

NOTE

MOVING THE LINE: LEVERAGING THE LEGALIZATION OF SPORTS GAMBLING TO PROTECT STUDENT-ATHLETES AND PRESERVE AMATEURISM

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INTRODUCTION

From daily wagers, to weekly pick'ems, to seasonal bracket challenges, sports gambling is a pervasive part of American culture.¹ Sports gambling is derivative of sports spectatorship, and just as sports fanatics personally identify with and cheer for certain teams or players, sports gamblers enjoy the thrill of watching a game and having a personal stake in its outcome.² Over the past half-century, sports gambling has become increasingly popular because of the influx of televised sporting events, proliferation of statistics and other information available to sports gamblers, widespread media access and advertising, and weakening stigma associated with gambling in general.³ Yet, virtually all sports gambling has been illegal in the United States for decades.⁴

That changed in May 2018 when the U.S. Supreme Court in *Murphy v. National Collegiate Athletic Association* (“*Murphy*”)⁵ struck down a federal law that prohibited states from enacting sports gambling legislation, thereby paving the way for states to legalize sports gambling. Sports gambling is an incredibly lucrative industry, and now that states can legalize sports gambling, many are lining up for a slice of the revenue pie. However, sports gambling—legal or otherwise—jeopardizes the safety of amateur and professional athletes by exposing them to internal and external pressures, and it threatens to corrupt the “integrity of the game.” Such negative externalities have tempered some states’ expectations, causing many to adopt a “wait-and-see” approach.⁶ The expansion of legalized sports gambling will usher in a new era of sports coverage and fan interaction and challenge the professional and amateur sports leagues. The sports leagues must adapt to changing social mores and redefine their policies to promote and protect fair and honest competition.

This will be especially challenging for the National Collegiate Athletic Association (the “NCAA”). Critics argue that the NCAA is utilizing

¹ George Ignatin, *Sports Betting*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 168, 169 (1984).

² Neil H. Huffey, *College Sports Wagering: A Case Study About Gambling on College Athletics and the Motivations and Consequences Surrounding Legislation Wanting to Ban Wagering on College Sports*, 23 (Apr. 1, 2001) (unpublished M.P.A. thesis, University of Nevada, Las Vegas) (on file with University Libraries, University of Nevada, Las Vegas)

³ See *id.* at 15–17.

⁴ See generally *id.*

⁵ See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

⁶ Phil Helsel, *Sports Betting is Now Legal in Several States. Many Others are Watching from the Sidelines*, NBC UNIVERSAL NEWS (May 14, 2018, 5:13 AM), <https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211>.

its amateurism model to exploit unpaid student-athletes.⁷ Indeed, the NCAA rakes in hundreds of millions of dollars per year but its athletes are forbidden from profiting from their talent and marketability. Student-athletes are often financially destitute, rendering them especially vulnerable to outsiders seeking to influence the outcomes of games. Although the NCAA has stringent anti-gambling rules, the intermingling of sports gambling and college athletics has a colorful history painted with scandal, corruption, and self-dealing.⁸ The legalization of sports gambling is likely to exacerbate these problems.

This Note argues that the NCAA should view the legalization of sports gambling as an opportunity to further its mission to protect student-athletes, maintain amateurism, and promote the integrity of the game. Indeed, this Note proposes that the NCAA should leverage its ability to determine the location of NCAA tournaments, games, and events—which are incredibly profitable for hosting cities—to accomplish its policy objectives and improve its public image.

I. BACKGROUND

To understand the challenges the legalization of sports gambling poses to the NCAA, it is necessary to first discuss the development and background of sports gambling in the United States. This Section will begin by exploring the early history of sports gambling, with special attention devoted to the history of gambling on college athletics. Next, this Section will examine the mindset of the lawmakers and regulators who lobbied for and against sports gambling legislation before turning to an analysis of the Professional and Amateur Sports Protection Act (“PASPA”), which prompted *Murphy*.

A. *The History of Early Sports Gambling and Gambling on College Athletics*

Gambling was an integral part of early American life.⁹ In the colonies, “playing the lottery was considered a civic responsibility.”¹⁰ This expectation derived from the connection between gambling and effective fiscal policy measures: gambling proceeds quite literally helped to build

⁷ See Daniel Laws, Note, *Amateurism and the NCAA: How a Changing Market Has Turned Caps on Athletic Scholarships into an Antitrust Violation*, 51 U. RICH. L. REV. 1213, 1213 (2017).

⁸ See John R. Thelin & Jason R. Edwards, *History of Athletics in U.S. Colleges and Universities*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/united-states-and-canada/us-history/college-athletics> (last visited Oct. 29, 2019).

⁹ See Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571–72 (2013).

¹⁰ *Id.* at 572.

America.¹¹ Proceeds from state-sponsored gambling were a source of financing for infrastructure, industrialization, the creation and maintenance of universities, church construction, projects of westward expansion, the development of public works, and even the Revolutionary War.¹²

Outside of its utility for nation-building, gambling was popular among early American sports fans.¹³ Sports gambling was popularized in the nineteenth century largely by horse racing, at the time known as the “Sport of Kings.”¹⁴ Initially, breeders raced their horses purely for the love of the sport.¹⁵ However, a sports gambling fervor overtook the race-tracks in the early nineteenth century, and sports gamblers flocked to the tracks in droves to wager on races.¹⁶ At the time, fans from all over the country could legally gamble on horse racing.¹⁷

Although most states throughout the nineteenth century permitted lotteries and gambling on horse races, states began to outlaw these practices because of widespread corruption associated with gambling and the influence of religious organizations that strongly opposed gambling.¹⁸ By the beginning of the twentieth century, almost all forms of gambling were illegal nationwide.¹⁹

This near nationwide ban on gambling coincided with the rise of professional baseball in the late nineteenth century.²⁰ As baseball became more popular, so too did sports gambling.²¹ Without a legal means to cast their bets, sports gamblers turned to the black market and placed their bets underground with bookmakers run by organized crime syndicates.²²

The flourishing underground sports gambling market spilled onto the playing field. Mobsters infiltrated Major League Baseball (“MLB”) and bribed disgruntled players who, in exchange for money, were willing

¹¹ See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 25–26 (1992).

¹² *Id.* at 12, 25–26, 28–29.

¹³ See generally Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 25–29 (2016).

¹⁴ *Id.* at 25–26; see *Where the Ponies Run for the Masses*, N.Y. TIMES, May 31, 1908. The first horse racing track in America was built in 1665 on Long Island.

¹⁵ See generally *id.*

¹⁶ *Id.* In 1823, about 65,000 people attended a horse race at Union Course on Long Island, driven by a “gambling fever.” It is estimated that about \$200,000 was gambled on that race. At the end of 2018, that amount was equivalent to about \$4,782,987. See CPI INFLATION CALCULATOR, <https://www.officialdata.org/1823-dollars-in-2018?amount=200000>.

¹⁷ See Fielkow et al., *supra* note 13, at 25–26.

¹⁸ See Woo, *supra* note 9, at 572.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

to share inside information, fix games, and shave points.²³ Things were brought to a boil in 1919 with the infamous Black Sox Scandal, when eight Chicago White Sox players were accused of conspiring with gamblers to throw the 1919 World Series.²⁴ Judge Landis, the MLB commissioner at the time, gave lifetime bans to the players involved in the scandal, which helped to restore the public's confidence in the integrity of the sport.²⁵

Though temporarily fortified by Landis' punishments, the public's confidence in the integrity of baseball and sports generally was soon undermined again by the realities of sports gambling. The 1920s witnessed a dramatic rise in the popularity of sports and, with it, the proliferation of organized crime, underground gambling, and the potential for corruption and scandal.²⁶ The association between organized crime and sports challenged the public's perception of sports as a pure and wholesome pastime and contributed to gambling's unsavory reputation.²⁷

This trend was especially true for college athletics.²⁸ Initially, college administrators viewed athletics as a distraction from scholarly work, and they discouraged intercollegiate competition.²⁹ Unphased, students formed their own teams and athletic associations over which college administrators had little control.³⁰

The unorganized and unregulated nature of college athletics invited scandal and corruption.³¹ Local businessmen, alumni, school officials, and other commercial interests understood that college athletics, in its unsupervised form, was an untapped goldmine.³² These entrepreneurs were eager to score a quick profit, and they offered to share the spoils with players who cooperated in their endeavors.³³ Student-athletes were tempted to cheat, games were fixed, and money changed hands as col-

²³ See Evan Andrews, *The Black Sox Baseball Scandal*, HISTORY (Oct. 9, 2014), <https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

²⁴ *Id.*

²⁵ See Woo, *supra* note 9, at 573.

²⁶ *Id.*

²⁷ See Richard Johnson, *The Centuries-Old History of How Sports Betting Became Illegal in the United States in the First Place*, SBINATION (May 18, 2018, 8:00 AM), <https://www.sbnation.com/2018/5/18/17353994/sports-betting-illegal-united-states-why>.

²⁸ *Id.*

²⁹ See Thelin & Edwards, *supra* note 8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

lege athletics and gambling formed an early union.³⁴ Even a “highbrow regatta” between Yale and Harvard was tainted by corruption.³⁵

College administrators recognized that, if left unorganized and unregulated, increasing commercialization and corruption threatened to stain the integrity of college athletics.³⁶ Without uniform rules and standards governing fair play, intercollegiate competitions—especially football games—were violent and sometimes fatal affairs.³⁷ Further, although college athletics were initially dominated by a handful of prestigious universities, newcomer colleges began to utilize athletics as a tool to generate revenue, tie the college to the community, increase the college’s publicity, and build goodwill.³⁸ Indeed, what was once perceived as a friendly and gentlemanly competition was being popularized as a profit-generating clash of gladiators, evidenced by increasing ticket sales and attendance at intercollegiate contests.³⁹ As President Walker of Massachusetts Institute of Technology remarked, “it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics.”⁴⁰ Accordingly, college faculty members began to assume control over college athletics, and loosely-assembled conferences were organized to oversee intercollegiate competition.⁴¹

From this chaos emerged the NCAA. The unchecked corruption and professionalized violence characterizing college athletics had spurred the federal government and various college officials to work together to create a centralized regulating authority.⁴² The NCAA was founded in 1906 primarily to formulate rules governing intercollegiate competition and to organize and promote intercollegiate championship events.⁴³ Its stated fundamental purpose is to protect student-athletes and to foster clean and fair intercollegiate competition.⁴⁴ This notion of clean and fair competition is referred to as the “integrity of the game.”⁴⁵ According to the

³⁴ See Caitlin D. Buckstaff, Note, *Covering the Spread: An Assessment of Amateurism and Vulnerability of Student-Athletes in an Emerging Culture of Sports Wagering*, 16 VAND. J. ENT. & TECH. L. 133, 138–39 (2013).

³⁵ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10–11 (2000). In the competition, Harvard tried to gain an unfair advantage by recruiting a professional sailor who was not a student. *Id.*

³⁶ *Id.* at 11–12.

³⁷ *Id.* at 12. In 1905 alone, eighteen college athletes died playing football and 100 more suffered serious football-related injuries. *Id.*

³⁸ See Thelin & Edwards, *supra* note 8.

³⁹ See Smith, *supra* note 35, at 11.

⁴⁰ *Id.*

⁴¹ *Id.* at 11–13.

⁴² *Id.* at 12–13.

⁴³ *Id.*

⁴⁴ See Buckstaff, *supra* note 34, at 146.

⁴⁵ *Id.*

NCAA, a student-athlete upholds the integrity of the game if the student-athlete performs in good faith and manifests an unequivocal love for the game.⁴⁶

Initially, the NCAA was ineffective as a centralized regulator.⁴⁷ The NCAA was comprised of sixty-two original member colleges,⁴⁸ but the East Coast colleges, which dominated college athletics, stymied the NCAA's efficacy by boycotting NCAA meetings and refusing to cooperate with colleges from the West and Midwest.⁴⁹ As a result, students and college faculty continued to be the major forces driving the evolution of college athletics.⁵⁰ At the same time, the public became increasingly interested in college athletics—especially basketball and football—and the attendant commercial interests grew in kind.⁵¹

The popularization and commercialization of college athletics in the 1920s, combined with the lack of oversight and regulation, was a recipe for abuse, scandal, and corruption. The advent of television, coupled with the proliferation of radios and broadcasting of major sporting events, increased consumer access across all swaths of society.⁵² Entrepreneurs—including college administrators—capitalized on the increased viewership and treated athletics as a lucrative investment.⁵³ In response to the growing interest, these entrepreneurs created new athletic programs and funneled money into existing athletic programs, endeavoring to build successful, profit-generating enterprises.⁵⁴ As a result, many of the concerns plaguing the NCAA today—including player compensation, recruitment, gambling, scholarships, and eligibility—arose in the early- to mid-twentieth century.⁵⁵

The increased profitability and accessibility of college athletics caused outsiders to focus on the lack of governance and the potential for corruption.⁵⁶ In a 1929 report, the Carnegie Foundation for the Advancement of Education remarked: “[a] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created.”⁵⁷ The Carnegie Report further coun-

⁴⁶ *Id.*

⁴⁷ See Thelin & Edwards, *supra* note 8.

⁴⁸ See Smith, *supra* note 35, at 12.

⁴⁹ See Thelin & Edwards, *supra* note 8.

⁵⁰ See Smith, *supra* note 35, at 13.

⁵¹ *Id.*; see also Thelin & Edwards, *supra* note 8.

⁵² See Smith, *supra* note 35, at 14.

⁵³ *Id.* at 13–14.

⁵⁴ *Id.* at 14.

⁵⁵ See Thelin & Edwards, *supra* note 8. For example, many college football teams did not cap the amount of scholarship money available to athletes and schools did not actively police eligibility requirements.

⁵⁶ See Smith, *supra* note 35, at 13.

⁵⁷ *Id.*

seled that college administrators could reclaim the “integrity of sport” by upending the rampant commercialization enabled by previous boards of trustees.⁵⁸ This call to arms illuminates the interrelation between amateurism and athletic integrity on one hand and commercialism and corruption on the other.⁵⁹

Increased spectatorship exposed the public to the nuances of college athletics and fueled its demand for a specific “brand” of competition.⁶⁰ The public feared that this “brand” was jeopardized by the lack of centralized governance in college athletics.⁶¹ This fear was realized with the influx of gambling scandals in the mid-twentieth century.⁶² The first major domino fell in 1951 when the New York District Attorney’s Office unearthed a massive point-shaving scandal implicating thirty-two college basketball players from seven universities.⁶³ These players accepted bribes to “fix” the outcomes of at least eighty-six games between 1947 and 1950.⁶⁴ College gambling scandals persisted throughout the twentieth century,⁶⁵ and the association between gambling and college athletics challenged the celebrated student-athlete ideal, stained the integrity of the game, and fueled public criticism. This criticism, combined with the proceeds from lucrative television contracts, fostered the regulatory and enforcement power of the NCAA.⁶⁶

Although early NCAA oversight failed to reign in the corruption and scandal that plagued college athletics, the mid-twentieth century witnessed the rise of a more powerful and active NCAA.⁶⁷ The foregoing factors—the commercialization and popularization of college athletics, inconsistent enforcement of rules, inequities in recruitment and scholarships, and gambling scandals—caused academic leaders to demand nationwide oversight and motivated congressional hearings to devise a solution.⁶⁸ When individual schools, athletic conferences, and organizations (such as the American Council on Education) could not present a

⁵⁸ *Id.* at 13–14.

⁵⁹ *Id.* at 13.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Buckstaff, *supra* note 34, at 138–39.

⁶³ *Id.*

⁶⁴ Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN (Nov. 19, 2003), https://www.espn.com/classic/s/basketball_scandals_explosion.html.

⁶⁵ Dennis Dodd, *A National College Football Injury Report may be Coming Soon if Big Ten Ads Get Their Way*, CBS SPORTS (July 2, 2018), <https://www.cbssports.com/college-football/news/a-national-college-football-injury-report-may-be-coming-soon-if-big-ten-ads-get-their-way/>. In college athletics, there has been at least one point-shaving or gambling scandal every decade since the 1940s, with the most recent point-shaving scandal occurring in 2010 with the University of San Diego basketball team. *Id.*

⁶⁶ See Smith, *supra* note 35, at 13–15.

⁶⁷ See Thelin & Edwards, *supra* note 8.

⁶⁸ *Id.*

unified plan, the NCAA was vested with regulatory power to pass more stringent rules premised on recapturing the integrity of the game and protecting student-athletes.⁶⁹ The NCAA, once an organization assembled to oversee intercollegiate championships, started to take its form as a powerful governing authority.⁷⁰

B. The Feds Step to the Plate: Early Sports Gambling Legislation

Traditionally, the states were independently responsible for regulating gambling activity.⁷¹ By the end of the nineteenth century, virtually all states prohibited gambling, but they began to loosen their gambling prohibitions in the early twentieth century.⁷² During the Great Depression, individual states began legalizing various forms of gambling to generate revenue for their dwindling coffers, but gambling on sports contests remained illegal nationwide.⁷³ The public remained strongly opposed to gambling on sporting events, but the states' inconsistent application of gambling laws, increasing popularity of sports generally, and inadequate regulation of sports gambling combined to enable illegal sports gambling to flourish throughout the early to mid-twentieth century.⁷⁴ Nevada was the first state to legalize intrastate sports gambling in 1949, but underground crime syndicates remained the primary channel for sports gambling, and the syndicates openly defied state laws prohibiting interstate bookmaking.⁷⁵ These circumstances motivated Congress to devise a coherent solution to combat the burgeoning underground sports gambling market.⁷⁶

In 1961, Congress passed a series of anti-gambling laws designed to thwart organized crime and illegal gambling operations and to protect the "integrity of the game."⁷⁷ These laws included the Wire Act, the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act, and, later, the Sports Bribery Act and the Illegal Gambling and Business Act.⁷⁸ Congress intended for these laws to complement existing state laws by further restricting organized crime and illegal sports gambling.⁷⁹ Although these federal laws successfully curbed illegal interstate gam-

⁶⁹ *Id.*; see generally Buckstaff, *supra* note 34, at 146–52.

⁷⁰ See Smith, *supra* note 35, at 12–16.

⁷¹ See Woo, *supra* note 9, at 571.

⁷² See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1468–69 (2018); Fielkow et al., *supra* note 13, at 26–27.

⁷³ See *Murphy*, 138 S. Ct. at 1469–70. However, during the Great Depression, New Jersey allowed pari-mutuel gambling on horse races to increase state revenue. *Id.* at 1469.

⁷⁴ *Id.* at 1468–70; Woo, *supra* note 9, at 573–74.

⁷⁵ See Fielkow et al., *supra* note 13, at 26–27.

⁷⁶ See Woo, *supra* note 9, at 573–74.

⁷⁷ *Id.*; see also Fielkow et al., *supra* note 13, at 27.

⁷⁸ See Fielkow et al., *supra* note 13, at 27.

⁷⁹ See Woo, *supra* note 9, at 574.

bling activities, each state was individually responsible for regulating gambling activity occurring within its borders.⁸⁰ Ultimately, the states' fractured enforcement measures failed to prevent illegal sports gambling, causing the Commission on the Review of the National Policy Toward Gambling to conclude in 1976 that "effective gambling law enforcement was an impossible task."⁸¹ Accordingly, the federal government half-heartedly enforced its anti-gambling laws, and illegal sports gambling persisted.⁸²

As illegal sports gambling flourished throughout the United States, the public's confidence in the integrity of sports waned.⁸³ In 1983 alone, close to \$8 billion was illegally gambled on sports games: this amount soared to nearly \$50 billion by 1989.⁸⁴ The inverse relationship between the public's confidence in sporting outcomes and the prevalence of illegal gambling was a recurring motif of mid- to late-twentieth century sports.⁸⁵ This relationship manifested itself again when Pete Rose was banned from baseball in 1989 for betting on his own team's games.⁸⁶ Yet, by 1991, despite the rising public criticism, at least thirteen states were considering legalizing sports gambling.⁸⁷

With renewed public criticism and the threat of state-sanctioned sports gambling, Congress felt that it must act to prevent the further erosion of the public's confidence in sports, to forestall the spread of illegal sports gambling in the United States, and to protect the integrity of professional and amateur sports.⁸⁸ Pundits cautioned that a federal ban on sports gambling would violate federalism principles by stepping on the toes of state legislatures.⁸⁹ Further, many experts viewed state-sanctioned gambling as a viable means of generating revenue to bolster states' coffers.⁹⁰ However, advocates for more stringent federal oversight—including the NCAA, the MLB, the National Football League ("NFL"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") (collectively, the "Leagues")—cited the increasing

⁸⁰ *Id.*

⁸¹ Fielkow et al., *supra* note 13, at 28.

⁸² *Id.* at 28–29.

⁸³ *Id.* at 29. A 1986 Sports Illustrated article is indicative of the public's perception of gambling as a plague on sports: "[N]othing has done more to despoil the games Americans play and watch than widespread gambling on them. As fans cheer their bets rather than their favorite teams, dark clouds of cynicism and suspicion hang over games, and the possibility of fixes is always in the air." John Underwood, *The Biggest Game in Town*, SPORTS ILLUSTRATED, Mar. 10, 1986.

⁸⁴ See Fielkow et al., *supra* note 13, at 29.

⁸⁵ *Id.* at 25–29.

⁸⁶ See Woo, *supra* note 9, at 575.

⁸⁷ See Fielkow et al., *supra* note 13, at 31.

⁸⁸ See Woo, *supra* note 9, at 575–76.

⁸⁹ *Id.* at 576.

⁹⁰ *Id.*

popularity and legalization of gambling in general and argued that sports gambling was particularly addictive among young people.⁹¹ Further, these advocates contended that sports gambling in the past had severely tarnished the integrity of the game.⁹² After weighing the competing concerns, President Bush signed PASPA into law on October 28, 1992, primarily intending to keep sports “clean” by decreasing the likelihood that a gambling scandal would affect the outcome of a sporting contest.⁹³

PASPA extended federal regulatory control over intrastate gambling activities and prohibited states from legalizing any new forms of sports gambling.⁹⁴ Section 3702 of PASPA made it illegal for any governmental agency or person to:

[S]ponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . 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.⁹⁵

PASPA did not make sports gambling a federal crime; rather, PASPA empowered the U.S. Attorney General and the Leagues to bring civil suits to enjoin violations.⁹⁶ However, since its enactment, “PASPA has operated as a de facto federal ban” on sports gambling.⁹⁷

PASPA contained two exceptions. First, PASPA contained a “grandfather provision” that exempted from the gambling ban states with legalized sports-gambling schemes in effect when Congress enacted PASPA.⁹⁸ Initially, four states qualified for this exception: Nevada, Delaware, Oregon, and Montana.⁹⁹ Second, PASPA provided a one-year window for states to satisfy the first exception by creating their own sports-gambling schemes.¹⁰⁰ At the time, New Jersey legislators were considering passing a bill that would legalize sports gambling, and Congress assumed that New Jersey would take advantage of the one-year

⁹¹ See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1469–70 (2018). Before 1988, only New Jersey and Nevada legally operated casinos, but the enactment of the Indian Gaming Regulatory Act in 1988 resulted in casinos opening on Indian land throughout the United States. By the early 1990s, legislators feared that the popularization of legalized gambling would spread to sports gambling. *Id.*

⁹² *Id.*

⁹³ Fielkow et al., *supra* note 13, at 30–32.

⁹⁴ See Woo, *supra* note 9, at 576.

⁹⁵ Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1992).

⁹⁶ See *Murphy*, 138 S. Ct. at 1470–71.

⁹⁷ Buckstaff, *supra* note 34, at 140.

⁹⁸ *Id.* at 140–41.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 141.

window by permitting sports gambling in Atlantic City.¹⁰¹ However, neither New Jersey nor any other state took advantage of the exception.¹⁰² Consequentially, a year after PASPA was enacted, only Nevada, Delaware, Oregon, and Montana were permitted to operate sports gambling schemes, and only Nevada permitted sports gambling on college athletics.¹⁰³

II. *MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*

Congress was optimistic that PASPA would restore the public's confidence in the integrity of sports and curb the spread of illegal sports gambling.¹⁰⁴ Unfortunately, neither of these expectations materialized and illegal sports gambling persisted after 1992, causing critics to challenge PASPA's effectiveness and question its constitutionality.¹⁰⁵ Opponents argued that PASPA violated the Commerce Clause and federalism principles, and they questioned the legitimacy of a federal ban that did not hold all states to the same standards and effectively granted a sports gambling monopoly to the states benefitting from the grandfather provision.¹⁰⁶

PASPA's inefficacy and questionable constitutionality created an opportunity for states and private actors to advocate for its repeal.¹⁰⁷ The first challenge came in 2009 when Delaware's governor attempted to sign into law a bill that would legalize gambling on professional and amateur sports at Delaware racetracks.¹⁰⁸ The Leagues filed a complaint with the U.S. District Court for the District of Delaware, and the U.S. Court of Appeals for the Third Circuit ultimately concluded that the Delaware law violated PASPA.¹⁰⁹ However, the suit inspired other challengers and foreshadowed what would be a near decade-long battle between federal courts and New Jersey legislators.¹¹⁰

This Section will discuss New Jersey's Sports Wagering Law of 2012 and the subsequent suit to enjoin its enactment, *Christie v. National Collegiate Athletic Association* ("*Christie P*"). Next, this Section will examine New Jersey's subsequent effort to legalize sports gambling and the

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 141–42.

¹⁰⁴ See Fielkow et al., *supra* note 13, at 32–33.

¹⁰⁵ See Buckstaff, *supra* note 34, at 142. Regarding PASPA's inefficacy, in 2015 alone, 97% of sports gambling was done illegally, representing between \$148–\$500 billion, compared to only \$4.2 billion in legal sports gambling at Nevada sportsbooks. Fielkow et al., *supra* note 13, at 23.

¹⁰⁶ See Buckstaff, *supra* note 34, at 142.

¹⁰⁷ See Fielkow et al., *supra* note 13, at 33.

¹⁰⁸ *Id.* at 33–34.

¹⁰⁹ *Id.*

¹¹⁰ See generally *id.*

suit that followed (“*Christie II*”), which ultimately made its way before the U.S. Supreme Court as *Murphy v. National Collegiate Athletic Association*.

A. *The Undercard: Christie I and Christie II*

Although New Jersey legislators failed to capitalize on PASPA’s one-year window to legalize in-state sports gambling, they “had a change of heart” when gaming revenue from New Jersey’s Atlantic City casino began to decline after the economic recession in 2008.¹¹¹ In 2009, a gaming association, several horseracing groups, and a New Jersey senator filed an action against the U.S. Attorney General, seeking a declaratory judgment that PASPA was unconstitutional.¹¹² The U.S. District Court for the District of New Jersey dismissed the case because, at the time, New Jersey did not have a sports gambling scheme in place that conflicted with PASPA.¹¹³ The District Court concluded that the threat of federal preemption alone was insufficient to challenge the constitutionality of PASPA “absent some interest in defending a particular state law.”¹¹⁴ Crucially, the District Court did not rule on the constitutionality of PASPA, which caused New Jersey legislators to double down.¹¹⁵

In 2012, New Jersey voters amended the state constitution to legalize gambling on professional and amateur sports.¹¹⁶ New Jersey’s economy was struggling, and voters hoped that revenue from legalized sports gambling would bolster state coffers and “stanch the sports-wagering black market flourishing within [New Jersey’s] borders.”¹¹⁷ The New Jersey legislature responded by enacting the Sports Wagering Law on January 17, 2012 (the “2012 Law”).¹¹⁸ The 2012 Law enabled New Jersey officials to license sports gambling in casinos and racetracks—a clear violation of PASPA.¹¹⁹

In response, on August 7, 2012, the Leagues sued New Jersey Governor Chris Christie, New Jersey’s Racing Commissioner, and New Jersey’s Director of Gaming Enforcement (collectively, “New Jersey”) in

¹¹¹ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1471 (2018).

¹¹² See *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. Mar. 7, 2011). The plaintiffs argued that PASPA’s limitation on sports gambling violated the following: the Commerce Clause, the First Amendment freedoms of expression and assembly, the Tenth Amendment, the Eleventh Amendment, the substantive and procedural protections of the Due Process Clause of the Fifth and Fourteenth Amendments, and the Equal Protection Clause. See *id.* at *2.

¹¹³ *Id.* at *10.

¹¹⁴ *Id.* at *10; see also Fielkow et al., *supra* note 13, at 34.

¹¹⁵ See Fielkow et al., *supra* note 13, at 34–35.

¹¹⁶ *Id.* at 35.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

the U.S. District Court for the District of New Jersey (“*Christie I*”), seeking to enjoin the 2012 Law.¹²⁰ The Leagues filed a motion for summary judgment, arguing that the 2012 Law violated PASPA, and, therefore, the Supremacy Clause of the U.S. Constitution.¹²¹ New Jersey countered that PASPA violated equal sovereignty principles and the Commerce Clause because of the alleged discriminatory exceptions that favored states with pre-PASPA sports-gambling schemes.¹²² Further, New Jersey argued that PASPA violated the anti-commandeering principle by prohibiting New Jersey from legalizing sports gambling and by requiring New Jersey to maintain laws that criminalized sports gambling.¹²³ The District Court rejected New Jersey’s arguments and granted the Leagues’ motion for summary judgment, which enjoined the 2012 Law from going into effect.¹²⁴ New Jersey appealed the District Court’s decision to the Third Circuit.¹²⁵

The Third Circuit affirmed the District Court’s judgment.¹²⁶ Regarding New Jersey’s Commerce Clause argument, the Third Circuit concluded that sports gambling is interstate commerce activity that falls within Congress’s purview under the Commerce Clause because: (1) gambling and sporting events are economic activities, (2) sporting events “substantially affect” interstate commerce, and (3) money gambled on sporting events “substantially affects” interstate commerce.¹²⁷ Next, the Third Circuit held that PASPA did not violate anti-commandeering principles, reasoning that PASPA merely invalidated states’ sports gambling laws and did not “require or coerce the states to lift a finger.”¹²⁸ Finally, the Third Circuit rejected New Jersey’s argument that PASPA violated the equal sovereignty principle, holding that Congress’s powers under the Commerce Clause pertain to matters of national concern requiring national solutions that “will necessarily affect states differently.”¹²⁹

Although the Third Circuit ruled against New Jersey in *Christie I*, it inadvertently suggested a way for New Jersey to legalize sports gambling without violating PASPA.¹³⁰ The Third Circuit wrote:

¹²⁰ See Nat’l Collegiate Athletic Ass’n v. Christie, 926 F. Supp. 2d 551, 551, 553 (D.N.J. 2013).

¹²¹ *Id.* at 556.

¹²² See *id.* at 557–58.

¹²³ *Id.* at 561–62.

¹²⁴ *Id.* at 579.

¹²⁵ See generally Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

¹²⁶ *Id.* at 241.

¹²⁷ *Id.* at 224–26.

¹²⁸ *Id.* at 231.

¹²⁹ *Id.* at 238; Fielkow et al., *supra* note 13, at 37.

¹³⁰ See Fielkow et al., *supra* note 13, at 38.

[W]e do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering. . . . [U]nder PASPA . . . a state may repeal its sports wagering ban. . . . Nothing [under PASPA] *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling licenses or the affirmative authorization by law of gambling schemes.¹³¹

New Jersey legislators felt that they had found a loophole that would enable them to legalize intrastate sports gambling.¹³² They tried their luck again in 2014.¹³³

Senate Bill 2460 (the “2014 Law”) was an “end-around” route to legalizing sports gambling.¹³⁴ Instead of passing a law that affirmatively authorized sports gambling—an option precluded by *Christie I*—New Jersey legislators repealed state law prohibitions on sports gambling.¹³⁵ This had the practical effect of permitting sports gambling in state-licensed racetracks and Atlantic City casinos.¹³⁶

In October 2014, the Leagues filed a complaint in the U.S. District Court for the Court of New Jersey (“*Christie II*”), challenging the 2014 Law and seeking declarative and injunctive relief against, among others, Governor Christie, the director of the New Jersey Division of Gaming Enforcement, the president of the New Jersey Senate, and the New Jersey Thoroughbred Horsemen’s Association (collectively, “New Jersey”).¹³⁷ The Leagues argued that the 2014 Law was “nothing more than a de facto authorization of sports gambling.”¹³⁸ They claimed that, by repealing the prohibition on sports gambling only at Atlantic City casinos and horse racetracks—venues that are state-licensed and regulated—the practical effect of the 2014 law was to affirmatively authorize and license sports gambling and, therefore, like the previous 2012 Law,

¹³¹ *Governor of New Jersey*, 730 F.3d at 232–33 (italics in original) (internal quotations omitted).

¹³² See Fielkow et al., *supra* note 13, at 38.

¹³³ *Id.* at 38–39.

¹³⁴ *Id.* In pertinent part, the 2014 Law states: “[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events” S. 2460, 216th Leg. (N.J. 2014).

¹³⁵ See Fielkow et al., *supra* note 13, at 39.

¹³⁶ *Id.*

¹³⁷ See Nat’l Collegiate Athletic Ass’n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014).

¹³⁸ Complaint for Declaratory and Injunctive Relief at 4, Nat’l Collegiate Athletic Ass’n v. Christie, 799 F.3d 259 (3d Cir. 2015) (No. 3:14-cv-06450-MAS-LHG), 2014 WL 5395199.

the 2014 Law violated PASPA.¹³⁹ The District Court agreed, and, on appeal, the Third Circuit affirmed the District Court's ruling, writing that New Jersey could not circumvent PASPA with "clever drafting."¹⁴⁰

A persuasive dissent from Third Circuit Judge Julio Fuentes provided New Jersey with a glimmer of hope.¹⁴¹ Judge Fuentes argued that the majority improperly equated laws that authorized sports gambling, which were prohibited by PASPA, with laws that repealed sports gambling prohibitions, which were not covered by PASPA.¹⁴² Further, Judge Fuentes exposed an inconsistency between *Christie I* and *Christie II*: if a partial repeal on sports gambling amounted to an authorization of sports gambling, then New Jersey must prohibit all sports gambling in perpetuity or until PASPA itself was repealed, which is the opposite of what the District Court stated in *Christie I* when it asserted: "[n]othing in these words *requires* that the states keep any law in place."¹⁴³

Likely inspired by this dissent, New Jersey filed a motion for a re-hearing of the case *en banc*, which the Third Circuit granted.¹⁴⁴ Despite Judge Fuentes' dissenting opinion, the Third Circuit panel affirmed the District Court's judgment.¹⁴⁵ The Third Circuit panel concluded that, although the 2014 law was a partial repeal of New Jersey's sports gambling prohibitions, it effectively authorized sports gambling.¹⁴⁶ Further, the Third Circuit panel rejected the reasoning from *Christie I* that a repeal could not constitute an authorization.¹⁴⁷ Regarding New Jersey's anti-commandeering argument, the Third Circuit panel wrote: "PASPA does not command states to take affirmative action, and it does not present a coercive binary choice."¹⁴⁸ The Third Circuit panel reasoned that Congress commandeers a state if it imposes a federal scheme on state officials but not when it merely invalidates contrary state laws.¹⁴⁹

¹³⁹ *Id.* at 1.

¹⁴⁰ Nat'l Collegiate Athletic Ass'n v. Christie, 799 F.3d 259, 267 (3d Cir. 2015).

¹⁴¹ *See id.* at 268–72 (Fuentes, J., dissenting).

¹⁴² *Id.* at 269 (Fuentes, J., dissenting) ("In holding that a partial repeal of prohibitions is state authorization, the majority must infer authorization. PASPA, however, contemplates more.")

¹⁴³ *Id.* at 270–71; *see also* Fielkow et al., *supra* note 13, at 41–42.

¹⁴⁴ *See* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389 (3d Cir. 2016) (*en banc*).

¹⁴⁵ *Id.* at 402.

¹⁴⁶ *Id.* The court reasoned that the 2014 law was an authorization because it "selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1472 (2018).

¹⁴⁷ *See Governor of New Jersey*, 832 F.3d at 402.

¹⁴⁸ *Id.* at 401.

¹⁴⁹ *Id.* at 400–02; *see also* Fielkow et al., *supra* note 13, at 43.

New Jersey filed a petition for writ of certiorari, which the U.S. Supreme Court granted on June 27, 2017.¹⁵⁰

B. *Main Event: Murphy v. NCAA*

The U.S. Supreme Court agreed to hear the case to settle the anti-commandeering issue.¹⁵¹ After weighing each side's arguments, the Court ruled on May 14, 2018, that PASPA violated the anti-commandeering doctrine, and it struck down the law.¹⁵²

Justice Samuel Alito, writing for the Court, began by resolving the parties' dispute over how to interpret the PASPA provision prohibiting states from "authorizing" sports gambling.¹⁵³ The Leagues urged a narrow interpretation, arguing that a state violates PASPA when it affirmatively authorizes sports gambling.¹⁵⁴ New Jersey argued for a broad interpretation, maintaining that a state violates PASPA by either affirmatively authorizing sports gambling or by repealing the state's prohibition on gambling.¹⁵⁵ The Court agreed with New Jersey's interpretation after analyzing Congressional intent behind the enactment of PASPA.¹⁵⁶ The Court concluded: "When a State completely or partially repeals old laws banning sports gambling, it 'authorizes' that activity."¹⁵⁷

Next, the Court considered the anti-commandeering argument.¹⁵⁸ The Court wrote that the anti-commandeering doctrine is "simply the expression of a fundamental structural decision incorporated into the Constitution . . . the decision to withhold from Congress the power to issue orders directly to the States."¹⁵⁹ The Court concluded that PASPA did exactly this: by prohibiting state authorization of sports gambling, PASPA "unequivocally dictates what a state legislature may and may not do."¹⁶⁰

The Court then turned to the Leagues' preemption argument—that the PASPA provision constitutes a valid preemption of conflicting state law under the Constitution's Supremacy Clause.¹⁶¹ The Court explained

¹⁵⁰ See Brief for Petitioners at 1, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (No. 16-476), 2017 WL 3774486.

¹⁵¹ See *Murphy*, 138 S. Ct. at 1473.

¹⁵² See Amy Howe, *Opinion Analysis: Justices Strike Down Federal Sports Gambling Law*, SCOTUSBLOG (May 14, 2018, 3:19 PM), <http://www.scotusblog.com/2018/05/opinion-analysis-justices-strike-down-federal-sports-gambling-law/>.

¹⁵³ *Murphy*, 138 S. Ct. at 1473.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1474.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1475–79.

¹⁵⁹ *Id.* at 1475.

¹⁶⁰ *Id.* at 1478.

¹⁶¹ *Id.* at 1479–81.

that, for a federal law to preempt a state law, the federal law must: (1) be a constitutional exercise of Congressional power and (2) regulate private actors and not States.¹⁶² Ultimately, the Court concluded that “the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because . . . there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States,” which is exactly what the anti-commandeering doctrine prohibits.¹⁶³

Having determined that the PASPA provision prohibiting states from authorizing or licensing sports gambling was unconstitutional, the Court considered whether the remaining PASPA provisions were severable.¹⁶⁴ The Court reasoned that Congress would not have wanted the rest of the PASPA provisions to survive without the authorization provision because the provisions collectively represented a coherent federal policy.¹⁶⁵ Accordingly, the Court concluded “that no provision of PASPA is severable from the provision directly at issue in these cases.”¹⁶⁶

In conclusion, the Court acknowledged that “the legalization of sports gambling requires an important policy choice, but the choice is not ours to make.”¹⁶⁷ The Court continued, “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”¹⁶⁸

III. MURPHY’S IMPACT ON THE NCAA

The Court’s decision in *Murphy* does not amount to the nationwide legalization of sports gambling. Rather, by overturning PASPA, the Court paved the way for states to individually legalize sports gambling within their borders.¹⁶⁹ Despite lofty expectations, only thirteen states have legalized sports gambling thus far.¹⁷⁰ However, the state-by-state

¹⁶² *Id.* at 1479.

¹⁶³ *Id.* at 1481.

¹⁶⁴ *Id.* at 1481–85. The remaining PASPA provisions included prohibitions on state-run sports lotteries, sports-gambling schemes by private actors, and the advertising of sports gambling. *See* Howe, *supra* note 152.

¹⁶⁵ *See* *Murphy*, 138 S. Ct. at 1484.

¹⁶⁶ *Id.* at 1484.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See* Johnson, *supra* note 27.

¹⁷⁰ *See* Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Aug. 2, 2019), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization. The thirteen states with full-scale state-regulated sports gambling are: Arkansas, Delaware, Indiana, Iowa, Oregon, Mississippi, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, and West Virginia. An additional eight jurisdictions recently passed sports gambling laws that will go into effect in 2019 or early 2020. These jurisdictions are: Illinois, Indiana, Iowa, Montana, New Hampshire, North Carolina, Tennessee, and Washington D.C. Twenty-six states are

trend points strongly towards near-nationwide legalization—all but seven states have announced their intention to legalize some form of sports gambling in the near future.¹⁷¹ The states contemplating legalizing sports gambling are mired in disputes regarding, among other issues: the ethical implications of sports gambling, the taxation rate, which entities may offer sports gambling, which events and sports may be wagered on, and whether the states should pay the sports leagues an integrity fee.¹⁷² Further, gambling controversies¹⁷³ in states that legalized sports gambling post-*Murphy* may have tempered the anticipated sports gambling frenzy, causing some states to adopt a “wait-and-see approach.”¹⁷⁴ Still, according to a poll conducted by the National Research Group (“NRG”), sixty percent of Americans support legalized sports gambling, leading many commentators to speculate that the nationwide legalization of sports gambling is inevitable.¹⁷⁵ Indeed, experts estimate that within five to ten years after the *Murphy* decision, twenty to thirty states will legalize sports gambling.¹⁷⁶

As further evidence of the national trend towards legalized sports gambling, the professional sports leagues—the NFL, NBA, MLB, and NHL—have done an about-face.¹⁷⁷ The very leagues that once staunchly opposed legalized sports gambling are now seeking a cut of the profits,

“moving towards legalization,” which means that sports gambling bills have been introduced to state legislatures for discussion. *See generally id.*

¹⁷¹ *Id.* Ryan Rodenberg speculates that, because of its historical opposition to any form of gambling, Utah is the only state that is unlikely to legalize some form of sports gambling.

¹⁷² *See* Jennifer Gaynor et al., *Will You Soon Be Able to (Legally) Bet on Sports Outside of Nevada?: What the Supreme Court Decision Really Means*, NEV. LAW. 8, 10 (Aug. 2018). An integrity fee would tax the handle (i.e. the amount of money bet) at a specified rate, which in turn would be paid to each league on which the sports gambling occurs. *See Sports Betting Integrity Fee*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/integrity-fee/> (last visited Sept. 30, 2018).

¹⁷³ *See, e.g.,* David Purdum & Ben Fawkes, *Leader Prevented from Making Final Wager in \$2.5M Betting Contest*, ESPN (Jan. 14, 2019, 11:45 AM), http://www.espn.com/chalk/story/_/id/25756205/draftkings-sports-betting-national-championship-ends-controversy-leader-prevented-making-final-wager. The 2019 DraftKings Sports Betting National Championship, hosted in Jersey City, NJ from January 11, 2019 to January 13, 2019, featured three days of gambling on NFL Divisional Weekend Games. The event was the first of its kind since states outside of Nevada began legalizing sports gambling after *Murphy*. The event ended in controversy after the leading gambler was prevented from betting his winnings from earlier in the day on a later contest, although other gamblers were able to do so. DraftKings accepted the blame, stating “We will learn from this experience and improve upon the rules and experience for future events.” *Id.*

¹⁷⁴ Helsel, *supra* note 6.

¹⁷⁵ *See* NAT’L RES. GRP., PLACE YOUR BETS: INSIDE THE FUTURE OF SPORTS BETTING, https://mma.prnewswire.com/media/703398/National_Research_Group_Polling_Data.pdf?p=pdf (May 17–18, 2018).

¹⁷⁶ *See* Helsel, *supra* note 6.

¹⁷⁷ *See generally* David Purdum, *How NBA Sparked the American Sports Gambling Gold Rush*, ESPN (Nov. 2, 2018), http://www.espn.com/chalk/story/_/id/25145786/why-nba-other-professional-leagues-jumping-sports-gambling.

sparking what many have dubbed the “American sports gambling gold rush.”¹⁷⁸ Instead of fighting the legalization of sports gambling, the professional sports leagues feel that they can leverage the impending bonanza into increased profits and viewership.¹⁷⁹

Unlike the professional sports leagues, the NCAA has consistently opposed legalized sports gambling.¹⁸⁰ After the Court’s decision in *Murphy*, Donald Remy, the NCAA’s chief legal officer, released a statement: “While we certainly respect the Supreme Court’s decision, our position on sports wagering remains.”¹⁸¹ Although the professional sports leagues and NCAA are both commercial entities that can financially benefit from legalized sports gambling, “there’s still an optical divide between professional sports leagues being close with gambling . . . [and] colleges, universities, or the NCAA doing those same things.”¹⁸² To be sure, the NCAA is a multibillion-dollar enterprise.¹⁸³ But unlike the professional sports leagues, the NCAA features *unpaid* athletes. This fact exposes the NCAA to constant ridicule, with pundits calling for student-athlete remuneration.¹⁸⁴ A close association with legalized sports gambling would further challenge the NCAA’s public image by focusing the spotlight on its profit motive and lending credence to the argument that the NCAA exploits student-athletes.

¹⁷⁸ *Id.* The NFL alone estimates that it can rake in upwards of \$2.3 billion in additional revenue from sports gambling. See Andrew Maykuth, *What are the Odds? Colleges Fear Sports Betting Will Lead to Cheating*, PHILA. INQUIRER (Sept. 18, 2018), https://journalstar.com/business/national-and-international/what-are-the-odds-colleges-fear-sports-betting-will-lead/article_12303375-200e-5832-a968-f8f1ea76346b.html.

¹⁷⁹ See David Purdum & Ryan Rodenberg, *Future of Sports Betting: the Marketplace*, ESPN (May 4, 2017), http://www.espn.co.uk/chalk/story/_/id/17892685/the-future-sports-betting-how-sports-betting-legalized-united-states-the-marketplace-look-like. According to an NRG poll, if sports gambling was legalized nationwide, 79% of sports gamblers indicated that they would watch more sports live rather than delayed, 77% indicated that they would watch more sports on TV, and 60% indicated that they would watch new sports that they did not previously watch. NAT’L RES. GRP., see *supra* note 175.

¹⁸⁰ See Stacey Osburn, *NCAA Examines Impact of Sports Wagering*, NCAA (July 19, 2018, 2:01 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-examining-impact-sports-wagering>.

¹⁸¹ *Id.*

¹⁸² Craig Meyer & Stephen J. Nesbitt, *Legalized Gambling is Close. So is a Big Decision for NCAA Schools*, PITTSBURGH POST-GAZETTE (July 17, 2018, 8:00 AM), <https://liber.post-gazette.com/news/state/2018/07/17/legalized-sports-betting-pennsylvania-ncaa-gambling-rules-pa-west-virginia-marshall-paspa/stori%E2%80%A6>.

¹⁸³ See, e.g., Patrick Mayhorn, *Why the Legalization of Sports Gambling is Bad for College Athletes*, LAND-GRANT HOLY LAND (May 15, 2018, 12:43 PM), <https://www.landgrant-holyland.com/2018/5/15/17354462/ncaa-football-why-legalized-gambling-is-bad-for-college-athletes>.

¹⁸⁴ *Id.*

A. *Policies and Rationale Underlying the NCAA's Anti-Gambling Stance*

Central to the NCAA's anti-gambling stance is the NCAA's mission to promote the integrity of the game.¹⁸⁵ The "integrity of the game"—previously discussed—refers to the notion that athletes should compete in good faith, untainted by corruption.¹⁸⁶ Gambling threatens the maintenance of competitive equity and promotes unethical conduct by tempting players, staff members, universities, and outsiders to influence the results of a contest, thereby jeopardizing the integrity of the game.¹⁸⁷

The NCAA's promotion of amateurism as a bedrock principle and celebration of the student-athlete ideal informs its apprehension towards sports gambling.¹⁸⁸ The NCAA "prides itself on the amateur status of its student-athletes."¹⁸⁹ Accordingly, the NCAA endeavors to maintain a clear demarcation between college athletes and professional athletes by promoting college athletes as "students first, athletes second."¹⁹⁰ This demarcation means that college athletes are forbidden from receiving benefits in connection with playing sports.¹⁹¹ Therefore, college athletes have a greater financial incentive to gamble than professional athletes, who have salaries and, oftentimes, lucrative endorsements.¹⁹² To protect the welfare of student-athletes and preserve amateurism, the NCAA has consistently opposed all forms of sports gambling.¹⁹³

The NCAA uses its rule-making and enforcement power to promote the integrity of the game, protect student-athletes, and preserve amateur-

¹⁸⁵ See Dennis Dodd, *College Football Will Struggle to Define "Integrity" in the Age of Legalized Sports Betting*, CBS SPORTS (Aug. 16, 2018), <https://www.cbssports.com/college-football/news/college-football-will-struggle-to-define-integrity-in-the-age-of-legalized-sports-betting/>.

¹⁸⁶ See Buckstaff, *supra* note 34, at 146.

¹⁸⁷ See *id.* at 146, 152–59.

¹⁸⁸ *Id.* at 149.

¹⁸⁹ Laws, *supra* note 7.

¹⁹⁰ See Brief for Employer at 4, *Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA)*, No. 13-RC-121359 (N.L.R.B. 2015).

¹⁹¹ See *Payment from Sports Team*, NCAA (July 2019), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Payment_from_team.pdf; *Prize Money*, NCAA (July 2019), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Prize_Money.pdf; *Promoting or Endorsing Commercial Products or Services*, NCAA (July 2019), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf; *Representation or Marketing by a Professional Sports Agent*, NCAA (July 2019), http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Agent_Representation.pdf.

¹⁹² See Buckstaff, *supra* note 34, at 157–59.

¹⁹³ See *Sports Wagering*, NCAA, <http://www.ncaa.org/enforcement/sports-wagering> (last visited Jan. 15, 2019). On its official website, the NCAA posts: "The NCAA opposes all forms of legal and illegal sports wagering, which has the potential to undermine the integrity of sports contests and jeopardizes the welfare of student-athletes and the intercollegiate athletics community." *Id.*

ism.¹⁹⁴ When a school joins the NCAA, it must agree to abide by the NCAA Constitution and bylaws.¹⁹⁵ These sources of authority enable the NCAA to enact binding rules and regulations and to exact punishments on its members for rules violations.¹⁹⁶ Crucially, the NCAA's power is limited: its power does not extend beyond member schools, staff, and student-athletes.¹⁹⁷

The NCAA cannot control whether members of the public gamble on NCAA games, but it can control (or attempt to control) gambling among its member schools, staff, and athletes.¹⁹⁸ Pursuant to its regulatory power, the NCAA enacted Bylaw 10.3, under which "it is unethical for certain individuals to engage in sports wagering."¹⁹⁹ Bylaw 10.3 states:

The following individuals shall not knowingly participate in sports wagering activities or provide information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition: (a) staff members of an institution's athletic department; (b) nonathletics department staff members who have responsibilities within or over the athletics department . . . ; (c) staff members of a conference office; and (d) student-athletes.²⁰⁰

The NCAA punishes student-athletes who violate the gambling prohibition, sometimes rescinding eligibility.²⁰¹ Additionally, the NCAA polices sports gambling by sharing the results of its investigations with the FBI, which sometimes results in federal repercussions for rulebreakers.²⁰² Each season, the NCAA educates member schools, staff, and student-athletes about its sports gambling rules and the penalties for rules violations.²⁰³

¹⁹⁴ Buckstaff, *supra* note 34, at 151.

¹⁹⁵ *Id.*

¹⁹⁶ See Walter T. Champion, *The NCAA "Doth Protest Too Much, Methinks" About DFS*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 117, 121 (2016).

¹⁹⁷ See Buckstaff, *supra* note 34, at 151.

¹⁹⁸ *Id.* at 146–47.

¹⁹⁹ *Id.* at 147. The NCAA defines "sports wagering" as "placing, accepting, or soliciting a wager (on a staff member's or student-athlete's own behalf or on behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest." NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-20 NCAA DIVISION I MANUAL § 10.02.1 (2019), available at <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

²⁰⁰ NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-20 NCAA DIVISION I MANUAL § 10.3 (2019), available at <http://www.ncaapublications.com/productdownloads/D120.pdf>.

²⁰¹ *Id.* § 10.3.2–10.4; see also Buckstaff, *supra* note 34, at 147.

²⁰² See Buckstaff, *supra* note 34, at 147–48.

²⁰³ *Id.* at 148.

B. “One More Headache”:²⁰⁴ *The NCAA’s Anticipated Challenges from the Legalization of Sports Gambling*

Ironically, commentators fear that legalized sports gambling makes college athletics *more* susceptible to gambling scandals.²⁰⁵ History has proven that college athletics is especially vulnerable to corruption: seven of the last nine major sports gambling scandals in the past twenty-five years have involved college athletics.²⁰⁶ With the nationwide legalization of sports gambling on the horizon, the NCAA should brace itself for an increase in gambling scandals.²⁰⁷ As former New York mobster and match-fixer Michael Franzese opines, “[t]he more access you have, the more people gamble. The more chance you have for things to awry. It’s very simple.”²⁰⁸ Tom McMillen—former Congressman, former NBA player, and CEO of an association of NCAA Division I athletic directors—agrees: “I’ll give you something that I’ll put 100% odds on. If gambling on colleges is [legal] in 20 or 30 states there is probably a 100% chance of a point-shaving scandal at some school.”²⁰⁹

The NCAA must grapple with the tension between shifting social mores and its staunch opposition to sports gambling.²¹⁰ Before *Murphy*, the NCAA’s apprehension towards sports gambling was consistent with the near-nationwide ban on sports gambling. This consistency gave a degree of rationality and legitimacy to its prohibition on sports gambling. However, as more states legalize sports gambling, student-athletes may question the divide between the NCAA’s stringent anti-gambling rules

²⁰⁴ Meyer & Nesbitt, *supra* note 182.

²⁰⁵ See, e.g., Dodd, *supra* note 185 (“[m]y greatest concerns really start with the integrity of our games” said Ross Bjork, Ole Miss’s athletic director, in an official statement following *Murphy*).

²⁰⁶ See Mike Fish & David Purdum, *Sports Leagues Stand Pat as Legal Gambling Spreads*, ESPN (Sept. 26, 2018), <http://www.espn.com/espn/print?id=24783436>.

²⁰⁷ See *id.* But see Andrew Maykuth, *What are the Odds? Colleges Fear Sports Betting Will Lead to Cheating*, PHILA. INQUIRER (Sept. 14, 2018), <http://www.philly.com/philly/business/college-sports-betting-ncaa-laws-pennsylvania-new-jersey-20180914.html> (arguing that an increase in legalized sports gambling will decrease the amount of gambling scandals in college sports because legal bookmakers have an incentive to ensure that the games and gambling are perceived to be fair).

²⁰⁸ Dodd, *supra* note 185.

²⁰⁹ Steve Berkowitz & Erik Brady, *Legalized Sports Betting Will Wreak Havoc on College Athletics. Or Not.*, USA TODAY (May 31, 2018, 4:28 PM), <https://www.usatoday.com/story/sports/college/2018/05/31/sports-betting-college-athletics-world-concerned-supreme-court-ruling/645367002/>.

²¹⁰ See Dennis Dodd, *Good Luck, NCAA: Supreme Court’s Sports Betting Ruling Hands System Latest Major Problem*, CBS SPORTS (May 14, 2018, 2:46 PM), <https://www.cbssports.com/college-football/news/good-luck-ncaa-supreme-courts-sports-betting-ruling-hands-system-another-major-problem/>.

and the increasing normalization of sports gambling throughout the nation.²¹¹

The widespread use of popular social media platforms like Twitter, Instagram, Facebook, and Snapchat render student-athletes increasingly accessible and vulnerable to outsiders seeking inside information.²¹² Gamblers already pressure student-athletes to leak confidential information about themselves, other players, the team, and strategy.²¹³ This outside pressure is not unique to student-athletes: trainers, staff, and even students may be targeted by gamblers and bookies seeking to gain an upper hand.²¹⁴ This is especially true for trainers, who possess valuable information regarding athletes' health and playing status.²¹⁵ Currently, the NCAA does not have a national injury reporting system.²¹⁶ As a result, gamblers sometimes approach trainers for medical information regarding a player's health and fitness.²¹⁷ A 2014 study found that eight percent of Division I trainers responding to the survey knew of a trainer who had been pressured to provide confidential information.²¹⁸ Tory Lindley, the athletic director at Northwestern University, speculates that the number is actually closer to twenty-five percent, and suggests that, with legalized sports gambling, that number "is only going to increase."²¹⁹

Additionally, as more states legalize sports gambling, student-athletes may be more tempted to gamble despite the NCAA's prohibition. In a pre-*Murphy* study conducted by the NCAA, fifty-four percent of male student-athletes and thirty-one percent of female student-athletes reported that they believed sports gambling was a harmless pastime despite its illegality.²²⁰ Additionally, twenty-four percent of male student-athletes indicated that they had violated NCAA bylaws by gambling on

²¹¹ *Id.* ("We are suddenly in [an] age when an NCAA athlete can legally bet on a game while losing his eligibility for doing so.")

²¹² See Buckstaff, *supra* note 34, at 156.

²¹³ See Sean Isabella, *Legal Gambling Could Put NCAA Athletes at Risk*, NEWBURYPORT NEWS (July 4, 2018), https://www.newburyportnews.com/sports/local_sports/legal-gambling-could-put-ncaa-athletes-at-risk/article_904a4ba7-deeb-5689-82b4-79c45b755f5%E2%80%A6; John Wolohan, *Why Legalizing Sports Betting is Good for the NCAA*, CHRON. HIGHER EDUC. (May 21, 2018), <https://www.chronicle.com/article/Why-Legalizing-Sports-Betting/243478>.

²¹⁴ See Berkowitz & Brady, *supra* note 209 ("Sometimes fellow students are in the best position to know if the quarterback wrenched a knee—or broke up with his girlfriend. That sort of information could be valuable to gamblers."); see also Fish & Purdum, *supra* note 206.

²¹⁵ See Fish & Purdum, *supra* note 206.

²¹⁶ See Dodd, *supra* note 185.

²¹⁷ See Fish & Purdum, *supra* note 206.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, TRENDS IN NCAA STUDENT-ATHLETE GAMBLING BEHAVIORS AND ATTITUDES 5 (2017).

sports for money.²²¹ The NCAA should expect these percentages to increase now that states are legalizing sports gambling.²²² Despite the NCAA's efforts to educate student-athletes about the dangers of gambling, some student-athletes may mistakenly believe that legal sports gambling displaces the NCAA's prohibition against sports gambling.²²³ Other student-athletes may knowingly defy NCAA rules because they disagree with the prohibition, feel that sports gambling is harmless, or self-align with the normalization of sports gambling.²²⁴

Further, student-athletes are financially vulnerable, which increases the likelihood that they will engage in sports gambling for money and makes them attractive targets for outsiders looking to influence the outcome of a game.²²⁵ Studies have found that most student-athletes live below the federal poverty line and that athletic scholarships fail to cover living essentials like clothing and food.²²⁶ Compounding this issue, most student-athletes are from low-income families that are unable to cover the difference between scholarship money and living essentials.²²⁷ Further, student-athletes are forbidden from receiving economic benefits, and, because of their rigorous training and academic schedules, they are left with little time for employment.²²⁸ Accordingly, many student-athletes resort to other means to compensate for their financial shortfalls—including sports gambling.²²⁹

The NCAA openly admits that a student-athlete's financial plight increases the likelihood that the student-athlete will be involved in a gambling scandal.²³⁰ As McMillan notes, “[i]n the last 25 years, all the [gambling] scandals involving players have been at the college level.”²³¹ McMillan believes that legalized sports gambling will only increase the likelihood that a player will be involved in a scandal.²³² Although match-fixing violates NCAA rules and federal laws, student-athletes—the majority of which will neither play professionally nor profit from their athletic ability—may be willing to risk jail time and a potential career to fix

²²¹ *Id.* at 1. The rate is much lower for women (about five percent). *Id.*

²²² *See* Dodd, *supra* note 210.

²²³ *See* Buckstaff, *supra* note 34, at 155.

²²⁴ *Id.* at 155–56.

²²⁵ *Id.* at 157–59.

²²⁶ *Id.* at 157.

²²⁷ *See* Adam J. Koblenz, *The Whole Nine Yards: Should Student-Athletes Score an Education and Compensation?*, 13 J. BUS. & TECH. L. 37, 57–58 (2018).

²²⁸ *See* Buckstaff, *supra* note 34, at 159.

²²⁹ *Id.*

²³⁰ *Id.* at 150. The NCAA states: “financially troubled student-athletes are viewed by organized gambling as easy marks for obtaining insider information or affecting the outcome of a game.” *Id.*

²³¹ Fish & Purdum, *supra* note 206.

²³² *Id.*

a game in exchange for money.²³³ Indeed, “telling a broke player from a family that’s struggling back home to keep the lights on not to receive money for point-shaving is a [hard] sell.”²³⁴

Furthermore, the legalization of sports gambling focuses the spotlight on the NCAA’s amateurism model. Commentators argue that the NCAA’s amateurism model perpetuates the black market in college sports gambling and many of the dangers faced by student-athletes.²³⁵ Professional athletes earn their money from clean and fair competition, so they are not likely to risk involvement in a gambling scandal. Amateur athletes, however, are not similarly incentivized to ensure the “integrity of the game,” which makes the NCAA uniquely vulnerable to corruption.²³⁶ As sports gambling scandals persist, the underlying financial inequities experienced by student-athletes will surface, making it even harder for the NCAA to defend its amateurism model and decision not to pay its athletes.²³⁷

Crucially, the NCAA cannot appear to profit from the legalization of gambling.²³⁸ The NCAA has already announced plans to host championship events in Nevada,²³⁹ which only fuels the claim that the NCAA’s amateurism model exploits student-athletes.²⁴⁰ For years, the NCAA has defended its amateurism model, arguing that it is the essential and driving force behind the NCAA’s product and that giving student-athletes a free education is fair remuneration.²⁴¹ But critics focus on the billions of dollars generated by the NCAA and its member schools through commercial and broadcasting ventures and compare it to the financial hardship experienced by its student-athletes.²⁴² These critics are already protesting that “the gambling law change is yet another way for everyone but players to profit on college athletics.”²⁴³ Indeed, if the NCAA receives extra money from sports gambling, “it will only give critics of the

²³³ See Wolohan, *supra* note 213.

²³⁴ Craig Meyer & Stephen J. Nesbitt, *The NCAA’s Amateur Model is Already Fragile. Will Legalized Sports Betting Kill It?*, PITTSBURGH POST-GAZETTE (July 19, 2018, 8:00 AM), <https://liber.post-gazette.com/news/state/2018/07/19/ncaa-amateurism-rules-college-sports-gambling-legalization-pa/stories/201807190036.print>.

²³⁵ See, e.g., Buckstaff, *supra* note 34, at 157–61.

²³⁶ Jen Booton, *Why the NCAA Needs a Robust Sports Betting Framework*, SPORTTECHIE (Apr. 23, 2018), <https://www.sporttechie.com/robust-sports-betting-framework-benefit-ncaa-needs/>.

²³⁷ See *id.*

²³⁸ See Wolohan, *supra* note 213.

²³⁹ See generally Ralph D. Russo, *NCAA Opens Door to Championships in States with Sports Bets*, ASSOCIATED PRESS (May 17, 2018), <https://www.apnews.com/d74128caa97240099a2352e3c9ca130e>.

²⁴⁰ See, e.g., Laws, *supra* note 7; Mayhorn, *supra* note 183.

²⁴¹ Mayhorn, *supra* note 183.

²⁴² See Buckstaff, *supra* note 34, at 160.

²⁴³ See Mayhorn, *supra* note 183.

NCAA more ammunition in their argument that the colleges are exploiting athletes and that the line between college and professional sports is increasingly blurry.”²⁴⁴ Combatting negative press in connection with sports gambling is likely an uphill battle for the NCAA. The NCAA derives the lion’s share of its revenue from television contracts and gate receipts, and legalized sports gambling is expected to increase television viewership and game attendance.²⁴⁵ Therefore, whether directly or indirectly, the NCAA is positioned to cash-in on legalized sports gambling.

IV. RECOMMENDED POST-MURPHY COURSES OF ACTION FOR THE NCAA

The NCAA is at a critical juncture. It is under relentless siege from the court of public opinion, causing some experts to suggest that doomsday is nearing for the NCAA’s amateurism model.²⁴⁶ In 2018 alone, among other issues, a former Clemson football player in *Jenkins v. NCAA* made significant headway in the argument for player compensation,²⁴⁷ basketball coaches, company executives, and sports agents were investigated for defrauding NCAA colleges with recruiting violations,²⁴⁸ a federal court suggested that student-athletes participating in revenue-producing sports might be employees under the Fair Labor Standards Act,²⁴⁹ and the NCAA cleared Michigan State University of any wrongdoing in the sexual assault cases involving Larry Nassar.²⁵⁰ Some com-

²⁴⁴ Wolohan, *supra* note 213.

²⁴⁵ *See id.*

²⁴⁶ *See, e.g.,* Dodd, *supra* note 185; *see also* Matt Norlander, *Legalized Sports Betting Presents the NCAA with an Amazing Opportunity, Not a Problematic Hurdle*, CBS SPORTS (July 23, 2018, 1:30 PM), <https://www.cbssports.com/college-basketball/news/legalized-sports-betting-presents-the-ncaa-with-an-amazing-opportunity-not-a-problematic-hurdle/>.

²⁴⁷ *See generally* Glenn M. Wong & Cameron Miller, *2018 Mid-Year Legal Issues in College Athletics*, ATHLETICDIRECTORU, <https://athleticdirector.com/articles/2018-mid-year-college-athletics-legal-issues/> (last visited Jan. 15, 2019). The attorneys argued that the NCAA’s compensation rules violate anti-trust law, and, in pre-trial rulings, the court agreed. At trial, the NCAA must prove that amateurism drives the consumer appeal of college sports or that paying student-athletes would harm the cohesion of a school’s educational and athletic functions. However, even if the NCAA succeeds in this argument, the players can still win if they show that less restrictive means can accomplish the NCAA’s desired result. *See id.*

²⁴⁸ *Id.* The investigations involve allegations that cash was funneled to high school basketball recruits in exchange for their commitment to play for a particular school or sign with a particular agency once they play professionally.

²⁴⁹ *Id.* The suggestion comes from *Berger v. NCAA*, which was decided in 2016, but athletes continue to bring suits arguing that they are employees who qualify for minimum wage and possible overtime compensation. The most recent case was *Livers v. NCAA*, which was decided in May 2018.

²⁵⁰ *See generally* Dan Murphy, *Michigan State: NCAA Finds No Rule Violations in Sexual Assault Cases*, ESPN (Aug. 30, 2018), http://www.espn.com/college-sports/story/_/id/24523562/michigan-state-says-cleared-violations-larry-nassar-scandal-ncaa. Larry Nassar was sentenced to 175 years in state prison for using his authority as a team doctor and physician to sexually abuse his patients. The NCAA cleared MSU, his employer, of any wrongdoing de-

mentators argue that the legalization of sports gambling is another major setback for the NCAA,²⁵¹ but others are quick to recognize the silver-lining: the legalization of sports gambling affords the NCAA an opportunity to devise a progressive, practical solution to repair its battered image and to promote goodwill.²⁵²

Currently, the NCAA is waiting to see how the sports gambling landscape will unfold before it acts. After the decision in *Murphy*, the NCAA established a working group to explore possible courses of action and to consider the challenges posed by legalized sports gambling.²⁵³ The NCAA also doubled down on educating member schools, staff, and student-athletes about the dangers of sports gambling and the potential rule violations,²⁵⁴ enhanced its sports gambling monitoring and detection systems,²⁵⁵ announced that it will not pursue sports gambling revenue,²⁵⁶ and issued a resolution to reinforce its commitment to student-athlete wellbeing and the promotion of the integrity of the game.²⁵⁷ Further, the NCAA openly supports efforts to reestablish federal control over sports gambling.²⁵⁸ NCAA president Mark Emmert remarked: “While we recognize the critical role of state governments, strong federal standards are necessary to safeguard the integrity of college sports and the athletes.”²⁵⁹

spite intense public outcries and reports from several former MSU athletes that their complaints to MSU authorities about Nassar’s abuse were not taken seriously. *See id.*

²⁵¹ *See, e.g.*, Buckstaff, *supra* note 34, at 162; *see also* Mayhorn, *supra* note 183.

²⁵² *See, e.g.*, Norlander, *supra* note 246.

²⁵³ *See NCAA Examining Impact of Sports Wagering*, NCAA (July 19, 2018, 2:01 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-examining-impact-sports-wagering>.

²⁵⁴ *Id.*

²⁵⁵ *See NCAA to Use Technology Services to Monitor Sports Wagering*, NCAA (Sept. 4, 2018, 5:00 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-use-technology-services-monitor-sports-wagering>.

²⁵⁶ *See* Steve Berkowitz, *NCAA Will Not Seek a Cut from Sports Betting*, *Association Executive Says*, USA TODAY (June 28, 2018), <https://www.usatoday.com/story/sports/2018/06/28/ncaa-not-seek-revenues-sports-betting/743201002/>.

²⁵⁷ *See* NCAA, *supra* note 255.

²⁵⁸ *See* Emily James, *NCAA Supports Federal Sports Wagering Regulation*, NCAA (May 17, 2018, 10:00 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-supports-federal-sports-wagering-regulation>. The NCAA supports a bill recently circulated by Senator Orin Hatch that would require state legislatures to obtain federal permission before passing their own sports gambling laws. The bill also contemplates requiring approval from two new federal organizations: a National Sports Wagering Commission and a National Sports Wagering Clearinghouse. The bill is premised on Congress’s power to regulate interstate commerce. *See* Joss Wood, *Federal Government Wants a Piece of Sports Betting Action, Says Sen. Hatch*, PLAYUSA (Dec. 18, 2018), <https://www.playusa.com/federal-government-legal-sports-betting/>.

²⁵⁹ James, *supra* note 258.

A. *Proposed Solutions for the NCAA in a Pro-Sports Gambling Climate*

Some commentators argue that the NCAA must redefine its amateurism model and pay student-athletes.²⁶⁰ They argue that because the NCAA's current model renders student-athletes financially vulnerable and more susceptible to sports gambling scandals, the NCAA should consider increasing the funds available to student-athletes during their academic careers.²⁶¹ One suggestion is that the NCAA treat student-athletes like employees.²⁶² However, the NCAA fears that this would blur the line between amateur and professional competition and disturb the innocence and honesty associated with the student-athlete ideal.²⁶³ Another suggestion is that the NCAA allocate some of its revenue to a trust payable to student-athletes upon graduation.²⁶⁴ In this way, student-athletes would not be paid for their performance while participating in intercollegiate competition, thus preserving amateurism.²⁶⁵ However, this solution provides only *future* financial security and does not address a student-athlete's immediate need for financial assistance.²⁶⁶ Other pundits suggest that the NCAA should allow colleges to create a stipend to supplement athletic scholarships, which would be payable during a student-athlete's college career.²⁶⁷ However, this solution disadvantages schools with small athletic programs that may be unable to afford an increase in scholarship amounts.²⁶⁸ Further, the NCAA fears that paying student-athletes would deplete the funds allocated by schools to their athletic programs, causing schools to cut or underfund currently-offered athletic programs.²⁶⁹

Others suggest that the NCAA should seek an integrity fee from states that legalize sports gambling.²⁷⁰ These commentators propose that the integrity fee collected by the NCAA be either reinvested into gambling oversight committees and compliance programs or provided back

²⁶⁰ See Buckstaff, *supra* note 34, at 162–63.

²⁶¹ *Id.*

²⁶² See, e.g., Art Carden, *College Athletes are Worth Millions. They Should be Paid Like It.*, FORBES (July 26, 2018, 4:22 PM), <https://www.forbes.com/sites/artcarden/2018/07/26/college-athletes-are-worth-millions-they-should-be-paid-like-it/#496aa8c5452e>.

²⁶³ See Buckstaff, *supra* note 34, at 163.

²⁶⁴ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1060–61 (9th Cir. 2015).

²⁶⁵ See Buckstaff, *supra* note 34, at 164–65.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 165–66.

²⁶⁸ *Id.*

²⁶⁹ See Laws, *supra* note 7, at 1225.

²⁷⁰ See Eric Ramsey, *NCAA Rejects Integrity Fee Concept in Laying Out Sports Betting Requests to Indiana Lawmakers*, LEGAL SPORTS REP. (Oct. 24, 2018), <https://www.legalsportsreport.com/25234/ncaa-indiana-sports-betting-integrity-fee/>.

to the players.²⁷¹ This solution has the dual advantage of aligning the NCAA's gambling policy with the national trend toward sports gambling legalization and placating demands to pay players.²⁷² In fact, several NCAA colleges have already successfully lobbied their respective states for integrity fees and have promised to dedicate a portion of the revenue to improve their compliance programs.²⁷³ However, the NCAA has stated that it will not pursue integrity fees because "it feels a little disingenuous . . . to think about taking revenue," although it recognizes that it will need to pay for the increased costs associated with policing sports gambling.²⁷⁴ Instead, the NCAA has announced that it will allow schools to individually pursue integrity fees: "Schools will need to look at their own values and decide [what to do]."²⁷⁵

Alternatively, the NCAA could sell its "official data" to sportsbooks and invest the revenue into gambling compliance programs, oversight committees, and educational campaigns.²⁷⁶ From a gambler's perspective, the accuracy and reliability of real-time sports data is incredibly important to ensure that odds are correctly set.²⁷⁷ Pre-*Murphy*, sportsbooks relied on third-party data providers to supply the data necessary to calculate gambling odds.²⁷⁸ Now, professional sports leagues are partnering with data collection companies to supply "official data" to sportsbooks, and commentators suggest that the NCAA should do the same.²⁷⁹ In fact, the NCAA has already expressed an interest in monetizing the use of "official data,"²⁸⁰ evidenced by its partnership with global

²⁷¹ See, e.g., Norlander, *supra* note 246; Dodd, *supra* note 185.

²⁷² See Norlander, *supra* note 246.

²⁷³ See Dodd, *supra* note 185. These schools include West Virginia University and Marshall University. Other schools—like Missouri University, Rutgers University, and the University of Connecticut—are also exploring this option. See David Purdum & Darren Rovell, *Missouri, Rutgers, UConn Among Schools Exploring Compensation for Costs Caused by Sports Betting*, ESPN (May 18, 2018), <http://www.espn.com/espn/print?id=23539466>.

²⁷⁴ Berkowitz, *supra* note 256.

²⁷⁵ *Id.*

²⁷⁶ See Benjie Cherniak, *A Trader's View on How the NCAA Should Approach Legal Sports Betting*, LEGAL SPORTS REP. (Apr. 18, 2019), <https://www.legalsportsreport.com/31482/sg-ncaa-legal-sports-betting/>.

²⁷⁷ See Nicholas Garcia, *How Much is Sports Betting Like a Financial Market? Data is Key in Both*, PLAYUSA (June 10, 2019), <https://www.playusa.com/sports-betting-financial-market-collide/>.

For example, a gambler watching a football game on the television may want to make a real-time bet that one team will win the game based on that team's score with one-minute left in the game. If the data available to the gambler—such as the time remaining in the game—is unreliable or lagging behind the real-time data available to a gambler watching in person, the gambler watching from home is at a serious disadvantage.

²⁷⁸ *Id.*

²⁷⁹ *Id.*; see also Cherniak, *supra* note 276.

²⁸⁰ See Ryan Rodenberg, *NCAA Pivots to Address Sports Betting Integrity*, ESPN (Mar. 11, 2019), https://www.espn.com/chalk/story/_/id/26229344/how-ncaa-pivoting-address-sports-betting-integrity.

tech firms Google Cloud and Genius Sports.²⁸¹ The NCAA has justified its partnerships as a means for engaging with fans and increasing viewership (thereby increasing revenue),²⁸² but it could also use its data-collection framework to sell “official data” to sportsbooks.

Some analysts suggest that the NCAA should relax its strict punishments for gambling violations.²⁸³ The normalization of sports gambling is starkly contrasted by the NCAA’s exacting punishments for gambling violations. The NCAA must now adapt to changing social mores if it hopes to survive. As former NCAA Vice President Oliver Luck remarked, “[a] full season of eligibility? That’s a lot, right? The membership, at some point, is going to want to . . . create some sort of sliding scale [for punishments].”²⁸⁴

Additionally, as some commentators suggest, the NCAA should create a mandatory injury-reporting policy for its members schools.²⁸⁵ Information regarding a player’s health and playing status often informs a gambler’s decision to make certain bets. For example, knowing that a team’s Heisman Trophy caliber quarterback is injured may cause a gambler to bet on the opposing team. Currently, individual coaches largely determine injury reporting, and they often prefer to withhold injury information for strategic reasons.²⁸⁶ Increased transparency may alleviate the pressure on insiders to leak confidential information, thereby protecting student-athletes and preserving the integrity of the game.²⁸⁷ However, a mandatory injury-reporting policy may run afoul of student and patient privacy laws and would require student-athletes to consent to having their injury information publicized.²⁸⁸ After considering these challenges, the NCAA announced that it will not implement nationwide injury-reporting standards for the 2019 football season.²⁸⁹

²⁸¹ See generally Brian Socolow, *Data Deal Gives NCAA Opportunity to Win Fans and Increase Revenue*, SPORTTECHIE (Dec. 17, 2018), <https://www.sporttechie.com/data-deals-give-ncaa-opportunity-win-fans-revenue-betting/>.

²⁸² *Id.*

²⁸³ See Dennis Dodd, *College Football Will Struggle to Define ‘Integrity’ in the Age of Legalized Sports Betting*, CBS SPORTS (Aug. 16, 2018, 4:32 PM), <https://www.cbssports.com/college-football/news/college-football-will-struggle-to-define-integrity-in-the-age-of-legalized-sports-betting/>.

²⁸⁴ Dodd, *supra* note 185.

²⁸⁵ See, e.g., Alex Kirshner, *College Football Might Get Mandatory Injury Reports. It’s Probably for the Best.*, SBNATION (Aug. 9, 2018, 12:11 PM), <https://www.sbnation.com/college-football/2018/8/9/17651764/injury-report-rules-ncaa>.

²⁸⁶ See Dodd, *supra* note 65. Mike Leach, head coach of the Washington State football team, stated: “Whatever weaknesses or vulnerabilities that we have as a team, I can’t possibly fathom why I would have any interest in revealing that to my opponent.” *Id.*

²⁸⁷ *Id.*

²⁸⁸ See Kirshner, *supra* note 285.

²⁸⁹ *NCAA Declines to Implement Football Injury Reports*, ESPN (Aug. 7, 2019), https://www.espn.com/college-football/story/_/id/27342925/ncaa-declines-implement-football-injury-reports.

Finally, many experts suggest that the NCAA should lobby states to prohibit sports gambling on local teams or college athletics in general.²⁹⁰ New Jersey's sports gambling laws expressly prohibit gambling on local college teams, such as Rutgers University, and other states are considering similar prohibitions.²⁹¹ However, some states permit gambling on local college teams,²⁹² and if states may individually legislate sports gambling, it is unlikely that the NCAA will be able to achieve nationwide uniformity. Further, other experts argue that prohibiting gambling on local teams is counterproductive: it funnels would-be legal gamblers to underground channels and encourages behavior detrimental to student-athlete wellbeing and the integrity of the game.²⁹³

B. Leveraging the Sports Gambling Goldrush into a Positive Public Image

Instead of distancing itself from the nationwide normalization and legalization of sports gambling, the NCAA has an opportunity to utilize sports gambling to restore the public's confidence in the NCAA's mission to protect student-athletes and to promote the integrity of the game. The NCAA has binding power over its member schools, staff, and student-athletes. If the NCAA leans primarily on this power to combat the dangers associated with sports gambling, the NCAA is likely to be only marginally effective. Too many actors have too much of a say in how legalized sports gambling will unfold, and the NCAA, without the power to affect binding national decisions, cannot afford to watch from the sidelines. The forces of change are in motion, and the NCAA would be wise to redirect this momentum in a positive direction.

Despite the NCAA's limited regulatory and enforcement power, the NCAA still has a valuable asset: it can determine the location of NCAA events. For a state, hosting an NCAA event—especially an NCAA tournament game—can be incredibly profitable.²⁹⁴ State officials devote large amounts of time and resources to host NCAA events because they

²⁹⁰ Brian Pempus, *NCAA Will Need States to Help Implement Total Athlete Betting Ban*, US BETS (Apr. 22, 2019), <https://www.usbets.com/ncaa-college-betting-prohibition/>.

²⁹¹ See Morgan Moriarty, *You Can't Bet on Rutgers in New Jersey, Which is Funny, but a lot of States Will Have Gambling Laws Like That*, SBNATION (June 14, 2018, 12:02 PM), <https://www.sbnation.com/college-football/2018/6/14/17464124/rutgers-bets-new-jersey-sports-gambling>.

²⁹² *Id.* Nevada, for example, permits gambling on in-state college teams.

²⁹³ *Id.*

²⁹⁴ See Denise Neil et al., *The NCAA Tournament Has Come and Gone from Wichita: How'd We Do?*, WICHITA EAGLE (Mar. 18, 2018), <https://www.kansas.com/news/article205507164.html>; Trace Welch, *It Pays to Host: Economic Benefits of Hosting the NCAA Tournament*, FRONT OFF. SPORTS (Mar. 26, 2015), <https://frntofficesport.com/it-pays-to-host-economic-benefits-of-hosting-the-ncaa-tournament/>.

know that the host city stands to gain a significant economic stimulus.²⁹⁵ Economic benefits include profits from transportation, lodging, food and beverage sales, recreational activities, business services, and event space rentals.²⁹⁶ For example, in 2015 when Seattle hosted several NCAA March Madness tournament games, it generated around \$7.8 million in economic benefits and \$957,000 in tax revenue for the greater Seattle area.²⁹⁷ Analysts estimate that hosting a weekend of NCAA March Madness tournament games can generate between \$10 million to \$15 million for a host city.²⁹⁸ Expect that profit margin to increase in a state that authorizes gambling on college athletics. Keeping this in mind, the NCAA has several options for accomplishing its sports gambling agenda.

First, the NCAA should refuse to host championship events in states that permit sports gambling. In fact, the NCAA has successfully utilized this strategy in the past to lobby for political change. For example, the NCAA pulled seven championship events out of North Carolina in protest of the State's law on bathroom use by transgender people, leading experts at the time to speculate that the potential lost revenue could be the "tipping point" in the battle for the repeal of the law.²⁹⁹ Further, the NCAA refused to host events in South Carolina until South Carolina in 2015 removed the Confederate flag flying over the South Carolina Statehouse.³⁰⁰

The NCAA is unlikely to successfully lobby a state to repeal or prohibit a law permitting sports gambling in general because the professional sports leagues have already embraced sports gambling, but it might successfully lobby a state to prohibit gambling on college athletics. In this way, the NCAA can leverage the sports gambling bonanza to align states' gambling policies with its own anti-gambling position. This strategy may also improve the NCAA's public image. By boycotting states that allow gambling on college games, the NCAA weakens the claim that it seeks to exploit student-athletes and strengthens its position that it endeavors to protect student-athletes and promote the integrity of the game.

²⁹⁵ See Welch, *supra* note 294.

²⁹⁶ See Geoff Baker, *Hosting NCAA Tournament Games Has Tangible Benefits*, SEATTLE TIMES (Mar. 15, 2015, 9:16 PM), <https://www.seattletimes.com/sports/ncaa-tournament/hosting-ncaa-tournament-games-has-tangible-benefits/>.

²⁹⁷ See Welch, *supra* note 294.

²⁹⁸ See Jeff Hartsell, *Open for NCAA Business with Confederate Flag Down, Palmetto State Back in the Game*, POST & COURIER (May 19, 2016), https://www.postandcourier.com/sports/open-for-ncaa-business-with-confederate-flag-down-palmetto-state/article_76d0bd8a-6782-5115-b6f0-d633bdd%E2%80%A6/.

²⁹⁹ Jonathan Drew & Gary D. Robertson, *Lost Revenue from NCAA Decision may be N.C.'s Tipping Point*, ASSOCIATED PRESS (Sept. 13, 2016, 5:31 PM), <https://www.courant.com/sports/hc-north-carolina-lgbt-0914-20160913-story.html>.

³⁰⁰ See Hartsell, *supra* note 298.

However, the NCAA faces a significant challenge: forty-three states have legalized or intend to legalize sports gambling, and many of these states permit or intend to permit gambling on college athletics.³⁰¹ Some states with pending sports gambling legislation—such as New Hampshire, Maine, Virginia, and Vermont—do not intend to permit in-state sports gambling,³⁰² and other states—such as Tennessee—intend to restrict the form of gambling on college athletics.³⁰³ Therefore, the NCAA might have more success if, instead of demanding that a state prohibit gambling on college athletics generally, it refuses to host NCAA events in states that permit gambling on college athletic competitions occurring within the state or, if that does not work, on any competition involving an in-state college. The NCAA could further cabin its demands while still improving its public image by lobbying for a prohibition on certain types of sports gambling that pose a unique risk to player safety and the integrity of the game, such as real-time gambling on college athletics.³⁰⁴

Alternatively, the NCAA should demand an integrity fee in exchange for allowing a state to host NCAA events. The NCAA opposes an integrity fee because it does not want to appear to exploit its student-athletes and because it sees accepting an integrity fee as inconsistent with its anti-gambling stance. However, the NCAA can accept an integrity fee and remain true to its mission. Integrity fee revenue could be reinvested into compliance programs, oversight committees, or anti-gambling educational campaigns. Further, should any of the many pending suits against the NCAA result in a determination that the NCAA must pay student-athletes, the NCAA could dip into the integrity fee revenue. States may oppose paying the NCAA an integrity fee because doing so reduces state revenue,³⁰⁵ but the NCAA may try to force a state's hand by threatening to withhold lucrative NCAA events. Although this strategy requires the NCAA to roll back its anti-gambling stance, it leverages one of the NCAA's assets to capitalize on the sports gambling gold rush

³⁰¹ See Rodenberg, *supra* note 170.

³⁰² *Id.*

³⁰³ *Id.* For example, Tennessee prohibits in-game prop bets on college athletics.

³⁰⁴ On February 20, 2019, a fan at a Georgia v. Mississippi State college basketball game threw a small stuffed toy onto the court with 0.5 seconds left in the game. The toss came as a Mississippi State player was shooting free-throws. As a result, Georgia was assessed a technical foul and the Mississippi State player earned an extra free-throw. 0.5 seconds later, Mississippi State won the game, 68-67. Incidents like this highlight the dangers to player safety and the integrity of the game inherent in sports gambling, as some commentators speculate that the toss may have been motivated by the fan's desire to influence the outcome of the game based on a sports wager made by the fan. Logically, this risk of danger is exacerbated when courtside gamblers can place real-time bets. See *Georgia Assessed Critical Technical Foul after Fan Throws Stuffed Toy on Court*, ESPN (Feb. 20, 2019), <https://www.espn.com/mens-college-basketball/recap?gameId=401083081>.

³⁰⁵ See LEGAL SPORTS REP., *supra* note 172.

and utilizes profits to better achieve its mission to protect student-athletes and promote the integrity of the game.

CONCLUSION

Just as sports gambling promotes viewership, attracts commercial interests, and encourages fan interaction, it forces sports leagues to redefine their core values to maintain the “integrity of the game” and protect athletes. It challenges sports leagues to reconcile their promotion of honest and fair competition with the near-nationwide normalization of an activity replete with under-the-table dealing, corruption, and scandal. Common sense dictates that gamblers prefer safe bets, yet gambling is necessarily a calculated risk-taking in an uncertain outcome. The history of sports gambling has shown that uncertainty can be combatted by incentivizing players and teams to dictate the outcome of the wager.³⁰⁶ This is the challenge faced by the NCAA, which must determine how to steer financially-destitute athletes away from the temptation to score a quick profit while battling poor public relations and challenges to its amateurism model and student-athlete ideal. One thing is certain, however: the NCAA is both the cause and cure of many its problems.

The Supreme Court’s decision in *Murphy* opened the door to the nationwide legalization of sports gambling.³⁰⁷ States, private entities, and individual actors are scrambling to participate in the sports gambling gold rush. The NCAA should view this scramble as an opportunity to improve its public relations, protect its student-athletes, and maintain its amateurism model. Instead of joining the scramble, the NCAA should leverage its ability to determine the location of highly profitable NCAA events to effect positive change.

³⁰⁶ See John Holden, *Match Fixing and Other Manipulations In Sports Betting: A Primer*, LEGAL SPORTS REP. (June 4, 2018, 4:00 PM), <https://www.legalsportsreport.com/20922/match-fixing-primer-sports-betting/>.

³⁰⁷ See Quinn Emanuel Urquhart & Sullivan, LLP, *August 2018: The Implications of the United States Supreme Court’s Murphy v. NCAA Decision on Legalized Sports Betting*, JD SUPRA (Aug. 5, 2018), <https://www.jdsupra.com/legalnews/august-2018-the-implications-of-the-19446/>.

