

NEW JERSEY BEAT THE SPREAD: *MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION* AND THE DEMISE OF PASPA ALLOWS FOR STATES TO EXPERIMENT IN REGULATING THE RAPIDLY EVOLVING SPORTS GAMBLING INDUSTRY

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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2018.604
<http://lawreview.law.pitt.edu>



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NEW JERSEY BEAT THE SPREAD: *MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION* AND THE DEMISE OF PASPA ALLOWS FOR STATES TO EXPERIMENT IN REGULATING THE RAPIDLY EVOLVING SPORTS GAMBLING INDUSTRY

Matthew A. Melone*

One of my most important responsibilities as commissioner of the N.B.A. is to protect the integrity of professional basketball and preserve public confidence in the league and our sport. I oppose any course of action that would compromise these objectives. But I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.

—Adam Silver‡

The statement above by Adam Silver aptly captures the changes in public sentiment towards sports gambling over the past quarter century. The Professional and Amateur Sports Protection Act (“PASPA”), a federal law that prohibits states from sanctioning sports betting, was enacted in 1992 at the instigation of the professional sports leagues and the National Collegiate Athletic Association in order to safeguard the integrity of their products.¹ Surprisingly, very little litigation has been spawned by PASPA and, until recently, it garnered little attention from the

* Professor of Law, Lehigh University, Bethlehem, PA.

‡ Adam Silver, Op-ed., *Legalize Sports Betting*, N.Y. TIMES, Nov. 14, 2014, at A27.

¹ See Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. § 3701 *et seq.* (2018)) (*invalidated by* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018)).

sports and gaming industries. However, technological changes have disrupted media consumption patterns thereby forcing the sports industry to evaluate whether existing business models have long-term viability. In addition, those same technological changes, in combination with industry ingenuity, resulted in the exponential growth of the fantasy sports industry. The sports industry took notice that increased consumer interest in fantasy sports concomitantly served to increase consumer interest in their product. It is not much of a leap of faith to believe similar synergies could be realized by the professional sports leagues and revenue-generating college sports programs from legalized sports wagering. New Jersey provided the first significant challenge to PASPA earlier this decade—challenge that culminated with the Supreme Court’s decision in May 2018 to hold that PASPA is unconstitutional.²

Part I of this Article provides a brief overview of federal gambling legislation other than PASPA. In general, federal law buttressed state policy preferences by creating federal offenses for violations of state gambling laws. In effect, the federal government left the policy choices with respect to wagering to the states and then provided assistance to the states in the enforcement of those policy choices. Part I also discusses PASPA, which was a marked departure from traditional federal gambling laws. PASPA usurped state prerogatives by prohibiting states from authorizing sports gambling. Moreover, PASPA did so without the creation of an independent federal gambling offense for sports wagering. PASPA, therefore, implemented federal policy exclusively through the states thereby raising certain constitutional issues, most notably the anticommandeering principle, which also are discussed in this part.

Part II of this Article discusses the New Jersey challenges to the statute. New Jersey twice challenged PASPA. The first challenge raised several constitutional issues which were all rejected by the Third Circuit. Subsequent legislation was passed, and New Jersey again challenged PASPA. Again, the Third Circuit rejected the state’s claims. However, the Court granted certiorari and ultimately overturned the Third Circuit, holding that PASPA violated the anticommandeering principle and, therefore, was unconstitutional.

Part III provides an analysis and critique of the Court’s decision. The Court distinguished between federal laws that permissibly preempt state action pursuant to the Supremacy Clause and federal laws that impermissibly commandeer state authorities to do the federal government’s bidding. In addition, the Court made clear that, for purposes of determining whether anticommandeering principle is violated,

² See *Murphy*, 138 S. Ct. at 1461.

no distinction should be made between federal commands which order states to take action and federal commands which prohibit states from taking action.³ The Court's reasoning with respect to these issues leaves many questions unanswered including whether, and to what extent, the federal government can prevent a state from sanctioning an activity. The legal state of affairs with respect to marijuana legalization evidences that federal prohibition coupled with state sanction does not well serve principles of federalism and has the potential to erode respect for the law. Thus, the federal government should be reluctant to prohibit activities for which public support—and state sanction—exists.

Part III concludes with the opinion that the demise of PASPA is welcome. Public attitudes toward sports gambling have changed considerably since PASPA was enacted and, due to technological changes and the increased use by the sports industry of advanced metrics, the sports gambling industry is undergoing rapid development and change. The Court's decision allows states to enact regulatory regimes that reflect their own policy preferences. It is difficult to predict how widespread legalized sports betting will impact the sports industry and society at large. Myriad state regulatory approaches provide greater assurance than uniform federal rules that a particular regulatory regime is well suited to the particular needs of a state and that one or more implemented regimes is effective and can serve as an exemplar for other states.

I. FEDERAL GAMBLING REGULATION

Gambling has long generated consternation and disdain, historically rooted in religious grounds, and, when permitted, is subject to regulation.⁴ In modern times, opprobrium toward gambling activities is due to the host of negative externalities such activities create and the belief that such activities yield little societal benefits. A report issued by the National Gambling Impact Study Commission in 2009 concluded gambling is a contributing factor to a host of societal problems, including divorce, domestic abuse, child neglect, crime, substance abuse, and financial

³ *Id.* at 1478.

⁴ *See generally* Per Binde, *Gambling and Religion: Histories of Concord and Conflict*, 2007 J. GAMBLING ISSUES 145. The monotheistic religions condemned gambling activities because, among other reasons, of fear that such activities provided competition for religious dogma and eroded the Protestant work ethic. *Id.*

hardships.⁵ The use of the internet to facilitate gambling activities has exacerbated the ills associated with gambling.⁶ The societal benefits of gambling are primarily economic in nature—the industry long has been a source of jobs, infrastructure development, and tax revenues.⁷ Gambling also provides entertainment value.

In light of organized crime's dominance of the illegal gambling industry, modern federal anti-gambling statutes were enacted to assist the states in the enforcement of their gambling prohibitions.⁸ In general, federal law does not create independent prohibitions on gambling activities but instead creates a federal offense for certain violations of state law.⁹ For the most part, the federal government leaves it to the states to determine whether, and to what extent, to legalize gambling activities. The one notable exception is sports gambling.¹⁰

A. *Federal Anti-Gambling Statutes: Federalism in Practice*

A number of federal statutes buttress state gambling prohibitions.¹¹ Generally, these statutes do not reach activities that are legal under state law and have been in force for decades. A more recent statute, enacted in 2006, attempts to rein in the use

⁵ NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 7-1 to 7-28 (2009). The Commission was created by Congress in 1996 to conduct a study of the societal impact of gambling in the United States. National Gambling Impact Study Commission Act, Pub. L. No. 104-149, § 4, 110 Stat. 1484 (1996).

⁶ See Anthony Vecchione, Comment, *Fantasy Sports—Has Recent Anti-Gambling Legislation 'Dropped the Ball' by Providing a Statutory Carve-out for the Fantasy Sports Industry?*, 61 SMU L. REV. 1689, 1698 (2008). Online gambling activities increase the risk that gambling is undertaken by minors, have the potential to exacerbate the problems associated with pathological gamblers, attract disreputable operators and criminal elements, facilitate money laundering, and decrease workplace productivity. *Id.*

⁷ See Dallis Nicole Warshaw, Comment, *Breaking the Bank: The Tax Benefits of Legalizing Online Gambling*, 18 CHAPMAN L. REV. 289, 291 (2014) (citing WILLIAM N. THOMPSON, LEGALIZED GAMBLING: A REFERENCE HANDBOOK 5-6 (2d ed. 1997) and CHARLES T. CLOTFELTER, GAMBLING TAXES, THEORY AND PRACTICES OF EXCISE TAXES 84-85 (2005)). Gambling activities have financed public works throughout history, including the Continental Army during the Revolutionary War. *Id.*

⁸ See Kaitlyn Dunphy, Note, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 BROOK L. REV. 1295, 1311 (2014). Federal anti-gambling legislation dates to the mid-nineteenth century when Congress passed legislation in 1868 to prohibit the use of the mails for the promotion of state lotteries. *Id.* at 1312. Additional anti-lottery legislation followed later in the nineteenth century. *Id.* at 1313-14.

⁹ See *infra* notes 11-32 and accompanying text.

¹⁰ See *infra* notes 33-51 and accompanying text.

¹¹ See *infra* notes 11-32 and accompanying text.

of the internet as a facilitator of illegal wagers. A brief overview of the salient statutes follows.

Pursuant to the Wire Act, a person engaged in the business of betting or wagering who 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 is subject to criminal sanctions.¹² Exempt from the Wire Act's strictures is any transmission in interstate or foreign commerce of information that assists in the placing of bets or wagers on any sporting event or contest if the transmission originates in a state or foreign country in which sports betting is legal and has its terminus in a state or foreign country in which sports betting is legal.¹³ In 2011, the federal government, in contrast to previous practice, made clear that the Wire Act applies only to sports gambling.¹⁴

¹² 18 U.S.C. § 1084(a) (2018). Violations are subject to fines, imprisonment for no longer than two years, or both. *Id.* The statute also prohibits the transmission of a wire communication which entitles the recipient to money or credit as a result of a bet or wager or information assisting in the placing of bets or wagers. *Id.* Although originally enacted to prohibit telegraph transmissions, the statute also applies to internet communication. *See* *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001). Cohen, a U.S. citizen, was convicted of Wire Act violations stemming from his operation of a sports betting website that was maintained in Antigua and Barbuda. *Id.* at 70.

¹³ 18 U.S.C. § 1084(a) (2018). For purposes of the statute the term "state" means any state, territory, or possession of the United States and the District of Columbia. *Id.* § 1084(c). In addition, transmissions of news reports of sporting events or contests in interstate or foreign commerce are exempt. *Id.* § 1084(a). Intrastate activities are not covered by the Wire Act but it is not clear whether internet communications between residents of one state that cross state lines in transmission are covered by the statute. The Department of Justice had the opportunity to clarify this issue in 2011 but failed to do so. *See* *Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 1–2 (2011) [hereinafter *Lottery Ticket Opinion*]. The Department of Justice was queried by two states about this issue in connection with intrastate lottery games. *Id.* The Department's Office of Legal Counsel responded that the Wire Act did not apply to non-sports wagering activities and, accordingly, did not address this issue. *Id.* This issue will need to be clarified if states allow online sports gambling. *See infra* note 259.

¹⁴ *Lottery Ticket Opinion*, *supra* note 13. The Department of Justice had interpreted the statute to apply to all forms of bets and wagers. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529, 538 (2010). However, in response to inquiries from New York and Illinois concerning the applicability of the Wire Act to the sale of lottery tickets to in-state purchasers, the Department of Justice's Office of Legal Counsel concluded that the Wire Act does not prohibit wagering or betting activities that do not involve sporting events or contests. *Lottery Ticket Opinion*, *supra* note 13. Two courts had reached different conclusions with respect to this issue. *Compare In re Mastercard Int'l, Inc.*, 313 F.3d 257 (5th Cir. 2002) (holding that the Wire Act applies only to sports betting), *with United States v. Lombard*, 639 F. Supp. 2d 1271 (D. Utah 2007) (holding that the Wire Act's prohibition on the transmission of money or credit or information that assists in the placement of bets was not limited to sports gambling).

The Travel Act prohibits anyone from traveling in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with the intent to distribute the proceeds of an unlawful activity, commit any crime of violence to further any unlawful activity, or promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity.¹⁵ For this purpose, an unlawful activity includes any business enterprise that involves gambling that either violates the law of the state in which the violation was committed, or federal law.¹⁶

The Illegal Gambling Business Act prohibits anyone from conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business.¹⁷ An illegal gambling business is a gambling business that involves five or more persons who conduct, manage, supervise, direct, or own such business, has been or remains in substantial continuous operation for more than thirty days, has gross revenue of at least \$2,000 in any single day, and is in violation of the law of the state or political subdivision in which such business is conducted.¹⁸

The Interstate Transportation of Wagering Paraphernalia Act (“the Paraphernalia Act”) prohibits anyone from knowingly carrying or sending in interstate or foreign commerce any record, paraphernalia, ticket, certificate, token, paper, writing, or other device that is, or will be, used or adapted, devised, or

¹⁵ 18 U.S.C. § 1952(a)(1)–(3) (2018). Violations of the statute may result in imprisonment for no more than five years unless the violation consists of the commission of a crime of violence in which case the violation may result in imprisonment for no more than 20 years. *Id.* § 1952(a)(3). If the violation results in a death then the violation may result in life imprisonment. *Id.*

¹⁶ *Id.* § 1952(b). A state, for this purpose, includes the District of Columbia and possessions and territories of the United States. *Id.*

¹⁷ 18 U.S.C. § 1955(a) (2018). Violators are subject to a fine, imprisonment for no longer than five years, or both. *Id.* The World Trade Organization’s Appellate Body found that the Wire Act, the Travel Act, and this statute violated the United States’ obligation to allow market access to Antigua under the General Agreement on Trade in Services. *See* Jordan Hollander, *The House Always Wins: The World Trade Organization, Online Gambling, and State Sovereignty*, 12 RUTGERS J.L. & PUB. POL’Y 179, 181 (2015). The United States did not respond to the Appellate Body’s findings leading the World Trade Organization to authorize Antigua to suspend certain obligations with respect to intellectual property rights. *Id.* at 208–09.

¹⁸ 18 U.S.C. § 1955(b)(1) (2018). A state, for this purpose, includes the District of Columbia and possessions and territories of the United States. *Id.* § 1955(b)(6). Bingo games, lotteries, and similar games of chance conducted by I.R.C. § 501(c)(3) organizations are exempt from the statute if certain conditions are met. *See id.* § 1955(e). Under 26 U.S.C. § 501(c)(3), exempt “organizations” are those operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, to foster certain amateur sports, or to prevent cruelty to children or animals. 26 U.S.C. § 501(c)(3) (2018).

designed for use in bookmaking, wagering pools with respect to sporting events, or numbers, policy, bolita, or similar games.¹⁹ This statute does not apply to the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a state in which such bets or wagers are legal under state law.²⁰

The Wire Act is of marginal utility with respect to internet gambling due to its limited application—sports gambling only.²¹ The Unlawful Internet Gambling Enforcement Act (“UIGEA”) was enacted in 2006 as a result of the perceived inadequacy of voluntary efforts by credit card companies to deny authorization for transactions on gambling websites in curbing the growth of online gambling.²² The statute’s objective is to restrict the flow of funds to online gambling operators by prohibiting any person engaged in the business of betting or wagering from knowingly accepting, in connection with the participation of another person in unlawful internet gambling, any credit, the proceeds of credit, an electronic funds transfer, funds transmitted through a money transmitting business, a check, draft, or similar instrument drawn on or payable through a financial institution, or the proceeds of any other financial transaction prescribed by the Secretary of the Treasury or the Board of Governors of the Federal Reserve System.²³ The statute

¹⁹ 18 U.S.C. § 1953(a) (2018). Violators are subject to a fine, imprisonment for no longer than five years, or both. *Id.* The prohibition does not apply to transportation by a common carrier in the usual course of business. *Id.*

²⁰ *Id.* § 1953(b). A similar exemption applies to pari-mutuel betting equipment, tickets, and equipment. *Id.* A state, for this purpose, includes the District of Columbia and possessions and territories of the United States. *Id.* § 1953(d)(6). Also exempt is the carriage or transportation of newspapers or similar publications. *Id.* § 1953(b).

²¹ See *supra* note 13 and accompanying text. Several bills were introduced in Congress that would have amended the Wire Act to capture on-line gambling in general within its purview but the bills failed to win passage. See S. 474, 105th Cong. (1997); S. 692, 106th Cong. (1999); H.R. 4777, 109th Cong. (2006).

²² Security and Accountability For Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006) (codified at 31 U.S.C. §§ 5361–5367 (2018)). Gamblers routinely used other payment mechanisms, including checks and wire transfers, that mitigated the efficacy of credit card company efforts to hinder on-line gambling. See U.S. GEN. ACCOUNTING OFFICE, GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 20–30 (2002).

²³ 31 U.S.C. § 5363 (2018). Violations are punishable by fine, imprisonment for not more than five years, or both. *Id.* § 5366(a). A financial transaction provider, interactive computer service, or telecommunication service may be liable for violations of the statute if such provider or service has actual knowledge and control of bets and wagers and has engaged in certain operational activities or owns or controls persons who engage in those activities. See *id.* § 5367. This provision has been broadly interpreted. See *United States v. Rubin*, 743 F.3d 31 (2d Cir. 2014) (holding that an individual hired to disguise payments from gamblers as payments from non-existent legitimate businesses violated the statute). Another statute, the Illegal Money Transmitting Business Act of 1992, makes it a criminal offense to conduct, control, manage, supervise, direct, or own all or part of an unlicensed money transmitting

also requires that the Treasury Department and the Federal Reserve promulgate regulations requiring designated payment systems, and all participants therein to establish policies and procedures reasonably designed to identify, block, or otherwise prevent or prohibit the acceptance of transactions prohibited by the statute.²⁴

Unlawful internet gambling is defined as the placement, receipt, or otherwise knowing transmission of a bet or wager by any means which involves the use, at least in part, of the internet if such bet or wager is unlawful under any applicable federal or state law in the place in which such bet or wager is initiated, received, or otherwise made.²⁵ Bets or wagers initiated and received or otherwise made exclusively in one state do not constitute unlawful internet gambling if such bets are expressly authorized in the state by laws or regulations that include reasonably effective age and location verification requirements and appropriate data security safeguards.²⁶

business. 18 U.S.C. § 1960(a) (2018). An unlicensed money transmitting business is defined as a money transmitting business that affects interstate commerce in any manner and fails to comply with either state law licensing requirements or federal registration requirements, or otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity. *Id.* § 1960(b)(1). In addition, a general anti-money laundering provision enacted as part of the USA Patriot Act could capture payment processors, such as PayPal, and facilitators of illegal gambling activities. *Id.* § 1956; see Yochi J. Dreazen, *E-Commerce (A Special Report): The Rules—Money Transfers: Too User-Friendly?—Legislation Aimed at Stopping Terrorism Could Have a Devastating Impact on an Innocent Bystander: PayPal*, WALL ST. J., Oct. 21, 2002, at R9.

²⁴ 31 U.S.C. § 5364(a) (2018). The Department of the Treasury and the Federal Reserve have both issued regulations that provide a set of due diligence procedures as a safe harbor for payment system participants; rules are set forth for credit and debit card issuers, operators, merchants, third party processors, financial institutions that originate or receive ACH or wire transfers, banks within the check clearing system, and money transmitters. *See generally* 12 C.F.R. §§ 233.1–233.7 (2008); 31 C.F.R. §§ 132.1–132.7 (2008).

²⁵ 31 U.S.C. § 5362(10)(A) (2018). The term “bet or wager” is defined as the staking or risking of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance and the purchase of a chance or opportunity to win a lottery or prize if the opportunity to win is determined predominately by chance. *Id.* § 5362(1)(A)–(B). A bet or wager also includes any other scheme that is prohibited by PASPA. *Id.* § 5362(1)(c). *See infra* notes 37–38 and accompanying text for a discussion of prohibited activities under PASPA. Excluded from the definition are securities and commodity transactions, over the counter derivative instruments, insurance, indemnity and guarantee contracts, deposit accounts, participation in games or contests in which participants risk nothing other than their personal efforts or points or credits provided by the sponsor that are useable only for participation in such games or contests. 31 U.S.C. § 5362(1)(E)(i)–(viii); *id.* § 5362(10)(A). In addition, a bet or wager does not include the participation in any fantasy or simulation sports game in which no fantasy team is based on the current membership of a professional or amateur sports organization, as defined by PASPA. *Id.* § 5362(1)(E)(ix). *See infra* notes 27–30 and accompanying text for a discussion of the requirements that must be met in order for the statute’s fantasy sports exception to apply.

²⁶ 31 U.S.C. § 5362(10)(B)(i)–(ii) (2018). A state, for this purpose, includes the District of Columbia and possessions and territories of the United States. *Id.* § 5362(9). The statute makes clear that the intermediate

The legislation does not prohibit any activity permitted under the Interstate Horseracing Act of 1978, does not disturb the relationship between the Interstate Horseracing Act of 1978 and other federal statutes, and does not preempt any state law that prohibits gambling.²⁷ Moreover, the UIGEA expressly provides that its provisions shall not be construed to alter, limit, or extend any federal or state law that prohibits, permits, or regulates gambling.²⁸

The UIGEA expressly sanctions certain fantasy sports activities regardless of whether state law prohibits such activities.²⁹ A bet or wager does not include the participation in any fantasy or simulation sports game in which no fantasy team is based on the current membership of a professional or amateur sports organization, as defined by PASPA.³⁰ Moreover, the winning outcome may not be based either on the score, point-spread, or the performance of any single real-world team or combination of such teams or solely on the performance of an individual athlete in any single event.³¹ All prizes and awards must be established and made known to participants prior to the game or contest; the value of such prizes and awards cannot be determined by the number of participants or the amount of fees paid by such participants; and all winning outcomes must reflect the relative knowledge and skill of the participants.³² The requirement that outcomes must reflect the participants'

routing of data does not determine the location in which a bet or wager is initiated, received, or otherwise made. *Id.* § 5362(10)(E). Moreover, the bet or wager cannot violate PASPA, the Gambling Devices Transportation Act, the Interstate Horseracing Act of 1978, or the Indian Gaming Regulatory Act. *Id.* § 5362(10)(B)(iii).

²⁷ *Id.* § 5362(10)(D).

²⁸ *Id.* § 5361(b).

²⁹ See *infra* note 265 and accompanying text for a discussion of the status of fantasy sports contests under state law. It was not entirely free from doubt whether the UIGEA's fantasy sports carve-out insulated qualified fantasy sports contests from the application of PASPA. *Id.* The UIGEA expressly preserved gambling prohibitions included in other federal statutes and PASPA's operative language could be interpreted to capture fantasy sports activities. See *supra* note 27; see also *infra* notes 47–53 and accompanying text.

³⁰ 31 U.S.C. § 5362(1)(E)(ix) (2018). An amateur sports organization is any person or governmental entity, or league or association of such persons or governmental entities, that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate. 28 U.S.C. § 3701(1) (2018). A professional sports organization is identically defined except that such organization sponsors, organizes, schedules, or conducts a competitive game in which one or more professional, as opposed to amateur, athletes participate. *Id.* § 3701(3).

³¹ 31 U.S.C. § 5362(1)(E)(ix)(III) (2018).

³² *Id.* § 5362(1)(E)(ix)(I)–(II).

relative knowledge and skills could be interpreted as conclusory. That is, outcomes determined by the accumulated statistics of athletes are deemed to be the result of the skill and knowledge of the participant. If, however, the skill and knowledge required of participants is a factual question to be answered based on the nature of the contest and the effort of the participants, then it is conceivable, for purposes of the statute, that the outcomes of contests in which the rosters of the participants are selected automatically by an algorithm are not the result of skill and knowledge. A carve-out that is heavily reliant on facts and circumstances is hardly much of a carve-out.

Generally applicable federal gambling legislation did not prohibit sports gambling if such activities did not violate state law and, in the case of certain fantasy sports activities, regardless of whether such activities violated state law. With the enactment of PASPA, sports gambling was the exception.

B. Sports Gambling: Federal Strong-Arming

PASPA, enacted in 1992, significantly restricted state sanctioned sports gambling.³³ The statute was enacted in response to Congress's concern about the growth of state-sponsored sports gambling and the concomitant erosion of public confidence in the integrity of professional and amateur sports contests.³⁴ Moreover, the legislation evidenced congressional skepticism about the assertion that the legalization of sports gambling would have a chilling effect on illegal sports gambling.³⁵ In contrast, Congress believed that legalization would increase the incidence of illegal gambling because state-sanctioned games inevitably would fail to satiate the appetite of many gamblers who are initially drawn to them.³⁶ Finally, the statute manifested Congress's belief that "[t]he moral erosion [sports gambling]

³³ Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701–3704 (2018)).

³⁴ S. REP. NO. 102-248, at 5 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555. Note that a separate federal statute criminalizes sports bribery.

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 under this title, or imprisoned not more than 5 years, or both.

18 U.S.C. § 224 (2018).

³⁵ S. REP. NO. 102-248, at 7, *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3558.

³⁶ *Id.*

produces cannot be limited geographically” because once sports gambling is legalized in a state, a race to the bottom would ensue among other states.³⁷ However, in a nod to practical economics and despite the aforementioned concerns, the legislation exempted Nevada and other states that already had legalized some form of sports gambling.³⁸

PASPA’s operative provision makes it unlawful for:

a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . 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.³⁹

Similarly, it is unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, the aforementioned activities.⁴⁰ Civil actions to enjoin violations of the statute may be brought by the Attorney General of the United States or by any amateur or professional sports organization whose competitive game is the basis of the statutory violation.⁴¹

The statutory language could be interpreted to apply to fantasy sports contests. The fantasy sports carve-out provided by the UIGEA does not override PASPA.⁴² Fantasy sports activities, if they constitute betting, gambling, or wagering schemes, are based on the performances of one or more amateur or professional athletes in competitive games.⁴³ Consequently, a state that sponsors, operates, advertises, promotes, licenses, or authorizes by law or compact fantasy sports activities may very well violate the statute. Moreover, a private enterprise licensed by the

³⁷ *Id.* at 5.

³⁸ *Id.* at 8.

³⁹ 28 U.S.C. § 3702 (2018). A government entity is a state, including territories or possessions of the United States, or political subdivisions thereof, and entities or organizations that have governmental authority over territories of the United States, including certain Native American entities or organizations. *Id.* § 3701(2), (5).

⁴⁰ *Id.* § 3702(2).

⁴¹ *Id.* § 3703. *See supra* note 30 for the definitions of amateur and professional sports organizations.

⁴² *See supra* note 28 and accompanying text.

⁴³ *See infra* notes 46–49 and accompanying text for a counterargument in this respect.

government or authorized by law to engage in the statutorily prohibited activities likewise may violate the statute. Unlike other federal statutes, the determination of whether or not fantasy sports contests are betting, gambling, or wagering schemes is not left to state law.⁴⁴ However, fantasy sports contests do not violate PASPA if the activity in question is free of a prohibited form of state imprimatur.

PASPA has not been used to challenge the legality of fantasy sports. Although the Court has now rendered this issue moot, it is likely that PASPA was never intended to apply to fantasy sports contests. PASPA was enacted during the infancy of the fantasy sports industry, and one of its objectives was to protect the integrity of amateur and professional sporting events.⁴⁵ Accordingly, it is arguable that PASPA was unconcerned with wagers whose outcomes are determined by an amalgamation of statistics generated by the performance of numerous athletes in various contests. Instead, PASPA's focus was on wagers based on the individual performances of athletes in discrete contests—performances susceptible to influence by gamblers. Except for its grandfather provisions, PASPA does not defer to state law, so whether or not fantasy sports contests are considered to be gambling or wagering schemes is a federal issue.⁴⁶ It is unclear whether fantasy sports activities are deemed to be gambling or wagering schemes under federal law. The UIGEA contains a fantasy sports carve-out, but this legislation expressly provides that its provisions shall not be construed to alter, limit, or extend any federal or state law that prohibits, permits, or regulates gambling.⁴⁷ Moreover, the UIGEA prohibits any bet or wager that violates PASPA.⁴⁸ Therefore, the UIGEA cannot be construed to exempt from PASPA an activity which was, prior to its enactment, prohibited by PASPA; but the UIGEA's fantasy sports carve out does lend credence to the notion that PASPA was never intended to reach fantasy sports activities.

⁴⁴ See *infra* notes 46–48 and accompanying text.

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ See *supra* notes 39–40 and accompanying text.

⁴⁷ See *supra* note 28 and accompanying text. The Attorney General of Illinois specifically referenced the UIGEA fantasy sports carve-out and its inapplicability to state law in her opinion that daily fantasy sports contests violate Illinois law. See Sports and Gaming: Daily Fantasy Sports Contests as Gambling, 15-006, Op. Ill. Att'y Gen. 13 (2015). See also The Legality of Fantasy Sports Leagues under Texas Law, KP-0057 Op. Tex. Att'y Gen. 7 (2016) (Attorney General of Texas opining that season-long fantasy leagues also violate state law if fees are retained by the league sponsor and not entirely paid out to participants).

⁴⁸ See *supra* note 28 and accompanying text.

The statute exempts certain activities from its reach; for example, pari-mutuel animal racing and jai-alai games are categorically exempt.⁴⁹ The legislation also exempts certain casino activities and contains two general grandfather provisions. An activity otherwise prohibited by the statute is permitted if such activity is not a lottery and is conducted exclusively in a casino located in a municipality, and such activity or similar activity was authorized to be operated in the municipality not later than one year after the effective date of the statute.⁵⁰ Moreover, any commercial casino gaming scheme operated by a casino located in a municipality, other than a lottery, is permissible if such scheme was in operation in the municipality throughout the ten year period preceding the effective date of the statute and is subject to comprehensive state regulation applicable solely to such municipality.⁵¹

Two general grandfather rules are provided in the statute. First, lotteries, sweepstakes, and betting, gambling and wagering schemes operated in a state or other governmental entity are permitted if such schemes were conducted by the state or governmental entity at any time between January 1, 1976 and August 31, 1990.⁵² Second, lotteries, sweepstakes, and betting, gambling and wagering schemes operated in a state or other governmental entity are permitted if such schemes were authorized by statute in effect on October 2, 1991 and such scheme was actually conducted in the state or other governmental entity at any time between September 1, 1989 and October 2, 1991.⁵³ The first described grandfather rule appears to apply to activities conducted by the state or governmental authority itself during the statutory reference period. The second described grandfather rule appears to allow activities operated by private enterprises pursuant to statute if such activity had been conducted in the jurisdiction during the statutory reference period.

The Third Circuit had occasion to interpret the first grandfather rule described above in a case involving Delaware's plan to institute a sports betting scheme in 2009.⁵⁴ During the 1976 National Football League season, Delaware operated a

⁴⁹ 28 U.S.C. § 3704(a)(4) (2018). Thus, horseracing and greyhound racing activities are exempt from the statutory prohibition. Pari-mutuel is a term that describes the betting system utilized in such activities. *See Parimutuel*, BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

⁵⁰ 28 U.S.C. § 3704(a)(3)(A) (2018).

⁵¹ *Id.* § 3704(a)(3)(B).

⁵² *Id.* § 3704(a)(1).

⁵³ *Id.* § 3704(a)(2).

⁵⁴ *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), *rev'g* 2009 U.S. Dist. LEXIS 69816 (D. Del. 2009).

sports betting scheme known as “Scoreboard” under which three types of games were offered.⁵⁵ The games required a player to pick a winner in multiple games; the games differed from each other in several respects; games were selected with or without a point spread; and the minimum number of games whose winner had to be correctly selected varied, but a player participating in Scoreboard had to select a winner in at least three games.⁵⁶ Delaware intended to commence, on September 1, 2009, a sports betting scheme that would allow single game wagers in professional and amateur sports except for sporting events involving a Delaware college or university or a Delaware amateur or professional sports team.⁵⁷ The leagues representing the four major professional team sports, baseball, football, basketball, and hockey, and the National Collegiate Athletic Association filed for a preliminary injunction in federal district court asserting that the state’s proposed scheme violated PASPA.⁵⁸ The district court denied the preliminary injunction.⁵⁹

The Third Circuit reversed the district court, decided the case on the merits, and held that Delaware’s scheme violated PASPA.⁶⁰ The court rejected the state’s assertion that the grandfather rule should be applied broadly to allow any sports lottery because the state had conducted a sports lottery in 1976.⁶¹ Instead, the court believed the statutory language was clear and that the grandfather rule applied only to schemes that the state had actually conducted in 1976.⁶² According to the court, whether or not Delaware could have offered a broader range of games in 1976 under state law was irrelevant.⁶³ The court conceded that the grandfather rule did not limit games to those identical in every respect to the games offered in the past, but it held that any differences between the present and past games must be *de minimis* and not substantial.⁶⁴ Permissible distinctions would include differences in the location at

⁵⁵ *Id.* at 296.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 297.

⁵⁹ *Id.*

⁶⁰ *Id.* at 304.

⁶¹ *Id.* at 301–02.

⁶² *Id.*

⁶³ *Id.* at 301.

⁶⁴ *Id.* at 303–04.

which tickets may be purchased or differences in the existing teams that may be bet upon.⁶⁵ However, Delaware's plan to allow wagers to be placed on single football games and to allow wagers to be placed on sporting events that did not involve the National Football League teams were considered by the court to be substantive changes from the 1976 scheme. Accordingly, PASPA limited Delaware to the provision of three or more game parlay bets on National Football League games.⁶⁶

1. PASPA and the Anticommandeering Principle

PASPA prohibits states from taking action that they, as sovereign entities, would otherwise be entitled to take. Despite Congress's expansive power to act pursuant to its Commerce Clause power and to preempt the field when it does so act, the Tenth Amendment imposes limitations on federal power.⁶⁷ Any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" exceeds Congress's constitutional power.⁶⁸ Consequently, Congress "lacks the power directly to compel the States to require or prohibit" acts which the federal government sees fit to require or prohibit.⁶⁹ This so-called anticommandeering principle recognizes the constitutional system of dual sovereignty and, in part, is intended to preserve political accountability on federal officials by preventing them from making policy choices and passing the proverbial buck to state officials.⁷⁰

In *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court upheld a federal statute that established certain standards for coal mining operations and required states that wished to assume regulatory authority over such operations, among other requirements, to enact laws that implemented the standards set forth in the federal statute.⁷¹ If a state declined to participate, then the federal government would assume regulatory responsibilities.⁷² The Court noted that federal law did not

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ U.S. CONST. AMEND. X.

⁶⁸ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283–88 (1981).

⁶⁹ *New York v. United States*, 505 U.S. 144, 166 (1992).

⁷⁰ *Id.* at 168. *See also* *Printz v. United States*, 521 U.S. 898, 930 (1997) (striking down provisions that required states to "absorb the financial burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects").

⁷¹ *Hodel*, 452 U.S. at 269.

⁷² *Id.* at 272.

compel the states to adopt the federal standards, did not require them to expend state funds, and did not otherwise coerce them into participation in the federal program.⁷³ The Court later stated that, because Congress could have chosen to preempt the field entirely, the legislation in question “merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field.”⁷⁴ In *F.E.R.C. v. Mississippi*, the Court upheld a federal requirement, imposed on state utility commissions, that mandated such commissions to consider, but did not mandate, the enactment of certain standards for energy efficiency.⁷⁵ Despite the fact that federal law commandeered state resources to consider the energy standards, the Court upheld the law because it did not require the implementation of such standards and was merely “only one step beyond *Hodel*.”⁷⁶

Federal prohibitions on state actions or federal requirements on states to enact regulations have been upheld if such prohibitions or requirements do not implicate a state’s control over its regulation of private parties or if they merely subject a state to the same requirements applicable to private parties. Thus, federal laws prohibiting a state from issuing bonds in bearer form and prohibiting state motor vehicle departments from divulging private information about its citizens did not violate the Tenth Amendment.⁷⁷

In *New York v. United States*, the Court struck down a federal law designed to regulate and encourage the orderly disposal of low-level radioactive waste.⁷⁸ The law included a “take-title” provision which mandated that a state take title to radioactive waste at the request of the waste generator if such state had not been able to arrange for the disposal of the waste by a certain time.⁷⁹ According to the Court, “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”⁸⁰ In the Court’s opinion, the take-title provision “crossed the line distinguishing encouragement from

⁷³ *Id.* at 288.

⁷⁴ *Printz*, 521 U.S. at 926.

⁷⁵ *FERC v. Mississippi*, 456 U.S. 742, 769–71 (1982).

⁷⁶ *Id.* at 764.

⁷⁷ See generally *South Carolina v. Baker*, 485 U.S. 505 (1988); *Reno v. Condon*, 528 U.S. 141 (2000).

⁷⁸ *New York v. United States*, 505 U.S. 144, 149 (1992).

⁷⁹ *Id.* at 153 (citing 42 U.S.C. § 2021e(d)(2)(C) (2018)).

⁸⁰ *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

coercion.”⁸¹ The Court applied similar reasoning to invalidate the provisions of federal gun control legislation, the Brady Act, which required local authorities in certain states to run background checks on gun purchasers.⁸² Congress “may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.”⁸³

Congress cannot compel state cooperation but, through its spending power, it can obtain such cooperation. A plethora of federal programs dispense an enormous amount of funds to the states, often with strings attached.⁸⁴ However, the use of the spending power as a carrot to obtain state cooperation has its own limits, both constitutionally and politically. In *South Dakota v. Dole*, the Court set forth the conditions under which such an exercise of the spending power is constitutionally permissible.⁸⁵ The federal spending in question must advance the general welfare, conditions imposed upon the receipt of funds must be stated unambiguously and such conditions must relate to the federal interests sought to be advanced, and such conditional spending cannot be prohibited by another constitutional provision.⁸⁶ Moreover, the Court held that the Tenth Amendment precludes financial inducements that are so coercive they compel states to accept such inducements.⁸⁷ In *Dole*, the Court upheld the constitutionality of the National Minimum Drinking Age Act which withheld 5% of federal highway funds from any state that did not adopt a legal drinking age of at least twenty-one to.⁸⁸ According to the Court, the financial inducement in this case was not coercive but merely a form of “relatively minor encouragement.”⁸⁹

In *National Federation of Independent Business v. Sebelius*, the Court upheld the constitutionality of the Patient Protection and Affordable Care Act’s individual

⁸¹ *Id.* at 175.

⁸² *See generally* *Printz v. United States*, 521 U.S. 898 (1997).

⁸³ *Id.* at 935.

⁸⁴ *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 12 (2015).

⁸⁵ *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

⁸⁶ *Id.*

⁸⁷ *Id.* at 211.

⁸⁸ *Id.* at 212.

⁸⁹ *Id.* at 211.

health insurance mandate pursuant to Congress's taxing power.⁹⁰ However, the Court ruled against the government on two issues in that case. First, it held that the individual health insurance mandate was beyond Congress's power to regulate interstate commerce.⁹¹ Second, it held that the expansion of Medicaid under the statute impermissibly compelled the states to enact or administer a federal program.⁹² The Court recognized that the federal government may induce states, through the spending power, to enact or administer programs.⁹³ However, otherwise permissible financial inducements become impermissible when a state is left with no practical choice but to comply with federal mandates, when, in the Court's words, "pressure turns into compulsion."⁹⁴ Under the statute, a state that refused to expand its Medicaid program faced a loss of all federal Medicaid funding.⁹⁵ In theory, a state had the option to refuse, and lose a great deal of federal funding. Practically, given the amount of money at stake, a state had no choice.

Whatever one's opinion is about the efficacy of federal gambling legislation, it does have the virtue of clarity with respect to federalism. With the exception of PASPA, federal gambling legislation is a form of classic cooperative federalism. States enact the policies that suit the needs of their citizens, and the federal government provides assistance to the states when needed. PASPA clearly is not an exercise in federalism. The federal government preempted state policy preferences with respect to sports gambling. PASPA did not, however, provide for an independent federal prohibition on sports gambling but instead precluded the states from sanctioning sports wagering. Thus, PASPA raised the anticcommandeering

⁹⁰ Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012). This was the first in a trilogy of cases before the Court that concerned the Patient Protection and Affordable Care Act, commonly referred to as "ObamaCare." In 2014, the Court held that, pursuant to the Religious Freedom Restoration Act, the requirement to provide certain contraceptive coverage could not be enforced against three closely-held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). In 2015, the Court considered whether federal tax credits made available by the statute were available to qualified individuals who purchased health insurance on either Federal or State Exchanges or whether such credits were limited to qualified individuals who purchased health insurance on State Exchanges. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). The Court held that the Act made available tax credits to qualified individuals who purchased health insurance on Federal Exchanges. *Id.* at 2496.

⁹¹ *Sebelius*, 567 U.S. at 558.

⁹² *Id.* at 581–85.

⁹³ *Id.* at 576.

⁹⁴ *Id.* at 580 (citations omitted).

⁹⁵ *Id.* at 581.

principle as a constitutional infirmity with the statute—an issue New Jersey seized upon.

II. CONSTITUTIONAL CHALLENGES TO PASPA

New Jersey twice challenged the constitutionality of PASPA. Its first challenge raised several constitutional issues, all of which were rejected by the Third Circuit. A second challenge, brought after the state enacted certain legislative changes to its gambling statutes, was similarly rejected by the Third Circuit. However, the Supreme Court granted certiorari and reversed the Third Circuit. The Court held that PASPA impermissibly commandeered the states' power.

A. *New Jersey Challenges: Lower Courts*

The voters of New Jersey approved, by referendum, an amendment to the state's constitution permitting the state legislature to enact legislation authorizing sports gambling.⁹⁶ Subsequently, the legislature enacted such a measure, but the measure failed to meet the deadline set forth in the PASPA grandfather provision.⁹⁷ The National Collegiate Athletic Association and various professional sports leagues brought suit to enjoin the state from licensing sports betting, and the district court rejected the state's claims that the plaintiffs lacked standing to assert a claim and that PASPA was unconstitutional.⁹⁸ The Third Circuit affirmed the district court's decision.⁹⁹ Based largely on an expert witness report and league internal surveys, the court held that the sports leagues and the National Collegiate Athletic Association had standing to bring suit to enforce PASPA due to the threat of reputational harm posed by sports gambling.¹⁰⁰

⁹⁶ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 217 (3d Cir. 2013), *aff'g* Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

⁹⁷ *Id.* See *supra* notes 53–54 and accompanying text for a discussion of PASPA's grandfather rules. Note that the New Jersey Betting and Equal Treatment Act of 2015, which would have allowed New Jersey to legalize sports betting, was introduced in 2015. H.R. 457, 114th Cong. (2015). The Sports Gaming Opportunity Act of 2015 was also introduced that year and would have granted all states the opportunity to legalize sports gambling during a four-year window ending on January 1, 2019. H.R. 416, 114th Cong. (2015).

⁹⁸ *NCAA*, 730 F.3d at 214–15.

⁹⁹ *Id.* at 215.

¹⁰⁰ See *id.* at 218–24. The requirement of standing is rooted in Article III of the Constitution, which provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this

The state raised three constitutional claims. First, the state asserted that PASPA was beyond Congress's power to regulate interstate commerce; but the court, citing *United States v. Lopez*, held that "Congress may regulate an activity that 'substantially affects interstate commerce' if it 'arise[s] out of or [is] connected with a commercial transaction.'"¹⁰¹ According to the court, both wagering and national sports are economic activities and both activities substantially affect interstate commerce.¹⁰² Moreover, assuming *arguendo* that PASPA also reaches purely local

Constitution, the Laws of the United States and . . . to Controversies to which the United States shall be party . . ." U.S. CONST. art. III, § 2. The standing requirement also has a prudential dimension.

The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . ." Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . . Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.

Warth v. Seldin, 422 U.S. 490, 499–501 (1975). A discussion of standing jurisprudence, oftentimes bewildering and subject to criticism, is beyond the scope of this work. For a cogent analysis and critique of the Supreme Court's holdings in this respect see Richard E. Epstein, *Standing or Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001). See also Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Louis L. Jaffe, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

¹⁰¹ *NCAA*, 730 F.3d at 224 (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

¹⁰² *Id.* at 224–25. The court, in a footnote, did acknowledge *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), the case that granted professional baseball an exemption

activities, such as casual bets among family members, Congress had a rational basis for concluding that purely intrastate activity, when combined with like conduct by other similarly situated people, affects interstate commerce.¹⁰³

Second, the state asserted that PASPA impermissibly commandeers the states to enforce a federal regulatory program. The Third Circuit examined various Supreme Court decisions that implicated the anticommandeering principle and found that this principle is inapplicable to federal laws that merely prohibit a state from acting in a manner that would violate federal law.¹⁰⁴ PASPA, in the court's opinion, does not require a state to do anything. Instead, it merely prevents a state from doing what the statute prohibits it from doing under the authority of the Supremacy Clause.¹⁰⁵ According to the court, PASPA does not even prohibit a state from repealing an anti-gambling law so long as the state does not affirmatively authorize or license sports gambling.¹⁰⁶

Finally, the court rejected the state's assertion that PASPA singled out Nevada for favorable treatment and, therefore, violated the equal sovereignty of the states.¹⁰⁷ The court found the state's reliance on two Supreme Court cases that dealt with the Voting Rights Act of 1965 misplaced.¹⁰⁸ The contours of the equal sovereignty principle are not clear. The Court has held that the principle is applicable to the terms upon which states are admitted to the United States.¹⁰⁹ However, the Court has indicated that the doctrine may have broader relevance. In a 2009 decision involving the Voting Rights Act of 1965, the Court stated:

[t]he doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.' But a departure from the fundamental

from the Sherman Antitrust Act on the ground that professional baseball is not in interstate commerce. *See id.* at 225 n.7.

¹⁰³ *Id.* at 225–26 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942) (citations omitted)).

¹⁰⁴ *Id.* at 227–29 (citations omitted).

¹⁰⁵ *Id.* at 230–31.

¹⁰⁶ *Id.* at 232.

¹⁰⁷ *Id.* at 237–40. The equal sovereignty doctrine is rooted in Article IV, Section 4 of the U.S. Constitution and the Tenth Amendment thereto. *See Shelby County v. Holder*, 570 U.S. 529, 543 (2013); *Coyle v. Smith*, 221 U.S. 559, 566–67 (1911).

¹⁰⁸ *NCAA*, 730 F.3d at 237–39 (citations omitted).

¹⁰⁹ *See South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets.¹¹⁰

More recently, in another Voting Rights Act of 1965 decision, the Court noted that “*Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a bar on differential treatment outside that context. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”¹¹¹

According to the Third Circuit, the equal sovereignty principle does not prohibit Congress from differentiating among states in the exercise of its commerce power.¹¹² Moreover, assuming the equal sovereignty principle required disparate treatment of a state or states to be justified by unique conditions or facts present in the disfavored state or states, PASPA's grandfather rule still passed constitutional muster. The objective of PASPA was not to eliminate sports gambling but to prevent its spread.¹¹³ Finally, if Congress, in fact, was so constrained, then the appropriate rectification of PASPA's equal sovereignty violation is invalidation of the grandfather rule that favors Nevada and not the invalidation of the entire statute.¹¹⁴ Unfortunately, this issue was not addressed by the Supreme Court in *Murphy* and, therefore, the scope of the equal sovereignty principle remains unclear.¹¹⁵

¹¹⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (quoting *Katzenbach*, 383 U.S. at 328–29).

¹¹¹ *Shelby County*, 570 U.S. at 542.

¹¹² *Id.* at 238–39.

¹¹³ *Id.* at 239.

¹¹⁴ *Id.* See Michael Welsh, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV. 1009 (2014), for a critique of the Third Circuit's decision with respect to the equal sovereignty issue.

¹¹⁵ See *Hodel v. Indiana*, 452 U.S. 314, 332–33 (1981) and *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326–27 (1915), for the proposition that federal laws often have disparate impact among the states due to demographic, geographical, economic, and other differences among states, and such disparities do not raise constitutional issues. Recently, several states have sued the federal government alleging that the \$10,000 cap on the federal tax deductibility of state and local income and property taxes enacted as part of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054, is unconstitutional. See Jesse McKinley, *4 States File Lawsuit Against Trump's 'Economic Missile' Tax Plan*, N.Y. TIMES, July 18, 2018, at A21. The cap will disfavor taxpayers who reside or who are subject to taxes in high tax states. *Id.* The final version of the tax legislation is entitled “An Act to provide for reconciliation pursuant

The Third Circuit was not through with New Jersey and PASPA. In 2014 New Jersey enacted legislation that, in effect, permitted casinos and racetracks to engage in sports wagering without a state imprimatur.¹¹⁶ The Third Circuit had occasion to opine on whether this law violated PASPA and, if so, whether PASPA's application in this case violated the anticommandeering principle.¹¹⁷ The Court held that the allowance of casino sports gambling in the midst of myriad prohibitions on sports gambling amounted to state authorization thereby causing the law to violate PASPA.¹¹⁸ The law, in essence, channeled sports gambling to particular venues,¹¹⁹ and as a result, the statute violated PASPA. Although the court did not categorically state that a partial repeal of a prohibition, as opposed to a total repeal, amounts to state authorization of the activity to which the partial repeal applies, in this case it did.¹²⁰ For this reason, and for the reasons set forth in the earlier case, the court held that the anticommandeering principle was not violated.¹²¹ The dissenting judges believed the repeal of a pre-existing prohibition is not tantamount to state authorization, and took exception to the majority's assertion that partial repeal of prohibitions may, in some cases, amount to authorization while, in other cases, it may not.¹²² The state petitioned the Supreme Court and, on June 27, 2017, the Court granted certiorari.¹²³

B. Murphy v. National Collegiate Athletic Association

On May 14, 2018, the Supreme Court, in a 6-3 decision, held that PASPA was unconstitutional.¹²⁴ The Court held that the repeal, in whole or in part, of an existing

to titles II and V of the concurrent resolution on the budget for fiscal year 2018" (also commonly referred to as the "Tax Cuts and Jobs Act").

¹¹⁶ Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 392 (3d Cir. 2016) (en banc), *aff'g* by an equally divided court Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014).

¹¹⁷ *Id.* at 392.

¹¹⁸ *Id.* at 396–98.

¹¹⁹ *Id.* at 396–97.

¹²⁰ *Id.* at 400–02.

¹²¹ *Id.*

¹²² *Id.* at 402–06 (Fuentes, J., dissenting); *id.* at 406–08 (Vanaskie, J., dissenting).

¹²³ Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327 (2017) (mem.).

¹²⁴ Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018) (Ginsburg, J., dissenting) (Breyer, J., concurring in part, dissenting in part). Governor Christie's name had been replaced by that of his successor, Philip D. Murphy.

statutory prohibition amounts to state authorization of the activity that, prior to repeal, had been prohibited.¹²⁵ Accordingly, New Jersey's legislative action fell within the confines of PASPA.¹²⁶ The Court then held that the PASPA provision at issue in the case violated the anticommandeering principle and, therefore, was unconstitutional.¹²⁷ According to the Court, and in contrast to the Third Circuit, no distinction should be made between federal legislation that commands a state to act and federal legislation that prohibits a state from taking action.¹²⁸ The Court proceeded to distinguish federal edicts that impermissibly commandeered states from federal edicts that preempt state law pursuant to the Supremacy Clause.¹²⁹ Finally, because the Court believed that the statutory provision at issue in the case was not severable from the other operative provisions of the statute, the entire statute was held to be unconstitutional.¹³⁰

The statutory provision at issue in the case makes it unlawful for

a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . 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.¹³¹

The petitioners asserted that the term "authorize" is synonymous with "permit."¹³² Accordingly, PASPA requires a state to maintain their existing laws against sports gambling because a total or partial repeal of such laws amounts to the authorization

¹²⁵ *Id.* at 1474.

¹²⁶ *See infra* notes 130–39 and accompanying text.

¹²⁷ *See infra* notes 145–54 and accompanying text.

¹²⁸ *See supra* notes 104–05 and accompanying text; *see also infra* note 151 and accompanying text.

¹²⁹ *See infra* notes 157–71 and accompanying text.

¹³⁰ *See infra* notes 173–89 and accompanying text.

¹³¹ Professional and Amateur and Sports Protection Act, 28 U.S.C. § 3702 (2018), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). A governmental entity is a state, including territories or possessions of the United States, or political subdivisions thereof, and entities or organizations that have governmental authority over territories of the United States, including certain Native American entities or organizations. 28 U.S.C. § 3701(2), (5).

¹³² *Murphy*, 138 S. Ct. at 1473.

of previously prohibited activities.¹³³ In contrast, the respondents countered that for a state to “authorize” an activity it must take some affirmative action empowering someone with the right or authority to act.¹³⁴ The failure of a state to prohibit an action does not amount to state authorization of such action.¹³⁵ PASPA does not prohibit the repeal of sports gambling prohibitions. Instead, legislation that operates to repeal prohibitions on selected activities while leaving other prohibitions undisturbed is tantamount to the authorization of the activities for which the prohibitions have been repealed. For example, repeal of the prohibition against sports gambling activities conducted by the state, or by a limited number of preferred providers, is prohibited; such a form of partial repeal would amount to state authorization of the activity because it empowers action by a limited number of actors.¹³⁶

The Court noted that petitioners’ interpretation would render the statutory prohibition unconstitutional—a point conceded by the respondents, and the United States an amicus in support of respondents.¹³⁷ The Court held that the petitioners’ interpretation was the correct one although it also believed that repeal of a prohibition, whether total or partial, would also fall within the respondents’ interpretation of the term “authorize.”¹³⁸ According to the Court, “[w]hen a State completely or partially repeals old laws banning sports gambling it ‘authorize[s]’ that activity.”¹³⁹ Moreover, the repeal of sports gambling prohibitions not only permit sports gambling, it also empowers persons with the right or authority to act.¹⁴⁰

As noted above, PASPA, in addition to prohibiting certain state actions with respect to sports gambling, prohibits private actors from undertaking certain activities when such activities are conducted “pursuant to the law.”¹⁴¹ The United States argued that, for this prohibition on actions by private parties to apply, an affirmative grant of authority by the state is required, and such prohibition would not

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1474.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *supra* note 37 and accompanying text.

apply to actions by private parties in an area unregulated by the state.¹⁴² Consequently, the repeal by a state of existing prohibitions on an activity should not be equated with the activity's authorization by the state.¹⁴³ The Court was not persuaded by this argument and believed the conduct of a previously prohibited but now permitted activity amounts to conduct pursuant to state law.¹⁴⁴ Finally, the Court rejected the respondents' argument that the Court should adopt a reasonable interpretation of the statute that avoids a constitutional infirmity with the statute.¹⁴⁵ According to the Court, reliance on this canon of statutory interpretation would have been fruitless because the statute, regardless of the interpretation adopted, violates the anticommandeering principle.¹⁴⁶

The anticommandeering principle is "the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States."¹⁴⁷ In a system of dual sovereignty, both the federal government and the states wield sovereign powers, but state sovereignty is limited in several ways. First, certain grants of power to the federal government impose implicit restrictions on state governments.¹⁴⁸ Second, as a result of the Supremacy Clause, state law is preempted when such law conflicts with federal law that is within the scope of the authority granted to Congress by the Constitution.¹⁴⁹ The federal government is constrained by its authority to act only within the enumerated powers conferred upon it, and all other legislative power is reserved to the states.¹⁵⁰ The anticommandeering principle "simply represents the recognition of this limit on congressional authority."¹⁵¹

¹⁴² *Murphy*, 138 S. Ct. at 1474.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1475. The respondents also argued that the petitioners' interpretation was implausible in light of the fact that the statute applied to all governmental entities, including subdivisions of a state. The Court rejected this argument. *See id.* at 1474–75.

¹⁴⁶ *Id.* at 1475.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1475–76 (citing *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)).

¹⁴⁹ *Id.* at 1476.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Justice Alito noted that the anticommandeering principle has emerged relatively recently, and on few occasions. Citing to *New York v. United States*, Justice Alito stated that, unlike the Articles of Confederation, the Constitution grants Congress legislative authority over individuals rather than states and that “even a particularly strong federal interest” would not enable Congress to command a state to enact regulation.¹⁵² “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”¹⁵³ The anticommandeering principle serves several important purposes, including the reduction of the risk of tyranny by maintenance of a balance of power between the states and the federal government, the promotion of political accountability, and prevention of enforcement cost shifting to the states.¹⁵⁴

According to the Court, the legislative prohibition on states from authorizing sports gambling, regardless of whether the term “authorize” is interpreted according to the manner posited by either the petitioners or the respondents, dictates to a state legislature what it may or may not do and, in effect, puts such legislature under the direct control of Congress.¹⁵⁵ The Court proceeded to dispel the notion that a distinction should be made between congressional dictates to a state to enact legislation and congressional dictates that prohibit a state from enacting legislation. According to the Court, the distinction between a command to act and command to refrain from action is facile.

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded “affirmative” action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event. . . . Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.¹⁵⁶

¹⁵² *Id.* citing *New York v. United States*, 505 U.S. 144, 178 (1992).

¹⁵³ *Id.* at 1477 (citing *New York*, 505 U.S. at 178).

¹⁵⁴ *Id.* (citing *New York*, 505 U.S. at 168–69, 181–82; *Printz v. United States*, 521 U.S. 898, 929–30 (2007)).

¹⁵⁵ *Id.* at 1478.

¹⁵⁶ *Id.*

The Court then proceeded to distinguish the statute in question from congressional actions that the Court had previously upheld. In those cases, Congress either exerted pressure on states to act in accordance with congressional objectives, regulated states similarly to private actors in an activity in which both engage, provided states with a choice to act or not act, or merely required states to consider, but not necessarily adopt, a federal regulatory scheme.¹⁵⁷

Thus, the Court clarified that the federal government can neither order a state to do something nor order it to do nothing.¹⁵⁸ However, in certain respects, the anticommandeering principle conflicts with the preemption of state law when such preemption is warranted by the Supremacy Clause. In certain areas, Congress has prohibited states from the exercise of any regulatory role. The Court drew a distinction between preemption and the anticommandeering principle. The Supremacy Clause is a “rule of decision” and not an independent grant of legislative power.¹⁵⁹ For PASPA to preempt state law, it must first represent the exercise of a constitutionally granted congressional power, and, in addition, it must be best interpreted as a statute that regulates private actors, not states.¹⁶⁰

The Court noted that federal preemption of state law occurs in three circumstances, but all three circumstances share an attribute—federal law confers rights or imposes restrictions on private actors, and state law confers conflicting rights or imposes conflicting restrictions.¹⁶¹ In cases of “conflict” preemption, a state law imposes a duty or confers a right that is conflict with federal law.¹⁶² By way of example, the Court referred to *Mutual Pharmaceutical Co. v. Bartlett*, in which the Court struck down a state law that required a generic drug manufacturer to provide information on a generic drug label in addition to that required by the F.D.A.¹⁶³

¹⁵⁷ *Id.* at 1478–79 (discussing *Reno v. Condon*, 528 U.S. 141 (2000); *South Carolina v. Baker*, 485 U.S. 505 (1988); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981)). For a discussion of several of these cases, see *supra* notes 71–77 and accompanying text. Note that federal laws that incentivize states to act in a certain manner are susceptible to challenge if the incentive structure embedded in the legislation is coercive. See *supra* notes 85–95 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1479 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015)).

¹⁶⁰ *Id.* (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1480.

¹⁶³ *Id.* (citing *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013)).

Because federal law prohibited generic drug manufacturers from altering the composition of an F.D.A. approved drug or the F.D.A. approved label, the state law in question conflicted with federal law and, thus, was preempted.¹⁶⁴

“Express” preemption implicates federal laws that appear strikingly similar to PASPA. In such cases, federal law precludes state action.¹⁶⁵ For example, a provision of the Airline Deregulation Act of 1978 prohibited states or their political subdivisions from enacting or enforcing any law, rule, regulation, standard, or provision having the force and effect of law related to air carriers rates, routes, or services.¹⁶⁶ Although this provision operated directly on the states, the Court distinguished this provision from the PASPA provision at issue. Despite the language used in the statute, the Airline Deregulation Act of 1978 conferred on private actors, in this case airlines, a federal right to engage in certain conduct free of state law constraints.¹⁶⁷ Therefore, despite its linguistic similarity to the PASPA provision in question, this provision operated similarly to any other federal law with preemptive effect.

Finally, “field” preemption occurs when federal law occupies an area of regulation “so comprehensively that it has left no room for supplementary state legislation.”¹⁶⁸ Federal law that governs the registration of aliens, for example, reflects a congressional decision to preclude any state regulation, whether or not such state regulation is consistent with federal law.¹⁶⁹ Despite the fact that field preemption in this area appears to directly restrict state governments, federal law provides aliens with a right to be free of any registration obligation other than those required by federal law.¹⁷⁰ Consequently, field preemption operates similarly to conflict and express preemption—it is predicated on federal law that regulates private actors and not states.¹⁷¹

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing 49 U.S.C. App. § 1305(a)(1) (1988); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 140 (1986)).

¹⁶⁹ *Id.* (citing *Arizona v. United States*, 567 U.S. 387 (2012)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

PASPA's prohibition on state authorization of sports gambling is not, according to the Court, a preemption provision because there is no way this provision can be interpreted as a regulation of private actors.¹⁷² The provision in question neither confers federal rights on anyone who desires to conduct sports gambling operations nor does it impose any restrictions on private actors.¹⁷³ Therefore, this prohibition can only be understood as a direct command to the states in violation of the anticommandeering principle.¹⁷⁴

The issue before the Court was whether a state may be prohibited from authorizing or licensing sports gambling.¹⁷⁵ The statute also prohibits a state from operating, sponsoring, or promoting sports gambling.¹⁷⁶ The Court held that the prohibitions on these state activities were not severable from the provision at issue in the case and, accordingly, were similarly constitutionally infirm. In order for these provisions to fail "it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.'"¹⁷⁷ According to the Court, Congress would not have barred states from operating state-run sports lotteries if such states could authorize or license private casino operators to engage in sports gambling.¹⁷⁸ Casino gambling was considered a more pernicious form of gambling than state lottery schemes.¹⁷⁹ The Court rejected the argument that state operated schemes can be interpreted by the public as a tacit endorsement of the activity and, therefore, justifies the prohibition on state operated sports betting arrangements.¹⁸⁰ The Constitution has never been interpreted to permit the federal

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* The Court rejected the respondents' argument that the prohibition on licensing sports gambling should be upheld. The federal government's power to restrict a state from licensing an operation is subject to the same constraints as its power to restrict a state from authorizing an activity. *Id.* at 1481–82.

¹⁷⁵ *See supra* note 133.

¹⁷⁶ *See supra* note 39 and accompanying text.

¹⁷⁷ *Murphy*, 138 S. Ct. at 1482 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1482.

¹⁸⁰ *Id.* at 1483.

government to deny a state the right to express its views on matters of public importance, and the Court declined to do so in this case.¹⁸¹

With respect to the prohibition on state sponsorship and promotion activities, the Court believed the distinction between these activities and state authorization, licensing, and operation was too uncertain and that Congress would not have sought to bar such an ill-defined category of conduct.¹⁸² As a result, the entire operative provision that prohibited various types of state action with respect to sports gambling was struck down.¹⁸³

In addition to the prohibitions the statute imposed on the states, a second operative provision in the statute made it unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity the aforementioned activities.¹⁸⁴ This provision was not at issue in the case, but the Court proceeded to examine whether this provision was severable from the provision at issue or whether the entire statute should fail to pass constitutional muster. The Court noted that PASPA deviated from the general federal framework with respect to gambling, pursuant to which the violation of state gambling laws was a predicate to a federal offense.¹⁸⁵ In contrast, a violation of PASPA by a private actor required such actor's behavior be in accordance with state law.¹⁸⁶ This counterintuitive result makes sense if the prohibitions on state governments were operative because it serves a coherent federal policy—to prevent states from legalizing sports gambling.¹⁸⁷

If, however, the restrictions imposed directly on the states are not operative, then the prohibitions on private actors cease to serve any coherent policy purpose and undermines the policy choices of the people of a state.¹⁸⁸ In effect, a private actor would violate federal law only if such actor complies with state law. Operation of a sports gambling venture in violation of state law would be permissible under

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1483–84.

¹⁸⁸ *Id.*

PASPA—“a weird result,” in the Court’s words.¹⁸⁹ Moreover, Congress contemplated that PASPA would impose no enforcement costs on the federal government.¹⁹⁰ Since states can now broadly decriminalize sports gambling, it is likely that federal enforcement costs would ensue as a result of civil suits and contempt applications against a multiplicity of private parties.¹⁹¹

Consequently, the Court held that no provision of PASPA was severable from the operative provision at issue in the case, and, accordingly, the entire statute was unconstitutional.¹⁹² Justice Thomas’ concurrence invited the Court to revisit its jurisprudence with respect to severability.¹⁹³ Justice Thomas pointed out that this jurisprudence is a relatively recent phenomenon and that severability analysis suffers from two significant infirmities. First, it requires courts to turn their focus from a statute’s language to legislative intent.¹⁹⁴ Because Congress does not pass statutes with the notion that a portion of such statutes are unconstitutional, an inquiry into legislative intent invariably devolves into the advancement of judicial policy preferences.¹⁹⁵ Second, in many cases the parties before the courts lack standing to challenge the provisions to which severability analysis is applied thereby inviting the courts to issue advisory opinions.¹⁹⁶ Justices Ginsburg and Sotomayor dissented because they believed the statute’s various prohibitions on states, other than those

¹⁸⁹ *Id.* at 1484.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* The Court also struck down the statute’s prohibitions on both states and private actors from advertising sports gambling operations. *Id.* The Court relied heavily of First Amendment principles as set forth in several of its precedents with respect to the advertisement of legal activities. *See id.*

¹⁹³ Justice Thomas concurred in the judgment because no alternative rule was proposed. *See id.* at 1485 (Thomas, J., concurring).

¹⁹⁴ *Id.* at 1486.

¹⁹⁵ *Id.* at 1486–87.

¹⁹⁶ *Id.* at 1487. *See supra* note 100 for a brief discussion of the constitutional and prudential dimensions of standing. Standing will be maintained only if the injury alleged is concrete, particularized, and actual or imminent, is fairly traceable to the challenged action, and is redressable by a favorable ruling. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148 (2013) (citing to *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Standing jurisprudence has also been informed by prudential considerations such as separation of powers and federalism concerns and whether a sufficiently concrete adversarial position exists to ensure a sharp presentation of the issues. *See Allen v. Wright*, 468 U.S. 737, 751 (1984); *Deposit Guarantee Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

that prohibited states from authorizing and licensing sports gambling, were severable from the prohibitions in question.¹⁹⁷ Likewise, the statute's prohibitions on private actors were severable.¹⁹⁸ Justice Breyer also believed that the provisions applicable to private parties were severable from those operative on the states.¹⁹⁹

III. ANALYSIS

Two significant principles emerged from the Court's decision in *Murphy*. First, a distinction exists between federal laws that permissibly preempt state action and federal laws that impermissibly commandeer state authorities. According to the Court, the distinction between the two is premised on whether the federal law in question confers rights or imposes restrictions on private actors.²⁰⁰ If federal law confers such rights or imposes such restrictions, then state action may be preempted by federal law. Otherwise, preemption will not immunize the federal government from anticommandeering claims. Second, the Court held that the anticommandeering principle applies not only to federal laws that mandate state action but also to federal laws that prohibit state action.²⁰¹ The Court's reasoning with respect to the preemption versus anticommandeering issue is not entirely clear, and casts doubt on the federal government's ability to prohibit state action in a number of circumstances.

A. Preemption versus Commandeering

According to the Court, federal statutes that preempt state law pursuant to the Supremacy Clause, whether conflict, express, or field preemption, impose restrictions on, or confer rights to, private actors and do not operate directly upon states.²⁰² The operative provision at issue in this case, in the Court's opinion, did not regulate private conduct, but instead directly regulated states.²⁰³ The Court's reasoning is unsatisfactory in several respects.

First, a second operative provision of the statute does regulate private parties. This provision makes it unlawful for a person to sponsor, operate, advertise, or

¹⁹⁷ *Murphy*, 138 S. Ct. at 1489–90 (Ginsburg, Sotomayor, J., dissenting).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1488 (Breyer, J., concurring in part, dissenting in part).

²⁰⁰ See *supra* notes 159–72 and accompanying text.

²⁰¹ See *supra* note 156 and accompanying text.

²⁰² See *supra* notes 159–72 and accompanying text.

²⁰³ See *supra* notes 170–72 and accompanying text.

promote, pursuant to the law or compact of a governmental entity certain sports gambling activities.²⁰⁴ The Court did note the existence of this provision, but did not discuss it in the context of preemption. Instead, it discussed this provision only in the context of its severability from the operative provision at issue.²⁰⁵ PASPA does not create an independent federal offense for sports wagering and any restrictions imposed on private actors under the statute are predicated on state authorization of sports gambling. Perhaps the lack of an independent federal offense in the statute was important to the Court but, if so, such importance went unsaid. Otherwise, it is difficult to ascertain why this provision does not restrict individual conduct and why such a restriction is insufficient to trigger federal preemption.

Moreover, the Court had previously upheld preemption in the case of federal legislation that regulated airline fares and immigration documentation.²⁰⁶ In both cases, the states were told what they could not do, but the Court believed the preemptive effect of federal law in these cases was justified because the laws in question provided rights to private actors.²⁰⁷ In the airline case, federal law granted rights to airlines to be free of state and local regulation, and in the immigration case immigrants were conferred the right to register with one level of government only.²⁰⁸ I fail to see how the PASPA provision in question did not confer rights on the professional sports leagues and the National Collegiate Athletic Association with the right to conduct their affairs free of any state sanctioned activity to which they are opposed. It appears that these rights are as cognizable as the right to set airfares free of state interference or the right to register one's immigration status with a single government agency and could support the position that state legalization statutes are preempted.

As noted previously, the Third Circuit believed that commands to act affirmatively were fundamentally different from commands that merely ordered states to refrain from action.²⁰⁹ An important principle that emerged from the Court's holding is that the anticommandeering principle is applicable to federal commands

²⁰⁴ See *supra* note 40 and accompanying text.

²⁰⁵ See *supra* notes 183–90 and accompanying text.

²⁰⁶ See *supra* notes 165–70 and accompanying text.

²⁰⁷ See *id.*

²⁰⁸ See *supra* note 169 and accompanying text.

²⁰⁹ See *supra* notes 103–06 and accompanying text.

that prohibit state action in addition to commands that compel state action.²¹⁰ It is not clear from the Court's opinion whether, and to what extent, a federal statute can preempt state legalization efforts. If the federal government cannot prohibit states from legalizing certain activities, then the federal government should be wary of criminalizing activities that enjoy popular support at the state level. The Controlled Substances Act and the states' approach to marijuana businesses offer a cautionary tale on the scope of federal preemption and whether federal criminalization should co-exist with state legalization.

The Controlled Substances Act was enacted during the Nixon Administration.²¹¹ This legislation set forth five schedules of drugs, Schedules I–V, with the most severe restrictions imposed on Schedule I drugs, drugs or substances that have a high potential for abuse, have no medically accepted use, and lack safe use under medical supervision.²¹² Marijuana is listed as a Schedule I narcotic.²¹³ As

²¹⁰ See *supra* note 157 and accompanying text.

²¹¹ The Controlled Substances Act was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–889 (2018)). Prior to this legislation, federal anti-marijuana legislation did not criminalize marijuana activities but instead first subjected the product to labeling requirements and later, with the enactment of Marihuana Tax Act of 1937, subjected manufacturers, distributors, dispensers, and certain other persons in the marijuana business to occupational registration with the federal taxing authorities and to an occupational privilege tax. See generally Pure Food and Drug Act of 1906, Pub. L. No. 59-384, § 8, 34 Stat. 768, 770 (1906); Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, 552 (1937). The Marihuana Tax Act of 1937 was held to be unconstitutional because its registration requirement had the propensity to self-incriminate the registrant with respect to state law prohibitions and the Act had certain due process deficiencies. See *Leary v. United States*, 395 U.S. 6 (1969). This statute was repealed in 1970. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1292 (1970).

²¹² See generally 21 U.S.C. § 812 (2018). Controlled substance analogues, to the extent used for human consumption, are treated as controlled substances. A controlled substance analogue is a substance whose chemical structure is substantially similar to a controlled substance listed on Schedules I or II and that has certain effects on the central nervous system. See *id.* §§ 802(32)(A), 813.

²¹³ Marijuana is defined as:

all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

a controlled substance, marijuana cannot be manufactured, distributed, dispensed, or possessed with the intent to manufacture, distribute, or dispense.²¹⁴ Moreover, marijuana, unlike Schedule II-V controlled substances, cannot be prescribed by a physician.²¹⁵ The constitutionality of the statute's application to legalized marijuana was upheld by the Supreme Court in *Gonzales v. Raich*.²¹⁶

Every state maintained prohibitions on marijuana at the time of the enactment of the Controlled Substances Act.²¹⁷ Public support for the medical use of marijuana, the seeming futility and significance of the cost of the enforcement of legal prohibitions, and the belief that legal prohibitions disproportionately burdened minority groups led to change in public attitude toward marijuana.²¹⁸ In 1996, California became the first state to permit the medical use of marijuana, and, as of the end of June 2018, thirty states and the District of Columbia have enacted medical

Id. § 802(16).

²¹⁴ *See id.* § 841(a).

²¹⁵ *See id.* § 829(a)–(c). There was some doubt in Congress prior to the passage of the legislation as to whether marijuana should be classified as a Schedule I narcotic and numerous unsuccessful court challenges have been brought to remove it from such Schedule. Efforts to remove marijuana as a scheduled drug or to reclassify it began shortly after the passage of the Act. *See Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enf't Admin.*, 539 F.2d 735 (D.C. Cir. 1977); *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974). *See also* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. REV.* 74, 82 n.22 (2015) (discussing the controversy over the legislation's treatment of marijuana and court challenges to its current designation).

²¹⁶ *Gonzales v. Raich*, 545 U.S. 1 (2005). In that case, the petitioners asserted, among other claims, that the enforcement of the Controlled Substances Act against locally produced and consumed marijuana for medical uses, as permitted under California law, was beyond Congress's power to regulate interstate commerce. *Id.* at 7–8. The Court, relying heavily on the seminal case of *Wickard v. Filburn*, 317 U.S. 111 (1942), rejected the petitioners' claim. *Id.* at 17–27. The Court has also held that the Controlled Substances Act does not provide, nor is required to provide, a medical necessity exception to its prohibitions. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

²¹⁷ Chemerinsky et al., *supra* note 215, at 84 (citing to A.C.L.U. and Department of Justice statistics).

²¹⁸ *Id.* at 84–85.

marijuana laws.²¹⁹ Nine states and the District of Columbia have legalized, to varying degrees, recreational use of marijuana.²²⁰

The Controlled Substances Act did not occupy the field with respect to drug regulation. To the contrary, the statute states:

[n]o provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.²²¹

Although it is arguable that a state law imprimatur to an activity that is criminal under federal law creates a positive conflict with the objectives of federal law, courts have interpreted the preemptive effect of the Controlled Substances Act very narrowly. State law is deemed to cause a positive conflict with the Act only if compliance with state and federal law is a physical impossibility.²²² Thus, only state laws that require its citizens or its officials to violate the Controlled Substances Act would be preempted.

It is not clear by the Court's reasoning with respect to PASPA whether Congress could prohibit a state from legalizing marijuana. On the one hand, it is arguable that such a statute would preempt any state law to the contrary because the Controlled Substances Act clearly operates as a prohibition on private conduct and, therefore, such a prohibition imposed on the states would not violate the anticommandeering principle but, instead, would preempt state law pursuant to the Supremacy Clause. On the other hand, if state legalization statutes do not present an

²¹⁹ See *Legal Recreational Marijuana States and DC*, PROCON.ORG, <https://marijuana.procon.org/view.resource.php?resourceID=006868> (last visited Aug. 12, 2018). State laws vary considerably in their details concerning permissible quantities, licensed dispensaries and other supply chain considerations, user registration, and other relevant details. *See id.*

²²⁰ *See id.*

²²¹ 21 U.S.C. § 903 (2018).

²²² *See Chemerinsky et al., supra* note 215, at 105–06 (citing to *S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002); *Gonzales v. Oregon*, 546 U.S. 243, 290 (2006) (Scalia, J., dissenting); and *Solorzano v. Superior Court*, 13 Cal. Rptr. 2d 161, 169–70 (Cal. Ct. App. 1992)). The first case cited by the authors concerned legislation dealing with explosives that contained preemption language similar to that used in the Controlled Substances Act.

obstacle to federal law enforcement, then perhaps preemption is inapplicable and such a statute does nothing more than operate as a gratuitous federal command on state legislatures. Prior to its decision in this case, the anticommandeering principle would have been inapplicable because a prohibition on state action did not implicate the principle. A similar argument could be made that state legalization of sports gambling would present no obstacle to federal enforcement of a separate federal prohibition on sports gambling, if such a federal prohibition were to be enacted.

As discussed above in the Court's opinion, PASPA's operative provision operated directly upon the states, in contrast to federal laws that operate on private parties.²²³ This distinction was germane to determine whether state action was impermissibly impeded or permissibly preempted. The Court did not articulate a clear test for determining whether federal law operates to confer rights or impose duties on private actors. As noted above, the assertion that PASPA conferred rights upon the professional sports leagues and the National Collegiate Athletic Association similar to the rights conferred on private parties by other federal legislation that the Court upheld is plausible.²²⁴ The fact that PASPA did not create an independent federal offense may very well distinguish PASPA from those other laws. If so, the Court should have stated as much because if, in fact, this feature of PASPA was important, then any federal legislation that requires states to adhere to certain standards but does not contain a separately enforceable federal standard is subject to challenge. After all, how can federal law preempt state law when there is no federal standard displaced by state law?²²⁵

For example, one month after the Court issued its decision in *Murphy*, the Court issued its opinion in *South Dakota v. Wayfair, Inc.*²²⁶ The Court, overruling longstanding precedent, held that South Dakota was not prohibited under the Commerce Clause from enacting legislation that required remote sellers to collect and remit sales tax on goods and services sold to buyers for delivery in the state,

²²³ See *supra* notes 172–74 and accompanying text.

²²⁴ See *supra* note 206 and accompanying text.

²²⁵ Similar anticommandeering issues are raised by federal legislation that requires states to adopt, or recognize, legal standards enacted by other states. See Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029 (2018).

²²⁶ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

even though the seller did not have a physical presence in the state.²²⁷ Prior to this decision, Congress had to authorize states to impose and collect sales taxes from remote sellers who lacked the adequate physical presence in a state.²²⁸ Despite the fact that states no longer need Congressional approval to impose such sales taxes, some businesses would prefer Congress establish uniform standards by which the states could impose such sales taxes.²²⁹ In the absence of a national sales tax, it is unclear whether Congress can impose such standards without violating the anticommandeering principle.

For example, under a bill introduced several years ago, the Remote Transactions Parity Act of 2015, states could not impose and collect sales taxes from remote sellers unless the state was a member state under the Streamlined Sales and Use Tax Agreement or, alternatively, adopted certain minimum simplification requirements.²³⁰ Now that the Supreme Court has removed the constitutional barrier that had prohibited states from imposing sales tax obligations on remote sellers, it is quite possible that federal legislation similar to the Remote Transactions Parity Act of 2015 violates the anticommandeering principle. In the absence of a national sales tax, such legislation would, like PASPA, operate directly against the states and not against private actors.

The state versus private actor distinction drawn by the Court confuses the preemption issue because the fact that federal law operates on private actors should not be sufficient to trigger preemption and preclude a finding that federal law impermissibly commandeers the states. State law is preempted if such law presents

²²⁷ The Court overruled the physical presence rule set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967). *See id.* at 2092–99.

²²⁸ Several bills have been introduced in Congress. *See, e.g.*, Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015).

²²⁹ *See, e.g.*, Jay Steinmetz, *Interstate Sales-Tax Compliance is Killing My Business*, WALL ST. J., Aug. 9, 2018, at A15.

²³⁰ Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. § 2 (2015). The Streamlined Sales and Use Tax Agreement is an agreement among member states the purpose of which is to reduce the burdens on business of sales tax compliance by, among other measures, requiring state level administration of such taxes, uniformity of state and local rates, and simplified rates, exemptions, and tax returns. *About Us*, SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/index.php?page=About-Us> (last visited Oct. 20, 2018). The agreement was adopted in 2002 and has been amended numerous times. Twenty-four states are in full or substantial compliance with the agreement. *See State Info*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/index.php?page=state-info> (last visited Oct. 20, 2018).

an obstacle to enforcement of federal law, is expressly preempted, or deals with a field of law occupied exclusively by the federal government.²³¹ Assume the federal government does, in fact, enact a national sales tax that imposes tax collection obligations on remote sellers and that this legislation prohibits states from imposing their own sales tax obligations on such sellers. Such legislation clearly imposes an obligation on private parties and, correspondingly, provides them with the right to collect and remit certain sales taxes to one, and only one, taxing jurisdiction. It is not clear whether such a law should have preemptive effect on state legislation to the contrary. State sales taxes on such sales present no obstacle to enforcement of the federal law. Such a law would infringe on a right that is inherent in a sovereign—the power to tax—and whether the federal government can expressly preempt state law, or exclusively occupy such a field of law, is doubtful. For example, federal tax laws impose obligations on private parties. It would be remarkable, however, if the federal government could pass legislation that preempted all state income taxes.

If, in fact, the federal government cannot prevent states from legalizing an activity, then the federal government should proceed cautiously in prohibiting behavior that is sanctioned at the state level. Putatively, the ability of states to decide for themselves whether to legalize an activity prohibited under federal law is an exercise in federalism. However, there are a number of collateral consequences to engaging in a business that is legal under state law but whose subject matter nonetheless violates a federal statute. The most significant of these consequences are the difficulty in securing banking services and the inability to enforce contracts.²³²

²³¹ See *supra* notes 161–71 and accompanying text.

²³² State sanctioned marijuana businesses also bear a tax burden that is not imposed on other businesses and would not be imposed on gambling enterprises. In 1982 Congress added § 280E to the Tax Equity and Fiscal Responsibility Act. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97–248, § 351, 96 Stat. 324, 640 (1982). This provision disallows a deduction or credit for any expense paid or incurred in carrying on a trade or business that consists of trafficking in a Schedule I or II substance under the Controlled Substances Act, which is prohibited under federal or any State law in which the business is conducted. *Id.* The legislative history is clear that, due to constitutional concerns, I.R.C. § 280E does not apply to expenditures that are deductions from gross receipts—*i.e.*, cost of goods sold. S. REP. NO. 97–494, at 309 (1982). Therefore, under the statute, a state sanctioned marijuana seller can deduct the cost of the product sold from its gross receipts, but other legal expenses such as rent, payroll, utilities, and the like, are not deductible. It may be possible for marijuana businesses to segregate their operations so that only a portion of the business falls within the confines of I.R.C. § 280E—the actual trafficking operation—while other operations escape its reaches. This could alleviate the effects of I.R.C. § 280E for some operations. The Tax Court sanctioned the segregation of costs among different trades or businesses. See *Cals. Helping to Alleviate Med. Problems, Inc. v. Comm’r of Internal Rev.*, 128 T.C. 173 (2007). The Ninth Circuit more recently held against the taxpayer on a similar issue but, in that case, the non-trafficking activities of the taxpayer were minimal and provided free of charge. The court, however, did

These collateral consequences diminish, to a significant extent, the benefits of federalism. The experiences of state sanctioned marijuana businesses are instructive in this respect.

The Money Laundering Control Act prohibits financial institutions from knowingly engaging or attempting to engage in monetary transactions in criminally derived property of a value greater than \$10,000.²³³ The Bank Secrecy Act requires financial institutions to maintain programs designed to verify the identity of its prospective customers and, for higher risk accounts, requires verification of the purpose of the accounts, the source of funds in the accounts, and the customers' line of business.²³⁴ Various reporting obligations are imposed on financial institutions with respect to suspicious activities, including those activities that involve funds derived from illegal sources.²³⁵ Despite the fact that the Departments of Justice and Treasury have signaled a permissive attitude toward financial institutions doing business with state sanctioned marijuana businesses, the Financial Crimes Enforcement Network reported that less than 300 financial institutions do business with state sanctioned marijuana businesses.²³⁶

not dispute the notion that a marijuana dispensary could engage in more than one trade or business for purposes of I.R.C. § 280E. *See Olive v. Comm'r of Internal Rev.*, 792 F.3d 1146, 1149–50 (9th Cir. 2015).

²³³ 18 U.S.C. § 1957(a) (2018).

²³⁴ *See* 31 U.S.C. §§ 5318(h), (l) (2018); 31 C.F.R. § 1020.220 (2014).

²³⁵ *See* 31 C.F.R. § 1020.320 (2014). Financial institutions regulated by state authorities are not immune from the reach of federal law. Virtually all state chartered financial institutions are federally insured by either the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. After the savings and loan crisis of the 1980s all states require their state-chartered banks to obtain federal deposit insurance. Maintenance of federal deposit insurance requires insured institutions to comply with federal money laundering statutes and other federal laws and subject institutions to risk management protocols. *See* George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 676–77 (1994). A few states do not require that state-chartered credit unions obtain federal deposit insurance. *See* Julie Andersen Hill, *Marijuana, Federal Power, and the States: Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 617–18 (2015). Similarly, a state-chartered institution that is a member of the Federal Reserve System must comply with federal banking laws. *See id.* at 625–26. Financial institutions that are not members of the Federal Reserve System that seek access to the federal payment systems operated by the Federal Reserve must adhere to the terms and conditions imposed by the Federal Reserve. *Id.* at 627–30.

²³⁶ *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys (Feb. 14, 2014) (on file with the Washington State Department of Financial Institutions); Bruce Barcott, *Shh! Here's How Cannabis Companies are Banking Legally on the Down Low*, LEAFLY (Dec. 30, 2015), <https://www.leafly.com/news/politics/shh-heres-how-cannabis-companies-are-banking-legally-on-the-down>.

The inability to bank is not the only issue confronting state sanctioned marijuana businesses. A century and a half ago, the Court, in *Coppell v. Hall*,²³⁷ issued a forceful statement regarding the unenforceability of illegal bargains in a case that involved the sale of certain goods from a seller located in Confederate territory that violated a legislatively authorized Presidential proclamation and a Treasury regulation implementing that proclamation.

The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim *ex dolo malo non oritur actio* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.²³⁸

Although the *Restatement (Second) of Contracts* frames the issue of enforceability on broader public policy grounds, and not the narrower grounds of illegality, it does state that an agreement made unenforceable by legislation cannot be enforced.²³⁹ Courts have refused to enforce bargains that violate the law, as was the case in the famous *Baby M* case, but the reverse is not true.²⁴⁰ It is unlawful to aid and abet the commission of a federal crime.²⁴¹ State sanctioned marijuana

²³⁷ *Coppell v. Hall*, 74 U.S. 542, 555–56 (1868).

²³⁸ *Id.* at 558.

²³⁹ RESTATEMENT (SECOND) OF CONTRACTS §§ 178(1), 178 cmt. a (AM. LAW INST. 1981).

²⁴⁰ The *Baby M* case involved a surrogate mothering contract. *See In re Baby M*, 537 A.2d 1227 (N.J. 1988). At the time, New Jersey had no law dealing with such contracts. *Id.* at 1235. The New Jersey Supreme Court held that the contract was not enforceable because it violated the public policy of the state. *Id.* at 1234. The court found evidence of the state's public policy in other statutes, such as the state's adoption and baby selling statutes. *Id.* at 1247.

²⁴¹ *See* 18 U.S.C. § 2 (2018).

enterprises, as a result, have had difficulty enforcing agreements. For example, a contract for the sale of medical marijuana products, legal under Colorado law, was nonetheless held unenforceable due to the Controlled Substances Act, and an Arizona court denied relief, on similar grounds, to two lenders who each sought repayment of a \$250,000 loan they had extended to a Nevada corporation for the purpose of financing a retail medical marijuana sales and growth center located in Colorado.²⁴²

The inability to enforce contracts is particularly problematic with respect to the willingness of counterparties to enter into long-term agreements, such as leases or supply contracts. Moreover, doubts regarding contract enforcement may impede businesses in attracting talented employees. The Colorado Supreme Court held that an employee was not wrongfully terminated for his state-legalized use of medical marijuana.²⁴³ The court refused to interpret a state statute that protected employees from being terminated for lawful activities as referring only to lawful activities under state law.²⁴⁴ Moreover, businesses that operate within the confines of state law, but violate federal law, may have difficulty providing a standard menu of employee fringe benefits, such as I.R.C. Section 401(k) plans and medical insurance, if the providers of such benefits refuse to do business with such firms.²⁴⁵ Lack of otherwise

²⁴² *Haerberle v. Lowden*, 2012 WL 7149098, at *5 (D. Colo. 2012); *Hammer v. Today's Health Care II*, 2012 WL 12874349, at *2 (Ariz. Ct. App. 2012). A federal district court recently refused to grant summary judgement to an insurance company that refused to honor a claim for marijuana crop damage. *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 829–30 (D.D.C. 2016). The insurer argued that the policy excluded coverage for contraband and that the policy should not be enforced on public policy grounds. *Id.* at 832. The court ruled that the policy's definition of contraband was ambiguous and that the federal government's inconsistent enforcement policy with respect to marijuana precluded it from voiding the policy on public policy grounds. *Id.* at 829–30. A federal district court in Hawaii came to the opposite conclusion in an earlier case concerning property insurance coverage. *See Tracy v. USAA Casualty Ins. Co.*, 2012 U.S. Dist. LEXIS 35913, at *39 (D. Haw. Mar. 16, 2012).

²⁴³ *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015).

²⁴⁴ *Id.* at 852–53. According to data from one of largest workplace testing laboratories, the percentage of workers testing positive for marijuana has increased in recent years and the rate of increase was significantly higher in states that have legalized marijuana. *See Lauren Weber, Tests Show More American Workers Using Drugs*, WALL ST. J., May 17, 2017, at B1.

²⁴⁵ Difficulty in obtaining providers for employee benefits can present significant problems for the employer. If the employer has affiliated businesses in more traditional lines of business, then the existence of employees in marijuana businesses may impact its employee benefit plans in those traditional businesses. For example, qualified pension and profit-sharing plans, including I.R.C. § 401(k) plans, have strict coverage requirements and those requirements are imposed on all related businesses, as statutorily defined. *See generally* 26 U.S.C. § 414(c) (2018) (requiring that all employers under common control be treated as a single employer). In addition, the Patient Protection and Affordable Care Act requires

available job protections and employee benefits affect rank and file employees, but lack of contractual protections will have a chilling effect on the ability to attract managerial talent. Deferred compensation arrangements, whether payable in cash or equity, will not likely be an acceptable part of a compensation package if their enforcement is doubtful.²⁴⁶ Moreover, a firm should be reticent in granting equity to an employee if any concomitant shareholder, partnership, or LLC operating agreements regarding such equity are not enforceable.²⁴⁷

Potential solutions to the problem of contract enforceability are unsatisfactory. For example, states could pass legislation that directs their courts to base public policy decisions solely on state law. In 2013, Colorado passed legislation that states, as a matter of public policy, that a marijuana contract, legal under state law, is not void or unenforceable.²⁴⁸ However, it is not clear whether state courts will abide by such statutes and willfully ignore federal law. As noted by the Court in *Coppel*, waivers of illegality defenses are not enforceable, and, therefore, insertion of protective language in agreements provides assurances that are probably more illusory than real.²⁴⁹ Forum selection clauses will be effective only if the parties are assured that the courts in the selected forum will enforce the agreement. Although it is more likely that a state court will look only to a state's asserted public policy with respect to an issue than would a federal court, waivers of the right to federal diversity jurisdiction have limited utility until state courts show they will enforce contracts that are legal under state law but violate federal law.

employers that employ 50 or more full-time or full-time equivalent employees to provide affordable health insurance coverage to its employees or incur a penalty. *See generally* 26 U.S.C. § 4980H (2018).

²⁴⁶ Deferred compensation arrangements are used, among other reasons, by employers as a tool for employee retention. For employees, deferred compensation represents nothing more than a contractual claim against the employer. If the employer sets aside assets to satisfy its deferred compensation obligation, then such deferred compensation is taxable under the doctrine of constructive receipt. *See* Rev. Proc. 92-65, § 3(d), 1992-2 C.B. 428. This rule also applies if assets are set aside due to a change in the employer's financial condition whether or not such assets are subject to claims of creditors. *See* 26 U.S.C. § 409A(b)(2) (2018).

²⁴⁷ In closely-held businesses, these agreements contain provisions that specify permissible transfers of equity by the equity holders, buy-sell provisions, and other terms governing the rights and obligations of the owners to the company and to each other.

²⁴⁸ Colo. Rev. Stat. § 13-22-601 (2018). Oregon enacted a similar statute. *See* Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 12, 2015 OR. LAWS 1 (stating that "[n]o contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law").

²⁴⁹ *See supra* note 238 and accompanying text.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court held that arbitration provisions are enforceable despite the claim that the contract in which such provisions are contained is illegal.²⁵⁰ According to the Court, only challenges to the validity of the arbitration provisions themselves are appropriate grounds to bypass arbitration for court resolution of a dispute.²⁵¹ Thus, mandatory arbitration provisions in a marijuana-related contract will be respected despite the underlying illegality of the contract itself. However, mandatory arbitration provisions, although they may provide some comfort that an agreement will be upheld by the arbitrator, do not assure that a court will not overrule the arbitrator on public policy grounds, particularly a public policy that is expressed so clearly by federal law.²⁵² As the Supreme Court has stated, “in any event, the question of public policy is ultimately one for resolution by the courts Such a public policy, however, must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”²⁵³

In addition to the difficulties state legalized businesses have in accessing the banking system and obtaining assurance that their contracts are legally enforceable, these businesses face other issues including the unavailability of bankruptcy protections, difficulty in obtaining adequate legal services, and meager intellectual property law protections.²⁵⁴

²⁵⁰ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006).

²⁵¹ *Id.* at 444–49.

²⁵² See generally Judith Stilz Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?*, 20 HOFSTRA LAB. & EMP. L.J. 87 (2002); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. DISP. RESOL. 91 (2000).

²⁵³ *W.R. Grace & Co. v. Local Union*, 759, 461 U.S. 757, 766–67 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)) (citing to *Int’l Bhd. of Teamsters v. Wash. Emp’rs, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977)); *Int’l Union of Elec. v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963); Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 287 (1980).

²⁵⁴ In April 2017, Clifford White, the Director of the Executive Office for United States Trustee, issued a directive to all Chapter 7 and Chapter 13 Trustees to inform them that marijuana assets cannot be administered under the bankruptcy code. Directive from Clifford J. White III, Dir., Exec. Office for U.S. Tr., to Chapter 7 and Chapter 13 Trs. (Apr. 26, 2017). Bankruptcy court judges may dismiss a case under Chapters 7, 11, and 13 for cause. See 11 U.S.C. §§ 707(c), 1112(b), 1307(c) (2018). Moreover, any plan of reorganization under Chapter 11 must be proposed in good faith and not forbidden by law. Similar provisions apply to plans proposed by debtors under Chapter 13. See *id.* §§ 1129(a)(3), 1325(a)(3). Courts have come to the same conclusion. See Steven Mare, Note, *She Who Comes Into Court Must Not Come with Green Hands: The Marijuana Industry’s Ongoing Struggle with the Illegality and Unclean Hands Doctrine*, 44 HOFSTRA L. REV. 1351, 1363–65 (2016) (discussing several recent cases that have been dismissed by the courts). Under the American Bar Association’s Model Rules of Professional Conduct,

Disparities between state and federal policy choices are not unusual or particularly problematic.²⁵⁵ However, the federal government must be prepared to enforce its policy choices in the face of state resistance. Otherwise, open disrespect for federal law is invited and such disrespect can erode cultural norms that have a significant influence on the level of voluntary compliance with the law.²⁵⁶ The current legal state of affairs with respect to marijuana serves to diminish respect for federal law in general and should give pause to those who believe that federal law

adopted by all 50 states and the District of Columbia, attorneys may not knowingly facilitate the criminal conduct of a client. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983). *See also* Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217 (2016) (setting forth the difficulties that marijuana businesses have in obtaining and enforcing trademark and patent claims).

²⁵⁵ Throughout the nation's history, state responses to federal laws with which they disagree often have been confrontational. State attempts to nullify federal law can be traced as far back as the late eighteenth century and over the course of our history have implicated, *inter alia*, the Alien and Sedition Acts of 1798, taxation of the bank of the United States, embargoes during the war of 1812, tariffs during the early part of the nineteenth century, and the Fugitive Slave Act. *See* Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1289–304 (2015) (describing, in some detail, numerous instances of state nullification). In modern times, states have attempted to thwart school desegregation and federal gun control legislation. *Id.* at 1304–07, 1311. The federal government vigorously defended its prerogatives, either in court or with threats of force. *Id.* at 1289–07, 1311 (describing various court cases, legislation to authorize force, and executive branch threats of force).

²⁵⁶ The existence of effective deterrents to non-compliance, and the reputational harm attendant to such non-compliance, are critical components of an effective legal scheme that is predicated, in large part, on voluntary compliance. With respect to federal income taxes, one scholar believes that high tax penalties increase compliance through deterrence, separation, and signaling. Separation refers to the propensity for high penalties to prompt taxpayers to self-identify as compliant thereby permitting the government the ability to observe non-compliant groups. Signaling refers to the reputational enhancing benefits to taxpayers in signaling their compliance. *See* Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 681–83 (2012). By nudging cultural norms toward compliance deterrence can, over time, heighten the reputational harm of non-compliance. *Id.* at 685–86. Conversely, significant reputational damage is a further deterrent to non-compliance because it increases the cost of such non-compliance if it is discovered. *Id.* The size of the sanctions for non-compliance and the probability of detection are key variables with respect to the efficacy of the deterrents. These two variables have mutually dependent properties because the probability of detection should influence the size of the sanctions. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193 (1968). In the tort realm, support for punitive damages is based, in part, on analogous reasoning. *See, e.g.,* W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 315 (2001) (noting that this rationale can be traced to the writings of Jeremy Bentham); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 194, 203 (3d ed. 1986). For example, if there is 100% certainty of detection, then a penalty that slightly exceeds the benefits gained from noncompliance should be sufficient to deter non-compliance. Alternatively, sanction must be set higher if the detection rate is 10% in order to overcome the low probability of detection. Criminal sanctions, particularly the possibility of imprisonment, serve this function. *See id.*

can co-exist comfortably with state laws that legalize the very behavior federal law prohibits. With respect to marijuana, the federal government, instead of defending federal law, has chosen to openly disregard its own law.²⁵⁷ Non-enforcement of laws may be desirable under certain circumstances. For example, resource constraints, unintended consequences as a result of poor legislative language, or societal shifts that command public support for non-enforcement may very well justify prosecutorial discretion. There is a cost of non-enforcement, however. Such actions cannot help but erode citizens' respect for federal law. Consequently, the absence of federal law is preferable to the existence of federal law that is ignored or openly flouted.

B. *Sports Wagering After Murphy*

From a policy standpoint, in my opinion, PASPA was a mistake. If the federal government believed sports gambling is a vice that had to be, for all practical purposes, cabined off in Nevada, then federal law should have criminalized sports gambling instead of ordering the states to refrain from sanctioning sports wagering.

²⁵⁷ In the aftermath of the 2008 election, the Department of Justice gave notice to U.S. Attorneys that federal resources should not be expended in pursuit of persons whose actions comply with state medical marijuana laws. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys (Oct. 19, 2009) (on file with the United States Department of Justice). Shortly thereafter, in the midst of the campaign in California to legalize recreational use of marijuana, Attorney General Eric Holder indicated that federal tolerance of medical uses of marijuana would not extend to recreational use of the substance. See John Hoeffel, *Holder Vows Fight Over Prop 19*, L.A. TIMES (Oct. 16, 2010), <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>. Three years later, the Department of Justice updated its guidance to U.S. Attorneys by serving notice that enforcement of federal marijuana prohibitions was not a priority in states whose marijuana regulations did not hinder certain federal priorities, such as the prevention of criminal elements from entering the business, prevention of diversion of the product to other states, and prevention of legal marijuana businesses from serving as a front for illegal narcotics activities. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all United States Attorneys (Aug. 29, 2013) (on file with the United States Department of Justice). There are constitutional restraints to executive branch non-enforcement of the law. However, significant judicial deference is afforded to prosecutorial enforcement choices. See generally Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 301–10 (2015) (discussing case law and practical enforcement realities). The Consolidated Appropriations Act of 2017 prevents any funds appropriated for the Department of Justice for the current fiscal year to be used to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Pub. L. No. 115-31, Div. B, § 537 (2017). The defunding of the Department of Justice with respect to medical marijuana enforcement has been in force since the fiscal year 2015 and has prevented federal actions taken against individuals and state legalized dispensaries. See Consolidated Appropriations Act of 2016, Pub. L. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

Traditionally, states have been left to themselves to decide whether or not to allow wagering activities.²⁵⁸

It is certainly possible that sports wagering activity will increase dramatically once a critical mass of states get on board.²⁵⁹ Despite the fact that an enormous amount of illegal sports gambling occurs, the legalization of sports gambling will have significant effects on the gaming market.²⁶⁰ First, the professional sports leagues will seek, and are already seeking, a stake in the market.²⁶¹ This will have the effect of increasing the promotion, accessibility, and variety of wagers possible. Second, professional sports have already adopted and deployed data analytics,²⁶² and there is no reason to believe the creativity and ingenuity of sports executives will not be deployed to exploit the plethora of data now available for legalized gambling opportunities. Moreover, the gaming industry and the networks will use their creativity to generate interest in gaming through mobile platforms and in-game

²⁵⁸ See *supra* notes 13–33 and accompanying text.

²⁵⁹ As of August 1, 2018, Nevada, Delaware, New Jersey, and Mississippi had legalized sports betting and four other states, Pennsylvania, New York, Rhode Island, and West Virginia, passed legislation to authorize sports betting. See *State-by-State Sports Betting Bill Tracker*, ESPN (Sept. 19, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states. Bills have been introduced in a number of states. *Id.*

²⁶⁰ The American Gaming Association estimates that Americans wager approximately \$150 billion per year on illegal sports wagers, 30 times the amount wagered legally. The effect of legalization on the illegal market is difficult to predict because the illegal market has its advantages particularly in states that impose significant taxes on sports wagers. See Brian Costa & Zolan Kanno-Youngs, *Bookies Remain in the Action*, WALL ST. J., June 27, 2018, at A14. See also ILLEGAL GAMBLING ADVISORY BD., AM GAMING ASS'N, LAW ENFORCEMENT SUMMIT ON ILLEGAL SPORTS BETTING: AFTER ACTION REPORT (2015) [hereinafter Law Enforcement Summit].

²⁶¹ The National Basketball Association has named MGM Resorts International as its official gambling partner. See Kevin Draper, *N.B.A. Has Gambling Partner, in a First for the U.S.*, N.Y. TIMES, Aug. 1, 2018, at B10. See also Chris Kirkham & Austen Hufford, *Gambling Firms Chase the Sports Bet*, WALL ST. J., May 17, 2018, at B2; Chris Kirkham & Rachel Bachman, *Leagues, States Make Sports-Betting Play*, WALL ST. J., May 16, 2018, at A3; Andrew Beaton, *NFL Sees a Gambling Windfall*, WALL ST. J., May 16, 2018, at A14; Andrew Beaton, *Leagues Gear Up for a Betting Future*, WALL ST. J., May 15, 2018, at A12.

²⁶² See, e.g., Tim Casey, *Analytics Begins to Creep into the Women's Game*, N.Y. TIMES, Mar. 20, 2018, at B13; Marc Tracy, *Data Tracking Extends to Sleep*, N.Y. TIMES, Sept. 24, 2017, at SP7. The use of data analytics in sports is not new. The Oakland Athletics' extensive use of data was brought to light in a popular book published a decade and a half ago. See MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (W.W. Norton & Co. 2003). The book became the basis for a motion picture, *Moneyball*, starring Brad Pitt that was released in 2011.

betting.²⁶³ Presently, the networks do provide some content regarding fantasy sports and legal betting, but it is modest.²⁶⁴ There is no reason to believe that gaming-related content will not increase dramatically as the leagues, the gaming industry, and the media work to each other's mutual benefit. The growth of the fantasy sports industry may very well portend what is in store for sports wagering.²⁶⁵

²⁶³ See Chris Kirkham, *Online Sports Betting Reckons for U.S. States*, WALL ST. J., July 14, 2018, at B3. It is not clear whether the Wire Act poses an impediment to online wagering if wagers are routed to servers in states that do not authorize sports betting. The Department of Justice had the opportunity to clarify the application of the Wire Act with respect to internet transmissions but failed to do so. See *supra* note 13 and accompanying text.

²⁶⁴ See, e.g., *Fox Sports 1's 'Lock It In' leads rise of gambling TV shows*, FOX SPORTS (Sept. 12, 2018), <https://www.foxsports.com/other/story/fox-sports-1-s-lock-it-in-leads-rise-of-gambling-tv-shows-091218>; Grant Lucas, *ESPN Launches First Gambling-Focused Show—And It's Only The Beginning*, THE LINES (May 31, 2018), <https://www.thelines.com/espn-gambling-show/>.

²⁶⁵ Whether fantasy sports were subject to PASPA was not clear although the statutory language could very well be interpreted to apply to such contests. See *supra* notes 42–43 and accompanying text. The Court's holding in *Murphy* has mooted this issue. Whether fantasy sports contests constitute gambling under state law often is unclear. A few states have addressed the legal status of fantasy sports contests. Montana does not prohibit participation in fantasy sports leagues but prohibits any wager by telephone or over the internet. MONT. CODE ANN. § 23-5-802 (2010). Nevada requires a gaming license to operate a sports pool in order to conduct daily, but not season-long, fantasy sports operations in the state. Notice 2015-99 (Nev. Gaming Control Bd., Oct. 15, 2015). See also Howard Stutz, *Nevada Gaming Regulators Ban Daily Fantasy Sports From the State*, LAS VEGAS REV. J. (Oct. 15, 2015), <http://www.reviewjournal.com/business/casinos-gaming/nevada-gaming-regulators-ban-daily-fantasy-sports-from-the-state>. New Jersey gaming regulations recently authorized licensed casinos to offer fantasy sports tournaments that meet certain requirements to their patrons and Massachusetts has issued regulations regulating fantasy sports contests. N.J. Div. of Gaming Enforcement Reg. § 13:69P-1.1 (2013); 940 C.M.R. §§ 34.00–34.18 (2016). New York had taken the position that daily fantasy sports contests violate its gambling laws but that traditional season-long fantasy sports contests do not, a position that has since changed due to legislation. The New York Supreme Court stayed a preliminary injunction against the companies and the stay was extended by the appellate division until May 2016. See *New York v. FanDuel, Inc.*, No. M-6204 (N.Y. App. Div., Jan. 11, 2016); *New York v. DraftKings, Inc.*, No. M-6206 (N.Y. App. Div., Jan. 11, 2016). Illinois and Texas have taken similar positions, but the Attorney General of Texas has opined that season-long fantasy leagues also may violate state law. See *Sports and Gaming: Daily Fantasy Sports Contests as Gambling*, 15-006, Op. Ill. Att'y Gen. 13 (2015); *The Legality of Fantasy Sports Leagues under Texas Law*, KP-0057 Op. Tex. Att'y Gen. 7 (2016) (arguing that season-long fantasy leagues also violate state law if fees are retained by the league sponsor and not entirely paid out to participants). See Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (Sept. 21, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states. See also *Attorney General Opinions On Daily Fantasy Sports*, LEGAL SPORTS REP. (May 1, 2018), <https://www.legalsportsreport.com/state-legality-of-dfs/>.

Fantasy sports activities began with the creation of fantasy golf in the 1950s.²⁶⁶ The creator of fantasy golf then created the first fantasy football league in 1963.²⁶⁷ Strat-O-Matic baseball, a board game that shared attributes of fantasy sports because the performance of the players was influenced by real world statistics, was developed in 1961.²⁶⁸ Daniel Okrent, a University of Michigan student, later created Rotisserie Baseball, a game that was enormously popular and that continues as a popular format for fantasy baseball.²⁶⁹

The catalysts for the growth of fantasy sports contests were a combination of technological developments and industry ingenuity. The internet contributed to the rapid growth of fantasy sports participation, and fantasy sports web sites proliferated, with some assistance by the courts.²⁷⁰ Consumer interest in fantasy sports games was boosted by the ability of fantasy sports web sites to provide up-to-the minute statistics, and this interest was further heightened by the penetration of high speed broadband into the home, the ubiquity of the smart phone, and the popularity of social media.²⁷¹

The industry itself provided the second catalyst for growth with the development of daily fantasy sports games which provide participants with a more

²⁶⁶ See Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 U.N.L.V. GAMING L.J. 201, 204 (2014).

²⁶⁷ Anthony Vecchione, Comment, *Fantasy Sports—Has Recent Anti-Gambling Legislation ‘Dropped the Ball’ by Providing a Statutory Carve-out for the Fantasy Sports Industry?*, 61 SMU L. REV. 1689, 1692–93 (2008).

²⁶⁸ Trippiedi, *supra* note 266, at 204.

²⁶⁹ *Id.* at 204–05.

²⁷⁰ The courts made clear that the use of statistical information by fantasy sports operators was protected by the First Amendment and that such use did not amount to trademark infringement or appropriation by such operators. See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997). Case law on athletes’ rights of publicity had been decidedly mixed with some early cases favoring the athlete and others decided against the athlete. Similar issues have been litigated in the context of sports video games. A discussion of the tension between the First Amendment and the right of publicity is beyond the scope of this work. For an overview and critique of the current state of the law in this respect see Timothy J. Bucher, *Game On. Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1 (2012); Risa J. Weaver, Note, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 9 DUKE L. & TECH. REV. 1, 2 (2010).

²⁷¹ Adam Krejcik, *Keynote: Bold Predictions on the Daily Fantasy Sports Market* 8–9, 17, EILERS RESEARCH (Jan. 16, 2014), http://www.ifrahlaw.com/wp-content/uploads/2015/01/Eilers_Fantasy-Bold-Predictions-2015-FSTA-2.pdf.

immediate experience than the traditional season-long variety of contests sites.²⁷² The number of fantasy sports participants increased, by one estimate, to almost 41 million in 2014 from 500,000 in 1988, and daily fantasy sports participants paid approximately \$1 billion in entry fees in 2014.²⁷³ In addition, the growth of fantasy sports has spawned support businesses that include purveyors of fantasy sports advice, providers of insurance, and dispute resolution services.²⁷⁴ Professional sports organizations have embraced fantasy activities. Major League Baseball and the National Basketball Association are equity investors in DraftKings and FanDuel, respectively, the National Hockey League offers sponsored contests in partnership with DraftKings, and most National Football League teams have advertising or sponsorship arrangements with FanDuel or DraftKings.²⁷⁵

²⁷² Although all fantasy sports contests award points to contestants based on statistics generated in real-world sporting events by the athletes selected by the contestants, there are significant differences between season long and daily fantasy contests. Selection of athletes in traditional season-long fantasy sports leagues is made through a draft by which a pool of athletes are selected by the participants based on a particular participant's position in the draft. KEVIN BONNET, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* 17, 23–24 (2014). The ability to draft for team depth and negotiate effective player trades is an important determinant of success in season-long fantasy leagues because of the possibility of both player injuries and consistent underperformance by selected athletes. Season-long fantasy leagues require significant support from the website service provider and, accordingly, have small payouts as a percentage of the entry fees paid by participants, often less than 50%. *Id.* at 26. In contrast to participants in season-long fantasy sports leagues, daily fantasy sports participants build a roster of players through a salary cap draft pursuant to which a participant is given a fixed amount of dollars with which to select from a menu of players, each of whom carries a predetermined price which may vary among league operators. *Id.* at 49–51. Athlete selection is non-exclusive and the same athlete can appear on any number of individual daily fantasy teams. *Id.* at 24. Whether a high-performing athlete was a good selection for a participant depends on that athlete's relative cost and the effect that this cost had on the participant's budget for other player selections. Daily fantasy sports participants can compete in a variety of contests, including head-to-head matchups in which two participants compete directly against each other in a winner-take-all contest and multi-player contests. *Id.* at 58–71. Because participants have to select and manage a team for one day, daily fantasy sports activities are much more susceptible to multiple and regular participant entries. In comparison to season-long fantasy leagues, website support service costs for daily fantasy sports leagues are spread over a much greater number of contests thereby resulting in greater payouts as a percentage of entry fees paid. *Id.* at 26–27.

²⁷³ Krejciak, *supra* note 271, at 8, 10. A more recent estimate puts the number of fantasy sports participants in 2017 at slightly over 59 million. See *Industry Demographics*, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> (last visited Aug. 7, 2018).

²⁷⁴ See Christopher Miner, Comment, *Fantasy Sports and the Right of Publicity Are Under Further Review*, 30 *TOURO L. REV.* 789, 791–92 (2014).

²⁷⁵ *The NFL And Its Complicated Relationship With DFS: League Says It's Not Gambling, But Treats It Like It Is*, *LEGAL SPORTS REP.* (June 29, 2015), <http://www.legalsportsreport.com/1997/nfl-relationship-to-daily-fantasy-sports/>; Marc Edelman, *7 Legal Risks Of The NBA Investing In FanDuel*, *FORBES* (Nov. 13, 2014), <http://www.forbes.com/sites/marcedelman/2014/11/13/7-legal-risks-of-the-nba->

CONCLUSION

Fantasy sports participation increased dramatically as a result of technological developments and effective marketing by industry leaders. Mobile betting applications, in-game wagering, the creative use of advanced metrics to promote wagering, and effective marketing may very well usher in transformative changes in the sports betting market. Public attitudes towards sports betting have changed considerably since PASPA was enacted and, in this respect, there is a similarity between sports gambling and marijuana.²⁷⁶ The Court, by striking down PASPA, has allowed for states to experiment and determine for themselves whether to permit sports betting and, if permitted, to establish their own regulatory framework for such activities. Therefore, the sports gambling industry can evolve without the impediments to which the marijuana market is subject due to federal law. James Madison believed there was little risk of federal overreach into state affairs.

[S]hould an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance, and perhaps refusal, to co-operate with the officers of the union; the frowns of the executive magistracy of the state; the embarrassment created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.²⁷⁷

Madison was a bit too optimistic concerning the ability of states to ward off unwarranted federal intrusion into their affairs but, at least with respect to sports

investing-in-fanduel/; *The NHL Takes A Shot at Daily Fantasy Sports Games*, KLEIN, MOYNIHAN, TURCO, (Nov. 13, 2014), <http://www.kleinmoynihan.com/the-nhl-takes-a-shot-at-daily-fantasy-sports-games/>. The National Collegiate Athletic Association, FanDuel, and Draft Kings reached an agreement whereby these daily fantasy sports operators will no longer offer contests based on the performance of college athletes. Fantasy sports contests based on college sporting events represent a small portion of these operators' revenue. See David Purdum, *DraftKings, FanDuel to Stop Offering College Fantasy Games*, ESPN (Mar. 31, 2016), http://espn.go.com/chalk/story/_/id/15104454/draftkings-fanduel-stop-offering-college-fantasy-games.

²⁷⁶ See LAW ENFORCEMENT SUMMIT, *supra* note 260, at 15 (reporting the results of public opinion polling conducted by the Mellman Group).

²⁷⁷ THE FEDERALIST NO. 46 (James Madison).

gambling, the states have been restored their rightful place in the regulatory landscape.

