

## DUE PROCESS, PRIVATE NONDELEGATION DOCTRINE, AND THE REGULATION OF SPORTS BETTING

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### INTRODUCTION

On May 14, 2018, the United States Supreme Court declared the Professional and Amateur Sports Protection Act (“PASPA”) unconstitutional under the Tenth Amendment’s anti-commandeering doctrine.<sup>2</sup> But PASPA was also unconstitutional for at least two other independent reasons: PASPA’s grant of regulatory power to sports leagues ran afoul of both the private nondelegation doctrine (as derived from the Vesting Clauses) and the Fifth Amendment’s Due Process Clause.

In the wake of the Supreme Court’s ruling in the long-running sports wagering litigation involving New Jersey and a quintet of sports leagues,<sup>3</sup> forward-looking visions of what the regulatory landscape for sports betting should look like have sprouted up on Capitol Hill and in many statehouses. Indeed, when the Supreme Court declared PASPA unconstitutional on anti-commandeering grounds, New Jersey—the primary defendant in the case—was free to authorize sports betting within its borders. Other states previously subject to PASPA’s qualified ban did the same.<sup>4</sup>

A majority of the five sports leagues who initiated and then lost the Supreme

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<sup>2</sup> *See* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

<sup>3</sup> *See generally id.* at 1470–73.

<sup>4</sup> As of Nov. 26, 2018, legal sports betting had similarly been authorized in Delaware, West Virginia, Pennsylvania, Rhode Island, New York, and Mississippi. Prior to the Supreme Court’s ruling, only Nevada—which was grandfathered in under PASPA’s partial federal ban—offered a full menu of legal sports betting options. *See* Ryan Rodenberg, *State-By-State Sports Betting Bill Tracker*, ESPN (last updated Feb. 13, 2019), [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states) (last visited Mar. 11, 2019).

Court case—the National Collegiate Athletic Association (“NCAA”), National Basketball Association (“NBA”), National Football League (“NFL”), National Hockey League (“NHL”), and Major League Baseball (“MLB”)—have now turned to lobbying instead of litigation. Indeed, following their Supreme Court loss, four-fifths of the sports leagues have now moved to exert regulatory control over sports betting by lobbying Congress and/or States to provide each respective league with the statutory right to restrict wagering in certain discrete ways.<sup>5</sup> Such requests have taken many forms, but are generally positioned as a pre-approval, veto, or consent right. One prominent United States Senator, Democrat Chuck Schumer from New York, even included such a league-friendly prong in an August 2018 statement about how he would regulate sports betting at the federal level.<sup>6</sup>

The purpose of this article is two-fold. First, this article *retrospectively* explains why Congress’ move to deputize sports leagues with regulatory power under PASPA unconstitutionally violated both the private nondelegation doctrine and Due Process Clause. Second, this article *prospectively* analyzes how Congress could run afoul of the Constitution again if it passes a federal law granting private sports leagues the statutory power to unilaterally decide what kind of betting options sports books can offer.

Part one of this paper provides a primer on the private nondelegation doctrine and tethered due process concerns. Part two analyzes PASPA’s delegation of regulatory authority vis-à-vis both the private nondelegation doctrine and Due Process Clause. Part three applies the private nondelegation doctrine and Due Process Clause to any future lawmaking that provides sports leagues with pre-approval or consent rights over the offering of sports betting in a legal environment. The article concludes with a policy recommendation.

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<sup>5</sup> Of the five leagues, only the NHL has been absent from state and federal lobbying efforts. According to NHL executive Gary Bettman: “We are not lobbying. That is not the approach that we have embraced.” See Zachary Zaggar, *NHL Embraces Sports Betting with MGM Resorts Sponsorship*, LAW360 (Oct. 29, 2018, 6:19 PM), <https://www.law360.com/articles/1096412/nhl-embraces-sports-betting-with-mgm-resorts-sponsorship>. Also absent from the sports betting lobbying push to date has been casinos demanding direct payment from sports leagues. As of Nov. 1, 2018, no sports betting operator has lobbied for a “consumer engagement fee” or “bet processing fee” extracted from the sports leagues as compensation for the benefits leagues (in)directly receive from sports betting. At least one state-level government entity and a number of academic studies have addressed the pecuniary benefits flowing from regulated sports betting to leagues. See Public Policy Information Sheet: Sports Betting, Colorado Department of Revenue (n.d.) (on file with author) (“Sports betting can make sports more interesting, negating the need for any payment [to sports leagues].”) at 5. See also Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE LAW J. ONLINE 1, 9 n.48 (2017).

<sup>6</sup> Sen. Charles E. Schumer, Protecting the Games We Love after *Murphy v. NCAA*: A Federal Framework for Consumer Protection and Sports Integrity (Aug. 2018), [https://www.democrats.senate.gov/imo/media/doc/Consumer\\_Protection\\_Sports\\_Integrity\\_Framework.pdf](https://www.democrats.senate.gov/imo/media/doc/Consumer_Protection_Sports_Integrity_Framework.pdf) (last visited Mar. 10, 2019).

## I. PRIMER ON PRIVATE NONDELEGATION DOCTRINE AND DUE PROCESS

Both the private nondelegation doctrine and the Due Process Clause are implicated any time a piece of legislation—like PASPA—bestows regulatory power to private entities. A doctrinal summary of both is below.

A. *Nondelegation Doctrine Generally*

The nondelegation doctrine “is rooted in the principle of separation of powers that underlies our tripartite system of Government.”<sup>7</sup> The nondelegation doctrine includes both public and private prongs. Under the public nondelegation doctrine, where lawmakers grant regulatory authority to another governmental entity, “Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>8</sup> Indeed, delegations of rulemaking authority conveyed to an agent under the limits of an intelligible principle are allowed; those without the limits of an intelligible principle are prohibited.<sup>9</sup>

The Court has largely allowed Congress to delegate rulemaking authority to other government actors under the public nondelegation doctrine.<sup>10</sup> In contrast, delegations to private entities—such as sports leagues—receive more scrutiny.<sup>11</sup>

The Supreme Court and U.S. Court of Appeals for the D.C. Circuit recently probed the contours of the private nondelegation doctrine in the so-called ‘*Amtrak*’ case.<sup>12</sup> At issue was whether Congress could constitutionally authorize Amtrak to set certain metrics and standards while simultaneously competing with other railroad operators that were subject to the same metrics and standards. The D.C. Circuit had initially deemed Amtrak a private entity and, as such, declared Congress’ grant of regulatory authority to be in violation of the private

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<sup>7</sup> *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

<sup>8</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

<sup>9</sup> *J.W. Hampton*, 276 U.S. at 409.

<sup>10</sup> *See Whitman*, 531 U.S. at 472. On October 2, 2018, the Supreme Court heard oral arguments in *Gundy v. United States*, No. 17-6086 (2d Cir.), a case about the permissibility of Congress’s delegation of power to the Department of Justice under a sex offender registration and notification statute. As of Dec. 22, 2018, the Court had yet to issue its ruling. *See Gundy v. United States*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/gundy-v-united-states/> (last visited Mar. 3, 2019).

<sup>11</sup> *See Mistretta*, 488 U.S. at 373 n.7 (The statute under review was upheld because it did not “delegate regulatory power to private individuals.”).

<sup>12</sup> *See generally* U.S. Dept. of Transp. v. Ass’n of Am. R.Rs. (*Amtrak II*), 135 S. Ct. 1225, 1125–34 (2015); *See also* Ass’n of Am. R.Rs. v. U.S. Dept. of Transp. (*Amtrak I*), 721 F.3d 666, 670 (D.C. Cir. 2013); and Ass’n of Am. R.Rs. v. U.S. Dept. of Transp. (*Amtrak III*), 821 F.3d 19, 36 (D.C. Cir. 2016).

nondelegation doctrine.<sup>13</sup> The Supreme Court—with no dissents—labeled Amtrak a government entity and remanded the case to the D.C. Circuit.<sup>14</sup> On remand, the D.C. Circuit found that the underlying statute violated the Due Process Clause.<sup>15</sup>

Because Amtrak was deemed a public actor for purposes of the case, the Supreme Court did not squarely reach a conclusion on private nondelegation doctrine grounds. Nevertheless, the Supreme Court paid attention to the private nondelegation doctrine for good reason: the lower court decision pinpointed the issue as dispositive in its resolution of the case.<sup>16</sup> Even on remand, the D.C. Circuit reaffirmed that “[o]ur prior opinion detailed extensively why private entities cannot wield the coercive power of government and seeing as the Supreme Court reversed on other grounds, we stand by that analysis.”<sup>17</sup> Accordingly, a brief summary of the appellate court’s initial ruling is in order.

The D.C. Circuit opened its discussion “with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity.”<sup>18</sup> In distinguishing the public nondelegation doctrine, the court found that “[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”<sup>19</sup> Private entities can, however, “help a government agency make its regulatory decisions.”<sup>20</sup> The D.C. Circuit cited the Supreme Court’s *Sunshine Anthracite Coal Co. v. Adkins* decision for “a modest principle: Congress may formalize the role of private parties in proposing regulations so long as that role is merely ‘as an aid’ to a government agency that retains the discretion to ‘approve[], disapprove[], or modif[y]’ them.”<sup>21</sup>

In *Amtrak II*, Justice Alito and Justice Thomas expanded on the private nondelegation doctrine in separate concurrences.<sup>22</sup> Justice Alito pointed out the

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<sup>13</sup> See *Amtrak I*, 721 F.3d at 677.

<sup>14</sup> See *Amtrak II*, 135 S. Ct. at 1228.

<sup>15</sup> See *Amtrak III*, 821 F.3d at 39.

<sup>16</sup> *Amtrak I*, 721 F.3d at 677. See discussion of the lower court’s decision *infra* notes 18-21.

<sup>17</sup> See *Amtrak III*, 821 F.3d at 37 (citing *Amtrak I*, 721 F.3d at 670-74) (citation omitted).

<sup>18</sup> See *Amtrak I*, 721 F.3d at 670.

<sup>19</sup> *Id.* at 671.

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

<sup>21</sup> *Id.* (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

<sup>22</sup> See *U.S. Dept. of Transp. v. Ass’n of Am. R.Rs. (Amtrak II)*, 135 S. Ct. 1225, 1234, 1240 (2015). In addition to Justice Thomas and Justice Alito, Chief Justice Roberts has also recently signaled his likely stance on the private nondelegation doctrine via a dissenting opinion in *Wellness Int’l Network, Ltd., et al. v. Sharif*, 135 S. Ct. 1932, 1957-58 (2015) (Roberts, J., dissenting), that cites a group of cases—*Whitman*, *Carter Coal*, *Amtrak II*, and *Mistretta* (Scalia, J., dissenting)—discussed herein: “It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions. Such delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised.”

government's acknowledgement and acquiescence of the doctrine generally: "Even the United States accepts that Congress 'cannot delegate regulatory authority to a private entity[.]'"<sup>23</sup> Justice Alito explained: "The principle that Congress cannot delegate away its vested powers exists to protect liberty."<sup>24</sup> When delegating to private parties, according to Justice Alito, "there is not even a fig leaf of constitutional justification."<sup>25</sup> Further, "[b]y any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'"<sup>26</sup>

Justice Thomas's concurrence covered related ground. According to Justice Thomas, "this Court has held that delegations of regulatory power to private parties are impermissible[.]"<sup>27</sup> Justice Thomas reasoned:

[O]ur so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the 'private nondelegation doctrine' is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.<sup>28</sup>

Both Justice Alito and Justice Thomas cited the Supreme Court's *Carter Coal* decision.<sup>29</sup> Their discussion of the case is revealing, as *Carter Coal* blurs the line between the private nondelegation doctrine and the Due Process Clause, "describing the impermissible delegation there as 'clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.'"<sup>30</sup> In this way, while the private nondelegation doctrine and the due process concerns are separate, it is useful to envision both as tethered and somewhat overlapping when analyzing Congressional delegations to private entities and the resulting impact such delegations have on competitors.

### B. Due Process Concerns

Beyond the private nondelegation doctrine, general notions of due process also are germane in the sports betting regulatory space. Indeed, when the Supreme Court remanded the *Amtrak* case to the U.S. Court of Appeals for the D.C. Circuit, the appellate court decided the case on due process—not private

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<sup>23</sup> *Amtrak II*, 135 S. Ct. at 1237 (citing *Amtrak I*, 721 F.3d at 670).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1238 (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

<sup>27</sup> *Id.* at 1252 (citing *Carter Coal*, 298 U.S. at 311).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1238 (Alito, J. concurring); *id.* at 1252 (Thomas, J., concurring).

<sup>30</sup> *Ass'n of Am. R.Rs. v. U.S. Dept. of Transp. (Amtrak I)*, 721 F.3d 666, 671 n.3 (D.C. Cir. 2013) (quoting *Carter Coal*, 298 U.S. at 311).

nondelegation—grounds. The D.C. Circuit’s analysis provides an extra layer of constraint that is arguably broader than the private nondelegation doctrine triggered by PASPA and future lawmaking that could grant sports leagues, labor unions, or other private third parties with pre-approval or consent rights over sports betting offerings.

On remand from the Supreme Court, the D.C. Circuit re-reviewed the constitutionality of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”).<sup>31</sup> The D.C. Circuit described PRIIA as a statute that “authoriz[ed] Amtrak] to regulate its resource competitors.”<sup>32</sup> Accordingly, the court found itself charged with answering the following question: “Does it violate due process for an entity to make law when, economically speaking, it has skin in the game?”<sup>33</sup> In a unanimous 3-0 ruling, the D.C. Circuit answered in the affirmative, concluding that “PRIIA violates the Fifth Amendment’s Due Process Clause by authorizing an economically self-interested actor to regulate its competitors.”<sup>34</sup>

The D.C. Circuit outlined its rationale in detail. With a reference to the Magna Carta, the court found that “[n]o clause in our nation’s Constitution has as ancient pedigree as the guarantee that ‘[n]o person . . . shall be deprived of life, liberty, or property without due process of law.’”<sup>35</sup> The resulting concern over “fairness,” according to the court, is the “one theme above all others [that] has dominated the Supreme Court interpretation of the Due Process Clause.”<sup>36</sup> With that foundation, the D.C. Circuit positioned the case for analysis as follows: “Our view of this case can be reduced to a neat syllogism: if giving a self-interested entity regulatory authority over its competitors violates due process (major premise); and PRIIA gives a self-interested entity regulatory authority over its competitors (minor premise); then PRIIA violates due process.”<sup>37</sup>

Beyond *Carter Coal*, the court cited two cases—*Eubank v. City of Richmond*<sup>38</sup> and *City of Eastlake v. Forest City Enters., Inc.*<sup>39</sup>—to highlight that “the Supreme Court has consistently concluded the delegation of coercive power to private parties can raise similar due process concerns.”<sup>40</sup> The D.C. Circuit’s decision, however, was primarily guided by *Carter Coal*. The court concluded:

[D]ue process of law is violated when a self-interested entity is “intrusted with the power to regulate the business . . . of a competitor.” “A] statute

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<sup>31</sup> Ass’n of Am. R.Rs. v. U.S. Dept. of Transp. (*Amtrak III*), 821 F.3d 19, 23 (D.C. Cir. 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 27 (citing U.S. Const. amend. V (“Fifth Amendment”).)

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

<sup>37</sup> *Id.*

<sup>38</sup> 226 U.S. 137 (1912).

<sup>39</sup> 426 U.S. 668, 677–78 (1976).

<sup>40</sup> *Amtrak III*, 821 F.3d at 31.

which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property” and transgresses “the very nature of [government function].”<sup>41</sup>

The court then applied its finding to Amtrak. According to the D.C. Circuit, “[b]ecause PRIIA endows Amtrak with regulatory authority over its competitors, that delegation violates due process.”<sup>42</sup> In the case of Amtrak, “Congress delegated its legislative power to an entity that is designed to be the *opposite* of ‘presumptively disinterested.’”<sup>43</sup> Using the Amtrak litigation as a case study, the court ended with some policy advice for Congress: “[T]he Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies. . . . To do both is an affront to ‘the very nature of things,’ especially due process.”<sup>44</sup>

## II. APPLICATION TO THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Analyzing PASPA under the private nondelegation doctrine and the Due Process Clause resembles a Venn diagram of two circles that overlap considerably. PASPA’s grant of regulatory power to sports leagues ran counter to both, leading to the same result: PASPA’s delegation was unconstitutional on both grounds for largely the same reasons.<sup>45</sup>

### A. Private Nondelegation Doctrine

PASPA’s grant of regulatory authority to sports leagues put coercive pressure on States to only authorize sports betting schemes that would be approved by private sports organizations. Indeed, the leagues have a history of

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<sup>41</sup> *Id.* (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

<sup>42</sup> *Id.* at 34.

<sup>43</sup> *Id.* (emphasis in original) (citing *Carter Coal*, 298 U.S. at 311).

<sup>44</sup> *Id.* at 36 (emphasis in original).

<sup>45</sup> PASPA’s grant of regulatory power read as follows: “A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.” 28 U.S.C. § 3703 (2012). Neither the Department of Justice nor any other branch of the federal government was a party in the Supreme Court case. Only the five private sports leagues initiated and furthered the case, although the government did appear as *amici* (in support of the plaintiff leagues) during the litigation. Indeed, PASPA’s form of outsourced regulatory power was purely elective, as evidenced by the discretionary word “may” in § 3703. In the twenty-six years that PASPA was good law, the government never filed a case alleging a violation of PASPA. *See generally* Motion of Professor Ryan M. Rodenberg for Leave to Participate in Oral Argument as *Amicus Curiae* and for Divided Argument, *Christie v. Nat’l Collegiate Athletic Ass’n* 3–4, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477).

suing states in connection with sports betting.<sup>46</sup> The five leagues turned to PASPA three times when trying to regulate States' oversight of sports betting. In 2009, the five leagues successfully sued Delaware Governor Jack Markell under PASPA.<sup>47</sup> In 2012 and 2014, the same five leagues sued New Jersey Governor Chris Christie.<sup>48</sup> The second of the two lawsuits against Governor Christie eventually landed at the Supreme Court.<sup>49</sup>

The Supreme Court's 2018 decision in *Murphy v. NCAA* made multiple references to the regulatory power of Congress in the sports betting realm, resulting in an easy nexus for further analysis under the private nondelegation doctrine and Due Process Clause.<sup>50</sup> Justice Alito's majority opinion made clear: "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own."<sup>51</sup> In his partial concurrence and partial dissent, Justice Breyer wrote: "Congress has the constitutional power to prohibit sports gambling schemes[.]"<sup>52</sup>

In dissent, Justice Ginsburg posited: "Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis[.]"<sup>53</sup> In a footnote, Justice Ginsburg explained: "[D]irect federal regulation of sports-gambling schemes

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<sup>46</sup> Prior to PASPA's enactment in 1992, the NBA sued Oregon in 1989 over the state's plan to offer sports betting. *See Nat'l Basketball Ass'n v. Or. State Lottery*, 3:89-cv-06470-MA (D. Or. Dec. 21, 1989) (on file with author). In 1976, the NFL sued Delaware in connection with the state's sports-themed lottery. *See Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1372 (D. Del. 1977).

<sup>47</sup> *See Office of Comm'r of Baseball v. Markell*, 579 F.3d 293, 296, 304 (3d Cir. 2009).

<sup>48</sup> *See Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

<sup>49</sup> *See Murphy*, 138 S. Ct. 1461. PASPA's "private attorney general" bestowed—similar to *qui tam* plaintiffs in a False Claims Act case—sports leagues with the power to sue state officials in federal court. Such delegation may have also raised issues under the Appointments Clause. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000). More generally, the underpinning of the private nondelegation doctrine and the Due Process Clause—as applied to the context of sports betting regulation—relate to the Appointments Clause's ban on private individuals' exercising "significant authority pursuant to the laws of the United States." *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976). *See also* Ryan Rodenberg, *Sports Betting Bills Would Give Leagues Power to Sue Match-Fixers*, LEGAL SPORTS REP. (April 2, 2018, 6:40AM), <https://www.legalsportsreport.com/19504/sports-leagues-sue-match-fixers/>.

<sup>50</sup> *See generally* *Murphy*, 138 S. Ct. 1461. Congressional power to regulate gambling under the Commerce Clause has been upheld by the Supreme Court before. *See Champion v. Ames*, 188 U.S. 321, 326, 330 (1903). Likewise, the Supreme Court has upheld Congress's power to ban gambling as a vice activity. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

<sup>51</sup> *Murphy*, 138 S. Ct. at 1484-85.

<sup>52</sup> *Id.* at 1488.

<sup>53</sup> *Id.* at 1489. "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce." *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)).



nationwide, including private-party schemes, falls within Congress' power to regulate activities having a substantial effect on interstate commerce. Indeed, . . . direct regulation is precisely what the anticommandeering doctrine requires."<sup>54</sup> Justice Ginsburg also elaborated on why the suggestion that Congress should impose a "federal framework"<sup>55</sup> of laws upon the States is problematic: "The concern triggering the [anticommandeering] doctrine arises only 'where the Federal Government compels States to regulate' or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact."<sup>56</sup>

PASPA's conferral of regulatory power to private sports leagues under section 3703 violated well-established constitutional limits on legislative delegations under *Carter v. Carter Coal*<sup>57</sup> and *Amtrak II*.<sup>58</sup> Both Supreme Court cases emphasized that Congress cannot delegate regulatory authority to a private entity. Nevertheless, PASPA gave private sports leagues a dispositive role in determining what types of sports betting were permissible in various States. For this reason, it was unsurprising that the Department of Justice opined that it was "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues."<sup>59</sup> If the Supreme Court had opted for a narrow approach in

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<sup>54</sup> *Murphy*, 138 S. Ct. at 1490 n.4 (citing *Gonzales*, 545 U.S. at 17) (citation omitted)..

<sup>55</sup> The first contemporary reference to a "federal framework" for sports betting was likely made by NBA executive Adam Silver in a New York Times op-ed. In relevant part, Silver wrote:

Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards. These requirements would include: mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures, geo-blocking technology to ensure betting is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming.

Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 14, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silverlegalize-sports-betting.html>. Silver's suggested "federal framework" would be unconstitutional for the same reason the Supreme Court deemed PASPA to be unconstitutional: namely, such a directive to the States runs counter to the anti-commandeering doctrine. As early as 2001, the constitutional implications of such an approach were addressed in the 'minority views' contained in the Senate report following a sports betting-related hearing before the Senate Committee on Commerce, Science, and Transportation on April 26, 2001. *See* S. REP. NO. 107-16, at 18 (2001) (citing "serious Fifth and Tenth Amendment issues").

<sup>56</sup> *Murphy*, 138 S. Ct. at 1489 (citing *New York v. United States*, 505 U.S. 144, 168 (1992)).

<sup>57</sup> 298 U.S. 238, 311 (1936).

<sup>58</sup> *Dep't of Transp. v. Ass'n of Am. R.Rs. (Amtrak II)*, 135 S. Ct. 1225 (2015).

<sup>59</sup> Letter from W. Lee Rawls, Assistant Attorney Gen., Dep't of Justice, to the

its consideration of PASPA's constitutionality—as advocated by the three Justices who dissented from the majority opinion—the Supreme Court could have severed out PASPA section 3703's unconstitutional delegation of regulatory power to private sports leagues.<sup>60</sup>

Congress was put on notice about PASPA's delegation-related infirmities early on. Former Senator Bill Bradley, a PASPA supporter, described section 3703's delegation of regulatory power to private sports leagues as an “aid in the enforcement of this legislative goal of proscribing sports betting.”<sup>61</sup> Two witnesses, both of whom opposed PASPA during Congressional hearings, provided testimony in 1991 on private nondelegation doctrine concerns. Massachusetts Lottery director Thomas O'Heir emphasized: “[PASPA] would delegate to private parties the power to enforce. . .restrictions against the States.”<sup>62</sup> Oregon State Lottery director James Davey said:

“While it is true the federal government has regulated interstate wagering, the federal government has not attempted to tell the states what they can do within their own borders. This legislation would do precisely that. Moreover, it would delegate to private parties, the professional sports leagues, the power to enforce these restrictions against the sovereign states. If Congress can enact this legislation, what is to stop it from. . .authorizing other private parties to enforce their ‘special interests’ against the states.”<sup>63</sup>

In a now-ironic (and revealing) twist, the same five sports leagues who initiated the legal case that would eventually land at the Supreme Court—the NCAA, NFL, NBA, NHL and MLB—flagged private nondelegation doctrine concerns in 2007 when opposing draft legislation that would relax some of the internet gambling restrictions in the Unlawful Internet Gambling Enforcement Act of 2006.<sup>64</sup> This Act, House Bill 2046, included an opt-out clause whereby individual sports leagues were provided a mechanism to prohibit betting on affiliated sporting events. The five leagues opposed the opt-out provisions and wrote the following in a May 31, 2007 letter to Congress: “[T]he opt-outs are subject to challenge in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to

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Honorable Joseph R. Biden, Jr., Chairman, Comm'n on the Judiciary, 2 (Sept. 24, 1991).

<sup>60</sup> The Supreme Court has followed the severability approach in numerous cases. *See* *United States v. Booker*, 543 U.S. 220, 258 (2005) (the Supreme Court found that courts should “refrain from invalidating more of the statute than is necessary.”). *See also* *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (in a different case, the Supreme Court recognized a “presumption. . .in favor of severability.”).

<sup>61</sup> Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. OF SPORT L. 5, 9 (1992).

<sup>62</sup> *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the Comm. on the Judiciary*, 102d Cong. 68 (1991) (statement of Thomas O'Heir, Director of Massachusetts State Lottery).

<sup>63</sup> *Id.* at 158.

<sup>64</sup> *See* 31 U.S.C. § 5361 (2012).

private parties (commissioners of various sports leagues and conferences).”<sup>65</sup>

The leagues’ argument was well-grounded in 2007<sup>66</sup> and remains so today.<sup>67</sup> Through PASPA, Congress unconstitutionally delegated its legislative authority to private entities. The private sports leagues, in turn, were free to unilaterally regulate sports betting at the state level. The leagues sought to exert regulatory control of certain States (Delaware and New Jersey), but opted against pursuing PASPA actions against a host of other States. The regulatory power PASPA bestowed was discretionary. Such discretion—when delegated to private sports leagues—is unconstitutional under the private nondelegation doctrine.

Others viewed PASPA similarly. Iowa Republican Senator Chuck Grassley—the only current member of the Senate who voted against PASPA in 1992—recognized the statute’s infirmities under the private nondelegation doctrine: “[PASPA] would prohibit purely intrastate activities. The federal government has never authorized private parties to enforce such restrictions against the States. This legislation would do so.”<sup>68</sup> Likewise, two academic commentators concluded: “PASPA is vulnerable to constitutional challenges based on its procedural mechanisms. . . . PASPA is facially unprecedented law, giving sports organizations the ability to trump state legislators.”<sup>69</sup>

By bestowing regulatory authority to sports leagues—as evidenced by repeated PASPA litigation initiated against sitting state governors, other government officials, and private-sector competitors—Congress pushed PASPA into unconstitutional territory vis-à-vis the private nondelegation doctrine.

### B. Due Process Clause

Deputizing self-interested sports leagues to regulate both state officials and private competitors via PASPA also violated the Due Process Clause. Under PASPA, sports leagues could opt to regulate or not according to their own

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<sup>65</sup> Letter from Rick Buchanan, Exec. VP and Gen. Counsel, Nat’l Basketball Ass’n, et al., to Members of the House Fin. Serv. Comm. (May 31, 2007) (on file with author) [hereinafter Letter from Buchanan].

<sup>66</sup> Brief of the National Football League as *Amicus Curiae* in Support of the Negative Position at 13, *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104, (Del. 2009) (No. 150, 2009) (two years after the leagues’ 2007 letter to Congress, the NFL similarly cautioned the Delaware Supreme about a delegation of regulatory power to a governmental entity in connection with the contours of “specific sports betting games.”).

<sup>67</sup> See Letter from Buchanan, *supra* note 65, at 174. The rationale behind the leagues’ 2007 letter to Congress also applies to the current lobbying demand for a consent/veto/pre-approval right over sports betting made by a majority of the same five sports leagues, which would effectively operate the same way as the “opt out” clause the five leagues *opposed* on private nondelegation doctrine grounds in 2007.

<sup>68</sup> S. Rep. No. 102-248, at 12 (1991).

<sup>69</sup> I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 687 (2012).

interests. Such a unilateral right resulted in States and private sports betting providers being deprived of basic due process protections under the regulatory scheme.

Indeed, over the course of a decade, the government repeatedly positioned PASPA as a regulatory statute. In 2009, the Department of Justice wrote: “Congress enacted PASPA. . .intending to further regulate interstate sports gambling . . . .”<sup>70</sup> One year later, the Justice Department wrote: “To regulate sports betting, an activity with uncontested effect on interstate commerce, Congress enacted a national policy.”<sup>71</sup> According to the Solicitor General in 2014, “PASPA does not merely limit the regulatory reach of the States; it directly regulates private conduct as well.”<sup>72</sup> Three years after that, the Solicitor General wrote: “portions of Section 3702(1) permissibly ‘regulate[] state activities.’”<sup>73</sup>

PASPA’s offloading of regulatory power to sports leagues for use against non-preferred competitors was a type of unconstitutional conferral impermissible under the Due Process Clause. The ability to commandeer States’ choices regarding sports gambling was pernicious to due process considerations, as it vanquished any political accountability. Further, the discretionary nature of PASPA’s conferral of regulatory power put coercive pressure on States to kowtow to private interests operating far outside the substantive and procedural due process protections built into normal government regulation.

The D.C. Circuit’s findings in the *Amtrak* case on remand from the Supreme Court illustrated why PASPA was problematic from a due process perspective. Beyond fairness concerns, “‘the power to regulate the business . . . of a competitor . . . undertakes an intolerable and unconstitutional interference with personal liberty and private property’ and transgresses ‘the very nature of [government function].”<sup>74</sup> Like *Amtrak*, profit-maximizing sports leagues with

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<sup>70</sup> Federal Defendants’ Opposition to Governor Jon S. Corzine’s Motion to Intervene at 5, *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301, 2009 WL 4890880 (D.N.J. July, 20, 2009).

<sup>71</sup> Reply in Support of Federal Defendants’ Motion to Dismiss at 7, *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301, 2010 WL 5916898 (D.N.J. Oct. 18, 2010).

<sup>72</sup> Brief for the United States in Opposition at 17, *Christie v. Nat’l Collegiate Athletic Ass’n*, 730 F.3d 208 (3rd Cir. 2013) (No. 13-967).

<sup>73</sup> Brief for the United States as Amicus Curiae at 13, *Nat’l Collegiate Athletic Ass’n v. Christie*, 832 F.3d 389 (3rd Cir. 2016) (Nos. 16-476, 16-477) (quoting *S.C. v. Baker*, 485 U.S. 505, 514 (1988)).

<sup>74</sup> *Ass’n of Am. R.Rs. v. U.S. Dept. of Transp. (Amtrak III)*, 821 F.3d 19, 31 (D.C. Cir. 2016) (citing *Carter v. Carter Coal*, 298 U.S. 238, 311 (1936)). See S. Rep. 102-248, at 8 (1991) (for a discussion of how sports leagues compete with betting operators, see *infra* notes 95-100 and accompanying text. Revealingly, when the Supreme Court declared PASPA unconstitutional, the ruling also effectively wiped away a constraint on sports leagues recognized by the Senate Judiciary Committee in 1991 and memorialized in the accompanying Senate Report: “The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports gambling operations. They are clearly prohibited under this bill from instituting their

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power over States' lawmaking or private entities' business are "the *opposite* of 'presumptively disinterested.'"<sup>75</sup>

Upon finding that PASPA section 3703 violated due process, the Court could have severed out the offending portion of the statute.

#### IV. APPLICATION TO FUTURE SPORTS BETTING REGULATION

Constitutional problems stemming from sports betting regulatory efforts are not limited to PASPA.

In the wake of the Supreme Court declaring PASPA unconstitutional, four out of five of the plaintiff sports leagues from the case have shifted from litigation to lobbying.<sup>76</sup> One speaking point from their non-uniform lobbying efforts is bent on having legislators grant leagues veto power over certain types of sports betting options.<sup>77</sup> The requests take the form of statutory mandates that sports leagues have the right to bar discrete betting options absent pre-approval or consent. The leagues' lobbying efforts differ markedly from the already-established procedure in Nevada, where leagues are free to request that governmental regulators stop certain kinds of sports betting, but the ultimate regulatory decision rests entirely with duly-authorized state regulators.<sup>78</sup>

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own sports betting scheme." See also Brief of Professor Ryan M. Rodenberg as Amicus Curiae in Support of Petitions for Writ of Certiorari at 19, *Christie v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct 1461 (2018) (Nos. 16-476, 16-477) (likewise, in a 2012 deposition, an NFL executive explained the NFL's motivation to become involved in sports betting: "The NFL is in a revenue-generating business. If the NFL believes that sports gambling would allow it to increase its revenue, the NFL would engage in that activity.").

<sup>75</sup> *Amtrak III*, 821 F.3d at 34.

<sup>76</sup> See generally Dustin Gouker, *New NBA, MLB Lobbying Document Surfaces: 'Sports Leagues Should Be Compensated.'* LEGAL SPORTS REP. (Feb. 8, 2018, 9:41 AM), <https://www.legalsportsreport.com/18303/nba-mlb-lobbying-sports-betting-wv/> (two of the plaintiffs in the Supreme Court case—MLB and the NBA—commenced public lobbying in connection with sports betting *before* the Supreme Court issued its ruling on May 14, 2018). See *supra* note 5 and accompanying text. See also *infra* notes 98-100 and accompanying text.

<sup>77</sup> See Protecting Sports Integrity after PASPA, NFL (May 2018) (on file with author) (referencing "league consent for betting on league events") [hereinafter NFL], available at <https://nflcommunications.com/Documents/2019%20PR%20Meeting%20Electronic%20Briefing%20Book.pdf>. See also Statement to the New York State Senate Standing Committee on Racing, Gaming and Wagering, Nat'l Basketball Ass'n, 3 (Jan. 24, 2018) ("leagues should have the right to restrict wagering on their own events"), available at [https://www.nysenate.gov/sites/default/files/1.24.18\\_testimony\\_of\\_national\\_basketball\\_association.pdf](https://www.nysenate.gov/sites/default/files/1.24.18_testimony_of_national_basketball_association.pdf) [hereinafter Statement to New York State Senate].

<sup>78</sup> NEV. ADMIN. CODE § 22.120(d) (2018) ("No wagers may be accepted or paid by any book on: . . . [a]ny event, regardless of where it is held, involving a professional team whose home field, a court, or base in Nevada, or any event played in Nevada involving a professional team, if, not later than 30 days before an event or the beginning of a series of events, the team's governing body files with the commission

Beyond constitutional concerns attached to the leagues' lobbying demands, there are additional hurdles as both Congress and the Department of Justice have previously staked out positions on this issue. Congress found that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."<sup>79</sup> In accord, the Justice Department advised that "it is left to the states to decide whether to permit gambling activities based upon sporting events."<sup>80</sup>

Against this backdrop, specific examples from various league and team statements submitted to government regulators and federal/state lawmakers are illustrative.<sup>81</sup>

In conjunction with a September 27, 2018 Congressional hearing, the NFL filed a one-page document entitled "Protecting Sports Integrity After PASPA." In its submission, the NFL wrote that one of the "[k]ey [c]omponents of [m]odel [p]ost-PASPA [l]egislation" would include "league consent for betting on league events."<sup>82</sup> The NFL expanded on this point in a separate filing to the same Congressional subcommittee. The NFL wrote: "Specifically, professional and amateur sports organizations should be able to restrict, limit, or exclude wagers

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a written request that wagers on the event or series of events be prohibited, and the commission approves the request").

<sup>79</sup> 15 U.S.C. § 3001(a)(1) (2012).

<sup>80</sup> Letter from W. Lee Rawls, Assistant Attorney Gen., Dep't of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Comm'n on the Judiciary, 1 (Sept. 24, 1991).

<sup>81</sup> See NAT'L COLLEGIATE ATHLETIC ASS'N, REPORT OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION BOARD OF GOVERNORS MEETING AUG. 7, 2018, 6–7 (2018), available at [https://www.ncaa.org/sites/default/files/Aug2018BOG\\_Report\\_20180820.pdf](https://www.ncaa.org/sites/default/files/Aug2018BOG_Report_20180820.pdf). The NCAA has moved to lobby on sports betting at the state and federal level too, but has not taken as firm a stance as the NFL, NBA, and MLB on the issue of whether sports leagues should have a statutory right to unilaterally restrict certain types of wagering. See generally NAT'L COLLEGIATE ATHLETIC ASS'N, SPORTS WAGERING PRINCIPLES (on file with author). But see Dan Wolken, *National Sports Gambling Coming, It Will be Good for Colleges and the NCAA Needs to be Ready*, USA TODAY (Dec. 7, 2017, 2:33 PM), <https://www.usatoday.com/story/sports/college/columnist/danwolken/2017/12/07/sports-gambling-ultimately-good-collegesport-s-ncaa-needs-ready/931288001/> ("NCAA President Mark Emmert . . . suggested the possibility of a 'carve out' if PAPA [sic] is struck down, essentially lobbying states to exclude college sports if gambling becomes legal nationwide.").

<sup>82</sup> NFL, *supra* note 77. See generally Dustin Gouker, *An NFL Team Wants You To Vote To 'Protect Your Right To Legally Bet on Sports'*, LEGAL SPORTS REP. (Nov. 6, 2018), <https://www.legalsportsreport.com/25655/miam-dolphins-plug-legal-sports-betting/> (the Miami Dolphins—an NFL team—added a wrinkle on Nov. 5, 2018 when the team tweeted out a message on the eve of election day. The Miami Dolphins urged followers to vote as a way to "[p]rotect your right to legally bet on sports." Whether individuals have a "right" to legally bet on sports is beyond the scope of this paper, but the underlying issue of any such "rights" attaching to individuals could impact arguments in favor of granting sports leagues the ability to restrict the types of sports betting available to individuals).

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that are not determined solely by the final score or outcome of the event[.]”<sup>83</sup> The foregoing sentence was also included in separate filings in Illinois<sup>84</sup> and Pennsylvania.<sup>85</sup>

According to a formal statement filed by the NBA in both New York and Kansas:

[L]eagues should have the right to restrict wagering on their own events. Certain types of bets are more susceptible to manipulation than others, such as whether a player will commit the first foul of the game. Different sports will have different types of bets, and so each league needs the ability to approve the types of wagering that are offered.<sup>86</sup>

In a submission to the Kansas legislature, the Kansas City Royals—an MLB team—posited, in relevant part, that “the following requirements [are] necessary to legalizing sports betting in Kansas: . . . the ability for sports leagues to opt-out of problematic forms of betting.”<sup>87</sup> In February 2018, the NBA and MLB jointly disseminated a one-page summary sheet in West Virginia entitled “Protecting the Integrity of Sports in a Regulated Sports Betting Market” that declared: “Sports leagues must be able to opt[ ] out of betting.”<sup>88</sup> The NBA and MLB also reportedly co-wrote a “model” bill for States that included expanded language on this point:

A sports governing body may notify [regulating entity] that it desires to restrict, limit, or exclude wagering on its sporting events by providing notice in the form and manner as [regulating entity] may require, including without limitation[,] restrictions on the sources of data and associated video upon which an operator may rely in offering and paying wagers and

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<sup>83</sup> *Post-PASPA: An Examination of Sports Betting in America: Before Subcomm. on Crime, Terrorism, Homeland Security and Investigation of the H. Comm. on the Judiciary*, 115th Cong. (Sept. 27, 2018) (testimony of Jocelyn Moore, Executive Vice President, Communications and Public Affairs, National Football League), available at <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-MooreJ-20180927.pdf>.

<sup>84</sup> *Senate Bill 7 (Gaming-Variou)s: Hearing Before Subcomm. on Gaming and Subcomm. on Sales and Other Taxes of Ill. H.*, 2018 Leg., 100th Sess. 2 (Il. Oct. 17, 2018) (Testimony of the National Football League) (on file with author).

<sup>85</sup> Letter from Jocelyn Moore, Senior Vice President, Pub. Policy & Gov’t Affairs, National Football League, to the Bd. Members of the Pa. Gaming Control Bd., 3 (June 15, 2018), available at <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-MooreJ-20180927.pdf>.

<sup>86</sup> Statement to New York State Senate, *supra* note 77. See also Letter from the National Basketball Association to the Kansas Legislature, House Federal & State Affairs Comm. (Mar. 13, 2018) (on file with author).

<sup>87</sup> Statement from Kevin Uhlich, Senior Vice President, Business, Kansas City Royals, to the Kansas State Legislature, *Statement of the Kansas City Royals on Sports Betting Legislation* (Mar. 9, 2018) (on file with author).

<sup>88</sup> Press Release, NBA & MLB, Protecting the Integrity of Sports in a Regulated Sports Betting Market (n.d.) (on file with author). See also Gouker, *supra* note 76.

the bet types that may be offered. Upon receiving such notice, [regulating entity] shall publish the wagering restrictions. Offering or taking wagers contrary to such published restrictions shall be a violation of this Act.<sup>89</sup>

Beyond the leagues, a group of five player associations has made a similar request. In written testimony submitted to the Congressional hearing on September 27, 2018, the National Basketball Players Association, National Football League Players Association, Major League Baseball Players Association, and Major League Soccer Players Association wrote: “[A]greement should be required between the players and the leagues in which they play as to the kinds of bets that will be allowed in their particular sport.”<sup>90</sup> The formal statements from the various sports leagues and player associations mirror the policy stance of Senator Chuck Schumer (D-NY) who issued a two-page memo on August 29, 2018, that outlined his preferred approach to federal-level regulation.<sup>91</sup> Senator Schumer’s optimal regulatory framework would “[r]equire agreement between the league or appropriate governing body and those entities taking bets on what types of bets will be permitted.”<sup>92</sup>

During the September 27, 2018 Congressional hearing, the American Gaming Association (“AGA”) rebutted the NFL’s suggestion that sports leagues should be empowered to regulate sports betting by controlling the type of wagers offered.<sup>93</sup> The AGA’s rebuttal focused on Nevada’s approach to the issue and practical business considerations, not the constitutional implications stemming from the delegation of regulatory authority to private sports leagues. According to the AGA:

[A] few major sport leagues have proposed they be able to restrict, at their sole discretion, the types of bets allowed on their games. This suggestion was made based on the leagues’

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<sup>89</sup> Brett Smiley, *Exclusive: Here’s the ‘Model’ Sports Betting Playbook from NBA, MLB*, SPORTS HANDLE (Feb. 20, 2018, 1:29 PM), <https://sportshandle.com/sports-betting-nba-mlb-model-act-integrity-fee/>.

<sup>90</sup> *Post-PASPA: An Examination of Sports Betting in America: Before Subcomm. on Crime, Terrorism, Homeland Security and Investigation of the H. Comm. on the Judiciary*, 115th Cong. (Sept. 27, 2018) (testimony of the NFL Players Association, MLB Players Association, NHL Players Association, National Basketball Players Association, and Major League Soccer Players Association) (on file with author).

<sup>91</sup> Memorandum from Senate Democratic Leader Charles E. Schumer on Protecting the Games We Love after *Murphy v. NCAA: A Federal Framework for Consumer Protection and Sports Integrity* (Aug. 29, 2018), available at [https://www.democrats.senate.gov/imo/media/doc/Consumer\\_Protection\\_Sports\\_Integrity\\_Framework.pdf](https://www.democrats.senate.gov/imo/media/doc/Consumer_Protection_Sports_Integrity_Framework.pdf).

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

<sup>93</sup> *See Post-PASPA: An Examination of Sports Betting in America: Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations, H. Comm. on the Judiciary*, 115th Cong. (Sept. 27, 2018) (statement of Sara Slane, Senior Vice President, American Gaming Association (AGA)), <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-SlaneS-20180927.pdf>.



concerns that certain types of bets could be more susceptible to manipulation in the betting market. While sports book operators are aligned on the underlying goal of preventing market manipulation—which could severely impact both their business reputations and bottom lines—we see this proposal as counterproductive and unnecessary. Sports book operators already have significant economic incentive to avoid offering bets that pose a significant risk. Moreover, attempts to restrict bets that have broad customer demand would further empower illegal operators that don’t abide by the same set of rules.

As the only state with a long enough history to be used as a case study, Nevada has gotten this right. Sports leagues have the ability to ask the Nevada Gaming Commission to restrict wagering on games involving that league’s Nevada-based teams, or on league’s contests which take place in Nevada. Even then, there is no unilateral ability for any league to call the shots when it comes to what bets sportsbooks can offer. In the past decade, the leagues have not once availed themselves of this option.<sup>94</sup>

Sports leagues are in direct competition with sports betting operators, as illustrated by the following examples:

- Sports leagues and owners of league teams hold—or held—equity stakes in FanDuel and DraftKings, two companies that are now functioning as full-blown sportsbooks;<sup>95</sup>
- Sports leagues and owners of league teams hold equity stakes in businesses who disseminate gambling data domestically and internationally;<sup>96</sup>
- Individual league teams and certain sports leagues—such as the NHL, NBA, and MLB—have entered into ‘official gaming partnerships’ or advertising

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<sup>94</sup> *Id.* For a discussion of Nevada’s regulations on this topic, see *supra* note 78 and accompanying text.

<sup>95</sup> See Eben Novy-Williams, *Major League Baseball Taps MGM as First Sports-Gambling Partner*, BLOOMBERG (Nov. 27, 2018, 12:08 PM), <https://www.bloomberg.com/news/articles/2018-11-27/major-league-baseball-taps-mgm-as-firstsports-gambling-partner> (“MLB also is in the process of cutting its minority stake in sportsbook operator DraftKings.”). See also Darren Rovell & David Purdum, *Sources: MLB, NBA Looking to End Respective Ownership Stakes in DraftKings, FanDuel*, ESPN.COM (Apr. 19, 2018), [http://www.espn.com/chalk/story/\\_/id/23249204/mlb-nba-discuss-divesting-financial-interests-draftkings-fanduel](http://www.espn.com/chalk/story/_/id/23249204/mlb-nba-discuss-divesting-financial-interests-draftkings-fanduel).

<sup>96</sup> See Daniel Kaplan & Eric Fisher, *NFL buys stake in stats firm: Europe’s Sportradar will replace Stats LLC*, SPORTS BUS. J. (Apr. 20, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/04/20/Leagues-and-Governing-Bodies/NFL-sportradar.aspx>. See also Scott Soshnick, *Jordan, Cuban, Leonsis Put Millions on Sports Betting’s Future*, BLOOMBERG.COM (Oct. 27, 2015, 4:00 AM), <https://www.bloomberg.com/news/articles/2015-10-27/jordan-cuban-leonsis-put-millions-on-sports-betting-s-future>.

deals with some, but not all, sportsbooks;<sup>97</sup>

- Certain sports leagues—such as the NBA and MLB—are lobbying to extract an “integrity fee” and/or “royalty” from sportsbooks;<sup>98</sup>
- Certain sports leagues—such as the NCAA, NFL, NBA, and MLB—are lobbying for a statutory mandate pertaining to sports betting-relevant data;<sup>99</sup> and
- Certain sports leagues—such as the NBA and MLB—are lobbying for sports betting “exclusivity zones” in certain geographic areas.<sup>100</sup>

Suggestions that sports leagues should have the unilateral right to regulate sports betting via statute is the precise type of privately-held regulatory power Justice Alito cautioned against in his *Amtrak* concurrence. The concerns expressed in *Carter Coal* and *Amtrak* are applicable to any potential case if Congress (or one or more States) were to enact a law providing sports leagues with the right to regulate sports wagering via any type of consent, veto, restriction, or opt-out right. Accordingly, any Congressional grant of such

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<sup>97</sup> See David Purdum & Darren Rovell, *NBA Signs Deal With MGM to be Gaming Partner*, ESPN.COM (August 9, 2018), [http://www.espn.com/chalk/story/\\_/id/24245142/nba-first-league-betting-sponsor-deal-mgm](http://www.espn.com/chalk/story/_/id/24245142/nba-first-league-betting-sponsor-deal-mgm). See also Adam Candee, *MGM Inks Another Major Deal to Become Official Sports Betting Partner of the NHL*, LEGAL SPORTS REP. (Oct. 29, 2018), <https://www.legalsportsreport.com/25328/mgm-nhl-official-sports-betting-partnership/>. See also David Purdum & Darren Rovell, *MLB and MGM Resorts International Strike Gaming Partnership*, ESPN.COM (Nov. 27, 2018), [http://www.espn.com/chalk/story/\\_/id/25393195/major-league-baseball-partners-mgm-resorts-international](http://www.espn.com/chalk/story/_/id/25393195/major-league-baseball-partners-mgm-resorts-international).

<sup>98</sup> See Dustin Gouker, *NBA's Silver on Sports Betting: 'I Don't Want to Hide From the Fact That I Think it Will Be Good for Business'*, LEGAL SPORTS REP. (October 17, 2018), <https://www.legalsportsreport.com/24986/nba-silver-talks-sports-betting/>.

<sup>99</sup> See John Holden, *Making Sense of Pro Sports Leagues' Search for Sports Betting Data Fees*, LEGAL SPORTS REP. (June 18, 2018, 1:04 PM), <https://www.legalsportsreport.com/21245/search-for-sports-betting-fees/>. For a discussion of competition between and among various entities in the gambling (data) marketplace. See Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, WASH. J. OF L., TECH. & ARTS 11(2), 63, 101, n.155 (2015). See also Steve Fainaru et al., *Gambling on the Come: Leagues Strike Deals with Gambling-Related Firms*, ESPN.COM (Jan. 28, 2016), [http://www.espn.com/espn/otl/story/\\_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms](http://www.espn.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms) (the NBA partnered with two sports betting data dissemination firms in November 2018); Eben Novy-Williams, *NBA Breaks Fresh Ground for Sports with First Gambling Data Deal*, BLOOMBERG.COM (Nov. 28, 2018), <https://www.bloomberg.com/news/articles/2018-11-28/nba-breaks-fresh-ground-for-sports-with-first-gambling-data-deal> (“Firms to serve as middlemen between NBA and betting operators.”); David Purdum, *Sportsbook will use real time NBA data for in-game betting odds this season*, ESPN.COM (Nov. 28, 2018, 9:16 AM), <https://abcnews.go.com/Sports/sportsbooks-real-time-nba-data-game-betting-odds/story?id=59467738>.

<sup>100</sup> Memorandum from MLB, the NBA, the PGA Tour, Monumental Sports & Entertainment, the Washington Nationals, MGM, DraftKings, FanDuel on The Essential Components for Legal Sports Betting in the District of Columbia (n.d.) (on file with author).

regulatory power to sports leagues would violate the private nondelegation doctrine.<sup>101</sup> Bestowing sports leagues with such coercive power runs counter to the Due Process Clause, too.<sup>102</sup>

## V. CONCLUSION

This article concludes with a policy recommendation. While government regulators and lawmakers should be open to receiving suggestions from sports leagues and other interested third parties as part of a normal public comment process, neither state nor federal law should—or can, in a constitutionally-compliant way—delegate regulatory power to such private entities. To do so would violate well-established constitutional limits under the private nondelegation doctrine and Due Process Clause.

If Congress is going to regulate sports betting, Congress must do so directly via conferral of regulatory power to a federal agency like the Commodity Futures Trading Commission (“CFTC”), Federal Trade Commission (“FTC”), or Securities and Exchange Commission (“SEC”).<sup>103</sup> Justice Alito made this clear

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<sup>101</sup> Whether state law equivalents of the federal-level private nondelegation doctrine could apply is potentially relevant as well, but beyond the scope of this paper. See generally Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, U. CONN. INS. L. REV. (forthcoming 2018) (on file with author) (“[B]asic separation of powers and non-delegation principles embedded in every state Constitution”). See also Calvin Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 171 (2014) (“[T]he states are generally in agreement that private delegations are unconstitutional under the relevant state constitutions”). For a state-by-state breakdown of the nondelegation doctrine’s status under each state constitution, see Jim Rossi, *Institutional Design and the Lingering Legacy of the Antifederalist Separation of Powers Ideals in the States*, 52(5) VANDERBILT L. REV. 1167, 1191-1201 (1999). See also Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L. J. AM. U. 567 (1994).

<sup>102</sup> The Fifth Amendment’s Due Process Clause applies to the federal government and the Fourteenth Amendment’s Due Process Clause applies to the States. See generally *Dept. of Transp. v. Ass’n of Am. R.Rs. (Amtrak III)*, 821 F.3d 19 (D.C. Cir. 2016); see also *supra* text accompanying notes 31-44.

<sup>103</sup> Indeed, Representative Frank Pallone (D-N.J.) recognized the constraints of the nondelegation doctrine and Due Process Clause when he introduced comprehensive sports betting legislation in 2017, which delegated regulatory authority to the FTC. See David Purdum, *GAME Act proposing repeal of federal prohibition on sports betting revealed*, ESPN.COM (May 25, 2017), [www.espn.com/chalk/story/\\_/id/19457893/congressional-committee-unveils-game-act-proposing-repeal-federal-prohibition-sports-betting](http://www.espn.com/chalk/story/_/id/19457893/congressional-committee-unveils-game-act-proposing-repeal-federal-prohibition-sports-betting). After the Supreme Court’s ruling, Rep. Pallone withdrew his draft bill; Tony Batt, *New Jersey’s Pallone Pulls Plug on Federal Sports-Betting Bill*, GAMBLING COMPLIANCE (Sept. 14, 2018) (on file with author). On Dec. 5, 2018, Senator Orrin Hatch (R-Utah) released an untitled ‘discussion draft’ of comprehensive sports betting legislation, finding that “there is an important role for Congress in setting minimum standards for sports wagering that affects interstate commerce.” Orrin Hatch, Discussion Draft, To acknowledge the rights of States with

in the recent Supreme Court decision: “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”<sup>104</sup> Accordingly, there are two paths Congress *cannot* take: (i) Congress cannot implement a “federal framework”—as suggested by an NBA executive in a widely-read New York Times op-ed<sup>105</sup>—that dictates regulatory terms to the States and (ii) Congress cannot delegate any regulatory power (about what types of bets are permitted or otherwise) to private sports leagues or other private-sector third parties.<sup>106</sup>

A federal sports betting regulatory statute has already been declared unconstitutional once.<sup>107</sup> If Congress is going to take a stab at drafting a second sports betting regulatory statute, it should do so in a way that adheres to the Constitution and is consistent with the private nondelegation doctrine and Due Process Clause.

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respect to sports wagering and to maintain a distinct Federal interest in the integrity and character of professional and amateur sporting contests, and for other purposes (later introduced with non-substantive changes in the Senate on Dec. 19, 2018 as the Sports Wagering Market Integrity Act of 2018), <https://www.legalsportsreport.com/wp-content/uploads/2018/12/Sports-Betting-Discussion-Draft.pdf>. See also David Purdum, *Congress pushing for federal sports betting oversight*, ESPN.COM (Dec. 5, 2018), available at [http://www.espn.com/chalk/story/\\_/id/25453710/congress-pushing-federal-sports-betting-oversight](http://www.espn.com/chalk/story/_/id/25453710/congress-pushing-federal-sports-betting-oversight). Senator Hatch’s release of a draft bill raises the specter of a bifurcated approach where in-person retail sports betting is regulated at the state level and mobile/online sports betting is regulated at a federal level. One element included in Senator Hatch’s draft bill—a mandate that operators purchase data from sports leagues or leagues’ designees during a pre-set time period with a December 31, 2022 sunset provision—also raises the possibility of a multi-year interim period during which sports leagues empowered to control the data faucet would likely move to control the market by: (i) directly (and exclusively) offering sports betting to consumers; (ii) using the federal legislation as a shield against competition and, in turn, cut out the middlemen (i.e. data brokers and/or other bookmakers); and (iii) enjoy the quasi-grant of *sui generis* rights via a federal statute that aims to steer clear of the “limited Times” requirement of the Constitution’s Intellectual Property Clause contained in Article I. See S. 3793.

<sup>104</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484 (2018).

<sup>105</sup> Adam Silver, Opinion, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 14, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

<sup>106</sup> Such federal-level constraints are generally applicable at the state-level too. See Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, U. CONN. INS. L. REV. (forthcoming 2018) (on file with author). See also Calvin Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 170 (2014).

<sup>107</sup> *Murphy*, 138 S. Ct. at 1477.