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Murphy's Law: How to Avoid Going Wrong with Federal Regulation of Sports Gambling

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Murphy’s Law: How to Avoid Going Wrong with Federal Regulation of Sports Gambling

ABSTRACT

Sports betting plays a major role in how fans and spectators enjoy sports. Fans place bets in their living rooms, engage in online fantasy sports, and travel to Nevada for massive Super Bowl parties just for the thrill of wagering on the “big game.” Yet, until 2018, the federal government banned sports betting, making states unable to exploit this lucrative business, even though the sports betting industry estimates that billions of dollars are spent on illegitimate sports wagering. With the recent striking of the federal ban on the regulation of sports betting, states have begun to benefit from sports betting within their own borders, creating a patchwork of legislation that operators must navigate. But state-specific legislation does not fully solve the problem of unregulated and untaxed interstate gambling that is still bound to occur. To take advantage of untaxed revenue and protect citizens who might otherwise explore illegitimate and unsafe betting options, this Note argues the federal government must enact comprehensive laws legalizing and creating rules specifically for interstate sports betting operators.

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Twenty-six million people planned to bet \$6.8 billion on February 2020's Super Bowl LIV.¹ Only \$154.7 million of this was wagered in Nevada, the center of the sports betting world.² What happened to the other \$6.6 billion? While some of it may have gone through newly legalized frameworks in other states, the vast majority was likely left unregulated and untaxed by federal and state governments.³

The federal government is ignoring a massive amount of potential revenue that could be realized through legalizing—and taxing—interstate sports betting. Various legislators have introduced bills, but none have gained traction in Washington, DC.⁴ Congress

1. *Super Bowl LIV Wagering Estimates*, AM. GAMING ASS'N (Jan. 28, 2020), <https://www.americangaming.org/resources/super-bowl-liv-wagering-estimates/> [<https://perma.cc/2WUH-Y5JF>].

2. Press Release, Nev. Gaming Control Bd., Super Bowl 2020, (Feb. 4, 2020), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=16539> [<https://perma.cc/ZQT3-SBUV>].

3. See *Super Bowl 2021: Guide to Legal US Sportsbooks*, LEGAL SPORTS REP. (Jan. 9, 2020), <https://www.legalsportsreport.com/sports-betting/super-bowl/> [<https://perma.cc/4WH9-JRNN>] (estimating that only \$325 million out of \$6 billion of total bets were wagered legally for Super Bowl LIV).

4. See, e.g., Brett Smiley, *Report: Romney To Carry Federal Sports Betting Bill Torch With New York's Schumer*, SPORTS HANDLE (Sept. 6, 2019), <https://sportshandle.com/romney-schumer-sports-betting-federal-bill-report/> [<https://perma.cc/G7WY-FPN8>]; Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong.

likely fears treading into the same waters it sunk in with the Professional and Amateur Sports Protection Act (PASPA), which banned all sports betting with few exceptions.⁵ In May 2018, the Supreme Court struck down this federal ban.⁶ In the wake of that decision, eighteen states now have some form of legalized and regulated sports betting, with six extremely close to launching similar laws.⁷ Sports gambling laws vary widely from state to state,⁸ causing concern with professional sports leagues,⁹ professional sports players' associations,¹⁰ and some governmental figures.¹¹ These entities all have shown support for a new federal law to patch some of the holes that PASPA¹² left. However, in enacting any new legislation, lawmakers must avoid the same constitutional problems that faced PASPA.

This Note argues that a new federal statute should be established that exclusively governs interstate sports betting operators. Part I discusses how sports gambling has been historically regulated through the Wire Act¹³ and PASPA.¹⁴ It then reviews the eventual downfall of PASPA in the Supreme Court.¹⁵ Part I continues with the leagues', the states', and the federal government's reactions to *Murphy v. Nat'l Collegiate Athletic Ass'n*, the case that struck down PASPA. Part II explores the benefits and potential market effects of a new federal framework for sports betting versus state-specific legislation. Part III concludes that a new federal statute focused solely on interstate

5. See Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, § 2(a), 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–04 (2018)), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

6. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. at 1461.

7. See *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. (Jan. 8, 2019), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> [<https://perma.cc/LT3F-9973>].

8. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (June 9, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [<https://perma.cc/J6LU-SSQQ>].

9. Brett Smiley, *Exclusive: Here's the 'Model' Sports Betting Playbook From NBA, MLB*, SPORTS HANDLE (Feb. 20, 2018), <https://sportshandle.com/sports-betting-nba-mlb-model-act-integrity-fee/> [<https://perma.cc/XR48-Z6WW>].

10. *Post-PASPA: An Examination of Sports Betting in America: Hearing Before Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary*, 115th Cong. 24–25 (2018) (testimony of the NFL Players Association, MLB Players Association, NHL Players Association, NBA Players Association, and Major League Soccer Players Association).

11. Smiley, *supra* note 4.

12. See Wayne Parry, *Feds Eye Move to Regulate Legal Sports Betting*, ASSOCIATED PRESS (Dec. 19, 2018), <https://apnews.com/a3e2b43f3931436e8156f54471ad5fc3> [<https://perma.cc/78ZH-T4LM>].

13. See Interstate Wire Act of 1961, Pub. L. No. 87-216, § 2, 75 Stat. 491 (1961) (codified as amended at 18 U.S.C. § 1084 (2018)).

14. See 28 U.S.C. § 3702.

15. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. at 1461.

sports betting platforms should be implemented to supplement the growing patchwork of state sports betting laws.

I. THE LEGISLATION BANNING SPORTS BETTING AND ITS (PARTIAL) DOWNFALL

A. Legislation and Case Law History

Sports betting in the United States has a long history of both legislation and case law. First, the Wire Act was implemented to prohibit all variations of interstate gambling.¹⁶ While the Wire Act sufficiently targeted organized crime, legislators and sports leagues decided that better tailored legislation was necessary for sports betting; they enacted the Professional and Amateur Sports Protection Act (PASPA) in 1992.¹⁷ PASPA prohibited state-sponsored sports betting schemes, and New Jersey eventually challenged the Act as unconstitutional under the anti-commandeering doctrine.¹⁸ After multiple challenges by New Jersey, the Supreme Court ruled that PASPA was, in fact, unconstitutional and struck down the entirety of the statute.¹⁹ This Section analyzes the necessity of PASPA, its enactment, and its eventual downfall in the Supreme Court.

1. The Wire Act

The Interstate Wire Act of 1961 clearly prohibits interstate sports gambling.²⁰ Congress passed the Wire Act to assist states in enforcing their own gambling laws and to stifle organized interstate gambling activities.²¹ US Attorney General Robert F. Kennedy introduced the Wire Act with the primary goal of taking away mafia organizations' most profitable revenue stream: bookkeeping.²² The Act

16. 18 U.S.C. § 1084(a).

17. See *What Is PASPA? The Professional Amateur Sports Protection Act*, THE LINES (May 25, 2018), <https://www.thelines.com/betting/paspa/> [https://perma.cc/TT45-TPQL]; Keith Pickard, *Crossed Wires: How the Wrangling Over the Wire Act is Shaping Policy in Sports Betting*, NEV. LAW., June 2020, at 8, 9, https://www.nvbar.org/wp-content/uploads/Nevada-Lawyer_June2020_CrossedWires-WireAct.pdf [https://perma.cc/KYN9-432P].

18. *Murphy*, 138 S. Ct. at 1466.

19. *Id.* at 1465–66.

20. 18 U.S.C. § 1084(a); see *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 136 (D.N.H. 2019).

21. Daniel L. Wallach, *The "Shifting Line" of Sports Betting Legalization*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 297, 299 (Michael A. McCann ed., 2018).

22. Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, in 29 CTR. FOR GAMING RSCH. OCCASIONAL PAPER SERIES 1, 1 (D. Schwartz ed., 2014).

criminalizes anyone “engaged in the business of betting,” offering, or taking bets through the use of wired devices from gamblers in other states.²³ For someone to be “engaged in the business of betting,” all the government must prove is that the accused “participated in a regular course of conduct or series of transactions” that was dedicated to profiting from betting.²⁴ A more general term for someone covered under the Act would be a “bookie.”²⁵ The Wire Act has evolved with technology, with courts finding that it encompasses the internet (and therefore cell phones and assumedly phone applications) as a “wire communication facility.”²⁶

The Wire Act includes a safe harbor that permits the transmission of information that assists the placing of bets between states where betting on sports is legal.²⁷ The safe harbor is only available when sports betting is legal in both the “sending” jurisdiction and the “receiving” jurisdiction; one alone is not sufficient.²⁸ Additionally, the safe harbor is limited to the transmission of information *assisting* bets (such as instructions on how to place a bet), not the bets themselves.²⁹ One final limitation to the safe harbor is that it does not apply to the individuals placing the bet; rather, it only applies to those *in the business* of betting.³⁰ Courts have not expanded this language to individual gamblers, regardless of their betting habits.³¹

2. Professional and Amateur Sports Protection Act (PASPA)

Legislators and sports leagues, concerned about the particular harms of widespread sports betting, were not satisfied with relying on an act designed to target organized crime. Spurred by concerns over match fixing, America’s youth having access to sports betting and becoming compulsive gamblers, and public confidence in sporting events, former National Basketball Association (NBA) player Bill

23. 18 U.S.C. § 1084(a).

24. Wallach, *supra* note 21, at 300 (citing *United States v. Rozenfeld*, No. 13 Cr. 268, 2014 WL 917057, at *3 (S.D.N.Y. Mar. 10, 2014)).

25. *Id.* at 299.

26. *Id.* at 300 (citing *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001)).

27. 18 U.S.C. § 1084(b).

28. *See United States v. Cohen*, 260 F.3d 68, 73 (2d Cir. 2001).

29. 18 U.S.C. § 1084(b).

30. 18 U.S.C. § 1084(a).

31. Wallach, *supra* note 21, at 301–02 (citing *United States v. Anderson*, 542 F.2d 428, 436 (7th Cir. 1976); *United States v. Baborian*, 528 F. Supp. 324, 329 (D.R.I. 1981), *rev’d on other grounds*; *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983)).

Bradley introduced PASPA on February 22, 1991.³² Bradley had support from the commissioners of the NBA, National Football League (NFL), and Major League Baseball (MLB); the leagues supported the curbing of sports gambling in order to protect the integrity of sporting events.³³ Additionally, the Senate Judiciary Report expressed major concern with sports gambling as “a national problem” that inflicted harms “beyond the borders of those States that sanction it.”³⁴ While the Wire Act did (and still does) prohibit interstate sports gambling, PASPA went further, making it illegal for any state to sanction intrastate sports gambling schemes.³⁵

In 1992, barely a year after its introduction, PASPA was passed and went into effect on January 1, 1993.³⁶ PASPA prohibited all state-run sports gambling schemes with narrow carveouts grandfathering in Nevada and other states that had already established sports gambling lotteries or schemes.³⁷ Additionally, it provided a “grace period” of one year to New Jersey and other states with previously legalized casino gambling to legalize sports gambling before being subjected to the federal ban.³⁸ However, New Jersey became subject to PASPA’s ban as it was unable to form a sports gambling scheme in time.³⁹

State and private actors were the targets of the ban, but private actors were only subject to PASPA if they acted “pursuant to the law” of a state.⁴⁰ This emphasized the statute’s targeting of state-sponsored sports gambling.⁴¹ To enforce this, PASPA empowered the Attorney General of the United States to seek injunctions in federal district court against violators of PASPA. Additionally, PASPA provided both professional and amateur sports organizations a cause of action to seek an injunction if the organization’s “competitive game[s] [were] alleged to be the basis of such violation.”⁴² For example, the National Hockey

32. S. REP. NO. 102-248 (1992), as reprinted in 1992 U.S.C.C.A.N. 3553, 3554–56; *What Is PASPA?*, *supra* note 17; see also Wallach, *supra* note 21, at 302.

33. S. REP. NO. 102-248, at 3554; *What Is PASPA?*, *supra* note 17.

34. S. REP. NO. 102-248, at 3556.

35. Wallach, *supra* note 21, at 299, 302.

36. S. REP. NO. 102-248, at 3555; Hunter M. Haines, Note and Comment, *Passing the Ball: The United States Supreme Court Strikes Down PASPA and Throws Sports Gambling Back to State Legislatures*, 78 MD. L. REV. 604, 609 (2019).

37. 28 U.S.C. § 3704(a)(1)–(2); Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 287 (2011).

38. § 3704(a)(3); Wallach, *supra* note 21, at 307.

39. Wallach, *supra* note 21, at 307.

40. *Id.* at 303; § 3702(2).

41. S. REP. NO. 102-248, at 3553, 3555; see also Wallach, *supra* note 21, at 302–03.

42. § 3703; Wallach, *supra* note 21, at 304.

League (NHL) could seek an injunction against Florida if the state legalized sports betting on NHL games, but the NHL would not have standing to block any wagering on MLB or NFL games. *Murphy v. Nat'l Collegiate Athletic Ass'n*, the case invalidating PASPA, is an extreme example of sports leagues joining together to sue a governing body, New Jersey, for legalizing sports betting.⁴³

3. *Murphy v. United States*

Despite having missed its chance in 1993 to legalize sports betting, New Jersey amended its state constitution in 2011 to allow the state legislature to license sports gambling at particular locations.⁴⁴ New Jersey needed state funds after the 2008 financial crisis and was wary of the underground sports betting industry flourishing in casino towns, such as Atlantic City.⁴⁵ Following that amendment, Governor Chris Christie signed the Sports Wagering Law in January 2012.⁴⁶ The Sports Wagering Law permitted sports betting in casinos and racetracks, taking advantage of already available gaming infrastructure.⁴⁷

Unfortunately for New Jersey, four professional sports leagues joined the NCAA in *National Collegiate Athletic Ass'n v. Governor of New Jersey* in suing New Jersey under PASPA before the state was able to issue any licenses.⁴⁸ In the first of multiple rounds of litigation, the sports leagues successfully convinced the court that, under PASPA, New Jersey could not sanction sports betting.⁴⁹ New Jersey's argument that the statute violated the anti-commandeering doctrine was fruitless.⁵⁰ This constitutional doctrine prohibits the federal government from "commandeering" state governments; essentially, the federal government may not impose "targeted, affirmative, coercive duties" on state legislators.⁵¹ On appeal, New Jersey argued that PASPA violated the anti-commandeering doctrine by forcing the states to *not* regulate sports gambling, reasoning that if the state repealed any ban or regulations, they could be found to have "authorized" sports

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

44. Wallach, *supra* note 21, at 307–08.

45. See *id.* at 308.

46. *Id.*

47. *Id.*

48. *Id.* at 309.

49. *Id.*

50. See *id.*

51. Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 158 (2001).

gambling.⁵² The US Court of Appeals for the Third Circuit denied New Jersey's appeal.⁵³ The court found that "it is hard to see how Congress can 'commandeer' a state, or how it can be found to regulate how a state regulates, if it does not require it do anything at all."⁵⁴ The majority did not accept New Jersey's argument, upholding PASPA as constitutional.⁵⁵

After losing its appeal in the Third Circuit, New Jersey filed a petition for a writ of certiorari in the Supreme Court.⁵⁶ In opposing Supreme Court review, the federal government argued that "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."⁵⁷ The Supreme Court silently agreed, denying New Jersey's petition for review of this decision.⁵⁸

New Jersey capitalized on the government's suggestion in October 2014 by partially repealing its sports betting laws in what is known as the "2014 Act."⁵⁹ The 2014 Act expressly states "that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling."⁶⁰ Rather, it repealed state-law provisions that prohibited sports gambling regarding wagering by anyone twenty-one years or older at a horseracing track, casino, or gambling casino in Atlantic City (remarkably similar locations to the 2012 Sports Wagering Law).⁶¹ The repeal did not apply to wagers on New Jersey college teams or collegiate events within the state.⁶² Once again, in *National Collegiate Athletic Ass'n v. Christie*, the sports leagues used their standing under PASPA to sue New Jersey,

52. Wallach, *supra* note 21, at 310.

53. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 215 (3d Cir. 2013) [hereinafter *Christie I*].

54. *Id.* at 231.

55. *Id.* at 232 ("Nothing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] by law' of gambling schemes.") This decision may have been spurred by the majority's note that the Supreme Court has only twice invalidated a federal law under the anti-commandeering doctrine. *See id.* at 227.

56. Petition for Writ of Certiorari, *Christie I*, 573 U.S. 931 (2014) (No. 13-967).

57. Brief for United States in Opposition at 11, *Christie I*, 573 U.S. 931 (2014) (No. 13-967).

58. *Christie I*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 573 U.S. 931 (2014).

59. Wallach, *supra* note 21, at 311-12.

60. The 2014 Act, 2014 N.J. Sess. Law Serv., ch. 62.

61. *See id.*

62. *Id.*

alleging this time that the repeal was a circumvention of PASPA.⁶³ For the second time, the Third Circuit heard the appeal after New Jersey was once again unsuccessful in the district court; it held that the repeal amounted to an authorization and there was no violation of the anti-commandeering doctrine.⁶⁴ This time, the Supreme Court found the constitutional debate significant enough to grant certiorari.⁶⁵

New Jersey's long journey finally ended with a victory when the Supreme Court held that PASPA violated the anti-commandeering doctrine.⁶⁶ The majority found that the federal government's distinction between affirmative command and preclusive actions was "empty."⁶⁷ Rather, whether affirmative or preclusive, Congress is essentially in direct control of state legislatures.⁶⁸ The Court reasoned that "[a] more direct affront to state sovereignty is not easy to imagine."⁶⁹ The entirety of PASPA was thus struck down as unconstitutional, opening the doors for state-sponsored sports betting.⁷⁰ The Court closed by stating that Congress may still regulate sports gambling directly (albeit in a more constitutional manner). However, if it chose not to do so, "each State is free to act on its own."⁷¹ This final statement foreshadowed the barrage of legislation states would enact less than two years after the *Murphy* decision in order to profit from this new revenue stream.⁷²

B. Responses to the End of PASPA

1. State Responses

Unsurprisingly, New Jersey was the first state to legalize sports betting after the demise of PASPA.⁷³ Following its lead, fourteen other states now have legalized and regulated sports gambling.⁷⁴ Some have realized financial success from regulating and taxing the activity. For

63. Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488, 506 (D.N.J. 2014) [hereinafter *Christie II*].

64. *Christie II*, 832 F.3d 389, 396–97, 402 (3d Cir. 2016).

65. See *Christie II*, 832 F.3d 389, cert. granted, 137 S. Ct. 2327 (2018) (mem.).

66. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1482, 1484–85.

71. *Id.* at 1484–85.

72. *Legislative Tracker*, supra note 7.

73. Brent Johnson, *Phil Murphy Signs N.J. Sports Betting Law. You Can Start Betting on Thursday*, N.J.COM (June 11, 2018), https://www.nj.com/politics/2018/06/sports_betting_to_begin_in_nj_after_phil_murphy_si.html [<https://perma.cc/VW8Y-HT74>].

74. See *Legislative Tracker*, supra note 7.

example, New Jersey implemented an online sports betting regime and quickly became the largest market for regulated online gambling in the United States, beating out Nevada for the top spot.⁷⁵ Mississippi was the first southern state to partake in the action, but with a twist: the state allows sports betting operations on casino property, but only allows mobile wagering if one is located on that same property.⁷⁶ Even with the odd restrictions on mobile wagering, Mississippi still experienced relative success with \$6.2 million in revenue from the sportsbooks in November 2018.⁷⁷

However, revenue numbers through December 2019—almost a full year and a half since states could capitalize on sports betting—show varying levels of financial success. For example, New Jersey quickly adopted a comprehensive scheme allowing sports betting in casinos, at racetracks, and online from anywhere in the state.⁷⁸ Giving citizens a variety of options and legal opportunities to place bets has led to New Jersey netting \$47,761,913 from June 2018 to December 2019.⁷⁹ Compare that with New York, which took a year longer to enact sports betting legislation.⁸⁰ New York, unlike New Jersey, requires that bets be placed in-person, rather than on phones or other devices.⁸¹ Additionally, New York followed New Jersey in prohibiting bets on in-state college teams.⁸² Partly due to the delay, but more significantly due to its refusal to allow mobile gambling, New York's 10 percent sports-gaming tax has only netted the state \$700,000 as of December 2019.⁸³

This illustration suggests that a state cannot be guaranteed a steady revenue stream from sports betting if it is unwilling to be flexible with how it allows its citizens to participate in sports betting.

75. Ben Burd, *The Biggest Sports Betting States in 2019*, SPORTS ECONOMIST (Feb. 6, 2020), <https://thesportseconomist.com/2019/09/04/the-biggest-sports-betting-states-in-2019/> [<https://perma.cc/9K2U-WV9K>].

76. *Id.*

77. *Id.*

78. See Act of June 11, 2018, 2018 N.J. Sess. Law Serv., ch. 33, codified at N.J. Stat. Ann. §§ 5:12A-10 to -19.

79. See Jon Chrisos, *Sports Betting Is Illegal in Maine. Here's How Much Other States Are Making in Tax Revenue*, WGME (Feb. 3, 2020), <https://wgme.com/news/i-team/sports-betting-is-illegal-in-maine-heres-how-much-other-states-are-making-in-tax-revenue> [<https://perma.cc/99MU-9YWX>].

80. Don Cazentre, *Why Is New York Lagging Behind in Sports Betting Revenues?*, N.Y. UPSTATE (Nov. 12, 2019) <https://www.newyorkupstate.com/casinos/2019/11/why-is-new-york-lagging-behind-in-sports-betting-revenues.html> [<https://perma.cc/GN9U-MT39>].

81. *Id.*

82. *Id.*

83. *Id.*; Chrisos, *supra* note 79.

2. League Responses

At first, professional sports leagues lobbied the government for the ability to opt their teams out of legalized gambling.⁸⁴ Clearly, states did not approve of this approach; it verged too closely to the enforcement power the leagues enjoyed under PASPA. As a result, the leagues developed a different approach—lobbying for “integrity fees.”⁸⁵ Integrity fees are essentially taxes on sports betting that benefit the leagues at the expense of sportsbooks and other betting operators.⁸⁶ Leagues started their request for these fees at 1 percent of sportsbook revenues.⁸⁷ Upon realizing that the state-sponsored sportsbooks would fight against losing what would be 20 percent of their revenue under the 1 percent fee, leagues dropped their expectation to 0.25 percent.⁸⁸

As states refused to incorporate integrity fees into their sports betting legislation, the quest for integrity fees faded. The leagues instead turned to a third plan of attack—mandated use of official league data.⁸⁹ Both Tennessee and Illinois included such a requirement in their sports betting bills.⁹⁰ Requiring official league data means that sportsbooks must purchase their data straight from the leagues or their affiliates; in effect, this provides leagues with the opportunity to monetize their own data.⁹¹ States that have not yet finalized their sports betting schemes may be more amenable to this option rather than allowing leagues to opt-out or giving them an integrity fee; this compromise provides state sportsbooks with potentially faster data.⁹² However, some states may not be persuaded that the speed is necessary; Nevada, the golden child of legalized sports betting, has never mandated the use of official league data, and its sportsbooks have

84. Bill King, *Gaming Industry, Leagues Differ on Integrity Guards*, SPORTS BUS. J. (Apr. 16, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/04/16/World-Congress-of-Sports/Integrity.aspx> [<https://perma.cc/J2FQ-TN8M>].

85. Matt Bonesteel, *Sports Gambling ‘Integrity Fee’ Supporters Are Not Doing Themselves Any Favors*, WASH. POST (May 22, 2018, 11:49 AM), <https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?noredirect=on> [<https://perma.cc/MF2R-6FBA>]; *Sports Betting Integrity Fee*, LEGAL SPORTS REP. (May 15, 2018), <https://www.legalsportsreport.com/integrity-fee/> [<https://perma.cc/Y7GG-SGJ7>].

86. *Sports Betting Integrity Fee*, *supra* note 85.

87. *Id.*

88. *Id.*

89. *Official League Data*, LEGAL SPORTS REP. (Aug. 2, 2019), <https://www.legalsportsreport.com/official-league-data/> [<https://perma.cc/GHY5-GJLU>].

90. *See id.*

91. *See id.*

92. *See id.*

not had any discernible issues with a few seconds delay in receiving game data.⁹³

3. Federal Responses

During the arguments regarding PASPA's constitutionality in front of the Supreme Court, New Jersey Congressman Frank Pallone proposed the Gaming Accountability and Modernization Enhancement (GAME) Act.⁹⁴ Pallone designed the bill to repeal PASPA and create a minimum amount of consumer safeguards that focused on many of the same goals of PASPA, such as integrity and underage gambling, along with financial goals such as licensing and taxation.⁹⁵ It also was supposed to include ways to verify age and location, privacy and data security precautions, and "recourse mechanisms for consumers."⁹⁶ While the GAME Act was designed to give states the final say in legalization, it conditioned allowance of a state framework and involvement in interstate gaming on federal oversight. However, due to New Jersey's success in self-regulating its sports gambling and what appeared to be professional sports leagues' opportunism, Pallone withdrew his bill on September 12, 2018.⁹⁷

The next proposed sports betting bill developed at the end of 2018—the Sports Wagering Market Integrity Act (SWMIA). This bill is the brainchild of Senators Orrin Hatch and Chuck Schumer.⁹⁸ It includes a provision requiring attorney general approval of proposed state-sponsored sports gambling programs, lists prohibited bettors, mandates the use of official data, institutes a national clearinghouse, and outlines more provisions related to responsible gambling and consumer safety.⁹⁹ SWMIA is still making its way through Congress, with Mitt Romney taking over Senator Hatch's position as Schumer's

93. *See id.*

94. Press Release, Congressman Frank Pallone, Jr., Pallone Introduces GAME Act on Day Supreme Court Hears Arguments in New Jersey's Sports Betting Case (Dec. 7, 2017), <https://pallone.house.gov/press-release/pallone-introduces-game-act-day-supreme-court-hears-arguments-new-jersey%E2%80%99s-sports> [<https://perma.cc/2FGD-TRQ8>] [hereinafter Congressman Pallone Release].

95. Wallach, *supra* note 21, at 323.

96. Congressman Pallone Release, *supra* note 94.

97. Bart Shirley, *Rep. Frank Pallone Retracts Game Act Federal Sports Betting Bill*, PLAY USA (Sept. 17, 2018), <https://www.playusa.com/frank-pallone-sports-betting-bill/> [<https://perma.cc/9USJ-22SS>].

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

99. John Holden, *Instant Expert Legal Analysis of the Federal Sports Betting Bill – Part 1*, LEGAL SPORTS REP. (Dec. 20, 2018), <https://www.legalsportsreport.com/26953/federal-sports-betting-bill-analysis/> [<https://perma.cc/982E-PSUS>].

partner.¹⁰⁰ As expected, public and congressional opinions on the legislation are varied. Some believe SWMIA is destined for failure in a divided Congress; others suggest it could be the beginning of a necessary federal framework, be it expansive or narrow.¹⁰¹

II. CONSIDERING THE BENEFITS OF FEDERAL VERSUS STATE REGULATION OF SPORTS BETTING

As more states regulate sports betting within their borders, a varied patchwork of legislation will likely become burdensome on the sports betting industry. Regulators and the leagues—acting as lobbyists—now must decide whether the burden of fifty different frameworks is better or worse than a new federal framework. A new federal framework will likely produce a variety of benefits, including promoting uniformity, creating minimum standards for industry members to follow, enhancing reliability with official data mandates, increasing enforcement for illegal interstate betting operations, and maintaining the integrity of sporting events. These benefits have both positive and negative market realities. The positive effects include creating better liquidity in the sports betting market, allowing more consumer choice, and arguably permitting steeper penalties for match fixing. Negative effects, on the other hand, include encouraging offshore betting and creating more opportunities for bad actors to engage in match fixing, despite the steeper penalties.

A. *Benefits of Federal Regulation*

A federal framework for sports betting, however minimal or expansive, is bound to have a multitude of benefits. The primary tangible gains of a federal framework include uniformity and reliability of governing structures as well as the integrity of games.¹⁰² A federal framework will likely benefit the leagues, bettors, sportsbooks, and lawmakers; but these stakeholders should be wary that an overbroad federal framework may encounter constitutional and legal pitfalls that

100. Smiley, *supra* note 4.

101. Compare *Mitt Romney Working on New Federal Sports Betting Bill*, SPORTSBOOK REV. (Sept. 20, 2019), <https://www.sportsbookreview.com/news/mitt-romney-working-on-new-federal-sports-betting-bill-85410/> [<https://perma.cc/9CDU-T2XM>], with Jeremy Maltby, Irwin Rajj, Laurel L. Rimon & Alexander Chester, *Federal Sports Betting Proposals: The Sports Wagering Market Integrity Act of 2018*, O'MELVENY & MYERS LLP (Feb. 13, 2019), <https://www.omm.com/resources/alerts-and-publications/alerts/federal-sports-betting-proposals/> [<https://perma.cc/32BX-78SQ>].

102. See S. REP. NO. 102-248, at 3556 (1992).

could threaten its viability. Thus, enacting a federal framework for sports betting must be deftly crafted and carefully implemented.

1. Uniformity

Uniformity in legalization and regulation of sports betting is an important benefit for the leagues and any sportsbooks looking to expand into other states.¹⁰³ Consistent licensing, compliance, and reporting requirements would allow ease of operation.¹⁰⁴ Nonuniform laws across all fifty states create a myriad of inefficiencies.¹⁰⁵ Conversely, an interstate law in addition to overruling the Wire Act (as proposed by SWMIA) would create an opportunity for interstate wagering to occur.

Yet, to obtain uniformity, a federal law could face a major anti-commandeering issue similar to the one that plagued PASPA.¹⁰⁶ Specifically, because a federal law setting requirements for state licensing schemes could “compel the States to require or prohibit [acts by private actors],” it might violate the anti-commandeering doctrine. As a result, obtaining federally imposed uniformity by requiring state action could be constitutionally tricky.¹⁰⁷ Additionally, even if there is no constitutional issue, the individual states might be better equipped to regulate their own markets because an overarching federal law would not be tailored to state-specific market realities.¹⁰⁸

2. Minimum Standards

To accomplish some form of uniformity, a federal law may attempt to establish minimum standards. For instance, rather than provide an overarching, detailed scheme for the states, a federal law may establish set penalties for match fixing or other sports betting-related crimes for the private actors. Regulating the minimum might be a better way to skirt the anti-commandeering doctrine, especially if the law concentrates on private actors engaged in interstate commerce, rather than imposing requirements on the states. In doing so, the federal government could not be accused of forcing the states to act. However, these minimum standards might already have

103. *See id.*

104. Jennifer Roberts & Greg Gemignani, *Who Wore It Better? Federal v. State Government Regulation of Sports Betting*, 9 UNLV GAMING L.J. 77, 88 (2019).

105. Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 159–60 (2018).

106. U.S. CONST. amend. X; *see also* State v. Rosenthal, 559 P.2d 830, 836 (Nev. 1977).

107. *See* JAY B. SYKES, CONG. RSCH. SERV., LSB10133, THE SUPREME COURT BETS AGAINST COMMANDEERING: MURPHY V. NCAA, SPORTS GAMBLING, AND FEDERALISM 2 (2018).

108. Roberts & Gemignani, *supra* note 104, at 88.

been enacted by some states;¹⁰⁹ consequently, a federal law would be a waste of resources.¹¹⁰

Despite these drawbacks, the majority of states are new to sports gambling. Therefore, federal guidance that incorporates voices from all interested parties could be beneficial. But, any federal scheme, even one with nominal requirements, runs the risk of being seen as too heavy-handed under the anti-commandeering doctrine.¹¹¹ Regardless of these anti-commandeering concerns, Congress appears to have the Supreme Court's blessing, through *Murphy*, to enact federal regulation pertaining to *individuals* engaged in *interstate* sports betting.¹¹² Thus, congressional enactment of minimum standards partnered with a paring back of the Wire Act¹¹³ may stimulate new business and economic benefits.

3. Official Data

As discussed in Part I,¹¹⁴ an official data mandate is extremely desirable for the leagues in both state and potential federal legislation. The legislators' reasoning put forth for official league data in a federal framework mirrors that of states: if the information comes from the league itself (or its official data-collecting partner), it is going to be consistent and fair.¹¹⁵ But, as previously discussed, Nevada's history of using "unofficial" data seems to undercut this reasoning, as its sportsbooks have had tremendous success without any substantial delays in obtaining real-time data.¹¹⁶ It is yet to be seen if this unofficial data will remain both fair, consistent, and fast on a larger scale as sports betting becomes more prolific, even if only permitted intrastate. Additionally, there may be constitutional concerns with this mandate. Some commenters have argued that a First Amendment issue may arise if the federal government were to pursue this option.¹¹⁷

109. *Id.* at 89.

110. *See id.*

111. *See* U.S. CONST. amend. X.

112. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476–77 (2018); Douglas L. McSwain, *The Legalization of Sports Betting: A Federalism Framework and the Horse Racing Model*, 11 KY. J. EQUINE, AGRIC. & NAT. RES. L. 63, 63 (2019).

113. *See infra* Sections II.B.2, III.B.

114. *See supra* Section I.A.2.

115. Roberts & Gemignani, *supra* note 104, at 93.

116. *Official League Data*, *supra* note 89.

117. *See* Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, WASH. J.L. TECH. & ARTS 63, 96–101 (suggesting that while the leagues may have a pecuniary interest in their data, a restriction on an individual's right to disseminate

Perhaps the biggest potential issue with an official data mandate is the threat of an antitrust violation. States that impose this requirement create a natural monopoly for each league in its own data; in turn, leagues might be challenged under the Sherman Antitrust Act.¹¹⁸ The league's immediate defense under an antitrust violation for an official league data mandate would be the state action doctrine.¹¹⁹ The state action doctrine first protects against the challenge of any anticompetitive action by the state itself.¹²⁰ Here, arguably the state itself is not acting anticompetitively; rather, it seems to be commanding corporate activity and transactions.¹²¹

In Tennessee—one of the states mandating official league data—the state action doctrine is on shaky ground, according to Tennessee attorney Alex Hall.¹²² Since the state itself is not acting, the standards in Tennessee are that “the requirement must be one clearly articulated and affirmatively expressed as state policy” and also “actively supervised by the state itself.”¹²³ Hall argues that neither of these requirements are met because, first, there is no reflection of policy regarding official data and, second, leaving cooperation to private negotiation “demonstrates a lack of state supervision.”¹²⁴

While the pitfalls of official league data and antitrust concerns may deserve a more thorough discussion, it is important to note that legislators and leagues must be aware of this threat when considering an official data mandate.

4. Enforcement

Enforcement has been a concern since before PASPA was dismantled.¹²⁵ Any regulatory authority, whether a new governmental

information occurring in publicly funded arenas could violate the First Amendment); *Official League Data*, *supra* note 89.

118. 15 U.S.C.A. §§ 1–2 (West) (The Sherman Act creates steep penalties for anticompetitive agreements and unilateral conduct that monopolizes a market).

119. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (“The Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action or official action directed by a state.”).

120. *Id.*

121. Brett Smiley, *Does Tennessee’s Sports Betting Data Mandate Enjoy Antitrust Immunity?*, SPORTS HANDLE (June 10, 2019), <https://sportshandle.com/tennessee-sports-betting-data-mandate-antitrust/> [<https://perma.cc/RA5D-FMFE>].

122. *Id.*

123. *Id.*; *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978).

124. Smiley, *supra* note 121.

125. Christopher Polisano, *Betting Against PASPA: Why the Federal Restrictions on Sports Gambling Are Unconstitutional and How They Hurt the States*, Comment, 25 JEFFREY S. MOORAD SPORTS L.J. 453, 479 (2018) (“Increased transparency from legalization would allow law

entity or a delegation to an existing agency, will clearly have the ability to enforce illegal interstate sports betting.¹²⁶ Additionally, SWMIA suggests that the Attorney General should have the power to bring actions against offshore sports betting websites.¹²⁷

Jennifer Roberts, previously Director of Sports Gaming Regulation for the Tennessee Education Lottery Corporation, and Greg Gemignani, a gaming law expert and instructor at the International Center for Gaming Regulation at University of Nevada, Las Vegas School of Law, suggest that the resources brought in through taxation might lead to increased enforcement.¹²⁸ Taxation, as evidenced by the various states' successes, will likely be lucrative for the federal government, but it alone may not be the catalyst for increased enforcement.¹²⁹ More likely than not, enforcement will be the consequence of lobbying by sports leagues that are opposed to sacrificing the integrity of their games.¹³⁰

5. Integrity

As mentioned in Section I.B.2,¹³¹ the leagues are unlikely to win any battle for integrity fees. However, sports' history of match fixing and gambling-based corruption¹³² might motivate the government to investigate and enforce any issues coming out of the leagues themselves.

Additionally, the integrity of US sports leagues may not be at as much of a risk as our history may make us believe. Dr. Declan Hill, an academic expert on match fixing, asserts that there are three conditions that foster match fixing: 1) vast illegal gambling markets, 2) poor wages paid to players and referees, and 3) a perception that the league in question is corrupt.¹³³

enforcement to focus more resources on other important areas of concern. According to one former FBI Director, 'a regulated market combined with modern data analytics technology makes it easier to track sports wagering, identify suspicious and anomalous betting patterns, and strengthen the integrity of games.'").

126. See, e.g., Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 105.

127. *Id.* § 301(f).

128. Roberts & Gemignani, *supra* note 104, at 90.

129. Miller & Cabot, *supra* note 105, at 171.

130. See, e.g., S. REP. NO. 102-248, at 3556 (1992).

131. See *infra* Section II.B.2.

132. See, e.g., William F. Lamb, *The Black Sox Scandal*, SOC'Y AM. BASEBALL RES. (2015), <https://sabr.org/research/black-sox-scandal-bill-lamb> [https://perma.cc/VR58-VXDC].

133. See Declan Hill, *A Critical Mass of Corruption: Why Some Football Leagues Have More Match-Fixing than Others*, 11 INT'L J. SPORTS MKTG. & SPONSORSHIP 221, 226-29 (2010).

As for the first factor, vast illegal gambling markets, those vouching for new federal sports gambling legislation believe that these exist in the United States.¹³⁴ Even those who believe that state legislation will swallow up illegitimate gambling cannot argue with the black-market valuations. For example, the American Gaming Association has estimated that up to \$150 billion per year is illegally bet on sports.¹³⁵

The second factor, poor wages, is only of concern in the NCAA. As of 2016, the NBA, MLB, NHL, and NFL all paid their players, on average, between \$2 million and \$6 million.¹³⁶ Even the MLS had an average salary of just over \$300,000 at the time.¹³⁷ NCAA student-athletes, on the other hand, have no opportunity to make money during college through their athletic efforts.¹³⁸ Some of these athletes may be particularly susceptible to the chance to earn some money for a missed free throw or field goal. New Jersey's own law appears to acknowledge this concern by not allowing bets on in-state collegiate sport or athletic events.¹³⁹

Finally, the third factor, perception, is particularly subjective in US sports. While history suggests there is a risk of illegitimacy in games,¹⁴⁰ most do not believe any games are fixed for gambling purposes; rather, outrage is more often directed at leagues playing

134. S. REP. NO. 102-248, at 3566.

135. Elaine S. Povich, *Show Me the Money: Sports Betting Off and Running*, PEW CHARITABLE TRS. (Sept. 10, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/10/show-me-the-money-sports-betting-off-and-running> [<https://perma.cc/4KYY-3KEL>].

136. Kurt Badenhausen, *The Average Player Salary and Highest-Paid in NBA, MLB, NHL, NFL and MLS*, FORBES (Dec. 15, 2016, 9:34 AM), <https://www.forbes.com/sites/kurtbadenhausen/2016/12/15/average-player-salaries-in-major-american-sports-leagues/#6adb92d61050> [<https://perma.cc/THD5-9GCN>].

137. *Id.*

138. John Holden, *Match Fixing and Other Manipulations in Sports Betting: A Primer*, LEGAL SPORTS REP. (June 6, 2018), <https://www.legalsportsreport.com/20922/match-fixing-primer-sports-betting/> [<https://perma.cc/CBX8-36RY>].

139. N.J. Stat. Ann. § 5:12A-10 (West 2018) (“[P]rohibited sports event’ means any collegiate sport or athletic event that takes place in New Jersey or a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place. A ‘prohibited sports event’ does not include the other games of a collegiate sport or athletic tournament in which a New Jersey college team participates, nor does it include any games of a collegiate tournament that occurs outside New Jersey even though some of the individual games or events are held in New Jersey. A prohibited sports event includes all high school sports events, electronic sports, and competitive video games but does not include international sports events in which persons under age 18 make up a minority of the participants.”); see also Caitlin D. Buckstaff, Note, *Covering the Spread: An Assessment of Amateurism and Vulnerability of Student-Athlete’s in an Emerging Culture of Sports Wagering*, 16 VAND. J. ENT. & TECH. L., 133, 153 (2013).

140. See, e.g., Holden, *supra* note 138.

favorites towards money-making teams.¹⁴¹ Overall, integrity is one of the primary reasons for implementing federal legislation and appears to be interwoven into many of the other factors. Integrity concerns, however, are also based on speculation and biases regarding the socioeconomic statuses of athletes and others involved in sports. Thus, while integrity should be considered and protected, especially in the NCAA, it may not be as pressing of an issue as legislators and sports leagues believe.

B. Market Realities

A federal framework for sports betting will affect more than the game itself. Some ramifications of a federal framework, such as better market liquidity and more consumer choice, are a societal positive. But more sinister consequences loom, such as driving more betting into underground markets and incentivizing match fixing. As with any law, these realities must be considered, and the trade-offs must be weighed carefully.

1. Incentivizing Offshore Betting

Offshore betting may become an issue if wider regulation ensues. Sara Slane, the prior Senior VP of Public Affairs for the American Gaming Association, testified before a House subcommittee that “unnecessary regulations will only allow illegal offshore sportsbooks to thrive.”¹⁴² While potentially counterintuitive, this argument is not without merit. The underground sports betting market flourished during the existence of PASPA¹⁴³ because people enjoy sports betting and had no other way to engage in it. Now, as sports betting becomes even more prolific due to daily fantasy sports, individuals are looking for more ways to engage with a league or a specific team. For example, people who want to place a bet on which NFL team will win the Super Bowl will be forced to do so illegitimately if their state has chosen not to support sports betting.

141. See, e.g., Zach Lucini, *This Guy Thinks All Pro Sports Are Rigged*, VICE (Dec. 20, 2013), https://www.vice.com/en_us/article/5gkbgq/this-guy-thinks-all-pro-sports-are-rigged-0000165-v20n12 [<https://perma.cc/45WA-KQRX>].

142. *Post-PASPA: An Examination of Sports Betting in America*, *supra* note 10, at 11 (testimony of Sara Slane).

143. See Povich, *supra* note 135.

While not all fans engage with their favorite sports in this way, many do, with market valuations suggesting that the trend will grow.¹⁴⁴ Those in favor of leaving sports betting oversight up to the states believe that this is enough; however, there is a large untapped market for *interstate* sports betting that will remain unregulated and potentially unsafe for individuals' privacy and assets. Individuals who reside in states without a betting framework likely will still seek an option to wager on games, and a regulated interstate framework may capitalize on this money, which would otherwise go untaxed. Nevertheless, as Sara Slane suggested, regulating too heavily may deter market entry and potentially cause sportsbooks to move offshore.¹⁴⁵

2. Better Market Liquidity If the Wire Act Is Updated

If the Wire Act was modified, as suggested by SWMIA,¹⁴⁶ there is a strong potential for better market liquidity because sports gambling companies could operate across state lines. With this option, there might be more access to sports gambling for those not in states that have chosen to legalize it, minimizing the concern of offshore betting by replacing it with federally regulated options. SWMIA suggests that only interstate bets pursuant to an "interstate sports wagering compact" would be permitted.¹⁴⁷ This requirement likely eases some enforcement burdens. It may also alleviate the concern that an individual located in a state where sports betting is illegal who places a bet through a website hosted in a state where sports betting is legal would be charged with a felony under the Travel Act and Unlawful Internet Gaming Enforcement Act.¹⁴⁸

As it currently stands, the Wire Act seems to be the single most formidable barrier to interstate sports gambling.¹⁴⁹ Some speculate regarding the Supreme Court's language in *Murphy* addressing the

144. *Sports Betting Market Expected to Reach \$8 Billion by 2025*, MARKETWATCH (Nov. 4, 2019, 3:42 PM), <https://www.marketwatch.com/story/firms-say-sports-betting-market-to-reach-8-billion-by-2025-2019-11-04> [<https://perma.cc/F3R7-4SVA>].

145. See *Post-PASPA: An Examination of Sports Betting in America*, *supra* note 10, at 11 (testimony of Sara Slane).

146. Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 301.

147. *Id.* § 105(a) ("Each sports wagering opt-in State may enter into such interstate sports wagering compact as may be necessary to provide for sports wagering on an interactive sports wagering platform between and among individuals located in any State that is party to such compact.").

148. Lars A. Peterson, Note, *The Winning Lineup: Framework for Federal Regulation of Daily Fantasy Sports*, 80 U. PITT. L. REV. 729, 745–46 (2019).

149. See Juan Carlos Blanco, *What Is the Net Effect of the New Wire Act Opinion on Sports Betting?*, THE LINES (Apr. 14, 2019), <https://www.thelines.com/wire-act-sports-betting/> [<https://perma.cc/M4FV-A9XL>].

Wire Act, specifically, whether the Court suggested that interstate transmission of information (though still not bets themselves) is now permissible.¹⁵⁰ Nevertheless, for true market opportunities to open up for sports betting entities, individuals around the country must be able to access websites allowing them to place bets.

3. More Consumer Choice and Engagement

Federal regulation would allow citizens of certain states the ability to enter a wider variety of bets—since lines and bets available vary by the sportsbook¹⁵¹—and choose the companies they trust most. Integrity issues caused by citizens betting on their own states' sports might become a concern, but this situation cannot be truly avoided. Match fixers can easily access out-of-state sportsbooks to make bets, whether by traveling or masking their IP addresses.¹⁵² As a result, there seems to be no legitimate reason to restrict genuine fans and bettors from having the choice to gamble on their local university's team.

Additionally, as fans gain the opportunity to bet on more events outside the areas they live, they will become more engaged in the product. Sports betting, whether single-game or real-time “prop” bets (bets placed on singular events during a game), will likely spur increased engagement similar to what fantasy football encouraged.¹⁵³ Research has shown that 64 percent of fantasy sports players watch

150. Sam Shefrin, *Everything We Know About the Interstate Wire Act of 1961*, LINEUPS (June 5, 2019, 11:58 AM), <https://www.lineups.com/betting/everything-we-know-about-the-interstate-wire-act-of-1961/> [<https://perma.cc/C469-HMZM>].

151. Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan. 30, 2015), <https://www.complex.com/sports/2015/01/how-betting-lines-work/> [<https://perma.cc/VA7N-2LM5>] (“Once upon a time, there weren’t many reputable sportsbooks out there. So there was a lot more consistency from one sportsbook to the next. But today, there are so many of them that it’s not uncommon for betting lines to differ from one sportsbook to the next.”); see Marcus Mosher, *NFL Prop Bets*, BOOKIES.COM (Dec. 10, 2019), <https://bookies.com/tips-and-picks/nfl-prop-bets/> [<https://perma.cc/Y2FA-ACUA>] (suggesting that new bettors look at multiple sportsbooks before placing their first prop bet to find the best value since the available bets vary from site to site).

152. David Nugent, *Does Using a VPN Help You Gamble in a Restricted Jurisdiction?*, LEGAL GAMBLING & THE L. (Mar. 13, 2018), <https://www.legalgamblingandthelaw.com/blog/does-using-a-vpn-help-you-gamble-in-a-restricted-jurisdiction/> [<https://perma.cc/RR8T-E37D>] (“Online gambling is restricted and outlawed in several countries across the world. However, in order to actually enforce the restriction, ISPs go ahead and block websites depending on your IP address/location. However, with right use of the right VPN, you can remotely access your favorite online casino or casinos without any restrictions through some random server somewhere else in the world wherein there is no restriction or ban in place.”).

153. *Rise of Fantasy Football Played Big Part in League’s Growth*, FANTASY SPORTS & GAMING ASS’N (Sept. 2, 2019), <https://thefsga.org/rise-of-fantasy-football-played-big-part-in-leagues-growth/> [<https://perma.cc/XEL6-QXXZ>].

more live sports because of their involvement in fantasy leagues or daily fantasy, both of which have similarities to traditional sports betting.¹⁵⁴ This number is likely to increase as fans get involved in sports betting, which promises a lower time commitment but the same entertainment value.¹⁵⁵ Sports teams may be able to follow a European sports model and provide sportsbooks in-stadium;¹⁵⁶ while in-stadium sportsbooks seem unimaginable in the current US sports culture, American leagues are already mimicking English football by accepting official betting partners and sponsors.¹⁵⁷ An in-stadium sportsbook would help leagues acquire a form of their long-sought-after integrity fees¹⁵⁸ while simultaneously drawing more attendance.

Overall, sports betting could provide consumers with more choice in where and on what they bet. Additionally, fans who attend or watch the games from home will be more likely to actively engage in the sports product while placing single bets on the game, rather than the season-long commitment of fantasy football.

III. FEDERAL REGULATION FOR INTERSTATE SPORTS GAMBLING BUSINESSES AS A SOLUTION

The federal government should modify SWMIA both to avoid the same traps that PASPA fell into and reflect the growing acceptance of sports betting. Setting minimum standards for states to follow and

154. *Id.*

155. See Daniel Wallach, *Player Unions Need to Engage on Sports Betting, and It's Not Too Late*, FORBES (Apr. 8, 2018, 9:42PM), <https://www.forbes.com/sites/danielwallach/2018/04/08/player-unions-need-to-engage-on-sports-betting-and-its-not-too-late/#3b19a9155d23> [<https://perma.cc/WGZ4-2ZXA>] (“For the leagues, sports betting legalization will drive fan engagement, which in turn will increase television ratings and the value of the leagues’ media rights deals.”).

156. Tariq Panja, *Is Britain the Future of U.S. Sports Betting?*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/sports/sports-betting-england.html> [<https://perma.cc/XY7Y-N4XJ>] (“Nine of the 20 soccer teams playing in the Premier League have names of gambling companies emblazoned on their jersey fronts. . . . Inside the stadium, betting odds crawl across advertising boards. Almost every Premier League soccer team has an official betting partner, which in some cases is a multimillion-dollar relationship that includes betting booths inside the stadium and dedicated websites.”).

157. Irwin Raji, Jared F. Bartie & Alexander Chester, *Legalized Sports Gambling: Revenue Opportunities Following Murphy*, O’MELVENY & MYERS LLP (Aug. 13, 2018), <https://www.omm.com/resources/alerts-and-publications/alerts/client-alert-legalized-sports-gambling-revenue-opportunities-following-murphy/> [<https://perma.cc/P4X9-8HHH>]; see *U.S. Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting-deals/> [<https://perma.cc/AE7R-ETDX>] (last updated Mar. 28, 2019).

158. Raji et al., *supra* note 157 (discussing the potential of monetization of in-stadium betting through betting kiosks or phone applications).

requesting that they apply for federal approval (as proposed by SWMIA)¹⁵⁹ treads too close to the anti-commandeering issues PASPA faced; rather, a new federal law must solely focus on regulating and controlling interstate-only gambling activity. Such a statute would need to alter the Wire Act to permit interstate sports gambling; it is no longer realistic to ignore the prevalence of the internet and its influence on sports betting. The statute should not infringe on state gambling laws except to allow those citizens to participate in federally regulated activities.

Rather than requiring interstate compacts, a new law should allow sports betting entities to operate exclusively online under exclusive federal jurisdiction. Repealing the Wire Act and creating a strict framework with higher standards (and penalties) for interstate sportsbooks would help maintain integrity while generating more revenue for businesses, the government, and the leagues.

The new statute would need to accomplish several goals: (1) enact steeper penalties for violations, (2) command modification or replacement of other sports gambling laws, (3) dictate revenue sharing between the states and the federal government, (4) create an advisory committee for the continued enforcement and support of states and individual bettors, and (5) facilitate an open-market system for sports data rather than mandate the use of official league data.

A. Steeper Penalties

A new law would necessitate creating steeper penalties for violators of sports betting laws; such a statute would deter match fixing by making it a federal crime. Steeper penalties would not discourage honest bettors, primarily average sports fans, from engaging in wagering; rather, it would disincentivize only those with the power to alter the outcome of a bet from doing so. The necessity of steeper penalties comes from individuals being able to utilize the anonymity of the internet to harm the integrity of games or scam inexperienced bettors. Without steeper, potentially criminal penalties, the same characters who helped the offshore and underground sports betting markets thrive during PASPA will likely continue in their own ways to escape state penalties.¹⁶⁰

159. Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. §§ 102(a)(1), 103(b).

160. See Martin Derbyshire, *Legal Sportsbooks Have to Dominate Illegal Ones and Lawmakers Are Key*, PLAY USA (Feb. 20, 2020), <https://www.playusa.com/lawmakers-sports-betting-market/> [<https://perma.cc/94FH-UA5P>].

As proposed, SWMIA creates a blanket prohibition on accepting sports wagers and creates exceptions for operators and individuals who accept these wagers in accordance with state law.¹⁶¹ Any violators would be subject to a fine of either up to \$10,000 or three times the amount of money wagered, whichever is greater.¹⁶² This fine is sufficiently high, since a separate violation occurs for each sports wager accepted.¹⁶³ However, SWMIA fails to set a standard for when actions become criminal, instead delegating the criminal penalties to the Wire Act and the Illegal Gambling Business Act (IGBA).¹⁶⁴ Both acts impose fines; the Wire Act allows for imprisonment for up to two years and the IGBA for up to five.¹⁶⁵ For full deterrent power and clarity of law, the new federal statute should instead expressly set its own criminal penalties—for instance, an additional fine and up to five years in prison. Under this structure, any one person who is operating an illegal sportsbook will be threatened with a steeper penalty than what he or she would be subject to under the Wire Act. Additionally, any businesses that would have fallen under the IGBA's discretion would face explicit, high, designated fines and up to five years in prison for each individual involved. Instituting penalties with easy-to-comprehend consequences may create a better deterrence mechanism.

B. Modification or Elimination of Existing Sports Gambling Laws

The Wire Act is perhaps the most substantial barrier to a federal sports gambling framework.¹⁶⁶ It is time to replace the Wire Act and modify the Travel Act and Unlawful Internet Gaming Enforcement Act in order to create a clean slate for new federal law. Stepping around a patchwork of different gambling laws creates a situation in which sports betting entities, leagues, and states are left unsure as to whether or not an action is federally illegal. While scholars may enjoy a good debate and analysis over the legality of certain actions, the individual stakeholders will be much better off when they have a singular set of

161. § 101(a)–(b).

162. *Id.* § 101(d)(1).

163. *Id.* § 101(d)(2).

164. 18 U.S.C. § 1084; 18 U.S.C. § 1955.

165. 18 U.S.C. § 1084; 18 U.S.C. § 1955.

166. See Tucker Davison, Case Note, *Merging Sports Gambling and Technology: What's Really Going to Happen?*, 22 SMU SCI. & TECH. L. REV. 165, 171–73 (2019).

rules to follow.¹⁶⁷ Clearly, drafting such a statute is a daunting task.¹⁶⁸ However, Congress should not be dissuaded by the effort; the benefits of taxation, consumer protection, and market liquidity outweigh the costs of drafting, monitoring, and enforcing it.

C. State and Federal Revenue Sharing

Because the proposed law would be singularly focused on interstate gambling, states would still be free to police entities within their jurisdiction. This would allow states to primarily capitalize on brick-and-mortar casinos or state-specific mobile sports betting applications. Additionally, a new federal law should implement revenue sharing with the states involved in each bet. A simple percentage of any gambling revenue will be split with each state involved in the transaction; for instance, if the sportsbook operating the interstate application is housed in one state and the individual betting is a resident of another, both states get a 3 percent share of revenue from that bet. This would incentivize states to monitor the betting activity of their citizens, which could lead to the exposure of more bad actors, such as match-fixers or scammers—one of the primary benefits of the legalization of any widespread illegal activity.

Alternatively, rather than taxing the entities or individuals who receive the wagers (i.e., the sportsbooks), the state and federal governments may rely on a system similar to the lottery. Here, the states could tax the bets themselves by taking a percentage from the sportsbooks' revenues, and the federal government could capitalize on individuals' increased income taxes.¹⁶⁹ But, if the federal government opted for this type of revenue sharing and monetization, it may be necessary to employ an additional federal tax on sportsbooks that accept interstate wagers online in order to truly capitalize on the industry.

167. See, e.g., OFFICE OF THE PARLIAMENTARY COUNSEL, WHEN LAWS BECOME TOO COMPLEX, 2013 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf [https://perma.cc/GA7Y-K23H].

168. See Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498–99 (1950).

169. Amelia Josephson, *The Economics of the Lottery*, SMART ASSET (Nov. 1, 2019), <https://smartasset.com/taxes/the-economics-of-the-lottery> [https://perma.cc/ZV55-2946].

D. Oversight Committee for Addiction and Consistency

In this proposed federal law, it would be necessary to have a committee that includes individuals from the leagues, players associations, and other interested parties outside of the government to make sure any concerns, such as funds for addiction treatment or league and state revenue sharing percentages, are addressed directly rather than merely lobbied for. This committee would remain in existence after the bill passed to act as an advisor to whichever governing body is assigned to monitor and enforce the new laws surrounding interstate sports betting. One primary role of the committee will be to act as a resource to individuals who struggle with gambling addiction. The committee will be granted a percentage of sports gambling revenues and utilize that revenue to provide programming that educates and supports addicted individuals.

Additionally, the oversight committee would be empowered to release guidance to the states to encourage uniformity. By having access to some of the revenue from interstate sports gambling, the committee would have the ability to conduct further research and gather information on what state and federal systems are most profitable and safe. Money and information would equip the committee to create sensible standards that, while not requirements, would nudge states into adopting more uniform laws nationwide.

The sticking point here, though, is participation from those outside the federal government. It will be critical to encourage players, league executives, sportsbook managers, and other third parties to send representatives to serve on the committee. That being said, the leagues and players associations have an interest in representing themselves and lobbying for guidelines that are beneficial to the integrity of their sports.¹⁷⁰ Additionally, the players associations likely have an interest in voicing their opinions regarding player images and likenesses.¹⁷¹ Similarly, the leagues may want to continue to push integrity fees or mandated (or suggested) official data usage.¹⁷² Ideally, these parties, the sportsbooks, and various sports economists, lawyers, and other professionals will be able to find economically sound guidelines and suggestions for the federal and state legislatures to follow.

170. See King, *supra* note 84.

171. See Irwin Raji, *Murphy and Athletes' Publicity Rights*, O'MELVENY & MYERS LLP (Oct. 31, 2018), <https://www.omm.com/resources/alerts-and-publications/alerts/murphy-and-athletes-publicity-rights/> [<https://perma.cc/Q8FG-KDNY>].

172. *Official League Data*, *supra* note 89.

E. Open-Market Data Usage

While some states opt for official data mandates, the federal government would be wise to resist lobbying efforts and allow sports betting entities to choose any data provider they trust. While official league data may have some benefits, Nevada demonstrates those benefits are not necessary to a successful sports betting regime.¹⁷³ Rather than gifting a monopoly to the leagues,¹⁷⁴ the committee under the new federal law should research and set standards for the average acceptable accuracy and speed of sports data for federally regulated sportsbooks.

Additionally, not mandating official data usage will encourage leagues to innovate and create new, valuable ways of collecting and disseminating data. Matt King, CEO of daily fantasy company FanDuel, does not currently find much appeal in official data for his company besides using it as a tool to maintain FanDuel's relationships with different leagues.¹⁷⁵ Once the leagues create a product that is truly superior to the cheaper alternatives available to sportsbooks, the leagues should be able to trust the market to adjust in their favor.

IV. CONCLUSION

Sports betting is not going anywhere. Whether it is legalized by the states, by the federal government, or not at all, individuals will continue to bet on sports teams and utilize this activity as a way to engage with the game. Modification of SWMIA with the intention of achieving uniformity for private, interstate actors while avoiding the same constitutional issues PASPA faced would allow interstate sports betting to thrive economically while also addressing negative societal consequences. If the states, leagues, and, most critically, the federal government can agree on a way to regulate interstate sports betting, the benefits to all stakeholders will be enormous. Those with gambling addictions may feel more comfortable seeking assistance as the activity becomes normalized, and more resources can be expended to help those individuals. Both state and federal governments will realize tax gains from individuals switching from unreliable, offshore bookies to safer, regulated sports betting. Finally, leagues will see increased fan

173. Savannah Malnar, *Legalized Sports Betting and the Pitfalls of an Official League Data Mandate*, JETLAW BLOG (Feb. 2, 2020) (on file with author).

174. Smiley, *supra* note 121.

175. Bill King, *Sportsbooks Weigh Benefits of Official Data*, SPORTS BUS. J. (Apr. 15, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/04/15/In-Depth/Data.aspx> [https://perma.cc/Q279-5JGX].

engagement and viewership as fans begin to have a more cognizable interest in a wider variety of games. If the federal government opts to legalize interstate sports gambling, the odds are good it will be a winner for all parties.

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