



2010

Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World

Anthony G. Galasso Jr.
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Entertainment, Arts, and Sports Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Galasso, Anthony G. Jr. (2010) "Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World," *Kentucky Law Journal*: Vol. 99 : Iss. 1 , Article 6.
Available at: <https://uknowledge.uky.edu/klj/vol99/iss1/6>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Betting Against the House (and Senate): The Case for Legal, State–Sponsored Sports Wagering in a Post–PASPA World

Anthony G. Galasso, Jr.¹

INTRODUCTION

AMERICAN jurisprudence has evolved to expunge the idea that it is permissible to treat similarly situated individuals differently based solely on one's status. Yet, this kind of discrimination still exists among states. For example, Delaware and New Jersey are similar in many ways: both states are geographically located near one another; both states offer state–sanctioned gaming in the forms of pari–mutuel wagering on horse races and casino gambling;² and in 2009, both states experienced revenue shortfalls which led to budget crises.³ This prompted both states to consider an expansion of gaming within their borders to include wagering on sporting events.⁴ Despite the similarities between the two states and their shared history of gaming ventures and direct competition with one another for gamblers' business, they receive unequal treatment under the law: federal law permits Delaware to sanction sports wagering, but forbids New Jersey.

The Professional and Amateur Sports Protection Act⁵ (PASPA or the "Act") prohibits states from enacting, licensing, or operating any kind of wagering scheme on sporting events.⁶ However, the law carves out an exception for states that operated some form of sports wagering scheme between 1976 and 1990.⁷ Though not specifically named in the Act,

1 JD expected 2011, University of Kentucky College of Law; BA 2007, *summa cum laude*, University of Richmond. The author wishes to thank Laura D'Angelo and Dan Waxman for their invaluable assistance in ensuring the quality and accuracy of this Note.

2 See Wayne Parry, *Delaware's Expanded Gambling Worries Atlantic City*, NJ.COM (June 7, 2009), http://www.nj.com/news/index.ssf/2009/06/delawares_expanded_gambling_wo.html.

3 Chris Megerian, *Del. Suffers Sports Betting Loss, but N.J. Bid Still Alive: At Issue is a Federal Ban on Single-Game Wagering*, THE STAR–LEDGER (Newark, N.J.), Aug. 25, 2009, at 3; Charles W. Kim, *Betting Suit Could Mean Major NJ Sports Loss*, DIGITAL JOURNAL (June 11, 2009), <http://www.digitaljournal.com/article/274026>.

4 Kim, *supra* note 3; Megerian, *supra* note 3.

5 Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2006).

6 *Id.* § 3702.

7 *Id.* § 3704.

Nevada, Oregon, Montana, and Delaware are the only states that enjoy this exception.⁸ Because New Jersey failed to establish any sports wagering scheme during the specified period, PASPA prevents New Jersey from establishing any such scheme today.⁹ New Jersey's casino gaming industry has already experienced large declines in revenue caused in part by the recent expansion of casino-style wagering into nearby states.¹⁰ This expansion has caused New Jersey to lose its status as the exclusive home of casino gaming on the East Coast. With the threat of the introduction of sports wagering into Delaware and the federal prohibition on New Jersey acting similarly, New Jersey's gaming industry may be at a severe competitive disadvantage.

To combat this unequal treatment and to enable the New Jersey gaming industry to remain competitive, New Jersey State Senator Raymond Lesniak, joined by the Interactive Media Entertainment and Gaming Association ("iMEGA") and three New Jersey horse racing groups, filed a lawsuit in federal court seeking to overturn PASPA "on the grounds it unconstitutionally regulates commerce and discriminates against New Jersey and the 45 other states where wagering on sports is illegal."¹¹ This Note will address the issues raised in the Lesniak/iMEGA lawsuit, focusing on whether the discrimination among states created by PASPA is indeed unconstitutional and under what theory a challenge to the statute could proceed.

Additionally, this Note will address the underlying question that follows from the constitutional analysis: even if PASPA could be challenged constitutionally, should it actually be overturned? At the core of the discussion is this question: Do the pecuniary interests of the states outweigh the desire to protect the integrity of professional and amateur sports in the United States—Congress' stated goal in enacting PASPA.¹²

8 "In Nevada, sports wagering is permitted in licensed commercial casinos and gaming establishments." Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS LAW. J. 143, 146 (2006). Oregon operated a sports wagering lottery focused on the outcome of National Football League games until the legislature moved to end it in 2005. *Id.* at 145-46. Montana operates sports betting pools where the winner is determined by the performance of individual football players in games or professional stock car drivers in races. *How to Play*, MONTANA SPORTS ACTION, http://www.montanaspportsaction.com/football_howtoplay.xsp (last visited Aug. 28, 2010). Delaware offered a sports lottery predicated on the outcome of NFL games for a single year, 1976, before attempting to legalize sports wagering again in 2009. *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 295-96 (3d Cir. 2009).

9 *See* 28 U.S.C. § 3704(a)(3). A loophole in PASPA would have allowed New Jersey to implement a sports-wagering scheme within one year of the Act's effective date because it was a state that had casino gaming in the ten years prior to the Act. Levinson, *supra* note 8, at 149. The Legislature failed to pass legislation creating a sports wagering scheme, and the window offered by PASPA closed for good. *Id.*

10 Chris Herring, *Neighbors Raise Stakes on New Jersey*, WALL ST. J., June 21, 2010, at A26.

11 Rudy Larini, *Legislator Fights Ban on Sports Betting: Lesniak Sees \$100M a Year in Tax Revenue*, THE STAR-LEDGER (Newark, N.J.), Mar. 24, 2009, at 11.

12 S. REP. NO. 102-248, at 4 (1992).

To address these questions, this Note divides the inquiry into three parts. Part I examines PASPA to understand why it was enacted and what its effects have been on legalized sports wagering. The legislative history surrounding the Act is examined to determine what policy goals led to its enactment and how and why it discriminates among states. Further, this Part analyzes the impact of this discrimination on state-sponsored wagering throughout the country and concludes that the effects of PASPA have extended far beyond its stated purpose of protecting the integrity of athletic competitions.

Part II describes the availability of constitutional challenges to PASPA. This includes a look at the issues raised at the time of the Act's passing, as well as the specific claims alleged in the Lesniak/iMEGA complaint. This Part presents the most compelling arguments for overturning PASPA: (1) PASPA violates the Tenth Amendment, (2) PASPA violates the Eleventh Amendment, and (3) PASPA is an abuse of the power granted to Congress under the Commerce Clause due to its explicit discrimination among the states.

Part III details why overturning PASPA should be pursued despite its poor chances of success in the courts. To do so, this Part weighs the competing policy interests that are implicated by the sports wagering discussion. The potential economic benefits of legalization are weighed against protecting the integrity of professional and amateur sports. Despite what proponents of PASPA argued in favor of its passing in 1990, and continue to argue now, legal sports wagering offers not only economic benefits, but also a regulatory scheme that would achieve PASPA's goals better than the Act itself. This Part also examines the benefits New Jersey expects to obtain from sports wagering, including providing an economic boost to its horse racing industry and incentives that may lure gamblers away from internet wagering. This Note also discusses how these same benefits may be achieved in states like Kentucky. Part IV presents the conclusion that the benefits of legalized, state-sponsored sports wagering far outweigh the benefits of prohibition. The policies behind the law need to be reexamined because a law that serves a limited, abstract purpose and has manifested harmful effects should not be unassailable. In conclusion, PASPA is preventing state-sponsored initiatives that will not only provide great economic benefit, but will more capably serve the purposes of PASPA.

I. PASPA: PURPOSES AND EFFECTS, INTENTIONAL AND UNINTENTIONAL

According to the Judiciary Committee's report recommending the passage of PASPA, the Act's express purpose is "to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity."¹³ A large portion of the rest of the report is devoted to outlining

¹³ *Id.* at 3.

why this is such a priority for Congress. According to the report, PASPA “serves an important public purpose, to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.”¹⁴ The threat of expanding sports wagering is “chang[ing] the nature of sporting events from wholesome entertainment for all ages to devices for gambling,” thereby “undermin[ing] public confidence in the character of professional and amateur sports,” as well as “promot[ing] gambling among our Nation’s young people.”¹⁵ Above all, the bill “represents a judgment that sports gambling . . . is a problem of legitimate Federal concern for which a Federal solution is warranted.”¹⁶ “We must do everything we can to keep sports clean so that the fans, and especially young people, can continue to have complete confidence in the honesty of the players and the contests.”¹⁷

The report goes on to explain that this need to protect the integrity of professional and amateur sports outweighs the potential economic benefit legalized sports wagering offers to cash-strapped states. Specifically, the report states that

[t]he answer to State budgetary problems should not be to increase the number of lottery players or sports bettors, regardless of the worthiness of the cause [T]he risk to the reputation of one of our Nation’s most popular pastimes, professional and amateur sporting events, is not worth it.¹⁸

At the time PASPA was being considered in Congress, as many as thirteen states were considering the possibility of enacting legislation allowing sports betting within their borders as “a panacea to their mounting deficits.”¹⁹ Nevertheless, proponents of the Act, such as Senator Bill Bradley of New Jersey, believed that “the harm that state-sponsored sports betting causes”—that is, threatening the integrity of sports in the eyes of both fans and young people—“far outweighs the financial advantages received.”²⁰ The very premise of PASPA, according to Senator Bradley, was “that the revenue 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 addition [sic], legalizing sports gambling would aggravate the problems associated with gambling.”²¹

PASPA sought to accomplish these goals by making it illegal for any

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 6–7.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7.

¹⁹ Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992).

²⁰ *Id.*

²¹ *Id.* at 6.

“governmental entity” to run any kind of wagering scheme based on the outcome of sporting events.²² Any violation of the Act can be enjoined by a civil action filed either “by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.”²³ The final provision of PASPA states that the prohibition does not apply to any wagering scheme that existed between 1976 and 1991 or “pari-mutuel animal racing or jai-alai games.”²⁴ Section 3704 of PASPA has proven to be the most controversial as it effectively forbids state-sponsored sports wagering in every state except Nevada, Oregon, Montana, and Delaware.²⁵ PASPA also contained a loophole allowing states that had legal, state-sponsored casino gaming within ten years prior to the Act’s effective date to establish a state-sponsored sports wagering scheme; however, it only gave such states one year from the effective date of the Act to do so.²⁶

It is difficult to understand why an exception was carved out for these states if sports wagering is indeed as dangerous as the majority of Congress believed. An attempted explanation was provided in the Judiciary Committee report. While reiterating that “all . . . sports gambling is harmful,” the report expressed “no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation,” or “to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry . . .”²⁷ Thus PASPA, as explained by the Judiciary Committee, was designed to curtail the proliferation of sports wagering, not to eradicate it from the nation entirely.

In the eighteen years since the passage of PASPA, the Act’s overall effect has been to help Nevada develop a monopoly on sports wagering. The reason for this is not only that PASPA discriminates between the four exempted states and the rest of the Union, but it also discriminates among the four exempted states as well. This was made clear in 2009 when Delaware passed an act that authorized single-game, head-to-head wagers in addition to “multi-game parlay” wagers.²⁸ Major League Baseball (MLB), the National

22 28 U.S.C. § 3702 (2006).

23 *Id.* § 3703.

24 *Id.* § 3704(a)(4).

25 *See id.*

26 *Id.* § 3704(a)(3). This would have allowed New Jersey to institute a legal sports wagering scheme, but the Legislature voted against this option. Levinson, *supra* note 8, at 149–50. This in effect creates a third level of discrimination, between exempted casino states (which only had one year of exemption) and exempted sports wagering states (which had a general, permanent exemption). The other two levels of discrimination are the ones discussed in this Note: between exempted states and non-exempted states, and among the exempted sports wagering states.

27 S. REP. NO. 102–248, at 8 (1992).

28 *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 295–96 (3d Cir. 2009).

Basketball Association (NBA), the National Collegiate Athletic Association (NCAA), the National Football League (NFL), and the National Hockey League (NHL) collectively sought an injunction to prevent implementation of any wagering scheme that would include betting beyond parlay wagering on NFL games.²⁹ The district court denied the injunction, but the Third Circuit reversed in *Office of the Commissioner of Baseball v. Markell*.³⁰ The court's rationale was that PASPA allowed for sports wagering only "to the extent the scheme was conducted" in the past. Hence, Delaware was limited to offering sports wagering to the extent it did in 1976.³¹ Because the 1976 sports lottery was confined to parlay wagering on NFL games, any sports wagering Delaware offers post-PASPA must be similarly restricted.

Because Nevada offered types of wagering in the past that other states did not, the *Markell* decision enables Nevada to receive millions of dollars in revenue that is unavailable to any other state. As reported in an article published in 2006, \$2.5 billion are wagered annually in licensed sports books in Nevada, which results in \$120 million in net revenue for casinos each year.³² In addition, "one-third of sports wagers in Nevada are on collegiate sporting events,"³³ and "Nevada is the only state in which gambling on collegiate sporting events is currently legal."³⁴ In light of the *Markell* decision, Nevada is the *only* state where wagering on collegiate sports could *ever* be legal because the other three exempted states would be limited to offering wagering to the extent they have in the past: multi-game wagers on NFL contests. This represents millions of dollars made exclusive property of Nevada by the terms of PASPA that financially-starved states cannot access, *even* if they are among the few exempted.

Another effect of PASPA is the increased power it gives to sports organizations to affect state gaming policies. The NCAA already wields great influence over state gaming policy, even beyond the terms of PASPA. For instance, the NCAA refused to hold any men's college basketball tournament games in Oregon because of Oregon's sports lottery, notwithstanding the fact that the state never offered wagering on NCAA games (nor could it in light of the *Markell* court's reading of PASPA).³⁵ In response to the NCAA's decision, Oregon passed legislation in 2005 to eliminate its sports lottery at the end of 2007.³⁶ In its final

29 *Id.* at 293.

30 *Id.* at 304.

31 *Id.* at 303 (quoting 28 U.S.C. 3401(a)(1) (2006)).

32 Levinson, *supra* note 8, at 144, 146.

33 *Id.* at 147.

34 Aaron J. Slavin, *The "Las Vegas Loophole" and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. MIAMI BUS. L. REV. 715, 720 (2002).

35 Levinson, *supra* note 8, at 146; *Markell*, 579 F.3d at 295.

36 Aaron Fentress & Helen Jung, *March Madness Returning to Portland*, THE OREGONIAN (Portland, Or.), July 7, 2006, at A1.

year of existence, the Oregon sports lottery generated record sales of \$12.7 million; the sports lottery was able to provide funding to Oregon schools in amounts ranging from less than \$1 million to \$2.9 million.³⁷

In light of the power granted in PASPA for sports organizations to bring civil actions seeking injunctions, sports organizations now have direct power to influence state gaming policies. The *Markell* decision is a prime example of such power: four major professional sports organizations and the NCAA banded together to defeat a wagering scheme that was proposed by the Governor of Delaware, approved by an advisory opinion of the Delaware Supreme Court, and passed by the state legislature.³⁸

PASPA, in its eighteen years of existence, has proven effective in preventing the expansion of sports wagering in the United States; whether it has achieved its stated goal of protecting the integrity of professional and amateur sports is debatable. PASPA has also successfully managed to funnel virtually all legal, state-sponsored sports wagering in the country into one state at the expense of all the others due to judicial interpretations of the Act. This is a tragic consequence neither the Judiciary Committee nor Senator Bradley anticipated.

II. CHALLENGING PASPA: THREE THEORIES

After examining the effects of PASPA on state economies (both those included and excluded from its provisions), one may conclude that its effects are unequal and that the Act is unfair. However, overturning PASPA will require more than proof of inequality or unfairness. Opponents of the law will only be able to overturn PASPA if they can prove that it is unconstitutional. Senator Lesniak, iMEGA, and three horse racing organizations allege nine violations of their constitutional rights in their complaint (“Lesniak/iMEGA complaint”).³⁹ Of the nine, this Note will focus on the three most significant theories: (1) PASPA violates the Tenth Amendment,⁴⁰ (2) PASPA violates the Eleventh Amendment,⁴¹ and (3) PASPA violates the Commerce Clause due to blatant discrimination between the states.⁴²

37 Kevin Hays, *Oregon Says Goodbye to Betting on NFL Games*, SALEM-NEWS.COM (Feb. 4, 2007), http://www.salem-news.com/articles/february042007/oregonnflbetting_020407.php.

38 *Markell*, 579 F.3d at 295.

39 Complaint and Demand for Declaratory Relief at 18–36, Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder, No. 3:09-cv-01301-GEB-TJB (D.N.J. Mar. 23, 2009), 2009 WL 4890878.

40 *Id.* at 26–27.

41 *Id.* at 27–29.

42 *Id.* at 18–21.

A. *The Tenth Amendment Theory*

The Tenth Amendment reads: “The 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.”⁴³ The Lesniak/iMEGA complaint asserts that, “[r]aising revenue by means of state laws authorizing Sports Betting is a right reserved to the individual states” because it is neither a power delegated to the United States nor denied to the individual states.⁴⁴ Therefore, “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”⁴⁵

This view existed at the time of the Judiciary Committee hearings on Senate Bill 474, which later became PASPA, and also found its way into the committee report in the “Minority Views of [Senator Chuck] Grassley.”⁴⁶ Senator Grassley characterized the bill as “a substantial intrusion into States’ rights [that] would restrict the fundamental right of States to raise revenue to fund critical State programs.”⁴⁷ Lotteries and gaming, Senator Grassley argued, have been “traditionally” state issues, and in light of the fiscal crises states faced in the early 1990s—as many states face again in the present day—“Congress should not be telling the States how they can or cannot raise revenue.”⁴⁸ Senator Grassley also cited a letter, later cited by Senator Lesniak in 2009,⁴⁹ from the Justice Department to Chairman of the Judiciary Committee Senator Joe Biden stating concerns over the bill because it presents “federalism issues.”⁵⁰

In fact, the Lesniak/iMEGA suit is not the first time that the Tenth Amendment has been invoked in a case attempting to overturn PASPA. In *Flagler v. U.S. Attorney*, a private citizen of New Jersey sued the United States Attorney for the District of New Jersey and the United States Attorney General alleging that PASPA was in violation of the Tenth Amendment, as the power to outlaw sports wagering was not expressly granted to the federal government.⁵¹ The district court dismissed Flagler’s complaint

43 U.S. CONST. amend. X.

44 Complaint and Demand for Declaratory Relief, *supra* note 39, at 26.

45 *Id.*

46 S. REP. NO. 102–248, at 12 (1992).

47 *Id.*

48 *Id.*

49 Raymond Lesniak, New Jersey state Senator, Press Conference: Sports Betting: Why Not in New Jersey? (Mar. 23, 2009), http://blog.nj.com/njv_raymond_lesniak/2009/03/sports_betting_why_not_in_new.html.

50 S. REP. NO. 102–248, at 13.

51 Complaint at 1, *Flagler v. U.S. Attorney*, No. 2:06–cv–3699–JAG (D.N.J. Aug. 7, 2006).

without reaching the merits, finding that the plaintiff lacked standing after applying the three-prong test from *Lujan v. Defenders of Wildlife*.⁵²

The court's application of the *Lujan* three-prong test for standing illustrates the difficulty in challenging PASPA under the Tenth Amendment. The first requirement for standing is that "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."⁵³ Plaintiff Flagler failed this test in the court's estimation because he "provided [the] [c]ourt with no explanation of how a right to gamble on professional and amateur sports would be or could be a 'legally protected interest.'"⁵⁴ The second standing requirement is that "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant"⁵⁵ The court concluded that Flagler suffered no injury, rendering discussion of the causation requirement moot.⁵⁶ The third requirement is that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁵⁷ The court stated that Flagler failed this prong because even if PASPA is found to be unconstitutional, it does not necessarily follow that the state legislature will approve wagering on sports.⁵⁸

The difficulty in demonstrating that one has standing to bring an action seeking to overturn PASPA may explain why it has been attempted only twice before, despite the overwhelming concerns of Tenth Amendment violations since the hearing in 1992. Plaintiffs challenging PASPA in federal court must be able to establish all three elements, and "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."⁵⁹ In the Lesniak/iMEGA complaint, the harm alleged is experienced by "members [of iMEGA] and private citizens similarly situated in the [forty-six] remaining states, including New Jersey, who wish to take advantage of iMEGA members' [wagering] services and/or Internet Sports Betting or Sports Betting in general."⁶⁰ In light of the high evidentiary standard for standing outlined in *Lujan* and applied by the court in *Flagler*, it seems that any Tenth Amendment claim may be predicated on harms too indirect or remote to succeed.

52 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Flagler v. U.S. Attorney*, No. 06–3699 (JAG), 2007 WL 2814657, at *2 (D.N.J. Sept. 25, 2007).

53 *Flagler*, 2007 WL 2814657, at *2 (quoting *Lujan*, 504 U.S. at 560).

54 *Id.* at *2.

55 *Id.* (quoting *Lujan*, 504 U.S. at 560).

56 *Id.*

57 *Id.* (quoting *Lujan*, 504 U.S. at 561).

58 *Id.* at *3.

59 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

60 Complaint and Demand for Declaratory Relief, *supra* note 39, at 26–27.

B. The Eleventh Amendment Theory

The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁶¹ The Lesniak/iMEGA complaint alleges that PASPA violates the Eleventh Amendment because it “permits the commencement of a civil action against the State of New Jersey in a Federal Court by any professional sports organization or amateur sports organization . . . pursuant to 28 U.S.C. §3703” where “[t]he State of New Jersey has not waived its sovereign immunity under the Eleventh Amendment.”⁶²

However, the fact that New Jersey, or any other state that violates PASPA, has not waived its sovereign immunity may not matter in deciding if it is vulnerable to a claim by a sports organization seeking injunctive relief. The Supreme Court carved out an exception from Eleventh Amendment sovereign immunity in *Ex parte Young*, holding that “suits seeking declaratory and injunctive relief” may be brought “against state officers in their individual capacities” when a state acts unconstitutionally.⁶³ The *Young* exception has since been broadened to include situations “when the case calls for the interpretation of federal law.”⁶⁴ This explains why the *Markell* case was brought against Governor Markell and the Director of the Delaware State Lottery. Therefore, precedent indicates that any suit for injunctive relief brought by a sports organization under 28 U.S.C. § 3703 will not be barred by Eleventh Amendment state sovereign immunity because such a suit will call for the interpretation of federal law.

Furthermore, even if sovereign immunity did apply, the suit brought by Lesniak/iMEGA would suffer from the same handicaps presented by issues of standing that limit Tenth Amendment claims. None of the plaintiffs are officers of the state of New Jersey and they do not represent the state in any official capacity.⁶⁵ It is likely that any harm suffered by the plaintiffs would be too indirect, if they can demonstrate they suffered any harm at all.

61 U.S. CONST. amend. XI.

62 Complaint and Demand for Declaratory Relief, *supra* note 39, at 28.

63 *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

64 *Id.* at 274.

65 See *Ex parte Young*, 209 U.S. 123, 157 (1908) (holding that an officer acting in an official capacity can be sued to enjoin the actions of the state as long as the officer has “some connection with the enforcement of the act”). Mr. Lesniak is not serving in an official capacity as he is a state senator who legislates rather than enforces the laws.

C. The “Uniformity Restraint” Theory

The third theory for overturning PASPA on constitutional grounds is that it violates the Commerce Clause⁶⁶ through its discrimination among the states. Lesniak/iMEGA argued in their complaint that “Congress is required to legislate uniformly amongst the several states.”⁶⁷ This theory, like the Tenth Amendment theory, was also identified by Senator Grassley in the Judiciary Committee’s report.⁶⁸ Senator Grassley considered the discriminatory aspect of PASPA to be “[p]erhaps even more troubling” than the states’ rights issue and concluded, “[t]here is simply no rational basis, as a matter of Federal policy, for allowing sports wagering in three States, while prohibiting it in the other [forty–seven], nor any rational basis . . . for the purported discrimination between Nevada, Oregon, and Delaware.”⁶⁹ The stated policy was to not apply the prohibition retroactively to Oregon and Delaware; however, at the time of the passage of PASPA, “Delaware [was not] conducting any form of sports wagering and [had not] done so for the last fifteen (15) years.”⁷⁰

Professor Thomas Colby reviewed the issue of whether Congress is authorized to discriminate among the states and concluded that “if we fail to imply a general uniformity constraint on the commerce power, then we fatally undermine the fundamental constitutional principle that pervaded the Constitutional Convention, that Congress must not be permitted to use the commerce power to favor some states at the expense of others.”⁷¹ He argues that “we should interpret the Constitution in a manner that preserves this fundamental precept and ensures that it remains relevant and vital in the twenty–first century and beyond.”⁷² Colby’s analysis does not apply to all discriminatory laws; for instance, laws that are “neutral” on their face but necessarily impose different burdens because of natural differences among states, such as coal mining regulation, would not be unconstitutional,⁷³ neither “would laws that incorporate differing state standards.”⁷⁴ He specifically names PASPA as a law that violates his proposed principle: “[t]he only federal laws that would potentially be unconstitutional under the uniformity principle would be those statutes that—like the Sports Protection Act—regulate

66 U.S. CONST. art. I, § 8, cl. 3.

67 Complaint and Demand for Declaratory Relief, *supra* note 39.

68 S. REP. NO. 102–248, at 13 (1992).

69 *Id.*

70 *Id.*

71 Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 255 (2005).

72 *Id.*

73 *Id.* at 255–56.

74 *Id.* at 256.

along states lines and treat the same object differently in different states.”⁷⁵

The central tenet of Colby’s argument is that uniformity does not require uniform rules, defined as the law being the same in every state, but does require uniform treatment, defined as “anti-discrimination” such that “states (and their people) are all treated equally by the federal government.”⁷⁶ In the sports wagering context, “a federal law allowing each state to decide for itself whether it wishes to legalize sports gambling is uniform in the sense of uniform treatment, but not in the sense of uniform rules.”⁷⁷ This means:

[E]ach state [is afforded] the same opportunity to act (thus uniform treatment), but the ultimate rules are likely to vary across state lines—sports betting will probably be legal in some states, and not in others—as some states will choose to legalize gambling and others will not (thus nonuniform rules).⁷⁸

It is worth noting that in the gaming arena Congress had previously allowed the states a similar opportunity to act with regard to interstate betting on horse racing. The Interstate Horseracing Act of 1978 included a finding that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.”⁷⁹ All Congress would have to do to remedy the unconstitutional discrimination at issue in PASPA is apply the same finding to another form of wagering.

Ultimately, the rule espoused by Colby is that

Congressional acts enacted pursuant to the commerce power should be subject to some form of heightened scrutiny if they regulate in geographic terms, and, in particular, should be viewed with significant skepticism if their regulatory scope is explicitly drawn along state lines. Unless Congress can present other compelling, nondiscriminatory justifications for the differential treatment (and can establish the lack of reasonable, nondiscriminatory alternatives), these statutes should be upheld only if they were enacted to solve a localized problem that does not exist elsewhere in the nation, such that they could have easily been drawn in reasonable nongeographic terms to achieve the same effect. Reviewing courts should ensure both that these statutes were not adopted for impermissible purposes (that is, to favor or disfavor particular states) and that they do not treat similarly situated persons or objects differently in different states.⁸⁰

Colby finds support for this rule in the fact that uniformity in commercial regulation was a goal sought “passionately” by the participants in the

75 *Id.*

76 *Id.* at 264.

77 *Id.* at 265.

78 *Id.* at 265–66.

79 15 U.S.C. § 3001 (2006).

80 Colby, *supra* note 71, at 339–40 (footnote omitted).

Constitutional Convention.⁸¹ Consequently, the aspirations for uniformity were manifested in the “combined effect of the Commerce Clause, the Uniformity Clause, and the Port Preference Clause.”⁸² The Framers found these provisions to be sufficient to preserve uniformity; hence, the reason uniformity’s explicit protection in the Constitution is so limited.

Furthermore, Colby states that “[m]ost scholars agree that the Framers imagined the commerce power to include only the power to tax and regulate commercial shipping and navigation between states,” activities implicating only the nation’s ports.⁸³ The Supreme Court espoused this view as late as 1870 in *Ward v. Maryland*. The Court noted that “[i]nequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.”⁸⁴ The three aforementioned clauses of the Constitution, when taken together, “show[] that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations.”⁸⁵

Applying Colby’s rule, PASPA would undoubtedly fail a heightened uniformity test. The activity that PASPA regulates, state-sanctioned sports wagering, would qualify as a commercial activity, as well as one that raises revenue. The regulatory scope is effectively drawn along state lines, as Nevada, Delaware, Oregon, and Montana are the only states that qualify for exemption from its provisions.⁸⁶ The reasons for the discrimination are not compelling, as PASPA was premised on whether any such scheme had existed in the state in the past, regardless of whether it was in place at the time of the passage of the law.⁸⁷ At the time of the Act’s passage, states like Delaware were no different than states with no wagering scheme; Delaware had willingly moved in the direction that PASPA forced all states to move.⁸⁸ The discrimination in its favor allowed Delaware to resurrect state-sponsored sports wagering, which it had abandoned some

81 *Id.* at 272.

82 *Id.* at 283. The Commerce Clause states that Congress shall have the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Uniformity Clause states that “all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1. The Port Preference Clause states that “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” U.S. CONST. art. I, § 9, cl. 6.

83 Colby, *supra* note 71, at 283.

84 *Ward v. Maryland*, 79 U.S. 418, 431 (1870).

85 *Id.*

86 28 U.S.C. § 3704.

87 *Id.*

88 *See Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 303 (3d Cir. 2009).

thirty years earlier.⁸⁹ The discrimination in Delaware's favor is contrary to the very purposes of the law. The question remains, however, whether this heightened scrutiny would be applied by a court reviewing PASPA.

Colby characterizes the position of the courts on uniformity in the present day to be a "180-degree reversal" from its stance in the time of *Ward v. Maryland*.⁹⁰ Indeed, the Supreme Court has concluded that "there is no requirement of uniformity in connection with the commerce power."⁹¹ This evolution in the case law can be traced back to a statement in *James Clark Distilling Co. v. Western Maryland Railway*. The Supreme Court noted that the plaintiff sought "to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States."⁹² Colby argues that this statement was referring only to the concept of uniform rules, not uniform treatment, but concedes that it has come to be interpreted as rejecting both uniform rules and treatment, and this idea has "taken root."⁹³ This is the context in which PASPA was passed and in which it still exists. As a result, at the time of consideration for the bill that would become PASPA, it could safely be said that "federal courts addressing the issue of whether federal anti-gambling legislation may vary in its application have consistently held that the regulation of gambling is within the Federal Commerce Clause power and, as such, Congress is not required to enact uniform legislation."⁹⁴ Thus, the proponents of PASPA were able to feel assured that its opponents "who have asserted that the proposed bill discriminates between the states have no legitimate constitutional basis for this contention."⁹⁵

Therefore, it is likely that a challenge to PASPA on grounds that it unconstitutionally discriminates among states will be rejected by the courts. Though concerns over the Act's discriminatory aspects were voiced at the time of its consideration and the Act has been identified by scholars as a particular example of the kind of discrimination the Constitution was created to prevent, the fact remains that the twentieth century witnessed stark changes in how the courts perceived any uniformity requirement present in the Constitution. Though the Supreme Court moved in the direction of restricting Congress' power under the Commerce Clause in the mid-1990s,⁹⁶ it has not made any indications that uniformity will re-emerge

89 *Id.*

90 Colby, *supra* note 71, at 288-289.

91 *Id.* (quoting *Currin v. Wallace*, 306 U.S. 1, 14 (1939)).

92 *Id.* at 298 (quoting *James Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311, 327 (1917)).

93 *Id.* at 299, 301.

94 Bradley, *supra* note 19, at 17-18.

95 *Id.* at 18.

96 *See United States v. Lopez*, 514 U.S. 549, 565-68 (1995).

as an effective restraint on the legislature. As a result, though the third theory with which to challenge PASPA is the most compelling in terms of historical support, it does not hold much promise given the current judicial climate.

III. WHY SPORTS WAGERING: LOOKING AT COMPETING POLICY CONCERNS

Considering the above analysis, if overturning PASPA is such a difficult and potentially fruitless endeavor, should the effort be made at all? An answer to this question can be found through balancing the competing policy interests found on both sides of the issue. Despite the frequent iterations by proponents of PASPA that “[t]he disadvantages of legal sports gambling far outweigh the advantages,”⁹⁷ it is in reality the disadvantages of *illegal* sports wagering that cause most of the problems Congress and other supporters of the law seek to control. Legal sports wagering, while sought primarily by states seeking to alleviate economic hardship, in fact serves the very purposes of PASPA: protecting the integrity of sports from gambling money influencing the outcome of matches and preventing underage gambling. Additionally, in an era in which internet gaming has become an area of concern for many states, legalized sports wagering gives states the opportunity to present a legal alternative to internet wagering—an alternative that would keep money otherwise wagered online within the state.

Beyond the nebulous goal of “maintain[ing] the integrity of our national pastime,”⁹⁸ the prohibitions against sports wagering were implemented to remedy two specific problems. The first of these problems is the perception that legal sports betting will lead to a higher incidence of game-fixing or point-shaving. In the words of the Judiciary Committee report, if sports wagering was legalized, sports would “come to represent the fast buck, the quick fix, the desire to get something for nothing. . . . Widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think ‘the fix was in’ whenever their team failed to beat the point-spread.”⁹⁹ College athletes, in particular, are seen as potential victims of gamblers’ influence and sports wagering is seen as “jeopardizing the integrity of collegiate sporting events.”¹⁰⁰

The fact is, however, that legal bookmakers have an economic interest in fair results in sporting contests and have proven to be effective in helping root out corruption when it has occurred. One example is the Arizona State University point-shaving scandal of 1993–1994, in which members of the men’s basketball team collaborated with organized crime figures

97 Bradley, *supra* note 19, at 18.

98 S. REP. NO. 102-248, at 4 (1992).

99 *Id.* at 4–5.

100 Slavin, *supra* note 34, at 723.

and purposefully missed free throws to avoid covering the point spread.¹⁰¹ Nevada bookmakers “discovered that the betting pattern on Arizona State games changed tremendously, [and] they alerted the FBI.”¹⁰² In addition, when the casinos noticed that “\$250,000 in bets caused the line to drop to three points,” for a game between Arizona State and the University of Washington, they “suspended betting on the game.”¹⁰³

In countries where sports wagering and online bookmaking are legal, news of recent scandals provide examples of the effectiveness of legal bookmakers in detecting and reporting corruption in sporting events. Consider, for instance, the recent spate of allegations of match-fixing in professional tennis. When professional tennis player Nikolay Davydenko was suspected of throwing a tennis match he was favored to win in 2007, it was the British online sports book Betfair that “brought the scandal to light” and “refused to pay \$7 million of bets on Davydenko.”¹⁰⁴ Betfair’s “security team had recognized irregular betting patterns” during the match and “turned over all of its data to the” Association of Tennis Professionals after the match ended.¹⁰⁵ Similarly, in a 2010 professional tennis tournament in Brisbane, Australia, “Australian bookmakers reported a suspicious amount of money” coming in on a particular match to authorities.¹⁰⁶ Beyond recent tennis scandals, since its founding in 2000, Betfair “has alerted dozens of sports about suspicious betting activity, leading to investigations in horse racing [and] soccer”¹⁰⁷ The company “has agreements with 32 sports governing bodies and is seeking more, promising to share in real time any unusual betting activity.”¹⁰⁸ American sports, by contrast, see “more money . . . bet illegally and without regulation.”¹⁰⁹ Wharton School of Business professor Justin Wolfers argues that in American sports “[t] here is a greater potential for corruption Bad guys are going to get away with more stuff unless we channel it into a legitimate economy.”¹¹⁰

The second major concern PASPA was enacted to address was the growth of compulsive gambling among teenagers. Senator Bill Bradley, writing in defense of the bill, stated affirmatively that “state sponsored

101 *Id.* at 731.

102 *Id.* at 732.

103 *Id.*

104 Joe Drape, *Gambling on Matches Makes Tennis Tours Uneasy*, N.Y. TIMES, Jan. 26, 2010, at B11.

105 Joe Drape, *Web Site Puts Focus on Fix in Sports Bets*, N.Y. TIMES, May 25, 2008, at A1. After an investigation, the ATP cleared Davydenko of any incidence of match-fixing in 2007. Drape, *supra* note 104.

106 Drape, *supra* note 104.

107 Drape, *supra* note 105.

108 *Id.*

109 *Id.*

110 *Id.*

sports lotteries would exacerbate the problem of teenage gambling.”¹¹¹ In 1999, the National Gambling Impact Study Commission echoed this belief, recommending further restrictions on sports wagering because it “can put adolescent gamblers at risk for gambling problems.”¹¹² While concerns about the proliferation of underage gamblers are entirely justified, proponents of PASPA fail to recognize that these concerns could be adequately addressed through a legitimate market. Sports wagering exists in the United States whether it is legal or illegal. What legal sports wagering offers that illegal sports wagering does not is the potential for strict oversight. Specifically, legal sports wagering schemes provide the ability to exercise control over who is allowed to access wagering facilities and place bets.

The problem of underage gaming can easily be solved by careful placement of sports books in venues like casinos or off-track betting parlors that already have age restrictions and have histories of enforcing the minimum age requirement.¹¹³ Senator Bradley seemed dismissive of this argument when he said that “sports betting would teach young people how to gamble. This, in turn, would lead these children to illegal gambling once they discover that the odds and pay-offs are better.”¹¹⁴ This line of thinking ignores the fact that legalized sports wagering, with increased oversight and regulation, could curtail illegal wagering altogether. This phenomenon would not be unprecedented. The creation and spread of state lotteries “virtually eliminated” another once-prevalent form of illegal wagering, the numbers game.¹¹⁵ If enough adult bettors engage in legal wagering and cause the illegal bookmakers to dry up, as lotteries did to the numbers racket, the opportunities for teenagers to gamble illegally will also be eliminated.

This final point requires additional discussion. Wagering on sports takes place among the American people, regardless of its legality—“Americans want to wager on sporting events, but are limited in how they may do this legally.”¹¹⁶ As *Washington Post* horse racing columnist Andrew Beyer wrote, “[n]ot since Prohibition have Americans so readily engaged in an illegal activity as they do with sports betting today. The most upright citizens don’t hesitate to telephone a bookmaker—even though they may suspect or know that the bookie has ties to organized crime.”¹¹⁷ Beyer reported figures that “estimate[d] that illegal sports betting is a \$40-bil-

¹¹¹ Bradley, *supra* note 19, at 7.

¹¹² Slavin, *supra* note 34, at 736.

¹¹³ See Levinson, *supra* note 8, at 162 (noting New Jersey’s enforcement of casino age restrictions would carry over into sports books, should they become legal).

¹¹⁴ Bradley, *supra* note 19, at 7.

¹¹⁵ Andrew Beyer, *Betting Bill: File It Under Inexplicable*, WASH. POST, Nov. 16, 1991, at G9.

¹¹⁶ Levinson, *supra* note 8, at 144.

¹¹⁷ Beyer, *supra* note 115.

lion-a-year industry—and one that is growing steadily.”¹¹⁸ The prohibition against sports wagering has done little to eliminate illegal gambling or cure its negative effects. All that the prohibition against sports wagering can be said to have actually accomplished is encapsulated in the fact that because “sports wagering is illegal in most states, it does not provide many of the positive impacts that other forms of gambling provide.”¹¹⁹

The possible economic incentives that have driven the reemergence of the debate on PASPA are not to be taken lightly. Consider the impact of legal sports wagering in Nevada, the only state allowed to fully benefit from sports wagering revenue under the current law. On Super Bowl weekend alone, “250,000 people visit Las Vegas, [and] the hotel occupancy rate is essentially 100%.”¹²⁰ The sports wagering industry generates jobs, “not only those in the race and sports books,” but also “throughout each of the hotel-casino-resort complexes to maids, valet parking attendants, food and beverage servers, and casino floor personnel. These jobs, along with federal, state, and local tax levies, help generate billions of dollars in government revenues.”¹²¹ In the modern economic climate, “it would seem inescapably logical for cash-strapped state governments to legalize sports betting and let the revenue from it flow to legitimate purposes instead of criminals.”¹²²

This line of thinking has driven New Jersey State Senator Lesniak to seek a judicial overturning of PASPA in an effort to bring sports wagering to his state. Sports wagering would offer New Jersey, a state with budgetary concerns and a gaming industry struggling to remain competitive, four positive impacts:

First, it would increase direct revenue for the State Second, sports wagering would expand indirect revenue due to increases in taxes from travel and tourism related industries. Third, sports wagering would draw more visitors to the Atlantic City region Finally, New Jersey would be able to fend off the growing online gaming industry.¹²³

Additionally, Lesniak and the horsemen’s groups who joined his lawsuit with iMEGA see sports betting as a viable option to be a “savior for the [New Jersey] horse racing industry,” which is currently dependent on state subsidies for its survival.¹²⁴ In Lesniak’s opinion, wagering on sports and wagering on horse racing both constitute wagering on athletic events, making them a much better fit for one another than casino-style gaming at racetracks.¹²⁵

118 *Id.*

119 Slavin, *supra* note 34, at 725.

120 *Id.* at 741.

121 *Id.*

122 Beyer, *supra* note 115.

123 Levinson, *supra* note 8, at 151.

124 Lesniak, *supra* note 49.

125 *Id.*

It is worth emphasizing that the overturning of PASPA would not only benefit New Jersey. It could potentially benefit any state seeking a new source of necessary revenue. A prime example is Kentucky. Like New Jersey, Kentucky is facing a budget shortfall, in the amount of \$1.5 billion.¹²⁶ Kentucky has also considered expanding gaming,¹²⁷ and it is at least plausible that it loses revenue to casinos and gaming establishments strategically located in neighboring states.¹²⁸ Furthermore, expanded gaming has been viewed in Kentucky as a way to “boost the state’s horse industry,” which is vital to the state’s economy and identity.¹²⁹ Finally, Kentucky is a state that has also attempted to curtail citizens’ online gaming in an effort to protect the horse industry, even going so far as to have Governor Steve Beshear “attempt to seize 141 gambling domain names” before the Kentucky Court of Appeals ruled that such action was beyond his authority.¹³⁰

The need for an expansion of gaming to protect Kentucky’s horse industry should not be understated. While most people associate Kentucky with its horse industry, the amount of money generated by the equine sector in Kentucky has declined by hundreds of millions of dollars.¹³¹ Money derived from expanded gaming could be used to bolster the amount of purse money available in races and attract more competitors, a scheme implemented by states like Indiana and West Virginia that have successfully cut into Kentucky’s market share of the horse racing and breeding industry.¹³² However, at this point, expansion of gaming to include casinos and racetrack slots would only bring Kentucky to the status quo. Sports wagering not only would give Kentucky a unique opportunity to recoup some of

126 Stephenie Steitzer, *Sales Tax Seen as Way to Balance Ky. Budget: Legislative Leaders Doubt There’s Time to Draft Bill*, COURIER-JOURNAL (Louisville, Ky.), Jan. 23, 2010, at A1.

127 *Increasing Number of States are Considering Initiatives*, USA TODAY, June 25, 1991, at C8. Noting that Kentucky attempted to implement a sports lottery in 1989 but the scheme was contested by the Kentucky Thoroughbred Association and eventually the governor asked the lottery board to shelve the plan. With the current Governor and the Kentucky horsemen’s groups now solid backers of expanded gaming to aid the horse industry, one wonders if the result would be different today.

128 *Id.*

129 Joseph Gerth, *Kentucky General Assembly; Senate Panel Backs Gambling Amendment*, COURIER-JOURNAL (Louisville, Ky.), Jan. 21, 2010, at B8.

130 Stephenie Steitzer, *Internet Gambling Case Argued before Ky. High Court*, COURIER-JOURNAL (Louisville, Ky.), Oct. 23, 2009, at B10. The Kentucky Supreme Court later held that the electronic gaming industry groups representing the web site owners, which includes iM-EGA, could not represent them if the owners remained anonymous. Stephenie Steitzer, *Web Gambling Group Moves to Counter Ruling*, COURIER-JOURNAL (Louisville, Ky.), Mar. 25, 2010, at B4. The owners have the option to come forward, reveal themselves, and re-argue the case. *Id.*

131 Burt Schreiner, *Horse Biz in Slump*, COLUMBUS DISPATCH, Jan. 2, 2010, at A8, available at http://www.dispatch.com/live/content/business/stories/2010/01/02/farm_scene_ky..ART_ART_01-02-10_A8_S7G5E5H.html?sid=101.

132 *Id.*

its losses, but also would establish a market share in a new form of wagering which complements its racing industry better than slots or casino games.

Kentucky and New Jersey face the same budget issues and threats to their respective horse industries and seek the same goals from expanded gaming in their states. New Jersey has determined that sports wagering might be in its best interest and is pushing to let citizens decide the issue through a referendum vote.¹³³ Kentucky might find itself able to draw the same conclusion, especially in light of the chance of expanded gaming at Kentucky racetracks becoming more remote.¹³⁴

In summation, there are compelling reasons behind the efforts to overturn PASPA and create opportunities for legal, state-sponsored sports wagering schemes despite the long odds against success. Contrary to what proponents of the law have said, the benefits of legal sports wagering outweigh its costs. The aims that PASPA was meant to accomplish could be better achieved through legal sports wagering with strict oversight than by the terms of the law itself.

CONCLUSION

Congress enacted PASPA at the behest of the major American sports organizations in 1992 in order to protect the integrity of professional and amateur sports.¹³⁵ The effects of the law, however, have manifested themselves in ways different than Congress intended. PASPA, through discrimination among the states, has created a de facto monopoly on legal sports wagering in Nevada allowing the state to enjoy revenue opportunities denied to the rest of the country. For this reason, the law is being challenged in federal court based on alleged violations of the Tenth and Eleventh Amendments and abuse of power under the Commerce Clause.

Due to precedent, however, these claims will most likely fail. The crucial questions that need to be asked are how much sense does this make, and does the rationale behind PASPA actually justify denying this source of revenue to the states? The obvious answers are no. Besides the important economic benefits being withheld from states in need, the fact also remains that the dangers of legal sports wagering have been drastically overstated. In addition, legal sports wagering actually has the opportunity to create the very salutary effects PASPA's supporters desired. While the law seems settled and the chances of overturning it slim, it is necessary to question the

133 Mark Eckel, *Sports Betting Can Save Atlantic City*, NJ.COM: (AUGUST 9, 2010, 9:19 AM), http://www.nj.com/mercer/index.ssf/2010/08/eckel_sports_betting_can_save.html.

134 Gerth, *supra* note 129.

135 Levinson, *supra* note 8, at 176. It is worth asking where scandals involving performance-enhancing drugs, criminal behavior, and other lascivious or at least morally questionable behavior by professional and amateur athletes fit into a discussion about protecting the "integrity" of sports. *See id.* at 176-77. Such a question, however, is too far outside the purview of this Note for discussion and this Note takes no position on the answer.

wisdom behind current federal gaming policy. That policy is aimed towards serving a very abstract purpose—protecting the “integrity” of sports—that denies the states desperately-needed revenue and stimulus for industries within their borders. If the courts are unable or unwilling to change the status quo, now may be the time to revisit the question in the legislature with recognition that the conventional wisdom on legal sports betting is incorrect.

