CAVIAR, <http://www.chrissycaviar.com/ccaviar/infoFrameset.htm> [https://perma.cc/5J9C-ZWBV].

⁵³ *Id.*

⁵⁴ 793 P.2d 479 (Cal. 1990).

⁵⁵ ANDREWS, *supra* note 32, at 122.

⁵⁶ Mark Frauenfelder, *Own Your DNA – And Get it in Writing*, WIRED (Mar. 26, 1997, 2:48 PM), <https://www.wired.com/1997/03/own-your-dna-and-get-it-in-writing> [https://perma.cc/2UYU-3YFZ].

⁵⁷ *Id.*

While these four artists raised privacy concerns with their works, they did not actively infringe anyone's right to privacy. Dewey-Hagborg used discarded property. Critical Art Ensemble used volunteers from the audience. Conant used herself. Miller used no one at all. But what if artists infringe on an unsuspecting person's privacy, where privacy is infringed and no benefit is conferred? Such was the issue in *Foster v. Svenson*.

III. FOSTER V. SVENSON

Foster v. Svenson raises questions surrounding the priorities of art and privacy, but because of the constraints of New York privacy law, it is unable to satisfactorily address these questions. Indeed, the limitations of the New York privacy statute prevented the Fosters from achieving an equitable solution.

At the center of this case is the work of Arne Svenson. Svenson is a critically acclaimed photographer whose work has appeared in many galleries.⁵⁸ He did not even leave his apartment for the project at issue, *The Neighbors*.⁵⁹ Svenson set himself up at the corner of his apartment window, hidden from view, and took photographs of those living in the apartment building across from him.⁶⁰ The apartment building he targeted had large glass windows that allowed Svenson to see the goings-on of the tenants⁶¹ and capture snapshots of their daily lives.⁶² Svenson's neighbors were unaware of his project, and he secretly captured thousands of photographs of them for a whole year.⁶³

In *The Neighbors*, Svenson intended to comment on the "anonymity" of urban life,⁶⁴ noting in an interview,

New Yorkers are masters of being both the observer and the observed. We live so densely packed together that contact is inevitable—even our homes are stacked facing each other. I have found this symbiotic relationship between the looker and the observed only here—we understand that privacy is fluid and that glass truly is transparent.⁶⁵

⁵⁸ *Bio*, ARNE SVENSON, <https://arnesvenson.com/bio.html>.

⁵⁹ *The Neighbors*, ARNE SVENSON, <https://arnesvenson.com/theneighbors.html>.

⁶⁰ *Foster v. Svenson*, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Bio*, *supra* note 58.

⁶⁵ David Rosenberg, *Watching the Neighbors*, *New York City-Style*, SLATE (May 21, 2013, 11:00 AM), <https://slate.com/culture/2013/05/arne-svenson-the-neighbors-is-a-voyeuristic-look-into-a-new-york-city-apartment-building-photos.html> [https://perma.cc/V8L5-8HLP].

Svenson tried to obscure his subjects' faces, and no adult faces are seen in the photographs. Svenson wanted to draw attention to the notion that people believe they are in complete privacy while leaving the curtains open, but, in actuality, their private stage is available for all to see.⁶⁶ The photos depict images including a man lounging on his couch, a couple sitting in their bathrobes, and a family's dog.⁶⁷

Following Svenson's compilation of *The Neighbors*, galleries in New York and Los Angeles exhibited his work.⁶⁸ And despite Svenson obscuring all of the adult faces, Matthew and Martha Foster discovered that two of Svenson's photos pictured their infant children.⁶⁹ Photograph No. 6 featured both children, while No. 12 featured only their daughter.⁷⁰ The children were undressed in both photos, and, compared to Svenson's careful obfuscation of the faces of his other subjects, the children's faces were partially exposed, making them easily identifiable. The Fosters complained to Svenson, the New York City gallery displaying his work, and the art website Artsy, and the photographs were ultimately taken down.⁷¹

In May 2013, however, Photograph No. 12 appeared on a New York City television broadcast.⁷² Subsequent New York City broadcasts and online media ensued, which included the publication of the name of the Foster's apartment building (The Zinc).⁷³ This vastly increased the information available to the public about the Foster family. Ultimately, publicity around the photograph of the Foster's daughter drove them to sue, setting up this battle between their right to privacy and Svenson's First Amendment rights.⁷⁴

The Fosters were not the only ones who felt their privacy had been violated. Fellow resident of The Zinc, Mariel Kravetz, invited a *New York Post* reporter to her apartment to take photographs of Svenson's own apartment as a form of revenge.⁷⁵ On the Internet, dozens of articles and thousands of comments noted that while some might consider the photo-

⁶⁶ *Bio*, *supra* note 58.

⁶⁷ *The Neighbors*, *supra* note 59.

⁶⁸ *Foster*, 128 A.D.3d at 153.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 154.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See, e.g., Jennifer Bain, *A Sneak Peek into Tribeca Peeping Photographer's Apartment*, N.Y. POST (May 23, 2013, 4:00 AM), <https://nypost.com/2013/05/23/a-sneak-peek-into-tribeca-peeping-photographers-apartment> [https://perma.cc/W7FY-YAMD].

graphs beautiful, the infringement of privacy was at least concerning, if not outrageous.⁷⁶

Despite these concerns, the Supreme Court of New York found for Svenson because *The Neighbors* served an artistic purpose,⁷⁷ and the Appellate Division affirmed.⁷⁸ New York's narrow privacy statute constrained both rulings, leaving the courts little choice.

New York's privacy statute originated following *Roberson v. Rochester Folding Box Co.*,⁷⁹ a case about, ironically, the dissemination of lithographs taken without the subject's permission. In *Roberson*, the New York Court of Appeals rejected a common law right to privacy.⁸⁰ In response, within the next year, the New York State Legislature enacted a statutory right to privacy.⁸¹ This statute, practically unrevised since, prohibits the use of a person's "name, portrait, picture, or voice" without the person's written consent for "advertising purposes" or "for purposes of trade."⁸² The statute's limited scope—covering only infringements of privacy for advertising or trade purposes—was purposeful, intending to balance privacy and First Amendment interests.⁸³ And this limited scope has shielded various types of First Amendment speech that infringe on privacy, including newspaper publications, literature, and television programs.⁸⁴

⁷⁶ See, e.g., *The Voyeur Next Door*, TRIBECA CITIZEN (Apr. 29, 2013), <http://tribecacitizen.com/2013/04/29/the-voyeur-next-door> [https://perma.cc/D7AF-VU7J]; John Bacon, *New Yorkers Furious Over Photos Taken Through Windows*, USA TODAY (May 17, 2013, 9:13 AM), <https://www.usatoday.com/story/news/nation/2013/05/17/nyers-furious-over-photos-taken-through-windows/2193353> [https://perma.cc/56ET-MN5E]; Trevor Dayley, *How Would You Feel Being Secretly Photographed in Your House for an Art Exhibit?*, FSTOPPERS (May 17, 2013), <https://fstoppers.com/news/how-would-you-feel-being-secretly-photographed-your-house-art-exhibit-3243> [https://perma.cc/4JUY-MU7W]; Selim Algar, *Tribeca Residents Furious Over Being Secretly Photographed for New Chelsea Art Exhibit*, N.Y. POST (May 16, 2013, 4:00 AM), <https://nypost.com/2013/05/16/tribeca-residents-furious-over-being-secretly-photographed-for-new-chelsea-art-exhibit> [https://perma.cc/F7MY-PGUT].

⁷⁷ *Foster*, 128 A.D.3d at 154.

⁷⁸ *Id.*

⁷⁹ 64 N.E. 442 (N.Y. 1902).

⁸⁰ *Id.*

⁸¹ See N.Y. CIV. RIGHTS LAW §§ 50–51.

⁸² *Id.* For advertising purposes, the statute prohibits only the use of a person's "name, portrait, or picture" without written consent. *Id.* § 50.

⁸³ *Foster*, 128 A.D.3d at 156.

⁸⁴ See *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353 (N.Y. 1985); *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 305 (N.Y. App. Div. 1965).

Before *Foster*, several lower New York courts addressed whether art falls outside the privacy statute, consistently holding that it does.⁸⁵ But many of these earlier cases addressed paintings, collages, and other manufactured artistic renderings of people, while *Foster* addresses the use of photography, which more accurately depicts the world.⁸⁶ While drawings and paintings can be fanciful, photography inherently captures the still life of a real-world scene.

The New York Supreme Court solidified the notion of photography as protected speech just a few years before *Foster* in *Nussenzweig v. DiCorcia*,⁸⁷ holding that photography is protected First Amendment speech. The defendant in that case photographed people walking by Times Square and displayed the photos for sale in his gallery.⁸⁸ The plaintiff was an Orthodox Jew who had strong religious beliefs against the use of his image.⁸⁹ While the court did not reach the constitutional question because the statute of limitations had run,⁹⁰ the concurring judicial opinion addressed it.⁹¹ The concurrence concluded that the First Amendment protected the defendant's photography and that even selling the pictures did not render the photography a commercial activity that would violate Nussenzweig's privacy.⁹² In *Foster*, the Appellate Division similarly found that because Svenson's photos constituted artwork, they were not used "for advertising or trade purposes," and were thus not actionable as a statutory invasion of privacy.⁹³

The *Foster* court went further than the *Nussenzweig* court by expanding the newsworthy exception to the privacy statute. The New York Court of Appeals had long since established that newsworthy events and matters of public concern are exceptions under the privacy statute because they are not primarily commercial,⁹⁴ granting broad protections to the press.⁹⁵ In *Foster*,

⁸⁵ See, e.g., *Nussenzweig v. DiCorcia*, 38 A.D.3d 339, 339, 347 (N.Y. Sup. Ct. 2007); *Altbach v. Kulon*, 302 A.D.2d 655 (N.Y. Sup. Ct. 2003); *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

⁸⁶ See, e.g., Clive Thompson, *The Invention of the "Snapshot" Changed the Way We Viewed the World*, SMITHSONIAN MAG. (Sept. 2014), <https://www.smithsonianmag.com/innovation/invention-snapshot-changed-way-we-viewed-world-180952435> [https://perma.cc/PQC5-5A3R].

⁸⁷ 38 A.D.3d 339 (N.Y. Sup. Ct. 2007)

⁸⁸ *Id.* at 343 (Tom, J.P., concurring).

⁸⁹ *Id.*

⁹⁰ *Id.* at 341 (majority opinion).

⁹¹ *Id.* at 342 (Tom, J.P., concurring).

⁹² *Id.* at 342, 347.

⁹³ *Foster v. Svenson*, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015).

⁹⁴ *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

⁹⁵ *Foster*, 128 A.D.3d at 158.

the Appellate Division expanded this protection by granting protections to art equal to those of the press, noting the importance of disseminating images, aesthetic values, and symbols to the public.⁹⁶ By finding that *The Neighbors* comprised a series of photographs that were artistic expression and therefore in the public interest, the court took the holding of *Nussenzweig*—which only applied to the public sphere—and grafted it onto people's homes.

Svenson sold the photos of the Fosters and used pictures of his photography in promotional materials,⁹⁷ and the court held that the fact that his art was sold for a profit did not reduce its constitutional protections.⁹⁸ Because the Fosters conceded that the photos constituted art, the photographs did not fall under the purposes of advertising or trade.⁹⁹

The Appellate Division did note a restriction to the protection of art over privacy, but the limitation is nearly impossible to reach.¹⁰⁰ Citing *Howell v. New York Post Co.*,¹⁰¹ the *Foster* court maintained a high standard for photography constituting outrageous behavior.¹⁰² In *Howell*, the photographer trespassed into a psychiatric facility to photograph the plaintiff.¹⁰³ The Court of Appeals held that source-gathering needed to be “atrocious, indecent and utterly despicable conduct” to constitute outrageous behavior, and, according to the Appellate Division, Svenson's photography of the Fosters did not “remotely approach” this threshold.¹⁰⁴

That said, the court did not eagerly accept that its holding in *Foster* should be the law. Justice Renwick questioned whether New York's statutory privacy tort did not allow redress for the type of privacy infringement caused by Svenson's photography,¹⁰⁵ noting that Svenson's photography was disturbing and that many people would similarly be rightly offended by how the pictures were taken.¹⁰⁶ Yet, because relevant precedent states that art is subject to the privacy statute only when created solely for trade, Justice Renwick was bound by *stare decisis*. In the final lines of her opinion,

⁹⁶ *Id.* at 159.

⁹⁷ *Id.* at 160.

⁹⁸ *Id.* at 160–61.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 159.

¹⁰¹ 612 N.E.2d 699 (N.Y. 1993).

¹⁰² *Foster*, 128 A.D.3d at 161–62.

¹⁰³ 612 N.E.2d at 700.

¹⁰⁴ *Foster*, 128 A.D.3d at 162.

¹⁰⁵ *Id.* at 152.

¹⁰⁶ *Id.* at 163.

Justice Renwick pleaded to the legislature to revisit this issue, noting the heightened threats to privacy caused by new technologies.¹⁰⁷

Notably, privacy in other contexts does not provide a bright-line rule, and the conflict between art and privacy is no different. Even so, the New York privacy statute is grossly limited, leading to an inequitable outcome: the Fosters' privacy was compromised with nothing in return. The court in *Foster*, while constrained by New York law, worsened the situation by allowing First Amendment rights to trump privacy even when looking into someone else's home. The holding in *Foster* left murky the contours of the law: how far does this extension of First Amendment rights go? Does it change depending on the floor of the apartment or the distance of the photographer? This uncertainty exists because New York courts focus on whether First Amendment rights trumped privacy, rather than on how the most equitable solution for both sides might be crafted.

IV. THE RED HERRING OF EXPRESSION VERSUS PRIVACY

In New York, courts have incorrectly allowed the question of equity to be subsumed by the battle between expression and privacy. From the beginning, these two rights have been at loggerheads: Warren and Brandeis championed privacy over the press;¹⁰⁸ Prosser predicted tension between privacy and the First Amendment.¹⁰⁹ The battle is old, and answers remain elusive. Unfortunately, the explicit constitutional right to expression has subsumed privacy, and with it, the pursuit of equitable outcomes in cases like *Foster*.

While the right to privacy had a long and tortured route to recognition, the First Amendment explicitly enshrined the freedom of speech and the press.¹¹⁰ Despite only specifically mentioning speech and the press, the First Amendment has unquestionably come to also protect freedom of artistic expression.¹¹¹ That said, art has usually been analyzed through the lens of free speech rather than as art for art's sake.¹¹² Art is unique through its

¹⁰⁷ *Id.*

¹⁰⁸ See Warren & Brandeis, *supra* note 9, at 196.

¹⁰⁹ See Richards & Solove, *supra* note 18, at 1901.

¹¹⁰ U.S. CONST. amend. I.

¹¹¹ See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995); Edward J. Eberle, *Art as Speech*, 11 U. PENN. J.L. & SOC. CHANGE 1, 1 (2007).

¹¹² Eberle, *supra* note 111, at 4; Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WISC. L. REV. 221, 235 (1987).

creative process, style of expression, and method of communication, opening up opportunities both to view the world from a different perspective and to demonstrate one's own creativity.¹¹³

Art deserves protection. For example, authoritarian regimes have censored art throughout history to prevent the communication of ideas that could threaten the existing power structure.¹¹⁴ Indeed, the categories that the Supreme Court has found undeserving of First Amendment protection are limited and include fighting words,¹¹⁵ child pornography,¹¹⁶ and obscenities.¹¹⁷ While some of these categories apply to art, for the most part, these are narrow restrictions.¹¹⁸

The *Foster* court could not examine whether freedom of expression in art should trump privacy rights; nor did it have to answer it. The expression-versus-privacy debate sparked vocal criticism against Svenson and *The Neighbors*,¹¹⁹ but the focus should have been on crafting the most equitable solution. While Svenson's photographs were described as beautiful, the means by which he captured the photographs remain controversial.¹²⁰ Svenson—unlike Heather Dewey-Hagborg, the Critical Art Ensemble, Chrissy Conant, or Larry Miller—actively violated his subject's privacy without their permission. He looked into people's lives and captured images ranging from couples arguing to young children and tenants going about their morning routines. While Svenson may have tried his best to anonymize his subjects, those who knew the subjects could connect the dots. Less focus on the overarching issue of expression versus privacy and more emphasis on doing right by the individual litigants would have resulted in a more just outcome.

¹¹³ Eberle, *supra* note 111, at 6–14.

¹¹⁴ See, e.g., ERNST ROSE, *A HISTORY OF GERMAN LITERATURE* 309 (1960) (noting Nazi Germany's restriction of artistic and literary works to those praising the Aryan race and upholding perceived "German" values); Marci A. Hamilton, *Art Speech*, 49 *VAND. L. REV.* 73, 87–88, 97–98 (1996) (explaining how Iran banned the works of Salman Rushdie).

¹¹⁵ *Cohen v. California*, 403 U.S. 15, 20 (1971).

¹¹⁶ *New York v. Ferber*, 458 U.S. 747, 756–65 (1982).

¹¹⁷ *Miller v. California*, 413 U.S. 15, 26–27 (1973).

¹¹⁸ See Eberle, *supra* note 111, at 27.

¹¹⁹ See, e.g., Stephanie Wolf, *Art or Invasion of Privacy? Photographer Arne Svenson's MCA Exhibit Raises Eyebrows*, *COLO. PUB. RADIO* (May 27, 2016), <https://www.cpr.org/show-segment/art-or-invasion-of-privacy-photographer-arne-svensons-mca-exhibit-raises-eyebrows> [<https://perma.cc/3Q6F-WKMB>]; Hili Perlson, *Voyeuristic Photographer Arne Svenson Wins New York Appellate Court Case*, *ARTNET NEWS* (Apr. 10, 2015), <https://news.artnet.com/market/arne-svenson-neighbors-photographs-supreme-court-286916> [<https://perma.cc/H8MU-GHVA>].

¹²⁰ Wolf, *supra* note 119.

But while the *Foster* ruling fails because it does not propose an equitable solution, both legislative reform and the doctrine of unjust enrichment offer hope for avoiding similar injustice in the future. Such new approaches are necessary because the Foster's situation is not unique. Just last year, major exhibitions on voyeurism and surveillance in photography appeared at the International Center of Photography and the San Francisco Museum of Modern Art.¹²¹

New York needs a better solution than its current statute offers. For example, California, Illinois, Massachusetts, and federal law all prescribe privacy regimes more equitable than New York's.¹²² Having laid out the weaknesses of the New York statute, this Article analyzes the respective regimes of those other four jurisdictions, which collectively highlight both the need for statutory reform in New York and the possibility of an interim stopgap via the doctrine of unjust enrichment.

V. HOW WOULD THE COURTS DECIDE?

A. New York

The *Foster* court, albeit disappointingly, correctly decided the case under New York law because of New York's narrow statutory definition of privacy torts. Following the controversial New York Court of Appeals decision in *Roberson*,¹²³ the New York State Legislature enacted a statutory right to privacy in 1903.¹²⁴ Despite major changes in the field of privacy because of advancements in technology, the New York statutory right to privacy has not changed since, and unlike many other states, New York has not adopted a common law right to privacy. To succeed in a New York right-of-privacy tort claim, the plaintiff must prove the defendant (1) used the plaintiff's name, portrait, picture, or voice (2) "for advertising purposes or for the pur-

¹²¹ *Strangers: The First ICP Triennial of Photography and Video*, INT'L CTR. PHOTOGRAPHY, <https://www.icp.org/exhibitions/strangers-the-first-icp-triennial-of-photography-and-video> [https://perma.cc/2TC8-59JN]; *Exposed: Voyeurism, Surveillance, and the Camera Since 1870*, SFMOMA, <https://www.sfmoma.org/publication/exposed-voyeurism-surveillance-and-camera-1870> [https://perma.cc/PS5S-JFHG]; see also Nikki Williams, *Surveillance Art: Rebellion or Hypocrisy*, CTR. DIG. ETHICS & POL'Y (Mar. 4, 2016), <https://www.digitaethics.org/essays/surveillance-art-rebellion-or-hypocrisy> [https://perma.cc/LQV9-DC3W].

¹²² See *infra* Part V.

¹²³ 64 N.E. 442 (N.Y. 1902).

¹²⁴ N.Y. CIV. RIGHTS LAW §§ 50–51.

poses of trade” (3) without the defendant’s consent (4) within the state of New York.¹²⁵

The most difficult element in this definition is the second prong, “for advertising purposes or for the purposes of trade.” New York legislators specifically crafted this limitation to protect First Amendment expression¹²⁶ because restricting commercial speech is much easier under First Amendment jurisprudence than pure expression in the form of political discourse or art.¹²⁷ Since the terms “advertising purposes” and “for the purposes of trade” were left undefined by the legislature, it might seem they have a broad scope. But the New York Court of Appeals has held these terms to be very narrow.¹²⁸ The form of expression can be made for profit, such as journalism or art; it just cannot be a disguised advertisement or solely for commercial purposes.¹²⁹ If the work has any artistic contribution, it is immune from the privacy statute.¹³⁰

The New York Court of Appeals made it even harder for privacy interests to triumph over artistic ones when it held that free speech rights trump privacy rights if the speech concerns “newsworthy events or matters of public interest,” which has been held as the central question for determining whether a work is for advertising or trade.¹³¹ The New York courts have indeed equated art with freedom of speech.¹³² While the primary focus of these exceptions is the press, exceptions have also been applied to forms of artistic expression.¹³³

¹²⁵ *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87 (2d Cir. 1989); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002).

¹²⁶ *Hoepker*, 200 F. Supp. 2d at 348.

¹²⁷ *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

¹²⁸ *See, e.g.*, *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1321–22 (N.Y. 1982).

¹²⁹ *See id.* at 1322.

¹³⁰ This bar is so low that it seems that any work that is copyrightable and is not an advertisement would be exempt from the New York privacy statute. Copyright only requires minimal original expression. *See, e.g.*, *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005) (holding that since the “photograph does not result from slavishly copying another work and therefore is original in the rendition”).

¹³¹ *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 584–85 (N.Y. 1984).

¹³² *See Simeonov v. Tieg*s, 602 N.Y.S.2d 1014, 1018 (N.Y. Civ. Ct. 1993).

¹³³ *See, e.g.*, *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 305 (N.Y. App. Div. 1965) (finding motion pictures are protected); *Stephano*, 474 N.E.2d at 585 (finding photograph of a fashion model newsworthy).

A possible alternative would have been an intrusion-upon-seclusion claim. An intrusion-upon-seclusion claim typically involves four elements: (1) intentional invasion of the private affairs of the plaintiff; (2) the invasion must be offensive to a reasonable person; (3) the matter upon which the defendant intruded must be a personal matter; and (4) the intrusion must have caused mental anguish or suffering.¹³⁴ Theoretically, an intrusion-upon-seclusion claim could have offered a viable way to sidestep New York's narrow privacy statute. But New York does not recognize intrusion-upon-seclusion claims.¹³⁵ There is a strong argument that pictures of the Fosters' children inside their own home was a private matter and that the press coverage around the pictures caused the Fosters mental anguish. Without the availability of such a claim, however, New York plaintiffs such as the Fosters are limited to claims under the privacy statute.

Both because of New York's broad protections for freedom of artistic expression and because New York does not recognize the intrusion-upon-seclusion doctrine, there was little room for the Appellate Division to maneuver in *Foster*. The photographs were displayed in galleries and featured in museums. There was little doubt that they were produced as—and considered to be—art. If the advertising and trade exceptions were wider, the photographs might have been privacy-rights violations. But since the photographs also had an artistic purpose, they fell under the exception for newsworthy events or matters of public interest. New York's privacy statute left the court without the flexibility to instead focus on an equitable solution.

B. California

Like the New York statute, the California physical invasion of privacy statute restricts advertising and trade use, but unlike the New York statute, it also requires an element of intent.¹³⁶ Additionally, the California Supreme Court has held that only sufficiently “transformative” art trumps the privacy right to publicity.¹³⁷

Recently, Californian courts have separated its invasion of privacy analysis into two components: (1) analyzing perceived harm and (2) First

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 652 (AM. LAW INST. 1977).

¹³⁵ *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993).

¹³⁶ CAL. CIV. CODE § 1708.8(a) (West 2016).

¹³⁷ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

Amendment protection.¹³⁸ And while this separate, more careful analysis might benefit privacy,¹³⁹ the main focus of the California cases has been on press freedoms versus clear violations of the law. In *Raef v. Appellate Division of Superior Court*, the court ruled against the paparazzi when they dangerously sped in a motorized vehicle to capture footage.¹⁴⁰ Similarly, in *Shulman v. Group W Productions, Inc.*, the plaintiffs suffered injuries from a serious car accident and were filmed and recorded while in the medical helicopter by a cameraman and nurse, a clear violation of the law.¹⁴¹ But while the *Shulman* court, like the *Raef* court, found against the photographers, it also found a violation of privacy and emphasized that “[t]he tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.”¹⁴²

The California courts have not yet faced a case that pits the protection of art under the First Amendment protection of expression against individual privacy rights. For this reason, it is unclear how California courts would rule on facts similar to those in *Foster*.¹⁴³ The elements for invasion of privacy in California are more straightforward than those of New York. There must be (1) an intentional intrusion into a private place, conversation, or matter (2) in a manner highly offensive to a reasonable person.¹⁴⁴ An application of the *Shulman* analysis to the facts in *Foster* could go either way, but the filming of an injured person in a medical helicopter probably represents a more obvious violation of the expectation of privacy than Svenson photographing across-the-street tenants from his apartment window.

Under the California Civil Code, California courts have interpreted motive to be an essential element in determining whether an intrusion is highly offensive.¹⁴⁵ Indeed, in analyzing the offensiveness of an intrusion, a court must consider “the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and

¹³⁸ See, e.g., *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 477–79 (Cal. 1998); *Raef v. App. Div. Super. Ct. of L.A. Cty.*, 193 Cal. Rpt. 3d 159, 168–69 (Cal. Ct. App. 2015).

¹³⁹ See Madeline Kessler, Note, *In the Privacy of One’s Own Home: Does New York State Law Prevent Invasions of Privacy in the Home?*, 36 CARDOZO ARTS & ENT. L.J. 481, 493–97 (2018).

¹⁴⁰ 193 Cal. Rpt. 3d at 162–63.

¹⁴¹ 955 P.2d at 474–75.

¹⁴² *Id.* at 490.

¹⁴³ Cf. Kessler, *supra* note 139, at 493–97.

¹⁴⁴ *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1203 (S.D. Cal. 2008).

¹⁴⁵ CAL. CIV. CODE § 1708.8(a) (West 2016); *Streisand v. Adelman*, Case No. SC 077 257, at *35 (Cal. Super. Ct. Dec. 31, 2003).

objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”¹⁴⁶ If filming a person in disregard to their privacy is offensive, then selling photos of a person, like in *Foster*, seems similarly offensive.

While *Shulman*’s holding, taken to the furthest extent, might allow the Fosters to win, if *Foster* were before a California court, the outcome would probably turn on a finding of motive. Svenson was motivated not by malice, but a desire to create art, which likely fails to meet the threshold of highly offensive. That said, the *Raef* and *Shulman* courts did focus on harm to the plaintiff.¹⁴⁷ So while highly offensive intent may be a difficult element to satisfy under the facts of *Foster*, California courts have unmoored these cases from a rigid First Amendment expression-versus-privacy framework to provide an equitable solution to the harm.

C. Illinois

Much like California’s privacy protections, Illinois’ statute is not limited to advertising and trade use, and it likewise also looks at intent. Like California, Illinois recognizes a common law right to the four categories of privacy enumerated by Prosser,¹⁴⁸ although the Illinois legislature also codified the right of publicity in 1999 in the Right of Publicity Act.¹⁴⁹ For an Illinois claim under the right of publicity, a plaintiff must prove that (1) the defendant gave publicity (2) to a matter of the plaintiff’s private, not public, life (3) that was highly offensive to a reasonable person and (4) was not of legitimate public concern.¹⁵⁰

Under these four elements, the Fosters might have won. It is undisputed that Svenson made aspects of their lives public, but it is less clear if looking through their glass window was public or private and whether the matter was highly offensive or a legitimate public concern. Especially problematic is that Illinois, like California, considers the intent of the defendant. In *Jacobson v. CBS Broadcasting, Inc.*, a journalist sued a rival news station when it broadcasted her swimming in the broadcast subject’s pool.¹⁵¹ In

¹⁴⁶ *Deteresa v. Am. Broad. Cos., Inc.*, 121 F.3d 460, 464 (9th Cir. 1997) (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.3d 633, 648 (Cal. 1994)).

¹⁴⁷ See, e.g., *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 477–79 (Cal. 1998); *Raef v. App. Div. Super. Ct. of L.A. Cty.*, 193 Cal. Rpt. 3d 159, 168–69 (Cal. Ct. App. 2015).

¹⁴⁸ See also Prosser, *supra* note 20, at 388–89.

¹⁴⁹ 765 ILL. COMP. STAT. § 1075.1 (1999).

¹⁵⁰ *Green v. Chi. Tribune Co.*, 675 N.E.2d 249, 252 (Ill. App. Ct. 1996); see also *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985).

¹⁵¹ *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1169 (Ill. App. Ct. 2014).

upholding the case's summary dismissal, the Illinois Court of Appeals focused on intent, finding that CBS did not act with actual malice.¹⁵² Even if the average person might view Svenson's actions unfavorably, his intent was not malicious. Indeed, he even took precautions to try to maintain his subjects' privacy.

But unlike the California courts, Illinois courts have not emphasized harm to the plaintiff. So, while Illinois' privacy statute is less restrictive than New York's, it is not as equity-focused as California's. While the outcome for the Fosters under both California and Illinois law might be similar—both would probably turn on intent—California's equity-focused approach better balances the First Amendment and privacy interests.

D. *Massachusetts*

Massachusetts' privacy statutes fuse aspects of the New York, California, and Illinois statutes. Massachusetts has two privacy statutes, one focusing on advertising and trade use, like New York's,¹⁵³ and one that is more open-ended, like California's and Illinois'. Massachusetts' statute states, "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."¹⁵⁴ However, Massachusetts courts have interpreted "unreasonable, substantial or serious interference" as a high bar; indeed, one appeals court surmised that the revelation of things such as "certain manuscripts, private letters, family photographs, or private conduct which is no business of the public [would count as an invasion of privacy] . . . [whereas t]he appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects."¹⁵⁵ Limited circulation inside an industry, such as only in one article for food distributors, is also not considered a violation of the general privacy statute.¹⁵⁶

Despite this high bar, Massachusetts' privacy statute provides a helpful comparison to New York's because it supplements its advertising-and-trade-focused privacy statute with a general privacy statute. But as of now, the boundaries of this law are still amorphous. It is likely that the Fosters might

¹⁵² *Id.* at 1179–80.

¹⁵³ MASS. GEN. LAWS ANN. ch. 214 § 3A (West 1973).

¹⁵⁴ MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1973).

¹⁵⁵ *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979).

¹⁵⁶ *See Fratarolli v. Bill Comm'n's, Inc.*, No. 934025, 1994 WL 878935, at *3 (Mass. Super. Ct. Nov. 14, 1994).

fail on a claim in a Massachusetts court too, with the question likely turning on whether an unblocked glass window constitutes a public space. This is a nebulous question that, overshadowed by the concept of the sanctity of the home, might turn on various factors, such as lighting of the apartment, the size of the window, and the distance of the photographer. However, by maintaining a general privacy statute, the Massachusetts legislature allows the courts more freedom in addressing modern privacy concerns such as those in *Foster*.

E. Federal Courts

The federal structure for privacy is the most conducive for courts to issue equitable rulings. The Supreme Court uses a broader definition of privacy, while upholding the preeminence of the First Amendment.¹⁵⁷ For example, in *Stanley v. Georgia*, the Court determined that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”¹⁵⁸ Yet, in *Bartnicki v. Vopper*, the Supreme Court permitted the broadcast of a newsworthy private phone conversation, analagous to the New York courts’ decisions in *Nussenzweig* and *Foster*.¹⁵⁹ The most valuable Supreme Court decision for elucidating a boundary between expression and privacy, however, is *Zacchini v. Scripps-Howard*, where the Court hinted at recovery for violations of one’s right to publicity.¹⁶⁰

The First Amendment broadly states, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁶¹ Artistic expression has been incorporated under this gambit of First Amendment protections.¹⁶² However, the First Amendment is not absolute. Federal courts have recognized several exceptions that infringe on others’ rights, including defamation, fighting words, and obscenity.¹⁶³ To determine if speech is protected and not obscene, the Supreme Court considers whether the speech has “seri-

¹⁵⁷ The constitutional “right to privacy” has been defined as in the pneumbras of other constitutional rights. See *Lawrence v. Texas*, 539 U.S. 558, 594–95 (2003) (citing *Griswold v. Connecticut*, 381 U.S. 478, 481–82 (1965)).

¹⁵⁸ 394 U.S. 557, 565 (1969).

¹⁵⁹ 532 U.S. 514, 525 (2001).

¹⁶⁰ 433 U.S. 562, 578 (1977).

¹⁶¹ U.S. CONST. amend. I.

¹⁶² See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995); Eberle, *supra* note 111, at 1.

¹⁶³ See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014).

ous literary, artistic, political, or scientific value.”¹⁶⁴ This question could have been valuable in *Foster*, but it was not raised.¹⁶⁵ Even so, raising this question might not have changed the outcome because it hinges on judges’ opinions of what constitutes art.

In addition, privacy in and of itself has rarely been demarcated as one of the limited federal exceptions to freedom of expression. In part, this is because of the compelling state interest in both circulating public news and information¹⁶⁶ and sharing events that are newsworthy and of public concern.¹⁶⁷

Despite these restrictions, the Supreme Court focused on equity in *Zacchini v. Scripps-Howard*, where it held that protecting individuals’ privacy was a compelling state interest in the face of First Amendment rights.¹⁶⁸ This exception was limited to the use of a person’s name or likeness for commercial gain, also known as the right of publicity.¹⁶⁹ However, the court focused on both harm to the plaintiff (from having his performance broadcast without his permission) and possible damages recovery.¹⁷⁰ *Zacchini* implies an important right of recovery, which might be achieved through another type of equitable suit, such as unjust enrichment.

VI. MOVING PAST *FOSTER*

These comparisons with other jurisdictions raise three potential issues from the outcome of *Foster*. First, are works such as Svenson’s art? Second, is New York’s statute on privacy too constraining and thus ill-suited for the twenty-first century? Finally, is there merit in using unjust enrichment as an alternative to a strict privacy remedy to achieve an equitable solution? While questioning whether *The Neighbors* is art appears to be a perilous route, revising the New York privacy statute and pursuing unjust enrichment claims would provide for an equitable solution that transcends the fight between privacy and freedom of expression.

¹⁶⁴ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁶⁵ *Foster v. Svenson*, 128 A.D.3d 150, 158 (N.Y. App. Div. 2015).

¹⁶⁶ *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975) (holding that, since the information was already public, the publication of it did not violate a reasonable expectation of privacy).

¹⁶⁷ *See, e.g., Hoepker v. Kruger*, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002).

¹⁶⁸ 433 U.S. 562, 578 (1977).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

A. *Is it Art?*

The *Foster* court itself suggested that the Fosters might have argued that Svenson's photos were not art.¹⁷¹ Since this question was not raised, the *Foster* court could not address it. The court's suggestion is unworkable, however, since the question of "what is art?" is inherently elusive and highly subjective.

It is indeed true that if the Fosters could have shown that Svenson's photos were not art, then the photos would not have qualified for the First Amendment protection they received. However, winning on this claim would have been extremely difficult. Indeed, Svenson is a widely acclaimed professional photographer.¹⁷² *The Neighbors* was also presented in galleries and museums across the country, and copies were sold both at exhibitions and online.¹⁷³ One could argue that, since photography is nothing more than taking pictures of existing things, it does not qualify as artwork, but the Supreme Court soundly rejected this argument in the copyright context over a century ago.¹⁷⁴

If the term "art" were better defined in New York, winning under such a claim might be easier. For example, California applies the higher standard of needing to be sufficiently "transformative" art to win over another right.¹⁷⁵ Similarly, the Supreme Court has required that a work "must have serious literary, artistic, political, or scientific value."¹⁷⁶ But even with these higher bars, art is still a vague term and the Fosters and those like them would be far from guaranteed to win in court.

Another concern with considering arguments on whether a work constitutes art is that decisions—and thus future precedent—would hinge on the personal opinion of the judge hearing the case. By nature, the judgment of art does not have any accepted standards; opinions on art are an expression of our own individual fancies.¹⁷⁷ The Supreme Court has given no delineating lines on what qualifies as having artistic value.¹⁷⁸ The courts could apply a philosophical notion of what qualifies as art,¹⁷⁹ but that would also be

¹⁷¹ *Foster v. Svenson*, 128 A.D.3d 150, 160 (N.Y. App. Div. 2015).

¹⁷² *Bio*, *supra* note 58.

¹⁷³ *Foster*, 128 A.D.3d at 160.

¹⁷⁴ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

¹⁷⁵ *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

¹⁷⁶ *Miller v. California*, 413 U.S. 15, 26 (1973) (in the context of obscene works).

¹⁷⁷ Eberle, *supra* note 111, at 15.

¹⁷⁸ Nahmod, *supra* note 112, at 243.

¹⁷⁹ *Id.* at 260–261.

murky at best and, without a clear ruling by the highest courts at the state and federal level, would likely be applied inconsistently.

Even artists themselves cannot decide what is art. The first performance of Igor Stravinsky's now seminal work, *The Rite of Spring*, was a disaster. The audience broke into a fight and fellow composers described it as "the work of a madman."¹⁸⁰ Composer Camille Saint-Saëns was so derisive that he exclaimed, "If that's a bassoon, then I'm a baboon!"¹⁸¹ Today, *The Rite of Spring* is considered one of the most important pieces of twentieth-century music.¹⁸² Pablo Picasso's now famous *Les demoiselles d'Avignon* was also a disaster on its public debut. Painter Matisse thought it was a hoax, not art, and the crowd was nearly universally repulsed.¹⁸³ Today, the piece is one of the prized works in the Museum of Modern Art in New York.¹⁸⁴ Needless to say, tastes change, and one man's trash is another's treasure. When asked about whether a rubber foot in a loaf of bread was art, Stefan Edlis, a renowned art collector, merely said, "Well, it's not food."¹⁸⁵

On the other hand, one could consider the amount of effort put into creating the work. When the Supreme Court decided to accept photography under copyright law, they noted the effort that the photographer had put into the work: he could not have just snapped the picture, but needed to have taken time to determine the best lighting, to dress and position his subject, and to arrange the background.¹⁸⁶ But, at least in the copyright space, the Supreme Court rejected the idea that hard work alone made a work copyrightable, discarding the "sweat of the brow" doctrine.¹⁸⁷

Especially with contemporary art, art often does not even look like what many think of as art—but for its display in a museum or gallery with a label. For example, the University of Michigan Museum of Art has on display *Untitled (March 5th) #2*.¹⁸⁸ The piece consists of two hanging 40-watt

¹⁸⁰ Kim Willsher, *Rite that Caused Riots: Celebrating 100 Years of The Rite of Spring*, GUARDIAN (May 27, 2013, 10:01 AM), <https://www.theguardian.com/culture/2013/may/27/rite-of-spring-100-years-stravinsky> [https://perma.cc/LCW8-9JBS].

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Picasso's "*Les Demoiselles D'Avignon*" Ignites Furore, HISTORY, <https://www.historychannel.com.au/this-day-in-history/picassos-les-demoiselles-davignon-ignites-furore> [https://perma.cc/W9XN-M25N].

¹⁸⁴ *Id.*

¹⁸⁵ THE PRICE OF EVERYTHING 57:12 (HBO 2018).

¹⁸⁶ Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).

¹⁸⁷ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991).

¹⁸⁸ *Exchange: Untitled (March 5th) #2*, UMMA EXCHANGE, <https://exchange.umma.umich.edu/resources/18801/view> [https://perma.cc/62PT-A74V].

light bulbs attached to extension cords.¹⁸⁹ The piece's artist, Felix Gonzalez-Torres, explained that the two light bulbs represented himself and his lover at the height of the AIDS crisis, with one and then the other eventually burning out.¹⁹⁰ Works such as these make the question of what is art in the twenty-first century even murkier.

If Svenson had taken a photograph of the building across the street without planning or focus, would it have less artistic meaning? Can you do anything and claim protection by merely calling it art? In the end, whether something is art is in the eyes of the beholder. These might be important questions to address, but they should not be the primary concern of judges. A more valuable question to consider is how to both protect artistic expression—whether of the next Renoir or a photograph of Fifth Avenue—and provide for equitable recovery when art breaches privacy.

B. *Revise the Statute*

The most straightforward way to better provide for equitable solutions in cases like *Foster* is to revise New York's privacy statute. The century-old New York privacy statute cannot properly protect individuals from the privacy risks of modern technology. While not an immediate solution, revising the New York privacy statute is the best way, in the long-term, to both clarify the boundaries between privacy and art and prioritize equity above this battle of rights.

New York's privacy statute has remained largely unchanged since it was first drafted in 1903, yet life in the twenty-first century would be unrecognizable to a New Yorker from 1903. Technology has raised various new issues on privacy as well as the dissemination of information and pictures without permission.¹⁹¹ Surveillance has become so pervasive in 2020 that some question whether there can even be a reasonable expectation of privacy at all.¹⁹² The rise of the Internet has further desensitized us to inva-

¹⁸⁹ *Id.* I saw similarly situated bare light bulbs in the basement of my undergraduate college and never thought of them as art.

¹⁹⁰ *Id.* A similar work by Gonzalez-Torres consists of a pile of 175 pounds of candy, the weight at which his partner, Ross Laycock, died from AIDS. Guests are encouraged to take a piece of candy, mirroring the slow agonizing death of Laycock. Stephanie Eckhardt, *The New Met Breuer Wants You to Take Candies, Not Photos*, W MAGAZINE (Mar. 13, 2016, 11:00 AM), <https://www.wmagazine.com/story/felix-gonzalez-torres-candy-the-met-breuer>.

¹⁹¹ See Barbara Pollack, *When Does Surveillance Art Cross the Line?*, ARTNEWS (Sept. 9, 2014, 9:30 AM), <http://www.artnews.com/2014/09/09/privacy-and-surveillance-art> [<https://perma.cc/M6DC-ZJFE>].

¹⁹² *Id.*

sions of our privacy.¹⁹³ There are myriad new risks to privacy that the 1903 statute simply could neither have imagined nor prevented. Popular outrage against Svenson's photography suggests a need for reform.¹⁹⁴

While the 1903 legislature cared about protecting First Amendment interests, "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy."¹⁹⁵ As discussed earlier, the privacy statutes of California¹⁹⁶ and Illinois¹⁹⁷ are not solely restricted to commercial-infringement exceptions. Meanwhile, Massachusetts—like New York—has commercial exceptions to its privacy statute, but—unlike New York—Massachusetts also maintains a complementary general privacy exception akin to the stand-alone privacy statutes of California and Illinois.¹⁹⁸ And other elements, such as intent, have been used to continue to protect First Amendment rights in states such as California and Illinois.¹⁹⁹ Further, the Second Restatement of Torts uses a reasonable person standard to limit privacy violations.²⁰⁰ These all represent alternatives that New York could consider adding to its statute if it is concerned about either protecting First Amendment rights or enabling more equitable solutions to expression-versus-privacy issues.

Notably, New York Senator David Carlucci introduced a revision to New York's privacy statute in January 2017.²⁰¹ Senate Bill S1648 would have changed the statute to "[p]rohibit[] the recording of visual images of a person having a reasonable expectation of privacy while within a dwelling, when such images are recorded by another person outside the dwelling."²⁰² However, the bill has not advanced beyond the committee stage.²⁰³ One advantage of this proposal—compared to the California and Illinois statutes—is its reduced mens rea requirement. Indeed, rather than requiring intent to violate another person's privacy (as in California and Illinois), mere

¹⁹³ *See id.*

¹⁹⁴ *See* Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W.J.L. TECH. & INTERNET 1, 12–13 (2018).

¹⁹⁵ *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 42 (Cal. 1971).

¹⁹⁶ CAL. CIV. CODE § 1708.8(a) (West 2016).

¹⁹⁷ 765 ILL. COMP. STAT. § 1075.1 (1999).

¹⁹⁸ MASS. GEN. LAWS ANN. ch. 214 § 1B and § 3A (West 1973).

¹⁹⁹ CAL. CIV. CODE § 1708.8(a) (West 2016); *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1203 (S.D. Cal. 2008); *Streisand v. Adelman*, Case No. SC 077 257, at *35 (Cal. Super. Ct. Dec. 31, 2003); *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1179–80 (Ill. App. Ct. 2014).

²⁰⁰ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

²⁰¹ S. 1648, 2017–2018 Leg., Reg. Sess. (N.Y. 2017).

²⁰² *Id.*

²⁰³ *Id.*

knowledge of taking the photo would have sufficed under Senator Carlucci's New York proposal. Because proving intent is difficult in art cases like *Foster*, using a standard of knowledge instead of intent represents a sound policy choice.

The potential risk of statutory revision is that it could restrict the First Amendment right of expression, which would be unconstitutional. And even if it were not unconstitutional, any revision could limit what is considered art. But as the statute currently stands, almost no privacy infringement is actually prohibited. Only images and names used for advertising and trade purposes are covered. As shown by the art of Dewey-Hagborg, the Critical Art Ensemble, and others, it is possible to create meaningful art without harming others or infringing on their privacy. A revised statute could provide guidelines, clarifying for artists when their actions could lead to legal liability. Such clear statutory guidelines would allow artists to work right up to this line, but not cross it, since after that point the art would pose the highest risk of legal liability. Finally, in the case of a privacy violation in the name of art, a revised statute could lay out an equitable system of balancing rights and achieving recovery.

Even if New York revised its privacy statute, one potential remedy—an injunction—would not be very useful today. A photograph posted online can quickly leave the possession of only the photographer and spread rapidly across the globe. It would be impossible for an injunction against only the artist to stop all circulation of the photo. Indeed, once available online, photographs can be shared and posted on websites by scores of users within seconds.

Section 51 already provides for damages as a remedy along with injunctions, but until the New York legislature expands the law to include a broader definition of privacy, this route is blocked to those such as the *Fosters*. Damages are not the ideal remedy for plaintiffs like the *Fosters*, but damages still represent an equitable solution, since defendants like *Svenson* should not reap unencumbered profits resulting from invasions of privacy. Indeed, damages—rather than laying out a winner between expression and privacy—instead offer a balanced, equitable solution.

C. *Unjust Enrichment*

Another equity-based possibility—which benefits from being a more immediate possibility since it does not require ratification by the New York legislature—is unjust enrichment. The unjust enrichment doctrine allows courts flexibility when an existing doctrine does not cover an issue. Unjust enrichment claims can fill holes in statutory law fields like contracts, tort,

and property law.²⁰⁴ This flexibility has led to the use of unjust enrichment claims in cases of public concern across the country²⁰⁵ to obtain restitution from parties who misled groups of individuals or the public for private gain.²⁰⁶

While the fields in which unjust enrichment claims apply have continued to expand, these newly encompassed areas typically relate to commercialization of a loss. For example, unjust enrichment claims against both the tobacco²⁰⁷ and gun industries²⁰⁸ have been articulated in terms of economic gain. In *City of Boston v. Smith & Wesson Corp.*, the court recognized that an unjust enrichment claim was an appropriate legal basis for addressing the defendant's reckless firearm distribution system that increased crime in Boston.²⁰⁹ In that case, the City of Boston successfully pled an unjust enrichment claim on the premise that Smith & Wesson profited on its firearm sales in the illegal secondary firearms market and that the violence following the sales led to several deaths in Boston, harming the population at large.²¹⁰ Some have argued that unjust enrichment could be a viable route for pursuing data aggregators, too.²¹¹

²⁰⁴ David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y. L. SCH. L. REV. 626, 629 (2001) (citing JACK BEATSON, *THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION* 209 (1991)).

²⁰⁵ Candace Saari Kovacic-Fleischer, *Restitution in Public Concern Cases*, 36 LOY. L.A. L. REV. 901 (2003) (citing *Newby v. Enron Corp.*, 18 F. Supp. 2d 684 (S.D. Tex. 2002)); see also *SEC v. Yun*, 148 F. Supp. 2d 1287 (M.D. Fla. 2001); *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000); *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999); *State v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at *15-16 (R.I. Super. Ct. Apr. 2, 2001); *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35 (W.D. Okla. 1991)).

²⁰⁶ See, e.g., *Greenberg v. Miami Child. Hosp. Res. Inst., Inc.*, 264 F. Supp. 2d 1064, 1072-73 (S.D. Fla. 2003) (denying the defendant's motion to dismiss the plaintiffs' unjust enrichment claim); *Lead Indus. Ass'n*, 2001 WL 345830, at *15-16 (ruling that the plaintiff's unjust enrichment claim was sufficient); *City of New York v. Lead Indus. Ass'n*, 644 N.Y.S.2d 919 (N.Y. App. Div. 1996) (reversing the lower court's dismissal of the plaintiff's unjust enrichment claim); *Smith & Wesson Corp.*, 12 Mass. L. Rptr. at *1 (ruling that the plaintiff had adequately asserted its unjust enrichment claim).

²⁰⁷ *Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331 (Miss. 2004).

²⁰⁸ *Smith & Wesson Corp.*, 12 Mass. L. Rptr. at *18.

²⁰⁹ *Id.* at *18.

²¹⁰ *Id.* at *2.

²¹¹ Andrews, *supra* note 3, at 457-60; Class Action Complaint and Demand for Jury Trial, *Zak v. Bose Corp.*, No. 17-cv-2928, 2017 WL 1395259 (N.D. Ill. Apr. 18, 2017).

A prime example is genetics. The field of genetics was brought into the commercial realm when scientists and pharmaceutical companies realized its potential lucrativeness.²¹² In *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, plaintiff Daniel Greenberg approached defendant Dr. Reuben Matalon to request his help with isolating the gene related to Canavan, a fatal disorder most often affecting Ashkenazi Jews.²¹³ Greenberg and others affected by Canavan provided Matalon with tissue samples.²¹⁴ In 1993, Matalon's team realized a major breakthrough by successfully isolating the gene that caused Canavan.²¹⁵ Greenberg and the other families continued to provide tissue while, unbeknownst to them, Matalon filed for and was granted a patent.²¹⁶ Matalon's hospital then started both limiting Canavan disease testing and charging royalties for access to the gene patent, leading to a lawsuit for recovery.²¹⁷

One of Greenberg's legal theories was unjust enrichment, which survived a motion to dismiss. Although the case later settled out of court, legal scholar Debra Greenfield argued that the court's decision to not dismiss the unjust enrichment claim in *Greenberg* could be extrapolated further.²¹⁸ As Greenfield's argument went, if a patient's tissue or DNA was taken in a normal medical procedure—but was then used to make a profit by the physician or researchers—then the patient might have grounds to file an unjust enrichment claim.²¹⁹ In such a case, a benefit would have been taken from the plaintiff, the defendant would have profited from that benefit, and the defendant's retention of such a benefit would have been unjust. A possible harm or a non-financial loss would be enough to satisfy this portion of the claim.²²⁰

²¹² For example, in 2017 a patent court decided a heated battle over patents for the revolutionary gene-editing technology CRISPR-Cas9, with a potential profit in the millions awaiting the winner. Sharon Begley, *Broad Institute Prevails in Heated Dispute Over CRISPR Patents*, STAT (Feb. 15, 2017), <https://www.statnews.com/2017/02/15/crispr-patent-ruling> [<https://perma.cc/G97R-CT8X>]; *Broad Inst. v. Regents of the Univ. of Cal.*, 2017 WL 657415 (Patent Tr. & App. Bd. 2017).

²¹³ 264 F.Supp.2d 1064, 1066 (S.D. Fla. 2003).

²¹⁴ *Id.* at 1067.

²¹⁵ *Id.* at 1067.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Debra Greenfield, *Greenberg v. Miami Children's Hospital: Unjust Enrichment and the Patenting of Human Genetic Material*, 15 ANNALS HEALTH L. 213, 246 (2006).

²¹⁹ *Id.*

²²⁰ *E.g.*, *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028 (Ky. Ct. App. 1936) (where profits received by the defendant who used part of the plaintiff's cave were the basis for recovery rather than any actual losses to the plaintiff).

Creating art at the expense of privacy could fit into unjust enrichment as well. Under New York law, to make an unjust enrichment claim, the plaintiff must allege that “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.”²²¹ With an expanded view of commerce, which has been less rigidly constrained than the advertising and trade purposes of §§ 50-51, Svenson’s actions would readily fit these elements.

First, Svenson was enriched—from *The Neighbors*, Svenson gained press, prestige, and profits. Second, the photographs were published at the expense of the Fosters’ privacy, and the Fosters received nothing in return. Without this injury to their privacy, Svenson would not have been able to capture these photographs or enjoy the profits from them. By publishing the photographs, Svenson injured the Fosters’ right to privacy, their right to enjoy their home free from prying eyes, and their reputation. Third—and finally—the public’s outrage and disapproval around Svenson’s photographs demonstrated that Svenson’s actions were against equity and good conscience.²²² At the very least, since Svenson profited at the expense of the Fosters, he should disgorge the profits.

Admittedly, unjust enrichment will not, by itself, provide specific protection for privacy. But the possibility of damages stemming from an unjust-enrichment claim would deter artists from engaging in behavior similar to Svenson’s. The ruling in *Foster* only encourages artists to engage in risky artistic creations that endanger others’ right to privacy. These artists profit by exploiting others whose privacy is risked—even when the artist takes precautions like Svenson. The unjust enrichment doctrine also offers an equitable solution for both parties, rising above the battle between expression and privacy. Statutory change is the ideal route for the future, but, in the interim, unjust enrichment could provide a remedy for victims such as the Fosters.

CONCLUSION

The worries of Warren, Brandeis, and the specter of the Kodak fiend remain as present now as they were at the end of the nineteenth century. While the art of Heather Dewey-Hagborg and the Critical Art Ensemble, and even Arne Svenson, have brought public attention to issues of privacy, the holding of *Foster v. Svenson* puts the art world and the right to privacy in

²²¹ *Georgia Malone & Co., Inc. v. Rieder*, 973 N.E.2d 743 (N.Y. 2012).

²²² See Blanke, *supra* note 194, at 12–13.

each other's crosshairs rather than offering equitable solutions. Though New York's, rigid and century-old privacy laws significantly constrained the ultimate decision in *Foster*, the court nonetheless managed to leave a trail of breadcrumbs to guide reform. Indeed, this breadcrumb trail—considered alongside an analysis of other state and federal courts—provides two viable paths forward: statutory reform and unjust enrichment. While the *Foster* court did suggest that we could question what qualifies as art, that would be a slippery and uncertain path that could never have objective rules. Instead, the pragmatic suggestion is for the New York legislature to modernize its privacy laws in line with other states'. Until New York legislators rewrite the statute, however, the best weapon may lay in the yet-untested application of unjust-enrichment doctrine. In the eyes of the beholder, *The Neighbors* may be art, but it is also a cautious lesson on how New York law categorically values expression over privacy and equity.

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

Kendall Howell

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

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.

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.

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 statistics¹³—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

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 eye-witness 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:

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

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

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

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 Schorettenboer, *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

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=SnRQAAAAIIBAJ&sjid=ahEEAAAAIIBAJ&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

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

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

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

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=uIYDAAAIAIBAJ&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

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 participated⁹⁶ 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

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

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:

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

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.

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

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

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-

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 Settini, *Baseball Scores \$12 Billion In Television Deals*, FORBES (Oct. 2, 2012), <https://www.forbes.com/sites/christinasettini/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 twenty 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

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-htmllstory.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.sportrac.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-

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

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/R9Y9K-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

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-

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 long-standing 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-

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 so²⁰⁰—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

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.

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 CONNELLY & 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

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 spread²¹⁰—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-

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://www.legalsportsreport.com/news/penn-national-ceo-big-opportunity-in-sports-betting-is-increased-visitation-not-direct-revenue>

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

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

²¹³ See CONNELLY & 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

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.

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 CONNELLY & 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

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-sport-radar-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.

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