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## Time for Federal Regulation: Online Sportsbooks and the Constitution

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## Introduction

In just four years since *NCAA v. Murphy*<sup>1</sup> invalidated the Professional and Amateur Sports Protection Act- a decision that paved the way for the legalization of sports gambling in the United States- online sportsbooks have greatly increased in size and number. Currently, online sportsbooks operating in eighteen states allow for wagers to be placed on all four major professional leagues along with many collegiate athletics competitions.<sup>2</sup> Prior to the *NCAA v. Murphy*<sup>3</sup> decision, states have historically been in charge of the regulation of gambling within their borders. This is evidenced by state-run lotteries, sports betting in Las Vegas, and casinos in places like Atlantic City, New Jersey. While there are notable differences between these three aforementioned permissible gambling schemes, the largest similarity between them is that they are all subject to state regulation. Since *NCAA v. Murphy*,<sup>4</sup> online sports gambling has fallen squarely within the realm of state regulation. This state regulation of online sports gambling has not occurred by design, but rather is the culmination of an incomplete and ineffective patchwork of federal regulation which has attempted to regulate the sports gambling industry. This article suggests that despite state regulation, which has occurred to this point, online sportsbooks should be federally regulated in such a way that provides for better protections with regard to the integrity of our professional and collegiate athletics, as well as a means to set federal baseline standards that provide for increased consumer protection, accessibility, and education for the millions of Americans who place online wagers on sporting events. This federal regulation in turn would also

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<sup>1</sup> 138 S. Ct. 1461 (2018).

<sup>2</sup> The four major professional sports leagues consist of the National Football League (“NFL”), Major League Baseball (“MLB”), National Basketball Association (NBA), and National Hockey League (“NHL”). Collegiate Athletics fall under the umbrella of the National Collegiate Athletic Association (“NCAA”).

<sup>3</sup> 138 S. Ct. 1461 (2018).

<sup>4</sup> *Id.*

provide a national foundation which allows for flexibility and regulatory evolution alongside online gambling.

The first part of this article addresses the background of sports gambling within the United States including the number of state-based models which have historically and contemporaneously been utilized to regulate gambling at the state level. In addition, this section also highlights relevant attempts by the federal government to regulate gambling throughout the nation, which includes: The Wire Act,<sup>5</sup> originally passed in 1961; the Unlawful Internet Gambling Enforcement Act,<sup>6</sup> which was signed into law in 2006; and perhaps most importantly, the aforementioned Professional and Amateur Sports Protection Act,<sup>7</sup> commonly known as “PASPA,” which was signed into law in 1992, by President George H.W. Bush. Together, these federally enacted statutes have provided an incomplete regulatory framework by the federal government in an attempt to regulate sports gambling.

The second part of this article will provide support for the proposition that through the Commerce Clause,<sup>8</sup> the federal government is properly enabled to regulate online sports gambling, which to this point, has been left primarily to the states and their governments. This section discusses the foundation of legal principles which have developed in case law, clarifying the bounds and scope of the federal government when using their constitutionally enumerated Commerce Clause powers to regulate specific activities.

The third part of this paper illustrates how proper federal legislation and regulation of online sportsbooks can be implemented. This regulation serves to create and ensure uniformity

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<sup>5</sup> 18 U.S.C. § 1084.

<sup>6</sup> 31 U.S.C. § 5361- 5367.

<sup>7</sup> 28 U.S.C. § 3701.

<sup>8</sup> U.S. Const. Art. I § 8 Cl. 2.

and oversight within the states that have legalized gambling, as well as provide a federally maintained standard for states that have not already chosen to legalize online sports gambling.

Finally, in an effort to comprehensively analyze and critique the relevant issues and arguments set forth by proponents of continued state-based regulation the last portion of this article briefly dispels some concerns opponents of federal regulation cite to.

## **Part I**

### **I. History of Gambling and State Regulation within the United States**

Even before European settlement of North America, gambling was a large part of Native American life. Games like Chungke,<sup>9</sup> archeological discoveries of gambling houses, and mythical stories of Noquilpi, who won all the people of the earth through a wager, have been found to exist within various North American Native American Tribes.<sup>10</sup> With the influx of Europeans into the new world came an influx of more traditional wagering games and lotteries throughout the nation. From the 1740s until 1776, the colonial legislature authorized 157 lotteries.<sup>11</sup> In fact, these chartered lotteries were used for a plethora of state activities such as funding for government, towns, schools, churches, and in one instance to post ransom for a sailor who had fallen into the hands of the French.<sup>12</sup> There are even some claims that the royal government's attempts to end gambling activities were embodied by the Stamp Act of 1765, which placed a ten-schilling tax on playing cards. Additionally, the prohibitions of lotteries in 1769, signaled that the colonies had outgrown the supervision of Great Britain and that a break with the motherland was necessary.<sup>13</sup>

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<sup>9</sup> DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 136 (2006). Chungke is a game believed to have been the subject of various wagers, which was played via the use of large flat polished disks with hollow centers which were either rolled or used as hoops through which stones were thrown. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 144.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

### **A. State Based Regulation: The Lottery**

Even in the earliest days of known gambling within the states, as gambling rose to prominence within the nation, so too did fraud and deception. The need for regulation of gambling, especially privately-run lotteries was apparent. Lottery managers and swindling agents became just as abundant as the lotteries themselves, and consumers of these lotteries seemed to accept the associated risk of trickery with the lottery itself.<sup>14</sup> In 1821, the New York State legislature passed a law providing for the gradual extinction of the lottery after an earlier formed committee within the state had found that the Medical Science Lottery, a lottery intended to aid the funding of scientific research and experimentation, contained many dishonest operators and corrupt public officials.<sup>15</sup> The revival of lotteries as we know them today began in 1964, in New Hampshire.<sup>16</sup> As a result of the success seen by New Hampshire and their state-run lottery, other states followed suit and by 1975, twelve other states had established and regulated their lotteries.<sup>17</sup> Today, lotteries are the most widespread form of gambling in the U.S., spread across thirty-seven states and the District of Columbia, virtually all of which are operated as government monopolies.<sup>18</sup> Despite having the worst odds of any current form of gambling, it is the only form of commercial gambling which a majority of adults have reported playing in.<sup>19</sup> While these lotteries serve not only as an important tax base, they also serve to demonstrate the fact that states historically have, and continue to, regulate gambling activities. Each lottery throughout the nation is regulated by the state or provincial government, whereby federal intervention only occurs in a couple of cases with

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<sup>14</sup> *Id.* at 148.

<sup>15</sup> *Id.* at 150.

<sup>16</sup> *Lotteries*, NATIONAL GAMBLING IMPACT STUDY COMMISSION, <https://govinfo.library.unt.edu/ngisc/research/lotteries.html> (last visited Apr. 10, 2022).

<sup>17</sup> *Id.*

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

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

regards to interstate advertising and ticket distribution.<sup>20</sup> Some state-run lotteries have also been utilized and adapted to the area of sports gambling. While the ability for state-run lottery models to incorporate sports wagering may seem far too attenuated, the idea, as history has shown us, is not far-fetched. Long before the unconstitutionality of PASPA was declared by the Supreme Court in 2018, Delaware employed a lottery model to launch a sports lottery.<sup>21</sup> This lottery-based method allowed individuals to place bets on NFL based scoreboard games, which the lottery very clearly disclaimed any association or endorsement to the NFL.<sup>22</sup> While not the typical method adopted by states to allow their citizens to place sports wagers, the lottery-based scheme employed by Delaware and a few other states pre-*Murphy*, shows an interesting intersection in how states were able to take their monopolistic regulation of lotteries and apply it to the world of sports wagering.

## **B. The Nevada Model**

Perhaps the most prominent and widely recognized instance of state-based regulation of gambling is found in Las Vegas, Nevada. While not formally adopted by every state, some variation of the Nevada-based model has been employed by those states who have chosen to legalize online sports gambling in the wake of *Murphy*.<sup>23</sup> In 1931, in an attempt to mitigate the effects the Great Depression had on the mining business which resulted in an exodus of individuals from the area, Nevada legalized gambling within its borders.<sup>24</sup> Despite the legalization efforts, it was not until the 1950s that gambling was more generally available.<sup>25</sup> Before then, gambling was mainly limited to private “turf clubs.”<sup>26</sup> In 1951, the federal government imposed a 10% tax on

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<sup>20</sup> *Who Regulates the Lottery*, PLAYPORT (Oct. 18, 2019), <https://playport.com/who-regulates-the-lottery>.

<sup>21</sup> JOHN T. HOLDEN, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 600 (2020).

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

<sup>23</sup> 138 S. Ct. 1461 (2018).

<sup>24</sup> *This Day in History: Nevada Legalizes Gambling*, HISTORY (Mar. 3, 2010), <https://www.history.com/this-day-in-history/nevada-legalizes-gambling>.

<sup>25</sup> *Question of the Day*, LAS VEGAS ADVISOR (Nov. 17, 2017), <https://www.lasvegasadvisor.com/question/sports-betting-history/>.

<sup>26</sup> *Id.*

Nevada’s legal sports books.<sup>27</sup> This lofty tax either drove legitimate business operators out of business or forced them to operate through underground channels.<sup>28</sup> In 1974, Congress reduced the tax to 2%, thereby increasing the number of sports books in Las Vegas.<sup>29</sup> Once again in 1983, the tax on sports betting was reduced to 0.25%, significantly increasing the allure of those individuals who sought to operate sportsbooks within Nevada’s borders.<sup>30</sup> The state of Nevada created the Gaming Control Board in 1955,<sup>31</sup> and this model of regulation which has been in place since its implementation, has served as a basis for other states who have been looking to implement legal sports gambling within their borders. Serving as a model for state-based regulation of sports gambling for the past sixty years, the Nevada Gaming Control Board and the regulation they provide is guided by four distinct principles: The gaming industry is important to the economy and welfare of the people of Nevada; growth of the gaming industry is conditioned on the perception of legitimacy of the industry, including the absence of criminal influence; strict regulation is necessary to maintain public confidence; and all establishments offering gaming or to assist in protecting the “public health, safety, morals, good order and general welfare of the inhabitants of the state and to preserve the competitive economy and policies of free competition of the state of Nevada.”<sup>32</sup> These principles have guided Nevada’s Gaming Control Board and served to protect the integrity of sporting events around the world, all while simultaneously generating billions of

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<sup>27</sup> *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE, <https://sportshandle.com/gambling-laws-legislation-united-states-history/> (last visited Apr. 26, 2022).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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

<sup>31</sup> *About Us*, NEVADA GAMING CONTROL BOARD GAMING COMMISSION, <https://gaming.nv.gov/index.aspx?page=2#:~:text=The%201955%20Legislature%20created%20the,and%20the%20operation%20of%20gaming> (last visited Apr. 26, 2022).

<sup>32</sup> *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Subcomm. on Crime Terrorism, Homeland Sec. & Investigations of the H. Comm. on the Judiciary*, 115th Cong. 2–3 (2018) (statement of Becky Harris, Chair, Nevada Gaming Control Board).

dollars' worth of handle and many millions in revenue for the multitude of companies that operate sportsbooks in Las Vegas.

## **II. History of Federal Regulation**

Having briefly looked at the models of state-based regulation of gambling, of similar importance is the historical patchwork of federal regulation in sports gambling. This patchwork, as the name suggests, is a compilation of different statutes, additions to statutes,<sup>33</sup> and guidance the federal government has provided over multiple decades in an attempt to reign in sports gambling and some of the perceived associated harms. The familiar goal of federal regulation of sports gambling has not always been the goal we hear of today, the “protection of the integrity of our sports.” Rather, many attempts by the federal government to regulate sports gambling were derived from the federal government’s objective to put an end to peripheral schemes commonly associated with sports gambling such as money laundering and organized crime.

### **A. The Federal Wire Act**

The Wire Act,<sup>34</sup> signed into law by President Kennedy in 1961, is the earliest of the major federal legislation aimed at sports gambling. The Wire Act dealt with the transmission of wagering information and relevant in part reads:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>35</sup>

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<sup>33</sup> The Unlawful Internet Gambling Act was not an independently created piece of legislature but rather an addition to the SAFE Port Act, a bipartisan piece of legislation which was intended to enhance the security of our nation’s ports.

<sup>34</sup> 18 U.S.C. § 1084.

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

Then U.S. Attorney General Robert F. Kennedy (“RFK”) enacted the Wire Act in an attempt to reign in organized crime in the 1960s and ‘70s by cracking down on activities which were commonly used among the racketeering groups.<sup>36</sup> At the time of the law’s enactment, RFK stated:

[T]he Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communications. It is not intended that the [Wire Act] should prevent a social wager between friends by telephone. This legislation can be a most effective weapon in dealing with one of the major factors of organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclination and morals.<sup>37</sup>

As seen from the comments of RFK, the Wire Act does not directly address or act as a prohibition for illicit gambling activity. Instead, it allows the federal government to invoke their Commerce Clause powers to prohibit the transmittance of wagering information across state lines, in effect acting as a back-door prohibition on gambling. Even today, despite the widespread legalization of gambling across the country, the Wire Act is still relevant when considering the control the federal government may exhibit on online, interstate gambling. In order for online gambling, specifically online sportsbooks to operate interstate, amendments or repeal of specific section of the Wire Act will need to be effectuated. Recently, in support of the fact that the Wire Act is not merely an outdated and archaic law, but rather a relevant statute which stands in the way of recognizing, legitimizing, and addressing online sports gambling on a national level, the First Circuit stated in a recent holding, “the Wire Act applies only to interstate wire communications related to sporting events or contests.”<sup>38</sup>

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<sup>36</sup> *This Day in History: Nevada Legalizes Gambling*, HISTORY (Mar. 3, 2010) <https://www.history.com/this-day-in-history/nevada-legalizes-gambling>.

<sup>37</sup> *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE, <https://sportshandle.com/gambling-laws-legislation-united-states-history/> (last visited Apr. 26, 2022).

<sup>38</sup> *N.H. Lottery Comm’n v. Rosen*, 986 F.3d 38, 48 (1st Cir. 2021).

## **B. Professional and Amateur Sports Protection Act (PASPA)**

Most relevant to our discussion of federal prohibition of gambling is the PAPA.<sup>39</sup> Signed into law by President George H.W. Bush in 1992, PASPA was intended to preserve the integrity of the nation’s sporting events. The law very succinctly states:

It shall be unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>40</sup>

Once again, as seen with the Wire Act,<sup>41</sup> rather than effectuate a straightforward ban or prohibition on sports wagering, Congress chose only to prohibit states from “sponsoring...wagering scheme[s] based on competitive sporting events.”<sup>42</sup> While this ultimately would lead to the downfall of PASPA, the law effectively outlawed sports gambling within the nation until 2018, when, only after years of contentious litigation beginning in 2012, New Jersey successfully mounted a constitutional challenge to the law arguing that “PASPA improperly regulat[ed] state governments regulation of their citizens,”<sup>43</sup> thus violating Tenth Amendment anti-commandeering principles. In the Supreme Court’s holding, Justice Alito stated, “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own... PASPA “regulate[s] state governments’ regulation” of their citizens,<sup>44</sup>... The Constitution gives Congress no such power.”<sup>45</sup> This decision effectively ended the quarter-century-long prohibitions

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<sup>39</sup> 28 U.S.C § 3701.

<sup>40</sup> 28 U.S.C § 3701.

<sup>41</sup> 18 U.S.C. § 1084.

<sup>42</sup> 138 S. Ct. 1461 (2018).

<sup>43</sup> *See* Murphy, 138 S. Ct. at 1485.

<sup>44</sup> *See* New York v. United States, 505 U. S. 144 (1992).

<sup>45</sup> *See* Murphy, 138 S. Ct. at 1485.

on sports gambling which PASPA effectuated, opening the national landscape for online sportsbook companies to compete over.

### **C. The Unlawful Internet Gambling Enforcement Act**

Most recently, in 2006, in an attempt to strengthen federal prohibitions against gambling, Congress passed the Unlawful Internet Gambling Enforcement Act<sup>46</sup> (“UIGEA”). Most prominently, the UIGEA:

prohibits any person engaged in the business of betting, as defined, from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. The Treasury Department and the Federal Reserve Board must develop jointly and prescribe regulations requiring payment systems to identify and block or otherwise prevent or prohibit the acceptance of payment for internet gambling transactions.<sup>47</sup>

Once again, the UIGEA did not outlaw gambling explicitly but rather made it unlawful for an individual engaged in the business of betting to accept funds via credit, EFT transfer, money-transmitting businesses, or other methods.<sup>48</sup> This law also, rather than putting the burden on typical law enforcement, took a different approach by instead requiring banks and other financial institutions to block restricted transactions and take measures to identify such transactions.<sup>49</sup> Perhaps most notably, the UIGEA and how its enactment serves as an example of the disjointed nature of federal prohibitions against gambling. The UIGEA was not a law drafted and submitted for approval itself; instead, this legislation concerning the prohibition of money transfers associated with online gambling was conspicuously added to the end of another piece of legislation

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<sup>46</sup> 31 U.S.C. §§ 5361- 5367.

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

<sup>48</sup> *Unlawful Internet Gambling Enforcement Act*, FEDERAL TRADE COMMISSION (2006), <https://www.ftc.gov/legal-library/browse/statutes/unlawful-internet-gambling-enforcement-act>.

<sup>49</sup> *Id.*

shortly before its passage, known as the SAFE Port Act- a law which concerned maritime and cargo security.<sup>50</sup>

## Part II

Article 1, Section 8, Clause 3, of the United States Constitution, commonly known as the “Commerce Clause” of the Constitution, gives Congress the ability to regulate commerce among the several states.<sup>51</sup> This power does not go unchecked, however, and has been refined through years of judicial interpretation, laying relevant guidelines Congress must consider when enacting legislation under their enumerated power to regulate commerce. A summation of the relevant framework Congress has been given by the judiciary regarding their powers under the Commerce Clause is necessary because, should Congress choose to implement federal regulation of online sportsbooks themselves rather than just the activities associated with online gambling, as they have traditionally done with legislation, the Commerce Clause is undoubtedly the vehicle which would allow the federal government to regulate said online sportsbooks. Our historical underpinning of Congress’s powers under the Commerce Clause begins in 1824, with *Gibbons*.<sup>52</sup> At issue in this case was whether Congress or the several States, possessed the ability to regulate -specifically license- individuals to operate steamboats in U.S. navigable waters. The Supreme Court held that Congress did possess such power and this power “must be exercised within the territorial jurisdiction of the several states.”<sup>53</sup> *Gibbons* was the first notable case which set the standard for

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<sup>50</sup> *Unlawful Internet Gambling Enforcement Act of 2006*, GAMBLING.COM, <https://www.gambling.com/us/laws/uigea> (last visited Mar. 8, 2022) (“The Port Act, which limited foreign ownership of U.S. ports as a national security measure, was overwhelmingly supported by both parties and both chambers of Congress. Just a few hours before Congress adjourned ahead of the 2006 midterm elections, UIEGA backers attached the bill as a rider to the unrelated port security legislation. Without enough time for lawmakers to review — or reportedly even notice — the attachment, Congress passed the entire measure and then-President George W. Bush signed it into law a few weeks later.”).

<sup>51</sup> U.S. Const. Art. I § 8 Cl. 2.

<sup>52</sup> 22 U.S. 1 (1824).

<sup>53</sup> *Id.* at 197.

Congress to regulate interstate commerce. Included in the opinion is a nod to Congress’s power to regulate commerce that was concentrated within one state, should it “be connected with commerce...among the several States.”<sup>54</sup> The Supreme Court dealt with just this issue in the seminal case *Wickard v. Filburn*.<sup>55</sup> The issue SCOTUS addressed was whether the federally enacted Agricultural Adjustment Act of 1938, which set maximum allowable wheat production for farmers so as to control pricing and supply and demand, was an overreach on behalf of Congress to control a form of commerce which was not itself interstate in nature. In *Wickard*, the Supreme Court held that commerce power was not confined to regulation of commerce among the states but also allowed for the regulation of any activities which affect interstate commerce.<sup>56</sup>

This language by the Supreme Court in *Wickard*<sup>57</sup> seemingly granted Congress the authority to regulate much more than commerce which was purely interstate. Rather, it allowed them to effectively regulate intrastate activities which “affect” interstate commerce. Following the guidance provided by the court in *Wickard*, Congress used their power to regulate commerce *ad nauseum*.<sup>58</sup> It was not until *United States v. Lopez*,<sup>59</sup> in 1995, that the Supreme Court finally ended what seemed to be Congress’s *carte blanche* power to regulate through the Commerce Clause. In *Lopez*, the Court held that Congress had exceeded their Commerce Clause powers through the enactment of the Gun Free School Zone Act, which prohibited one’s ability to possess a gun near a school.<sup>60</sup> The Government defended the Act on the grounds that, “the costs of violent crime [were] substantial,” “violent crime reduces the willingness of individuals to travel to areas within

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<sup>54</sup> *Id.* at 198.

<sup>55</sup> 317 U.S. 111 (1942).

<sup>56</sup> *Id.* (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

<sup>57</sup> *Id.*

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

<sup>59</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>60</sup> *Id.*

the country that are perceived to be unsafe,” and finally, “the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.”<sup>61</sup> Despite these three contentions from the Government, the Supreme Court held that the Gun Free School Zone Act “upset[] the federal balance to a degree that renders it an unconstitutional assertion of the commerce power[.]”<sup>62</sup> The Supreme Court’s decision to limit Congress’s powers under the Commerce Clause for the first time in nearly fifty years, while important, is not where *Lopez* gains its notoriety. Chief Justice Rehnquist used *Lopez* as the Courts opportunity to formulate a bright line rule to be used in evaluating Congress’ powers under the Commerce Clause.<sup>63</sup>

Before asserting that online sportsbooks themselves should be federally regulated, there must be a showing that the sportsbooks themselves as they currently operate, not just the activities associated with online gambling, fall within the scope of the Commerce Clause.<sup>64</sup> In light of the guidance and jurisprudence provided by the Supreme Court in the above-referenced cases, specifically *Lopez*,<sup>65</sup> there is an analytical framework which tends to show that online sportsbooks themselves may be federally regulated under the penumbras of the Constitution for two reasons

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<sup>61</sup> *Id.* at 562.

<sup>62</sup> *Id.* at 580 (Kennedy, J., concurring)

<sup>63</sup> *Id.* at 559. (The court identified 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' 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.”).

<sup>64</sup> The federal government in their patchwork of federal regulation of gambling has never levied their commerce clause powers on sportsbooks themselves, rather the federal government has targeted peripheral components of sports wagering such as transfer of wagering information, government sponsorship of gambling activities, and transfer of monies/ credits in connection with sports wagering.

<sup>65</sup> *Id.* at 549.

which will : online gambling utilizes interstate channels and online gambling has a substantial relation to interstate commerce.

### **I. Online Sportsbooks and the Use of Channels of Interstate Commerce**

There is evidence which tends to show that individuals have utilized methods of interstate travel in order to access online sportsbooks.<sup>66</sup> Many of today's online sportsbooks use GeoComply,<sup>67</sup> or some other form of a location tracking service to ensure that individuals placing wagers are properly within the borders of states which have chosen to permit online wagering. As such, there have been recorded instances of individuals using various transportation methods, including public transportation to locate themselves outside of the jurisdictional area which prohibits online wagering, and into locales which do permit online bets to be placed. This phenomenon was observed specifically in New Jersey when the state had chosen to legalize gambling, while its neighbor, New York had yet to do so.<sup>68</sup> This aforementioned scenario presents an interesting circumstance in which individuals are purposefully engaging in interstate travel for the purposes of placing bets. Furthermore, for individuals to even place bets after having entered the jurisdiction where wagering is acceptable, they must have an account which is registered in the

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<sup>66</sup> See generally David Waldstein, *At the George Washington Bridge Casino, Your Bets Are a Bike Ride Away*, NEW YORK TIMES (Nov. 10, 2021) <https://www.nytimes.com/2021/10/10/sports/football/nfl-gambling-bridge.html> (detailing the travels of New Yorkers who have crossed the George Washington Bridge during a time when sports gambling was illegal in New York, but legal in New Jersey, making the short trip across the George Washington Bridge an easy way to engage themselves in the legal gambling market).

<sup>67</sup> See generally John Crudele, *How GeoComply monitors where bettors are placing an online wager*, NEW YORK POST (Jan. 30, 2019) <https://nypost.com/2019/01/30/how-geocomply-monitors-where-bettors-are-placing-an-online-wager/> (“David Briggs, chief executive of GeoComply, says his company uses GPS locators and Wi-Fi triangulation to determine where people are when they are trying to bet. In other words, the company’s equipment can establish not only which cell phone towers a bettor is bouncing off but also what Wi-Fi connections are within the bettor’s range.”).

<sup>68</sup> Chris Sheridan, *New Jersey border towns surpass Las Vegas as sports gambling hotspot*, BASKETBALLNEWS.COM <https://www.basketballnews.com/stories/americas-new-sports-gambling-hotspot-is-a-starbucks-in-new-jersey> (last visited Mar. 15, 2022) (“New York has legalized sports gambling, but will not have it up and running for several months, and New Yorkers are seeking someplace to have a little action. They are ponying up the \$16 toll to drive to New Jersey and back into NY via the George Washington Bridge, Lincoln Tunnel or Holland Tunnel, or are boarding trains that travel under the Hudson River and heading into New Jersey’s border cities and towns, including Hoboken and Jersey City. As a result, they’ve become the gambling capitals of America -- in terms of where the most money is being wagered.”).

state where the bet is to be placed. Because sportsbooks do not have some sort of domicile requirement, an individual who resides in a state where online sports gambling is illegal can create an account in a state where online gambling *is* permitted, and then deposit money, place wagers, and withdraw funds while in the state which permits online sports wagering.<sup>69</sup> Finally, while the financial regulations and implications go beyond the scope of this article, it is also possible for individuals located in one state where wagering is illegal to log into their sportsbooks accounts which have been created and for all intensive purposes are maintained in another state where online gambling is legal, and deposit and withdraw funds in real time.<sup>70</sup> Concededly, the use of interstate channels by individuals looking to place wagers in states which are not their own may not in itself allow for federal regulation, and with the onslaught of legalization occurring in states where it was previously illegal, the requirement for individuals to travel to other states to place wagers may be moot in many circumstances, as it was for New York residents who once trekked across the George Washington Bridge to place wagers as it is no longer necessary since New York’s legalization in February of 2022, however it cannot be said that there is no evidence to support the notion that individuals use interstate channels as a means to place online wagers.

## **II. Online Sportsbooks Have a Substantial Relation to Interstate Commerce**

### **A. Gambling is Economic in Nature**

Online sportsbooks as they currently operate have a substantial relation to interstate commerce by virtue of the fact that wagering since its inception is economic in nature. In 2021,

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<sup>69</sup> Steve Patrella, *Traveling To (Or Through) a State With Online Sports Betting? Here’s What You Need to Know*, ACTION NETWORK <https://www.actionnetwork.com/legal-online-sports-betting/online-sports-betting-states-deposit-withdraw-promos-traveling> (last visited Mar. 15, 2022) (“While online sports betting may not be legal in your state, it’s infiltrating more and more every month. If you are traveling... to or through one of these states for the holidays, you can bet and withdraw money with ease.”).

<sup>70</sup> *Id.*

alone, U.S. gambling revenue hit a record 53 billion.<sup>71</sup> This revenue derived from legal gambling within the nation came from eighteen different states and was a culmination of legal bets placed on a variety of sporting contests ranging throughout the nation. Furthermore, in the days leading up to Super Bowl LVI, some analysts projected nearly 32 million Americans to wager as much as 7.6 billion dollars on the final game of the 2021-2022 season.<sup>72</sup> Finally, as a metric to show the size and scope of gambling within the United States, a recent Morgan Stanley research report spotlighting DraftKings<sup>73</sup> assessed the total addressable market for the company in 2022, was valued at approximately 80 billion dollars, up from 67 billion dollars just the year before.

### **B. Professional and Collegiate Sports Impact on Interstate Commerce**

Perhaps the most influential way in which sportsbooks are substantially related to interstate commerce is through their intimate relationship with the four major professional sports leagues as well as the NCAA. While the underlying professional sporting events are undoubtedly interstate in nature by virtue of away games, contests at neutral cities, and preseason games located elsewhere with respect to their home states, the national effects of professional and collegiate sporting events exert themselves in much larger ways, such as employment and revenue generation derived from professional sports franchises around the country. Should the availability and popularity of online gambling and wagering on professional sporting contests impact, in any way, the integrity of the

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<sup>71</sup> Will Yakowicz, *U.S. Gambling Revenue Hit Record \$53 Billion In 2021*, FORBES (Feb. 15, 2022) <https://www.forbes.com/sites/willyakowicz/2022/02/15/us-gambling-revenue-hit-record-53-billion-in-2021/?sh=178872947f50> (In 2021, Americans gambled the most money than ever before. The American Gaming Association reported that 53 billion in revenue was generated from casinos and gaming mobile apps. While in-person gambling still was the most significant source of revenue, Igaming brought in more money ever than before which at the time the article was written, 3.71 billion in revenue was generated from the six states which allowed it.)

<sup>72</sup> Kelsey Snell, *31.4 million Americans are expected to bet \$7.6 billion dollars on the Super Bowl*, NPR.ORG (Feb. 13, 2022) <https://www.npr.org/2022/02/13/1080464155/31-4-million-americans-are-expected-to-bet-7-6-billion-dollars-on-the-super>.

<sup>73</sup> *See About*, DRAFTKINGS, <https://sportsbook.draftkings.com/help/sports-betting/where-is-sports-betting-legal?> (last visited Apr. 17, 2022). DraftKings is a U.S.-based online sportsbook and daily fantasy provider which currently operates an online sportsbook in seventeen states within the nation.

contests on which said wagers are placed, professional sports leagues could potentially suffer catastrophic damage to their reputation, subsequently decreasing public engagement and resulting in a loss of economic stimulus around the country.<sup>74</sup> In sum, inadequate supervision and regulation of online sportsbooks resulting in integrity issues within the major professional sports leagues and college athletics could send a tidal wave of economic distress<sup>75</sup> throughout the fifty two cities<sup>76</sup> within the nation who harbor professional sports franchises alone. This point is not to say that states have failed to effectively regulate and monitor online sportsbook wagering, but the probability of illicit conduct evading regulatory breadth increases as does the number of separate municipalities and state governments performing said regulation and oversight. Federal regulation seeks to resolve state-by-state regulatory complexity and ensure national uniformity throughout the nation with regard to monitoring gambling activity.

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<sup>74</sup> See *Integrity*, GENIUS SPORTS, <https://geniussports.com/sportstech/integrity/> (last visited Mar. 18, 2022) (“Integrity is the lifeblood of every sport. Match-fixing and betting-related corruption pose the biggest threat to the integrity of your sport.”).

<sup>75</sup> *Impact of COVID-19 on the Sports Job Market in the United States*, IUPUI <https://blogs.iu.edu/iupuisii/2021/05/03/impact-of-covid-19-on-the-sports-job-market-in-the-united-states/> (last visited Mar 15, 2022). An interactive analysis of job postings relating to the sports job market. While the COVID-19 pandemic is by almost all accounts an unprecedented historical event, in this case, it serves as a stark reminder of how many jobs the professional sports industry provides throughout the nation. Should the major professional sports leagues suffer reputational damage from game fixing and other illicit gambling activity resulting in decreased fan engagement, economic harm will undoubtedly result from which we can reference the effects related to COVID-19 as a worst-case scenario for the professional sports leagues. “The impact of COVID-19 on the sports job market cannot be understated. The cancellation of sporting events and seasons wreaked havoc on all industry revenue streams, forcing sports properties to take unprecedented measures. Layoffs, furloughs, and salary reductions have been prevalent across the board in the Big 5 professional sports leagues and Power Five intercollegiate athletic departments. New job postings on Teamwork Online also dwindled to a bare minimum in the quarter following the onset of the pandemic. While the sports industry was hit hard in the second quarter of 2020, each subsequent quarter has seen an increase in new job postings, but not yet returning to pre-pandemic levels. Compared to the two previous years, the number of jobs posted in a month drastically decreased from April to January during the pandemic. However, February and March 2021 showed more new job postings than their 2020 and 2019 counterparts. Sales positions decreased relative to postings in other departments during COVID (April 2020-March 2021). Before COVID (March 2018-March 2020) sales accounted for 35% of positions, but only 25% during COVID (-11%). Admin/General Management (+5%), Facility Operations (+4%), and Player Operations (+3%) saw the greatest relative increases.”

<sup>76</sup> *North American Sport Franchises*, STADIUM MAPS, <https://www.stadium-maps.com/facts/sports-franchises.html#:~:text=There%20are%20a%20total%20of,the%20United%20States%20and%20Canada> (last visited March 15, 2022) (showing the prevalence of sports franchises within our nation’s cities).

### **Part III**

Having discussed the relevant historical framework behind federal prohibition of gambling, and how regulation would be possible through proper implementation of the federal government's powers under the Commerce Clause, the final aspect of this article discusses possible legislative framework for how said regulation by the federal government might be achieved. Proponents of continued state-based regulation advocate that federal involvement would add an unnecessary layer of bureaucracy and costs to the regulation of sports wagering; however, this would not be the case.<sup>77</sup> Should federal regulation of online sportsbooks be performed properly, it may be done in such a way that does not increase cost, complexity, or difficulty in accessibility to online wagering but instead, makes online wagering safe and accessible. Most importantly, it protects both consumers and the integrity of the underlying sporting events.

#### **I. Federal Regulation Through Cooperative Federalism**

Federal regulation of online sports gambling may be achieved in a way that comports with the Constitution's foundation and intended advancement of cooperative federalism. In its most basic form, cooperative federalism is a term which describes the ability for states and the federal government to divide responsibilities while also collaborating with one another on overlapping functions to achieve a specific result. Cooperative federalism is perhaps best exemplified by some of our nation's environmental statutes, specifically the Clean Air Act and the Clean Water Act.

##### **A. The Clean Air Act**

One noteworthy example of cooperative federalism within our nation is the Clean Air Act.<sup>78</sup> Signed into law by President Richard Nixon in 1970, the Clean Air Act ("CAA") was

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<sup>77</sup> DREW THORNLEY, A Case Against Federal Regulation of Intrastate Sports Wagering, 11 UNLV GAMING LAW JOURNAL 1, 114.

<sup>78</sup> 42 U.S.C. §§ 7401-7671.

designed to foster the growth and success of the rapidly evolving American economy while simultaneously improving human health and protecting the environment.<sup>79</sup> In short, under the CAA, the federal government creates National Ambient Air Quality Standards (“NAAQS”). The state must then meet these minimum requirements.<sup>80</sup> In doing so, the state is afforded broad discretion for how to meet the federally established and maintained NAAQS, so long as they file “State Implementation Plans,” which detail how they plan on doing so. The idea of cooperative federalism exemplified by the Clean Air Act was summarized by the Supreme Court in *Train v. Natural Resources Defense Council, Inc.*:

We believe that the foregoing analysis of the structure and legislative history of the Clean Air Amendments shows that Congress intended to impose national ambient air standards to be attained within a specific period of time. It also shows.... ‘[e]ach State shall have the primary responsibility for assuring air quality’ within its boundaries, § 107 (a), left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations.<sup>81</sup>

Since its inception, the CAA has led to significant environmental and public health benefits across the United States.<sup>82</sup> Additionally, the CAA has been successful at not just protecting the health of humans and the environment, but also at allowing for the rapid growth and expansion of the U.S. economy.<sup>83</sup> At first glance the similarities between the CAA and any potential future federal legislation which aims to regulate online sportsbooks might seem too far attenuated.

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<sup>79</sup> *40<sup>th</sup> Anniversary of the Clean Air Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/40th-anniversary-clean-air-act> (last visited Mar. 12, 2022).

<sup>80</sup> *Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/naaqs>. (last visited Mar. 19, 2022).

<sup>81</sup> 421 U.S. 60 (1975).

<sup>82</sup> *40<sup>th</sup> Anniversary of the Clean Air Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/40th-anniversary-clean-air-act> (last visited Mar. 17, 2020). (“After the Clean Air Act’s first 20 years, in 1990, it prevented more than 200,000 premature deaths, and almost 700,000 cases of chronic bronchitis were avoided.”).

<sup>83</sup> *Id.* (“From 1990 to 2010, total emissions of the six principal air pollutants decreased by more than 41 percent, while the Gross Domestic Product increased by more than 64 percent.”).

However, the CAA and future potential national online wagering legislation may actually have more similarities than that which meets the eye, making it a useful resource in understanding how we might provide effective federal regulation and oversight in a way that does not conflict with the inherent values and protections that the Tenth Amendment provides for. The CAA considered both the health and safety of Americans as well as counteractive challenges posed by a rapidly growing American economy. Similar to air pollution at a time when the American industry was sprouting and flourishing, online sports wagering threatens the integrity of professional and collegiate sporting events which effects more American's than just those who are engaged in sports wagering. Like the CAA, federal online sports wagering regulation should aim to protect the millions of Americans who gamble, as well as the millions more who generally enjoy the numerous pleasures professional and collegiate sports provide, all while simultaneously fostering a regulated, safe, and acceptable environment for the rapidly evolving online sports wagering market to flourish as did the American economy under the CAA. As seen in the CAA primarily state-based method for implementing controls on pollution,<sup>84</sup> allowing the federal government to regulate online sports gambling in its entirety is not the answer. Instead, future legislation aimed to regulate the ever-expanding online gambling industry, like the CAA, should serve as a proverbial floor rather than a ceiling, providing only federally maintained minimum standards. States then, as seen in the CAA, would have broad discretion in how to attain compliance with these federally imposed standards.<sup>85</sup> While the CAA is only to serve as an example and possible framework for lawmakers

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<sup>84</sup> 42 U.S.C. §§ 7401-7671 (calling for state, local, federal and tribal governments to implement the Act in partnership to reduce pollution. Roles vary depending on the nature of the air pollution problem).

<sup>85</sup> *Id.* Programs use a variety of methods to provide companies with flexibility on ways to reduce air pollution while maintaining accountability for achieving required emissions levels. EPA often sets performance standards in the form of numerical emission limits. This approach gives companies flexibility to decide the best way to achieve that emissions rate, considering cost and other factors.

seeking to install national regulation of the online sportsbook industry, it is not the only possible framework for federal regulation of online gambling.

## **B. The Clean Water Act**

Similar to the CAA, the Clean Water Act (“CWA”) is another environmental piece of legislation which gives the states broad discretion in achieving federally implemented standards. Originally enacted in 1948, it was not until growing public awareness and concern for water pollution in the 1970’s led to sweeping amendments made to the Act in 1972, which created the CWA as we know it today.<sup>86</sup> In contrast to the CAA, the CWA establishes a National Pollutant Discharge Elimination System (“NPDES”) which is the mechanism through which water pollution is monitored and controlled via a permitting program commonly referred to as the NPDES program.<sup>87</sup> Permits issued to polluters through the NPDES program “contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people’s health.”<sup>88</sup> Section 402 of the CWA allows the state to issue the NPDES permits if the state is authorized to implement the program. However, in the event the state is not authorized to implement the program, an NPDES permit must be acquired directly from the EPA.<sup>89</sup> Furthermore, states can possess full, or even partial NPDES authority.<sup>90</sup> Some requirements necessary for a state to be authorized under the NPDES permitting process include, but are not limited to: the ability to issue permits that will meet the same substantive standards that would apply if EPA were acting as the permit-issuer; requirements relating to the

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<sup>86</sup> *History of the Clean Water Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Apr. 19, 2022).

<sup>87</sup> *NPDES Permit Basics*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/npdes/npdes-permit-basics> (last visited Apr. 19, 2022).

<sup>88</sup> *Id.*

<sup>89</sup> Craig N. Johnston, William F. Funk & Victor B. Flatt, *LEGAL PROTECTION OF THE ENVIRONMENT*, 186 (4<sup>th</sup> ed. 2018).

<sup>90</sup> *See generally Who Has to Obtain a Title V Permit*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit> (last visited Apr. 19, 2022). The Clean Air Act has a similar permitting process known as the Title V permit which is required by major polluters.

states investigatory powers; the involvement of both the public and the EPA in state issuance processes; and the state's ability to bring enforcement actions.<sup>91</sup> To date, thirty-five states have achieved full authorization to issue NPDES permits, which is roughly only five more than the number of states who have authorized sports gambling.<sup>92</sup> Like the CAA, the CWA serves as a possible cooperative federalism model for what federal regulation of online sports wagering may look like. Should federal regulation of online sportsbooks be modeled after the CWA, states may retain the autonomy to permit companies who provide online sportsbook services to the citizens and customers of their state, while the major professional sports leagues as well as the customers of the online sportsbooks simultaneously receive the benefits and protections of federal regulatory oversight.

## **II. Federal Regulation Through a National Interstate Compact**

Another avenue for federal regulation would be through the formation of an interstate compact between states who have chosen to legalize online sports gambling. Contrary to the perceptions of bureaucratic red tape which may surround traditional federal intervention, an interstate compact between states who have already chosen to legalize online sports gambling would provide: uniform federally maintained minimum standards; consolidation of regulatory oversight processes; streamline processes for other states who may choose to legalize the activity making accessible tax bases which were previously unavailable. In 2018, Republican U.S. Senator Orrin Hatch, and Democrat U.S. Senator Charles Schumer, introduced the *Sports Wagering Market Integrity Act of 2018* (“SWMIA”).<sup>93</sup> In the wake of *Murphy*,<sup>94</sup> this bipartisan Bill, among other things, advocated

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<sup>91</sup> Craig N. Johnston, William F. Funk & Victor B. Flatt, *LEGAL PROTECTION OF THE ENVIRONMENT*, 247 (4<sup>th</sup> ed. 2018).

<sup>92</sup> *NPDES State Program Authority*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/npdes/npdes-state-program-authority> (last visited Apr. 24, 2022).

<sup>93</sup> See *Sports Wagering Market Integrity Act*, S. 3793, 115th Cong. (2018).

<sup>94</sup> *Murphy*, 138 S. Ct. at 1461.

for federal prohibition of sports gambling unless: (1) the wagering operator was located in a state which provided relevant state laws for accepting said wager; and (2) said wager was accepted in accordance with an applicable State and local gambling law.<sup>95</sup> While federal prohibition(s) on gambling is certainly not the answer, even if only to advance federally regulated wagering, SWMIA promoted the idea of an interstate compact between states who have chosen to legalize online sports wagering which would be a viable means for federal regulation.<sup>96</sup> Such a compact, submitted to, and approved by the Attorney General, would serve two important purposes. First, an interstate compact between states who have already chosen to legalize online sports gambling which would provide uniform federally maintained minimum standards across multiple states and consolidate the necessary regulatory oversight processes. Having each state enter into a single uniform national compact would create national standards to be observed and overseen at the federal level rather than the current scheme of regulation which varies from state to state. These uniform standards to be effectuated throughout the country by the proposed-for interstate compact would foster administrative convenience, and future necessary changes in policy could be effectuated once to the nationwide interstate compact, resulting in compliance throughout the numerous constituent states. Secondly, an interstate compact providing federally maintained minimum standards would streamline the processes for other states who may choose to legalize the activity and access tax bases which were previously unavailable. Furthermore, some additional considerations which are relevant and should be included into the aforementioned interstate compact may include but are not limited to: (1) allowance of wagering platforms to be accessed by individuals located in any states that are a party to the compact; and (2) the establishment of a

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<sup>95</sup> See *Sports Wagering Market Integrity Act*, S. 3793, 115th Cong. (2018).

<sup>96</sup> *Id.* at 49.

federal oversight committee.<sup>97</sup> While there has not been any headway made on the above referenced interstate compact for states who have chosen to legalize online sportsbooks, it would not be the first compact made between states with regard to the larger world of online gambling. In 2014, Nevada and Delaware joined into the Multi-State Interstate Gaming Agreement (“MSIGA”) which is an interstate compact designed to “pool” online poker players from the various states. New Jersey joined into the compact in 2017, which hiked up the combined population within the agreement to 13.4 million. While a lack of clarity regarding potential violations of the Wire Act has slowed some state’s eagerness to enter into the agreement,<sup>98</sup> the MSIGA withstood a convincing set of circumstances in 2020, when as a result of the COVID-19 pandemic, the World Series of Poker was forced to take place online, and players who were geolocated in either New Jersey or Nevada were able to compete against one another as a result of the benefits conferred by the interstate compact.<sup>99</sup>

#### **Part IV**

Those who oppose federal intervention have contended that federal regulation is unnecessary and that states are actually in the best position to regulate sports wagering as exemplified by their ability to operate state lotteries.<sup>100</sup> While true that state lotteries have been in existence much longer than online sports wagering and remain state operated and regulated, it is

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<sup>97</sup> See generally Council on Environmental Quality, THE WHITE HOUSE, <https://www.whitehouse.gov/ceq/> (last visited Apr. 26, 2022) As yet another parallel between possible future regulatory framework for online gambling and environmental law, the Council of Environmental Quality is a division of the executive office which coordinates federal environmental efforts in the United States and works closely with agencies and other White House offices on the development of environmental and energy policies and initiatives. Such a council may provide a framework for which a council might be established in order to coordinate and monitor federal regulation of online sports gambling.

<sup>98</sup> *Michigan Takes Another Step Toward Interstate Online Poker Compact*, GREAT LAKES STAKES, (Mar. 23, 2022) (<https://www.greatlakesstakes.com/news/michigan-takes-another-step-toward-interstate-online-poker-compact>).

<sup>99</sup> See *About*, WSOP, <https://www.wsop.com/online-poker/> (last visited Apr. 26, 2022). Delaware was not included because it had not licensed the World Series of Poker.

<sup>100</sup> THORNLEY, *supra* note 79, at 114.

worth noting that the present-day state-run lotteries we know of today, are a derivative of the original inception of lotteries which were not chartered by states, but rather privately run. These lotteries in the early to mid 1800's became so fraught with fraud and deception that the states, despite their reluctance to do so because of the massive revenue stream lotteries provided, had to place strict licensing sanctions which in many cases led to the gradual extinction of lotteries.<sup>101</sup> This historical example shows how at the outset, regulation which seems to be unnecessary and overbearing at the time, develops only after large scale fraud and deception is observed, thus requiring much greater oversight than the general public or political officials may be willing to admit at the time.

Finally, it is necessary to evaluate the economic implications which might result from federal regulation. Despite increased oversight, this should not increase the costs required to effectively operate the numerous sportsbooks presently available. With regard to added costs as a result of federal regulation, as is agreed to by almost any proponent or opposition to sports gambling, the two most important aspects of continued legalized gambling are primarily the integrity of the contests upon which the wagers are placed, and secondly, elimination of underground bookmaking and unregulated markets. It is paramount that federal regulation does not come with high costs traditionally associated with large-scale oversight. While there is certainly a price which many would pay to preserve the integrity of our sporting contests, there is also no sense in setting the price so high as to encourage underground or offshore sports wagering which is able to evade current regulatory measures.<sup>102</sup> Two costs which are important to consider

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<sup>101</sup> SCHWARTZ, *supra* note 9, at 149-150.

<sup>102</sup> *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Subcomm. on Crime Terrorism, Homeland Sec. & Investigations of the H. Comm. on the Judiciary*, 115th Cong (2018) <https://www.govinfo.gov/content/pkg/CHRG-115hrg32844/pdf/CHRG-115hrg32844.pdf> (last visited Mar. 19, 2022). At a Senate judiciary committee hearing, Sarah Slain, Senior Vice President of Public Affairs for the American Gaming Association spoke out against the addition of fees such as mandatory data purchasing requirements or

would be “integrity fees” and additional federal taxes; however, it is certainly possible that neither of these additional costs come to fruition just because federal oversight is incorporated into online gambling. Integrity fees are essentially money that would be skimmed from all wagers made (“the handle”) and paid to the professional leagues. The term “integrity fee was first referenced in a bill before the Indiana legislature known as HB 1325.<sup>103</sup> In the proposed law, the leagues were requesting an integrity fee based on 1% of the of the handle, however, that figure was subsequently decreased to .25%.<sup>104</sup> The “handle” is the total amount wagered by bettors; the handle is separate from revenue in that handle measures how much money flows through sportsbooks. Some projections surmise that 1% of the handle is equivalent to 20-25% of revenue sportsbooks generate.<sup>105</sup> The leagues requesting a handle have not given a definitive answer as to what the integrity fee provides, in some occasions stating that it would be put forth to preserve the leagues in game integrity, in other instances that it is a royalty of sorts which is paid to the leagues in return for the “intellectual property” of the sport.<sup>106</sup> It is undeniable that integrity fees, if instituted under the federal regulatory scheme, would lead to higher costs which inevitably would be passed down to the consumers. The implementation of federal regulatory action does not necessitate the levying of integrity fees and it is paramount that such fees are not assessed. The purpose of federal regulation is not to assess fees, install profit sharing programs, or levy additional taxes. Federal

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financial requirements “As sports betting is a low margins business, these policies will increase cost on legal sports books, thereby empowering the illegal operators to offer better paying and more competitive odds”

<sup>103</sup> Bill Grinstead, *Integrity Fees — What Are They And Why Are They So Controversial?*, SPORTSHANDLE <https://sportshandle.com/integrity-fees/> (last visited Mar. 17, 2022).

<sup>104</sup> *Id.* Mainly, the NBA and the MLB most strongly advocated for integrity fees.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* “Since that initial ask, the integrity fee has evolved. It’s now often referred to by the leagues as a royalty, and the leagues admit they’ll provide virtually nothing in return for the fee, rather, they believe they deserve to be paid for the “intellectual property,” for the existence of games, the games that sportsbooks offer bets on... In Missouri however, the term integrity fee means something else altogether. Rather than a payout to the professional sports leagues, the integrity fee in HB 119 and SB 44 is a payout to the state to be used to maintain, repair or build sports venues. In essence, the professional leagues still get something out of it, but the fee wouldn’t be paid to the leagues.”

regulation should be specifically tailored to consolidating and ensuring a uniform set of standards apply online sports wagering throughout the nation so as to protect, inform, and make accessible online sports gambling to the millions of Americans who legally wager. These federally enacted standards should also prioritize the integrity of professional and collegiate athletics upon which sportsbook's customers place their bets on. This point is well summarized by Senator Charles Schumer in a *Senate Democrats* press release regarding the introduction of the Sports Wagering Market Integrity Act:<sup>107</sup>

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. 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."<sup>108</sup>

It is important that competition integrity and consumer protection remain the central theme of the advocated for regulation. As was seen in 1951, when Congress enacted a 10% tax on wagers, should integrity fees or additional taxes become part of the national regulatory scheme, it is a foregone conclusion that sports wagering will once again return to the depths of the darkest underground channels and offshore sites which directly conflates with this proposed purpose of federal regulation. On this point, proponents of continued state regulation and advocates of federal regulation can certainly agree.

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<sup>107</sup> Sports Wagering Market Integrity Act, S. 3793, 115th Cong. (2018). While the SWMIA was a solid foundational basis, the Act itself in the opinion of the author was a broad overreach in many aspects. The Bill included provisions which required integrity, required data purchases of league information by sportsbooks, the establishment of a clearinghouse, and a relatively large budget itself to be expended in order to perform regulatory oversight.

<sup>108</sup> *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>.

## Conclusion

In just four years after the Supreme Court declared PASPA unconstitutional, online sports gambling has grown to epic proportions. Due to the size, scope, and importance professional and amateur sports such as collegiate athletics play in our everyday society, it is important that the regulation of online sportsbooks is handled properly and effectively.

Professional and amateur sporting events provide an entertainment outlet for millions of Americans throughout the country, and as of 2018 these sporting events have simultaneously provided alternative entertainment via online sports gambling. Because of this, the protection of consumers, as well as the protection of the integrity of our sports is not something to be taken lightly. Online sports gambling's scope is national in nature and substantially effects interstate commerce in more and more ways as it continues to evolve. As a result, this activity falls squarely within the federal governments jurisdiction under the Commerce Clause of the Constitution. The economic activity that is sports gambling, as well as the interplay it has between employment opportunities for millions of Americans throughout the country requires uniformity throughout the nation rather than standards which fluctuate from state to state. As JUSTICE Alito states in the Courts opinion in *NCAA v. Murphy* "Congress can regulate sports gambling directly."<sup>109</sup> and it should do just that. Contrary to the beliefs and fears of many, particularly those who vigorously oppose federal regulation, federal regulation does not have to be totalitarian, with supreme authority residing in the federal government alone, but rather, can take the form similar to that of the CAA or CWA which are federal laws, yet comport with the values of cooperative federalism indoctrinated into our Constitution by the Tenth Amendment. Online sports gambling has finally come to light in our country and while states have been effective in their regulation thus far, with

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<sup>109</sup> Murphy, 138 S. Ct. at 1485.

the economic security of millions of Americans, and the integrity of our professional and collegiate sports on the line, we cannot afford to retroactively address any issues which may arise. Instead, Congress must take steps to proactively protect the economic security and integrity of sports in America through federal regulation.