WHAT EVERY STATE LAWMAKER NEEDS TO KNOW ABOUT A SPORTS LEAGUE'S PROPERTY RIGHT TO SPORTS BETTING INCOME

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When the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA),¹ the Court stripped United States sports leagues of the functional equivalent of a property right—the *right to exclude*² state-authorized betting outside Nevada (and a few other jurisdictions) on their games.³

However, the Court's demolition of PASPA did not impact any right other than the league's statutory right to exclude. The rights held by the leagues are not limited to the right to exclude. Rather, like all other owners of property,⁴ the leagues are entitled to all incidents of ownership of their property, including the *right to income* created by their property.⁵ If a state authorizes sports betting via legislation that takes a league's right to income, the state may be liable to the league for just compensation pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution.⁶ Such liability could be significant.⁷

This article shows that although a league does not have a property right to a share of the total amount of money bet on its games (the handle), a league may have a property right to a share of the income held on such betting because the income is created by a league's human capital. The article then examines the benefits and costs of three state options for responding to league claims to property rights in sports betting:

1. the "New Jersey Option," which rejects out of hand any league property right in sports betting;
2. the "Proposed New York Option," which codifies a "one size fits all" league property right in sports betting; and

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¹Murphy v. National Collegiate Athletic Association, 584 U.S. ___, 138 S. Ct. 1461 (2018).

²The leagues' statutory right to exclude was found in § 3703 of the Professional and Amateur Sports Protection Act (PASPA), which granted the leagues the right to enjoin sports betting beyond Nevada and a few other jurisdictions. See 28 U.S.C. § 3703. See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 588 (2005) ("Enforcement issues were not part of the classic property discourse. . . . Eventually, enforcement issues did find their way into the discussion thanks to Calabresi and Melamed's division of the legal protection of entitlements into property, liability and inalienability rules."). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (holding "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property.").

³In *Murphy*, the Supreme Court held that PASPA violated the Tenth Amendment because the statute "commandeered" New Jersey's sovereign law-making authority. 138 S. Ct. at 1475–81. The sports league's statutory right to exclude licensed and regulated betting on sports outside Nevada and a few other jurisdictions was a collateral casualty of the Court's decision, which invalidated PASPA entirely.

⁴Commission on the Review of the National Policy toward Gambling, *Final Report* 178 (1976) ("Team owners have a legitimate proprietary interest in their sports, and

the courts must determine whether a legal sports betting system violates this interest."), available at [https://archive.org/details/gamblinginameric00unit](https://archive.org/details/gamblinginameric00unit/Morris%20Communications%20Corp.%20v.%20PGA%20Tour,%20Inc.,%20235%20F.%20Supp.%202d%201269,%201281%20(M.D.%20Fla.%202002)/pgma/pgma_controls_the_right_of_access_to_that_information_and_can_place_restrictions_on_those_attending_the_private_event_giving_the PGA_Tour_a_property_right_that_the_Court_will_protect.pdf); *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1281 (M.D. Fla. 2002) ("[T]he PGA controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect."), *aff'd*, 364 F.3d 1288 (11th Cir. 2004).

⁵A.M. Honoré, *Ownership, in THE NATURE AND PROCESS OF LAW* 370, 370 (Patricia Smith ed. 1993) ("Ownership comprises . . . the right to the income of the thing. . . ."). "Legal philosopher A.M. (Tony) Honoré, a professor at the University of Oxford, has identified a right to [the income of the thing] as one of the eleven 'standard incidents' of property ownership. . . . By and large, legal commentators appear to have accepted Honoré's list of the incidents of property ownership as the basis of modern ownership." *Burns v. PA Dept. of Correction*, 544 F.3d 279, 287 (3d Cir. 2008).

⁶U.S. CONST. amend. V, § 3 ("[N]or shall private property be taken for public use, without just compensation.").

⁷Reportedly, Delaware operators earned \$1 million of income on \$7 million of handle during the first 30 days that betting on sports was in Delaware. See Jill R. Dorson, *Happy Anniversary! Delaware Sports Betting a Winner One Month In*, SPORTSHANDLE.COM (July 5, 2018), <https://sportshandle.com/happy-anniversary-delaware-sports-betting-a-winner-1-month-in/>. A single New Jersey race track has estimated it may generate annual income of \$50 million from sports betting. See Keith Sargeant, *N.J. Sports Betting at Monmouth Park: Inside the Setup for Gambling on Games in N.J.*, NJ.COM (June 14, 2018), https://www.nj.com/sports/index.ssf/2018/06/sports_betting_at_monmouth_park_inside_the_setup_f.html.

3. the “Value Maximizing Option,” which authorizes an administrative process that provides:

- a. a mandatory, but flexible, negotiation and dispute resolution process for leagues and operators to privately adjust the benefits and burdens of sports betting amongst themselves pursuant to the guidance provided by the Supreme Court’s decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); and
- b. a specialized civil enforcement mechanism that empowers every league to monitor all betting and take enforcement action against any unlicensed operator who takes a bet from a resident of the state.

I. A SPORTS LEAGUE’S HUMAN CAPITAL CREATES SPORTS BETTING INCOME, WHICH MAY BE THE NONEXCLUSIVE PROPERTY OF THE SPORTS LEAGUE

Property rights avail against the rest of the world without regard to the consent or agreement of anyone else.⁸ Consistent with the inherent scope of property rights, the Supreme Court has recognized the rule of property that income *follows* its underlying capital, known as the “interest follows principal” rule, has become firmly embedded in the common law of various states.⁹

From tolls created by river traffic¹⁰ to income generated by established trade routes¹¹ to interest created by cash deposits,¹² the Supreme Court has held that income is the constitutionally protected property of

the owner of the capital that creates the income. If sports betting income is created by a sports league’s human capital, then logically, that income follows its capital and is the property of the owner of the capital that creates the income, i.e., the sports league.

A. Sports betting income (aka vigorish) = interest income

“Vigorish” means both traditional lender interest income and income a sports betting operator receives from bets on a game.¹³ Traditional lender’s interest income is created by financial capital the lender loans to the borrower, who pays for the use of the lender’s capital.

Booking sports bets inverts the traditional financial relationship between the borrower of financial capital and the lenders of financial capital. For example, on a straight \$11-to-\$10 sports bet, an operator borrows \$11 from Bettor-A backing Team A and borrows \$11 from Bettor-B backing Team B, the opponent of Team A. This borrowed \$22 is known as the handle. While the operator immediately acquires a possessory interest in the handle, the operator does not immediately acquire an ownership interest, in whole or in part, in the handle.

The operator does not acquire any ownership interest in any handle until the bet is settled by the performance of the league’s human capital. If Team A’s performance in the game results in Team A winning the game, the operator repays Bettor-A both Bettor-A’s underlying capital (\$11) and interest in the amount of 90.9% (\$10 of the \$11 borrowed from losing Bettor-B). The operator also retains or “holds” a little more than 4.5% interest (\$1 of the \$11 borrowed from losing Bettor-B), which is the operator’s income.¹⁴

⁸Bell and Parchomovsky, *supra* note 2, at 533.

⁹Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) (“The rule that ‘interest follows principal’ has been established under English common law since at least the mid-1700’s. . . . Not surprisingly, this rule has become firmly embedded in the common law of the various States.”); Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) (“The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.”).

¹⁰Monongahela Nav. Co. v. United States, 148 U.S. 312, 324 (1893).

¹¹Kimball Laundry Co. v. United States, 338 U.S. 1, 16 (1949).

¹²See *supra* note 9.

¹³See MERRIAM-WEBSTER.COM (defining “vigorish” as “1: a charge taken (as by a bookie or a gambling house) on bets; 2: interest paid to a moneylender”), <https://www.merriam-webster.com/dictionary/vigorish>.

¹⁴Like traditional variable rate loans, the operator’s income is pegged to a variable index (scores and statistics in a game) that follows the performance of the human capital just as a borrower’s payment obligation is pegged to a variable index (interest rate) that follows the performance of the borrowed principal. If the operator borrows more financial capital from the losing lenders/bettors than it borrows from the winning lenders/bettors, the borrowing operator’s income will exceed 4.5% interest. If the operator borrows more financial capital from winning lenders/bettors than it borrows from losing lenders/bettors, then the operator will assume the position of a personal guarantor, step into the shoes of the absent losing bettors/lenders, and incur negative income (i.e., losses on the game). When an operator borrows financial capital pursuant to an odds-based loan structure, the result is the same. The operator simply sets its margins to reflect the risk of the loan.

Where the handling of bets and the underlying sporting events that are the subject of the bets are centralized at a single physical location—such as at a racetrack—the rights of possession of the income and ownership of the income are likewise highly centralized. But when the handling of bets and the underlying events that are the subject of the bets are decentralized, the rights of possession and ownership may also be decentralized and subject to allocation—such as allocation pursuant to the Interstate Horse Racing Act.¹⁵

Rights of true owners are superior to rights of mere possessors.¹⁶ If a sports league owns a right to income from bets that an operator handles on the league's games, an operator's possession of that income at settlement will not divest the league of its ownership right.¹⁷ Thus, if a state authorizes a casino or racetrack to handle bets on basketball, baseball, golf, football, and other unaffiliated games, the leagues that own those games may also own the income from the bets if the leagues create that income as a matter of fact and law.

B. A sports league's human capital creates sports betting income as the income follows the league's human capital as interest follows principal

How does a single borrower invert the traditional lending model and induce interest payments from

multiple lenders as a sports betting operator does from bettors? The answer is that unlike in the traditional lending model—where the principal borrowed is *nothing but* financial capital—a sports betting operator necessarily borrows and uses pools of *human capital* from a sports league in order to settle its bets and take possession of income.¹⁸

1. A franchise's human capital is property

Financial capital is not the only form of capital. Natural capital and human capital are other forms of capital.¹⁹ Human capital has been defined as follows:

Human capital, intangible collective resources possessed by individuals and groups within a given population. These resources include all knowledge, talents, skills, abilities, experience, intelligence, training, judgment, and wisdom possessed individually and collectively, the cumulative total of which represents a form of wealth available to nations and organizations to accomplish their goals.

Human capital is available to generate material wealth for an economy or a private firm.²⁰

Generally, human capital has been recognized as underlying principal and a protected interest in numerous legal contexts, including: contracts not to compete,²¹ contracts to insure executive compensation,²² taxation of executive compensation,²³ due

¹⁵See Interstate Horse Racing Act, 15 U.S.C. § 3001, et seq. The Interstate Horse Racing Act grants tracks and horsemen the right to exclude betting on races involving their tracks and horses that are simulcast at other tracks or casino sports books. See 15 U.S.C. §§ 3003, 3004. The right to exclude “indirectly confers upon the property holder the right to determine the price of using the property.” Bell and Parchomovsky, *supra* note 2, at 598. Thus, the Interstate Horse Racing Act grants “home” tracks and horsemen the right to allocate the income from betting on their races even when the bet is not physically placed at the home track's betting window.

¹⁶See Bell and Parchomovsky, *supra* note 2, at 593 (“[R]ules of possession are subsidiary, not primary. That is, rights of owners are preferred to those of possessors, and for possession to be important, ownership must be unclear or the owner must be, for some reason, unavailable to assert her rights.”).

¹⁷*Id.* at 594 (“Since the value of stability in ownership would be seriously compromised by permitting current possessors to defeat the claims of owners, the law must properly assign a lower priority to possessors' claims.”).

¹⁸DICTIONARY.COM (defining “borrow” as “to use, appropriate or introduce from another source or from a foreign source”), <http://www.dictionary.com/browse/borrow>. See also *In re Tax Exemption of Kouri Place, LLC*, 44 Kan.App. 2d 467, 475, 239 P.3d 96 (Kan. App. 2010) (“[T]here may be a non-physical, intangible use of property, just as there may be a physical use.”).

¹⁹*The Five Capitals*, FORUM FOR THE FUTURE, <https://www.forumforthefuture.org/project/five-capitals/overview> (last visited June 23, 2018). The river in *Mono-*

ngahela Nav. Co. v. United States is an example of natural capital. Because the river is natural capital, the navigation company needed a license from the government to operate its lock business on the river, which included the collection of tolls from the river traffic using both the river and its services. Economically, sports betting is nearly identical. Sports betting traffic (i.e., bettors) uses a river of league games and the services of sports betting operators that operate on the river of games pursuant to a license from the government. The only difference is the river of games is private human capital and the river is public natural capital.

²⁰Richard Huff, *Human Capital*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/human-capital> (last visited June 23, 2018). In 1992, Gary Becker won the Nobel Prize for Economics for his pioneering work on human capital. See Press Release, Royal Swedish Academy of Sciences, *This Year's Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human Behavior and Relations* (Oct. 13, 1992), https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1992/press.html (stating “[i]t is hardly an overstatement to say that the human-capital approach is one of the most empirically applied theories in economics today”).

²¹*Marsh USA Inc. v. Cook*, 354 S.W. 3d 764, 769 (Tex. 2011).

²²*International Ins. Co. v. Johns*, 874 F.2d 1447, 1463 (11th Cir. 1989).

²³*Menard, Inc. v. Commissioner of Internal Revenue*, 560 F.3d 620, 626 (7th Cir. 2009).

process litigation,²⁴ bankruptcy,²⁵ and domestic relations.²⁶

A sport's league's human capital is subject to a network of intangible contract rights held by: (1) the league and its referees and umpires (and their unions); (2) its member franchises and their coaches; and (3) its member franchises' players and their unions. A sports franchise's network of intangible contract rights, including the human capital that makes up the bulk of the value, has been held to constitute property as a matter of law.²⁷ If the human capital of a sports franchise is property as a matter of law, then the human capital of a sports league, which is a collection of sports franchises, is also property as a matter of law.

2. Because a sports league's human capital settles all bets on the league's games, income from handling bets on such games follows the league's human capital as interest follows principal

To settle a bet, every time a sports betting operator handles a bet by borrowing financial capital from two or more bettors, the operator also borrows and uses a sports league's human capital in the form of the talents and skills of the league's players, coaches, and officials that collectively produce a game. With-

out the use of the sports league's human capital to settle bets, the financial capital borrowed by an operator from the bettors is inert and a sports betting operator's interest in income never comes into existence.²⁸ Simply stated, an operator's income follows the league's human capital in both a temporal and economic sense.

Concededly, a sports betting operator's use of a sports league's human capital to settle bets is a "non-rival" use because an infinite number of operators can simultaneously use a league's human capital to settle the bets they handle without depleting or consuming even a scintilla of the human capital.²⁹ In the hands of an operator, a league's human capital is a super-efficient "settlement machine" much like a slot machine or dice or cards or a roulette wheel is a settlement machine.³⁰ Moreover, because a league's human capital is subject to infinite simultaneous use as a settlement machine, a bet is a textbook example of a *non-rival partially excludable good*, which is the fountainhead of sports betting's immense potential to create wealth for the owners and operators of sports betting.³¹

Rivalry and excludability are closely linked, but not identical concepts. Rivalry is a purely technological attribute; excludability is a function of both technology and the legal system.³² Without PASPA, a sports

²⁴O'Donnell v. Barry, 148 F.3d 1126, 1140 (D.C. Cir. 1998).

²⁵Medill v. State, 477 N.W. 2d 703, 708 (Minn. 1991).

²⁶Blake v. Blake, 207 Conn. 217, 230, 541 A.2d 1201 (Conn. 1988).

²⁷City of Oakland v. Oakland Raiders, 32 Cal. 3d 61, 66 (1982).

²⁸As a bet is made and settled by the interaction of the human capital of at least two members of a league (i.e., at least two teams or individual competitors), an operator borrows and uses the league's "bundle" of property, not a "stick" of property of an individual member. Neither a game nor settlement of bets would ever come into existence if only one team's human capital took the field. If a league owns a property interest in sports betting, its members and affiliates (e.g., unions) are entitled to a single "bundled" compensation and further allocation of "sticks" of income is left to internal contractual bargaining between and amongst members and affiliates.

²⁹See Bell and Parchomovsky, *supra* note 2, at 578; Paul Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S74-S75 (1990) ("A purely rival good has the property that its use by one firm or person precludes its use by another; a purely non-rival good has the property that its use by one firm or person in no way limits its use by another."). A traditional borrower's use of financial capital extends to the actual rival use of the lender's underlying financial capital (not merely to the use of the interest rate that follows the performance of the capital). Likewise, a sports betting operator's use extends to the actual non-rival use of a league's human capital to settle the bets it handles (not merely to the use of the data—scores and statistics—that follows the performance of the capital). The only difference between the traditional buyer's use and the sports betting operator's use is the tra-

ditional borrower's use is rival (i.e., no other borrower can use the same financial capital that the borrower uses) and the sports betting operator's use is non-rival (i.e., an infinite number of other operators can use the league's human capital simultaneously without depleting the capital or interfering with any other operator's use). Thus, as is discussed in more detail *infra* in Section I.B.3., for purposes of the "interest follows principal" rule, use of data that measures performance of a league's human capital is equivalent to use of the league's human capital itself because income that follows data that follows the league's human capital is income that follows the league's human capital itself.

³⁰An imperfect analogy illustrates that the use of league human capital as a sports betting "settlement machine" is what prompted former Senator Bill Bradley to sponsor PASPA. In 1991, Senator Bradley wrote in an academic paper that "[a] thletes are not roulette chips, but sports betting treats them as such." See David Purdum, *Sports betting legalization: How we got here*, ESPN.com (May 22, 2018), http://www.espn.com/chalk/story/_/id/23561576/chalk-line-how-got-legalized-sports-betting.

Sports betting actually treats league human capital as a roulette *wheel*, which is the settlement machine in a roulette game. A roulette *chip* represents the financial capital of the roulette bettor and is the equivalent of the financial capital a sports-bettor loans to an operator. Notwithstanding this discrepancy, Senator Bradley's quote demonstrates that he recognized that league human capital plays a critical role in settling bets on games.

³¹Romer, *supra* note 29, at S74. ("The interesting case for growth theory is the set of goods that are non-rival yet excludable.").

³²Romer, *supra* note 29, at S73-S74. See also Burns, 544 F.3d at 289 ("The use of economics in legal analysis has increased exponentially over the last three

league can no longer prevent a licensed operator from using the league's human capital to settle bets on the league's games because a bet is a non-rival good and leagues lost the right to exclude that PASPA provided. But neither the demise of PASPA nor the non-rival nature of a bet on a league's human capital deployed in competition implies that the league's human capital no longer functions as a settlement machine. To the contrary, since the performance of a league's human capital still settles all bets that an operator handles on a league's games, the operator's income still follows the league's human capital just as interest follows principal.

For all of these reasons, while bettors create sports betting handle when they loan their financial capital to an operator,³³ the sports league—not the bettors or the state or even the sports betting operator itself—creates the operator's income by providing the “good” or “thing”³⁴ that settles all bets: the talents and skills of the league's human capital deployed in competition.

3. The right to income pursuant to the “interest follows principal” rule is an in rem property right that is independent of the league's intellectual property rights, if any, in data

Honoré's “right to the income of the thing”—such as the right to income pursuant to the “interest follows principal” rule—is inherently rooted in the legally indivisible coupling of the income to the thing that creates the income. Thus, the right to income is an in rem right to a share of ownership of the income against the rest of the world.³⁵

Courts have recognized that an in rem right to income pursuant to the “interest follows principal” rule is distinct from an intellectual property (IP) right to royalties.³⁶ However, like IP rights, “in rem rights have a primarily creative force.”³⁷ For this reason, to date, at least one sports league has mistaken the right to income created by the settlement of bets by its human capital for an IP right to a royalty.³⁸

decades, with the advent of the law and economics movement. . . . Resort to basic economic theory here is not intended, however, to imply that all legal questions should be viewed through a ‘law and economics’ lens. . . . We do believe, however, that ‘certain conceptual tools created by economists for the analysis of explicitly economic transactions can usefully be adapted to the legal environment.’ Moreover, where a legal issue contains an explicitly economic component, as does the instant case, the ‘language of economics’ is not simply useful but highly germane because it allows us to objectively measure and describe the economic result of a particular action.” (citations omitted).

³³In contrast to a license to handle sports bets, a ticket that represents a bet is property that is created by the financial capital a winning bettor loans to an operator. See Bell and Parchomovsky, *supra* note 2, at 582 (“[M]any types of papers have the power to dispose of the value they represent. Bearer bonds and many other negotiable instruments, for example, pay a sum of money to the bearer of the instrument—the paper itself contains the right to receive the money, rather than merely serving as evidence of a debt. Bearer bonds, therefore, are best treated as property themselves, rather than as evidence of an *in personam* claim; bearer bonds’ transferability and value depends on a bearer being able to rely on legally protected stability in ownership.”). Like the possessor of a bearer bond, the possessor of a betting ticket is also the true owner of the ticket and a league does not have any claim to either the ticket or the income that follows a winning ticket. Thus, a bettor may transfer ownership of a ticket on a platform such as PropSwap (<https://propswap.com>) or collect income from the sports betting operator if the ticket ultimately settles as a winning bet free and clear of any claim by a league or any other person.

³⁴See Bell and Parchomovsky, *supra* note 2, at 577 (“It is crucial to clarify that in the context of property, the term ‘thing’ extends beyond physical objects.”). *Accord* Portuguese-Am. Bank of S.F. v. Welles, 242 U.S. 7, 11–12 (1916) (“When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse.”); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (recognizing the “notion of ‘property’ . . . extends beyond land and tangible goods”); *Kimball Laundry*, 338 U.S. at 10–11 (holding “the intangible acquires a value to a [potential purchaser of services] no different from the value of the business’ physical property”).

³⁵See BLACK’S LAW DICTIONARY 864, 1420 (9th ed. 2009) (in Latin, “in rem” means “against a thing”); Bell and Parchomovsky, *supra* note 2, at 579 (“When Blackstone described property as the law of things, he was reflecting the historical understanding of property as creating rights *in rem*, i.e., against the rest of the world.”).

³⁶See *Estate of Graham v. Sotheby’s, Inc.*, 178 F. Supp. 3d 974 (C.D. Cal. 2016), *aff’d in part and rev’d in part sub nom.* *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1074–75 (9th Cir. 2018). In *Estate of Graham*, the trial court found two auction houses did not have a meritorious “interest follows principal” claim under the California Resale Royalty Act (CRRRA) because the auction houses did not own the underlying principal capital that created the income. *Estate of Graham*, 178 F. Supp. 3d at 993 (“The CRRRA makes clear that the five percent royalty interest is not the reseller’s ‘property’ by providing that ‘amounts of money held by any seller or agent for payment of artists pursuant to this section shall be exempt from enforcement of a money judgment by the creditors of the seller or agent.’”). On appeal, the Ninth Circuit noted even if the royalty at issue, which the auction houses paid rather than received, was subject to the “interest follows principal” rule, such a result would not void the CRRRA, but rather would entitle the auction houses to be compensated by the state. *Close*, 894 F.3d at 1075 n.8. In other words, the Ninth Circuit recognized that the “interest follows principal” rule does not include a right to exclude. Finally, while the Ninth Circuit reserved judgment on the application of the “interest follows principal” rule as discovery was not complete in the case, the Ninth Circuit did indicate that the royalty at issue resembled an adjustment of benefits and burdens akin to rent control that are subject to a “regulatory taking” analysis, not the *per se* taking analysis that the Supreme Court has held applies to the “interest follows principal” rule. See *infra* note 71 and accompanying text.

³⁷See Bell and Parchomovsky, *supra* note 2, at 579.

³⁸Matt Rybaltowski, *Adam Silver Touts Virtues of NBA’s Intellectual Property in Support of 1% Gambling Integrity Fee*, FORBES (Feb. 18, 2018), <https://www.forbes.com/sites/mattybaltowski/2018/02/18/adam-silver-touts-virtues-of-nbas-intellectual-property-in-support-of-1-gambling-integrity-fee/#273e18392f19> (“I would only say from the NBA’s standpoint we will spend this year roughly \$7.5 billion creating this content, creating these games,” [Adam] Silver said at an NBA All-Star Weekend press conference. “Those are total expenses for the season. So this notion that as the intellectual property creators that we should receive a 1% fee seems very fair to me.”).

The distinction is an important one. One must qualify as an inventor or author by providing the public with a “new thing” in order to obtain an IP right and the royalty that follows it.³⁹ But in order to own an in rem right to income created by underlying capital pursuant to the “interest follows principal” rule, all one must be is the rightful owner of the underlying capital that the income follows.⁴⁰ The owner of the underlying capital is not required to contribute any creativity or labor (in addition to the capital) to the creation of the income in order to own a property right to the income that follows the capital in rem.

No court has ever held that IP statutes and regulations preempt the “interest follows principal” rule. In the only decision from a federal court of appeals that even remotely addresses the interplay between the “interest follows principal” rule and IP law, the United States Court of Appeals for the Ninth Circuit indicated that, under some circumstances, the “interest follows principal” rule might apply to property that falls within one of the categories of IP work.⁴¹

Even if IP law could preempt the “interest follows principal” rule, IP law does not do so with respect to settlement of bets by a sports league’s human capital. In order for preemption to arise under the Copyright Act, the “subject matter” of the “work” at issue must fit “into one of the copyrightable categories in a broad sense.”⁴² But it is settled law that a sports league

categorically does *not* possess any IP right in its underlying games and limited rights with respect to data (e.g., scores and statistics) that follow its games because a game is a human capital competition, not a work of authorship.⁴³ In *National Basketball Association, Inc. v. Motorola, Inc.*, the United States Court of Appeals for the Second Circuit held that—in contrast to scripted entertainment—unscripted entertainment (such as a game) is categorically beyond the boundary of IP protection, when it stated:

Sports events are not “authored” in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, *athletic events are competitive* and have no underlying script. Preparation may even cause mistakes to succeed, like a broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run.⁴⁴

³⁹See Paul J. Heald and Suzanna Sherry, *Implied Limits on Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1144, 1162 (2000) (“[A]n author or inventor may not be given something for nothing; the author or inventor must give the public something it did not have before to earn the grant of exclusive rights from Congress.”).

⁴⁰See *supra* note 9.

⁴¹*Close*, 894 F.3d at 1075.

⁴²See *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004) (“A work need not consist of entirely copyrightable material in order to meet the subject matter requirement, but instead need only fit into one of the copyrightable categories in a broad sense.”).

⁴³See *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997) (“In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a). Section 102(a) lists eight categories of ‘works of authorship’ covered by the act, including categories as ‘literary works,’ ‘musical works,’ and ‘dramatic works.’ The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.”) (hereinafter referred to as *NBA*). See also Marc Edelman, *Lack of Integrity? Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 115 N.Y.U. J. L. & BUS. ____ (2018). While the nuances of IP protection of a sports league’s data is beyond the scope of this article, the author notes that while courts have refused protection to sports leagues such as the NBA that sponsor centralized human capital competition (i.e., only one ball is used in each competition), the courts have extended protection to leagues such as the

Professional Golfers’ Association that sponsor decentralized human capital competition (i.e., multiple balls are used simultaneously in each competition). See *Morris Communications, Inc. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1279 (M.D. Fla. 2002) (“Golf, unlike basketball, precludes a single person gathering all the information occurring on all 18 holes. . . . If Morris were able to gather scores from all 18 holes through a television or radio broadcast, Morris could then republish that information, absent a hot-news exception. However, golf’s *atypical format* [i.e., decentralized, simultaneous multi-ball human capital competition] prevents any single television or radio broadcast from providing results from all 18 holes live.”) (emphasis added), *aff’d*, 364 F.3d 1288, 1291 (11th Cir. 2004) (“The nature of a PGA golf tournament makes it impossible for one person to physically follow all the players at once. First, the average golf course spans approximately 150 acres and various golfers play numerous holes simultaneously.”). Thus, at this time, it appears data that follows decentralized human capital competition enjoys greater IP protection than data that follows centralized human capital competition.

⁴⁴*NBA*, 105 F.3d at 846. The author notes that it is the “hope and faith” inherent in human capital competition that makes such capital useful as a “settlement machine” and makes sports betting attractive to the bettor/lender. If some bettors know what will happen in a human capital competition before the game is played, the integrity of the competition is lost as the game is scripted or “rigged.” The author further notes that the “notable recent event” to which the Second Circuit panel appears to be referring was Jeffrey Maier’s interference with a fly ball hit by the New York Yankees’ Derek Jeter in the 1996 American League Championship Series between the Yankees and the Baltimore Orioles. See Zack Pierce, *20 Years Ago Today, Jeffrey Maier Gave Derek Jeter and the Yankees a Boost*, FOX SPORTS (Nov. 15, 2016), <https://www.foxsports.com/mlb/story/20-years-ago-today-jeffrey-maier-gave-derek-jeter-and-the-yankees-a-boost-100916>.

Further, even if settlement of bets by a sports league's human capital somehow could be shoehorned into a category subject to IP regulation, application of the "interest follows principal" rule still would not be preempted because—in order for the league to maintain a claim—"extra elements" in addition to the performance of the league's human capital are necessary. For example, bettors must be willing to lend their financial capital to a sports betting operator before a claim based on the "interest follows principal" rule can ever arise. The federal courts have recognized that neither the Copyright Act nor any other IP regulation preempts categories of claims that include such extra elements.⁴⁵ Claims arising from the settlement of bets by human capital competitions and other sporting events are within the "not preempted" category. To hold otherwise potentially could cause unintended consequences. For example, if IP preemption applies to sporting events, then the rights held by horsemen and racetracks under the Interstate Horse Racing Act would be subject to preemption, which is absurd.⁴⁶

A sports league's data and the application of IP law thereto are simply irrelevant to the "interest follows principal" rule. Honoré did not list data as one of the core incidents of modern ownership, but he did list income.⁴⁷ It is indisputable that, where income follows data that follows a sports league's human capital deployed in competition, the income follows the human capital. The income is like a caboose at the rear of a three-car train and a sports league's human capital is the engine pulling the caboose and a car in between (the data) the caboose and the engine. The income caboose has no choice but to follow the league's human capital engine where it takes it. Whether the engine owner has a property interest in the car between (the data) the engine and the caboose is irrelevant under the "interest follows principal" rule. All that matters is that the income (caboose) follows the principal (the human capital engine).

In light of a sports league's lack of IP rights in its human capital competition and the fact that "extra elements" beyond its human capital's performance are necessary before a league might have a right to income from its human capital's settlement of bets on its games, it appears clear that if a league has a right to income based on the "interest follows principal" rule, that right is an independent in rem property right and not an IP right subject to preemption by IP law.

C. Sports betting income may be the nonexclusive property of the sports leagues

The right to income "concerns the social use of property by the owner and others" and is among the most complex aspects of property law.⁴⁸ The right to income can include "the benefits of mere use and occupation, but ordinarily concerns fruits, rents, profits, the rewards of exploiting a thing, or the 'brute product of a thing, made by nature or by other persons.'"⁴⁹

In *Raceway Park, Inc., v. Ohio* the United States Court of Appeals for the Sixth Circuit relied upon the Supreme Court's "interest follows principal" decisions in *Phillips v. Washington Legal Foundation* and *Webb's Fabulous Pharmacies, Inc. v. Beckwith* to determine if two Ohio racetracks had property rights to income created by betting on their simulcasts of races at off-track locations.⁵⁰ Although the Sixth Circuit held that the tracks did not have a protected property interest in income from betting on their simulcasts, the Sixth Circuit noted that the tracks' argument had "some force" and, therefore, assumed the income was the private property of the tracks for argument's sake and proceeded to analyze whether the Ohio statute reasonably balanced the benefits and burdens of the betting on simulcasts among all Ohio stakeholders.⁵¹

For several reasons, it is unlikely the Sixth Circuit's holding in *Raceway Park* would control in a future

⁴⁵See, e.g., *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 430–31 (2d Cir. 2012).

⁴⁶See Schuyler Moore, *Copyright Preemption Run Amok*, FORBES (Apr. 8, 2017) ("Copyright preemption should only apply if the plaintiff owns a copyrighted work that is somehow being infringed. Such a plaintiff should be required to enforce their rights under the Copyright Act or not at all. It is ludicrous to apply copyright preemption to a plaintiff that cannot bring a copyright action at all . . .").

⁴⁷See *supra* note 5 and accompanying text.

⁴⁸J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 756–57 (1996).

⁴⁹*Id.* (quoting Honoré, *supra* note 5, at 4).

⁵⁰356 F.3d 677, 682–84 (6th Cir. 2004).

⁵¹*Id.* at 683 n.4.

dispute between a sports league and a state over the ownership of the income from sports betting on games owned by a league. First, in *Raceway Park*, the complaining tracks were attempting to assert a property interest to bets placed on races they did not own. Where tracks own races that create betting income, courts have found that income follows the races and tracks have a protected property right to that income under the Interstate Horse Racing Act.⁵²

Second, the law at issue in *Raceway Park* allocated the benefits and burdens of betting amongst all stakeholders. The complaining tracks were dissatisfied with their share of income, but they did receive a share. In contrast, legislation that does not allocate any benefits of betting to a stakeholder is likely an irrational adjustment of the benefits and burdens of betting.⁵³

Third, the Supreme Court has held that an owner of property need not have any interest in *anticipated* income in order to have a property interest in income that is, in fact, created by its property.⁵⁴ In other words, a sports league may have a property interest in sports betting income created by the league's human capital even if the league is not in the business of handling sports bets and does not have any power or right to handle bets on the league's games.

In their research paper, *A Theory of Property*, Abraham Bell and Gideon Parchomovsky propose that the answer to the following question is determinative whether an interest qualifies as property subject to in rem protection: "[W]ould a taking of the physical

embodiment of the asset substantially deprive the holder of the value [of the asset]? If the answer is yes, then the asset should receive *in rem* protection and consequently be considered property."⁵⁵ In the context of sports betting, the answer to this question clearly is "yes."⁵⁶ Taking the embodied human capital of a sports league's member teams would deprive the league of value. The affirmative answer to this question and the Supreme Court's holdings that income follows underlying capital suggests sports betting income is the property of the sports league.

The Supreme Court has rejected the argument that a government authority can create income by enacting a regulatory scheme.⁵⁷ In authorizing a board or commission to license sports betting operators to handle bets and collect income, a state grants an in personam privilege⁵⁸ that moves "through authorized channels approved by the regulatory authority."⁵⁹ As the licensed possessor of sports betting income, an operator is the owner of the income by presumption *unless* a sports league has a superior ownership interest in the income.⁶⁰ If a sports league's ownership interest in sports betting income is superior to an operator's interest, the state cannot transfer all of the income to the sports betting operator free and clear of the league's ownership interest without either acquiring the league's ownership interest from the league or incurring liability under the Takings Clause.⁶¹ As federal courts have recognized, to hold otherwise would permit states to "opt-out" of the Takings Clause in violation of the Supremacy Clause.⁶²

⁵²See *Kentucky Div., Horsemen's Benevolent & Protective Ass'n. v. Turfway Park Racing*, 20 F.3d 1406 (6th Cir. 1994), and *Horsemen's Benevolent Protective Assoc.—Ohio Div., Inc. v. DeWine*, 666 F.3d 997 (6th Cir. 2012).

⁵³See *Eastern Enterprises v. APFEL*, 524 U.S. 498, 536 (1998).

⁵⁴*Phillips*, 524 U.S. at 171 ("Regardless of whether that owner has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying capital.") (emphasis in original).

⁵⁵Bell and Parchomovsky, *supra* note 2, at 574.

⁵⁶See *Oakland Raiders*, 32 Cal. 3d at 66 ("A franchise is property, and nothing more; it is incorporeal property. . . ." (quoting *The West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 533 (1848))).

⁵⁷*Webb's Fabulous Pharmacies*, 449 U.S. at 163–64.

⁵⁸Shannon Bybee, *The Legal Status of Gaming and Its Impact on Licensing*, 2 GAMING RESEARCH & REV. J. 61, 61 (1995) ("The legal status of gaming or gambling is not the same as other businesses. Gaming is said to be a 'privileged' business. There is no 'right' to conduct a gaming business.").

⁵⁹Bell and Parchomovsky, *supra* note 2, at 581.

⁶⁰See *Sabariago v. Maverick*, 124 U.S. 261, 298–299 (1888) ("[P]ossession is always presumption of [an ownership] right, and it stands good until other and stronger evidence destroys the presumption.").

⁶¹Bell and Parchomovsky, *supra* note 2, at 595 ("A transferee receives only such title as the transferor conveys, and, generally, under no circumstances may the transferee receive title superior to that owned by the transferor. Thus, in order to determine to what extent any purported owner actually holds title over an asset, one must trace the provenance of the title to its 'root,' i.e., the original owner and grantor in the chain.").

⁶²See *Schneider v. California Dept. of Correction*, 151 F.3d 1194, 1200–01 (9th Cir. 1998) ("State law may affirmatively create constitutionally protected 'new property' interests . . . [but may not] . . . roll back or eliminate traditional 'old property rights.' . . . Were the rule otherwise, States could unilaterally dictate the content of—indeed, altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.").

II. BEYOND NEVADA, STATE LAW THAT DEPRIVES A SPORTS LEAGUE OF SPORTS BETTING INCOME MAY BE A PER SE TAKING OF A LEAGUE'S PROPERTY

As the Sixth Circuit observed in *Raceway Park v. Ohio*, “[t]he fact that a controversial way of making money may over the years be alternatively banned, heavily licensed, or permitted by the state, does not mean that the profits of such enterprises, when legal, can be taken by the state without being subject to Takings Clause protection.”⁶³

During the 25 years that PASPA was binding federal law, the overwhelming majority of states beyond Nevada treated sports betting as a prohibited nuisance.⁶⁴ A state may legalize an activity that its law previously characterized as a nuisance, but doing so also can expose the state to liability under the Takings Clause.⁶⁵

As the National Football League (NFL) long ago expressly recognized (and the other sports leagues have implicitly recognized), Nevada is a “unique” case.⁶⁶ In the words of Judge Richard Posner, one of the United States’ leading experts on property rights, the NFL and the other sports leagues have provided Nevada with a “lucrative silence” by failing to assert any property right to income from sports betting in Nevada.⁶⁷ However, sports leagues have not remained silent about sports betting income in any jurisdictions outside Nevada.

A. Sports leagues have abandoned any claim to a property right to sports betting income in Nevada

Of course, in Nevada, no sports league shares in any sports betting income. Nor does any league have a nonfrivolous claim to any share of sports betting income in Nevada. The passage of decades without any assertion of a property interest by any league is strong evidence that all sports leagues long ago abandoned any claim to a property interest in sports betting income in Nevada that is created by a league’s human capital.⁶⁸

The length of time that Nevada’s operators have held unchallenged possession and presumed sole ownership of sports betting income understandably has strengthened the value of sports betting income to both Nevada and its operators beyond the value of such income to other states and their operators where booking sports bets has been prohibited as a nuisance.⁶⁹ As Justice Oliver Wendell Holmes once observed, “[a] thing which you have enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act. . . .”⁷⁰

For these reasons, Nevada cannot be liable as a matter of law under the Takings Clause to any league for any percentage of income that follows any league’s human capital.

⁶³*Raceway Park*, 356 F.3d at 682 n. 4.

⁶⁴*See, e.g., United States v. Edge Broadcasting Co.*, 509 F.3d 418, 426 (1993) (holding gambling “falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether”).

⁶⁵*Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

⁶⁶*National Football League v. Governor of the State of Delaware*, 435 F. Supp. 1382, 1390 (D. Del. 1977) (“Numerous representatives of the NFL testified that they considered the situation in Nevada unique and did not believe it posed the same kind of threat to their enterprise [as betting in Delaware].”).

⁶⁷*Cerajeski v. Zoeller*, 735 F.3d 577, 583 (7th Cir. 2013).

⁶⁸*Goldfield Consol. Miller & Transp. Co. v. Old Sandstrom Annex Gold Mininig Co.*, 38 Nev. 426, 150 P. 313, 317 (1915); *Simon v. Weissman*, 301 Fed. Appx. 107, 111–12 (3d Cir. 2008) (holding rule that “interest follows principal” does not apply to abandoned property). No legal significance should be read into the sports leagues’ abandonment of any claim to a property interest in sports betting income in Nevada that is created by the league’s human capital. Prior to 1974, sports betting in Nevada was a quasi-legal activity because a 10% federal excise tax on handle made bona fide sports betting economically and practically impossible. RICHARD O. DAVIES AND RICHARD G. ABRAM, *BETTING THE LINE: SPORTS WAGERING IN AMERICAN*

LIFE 122 (2001) (“At first there was not much to attract professional bettors because a 1951 law passed by Congress imposed a 10 percent tax on all sports bets and required all bookmakers to purchase a fifty-dollar license.”). Given the tax and the state’s relatively small population, the transactional costs the leagues would have incurred to pursue a right to income in Nevada probably would have been greater than the value of the right until the mid-1980s when Nevada began to permit multiple operations under a single license and Vic Salerno began to develop computerized betting operations. *See* Chris Sieroty, *Salerno Helped Build Leroy’s into a Powerhouse*, LAS VEGAS REVIEW-JOURNAL (July 15, 2012), <https://www.reviewjournal.com/sports/betting/salerno-helped-build-leroy-s-into-a-powerhouse/>. Even today, because of the relatively small population, compliance costs, and fierce competition, some operators choose to abandon the Nevada market, as daily fantasy sports (DFS) operators did in 2015 when regulators indicated DFS contests required a gaming license to be legal in the state. *See, e.g., Christopher Palmeri, Amaya Fantasy Sports Unit Pulls out of Nevada after Ruling*, BLOOMBERG (Oct. 16, 2015), <https://www.bloomberg.com/news/articles/2015-10-16/amaya-says-fantasy-sports-unit-pulls-out-of-nevada-after-ruling>.

⁶⁹*Bell and Parchomovsky, supra* note 2, at 594.

⁷⁰Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

B. Beyond Nevada, however, the Supreme Court's per se approach to takings may apply to sports betting income

The Supreme Court has held that, where a state takes a protected right to income, the Court's per se approach to the Takings Clause applies.⁷¹ The Supreme Court has held the Takings Clause "protects private property without any distinction between different types."⁷² The United States Court of Appeals for the District of Columbia Circuit has stated this rule as: "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly use,' or 'permanently' occupy, space or a thing which heretofore was understood to be under private ownership."⁷³

In *Cerajeski v. Zoeller*, Judge Posner illustrated the per se rule that, where activity is not a nuisance or otherwise banned by the state's exercise of its police power, the loss of the fruit of underlying capital (i.e., income) is *equivalent* to the loss of underlying property itself:

Suppose Cerajeski had not lost a bank account but an apple orchard. Years later his guardian learns about the orchard, visits it, and discovers that a neighboring farmer has occupied the orchard for a number of years. The farmer acknowledges the guardian's right to the property, and leaves—thanking her profusely for the opportunity to gather and sell the apples that the orchard has produced all these years, but not compensating her for having appropriated them. She would be understandably indignant. He had converted property of hers—the apples. He would be entitled to a reasonable fee for having harvested and sold them rather than letting them

rot, but not to keep the entire revenue from their sale. If you own an apple tree, you own the apples; and if you own a deposit account that pays interest, you own the interest, whether or not the state calls interest property.⁷⁴

The sports leagues own the human capital that creates sports betting income just as the hypothetical guardian owned the orchard that created "apple income." Thus, outside Nevada, the sports leagues may own a share of the income from the settlement of bets on their games just as the guardian owned a share of the income from the sale of the apples.⁷⁵

The sports betting operator certainly has an "operator's right" to a reasonable fee for handling the bets and harvesting the income.⁷⁶ The state is entitled to tax the income. But it is as doubtful that the state can withhold from the sports league an owner's share of the income from bets on the league's games as it is the farmer who worked the orchard can withhold from the owner of the orchard a share of the income from the sale of the apples.

The decision of the United States District Court of Appeals for the Third Circuit in *Burns v. PA Dept. of Correction* is also instructive. In *Burns*, a prisoner contended that he possessed a protected property interest under the Due Process Clause in his prison bank account, which the prison system violated by assessing medical expenses against the account to pay for the medical care of another inmate that the prisoner had assaulted.⁷⁷ By a 2–1 margin, the Third Circuit held the prisoner possessed Honoré's "right to security" despite "no precedential authority addressing the right to security."⁷⁸

In doing so, the majority followed the "law and economics movement" that grew to fruition at the University of Chicago and includes Nobel Prize winners Ronald Coase and Gary Becker; federal judges

⁷¹Brown v. Legal Found. of Washington, 538 U.S. 216, 235 (2003).

⁷²Horne v. Dept. of Agriculture, 576 U.S. ___, 135 S. Ct. 2419, 2426 (2015).

⁷³Nixon, 978 F.2d at 1285 (emphasis added).

⁷⁴Cerajeski, 735 F.3d at 580.

⁷⁵As discussed *supra*, a sports league's IP rights, if any, are irrelevant under the Takings Clause because IP rights "fall outside the bounds of the Takings Clause." *Estate of Graham*, 178 F. Supp. 3d at 994.

⁷⁶*Id.*

⁷⁷544 F.3d at 282–86. In *Burns*, the Third Circuit noted that "property" is sometimes defined more broadly under the Due Process Clause than it is under the Takings Clause. *See id.* at 285 n.3. The distinction is not relevant here because a claim pursuant to the "interest follows principal" rule is a claim under the Takings Clause, not the Due Process Clause. Whether a state's authorization and licensing of sports betting that uses a sports league's human capital to settle the bets without compensating a sports league for its settlement services may be a violation of a league's rights under the Due Process Clause is beyond the scope of this article.

⁷⁸*Id.* at 291.

Posner, Guido Calabresi, and Frank Easterbrook; and other notable scholars.⁷⁹ In concluding that the prisoner did, as a matter of law, possess a constitutionally protected property interest in Honoré's "right to security" incident of ownership, the Third Circuit stated "where a legal issue contains an explicitly economic component, as does the instant case, the 'language of economics' is not simply useful but highly germane because it allows us to objectively measure and describe the economic result of a particular action."⁸⁰

While not every legal question is susceptible to an economic analysis of law,⁸¹ the issue of whether a sports league possesses a "right to income" pursuant to the "interest follows principal" rule is *perfectly* suited to such analysis because the issue has an explicitly economic component, specifically: the value of the settlement service provided by the league's human capital deployed in competition.

The Supreme Court has held that the "value" compensable under the Fifth Amendment is "that value which is capable of transfer from owner to owner, and thus of exchange of some equivalent. Its measure is the amount of that equivalent."⁸² Sports betting income is the value of bets handled by an operator and settled by a sports league's human capital and such income can be transferred easily between owners of the income: operators and leagues.⁸³ Thus, if a state authorizes sports betting without compensating a sports league for the value of the use of the league's

human capital to settle the bets, the state may be liable for a per se taking of the league's property.⁸⁴

III. STATE OPTIONS FOR RESPONDING TO SPORTS LEAGUES' CLAIMS TO PROPERTY RIGHTS IN SPORTS BETTING

By dispossessing U.S. sports leagues of their statutory right under PASPA to exclude licensed and regulated sports betting beyond Nevada and the other grandfathered jurisdictions, the Supreme Court stripped the leagues of the market power they held over licensed and regulated sports betting.⁸⁵ In considering its options for responding to a sports league's claim to a property right in licensed and regulated sports betting, a state should keep in mind that as its position hardens, it compels the leagues to seek intervention from the federal courts and Congress, which has the power to return market power to the leagues and has shown a willingness to do so by granting a "right to exclude" to tracks and horsemen in the Interstate Horse Racing Act.⁸⁶

In response to the demise of PASPA, the National Basketball Association (NBA), Major League Baseball (MLB), and the PGA Tour (PGA) reportedly are asking state legislatures to statutorily allocate a share of the betting handle on their respective games to the leagues as an "integrity fee" or "royalty" based on claims that they have a property right to such income.⁸⁷ States have at least three options for

⁷⁹See Herbert Hovenkamp, *Law and Economics in the United States: A Brief Historical Survey*, 19 CAMBRIDGE J. ECON. 331, 331 1995 ("The discipline of Law and Economics is often seen as beginning in the late 1950s, with the founding of the *Journal of Law and Economics*, or perhaps, in 1960 with the publication of Ronald Coase's article 'The Problem of Social Cost' Although not everyone agrees about the proper definition of 'Law and Economics', two seem to be helpful. First, Law and Economics is the study of the role of economics in the formation of legal policy. Second, Law and Economics is the study of law using assumptions and methodologies of economics."). The economic assumptions and methodologies relied upon in this article are those about non-rival, partially excludable goods that are set forth by Paul Romer in his seminal paper, *Endogenous Technological Change*. See *supra* note 29. In 1997, Professor Romer was named one of America's 25 most influential people for his work. An excellent detailed recounting of Professor Romer's work can be found in David Warsh's book, *Knowledge and the Wealth of Nations: A Story of Economic Discovery* (2006). On October 8, 2018, the Norwegian Committee awarded Professor Romer the Nobel Prize for Economics for his work on non-rival, partially excludable goods.

⁸⁰*Id.* at 289.

⁸¹*Id.*

⁸²*Kimball Laundry Co.*, 338 U.S. at 6. See also *Monongahela*, 148 U.S. 312, 328 ("The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner.").

⁸³See *supra* notes 58–61 and accompanying text.

⁸⁴See *supra* notes 8–12 and accompanying text.

⁸⁵While PASPA was the binding law of the land, an overwhelming "endowment effect," with respect to human capital, gripped several leagues—e.g., the NFL and National Collegiate Athletic Association (NCAA)—and caused the leagues to set what was essentially an infinite "reserve price" on their right to exclude betting on their games beyond Nevada. See Bell and Parchomovsky, *supra* note 2, at 568–69 (discussing reserve prices and the endowment effect) and 589 ("As law and economics scholars have noted, property rule protection enables the entitlement holder to set the [reserve] price at which the item will be used or transferred. *A fortiori*, it also empowers her to refuse to deal altogether and keep the object."). However, if the leagues had softened their position just a tiny bit, the leagues could have exercised market power by trading the states their right to exclude sports betting beyond Nevada for "the full value of the ownership right before departing with it." *Id.* at 598.

⁸⁶See *supra* note 15 and accompanying text.

⁸⁷Brett Smiley, *A Timeline of the Leagues' Fight for a Sports Betting "Integrity Fee"*, SPORTSHANDLE.COM (June 12, 2018), <https://sportshandle.com/a/timeline-of-the-leagues-fight-for-a-sports-betting-integrity-fee/>.

responding to these claims: (1) the New Jersey Option; (2) the Proposed New York Option; and (3) the Value Maximizing Option.

A. The New Jersey Option

As of September 1, 2018, no legislature has recognized the leagues' claims to a property-right-based share of sports betting income. Since the Supreme Court struck down PASPA, legislatures in New Jersey and Rhode Island have authorized sports betting without providing leagues any income and West Virginia has discussed, but not provided income.⁸⁸ One New Jersey lawmaker urged all 50 states to reject the leagues' claims and labeled the leagues' claims "extortion."⁸⁹

The benefit of the New Jersey Option to a state is that, by avoiding the *marginal cost*⁹⁰ of compensating a league, the state can extract a slightly higher marginal tax rate on sports betting income and thereby create marginally greater tax revenue. The Eleventh Amendment prohibits a league from recovering just compensation from the state in federal court, so a league's only forum for seeking compensation pursuant to the Takings Clause may be in the state's own courts.⁹¹ Only if a league prevails in such an action will a state be obligated to compensate the league.

The *fixed cost*⁹² of the New Jersey Option to a state is that leagues will have nothing to lose if the New Jersey Option is preempted by Congress. Exercising the

New Jersey Option does nothing but incentivize sports leagues to relentlessly seek the return of the right to exclude and market power over sports betting to the leagues via preemptive federal legislation.⁹³ Combating the leagues at the federal level will tax indefinitely a state's political capital in Congress, which already has demonstrated in the Interstate Horse Racing Act a willingness to grant market power to owners of capital that underlies betting. Exercising the New Jersey Option also forfeits monitoring and enforcement assistance from the leagues, which could be deployed to help channel all sports betting into the licensed and regulated market.

Finally, a state's exposure to potential liability under the Takings Clause will only grow as betting on sports grows in the state. While such liability currently may seem highly speculative, it is always prudent for a party to consider capping liability exposure as soon as it becomes aware of the exposure, especially when, as in this case, all of the foundational legal blocks are already in place for a league to build a potentially meritorious takings case.

The Supreme Court has indicated it believes the meaning of property under the Takings Clause is a federal question, not a question of state law.⁹⁴ The Court has recognized constitutionally protected property interests in a wide variety of intangible property similar to a sports league's human capital.⁹⁵ Given these precedents, the Court's newfound interest in sports betting law, and the Court's recognition

⁸⁸ See N.J. STAT. ANN. § 5:12A-11 (Issuance, renewal of sports wagering licenses); 6 R.I. GEN. LAWS § 42-61.2-2.4 (State to conduct sports wagering hosted by Twin River and the Tiverton Gaming Facility); W. VA. CODE § 29-22D-1, et seq. (West Virginia Lottery Sports Wagering Act).

⁸⁹ Associated Press, *N.J. Lawmaker Urges States to Reject Sports Betting "Integrity Fee,"* ESPN.COM (May 24, 2018), http://www.espn.com/chalk/story/_/id/23584671/new-jersey-lawmaker-wants-states-reject-sports-betting-integrity-fee-legislation-enacted.

⁹⁰ "Marginal cost is the additional cost incurred in the production of one more unit of a good or service," ECONOMICS ONLINE, http://www.economicsonline.co.uk/Definitions/Marginal_cost.html (last visited July 5, 2018).

⁹¹ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States or Citizens of another State, or by Citizens or Subjects of any Foreign State."). See *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948 (9th Cir. 2008). Because the Takings Clause is self-executing, subject to the ripeness doctrine, a sports league might be able to maintain a federal in rem action against the income itself that its settlement of bets creates if the income is in the hands of a licensed private operator. Compare *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (explaining that sovereign immunity cannot be invoked to bar federal jurisdiction when state does not have possession of the *res*). Such an action would be akin to a constitutional forfeiture action. Compare *United States v. \$124,700 in U.S. Currency*, 458 F.3d 822 (8th Cir. 2006). A sports league also might be able to

maintain a federal action for prospective relief under *Edelman v. Jordan*, 415 U.S. 651 (1974).

⁹² "A fixed cost is an expense or cost that does not change with an increase or decrease in the number of goods or services produced or sold," INVESTOPEDIA, <https://www.investopedia.com/terms/f/fixedcost.asp> (last visited July 5, 2018).

⁹³ See Darren Rovell, *Senate Minority Leader Chuck Schumer Suggests a Federal Framework for Sports Betting*, ESPN.COM (Aug. 29, 2018), http://www.espn.com/chalk/story/_/id/24511871/chuck-schumer-suggests-federal-framework-sports-betting ("Schumer's suggestions include the idea that all sportsbooks only use official league data to determine outcomes and that sports leagues themselves should be involved in determining what bets should be accepted Suggesting that legal books would have to use official data could be a huge revenue stream for leagues, but some could also be strongly opposed, reasoning that requiring official data would give the leagues a monopoly and is not integral to the sanctity of a bet.").

⁹⁴ *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943); *Murr v. Wisconsin*, 582 U.S. __ (2017).

⁹⁵ See *supra* notes 34 and 56. See also *Nixon*, 978 F.2d at 1285 (recognizing a "thing" protected as property by the Takings Clause "encompasses 'any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned'").

that the ownership of income follows the owner of its underlying capital, it is likely that if a dispute over the ownership of sports betting income ever reaches the Supreme Court, the Court will find that—beyond Nevada—the sports league that owns the human capital that settles the bets and creates the income also owns the income.

The sports leagues lost market power over sports betting because they valued their self-perceived marginal cost of sports betting (potential negative perception of the integrity of the leagues' games) more than they valued their real fixed cost of sports betting (the potential loss of the right to *control* the expansion of state authorized sports betting under PASPA). In other words, equipped with the nearly all-powerful right to exclude, the leagues had a strong hand, but they still overplayed it. Each state now has market power over sports betting and it would be nothing but prudent for each state to learn from the leagues' mistake while the lesson is still fresh and think twice before making the same bet that unexpectedly blew up in the leagues' faces.

B. The Proposed New York Option

In contrast to New Jersey and other states, in 2018, New York proposed legislation that included a “sports wagering royalty fee” of 0.20% of handle, which a league could claim by providing “evidence of policies, procedures and training programs it has implemented to protect the integrity of its sporting events.”⁹⁶ While the proposed legislation did not pass before the end of the 2018 legislative session, it is expected to surface again in some form in 2019.

The peculiar economic nature of non-rival goods is considered by some to be a market failure that justi-

fies government intervention in the price system.⁹⁷ Further, not all sports betting operators oppose the Proposed New York Option. On May 25, 2018, legendary “odds-whisperer” Michael “Roxy” Roxborough—who literally wrote the book on sports betting⁹⁸—thoughtfully observed on Twitter as follows:

- “Bookies should be working with the leagues and yes paying .25% of handle. That your entire business entirely depends on someone else's product without being a partner is absurd. But more importantly, books can extract a lot from the leagues to increase their bottom line.”⁹⁹
- “Sports betting of the near future will look nothing like the static [Nevada] model. Totally interactive with live streaming necessitates league partners. Stick to the [Nevada] model and you will be dust in the wind”¹⁰⁰

At the interstate level, Roxborough's view is supported by a 2017 trade publication report that estimated commercial and political buy-in from sports leagues could increase expected sports betting income in the United States from \$2 billion to \$5.8 billion by 2025.¹⁰¹

The benefits of the Proposed New York Option to a state are: (1) mitigation of exposure to potential liability under the Takings Clause because any league claim would be for a “regulatory taking,” which is much harder to prove than a *per se* taking;¹⁰² (2) potential increase of marginal income and corresponding marginal increase in tax revenue;¹⁰³ and (3) alignment with leagues on the federal level that could serve as the foundation for a bipartisan campaign to

⁹⁶S7900C, 2017–2018 Session (Mar. 7, 2018).

⁹⁷See Pranav Jain, *4 Types of Market Failures that Require Government Intervention*, HUFFINGTON POST (Sept. 2, 2017), https://www.huffingtonpost.in/pranav-jain/4-types-of-market-failures-that-require-government-intervention_a_21710283/ (“It is incumbent upon government to provide for and intervene in systems and market failures which involve non-rival and non-excludable goods.”).

⁹⁸Roxy Roxborough and Mike Rhoden, *Sports Book Management: A Guide for the Legal Bookmaker* (1998) (on file with author). After Nevada bookmaker Chris Andrews noticed Roxborough's quantitative approach to betting on baseball, Roxborough went on to found Las Vegas Sports Consultants, which became licensed to make betting lines for Nevada's sportsbooks. See Dave Tuley, *Profiling Roxy Roxborough, a Vegas Legend*, ESPN.COM (Aug. 19, 2015), http://www.espn.com/chalk/story/_id/13467100/profiling-roxy-roxborough-las-vegas-legend-chalk.

⁹⁹Roxy Roxborough (@RoxyLasVegas), TWITTER (May 25, 2018, 3:39 PM), <https://twitter.com/RoxyLasVegas/status/1000099016112156672>.

¹⁰⁰Roxy Roxborough (@RoxyLasVegas), TWITTER (May 25, 2018, 6:35 PM), <https://twitter.com/RoxyLasVegas/status/1000143399977021441>.

¹⁰¹GAMBLING COMPLIANCE, U.S. SPORTS BETTING: A MARKET ON THE CUSP OF MAJOR CHANGE (2017).

¹⁰²See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (holding an interference with property rights that “arises from a public program that adjusts the benefits and burdens of economic life to promote the common good” is not a taking); *Raceway Park*, 356 F.3d at 684–88 (finding Ohio General Assembly reasonably adjusted benefits and burdens when it allocated income from betting on simulcast racing and did not effect a taking).

¹⁰³See *supra* note 101 and accompanying text.

repeal the 0.25% federal excise tax on sports betting handle.¹⁰⁴

One of the costs of the Proposed New York Option to a state is that it is an inflexible “one size fits all” expense. Property rights emerge when the benefits of establishing those rights exceed cost.¹⁰⁵ Moreover, different patterns of property rights lead to different patterns of behavior.¹⁰⁶ Sports league interests and betting patterns differ from sport to sport and some leagues may not even want compensation for settlement services.¹⁰⁷ The Proposed New York Option forfeits flexibility that leagues and operators could use to tailor their relationship to produce maximum efficiency and security. In addition, as under the New Jersey Option, the Proposed New York Option also forfeits monitoring and enforcement assistance from the leagues, which could be deployed to help channel all sports betting into the licensed and regulated market.

The Supreme Court has held that “the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.”¹⁰⁸ The Proposed New York Option satisfies this test. But, “as society changes, the value derived from different assets is transformed and therefore the objects of property law will change over time. Similarly, as the cost of providing property rights for asset or owner classes changes, the net utility of providing property rights will change as well.”¹⁰⁹ If the value of all property rights of every sports league is uniformly fixed in an authorizing statute, it will be difficult for the state,

leagues, and operators to adapt to changes in the sports betting market, which is by its very nature liquid and dynamic.

For all of these reasons, while the Proposed New York Option is probably superior to the New Jersey Option, it still probably has some shortcomings that may hinder states, leagues, and operators from maximizing the value of a state's sports betting market.

C. The Value Maximizing Option

Nobel Prize winner Ronald Coase's approach to property “calls for well-defined legal rights to be assigned and then allocated through voluntary exchanges mediated by the law of contracts.”¹¹⁰ It is especially important that a state legislature clearly define a robust right to enforce the right to ownership of income from settlement of bets on a league's games. In the context of betting on sports, “integrity” includes not only the integrity of the underlying human capital competition (endogenous integrity), but also the integrity of the market itself, which includes that *all* bets are placed only in the licensed and regulated market (exogenous integrity). Even New Jersey's chief regulator, David Rebeck, has acknowledged that in order to achieve the latter the state will need help from the sports leagues.¹¹¹

Congress frequently authorizes private citizens to enforce federal laws as private attorneys general for the purpose of keeping capital “clean” and maintaining the integrity of markets. For example, under the Clean Water Act, subject to a jurisdictional notice provision, private citizens are authorized to act as

¹⁰⁴See 26 U.S.C. § 4401. See also Eric Ramsey, *Nevada Congresswoman Calls for End to Federal Sports Betting Handle Tax*, LEGALSPORTSREPORT.COM (Dec. 13, 2017), <https://www.legalsportsreport.com/16955/federal-sports-betting-handle-tax/>.

¹⁰⁵Douglas W. Allen, *The Rhino's Horn: Incomplete Property Rights and the Optimal Value of an Asset*, J. LEGAL STUD. S339, S340 (2002).

¹⁰⁶*Id.*

¹⁰⁷See 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/>.

¹⁰⁸*Monongahela Nav. Co.*, 148 U.S. at 324.

¹⁰⁹Bell and Parchomovsky, *supra* note 2, at 563.

¹¹⁰*Id.* at 535. The American Gaming Association's post-PASPA policy mirrors the Coasian approach as it encourages contracts over statutes. See Press Release, American Gaming Association, *AGA Outlines Sports Betting Priorities in Letter to Congress* (May 22, 2018) <https://www.americangaming.org/newsroom/press-releases/aga-outlines-sports-betting-priorities-letter-congress> (“Sports betting can benefit sporting bodies and gaming companies alike. The gaming industry

supports strong contracts between these parties to address issues such as data and the value of other activities. The gaming industry will vigorously oppose efforts to use federal or state legislation to set basic business terms.”).

¹¹¹See Grant Lucas, *NJ Regulatory Chief Determined to Put an End to Illegal Sports Betting Sites*, NJGAMBLINGSITES.COM (Aug. 9, 2018), <https://www.njgamblingsites.com/14590/new-jersey-end-illegal-sportsbook-sites/> (“As the regulated sports betting world continues to expand, it will take a village to take down the black market . . . [David] Rebeck recognized as much, noting that cooperation between state regulators and sports leagues will help accomplish such a feat. ‘Hopefully,’ Rebeck said, ‘in the future when we get over . . . our past disputes . . . we better start working together on some of these issues because if not, somebody's going to get burned, and none of us want a scandal.’”). See also Ike Brannnon, *Can Your Neighborhood Bookie Compete with the Internet*, REGULATION 2 (2018) (“In the world awash in legal betting and more on the way, how are bookies fairing in the 21st Century? Quite nicely, it appears. Despite some practices that seem almost antiquated, the economics of gambling tilts toward the local, illegal betting syndicate in many places. Against the odds, the local bookmaker has prospered against the legal competition.”).

private attorneys general to keep the “natural capital” that is our country’s rivers and streams clean.¹¹² Under the Clayton Act, citizens are authorized to act as private attorneys general to maintain the integrity of the country’s commercial markets.¹¹³

Congress has even extended private attorney general enforcement authority to the sports sector in the Interstate Horse Racing Act, which prohibits betting on races without the consent of the track that is hosting the races.¹¹⁴ In 2017, armed with this enforcement authority, the Stronach Group extracted a settlement from an online horseracing contest operator, Derby Wars, which required Derby Wars to agree to compensate the Stronach Group before using any of the company’s races in its contests.¹¹⁵ In doing so, the Stronach Group protected the exogenous integrity of the interstate horseracing market, which, under the Interstate Horse Racing Act, requires that the owners of the capital that settles bets on horse races receive a share of income from all betting.¹¹⁶

Bell and Parchomovsky identified the obvious link between “property definition and enforcement” and observed, “[e]nforcing property rights through monitoring infringements, apprehending transgressors and prosecuting and punishing violators has the effect of strengthening the value of property.”¹¹⁷ Monitoring and apprehension are most effective when carried out by specialized, highly incentivized agents.¹¹⁸ If the sports leagues’ persistent exercise of the market power granted to them pursuant to PASPA proved anything, it was that the leagues are tenacious enforcers of their rights when enforcement action is necessary.¹¹⁹

In order to maximize the value of a sports betting market, state legislatures considering and debating

legislation that authorizes sports betting may wish to consider the following:

- Under the Takings Clause, if a sports league has a property interest in income from sports betting, *the state*—not the sports betting operators—has the legal obligation to justly compensate the sports leagues for their property interest. Thus, it is in the state’s interest to adopt a sports betting policy that not only maximizes marginal revenue to the state, but also minimizes fixed liability exposure to the Takings Clause.
- “Just compensation” is measured by an owner’s pecuniary loss alone. Non-pecuniary loss—such as any alleged reputational harm associated with sports betting—is not compensable.¹²⁰
- While the owner of the interest in the human capital that creates a sporting event and the income from sports betting that follows may not be controversial, confusion or disputes could arise (e.g., in college sports when a team from one conference plays a game against a team from another conference or a team from one state plays a team from another state or in professional sports between owners and players’ unions).¹²¹ Thus, with input from sports leagues actively participating in the legislative process, states should specifically define the term “owner of the property interest in income from sports betting” in order to avoid value-destroying fragmentation of a league’s property interest.¹²²

¹¹²See 33 U.S.C. § 1365.

¹¹³See 15 U.S.C. § 15.

¹¹⁴See *supra* note 15.

¹¹⁵Matt Hegarty, *Stronach Group, Derby Wars Reach Settlement*, DAILY RACING FORM (June 14, 2017), <https://www.drform.com/news/stronach-group-derby-wars-reach-settlement>.

¹¹⁶See *supra* note 15.

¹¹⁷Bell and Parchomovsky, *supra* note 2, at 589. See also *id.* (“Property rule enforcement is . . . instrumental in the blocking of nonconsensual takings that may substantially deplete the value assets generate for their owners.”).

¹¹⁸*Id.* at 560.

¹¹⁹In contrast, state law enforcement of prohibitions on bookmaking has been almost nonexistent for decades. Quite simply, limited state law enforcement resources are consumed by attention to violent and other crime that is of greater

public concern than illegal bookmaking, which only victimizes members of the public who seek it out.

¹²⁰*Brown*, 538 U.S. at 237.

¹²¹See, e.g., Adam Candee, *Chaos Erupts in West Virginia over Sports Betting after Governor Issues Statement on Integrity Fee*, LEGALSPORTSREPORT.COM (May 10, 2018), <https://www.legalsportsreport.com/20293/wv-integrity-fee-sports-betting/> (reporting governor of West Virginia announced sports betting operators had agreed to pay the University of West Virginia and Marshall University an integrity fee, but operators denied an agreement had been reached); Mark Belko, *Pirates Want a Piece of the Sports Betting Pie to Pay for PNC Park Upkeep*, PITTSBURGH POST-GAZETTE (June 25, 2018), <http://www.post-gazette.com/business/development/2018/06/25/Pirates-want-a-piece-of-the-sports-betting-pie-to-pay-for-PNC-Park-upkeep-NFL-MLB-PGA-gaming/stories/201806250070>.

¹²²Bell and Parchomovsky, *supra* note 2, at 563–64 (“A different limitation on assets’ suitability for property protection stems from asset size and the threat of asset fragmentation. Here, the withholding of property protection is not categorical

- If a sports league has a property interest in sports betting income, the sports league has a property interest *only* in the income; a league does not have a property interest in the amount of handle because the bettors, not the leagues, create the handle by depositing financial capital with the operator. Adjustments of benefits and burdens of sports betting between leagues and operators should be based on income. If legislation authorizing betting on sports provides that operators will pay a share of income directly to a sports league, the legislation should also provide mechanisms for the league to secure the payments. If a sports league insists a property interest in income be calculated and paid as a percentage of handle, the sports league's interest should be discounted to compensate for the share of the risk of loss that the sports league should bear, but is avoiding.
- Although unlikely, it is possible that income from sports betting will be negative (i.e., the state or a sports betting operator will lose more than they win from the bettors over a defined period of time). Legislation authorizing betting on sports should provide that in the event a defined period generates negative income, sports leagues will reimburse operators for the league's share of the loss. Legislation also should provide mechanisms for the state and/or operator to secure the reimbursement payments. If a sports league refuses to share the risk of loss, the sports league's interest should be discounted to compensate for the share of the risk of loss that the sports league should bear, but is avoiding.
- A sports league does not have a property interest in the *anticipated* generation of in-

come. In other words, neither states nor sports leagues have a right to compel an operator to take bets on a league's games. Consistent with the privilege to handle bets, if an operator does not want to take bets on a league's games, it is free to not do so.

- A sports league does not have a right under the Takings Clause to exclude the state or operators from handling bets on its games. Injunctive relief is not available under the Takings Clause.¹²³
- The value of the property interest to one sports league may not be the same as the value to another league. Legislation that provides a procedural framework mandating leagues and operators promptly negotiate an agreement or, if agreement is not possible, resolve their disputes via efficient mandatory binding arbitration before a neutral third party. This may be preferable to fixing "one size fits all compensation" in a statute, which can only be changed by mustering enough votes in the legislature to amend the statute.¹²⁴ Sports leagues and operators are sophisticated enterprises and quite capable of quantifying their interests via negotiations.¹²⁵ Refraining from uniformly fixing the value of all sports leagues' property interest in an authorizing statute will provide flexibility to leagues and operators, which will increase the likelihood that the private stakeholders will reach a mutually acceptable agreement and build healthy long-term trust with one another.
- A sports league's cause of action under the Takings Clause does not become ripe until it has exhausted all state procedures that are available to it to seek compensation from the state.¹²⁶ Disputes about compensation can

but individualized. Take ownership in land, for instance. Needless to say, in principle, ownership in land is a recognized property interest. However, if the interest is devised to too many devisees, or allowed to descend to too many heirs, it may become so fragmented as to lose virtually all its value.").

¹²³*Ruckelshaus*, 467 U.S. at 1016.

¹²⁴Under the Federal Insecticide, Fungicide and Insecticide Act (FIFRA), Congress authorizes the United States Environmental Protection Agency to consider some data submitted by a party to register a pesticide to support a competitor's application if the applicant agrees to compensate the original submitter. 7 U.S.C. § 136a (c)(1)(F)(iii). If the parties cannot agree on the amount of compensation, FIFRA

provides that either may initiate a binding arbitration proceeding, and if the original submitter refuses to participate in negotiations or arbitration, it forfeits its claim to compensation. *Id.* The Supreme Court approved this model of required negotiation plus mandatory binding arbitration in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

¹²⁵David Purdum and Darren Rovell, *NBA Signs Deal with MGM to Be Gaming Partner*, ESPN.COM (Aug. 9, 2018), http://www.espn.com/chalk/story/_/id/24245142/nba-first-league-betting-sponsor-deal-mgm.

¹²⁶*Williamson County Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985).

result in acrimonious, lengthy, and expensive litigation battles.¹²⁷ The Supreme Court has approved binding arbitration as a procedure for establishing the compensation that is just when stakeholders cannot agree on compensation.¹²⁸ An operator that does not avail itself to the negotiation and dispute resolution process can be denied a license. A league that does not avail itself of the negotiations and the dispute resolution process can be deemed to have forfeited all claims to compensation for a property interest in income from sports betting.¹²⁹

- States, sports leagues, and sports betting operators all have an interest in the repeal or amendment of the 0.25% federal excise tax on sports betting handle. All stakeholders should attempt to agree on a unified approach to repealing or amending the excise tax as part of the adjustment of the benefits and burdens of sports betting. Repeal of the federal excise tax on sports betting could partially or perhaps completely offset a league's property interest in income and provide a windfall to Nevada operators who would not be subject to any league property interest.
- States should deputize leagues as "private attorneys general" to police the state's sports betting market. Authorizing legislation should include a cause of action that empowers every sports league to obtain injunctive relief, treble damages, and attorney fees in an action against any unlicensed sports betting opera-

tor taking a bet on *any* sport.¹³⁰ Because state enforcement resources are scarce and licensed operators are poorly positioned in the market to pursue unlicensed operators, an enforcement void exists in regulated sports betting markets. Self-interested leagues and their attorneys are perfectly positioned to fill this enforcement void.

- Sports leagues should contribute to funding the promotion of responsible gambling. As stakeholders in the expanded sports betting market, sports leagues should contribute their fair share to these important programs.

IV. CONCLUSION

By striking down PASPA and stripping U.S. sports leagues of their right to exclude licensed and regulated sports betting beyond Nevada and a few other jurisdictions, the Supreme Court transferred market power over sports betting from the leagues to the states. Each state now has choices as to how to craft its sports betting policy. But if the demise of PASPA teaches anything, it should teach a state that whenever gambling is involved, one must always be careful not to overplay one's hand. If all members of a state legislature take this lesson to heart and work diligently with the sports leagues and sports betting operator stakeholders, the state legislature is likely to craft and authorize a sports betting policy that both maximizes the value of sports betting and minimizes potential exposure to liability under the Takings Clause.

¹²⁷See Susan Zeller Dunn, *Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc.: Controlling the Stakes of Kentucky's Horse Racing*, 22 N. KY. L. REV. 405 (1995).

¹²⁸*Ruckelshaus*, 467 U.S. at 1019.

¹²⁹See *supra* note 124 and accompanying text.

¹³⁰Bell and Parchomovsky, *supra* note 2, at 561.