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BE HONEST WITH ME: HOW FEDERAL REGULATION OF SPORTS GAMBLING MUST PROTECT THE INTEGRITY OF THE GAME

*Grant Ellfeldt**

On May 14, 2018, the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA). Before the Court's decision, PASPA had entirely prohibited states from legalizing sports gambling. In light of their newfound liberty, states began to individually legalize and regulate sports gambling. The federal government did not wait long to introduce their own regulations. On December 19, 2018, Congress introduced the Sports Wagering Market Integrity Act (SWMIA). At its core, SWMIA is designed to protect the integrity of professional sports.

To protect the integrity of professional sports and prevent fraud, SWMIA must accomplish three things. First, because sports wagers are similar to securities, SWMIA's regulations should mirror securities regulations. Specifically, the bill should establish a federal agency to enforce criminal punishments for fraud. While SWMIA establishes the National Sports Wagering Clearinghouse ("Clearinghouse") to collect and distribute information, Congress should extend the powers of the Clearinghouse to investigate and enforce criminal punishments against fraud.

Second, SWMIA must properly balance the roles of federal and state governments. Through a form of cooperative federalism, SWMIA appropriately balances state and federal roles. SWMIA establishes the Clearinghouse to centralize resources in the fight against illegal gambling. At the same time, by allowing states to individually license their operators, SWMIA preserves local discretion in the states.

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Finally, successful regulations must both encourage and require the professional sports leagues to cooperate with enforcement agencies. To encourage cooperation, SWMIA grants exclusive control of sports gambling data to the leagues. While the exclusive data provision grants the leagues immense power, it is necessary to encourage cooperation between the government and the leagues. Merely encouraging the leagues to cooperate, however, is not enough. SWMIA must also *require* the leagues to cooperate. Otherwise, as Tim Donaghy's dramatic scandal illustrates, the leagues have leeway to conceal pervasive fraud.

I. INTRODUCTION

On May 30, 2007, Tim Donaghy teed up a perfectly white golf ball, driver in hand.¹ His phone vibrated inside his pocket.² He straightened up and answered the phone.³ His driver fell to the soft grass that surrounded his beautiful Florida home.⁴ Two weeks later, Donaghy was sitting in the United States Attorney's Office in Brooklyn, New York, divulging shocking information about the largest sports gambling scandal in nearly a century.⁵

Between 1994 and 2007, Tim Donaghy refereed National Basketball Association (NBA) games.⁶ There was nothing suspicious about Donaghy on the surface, but he had a serious detrimental habit.⁷ Donaghy was a compulsive gambler.⁸ In 2003, he allegedly conspired with a small group of sports bookkeepers to place wagers on games that he officiated.⁹ The group

1. Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Feb. 19, 2019), https://www.espn.com/nba/story/_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games [<https://perma.cc/2RMQ-GAAN>].

2. *See id.*

3. *See id.*

4. *See id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

started with small bets, but the stakes quickly escalated.¹⁰ Donaghy and his crew allegedly placed large bets on games he officiated, but not large enough to raise suspicion by the Federal Bureau of Investigations (FBI).¹¹ By the time the FBI began its investigation, Donaghy had dug himself into one of the biggest scams in sports history.¹²

During their investigation, the FBI met with high-level NBA executives, including then-Commissioner David Stern.¹³ Stern promised to fully comply with the investigation.¹⁴ However, just a few days after the meeting, the story leaked to the press, blowing the investigation wide open.¹⁵ As a result, any chance of catching other referees entangled in the scandal dissipated once the story hit the press.¹⁶ Although Donaghy was punished, the FBI missed out on a golden opportunity to uncover the depth of this gambling scandal.¹⁷

Donaghy's scandal embodies the gambling fraud that threatens the integrity of professional sports. For this very reason, the major professional sports leagues have historically opposed sports gambling.¹⁸ This intense opposition, however, has evolved into mild skepticism and has now bloomed into open acceptance.¹⁹ In the past few years, the leagues, including the NBA, National Football League (NFL), National Hockey League (NHL), and Major League Baseball (MLB) have more or less come to approve the legalization of sports gambling.²⁰

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Robert Shawhan, *Legalizing Federal Sports Gambling Laws: You Got to Know When to Hold 'em*, 40 HASTINGS COMM. & ENT. L.J. 41, 44–45 (2018).

19. *Id.*

20. See David Purdum, *\$12 Billion in Handle? Why Pennsylvania Sports Betting Could be Huge*, ESPN (Nov. 14, 2018), https://www.espn.com/chalk/story/_/id/25278065/with-estimated-

Until May 14, 2018, federal law prohibited sports gambling in every state with limited exceptions.²¹ When the Supreme Court struck down the law prohibiting sports gambling in *Murphy v. NCAA*, states became free to legalize and regulate sports gambling.²² Not surprisingly, Congress did not wait long before drafting regulations designed to maintain competitive integrity and combat fraudulent gambling.²³ The federal regulations are currently pending before the House of Representatives.²⁴

To be successful, federal regulation of sports gambling must protect the integrity of professional sports. Using the regulations pending before the House as a guideline, successful federal regulations will accomplish three things. First, since securities and sports gambling regulations are so similar, sports gambling regulations should emulate securities regulations. Second, appropriate regulations will maintain a balance between federal and state power. Finally, successful regulations should encourage and require the leagues to cooperate with government enforcement agencies. Donaghy's scandal emphasizes why the regulations must keep the leagues accountable for internal violations, and how the current draft alarmingly falls a step short.

This Article first argues that sports wagers are very similar to securities regulations. Because they are similar, federal regulations of sports gambling should largely draw from securities regulations. Next, this Article establishes the importance of balancing federal and state power when regulating sports gambling, and explains how the Sports Wagering Market Integrity Act (SWMIA) properly balances such power. Finally, this Article argues that to

12-million-handle-here-why-pennsylvania-sports-betting-market-dwarf-nevada [https://perma.cc/Q8MN-SPTA]; see also Anthony Cabot & Keith Miller, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 177-78 (2018) (explaining how decline in NFL ratings has led first to the proliferation of fantasy sports and sports gambling); see also Adam Candee, *NHL's Bettman Joins NBA, NFL In Call For National Sports Betting Rules*, LEGAL SPORTS REP. (May 29, 2018, 11:25 AM), <https://www.legalsportsreport.com/20787/nhl-joins-nba-nfl-in-national-sports-betting-rules/> [https://perma.cc/6KKT-PNS8] [hereinafter *NHL's Bettman Joins NBA & NFL*]; see also David Purdum, *MLB to Talk Betting with Owners*, ESPN (Feb. 5, 2015), https://www.espn.com/chalk/story/_id/12286521/mlb-commissioner-rob-manfred-says-legalized-sports-betting-needs-fresh-consideration [https://perma.cc/R276-5FWY] [hereinafter *MLB Talk with Owners*].

21. 28 U.S.C. §§ 3701-3704 (2012).

22. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

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

24. *Id.*

protect the integrity of professional sports, federal regulations should both encourage and require the leagues to cooperate with enforcement agencies. To foster cooperation, SWMIA vests exclusive data rights in the sports leagues. However, SWMIA falls one step short and must also require the leagues to cooperate.

II. BACKGROUND

A. *Sports Gambling in American History*

Traditionally, American culture has given sports gambling a cold reception.²⁵ The widely-publicized integrity violations in historical American sports have made sports gambling far from a fan favorite.²⁶ For example, the 1919 Chicago White Sox essentially threw away the World Series after becoming involved with gambling operators.²⁷ Pete Rose, baseball's all-time leader in hits, still faces exclusion from the Hall of Fame because he placed wagers on his team as a manager.²⁸ Tim Donaghy has similarly become a social outcast because he allegedly placed wagers on NBA games that he refereed.²⁹

Despite these incidents, sports gambling has remained legal in a few states, including Nevada.³⁰ Over the last forty years, Congress has indirectly regulated sports gambling by helping individual states impose local regulations.³¹ However, congressional regulation of sports betting has been limited in scope. For example, in 1961, Congress enacted the Wire Act.³² This Act

25. See Shawhan, *supra* note 18, at 44–45.

26. *Id.* at 45.

27. *MLB Talk with Owners*, *supra* note 20.

28. *Pete Rose Banned for Life: Giamatti Says He Bet On Games; Appeal Possible in Year*, L.A. TIMES (Aug. 24, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-08-24-mn-1531-story.html> [<https://perma.cc/9LRY-QJ9B>].

29. Eden, *supra* note 1.

30. Shawhan, *supra* note 18, at 44.

31. *E.g.* Cabot & Miller, *supra* note 20, at 154.

32. 18 U.S.C. § 1084 (2012).

criminalized certain wire transfers pertaining to gambling.³³ In 1978, Congress enacted the Interstate Horseracing Act (IHA).³⁴ The IHA ensured that bookkeepers split profits with track and horse owners.³⁵ While the IHA regulated profits of private operators, it did not regulate profits on a criminal level.³⁶ The Wire Act and IHA represent the bulk of federal regulation of sports gambling in the latter twentieth century.³⁷

B. PASPA: Broad Prohibition on Sports Gambling

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA).³⁸ Instead of regulating sports gambling, PASPA only prohibited state legislatures from legalizing sports gambling.³⁹ PASPA did not allow states or persons to “sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme” based on professional or amateur sports.⁴⁰ However, PASPA carved out several exceptions, including grandfathering Nevada outside the prohibition.⁴¹ The Act also provided a limited exception for New Jersey, which allowed the state to legalize and license sports gambling in Atlantic City within one year of PASPA’s enactment.⁴²

Throughout the PASPA era, the professional sports leagues have collectively supported PASPA’s purpose and resisted the legalization of sports

33. *Id.*

34. 15 U.S.C. §§ 3001–3007 (2012).

35. *See id.*

36. *See Cabot & Miller, supra* note 20, at 155.

37. *Id.* at 154–55.

38. 28 U.S.C. §§ 3701–3704 (2012).

39. *Id.* § 3702.

40. *Id.*

41. *Id.* § 3704(a)(2).

42. *Id.* § 3704(a)(3); New Jersey never legalized sports gambling in their allotted year, but they tried hard in later years. *See* Scott J. Gregory, *Don’t Bet on It? Economic and Legal Implications of Legalized Sports Betting and Daily Fantasy Sports in the United States*, 10 OHIO ST. BUS. L.J. 217, 222–27 (2016).

gambling.⁴³ While the National Collegiate Athletic Association's (NCAA) position has not changed, the NBA, NFL, NHL, and MLB have slowly shifted from opposing sports gambling to approving of it, starting with fantasy sports.⁴⁴

C. *Fantasy Sports and the Slow Crawl Towards Approval of Sports Gambling*

Fantasy sports function similar to sports gambling.⁴⁵ Instead of betting on the outcome of individual games, fantasy participants essentially bet on the outcome of individual players.⁴⁶ Participants typically pay an entry fee to join a fantasy league.⁴⁷ The participants then assemble their team of individual players, usually from a draft pool.⁴⁸ Each week, the professional players receive points based on their individual performance.⁴⁹ At the end of the season, the participant with the most collective points or team victories wins and receives a prize.⁵⁰ By choosing players who they believe will perform well, participants place a bet on the collective performances of real-life players.⁵¹

43. See Gregory, *supra* note 42, at 220 (detailing the bitter battle over legalization of sports betting between New Jersey's legislature and the major professional and collegiate sport leagues).

44. See *id.* at 235–37.

45. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 129–34 (2016) (outlining how daily fantasy sports must comply with gambling laws because of their similarities).

46. See *How Online Fantasy Sports Work*, BETTING USA, <https://www.bettingusa.com/fantasy/how-it-works/> [<https://perma.cc/2UU7-B88P>]; see also Edelman, *supra* note 45, at 129–34; see also Andrew Brandt, *The NFL has a Gambling Problem*, SPORTS ILLUSTRATED (Nov. 5, 2015), <https://www.si.com/mmqb/2015/11/05/nfl-gambling-daily-fantasy-dfs-draftkings-fanduel-goodell> [<https://perma.cc/98U9-4FJN>].

47. *How Online Fantasy Sports Work*, *supra* note 46.

48. See *id.*

49. *Id.*

50. *Id.*

51. See Edelman, *supra* note 45, at 129–34; see also Brandt, *supra* note 46.

Fantasy sports have paved the way for the legalization of sports gambling.⁵² In the last decade, both the NBA and NFL reached substantial sponsorship deals with major fantasy companies like FanDuel and DraftKings.⁵³ The NBA has even taken an equity stake in FanDuel.⁵⁴ The change in position by the sports leagues is largely motivated by the need to restore fan engagement.⁵⁵ For example, ratings for NBA and NFL games—the two most popular sports in the United States—has declined in recent years.⁵⁶ As a result of the decline, the leagues are looking for new ways to restore fan engagement.⁵⁷ Fantasy sports keep fans engaged in ways that traditional sports do not.⁵⁸ For example, even when the outcome of a game is largely determined by the score, fantasy participants will continue watching to see how their player performs.⁵⁹ The increasing popularity of fantasy sports has played a large role in the acceptance of sports gambling.

D. The Long Battle Between New Jersey and the Leagues

As fantasy sports paved the way for sports gambling, New Jersey set out to re-vamp its gambling economy.⁶⁰ During World War II, long before the passage of PASPA, the gambling economy in New Jersey's Atlantic City

52. See Edelman, *supra* note 45, at 129.

53. Dustin Gouker, *DFS Partnership / Sponsorship Tracker*, LEGAL SPORTS REP. (Nov. 13, 2018), <https://www.legalsportsreport.com/dfs-sponsorship-tracker/> [https://perma.cc/6TP3-882T].

54. Darren Heitner, *FanDuel Signs Multi-Year Partnerships With 13 NBA Teams*, FORBES (June 23, 2015, 8:54 AM), <https://www.forbes.com/sites/darrenheitner/2015/06/23/fanduel-signs-multi-year-partnerships-with-13-nba-teams/#6653277bbf25> [https://perma.cc/ML6B-Q7Q6].

55. See Cabot & Miller, *supra* note 20, at 161-62.

56. Scooby Axson, *NFL TV Ratings Down 7.5 Percent*, SPORTS ILLUSTRATED (Oct. 18, 2017), <https://www.si.com/nfl/2017/10/18/nfl-television-ratings-decline> [https://perma.cc/U9K8-2WUW]; see Cabot & Miller, *supra* note 20, at 161-62.

57. Cabot & Miller, *supra* note 20, at 162.

58. *Id.*

59. *Id.*

60. Gregory, *supra* note 42, at 223.

slumped.⁶¹ After a legislative push that increased tourism by stimulating casino markets, the city's economy steadily grew.⁶² Despite this past growth, in recent years, Atlantic City's gambling economy has reached yet another slump.⁶³ In 2014, four casinos shut down completely.⁶⁴ In order to revitalize its gambling industry, Atlantic City needed to differentiate its gambling experience. By the time New Jersey committed itself to revitalizing its casinos, PASPA obstructed the state's policy.⁶⁵ Although PASPA allowed New Jersey to legalize sports gambling in Atlantic City within one year of PASPA's enactment,⁶⁶ New Jersey did not legalize sports gambling within their allotted year.⁶⁷

In 2011, by referendum, New Jersey voters repealed the state ban on sports gambling.⁶⁸ After the voters repealed the ban, the New Jersey legislature quickly enacted a law authorizing and regulating sports gambling at casinos and racetracks.⁶⁹ New Jersey realized that their law conflicted with PASPA, so they made efforts to reconcile the conflict.⁷⁰ For example, a New Jersey Congressman proposed a federal bill that would exempt New Jersey from PASPA.⁷¹ They also proposed a bill that would give all states four

61. *Id.*

62. *Id.* at 224.

63. *Id.* at 225.

64. Wayne Parry, Associated Press, *As 4 of its 12 Casinos Closed, Atlantic City Casino Industry Grew Operating Profit 44 Percent*, FOX BUSINESS (Apr. 7, 2015), <https://www.foxbusiness.com/markets/as-4-of-its-12-casinos-closed-atlantic-city-casino-industry-grew-operating-profit-44-percent> [<https://perma.cc/PXE6-2MVU>].

65. Gregory, *supra* note 42, at 227.

66. 28 U.S.C. § 3704(a)(3) (2012).

67. Gregory, *supra* note 42, at 222.

68. *NJ Voters: We Want to Bet on Sports if US Says Yes*, NBC (Nov. 8, 2011, 10:44 PM), <https://www.nbcnewyork.com/news/local/NJ-Sports-Betting-Votes-Yes-Federal-Ban-Lifted-133506083.html> [<https://perma.cc/X36U-2KCG>].

69. *NCAA v. Christie*, 61 F. Supp. 3d 488, 491 (D. N.J. 2014).

70. Gregory, *supra* note 42, at 226–27.

71. N.J. Betting and Equal Treatment Act of 2012, H.R. 3809, 112th Cong. (2012).

years to legalize sports gambling.⁷² Neither of the bills, however, survived House committee debates.⁷³

In 2012, the same year that New Jersey amended their Constitution to allow sports gambling, the four major sports leagues and the NCAA brought an action in federal court to enjoin the amendment.⁷⁴ The leagues argued that the amendment clearly violated PASPA.⁷⁵ In response, New Jersey argued that PASPA violated the Tenth Amendment because it commandeered state authority.⁷⁶ However, the Third Circuit Court held that PASPA did not violate the Tenth Amendment.⁷⁷ The court framed the issue in terms of federal power and state power under the Supremacy Clause.⁷⁸ In terms of the anti-commandeering principle, the court distinguished between *requiring* and *prohibiting* the states from doing something.⁷⁹ It reasoned, “[w]hen Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do; it is barring them from doing something they want to do.”⁸⁰ Unlike prior cases of federal coercion, the court continued, “PASPA does not *require* or coerce the states to lift a finger.”⁸¹ Based on this distinction, the court held that PASPA did not violate the Tenth Amendment and thus, PASPA prevented New Jersey from repealing its ban and legalizing sports gambling.⁸² The

72. Sports Gaming Opportunity Act of 2012, H.R. 3797, 112th Cong. (2012).

73. *See id.* (did not pass House of Representatives); *see also* H.R. 3809 (did not pass House of Representatives).

74. Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 217 (3d Cir. 2013).

75. *Id.*

76. *Id.* at 224.

77. *Id.* at 237.

78. *Id.* at 230.

79. *Id.*

80. *Id.*

81. *Id.* at 231 (emphasis in original).

82. *Id.* at 237.

court's decision received due criticism.⁸³ Experts and scholars alike took issue with the amount of unregulated, illegal sports gambling that occurred daily and they criticized the court's apparent willingness to overlook the unregulated market.⁸⁴ Although the Supreme Court denied New Jersey's writ of certiorari,⁸⁵ New Jersey's persistence and legal arguments would soon win the day.

E. Prohibited No More: New Jersey Finally Wins and Changes the Landscape of Sports Gambling

After the Third Circuit upheld PASPA in 2013, New Jersey enacted a subsequent law specifically drafted to circumvent PASPA.⁸⁶ The legislature specifically framed the law as a *repeal* rather than an *authorization* of sports gambling.⁸⁷ As expected, the leagues once again brought suit to invalidate the law.⁸⁸ Consistent with the Third Circuit's ruling in 2013, the District Court and Third Circuit found that PASPA did not violate the anti-commandeering rule because it "does not command states to take affirmative actions."⁸⁹

However, unlike the 2013 case, the Supreme Court granted certiorari in *Murphy v. NCAA*.⁹⁰ The issue of the case boiled down to whether repealing a law that prohibits sports gambling is equivalent to "authorizing" sports gambling.⁹¹ In its decision, the Court explained the history of the anti-commandeering principle, starting with the ratification of the Constitution.⁹² The

83. See Gregory, *supra* note 42, at 235–40.

84. See *id.*

85. *Murphy v. NCAA*, 138 S. Ct. 1461, 1472 (2018).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1473 (citing Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 401 (3d Cir. 2013)).

90. *Id.*

91. *Id.* at 1473–75.

92. *Id.* at 1475.

Court emphasized that the anti-commandeering principle “is important” because it is a “structural protection[] of liberty,” it “promotes political accountability,” and it “prevents Congress from shifting the cost of regulations to the states.”⁹³ After setting the stage of precedent and policy, the Supreme Court held that PASPA violated the anti-commandeering rule because it “unequivocally dictates what a state legislature may and may not do.”⁹⁴ Regardless of the interpretation of “authorize,” the Court found that through PASPA, “state legislatures are put under the direct control of Congress.”⁹⁵

When considering the anti-commandeering principle, the Supreme Court rejected the distinction between prohibiting and requiring the states to act.⁹⁶ According to the Court, the basic anti-commandeering rule boils down to: “Congress cannot issue direct orders to state legislatures.”⁹⁷ As far as the Court was concerned, this basic rule applies regardless if the law prohibits or requires the states to act.⁹⁸ The Court also affirmatively refused to frame the issue in terms of federal supremacy.⁹⁹ It held that the Supremacy Clause does not confer independent legislative power.¹⁰⁰ Rather, it is simply a “rule of decision” when deciding conflicts between federal and state law.¹⁰¹ Since the Constitution grants the federal government power to regulate private actors, the Supremacy Clause is essentially a tiebreaking mechanism between federal and state regulations.¹⁰² PASPA’s provision preventing states from

93. *Id.* at 1477.

94. *Id.* at 1478.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1479.

100. *Id.* (citations omitted).

101. *Id.* (citations omitted).

102. *Id.*

legalizing sports gambling, however, did not regulate or restrict private actors.¹⁰³ Therefore, PASPA could not be classified as a federal regulation and the Supremacy Clause did not apply.¹⁰⁴ After New Jersey's long and bitter fight, the Supreme Court finally struck down PASPA.¹⁰⁵

F. Enter Federal Government: Schumer and Hatch Draft Federal Regulations of Sports Gambling

Many states did not wait long after *Murphy* struck down PASPA to legalize and regulate sports gambling. Since *Murphy*, eleven states, including New Jersey, have proposed and passed legislation legalizing sports gambling.¹⁰⁶ New Jersey collected \$94 million in sports gambling revenue in the second half of 2018, but this number is relatively small compared to the \$2.51 billion in racetrack and casino revenue.¹⁰⁷ More states are expected to pass similar legislation as they take advantage of tax benefits and explore new methods to revitalize local economies.¹⁰⁸

103. *Id.* at 1481.

104. *Id.*

105. *Id.* at 1485.

106. Alexandra Licata, *42 States Have or are Moving Towards Legalizing Sports Betting – Here are the States Where Sports Betting is Legal*, BUS. INSIDER (Aug. 2, 2019, 1:51 PM), <https://www.businessinsider.com/states-where-sports-betting-legal-usa-2019-7> [<https://perma.cc/U73A-ALHK>].

107. Joyce Hanson, *NJ Sees \$1.25B Wagered in Legal Sports Betting in 2018*, LAW 360 (Jan. 15, 2019, 6:58 PM), <https://www.law360.com/articles/1118464/nj-sees-1-25b-wagered-in-legal-sports-betting-in-2018> (last visited Oct. 23, 2019).

108. Illegal influence of sports matches is a substantial part of the illegal gambling market. Illegal influence usually consists of a group of operators and high-stake gamblers working with corrupt professional sports insiders who unduly influence the outcome of games under their control. This Note is most concerned with this kind of illegal influence, but there are many forms of illegal gambling. Money laundering is also an illegal practice closely related to sports gambling. See *Best Practices for Anti-Money Laundering Compliance*, AM. GAMING ASS'N (2017), <https://www.americangaming.org/wp-content/uploads/2018/12/Best-Practice-2017.pdf> [<https://perma.cc/WWF7-72GL>].

Predictably, the federal government quickly got involved. In December 2018, senators Chuck Schumer and Orrin Hatch proposed the Sports Wagering Market Integrity Act (SWMIA).¹⁰⁹ SWMIA establishes comprehensive federal regulations of sports gambling.¹¹⁰ The Act primarily “set[s] standards for sports wagering and provide[s] law enforcement with additional authority to target the illegal sports wagering market.”¹¹¹ The Bill will likely not pass in 2019, but it may pass eventually.¹¹² The bipartisan nature of SWMIA and the strong support from professional sports leagues¹¹³ suggests that the Act ultimately has a strong chance of passing.

III. DISCUSSION

The successful regulation of sports gambling is a daunting task. To successfully regulate sports gambling, maintaining the integrity of professional sports is crucial. There are many ways to approach the integrity issues that lie outside the scope of this Article, but successful regulations should focus on three things. First, because of their inherent similarities, sports gambling regulations should mirror securities regulations. Specifically, the regulations should develop an enforcement agency that imposes criminal punishments for fraud. SWMIA establishes a national agency to help combat illegal gambling, but this agency lacks the ability to criminally enforce fraudulent activities.

Second, sports gambling regulations must strike a proper balance between federal and state control. The states have a significant local interest in licensing operators within their borders. At the same time, the federal government has a significant national interest in combatting illegal gam-

109. *See generally* Sports Wagering Market and Integrity Act, S. 3793, 115th Cong. (2018).

110. *See generally id.*

111. *Id.* § 2(10) (Findings).

112. Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill in Senate*, LEGAL SPORTS REP. (Dec. 19, 2018, 9:51 AM), <https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/> [<https://perma.cc/PZ65-QTP6>] [hereinafter *Sports Bill in Senate*].

113. In contrast to the NBA, NFL, MLB and NHL, the NCAA continues to strongly oppose the legalization of sports gambling. *See* Candee, *supra* note 20; *see also* Dustin Gouker, *NCAA Head: Sports Betting Is ‘Going to Threaten the Integrity of College Sports In Many Ways’*, LEGAL SPORTS REP. (Jan. 25, 2019), <https://www.legalsportsreport.com/28038/ncaa-says-sports-betting-will-threaten-integrity/> [<https://perma.cc/N4EZ-DTNC>].

bling. SWMIA effectively balances both interests. By adopting a cooperative federalism approach, SWMIA leaves states with discretion in choosing who they license with. Likewise, the Act establishes a national entity to collect and distribute data to enforcement agencies. SWMIA's successful balancing of both federal and state interests will contribute to the success of the regulations.

Finally, successful regulations must both encourage and require sports leagues to cooperate with one another. The federal government cannot effectively combat fraud without their support. To foster encouragement, the regulations should compensate the leagues for use of their data. While compensation for use of sports data is not supported in existing law, SWMIA creates an exception by granting the leagues exclusive control over data used by sports gamblers. This data provision grants immense power to the leagues, but it is necessary to encourage cooperation between the leagues and government. Donaghy's scandal, however, illustrates how the leagues still might undermine enforcement agencies to preserve their brand. The regulations, therefore, must also require the leagues to cooperate with enforcement agencies.

A. Successful Sports Gambling Regulations Should Emulate Federal Securities Regulations

“[T]here is no moral difference between gambling . . . on the race track and gambling in the stock market.”¹¹⁴ In his quote before Congress, Theodore Roosevelt wryly articulates that gambling and investing share many similarities. The Securities Acts of 1933 and 1934 regulate the registration and exchange of securities between investors.¹¹⁵ Mr. Roosevelt's opinion suggests that because of their similarities, federal sports gambling regulations should emulate security regulations for two reasons. First, investment contracts and sports wagers are substantively similar. Second, trading securities is also similar to placing sports wagers. With these similarities in mind, Congress should craft sports gambling regulations that criminally punish for and broadly enforce against sports gambling fraud.

114. 42 CONG. REC. 1346–50 (1908); John Maynard Keynes echoed Roosevelt's sentiment: “It is usually agreed that casinos should, in the public interest, be inaccessible and expensive. And perhaps the same is true of Stock Exchanges.” JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 159 (1936).

115. *See generally* 15 U.S.C. §§ 77a–78III (2019).

1. Federal Sports Gambling Regulations Should Emulate Security Regulations Because Investment Contracts Are Similar to Sports Gambling Wagers

Investment contracts and gambling wagers are similar for four reasons. First, investment contracts and sports wagers both involve payment, risk, and reward. Second, the Supreme Court's three-part test delineated in *SEC v. W.J. Howey Co.*,¹¹⁶ for determining what constitutes an investment contract extends to many sports wagers. Third, many specific types of security investments are functionally similar to sports gambling wagers. Finally, the entertainment value in sports gambling does not detract from its similarity to investment contracts.

a. Investment Contracts and Sports Wagers Both Involve Payment, Risk, and Reward

Investment contracts and sports wagers both involve payment, risk, and reward. Common law defines gambling as the payment of "consideration in order to participate in an activity, that's [sic] outcome is determined partly by chance, and may reward the participant with something of value."¹¹⁷ Like gambling, investing in stock requires payment to participate.¹¹⁸ The outcome of the investment is at least partly determined by chance and involves reward of "something of value."¹¹⁹ Investing in futures and corporate bonds, for example, "involve assuming a risk in hopes of an accession to wealth."¹²⁰

116. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946).

117. Christopher B. Chuff, "Rolling the Dice" on Financial Regulatory Reform: *Gambling Law as a Framework for Regulating Structured Investments*, 18 VILL. SPORTS & ENT. L.J. 569, 598 (2011) (citations omitted).

118. *Id.*

119. *Id.*

120. *Id.*

b. The *Howey* Test for Securities Includes Many Sports Wagers

Second, the legal test for defining an “investment contract” will include many sports wagers. Under the Securities Acts of 1933 and 1934, the definition of “security” includes “investment contracts.”¹²¹ In turn, the definition of “investment contract” has been judicially constructed to include three criteria: (1) an investment of money, (2) in a common enterprise, and (3) with the expectation of profits to be derived solely from the efforts of the promoter or a third party.¹²² Regarding the first requirement, both sports gambling and securities require an investment of money. Just as the security investor puts down money in hopes of a future return in a company’s performance, a sports gambler puts down money in hopes of a future return in a team’s performance.

For the second requirement, both practices involve a common enterprise. Different circuit courts have applied two different standards of “common enterprise.”¹²³ The first is horizontal commonality, which “involves the pooling of assets from multiple investors so that all share in the profits and risks of the enterprise.”¹²⁴ The second is vertical commonality, which requires that “the investors’ fortunes be interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.”¹²⁵ Sports gambling is very similar to vertical commonality. Just as investment contracts depend on “promoters” and “third parties,”¹²⁶ sports wagers depend on promoters and third parties. Sports gamblers rely on sportsbooks to promote sports gambling by accepting and paying out bets. Additionally, sports gamblers rely on third-party teams and players to achieve the result that the gambler wagers for. In fact, the results of the wager lie entirely in the hands of the third-party sports teams.

121. 15 U.S.C. § 77b(a)(1) (2019); *SEC v. SG Ltd.*, 265 F.3d 42, 46 (1st Cir. 2001).

122. *SEC*, 265 F.3d at 46.

123. *Id.* at 49.

124. *Id.*

125. *Id.* (citation omitted).

126. *See id.* (citations omitted).

For the third *Howey* requirement, both an investor and a sports gambler expect profits from their venture.¹²⁷ Investors hope their recipient company will perform as the investor anticipates. Similarly, gamblers hope their chosen team will perform as the gambler anticipates. Sports gambling arguably involves less of an expectation of profit than investment because the risks attached to sports gambling are higher.¹²⁸ However, investors looking for high returns similarly make high-risk security investments.¹²⁹ The fact that a sports wager is high-risk does not obviate the fact that the gambler expects profit.¹³⁰ If sports gamblers truly did not expect a profit, they would not place wagers, and sports gambling would not exist. Therefore, because many sports wagers meet the *Howey* definition of an “investment contract,” sports wagers and investment contracts are very similar.

c. Many Specific Types of Investment Contracts Are Similar to Sports Wagers

Securities are also similar to sports wagers because many specific types of security investments are similar to sports wagers. For example, a derivative contract is essentially the same as a sports wager.¹³¹ A derivative is “a trading instrument whose value depends on the performance of another variable.”¹³² Investors usually use derivatives to “hedge against” or “speculate on” price fluctuations in the market.¹³³ For a long time, derivatives have been criticized as a “form of legalized gambling.”¹³⁴ A district court in New York once found that a certain derivative contract was essentially a gamble,

127. *See id.* at 46.

128. *See* Thomas L. Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*, 24 ANN. REV. BANKING & FIN. L. 375, 409–10 (2005).

129. *Id.*

130. *Id.*

131. *Id.* at 395.

132. Kimberly D. Krawiec, *More Than Just “New Financial Bingo”: A Risk-Based Approach to Understanding Derivatives*, 23 J. CORP. L. 1, 7 (1997).

133. *Id.*

134. Hazen, *supra* note 128, at 395.

but nevertheless characterized it as a security.¹³⁵ The court wrote: “Although I have characterized . . . [the] swap agreements as ‘bets’ and ‘speculations’ on currency fluctuations, the transactions were in the form of forward contracts, swaps and derivatives.”¹³⁶ Derivatives usually involve high risk and therefore are similar to sports wagers.¹³⁷

Futures contracts are also similar to sports wagers. A futures contract involves exchanging money for a “delivery obligation” at a certain date in the future.¹³⁸ “Most futures contracts, are functionally the same as a wager, since rather than delivering under the contract, the vast majority of futures contracts are settled through a process known as offset.”¹³⁹ Generally, instead of “transferring the underlying commodity or security, the parties enter into offsetting transactions.”¹⁴⁰ Therefore, because the parties usually offset rather than deliver under the contract, the parties essentially place a wager on the future price of a good.

Finally, hedging closely resembles a sports wager. A hedge fund is “any pooled investment vehicle that is privately organized, administered by professional investment managers, and not widely available to the public.”¹⁴¹ They are typically used to take “both long and short positions on debt and equity securities to reduce risk.”¹⁴² Like hedging, sports wagering can be

135. *Korea Life Ins. Co. v. Morgan Guar. Tr. Co. of N.Y.*, 269 F. Supp. 2d 424, 442 (S.D.N.Y. 2003).

136. *Id.*

137. Krawiec, *supra* note 132, at 7 (“[D]erivatives are generally perceived as very risky products.”).

138. Hazen, *supra* note 128, at 406–07.

139. *Id.* at 407.

140. *Id.*

141. *Goldstein v. SEC*, 451 F.3d 873, 875 (D.C. Cir. 2006) (citations omitted).

142. *Id.* at 876.

used to minimize risk. For example, a team owner can offset losses attributable to low attendance in two ways.¹⁴³ The owner could hedge for low attendance on the stock market.¹⁴⁴ Alternatively, the owner could make a bet against his or her own team as a functional hedge against revenue loss.¹⁴⁵ Both actions are protective measures in anticipation of revenue loss, yet traditional hedging is legal while gambling on one's own team is not.¹⁴⁶ To be clear, this Article does not advocate that owners should be allowed to bet on their own teams. There are a host of moral issues associated with this kind of gambling.¹⁴⁷ Nevertheless, hedging and gambling are functionally similar. This similarity should encourage Congress to mirror sports gambling regulations on securities regulations.

d. Entertainment Value in Sports Gambling Does Not Make It Less Like a Security

Finally, the entertainment value in sports gambling does not detract from its similarity to an investment contract. Sports gambling has inherent entertainment value.¹⁴⁸ Most consumers who occasionally place bets would classify sports wagering as recreational rather than professional.¹⁴⁹ The entertainment value of a sports wager, however, does not make it less similar to an investment contract. Courts have found that a stock exchange structured like a virtual video game was still an investment contract for purposes of securities laws.¹⁵⁰ The court carefully distinguished between substance and nomenclature.¹⁵¹ When addressing the entertainment element of the exchange, the court gave little weight to the fact that the exchange was called

143. Hazen, *supra* note 128, at 434–35.

144. *Id.* at 435.

145. *Id.*

146. *Id.* at 377–78.

147. *E.g., id.* at 379 (hedging against terrorist attacks creates moral issues).

148. *Id.* at 409 n.147.

149. *Id.*

150. SEC v. SG Ltd., 265 F.3d 42, 48 (1st Cir. 2001).

151. *See id.* at 47–48.

and structured like a game.¹⁵² The court explained that “it is equally immaterial whether the promoter depicts the enterprise as a serious commercial venture or dubs it a game.”¹⁵³ Therefore, though labeled as “games,” sports wagers are still substantively similar to investment contracts.

Furthermore, like sports gambling, investing in securities often involves some form of entertainment or “thrill.”¹⁵⁴ As one scholar has noted:

[I]nvesting in individual securities or derivative products provides a form of entertainment for some investors in much the same way as rational actors are willing to gamble, notwithstanding the odds and the cut to the house, because of the enjoyment of the game.¹⁵⁵

Both investing and gambling even satisfy the “need to play because of the excitement, risk, and rewards investing and gambling both provide.”¹⁵⁶ Therefore, labeling should not distract Congress from the substance of the transactions. Indeed, sports wagers and investment contracts are similar for many reasons. They both involve the core elements of payment, risk, and reward. Many sports wagers would furthermore qualify as investment contracts under *Howey*’s established test, and many particular types of investment contracts closely resemble sports wagers. For each reason described, and because both investment contracts and securities have some entertainment value, the regulation of sports gambling should resemble the regulation of securities.

2. Federal Sports Gambling Regulations Should Emulate Security Regulations Because Trading Securities is Similar to Making a Sports Wager

In addition to substantive similarities, the economics and behavior involved in trading securities are similar to placing sports wagers. First, trading a security is economically similar to placing a sports wager because both

152. *Id.* at 52–53.

153. *Id.* at 48.

154. Hazen, *supra* note 128, at 401.

155. Chuff, *supra* note 117, at 607.

156. *Id.* at 601–02.

are intended to “reap economic benefits” and both involve “risk taking.”¹⁵⁷ In fact, “[m]any gambling activities involve the same kind of analytical ability, research, and skill that informed investing requires.”¹⁵⁸ For example, analyzing how many games the Los Angeles Rams will win in a season requires extensive research of player statistics, matchups, prior records, power indexes, and many other factors.¹⁵⁹ The bettor then analyzes the data and forms logical predictions about how many wins the Rams will acquire next season.¹⁶⁰ Much of the same “research” and “analytical ability” is required in investing.¹⁶¹

Additionally, sports gamblers and investors share many behavioral similarities. First, both practices include overconfidence bias.¹⁶² Gamblers often approach their wager with a false sense of confidence, and they often attribute their losses to being “unlucky.”¹⁶³ Similarly, investors “are reluctant to believe that the[] risks apply to them personally.”¹⁶⁴ Both gamblers and investors often approach the wager or investment with a false sense of confidence that impairs their judgment.

Sports gamblers and investors also exhibit confirmation bias.¹⁶⁵ When they collect information, both gamblers and investors “seek out information that confirms their beliefs about uncertainties” and “discard information contrary to their beliefs.”¹⁶⁶ Both also tend to believe that their information and

157. Hazen, *supra* note 128, at 377.

158. Chuff, *supra* note 117, at 599–600.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 609.

163. *Id.*

164. *Id.*

165. *Id.* at 610.

166. *Id.*

analytical ability are better than that of the general public, and thus are more likely to commit to information that supports their initial position.¹⁶⁷

Although they generally believe their analytical ability is above-average, sports gamblers and investors also tend to participate in herd behavior.¹⁶⁸ In other words, when trading securities or placing wagers, both parties have a “tendency to invest or bet with the crowd or herd.”¹⁶⁹ Sports gamblers often track the ways the sportsbooks adjust the lines, and they have a “fear of acting contrary to the majority” based on the belief that the majority knows something important.¹⁷⁰ Similarly, investors track the way stock prices fluctuate and often make decisions in-line with majority investors because they too fear the majority has seized important information.¹⁷¹

Finally, like investing, sports gambling is not necessarily irrational behavior, but could instead be understood as a rational, high-risk investment.¹⁷² When an individual on Wall Street wants a high pay-off with “sufficient intensity,” the individual makes a high-risk investment.¹⁷³ A sports wager is functionally the same as a high-risk investment in the stock market.¹⁷⁴ The gambler knows that the venture is high-risk, but based on careful research and analysis, the gambler makes a high-risk, high pay-off investment on the selected team. Furthermore, even assuming sports gambling contains irrational behavior such as herd behavior and “thrill” seeking, these elements are also found in investing.¹⁷⁵

Therefore, sports wagers and investment contracts are very similar, and placing a sports wager is closely related to trading securities. Because of their similarities, federal regulation of sports gambling should largely mirror

167. *Id.*

168. *Id.* at 611.

169. *Id.*

170. *Id.*

171. *Id.*

172. Hazen, *supra* note 128, at 409–10.

173. *Id.*

174. *Id.*

175. *See id.*

the regulation of securities. In particular, sports gambling regulations must criminally punish and enforce against fraud.

3. Sports Gambling Regulations Should Strictly Punish and Broadly Enforce Against Fraud

As Congress debates and revises SWMIA, they must ensure that the substance of sports gambling dictates how it is regulated.¹⁷⁶ Social distaste and a misplaced focus on the parties are distractions that threaten the passage of effective, substantive-based regulations.¹⁷⁷ Like securities, the core attribute of any successful regulation is that it must work to prevent fraud. Fraud is the core evil of both securities and sports gambling. The Securities Act was passed in large part “to insure the maintenance of fair and honest markets in transactions.”¹⁷⁸ The Exchange Act similarly “provides remedies to investors or shareholders who have been misled or defrauded.”¹⁷⁹ Like securities, sports gambling is susceptible to fraud.¹⁸⁰ As explained below, Donaghy’s NBA scandal exemplifies how bookies and inside officials can destroy the integrity of sports.¹⁸¹ Successful sports gambling regulations will prevent fraud by strictly policing insider behavior and ensuring that professional leagues comply with enforcement agencies.

Like securities, successful regulations should also establish a federal enforcement agency to enforce against fraud. The Security Acts allows the Security and Exchange Commission (SEC) to directly bring claims against

176. *Id.* at 377–78.

177. *Id.* at 377.

178. 15 U.S.C. § 78b (2019); Chuff, *supra* note 117, at 620 (“The Securities Act was enacted to prevent investors from being defrauded in connection with the sale or purchase of securities in interstate commerce.”).

179. Chuff, *supra* note 117, at 624; *see* § 78jjj (creating causes of action based on “fraud or deceit” and “misrepresentation.”).

180. *E.g.* Eden *supra* note 1 (NBA referee placing bets on games he controlled); *e.g.*, Gerard Couzens, *The Shame in Spain Valencia Caught up in La Liga Match-Fixing Scandal With Win Over Real Valladolid That Secured Champions League Investigated*, THE SUN (May 28, 2019), <https://thesun.co.uk/sport/football/9168154/valencia-la-liga-match-fixing-real-valladolid/> [<https://perma.cc/9GRT-SNRW>] (La Liga players colluding with bookies to fix matches); *e.g.*, Luke Harding, *Two Years in Jail for Match-Fixing German Referee*, GUARDIAN (Nov. 17, 2005), <https://www.theguardian.com/football/2005/nov/18/newsstory.sport4> [<https://perma.cc/XPV2-X6R2>] (German soccer referee colluding with bookies to fix matches).

181. *See* Eden, *supra* note 1.

infringers. The SEC may bring claims against corporations or individuals “if any of these entities defrauded an investor or shareholder.”¹⁸² The most common claims are securities fraud and insider trading.¹⁸³ The SEC’s enforcement power is a key model for sports gambling. Just like the SEC, enforcement of sports gambling needs a national federal agency to pool together resources and personnel to prevent sports gambling fraud on a national level. The individual states cannot hope to individually combat the bookie and league-insider fraud that permeates state lines.¹⁸⁴ Additionally, a direct enforcement power is important because like individual security holders, individual sports gamblers will rarely have the resources or incentives to personally go after fraudulent operators. Therefore, maintaining the integrity of sports gambling requires a national entity that can investigate and bring claims against fraudulent operators “through enforcement actions.”¹⁸⁵

SWMIA establishes a national entity, but the entity lacks power to enforce against fraud. Created by SWMIA, the National Sports Wagering Clearinghouse (“Clearinghouse”)¹⁸⁶ is a national agency that collects and distributes data on legal and illegal sports gambling.¹⁸⁷ With this pooled data, the Clearinghouse facilitates communication between federal and state enforcement agencies.¹⁸⁸ The collection of information and facilitation of communication between entities is extremely important, but the Clearinghouse must go one step further. To successfully regulate sports gambling, the Clearinghouse must also have the power to enforce the regulations against parties engaged in fraudulent behavior. Armed with enforcement power, the Clearinghouse could streamline all its resources to efficiently combat fraudulent gambling in ways that individual consumers could not.

Additionally, as with securities, sports gambling regulations must enforce strict criminal penalties. Strict criminal punishment is a cornerstone of

182. See Chuff, *supra* note 117, at 624–25 (unlawful to defraud investors); see also § 78jkk (creating causes of action based on “fraud or deceit” or “misrepresentation”).

183. Chuff, *supra* note 117, at 624–25.

184. Cabot & Miller *supra* note 20, at 172.

185. Chuff, *supra* note 117, at 625.

186. Sports Wagering Market and Integrity Act, S. 3793, 115th Cong. § 106(a) (2018).

187. *Id.* § 106(c)(4).

188. *Id.*

corporate and securities regulations. For example, when Congress passed the Sarbanes-Oxley Act (SOX), they “increased criminal penalties as an important part of its reforms.”¹⁸⁹ Specifically, CEOs and CFOs of public companies were then required to “personally certify their company’s financial statement with criminal consequences for false certifications.”¹⁹⁰

Federal sports gambling regulations should establish similar penalties. “The criminal enforcement weapon is especially applicable when we recognize that many market participants are gamblers and many of the securities fraudsters seem to engage in behavior quite similar to those who profit from illegal gambling activities.”¹⁹¹ Because “fraudsters” in both securities and gambling behave similarly, criminal punishments are warranted in both.¹⁹² Like public companies, gambling operators and sportsbooks that meet minimum thresholds of revenue and/or number of consumers should be required to establish strict internal controls over their business operations. As a national enforcement entity, the Clearinghouse should be restructured to enforce criminal punishments against sportsbooks and operators that do not maintain and monitor sufficient internal controls.¹⁹³ The exact scope of the internal controls that should be implemented is beyond this Article’s reach. However, at a minimum, the controls should require the leagues and operators to establish internal controls designed to prevent undue influence of games.¹⁹⁴

189. Hazen, *supra* note 128, at 384.

190. *Id.*; see 15 U.S.C. § 7241(a) (2019).

191. Hazen, *supra* note 128, at 384.

192. *Id.*

193. While SOX holds company officers personally liable in certain circumstances, that exact approach may not be conducive to sports gambling. Holding sportsbook operators personally liable will inevitably create major barriers of entry. The operators will likely have to purchase professional liability insurance and will inevitably pass this cost on to consumers. If the prices rise too high, consumers may be driven back into cheap illegal markets. See Purdum, *supra* note 20 (expressing concern that 34% tax and \$10 million licensing fee in Pennsylvania will drive consumers to the cheaper illegal market); Congress should carefully consider whether holding the operators personally liable is worth the market costs. Regardless, the regulations should require operators to establish and monitor internal controls that prevent operators from colluding with corrupt insiders who can influence the outcome of games, especially referees. See Eden, *supra* note 1; see also Harding, *supra* note 180 (German soccer referee colluding with bookies to fix matches).

194. *E.g.*, N.J. ADMIN. CODE § 13:69n-17 (2019) (New Jersey regulations as example of regulatory internal controls).

Because sports wagers and securities are substantively similar, and because trading securities is similar to making sports wagers, sports gambling regulations should model securities regulations. The regulations should expand the Clearinghouse from a simple information agency into an enforcement agency that closely monitors sportsbooks and league officials. The foregoing analysis heavily emphasizes the role of the federal government, but successful regulations also depend on participating state governments.

B. Successful Regulations Will Strike an Appropriate Balance Between Federal and State Power

The federal regulations outlined above are substantial. They call for the federal government to play a significant role in the gambling market by greatly expanding a federal agency to monitor and enforce against fraud. Comprehensive federal regulations risk depriving the states of their interest in regulating their citizens. Successful regulations, therefore, must strike a proper balance between federal and state control. SWMIA adopts an appropriate balance between federal and state regulatory authority. The Act allows states to create their own regulatory scheme so long as they opt in to the general federal scheme.¹⁹⁵ This type of law is known as “cooperative federalism.”¹⁹⁶ A potential problem with this approach is that different states could regulate and report data differently. The Clearinghouse, however, solves this problem by nationally collecting data and assisting enforcement agencies.¹⁹⁷ SWMIA’s approach would solve this problem by maintaining state discretion while equipping the federal government to combat illegal gambling.

1. States Should Retain Discretion to Issue Licenses

An appropriate balance between federal and state power is crucial to successfully regulating sports gambling,¹⁹⁸ and SWMIA achieves this proper balance. SWMIA prohibits any operator from accepting sports wagers unless the state where the operator does business has opted in to SWMIA’s

195. See Sports Wagering Market and Integrity Act, S. 3793, 115th Cong. §§ 101(a), (b) (2018).

196. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 269 (1981).

197. S. 3793 § 106(a).

198. Cabot & Miller, *supra* note 20, at 174.

regulatory scheme.¹⁹⁹ Under this approach, the states must accept the general federal regulations, but the states retain authority to license the gambling operators.²⁰⁰ The ability to issue licenses is a “central feature” of a state’s power over its citizens.²⁰¹ “States’ discretion to grant licenses to and oversee the operations of casino owners and employees is a central feature of state regulatory regimes” and those “powers serve as the state’s primary means of control over the gaming industry.”²⁰² States have many ways to license on a local level to meet local needs, including restricting hours of operation, prohibiting sportsbooks from offering certain amenities, and broadly taxing gambling revenue.²⁰³ For example, West Virginia currently imposes a 10% tax on sports gambling while Pennsylvania imposes a 34% tax.²⁰⁴ Both policy choices represent distinct treatment of sports gambling in two different states and will have different effects on how sports gambling develops locally. Additionally, many states have distinct economic goals in mind. New Jersey, for example, structures its licensing requirements around revitalizing Atlantic City as an important economic hub.²⁰⁵ Furthermore, because individual states are closer to the fraud that occurs within their borders, they can personalize their licensing to prevent local fraud. By allowing states to issue licenses after opting in to the federal scheme, SWMIA suitably leaves the states discretion to license their own local operators.²⁰⁶

199. S. 3793 §§ 101(a), (b).

200. S. 3793 §§ 101(b), 103(b)(2)(C).

201. Chuff, *supra* note 117, at 614.

202. *Id.*

203. Chuff, *supra* note 117, at 616 (2011) (an argument can be made that the federal regulations infringe on state discretion by establishing consumer protections. On a national level, SWMIA prevents persons under twenty-one, persons on the self-exclusion list, and interested coaches or players from placing sports wagers); S. 3793 §§ 101(a), (b) § 103(b)(4) (while states could maintain their own consumer protections more narrowly tailored to their respective interests, a uniform federal regulation efficiently establishes protections that most states would establish anyway).

204. W. VA. CODE § 29-22D-16(a) (2019); 4 PA.C.S. § 13C62(a) (2019).

205. Gregory, *supra* note 42, at 223–25; *see* Chuff, *supra* note 117, at 618–19 (regulations must mitigate the “systemic risk and pervasive externalities to affect the surrounding community and economy” while simultaneously realizing the benefits of “economic revitalization” and “entertainment.”).

206. Unlike PASPA, SWMIA does not violate the Tenth Amendment’s anticommandeering principle. In *Hodel*, Congress enacted a law regulating coal mining and giving the states the

2. The Clearinghouse Vitably Facilitates Communication Between the States, Federal Government, and the Leagues

To equip the states and leagues to protect the integrity of sports, SWMIA establishes the Clearinghouse as a national entity to collect and organize sports data.²⁰⁷ The Clearinghouse operates a national repository of data accessible by enforcement officers.²⁰⁸ This interstate repository is important because states do not have the resources to fight illegal gambling on their own.²⁰⁹ The illegal market is widespread, and much illegal gambling is housed overseas.²¹⁰ States need a national entity to readily collect and distribute data.²¹¹ Without national collection, states would be forced to constantly communicate with one another about information that has been collected in different ways, or not collected at all.²¹² This state-by-state approach is especially inefficient when Internet gambling occurs across state and national lines. Most importantly, to prevent fraud by corrupt officials, the sports leagues also need a national entity to collect and distribute data. The sports leagues operate across state lines, and a national entity provides a centralized information resource for the leagues. Without a centralized resource, the leagues would be relying on individual states to collect and distribute information. Even if the states decided to collect and offer data to the leagues, the leagues would have to synthesize and make sense of accumulated data. A state-by-state method is therefore inefficient and risks that some states will not participate. The Clearinghouse, on the other hand, is efficient. It ensures that data and information will be captured and offered

choice to “either implement” the federal program “or else yield to a federally administered regulatory program.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981). Thus, the states were “not compelled to enforce the [federal] standards” or to “participate in the federal regulatory program.” *Id.* at 288. The Court deemed this kind of law as “cooperative federalism” and held that it did not violate the anticommandeering principle because it did not compel states to participate. *Id.* at 289; *see* *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (“[T]he federal law *allowed* but did not *require* the States to implement a federal program.”) (emphasis in original).

207. S. 3793 § 106(a).

208. *Id.* § 106(c)(4).

209. Cabot & Miller, *supra* note 20, at 172.

210. *Id.*

211. *Id.*

212. *Id.* at 176.

to the leagues on a national level, consistent with their national business model.

England's gambling laws provide an example of a successful national information entity. In 2004, England proposed a Bill that reinvented the country's regulation of sports gambling.²¹³ The Bill granted the Gambling Commission power to facilitate information with local agencies.²¹⁴ The Commission's power includes:

[I]nvestigatory powers previously unavailable to the Gaming Board that include requiring local authority to produce information, and enabling it to exchange information (including criminal records) through 'gateways' with sporting and other industry regulators and enforcement agencies.²¹⁵

Like England's Commission, the Clearinghouse can "exchange information" and require "local authority to produce information."²¹⁶ These powers over local authorities will enable the Clearinghouse to closely monitor sports gambling fraud on a national level.²¹⁷ The in-flow of local information into a national collecting agency is crucial to efficiently monitor illegal practices.²¹⁸ Like England's Commission, the Clearinghouse will properly equip the federal government, state governments, and the leagues to combat illegal gambling. The Clearinghouse and the provision allowing states to license local operators establishes a balanced federal-state approach that will contribute to SWMIA's success. While the federal-state balance is appropriate, SWMIA still must work hard to prevent insider fraud.

213. See generally Gambling Act 2005, c.19, § 326(1), (Eng.); Stephen Walsh & Juan Lopez, *Gambling on a New Commission*, 154 NLJ 1850 (2004).

214. Walsh & Lopez, *supra* note 213.

215. *Id.*

216. *Id.*

217. *Id.*

218. Returning briefly to the securities analogy, Christopher Chuff has argued that a "single, unified administrative agency should govern all participants and transactions in the financial markets." Chuff, *supra* note 117, at 614 (citations omitted). Such a single agency would "enable open communication between many financial regulators, increase efficiency of the administrative agencies' aggregate actions, and breed consistency and predictability into the legal framework." *Id.* at 614 (citations omitted). These same principles hold true for the Clearinghouse in the sports gambling market.

C. Successful Regulations Must Encourage and Require Cooperation Between the Leagues and Enforcement Agencies

Finally, federal regulations should both encourage and require the leagues to cooperate with enforcement agencies. To protect the integrity of professional sports, the regulations must prevent fraudulent match fixing. The best way to prevent fraudulent match fixing is to ensure that the leagues will help combat the fraud. To ensure the leagues will help, the regulations should both encourage and require the leagues to cooperate with enforcement agencies. Otherwise, scandals like Donaghy's will persist.

1. The Largest Threat to Sports Integrity Comes from the Inside

Federal regulations can help prevent fraud, but match-fixing could not be stopped overnight since the government regulates sports gambling.²¹⁹ The "global nature" of match-fixing in soccer, for example, demonstrates that match-fixing can "take place anywhere, regardless of whether gambling on sports is legal or illegal in a particular place."²²⁰ When considering the scope of the regulations, Congress must recognize that match-fixing boils down to corrupt insiders, specifically players or referees.²²¹ The largest threat to the integrity of sports comes from fraud generated by players or referees and corrupt bookies.²²² Within the last fifteen years, there have been three incidents which illustrate how this fraud occurs.

First, in Germany, Robert Hoyzer refereed games in the nation's top soccer league ("Bundesliga").²²³ German enforcement agencies accused Hoyzer of fraudulently fixing matches.²²⁴ After a four-week trial, the court found Hoyzer guilty of fixing matches by awarding penalties to sides that he bet on and sending off players for sides that he bet against.²²⁵ Hoyzer reportedly conspired with a sports-bar owner to fix the matches, and even received

219. Gregory, *supra* note 42, at 219.

220. *Id.*

221. *E.g.*, Eden, *supra* note 1; *e.g.*, Couzens, *supra* note 180; *e.g.*, Harding, *supra* note 180.

222. *E.g.*, Eden, *supra* note 1; *e.g.*, Couzens, *supra* note 180; *e.g.*, Harding, *supra* note 180.

223. Harding, *supra* note 180.

224. *Id.*

225. *Id.*

solicitations from sports bettors during halftime of some matches.²²⁶ Less than five years later, German police uncovered possible violations in three Union of European Football Association (UEFA) Champions League matches and twelve UEFA Europa League matches.²²⁷ The German police noted that more than 200 games were under suspicion, but informed the public that this might be just the “tip of the iceberg.”²²⁸ The police believed that more than one referee was involved, and catching all of the perpetrators was crucial to maintaining integrity.²²⁹

Second, a scandal recently occurred in Spain’s top soccer league, La Liga.²³⁰ On the last day of the season, fifth-placed Valencia faced Real Valladolid.²³¹ Valencia needed a win to secure an automatic spot in next year’s Champions League, a coveted position for clubs across Europe.²³² A betting agency reportedly paid Valladolid players to fix the match, and Valencia won the game after Valladolid made two atrocious defensive mistakes.²³³ Spanish reports indicate that a criminal organizational leader named “Bravo” facilitated the fraud.²³⁴ While the suspected players have been arrested, the investigation to uncover the extent of the scandal is ongoing.²³⁵

226. *Id.*

227. Owen Gibson, *Europe Hit by ‘Biggest-Ever’ Match-Fixing Scandal*, *GUARDIAN* (Nov. 20, 2009), <https://www.theguardian.com/sport/2009/nov/20/uefa-match-fixing-germany> [<https://perma.cc/JHE8-2XF7>].

228. *Id.*

229. Compared to the professional athletes or coaches, professional referees are especially susceptible to betting syndicates because they often make significantly less money. See Jack Anderson, *Sports: Murphy’s Law*, 161 *NAT’L L.J.* 395 (2011) (“A common theme has been that individuals targeted by betting syndicates are often those who, relative to their counterparts, are modestly paid.”).

230. Couzens, *supra* note 180.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

Finally, the Donaghy scandal is a sobering example of insider fraud.²³⁶ Donaghy refereed NBA games from 1994 to 2007.²³⁷ According to his wife, he was extremely secretive and spent most of his time playing golf and gambling.²³⁸ Sometime in the early 2000s, Donaghy allegedly began placing wagers on games that he officiated.²³⁹ According to ESPN, but denied by the NBA, Donaghy colluded with well-connected bookies to fix NBA games by ensuring that the game stayed in the spread.²⁴⁰ ESPN writer Scott Eden claims that Donaghy kept games in the spread by calling more fouls or letting fouls slide depending on how the game developed.²⁴¹ While the NBA claims that Donaghy's bets were isolated incidents, Eden claims that Donaghy placed wagers on games that he officiated for many years.²⁴² Like Robert Hoyzer and the La Liga soccer players, Donaghy used his close position to fraudulently affect the outcome of a game. Corrupt insiders with power to alter the outcome of any given match are the primary source of sports gambling fraud, and the regulations must focus on these individuals.

2. The Regulations Must Encourage the Leagues to Cooperate, and SWMIA's Exclusive Data Provision Will Help Accomplish This Goal

To prevent the fraud outlined above, the leagues must be fully committed to preventing fraud. The regulations, therefore, should encourage the leagues to cooperate with enforcement agencies. To foster cooperation through the regulations, Congress has various options. Paying the leagues a flat integrity fee under the regulatory scheme is one way to get the leagues

236. Eden, *supra* note 1.

237. *Id.*

238. *Id.*

239. In his article, Eden believes the evidence is clear that Donaghy placed wagers on games that he personally refereed. Eden, *supra* note 1 (the NBA disputes that Donaghy placed bets on games that he actually refereed); see Cassandra Negley, *NBA Disputes Findings, Game Anecdotes and 'Conflicting' Quotes in ESPN's Tim Donaghy Report*, YAHOO! SPORTS (Feb. 22, 2019, 11:38 AM), <https://sports.yahoo.com/nba-disputes-findings-game-anecdotes-conflicting-quotes-espn-tim-donaghy-report-193821436.html> [<https://perma.cc/3KNP-MAW7>].

240. Eden, *supra* note 1; Negley, *supra* note 239.

241. Eden, *supra* note 1.

242. Eden, *supra* note 1; Negley, *supra* note 239.

on board.²⁴³ Another method is to include a provision that pays the leagues for use of their data and information.²⁴⁴ The NBA specifically believes it should receive compensation for the use of its data.²⁴⁵ Commissioner Adam Silver claims that without the NBA as an organization, the data would not be available and sports gambling would not be possible.²⁴⁶ While existing law does not create protectable interests in sports data, SWMIA effectively fashions an exception for the leagues.²⁴⁷ This exception is not perfect, but it adequately fosters cooperation between the leagues and the government.

To foster cooperation, the regulations could pay the leagues for use of their data, but existing law does not support any protectable interest in the data. Courts have recognized unfair competition between businesses built on disseminating facts, but the facts themselves are not protectable property.²⁴⁸ A foundational case addressing the protection of facts is *Int'l News Serv. v. AP*, 248 U.S. 215 (1918) (“*INS*”). Both the plaintiff and defendant published news, but the defendant poached facts from plaintiff’s sources and sold the facts as news to plaintiff’s competitors.²⁴⁹ The Court noted that the commercial value of the news lay in the promptness and accuracy of the information.²⁵⁰ Under unfair competition laws, defendant could not rip off plaintiff’s hard-earned efforts to gather and organize the facts.²⁵¹ Otherwise,

243. See Adam Candee, *NBA’s Adam Silver on Sports Betting*, LEGAL SPORTS REP. (June 1, 2018), <https://www.legalsportsreport.com/20904/nba-commissioner-adam-silver-talks-sports-betting/> [<https://perma.cc/E9MC-86UX>] [hereinafter *NBA’s Sports Betting*].

244. See Matt Rybaltowski, *Adam Silver Touts Virtues of NBA’s Intellectual Property In Support Of 1% Gambling Integrity Fee*, FORBES (Feb. 18, 2018, 9:47 PM), <https://www.forbes.com/sites/mattyrybaltowski/2018/02/18/adam-silver-touts-virtues-of-nbas-intellectual-property-in-support-of-1-gambling-integrity-fee/#18c45a5f2f19> [<https://perma.cc/APJ8-B33E>].

245. *NBA’s Sports Betting*, *supra* note 243.

246. *Id.*

247. Sports Wagering Market Integrity Act, S. 3793, 115th Cong. § 103(b)(5) (2018).

248. See *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 234 (1918); see also *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377 (D. Del. 1977); see also *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997).

249. *Int’l News Serv.*, 248 U.S. at 231.

250. *Id.* at 230.

251. *Id.* at 239.

defendant could “reap where it has not sown.”²⁵² The Court upheld the injunction against defendant for appropriating and disseminating plaintiff’s news.²⁵³ But the Court limited its ruling to unfair competition between the parties and declined to hold that the parties had public rights to the information.²⁵⁴ Furthermore, the Court expressly held that the facts themselves were in the public domain and could not be protected by copyright.²⁵⁵

Subsequent courts limited the scope of unfair competition under *INS* while emphasizing that facts and data could not be protected.²⁵⁶ The issue arose in a sports and gambling context in the mid-1970s.²⁵⁷ Delaware established a lottery system in which consumers placed small bets on the outcome of NFL games.²⁵⁸ The lottery scoreboard did not use any team names, but it referred to the teams by city, such as “Philadelphia” when referring to the Philadelphia Eagles.²⁵⁹ The NFL sued the state of Delaware for misappropriation and trademark infringement in *Nat’l Football League v. Governor of Del.* (“*Delaware*”).²⁶⁰ In that case, the NFL argued that they had invested immense time and effort in building the popularity of their brand.²⁶¹ According to the NFL, by profiting from information generated by NFL games, Delaware “reap[ed] where it ha[d] not sown.”²⁶²

252. *Id.*

253. *Id.* at 246.

254. *Id.* at 236.

255. *Id.* at 234.

256. *See Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377 (D. Del. 1977); *see also Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997); *see also Feist Publ’ns, Inc. v Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

257. *Nat’l Football League*, 435 F. Supp. at 1375.

258. *Id.*

259. *Id.* at 1380.

260. *Id.* at 1375–76.

261. *Id.* at 1377.

262. *Id.* (quoting *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 239 (1918)).

However, the court rejected the NFL's argument.²⁶³ It found that the NFL did not have a protectable interest in the "end result" of its hard labor, regardless of how much "public interest" the information generated.²⁶⁴ Further, the NFL disseminated the information into the public domain, and it did not have a protectable interest in public information.²⁶⁵ The judge compared lotteries that profit from sports data to businesses that profit from sports games by selling food or souvenirs to game attendants on their way to the stadium.²⁶⁶ According to the court, businesses that profit from sports games in this way are "collateral service[s]" to the game itself.²⁶⁷ Like the adjacent businesses that profit from game attendants, gambling operators may profit from public sports information.²⁶⁸ Therefore, the NFL had no protectable stake in public game data and they could not collect any profits from gambling operators who used the information.²⁶⁹

In a similar vein, the Second Circuit declined to extend copyright protection to athletic competitions and the data underlying the games.²⁷⁰ In 1996, Motorola manufactured the "SportsTrax" device.²⁷¹ SportsTrax supplied real-time information about NBA games, including the teams playing, scores, time remaining, and possession.²⁷² SportsTrax operated on a "data feed" in which live watchers or listeners streamed the information as they watched the game.²⁷³ The NBA claimed that this relay of information

263. *Id.* at 1377–78.

264. *Id.* at 1377.

265. *Id.*

266. *Id.* at 1378.

267. *Id.*

268. *Id.*

269. *Id.*

270. *See generally* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

271. *Id.* at 843.

272. *Id.* at 843–44.

273. *Id.* at 844.

violated its copyright in the games.²⁷⁴ However, the court held that the sports game itself is not sufficiently “authored” for copyright protection.²⁷⁵ The court noted that a broadcast can be copyrighted when it is simultaneously recorded by the NBA.²⁷⁶ However, the court specifically held that the data from the broadcasts, including game scores and other statistics, could not be protected by copyright.²⁷⁷ Because the facts are not protectable, private entities like sports gambling operators may freely use the game data.²⁷⁸

The court also distinguished *Int’l News Serv. v. Assoc. Press* from the case because Motorola’s real-time transmission did not “free-ride” on the NBA’s efforts.²⁷⁹ The court distinguished between appropriating information from the NBA’s source and using one’s own resources and efforts to collect facts from the game.²⁸⁰ Because Motorola used its own efforts to collect factual game information, and because there is no inherent property right in that information, it did not unfairly compete under *INS*.²⁸¹

INS, *Delaware*, and *Motorola* collectively illustrate that under current law, the sports leagues are not legally entitled to compensation for use of their data.²⁸² The data from games are not protectable by copyright or trademark, no matter how much effort and money the leagues invest in each game.²⁸³ Under these cases, sports gambling is a “collateral” business to the

274. *Id.* at 845.

275. *Id.* at 847.

276. *Id.*

277. See 17 U.S.C. § 102(a) (2006); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991); *Nat’l Basketball Ass’n*, 105 F.3d at 847.

278. *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (noting that gambling operators are free to use public sports information).

279. *Nat’l Basketball Ass’n*, 105 F.3d at 854 (citation omitted).

280. *Id.*

281. *Id.*

282. See 17 U.S.C. § 102(a) (2006); *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 223 (1918); *Nat’l Basketball Ass’n*, 105 F.3d at 847.

283. See 17 U.S.C. § 102(a); *Int’l News Serv.*, 248 U.S. at 234; *Nat’l Basketball Ass’n*, 105 F.3d at 847.

sports games themselves.²⁸⁴ Therefore, while Congress could compensate the leagues for use of their data, this method has no direct support from case law.²⁸⁵ Unless federal regulations create an exception to the rules above, the leagues are not entitled to compensation for the use of their data. Without compensation, however, the leagues will lack incentive to cooperate with the government's cumbersome regulations. To solve this problem and foster cooperation, SWMIA compensates the leagues by granting them exclusive control over gambling data.²⁸⁶

Instead of compensating the leagues for their data or paying the leagues a flat fee for maintaining integrity, SWMIA contains an exclusive data provision.²⁸⁷ The provision provides that until 2024, all licensed gambling operators may only use data provided by the relevant sports league or an entity expressly authorized by that league.²⁸⁸ After 2024, the operators must use data of the same quality approved by the applicable league.²⁸⁹ For example, a sportsbook accepting wagers for a Sunday NFL football game may only use data authorized by the NFL. In anticipation of this provision, the leagues have already established business relationships with sports data processors.²⁹⁰ All four leagues process data using Sportradar, a leading sports data

284. *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1977).

285. *Int'l News Serv.*, 248 U.S. at 23; *Nat'l Football League*, 435 F. Supp. at 1377–78; *Nat'l Basketball Ass'n*, 105 F.3d at 847.

286. Sports Wagering Market Integrity Act, S. 3793, 115th Cong. § 103(b)(5) (2018).

287. *Id.*

288. *Id.*

289. *Id.*

290. *League Partnerships*, SPORTRADAR, <https://sportradar.us/about-us/league-partnerships/> [<https://perma.cc/K736-JW8T>] (outlining Sportradar's relationship with the NFL, NBA, MLB, and NHL).

collector and processor.²⁹¹ Sportradar uses an application programming interface (API) to collect and process sports data.²⁹² Sportradar's API and Managed Trading Services (MTS) can help users create custom sportsbook platforms, making an easy jump into the gambling market for the leagues.²⁹³ In fact, the NBA has already incorporated Sportradar's integrity processes and policies, setting the stage for a smooth transition if and when SWMIA takes effect.²⁹⁴ Big-business data operators like Sportradar are likely the type of entities that will exclusively provide data to operators under SWMIA.²⁹⁵

SWMIA's exclusive data provision vests immense power in the sports leagues, but ultimately is an appropriate way to foster cooperation between the leagues and the government. In sports gambling, control over data dictates the entire industry.²⁹⁶ Whoever controls the data effectively controls sports gambling.²⁹⁷ Control over data distribution is essentially "the difference between having value and having no value at all."²⁹⁸ Congress, therefore, has given the leagues an extremely valuable method of control over sports gambling. Because the leagues have exclusive protection of the data under SWMIA, the bill effectively carves out an exception to the *Delaware*

291. *Id.* (outlining Sportradar's relationship with the NFL, NBA, MLB, and NHL); Rybaltowski, *supra* note 244.

292. *Sports Data*, SPORTRADAR, <https://sportradar.us/sports-data/> [<https://perma.cc/QX5K-X9B8>].

293. *Sports Betting*, SPORTRADAR, <https://sportradar.us/betting-services/> [<https://perma.cc/FXZ9-KDQP>] ("Whether you want to create a sophisticated sportsbook from scratch, or expand and grow an existing one, Sportradar's Managed Trading Services (MTS) is the perfect partner.").

294. Rybaltowski, *supra* note 244.

295. *League Partnerships*, *supra* note 290 (outlining Sportradar's relationship with the NFL, NBA, MLB, and NHL).

296. See James Glanz & Agustin Armendariz, *When Sports Betting is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> [<https://perma.cc/T249-MQ7P>].

297. *Id.*

298. *Id.*

and *Motorola* rules.²⁹⁹ In the context of sports gambling, the leagues now have a protectable interest in the facts derived from the applicable game.

Furthermore, while the exclusive data provision expires in 2024, this limitation is less restrictive than it appears. As of the current SWMIA draft, the data provision expires in 2024.³⁰⁰ Future drafts, however, could extend the date or make it permanent.³⁰¹ Indeed, under the first draft, the provision expired in 2022 but has since been pushed back to 2024.³⁰² Additionally, after 2024, the data must be of the same quality as that approved by the leagues.³⁰³ The leagues already use high-quality data provided by providers like Sportradar.³⁰⁴ Under a narrow interpretation, “of the same quality” may be limited to data from providers like Sportradar who are closely affiliated with the leagues.³⁰⁵ A narrow interpretation would effectively keep the data in the leagues’ control. Other criticisms of the data provision include market barriers and other inefficiencies.³⁰⁶ For example, data from leading providers like Sportradar and Genius Sports is expensive.³⁰⁷ The going rate for a data package covering 300 games can fall within \$4,000 to \$6,000 a month.³⁰⁸ Small operators cannot afford these prices, and this provision will

299. See *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1977); see also *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997).

300. Sports Wagering Market Integrity Act, S. 3793, 115th Cong. § 103(b)(5) (2018).

301. See John Brennan, *Federal Sports Betting Bill Has ‘Integrity’ in the Title and Data in the Details*, SPORTS HANDLE (Dec. 19, 2018), <https://sportshandle.com/federal-sports-betting-bill-introduced/> [<https://perma.cc/7H4G-HEW3>] (pointing out that the timeline has already been extended from 2022 to 2024).

302. *Id.*

303. S. 3793 § 103(b)(5).

304. *Sports Betting*, *supra* note 293.

305. S. 3793 § 103(b)(5).

306. See Matt Rybaltowski, *Here’s How Much ‘Official’ League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/> [<https://perma.cc/FLL2-YKUE>] [hereinafter *Official League Data Cost*] (indicating that small operators cannot pay for big-company data and big company data may not be of much higher quality anyway).

307. *Id.*

308. *Id.*

create even higher barriers of entry to the gambling market.³⁰⁹ Some experts also argue that as technology becomes generally available to smaller operators, there is no substantial difference in quality in data from league-authorized entities and non-authorized entities.³¹⁰ Finally, SWMIA's data provision may create virtual monopolies in large data companies that have close connections to the powerful sports leagues.³¹¹

Although the data provision has troubling implications, it ultimately will encourage the cooperation necessary to combat fraud. For the reasons above, the exclusive data provision vests substantial power in the leagues and it might hinder the growth of the gambling market. While this power should not be granted lightly, the data provision is the kind of compensation that will facilitate cooperation between the leagues and the government. Without their slice of the pie, the leagues will have less incentive to comply with cumbersome federal regulations. Thus, the data provision should give the leagues incentive to cooperate. But merely encouraging cooperation may not be enough to keep the leagues accountable. In addition to being encouraged to cooperate, the leagues should be *required* to cooperate with enforcement agencies.

3. The Regulations Must Require the Leagues to Cooperate, but SWMIA Does Not Expressly Require the Leagues to Cooperate

While SWMIA's data provision encourages the leagues to cooperate, SWMIA troublingly leaves room for the leagues to cover up internal fraud.³¹² Under the Bill, gambling operators and state entities must explicitly cooperate with federal investigations.³¹³ However, the Bill fails to require the sports

309. See Cabot & Miller, *supra* note 20, at 158–59 (discussing barriers to entry created by regulatory compliance costs).

310. *Official League Data Cost*, *supra* note 306; see also Glanz & Armendariz, *supra* note 296 (arguing that Sportsradar's affiliation with oft-indicted offshore operators presents yet another integrity issue).

311. In the case of Sportradar, the integrity of the data provider also becomes an issue. According to various reports, Sportradar has provided information to offshore operators that are under federal investigation. See Glanz & Armendariz, *supra* note 296.

312. See Sports Wagering Market Integrity Act, S. 3793, 115th Cong. § 103(b)(15) (2018).

313. *Id.*

leagues to cooperate with investigations.³¹⁴ Donaghy's referee scandal illustrates how and why the leagues may abuse this freedom to undermine the investigation and enforcement of fraud.

Donaghy's scandal suggests that the leagues may undercut enforcement agencies to preserve their brand. After the FBI received a tip that Donaghy was fixing spreads, it conducted a tight-lipped investigation.³¹⁵ The FBI held the investigation under wraps because it wanted to catch other colluding referees.³¹⁶ Despite this covert approach, the lead investigator sat down to discuss the scandal with then-NBA Commissioner David Stern and other NBA executives, including current commissioner Adam Silver.³¹⁷ Stern was visibly upset, and he voiced complete cooperation with the FBI.³¹⁸ Only a month after the meeting, however, the investigation leaked to the *New York Post*, which naturally blew the entire issue open.³¹⁹ The author of ESPN's article suggests, and the FBI's lead investigator believes, that the NBA leaked the story to avoid uncovering widespread game fixtures by other referees.³²⁰ By allegedly leaking the story, the NBA purportedly cut off any chance of exposing pervasive integrity violations within the league.³²¹

Naturally, the NBA disputes the accuracy of ESPN's article, including the extent of Donaghy's collusion.³²² Regardless of whether the NBA leaked the investigation, this scandal illustrates the potential conflict between leagues and enforcement agencies. Professional sports leagues have powerful brands.³²³ Like all brands, their value is subject to public perception. The

314. *See id.*

315. Eden, *supra* note 1.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*; Gibson, *supra* note 227.

322. *See* Negley, *supra* note 239.

323. *See* Kenneth Cortsen, *NBA, LeBron James and Global Branding of Basketball*, SPORT MANAGEMENT PERSPECTIVES (July 6, 2017), <http://kennethcortsen.com/nba-lebron-james-global->

leagues will maintain the appearance of integrity at all costs, and they have powerful resources to do so.³²⁴ If they are not required to cooperate with the regulating or enforcement agencies, they can use their power to inhibit investigations that might devastate their business.³²⁵ Therefore, unless the regulations strictly regulate the leagues, internal violations will persist.

To solve this problem, the regulations should first facially require the leagues to cooperate. Congress can find helpful language in the United Kingdom Gambling Commission publications.³²⁶ The United Kingdom passed comprehensive gambling regulations in 2005.³²⁷ The regulations state that “[a] person commits an offence if without reasonable excuse he obstructs, or fails to cooperate with, a constable, enforcement officer or authorized person who is exercising or seeking to exercise a power” under the Act.³²⁸ Because sports gambling is widespread in the United Kingdom, lawmakers in the United States should openly derive from the language and approach of the United Kingdom Commission. At a bare minimum, federal regulations must include similar language requiring the leagues to cooperate with—and not obstruct—investigations.

Additionally, as a lead enforcement and information agency, the Clearinghouse should promulgate codes that clarify the role of league officials.

branding-basketball/ [https://perma.cc/67YU-AC8J] (“[T]he business model of the NBA and the attached capitalization power have grown considerably over the years.”).

324. For example, at the time that Eden suggests the NBA leaked the Donaghy scandal, former FBI agent Bernie Tolbert served as Senior Vice President of Security for the NBA. Eden, *supra* note 1.

325. *E.g., id.*

326. *See generally* Gambling Act 2005, c.19, § 326(1), (Eng.).

327. *Id.*

328. *Id.* Under the United Kingdom’s standard scale, the maximum fine available for this offense is £1,000. *See* Gambling Act 2005, c.19, § 326(2), (Eng.); *see also* Criminal Justice Act 1982, c.48, § 37(2), (Eng.).

The United Kingdom's Gambling Commission provides several provisions with helpful language.³²⁹ For example, the United Kingdom's Gambling Commission requires licensees to:

[W]ork with the Commission in an open and cooperative way and to disclose anything which the Commission would reasonably need to be aware of in exercising its regulatory functions. This includes, in particular, anything that is likely to have a material impact on the licensee's business or on the licensee's ability to conduct licensed activities compliantly. Licensees should have this principle in mind in their approach to, and when considering their compliance with, their obligations under the conditions attached to their license.³³⁰

By including simple language like this, the Clearinghouse could actively remind and encourage league officials to cooperate with the regulations. Because the Clearinghouse will work closely with the leagues in the course of exchanging data and information,³³¹ the entities have an opportunity to build a strong relationship. If the relationship is strong and mutually respectful, league officials are more likely to cooperate.

Facial requirements and good relationships, however, may not be enough. Eden suggests that the NBA, who did not have a bad relationship with the FBI and expressed total cooperation with the investigation, leaked the scandal to prematurely end the investigation.³³² The regulations must, therefore, enforce criminal punishments against league officials who refuse to cooperate or obstruct enforcement agencies.³³³ To enforce criminal punishments, the Clearinghouse should exercise strong oversight over the

329. Gambling Codes of Practice, U.K. GAMBLING COMMISSION (Apr. 2018), <https://www.gamblingcommission.gov.uk/PDF/Gambling-codes-of-practice-Consolidated-for-all-forms-of-gambling.pdf> [<https://perma.cc/D9SS-HFXE>].

330. *Id.*

331. *See* Sports Wagering Market and Integrity Act, S. 3793, 115th Cong. § 106(a) (2018).

332. Eden, *supra* note 1.

333. *See* Hazen, *supra* note 128, at 384 ("The criminal enforcement weapon is especially applicable when we recognize that many market participants are gamblers and many of the securities fraudsters seem to engage in behavior quite similar to those who profit from illegal gambling activities.").

leagues.³³⁴ Like the SEC, the Clearinghouse should perform routine check-ups and streamline investigations of league officials.³³⁵ Because it facilitates data and information between leagues and enforcement agencies, the Clearinghouse is already in prime position to strictly monitor the leagues during investigations.³³⁶ With increased oversight and threat of stricter punishment, the professional leagues will have more difficulty undermining investigations.

Congress must walk a fine line. The drafters must encourage cooperation without twisting the leagues' arms. Forced cooperation may embitter the leagues, making them more likely to undermine operations. Too little encouragement, on the other hand, permits the leagues to protect their brand at the expense of integrity. There is no easy answer, but successful regulations must at least facially require the leagues to cooperate. Successful regulations will also require strict compliance with enforcement agencies and criminally punish obstructionists. Unless SWMIA is revised to require this cooperation and enforce criminal punishments for violators, internal violations like Donaghy's (and the other NBA referees who may have partook in the scandal)³³⁷ will go unrevealed and unpunished.

IV. CONCLUSION

A new dawn is rising for sports gambling in the United States, and it presents significant legal challenges. In *Murphy*, the Court tossed away wide prohibition on sports gambling,³³⁸ and the federal government must decide how to regulate this lucrative market.³³⁹ To prevent fraud, federal regulations must primarily emulate security regulations. Like security regulations, the regulations cannot work properly unless they prevent fraud through criminal punishment and strict enforcement. Additionally, successful regulations

334. As explained above, the Clearinghouse under the current draft of SWMIA plays only an informational role. See S. 3793 § 106(a). The Clearinghouse, however, should take on an enforcement and monitoring role, especially with the professional sport leagues.

335. See Chuff, *supra* note 117, at 624–25 (citations omitted) (discussing the SEC's enforcement role).

336. See S. 3793 § 106(a).

337. See Eden, *supra* note 1.

338. *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018).

339. See generally S. 3793.

must strike a proper balance between state and federal control. The crucial part of this balance is allowing the states to license operators while establishing a national entity to collect and distribute data. Finally, the regulations must decide how to encourage cooperation between the government and the professional sport leagues. While the leagues are not entitled to compensation for the use of game data,³⁴⁰ SWMIA encourages cooperation by granting control of the data exclusively to the leagues.³⁴¹ While the leagues may be encouraged, they must also be required to cooperate. The Clearinghouse must take an active oversight role and enforce criminal punishments against the leagues for failure to cooperate. There is no clear play in this area, but successful regulations must cover these fundamental requirements.

340. *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 234 (1918); *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377–78 (D. Del. 1977); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997).

341. *See* S. 3793 § 103(b)(5).