

# Never Tell Me the Odds: The Importance of Federal Legislation in Sports Gambling Regulation

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## I. INTRODUCTION

The sports gambling industry underwent a massive shift in 2018 when the Supreme Court invalidated the Professional and Amateur Sports Protection Act of 1992 (PASPA) in *Murphy v. NCAA*.<sup>1</sup> The decision repealed the federal restriction on sports gambling in the United States. There has long been a negative attitude towards gambling, particularly sports gambling, in this country. Due in no small part to the perceived immorality of sports gambling—and the organized criminal activity surrounding it—Congress cracked down on the industry, outlawing the practice.<sup>2</sup> Recently though, public opinion of sports gambling shifted, and many states sought to legalize the practice within their borders.<sup>3</sup> New Jersey in particular made a concerted effort—which eventually led to the Supreme Court hearing *Murphy* and overturning PASPA.<sup>4</sup>

This Note will explore the post-PASPA landscape of sports gambling. In particular, it will address the tension between sports gambling laws passed by individual states and the desire for new federal legislation to replace the now-extinct PASPA. This Note recommends that the ideal course of action is federal legislation to set a minimum baseline that all state laws must at least meet.

Part II discusses the historical approach to sports gambling, including how the National Collegiate Athletic Association (NCAA) has traditionally opposed betting in all its forms. However, now that sports gambling is legal nationally, the NCAA joins other major sports leagues, like the NBA and NFL, in requesting federal legislation addressing sports gambling, rather than state solutions. Part III analyzes the different versions of state laws currently active in the post-PASPA universe. Part III also discusses an already presented proposal for new federal legislation. Part IV argues the best way to proceed is to pass new federal legislation, taking parts from the once-proposed federal legislation and various state methods. This solution provides a minimum standard all state laws should meet, thus alleviating any issues that sports leagues may have in attempting to manage different gambling laws in each state. A minimum standard for all state laws to meet also prevents a race to the bottom for states wishing to legalize sports gambling, which could open up the possibility of integrity issues for the respective sports.

## II. BACKGROUND

This Note starts with a discussion of the history of sports gambling in the United States and the enactment of PASPA. Next, the Note will discuss the NCAA's particular opposition to sports gambling, followed by the push to legalize sports gambling, the eventual demise of PASPA, and what the post-PASPA landscape looks like, both from a state and federal perspective.

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1. John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 329–30 (2019).

2. See *infra* Section II.A.

3. See *infra* Section II.C.

4. *Id.*

A. *The Historical Prohibitions on Sports Gambling and the Passing of PASPA*

To better understand the sports gambling issue as it currently stands, a history of the United States' reluctance to embrace legalized sports betting is necessary. While today people often think about gambling addiction, the concern expressed by early proponents of sports gambling prohibitions was the ability of criminal organizations to generate revenue via sports gambling.<sup>5</sup> This concern dates back to 1951 when the Special Committee on Organized Crime in Interstate Commerce—known as the Kefauver Committee, as it was led by former Tennessee Senator Estes Kefauver—found evidence of widespread illegal gambling in America.<sup>6</sup> The Kefauver Committee was not alone in illustrating the connection between gambling and criminal organizations.<sup>7</sup> In a 1961 Senate hearing, Attorney General Robert F. Kennedy announced organized crime's illegal gambling business was valued in excess of \$7 billion in that year alone.<sup>8</sup> The desire to curb the income of organized crime via gambling eventually led to the passing of the Wire Act in 1961.<sup>9</sup> The Wire Act was designed to combat criminal organizations soliciting bets and gambling information across state lines, generally via telephone.<sup>10</sup> It did so by imposing fines and prison time for “[w]hoever 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 . . . .”<sup>11</sup>

Congress did not consider any further anti-sports gambling legislation until it passed PASPA in the early 1990s.<sup>12</sup> The newfound push to create additional federal legislation did not come from within Congress, but from professional sports leagues.<sup>13</sup> The leagues expressed concern with protecting the integrity of the game, the innocence of the American youth, and intellectual property rights.<sup>14</sup> Because of the interest professional sports leagues had in restricting sports betting, a considerable number of athletes and executives from

5. Holden, *supra* note 1, at 334.

6. *Special Committee on Organized Crime in Interstate Commerce*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Kefauver.htm> [<https://perma.cc/NFV4-5HJT>]. The Kefauver report found evidence of gambling and bookmaking everywhere from “restaurants to cigar stands” as well as in police forces in major cities like Chicago, where it was reported that “one-fifth of the city’s police captains were said to be slated for the skids.” *Id.*

7. Holden, *supra* note 1, at 334.

8. *Id.*

9. *Id.* at 335.

10. *Overview of the Wire Act*, ODDS SHARK, <https://www.oddsshark.com/legal/wire-act> [<https://perma.cc/6QG8-R5A6>].

11. 18 U.S.C. § 1084(a).

12. Holden, *supra* note 1, at 335.

13. *Id.* at 337.

14. *Id.* at 337–38; see also generally Ryan M. Rodenberg et al., “Whose” Game Is It? Sports-Wagering and Intellectual Property, 60 VILL. L. REV. TOLLE LEGE 1 (2014) (discussing the intellectual property concerns that arise with sports betting); Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball’s Continuing Crusade Against Sports Gambling*, 2 SETON HALL J. SPORT L. 19, 21 (1992) (“In addition to aggressively and jointly lobbying Congress, in conjunction with the other professional and amateur sports organizations, Major League Baseball (MLB) has lodged a concerted grass-roots campaign against the legalization of state-sanctioned and state-authorized sports gambling enterprises. This campaign is aimed at preserving the integrity of our sports contests, preserving the image of its athletes as role models for our nation’s youth, and preventing the deleterious effects that sports gambling would have upon the youth of America.”).

sports leagues offered their opinions alongside members of Congress during the legislative hearings for PASPA.<sup>15</sup> National Football League (NFL) Commissioner Paul Tagliabue testified that state-sanctioned sports gambling sends negative messages to the country's youth.<sup>16</sup> Stephen Greenberg, Deputy Commissioner of Major League Baseball (MLB), contended state-sponsored betting would lead to more frequent attempts to manipulate the outcome of games.<sup>17</sup> MLB Hall of Fame member Frank Robinson stated athletes are no different than the rest of the population and would be subject to the same temptations to bet on sports as everyone else, and state-sanctioned betting would multiply the amount that players would bet.<sup>18</sup>

Members of Congress echoed the sentiment of these figures and many others in the sports world.<sup>19</sup> Senator Bill Bradley, a former National Basketball Association (NBA) player himself, testified the organization of a larger legal gambling market would likewise increase the illegal gambling market, creating "an atmosphere that invites corruption."<sup>20</sup> Perhaps the strongest voice in support of PASPA was chair of the Senate Judiciary Committee Joe Biden, who eventually authored the Senate Report for the bill.<sup>21</sup> In the report, Biden wrote "[s]ports gambling is a national problem. The harms it inflicts are felt beyond the borders of those [s]tates that sanction it. The moral erosion it produces cannot be limited geographically. Once a [s]tate legalizes sports gambling, it will be extremely difficult for other [s]tates to resist the lure."<sup>22</sup>

Riding the wave of support from Biden and others, the bill made it through the Senate almost unanimously, through the House on a voice vote, was signed by President George H.W. Bush, and went into effect in January 1993.<sup>23</sup> PASPA made it illegal for a state to "sponsor, operate, advertise, promote, license, or authorize" any type of sports gambling.<sup>24</sup> Save for the few states who already had some sports gambling structure in place—who were able to apply for an exemption within one year of PASPA being in place<sup>25</sup>—sports gambling was effectively outlawed across the country.<sup>26</sup>

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15. See generally Holden, *supra* note 1 (illustrating the different athletes and commissioners that testified in front of Congress during the various PASPA hearings).

16. *Id.* at 340.

17. *Id.* at 341.

18. *Id.* at 348.

19. Testimony to a similar effect was also given by Gary Bettman, speaking on behalf of the NBA shortly before becoming Commissioner of the National Hockey League (NHL), former NFL linebacker and Cincinnati City Councilman Reggie Williams, MLB Commissioner Francis Vincent, and NBA Commissioner David Stern, to name a few. *Id.* at 339–45.

20. Holden, *supra* note 1, at 344.

21. *Id.* at 350–51.

22. S. REP. NO. 102-248, at 5 (1991).

23. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3702(1), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018). It should be noted that PASPA underwent some minor changes from the time that hearings were held to the time it was passed. Most of the changes added exemptions to the new rule, including allowing New Jersey a one-year window to add sports gambling to Atlantic City (which they did not take advantage of). One interesting addition was the ability of both professional and amateur sports leagues to enforce the statute with the same authority which the Attorney General possessed. Holden, *supra* note 1, at 353.

24. PASPA, 28 U.S.C. § 3702(1), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

25. See *infra* Part II.

26. Christopher Polisano, Comment, *Betting Against PASPA, Why the Federal Restrictions on Sports*

### B. The NCAA's Opposition to Sports Gambling

While professional sports leagues like the NBA or NFL were a part of the push to make sports gambling illegal, the NCAA has maintained their strong opposition to sports gambling even today. This is largely rooted in their commitment to amateur athletes.<sup>27</sup> Part of the NCAA's "Basic Purpose" as outlined in their constitution, is to "maintain intercollegiate athletics as an integral part of the educational program."<sup>28</sup> A major part of maintaining intercollegiate athletics is to "retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>29</sup> This demarcation illustrates an important concept of the NCAA's mindset: they are not a professional sports organization and will operate differently than a professional sports organization.<sup>30</sup>

One major part of the NCAA's commitment to maintaining intercollegiate athletics is making sure they provide a "fair, inclusive, and fulfilling environment" for everyone involved.<sup>31</sup> To do this, the NCAA strives to ensure the integrity of the athletic system is not compromised.<sup>32</sup> This is further evidenced in the NCAA's bylaws, which lay out the requirements of "ethical conduct" and subsequent disciplinary action for violations of the ethical conduct policy.<sup>33</sup> Under Article 10.3 of the Operating Bylaws, student-athletes, staff members in the athletic department, or staff members with some responsibility within or over the athletic department are not allowed to participate in any sports wagering activities.<sup>34</sup> Any student-athlete found to be in violation will no longer be eligible to compete in intercollegiate athletic competitions.<sup>35</sup>

Further proof of the NCAA's opposition to sports gambling can be found in the "Enforcement" area of its website, which flatly states: The NCAA opposes gambling and sports wagering, as it "has the potential to undermine the integrity of sports contests and jeopardizes the well-being of student-athletes and the intercollegiate athletics community."<sup>36</sup> NCAA President Mark Emmert continues to express concern for the risk sports gambling can pose on the integrity of intercollegiate athletics.<sup>37</sup> Part of the NCAA's

*Gambling are Unconstitutional and How They Hurt the States*, 25 JEFFREY S. MOORAD SPORTS L.J. 453, 461 (2018). Only four states took advantage of the exemptions: Nevada, Oregon, Montana, and Delaware.

27. Press Release, NCAA, NCAA Examining Impact of Sports Wagering (July 19, 2018), <https://www.ncaa.org/about/resources/media-center/news/ncaa-examining-impact-sports-wagering> [<https://perma.cc/RQ6B-KDCJ>] (quoting NCAA Chief Legal Officer Donald Remy who stated: "While we certainly respect the Supreme Court's decision, our position on sports wagering remains . . . . With this new landscape, we must evolve and expand our long-standing efforts to protect both the integrity of competitions and the well-being of student-athletes.").

28. NCAA, DIVISION 1 MANUAL 1 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/8ULF-U5UU>].

29. *Id.*

30. *See generally id.* (laying out the purpose of the NCAA).

31. *Fairness*, NCAA, <http://www.ncaa.org/about/what-we-do/fairness-and-integrity> [<https://perma.cc/5Q7N-NZS4>].

32. *See id.* (discussing how the NCAA has maintained the integrity of their sports competitions, with examples like conducting investigations into the basketball recruiting scandals).

33. NCAA, *supra* note 28, at 44.

34. *Id.* at 44–45.

35. *Id.* at 45.

36. *Sports Wagering*, NCAA, <https://www.ncaa.org/enforcement/sports-wagering> [<https://perma.cc/WAT7-XPJ3>].

37. Tim Reynolds, *NCAA's Emmert Expresses Concern Over Wagering, Esports*, ASSOCIATED PRESS (Jan.

concern is for the wellness of students and student-athletes, and how the signs of addictive gambling are often harder to detect than other addictions like drugs or alcohol.<sup>38</sup> They are further concerned the student-athlete is more likely to engage in sports gambling than a typical college student, due to their increased interest and exposure to athletics.<sup>39</sup>

An additional concern of the NCAA is the access that bettors—typical college students or otherwise—would have to the student-athletes or information about student-athletes.<sup>40</sup> One example is student-athlete injuries, where information on the health of a student-athlete can drastically impact the outcome of a game.<sup>41</sup> Access to this kind of information would be disproportionately beneficial when potentially placing a bet, and it is not hard to imagine bettors actively trying to ascertain this information from coaches, players, and other staff.<sup>42</sup>

There is the further concern of gambling directly impacting the game on the field, which can appear in the form of intentionally losing a game or “point shaving.”<sup>43</sup> While this is not a common occurrence, it has still happened enough for the NCAA to consider it a legitimate concern.<sup>44</sup> Always considering any perceived threats to the integrity of intercollegiate athletics, the NCAA continues to oppose sports gambling in all of its forms.<sup>45</sup>

### C. The Push for Legalization of Sports Gambling

Despite the previous opposition of both professional and collegiate sports organizations to sports betting, there was a push in recent years to allow states to make their own decisions on sports gambling, rather than the federal government regulating the practice.<sup>46</sup>

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24, 2019), <https://apnews.com/article/7d62e621e8dd4c3bb1edfc54363c40c6> [<https://perma.cc/LY8Q-7YZR>] (quoting Emmert, “Sports wagering is going to have a dramatic impact on everything we do in college sports . . . . It’s going to threaten the integrity of college sports in many ways unless we are willing to act boldly and strongly.”).

38. Jeffrey L. Derevensky & Tom Paskus, *Mind, Body and Sport: Gambling Among Student-Athletes*, NCAA, <http://www.ncaa.org/sport-science-institute/mind-body-and-sport-gambling-among-student-athletes> [<https://perma.cc/6SVT-PRWS>].

39. *Id.*

40. Hunter M. Haines, Comment, *Passing the Ball: The United States Supreme Court Strikes Down PASPA and Throws Sports Gambling Back to State Legislatures*, 78 MD. L. REV. 604, 625 (2019).

41. *Id.*

42. See Derevensky & Paskus, *supra* note 38 (claiming that a 2012 study shows that one in twenty Division I men’s basketball student-athletes have reported being contacted regarding this type of inside information).

43. Ray Gustini, *How Point Shaving Works*, THE ATLANTIC (Apr. 12, 2011), <https://www.theatlantic.com/entertainment/archive/2011/04/how-point-shaving-works/349575/> [<https://perma.cc/R9DR-U9RR>] (defining point shaving as ensuring that your team does not cover the point spread in a game, not necessarily purposefully losing).

44. Some examples include: In 1994, Northwestern University running back, Dennis Lundy, intentionally fumbling a ball in a game against the University of Iowa to win \$400 that he bet against his own team; in 1997, two members of the Arizona State men’s basketball team admitted to shaving points in four home games from 1993–1994; in 1998, two former members of the Northwestern University basketball team were indicted for conspiracy to fix games, point shave, and accepting bets. John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221, 237–38 (2002).

45. Reynolds, *supra* note 37.

46. See generally *OFC Comm Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (holding that PASPA preempts Delaware’s law that allowed wagering on athletic contests).

The two major challenges to PASPA both came out of New Jersey.<sup>47</sup> New Jersey citizens voted to amend the state's Constitution to allow the state legislature to legalize sports gambling, and the legislature obliged.<sup>48</sup> This eventually led to a legal challenge, which became *National Collegiate Athletic Ass'n v. Governor of New Jersey* ("Christie I").<sup>49</sup> *Christie I* focused on the constitutionality of PASPA and whether Congress has the authority to restrict a state's ability to pass gambling legislation.<sup>50</sup> The Third Circuit ruled 2–1 that Congress was within its authority under the Commerce Clause to regulate state gambling laws, and it did not violate the Tenth Amendment anti-commandeering principle.<sup>51</sup> In 2014, New Jersey tried again, passing another law attempting to legalize sports gambling eventually leading to *Christie II*,<sup>52</sup> a new legal challenge to PASPA.<sup>53</sup> In an *en banc* decision, the Third Circuit relied on their ruling in *Christie I* and held New Jersey's legislation effectively authorized sports gambling in the state, and was thus a violation of the terms of PASPA.<sup>54</sup> This time, the Supreme Court granted certiorari to examine PASPA's constitutionality.<sup>55</sup>

The case the Supreme Court eventually heard was *Murphy v. NCAA*.<sup>56</sup> New Jersey's argument relied heavily on the anti-commandeering doctrine present in the Tenth Amendment, which makes it unconstitutional for Congress to directly dictate what a state can or cannot do legislatively and violate a state's sovereignty.<sup>57</sup> Justice Alito, writing for the Court, strongly rebuked PASPA, declaring the provision "unequivocally dictates what a state legislature may and may not do."<sup>58</sup> He concluded: "[j]ust as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling."<sup>59</sup> The Court concluded Congress did not have the authority to pass PASPA, rendering the statute

47. Polisano, *supra* note 26, at 462.

48. *Id.* at 463.

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

50. See generally *id.* (deciding the constitutionality of *Christie I*).

51. Ryan M. Rodenberg & John T. Holden, *Sports Betting has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 17–18 (2017).

52. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted, opinion vacated*, Order Sur Petitions for Rehearing En Banc, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. 2015), and *aff'd* 832 F.3d 389 (3d Cir. 2016).

53. Polisano, *supra* note 26, at 463.

54. *Id.* at 464.

55. Richard Wolf, *Sports Betting, States' Rights on Tap at Supreme Court*, USA TODAY, (Dec. 4, 2017), <https://www.usatoday.com/story/news/politics/2017/12/03/sports-betting-states-rights-tap-supreme-court/910669001/> [<https://perma.cc/XE54-H6YG>].

56. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). The case was titled "Murphy" as opposed to "Christie" because Chris Christie was no longer Governor of New Jersey at this time, and Phillip Murphy had assumed office.

57. The two leading cases on anti-commandeering doctrine are *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). Both cases held that the particular legislative action directly ordered the respective state legislatures to act in a certain way, which is a violation of the Tenth Amendment.

58. *Murphy*, 138 S. Ct. at 1478. Justice Alito would go on in his strongly worded opinion to say "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id.*

59. *Id.* at 1482.

unconstitutional. Thus, *Murphy* removed any federal restriction on states authorizing sports gambling.<sup>60</sup>

*D. The Post-PASPA Landscape: What to Expect Going Forward*

With the demise of PASPA, individual states now have the freedom to legalize sports betting within their borders.<sup>61</sup> Many states quickly took advantage of this. Delaware hosted the first legal sports betting event to take place outside of Nevada since 1992, just three weeks after the *Murphy* decision came down.<sup>62</sup> Not long after, New Jersey, Mississippi, Pennsylvania, Rhode Island, and West Virginia followed suit.<sup>63</sup> As of this writing, there are twenty-five states, plus the District of Columbia, where sports betting is now legal in some form or a sports betting law has passed the state legislature and is pending launch; almost every state has a sports gambling law currently pending in their state legislatures.<sup>64</sup>

One feature of allowing states to make their own decision regarding legislation is each individual state gets to decide what guidelines work best for them. This, however, can lead to discrepancies in laws between states. For example, Pennsylvania's sports gambling law includes a 36% tax rate on sports wagering revenue,<sup>65</sup> while Nevada's tax on gaming revenue is only 6.75%.<sup>66</sup> Aside from tax issues, states can have different rules for what type of sporting events bettors are allowed to wager on. New Jersey's sports gambling law does not allow bettors to bet on any collegiate athletic event taking place in the state of New Jersey, or any game in which a New Jersey collegiate team participates.<sup>67</sup> In Iowa, no such restriction exists, but the state does not allow betting on any in-game prop bets<sup>68</sup> related to college athletes playing in games for or against an Iowa team.<sup>69</sup>

While these examples show how states can pass drastically different laws, some have called for Congress to implement a law to fill the hole left by PASPA.<sup>70</sup> Derrick Crawford—Managing Director of Enforcement for the NCAA—called for federal legislation in a speech at the NYU School of Law, hoping congressional action would set

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60. *Id.* at 1484–85.

61. Haines, *supra* note 40, at 606.

62. John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 588 (2020).

63. *Id.*

64. Ryan Butler, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Feb. 4, 2021, 8:00 AM), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> [<https://perma.cc/A82S-926U>]. Sports gambling takes different forms in different states. Some states like New York or Delaware have legalized sports betting, but only in person, at physical locations. Some states like Nevada offer online betting but require in-person sign-up. Others like Iowa offer fully online services, with no in-person restrictions. *Id.*

65. Dustin Gouker, *PA Governor Signs Sports Gambling Law, But What's Next?*, LEGAL SPORTS REP. (Jan. 19, 2018), <https://www.legalsportsreport.com/16339/pa-sports-betting-law/> [<https://perma.cc/6GBE-FN2Q>].

66. Holden, *supra* note 62, at 589.

67. 2018 N.J. Laws 236.

68. A proposition bet, or prop bet, is a bet on an in-game occurrence, not tied to the final score or outcome, often focused around the stats of a player in a particular game. For example, hypothetically a bet could be placed on whether LeBron James will score more or less than 27.5 points in his upcoming game. This would be considered a prop bet. Steve Petrella, *What is a Prop Bet? Definition, Examples, Super Bowl Props, More*, ACTION NETWORK, (Feb. 2, 2021), <https://www.actionnetwork.com/education/prop-bet> [<https://perma.cc/6E38-5XYM>].

69. Danny Lawhon, *Betting in Iowa: What Gamblers Need to Know*, DES MOINES REG., May 27, 2019, at C4.

70. Haines, *supra* note 40, at 625.

a federal standard of integrity in sports gambling laws.<sup>71</sup> While there is nothing imminent coming from Congress, there is a draft of a federal sports gambling bill, first circulated by former Senator Orrin Hatch.<sup>72</sup> The bill begins by stating there is an important role for Congress to set minimum standards of sports wagering to target the illegal sports wagering market and potential bad actors.<sup>73</sup> One of the bill's relevant provisions would require a state to send a draft of their potential legislation to the Attorney General for approval.<sup>74</sup> Another provision requires the use of "official" data,<sup>75</sup> at least until a specified future date.<sup>76</sup> The draft also includes an "excise tax"<sup>77</sup> of 0.25% coming out of all gambling revenue that would be put aside for enforcement of the federal gambling laws.<sup>78</sup>

### III. ANALYSIS

Once PASPA was struck down, a gap formed in gambling legislation, essentially providing no guidelines for how sports gambling should be approached across the country.<sup>79</sup> States are now free to pass their own laws on sports betting, without interference from the federal government. There has been a rush to capitalize on this opportunity,<sup>80</sup> and a vast majority of the states have either passed or are considering passing state sports gambling laws in their respective state legislatures.<sup>81</sup>

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71. NYU School of Law, *Legalized Sports Gambling: Leagues and States Roll the Dice*, YOUTUBE (Oct. 24, 2018), <https://www.youtube.com/watch?v=yNZ7TR75EuM>.

72. Dustin Gouker, *Feds Would Have to Approve State Sports Betting Laws Under New Draft Bill in Congress*, LEGAL SPORTS REP. (Dec. 4, 2018), <https://www.legalsportsreport.com/26545/federal-sports-betting-bill-2018/> [<https://perma.cc/VW3C-G8C7>].

73. John Holden, *Breaking Down the Federal Sports Betting Bill Discussion Draft: Part 1*, LEGAL SPORTS REP. (Dec. 6, 2018, 7:00 AM), <https://www.legalsportsreport.com/26581/federal-sports-betting-bill-draft-1/> [<https://perma.cc/9SPQ-P28N>].

74. *Id.* This essentially creates a federal governing body for sports legislation.

75. "Official" data refers to compiled stats, outcomes, and other data obtained pursuant to an agreement with sports leagues, data companies, or governing bodies. The purpose behind official data is for the sports leagues to have control over the data that is produced in their respective sport. The debate on the merits of official data and whether they have a place in sports betting is beyond the scope of this Note. For a more in-depth discussion on the meaning, history, and potential impact of official data, see *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> [<https://perma.cc/5YEJ-TSCH>] and John Holden, *Making Sense of Pro Sports Leagues' Search for Sports Betting Data Fees*, LEGAL SPORTS REP. (June 19, 2018, 11:12 AM), <https://www.legalsportsreport.com/21245/search-for-sports-betting-fees/> [<https://perma.cc/MT2E-Z7HF>].

76. Holden, *supra* note 73.

77. The excise tax is sometimes referred to as an "integrity fee." The idea of an integrity fee is to take a portion of all bets placed, not just on the revenue earned, and direct this somewhere else. When talking about integrity fees, the money is generally directed to the sports leagues, in the hope that they would use this to monitor the betting. However, there are generally no guidelines placed on how the integrity fee is to be used. See *Sports Betting Integrity Fee*, LEGAL SPORTS REP. (Aug. 2, 2019, 3:04 AM), <https://www.legalsportsreport.com/integrity-fee/> [<https://perma.cc/XW7R-MS8V>].

78. Gouker, *supra* note 72.

79. While this gap in sports gambling legislation exists, there are still some federal statutory guidelines like the Federal Wire Act (18 U.S.C. § 1084) and the Sports Bribery Act (18 U.S.C. § 224).

80. Holden, *supra* note 62.

81. Alexandra Licata, *42 States Have or are Moving Towards Legalizing Sports Betting—Here are the States Where Sports Betting is Legal*, BUS. INSIDER (Aug. 2, 2019, 12:21 PM), <https://www.businessinsider.in/sports/42-states-have-or-are-moving-towards-legalizing-sports-betting-here-are-the-states-where-sports-betting-is-legal/articleshow/70504747.cms> [<https://perma.cc/65EY-6EKK>].

While states have every right to try and pass sports gambling laws as soon as possible, this can present problems for sports organizations operating on a national level. It would become incredibly difficult for a national sports league to comply with potentially fifty different state gambling laws. Because of this, there has been a push among sports leagues for Congress to pass new federal gambling legislation.<sup>82</sup> One example is the NBA endorsing a “50-state solution” to both the Senate Racing, Gaming, and Wagering Commission, and the New York Committee on Sports Betting.<sup>83</sup> This is a further issue for the NCAA, which generally opposes sports gambling.<sup>84</sup> However, the NCAA would much prefer federal standards for gambling rather than attempting to comply with the many different state statutes, due in large part to their concern for integrity of their competitions.<sup>85</sup> Considering these competing issues, it is necessary to analyze the state and federal approaches and potential impact they could have on the leagues, players, and integrity of games played.

#### A. *Leaving it to the States: The Current Approach*

Since PASPA’s downfall, states have been active in passing their own gambling legislation, in an attempt to not only regulate the process, but also profit off of it.<sup>86</sup> Numerous states began this process,<sup>87</sup> and the different types of laws states can pass are illustrated by the laws in Nevada, New Jersey, and Delaware.

##### 1. *Nevada’s State Regulation*

Nevada is the first state most people think of when considering gambling; they were the first state to legalize any form of gambling in 1931<sup>88</sup> and sports gambling in 1949.<sup>89</sup> Because of its early date of legalization, Nevada was grandfathered in and allowed to continue their sports betting practice when PASPA was passed in 1992, essentially giving

82. Michael Larkin, *These Casino Stocks Take Knee as NFL Asks Congress for Sports Betting Law*, INVESTOR’S BUS. DAILY (Sept. 27, 2018, 5:53 PM), <https://www.investors.com/news/sports-betting-federal-regulation-nfl-casino-stocks/> [https://perma.cc/4HS9-XB3T].

83. Eric Ramsey, *NBA to NY Senate: ‘We Support the Passage of a Comprehensive Sports Betting Bill’*, LEGAL SPORTS REP. (Jan. 24, 2018), <https://www.legalsportsreport.com/17954/ny-senate-on-sports-betting-and-nba/> [https://perma.cc/3PGW-JQCS].

84. *Sports Wagering*, *supra* note 36.

85. Matt Bonesteel, *NCAA Will Allow Championships in States with Sports Gambling. It had No Choice.*, WASH. POST (May 17, 2018, 12:03 PM), <https://www.washingtonpost.com/news/early-lead/wp/2018/05/17/ncaa-will-allow-championships-in-states-with-sports-gambling-it-had-no-choice/> [https://perma.cc/WX8G-ACRD]; see also Emily James, *NCAA Supports Federal Sports Wagering Regulation*, NCAA (May 17, 2018, 10:00 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-supports-federal-sports-wagering-regulation> [https://perma.cc/F4CA-7DW6] (quoting NCAA President Mark Emmert saying: “While we recognize the critical role of state governments, strong federal standards are necessary to safeguard the integrity of college sports and the athletes who play these games at all levels.”).

86. Licata, *supra* note 81.

87. *U.S. States with Legal Sports Betting*, LEGAL SPORTS BETTING (Feb. 11, 2021), <https://www.legalsportsbetting.com/states-with-legal-sports-betting/> [https://perma.cc/PY2V-RPRV].

88. *Nevada Legalizes Gambling*, HISTORY (Mar. 18, 2020), <https://www.history.com/this-day-in-history/nevada-legalizes-gambling> [https://perma.cc/S6AV-4FC9].

89. Licata, *supra* note 81.

the state a monopoly on the sports gambling industry.<sup>90</sup> Nevada's history provides experience for other states to look to when making their own gambling laws.

One approach Nevada took was to make a commitment to eradicate the illegal betting systems prevalent at the time.<sup>91</sup> This was accomplished by lowering the tax taken on all legally placed bets because higher tax rates had discouraged bettors from using the legal gaming system.<sup>92</sup> The Nevada legislature further established its commitment to legitimizing gambling when they declared in 1977 the gaming industry, as a matter of public policy, is "vitally important to the economy of the state and the general welfare of its inhabitants" and it is important to keep gaming "free from criminal and corruptive elements."<sup>93</sup>

Nevada normalized gambling in the state and removed any stigma surrounding the process. Rather than focus on gambling prevention, they embraced it, allowing the state to ensure the integrity of the process.<sup>94</sup> The commitment to legitimizing sports gambling is something other states are going to try to emulate.<sup>95</sup> The Nevada system has been accepted by the major sports organizations for years. However, while every state would be thrilled to have a system as established as Nevada, therein lies the issue: Nevada has had its system in place for forty years. A state passing a sports gambling bill today does not have the infrastructure built into their existing legislation the way Nevada does,<sup>96</sup> and will not be able to operate their system the same way.<sup>97</sup> While other states may not be able to perfectly replicate the Nevada system, they still can look to Nevada as a potential guide. As new states pass their respective gambling legislation, they can adopt similar principles to what Nevada implemented over forty years ago: a low tax rate on bets being placed, commitment to state oversight, and dedicating state funds to the regulation process.

## 2. *New Jersey's State Regulation*

The most successful state to pass a sports gambling law post-PASPA is New Jersey.<sup>98</sup> New Jersey's legislation made it immediately legal for casinos and racetracks to accept in-

90. *Id.*

91. Becky Harris, *Background Materials*, HOUSE COMM. ON THE JUDICIARY 1 (Sept. 27, 2018), <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-HarrisB-20180927.pdf> [<https://perma.cc/G9CK-A8YR>].

92. *Id.* at 2. The federally enforced excise tax on all bets placed was 10%, based on a 1951 law. This law had the effect of driving bettors to illegal bookmakers, who did not take out the tax. In 1971, a law was passed lowering the excise tax from 10% to 2%, which made it more attractive for bettors to interact with the organized and legal bookmakers. *Id.*

93. *Id.*

94. *Id.* at 4. In the report, Harris discusses how the majority of the serious sports scandals throughout history were uncovered by Las Vegas book makers. She attributes this to the state's focus on legitimization of the process. *Id.* at 5–7.

95. Butler, *supra* note 64 (claiming that New Jersey's state law is the closest to Nevada that we have seen and comparing other states to New Jersey).

96. Some general components of the Nevada structure include low tax rate, state oversight and regulation, and the dedication of state resources to the regulation process.

97. Harris, *supra* note 91, at 7 ("Over the past 40 years Nevada has developed a specialized regulatory knowledge with regard to sports betting that cannot be easily replicated in a short period of time.").

98. Weston Blasi, *New Jersey Passes Nevada in Sports Gambling—Should Las Vegas be Worried?*, MARKETWATCH (Nov. 9, 2019, 11:18 AM), <https://www.marketwatch.com/story/new-jersey-passed-nevada-in-sports-betting-last-month-should-las-vegas-be-worried-2019-11-04> [<https://perma.cc/NMY6-XQQ3>].

person bets on sports.<sup>99</sup> Additionally, the state implemented a thirty-day grace period before online bets could be accepted, which is now fully in place.<sup>100</sup> While there are many specific provisions to the bill,<sup>101</sup> its distinguishing characteristic is it gives the New Jersey Division of Gaming Enforcement the responsibility of enforcing the terms of the legislation.<sup>102</sup> Other states have also adopted this method<sup>103</sup>—sometimes referred to as the Gaming Control Board Method—because states can use their existing gaming or gambling boards to regulate the new sports gambling laws.<sup>104</sup>

The Gaming Control Board Method seeks to emulate the Nevada system slightly.<sup>105</sup> Rather than create a new governing board or system of regulation, states simply add responsibility to an already existing regulatory body with experience regulating gambling.<sup>106</sup> These gaming boards generally handle the casino gaming or racing industries in their states and are familiar with betting and wagering issues. This is similar to the Nevada method because this approach allows a state to monitor sports gambling with an experienced regulatory body. New Jersey further believes this type of regulatory scheme negates the need for any federal intervention.<sup>107</sup> While this is not a mirror image of the system Nevada has in place, it has been popular among states passing new sports gambling legislation.<sup>108</sup>

Potential issues with this method come in the form of uncertainty. Unlike in Nevada, sports leagues have relatively no experience working with New Jersey—or the handful of other states using a similar method—in the area of sports gambling.<sup>109</sup> Concerns over states' inexperience handling sports wagers have led leagues, like the NBA<sup>110</sup> and the NCAA,<sup>111</sup> to call for federal legislation rather than rely on the states to manage themselves. It is too soon to know how effective a method like New Jersey's will be, but it continues to be a popular choice among states with newly legalized sports betting.<sup>112</sup>

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99. Eric Ramsey, *New Jersey Sports Betting is Finally Here, as Governor Signs Bill*, LEGAL SPORTS REP. (June 11, 2018, 12:34 PM), <https://www.legalsportsreport.com/21121/new-jersey-governor-signs-sports-betting-into-law/> [<https://perma.cc/6BPM-9WJE>].

100. *Id.*

101. See 2018 N.J. Laws 235–57 (containing provisions like an 8.5% tax on in-person bets, 13% tax on online bets, and no wagering on New Jersey college teams or college games taking place in New Jersey).

102. Ramsey, *supra* note 99.

103. See generally Gouker, *supra* note 65 (analyzing how this method has been adopted by different states); Dustin Gouker, *Mississippi is Already Poised to Offer Legal Sports Betting, Thanks to Language in a Fantasy Sports Law*, LEGAL SPORTS REP. (June 29, 2017, 10:14 AM), <https://www.legalsportsreport.com/14536/mississippi-sports-betting-law/> [<https://perma.cc/CJN2-CE98>] (discussing Mississippi).

104. Holden, *supra* note 62, at 598.

105. *Id.* at 600.

106. *Id.* at 598.

107. Brian Pempus, *New Jersey Has 'Great Concerns' as Feds Prepare New Legal Opinion on iGaming, US BETS* (Dec. 19, 2018), <https://www.usbets.com/feds-revisit-wire-act-possible-ipoker-crackdown/> [<https://perma.cc/GN8U-FV6H>] (quoting former New Jersey State Senator Raymond Lesniak saying “[w]hen ever Congress . . . tries to get their hands in on the state’s business, I have great concerns”).

108. Holden, *supra* note 62, at 598.

109. See generally Ramsey, *supra* note 83 (discussing the NBA wanting federal legislation rather than state control).

110. *Id.*

111. James, *supra* note 85.

112. See Eric Ramsey, *Iowa Sports Betting Launch: What You Need to Know*, LEGAL SPORTS REP. (Aug.

### 3. Delaware's State Regulation: The Lottery

Rather than have the casino industry manage sports gambling, some states opt to use the existing structure of the lottery system. Delaware is one such state.<sup>113</sup> In fact, due to their existing lottery structure, Delaware was able to move quickly after PASPA was struck down and became the first state to legalize sports gambling.<sup>114</sup> What sets this approach apart from the other forms of regulation is this method does not rely on the state's casinos at all.<sup>115</sup> The immediate benefit of this method is that a state gains flexibility and control of how they offer sports gambling: the service is not tied to a specific casino location, and it can be provided anywhere a typical lottery is operated.<sup>116</sup> This method also keeps the lottery office managing and monitoring the system because retailers will not possess a large enough amount of cash to pay out most bets.<sup>117</sup> Therefore, bettors are forced to go through the state's lottery officials.<sup>118</sup>

The lottery system is not without its drawbacks. One example is the handling of mobile and online betting. Unlike Delaware, states utilizing their casino's existing game boards possess the technology and infrastructure to produce a secured mobile gaming product.<sup>119</sup> More likely than not, a lottery system like Delaware's will not possess that.<sup>120</sup> Delaware officials contend mobile gambling would be within the confines of the law, but they have yet to offer it.<sup>121</sup> An additional issue for any state adhering to this method is the lack of competition.<sup>122</sup> If a state is operating its own sports gambling system through the lottery, there is no entity that can compete, leaving consumers susceptible to any standards or regulations that are implemented.<sup>123</sup> Contrast that with a system that uses casinos and existing gaming boards for regulation, where there are often multiple options bettors can choose to use based on their preferences.<sup>124</sup>

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15, 2019, 10:14 AM), [https://www.legalsportsreport.com/35141/iowa-sports-betting-launch/\[https://perma.cc/2YD9-4D9H\]](https://www.legalsportsreport.com/35141/iowa-sports-betting-launch/[https://perma.cc/2YD9-4D9H]) (showing that Iowa, one of the more recent states to legalize sports gambling, is using the existing Iowa Racing and Gaming Commission to monitor sports betting).

113. See Holden, *supra* note 62, at 600 (laying out Delaware's system). Delaware had a system of lottery sports gambling in place years before PASPA was enacted in 1992. They continued to have lottery sports gambling in place, even during PASPA's imposed prohibition on sports gambling, in which they were grandfathered in. *Id.* at 601.

114. Jill R. Dorson, *Delaware Lottery Director on Sports Betting: 'We've Been Ready Since 2009'*, SPORTS HANDLE (June 1, 2018), <https://sportshandle.com/delaware-sports-betting-june-paspa-governor-camey/>.

115. Holden, *supra* note 62, at 601.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See generally Holden, *supra* note 62 (discussing Delaware's system).

121. *Delaware Sports Betting*, LEGAL SPORTS REP., [https://www.legalsportsreport.com/delaware/\[https://perma.cc/Q56X-EHL4\]](https://www.legalsportsreport.com/delaware/[https://perma.cc/Q56X-EHL4]).

122. Holden, *supra* note 62, at 602.

123. *Id.*

124. *Id.* While the Gaming Board Control Method still potentially has a lack of competition problem, it is less extreme. The option of multiple casinos creates some competition. There can only be one state lottery system, leaving it completely immune from any outside competition.

### B. Federal Regulation: Setting a Baseline for States

An alternative to allowing the states to create their own regulations is for the federal government to step in with legislation to fill the gap left by PASPA. Sports leagues would much prefer one federal statute to individual states passing several different statutes.<sup>125</sup> This is important to the leagues, so they do not have to worry about the potential difficulties of navigating fifty different laws and working with each state individually.<sup>126</sup>

#### 1. Newly Proposed Sports Gambling Bill

In 2018, a draft of a new bipartisan<sup>127</sup> federal sports gambling bill circulated.<sup>128</sup> The purpose behind the bill is to set sports gambling standards across the country, or at least to establish a minimum standard that all states legalizing sports betting would have to meet.<sup>129</sup> The proposed bill itself is over 100 pages,<sup>130</sup> but a discussion of some of the more relevant provisions is appropriate.

The bill begins by making it illegal for any person to accept a bet on any sport.<sup>131</sup> It follows this up by creating an exception for states seeking to provide a sports gambling system within their state.<sup>132</sup> Taken together, these two provisions make it so the only way a state can legalize sports gambling is through the federally implemented guidelines.<sup>133</sup> For a state to get approval to allow sports gambling, they would need to submit the proposed law to the Attorney General, who would decide if the law sufficiently complies with the federal standards.<sup>134</sup> The Attorney General would have 180 days to either approve or deny the state law.<sup>135</sup> The seriousness of this proposition cannot be understated. Effectively, this would: (1) create a “mechanism in which states cannot unilaterally pass [sports gambling] laws,”<sup>136</sup> and (2) “create a federal regulatory body capable of overseeing sports wagering.”<sup>137</sup> This immediately raises anti-commandeering concerns, which is why PASPA was struck down in *Murphy*.<sup>138</sup> While the government has the ability under the Commerce Clause to regulate sports betting, requiring a state to submit a law they pass to the federal government for approval comes very close to commandeering, at the very least.

125. Ramsey, *supra* note 83.

126. *Id.*

127. U.S. Senators Charles Schumer, Orrin Hatch Introduce Federal Sports Gambling Bill, ESPN (Dec. 19, 2018), [https://www.espn.com/chalk/story/\\_/id/25573273/senators-chuck-schumer-orrin-hatch-introduce-federal-sports-gambling-bill](https://www.espn.com/chalk/story/_/id/25573273/senators-chuck-schumer-orrin-hatch-introduce-federal-sports-gambling-bill) [<https://perma.cc/3WZ4-GMHB>].

128. Gouker, *supra* note 72.

129. Holden, *supra* note 73 (quoting from the findings section of the bill: “While each State may decide whether to permit sports wagering and how to regulate sports wagering, there is an important role for Congress in setting minimum standards for sports wagering that affects interstate commerce and providing law enforcement with additional authority to target the illegal sports wagering market and bad actors in the growing legal sports wagering market.”).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Holden, *supra* note 73.

135. Gouker, *supra* note 72.

136. *Id.*

137. Holden, *supra* note 73.

138. See *supra* Section II.C.

It is unlike any other type of law applying to the states. States do not have to send their tax plans or infrastructure bills to the federal government for approval.

The bill also includes an imposed minimum age for betting<sup>139</sup> and a ban on all athletes, coaches, referees, and employees of sports organizations from placing bets on their respective organizations.<sup>140</sup> Also present is a short-term<sup>141</sup> requirement to only use data properly licensed by an “applicable sports organization” or an “entity expressly authorized” by an applicable sports organization.<sup>142</sup> This is likely referring to middlemen data companies like Sportsradar or Genius Sports.<sup>143</sup> The viability of such a provision is questionable, as it is unclear whether Congress can mandate a company to only use specific data, especially if there are similar alternatives.<sup>144</sup>

Some final important portions include: creating a National Sports Wagering Clearinghouse, whose purpose is to promote and ensure the integrity of the gambling process by monitoring the sports wagering data; creating a federal excise tax of 0.25% on every bet placed, with the funds all going to federal enforcement of gambling laws; and clarifying how the bill interacts with the Wire Act<sup>145</sup> and the Sports Bribery Act.<sup>146</sup> Additionally, an advisory committee under the Secretary of Health and Human Services would oversee a gambling addiction research project.<sup>147</sup>

As far as this bill goes, there are ideas to be hotly debated—like the data requirement or not giving states unilateral control of their own laws—and ideas that everyone will be in support of—like the excise tax for the benefit of a federal enforcement or updating the Wire and Sports Bribery Acts.<sup>148</sup> However, it is unclear whether this bill will ever see the floor of Congress. Since leaving the desk of Senator Hatch, there has been almost no

139. The bill does not actually specify an age, just that there should be a minimum age. 18 or 21 seem to be the likely ages targeted. Holden, *supra* note 73.

140. *Id.*

141. As it is currently written, the provision would expire on December 31, 2022. Considering the dormancy of the bill, this date would likely be altered. Gouker, *supra* note 72.

142. *Id.*

143. *Id.*

144. There is a long history of case law that is relevant to the “official” data debate. This includes discussions of copyright law, antitrust, the First Amendment, and intellectual property. For the sake of this Note, it is sufficient to know that there is no clear answer as to whether official data would be able to be monopolized by a sports league or by Congressional mandate. Much of the debate depends on how the data is to be used. For example, you cannot own a copyright on factual information. However, you can have a copyright or own the intellectual property right if that factual information is used in a unique and proprietary way. To explore this further, see *Official League Data*, *supra* note 75.

145. The bill clarifies that “intermediate routing of electronic data shall not determine the location in which” your bet was placed. Gouker, *supra* note 72 (discussing Wire Act clarifications in Sec. 301 of the bill). It also expands the government’s power under the Wire Act, allowing civil actions to be brought for violations. *Id.*

146. The bill would effectively modernize the Sports Bribery Act, incorporating extortion and blackmail, as well as adding whistleblower protections. *See id.* (discussing Sports Bribery Act in Sec. 302 of the bill).

147. John Holden, *Breaking Down the Federal Sports Betting Bill Discussion Draft: Part 2*, LEGAL SPORTS REP. (Dec. 5, 2018), <https://www.legalsportsreport.com/26590/federal-sports-betting-bill-draft-2/> [<https://perma.cc/N5T3-GT23>].

148. *See generally id.* (discussing key sections of the proposed federal legislation which would likely be included in any sports gambling bill); *see generally* John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453 (2015) (examining the events that led to the 1964 Sports Bribery Act and the challenges facing major policy changes deviating from the statute).

progress.<sup>149</sup> If it ever does make it to Congress, it is likely to see substantial edits before that time. While the outcome of this bill is unknown, it shows there is still a desire to have a federal standard.

## 2. Pushbacks to Federal Legislation

While sports organizations and some senators may want to see federal legislation controlling sports gambling, there is healthy pushback.<sup>150</sup> It is almost a virtual certainty any proposed federal legislation is going to be challenged in the courts, especially considering the anti-commandeering rationale in *Murphy*.<sup>151</sup> For any law to survive a challenge, it needs to tread carefully around telling a state legislature how they must act.<sup>152</sup> While *Murphy* states Congress is not precluded from enacting federal sports gambling legislation,<sup>153</sup> it is a consideration the drafters of a bill will need to be aware of.

Aside from general Tenth Amendment arguments for state's rights, there will also be pushback from the states with enacted sports gambling legislation. If a bill is proposed and passed, completely grandfathering those state laws in seems unlikely. Over half of the states have active sports gambling legislation.<sup>154</sup> If Congress allows grandfathering to happen, it almost defeats the purpose of the federal regulation if that many states are not required to comply. This raises further concerns of whether states would need to pass a new law to comply with the federal law. Again, this seems unlikely—not to mention a waste of state resources. With the lack of a definitive federal proposal at this time, a lot is still up in the air. If a bill were to become more imminent, some of these issues are sure to be answered, but it is clear there are a number of considerations that Congress will need to be cognizant of before delving into federal sports gambling legislation. However—even with all of the questions that arise—federal legislation still provides a number of benefits, like creating a consistent minimum standard that all state laws must meet and committing funds to maintain the integrity of the sports betting process.

## IV. RECOMMENDATION

The biggest issue facing sports gambling is uncertainty. Every week, a new state passes a sports gambling law or is debating one in the state legislature.<sup>155</sup> While it may

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149. See *infra* note 158 (explaining that the federal government sets a threshold of labor standards that all states must meet but states are able to implement higher standards per individual state law).

150. Pempus, *supra* note 107.

151. See generally *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (holding that PASPA violated the anticommandeering doctrine).

152. See *supra* Section II.C (discussing the demand for the legalization of sports gambling).

153. *Murphy*, 138 S. Ct. at 1484–85 (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

154. Licata, *supra* note 81.

155. Recently, Missouri's state legislature has been actively debating this issue. Kurt Erickson, *As Missouri Lawmakers Consider Sports Gambling, Revenue Estimates Jump*, ST. LOUIS POST-DISPATCH (Oct. 24, 2019), [https://www.stltoday.com/news/local/govt-and-politics/as-missouri-lawmakers-consider-sports-gambling-revenue-estimates-jump/article\\_e4a9fec5-865d-55a8-956e-62f42f2f7af2.html](https://www.stltoday.com/news/local/govt-and-politics/as-missouri-lawmakers-consider-sports-gambling-revenue-estimates-jump/article_e4a9fec5-865d-55a8-956e-62f42f2f7af2.html) [https://perma.cc/3VF4-PECM]. Colorado citizens voted via ballot proposition to allow sports betting using their existing casino system, which launched in May 2020. Saja Hindi, *Colorado Prop DD, the Sports Betting Measure, Narrowly Passes*, DENVER POST (Nov. 13, 2019, 3:46 PM), <https://www.denverpost.com/2019/11/06/colorado-proposition-dd-results->

seem more laws and more discussion would add clarity to the situation, it does the opposite. Each law passed is unique and requires sports leagues like the NCAA to comply with an additional standard to ensure the integrity of their league.<sup>156</sup> It would be most beneficial to the sports leagues—who are the ones that sports gambling impacts most—to have a baseline or standard expectation for all sports betting laws enacted by state legislatures. The best way for this to happen is for Congress to pass a law setting a federal standard. The Supreme Court stated in *Murphy* that Congress has the authority to pass a law regulating sports gambling, despite PASPA being struck down.<sup>157</sup> Passing such a law would impose a baseline that all states must meet when enacting their own laws—with consideration for what would be best for their respective state—similar to the way the Fair Labor Standards Act (FLSA) sets a baseline for labor practices.<sup>158</sup>

*A. Effective Federal Sports Gambling Legislation Should Seek to Help Sports Leagues Like the NCAA by Establishing a Minimum Standard with Which All State Laws Must Comply*

For the benefit of the sports leagues, Congress should pass a law setting a federal standard for all state sports gambling laws. As discussed previously, the major sports organizations like the NBA,<sup>159</sup> NFL,<sup>160</sup> and the NCAA<sup>161</sup> are all proponents of a federal standard for sports gambling legislation. The goal behind seeking federal intervention is to make it easier for the leagues to comply with different laws in different states to ensure the integrity of their competitions.<sup>162</sup> The federal legislation would give some guidance to states regarding what their laws would need to look like if they chose to allow sports gambling.

The 2018 federal sports gambling bill presents a number of provisions that would do just that,<sup>163</sup> and any federal sports gambling legislation should adopt some of these provisions. One such provision is the federal excise tax, which would charge a tax on each bet placed.<sup>164</sup> In the proposed bill, this tax revenue would be placed in a “wagering trust fund” to be used for the enforcement of federal sports gambling laws.<sup>165</sup> A similar part of the bill creates a National Sports Wagering Clearinghouse, which would monitor the

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sports-betting/. More recently, Virginia surprised its citizens with an abrupt rollout, and has been licensing companies to launch their services rapidly. Adam Candee, *Surprise: Virginia Sports Betting Live After Thursday Launch*, LEGAL SPORTS REP. (Jan. 21, 2021), <https://www.legalsportsreport.com/47387/virginia-sports-betting-launch-date/> [https://perma.cc/JPY7-Z6CK].

156. See *supra* Section II.B.

157. *Murphy*, 138 S. Ct. at 1484 (“Congress can regulate sports gambling directly . . .”).

158. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (1938) (setting a model baseline labor model). For example, the FLSA sets the federal minimum wage at \$7.25 per hour but as of 2020, twenty-nine states have implemented a law establishing a higher minimum wage. *State Minimum Wages*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 8, 2021), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [https://perma.cc/4WBX-K9HH].

159. Ramsey, *supra* note 83.

160. Larkin, *supra* note 82.

161. Bonesteel, *supra* note 85.

162. See *supra* Part II.

163. Holden, *supra* note 147.

164. See *supra* Section III.B.

165. Holden, *supra* note 147.

integrity of sports betting by managing a national database of sports bets and coordinating with both public and private programs on sports betting integrity.<sup>166</sup> The Clearinghouse would also help authorities investigate any sports betting integrity violations.<sup>167</sup> These two parts of the proposed gambling bill show a strong commitment to ensuring the integrity of the games is maintained and monitored. Most importantly, these provisions would be supported by the NCAA and other organizations.

A further concern for integrity is the access to information bettors may have, primarily on college campuses.<sup>168</sup> While professional athletes are insulated from direct fan interaction, student-athletes on college campuses do not usually enjoy that luxury. Student-athletes are still on campus with the rest of the student body and are exposed to the general public in a way that professional athletes are not. This poses an issue for the dissemination of information for betting purposes. The proposed bill adds a provision that would license “official” data coming from sports leagues in an attempt to address potential information dissemination issues.<sup>169</sup> It is unclear how exactly a provision of this nature would be undertaken by Congress,<sup>170</sup> but finding a way to manage the information that is used when placing a bet is imperative to a federal gambling bill.<sup>171</sup>

Other concerns expressed about sports betting in general are the illegal and immoral side of gambling.<sup>172</sup> The bill proposed by Senator Hatch in 2018 addresses some of those issues.<sup>173</sup> It contains sections on preventing money laundering,<sup>174</sup> bribery,<sup>175</sup> and gambling addiction.<sup>176</sup> Setting up a federal framework for these issues is incredibly important for any bill Congress passes. While individual states can and should contribute to the

166. *Id.*

167. *Id.*

168. *See supra* Section II.B.

169. *See supra* Section III.B.1.

170. For more analysis on potential Congressional action, see *supra* note 144 and accompanying text.

171. One example of why information on gambling is so important, and why the NCAA is concerned about integrity issues, can be seen with player injuries. In professional leagues, teams are required to disclose an injured player’s status and injury throughout the week. *NBA Injury Report: 2020-2021 Season*, NBA, <https://official.nba.com/nba-injury-report-2020-21-season/#:~:text=NBA%20teams%20must%20report%20information,rest%20for%20all%20NBA%20games.&text=For%20the%20second%20game%20of,an&d%208%3A30%20p.m.%20ET> [<https://perma.cc/QEG2-DKBC>] (“NBA teams must report information concerning player injuries, illnesses, and rest for all NBA games.”). The NCAA does not have this requirement. There is nothing preventing a coach from saying nothing about a player’s health and then have them not play. Theoretically, this could become an issue if fellow students or other townspeople see the player in question on crutches. Access to this type of information is what Congress should attempt to regulate, whether it be by requiring the NCAA to disclose injuries, or some other method.

172. Devin O’Connor, *Sen. Orrin Hatch Says Federal Sports Betting Oversight Needed, Gaming Industry Rejects Argument*, CASINO.ORG (Aug. 24, 2018), <https://www.casino.org/news/sen-orrin-hatch-says-federal-sports-betting-oversight-needed/> [<https://perma.cc/ZYP5-6UV3>] (quoting Senator Orrin Hatch saying: “I have grave concerns about gambling, and sports betting in particular. There’s no question that sports betting has ruined far too many lives.”).

173. *See supra* Section III.B.

174. Holden, *supra* note 147 (describing section 104 as mainly incorporating existing federal laws while declaring state betting operators have to meet certain state legislation obligations).

175. *Id.* (stating that section 302 would modernize the Sports Bribery Act by newly including extortion and blackmail, as well as whistleblower protection).

176. *Id.* (explaining that Title IV establishes an advisory committee under the Secretary of Health and Human Services to look at and track gambling addiction).

enforcement and monitoring of the gambling system as a whole, the federal government is more equipped to do so. Moreover, knowing the federal government is responsible for overseeing these issues relieves the sports leagues from the responsibility.

*B. A Federal Sports Gambling Bill Must Avoid Taking the Entire Law-Making Process from the States*

While the above provisions of Senator Hatch’s proposed bill should be incorporated into any federal legislation, not all of the bill’s provisions should be adopted. One provision in particular that should be left behind is the requirement for federal approval of all state-passed sports gambling legislation.<sup>177</sup> Under the proposal, every state passing a sports gambling law would have to submit the law to the Attorney General for analysis on whether the law passes the minimum standards set by the federal government.<sup>178</sup> This effectively creates a federal regulatory body for sports gambling laws and does not allow a state to pass a law on its own accord.<sup>179</sup> Not only would states be unable to pass a law in their legislatures, but it also brings up Tenth Amendment commandeering concerns.<sup>180</sup> When PASPA was overturned in *Murphy*, it was overturned on commandeering grounds, with the Court saying “[a] more direct affront to state sovereignty is not easy to imagine,”<sup>181</sup> concerning the imposition of a restriction on all sports gambling. A federal government mandate for a state to send its law to a federal governing body for approval raises immediate commandeering concerns and is unlike any other type of law a state has authority to pass.<sup>182</sup> If Congress is to seriously attempt to set a standard for sports betting laws that is constitutional, these provisions should be avoided.

*C. For a Federal Sports Gambling Bill to Pass Through Congress It Must Appease Both Political Parties and Consider Individual States’ Wishes*

Getting a federal sports gambling bill to pass in Congress will be difficult for basic political reasons, but also because states are likely to oppose a federal bill. Congress needs to be especially cognizant of individual states’ interests when drafting federal gambling legislation. On the national political spectrum, the proposed bill is presented as one with bipartisan support, being co-sponsored by Utah Republican Senator Mitt Romney—who is taking the retired Senator Hatch’s place as sponsor—and New York Democratic Senator Chuck Schumer.<sup>183</sup> Starting with bipartisanship is good for a bill, especially with the increasing level of partisanship seen in Congress. However, whatever changes are made to the existing bill or whatever new bill is proposed, lawmakers will need to make sure the bill is not perceived to favor one party over another. Putting forth a united front, while

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177. See *supra* Section III.B (describing the federal approval section of Senator Hatch’s proposed bill).

178. Gouker, *supra* note 72.

179. See *supra* Section III.B (describing the proposed federal regulatory body).

180. See *supra* Section II.C (explaining the commandeering concerns surrounding federal control over state laws).

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

182. See *supra* Section II.B.1 (explaining why this federal mandate raises commandeering concerns).

183. Devin O’Connor, *Sen. Mitt Romney Hatching Federal Sports Betting Bill with Strange Bedfellow Sen. Chuck Schumer*, CASINO.ORG (Sept. 6, 2019), <https://www.casino.org/news/sen-mitt-romney-hatching-federal-sports-betting-bill/> [https://perma.cc/Q5VZ-S75Y].

difficult, would go a long way towards passing a sports gambling bill.

The more important concern when potentially passing federal legislation is its impact on states who have already passed their sports gambling legislation. Many states have already passed sports gambling laws and have fully functioning sports gambling industries operating within their borders.<sup>184</sup> One concern these states may have is whatever law the federal government passes may take money out of the pocket of the state and reapportion the money to the federal government.<sup>185</sup> Naturally, states will be opposed to this. Another concern a state may express is having to pass a new state sports gambling law after having already passed one.<sup>186</sup> A state would likely be reluctant to force its legislature and citizens to decide on a new version of sports gambling legislation, as this would consume time and resources and create uncertainty among the citizens.

Congress needs to be aware of these concerns. A full-blown grandfathering clause would most likely be ineffective because—by the time a federal bill gets enacted—well over half the states could already have state legislation in place.<sup>187</sup> The grandfather clause would then allow states' law to supersede federal law. While this is a difficult issue to solve, one way Congress could address this is to implement a grace period where a state's gambling law would not be invalidated or illegal and would still be able to operate while the legislature decides how to best comply with the federal legislation.<sup>188</sup> While this may not be a perfect solution, helping the states as much as possible—and being flexible in the original administration of the federal law—will be key for representatives' approval of a federal sports gambling law when some of their constituents may initially oppose the legislation.

## V. CONCLUSION

In the post-PASPA landscape, states are rushing to pass their own sports gambling legislation to capitalize on the new revenue stream. States have every right to do this, but the multitude of different gambling laws poses problems for sports leagues, some of which do not approve of sports gambling in any capacity. To alleviate the sports leagues' concerns about integrity and complying with different laws, Congress should pass a new federal sports gambling bill.

This Note suggests the new federal sports gambling legislation should not just accept Senator Hatch's proposal. Rather, it should combine parts from that proposition with examples from state laws that have already been passed. Importantly, the legislation should focus on including an excise tax to put towards maintaining integrity, updates to the Sports Bribery and Wire Acts, and baselines for enforcing the laws. A law of this kind would go a long way towards assisting the leagues while also allowing citizens to place bets on sports in their states.

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184. *See supra* Part II.

185. Depending on how the excise tax is applied, that 0.25%, or whatever it happens to be, could come from what the states are already making.

186. *See supra* Section III.B.2 (analyzing opposition to implementing federal regulation).

187. *Id.*

188. For example, the legislature could use this time to amend their current laws slightly to fit what the federal law requires, without rendering null their current laws.