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Anyone's Game

Sports-Betting Regulations after *Murphy v. NCAA*

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EXECUTIVE SUMMARY

Until very recently, sports betting was regulated—and banned in most states—by a federal law, the Professional and Amateur Sports Protection Act (PASPA). Last year, however, the Supreme Court ruled in *Murphy v. NCAA* that PASPA was unconstitutional because it dictated what state law could and couldn't be in this area. With PASPA struck down, states have the opportunity to make their own laws on sports betting for the first time in a quarter of a century. Many have now legalized the practice, while others are in the process of doing so. Congress likewise is deciding if and how to regulate sports betting directly—rather than by “commandeering” the states as PASPA did—considering input from sports leagues, gaming associations, and others. The leagues are urging

federal regulation that would guarantee them a percentage of sports-betting purveyors' profits. Gaming associations, on the other hand, argue that states are best equipped to regulate the practice themselves.

Our Constitution enshrined the principle that, with some exceptions, states are best-equipped to make their own laws instead of being forced into one-size-fits-all schemes. The Court in *Murphy* restored that regulatory framework, leaving sports betting to the states just like other forms of gambling. Sports betting is thus a new frontier, providing an opportunity to show how federalism can function. Congress would do well to remember our founding principles when considering new legislation and to avoid policies requiring sports-betting purveyors to pay excessive fees to the leagues, which would be an unnecessary burden on states and their citizens.

INTRODUCTION: WHAT MURPHY DID

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA), which prevented states—with several exceptions—from authorizing sports betting under state law.¹ Under PASPA, states could not “sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate.”² The law also provided exemptions for states that already had betting systems in place³ and allowed states a one-year window to enact such a system.⁴ In 2011, long after the one-year window had expired, New Jersey voters decided to amend the state constitution to allow sports betting.⁵ Since PASPA was a federal law, the NCAA (National Collegiate Athletic Association) and the major professional sports leagues argued that it preempted New Jersey’s state law, and thus New Jersey could not legalize sports betting. New Jersey, in contrast, argued that PASPA was a violation of the anti-commandeering doctrine articulated in *New York v. United States* and *Printz v. United States*.⁶

The anti-commandeering doctrine, stated simply, is the idea that the federal government cannot compel states or state officials to enforce federal law or otherwise do the federal government’s bidding. In *New York*, a federal statute required states to take title to and dispose of low-level radioactive waste. The Court noted that Congress could regulate waste disposal, but not by compelling state action: “[r]ather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste . . . Congress has impermissibly directed the States to regulate in this field.”⁷

Printz expanded on the *New York* decision and explained why the federal government should not enlist states into a federal scheme. When Congress directs the states to enforce a federal policy, it shifts the blame for any “burdensomeness and . . . defects” in the policy to the states, while still allowing Congress to “take credit for ‘solving’ problems.”⁸ In short, it reduces state and federal accountability to citizens and prevents states from choosing their own laws.

Here, the sports leagues prevailed at both the district level and on appeal. The U.S. Court of Appeals for the Third Circuit interpreted PASPA as preventing New Jersey from not only authorizing sports betting, but also from changing its laws to be silent on the issue.⁹ Essentially, federal law said that states could not even repeal their existing laws on sports betting.

The Supreme Court, however, found in New Jersey’s favor, reasoning that PASPA violated the anti-commandeering doctrine by preventing the state from changing its laws regarding sports betting.¹⁰ The Court established that there is no difference between compelling a state to create a new law and preventing them from repealing an old one.¹¹ “If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful,” wrote Justice Samuel Alito for the seven-justice majority. “We do not think that Congress ever contemplated that such a weird result would come to pass.”¹² The language of the law itself was, in the Court’s eyes, a major obstacle that prevented states from making and enforcing their own laws. Thus, the Court struck down PASPA, leaving sports betting unregulated at the federal level.

The Court suggested that Congress may still be able to

1. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701, invalidated by *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

2. 28 U.S.C. § 3702(i).

3. 28 U.S.C. § 3704(a)(1).

4. 28 U.S.C. § 3704(a)(3)(A).

5. N.J. Const. art. IV, § 7, ¶(2)(D), (F).

6. 505 U.S. 144 (1992); 521 U.S. 898 (1997).

7. 505 U.S. at 160.

8. 521 U.S. at 930.

9. *NCAA v. Governor of N.J.*, 832 F.3d 389, 401 (3d Cir. 2016) (en banc).

10. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

11. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018). (“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.”)

12. *Murphy v. NCAA*, 138 S. Ct. 1483–84 (2018).

regulate sports betting—but it had to try to do so directly rather than through the states.¹³ Congress’s role in sports betting should thus give states flexibility in crafting their own policies. After all, our system of government was created with the idea that states, being closer to the people, are best suited for governance. Based on this principle, states have regulated their own lotteries and casino gambling for decades. Congress should defer to each state in determining what is best for its citizens when it comes to sports betting.

CHANGES AT THE STATE LEVEL

ESPN continuously tracks all state legislation pertaining to sports betting. Its bill tracker is a surface-level look at how states are responding to *Murphy*, and it is a useful tool for identifying the current trends in state law.¹⁴ As it turns out, several states were already exempt from PASPA, a few have legalized, some are trying to legalize, many have begun the process of legalization in the absence of federal restrictions, and very few have not yet tried to change their current laws.

Four states (Delaware, Montana, Nevada, and Oregon) were already exempt from parts of PASPA before the *Murphy* decision. Delaware had a sports lottery and, after *Murphy*, started to offer single-game betting at three different casinos and online. The governor described it as “a full-scale sports gaming operation.”¹⁵ Nevada already had a legalized system of sports betting, as did Montana, which had betting pools for football and auto racing.¹⁶ Montana’s legislature introduced a bill early this year to include other sports. Likewise, the Oregon legislature introduced a more expansive sports betting bill in January—Oregon had parlay sports betting until 2007, when the NBA (National Basketball Association) successfully challenged the practice.¹⁷

Since *Murphy*, six states have successfully passed and implemented a sports-betting system: Mississippi, New Jersey, New Mexico, Pennsylvania, Rhode Island, and West Virginia.¹⁸ In June 2018, New Jersey legalized sports betting, and casinos started taking bets. Mississippi preemptively legalized in 2017, and in 2018 the Mississippi Gaming Commission started requiring all bets to be in-person, with online betting to be decided later. The governor of Pennsylvania signed a bill that legalized sports betting in October of 2017, and it was implemented in mid-November 2018. In June 2018, the governor of Rhode Island signed the state budget, which included provisions for two (and only two) casinos to offer in-person sports betting, regulated by the state lottery. One casino started taking bets in late November 2018. In early 2018, West Virginia legalized, for both in-person and online bets, regulated by the West Virginia Lottery Commission. New Mexico has a gaming compact between the state and an Indian tribe; in-person sports gambling is legal on reservations.¹⁹

Two states have enacted but not yet implemented a sports-betting system: New York and Arkansas. New York’s legislature passed a law in 2013 for betting at four locations, and after *Murphy*, the issue was brought up once again. In January 2019, Gov. Andrew Cuomo proposed rolling out sports betting to upstate casinos, and is waiting on the New York Gaming Commission to come out with regulations before implementing.²⁰ Assemblyman Gary Pretlow is also spearheading a bill to legalize mobile sports betting, although Cuomo has said that such a bill would require a constitutional amendment.²¹ In November 2018, Arkansas voters passed a constitutional amendment (via ballot measure) to allow sports betting as a casino activity in four counties, regulated by the Arkansas Racing Commission, which the state has not yet implemented.²²

13. *Murphy v. NCAA*, 138 S. Ct. 1484–85 (2018).

14. Ryan Rodenberg, “State-by-State Sports Betting Bill Tracker,” *ESPN*, November 26, 2018.

15. Rodenberg, “State-by-State Sports Betting Bill Tracker.”

16. Rodenberg, “State-by-State Sports Betting Bill Tracker.”

17. Kevin Berry, “Sports Gambling in Oregon?” *NBC Sports*, May 14, 2018.

18. Rodenberg, “State-by-State Sports Betting Bill Tracker.” Unless otherwise specified, all state-specific information in this section comes from this article.

19. Rodenberg, “State-by-State Sports Betting Bill Tracker.”

20. Matthew Kredell, “NY Sports Betting Bill Still Coming from Key Assemblyman Despite Likely Veto,” *Legal Sports Report*, January 17, 2019.

21. Kredell, “NY Sports Betting Bill Still Coming from Key Assemblyman Despite Likely Veto.”

22. Michael R. Wickline, “Casino Measure Wins Arkansas Voters’ Support,” *Arkansas Democrat-Gazette*, November 7, 2018.

A sizable number of state legislatures have introduced bills or constitutional amendments to legalize sports gambling, to mixed results. The mayor of Washington, DC, also signed a new bill that legalizes both online and in-person betting. Connecticut passed a limited anticipatory law in 2017, failed to pass a comprehensive bill last year, and introduced a new one early this year. Likewise, legislatures in Hawaii, Illinois, Kansas, Massachusetts, Missouri, New Hampshire, North Dakota, Tennessee, Virginia, and Washington introduced bills in 2019, as well as Maine, which introduced seven different bills in January 2019 alone.

South Carolina's legislature proposed a constitutional amendment to allow sports betting in 2017 and proposed a new one in early 2019. South Dakota legislators introduced a comparable resolution in January 2019 that would put a constitutional amendment to legalize sports betting on the ballot in 2020. California is also holding a voter referendum in 2020 to legalize the practice.²³ Oklahoma is considering expanding its tribal compact to include sports-betting pools, and the session ended without a vote. Similarly, Arizona introduced a bill in January that would allow tribes to conduct sports betting, and state Senator Sonny Borelli anticipated that the Department of Gaming "will kind of cut-and-paste what Nevada does."²⁴

In 2017, Kentucky's legislature introduced a legalization bill which included an initial licensing fee of \$250,000 and "a hefty tax rate—3 percent of handle."²⁵ In a similar way, a Texas bill would require a \$250,000 permit fee and impose a 6.25 percent tax on each bet. A new Virginia bill also has a \$250,000 permit fee and a 15 percent revenue tax. Indiana's legislature introduced a bill with a "1 percent 'integrity fee' to specific sports leagues based on wagering handle . . . [and] a 9.25 percent tax on sports betting-related revenue."²⁶ This is a result of the bill's sponsor taking input from the NBA and MLB (Major League Baseball). Iowa's state legislature also took input from the sports leagues in a January 2018 bill that did not come to a vote.

State legislatures in Maryland and Louisiana introduced bills to legalize sports betting that failed to pass. Minnesota saw a bill that was introduced in May 2018 and did not pass, and Michigan's legislature passed a bill that was then vetoed by the governor.

Ohio rounds out the states moving to legalize sports betting. Ohio's legislature introduced a short placeholder bill expressing intent to later introduce specific legislation.²⁷

The remaining 12 states have not made any efforts to legalize sports betting: Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Nebraska, North Carolina, Utah, Vermont, Wisconsin, and Wyoming. Utah has a long tradition of keeping gambling illegal in all its forms; it does not even have a lottery and has rejected attempts to create one.²⁸ It is thus highly unlikely to introduce a new sports-betting bill.

In sum, an overwhelming majority of states have changed or are working to change their policies in response to *Murphy*. Only 12 states have not introduced legislation on sports betting since *Murphy* and 4 were already exempt from PASPA, although they may expand their existing operations. The remaining states have either passed a bill, amended their constitution, made a tribal compact, or are attempting to do one of the three.

THE BROAD STATE POLICY TRENDS

Generally, states are proposing that state gaming commissions, lotteries, or racing commissions oversee sports betting as an extension of existing activities, rather than creating entirely new commissions to handle one type of betting—with one exception being the Hawaii bill, which provides for a "Hawaii sports wagering corporation" as a unique oversight feature.

The methods of attempted—or successful—legalization differ from state to state as well. States such as Oklahoma and New Mexico have existing compacts with Indian tribes to authorize gambling and are attempting to expand into

23. Patrick McGreevy, "Initiative to Legalize Sports Betting in California Proposed for 2020 Ballot," *Los Angeles Times*, June 12, 2018.

24. Joshua Shure, "Senate Postpones Debate on Bill that Would Legalize Arizona Sports Betting," *Phoenix Business Journal*, February 9, 2019.

25. Rodenberg, "State-by-State Sports Betting Bill Tracker."

26. Rodenberg, "State-by-State Sports Betting Bill Tracker."

27. John Kosich, "Sports Betting Is Coming to Ohio Says the State's Governor-elect, It's Just Not Clear When," *News 5 Cleveland*, November 16, 2018.

28. Aaron Falk, "Sports Betting Is Now on the Table Nationally, but Probably Not in Utah," *Salt Lake Tribune*, May 14, 2018.

sports betting through amending or reinterpreting the compacts.²⁹ Others, including Arkansas, California, South Carolina, and South Dakota, are working to amend their state constitutions to allow it. For the rest, the state legislatures are introducing bills with varying degrees of success—some have passed, some are still awaiting a vote, and others have failed.

There are a few schools of thought on the scope of proposed sports betting. Some states are legalizing with relatively few restrictions. Delaware, which was already exempt from PASPA, recently expanded its sports-betting operations and favors both in-person and online betting. Likewise, West Virginia's system allows for both types of betting.

On the other hand, some states are implementing major restrictions and taxes. As mentioned above, Rhode Island only allows in-person bets at two casinos. Washington is considering legislation that would allow sports betting but restrict it to either tribal casinos or horseracing tracks. States such as Pennsylvania are legalizing and including huge taxes and start-up costs: a "34 percent [tax] on operators' revenue plus a 2 percent tax that goes for local grants to counties, as well as a onetime fee of \$10 million."³⁰ Bills in Kentucky, Texas, and Virginia include \$250,000 permit fees and similarly high tax rates.

Some states are legalizing but are cautious about allowing betting for in-state college games. New Mexico allows sports betting at tribal casinos yet prohibits betting on University of New Mexico or New Mexico State University games. Virginia's new bill would also prohibit bets on Virginia college games. The author of a Tennessee bill has suggested that it could be amended so that colleges can opt out.

States such as Iowa and Indiana are applying a different method, with legislatures taking input from the sports leagues (who are unfavorable to sports betting in general). They have added huge fees and licensing costs to their

proposed legislation. There are several types of fees, including a 1 percent integrity fee in Indiana, payable to the sports leagues—giving them a cut of the action. Generally, the more the leagues are involved in the legislative process, the more limited sports betting will be in any given state.

CONGRESSIONAL (IN)ACTION

Congress has not yet regulated sports betting since *Murphy*, but a big push to regulate (or ban) the practice could happen sooner rather than later. Former senator Orrin Hatch—from gambling-unfriendly Utah—has characterized an environment where states make their own regulations about sports gambling as a "patchwork race to the regulatory bottom."³¹ Senate Minority Leader Chuck Schumer, of New York, also expressed concern that without congressional action game-fixing would be an issue.³² In December, the two introduced the Sports Wagering Market Integrity Act of 2018, which would have the U.S. Department of Justice set a floor for state sports-betting laws.³³ The bill would need to be reintroduced in 2019 to move forward, and there is currently no Republican sponsor for it in the wake of Hatch's retirement.³⁴

Under Hatch and Schumer's proposed framework, purveyors of sports betting would have to base their betting outcomes on league data—the official results of every play, referee call, and game win—coming from a league itself. Although most people find out the score of a game from third parties such as TV networks or apps, under this type of regulation, purveyors would have to purchase the data, which could be highly valuable, from the leagues.

Sports leagues argue that data regulations would guard against cheating and prevent purveyors from using fraudulent data to rip off bettors, but according to Michelle Minton, senior fellow at the Competitive Enterprise Institute, it

29. Eric Ramsey, "Welcome State No. 6 With Sports Betting: New Mexico Goes Live at Santa Ana Star," *Legal Sports Report*, October 16, 2018.

30. Phil Helsel, "Sports Betting Is Now Legal in Several States. Many Others Are Watching from the Sidelines," *NBC News*, August 13, 2018.

31. Herb Jackson, "Sports betting: Congress May Try to Regulate, but Passage of Any Legislation Is a Long Shot," *USA Today*, May 15, 2018.

32. Michelle Minton, "Congress Already Ruined Sports Betting Once; Don't Let Them Do It Again," *Washington Examiner*, October 1, 2018.

33. Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

34. David Purdum and Ryan Rodenberg, "What You Need to Know about the New Federal Sports Betting Bill," *ESPN*, December 20, 2018.

would give the leagues a monopoly over data and allow them to fix prices at an exorbitant rate.³⁵ The question, therefore, is not about preserving fairness, but whether sports leagues can form a government-sanctioned monopoly and charge purveyors for the score of a game. For all the concern about keeping games fair, the proposed league-data requirement rings hollow when it comes to competition in the market.

In addition to it having anti-competitive effects, Minton also notes that a league-data purchasing mandate may grow the already prolific sports-gambling black market.³⁶ Her reasoning is straightforward: if leagues control the flow of data, they control the types of bets that bettors can make, and can greatly restrict sports betting.³⁷ This type of policy could thus bring an unintended consequence: bolstering the *illegal* sports-betting market, making it “harder . . . for legal gambling operators to offer the same types of games, odds, and payouts as the illegal market, ensuring that customers continue to spend their money illegally.”³⁸ As a result, match-fixing—the oft-cited fear that accompanies sports-betting legalization—could become more prevalent because “it is easier for criminals to hide their behavior and profit in unregulated markets. And, the more the criminals profit . . . the more money and incentive they have to attempt to corrupt players and officials.”³⁹ Instead of ensuring fairness, data requirements could corrode current systems that have been in place for decades in some states.

The Sports Wagering Market Integrity Act would also require states to obtain the U.S. Attorney General’s approval before implementing a sports-betting system.⁴⁰ The attorney general’s approval is conditioned on states’ conforming with numerous standards, including restrictions on betting

sites and a requirement for state law to prohibit certain types of betting. But these conditions may implicate the anti-commandeering doctrine in the same way that PASPA did before it was struck down in *Murphy*.

INTEGRITY FEES

Another major policy proposal—not addressed in the Hatch-Schumer bill—is the aforementioned integrity fee. The leagues argue that the fee—which betting purveyors would pay to the leagues, naturally—will cover the higher costs of protecting the integrity of the game if sports betting becomes more prevalent. According to NBA spokesman Mike Bass, “we will need to invest more in compliance and enforcement, and believe it is reasonable for operators to pay each league 1% of the total amount bet on its games to help compensate for the risk and expense created and the commercial value our product provides them.”⁴¹

The purpose of an integrity fee, as derived from Bass’s statement, is twofold. First, integrity fees would hypothetically compensate leagues for increased costs. The theory that legal sports betting increases the cost of enforcing the game’s fairness relies on the idea that players and purveyors will have a monetary incentive to cheat if sports betting becomes more widespread. Game-fixing is perceived as a pervasive issue with sports betting: it appears constantly in pop culture, and naturally the leagues want to cover the risk that it could become a common occurrence.⁴² They may have some cause for concern: after all, sports betting is legal in many European countries, and their soccer leagues are burdened with a match-fixing problem.⁴³ But salary

35. Minton, “Congress Already Ruined Sports Betting Once.”

36. Oxford Economics, using data from the National Gaming Impact Study Commission, found in 1999 that the estimated handle (total amount of bets) for illegal bets in the United States was between \$80 billion and \$380 billion.

37. Minton, “Congress Already Ruined Sports Betting Once.”

38. Minton, “Congress Already Ruined Sports Betting Once.”

39. Minton, “Congress Already Ruined Sports Betting Once.”

40. S. 3793 § 102(b)(1).

41. Darren Heitner, “NBA Asks For 1% Integrity Fee from Sports Betting Operators,” *Forbes*, January 25, 2018.

42. Game-fixing is often romanticized in movies, music, and on TV as a seedy but attractive activity. For instance, a central plot point of the film *Pulp Fiction* involved Bruce Willis’s character agreeing to fix a boxing match in exchange for a loan. Similarly, in the 1994 film *Blue Chips*, starring Shaquille O’Neal, a college athlete engaged in a point-shaving scheme to fix a college basketball game. Rapper Action Bronson boasted about rigging a basketball game in Mac Miller’s 2013 song “Red Dot Music” (“Check the bio, I fixed the game between Kentucky and Miami of Ohio”). In Marvel’s *Daredevil*, a Netflix TV series, the titular character’s father, a boxer, refused to throw a fight and bet on himself instead.

43. Brian Shactman, “Here’s Why Soccer Match-Fixing Is Not a US Problem,” *CNBC*, February 5, 2013.

discrepancies between U.S. and European athletes have a strong effect on the prevalence of cheating. European soccer players, on average, bring home \$154,852, compared to an average salary of \$2.1 million for an NFL (National Football League) player.⁴⁴ According to Scott Minto, director of the sports master's of business administration program at San Diego State University, game-fixing can be a concern when athletes are poorly paid, but it is much less of a problem when players have higher salaries: "Where the economy might not be great, where the money is not great, the temptation is there."⁴⁵ Highly paid professional athletes are thus less likely to risk an entire career for "the allure of a mid-sized payout."⁴⁶ The leagues are anticipating a flood that may never arrive.

There are currently no integrity fee requirements in states such as Nevada, which have had legal—and functioning—sports-betting systems for decades.⁴⁷ But the leagues have begun criticizing Nevada's long-established system. As the MLB's investigation chief said about sports-betting purveyors in states such as Nevada, "You can say that you care about integrity too . . . but when you turn around and oppose any requirement that you let the leagues know about integrity problems, it is hard for me to believe you."⁴⁸ Sports leagues are insinuating that betting purveyors don't care about the integrity of the game and have no means of protecting it, thus leaving integrity fees as the only option.

Purveyors argue that this is far from the truth. According to Jay Kornegay, vice president of the Race and Sports SuperBook at the Westgate Las Vegas Resort and Casino, "We've been protecting the games and the product for four decades. Some have been acting like we haven't been doing this . . . We want to protect the game like you do. Integrity is

the name of the game for us."⁴⁹ It's no coincidence that the leagues are suddenly finding fault with the way states and casinos handle sports betting as more and more states legalize the practice without implementing the league-data purchase requirements, integrity fees, and other revenue-sharing arrangements that the leagues desperately want.

The second purpose of an integrity fee, apart from covering the increased costs of enforcement, is to compensate the leagues for the value that betting purveyors derive from the game itself. In short, the leagues admittedly want to be paid for supporting a sports-related industry.⁵⁰ A 1 percent integrity fee, they argue, is reasonable, considering that sports leagues host the competitive events from which purveyors and bettors profit.⁵¹ Since "a legal Nevada sports book" sees just 3.5–5 percent in revenue, however, a 1 percent fee would actually be 20–29 percent of a purveyor's total revenue.⁵² Not only would this be a huge barrier to entry in the market, but it's a much bigger piece of the pie than the leagues are advertising. It should thus come as no surprise that sports-betting purveyors such as Joe Asher, CEO of William Hill U.S., characterize integrity fees as "a euphemism for a 'cut of the action.'"⁵³

The leagues' integrity fee, if compelled by law, would essentially give private companies the authority to tax private individuals and other entities with the government's help. American Gaming Association (AGA) president and CEO Geoff Freeman asserted that the gaming industry is serious about "eliminating the illegal market, [and] protecting consumers" and that "the role of government . . . most certainly does not include transferring money from bettors to multi-billion dollar sports leagues."⁵⁴

44. Shactman, "Here's Why Soccer Match-Fixing Is Not a US Problem"; and Kurt Badenhausen, "The Average Player Salary and Highest-Paid in NBA, MLB, NHL, NFL and MLS," *Forbes*, December 15, 2016.

45. Shactman, "Here's Why Soccer Match-Fixing Is Not a US Problem."

46. Shactman, "Here's Why Soccer Match-Fixing Is Not a US Problem."

47. Hilary Russ, "U.S. States Should Not Copy Nevada Sports Betting Law: MLB," Reuters, June 8, 2018.

48. Russ, "U.S. States Should Not Copy Nevada Sports Betting Law."

49. Matt Bonesteel, "Sports Gambling 'Integrity Fee' Supporters Are Not Doing Themselves Any Favors," *Washington Post*, May 2, 2018.

50. Darren Heitner, "NBA Asks for 1% Integrity Fee from Sports Betting Operators," *Forbes*, January 25, 2018.

51. Heitner, "NBA Asks For 1% Integrity Fee from Sports Betting Operators."

52. Heitner, "NBA Asks For 1% Integrity Fee from Sports Betting Operators."

53. Matt Bonesteel, "If Sports Gambling Is Legalized, the NBA Wants in on the Profits," *Washington Post*, January 25, 2018.

54. Heitner, "NBA Asks for 1% Integrity Fee from Sports Betting Operators."

HOUSE SUBCOMMITTEE HEARING

The House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations held a hearing in September 2018 called “Post-PASPA: An Examination of Sports Betting in America.”⁵⁵ Chairman Jim Sensenbrenner’s opening statement laid out several possibilities for congressional action: “One option, of course, would be for Congress to re-enact a federal ban on sports gambling . . . [or to] adopt uniform, minimum federal standards, which would guide the imposition of sports wagering across the nation, in states that desire to legalize the practice.”⁵⁶ He also suggested a third option, for “Congress to defer to the states and allow them to legalize and regulate the sports gaming business.”⁵⁷ In his closing statement, he said that “for Congress to do nothing is the worst possible alternative,” indicating support for some form of legislation rather than simply leaving it to the states.⁵⁸

In terms of how it can regulate, Congress has two options, as Justice Sandra Day O’Connor described in *New York v. United States*: “The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.”⁵⁹ Congress can thus regulate individuals directly, without the states’ help—and under existing precedent, the Commerce Clause would likely give authority, even over wholly in-state gambling—or persuade states to enforce a federal program by offering them funding or other incentives.

Jocelyn Moore, NFL executive vice president of public affairs, testified that the NFL is “very concerned leagues and states alone cannot fully guard against the harms Congress has long associated with sports betting.”⁶⁰ Like Senator Schumer, she advocated for the use of official league data “to protect consumers and to ensure integrity . . . the information used to settle these wagers [must be] correct and

timely, something that can only come from official data provided by the sports leagues themselves.”⁶¹ Moore did not address how a league-data purchase requirement would allow leagues to have a monopoly on data and set high prices, however, nor did she address its possible anti-competitive effects.

On the opposing side, the American Gaming Association argued that regulations are already in place for gambling, specifically anti-game-fixing laws, at both state and federal levels. According to AGA Senior Vice President Sara Slane, “state and tribal regulators have decades of experience effectively overseeing gaming operations within their jurisdictions.”⁶² In her view, lawmaking authority is best left in the hands of the most experienced regulators: state and tribal authorities.

WHY LEAVE IT TO THE STATES?

The Framers deeply valued self-governance and instituted a dual-sovereignty federalist system to that end. The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The states and the people thus retain power so that state and local governments can have some degree of autonomy in making and enforcing laws.

In *Federalist* 45, James Madison expressed the Framers’ philosophy on how power should be distributed between states and the federal government. In his words, “the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” Congressional power was meant to be “exercised principally on external objects, as war, peace, negotiation, and foreign commerce” with state power “extend[ing] to all the objects which . . . concern the lives, liberties, and properties of the

55. “Post-PASPA: An Examination of Sports Betting in America,” Subcommittee on Crime, Terrorism, Homeland Security and Investigations, 115th Cong. (2018).

56. David Purdum, “Congress Indicates It May Act on Sports Betting,” *ESPN*, September 27, 2018.

57. Purdum, “Congress Indicates It May Act on Sports Betting.”

58. Purdum, “Congress Indicates It May Act on Sports Betting.”

59. 505 U.S. 144, 188 (1992).

60. “Post-PASPA: An Examination of Sports Betting in America,” statement of Jocelyn Moore, executive vice president, communications and public affairs, NFL.

61. “Post-PASPA: An Examination of Sports Betting in America,” statement of Jocelyn Moore.

62. “Post-PASPA: An Examination of Sports Betting in America,” statement of Sara Slane, senior vice president, AGA.

people, and the internal order, improvement, and prosperity of the State.” Madison’s call for the federal government to handle international affairs and the states to handle everything else is a far cry from the enormous, all-encompassing federal government that we know today. States and localities—governments that are much closer to the people than is the federal government—*should* handle issues that concern the people. Indeed, the whole point of designing a federalist system was to serve the people’s needs and preferences. “Were the Union itself inconsistent with the public happiness,” Madison continued in *Federalist* 45, he would just as well have voted to “abolish the Union.” Madison and his contemporaries believed that a federal government with too much power is more averse to the public good than more localized policymaking.

With this framework in mind, congressional action should be focused on respecting state sovereignty when it comes to issues that directly concern the people. Gambling has traditionally been this sort of policy area.⁶³ Even when legalized gambling became increasingly unpopular in the 1800s, it was states, rather than Congress, that chose to prohibit the practice.⁶⁴ Whether the practice was endorsed, outright banned, or some degree of either, states have been the ones to decide the status of gambling. PASPA was a notable exception to an extensive history of state choice and a hands-off federal approach to gambling. States should be allowed to continue this tradition, which harks back to the colonial era in some cases.

Although Congress has the power to legislate in certain areas, and although that power has increased with time, it must not abandon our founding principles. Justice O’Connor, writing for the majority in *New York*, explained that “the actual scope of the Federal Government’s authority with respect to the States has changed over the years . . . but the constitutional structure underlying and limiting that authority has not.”⁶⁵ An expanding federal government, in other words, has enabled Congress to regulate specific areas that the Framers did not anticipate, but the *manner* in which Congress regulates should remain consistent with federalism.

If the federal government decides to get involved in sports betting, it may regulate externalities and interstate

spillover while still upholding the important principles of federalism and state sovereignty. As long as states are allowed to define if and how to legalize and regulate sports betting, Congress would then be acting within its enumerated powers as originally understood by the Framers of the Constitution. But it should leave the heavy lifting to the states, whose decades of experience with sports-betting and other types of gambling give state legislatures an edge when it comes to crafting new policy.

CONCLUSION

Since the *Murphy* decision, the landscape for state-authorized sports betting has rapidly evolved. Six states have legalized and implemented sports betting, two have passed a law and are waiting to implement it, and four were already exempt from the now-defunct PASPA. Twenty-five states, plus DC, have been working—some more successfully than others—to legalize. Only 12 states have taken no action, and no doubt some never will.

The states that have implemented or are trying to implement sports betting have taken a variety of approaches. Some only want a highly regulated system of in-person bets with high taxes on the activity, while others want to include online betting and adopt fewer regulations. Some have advocated for integrity fees payable to the sports leagues, while others eschew them.

At the federal level, Congress has yet to determine what, if anything, it should do. One new bill attempts to regulate sports betting but suffers from some of the same Tenth Amendment concerns as PASPA. If Congress wants to regulate the interstate effects and externalities of sports betting, it has the power to do so. But it should not impose a sweeping regulatory scheme on states that would rather regulate the practice on their own terms, according to their own unique needs, and tailored to the wishes of their citizens.

Most of all, Congress should not permit private sports leagues to essentially tax sports-betting purveyors through league-data purchase mandates or integrity fees. Such fees allow sports leagues to get a cut of the action, while proving to be prohibitively high for purveyors and doing little to curb the black market. In fact, restrictive regimes may

63. See, for example, Roger Dunstan “Gambling in California,” California State Library, January 1997. Section II provides a history of gambling in the United States, including the prevalence of lotteries during the colonial period.

64. Dunstan “Gambling in California.”

65. 505 U.S. 144, 159 (1992).

actually *encourage* the growth of illicit gambling. To limit the prevalence of black-market betting, states should continue to regulate gambling—as they have for hundreds of years in many cases—undisturbed by intrusive federal policies. If a state can be trusted to set rules for lotteries, casinos, and online poker, surely it can handle office betting pools, casino sports gambling, and fantasy-sports websites.

With PASPA overturned, the odds have never been better for legislatures with designs on legalizing sports betting. States are placing a substantial wager on their own legislative agendas, while sports leagues want to hedge their bets by lobbying for high fees. The future of sports betting is anyone's game. If Congress employs federalism as a guiding principle, however, the states and the people are a clear favorite.