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# The Aftermath of *Murphy v. NCAA*: State and Congressional Reactions To Leaving Sports Gambling Regulation To The States

BY ETHAN MORDEKHAI / ON OCTOBER 17, 2023



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In 2018, the Supreme Court ruled in *Murphy v. NCAA* that the Professional and Amateur Sports Protection Act of 1992 (“PAPSA”) violated the anti-commandeering rule and was therefore unconstitutional. PAPSA had effectively barred states from authorizing sports gambling. The act did not make sports gambling a federal crime, however it did allow professional sports organizations to bring civil actions to enjoin violations. Thus, after the New Jersey legislature authorized sports gambling in 2012, the NCAA brought a federal action to enjoin the law on the ground that it violated PAPSA. The case made its way to the Supreme Court, and the Court sided with New Jersey holding that, under the anti-commandeering rule, Congress did not have the power to tell the states that they cannot authorize sports gambling.<sup>1</sup>

## **Post-Murphy: States Race to Get in on the Action**

Since the *Murphy* decision, over 34 states and Washington D.C. have legalized sports betting in some form and have each created their own unique legislation and regulatory

schemes.<sup>2</sup> Many have legalized online sports gambling, which has dramatically grown the industry in the few short years it has been around.<sup>3</sup> In 2022, U.S. sportsbooks revenue hit \$7.5 billion, which was a 75% increase from 2021.<sup>4</sup> Despite the negative effects of gambling on society, it is hard to blame these states for choosing to legalize sports gambling, as it is a massive generator of tax revenue. In total, sports gambling generated over \$1.5 billion in state tax revenue in 2022.<sup>5</sup> Furthermore, legalizing sports gambling creates a large amount of new employment opportunities within each state and allows states to regulate the problematic industry to protect consumers and ensure there is adequate help for addicted gamblers.

### **A Legal Reality Check for Daily Fantasy Sports Contests**

Many different legal issues have arisen amongst the states since they were left to handle the complex industry of sports gambling on their own. One major issue that has come up in multiple states revolves around online daily fantasy sports (“DFS”) contests. In DFS contests, users create a lineup of different players they believe will perform well and then can wager their lineup against another user’s lineup in a head-to-head contest. The user whose lineup scores the most points wins the predetermined amount of money after the site takes its cut. Most states have prohibitions on private gambling in general, however New York and Illinois permit certain exceptions.

In two factually similar cases, New York and Illinois appellate courts concluded that games of chance were considered private gambling and therefore illegal, while games of skill were legal in accordance with each state’s criminal code. In *Dew-Becker v. Wu*, the Illinois Supreme Court considered three applicable tests that courts have used to determine if a contest is one of skill or chance. The most popular test is the “predominant factor test” and under this test “contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling.”<sup>6</sup> The second test considered was the “material element test”, where if chance is materially significant in determining the outcome of the contest, the contest is considered prohibited gambling, even if skill is a more important factor.<sup>7</sup> The third test considered was the “any chance test”, where if chance plays any role at all in the outcome of the contest, the contest is considered prohibited gambling.<sup>8</sup> The court ultimately chose to use the “predominant factor test” because the “material element test” relied too much on a subjective determination for what is material, and the “any chance test” would yield virtually every contest as prohibited gambling.<sup>9</sup> Relying on several peer-reviewed studies, the court determined that DFS head-to-head contests are predominantly determined by skill.<sup>10</sup> One strong piece of evidence for its conclusion was the fact that highly experienced and skilled players profited far more from these contests than new, unexperienced players.<sup>11</sup>

In *White v. Cuomo*, the lower New York courts both ruled that head-to-head DFS contests do in fact constitute prohibited gambling after applying the “material element test”.<sup>12</sup> However, the Court of Appeals reversed the decision, opting instead to apply the more popular and practical “predominant factor test,” like the Illinois Supreme court did.<sup>13</sup> As state courts

continue to navigate the legal and regulatory complexity of sports gambling and DFS, the outcome in these cases could have major implications on the industry.<sup>14</sup> The classification of DFS as a form of sports gambling could subject the industry to the costly regulatory laws governing sports gambling in each state.<sup>15</sup>

### **Congressional Proposals: Attempts to Protect Consumers and Support a Burgeoning Industry**

Since *Murphy*, there have been multiple bills introduced in Congress to federally regulate sports betting, either entirely or partially, but so far none have been passed.<sup>16</sup> These bills seek to provide uniformity for sports gambling practices in the U.S. as opposed to the current patchwork system that varies state by state.<sup>17</sup> A few months after *Murphy*, Senators Chuck Schumer (D-NY) and Orrin Haach (R-UT) introduced the Sports Wagering Market Integrity Act of 2018.<sup>18</sup> The bill intends to provide a federal framework for the legal sports betting industry. The bill would impose a general prohibition on sports wagering but allow states to submit applications to the Attorney General to implement a sports-wagering program subject to certain minimum standards. The bill would also restrict bets when necessary to protect contest integrity and create the National Sports Wagering Clearinghouse to oversee the industry. In 2023, Rep. Paul Tonko (D, NY-20) introduced the Betting on Our Future Act, a bill which would ban the advertisement of sportsbooks on any medium of electronic communication.<sup>19</sup> Modeled on the Public Health Cigarette Smoking Act of 1969, which banned tobacco advertisements, Tonko's bill points to the harmful effects of sports gambling on society, specifically adolescents. Also in 2023, Rep. Dina Titus (D, NV-1) introduced the Discriminatory Gaming Tax Repeal Act, which would repeal the current 0.25% excise tax on all sports wagers.<sup>20</sup> As the sports gambling industry continues to rapidly grow, it seems like just a matter of time before Congress steps in to impose at least some federal regulations on sports gambling.

### **Why Congress Should Set the Ground Rules for Sports Betting**

Since 2018, sports gambling has become one of the biggest industries in the U.S., and as sports continue to grow in popularity, the industry will grow with it. For now, since Congress has yet to make any significant progress on a federal regulatory scheme, the states are left to themselves to navigate the legal and regulatory aspects of this complex industry. Gambling can be an extremely dangerous to consumers, but because of the tax revenue it is generating for the states that have legalized it, it appears that the states' interests are not aligned with that of its citizens.<sup>21</sup> Congress should ultimately step in and implement some sort of uniform regulation in order to ensure that consumers are adequately protected.

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1. See *Murphy v. NCAA*, 138 S. Ct. 1461; 28 U.S.C.S § 3702(1)
2. Chris Bengel & Shanna McCarriston, U.S. sports betting: Here's where all 50 states currently stand on legalizing online sports gambling sites, CBS Sports (Aug. 16, 2023, 1:53pm), <https://www.cbssports.com/general/news/u-s-sports-betting-heres-where-all-50-states-currently-stand-on-legalizing-online-sports-gambling-sites/#:~:text=Now%2C%20over%2034%20states%20and,before%20the%20end%20of%202023.>
3. *Id.*
4. Ed Dixon, Study: US Sportsbooks post record US\$7.5bn revenue in 2022, Sportshandle (Feb. 17, 2023), [https://www.sportspromedia.com/news/us-sports-betting-sportsbooks-revenue-2022-draftkings/?zephrr\\_sso\\_ott=PvHGiw#:~:text=Sportsbook%20revenue%20in%20the%20US,American%20Gaming%20Association%20\(AGA\).](https://www.sportspromedia.com/news/us-sports-betting-sportsbooks-revenue-2022-draftkings/?zephrr_sso_ott=PvHGiw#:~:text=Sportsbook%20revenue%20in%20the%20US,American%20Gaming%20Association%20(AGA).)
5. Chris Altruda, Legal US Sports Betting Revenue, Handle And Tax Totals Since PASPA Repeal (last updated Sept. 19, 2023), <https://sportshandle.com/sports-betting-revenue/>.
6. *Dew-Becker v. Wu*, 178 N.E.3d at 1039.
7. *Id.* at 1040.
8. *Id.*
9. *Id.* at 1041.
10. *Id.*
11. *Id.*
12. See *White v. Cuomo*, 38 N.Y.3d 209 at 223.
13. *Id.*
14. *Masuda*, supra note 8.
15. *Id.*
16. Damola Orimolade, Sports Gambling: Background and Federal Laws, Prolegis, <https://www.prolegis.com/public/briefings/sports-gambling>.
17. *Id.*
18. Schumer, Hatch introduce Bipartisan Sports Betting Integrity Legislation, Senate Democrats, <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.
19. Lillian Walker, Federal Bill to ban sports betting ads introduced in the US ,iGamingBusiness, <https://igamingbusiness.com/sports-betting/sports-betting-regulation/federal-bill-to-ban-sports-betting-ads-introduced-in-the-us/>
20. Orimolade, supra note 16.
21. Altruda, supra note 5.