

WHY THE SOUTH STILL HASN'T BET THE FARM—AFTER *MURPHY V. NCAA*, SOUTHERN STATES ARE LESS CONCERNED WITH PROTECTING MORAL CONSERVATISM AND MUCH MORE CONCERNED WITH AN INABILITY TO MAKE SPORTS GAMBLING ECONOMICALLY VIABLE AT THE STATE LEVEL

Nicole Williamson*

I. INTRODUCTION

As the effects of the COVID-19 pandemic persist, states in the United States continue to look for new and alternative streams of income.¹ As of 2022, non-medical marijuana remains illegal in most of the South, but there appears to be bipartisan support for a popular alternative: sports gambling.² For example, bipartisan proponents for reformation of state gaming laws (such as those in Texas, Oklahoma, Missouri, Kentucky, Alabama, Georgia, and South Carolina) contend that state-level legalized sports wagering would likely provide a clear and convenient means to new tax revenue, sponsorship income, tourism dollars, and job creation.³

While legalized sports wagering at the state level would have seemed an unattainable goal just thirty years ago, since 2018, thirty-three states have legalized some form of sports gambling.⁴ This new wave of gaming reformation comes after the Supreme Court's decision in *Murphy v. National Collegiate Athletic Association*.⁵ In *Murphy*, the state of New Jersey and its then-governor, Chris Christie, challenged the constitutionality of the Professional and Amateur

* Nicole Williamson is a civil litigation attorney at Sanjay R. Chadha, PLLC and a graduate of South Texas College of Law in Houston, Texas.

¹ See generally Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043 (2021).

² See Wayne Parry, *BC-US—AP Poll-Sports Betting, 1st Ld-Writethru, US*, AP NEWS (Mar. 20, 2019), <https://apnews.com/article/7e8a96f8e05d4f9cfa57ab3c1e42480> (discussing how support for legal sports betting appears to cross political party lines: 65% of Democrats and 59% of Republicans want legal betting on professional sports, while only 47% of Democrats and 41% of Republicans think it should be legal to bet on college sports).

³ See *id.*

⁴ Will Yakowicz, *Where Is Sports Betting Legal? A Guide to All 50 States*, FORBES (Jan 7, 2022, 6:00 AM), <https://www.forbes.com/sites/willyakowicz/2022/01/07/where-is-sports-betting-legal-america-2022/?sh=63fa96a32342>.

⁵ See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

Sports Protection Act (PASPA).⁶ Specifically, New Jersey challenged PASPA's ability to prohibit a majority of U.S. states from being able to "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling.⁷ Ultimately, on May 14, 2018, the Supreme Court ruled that such regulation qualified as an unconstitutional commandeering of states' rights.⁸

However, despite a number of states rushing to modify or outright repeal their body of gaming law in the aftermath of *Murphy*⁹—and record-breaking polls suggesting that the South's population overwhelmingly favors legalized gambling¹⁰—prohibitions against sports gambling in several Southern states remain.¹¹ More specifically, though sports betting has been legalized and gone live in thirty-three states as of January 31, 2023, several Southern states (including Texas, Oklahoma, Missouri, Kentucky, Alabama, Georgia, and South Carolina) have so far failed to either introduce or successfully pass legislation legalizing sports gambling. With a majority of constituents supporting legalized gambling, a favorable political climate, the repeal of PASPA, and the opportunity to create new taxes—why have these states not legalized gambling yet? Ultimately, the answer is simple. After *Murphy*, Southern states are less concerned with protecting moral conservatism and much more concerned with an inability to make sports gambling economically viable at the state level.

II. FEDERAL COMMANDEERING THROUGH PASPA PREVENTED STATES FROM HAVING A CHOICE IN LEGALIZED SPORTS WAGERING

A. The Road to PASPA: How Baseball Got America Obsessed with the 'Integrity of the Game'

The idea of regulating gambling on professional sports did not become a major part of the American consciousness until the early 1900s.¹² In fact, the notion of maintaining the "integrity of the league or game" was rarely, if ever,

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ Matthew Dziok, *Sports Law - Sports Gambling in a Post-Murphy World: Ensuring Emerging Sports Gambling Laws Adequately Protect the Integrity of College Sports*, 44 W. NEW ENG. L. REV. 149, 162 (2022).

¹⁰ *See* Ben Strauss and Emily Guskin, *Support for Legal Sports Betting Grows, Post-UMD Poll Finds*, WASH. POST, (July 8, 2022, 10:00 AM), <https://www.washingtonpost.com/sports/2022/07/08/legal-sports-betting-support-americans/>.

¹¹ *See Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS'N, <https://www.americangaming.org/research/state-gaming-map/> [<https://perma.cc/M6FL-KGKJ>].

¹² *See generally* Kaitlyn Kallert, *High Stakes: Throwing a Hail Mary to Congress for Federal Ban on Sports Betting College Athletics*, 28 J.L. & POL'Y 276, 280 (2019).

mentioned until radio and newspaper coverage of the infamous “Black Sox Scandal” propelled such ideas into the public discourse.¹³

The Black Sox Scandal involved an alleged fix of the 1919 World Series.¹⁴ The following White Sox players were accused of engaging in a conspiracy to fix baseball’s biggest game: pitchers Eddie Cicotte and Claude Williams, center fielder Happy Felsch, shortstop Swede Risberg, first baseman Chick Gandil, third baseman Buck Weaver, reserve infielder Fred McMullin, and left fielder “Shoeless” Joe Jackson.¹⁵ Ultimately, the White Sox lost the World Series to the Cincinnati Reds five games to three, with several players performing far below their normal standards.¹⁶ The ensuing investigation resulted in the indictments of seven White Sox players, five gamblers, and long-time first baseman Hal Chase for conspiracy.¹⁷ While none were convicted, all eight players were banned from baseball for life.¹⁸

Shortly after the world learned the 1919 World Series had been rigged by gangsters intending to profit off of illegal wagering, Major League Baseball (MLB) sought to repair the lack of integrity in the sport by appointing its first commissioner, Judge Kennesaw Mountain Landis.¹⁹ Tasked with restoring baseball’s image, Landis began immediately campaigning against illegal gambling and publicly reprimanded and banned all players that MLB’s internal investigation found to be involved in the scandal.²⁰ Before the Black Sox Scandal, the public rarely made attempts to hide wagers made on professional sports matches.²¹ However, the public’s disdain for the improprieties associated with the Black Sox Scandal—namely, the activities of criminal organizations seeking to profit off of gambling—caused a shift in the attitude toward sports

¹³ See Adriano Pacifici, *Scope Authority Sports League Commissioner Disciplinary Power: Bounty Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 96–97 (2014).

¹⁴ DANIEL A. NATHAN, SAYING IT’S SO: A CULTURAL HISTORY OF THE BLACK SOX SCANDAL 1 (2010).

¹⁵ See *id.* at 2–3, 5 (identifying the accused players, the positions they played, and how they performed during the series).

¹⁶ See *id.*

¹⁷ See HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 325–30 (1st ed. 1971).

¹⁸ See *id.*

¹⁹ See Pacifici, *supra* note 13, at 96–97.

²⁰ See *id.*

²¹ See DANIEL E. GINSBURG, THE FIX IS IN: A HISTORY OF BASEBALL GAMBLING AND GAME FIXING SCANDALS 2 (1995) (discussing the publicly accepted relationship between baseball and gambling, which had been intrinsically related since the origin of the game).

gambling.²² Whereas sports gambling was once widely accepted, it soon became seen as improper.²³

Nationwide, regulations of professional sports leagues mirrored this shift in public sentiment. MLB's appointment of Landis motivated other U.S. professional sports leagues to follow suit and appoint their own regulators.²⁴ Each regulator was then charged with the protection of fairness in the sport and the integrity of the game.²⁵ However, the use of the phrase "integrity" ultimately became less about protecting a sense of "morality" and more about leagues protecting their bottom line from public disdain concerning the undue influence of sports wagering.²⁶ Thus, since the early 1900s, a now familiar argument has been consistently reiterated: sports are only favorable and profitable to the extent that integrity is ensured.²⁷

However, particularly after the Great Depression, the need for new sources of state revenue was urgent, and many states turned to the idea of legalizing state-sponsored gaming.²⁸ As a result, state senators had to combat a new public stigma against state lotteries and racetracks, particularly in the Northern states.²⁹ Consequently, from the inceptions of these new state-legalized

²² See NATHAN, *supra* note 14, at 17 (regarding shifting public opinion). For a comprehensive examination of the Black Sox Scandal and the central role played by organized crime, see generally ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963).

²³ See *Mexico City 1968 Olympic Games*, ENCYC. BRITANNICA (Oct. 5, 2021), <https://www.britannica.com/event/Mexico-City-1968-Olympic-Games> for another example of a sporting event that shifted public opinion against sports gambling; see also, Bob Greene, *What Changed the Olympics Forever*, CNN (July 23, 2012), <https://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/index.html>.

²⁴ See Pacifici, *supra* note 13, at 96, 98, 99.

²⁵ See *id.* at 98 (discussing the broad powers of commissioners of the major professional sports leagues).

²⁶ For example, the NFL has gone from hating gambling to loving it, because it has found a way to turn gambling into an extremely viable revenue stream. See Mike Florio, *Report: NFL Expects to Generate \$270 Million from Gambling Deals*, NBC SPORTS: PROFOOTBALLTALK (Aug. 27, 2021), <https://profootballtalk.nbcsports.com/2021/08/27/report-nfl-expects-to-generate-270-million-from-gambling-deals/>.

²⁷ See generally John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 381–82 (2019) ("The increased sophistication in sports integrity is being publicly driven by several for-profit companies that monitor online gambling line movements looking for anomalous, suspicious, or unexplained changes in pricing, which might indicate some form of corruption taking place.").

²⁸ Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 572 (2013).

²⁹ See generally Ronald J. Rychlak, *Lotteries, Revenues, and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992); see also generally David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation Online Poker*, 12 J. HIGH TECH. L. 450 (2012).

gaming systems, politicians had to artfully differentiate between *wholesome* state-sponsored gaming and spurious *illegal* betting on live sports.³⁰

This dichotomy is why live sports gaming would not become formally legalized in any state until the late 1940s.³¹ Buoyed by a reduction in the gaming tax rate,³² Nevada became the first state to legalize sports wagering in 1949.³³ This has resulted in millions of Americans flooding Las Vegas every year since to legally wager.

B. The Road to PASPA: How Federal Regulators Grew Tired of Relying on States to Stop Gambling

By the early 1960s, criminal organizations in Las Vegas “became the primary operators of sports gambling schemes throughout the United States.”³⁴ As media outlets across the country became infatuated with American crime stories, America’s relationship with gambling changed.³⁵ As the violent and gruesome details of crimes committed by criminal organizations such as the “Mob” were featured in more and more national headlines, the public began to fear these organizations’ associations with organized gambling.³⁶ Congress quickly noted the public’s negative stigma toward organized crime and its connection to sports gambling.³⁷ Subsequently, federal agents vowed to crack down on any illicit gaming activity.³⁸ Thus, the period from the early 1960s to

³⁰ See *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (examining the history of legal sports betting in the United States).

³¹ See *id.*

³² See I.R.C. § 4401 (2012); *id.* § 4411; see also generally Kevin Braig, *Client Alert: Reform the Federal Sports Betting Excise Tax Dilemma*, SHUMAKER, LOOP & KENDRICK, LLP (Nov. 3, 2017), <https://www.shumaker.com/latest-thinking/publications/2017/11/client-alert-reform-the-federal-sports-betting-excise-tax-dilemma>.

³³ See generally Richard N. Velotta, *Legalized Sports Wagering Elsewhere Might Not Affect Nevada Much*, LAS VEGAS SUN (Jan. 6, 2013, 2:00 AM), <https://lasvegassun.com/news/2013/jan/06/legalized-sports-wagering-elsewhere-might-not-affect>.

³⁴ See generally Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 284 (2011).

³⁵ S. REP. NO. 82-725, at 3–4 (1951) [hereinafter Kefauver Final Report].

³⁶ See DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 93–95 (2005).

³⁷ John Holden, *Legislative Sausage Making: How We Got the Wire Act, Part One*, LEGAL SPORTS REP. (Sept. 7, 2018), <https://www.legalsportsreport.com/22332/making-the-wire-act-sports-betting-part-one/> (“In 1964, Congress attacked the stream of revenue for organized crime that took the chance out of sports gambling, notably match fixing via bribery. The Sports Bribery Act was passed in 1964 as a holdover from the Kennedy-era anti-organized crime legislation of 1961.”).

³⁸ SCHWARTZ, *supra* note 36, at 93–95.

the early 1970s was characterized by a legislative crusade to oust organized crime from gambling.³⁹

First, Congress passed the Wire Act in 1961.⁴⁰ The Wire Act was this period's first formal anti-gambling act, and it was directed specifically at preventing illegal sports gambling.⁴¹ The goal of the Wire Act was, and purportedly still is, to assist the states "in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses."⁴² The Act functioned as a legal mechanism to aid in the suppression of organized gambling activities and the prohibition of "wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce."⁴³ In general, two elements must be present for a violation of the Wire Act to have occurred: (1) the information transmitted by wire must have assisted in the placing of bets or wagers, and (2) the defendant must have been engaged in the business of wagering or betting during the time of transmission.⁴⁴ Traditionally, the Justice Department has used the Wire Act to prosecute bookies

³⁹ Keith C. Miller, *Sports Betting Integrity at Risk: The Role of the Wire Act*, 61 SANTA CLARA L. REV. 247, 252 n.34 (2021) (illustrating how Congress passes laws predicated on federal offenses on a state law violation to assist states in investigating and prosecuting multistate criminal organizations).

⁴⁰ The full text of subsection (a) of the Wire Act provides: "Whoever 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." Interstate Wire Act of 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified as amended at 18 U.S.C. § 1084(a)).

⁴¹ *United States v. Donaway*, 447 F.2d 940, 942 (9th Cir. 1971). See also Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line up to Place Their Bets*, 45 CONN. L. REV. 653, 659 (2012) ("The Wire Act, 18 U.S.C. § 1084—also called the Interstate Wire Act and the Wire Wager Act—was the government's first direct regulation on gambling since the 1890s lottery legislation.").

⁴² Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 560 (2005). See also 18 U.S.C. § 1084(a) (2012).

⁴³ Joel Michael Schwartz, *The Internet Gambling Fallacy Craps*, 14 BERKELEY TECH. L.J. 1021, 1030 (1999) (citing Letter from Robert F. Kennedy, United States Attorney General, to Speaker of the House of Representatives (Apr. 6, 1961) found in H.R. REP. NO. 87-967, at 1 (1961), as reprinted in 1961 U.S.C.C.A.N. 2631, 2633).

⁴⁴ *Truchinski v. United States*, 393 F.2d 627, 630 (8th Cir. 1968).

who accepted and completed bets over the telephone from people in jurisdictions where gambling was illegal.⁴⁵

Second, Congress passed the Travel Act in 1961.⁴⁶ Similar to the Wire Act, the Travel Act was implemented to assist law enforcement in the prosecution of illegal gambling.⁴⁷ The Travel Act made it a crime to travel in interstate or foreign commerce with the “intent to distribute the proceeds of any unlawful activity, commit any violent crime to further any unlawful activity, or otherwise promote, manage, establish, carry on, or facilitate any unlawful activity.”⁴⁸ Facilitating illegal activity included traveling to engage in unlawful gambling.⁴⁹ The primary utility of the Act was to provide federal assistance to local law enforcement in situations where illegal gambling extended beyond a state’s geographic jurisdiction.⁵⁰

Third, Congress passed the Interstate Transportation of Wagering Paraphernalia Act in 1961.⁵¹ The Act prohibited anyone except “common carriers in the usual course of its business,” from knowingly carrying or sending “in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, adapted, devised, or designed for use” in a variety of gambling-related activities.⁵² The legislative history of the Paraphernalia Act suggests that it was enacted to close loopholes created by narrow court interpretations of anti-lottery statutes.⁵³ However, its utility was severely limited by its application to only those who engaged in gambling by sending physical items in the mail.⁵⁴

Next, Congress passed the Sports Bribery Act in 1964 to close loopholes that had become apparent in the Wire Act and the Travel Act.⁵⁵ The Sports Bribery Act states:

⁴⁵ See David B. McGinty, *The Near-Regulation of Online Sports Wagering by United States v. Cohen*, 7 GAMING L. REV. 205, 209 (2003) (citing Letter from Robert F. Kennedy, United States Attorney General, to Speaker of the House of Representatives (Apr. 6, 1961) found in H.R. REP. NO. 87-967, at 4 (1961), as reprinted in 1961 U.S.C.C.A.N. 2631, 2633); see also generally, *Martin v. United States*, 389 F.2d 895 (5th Cir. 1968).

⁴⁶ Travel Act of 1961, Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952).

⁴⁷ See *United States v. Altobella*, 442 F.2d 310, 313 (7th Cir. 1971).

⁴⁸ 18 U.S.C. § 1952(a)(1–3).

⁴⁹ See generally 18 U.S.C. § 1952(a), (b).

⁵⁰ *Altobella*, 442 F.2d at 313.

⁵¹ See Interstate Transportation of Paraphernalia Act of 1961, Pub. L. No. 87-218, 62 Stat. 793 (codified as amended at 18 U.S.C. § 1953).

⁵² *Id.* See also 107 CONG. REC. 16,537 (1961) (statement of Rep. Emmanuel Celler, Chair, House Jud. Comm.).

⁵³ H.R. REP. NO. 87-968, at 2 (1961), reprinted in 1961 U.S.C.C.A.N. 2634, 2635.

⁵⁴ *Id.*

⁵⁵ See Sports Bribery Act of 1964, Pub. L. No. 88-316, 78 Stat. 203 (codified as amended at 18 U.S.C. § 224).

Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both.⁵⁶

However, despite the apparent wide scope of the language of the statute, enforcement of the Act has mostly been reduced to bribery in horseracing matches.⁵⁷ In fact, “[w]hile there have been several other sports implicated in reported cases, missing from the U.S. match-fixing case inventory is any instance of a major professional team sports league game being influenced and subsequently prosecuted under the Sports Bribery Act.”⁵⁸

Finally, Congress enacted the Illegal Gambling and Business Act (IGBA) in 1970.⁵⁹ The Act sought to eliminate high-stakes gambling operations.⁶⁰ Specifically, the Act criminally sanctioned anyone who “conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”⁶¹ A business violates IGBA if its business activity is:

- (1) a violation of the law of a State . . .
- (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.⁶²

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* United States v. Donaway, 447 F.2d 940 (9th Cir. 1971); United States v. Pinto, 503 F.2d 718 (2d Cir. 1974); United States v. Turcotte, 515 F.2d 145 (2d Cir. 1975); *see also* John Holden, *The Sports Bribery Act: A Look Back at Attempts to Aid Integrity*, LEGAL SPORTS REP. (May 30, 2018), <https://www.legalsportsreport.com/20813/sports-integrity-in-the-us-history/>.

⁵⁸ John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 458 (2015).

⁵⁹ *See* Illegal Gambling and Business Act, Pub. L. No. 91-452, 84 Stat. 922, 937-38 (codified as amended at 18 U.S.C. § 1955). The Illegal Gambling Business Act was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.), which also contains the well-known Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-68.

⁶⁰ Matthew R. Yost, *Video Game Gambling: Too Big a Bet for New Jersey*, 70 RUTGERS UNIV. L. REV. 335, 351 (2017).

⁶¹ 18 U.S.C. § 1955(a) (2020).

⁶² *See id.* §§ 1955(b)(1)(i)-(iii).

The fatal flaw of this Act was that it required a state to first declare the gambling activity illegal.⁶³ Thus, the Act was powerless unless a state chose to act first.⁶⁴

C. Arriving at PASPA: Federal Regulators Decide to Take the Power Back

While the aforementioned Acts were the federal government's first attempts to standardize federal regulation of gambling, the laws themselves were "not intended to preempt state gambling laws."⁶⁵ Rather, they were designed to be utilized as tools "to assist the several [s]tates in the enforcement of their laws pertaining to gambling."⁶⁶ In fact, at the time Congress drafted the Travel Act, the Wagering Paraphernalia Act, and the Illegal Gambling Business Act, such deference to state enforcement was not accidental, but instead done in conformity with the Constitution's Supremacy Clause.⁶⁷

Article VI, Clause 2 of the Constitution (the Supremacy Clause) reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁶⁸

Under the Supremacy Clause, it would have been perfectly legal for the federal government to create a national criminal penalty for individual citizens who engaged in gambling.⁶⁹ However, such a law could have criminalized state lotteries, racetracks, and other 'legal' gaming.

⁶³ See *United States v. DiCristina*, 726 F.3d 92, 100, n.8 (2d Cir. 2013) (stating that a conviction under the Illegal Business Gambling Act requires a violation of state law).

⁶⁴ *Id.* at 92, 98–99, 103. *United States v. Yaquinta*, 204 F. Supp. 276, 277 (N.D.W. Va. 1962).

⁶⁵ Robert E. Goeller, *The Money, Man, The Money: Sports Gambling in Professional and Amateur Sports*, 12 WILLAMETTE SPORTS L.J. 1, 3 (2015).

⁶⁶ *Id.*

⁶⁷ Kailey J. Walsh, *Going "All In" after Murphy v. NCAA: An Approach for California to Legalize Sports Gambling*, 42 HASTINGS COMM. & ENT. L.J. 117, 124 (2020).

⁶⁸ U.S. CONST. art. VI, cl. 2.

⁶⁹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct.1461, 1478, 1484–85 (2018) ("[T]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage" and "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.").

Congress, frustrated by the failure of the previous Acts to prohibit the spread of sports wagering, proposed 28 U.S.C. § 3702(1), also known as the Professional Amateur Sports Protection Act (PASPA).⁷⁰ By positioning sports gambling as a “national problem” with harms that “cannot be limited geographically,” PASPA’s text and legislative history clearly indicate that Congress was motivated to invoke the Supremacy Clause and ban sports gambling.⁷¹

As a result, Congress made clear that under PASPA, it shall be unlawful for:

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.”⁷²

In drafting such language, however, Congress failed to take into account that the Act was “inconsistent with the Tenth Amendment.”⁷³

III. THE DEATH OF PASPA: THE STATES FIGHT TO CHOOSE FOR THEMSELVES

A. Fighting Back: *NCAA v. Christie*

The Tenth Amendment of the Constitution states, “[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.”⁷⁴ Nonetheless, PASPA’s federal ban on sports wagering initially only permitted four states to

⁷⁰ S. REP. NO. 102-248 (1992), as reprinted in 1992 U.S.C.C.A.N. 3553, 3556 (“The purpose . . . is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.”)

⁷¹ Yan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 28 (2017).

⁷² 28 U.S.C. § 3702, *invalidated by Murphy v. Nat’l Collegiate Athletic Ass’n*, 1138 S. Ct. 1461 (2018).

⁷³ See Mike Maharrey, *States Don’t Have to Comply: The Anti-Commandeering Doctrine*, TENTH AMEND. CTR. (Dec. 28, 2013), <http://www.tenthamentendmentcenter.com/2013/12/28/states-dont-have-to-comply-the-anti-comandeering-doctrine/>.

⁷⁴ U.S. CONST. amend. X.

manage their own sports gaming law.⁷⁵ Ultimately, New Jersey was not one of the states that PASPA permitted to institute its own legal sports gambling scheme.⁷⁶ In 2011, New Jersey's Legislature grew tired of being prohibited from the growing sports gaming market and amended its state constitution to legalize sports betting.⁷⁷ Several professional sports leagues, concerned with protecting the integrity of their sports, sued New Jersey under PASPA, thus creating *Nat'l Collegiate Athletic Ass'n v. Christie* (Christie I).⁷⁸

At issue in *Christie I* was the new amendment to New Jersey's state constitution, which now permitted sports gambling at casinos and racetracks.⁷⁹ With the constitutional impediment gone, the New Jersey Legislature went on to amend the necessary state statutes to allow legal in-state sports gaming.⁸⁰

In response, the NCAA and other organizations petitioned the U.S. District Court of New Jersey on August 7, 2012.⁸¹ They asked the court to enjoin New Jersey's amendments from taking effect.⁸² The NCAA's primary argument was that New Jersey's amendments directly contravened PASPA.⁸³ Specifically, the NCAA argued that PASPA unequivocally prohibited states and individuals "from sponsoring, operating, advertising, promoting, licensing, or authorizing" any form of gambling on competitive games involving amateur or professional athletes.⁸⁴

In its defense, New Jersey argued that the court should consider the Supreme Court's rulings in *New York v. United States* and *Printz v. United States*.⁸⁵ In *New York v. United States*, the Court held that the Tenth Amendment prohibits the federal government from forcing states to pass or refrain from passing certain legislation.⁸⁶ Specifically, the Court found that while the federal government can encourage states to adopt certain regulations through Congress's spending and commerce powers, it cannot directly compel states to enforce federal regulations.⁸⁷ In *Printz*, the Court similarly confirmed that Congress

⁷⁵ See 138 CONG. REC. 12,974 (daily ed. June 2, 1992) (statement of Sen. Grassley) (seeking an amendment to provide for certain exemptions to prohibited state activities).

⁷⁶ See *id.*

⁷⁷ See *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013) [Hereinafter *Christie I*].

⁷⁸ *Id.* at 554–55.

⁷⁹ See *id.*

⁸⁰ See generally N.J. STAT. ANN. § 5:12 (2013).

⁸¹ See *Christie I*, 926 F. Supp. 2d at 553.

⁸² See *id.*

⁸³ *Id.* at 556, 577–78.

⁸⁴ *Id.* at 578–79.

⁸⁵ See *id.* at 570.

⁸⁶ See *New York v. United States*, 505 U.S. 144, 146 (1992).

⁸⁷ *Id.* at 144.

cannot pass legislation that directly compels state authorities to participate in activities only necessary to enforce federal regulations.⁸⁸

Ultimately, the district court granted the injunction against New Jersey.⁸⁹ New Jersey appealed the decision to the Third Circuit and alleged that PASPA violated the Tenth Amendment.⁹⁰ Specifically, New Jersey argued that PASPA was flawed because it regulated a state's exercise of its lawmaking power by preventing it from modifying or repealing its laws prohibiting sports gambling, which constituted a direct violation of the anti-commandeering principle.⁹¹ In response, the NCAA countered that PASPA was critically different from the laws in the previous anti-commandeering cases because it did not command the states to take any affirmative act.⁹² Additionally, PASPA did not give an affirmative federal command to specifically *do* something.⁹³

The Third Circuit found New Jersey's arguments unpersuasive and explicitly rejected the premise that PASPA violated the Tenth Amendment's anti-commandeering principle.⁹⁴ The Third Circuit agreed with the NCAA's argument, reasoning that PASPA did not force New Jersey nor any other state to take affirmative action in conformity with an existing federal regulation, and therefore no commandeering had occurred.⁹⁵ Following its defeat at the Third Circuit, New Jersey asked the Supreme Court to grant certiorari.⁹⁶

In opposition to certiorari, the United States submitted a supporting brief contending that PASPA did not force New Jersey "to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment."⁹⁷ To the contrary, "New Jersey [was] free to repeal those prohibitions in whole or in part."⁹⁸ The Supreme Court denied certiorari.⁹⁹

⁸⁸ *Printz v. United States*, 521 U.S. 898, 900 (1997).

⁸⁹ *Christie I*, 926 F. Supp. 2d at 579.

⁹⁰ *See Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 237 (3d Cir. 2013).

⁹¹ *Christie I*, 926 F. Supp. 2d at 561–62.

⁹² *Id.* at 562.

⁹³ *Murphy*, 138 S. Ct. at 1471.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Christie v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931, 931 (2014) (cert. denied).

⁹⁷ *See* Brief in Opposition at 23, *Christie v. Nat'l Collegiate Athletic Ass'n*, (No. 13-967), 2014 WL 1989100 at *11 ("Nothing in that unambiguous language compels states to prohibit or maintain any existing prohibition on sports gambling.").

⁹⁸ *Id.*

⁹⁹ *Christie II*, 573 U.S. at 931.

B. The Knock-Out: The Supreme Court Says in *Murphy v. NCAA* the Federal Government Can Not Commandeer States' Right to Choose Whether to Legalize Sports Gambling

In 2014, in response to the suggestion that a partial repeal of existing law may be permitted under PASPA, the New Jersey Legislature modified its gambling laws by repealing the substantive portions that prohibited sports gambling.¹⁰⁰ Remaining cognizant of PASPA's language, the New Jersey Legislature specifically declared that the modification was "not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling."¹⁰¹ Instead, the modification simply removed the legal impediments to the "placement and acceptance of wagers on sporting events by persons twenty-one years of age or older at a horseracing track, casino, or gambling house in Atlantic City."¹⁰² In direct response to the legal battle with the NCAA and other amateur leagues, the 2014 repeal also "specified that it was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State."¹⁰³

In response, the NCAA and other amateur leagues once again sued New Jersey.¹⁰⁴ This time, the Third Circuit's majority was "unmoved by the New Jersey Legislature's 'artful[]' attempt to frame the 2014 Act as a repealer."¹⁰⁵ The majority stated that in "looking at what the law 'actually does' . . . [the law] constitutes authorization of sports gambling because it 'selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators.'"¹⁰⁶ In *Murphy*, the Supreme Court discussed the Third Circuit panel's reasoning.¹⁰⁷

Specifically, the Supreme Court thought it "significant" that the Third Circuit panel believed "that PASPA [did] not impose any affirmative command" nor "require or coerce the states to lift a finger,"¹⁰⁸ yet still "recognized that an affirmative command (for example, 'Do not repeal') can often be phrased as a prohibition."¹⁰⁹ Thus, the Supreme Court struggled to reconcile how the Third Circuit originally concluded that a repeal would not amount to "authorization" within the meaning of PASPA, only to later find that such repeal was tantamount to authorization of sports gambling within the meaning of PASPA.¹¹⁰

¹⁰⁰ *Murphy*, 138 S. Ct. at 1472.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Murphy*, 138 S. Ct. at 1472.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1471.

¹⁰⁹ *Id.* at 1472.

¹¹⁰ *Id.*

This time, Petitioners argued that the federal government, through PASPA's anti-authorization provision, now required states to affirmatively maintain their existing laws against sports gambling without any alteration.¹¹¹ The Supreme Court agreed, indicating that § 3702(1) of PASPA effectively made it unlawful for a state to "authorize" sports gambling schemes.¹¹² Thus, the Court was required to "decide whether this provision [was] compatible with the system of 'dual sovereignty' embodied in the Constitution."¹¹³

In the end, the Supreme Court struck down PASPA. Specifically, the Supreme Court reasoned that:

Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens. The Constitution gives Congress no such power.¹¹⁴

In his concurring opinion, Justice Thomas also briefly addressed the other pertinent constitutional considerations relevant to PASPA:

I agree with the Court that the Professional and Amateur Sports Protection Act (PASPA) exceeds Congress' Article I authority to the extent it prohibits New Jersey from "authoriz[ing]" or "licens[ing]" sports gambling. Unlike the dissent, I do "doubt" that Congress can prohibit sports gambling that does not cross state lines. But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling "directly," it "does not authorize Congress to regulate state governments' regulation of interstate commerce." The Necessary and Proper Clause does not give Congress this power either, as a law is not "proper" if it "subvert[s] basic principles of federalism and dual sovereignty." Commandeering the States, as PASPA does, subverts those principles.¹¹⁵

IV. NOW THAT STATES ARE CHOOSING: CLAIMS THAT SOUTHERN STATES ARE PROHIBITING GAMBLING ON THE BASIS THAT THE SOUTH MORALLY DISAGREES WITH GAMBLING ARE MISGUIDED

After the Court struck down PASPA in *Murphy*, states regained control over the decision of whether to legalize sports gambling within their borders.

¹¹¹ See *Murphy*, 138 S. Ct. at 1473.

¹¹² See *id.* at 1474.

¹¹³ *Id.* at 1468.

¹¹⁴ *Id.* at 1484–85.

¹¹⁵ *Id.* at 1485.

While a myriad of factors are relevant to which regulatory scheme (if any) is enacted by a state to legalize gambling, old arguments that the South is resistant to sports betting legalization because of its “unique” belief in maintaining the “integrity of the game,” alongside its widespread moral conservatism, remain prevalent. However, prohibiting gambling in the South on the basis that Southern constituencies overwhelmingly have a moral disagreement with gambling is highly misguided.

A. The South Historically Favored Gambling

Generally throughout U.S. history, there has been a divergence between how Southern and Northern states pursued bans against gambling.¹¹⁶ In the North, states followed the puritanical beliefs that gambling and card-playing were “the devil’s picture book” and “likely a reaction to the disdained excesses of the European aristocrats, who valued idleness as a courtly virtue.”¹¹⁷ Meanwhile, the South not only widely appreciated, but adopted the European notion that gambling was a luxury illustrative of class and an enviable state of carefreeness.¹¹⁸ Therefore, while Northern states rushed to outlaw the activity, it was a different story in the South, where early anti-gaming efforts were originally only focused on prohibiting the nuisances associated with abusive gambling transactions that disturbed the peace.¹¹⁹ Effectively, the South was only concerned with stopping saloon brawls and abusive bookies.

Southern states such as Texas did not show much interest in banning public gambling until most of the U.S. had already outlawed “games of chance” via amendments to state constitutions.¹²⁰ The wave of state constitutional amendments happened after the country recovered from the Civil War and calls for unity were prevalent.¹²¹ Thus, consistent with the codes of its Northern neighbors, Southern states such as Texas amended their penal codes to define “illegal gambling” as gambling that was “perpetrated in public.”¹²²

¹¹⁶ See Scott Sloan, *Putting Texas Back in Texas Hold ‘Em*, 27 SPORTS LAWS. J. 103, 110–12 (2020).

¹¹⁷ *Id.* at 111.

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See generally* Wheelock v. State, 15 Tex. 260 (1855).

¹²¹ *See* Sloan, *supra* note 116, at 112.

¹²² Joshua C. Tate, *Gambling, Commodity Speculation, and the “Victorian Compromise”*, 19 YALE J. L. & HUMANS. 97, 103 (2007) (“Gambling was a favorite pastime of the plantation-holding elite of Southern society. Southern gambling statutes, therefore, tended to be aimed at ‘casino games enjoyed by the masses in taverns and public places,’ not the ‘civilized poker games of gentlemen planters.’ Southern judges tended to respect this tradition of elite private gambling, and applied legislative prohibitions primarily to the forms of gambling preferred by the masses. The Southern legal system presented a stern position against gambling on the surface, but preserved the traditional privileges of the leisured elite.”).

B. The South Intentionally Invoked Weak Gambling Laws and Sparsely Enforced Them

Texas, after amending its penal code to prohibit “public betting,” notably still allowed individuals to privately gamble on games of chance, such as Texas Hold ‘Em, in their homes, at businesses after hours, and in law offices.¹²³ Southern courts spoke openly about the hypocrisy of legislatures intentionally defining “illegal gambling” imprecisely and providing even sparser mechanisms to enforce these new laws. For example, in *Wheelock v. State*, the Texas Supreme Court expressed confusion over the Texas Legislature’s choice to ban public gambling while still allowing vast exceptions for private gambling.¹²⁴ Specifically, the Court stated, “the legislature would, perhaps, more effectually have suppressed the evil they aimed to suppress, if they had prohibited all gaming, in whatever place.”¹²⁵ Rather, the Court concluded that the Legislature seemed to have “intended the prevention of the evil example rather than the suppression of the evil itself.”¹²⁶

Other examples of the South’s defiance to enforcing Northern moral conservatism regarding gambling were Kentucky and South Carolina’s engagement in horseracing. In the second half of the 1800s, Kentucky became known as the birthplace of pari-mutuel horse racing betting.¹²⁷ South Carolina also embraced horse racing and its axiomatic wagering.¹²⁸ In the mere span from the 1860s to 1890, the U.S. fell so in love with horse racing and gambling that it built approximately 314 horse racing tracks.¹²⁹ At these tracks, wagering on the races was an expression of opulence for the elite.

C. Conservative Opposition to Gambling in the South Was Brief

As mentioned above, the Black Sox Scandal drastically changed how the public viewed sports gambling.¹³⁰ Moreover, subsequent scandals at CCNY

¹²³ See Sloan, *supra* note 116, at 117.

¹²⁴ See *Wheelock*, 15 Tex. at 264.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See FRED S. BUCK, *HORSE RACE BETTING: A COMPREHENSIVE ACCOUNT OF PARI-MUTUEL AND BOOKMAKING OPERATIONS* 10 (4th ed. 1971) (providing a historical analysis of pari-mutuel betting).

¹²⁸ See JOHN HERVEY, *RACING IN AMERICA 1665–1865* 99 (1944).

¹²⁹ See Steven Riess, *Cyclical History of Horse Racing: The USA’s Oldest and (Sometimes) Most Popular Spectator Sport*, 31 INT’L J. HIST. SPORT 29, 29–30 (2014).

¹³⁰ Kaitlyn Kallert, *High Stakes: Throwing a Hail Mary to Congress for a Federal Ban on Sports Betting In College Athletics*, 28 J. L. & POL’Y 276, 281 (2019).

in 1951,¹³¹ North Carolina State in 1961,¹³² and various Olympic scandals¹³³ shed additional light on the unsavory effect criminals had on sports gambling. During this time, amidst a massive negative shift in public sentiment toward gambling and a federal crackdown on illegal gambling, the South finally began to take a stronger stance against illegal gambling.

Political winds changed in the South after the Reconstruction era and the enactment of the Civil Rights Act in 1964.¹³⁴ The Civil Rights era had a profound political effect on the South, with many states experiencing political shifts away from the Democratic Party and toward the Republican Party.¹³⁵ With this shift, the “solid South” now adopted a heightened sense of conservatism.¹³⁶

It was not until this point in American history that the North and South began to have relatively similar experiences concerning gambling. As a result, the U.S. began a cyclical love-hate relationship with gambling.¹³⁷ Specifically, scholars have noted that “a cyclical string of events and legislation ensued.”¹³⁸ This relationship began when “anti-gambling legislation founded in morality took hold, which led to the proliferation of illegal sports gambling, which was followed by more anti-gambling legislation in response to new technology, until finally the circle was complete with the [majority of the] public’s re-acceptance of sports gambling.”¹³⁹

¹³¹ See Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN: ESPN CLASSIC (Nov. 19, 2003), https://www.espn.com/classic/s/basketball_scandals_explosion.html (discussing point-shaving at Madison Square Garden and describing how the CCNY scandal of 1950–51 was a college basketball point-shaving gambling scandal that involved seven schools in all, with four in Greater New York, two in the Midwest, and one in the South).

¹³² See Joe Goldstein, *Explosion II: The Molinas Period*, ESPN: ESPN CLASSIC (Nov. 19, 2003), https://www.espn.com/classic/s/basketball_scandals_molinas.html (describing how the Molinas scandal saw thirty-seven players from twenty-two different colleges arrested in connection with the incident).

¹³³ See Greene, *supra* note 23.

¹³⁴ See generally Becky Little, *How the ‘Party of Lincoln’ Won Over the Once Democratic South*, HISTORY.COM (Apr. 10, 2019), <https://www.history.com/news/how-the-party-of-lincoln-won-over-the-once-democratic-south>.

¹³⁵ See ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944-1972* 338–39 (2015).

¹³⁶ See generally ROBERT J. NORRELL, *CIVIL RIGHTS STUDIES: ONE THING WE DID RIGHT: REFLECTIONS ON THE MOVEMENT* 68 (Armstead L. Robinson & Patricia Sullivan, eds., 1997).

¹³⁷ See generally Kevin W. Morrissey Jr., *Untangling the Confusing Web of Sports Gambling Regulation in the Wake of Murphy v. NCAA*, 39 REV. BANKING & FIN. L. 1171, 1175–76 (2019).

¹³⁸ *Id.* at 1175.

¹³⁹ *Id.* at 1175–76.

However, moral conservatism toward gambling has significantly waned. Recent polls show that in the last four years, public perception about gambling has massively shifted toward favoring legalization, with almost 80% of the nation in support.¹⁴⁰ Even polls conducted in Southern states that have opted *not* to legalize sports wagering indicate record-breaking support for legalized sports gambling.¹⁴¹ For example, in Kentucky, a poll found that 65% of respondents favor legalizing sports betting.¹⁴² Comparably, in Alabama, “52% support legal sports betting.”¹⁴³ Likewise, a statewide poll conducted in Georgia indicated “64[%] of voters are in favor of casino gaming, while 57[%] are in favor of legal sports wagering overall.”¹⁴⁴ Thus, the claim that the South has failed to legalize sports betting because it is morally opposed to sports gambling is largely unsupported by history and recent polling.

¹⁴⁰ Darren Rovell, *Poll: 80% of Americans Are Now in Favor of Sports Betting Legalization*, ACTION NETWORK (Sept. 23, 2021, 1:53 PM), <https://www.actionnetwork.com/news/sports-betting-legalization-poll-october-10-2019> (“In February 2017, results of a Seton Hall Sports Poll revealed that only 46% of Americans believed betting on sports should be legalized. Some [thirty-two] months later, the latest version of the poll published Thursday reveals that 80% [of Americans] are in favor of sports betting legalization.”).

¹⁴¹ See Matthew Dallek, *The Conservative 1960s*, ATLANTIC (Dec. 1995) <https://www.theatlantic.com/magazine/archive/1995/12/the-conservative-1960s/376506>. (“[I]n the late 1950s and early 1960s conservatives were widely dismissed as ‘kooks’ and ‘crackpots’ with no hope of winning political power [...]” but, “conservatives put themselves in a position to take advantage of the growing disillusionment over civil rights, student protests, and Vietnam.”). Also during the 1960’s “in the South, the growth of the civil-rights movement, industrial expansion, and the rise of an urban middle class revitalized the Republican party.” *Id.*

¹⁴² Bennett Conlin, *Survey Says: Kentuckians Want Legal Mobile Sports Betting*, SPORTS HANDLE (Feb. 14, 2022), <https://sportshandle.com/survey-says-kentuckians-want-legal-mobile-sports-betting/#:~:text=A%20poll%20conducted%20by%20Republican,racetracks%20and%20through%20mobile%20platforms>. A February poll conducted by Republican pollster Robert Blizzard of Public Opinion Strategies surveyed 500 registered Kentucky voters and “found that 65% of respondents supported allowing sports betting, both in person at Kentucky racetracks and through mobile platforms.” *Id.*

¹⁴³ Jill R. Dorson, *Study Group: Gambling, Including Sports Betting, Could Be Good for Alabama*, SPORTS HANDLE (Dec. 22, 2020), <https://sportshandle.com/alabama-study-gambling-121820>.

¹⁴⁴ Jill R. Dorson, *Survey Says! Georgians Support Sports Betting*, SPORTS HANDLE (Jan. 21, 2020), <https://sportshandle.com/georgia-poll-sports-betting/>.

V. NOW THAT THE STATES ARE CHOOSING: SOUTHERN STATES ARE MORE LIKELY SLOW TO LEGALIZE BECAUSE OF FEAR OF NOT BEING ABLE TO ENACT A PROFITABLE REGULATORY SCHEME

A. Too Many Choices: Regulatory In-Fighting and Contrary Lobbying Campaigns Have Paralyzed States Considering Legislation

After the death of PASPA, representatives from the National Football League (NFL) publicly argued that eager states rushing to enact gambling legislation were in “a regulatory race to the bottom.”¹⁴⁵ Nonetheless, many states salivated at the possibility of a legal sports betting market, which would allow millions of Americans to gamble, something many Americans were already doing illegally overseas.¹⁴⁶ As such, proponents of legalized sports wagering supported lawmakers’ efforts to mandate standards aimed at protecting consumers, operators, and sports leagues.¹⁴⁷ Moreover, economic studies estimated that states could collectively generate somewhere between \$16 billion¹⁴⁸ and \$20 billion¹⁴⁹ in new tax revenue.¹⁵⁰ However, the states that rushed to legalize learned the hard way that implementation of state-sponsored gambling was and remains much more difficult than anticipated.

First, sports gambling is a hypercompetitive economic space featuring a complicated web of intersectionality between state, federal, and tribal law.¹⁵¹ Second, commercially speaking, states had several regulatory schemes to consider.¹⁵² Lawmakers across the country were quickly pulled in different

¹⁴⁵ Eric Ramsey, *Say What? The Five Worst Takes from the Sports Betting Hearing in Congress*, LEGAL SPORTS REP. (Sept. 28, 2018, 10:58 AM), <https://www.legalsportsreport.com/24540/five-worst-takes-sports-betting-hearing> (quoting Jocelyn Moore, NFL Executive Vice President, during her testimony to a Congressional subcommittee, “Since the Supreme Court’s decision, states are rushing to promote sports betting. And we are witnessing a regulatory race to the bottom.”).

¹⁴⁶ See Michelle Minton, *Legalizing Sports Betting in the United States*, COMPETITIVE ENTER. INST. (Mar. 1, 2018), <https://cei.org/studies/legalizing-sports-betting-in-the-united-states/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See generally Esther M. Bauer, *High Stakes for the IRS: Tax Officials Say North Texas Bookmaking, Betting Are on a Roll*, DALLAS MORNING NEWS, Aug. 10, 1986, at 33A (citing Internal Revenue Service statistics in 1982 as estimating unreported tax revenue on sports betting at \$3.5 billion).

¹⁵¹ See generally Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17 (2010).

¹⁵² See generally Ian Abovitz, *Why the United States Should Rethink Its Legal Approach to Internet Gambling: A Comparative Analysis of Regulatory Models That*

directions by lobbying groups with unique ideas on how to legalize sports betting.¹⁵³ Some posited to state lawmakers that the quickest route to legalization was maintaining an online gambling ban and only allowing state residents to place sports bets in person at casinos.¹⁵⁴ Others argued revenue maximization would come through an online partnership with already well-established gambling books and operators.¹⁵⁵

Nevada was seen as the poster child for how to implement legal gambling, but much of the favorable state and federal breaks given to Las Vegas's gaming industry specifically came at the urging of the mob during the 1950s through the 1970s.¹⁵⁶ Meanwhile, other states that have attempted to create legal gambling markets, such as New Jersey and Pennsylvania, are still stuck trying to figure out how to protect consumers, mitigate gambling addictions, keep operators accountable, keep the vibrant black market uncompetitive, and keep state gaming revenue high.¹⁵⁷ Ultimately, there is no clear path to an easily replicable and efficient regulatory scheme. Moreover, the commercial in-fighting between casinos, sports leagues, online operators, and the hundreds of massive lobbying campaigns have paralyzed many lawmakers in Southern states and prevented them from coalescing around one path toward legalization.¹⁵⁸

Have Been Successfully Implemented in Foreign Jurisdictions, 22 TEMP. INT'L & COMP. L.J. 437 (2008).

¹⁵³ See N.Y. CONST. art. I, § 9 (“No lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling ... shall hereafter be authorized or allowed within this state.”). For an example of a state statute that completely outlaws gambling activity, see UTAH CONST. art. VI, § 27 (“The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose.”).

¹⁵⁴ See NEVADA GAMING COMMISSION AND STATE GAMING CONTROL BOARD, <http://gaming.nv.gov/> (last visited Sept. 16, 2022). For more examples of the means by which states have effectively regulated gambling activity, see NEW JERSEY DIVISION OF GAMING ENFORCEMENT, <http://www.state.nj.us/lps/ge/index.html> (last visited Sept. 16, 2022); NEW JERSEY CASINO CONTROL COMMISSION, <http://www.state.nj.us/casinos> (last visited Sept. 16, 2022).

¹⁵⁵ See *id.*

¹⁵⁶ See Taylor Reeves, *A Cry for Uniformity: The Pressing Need for Casinos to Be on the Same Page for Security*, 11 UNLV GAMING L.J. 321, 322–23 (2021).

¹⁵⁷ See *Casino Gaming Benefits for Pennsylvanians*, PA. GAMING CONTROL BD. (last visited Oct. 2, 2022), <http://gamingcontrolboard.pa.gov/?p=52>; see also *Pennsylvania*, AM. GAMING ASS'N (last visited Feb. 12, 2022), <https://www.americangaming.org/state/pennsylvania/> (discussing “real property tax relief, economic development, tourism development, and a gambling addiction program.”); see also *New Jersey*, AM. GAMING ASS'N (last visited Feb. 12, 2022), <https://www.americangaming.org/state/new-jersey/>.

¹⁵⁸ Texas's Dan Patrick argues that the pro-gambling message is diluted by competing interests, and “there's so much infighting and competition amongst all the people in that arena.” See Chuck Lindell, *Don't Bet on Gambling, Gaming in Texas*

B. Uncertainty in Choices: States Do Not Know What the Federal Government Plans to Do

Additionally, the ramifications of PASPA's demise are far from over. In *Murphy*, the Supreme Court made it clear that Congress could directly regulate sports gambling if it chose to.¹⁵⁹ However, "Congress may not simply commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹⁶⁰

Therefore, the uncertainty over what the federal government will do if it feels states are supporting unruly organized crime is still prevalent.¹⁶¹ If state regulators are not incredibly precise in the drafting of regulations aimed at mitigating criminal activity related to gambling, they could leave the door open for criminal prosecutions under the Wire Act,¹⁶² IGBA,¹⁶³ and/or the Unlawful Internet Gambling Enforcement Act.¹⁶⁴ Moreover, in addition to considering the relatively slim profit margins of sports betting and alternative streams of tax revenue, states will need to prevent potentially conflicting federal and state laws from adversely affecting consumers, leagues, and regulators.

Thus, states must maintain enough flexibility to adapt to any potential federal regulatory framework that Congress may enact.¹⁶⁵ This is why despite many Northern states having experimented with sports betting within their

Anytime Soon, Lt. Gov. Patrick Says, AUSTIN AM.-STATESMAN (Feb. 9, 2021, 12:18 PM), <https://www.statesman.com/story/news/2021/02/09/gambling-texas-sports-betting-lt-gov-dan-patrick-expansion/4452243001/>.

¹⁵⁹ See *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018) ("The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.").

¹⁶⁰ See *id.* at 1477.

¹⁶¹ See generally Jennifer Gaynor et al., *Will You Soon Be Able to (Legally) Bet on Sports Outside of Nevada?*, 26 NEV. LAW. 8 (Aug. 2018), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Aug2018_Sports-Betting.pdf.

¹⁶² See *id.* at 9 (paraphrasing elements as conduct that finances, manages, supervises, directs, or owns, all or in part of illegal gambling business that is a violation of the law).

¹⁶³ See *id.*

¹⁶⁴ See *id.* (prohibiting "anyone in the business of betting or wagering from accepting anything of value in the furtherance of illegal online wagering" and requiring financial institutions to block transfers for online gambling).

¹⁶⁵ See *id.* (posing questions about state law, such as: "who will regulate sports wagering within their state; the taxes and licensing fees to impose; the licensing process and who will be subject to licensing; who can take sports wagers; what events may be wagered upon; and whether licenses may accept wagers that are placed over the telephone or via the internet").

borders, legalization has largely been achieved through disjointed, patchwork legislation.¹⁶⁶

C. Limited Choices: The Margins on Legalized Sports Betting Are Low and Southern States Typically Do Not Favor High Taxes Which Limits In-State Operators from Being Able to Compete with Off-Shore Books

Lawmakers in favor of sports gambling have stressed that legalized sports gambling profits will be used to “offset reliance on taxes for state needs” and “support critical state services,” like road and bridge repairs, education and human services.¹⁶⁷ Generally, states authorize licensed sports gambling operators to conduct sports gambling either online, through brick-and-mortar locations (like casinos), or both, with the state collecting a tax on the operators’ sports gambling profits.¹⁶⁸ However, participation in the sports gambling industry comes at a significant regulatory price via licensure fees and taxes, as well as costs associated with compliance and responsible gambling requirements.¹⁶⁹ As a result, four out of the first six states that legalized sports gambling in 2018 after the Supreme Court struck down PASPA saw tax revenue fall far short of projections.¹⁷⁰

Additionally, the global online gambling market is predicted to expand at a compound annual growth rate of 11.7% from 2023 to 2030.¹⁷¹ States are then forced to tax online bookmakers which illegal offshore gaming providers routinely escape.¹⁷² State implemented taxes hurt the capacity for state-sanctioned bookmakers to remain competitive with illegal bookmakers, who are not forced to account for taxes in their revenue scheme.¹⁷³

¹⁶⁶ See Savannah Malnar, *Murphy’s Law: How to Avoid Going Wrong with Federal Regulation of Sports Gambling*, 23 VAND. J. ENT. & TECH. L. 161, 161 (2020).

¹⁶⁷ *Id.* at 165.

¹⁶⁸ Matthew Dziok, *Sports Law - Sports Gambling in a Post-Murphy World: Ensuring Emerging Sports Gambling Laws Adequately Protect the Integrity of College Sports*, 44 W. NEW ENG. L. REV. 149, 150, 163 (2022).

¹⁶⁹ *Id.*

¹⁷⁰ Jennifer McDermott and Geoff Mulvihill, *Most States’ Sports Betting Revenue Misses Estimates*, AP NEWS (April 2, 2019), <https://apnews.com/article/nv-state-wire-wv-state-wire-courts-supreme-courts-ri-state-wire-21f9833e917948d6a36422bb286541b4>.

¹⁷¹ *Online Gambling Market Size Is Projected to Reach USD 153 Billion by 2030, Growing at a CAGR of 11.7%*, GLOBENEWSWIRE (Sept 8, 2022), <https://www.globenewswire.com/news-release/2022/09/08/2512847/0/en/Online-Gambling-Market-Size-is-projected-to-reach-USD-153-Billion-by-2030-growing-at-a-CAGR-of-11-7-Straits-Research.html>.

¹⁷² Georgia R. Carroll, “Consistency is all I ask!”: Leveling the Playing Field of Online Sports Gambling, 47 IOWA J. CORP. L. 215, 227 (2021).

¹⁷³ Andrew J. Silver, *Legal Sports Betting Still Faces Competition From Illegal Market; Low State Taxes Could Turn The Tide*, FORBES, (Apr. 7, 2020),

This issue is also exasperated by professional sports leagues' push to require sportsbooks to use real-time league-created data.¹⁷⁴ In states where lawmakers made deals with leagues like the NFL, NBA, and MLB, operators have had to calculate costs related to maintaining data licenses with individual leagues.¹⁷⁵ States now must figure out how to set tax rates at a level where state-imposed regulatory costs do not scare away operators looking to enter state markets or cause operators to pass these costs on to consumers, who could ultimately choose to engage in cheaper illegal sports gambling rather than go the legal route. Such risks are heightened among Southern constituencies, which tend to be largely Republican and therefore have a uniquely fervent distaste to high taxes.

Given all this, legislating a tax rate sufficient to allow states to recoup operation costs, tax collection, regulatory enforcement, broker fees, and data sharing, while also keeping states competitive with the illegal market, is much more difficult than anticipated. In practically every state, consumers and operators alike have balked at the stunning tax rates on gross gaming revenue.¹⁷⁶ For example, in Delaware sports gambling is taxed by statute at 50%,¹⁷⁷ in New Hampshire, the tax rate is 51% online and 50% retail tax,¹⁷⁸ in Rhode Island, the fee is 51% of gross gaming revenue,¹⁷⁹ in New York, the rate is also 51%,¹⁸⁰ and

<https://www.forbes.com/sites/andrewsilver/2020/04/07/legal-sports-betting-still-faces-competition-from-illegal-market-low-state-taxes-could-turn-the-tide/?sh=5ef2760023e3> (explaining that illegal operators can “offer more attractive odds and lines than legal operators—who must build the need to pay taxes into their revenues and, therefore, adjust their odds and lines accordingly—enabling illegal operators to have a better chance to retain high-volume customers.” Additionally, explaining that “with high tax rates, the lines and odds that legal operators can afford to offer to consumers inherently decrease in attractiveness as compared to their illegal counterparts, further exacerbating illegal operators’ competitive advantage.”).

¹⁷⁴ Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV., 69, 108–9 (Oct. 2021).

¹⁷⁵ *Id.* at 99.

¹⁷⁶ Calculated by taking how much has been staked on bets minus how much money has been paid out to winning bettors.

¹⁷⁷ DEL. CODE tit. 29 § 4815(c)(1) (2023). Delaware has a revenue-sharing model, where the state takes 50% of net proceeds after vendor of 12.5% of gross gaming revenue. From sports lottery retailers, the state takes 90%.

¹⁷⁸ *Gaming Regulations and Statutory Requirements: New Hampshire*, AM. GAMING ASS'N, https://www.americangaming.org/wp-content/uploads/2019/07/AGA-Gaming-Regulatory-Fact-Sheet_NH.pdf (last visited, Feb. 20, 2023).

¹⁷⁹ R.I. GEN. LAWS § 42-61.2-5.

¹⁸⁰ N.Y. COMP. CODES R. & REGS. tit. 9 § 5329.28 (2021).

in Pennsylvania,¹⁸¹ the rate is currently at 34%.¹⁸² Therefore, it seems likely the main reason many Southern states have delayed legalizing sports betting is the uncertainty over how to set a competitive tax rate that sufficiently makes gambling economically viable at the state level.

VI. CONCLUSION

Throughout U.S. history, gambling has endured a long and complicated relationship with the American people. Over the course of the last 150 years, sports wagering has oscillated between being widely legal and widely illegal. The Supreme Court's surprise decision in *Murphy* put the right to choose whether to allow gambling back into the states' hands. However, it appears that the opportunity to generate new sources of state revenue has seemingly not been enough to keep sports wagering at the forefront of Southern lawmakers' minds.

Thus, while many have posited that the prohibition of sports gaming in the South is mainly due to moral conservatism and protecting the integrity of sports, these arguments have been largely unsupported. History and public opinion make it overwhelmingly clear that the South is much more inclined to gamble than its neighbors in the North. Instead, the complex web of regulatory schemes and basic economic principles makes it much more likely that the reason Southern states have chosen not to legalize sports gambling is that they are insecure as to which, if any, scheme will be viable enough to economically compete with illegal bookmakers.

¹⁸¹ 4 PA. CONS. STAT. § 13C62(a) (2022).

¹⁸² See *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited Sept. 18, 2022).