

**ALL BETS ARE OFF:  
REVISITING THE PROFESSIONAL AND AMATEUR  
SPORTS PROTECTION ACT (PASPA)<sup>♦</sup>**

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INTRODUCTION

The Professional and Amateur Sports Protection Act (“PASPA”) is a federal statute enacted on October 28, 1992, which effectively outlawed most states from sanctioning or sponsoring any form of sports gambling. At first glance, this statute appears to be a noble attempt to limit the proliferation of what many in this country view as an immoral and corruptible activity. On several notable occasions, gangsters and other notorious criminals were successful in coercing athletes and other sports participants to commit fraud and other illegal acts in order to profit from gambling wagers.<sup>1</sup> Lawmakers have been concerned that repeated sports gambling scandals may destroy the integrity and

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<sup>1</sup> For example, see the 1919 Chicago Black Sox World Series scandal discussed *infra* Part I.

popularity of the national pastimes our country enjoys; PASPA was enacted to limit the channels of legal sports gambling in the United States, with the goals of lowering the rate of sports scandals and preserving sports integrity for future generations.<sup>2</sup>

Despite these federal restrictions, the state of New Jersey is attempting to bring sanctioned sports gambling within their borders. In a November 8, 2011 non-binding referendum, New Jersey citizens, by a sixty-five-to-thirty-five percent margin, voted to support a bill legalizing sports betting.<sup>3</sup> With the support of its citizens, on January 17, 2012, New Jersey Governor Chris Christie signed “the Sports Wagering Law,”<sup>4</sup> which permits sports gambling activity in local casinos and racetracks.<sup>5</sup> However, before their ultimate goal can be realized, state legislators must overcome the preemptive control of PASPA, either through a constitutional challenge in court or through congressional repeal or amendment.

In 2009, New Jersey State Senator Raymond Lesniak, attempted the former by being a party to a lawsuit—*Interactive Media Entertainment v. Holder* (“Lesniak Lawsuit”)—challenging PASPA’s constitutionality.<sup>6</sup> This effort proved unsuccessful as the district court dismissed the suit on procedural grounds, holding that the parties involved did not have proper standing.<sup>7</sup> The court found that only the Governor and, in some instances, the state Attorney General could adequately represent a state in challenging a federal law.<sup>8</sup>

However, given the new legislative developments in New Jersey, the courts will likely need to determine the substantive constitutional claims against PASPA in the near future. On August 7, 2012, the four

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<sup>2</sup> See *infra* Part III.A for an examination into the legislative history of PASPA.

<sup>3</sup> Hartley Henderson, *Christie’s Mandate to Expand Gambling in New Jersey is Now Clear*, OSGA (Nov. 11, 2011, 1:48 PM), [http://www.osga.com/artman/publish/article\\_9726.shtml](http://www.osga.com/artman/publish/article_9726.shtml).

<sup>4</sup> See Christian Red, *N.J. Gov Takes on the Big Leagues Over Sports Betting*, NYDAILYNEWS.COM (Aug. 7, 2012), [http://articles.nydailynews.com/2012-08-07/news/33087222\\_1\\_illegal-sports-sports-leagues-chris-christie](http://articles.nydailynews.com/2012-08-07/news/33087222_1_illegal-sports-sports-leagues-chris-christie). The law is codified in 12A N.J.S.A. §§ 5:12A-1 to 5:12A-6 (2012), available at [http://www.state.nj.us/casinos/actreg/act/docs\\_article12A/cca-article-12A-rev120720.pdf](http://www.state.nj.us/casinos/actreg/act/docs_article12A/cca-article-12A-rev120720.pdf).

<sup>5</sup> Mike Pritchard, *Christie Sign Sports Betting Law*, ATLANTIC CITY WEEKLY (Jan. 18, 2012), <http://www.atlanticcityweekly.com/news-and-views/Christie-Signs-Sports-Betting-Law-137602028.html>.

<sup>6</sup> See *Interactive Media Entm’t & Gaming Ass’n. v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. 2011). This was only the second lawsuit to challenge this statute. In 2007, a private New Jersey citizen attempted to challenge PASPA on constitutional grounds in *Flagler v. U.S. Attorney of New Jersey*, which the court also dismissed due to lack of standing. *Flagler v. U.S. Att’y of N.J.*, No. 06-3699, 2007 WL 2814657, at \*2 (D.N.J. 2007).

<sup>7</sup> See *Interactive Media*, 2011 WL 802196. For an in-depth analysis of standing issues that parties may encounter when contesting PASPA in court, see Anthony G. Glassano Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-Paspa World*, 99 KY. L.J. 163, 170–73 (2010).

<sup>8</sup> *Interactive Media*, 2011 WL 802196 at \*10.

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major professional sports leagues<sup>9</sup> and the National Collegiate Athletic Association (“NCAA”) filed suit seeking declarative and injunctive relief to prevent Governor Christie from moving forward with the Sports Wagering Law.<sup>10</sup> The plaintiffs claim that New Jersey’s plan to sponsor and authorize sports gambling violates PASPA and will cause irreparable damage to the leagues’ reputation.<sup>11</sup> The outcome of New Jersey’s efforts to legalize sports gambling may hang in the balance of the court’s eventual decision on this issue.

Part I of this Note describes the history of state and federal sports gambling jurisprudence in the United States, including the motivations behind the enactment of PASPA. Part II analyzes the primary constitutional challenge against PASPA—that Congress has overstepped its bounds under the Commerce Clause by restricting states from regulating sports gambling. This Part will argue that even if a court finds that PASPA intrudes too far into states’ rights, any resulting amendments to the statute would not help states’ efforts in creating a thriving sportsbook or sports lottery industry. Part III examines some significant changes that have occurred in the sports gambling arena since the enactment of PASPA. This Part argues that PASPA has subsequently become ineffective at serving its original intended purpose. It also argues that repealing PASPA will better serve Congress’ original goals when it first passed the legislation.

#### I. HISTORY OF SPORTS BETTING IN THE UNITED STATES AND THE ENACTMENT OF PASPA

Gambling in the United States has traditionally been a state regulated activity. Its roots can be traced back to the colonial settlements of the eighteenth century as monies received from gambling operations were an effective method of fundraising for local governments.<sup>12</sup> Revenue generated from colony-sanctioned lotteries was used to “build cities, establish universities, and even to help finance the Revolutionary War.”<sup>13</sup> In fact, gambling was such an integral part

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<sup>9</sup> Major League Baseball, the National Basketball Association, the National Football League and the National Hockey League.

<sup>10</sup> Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, No. CV124947, 2012 WL 3171566 (D.N.J. filed on Aug. 7, 2012).

<sup>11</sup> *Id.* at 10.

<sup>12</sup> All thirteen colonies used funds from lotteries to help fund substantial public works like the creation of universities (e.g., Harvard, Yale, Columbia, Dartmouth, Princeton, and William and Mary), churches and libraries. Roger Dunstan, *Gambling in California: History of Gambling in the United States*, CAL. RES. BUREAU: CAL. ST. LIBR. CRB-97-003 (1997), available at <http://www.library.ca.gov/crb/97/03/Chapt2.html>. State lotteries now exist in forty-three of the fifty states and the District of Columbia, Puerto Rico and the U.S. Virgin Islands. *Lottery Results*, USA.GOV, <http://www.usa.gov/Topics/Lottery-Results.shtml> (last updated Oct. 5, 2012).

<sup>13</sup> Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C.L. REV. 11, 12 (1992).

of financing colonial governments that, during that era, playing the lottery was considered a civic responsibility.<sup>14</sup> In later years, sanctioned gambling was a tool used to stimulate local economies and fund subsequent war efforts.<sup>15</sup> However, as with any lucrative venture, the opportunity for abuse was ever apparent. Many lotteries ended in scandal, with operators absconding with or misappropriating proceeds.<sup>16</sup> In addition, many religious organizations strongly opposed gambling activities in the United States.<sup>17</sup> Thus state legislation on gambling became evermore complex and tumultuous, based on financial need and public perception. After being considered an acceptable practice by most states in the early 1800's, lotteries and racetracks gradually became outlawed until, by the beginning of the twentieth century, virtually all forms of gambling were made illegal across the United States.<sup>18</sup> After the Great Depression, the need for revenues compelled states to once again legalize certain forms of gambling.<sup>19</sup> In 1931, Massachusetts decriminalized bingo and charitable gambling and Nevada legalized many forms of gambling (though not sports gambling).<sup>20</sup> Since then, states gradually allowed more forms of gambling activity. Currently forty-three states have sanctioned lotteries, while twenty-two states allow commercial casino gambling.<sup>21</sup>

State and federal regulation of sports gambling has followed a more distinct path in this country. Sports betting activity became increasingly popular—in conjunction with the rise of professional baseball—during the late 1800s when gambling was illegal in the United States and, as a result, wagers were handled underground through organized crime syndicate bookmakers.<sup>22</sup> The negative stigma attached to gambling and sports in the United States was further exacerbated after the 1919 Black Sox scandal when notorious gangster, Arnold Rothstein, paid members of the Chicago White Sox professional baseball team to try and lose games during the World Series.<sup>23</sup> After

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<sup>14</sup> Charles T. Clotfelter & Philip J. Cook, *Selling Hope: State Lotteries in America* 32–33 (1991).

<sup>15</sup> Dunstan, *supra* note 12.

<sup>16</sup> *Id.* (“Notable among the later lotteries was a private lottery passed by Congress in 1823 for the beautification of Washington D.C. Unfortunately, the organizers absconded with the proceeds and the winner was never paid.”) *Id.*

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

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

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

<sup>20</sup> *See id.* *See also Major Events in Nevada Gaming History*, THE WAGERING RESOURCE, [http://www.wageringresource.com/index.php?option=com\\_content&view=article&id=163&Itemid=111](http://www.wageringresource.com/index.php?option=com_content&view=article&id=163&Itemid=111) (last visited Apr. 1, 2012).

<sup>21</sup> *See* USA.GOV, *supra* note 12; *State Information*, AMERICAN GAMING ASSOCIATION, <http://www.americangaming.org/industry-resources/state-information> (last visited Apr. 1, 2012).

<sup>22</sup> Jerry Martin, *History of Sports Betting*, ULTIMATECAPPER.COM, <http://www.ultimatecapper.com/history-of-sports-betting.htm> (last visited Jan. 2, 2012). Dunstan, *supra* note 12.

<sup>23</sup> For a detailed account of the Black Sox scandal and aftermath, see Douglas O. Linder, *The*

this incident, the public perception of sports betting became associated with criminal activities and the notion that gangsters could ruin the sanctity of a cherished national pastime.<sup>24</sup> Consequently, no state legalized any form of sports gambling for many years, until Nevada authorized sports betting in standalone locations in 1955 and hotel sportsbooks in 1975.<sup>25</sup>

With the understanding that match-fixing scandals could lead to a decline in popularity and revenues, professional baseball owners attempted to reclaim some order and respectability of their league by appointing Judge Kenesaw Mountain Landis to become the first commissioner of baseball.<sup>26</sup> Judge Landis is widely credited for restoring the public image of professional baseball, placing harsh lifetime bans on all Black Sox players who participated in the 1919 scandal with the stern warning that,

Regardless of the outcome of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever again play professional baseball.<sup>27</sup>

Public reprimands and lifetime bans resurrected the image of professional baseball in the public eye. A surge of sports popularity would soon follow during the 1920s—also known as the “Golden Age of Sports” where professional baseball, professional and collegiate football, and collegiate basketball saw large increases in fan viewership and attendance.<sup>28</sup> The rise in popularity led to more underground sports betting activity, which increased the potential for corruption and scandal.<sup>29</sup> Due to the growth of illegal activities, large multi-state organized crime syndicates controlled the majority of underground

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*Black Sox Trial: An Account*, FAMOUS AM. TRIALS (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksox.html> (last visited Feb. 20, 2012).

<sup>24</sup> Martin, *supra* note 22.

<sup>25</sup> The Wagering Resource, *supra* note 20.

<sup>26</sup> *Kenesaw Mountain Landis*, MLB.COM, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_1](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_1) (last visited Apr. 1, 2012).

<sup>27</sup> Rob Neyer, *Landis Had Major First Impact as Commish*, ESPN.COM (Jan. 22, 2004), [http://sports.espn.go.com/mlb/columns/story?columnist=neyer\\_rob&id=1714894](http://sports.espn.go.com/mlb/columns/story?columnist=neyer_rob&id=1714894).

<sup>28</sup> James Marshall, *The Golden Age of Sports: A Roaring Replay of the 1920's*, SPORTPLANET, <http://www.sportplanet.com/sbb/apfas/20r.htm> (last visited Jan. 2, 2012).

<sup>29</sup> Some infamous gambling-related sports scandals that occurred after the 1919 Black Sox scandal include: the 1951 college basketball point-shaving scandal, the 1963 suspension of NFL MVP Paul Hornung for betting on NFL games, the 1979 Boston College basketball point-shaving scandal, and the 1985 Tulane basketball point-shaving scandal. Jeff Merron, *Biggest Sports Gambling Scandals*, ESPN (Feb. 7, 2006), <http://sports.espn.go.com/espn/page2/story?page=merron/060207>.

sportsbooks during the middle of the twentieth century.<sup>30</sup> These syndicates openly defied state gambling laws by using the telegraph and telephone to receive bets across state lines.<sup>31</sup> In order to combat the influence of organized crime, Congress believed that a federal intervention was necessary.

In 1961, Congress enacted the Wire Act as part of a series of antiracketeering laws to restrict interstate bookmaking.<sup>32</sup> These federal statutes were intended to complement existing state laws, which made unauthorized in-state bookmaking illegal.<sup>33</sup> While these laws helped to prevent large syndicate operations from participating in interstate gambling activities, they steered clear from regulating any intrastate gambling activities, leaving states to regulate and control aspects of sports gambling as they saw fit within their borders.<sup>34</sup> This would change after the enactment of PASPA in 1992.

PASPA extended federal regulatory involvement to controlling in-state sports gambling activity. Section 3702 of PASPA states:

It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>35</sup>

When the original Senate Bill 474 (S. 474) and House Bill 74 (H.R. 74) ("PASPA") were being heard in Congress, as many as thirteen states were considering initiatives that would allow some form of sports betting in order to provide relief from increasing state deficits.<sup>36</sup> The Senate Judiciary Committee Report on the PASPA bill

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<sup>30</sup> Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 283–84 (2012), available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1026&context=glj>.

<sup>31</sup> *Id.* at 284 (citing DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 29–30 (William R. Eadington ed., 2005)).

<sup>32</sup> Jeffrey Rodefer, *Federal Wire Wager Act*, GAMBLING-LAW-US.COM, <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> (last visited Jan. 2, 2012).

<sup>33</sup> *See id.* ("The Wire Act complements other federal bookmaking statutes, such as the Travel Act (interstate travel in aid of racketeering enterprises, including gambling), the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling Business Act (requires a predicate state law violation).").

<sup>34</sup> *See* Rodefer, *supra* note 32; Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law*, 6 GAMING L. REV. 393, 394 (2002).

<sup>35</sup> 28 U.S.C. § 3702 (2006). A governmental entity is defined to include "a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States . . ." 28 U.S.C. § 3701 (2006).

<sup>36</sup> Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind*

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noted that “[s]tates [were] considering a wide variety of [s]tate-sponsored gambling schemes” including “allow[ing] sports gambling on river boats . . . [sports betting] at off-track betting parlors . . . casino-style sports books,” and “sports theme[s] for [state] lotteries.”<sup>37</sup>

PASPA supporter’s arguments were bolstered by yet another notorious sports betting scandal when in August of 1989, Pete Rose, a professional baseball player and manager was banned from Major League Baseball amid allegations that he gambled on baseball games in which he participated. Acting on this renewed negative sentiment toward sports betting and amid concerns that state-sanctioned sports betting would leave the “imprimatur of the state on this [iniquitous] activity,”<sup>38</sup> proponents of the PASPA bill believed that preventing state expansion into sports gambling was necessary.

Senator Bill Bradley, a former professional basketball player and PASPA supporter, believed that disallowing state sanctioned sports betting would “protect the integrity of sports by proscribing the development of sports gambling.”<sup>39</sup> Statements by the Senate Judiciary Committee majority and other congressmen mirrored these sentiments, claiming that the expansion of sports gambling would “change the [wholesome] nature of sporting events from . . . [and] undermine public confidence and the integrity of the [professional and amateur sports].”<sup>40</sup> The legislative record expressed two primary concerns regarding state-sponsored sports betting: (1) that children would become unnecessarily exposed to this potential harm, thus making them more susceptible to engage in this undesired activity, and (2) that any increase in sports gambling, be it regulated or not, would increase the likelihood of corruption and the possibility of destroying the integrity crucial to professional and amateur sports.

PASPA also had the support of the commissioners of various sports leagues, including Francis T. “Fay” Vincent of Major League Baseball (“MLB”), David Stern of the National Basketball Association (“NBA”) and Paul Tagliabue of the National Football League

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*Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992). Senator Bradley expressed similar sentiments during a 1992 Senate debate (“Sports betting threatens the integrity of and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling. Sports gambling raises people’s suspicions about point-shaving and game-fixing. . . . If sports betting spreads, more and more fans will question every coaching decision and official’s call.”). 138 CONG. REC. S17434-01 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley), 1992 WL 275344, at \*S17435.

<sup>37</sup> S. Rep. No. 102-248, at 4 (1992).

<sup>38</sup> Bradley, *supra* note 36, at 5.

<sup>39</sup> *Id.*

<sup>40</sup> S. REP. NO. 102-248, at 4; *See also* 138 CONG. REC. H11756-02, at 5 (daily ed. Oct. 5, 1992) (statement of Rep. Fish), 1992 WL 280167 (“The bottom line is that coast-to-coast gambling would threaten the credibility of popular sports events.”).

(“NFL”).<sup>41</sup> The commissioners sought to prevent another Pete-Rose-type scandal that could tarnish the image of their organizations. As Richard H. McLaren, Professor of Law at the University of Western Ontario, states, “[e]ven . . . isolated [match fixing] events have, in the past decade, shaken the integrity of some sports and caused severe and serious setbacks. . . . No other aspect of sports corruption works so quickly to destroy the integrity of a sport, which has often taken decades to build.”<sup>42</sup> By preventing state-sponsored sports gambling, the commissioners believed PASPA would reduce the overall activity of sports betting, thus decreasing the likelihood that a scandal could affect their leagues.<sup>43</sup>

Senator Chuck Grassley, a member of the Senate Judiciary Committee, was one of the few outspoken opponents to PASPA. Grassley argued that PASPA would be a direct intrusion into state rights, raising constitutional issues and violating the principles of federalism.<sup>44</sup> The Department of Justice expressed similar views.<sup>45</sup> Using state regulated lotteries as an example, they believed that the collection of gambling revenue was a decision traditionally left to the states and that PASPA would be a federal intrusion into this state right. Grassley further argued that preventing states from sanctioning sports gambling would interfere with state revenues while “creat[ing] a virtual monopoly for [illegal gambling operators] over a multi-billion dollar industry.”<sup>46</sup> In addition, Grassley was concerned by the grandfather clauses embedded in the PASPA bill—allowing certain states to keep their existing forms of sports gambling. He argued that such clauses would effectively create an additional “monopoly on lawful sports wagering [for the grandfathered states] to the exclusion of the other 47.”<sup>47</sup>

Nevertheless, the statute was enacted on October 28, 1992, effectively preventing states from legalizing any new sports gambling activities.

During its nineteen-year existence, PASPA has rarely been

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<sup>41</sup> S. Rep. No. 102-248.

<sup>42</sup> Richard H. McLaren, *Doping in Sports: Legal and Ethical Issues: Corruption: Its Impact on Fair Play*, in *THE BUSINESS OF SPORTS* 725 (Scott R. Rosener & Kenneth L. Shropshire eds., 2d ed. 2011).

<sup>43</sup> As Commissioner Tagliabue testified, “Sports gambling threatens the character of team sports. . . . With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.” S. REP. NO. 102-248, at 4.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 9–11.



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examined in court.<sup>48</sup> In recent years however, support has been growing to reexamine the statute and shift sports gambling legislation authority back to the states. The Lesniak Lawsuit in 2009 was the first attempt by any state to challenge the legitimacy of PASPA on constitutional grounds. However testing congressional authority in court will be difficult because, as Part II will argue, relevant case law suggests that Congress is within its powers to legislate most, if not all, forms of sports gambling activity in this country.

## II. CONSTITUTIONAL CHALLENGE TO PASPA: SPORTS GAMBLING AND THE COMMERCE CLAUSE

The primary claim brought forth in the Lesniak Lawsuit was that Congress exceeded the scope of authority granted in the Commerce Clause to inhibit states from self-regulating gambling activity related to sports.<sup>49</sup> This will likely be New Jersey's core argument against PASPA for the August 7, 2012 suit that Governor Christie is facing, and for any future state challenges. This Part provides a reasoned prediction for the outcome of the main Commerce Clause challenge against PASPA. By analyzing the statute under current case law, it appears likely that Congress can prohibit states from sponsoring or authorizing gambling activities related to the vast majority of, if not all, sporting events that occur in this country. Although a more difficult question exists as to Congress' authority to regulate certain intrastate sporting competitions, this Part argues that even if PASPA was modified to not include those activities, it would still prevent states from effectively legalizing gambling on any major sports markets. Therefore, even if New Jersey wins a future challenge to PASPA's constitutionality, it will likely not help achieve the state's end goal of creating a robust sportsbooking industry.

### *A. States' Argument: Federal Sports Gambling Legislation Violates Tenth Amendment Rights*

The Lesniak lawsuit claimed that PASPA's provisions exceeded the scope of authority given to Congress and violated the Tenth Amendment. Senator Lesniak's original complaint states:

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<sup>48</sup> The Supreme Court has heard only one PASPA-related case, *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (determining the advertising limits of local casino gambling under PASPA).

<sup>49</sup> The claims included in the lawsuit included: violations of the Commerce Clause, Equal Protection Clause, and the Tenth, Eleventh, and First Amendments; violations of procedural and substantive due process; that PASPA was void for vagueness and overbreadth; and interference with constitutional rights of privacy. *Complaint and Demand for Declaratory Relief, Interactive Media Entm't & Gaming Ass'n. v. Holder* (2009) (No. 3:09-cv-01301), 2009 WL 4890878 [hereinafter *Lesniak Complaint*].

PASPA violates the Tenth Amendment by unconstitutionally arrogating to the United States such express and implied reserved powers to the individual states to regulate matters affecting its citizens including the raising of revenue by means of a form of authorized Sports Betting.<sup>50</sup>

The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>51</sup> Plaintiffs in the Lesniak lawsuit and other critics of PASPA believe that the federal law intrudes on what was traditionally a state power—the ability to generate revenue through gambling regulation.<sup>52</sup> Senator Grassley, in his minority opinion in the Senate Judiciary Committee Report on PASPA, argued that although Congress had the requisite authority to regulate interstate gambling related activities, “[t]he Federal Government also ha[d] never authorized private parties to enforce such restrictions [on purely intrastate wagering activities] against the [s]tates.”<sup>53</sup> The U.S. Department of Justice, in its letter to Senate Committee Chairman Joe Biden, also noted that “determinations of how to raise revenue have typically been left to the [s]tates.”<sup>54</sup>

As discussed above, the history of gambling legislation in the United States also supports this federalist assertion. Virtually all other forms of gambling are solely state-regulated in this country. States have the power to conduct their own lotteries, create racetracks, and establish commercial casinos free from federal intervention.<sup>55</sup> Given this state tradition of self-regulating gambling activity within their borders, a statute like PASPA appears to intrude upon a right protected under the Tenth Amendment.

*B. Federal Counterargument: PASPA is Authorized Under the Commerce Clause*

Despite any infringement into historically state-regulated

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<sup>50</sup> Lesniak Complaint ¶ 127.

<sup>51</sup> U.S. Const. amend. X.

<sup>52</sup> See Jeffrey Standen, *PASPA Under Fire*, GAMING LAW MEMO BLOG (Mar. 24, 2009), <http://gaminglawmemo.blogspot.com/search/label/PASPA>.

<sup>53</sup> S. Rep. No. 102-248, at 10.

<sup>54</sup> *Id.* at 11. The DOJ letter continues, “The Department is concerned that, to the extent the bill can be read as anything more than a clarification of current law, it raises federalism issues.” *Id.*

<sup>55</sup> Unlike other countries, such as the United Kingdom, the United States does not conduct a national lottery run by the federal government. Instead, states are granted the power to conduct their own lotteries, if they so choose. Betting has been a zone of activity free from federal intervention. See *Facts Sheets: Types of Gaming by State*, AM. GAMING ASS’N, <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Jan. 3, 2012), for a comprehensive list of states that allow different forms of legalized gaming, including state-run lotteries and casino gaming. This does not include Indian reservations, which allow casino gambling authorized under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701(2006).

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activities, proponents of PASPA will argue that the statute is a valid exercise of Congress' Commerce Clause power granted under Article I, Section 8 of the Constitution.<sup>56</sup> While the court's interpretation of the Commerce Clause and its relationship to federalism and state authority has shifted several times during our nation's jurisprudential history, a close examination of the relevant case law will help determine the validity of PASPA under the Commerce Clause.<sup>57</sup>

The latest Supreme Court case establishing ground rules for Congress' authority under the Commerce Clause is *United States v. Lopez* in 1995.<sup>58</sup> In *Lopez*, the Supreme Court found that the Gun-Free School Zones Act of 1990—which made the possession of a firearm in a school zone unlawful—exceeded Congress' authority to act. In his majority opinion, Chief Justice Rehnquist defined,

three broad categories of activity that Congress may regulate under its commerce power: [1] Congress may regulate the use of the channels of interstate commerce; [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; [3] Congress' commerce authority includes the power to regulate those activities having substantial relation to interstate commerce.<sup>59</sup>

The majority found that mere possession of a firearm in a school zone was not a regulation of a channel of interstate commerce and only had a tenuous connection to interstate commerce. Accordingly, the Court held that the statute went beyond the scope of Congress' commerce power and it has since been amended.<sup>60</sup> As future cases demonstrate, the *Lopez* test would likely be applied to determine the central issue here.<sup>61</sup>

Following the Court's holding in *Lopez*, legislation against gambling on sporting competitions appears to have a substantial relationship to interstate commerce, meeting the third category defined by Chief Justice Rehnquist. Sports gambling—essentially an entertainment service that operators provide in exchange for money—is

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<sup>56</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

<sup>57</sup> For a general overview of the varying methodologies that Supreme Court Justices have used to interpret the Commerce Clause, see Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2003).

<sup>58</sup> See *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>59</sup> *Id.* at 558–59.

<sup>60</sup> The applicable statute now reads, “It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(2)(A) (2006).

<sup>61</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Jones*, 529 U.S. 848 (2000).

inherently commercial in nature. Placing wagers on a game, or paying money for a sports-related lottery ticket involve monetary transactions determined by the outcomes of sporting events.

In addition, sports games are typically played under the umbrella of various professional and amateur athletic leagues or associations, consisting of teams and athletes located across the nation and the world. These sports organizations are international multi-billion dollar businesses, generating revenue across the globe from ticket, licensing, advertising and merchandise sales.<sup>62</sup> Even amateur sports associations such as the National Collegiate Athletic Association (“NCAA”) enter into large financial contractual relationships with international corporate sponsors and media conglomerates.<sup>63</sup> Assuming that a wager was placed on a game between two intrastate teams from one of these leagues—e.g., the New York Yankees versus the New York Mets—there are still a myriad of interstate commerce implications connected to such an event, including international broadcasting rights, league-wide revenue-sharing agreements, corporate sponsorships and nationwide advertisements. Accordingly, the courts are fairly unanimous in finding that sports leagues and associations, both professional and amateur, are businesses that fall under the scope of the Commerce Clause.<sup>64</sup>

Furthermore, major distinctions exist between the Gun-Free School Zones Act in *Lopez* and PASPA as they relate to the Commerce Clause. The connection between regulating guns in schools and interstate commerce was too remote for the Supreme Court to find a

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<sup>62</sup> Cork Gaines, *NFL Players and Owners Are Fighting over the Biggest Pie in Sports*, BUSINESS INSIDER (Mar. 22, 2011, 10:56 AM), <http://www.businessinsider.com/nfl-biggest-pie-in-sports-2011-3#ixzz1iWOYUx1Q>.

<sup>63</sup> See *College Athletics Revenues and Expenses—2011*, ESPN, [http://espn.go.com/ncaa/revenue/\\_year/2009](http://espn.go.com/ncaa/revenue/_year/2009) (last visited Jan. 3, 2012), for a breakdown of athletic revenues and expenses for the top forty collegiate athletic programs in the United States.

<sup>64</sup> See, e.g., *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205 (1971) (“Basketball . . . does not enjoy exemption from the [federal] antitrust laws”); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957) (holding that the National Football League operates in interstate commerce and enjoys no special exemption from federal antitrust laws); *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977) (“[I]ntercollegiate athletics in its management is clearly business . . . significantly involved in interstate commerce in the conduct of the athletic programs”); *Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976); *Banks v. NCAA*, 746 F.Supp. 850 (N.D. Ind. 1990). The notable exception to this general rule is the Supreme Court’s decision to recognize the sport of baseball as a pastime and not a part of interstate commerce, thus giving professional baseball an exemption from federal antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200 (1922). This series of decisions have been widely criticized and are used as examples of the Court’s misreading of prior decisions and improper usage of *stare decisis*. See, e.g., David L. Snyder, *Anatomy of an Aberration: An Examination of the Attempts to Apply Antitrust Law to Major League Baseball Through Flood v. Kuhn (1972)*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 177 (2008); Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1 (2005); Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball’s Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983).

substantial relationship. It is possible to argue that the presence of guns correlates to an increase in crime, which then leads to a drop in education quality and subsequent decrease in earning power.<sup>65</sup> However, the Court found that this relationship was too attenuated to be considered within the scope of congressional power under the Commerce Clause.<sup>66</sup> In contrast, PASPA's connection to interstate commerce is clear. Sports gambling legislation involves the regulation of wagers or lotteries—essentially commercial activities on their own—directly related to sporting events conducted primarily by businesses engaged in interstate commerce.<sup>67</sup>

PASPA may also meet the second prong of the Commerce Clause test as defined in *Lopez*, protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.<sup>68</sup> Prior to PASPA's enactment, only a select few states allowed any forms of sports gambling. Out-of-state residents who wished to engage in sports betting would need to travel to those states in order to place wagers. Arguably, legislation that affects where people can or cannot place wagers essentially regulates the travel of these persons from one state to another, even though the “threat” comes from only intrastate activities.

The Supreme Court used similar reasoning in deciding *Heart of Atlanta v. United States*, holding that Congress had authority to enact Title II of the Civil Rights Act of 1964 under the Commerce Clause.<sup>69</sup> In *Heart of Atlanta*, the owner of a motel who refused to rent rooms to black patrons filed suit claiming that Title II requirements exceeded Congress' commerce power.<sup>70</sup> The Court reasoned that since a large percentage of the motel's business was to out-of-state residents and since the hotel was strategically placed along interstate roads, the motel had a significant effect on the movement of these residents from state to state.<sup>71</sup> These residents were considered to be an instrumentality of interstate commerce, thus authorizing the statute against purely intrastate activities.

The regulation of the Louisiana Lottery, which ran from 1868 to the early 1900s, is another example of Congress' authority to act on a seemingly intrastate activity.<sup>72</sup> In 1878, Louisiana was the only state in

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<sup>65</sup> This was one of the arguments made by Justice Breyer in his dissent in *United States v. Lopez*, 514 U.S. 549, 618–25 (1995).

<sup>66</sup> *Id.* at 567 (“The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce”).

<sup>67</sup> See *Radovich*, 352 U.S. at 452.

<sup>68</sup> *Lopez*, 514 U.S. at 558.

<sup>69</sup> See *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).

<sup>70</sup> *Id.* at 242–44.

<sup>71</sup> *Id.* at 243, 255–56.

<sup>72</sup> See *Rychlak*, *supra* note 13, at 38–44.

the nation to allow lotteries.<sup>73</sup> The popularity of the lottery spread nationwide, “making annual profits of up to \$13 million and paying out more than \$3 million per year.”<sup>74</sup> Almost 93% of the revenue generated from the lottery came from outside the state.<sup>75</sup> The Supreme Court found that Congress’ subsequent regulation of this lottery was seen as a valid exercise of authority under the Commerce Clause, given the widespread interstate commercial activity the lottery was generating.<sup>76</sup>

Prior to the enactment of PASPA, a similar monopoly existed on legalized sports betting in the United States. Nevada, being the only state that allows sports bookmaking, attracts a large number of out-of-state residents to spend money placing wagers on games.<sup>77</sup> Given the effect it has on the travel habits of people and given the accessibility of its casinos to out-of-state residents, a strong argument can be made that sports gambling legislation like PASPA affects one of the instrumentalities of commerce—the movement of people. Therefore, under the second and third prong of the *Lopez* test, a court would likely determine that PASPA, as it relates to sporting events operated under the control of professional and amateur sports leagues, is a valid exercise of Congress’ commerce power.<sup>78</sup>

### C. PASPA’s Extension into Intrastate Sports Gambling

One issue that courts may consider is whether Congress can regulate gambling on intrastate sporting events that have little or no connection with interstate commerce. Take, for example, a non-televised, unadvertised basketball game between two intrastate high schools with no ties to any multi-state athletic associations and no out-

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<sup>73</sup> *Id.* at 40.

<sup>74</sup> *Id.* at 41.

<sup>75</sup> *Id.* at 42.

<sup>76</sup> *See, e.g.,* *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the ban on lottery tickets from interstate commerce); *Ex parte Rapier*, 143 U.S. 110, 134 (1892) (upholding the ban on lottery materials from the mails under the Postal Powers Clause of the Constitution, and finding such material “injurious to the people”).

<sup>77</sup> For example, according to the Las Vegas Convention and Visitors Authority, 267,000 visitors traveled to Las Vegas during Super Bowl weekend in 2010. Wagers for the 2010 Super Bowl in Nevada totaled \$81.5 million. Amanda Finnegan, *Super Bowl, Chinese New Year Align for Big Weekend*, LAS VEGAS SUN (Feb. 4, 2011, 2:05 AM) <http://www.lasvegassun.com/news/2011/feb/04/super-bowl-chinese-new-year-align-big-weekend>.

<sup>78</sup> Assuming Congress has the proper authority to enact PASPA under the Commerce Clause, a question may still remain as to whether the statute still infringes upon a state’s sovereign power to perform a traditional state function, in violation of the Tenth Amendment. The Supreme Court appears to have answered this question in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that the Fair Labor Standards Act could be extended under the Commerce Clause, and applied to state government employees). The Court found that “the sovereignty of the States is limited by the Constitution,” and that Article I, Section 8 “works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.” *Id.* at 548. Such limitations to state sovereignty allow for federal laws, enacted under constitutionally authorized power, to trump conflicting state laws.

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of-state spectators. Section 3702 of PASPA makes gambling on any “competitive game[ ] in which amateur or professional athletes participate” unlawful.<sup>79</sup> The plain language of the statute indicates that PASPA extends to intrastate games like in the hypothetical above. Can Congress bar a state from allowing such localized gambling, or does it overreach its authority in these narrow instances?

The Supreme Court answered a related question in its decision of *Gonzales v. Raich* in 2005.<sup>80</sup> In *Gonzales*, two California residents were charged in violation of the federal Controlled Substances Act (“CSA”) for growing marijuana for the sole purpose of personal medical consumption. Due to the strictly intrastate nature of the violation along with California law permitting such activities, the residents claimed that enforcing federal law to their activities was impermissible under the Commerce Clause. The Court held that the CSA could prohibit purely local cultivation and use of marijuana, even if the activity was in compliance with state law. In other words, “Congress’ power to regulate interstate markets for [drugs and other] medicinal substances encompasses those markets that are supplied with drugs produced and consumed locally.”<sup>81</sup>

In coming to this decision, the Court first reasoned that the activity of growing marijuana was essentially economic and commercial in nature. Defining economics as “the production, distribution, and consumption of commodities,”<sup>82</sup> the Court considered the CSA, in its control over the production and distribution and use of substances of which there is an established commercial interstate market, to be a valid exercise of Commerce Clause power. Compared to the Gun-Free School Zones Act in *Lopez*, which regulated gun possession without requiring any connection to interstate activity, the Court found that the CSA “directly regulates economic, commercial activity,”<sup>83</sup> and given the interstate implications of the statute, “legislation regulating that activity will be sustained.”<sup>84</sup>

The Ninth Circuit Court of Appeals attempted to separate the intrastate cultivation and use of marijuana as a unique class of activities and ruled that this class was beyond the scope of federal authority. While the Supreme Court recognized that such a distinction could have been proper when the statute was created, they noted that the issue before them was not whether an interstate and intrastate class could be made, but whether Congress’ decision “to include this narrower

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<sup>79</sup> 28 U.S.C. § 3702 (2006).

<sup>80</sup> 545 U.S. 1 (2005).

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* at 25.

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.* at 25 (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000)).

[intrastate] class of activities within the larger regulatory scheme was constitutionally deficient.”<sup>85</sup> The Court rejected the Ninth Circuit’s reasoning and found that “Congress acted rationally in determining that none of the characteristics making up the purported [intrastate] class, whether viewed individually or in the aggregate, compelled an exemption from the CSA.”

Relating these guiding principles to the current issue of intrastate sports gambling, two questions need to be considered: (1) is sports gambling an economic activity and if so, (2) is there a rational basis for Congress to conclude that intrastate gambling could substantially affect the larger interstate sports gambling regulations?

In regards to the former question, it is likely that a court would consider gambling on sports to be economic and commercial in nature. The Merriam-Webster Dictionary defines the word gamble as “to play a game for money or property.”<sup>86</sup> As discussed above, sports gambling involves wagers, most commonly in the form of money, to be won or lost depending on the outcome of a sporting event or an athlete’s performance.<sup>87</sup> Although contrarians may argue that gambling does not necessarily need to involve money or property per se,<sup>88</sup> compared to gun possession or marijuana cultivation, placing wagers on sports appear closely tied to the definition of commerce. In addition, similar to the marijuana market in *Gonzales*, an established interstate commercial market already exists with sports gambling, as sports bookmaking is a multi-billion dollar industry worldwide.<sup>89</sup>

Assuming that gambling is a commercial activity, Congress is permitted to regulate intrastate sports gambling if they have a rational basis for believing that such activities could affect the overall legislation.<sup>90</sup> The Court in *Gonzales* considered potential enforcement difficulties and diversion into illicit channels as sufficient evidence of a

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<sup>85</sup> Id. at 26 (internal quotation marks omitted).

<sup>86</sup> *Gamble Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gamble> (last visited Apr. 1, 2012).

<sup>87</sup> See *supra* p. 111.

<sup>88</sup> For example, bets are occasionally made for no stakes (“gentlemen’s bets”), or for things that have no monetary value. CrowdPark is a company specializing in providing non-monetary social betting services online. CROWDPARK, <http://www.crowdpark.com> (last visited Apr. 1, 2012).

<sup>89</sup> According to British bookmaker William Hill, the market size of sports gambling in the United Kingdom alone is £ 2.5 billion. *About Our Industry*, WILLIAM HILL, <http://www.williamhillplc.com/wmh/about/aboutourindustry> (last visited Apr. 1, 2012). H2 Gambling Capital estimates the global gaming sector to reach € 24.6 billion in 2011, of which forty-three percent is attributed to sports betting revenues. *Preliminary Results 2011 H2 eGaming Dataset Now Available*, H2 GAMBLING CAPITAL, (Feb. 16, 2012), <http://www.h2gamblingcapital.com/article/preliminary-results-2011-h2-egaming-dataset-now-available>.

<sup>90</sup> Some Supreme Court Justices believe that *Lopez* suggests that Congress can regulate even noneconomic, local activity if that regulation is a necessary part of a more general regulation of interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 37 (Scalia, J., concurring) (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).



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rational basis to include intrastate activities in the overall federal regulation of the CSA.<sup>91</sup> Arguably, these same concerns would occur if purely intrastate sports gambling were to be permitted under PASPA while other forms were not. Legalized sportsbooks that offered betting services on local games would be one step away from offering the same services on more lucrative professional and collegiate sports. Since the wagering process is identical, regardless of the type of games, ensuring that such legalized bookmakers were not entering into illegal activities would be difficult to monitor and enforce. Also, allowing wagers to be placed on high school sports would be an affront to PASPA's goal to limit the potential corruptible effects of gambling on youngsters.<sup>92</sup> A statute that bans professional and collegiate sports gambling while allowing bets on certain high school games seems entirely contrary to this purpose. This would increase exposure to gambling for high school students, especially student athletes, who may now be tempted to "fix" games for money. For these reasons, it is likely that a court would conclude that a rational basis exists for Congress to encompass any and all forms of sporting competitions (except the ones which PASPA explicitly excludes) when it sought to regulate sports gambling.

Regardless of how a court would rule on this narrow issue, any subsequent amendments to the statute would provide little to no relief for states. The overwhelming majority of wagers placed in this country are on nationally or regionally televised professional and amateur sporting events.<sup>93</sup> Sportsbooks that offer wagers for local high school sports are rare and limited to those events that are broadcast nationally.<sup>94</sup> As discussed above, nationally broadcast sporting events would implicate the Commerce Clause even if the actual event only involved intrastate teams or athletes. As a result, states will not be allowed to generate the type of revenue they are seeking because they will still be restricted to offering bets on a very limited selection of sporting events, especially compared to competitors in Nevada or online. Therefore, even if New Jersey did score a victory in court, any amendments made to PASPA would prevent the state from conducting

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<sup>91</sup> Id. at 2–3.

<sup>92</sup> See *infra* notes 100–02 and accompanying text, for a discussion on Congress' concern about sports-gambling exposure to the nation's youth.

<sup>93</sup> As gambling expert Allen Moody notes, odds makers know that more wagers are placed on events that are televised vs. untelevised, providing sportsbooks an incentive to offer wagers on televised games. Allen Moody, *Why Most Sports Gamblers Lose*, ABOUT.COM, <http://sportsgambling.about.com/od/advancedtheory/a/bettorslose.htm> (last visited Oct. 19, 2012). VegasInsider.com, a website that reports betting lines of the major Las Vegas sportsbooks, follows only televised sports and entertainment events. VEGASINSIDER.COM, <http://www.vegasinsider.com> (last visited Apr. 1, 2012).

<sup>94</sup> See Jim Halley & Nicole Auerbach, *Offshore Sites Setting Betting Lines on High School Football*, USA TODAY (Nov. 4, 2011, 2:58 PM), <http://www.usatoday.com/sports/preps/football/story/2011-11-02-high-school-football-betting/51065482/1>.

sports gambling activity in the forms it desires.

### III. THE INEFFECTICACY OF PASPA AND ARGUMENTS FOR REPEAL

The previous Part dissected the primary constitutional argument against PASPA, concluding that a successful judicial challenge is not likely. Therefore, states that want to legalize sports gambling should not waste their resources in court, but should instead focus their efforts on lobbying for Congress to repeal or amend the statute.<sup>95</sup> This Part urges for PASPA's repeal, arguing that the statute is currently doing more harm than good by not achieving its intended purposes while restricting a potential source of state revenue. By outlining the original purposes behind PASPA and examining the current landscape of sports betting in this country, this Part asserts that eliminating PASPA and allowing states the option to legalize sports gambling can better achieve the statute's original goals.

#### A. *Original Purpose of PASPA*

PASPA garnered a large amount of congressional support when it was enacted in 1992. The legislative historical records indicate that proponents of the bill believed that any expansion of sports gambling, including state-sanctioned sports gambling, would increase the chances of corruption and ruin the public image of professional and amateur sports.<sup>96</sup> As Senator Dennis DeConcini, the creator of this bill, stated, "Is sports gambling a good thing? I think most people would agree that it is not. The spread of legalized sports gambling . . . [t]hreatens the very foundation of professional and amateur sports events."<sup>97</sup> In their minds, "game fixing" and other scandals were inextricably linked to sports betting.<sup>98</sup> Even if states were regulating and overseeing sports betting operations, supporters of the bill argued that illegal sports

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<sup>95</sup> In fact, legislators from Missouri, Rhode Island and Illinois have already introduced resolutions to get PASPA repealed in Congress. Statement of N.J. Sen. Raymond J. Lesniak, N.J. SENATE DEMOCRATS (Feb. 22, 2010), <http://www.njsendems.com/release.asp?rid=3179>.

<sup>96</sup> See S. REP. NO. 102-248, at 4. ("Sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.")

<sup>97</sup> Prohibiting State-Sanctioned Sports: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 102d Cong. 1 (1991) [hereinafter S. 473 and S. 474 Hearing] (statement of Sen. Dennis DeConcini).

<sup>98</sup> See S. REP. NO. 102-248, at 5; 138 CONG. REC. H11756-02, at 5 (daily ed. Oct. 5, 1992) (statement of Rep. Fish) ("the further legalization of team sports betting by a State or municipality would increase the chances that persons gambling on games would attempt to influence the outcome of those games. Congress has already recognized this as a national problem by adopting provisions in the Federal Criminal Code with outlaw conspiracy and bribery aimed at influencing the outcome of a sports event").

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gambling establishments, often associated with organized crime, would not decrease.<sup>99</sup> Given these concerns, PASPA was enacted to restrict the available channels of legal sports gambling, in the hopes this would limit the level of sports gambling activity, thus reducing the likelihood of scandals and aiding the preservation of sports integrity.

Congress was also concerned with keeping sports gambling activities away from the nation's youth. Senator DeConcini believed that teenage gambling problems were on the rise, stating that “[o]f the approximately 8 million compulsive gamblers in America, 1 million of them are under 20.”<sup>100</sup> He and other PASPA supporters believed that state-sanctioned sports gambling would attract a new generation of bettors, perpetuating the risk of a potentially damaging scandal.<sup>101</sup> Senator Bradley stated that PASPA's goal was to “protect sports from becoming a vehicle for promoting gambling among teenagers, ensuring that the values of character, cooperation, and good sportsmanship that have figured so heavily in the growth of athletic competition throughout the ages are not significantly compromised.”<sup>102</sup>

While Congress did consider some of the benefits that could potentially result from state-sponsored gambling, the majority believed that any gains resulting from revenue generation were not enough to justify the potential harms that legalized state sanctioned gambling would bring. In their eyes, sports betting was such a vice that, “a line between legal and illegal, right and wrong,” had to be drawn regardless of whether the activity was profitable or not.<sup>103</sup> In addition, public sentiment around sports betting at this time—during the aftermath of the Pete Rose baseball scandal—was particularly negative.<sup>104</sup> By enacting PASPA, lawmakers believed that limiting the accessibility of sports gambling would quell future generations' desires to participate in this activity.

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<sup>99</sup> See *id.* at 10 (statement of Sen. Bill Bradley) (“Legal gambling on sports through a lottery system will almost certainly increase the amount of illegal gambling on sports, creating an atmosphere that invites corruption.”).

<sup>100</sup> *Id.* at 2 (statement of Sen. Dennis DeConcini).

<sup>101</sup> *Id.* (“Teenagers gamble on sports, lotteries, and card games. Government should not be in the business of encouraging people, especially our young people, to gamble.”).

<sup>102</sup> Bradley, *supra* note 36, at 6.

<sup>103</sup> See S. REP. NO. 102-248, at 6. Senator Bradley would go as far as to equate the vice of sports gambling to drug use. Bradley, *supra* note 36, at 6 (“[R]evenue earned by the states through sports gambling is not enough to justify the waste and destruction attendant to the practice. Just as legalizing drugs would lead to increased drug addiction, legalizing sports gambling would aggravate the problems associated with gambling.”). It is telling how “socially destructive” Congress actually considered sports betting, in light of the grandfather provisions included in PASPA, effectively allowing certain states to have legalized sports gambling.

<sup>104</sup> S. 473 and S. 474 Hearing, *supra* note 97, at 1. See *supra* text accompanying note 38, for a description of the Pete Rose scandal.

### B. *The Effects of PASPA on the Current Landscape of Sports Gambling*

In 1991, columnist Andrew Beyer commented on the PASPA proceedings by writing that, “[n]ot since Prohibition have Americans so readily engaged in an illegal activity as they do with sports betting today.”<sup>105</sup> While this sentiment rang true over twenty years ago, the levels of illegal sports gambling activity have increased significantly. The technological advances of the Internet and the e-commerce industry have led to a proliferation of offshore sportsbooks and gambling websites accessible to bettors worldwide, including the United States.

There are approximately eighty-five countries, including the United Kingdom, France, and Italy that offer legal but regulated sports betting.<sup>106</sup> These jurisdictions offer approximately 2100 unique online gambling services, including sportsbooks, accessible to anyone with an Internet connection.<sup>107</sup> The proliferation of these sites, along with a slow legislative response, has transformed illegal online gambling to “an immensely popular and profitable industry that continues to grow exponentially” in the United States.<sup>108</sup> According to a Christian Capital Advisors report, in or around 2006, the United States accounted for half of the global online gambling market.<sup>109</sup>

As mentioned above, sports gambling has transformed into a multi-billion dollar industry, generating significant proceeds from American users.<sup>110</sup> During the twenty years subsequent to PASPA’s enactment, gross gambling revenues for legal casinos in the United States grew from \$8.6 billion in 1991 to \$34.6 billion in 2010.<sup>111</sup> In comparison, global online gambling revenues totaled approximately \$30 billion in 2010, nearly matching the amount of total casino revenues

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<sup>105</sup> See S. REP. NO. 102-248, at 14.

<sup>106</sup> David O. Stewart, *Online Gambling Five Years after UIGEA 4* (Am. Gaming Ass’n., 2011).

<sup>107</sup> Jason Gross, *Internet Gambling & the Law—Prohibition vs. Regulation*, METROPOLITAN CORP. COUNSEL (Aug. 1, 2006, 1:00 PM), <http://www.metrocorpcounsel.com/articles/7090/internet-gambling-law-prohibition-vs-regulation>.

<sup>108</sup> *Id.* Only until the Second Circuit’s decision in *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), did a court hold that online sportsbooks were impermissible under the Wire Act. However, prosecutions have only centered around the online sportsbooks that *receive* bets, and not against sports bettors who *place* bets. See Allen Moody, *Is Online Sports Betting Legal?*, ABOUT.COM (Nov. 21, 2009), [http://sportsgambling.about.com/od/sportsgambling101/a/betlegal\\_2.htm](http://sportsgambling.about.com/od/sportsgambling101/a/betlegal_2.htm).

<sup>109</sup> Indrajit Basu, *US-barred Gambling Set to Roll in Asia*, ASIA TIMES ONLINE (Oct. 31, 2006), [http://www.atimes.com/atimes/South\\_Asia/HJ31Df01.html](http://www.atimes.com/atimes/South_Asia/HJ31Df01.html).

<sup>110</sup> See *supra* note 89 and accompanying text, for estimates of the global sports gambling industry’s size.

<sup>111</sup> See *Revenues*, CASINO CHECKER, [http://www.casinochecker.com/casino\\_knowledge/economy/revenues.htm](http://www.casinochecker.com/casino_knowledge/economy/revenues.htm) (last visited Oct. 22, 2012); *Gaming Revenue: 10 Year Trend*, AM. GAMING ASS’N, <http://www.americangaming.org/industry-resources/research/fact-sheets/gaming-revenue-10-year-trends> (last visited Feb. 1, 2012). Gross gambling revenues are calculated by totaling the amount wagered minus the amounts paid out as a result of wagers. They do not take into account other expenses associated with placing wagers such as taxes, salaries, and overhead expenses. *Id.*

generated in the United States in the same year.<sup>112</sup> Revenue estimates for online sports betting are more significant. A 2003 *Forbes* article estimated that \$80 billion to \$380 billion in wagers were placed illegally in the United States annually, much of it resulting from online sportsbook activity.<sup>113</sup> Considering the amount of sports wagers placed in the entire state of Nevada in 2010 was approximately \$275 million, this figure is staggering.<sup>114</sup> Despite PASPA's aims, the advent of Internet sportsbooks has significantly increased the levels of sports gambling activity in this country.

This rise in sports gambling popularity has also led to the mainstream acceptance of the activity by the general public. From sports announcers giving their "picks of the week" on television to watching President Obama fill out his NCAA college basketball tournament bracket, bets and pools have become a part of the experience of following sporting events.<sup>115</sup> Major newspapers and sports websites now offer betting lines and gambling advice to their followers.<sup>116</sup> Even NBA Commissioner David Stern acknowledged this shift in the public perception of gambling in a 2009 interview with *Sports Illustrated*, stating, "[gambling] may be a little immoral, because it really is a tax on the poor . . . [b]ut having said that, it's now a matter of national policy: Gambling is good."<sup>117</sup> Not only have gambling and sports gambling become more prevalent in modern society, but they have become acceptable activities in modern culture.

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<sup>112</sup> Stewart, *supra* note 106, at 4.

<sup>113</sup> Ari Weinberg, *The Case for Legal Sports Gambling*, FORBES (Jan. 27, 2003, 11:55 AM), [http://www.forbes.com/2003/01/27/cx\\_aw\\_0127gambling.html](http://www.forbes.com/2003/01/27/cx_aw_0127gambling.html). These are estimates of the total amount of wagers placed, not the gross gambling revenues.

<sup>114</sup> This figure was calculated from the 2010 Gaming Revenue Report released by the Nevada State Gaming Board, by dividing the statewide "Win Amount" of "Sports Pool" games (\$11.629 million) from the "Win Percent" of "Sports Pool" games (4.18 percent). NEV. STATE GAMING CONTROL BD., GAMING REVENUE REPORT 4 (2010), available at [http://gaming.nv.gov/documents/pdf/1g\\_10dec.pdf](http://gaming.nv.gov/documents/pdf/1g_10dec.pdf).

<sup>115</sup> See Steve Tutaj, *Swami Sez: Time for ESPN to Show Chris Berman the Door*, BLEACHER REP. (Feb. 5, 2007), <http://bleacherreport.com/articles/673-swami-sez-time-for-espn-to-show-chris-berman-the-door>; Andy Katz, *President Obama Picks UNC-UK Rematch*, ESPN (Mar. 14, 2012, 9:37AM), [http://espn.go.com/blog/collegebasketballnation/post/\\_id/53434/president-obama-picks-unc-uk-rematch](http://espn.go.com/blog/collegebasketballnation/post/_id/53434/president-obama-picks-unc-uk-rematch).

<sup>116</sup> Sports betting lines are readily accessible to people nationwide. Sources include several of the widest circulated newspapers in the country, including *USA Today*, the *New York Post*, the *Chicago Sun-Times*, *Bloomberg Terminals*, and on most major sports websites including *Yahoo! Sports* and *ESPN*. *ESPN* also has sections dedicated to sports gambling with writers providing advice and betting tips on sporting events. See, e.g., Chad Millman, *Do Players Want Sports Betting Legalized?*, *Chad Millman Blog*, ESPN (Oct. 12, 2011, 9:31 AM), [http://insider.espn.go.com/insider/blog/\\_name/millman\\_chad](http://insider.espn.go.com/insider/blog/_name/millman_chad) ("Millman's daily blog explores the culture of sports gambling; on Mondays and Fridays in the fall, he investigates trends in point spreads related to professional football"); *Picks Central*, ESPN, <http://insider.espn.go.com/insider/pickscentral> (last visited Feb. 2, 2012).

<sup>117</sup> Ian Thomsen, *Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SPORTS ILLUSTRATED (Dec. 11, 2009, 2:26 PM), [http://sportsillustrated.cnn.com/2009/writers/ian\\_thomsen/12/11/weekly.countdown/index.html](http://sportsillustrated.cnn.com/2009/writers/ian_thomsen/12/11/weekly.countdown/index.html).

Given the widespread participation in sports gambling in the United States, the original aims of PASPA—to reduce the exposure and accessibility of sports gambling to the general public—have not been successful. In particular, Congress' desire to prevent teenagers from exposure to sports gambling has become moot in light of the ease of accessibility to this activity through the Internet. In reality, the bans on sports and Internet gambling have deterred the legitimate, compliant online sports gambling operators from entering the American market and leaving unlicensed, unregulated online gambling operators in their place. These sports betting websites are readily accessible to young people because they “make little to no effort to exclude underage gamblers.”<sup>118</sup>

However, even with this increase in sports gambling activity, the integrity of professional and amateur sports has remained intact while popularity and revenues are at an all-time high.<sup>119</sup> Recent sports-related scandals in the United States have been scarce even though the level of sports betting continues to grow dramatically.<sup>120</sup> In order to explain this anomaly, one of the premises believed by the original PASPA supporters—that the creation of legitimate sportsbooks would not reduce the amount of crooked gambling operations run by organized crime syndicates and other organizations prone to sports corruption—should be challenged.<sup>121</sup> In fact, the National Gambling Impact Study Commission acknowledges many advocates who argue that the introduction of legalized, but regulated, gambling would in fact “undermin[e] illegal gambling and the organized crime it supports.”<sup>122</sup> The online sportsbooks of today are no longer underground offshoots of criminal syndicates. The industry is now operated by large, publicly traded corporations and regulated under tight jurisdictional controls.<sup>123</sup>

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<sup>118</sup> Stewart, *supra* note 106, at 15.

<sup>119</sup> For example, revenues for the National Football League in 2010 are estimated to be at \$9 billion compared to \$1.2 billion in 1990. *Compare Sports Industry Overview*, PLUNKETT RESEARCH, LTD., <http://www.plunkettresearch.com/sports-recreation-leisure-market-research/industry-statistics> (last visited Feb. 2 2012), with *Discrepancies in N.F.L. Revenue*, N.Y. TIMES (July 2, 1992), <http://www.nytimes.com/1992/07/02/sports/discrepancies-in-nfl-revenue.html>.

<sup>120</sup> According to sportswriter Jeff Merron's top ten biggest sports scandals, none have occurred during the post-1998 online sports betting boom, while one made his top ten list in 1996 between PASPA's enactment (in 1992) and 1998. Jeff Merron, *Biggest Sports Gambling Scandals*, ESPN, <http://sports.espn.go.com/espn/page2/story?page=merron/060207> (last visited Feb. 2, 2012).

<sup>121</sup> Another way to explain the decline of sports scandals in professional sports is the increase of player salaries during this era. Professional athletes earning large salaries have far less incentive to fix games, especially if the consequences for getting caught include league banishment, as Pete Rose was. However, this theory does not adequately explain the decline in scandals among amateur sports.

<sup>122</sup> Nat'l Gambling Impact Study Comm'n: Final Report 1–5 (1999).

<sup>123</sup> For example, William Hill, one of the United Kingdom's oldest and largest sportsbooks has a market value of over £ 1 billion pounds, has operated online since 1998 and is one of several gambling companies publicly traded on the London Stock Exchange. See *Key Facts*, WILLIAM HILL, <http://www.williamhillplc.com/wmh/media/keyfact> (last visited Feb. 2, 2012).

These businesses have little financial motive to promote betting scandals that could tarnish their legitimacy and expose them to potential regulatory and legal ramifications in their home countries.<sup>124</sup> In fact, given the profitability of the sportsbook industry, these companies have more incentive to monitor and notify investigators regarding any irregular and suspicious betting activity in order to prevent fraudulent losses.<sup>125</sup> This is contrary to Congress' original prediction that increased sports betting activity would lead to more scandal and corruption. Given these changes and recent developments in the sports gambling environment, it would be prudent for Congress to reexamine and adapt sports gambling legislation to fit the current period.

### C. *Benefits of Eliminating PASPA and Shifting to State Regulation*

By enacting PASPA and preventing state regulated sports gambling, Congress believed that potential harms created from legalized state sponsored sports betting outweighed the benefits of state revenue generation.<sup>126</sup> However, the sports gambling environment in the United States today is not what lawmakers and other PASPA proponents foresaw when they enacted the bill in 1992. In general, PASPA and other gambling legislation have done very little to prevent online gambling and sports betting activity. Even Commissioner Stern, one of the original supporters of PASPA, has publicly shifted his stance towards sports gambling in recent years.<sup>127</sup> While PASPA seemed to be a logical strategy to limit sports gambling activity at the time, past proponents can no longer claim that the statute is still effective today. Permitting sanctioned sports gambling will not only provide states with a much needed revenue stream and source for jobs, but can also help serve Congress' goal of preserving sports integrity. Given this new era of sports gambling, it is imperative for Congress to revisit PASPA and

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<sup>124</sup> These concerns are especially strong in the wake of U.S. government crackdown of these international gambling businesses, arresting and convicting owners of offshore sportsbooks. *See, e.g., United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

<sup>125</sup> The 1994 Arizona State University ("ASU") basketball point-shaving scandal was an early example of sportsbook monitoring which led to subsequent investigation and eventual prosecution. After legitimate Las Vegas sportsbooks detected unusually high amounts of money being wagered on ASU games, subsequent government investigation led to the forty-six-month sentencing of Benny Silman, the mastermind behind an elaborate system where players on the ASU basketball team were paid to purposely miss shots. *See Jimmy Magahern, A Sure Thing*, TIMES PUBL'NS (Feb. 2011), <http://www.timespublications.com/feb11-feature2.asp>.

<sup>126</sup> *See S. REP. NO. 102-248*, at 6 (1992) ("The committee recognizes that sports gambling offers a potential source of revenue for the States, but . . . believes the risk to the reputation of one of our Nation's most

popular pastimes, professional and amateur sporting events, is not worth it.").

<sup>127</sup> In his 2009 *Sports Illustrated* interview, Stern admits that policies toward sports gambling were "formulated at a time when gambling was far less widespread" and believes that a new approach regarding sports betting is needed. He stated that "we have moved to a point where that leap [towards advocating legalized sports gambling] is a possibility . . ." Thomsen, *supra* note 117.

consider its repeal.

As previously discussed, billions of United States dollars are continually siphoned away illegally to unregulated and untaxed online sportsbooks. According to a 2010 study on gambling in various international jurisdictions by the South African Gambling Review Commission, the United States' system of regulating sports betting and online gambling is "considerably weak."<sup>128</sup> This report noted that federal and state agendas are often in conflict and "these [regulatory] bodies are characterized by differences of opinion on policy issues, interdepartmental rivalry, political disputes and an absence of coordination."<sup>129</sup>

Concurrently, state governments are suffering through the most severe fiscal crises in decades. According to the Center on Budget and Policy Priorities, the 2007 recession "cause[d] the largest collapse in state revenues on record" and while revenues have begun to grow in 2010, they are "not growing fast enough to recover anytime soon."<sup>130</sup> Already, twenty-nine states are projecting or addressing budget shortfalls totaling \$44 billion for the 2013 fiscal year.<sup>131</sup>

Repealing PASPA and allowing states to self-regulate sports gambling would siphon this money away from illegal foreign providers and create a significant revenue stream for local governments during this recessionary period. In Delaware, for example, where only a minor form of sports gambling is allowed under PASPA, revenues generated during the 2009 NFL season totaled \$1.2 million, along with an additional \$6.2 million in cross-over betting increases.<sup>132</sup> Oregon's now defunct sports lotteries brought in an estimated \$2 to \$2.5 million in revenue earmarked for state school scholarships.<sup>133</sup> PricewaterhouseCoopers estimated that legalized online gambling in the United States could "yield[ ] as much as \$43 billion in tax revenue."<sup>134</sup> These figures and estimates demonstrate that the amount of potential state revenues is substantial once restrictions on state-sponsored sports

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<sup>128</sup> S. Africa Gambling Review Comm'n: Int'l Study Of Gambling Jurisdiction 10 (2010), available at <http://www.thedti.gov.za/news2011/Appendix.pdf>.

<sup>129</sup> Id.

<sup>130</sup> Phil Oliff et al., *States Continue to Feel Recession's Impact*, CENTER ON BUDGET & POL'Y PRIORITIES, <http://www.cbpp.org/cms/index.cfm?fa=view&id=711> (last updated June 27, 2012). See also Jeremy Gerst & Daniel Wilson, *Fiscal Crises of the State: Causes and Consequences*, FED. RES. BANK S.F., (June 28, 2010), <http://www.frbsf.org/publications/economics/letter/2010/el2010-20.html>.

<sup>131</sup> Oliff et al., *supra* note 130.

<sup>132</sup> Doug Denison, *Sports Betting Revenues Look Strong Through First Weeks of Football Season*, DOVER POST Oct. 2, 2009, available at 2009 WL 26925951.

<sup>133</sup> Carla Hanson, *Oregon Sports Action Laid to Rest*, BLUEOREGON (Feb. 9, 2007), [http://www.blueoregon.com/2007/02/oregon\\_sports\\_a](http://www.blueoregon.com/2007/02/oregon_sports_a).

<sup>134</sup> Rotem Nicole Moran, Note & Comment, Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA, 31 LOY. L.A. ENT. L. REV. 55, 80 (2010-2011).



gambling are lifted.

Furthermore, establishing a newly formed state sportsbook industry would create a significant number of employment opportunities for citizens. According to Gamble Aware, a non-profit organization dedicated to gambling education, the United Kingdom's sports betting industry directly and indirectly supports over 100,000 employment opportunities, many requiring few formal qualifications.<sup>135</sup> Legislators reevaluating the merits of PASPA should likewise consider this potential benefit in their decision.

Lastly, a state regulated system of sports betting will improve monitoring and enforcement controls on suspicious and illegal betting activity, thus helping to preserve the integrity of sports by early detection and investigation of potential fraud. Improvements in monitoring technology can allow state regulated sportsbooks working in conjunction with state and federal investigators to effectively detect illegal betting activity, and investigate and prosecute wrongdoers. A prime example of this occurred in the United Kingdom in 2007, when British sportsbook *Betfair* noticed irregular betting patterns of a professional tennis match in Europe, prompting a subsequent investigation by the Association of Tennis Professionals.<sup>136</sup> Although the alleged players in the tennis match were eventually found innocent, the investigation and subsequent reporting of these bets led to the revelation that match fixing occurred in professional tennis as athletes admitted they had been approached in the past to "sell [their] game[s]."<sup>137</sup>

Contrast the quick detection and subsequent investigation of this potentially damaging tennis scandal to the National Basketball Association's gambling scandal in 2006–2007, where Tim Donaghy, a NBA referee, pleaded guilty to "receiv[ing] cash payments in exchange for providing betting recommendations or 'picks' on NBA games, including games he officiated, to individuals involved in the business of sports betting."<sup>138</sup> Despite evidence that irregular betting patterns and activity occurred during the games Donaghy officiated, the referee's

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<sup>135</sup> *Gambling Facts and Figures*, GAMBLE AWARE, <http://www.gambleaware.co.uk/gambling-facts-and-figures> (last visited Feb. 2, 2012). *Gamble Aware* is a website administered by the GREaT Foundation, a U.K. charity that supports the research, education and treatment of problem gambling. *About Gamble Aware*, GAMBLE AWARE, <http://www.gambleaware.co.uk/about-gamble-aware> (last visited Nov. 8, 2012).

<sup>136</sup> See Joe Drape, *Talk of Efforts to Fix Matches Rattles Pro Tennis*, N.Y. TIMES (Nov. 25, 2007) at 11, <http://www.nytimes.com/2007/11/25/sports/tennis/25tennis.html?pagewanted=1&ei=5090&en=cca4d9d35868162a&ex=1353646800&partner=rssuserland&emc=rss>.

<sup>137</sup> *Id.*

<sup>138</sup> *United States v. Donaghy*, 570 F. Supp. 2d 411, 416 (E.D.N.Y. 2008). For a brief synopsis of the Tim Donaghy scandal, see Pat Milton, *Gambling Ref Could Get 25 Years*, ASSOCIATED PRESS, Aug. 16, 2007, available at 2007 WL 15916938.

illegal acts went undetected and unreported to investigators for years.<sup>139</sup> Donaghy himself admitted that he had been gambling on NBA games for four years prior to his arrest.<sup>140</sup> Donaghy was implicated only after “the FBI stumbled upon [him] . . . while working on [an unrelated] organized crime investigation.”<sup>141</sup> Had he not fallen into the FBI’s lap during its unrelated investigation, it is possible that Donaghy’s game fixing could still be occurring unnoticed and unchecked. A regulated state sportsbook could have tracked and detected betting anomalies in Donaghy’s games and notified investigators sooner, much like Betfair did in 2007.

These examples demonstrate that a legal but tightly regulated sports gambling system could monitor suspicious bets early and actually help prevent future sports scandals. Considering that preserving the integrity of sports was the primary goal of PASPA, lawmakers should seriously question whether our current system achieves that goal better than having regulated sportsbooks working in connection with state and federal administrative and enforcement agencies. If not, then Congress should take action and repeal PASPA.

#### CONCLUSION

Sports gambling jurisprudence is continually evolving in this country. Many factors contribute to these changes including public perception, criminal involvement, and the need for fiscal revenues. In recent years, the evolution of these factors appears to have shifted to support a major reevaluation of sports gambling legislation. PASPA has done little to stop the proliferation of sports betting in this country, and the government’s inability to prevent online sports betting activity has rendered PASPA’s power largely ineffective. Despite the surge of sports betting in the United States, the integrity of professional and amateur sports leagues has remained intact, as the sportsbook industry moves from being controlled by organized crime to being operated by legitimate and regulated corporations and businesses. These new realities, combined with the current economic recession have led legislators in states such as New Jersey to challenge the legitimacy of PASPA in court. However, these lawsuits will likely fail because, although the actual statutes may not have served their purposes, Congress was within its constitutional powers to enact such laws.

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<sup>139</sup> Wayne Drehs, *Numbers Indicate Unlikely Outcomes in Games Donaghy Officiated*, ESPN, July 24, 2007, available at [http://pregame.com/pregame\\_blogs/b/tj-bell/archive/2007/09/13/july-24-2007-numbers-indicate-unlikely-outcomes-in-games-donaghy-officiated.aspx](http://pregame.com/pregame_blogs/b/tj-bell/archive/2007/09/13/july-24-2007-numbers-indicate-unlikely-outcomes-in-games-donaghy-officiated.aspx).

<sup>140</sup> Donaghy, 570 F. Supp. 2d at 416.

<sup>141</sup> Bomani Jones, *Corruption on the Court Is Bad News for NBA*, ESPN (July 20, 2007, 7:22 PM), <http://sports.espn.go.com/espn/page2/story?page=jones/070720>.

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States that desire the power to control and regulate sports betting activities within their borders should not waste their resources fighting PASPA through judicial means. Instead, lawmakers should focus their energies on federal legislators Washington to repeal or modify PASPA. Although PASPA's enactment in 1992 was well-intentioned, it is no longer effective in achieving its purpose to preserve sports integrity. Allowing states to regulate and monitor sports betting is the best method to achieve this goal.

*Chil Woo\**

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