

## WHO WORE IT BETTER? FEDERAL V. STATE GOVERNMENT REGULATION OF SPORTS BETTING

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### INTRODUCTION

It's been less than one year since the United States Supreme Court issued its decision in the case of *Murphy v. National Collegiate Athletic Association* in May 14 2018<sup>2</sup>, but major news announcements about sports betting continue to happen on an almost daily basis. The post-*Murphy* state of the law created a frenzy over sports betting that has resulted in several jurisdictions enacting legislation to permit the conduct of legal and regulated sports betting operations; several more states approving ballot initiatives or legislation; and even more jurisdictions considering sports betting bills during their 2019 legislative sessions.<sup>3</sup>

While there are numerous topics when it comes to legalization and regulation of sports betting, such as whether the state lottery should oversee sports betting versus casino gaming commissions; what the appropriate tax rate should be; and whether the federal Wire Act will ever be amended to permit interstate sports wagering or layoff betting, this paper will focus on the ongoing debate of whether wagering on sporting events that can occur anywhere in the world should be regulated primarily by the U.S. federal government or state governments.

### I. THE EMERGENCE OF SPORTS WAGERING REGULATION IN AMERICA

Evidence of athletic competitions has been discovered among historical relics of many early cultures across the world.<sup>4</sup> Betting on events such as

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<sup>2</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1461 (2018).

<sup>3</sup> See generally H.R. 12, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019); S. 222-110, 1st Sess. (Mo. 2019); H.R. 1638, 2019 Gen. Assemb., Reg. Sess. (Va. 2019).

<sup>4</sup> DAVID SCHWARTZ, ROLL THE BONES: THE HISTORY OF GAMBLING 5-21 (1st ed. 2006).

Olympic competitions even occurred in ancient Greece.<sup>5</sup> Despite a lengthy history of betting on sporting events, the regulation of sports wagering in America is merely decades old.

Nevada was the first state to legalize regulated sports wagering in 1949<sup>6</sup> Meanwhile, the only federal involvement in sports wagering was the imposition of a wagering excise tax shortly after Nevada began to regulate sports wagering.<sup>7</sup> The wagering excise tax on sports betting was created pursuant to the Revenue Act of 1951 as a tool to target organized crime and “to facilitate the enforcement of state criminal laws against gambling”<sup>8</sup> and remains in effect today. At the time it was passed, the tax was set at ten percent of all amounts wagered (“handle”).<sup>9</sup> Tax on handle can be overwhelming for a legal and regulated sports betting company because the tax doesn’t take into account payments made to customers on winning wagers. To understand how crippling this tax would be on a modern legal sports betting operator in Nevada, let’s analyze the impact of this tax if it had applied to wagering on the 2018 NFL Super Bowl. Customers in Nevada wagered a record \$158.6 million on the 2018 Super Bowl at the 198 licensed sports books in Nevada.<sup>10</sup> If the 1951 wagering excise tax of ten percent of handle was still in effect, sports books would be required to pay \$15.86 million to the federal government. After paying winning wagers to customers who bet on the underdog Philadelphia Eagles, Nevada sports books had retained about \$1.17 million (the “hold”).<sup>11</sup> Therefore, after paying the ten percent federal wagering excise tax, Nevada sports books would have suffered a loss in excess of \$14 million.<sup>12</sup> Therefore, when the tax was ten percent on handle, given the significant risk of loss, the high tax rate, and the limited market, Nevada casino

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<sup>5</sup> Sally M. Gainsbury, *Gambling on the Olympics: Editorial*, 10 INT’L GAMBLING STUD. 1, 1 (2010).

<sup>6</sup> See Richard N. Velotta, *Legalized Sports Wagering Elsewhere Might Not Affect Nevada Much*, LAS VEGAS SUN (Jan. 6, 2013, 2:00 AM), <https://lasvegassun.com/news/2013/jan/06/legalized-sports-wagering-elsewhere-might-not-affe/>.

<sup>7</sup> See I.R.C. § 4401 (2012); *id.* § 4411. See also Kevin Braig, *Client Alert: Reform the Federal Sports Betting Excise Tax “Dilemma”*, SHUMAKER, LOOP & KENDRICK, LLP (Nov. 3, 2017), <https://m.slk-law.com/NewsEvents/Publications/Client-Alert-Reform-the-Federal-Sports-Betting-Excise-Tax-Dilemma>.

<sup>8</sup> *The Federal Gambling Tax and the Constitution*, 43 J. CRIM. L. & CRIMINOLOGY 637, 637 (1953); Braig, *supra* note 7.

<sup>9</sup> *The Federal Gambling Tax and the Constitution*, *supra* note 8. Occupational tax stamps are used by the federal government as an added tax on those considered to be occupied in a vice industry.

<sup>10</sup> PRESS RELEASE, NEV. GAMING CONTROL BD. (Feb. 5, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=12742>.

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* According to the Nevada Gaming Control Board, the handle (amount wagered) on the 2018 Super Bowl was \$158.6 million. A ten percent excise tax on \$158.6 million is \$15.86 million. Nevada sports books payed out \$157.43 million to patrons with winning bets, thus leaving the sports books with a hold of \$1.17 million of the amounts wagered. If the books owed the ten percent excise tax on handle, the books would have lost \$14.69 million (\$1.17 million – \$15.86 million).

Spring 2019]

WHO WORE IT BETTER?

79

operators stayed away from offering sports wagering.<sup>13</sup> The result was the rise of the “turf club” in Nevada, which was a stand-alone business that took non-parimutuel wagers on horse racing and accepted sports bets.<sup>14</sup>

In addition to the crushing wagering excise tax on sports wagering handle, Nevada was struggling to prevent federal intervention in its gaming industry. When casino wagering was legalized in 1931, regulation was performed on a county-by-county basis by local sheriffs, and the only qualification for licensing was that the licensee had to be a U.S. citizen.<sup>15</sup> In 1945, the Nevada State Legislature created the first state-wide gaming license and provided the Nevada Tax Commission with limited regulatory oversight.<sup>16</sup> This light regulation attracted both legitimate operators and less-than-legitimate developers with ties to organized crime to the Nevada gaming industry.<sup>17</sup> In post-war America, this also attracted the attention of the federal government, which saw organized crime as one of the most existential threats to the American way of life.

In response to threats of federal government intervention into Nevada legalized casino gambling, the Nevada legislature created the Nevada Gaming Control Board in 1955 to aid the Nevada Tax Commission in investigating the suitability of gaming license applicants.<sup>18</sup> The stated policy goal of the creation of the Nevada Gaming Control Board was to “inaugurate a policy to eliminate the undesirable elements in Nevada gaming and to provide regulations for the licensing and the operation of gaming.”<sup>19</sup> While the creation of the Nevada Gaming Control Board was significant, it was limited in its regulatory oversight since it was an adjunct of the Nevada Tax Commission. Accordingly, the specter of federal involvement in Nevada’s gaming industry was ever present given the limited regulatory authority granted to the Nevada Tax Commission. Recognizing this threat, Grant Sawyer, an upstart Nevada gubernatorial candidate, campaigned on the promise of restructuring Nevada’s gaming regulatory system.<sup>20</sup> In 1959, the year Grant Sawyer was elected Governor, the Nevada State Legislature passed the modern Gaming Control Act, which created a new state agency called the Nevada Gaming Commission to oversee regulated gaming, separated the Nevada Gaming Control Board from the Nevada Tax

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<sup>13</sup> See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET (2005). Unless you also count the prison casino, which had its own sports book. *The Casino*, NEV. STATE PRISON PRES. SOC’Y, <http://nevadastateprison.org/the-casino/> (last visited Mar. 6, 2019).

<sup>14</sup> See *id.*

<sup>15</sup> LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 11 (3d ed. 2000).

<sup>16</sup> See *id.* at 12.

<sup>17</sup> See *id.* at 13.

<sup>18</sup> *About Us*, NEV. GAMING CONTROL BD., <https://gaming.nv.gov/index.aspx?page=2> (last visited Mar. 6, 2019).

<sup>19</sup> *Id.*

<sup>20</sup> See A.D. Hopkins, *Grant Sawyer*, LAS VEGAS REV.-J. (Feb. 7, 1999, 12:44 AM), <https://www.reviewjournal.com/news/grant-sawyer/>.

Commission, and provided the Gaming Control Board with broad powers of regulatory investigation, audit, and enforcement.<sup>21</sup> Governor Sawyer's efforts were successful at convincing the John F. Kennedy presidential administration to allow Nevada to regulate gambling without federal interference.<sup>22</sup> As a result, the regulatory model created by the modern Gaming Control Act helped legitimize the gaming industry in Nevada, and served as a blueprint for other jurisdictions to successfully regulate gambling.

With enhanced powers for suitability investigations, audits, and enforcement against illegal gambling activities, Nevada's new gambling regulatory scheme became complementary to the federal government's law enforcement efforts to target organized crime. Apart from the wagering excise tax, the federal government remained relatively absent from oversight of legal, regulated gambling operations. The federal government instead relied on the multitude of criminal laws passed to continue to target organized criminal enterprises. In 1961, Congress passed several criminal laws aimed to "combat interstate gambling operations" that included the Federal Wire Act and laws targeting interstate transportation of wagering paraphernalia, gambling devices, and aid for racketeering.<sup>23</sup> This was followed by passage of the Illegal Gambling Business Act and Racketeer Influenced and Corrupt Organizations Act ("RICO") in 1970. These statutes are "designed to combat 'the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'"<sup>24</sup> However, the net result of these federal criminal laws was that legal sports wagering activity would be limited to intrastate wagering in the United States.

Meanwhile, U.S. Senator Howard Cannon from Nevada successfully lobbied his colleagues in Congress to approve a reduction of the excise tax from ten percent to two percent on handle in 1974.<sup>25</sup> As a result, sports betting operations became more attractive to casino operators in Nevada. Jackie Gaughan, a pioneer and innovator in the casino gaming industry, opened the first significant race and sports book at the Union Plaza Hotel & Casino in downtown Las Vegas in 1975.<sup>26</sup> One year later, the infamous Frank "Lefty" Rosenthal<sup>27</sup>

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<sup>21</sup> See *Gaming Commission*, NEV. GAMING CONTROL BD., <https://gaming.nv.gov/index.aspx?page=3> (last visited Mar. 6, 2019).

<sup>22</sup> See Michael Green, *John F. Kennedy, Part 2*, NEV. PUB. RADIO (June 2, 2017), <https://knpr.org/knpr/2017-06/john-f-kennedy-part-2>.

<sup>23</sup> *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968) (citing 18 U.S.C. §§ 1084, 1952, and 1953, and 15 U.S.C. § 1171).

<sup>24</sup> Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J. L. & TECH. Section 26, P 11 (2004), available at <http://jolt.richmond.edu/jolt-archive/v10i3/article26.pdf> (quoting S. Rep. No. 91-617, at 80 (1969)).

<sup>25</sup> See Pub. L. No. 93-499, § 3, 88 Stat. 1549, 1550 (1974); Braig, *supra* note 7.

<sup>26</sup> See Vinny Magliulo, *History of Sports Betting in Las Vegas*, VSiN (Aug. 21, 2017, 2:52 PM), <https://www.vsin.com/history-of-sports-betting-in-las-vegas/>.

<sup>27</sup> Frank "Lefty" Rosenthal was the basis for the fictional character Sam "Ace" Rothstein who was played by Robert DeNiro in the movie *Casino*. Michael Carlson,

Spring 2019]

WHO WORE IT BETTER?

81

established a race and sports book at the Stardust.<sup>28</sup>

Less than ten years after the first excise tax reduction, Congress reduced the tax rate to its current form at 0.25 percent of sports wagering handle for state-authorized bookmakers.<sup>29</sup> In addition, the current law retains a two percent excise tax on the handle of illegal sports wagering.<sup>30</sup> Then, in 1992, the federal government broadened its approach to sports wagering by enacting the Professional and Amateur Sports Protection Act (“PASPA”).

## II. HISTORY OF PASPA

As previously mentioned, Nevada has had a long history with authorizing and regulating sports wagering since 1949. In 1973, Montana legalized limited sports pool wagering, which still operates to this day.<sup>31</sup> Then, in August 1976, the Delaware State Lottery created lottery games based upon National Football League games.<sup>32</sup> Although the state was ultimately successful in a challenge from the NFL regarding use of team names and game results,<sup>33</sup> the games ceased in December 1976 after the state lottery lost money when it made a mistake in betting lines and bettors swarmed to take advantage of the error.<sup>34</sup> The State of Delaware was apparently “forc[ed] to draw on its emergency fund to pay the winning bettors,”<sup>35</sup> which is clearly contrary to the entire purpose of a state lottery – to generate revenue for the state. Delaware immediately ended its sports wagering lottery products after the loss.<sup>36</sup>

Meanwhile, broad-based sports wagering remained active in Nevada and limited sports wagering continued in Montana. Then, in 1989, Oregon became the next state to try sports wagering through a state lottery product titled “Sports Action.”<sup>37</sup> Sports Action initially was a lottery product based upon the results of NFL games.<sup>38</sup> Just over a year after starting NFL game wagering, the product

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*Frank ‘Lefty’ Rosenthal*, THE GUARDIAN (Oct. 20, 2018 7:01 PM), <https://theguardian.com/world/2008/oct/21/usa>.

<sup>28</sup> See Magliulo, *supra* note 26.

<sup>29</sup> See I.R.C. § 4401(a) (2012).

<sup>30</sup> *Id.*

<sup>31</sup> *History of Gambling*, MONT. DEP’T OF JUST., <https://dojmt.gov/gaming/history-of-gambling/> (last visited Mar. 6, 2019).

<sup>32</sup> Nat’l Football League v. Governor of Del., 435 F. Supp. 1372, 1375 (D. Del. 1977).

<sup>33</sup> *Id.*

<sup>34</sup> Verified Complaint at 8, Office of the Comm’r of Baseball v. Markell, 579 F.3d 293 (3d Cir. 2009) (No. 09-3297).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

<sup>37</sup> DERRICK K. HACKEL, BEATING THE SPREAD: OREGON’S ROLE IN THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT, 14 (2012), <https://minds.wisconsin.edu/bitstream/handle/1793/65079/HackelFall2012.pdf?sequence=2>.

<sup>38</sup> See *id.*

was approved to expand to take wagers on NBA basketball games, but was voluntarily abandoned after the NBA filed suit to stop the product.<sup>39</sup> In addition, the NCAA also put pressure on Oregon by refusing to allow any NCAA post-season tournament games to be played in the state until the Sports Action product was abandoned.<sup>40</sup>

The financial success of Oregon's Sports Action was noticed by other lotteries and even the Washington D.C. lottery was considering introducing a product similar to Oregon's "Sports Action."<sup>41</sup> However, pressure from major sports leagues killed the launch of any new sports-themed lottery games in Washington D.C.<sup>42</sup> Despite this, other states were looking at offering a similar sports wagering product due to the success of Oregon.<sup>43</sup> To stop the spread of sports wagering, the U.S. Congress decided to take action.<sup>44</sup>

Congress first attempted to amend the Lanham Trademark Act of 1946 to provide protection for "the service marks of professional sports organizations from misappropriation by state lotteries."<sup>45</sup> However, this effort to modify intellectual property laws to limit sports lotteries failed.<sup>46</sup>

Then, in 1991, sponsors Senators Orrin Hatch (a Republican Senator from Utah) and Bill Bradley (a Democrat Senator from New Jersey), a former college and professional basketball player, introduced PASPA.<sup>47</sup> The stated goal of the legislation was to prevent states from benefiting from "the good will of professional and amateur sports" and to stop the "serious harm to the integrity of sports."<sup>48</sup> To meet this goal, PASPA sought to stop the spread of state-sponsored sports wagering.<sup>49</sup> PASPA became law in 1992<sup>50</sup> and all states and Indian tribes

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<sup>39</sup> *Id.* at 18.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> See Dustin Gouker, *New Bill in District of Columbia Would Legalize Sports Betting Via Lottery*, LEGAL SPORTS REP. (Sept. 18, 2018, 10:14 AM), <https://www.legalsportsreport.com/24200/new-bill-dc-sports-betting/>.

<sup>42</sup> *See id.*

<sup>43</sup> *See* HACKEL, *supra* note 37, at 20.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 21.

<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.* (citing Professional and Amateur Sports Protection Act, S. 474, 102nd Cong. (1991)).

<sup>49</sup> *See id.* *See also* Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012) ("It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.").

<sup>50</sup> HACKEL, *supra* note 37, at 28.

were thereafter prevented from offering sports wagering. PASPA contained three sets of state exemptions from its broad prohibitions: The first exemption was for states that had sports lottery products prior to the enactment of PASPA.<sup>51</sup> This exemption was applicable only to Delaware and Oregon.<sup>52</sup> A second exemption was for states that had statutes authorizing sports wagering, but only to the extent sports wagering was conducted in such states.<sup>53</sup> This second exemption applied to the limited legal charitable sports wagering activities of Montana,<sup>54</sup> and the broad-based sports wagering activities of Nevada.<sup>55</sup> A final exemption was granted to any state that had legal and licensed casino gambling in a municipality for more than ten years and enacted legislation to conduct legal sports wagering within such casinos within one year of the enactment of PASA.<sup>56</sup> The only state that could meet this exemption criteria was New Jersey.<sup>57</sup> However, the state political climate in New Jersey caused sports wagering legislation to stall, and New Jersey missed the one-year window to qualify for its PASPA exemption.<sup>58</sup>

After PASPA, Nevada was the only state permitted under federal law to offer full-scale regulated sports wagering.<sup>59</sup> Despite its exemption, Oregon stopped offering Sport Action in 2007.<sup>60</sup> Montana continued its limited sports wagering

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<sup>51</sup> 28 U.S.C. § 3704(a)(1) (2012).

<sup>52</sup> The grandfather clauses apply to four states: Delaware, Oregon, Montana, and Nevada. *See* S. REP. No. 102-248, at 10 (1991) (explaining that the first grandfather clause, § 3704(a)(1), permitted Oregon and Delaware to “conduct sports lotteries on any sport,” because sports lotteries were previously conducted by those States); *id.* (explaining that the second grandfather clause, § 3704(a)(2), permitted casino gambling on sporting events to continue (but not expand) in Nevada to the extent that it was previously conducted); 138 CONG. REC. S7272-02 (daily ed. June 2, 1992) (statement of Sen. DeConcini) (recognizing that Montana law had long allowed sports pools and calcutta pools and had more recently permitted fantasy sports leagues and sports tab games), 1992 WL 116822, at \*S7276.

<sup>53</sup> § 3704(a)(2).

<sup>54</sup> *See* MONT. CODE ANN. §§ 23-5-221 to -222 (2017).

<sup>55</sup> *See generally* NEV. REV. STAT. §§ 463.010–820 (2017).

<sup>56</sup> 28 U.S.C. § 3704(a)(3).

<sup>57</sup> *See* 138 CONG. REC. S7274-02 (statement of Sen. Grassley) (recognizing New Jersey was the only State eligible for the second grandfather clause exception), 1992 WL 116822, at \*S7280; *In re* Casino Licensees for Approval of a New Game, Rulemaking, and Authorization of a Test, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div. 1993) (“Earlier this year, the Legislature chose not to vote on a joint resolution to place a referendum on the ballot permitting a proposed constitutional amendment authorizing casino betting on sports events.”), *aff’d per curiam*, 138 N.J. 1 (1993).

<sup>58</sup> Brent Johnson, *The Story of When N.J. Almost Legalized Sports Betting in 1993*, NJ.COM (Mar. 14, 2015), [https://www.nj.com/politics/index.ssf/2015/03/the\\_story\\_of\\_njs\\_missed\\_opportunity\\_on\\_sports\\_bett.html](https://www.nj.com/politics/index.ssf/2015/03/the_story_of_njs_missed_opportunity_on_sports_bett.html).

<sup>59</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1471 (2018) (“At the time of PASPA’s adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos, and three States hosted sports lotteries or allowed sports pool.”).

<sup>60</sup> *See* Andrew Greif & Ted Sickinger, *Will Sports Gambling Return in Oregon? Lottery ‘Very Interested’ Following Supreme Court Ruling*, THE OREGONIAN (May

pools,<sup>61</sup> and Delaware held off on bringing back its lottery product for more than a decade.<sup>62</sup> The prohibition against state-regulated sports wagering created an illegal market consisting of local bookies and offshore websites that flourished, with the estimated size of the illegal sports wagering market in the United States ranging from \$80 billion to \$380 billion annually.<sup>63</sup>

In 2009, Delaware decided to take advantage of its PASPA carveout and reintroduce its sports lottery with the intent of offering both multi-game and single-game wagers on sporting events.<sup>64</sup> Professional sports leagues responded to Delaware's action by filing for an injunction to preclude Delaware from offering any sports lottery products that were not offered in the 1970s – thus limiting Delaware to three-event parlay wagering on NFL games only.<sup>65</sup> The Third Circuit Court of Appeals in *Office of Commissioner of Baseball v. Markell* agreed with the leagues, but allowed a small expansion of Delaware's sports lottery to recognize teams that didn't exist in the 1970s or moved cities since the 1970s, such as the Baltimore Colts being the Indianapolis Colts and the addition of expansion teams Carolina Panthers and Jacksonville Jaguars.<sup>66</sup> After the ruling, Delaware offered sports wagering, but was limited to multi-game parlay card wagering during NFL season.<sup>67</sup>

The next year, the New Jersey state legislature received testimony that regulated sports wagering could benefit the state with revenues and help mitigate the impact of the large illegal betting market in the state.<sup>68</sup> The legislature then created a referendum for voters to amend the state constitution to allow laws

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14, 2018), [https://www.oregonlive.com/sports/index.ssf/2018/05/will\\_sports\\_gambling\\_return\\_in.html](https://www.oregonlive.com/sports/index.ssf/2018/05/will_sports_gambling_return_in.html).

<sup>61</sup> 138 CONG. REC. S7274-02 (statement of Sen. DeConcini) (recognizing that Montana law had long allowed sports pools and calcutta pools and had more recently permitted fantasy sports leagues and sports tab games), 1992 WL 116822, at \*S7276.

<sup>62</sup> See *Office of the Comm'r. of Baseball v. Markell*, 579 F.3d 293, 295-96 (3d Cir. 2009).

<sup>63</sup> OXFORD ECONOMICS, ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING (May 2017), available at <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf>.

<sup>64</sup> See *Markell*, 579 F.3d at 296.

<sup>65</sup> *Id.* at 300-01. The parlay wagers were based on the on outcomes of three or more NFL events. This also meant that a wager on the outcome of the Super Bowl could not be made because that involved only one event between two teams.

<sup>66</sup> *Id.* at 303-04.

<sup>67</sup> *Id.* at 304. A lottery parlay card wagering product in the 1970s was one where multiple events were wagered on for a single bet, but all the events selected by a patron must have been won in order for the patron to win the bet. For example, in a standard NFL week of football there are 14 games on which to bet. A parlay card will require a patron to pay a wager of a fixed amount, then the patron must pick the winners of three of the 14 games with three selections. If the patron correctly picks the winners of three games, then the patron wins a fixed prize. However, if the patron incorrectly picks on any game, the patron's wager is lost in its entirety.

<sup>68</sup> *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013).



Spring 2019]

WHO WORE IT BETTER?

85

authorizing sports wagering.<sup>69</sup> The referendum passed with overwhelming public support and the New Jersey legislature enacted companion legislation to allow regulated sports wagering at Atlantic City casinos and racetracks throughout the state.<sup>70</sup> This prompted an immediate challenge from the major college and professional sports leagues, which had automatic standing to pursue an injunction under PASPA pursuant to 28 U.S.C. § 3703.<sup>71</sup> The District Court and Third Circuit Court of Appeals issued opinions favorable to the leagues and rejected the argument that PASPA was unconstitutional.<sup>72</sup> The state appealed the rulings to the U.S. Supreme Court, but the U.S. Supreme Court denied certiorari to hear the case.<sup>73</sup>

After the U.S. Supreme Court denied the petition to hear the case, New Jersey tried a different angle to allow what the voters favored.<sup>74</sup> In the court opinions issued against New Jersey, the court held that PASPA did not require the state to make sports wagering illegal, it merely precluded the state from authorizing and regulating sports wagering.<sup>75</sup> During the 2014 session, the New Jersey legislature responded by repealing the state's criminal prohibition against sports wagering at licensed casinos and racetracks.<sup>76</sup> The leagues again immediately sought injunctive relief, arguing that the criminal law repeal was equivalent to an authorization of sports wagering in violation of PASPA.<sup>77</sup> The district court and Third Circuit Court of Appeals once again issued court opinions favorable to the leagues.<sup>78</sup> The state once again appealed to the U.S. Supreme Court.<sup>79</sup>

Somewhat surprisingly, the Supreme Court took the case this time and on May 14, 2018, issued the *Murphy* decision.<sup>80</sup> The Court concluded that PASPA's prohibition against states being allowed to authorize sports wagering was an unconstitutional violation of anti-commandeering principles under the Tenth Amendment.<sup>81</sup> In invalidating the entirety of PASPA, the Court noted that Congress could still make the decision to either regulate or criminalize sports wagering.<sup>82</sup> However, now, after *Murphy*, the federal prohibition against tribes

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<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 799 F.3d 259, 262-63 (3d Cir. 2015).

<sup>73</sup> *Id.* at 263.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 263-64.

<sup>78</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1472 (2018).

<sup>79</sup> *Id.* at 1473.

<sup>80</sup> *See id.* at 1461.

<sup>81</sup> *Id.* at 1478.

<sup>82</sup> *See id.* at 1484-85.

and states authorizing sports wagering was lifted.<sup>83</sup>

Although there were a few states that passed legislation on sports betting prior to the *Murphy* decision, several jurisdictions began planning for sports betting.<sup>84</sup> As of the time this article is being authored, there are eight jurisdictions with regulated sports wagering operations – Nevada (including tribal), New Jersey, Pennsylvania, New Mexico (tribal only), Delaware (through lottery at racetrack casinos), Rhode Island (through lottery at casinos), West Virginia (through lottery at casinos), and Mississippi (land-based only and tribal).<sup>85</sup> Arkansas, New York, and Washington, D.C. have enacted laws to legalize sports betting and are pending its launch.<sup>86</sup> Michigan's legislature recently enacted legislation allowing for Internet gambling that also authorizes sports wagering, but the Governor vetoed the bill.<sup>87</sup>

### III. TENTH AMENDMENT

When it comes to modern gambling, Nevada had the luxury of being the only state to have legalized and regulated gambling from 1931 until New Hampshire offered the first modern lottery in 1964.<sup>88</sup> New Jersey was the second state in the United States to legalize and regulate casino gambling when the state authorized regulated casinos to be operated for redevelopment purposes in Atlantic City that opened in 1978.<sup>89</sup> Throughout this time, gambling, including sports wagering, was always considered a state-governed activity.<sup>90</sup> The federal government enacted statutes to prosecute gambling that crosses states lines, but, outside of PASPA, it never chose to regulate or criminally prohibit state-regulated and -authorized casino gambling, lotteries, or sports wagering conducted on an

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<sup>83</sup> *Id.*

<sup>84</sup> Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Mar. 7, 2019).

<sup>85</sup> *Id.* See also *US Sports Betting News*, LEGAL SPORTS REP., <https://www.legal-sportsreport.com/sports-betting/> (last visited Mar. 6, 2019).

<sup>86</sup> Gouker, *supra* note 84; *US Sports Betting News*, *supra* note 85.

<sup>87</sup> The Associated Press, *The Latest: Snyder Signs Bill to Require Grades for Schools*, U.S. NEWS (Dec. 28, 2018, 7:53 PM), <https://www.usnews.com/news/best-states/michigan/articles/2018-12-28/the-latest-snyder-signs-bill-to-require-grades-for-schools>.

<sup>88</sup> See *History*, NHLLOTTERY, <https://www.nhlottery.com/About-Us>. See also George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 30 *Gaming Res. & Rev. J.* 65, 65, 71 (1996).

<sup>89</sup> Philip Wechsler, *Atlantic City Opens its First Casino in 1978*, N.Y. DAILY NEWS (May 25, 2015, 12:00 PM) (reprinted from original publication of May 27, 1978), <https://www.nydailynews.com/news/national/casino-atlantic-city-opened-1978-article-1.2228123>.

<sup>90</sup> See Fenich, *supra* note 88 (listing various state gaming laws passed between 1931 and 1995). See also *Nevada v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977).

Spring 2019]

WHO WORE IT BETTER?

87

intrastate basis.<sup>91</sup>

A state's powers to regulate casino gambling, including sports wagering, was even tested in the courts. These tests originated from an unlikely source, namely a person with ties to organized crime. Frank "Lefty" Rosenthal became the quality control tester of the Nevada's gaming statutes and gaming regulatory system.<sup>92</sup> Rosenthal sued the State of Nevada and Nevada gaming regulators four times in both federal and state court because he was denied a license to participate in gaming in Nevada on the grounds that he was unsuitable.<sup>93</sup> The court opinions from these suits confirmed one of the important tenets of gaming law in recognizing that gaming (which includes sports wagering) is "distinctively [a] state problem" that is "reserved to the states within the meaning of the Tenth Amendment to the United States Constitution."<sup>94</sup>

The Tenth Amendment reads, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>95</sup> Interestingly, this constitutional provision played an important role in the *Murphy* decision in fostering the current state of the law regarding sports wagering in the United States.

#### IV. STATE VERSUS FEDERAL GOVERNMENT REGULATION

Despite state and tribal efforts to authorize regulated sports wagering, there has been quite a bit of discussion on whether states or the federal government would be the appropriate authority for sports betting regulation. In several countries, sports wagering is regulated on a national basis. For example, the United Kingdom first legalized sports betting in 1960.<sup>96</sup> In doing so, the country had a single set of standards that allowed the creation of national pools of liquidity.<sup>97</sup> Within six months of sports betting shops being allowed to open, 10,000 had been set up in the United Kingdom.<sup>98</sup> However, the United Kingdom and the United States have two very different forms of government, two very different governmental foundations, and two very different histories with sports betting.

Although we can look to the United Kingdom for guidance, we must follow a unique path to determine whether a federal or state approach to sports wagering

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<sup>91</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1483 (2018).

<sup>92</sup> See Kirk D. Homeyer, *Jeffrey A. Silver: The Man Who Exiled Frank "Lefty" Rosenthal from Nevada Gaming*, 4 UNLV Gaming L. J. 73, 96 (2013).

<sup>93</sup> See *id.* at 94-96.

<sup>94</sup> *Nevada v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977).

<sup>95</sup> U.S. CONST. amend. X.

<sup>96</sup> BBC, *On This Day 1950–2005, 1 September, 1960: Game On for British Betting Shops*, [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/1/newsid\\_2969000/2969846.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/1/newsid_2969000/2969846.stm) (last visited Mar. 8, 2019).

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*

would be ideal. Below is a breakdown of several key issues relating to the arguments on state versus federal government regulation of sports wagering.

#### V. PROS AND CONS OF FEDERAL GOVERNMENT OVERSIGHT

So far, there appears to be limited support for the federal government to create a new governmental agency that would directly regulate sports betting.<sup>99</sup> Rather, proponents of federal government involvement argue for Congress to simply create a framework for states to follow for regulation, with some reporting. Proponents cite beneficial issues enjoyed by other national markets, like the United Kingdom. These benefits are generally identified as uniformity of laws and regulations, national information sharing, common national enforcement standards, enhanced national integrity of wagering, limited political involvement, and uniformity in data sources as advantages that will both serve to grow a legal and regulated market and provide common consumer protections. The following section examines these avowed benefits:

##### A. *Uniformity of Regulatory Laws*<sup>100</sup>

PROS: Proponents of federal legislation contend that a federal framework will create uniformity so that operators do not have to worry about different licensing, compliance, and reporting requirements in the thirty or more jurisdictions expected to legalize and regulate sports wagering.

CONS: The problem is that uniformity of regulatory laws may not be accomplished if states continue to regulate and are allowed to set their own tax rates and can establish more stringent or additional requirements than what is set forth in federal framework legislation. Additionally, each state is likely to know the particular issues in its market, which may not be the same issues present in other markets. True uniformity, if imposed by the federal government, would likely result in overregulation in some markets and under-regulation in others.

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<sup>99</sup> In an informal poll of several current gaming regulators, there has been little or no support among current regulators for any new federal regulation sports betting. The authors have been instructors to over 200 gaming regulators and policy makers from across the United States and have asked if any regulator supports a new federal regime to regulate sports wagering. Conversely, the question was asked of such regulators whether sports wagering should remain a state regulated activity. The results have been remarkably consistent in that course participants did not voiced support for any new federal regulation of sports wagering and every regulator has voiced support for state regulation of sports wagering.

<sup>100</sup> See generally Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State versus Federal Oversight*, 8 UNLV GAMING L. J. 153 (2018).

Spring 2019]

WHO WORE IT BETTER?

89

*B. Minimum Standards*

PROS: Federal legislation would likely create minimum requirements for states and operators to follow, such as suitability standards, reserve requirements, and internal controls.

CONS: States and tribes have experience with strict regulation of the casino gambling industry and already have standards in place that would meet or exceed any federally-imposed standards. Additionally, the federal government has little or no experience in regulated gaming and minimum standards could undermine current state and tribal regulatory regimes that are tailored for their local issues.

*C. Information Sharing*

PROS: The federal government can serve as a central repository for and monitoring of wagering activity that may occur across state and tribal boundaries. The information could be used to prevent organized criminal activities and risks that come from having several operators that remain in competition with each other.

CONS: States require reports on suspicious wagers and operators must comply with reporting and compliance for anti-money laundering reports.<sup>101</sup> States can enter into cooperative arrangements to share information to protect against interstate criminal vulnerabilities and betting integrity issues. Also, operators have formed the Sports Wagering Integrity Monitoring Association (SWIMA) to address information sharing issues, while a group of regulators have created the U.S. Sports Betting Forum.<sup>102</sup> Finally, a central repository for sensitive financial information is a security risk and given the number of issues the federal government has had with hacking attacks and inadvertent disclosures of information, such a system is likely to be counter-productive.<sup>103</sup>

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<sup>101</sup> See, e.g., NEV. GAMING REG. 22.121 (2018). See also 31 U.S.C. § 5311 (2012).

<sup>102</sup> Chris Murphy, *Swima aims to strengthen betting integrity*, SBCAMERICAS (Nov. 27, 2018), <https://sbcamericas.com/2018/11/27/swima-aims-to-strengthen-sports-betting-integrity/>; *New 'US Sports Betting Forum' established by state regulators to discuss sports gambling policy*, CDC GAMING REPS. (Oct. 17, 2018), <https://www.cdcgamingreports.com/new-us-sports-betting-forum-established-by-state-regulators-to-discuss-sports-gambling-policy/>.

<sup>103</sup> See Jim Finkle & Dustin Volz, *Database of 191 million U.S. Voters Exposed on Internet: Researcher*, REUTERS (Dec. 28, 2015, 4:22 PM), <https://uk.reuters.com/article/us-usa-voters-breach-idUKKBN0UB1E020151229>. See also Brendan I. Koerner, *Inside the Cyberattack That Shocked the US Government*, WIRED (Oct. 23, 2016, 5:00 PM), <https://www.wired.com/2016/10/inside-cyberattack-shocked-us-government/>.

*D. Enforcement*

PROS: The expansion of sports wagering will likely see an increase in the excise tax on wagering, so monies could be dedicated to increased enforcement of federal criminal laws that target illegal sports wagering and illegal interstate activities.

CONS: Despite having existing resources to combat illegal wagering, the federal government has not engaged in any meaningful enforcement<sup>104</sup> and offshore websites continue to target and accept wagers from U.S. residents.<sup>105</sup> Therefore, there is no established history of any relationship between wagering excise tax revenue and enforcement.

*E. Integrity*

PROS: Proponents of federal legislation argue that sports wagering is different than casino gambling because the sport event upon which wagers are made occurs outside of the four walls of the casino, unlike slot machines or table games.<sup>106</sup> As such, federal government oversight is needed to protect sports integrity because states cannot oversee and enforce against events outside of their borders.

CONS: Sports wagering is really not that unique because horse racing, lottery, internet gambling, and multi-state progressives, are activities that occur on an interstate basis without federal regulation. Further, federal government has in the past exercised its authority to conduct investigations into sports bribery and match fixing, so regulation of wagering would have no impact on that capability.<sup>107</sup> Also, many sporting competitions occur internationally, and the federal government would have no jurisdiction over international events.<sup>108</sup>

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<sup>104</sup> See Memorandum Opinion for the Acting Assistant Attorney General, Criminal Division, Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. \_\_ (Nov. 2, 2018) (identifying limited number of cases prosecuted under the Wire Act). See also, e.g., BOVADA, <https://www. Bovada.lv/> (last visited Mar. 25, 2019); 5DIMES, <https://www. 5dimes.eu/> (last visited Mar. 25, 2019); BETONLINE.AG, <https://www. betonline.ag/> (last visited Mar. 25, 2019); YOUWAGER.EU, <https://www. youwager.eu/> (last visited Mar. 25, 2019); GT BETS, <https://www. gtbets.eu/> (last visited Mar. 25, 2019); BOOKMAKER, <https://www. bookmaker.eu/> (last visited Mar. 25, 2019); MY BOOKIE, <https://mybookie.ag/> (last visited Mar. 25, 2019); WAGERWEB, <https://www. wagerweb.eu/> (last visited Mar. 25, 2019).

<sup>105</sup> See BOVADA, <https://www. Bovada.lv/> (last visited Mar. 7, 2019).

<sup>106</sup> Miller & Cabot, *supra* note 100, at 167.

<sup>107</sup> See Mark Zeigler, *3 with USD ties charged in conspiracy to fix games*, THE SAN DIEGO UNION-TRIB. (Apr. 11, 2011, 11:12 AM), <https://www. sandiegouniontribune.com/sports/toreros/sdut-ten-indicted-college-basketball-points-fixing-sche-2011apr11-htmlstory.html>.

<sup>108</sup> For example, several U.S. bookmakers in Nevada take wagers on English Premier League soccer matches; even if integrity issues arose in England regarding such

SIDEBAR: It's important to distinguish between integrity of sports and integrity of betting on sports. There are events that can affect the integrity of a sporting event that have nothing to do with wagering on the event. For example, when Tom Brady was suspected of using underinflated footballs to gain an advantage in a playoff game, NFL fans questioned the integrity of the team.<sup>109</sup> When James Harden of the Houston Rockets took at least four steps to shoot a potentially game-affecting three pointer, game officiating and fairness of NBA basketball were questioned.<sup>110</sup>

Betting integrity involves the monitoring of wagers on sporting events to help uncover unusual betting patterns, suspicious bets, or use of a sports book to facilitate illegal gambling.<sup>111</sup> Regulated sports books risk their money against their patron's money with each wager. The pricing of bets in regulated markets is based on an assumption that the event on which wagering occurs has integrity. When anomalies occur in wagering, it can signal that the integrity of an event has been compromised. Since regulated books are at risk for each wager, anomalous activity that causes losses is quickly investigated and gaming regulatory and law enforcement authorities are quickly notified when there is any evidence that an event is being compromised.<sup>112</sup> Thus, legal, regulated sports books have helped uncover match-fixing or point-shaving in the past.<sup>113</sup>

At times, sports integrity and betting integrity can intersect. During the 2018 NBA Finals, it was discovered afterwards that star player LeBron James had played at least three games with a broken hand.<sup>114</sup> Since this was not reported in

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events, U.S. law enforcement has no authority to exercise police powers in the United Kingdom.

<sup>109</sup> See *Deflategate Timeline: After 544 Days, Tom Brady Gives In*, ESPN (July 15, 2016), [http://www.espn.com/blog/new-england-patriots/post/\\_id/4782561/timeline-of-events-for-deflategate-tom-brady](http://www.espn.com/blog/new-england-patriots/post/_id/4782561/timeline-of-events-for-deflategate-tom-brady).

<sup>110</sup> Jared Woodcox, *Utah Jazz: NBA Officials admit to missing egregious James Harden travel*, THE J NOTES, <https://thejnotes.com/2018/12/18/utah-jazz-nba-officials-admit-missing-egregious-james-harden-travel/> (last visited Mar. 7, 2019) (Out of full disclosure, co-author Jennifer Roberts is a big fan of the Utah Jazz, so this example is even more appropriate!).

<sup>111</sup> See Brett Smiley, *So What the Heck Is Integrity Monitoring, Anyways?*, SPORTSHANDLE (June 7, 2018), <https://sportshandle.com/so-what-the-heck-is-integrity-monitoring-anyways/>.

<sup>112</sup> See Todd Dewey, *Las Vegas bookmakers know a fix when they see one*, LAS VEGAS REV.-J. (Sept. 8, 2017), <https://www.reviewjournal.com/sports/betting/las-vegas-bookmakers-know-a-fix-when-they-see-one/>.

<sup>113</sup> See NEV. GAMING CONTROL BD., *Background Materials of Becky Harris, Chairwoman, Hearing Before the Judiciary's Subcommittee on Crime, Terrorist, Homeland Security and Investigations* (Sept. 27, 2018), <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-HarrisB-20180927.pdf>.

<sup>114</sup> See Fred Kerber, *LeBron Played Last Three Finals Games With Serious Hand Injury*, N.Y. POST (June 9, 2018, 1:04 AM), <https://nypost.com/2018/06/09/lebron-played-last-three-finals-game-with-serious-hand-injury/>.

injury reports,<sup>115</sup> sports books accepted wagers on lines set without knowledge of the injury. Additionally, there were some individuals who knew of the injury (e.g., doctor, trainer, family or friends), which increases the risk of an insider placing a wager with hidden information.<sup>116</sup>

Proponents of federal legislation have failed to explain how federal government involvement will protect betting integrity but seem to rely on the simple argument of preserving sport integrity. Even then, there is not clear evidence or support that federal government involvement will protect sport integrity either.

#### F. Politics

PROS: A national sports wagering czar, commission, or agency head would be answerable to elected officials and national focus and attention will protect the selection and activities of such an appointee. This will insulate the sports wagering market from political influences of the more than fifty jurisdictions that may decide to regulate sports wagering.

CONS: The risk, however, could be greater when a new federal role is created, and limitations and customs are not established. With state regulatory agencies, there are already regulatory systems, processes, and procedures in place. The risk of regulatory overreach and regulatory creep may be greater with newly-created roles and responsibilities in the federal government. For example, a political appointee responsible for betting integrity may want the federal government to suddenly play a larger role in overseeing sports integrity, such as evaluating game rules, overseeing game play, and active monitoring of the sport. Finally, the federal government seems to be going through ever increasingly tight spirals of dysfunctionality; at the time this paper is being authored there is no U.S. Attorney General, no Secretary of Defense, no Chief of Staff for the President, and the federal government is subject to a partial shut-down with no imminent resolution.<sup>117</sup> Subjecting all the legal sports wagering markets to such dysfunctionality is counterproductive to comprehensive regulation.

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<sup>115</sup> Dustin Gouker, *LeBron James, An Injured Hand And The Implications For The NBA's Future With Sports Betting*, LEGAL SPORTS REP. (June 10, 2018), <https://www.legalsportsreport.com/21095/lebron-james-injury-and-sports-betting/>.

<sup>116</sup> *See id.*

<sup>117</sup> Jacqueline Alemany, *Power Up: Trump has limited options to end government shutdown*, POWERPOST (Jan. 14, 2019), [https://www.washingtonpost.com/news/powerpost/paloma/powerup/2019/01/14/powerup-trump-has-limited-options-to-end-government-shutdown/5c3b939e1b326b66fc5a1c32/?noredirect=on&utm\\_term=.2a2a03741e31](https://www.washingtonpost.com/news/powerpost/paloma/powerup/2019/01/14/powerup-trump-has-limited-options-to-end-government-shutdown/5c3b939e1b326b66fc5a1c32/?noredirect=on&utm_term=.2a2a03741e31). *See also* Kathryn Dunn Tenpas, *Tracking turnover in the Trump administration*, BROOKINGS (Mar. 2019), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/>.



Spring 2019]

WHO WORE IT BETTER?

93

*G. Official Data*

PROS: Proponents argue that federal legislation is needed so that sports wagering can be based upon official data from sports leagues or organizations holding the event upon which wagers are made. Such a requirement will ensure fairness in determining wagers.

CONS: A mandate that official data be used solely benefits commercial interests and does not enhance fairness. If state regulators must require operators to use official data, the question becomes whether state regulators would require licensing or suitability for sports leagues or betting monitoring companies because information supplied is used for determining the outcome of a wager. Nevada has a long history of fair sports wagering, and it has done so without forcing commercial relationships on the gaming industry. Moreover, requiring small operators to pay for official data could adversely affect product offerings or operations.

*H. Existing Federal Gambling Framework Laws*

PROS: Proponents of federal legislation cite the Interstate Horse Racing Act of 1978 (“IHRA”) and the Indian Gaming Regulatory Act of 1988 (“IGRA”) as proof that the federal government has previously provided a framework for regulating gaming.<sup>118</sup>

CONS: The IHRA is a law that assists states in permitting interstate horse race wagering when it is legal under state law.<sup>119</sup> The IHRA does not dictate standards, regulate wagers, or provide any federal oversight. IGRA was enacted in response to a U.S. Supreme Court opinion that held that Indian tribes were sovereign nations with the power to authorize and regulate gaming on tribal land to the same extent as states where such tribal lands were located.<sup>120</sup> IGRA limits federal government oversight to Indian gaming subject matter that is not subject to state law.<sup>121</sup> Federal courts have confirmed that any Indian gaming subject matter subject to compacts with states is outside of the jurisdiction of IGRA.<sup>122</sup> Therefore, the cited examples do not exhibit a federal framework for regulation, but a federal respect for states to control and regulate gaming either through laws or compacts and with the federal government only having a role in interstate commerce or in Indian affairs beyond the control of a state.

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<sup>118</sup> Miller & Cabot, *supra* note 100, at 155, 169.

<sup>119</sup> See 15 U.S.C. § 3001(a) (2012).

<sup>120</sup> California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 222 (1987).

<sup>121</sup> See Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n, 383 F. Supp. 2d 123,135-136 (D.D.C. 2005).

<sup>122</sup> See *id.* at 135–36.

## VI. STATE-LEVEL ISSUES

Those favoring state regulation of sports wagering will not only highlight the decades of history in Nevada, but will focus on the fact that there are already a handful of states successfully regulating sports wagering. In other words, their argument rests on the premise that an established working regulatory structure should not be replaced with an untested novel regulatory structure. However, this does not mean that state regulation of sports wagering is without issues.

*A. Lotteries v. Gambling Commissions*

In states with both a lottery and commercial gaming, a decision will need to be made on whether the state lottery or regulated commercial interests will conduct sports wagering. The benefit of a state lottery is that more revenue is captured for the state, while the benefit of a state gaming commission is that there are built-in resources for licensing investigations, audits, enforcement, and technology. The risk for a state lottery is the volatility that comes with sports wagering. For example, Nevada sports books had a challenging NFL Sunday in November and were faced with a \$10 million loss.<sup>123</sup> As mentioned above, Delaware already experienced losses in the 1970s that caused financial hardship for the state.<sup>124</sup> Additionally, a lack of competition can be another negative for state lottery-operated sports wagering. Innovation, particularly technical innovation, often drives demand.<sup>125</sup> Lotteries that are state monopolies have no competitive incentive to innovate and, thus, may have institutional inertia that slows innovation. Conversely, competitive commercial gaming is forced to innovate to survive and sees legal and illegal operators as competitors. Therefore, the debate will be whether sports wagering should be operated by the higher state-retained per-bet revenue of lotteries versus the lower per-bet revenue for the state that comes from commercial gaming but where the volume of betting may be increased through competition and innovation.

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<sup>123</sup> *Nevada Sports Books Lose \$10M on Sunday's NFL Games*, LAS VEGAS REV.-J. (Nov. 4, 2018, 10:31 PM), <https://www.reviewjournal.com/sports/betting/nevada-sports-books-lose-10m-on-sundays-nfl-games-1519488/>.

<sup>124</sup> Verified Complaint at 8, *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (No. 09-3297).

<sup>125</sup> See generally Statista, *Apple iPhone Device Market Share Worldwide by Model From 2015 to 2018*, STATISTA (Oct. 2018, 10:31 PM), <https://www.statista.com/statistics/606147/iphone-model-device-market-share-worldwide/>. In 2016, the iPhone 6 was the most popular iPhone in use, in 2017 the iPhone 7 replaced the iPhone 6 as the most popular iPhone in use. One could conclude that, despite having substantially the same capabilities and technology, the incremental innovation in the iPhone 7 drove consumers' demand for upgrades.

Spring 2019]

WHO WORE IT BETTER?

95

*B. Mobile Sports Wagering*

In Nevada, the technological innovation of mobile sports wagering was wildly successful and research suggests that more than half of all sports wagers in Nevada will be placed through a mobile device by 2020.<sup>126</sup> States must not only decide whether to authorize the option of sports wagering by mobile device, but whether mobile wagering accounts can be set up remotely or in person at a land-based establishment. Currently, Mississippi restricts sports wagering to land-based operations only.<sup>127</sup> The main risk of not allowing mobile sports wagering is that it will be more challenging to shift bettors using mobile sports betting applications offered by illegal operators to the legal and regulated land-based market. For states with Indian gaming, mobile betting will be a significant issue since IGRA only permits Indian gaming that is free from state regulation when it occurs on tribal land.<sup>128</sup> Mobile sports wagering would likely be conducted by patrons located off of tribal land. Therefore, the issue of mobile sports wagering will be significant in states with Indian gaming.

*C. Illegal Operations*

Legal and regulated sports wagering operators, whether state, commercial, or tribal, will all continue to be in competition with unregulated illegal operators. The illegal operators will continue to offer competitive pricing, issue credit to sports bettors, allow for credit card use, and provide more flexibility with wagering options. Legal regulated sports wagering operators will offer more consumer protections, such as legitimate patron dispute processes, patron fund protections, responsible gambling measures, and operator transparency. Both state and federal governments operate with limited funds, resources, and personnel to target illegal gambling, so it may take some time before the illegal operators are insignificant. However, illegal operators will continue to influence legal and regulated gaming because they will fill demand any time legal and regulated gaming becomes uncompetitive due to overregulation or over-taxation.

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<sup>126</sup> See Joss Wood, *Will Nevada Finally Allow Sports Bettors To Sign Up Online?*, LEGAL SPORTS REP. (Sept. 10, 2018, 6:00 AM), <https://www.legalsportsreport.com/23602/nevada-sports-betting-online-signup/>. See also Dustin Gouker, *Mobile Sports Betting Could Account For Half Of Nevada's Handle By 2020*, LEGAL SPORTS REP. (Jan. 26, 2016), <https://www.legalsportsreport.com/7579/nevada-casinos-poised-to-profit-mobile-sports-betting/>.

<sup>127</sup> *Mississippi Sports Betting Information – Sportsbooks, Betting Sites*, SPORTS HANDLE.COM, <https://sportshandle.com/mississippi-sports-betting-information/> (last visited Mar. 7, 2019). See also Mary Perez, *\$9.8 Million Wagered in Mississippi Casinos During First Month of Sports Betting*, SUN HERALD (Sept. 7, 2018, 5:00 AM), <https://www.sunherald.com/news/business/casinogambling/article217948370.html>.

<sup>128</sup> 25 U.S.C. § 2701(5) (2012); *id.* § 2703(4) (defining “Indian lands”).

## VII. HATCH-SCHUMER BILL

On December 19, 2018, U.S. Senators Orrin Hatch (Republican Senator from Utah) and Chuck Schumer (Democrat Senator from New York) introduced the Sports Wagering Market Integrity Act of 2018 in Congress.<sup>129</sup> Although an entire paper could be dedicated to analyzing this proposed legislation, and the likelihood of the legislation passing in its current form is remote, this paper will provide a cursory overview of some key provisions and the issues created by these key provisions.

In Section 101, it is unlawful for any person to accept a sports wager, unless done pursuant to approved state sports wagering or as social gambling.<sup>130</sup> The definition of a sports wager does not include fantasy sports (and, according to operators of such, daily fantasy sports) or horse racing, but, interestingly, there is no exclusion for jai alai.<sup>131</sup>

To have sports wagering, states must seek approval from the U.S. Attorney General and meet minimum standards set forth in the law.<sup>132</sup> The Attorney General then has 180 days to issue approval.<sup>133</sup> We can only imagine that states with regulated sports wagering currently in operation would be less than thrilled having to seek approval, but considering there is no grandfathering for those states, does this mean sports wagering must cease until approval is obtained? Moreover, Indian tribes would have to add another layer of approvals aside from satisfying the requirements of IGRA.<sup>134</sup> In addition, states are required to submit notice of any material changes of state sports wagering laws.<sup>135</sup> Then what? Finally, the approval from the Attorney General is only good for three years.<sup>136</sup> If the approval is not renewed on time, must the sports betting operation be shut down?

States would be required to make certain investigations and follow suitability standards set forth in the proposed federal legislation, some of which may be stricter than standards that exist in states with current sports betting operations.<sup>137</sup> For example, Nevada does not have any automatic disqualifiers, so the requirement to reject any operator convicted of a crime punishable by more

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<sup>129</sup> Press Release, Senator Democrats, Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.

<sup>130</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 101 (a)-(b) (2018).

<sup>131</sup> *Id.* § 3(17)(C).

<sup>132</sup> *Id.* § 102(a).

<sup>133</sup> *Id.* § 102(b)(1).

<sup>134</sup> *See id.* § 501(b).

<sup>135</sup> *Id.* § 102(c).

<sup>136</sup> *Id.* § 102(d), (e).

<sup>137</sup> *See generally* § 103.

than one year of imprisonment may eliminate someone with a forty-year-old conviction in their background who has already been deemed suitable by the Nevada Gaming Commission.<sup>138</sup> Also, state regulatory agencies are prohibited from accepting wagers on amateur athletic competitions, except for the Olympics and college athletics, and must honor requests by sports leagues to limit wagering on certain events.<sup>139</sup> This seems to be treading awfully close to the anti-commandeering principles discussed in *Murphy* in which a direct order to a state legislature (to not pass sports wagering legislation), versus private actors, was deemed unconstitutional.<sup>140</sup>

The Hatch-Schumer Bill also prohibits regulated sports betting operators from accepting bets from individuals connected to sports leagues, such as athletes, coaches, officials, or employees.<sup>141</sup> Owners of sports teams do not seem to be included within this prohibition.

The proposed legislation also includes a requirement for sports wagering operators to use official data through December 31, 2024.<sup>142</sup> We find it interesting that Congress would be mandating a commercial enterprise (sports book operator) to use the product of another commercial enterprise (sports leagues).

Sports wagering is a low-margin, highly volatile business. The average hold for sports wagering in Nevada since data has been tracked from 1984 to present is about five percent.<sup>143</sup> The proposed Hatch-Schumer Bill would impose additional costs onto sports betting operators that could cut into these low margins.<sup>144</sup> For example, sports betting operators would be required to contribute to problem gambling treatment and research; use official data (presumably at a cost); establish a reserve (required by some jurisdictions); conduct annual employee background checks; create the ability to share wagering information in real-time; and perform additional compliance, record keeping, and reporting.<sup>145</sup> These additional costs and requirements may be too burdensome for some sports betting operators, forcing them to either raise prices (and potentially push customers back to the illegal market) or to shut down altogether.

The proposed legislation also provides that the Attorney General should designate a non-profit entity to serve as a National Sports Wagering Clearinghouse that would, among other things, maintain a National Exclusion

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<sup>138</sup> See *id.* § 103(b)(8)(C)(iii).

<sup>139</sup> *Id.* § 103(b)(2)(D), (b)(3)(C)(i).

<sup>140</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018).

<sup>141</sup> S. 3793, § 103 (b)(4)(A)(iii).

<sup>142</sup> *Id.* § 103(b)(5)(A)(i)–(ii).

<sup>143</sup> DAVID G. SCHWARTZ, UNLV CTR. FOR GAMING RESEARCH (Jan. 2018), *NEVADA SPORTS BETTING TOTALS: 1984-2017*, available at [https://gaming.unlv.edu/reports/NV\\_sportsbetting.pdf](https://gaming.unlv.edu/reports/NV_sportsbetting.pdf).

<sup>144</sup> See generally S. 3793, §§ 101–502.

<sup>145</sup> See generally *id.*

List<sup>146</sup>; coordinate efforts among key stakeholders; and receive and publish wagering information.<sup>147</sup>

There are some positive provisions contained in the Hatch-Schumer Bill. For example, instead of the federal excise tax going into a general fund, the legislation proposes that tax proceeds go toward enforcement against illegal operations and problem gambling research and treatment.<sup>148</sup> The proposed legislation would also amend the antiquated federal Wire Act to allow wagers, layoff bets, and information aiding in placement of sports bets or wagers to cross state lines among states with approved sports wagering and interstate compacts.<sup>149</sup>

### VIII. CONCLUSION

Legal, regulated sports wagering may exist in twenty to thirty states within the next five years. However, the possibility of federal government oversight still looms. Federal involvement in sports wagering has some positive aspects, but there are many legal and social implications at play with a federal framework. Nevada has had legal, regulated sports wagering for several decades and the lessons learned from this experience can help guide states or tribes looking to authorize sports wagering.

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<sup>146</sup> *Id.* § 103(b)(4)(B).

<sup>147</sup> *Id.* § 106(c).

<sup>148</sup> *Id.* § 201.

<sup>149</sup> *Id.* at § 301. This section would also eliminate the issue of intermediate routing that was raised in the case of *United States v. Yaquinta*, 204 F. Supp. 276, 277 (N.D.W. Va. 1962).