A LAW OF CONFUSION: CONFLICTING INTERPRETATIONS OF THE WIRE ACT PROVE THE NEED FOR MODERN REFORM

BAXTER GEDDIE

Baxter Geddie is a May 2020 graduate of the University of Mississippi School of Law in Oxford, Mississippi.

INTRODUCTION

The gambling industry in the United States has had a tumultuous, but nonetheless successful, history. Lotteries existed even before the Constitution, when settlers without taxing authority needed funds to build towns.¹ The Second Continental Congress then employed a lottery to form an army to fight for independence.² Full service casinos, such as the Crescent City House in New Orleans and the Palace of Fortune in Washington D.C., opened during the early and mid-1800s.³ However, negative attitudes

about gambling ultimately led most states to ban lotteries by the mid-nineteenth century, and most newly admitted states' constitutions explicitly outlawed lotteries.⁴

The economic turmoil of the Great Depression re-enlightened states as to the value of gambling revenue.⁵ Nevada legalized casino gambling as early as 1931, only two years after the stock market crash of 1929.⁶ Twenty-one states reopened race tracks during the 1930s, and bingo was legal in 11 states by the 1950s.⁷ Congress followed suit with federal gambling legislation, including the Wire Act,⁸ the International Travel Act,⁹ the Interstate Transportation of Wagering Paraphernalia Act,¹⁰ and the Illegal Gambling Business Act,¹¹ to name a few. Today, all but five states operate a lottery,¹² 24 states have commercial casinos,¹³ and, with the recent repeal of the Professional and Amateur Sports Protection Act (PASPA),¹⁴ 18 states have operational sports betting, and it has recently been legalized in an additional three states.¹⁵

The gambling industry has undoubtedly been reinvigorated during the last several decades, but many of the federal laws enacted during the second half of the twentieth century continue to burden its growth. This is especially true with regard to how the gambling industry has adapted to technology, particularly the Internet. The public opinion of gambling has grown increasingly more favorable,¹⁶ yet Congress refuses to accommodate the industry and its consumers with legislative reform. While many antiquated laws remain, one in particular has caused the most conflict and confusion. At its current rate, the gambling industry is on pace to continue its expansion, and the

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¹STEVEN DURHAM AND KATHRYN HASHIMOTO, *THE HISTORY OF GAMBLING IN AMERICA: BALANCING COSTS AND BENEFITS OF LEGALIZED GAMING* 5 (2010).

²DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 146 (2006).

³George T. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. J. 65, 67 (1996).

⁴Keith C. Miller, *State Lotteries and Their Customers*, 9 UNLV GAMING L.J. 177, 178 (2019).

⁵Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 527, 531 (2014).

⁶*Id.* at 569 n.19.

⁷*Id.* at 569 n.18.

⁸18 U.S.C. § 1084 (2012).

⁹18 U.S.C. § 1952 (2012).

¹⁰18 U.S.C. § 1953 (2012).

¹¹18 U.S.C. § 1955 (2012).

¹²PLAY USA, <https://www.playusa.com/lottery/> (last visited Apr. 9, 2020).

¹³American Gaming Association, *State of the States 2019*, AMERICAN GAMING ASSOCIATION (2019), at 3, https://www.americangaming.org/wp-content/uploads/2019/06/AGA-2019-State-of-the-States_FINAL.pdf.

¹⁴28 U.S.C. § 3701 et seq. (repealed 2018).

¹⁵*Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT (Apr. 7, 2020, 14:01 PDT), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/>.

¹⁶American Gaming Association, *supra* note 13, at 8.

time is ripe for Congress to reform, repeal, or replace the Wire Act. Such congressional action will lead to more uniform laws across the states and hopefully decrease the black market, allowing the gambling industry to flourish and reach its full potential.

THE WIRE ACT'S TEXT AND PURPOSE

The Wire Act was enacted in 1961 to outlaw sports betting enterprises run by organized crime groups.¹⁷ Congress sought to shut these types of operations down by targeting the means by which bets were placed with the mob—the telegraph and, to some extent, the telephone.¹⁸ Organized crime and illegal gambling continue to coexist even though the Wire Act remains in place, making its effectiveness highly questionable and a subject of constant debate. The Act applies to:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers¹⁹

It is undisputed that the Wire Act applies only to those engaged in the “business” of gambling, not to individual bettors.²⁰ It makes sense that, rather than targeting each individual gambler, illegal gam-

bling is best prevented by sanctioning the business itself.²¹ Thus, the *who* is clear, but the *what* has been the source of disagreement. While the gambling industry has innovated, the Wire Act’s language has not changed, and courts have struggled to interpret how it applies to modern gambling.

“Wire communication”

The most obvious argument is that the Wire Act applies only to wire communications.²² Enacted before cell phones and the Internet were invented, the purpose of the Wire Act was *not* to prohibit gambling over satellite communications, but telegraphs and the earliest versions of telephones.²³ Thus, cell phone conversations and Internet activity via satellite should arguably be excluded from its jurisdiction.²⁴ However, in 2001, the Second Circuit applied the Wire Act to wagers over the Internet to affirm James Cohen’s conviction for operating an online sports gambling service based in Antigua.²⁵

One author compared this expansion of the Wire Act to “regulating 21st century jet travel using a law intended to regulate horse drawn wagons.”²⁶ This is especially so considering how the functionality of the Internet has changed since 2001. The court in *People ex rel. Vacco v. World Interactive Gaming Corp.* described precisely how the Internet worked in 1999: “When the telephone wire is connected to a modem attached to a user’s computer, the user’s phone line actually connects the user to the Internet server and then the user may log onto this illegal gambling website from any location in the United States.”²⁷ Today,

¹⁷Hearings Before the Senate Judiciary Committee on the Attorney General’s Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess., 4 (1961) (statement of Robert Kennedy, Attorney General) (“Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling.”); Miller, *supra* note 5, at 533 (“[The Wire Act] was originally enacted to combat the then-rampant organized crime activity of sports betting”); C. Jeremy Pope, *Losing the Battle but Winning the War: The Federal Government’s Attempts to Regulate Internet Gaming Through Utilization of the Wire Act and Other Means*, 74 MISS. L.J. 903, 907 (2005) (“The Wire Act was passed in 1961 in an attempt . . . to combat organized crime.”); Brandon P. Rainey, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 157 (2009) (“The original purpose of the Wire Act was to prohibit illegal sports books and betting services that were typically run by organized crime groups.”).

¹⁸Benjamin William Perry and Alex McFall, *Gambling on a DOJ Enforcement Action: State of the Wire Act*, 2019 WL 4049639.

¹⁹18 U.S.C. § 1084(a) (2012).

²⁰United States v. Southard, 700 F.2d 1, 22 (1st Cir. 1983) (affirming a jury instruction stating mere bettors are not engaged in the business of gambling); *See also*

Rainey, *supra* note 17, at 157 (“Under the Wire Act, gambling businesses which make gambling over wires their day-to-day occupation may be prosecuted, but individual gamblers cannot be.”).

²¹Rainey, *supra* note 17, at 157.

²²*Id.* at 160.

²³I. NELSON ROSE AND MARTIN D. OWENS, JR., INTERNET GAMING LAW 161 (2d. ed. 2009).

²⁴Rainey, *supra* note 17, at 160.

²⁵United States v. Cohen, 260 F.3d 68, 76 (2d Cir. 2001).

²⁶Brad R. Humphreys, *An Overview of Sports Betting Regulation in the United States* 4 (West Virginia Department of Economics, Working Paper No. 17-31, 2017).

²⁷People ex rel. v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 852 (Sup. Ct. 1999).

this sort of wire connection is unnecessary for Internet use.

The First Circuit rebutted the narrow definition of “wire communication” in 2014. “The internet is an ‘instrumentalit[y] . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.’”²⁸ The court quipped, “Anyone reading this opinion on the court’s website . . . would readily agree that the internet is used and useful in the transmission of writings. Indeed, it is rather remarkable that a definition written before the internet was invented so accurately describes it.”²⁹ Therefore, assuming that “wire communication” includes satellites, the main dispute today surrounds the specific activity the Wire Act prohibits.

The clauses in dispute

By its language, the Wire Act applies to (1) “transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of *bets or wagers on any sporting event or contest*,” (2) “transmission of a wire communication which entitles the recipient to receive money or credit as a result of *bets or wagers*,” and (3) “*information assisting in the placing of bets or wagers*.”³⁰ The looming question is whether, by this language, the Wire Act applies only to sports betting or to all forms of gambling. Courts are split,³¹ and the Department of Justice itself has changed its position twice in the last decade.³²

This distinction is central to how the 1961 law applies to Internet gambling, including both casino games and now many state lotteries. The phrase

“on any sporting event or contest” clearly applies to the first prohibited activity, but if it also applies to the second and third, the Act is arguably limited to sports gambling.³³ On the other hand, if the limiting phrase modifies only the first type of transaction, then the remaining two clauses prohibit all types of Internet gambling.³⁴

The court split

Before John Cohen was convicted for operating an Internet sports gambling enterprise through Antigua in 2001,³⁵ New York applied the Wire Act to online games such as “virtual slots, blackjack, or roulette.”³⁶ The defendant in *World Interactive Gaming Corp.* was a casino based in Antigua that operated an online casino in New York.³⁷ While the court did not directly consider whether the Wire Act was limited only to sports gambling, it held that “[b]y hosting this casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act . . . occurred.”³⁸ It based this holding on the Wire Act’s legislative history that stated, “The purpose of the bill is to assist various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses”³⁹

In contrast, the Fifth Circuit affirmed a district court’s interpretation of the Wire Act in 2002 as applying only to sports gambling.⁴⁰ Larry Thompson and Lawrence Bradley incurred significant credit card debt from online casino games and attempted to escape payment by alleging that their respective credit card companies facilitated an illegal gambling enterprise by allowing them to build such debt.⁴¹ The plaintiffs based one of their claims on the Wire Act.⁴²

²⁸United States v. Lyons, 740 F.3d 702, 716 (1st Cir. 2014) (quoting § 18 U.S.C. 1081).

²⁹Lyons, 740 F.3d at 716; *But see* Rainey, *supra* note 17, at 160 (“The intent of the Wire Act could not have been to apply to technology like the Internet because such a thing was inconceivable.”).

³⁰18 U.S.C. § 1084(a) (2012) (emphasis added).

³¹*See generally* In re MasterCard Intern. Inc., 313 F.3d 257 (5th Cir. 2002); United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); *People ex rel. Vacco*, 714 N.Y.S.2d 844; United States v. Lombardo, 639 F. Supp. 2d 1271 (D. Utah 2007).

³²*See generally* Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. 1 (2018); Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1 (2011).

³³Miller, *supra* note 5, at 533.

³⁴*Id.*

³⁵Cohen, 260 F.3d 68.

³⁶*People ex rel. Vacco*, 714 N.Y.S.2d at 847.

³⁷*Id.*

³⁸*Id.* at 852.

³⁹*Id.* at 851 (citing H.R. Rep. No. 967 (1961) as reprinted in 1961 U.S.C.C.A.N. 2631, 2631).

⁴⁰In re MasterCard Intern. Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 480 (E.D. La. 2001).

⁴¹In re MasterCard Intern. Inc., 313 F.3d 257, 260–61 (5th Cir. 2002).

⁴²*Id.* at 262.

The district court also looked to the legislative history of the Wire Act, including the House Judiciary Committee chairman's statement that the Wire Act involves "transmission of wagers or bets and layoffs on horse racing and other *sporting events*."⁴³ The district judge also considered recent legislative attempts to amend the Wire Act to prohibit using the Internet to bet on "*contest[s]* of chance or a future contingent event not under the control or influence of [the bettor]."⁴⁴ He found this to imply that "the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, *sporting events or contests*."⁴⁵ The Fifth Circuit agreed "with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion."⁴⁶ Therefore, the plaintiffs could not predicate their claims on the Wire Act because the court applied it only to sports gambling, and they did not accumulate their debt through sports gambling.⁴⁷

In 2007, the defendants in *United States v. Lombardo* were charged with violating the Wire Act by operating a company that served as a middleman between bettors and financial institutions by "mis-classifying the charge in order to hide its gambling nature, thus duping banks into disbursing funds."⁴⁸ The defendants argued the Wire Act charge was insufficient because the Act applies only to sports gambling, and the indictment did not set forth any sports bets facilitated by the defendants.⁴⁹ The *Lombardo* court recognized that most "prosecutions under § 1084(a) have involved the practice of bookmaking, or taking bets on sporting events over the telephone," but nonetheless addressed the issue of whether casino-like gaming over the Internet falls within the Act's enforcement.⁵⁰ The court held that the Wire Act "is not confined entirely to wire communications related to sports betting" because the "presumably intentional exclusion of the 'sporting event or contest'

qualifier from the second and third prohibited uses indicates that at least part of § 1084(a) applies" to non-sports gambling.⁵¹

The First Circuit considered the question more recently in 2014.⁵² Todd Lyons and Daniel Eremian were charged under the Wire Act for operating a gambling business located in Antigua that allowed bettors to place bets over the Internet or telephone.⁵³ The defendants argued that they were protected by the safe harbor provision of the Wire Act,⁵⁴ which exempts from prohibition "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."⁵⁵ The court did not accept the defendants' argument because, while the exemption permits the "transmission of information assisting in the placing of bets," it does not "exempt from liability the interstate transmission of bets themselves."⁵⁶ State and federal courts' inability to reach a consensus on whether or not the Wire Act only governs sports gambling has created a distinction that could have a major impact on other forms of gambling, especially lotteries.

LOTTERIES

It was likely not a surprise that, with the advent of the Internet, traditional casino games became popular online and, before the repeal of PASPA, offshore sportsbooks were introduced online. On the other hand, it was probably less expected that the function of lotteries would change merely because of the Internet since, traditionally, physical lottery tickets were bought at convenience stores and considered more as a long-shot chance at winning a random drawing than the placing of a bet or wager. Additionally, given the physical aspect of lottery tickets, as opposed to transmitting a bet over wires or Internet satellites, it

⁴³*Internet Gambling Litig.*, 132 F. Supp. 2d at 480 (quoting 107 Cong. Rec. 16533 (Aug. 21, 1961)) (emphasis added).

⁴⁴*Id.* (quoting S.474, 105th Congress (1997)) (emphasis added).

⁴⁵*Id.* at 481 (emphasis added).

⁴⁶*In re MasterCard*, 313 F.3d at 262 (5th Cir. 2002).

⁴⁷*Id.*

⁴⁸*United States v. Lombardo*, 639 F. Supp. 2d 1271, 1275 (D. Utah 2007).

⁴⁹*Id.* at 1278.

⁵⁰*Id.*

⁵¹*Id.* at 1281.

⁵²*United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014).

⁵³*Id.* at 710.

⁵⁴*Id.* at 712.

⁵⁵18 U.S.C. § 1084(b) (emphasis added).

⁵⁶*Lyons*, 740 F.3d at 713.

could be questioned how interstate commerce would even be relevant in the operation of lotteries. However, the Supreme Court decided Congress's ability to regulate lotteries in 1903, long before the prohibitions of the Wire Act were even considered.

In *Champion v. Ames*, Champion and others transported lottery tickets from Texas to California and were charged under a federal law which made it illegal to carry from state to state "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery."⁵⁷ The defendants argued the law was void under the Constitution because the carrying of lottery tickets did not constitute commerce within the meaning of the Commerce Clause.⁵⁸

The Supreme Court considered whether Congress could regulate the carrying of lottery tickets between states.⁵⁹ The Court stated that Congress's commerce powers were not limited to the "instrumentalities of commerce" in use when the Constitution was adopted, "but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."⁶⁰ However, the defendants argued that "lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce."⁶¹ The Court disagreed based on the fact that the tickets offered a large prize to the holder, and even if the ticket holder did not win a prize, the ticket still had monetary value in that it could have been sold to another person before a prize was drawn.⁶² Thus, the Court held that lottery tickets were "subjects of commerce," and the regulation of carrying lottery tickets was a "regulation of commerce among the several states."⁶³

The defendants also argued that Congress's power was to *regulate*, not *prohibit*.⁶⁴ Therefore, the Court

considered whether by prescribing an activity, in this case carrying lottery tickets between states, Congress exceeded its power.⁶⁵ The Court reasoned first that no one has the right under the Constitution to "introduce into commerce among the states an element that will be confessedly injurious to the public morals," and therefore it was not against anyone's liberty interest to prohibit doing so.⁶⁶ Then, given that an individual state could prohibit the sale of lottery tickets within its borders to guard "the morals of its own people," Congress was not without the power to "protect the commerce which concerns all the states."⁶⁷ Thus, the Court concluded that "regulation may take the form of prohibition," and Congress was permitted to enact legislation prohibiting the transportation of lottery tickets between states.⁶⁸ Nearly 120 years after *Champion*, and over half a century since the Wire Act's enactment, federal regulation of the lottery remains in dispute.

Just as traditional casino games and sportsbooks have shifted online, lotteries have also used the Internet to extend their reach to customers. For example, the New Hampshire Lottery Commission offers different types of games using the Internet, including multi-jurisdictional games that allow online and in-store ticket purchases and "iLottery" games that operate solely online.⁶⁹ Even "brick-and-mortar" retailers use the Internet or some other form of satellite connection to connect lottery terminals to vendors' main systems.⁷⁰ Additionally, when a jackpot is won, the several states participating in a multi-jurisdictional lottery must transfer their portion of the money to the state that sold the winning ticket, typically via wire transfer.⁷¹

Two of the largest games of this kind, Powerball and Mega Millions, are offered by a large majority of states.⁷² While geo-fencing technology can typically

⁵⁷ *Champion v. Ames*, 188 U.S. 321, 322–23 (1903) (quoting 28 Stat. 963 et seq. (1894)).

⁵⁸ *Id.* at 322.

⁵⁹ *Id.* at 353.

⁶⁰ *Id.* at 350 (quoting *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877)).

⁶¹ *Id.* at 353.

⁶² *Id.* at 353–354.

⁶³ *Id.*

⁶⁴ *Id.* at 345.

⁶⁵ *Id.*

⁶⁶ *Id.* at 357.

⁶⁷ *Id.*

⁶⁸ *Id.* at 359, 363.

⁶⁹ *New Hampshire Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 138 (D.N.H. 2019).

⁷⁰ *Id.*

⁷¹ *Id.* at 139.

⁷² LOTTO AMERICA, <https://www.lottoamerica.com/powerball/participating-states> (last visited Apr. 9, 2020); MEGA MILLIONS, <https://www.megamillions.com/Where-to-Play.aspx> (last visited Apr. 9, 2020).

ensure payers only purchase tickets within legal states, many states should share the same concern of New Hampshire that there is no way to guarantee that “intermediate routing of data or information ancillary to a transaction does not cross state lines.”⁷³ Thus, lotteries are arguably the most impacted by the recent dispute surrounding the proper interpretation of the Wire Act.

The Department of Justice Opinions

While different courts routinely disagree, it is more surprising that the Department of Justice (DOJ) has taken two distinctly opposite positions in less than a decade. Before 2011, the DOJ was presumed to follow the broad interpretation of the Wire Act—that it applied to all forms of gambling.⁷⁴ In 2011, Illinois and New York asked the DOJ about the legality of selling lottery tickets over the Internet using out-of-state transaction processors.⁷⁵ The States’ joint letter asked whether the Wire Act prohibits “States from conducting in-state lottery transactions via the Internet if the transmissions over the Internet during the transaction cross State lines,” limiting “States’ abilities to transmit lottery data to out-of-state transaction processors.”⁷⁶ The DOJ opined that “interstate transmission of wire communications that do not relate to a ‘sporting event or contest’ . . . fall outside the reach of the Wire Act,” and because the “New York and Illinois lottery proposals do not involve wagers on sporting events or contests, the Wire Act does not . . . prohibit them.”⁷⁷ Thus, in 2011, the DOJ did not believe that the exclusion of the phrase “sporting event or contest” from the second and third prohibitions of

the Wire Act implied that purchasing lottery tickets online or online casino games were illegal.

In 2018, to the surprise and dismay of the online gambling industry and after nearly a decade of growth, the DOJ reversed its 2011 interpretation of the Wire Act.⁷⁸ The 2018 memo concluded that “the prohibitions of 18 U.S.C. § 1084(a) are not uniformly limited to gambling on sporting events or contests,” but only the clause which directly mentions sporting events is so limited.⁷⁹ Most surprisingly, the DOJ disregarded Congress’s intent and instead chose to base its opinion solely on the Wire Act’s text.⁸⁰ As one author commented, “This new interpretation seems to ignore not only the legislative intent clearly expressed on the record at the time of the Wire Act’s initial passage, but it also appears to disregard the complete absence of any compelling reason to disturb the 2011 opinion.”⁸¹ The DOJ’s 2018 opinion has, for good reason, created significant alarm in the online gaming industry.⁸²

New Hampshire Lottery Commission v. Barr

The New Hampshire Lottery Commission (the “Commission”) responded quickly to the DOJ’s 2018 opinion by filing a lawsuit against Attorney General Barr and the DOJ seeking a declaratory judgment that the Wire Act is limited to sports gambling and an order setting aside the DOJ’s 2018 interpretation.⁸³ In an attempt to end the litigation early, the DOJ argued that lotteries did not face a credible threat of prosecution based on the 2018 memo and therefore lacked standing to bring suit.⁸⁴ Given that the 2018 memo opined that the Wire Act applies to all forms of interstate gambling and many forms of

⁷³New Hampshire Lottery Comm’n, 386 F. Supp. 3d at 139.

⁷⁴Miller, *supra* note 5, at 535.

⁷⁵*Id.* at 542.

⁷⁶*Id.*

⁷⁷Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1, 1 (2011).

⁷⁸See generally Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. 1 (2018).

⁷⁹*Id.* at 23.

⁸⁰*Id.* at 14–15.

⁸¹Gregory A. Brower and Mark R. Starr, *The Wire Act Revisited: How the DOJ’s Recent Reinterpretation May Affect Gaming in Nevada*, NEVADA LAWYER, Apr.

2019, at 10; But see Devin O’Connor, *Justice Department: Lotteries Not Immune from Wire Act, But DOJ Says “No Credible Threat of Prosecution,”* CASINO.ORG (Apr. 26, 2019), <https://www.casino.org/news/justice-department-lotteries-not-immune-from-wire-act/> (“The DOJ’s decision to re-review the 2011 opinion is thought to be the work of billionaire GOP megadonor Sheldon Adelson. The 85-year-old Las Vegas Sands owner has been on a mission to end internet gambling.”).

⁸²Dustin Gouker, *Top Lottery Group Says Wire Act Opinion “Detrimental” to Industry; Court Challenge Likely Looms*, ONLINE POKER REPORT (Feb. 5, 2019), <https://www.onlinepokerreport.com/35041/top-lottery-decries-wire-act-opinion/>.

⁸³New Hampshire Lottery Comm’n v. Barr, 386 F. Supp. 3d 132, 136 (D.N.H. 2019).

⁸⁴*Lotteries Not Impacted by Wire Act Opinion, DoJ Claims*, iGB (Apr. 9, 2019), <https://www.igamingbusiness.com/news/lotteries-not-impacted-wire-act-opinion-doj-claims>.

the lottery now involve an interstate component over the Internet, this argument made little sense.⁸⁵ The district court in *New Hampshire Lottery Comm'n v. Barr* did not accept this argument either. Instead, Judge Babodero found that the Commission demonstrated its standing by showing “a sufficiently imminent threat of enforcement” and a “choice between risking criminal prosecution, winding down their operations, or taking significant and costly compliance measures that may not even eliminate the threat.”⁸⁶

Judge Babodero heavily scrutinized the DOJ’s 2018 interpretation of the Wire Act and ultimately awarded the Commission the relief it sought.⁸⁷ In his examination, Judge Babodero analyzed the statutory construction of the Wire Act, specifically whether the phrase “sporting event or contest” applies to all of § 1084(a) or only to the clause it immediately follows.⁸⁸ Wading through the parties’ various arguments of “syntactic structure,” Judge Babodero was not persuaded by the government’s interpretation.⁸⁹ He believed the DOJ’s 2018 memo gave controlling weight to a “suggested” but not required rule of statutory construction—the rule of the last antecedent—and, in doing so, disregarded other relevant sources of meaning.⁹⁰ “This is not the approach to statutory construction that Supreme Court precedent requires,” rather, “a court must look at more than grammar” to determine the meaning of an ambiguous statute.⁹¹

Guided by the rule that statutes “should be interpreted ‘as a symmetrical and coherent regulatory scheme,’” Judge Babodero first found no reason why a legislature would prohibit transmissions of *payment* for sports and non-sports gambling but only prohibit the transmission of *information* related to sports gambling.⁹² “It is bizarre to authorize an activity but prohibit getting paid for doing it.”⁹³ Sec-

ond, he looked to the original draft of the Wire Act, which penalized anyone who “leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or wagers, on any *sporting event or contest*”⁹⁴ This left him no doubt that the original Wire Act was “unequivocally limited to sports gambling.”⁹⁵ Lastly, Judge Babodero stated that, rather than focusing solely on the exclusion of a single comma, the court should look to the description the DOJ provided the Judiciary Committee while the Wire Act was under consideration: “[The Wire Act] is aimed now at those who use the wire communication facility for the transmission of bets or wagers *in connection with a sporting event* and also who use the facility for the transmission of the winnings.”⁹⁶

The district court held that, because the syntax of the Wire Act alone did not provide an adequate answer, “a careful contextual reading of the Wire Act as a whole” revealed that all of the Act’s prohibitions applied only to bets or wagers on a sporting event or contest.⁹⁷ Therefore, Judge Babodero set aside the DOJ’s 2018 opinion.⁹⁸ An appeal has already been filed by the DOJ, but the New Hampshire District Court’s ruling has given state lotteries a sigh of relief while the First Circuit’s review is pending.

The impact on lotteries

As evidenced by the New Hampshire Lottery Commission’s rapid response to the DOJ’s 2018 opinion, multi-state lotteries will suffer the most immediate impact if the DOJ’s recent interpretation is actually implemented and enforced. Today, every state except Alabama, Alaska, Hawaii, Nevada, and Utah have Powerball and Mega Millions.⁹⁹ The New Hampshire

⁸⁵Dustin Gouker, DOJ “Did Not Address” Lotteries in Wire Act Opinion, Deputy AG Rosenstein Says in Memo, ONLINE POKER REPORT (Apr. 8, 2019), <https://www.onlinepokerreport.com/36324/doj-wire-act-does-not-apply-to-state-lotteries/>.

⁸⁶*New Hampshire Lottery Comm’n*, 386 F. Supp. 3d at 144.

⁸⁷*Id.* at 136.

⁸⁸*Id.*

⁸⁹*Id.* at 148–49.

⁹⁰*Id.* at 151.

⁹¹*Id.* at 151–52 (citations omitted).

⁹²*Id.* at 152–53 (citation omitted).

⁹³*Id.* at 153.

⁹⁴*Id.* at 154 (citing S. 1656, 87th Cong. § 2 (1961) (as introduced)) (emphasis added).

⁹⁵*Id.* at 155.

⁹⁶*Id.* at 156 (quoting *Report of Proceedings: Hearing Before the S. Comm. on the Judiciary*, Exec. Sess., 87th Cong. 55 (1961)) (emphasis added).

⁹⁷*Id.* at 157.

⁹⁸*Id.* at 160.

⁹⁹LOTTO AMERICA, *supra* note 72.

Lottery Commission feared that the DOJ's new opinion could force it to shut down many games of this type, resulting in an annual revenue loss of around \$90 million.¹⁰⁰ Banning interstate transmissions could cut sales in New Hampshire by around 25%, while banning multi-jurisdictional games such as Mega Millions and Powerball could reduce the state's lottery revenue by \$80 million.¹⁰¹ The Associated Press has reported that states will collectively lose more than \$220 million in annual lottery proceeds if the DOJ's opinion is enforced against online lottery sales, and if the DOJ's interpretation leads to prohibition of all online lottery-related activities, the losses could exceed \$23 billion annually.¹⁰²

SPORTS GAMBLING

How the Wire Act is actually enforced most immediately impacts online lotteries since these services are already in use. Nonetheless, the Wire Act's impact on the gambling industry as a whole should also be considered. If certain types of gambling should be excluded from the Wire Act altogether, what characteristics of sports gambling make it so dangerous that it should be prohibited from interstate commerce?

The Wire Act undoubtedly applies to sports gambling, but the outdated nature of the Act prompts consideration of whether sports gambling still deserves prohibition. It is no longer necessary to restrict interstate transmission of sports bets to cut down on mob activity, as was the original purpose of the Wire Act.¹⁰³ Additionally, when the DOJ issued its first opinion on the Wire Act in 2011, sports gambling had been illegal for nearly 20 years.¹⁰⁴ Mob activity is no longer rampant, and the federal government no

longer prohibits sports gambling, so what purpose does the Wire Act, even limited to sports gambling, seek to serve?

The Professional and Amateur Sports Protection Act

Congress passed the Professional and Amateur Sports Protection Act in 1992, which placed an outright prohibition on legalized sports gambling except in states where it was already legal.¹⁰⁵ In 2009, New Jersey Senator Raymond Lesniak introduced a sports gambling bill, but the National Collegiate Athletics Association (NCAA) and several major professional sports leagues immediately sued to enjoin New Jersey's new law, arguing it violated PASPA.¹⁰⁶ The district court held PASPA was a "constitutional exercise of Congress's powers pursuant to the Commerce Clause,"¹⁰⁷ and the Third Circuit Court of Appeals affirmed.¹⁰⁸ The Supreme Court denied certiorari, so Lesniak introduced another law, quickly followed again by suits from various sports leagues.¹⁰⁹ The Third Circuit held that New Jersey's new bill also violated PASPA, and PASPA did not violate anti-commandeering principles.¹¹⁰ However, the Supreme Court granted certiorari, and, relying on the anti-commandeering doctrine, held PASPA unconstitutional.¹¹¹

The Court decided that Congress may regulate sports gambling if it so chooses, but if it chooses not to, it cannot prevent states from doing so on their own.¹¹² However, it has also been argued that the Court's discussion of the Wire Act's safe harbor provision¹¹³ overruled, or at least reinterpreted, the Wire Act.¹¹⁴ The Court recognized that many federal gambling

¹⁰⁰ *Lotteries Not Impacted by Wire Act Opinion*, *supra* note 84.

¹⁰¹ *Id.*

¹⁰² O'Connor, *supra* note 81.

¹⁰³ *Supra* note 17.

¹⁰⁴ 28 U.S.C. § 3701 et seq. (repealed 2018).

¹⁰⁵ *Id.*

¹⁰⁶ Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATO SUP. CT. REV. 247, 249 (2018).

¹⁰⁷ *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013).

¹⁰⁸ *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 240 (3d Cir. 2013).

¹⁰⁹ See generally *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488 (D. N.J. 2014).

¹¹⁰ *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016).

¹¹¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States.").

¹¹² *Id.* at 1461.

¹¹³ 18 U.S.C. § 1084(b) (2012) (emphasis added) (exempting from prohibition "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.").

¹¹⁴ Daniel Wallach, *Did the Supreme Court Reinterpret the Wire Act to Allow Cross-Border Internet Sports Betting?*, FORBES (July 8, 2018), <https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#57bb58a046c5>.

laws apply only if the underlying gambling is illegal under state law.¹¹⁵ “These provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling.”¹¹⁶ The favorable interpretation of the Court’s dicta is that if sports gambling is legal in both the sending and receiving state, then it is not a violation of the Wire Act. Unfortunately, this liberal reading has not overridden the alternative interpretation—that the Court simply reiterated the plain language of the Act and only intended to clarify that the Wire Act allows the transmission of *information* but not the placing of an actual bet.¹¹⁷

Therefore, assuming the Wire Act still prohibits the placing of sports bets between two states with legal sports gambling, the rapid growth of the sports gambling industry since the repeal of PASPA begs the question of why sports gambling is singled out. Sports gambling has proven especially profitable since its legalization,¹¹⁸ and permitting multi-state uses could maximize its true potential.

The rapid growth of sports gambling

According to the American Gaming Association, nearly 90 percent of Americans have a favorable opinion of gambling as a form of entertainment.¹¹⁹ As of early 2020, 18 states have legal and operational sports betting, three recently legalized sports betting, and 18 more have pending legislation to legalize sports betting.¹²⁰ The industry-wide revenue from sports gambling increased over \$260 million between 2017 and 2018 to a total of \$430.2 million.¹²¹ This comes from only about six months of legalized sports betting outside of states in which it was already legal before the PASPA repeal. Additionally, from June 2018 to February 2020, the total handle of sports bets in the United States was \$17,591,744,451, total revenue was \$1,229,693,083, and total state tax revenue was \$155,684,758.¹²²

As much of an increase as this seems, these amounts are still miniscule when compared to the estimated \$150 billion handle of offshore sportsbooks.¹²³ Even with online sports gambling limited to within states, the impact it can have on the industry has been recognized in New Jersey, where \$780 million of the \$1.2 billion bet on sports in 2018 was made online or through mobile apps.¹²⁴

REFORM, REPEAL, OR REPLACE THE WIRE ACT

Wire Act inconsistencies

It is undisputed that the Wire Act was originally enacted to curb the rampant mob activity of the mid-twentieth century.¹²⁵ Today, while an illegal gambling market remains, the gambling industry as a whole is arguably more associated with entertainment, so the Wire Act currently restricts a broader range of activity than what it was originally intended to prohibit. So what is it good for? For one, it requires gamblers to gamble only within states, which also keeps the revenue within that respective state. However, this is a concern for states rather than the federal government, and it can be remedied with state compacts similar to those already in use with lotteries. Additionally, this limits the market for gamblers because they can only bet on platforms and services provided within their state. Expanding the options for gamblers to services offered in other states that are not offered in their current state would certainly increase the overall revenue of the industry. On the other hand, Congress’s ability, if not duty, to regulate interstate commerce is undisputed, and federal legislation can provide states with structure and guidance. Therefore, repealing the Wire Act does not necessarily have to equate to abolishing federal gambling regulation, but the Wire Act does not function coherently with today’s gambling industry and should be

¹¹⁵*Murphy*, 138 S. Ct. at 1483.

¹¹⁶*Id.*

¹¹⁷Wallach, *supra* note 114.

¹¹⁸See notes 119–122 and accompanying text.

¹¹⁹American Gaming Association, *supra* note 13, at 8.

¹²⁰See *Legislative Tracker: Sports Betting*, *supra* note 15.

¹²¹American Gaming Association, *supra* note 13, at 8.

¹²²*US Sports Betting Revenue and Handle*, LEGAL SPORTS REPORT (Mar. 22, 2020), <https://www.legalsportsreport.com/sports-betting/revenue/>.

¹²³American Gaming Association, *supra* note 13, at 9.

¹²⁴Daniel J. Munoz, NJ, *PA Attorneys General Push Back Against DOJ Wire Act Interpretation*, NJBIZ (Feb. 5, 2019), <https://njbiz.com/nj-pa-attorneys-general-push-back-doj-wire-act-interpretation/>.

¹²⁵*Supra* note 17.

replaced with a law that permits cross-border gambling while still giving states an adequate foundation to formulate their own legislation.

The court split and the conflicting DOJ opinions are clear evidence that the Wire Act's text is not clear enough to support a uniform interpretation. Courts and the DOJ are not the only ones confused by the Act's language, though. Congress itself has created inconsistencies through legislation enacted since the Wire Act that does not conform to the same principles. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) is a relatively recent law that, like many post-Wire Act laws, sought to piggyback off of the Wire Act, yet it directly conflicts with the Wire Act in a major way.

The UIGEA states, "[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling" the proceeds of any form of financial transaction.¹²⁶ Under the UIGEA, anyone engaged in the business of betting or wagering cannot "knowingly accept" transactions made through unlawful Internet gambling.¹²⁷ The law indirectly targets financial institutions by restricting money transfers to providers of Internet gambling services.¹²⁸ The UIGEA does not specifically make Internet gambling illegal, but only bets already unlawful under any "applicable Federal or State law in the State . . . in which the bet . . . is initiated, received, or otherwise made."¹²⁹ Thus, if the Wire Act prohibits the action, then it is also illegal under the UIGEA.

There is a critical difference between the Wire Act and the UIGEA, though. The UIGEA states that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made."¹³⁰ Thus, under the UIGEA, the only relevant locations are where the bet is made and received, regardless of the interstate transmission.¹³¹ This is sensible because it is likely impossible to ensure that

every payment or other wire communication relating to a bet placed online remains within a single state's jurisdiction.¹³² However, this permissive routing of wagers to and from states in which it is lawful is in direct conflict with the Wire Act, which is a blanket prohibition of all interstate transmissions related to gambling.¹³³

The UIGEA is an example of modern gambling legislation that exempts from prohibition activity between two states when it is legal in both, regardless of whether wire transmissions pass through states in which the activity is *not* legal. This is a logical approach that adapts to modern technology, which the Wire Act does not, and is a major reason why the Wire Act should be replaced with legislation that includes a similar exception.

While the UIGEA does contain this favorable exception that is excluded from the Wire Act, it is still not an adequate alternative to the Wire Act because the UIGEA contains significant shortcomings, too. The primary loophole is the increasing use of alternative payment methods known as "e-wallets,"¹³⁴ such as Venmo and Cash App. Gamblers deposit money into an e-wallet, which then transfers the money to the gambling service provider, so banks regulated by the UIGEA do not participate in the direct transfer of money to the gambling website.¹³⁵ Additionally, these intermediaries can disguise the nature of the transaction by providing no indication of what payments are actually for. Thus, the UIGEA has driven gambling payments into private hands rather than adding to taxable income, and rather than preventing online gambling, users continue to do so on an unregulated black market.¹³⁶

Traditional arguments against gambling

Online gambling has many perceived negative effects on society. However, consumers are more vulnerable in the current market because the absence of regulation leaves them more unprotected than they

¹²⁶31 U.S.C. § 5363 (2012).

¹²⁷Rainey, *supra* note 17, at 150.

¹²⁸*Id.* at 151.

¹²⁹31 U.S.C. § 5362(10)(A) (2012).

¹³⁰§ 5362(10)(E).

¹³¹Miller, *supra* note 5, at 544.

¹³²*Id.*

¹³³*Id.* at 539.

¹³⁴Rainey, *supra* note 17, at 151–52.

¹³⁵*Id.* at 152.

¹³⁶*Id.* at 153.

otherwise would be. Indeed, one of the reasons most commonly cited for legalizing and regulating gambling, rather than full prohibition, is that consumers always find ways to gamble illegally over the Internet.¹³⁷

Opponents of legalization have raised new arguments such as bankruptcy, domestic violence, crime, suicide, divorce, substance abuse, and pathological gambling.¹³⁸ The most common argument involves the so-called “four evils” of online gambling: (1) access to online gambling by minors, (2) potential for fraud, (3) gambling addiction, and (4) tax preservation.¹³⁹ However, countries that have successfully enacted online gambling have addressed these concerns, each of which are more appropriately dealt with through legalization and regulation than prohibition.

For example, Australia passed the Interactive Gambling Amendment Bill (IGAB) in 2016, which prohibits online casino gambling but permits online sports betting.¹⁴⁰ The main focus of the IGAB is to protect Australians from illegal offshore gambling websites by implementing stronger restrictions on inducements, a national self-exclusion register for online wagering, consistent and understandable gambling messaging, and customer age verification.¹⁴¹

Switzerland adopted the Money Gaming Act (MGA) in 2018.¹⁴² The MGA consolidated all of Switzerland’s gaming laws into a single law and abolished the ban on Internet gambling.¹⁴³ Switzerland protects its citizens from the fraud and abuse of offshore websites by only allowing services licenses by the

Switzerland government and banning all foreign providers.¹⁴⁴

The United Kingdom is arguably more open to online gambling than any country in the world, and over half of the United Kingdom’s betting market was made up of online bets in 2017.¹⁴⁵ The United Kingdom recognizes what the United States has failed to, that prohibiting Internet gambling is an “unrealistic objective.”¹⁴⁶ Nevertheless, the United Kingdom is also aware that there are obvious social concerns with online gambling, and three stated objectives of its Gambling Act are to prevent gambling from being a source of or associated with crime, to ensure gambling is conducted openly and fairly, and to protect vulnerable groups from being targeted or exploited.¹⁴⁷

In replacing the Wire Act with modern legislation regulating cross-border gambling, the United States can follow the example already set by other countries which do the same. First and foremost, the mere fact that online gambling requires the Internet makes regulation that much more plausible and effective. For example, bets placed online can easily be tracked and recorded, making it easy to identify and monitor compulsive and problem gamblers.¹⁴⁸ Websites also have the ability to set monetary, temporal, or other limits on consumers.¹⁴⁹ Underage gambling can be prevented more easily with age-verification technology, and regulated websites are more prone to enforce restrictions than offshore, illegal, unregulated sites which have no incentive to prevent underage gambling.¹⁵⁰ When verified, of-age gamblers begin using regulated, legal websites, illegal sites will be

¹³⁷Miller, *supra* note 5, at 567–68.

¹³⁸DURHAM AND HASHIMOTO, *supra* note 1, at 119–20.

¹³⁹John D. Andrie, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT’L L. 1389, 1404 (2004).

¹⁴⁰What Is Australia’s Interactive Gambling Act?, GAMBLING.COM, <https://www.gambling.com/au/laws/iga> (last visited Apr. 9, 2020).

¹⁴¹Alan Tudge, *Media Release: Gambling Ministers Agree to Stronger Online Gambling Protections*, AUSTRALIAN GOVERNMENT DEPARTMENT OF HUMAN SERVICES (Sept. 8, 2017), <http://pandora.nla.gov.au/pan/65939/20171219-1410/www.mhs.gov.au/media-releases/2017-09-08-gambling-ministers-agree-stronger-online-gambling-protections.html>.

¹⁴²Tom McKay, *Swiss Voters Overwhelmingly Choose to Legalize Online Gambling, But Block All Foreign Sites*, GIZMODO (June 10, 2018), <https://gizmodo.com/swiss-overwhelmingly-vote-to-legalize-gambling-but-blo-1826714461>.

¹⁴³Andreas Glamer, Yannik Hassig, and Alexandra Korner, *Switzerland’s Parliament Passes the New Money Gaming Act*, ONLINE GAMBLING LAWYER (Oct.

2017), at 14, https://www.mme.ch/fileadmin/files/documents/MME_Compact/2017/OGL_October_2017_p14-15.pdf.

¹⁴⁴*Id.* at 14–15.

¹⁴⁵A Look Inside the Numbers of Sports Betting in the U.S. and Overseas, STREET AND SMITH’S SPORTS BUSINESS JOURNAL (Apr. 16, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/04/16/World-Congress-of-Sports/Research.aspx>.

¹⁴⁶U.S. GEN. ACCOUNTING OFFICE, GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES, 18 (2002), <https://www.gao.gov/new.items/d0389.pdf>.

¹⁴⁷Lisa Boikess, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 151, 200 (2008).

¹⁴⁸Andrie, *supra* note 139, at 1408.

¹⁴⁹Theresa E. Loscalzo and Stephen J. Shapiro, *Internet Gambling Policy: Prohibition Versus Regulation*, 7 VILL. SPORTS & ENT. L.J. 11, 24 (2000).

¹⁵⁰Ryan S. Landes, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 939 (2007).

left to rely solely on underage gamblers, who arguably do not have the resources to support this endeavor long term.¹⁵¹

Regardless of what specific measures are chosen, there are numerous frameworks for protecting American gamblers from the social concerns raised by opponents of legalized online gambling. While these problems undoubtedly exist, proper oversight can curb their effects, and the technology available in the modern gambling industry makes it all the more plausible to implement such regulations, which can more effectively prevent the negative effects that are more prone to exist in an unregulated market.

Federal proposals

After the repeal of PASPA in 2018, Senators Orrin Hatch and Chuck Schumer were the first to propose federal gambling legislation.¹⁵² The Sports Wagering Market Integrity Act of 2018 (SWMIA) sought to continue allowing states to regulate sports betting while also providing federal law to “set standards . . . and provide law enforcement with additional authority to target the illegal sports wagering market and bad actors in the growing legal sports wagering market.”¹⁵³ Most notably, the SWMIA included a section that would have permitted online betting between states in which it was legal as long as the states entered into an interstate sports wagering compact.¹⁵⁴ Additionally, it sought to amend the Wire Act to include an exclusion similar to the UIGEA, stating that intermediate routing of electronic data “*shall not* determine the location or locations in which a bet or wager, or information assisting in the placing of a bet or wager, is initiated, received, or otherwise made.”¹⁵⁵

The SWMIA also included consumer protection measures. First, it would have formed a national clearinghouse for providers and consumers regard-

ing sports wagering integrity, responsible betting, and responses to gambling disorders.¹⁵⁶ It also envisioned a self-exclusion list by which individuals could restrict themselves from placing bets altogether.¹⁵⁷ Furthermore, it required operators to implement safeguards, including a prohibition on minimum or maximum withdrawal limits or penalties for inactivity, and it required providers to dedicate a percentage of their revenue to treatment for gambling disorders and education on responsible gambling.¹⁵⁸

This proposal was not entirely positive, however, and included some items not so favorable to proponents of expanding the industry. For example, the SWMIA mandated that providers could only use data licensed by sports leagues.¹⁵⁹ Additionally, it gave states discretion to offer or not offer certain wagers.¹⁶⁰ In reality, this provision would also give leagues more power, since leagues would likely play a major role in deciding which types of wagers affect the integrity of their games.¹⁶¹

Both of these provisions would have a negative impact on the industry in that the increased costs spanning from them would presumably be passed on to consumers. First, if sports leagues are the sole providers of data used to create wagers, the number of data services currently utilized would significantly decrease, and the leagues would effectively have a monopoly over this service, increasing costs to providers.¹⁶² These increased costs would translate into worse odds for consumers, or, alternatively, consumers would simply return to the illegal market.¹⁶³ The result would be the same if too much discretion were given to states and sports leagues in determining which wagers to offer. If a popular bet is discouraged by leagues and prohibited by states, bettors will simply turn elsewhere—the illegal gambling market—to place these bets.¹⁶⁴

¹⁵¹ Loscalzo and Shapiro, *supra* note 149, at 23.

¹⁵² Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018).

¹⁵³ *Id.* § 2(10).

¹⁵⁴ *Id.* § 105.

¹⁵⁵ *Id.* § 301(1)(B) (emphasis added).

¹⁵⁶ *Id.* § 106.

¹⁵⁷ *Id.* § 103(6)(A).

¹⁵⁸ *Id.* § 103(6)(B) & (D).

¹⁵⁹ *Id.* § 103(b)(5).

¹⁶⁰ *Id.* § 103(b)(3).

¹⁶¹ Daniel Boswell, *The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting*, 28 U. MIAMI BUS. L. REV. 115, 141 (2019).

¹⁶² *Id.* at 140.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 141.

Senator Hatch retired, and the SWMIA died in committee, but Senator Mitt Romney joined Senator Schumer in introducing another federal bill in December 2019.¹⁶⁵ The text of the new proposal has not been released, but it allegedly resembles the 2018 bill, including the national clearinghouse and amendments to the Wire Act that allow cross-border gambling.¹⁶⁶

These proposals are evidence that at least some members of Congress recognize the need for a federal framework to guide states through the rapid expansion of the gambling industry. In particular, it is promising that each proposal has included amending the Wire Act to permit interstate gambling. However, the original proposal, introduced before the DOJ's 2018 change of heart, fell short by focusing too narrowly on sports gambling alone. Any federal legislation should include all forms of online gambling, including casino games and, in particular, lotteries, since the Department of Justice's most recent interpretation of the Wire Act, if enforced, will most negatively affect lottery games already in practice. Interstate lottery activity should also be a primary focus of any federal legislation because lotteries are a function of government revenue rather than private business.

In addition to amending, or at least clarifying, the Wire Act, new federal legislation should attempt to consolidate federal gambling legislation into a single coherent law. The conflict between the Wire Act and the UIGEA is just one example of confusion between antiquated and modern legislation. Consolidating federal legislation will avoid this conflict in the future and help states, service providers, and individual gamblers more easily adhere to federal guidelines.

Federal gambling legislation is on the horizon, and proposals already introduced include favorable provisions, but the federal law that ultimately prevails should be certain to include specific themes. First, in order to appease those traditionally against gambling, the legislation should include specific provisions aimed at curbing the negative social concerns of gambling such as addiction and underage gambling. Second, Congress must create a regulatory

scheme that directs the proceeds of gambling revenue, particularly by leaving individual states enough authority to create and enforce compacts with other states so that each state retains the majority of revenue it generates. Third, federal legislation must target illegal gambling not only by strict prohibition and enforcement, which has clearly been ineffective thus far, but by properly incentivizing consumers to use the legal services available. Lastly, and most importantly, Congress must amend the Wire Act so as to permit all types of online gambling between states in which it is legal, denouncing the split between courts and the conflict caused by the Department of Justice, so that sports gambling can reach its full, legal potential and lotteries can continue functioning and growing at their current rates of success.

In addition to the themes that should be included in any future federal gambling legislation, Congress should also reflect on the past failures of gambling legislation to avoid repeating its mistakes. First, federal legislation should avoid any provisions that may discourage participation. *Too much* oversight and regulation could suffocate both providers and consumers, making providers unwilling to comply and forcing consumers back into the illegal market. Second, the gambling industry's rapid growth has been accompanied by many changes and advancements. This trend is likely to continue, thus, while long-term success should be the goal of any federal legislation, gambling legislation in particular should make specific avenues available to more easily amend and adjust the laws as the market changes. Lastly, a major concern of federal legislation is the effect it may have on states, and rightly so. Many states are not similarly situated with respect to both casino gaming and sports leagues. Congress should ensure that, regardless of population or resources, each state is given an equal opportunity to participate in the expansion and success of the gambling industry.

CONCLUSION

The Wire Act has caused a great deal of confusion between courts, the Department of Justice, online

¹⁶⁵Jacob Jennings, *US Senate Begins Work on Federal Sports Betting Bill*, SPORTSBETTING.LEGAL (Sept. 13, 2019), <https://sportsbetting.legal/news/us-senate-sports-betting-bill/>.

¹⁶⁶*Id.*

casinos, and lotteries. Additionally, as an antiquated law from 1961, it no longer serves the purpose for which it was enacted. Meanwhile, Congress has failed to enact new legislation to comport with the flourishing modern gambling industry. The Department of Justice's 2018 opinion interpreting the Wire Act as prohibiting all forms of interstate gambling created a significant stir in the industry, particularly for lotteries, so much so that a state lottery commission filed suit. This sort of conflict over the proper interpretation of the Wire Act will inevitably

be ongoing until Congress resolves this issue once and for all. Federal legislation permitting cross-border, online gambling is the only logical solution in our modern society which is constantly interconnected by the Internet. Legislation that addresses societal concerns with expanded gambling while also providing states with a uniform framework from which to enact their own laws will allow the modern gambling industry, in all forms of gambling, to thrive for the benefit of casinos, lotteries, sports leagues, gamblers, and governments alike.