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WHAT ARE THE ODDS? THE POTENTIAL FOR TRIBAL CONTROL OF SPORTS GAMBLING AFTER *MURPHY v. NCAA*

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I. Introduction

Professional and amateur sports have historically been somewhat of a triple threat, operating as a source of entertainment, pride, and revenue for athletes, fans, and government entities alike. Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992 to prevent states from authorizing sports betting in an attempt to protect the integrity of sporting events.[1] This federal regulation took power away from the states to unilaterally choose their stance on sports gambling until May 14, 2018, when the Supreme Court ruled on the Act's constitutionality after several attempts by the State of New Jersey to enact legislation allowing for sports betting and gambling within their borders.[2] New Jersey's roll of the dice opened the door for state, federal, and tribal regimes to evaluate the opportunities and challenges associated with execution and regulation of sports betting moving forward. This Note will briefly discuss the history of sports betting in the United States, the enactment and purpose of the Professional and Amateur Sports Protection Act, New Jersey's legal history involving the Act, the decision of the Supreme Court in *Murphy v. National Collegiate Athletic Association*, and why this decision could make Indian tribes the ideal sports bookies.

II. Brief Introduction to Gambling History and Perception in the United States

Gambling law in the United States can best be described as a wild card, with perception and legality of the high stakes game changing throughout the years.[3] "Games of chance" have been utilized since the beginning of American history, as settlers used these games as a way to generate funds

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1. 28 U.S.C. § 3702 (2012).
2. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
3. *See id.* at 1468–69.

for the establishment of the colonies, in addition to entertainment.[4] Revenue from gaming, usually in the form of lotteries, was used by colonists to "build cities, establish universities, and even to help finance the Revolutionary War."[5] Though such forms of gambling were generally approved of early on, the acceptance of gambling, customarily a state-regulated activity, began to fade in the nineteenth century, and by the beginning of the twentieth century gambling was largely outlawed throughout the country.[6] The Great Depression, however, forced states in desperate need of revenue to reconsider gambling, which once again led to the legalization of certain gaming operations within the states.[7] For example, New Jersey, the state that challenged PASPA in *Murphy v. NCCA,* outright banned gambling in their constitution in 1897, but beginning in 1929, the effect of the Great Depression led them to rethink their stance on games of chance.[8] In an effort to increase revenue, the state authorized horse racing betting, which was followed soon thereafter by bingo games at church forums and nonprofit organizations and a state lottery system.[9]

Atlantic City, New Jersey's most notable tourist attraction, began to view casino gambling as an opportunity to regain status in the 1960s after years of economic downturn deterred business.[10] The city's need to revitalize led to a failed referendum to legalize casinos statewide, but received a second wind in 1976 when voters approved city-specific legalization for casinos in Atlantic City.[11] Nevada was the only other state operating legal gambling casinos at that time, which meant that Atlantic City essentially held a monopoly over the eastern coast of the United States for casino gambling

4. *A History of American Gaming Laws,* HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/a-history-of-american-gaming-laws-31222 (last visited Sept. 25, 2018).

5. Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571 (2013) (quoting Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C.L. REV. 11, 12 (1992)).

6. *A History of American Gaming Laws*, *supra* note 4.

7. Woo, *supra* note 5, at 572 (citing ROGER DUNSTAN, CAL. RESEARCH BUREAU, NO. CRB-97-003, GAMBLING IN CALIFORNIA ch. 2 (1997), https://web.archive.org/web/|20100206012146/http://www.library.ca.gov/CRB/97/03/Chapt2.html ("History of Gambling in the United States")).

8. *Murphy*, 138 S. Ct. at 1469.

9. *Id.*

10. David G. Schwartz, *Atlantic City's History of Second Chances & Salt Water Taffy*, FORBES (Jun. 28, 2018, 8:10 AM), https://www.forbes.com/sites/davidschwartz/2018/06/28/why-we-should-all-be-rooting-for-atlantic-city-today/#142d9d6a6529.

11. *Id.*; *see also Murphy*, 138 S. Ct. at 1469.

operations.[12] The scarcity of gambling destinations in the United States resulted in a boom of gambling tourism in Atlantic City.[13]

In addition to state approved gaming operations, Indian tribes utilized small scale gaming activities until the passage of the "Indian Gaming Regulatory Act" on October 17, 1988, when casinos on tribal land became the norm.[14] Although legal gambling casinos operated in select states and on Indian land, Nevada was the only state in which legal sports gambling inside casinos existed.[15] Sports betting has informally been a part of the sports industry since the establishment of professional and amateur leagues in the United States in the late nineteenth century.[16] Participating in sports betting has consistently been a popular pastime, however, there have also been many fears associated with combining sporting events and gambling. Because sports gambling has generally been illegal throughout the United States, the practice of wagering bets on games has primarily been a closed-door practice between friends and fans.[17] For instance, "Analysts estimate that gamblers in the United States wager as much as $150 billion each year illegally through bookies and offshore accounts, as well as through less formal wagers, such as office pools around the men's NCAA basketball tournament."[18] Traditionally, professional and amateur sports entities have resisted broad legalization of sports betting in recognition of the chance that the outcome of the game will no longer reflect the "struggle of opponents," but instead reflect the "betting line or point spread."[19] Too, "Professional leagues already fight an image problem with drug scandals, commercial exploitation of cities and fans, racial inequities among players and administrative personnel, as well as a few gambling scandals involving high profile players[.]"[20] Sports gambling scandals, like Arnold Rothstein paying

12. *Murphy*, 138 S. Ct. at 1469.

13. *See id.*

14. 25 U.S.C. §§ 2701–2721 (2012).

15. *Murphy*, 138 S. Ct. at 1469.

16. Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 283 (2012) (citing DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 29–30 (William R. Eadington ed., 2005)).

17. *See id.* at 284.

18. Kevin Draper, Tim Arango & Alan Blinder, *Indian Tribes Dig In to Gain Their Share of Sports Betting*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/sports/sports-betting-indian-casinos.html.

19. James H. Frey, *Gambling on Sport: Policy Issues*, 8 J. GAMBLING STUD. 351, 358 (1992).

20. *Id.*

off members of the Chicago White Sox baseball team to try and throw the World Series, helped generate the narrative and well-accepted argument against widespread legalization of sports gambling.[21] In addition to the potential impact on the outcome of games and pressure on athletes, there is also a concern centered around the impact sports betting can have on fans. "Opponents [of sports betting] argue that it is particularly addictive and especially attractive to young people with a strong interest in sports, and in the past gamblers corrupted and seriously damaged the reputation of professional and amateur sports."[22] The legislature and leagues took these worries into consideration to establish a federal regulation—the Professional and Amateur Sports Protection Act—in an attempt to monitor and prohibit the further spread of issues associated with gambling and betting on professional and amateur sporting events.

III. Language and Implications of the Professional and Amateur Sports Protection Act

The fear of corruption associated with the allowance of sports betting and the impact on athletes, fans, and game integrity led to the enactment of the Professional and Amateur Sports Protection Act in 1992.[23] Prior to the enactment of PASPA, the federal government did not have regulatory authority over sports gaming as this power was left to the states to individually regulate. PASPA effectively gave the federal government power over the states to control the legality of sports gambling throughout the country, taking away this power from the states almost entirely. Title 28 U.S.C. § 3702 states:

> It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes

21. Woo, *supra* note 5, at 572.
22. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1469–70 (2018).
23. 28 U.S.C. § 3702 (2012).

> participate, or are intended to participate, or on one or more performances of such athletes in such games.[24]

Some of the largest proponents of the passage of the Act were the professional and college amateur leagues, specifically the National Collegiate Athletic Association (NCAA).[25] Within amateur leagues, there are concerns centered around the notion that student athletes are easily affected by betting and the appeal of making a quick buck.[26] NCAA officials fear that "kids" are more inclined to throw a game or pay attention to a betting line because they are more easily influenced by money due to their immaturity.[27] Those in favor of the enactment of PASPA saw enhanced federal regulation as a way to ensure the protection of the "integrity of sports by proscribing the development of sports gambling."[28] Regulation that stopped the growth of sports gambling allowed proponents of the Act to ensure the security of professional and amateur sports and protection of athletes moving forward. "PASPA's legislative history reflects the law's three basic goals: (1) to stop the spread of state-sponsored sports gambling, (2) to maintain sports' integrity, and (3) to reduce the promotion of sports gambling among America's youth."[29] Despite these policy considerations, those opposed to the enactment of PASPA, including the Department of Justice, most feared the Act would interrupt the states' right to regulate their own policies regarding gaming.[30] Notwithstanding this fear, PASPA was passed, prohibiting states from regulating sports gaming issues within their own borders—a power the states had historically held.[31]

PASPA included a provision that exempted states who allowed for sports betting between 1976 and 1990 from the authoritative and restrictive

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24. *Id.* Definitions for the Act are included in 28 U.S.C. § 3701 (2012)).

25. *Murphy*, 138 S. Ct. at 1470.

26. Adam Edelman, *As States Race to Launch Sports Betting, Calls Grow for Congress to Protect Games' Integrity*, NBC NEWS (May 14, 2018), https://www.nbcnews.com/politics/politics-news/states-race-launch-sports-betting-calls-grow-congress-protect-games-n874051.

27. *See id.*

28. Woo, *supra* note 5, at 575 (quoting Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5 (1992)).

29. Meer, *supra* note 16, at 288; *see* S. REP. NO. 102-248, at 4–5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3553–55.

30. *Id.*

31. *See* 28 U.S.C. § 3702 (2012).

language of the Act.[32] Title 28 U.S.C. § 3704(a) provides that § 3702 shall not apply to numerous categories of gaming and wagering, "to the extent that the scheme was conducted by that State or other *governmental entity* at any time during the period beginning January 1, 1976, and ending August 31, 1990[.]"[33] When PASPA was passed, Nevada, Oregon, Delaware, and Montana all had some form of sports gaming operation in place.[34] This provision allowed these select states to continue operating sports betting schemes that began before PASPA.[35] Section 3704(a)(3)(A)–(B) of the Act further permitted other states, like New Jersey, a one-year grace period during which the state could legalize sports gambling before the regulation of PASPA would prohibit them from doing so.[36] The Act provided an exemption for gaming schemes implemented in municipal casinos within one year of the Act's effective date, so long as the municipality previously operated a "commercial casino gaming scheme" throughout the ten years leading up to the effective date, "pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality[.]"[37]

The language presented is best referred to as a "grandfather" provision that permitted sports gaming activities to continue in states where sports gambling was previously legal, and similarly allowed other states the opportunity to legalize sports gambling activities within a one year period after the Act's effective date.[38] Despite New Jersey's historic relationship with gambling and Atlantic City's appeal to gamblers, the state was forced to comply with PASPA when the state failed to pass legislation within the one-year grace period.[39]

A. National Collegiate Athletic Association v. Christie*—2012 Act*

The constraints of PASPA tied the states' hands from making their own decisions regarding sports betting, which led New Jersey to challenge the Act. At the time PASPA was ultimately passed and enacted, New Jersey did not see the need to take advantage of § 3704(a)(3)(A)–(B), which would

32. *Id.* § 3704.
33. *Id.* § 3704(a)(1).
34. Meer, *supra* note 16, at 287.
35. *Id.*
36. 28 U.S.C. § 3704(a)(3)(A); *see also* Meer, *supra* note 16, at 287.
37. 28 U.S.C. § 3704(a)(3)(A)–(B).
38. *Id.* § 3704(a)(1)–(3); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).
39. Meer, *supra* note 16, at 289; *see also Murphy*, 138 S. Ct. at 1471.

have allowed for the enactment of some form of legislation regarding sports betting in the state.[40] By failing to act within the window of opportunity provided by the Act, New Jersey missed its chance for state regulation of sports betting to continue. In 2011, Atlantic City began facing tourism competition once again, which lead the state to decide they wanted to allow sports betting in casinos throughout the state after holding a series of public hearings on the issue.[41] The legislature then drafted a referendum seeking public approval to amend the New Jersey Constitution to allow sports betting, which was favored by 64% of New Jersey voters.[42] After receiving approval from voters, the legislature enacted the "Sports Wagering Act," known as the "2012 Act."[43] The 2012 Act directly conflicted with the restrictions set forth in PASPA because the 2012 Act legalized sports betting in "privately owned casinos and racetracks located in the state [of New Jersey]."[44] The 2012 Act was largely opposed by the NCAA and other major league sports entities, such as the National Basketball Association (NBA), National Hockey League (NHL), National Football League (NFL), and the office of the Commissioner of Baseball, who together brought an action in federal court.[45] The parties jointly sued the Governor of New Jersey at the time, Christopher Christie, and other New Jersey state officials.[46]

The sports entities collectively opposed the 2012 Act on the grounds that it violated the regulations proscribed in PASPA.[47] In return, "[t]he State and other Defendants who intervened in the case, argue[d] that PASPA violate[d] the federal Constitution and cannot be used by the Leagues to prevent the implementation of legalized sports wagering."[48] The District Court Judge disagreed with the State's argument, stating that they are

40. *See* David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book?*, GLOBAL GAMING BUS., July 2008, at 36, http://www.rmclegal.com/docs/media/Why%20doesnt%20every%20casino%20have%20a%20sports%20betting.pdf.

41. Axel Schamis & Katherine Van Bramer, *Christie v. National Collegiate Athletic Association*, CORNELL L. SCH. LEGAL INFO. INST.: SUP. CT. BULL., https://www.law.cornell.edu/supct/cert/16-476 (last visited Sept. 30, 2018).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

48. Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 554 (D.N.J.), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

required to "adopt an interpretation that would deem the statute constitutional so long as that reading is reasonable."[49] In doing so, the district court found that PASPA, under the Commerce Clause, was a reasonable expression of Congress's powers.[50] The court found it important that the Act allowed for states to continue operating their sports betting regimes if they existed prior to the enactment.[51] Next, the court considered the Tenth Amendment's "anticommandeering" principles, an argument articulated by the State.[52] The Anticommandeering doctrine requires the Federal Government to "neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[53] The district court, as well as the Third Circuit, found that PASPA was not an anticommandeering Tenth Amendment violation because it did not "force New Jersey to take any legislative, executive or regulatory action[]"—siding with the NCAA's argument.[54] The court in *NCAA v. Christie* also noted that Congress satisfied the necessary requirements for rational basis when enacting PASPA.[55] The Third Circuit panel noted the provisions of PASPA did not require the states to "lift a finger"[56], honing in on the idea that the Act "only prohibits affirmative authorizations and does not prohibit repeals."[57] New Jersey then filed a petition for a writ of certiorari that was ultimately denied review by the Supreme Court.[58]

B. Murphy v. National Collegiate Athletic Association*—2014 Act*

In 2014, New Jersey decided to once again wager on the issue of PASPA's constitutionality by enacting new sports gaming legislation.[59] Senate Bill 2460, referred to as the 2014 Act, took the Third Circuit's suggestion in *NCAA v. Christie* wherein the court stated, "not [to] read PASPA [as] prohibit[ing] New Jersey from repealing its ban on sport

49. *Id.*
50. *Id.*
51. *Id.* at 554–55.
52. *Id.* at 555.
53. Printz v. United States, 521 U.S. 898, 935 (1997).
54. Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d at 555.
55. *Id.*
56. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).
57. Schamis & Bramer, *supra* note 41.
58. *Murphy*, 138 S. Ct. at 1472.
59. S.B. 2460, 206th Leg., First Ann. Sess. (N.J. 2014).

wagering."[60] Further, the 2014 Act used words taken from the United States' brief to the Supreme Court opposing New Jerseys' petition for writ of certiorari regarding the 2012 Act against them, by quoting: "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."[61] The New Jersey legislature did just that. The 2014 Act was framed as a "repealer" and thus "repeal[ed] the provisions of state law prohibiting sports gambling insofar as they concerned the 'placement and acceptance of wagers' on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City."[62] Within the 2014 Act's language, the legislators specified that collegiate sports and athletic events shall not include events that take place in New Jersey or involve New Jersey teams, which one can assume was to protect athletes and New Jersey sports' integrity.[63] The legislature's clever use of the Third Circuit's language and the United States amicus brief argument to craft their bill ultimately promoted the same reaction from the original plaintiffs in *NCAA v. Christie*, and another suit was brought against the state for PASPA violations.[64] The NCAA argued the 2014 Act, although framed as a repealer, was in fact an affirmative authorization of sports betting because it allowed for the removal of the prohibition on sports betting in particular locations.[65] The district court reached the same conclusion as with the 2012 Act, finding the 2014 Act violated the federal regulations set forth in PASPA.[66] The case was next heard and affirmed by the Third Circuit Court sitting en banc.[67] When evaluating the case, the court looked to what the law "actually d[id]" and concluded that the repeal was an authorization because the selective removal in certain locations "permissively channel[ed] wagering."[68] The

60. *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013)).

61. *Id.* (quoting Brief for the United States in Opposition at 11, Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 554 (D.N.J. 2013) (Nos. 13-967, 13-979, 13-980)).

62. *Murphy*, 138 S. Ct. at 1472.

63. Act of Oct. 27, 2014, ch. 62, 2014 N.J. Laws 602, 602.

64. *Murphy*, 138 S. Ct. at 1472.

65. Schamis & Bramer, *supra* note 41.

66. *See* Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 577 (D.N.J.), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

67. *See* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d at 215.

68. *Murphy*, 138 S. Ct. at 1472.

court further concluded that the language of PASPA did not violate the principles of the anticommandeering doctrine because it "d[id] not command states to take affirmative actions."[69] Despite the outcome of the lower courts, the 2014 Act increased New Jersey's odds and the Supreme Court granted the State's petition for certiorari to review the question of the constitutionality of the Professional and Amateur Sports Protection Act in 2018.[70]

IV. Issue Before the Supreme Court: Murphy v. National Collegiate Athletic Association

On certiorari review, the issue before the Supreme Court was "the constitutionality of the PASPA provision prohibiting States from 'author[izing]' sports gambling."[71] To begin, the Court examined the meaning of the Act, noting that Respondents and the United States (acting as an amicus for Respondent NCAA) seemed to understand that under Petitioners' interpretation of the provision at issue, the provision would in fact be unconstitutional.[72] Petitioners argued the provision required states to keep their laws against sports gambling untouched, acting as an anti-authorization provision.[73] Further, the State argued that "permit" is a generally accepted synonym of "authorize," meaning that "any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization."[74] While on the other hand, Respondents contended that authorization is to be construed more narrowly to require an actual affirmative action.[75] According to Respondents, the 2014 Act encouraged affirmative action by giving entities the authority to implement sports gaming operations in the State of New Jersey, instead of looking at it as a repeal of previous language.[76] After evaluating both views, the Court accepted Petitioner's interpretation.[77] The Court agreed that "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that

69. *Id.* at 1473 (quoting Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389, 401 (2016)).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* (citing Brief for Petitioners at 42, *Murphy*, 138 S. Ct. 1461 (No. 16-476)).
75. *Id.*
76. *Id.*
77. *Id.* at 1474.

activity."[78] The Court maintained that repealing a law banning sports gaming gives way to the right to act on betting operations.[79]

The Supreme Court went on to explain in its analysis that, even if the interpretation offered by Respondents was accepted, the Act's provision would still violate the Tenth Amendment's anticommandeering doctrine.[80] The primary argument for the State was the intentional limitation of congressional authority. Federalism, or the balance between federal and state sovereignty shown through the principle of the anticommandeering doctrine, provides that legislative powers granted to Congress preempt state law if they are directly at conflict, but powers not specifically enumerated to Congress by the United States Constitution are reserved for the states.[81] Justice Alito, writing for the majority, noted that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."[82] Further, the Court stated, "The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own[.]"[83] The Court contended that PASPA § 3702(1) violated this doctrine because it "unequivocally dictate[d] what a state legislature may and may not do."[84] "The Court also explained that there was no meaningful difference between directing a state legislature to enact a new law or prohibiting a state legislature from doing so, and PASPA's anti-authorization provision violated the anticommandeering principle because it specifically mandated what a state could and could not do."[85] Additionally, the Court quickly addressed the issue of preemption, stating "every form of preemption is based on federal law that regulates the conduct of private actors, not the States."[86] Thus, the Court held that PASPA's prohibition clause is not a "preemption provision because there is no way in which this provision can be understood as a regulation of private actors."[87]

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78. *Id.*
79. *Id.*
80. *Id.* at 1475.
81. *Id.* at 1476.
82. *Id.*
83. *Id.* at 1484–85.
84. *Id.* at 1478.
85. *Murphy v. National Collegiate Athletic Association*, OYEZ, https://www.oyez.org/cases/2017/16-476 (last visited Jan. 3, 2019).
86. *Murphy*, 138 S. Ct. at 1481.
87. *Id.*

This conclusion led the Court to next consider the question of severability.[88] Petitioners claimed that the entire Professional and Amateur Sports Protection Act was "doomed" given the unconstitutionality of § 3702(1).[89] The Court responded, in sum, that in order for the law to remain intact, it must be "fully operative" despite loss of the invalid provision and cannot result in a different effect then was the original intent of Congress.[90] "For instance, other provisions of [PASPA], which were not challenged in this case, prohibited state-run sports lotteries and prohibited privately run sports betting. [Justice] Alito reasoned that Congress would not have intended those provisions to stand in the absence of the challenged provision."[91] Analyzing the Act, coupled with the original intent of Congress, the Court concluded "no provision of PASPA is severable from the provision directly at issue in these cases."[92] Meaning PASPA could not stand on its own without the prohibition provision. Justice Ginsburg wrote the dissenting opinion that was joined in full by Justice Sotomayor and in part by Justice Breyer. The dissenting Justices were largely dissatisfied with the majority's failure to recoup the statute instead of overruling PASPA as a whole. The dissenting Justices asserted that, "Deleting the alleged 'commandeering' directions would free the statute to accomplish just what Congress legitimately sought to achieve: stopping sports-gambling regimes while making it clear that the stoppage is attributable to federal, not state, action."[93]

Although sports gambling historically has been a controversial topic, the Court held in a 6-3 decision that Congress has no authority to regulate what is currently within the power of the state governments to decide.[94] The Professional and Amateur Sports Protection Act infringes on the authority of the states, by attempting to "regulate[] state governments' regulation of their citizens."[95] Though *Murphy v. NCAA* stands as important decision for the sports world, the holding's true constitutional value is that "*Murphy* makes explicit what *Printz* and *New York* implied: the anti-commandeering rule applies with equal force whether Congress

88. *Id.*

89. *Id.* at 1482; 28 U.S.C. § 3702(1) (2012).

90. *Murphy*, 138 S. Ct. at 1482.

91. *Murphy v. NCAA*, BALLOTPEDIA, https://ballotpedia.org/Murphy_v._NCAA (last visited Dec. 29, 2018).

92. *Murphy*, 138 S. Ct. at 1484.

93. *Id.* at 1490 (Ginsburg, J., dissenting).

94. *Id.* at 1484–85.

95. *Id.* at 1485.

affirmatively directs a state to act or prohibits a state from doing so."[96] PASPA violated the Tenth Amendment's anticommandeering doctrine given its restrictive and regulatory language over state rights, and thus, the Supreme Court overturned the ruling of the lower courts and threw out PASPA altogether.[97] The Court's decision in *Murphy* meant that New Jersey finally won the jackpot.

V. Indian Gaming Regulatory Act

With the downfall of PASPA came the question of how the integrity of sports could best be protected notwithstanding the loss of federal regulation. Despite the history of heavy tribal gaming regulation in the United States, tribal gaming is only mentioned once in the opinion written by Justice Alito regarding the constitutionality of the Act.[98] In fact, tribal gaming is only referred to in the introductory material, noting merely "the enactment of the Indian Gaming Regulatory Act in 1988" and the positive affect the Act had on the spread of casinos.[99] Though the Court recognized the important role Indian tribes played in the growth of casino gambling across the country, the Court completely failed to discuss their future.

President Ronald Reagan signed the Indian Gaming Regulatory Act (IGRA) into law largely to protect "the sovereign rights of Indian tribes."[100] The IGRA has three primary goals, which are defined in 25 U.S.C § 2702.[101] The first is to provide a regulatory basis for Indian gaming in order to promote the development of strong tribal economy and government.[102] The second purpose is to shield tribes from "organized crime" while ensuring they are the beneficiaries of gaming revenues.[103] Lastly, the IGRA was enacted "to declare [] the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission."[104] The establishment of the IGRA

96. Mark Brnovich, *Betting on Federalism:* Murphy v. NCAA *and the Future of Sports Gambling*, 2018 CATO SUP. CT. REV. 247, 266–67.

97. *See Murphy*, 138 S. Ct. 1461.

98. *See id.*

99. *Id.* at 1469.

100. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 182 (2010).

101. 25 U.S.C. § 2702 (2012).

102. *Id.* § 2702(1).

103. *Id.* § 2702(2).

104. *Id.* § 2702(3).

was necessary to address concerns involving gaming and how to protect gaming operations, as tribal gaming regimes were, and remain, an important source of tribal revenue.[105]

Congress recognized casino gaming as a unique means to an end, creating a prosperous source of revenue for Indian tribes throughout the United States.[106] At large, the IGRA acts as a "compromise" between the "competing interest" of "tribal needs and state concerns."[107] The Act divides gaming into three distinct classes—I,II, and III—and each class has its own set of regulatory tools and procedures.[108] Class I gaming refers to "social games," where the prizes are minimal or the games are connected to "tribal ceremonies or celebrations."[109] Class II encompasses gaming such as bingo and card games authorized by state laws.[110] The last grouping, class III gaming, is a catchall category that includes "all forms of gaming that are not class I [] or class II []."[111] Typically, class III games are those commonly played at casinos, such as black jack, craps, and slot machines.[112] Class III games require authorization outside of the norm required for classes I and II.[113] Tribal gaming operations that wish to operate class III gaming schemes must be:

> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b), and
>
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

105. *Id.*

106. Ducheneaux, *supra* note 100, at 182–83.

107. Deborah F. Buckman, Annotation, *Validity of Indian Gaming Regulatory Act*, 200 A.L.R. Fed. 367 (2005).

108. 25 U.S.C. § 2703 (2012).

109. *Id.* § 2703(6).

110. *Id.* § 2703(7)(A)(i)–(ii).

111. *Id.* § 2703(8).

112. Steven J. Gunn, *Indian Gaming Regulatory Act (1988)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/united-states-and-canada/north-american-indigenous-peoples/indian-gaming-regulatory-act (last updated Oct. 14, 2019).

113. 25 U.S.C. § 2710 (2012).

> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.[114]

The IGRA allows states and Indian tribes to negotiate compacts. Tribal-state compacts govern gaming activities on Indian lands and allow for any state and any Indian tribe to enter into an agreement for casino gaming, pursuant to the terms of the IGRA.[115] Within Indian country, tribal-state compacts "govern[] the operation of Class III gaming enterprises . . . as Congress chose not to unilaterally impose state law and state jurisdiction over Indian gaming."[116] One appeal for states that opt into tribal-state compacts is the potential for revenue sharing. Compacts that account for revenue sharing allow states to address budget deficits, but in return require that tribes are given "substantial exclusivity for Indian gaming in the state."[117] Approved revenue sharing payment plans maintain that the benefit received by the state should not exceed the benefit of the tribe, as such payment would violate the IGRA.[118] There are at least ten states whose tribal compacts provide for a revenue sharing scheme in exchange for exclusivity of gaming operations.[119] An exclusivity provision normally requires states to "prohibit[] non-Indian gaming from competing with Indian gaming or [] agree[] to relinquish payments if non-Indian gaming is permitted by the state in the future."[120] Those tribes with exclusivity provisions stand to benefit from the Supreme Court's decision in *Murphy* regarding sports betting.

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114. *Id.* § 2710(d)(1)(A)–(C) (emphasis added).

115. *Id.* § 2710.

116. G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219, 224 (2010).

117. Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 326 (2004–2005) (citing the Senate Committee on Indian Affairs, 107th Cong. (2001)).

118. *Id.*

119. Dave Palermo, *Tribes Scramble to Figure Out How Sports Betting Can Fit into Indian Gambling Under Federal Law*, LEGAL SPORTS REP. (Aug. 4, 2017, 11:50 AM), https://www.legalsportsreport.com/14890/tribes-sports-betting-and-federal-law/.

120. Eidson, *supra* note 117, at 328 (quoting Bruce Babbitt, Secretary of the Interior, Department of the Interior).

VI. The Fall of PASPA and the Opportunity for Indian Tribes

The Supreme Court's decision to scrap PASPA brings about a unique opportunity for the expansion of sports betting in tribal gaming operations across the country, as their established success and regulation makes Indian tribes ideal bookies. As of 2015, 238 gaming tribes operated 474 Indian gaming operations across the country.[121] Of those 474 gaming operations, 317 allowed for both class II and III games.[122] It is important to note that 25 C.F.R. § 502.4 places sports betting within class III gaming, meaning that the federal government classifies sports betting as a class III gaming operation.[123] Because PASPA prevented states from implementing new gambling laws related to sports activities,[124] the Supreme Court's decision in *Murphy* effectively restored power back to the states, allowing them to once again decide for themselves whether to permit sports betting operations within their borders.[125] Another possibility for growth in sports betting operations stems from tribal-state gaming compacts already in place for class III gaming operations on tribal land, assuming that federal legislation involving sports betting regulation is not enacted.[126] When the Supreme Court rendered its decision in *Murphy*, Chris Grove, the managing director at Eilers & Krejcik (a gaming sector research firm), predicted that some thirty-two states would see the legislature moving forward state laws in favor of sports betting.[127] As of November 1, 2019, thirteen states have authorized either full scale sports betting or some form of legalized sports gambling, including: Nevada, Delaware, New Jersey, Mississippi, West Virginia, New Mexico, Pennsylvania, Rhode Island, Arkansas, New York, Iowa, Oregon, and Indiana.[128] Numerous other states have passed bills, or are currently waiting on introduced bills to be passed.[129] Three days after the Supreme Court's decision in *Murphy v. NCAA*, New Jersey Governor Phil Murphy took action and signed the 2014 Act (at issue in *Murphy v.*

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121. NAT'L INDIAN GAMING COMM'N, FACTS AT A GLANCE (2016), https://www.nigc.gov/images/uploads/NIGC%20Uploads/aboutus/2016FactSheet-web.pdf.

122. *Id.*

123. 25 C.F.R. § 502.4(c) (2019).

124. 28 U.S.C. § 3702 (2012).

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

126. *See id.*

127. Edelman, *supra* note 26.

128. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Aug. 2, 2019), http://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

129. *Id.*

NCAA) into law allowing for sports wagering at Monmouth Park and Borgata Casino.[130] Additionally, New Jersey implemented several online sports betting services and apps since the overturn of PASPA, including DraftKings Sportsbook, playMGM mobile app, Sugarhouse Online Sportsbook & Casino, William Hill, FanDuel, 888 Sport, and BetStars.[131] After taking down PASPA, New Jersey capitalized on its power to choose its own sports betting destiny by quickly adding ways to participate in sports gambling throughout the state.

As for tribal gaming, it is difficult to predict how the dissolution of PASPA will affect tribal-state compacts. Each compact is different, and the way in which states and tribes will operate as to the implementation of sports betting will depend on the particular language of each individual compact.[132] Put simply, there is no bright line rule for tribes across the United States regarding sports betting.[133] In New Mexico, "any or all forms of Class III Gaming" is included in their tribal compacts.[134] Pursuant to the federal placement of sports betting within class III gaming operations, the state was able to quickly implement sports betting without amending tribal compacts or the state constitution.[135] After the Court's decision in *Murphy v. NCAA*, the Santa Ana Star Casino & Hotel—a tribal gaming operation in New Mexico—formed an agreement with USBooking to create a "Nevada-style sports betting service."[136] A key fact to the introduction of this sportsbooking venue in New Mexico is that sports betting and gambling is currently illegal in the state outside of tribal land.[137] The language of the tribal-state compact enabled the Tribe to act swiftly to bring sports betting to the casino without much hassle because the existing compact already provided for all forms of class III gaming.[138] But, an area of conflict and

130. *Legal US Online Sports Betting and Mobile Betting Apps*, PLAYUSA, https://www.playusa.com/sports-betting/ (last updated Oct. 18, 2019).

131. *Id.*

132. Palermo, *supra* note 119.

133. *Id.*

134. Rodenberg, *supra* note 128.

135. *Id.*

136. Robert Mann, *USBookmaking Partners with Tribal Casino to Offer New Mexico Sports Betting*, SPORTSHANDLE (Oct. 8, 2018), https://sportshandle.com/usbookmaking-partners-with-tribal-casino-to-offer-new-mexico-sports-betting/.

137. *Legal US Online Sports Betting and Mobile Betting Apps*, *supra* note 130. A "sportsbook" is an "establishment that takes bets on sporting events and pays out winnings." *See Sportsbook Definition,* LEXICO, https://www.lexico.com/en/definition/sportsbook (last visited Nov. 19, 2019).

138. 25 C.F.R. § 502.4 (2019).

concern also arises from the state's tribal-state compact. "[New Mexico] has agreements with 18 tribes . . . that allow the state to run lottery games while still honoring the pacts."[139] Pursuant to the language of the compacts, New Mexico plans to implement a lottery game involving sports, most likely a form of "parlay wagering."[140] Issues like these will continue to define the balance between state, federal, and tribal power over sports betting.

The situation in New Mexico exemplifies the issues likely to arise in states that have Indian gaming operations through compacts. For instance, one issue is whether states with exclusivity agreements are bound to only allow for the implementation of sports betting within tribal gaming operations, or if states will be able to operate sports wagering on their own—despite these exclusivity compacts. Also, will states and tribes be forced to amend their compacts to allow for sports gaming or will the IGRA be amended to speak on the issue of sports betting? It is clear from the Supreme Court's decision regarding PASPA that states once again possess the authority to decide on the issue of sports betting given the Tenth Amendments anticommandeering principles. The federal authority of the IGRA also makes it clear that tribal-state compacts that do not provide tribes with exclusive rights to gaming in their state run the risk of states implementing and operating sports betting on their own, rather than allowing the tribes the exclusive right to bring sports betting into their current operations.[141] The decision in *Murphy v. NCAA* will require many tribes to rework their compacts in order to ensure that the language includes the ability to offer sports betting within Indian Country gaming operations.[142] Without language specifically granting all gaming authority to the tribe, or language allowing the tribe to operate sports betting (such as "all class III gaming"), it is likely the state will be able to implement sports betting outside of Indian Country.[143] Likewise, tribes should be able to bring in sports betting opportunities through good faith compact negotiations even if the state chooses not to enact laws regarding sports

139. Jill R. Dorson, *New Mexico Lottery to Offer Game Tied to Sports*, SPORTSHANDLE (Nov. 1, 2018), https://sportshandle.com/new-mexico-lottery-to-offer-game-tied-to-sports/.

140. *Id.*

141. Andrew Westney, *High Court Sports Bet Ruling Could Mean Bonanza for Tribes*, LAW360 (May 14, 2018, 9:53 PM), https://www.law360.com/articles/1043408/high-court-sports-bet-ruling-could-mean-bonanza-for-tribes (via subscription).

142. *Id.*

143. *Id.*

betting.[144] Larry S. Roberts, former Acting Assistant Secretary for Indian Affairs, stated that "[tribes with exclusivity compacts for all class III gaming] may take the position that sports betting falls under that exclusivity provision, and if the state authorizes it for any entity that's not a tribal entity, that that violates the exclusivity provisions[.]"[145]

Despite the fact that the answer to how, where, and if sports betting will be implemented may take time to unfold given the differences in compacts and all fifty states' right to choose once again on the issue of sports betting, the original policy considerations associated with gambling and sporting events might provide some guidance as to the "right" answer. The foundation of the Professional and Amateur Sports Protection Act encompassed the primary policy concern of protecting the integrity of sports.[146] The proponents of PASPA argued that federal regulation would not only protect the integrity of American sports, but would also protect fans from gambling addiction and the serious threat of corruption associated with betting games.[147] Although the Supreme Court effectively threw out federal regulation of sports betting, leaving open the option for states to act, the policy concerns that existed before PASPA's enactment still exist today. The NCAA, National Basketball Association, and National Football League should still be concerned with the future of sports and the effects of legalized betting. In 2014, before the Court's decision in *Murphy*, NBA Commissioner Adam Silver wrote an opinion on the legalization and regulation of sports betting for the New York Times.[148] Although somewhat uncharacteristic of the commissioner of a large sports entity, Silver shared that he believed PASPA should be overturned because of "domestic and global trends."[149] Silver noted that although restrictions were in place to prevent sports betting, its practice was in fact widespread in the United States.[150] "There is an obvious appetite among sports fans for a safe and legal way to wager on professional sporting events. Mainstream media outlets regularly publish sports betting lines and point spreads."[151] Silver's

144. Palermo, *supra* note 119.

145. Westney, *supra* note 141.

146. *See* 28 U.S.C. § 3702 (2012).

147. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

148. *See generally* Adam Silver, Opinion, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

149. *Id.*

150. *Id.*

151. *Id.*

request did not come without restraints and restrictions, as he stated that "Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards."[152] The Commissioner's call for regulatory requirements was to "ensure the integrity of the game."[153] The issue of integrity is clearly a reoccurring theme and argument for protecting the sports industry. The idea behind PASPA, or a call for federal regulation in general, is to ensure that integrity is maintained. Although tribal gaming was left out of the Supreme Court's opinion as a solution, it unquestionably exists as a regulatory scheme capable of maintaining and monitoring the honor of the sports industry. The IGRA established a framework, both tribal and federal in nature, to monitor and regulate Indian gaming known as the National Indian Gaming Association (NIGA).[154] NIGA's mission is "to protect and preserve the general welfare of tribes striving for self-sufficiency through gaming enterprises in Indian Country[]" by working with "the federal government and Congress to develop sound policies and practices and to provide technical assistance and advocacy on gaming-related issues."[155] The mission of the NIGA also includes protecting "Indian sovereign governmental authority in Indian Country."[156] When PASPA was struck down, the NIGA announced that in their advocacy role they would ensure that certain policies and principles regarding sports betting were adhered to:

> Tribes have governmental authority to regulate gaming; Sports betting revenues will not be subject to taxation for Tribal Governments; Customers access for Tribes is permissible where Sports Betting is legal; Tribal rights under IGRA and Gaming Compacts are protected; IGRA will not be opened up for amendments; Tribal Governments receive a positive economic benefit in any federal Sports Betting legalization proposals; Indian Tribes have the right to opt in to a federal regulatory scheme to ensure access to broad-based markets; Integrity and protection of the game and patron protections are of high

152. *Id.*

153. *Id.*

154. Ernest L. Stevens, Jr., *Impacts for Indian Gaming from the Murphy Court's PASPA Ruling*, INDIAN GAMING, June 2018, at 14, 14, http://www.indiangaming.com/istore/Jun18_SpeakOut.pdf.

155. *About Us*, NAT'L INDIAN GAMING ASS'N, https://www.indiangaming.org/about (last visited Jan. 10, 2019).

156. *Id.*

> importance; Any consideration of Mobile, on-line or internet gaming must also adhere to these principles.[157]

These principles offered by the NIGA suggest that their goal is to maintain the integrity of Native gaming operations, while also maintaining the policy goals and regulatory ideals of those who support regulations of sports betting.[158] In states where tribal-state gaming exclusivity compacts are prevalent, a regulatory scheme is essentially already in place. Ernest L. Stevens, Jr. made the argument that Indian Country is suited to handle issues of gaming regulation and is the only gaming operation that maintains and works with a federal agency.[159] "Indian gaming is the most highly regulated form of gaming in the United States. Tribes spent more than $450 million on tribal, federal, and state regulation of Indian gaming in 2017 alone."[160] If federal legislation were to be enacted, the hope of the Tribes is that they are given a seat at the table, because their current infrastructure could benefit from the addition of sports betting and the integrity of sports betting could thrive under the existing Indian tribal gaming regulations.

A question that remains for Indian tribes is whether or not sports betting is a gambling industry in which they want to enter. Although the image that comes to mind of the Nevada sports betting industry, and the fun to be had when gambling with friends and other fans might insinuate that this is a profitable market, the NIGA leaders suggest that support for sports betting among tribal leaders is divided.[161] Many believe, based upon the popularity of sports betting, that it could bring about greater prosperity for tribes, but in reality sports betting is a low-profit market.[162] For example, in 2017, Nevada sportsbooks only contributed 2.4% of the total gaming revenue within the state.[163] Commission Chairman Jonodev Osceola Chaundhuri stated that "[t]here's a broad spectrum in Indian Country covering two extremes: Tribal nations that would not benefit at all, and on the other end,

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157. *Sport Betting Notice*, NAT'L INDIAN GAMING ASS'N, https://indiangaming.org/news/sport-betting-notice (last visited Jan. 10, 2019).

158. *See id.*

159. Stevens, *supra* note 154.

160. *Id.*

161. Nick Sortal, *Some Indian Casinos Cautious About Sports Wagering*, CDC GAMING REP. (Jan. 30, 2018), https://www.cdcgamingreports.com/commentaries/some-indian-casinos-cautious-about-sports-wagering/.

162. Regina Garcia Cano, *Indian Casinos Across US Wary of Betting on Sports Books*, FOX26 NEWS (Dec. 26, 2018), https://kmph.com/sports/content/indian-casinos-across-us-wary-of-betting-on-sports-books-12-26-2018.

163. *Id.*

tribal nations that would significantly benefit[.]"[164] Experts suggest that less than one hundred tribal gaming operations would create a sportsbook operation because so many tribal gaming operations are too small, operating more so as a job program than a money-making operation.[165] In addition to considering the language of their present compacts, the potential need for amendments, the likelihood of new state laws, and the possibility of future federal regulation, Indian tribes must consider their stance on sports betting as it relates to their current operations.

VII. Conclusion

The Supreme Court's decision in *Murphy v. NCAA* to strike down PASPA corrected a mistake of Congress. The language of PASPA prohibiting states from authorizing sports betting and gambling operations was a clear violation of the Tenth Amendment of the United States Constitution. The anticommandeering rule maintains that Congress may not simply take the legislative process away from the states by forcing them into federal regulatory programs.[166] The opportunity for Indian tribes to explore sports betting is extremely important where compacts allow for all class III gaming operations, or where exclusivity provisions are provided in tribal-state gaming compacts. Because the IGRA is a balance between both federal and tribal power, Indian gaming remains the most highly regulated gaming scheme in the country. For those who criticize the lack of federal regulation of sports betting and wish to maintain the integrity of the game through regulation, Indian tribal gaming offers a swift and efficient solution where renegotiation of tribal compacts is not necessary. New Jersey's willingness to place its bet on the unconstitutionality of PASPA allows states, and Indian tribes, to once again go all in on sports betting operations if they choose to do so.

164. *Id.*
165. Sortal, *supra* note 161.
166. *Murphy v. National Collegiate Athletic Association*, *supra* note 85.