
THE BANK IS OPEN: AN OVERVIEW OF HOW MURPHY V. NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION WILL AFFECT THE NBA AND ITS
PLAYERS

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I. Introduction

Professional athletes in the United States make up the majority of the “100 top-earning athletes in the world.”¹ Players like National Basketball Association (“NBA”) star LeBron James and National Football League (“NFL”) quarterback Matt Ryan have been handed unprecedented contracts in recent years.² Even middling NBA players like Chandler Parsons and Joakim Noah have received enormous

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¹ See Kurt Badenhausen, *The World’s Highest-Paid Athletes*, FORBES (June 11, 2019), archived at <https://perma.cc/CTQ8-QHCL> (noting that out of the world’s 100 top-earning athletes of 2019, sixty-two of them are Americans).

² See *id.* (listing LeBron James’s \$85.5 million and Matt Ryan’s \$67.3 million salaries for 2018, both of which landed in the top ten salaries among athletes in the world for that year). For comparison, perhaps the greatest basketball player of all time, Michael Jordan, signed a contract with the NBA’s Chicago Bulls in 1988 that paid him \$25 million over the course of eight years. See *Jordan Signs 8-Year Contract with Bulls*, LOS ANGELES TIMES (Sept. 21, 1988), archived at <https://perma.cc/J9HF-Y4RL>. To compare the \$67.3 million Matt Ryan earned in the 2017-18 season to earnings of past NFL players, the entire Pittsburgh Steelers team earned, collectively, just \$13.1 million. See John Breech, *FLASHBACK: Steelers only spent \$13.1M for entire team’s salary in 1990*, CBS SPORTS (Aug. 29, 2014), archived at <https://perma.cc/CDE7-WQKD>. Further, the top individual earners of the 1990s were quarterbacks Joe Montana and Jim Kelly, who earned \$3.25 million and \$2.6 million respectively. *Id.*

contracts.³ As a result, some critics argue that most professional athletes are overpaid.⁴ But, much to their chagrin, professional athletes in the United States are soon going to be making more money than ever before.⁵

The revenue that supplies the American professional athlete's massive salary comes from a variety of sources.⁶ As lucrative as those sources are, the United States Supreme Court's decision in *Murphy v. National Collegiate Athletic Association* will provide access to yet

³ See Dan Favale, *5 Worst NBA Contracts at Every Position*, BLEACHER REP. (July 17, 2017), archived at perma.cc/VC2E-HFBZ (listing Chandler Parsons's and Joakim Noah's contracts as two of the five worst contracts for their respective positions in the NBA). Both Chandler Parsons and Joakim Noah have not met expectations performance-wise since signing those contracts, as neither of their statistics have been up to par and both have been plagued by injury. *Id.* See also *Chandler Parsons Contract, Salary Cap Details & Breakdowns*, SPOTRAC (Sept. 2, 2019), archived at perma.cc/Q6NS-BVPW (detailing Chandler Parsons four-year, \$94.4 million contract as the forty-fifth highest in the NBA); *Joakim Noah Contract, Salary Cap Details & Breakdowns*, SPOTRAC (Sept. 2, 2019), archived at perma.cc/3BQW-KUX8 (detailing Joakim Noah's four-year contract as the fifty-third highest in the NBA). Joakim Noah, since signing his contract in 2016, has played just over half of a season, and last year was behind Enes Kanter, Kyle O'Quinn, and Willy Hernangomez in the New York Knicks' rotation. See Scott Davis, *The disastrous \$72 million contract the Knicks gave Joakim Noah is getting worse*, BUS. INSIDER (Jan. 29, 2018), archived at perma.cc/WWH8-WZE2 (reiterating the negative implications of the Knicks' signing Noah).

⁴ See Chris Mueller, *Two Sides to Every Coin: Are Professional Athletes Overpaid?*, BLEACHER REP. (Mar. 4, 2012), archived at perma.cc/CDF6-DKJC ("If you look at it subjectively, it is hard to deny something that I think a lot of people will think: Most athletes are overpaid."). *But see* Leland Faust, *Believe it or not, professional athletes are actually underpaid*, SPORTS ILLUSTRATED (Oct. 20, 2016), archived at <http://perma.cc/9C8R-LMV6> (arguing that professional athletes should be paid more due to their effects on sports franchise values, influences on American culture, etc.).

⁵ See Scott Davis, *There is buzz around the NBA that legal betting could cause player salaries to spike again and create more wild offseason spending sprees*, BUS. INSIDER (Aug. 5, 2018), archived at perma.cc/F3SU-VDM2 (discussing how the legalization of sports gambling may create a salary spike in player contracts as doors are now open for professional sports leagues to partner with the gambling industry, creating windfalls for the leagues).

⁶ See John Nagel, *Why do major league athletes make so much money?*, QUORA (Mar. 7, 2018), archived at <https://perma.cc/4ZE3-FDA2> (considering, generally, the major factors that contribute to sports leagues' revenue, ranging from merchandising to television contracts).

another source of revenue for professional sports leagues.⁷ The Supreme Court's decision in *Murphy* legalized sports gambling throughout the country, leaving regulation of it to the states, and leagues free to partner with gambling agencies in an effort to maximize revenue production.⁸ As professional sports leagues like the NBA begin to make more money after the *Murphy* decision, players will likely push for a share of the new revenue.⁹ Without a doubt, professional athletes will soon see increases in contract size as sports gambling expands to new markets and jurisdictions.¹⁰

Part II of this Note provides an overview of the complicated history with gambling in the United States, and reviews the Professional and Amateur Sports Protection Act (PASPA) and significant cases that it has upheld.¹¹ Part III details how the Supreme

⁷ 138 S. Ct. 1461, 1461 (2018) (ruling that regulation of sports gambling is a power left to the individual states). See Michael McCann, *How the Supreme Court's Sports Betting Ruling Affects Leagues, Players and Fans*, SPORTS ILLUSTRATED (May 14, 2018) [hereinafter *Supreme Court's Sports Betting Ruling*], archived at <https://perma.cc/23XM-9GAT> (proposing the question of whether players have a contractual right to receive a proportion of the funds from sports betting).

⁸ See *Murphy*, 138 S. Ct. at 1484–85 (noting that the legalization of sports gambling is not a choice for the Supreme Court to make); see also *Supreme Court's Sports Betting Ruling*, *supra* note 7 (discussing the potential impacts that the *Murphy* case might have on professional sports leagues); John Wolohan, *How Legal Sports Betting Could Benefit the Pro Leagues*, FORTUNE (May 21, 2018), archived at <https://perma.cc/S992-9P3Z> (arguing that professional sports leagues should expect to see increased revenue in other areas due to the legalization of sports gambling). “For example, people who have bet money on games watch more games on television. If more people are watching, TV ratings increase, and the networks are able to charge more money for ad rates.” Wolohan, *supra*. See also David Purdum & Darren Rovell, *NBA signs deal with MGM to be gaming partner*, ESPN (Aug. 9, 2018), archived at perma.cc/SH5P-63Y4 (noting that the NBA has pioneered the path for professional sports leagues to negotiate deals with gambling partners).

⁹ See Danny Heifetz, *If Sports Gambling Is Legal, Where Does the Money Go?*, THE RINGER (May 24, 2018), archived at perma.cc/KH9A-LU87 (acknowledging that players want a piece of the cake that is the increased revenue resulting from the NBA's partnership deal).

¹⁰ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (discussing the ways in which players could “deserve” a cut of revenue generated from sports betting); see also Davis, *supra* note 5 (asserting that the legalization of sports gambling has created a “buzz” that the salary cap will again spike, resulting in larger contracts and increased team spending).

¹¹ See *infra* Part II. See also Professional and Amateur Sports Protection Act, 28 U.S.C.A. §§ 3701–04 (West 1992).

Court deemed PASPA unconstitutional in *Murphy* and the downstream effects of that decision.¹² Part IV provides an analysis of the implications of *Murphy* and their effects on the gambling industry in general, the NBA, and the NBA's players, as well as the action the National Basketball Players Association ("NBPA") will likely have to take to protect its players.¹³

II. History

Since its very beginning, gambling has been prevalent in American society.¹⁴ From the first efforts to regulate it, gambling has posed a unique public policy issue: it is very popular among the public, yet public authorities have strictly regulated it.¹⁵ Critics have charged gambling as immoral, sacrilegious, and addictive throughout our nation's existence, resulting in its complete prohibition in 46 of the 50 states until May 2018.¹⁶

¹² See *infra* Part III. See also *About & History*, NBPA (2019), archived at <https://perma.cc/U2VZ-E7JW> ("The National Basketball Players Association (NBPA) is the union for current professional basketball players in the National Basketball Association."). The NBPA was established in 1954 to ensure the protection of the NBA players' rights and to maximize their opportunities on and off the court. *Id.*

¹³ See *infra* Part IV.

¹⁴ See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 23–4 (1992) (noting the Puritans' use of lotteries in the New World); see also Joel Weinberg, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 296 (2006) (dubbing the United States as a "gambling nation, where a vast majority of Americans gamble for recreation"); Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571 (2013) (stating that gambling in the United States can be traced back to the colonial settlements of the eighteenth century).

¹⁵ See Ronald M. Pavalko, *Gambling and Public Policy*, 6 PUB. INTEGRITY 333, 333 (2014), archived at <https://perma.cc/5BMK-82UM> (highlighting gambling's public policy issues and the fact that internet gambling flourishes while the federal and state governments are ambivalent about legalizing it).

¹⁶ See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018) (noting that gambling was illegal in all but the four states that PASPA grandfathered); see also *Phillips v. Double Down Interactive, LLC*, 173 F. Supp. 3d 731, 743 (N.D. Ill. 2016) (discussing the plaintiff's argument that gambling is "'immoral' and 'otherwise unethical, oppressive, [and] unscrupulous,'" because it can be associated with addiction).

Once the federal government was established, the regulation of gambling was left to the states, however, the industry has been part of American society since the colonial period.¹⁷ Colonies took advantage of the gambling industry's popularity by incorporating lottery systems to produce revenue.¹⁸ The colonies used these proceeds to make societal improvements due to the lack of a centralized government and its inability to tax.¹⁹ The colonies did not run these lotteries themselves, but authorized private parties to do so.²⁰

By the early nineteenth century, corruption and scandal spread throughout the lottery industry, resulting in a decline in the industry's popularity.²¹ Consequently, all but three states banned lotteries

¹⁷ See Woo, *supra* note 14 (“Gambling in the United States has traditionally been a state regulated activity.”). “All thirteen colonies used funds from lotteries to help fund substantial public works...” *Id.*

¹⁸ See *id.* at 571–72 (“In fact, gambling was such an integral part of financing colonial governments that, during that era, playing the lottery was considered a civic responsibility.”).

¹⁹ See *id.* noting that colonial settlements utilized gambling proceeds in local governments).

Between 1746 and the Civil War, American lotteries were authorized for such projects as the establishment or improvement of Harvard, Yale, Kings College (Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina, and the University of Michigan, the benefit of the Masons, the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches. During this period, lotteries provided funds to 47 colleges, 300 lower schools and 200 church groups.

Rychlak, *supra* note 14, at 25–26.

²⁰ See Christine Hurt, *Regulating Publics Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. Rev. 371, 394 (2006) (stating that private parties petitioned their governments to use lotteries to raise capital for public goods). However, most colonies enacted regulatory schemes that barred any personal profits resulting from the operation of lotteries. See Rychlak, *supra* note 14, at 26 (observing that because of allegations of fraud and misrepresentation, colonies prevented personal profits from lottery operation).

²¹ See Daniel J. Larson, *Can Daily Fantasy Sports Overcome the Odds?*, 17 J. HIGH TECH. L. 451, 453 (2017) (“Public opinion rapidly declined once it was revealed that the lottery administrators were growing increasingly wealthy through dishonest

entirely.²² In addition to the state prohibitions, the federal government virtually destroyed the lottery industry when it passed the Anti-Lottery Act of 1890.²³ By the end of the nineteenth century, state lotteries were essentially extinct.²⁴

The ban on state lotteries was the impetus that sparked the forms of gambling that are so prominent today, principally sports betting.²⁵ Sports betting began with wagering on horse racing during the 1800s.²⁶ Into the 1920s, the American bettor's sport of choice was baseball.²⁷ As a result, baseball was ingrained with corruption, and internal gambling among its players generated the infamous Black Sox scandal; Scandals like this have plagued every sport and continue to

means.”); *see also* Hurt, *supra* note 20, at 395 (observing that private lottery companies strayed from their public purposes and were found to be fraudulent).

²² *See* Larson, *supra* note 21, at 453–54 (discussing the failure to regulate lotteries that resulted in the banning of them completely).

²³ *See* 18 U.S.C. §§ 1302, 1953 (2014) (defining lottery contraband and outlining the penalties for taking part in any activity related to any sort of lottery or game of chance). *See also* G.R. BLAKELY, DEVELOPMENT OF THE LAW OF GAMBLING 1775-1976, at 672–73 (Cornell L. Sch., 1977) (discussing the anti-lottery regulations that emerged in the 1800s).

²⁴ *See* John V. Haskell, *More than Just Skin(s) in the Game: How One Digital Video Game Item is Being Used for Unregulated Gambling Purposes Online*, 18 J. HIGH TECH. L. 125, 130 (2017) (discussing the fall of the state lottery industry due to the Anti-Lottery Act of 1890).

²⁵ *See* Haskell, *supra* note 24, at 130 (stating that “with the fall of state-run lottery schemes, social gambling began to take a new form as the many Americans began to place their hard-earned dollars on sports betting in the early 1900s”). At the turn of the 20th century, Americans turned to sports gambling as state lotteries throughout the country were ousted. *Id.* at 130–31.

²⁶ *See* Larson, *supra* note 21, at 454 (tracing the earliest form of sports gambling to horseracing).

²⁷ *See* Haskell, *supra* note 24, at 130–31 (mentioning baseball's prominence in the realm of gambling); *see also* Larson, *supra* note 21, at 454 (noting the new and exciting opportunities that baseball provided to gamblers in the early 1900s); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L. J. 201, 202 (2015) (framing the rise of baseball as a forum for sports betting as other forums declined).

do so.²⁸ Such high-profile scandals provoked a public backlash against professional baseball.²⁹

However, it did not take long for sports gambling's popularity to rebound with the American people as action moved to other sports.³⁰ Although illegal at the time, Americans in the 1920s turned to wagering their cash on other professional and collegiate sports, in addition to baseball.³¹ Federal prohibition forced activity to black

²⁸ See Larson, *supra* note 21, at 454 (discussing the grip that “con artists” had on a few players who helped to rig games); Rob Neyer, *Two distinct periods of gambling*, ESPN (Jan. 7, 2004), *archived at* <https://perma.cc/FF2S-2CZS> (referencing researcher and author Howard Rosenberg’s discovery of 162 instances of players and team officials gambling on baseball). The 1919 World Series, one of the most famous sports gambling scandals in history, was one of the games that these con artists rigged. See Larson, *supra* note 21, at 454. The scandal received global attention, and gambling’s reputation throughout the country plummeted. *Id.* Players involved in the fixing of the 1919 World Series received major payouts. See Neyer, *supra*. Pitcher Eddie Cicotte was paid \$10,000 for his part in the fixing, and Shoeless Joe Jackson was paid \$5,000; both were members of the White Sox team that is notoriously nicknamed the “Black Sox.” *Id.* The 1919 World Series was not the only championship series plagued by the effects of illegal gambling, though many believe it to be an isolated incident. *Id.* The 1903 and 1912 World Series championships were particularly clouded with the suspicion of corruption. *Id.* In 2007, an illegal gambling operator cut a deal with NBA referee Tim Donaghy to fix games. See Scott Eden, *How former ref Tim Donaghy conspired to fix NBA games*, ESPN (Feb. 19, 2019), *archived at* <https://perma.cc/9T6E-SMAV> (“‘If you looked at the stats,’ said one gambler in *The Office* at the time, ‘you could see he was calling more fouls on the team he bet against and less fouls on the team he bet on. That was obvious.’”).

²⁹ See Larson, *supra* note 21, at 454 (“The massive scandal caught the world’s attention; and once again the public opinion of gambling plummeted.”); Trippiedi, *supra* note 27, at 202 (acknowledging the negative impression of sports bettors that the corruption rigging the 1919 World Series left on the public).

³⁰ See Larson, *supra* note 21, at 454 (stating “[b]ut it wouldn’t take long before the sports gambling craze regained its grip”).

³¹ See *id.* at 455 (noting the comeback that sports gambling made through boxing, college football, basketball, and horseracing; and the illegality of sports gambling at the federal level); Haskell, *supra* note 24, at 130–31 (observing that professional and collegiate sports other than baseball were popular forums for gambling). See also Jeremy Martin, *History of Sports Betting and the Point Spread*, DOC’S SPORTS SERVICE (May 30, 2017), *archived at* <https://perma.cc/2Q3Y-MDAQ> (dubbing the 1920s at the ‘Golden Era’ of sports); Jim Sumner, *Sports in the 1920s*, TAR HEEL JUNIOR HISTORIAN (2004), *archived at* <https://perma.cc/M9UT-N2JR> (highlighting the economy’s, radio’s, and newspapers’ influences on the rise in popularity of sports in the 1920s).

markets, where mobsters were the catalysts of this illegal industry.³² Horse racing and baseball remained a primary interest, and as boxing gained popularity, the three fan-favorites sat at the top of the illegal sports betting industry.³³ While college basketball managed to build a fairly strong presence, college football became the amateur sport of choice for bettors.³⁴

Despite being illegal, sports betting remained a part of American culture through the 1950s and 1960s when Congress launched its campaign aimed specifically at cracking down on gambling.³⁵ Congress's first attempt to gain some ground in regulating gambling was to legalize it, in a way.³⁶ The Revenue Act of 1951 ("Revenue Act") legalized gambling at the federal level.³⁷ However,

³² See Chapter 8: *SPORTS GAMBLING*, ENCYCLOPEDIA.COM (2005), archived at <https://perma.cc/CKH2-N8TJ> (discussing mobsters' organization of illegal sportsbooks in the 1920s). During the 1920s and the early 1930s, mobsters dominated the illegal gambling business by setting up gambling systems across the country. *Id.* The mobsters, in essence, benefitted from the banning of gambling as they set up their own wiring services to relay official results, whereas the legitimate wire services were prohibited from doing so. *Id.* As a result, gamblers had no choice but to wager through the mobsters' systems. *Id.*

³³ See *US Sports Betting History*, BEST ONLINE BETTING SITES (Oct. 12, 2018), archived at <https://perma.cc/9CGK-X4ZR> (pointing out horseracing, baseball and boxing's prominence in 1920s sports betting).

³⁴ See *id.* (discussing football's popularity in the 1920s, and college football's footing in the sports betting industry).

³⁵ See Haskell, *supra* note 24, at 131 (pointing to Congress's regulations in the 1950s and 1960s); John E. Coons, *The Federal Gambling Tax and the Constitution*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 637, 637 (1953) (noting that Congress recognized the need for combatting organized crime, specifically the illegal gambling industry, and that Congress enacted two new tax laws on gambling in 1951). Congress's new attack on illegal gambling was implemented in the Revenue Act of 1951. See Coons, *supra*, at 637; see also Ryan M. Rodenberg & Anastasios Kaburakis, *Legal and Corruption Issues in Sports Gambling*, 23 J. LEGAL ASPECTS SPORT 8, 10–17 (2013) (providing a primer on federal statutory provisions regarding the regulation of gambling).

³⁶ See Haskell, *supra* note 24, at 131 (breaking down Congress's imposition of a 10% excise tax on any and all wagers on sporting events and an annual stamp tax on anyone who was liable for the excise tax). See also Coons, *supra* note 35, at 637 ("The first law imposes a ten per cent excise tax on all wagers on sports events or other contests placed with a person engaged in the business of accepting wagers or in a wagering pool or lottery conducted for profit.").

³⁷ See Revenue Act of 1951, Pub. L. No. 183, 65 Stat. 529 (effective through 1953) (providing temporary regulatory schemes for gambling at the federal level). See also Coons, *supra* note 35, at 637 (explaining the two laws that Congress implemented

the Revenue Act enforces state criminal laws against gambling as a means to discourage it.³⁸ The Revenue Act forced professional gamblers to report their gambling activity to the federal government for tax purposes, exposing them to prosecution under *state* anti-gambling laws.³⁹

Ten years later, Congress proposed the Wire Act of 1961 (“Wire Act”).⁴⁰ In response to the suggestions of a Senate special committee spearheaded by Senator Estes Kefauver, the Wire Act assisted States with enforcing anti-gambling laws.⁴¹ The Wire Act was

via the Revenue Act of 1951 to combat organized crime and its role in sports gambling). “The second law is a special \$50.00 per year occupational stamp tax on a person liable for the tax on wagers or a person who receives wagers in behalf of any person so liable.” *Id.* The Act also stated that paying the taxes it demanded did not relieve any of those taxpayers from criminal penalties that may be the consequence of violating any federal or state law prohibiting the gambling activities that the taxpayer participated in. *Id.* Failure to pay either of these taxes warranted a fine anywhere from \$1,000 to \$5,000, and “willful violations” warranted a fine of up to \$10,000 and imprisonment of up to five years. *Id.*

³⁸ See Coons, *supra* note 35, at 637 (presenting the purpose of the Revenue Act’s two gambling regulations).

³⁹ See *id.* at 637–38. (discussing the dilemma that professional gamblers faced as a result of the Revenue Act). Naturally, if the gamblers did not report their activities, then the statute’s sanctions became operative, and the gamblers were subject to fines and imprisonment. *Id.*

⁴⁰ 18 U.S.C. § 1084 (1994) (penalizing any engagement of gambling activity via wire communication in interstate or foreign commerce involving wagers on sporting events).

⁴¹ See Rodenberg & Kaburakis, *supra* note 35, at 10–11 (reviewing the work of Senator Kefauver and the *Special Committee to Investigate Organized Crime in Interstate Commerce*, also known as the Kefauver Committee). See also Haskell, *supra* note 24, at 131 (laying out the purpose of the Wire Act). In an attempt to illegalize communication between gambling organizations and their participants via wire communication, the Wire Act states:

[W]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

Haskell, *supra* note 24, at 132. Further, the Wire Act defines a “wire communication” as:

a more aggressive approach by Congress aimed not just to take down gambling facilities and organizations, but to take down the individual gambling professionals as well.⁴² By enacting the Wire Act, Congress aimed to reduce the efficiency of sports gambling to diminish participation in the activity.⁴³ However, the Wire Act obviously could not defeat gambling's popularity as the black market industry maintains its presence today.⁴⁴

In 1970, Congress enacted the Organized Crime Control Act, an even more aggressive, overarching approach that included a pair of acts aimed at cracking down on gambling.⁴⁵ Both the Illegal Gambling Business Act of 1970⁴⁶ ("IGBA"), and the Racketeer Influenced and

[A]ny and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

18 U.S.C. §1081 (1994). *See also* Rodenberg & Kaburakis, *supra* note 35, at 11 (setting forth that the Wire Act made it clear that its provisions were only to be enforced in interstate or foreign commerce in a State or foreign country that had outlawed gambling on sporting events). Kefauver, a Democrat from Tennessee, introduced a resolution to the Senate that led to the formation of the Kefauver Committee. *Id.* at 10. The Kefauver Committee held hearings that were occasionally publicly broadcasted. *Id.* at 11. One of the recommendations that the Committee made to the federal government was regulation of practices by sports bettors that took place via wire communication, i.e. radio, television, telegraph, and telephone. *Id.* The Kefauver Committee's recommendation led to Congress passing the Wire Act of 1961. *Id.*

⁴² *See* Larson, *supra* note 21, at 460 (providing that the Wire Act has been asserted against professional gamblers in addition to the facilities and organizations of the industry).

⁴³ *See* Larson, *supra* note 21, at 459–60 (suggesting that the true purpose of the Wire Act was to reduce the gambling industry's ability to quickly and efficiently retrieve results of sporting events).

⁴⁴ *See* *Gambling Industry in the U.S. – Statistics & Facts*, STATISTA (July 24, 2018), archived at <https://perma.cc/U63Z-ZSQY> (reporting that gambling contributes around \$137.5 billion to the U.S. economy as of 2018 and employs more than 730 thousand people).

⁴⁵ *See* Rodenberg & Kaburakis, *supra* note 35, at 13–15 (setting forth the legislation that incorporated acts aimed at controlling illegal gambling).

⁴⁶ 18 U.S.C. § 1955 (2014) (defining "illegal gambling business," and the implications carried with operating such a system).

Corrupt Organizations Act⁴⁷ (“RICO”) became law as parts of the Organized Crime Control Act.⁴⁸ Congress enacted the IGBA as a means to take down “gambling businesses of major proportions.”⁴⁹ The RICO Act, on the other hand, was aimed at removing organized crime and racketeering from legitimate business operations conducting interstate activity.⁵⁰ Neither of these attempts to slow the growth of gambling in America seemed to be effective as gambling maintained its conspicuous presence throughout the country.⁵¹

Next in the line of major federal anti-gambling regulations was The Professional and Amateur Sports Protection Act of 1992 (“PASPA”).⁵² PASPA was Congress’s most explicit and direct attack

⁴⁷ 18 U.S.C. §§ 1961–1962 (2016) (defining “racketeering activity,” and outlining the activities prohibited as a result of this statute, which has very recently been preempted). *See also* Melanson v. U.S. Forensics, LLC, 183 F. Supp. 3d 376, 392 (E.D.N.Y. 2016) (preempting RICO, holding that “civil RICO claims are precluded where the challenged conduct is already covered by a more comprehensive and specialized federal statute”).

⁴⁸ *See* Rodenberg & Kaburakis, *supra* note 35, at 13–14 (reviewing the purposes and functions of both the Illegal Gambling Business Act of 1970, and the Racketeer Influenced and Corrupt Organizations Act).

⁴⁹ *See* Rodenberg & Kaburakis, *supra* note 35, at 14 (discussing how prosecutors used the IGB: in order for the prosecution to establish an IGBA claim, it must prove that the business “(1) is violating a state or local law; (2) includes five or more people who finance, manage, supervise, direct, or own all or part of the business; and (3) is in substantially continuous activity for more than 30 days or has gross revenue of \$2,000.”).

⁵⁰ *See* Rodenberg & Kaburakis, *supra* note 35, at 14 (offering the implications of the RICO act). The statute’s language is general enough to that the government could apply it to any illegal activities relating to any enterprise that affects interstate commerce. *Id.* “For a RICO case to be established, the government needs to prove that an enterprise existed and that it affected interstate or foreign commerce.” *Id.*

⁵¹ *See Gambling In The United States: An Overview*, ENCYCLOPEDIA.COM (2016), archived at <https://perma.cc/GST5-43SX> (expounding upon the popularity of gambling in America during the 1970s). During the 1970s, the U.S. Commission on the Review of the National Policy toward Gambling conducted a nation-wide study on the attitude of Americans towards gambling. *Id.* The study produced results that showed overwhelming support for the illegal activity. *Id.* The commission reported that 80% of Americans approved of gambling, and that 67% of Americans engaged in gambling activities. *Id.* The commission, in its final report: *Gambling in America*, went so far as to suggest that state governments consider legalizing and regulating gambling on their own, free from any federal government intervention. *Id.*

⁵² *See* 28 U.S.C. §§ 3701–3704 (1992) (defining unlawful sports gambling).

on gambling, and very specifically sports gambling.⁵³ The Act, unlike previous legislation, expressly and explicitly forbade any involvement whatsoever in sports gambling by any person or government entity.⁵⁴ Controversially, PASPA was passed at a time when a minority of states were in the process of creating legislation that legalize forms of sports betting.⁵⁵ Consequently, there was both strong support and vehement opposition to PASPA.⁵⁶

⁵³ See Haskell, *supra* note 24, at 135 (“Expressly forbidding states to sanction sports betting, PASPA was by far and away the Federal Government’s most direct action in an attempt to regulate or do away with a gambling scheme that was quickly growing out of hand since the Anti-Lottery Act of 1890.”). See also Will Brinson, *Can I legally bet on sports now? Everything you need to know about Supreme Court’s ruling*, CBS SPORTS (May 14, 2018), archived at <https://perma.cc/Z5SN-H395> (providing insight as to why sports betting was illegal).

⁵⁴ 28 U.S.C. § 3702 (1991).

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.

Id.

⁵⁵ See Woo, *supra* note 14, at 574 (stating that at the time of PASPA enactment, as many as thirteen states were considering allowing sports bets). Moreover, Woo goes on to quote the Senate report, noting that the states would be allowing gambling in an effort to provide relief from the increasing state deficits. *Id.* at 574–75. “States are considering a wide variety of State-sponsored gambling schemes. Some would allow sports gambling on river boats, other would take bets on sports at off-track betting parlors, still others propose casino-style sports books.” *Id.* (quoting S. REP. NO. 102-248, at 5 (1992)).

⁵⁶ See Steven L. Shur, *Police Blockade: How the Revitalization of the Tenth Amendment Could Pave the Way to Legalized Sports Betting in New Jersey*, 10 RUTGERS L. J. & PUB. POL’Y 99 (2013) (discussing Senator Bill Bradley’s support of PASPA at the time Congress was considering it). “The very premise of PASPA, according to Senator Bradley, was ‘that the revenue earned by the states through sports gambling is not enough to justify the waste and destruction attendant to the practice.’” *Id.* See also Woo, *supra* note 14, at 575–76 (noting that PASPA had the support of the commissioners of Major League Baseball, the National Basketball League, and the National Football League). Senator Chuck Grassley was one of the opponents to PASPA, arguing that the Act would directly intrude on states’ rights, raise constitutional issues, and violate the principles of federalism. *Id.* Further,

A strange twist to the enactment of PASPA was the grandfathering-in of Oregon, Delaware, Montana and Nevada as the only four states exempt from the Act.⁵⁷ PASPA also provided a provision that would have allowed New Jersey to set up a sports gambling operation within a year of the Act's enactment.⁵⁸ Through section 3704 of PASPA, the federal government essentially left a lottery to the four grandfathered states and the country's illegal gambling operators.⁵⁹ Since PASPA was enacted, these four states have maintained the power to allow its citizens to legally place bets on both professional and collegiate sports.⁶⁰ Oregon's system allowed its citizens to legally bet on each quarter of a football game, as well as on the game as a whole, but legislation was eventually passed prohibiting betting on the outcome of sports games.⁶¹ In 2009, Delaware reinstated its sports betting system, allowing its citizens to wager on professional football games.⁶² Delaware attempted to expand its system to allow bets on leagues other than the NFL, but in *The Office of the Commissioner of Baseball v. Markell*, the Third Circuit Court of

Grassley argued that preventing states from allowing and regulating sports gambling would interfere with state revenues and leaving a monopoly for the illegal sports gambling operators over a multi-billion-dollar industry. *Id.*

⁵⁷ See Andrew Vacca, *Sports Betting: Why the United States Should Go All In*, 11 WILLAMETTE SPORTS L.J. 1, 4 (2014) ("Oregon, Delaware, Montana and Nevada are the only four states exempt from PASPA."). PASPA allowed any State that conducted its own "lottery, sweepstakes, or other betting, gambling, or wagering scheme" during January 1, 1976 and August 31, 1990 to continue to conduct its own system and regulate that system as the State saw fit. 28 U.S.C. § 3704 (1992). See also Vacca, *supra*, at 4 (grandfathering in Oregon, Delaware, Montana and Nevada).

⁵⁸ See 28 U.S.C. § 3704 (permitting a sports operating system to be established within one year after the enactment of PASPA); *Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018) ("Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's effective date.").

⁵⁹ See 28 U.S.C. § 3704(a)(1) (leaving open the operation of "other betting, gambling, or wagering scheme[s]" during the period from January 1, 1976 to August 31, 1990).

⁶⁰ See Vacca, *supra* note 57, at 4–5 (pointing out the powers that the four grandfathered states maintained).

⁶¹ See *id.* at 4 (outlining Oregon's approach to sports gambling after PASPA was enacted). Oregon's legislature passed a bill in 2005 that prevented the state from executing a lottery system that was based on the outcome of sports games. *Id.* However, the bill reserved Oregon's right to reestablish their sports betting lottery. *Id.*

⁶² See *id.* at 5 (noting Delaware's reintroduction of sports gambling in 2009).

Appeals prevented any expansion beyond the extent by which the State's former gambling system was operated.⁶³ Montana did not reinstitute a sports lottery system, but instead authorized sports pools and tab games that were allowed under PASPA.⁶⁴ Lastly, Nevada is the only states to maintain a completely unrestricted and fully operational sportsbook.⁶⁵

New Jersey failed to establish a sports betting operation within a year of PASPA's enactment and missed its opportunity to participate in legal sports gambling operations.⁶⁶ Since then, New Jersey has had a change of heart.⁶⁷ In 2012, the New Jersey legislature exercised an

⁶³ See *Comm'r of Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (holding that "expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling—namely single—game betting—beyond 'the extent' of what Delaware 'conducted' in 1976 would engender the very ills that PASPA sought to combat"). In March 2009, the Governor of Delaware proposed legislation authorizing sports gambling, and in response, professional sports leagues filed a complaint claiming that the bill violated PASPA. *Id.* at 295. The court added that the sports lottery system did not have to be identical in every way to the operations of the 1976 lottery. *Id.* at 303. "Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period." *Id.* The court's rationale rested upon limiting the spread of state-sponsored sports gambling and maintaining the integrity of sports in general. *Id.* at 304.

⁶⁴ See Vacca, *supra* note 57, at 5 (explaining briefly Montana's post-PASPA sports gambling atmosphere). Through the sports pools and tab games, Montana allowed its citizens to bet on Fantasy Football and Fantasy Racing Lottery. *Id.*

⁶⁵ See Vacca, *supra* note 57, at 5 ("Nevada is the only state to offer a fully operational sports book [sic], which allows its citizens to place legal wagers on all sporting events in every league without restriction."). For example, in the mid-1990s, a Nevada casino was the first gambling operation to offer "in-game" bets. See Vinny Magliulo, *History of sports betting in Las Vegas*, VSiN (Aug. 21, 2017), archived at <https://perma.cc/UAD6-ENPU>. Additionally, in 2016 Vic Salerno, a veteran operator, secured Nevada's first approval from state regulators for Fantasy Sports. *Id.* A unique example of the lack of restriction in Nevada, is Nevada Sports Books' offering of odds and accepting of wagers on the NFL and NBA Drafts. *Id.* See also *Sportsbook*, LEXICO (2019), archived at <https://perma.cc/2U8W-SQGQ> (defining sportsbook as "[a]n establishment that takes bets on sporting events and pays out winnings").

⁶⁶ See *Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018) (noting that New Jersey did not take advantage of the PASPA provision enabling them to establish a legal sports betting scheme within the state).

⁶⁷ See *id.* (pointing out New Jersey's failure to establish a sports betting operation within the given period laid out in PASPA § 3704(a)(3), and that the state has switched its position on the matter as they wish to legalize sports gambling).

authority, granted by a voter-approved amendment to the state constitution, to legalize sports betting within the state.⁶⁸ In *National Collegiate Athletic Association v. Christie*, the NCAA and major professional sports leagues sued the New Jersey governor at the time, Chris Christie, in an action seeking to enjoin the 2012 law.⁶⁹ The District Court and the Third Circuit found in favor of the NCAA, reasoning that the language in PASPA did not contain affirmative commands instituting prohibition that would violate the anti-commandeering doctrine.⁷⁰ Upon New Jersey's petition for a writ of certiorari, the Department of Justice informed the Supreme Court that PASPA left the states free to repeal those state prohibitions of sports betting in whole or in part, assuming that the federal government's PASPA was supreme; the court denied the petition for certiorari.⁷¹

In 2013, New Jersey again attempted to license gambling on certain sporting events in the hopes of reaping the industry's monetary benefits.⁷² Unfortunately for New Jersey, in *NCAA v. Governor of*

⁶⁸ See *id.* (summarizing the process in which the state of New Jersey authorized sports betting in Atlantic City and at horseracing tracks in violation of PASPA).

⁶⁹ See *id.* (stating that the NCAA and professional sports leagues quickly attacked the 2012 legislation by arguing that the new law violated PASPA).

⁷⁰ See *id.* at 1471–72 (reviewing the Third Circuit's reasoning that "PASPA does not require or coerce the states to lift a finger").

⁷¹ See *id.* (detailing the Third Circuit's logic in determining that PASPA does not violate the anti-commandeering doctrine and the equal sovereignty principal, due to a lack of affirmative commands).

The panel recognized that an affirmative command (for example, "Do not repeal") can often be phrased as a prohibition ("Repeal is prohibited"), but the panel did not interpret PASPA as prohibiting the repeal of laws outlawing sports gambling. A repeal, it thought, would not amount to "authoriz[ation]" and thus would fall outside the scope of § 3702(1). "[T]he lack of an affirmative prohibition of an activity," the panel wrote, "does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." ... Opposing certiorari, the United States told this Court that PASPA does not require New Jersey "to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."

Murphy, 138 S. Ct. at 1471.

⁷² See *NCAA v. Governor of N.J. (Christie II)*, 730 F.3d 208, 214–15 (3d Cir. 2013) (deciding on appeal whether the PASPA was constitutional). Both professional and amateur sports organizations—and the United States as an intervening plaintiff—

New Jersey the Third Circuit held that the State's Sports Wagering Law violated PASPA, upholding its constitutionality.⁷³ The Third Circuit refused to invalidate PASPA based on both of New Jersey's claims that PASPA violated both the anti-commandeering doctrine and the equal sovereignty principle.⁷⁴ Moreover, the Third Circuit rejected New Jersey's arguments that their Sports Wagering Law, referred to as "the 2014 Law," did not violate PASPA, holding that (1) the Law

brought a class action suit against Chris Christie, governor of New Jersey at the time, to halt the proposed Sports Wagering Law. *See NCAA v. Christie (Christie I)*, 926 F. Supp. 2d 551 (2013). The Sports Wagering Law sought to license gambling in the state, which the suing parties contended was in direct violation of PASPA. *Id.* at 555. New Jersey contended that the leagues had no standing to bring suit as they suffered no injury from the State's legalization of gambling on the outcome of sporting events. *Id.* at 558. New Jersey also argued that PASPA was legislation that exceed Congress' commerce power. *Id.* Further, New Jersey argued that in prohibiting states from passing legislation to sanction sports gambling, PASPA violated both the "anti-commandeering" doctrine and the "equal sovereignty" principle as a select number of states are exempt from these same prohibitions on state-sanctioned sports gambling. *Id.* at 561–62. The District Court found in favor of the United States and the various sports organizations, granting summary judgment and enjoining New Jersey from sanctioning sports betting. *Id.* at 579.

⁷³ *See Christie II*, 730 F.3d 208 at 215 (upholding the District Court's ruling enjoining New Jersey's sanctioning of sports gambling).

⁷⁴ *See Printz v. United States*, 521 U.S. 898, 935 (1997) (elaborating on the anti-commandeering doctrine, stating that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"); *see also Christie I*, 926 F. Supp. 2d at 577 (explaining that the equal sovereignty doctrine, or "equal footing" doctrine, calls for the admission of a state into the Union without the deprivation of "attributes essential to its equality in dignity and power with other states"); *Christie II*, 730 F.3d at 214–15 (refusing to apply the principles New Jersey argued on appeal).

As will be made clear, accepting New Jersey's arguments on the merits would require us to take several extraordinary steps, including: invalidating for the first time in our Circuit's jurisprudence a law under the anti-commandeering principle, a move even the United States Supreme Court has only twice made; expanding that principle to suspend commonplace operations of the Supremacy Clause over state activity contrary to federal laws; and making it harder for Congress to enact laws pursuant to the Commerce Clause if such laws affect some states differently than others.

Christie II, 730 F.3d at 215. The court went on to note that *Christie I* was the first case addressing the constitutionality of PASPA. *See id.* at 216.

authorizes illegal activity;⁷⁵ (2) the Law's selectiveness constitutes specific permission and empowerment;⁷⁶ and (3) Congress intended to prevent the institution of such a scheme.⁷⁷ *NCAA v. Governor of New Jersey* proved to be a landmark decision upholding the federal government's power to execute omnipotent regulation of sports gambling by affirming PASPA, at least for the time being.

III. Premise

In 2017, involvement in sports gambling in Nevada amounted to the highest it has been since 1985 reaching a record \$4.9 billion dollars legally wagered in that year alone.⁷⁸ Taxes on gambling in Nevada made up 18% of Nevada's total revenue production in 2015, resulting in \$906 million worth of tax revenue.⁷⁹ Such significant

⁷⁵ See *NCAA v. Governor of N.J. (Christie III)*, 799 F.3d 259, 266 (3d Cir. 2015) (reasoning that New Jersey's Sports Wagering Law authorized activity that other statutory provisions made illegal). "Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks." *Id.*

⁷⁶ See *id.* at 266 (finding specific permission and empowerment in New Jersey's Sports Wagering Law). "The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do." *Id.*

⁷⁷ See *id.* (noting that New Jersey failed to take advantage of the grandfathering exception at the time of PASPA's enactment). "Third, the exception in PASPA for New Jersey, which New Jersey did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law." *Id.* "The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does." *Id.* Therefore, the court inferred that, through PASPA's explicit excepting of a sports gambling operation in New Jersey's casinos, Congress intended to prevent such a scheme and that such a scheme violated PASPA. *Id.* at 266–67.

⁷⁸ See *A look inside the numbers of sports betting the U.S. and overseas*, SPORTS BUS. J. (Apr. 16, 2018), archived at <https://perma.cc/GLF5-JUBX> (providing data portraying the 440% growth of sports betting in Nevada since 1985). Gambling on football, basketball and baseball each hit a record high in 2017 at casinos in Nevada. *Id.* Football's share of 36% of sports betting was its lowest rate since at least 1992. *Id.* Baseball made up more than 23% of sports gambling, which is the sport's highest since 2001. *Id.* Basketball has ranged from 28% to 31% throughout the past six years, but its total of \$1.48 billion wagered in 2017 was more than double the amount from 2011. *Id.*

⁷⁹ See Ron Knecht & Geoffrey Lawrence, *Popular Annual Financial Report*, ST. OF NEV. (June 30, 2015), archived at <https://perma.cc/J5V3-ZPR3> (detailing the sources of revenue for the state of Nevada, of which gaming taxes were the second highest

revenue production from a source that was illegal in virtually every state is partially the reason for the United States Supreme Court's review of *Murphy v. National Collegiate Athletic Association*.⁸⁰

A. *New Jersey Pioneers the Opposition Against PASPA*

Following the line of reasoning that the United States government used in opposing a writ of certiorari in *NCAA v. Christie*, New Jersey enacted the law at issue in *Murphy* which—instead of authorizing sports betting—repealed state law provisions that prohibited people twenty-one years of age or older from partaking in gambling at horseracing tracks and casinos.⁸¹ In response, the NCAA, NBA, NFL, and MLB sued New Jersey's governor, Philip D. Murphy, seeking an injunction preventing New Jersey's operation of legal

contributor behind only sales and use taxes). Over the last 10 years, gaming tax revenue production has increased about six million dollars. *Id.*

⁸⁰ See *Murphy v. NCAA*, 138 S. Ct. 1461, 1468 (2018) (laying out New Jersey's desire to legalize sports gambling at casinos and horseracing tracks).

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to “authorize” sports gambling schemes. We must decide whether this provision is compatible with the system of “dual sovereignty” embodied in the Constitution.

Id. See also David Purdum & Ryan Rodenberg, *Future of sports betting: the marketplace*, ESPN (May 4, 2017), archived at <https://perma.cc/W8YS-RYWA> (providing an analysis of the potential marketplace for sports betting prior to the *Murphy* decision); Kristi Dosh, *As the Sports-Betting Industry Transforms, Entrepreneurs May Find It Hard to Get in on Gambling Profits – but Related Businesses Will Thrive*, ENTREPRENEUR (May 21, 2018), archived at <https://perma.cc/4CCN-DHX8> (observing that the legal sports betting market was worth about \$270 million in 2017, with another \$2.5-3 billion via illegal gambling activity).

⁸¹ See *Murphy*, 138 S. Ct. at 1472 (laying out the details of New Jersey's 2014 Act repealing sports betting prohibitions). “The 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling.” *Id.* The lawmakers specifically promulgated the act to operate as a repealing of state law. *Id.* “Specifically, it repeals the provisions of state law prohibiting sports gambling insofar as they concerned the ‘placement and acceptance of wagers’ on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City.” *Id.*

sports betting.⁸² Through the anti-commandeering doctrine and the Tenth Amendment, the Supreme Court ruled PASPA unconstitutional and, therefore, left authority to regulate gambling to the States.⁸³ The *Murphy* opinion notes three reasons why the anti-commandeering doctrine is essential to the American government.⁸⁴ First, the Court reasons that the doctrine serves as a structural protection of liberty promoted by the Constitution.⁸⁵ Second, the Court proposes that the

⁸² See *id.* at 1465–66 (establishing the grounds for NCAA et al.’s suit., against the governor of New Jersey and other state officials and its urging of the court to find that the State’s law violates PASPA); see also Ilya Somin, *Federalism Comes Out as the Winner in Murphy v. NCAA*, THE REGULATORY REVIEW (July 10, 2018), archived at <https://perma.cc/33DH-E5C4> (noting that the NBA, NFL and MLB joined the NCAA in the suit to enjoin New Jersey).

⁸³ See U.S. CONST. amend. X (stating “[t]he 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”). See also *Murphy*, 138 S. Ct. at 1478 (explicitly stating that PASPA violates the anti-commandeering rule by directly controlling state action). The Supreme Court address the “authorization provision” specifically, which prohibits states from enacting new law permitting sports gambling, as well as repealing old law that bans it. *Id.* at 1474. The Court reasons that the provision “unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States.” *Id.* at 1478. Further, the Court goes on to say that “state legislatures are put under the direct control of Congress,” which is specifically the sort of consequence that the anti-commandeering doctrine is intended to prevent. *Id.*

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anti-commandeering doctrine simply represents the recognition of this limit on congressional authority.

Id. at 1476.

⁸⁴ See *Murphy*, 138 S. Ct. at 1477 (explaining why adherence to the anti-commandeering rule is important, giving several specific reasons).

⁸⁵ See *id.* at 1467 (citing to several cases that support the idea of the anti-commandeering doctrine as a structural protection of liberty). Quoting its opinion in *New York v. United States*, the Court states “[t]he Constitution does not protect the sovereignty of States for the benefits of the States or state governments as abstract political entities. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.” *Id.* (quoting 505 U.S. 144 (1992)). “[A] healthy balance of power between States and the Federal Government [reduces] the risk of tyranny and abuse from either front.” *Id.*

anti-commandeering doctrine maintains political accountability, rendering state and local politicians responsible for the legislation they enact.⁸⁶ Third, the anti-commandeering doctrine works to prevent Congress from shifting the burden of regulation onto the States without executing their due diligence.⁸⁷ Through application of the anti-commandeering doctrine and by recognizing that the regulation of gambling is a power not specifically enumerated to the federal government in the Constitution, the Supreme Court ultimately held that the industry's regulation is inherently left to the States.⁸⁸ With

⁸⁶ *See id.* at 1477 (comparing the difference between Congress itself regulating versus Congress commanding States to regulate).

When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

Id.

⁸⁷ *See id.* at 1477 (discussing the implications Congress must consider when deciding to regulate itself or leave regulation to the States). When Congress decides to execute any regulation, it must consider the fact that it has to appropriate the funds for such regulation on its own. *Id.* Therefore, Congress is pressured to weigh both the benefits and the costs of such proposed regulation before enacting it into law. *Id.* There are ways around this issue in which Congress can compel the States to enact and enforce its programs, but it cannot enact legislation that commands States to govern exactly how Congress demands. *Id.*

⁸⁸ *See id.* at 1484–85 (weighing the support and opposition of legalizing sports gambling and concluding that the Supreme Courts job is to decide whether laws are constitutional, not to regulate). Supporters of sports gambling's legalization argue, as they long have, that its legalization would provide significant revenue for the States, while weakening the rampant illegal sports betting systems run by organized crime. *Id.* Opposition argues that legalization will result in youth addiction; encourage those who, due to their financial status, should not be gambling to throw away their income; and induce corruption throughout both professional and collegiate sports. *Id.* The Court concluded that Congress has the power to regulate sports gambling directly, but that it does not have the power to regulate how state governments' regulation of sports gambling. *Id.* The Court found that PASPA regulates how states regulate gambling, and therefore found PASPA to be unconstitutional. *Id.* *See also* Nicholas R. Pierce, *Supreme Court Strikes Down PASPA*, 56 AUG HOUS. LAW. 36 (2018) (listing the several states that had already enacted legislation legalizing sports betting in anticipation of the *Murphy* decision); Phil Helsel, *Sports betting is now legal in several states. Many others are watching it from the sidelines*, NBC NEWS (Aug. 13, 2018), *archived at* <https://perma.cc/M6H5-GSAH> (commenting on the wave of states that quickly began the process of legalizing sports betting).

this decision, the Supreme Court removed federal oversight from the equation and opened the flood gates.⁸⁹

B. *The NBA and MGM post-Murphy*

Within months of the *Murphy* decision, NBA Commissioner Adam Silver announced that the league had entered into an agreement with MGM Resorts International (“MGM”), making the Nevadan corporation the official gaming partner of professional basketball in the United States.⁹⁰ The deal marks the first partnership between a professional sports association and a major gambling operator in the country.⁹¹ The agreement is reportedly in place for three years, worth an estimated \$25 million.⁹² The NBA and MGM’s partnership allocates 1% of the total amount of money bet on NBA games via MGM’s systems to the two leagues.⁹³ In return, the NBA will supply

⁸⁹ See Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (Sept. 1, 2019), archived at <https://perma.cc/5TSY-AGDX> (measuring the change in the sports gambling landscape and ranking all 50 states and Washington D.C.’s likelihood of offering “full scale legal sports betting”); see also Guy Bentley, *Legalized sports betting: The best defense against corruption*, WASHINGTON EXAMINER (May 16, 2018), archived at <https://perma.cc/369D-C8HT> (highlighting that the striking down of PASPA provided an opportunity to protect and reinvigorate sports while simultaneously taking a multibillion dollar black market sports gambling system).

⁹⁰ See Brian Pempus, *The NBA Finds A Partner For Sports Gambling*, CARD PLAYER (Aug. 14, 2018), archived at <https://perma.cc/27PR-J8AT> (announcing the NBA and MGM’s multi-year partnership). In accordance with this deal, MGM has non-exclusive rights to official NBA and WNBA data and branding across all of MGM’s land-based and digital sports betting products. *Id.* MGM and the NBA will be using “anonymized real-time data sharing” to monitor games and create wagers. *Id.* Silver had been advocating and likely preparing for the legalization of sports betting for quite some time. See Adam Kilgore, *For sports leagues, legalized sports betting offers new risks, and massive rewards*, WASHINGTON POST (May 14, 2018), archived at <https://perma.cc/3VMA-LVHQ> (stating that the Commissioner had been in talks with team owners regarding gambling profit sharing).

⁹¹ See Purdum & Rovell, *supra* note 8 (pointing out that the NBA is the first major U.S. sports league to partner with a sportsbook operator post-*Murphy*).

⁹² See Michael McCann, *What the NBA and Its Players Stand to Gain From Partnership With Vegas-Based MGM*, SPORTS ILLUSTRATED (July 31, 2018), archived at <https://perma.cc/8GNP-DKSH> (discussing the length and value of the deal between the NBA and MGM).

⁹³ See Pempus, *supra* note 90 (reviewing some of the more prominent details of the NBA and MGM’s agreement). The 1% payment allocation to the NBA and WNBA,

MGM with official data and will promote MGM Resorts across the league's digital assets like NBA TV, the leagues official television channel, and NBA.com, its official website.⁹⁴

In an effort to maximize revenue production and establish a dominant presence in this new market, MGM also partnered with GVC Holdings ("GVC").⁹⁵ MGM and GVC intend to "revolutionize the world of sports betting and online gaming in the United States," and have begun their efforts with an investment of \$100 million respectively, \$200 million total.⁹⁶ Per the agreement, the companies

per NBA testimony at a New York sports betting hearing, is compensation for the leagues risk and expense that is created by betting and for the commercial value that the leagues' product creates for sports betting operators. *Id.* This approach is modeled after international jurisdictions that have maintained legal sports betting systems for some time. *Id.*

⁹⁴ See McCann, *supra* note 92 (breaking down the give-and-take between the NBA and MGM as part of their partnership deal); see also Kevin Draper, *N.B.A. Makes MGM Resorts International Its First Gambling Partner*, N.Y. TIMES (July 31, 2018), archived at <https://perma.cc/Y7LD-PBN5> (commenting on the details of the partnership agreement). In addition to using the NBA's official data, MGM will work with the league to detect and prevent fraud and game-fixing. Draper, *supra*. MGM will also have the right to use NBA and WNBA marks and team logos, and together the NBA and MGM will work on a coordinated marketing plan. *Id.*; see also John Holden, *Can Leagues Own Data Rights When it Comes to US Sports Betting?*, LEGAL SPORTS REPORT (May 29, 2018), archived at <https://perma.cc/9YQ8-FVBU> (discussing the ownership rights of professional sports leagues as it pertains to "official data").

⁹⁵ See Brian Pempus, *MGM Resorts Lands Partner For U.S. Online Sports Betting, Plans To 'Dominate' Market*, CARD PLAYER (July 30, 2018), archived at <https://perma.cc/N3A2-9NNA> (announcing the establishment of a 50-50 joint venture between MGM and GVC established to create a sports betting and online gaming platform in the United States); see also Matt Rybaltowski, *Commitment To Timely, Accurate Data Drives MGM Resorts' Sports Betting Deal With NBA*, FORBES (Aug. 8, 2018), archived at <https://perma.cc/HP82-TRYD> (proposing that expedited delivery of data was also a major driving force in the NBA and MGM's deal). See Chris Kirkham, *States Weigh Bets on Mobile Sports Gambling*, WALL STREET J. (July 13, 2018), archived at <https://perma.cc/7KW6-NFXC> (stating that the digital world of gambling offers a potential \$9 billion growth to the gambling industry).

⁹⁶ See Press Release, MGM Resorts Int'l, MGM Resorts International and GVC Holdings PLC Announce Joint Venture to Create Leading Sports Betting and Interactive Gaming Platform in the U.S. (July 30, 2018), archived at <https://perma.cc/ASR6-XZXF> (highlighting the credentials of MGM and GVC as leading global entertainment companies); see also Pempus, *supra* note 95 (pointing

will establish a sports betting and online gaming platform in the United States.⁹⁷ With both companies' credentials in mind, MGM believes that the partnership is set to dominate the American sports gambling market.⁹⁸

C. *Players and the National Basketball Players' Association*

The alliance between the NBA, MGM, and GVC is destined produce enormous amounts of revenue for all parties involved.⁹⁹ A major issue presenting itself following the *Murphy* decision, and this new partnership, is the lack of an addressing of sports betting in the NBA-NBPA Collective Bargaining Agreement.¹⁰⁰ Integrity fees

out both partners' enormous investments made in an effort to dominate American sports gambling).

⁹⁷ See Matt Rybaltowski, *Poised To Grow Sports Betting Platform, MGM Strikes Historic Deals With GVC Holdings, Boyd Gaming*, FORBES (July 30, 2018), archived at <https://perma.cc/85QP-T5SW> (reviewing the partnership between MGM and GVC and their plans going forward); see also Brian Windhorst, *FAQ: How will legal gambling change the NBA and the way we watch it?*, ESPN (May 17, 2018), archived at <https://perma.cc/WWL7-FYDN> (noting that the NBA has been on the leading edge of the movement towards legal sports betting and is pushing for the promotion of online betting platforms).

⁹⁸ See Pempus, *supra* note 95 (quoting CEO and Chairman of MGM Resorts, Jim Murren, who foresees the partnership as positioned to become an instant leader in technology, market access, sports relationships and brands).

⁹⁹ See Pempus *supra* note 95 (setting forth an assumption that if 30 states incorporate legalized and regulated sports betting, the U.S. market is expected to grow as much as \$6 billion by 2023); Robert Marks, *The Murphy Decision and the Ramifications of Sports Gambling Legalization*, BOYLAN CODE (June 4, 2018), archived at <https://perma.cc/2TMM-6MCE> ("with a possible total amount wagered in sports gambling likely reaching the billions of dollars . . . an entire market could be incoming"). See also McCann, *supra* note 92 (suggesting that NBA players and the National Basketball Players Association are carefully watching how the league handles the developing legal sports betting industry); *Supreme Court's Sports Betting Ruling*, *supra* note 7 (mulling over whether NBA players will be sharing in the profits of the NBA and MGM's partnership via integrity fees and other revenue producing assets). In reality, the players are the ones who bear a lot of the costs of sports betting; the physical labor involved in preparing for and playing the games on which wagers are placed. See *Supreme Court's Sports Betting Ruling*, *supra* note 7.

¹⁰⁰ See NBA & NBPA, 2017 Collective Bargaining Agreement, at 15 (January 19, 2017) [hereinafter NBA-NBPA 2017] (outlining the contractual obligations between the NBA itself, and the NBA Players Association and the players); see also *Supreme Court's Sports Betting Ruling*, *supra* note 7 (pointing out the absence of a specific provision in the NBA's collective bargaining agreement addressing sports betting

present another issue.¹⁰¹ These fees are costs often incorporated in the operation of sports betting schemes.¹⁰² They offer the questions as to whether leagues will be paid integrity fees, and if so, whether players will see a cut.¹⁰³ Further, the NBA is anticipating that player salaries will be increasing partially due to the introduction of sports betting.¹⁰⁴ The values of leagues and their teams are on the rise due to the increased revenues that legalized sports gambling operations throughout the country will generate, but the NBA has not promulgated a plan to deal with players' demands for increases in compensation.¹⁰⁵ With impending revenue increases on the horizon, it is only a matter of time before the National Basketball Association Players Association ("NBAPA") takes action in an effort to ensure that players see their fair share of the profits.¹⁰⁶

and how the revenues would be allocated). Per the current agreement, revenue from gambling is incorporated in "Basketball Related Income," which is split 49% to the players and 51% to the owners. *Id.* See also Taylor Smith, *NBA Owners and Players Strike New Collective Bargaining Agreement*, GAMBLINGSITES.ORG (Dec. 15, 2016), archived at <https://perma.cc/X3D9-2PLM> (reviewing the collective bargaining agreement between the NBA owners and the NBA Players Association).

¹⁰¹ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (listing integrity fees as an emerging topic of debate among professional sports leagues).

¹⁰² See *Supreme Court's Sports Betting Ruling*, *supra* note 7 ("[B]etting operators and sports books would pay these fees to the leagues in states that legalize sports betting.").

¹⁰³ See Holden, *supra* note 94 (defining integrity fees as the cost that leagues impose on betting operators to protect the integrity in sports betting). See also *Supreme Court's Sports Betting Ruling*, *supra* note 7 (presenting the argument that perhaps players deserve a share of integrity fees as they are poised to experience similar costs to the NBA's compliance, monitoring and investigation costs stemming from sports betting).

¹⁰⁴ See Windhorst, *supra* note 97 (discussing the impact that the introduction of sports betting will have on the NBA's players and whether the increase in salary will simply be a temporary spike).

¹⁰⁵ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 ("Division of wealth is determined by the collective bargaining agreement. The CBA reflects each side giving and taking—and each must live with the consequences.").

¹⁰⁶ See Vincent Cohen Jr. et al., *How Sports Bet Ruling Affects Players' Collective Bargaining*, LAW 360 (July 2, 2018), archived at <https://perma.cc/UU3H-GA82> (outlining what moves players' associations must make in reaction to the *Murphy* decision); Daniel Wallach, *Player Unions Need To Engage On Sports Betting, And It's Not Too Late*, FORBES (Apr. 8, 2018), archived at <https://perma.cc/WGZA-2ZXA> (asserting that players' unions will soon take the initiative of getting involved in the introduction of a legalized sports betting industry). See also Irwin Raji et al.,

D. *Players' Publicity Rights*

A burgeoning issue that will likely flow from the waves *Murphy* will cause is the issue of players' publicity rights.¹⁰⁷ "Publicity rights" refer to the legal protections that shield the players, and people in general, from exploitation of their names, images, and likeness.¹⁰⁸ In *Daniels v. FanDuel, Inc.*, the Indiana Supreme Court made the first notable decision in regards to players' publicity rights.¹⁰⁹ In this case, collegiate student athletes brought a class action suit against FanDuel, an online fantasy-sports operator for violation of the student-athletes' right of publicity under state law.¹¹⁰ The Indiana Supreme Court affirmed the District Court's decision that FanDuel's use of student-athletes' names and likeness, as well as their statistics,

Legalized Sports Gambling: Revenue Opportunities Following Murphy, O'MELVENY (Aug. 13, 2018), archived at <https://perma.cc/D5X4-PMUQ> (offering integrity fees as a possible means for players to benefit from the results of *Murphy*); McCann, *supra* note 92 (delivering the NBA's justification for integrity fees as a means of compensation to those who help produce the games—owners, players, and other parties). Based on an Indiana Supreme Court decision, players may not see any monetary benefit from use of their "image and likeness" for commercial purposes. See *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 393 (Ind. 2018) (citing Ind. Code §§ 32-36-1-1(c)(1)(B)). But see, Andrew Beaton, *Players Unions Join Battle Over Publicity Rights in Potential Sports-Betting Preview*, WALL STREET J. (May 18, 2018), archived at <https://perma.cc/C6NH-AM3L> (declaring that sports unions and players associations have publicly stated that use of players' images should not be allowed without players' permission).

¹⁰⁷ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 ("Indeed, the players' associations contend that legal betting could jeopardize players' privacy and publicity rights."); see also Raj et al., *supra* note 106 (highlighting *Murphy*'s effect on the debate as to whether sportsbooks and fantasy sports operators should be compensating athletes for using their names and likeness).

¹⁰⁸ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (expanding on publicity rights of professional athletes).

¹⁰⁹ See *Daniels*, 109 N.E.3d at 394 (upholding fantasy sports operators' rights to use both professional and student-athletes' image and likeness without the consent of the athletes themselves). See also IND. CODE ANN. § 32-36-1-1 (West 2019) (explaining Indiana's rights of publicity).

¹¹⁰ See *Daniels*, 109 N.E.3d at 394 (outlining the plaintiffs' arguments). The plaintiffs argued (1) that the "statutory exception for newsworthiness does not apply in the context of commercial use," and (2) that the fact that FanDuel is a media company/news broadcaster is immaterial in the context of the newsworthiness exception. *Id.*

fell within the scope of what is considered “the newsworthy value exception.”¹¹¹ The court reasoned that the use of the student-athletes’ names, likeness, and statistics resembled the use of such data in newspapers and websites across the country.¹¹² Further, the court stated that “it would be strange law that a person would not have a first amendment right to use information that is available to everyone.”¹¹³ *Daniels* has carved out a path that could lead to serious controversy as more and more companies like FanDuel begin to exploit players’ information in the wake of *Murphy*.¹¹⁴

In 2015, three years prior to *Daniels*, professional football player Pierre Garcon also sued FanDuel.¹¹⁵ Garcon sued for FanDuel’s exploitation of his “popularity and accomplishments.”¹¹⁶ The suit

¹¹¹ See *id.* at 396–97 (“It is difficult to find that the use of this otherwise publicly available information is somehow drastically different such that it should be placed outside the definition of ‘newsworthy’”). The Indiana Supreme Court found that the information pertaining to the athletes’ image and likeness is not stripped of newsworthy value simply because it is being used in commercial context. *Id.* at 396. “On the contrary, fantasy sports operators use factual data combined with a significant, creative component that allows consumers to interact with the data in a unique way.” *Id.*

¹¹² See *id.* at 396 (“Considering the arguments presented in this case, Defendants’ use of players’ names, images, and statistics in conducting fantasy sports competitions bears resemblance to the publication of the same information in newspapers and websites across the nation.”).

¹¹³ See *id.* (agreeing with the United States Court of Appeals, Eighth Circuit decision in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball*, 505 F.3d 818, 823 (8th Cir. 2007), that preventing a person or entity from using information that is readily available in the public domain would seem contradictory to the First Amendment of the United States Constitution).

¹¹⁴ See Nicole Kardell, *Ruling in Daniels v. FanDuel Highlights The Value Of Sports Data And Contemporary Culture*, JD SUPRA (Oct. 29, 2018), archived at <https://perma.cc/8L7K-B3DY> (concluding that *Daniels* “will make it easier for operators to access and use data and harder for leagues . . . to lobby for statutory restrictions”).

¹¹⁵ See Complaint at 1, *Garcon v. FanDuel*, No. 8:15-cv-03324-PJM (D. Md. 2015) (“Plaintiff Pierre Garcon, through his attorneys, brings this Class Action against Defendant FanDuel Inc. for himself and for all other similarly situated.”); see also *Supreme Court’s Sports Betting Ruling*, *supra* note 7, at 6 (reviewing Garcon’s legal battle).

¹¹⁶ See Complaint, *supra* note 115, at 1 (stating that FanDuel “knowingly and improperly” exploited Garcon’s name and likeness).

ended up settling before trial, leaving the notion that perhaps FanDuel expected courts to give a payout to Garcon, a *professional* athlete.¹¹⁷

IV. Analysis

The introduction of legal sports betting into American sports will have enormous and expansive effects on revenue production in professional sports leagues like the NBA.¹¹⁸ Because of the *Murphy* decision, professional sports leagues may now partner with casinos and online gambling operators, catalyzing technological growth and revenue increases.¹¹⁹ As league revenues increase, inevitably professional athletes' salaries will rise as well.¹²⁰ Along with all of the excitement and potential benefits anticipated post-*Murphy* comes the potential for conflict.¹²¹ Players may be more vulnerable to exploitation of their image and likeness; perhaps violations of their own publicity and privacy rights.¹²² Finally, *Murphy* will likely result

¹¹⁷ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (discussing the conclusion of Garcon's suit against FanDuel).

¹¹⁸ See Kilgore, *supra* note 90 ("The Supreme Court's decision today paves the way to an entirely different landscape – one in which we have not previously operated.").

¹¹⁹ See *id.* (noting that regulators and sportsbook operators maintain the most innovative technology as it relates to the gambling industry); see also Kirkham, *supra* note 95 (theorizing that betting via smartphones could increase total revenue production in sports gambling by an estimated \$9 billion).

¹²⁰ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (detailing how increases in the NBA's revenue production leads to higher a salary cap). "TV broadcasts, apparel sales, arena signage and other NBA products and services that produce revenue are included within BRI." *Id.* BRI is also connected to the configuration of the annual salary cap for NBA teams, with higher BRI meaning a higher salary cap. *Id.*

¹²¹ See Kilgore, *supra* note 90 (discussing the likelihood of potential legal issues that will be directly linked to the introduction of sports betting). "New wagering rules also seem likely to create new labor battlefields, with players' unions keeping a watchful eye on the leagues' response." *Id.* "In one scenario, leagues could take in integrity fees as a reimbursement from states and could argue the money is not revenue to be shared with players under collective bargaining agreements." *Id.* "And leagues believe they should be compensated for both their role in ensuring fairness and for casinos using their content to profit." *Id.* See also Wallach, *supra* note 106 (pointing out that although there is financial upside for the players, sports betting may not particularly be a good thing for professional athletes).

¹²² See Rajj et al., *supra* note 106 (providing an overview of athlete's publicity rights and discussing the potential path courts might take in ruling on players' publicity rights).

in internal strife between professional sports leagues and their players' associations as they negotiate new collective bargaining agreements that address the budding sports betting industry.¹²³

A. *Murphy's Effect on Gambling*

The initial ripple that will be felt in the wake of *Murphy* will be a growing number of states that legalize and regulate sports betting nationwide.¹²⁴ By August 2018, just three months after the Supreme Court handed down its decision, as many as nineteen states had already legalized or began the process of legalizing the industry.¹²⁵ The increasing number of states deciding to legalize sports betting will be like adding fuel to a fire.¹²⁶

The sports betting industry now has a plethora of undiscovered territory to explore; specifically, gambling applications on mobile devices.¹²⁷ Gambling apps are going to be an extremely sought after technological innovation as casinos, sports books, fantasy sports providers, and other members of the industry race to make their platforms as accessible as possible.¹²⁸ This exposes a new frontier of

¹²³ See Wallach, *supra* note 106 (urging players and their representative associations to involve themselves in the lobbying of state laws and the negotiation of beneficial and protective collective bargaining agreements to ensure adequate protection of their rights).

¹²⁴ See Helsel, *supra* note 88 (laying out the landscape regarding the states involved in legalizing sports betting). Although the focus of this article is on the profitability of sports betting, state legalization of sports betting stands to be worthwhile as it will protect the bettors themselves when disputes arise as well. *Id.*

¹²⁵ See Helsel, *supra* note 88 (providing an image mapping the different states that have begun legalizing sports betting). "Three months after the Supreme Court overturned a law prohibiting states from legalizing sports betting, a few states have begun accepting wagers." *Id.*

¹²⁶ See Dosh, *supra* note 80 (elucidating the urgency with which entrepreneurs are working to get involved in the sports betting industry in the wake of *Murphy*); see also Marks, *supra* note 99 ("New businesses and casinos specializing in sports wagering will spread like wildfire.").

¹²⁷ See Brinson, *supra* note 53 (discussing the possibilities involved with placing bets on mobile devices); see also Kirkham, *supra* note 95 (surmising that post-*Murphy*, the latest question for states is whether to join the mobile-betting market, which is valued at a potential \$9 billion).

¹²⁸ See Purdum & Rodenberg, *supra* note 80 (pointing out that some of the world's largest tech companies are expected to become some of the world's most influential bookmakers); see also Kirkham, *supra* note 95 ("For casino operators and book

commerce, both intra- and interstate, that has not been regulated before.¹²⁹ Congress, state legislatures, NBA owners, and the NBAPA will have to take significant steps in the regulation of the industry in order to preserve the integrity of sports and to ensure that online sports betting platforms are safe and secure for their users.¹³⁰ Moreover, the leagues themselves will have to undertake their own efforts to preserve the integrity of their sports.¹³¹

Perhaps the most intriguing aspect of post-*Murphy* sports betting and its online platforms is the introduction of legal live betting.¹³² Casinos and sports books are now capable of offering live, in-game betting to their customers.¹³³ In-game betting offers more bets to be made per game as gamblers can bet on who will score the next basket, whether Kyrie Irving will make his next free throw, or if LeBron James's next score will be via dunk or three-pointer; the

makers, mobile gambling is attractive because it makes placing bets easier and allows for in-game wagering, see as a strong growth area.”).

¹²⁹ See Pierce, *supra* note 88 (suggesting that states will have to decide whether to allow online betting or require gamblers to be physically present in a casino or sports book). As an aside, Congress still maintains the authority to pass a bill that regulates gambling through its interstate commerce power, and NBA Commissioner Adam Silver often speaks about his desire for Congress to do so. See Windhorst, *supra* note 97. “It’s much easier to lobby one body and guarantee a fee from every state than piecemeal it in places where the NBA doesn’t have teams (and, thus, little leverage).” *Id.*

¹³⁰ See Rodenberg, *supra* note 89 (analyzing the ways in which the states who have passed legislation legalizing sports betting have implemented their systems). “In states such as Mississippi, sports betting will be confined to casinos and racetracks across the state, though customers will be able to bet on a phone while there.” See Kirkham, *supra* note 95. Other options include “age-verified betters” to sign up remotely without having to be present in a casino or requiring customers to register in person at a casino or another betting storefront to utilize mobile sports betting outside the premises of a casino. *Id.*

¹³¹ See Windhorst, *supra* note 97 (discussing the steps the NBA is taking to protect the game of basketball).

¹³² See Weinberg, *supra* note 14 (declaring that “[e]veryone’s a winner’ if Internet gambling is regulated”).

¹³³ See Rybaltowski, *supra* note 95 (detailing the rise in popularity of in-game betting as state-of-the-art technology for sports gambling advances at a rapid pace). See also Windhorst, *supra* note 97 (“[T]he NBA has been actively lobbying states to offer betting on mobile phones and even for fans to be able to register a mobile gambling account without having to go to a sportsbook first.”). The NBA reasons that allowing mobile sports betting offers a means to combat illegal sportsbooks that have already implemented the use of mobile betting. See *id.*

opportunities are quite literally endless.¹³⁴ Without a doubt, casinos and sports books will see a spike in revenue production as gamblers will be placing more bets throughout the games they watch, rather than a single bet on an end result.¹³⁵

B. *Downstream Effects of Murphy Decision*

Through its partnership with MGM, the NBA is poised to profit considerably, both fiscally and in regard to data collection, as the sports betting industry grows exponentially under *Murphy*.¹³⁶ In 2017, gamblers wagered almost \$5 billion on sports in the state of Nevada alone, and gamblers wager an estimated \$150 billion illegally in the United States every year.¹³⁷ *Murphy* opens an avenue for States to take that \$150 billion out of the hands of illegal sports betting operators, and place it in the hands of casinos and sports books.¹³⁸ Professional sports leagues like the NBA will be able to assert sports betting rights fees and integrity fees as compensation for their providing of the

¹³⁴ See Raij et al., *supra* note 106 (providing an example of in-game betting through Chelsea FC, an English soccer club, and William Hill's partnership which allows fans to place bets at the stadium during games). See Windhorst, *supra* note 97 (highlighting the NBA's position for tight regulation or even the banning of easily manipulated prop bets and exploring the potential for corruption in the NBA due to the legalization of prop betting). The league differentiates between prop bets that they want to ban, and prop bets that they want to regulate. *Id.* For example, the league wants to rid the sports betting industry of the capability to exploit situations like who gets called for the first foul in a game; whereas they seek to cap the wager amount on bets like who will score the next basket. *Id.*

¹³⁵ See Pempus, *supra* note 95 (estimating the U.S. sports betting market to grow to as much as \$6 billion by 2023 assuming that just thirty states institute sports betting into their economy).

¹³⁶ See Raij et al., *supra* note 106 (stating that shortly after the Supreme Court handed down its *Murphy* decision, Mark Cuban claimed that any "top-four professional sports team" saw the value of their team double).

¹³⁷ See Wolohan, *supra* note 8 (discussing the benefits that states that legalize sports betting may reap).

¹³⁸ See *id.* (simplifying the assertion that legalizing sports betting allows for the monitoring of wagering data and ensuring that the sports betting funds are kept out of organized crime). "Think about it this way: When bettors use illegal bookies, the leagues have no means to monitor which teams or games the money is being wagered on." *Id.* "As a result, if a game is being fixed by bettors, it would be impossible for the leagues or the sports books to quickly identify which games may be fixed and which players they need to keep an eye on." *Id.*

games that bets are placed on.¹³⁹ Further, *Murphy* will likely create a domino effect, as newfound revenue production from sports betting increases revenue in other areas.¹⁴⁰ It is safe to assume that bettors watch the games they bet on, and if more people are gambling, more people are watching games, increasing in TV ratings.¹⁴¹ Thus, networks have the ability to charge more for advertising deals, which increases the rate leagues can charge those networks for broadcasting rights.¹⁴² *Murphy* seemingly creates a new opportunity for the NBA

¹³⁹ See Holden, *supra* note 94 (explaining that “sports betting” rights are akin to data rights). In charging sports betting rights fees, leagues will be requiring betting operators to pay for the rights to use official league data. *Id.* Sports betting rights fees are essentially a protection of the leagues data as intellectual property. *Id.*; see also *Supreme Court’s Sports Betting Ruling*, *supra* note 7 (analyzing the uses of sports betting right fees and integrity fees). Even if state legislatures only grant the NBA a fraction of a percent of each bet placed on its games, that amount could potentially be worth billions over the next decade. See Windhorst, *supra* note 97.

¹⁴⁰ See Wolohan, *supra* note 8 (suggesting that legal sports betting will produce revenue outside of integrity fees); Wallach, *supra* note 106 (realizing the snowball effect that increased fan engagement due to sports betting will likely produce). Some authorities throughout the professional sports industry are skeptical of legalized gambling and are weary of the corruption that seems to come along with it, like the Black Sox scandal of the 1920s. See Windhorst, *supra* note 97; see also Larson, *supra* note 21 (discussing the corruption surrounding sports gambling from the Black Sox scandal of the 1920s).

¹⁴¹ See Wolohan, *supra* note 8 (summarizing the effect that gambling has on TV ratings).

For example, people who have bet money on games watch more games on television. If more people are watching, TV ratings increase and the networks are able to charge more money for ad rates. This additional money is then passed on to the leagues via increased broadcasting rights, which is the single most important revenue source for all of the leagues, especially with dwindling TV sports viewership in recent years.

See Wolohan, *supra* note 8.

¹⁴² See Wolohan, *supra* note 8 (furthering the argument that legalizing gambling increases the amount of revenue that can be produced via broadcasting rights agreements); see also Kirkham, *supra* note 95 (“Professional sports leagues and television networks stand to gain from increased viewership of sporting events, with research showing bettors consume more games and more minutes of sporting events than those who don’t.”).

and other sports leagues to increase revenue in almost every facet of their operation.¹⁴³

However, as the sports betting industry becomes more and more profitable, it, too, becomes more and more powerful, posing substantial risks to the NBA and other sports leagues.¹⁴⁴ As seen in the past, fraud and corruption are an innate aspect of gambling as bettors seek to influence the outcomes of games.¹⁴⁵ In 2007, NBA referee Tim Donaghy took part in a gambling ring, fixing NBA games at a rate of 88% in favor of the teams Donaghy had wagered on.¹⁴⁶ At the time, the league thought it was impossible for anyone to fix its games; yet Donaghy was evidently successful in his endeavors.¹⁴⁷ The NBA will likely institute preemptive measures to insulate the game from these influences.¹⁴⁸ This means increased spending to provide for compliance, monitoring and investigation of any irregularities that might occur due to these third-party influences might cause.¹⁴⁹ Such spending has implications on profits, as the money the league uses will

¹⁴³ See Kilgore, *supra* note 90 (“In their initial reactions, many organizations appeared eager to leap into an industry they believe promises a new infusion of cash.”)

¹⁴⁴ See McCann, *supra* note 92 (noting that the NBA has stressed that increased amounts of sports betting pose elevated risks to the league).

¹⁴⁵ See *supra* Part 0. See also McCann, *supra* note 92 (pointing out that those with financial stakes in the outcome of games present the risk of attempts to fix those games). *But see* Kilgore, *supra* note 90 (citing sports law professor Ryan Rodenberg who suggests that professional athletes will have no financial incentive to throw games). Washington Wizards (NBA) and Washington Capitals (NHL) owner Ted Leonsis believes that the legalization of sports betting actually offers protection from corruption within the leagues. Kilgore, *supra* note 90. “I think that the increased transparency that will accompany more legalized betting around the country will only further protect against potential corruption.” Kilgore, *supra* note 90.

¹⁴⁶ See Eden, *supra* note 28 (“His picks were winning at an 88 percent clip, totally unheard of in sports betting for any sustained period of time.”).

¹⁴⁷ See Eden, *supra* note 28 (quoting former FBI agent Phil Scala saying he was told fixing games in the NBA was impossible).

¹⁴⁸ See McCann, *supra* note 9294 (stating that the NBA does not want players, coaches, and referees to be offered bribes to change the results of games). The NBA has already hired a firm, Sportradar, which is focused on monitoring legal betting across the globe and has helped to crack down on match-fixing throughout many different sports leagues. See Windhorst, *supra* note 9797.

¹⁴⁹ See McCann, *supra* note 92 (noting the NBA’s intention to increase spending in these areas to ensure corruption does not make its way into the league).

draw from potential dividends that would otherwise be distributed to players, coaches, and owners.¹⁵⁰

C. Murphy's Effect on NBA Players

According to the current NBA-NBPA Collective Bargaining Agreement, any "basketball related income" ("BRI") is split between the two parties at a rate of 51% to the owners and 49% to the players.¹⁵¹ Due to a lack of specific provisions detailing the distribution of sports-betting-produced income, one might assume that those proceeds will follow the same categorization and split-rate.¹⁵² However, the language of the collective bargaining agreement related to categorizing gambling proceeds as BRI: "All proceeds, net of Taxes, *less reasonable and customary expenses*...from gambling on NBA games or any aspect of NBA games..." (emphasis added) creates a potential interpretational issue.¹⁵³ If the NBA decides to categorize sports betting rights fees and integrity fees as "reasonable and customary expenses," NBA players could end up realizing no benefit from the legalization of sports betting.¹⁵⁴ This is unlikely, however, as sources familiar with the NBA's approach have declared that the league and

¹⁵⁰ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (discussing the costs that the NBA will face in maintaining its integrity in the presence of sports betting). See also Bentley, *supra* note 89 (noting that the NBA and other sports leagues would be able to work with sports books, as well as law enforcement, thus sharing the costs of maintaining the integrity of the leagues).

¹⁵¹ See Smith, *supra* note 100 (detailing provisions of the 2016 collective bargaining agreement that changed and those that remained the same in relation to the previous agreement).

¹⁵² See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (categorizing sports betting rights fees and integrity fees as "basketball related income").

¹⁵³ See NBA-NBPA 2017, *supra* note 100, at 133 (describing proceeds related to gambling as basketball related income). BRI incorporates revenue generated via TV broadcasts, apparel sales, arena advertising and other various NBA products and services. See McCann, *supra* note 92.

¹⁵⁴ See Cohen Jr. et al., *supra* note 106 (expanding on the possibility that the NBA does not consider these fees BRI). Because of the potential impacts on players in professional sports leagues of every kind, the NBPA and many other major players' associations have requested a "seat at the table" of contract negotiations between the leagues and companies involved in the sports betting industry. See McCann, *supra* note 92.

its players agree that the fees should be considered BRI.¹⁵⁵ With that being said, there is little doubt left that with the implementation of proceeds from sports betting being distributed at a rate of 49%, NBA players will indubitably realize an increase in pay throughout the years to come.

Players will also have to make efforts to protect themselves as they inevitably become involved in the sports betting industry.¹⁵⁶ The NBA players' association maintains the position that legal sports betting presents a threat to both the players' privacy and publicity rights.¹⁵⁷ Awareness of their rights, and monitoring and protecting the use of their image is a burden that players will be forced to bear; thus, players maintain some essence of clout in the discussion of whom the profits from bets on NBA games are distributed to.¹⁵⁸

Players may have the opportunity to benefit from the encroachment on players' rights, although there are indications of a trend toward the opposite.¹⁵⁹ In *Daniels*, the Indiana Supreme Court, implementing a broad construction of the First Amendment, ruled that "Defendants' use of players' names, images, and statistics in conducting fantasy sports competitions bears resemblance to the

¹⁵⁵ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (denoting that "[s]ources familiar with the NBA's thinking on sports betting right and integrity fees tell SI.com that the league and players' association are in agreement: These fees count as BRI").

¹⁵⁶ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (discussing the players' associations contention that legal betting could jeopardize players' rights).

¹⁵⁷ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (offering the NFL's Pierre Garcon's storied effort to enforce his legal rights in a similar situation). Emerging technologies are making it easier and easier to understand the idiosyncrasies of the NBA player, and both the NBA and the NBPA need to find a solution to ensure the protection of proprietary player information and the sharing of such with sports betting operators and other third parties who will be profiting from its use. See McCann, *supra* note 92.

¹⁵⁸ See *Supreme Court's Sports Betting Ruling*, *supra* note 7 (highlighting the notion that players' efforts and expenses to protect their rights may be used as a basis to demand a portion of fees gambling operators pay to the NBA).

¹⁵⁹ See Rajj et al., *supra* note 106 (elaborating on the potential that *Murphy* reinvigorated a debate as to whether players should be compensated from use of their names and likeness). See also Complaint, *supra* note 115, at 1–2 (detailing Pierre Garcon's class action suit against FanDuel); *Supreme Court's Sports Betting Ruling*, *supra* note 7 (pointing out that professional football player Pierre Garcon settled his suit with FanDuel). But see *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 398 (Ind. 2018) (ruling that collegiate student-athletes are not entitled to fees for use of their image, likeness, or statistics).

publication of the same information in newspapers and websites across the nation.”¹⁶⁰ This opens the door for permitting sports betting casinos, books, apps, and more to use players’ personal information without paying the players.¹⁶¹ However, *Daniels* addresses only collegiate student-athlete’s publicity rights.¹⁶² NBA players should be hoping for state legislation in reaction to *Murphy* requiring that casinos, sportsbooks, sports betting and fantasy sports apps operators pay a usage fee for the use of *professional* players’ image and likeness.¹⁶³ Moreover, players should be hoping that state courts do not follow *Daniels*’ lead, and instead apply a narrow construction to statutes prohibiting the use of personal publicity rights for commercial purposes.¹⁶⁴ With Pierre Garcon’s suit having been settled before trial, it remains to be seen whether courts will interpret statutes differently for collegiate student-athletes and for professional athletes.¹⁶⁵

Further, casinos, sportsbooks and other betting operators pay sports betting rights fees for the use of data that the leagues generate.¹⁶⁶ A parallel can be drawn here: that the operators should pay an image

¹⁶⁰ See *Daniels*, 109 N.E.3d at 396 (applying a broad construction of the Indiana statute protecting exploitation of personal publicity rights for commercial purposes). The application of a broad construction to this statute seems to be circumventing the purpose of the statute and the intents of its drafters. See *id.*; see also IND. CODE ANN. § 32-36-1-1 (West 2019).

¹⁶¹ See Raij et al., *supra* note 106 (analyzing the unsettled law on players’ personal publicity rights).

¹⁶² See Kardell, *supra* note 114 (noting that the *Daniels* case was brought by several college athletes).

¹⁶³ See IND. CODE ANN. § 32-36-1-1 (requiring written consent for a player’s image and likeness to be used for a commercial purpose). The Indiana Supreme Court interprets the statute to somehow not apply to daily fantasy sports operations. See *Daniels*, 109 N.E.3d at 396.

¹⁶⁴ See *Daniels*, 109 N.E.3d at 396 (reasoning that a player’s image and likeness possess “newsworthy value,” and that the information is publicly available). A narrow construction of the statute would call for those who use the image and likeness of NBA players to pay those players some sort of fee. *Id.*

¹⁶⁵ See *Supreme Court’s Sports Betting Ruling*, *supra* note 7 (noting Garcon’s victory over FanDuel resulting in extrajudicial settlement).

¹⁶⁶ See *Supreme Court’s Sports Betting Ruling*, *supra* note 7 (stating that sports betting rights fees reflect “the shared enterprise by players and the league in delivering a product from which sports betting companies seek to derivatively profit”).

and likeness fee to the players for the use of their own personal data.¹⁶⁷ Players are the laborers here, and the courts of this country should be working to protect their rights, rather than waiving them and allowing the exploitation of their image for the benefit of casinos and large corporations.¹⁶⁸ Until there is a Supreme Court ruling, players' publicity and privacy rights will remain an open issue.¹⁶⁹

Finally, the NBA is projecting an increase in the league's salary cap that is likely, in part, due to gambling-related revenue.¹⁷⁰ The NBA-NBPA Collective Bargaining Agreement establishes that a higher BRI results in an increased salary cap.¹⁷¹ If the anticipated increase in revenue due to legalized gambling is anything like the surge that resulted from the increase in TV contract value a few years ago, players will be capable of negotiating higher-valued contracts.¹⁷² It is

¹⁶⁷ See Beaton, *supra* note 106 (presenting how players will be compensated for the use of their publicity rights as one of the issues concerning organizations involved in the sports betting industry). *Contra Daniels*, 109 N.E.3d at 396 (denying collegiate athletes protection of the use of their image and likeness in fantasy sports operations).
¹⁶⁸ See Beaton, *supra* note 106 (quoting Becca Roux, executive director of the U.S. Women's Soccer National Team Players Association, saying "[a]thletes in all sports cannot allow this decision to erode hard-earned publicity rights, which is why our unions are fighting together to protect them").

¹⁶⁹ See Kardell, *supra* note 114 (concluding that *Daniels* is evidence of a *trend* toward the newsworthy exception becoming the norm).

¹⁷⁰ See Windhorst, *supra* note 97 ("After a modest increase in the cap this season, the NBA is projecting the salary cap to inflate by \$7 million in 2019. The league hasn't explained the reason, but some of that projection might include some anticipated new gambling-related revenue."). Due to the processes involved in establishing gambling operations, it is likely that it will take a year or two, perhaps more, before the NBA sees significant profits from sports betting. *Id.*

¹⁷¹ See NBA-NBPA 2017, *supra* note 100 (defining, at length, basketball related income); see also McCann, *supra* note 92 (examining the impact that a significant increase in revenue will have on the salary cap as negotiated in the Collective Bargaining Agreement). The author opined that "at the most basic level, higher BRI translates into a higher salary cap." *Id.*

¹⁷² See McCann, *supra* note 92 (analyzing the fact that due to the higher-valued TV contracts that the NBA entered into a few years ago, players who were free agents in the following couple of years realized a disproportionate increase in their salaries when compared to players who did not sign soon after those agreements). "The sports betting industry is the U.S. is projected to be worth anywhere from \$67 billion to \$150 billion." *Id.* "If the NBA and its players can acquire a meaningful portion of that industry, NBA players would stand to benefit with a higher cap." *Id.* See also Davis, *supra* note 5 ("[T]wo league sources theorized to Business Insider that

up to the NBA and the NBPA to bargain for a collective agreement that does not unjustly enrich the players who are lucky enough to be free agents in the upcoming few years, but allows for an equitable spread of the wealth caused by a flourishing new industry.¹⁷³ Sports Illustrated's Michael McCann writes "[o]verall, though, most NBA players are probably thrilled to see the NBA move first among major pro leagues in this new world of legalized sports betting."¹⁷⁴ McCann continues, "[w]hile the precise impact of the NBA embracing sports betting remains to be seen, the most likely result will be more money for NBA players."¹⁷⁵

D. *The Role of the National Basketball Players' Association*

The NBPA stands to play a pivotal role in the promulgation of future legislation. The NBPA will have to work with and support the NBA while lobbying state legislatures to promote the mutual interest of maximizing revenue and protecting its players.¹⁷⁶ With the result handed down in *Daniels v. FanDuel*, the NBPA must work to promote state legislation that explicitly protects players' publicity rights from commercial exploitation—legislation requiring courts to apply a narrow construction of publicity rights legislation.¹⁷⁷

online gaming could cause another spike in salary cap, much like the league saw in 2016 after a new, \$24 billion TV deal kicked in").

¹⁷³ See McCann, *supra* note 92 (pointing out that the NBA and NBPA failed to incorporate an equitable distribution proposition into their last collective bargaining agreement).

¹⁷⁴ See *id.* (anticipating beneficial outcomes for NBA players with sports betting legalized).

¹⁷⁵ See *id.* (concluding that, due to the *Murphy* decision, NBA should be excited to see gambling legalized as they will likely see an increase in their salaries in the upcoming years).

¹⁷⁶ See Wallach, *supra* note 106 (breaking down the issues that players and the NBPA will face in receiving their fair share of proceeds deriving from sports betting). Most of the NBA's intellectual property and biophysical data issues are resolved through the NBA-NBPA Collective Bargaining Agreement. See McCann, *supra* note 92.

¹⁷⁷ See Beaton, *supra* note 106 (quoting Becca Roux, who makes it clear that players' associations across the country must play a massive role in protecting the personal safety, integrity and rights of the players).

Further, the NBPA and the NBA will need to expressly address sports betting within their next collective bargaining agreement.¹⁷⁸ In order to ensure that the players are receiving their fair share, the NBPA will have to work with the league to sort out split-rates and shares of proceeds related to revenue generated via sports betting.¹⁷⁹ The current agreement is set to run through 2023-24, but the league and its players may find it necessary to address the issues at hand sooner.

V. Conclusion

Murphy introduced a monumental shift in this country's regulation of gambling, and specifically sports betting. Following an extended period of illegality, the Supreme Court's lifting of the sports betting ban denotes a more positive treatment of the industry and now allows states to take the billions of dollars in revenue out of the hands of black-market sportsbook operators. In doing so, as favorable legislation is enacted state by state, both professional sports leagues and their players will see massive increases in revenue production but will also be exposed to numerous legal issues that will indubitably take some time to sort out. But for the most part, a legal sports betting industry will bring financial profit to everyone involved.

¹⁷⁸ See Cohen Jr. et al., *supra* note 106 (detailing the long-term solution as "negotiating favorable revenue splitting and fee splitting terms in the underlying CBAs").

¹⁷⁹ See *id.* (contending that "it is possible that the leagues will contend that other provisions in the CBAs with their respective players' associations limit the amount of money that players can receive through alternative fees"). The NBPA will need to narrow the broad splitting provisions found in the NBA-NBPA collective bargaining agreement. *Id.*