

A CASE AGAINST FEDERAL REGULATION OF INTRASTATE SPORTS WAGERING

*Drew Thornley**

INTRODUCTION

In the aftermath of the U.S. Supreme Court's decision declaring unconstitutional the Professional and Amateur Sports Protection Act (PASPA), which barred most states from legalizing sports wagering, many states have legalized intrastate sports betting. Meanwhile, the U.S. Congress has considered an expanded regulatory role for the federal government. A healthy debate has emerged regarding whether individual states should have the power to regulate sports betting within their respective states or whether federal oversight is needed.

This article argues against the latter position, while leaving untouched the separate issue of whether sports gambling (or gambling, more generally) should be regulated at all. For purposes of this article, the author operates under the assumption that sports gambling should be regulated and, thus, addresses only the issue of whether such regulation should be by the federal government or the individual states.

Part I very briefly provides relevant background on PASPA and New Jersey's challenge to the law. Part II very briefly discusses the aftermath of the Supreme Court's ruling on PASPA, including various states' legalizing sports betting within their respective states and the introduction of a bill calling for federal regulation of the sports-betting industry in the U.S. Part III lays out the author's argument against additional federal involvement, arguing that the individual states alone should handle regulation of intrastate sports wagering.

PART I

The Professional and Amateur Sports Protection Act (hereafter "PASPA")¹ was signed into law by President George H.W. Bush on October 28, 1992.

* Assistant Professor of Legal Studies, Stephen F. Austin State University, Nacogdoches, Texas. B.A., The University of Alabama. J.D., Harvard Law School.

¹ 28 U.S.C. § 3701 (2018). PASPA is also known as the *Bradley Act*.

Enacted pursuant to Congress's powers under the Commerce Clause, PASPA generally outlawed sports betting in the U.S. As explained by the Supreme Court of the United States (hereafter "SCOTUS"),

[The Professional and Amateur Sports Protection Act (PASPA)]... makes it unlawful for a State or its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events, 28 U. S. C. §3702(1)... [and] for "a person to sponsor, operate, advertise, or promote" those same gambling schemes... if done "pursuant to the law or compact of a governmental entity," §3702(2). [But] PASPA does not make sports gambling [itself] a federal crime. Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. §3703... "Grandfather" provisions allow existing forms of sports gambling to continue, §3704(a)(1)–(2), [and] another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City... within a year of PASPA's enactment, § 3704(a)(3).²

New Jersey failed to enact sports betting within the one-year window, but in 2011, New Jersey voters approved a state-constitutional amendment that permitted the New Jersey Legislature to legalize sports gambling.³ The New Jersey Legislature did so in 2012⁴, and Governor Chris Christie signed the law. Subsequently, the law was challenged in federal court by the NCAA and the four major professional sports leagues⁵, which sought an injunction against the law on the grounds that it violated PASPA. In response, New Jersey claimed PASPA violated the U.S. Constitution's Tenth Amendment, Commerce Clause, Due Process Clause, Equal Protection Clause, and Equal Footing Doctrine.⁶ In ruling for the plaintiffs, the trial court rejected each of New Jersey's positions, writing, "The Court has determined that PASPA is constitutional, and due to the operation of the Supremacy Clause, New Jersey's Sports Wagering Law is preempted."⁷ The Third Circuit affirmed, stating, "Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else

² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1469 (2018).

³ *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 491 (D.N.J. 2014).

⁴ *Id.*

⁵ *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 553 (D.N.J. 2013). The National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).

⁶ *Id.* at 554.

⁷ *Id.* at 577.

in our Constitutional structure.”⁸ SCOTUS then denied New Jersey’s petition for certiorari.⁹

In 2014, New Jersey passed another law¹⁰, which repealed any New Jersey state laws prohibiting sports gambling in the state. Just three days later, the plaintiffs from the earlier *Christie* lawsuit (the major professional sports leagues) again filed suit in federal court, alleging New Jersey’s new law violated PASPA and seeking declaratory and injunctive relief.¹¹ Once again, the defendants challenged the constitutionality of PASPA.¹² As was the case with the earlier *Christie* case, the plaintiffs prevailed at trial, as the court ruled that New Jersey’s 2014 law, “by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme”¹³, was preempted by PASPA. Once again, the Third Circuit affirmed, stating, “We will not allow Appellants to bootstrap already decided questions of PASPA’s constitutionality onto our determination that the 2014 Law violates PASPA. We reject the notion that PASPA presents states with a coercive binary

⁸ Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 730 F.3d 208, 240 (3d Cir. 2013).

⁹ *Christie v. Nat’l Collegiate Athletic Ass’n*, 573 U.S. 931 (2014).

¹⁰ See N. J. Laws, P.L. 2014, Chapter 62, https://www.njleg.state.nj.us/2014/Bills/PL14/062_.HTM. The bill summary contains the following statement: “This bill implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Association v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), wherein the court in interpreting the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*, stated that it does “not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.” *National Collegiate Athletic Association*, 730 F.3d at 232. The court further stated that “it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be.*” *Id.* at 233 (emphasis added).

Moreover, the United States in its brief submitted to the Supreme Court of the United States in opposition to petitions for writs of certiorari in the above-referenced case wrote 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.*” United States Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari (Nos. 13-967, 13-979, 13-980), dated May 14, 2014, at 11 (emphasis added).” *Id.* As explained by SCOTUS, “Instead of affirmatively authorizing sports gambling schemes, this law repeals state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State.” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1469 (2018).

¹¹ *Nat’l Collegiate Athletic Ass’n v. Christie*, 61 F. Supp. 3d 488, 490 (D.N.J. 2014).

¹² *Id.* at 498.

¹³ *Id.* at 504.

choice or affirmative command and conclude, as we did in *Christie I*, that it does not unconstitutionally commandeer the states.”¹⁴ On June 27, 2017, SCOTUS granted New Jersey’s petition for certiorari. Finally, on May 14, 2018, SCOTUS struck down PASPA¹⁵, on the grounds that it violated the Tenth Amendment, since it contravened the Constitution’s anti-commandeering rule, in multiple ways.¹⁶ SCOTUS explained,

[PASPA’s anti-authorization] provision unequivocally dictates what a state legislature may and may not do. [The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws] is empty... The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event..¹⁷...

¹⁴ Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 832 F.3d 389, 402 (3d Cir. 2016).

¹⁵ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1461 (2018). By this time, Phil Murphy was the Governor of New Jersey. Governor Murphy took office on January 16, 2018.

¹⁶ *Id.* at 1478. The case’s syllabus explained the meaning of the Constitution’s anti-commandeering rule as follows: “As the Tenth Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York v. United States*, 505 U.S. 144, and *Printz v. United States*, 521 U.S. 898, simply represents the recognition of this limitation. Thus, ‘Congress may not simply ‘commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.’” *New York, supra*, at 161. Adherence to the anticommandeering principle is important for several reasons, including, as significant here, that the rule serves as ‘one of the Constitution’s structural safeguards of liberty,’ *Printz, supra*, at 921, that the rule promotes political accountability, and that the rule prevents Congress from shifting the costs of regulation to the States.” *Id.* at 1465.

¹⁷ *Id.* at 1478. The case’s syllabus states, “Contrary to the claim of respondents and the United States, this Court’s precedents do not show that PASPA’s anti-authorization provision is constitutional. *South Carolina v. Baker*, 485 U. S. 505; *Reno v. Condon*, 528 U. S. 141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264; *FERC v. Mississippi*, 456 U. S. 742, distinguished....Nor does the anti-authorization provision constitute a valid preemption provision. To preempt state law, it must satisfy two requirements. It must represent the exercise of a power conferred on Congress by the Constitution. And, since the Constitution “confers upon Congress the power to regulate individuals, not States,” *New York, supra*, at 177, it must be best read as one that regulates private actors. There is no way that the PASPA anti-authorization provision can be understood as a regulation of private actors. It does not confer any federal rights on private actors interested in conducting sports gambling operations or impose any federal restrictions on private actors.” *Id.* at 1467.

PASPA's provision prohibiting state "licens[ing]" of sports gambling schemes also violates the anticommandeering rule. It issues a direct order to the state legislature and suffers from the same defect as the prohibition of state authorization. Thus, this Court need not decide whether New Jersey's 2014 law violates PASPA's antilicensing provision.¹⁸

PART II

After the Supreme Court invalidated PASPA, a number of states (some even within one month) legalized some form of intrastate sports betting. In fact, some states passed such legislation before PASPA was invalidated.¹⁹ Many other states have followed suit. To date²⁰, some form of sports gambling is legal (even if not yet operational) in Arkansas, Colorado, Delaware, Illinois, Indiana, Iowa, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, D.C., and West Virginia. Additionally, such betting is legal at certain Native-American venues in New Mexico, thanks to a tribal-gaming compact.²¹ More states are headed toward legalization.²² Before long, legal sports betting will be the rule among the states, not the exception.

¹⁸ *Id.* at 1467.

¹⁹ See Matthew Kredell, *One Year After PASPA Repeal, Sports Betting Legislation Appears in More Than 75% of US*, LEGAL SPORTS REPORT (May 14, 2019), <https://www.legalsportsreport.com/32440/sports-betting-legislation-after-paspa/> ("Delaware, Pennsylvania and Mississippi had passed legislation to legalize sports betting in previous years, and West Virginia anticipated the legal decision by passing a bill before it adjourned in March 2018.").

²⁰ *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Sept. 26, 2020).

²¹ National Indian Gaming Commission, *Indian Gaming Regulatory Act*, NAT'L INDIAN GAMING COMM'N, <https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act> (last visited Sept. 25, 2020) ("The Indian Gaming Regulatory Act was enacted by the United States Congress on October 17, 1988, to regulate the conduct of gaming on Indian Lands. IGRA establishes the National Indian Gaming Commission and the regulatory structure for Indian gaming in the United States. Public Law 100-497-Oct. 17, 1988 100th Congress Sec. 2701."); *Legal New Mexico Sports Betting*, LEGAL SPORTS BETTING (Feb. 4, 2020), <https://www.legalsportsbetting.com/new-mexico/>; See Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467; See also John Holden, *So How Exactly Is New Mexico Sports Betting Legal, And What Does It Mean In Other States?*, LEGAL SPORTS REPORT (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/>.

²² See Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Mar. 26, 2020), <https://www.espn.com/chalk/story/>

As the list of states that have legalized sports betting has grown, so have some calls for federal regulation of the industry. Better uniform federal standards that apply to all states than a patchwork of state-by-state regulation without oversight by the federal government, as the argument goes. This position took federal-legislative form with the *Sports Wagering Market Integrity Act of 2018*, introduced December 19, 2018, by U.S. Senators Charles Orrin Hatch (R-UT) and Charles Schumer (D-NY).²³ Fundamentally, the now-dead Hatch-Schumer Act would have required states with legal sports betting to comply with federal rules established by the U.S. Department of Justice. A *Senate Democrats* press release explained and defended the bill, in part, as follows:

“This bipartisan legislation would put in place world-class safety measures to protect consumers, preserve the integrity of sporting events, and ensure the propriety of the sports wagering market... “As a lifelong sports fan, I treasure the purity of the game, and after *Murphy v. NCAA*, I knew that Congress had an obligation to ensure that the integrity of the games we love was never compromised,” said Schumer. “That is why I believe the time is now to establish a strong national integrity standard for sports betting that will protect consumers and the games themselves from corruption...States historically have regulated other forms of gaming with little intervention by the federal government. But the interstate nature of most sports wagering and the thriving, transnational illegal market demand the attention of the federal government to establish consistent standards for sports wagering regulators and to provide law enforcement with additional authorities to target the illegal sports wagering market and bad actors in the growing legal market...”²⁴

Prior to introducing the bill, Senator Hatch wrote,

“For the sake of the athletes, for the sake of the fans and for the sake of the game, Congress must act to protect the integrity of sports and guide states as they consider whether to embrace sports betting. To be clear, it will be up to each state to decide whether to legalize sports gambling and how

[/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.](#)

²³ See Sports Wagering Market Integrity Act, S. 3793, 115th Cong. (2018).

²⁴ Senate Democrats, Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation, SENATE DEMOCRATS (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.

to regulate it. To this end, I am working on legislation that will establish clear-cut, minimum standards for sports betting—standards that protect consumers, deter illegal bookmaking, and empower states that opt against the legalization of sports gambling. The ultimate aim of my legislation is to uphold transparency, honesty and principle in the athletic arena.”²⁵

Senator Hatch also stated that, in the wake of SCOTUS’s ruling striking down PASPA, “I began working with stakeholders to ensure we were doing everything possible to protect the integrity of sports from corruption.”²⁶ Clearly, the bill’s authors have focused on the bill’s overarching goal: protecting the integrity of organized/competitive sports. The NFL, NCAA, MLB, PGA, and others have voiced hearty support for the bill.²⁷

²⁵ Orrin G. Hatch, *Sports Betting Is Inevitable—Let’s Make Sure It’s Done Right*, SPORTS ILLUSTRATED (May 23, 2018), <https://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation>.

²⁶ ESPN News Services, *U.S. Senators Charles Schumer, Orrin Hatch Introduce Federal Sports Gambling Bill*, ESPN (Dec. 29, 2018), https://www.espn.com/chalk/story/_/id/25573273/senators-chuck-schumer-orrin-hatch-introduce-federal-sports-gambling-bill.

²⁷ See Senate Democrats, *supra* note 24, for support from Jocelyn Moore, National Football League Executive Vice President (“Rather than preventing states from making policy choices about whether or not to allow sports betting, the Sports Wagering Market Integrity Act would ensure that all state-sanctioned sports betting is conducted pursuant to core standards that protect consumers, guard against problem gambling and gambling by our nation’s youth, and uphold the integrity of sporting contests.”), the NCAA (“With legalized sports wagering, the NCAA’s main priorities are protecting student-athletes well-being and the integrity of competition. Because of this, we applaud the bipartisan support of Senators Hatch and Schumer in proposing the federal sports wagering legislation. Federal standards are needed to promote a safe and fair environment for the nearly half a million students who play college sports.”), Gordon A. Smith, Chief Executive Officer and Executive Director, United States Tennis Association (“Based on our experience with and understanding of sports wagering abroad, the USTA supports a federal, holistic approach to regulating sports wagers, and uniform cooperation and regulation with state gaming regulators and betting operators, as well as robust education and regulations for athletes and others affiliated with these sporting events. The proposed federal sports wagering bill, if enacted, would significantly aid sports organizations in maintaining the integrity of sport. We applaud the introduction of this bill and stand ready to work with you to advance this important legislation.”), and Keith Whyte, Executive Director of the National Council on Problem Gambling (“The National Council on Problem Gambling thanks Senator Orrin Hatch and Senator Chuck Schumer for their leadership in addressing problem gambling. Using revenue from the existing sports wagering excise tax, this bill provides the first-ever Federal funding dedicated to

It remains to be seen whether a bill akin to the Hatch-Schumer Act²⁸ will become law, but given how early it is in the post-PASPA world, debating the federal government's role, if any, in the regulation of sports betting is timely. To that end, the author's thoughts on the matter follow.

PART III

In striking down PASPA, SCOTUS opened the door for states to authorize and regulate gambling. But one can argue that just because a state *can* do something doesn't necessarily mean it *should*. Maybe the matter should be handled entirely by the federal government, given its authority to regulate interstate commerce.²⁹ Or maybe the states can regulate in accordance with federally-imposed standards, as would be the case with the proposed Hatch-Schumer bill. Either way, the author's opinion is that the federal government should not get involved. The states *can* regulate intrastate sports gambling, and they *should* regulate it, free from federal involvement, for at least the following reasons: (1) constitutionally, states rightly have exclusive power over purely intrastate sports gambling; (2) states are already regulating intrastate sports

gambling addiction prevention, research and treatment programs. NCPG believes these measures are a great first step to addressing problem gambling across the country. These essential programs will improve public health and wellness by reducing the personal, social and economic costs of gambling addiction.”); *see also* Wayne Parry, *APNewsBreak: Feds eye move to regulate legal sports betting*, AP NEWS, (Dec. 19, 2018), <https://apnews.com/a3e2b43f3931436e8156f54471ad5fc3> (“Likewise, Major League Baseball said in a statement, ‘Legalized sports betting is rapidly spreading across the country, creating a clear need for a set of consistent, nationwide integrity standards to protect the sports that millions of Americans love.’ The PGA Tour called for establishment of a national body to oversee the integrity of sports in the United States.”) (“Without continued federal guidance and oversight, we are very concerned that sports leagues and state governments alone will not be able to fully protect the integrity of sporting contests and guard against the harms Congress has long recognized as being associated with sports betting.”).

²⁸ Senators Schumer and Mitt Romney have explored the possibility of introducing a new version of the Hatch-Schumer Act. *See Chuck Schumer, Mitt Romney Collab on Federal Sports Betting Legislation*, SBJ DAILY (Sept. 11, 2019), <https://www.sportsbusinessdaily.com/Daily/Issues/2019/09/11/Gambling/Federal-Legislation.aspx>.

²⁹ “Current forms of illegal sports betting usually involve a website or an internet-connected device, with data on scores and other statistics passing freely over state and international boundaries — which supports the argument that, when such betting becomes legal, a federal entity should be involved.”

James Glanz, *States Are Pushing to Keep Federal Regulation Out of Sports Gambling*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/sports/sports-gambling-regulation.html>.

gambling and are doing so effectively; and (3) federal involvement would add unnecessary bureaucracy and costs.

A. The power to regulate intrastate sports gambling belongs to the states.

The Tenth Amendment to the U.S. Constitution states, “The 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.” In plain terms, this means that states have control over anything over which the Constitution does not give the federal government power.³⁰ For purposes of this article, notably absent from the list of the U.S. Constitution’s specifically-enumerated federal powers is the power to regulate intrastate sports wagering. Cato Institute’s Tim Lynch writes,

Gambling regulation has always been considered the province of state and local government...The call for federal intervention should be resisted for several reasons. First and foremost, the Constitution does not authorize the federal government to involve itself in gambling. In the landmark case of *Maybury vs. Madison*, Chief Justice John Marshall observed that the powers of Congress "are defined and limited." A cursory examination of the Constitution by any educated person would show that the powers of Congress are spelled out explicitly in Article I, section 8. The 10th Amendment was later added to make it clear that the powers not delegated to the federal government were to be "reserved to the states."...Federal gambling regulation would be the antithesis of respect for the 10th Amendment.³¹

The power to regulate intrastate gambling simply does not belong to the federal government. Rather, if it is to occur³², such regulation belongs to the individual states; and, indeed, gambling generally (not just sports gambling) has traditionally been predominantly under state (and local and tribal) control.

³⁰ See U.S. CONST. art. I, § 8.

³¹ Tim Lynch, *Gambling Regulation Belongs to the States*, CATO (July 23, 1998), <https://www.cato.org/publications/commentary/gambling-regulation-belongs-states>; Martin Derbyshire, *If Congress Must Regulate Sports Betting, It Should Focus On Enforcement*, PLAYUSA (Feb. 20, 2020), <https://www.playusa.com/congress-sports-betting-enforcement/> (“It...appears to be another attempt to expand federal involvement in the gaming industry. If so, it tramples all over state rights and is as unconstitutional as the Professional and Amateur Sports Protection Act (PASPA) struck down in May.”).

³² As stated in the Introduction, this article does not address whether sports gambling should be regulated.

However, one could argue that just because the states have been in charge of something does not mean they should have been and/or should be in the future. This is certainly true, but it is not a winning argument in this context. This is not an area in which the states have wrongly been in control. Rather, states are the appropriate powers. The path thus far has been perfectly in line with the mandates of the Constitution, which does not list gambling/wagering as an area reserved for the federal government.

But again, one could counter, arguing that, though gambling is not a specifically-enumerated power of the federal government, the federal government has the Constitutional authority to regulate gambling, per its power to regulate interstate commerce.³³ This, too, should be a losing position. Intrastate sports gambling, by definition, occurs entirely within the borders of a given state. It is not interstate in nature. Where it is legal and already occurring, sports wagers must be made while in the state, either while physically at the sports-betting venue and/or (where online sports wagering is permitted) while using a computer or mobile device within the state.³⁴

So, to make the interstate-commerce argument, one would necessarily have to make the case that intrastate-sports gambling is, at least to some material degree, interstate in nature. Perhaps one would, for example, argue that people might cross a state line, in order to place a sports wager. This would be nowhere near sufficient to justify federal regulation per the ICC.

According to SCOTUS, there are

three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.³⁵

None of these three categories gives the U.S. Congress a legitimate basis for interstate-commerce regulation of intrastate sports gambling, and neither would other attempts to frame intrastate sports wagering as commercially-interstate in

³³ U.S. CONST. art. I, § 8 (“The Congress shall have the Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

³⁴ See *US States with Legal Sports Betting*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/states-with-legal-sports-betting/> (last updated Sept. 23, 2020).

³⁵ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

nature. A closer examination of each of the three justifications for the federal government's interstate-commerce power is in order.

Certainly, reasonable minds can (and do) disagree regarding whether intrastate sports wagering is truly intrastate in nature. The author believes it is. Thus, if one accepts the position that intrastate sports wagering is not an interstate-commerce activity, it is necessarily true that there can be no channels of interstate commerce³⁶, nor can there be instrumentalities, persons, or things in interstate commerce. Intrastate sports wagering does not entail networks of highways and roads, of waterways and canals, of airports and bridges, or of any other traditional channels of interstate commercial activity. Here, a bettor places, and a wagering operator accepts, a bet at a physical betting counter or via a website or app within the operator's state.

One might argue that, since the internet—a connected network not bound to the borders of a given state—is being used to place and receive bets and/or since operators might use the internet to acquire data to aid them in setting betting odds, online sports wagering is interstate in nature. For example, perhaps one would argue that (due to the technological nature of electronic transmissions, in which communications sent and received in the same state can nonetheless be routed via another state³⁷) a bet placed online that even monetarily enters another

³⁶ See 29 C.F.R. § 776.29 (2019).

³⁷ “[T]he communications systems in the U.S. have changed dramatically since 1961 when the FWA was enacted. In 1961, the physical communications layer of the phone system dedicated circuits for communications connections. You may recall the old movies where a telephone user talks to an operator, then the operator plugs wires into a switchboard to connect the caller to the recipient. By 1961, many of these manual service exchange switches were still in use, and automated switches were simply an automated version of manual exchanges. Digital and touchtone service was not available anywhere yet. In 1961, the phone system was the electromechanical version of two tin cans on a string because only one conversation per circuit was generally accommodated. Until the use of packet switching network technology, the only way to increase network capacity was to lay new communications lines. If you analogize the old phone system to a road, it would be a road between origin and destination where only two cars can travel at any given time and the only destinations are the sending location and receiving location. In the late 1990s and early 2000s, the network began to change to use internet technologies. Internet technologies break communications down into packets with a “to” and “from” address. It allows multiple discrete connections over a common physical layer (wire). The road analogy for the new system is like our current road system, where many cars may travel on the same system of roads, and many destinations may be reached over common roadways. Just like a real road system, congestion may occur when too many users try to use the same road to get to a destination. However, unlike the road system, the packet switched network monitors congestion and sends each data and voice packet from origin to destination via the least congested and efficient route possible based on the priority of the packet, without regard to geographic distance. This means communications over a packet switched network

state's network makes such a bet interstate in nature, thus violating the Federal Wire Act³⁸, which bars the use of an interstate or foreign wire for sports wagers and information assisting the placing of sports.

In support of this position, one would likely point to two cases holding that such electronic border breaching implicated interstate commerce. In *United States v. Yaquinta*³⁹, a case involving horse wagers made via long-distance telephone calls made and received in West Virginia but routed through Ohio, the trial judge held the Wire Act was violated, writing that “the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat, if that will serve the congressional purpose.”⁴⁰ Further support for this position comes from the DOJ's 2011 Wire Act guidance, which states “that the acceptance of wagers through the use of a wire communication facility by a gambling business...from individuals located either outside a state or within the borders of the state (but where transmission is routed outside of the state) would violate federal law.”⁴¹ Likewise, in *United States v. Kammersell*,⁴² the Tenth Circuit ruled that a bomb threat that originated in Utah but that was routed to Virginia before ending in Utah was interstate in nature and in violation of 18 U.S.C. § 875(c)⁴³. The court held, “A threat that was unquestionably transmitted over interstate telephone lines falls within the literal scope of the statute and gives rise to federal jurisdiction.”⁴⁴

However, a critical distinction between the activities involved in these cases and intrastate sports wagering conducted in states where such wagering is legal is that the latter involved illegal actions. It is difficult, then, to imagine that such

can, and often do, cross state lines and even international boundaries.” Kate C. Lowenhar et al., *The Potentially Catastrophic Impact of Re-interpreting the Federal Wire Act (Using RAWA as a Guide)*, NEV. GAMING L., Sept. 2018, at 46, <https://www.nvbar.org/wp-content/uploads/13-Catastrophic-Impact-of-Re-Interpreting-Federal-Wire-Act.pdf>.

³⁸ 18 U.S.C. §§ 1081-1084 (2012).

³⁹ *United States v. Yaquinta*, 204 F. Supp. 276 (N.D.W. Va. 1962).

⁴⁰ *Id.* at 278.

⁴¹ Mark Hichar, *Even if the PASPA is Struck Down, the Wire Act Will Still Prohibit Sports Bets from Crossing State Lines.*, PUB. GAMING INT'L 40, 41 (Mar./Apr. 2018), <http://www.publicgaming.com/PUBLICGAMINGMARCHAPRIL2018/MARKHICHARFINAL.pdf>. Interestingly, “While the Unlawful Internet Gaming Enforcement Act (the “UIGEA”) contains an express exception for intermediate routing, the Wire Act contains no such exception, and the UIGEA states that “[n]o provision of [the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States.” *Id.* (citing 31 U.S.C. §§ 5361 – 5367 and 31 U.S.C. § 5361(b)).

⁴² *United States v. Kammersell*, 196 F.3d 1137, 1139 (10th Cir. 1999).

⁴³ 18 U.S.C. § 875(c) (2012) states, “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”

⁴⁴ *Kammersell*, 196 F.3d at 1139.

use of the Wire Act, which was passed to fight organized crime, would extend to legal activities like intrastate sports betting.⁴⁵ Attorney Mark Hichar writes that “this form of intrastate sports betting appears to be happening in Nevada without challenge from regulators or law enforcement, and if a court were to hold that the Wire Act prohibited such conduct, such would be contrary to the Wire Act’s stated purpose.”⁴⁶ The *Yaquina* court discussed the purpose of the Wire Act, writing,

The congressional purpose here is very frankly elucidated in the Attorney General's letter to the branches of the Congress, dated April 6, 1961, in which he says, "The purpose of this legislation is to assist the various States * * * in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of * * * wire communication facilities which are or will be used for the transmission of certain gambling information in interstate * * * commerce. * * *...the objective of the Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received."⁴⁷

Indeed, with regard to intrastate sports wagering made, the state where the wagering communication is (sent and) received is one in which such wagering is legal.⁴⁸

⁴⁵ Hichar, *supra* note 4, at 42.

⁴⁶ *Id.* at 43.

⁴⁷ United States v. *Yaquina*, 204 F. Supp. 276, 278-79 (N.D.W. Va. 1962).

⁴⁸ Hichar, *supra* note 41, at 43. On this point, Hichar writes, “Had the underlying wagering in *Yaquina* been legal, it seems unlikely that the prosecution would have been brought, and if it had been brought, it seems unlikely that the court would have found the defendants guilty under the Wire Act, even if the wagering related information constituted actual bets and wagers (as opposed to mere information assisting in the placing of bets and wagers). If the underlying wagering had been legal in West Virginia, there would have been no need to assist the State in the enforcement of its laws, and using the Wire Act to prohibit communications that began and ended in that State, and assisted in wagering authorized by that State, would not have served the purpose for which the Wire Act was enacted.” “*As noted above, the Yaquina court determined that the out-of-state routing of communications beginning and ending in the same state was sufficient to consider the communications “in interstate or foreign commerce” for purposes of the Wire Act, “if that will serve the congressional purpose.” Yaquina, 204 F. Supp. at 278 (emphasis added). If the communications at issue in Yaquina had related to wagering expressly authorized by the state, then applying the Wire Act to prohibit*

If truly interstate actions are being taken in furtherance of sports wagering, then the Wire Act and the Unlawful Internet Gambling Enforcement Act (UIGEA)⁴⁹ (which makes it unlawful “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made”⁵⁰) are available to the federal government; but laws already in place that criminalize interstate gambling should not be extended to purely intrastate gambling—meaning wagering in which the bet is placed and received in the same state—on the basis that such gambling can involve an electronic transmission that travels via another state’s network or on the basis of other feeble attempts to turn intrastate wagering into an interstate activity. The regulation of sports wagers placed and received in the same state squarely belongs with the individual states. The UIGEA itself recognizes this, carving out an exception for intrastate⁵¹ (and intratribal⁵²) wagering. As for what qualifies as “intrastate”, the UIGEA states that “the bet or wager is initiated and received or otherwise made exclusively within a single State”⁵³. Such an intrastate definition should not be affected solely because the least-congested route for an electronic communication included another state’s transmission network.

Additionally, and regarding the third justification, intrastate sports wagering surely lacks the “substantial relation to interstate commerce” that SCOTUS has ruled can justify federal regulation of a commercial activity.⁵⁴ In analyzing the Commerce Clause, SCOTUS held in *Gibbons v. Ogden*, “It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the

such communications would not have served the congressional purpose, and the court’s statement suggests it would have decided the case differently.” *Id.* at 43. “Moreover, use of the Wire Act to prohibit intrastate wagering (except for the routing of transmissions) expressly authorized by a state would actually thwart that state’s laws, directly contrary to the stated purpose of the Wire Act. The Wire Act should not be used toward such ends inconsistent with its intended purpose.” Mark Hichar, *The Wire Act Should Not be Used to Prohibit Internet Gambling Carried Out Under the UIGEA Intrastate Wagering Exception*, 13 GAMING L. REV. AND ECON. 106, 114 (2009),

https://www.researchgate.net/publication/247565503_The_Wire_Act_Should_Not_Be_Used_to_Prohibit_Internet_Gambling_Carried_Out_under_the_UIGEA_Intrastate_Wagering_Exception.

⁴⁹ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).

⁵⁰ *Id.* at § 5362(10)(A) (2006).

⁵¹ *Id.* at § 5362(10)(B) (2006).

⁵² *Id.* at § 5362(10)(C) (2006).

⁵³ *Id.* at § 5362(10)(B)(i) (2006).

⁵⁴ *See Fry v. United States*, 421 U.S. 542, 547 (1975) (“Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.”).

same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary”⁵⁵. The *Gibbons* court went on to say that the federal government’s regulatory power does not extend to activities “which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.”⁵⁶ Thus, perhaps the best route for proponents of using the Commerce Clause to regulate intrastate sports wagering is by attempting to show that intrastate sports wagering affects interstate commerce. Indeed, since *Gibbons* and beginning with its decision in *Wickard v. Filburn*⁵⁷, SCOTUS has greatly expanded the reach of the Commerce Clause by ruling that certain activities that were seemingly intrastate in nature substantially affected interstate commerce.⁵⁸ The *Wickard* court stated (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)),

The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence, the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.⁵⁹

As previously mentioned, reasonable minds can disagree, but the author believes intrastate sports wagering does not affect interstate commerce to such a degree that justifies its regulation via the Commerce Clause. Intrastate sports wagering seems entirely different than the types of intrastate activities SCOTUS has ruled substantially affect interstate commerce. For example, in *Swift and*

⁵⁵ *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

⁵⁶ *Id.* at 195.

⁵⁷ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵⁸ *See generally* *Swift & Co. v. United States*, 196 U.S. 375 (1905); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Perez v. United States*, 402 U.S. 146 (1971); *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁵⁹ *Wickard*, 317 U.S. at 124.

Company v. U.S., SCOTUS ruled the federal government had the power to regulate local meat packers that acted in concert to manipulate prices in the country's meat-packing industry, on the grounds that their respective local activities were part of the broader "stream of commerce".⁶⁰ In *U.S. v. Darby*, SCOTUS held that, regarding the Fair Labor Standards Act of 1938, "Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end even though they involve control of intrastate activities."⁶¹ In *NLRB v. Jones*, a labor-relations case involving the rights of workers to unionize, the Court held, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."⁶² In *Perez v. U.S.*, a case involving intrastate "loan sharking", the Court ruled that Title II of the Consumer Credit Protection Act was a valid use of Congress's Commerce Clause power. The Court held, "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. . . . In the setting of the present case there is a tie-in between local loan sharks and interstate crime."⁶³ In *Gonzales v. Raich*, a case involving the cultivation in California of marijuana intended for medicinal purposes, the Court ruled the Commerce Clause's reach extends to "the intrastate, noncommercial cultivation, possession and use of marijuana."⁶⁴ The Court wrote, "Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the (federal Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. §801 *et seq.*) and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim."⁶⁵

By contrast, intrastate sports wagering involves private transactions (contracts) between bettors and sports-wagering operators within the same state.

⁶⁰ See *Swift & Co.*, 196 U.S. at 397-99. The Swift court held, "Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect to such sales. . . . When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when, in effect, they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce." *Id.* at 397.

⁶¹ *Darby*, 312 U.S. at 121.

⁶² *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

⁶³ See *Perez*, 402 U.S. at 154-55.

⁶⁴ *Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005).

⁶⁵ *Id.*

It does not involve goods. It does not relate to employment conditions. It does not involve a private monopoly, price-fixing, or anything else illegal per federal law. It does not interfere with any federal statutory scheme or burden or obstruct interstate commerce. Intrastate sports wagering is just that: *intrastate* sports wagering. Bets are placed and received in the same state. No transactions involve parties located in different states. Nothing about the private betting transactions within any state that has legalized sports wagering within that state impacts commerce between or among states. In short, it does not substantially affect interstate commerce.

As such, any efforts to reframe purely intrastate wagering as interstate wagering, in order to bring it within the reach of the Wire Act, the UIGEA, or any other current or potential federal law should be resisted. If such lines of reasoning are used to justify a finding of interstate commerce, then it is hard to imagine any activity that would be off-limits to interstate-commerce regulation, especially given that we live in the age of the internet.⁶⁶ Further expansion of the federal government's interstate-commerce powers, particularly of this magnitude, should not be entertained, if the Tenth Amendment is to have any meaning at all. The federal government should heed the first sentence of Justice Thomas's *Gonzales v Raich* dissent: "Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."⁶⁷

⁶⁶ "[A]n interpretation that interstate commerce includes communications that may cross state lines while in transmission between two points within one state would make nearly all electronic communications subject to FWA prohibitions... The problem with reinterpreting the FWA to apply to all communications that do or could cross state lines is that all modern communications equipment - including land phones, cell phones, office phones, computers and tablets - ultimately use packet-switched networks that can, and often do, cross jurisdictional boundaries, even if the users are not aware of the fact." Lowenhar et al., *supra* note 37, at 46.

⁶⁷ *Gonzales*, 545 U.S. at 59–69 (Thomas, J., dissenting). Justice Thomas continued, "Even the majority does not argue that respondents' conduct is itself "Commerce among the several States. Art. I, § 8, cl. 3. *Ante*, at 2209. Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly, no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana. On this traditional understanding of "commerce," the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and

B. *States are fully capable of, and best positioned for, regulating sports wagering and are already doing so effectively.*

Beyond the fact that states have the authority to regulate sports betting, states (and tribal nations) are equipped to do so and, in fact, are already doing so effectively.⁶⁸ Moreover, even if there is room to improve (and, with regard to any endeavor, there almost always is), there is no deficiency that warrants getting the federal government involved. Post-PASPA, there appear to be no major issues or problems, thus far, in states operating legal sports wagering. And these states are handling a sizeable volume of sports bets. According to *Legal Sports Report*, from June 2018 through December 31, 2019, in the twelve states with legal sports betting, the total handle (amount wagered) was \$15,780,239,725.⁶⁹ The states with the two largest handles were Nevada and New Jersey, with handles of \$7,769,197,243 and \$5,272,419,709, respectively.⁷⁰ Additionally, although most of the states that have legalized sports wagering have done so only recently, Nevada has for decades effectively operated and regulated sports gambling. The American Gaming Association writes,

In partnership with teams, leagues and regulators, gaming operators have successfully protected the integrity of both

selling of marijuana. Instead, it bans the entire market—intrastate or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial. . . . To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as the “the production, distribution, and consumption of commodities.” *Ante*, at 2211 (quoting Webster's Third New International Dictionary 720 (1966) (hereinafter Webster's 3d)). This carves out a vast swath of activities that are subject to federal regulation. See *ante*, at 2224–2225 (O'Connor, J., dissenting). If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the “powers delegated” to the Federal Government are “few and defined,” while those of the States are “numerous and indefinite.” The Federalist No. 45, at 313.”

⁶⁸ This is also true of lotteries and other forms of non-sports gaming. In fact, 45 states currently operate a lottery. Alabama, Alaska, Hawaii, Nevada, and Utah do not operate a lottery.

⁶⁹ *US Sports Betting Revenue and Handle*, LEGALSPORTSREPORT, <https://www.legal-sportsreport.com/sports-betting/revenue> (last updated Sept. 23, 2020). This number is low, however, since revenue numbers are not yet available for some states. Oregon: “The reported data does not include tribal sports betting.” New Mexico: “Some tribal casinos currently feature sportsbooks. However, revenue figures from these casinos are not currently available.” Arkansas: “Arkansas sports betting began in July 2019. No revenue numbers have been reported yet.”

⁷⁰ *Id.*

bets and competitions for decades in Nevada. AGA's continued position of support for state and tribal regulators was echoed in testimony by Nevada Gaming Control Board Chairwoman Becky Harris. "I don't think that right now is the time for any kind of federal engagement with regard to gambling," said Chairwoman Harris. "States do a great job in every area including sports betting and we've just begun to see the roll out in other states. Nevada has a comprehensive regulatory structure that has been refined over decades, and we have a lot of integrity in our process."⁷¹

In addition to managing effectively in-person betting, states are equipped to regulate online and mobile wagering. In states where such wagering is permitted⁷², betting operators employ geofencing, a technology that ensures sports wagers are not made from bettors outside the state.⁷³ GeoComply, the geofencing leader in the sports-betting industry, which "provides services to approved sports betting markets to ensure users remain within the allowed borders"⁷⁴, is "an approved vendor in the states of New Jersey, Nevada, Delaware, Georgia, Mississippi, and West Virginia."⁷⁵ In fact, GeoComply was founded specifically to provide geofencing services to the online-gaming

⁷¹ Press Release, Am. Gaming Ass'n, AGA to Congress: When It Comes to Sports Betting, States and Sovereign Tribal Nations Know Best (Sept. 27, 2018), <https://www.americangaming.org/new/aga-to-congress-when-it-comes-to-sports-betting-states-and-sovereign-tribal-nations-know-best/>.

⁷² The Wall Street Journal reports that mobile or online sports wagering is currently offered in Iowa, Nevada, New Jersey, Pennsylvania, and West Virginia. Katherine Sayre, *Mobile Sports Betting Is the Moneymaker as More States Legalize*, WALL ST. J. (Sept. 2, 2019, 15:03), <https://www.wsj.com/articles/mobile-sports-betting-is-the-moneymaker-as-more-states-legalize-11567445689>. According to PlayUSA.com, the states either offering it currently or making plans to offer it are Indiana, Iowa, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Delaware, Colorado, Tennessee, Michigan, Virginia, Montana, Illinois, West Virginia, and Washington D.C. *Legal US Online Gambling Guide*, PLAYUSA, <https://www.playusa.com/us/> (last visited Oct. 20, 2020).

⁷³ See Katherine Sayre, *Mobile Sports Betting Is the Moneymaker as More States Legalize*, WALL ST. J. (Sept. 2, 2019, 7:03 PM), <https://www.wsj.com/articles/mobile-sports-betting-is-the-moneymaker-as-more-states-legalize-11567445689> ("Under the Supreme Court's ruling, each state can set up its own betting system, but bets across state lines aren't permitted. Mobile apps can use a method known as "geofencing" to keep betting action within a state's borders.").

⁷⁴ *Sports Betting*, GEOCOMPLY, <https://www.geocomply.com/geocomply-industries/sports-betting/> (last visited Oct. 20, 2020).

⁷⁵ *About Us*, GEOCOMPLY, <https://www.geocomply.com/about-us/> (last visited Oct. 20, 2020).

industry.⁷⁶ Indeed, such technologies appear to be effective⁷⁷, experiencing high levels of success in ensuring that, in states where intrastate sports wagering is legal, all wagering comes from within the state. GeoComply, which was “designed to ensure that no one can place bets from out of state”⁷⁸, states,

Since launching in 2011, GeoComply has quickly become the iGaming industry’s trusted solution for reliable, accurate and precise geolocation services. GeoComply’s patented and proprietary geolocation solution is unparalleled in its level of accuracy and integrity, as well as in its depth of security and ease of implementation. GeoComply’s proprietary and highly adaptive technology has successfully met and exceeded all challenges put forth by North American regulators with record-high verification rates.⁷⁹

⁷⁶ Brant James, *Q&A with Geocomply VP Lindsay Slader On Geofencing & Future*, BOOKIES (Dec. 13, 2019), <https://bookies.com/news/q-a-with-geocomply-vp-lindsay>

-slader-on-geofencing-future (Lindsay Slader, GeoComply’s Vice President of Regulatory Affairs, says, “[w]e exist solely for the purpose of providing high-caliber geolocation specifically for the online gaming market.”).

⁷⁷ *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP. (Sept. 23, 2020), <https://www.legalsportsreport.com/sports-betting/revenue/> (West Virginia’s experience is noteworthy but not because of any technical problems. “Delaware North, the only live operator, had to shut down. So too did two retail sportsbooks, leaving just three places to bet on sports in the state.”); Adam Candee, *Original WV Sports Betting Operators Might Rise From the Dead*, LEGAL SPORTS REP. (Jan. 23, 2020), <https://www.legalsportsreport.com/37230/wv-sports-betting-operators-relaunch/> (However, the problems there were not related to technology. “Both casinos halted sports betting in West Virginia back in March 2019 after less than four months of online wagering. The Delaware North-owned properties suffered from a dispute among the parent company and tech providers Miomni and EnterG. The fight over pricing and intellectual property led to the shutdown of the BetLucky app, as well as retail sportsbooks at both casinos. Lawsuits flew back and forth both in the United States and the United Kingdom.”).

⁷⁸ James, *supra* note 76.

⁷⁹ According to GeoComply, “Enhanced geolocation tools utilize both device-based browser geolocation and network connection analysis. This allows levels of accuracy of +/- 25 meters, pinpointing users to a house level, and comprehensively stopping spoofing via 350+ checks per transaction. Multiple databases and failover systems maximize pass rates to achieve 98% or more. *See Download Integrated Mobile and Desktop SDKS*, GEOCOMPLY, <https://www.geocomply.com/solutions/download/> (last visited Sept. 28, 2020). When asked by Bookies.com “Is there a next generation

Moreover, the large volume of such wagering in states like New Jersey and Nevada (the two biggest sports-betting markets in the country) does not appear to have created any material problems. According to *The Wall Street Journal*,

New Jersey sports bettors wagered a total of \$3.2 billion in the first year, with \$2.4 billion of that coming in through mobile phones and computers, according to state data...Nevada doesn't require casinos to break out mobile-betting revenue in their reports, but regulators estimated that last year about half of sports bets were online, a spokesman for the Nevada Gaming Control Board said.⁸⁰

That states already possess and use the technological capability to bar interstate wagering is strong support for the position that federal regulation is unnecessary.⁸¹

States' (and tribes') effective regulation of intrastate sports wagering can be attributed in part to a number of factors, such as the sheer amount of human and financial resources they devote to sports-gaming regulation and to their direct knowledge, and close understanding, of the gaming markets within their borders. According to Sara Slane, then-AGA's senior vice president of public affairs,

Because of the active, robust state and regulatory tribal gaming oversight, gaming is one of the most strictly regulated industries in America. Right now, over 4,000 gaming regulators with budgets that exceed \$1.3 billion dollars oversee the gaming industry...Just as Congress has

coming where you can pinpoint someone within a couple inches?", GeoComply's Slader responded, "We already do that, too. If you think about a use case like Mississippi where they legislated sports betting statewide, however, the state constitution only allows for sports betting on premises inside their existing casino facilities, we had to scale down the existing system that we have and augmented it with hardware, put Bluetooth beacons on the walls in properties so that the minute that you step out the front door of the casino, you're cut off from wagering." James, *supra* note 76.

⁸⁰ Sayre, *supra* note 73.

⁸¹ Not everyone agrees. Senator Orrin Hatch writes, "As the multi-billion dollar gambling industry grows, so too does the likelihood that players will be exposed to bribes, exploitation, and other forms of corruption endemic to an environment where sports betting is poorly regulated. Containing this corruption is difficult, not least because a borderless internet makes it all but impossible to enforce state laws across state lines. The rise of fantasy leagues, off-shore websites, and online booking have made sports betting opportunities even more prevalent than ever before." Hatch, *supra* note 25.

refrained from regulating lotteries, slot machines, table games and other gambling products, it should leave sports betting oversight to the states and tribes that are closest to the market...With such robust and rigorous regulatory oversight at both the state and federal levels, there is no need to overcomplicate or interfere with a system that is already working.⁸²

Indeed, states (and tribes) are better positioned to regulate their wagering markets than is the federal government. Undoubtedly, the former are much closer to the gambling operations within their states. Advocates of federal intervention regularly mention the primary goal of federal involvement: protecting the integrity of sports. Can states not do this? Has Nevada failed for decades at protecting the integrity of sports? Is there any compelling reason to believe that the federal government will be more effective than states and/or private entities, such as the Sports Wagering Integrity Monitoring Association⁸³ and others⁸⁴, at

⁸² Am. Gaming Ass'n, *supra* note 71.

⁸³ *About SWIMA*, <https://www.swima.net/> (last visited Sept. 28, 2020) (“Established in November 2018, the Sports Wagering Integrity Monitoring Association (SWIMA) is a not-for-profit organization designed to detect and discourage fraud and other illegal or unethical activity related to betting on sporting events in the United States. SWIMA is a multi-jurisdictional entity that works in partnership with its member gaming operators; federal, state and tribal regulators and law enforcement; and other various stakeholders involved in sports wagering in the United States.”).

⁸⁴ *Together, Protecting the Future of Sports*, GENIUS SPORTS, <https://www.genius-sports.com/sports/integrity> (last visited Sept. 28, 2020) (Another of the companies offering sports-wagering services is Genius Sports. On the issue of protecting integrity, Genius Sports says, “Integrity is the lifeblood of every sport. Match-fixing and betting-related corruption pose the most significant threat to the integrity of your sport. Your relationships with your fans, commercial strength, and ability to rule independently all rely on your competitions being fair, transparent and unpredictable. Combining round-the-clock bet monitoring, educational services, integrity audits, and over a decade’s experience, we’ll work alongside you to provide the greatest level of protection... Our Bet Monitoring System leads the fight against match-fixing with predictive algorithms that flag potentially suspicious betting activity.” Andy Levinson, Senior Vice President of Tournament Administration for the PGA, says, “Genius Sports plays a pivotal role in supporting our Integrity Program. Not only have they helped to inform our existing rules and regulations but their monitoring system provides us with round-the-clock surveillance and protection.”). Another company in this space is Sportradar Integrity Services, “a non-profit unit within the Sportradar group and the world’s leading supplier of sports integrity solutions for sports governing bodies, anti-doping organisations, clubs, state authorities, law enforcement agencies as well as private organisations to support them in the fight against betting-related match-fixing, doping and other integrity threats.” *About Us*,

warding off corruption and other ills in the sports-gambling industry?⁸⁵ The author contends there is not. States are already actively pursuing the goal of integrity within their sports-wagering industries. For example, the Nevada Gaming Control Board writes,

The primary purpose of the Board is to protect the stability of the gaming industry through investigations, licensing, and enforcement of laws and regulations; to ensure the collection of gaming taxes and fees an essential source of state revenue; and to maintain public confidence in gaming... Our agency's reputation has been built around a philosophy of consistent legal, ethical and fair-minded practices and actions. Our reputation has also been established through highly rigorous standards for licensing, suitability and operation... We protect the integrity and stability of the industry through our investigative and licensing practices, and we enforce laws

SPORTRADAR, <https://integrity.sportradar.com/about-us/> (last visited Oct. 5, 2020); (Says the company, "Through our unique Fraud Detection System (FDS), and other advanced Monitoring & Detection services, we monitor the entire global betting market and detect betting-related fraud in sport. Our Intelligence & Investigation services offer support for our integrity partners' match-fixing investigations and intelligence management. Our customised Education & Prevention services and tools help our partners tackle and prevent match-fixing... We provide background checks and detailed reporting on both organisations and individuals to help sports governing bodies, clubs, anti-doping organisations, law enforcement agencies, private organisations as well as bookmakers and casinos make high-stakes decisions by finding weak spots, potential issues and threats to their sport and business. ... Our Integrity Services team, currently distributed across 15 different locations around the world, relies on the close cooperation and expertise of over 100 dedicated full-time employees. By identifying strong talent from a variety of backgrounds in areas such as operations, betting analysis, anti-doping, intelligence, investigation, development, IT, education, sales, design, marketing and management, we have developed a unique pedigree and understanding of the global match-fixing and doping phenomena.").

⁸⁵ Hillary Russ, *First Sports Betting Integrity Group Launched in United States*, REUTERS (Nov. 27, 2018), <https://uk.reuters.com/article/usa-gambling-sports/first-sports-betting-integrity-group-launched-in-united-states-idUKL2N1Y21I6> ("Sportsbooks, leagues and regulators already do their own fraud monitoring, looking for odd betting patterns, abnormalities, insider activity and other suspicious data.").

and regulations, while holding gaming licensees to high standards.⁸⁶

Finally, in support of the position that the individual states are best positioned to regulate sports wagering, it is also worth noting that most states already regulate non-sports gaming options. For example, forty-five states⁸⁷ currently operate state lotteries. Clearly, then, states are no strangers to gaming regulation. They have been doing it for years—some for decades—and their track records do not reveal any compelling reason not to trust them to continue to regulate gaming of all types, free from federal involvement.

C. Federal involvement adds unnecessary bureaucratic requirements and costs.

A third reason to argue against federal involvement in intrastate sports gambling is that it would add an unnecessary layer of bureaucracy and an unnecessary layer of costs to the regulation of sports wagering. As explored above, states are empowered to regulate, are fully capable of regulating, and are already effectively regulating intrastate sports gambling. Especially considering state operators are technologically able to ensure sports wagering in their respective states stays entirely within the borders of their states, there is simply no need for the federal government to become involved. Moreover, it is undeniable that adding more rules from another regulatory authority, particularly the federal government, would impose additional costs on all market participants.

For example, several of the Hatch-Schumer Act's many provisions⁸⁸ are worth noting for the time and/or money that will be required, in order for states

⁸⁶ *About Us*, NEV. GAMING CONTROL BD. GAMING COMM'N, <https://gaming.nv.gov/index.aspx?page=2> (last visited Oct. 4, 2020).

⁸⁷ *Lotteries in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lotteries_in_the_United_States#States_with_no_lotteries (last visited Oct. 4, 2020). Washington, D.C., the U.S. Virgin Islands, and Puerto Rico also operate lotteries.

⁸⁸ *Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation*, SENATE DEMOCRATS (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation> (“Prohibit the acceptance of sports wagers, with exceptions for social gambling and states that meet certain minimum standards; Permit states to authorize online sports wagering to provide a regulated alternative to the illegal, offshore market; Prohibit sports wagers on amateur sporting events except the Olympics and college sports; Establish to request restrict certain sports wagers when necessary to protect contest integrity; Prohibit sports wagering by individuals younger than 21; athletes, coaches, officials, and others associated with sports organizations; and individuals convicted of certain federal crimes related to sports wagering; Require that sports wagering operators use data provided or licensed by sports organizations

to comply with them. According to a draft of the Act circulated by Senator Hatch's office, in order to set up a sports-wagering operation, a state would have to receive approval from the U.S. Attorney General.⁸⁹ Secondly, through 2022, operators would be required to use data only from the relevant sports leagues or sources authorized by the relevant sports leagues, when determining the outcome of sports wagers.⁹⁰ Thirdly, operators would be obligated to furnish certain information in real-time (or soon thereafter) to the National Sports Wagering Clearinghouse⁹¹, "the entity designated by the Attorney General under section 106(b)."⁹² Information that would be required to be disclosed would include certain wager-transaction data⁹³, as well as information regarding suspicious

to determine the outcome of sports wagers through 2024, and set requirements for data used thereafter; Establish a national self-exclusion list; Put in place a variety of consumer protections, including disclosure, advertising, and reserve requirements; Establish recordkeeping and suspicious transaction reporting requirements; Update existing casino anti-money laundering laws to include sports wagering operators; Provide a process whereby states may compact with each other to permits (sic) interstate sports wagering; Create a National Sports Wagering Clearinghouse that would be responsible for analyzing sports wagering data to identify patterns or trends of illegal activity. Additionally, this Clearinghouse would receive and share anonymized sports wagering data and suspicious transaction reports among sports wagering operators, state regulators, sports organizations, and federal and state law enforcement; Dedicate revenue from the existing sports wagering excise tax to law enforcement and programs for the prevention and treatment of gambling disorder; Update the Wire Act to permit certain interstate sports wagers, while also providing additional enforcement authorities such as a state cause of action and a new mechanism for the Department of Justice to target unlicensed, offshore sports wagering websites; Expand the Sports Bribery Act to cover extortion and blackmail, prohibit sports wagers based on nonpublic information, and strengthen whistleblower protections; and Provide additional authorities to the Department of Health and Human Services to prevent, monitor, and treat gambling addiction.).

⁸⁹ § 102(b), Sports Betting Discussion Draft, Office of Senator Orrin Hatch, <https://www.legalsportsreport.com/wp-content/uploads/2018/12/Sports-Betting-Discussion-Draft.pdf>.

⁹⁰ *Id.* § 103(5)(A)(i). After 2022, operators may use data solely from sources approved by their respective state regulatory authority. *See id.* at § 103(5)(A)(ii).

⁹¹ *Id.* § 106.

⁹² *Id.* § 3(8).

⁹³ *Id.* § 103(b)(12). For each wager, the operator would be required to report "in real-time or as soon as practicable, but not later than 24 hours after the time at which a sports wager is accepted by the sports wagering operator" the following data: "(i) a unique identifier for the transaction and, if available, the individual who placed the sports wager, except that such identifier shall not include any personally identifiable information of such individual; (ii) the amount and type of sports wager; (iii) the date and time at which the sports wager was accepted; (iv) the location at which the sports wager was placed, including the internet protocol address, if applicable; and (v) the outcome of the sports wager;" *Id.* § 103(b)(12)(B).

transactions⁹⁴. Fourthly, operators would be subject to numerous requirements relating to recordkeeping⁹⁵, advertising⁹⁶, consumer protection⁹⁷, and other areas. Each of these adds costs for operators.

Perhaps most worrisome to state operators is the possibility that the federal government might impose a so-called “integrity fee”, which is, in essence, an off-the-top tax on all sports wagers (a.k.a. the “handle”) that is paid to professional sports leagues. Since a sports-wagering operator’s handle is a pre-tax amount, the integrity fee would reduce the amount of taxes states make on sports wagering. It’s possible states would respond to this reduced tax revenue by increasing the fees they charges operators. Furthermore, integrity fees would drastically reduce the amount of revenue for operators.⁹⁸ As with any business, operators might then pass on their higher costs to consumers⁹⁹, especially considering how tight the margins already are for operators, who have to pay (in addition to all of their internal/operational costs) state taxes and a federal excise tax of 0.25 percent of handle.

⁹⁴ *Id.* § 103(b)(13)(B); These reports would also be required to be submitted to the relevant state’s regulatory authority. *Id.* at § 103(b)(13)(A).

⁹⁵ *Id.* § 103(b)(10).

⁹⁶ *Id.* § 103(b)(7).

⁹⁷ *Id.* § 103(b)(6).

⁹⁸ *Sports Betting Integrity Fee*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/integrity-fee/> (last visited Sept. 27, 2020) (“An integrity fee, as proposed, would tax handle at a rate of 1%, payable to each league on which sports wagering would occur. Leagues later slashed that ask to 0.25%. Some who are new to the sports betting industry confuse handle for revenue: Handle is the total amount wagered by bettors, so it’s a gauge of how much money is flowing through sportsbooks. Revenue, on the other hand, is how much sportsbooks hold from the total amount wagered. Historically, this number comes in at about 5% of handle for sportsbook operators. An integrity fee, then, would send a set amount of wagers from sportsbooks to the leagues, regardless of the revenue picture of the sportsbook. Using a 1% fee and a 5% hold, a one percent integrity fee would equate to roughly 20% of revenue going to the leagues. The fees have no requirements for the leagues attached to them. It’s just a transfer of money from gaming operators to the leagues.”).

⁹⁹ Darren Heitner, *NBA Asks For 1% Integrity Fee From Sports Betting Operators*, FORBES (Jan. 25, 2018, 7:18 AM), <https://www.forbes.com/sites/darrenheitner/2018/01/25/nba-asks-for-1-integrity-fee-from-sports-betting-operators/#366d017d643a> (Forbes reports that the American Gaming Association “disagrees that the 1% “integrity fee” is necessary or justified, and takes the position that it is merely a proposal that skims money from American taxpayers...The AGA notes that a legal Nevada sports book realizes only 3.5% to 5% in revenue and that a 1% “integrity fee” on all money wagered legally would amount to 20% to 29% of that total revenue.”); *Sports Betting Integrity Fee*, LINES (May 24, 2018), <https://www.thelines.com/betting/integrity-fee/> (“And naturally, if the sportsbooks start to get squeezed, the customer is next in-line. An even tighter profit margin is sure to result in: Prices on straight bets going up.”).

More problematic fundamentally, an integrity fee would transfer a huge amount of money to parties that are not involved in sports wagers.¹⁰⁰ *Legal Sports Report* writes, “Yes, the leagues’ contests are the basis for betting. But the leagues are playing no functional role in the industry. The state will be regulating it. The sportsbooks are operating it. The leagues simply exist.”¹⁰¹ As in any legal transaction, there are already three parties in every legal sports wager: the seller (sports-wagering operator), the buyer (the bettor), and the government. An integrity fee adds, and would significantly enrich, an unnecessary fourth party.

Thus far, no state that has legalized intrastate sports wagering has mandated an integrity fee. And, of course, why would they? This would simply reduce their tax revenue. The NBA and MLB are leading proponents of such a fee.¹⁰² The NBA says these fees are necessary.

NBA spokesman Mike Bass justifies the fee by referencing the risk the league is and will be taking as it supports a change in the current law that limits full-fledged sports betting to taking place within Nevada's borders. “Sports

¹⁰⁰ John Holden, *Integrity Fee Issues For NBA And MLB Run Deeper Than They Appear*, LEGAL SPORTS REP. (May 24, 2019), <https://www.legalsportsreport.com/32378/holden-nba-mlb-integrity-fee/> (Among other problems, this could create anti-trust problems for professional sports leagues. *Legal Sports Report* writes, “Marc Edelman, a professor of law at Baruch College and expert on antitrust regulations and their application to sport, said: “As a general matter, a company may choose to do business or not do business for any reason. What makes the leagues distinct is that they have a monopoly in their sports.’ Edelman noted that while sports leagues have monopolies amongst their own sport, when they seek to leverage that monopoly into another market they may run afoul of Section 2 of the Sherman Antitrust Act, which can be a felony with fines up to \$100 million for corporate offenders. Edelman cautioned: ‘It would be very early in the process to draw any presumption that there is an antitrust violation, but these allegations would have to be looked at very closely from a collusion perspective under Section 1 of the Sherman Antitrust Act, and from the perspective of attempting to create a monopoly in a new market, under Section 2 of the Sherman Act.’”).

¹⁰¹ Sports Betting Integrity Fee, *supra* note 98.

¹⁰² *Id.* (“Integrity fees, as they’ve been advanced in some states, are basically taxes on legal sports betting. They’ve been popularized by the NBA and Major League Baseball as they look to find a way to profit from the proliferation of sports betting in the US. The fee would transfer money from sportsbooks to sports governing bodies themselves. Leagues first proposed the fees in Indiana in 2018. Then the NBA adopted them as its preferred policy around the country during a hearing in New York. NBA and MLB are actively opposing legislation that does not include an integrity fee. It’s not an entirely new idea. For instance, pro leagues in both France and Australia already get a small percentage of wagers made in those jurisdictions. Curiously, they may have been introduced in the US by New Jersey lawmakers as a way to smooth the legal confrontation”); *See also* Heitner, *supra* note 99.

leagues provide the foundation for sports betting while bearing the risks it imposes, even when regulated,” says Bass. “If sports betting is legalized federally or state by state, we will need to invest more in compliance and enforcement, and believe it is reasonable for operators to pay each league 1% of the total amount bet on its games to help compensate for the risk and expense created and the commercial value our product provides them. This is a similar approach to legally-regulated sports betting in other international jurisdictions.”¹⁰³

The Lines reports,

The leagues have argued from the onset — the provision first made an appearance in a proposed Indiana sports betting bill in January — that the funds would go toward a comprehensive monitoring system that would ensure the outcomes of games played under their banner were free of any undue influence from sports betting. Moreover, some pesky questioning by Connecticut lawmakers recently got NBA VP and general counsel Dan Spillane to concede that the fee also represented an “intellectual property right” — aka royalty — paid to the leagues for the right to have their games wagered on.¹⁰⁴

But since an integrity fee is simply a transfer of money to sports leagues, it comes as no surprise that professional sports leagues favor and lobby for federal intervention. Sports leagues may claim they need the money, in order to protect the integrity of their respective sports, but these leagues have made it this far without such payments and, as noted above, multiple other public and private parties are already working to advance the goal of integrity in sports.

¹⁰³ See Matt Bonesteel, *Sports Gambling ‘Integrity Fee’ Supporters Are Not Doing Themselves Any Favors*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/> (“The NBA, in particular, seems to think it should get a cut of the money gambled on pro basketball games because of ‘the risk and expense created by betting and the commercial value our product creates for betting operators,’ as Dan Spillane, the NBA’s senior vice president and assistant general counsel, told a New York state Senate committee in January, when it discussed whether to allow sports gambling should the Supreme Court rule favorably. The money generated from such fees — 1 percent of the total amount bet on games — would be used for bet monitoring and investigations along with education, Spillane said.”).

¹⁰⁴ Sports Betting Integrity Fee, *supra* note 99.

As such, it is not surprising that states and sports books have largely objected to the idea of an integrity fee¹⁰⁵, so much so that sports leagues subsequently rebranded, in effect, the idea in the form of a mandate for sports books to pay to use official league data.¹⁰⁶ Whatever the name, some see this as simply a money-grab attempt by the leagues. Martin Derbyshire writes, “It smells likes (sic) its (sic) just another attempt to force operators to use official league data and create some kind of a national sports wagering clearinghouse. If so, it’s simply a cash grab aimed at making sure pro sports leagues and the feds get a piece of the sports betting pie.”¹⁰⁷

¹⁰⁵ Sports Betting Integrity Fee, *supra* note 99 (Integrity fees “are widely considered a non-starter by many in the gaming industry, considering that prospective sportsbook operators will also have to fork over...Veteran sportsbook operators and bookmakers rightly point out the water is already about chest-high when it comes to them squeaking out an appreciable annual profit. That’s without gift-wrapping millions to the leagues each year under the aforementioned 1 percent rate.”); Holden, *supra* note 100 (“When asked about William Hill’s position on these purported fees, CEO Joe Asher said, ‘It’s no secret we are firmly opposed to any sort of integrity fee.’ Indeed, Asher flagged a potentially related issue in July 2018, noting that the effect of consolidation of data utilizing exclusive providers would be leagues being able to charge whatever price for data they want. The situation is that the NBA and MLB have demanded Nevada books pay 0.25 percent of handle to the leagues in exchange for official league data...Robert Walker, of US Bookmaking, said that his company was not affected by these demands: If it is indeed true, I am not surprised. The leagues are doing whatever they can do to get a fee. I feel this agreement is between the leagues and the data providers only. The books should not have to pay an additional fee than what was otherwise agreed upon. If the fees are raised eventually due to the leagues demand than a sports book will have to decide if a data fee vendor change makes sense.”); *See generally* Maury Brown, *MLB’s Gamble On Integrity Fees And Its Official Data Stream Getting Pushback From Gaming Operators*, FORBES (May 7, 2019, 7:00 AM), <https://www.forbes.com/sites/maurybrown/2019/05/07/mlbs-gamble-on-integrity-fees-and-its-official-data-stream-getting-pushback-from-gaming-operators/#3ff5bd0b8014>; *See also* Bonesteel, *supra* note 103 (“But the proposed fees have been met with skepticism from just about everyone else.”).

¹⁰⁶ Holden, *supra* note 100 (“The concept of an integrity fee paid to sports leagues by states legalizing sports betting flopped so resoundingly that it had to be renamed. League officials stopped referring to an integrity fee and started calling it a royalty. By any name, a cut of legal sports betting handle stood as the goal, along with profit from the sale of so-called official league data.”).

¹⁰⁷ Martin Derbyshire, *If Congress Must Regulate Sports Betting, it Should Focus on Enforcement*, PLAYUSA (Feb. 20, 2020), <https://www.playusa.com/congress-sports-betting-enforcement/>; *See also* AGA Opposes Federal Government Overreach on Sports Betting, AM. GAMING ASS’N. (Dec. 19, 2018), <https://www.americangaming.org/new/aga-opposes-federal-government-overreach-on-sports-betting/> (“Additional areas this bill seeks to address – including the mandatory use of official

Finally, it is worth noting that, whether in the form of an integrity fee or a royalty fee or due to any of the proposed provisions in the Hatch-Schumer Act that will increase operators' expenses, raising the cost of sports wagering could lead more consumers to place bets in unregulated local and offshore markets, which would cut directly against the goal of ensuring that U.S. sports wagering takes place in regulated U.S. markets.¹⁰⁸ Regarding the Hatch-Schumer Act, U.S. Representative Fina Titus (Nevada) stated,

This bill undermines Nevada's expertise and experience in establishing a successful, regulated sports betting market. It would inject uncertainty into an established and regulated industry, weaken Nevada's ability to promptly adapt to maintain its gold standard, and risk causing bettors and operators to leave the regulated market.¹⁰⁹

CONCLUSION

Now that states are free to legalize intrastate sports wagering, the market for sports betting in the U.S. will continue to grow; and the burgeoning markets that are being created necessarily lead to debates about how best to regulate such markets, for the good of all market participants. Many have called for an expanded role for the federal government in such regulation, but such calls are unwarranted.

States, not the federal government, have the Constitutional authority to regulate intrastate sports gambling. And arguments that (particularly online/mobile) intrastate wagering has enough of an interstate connection to justify federal regulation via the Constitution's Interstate Commerce Clause should be rejected, for such an interpretation would exponentially increase the number of activities (namely, electronic communications) subject to the ICC, thus effectively gutting our nation's system of federalism, as established by the Tenth Amendment.

league data and the creation of a national sports wagering clearinghouse – can, and should, be decided by marketplace negotiations between private businesses and cooperative agreements among jurisdictions. In the mere six months since the U.S. Supreme Court paved the way for legal, regulated sports betting, significant developments on both of these fronts have already occurred without any federal involvement.”).

¹⁰⁸ Sports Betting Integrity Fee, *supra* note 99 (“And naturally, if the sportsbooks start to get squeezed, the customer is next in line. An even tighter profit margin is sure to result in...Consumers consequently still seeking out offshore sports betting websites and local bookmakers, i.e. the black market legalized sports betting is supposed to eradicate.”).

¹⁰⁹ Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill In Senate*, LEGAL SPORTS REP. (Dec. 19, 2018), <https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/>.

Moreover, states are already regulating intrastate sports gambling and are doing so effectively. States that have legalized sports gambling are devoting large amount of human and financial resources toward effective regulation of the sports wagering within their respective borders. And sports teams, sports-wagering operators, and others are availing themselves of sports-wagering services developed and offered by private companies, such as integrity-related services like fraud monitoring.

Finally, federal involvement would add unnecessary bureaucracy and costs that could distort markets and, ultimately, burden consumers, who might instead choose to place their bets in unregulated local and offshore betting markets. Proponents of an expanded regulatory role for the federal government have primarily touted the goal of integrity, but actions that could ultimately send more bettors away from regulated state markets to unregulated markets would work directly against such a goal. Such actions should be avoided, particularly given that, as noted above, they are unnecessary.

As such, the federal government should stay on the sidelines and let the individual states monitor and control the sports wagering that takes place entirely within their borders.