

**THE LEGALIZATION OF SPORTS BETTING:  
A FEDERALISM FRAMEWORK  
AND THE HORSE RACING MODEL**

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INTRODUCTION

What happens in Vegas is not staying in Vegas anymore—at least not when it comes to sports betting. Many states are poised to legalize sports wagering after the United States Supreme Court rendered its decision in *Murphy v. NCAA*,<sup>1</sup> striking the Professional and Amateur Sports Protections Act of 1992 (PASPA). Sports betting may be coming soon to a location near you!

On May 14, 2018, the Supreme Court in *Murphy* struck down PASPA on the grounds that it unconstitutionally “commandeered” state legislatures by forbidding them from legalizing sports betting in violation of the Tenth Amendment.<sup>2</sup> *Murphy* confirmed that Congress can regulate sports wagering, and even ban it altogether pursuant to its power to regulate interstate commerce in Article I, Section Eight of the Constitution.<sup>3</sup> Congress can only do so, however, in a law that operates directly on bettors or betting entities acting in, or affecting, interstate commerce.<sup>4</sup> Congress cannot merely prohibit states from enacting laws that legalize sports wagering.<sup>5</sup>

PASPA did just that by effectively requiring states to continue with their historical state-law prohibitions on sports

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<sup>1</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n.*, 138 S. Ct. 1461 (2018).

<sup>2</sup> *Id.* at 1479.

<sup>3</sup> *Id.* at 1476.

<sup>4</sup> *Id.* at 1476–77.

<sup>5</sup> *Id.*

wagering.<sup>6</sup> Prior to enacting PASPA in 1992, virtually every state prohibited sports wagering with notable exceptions such as Nevada—where wide open sports betting was long permitted—and a few other states such as Delaware, Montana, and Oregon, where some forms of such wagering existed pre-PASPA and were grandfathered in when PASPA was passed.<sup>7</sup> Because PASPA prohibited states from legalizing or expanding sports betting, the Court in *Murphy* announced its means of regulating sports wagering unconstitutional in violation of states’ reserved powers in the Tenth Amendment.<sup>8</sup>

With PASPA falling, numerous states are considering legalizing sports betting, and some have already done so or expanded it as of the writing of this Article.<sup>9</sup> State officials are salivating over potential new revenue from the taxation of sports wagering and the prospect of additional proceeds unrelated to income, property, user fees, or other taxes. These potential revenues are fueling an impetus among state officials to consider legalizing or expanding sports betting.<sup>10</sup>

Sports leagues and players’ associations are also eyeing the potential for enhanced revenues from sports wagering. Most leagues and players have reversed their long-standing opposition

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<sup>6</sup> See 28 U.S.C. § 3702, *invalidated by* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018) (“It shall be unlawful for – (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.”).

<sup>7</sup> See 28 U.S.C. § 3704(a).

<sup>8</sup> See *Murphy*, 138 S. Ct. at 1478.

<sup>9</sup> See Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (Mar. 12, 2019), [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states) [<http://perma.cc/P2L7-PY4X>].

<sup>10</sup> The prospect of a great deal of additional revenue from sports wagering for states may not actually be realistic. See, e.g., COMM’N ON THE REV. OF THE NAT’L POL’Y TOWARD GAMBLING, GAMBLING IN AMERICA 178 (Nina Graybill et al. eds., 1976) [hereinafter GAMBLING],

<https://ia802205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit.pdf> [<http://perma.cc/6VRC-9JEH>] (“The potential for raising revenue is much lower in single-event sports betting than in other types of wagering, due to the low takeout. Any attempt by a State to raise the takeout rate above that used by illegal bookmakers would drastically reduce the ability of the legal game to compete with its illegal counterpart.”).

to sports betting post-*Murphy*.<sup>11</sup> Many take a more recent posture in favor of legalization based on the opportunities for revenue-enhancement from the licensing of sports data or player statistics,<sup>12</sup> or the imposition of “integrity” fees that are meant to cover the costs of identifying,<sup>13</sup> monitoring, and punishing athletes or referees who demonstrate a lack of sports integrity by cheating or committing fraud. Some leagues are also calling for “royalties” to be paid to the leagues, teams, or players.<sup>14</sup> What these revenue-enhancing positions reflect is a proprietary sense of “ownership” that leagues and athletes share when confronted with the prospect of others generating revenue from betting on their athletic activities.

The federal government is weighing re-entry into the prohibition or regulation of sports betting, evidenced by House Judiciary Committee hearings on September 27, 2018 regarding sports wagering, as well as Senate Minority Leader Charles E. Schumer (D) and Sen. Orin G. Hatch (R) calling for renewed federal legislation dealing with sports betting.<sup>15</sup> In December 2018, Sen. Hatch introduced the Sports Wagering Market Integrity Act

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<sup>11</sup> See, e.g., Emily James, *NCAA Supports Federal Sports Wagering Regulation*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 17, 2018, 10:00 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-supports-federal-sports-wagering-regulation> [<http://perma.cc/7DLY-KAZA>] (“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.”).

<sup>12</sup> See, e.g., David Purdum & Darren Rovell, *Winners, Losers of Sports Betting Legalization*, ESPN (May 15, 2018), [http://www.espn.com/chalk/story/\\_/id/23510946/biggest-winners-losers-sports-betting-legalization](http://www.espn.com/chalk/story/_/id/23510946/biggest-winners-losers-sports-betting-legalization) [<http://perma.cc/JH67-GX7N>] (discussing the future of sports data and its growing value as sports betting is legalized).

<sup>13</sup> Brendan F. Conley, *How the Rise of the Daily Fantasy Sports Industry can Catalyze the Liberalization of Sports Betting Policies in the United States*, 66 BUFFALO L. REV. 715, 773–74 (May 2018) (“Moreover, the NBA and MLB, seemingly in preparation for a gambling-friendly verdict in *Murphy*, are actively lobbying at the state level for one-percent of state-sponsored sports betting revenue to go to the leagues, in the form of an ‘integrity fee.’”); see also, Dustin Gouker, *Why NBA, MLB Apparently Think They're Going to Lose the New Jersey Sports Betting Case*, LEGAL SPORTS REP. (Jan. 12, 2018, 11:29 AM), <https://www.legalsportsreport.com/17751/nba-mlb-lose-christie-vs-ncaa/> [<http://perma.cc/WG9K-PP9E>] (“According to ESPN, the NBA and Major League Baseball are behind the effort in Indiana—if sport wagering is legalized in the state—to give one percent of handle to leagues as an integrity fee.”).

<sup>14</sup> Richard N. Velotta, *Leagues Seeking Royalties from Sports Wagering May be Let Down*, LAS VEGAS REVIEW-JOURNAL (May 19, 2018, 2:38 PM), <https://www.reviewjournal.com/business/business-columns/inside-gaming/leagues-seeking-royalties-from-sports-wagering-may-be-let-down/> [<https://perma.cc/2Q5G-UXYE>].

<sup>15</sup> S. 3793, 115th Cong. (2018).

of 2018 to regulate sports betting.<sup>16</sup> This bill would allow states to establish online sports wagering, prohibit wagers on most amateur sporting events, restrict bets when needed to “protect contest integrity,” and prohibit this type of wagering by individuals under twenty-one.<sup>17</sup> It would also require operators to use only data provided or licensed by teams or leagues, would facilitate coordination between states on the issue of sports betting, and would designate a non-profit to evaluate suspicious transactions.<sup>18</sup>

As state and federal legislators begin debating legislation to legalize sports wagering, a number of considerations should be kept in mind. First, an understanding of federal gambling statutes other than PASPA will provide a foundational backdrop for how sports betting legalization must be fashioned. Next, an understanding of the traditional “federalism” approach to gambling in the United States as modeled within federal statutes pertaining to interstate off-track wagering on horse racing will be instructive. Interstate horseracing laws function without federal oversight and leave states with complete control over what forms of gambling to permit within their borders, yet require them to cooperate and not interfere with each other’s gambling policies. Finally, I will assess the national “federalism” framework under federal horseracing statutes and compare those statutes to other sports and sports betting in general to yield valuable insight for those considering legislation of sports betting at the federal and state levels.

Since wagering on sports appears poised to grow rapidly in the United States,<sup>19</sup> a rational framework needs to be conceived to protect not only the integrity of all sports, but to ensure sports betting is conducted in a functional, consistent, and easily navigable regulatory framework. Some states may never legalize sports wagering, but many already have or will.<sup>20</sup> Regardless of what any one state does, the proliferation of legalized sports betting is inevitable, and will impact sporting events and

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<sup>16</sup> *Id.*; see also Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill in Senate*, LEGAL SPORTS REP. (Dec. 19, 2018, 7:58 PM), <https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/> [<https://perma.cc/L4RR-U7SF>].

<sup>17</sup> Candee, *supra* note 16; see also Conley, *supra* note 13, at 774.

<sup>18</sup> Candee, *supra* note 16.

<sup>19</sup> Rodenberg, *supra* note 9.

<sup>20</sup> *Id.*

competitions everywhere, even in those states that choose never to legalize it. Legislators should not rush into legalizing sports betting without considering the current legal playing field and lessons from the nation's prior experience in regulating gambling on sports. If history's lessons are ignored, prior errors and omissions are bound to recur.<sup>21</sup>

#### I. FEDERAL LAWS APPLICABLE TO SPORTS WAGERING AND THEIR CONTINUING IMPACT ON LEGALIZATION EFFORTS

Any new state or federal law intended to legalize sports wagering must operate alongside current federal statutes governing sports betting other than PASPA, which is no longer enforceable after *Murphy*.<sup>22</sup> A wide array of federal laws still apply to sports gambling, but the most salient are discussed in this Article. Generally, federal statutes build an underlying federal support system for state laws prohibiting some or all forms of gambling.

One of the most significant federal statutes governing sports wagering is the Interstate Wire Act, which is often referred to as the Federal Wire Act (or simply the Wire Act), as amended, and found at 18 U.S.C. § 1084.<sup>23</sup> The Wire Act prohibits persons in the business of wagering or betting from transferring or transmitting sports wagering information across state lines or over wire facilities, including the internet, unless wagering on the sporting events or competitions is legal in both the state where the betting information originates and the state where the information is sent and received.<sup>24</sup>

In September 2011, the Department of Justice's Office of Legal Counsel (OLC) issued a surprisingly narrow interpretation

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<sup>21</sup> *Those Who Fail to Learn From History Are Doomed to Repeat It*, NATURE'S FINEST FOODS, LTD. (August 28, 2014), <http://www.nffonline.com/industry-news/2014/08/28/those-who-fail-learn-history-are-doomed-repeat-it> [<https://perma.cc/9UE5-5KRH>] (“Those who cannot remember the past are condemned to repeat it.” (George Santayana-1905). In a 1948 speech to the House of Commons, Winston Churchill changed the quote slightly when he said (paraphrased), “Those who fail to learn from history are condemned to repeat it.”).

<sup>22</sup> *Murphy*, 138 S. Ct. at 1484–85.

<sup>23</sup> 18 U.S.C. § 1084.

<sup>24</sup> *Id.* at (a).

of the Wire Act,<sup>25</sup> construing it to apply only to wagering on sporting events. In late 2018, the OLC reversed its 2011 opinion and construed the Wire Act to apply more broadly, including sports betting among a number of other covered wagering activities,<sup>26</sup> while also reversing its earlier interpretation of a related federal anti-gambling law pertaining to the use of the internet for gambling transactions,<sup>27</sup> discussed further below. Regardless of whether the OLC's 2011 opinion or its 2018 reversal is correct,<sup>28</sup> the key takeaway with respect to the Wire Act is that it prohibits sports gambling businesses from taking or receiving betting information across state lines in states where sports wagering is illegal. Regardless of which OLC opinion controls for federal law enforcement purposes, the Wire Act prohibits the transmission of sports betting information across state lines unless exclusively between states where such betting is legal.<sup>29</sup>

Another important federal statute pertaining to sports wagering, entitled the Bribery in Sporting Contests Act,<sup>30</sup> makes it a federal criminal offense to influence by bribery any sporting contest if the scheme involves the use of interstate commerce in

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<sup>25</sup> Memorandum for Brian A. Benczkowski, Assistant Attorney General, Criminal Division, from Virginia A. Seitz, Acting Assistant Attorney General, Office of Legal Counsel (Sept. 20, 2011) [hereinafter OLC Memo] (“Crim. Mem.”) <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> [<https://perma.cc/8EJW-7WMP>] (on file with the Office of Legal Counsel in Volume 35).

<sup>26</sup> Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. 1 (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download> [<https://perma.cc/6MPC-SUP8>].

<sup>27</sup> See *id.* at 17–18; see also Unlawful Internet Gambling and Enforcement Act of 2006, 31 U.S.C. §§ 5361–5366.

<sup>28</sup> The 2011 OLC opinion is consistent with an Eastern District of Louisiana decision affirmed by the Fifth Circuit Court of Appeals. OLC Memo, *supra* note 25; see *In re Mastercard*, 132 F. Supp. 2d 468 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).

<sup>29</sup> 18 U.S.C. § 1084 at (a). Until courts decide the precise scope of the Wire Act, legal uncertainty exists with respect to online and mobile device betting because betting instructions inevitably cross state lines when wire facilities that operate in interstate commerce are used. As a result, even if a bettor enters betting instructions—*i.e.*, places her bet—and her betting instructions are received and acted upon by the betting operator—*i.e.*, her bet is *accepted*—within two states where it is legal to wager on sports, one or more states in which the wire facilities are located and through which her betting instructions may cross, may treat sports betting as illegal, and implicate federal law. While arguably the mere location of wire facilities should not create a Wire Act concern, other federal anti-gambling laws prohibiting financial institutions from handling internet wagering transactions are likewise implicated by the uncertainty of the scope of the Wire Act.

<sup>30</sup> 18 U.S.C. § 224 (2012).

any way.<sup>31</sup> This statute is not limited in effectiveness to only states where the proscribed conduct is already unlawful under state or local law,<sup>32</sup> nor does it pre-empt state or local law.<sup>33</sup> Likewise, it does not abrogate or interfere with collegiate or professional sporting associations' private enforcement of their own rules prohibiting sports bribery or corruptive influences.<sup>34</sup> This statute broadly criminalizes a range of corrupt practices that could contaminate a sporting event and applies not just to athletic participants but also to referees or "any individual," who might attempt to influence or corrupt a sporting event's outcome.<sup>35</sup>

Other federal laws affecting sports wagering include the Illegal Gambling Business Act (IGBA),<sup>36</sup> the Interstate Transportation of Wagering Paraphernalia Act (ITWPA),<sup>37</sup> the Interstate and Foreign Travel and Transportation Act in Aid of Racketeering Act ("The Travel Act"),<sup>38</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>39</sup> and the Indian Gaming Regulatory Act (IGRA).<sup>40</sup> Much like the Wire Act, all of these federal laws reinforce and support states' anti-gambling laws, each with its own specific focus.<sup>41</sup> Specifically, the IGRA prescribes how Native American tribes may permit gambling on tribal lands within state law and compacts that tribes must negotiate with states.<sup>42</sup> The ITWPA, in turn, criminalizes the interstate transport of betting tickets and related writings to wagering pools for sporting events.<sup>43</sup> The IGBA prohibits five or more persons from conducting a gambling business for thirty days or more, and handling \$2,000 or more per day in gross revenue, if the business's operations violate state or local law.<sup>44</sup> The Travel Act criminalizes

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<sup>31</sup> *Id.* at (a).

<sup>32</sup> *Id.* at (b).

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

<sup>34</sup> *Id.* at (c)(2).

<sup>35</sup> *Id.* at (c)(3).

<sup>36</sup> 18 U.S.C. § 1955 (2012).

<sup>37</sup> 18 U.S.C. § 1953.

<sup>38</sup> 18 U.S.C. § 1952.

<sup>39</sup> 18 U.S.C. §§ 1962–1990.

<sup>40</sup> 25 U.S.C. §§ 2701–2721.

<sup>41</sup> *See* 18 U.S.C. § 1955(b)(1)(i); 18 U.S.C. § 1953(b); 18 U.S.C. § 1952(b); 18 U.S.C. § 1962(a); 25 U.S.C. § 2701(5).

<sup>42</sup> 25 U.S.C. § 2701(5); 18 U.S.C. § 1953(b); 18 U.S.C. § 1952 (b); 18 U.S.C. § 1962(a); 25 U.S.C. § 2701(5); *see* 18 U.S.C. § 1955(b)(1)(i).

<sup>43</sup> 18 U.S.C. § 1953(a).

<sup>44</sup> 18 U.S.C. § 1955(c).

the use of interstate facilities in a broad array of unlawful activities, including for illegal gambling businesses.<sup>45</sup> Finally, RICO acts as the enforcer by imposing criminal and civil penalties for violation of the aforementioned federal statutes if “enterprises” operate in violation of numerous state or federal laws, including anti-gambling laws.<sup>46</sup> In summary, if states treat sports betting as illegal, federal law treats it likewise within the realm of interstate commerce, but if states legalize sports betting, then federal law generally permits it within and between states that have legalized it.

Another federal law affecting sports wagering is the Unlawful Internet Gambling and Enforcement Act (UIGEA).<sup>47</sup> UIGEA focuses on prohibiting funding transactions for gambling that occurs over the internet.<sup>48</sup> UIGEA restricts financial payments between businesses for internet betting or wagering.<sup>49</sup> UIGEA requires regulation at the federal level to monitor financial “participants”—typically banks—involved in payment systems that fund internet wagering; the regulations require these participants to implement policies and procedures to block the processing of internet wagering transactions with the notable exception of fantasy sports and horse race wagering.<sup>50</sup>

Also affecting sports wagering is the Currency and Foreign Transactions Reporting Act, better known as the Bank Secrecy Act (BSA), which is an anti-money-laundering law (AML) that requires “money services” businesses including casinos and card clubs to report large monetary transactions (\$10,000 or more) through confidential suspicious activity reports (SARs), with enforcement through the Financial Crimes Enforcement Network (FinCEN).<sup>51</sup> The BSA, together with other federal AMLs, effectively prohibits

<sup>45</sup> 18 U.S.C. § 1952(a)(1)–(3).

<sup>46</sup> 18 U.S.C. § 1962(a)–(c).

<sup>47</sup> 31 U.S.C. §§ 5361–5367.

<sup>48</sup> *See* 31 U.S.C. § 5363.

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

<sup>50</sup> 31 U.S.C. § 5364(a)(1)–(2).

<sup>51</sup> *See, e.g.*, 31 U.S.C. §§ 5311–5314 (2001) (establishing one location of the Bank Secrecy Act); *see also* 31 U.S.C. § 310 (2010) (codification of the ability and enforcement powers of the Federal Crimes Enforcement Network); *see generally FinCEN’s Mandate From Congress, FEDERAL CRIMES ENFORCEMENT NETWORK*, <https://www.fincen.gov/resources/statutes> [<https://perma.cc/868E-EUS9>] (explaining the interplay between the Bank Secrecy Act and the Enforcement powers of FinCEN as it relates to SARs).

bettors from structuring their monetary transactions for betting so as to evade the law's reporting obligations. Depending on how sports wagering is legalized and regulated within states, operators might have to comply with the BSA and its regulations.

The foregoing does not exhaustively cover the federal laws that might apply to or affect sports betting, but they do reveal a robust federal legal playing field that continues to regulate sports gambling activities apart from PASPA. This federal playing field, unless amended, fixes the boundaries within which legalization of sports betting must occur; it affects not only the manner in which any state legalization effort must be carried out, but requires Congress, if it chooses to legislate again on sports betting post-*Murphy*, to consider amendments to currently applicable federal statutes.

Before leaving this discussion of the post-*Murphy* federal legal playing, one other important federal sports wagering law (alluded to in the UIGEA discussion above and discussed in detail below) is the Interstate Horseracing Act of 1978 (IHA).<sup>52</sup> The IHA embodies a federalism-style approach that models how Congress and state governments could operate together to regulate sports betting, keeping maximum control within states to prohibit or regulate any form of gambling, while avoiding federal oversight through agencies and maintaining federal legal support of states' gambling laws and policies.<sup>53</sup>

## II. THE INTERSTATE HORSERACING ACT: A "FEDERALISM" APPROACH TO THE REGULATION OF HORSE RACE WAGERING ACROSS STATE LINES

### *A. Background of the Enactment of the Interstate Horseracing Act*

In 1972, Congress began considering legislation to regulate interstate off-track wagering on horse racing after New York City Off-Track Betting Corporation (NYC OTB) accepted off-track bets on the Kentucky Derby without the agreement or consent of

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<sup>52</sup> 15 U.S.C. §§ 3001–07 (2000).

<sup>53</sup> *See id.* at § 3001.

Churchill Downs Incorporated, the sponsor of the Derby.<sup>54</sup> For months prior to the 1972 Derby, NYC OTB unsuccessfully tried to negotiate a remunerative arrangement with Churchill Downs in exchange for a contract permitting it to accept off-track wagers on the Derby.<sup>55</sup> Failing in that effort, NYC OTB went ahead and accepted bets on the Derby anyway, defending its action on the grounds that the nature and popularity of the Derby obviated any necessity for a contract with Churchill Downs to take bets on the race.<sup>56</sup> Additionally, NYC OTB claimed that the Derby was, in any event, in the public domain.<sup>57</sup> Under New York law and New York regulators' authorization, NYC OTB argued it could legally accept wagers on the Derby regardless of Churchill Downs's contractual consent.<sup>58</sup> As a result of this incident, Churchill Downs, other racetracks, and horsemen's associations around the country decried NYC OTB's action as "pirating [their] valuable property rights," and began lobbying Congress to prohibit any form of off-track betting on horse racing across state lines.<sup>59</sup>

Several congressional bills were introduced in the mid-1970s to prohibit "interstate off-track wagering."<sup>60</sup> However, racing and off-track betting interests began to merge after years of Congressional consideration of prohibitive legislation, as legislators recognized the need to negotiate a resolution between federal interdiction and permissible state regulation. Federal legislators were generally uninterested in any federal agency regulating horse racing or off-track betting, preferring instead a

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<sup>54</sup> *Interstate Horseracing Act: Hearing. on S. 1185 Before the S. Comm. on Commerce, Sci., & Transp.*, 95th Cong. 19 (1977) (statements of Thruston B. Morton, Former U.S. Senator and President of American Horse Council).

<sup>55</sup> *See* GAMBLING, *supra* note 10, at 137.

<sup>56</sup> *See id.*

<sup>57</sup> *Interstate Horseracing Act: Hearing. on S. 1185 Before the S. Comm. on Commerce, Sci., & Transp.*, 95th Cong. 127 (1977) (statements of Paul R. Screvane, President of NYC OTB Corp.).

<sup>58</sup> *See id.* at 128.

<sup>59</sup> *Id.* at 71.

<sup>60</sup> *See, e.g.*, S. 2834, 94th Cong. (1975); H.R. 14071, 94th Cong. (1976); H.R. 13875, 94th Cong. (1976); H.R. 11993, 94th Cong. (1976); H.R. 11610, 94th Cong. (1976).

“federalism” approach that left complete control over racing and off-track wagering to the states.<sup>61</sup>

*B. Financing of Horseracing through Pari-Mutuel Wagering*

Virtually every state that allowed horse race wagering at the time of the IHA’s enactment used a racing commission to oversee and regulate the sport and wagering on it, uniformly allowing a form of betting known as “pari-mutuel wagering.”<sup>62</sup> Unlike other sports in the United States, horseracing is financed almost entirely through amounts withheld from pari-mutuel bets on races. Bettors do not wager against a sports book, betting operator, or the house (i.e., the racetrack that sponsors the race) in the pari-mutuel form of wagering.<sup>63</sup> Instead, they wager against each other and the sponsoring racetrack withholds from their bets a commission—known as a “takeout.”<sup>64</sup> Out of this takeout, the racetrack pays state wagering taxes and funds a portion of its operational expenses.<sup>65</sup> The track then pays back to winning bettors that portion of each bet not “taken out” as winnings.<sup>66</sup> In the United States, the takeout rate is set by law or racing

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<sup>61</sup> See S. Rep. No. 95-1117, at 3 (“While this bill provides for the regulation by the federal government of interstate wagering on horseracing, there will be no Government enforcement of the law.”); 124 CONG. REC. H34899-900 (Oct. 10, 1978)(statement of Rep. Fred Rooney: “This bill does not require any Federal money. There is not an additional agency.”; statement of Rep. Joe Skubitz: “I am also satisfied that this bill will increase cooperation between the various interests involved in off-track wagering but will not, and this is critical, involve the creation of a new bureaucracy to regulate interstate wagering on horse-racing. There is no provision for Federal Government enforcement of this law.”).

<sup>62</sup> 15 U.S.C. § 3002(13) (2000); see also *Handicapping 101*, N.Y. RACING ASS’N (2019), <https://www.nyra.com/belmont/racing/nyra-wagering-info> [<https://perma.cc/R6PP-YSXU>] (Pierre Oller introduced “parier mutual” in his native France in 1865 meaning “mutual stake” or “betting among ourselves.” As this form of wagering was adopted in England it became known as “Paris mutuals,” and soon thereafter “parimutuels.” Pari-mutuel odds reflect how much is wagered on each horse or combination relative to the size of the mutuel pool).

<sup>63</sup> See, e.g., *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987 (Ky. 1931).

<sup>64</sup> 15 U.S.C. § 3002(20).

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

<sup>66</sup> *Id.*; see also *Lakhani v. Comm’r*, 142 T.C. 151, 165 (2014) (“[H]e must have known that takeout represents the track’s share of the betting pool and that the expenditures therefrom satisfy obligations of the track, not the betters.”).

regulators, averaging about twenty cents from each dollar bet, with the remaining eighty cents returned to winning bettors.<sup>67</sup>

The sponsoring racetrack not only pays taxes and operating expenses from takeout but also funds the purse account and other benefits for the horsemen and horsewomen racing their horses at the track.<sup>68</sup> The track's purse account is the lifeblood of horseracing because owners and trainers race their horses for purse awards, and make their livings through them.<sup>69</sup> From their purse winnings, jockeys,<sup>70</sup> or drivers,<sup>71</sup> stable employees, grooms, exercise riders, veterinarians, and farriers are compensated, and boarding and other stall expenses are paid. In short, the financial viability of horseracing as a sport depends entirely on takeout.

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<sup>67</sup> See generally, CALIFORNIA HORSE RACING BOARD, REGULAR MEETING 2-2 (June 2008), [http://www.chrb.ca.gov/Board/board\\_packages/Jun-2008.pdf](http://www.chrb.ca.gov/Board/board_packages/Jun-2008.pdf) [<https://perma.cc/A6LX-2Z7X>]; PA. DEP'T OF AGRIC., DOWNS AT MOHEGAN SUN POCONO, 2018 WAGERING FORMAT (2018), <https://www.agriculture.pa.gov/Animals/RacingCommission/Documents/2018%20Horse%20and%20Harness%20Take-out%20rates.pdf> [<https://perma.cc/A8VD-V89X>]; Jennie Rees, *Kentucky Downs Reduces Pick 4 Takeout To 14 Percent*, PAULICK REPORT (Aug. 21, 2018 2:50 PM), <https://www.paulickreport.com/horseplayers-category/kentucky-downs-reduces-pick-4-takeout-to-14-percent/> [<https://perma.cc/2NFX-3P3X>]; Molly Jo Rosen, *Horse Sense: Understanding Takeout*, BET AM. EXTRA (Feb. 26, 2014), <https://extra.betamerica.com/horse-sense-understanding-takeout/> [<https://perma.cc/2ZCK-L3NZ>].

<sup>68</sup> See, e.g., CAL. BUS. & PROF. CODE § 19605.7 (2016); FLA. STAT. §§ 550.625(a)(b), 550.6505 (2000); N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 527(d)(iii) (McKinney 2016) (Horsemen and horsewomen racing at the track typically bargain collectively with the track to fund the purse account in contracted-for amounts from the takeout, and they also bargain for other benefits that are funded from takeout; however, in some states, state law may require the track to fund the purse account and other benefits for employees and horsemen from the takeout.).

<sup>69</sup> See generally *id.*

<sup>70</sup> A jockey is a "person who rides or drives a horse especially as a professional in a race." See, e.g., *Jockey*, MERRIAM-WEBSTER DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/jockey> [<https://perma.cc/RZS8-9NW2>].

<sup>71</sup> See, e.g., *Harness Racing History*, SCARBOROUGH DOWNS (2014), <http://www.scarboroughdowns.com/HarnessRacingHistory.php> [<https://perma.cc/N35R-PL3Z>] ("Harness racing is a worldwide sport where a special breed of horses, called Standardbreds, race around a track while pulling a driver in a two-wheeled cart, called a sulky.").

*C. The IHA “Compromise” that Enshrines Racing Interests’ Proprietary Claim and Establishes States as “Primary” Regulators of Off-Track Wagering*

In 1978, when several interstate horse racing bills were again introduced in Congress,<sup>72</sup> racing interests (made up of “host racing associations” and racehorse owners, trainers, and breeders’ associations)<sup>73</sup> negotiated with off-track betting interests to permit interstate off-track wagering only if racing’s survival could be ensured in spite of the sport’s financial dependency on wagering. Host racetracks analogized themselves to “theaters”<sup>74</sup> and the horsemen<sup>75</sup> to actors “putting on the show.”<sup>76</sup> As such, host tracks and horsemen considered themselves generators of all wagering dollars bet on racing. Accordingly, racing interests refused to agree to off-track betting interests gaining any legal right to accept wagers on horse races in other states—such as the legal right NYC OTB thought it had to accept off-track bets on the 1972 Derby—without the racing interests’ express consent.<sup>77</sup>

Similar to the claims of sports leagues and players’ associations today, racing interests in 1978 claimed “proprietary

<sup>72</sup> Compare S. 1185, 95th Cong. (1977), with H.R. 14089, 95th Cong. (1978) (containing identical language in both the Senate bill and House bill).

<sup>73</sup> 15 U.S.C. § 3002(9) (2018).

<sup>74</sup> *Interstate Horseracing Act: Hearing on S. 1185 Before the Comm. on Commerce, Sci., & Transp.*, 95th Cong. 21 (1977), <https://www.congress.gov/bill/95th-congress/senate-bill/118> [<https://perma.cc/TFG2-V5FP>].

<sup>75</sup> 15 U.S.C. § 3002(12) (using “horsemen” is standard in the industry used in a gender neutral sense and is inclusive of both horsemen and horsewomen, and no slight whatsoever is intended to the critically important women-owners and women-trainers and other women who work and function within the sport of horseracing by this article’s use of this standard industry term “horsemen”); *Interstate Horseracing Act: Hearing on H.R. 14089 Before the H. Subcomm. on Transp. & Commerce of the Comm. on Interstate & Foreign Commerce*, 95th Cong. 18 (1978) (“This bill is intended predominantly as a preventive measure and to establish the proprietorship of the people who are putting on the show.”).

<sup>76</sup> See *Interstate Horseracing Act: Hearing on H.R. 14089 Before the Subcomm. on Transp. & Commerce of the Comm. on Interstate & Foreign Commerce*, 95th Cong. 18 (1978) (testimony of Arnold H. Kirkpatrick, Exec. Sec’y of the Advisory Comm. on Racing in the American Horse Council: “This bill is intended predominantly as a preventive measure and to establish the proprietorship of the people who are putting on the show.”).

<sup>77</sup> See generally Bennett Liebman, *The Wire Act and The Interstate Horse Racing Act: How Did We Get Here?*, Address at Albany Law School Government Law Center (May 3, 2007), in ALBANY LAW SCHOOL GOVERNMENT LAW CENTER <https://www.albanylaw.edu/media/user/glc/wireactandtheinterstatehorseracingact.pdf> [<https://perma.cc/GKR2-9G3A>].

rights” in their sport and argued that the “product”<sup>78</sup> of their sports competitions were the pari-mutuel bets generated on races.<sup>79</sup> Racing interests believed their proprietary rights would be infringed unless federal legislation granted them effective control over off-track wagering to protect their property from potential over-proliferation of off-track betting to the detriment of live-racing tracks, including “minor league” tracks,<sup>80</sup> and prevent the diminution of the entire sport.<sup>81</sup>

Off-track betting interests sought only to assure that under federal law they could continue to accept legal off-track wagers on races occurring in other states. They were especially interested in ensuring they could accept bets on nationally recognized races such as the Kentucky Derby and other similarly renowned “special event” races.<sup>82</sup>

<sup>78</sup> See *Interstate Horseracing Act: Hearing on S. 1185 Before Subcomm. on Commerce, Sci., & Transp.*, 95th Cong. 71 (referring to racetracks’ and horsemen’s “valuable property rights” being “pirated” by out-of-state off-track betting operators); see also *Interstate Horseracing Act: Hearing on H.R. 14089 Before the H. Subcomm. on Transp. & Commerce of the Comm. on Interstate & Foreign Commerce*, 95th Cong. 15 (“This bill will present (sic) [*i.e.*, prevent] an off-track betting system in one State from using a race in another State without the permission of the parties that have a *proprietary interest* in that race.” (emphasis added)). This same “proprietary” sentiment was mirrored in the comments of the floor sponsors of S. 1185 on the Senate floor when the bill was debated. See 95 CONG. REC. 31,553 (1978) (statement of Sen. Magnuson) (“The most important feature of this legislation is that it establishes the proprietary relationship of the horseracing industry: that is, the horsemen and the racetracks over its own races.”); *Id.* at 31,554 (1978) (statement of Sen. Huddleston) (“[T]his legislation represents an effort to protect only the proprietary rights of those engaged in racing. . .”).

<sup>79</sup> See *Interstate Horseracing Act: Hearing on S. 1185 Before Subcomm. on Commerce, Sci., & Transp.*, 95th Cong. 15 (1977) (“It’s . . . not without precedent in other fields of protecting the product of one operator undue exploitation that can be damaging to it by another. . . . There are precedents for this kind of protection. It just happens to be in the gambling field.”). The arguments of racing interests back in the 1970s is similar to that of sports leagues and players’ associations today, but not identical in the sense that horseracing, as a sport, depends largely on wagering take-out for the sport’s financial viability. See James, *supra* note 11. Professional and amateur collegiate sports exist today wholly separate and apart from financial dependency on sports wagering. That stated, the similarity in arguments put forth by sports leagues and players claiming to “own”—in a proprietary sense—the underlying sports contests and statistics and data generated from and around those contests are clearly analogous.

<sup>80</sup> *Interstate Horseracing Act: Hearing on S. 1185 Before Subcomm. on Commerce, Sci., & Transp.*, 95th Cong. 113 (1977) (explaining the necessity of minor tracks for breeding and training purposes).

<sup>81</sup> 95th CONG. REC. 31,555 (1978) (statement of Sen. Mathias) (“I understand the horsemen’s concern that interstate off-track betting, if allowed to spread in an uncontrolled manner, will result in the closing of a large number of the country’s racetracks and the diminution of the sport.”).

<sup>82</sup> See 15 U.S.C. §§ 3002(17), 3004(b)(2) (2018).

These competing interests negotiated a “compromise” that Congress adopted when it passed the IHA.<sup>83</sup> Two years before the IHA was enacted, the Commission on the Review of the National Policy Toward Gambling issued a final report that heralded the tradition in this country of states functioning as the primary regulators of gambling within their borders, with the federal government providing only a supporting role to states’ gambling laws and policies.<sup>84</sup> This national policy toward gambling embodies a “federalism” approach to the regulation of gambling and the compromise embodied in the IHA incorporates a “federalism” structure.

*i. The 1976 report of the commission on the national policy toward gambling*

The Commission started its review of the national policy toward gambling around 1972 after Congress created it in the Organized Crime Control Act of 1970.<sup>85</sup> The Commission’s report represents the only comprehensive federal review to date of the national impact of gambling in the United States and includes the results of several surveys, as well as assessments of state and federal laws and policies in regulating or prohibiting any and all forms of gambling.<sup>86</sup> While bills have been drafted and introduced in Congress since the Commission’s 1976 report that would establish another similar study-and-review Commission<sup>87</sup>—especially in light of the tremendous expansion of gambling since

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<sup>83</sup> See, e.g., 95 CONG. REC. 31,553 (statement of Sen. Magnuson) (“I think this compromise version [of the IHA bill] represents a reasonable compromise between these opposing viewpoints [referring to the opposing views of racing and off-track betting interests].”); *id.* at 31,552 (statement of Sen. Huddleston) (“It has already been detailed how the evolution of this [IHA] bill transpired, and I can say that it is the result of long and arduous hours of discussion and compromise among the horse industry, the off-track betting industry, and the State[s] (sic) through the National Association of State Racing Commissioners.”); *id.* at 31,558 (statement of Sen. Williams) (“[T]he various parties involved in this industry—the racetracks, the horsemen, the off-track betting interests, and the States themselves—have developed the ‘Mathias amendment,’ which is the bill in its present form. I believe that whenever all parties involved in a controversy . . . agree on a position which is reasonable, lawful, and desirable, it must have great merit to it.”).

<sup>84</sup> GAMBLING, *supra* note 10, at 2.

<sup>85</sup> See Organized Crime Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

<sup>86</sup> See GAMBLING, *supra* note 10.

<sup>87</sup> See, e.g., *National Policies Toward Gambling Review Act of 1995: Hearing on H.R. 462 Before Comm. on the Judiciary & Comm. on Res. & Comm. on Ways & Means*, 104th Cong. (1995).

1976—Congress has not yet authorized or commissioned an update of the original national gambling policy report issued by this 1970s-era Commission.

Notwithstanding the more than forty-year age of the Commission's final report, many of its findings are as relevant today, post-*Murphy*, as they were in 1978 when Congress relied on the report to enact the IHA. In particular, the report's first national policy announced:

The Commission believes that the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders. The Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests. The Commission recommends that Congress consider enacting a statute to insure States' continued power to regulate gambling.<sup>88</sup>

This national policy is reflected in the first congressional finding of the IHA itself.<sup>89</sup> The Commission's report recommended that the 94th Congress not adopt then-pending legislation (H.R. 14071) that would have prohibited all interstate off-track betting "to protect and further the horseracing industry" only.<sup>90</sup> Instead, the Commission urged Congress: "That unless there is evidence of a national interest or of interference by one State with the gambling policies of another, each State should have the primary responsibility for determining what forms of gambling may legally take place within its borders."<sup>91</sup> Congress adopted this very rationale, reciting it in the IHA's third finding,<sup>92</sup> and proclaiming

<sup>88</sup> See GAMBLING, *supra* note 10, at 5.

<sup>89</sup> 15 U.S.C. § 3001(a)(1) & (2) ("(a) The Congress finds that— (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests . . .").

<sup>90</sup> See GAMBLING, *supra* note 10, at 140.

<sup>91</sup> *Id.*

<sup>92</sup> 15 U.S.C. § 3001(a)(3).

its overall policy to be “to further [*both*] the horseracing and legal off-track betting industries in the United States.”<sup>93</sup>

*ii. The IHA’s prohibition and consent structure embodies a private interest “compromise” and grants states the “primary” regulatory role over interstate off-track wagering*

The beauty of the IHA is that it does not create a federal regulatory body or assign any federal agency to oversee interstate off-track betting; rather, it endows states—via their state racing commissions—to act as the sole regulators of whether and how much interstate off-track wagering to permit on horseracing within their states, preserving states’ “primary responsibility” over gambling regulation.<sup>94</sup> But the IHA also ensures states cooperate, and cannot interfere with each other in carrying out their roles.<sup>95</sup> It ensures this cooperation through a unique prohibition and consent structure.<sup>96</sup>

First, the IHA prohibits all interstate off-track wagering with a simple ban: “No person may accept an interstate off-track wager except as provided in this chapter.”<sup>97</sup> Following this sentence, the IHA spells out several prerequisite consents that, if fully satisfied, lift the prohibition.<sup>98</sup> The first prerequisite consent is that of the host racing association<sup>99</sup>—*i.e.*, the host racetrack sponsoring the race. As a “condition precedent” to the host track’s consent,<sup>100</sup> however, another prerequisite consent—that of the “horsemen’s group”—must also be obtained.<sup>101</sup> The horsemen’s group consent requires a written agreement between the host track and the horsemen’s group that spells out “terms and

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<sup>93</sup> *Id.* at (b).

<sup>94</sup> *Id.* at (a)(3).

<sup>95</sup> *Id.* at (a)(2).

<sup>96</sup> 15 U.S.C. § 3004.

<sup>97</sup> 15 U.S.C. § 3003.

<sup>98</sup> 15 U.S.C. § 3004(a)(1)–(3).

<sup>99</sup> *Id.* at (a)(1).

<sup>100</sup> *Id.* at (a)(1)(A).

<sup>101</sup> *Id.* The “horsemen’s group” is defined as “the group which represents the majority of owners and trainers racing [at the host racing association], for the races subject to the interstate off-track wager on any racing day.” 15 U.S.C. § 3002(12).

conditions<sup>102</sup> for the host track to give its consent.<sup>103</sup> Following these private racing-interest consents, the IHA confers consents onto the state racing commissions of both the host state and the off-track betting state.<sup>104</sup> Courts have interpreted the satisfaction of all of these prerequisite consents as mandatory before any interstate off-track wager may be legally accepted.<sup>105</sup>

The IHA, with this prohibition and consent structure, adopts the “federalism” approach recommended by the Commission on the Review of the National Policy Toward Gambling. The approach also ensures that states do not interfere with each other’s policies prohibiting, or regulating, horseracing or wagering.<sup>106</sup> Consequently, no state can legally authorize a local off-track betting operator to take bets on races occurring in another state, unless the other state’s racing commission has consented.<sup>107</sup> This prohibition and consent structure paved the way for horseracing and off-track betting interests to reach the

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<sup>102</sup> Compare 15 U.S.C. § 3002(22), with 15 U.S.C. § 3004(a)(1)(A).

<sup>103</sup> This “condition precedent” creates the horsemen’s group’s consent right to the interstate off-track wagering. See *Horsemen’s Benevolent & Protective Ass’n–Ohio Div. v. DeWine*, 666 F.3d 997, 1000 (6th Cir. 2012) (“In practice, . . . the Act does require the consent of the horsemen’s group.”). This horsemen’s group’s “consent” is often referred to as the horsemen’s “veto.” *Ky. Div., Horsemen’s Benev. & Prot. Ass’n v. Turfway Park Racing Ass’n*, 20 F.3d 1406, 1415 (6th Cir. 1994). I represented the horsemen’s associations in both of these cases.

<sup>104</sup> 15 U.S.C. § 3004(a)(2)–(3).

<sup>105</sup> See, e.g., *DeWine*, 666 F.3d at 999–1001 (stating that consent of the host racing association’s horsemen’s group is required); *Turfway Park Racing Ass’n*, 20 F.3d at 1412–15 (upholding the IHA’s constitutionality despite occasional vague language and discussing the required nature of the consents in § 3002(a)(1) and referring to the racetrack owner’s and the horsemen’s group’s consents as “veto” rights).

<sup>106</sup> See GAMBLING, *supra* note 10, at 8.

<sup>107</sup> Compare 15 U.S.C. § 3001(a)(2) & (3), with § 3004(a)(2) & (3).

aforementioned “compromise,”<sup>108</sup> thus opening the door for Congress to enact the IHA with full industry support.<sup>109</sup>

The IHA’s prohibition and consent structure, unlike the PASPA statute stricken in *Murphy*, has weathered constitutional challenges pursuant to the Commerce Clause (i.e., unlawful delegation of congressional power to regulate commerce),<sup>110</sup> the Tenth Amendment (i.e., anti-commandeering),<sup>111</sup> and the Fourteenth Amendment (i.e., vagueness and irrationality in violation of “substantive due process”).<sup>112</sup> The IHA has survived these legal challenges in large part because of its prohibition and consent structure.<sup>113</sup> The United States Supreme Court long ago approved of this kind of regulatory structure as early as 1917,<sup>114</sup> re-affirmed in 1939,<sup>115</sup> and it was reapproved by the Sixth Circuit Court of Appeals in 1994 in upholding the IHA’s constitutionality.<sup>116</sup> The Sixth Circuit also upheld the constitutionality of the IHA against a First Amendment attack based on the argument that the IHA’s regulation of telecasting (i.e., simulcasting) horse races infringed a racetrack’s “commercial speech;” however, the Sixth Circuit recognized the central scope and purpose of the IHA was to regulate only interstate off-track

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<sup>108</sup> 95 CONG. REC., *supra* note 78, at 31,552–53 (statement of Sen. Magnuson).

<sup>109</sup> *See, e.g.*, 124 CONG. REC. H34,897–99 (daily ed. Oct. 10, 1978) (statement of Rep. Carter) (“The [horse racing] industry has gotten together with the off-track betting people and they have reached a compromise which is supported by all segments of the racing industry”); *see also* 124 CONG. REC. H34,897–900 (daily ed. Oct. 10, 1978) (statement of Rep. Skubitz) (“I am satisfied that this [IHA House] bill is an acceptable compromise to meet the needs of the racing [and] legal off-track betting industries”) (Note: the IHA House bill, H.R. 14089 was identical to the Senate bill, S. 1185, which was ultimately enacted as the IHA); *see also* 124 CONG. REC. S31,552–53 (daily ed. Sept. 26, 1978) (statement of Sen. Huddleston) (“It has already been detailed how the evolution of this [IHA Senate] bill transpired, and I can say that it is the result of long and arduous hours of discussion and compromise among the horse industry, the off-track betting industry, and the State[s] (sic) through the National Association of State Racing Commissioners.”); *see also* 95 CONG. REC., *supra* note 78.

<sup>110</sup> *See Turfway Park Racing Ass’n*, 20 F.3d at 1416–17.

<sup>111</sup> *See id.* at 1415–16.

<sup>112</sup> *See id.* at 1413–16.

<sup>113</sup> *See id.*

<sup>114</sup> *See Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (explaining that a legal structure that imposes general property restrictions may constitutionally be removed and lifted by one half of the property owners affected by the restrictions).

<sup>115</sup> *See Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (explaining that a legal structure whereby Congress places a restriction upon its own regulation by withholding its operation unless two-thirds of those affected by the restriction vote for it).

<sup>116</sup> *Turfway Park Racing Ass’n, Inc.*, 20 F.3d at 1416.

wagering—not simulcasting, telecasting, or any other form of broadcasting of horse racing.<sup>117</sup>

*iii. The IHA's market-area approvals intend to protect live racing and the sport itself*

The IHA further creates market-area approvals in addition to its prerequisite consents discussed above.<sup>118</sup> Its market-area approvals were included to protect live-racing tracks from financial disruption due to the potential for overgrowth of off-track betting on interstate simulcasts to off-track betting sites located near live-racing tracks.<sup>119</sup> The IHA's market-area approvals protect both "60-mile tracks"<sup>120</sup> and adjoining-state tracks,<sup>121</sup> but are subject to exceptions for "special event" races in states that allow near year-round pari-mutuel wagering on horseracing.<sup>122</sup>

The courts have interpreted the IHA's market-area approvals as enforceable only by the host racing association, its horsemen's group, and the host or off-track state racing commissions.<sup>123</sup> The market-area approvals are not enforceable by live-racing tracks, off-track betting sites, or horsemen's associations located in the off-track betting state because of the IHA's narrow civil enforcement scheme.<sup>124</sup> These approvals are

<sup>117</sup> See generally *id.* at 1412 (illustrating that since the object of the IHA is to regulate interstate off-track wagering, the trial court's striking the IHA on First Amendment grounds did not withstand appellate scrutiny. The object of the IHA is *not* to regulate the telecasts of races, but instead, the wagering accepted on races. The IHA makes interstate wagering on horseracing illegal unless appropriate consents are obtained, and it does so regardless whether the race on which the wager is placed is telecast—*i.e.*, simulcast or broadcast—or not).

<sup>118</sup> See 15 U.S.C. § 3004(b).

<sup>119</sup> Compare 15 U.S.C. § 3002(14), with § 3004(b)(1)(A) & (B); see also S. Rep. No. 95-1117, at 4145 (1978).

<sup>120</sup> *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n, Inc.*, 989 F.2d 1266, 1269 (1st Cir. 1993).

<sup>121</sup> 15 U.S.C. § 3004(b)(1)(B).

<sup>122</sup> *Id.* (explaining that consequently the exception spelled out in the IHA for "special event" races arises only in states with racing days of at least 250 or more per year. This number of racing days works out to near year-round racing given that racehorses are typically not raced every day of the year).

<sup>123</sup> See *Sterling Suffolk Racecourse Ltd. P'ship*, 989 F.2d at 1270–73; accord *New Suffolk Downs Corp. v. Rockingham Ventures, Inc.*, 656 F. Supp. 1192, 1194 (D. NH. 1987).

<sup>124</sup> See generally *Sterling Suffolk Racecourse Ltd. P'ship*, 989 F.2d at 1273; accord *New Suffolk Downs Corp.*, 656 F. Supp. 1192, 1194 (D. NH. 1987) (note, this does not mean that the state laws of the off-track betting state may not provide market-area protections enforceable by private parties in that state).

arguably less successful in accomplishing their original intent for inclusion than the prerequisite consents discussed above.<sup>125</sup> But, to date, Congress has not amended the IHA to reverse the court decisions that limit the enforceability of the IHA's market-area approvals.<sup>126</sup>

### III. IS THE IHA AN APPROPRIATE MODEL FOR THE LEGALIZATION OF SPORTS BETTING?

Since 1978, the IHA has been amended only once—in 2000—to expand its scope by permitting electronic off-track wagering.<sup>127</sup> The lack of any other amendments over its nearly forty-one-year lifespan suggests it could embody a worthy model for the legalization of sports betting in general. Many admire the IHA's "federalism" structure that leaves to states primary control over sports gambling, yet ensures that sports participants are capable of receiving some form of remuneration from the betting that occurs on their sport.<sup>128</sup> This section explores whether the IHA is a good model for sports betting legalization in general.

As a legislative model, the IHA might be called "good" if it has successfully regulated horseracing and wagering across state lines—but success is not easily measured, at least objectively. As a matter of law and policy, the IHA's success has been debated in various places—in both litigation,<sup>129</sup> and industry commentary.<sup>130</sup>

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<sup>125</sup> Brief for Defendant-Appellee at 10–13, *Sterling Suffolk Racecourse Ltd. P'ship. v. Burrillville Racing Ass'n, Inc.*, 989 F.2d 1266 (1993) (No. 92-2260), 1993 WL 13625149.

<sup>126</sup> See 15 U.S.C. §§ 3001–3007.

<sup>127</sup> 15 U.S.C. § 3002(3); Pub. L. No. 106-553, § 1(a)(2), 14 Stat. 2762, 2762A-108 (2000) (adding "and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools" to the definition of "interstate off-track wager.").

<sup>128</sup> See, e.g., *Turfway Park Racing Ass'n*, 20 F.3d at 1416–17 (6th Cir. 1994).

<sup>129</sup> See *Turfway Park Racing Ass'n*, 20 F.3d at 1410–15.

<sup>130</sup> See, e.g., Joel Turner, *New Racing Economics Show Inadequacies of 1978 Interstate Horse Racing Act*, THOROUGHBRED RACING COMMENTARY (Feb. 16, 2015) [hereinafter Turner, *Racing Economics*], <https://www.thoroughbredracing.com/articles/new-racing-economics-show-inadequacies-1978-interstate-horse-racing-act> [https://perma.cc/Q3FS-PA3Q]; Joel Turner, *Update the 1978 Interstate Horse Racing Act—Survival of the US Industry Depends on it*, THOROUGHBRED RACING COMMENTARY (Feb. 17, 2016) [hereinafter Turner, *Survival*], <https://www.thoroughbredracing.com/articles/update-1978-interstate-horse-racing-act-%E2%80%93-survival-us-industry-depends-upon-it> [https://perma.cc/2SM6-GV9S].

From the perspective of revenue for the sport, the IHA has unquestionably grown total wagering dollars on horseracing. In 1980, total wagering handle was about \$6.6 billion, and that grew to a peak of just over \$15.9 billion in 2003; in 2017, total handle dipped to about \$11.5 billion.<sup>131</sup> Even so, total handle by 2017 had grown significantly since 1990, leaving no doubt the IHA has expanded total revenue for the sport.<sup>132</sup>

Notwithstanding that revenue growth, some commentators see foreboding trends—especially since much of it occurred after 2000 when Congress enacted minor amendments to the IHA that had major impacts on the sport.<sup>133</sup> Since 2000, an increasing amount of wagering handle comes from off-track betting, but less of that growing handle seems to flow back into horsemen’s purses.<sup>134</sup> Even in 2017, when total handle dipped to \$11.5 billion, an increasing share of total wagering revenue came from off-track handle at just over eighty-five percent.<sup>135</sup> The 2000 amendments unquestionably initiated tremendous growth in off-track betting by allowing electronic wagering through what is now called “account deposit wagering” (ADW wagering) via computers and mobile devices, which permit wagers to be placed anywhere a bettor is located so long as it is legal to wager there.<sup>136</sup> However,

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<sup>131</sup> *Pari-Mutuel Handle*, THE JOCKEY CLUB (2019), <http://www.jockeyclub.com/default.asp?section=FB&area=8> [https://perma.cc/G4J2-QLMT].

<sup>132</sup> *Id.*

<sup>133</sup> 15 U.S.C. § 3002(3); Pub. L. No. 106-553, § 1(a)(2), 14 Stat. 2762, 2762A-108 (2000).

<sup>134</sup> See, e.g., Cummings Associates, *Analysis of the Data and Fundamental Economics Behind Recent Trends in the Thoroughbred Racing Industry*, NAT’L HORSEMEN’S BENEVOLENT & PROTECTIVE ASS’N (2004), [https://nationalhbpa.com/wp-content/uploads/cummings\\_report7-17-04.pdf](https://nationalhbpa.com/wp-content/uploads/cummings_report7-17-04.pdf) [https://perma.cc/JM9N-PEPU]; Turner, *Survival*, *supra* note 130.

<sup>135</sup> *Pari-Mutuel Handle*, *supra* note 131.

<sup>136</sup> See UTAH CODE ANN. § 76-10-1101 (West 2012); UTAH CODE ANN. §§ 4-38-101–4-38-501 (West 2017) (stating that some jurisdictions do not allow gambling or wagering in any capacity. For example, Utah State Law prohibits risking anything of value contingent upon the outcome of any contest, game, scheme, or gaming device when the outcome is based on chance. Additionally, horse wagering (licensed or otherwise) is also prohibited); Turner, *Racing Economics*, *supra* note 130.

ADW wagering raises bettor poaching issues,<sup>137</sup> as well as fairness concerns stemming from market integration and consolidation between certain larger racetracks and ADW companies. Some argue this distorts the agreement process between host racetracks and their horsemen and casts a shadow over the future health of the sport unless legislative changes are made to the IHA.<sup>138</sup>

#### *A. Comparisons Between Horseracing and Other Sports*

Regardless of the concerns regarding the IHA and its amendments, there is no question that race wagering has grown beyond the most generous projections of the 1978 Congress that originally enacted the IHA and those who supported its passage. Given that horseracing depends on wagering for financial viability, the IHA can only be viewed as a financial success. Still, whether financial success alone means the IHA is a “good” model for the legalization of sports betting in general depends, in part, on the comparison between horseracing and other sports.

Horseracing clearly differs from other sports in multiple important ways. First, other sports exist financially separate from betting while horseracing depends on it. Horseracing’s dependence on wagering is a key reason racing interests in 1978 claimed their proprietary rights were pirated after off-track betting interests began taking bets on racing without their consent. Additionally, their property-based claims are what informed the IHA compromise that ultimately permitted interstate off-track wagering to be legalized subject to the consents of the host racing association and its horsemen’s group.

At the dawn of sports betting spreading nationwide, sports leagues, players’ associations, and athletes are asserting similar or

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<sup>137</sup> Bettor “poaching” occurs when bettors who would otherwise go to a local racetrack and wager on racing are encouraged by the ease of ADW wagering and financial incentives offered by ADW companies to forgo making a trip to the track to bet, and instead to wager via their ADW account, either online or via their mobile device. ADW companies have traditionally lessened the impact of “poaching” by offering to pay source market fees to racetracks based on the wagers taken from bettors whose residences are located within a twenty-five or fifty-mile radius of the track to help ameliorate the loss of bets from bettors who might otherwise have attended the track to wager. But, even so, ADW betting returns less economically to the horsemen’s purse account than wagers placed on-track, and in the long run, ADW betting may continue to be perceived by horsemen as not fairly contributing to the sport of horseracing.

<sup>138</sup> Turner, *Racing Economics*, *supra* note 130.

equivalent property-based claims. Their clamor for royalties, integrity fees, exclusive licensing rights of official sports data, and statistics for use in sports betting are all variations on a theme arising out of the concept of ownership and property rights on which they base their claims to remuneration from sports betting revenue. Their property-based notions, while differing in legal foundation, are clearly analogous to the proprietary rights claimed by racing interests back in 1978 at the dawn of the IHA.

That stated, regulation and governance of horseracing differs significantly from other sports, and likewise the regulation of wagering on racing differs from the regulation of sports betting. Because of horseracing's long association with wagering, state racing commissions (or similar racing regulatory bodies) were created to protect the public from both improper conduct in and around the horse races and from improper wagering.<sup>139</sup> For example, state-approved racing stewards are the eyes and ears of the state's racing regulatory body. In some ways, stewards function like officials—such as referees or umpires in other sports—in that they call fouls committed by racehorse jockeys or drivers during race competitions. But, in other ways, they are unlike other sports' officials because they enforce rules that apply outside of race competitions, such as rules to ensure no improper race medication was administered to a racehorse prior to a race,<sup>140</sup> or rules permitting stewards to eject undesirable persons from track grounds,<sup>141</sup> to name a few.<sup>142</sup>

Additionally, state racing regulatory bodies are charged with overseeing the wagering process, including promulgating rules that govern wagering and hearing disputes arising out of wagering.<sup>143</sup> State racing bodies issue permits or licenses to racetracks and off-track betting sites allowing them to accept wagers on horse races. They oversee state laws governing if and

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<sup>139</sup> *See, e.g.*, KY. REV. STAT. ANN. § 230.215 (LexisNexis 2018).

<sup>140</sup> *See, e.g.*, KY. REV. STAT. ANN. § 230.260 (LexisNexis 2018).

<sup>141</sup> *Id.*

<sup>142</sup> Stewards' actions are reviewable by the state racing regulatory body, and stewards cannot take adverse action against a racing licensee or permittee without the state providing a due process-compliant procedure for review, usually in an administrative hearing process in which the racing regulatory body reviews and decides, in a final decision, whether to adopt, modify, or reverse the stewards—a racing regulatory body decision that is further appealable into the state court system. *See Barry v. Barchi*, 443 U.S. 55 (1979).

<sup>143</sup> *See generally* KY. REV. STAT. ANN. § 230.260 (LexisNexis 2018); 3 PA. CONS. STAT. § 9311 (2018).

how wagering is allowed—*e.g.*, on-track wagering only, or interstate and intrastate simulcast wagering, as well as ADW wagering. Finally, they oversee the wagering process itself, including the licensing and oversight of tote companies that tabulate on-track and off-track bets, and that calculate the ever-changing pari-mutuel odds displayed to bettors. In this respect, the IHA allows state racing commissions to decide whether to allow merged wagering pools across state lines; but under the IHA's rubric, states must cooperate multi-jurisdictionally in exchanging wagering information to properly oversee the tote companies and the multiple betting sites that feed betting information into them, wherever they may be located.

In other sports, enforcement of competitive rule violations or event infractions, as well as oversight of officials' calls or unruly spectators, are not the responsibility of any public state regulatory body. Integrity concerns in the performance of other sports are matters typically overseen by a "private integrity oversight entity"<sup>144</sup> such as a sports league, outside commission, committee, association, or other sports governing body connected to the sport. Officials' calls are typically unreviewable outside the game or contest, and seldom, if ever, by a public agency.<sup>145</sup> Most private integrity oversight entities fashion the rules or codes governing the sport, and provide enforcement and training of the rules to ensure sports contests or competitions are conducted or performed with honesty and integrity by the participants and the officials in charge of them.

States that have legalized sports betting typically do not require their state gaming agency or other sports betting oversight body to monitor and ensure sports integrity. Bets are frequently

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<sup>144</sup> See, *e.g.*, Global Public Square Staff, *The Real Problem with Sports' Governing Bodies*, CNN (June 17, 2014, 12:57 PM), <http://globalpublicsquare.blogs.cnn.com/2014/06/17/the-real-problem-with-sports-governing-bodies/> [<https://perma.cc/KX6F-3Y5R>] (explaining that most sports governing bodies are private, or quasi-private, profiting entities).

<sup>145</sup> See Mark Maske, *NFL Will Consider Making Pass Interference Calls Reviewable, After Rams-Saints Gaffe*, WASH. POST (Jan. 21, 2019), [https://www.washingtonpost.com/sports/2019/01/21/nfl-will-consider-making-pass-interference-calls-reviewable-after-rams-saints-gaffe/?tid=ss\\_mail&utm\\_term=.82a86b1505e9](https://www.washingtonpost.com/sports/2019/01/21/nfl-will-consider-making-pass-interference-calls-reviewable-after-rams-saints-gaffe/?tid=ss_mail&utm_term=.82a86b1505e9) [<https://perma.cc/4AMD-8774>]; see generally Gregory Ioannidis, *Challenging the Actions of a Sports Governing Body*, SPORTS L. & PRACTICE BLOG (Apr. 2, 2013), <http://lawtop20.blogspot.com/2013/04/challenging-actions-of-sports-governing.html> [<https://perma.cc/7P8H-GT9X>].

taken on sporting events or contests irrespective of whether the contests are occurring within the betting state or between teams located solely within the betting state. In these states, it is principally the sports betting operators and their vendors that are subject to the state's public regulatory body oversight. That oversight, however, is focused primarily on ensuring integrity in the wagering and its process, not the underlying sporting event or contest.<sup>146</sup>

The dual focus of state racing regulators on integrity in racing and wagering—coupled with the IHA's requirement that states cooperate with each other in interstate off-track wagering—ensure that necessary information for regulatory oversight of both the sport and wagering is openly accessible to and freely exchanged between each affected state's racing regulatory body. For example, if an off-track wagering state's regulator picks up on an unusual or irregular betting situation, the off-track state can easily reach out to the host state's regulators under the cooperation requirement in the IHA. Furthermore, because tote companies are regulated by the cooperating states, the companies can be quickly contacted to assist in assessing any noted betting irregularities. This cooperation helps ensure both the integrity of horseracing and of the wagering itself because each state's racing regulatory body oversees both. Additionally, regulators of racing states cooperate and exchange information through an association of racing commissioners that assist with integrity and oversight of the sport and the wagering.<sup>147</sup>

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<sup>146</sup> See generally Ioannidis, *supra* note 145. To be sure, the regulatory oversight of wagering integrity in sports betting states will involve the expectation that betting operators need to monitor their bettors' wagering activity and report suspicious betting activity. As a result, operators routinely watch for in-person suspicious bettor conduct, and irregular betting patterns that may appear in data analytics of aggregate betting trends or from in-person observations of suspicious bettor behavior. Suspicious or irregular betting activity of any kind can reveal an investigatory need into whether coordination was occurring between bettors and the participants or officials involved in, or anyone connected to, the underlying sports competition or contest. In this sense, the close regulation of betting operators in sports betting states necessitates the exchange of suspicious betting information with law enforcement and sometimes with the sports teams or other private integrity oversight entities charged with enforcing integrity within the sport. This information exchange inevitably occurs across state lines and will usually involve law enforcement at either the state or federal level, or both. It may also involve the voluntary, but *not legally required*, involvement of the sports team or other private integrity oversight entities that oversee the integrity of the underlying sport.

<sup>147</sup> See generally ASS'N OF RACING COMM'R INT'L, <https://arci.com> [<https://perma.cc/F4ND-9CWW>].

One success of the IHA is the cooperation and information exchange that necessarily occurs under its rubric between state regulators. This cooperation and oversight takes no cognizance of state lines and often involves multi-state input, especially with the national merged wagering pools involved in most interstate simulcast wagering.<sup>148</sup> In contrast, sports betting legalization is occurring or expanding one state at a time. While the betting is, for now, restricted to intrastate wagering (in large part due to federal interstate gambling laws), the sporting events, contests, or competitions are typically occurring in other states than the betting state, or involve teams or athletes from different locations than the betting state. In other words, practically speaking, an interstate connection exists with all legalized sports betting, although nothing compels states' sports betting regulators to cooperate with other states' regulators, or with private integrity oversight entities governing the underlying sports.

With respect to its regulatory framework, the IHA appears to offer a successful federalism model for regulating sports wagering in general. States have remained in complete control over what gambling occurs within their borders. Yet, at the same time, they have had to cooperate and exchange critical information to help maintain integrity in both the underlying sport and wagering on it. Should Congress, post-PASPA, decide to legislate regarding sports betting, it may be worthy to recall the recommendations in the Final Report of the Commission on the Review of the National Policy Toward Gambling that informed the structural framework enacted into the IHA.<sup>149</sup>

### *B. Litigation under the IHA*

Before announcing the IHA to be a good legislative model for sports betting regulation, another perspective should be considered that reviews some of the important litigation arising under it. Most IHA litigation has involved its interface with, or impact on, other laws, but some litigation has arisen from its

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<sup>148</sup> Three men were accused of rigging wagers that generated \$3.2 million in payoffs back in 2002. See Jon Morgan, *Scandal Shakes Racing to Roots*, BALTIMORE SUN (Nov. 17, 2002), <https://www.baltimoresun.com/news/bs-xpm-2002-11-17-0211170060-story.html> [<https://perma.cc/LJ5U-VX4N>].

<sup>149</sup> See GAMBLING, *supra* note 10.

definitions and enforcement provisions. The nature of these litigated disputes provide insight into how good of a federalism model the IHA may be for sports betting legalization in general.

*i. Interaction between the IHA and antitrust law*

The IHA was enacted with less-than-clear legislative history regarding whether it was intended to repeal,<sup>150</sup> in any way, the applicability of the Sherman Antitrust Act to the sport of horseracing and wagering.<sup>151</sup> The Sherman Act has long been applied to horseracing as a sport because owners and trainers are not employees of racetracks. Courts have thus treated them as individual businesspersons in horizontal competition with each other for purposes of antitrust law.<sup>152</sup>

The IHA's intersection with antitrust has spawned several litigated cases. Most litigation stems from the "horsemen's group"<sup>153</sup> withholding racehorse owners' and trainers' consent to interstate simulcasting and off-track wagering.<sup>154</sup> For example, disagreements have arisen between horsemen's groups and out-of-state betting sites seeking to simulcast and accept off-track wagers, but to whom the horsemen have refused to give their consent.<sup>155</sup> Poignant disputes have arisen between horsemen's groups and the host racetrack itself when the horsemen and track

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<sup>150</sup> H.R. REP. NO. 95-1733, at 4 (1978); S. REP. NO. 95-554 (1977); S. REP. NO. 95-1117 (1978); *see generally* *Saratoga Harness Racing v. Veneglia*, No. 94-CV-1400, 1997 WL 135946, at \*5 n.6 ("This [IHA] legislation in no way modifies or affects the scope or application of the antitrust laws," but noting "[t]h[is] quoted passage is from H.R. 14089. . . . [reported at] H.R.Rep. No. 1733, [but]. . . . the bill that eventually became the IHA was S. 1185 [reported at S. Rep. No. 95-1117]. . . ."); *Churchill Downs, Inc. v. Thoroughbred Horsemen's Group, et al.*, 605 F. Supp. 2d 870, 885 n.22 (W.D. Ky. 2009) ("[T]he Senate [Report No. 95-1117] did not make any mention of antitrust concerns and this Court is not persuaded that Congress expressed any intent to apply or repeal the antitrust laws through its enactment of the IHA."). I served as counsel for the Horsemen's Group in the last case mentioned.

<sup>151</sup> *Veneglia*, 1997 WL 135946, at \*5.

<sup>152</sup> *See, e.g., Yonkers Raceway, Inc. v. Standardbred Owners Ass'n*, 153 F. Supp. 552 (S.D.N.Y. 1957); *United States Trotting Ass'n. v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981).

<sup>153</sup> 15 U.S.C. § 3002(12) (2019).

<sup>154</sup> *See Hileah, Inc. v. Fla. Horsemen's Benevolent & Protective Ass'n*, 899 F. Supp. 616 (S.D. Fla. 1995); *Alabama Sportservice, Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, 767 F. Supp. 1573 (M.D. Fla. 1991); *Veneglia*, 1997 WL 135946, at \*5.

<sup>155</sup> *Veneglia*, 1997 WL 135946, at \*5; *Churchill Downs, Inc.*, 605 F. Supp. 2d at 885–86 n.22.

cannot agree on simulcasting terms and conditions, or their contract negotiations otherwise stall.<sup>156</sup> In these circumstances, the ensuing litigation often involves claims that the horsemen's group refused to consent in violation of Section 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies in restraint of trade.<sup>157</sup>

Courts' response to such claims have varied. Some have held that since the IHA authorizes the horsemen to act collectively through their "horsemen's group," the IHA must impliedly repeal antitrust law.<sup>158</sup> Others have held there is no implied repeal, but there is simply no antitrust violation for horsemen to do what the IHA expressly authorizes them to do by and through their "horsemen's group."<sup>159</sup> How far the IHA may go, in authorizing conduct that some may believe violates the antitrust laws, remains for future litigation;<sup>160</sup> however, none of these antitrust claims

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<sup>156</sup> See, e.g., Ky. Div., *Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406 (6th Cir. 1994) (explaining Turfway Park counterclaimed against the horsemen's group that its actions in withholding consent violated antitrust law); see also *Hialeah, Inc.*, 899 F. Supp. at 616. But see *Churchill Downs, Inc.*, 605 F. Supp. 2d at 885–86 n.22 (explaining that the "horsemen's group" as authorized to act in the IHA itself must be able to cooperate and act together in exercising the horsemen's IHA consent rights).

<sup>157</sup> 15 U.S.C. § 1 (2019). The theory of such antitrust claims is that the horsemen's group is carrying out the collective will of the horizontally competitive owners and trainers, and their combined actions within and through the "horsemen's group" amounts to a combination or conspiracy between horsemen in violation of the antitrust laws.

<sup>158</sup> See *Churchill Downs*, 605 F. Supp. 2d at 885–86 n.22.

<sup>159</sup> *Id.*

<sup>160</sup> Part of the reason the horsemen get sued for alleged violations of antitrust based on their collective "horsemen's group" actions—authorized in the IHA—stems from the IHA's ambiguous legislative history that appears to envision the host racetrack having a "direct" role in negotiating interstate off-track wagering contracts with third parties, and the horsemen only an "indirect" role. See S. Rep. No. 95-1117, at 7–8 (1978). This "direct" and "indirect" distinction is dubious at best, and in any event, anachronistic in today's internet-connected world. Moreover, it is contrary to the horsemen's groups' ability to "veto" simulcast wagering at any out-of-state off-track betting site if such betting at that site might, in the horsemen's view, be harmful to the sport or otherwise to horsemen's interests. See *Turfway Park Racing Ass'n*, 20 F.3d at 1415 (horsemen are looking out for the sport of horseracing). Horsemen's groups wanting to exercise informed consent to interstate, off-track wagering cannot remain ignorant of the impact that such wagering may have at out-of-state locations. To become so informed, the horsemen's group may have to take an active, more direct role in negotiating terms and conditions of off-track wagering contracts with prospective out-of-state simulcasting sites.

would have been litigated had Congress been clearer on how it intended the IHA to interact with antitrust laws.<sup>161</sup>

*ii. The impact of the IHA on contrary state laws*

The impact of the IHA on inconsistent state laws has likewise been litigated. The constitutionality of state statutes that purport to revoke the horsemen's consent right and empower a state racing commission to overrule the horsemen's group's refusal to consent to off-track wagering have been successfully challenged.<sup>162</sup> While the IHA endows states with the "primary role" over the regulation of horseracing and off-track betting—and in that sense, follows a "federalism" model that elevates state racing commissions' authority—the IHA as a federal law creates enforceable private-party civil rights that cannot be restricted or denied by state officials acting under the color of state law.<sup>163</sup> Accordingly, state laws contrary to or inconsistent with the IHA's federally created consent rights may be stricken after litigation challenging their constitutionality under the Supremacy Clause,<sup>164</sup> with the potential for fee-shifting against the state and in favor of the prevailing litigant.<sup>165</sup>

Any potential sports wagering legislation at the federal level that confers upon leagues, teams, players, or athletes a federally created right to control whether sports betting occurs at

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<sup>161</sup> Antitrust law disputes also come up at the intersection of the IHA in other factual contexts regarding simulcasting and off-track betting. *See, e.g.*, *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 294 F. Supp. 2d 1291, 1306 (discussing the application of antitrust laws to simulcasting markets in the context of a dispute between off-track betting networks of different racetracks in Florida). Again, clarity in how Congress intended the IHA to interact with antitrust law and policy would have been much more desirable from the date the IHA was enacted.

<sup>162</sup> *See* *Horsemen's Benevolent & Protective Ass'n—Ohio Div. v. DeWine*, 666 F.3d 997, 1000–01 (6th Cir. 2012).

<sup>163</sup> *See id.*

<sup>164</sup> U.S. CONST. art. VI, cl. 2; *See generally DeWine*, 666 F.3d at 1000–01 (declaring Ohio's statutory scheme to be preempted by the IHA).

<sup>165</sup> In *DeWine*, the Ohio State Racing Commission was ordered to pay the attorneys' fees of the Plaintiff-horsemen's group. *Dewine*, 666 F.3d at 1000–01. (Please note, I know this because I served as counsel in the case for the Ohio Horsemen's Benevolent & Protective Ass'n). Both attorneys' fees and costs are awardable to prevailing plaintiffs in civil rights litigation brought pursuant to 42 U.S.C. § 1983. *See* 42 U.S.C. § 1988 (2019). The potential for fee-shifting presents a potent litigation tool against state regulators who attempt to enforce state laws contrary to the full exercise of the civil rights created within a federal statute such as the IHA.

all or the exclusive right to license the use of only official sports data or statistics—regardless whether such legislation adopts a “federalism” framework like the IHA—is subject to the preemptive effect of the Supremacy Clause.<sup>166</sup> As a result, Congress should consider whether and how it intends any federal sports betting regime to impact or preempt state law.

*iii. The need for clarity and practicality in key definitions*

Litigation has also arisen regarding whether a horsemen’s group “represents the majority of owners and trainers racing” at the host racetrack “on any racing day.”<sup>167</sup> The IHA’s definition of “horsemen’s group” is not as clear in practice as it may appear in words.<sup>168</sup> Disputes between a host racetrack and its horsemen, as well as between horsemen’s groups, can arise as to whether and which group represents the majority of owners and trainers for purposes of the host track and the horsemen’s group reaching an agreement to consent to off-track wagering.<sup>169</sup>

Unlike union and management election disputes overseen by the National Labor Relations Board,<sup>170</sup> the IHA lacks specificity as to how a horsemen’s group is selected or determined to represent the majority of owners and trainers. In the absence of state statutes or regulations that recognize a specific horsemen’s association as the majority group, many state racing commissions refuse to exercise their regulatory authority over racing to decide what group represents the majority. Further, from a practical standpoint, host tracks negotiate their interstate simulcast wagering contracts with out-of-state betting sites far in advance of their race meet and not simply on a day-by-“any racing day” basis.<sup>171</sup> And so, the horsemen who enter horses into races at the host track typically do so long after the track has already

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<sup>166</sup> U.S. CONST. art. VI, cl. 2.

<sup>167</sup> 15 U.S.C. § 3002(12); Ky. Div., *Horsemen’s Benevolent & Protective Ass’n v. Turfway Park Racing Ass’n*, 20 F.3d 1406, 1410 (6th Cir. 1994).

<sup>168</sup> *See Turfway Park Racing Ass’n*, 20 F.3d at 1410.

<sup>169</sup> *See* 15 U.S.C. § 3004(a)(1)(A) & (B) (2019); 15 U.S.C. § 3002(12) (2019); *see also*, *New England Horsemen’s Benevolent & Protective Ass’n v. Mass. Thoroughbred Horsemen’s Ass’n, Inc.*, 210 F. Supp. 3d 270, 275–76 (D. Mass. 2016).

<sup>170</sup> *See, e.g.*, *Auciello Iron Works v. NLRB*, 517 U.S. 781, 787–88 (1996); *NLRB v. Fin. Inst. Emps., Local 1182*, 475 U.S. 192, 198 (1986).

<sup>171</sup> *See* 15 U.S.C. § 3002(12) (2019).

negotiated such contracts. As a result, a key IHA definition—the “horsemen’s group”—lacks a certain amount of clarity and practicality that leads to litigation.<sup>172</sup>

*iv. The IHA’s civil enforcement and market-area approval provisions*

The 1976 Final Report of the Commission on the Review of the National Policy Toward Gambling recommends that civil relief statutes be a means for private parties to assist in enforcing gambling laws—of course not to the exclusion of federal criminal enforcement against interstate gambling businesses.<sup>173</sup> Based in part on this recommendation, the IHA exclusively employs a civil enforcement regime.<sup>174</sup> Violations of the IHA may be enjoined and damages may be awarded in civil actions brought by the host racetrack, the host racetrack’s horsemen’s group, or the host racing state.<sup>175</sup> The regime also provides for nationwide service of process, venue in the host or off-track state, statutory intervention rights, and a statutory damages formula that imposes a severe civil penalty on IHA violators.<sup>176</sup> Statutory damages in these actions are calculated using a formula that multiplies the dollar amount of illegal wagers by the host racetrack’s takeout rate for wagers of the same type, or the takeout rate at the off-track betting site if the wager is not of the same type.<sup>177</sup> This statutory formula typically results in an amount greater than treble damages under prevailing pari-mutuel takeout rates for horseracing and damages can,

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<sup>172</sup> See *Mass. Thoroughbred Horsemen’s Ass’n*, 210 F. Supp. 3d at 275–76; *Turfway Park Racing Ass’n*, 20 F.3d at 1410.

<sup>173</sup> See GAMBLING, *supra* note 10, at 21.

<sup>174</sup> See Interstate Horseracing Act of 1978, 15 U.S.C. § 3006 (2019).

<sup>175</sup> *Id.* at § 3005.

<sup>176</sup> *Id.* at §§ 3005, 3006(b), & 3007(b).

<sup>177</sup> *Id.* at § 3005(1). In nationally merged wagering pools, the same takeout rate is used for all wagering sites betting into the pool wherever the site may be located. Therefore, the host racetrack’s takeout rate would be the same for all off-track betting sites submitting wagers into its merged wagering pool.

therefore, be staggering if all eligible parties sue the violator.<sup>178</sup> This stiff civil enforcement remedy comports with the IHA's original intent—that no federal agency should be saddled with monitoring the law's compliance.<sup>179</sup>

Interestingly, however, the IHA includes market-area approval provisions, the violation of which are not civilly enforceable by the very entities those provisions would seem to protect. This apparent lack of enforceable protections has resulted in litigation.<sup>180</sup> Consistent with the general rule for federal legislation, courts have ruled consistently that unless the IHA expressly confers a private right of action on the specific person or entity, even if the entity is one of a class the statute is designed to protect, a remedy is unlikely to be implied.<sup>181</sup> Accordingly, racetracks that are arguably protected by the IHA's market-area approval provisions have been denied judicial relief in suits challenging off-track betting sites' acceptance of simulcasts and interstate off-track wagers without the tracks' approval because the IHA does not expressly empower such tracks to sue; only the host racetrack, its horsemen's group, and the race's host state are expressly granted the right to civilly enforce the IHA's provisions.<sup>182</sup>

Any potential sports betting legislation at the federal or state level should envision how compliance monitoring will occur

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<sup>178</sup> For example, if wagers were accepted in violation of the IHA at an interstate off-track betting site, the multiplier effect of this formula could be anywhere between eight to ten times the amount of the illegal wagers if the host racetrack or horsemen's group were to sue. This is because most host racetracks generally follow a takeout rate of twenty percent of the amount wagered. This figure represents a blended average rate of both straight and exotic wagering takeout, so racetracks receive in distribution roughly half of that takeout in compensation. If the horsemen's group *and* the host racetrack *and* the host state were to jointly sue the violator, the damage formula would be approximately twenty times or more than the amount of illegally accepted wagers because the horsemen's group and the state would each be entitled to their respective shares of the takeout in addition to the host racetrack. This example assumes that the illegally accepted wagers are of the same type accepted by the host racetrack. *See* Interstate Horseracing Act of 1978, 15 U.S.C. § 3006(b) (2019).

<sup>179</sup> *See supra*, note 61.

<sup>180</sup> *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n, Inc.*, 989 F.2d 1266, 1268–69, 1271 (1st Cir. 1993).

<sup>181</sup> *Id.* at 1268–69; *see also* *New England Horsemen's Benevolent & Protective Ass'n v. Mass. Thoroughbred Horsemen's Ass'n, Inc.*, 210 F. Supp. 3d 270, 277 (D. Mass. 2016); *New Suffolk Downs Corp. v. Rockingham Ventures, Inc.*, 656 F. Supp. 1192, 1194 (D. NH. 1987).

<sup>182</sup> 15 U.S.C. § 3006(a).

with or without governmental oversight or agency enforcement. As the Commission on the Review of the National Policy Toward Gambling recommends, a civil enforcement scheme, as used in the IHA, should be included; indeed, it is the sole enforcement tool within the IHA.<sup>183</sup> Any private entity intended to benefit from sports betting legislation should explicitly state its civil remedies because most courts will not imply an enforcement remedy.

*C. The IHA Permits States to Compete with Each Other, but Sometimes Results in a “Race to the Bottom”*

As recommended by the Commission on the Review of the National Policy Towards Gambling in 1976, Congress has employed a federalism rubric through the IHA that allows states autonomy to formulate their individual gambling policies— even though such policies are subject to federal pre-emption.<sup>184</sup> The IHA’s federalism framework has furthered each state’s gambling policy within its own borders, prevented states from interfering with one another’s policy, and forced states to cooperate if they want to permit interstate off-track wagering.<sup>185</sup> The IHA stands as a federalism precedent that has had the effect of elevating state law that typically governs intrastate racing and wagering activity to the successful governance of interstate wagering transactions, while permitting horseracing to thrive. Since 2000, however, one drawback has surfaced in how the IHA has functioned: competition that has developed between states vying to attract ADW operators to locate and license within their states.

The IHA’s 2000 amendments permit electronic off-track wagering and this form of wagering permits account deposit wagering (ADW).<sup>186</sup> In ADW wagering, the bettor pre-funds her betting account held by the ADW operator, then enters her electronic betting instructions to the operator—typically over a computer or mobile device—to place a bet from funds held in her account by the operator. Each ADW operator must be licensed and holds bettors’ account funds per the requirements of its state of

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<sup>183</sup> *Id.*

<sup>184</sup> See GAMBLING, *supra* note 10, at 7–8.

<sup>185</sup> See 15 U.S.C. § 3001(a)(2)–(3).

<sup>186</sup> 15 U.S.C. §3002(3).

licensure.<sup>187</sup> After a bettor's account is established and funded, the bettor places her betting instructions from wherever she is located, which is often not in the same state where the ADW operator is licensed.

The IHA is silent as to the situs of an electronically placed bet, but a fiction has arisen that treats the state in which the ADW operator is licensed and in which the bettor's account funds are transferred to purchase the betting ticket as the situs of the bet.<sup>188</sup> This fiction, of course, ignores the interests and gambling policies of the state in which the bettor may in fact be located and where she enters her electronic wagering instructions to the ADW operator to place her bet. After the IHA's 2000 amendments and the rise of this electronic-bet-situs fiction, only one state ends up having the ability to impose a wagering tax on the ADW wager—the state where the ADW operator is licensed.

Because only one state gets the privilege of taxing an ADW bet, states compete against each other to offer the most attractive ADW tax rate and regulatory environment to entice ADW operators to locate and license as multi-jurisdictional hubs within their state. Oregon and North Dakota appear to have won this state competition,<sup>189</sup> offering some of the most attractive tax rates and regulatory oversight for ADW operators and enticing the vast

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<sup>187</sup> See, e.g., KY. REV. STAT. ANN. § 230.210 (West 2019); 810 Ky. Admin. Reg. 1:145 (Mar. 2019).

<sup>188</sup> *Id.*

<sup>189</sup> Oregon wins this competition hands down. See Nancy Smith, *Florida Race Tracks are Ripping Off the State for Untold Millions in Tax Revenue*, SUNSHINE STATE NEWS (Feb. 22, 2016, 7:30 AM), <http://sunshinestateneews.com/story/florida-race-tracks-ripping-state-untold-millions-lost-tax-revenue> [<https://perma.cc/757P-FN27>]. North Dakota to a lesser extent has benefited. See Mike Nowatzki, *Other States Fuel Rise of Online Horse Race Betting in North Dakota*, THE BISMARCK TRIBUNE (Mar. 22, 2016) [https://bismarcktribune.com/news/state-and-regional/other-states-fuel-rise-of-online-horse-race-betting-in/article\\_91e516c0-1171-503d-ac16-dffbc1c3b990.html](https://bismarcktribune.com/news/state-and-regional/other-states-fuel-rise-of-online-horse-race-betting-in/article_91e516c0-1171-503d-ac16-dffbc1c3b990.html) [<https://perma.cc/7LSW-46U4>].

majority of operators to their states.<sup>190</sup> That any state can “win” in a competition with other states may, on the one hand, seem perfectly fair as any competition has winners and losers, but on the other hand, the fact that states are competing at all is counterproductive to the IHA’s policy and intent that states should not interfere with each other’s gambling policies (including their tax or regulatory policies), but rather should cooperate.<sup>191</sup> A competition that pits state against state runs counter to these IHA goals.

That states compete to attract the largest or the most ADW operators is predictable behavior. In many “federalism” programs, federal law elevates state law and policy to “primacy” and states use their primary regulatory authority to experiment and innovate—in a microcosm within their borders—until they discover the best methods to accomplish federal policy goals or other shared common values. Unfortunately, if federal law leaves a regulatory vacuum in some significant fashion or fails to establish minimum regulatory standards, states can find themselves in a “race to the bottom,” competing with other states in undesirable ways in pursuit of policies counter to federal policy or common values. Competition between states in some policy areas may be and often is good, but competition that causes states to fight over which offers the loosest regulation, the least level of sports betting oversight, or which is willing to forgo any effort to ensure sports integrity are not what a “federalism” model should encourage or permit.

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<sup>190</sup> California has its own unique ADW licensure rules that cause many multi-jurisdictional hub ADWs to also license within California, but California has a large enough population that access to its market of bettors does not stymie too many ADW operators from having to be licensed there in addition to being licensed in either Oregon or North Dakota. *See generally* Frank Angst, *Changing Business Model impacts California Racing*, BLOODHORSE (Mar. 2, 2017, 5:06 PM), <http://cs.bloodhorse.com/blogs/keeping-pace/archive/2017/02/27/changing-business-model-impacts-california-racing.aspx> [<https://perma.cc/JY74-WMMY>]; Ray Paulick, *Advance Deposit Wagering Growing in California*, BLOODHORSE (July 26, 2002), <https://www.bloodhorse.com/horse-racing/articles/186970/advance-deposit-wagering-growing-in-california> [<https://perma.cc/F9JA-ENRG>]. Other states have multi-jurisdictional licensing regimes, but to date, few have landed licensing ADW operators in such a way as to impose wagering taxes on the bets they accept from ADW account holders.

<sup>191</sup> Turner, *Survival*, *supra* note 130.

## CONCLUSION

The Commission on the Review of the National Policy Toward Gambling recommends a “federalism” framework as the proper way for Congress and the states to regulate sports betting consistent with both the tradition and history of overseeing gambling activity within the United States. Like them or not, and despite their age, the Commission’s “federalism” recommendations should not be ignored as legislative efforts mount before Congress and in the states regarding sports betting. Key portions of the Commission’s Final Report are worth repeating:

- “Gambling has customarily been controlled by State agencies, which can be flexible and responsive to local demands; the Commission finds no public interest in preempting this authority by the imposition of binding national standards. . . [W]here gambling is concerned there should be a considered reluctance on the part of the Federal Government to interfere with State policies. . . States should be left the determination of what forms of gambling, if any, are to be permitted . . .”<sup>192</sup>
- “There are, however, instances where positive action by the Federal Government may be necessary to the protection of identifiable national interests. . .”<sup>193</sup>
- “The Commission thus believes that Congress should consider taking action to protect the States’ continued authority to determine their own gambling policies. It was by similar means that Congress protected State regulation and taxation of insurance in 1945,<sup>194</sup> after the Supreme Court had held insurance to be an activity of interstate commerce.<sup>195</sup> Congress responded to the Court’s ruling by passing a statute consenting to the regulation of the insurance business by the States. . . . Congress thus

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<sup>192</sup> See GAMBLING, *supra* note 10, at 5–6.

<sup>193</sup> *Id.* at 6.

<sup>194</sup> *Id.* at 7 (citing McCarran–Ferguson Act, 15 U.S.C.A. §§ 1011–1015 (West 2019)).

<sup>195</sup> *Id.* at 7 (citing *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944)).

established the validity of State insurance regulations, which otherwise might have been challenged as unreasonable burdens on interstate commerce.”<sup>196</sup>

- “An appropriate method of achieving this objective would be the enactment of a Federal statute specifically empowering the States to regulate gambling within their borders.”<sup>197</sup>
- “The Commission emphasizes that such a statute would not foreclose the authority of Congress to legislate with respect to gambling where a federal presence became necessary. Congress could selectively enact statutes concerning those areas which it deemed to involve the national interest, and could act to prevent the channels of interstate commerce from being used by some States to interfere with the gambling policies of other States. We submit that such a protection of State and national interests would conform with the sound principles of federalism upon which this country was established.”<sup>198</sup>

The fundamental point of these recommendations is that “federalism” should be preserved in any federal attempt to regulate gambling or legalized sports betting.<sup>199</sup>

In 1978, Congress identified national interests with respect to interstate off-track wagering on horseracing. After *Murphy*, Congress may again identify national interests in the legalization of sports betting. There are certainly multi-state facets to—and interstate effects from—sports betting; so the potential for one state’s gambling policy to interfere with another’s can easily give rise to a national interest for Congress to act by requiring states with legal sports betting to cooperate and work together not only with other states, but with private sports integrity oversight entities to ensure the maintenance of sports integrity at all times.

The Interstate Horseracing Act of 1978 (IHA) provides a legal precedent indicative of how Congress and the states have

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<sup>196</sup> *Id.* at 7.

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

<sup>198</sup> *Id.* at 8 (emphasis added).

<sup>199</sup> *See id.* at 173–78.

followed a “federalism” framework to accomplish recognized national interests, while promoting primacy in state regulatory control over horserace wagering. The IHA does not supply every answer as to how best to structure a “federalism” framework, and many of its shortfalls are pointed out in this Article. Imperfect as it is, the IHA provides a model that, with some alteration, can point the way forward post-*Murphy*.

The IHA preserves states’ roles as the primary regulators of gambling within their own borders, while also balancing competing private interests much like those currently represented by sports participants, athletes, leagues, and those of sports betting operators. The IHA regulates a unique sport that has important differences from other sports. Those differences aside, the IHA commendably permits the market to drive the pricing of interstate off-track wagering rights and states have plenty of room to vary their taxing policies and rates on horserace wagering within the prevailing takeout rates in that market.<sup>200</sup> A similar market-driven model for sports betting may not have much room for states to vary their tax rates because margins for sports betting operators are much narrower than in horseracing.<sup>201</sup> Despite these difference between prevailing takeout rates in horserace wagering and the margins in sports betting, states that want to legalize sports betting can—in a properly constructed “federalism” framework—set their tax rates according to what the sports betting market will bear and adjust their revenue expectations accordingly. States can be expected to do this sort of adjustment to avoid the loss of betting dollars to the illegal sports betting market.

Additionally, within a “federalism” framework, Congress can set regulatory parameters permitting states not only to adjust

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<sup>200</sup> The one exception that constrains states regarding their tax policies on horserace wagering stems from the fiction that has arisen regarding the situs of electronically placed bets—a problem, that should be avoided in any sports betting legislation to avoid states competing with each other in undesirable ways in a “race to the bottom.” See *supra* text accompanying note 189. This problem also forewarns that states may sometimes behave in ways that are counterproductive to national policy goals by competing with each other for being the first or earliest adopters of expanded sports betting, but in doing so, they can fail to adequately consider national interests or shared common values “in a race to the bottom.”

<sup>201</sup> See Jeremy Balan, *Symposium: Sports Betting Not ‘Golden Goose’ for Racing*, BLOODHORSE (December 5, 2018), <https://www.bloodhorse.com/horse-racing/articles/231026/symposium-sports-betting-not-golden-goose-for-racing> [<https://perma.cc/4MYR-LKGR>].

to the sports betting market, but preventing them from interfering with each other's gambling policies. It would additionally encourage states to regulate legalized sports betting in ways that promote interstate cooperation and information exchange between sports betting regulators, operators, and private sports integrity oversight entities. In the long run, such cooperation is imperative to ensure that sports integrity is maintained along with sports betting oversight.